George Henry Artley
Lincoln College

Law and Politics under the Later Stuarts: Sir John Holt, the Courts, and the Constitutional Crisis of 1688

Submitted in fulfilment of the requirements
for the degree of Doctor of Philosophy of
the University of Oxford
Trinity Term 2019

Short Abstract

This thesis examines the relationship between law and politics during the decades of constitutional turbulence either side of the Glorious Revolution through an analysis of the career of Lord Chief Justice Sir John Holt (1642-1710). It is not an exhaustive biography of Holt, although it does pursue a number of biographical themes: Holt's family background; his rise to prominence in his legal career; the networks of patronage that advanced him. It also focuses on his jurisprudence, and on his constitutional and political thought. In doing so, this thesis helps to answer three interrelated questions: the significance of the law in the collapse of James II's regime, the nature of the intellectual relationship between law, history, and politics at the turn of the eighteenth century, and whether the revolution led to the establishment of the 'rule of law' in any identifiable sense in the years after 1688.

This thesis offers new perspectives in three principal areas of historiography. First, it demonstrates how Holt's career can help us to understand better the mechanics by which James lost the support of the judiciary. It suggests that Holt was not a whig, but rather a tory pushed to breaking point by James's arbitrary behaviour. Second, it argues that doubts about the universal applicability of J.G.A. Pocock's vision of common law intellectual and constitutional culture in this period, encapsulated in his theory of the 'common law mind', are well founded. This is achieved through a detailed analysis of Holt's manuscript opinions, an approach which also helps to uncover the historical significance of such documents within the eighteenth-century legal profession. Finally, this thesis suggests that dominant accounts of the emergence of a judiciary independent from political manipulation, and a constitutional system in which executive will was subordinated to law after 1688, need to be radically reassessed.

Long Abstract

This thesis examines the relationship between law and politics during the decades of constitutional turbulence either side of the Glorious Revolution through an analysis of the career of Lord Chief Justice Sir John Holt (1642-1710). Holt's career has been understudied, especially considering that his appointment as lord chief justice of the King's Bench in 1689 made him the most powerful judge in the highest court of the land, a post he held for over twenty years. The limited and fragmentary nature of our knowledge of his attitude towards government, political, and constitutional thought, and his jurisprudence is made all the more significant when we consider that the role of lawyers and the 'legal mind' has traditionally been given centre stage in the historiography of the political upheavals of the seventeenth century. This is particularly the case for the early and mid-1600s, ranging from classic studies such as J.G.A. Pocock's *The Ancient Constitution and the Feudal Law*, to more recent work by Alan Cromartie on Holt's predecessor Sir Matthew Hale. Yet the scope of these investigations into the relationship between law and the English state stops short at the events of the late 1680s. The primary aim of this thesis is to extend this analysis through and beyond the revolution of 1688 and, in doing so, to cast new light on the role of the law in the constitutional and political development of the institutions of state at the beginning of the eighteenth century.

For the scholar today, the meagre quantity of Holt's surviving correspondence presents a major frustration, one that has no doubt hindered modern studies of his career, as well as whitewashed him from work that has focused on his better known contemporaries. Yet Holt was not always so absent from the limelight. Throughout the eighteenth and early nineteenth centuries, hagiographic accounts of his career were published, studies which placed him firmly at the centre of the whig myth of 1688. He was the first 'modern' judge: non-partisan, impartial, just, and incorruptible. He personified the break from the abuses of the legal system by Charles I and his sons, with their supine judiciary and cavalier use of the prerogative. For judges of the eighteenth century he also represented a legal authority of immense weight. The source of this influence stemmed from his legal opinions, a fascinating collection of manuscripts authored by Holt and then copied numerous times for use by successive members of the judiciary in the days before printed reports of cases could be relied upon in court. These documents, which survive today in the Hardwicke Collection (British Library Additional Ms. 35979-81) as well as Harvard Law School Library (HLS Ms. 4039), comprise nearly one hundred individual accounts of trials in which Holt was involved, ranging from cases of debt, riot, and murder, to grand constitutional matters of church and state. Crucially, Holt does not simply tell us what happened

in each case, but also explains why he came to the decisions he did, in the process citing authorities from Selden and Fortescue to Bodin and the Book of Numbers. As such, these documents represent a fascinating resource for historians attempting to understand the influences behind, and impact of, the 'legal mind' in late seventeenth-century intellectual and political life. This thesis has far from exhausted the potential of what these sources contain, and focuses on those cases which help to answer the major questions outlined below.

This thesis sets out to answer three interrelated questions, each emerging from a different branch of historiography. The first is how significant the law was in the events that led to the Glorious Revolution. The second is the nature of the intellectual relationship between law, history, and politics at the turn of the eighteenth century, and whether J.G.A. Pocock's model of the 'common law mind' is really applicable to this period of English constitutional history. Finally, this thesis interrogates the claims of historians, as well as legal and political theorists, who have argued that the success of the constitutional settlement after 1688, in particular the emergence of fiscal trust in the government, can in a large part be attributed to the emergence within the state of 'the rule of law', including the de-politicisation of the judiciary, and the final subordination of executive will to legal oversight.

The first section of this thesis is entitled *Holt's Reluctant Revolution*. Its purpose is to demonstrate how studying Holt's early career can provide us with new perspectives on the reasons why James II lost his throne in 1688. The first chapter begins with an analysis of existing accounts of Holt's life and career, including those by Georgian lawyers, Victorian politicians, and twentieth-century legal scholars. The next section of the chapter reviews the importance of Holt's father, Sir Thomas, in the development of his son's early career and political allegiances. Sir Thomas Holt was a loyal supporter of the Crown during the Exclusion Crisis, as well as a tory beneficiary of Charles and James II's policy of *quo warranto* at the level of local government. It is suggested that his political proclivities presented a model for his son to follow, as well as an explanation for Sir John's rise through the professional and governmental ranks at the beginning of James's reign. This theory is tested in the next part of the chapter, which attempts to identify Holt's political allegiances through an analysis of his early State Trials, as well as the evidence for his religious leanings. The final section of the chapter then set outs what can be discovered about Holt's political and professional circles, including his friendship with Sir William Trumbull and, through this connection, links to Lord Sunderland and Henry St. John. Overall, the chapter argues that Holt's political circles were far from exclusively whiggish, and indeed suggests that

he had more of a natural leaning towards toryism. Similarly, Holt seems to have demonstrated a consistent jurisprudential and constitutional commitment to upholding the power of the king's prerogative, attitudes which sets the scene for an analysis of Holt's professional development during James II's reign.

This forms the subject of the second chapter of the thesis. This begins by setting out the historiographical consensus on the strength of James's legal position at the start of his reign, particularly with regard to political support for his control over the prerogative. It also highlights the strength of the professional attachment between the Crown and the judiciary in this period, and the loyalty that this inculcated between the king and his judges, an administrative reality that a wise king might have been able to exploit. This analysis leads into a discussion of Holt's role as Recorder of London during the first half of James's reign, where Holt seems to have been perfectly happy to prosecute Protestant non-conformists in the name of the government, but only as long as proper legal procedure was followed. He was, at this stage of his career, still a supporter of James's regime. All this would change by the end of 1686. What happened to cause this change of allegiance is explained in the rest of the chapter. To do so, a distinction is first made between James's absolutism, which had received the blessing of tories when used to support their monopoly of power, and his arbitrariness, which was perceived as a threat by the entire legal and political community. It is argued that James was relatively safe as long as his 'Anglican absolutism' did not become 'Catholic absolutism', or popery as it was known; a toxic blend of religious and political ideology synonymous with the exercise of arbitrary power. Yet this was precisely what happened. James's imposition of martial law onto the common law courts raised the spectre of popery and arbitrary power as understood both generally by the wider political community, as well as specifically by those trained in the common law. It also threatened the jurisdictional integrity and monopoly of authority over men's lives and property that the courts enjoyed. For these reasons, it is argued, Holt reluctantly felt that he had no choice but to resign, a decision also taken by Lord Chief Justice Herbert, who had ruled in favour of James's prerogative powers just months earlier.

Section II of the thesis, entitled *The Manuscript Opinions and Holt's 'Common Law Mind',* shifts the analysis to the intellectual background behind Holt's actions during this period of constitutional upheaval. It begins by introducing the manuscript opinions upon which this analysis is based, starting with a breakdown of the cases that they contain, a comparison of the relationship between the different documents, including their history of ownership and use, along with their

scattered and mangled reproduction in later editions of printed reports. Holt's possible reasons for writing the opinions, and what this says about the evolving nature of judicial attitudes towards law-making itself, are also suggested. The next chapter of the section begins with a detailed exploration of the arguments of J.G.A. Pocock regarding the nature of the 'common law mind' in this period. The salient features of his theory are explained and summarised, before the impact of his work on later scholarship is discussed. Responses and criticisms of Pocock's work are mentioned, which, together with the analysis of Pocock's work itself, forms the framework of investigation into Holt's understanding of legal reason, precedent, history and change, and how this affected his political and constitutional understanding of the relationship between law and the state. These issues are taken seriatim, starting with Holt's theory of the inherent authority of the 'reason' found in the law. This is then contrasted with the authority he ascribed to reason 'on the record', and his interpretation of written legal precedent, prescription, and 'immemorial usage' when coming to his decisions. Such discussions then lead into a broader debate on what Holt's opinions can tell us about the underappreciated impact of natural law theory on common law jurisprudence more generally, and on Holt's interpretation of statute specifically, in this period. How Holt successfully blended this appreciation for solid precedent and abstract theory in relation to prominent cases of state is also explained in the next section, which leads into a study of the impact of the work of the Tudor lawyer Christopher St German on Holt's thinking.

Having explored the jurisprudential philosophy behind Holt's opinions, chapter 5 explores his understanding of historical change in the law and the state, beginning with the importance he attached to changing custom over time. It is suggested that Holt thought about custom in a historical way, that is, with customs changing over time in response to evolving demands of state and society. In particular, evidence is offered that Holt appreciated the impact and importance of events such as the Norman Conquest in English history, and how such breaks in the legal development of the kingdom meant that the laws and constitutional arrangements of the Anglo-Saxons could not simply be resurrected in late seventeenth-century England. Holt's understanding of the importance and impact of Roman law, both on the continent and in English history, is also highlighted, along with an analysis of the impact of John Selden's work on Holt's constitutional assumptions and priorities. This leads finally into a discussion of how Sir Matthew Hale's view of historical change affected ideas of the preservation of the integrity of the law and the security of the state. The importance that Holt placed on not permitting ill-advised alterations to the law in the face of external pressure to do so leads into

the final section of the thesis, exploring how the law was treated in the aftermath of the Glorious Revolution.

Section III of the thesis, entitled '*Revolution and the Rule of Law'*, focuses on how the law was used by the government after 1688. It seeks to challenge those accounts which see this period as a watershed moment in the emergence of 'the rule of law' in English political life. The first chapter demonstrates how politics continued to exert a strong influence on the judiciary, and questions the notion that judges like Holt found themselves in a 'new era of judicial purity and freedom' as one Victorian writer claimed. Arbitrary abuses of the law by the government as part of the ongoing war effort and state of emergency in which the nation found itself during William's wars against James and France are revealed, including summary executions, press gang cover-ups, and the imposition of martial law away from the eyes of the press. The importance of Holt in maintaining the impression of legal legitimacy is also demonstrated, including his role as a 'constitutional choreographer' in matters of state. Holt's work as a backroom legal adviser to government is also explored, emphasising the continued importance of legal 'opinions' in the construction of official policy. Yet the chapter then goes on to show how on some occasions, especially those related to the success of the fiscal-military state, Holt's advice would be ignored or avoided, demonstrating the limits of influence that the judiciary had on the executive in this period. Holt's methods for upholding the security of the kingdom and the property of its subjects whilst also maintaining trust in the courts is then explored, emphasising his insistence on procedural consistency. Holt's role in defining his court's power of judicial review over city corporations during the jurisdictional upheaval of the 1690s is then analysed, demonstrating the importance of such oversight to his concept of 'the rule of law', and how this historical reality differs from the ideal projected onto this period by later studies. The final chapter of the thesis investigates what it was that was 'settled' in constitutional terms after 1688, and what role the law played in that settlement. This includes an assessment of the danger posed by the arbitrary legislative power of parliament, as well as the instability caused by partisan attempts to exploit the legal privileges enjoyed by each House of Parliament, with particular reference to the case of *Ashby v White* [1703]. Political manipulation of the House of Lords forms the focus of the next section of the chapter, which ends with a final case study of Holt's battle for jurisdictional pre-eminence with the Church of England in the upper house in the case of *Philips v Bury* [1694].

The conclusion of the thesis reiterates the findings that have been made, and seeks to apply them to the broader question of what it was that generated trust between rulers and ruled in the

aftermath of 1688, trust that had been sorely lacking for most of the seventeenth century. Finally, plans for future studies that can test and develop these methods and hypotheses further are suggested, including a study of the careers of MP lawyers in the early eighteenth century. Such studies would aim to present these figures in their intellectual and political contexts, as well as to explain how studies of their careers can help us to understand better the evolving structure of the institutional relationship between law and politics during the 1700s, especially their relationship with parliament.

Acknowledgments

This thesis would never have been written had it not been for a meeting in the Royal Oak pub, Oxford, in the spring of 2013. It was there that Robert Saunders and George Southcombe sat down with their old student, a miserable trainee at a corporate law firm in London, and encouraged him to stay in the job. That is, for about ten seconds. The formalities out of the way, they then proceeded to help me plan and chart my return to academia. It was in that same meeting that George Southcombe also reminded me of Sir John Holt. Without their support that afternoon, and ever since, you would not be reading these words. I cannot thank them enough.

I have come to the conclusion that the difference between a happy doctoral student and a sad one is the quality of his supervisors. The years I spent writing this thesis have been some of the happiest of my life. This is almost entirely down to the help, wisdom and kindness of Clive Holmes and Perry Gauci, truly the dream team, who were constantly by my side at every stage of the research and writing process. Both I and the manager of the Golden Cross branch of Pizza Express are forever in their debt.

Between 2013 and 2019 I was also lucky enough to meet a whole host of friendly, supportive, and reassuring scholars who helped this thesis on its way. Amongst many others my thanks go to Ian Archer, Susan Brigden, Paul Halliday, Felicity Heal, Alex Gajda, Mark Goldie, Steve Gunn, Diarmaid MacCulloch, and especially to my examiners Paul Monod and Grant Tapsell. Although we are yet to meet, I would also like to thank Philip Hamburger for his encouragement during the early years of the project. As with so many who have gone before me, the help of archivists and librarians across the UK and US was invaluable.

Writing a thesis always comes at a cost, not least a financial one. Without the generous support of Lincoln College Oxford, and the AHRC Sloane Robinson Scholarship, it is unlikely that this thesis would ever have got off the ground. Keeping it in the air was made possible thanks to the friendship and counsel of a wide range of individuals, too many to list here. Memorable assistance, both scholarly and social, was provided by Aneurin Ellis-Evans, Lydia Matthews, Jim Hollis, Robert Upton, Mel Marshall, James Wakeley, David Tweddle, Michael Nixon, Charles Cornish-Dale, Sarah Ward, Katie McKeogh, Steve Daly, Ioanna Tsakiropoulou, Chris St John-Smith, Will Thomas, Tom Daggett, Joe Mason, Peter Hood, Laura Brown, Ben Tansey,

Clara Benn, and Simon Faulkner. Anja Perse read the whole thesis through, and stopped me from pulling my hair out in the final few weeks of writing. Her love and patience are what saw me through those last tiring days.

One's child leaving a potentially lucrative career in the City to write a doctoral thesis on a long-dead lawyer might drive many parents to despair. Luckily for me, nothing could have been further from the truth. My final thanks go to my parents Kevin and Jeanette, as well as my grandmother, brothers, aunty and uncle, who have supported me emotionally (and financially) every step of the way. It is to my mother and father in particular that this thesis is dedicated with my everlasting love.

Contents

Abbreviations, Conventions, Figures, and Tables 1

Introduction 2

Section I: *Holt's Reluctant Revolution* 17

Chapter 1: An able, upright, and unbiased judge? 20
1.1 Introduction: A Contradictory Biography 20
1.2 Family Values 26
1.3 Politics, the Prerogative, and the Pulpit 30
1.4 Friends in High Places 34
1.5 Conclusion 38

Chapter 2: King James's Most Loyal Servant 39
2.1 Introduction 39
2.2 James's Legal Inheritance: The Judiciary as a 'Monarchical Administration' 41
2.3 Sir John Holt: Recorder of London by Royal Appointment 44
2.4 The Role of the Law in the Downfall of James II 46
2.5 The Cracks Start to Appear 51
2.6 Holt and the Revolution 55
2.7 Conclusion 57

Section II: *The Manuscript Opinions and Holt's 'Common Law Mind'* 59

Chapter 3: Courtroom, Case Books and Collectors: The History of Holt's Opinions 62
3.1 Introduction 62
3.2 The History and Identity of the Opinions 63
3.3 The Use of the Opinions, and their relationship to the Printed Reports 75
3.4 Why Holt Wrote the Opinions 78

Chapter 4: Learned Men's Opinions from Ancient Times, Still Extant in Writing 82
4.1 Introduction 82
4.2 The Ancient Constitution and the Feudal Law 84
4.3 Pushing beyond Pocock 92
4.4 'The Reason of the Law is the Law' 97
4.5 The Authority of Reason On the Record 101
4.6 Holt and the Natural Law 107
4.7 Getting the Mixture Right 110
4.8 St German, and Holt's Resurrection of the Natural Law Tradition 113
4.9 Conclusion 117

Chapter 5: Making Law for Changing Times 119
5.1 Introduction 119
5.2 'The Law of England changed' 119
5.3 Romans at the Gates 126
5.4 The Argonaut's Ship 131
5.5 'Better to Suffer a Mischief than an Inconvenience' 134
5.6 Conclusion 136

Section III: *Revolution and the Rule of Law* 137

Chapter 6: 'A New Era of Judicial Purity and Freedom' 140
6.1 Introduction 140
6.2 In Defence of the Realm 142
6.3 The Show Must Go On 148
6.4 Too Big to Fail 152
6.5 Conclusion 159

Chapter 7: Trial and Error: Holt and the Authority of the Courts after 1688 161

7.1 Introduction 161
7.2 Fair Trials: Vindicating the Public Justice of the Nation 162
7.3 Predictability: Building Barriers to Malice 168
7.4 Holt, Judicial Review, and Urban Corporations: Avoiding the Execution of Troublesome Offices 175
7.5 Conclusion 181

Chapter 8: The Constitutional Unsettlement 183

8.1 Introduction 183
8.2 The Arbitrary Legislative Power of Parliament 185
8.3 Parliamentary Privilege and the Right to Vote 189
8.4 The House of Lords: 'A Danger of Partiality' 194
8.5 The Bench, the Bishop, and the Bastards: A Case Study of the Legal Position of the Church of England after 1688 200
8.6 Conclusion 216

Conclusion 218

Bibliography 226

Figures

Figure 1. 'Judge thumb' (James Gillray, 1783) 81

Tables

Table 1: *Holt's Drafts* 64
Table 2: *Hardwicke I* 65
Table 3: *Hardwicke II* 66
Table 4: *Hardwicke III* 67
Table 5: *Harvard Hand 1* 68
Table 6: *Harvard Hand 2* 70

Abbreviations and Conventions

BL.:..... British Library.

CSPD: ..... *Calendar of State Papers, Domestic Series.*

EBRM: Roger Morrice*, The Entring Book of Roger Morrice,* gen. ed. M. Goldie (7 vols. Woodbridge, 2007).

ER: ..... *The English Reports.*

HMC: ..... Reports of The Royal Commission on Historical Manuscripts.

Ld. Raym.: R. Raymond, *Reports of cases argued and adjudged in the courts of King's Bench and Common Pleas, in the reigns of the late King William, Queen Anne, King George the First, and King George the Second*, 4th edn. (3 vols., 1792)

Mod.: T. Leach (ed.), *Modern reports: or, Select cases adjudged in the Courts of King's Bench, Chancery, Common Pleas and Exchequer*, 5th edn. (12 vols., 1793-96).

ODNB .....: Oxford Dictionary of National Biography.

Salk.: W. Salkeld, *Reports of cases adjudged in the Court of King's Bench: with some special cases in the courts of Chancery, Common Pleas and Exchequer, from the first year of K. William and Q. Mary, to the tenth year of Queen Anne*, 6th edn. (3 vols., 1795).

State Trials:T.B. Howell and T.J. Howell (eds.)*, Cobbett's Compete Collection of State Trials* (34 vols., 1809-28).

T.R.:C. Durnford and E. Hyde East (eds.)*, Term Reports in the Court of King's Bench* (7 vols., 1817).

All books were printed in London unless otherwise stated

Introduction

This thesis is not a biography of Sir John Holt (1642-1710). That is not to say that a modern biography of Holt does not need to be written. Instead, this thesis is an exploration of the ways in which research into Holt's legal career and intellectual background can help us to understand better the course of the dramatic political and constitutional upheavals experienced in England during his lifetime. Our aim is to show not only what can be achieved by putting Holt back into studies of this period, but also to show how existing studies have suffered in their approach to the legal dimension of the turbulent events that Holt was faced with and lived through.

Holt stands out as a candidate for research first and foremost because he was a prominent lawyer and later lord chief justice of the King's Bench at a crucial moment in English history when the judiciary found themselves on the front line of a constitutional conflict that would decide the future shape of the English state. In the first chapter of his work on the *Entring Book* of Roger Morrice, Mark Goldie notes that during Morrice's life:

> . . . political conflict was constantly conducted through the law courts, in which the courts were instruments by which the crown purged unpopular opponents, in which opposition movements retaliated by inventive manipulation of legal process, and in which the personnel involved in the judicial process were highly partisan. The courts were principal theatres for the enactment of power.[1]

It is a central claim of this thesis that 'the courts' were indeed 'the principal theatres for the enactment of power' during this period, especially during the reign of James II, and that it would be James's very public mishandling of that power that would ultimately lead to his downfall. Yet after the revolution that followed James's flight from his kingdoms, it would increasingly be parliament, now far from simply an event, that represented the nation's new theatre for the enactment of power, forever altering the constitutional structure of the state and, on the surface at least, putting an end to the use of the judiciary and the courts as instruments of political conflict. Yet whether the revolution really changed the ways in which the law was used by the government, and the extent to which judges actually remained tools of the executive, is a question that has not been properly investigated, and that an analysis of Holt's career can help us to answer.

[1] M. Goldie, *Roger Morrice and the Puritan Whigs* (Woodbridge, 2016), pp. 25-26.

If the historical importance of Holt's prominent professional position gives us our first reason for studying him, understanding and challenging what has traditionally been said about his, and the law's, role in the political and constitutional events of this period gives us our second. Perhaps not surprisingly, both issues are closely linked. Writing during Holt's lifetime, and concerning his elevation to the post of lord chief justice following the revolution, Gilbert Burnet noted that:

> Nothing gave a more general satisfaction than the naming of the Judges; the King ordered every Privy Counsellor, to bring a list of twelve: And out of these, twelve very learned and worthy Judges were chosen. This nomination was generally well received over the Nation. The first of these was Sir John Holt, made Lord Chief Justice of England, then a young man for so high a post, who maintained it all his time with a high reputation for capacity, integrity, courage, and great dispatch. So that since the Lord Chief Justice Hale's time, that Bench has not been so well filled, as it was by him.[2]

Writing nearly one hundred and fifty years after Holt's death, the Victorian politician John Campbell concluded that:

> The lustre of his fame in later times has been somewhat dimmed by our being accustomed to behold judges little inferior to him…During a century and a half, this country has been renowned above all others for the pure and enlightened administration of justice; and Holt is the model on which, in England, the judicial character has been formed. [3]

These two extracts capture the essence of Holt's existing legacy, both within the legal profession, as well in historical accounts of this period. For contemporaries like Burnet, what seemed to distinguish Holt was his character, a character that reflected the nature and success of the revolution that had brought him to the summit of his career. In this sense, Holt seemed to embody the conservative whig view of the revolutionary settlement: a return to a better time, his moral integrity an example of how judges should behave, indeed, had behaved, before Charles and James II's destructive campaign of legal manipulation had brought the nation to the brink of disaster. In Holt, the nation had found both the antithesis and antidote to the likes of Scroggs and Jeffreys, men who became the pantomime villains of the revolution, in Jeffreys's case, literally being burnt in effigy by the London mob.[4] Campbell's analysis of Holt reflects his later reputation amongst legal scholars and historians as the archetypal 'modern' judge, the cast

---

[2] Gilbert Burnet, *Bishop Burnet's history of his own time*, ed. O. Airy (2 vols., Oxford, 1897-1900), vol. I, p. 3.
[3] J. Campbell, *The lives of the chief justices of England: from the Norman Conquest till the death of Lord Mansfield* (1849-1857), p. 136.
[4] P.D. Halliday, 'Jeffreys, George, first Baron Jeffreys (1645–1689)', *ODNB*.

in which all judges to this day have in some sense been moulded. His professionalism is what marks him out for praise, a characteristic founded on his 'purity', which was measured by his having not been corrupted, or infected, by politics, as so many of his pre-revolutionary predecessors seemed to have been.

According to these accounts, not only was Holt apparently un-swayed by factional concern, he was also prepared, and perhaps even compelled, to keep both Houses of Parliament in check after the revolution, courageously preventing them from emulating the Stuarts in their cavalier use of their newly acquired legal powers. Sir William Holdsworth expressed such sentiments in his comments on Holt written in the early twentieth century. Holt 'ably and courageously vindicated the supremacy of the law as against arbitrary extensions of privilege attempted both by the House of Lords and the House of Commons', Holdsworth claimed, and this new 'independent position gained by the courts after the Revolution' finally restored the King's Bench's 'efficiency' given its new ability to focus on purely 'legal' matters.[5] These various but connected characterisations and interpretations of Holt and the law after 1688 – the judge moral, pure, independent, and of the law triumphing over political will - coalesce around the concept that his career marked the true beginning of what has been called 'the rule of law' in constitutional terms. This is an immensely slippery and problematic concept, as we shall soon see. Yet what needs to be appreciated at this stage is that nearly every branch of existing historiography, whether traditional whig accounts, legal scholarship, and even more recent histories of the Glorious Revolution, share the common belief that the legal landscape that we live in today, and the liberties that we are said to enjoy, have their foundations in events of 1688, and the influence of the example set by Sir John Holt. It is a view perhaps best expressed by the eminent scholar Geoffrey Holmes in his analysis of the interaction between the law, politics and the revolution during the English Augustan age:

> That . . . [the legal profession] not merely recovered its standing over the next thirty years, but substantially improved it, was naturally due in part to the Glorious Revolution: in particular, to the fact that the post-Revolution monarchy exhibited a respect for the judiciary which had been all too lacking from Charles II and James II . . . After 1688 the twelve judges in the three main common law courts ceased to be appointed, by and large, with political ends mainly in view . . . The restoration of the common lawyers' self-esteem also owed a great deal to the personal example set to lesser lights in the profession by one great judge . . . The incomparable Sir John Holt brought a rare combination of integrity, humanity and wisdom to the office of Lord Chief Justice of the King's and Queen's Bench from 1689 to 1710 . . . The commitment of many

[5] W.S. Holdsworth, *A History of English Law* (12 vols., 1903-72), vol. IV, pp. 258-262.

> common lawyers to politics, through parties, certainly continued long after the 1690s . . . But politics never again came near to imperilling the general course of justice, as it seemed to many to have done in the 1680s.[6]

This statement, typical of the current scholarly consensus, will be the focus of our critique in this thesis.

Another consensus that we will be challenging is the nature of the relationship between politics and common law intellectual culture in this period, as characterised by the theories of the 'common law mind' and 'ancient constitution' set out in J.G.A. Pocock's *The Ancient Constitution and the Feudal Law* in 1957, a ground-breaking work that remains highly influential to this day.[7] In it, Pocock makes the case that the way England's common lawyers understood historical change deeply influenced the nature of seventeenth-century political debate, and provided the intellectual context for the struggles for sovereignty between Crown and parliament. It was a universal belief in the literally immemorial character of English law, and the perfection of an Anglo-Saxon 'ancient constitution', Pocock argues, which triggered opposition to the Stuart Crown's supposedly novel use of its legal powers without parliamentary consent in the seventeenth century. The 'common law mind' seemed to dictate that parliament's existence in the present day provided conclusive evidence of its constitutional significance stretching back into the mists of time, well before the Crown's ancestors arrived in England in 1066. This line of immemorial institutionalist thinking thereby invalidated the Crown's apparent efforts to dispense with parliament in the present day. English common lawyers, according to Pocock, unlike their continental counterparts who dealt with the legal codes of identifiable sovereigns, were incapable of thinking historically, and instead weaved an ahistorical account of the ancestry and importance of the customary law, with parliament at its centre, which would ironically become historical fact after the whig victory of 1688. The Crown's supporters on the other hand were forced to respond to this common law constitutional thought with their own narrative, one much closer to the historical truth Pocock believes, which placed the fact of the Norman Conquest centre stage and, inadvertently, triggered the birth of truly 'historical' thinking amongst England's political classes.[8]

---

[6] G. Holmes, *Augustan England, Professions: State and Society 1680-1730* (London, 1982), p. 117.
[7] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law*, 2nd edn. (Cambridge, 1987).
[8] For evidence of Pocock's influence, see the treatment of Holt's predecessor Matthew Hale's views on history in A. Cromartie, *Sir Matthew Hale 1609-1676, Law, Religion and Natural Philosophy* (Cambridge, 1995); D.E.C. Yale (ed.), *Sir Matthew Hale's the Prerogatives of the King*; for criticism of this approach, see, C.W. Brooks, 'The place of Magna Carta and the ancient constitution in sixteenth-century English legal thought', in E. Sandoz (ed.), *The roots of liberty : Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, 1993) pp. 57–88; I. Campbell, 'Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland', *The Historical*

Pocock's theory of the 'common law mind', his belief in an 'ancient constitution', and the ways in which these models of common law intellectualism should supposedly have influenced how Holt conceived of historical change and constitutional innovation in the decades either side of the revolution will all be addressed in Section II of this thesis. We will achieve this through a careful and detailed analysis of manuscript sources, in order get to the heart of Holt's constitutional, political and jurisprudential mind. For the scholar today, the meagre quantity of Holt's surviving correspondence presents a major frustration, one which no doubt partly explains the lack of modern studies of his career, as well as his being marginalised in work that has focused on his better known contemporaries.[9] Yet Holt was not always so absent from the limelight. Throughout the eighteenth and early nineteenth centuries, hagiographic accounts of his career were published, studies which, as shown above, placed him firmly at the centre of the whig myth of 1688, if not defining the myth itself. Yet for judges of the eighteenth century, he also represented a professional legal authority of immense weight.

The source of this influence seems to have stemmed from his legal opinions, a fascinating collection of manuscripts authored by Holt and then copied numerous times for use by successive members of the judiciary in the days before printed reports of cases could be relied upon in court. These documents, which survive today in the Hardwicke Collection (British Library Additional Ms. 35979-81) as well as Harvard Law School Library (HLS Ms. 4039), comprise nearly one hundred individual accounts of trials in which Holt was involved, ranging from cases of debt, riot and murder, to grand constitutional matters of Church and state. Crucially, Holt does not simply describe what happened in each case, but also explains why he came to the decisions he did, in the process citing authorities from Littleton and Fortescue to Bodin and the Book of Numbers. As such, these documents represent an essential resource for historians attempting to understand the influences behind, and impact of, the 'legal mind' in late seventeenth-century intellectual and political life. They also remain almost entirely unstudied.

Journal, vol. 53 (2010), pp. 573-591; and the introduction to Matthew Hale, *The History of the Common Law of England* , ed. C.M. Gray (Chicago, 1971).

[9] That being said, modern detailed work on Holt's immediate judicial contemporaries is in short supply. For the classic account of John Somers's career, see W.L. Sachse, *Lord Somers, A Political Portrait* (Manchester, 1975). For George Treby, as with so many other judges of this period, we are forced to rely on E. Foss, *Biographia juridica: a biographical dictionary of the judges of England... 1066-1870* (1870). As we will see in Chapter 2, Foss's work is inadequate for modern scholarly purposes.

The only scholar to have worked extensively on Holt's manuscript opinions is Philip Hamburger.[10] In two lengthy articles he has demonstrated the ways in which studying these documents can open up exciting new avenues of research and understanding regarding the role of the judiciary in manipulating, and being manipulated by, the political processes involved in the creation of the revolutionary settlement in the decades after 1688.[11] Hamburger's first article, concerning the law of seditious libel, illustrates the ways in which Holt went to great lengths to adapt the existing common law to the needs of the Williamite regime, presenting his court as a friend to executive power, and a pillar of the state when statutory remedies were deemed neither politically possible nor palatable. His second article focuses on what Hamburger considers to be the neglected influence of natural law in Holt's thinking, and suggests links between Holt's judgments and the writing of John Locke. More broadly, this article opens up the possibility that Holt was keenly aware of the monumental constitutional significance of the events of 1688 in their immediate aftermath: that major institutional power shifts had taken place, with parliament now in danger of exercising the same sort of arbitrary power that, when exercised by the Crown, had led to the revolution in the first place, and that his court was essentially powerless to counter such power when expressed through statute. Instead, Holt concerned himself with identifying and delineating the power that his court possessed in reviewing the decisions of inferior jurisdictions, especially those of urban corporations, in an attempt to quell the partisan strife in these institutions which had been at the centre of the many legal crises of James II's reign.

These articles therefore demonstrate not only the understudied links that can be found between intellectual, legal and political currents of thought in this period, but they also provide strong evidence for the fact that contemporaries were under no illusions as to the novelty of the constitutional situation that they found themselves in; that the revolution had been no return to the past, whatever whig propaganda might have said, but instead represented an epoch defining moment in the history of the English state, with parliament now supreme in matters of law and politics. They also demonstrate how a careful study of Holt's opinions can open new perspectives on the multi-layered nature of the state in this period, and the variety of levels on which Holt was involved in its construction after 1688, as well as its maintenance in the face of

[10] Hamburger has cited 12 out of the nearly 100 cases found in Holt's opinions.
[11] P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review,* vol. 37 (1985), pp. 661-765, and 'Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v Wood*', *Columbia Law Review*, vol. 94 (1994), pp. 2091-2153. Jeffrey Goldsworthy is one of the few scholars to use Hamburger's findings in his own work, see J. Goldsworthy, *The sovereignty of parliament: history and philosophy* (Oxford, 1999), pp. 197-8.

the threats and upheavals that accompanied its birth. As sources, they therefore offer the potential for us to write a history that addresses larger themes, such as the emerging power of parliament and the evolution of the fiscal-military state, at the same time as focusing on the development and formation of the state at a local level, as explored by historians such as Michael Braddick.[12]

These sources will also allow us to engage with the growing body of scholarship that focuses on the role of corporations and corporate politics in the development of the English state domestically and also on a global level. Paul Halliday's *Dismembering the Body Politic* makes important claims for the role of King's Bench in taking over the supervision of local government from the privy council during this period, and in doing so, creating a safe arena in which partisan squabbles could dealt with without damaging the wider body politic.[13] Other scholars have focused on explaining the role of Holt's court in the battles over the monopolies granted to overseas trading corporations; institutions and networks of power that would lay the foundations of the British Empire in decades to come.[14] Yet these studies have not explored the connections between Holt's professional, political, and jurisprudential thinking in these cases, nor the historical context of the evolving relationship between law and politics after the revolution. Indeed, despite Hamburger's valuable work on Holt's opinions, his overall approach to them is not without its flaws, the key one of which seems to stem ultimately from his training as a legal historian. As such he seems unable to escape from the gravitational pull of the theory that unquestioningly traces the origins of 'the rule of law', and in particular the separation of law and politics as outlined by Holdsworth, to the events of 1688. In his review of *1688: The First Modern Revolution*, Grant Tapsell notes that Pincus 'Quaintly . . . [takes] aim at Thomas Babington Macaulay (d. 1859) as the misguided epitome of "Whig" history'.[15] For non-legal historians of the seventeenth century, it is a fair to say that such attacks on Macaulay's history are historiographically antiquated. But for legal historians, the whig interpretation of history still sits at the very heart of their analytical frameworks. As a result, they measure the 'correct' exercise of legal power by the government, and the appropriate level of political 'independence'

[12] Holt's opinions cover cases dealing with everything from disputes over fences and duck decoys, to the jurisdictional powers of the House of Lords and the legal foundations of the state's right to tax its subjects. They therefore speak to issues found in both the classic accounts of the development of the fiscal-military state in this period, such as John Brewer's *The Sinews of Power: War, Money and the English state, 1688-1783* (1989), as well as Michael Braddick's analysis of state formation at the local level, and the court's role as agents in preserving social order, see M. Braddick, *State Formation in Early Modern England, c. 1500-1700* (Cambridge, 2000).
[13] P. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns 1650-1730* (Cambridge, 1998).
[14] W.A. Pettigrew and George W. Van Cleve (eds.), 'Parting Companies: The Glorious Revolution, Company Power, and Imperial Mercantalism', *The Historical Journal*, vol. 57 (2014), pp. 617-638.
[15] G. Tapsell, 'Not So Revolutionary', *The Review of Politics*, vol. 72 (2011), p. 717.

of the judiciary, against the idealised standards supposedly restored and guaranteed by the revolution of 1688 (as well as by the individual heroism of Holt) seemingly without any sense that those standards might themselves be in some way politically constructed, or historically relative.

For example, in his most recent work *Law and Judicial Duty*, we find Hamburger arguing that the 'threat of [judicial] dismissal eventually came to an end when the English in the wake of the Revolution of 1688 confined the crown to lawful government'.[16] Yet what did 'lawful government' actually mean in this context? For Hamburger, the important point seems to be that the Crown no longer controlled the law, and that, by definition, meant that the law was now 'free' from 'political interference'. There the story ends. The reasons why, or even if, parliament was truly able to 'guarantee' judicial tenures after 1688, and whether the threat of dismissal or political manipulation actually disappeared, are not investigated. There is no need to labour this point, as it is a criticism of legal historians that has been made before, and one that can only be successfully understood and addressed by looking into the origins of these connected whig and legal histories of the 'rule of law', and investigation which forms a major part of this thesis.[17]

These criticisms aside, the view of the revolutionary significance of the events of 1688 advanced by this thesis is in many ways self-consciously whiggish, or 'neo-whiggish', in that it builds on the body of scholarship by writers such as Janelle Greenberg, Henry Horwitz, Lois Schwoerer, and William Speck, and agrees with their assessment of the Glorious Revolution as marking a significant shift in England's constitutional history and political culture.[18] It is also whiggish in the sense described by Howard Nenner, a legal historian whose work *By Colour Of Law* has provided much of the conceptual framework used in this study for understanding the

---

[16] P. Hamburger, *Law and Judicial Duty* (Harvard, 2008), p. 157.

[17] See Geoffrey Elton's views as summarised in C. Holmes, 'G. R. Elton as a Legal Historian', *Transactions of the Royal Historical Society*, series 6, vol. 7 (1997), pp. 267-279. While I agree with Holmes's view that Elton's criticisms were somewhat undermined by the ability of more recent legal historians, such as Paul Halliday, to contribute valuable work to our understanding of early modern politics (not least in their critiques of Elton's own work) I nevertheless remain convinced from my own reading of contemporary legal history that Elton's main criticisms still retain some, if not all, of their force, especially the link between 'whig' and 'lawyer's' history.

[18] See in particular J. Greenberg, *The radical face of the ancient constitution: St Edward's 'laws' in early modern political thought* (Cambridge, 2001); J. Greenberg and C. Weston, *Subjects and Sovereigns, The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge, 1981); H. Horwitz, *Parliament, policy and politics in the reign of William III* (Manchester, 1977); L.G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore, 1981); W. Speck, *Reluctant Revolutionaries, Englishmen and the Revolution of 1688* (Oxford, 1988). It is our goal to combine the close analysis of Greenberg and Schwoerer's work with the broader political perspective provided by Horwitz's text.

relationship between law and politics in this period.[19] This is best illustrated at the beginning of his chapter on 'Control of the Law', where Nenner argues that:

> An interpretation of the seventeenth century which focuses upon political conflict in the context of law may well be described as a qualified return to Whiggism. Certainly it is a rejection of that view which fixes property at the base of the struggle and which all too easily dismisses law and religion as superimposed idioms of political convenience. It is an interpretation that is Whiggish at heart because it neither avoids nor deemphasizes the basic accomplishment of the century, the triumph of Parliament and Protestantism. But it is qualified, and importantly qualified, because it does not pit absolutism against constitutionalism or law against prerogative. It is an interpretation which understands the political rule of law and a commitment to known and settled forms as constitutional constants throughout the century. Law, in this view, is not seen as a contestant for survival; rather, it is the politically acknowledged prize in the battle for sovereignty between king and Parliament. It is not a party to the struggle but the object for which the struggle takes place.[20]

The constitutional story of the seventeenth century then is how the king lost this battle for control of the 'political rule of law' with parliament in 1688. In their account, Greenberg and Weston have described this process as 'the Bodinian version of . . . order theory' giving way to 'the widely held community-centred ideology' which meant 'acceptance of the co-ordination principle in law-making and the theory of legal sovereignty in king, lords, and commons.'[21] Yet whether or not there was much 'co-ordination' in this new 'community-centred' ideology of law making is not something that has been extensively researched, nor has the identity of the 'community' that was supposedly making it. This thesis therefore aims to investigate the nature of the changes and continuity in the treatment of the law by those in political power either side of 1688 through an analysis of Holt's interaction with both government and parliament. As such, it is building on a broad foundation of existing scholarship, but also bringing vital new perspectives to these areas of study.

Our focus on the revolution of 1688 stems not only from a desire to test the legal, intellectual, and political approaches mentioned above, but is also inspired by a recent surge in historiographical interest in the revolution itself. Beginning with works triggered by the tri-centenary of the event, such as William Speck's *The Reluctant Revolutionaries*, a steady stream of literature has entered the historical market, culminating most recently with Pincus's

---

[19] H. Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago, 1977).
[20] Ibid., p 61.
[21] Greenberg and Weston, *Subjects and Sovereigns*, p. 257.

controversial study, and Tim Harris' *Revolution.*[22] The impact of this scholarship has been recently assessed in the 2013 work *The Final Crisis of the Stuart Monarchy*, edited by Harris and Stephen Taylor.[23] Yet, in stark comparison to earlier work by Schwoerer and Greenberg's generation, the law is barely mentioned in this collection, nor are the problems which characterise many of these scholars' approaches to the legal dimension of the revolution.[24]

This is partly due to a lack of recent work on the subject; the last major article to be written specifically on the relationship between the judiciary and politics under James II was by A.F. Havighurst in 1953.[25] Richard S. Kay's recent work has put legal history at the centre of the story of the Glorious Revolution, as well as the events of the 1690s, but he does not make use of Holt's opinions.[26] Indeed, most studies of this period have focused more on the British and international dimensions of the revolution, at the expense of a close reading of the practical legal and constitutional consequences of the revolutionary settlement in England, or the precise interaction between religious and legal factors in James's downfall. In this thesis we will take a different approach. We will argue that James II's Catholicism was not an unfortunate religious identity issue, but instead went to the very heart of his legal and political philosophy. For him, the concept of a Protestant king was an oxymoron: no Protestant king could ever truly control the law, and for James, controlling the law defined kingship. As a judge whose early career advanced significantly under James, but yet ended up a saint in the whig pantheon of revolutionary heroes, Holt offers us a unique window on how the judiciary responded to the threat that James's popery posed, and how they accommodated themselves to the altered constitutional situation in the aftermath of the revolution.

As a result, this thesis sets out to answer three interrelated questions, each addressing a different branch of historiography mentioned above. The first is how significant the law was in the events that led to the Glorious Revolution. The second is the nature of the intellectual relationship between law, history and politics at the turn of the eighteenth century, and whether J.G.A.

---

[22] Speck, *Reluctant Revolutionaries*; Pincus, *1688*; T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006).
[23] T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013).
[24] This contrasts with the wealth of work available for the first half of the seventeenth century. For example, see A. Cromartie, *The Constitutionalist Revolution, An Essay on the History of England, 1450-1642* (Cambridge, 2006); G. Garnett, "The ould fields': Law and History in the Prefaces to Sir Edward Coke's Reports', *Journal of Legal History*, vol. 34 (2013), pp. 245-284; and J.P. Sommerville, *Royalists and Patriots, Politics and Ideology in England, 1603-1640*, 1st edn. (London, 1986).
[25] A.F. Havighurst, 'James II and the Twelve Men in Scarlet', *Law Quarterly Review*, vol. 69, (1953), pp. 522-546.
[26] R.S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington, 2014).

Pocock's model of the 'common law mind' is really applicable to this period of English constitutional history. Finally, this thesis interrogates the claims of historians, as well as legal and political theorists, who have argued that the success of the constitutional settlement after 1688, in particular the emergence of fiscal trust in the government, can in a large part be attributed to the emergence within the state of 'the rule of law', including the de-politicisation of the judiciary, and the final subordination of executive will to legal oversight.

The first section of this thesis is entitled *Holt's Reluctant Revolution*. Its purpose is to demonstrate how the study of Holt's early career can provide us with new perspectives on the reasons why James II lost his throne in 1688. The first chapter begins with an analysis of existing accounts of Holt's life and career, including those by Georgian lawyers, Victorian politicians, and twentieth-century legal scholars. The next section of the chapter reviews the importance of Holt's father, Sir Thomas, in the development of his son's early career and political allegiances. Sir Thomas Holt was a loyal supporter of the Crown during the Exclusion Crisis, as well as a tory beneficiary of Charles and James II's policy of *quo warranto* at the level of local government. It is suggested that his political proclivities presented a model for his son to follow, as well as an explanation for Sir John's rise through the professional and governmental ranks at the beginning of James's reign. This theory is tested in the next part of the chapter, which attempts to identify Holt's political allegiances through an analysis of his early State Trials, as well as the evidence for his religious leanings. The final section of the chapter will then set out what can be discovered about Holt's political and professional circles, including his friendship with Sir William Trumbull and, through this connection, his links to Lord Sunderland and Henry St. John. Overall, the chapter will argue that Holt's political circles were far from exclusively whiggish, and indeed suggest that he had more of a natural leaning towards toryism. Similarly, it will be shown that Holt seems to have demonstrated a consistent jurisprudential and constitutional commitment to upholding the power of the king's prerogative, attitudes which set the scene for an analysis of Holt's professional development during James II's reign.

This forms the subject of the second chapter of the thesis, which begins by setting out the historiographical consensus on the strength of James's legal position at the start of his reign, particularly with regard to political support for his control over the prerogative. It also highlights the strength of the professional attachment between the Crown and the judiciary in this period, and the loyalty that this inculcated between the king and his judges, an administrative reality that a wise king might have been able to exploit. This analysis then leads into a discussion of

Holt's role as recorder of London during the first half of James's reign, where Holt seems to have been perfectly happy to prosecute Protestant non-conformists in the name of the government, but only as long as proper legal procedure was followed. He was, at this stage of his career, still a supporter of James's regime. All this would change by the end of 1686. What happened to cause this change of allegiance is explained in the rest of the chapter. To do so, a distinction is first made between James's absolutism, which had received the blessing of tories when used to support their monopoly of power, and his arbitrariness, which was perceived as a threat by the entire legal and political community. It is argued that James was relatively safe as long as his 'Anglican Absolutism' did not become 'Catholic Absolutism', or popery as it was known; a toxic blend of religious and political ideology synonymous with the exercise of arbitrary power. Yet this was precisely what happened. James's imposition of martial law onto the common law courts raised the spectre of popery and arbitrary power as understood both generally by the wider political community, as well as specifically by those trained in the common law. It also threatened the jurisdictional integrity and monopoly of authority over men's lives and property that the courts enjoyed. For these reasons, it is argued, Holt reluctantly felt that he had no choice but to resign, a decision also taken by Lord Chief Justice Herbert, who had ruled in favour of James's prerogative powers just months earlier.

Section II of the thesis, entitled *The Manuscript Opinions and Holt's 'Common Law Mind',* shifts the analysis to the intellectual background behind Holt's actions during this period of constitutional upheaval. It begins by introducing the manuscript opinions upon which this analysis is based, starting with a breakdown of the cases that they contain, a comparison of the relationship between the different documents, including their history of ownership and use, along with their scattered and mangled reproduction in later editions of printed reports. Holt's possible reasons for writing the opinions, and what this says about the evolving nature of judicial attitudes towards law-making itself, are also suggested. The next chapter of the section begins with a detailed exploration of the arguments of J.G.A. Pocock regarding the nature of the 'common law mind' in this period. The salient features of his theory are explained and summarised, before the impact of his work on later scholarship is discussed. Responses and criticisms of Pocock's work are mentioned, which, together with the analysis of Pocock's work itself, forms the framework of investigation into Holt's understanding of legal reason, precedent, history, and change, and how this affected his political and constitutional understanding of the relationship between law and the state. These issues are taken seriatim, starting with Holt's theory of the inherent authority of the 'reason' found in the law. This is then contrasted with the authority

he ascribed to reason 'on the record', and his interpretation of written legal precedent, prescription, and 'immemorial usage' when coming to his decisions. Such discussions then lead into a broader debate about what Holt's opinions can tell us about the underappreciated impact of natural law theory on common law jurisprudence more generally, and on Holt's interpretation of statute specifically, in this period. How Holt successfully blended this appreciation for solid precedent and abstract theory in relation to prominent cases of state is also explained in the next section, which leads into a study of the impact of the work of the Tudor lawyer Christopher St German on Holt's thinking.

Having explored the jurisprudential philosophy behind Holt's opinions, Chapter 5 explores his understanding of historical change in the law and the state, beginning with the importance he attached to changing custom over time. It is suggested that Holt thought about custom in a historical way, that is, with customs changing over time in response to evolving demands of state and society. In particular, evidence is offered that Holt appreciated the impact and importance of events such as the Norman Conquest in English history, and how such breaks in the legal development of the kingdom meant that the laws and constitutional arrangements of the Anglo-Saxons could not simply be resurrected in late seventeenth-century England. Holt's understanding of the importance and impact of Roman law, both on the continent and in English history, is also highlighted, along with an analysis of the impact of John Selden's work on Holt's constitutional assumptions and priorities. This leads finally into a discussion of how Sir Matthew Hale's view of historical change affected ideas of the preservation of the integrity of the law and the security of the state. The importance that Holt placed on not permitting ill-advised alterations to the law in the face of external pressure to do so leads into the final section of the thesis, exploring how the law was treated in the aftermath of the Glorious Revolution.

Section III of the thesis, entitled '*Revolution and the Rule of Law'*, focuses on how the law was used by the government after 1688. It seeks to challenge those accounts which see this period as a watershed moment in the emergence of 'the rule of law' in English political life. The first chapter demonstrates how politics continued to exert a strong influence on the judiciary, and questions the notion that judges like Holt found themselves in a 'new era of judicial purity and freedom' as one Victorian writer claimed.[27] Arbitrary abuses of the law by the government as part of the ongoing war effort and state of emergency in which the nation found itself during William's

[27] Foss, *Judges of England*, p. 351.

wars against James and France are revealed, including summary executions, press gang cover-ups, and the imposition of martial law away from the eyes of the press. The importance of Holt in maintaining the impression of legal legitimacy is also demonstrated, including his role as a 'constitutional choreographer' in matters of state. Holt's work as a backroom legal adviser to government is also explored, emphasising the continued importance of legal 'opinions' in the construction of official policy. Yet the chapter then goes on to demonstrate how on some occasions, especially those related to the success of the fiscal-military state, Holt's advice would be ignored or avoided, demonstrating the limits of influence that the judiciary had on the executive in this period. Holt's methods for upholding the security of the kingdom and the property of its subjects whilst also maintaining trust in the courts is then explored, emphasising his insistence on procedural consistency. Holt's role in defining his court's power of judicial review over city corporations during the jurisdictional upheaval of the 1690s is then analysed, demonstrating the importance of such oversight to his concept of 'the rule of law', and how this historical reality differs from the ideal projected onto this period by later studies. The final chapter of the thesis investigates what it was that was 'settled' in constitutional terms after 1688, and what role the law played in that settlement. This includes an assessment of the danger posed by the arbitrary legislative power of parliament, as well as the instability caused by partisan attempts to exploit the legal privileges enjoyed by each House of Parliament, with particular reference to the case of *Ashby v White* [1703].[28] Political manipulation of the House of Lords forms the focus of the next section of the chapter, which ends with a final case study of Holt's battle for jurisdictional pre-eminence with the Church of England in the upper house in the case of *Philips v Bury* [1694].[29]

The conclusion of the thesis reiterates the findings that have been made, before applying them to the broader question of what it was that seemed to generate trust between rulers and the ruled in the aftermath of 1688, trust that had been sorely lacking for most of the seventeenth century. Finally, plans for future studies that might further test and develop on these methods and hypotheses are suggested, including projects on the careers of MP lawyers in the early eighteenth century. Such studies would utilise the same techniques we have honed in our investigation of Holt in order to present these figures in their proper intellectual and political contexts, an approach that has so far rarely, if ever, been taken. It is hoped that such studies will help us to answer many of the unanswered questions that this thesis raises concerning the

[28] BL. Additional Ms. 34,125, ff. 138r-152v., 2 Ld. Raym. 930 (92 *ER* 126).
[29] BL. Additional Ms. 35,979, ff. 2r-12r., 4 Mod. 106 (87 *ER* 1294).

evolving structure of the constitutional relationship between law and politics during the 1700s, especially the connection between the judiciary and parliament. It is also hoped that these future projects might provide a stronger historical foundation for investigations into the constitutional crises of the latter half of the eighteenth century. As we shall see, questions of the precise legal relationship between Crown, parliament, the executive and the judiciary were far from settled by the revolution, something Holt knew only too well.

Section I

Holt's Reluctant Revolution

The purpose of this section is to demonstrate how studying Holt's early career can provide us with new perspectives on the reasons why James II lost his throne in 1688. Nearly every account of James's downfall agrees that James in some way subverted 'the rule of law' during his reign, and that this violation of the nation's shared understanding of the 'ancient constitution' was instrumental in his losing crucial political support in the run-up to William's invasion. The image of James's reign that emerges from these accounts is of a king who 'broke his monarchy' in the pursuit of his futile religious ambitions, and a ruler who, in failing to understand the insurmountable obstacles he faced, simply did not view politics as being 'the art of the possible.'[1] However, this narrative is somewhat contradicted by the near universal agreement within legal scholarship that James did not in fact 'break the law' in any technical sense. It is further complicated by the fact that it is rarely clear what scholars mean by 'the rule of law' in much of the historiography of his reign. Do the authors mean that James was breaking the law in the eyes of the judiciary, or was he merely violating constitutional norms with his vigorous use of the prerogative? Should one, or did one, matter more than the other? Perhaps most confusing of all is the lack of clarity over the relationship between, and relative importance of, James's perceived violation of the law, and his pursuit of Catholicising policies, in explaining why he ultimately lost the trust of the nation by 1688.

To help us untangle and hopefully answer some of these questions, we will need to focus on the nature of the academic consensus that has developed over James's use of the law, and how this behaviour related to fears over his popery. To do this, we will be concentrating on the lawyers who loyally served under James, and what it was about his behaviour that eventually drove many of them to abandon him. In particular, we will be analysing the early career of Sir John Holt. In doing so, we will be building on recent scholarship that has increasingly emphasised the importance of James's losing the political support of previously loyal tories, particularly at the level of local government, in explaining his downfall. Such studies emphasise the impact not of James objectively breaking the law during his reign, but of his using the law

[1] G. Southcombe and G. Tapsell, *Restoration Politics, Religion and Culture* (Basingstoke, 2010), p. 80.

against the 'wrong people' in an effort to advance his religious policies.[2] It will be argued that Holt's career offers evidence that the judiciary were also predisposed to support James's legal ambitions at the beginning of his reign, especially his use of the prerogative, until he similarly made the mistake of using the law in a way that undermined their previously mutually beneficial working relationship.

For many years such an analysis of Holt's behaviour under James would have appeared a fruitless endeavour, as the answers were already thought to be known. Holt was a loyalist to the whig cause, reluctant to his core to serve under James's regime, and who took the first opportunity he could to resign as recorder of London when asked to support James's popish policy of building a standing army. This reputation has been built upon centuries of biographies and accounts of his life and career. It is these texts with which we will therefore need to start. The goal of the first half of Chapter 1 is to set out what these accounts have said about Holt's political and legal involvement in the constitutional upheavals of the years before and after the revolution. The second half of the chapter will then aim to show how misleading many of these accounts are. Significantly, we will demonstrate that Holt's personal and professional circles placed him more firmly in the ideological camp of the tories, a point which has important consequences for our analysis of his career under James in the second chapter.

Chapter 2 therefore becomes an account not of a whig resigning his position in disgust, but of a loyalist pushed to breaking point. It will be argued that this episode in Holt's career offers us a valuable insight into the precise mechanics of how James mishandled those men upon whom he was relying to support his legal and religious agenda, and the reasons why he might have overestimated the strength of his constitutional position at the beginning of his reign. Notably, it was not over the king's use of his prerogative that Holt felt compelled to resign, but instead his use of martial law during peace time, an issue upon which Chief Justice Herbert, who had backed James in *Godden v Hales* [1686], also elected to fall on his sword. It is hoped that by the end of this section, we will have a better grasp of just what it was about James's behaviour that made it seem almost universally 'illegal' in the eyes of both lawyers and non-lawyers, and the significance of this to our understanding of the changes and continuity experienced in the relationship between law, politics and religion after the revolution, our subject of analysis in Section III.

---

[2] See for instance P. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns 1650-1730*; (Cambridge, 1998); T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006), especially pp. 182-256.

Chapter 1: An able, upright, and unbiased judge?

'Lord Bacon says, of all History, Biography is the most profitable and useful: And we may add, that of all Lives, those of Lawyers, are not least interesting: And of all Lawyers, that of the Lord Chief Justice Holt, is, perhaps, most worthy to be transmitted to Posterity.'[1]

1.1 Introduction: A Contradictory Biography

Writing in the Trinity vacation of 1763, John Rayner, barrister and author of various legal digests, noted the strange lack of public information available about the subject of his latest publication:

> It is observable, that not a Syllable concerning this consummate Judge, or any of his Family, is to be found, either in the ten Volumes, folio, of the General Dictionary; the five of the *Biographia Britannica*; or, the eleven large octavo of the *Biographical Dictionary*.[2]

Rayner's frustration is understandable: we still know little of Holt's early life. What is known is that he was born at Thame in Oxfordshire on 30 December 1642. Admitted to Gray's Inn at the tender age of nine, Holt subsequently matriculated from Oriel College Oxford on 31 July 1658, where he apparently took no degree. He was called to the bar in February 1664, at the age of 21.[3] Such a lack of information should not deter us, however. Indeed, precious little is known about the early life of Holt's great predecessor Sir Matthew Hale, a fact that, as Alan Cromartie has said, presents no 'serious loss to our knowledge of Hale', and something that certainly has not inhibited studies of his career.[4]

Traditional accounts of John Holt's life and career in the years before the Glorious Revolution come from two main groups of sources. The first is a selection of what we might term 'career biographies', including commentaries on cases deemed to be of particular merit or importance, published over the centuries since his death in 1710. The other group comprises printed collections of law reports in which Holt and his cases feature, the earliest of which were produced during Holt's lifetime. This first half of this chapter will focus on the biographies, the earliest example of which is John Rayner's work of 1764. Rayner was writing at the height of another titan of the King's Bench's career, namely Lord Mansfield, many of whose judgments

[1] J. Rayner, *The Life of the Right Honourable Sir John Holt* (1764), p. iii.
[2] Ibid., p. xiii.
[3] P. Halliday, 'Holt, Sir John (1642-1710)', *ODNB*.
[4] A. Cromartie, *Sir Matthew Hale 1609-1676, Law, religion and natural philosophy* (Cambridge, 1995), p. 2.

had their foundations in Holt's own opinions, as we shall see in Section III. Along with selected works by Coke, Fortescue and Bacon, and publications such as *The Guardian*, Rayner's main body of sources appear to have been those printed law reports that he could get his hands on, twenty-one separate volumes in total, which he listed in a table at the end of his work. Introducing the table, Rayner took the opportunity to heap praise on the man whose judgements the reports contained:

> LORD Chief Justice *Holt's* Arguments and Resolutions, were the Glory and Happiness of the Age in which they were pronounced, they have been the Guide and Imitation of succeeding ones, and will continue to be so to all future ones.

Reading further on, Rayner's motivation for concentrating on Holt's individual virtues becomes somewhat clearer:

> *England* is as much obliged to his Lordship's Administration, as to the Law itself: For though the Law is projected upon the finest Polity in all the known World; yet, without a Magistrate, it is but a dead Letter: Let it's excellency be what it will, it's good Influence and Effects will entirely depend upon the Integrity and Abilities of those who are to carry it into Execution.[5]

For Rayner then, writing over fifty years after Holt's death, his work was as much a warning to contemporaries as it was a celebration of Holt's legacy. The strong and stable constitutional settlement apparently achieved in Holt's lifetime, one which had produced 'the finest polity in the known world', depended for its continued glory on the efforts and stewardship of virtuous lawyers, the model for which had been provided by Sir John Holt. Key to Holt's success in preserving the perfection of the polity was his concern for the liberty of the individual and the preservation of his property:

> There never was an abler, more unbiassed, and upright Judge, since *England* was a Nation, than the Lord Chief Justice *Holt*…his Lordship was always remarkably strenuous in nobly asserting and as vigorously supporting the Rights and Liberties of the Subject, to which he paid the greatest Regard upon all Occasions.[6]

As well as supporting these rights and liberties, Holt also attacked those who threatened them: '[he] never suffered the least Reflection tending to depreciate either to pass uncensured, or

[5] Rayner, *Life of Holt,* p. 157.
[6] Ibid., pp. iii-iv.

indeed, without the severest Reprimand'.[7] Holt's achievements were even more remarkable when one considered that:

> No Chief Justice, perhaps, ever continued in that Post so long as Lord Chief Justice *Holt* did; his Lordship having maintained it twenty two years successively, with great Reputation for his Courage, Integrity, and compleat Knowledge in his Profession.[8]

Rayner placed great emphasis on Holt's steadfastness, solid judgement and clear understanding. This had been the secret of both his, and the revolutionary settlement's, success. For Rayner then, Holt represented the apotheosis of his profession, and the template for the future good conduct of others who had held his post:

> To his Justice and unshaken Integrity, and the universal Suffrages of Praise of a whole Nation for such Behaviour, we may possibly, in a great Measure, be indebted for such a Series of great Men since his Time, in the Profession of the Law, not be equalled in any former Period of History, and not likely to be exceeded in any future.[9]

This, then, was an eighteenth-century constitutional history that relied on heroes and the deeds of great men for its substance, and the determination of the story's outcome.

The next and far more substantial work to deal with Holt's career and legacy came in the 1840s, with Lord John Campbell's *The Lives of the Chief Justices of England*.[10] Following on from the success of his *Lives of the Lord Chancellors*, Campbell, who as whig lord chancellor found himself out of a job after the return of the tories to power under Peel in 1841, devoted sixty-one pages of his project to Holt.[11] Labelling Rayner's effort 'exceedingly meagre' as a biography, but seemingly 'very accurate' in the sources he cited, Campbell began with a similar lament as to the paucity of knowledge about Holt's private life and upbringing:

> It would have been most interesting and instructive to trace the formation of such a character, but, unfortunately, little that is authentic is known of Holt till he appeared in public life; and for his early career we are obliged to resort to vague and improbable traditions.[12]

---

[7] Ibid., p. iv.
[8] Ibid., p. vi.
[9] Ibid., p. vii.
[10] J. Campbell, *The lives of the chief justices of England: from the Norman Conquest till the death of Lord Mansfield* (1849-1857).
[11] See M.S. Campbell (ed.), *Life of Lord Chancellor Campbell*, 2nd edn. (2 vols., 1881), vol. 2, p. 248, where Campbell speaks of writing Holt's entry to keep his spirits up during an outbreak of cholera.
[12] Ibid., p. 119.

This did not stop Campbell from attempting to draw lessons from Holt's experiences with his father, a man who Campbell thought 'justly proud' of his son's achievements, even though 'he deplored his political degeneracy when he found him to be a Whig.'[13] On this point, Campbell was certainly far more interested in trying to ascertain Holt's political leanings than Rayner had been. Holt's father, Campbell argued, may have been a 'founder' of the 'party who were first called "*Tories*"', known for 'mixing in factious intrigues rather than pleading causes in Westminster Hall', but his son was quite different. Unlike 'The unprincipled, ignorant, and incompetent Chief Justices of the King's Bench' who had 'been exciting alternately the indignation and the disgust' of his readers, John Holt represented 'a man of unsullied honour, of profound learning, and of the most enlightened understanding'.[14] Echoing Rayner's earlier judgment, Campbell pronounced:

> To the happy choice of SIR JOHN HOLT as president in the principal common law court, and to his eminent judicial services, we may in no small degree ascribe the stability of the constitutional system introduced when hereditary right was disregarded, and the dynasty was changed.[15]

This 'stability' though came less from the constitutional protections afforded to courts by the revolutionary settlement itself, but rather despite it. It is notable that as much as Campbell emphasised the importance of Holt's individual character in a way with which Rayner might have agreed, Campbell, who as an early Victorian politician knew all too well the unsettled and ever shifting nature of Britain's balance of constitutional power, was especially keen to emphasise the ever present threat of a return to arbitrary rule as personified by the Stuart monarchs. Despite being a whig, he had largely absented himself from the debates surrounding the passage of the proposed Reform Bill of 1831, and is said to have been sceptical of the need for electoral reform more generally, stating that 'You cannot generally alter the right of voting without a complete *bouleversement*, and making the House of Commons too strong for the other branches of the Legislature'.[16] As we shall see in Section III of this thesis, Campbell's concerns closely echoed those of Holt in the aftermath of 1688, especially regarding the extent of the powers of a newly sovereign parliament, and the legal privileges enjoyed by its two houses. Indeed, in the uncertain years after the revolution, as contemporaries explored the new and uncharted boundaries of the constitutional landscape, this danger was arguably at its greatest.

---

[13] Ibid.
[14] Ibid., pp. 118-119.
[15] Ibid., p. 118.
[16] G.H. Jones and V. Jones, 'Campbell, John, first Baron Campbell of St Andrews (1779–1861)', *ODNB*.

Central to the efforts to resist any abuse of newly acquired powers in those key years, Campbell claimed, had been Holt:

> During the reigns of William and of Anne, factions were several times almost equally balanced, and many of the enormities of the banished race were forgotten; but when men saw the impartiality and mildness . . . [of] Chief Justice Holt . . . and the firmness with which, in the discharge of his duty, he alternately defied the power of either House of Parliament, they dreaded a counter-revolution, by which he would have been removed to make place for a Jeffreys, a Scroggs, or a Wright.[17]

The clock, then, could have, and still might be, turned back: the revolution was no *fait accompli*, the liberties defended from the Stuarts were revocable, and the independence of the judiciary was certainly not guaranteed. One brand of absolutism could simply have been replaced with another, new sort of parliamentary 'enormity', one which cared little for the delicate balance of constitutional power. This pessimistic view of the inherent survivability of such a balance, as well as 'the rule of law' more generally in the decades after the revolution, conflicts with the analysis found in nearly every history written since, from Joseph Addison who celebrated the Act of Settlement's clauses concerning judicial independence as 'the best law that ever passed in our days', to Lord Chief Justice Bingham writing in 2011 who argued that:

> The lesson that even the supreme authority in the state is subject to the law was painfully learned. It cost one king his head and another his throne. But the Britain which emerged from the Glorious Revolution was one where the rule of law, imperfectly and incompletely, held sway.[18]

Where Campbell's views did chime with those of other writers was in his shared belief that many of Holt's predecessors, including his father, had somehow been unfit to call themselves judges. Edward Foss, who had lent Campbell material from his library in order to complete his *Lives of the Lord Chancellors*, began his own biography of Holt with the following effusion:

> After the succession of chief justices that disgraced the bench in the reigns of Charles and James since the death of Sir Matthew Hale, it is refreshing to record a name which excites universal admiration, as possessed by one who was erudite in law, independent in character, and just and firm in his decisions. In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that perfect exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench, and which is now the undisputed glory of our judicature.[19]

---

[17] Campbell, *Chief Justices*, p. 118.
[18] Addison quoted in Rayner, *Life of Holt*, p. 10; T. Bingham, *The Rule of Law* (2011), p. 25.
[19] E. Foss, *Biographica juridicia: a biographical dictionary of the judges of England* (1870), p. 351.

Those earlier chief justices had apparently 'disgraced the bench' by allowing themselves to become pawns in the grubby games of partisan politics that had characterised the reigns of Charles and James II. After 1688 though, a change seems to have come over the judiciary, a change personified by Holt. Yet for that great legal historian of the early twentieth century, Sir William Holdsworth, this had less to do with Holt's individual character, and more to do with the deliberate removal of judges from the political arena in the aftermath of the revolution:

> . . . when the great constitutional controversies had been settled, and when the judges ceased to be appointed for political reasons, their decisions upon constitutional questions naturally acquired a different and more permanent value than . . . [was] possessed by many . . . earlier decisions, which were given during . . . [a] period of political conflict.[20]

As a result of this 'de-politicisation' of the judiciary after 1688, Holdsworth claimed that:

> The judges had now nothing to fear, either from the Crown, or from either one of the two Houses of Parliament . . . Therefore they could develop by their decisions the principles of constitutional law, as freely and impartially as they were accustomed to develop any of the other branches of English law.[21]

Holt's individual character was not totally irrelevant however. 'The Revolution had created a new set of political conditions', Holdsworth opined, 'and expanding trade was creating a new set of commercial conditions'. As a result:

> . . . the common law had need of a judge, who was sufficiently conversant with modern needs and modern thought to appreciate the nature of the problems demanding solutions; who had sufficient statesmanship to see the best solutions; who was a sufficiently good lawyer to put those solutions into a form which harmonized with the principles and technical rules of the common law. Holt satisfied all of these needs.[22]

'From this point of view', Holdsworth concluded, 'we may regard him as the father of a long line of great judges who have made our modern common law.' Yet this was not Holdsworth's only opinion on the matter. Confusingly, and contradicting his claim that 'the judges had now nothing to fear', Holdsworth also argued that Holt, as with other judges appointed after the revolution, had been forced to 'ably and courageously . . . [vindicate] the supremacy of the law as against arbitrary extensions of privilege attempted both by the House of Lords and the House of Commons.'[23] So it seems that judges might have been more secure in their posts after 1688,

---

[20] W.S. Holdsworth, *A History of English Law* (12 vols., 1903-72), vol. VI, p. 263.
[21] Ibid., p. 263.
[22] Ibid., p. 517.
[23] Ibid., p. 258.

but that the jurisdictional parameters and independent protection of those posts were still far from settled, and still open to attack. This is a crucial point, and one that has been picked up most recently by Paul Halliday, who notes that Holt's 'collisions with both Lords and Commons highlighted the dangers of peremptory parliamentary behaviour as parliament moved increasingly to the fore in the constitution.'[24] Yet even Halliday, normally a structuralist in his approach to such matters, attributes special importance to Holt's individual character in these clashes. Thus we are told that it was Holt's 'confidence in his opinions', and not any change in the relative political importance or constitutional role of the judiciary after the revolution, 'which permitted him to hold out against the threats of both houses of parliament at different times.'[25]

Taken altogether, these biographies have presented us with a something of a confusing and contradictory narrative regarding the relative importance of the different features of Holt's personality, background, and episodes in his career. These include his professional idiosyncrasies, political allegiances, as well as the impact of the perceived legal abuses of James II's reign, the emergence of 'the rule of law' in the aftermath of 1688, and the role of a newly 'independent' judiciary in preserving the constitutional settlement in the early decades of the eighteenth century. As we stated in our introductory chapter, these are all key themes that we will be analysing in this thesis. Section III will focus on the question of what sort of 'rule of law' was established after the revolution, whether the judiciary really were granted independence from political interference, and what role the law played, if any, in building the success of the revolutionary settlement. While Section II deals with Holt's intellectual background, in the remainder of Section I, we will attempt to present a clearer picture of Holt's professional and political influences, how this can help us to appreciate better the significance of the breakdown of his relationship with James II in 1687, and what this episode can add to our understanding of the relative importance of the law as a factor in James's eventual downfall.

1.2 Family Values

One aspect of Holt's biography that Lord John Campbell undoubtedly got right was that his father was a tory. Holt's father, Sir Thomas Holt, was also a lawyer, corporation recorder, and MP, all posts that Sir John would hold in his lifetime. Indeed, the parallels between the two

[24] Halliday, 'Holt', *ODNB*.
[25] Ibid.

men's careers are stark: both lived through years of constitutional upheaval, and both demonstrated the ways in which being a lawyer, both in training and as a matter of professional identity, might colour the political choices that they were forced to make.

Sir Thomas is thought to have been born around 1616, and was educated at Magdalen Hall in Oxford. Although his activities in the Civil War are unknown, they appear to have delayed his entry into a legal career. He was thirty-two by the time he began practising as a barrister of Gray's Inn in 1648, just four years before he had his son John admitted there.[26] When young John Holt was twelve years old, his father was elected as Abingdon's MP in Cromwell's first parliament, Sir Thomas having settled there around 1653.[27] Although initially loyal, Sir Thomas's relationship with the regime appears to have broken down, and he was noticeably absent from the millenarian regicide Major-General Goffe's advisory committee following Cromwell's decision to set up army generals as local governors.[28] Regardless, by the Restoration Thomas Holt's legal practice was on a strong footing, and he is said to have contributed more than any other in Abingdon to the king's 'voluntary' tax in 1661. Likewise, the Hearth Tax of 1663 shows him living at the imposing Unicorn House, coincidentally the same building that twenty-five years later William of Orange would lodge at on his march to London. In 1672 Holt added to his titles, being made steward, or recorder, of the corporation of Reading, though three years later he found himself being sacked as recorder of Abingdon on account of his frequent absences. It has also been suggested that the pro-whig inclinations of his successor, Thomas Medlycott, as opposed to Holt's apparent tory sympathies, may have contributed to his dismissal.[29]

Such sympathies did nothing to inhibit Thomas Holt's legal career. Having been made a bencher of Gray's Inn shortly before his appointment as steward of Reading, he was appointed serjeant-at-law, which allowed him to sit as a judge of the common law courts, in 1677.[30] In April 1679 he was knighted, and subsequently presided over the Berkshire county quarter-sessions, notably objecting to their petitioning for a new parliament at the height of the Exclusion Crisis. For this insult, in November 1680 the House of Commons resolved that 'Sir Thomas Holt, by

[26] J. Foster (ed.), *Alumni Oxonienses 1500-1714* (Oxford, 1891), pp. 706-747.
[27] B. Willis, *Notitia Parliamentaria . . . a series or lists of the representatives in the several Parliaments held from . . . 1541 . . . to . . . 1660 . . .* (1750), p. 259.
[28] The following biographical information comes from the detailed Abingdon Area Archaeological and Historical Society entry on Sir Thomas Holt: http://www.abingdon.gov.uk/history/people/sir-thomas-holt.
[29] Ibid.
[30] Foster, *Alumni.*

obstructing Petitioning to his Majesty for the Sitting of this Parliament, and declaring his Dislike and Abhorrence of such Petitioning, hath betrayed the Rights of the Subject'. It was ordered that he and Thomas Staples should 'be sent for in Custody of the Serjeant at Arms attending this House; to answer, at the Bar of this House, for the Misdemeanours by them committed against the Privilege of this House', a direct parallel to threats that would be made to his son over twenty years later, the significance of which cannot have escaped Sir John Holt's attention.[31] Again, Holt senior's career did not seem to suffer unduly from this episode. Indeed, in February 1681, Roger Morrice noted that Holt was being considered for attorney general, in competition with Sir Robert Sawyer.[32] Having proved his loyalty to the Crown he was confirmed as recorder of Reading under its new charter in 1685, and in 1686 was promoted to king's serjeant along with his son John, who was also appointed recorder of London that same year.[33] However, 1686 would also be the year of Sir Thomas's death, the timing of which denies us the opportunity of knowing how he might have behaved during the remainder of James's reign, and whether or not he might have responded differently to his son.

We know nothing of the closeness of the relationship between Sir Thomas and Sir John Holt, but our brief analysis of the father's career is useful in many regards. First, it clearly demonstrates the key role played by lawyers in political life under Charles and James II, both as MPs when parliament was sitting, but, perhaps more importantly, in corporate life during those extended periods when parliament was not. John Holt would have grown up hearing of, and perhaps participating in, his father's efforts to secure administrative authority and support at the level of local government, whilst furthering his career as one of the king's legal servants in Westminster. One role clearly aided the other. This is significant, because it is also clear that Sir Thomas, having lived through the chaos of civil war and interregnum, was one of the many lawyers and men of politics whose sympathies lay with a strong monarchy that should have been allowed to rule with the loyal support of its judiciary and legal machinery of state, and not necessarily with 'destabilising' parliaments. He therefore represents perfectly the model of a tory lawyer who helped the Crown to purge its whig opponents, overcome the Exclusion Crisis, and were prepared to gamble that James II's Catholicism would not metastasize as popery in the body politic.

---

[31] *Journal of the House of Commons: Volume 9, 1667-1687* (1802), pp. 657-659.
[32] *EBRM*, II, p. 269.
[33] J.S. Crossette, 'Holt, Sir John (1642-1710)', in B.D. Henning (ed.), *The History of Parliament: the House of Commons 1660-1690* (1983).

In exchange, men like Sir Thomas hoped to solidify their grip on local government, and maintain the prestige and prominence both of their position within, but also of the institution of, the common law courts, which bound them to their king as officers of his law. He was precisely the sort of man with whom Charles - and it was thought James - hoped to rule: a nation of loyal JPs, not rebellious MPs. That James eventually turned on such men was one of the greatest reasons for his downfall. Sir Thomas's loyalty might also offer us an early answer to the apparent conundrum of Sir John's meteoric rise to high legal office after James's accession. James perhaps wished to reward both this loyal supporter of the Crown, as well as to court and recruit his talented son for the cause. Thus we are presented with the historical irony that the man who would later come to be a poster-boy for the whig notion of 'the rule of law' should have been given that opportunity by the very 'illegal' regime that the whigs sought to overthrow. It is an irony that needs to be explored further, though one that perhaps could be explained more easily had loyal Sir Thomas lived to see the events leading up to the Glorious Revolution.

The influence of Sir Thomas Holt, much maligned by Sir John's biographers, on his son may well have been underestimated. The influence of Sir John's wife certainly has not. Holt married Ann Cropley in June 1675, over ten years after he had begun to plead in King's Bench. The union was said not to have been a happy one. As William Welsby – another of Holt's Victorian biographers – commented, their 'conjugal harmony, indeed-as, unluckily, has been the case in many a wise man's house-was, it appears, but very indifferently tuned.' The 'lofty and independent spirit which braved the wrath of Lords and Commons, was doomed' he added 'to find itself subjected to a more undignified mastery at home.'[34] Writing to his friend Jonathan Swift in 1729, John Arbuthnot noted that he had recently treated their mutual acquaintance John Gay, and had taken 'the same pleasure in saving him, as Ratcliff did in preserving My Lord chief Justice Holt's wife whom he attended out of spite to the husband who wished her dead.'[35] The source of Dr John Radcliffe's hatred of Holt seems to stem from his involvement in a case before him as lord chief justice in 1691. Radcliffe had found himself 'very late abrode in the City one night with some company', when, according to Roger Morrice, they were stopped by the constable and the watch. Radcliffe's friends happily handed over their names and addresses, but Radcliffe stubbornly refused, leaving the constable no choice but to take him into custody

[34] W.N. Welsby, *Lives of eminent English judges of the seventeenth and eighteenth centuries* (1846), pp. 133-34.
[35] H. Williams (ed.), *The Correspondence of Jonathan Swift* (Oxford, 1963-5), vol. 3, p. 325: Arbuthnot to Swift, 19 March 1729. The footnote to this entry reads 'The story that Sir John Holt . . . devoted himself incessantly to business to avoid the society of his wife, if questionable, is accepted'.

and imprison him in the New Prison Clerkenwell. Radcliffe refused to be kept in a good room, and insisted on spending the night in a cell with the common criminals, even after the panicked constable discovered his identity. Instead, Radcliffe brought an action against the constable and the watch in King's Bench. Straightforwardly dismissing his claim, Holt pointed out that the constable had only been doing his duty, and directed the jury to find for the defendants.[36] That Radcliffe was able to save the life of Holt's wife is testament to the grudge he bore for this slight.

Anecdotes such as this give us a rare glimpse into Holt's personal life. Something further of his family background and networks can be reconstructed. Holt's father Sir Thomas was the son of London merchant Rowland Holt and his wife Mary, herself the daughter of another London merchant. Born in south Oxfordshire, Thomas married Susan Peacock, daughter of John Peacock of Cumnor, and on his death was buried at St. James's Church Clerkenwell, about half a mile away from Sir John's London home on Bedford Row. [37] Sir John's wife Ann similarly came from London merchant stock, being the daughter of Sir John Cropley, 1st Baronet of Clerkenwell.[38] The Cropleys themselves were also politically connected. Ann's brother Sir Edward had died young in 1664, but his son John Cropley, Sir John Holt's nephew by marriage, was a life-long friend of the 3rd earl of Shaftesbury. Not surprisingly, he was a whig, though one described both as a 'dissident Country Whig' and a man of 'principled independence'.[39] What we can conclude from the nature of his extended family is that Holt would have been familiar with individuals sympathetic to both the whig and tory positions on matters of state or religion during his upbringing and early career. Yet none of this seems decisive when it comes to identifying Holt's actual political sympathies.

1.3 Politics, the Prerogative, and the Pulpit

In his biographical entry on Holt, Paul Halliday laments the difficulty in identifying the young judge's political allegiances during the 1670s and 80s: 'Unlike many leaders at the bar…Holt

---

[36] *EBRM*, V, p. 562.
[37] Elias Ashmole, *The visitation of Berkshire 1664-6*, ed. W.C Metcalfe (1882), p. 51; Foster, *Alumni.*
[38] Holt was 33 when they married, and their supposedly unhappy union was childless. Their fathers were presumably acquaintances, the marriage of their children possibly something arranged to force a family life on John Holt and to give John Cropley peace of mind in his old age; he would die the year after the wedding. Marriage would certainly have improved John Holt's career prospects.
[39] P. Watson, 'Cropley, Sir John, 2nd Bt. (1663-1713)', in D. Hayton, E. Cruickshanks and S. Handley (eds.), *The History of Parliament: the House of Commons 1690-1715* (2002).

defies easy labelling as a whig or tory', we are told.[40] Halliday's diffident assessment stems from his analysis of Holt's involvement in various trials in the final years of Charles II's reign. Potential evidence of Holt's 'sympathy for nonconformity' is taken from two cases, one in which he represented a 'Norwich alderman who lost his office after allegations that he had not observed the terms of the Corporation Act', and the other where he appeared for 'the Ipswich justices of the peace who would not support collecting fines from dissenters.'[41] Yet upon close inspection, Holt's behaviour in both cases can just as easily be explained by a belief that the law should be followed precisely to the letter, and that local government officials should not be treated leniently by the courts when they failed in their administrative duties. This stance was designed to improve the effectiveness of the law in the long run, not to undermine it, an approach that Holt would maintain throughout his career. The Norwich case, *R v Thacker* [1679], clearly displays this line in Holt's thinking.[42] Holt insisted that the alderman should not be penalised for failing to take the 'oaths agreeably to the Corporation' since they had never been 'tendered' to him, as the wording of the Corporation Act 1661 demanded. The attorney general Sir William Jones protested that such an exact reading of the requirements of the act would evade 'the intent of the statute', for 'if the magistrates were wilful or neglectful, and would not tender, the statute would signify nothing.' Yet it was precisely this neglect of duty that Holt was so reluctant for the courts to permit, neglect that he believed had the effect of weakening the provisions of the Corporation Act.[43]

Those better known cases that made it into *State Trials* show Holt appearing as counsel for the earl of Danby in 1679, and Lord Russell in 1683, as well as supporting the Crown in its prosecutions of seditious libel, a crime about which he had much to say after the revolution, and Slingsby Bethel for alleged assault at the 1681 Southwark parliamentary election. Yet Holt also represented whigs in a number of trials, including Lord Grey and Thomas Pilkington.[44] The problems with attempting to extract information about Holt's political leanings from such cases are numerous, and have only led to confusion in the past. For instance, despite Holt's prominent appearances for the Crown in this period, Welsby claimed that 'In almost all the…prosecutions that arose out of the contest of parties in the latter years of Charles II's reign, and that are

[40] Halliday, 'Holt', *ODNB*.
[41] Ibid.
[42] *R v Thacker*, 1 Freeman 475 (89 *ER* 356). For the Ipswich case, see *CSPD* 1683-4, pp. 263-65. My thanks to Paul Halliday for confirming these references.
[43] See Chapter 7 for a fuller discussion of Holt's attitude towards the court's role in regulating the officers of urban corporations.
[44] Halliday, 'Holt', *ODNB*.

recorded in the State Trials, he is to be found engaged in opposition to the court interest.'[45] Campbell went even further, somehow arguing that:

> . . . on public affairs he thought for himself, and he decidedly preferred the "country party." He had regarded with horror the iniquities of the infamous CABAL, and he associated himself with those who were struggling for the principles of civil and religious liberty. He was tainted with the rage against Popery, from which no patriot was then free; but, although a sincere member of the Church of England, he was for extending a liberal toleration to all orthodox Dissenters.

'With these principles' Campbell concluded, 'and his professional eminence, he was sure to be of service to his country in the struggles that were then going forward between the contending parties in parliament and in the courts of law.'[46] Such claims aside, on a practical level, Holt's spoken contributions in many of these trials were minimal. What does stand out from his interventions was his ability to argue effectively on technicalities, often to the immense frustration of the presiding judge. During the 1684 trial of William Sacheverell and other whigs for riot at the Nottingham mayoral elections of 1682, Holt attempted to argue that the election itself was not valid because the corporation's charter was in dispute, and therefore no riot could have been committed. He even suggested that the corporation's ceremonial mace had been 'usurped' as a result, in 'an affront to the king's authority.' Chief Justice Jeffreys had had enough by this point: 'Pray go on with you [sic] witnesses, and do not spend our time in such trivial stuff; for this is all stuff, mere stuff.'[47] Later that year, in the case of *scandalum magnatum* between the earl of Macclesfield and John Starkey, Holt's 'most creditable appearance at the bar' according to Campbell, Holt was accused by Macclesfield of using such 'a multitude of words, but comes not to the merits of the cause, but touches it as an ass mumbles thistles.'[48]

One of the major consistencies in Holt's constitutional outlook that we *can* identify from purely legal sources during this period is his firm belief in the authority and integrity of the royal prerogative. This was especially true in cases where the opposition based their claims on the constitutional right of parliamentary oversight in such matters, a position that is difficult to reconcile with any firm attachment by Holt to whig principles. As Halliday has pointed out, Holt advised both the corporations of London and Berwick to surrender their charters in the face of the Crown's *quo warranto* proceedings, arguing that 'all franchises - including corporations

---

[45] Welsby, *Lives of judges*, p. 95.
[46] Campbell, *Chief Justices*, pp. 123-124.
[47] *State Trials,* vol. 10, pp. 70-71.
[48] Ibid., p. 1387; Campbell, *Chief Justices*, p. 127.

- derive from the king and would thus survive in royal hands if seized after judgment or upon surrender.'[49] Holt's other high-profile pronouncements on the strength of the prerogative came in those cases dealing with the monopoly powers of various trading corporations, most famously in the case of *East India Company v Sandys* [1683–5].[50] As Edward Cavanagh has recently shown, Holt premised his arguments on the grounds that only the Crown had the power to control trade with infidels in such instances, an argument – though not this time with reference to infidels – that he maintained as corporate counsel in the lesser known case of *The Company of Merchant Adventurers v. Rebow* [1686].[51] As we shall see, it was a position with regard to the power of the prerogative that Holt would maintain for the rest of his career.

Away from debates concerning the constitutional status of the King's legal powers, no real assessment of Holt's religious leanings, another key indicator of one's potential political allegiances in this period, seems to have been undertaken. This is predominantly due to lack of evidence. As we saw above, Campbell believed Holt to be a 'sincere member of the Church of England', though Welsby thought, with no clear justification, that in 'matters of religion, Sir John Holt was a warm friend to a liberal toleration, and appears to have retained but in a mitigated degree the Whig horror of popery which was so generally felt or affected by that party.'[52] Rayner noted that upon his death, Holt's philanthropy extended to his giving 'legacies to St Andrew's Holborn, and to the servants who looked after him when he was ill, £5 each, and employed for an extra month after his death by his executors.'[53] St Andrew's was Holt's London parish church, one that to this day sits at the heart of London's legal community, and later the seat of Henry Sacheverell, who became its rector three years after Holt's death.[54] His gift of £5 seems entirely conventional.

One as yet untapped source of information and opinion on Holt's religious loyalties comes in the form of Roger Morrice's *Entring Book*. Although far from a neutral observer in such matters, Morrice's work provides us with evidence that among the circles he was writing for, Holt was viewed as a loyal member of the established Church. This was particularly the case when Holt

---

[49] Halliday, 'Holt', *ODNB*.
[50] *State Trials*, vol. 10, pp. 371-554.
[51] E. Cavanagh, 'Infidels in English Legal Thought: Conquest, Commerce, and Slavery in the Common Law from Coke to Mansfield, 1603-1793', *Modern Intellectual History* (online edn., Nov. 2017), https://doi.org/10.1017/S1479244317000580. For *The Company of Merchant Adventurers v. Rebow* [1686] see 3 Mod. 126 (87 *ER* 81).
[52] Welsby, *Lives of judges*, p. 132.
[53] Rayner, *Life of Holt*, p. 127.
[54] W.A. Speck, 'Sacheverell, Henry (1674-1724)', *ODNB*. St Andrew's is also where Sacheverell is buried.

served as recorder of London, as we shall see in the next chapter. Yet Holt also seems to have had little trouble in reconciling his Anglicanism with his service for the revolutionary regime, as evidenced by his judgment in the case of Ralph Gray, chaplain to Thomas Cartwright, the Bishop of Chester, in November 1689. Gray was accused of writing 'a very Scandalous Lybell, wherein he gave a very base and Scandalous Character of the King, viz: That he was part foole, part Knave and so unfit to Govern that he confidently hoped he should see King James upon the English Throne within Six Months.' Holt clearly had no sympathy for Gray's claim that he was a loyal member of the Church of England. As he is reported as saying in his summing up:

> . . . that he is a good son of the Church of England, and this does not at all excuse, but rather agravate his offence, for it is these kind of Scandalous miscarriages committed by many that pretend to be Members of the Church of England that has given colour for that reproach and disgrace that is cast upon the Church, and therefore as his Crime is the greater So I thinke his punishment ought to be.

Gray was found guilty, sentenced to pay one hundred marks, and to stand in the pillory.[55] Holt also had no problem in prosecuting members of the clergy that he believed were abusing their power and position for financial gain. Dr William Lancaster, vicar of St Martin's-in-the-Fields, found this out to his cost when he attempted to charge a French Protestant for having his child baptized in the same parish as his at the 'Church in Savoy'. As Holt ruled, 'nothing was due to any Chaplain, Rector, Vicar, or Priest for marrying, christening, or burying except they do or did officiate for it.' Yet he did not stop there, adding 'that the ancient common laws condemns it to be a gross simony for them to demand, take, or force money out of any lay-mans pocket . . . for where no work is performed by them there is nothing due to them by any act or statute whatsoever'.[56] Whatever Holt's loyalty to the Church of England, he clearly believed that his court had a right to demand that its ministers obey the common law when their behaviour trespassed on a subject's lay property, an aspect of his jurisprudential and jurisdictional theory that we will explore further in Chapter 8.

1.4 Friends in High Places

Besides the law reports and scattered fragments of evidence of his religious life, there are other sources to consider when attempting to reconstruct Holt's political and professional networks.

---

[55] *EBRM*, V, pp. 250-251.
[56] Lancashire Archives**,** FRL/1/27/12: 'Lord Chief Justice Holt's ruling against vicars, rectors and priests charging for marrying, christening and burying', undated.

Welsby was surprised to note that Holt could be found in 'confidential intimacy with Lord Sunderland', and could 'hardly understand what community of feeling could exist between the upright and inflexible judge and the unprincipled and mercurial minister.'[57] Yet Holt's ability to survive, and flourish, under both regimes either side of the revolution cannot have come without an element of pliability in his character, although he seems to have managed this without the same extreme sacrifices of 'principle' that the great chameleon Sunderland was known for undertaking.[58] Both men were survivors though, and Holt's possible association with Sunderland may well have been part of the reason behind Laurence Hyde's interference with Holt's judgments in the Lords, incidents that we will be analysing in Section III. Hard evidence of the connection between the two men however comes through letters which point to Holt's friendship with the civil lawyer and government official Sir William Trumbull, who counted Sunderland as his patron. The parallels between Trumbull and Holt are intriguing. Both men clearly felt the heavy burden of high office. Trumbull has also been described as 'stubborn, self-centred, and highly sensitive', all attributes that could equally be applied to Holt.[59] One can imagine the two men enjoying each other's company.

The two men certainly seem to have enjoyed a mutually beneficial working relationship. In 1683 for instance, we find Holt writing to Trumbull with legal advice concerning a case involving the Spanish Ambassador's request in a case involving *habeas corpus*.[60] Some seventeen years later, one 'Miss Elizabeth Ogilby' also wrote to Trumbull to thank him for helping her: 'My case was decided in the King's Bench yesterday. The Lord Chief Justice was well informed, and I know whom to thank for this. Fleury lost his case, with costs.'[61] The relationship also survived Trumbull's diplomatic postings abroad. In 1686 Sir Thomas Exton wrote to Trumbull while he was ambassador in France to let him know that 'your friend Mr. Holt is made Serjeant and recorder of London and Knighted.'[62] Holt no doubt heard Trumbull's first-hand accounts of events across the Channel upon his return, and of concerns over Louis XIV's growing power.

---

[57] Welsby, *Lives of judges*, p. 132.
[58] For Sunderland's career, see J.P. Kenyon, *Robert Spencer, earl of Sunderland, 1641-1702* (1958); and W.A. Speck, 'Spencer, Robert, second earl of Sunderland (1641–1702)', *ODNB*. Holt's relationship with Sunderland need not have been personal. In a professional capacity, Holt would be required to provide government ministers with legal opinions in politically and constitutionally sensitive matters on a regular basis, as we shall see in Section III. See for instance, SP 34/11/7, f. 9: 'Copy of letter dated 27 July 1709 from Lord Chief Justice Holt to Earl of Sunderland'.
[59] For biographies of Trumbull, see A.A. Hanham, 'Trumbull, Sir William (1639-1716)', *ODNB*; P. Watson and B.D. Henning, 'Trumbull, William', in Henning (ed.), *House of Commons 1660-1690*; for his time as ambassador in France see R. Clark, *Sir William Trumbull in Paris* (Cambridge, 1938).
[60] *HMC Downshire,* vol. I, p. 18.
[61] Ibid., p. 798.
[62] Ibid., p. 121.

As Morrice noted, Trumbull made it known when back in England that France was now 'something like the Countries that were overrun with the Goths and Vandals, and none but the Begotted [bigoted] in point of Religion had any manner of respect or Interest'.[63] The two men's friendship also continued during Trumbull's posting to Constantinople; Trumbull wrote to Holt in December 1690, reminding him that 'No distance of place or time can make me forget my obligations to you.'[64]

Holt seems to have leveraged these obligations six years later when he looked to secure a position for his brother 'in the Customs'. Trumbull wrote to Sunderland to ask for his assistance in the matter in late August 1696.[65] Holt thanked Trumbull a few days later by letter from Wells where he was riding the Western Circuit, but also anticipated that Lord Godolphin would 'endeavour to circumvent our design'.[66] Not long afterwards, Holt wrote again to Trumbull, suggesting that there was 'little reason to doubt of success were it not for Lord Godolphin, from whom I expect all opposition; but the King may do as he pleases.' The extent of the strain he was under at this stage of his career comes through vividly in what he said next: 'I am resolved not to continue in my place under these circumstances I am now. I have a great load fallen upon my shoulders by the death of my brother Powell this morning here.'[67] Holt would only ride the Western Circuit once more during his career, although it was the most remunerative of the circuits for the judges who served there. This possibly suggests that the demands of government after the revolution had become impossible to reconcile with such distance from London. Indeed, Holt would almost exclusively ride the Home Circuit for the rest of his life, as did his successor Thomas Parker within a year of his appointment as the new lord chief justice in 1710.[68]

The relationship between Sunderland, Trumbull and Holt would be tested to its limit in 1700. With Somers's fall that year, the Great Seal had gone into commission. Holt was one of the commissioners, and soon came under immense pressure to take up the role permanently as lord keeper, and eventually lord chancellor. Much of this pressure came from Sunderland, with Trumbull trapped in the middle, being asked to persuade his old friend of the service he would be doing for the king if he did so. Yet Holt was adamant that he did not want to leave his post

---

[63] *EBRM,* III, p.278.
[64] *HMC Downshire,* vol. I, p. 367.
[65] Ibid., p. 685.
[66] Ibid., p. 687.
[67] Ibid., pp. 688-689.
[68] J.S. Cockburn, *A History of English Assizes 1558-1704* (Cambridge, 1972), pp. 278-281.

in the King's Bench to take up a more nakedly political role. He seemed prescient about the later claim that all such careers end in failure. He was also no doubt worried about the sacrifices he would have to make to his legal principles in order to be successful in the role in the eyes of government, something we will be focusing on in Section III. Writing to Trumbull, he claimed 'I am so far from having changed my mind that I am confirmed in my resolution not to accept of the Great Seal, but will rather undergo the worst of consequences than injure the King's service and destroy my own reputation which will be the inevitable effect of my changing my present station.'[69] Sunderland responded by begging Trumbull to make Holt reconsider:

> The Attorney [Trevor] positively refuses the Seal, which makes the King think again about my Lord Ch. Justice [Holt] being told that if a pension may be secured to him in case of accidents, he will comply. Upon which his Majesty has sent to me to try him once more, which I know not how to do without you, and therefore beg of you to come to town for a day as soon as you can, though I fear it will be in vain.[70]

Trumbull responded that he had indeed tried once again to change his friend's mind, but that it was now a 'forlorn hope', even though Holt owed 'so many obligations to your Lordship that if you would please to try him once more, he would be sooner prevailed upon by your Lordship than any body in the world.'[71] Holt remained in his post, the Great Seal going instead to Sir Nathan Wright.

A year later, the 'man of mercury' Henry St. John wrote to Trumbull, whom he had chosen as his 'pattern', with concerns about a potential whig landslide at the next election:

> If in the next Parliament people continue thus mad, and the majority of the House be modern Whigs (as from the ill temper of the nation we have some reason to fear it may) why then *actum est*, at least we are on the very brink of destruction.

Yet he noted that 'The L.C. Justice and our *quondam* Speaker are very much your servants'. He added, 'I am glad to find these wise men are not in despair, but rather expect this may be turned to our advantage; for my part as I have less foresight, so I have more fear.'[72] Holt's wisdom and knowledge of events would indeed be borne out when the whig landslide failed to materialise. Although reluctant to take up political office in and of itself then, he was clearly far from cut-

---

[69] *HMC Downshire,* vol. I., p. 796.
[70] Ibid. p. 796.
[71] Ibid. p. 796.
[72] Ibid. p. 796; S. Handley, 'St. John, Henry II (1678-1752)', in D. Hayton, E. Cruickshanks, S. Handley (eds.), *The History of Parliament: the House of Commons 1690-1715*, (2002).

off as lord chief justice from the parliamentary pulse in Westminster. As we have already mentioned, the precise relationship between the courts and the government of the day will be the subject of our investigations in the final section of this thesis.

1.5 Conclusion

In this chapter we have attempted to lay the groundwork for our analysis of Holt's career in the rest of this thesis by identifying the key themes that emerge from existing accounts of his personal, political, and professional life. We have demonstrated that the political circles he seems to have moved in, contrary to the claims of most of his biographers, were far from whiggish, and indeed suggest more of a leaning towards toryism, though without any strong emphasis on Church interests. This can probably be best explained by his own jealous institutional attachment to his own court, a position he was not prepared to give up even when asked to by the king, and sweetened with the offer of a lucrative pension and high political office. His insistence on procedural regularity, administrative discipline, and the rigid enforcement of jurisdictional boundaries, also seems to have marked him out at an early stage in his career. Holt also demonstrated a strong and consistent jurisprudential and constitutional commitment to upholding the power of the king's prerogative in his early trials, behaviour which echoed his father's support for the Crown, and loyalty during the Exclusion Crisis. With these observations in mind, we have set the scene for Holt's professional development during James II's reign, the dramatic events of which we now turn to in our next chapter.

Chapter 2: King James's Most Loyal Servant

2.1 Introduction

During the course of working himself to death writing the fourth of nine volumes of *Lives of Eminent English Judges of the Seventeenth and Eighteenth Centuries*, Victorian barrister and legal scholar William Newland Welsby took some comfort and strength from the glowing example of Sir John Holt, the subject of his most recent entry:

> Attached from his youth, although without intemperance or bigotry, to the principles and party which sought to secure the maintenance of Protestantism and civil freedom against the treacherous encroachments of an unprincipled court,- for his father's precepts and example, if they reclaimed him to sobriety of conduct, had not succeeded in making him a convert to the excellences of the prerogative,- he was not likely to be selected by the court as one of its instruments, in the prosecution either of its own victims, or of those which it basely yielded up to the hoodwinked rage of popular delusion.[1]

As heroic a figure in whig history as Holt was, Welsby was nonetheless worried that his readers might find little of interest in the story of Sir John's unblemished legal career. It was precisely because Holt had apparently risen above the sordid politics of James II's 'unprincipled court' that relatively little was known about him. It was 'a general truth', Welsby lamented, 'that the biography of a lawyer, however eminent, unless he have also won his way to political distinctions, and bequeathed his fame to posterity as a statesman or an orator, cannot be expected to afford much of interest for the general reader.'[2]

Writing one hundred and sixty years earlier, Roger Morrice's interest had been captured by the installation of Sir John Peake as the new Lord Mayor of London. Peake was a member of the Mercers' Company, who boasted Queen Elizabeth as their most illustrious alumna. To celebrate this honour - and in an effort to upstage the other City guilds - the Mercers' book of ceremonies decreed that, upon the election of one of their members as Lord Mayor, a young virgin girl by the name of Elizabeth should be procured to ride in a chariot as part of the celebratory procession. A virgin Elizabeth was duly found for the installation of October 1686, and the young girl was joined in the cortege as it made its way from Westminster to Mercers' Hall by the recorder of London. The recorder, Sir John Holt, had earlier given a speech introducing

[1] W.N. Welsby, *Lives of eminent English judges of the seventeenth and eighteenth centuries* (1846), p. 94.
[2] Ibid., p. 90.

Peake to the Court of Exchequer. Morrice gives us a summary of what he said:

> Sir John Holt Recorder - when he presented him (the lord Mayor) to the Court made a Speech to this purpose. To represent the past Mayor sir William Prichard, as a most excellent patren [pattern], and that this was his peculiar glory that he had more utterly suppresst Seditious and factious Conventicles then all that went before him, and did not doubt that this Mayor would be his equal or superiour, and that his Majesties graces and favours to the City in the inlargement of their privilledges and immunities had been so many and great that it had made the City far greater and richer then ever.[3]

It is not clear whether Holt was one of those who later breached protocol by kissing the beauty-pageant Gloriana on the hands during the reception in Mercers' Hall, but his earlier speech, exalting King James's behaviour towards the City, and applauding Prichard's vigorous suppression of Protestant non-conformists, seems to have aroused little complaint.[4]

Morrice's report of Holt's loyal address sets the tone for the debates that we will be exploring in this chapter. Indeed, as part of our analysis, we will need to show how Holt, entirely contrary to Welsby's account, was indeed a powerful 'instrument' of the Jacobite court at the outset of James's reign. In doing so, and by following Holt's career throughout the 1680s, we will attempt to shed new light on the complex practical and ideological challenges faced by James's loyal judiciary during this period. In particular, we plan to show how these difficulties can be related to some of the better known episodes of constitutional and religious conflict that characterise the existing historiography of this period. Specifically, we will aim to show how putting the experiences of lawyers like Holt at the centre of this story can offer us new perspectives on how and why it was that James and his advisers steadily lost political support in the years and months before William of Orange's invasion in November of 1688.

To do this, we will first need to set the scene of James's position of relative political strength at the start of his reign. In doing so, we will not be the first to claim that James effectively squandered the constitutional powers that he had inherited from his brother. Similarly, the story of how he threw away these advantages in the space of three short years has also been the subject of historical enquiry since the events themselves. Yet even the best of these studies tend to present the importance of the law in these events - especially their relationship to James's

---

[3] *EBRM*, III, p. 276. 'Patren' here appears to be a mistake, either by Morrice or the transcriber. Holt presumably said 'pattern', holding up Prichard's tenure as the model for Peake to follow. Morrice also incorrectly names Peake as a member of the Company of Grocers throughout his account of the ceremony.

[4] For details of Prichard's contested election in 1682, see Anon., *An Exact account of the proceedings at Guild-Hall upon the election of the Right Honourable Sir William Prichard the present Lord Mayor of the City of London* (1682); and G.S. de Krey, 'Pritchard [Prichard], Sir William (1631/2-1705)', *ODNB*. Prichard was a key agent in the Crown's attempts to regain control of London from the whigs. Holt's citing of his example should make us even more reluctant to believe those who have labelled him a whig.

religious ambitions – in a confusing or ambiguous way. As a result, in this chapter we will aim to unravel the relationship between both factors in James's downfall. As we shall see, the behaviour of the judiciary under James, as well as James's behaviour towards his judiciary, can be difficult to explain, often seeming to veer from outright support to complete disobedience within the space of a few weeks or months, and Holt is no exception. Yet analysing why Holt and his brother judges behaved the way they did is essential if we are to understand better the causes of the revolution itself, and the context for the change and continuity within the constitutional framework of the nation in the decades afterwards.

2.2 James's Legal Inheritance: The Judiciary as a 'Monarchical Administration'

The story of the role of the law in James's downfall begins during the reign of his brother, in particular the nature of the royal response to the constitutional challenges posed by the whigs during the Exclusion Crisis. Paul Halliday has documented how during the 1680s, Charles and his supporters successfully set about crafting and adapting the king's common law prerogative powers to engineer a polity – and a bespoke set of political tools to govern that polity - without the need to call regular 'rebellious' parliaments. This was a sophisticated and complex system of control, cooperation, and exploitation, as Halliday summarises:

> The political events of the years 1678-81 gave the crown the reason to look for a new approach; encouragement from borough tories gave it the inspiration and assistance to act aggressively; policy discussions over the preceding years gave it the options from which to choose; but it was the success of quo warranto that brought these elements together into an effective policy to recraft the relationship between the King and the most numerous and important of subsidiary jurisdictions, the borough corporations.[5]

Quo warranto, that great prerogative writ, was the legal ace up the Crown's sleeve. When deployed in a time of political crisis and whig opposition, it could be used to tear up the charters by which urban corporations across the land were governed. Once revoked, these charters could be rewritten so as to guarantee the election of loyal tories – men like Sir Thomas Holt - to corporate office and grand juries, as well as the return of pliant MPs in the unfortunate event of having to call a parliament. As a policy, it seemed to have the potential to be the constitutional magic bullet that the Stuarts had been searching for since at least the the personal rule of Charles I. Crucially, this was royal prerogative power exercised through - and with the backing of - the courts, not the separate prerogative courts of Charles I's reign which had attracted the ire of

[5] P. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns 1650-1730* (Cambridge, 1998) pp. 195-196.

many common lawyers. It was, therefore, arguably in the interests of judges like Holt, already ideologically predisposed to support the Crown's legal powers, to back the Stuart's prerogative policy, not to oppose it. In effect, it was a win-win for both parties.

Writing twenty years before Halliday, Howard Nenner also emphasised the importance of the Crown's increasing legal sophistication, as evidenced by its handling of the *quo warranto* proceedings, and the threat that this posed to the whigs' ideological commitment to parliamentary oversight of the prerogative. 'Charles', he argued, 'by 1683, had done an extraordinarily effective job of recapturing the political initiative that had been surrendered temporarily to the Exclusionists'.[6] In his eyes, it was 'because the victory seemed to be going to the Stuarts that the Revolution became a necessity.'[7] Nenner is adamant that Charles and James's behaviour, their attempts to suspend or dispense with laws, and the development of their prerogative powers was 'testimony to their imaginative and often effective use of the law rather than to their disregard of it."[8] The Crown, it seemed, had learned to work within the acceptable parameters of political expectation when it came to the use of the law: this was not arbitrary rule brought in by the back door of Star Chamber, but legitimate absolutism exercised in the broad daylight of the common law courts, which bound loyal subjects to the king, the fountain of justice. It was as 'legal' as it was effective.

Steve Pincus, writing much more recently, concurs with the view that James's position, in his view throughout his reign, was one of extreme strength:

> James's regime may look brief and fragile in retrospect, but from the perspective of the later seventeenth century he had created a powerful edifice. It was precisely because James had been able to create such a powerful state that many of James's opponents realized that it could only be resisted with violence and that only a Revolutionary transformation could prevent a future English monarch re-creating his modern absolutist state.[9]

Pincus's claims for the 'modernity' of James's absolutist state aside, the notion that constitutional pre-eminence and control of the law was James's to lose is also backed up by William Speck. He noted that 'There was not much in the way of positive resistance' to James

---

[6] H. Nenner, *By Colour of Law, Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago, 1977), p. 155.
[7] Ibid., p. 64.
[8] Ibid., p. x.
[9] S. Pincus, *1688: The First Modern Revolution* (New Haven, 2009), p. 7. However, Pincus barely mentions the role of the judiciary in the collapse of James's regime, or the subtle interplay between legal and political criticisms of his policies. Instead, opposition to his military reforms is attributed primarily to their 'modernity'; see Pincus, *1688*, pp. 179-183.

and Charles's innovative use of their legal powers' and concluded that 'No king succeeded to a more powerful position than did James II.'[10] Yet Speck's account of James's legal inheritance did introduce one crucial caveat. James's regime relied for its strength on continued tory-Anglican support for his policies: 'As long as they were being implemented to consolidate the position of the established church and the Tory gentry, at the expense of Protestant Dissenters and exclusionist Whigs, they received substantial and solid support.'[11] The corollary of this position therefore was that if James used his absolutist legal powers *against* the interests of the tories, he might find support for those powers remaining in his hands rapidly diminishing. Tim Harris has also argued that James was no 'unfettered sovereign' when he came to the throne, able to ignore and supress 'the voice of the people' as and when he liked. Building on Speck's observations, he argues that Charles had in fact made the Crown a 'prisoner of party', leaving very little room for political policy manoeuvring in the future. Perhaps even more importantly, in justifying the strengthening of the Crown's legal powers by reference to its need to uphold the truly 'legal' tory-Anglican interest, and in labelling the whigs – who saw themselves as the true champions of 'lawful monarchy'- as little more than rebels, Charles left any future monarch who strayed from such a narrow and partisan concept of correct 'legal government' in danger of falling off a constitutional tightrope.[12] James failed so quickly then because he did not realise how much his power depended on this compromise, one which he abandoned soon into his reign.

Another key relationship that James depended on for his legal strength, and one that has traditionally attracted less coverage, was with the judiciary. Indeed, the last major analysis of this relationship under Charles and James II was by Alfred Havighurst nearly seventy years ago. In the conclusion to his first article on the subject, Havighurst made a number of points that have immense bearing on our own investigation. 'The fundamental conclusion', Havighurst stated, 'is this':

> . . . the judiciary was an integral part of the Stuart regime, a monarchical administration whose effective elements still sprung largely from royal authority. This relationship the judges accepted. Common law, which largely guided them, was founded on royal power, and their tenure of office, save for certain temporary limitations early in the reign, was entirely a matter of royal prerogative.[13]

---

[10] W.A. Speck, *Reluctant Revolutionaries, Englishmen and the Revolution of 1688* (Oxford, 1989), pp. 9, 41.
[11] Ibid., p. 9.
[12] T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006), p. 26.
[13] A.F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II', *Law Quarterly Review*, 66, (1950), pp. 250-251.

The fact that before 1688 the judiciary's public authority and institutional influence rested and relied on the continued constitutional power of the Crown cannot be underestimated; the relationship was symbiotic, as Havighurst explained:

> With the abolition of the prerogative courts the king leaned more heavily on the common law courts to accomplish his ends. Tudor precedents supporting strong monarchy were generally more binding than Lancastrian precedents supporting parliamentary claims. In the constitutional reaction after the failures of the Interregnum, and amid the dangers which beset the restored house of Stuart, the judges naturally supported the Crown and countenanced no thought of constitutional change. For them to have opposed Charles II, that would have been Revolutionary.[14]

Yet Havighurst was not arguing that the judiciary were absolute slaves of the Crown. They at least had some institutional independence and integrity, centred on a loosely shared set of legal values:

> . . . the judges regarded themselves as guardians and interpreters of the law; practice and precedent over the centuries had given the common law courts a position of prestige and, in varying degree, a role independent of the Crown.[15]

Yet the extent of this 'independent role', as with so many of the constitutional relationships between the institutions of state in this period, was not clearly defined. The boundaries in the eyes of one judge might be different to another's, and each judge had to balance their practical desire to stay in office with their principled attachment to the law they practised. At the heart of the conundrum lay the same question that had been haunting the polity for nearly a century: 'To whom were the judges responsible? What was the source of supreme law?'[16] On James's accession, the answer to this question for most judges was the king himself. It seems highly likely given his position, politics, and professional background that Holt would have been counted among their number.

2.3 Sir John Holt: Recorder of London by Royal Appointment

Holt's appointment as recorder of London in February 1686 came about as a direct result of the *quo warranto* proceedings against the City, proceedings in which Holt had backed the Crown's position and advised the surrender of its charter some years earlier. The Corporation had not taken his advice, however, and having forfeited its charter, James was able to appoint Holt as recorder by royal decree, knighting him at the same time. By April, Holt had been promoted to

[14] Ibid., p. 251.
[15] Ibid., p. 251.
[16] Ibid., p. 251.

king's serjeant along with nine others, and on the evening of the 24th he was one of four who, after a 'splendid dinner' at Serjeant's Inn, 'went to Whitehall and presented their Majesties, the Queen Dowager, the Prince and Princess with rings.'[17]

In the summer of that year, Holt's behaviour at the Guildhall sessions, where many 'Dissenters of all perswasions' were being prosecuted for riots, earned him a mention in Morrice's reports.[18] Holt had apparently been forced to repeat his opinion, which he had done many times in the past, that 'Meetings as such even upon a Religious account were not Riots, and he had thought they would have taken notice of it, and he could not punish them'. It was not that Holt had any sympathy for the dissenters brought into his court for prosecution, whether they be 'Presbyterian, independent, Anabaptists, Quakers &c', but more a point of principled legal procedure: 'he could not punish them for a Crime there was no proof of, and that they as such were not guilty of.' Most importantly, 'there . . . [were] other lawes enough to punish them by, and particularly an Act made for that very purpose'. Holt apparently resorted to berating the jurors:

> . . . when the Jury so readily found them guilty saith the Recorder Guilty, Guilty, Guilty of what, of a Riot (saith the jurey). saith the Recorder here is no Riot proved against them, You Jurey do you thinke every Meeting that is in London is a Riot, I do not believe that when you meet upon other occasions, as you doe upon many in London, that those people you have found guilty, if you were Indicted would finde you guilty of a Riot.[19]

That it was the failure of the jury to come to the technically correct verdict that 'saved' the dissenters at the Guildhall, as opposed to Holt having sympathy for the liberties of non-conformists, seems to be confirmed by Morrice's reporting of another incident a few months later. This shady event appears to have had its origins in intelligence reaching the authorities that a group of men connected with the late duke of Monmouth were planning to meet at a house in Southwark.[20] Holt signed a warrant for the arrest of all those found at the property, which was being used as a non-conformist meeting house at the time. Yet after a number of arrests were made, two strange men came to speak to the JP and constable at the scene, and the conventiclers were all released. Morrice assumed that the two men, 'informers' as he called them, were members of the security services, sent to abort the operation when it became clear

---

[17] 'Newsletter to John Squire', 24 April 1686, *CSPD* 1686-7, p. 111.
[18] *EBRM*, III, pp. 166-167.
[19] Ibid., p. 167.
[20] Ibid., p. 241.

that the high profile targets they had been hoping to arrest had not materialised. Morrice went so far as to surmise that Holt was the architect of this covert operation, as well as a general force behind the recent heavy prosecutions of dissenters in the City:

> Most certain is that these renewed vigorous prosecutions of the Protestant Dissenters at this time doth not proceed chiefly neither from the Malice, nor from the inclination, nor from the hopes of advantage the Informers Agents may have, but from some superiour influences, whether from the Court, or from the Church – or both it is not easie to determine. It is well known the Marshall is, and so indeed is the Recorder altogether under the ascendent of the Church – (it may be the Informers are also tributary to him [)].[21]

All the evidence would seem to suggest then that Holt was an enthusiastic supporter of attacks on non-conformists, provided such attacks were done according to 'the rules'. It is an approach to the consistency of court procedure that he would maintain after the revolution in the service of another regime. Over-enthusiastic juries aside, there was little by the end of the summer of 1686, the summer in which the Crown had been victorious in the case of *Godden v Hales*, to suggest that there were any cracks in Holt's relationship with, or support for, James's government. If Holt was a whig, and given what we know at this stage it seems safe to assume he was not, then whatever sympathy he might have had for dissenters was clearly not enough to force him to leave the service of the regime. By the following spring however, all of this had changed.

2.4 The Role of the Law in the Downfall of James II

So far we have seen how effective exploitation of the king's legal powers, facilitated by the loyal service of men like Holt, could be used to great effect to strengthen the political authority of the Crown and its allies. The purpose of this next sub-section is to analyse what role James's mishandling of this legal power played in the emergence of opposition to his rule. Holt can help us here, because the case that would eventually lead to his dismissal as recorder turned on the crucial distinction between James's legitimate use of his absolute power, and his illegal use of arbitrary force. As such, it demonstrates the importance that such distinctions made to contemporaries' attitudes towards James's use of the law, and provides further context for accusations that James had broken 'the rule of law' with his policies. When attempting to assess the importance of the law in the story of how James lost his throne, there is a natural tendency to approach the question in a binary fashion by comparing it to the relative importance of his

[21] Ibid., p. 242.

religious beliefs. This often plays out as a zero sum game: 'constitutional differences' - that is, abstract attachments to 'constitutional principles', the 'ancient constitution' or 'the rule of law', manifesting themselves as legal disagreements over the king's prerogative rights, and a fear for parliament's survival - are pitted against real 'religious concerns' - James's 'Catholicising' policies, the fear of religious persecution, fear for the survival of the Church of England and of the spread of Catholicism, all wrapped up in general hatred of 'popery' - in a battle that 'religion' often seems to win.

In his recent study of the law and the Glorious Revolution, Richard S. Kay argues that 'it is difficult to separate visceral religious hostility from political ideology. Catholic doctrine was perceived as bound to monarchical absolutism by definition'.[22] Yet despite this, he believes that it was 'the religious issue that provided the political substance of the grievances of 1688', even if 'the constitutional point on which issue was joined was the dispensing and suspending powers'.[23] As he has argued, the revolution may have been 'a constitutional Revolution' in the sense that it settled the 'central constitutional question of seventeenth-century England…to what extent may the king, on his sole judgment, employ the power and authority of (what we now call) the state', but what 'precipitated it was not some abstract attachment to constitutional principles. It was the perception of Englishmen that they were faced with a palpable threat of religious persecution.'[24] The legal debates and disagreements surrounding the king's constitutional powers were in themselves not a sufficient cause of his downfall, and 'Modern observers thus find nothing remarkable in the result in *Godden v. Hales*.'[25] James's biggest mistake therefore was his failure to 'keep his religion to himself'.[26]

William Speck's work also split the constitutional and religious dimensions of James's rule in two, considering them in separate chapters, and also concluding that it was James's religious ambitions that brought him down, not his use of the law. In fact, he argued convincingly that James never even broke the law: 'James might have strained his prerogative to the limit, but he never went beyond it. That he acted impolitically, even rashly, cannot be denied; that he acted unconstitutionally can.'[27] According to Speck, James's dispensing power was backed up by sound precedent in *Godden v Hales*, the establishment of the Commission for Ecclesiastical

[22] R.S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington, 2014), p. 37.
[23] Ibid., p. 40.
[24] Ibid., pp. 20-35.
[25] Ibid., p. 44.
[26] Ibid., p. 39.
[27] W.A Speck, *Reluctant Revolutionaries*, p. 153.

Causes was an act entirely within his rights as supreme governor of the Church, and there was nothing 'illegal' about the suspending power. Even James's attempts to raise a standing army were legally sound, as Speck argued: 'There can be no question that the Declaration of Rights was not merely clarifying but was changing the law when it declared the maintenance of a standing army in peacetime without parliamentary approval was illegal.'[28] As a result, Speck was adamant that the 'later Stuarts might well have succeeded in their bid for absolute power if it had not become associated with Catholicism.'[29] Steve Pincus on the other hand has taken entirely the opposite view. As far as he is concerned, 'James sought simultaneously to Catholicize the country and to modernize his government. It was these practices rather than prejudice against James's religion that provoked resistance.'[30] Moreover, opposition to James's 'sophisticated' state building was widespread, provoking resistance from whig and tory alike, resistance that in the case of the tories centred not on their hatred of James's Catholic faith, but his tampering with the law of the land.[31]

Tim Harris's work provides a different narrative by ostensibly eschewing the law vs. religion binary approach. His account emphasises the practical importance of the breakdown of James's alliance with the Crown's tory-Anglican allies in explaining his downfall. Harris argues that this relationship collapsed once James started breaking 'the rule of law' in pursuit of a new policy of 'Catholic Absolutism'. This is undoubtedly true, yet it is not always entirely clear what Harris means by James's breaking of 'the rule of law' in this context. He variously describes it as putting decisions 'beyond the power of the common law courts', 'vaunting the powers of the monarchy', assaulting 'the independence of the judiciary', making the law his 'plaything', or generally acting 'above the law'.[32] In essence he seems to be taking contemporary accusations of James's illegal behaviour at face value, something he confirms when he argues that the Declaration of Rights merely 'asserted ancient rights and liberties.'[33]

George Southcombe and Grant Tapsell have recently taken Harris's approach and successfully built on it. They too avoid simply pitting the law against religion, arguing that James lost his throne due to a combination of factors which led contemporaries to conclude that the king was no longer 'the foundation of good government'. Instead, he became viewed as a 'dangerous

[28] Ibid., pp. 141-153.
[29] Ibid., p. 166.
[30] Pincus, *1688*, p. 121.
[31] Ibid., p. 179.
[32] T. Harris, *Revolution,* pp. 182-236.
[33] Ibid., p. 486. Though Harris does go on to claim that same document also 'guaranteed the legal sovereignty of parliament', which was hardly an uncontroversial assertion of an 'ancient' right.

rogue elephant'. James's profound Catholic faith and spiritual beliefs, it is argued, 'drove his entire political agenda', leading him to pursue irrational legal and political policies which 'broke his monarchy'. He challenged 'constitutional tradition' with his military and fiscal policies, and lost the vital support of tories with his attacks on 'the rule of law' and innovations which threatened their cherished conception of the 'ancient constitution'. His Catholicising policies also necessitated an attack on the Church of England, further eroding the support of previously loyal Anglicans.[34] The irrational nature and catastrophic failure of such a political approach was matched only by the 'unfortunate combination of his subjects' hypersensitivity to anything that looked like 'popery', and the king's intolerance of anything that looked like disobedience.'[35] 'Law and confessionalistion', as the authors conclude, 'were the twin factors delineating state formation in this period', a conclusion which takes us right back to the debate about the relative importance of law and religion in James's downfall.[36]

How might we attempt to reconcile all of these approaches with our initial question? One feature common to all the above arguments, even those that stress that law *and* religion were equally important in James's demise, is the sense that these were at heart separate issues. True, as Southcombe and Tapsell argue, James's religion might be the driving force behind his legal and political policies, but this in itself implies that they were separate entities, like a locomotive and the carriage it pulls – in this case, off the rails – with it. We are left with the sense that James's Catholicism was a rogue and irrational element in this story, a bizarre spiritual commitment that poisoned what could have been an otherwise sound political approach. It still seems, therefore, as though it was James's popery, and not his handling of the prerogative, that was the problem. However, we are going to argue that this is the wrong way to view these issues. This is because the basic equation presented above, of James's popery fatally combining with his use of the law to lead to his overthrow, is the wrong one. Popery was not a separate element in this equation, it was the result: the sum of all fears. The problems caused by James's use of the law and his religion, therefore, simply cannot be separated, as they relied on each other for their political toxicity.

Harris appreciated this when he spoke of James's politics being those of 'Catholic Absolutism' which, in reality, is simply a repackaged term for what contemporaries meant when they spoke

---

[34] G. Southcombe and G. Tapsell, *Restoration Politics, Religion and Culture* (Basingstoke, 2010), pp. 77-84.
[35] Ibid., p. 85.
[36] Ibid., p. 169.

of popery. Crucially, absolutism and Catholicism on their own could be inert political forces. Yet when combined together they became the most dangerous and unstable element known in English politics. Indeed, James's 'absolutism' had been perfectly tolerable for most tories, including Holt, as long as it remained 'Anglican Absolutism', a position which, as we will show in Section III, they essentially returned to in the aftermath of 1688. James's mistake was to think he could swap out the Anglican element of this relationship and replace it with Catholicism without losing this support. His religion in this sense was not *driving* his politics; it was a fundamental part *of* his politics, a small but crucial distinction. Thus he was not breaking the monarchy as far as he was concerned, but instead fixing it by replacing its rotten and unstable Protestant parts. Yet this fatal combination of absolutism and Catholicism transformed James's regime into a popish one which became perceived as unstable and arbitrary, thereby threatening men's bodies and property as much as their religion. It might be argued that we are engaging in simple semantics here. Yet much of the confusion that surrounds these issues stems from the ways in which terms like 'Catholic' and 'popish', and more importantly 'arbitrary' and 'absolute', are used interchangeably without distinguishing them from each other in the ways that contemporaries seem to have understood them. It is a distinction, made through a careful analysis of the importance of the law, that has made a huge impact on our understanding of the practical and theoretical limitations placed on the absolute powers of the French monarch in this period, and one that needs to be applied to our own analysis of the similar limitations that were imposed on James by the English legal and political community. [37]

In essence, popery was the label applied to James's transgression of the political and legal limits of his absolute power as understood by the English political community. His rule had come to be perceived as a particularly poisonous blend of absolute government, combined with the Catholic tradition of unquestioning obedience, a constitutional mixture which effectively placed the king's power outside the realm of consensual government, and made his authority arbitrary. Lord John Somers expressed this view when he spoke of the revolution delivering England from 'popery, slavery, and arbitrary power'.[38] He also explained what it was about Catholicism that, when combined with absolute power, led to the miserable condition of 'Popish subjects'.

---

[37] For analysis of the consensual nature of absolutism within French politics and the importance of studying the law in understanding these issues, see J. Miller, 'The Potential for 'Absolutism' in later Stuart England', *History*, vol. 69 (1984), pp. 187-207; D. Parker, *The Making of French Absolutism* (1983); and D. Parker, 'Sovereignty, Absolutism and the Function of the Law in Seventeenth-Century France', *Past & Present*, no. 122 (1989), pp. 36-74 . Our argument here is that James failed to understand that absolute government itself - even that of his cousin - always had legal and political limits to its exercise.

[38] J. Somers, *A Vindication of the Proceedings of the Late Parliament A.D. 1689* (1689).

The central political characteristic of the Catholic faith was that it demanded 'blind obedience to earthly princes, as if they were as infallible as God himself', something that Somers's claimed absolute monarchs like the Pope and Louis XIV – and James II if he had had his way – depended on for their 'unlimited power'. This is not to say that a whig like Somers did not also object to the notion of the king enjoying 'absolute power' in and of itself. When he contrasted 'arbitrary' government with 'legal' government, he also argued that the opposite of 'absolute' government was 'political' government, by which he presumably meant parliamentary.[39] Such a distinction had been one of the central dividing lines between whigs and tories during the Exclusion Crisis: whigs had always assumed that a Catholic king with absolute powers would rule as a papist. James's fatal mistake was to prove them right. He did this by actively pursuing arbitrary rule through policies which had serious consequences for the security, lives and property of all his subjects.

Having clarified our terms of reference, the tendency to put religious concerns at the forefront of the narrative of James's demise becomes more understandable. The problem stems from most existing accounts centring on legal debates over James's *absolute* power, not his *arbitrary* rule, only to conclude, as Kay does, that these conflicts were far too inconclusive to have been a rallying point for total disaffection with James's rule. He is right, but this is because it was not James's absolutism that was the fundamental problem. Another issue is that the other key 'legal' conflicts of James's reign tend to be presented as the expulsion of the Magdalen fellows, or the attempted prosecution of the seven bishops, both of which naturally lend the story a religious flavour. Yet there was a key case that involved James's handling of the law that convinced even those judges who had supported his absolute rights under the prerogative that he had become arbitrary, a case that did not involve members of the Church. In this instance, we can see that James's popery became viewed as a genuine threat to the common law itself, something that lost him the crucial support of the judiciary, and demonstrating that in this case at least, he was genuinely seen to have broken the 'rule of law' in the eyes of his judges, including Holt.

2.5 The Cracks Start to Appear

The first sign of trouble with Holt's relationship with James came in September 1686. Morrice reported that:

[39] Ibid.

> There was a Souldier found guilty of running away from his Colours two sessions since. Sir John Holt has declined to give Judgment against him (for most Lawyers are positive in their opinion, that such as run from their Colours cannot be put to death by law, unless it be after there is a proclamation for War, Or they be marching in order to battle, or an enemy be neare). He has been to attend the Judges in this Case, who will declare their opinions.[40]

Yet a week later, there appears to have been a near complete reversal of judicial opinion. Nine judges unanimously found two soldiers guilty of deserting their colours, and the deputy recorder Sir Bartholomew Shower sentenced them to death. Holt held out however, and 'went to waite upon the King, opened this whole matter to his Majestie and very dutyfully and plainly told him his opinion in point of law &c, and did refuse to pass Judgement upon the Souldiers.'[41] Writing in April 1687, Morrice looked back to these events, explaining that one of the nine who passed sentence was Justice Thomas Street, a vote which would likely keep 'him in' favour with the king. Yet amongst the three judges who dissented in agreement with Holt in the matter were Lord Chief Justice Herbert, Justice Lutwyche and Lord Chief Baron Atkyns.[42]

How can we explain the different behaviour of these judges? Street's actions are particularly interesting, given that he was the only judge to rule against the Crown's interests in *Godden v Hales*, an action that Halliday has labelled as a sign of his judicial independence, and not at all evidence of collusion in order to give the appearance of judicial 'integrity' to proceedings.[43] Yet Halliday does not take Street's role in this case into account, behaviour which likely suggests that he was seriously regretting any demonstration of earlier defiance. But Street's behaviour also represents the complete opposite of the likes of Lord Chief Justice Herbert, who had ruled in James's favour in *Godden v Hales*, and now found himself unable to vote as the government wished in this case. An explanation for this can be found in the difference between the prerogative powers that were under discussion in *Godden v Hales*, and the arbitrary power that the courts were being asked to execute in the case of the deserting soldiers.

The jurisprudential problems with James's policy of martial law do not seem to have received much attention by scholars, but they almost certainly underpinned and informed Herbert and Holt's main objections to James's 'arbitrary' military policy.[44] In his analysis of the incident,

---

[40] *EBRM*, III, p.250.
[41] Ibid., p. 251.
[42] Ibid, IV, p. 19.
[43] P. Halliday, 'Street, Sir Thomas (1625-1696)', *ODNB*.
[44] For the political background to these issues, see L.G. Schwoerer, *"No Standing Armies!": The Antiarmy Ideology in Seventeenth-Century England* (Baltimore, 1974).

John Childs argues that Holt came to his opinion 'based upon two statutes which gave the impression that a deserter could be tried as a felon if he served the king overseas and was thus, presumably, on active service.'[45] Yet there were firmer principles at stake than the confused precedents found in these acts of parliament. Sir Matthew Hale perhaps spelled out the common law objections to martial law best. 'First', he argued, 'in truth and reality it is not a law, but something indulged rather than allowed, as a law'. 'Secondly', he continued, 'this indulged law was only to extend to members of the army…and never was so much indulged as intended to be executed or exercised upon others'. Yet thirdly, and perhaps most importantly of all, 'the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land.'[46] In pursuing martial law in peacetime then, James was treading as much on the jurisdiction of the common law courts as he was the liberties of his subjects, a foolish move which echoed his father's use of the prerogative courts, something which had alienated many common lawyers and lost him vital loyalist support. Harris touched on this when he noted that 'Increasingly, the armed forces seemed to be beyond the control of the common law.'[47] What we have demonstrated is why this was true both in the eyes of senior lawyers, as well as the general public.

The full extent of the ability of James's martial law policy to alienate lawyers and non-lawyers alike can be seen when we link Holt's professional jurisdictional and jurisprudential concerns with the political and philosophical pronouncements of contemporaries like John Locke, who used precisely the example of martial law to distinguish between the dangers of absolute government and arbitrary rule, a crucial distinction as we mentioned above. Locke wrote that:

> . . . even *absolute Power*, where it is necessary, is *not Arbitrary* by being absolute, but is still limited by that reason, and confined to those ends, which required it in some Cases to be absolute, we need look no farther than the common practice of Martial Discipline. For the Preservation of the Army, and in it of the whole Commonwealth, requires an *absolute Obedience* to the Command of every Superiour Officer, and it is justly Death to disobey or dispute the most dangerous or unreasonable of them . . .[48]

.....

Yet like Hale, Locke was at pains to point out that although during a battle, a serjeant could 'command a Souldier to march up to the mouth of a Cannon, or stand in a Breach, where he is almost sure to perish' using his absolute authority, such power did not extent to his arbitrary

---

[45] J. Childs, *The Army, James II and the Glorious Revolution* (Manchester, 1980), pp. 93-94.
[46] Sir Matthew Hale, *The History of the Common Law of England*, ed. C. M. Gray (Chicago, 1971), pp. 26-27.
[47] Harris, *Revolution,* p. 189.
[48] John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, 1988), pp. 361-362.

desire to 'command that Soldier to give him one penny of his Money' or 'seize one jot of his Goods'.[49] It was James's mistake in this case to have demanded that his judges exercise arbitrary power under both its legal and political definitions.

Holt's loyal address to James in the October of 1686 takes on a new light once we appreciate that this festering sore was lingering beneath the surface of their relationship. The sore itself would burst wide-open in April of 1687, when Herbert castigated James's legal advisors Graham and Burton for having brought yet another case of desertion into Westminster Hall, something that Morrice thought had been arranged 'by the Chancellor… Graham and Burton the two Sollicitors on purpose as a snare to the Chief Justice'.[50] Later that month Herbert would indeed be removed from the King's Bench and sent to Common Pleas, the same time as rumours began to swirl that Holt might be replaced by Shower, the 'Papist' Charles Trinder or John Tate as recorder of London.[51] In the end, it would be Tate who replaced Holt that May.[52] Tellingly for the lack of quality James now had left on the bench, even Trinder is said to have refused the offer of promotion to judge some time later.[53]

Holt was still left as king's serjeant though, unable to act in cases against the Crown. Yet his principled stance against James's arbitrary legal policies seems to have attracted the interest of others who faced similar assaults on the jurisdictional integrity of their own hallowed institutions. In January 1688, Edward Stillingfleet was faced with the dilemma of whether to respond to the Bishop of Oxford's 'book about abrogating the penal laws' or Henry Care's 'vindication of the ecclesiastical proceedings'. He would apparently have attacked Care's work first, but the vital legal dimension to James's attack on the Church gave him pause for thought. The problem was that 'he could get no lawyer to assist him in the law part, for therein he dare not trust himself though he durst in the rational and argumentative part if the statutes and cases of law were plainly laid before him'. He had apparently 'spoken to Serjeant Holt', but sadly 'nothing' had been 'done in it.'[54] At the trial of the seven bishops in June of the same year, Holt was apparently also called to the assistance of the attorney and solicitor generals, 'and he did

[49] Ibid., p. 362.
[50] *EBRM*, IV, p. 19.
[51] Ibid., pp. 26-27.
[52] Ibid., p. 47.
[53] J. Miller, *Popery and politics in England 1660-1688* (Cambridge, 1973), p. 224. For Trinder's attempts to neutralise political hostility to Catholics on behalf of James's regime, see C. Trinder, *The Speech of Charles Trinder, Esq; Recorder of Gloucester, at his Entrance upon that Office* (1688).
[54] *EBRM*, IV, p. 206.

appear in court but spoke not one word in the case all day long.'[55] In the end, it would be James's flight a few months later that finally terminated their barely functioning working relationship.

2.6 Holt and the Revolution

Holt's role in the course of the events of the Glorious Revolution, especially as advisor to the House of Lords and his contributions to the abdication debate, have been well documented by the likes of Robert Beddard, Richard S. Kay, and Michael Landon.[56] Holt undoubtedly aided these debates by resorting to the 'comforting vocabulary of common law' as Kay puts it, but as Grant Tapsell has also commented, none of this should distract us from the 'recognising that this legal equivalent of angels dancing on pin-heads struck some contemporaries as ridiculous.'[57] What is more, Kay's assessment that Holt showed himself to 'be entirely friendly to the new government' and a most 'successful elision of the contradictions of law and Revolution' is predicated on the idea that this was because Holt was 'an unambiguous Whig.'[58] As we have seen, Kay is on more than shaky ground with this assessment. Landon similarly labels Holt among the 'Whig lawyers' of the Convention Parliament, though also admits that he had not been 'so consistently opposed to the Crown' as lawyers like Pollexfen, an attribute he argues gave him an advantage when it came to his being named lord chief justice.[59]

Holt's specific arguments during the abdication debate also point to the fact that he understood that the common law itself was unable to provide all the answers for the situation parliament found itself in. As he said with reference to the Lords' objection that 'abdicate' was a word unknown to the common law, 'my Lords, the Question is not so much, whether it be a Word as ancient as the common Law, (though it may be too) for that will be no Objection against the using it, if it be a Word of a known and certain Signification'.[60] Instead, Holt took what can best be described as a broad practical approach, citing examples from Cicero to Minshew's *Dictionary*. As he explained:

> . . . the Language of England is altered greatly in the several Successions of Time, and the Intermixture of other Nations; and if we should be obliged to make use only of

[55] Ibid., p. 271.
[56] R. Beddard, *A Kingdom Without a King, The Journal of the Provisional Government in the Revolution of 1688* (Oxford, 1988); Kay, *Glorious Revolution*; M. Landon, *The Triumph of the Lawyers* (Alabama, 1970).
[57] G. Tapsell, '*The Glorious Revolution and the Continuity of Law*, by Richard S. Kay', *EHR,* 121 (2017), pp. 714-715.
[58] Kay, *Glorious Revolution*, pp. 196-199.
[59] Landon, *Triumph of the Lawyers*, p. 224.
[60] 'King James' Parliament: The second convention', in *The History and Proceedings of the House of Commons: Volume 2, 1680-*1695 (1742), pp. 199-255.

> Words then known and in use, what we should deliver in such a Dialect would be very difficult to be understood.[61]

This historical mind-set – one which reached for inspiration far beyond the sources of the English common law – is something we will be exploring in more detail in the next section of this thesis. Holt's involvement in these debates also suggests that he shared the opinion of the veteran Sir John Maynard that the nation was 'at this moment out of the beaten path.'[62] Holt's priority as a lawyer and servant of the state was to get the nation back onto that path as soon as possible. This meant re-establishing a strong government, with William on the throne at its centre as the keystone of the constitution. As he stated:

> I would have [stated] the sole administration of the government in the Prince of Orange, otherwise there will be confusion in the government; one may command one thing, the other another; and who shall be obeyed? And the government may be lost.[63]

Such sentiments have traditionally been seen as further evidence of Holt's 'whiggish' predispositions. Yet as we have seen, they match easily with Holt's pre-revolutionary support for strong government with the king at its summit. They also help provide an answer to the mystery of what it was that attracted Maynard to be Holt's parliamentary patron. For it would be as MP of Maynard's pocket borough of Bere Alston that Holt would sit in the Commons from January to May of 1689, before his elevation to the summit of King's Bench.[64] Maynard was equally keen to see a functioning government as soon as possible, arguing that 'extreme necessity makes its own law'.[65] Like Holt, Maynard has also often been labelled a whig, but as Halliday has pointed out, 'though he felt sympathy for dissent and bigotry against Catholics, his support of monarchy was just as clear. Maynard saw the king standing at the heart of the law he knew so well.'[66] Maynard's strong support for the royal prerogative was also well known, something he demonstrated in the case of *Thomas Skinner v the East India Company* [1668]. It is not that difficult to imagine that Holt took Maynard's example on board when he too began to establish himself with his similar judgment in the Crown's favour in *East India Company v Sandys* [1683-5].

2.7 Conclusion

---

[61] Ibid.
[62] Quoted in Kay, *Glorious Revolution*, p. 55.
[63] Kay, *Glorious Revolution*, pp. 141-42.
[64] 'Bere Alston', in B.D. Henning (ed.), *The History of Parliament: the House of Commons 1660-1690* (1983).
[65] Kay, *Glorious Revolution*, p. 169.
[66] P. Halliday, 'Maynard, Sir John (1604–1690)', *ODNB*.

John Maynard once commented that 'laws are edged tools; those that understand them, make good use of them; and those that do not understand them, will find that they are sharp, and will cut'.[67] As we have shown in this chapter, this is precisely what happened to James when he attempted to impose martial law through the common law courts of England. Holt's objections to such a policy have provided a clear example of how James's popery could damage his relationship with his judiciary, undermining their institutional independence to an intolerable degree. He had pushed men like Holt to the limits of their loyalty. Yet these limits were not dictated by any anti-absolutist elements in Holt's thinking: he was not a whig as has so often been assumed. Instead, James had failed to realise that his absolutism, as with that of his French cousin, had both practical and theoretical legal limitations, limitations that we have been able to highlight through an analysis of Holt's fall from favour. In addition, by demonstrating how Holt's jurisprudential attachment to the notion of strong monarchy can be reconciled with his support of William during the revolution, we have also been able to add to observations by David Lemmings concerning the political disposition of the judiciary in this period. As he has said:

> The ideology of the ancient constitution was widely accepted by the opponents of Stuart 'absolutism' in the seventeenth century, and survived in an ossified form to be employed by Whig lawyers who helped legitimize the Revolution of 1688; for these reasons it may indeed be appropriate to anticipate some element of 'Whiggism' in the politics of the lawyers.[68]

Yet the results of his research surprised him:

> The overall picture of the political characteristics of Augustan lawyer MPs... is quite remarkable. Far from manifesting a 'natural Whig bias', it seems very likely that after 1689, and with only a brief interlude in the parliament of 1705 (and possibly that of 1708), most of the barristers sitting in the House of Commons exhibited an abiding attachment to Toryism.[69]

Explaining this strange absence of appeals to the 'ancient constitution' during the revolution, as well as the lack of any expected 'natural Whig bias' in the post-revolutionary judiciary, will be the purpose of our next section examining Holt's intellectual background through a detailed analysis of his manuscript opinions.

---

[67] Ibid.
[68] D. Lemmings, *Gentlemen and Barristers, The Inns of Court and the English Bar, 1680-1730* (Oxford, 1990), p. 214.
[69] Ibid., p. 230.

.

Section II

The Manuscript Opinions and Holt's 'Common Law Mind'

In the last chapter, we demonstrated how an investigation of the common law jurisprudence surrounding martial law in the seventeenth century can help us to explain the emergence of judicial opposition to James's military policies. It also shows how legal theory was able to interact with political thought in this period, thereby providing the context for the development of further hostility to the government's technical and political mishandling of its legal powers. This episode therefore represents a prime example of what can be achieved by putting examinations of common law assumptions back into broader political studies of the constitutional upheavals of the late seventeenth century. The aim of this section is to delve deeper into Holt's intellectual hinterland in order to excavate further his political and constitutional views. We will achieve this through careful analysis of his legal thought, and in particular his use of history, as found in his manuscript opinions. In essence, we will attempt to get to know his 'common law mind', and how this might have conditioned his political behaviour. The notion of a 'common law mind' affecting the course of English politics has been historiographically significant ever since it was first posited by J.G.A. Pocock over 60 years ago.[1] According to Pocock, lawyers were incapable of thinking historically, wedded as they were to the concept of the absolute immemorial nature of the English constitution, one which stretched back into the mists of the Anglo-Saxon past. Whether or not Holt held such views forms the major theme of investigation in this section.

Such a study is important for a number of reasons. The first is that no analysis of this type appears to have been undertaken for the period in which we are interested.[2] Pocock's investigation does stretch as far as the events of 1688, but his handling of the significance of the Glorious Revolution seems very much an afterthought relative to the main body of his thesis, which deals with the political and constitutional thought of early-and-mid-seventeenth-century legal thinkers. The role, if any, of the 'ancient constitution' in the political thought of lawyers during and after the revolution therefore remains relatively unknown. Another important reason for studying the nature of Holt's common law thought is the emergence of a

[1] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law,* 2nd edn. (Cambridge, 1987).
[2] The essays in E. Sandoz (ed.), *The roots of liberty: Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, 1993), which address the impact of Pocock's legacy in a number of areas, bypass the period of Holt's career almost entirely.

wide and impressive range of literature over past decades which has challenged Pocock's thesis.[3] The best of this work has been undertaken by Chris Brooks, whose views on the deficiencies of Pocock's analysis provide the essential historiographical context for our own work on the subject of common law intellectual culture in this period.

In an essay published in 1993, Brooks argued that 'questions about the relationship between legal ideas and other strains of social and political theory' in sixteenth-and-seventeenth-century English history have suffered from both 'neglect' and 'misunderstanding'. The neglect he put down to British universities being 'more successful in producing students of ecclesiastical history and religious ideas than of legal history and juristic thought.' Such neglect also contributed to the 'misunderstandings of English legal thought' which he believed had 'accumulated' over a number of years. These misunderstandings accounted for the 'failure to investigate or reinterpret a category of analysis' which 'for too long' has 'exercised a paradigmatic influence on our conceptions about the nature of legal ideas about politics and society-the notion of the common law mind."[4] This concept, Brooks argued, had become 'an orthodoxy in modern scholarship' with the publication of Pocock's work, leading many to assume that the 'common law mind' held that 'English law had no history', and that English lawyers 'completely denied the civil law ever had any influence in their country'. Brooks agreed that 'parts of this picture demand assent', but overall he doubted whether ancient constitutionalism 'had always been the major constituent of English legal thought', and thought it far from clear 'how significant the ancient constitution was within the nexus of thought and practice which made up the intellectual environment of the legal profession'.[5]

It is our aim to answer Brooks's call in this section, and to subject Pocock's models of an 'ancient constitution' and a 'common law mind' to the scrutiny of archival evidence, an exercise which represents the final reason for our undertaking this investigation. As we will see in the next chapter, Holt's manuscript opinions represent a barely used resource for historians interested in the issues raised by Brooks, in terms of the richness of the material they contain,

---

[3] See for instance C. Brooks and K. Sharpe, 'History, English Law and the Renaissance', *Past & Present*, no. 72 (1976), pp. 133-142; I. Campbell, 'Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland', *The Historical Journal*, vol. 53 (2010), pp. 573–591; P. Christianson, 'Ancient Constitutions in the Age of Sir Edward Coke and John Selden', in Sandoz (ed.), *Roots of Liberty*, pp. 115-184; J. Greenberg, *The radical face of the ancient constitution: St Edward's 'laws' in early modern political thought* (Cambridge, 2001); D.R. Kelley, 'History, English law and the Renaissance', *Past and Present*, no. 65 (1974), pp. 24-51; Q. Skinner, 'History and Ideology in the English Revolution', *Historical Journal*, vol. 8 (1965), pp. 150-178.

[4] C.W. Brooks, 'The place of Magna Carta and the ancient constitution in sixteenth-century English legal thought', in Sandoz (ed.), *Roots of liberty*, pp. 75–88, at p. 75.

[5] Ibid., pp. 76-77.

but also because of the period in which they were written.[6] The late seventeenth-and early eighteenth-century common law mind is something of a historiographical blank slate, a fact that, as we will see in Section III, has hampered our understanding of the role of the law in the events surrounding the development of the post-revolutionary state. Before we undertake our analysis however, the precise nature and history of the sources that we will be using needs to be explained, an exercise that forms the basis of the next chapter.

[6] As we noted in our introduction, Philip Hamburger has only made use of 12 of these opinions in his work to date.

Chapter 3: Courtrooms, Case Books and Collectors: The History of Holt's Opinions

3.1 Introduction

On 27 November 1783, James Gillray published a caricature of a baby-faced judge carrying what appear to be two fasces, ancient symbols of a magistrate's power, entitled 'Judge Thumb'.[7] On closer inspection, the bundles of rods reveal themselves to be tipped with small human fingers, the judge himself crying out 'Who wants a cure for a nasty wife?' In the background, a young man beats a woman with one of the rods. She cries 'Murder, for God's sake, murder', yet the male figure assures her that 'its law, you bitch! It's not bigger than my thumb!' The judge in question was Sir Francis Buller (1746-1800), star pupil of Lord Mansfield and the King's Bench, though today perhaps best known for the comments attributed to him which led to Gillray's publication of this satirical cartoon.[8] Although the Victorian legal biographer Edward Foss claimed never to have been able to find any substantial evidence that Buller 'ever expressed so ungallant an opinion', Buller was said to have remarked that a husband could punish his wife with impunity as long as the stick used was no thicker than his thumb.[9] 'Judge Thumb' stuck.

By the mid-1780s, perhaps in an effort to escape the shadow of this reputation, as well as his patron Lord Mansfield's, Buller was carefully preparing and presenting his own legal opinions in court, a skill he had honed in the service of his legal superior. To aid him in this endeavour, Buller reached out for the finest legal sources and texts that he could get his hands on. Tucked into the back of a volume of manuscript notes held at the British Library is a small letter, addressed to Charles Yorke esq.[10] The letter reads:

> Mr. Justice Buller presents his compliments to Mr. Yorke, & has returned him the three volumes of manuscript notes which he obligingly lent him, & thinks himself much indebted to him for the use of them.
>
> .....
>
> 2.^{d} Nov^{er} 1786.[11]

[7] J. Gillray, 'Judge Thumb', 1783, see Figure 1.
[8] Biographical information taken from J. Oldham, 'Buller, Sir Francis, first baronet (1746–1800)', *ODNB*.
[9] E. Foss, *Biographica juridicia: a biographical dictionary of the judges of England* (1870), p. 137.
[10] Presumably Charles Philip Yorke (1764-1834), Home Secretary 1803-4, son of Charles Yorke (1722-70), and grandson of Philip Yorke (1690-1764), 1st earl of Hardwicke.
[11] Letter attached to back of BL Add Ms. 35,981.

The manuscript notes in question contain the legal opinions of Lord Chief Justice Sir John Holt. Explaining why Buller should have wanted to see Holt's opinions, and what he intended to do with them, forms one part of this section concerning what amounts to Holt's greatest literary legacy. These opinions, and the others that are known to survive in Britain and the United States, represent a vital resource for our understanding of the legal mind at the turn of the eighteenth century. As John Baker has commented, the 'literature produced by a profession is often the clearest guide to the state of its intellectual development', yet relatively little is known about the intellectual state of the legal profession during the century-long gap between the careers of Hale and Mansfield, nor its relation to broader political and constitutional developments.[12] Exploring the reasons why Holt wrote these opinions also allows us to highlight the methods of, and deficiencies in, the transmission of legal and jurisprudential ideas during his lifetime, and how and why this had come to be the case. Finally, in the absence of an extensive or published collection of works in the style of Coke and Hale, these opinions are the closest we can come to a treatise by Holt, and window into his mind. They are, therefore, vital if we are to attempt to explain his behaviour and responses to the upheavals faced on either side of the revolution of 1688, and how these were both directed by, and differed from, the intellectual inheritance of his judicial predecessors.

3.2 The History and Identity of the Opinions

The documents under investigation comprise five separate manuscript volumes. The first is British Library Additional Ms. 34,125, entitled *CASE-BOOK of Sir John Holt, Chief Justice of the King's Bench containing his notes of, and judgments in, eleven cases tried before him from 1701 to 1703* (hereafter *Holt's Drafts*). The text is widely believed to be in Holt's own hand. A pencil note on the opening index page reads 'This was the . . . book of Lord Holt as is clearly proved by comparing Coggs v Bernard herein with the report of the case in 2 L^d^Raymond's Reports - p. 912'. These notes are signed 'H. MacNamara', a barrister who appears to have owned and consulted the manuscript at some point in the 1850s.[13] In his 1994 article on Holt's opinion in the case of *City of London v Wood*, Philip Hamburger also argued for *Holt's Drafts* being in the judge's own hand.[14] It is not clear on what basis Hamburger made such a claim. However, we are able to confirm that this is indeed the case by comparing the text in *Holt's Drafts* to that

[12] J. Baker, *An Introduction to English Legal History*, 4th edn. (Oxford, 2007), p. 175.
[13] Almost certainly Henry Tyrwhitt Jones MacNamara, special pleader of Lincoln's Inn, and author of *A Practical Treatise on Nullities and Irregularities in Law, Their Character, Distinctions and Consequences* (1842).
[14] P. Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood', *Columbia Law Review*, 94 (1994), p. 2119.

found in Holt's letters to Chief Justice Treby found at the Derbyshire Record Office.[15] Their identical nature allows us to conclude that the existing authorities are correct as to the text's author. In addition, the general scruffiness of the hand, as well as the numerous crossings out and corrections strongly suggests that *Holt's Drafts* is indeed a collection of Holt's own opinions and notes on the cases in their original and incomplete form. The following table lists the cases found in the volume:

Table 1: *Holt's Drafts*

Case Name	Folio	Copied in other Ms. Volume?
Lane v Cotton & Frankland [1700]	f. 3r.-f. 25v.	*Hardwicke III* and *Harvard Hand 2*
Brown v Mugg [1699-1700]	f. 26r.- f. 40v.	*Hardwicke II*
Bourne v Hunt [1703]	f. 41r.- f. 58v.	*Hardwicke III*
R v Plummer [1701]	f. 59r.- f. 66v.	*Hardwicke I*
City of London v Wood [1702]	f. 67r.- f. 93r.	*Hardwicke II*
Smyth v Angell [1702]	f. 93v.-f. 98r.	*Hardwicke II*
Blackbourn v Davis [1701]	f. 99v.- f. 108v.	*Hardwicke II*
Reading v Rawstern [1702]	f. 109r.- f. 110v.	N/A
Coggs v Barnard [1702]	f. 111r- f. 130v.	*Hardwicke III*
Staple v. Heydon [1703]	f. 131r.- f. 137v.	*Hardwicke II*
Ashby v White [1703]	f. 138r.- f. 152v.	N/A

In addition to *Holt's Drafts* we have British Library Additional Ms. 35,979-81 (*Hardwicke*

[15] See, for instance, Derbyshire Record Office D239 M/O/1278: Holt to Treby, 23 Feb. 1700. The hand also matches that found in Holt's letters in TNA, SP/34 papers.

Collection). These are three volumes (hereafter referred to as *Hardwicke I, II* and *III*) in the hand of a single professional copyist, and contain some 70 opinions in the following cases:

Table 2: *Hardwicke I*

Case Name	Folio	Fullest Printed Report of Case[16]
Philips v Bury [1694]	f. 2r - f.12r.	4 Mod. 106 (87 *ER* 1294)[17]
Wilson v Law [1694]	f. 12r. – f. 16r.	1 Ld. Raym. 21 (91 *ER* 910)
R&R v Bishop of London and Dr Birch [1694]	f. 16v. – f. 24v.	1 Ld. Ram. 23 (91 *ER* 912)
Masters v Lewis [1694]	f. 24v. – f. 25r.	Skinner 516 (90 *ER* 231)
R v Horneby et al. (The Bankers' Case) [1695]	f. 25r. – f. 59r.	5 Mod. 30 (87 *ER* 500)
R v Plummer [1701]	f. 60r. – f. 65r.	12 Mod. 627 (88 *ER* 1565)
R v Tooley [1710]	f. 66r. – f. 73v.	11 Mod. 242 (88 *ER* 1015)
R v Bishop of Chester et al. [1697]	f. 74r. – f. 92r.	Shower 212 (1 *ER* 141)
Robtus Finch Gent. v Hundred de Shamell [1708]	f. 93r.	Ms. Only
Chamberlain & Plimpton v Newton and Clerk [1707]	f. 93v.- f. 95r.	Ms. Only.
Brown v Mugg [1700]	f. 96r.- f. 104v.	1 Salk. 162 (91 *ER* 150)
Brewster v Kidgell [1697]	f.105r. - f. 116r.	3 Salk. 339 (91 *ER* 1270)
Jones v Morley [1697]	f. 117r. – f. 122r.	Carthew 409 (90 *ER* 837)
Saunders v Owen [1698]	f. 122r. – f. 131r.	12 Mod. 199 (88 *ER* 1261)
Glenham v Hanby [1700]	f. 131r. – f. 134r.	1 Ld. Raym. 739 (88 *ER* 1395)
Leigh v White & Green [1699]	f. 135r.- f. 135v.	Ms. Only
Cox v Godsalve [1699]	f. 135v. – f. 136v.	Referenced and reproduced in *Crosby v Wadsworth* [1805], 6

[16] These printed reports are not direct copies of the manuscript opinions, though in many places there are strong parallels between the structure and text of the different documents. Occasionally, entire sentences and phrases are copied. A full history of the precise relationship between the various editions of printed reports and these manuscript opinions is beyond the scope of this thesis, but would be a worthwhile project for the future. Where the printed reports match the manuscript opinions found here exactly, this has been noted.

[17] For full references, and an explanation of how the *English Reports* relate to the original law reports, see the printed primary sources section of the bibliography.

		East 602 (102 *ER* 1419)
Pincard v Linch [1700]	f. 136v. – f. 139r.	Ms. Only
Mary Rock v Leighton [1700]	f. 139r. – f. 141v.	1 Salk. 310 (91 *ER* 273)
Tomkyes v Barnet [1693]	f. 142r.	1 Salk. 22 (91 *ER* 21)
House and Downes v Lord Petre [1700]	f. 142v. – f. 145r.	1 Salk. 311 (91 *ER* 274)
Machell v Clark [1702]	f. 145v. – f. 152v.	2 Ld. Raym. 778 (92 *ER* 19)

Table 3: Hardwicke II

Case Name	**Folio**	**Fullest Printed Report Case**
City of London v Wood [1701-2]	f. 2r. – f. 19v.	12 Mod. 669 (88 *ER* 1592)
Smith v Angell [1702]	f. 20r. – f. 23v.	2 Ld. Raym. 783 (92 *ER* 22)
Blackbourn v Davis [1701]	f. 24r. – f. 27v.	Holt 43 (90 *ER* 922)
Staple v Heydon and Fowler [1703]	f. 28r. – f. 33r.	6 Mod. 1 (87 *ER* 768)
Countess of Bridgwater et al. v The Duke of Bolton [1704]	f. 33v. – f. 49r.	Holt 281 (90 *ER* 1054)
Watkins and Ux. v Frome [undated]	f. 49r. – f.50r.	Ms. only
Clements v Scudamore [1704]	f. 50r. – f. 53r.	1 Salk. 243 (91 *ER* 215)
Carlton v Mortagh [1704]	f. 53v. – f. 56r.	1 Salk. 268 (91 *ER* 235)
Wangford v Wangford [1704]	f. 56v. – f. 63r.	11 Mod. 38 (88 *ER* 869)
Page v Hayward [1704]	f. 63v. – f.77v.	Holt 618 (90 *ER* 1242)
Sir Charles Thorald v Smith [1706]	f. 78r.	11 Mod. 71 (88 *ER* 896)
Susanna St. John v Sir Willoughby Chamberlain Knt. [undated]	f. 78v.	Ms. only
Benjamin Ward v Sir Stephan Evans [1703]	f. 79r. – f. 79v.	Holt 120 (90 *ER* 965)
Dilboe v Grevill [1696]	f. 80r. – f. 80v.	Ms. only

Audly v Audly [1677, 1680]	f. 80v. – f. 81r.	Ms. only
R *v Dr. Drake* [1706]	f. 81v. – f. 89v.	2 Salk. 660 (91 *ER* 563)
Annesley v Dixon [1706]	f. 90r. – f. 95r.	Holt 372 (90 *ER* 1106)
R *v Soley* [1707]	f. 95v. – f. 99v.	2 Salk. 594 (91 *ER* 503)
Buncker v Cook and Bokenham [1707]	f. 100r. – f. 107v.	Holt 746 (90 *ER* 1310)
Keble v Hickeringill [1706]	f. 108r. – f. 111r.	11 East 574 (103 *ER* 1127)
Archbishop of Canterbury v Willis [1708]	f. 111v. – f. 116r.	1 Salk. 315 (91 *ER* 278)
Gwanralt v Burwall et al. [1700]	f. 116r – f.126r.	1 Ld. Raym. 213 (91 *ER* 1038)
Fowler's Case [1700]	f. 126v. – f. 128r.	12 Mod. 418 (88 *ER* 1421)
Harman v Owden [1700]	f. 128v. – f. 130r.	1 Salk. 140 (91 *ER* 130)
Moor v Watts [1700]	f. 130v.	Holt 626 (90 *ER* 1246)
Fisher v Wigg & Nicholls [1700]	f. 131r. – f. 140r.	3 Salk. 206 (91 *ER* 779)
Freeman v Blewit [1700]	f. 140r. – f. 140v.	1 Salk. 409 (91 *ER* 355)
Bower v Courtnay [1699]	f. 141r. – f. 142r.	1 Ld. Raym. 501 (91 *ER* 1235)
Thorp v Thorp [1701]	f. 142v. – f. 147v.	12 Mod. 455 (88 *ER* 1448)
Wilmot v Tyler [1701]	f. 148r.	1 Ld. Raym. 671 (91 *ER* 1347)

Table 4*: Hardwicke III*

Case Name	Folio	Fullest Printed Report of Case
Parker v Kett [1702]	f. 2r. – f. 7r.	12 Mod. 466 (88 *ER* 1454)
Parker v Atfield [1702]	f. 7v. – f. 8r.	1 Ld. Raym. 678 (91 *ER* 1351)
Lancashire v Killingworth [1700]	f. 8v. – f. 10v.	12 Mod. 529 (88 *ER* 1498)
Margaret Lacy v Kinaston [1702]	f. 11r. – f. 13r.	1 Ld. Raym. 688 (91 *ER* 1359)
R *v Bear* [1699]	f. 13v. – f. 22r.	Holt 422 (90 *ER* 1132)
R *v Graep* [1697]	f. 22v. – f. 36v.	1 Ld. Raym. 261 (91 *ER* 1067)

Britton v Cole [1696]	f. 37r. – f. 42v.	Comb. 469 (90 *ER* 596)
R v Leighton [1706-08]	f. 43r. – f. 44r.	Fortescue 173 (92 *ER* 806)
Hopwood v Barefoot [1709]	f. 44r. – f.47v.	11 Mod. 237 (88 *ER* 1013)
Savil v Roberts [1699]	f. 47v. -f. 57r.	1 Salk. 13 (91 *ER* 14)
Ivason v Moore [1699]	f. 57r. – f. 61r.	Carthew 451 (90 *ER* 861)
Mayor & City of London v John Vanhacker [1699]	f. 61r. – f. 72r.	12 Mod. 269 (88 *ER* 1214)
R.v Knight [1700]	f. 75r. – f. 75v.	1 Salk. 375 (91 *ER* 327)
R v Burton [1700]	f. 75v- f. 80r.	Ms. only
Gage v Acton [1700]	f. 80v. – f.89r.	1 Salk. 325 (91 *ER* 288)
Lane v Cotton and Frankland [1701]	f. 89v. – f. 107v.	1 Salk. 17 (91 *ER* 17)
Bourn v Hunt [1703]	f. 108r. – f. 122r.	4 Brown 66 (2 *ER* 45)
Coggs v Barnard [1703]	f. 122v. – f. 136v.	2 Ld. Raym. 909 (92 *ER* 107)

Finally, we have Harvard Library, Law School HLS Ms. 4039, *Sir John Holt, Reports of cases, 1677-1701* (the *Harvard Opinions*). This volume is written in two distinct hands. *Harvard Hand 1* is not that of a professional scribe. *Harvard Hand 2* however does appear to be that of a reasonably proficient copyist, though not of the same quality as the transcriber of the cases in the *Hardwicke Collection*. The cases found in each hand are listed below:

Table 5: *Harvard Hand 1*

Case Name	Folio	Printed Report of Case
Roe v Haugh [1697]	f.1r-f.1v	3 Salk. 14 (91 *ER* 662)
Smalcomb v Sir Owen Buckingham and Sir Edward Wills, late Sheriffs of London [1697]	f.1v-f.2v	1 Salk. 320 (91 *ER* 320)
Winter v Lovedale [1697]	f.3r-f.6r	2 Salk. 537 (91 *ER* 456)

Brewster v Kidgell [1697][18]	f.6v-f.11v	1 Salk. 198 (91 *ER* 177)
Aston v Sheerman [1697]	f.11v-f.12r	1 Salk. 298 (91 *ER* 265)
Thomson v Leach [1697]	f.12r-f.14v	2 Salk. 427 (91 *ER* 372)
Lady Calverly v Sir R *Leving* [1698]	f.14v-f.15r	1 Ld. Raym. 330 (91 *ER* 1116)
Adkinson Administratix [1698]	f. 15r	1 Ld. Raym. 338 (91 *ER* 1121)
Silly v Dally [1698]	f.15r-f.16v	Carthew 444[19] (90 *ER* 857)
Gardiner v Booth and Poole [1698]	f. 16v-f.17r	2 Salk. 548 (91 *ER* 464)
Hill v Law [1698]	f.17r-f.17v	2 Salk. 656 (91 *ER* 656)
Allen v Dockwray [1698]	f.17v	1 Salk. 127 (91 *ER* 119)
Dr Watson (St David's) v Arch Bishop of Canterbury [1698]]	f. 18r-f.19r	3 Salk. 90 (91 *ER* 711)
Dillon v Walcott (Isabella Dillon Countess of Rosscomon v. John Walcot) [1698]	f.19r-f.19v	12 Mod. 407 (88 *ER* 1413)
Rex v Heaps et al. (The King v. Eliz Heaps Mary Sudbury & 6 others) [1699]	f. 19v	2 Salk. 593 (91 *ER* 502)
(Sir William) Lacon (Child) v Harvey [1699]	f.20r	1 Salk. 48 (91 *ER* 48)
Allenson v Dr Brookbank [1699]	f.20r-f.20v	2 Salk. 625 (91 *ER* 528)
Starkey v Cheesman [1699]	f.20v	1 Salk. 128 (91 *ER* 121)
Usher Charles' Case [1699]	f.20v-f.21r	5 Mod. 452 (87 *ER* 759)
Holland's Case [1699]	f.21v	12 Mod. 310 (88 *ER* 1342)
Rex v Paris Slaughter [1699]	f.21v	2 Salk. 611 (91 *ER* 518)
Glascock v Marmaduke Dayrell [1694]	f.22	Skinner 413 (90 *ER* 183)
Rex v Dr Watson, Bishop of St David's [1702]	f.22r-f.23r	1 Salk. 294 (91 *ER* 261)

[18] Case also found in Hardwicke I, though not a direct copy.
[19] This printed report appears to be a direct copy of the manuscript version listed here.

Rex v Chandler [1702]	f.23r	1 Salk. 378 (91 *ER* 378)
Rex v Inhabitants of the Precinct of Bridewell [1699]	f.23v	Connected with proceedings in 2 Salk. 486 (91 *ER* 417)
Ashmead v Ranger [1699]	f.24r	(91 *ER* 538) 2 Salk. 638
Winkle v Pike [undated]	f.24r	Ms Only.
Machin v Molton [1699]	f.24r	1 Ld. Raym. 452 (91 *ER* 1201)
Mountford v Nevill [undated]	f.24r	Ms. Only
Clay v Snelgrave [1700]	f.24v	1 Ld. Raym. 576 (91 *ER* 1285)
R v West (Mayor of Banbury) [1700]	f.24v	Ms. Only
Horn v Lewin [1700]	f.24v-f.26v	2 Salk. 583 (91 *ER* 490)
Alford v Jones [undated]	f.26v	Ms. Only
Attwood v Burr [1706]	f.26v	2 Salk. 603 (91 *ER* 511)
Woods v Lord Mayor and Commanalty of London [1701-2][20]	f.27r-f.39v	12 Mod. 669 (88 *ER* 1592)[21]

Table 6: *Harvard Hand 2*[22]

Case Name	Folio	Identical copy of case found in
Audly v Audly [1677, 1680]	f. 40r-40v.	*Hardwicke II*
R v Dr. Drake [1706]	f. 40v. – 48r.	*Hardwicke II*
Annesley v Dixon [1706]	f. 48r. – 53r.	*Hardwicke II*
R v Soley [1707]	f. 53r. – 56v.	*Hardwicke II*
Buncker v Cook and Bokenham [1707]	f. 56v. – 63r.	*Hardwicke II*
Keble v Hickeringill [1706]	f. 63v – 66v.	*Hardwicke II*

[20] Case also found in *Hardwicke II*, and *Holt's Drafts*, although neither is a direct copy.
[21] 12 Mod. 699 appears to be an identical copy of this manuscript.
[22] Copies of the final 16 cases of *Hardwicke II* and first 16 cases of *Hardwicke III*, in order.

Archbishop of Canterbury v Willis [1708]	f. 66v. – 70v.	*Hardwicke II*
Gwanralt v Burwall et al. (Groenvelt v Burrell) [1700]	f. 70v. – 79r.	*Hardwicke II*
Fowler's Case [1700]	f.79v. – 81r.	*Hardwicke II*
Harman v Owden [1700]	f. 81r. – 82v.	*Hardwicke II*
Moor v Watts [1700]	f. 82v. – 83r.	*Hardwicke II*
Fisher v Wigg & Nicholls [1700]	f. 83r. – 90v.	*Hardwicke II*
Freeman v Blewit [1700]	f. 90v. – 91r.	*Hardwicke II*
Bower v Courtnay [1699]	f. 91r. – 92r.	*Hardwicke II*
Thorp v Thorp [1701]	f. 92v. – 96v.	*Hardwicke II*
Wilmot v Tyler [1701]	f. 96v. – 97r.	*Hardwicke II*
Parker v Kett [1702]	f. 97r. – 101r.	*Hardwicke III*
Parker v Atfield [1702]	f. 101v. – 102r.	*Hardwicke III*
Lancashire v Killingworth [1700]	f. 102r. – 104r.	*Hardwicke III*
Margaret Lacy v Kinaston [1702]	f. 104r. – 107r.	*Hardwicke III*
R v Bear [1699]	f. 107v. – 114r.	*Hardwicke III*
R v Graep [1697]	f. 114r. – 125v.	*Hardwicke III*
Britton v Cole [1696]	f. 125v. – 130r.	*Hardwicke III*
R v Leighton [1706-08]	f. 130v. – 131r.	*Hardwicke III*
Hopwood v Barefoot [1709]	f. 131v. – 134r.	*Hardwicke III*
Savil v Roberts [1699]	f. 134r. – 142r.	*Hardwicke III*
Ivason v Moore [1699]	f. 142r. – 145r.	*Hardwicke III*
Mayor & City of London v John Vanhacker [1699]	f. 145r. – 153v.	*Hardwicke III*
R.v Knight [1700]	f. 153v. – 154r.	*Hardwicke III*
R v Burton [1700]	f. 154r. – 159r.	*Hardwicke III*
Gage v Acton [1700]	f. 159r. – 165r.	*Hardwicke III*

Lane v Cotton and Frankland [1701]	f. 165r. – 176v.	*Hardwicke III*

The precise relationship between *Holt Draft's*, *Hardwicke I-III*, and the *Harvard Opinions* may never be known, but an attempt to reconstruct their interrelated histories can be made.

The story beings with *Holt's Drafts*. Holt must have written these at some point between the date of the latest case found in the collection, 1703, and his death in 1710. The volume appears to be complete, and in the same form as Holt wrote it; all the cases are present, and in the same order, as an index in Holt's hand suggests they should be. The manuscript then seems to have made its way into the hands of Sir William Lee (1688-1754), who was called to the bar the year of Holt's death.[23] The British Library catalogue notes for the manuscript contain the following information:

> Paper; ff. 152. With book-plates of arms of Sir William Lee, Chief Justice 1737-1754 (who has inserted an index at f. 2); and of his grandson William Lee Antonie (ob. 1815). On f. 1 are some pencil notes signed H. Macnamara. A note on the inside of the old cover states that the volume was "found amongst some papers of C[hief] J[ustice] Lee at Totteridge Park [co. Herts]." Repaired 1835.

On its own, Lee's career offers a fascinating case study of the first generation of professional lawyer-politicians who emerged in the aftermath of 1688, rising as he did through the ranks of the legal profession and parliament to become lord chief justice of the King's Bench and ultimately chancellor of the exchequer. How he got hold of *Holt's Drafts* is uncertain, but what we do know is that they were not the only copy of Holt's opinions, original or otherwise, that he owned. The notes found in the *Harvard Opinions* tell us as much:

> Armorial bookplate of Sir William Lee, chief justice of the King's Bench; another bookplate of William Lee Antonie (19c.); a third bookplate with arms of Lee (19c.), probably Dr. John Lee; 'This manuscript was found amongst the manuscripts and papers of Chief Justice Lee at Totteridge Park and brought from thence by me to Hartwell after the decease of Mrs. Hartwell. (signed) John Lee, 1840.';
>
> 'McNamara, no. 9 Inner Temple Lane, Temple, 1850'; Dr. Lee's sale at Sotheby (no. 403) on 8 Nov. 1888; 'Bought by Clement Sadler Palmer, May '92, 100 Southampton Road, London WC for 15 shillings.'; 'MS 229' (on shield-shaped ticket on spine); given to HLS by Ezra Thayer, 30 April 1914.
>
> The cases in this book were copied from a manuscript notebook of Holt C.J. which is also in the possession of Dr. Lee.' (signed) H. M. (i.e. Henry McNamara). They extend

[23] The following biographical information is taken from D. Lemmings, 'Lee, Sir William (1688–1754)', *ODNB*.

from 1677 to 1701.

Lee, then, definitely owned both *Holt's Drafts* and the *Harvard Opinions* at some point in his life. What should immediately catch our eye though is MacNamara's claim that the cases found in the Harvard Opinions were copied from 'a manuscript notebook' of Holt. Since only one case from *Holt's Drafts* (*Lane v Cotton & Frankland*) made its way into the *Harvard Opinions*, *Holt's Drafts* cannot have been the single source, or the only set of Holt's original writings that Lee owned. More original drafts by Holt are missing from the picture. Confirmation of this point comes when we follow up the description of, and sales catalogues relating to, Lee's library at his home, Totteridge Park.

'Dr Lee's sale at Sotheby' was held over two days, Thursday 8th November and Saturday 10th November 1888, and was advertised as an auction of 'A Valuable Collection of Oriental Manuscripts from the Library of a Well Known Collector', the 'well known collector' being Lee's Victorian descendant Dr John Lee.[24] On page 27 of the catalogue, at lot 403, we find the Harvard Opinions. Yet they are not alone. Lots 402 'Law Cases, Temp. William III and Queen Anne, MANUSCRIPT', and 407 'Law Cases (1692-8), MANUSCRIPT', could both have been other collections of Holt's own notes. The smoking gun however appears on page 30, lot 454: 'Lee (Chief Justice Sir W.) Cases, AUTOGRAPH MS. *vellum with brass clasp*, *** In a MS. note by H.Macnamara, it is stated, "This Book was the Case-Book of C.J. Holt, as appears from the case of Rich *v.* Leighton."' This cannot be *Holt's Drafts*, indeed, *Holt's Drafts* were not included in this sale, but must instead be another volume of his draft opinions once owned by Lee. We do not know who bought this other set of Holt's original writings, but we do know who bought the *Harvard Opinions*: antiquarian book dealer Clement Sadler Palmer. It was from Palmer that Ezra Thayer presumably bought the manuscript, before taking it on its final journey across the Atlantic. Thayer was an attorney, Dane Professor of Law, and Dean of the Harvard Law School from 1910 to 1915. His gift of the *Harvard Opinion's* to the Law School was in the spring of 1914, just over a year before his tragic suicide at the age of 49.[25]

We know then that Lee owned at least two copies of Holt's original manuscript opinions, and possibly many more. Sadly none appear in the catalogue of the law library at Hartwell, the Lee family seat, composed in 1865 by William McAlpine, registrar of the Court of Probate, and sometime librarian of the College of Advocate's, Doctors' Commons (where presumably he

[24] Sotheby's, *A Valuable Collection of Oriental Manuscripts from the Library of a Well Known Collector,* London, 8 – 9 November, (1888).
[25] W.H. Dunbar and R. Pound, 'Ezra Ripley Thayer', *Harvard Law Review*, vol. 29 (1915), pp. 1-12.

first made the acquaintance of Dr John Lee).[26] Possibly the manuscript opinions were still in the possession of Henry McNamara at this stage, as his various notes found in their pages from the 1850s attest to, or that they never made the trip from Totteridge Park in 1840 with the *Harvard Opinions*.

Knowing that Lee owned these documents can also help us to explain the history of the *Hardwicke Collection*. Lee was a close friend of Philip Yorke, first earl of Hardwicke (1690-1764). Indeed, so close was their relationship that Hardwicke, when he became lord chancellor in 1737, nominated Lee to his old post as lord chief justice of the King's Bench. Yorke's journey to the heights of his profession started from humble beginnings. The son of an attorney from Dover, he became an articled clerk to London attorney Charles Salkeld, before entering the Middle Temple in 1708. His biography states that he may have become tutor to the son of Lord Chief Justice Parker (1667-1732), Holt's immediate successor and later earl of Macclesfield.[27] The similarities between the cases found in *Holt's Drafts*, the *Harvard Opinions*, and the *Hardwicke Collection* suggest that Lee and Hardwicke were exchanging manuscripts with each other throughout the eighteenth century. Of the 11 cases found in *Holt's Drafts*, all but two (*Reading v Rawstern* and *Ashby v White*) are to be found copied across *Hardwicke I, II* and *III*. This of course leaves fifty nine cases in the *Hardwicke Collection* for which we do not have a copy of Holt's original draft, but may well have been sourced from Lee's copies of Holt's originals to which we no longer have access.

The relationship between the *Harvard Opinions* and the *Hardwicke Collection* is slightly more complicated. As we saw earlier, the *Harvard Opinions* consist of two separate sets of cases, each written in a different hand. Notably, the final 16 cases of *Hardwicke II*, and the first 16 cases of *Hardwicke III*, are identical both in content and order to the 32 cases which make up *Harvard Hand 2*. Intriguingly, only one case from *Holt's Drafts – Lane v Cotton and Frankland* – was copied into *Harvard Hand 2*, and subsequently into *Hardwicke III*, suggesting that both *Harvard Hand 2*, and the *Hardwicke Collection*, were not straight copies of Holt's original drafts, but instead represent cherry picked compositions of cases, or were possibly copied themselves from other sets of copies now lost to us. It is also notable that the cases found in *Hardwicke I* and *II*, as shown in the tables above, were presented in roughly chronological order, suggesting that this

[26] W. McAlpine, *A Catalogue of the Law Library at Hartwell House* (1865).
[27] P.D.G. Thomas, 'Yorke, Philip, first earl of Hardwicke (1690–1764)', *ODNB*. The fullest biography of Yorke's life is P.C. Yorke's, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke* (3 vols., Cambridge, 1913). As a young man, Yorke apparently wrote to Holt to ask for advice 'as to the best method of preparing for his future career', see vol. I, p. 52.

was one way in which Holt's original opinions were being copied and catalogued by later lawyers. Although it would be highly satisfying to know precisely if, when, and how these manuscripts were copied from one another, the exercise itself would require knowledge of other texts that are currently lost to us. The result is rather like trying to complete a jigsaw puzzle with most of the pieces missing. It is, for instance, entirely possible that it was Hardwicke who gave *Holt's Drafts* to Lee, after he had had the contents copied out for his own use. A fire in Charles Yorke's chambers in 1752 could well have destroyed many of Holt's originals if the others had remained in the family's hands.

We are yet to mention the collection of cases which make up *Harvard Hand 1*. After studying them for any length of time, it soon becomes clear that these are not like any of Holt's opinions found in any of the other manuscript volumes. In fact, they are not opinions at all. The cases that can be dated with any reliability stretch from 1697 to around 1700. Again, looking at the table above, the order of the contents is roughly chronological, with some cases actually following a precise date order down to the day of the week, such as *R v Dr Watson* and *R v Chandler*. Some of the entries are full reports of cases, *Winter v Lovedale* being one such example. Others are nothing more than a hastily jotted paragraphs summing up the result of a particular case, *Winkle v Pike* for instance consisting of no more than a sentence. There are also some peculiarities in terms of the sense given of when the reports were written. Whilst not in the hand of professional copyist, neither is *Harvard Hand 1* a collection of hastily scribbled notes taken on the spot. Many appear to have been written as soon as the cases had been heard, or in their immediate aftermath. Others, such as *Horn v Lewin* and *Alford v Jones*, refer to events and judgements that occurred the term or year after the case itself had been concluded. As a result, these texts appear to be an exercise in careful copying and collation of several different types of notes and reports from cases that took place around the turn of the eighteenth century. The cases included in *Harvard Hand 1* all pre-date Lee's entry into the Middle Temple in 1704, so presumably these notes were not his own (not to mention the fact that in 1697, the date of the earliest case mentioned, he would have been nine years old).

3.3 The Use of the Opinions, and their relationship to the Printed Reports

Our analysis of the various manuscript volumes under consideration has hurled us deep into the world of late seventeenth-and early eighteenth-century legal literature. What emerges from our investigation is a picture of a legal world centred on the exchange, collection, and copying of manuscript reports and judicial opinions in the age before the dominance of the printed report in the nineteenth century. The effort expended by Lee and Hardwicke in building up the

manuscript collections of their respective libraries is testament to these documents' vital utility as part of their profession, a feature of the eighteenth-century courts that work by James Oldham has recently illustrated.[28] In the absence of reliable printed reports - or indeed, any sort of report at all - such manuscripts represented the highest authority in historical case law. These notes, Oldham tells us, 'were authoritatively invoked by both bench and bar', with Lee's and Hardwicke's own collections of reports and opinions on trials they were involved in gaining authoritative weight after their lifetimes.

In particular, Holt's opinions seem to have carried some of the greatest authority as part of the eighteenth-century practice of quoting from original manuscripts in court whenever possible. Oldham lists multiple cases in the decades after Holt's death where verdicts rested on the incantation of either *Holt's Drafts* or copies of them. In *Pitt's Case* [1733] Lord Hardwicke cited 'a good manuscript report' that he had in his possession of Holt's decision in '*Lord Banbury's Case*'.[29] Lee quoted from 'a manuscript of Lord Holt's of the case of *Hunt v Bourne*' in *Smith v Parkhouse* [1740].[30] There are other examples, but it is notable that in these two instances both judges were quoting from cases not found in the collections of manuscripts currently known to have been in their possession; *Hunt v Bourne*, for instance, is in neither Lee's copy of *Holt's Drafts* nor the *Harvard Opinions*, but is in Yorke's *Hardwicke III*, suggesting again that the extent of exchange between the two men was broader than the surviving physical evidence indicates.

As already mentioned, Chief Justice Buller seems to have made extensive use of the *Hardwicke Collection* well into the eighteenth century, and appears to have made copies of several cases found in those volumes. These 'copies of copies' of *Holt's Drafts* he used to great effect throughout his career. In *Erving v Peters* [1790] Buller read aloud Holt's opinion in the case of *Mary Rock v Leighton*, the printed report of Buller's speech matching the text of the opinion found in *Hardwicke I* word for word.[31] He did the same in *Milbourn v Ewart* [1793] where he used his copy of Holt's opinions 'to refute any suggestions by counsel for the defendant that the case of *Cage* v. *Acton* . . . had been reversed.'[32]

Finally, Edward Hyde East (1764-1847), judge, legal writer and politician seems to have used a copy of Holt's opinions when composing his fourteen volume collection of reports (1800-12),

---

[28] J. Oldham, 'The indispensability of manuscript case notes to eighteenth-century barristers and judges', in A. Musson and C. Stubbings (eds.), *Making Legal History: Approaches and Methodologies* (Cambridge, 2012).
[29] *Pitt's Case* [1733], 2 Comyns 444 (92 *ER* 1152).
[30] *Smith v Parkhouse*, [1740], 7 Mod. 366 (87 *ER* 1295).
[31] *Erving v Peters* [1790], 3 T.R. 685 (100 *ER* 803).
[32] *Milbourn v Ewart* [1793], 5 T.R. 381 (101 *ER* 213).

referring to *Cox v Godsalve* in *Crosby v Wadsworth* [1805], 'Holt's MS., of which I have the following copy from the original', and *Keble v Hikceringall* in *Carrington v Taylor* [1809], 'taken from a copy of Lord C.J. Holt's own MS. in my possession'.[33] Crucially, and somewhat ironically given the weight of authority he gave to his access to copies of Holt's original texts, it was with the publication of East's Reports that the tide began to turn against viewing manuscript opinions as the final word in reported cases. Indeed East, along with others, has been credited with ushering in the age of the reliable nineteenth-century printed report, thereby consigning earlier manuscript collections to the status of antiquarian amusements.[34]

The speed with which this process took place can be neatly illustrated with reference to the appearance in 1837 of *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others*.[35] In the introduction to this work, the anonymous editor explained the background to its publication:

> Shortly after the 8th of May, when the Committee of the late House of Commons came to that resolution respecting their own privileges which was afterwards adopted by the House at large, a respectable member of the legal profession recollected a purchase made by him forty years earlier, of a folio volume containing some MSS. judgements of Lord Chief Justice Holt.[36]

The 'respectable member of the legal profession' was 'J.D. Blake . . . Solicitor in Essex Street'. The 'original volume' was apparently left at the publishers 'for the inspection of such as may take an interest in the subject'. Its description is also worthy of note:

> The printed extract of the Lords' Committees (1704) appointed to draw up the state of the case upon the writ of error in Ashby *v.* White, with the resolutions of that House, is bound in the same volume; with an account of the ceremonial of Queen Anne's coronation. The writing appears to be that of some clerk, employed to copy from original documents.[37]

Several things stand out from these two passages. The first is that Blake must have purchased the original volume at some point in the late 1790s, presumably at the beginning of his career, but by 1837 had little practical use for it, other than as an object of topical legal and political history. This sentiment is echoed at the end of the introduction to the printed work, where the

---

[33] *Crosby v Wadsworth* [1805], 6 East 602 (102 *ER* 1419); *Carrington v Taylor* [1809], 11 East 571 (103 *ER* 1126).
[34] Oldham, 'Manuscript Notes', p. 51.
[35] *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others, and in the Case of John Paty and others, Printed from Original MSS* (1837).
[36] *Ashby v White*, p. iii. The resolution in question related to the privileges surrounding the publication of parliamentary papers, in connection with the case of *Stockdale v Hansard* [1839], 9 Ad & E (112 *ER* 1112).
[37] Ibid., p. iii.

editor hoped that publication of this obscure text would, 'bring to light other original judgements of the same Chief Justice, prepared and corrected by himself', something which would prove 'a valuable addition to our legal history.'[38] The image created by this appeal is one of Victorian lawyers owning copies of Holt's opinions, both originals and duplicates, unused for decades and gathering dust in their offices and libraries. It is an image captured perfectly by the American lawyer John William Wallace, who spoke in 1845 of his difficulties in compiling a record of English law reports:

> The knowledge requisite for the task belongs to a sort of which there is a good deal among the men near Westminster Hall, and little anywhere else; a kind of hereditary, traditional knowledge, derived perhaps from their unpublished MSS.; descending, in a sort, from generation to generation with the dust upon their ancient repositories, and partaking too much of the character of an heir-loom to pass to us by cis-Atlantic severance.[39]

Three years after the publication of *Ashby v White*, Dr Lee would begin the process of collecting and cataloguing Sir William's 'ancient repository' of neglected legal texts. 50 years later, Lee's 'heirlooms' were being sold off at Sotheby's. The second point to note from the introduction to *Ashby v White* is the allusion to 'some clerk, employed to copy from original documents'. This takes us back to the first half of the eighteenth century, when copying from Holt's original drafts then seems to have been commonplace. Understanding why such an industry should have existed takes us back even further, and can help us to begin to understand why Holt wrote his opinions in the first place.

3.4 Why Holt Wrote the Opinions

Holt's attack on the accuracy of the fourth volume of *Modern Reports* (first published in 1703) was so severe that it made its way into Lord Raymond's account of the trial of *Slater v May* [1704]: 'See the inconvenience of these scambling reports! They will make us appear to posterity for a parcel of blockheads.'[40] Yet it was not only the fourth volume that Holt had a problem with. Five years earlier, in the case of *The Bishop of Salisbury v Philips* [1699], Holt chastised 'Mr. Carthew' for citing a case from the second volume of *Modern Reports* (first published 1698),

---

[38] Ibid., p. xviii.
[39] J.W. Wallace, *The Reporters Chronologically Arranged, with Occasional Remarks upon their Respective Merits* (Philadelphia, 1845).
[40] *Slater v May* [1704], 2 Ld. Raym. 1071 (92 *ER* 210).

instructing him that 'no books ought to be cited at the bar, but those which were licensed by the judges.'[41]

Holt's frustration is understandable when we consider the state of legal reporting during his lifetime. As J.H. Baker has said, 'The reports of the period 1650-1750 were mostly of an inferior nature, consisting of short notes and scattered arguments intended for private use rather than publication.'[42] Reports of cases pre-1660 were of a particularly poor quality. The causes of these inaccuracies were manifold. Again, J. Wallace offered sound reasons for the problems with these early reports:

> But of the reporters, the original was lent, not to be printed, but to be copied. It was vitiated by transcript after transcript; mistaken by blunders of the penman; enlarged perhaps to introduce cases, and mutilated to exclude them. Ignorance and interest and accident all combined to produce error; and the work would be printed, at last, without the concurrence of the author, without the consent of the proprietor; and thrust surreptitiously upon the world from that copy, perhaps, which was the most corrupted of all.[43]

The 'blunders of the penman' is testament to the fact that not all of these reports were printed. Again, as Baker has pointed out 'only a minority of the Tudor and Stuart reports were printed, and those usually long after they were written.' Instead, 'the profession was accustomed to using manuscript reports of current cases, and until the 1640s several standard series could be obtained in mass-produced copies from law stationers.'[44] Yet the evidence we have gathered of manuscript copying and use suggests that the 1640s in no way marked the end of mass-production on this front. Yet not only were reports inaccurate, but they were also non-standardised. Many were written as a source of extra revenue for junior barristers.[45] This led to a complete mixture in terms of the types of report and levels of detail, 'Some reporters are minute: others general. One man gives you a daguerreotype: another but an outline', as Wallace said.[46] We have seen this already with the variety of levels of detail found reproduced in the reports found in *Harvard Hand 1*.

---

41 *The Bishop of Salisbury v Philips* [1699], 1 Ld. Raym. 535 (91 *ER* 1257).
42 Baker, *Legal History*, p. 183.
43 Wallace, *Reporters*, p. xii.
44 Baker, *Legal History*, p. 180.
45 Ibid., p. 180.
46 Wallace, *Reporters*, p. xxvi.

Holt, then, may have wanted to write his opinions to ensure that his verdicts were not similarly misreported. Some of his work certainly made it into print during his lifetime. In 1708, Holt inserted his opinions in *Armstrong v Lisle*, *R v Plummer* and *R v Mawgridge* into the printed publication of Kelyng's Reports, a collection of trials from the reign of Charles II.[47] Holt's reasons for publishing Kelyng's material seemed to stem from a sense of duty, and to ensure reputational damage control for his predecessor: 'the manuscript whereof under his own hand was in the custody of his grandson and heir; copies whereof were dispersed in several hands, which might hereafter be published to the injury of the author, and disadvantage of the publick'. With reference to his own cases, Holt merely added 'The three modern cases are conceived to be of some use, therefore are thought fit to be published; and if they shall be found to be of any benefit, its [sic] what is desired by the publisher thereof.'[48] Holt's opinion in *Ashby v White* also appears to have made it into print soon after he gave it; McAlpine's catalogue of Chief Justice Lee's library at Hartwell shows that Lee owned at least two copies of the case published in 1705, one of which contained 'MS. notes on the fly-leaf.'[49]

Yet Holt was not only motivated to write by fear for his reputation; he was, in many ways, creating a new genre of legal literature with his work, a genre of literature that reflected the shifting nature of the role of lord chief justice within not only the legal profession, but also politically and constitutionally within the state. Holt's opinions are our gateway into understanding what he thought the point of the law, and lawyers, was in late Stuart society. Where he got those ideas, and what he thought they were, will be the subject of our next chapter.

---

[47] J. Holt (ed.), *A Report of Divers Cases . . . Collected by Sir John Kelyng . . .* (1708). Notably, Holt's opinions in *Armstrong v Lisle* and *R v Mawgridge* are not to be found in the manuscripts we are studying.
[48] Ibid., p. ix.
[49] McAlpine, *Hartwell Catalogue*, p. 17.

Who wants a cure for a nasty Wife?
Here's your nice Family Amusements for Winter Evenings.
Who buys here?
Murder hey? do I use you Bitch, is not bigger than my Thumb!
Help! Murder for God sake, Murder!
JUDGE THUMB.
or — Patent Sticks for Family Correction; Warranted Lawful!
Butler
Pub.d Nov.r 29.th 1780. by W Humphry N.o 227 Strand

Figure 1.

Chapter 4: Learned Men's Opinions from Ancient Times, Still Extant in Writing

4.1 Introduction

In the second chapter of his *History of the Common Law of England,* Matthew Hale set out to describe the *lex non scripta* - the unwritten, 'common or municipal' law - that existed within the kingdom. Hale found himself at a disadvantage from the outset though, admitting that the term 'unwritten' was inherently misleading: 'I do not mean as if all those Laws were only Oral, or communicated from the former Ages to the later, merely by Word', he explained, for instead 'all those Laws have their several Monuments in Writing, whereby they are transferred from one Age to another'.[1] This was an important point for Hale; acts of parliament were not the only source of documented law in the land. Not to be outdone by their civil law and continental rivals, English common law judges had their own equivalents to 'Canons, Decrees and Decretal Determinations' in the form of 'Records of Pleas, Proceedings and Judgments', not to mention 'Books of Reports' recording the decisions of their predecessors. Hale also identified another type of document that contributed to the *lex non scripta*: those 'Tractates of Learned Men's Arguments and Opinions, preserved from ancient Times, and still extant in Writing'. It is these sort of texts that will form the basis of our investigation here.[2]

This chapter explores Holt's contribution to the 'unwritten law' of the country in the form of his manuscript opinions; documents which represent his best surviving 'monument in writing', and through which, as we saw in the previous chapter, he was able to communicate 'from the former ages to the latter'. Our analysis is primarily an attempt to engage with those scholarly studies of the seventeenth century which have focused on the wider political and constitutional implications of the common law system on the development of the English state. The major works in this field have concentrated on the importance of an idiosyncratic 'common law mind', that is, the impact of a specific type of customary jurisprudence on the broader political conscience of the educated classes, in explaining why seventeenth-century clashes over the nature of the constitution, and attempts to locate the source of sovereign authority within it, often centred on debates about its historical form. Although Holt left no treatise in the same manner as his predecessors Hale and Coke, we will attempt to show that Holt's 'common law mind', to the extent that such a thing ever existed, can be excavated from his opinions, documents where he recorded his understanding of the sources, function, nature and exercise

[1] Sir Matthew Hale, *The History of the Common Law of England*, ed. C.M. Gray (Chicago, 1971), p. 16. Hale's work was first printed in 1713.
[2] Ibid., p. 16.

of the common law, and common lawyers, in relation to the government and constitution of the kingdom.

Holt's potential relevance to contemporary academic discussions of early modern law and politics has been underappreciated, not least because most of the existing literature on this subject stops short of engaging properly with events beyond the 1670s. It is another objective of this chapter to begin to redress this imbalance, assisting in attacks on the existing 'teleological intellectual narrative' which claims that 'little of interest happened between Hale and Blackstone.'[3] In that vein, Matthew Hale, whose work we opened with, has been called 'the principal conduit by which much of the substance of Coke's and Selden's "constitutional" thought found its way into Restoration and early Hanoverian jurisprudence.'[4] Yet it was Holt's career, not Hale's, which stretched from the 1660s to the dying years of Queen Anne. The importance of his role as a 'conduit of constitutional thought' from the Restoration into the Augustan Age will be the final target of our investigation. We will attempt to establish the nature of the intellectual debt that Holt owed to his predecessors, and the extent to which he was forced to innovate in the face of shifting political and constitutional circumstances in the years following 1688.

Setting the historiographical scene for our investigation is a challenging task. Existing studies of the development and importance of common law jurisprudence in relation to England's seventeenth-century political traumas are not easily summarised, not only because of their number, but also because of the variety of different - sometimes interconnected, sometimes less outward-looking - academic disciplines that they have emerged from. The foundational secondary literature for our research neatly illustrates this point. J.G.A. Pocock's *The Ancient Constitution and the Feudal Law*, something of an ur-text for our purposes, has been variously described as a work of political theory, constitutional historiography and a study of English historical thought.[5] So influential has this work been, that even today writers on the subject of law, history and politics struggle to escape from its shadow. Alan Cromartie's more recent work has taken the form of an intellectual biography, and an essay on history and politics. Both texts have appealed to mainstream historians of English Civil Wars and Restoration, even though they focus specifically on the importance of the common law intellectual culture in these political processes.[6] Philip Hamburger on the other hand is a legal historian. His colossal 2008

---

[3] G. Owers, 'The Common Law Mind and the Eighteenth Century', *History of European Ideas*, vol. 40, (2013), pp. 598-601.

[4] J. Adamson, 'Review: A. Cromartie, Sir Matthew Hale 1609-1676: Law, Religion, and Natural Philosophy', *The Cambridge Law Journal,* vol. 55 (1996), pp. 141-144.

[5] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law,* 2nd edn. (Cambridge, 1987).

[6] A. Cromartie, *Sir Matthew Hale 1609-1676, Law, Religion and Natural Philosophy* (Cambridge, 1995).

study *Law and Judicial Duty* represents an attempt to contextualise the power of judicial review exercised by today's U.S. judges through an analysis of their English predecessors' ability, or duty as Hamburger sees it, to interfere in decisions made by government throughout Anglo-American history.[7] Hamburger is not alone in this sort of approach. Part of the reason why so much of the scholarship on law and politics in early modern England emanates from the United States is the apparent relevance of these academic discussions to contemporary struggles over the power of the judiciary to strike down the actions of the executive or the determinations of the legislatures within the politically charged atmosphere of U.S. constitutional debates. In itself, as we shall see, this is a suitably early-modern approach to political life in its didactic use of legal history. Both Hamburger and Cromartie have engaged with Pocock's now classic thesis: before we can do the same, it will be necessary to summarise the arguments found in *The Ancient Constitution and the Feudal Law*, as well as the responses that have been made to them by subsequent writers.

4.2 The Ancient Constitution and the Feudal Law

The principal pillars of Pocock's argument are threefold. The first is that political arguments over the location of sovereignty in seventeenth-century England were made not by appeals to abstract theories of natural law, or concepts of what could, or should be, but instead were settled by reference to 'the 'existing' municipal laws of the country', or how things were, and seemingly always had been.[8] In practice, this meant arguing – for instance – that because parliament existed in the form that it did in the 1600s, it could not be altered or dispensed with on the whim of a king, since it must have always formed a vital part of the nation's constitutional fabric. This method of reasoning was apparently the result of a particular quirk in English intellectual life: the existence of what Pocock calls a 'common law mind', with its emphasis on custom, prescription, and the resulting authority of antiquity. The common law mind mattered because of the way it forced Englishmen to think about their history, and their history alone. This was perhaps Pocock's main aim when writing *The Ancient Constitution*, to demonstrate the political significance of historiography, and how those concepts of history and historical change were fundamentally shaped by how a country thought its laws had been made.

According to this model, the impact of the common law mind on English historical understanding was profound. 'As a key to their past the English knew of one law alone', Pocock claims, 'for the records and histories of England did not reveal that any other law had been of comparable importance'.[9] And the crucial characteristic of this law - unlike in the other countries

[7] P. Hamburger, *Law and Judicial Duty* (Harvard, 2008).
[8] Pocock, *Ancient Constitution*, p. 17.
[9] Ibid., p. 30.

in Europe- was that it was purely customary. It was not the artificial or identifiable invention of a legislating prince, codifying emperor, or philosopher king, but an ancient heirloom; a treasure chest of accreted rules and liberties, whose origins could not be pinpointed accurately to any one moment in history. Like any inherited object with long forgotten foundations, its form and survival in the present were the only evidence of its existence and shape in the past, and vice versa. How things were, therefore, became the best guide to how things had been and should continue to be. As a result, Pocock argues, it became 'easy and natural' for Englishmen 'to believe that everything in the constitution was rooted in immemorial usage.'[10] By comparison, the French - with their mixed traditions of customary *and* written law - were not similarly seduced. Once they 'began to think historically of their written law', by which Pocock meant that they understood laws to have been created and altered by men in the past to suit the ever-shifting needs of a changing society, 'they were bound to make some extension of this way of thinking to their customary law as well'. This, 'acted as a check to any tendency they may have had to represent the whole of their law as immemorial custom', a tendency which, Pocock tells us, 'ran riot' in England.[11] The result of this was the creation of an English common law *mentalité*: an ahistorical epistemological prison in the minds of educated Englishmen, one which profoundly limited and retarded the development of a school of English historical thought, and that had a huge impact on the direction of institutional, constitutional and political conflict.

This point having been established, the second pillar of Pocock's thesis concerns what happened when the intellectual petri dish of the common law mind was subjected to the political heat generated by the struggles between Crown and parliament, beginning with the rule of the Stuarts. The result was the crystallisation of the concept of an 'ancient constitution', a phenomenon supposedly championed by, and best evidenced in, the writings and career of Sir Edward Coke. Pocock claimed that in the face of 'the increasing activity of a nearly sovereign monarchy', an emerging constitutional threat that the immemorial common law mind was supposedly incapable of accommodating on account of its novelty, Coke and other common lawyers like him were forced to respond in kind. They did this, so they thought, in order to protect the legal inheritance of free-born Englishmen from royal interference, a response that was dictated by their common law understanding of the past. Coke emphasised that those threatened laws and liberties were not only immutable by their antiquity, but redefined that antiquity to mean immemorial in the extreme sense of 'traceable to no original act of foundation'. 'The idea of the immemorial', Pocock argued, 'therefore took on an absolute

[10] Ibid., p. 22.
[11] Ibid., p. 30.

colouring . . . one of the key facts in Stuart historico-political thought.'[12] One absolute claim to sovereign power had developed to counter another. The development of the common law was presented, or potentially reinvented, as the antithesis of civil or canon law: it was not the product or plaything of princes, since it predated their very existence. Nor was it the will or property of any one man, especially not the descendants of William the Conqueror, the legal nature of whose invasion in 1066 became a new focus for political anxiety. For common lawyers and their parliamentary allies, the origins of the authority of the law, and the location of absolute sovereign power within the English constitution, was hidden in the mists of time, far away from the eyes of covetous kings.

It is important to emphasise that Pocock was adamant that this way of thinking, which he dubbed 'ancient constitutionalism', was not cynical. Instead, it was an entirely natural, organic response. Englishmen 'heatedly asserted [it] as literal historical truth'. It certainly was not a 'party argument put forward by some clever lawyers as a means of limiting the king's prerogative', but instead 'the nearly universal belief of Englishmen.'[13] Coke, we must remember, was trapped in the cage of his common law mind, and was therefore unable to think truly 'historically' about the social or legal impact of seismic political events such as the Norman Conquest. He 'had no conception that in the early common law he was dealing with the law of a society organized upon feudal principles', or, as Pocock later put it more succinctly, Coke 'knew all there was to know about feudal law in England, except the single fact that it was feudal.'[14] Instead, Coke made no distinction between the past and the present; the law of his day was as it had always been. The possibility that the law might be the product of continuous development in the face of changing historical circumstances was 'altogether suppressed.'[15]

There is a paradox to this element of Pocock's argument though, something that he himself identifies, but has not allowed to alter his theory. As Pocock admitted, 'If the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people; and it might seem that there was no theory more likely to lead to a historical conception of the nature of law'.[16] Crucially for our purposes though, Pocock did not so much answer this potential criticism of his thesis as simply double-down on the claims he had already made:

> Yet the fact is that the common lawyers, holding that law was custom, came to believe that the common law, and with it the constitution, had always been exactly what they were now, that they were immemorial: not merely that they were very old, or that they

[12] Ibid., p. 37.
[13] Ibid., pp. 37-54.
[14] Ibid., pp. 45-64.
[15] Ibid., p. 45.
[16] Ibid., p. 36.

> were the work of remote and mythical legislators, but that they were immemorial in the precise legal sense of dating from time beyond memory-beyond, that is, the earliest historical record that can be found.[17]

Coke was not alone in this fault in his thinking. His 'vast influence', so Pocock argues, which was 'after all partly posthumous' provides definitive evidence that his 'common law interpretation of English history' was 'a safe guide to the thought of his profession'.[18] It was a mode of thought that once implanted within the Inns of Court, spread 'to become a general belief in the gentry they did so much to educate', as if it were a virus.[19]

The third and final pillar of Pocock's argument centres on when and why certain individuals managed to break free from the limitations imposed on them by their common law minds, and how successful they were in doing so. If ancient constitutionalists were categorically not cynical about their understanding of the past, then apparently their royalist rivals expressly were. Those royalist writers relied on 'the rediscovery of feudalism' that steadily occurred over the course of the early seventeenth century for their political ammunition. This re-emergence of a feudal narrative within English historical thinking was spearheaded by antiquarians working in conjunction with continental scholars, men like Sir Henry Spelman. Spelman's intellect was not as 'misdirected' as Coke's, Pocock argues, since despite being trained in the common law, his early retirement to a life of erudition in the country permitted him a 'more detached', 'scholarly' and 'critical' approach to English legal history.[20] He was therefore intellectually free to undermine the absolute claims to the immemorial nature of English customary law made by the ancient constitutionalists, and demonstrated, with reference to the laws of other European nations, that the common law was likewise an identifiable product of a historical process of change.

Royalist writers such as Robert Brady writing in the 1670s seized on Spelman's earlier scholarship, and used it as a stick with which to beat their political rivals. As Pocock explains, Brady was able to 'tax the battered champions of the common-law tradition with not knowing what they mean[t] by immemorial', which was highly significant, since if the whig writers could not prove that 'the law of England had existed before the island was inhabited', then it necessarily followed that 'the laws that had first instance had been made by some man, empowered by God to do so and consequently sovereign, whose heirs were sovereign to this day'.[21] Practically speaking, this meant that the law was in the hands of the Charles II, a fact his supporters could use to legitimise the politically contentious *quo warranto* proceedings being

---

[17] Ibid., p. 36.
[18] Ibid., pp. 45-46.
[19] Ibid., p. 31.
[20] Ibid., p. 94.
[21] Ibid., p. 190.

embarked upon at the time. In this context, as had been the case earlier in the century, the significance of 1066 came to the fore. Those opposed to royal policy, common lawyers and whigs alike as Pocock sees them, 'angrily denied the occurrence of a Norman Conquest', on the basis that 'if William I in the eleventh century had ruled with absolute power, there was nothing to prevent Charles II in the seventeenth from revoking every law and liberty ever granted by the kings of England'.[22] In the face of this royalist onslaught against ancient constitutionalism, even Sir Matthew Hale was apparently forced to reject the royalists' awkward deployment of historical reality, and deny the fact of the Conquest. This was despite his apparently being 'subtly aware of the processes of history', unusually for a lawyer.[23]

Brady's work, on the other hand, comes in for far greater praise from Pocock. He was 'in the forefront of the historical thought of his age', and a man whose feudalist interpretation of history, along with Spelman's, 'must . . . be jointly reckoned as one of the most important occurrences in the history of our historiography'.[24] Indeed, Pocock believes that these royalist writers might have ushered in a new, 'modern' era of truly historical thinking in England, had political events not overtaken them. Instead, we are told, 'when the cause for which they fought was rejected for ever in 1688, their attitude to history was rejected with it and prevented from exerting its full influence on the course of English thought'. As Pocock laments, 'the heirs of Spelman died beaten and broken men, perishing among the spears of triumphant Whiggery'. 'With their defeat', he concluded, 'ended the first serious attempt to give feudalism its proper place in English history, and there was not another until the nineteenth century, when the task was successfully accomplished by historians whom we may feel to be still our own contemporaries.'[25]

From our reading of Pocock so far, we would be justifiably surprised to find any overt acknowledgement of the transformative legal impact of William I's conquest, or identifiably 'modern' historical methods of thought in Holt's opinions, dating as they do from after the watershed of 1688, and the triumph of ancient constitutionalist thought. Yet it would be unwise immediately to subject Holt's writings to Pocock's thesis without first considering one of the main responses to *The Ancient Constitution and the Feudal Law* that has emerged since its publication over sixty years ago. In his 1995 work *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy*, another one of our key secondary texts, Alan Cromartie engages with Pocock's arguments in relation to his comments on Hale, as well as Hale's predecessors Coke

[22] Ibid., p. 189.
[23] Ibid., p. 189.
[24] Ibid., p. 198.
[25] Ibid., pp. 210-227.

and Selden. Cromartie agrees with Pocock's assertion that English legal culture fundamentally shaped the nature of political debate in the seventeenth century, going as far as to say that lawyers were 'grammarians' of the 'language of political thought'. In fact, Cromartie claims, 'The English treated common law as a kind of political science, describing not just how things were, but how they ought to be.'[26] In this model, Sir Edward Coke takes on the role of an early-modern Cicero, convinced as to the perfection of the common lawyer's mind as the repository of historic custom: the complex set of his legal rules and precedents for how the kingdom should be governed, unintelligible to those not versed in the teaching of the Inns of Court.[27] This was because only common lawyers possessed the special ability to discern the 'reason' behind this complex ancient custom; the rationale, or logic that made the common law the natural law for England, and therefore 'the proper language of political debate.'[28] It was the strength of this 'reason', translated into and exercised though judicial opinions by lawyers like Coke, that gave the common law and its officers their unquestionable authority, and superiority, over rival claimants to jurisdictional pre-eminence within the kingdom.

Yet Coke's arguments that the seventeenth-century English common law's authority lay in its 'reason' were vulnerable to claims that many of the central features of the system had in fact been largely introduced from eleventh-century Normandy. The foreign origins of the common law also undermined the jurisprudence of Coke's contemporary John Selden, whose antiquarian scholarship stressed the peculiarly local, English nature of the common law as the source of its authority. It is on these points that Cromartie first engages directly with Pocock's study. Cromartie is happy to accept Pocock's assertion that 'a host of writers', during the seventeenth century, 'vigorously denied that William had been a conqueror', and that, 'The intellectual habits created by the English legal system, which was deemed to be immemorially ancient, made it hard to grasp that English institutions had been imported wholesale from feudal Normandy'.[29] But Cromartie goes further than Pocock in acknowledging the complex variety of reasons behind these writers' denials of William's conquest. In the first instance, there was the apparent contradiction that such denials were 'seldom or never found in the royalist propaganda of the period.'[30] This point can be interpreted in a number of ways. It certainly could be said to reinforce Pocock's assertion that the common law mind was not simply a matter of political convenience. Yet in an early response to Pocock's work, Quentin Skinner denied this outright. He identified a tradition of mainstream seventeenth-century English chronicle writing, in which

[26] Cromartie, *Hale*, pp. 11-12.
[27] Ibid., p. 16.
[28] Ibid., p. 32.
[29] Ibid., p. 33.
[30] Ibid., p. 33

the reality of the Norman Conquest was regularly spoken of without complication.[31] For Skinner, Pocock was wrong in not attributing a political motive to the claims of the ancient constitutionalists. The only context in which the Conquest was denied, as far as he was concerned, was that of political debate. In Cromartie's eyes though, Skinner's article 'rather intemperately implied that the Whig orthodoxy was a conscious 'fabrication' of a convenient 'bogus' past.'[32] With this in mind, Cromartie instead attempts to chart a *via media* between the rival interpretations of both scholars. 'The two varieties of explanation are not . . . mutually exclusive', he argues. Instead, 'it is entirely possible that fear of an inherited sovereignty accompanied rather than caused the eccentric historical outlook produced by Pocock's 'mind'.'[33] Whether Pocock's 'mind' actually existed though is not something that Cromartie sets out to challenge. Instead, in his initial explanation and assessment of Pocock's analysis of Sir Matthew Hale's failure to think 'historically', the two writers seem to be in almost total agreement. As Cromartie explains, the English, 'had no sense, with honourable exceptions, that . . . social life had once been feudal, or that the feudal order was an import, unknown before the year 1066.' Of course, 'The law's provisions might . . . be changed', he acknowledges, or 'might even undergo complete renewal, but the changes detected were gradual, and the common law as a system was immortal.' Importantly, 'This ruled out 'catastrophic breaks', and excluded a view of the past as essentially foreign'. This failure of seventeenth-century historiography was important in the eyes of both scholars, for in order to be able to, 'see their history more historically', the English first, 'needed to examine it as alien: to treat medieval England as a 'society', a cultural structure with its own dynamic, created by its own imported laws.'[34] Their inability to do this helped to explain Hale's apparent failure in his *History of the Common Law of England* to accept the Norman Conquest for what it was. 'His intellectual blindness, as Pocock rightly saw', Cromartie states, 'was intimately linked to his professional habits of mind.'[35] This was odd though, since 'Hale was plainly a man of enormous and critical learning, ideally equipped for proper historical work.' He also, 'lacked a political motive for denying the Normans their due', given his argument that the English had in fact consented to William's rule, rendering his legal rights by conquest a moot point. For Hale then, 'the Conquest was irrelevant to Stuart political life', and as a result, the chapter concerning the events of 1066 in his *History of the Common Law* 'reflected quite a motiveless obsession.'[36]

---

[31] Q. Skinner, 'History and Ideology in the English Revolution', *Historical Journal*, vol. 8 (1965), pp. 150-178.
[32] Cromartie, *Hale*, p. 34.
[33] Ibid., p. 34.
[34] Ibid., p. 108.
[35] Ibid., p. 109.
[36] Ibid., p. 108.

Not entirely motiveless though. Cromartie did raise one 'quibble' with Pocock's view of Hale. Those who argued for radical reform of the law, John Hare, John Milton, and levellers such as John Lilburne, all spoke of the need to throw off the Norman 'badge of servitude'. It was the reasoning of these dangerous radicals which was perhaps the true target in Hale's 'rejection' of the Conquest. Cromartie did not develop this point any further though, and overall seems generally happy to tow the Pocockian line: 'This minor objection apart', he says, 'the thrust of Pocock's argument is sound.' Hale 'wanted to present the law as rational and willed, as artificial reason, as well as the fruit of consent.' Moreover, in 'showing how a law conformed to reason', Hale 'offered a Whig history of the rule, the teleological story of how the rule in question came to be.' As Cromartie concluded, 'In setting out to characterise law, Hale gave a Whig account of the legal past. He was not 'doing history' at all, if history is defined in Pocock's terms.'[37] In the next section of this chapter, we shall begin to put Pocock's terms to the test.

4.3 Pushing beyond Pocock

It is a central claim of this thesis that we need to move beyond Pocock's definition of 'history' and the 'common law mind' if we are to better understand the political behaviour and constitutional significance of men such as Hale, and much more importantly, his successor Holt. To do this, we must re-contextualise the intellectual, institutional and political atmosphere in which seventeenth-century lawyers made their claims about the history and authority of the law. We must show that their training was neither an intellectual cage that rendered them incapable of processing the concept of historical change, nor a frame of mind that naturally led them to identify royal sovereign authority as the common law's natural enemy, or parliament as its natural ally. Finally, we need to challenge Pocock's claims to the extent and nature of common lawyers' isolation and ignorance of continental political and constitutional theory, and the precise nature of contemporary attitudes towards the uses and dangers of civil law, and natural law theory.

We are not the first to come to these conclusions. Pocock set out to deal with existing criticism of his work in a retrospect to the second edition published in 1987, where he attempted to reinforce his particular claim that ancient constitutionalist arguments were the response of an unconscious *mentalité* to the political upheavals of the period, and not the result of partisan thinking. However, in his review of the re-issue, Chris Brooks noted that the examples Pocock gives to back up his claims on this point just as easily demonstrate that common lawyers had

[37] Ibid., p. 109.

indeed discovered 'the possible constitutional significance of the idea of immemorial custom', and that they had deployed it accordingly in parliament's favour.[38] Going further, Brooks identified perhaps the greatest blind-spot in Pocock's thesis, namely the lack of allowance 'for the impact of juristic humanism on English legal thinking or for the common currency of Aristotelian and natural-law modes of thought'. 'Furthermore', Brooks continued, Pocock had done nothing in his retrospect to 'test his original proposition that ancient constitutionalism was likely to be part of the mentality of the 'typical educated Englishman' of the age, not to mention the uneducated.' In conclusion then, as far as Brooks was concerned, 'a 'common-law mind' based exclusively on ancient constitutionalism' was 'too narrow an analytical category to be of much use in aiding our understanding'.[39]

Brooks had in fact taken aim at Pocock's claims to the insularity of English common law thinking as early as 1976. In an article written with Kevin Sharpe, he stressed that 'in the late sixteenth and early seventeenth centuries English lawyers were less confident about their legal code, and more aware of the influence of continental and civil law upon the common law' than Pocock and other writers, notably D.R. Kelley, had allowed for.[40] Highlighting the late-Tudor increase in central court litigation, Brooks and Sharpe noted that there had been considerable anxiety about the common law's ability to deal with the political, social and economic demands being placed on it, on account of the system's apparent 'uncertainty', i.e. being based on the opinions of individual judges, and lack of codification. 'It is true', the authors noted, 'that ideas about law reform stopped short of consideration of the civil law as an alternative to the English legal system.' There were apparently a number of reasons for this, most notably the early seventeenth-century association of civil law with arbitrary government, an important theme to which we shall return.

Reform was needed though, and in the face of such demands for certainty within a common law system, it had been Sir Edward Coke who responded by elevating past decisions to the status of rules which would bind judges in the present. In this he was undertaking a major innovation, an innovation that Pocock seems to have mistaken for the norm. As Brooks and Sharpe highlighted, 'reason, not history' had been the common lawyer's guide to their decision making in the medieval and Tudor past. This was not Coke's novel brand of reason, requiring the precise invocation of ancient custom, but a far looser frame of mind involving 'the application to particular circumstances of a set of principles or maxims which had their

---

[38] C.W Brooks, 'Review: J.G.A. Pocock, The Ancient Constitution and the Feudal Law', *The English Historical Review*, vol. 105 (1990), pp. 733-735.
[39] Brooks, 'Pocock Review', p. 734.
[40] C. Brooks and K. Sharpe, 'History, English Law and the Renaissance', *Past & Present*, no. 72 (1976), pp. 133-142.

standards of proof in divinity, natural law and philosophy.' 'Given this outlook', they concluded, 'change could be accommodated easily.'[41] In this sense, Spelman's scholarship looked back to a common law intellectual tradition that pre-dated Coke, before the era when the particular political crises of the early seventeenth century temporarily erased the scope for doubt within the law, and demanded concrete historical guidelines for contemporary constitutional action. This argument has important consequences for our understanding of Holt's attitude towards reason, and especially its relationship to natural law theory, as well as history and change in the latter half of the century.

The importance of placing English legal thought into its broader European context, and the influence of natural law on educated society more generally has also been recognised by other scholars. Johann Sommerville notes that there was 'very wide agreement among Englishmen on the existence of a natural law inscribed by God in the hearts of men and discoverable by reason'.[42] On this basis, he argues that the political struggles of the early seventeenth century can be better understood as ideological, not primarily historical, battles between natural-law absolutists and their constitutionalist rivals. In this model, absolutists deployed arguments from a patriarchal natural law tradition - kings made laws as a father governs his family - while the constitutionalists emphasised the existence of a contractual relationship between ruler and the ruled that was voidable. Yet Somerville simultaneously emphasises the intellectual separateness of common lawyers from these sorts of theories: 'In general, common lawyers were concerned to defend the legal rights of Englishmen, not the natural rights of all men... they viewed the common law as an amalgam of custom and reason, of past English practices and universal moral truths'.[43] Unlike in Pocock's assessment however, Sommerville argues that lawyers like Coke remained aloof from the debates surrounding the importance of the Norman Conquest, a consequence of his belief that 'even absolute rulers . . . would later have become subject to customary limitations', which led Coke to elevate the common law 'which was customary, above both prince and people.'[44]

Ian Campbell's more recent article *Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland* presents us with a thought-provoking alternative model of Pocock's *mentalité*, one that integrates both common law constitutionalism and models of political discourse found in the rest of Europe.[45] The launch pad for his reassessment is the recent work of another

[41] Brooks and Sharpe, 'History, English Law, Renaissance', p. 136.
[42] J.P. Sommerville, *Politics and Ideology in England, 1603-1640*, 1st edn. (1986), pp. 14-15.
[43] Ibid., p. 106.
[44] Ibid., pp. 88-105.
[45] I. Campbell, 'Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland', *The Historical Journal*, vol. 53 (2010), pp. 573–591.

scholar, Janelle Greenberg, whose 2001 text set out to question nearly all of the original categories of Pocock's earlier argument.[46] In her work, she emphasises the similarities between English and continental ancient constitutional theory, arguing that the common law was in fact considered to have an identifiable father figure in the person of Edward the Confessor, a feature normally only thought to be found in civil law jurisdictions.[47] Moreover, she points out that English ancient constitution discourse was not incompatible with broader natural law contract theory. This is because 'time out of mind' and the 'immemorial' law did not mean a point in the past that was unidentifiable, as Pocock argues Coke and others understood it, but instead referred specifically to the date of the beginning of paper records, or 'artificial memory', set at 3 September 1189 (the coronation of Richard I) by the statute of Westminster in 1275.[48] In this sense, 'old' or 'ancient' did not mean so far in the past that no contract could possibly be identified, but merely older than a specific date, a time from which some written documentation, notably the Domesday Book, was known to survive.

Campbell takes Greenberg's findings as evidence that the time has come to 'revisit an old argument against Pocock for a single Aristotelian mentalité underlying all ancient constitution discourse.'[49] This argument originated with the work of Zachary Schiffman in the 1980s.[50] As Campbell explains, Schiffman's main interests lay in the work of sixteenth-century French lawyers and historians. He was 'unconvinced' though, by 'Pocock's account of their proto-modern historical consciousness.'[51] Instead, he argued that 'Aristotelian metaphysics underlay the way that medieval and early modern Europeans thought, argued, and wrote about the past.'[52] This 'Aristotelian historical consciousness' involved the process of a nation or institution 'unfolding' in 'a predetermined form according to its essence.' Writing political or legal history then 'meant discovering the unchanging essence of a thing, depicting the unfolding of this essence over time and sometimes, in cases of decay, calling for a return to original purity.' Modern historical consciousness, by contrast, 'left Aristotelianism behind', and depended on the concept of evolution, where a nation or institution was understood to be moving 'from one state of being to another, depending on its interaction with its environment.' French historical

---

[46] J. Greenberg, *The radical face of the ancient constitution: St Edward's 'laws' in early modern political thought* (Cambridge, 2001).
[47] Ibid., p. 9.
[48] Ibid., p. 22.
[49] Campbell, 'Aristotelian Ancient Constitution', p. 580.
[50] See the following by Z.S. Schiffman, 'Renaissance Historicism Reconsidered', *History and Theory*, vol. 24 (1985), pp. 170–82; 'Etienne Pasquier and the Problem of Historical Relativism', *Sixteenth Century Journal*, vol. 18 (1987), pp. 505–17; 'An Anatomy of the Historical Revolution in Renaissance France', *Renaissance Quarterly*, vol. 42 (1989), pp. 507–33.
[51] Campbell, 'Aristotelian Ancient Constitution', p. 580.
[52] Ibid., p. 581.

writers therefore had not been more 'modern' than their English counterparts in their use of primary sources: they too were simply seeking to discover the 'essence of existing institutions, such as parlement, the Gallican church, or the crown.' Pocock had 'confused the presence of modern historical method with modern historical consciousness.' In addition, Campbell argues that Brooks, Sharpe and Hans Pawlisch were all right to argue that 'Pocock's account of an English legal profession so dominated by the common law mind that they chose to have nothing to do with continental legal theory was inaccurate.' Instead, English lawyers 'frequently resorted to continental theory and indeed Roman law'.[53]

Campbell concludes his article by arguing that these criticisms of Pocock's thesis could be brought together by 'turning to Aristotelianism', in that the 'European elite's shared education in Aristotelian metaphysics explains why ancient constitution discourse occurred all over Europe.'[54] In this international model, political writers were only able to 'defend or attack particular institutions, such as kingdoms, courts, or churches' by searching 'that institution's past for indications of its essence.' To demonstrate beyond doubt that 'the essence of an institution was as it was claimed' it would be necessary to claim that that 'essence' had 'remained constant throughout the existence of the institution.'[55] This, then was what lay behind claims to the immemorial nature of the English constitution, and the nature of the historical relationship between Crown, parliament, Church, courts and people. It also helps to explain why writers such as Jean Bodin, who wished to defend the concept of strong monarchy, went beyond merely questioning French history, but attacked the very concept of Aristotelian mixed government itself. Holt referenced Bodin's *Les Six livres de la République* in his opinion in *City of London v Wood* [1702], where he praised the Frenchman's insistence on strong government at a local level, a model that England's urban corporations should follow for the good of the kingdom.[56] Campbell has noted that 'Bodin's doctrine of sovereignty allowed him to claim that the only real choice in government was between pure monarchy and several varieties of democracy, a form of government widely despised. 'Moreover', Campbell argues, 'there was no place in this new political metaphysics for the ancient constitution.'[57]

---

[53] Ibid., p. 582.
[54] Ibid., p. 583. In this sentiment he is joined by Chris Brooks: C.W. Brooks, 'The place of Magna Carta and the ancient constitution in sixteenth-century English legal thought', in E. Sandoz (ed.), *The roots of liberty : Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, 1993), pp. 75–88, at pp. 81-83; and J.W. Tubbs, *The common law mind: medieval and early modern conceptions* (Baltimore, 2000), pp. 46–52, 71–2, 80–2, 93, and 167–78.
[55] Campbell, 'Aristotelian Ancient Constitution', p. 583.
[56] City of London v Wood [1702], *Hardwicke III*, f. 13r.
[57] Campbell, 'Aristotelian Ancient Constitution', p. 586.

Where does this leave us in terms of our analysis of Holt's opinions? First, it helps us to understand the sorts of questions we need to ask about Holt's intellectual inheritance. On the one hand, we will need to probe Holt's understanding of history, and the process of historical change on the institutions and constitution of the kingdom. Put simply, is there any evidence that he believed in an immemorial, ancient constitution in the manner that Pocock understands it? If not, what did he believe? On the other hand, we need to test the insularity of Holt's common law mind. Was he immune to scholarship that fell outside of the common law canon? What was his attitude to civil or natural law theory? Did he comment on the laws of other European nations, and how did he think they compared to the law of England? Then there is the question of why Holt held the opinions he did. Are they identifiably the result of his understanding of the jurisprudence of his predecessors? Or does he go further than Coke, Selden, and Hale? Finally, and bridging these areas of investigation is another question: what did Holt mean when he spoke of the 'reason' of the law? Was it the historic evidence of the superiority of the common law as the political science of the country, an 'artificial reason' as some writers say Coke saw it? Or was it a more philosophically and ideologically fluid concept, linked to concepts of a universal natural law? Put another way, was Holt's reason customary, or Lockean? It is on the central question of Holt's understanding of 'reason' that we shall begin our investigation.

4.4 'The Reason of the Law is the Law'

Holt believed that the authority of his judicial opinions lay in the quality of the reasoning that he deployed to support them. At its most basic level, this is what Holt meant by reason; it was a measure of the soundness of the intellectual foundations of a judgment which made that judgment enforceable as correct law. Reason was the scales upon which the law was weighed, and might be found wanting. As Holt noted in one of his opinions, 'That law which allows a man a temptation to excuse himself by perjury is repugnant to right reason': it could, therefore, not be law.[58] Holt was not alone in this assertion. Sir John Powell, echoing Holt's opinion in the case of *Coggs v Barnard* [1703], told the court, 'Let us consider the reason of the case, for nothing is law that is not reason.'[59] In this he, and Holt, were echoing Sir Edward Coke, who had stated in his *First Institute*, 'The reason of the Law is the life of the law, for though a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficiall knowledge'.[60] A result of this approach was that judicial opinions had to be assessed in a holistic fashion if their reason was to be discovered. As Holt explained in his opinion of *Gage v Acton*

[58] *The City of London v Wood* [1701-2], *Hardwicke III*, f. 3r.
[59] *Coggs v Barnard* [1703], 2 Ld. Raym. 909 (92 *ER* 107), at 911.
[60] Sir Edward Coke, *The first part of the Institutes of the Lawes of England*, 2nd edn., (1629), p. 183b.

[1700], a debt case in relation to an intestate's estate, selective reading of existing opinions could defeat or confuse their purpose:

> That would not be likely upon the authority but to reject it and invalidate it. The judges if they were alive would not think themselves at all complemented in taking only so much of their opinions you take and telling them they are mistaken in the reason of it, for when a case is resolved upon a distinction, no man can say the... distinction is put obiter, the distinction is the very ground and reason of the resolution, as much as the reason of the law is the law, and therefore if the resolution be good authority in the case of a promise, it is so in the case of the bond with a condition that is not released.[61]

Whether a judgement possessed sound reason though very much depended on the quality of the 'reasons' put forward to support it. It should come as little surprise then that Holt, especially in cases where he was breaking new legal ground or in pronounced disagreement with his colleagues, went to great lengths to clearly and methodically lay out the reasoning behind the 'reason' of his opinions. The case of *Lane v Cotton and Frankland* [1701] is a prime example. In 1697, £300 worth of interest-bearing exchequer bills went missing after being entrusted to the care of the post office in London. The new question raised in law was whether the postmaster-general was liable for the loss of the bills by the post boy, one Underhill Brees, before they had been delivered. Holt, contrary to his brother judges, was firmly of the opinion that he was:

> The letter office for all England, Scotland and Ireland etc. is erected by act of parliament. The master thereof is appointed by the king with a salary and other posts are prohibited by the act of parliament under a penalty . . . While the letter lay in the office it was opened and the exchequer bills taken out and carried away and are totally lost. The post master general must make satisfaction to the owner of the bills.[62]

From the very outset of his opinion, Holt was keenly aware of the power that his judgment could have on future legal decision making: his opinion, though dissenting, as that of the lord chief justice would effectively guarantee an appeal, the threat of which would often force parties to settle outside of court. Holt made it quite clear that the point under discussion did not include the question of whether a postman robbed on the highway would be similarly answerable for the loss of the bills, and in doing so, advertised the precision with which he was deploying his reasoning in the case at hand:

> That being not the case in question I have no authority to meddle with it but shall leave it as I found it . . . for the disquisition thereof doth require a more particular consideration and debate abstracted from the present point in question . . . of which if I should give any opinion it would be extrajudicial and therefore without the limits of my authority.

Having delineated the boundaries of his judicial assessment, Holt set out to make the case as to why the postmaster-general was 'bound to make the owner of the bills satisfaction for his

---

[61] *Gage v Acton* [1700], *Hardwicke III*, ff.80v.-89r., at f.88r.
[62] *Lane v Cotton and Frankland* [1701], *Hardwicke III*, ff. 89v.-f. 107v., at f.92r.

damage.'[63] The first and greatest reason was a constitutional one: the post master was a 'public officer' and 'by virtue thereof' was 'instructed with the property and interest of the subject.' Public offices carried with them the trust of the subjects of the realm, an almost sacred duty in Holt's eyes, and had been established for the benefit of the nation at large. This notion, that the function of the law was to assist the people and to remove barriers to the kingdom's prosperity, had been integral to Holt's understanding of the purpose of the act of parliament establishing the office of postmaster in the first place:

> . . . for the maintenance of mutual correspondencys and preventing many inconveniencys happening by private posts, several public posts had therefore been erected, the well ordering whereof is a matter of general concernment and of great advantage as well for the preservation of trade and commerce [64]

It was in 'the nature of the trust that is vested in this officer' that he should keep all packets and parcels safe until they were delivered. There was no difference between this responsibility and that placed on the warden of the Fleet prison to keep prisoners safe: 'What difference can there be between the cases', Holt asked, 'The sheriff, the marshal of the kings bench and the warden of the Fleet are public officers appointed by the law'.[65] What emerges from Holt's assessment of reason in these sorts of cases is his broad understanding of a judicial public good test necessary for the proper interpretation of the purpose behind parliamentary statutes. In this instance, countering narrower and more practical claims that the post office had been erected as a Crown money-making scheme, he argued that, 'though a revenue to the Crown was also designed, yet that it would not have been sufficient to have procured the act, unless it had also been advantageous to the people.'[66] It was the interests of 'the people' then that had to take priority.

We should not suppose that this interpretive approach stemmed only from Holt's concern for the consumer rights of the general public. This assessment of the reason behind statutory law was as threatening as it was laudatory: the inverse supposition was that a statute that was not obviously advantageous to the people would not be a reasonable statute, and might well have to be interpreted in a way that made it so. It was also a politically contentious position for Holt to take. The broader context of *Lane v Cotton & Frankland* concerned the importance of the role of the postmaster-general as one of the chief surveillance officers of the state. Indeed, so sensitive was the position that in 1691 Sir Robert Cotton and Sir Thomas Frankland had been appointed as joint postmasters. Cotton being a tory, and Frankland having whig sympathies,

---

[63] Ibid., f. 92r.
[64] Ibid., f. 92v.
[65] Ibid., f. 93v.
[66] Ibid., f. 98v.

this move was designed to counter, at least superficially, any overt partisan bias in the undertaking of the role, as well as to strengthen the Court party's hand in the wake of the contentious dismissal of their predecessor John Wildman. Frankland, in particular, would use the revenue from his post, which brought in an annual salary of £1,500 by 1711, to fund his political career.[67] Holt's emphasis on the liability of the postmaster for the illicit opening of the post was, therefore, highly politically charged, and struck at the heart of the government's attempts to use the post as an intelligence gathering operation. His opinion in this case therefore represented Holt's attempt to demonstrate his own powers of surveillance over the exercise of powers granted to the public officers of the state by parliament.

This is not to say that Holt's position was motivated predominantly by political bias or factional concerns. In the face of the development of state power in the post-revolutionary period, Holt seems to have delved into the first principles of the common law as he understood them in order to strengthen his hand, and the institutional power of his court, to counter those developing threats to what he saw as the core values of the common law system. As a result, Holt attempted to assess the 'reason' behind statutory law in the same way as he would a point of common law, the law of 'liberty and property' as he understood it, an approach which represented another point of departure from the puisne judges in the case of *Lane v Cotton & Frankland*.[68] There, Justice Gould argued that as the postmaster's office was 'founded in government' it was immune to any private claims for losses, not least because, as already mentioned, its primary purpose was to raise revenue for the government. Holt disagreed entirely:

> I would desire it might be explained what is meant by being founded in government, doth he mean that it is created by act of parliament? So is the marshal, warden of the Fleet and the sheriff for every county instituted by law as much as this, whether by act of parliament or common law there can be no difference in reason.[69]

What mattered to Holt was that:

> . . . by the institution there is a trust created for the benefit of every subject in England . . . if that trust be not performed by taking that care which is necessary to preserve the subjects property it naturally, rationally and justly follows that the subject suffering in his property by such negligence should have his action.[70]

Holt determined then that where there was a loss to property, the law 'must make some person liable'.[71] William Holdsworth, in his comments upon Holt's judgment in the case, thought this

---

[67] See 'Frankland, Thomas (1665-1726)' in D. Hayton, E. Cruickshanks and S. Handley (eds.), *The History of Parliament: the House of Commons 1690-1715* (2002); and 'Cotton, Sir Robert (1644-1717)' in B.D. Henning (ed.), *The History of Parliament: the House of Commons 1660-1690* (1983).
[68] *Savil v Roberts* [1699], *Hardwicke III*, f. 51v.
[69] *Lane v Cotton & Frankland* [1701], *Hardwicke III*, f. 94r.
[70] Ibid., f. 94r.
[71] Ibid., f. 94v.

reasoning was 'perhaps an instance of a strain of legal conservatism which . . . characterises some of his other decisions and dicta', relying as Holt apparently did on the law of employer's liability from 'the middle ages', when 'deputies of an official were in fact his servants employed and paid by him, and not servants of the crown'.[72] In the end, the view that prevailed was that of Gould and the other justices. Yet as Holdsworth went on to say, 'the immunity conferred upon departments of the central government by the established rule in many cases works injustice'.[73] Indeed, when applied to the political and constitutional circumstances of the early eighteenth century, Holt's 'medieval' line of reasoning would in fact prove radical. In the concluding remarks to his opinion, he certainly acknowledged that his judgement was likely to ruffle a few feathers:

> I have now done having given my reasons for my opinion, and as I think removed those objections that were laid in the way. I shall only borrow so much time... to repeat those reasons because the clearness of them may be observed by so much dust that I have been forced to stir.[74]

The dust may well have been literal as well as metaphorical. That Holt believed that good opinions were based on sound reason is not in itself surprising. The key question is, what did Holt believe the source of that reason to be? His concluding remarks in *Lane v Cotton and Frankland* offer us one clue:

> These reasons are not of my invention but ancient rules of the law extant in our books and have so far prevailed with me as to convince me that judgment ought to be given for the plaintiff.[75]

How these ancient books, which when disturbed from their long forgotten shelves were liable to get dust in the eyes of those apt to ignore them, influenced Holt's conception of reason in other cases is the next target of our investigation.

4.5 The Authority of Reason On the Record

The complexity of Holt's attitude towards the relationship between the reason of the law, and the authority of written legal precedent, particularly that found in law reports, can be neatly summarised in a line from his opinion in *Gage v Acton*: 'because authority may prevail more than force of reason, I shall among others mention one 5.Rep.70.'[76] In microcosm this one sentence introduces us to the nature of the intellectually slippery attitude of the judiciary towards legal records and reports in this period: these documents were not synonymous with the 'reason' of the law, nor were they automatically imbued with legal authority, despite being referred to as 'authorities' and 'evidence' for what the reason of the law was. When properly deployed though,

---

[72] W.S. Holdsworth, *A history of English Law* (12 vols., 1903-72), vol. VI, pp. 267-268.
[73] Ibid., p. 268.
[74] *Lane v Cotton & Frankland* [1701], *Hardwicke III*, f. 105v.
[75] Ibid., f. 106r.
[76] *Gage v Acton* [1700], *Hardwicke III*, f. 82v.

according to 'reason' or on account of the reasonableness of the reasons they contained, Holt clearly thought that the force of their authority might win the day. '5. Rep. 70', as Holt refers to them, were Sir Edward Coke's fifth volume of reports. These works enjoyed such a reputation in Holt's day as to be simply known as 'the Reports'. As Wallace highlighted in his description of them, even Coke's 'great enemy and rival, lord Bacon' was forced to acknowledge in his own words that, 'had it not been for sir Edward Coke's reports (which, though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over of cases), the law, by this time, had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time'.[77]

'A ship without ballast' is a neat metaphor, for like ballast in a ship, law reports were seen as crucial to providing a sense of stability as the law developed, but were not necessarily what held the ship together, nor did they dictate its course. This important distinction in relation to the authority that Holt thought should be placed on Coke's work is something to which we shall return. Part of the problem with relying on the judgments found in the written reports of the period stemmed from their unreliability, something we touched upon in the previous chapter. This practical defect in record-keeping had immensely important jurisprudential consequences. As Holdsworth noted, 'because the reports were made by private reporters . . . It was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed.'[78]

The boundary between 'bad law' and 'bad reports' was, therefore, profoundly blurred in this period, with the dividing line being each judge's to draw as they saw fit. Consequently, borrowing another aphorism from Bacon, Holdsworth opined that any 'rule' found in such reports, 'like the magnetic needle, points at the law, but does not settle it.'[79] These factors help us to explain and understand why Holt cited the variety of reports that he did. In addition to Coke's *Reports* (which he deployed more often than any other, and not always approvingly), Holt referenced his use of the reports by: Brooke (published 1578), Dyer (published 1585), Keilway (published 1602), Hobart (published 1641), Noy (published 1656), Bulstrode (published 1659), Croke (published 1657-1661), Yelverton (published 1661), Moore (published 1663), Jones (published 1675), Rolle (published 1675-6), Vaughan (published 1677), Palmer (published 1678), Aleyn (published 1681), Siderfin (published 1683-4) Saunders (published 1686), Hardres

[77] J. W. Wallace, *The Reporters*, 2nd edn., (Philadelphia, 1845), p. 22.
[78] Holdsworth, *History of English Law,* vol. XII, p. 154.
[79] Ibid., p. 156.

(published 1693), and Modern volumes I and II (first edition of volume I published 1682), as well as manuscript reports of Sir Orlando Bridgman and Coke's *Institutes*.[80]

Holt certainly did not cite all of these sources out of respect for them. Of Siderfin's reports, Holt is said to have commented that 'many good cases are spoiled in Siderfin; neither reported with that truth or with that spirit which the case required.'[81] Yet Holt also used these reports as evidence and authorities for correctly decided law when they matched or supported his own opinions, and deployed them accordingly to outmanoeuvre those with whom he disagreed. In *The King and Queen v The Bishop of London and Dr. Birch* [1694], a dispute between Queen Mary and Bishop Compton over the right to appointment to the living of the rectory of St James's, Westminster, Holt began by delving into the legal records so as to discover and explain the history of royal rights to such appointments:

> Now that this ground stands firm appears by the ancient way of making bishops, which are agreed to be of the king's foundation and patronage as he is king. And anciently the sole appointment of bishops did belong to him . . . [and] by the statute of 24. of H. 8. the chapter is bound to elect the person nominated by the king so that the ancient right is restored to the crown vizt. of having the sole nomination[82]

This, Holt said, 'may serve for a reason of the King's Prerogative'.[83] But Holt went further, and went as far back into the case law, using reports selectively, as he could:

> In Wright's case as it is in Moore 399. the judgment was given for the king upon the search of many precedents so that it appears that the law was held so at that time.[84]

Efforts to argue to the contrary, even citing reasons given in Coke's *Reports*, were rejected for lack of documentary authority:

> Only Lord Coke in *Caudrey's Case*, saith that tempore E. 3. it was so held, but in what year, what book or record doth not appear. But that it was constant practice cannot be made appear by any case that I can find before the Reformation. Indeed some question is made in *Dr. and Student* cap. whether it belonged to the king or the pope. The opinion is for the king.[85]

Indeed, it was from the historical documentary evidence provided by case law that Holt constructed the historical narrative for the long-term jurisdictional struggle that he believed this case to be part of, namely centuries of ecclesiastical disobedience to the common law of the land:

> And from whence this constant disobedience to the law did proceed is easy to be observed. It is because the clergy looking upon themselves as a distinct body wholly separate from all the rest of the subjects of England, thought themselves exempted from all secular jurisdiction, and that no temporal law could oblige them. And this appears by Kelw 8. H. 8. Standish's case, where the whole body of the clergy did stiffly deny that

---

[80] See Wallace, *The Reporters* for more information on each set of reports.
[81] Wallace, *The Reporters*, p. 40.
[82] *R&R v Bishop of London and Dr Birch* [1694], *Hardwicke I*, f. 16v.- f. 24v., at ff. 17v.-18r.
[83] Ibid., f. 18r.
[84] Ibid., f. 18v.
[85] Ibid., f. 18v.

> they were to be called before any secular judge. And this opinion was maintained until the statute of 24. H. 8. 25. which took away appeals from Rome, and directed in what manner Bishops should be made, namely by the king's nomination. This evil could not be redressed and the king's right could not be discerned having been obscured and his by so many usurpations of the Pope.[86]

The reason of these written records and reported judgements therefore was clear for all to see, and the weight of their legal reliability and authority added to by their repeated use over time:

> From 25. H. 8. to 39. E. l. 63 years, then was the judgment in Wrights case, which being a judgment in point and practiced ever since is of great authority. And when there is no authority against this but only a single opinion, and there is a judgment and practice with it, it is as great an evidence of the law as can be produced. And it would be a very bold attempt in us to shake that which is so solemnly settled.[87]

In declaring that that which was settled should not be shaken, Holt was expressing what Holdsworth understood to be a decidedly Cokeian sentiment: the view that 'the authority of decided cases must be respected, even though the judge thought they led to inequitable and inconvenient results.'[88] Further evidence of this attitude can be found in Holt's opinion in *Savil v Roberts* [1699], a case involving a claim against false accusations of riot at the quarter sessions for the West Riding of Yorkshire.[89] Holt felt that his brother judges had failed to identify the appropriate source of legal reason or authority to decide the case, and set out to solve the problem himself with recourse to case law:

> . . . this point doth not appear to have been fully settled notwithstanding the several authorities that come directly to justify the action, yet very learned judges have delivered their opinions contrary there unto, there to arrive at a full & clear decision of this question and if it be possible for the future to put it out of doubt, I shall consider the grounds & reasons of such actions and of those cases & authorities that have upon the debating of this question been urged to the contrary.[90]

For Holt, the solution to the new problem posed by this case lay in the old common law remedy of amercements, or fines, found in some of the earlier reports and records that he, and he alone, had consulted. As he explained:

> . . . the plaintiff was amerced *pro falso clamore* which was by the ancient wisdom of the Common Law (upon the reason whereof we are to judge) that a sufficient security against vexation, which if it had been practised according to the original institution would have prevented causeless actions.[91]

The problem in this instance though was that the use of this common law remedy had died out, 'as all other humane constitutions by time and age grew to be neglected, and their force by some predominant corruptions or neglects in the observance of them.' This, though, was no reason at all to abandon the authority and wisdom of the recorded rule:

---

[86] Ibid., ff. 20v.- 21r.
[87] Ibid., f. 21r.
[88] Holdsworth, *History of English Law*, vol. XII, p. 152.
[89] *Savil v Roberts* [1699], *Hardwicke III*, f. 47v.-f. 57r.
[90] Ibid., f. 48v.
[91] Ibid., f. 53r.

> But notwithstanding the neglect of that security which the Common Law had provided it become ineffectual, yet the reason of the Common Law must direct judges in their determinations who are not to introduce new remedies because the old by disuse are become ineffectual, for the rule of the Common Law is that none shall be punished for suing out the Kings Writs[92]

Again, the weight of recorded and reported authority in this case was enough to convince Holt that the decisions they contained conformed to 'the reason of the law':

> I think so many authorities grounded upon so great reason should be sufficient to settle this point in peace, and though the law will both encourage and justify men in the prosecution of suits and indictments so they do it fairly and not upon malice without colour, for that is making the process of law to be an instrument of oppression & vexation[93]

So far then, we have seen little evidence of anything in Holt's attitude towards the source of the reason of the common law that would trouble Pocock's thesis of the importance of precedent, prescription, and 'immemorial usage' in judicial decision making. Holt clearly scoured the legal archives for examples of judgements that he considered reasonable, saw evidence of 'reason' in, and gave special weight to, those opinions that had been relied upon consistently over time. This conception of common law reason also chimes with the assessment of Philip Hamburger in relation to judicial determinations on 'subordinate laws', such as corporate by-laws:

> The common law judges used "law and reason" to test subordinate acts and customs and thus to determine whether these lesser laws were void, but with regard to common law, they merely used this standard to discern and declare the law where it was uncertain.[94]

A decision that was 'legal' could not violate the liberties of the people, and when it came to the common law test of 'reason', Hamburger makes it perfectly clear that this 'did not refer to an open-ended, abstract measure of reason or natural law'. Yet what reason did refer to is less clear to Hamburger. He suggests that a 'hint of what was added by the element of reason is apparent from suggestions that the test concerned the public interest."[95] Hamburger's assessment would seem to be borne out by Holt's opinion in the case of *The Mayor & Commonalty of the City of London v John Vanhacker* [1699] where Holt set out the following test for the validity of the City's customs and by-laws:

> . . . if any of the city's customs should be in any part difficult and defective... the mayor and aldermen of the city for the time being with the assent of the commoners of the City . . . might make and ordain fit and convenient remedies, when and as often as to them should seem expedient; so that such ordinances be profitable to the king and his people and agreeable to justice and reason.[96]

---

[92] Ibid., f. 53r.
[93] Ibid., f. 56v.
[94] Hamburger, *Judicial Duty*, p. 180.
[95] Ibid., p. 182.
[96] *The Mayor & Commonalty of the City of London v John Vanhacker* [1699], *Hardwicke III*, ff. 61r.-61v.

It is a central feature of Hamburger's thesis that similar public good tests of reason could not be applied by judges to the acts of sovereign bodies, such as acts of parliament, in the same way that they were to the by-laws of jurisdictionally subordinate urban corporations. As he states, 'there were not merely impediments to any judicial decision holding an act of Parliament unconstitutional or otherwise unlawful, but also the law itself left the reasonableness of a statute to Parliament.'[97] Hamburger is forced to make this point so as not to undermine his claim that the duty of modern day American judges to review and strike down contentious legislation stems from the same historic duty that guided their English ancestors. It was not the case that English judges did not want to hold statutes unreasonable as they did by-laws, argues Hamburger, they simply could not, as parliament was also a superior court, a restriction that does not affect today's U.S. judiciary.

Hamburger bases this claim on another of Holt's opinions, namely *The City of London v Wood*. There Holt said that, 'an act of parliament . . . binds absolutely without any dispute to be made of its justice or equity'.[98] It is notable though that Holt chose the word 'equity', and not 'reason' in this instance. As we have already seen in his opinion in *Lane v Cotton & Frankland*, Holt was perfectly willing to imply a broad public good test of 'reason' into the act of parliament establishing the post office, leaving plenty of room for him to dispute the purpose and proper mode of interpretation of that statute. Arguing that all statutes by definition conformed to reason, in the sense that they must always have been passed in the public interest, could be profoundly judicially, and politically, subversive, especially when this clashed with the true policy reason for that act being passed, be it revenue raising or actually limiting the freedoms of the people. Ironically, Holt was hinting at precisely what Hamburger, in relation to his conception of judicial duty, wants today's American judges to be doing. Once we appreciate this point, we can also begin to complicate the definition of common law reason so far offered by Hamburger, and dismantle that offered by Pocock.

4.6 Holt and the Natural Law

That late seventeenth-and early eighteenth-century judges saw the reason of the law at work when statutes and judgements were made for the public good offers a hint of the broader intellectual and jurisprudential factors at play in such decision making. The key to understanding this comes when we realise that this 'public good' test is evidence of the broader impact of natural law thinking on the common law in this period. Chris Brooks spoke of the need for

[97] Hamburger, *Judicial Duty*, p. 209.
[98] *The City of London v Wood* [1701-2], *Hardwicke III*, f. 2v.

more work on this subject in the review of Pocock that we discussed earlier. There, he concluded that:

> It is most likely to be the case that historical modes of argument and natural-law modes of argument were in a constant state of tension from the sixteenth to the eighteenth centuries. More research is needed in order to evaluate the nature and importance of each at different times.[99]

Indeed, the importance of natural law theory on the development of English jurisprudence and legal, political, and philosophical debate in the late seventeenth and early eighteenth centuries is a fascinatingly underdeveloped area of research, virtually unknown to non-legal historians, though one which any study of Holt must include. The major scholarly clash in this field currently comes from the work of Julia Rudolph on the importance of the common law in the early enlightenment, and her critique of the more traditional analysis of David Ibbetson, who generally argues against any sort of sophisticated use of natural law theory by common lawyers in our period.[100] Ibbetson is happy to admit that 'England, like everywhere else in Europe . . . [was] caught up in a fervour of Natural Law thinking.' Selden, Hobbes, and Locke all made use of it, influenced by the works of Grotius and Pufendorf, and lawyers too also saw its attraction: 'secular in the sense that it distanced itself from the tenets of revealed religion', natural lawyers could 'create a structure of rules governing social behaviour', as well as a 'systemic framework that had some claim to objective validity'. All this permitted the first 'structural overview' of the common law to be undertaken in our period.[101]

Yet overall, Ibbetson is sceptical about the true nature of the impact of this thinking on common law jurisprudence. 'Arguments, or assertions, based on the law of nature were ten a penny in the courts of the seventeenth and eighteenth centuries', he argues, yet 'frequently... these amount to little more than appeals to common sense or to essentially trivial observations about human relations.' These assertions 'both reflected and reinforced the common preconception that Natural Law was a body of self-evidently valid ideas antecedent to the Common Law and in some way superior to it', a notion that seems far less radical to Ibbetson than it would Pocock and his followers. One area in which Ibbetson is more convinced about the 'fertile effects' of the use of reasoning based on natural law principles comes when judges had to decide between competing reported decisions, something we touched on above. He cites Holt's judgment in *R v Thorpe*, a 1697 prosecution for a conspiracy to 'marry off an expectant heir to a woman of ill repute', where Holt argued that, 'since the law of nature provided that a father should have guardianship of his eldest son until the age of twenty-one, it followed that

---

[99] Brooks, 'Review: Pocock, *Ancient Constitution*', p. 735.
[100] J. Rudolph, *Common Law and Enlightenment in England, 1689-1750* (Woodbridge, 2013).
[101] D. Ibbetson, 'Natural Law and Common Law', *Edinburgh Law Review*, vol. 5 (2001), pp. 4-20.

the indictment was well-founded.' This was still though, for Ibbetson, a 'pretty unsophisticated' use of the natural law by Holt, and merely 'a bare assertion'. Far more impressive was the use of natural law by Matthew Hale, who took Grotius and Pufendorf to task on their rules of self-preservation, or Francis Buller, who in 1767 'gave what we can now recognise as the first formulation of the tort of negligence', lifted, apparently, from Pufendorf, 'the first theorist to formulate the general principle of an antecedant duty to take reasonable care, with liability arising for breach of that duty.' According to Ibbetson, there was 'nothing remotely like this in the earlier common law':

> Every man ought to take reasonable care that he does not injure his neighbour; therefore when a man receives hurt through default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages.[102]

Buller was referring to injury to a person's body. Yet his pronouncement looks remarkably familiar when placed next to Holt's opinion in the case of *Coggs v Barnard* [1702]. This landmark case was the first to establish the tort of negligence with reference to a man's property, something we saw Holt building on in the case of the postmaster-general, the manuscript opinion of which, as we noted in the previous chapter, Buller at one point had access to:

> He that without any reward shall undertake any employment to negotiate or manage for another shall negligently perform it, whereby the person trusting is damnyfied, must make satisfaction.[103]

There may well have been a jurisprudential leap involved in applying one principle for property to that of man's body, but the notion that there had been 'nothing remotely' like Buller's use of natural law tort theory in earlier common law, and that this can only have been lifted from Pufendorf, was surely not the case. In fact, Holt went to great lengths in his opinion to demonstrate his own sophisticated use of natural law theory, quoting at length from Roman Law sources, notably Justinian's *Institutes*, the categories and classifications of which were vital to the eighteenth-century exposition of natural law, as well as adapting the civil law concept of *mandatum*, 'a contract whereby anything is committed and undertaken to be done or performed gratis for another', for use within the English legal system.[104] Indeed, Holt's use of natural law theory would seem to validate the assertion made by Julia Rudolph that it was not merely 'a veneer, superimposed upon but not integrated with common law doctrine and ideas', as Ibbetson tends to argue. Instead, in Holt's opinions we find evidence to support Rudolph's claims that early eighteenth-century judges and writers, 'believed that the foundations of justice

---

[102] F. Buller, *An introduction to the law, relative to trials at nisi prius,* 7th edn., ed. R. W. Bridgman (1817), p. 24b.
[103] *Coggs v Barnard* [1702]*, Hardwicke III*, f. 136v. Although Buller's note of thanks to Charles Yorke for lending him the opinions is dated 1786, it is far from impossible that Buller knew of, or had access to, Holt's opinions before that date.
[104] Ibid., f. 132r.

lay in a mixture of universal principles and specific experience', as well as the fact that 'knowledge of laws enacted by the Romans to promote trade and manufacture, and to govern the colonies and their extensive empire, could be of use to English lawyers and policy-makers.'[105] Although above we saw that Holt was often able to identify the reason and authority of the common law from the evidence of rules and judgments found in the law reports and records, this did not mean that he totally rejected the idea of reason itself as an abstract concept, rooted in universal principles of natural law. In this he was not necessarily unusual at the turn of the eighteenth century, as the recent work of Ibbetson and Rudolph has shown. What is unusual though is that, to the extent that Holt has been integrated into these scholarly debates, he is usually used as an example of a conservative common law thinker who was resistant to outside innovation. His use of natural law theory, and the likely impact this had on those who read his opinions in the eighteenth century, has either been largely forgotten or overlooked. Even Rudolph labels Holt as a judge who merely 'looked to the framework of common law in order to interpret and integrate new elements of trust or contract law', leaving it to more exciting non-judicial legal commentators like Thomas Wood and Henry Ballow to develop a legal theory 'by means of reflection on common law as well as natural law jurisprudence.' But Holt did this too. He believed, as Rudolph herself describes, that the 'theoretical foundations, or 'backbone', of . . . justice lay in ideas and in examples that were derived from precedent and prescription as well as nature and reason.'[106] How he handled this potentially unstable mixture can now be explored.

4.7 Getting the Mixture Right

Holt's particular conception of the mixed nature of the theoretical foundations of the reason of the common law formed the core of many of his opinions. Indeed, we might suppose that one of the main aims of his writing and later publishing them was to transmit this jurisprudential model more widely. To begin with, it is clear that Holt believed that simply relying on the precedents and authority found in ancient or well-known written sources was not enough to reach a just decision in a contemporary case. In *R v Horneby (The Bankers' Case)* [1695], Holt recorded an objection to his reasoning on the issue of whether the Crown was legally and constitutionally permitted to mortgage off its civil income:

> Objection. Some opinions have been urged out of Fleta and Britton [Bracton], as if by the ancient law it was held that the inheritance and revenues of the crown could not be aliened.

Holt's response to the citing of these thirteenth-century texts was unequivocal:

> Resp. Suppose there had been such opinions among those ancient authors, yet I think they ought to have no weight against so universal a practice for so many hundreds of

[105] Rudolph, *Common Law and Enlightenment*, pp. 164-168.
[106] Ibid., p. 75.

> years for a great many of the tenets and doctrine in those books are obsolete and not law: and no opinion in any of them is wholly for the bare authority of the author to be relied upon.[107]

However, Holt was equally scathing when his opponents failed to counter properly the written precedents that he himself cited in support of his arguments. As he tartly observed at the end of his opinion in the *Bankers' Case*:

> June 23 1696. The Lord Keeper argued this case and differed in opinion from me, and agreed with the Lord Chief Justice Treby that the judgment ought to be reversed.
> But note, he answered none of the records and precedents cited by me, that had no reference to the court of augmentations. And with me did agree Nevill, Powell, Rokeby, Giles Eyre and Samuel Eyre, justices.[108]

Precedents and legal records were important then. But they were not the whole picture. Thinking more broadly, Holt clearly understood the importance of both an abstract reason and solid precedent acting in concert when justifying changes to the law, the law which after all had guaranteed men's property for centuries. In one sense this represented a sort of natural judicial caution, a two-stage 'double lock' test when making changes, as Holt explained in the case of *Fisher v Wigg and Nichols* [1700]:

> . . . since there is neither reason and precedent to maintain such an opinion, I think myself obliged to prefer the ancient land marks and boundaries of men's properties, and not make constructions upon superfluous and doubtful words to defeat men of their inheritances.[109]

Holt went further:

> These words are not proper and legal words . . . [they are] without any precedent in the books, and appears not that any sage of the law ever harboured such an opinion, but rather the contrary... therefore if it is a novelty in the law we ought to be careful of introducing it, because it may disturb men's estates that are now in peace.[110]

Lord Coke's pronouncement on the subject, Holt added, had been 'run away with as a very great authority', when in fact it was nothing more than a 'sudden apprehension doubtfully delivered'.[111] This was not the only occasion on which Holt found himself at odds with others in the court who seemed over eager in their use of, and trust in, the opinions found in Coke's *Reports* as if they were the last word on any given subject. Time after time, Holt felt obliged to correct his illustrious predecessor, whether pointing out that he had 'destroy[ed] his own reason' in relation to allowing the censors of the College of Physicians' to be a court of record, or that he had been doubtful, and lacked experience in pronouncing on whether the tithes that applied to mills were predial or personal.[112] Setting the record straight in this way clearly mattered to

---

[107] *R v Horneby et al.* (*The Bankers' Case*) [1695], *Hardwicke I*, f. 36r.
[108] *Bankers' Case*, f. 58v.
[109] *Fisher v Wigg & Nicholls* [1700], *Hardwicke II*, f. 139v.
[110] Ibid., ff. 134v.-135v.
[111] Ibid., f. 135v.
[112] See *Gwanralt v Burwall et al.* (Groenvelt v Burrell) [1700], *Hardwicke II*, f. 121v.; and *Fisher v Wigg and Nicholls*, f. 135v.

Holt: the common law could not be allowed to rest on its laurels, nor could the pronouncements of its long dead practitioners, no matter how illustrious, be automatically relied upon as a safe guide to correct judgment in the broader context of an ever-changing English society, especially at the turn of the eighteenth century. Other guides were needed. One such guide could be the law of nature.

Holt's opinion in *Coggs v Barnard* illustrates this point perfectly, and demonstrates how Holt was able to blend the two sources so successfully. From the outset, he acknowledged that the point of law under consideration was a difficult one, because the legal records - the easy go-to guide - were unclear: 'It must be acknowledged that our books do labour not only under some obscurity, but even contradictions in matters of this nature'.[113] To calm the nerves of the reader though, Holt made it clear that some sense could be made of these documents: 'yet I doubt not upon the authority and reason of our books to support this action.'[114] The trick was to keep some broader rules in mind when sifting through their arguments. For Holt understood that in order to win the day with his novel opinion, he had to do one of two things. That the 'the law doth oblige' a man to take care and avoid being negligent with another man's property, he knew, had to be 'made out either by constant usage or custom or by the rules of natural reason or justice.'[115] Far better would be to do both, and show how the one actually stemmed from the other. This was Holt's great talent. He simultaneously scoured the legal archives to discover the earliest precedents for his opinion, authorities that were 'full' as they were 'ancient'. Yet it was not just the age of these authorities that he relied on. Indeed, he defended these tests as being no 'less authority for being so old, unless it could be made out by more early authority and upon sound reason that the law hath been taken otherwise.' And the soundest reason of all was not antiquity, but a universal and natural test of justice. Bracton, the medieval author that Holt settled on, was shown as possessing both natures: 'Bracton delivers this as the law of England, and in truth it is the law of the world common and natural justice.'[116] The ancient laws of England, specially selected and presented as conforming to natural law theory, agreeable to 'the general practice in the world both ancient and modern', would be how Holt dragged the common law into the eighteenth century.[117]

To the extent that writers like Ibbetson have been able to identify similar patterns of jurisprudential fusion, they have located them scattered solely in the thinking of the judiciary of the late eighteenth century, a lifetime after the death of Holt, and even then argue that the

---

[113] *Coggs v Barnard* [1702], *Hardwicke III*, f. 123r.
[114] Ibid., f. 123r.
[115] Ibid., f. 124v.
[116] Ibid., f. 126v.
[117] Ibid., f. 128v.

intellectual influence for such patterns of thought came exclusively from continental Roman and natural law writers, particularly the tradition stemming from Grotius.[118] What we have shown is that there was a lord chief justice of the highest common law court in the land doing precisely the same thing at the end of the seventeenth century, one whose manuscript opinions, a tradition and method of scholarly communication that we are only just beginning to appreciate fully, were being read by the likes of Mansfield and Buller in the decades after his death, the very judges who supposedly were the first to make sophisticated use of natural law theory. In forgetting about Holt and his opinions, it is possible that the academic community has forgotten a central character in the development and transmission of this intellectual movement.

4.8 St German, and Holt's Resurrection of the Natural Law Tradition

Having looked forwards though, we might at this stage briefly consider looking back at what it was that inspired Holt to think in terms of the common law's synergy with natural law. Although Philip Hamburger has suggested that Holt was perhaps inspired by the writings of Pufendorf, Holt does not specifically reference that author, or Grotius, in any of his opinions.[119]At the beginning of this section we noted that Holt argued that 'the reason of the law is the law', and that this statement echoed that of Sir Edward Coke from the beginning of the seventeenth century. One potentially exciting source for the pedigree of Holt's natural law thought is that of an older common law tradition itself. Julia Rudolph has written on this subject more broadly, but as one of her reviewers, George Owers, has pointed out, her analysis is incomplete. This is especially true with regards to the vital influence of the Tudor lawyer Christopher St German.[120] St German's (c.1460-1540/41) most famous published work, commonly known as *Doctor and Student*, has been described as 'the most remarkable book relating to English law published in the Tudor period, and quite unlike any book to have come from the pen of an English lawyer before'.[121] The work itself takes the form of a dialogue between a doctor of divinity and a barrister, and seeks to explore the relationship between English law and conscience. Unlike the continental seventeenth-century natural law theorists, we know that Holt read and consulted *Doctor and Student*, as he refers to it in his opinions.[122] What St German had to say about the reason of the common law should make us sit up and take note. Chapter 2, entitled 'Of the lawe of reason', contains the following lines:

> Fyrste it is to be vnderstande, that the lawe of nature maye be consyderyd in two maners/ that is to saye/ generally and specyally/ when it is consyderyd generally/ then it is referryd to all creatures/ as well resonable as vnresonable... The lawe of nature

[118] See Ibbetson, 'Natural Law', pp. 16-20.
[119] Hamburger, 'Judicial Review', p. 2131.
[120] Owers, 'Common Law Mind', p. 600.
[121] J.H. Baker, 'St German, Christopher (c. 1460–1540/41)', *ODNB*.
[122] See *R&R v The Bishop of London and Dr. Birch* [1694], *Hardwicke I*, f. 18v.

> specyally consyderyd: whiche is also called the lawe of reason pertayneth oonly to creatures resonable that is man/ whiche is create to the Ymage of god.
> And this law ought to be kept as well among Iewes & gentyles/ as amonge crysten men... And this lawe is alway good & ryghtwyse styryng & enclynynge a man to good & abhorrynge euyl: & as to the orderyng of the dedes of man it is preferryd before the lawe of god. And it is wryten in the herte of euery man techyng hym what is to be don & what is to be fled . . . And bycause it is wryten in the herte/ therefore it may not be put awaye/ ne it is neuer chaungeable by no dyuersytie of place ne tyme... And therefore agaynst this lawe prescripcyon statute nor custome may not preuayle/ and yf any be brought in agaynst it they be not prescryptions statutes nor customes/ but thyngis voyd and agaynst iustyce. And al other lawes aswel the lawes of god/ as to the actis of men as other be grounded therupon.[123]

The similarities with what we have already seen of Holt's conception of reason are stark, if not identical. In this work of 1518 we see the clear forging of a link between English law as the law of reason, which is itself based on the highest laws of nature common to all mankind, a law which overrides 'prescriptions', 'statutes' and 'customs' and renders them 'void and against justice' if they fail to incline man towards good. But the similarities do not end there. Why St German should have written such a work when he did also presents a neat parallel to Holt's own circumstances. J.H. Baker has suggested that the purpose of the work was to 'to refute the notions that equity and conscience were outside or above the law', and that therefore 'the canon law was somehow higher than the law of England.' In doing so, Baker claims, St German sought to calm the nerves of those who thought that the impending legislative break with Rome would leave the common law devoid of any capacity to appeal to higher or universal notions of equity or reason. St German sought to deal with those legal difficulties, and as such, Baker argues, 'must be reckoned one of the major intellectual forces behind the English Reformation.'[124] We can also add another possible interpretation to St German's reasons for writing: to rein in an increasingly assertive claim to ecclesiastical jurisdiction over matters that he claimed were perfectly well handled at common law. As we will see in Section III of this thesis with Holt's battles over jurisdiction with Edward Stillingfleet, this was a concern that also preoccupied Holt in his own day.

The radicalism of St German is thrown into sharp relief when we understand that his predecessors had been historically reluctant to speak so openly of the common law's similarity to the law of nature. Hamburger has made this point with reference to medieval English lawyers:

> The hierarchy of reason presented so morally rigorous an account of legal obligation that common lawyers limited its place in English law. Historians of judicial review sometimes suggest that generalizations about natural law translated directly into English law, but common lawyers understood that they needed a more complex response.[125]

---

[123] Christopher St German, *Doctor and Student*, eds. T.F.T. Plucknett and J.L. Barton (1974), pp. 13-15.
[124] J.H. Baker, 'St German, Christopher (c. 1460–1540/41)', *ODNB*.
[125] Hamburger, *Judicial Duty*, p. 26.

In the sixteenth and seventeenth centuries, Hamburger has argued that common lawyers actually abandoned appeals to natural law altogether as being too vague, instead arguing that common law was binding even when it was unreasonable. Instead they appealed to notions of authority and hierarchies of will, stretching from God to kings and magistrates in order to keep the peace. This came about, so Hamburger argues, because of a collapse in faith in the ability of man to discern reason, or to agree on what was good for society, in the face of the political and institutional conflicts which characterised Europe in an era of Reformation and widespread civil war. We have seen a similar response in the attitude of Coke, who sought to downplay the common law's reliance on vague principles of natural law, and present it as a reliable system of learned precedents fit for seventeenth-century governments. Holt too lived in revolutionary legislative times, yet ones in which the ability of the common law to speak to broader notions of conscience and reason seemed capable, at least in his eyes, of being restated. It was not that Holt was inventing a natural law tradition, or borrowing one from abroad, so much as reaching back to a time when it had been more readily, though never entirely, acknowledged by English lawyers. Why Holt was able to do this must, in part, have had to do with the institutional environment in which he was operating. Holt clearly thought that authority or the will of a sovereign alone was not enough to justify obligation to the law. Whether this was to contain any such claims by a victorious parliament after 1688, or whether it was the result of his participation in a broader intellectual rejection of such arguments more famously embodied in the work of John Locke, will need to be analysed in the next section of this thesis. What is clear though, at this stage, is that Chris Brooks was right to suggest that if natural law theories were more familiar in the seventeenth century than Pocock's emphasis on ancient constitutionalism has allowed for, then Locke's use of those theories 'may appear less singular than is sometimes thought'.[126] It remains to say that paradoxically, it looks as though Rudolph and others were right when they claimed that Holt looked to the common law tradition in order to deal with the demands of his day: what they have failed fully to appreciate is the radical and revolutionary potential of this tradition, the 'dust' that Holt was stirring when he consulted these ancient texts. Yet with Holt's resurrection of, or perhaps his re-emphasis on, this branch of jurisprudence, came the return of the same doubts and insecurities expressed by medieval common lawyers. In the long term, this conflict and instability may well have been fatal to the common law itself. George Owers has hinted at the problems with this symbiosis between natural and common law as the eighteenth century progressed. In his assessment, the 'historic core of rationalism' assumed to be at the heart of common law jurisprudence 'though often lying dormant,

[126] Brooks, 'Review: Pocock, *Ancient Constitution*', p. 735.

amounted to a ticking time bomb', since it could easily be taken to imply the 'superiority of reason to common law'. The common law's adaptability, something championed by Holt, was therefore, with the movement towards rationalism in the eighteenth and nineteenth centuries, the seed of its own downfall.[127] For our purposes, we might also want to highlight another element of the unstable jurisprudential mixture that Holt appears to have inherited from St German: the relationship between reason in theory, and reason in practice. St German distinguishes these two sorts of reason in Chapter 14 of *Doctor and Student*:

> Also reason is deuyded in to two partyes/ that is to saye in to the hygher parte/ and into the lower parte. The hygher parte hedyth heuenly thynges & eternall. And reasonyth by heuenly lawes/ or by heuenly . . . reasons what is to be don and what is not to be don. And what thynges god commaundeth/ and what he prohybyteth. And this hygher parte of reason hathe no regarde to transytorye thynges/ or temporall thyngis: but that somtyme as it were by maner of counceyll she bryngeth forthe heuenlye reasons/ to ordre well temporall thynges. The lower parte of reason workyth moste to gouerne wel temporall thynges. And she groundeth her reasons moche vpon lawes of man/ and vpon reason of man/ whereby she concludyth that that is to be done/ that is honest and expedyent to the common welth/ or not to be done for it is not expedyent to the common welth.[128]

Yet this harmonious relationship between the higher and lower parts of reason was not an easy one to maintain. Holt was painfully aware of these contradictions, and although he might aspire to show how the common law could be reasonable in both a temporal as well as a universal sense, the reality was that reason 'expedient to the commonwealth' was often narrowly defined and, most importantly, historically contingent. Holt knew that sometimes, the needs of the commonwealth could rub awkwardly up against reason, and nowhere was this more obvious than in relation to the hallowed law of primogeniture. Holt needed to come up with a 'more complex response', as Hamburger has put it, to this conundrum.

One example of how Holt attempted to do this comes in his opinion in the case of *Clements v Scudamore* [1704]. Contrary to Pocock's claims, common law judges were well aware that there had been other identifiably important systems of law in England's past, the evidence of which was staring them in the face in the county of Kent, which still clung to an Anglo-Saxon system of ultimogeniture named 'Borough English'. Holt had the following to say about the reason of this system:

> The younger son in Borough English is in the place of the eldest son at Common Law, for as the general law and custom of the kingdom prefers the one so the custom of the place prefers the other . . . [but] according to natural reason & justice the one son ought not to be preferred to the other.[129]

---

[127] Owers, 'Common Law Mind', pp. 600-601.
[128] St German, *Doctor and Student*, pp. 85-87.
[129] *Clements v Scudamore* [1704], *Hardwicke II*, f. 50v.

Yet the 'general law and custom of the kingdom', the lower part of reason, *did* prefer one son to the other. Why this was the case, and how Holt was able to reconcile this with his understanding of the needs of higher and lower reason, is the subject of our next analysis of Holt's conception of history and change in the law.

4.9 Conclusion

Holt's opinions have provided us with a window into an intellectual world quite alien from that described by Pocock. With regard to his treatment and understanding of precedent, prescription, and reason, it is clear that Holt was not tied to a purely customary model of English jurisprudential thought. Similarly, with his references to natural law, it is clear that Holt was not an insular thinker in such matters, and was prepared to adapt the law to the needs of a changing society. Most importantly, these intellectual attitudes would inform his understanding of the purpose of the law within a civil society, and its relationship to government. The reason of the law, and the common good of the kingdom, were inextricably linked: precedent could not always provide a safe answer. The solution was to come up with what Chris Brooks has called 'the English version of the law of nature', a system which both respected the reason that could be found in the tradition of English legal custom, but did not make it so rigid that it would break in the face of political or social upheaval.[130] Holt's struggles to construct such a system, and the role that his understanding of historical change within the constitution affected his behaviour, are the subject of our next chapter.

[130] C.W. Brooks, 'The Ancient Constitution in Sixteenth-Century Legal Thought', in E. Sandoz (ed.), *The Roots of Liberty, Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Columbia, 1993), p. 81.

Chapter 5: Making Law for Changing Times

5.1 Introduction

In Chapter 4.2 we noted the following observation by J.G.A Pocock:

> If the idea that law is custom implies anything, it is that law is in constant change and adaptation, altered to meet each new experience in the life of the people; and it might seem that there was no theory more likely to lead to a historical conception of the nature of law.[1]

Pocock is adamant though that this 'historical conception of the nature of law' simply never took hold in pre-nineteenth-century England. Instead, he argues, it was smothered by the common law's epistemological obsession with a mythical ancient constitution, a constitutional fiction supposedly made real by the events of 1688. Yet it is quite clear that Holt, writing at the turn of the eighteenth century, understood the law precisely in these historical terms: the law changed and adapted – indeed, it *had* to change and adapt – to meet the needs of an ever shifting state and society. That the common law was able to do this was one of its greatest sources of strength, and was evidenced in the historical records that he consulted and quoted to support his opinions. The purpose of this chapter is to explore Holt's understanding of the relationship between history, change, custom and reason; both in terms of how these concepts had dictated the development of the common law in the past, as well as how they were to inform his behaviour as a judge in the context of his own time. We start our investigation by returning to Holt's opinion in the case of *Clements v Scudamore* [1704], and the local custom of 'borough English' that we touched on at the end of the last chapter. For there we can analyse the foundations of Holt's thought on this subject, before then moving on to compare his views to those of his predecessors, and how he was both inspired by, and able to build on, their work.

5.2 'The law of England changed'

Clements v Scudamore [1704] was a property dispute concerning copyhold land held in the manor of Croydon according to the custom of borough English.[2] The question before Holt's court was 'whether the daughter of the youngest son and heir in Borough English . . . shall inherit the land . . . though her father died in the lifetime of her grandfather.'[3] Within the first few lines of his opinion, Holt had already stated that the daughter would indeed inherit. But Holt was determined to explain why this was the case in greater detail. As we saw in Chapter 5, Holt was prepared to admit that 'according to natural reason & justice the one son ought not to be preferred to the other' when it came to the order of inheritance. Yet despite this, Holt was

[1] J.G A. Pocock, *The Ancient Constitution and the Feudal Law,* 2nd edn. (Cambridge, 1987), p. 36.
[2] *Clements v Scudamore* [1704], *Hardwicke II*, ff. 50r. – 53r.
[3] Ibid., f. 50v.

adamant that in borough English, the custom of the place 'supported by reason' dictated that the youngest son - not the eldest as in 'borough French' - would inherit his father's land.[4] What did Holt mean by this apparent contradiction? Once again, the answer seems to come from his reading of his fifteenth-century predecessors.

We have already spoken of the differences between higher and lower reason as set out by St German in Chapter 14 of *Doctor and Student*: This binary division was the product of the Doctor's explanation of the broad rational foundations of natural and civil law theory. Yet on its own this theory was insufficient to contain the complexities, or chaos as its detractors claimed, of English customary law, something that both St German and Holt were well aware of. Consequently, their task was to show that, far from being the opposite of reason, the common law had in fact synthesised and deployed reason in its own idiosyncratic customary fashion. In other words, both men wanted to demonstrate that the customs of the common law represented a branch of natural law, or at the very least, that the communal laws that had developed for the governance of the English commonwealth were not in conflict with the universal law of reason. St German took a practical approach to this task by having the Student explain the various sources, or grounds, of English law to the Doctor. The first of these, perhaps unsurprisingly, was 'the law of reason'. As the Student notes, the 'law of nature' as a term 'is not vsed amonge them that be learnyd in the lawes of Englande'. If anything was against the law of nature, the Student added, English lawyers tended to say that 'yf if [sic] be prohybyte by the lawe of nature. They say it is agaynst reason or that reason wyll not suffre that it be don.'[5] This explanation contrasts with Holt's apparent willingness to deploy the term 'natural law' two centuries later, a subject we shall return to later in this chapter.

There were two levels to the law of reason in England according to the Student. The law of reason primary prohibited murder, or the breaking of the peace: murder is evil by its very nature, and therefore by definition unreasonable. The law of reason secondary encompassed a diverse body of laws that applied only in England, and to circumstances that arose solely from English customs and patterns of land ownership. Despite their peculiar status, they were still, by definition, the embodiment of right or wrong, good or evil, such as liability for the death of livestock taken in satisfaction of a debt. The second ground of law in England was the law of God, with the third being the diverse customs of the realm, and the fourth the maxims of the law. The sixth ground comprised statutory law, but it is the Student's fifth ground that interests us most here. Those were 'dyuers partyculer customes vused in dyuers

[4] Ibid., f. 50v.
[5] Christopher St German, *Doctor and Student*, (eds.), T.F.T. Plucknett and J.L. Barton (1974), p. 31.

countres/townes/cyties/& lordshyppes in this realme'. These customs were particular, in that they differed from the general customs of the realm, such as the right to receive justice in the king's courts, or the system of primogeniture. Indeed, in many cases they were 'agaynst the sayde generall customis or maxymis of the law: yet neuertheles they stand in effecte' because 'they be not agaynste the lawe of reason/nor the law of god'. St German himself went on to list some examples of particular English customs that 'stand in effecte, and be taken for lawe', including 'burghenglysshe wher the yonger sone shall enheryte byfore the eldest'. [6]

From St German then, Holt learned that borough English did not conflict with the law of reason. Yet it was the work of another fifteenth-century lawyer that Holt quoted to support his claim that ultimogeniture could, in fact, be *supported* by reason: Littleton's *Tenures*. Printed anonymously within a year of the author's death in 1481, Littleton's *Tenures* was, according to Baker, 'the first law book to be printed in England', and continued to be used as a textbook for land law until the nineteenth century.[7] In *Clements v Scudamore* [1704] Holt referenced section 211 of the *Tenures*, which reads:

> . . . where by the custom called Borough English, in some borough, the youngest son shall inherit all the tenements, &c., this custom also stands with some certain reason; because that the youngest son (if he lack father and mother) because of his younger age, may least of all his brethren help himself, &c.[8]

It is clear from this passage that Littleton was not entirely convinced that the youngest son's inheriting was inherently reasonable, merely that a favourable interpretation behind the purpose of the custom could be constructed so that it did not violate reason, thereby conforming to St German's later assessment that local customs were not the embodiment of reason itself. Littleton's explanation seems to have been enough for Holt though. Both St German's jurisprudential categorisation, and Littleton's practical explanation, gave Holt the theoretical ammunition he needed to maintain his claims to the natural law foundations of the common law, despite so much of the law's actual edifice being comprised of custom. It is telling though that Holt had to reach back two centuries in order to find the legal theory to support his arguments. Part of the reason for this seems to be the ways in which Holt's attitude toward how customs changed over time differed from some of his more illustrious seventeenth-century predecessors, notably Sir Edward Coke. For Coke, immemorial continuity and use of custom was the guardian of the legitimacy of the common law system itself. Yet as Charles M. Gray has pointed out, we should not assume that Coke inhabited 'a fool's eternity wherein the law of

---

[6] Ibid., p. 71.
[7] J. H. Baker, 'Littleton, Sir Thomas (d. 1481)', *ODNB*.
[8] *Littleton's Tenures*, ed. E. Wambaugh (Washington, 1903), p.98. For Holt's reference in *Clements v Scudamore* [1704], see *Hardwicke II*, f. 50v.

seventeenth-century England looked simply indistinguishable from Anglo-Saxon law.'[9] What Coke did seem to believe though was that there had been an ancient common law that operated in Anglo-Saxon times, and that changes to custom over time had either served to dismantle or re-establish that perfect system. The biggest difference in Holt's conception of customary change was his historical perspective: the law of the Anglo Saxon's was not a perfect system that needed re-establishing for English state and society to flourish in the 1690s. Nor, if customs were capable of change over time, could they represent the jurisprudential roots of the common law itself: there had to be some other set of basic guiding principles outside of the purely customary sphere. To illustrate Holt's thinking on this subject in action, we turn now to the next section of Holt's opinion in *Clements v Scudamore* [1704].

Having established that borough English was a particular custom validated by reason, Holt continued:

> . . . by the ancient law of England, all lands were gavilkind partible among the heirs males. Vid. Lambert's *Saxon Laws* 167. Selden upon Eadmerus 184. vid. Lambert 202. 203. But upon the creation of tenures by knight service, which were never before the Conquest, the law of England changed, because the people grew martial & the Crown was supported by the nobility & gentry of the kingdom who by those tenures and the opportunity of wardship were obliged thereunto, it was necessary to keep the estate of a family in one who by his primogeniture was chief.[10]

This is a key paragraph, for it clearly demonstrates that Holt understood that customs were capable of change over time in reaction to new sets of social and economic conditions. In essence, it is evidence of a historical frame of mind in a judge which, according to some of the best scholarship on this subject, simply should not have existed in this period. Far from an unbroken or idealistic legal tradition that looked back to a perfect Anglo-Saxon past, Holt saw the Norman Conquest as representing a critical break in the law's development. The 'ancient law' of England was just that: the law that belonged to the ancients, and which was designed to meet their own particular set of historically contingent needs. Their method of landholding had been 'gavilkind', the practice of dividing land equally between sons. With the creation of feudal tenures and knight service in the aftermath of 1066 'the law of England changed'. Estates now had to be kept together, ruled over by the chief member of the family, the eldest male. Primogeniture was a novelty, introduced by the Normans, and with it the customary land law of England. This thinking is the precise opposite of Pocock's 'common law mind', and it was not the only time Holt deviated from it.

The case of *Blackbourn v Davis* [1701] was another property dispute that came before Holt's court, this time concerning a petition for a *mandamus* to the Prerogative Court of Canterbury in

---

[9] Sir Matthew Hale, *The History of the Common Law of England*, ed. C. M. Gray (Chicago, 1971), p. xxiii.
[10] *Clements v Scudamore* [1704], *Hardwicke II*, f. 50v.

the case of a man who had died intestate.[11] The plaintiff claimed that the Prerogative Court should be ordered to treat her as equal administratrix with her mother - the deceased's grandmother - regarding the distribution of her nephew's estate. Holt denied the application for the *mandamus*, and did so according to his understanding of the evolution and history of the customary law concerning the disposition of personal estates, that is, the law that governed what happened when someone died without having made a will. This was despite an act of parliament having been passed in 1670/1 concerning the disposition of an intestate's estate, since the act itself was silent as to the order of seniority when it came to the rights of administration.[12] As a result, Holt argued, one had to look at the evolution of the customary law, and the reason behind that custom, in order to interpret the intention behind the statute in this case. In his manuscript opinion, Holt laid out his understanding of the interplay between reason and custom, and how this helped him come to the judgment that the grandmother should trump the aunt when it came to her administrative powers.

It was not that custom did not matter in this case; quite the contrary. In fact, Holt was adamant that his decision was based on the 'law and custom of England' and the 'constant practice' of preferring certain family members to others in cases of this type.[13] But Holt's concept of 'constant practice' was not that which Pocock attributes to early modern English lawyers: it was historically informed, and capable of admitting to alteration over time in response to shifting socio-political conditions. Indeed, Holt looked to history for evidence of this change, and the reason behind it, in order to inform his judgment of how the law should be interpreted in his own day. To do this, Holt once again began by emphasising that the English customary law of intestates had its foundations in the universal law of nature and reason:

> 1st That law as all other laws in the world did prefer the children of the deceased and their descendants before any in the ascending or collateral line.[14]

Having secured this basic point, Holt could then move on to paint a picture of the law's historical development. Before the Conquest, the custom had indeed been different:

> 2ndly It is to be observed that anciently the Law of England did not prefer the males before the females in the inheriting of real estates, which appears by the laws of Edward the Confessor, confirmed by William the Conqueror vid: Selden upon Edmerus, 184, Lambert Saxon Laws 167. L: 36.[15]

Yet, in the aftermath of the Conquest, the custom was changed to suit the prevailing needs of landholders:

---

[11] *Blackbourn v Davis* [1701], *Hardwicke II*, ff. 24r.-27v.
[12] 'Charles II, 1670 & 1671: An Act for the better setling of Intestates Estates', in *Statutes of the Realm: Volume 5, 1628-80*, ed. John Raithby (1819), pp. 719-720.
[13] *Blackbourn v Davis* [1701], *Hardwicke II*, f. 27v.
[14] Ibid., f. 24r.
[15] Ibid., f. 24r.

> 3rdly In process of time though not long after the Conquest as to the descent of lands the law was altered, towit, in the time of H1 the inheritance was confined to the males, and females were excluded so long as there were any males or descendants from them, Lambert 202. 203.[16]

It was also in Henry I's reign that the custom of preferring the intestate's parents to their siblings had developed:

> 4thly If there was no sons nor daughters to the deceased the lands did descend to the father and mother which appears by the laws of H. 1. Lambert, ib. 202 . . . then the father's brother or sister, still supposing there was no grandfather or grandmother.[17]

Since this shift in the twelfth century, as far as Holt could discern from the records, the law had remained constant, something evidenced in the case law he was able to cite from sixteenth-and seventeenth-century law reports. The custom had changed then, before becoming settled. But the authority of the custom lay not just in its repeated use, but also in its reasonable foundations. After all, as we saw above, any custom that violated the law of reason could not be valid. In this case, the history of the custom's use was evidence of both its reasonableness, but also more importantly, and complicatedly as we shall see, the precise nature of the reason that had guided its development. It was only 'natural' that if the reason of the custom dictated that parents were to be preferred to siblings, then in this case the grandmother should be preferred to the aunt, or as Holt put it:

> That the father and mother were preferred to the brother or sister though in equal degree is most evident, and by parity of reason, the grandfather and grandmother shall be preferred before the aunts.[18]

At this stage, it is worth pausing to examine two features of Holt's opinion in *Blackbourn v Davis* [1701] that have the potential to complicate our narrative of Holt as something of a historically minded natural law theorist.

The first comes when we consider that in his scouring of the historical records, Holt seems to have come to the conclusion that William I 'confirmed' the laws of Edward the Confessor. It was a central tenet of the ancient constitutionalist creed that the Conqueror had, at the very least, decided himself to continue ruling by the laws that he found in England. Yet despite this, Holt seems to have also accepted that the customs of England were altered as a result of the changes caused by the Conquest. The solution to this particular conundrum again lies in the historical sources that Holt was using. 'Lambert's *Saxon Laws*', as he called it, was in fact William Lambarde's *Archaionōmia* (1568). Lambarde (1536-1601) had undertaken research into the origins of English law during the 1560s with the encouragement of those members of the antiquarian circle around Archbishop Matthew Parker. Both Parker and Lambarde believed in

---

[16] Ibid., f. 24v.
[17] Ibid., f. 24r.
[18] Ibid.

the power of historical enquiry to establish 'a firm basis for contemporary society', arguing wholeheartedly for 'the continuity of institutions' - in their case the Church of England and the common law - and 'historically validated laws and customs', especially 'the common law and the prerogative' whose functions had remained unaltered since the 'distant Anglo-Saxon past'.[19] Yet if this was Lambarde's aim, *Archaionōmia* was certainly capable of being read in a quite different way. All Holt had to do was turn from page 167 to page 202, and note that the law of inheritance had altered between the reigns of Edward the Confessor and Henry I, but not, it appeared, between the reigns of Edward and William I.[20] The nature and pace of the evolution of the law was evidenced in this very record. Given Lambarde's apparent intentions in writing the work, it is somewhat ironic that Holt used it as documentary proof of the changing nature of custom over time, a sign of how supposedly ancient constitutionalist texts could be subverted, as well as of the potential need for more investigation into the influence and interpretation of Lambarde's early works during the seventeenth and early eighteenth centuries. The second point of potential concern comes from Holt's statement that since parents were customarily preferred to siblings in the law of intestate's estates, 'by parity of reason', grandparents should be preferred to aunts. The problem stems from Holt's seemingly circular thinking in his assessment of the reason and authority of the custom itself. Holt implies that the constant preference shown over time to the vertical parental line is evidence in and of itself of the reason of the custom, reason that can be extended to apply to the grandmother in the case before him. Yet if a custom can become reasonable simply through repeated use, and that repeated use itself can be interpreted as evidence of its reason, then the line between the authority of that law because it is custom, and its authority because it complies with, or does not violate, abstract universal laws of reason, becomes blurred. In other words Holt seems to applying the test of time to the validity of this custom, not the test of reason. The problem is compounded by Holt's apparent readiness to concede, as we saw both in the cases involving the impact of the Norman Conquest on the laws of inheritance, that unpredictable historical events themselves are often the triggers for customary change. Yet such events, and the changes in custom that they led to, could not be inherently reasonable; if anything, they appeared random. Indeed, it was this problem of admitting to customary change over time that supposedly led Coke and Holt's other legal ancestors to deny its very existence: customs were law because they were reasonable, and they were reasonable because they had never changed, or if they had changed, this was simply a sign of decay which needed reversing in order to

[19] J. D. Alsop, 'Lambarde, William (1536-1601)', *ODNB*.
[20] W. Lambarde, *Archaionomia, sive, De priscis Anglorum legibus libri* (Cambridge, 1644).

restore the law to its ancient perfection. The 'test of time' therefore seems incompatible with an intellectual approach that sees time itself as inherently unstable and subject to abstract historical forces. At the very least, as we saw with St German and Littleton, Holt might argue that these customs simply had not to be unreasonable to be valid. But the question still remains: why did Holt rely on customary use in this case as evidence of reason itself - a distinctly ancient constitutionalist position - when he clearly understood that such customs were subject to the vagaries of time?

5.3 Romans at the Gates

One answer to this question is, of course, that Holt was simply inconsistent, or muddled in his thinking. The gulf between theory in principle and in practice is nearly always a wide one, and we should not fall into the trap of assuming that Holt had the luxury of exercising his jurisprudence in a hermetically sealed vacuum. Fortunately for us, we can go further than this general observation, for in his opinion of *Blackbourn v Davis* [1701] Holt set out the precise nature of the pressures he was facing: those of jurisdictional rivalry.[21] This stemmed from the involvement of at least one doctor of the civil law in the case, presumably arguing for the plaintiff. Heavy use appears to have been made, not only of the civil law in his submissions, but also of Biblical law. In fact, Holt tells us that his own lengthy historical exposition of the customary law was made to match that of 'the Jewish law [which] hath been expounded' by the doctor. Holt even went so far as to quote the Old Testament passages that had been cited in support of the aunt's case:

> The 27th Chapter of the Book of Numbers was an exposition of their law of descents. When Zelophillad died without issue male, leaving daughters, it was a question of difficulty, whether they would inherit, upon which divine oracle was consulted which determined for the daughters. And it was further declared that if a man die and have no son his inheritance shall pass to his daughters, and if he hath no daughter then to his brethren, and if he hath no brethren then to his father's brethren. And this was to be unto the children of Israel a statute and a judgement.[22]

This remained 'the Jewish law' though. Holt was not having it in his courtroom. Yet the doctor's jurisdictional errors had not ended there. As Holt wrote:

> The doctor that argued here gave us an account that they did not govern themselves in making distribution by any Law of England, but by the civil law, which is called the *Authenticks* in Novel 111.C.2 . . . This if it had the force of law amongst us goes no further in collateral than brothers and sisters.[23]

Again though, these civil law rules did *not* have force of law:

> This law was never received in England and therefore can be no rule to go by, for first by the law of England the father and mother are preferable to the brother and sister,

---

[21] *Blackbourn v Davis* [1701], *Hardwicke II*, ff. 24r.-27v.
[22] Ibid., f. 24v.
[23] Ibid., f. 25v.

> 2ndly By the law of England the brother and sister is preferred to the grandfather and grandmother. Indeed as to the father and mother it was otherwise held in the *Duke of Suffolk's Case*, but since otherwise determined. And constant practice hath been to prefer the mother before the brother.[24]

In this case then, the civil law directly contradicted the common law custom: there was no way of harmonising the two. Yet clearly the common law had to prevail. It seems likely that it was the need to reinforce this point - that the civil law rule had never been received or used in England - that forced Holt down the route of emphasising the reason and authority of time-tested English custom in this particular case, and not an appeal to that universal reason which governed both systems. To do so would have been fatal, for it would have allowed the doctor of civil law to apply his theory on an equal footing with that of the common lawyers, effectively letting the civil law into England via the back door:

> . . . upon this occasion it is to be observed that though upon these and like debates some use is made of the civil law, and it is quoted not to be relied upon as authority, but only for information and illustration to open and explain the nature and reason of things. For the civil law never had force in England, because nothing can give it any force, but its being received and an immemorial usage thereupon.[25]

Once again, Holt could have left his analysis there. Yet he seemed determined to demonstrate his historical learning, and perspective, on the subject. With a decidedly Erastian flavour, he therefore set out to chart his understanding of the historical development of the civil law, including previous failed attempts to introduce it into England:

> For if the civil law is considered in its whole progress, as first framed and established by Justinian by the advice and assistance of Trebonius, who was set on work by the emperor for that purpose, and in the sixth century vizt. Anno Domini 526. completed the work of the *Digests*, and after that the *Codes*, and then established the *Novels* which being after collected in the time of Frederick and translated out of Greek in which they were originally wrote and therefore called the *Authenticks*. And this system of laws which was collected from the Theodosian Code and the writings of Ulpian, Paulus, Papinian etc. and continued in force and was practised and received for the space of forty years, vizt. during Justinian's Reign and those of Justinian the 2nd and Mauritius until the time of Phocas and then they began to be neglected for the space of two hundred years until the reign of Basilius the emperor who totally laid them aside, and caused a new system to be compiled which were called the *Basilice*, which continually were the law of the empire until the year 1452 that Constantinople was taken by Mahomet the Great.
>
> But for the space of 500 years the Books of Justinian were lost until the pandeds were found in the Amalsi in Naples, which was besieged and taken by Lothair the Second, the western emperor which was in the year 1125. All which appears by Selden's notes on Fortescue, 10, 11, 12, *History of Tythes*, 478, Dr. Duck, L.1 Cap. 5, which time was about 25. H.1. of England. It was impossible they should be received in his time, for he reigned not about 10 years more, in all 35. There must be some time to transcribe and peruse them for they were carried to Boulogne, a university in the Pope's territory. But it appears that the clergy in King Stephen's reign did endeavour to introduce the system of civil law into England. For Theobald, then Archbishop of Canterbury, brought it out

[24] Ibid., f. 26r.
[25] Ibid., ff. 26r.- 26v.

> of Italy into England. But King Stephen caused the books to be torn and burnt. So John of Salisbury complained in the time of Henry 2. as did friar Bacon in the time of Ed 1. So that, notwithstanding the endeavours of the clergy, they were always rejected as being deemed prejudicial to the Crown of England. Selden's notes upon Fortescue, 39, 40. Though in the Admiralty they are used, not as authority but only to argue upon. For they are in their proceedings upon facts committed *Super Altum Mare*, are to govern themselves by the law of nations, which indeed are mingled within the civil law. And the methods of their proceedings do pursue those of the civil law, but civil law as such hath authority nowhere in any kingdom or state whatsoever.[26]

These passages are worth reproducing in full, not only because they display the extent to which Holt was prepared to go in his opinions to display the breadth of his historical erudition, but also because of their demonstration of the influence of John Selden (1584-1654), especially in cases dealing with the jurisdiction of the church, on his thinking. Holt references at least five of Selden's works throughout his opinions: his notes to Sir John Fortescue's *De laudibus legum Angliae* (1616), *The Historie of Tithes* (1618), his 1623 critical edition of the history *Eadmeri monachi Cantuariensis, historia novorum*, his *De successione in pontificatum Ebraeorum* (1636), and his edition of *Fleta* (1647).[27] In this case, Holt combined his reading of the seventeenth-century English lawyer, historian, and linguistic scholar with the Latin work *De Usu et Authoritate Juris Civilis Romanorum* (1653) of the civil lawyer and M.P. Dr. Arthur Duck (1580-1648). Duck had been a chief ally of Laud, and Holt's citing of his work - perhaps the most ambitious attempt to chart the European-wide reception of civil law printed in England, and not translated into English until 1724 - was obviously designed to counter any claims to Holt's ignorance of the subject or of Latin scholarship.[28] From Selden, on the other hand, Holt received detailed analyses of the structure of English law, government, and the constitution from Biblical times to the Bishops' War, with a particular emphasis on the impact of the Norman Conquest, the customary evolution of the English commonwealth, as well as an Erastian interpretation of the history of the jurisdictional conflicts between the church and state stretching back to the foundations of Christianity.[29]

The impact of Selden's thought can be seen throughout Holt's judgements, and provides one of the strongest explanations as to why Holt does not seem to fit the traditional insular 'common law mind' model. Even Pocock himself admitted in the retrospect to the second edition of *The Ancient Constitution* that 'Selden's absence' was 'a significant weakness in the structure' of his book, and that he would certainly 'not do as a representative of blinkered English insularity'.

---

[26] Ibid., ff. 26v.-27r.
[27] For Holt's opinions with heavy references to Selden, see *R v Horneby et al. (The Bankers' Case)* [1695], *Hardwicke I*, ff.25r.–59r.; *Blackbourn v Davis* [1701], *Hardwicke II*, ff. 24r. – 27v.; *R&R v Bishop of London and Dr Birch* [1694], *Hardwicke I*, ff. 16v. – 24v.; and *Clements v Scudamore* [1704], *Hardwicke II*, ff. 50r. – 53r.
[28] P. Stein, 'Duck, Arthur (1580-1648),' *ODNB*.
[29] P. Christianson, 'Selden, John (1584-1654)', *ODNB*.

Yet still Pocock went on to defend his thesis of the insular common law mind: 'Selden's ancient constitutionalism was sophisticated by comparison with a monolithic 'common-law mind', but used the same assumptions and arrived at the same conclusions.' Pocock based this claim on his analysis of the 1628 parliamentary debate attending the Petition of Right, where despite Selden's involvement, he finds little to suggest that anyone understood that 'William the Conqueror brought feudal tenures with him and imposed them by right of conquest'. This is crucial, for as Pocock puts it, 'until it was recognized that feudal tenures had been imported into England and imposed upon land and law, a history of English law could not be written'. [30] The problem here may well be where Pocock has chosen to look for such evidence. For as we saw above, Holt clearly found enough material in the work of Selden, combined with Lambarde and others, to come to the conclusion that, 'upon the creation of tenures by knight service, which were never before the Conquest, the law of England changed'. In fact, Holt's historical conception of change and the relative importance of the Conquests echoed by Paul Christianson's description of Selden's very similar theory, as expressed in his notes on Fortescue:

> The normal adjustments of time combined with the succeeding conquests of the Saxons, Danes, and Normans to alter both the society and its laws . . . This combination of continuity and change deliberately deconstructed Fortescue's seamless web of law, stretching unbroken from the Britons to his own day, into a suitable series of historical events . . . Within this new historical interpretation, the Norman conquest now seemed like just one more conquest that kept old customs and added new ones - not an unobtrusive or a catastrophic event.[31]

Using Selden, Holt had constructed a model of legal change that appreciated customs as being temporally contingent, subject to the same historical forces as the civil law during its long history of development, neglect, and resurrection. Yet this did not mean that Holt was any more willing to allow civil lawyers to dictate the law to him. Again, Christianson's notes on Selden's edition of *Fleta* match Holt's concerns on this point: 'This history served both to introduce the reader to *Fleta* (which Selden discussed at some length at the end of this essay) and, perhaps more importantly, to inoculate England against any universalist claims of Roman or civil lawyers'.[32] Indeed, Holt would use Selden's text to keep England inoculated in this fashion in circumstances that did not even involve civil lawyers. In one of his better known cases, *R v Horneby et al. (The Bankers' Case)* [1695], Holt found himself arguing in favour of the Crown's prerogative power to alienate its income.[33] One of the more obnoxious arguments presented to

---

[30] Pocock, *Ancient Constitution*, pp. 286-301.
[31] Christianson, 'John Selden'.
[32] Ibid.
[33] *R v Horneby et al. (The Bankers' Case)* [1695], *Hardwicke I*, ff. 25r. – 59r.

him by the Crown's lawyers - who in an attempt to avoid repaying Charles II's creditors claimed that his mortgaging of the revenues from the hereditary excise had been unlawful - had been their referencing *Fleta*, in particular a passage concerning a medieval congress where it had been held that such mortgaging was not permitted. Holt's response was comprehensive:

> It seems that author would have that determination of the Christian princes at the congress held at Montpellier, 4.E.I. to be a declaration of the law of all kingdoms and states, and therefore though he were a common lawyer he uses it as an authority in England.
> Resp. If he means that the resolution should be obligatory in England without any sanction from the law or statutes of the realm that is contrary to the fundamental constitution of our government, and therefore can be no proof of this matter. If he means it as a declaration of the law, that will be as vain and as much against the constitution as any other.
> But 2ndly, which is worse, there never was any such. Seld, *Dissertatio* 49 etc. which manifestly disproves it. The arguments whereof would be too tedious to rehearse.
> But 3rdly. If there had been such a constitution, it never obtained, nor never was received in England. The constant practice of the kings as well after as before 4.E.1. in granting the crown revenues hath always been to the contrary. Seld: *Disser Fleta.* 552.[34]

We will deal with the broader context of this fascinating case in the next chapter, yet at this stage it serves as a clear example of Holt's Seldenian inheritance, and to set the scene for our discussion to come of continued jurisdictional jealousy.

5.4 The Argonaut's Ship

In this and the previous chapter, we have attempted to paint a picture of Holt's jurisprudence, and the sources that he used to construct it. The resulting image has, in many places, been varied and seemingly contradictory. Having just established, for instance, that Holt was deeply concerned about the influence of civil lawyers on the development of English law, we can find him in the case of *R v Bear* [1699] appealing to the authority of universal laws of political society:

> This crime of libelling is an offence wherever there is a politick society to which the toleration thereof is repugnant and inconsistent, and it's against the law of all governments; against the laws of the twelve tables that were brought from Athens to Rome, even from one Commonwealth to another... So this opinion we now give is no novelty in the world, it is founded upon the principle of the preservation of all government, and the safety of all civil society.[35]

Even more surprisingly, when discussing the liability of servants in the case of *Lane v Cotton and Frankland* [1701], Holt went as far as saying:

> . . . when I find the law of England and the Roman Law to agree in many particulars, I find the reason why the Roman Law was so established. I think it very reasonable to suppose, that the law of England was made upon the same principle of justice, as the civil law was, and therefore in a parallel case, it is not improper to consider the same reason. For in truth the very essence of all law consists of the reasons of it.[36]

---

[34] Ibid., f. 37r.
[35] *R v Bear* [1699], *Hardwicke III*, ff. 13v. – 22r., at f. 21v.
[36] *Lane v Cotton and Frankland* [1701], *Hardwicke III*, ff. 89v. – 107v., at f. 96r.

Of course, Holt prefaced this claim with 'I do not quote this as an authority, for if I should be so understood, it might raise an accusation that I presume to judge the people of England by the rules of civil law.' The common law then shared a common ancestor with the civil law, which was a bold enough claim in itself, and the civil law might even be cited as evidence of the reason and justice of the common law when the two were in agreement. Yet in walking this jurisdictional tightrope, Holt had to maintain the balance in his institution's favour. Even when suggesting the influence of the civil law on Bracton (c.1210-c.1268), Holt found himself having to explain this in almost bizarre counter-factual terms, stating that 'Justinians *Institutions*, lib.3.Tit.15: hath the very words of Bracton, or rather, Bracton delivered the Law of England in the words of Justinian'.[37] A common lawyer like Holt then might admire, and even be inspired by, the civil law, but he must always be wary of surrendering his authority to the civil lawyer.

We have spoken about the influence of Selden in these matters. Yet one character we have not mentioned since the beginning of the last chapter, and who links Holt physically with Selden, is Sir Matthew Hale. Holt's career began under Hale, who was Selden's literary executor and friend. Both in terms of his views on history and legal change, but perhaps more importantly in his appreciation of moderate reform of the law centred on a need to maintain its usefulness to society, Hale's legacy can be seen in Holt. When we last spoke of Hale, it was in terms of Pocock and Cromartie's assessment of him as something of a tragic half-historian; a brilliant mind, capable of recognising gradual change in the law, but incapable of recognising the past as a foreign place. Yet other writers, notably legal scholars, including Charles M. Gray and Daniel R. Coquillette, have presented Hale in a more favourable light. Gray has emphasised Hale's recognition of the fact of legal change 'straightforwardly', and his movement away from Coke's conception of the 'remote origins' of the law. Yes, Hale viewed historical change in terms of the Argonaut's ship: rules and procedures altered over time, sometimes gradually, sometimes swiftly, but the 'basic political frame' or 'constitutional rules by which other rules can be authoritatively recognized as binding' remained unchanged. But Hale's scepticism about an 'infinitely ancient system' represented a vital gain 'for realistic historical thinking'.[38] As we have argued in this chapter, Holt took the development of this historical thinking one step further, and spoke of the customs of the Anglo Saxons in alien terms. This does not mean that he totally abandoned a belief in the need to preserve the integrity of the 'Argonaut's ship' though. In fact, Holt's appreciation of the random reality of historical change seems to have convinced him even more of the need to maintain the hull's integrity in the face of political, social and economic

[37] *Coggs v Barnard* [1702], *Hardwicke III*, ff. 122v. – 136v., at ff. 126v.-127r.
[38] Hale, *History*, ed. Gray, pp. xxii-xxvi.

upheaval. After all, the ship might well sink if the judiciary permitted the installation of rotten material into its fabric.

Here too Hale provided inspiration. He warned against the danger of law reformers starting with 'an inaccurate picture of the law to be reformed' and who gave 'too little consideration to the inconveniences that may ensue from superficially desirable changes.'[39] We see this sentiment repeated throughout Holt's opinions, both in terms of policy and procedure. In *R v Dr Drake* [1706], a case dealing with an accusation of seditious libel, Holt railed against an inaccuracy in the drafting of the information presented by the prosecution. Brushing off requests to ignore the mistake, Holt made his opinion on the matter clear:

> . . . if we should allow of such a variance I know not by what rule we shall go or govern ourselves in cases of this matter. The Rule of Law is, that the thing proved must agree with the thing that is described in the information.[40]

What makes Holt's position all the more remarkable was the highly political nature of the case. Drake was being prosecuted by the attorney general for publishing a pamphlet 'concerning the said settlement of the crown under the feigned name of the revolution'. The mistake in the information way tiny: the word 'nor' had been replaced by 'not'. But this was enough of an error for Holt:

> Surely the law will make no difference between short words and long words any more than it will distinguish between tall men and short men.
> It is not sufficient to say that it is a small matter of difference; so are the milestones and boundaries of land very small in themselves, yet there is a curse upon them that remove them. If we should in this case give judgment that there is no variance from the information, I should think we are removers of the ancient boundaries & landmarks of the law.[41]

5.5 'Better to Suffer a Mischief than an Inconvenience'

Holt developed this line of thinking further in his opinion of *Gage v Acton* [1700], a debt dispute between a widow and the executor of her late husband's estate. The case turned on the nature and wording of a bond made between the couple when the husband had been alive but before they were wed. Holt dissented from Justices Gould and Turton in reading the terms of the bond in the strictest terms, arguing that the debt had been extinguished upon their marriage. As he argued:

> The intention of the parties, be they never so plain, (which was no more but that the wife should have so much money after the death of the husband) will not be sufficient to alter the nature of legal acts, nor contradict the words of the lien which are express

---

[39] Ibid., p. xxix.
[40] *R v Dr. Drake* [1706], *Hardwicke II*, ff. 81v. – 89v., at f. 85r.
[41] Ibid., f. 85v.

> in making a present debt from the obligor to the obligee, nor in turning a condition subsequent into a condition precedent, which would be to overthrow all rules and methods of law.[42]

Holt chastised Gould and Turton, accusing them of behaving like Chancery lawyers in their keenness to bend the rules of law to suit the present situation. Yet, as Holt tartly remarked, even equity specialists would have agreed with him in this case:

> I will undertake that by this judgment which is now in a manner given we have exceeded the imagination and invention, though very fine and curious, of all the gentlemen on the other side of the hall.
> I must acknowledge that having had some conference with my brethren, and perceiving their inclination to be grounded upon the equity of the case, I had a desire to know what had been done in a court of equity.
> I must say I can never bring myself to give a judgement of law upon a point of equity upon which the Chancery can't make a decree, especially in case where the matter is at large, for here is creditor against creditor.[43]

Again, echoing the lecture he gave in *R v Dr Drake* [1706], Holt concluded:

> Certainly there is no reason to alter the rules of law for a rash and unadvised woman that was in so much hast to marry that she had no patience to be well advised beforehand. It behoves us to keep to the ancient rules of the law which are the bounds and land marks of all mens propertys, and better to suffer a mischief than an inconvenience for the reasons I have given.[44]

This was a double blow of course: in misapplying equity in this case, Holt was also accusing his fellow justices of ignoring the 'bounds and land marks' of their own bench and court, damaging not only their reputation, but the integrity of the common law itself. Yet Holt was not, as we have seen, immune to calls for change or reform in the law. He conceded that:

> If a bond with a condition subsequent can be made no present debt or demand, a man may be indebted to his wife, and pay money to his wife that shall be hers and not his. When all these things can be got over and brought to pass by the rules of law, then judgment ought to be given for the defendant. But in the meantime I think it ought to be given for the plt.[45]

Holt's remark in this case may have well been tongue in cheek, but it points to another aspect of Holt's jurisprudence that he shared with Hale: the need to ensure that the law remained useful to its primary customers, the English propertied classes. This is what he meant when he spoke of it being 'better to suffer a mischief than an inconvenience', for by rashly changing the law to suit particular cases, judges were in danger of undermining the unique selling point of the common law: the convenience of consistency. As Daniel Coquillette has commented in relation to Hale's thought, 'what the common law lacked in superficial theoretical elegance, it more than compensated for in its practical development, which was constantly being tested by

---

[42] *Gage v Acton* [1700], *Hardwicke III*, ff. 80v. – 89r., at f. 88r.
[43] Ibid., ff. 88r.-88v.
[44] Ibid., f. 88r.
[45] Ibid., f. 88r.

utility and concrete application.' It was this doctrine that would lead to the consolidation of the 'common law conquest' over the civil law, and would ultimately 'lead to progressive common law reform'.[46] Maintaining the law's usefulness was at the heart of Holt's jurisprudential model, yet his interpretation of that usefulness would often bring him into conflict with the other justices on the bench. It was also what drove his programme of restructuring and reform. This is what he meant when, in *Clements v Scudamore* [1704] he spoke of his judgment setting borough English estates 'of which there are many in the kingdom upon a certain foundation', bringing them 'to a rule which will establish quiet and repose among them, whereas if we deviate from the common and known rule of law, it will occasion abundance of disputes.'[47]

It was the same sentiment that governed his decision in the case of *Keble v Hickeringill* [1706] to extend the law of actions of trespass to cover the act of firing a gun so as to scare birds away from another man's duck decoy pond, despite the gun being fired on the shooter's own land. It was, according to Holt, 'lawful to use art to seduce' the ducks, 'to catch them and destroy them for the use of mankind', for 'every man that hath a property may employ it for his pleasure and profit', and 'there is great reason to give encouragement thereunto, that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action.'[48] And as we saw in *Lane v Cotton & Frankland* [1701], Holt was adamant that the law 'must make some person liable' for the loss of property, by which we now know he meant, that those with property should not be forced into the arms of other courts by the failure of the King's Bench to help them.[49]

5.6.Conclusion

The law had to adapt then, but, like the government of the kingdom under James II, it must never become arbitrary. As Holt opined in the case of *Mayor & City of London v John Vanhacker* [1699], there were those in the capital who endeavoured to make encroachments 'upon the government of it, who design to bring all things into disorder and confusion'. He saw in that case evidence of a 'spirit now fermenting', and 'a new light sprung up by which men can discern the errors and mistakes of their predecessors'. But, as he concluded, 'we are directed to the old paths in which it is most safe to walk', paths which had seen the City governed well 'throughout the various turns and revolutions of affairs'.[50] It is to how Holt applied his jurisprudence to secure the safety of his court, and the kingdom, through the 'revolutions of affairs' that occurred

---

[46] D. Coquillette, 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law', *Boston University Law Review*, vol. 67 (1987), pp. 932-933.
[47] *Clements v Scudamore* [1704], *Hardwicke II*, ff. 50r. -533r., at 52v.
[48] *Keble v Hickeringill* [1706], *Hardwicke II*, ff. 108r. – 111r., at ff. 108v.-111r.
[49] *Lane v Cotton and Frankland* [1701], *Hardwicke III*, ff. 89v. – 107v., at 94v.
[50] *Mayor & City of London v John Vanhacker* [1699], *Hardwicke III*, ff. 61r. – 72r., at f. 69v.

in the aftermath of 1688 that we turn to in the next section, as we analyse how Holt kept the Argonaut's ship afloat on the stormy seas of the years following the Glorious Revolution.

Section III

Revolution and the Rule of Law

In Chapter 1 we noted the triumphalist tone of Sir William Holdsworth as he described the importance of Sir John Holt in 'vindicating the supremacy of the law', as well as the achievements of the Glorious Revolution, which settled 'the great constitutional controversies' and granted the judiciary an 'independent position' with 'nothing to fear, either from the crown, or from either one of the two Houses of Parliament'.[1] Writing half a century earlier, Edward Foss had declared that Holt's career marked the starting point for 'a new era of judicial purity and freedom' in England, one characterised by a 'perfect exemption from extraneous influences'.[2] Reaching back still further to the immediate aftermath of the revolution, Tim Harris has identified a similar sentiment in Sir John Somers's 1690 boast that the nation's newfound happiness stemmed from 'our Princes' being 'tied up to the law as well as we'. Somers, says Harris, 'was making points which many constitutionalists might have thought were true in theory prior to the reign of James II.' 'The achievement of 1688-9', Harris concludes, 'was to ensure that they would also henceforth be true in practice.'[3] The same assumption lies at the heart of Philip Hamburger's analysis of the evolution of judicial duty between the seventeenth and eighteenth centuries. 'In doing their duty, judges had to exercise independent judgment', he argues, 'judgment independent of will.' This had been almost impossible prior to the revolution though, as 'monarchs pressured the judges', constantly 'seeking advisory opinions' on matters of political policy. In this the Stuarts had abused the legal system by undermining the integrity of the judiciary, for when 'push came to shove, the Crown could dismiss uncooperative judges - as it did on forced loans and later… seditious libels.' Mercifully though, the 'threat of dismissal eventually came to an end when the English in the wake of the Revolution of 1688 confined the Crown to lawful governance.' Even better, parliament gave the judges 'statutory protection a decade later', when their commissions were made 'upon good behaviour', and not according to the pleasure of the crown.[4]

The purpose of the final section of this thesis is to scrutinise this legal and historiographical consensus through an examination of Holt's experiences as lord chief justice after 1689. It will

[1] W. Holdsworth, *A History of English Law* (1972), vol. VI, pp. 258-263.
[2] E. Foss, *Biographia juridica: a biographical dictionary of the judges of England... 1066-1870* (1870), p. 351.
[3] T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006), p. 354.
[4] P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass., 2008), pp. 148-158.

be argued that the assumption that 1688 marked a turning point for judicial independence, and the establishment of a new constitutionalist system of government that was finally subject to the 'rule of law', is historically inaccurate. As we saw in the first section of this thesis, despite accusations of James II's 'illegal' behaviour, the revolutionary settlement was not one crafted by, or in the interests of, the law, but instead by the political necessity of constructing a strong English state. The law, as John Maynard said, was a tool of government of which James had lost control as a consequence of his political ineptitude. It was a tool that had now been picked up by others who intended to use it more effectively. This did not always mean it would be used in a way of which Holt approved. In fact, as we will see, much of his later reputation as a stalwart defender of 'independent' legal judgment and procedure stemmed from his suffering at the hands of those who sought to manipulate the legal system in ways not dissimilar to James. We have already identified this paradox in Chapter 1: if the judiciary was immune to outside interference, why was Holt forced to defend the 'supremacy' of the law quite so often, and why did his 'unshakable integrity' mark him out for particular praise? The answer to this, it will be suggested, is that there was, and remains, a fundamental contradiction at the heart of the whig description of the constitutional settlement that emerged from the Glorious Revolution: the incompatibility of this theory of the rule of law with the reality of parliamentary sovereignty and the power of the executive, and a contradiction that continues to cause 'constitutional uncertainty' in our own day.[5]

The first chapter of this section will investigate the lack of 'judicial independence' in the face of continued political manipulation of the law after 1688, how Holt responded to it, and how his behaviour helps us to explain his later reputation. The second chapter will focus on Holt's commitment to defending his reputation for fairness, and his belief in the importance of ensuring regularity in the procedure followed by the courts, and in the application of the law. These priorities, it will be argued, were part of his effort to generate stability in state and society through a promotion of legal certainty in its courts. The third chapter however will focus on the reality of the jurisdictional uncertainty caused by the transfers of sovereignty that took place in the wake of the revolution, and how Holt was forced to battle for the institutional independence and oversight of his courts against those in the Lords, Commons, and Church who attempted to expand their power in the wake of this upheaval, which had far from generated 'balance' in the constitution. Finally, in our concluding chapter to the thesis, the results of our investigations will be brought together in an attempt to present a clearer narrative

[5] T. Bingham, *The Rule of Law* (2010), pp. 168-170.

of the story of the relationship between law and politics in the years around the Glorious Revolution. The conclusion will emphasise both the continuities and the differences that can be observed in this relationship, as well as suggest subjects for future research that can build on and expand the work we have done in this study.

Chapter 6: 'A New Era of Judicial Purity and Freedom'

6.1 Introduction

The concept of 'judicial independence' sits at the heart of nearly every description of the 'rule of law' offered by historians and legal scholars over the past three centuries. From Holdsworth to Harris, the ideal of the separation and insulation of the judiciary from the will and caprice of the governor sits at the heart of countless accounts of the noble achievements of the constitutional settlement that emerged in the aftermath of the Glorious Revolution. The starting point for academic discussion on this point is invariably the definition laid down by Professor A.V. Dicey in his *An Introduction to the Study of the Law of the Constitution* of 1885.[1] Writing much more recently, both Lord Chief Justice Bingham and John Phillip Reid have credited Dicey with coining the expression 'the rule of law', and have used his theories as the foundation for their own explorations of the subject. As Bingham understood it, 'Dicey gave three meanings to the rule of law'.[2] The first, and perhaps most important, was that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'[3] Explaining Dicey's point further, Bingham added that an ordinary court of the land was the exact opposite of 'a tribunal of members picked to do the government's bidding, lacking the independence and impartiality which are expected of judges.'[4] This key point was echoed by Reid in his study. He argued that 'individuals should be governed by law rather than the arbitrary will of others', by which he meant 'not by the arbitrary will and caprice of government officials but by law ruling over governor and governed alike.'[5]

Both Bingham and Reid identify the origins of this system in the constitutional framework constructed in the years after 1688. Noting the blessings bestowed by the Bill of Rights for instance, Bingham observed that the 'authority and independence of Parliament were proclaimed', and the 'power to suspend laws' without its consent 'condemned as illegal'. 'Personal liberty and security', he added, 'were protected by prohibiting the requirement of

[1] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).
[2] Bingham, *Rule of Law*, p. 3.
[3] Bingham, quoting Dicey, ibid.
[4] Bingham, *Rule of Law*, p. 4.
[5] J.P. Reid, *Rule of Law*, *The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Illinois, 2004), p. 4.

excessive fines, the imposition of excessive bail, and the infliction of 'cruel and unusual punishments'.' 'Jury trial' was also 'protected'. Yet despite all of this, Bingham noted that:

> There is little advantage in the promulgation of laws, however benign, unless there are judges who are able and willing to enforce them. Otherwise, the powers that be can disregard the laws with impunity. But if the judges are to enforce the law against the highest authority in the state they must be protected against intimidation and victimization.[6]

This protection was finally brought about, according to Bingham and others, when 'the keel of judicial independence was laid in the Act of Settlement of 1701, which effectively protected the judges against dismissal by the government without good cause.'[7] This point could not be more important to grasp, for a 'truly independent judiciary is one of the strongest safeguards against executive lawlessness; it thus becomes a victim of authoritarian governments, as the history of countries such as Zimbabwe and Pakistan graphically illustrates.'[8]

Executive lawlessness was certainly a credible threat in the aftermath of 1688. As Richard S. Kay has observed, the revolution had been founded on a 'breach of law' that caused particularly acute difficulties for the courts and their judges, who had 'to be especially ingenious or especially bold to maintain the pretense of legal continuity' in its aftermath.[9] The revolutionary settlement, Kay points out, was extremely precarious, with the nation in an almost perpetual state of emergency during the 1690s due to the combined pressures of foreign war and internal plots in support of the recently deposed king. As a result, the Williamite regime 'must have been impatient . . . with the inconveniencies of ordinary legal procedure and tempted to elide the ordinary protections it accorded to those accused of crime.' Yet crucially, the 'new settlement's identification with the values of legality limited the extent to which it could bypass the courts.' Consequently, Kay argues, 'the government would have to rely for its protection on the sympathetic understanding of the judges.'[10] Kay points to the work of Paul Monod and Philip Hamburger in support of this thesis. 'The Crown mounted what appears to have been a fairly persistent campaign against disparagement of the legal quality of the new government', Kay notes. Indeed, Monod estimates that about six hundred individuals were prosecuted for seditious libel between 1689-97.[11] Hamburger's work on the other hand offers evidence of Holt

---

[6] Bingham, *Rule of Law*, p. 24.
[7] Ibid., p. 91. See also Hamburger *supra* n. 4.
[8] Bingham, *Rule of Law*, p. 25.
[9] R.S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington, 2014), p. 181.
[10] Kay, *Glorious Revolution*, p. 207.
[11] P. Monod, *Jacobitism and the English people, 1688-1788* (Cambridge, 1989), p. 245.

assisting the regime by adapting the common law to ensure prosecutions in the absence of those powers lost by the abandonment of the Licensing Act in 1695.[12] Holt then could apparently be trusted to assist 'independently' the government in preventing the spread of 'fake news' by using the legitimate powers of his court. Yet as we shall see later in this chapter, when it came to financing the state and the war effort, there were some cases where government debt and international trading corporations were viewed as being simply too big to fail. In those circumstances, the independence of the judiciary was very much a secondary consideration in the face of political necessity. Similarly, as we shall focus on in the first half of this chapter, there were in fact plenty of cases involving the security of the regime which were deemed too important to be left to the whim of a jury. The evidence we shall analyse should cause us to question the extent to which the decades after 1688 can in any way be described as 'a new era of judicial purity and freedom'.

6.2 In Defence of the Realm

On 30 June 1693, Henry Sydney, Lord Lieutenant of Ireland, wrote to the Earl of Nottingham concerning the plight of a Mr Sweetman.[13] Thought to be a 'dangerous person', Sweetman had been accused of complicity in the murder of several soldiers of Colonel Foulk's regiment near to Malyhedart Church, Dublin, in the early months of 1691. Remanded without evidence, he was committed to Newgate where 'he lay in irons from the 22nd of March to the 25th of May, 1691'. Sydney made it clear that 'in all that time the King's counsel at law were consulted upon the evidence which could be produced against him'. All 'were of opinion that it was not sufficient to convict him of either crime', so, after nine weeks in chains 'he was bailed by the Lord Chief Justice of the King's Bench'. Having ridden to the rescue of this unfortunate man, Holt was persuaded to throw him back into prison after a private conversation with 'Captain Fitzgerald' who had 'acquainted the Chief Justice that there was further evidence against him'. Sweetman spent another month languishing in prison. The new evidence never materialised: 'those who accused him did not prove it positively but by hearsay from another', yet despite frequent applications to prove his innocence in a court of law before his peers, his requests were constantly 'rejected in the expectation of further evidence'. Sweetman was finally bailed on 10 July, by which point his case had become something of an embarrassment for the government.

---

[12] P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review,* no. 3 (1985), pp. 661-765.
[13] 'Viscount Sydney to the Earl of Nottingham', 30 June 1693, *CSPD* 1693, p. 205.

We can safely assume that Sweetman would have been rather surprised to learn that he was lucky enough to be living under a regime that governed according to the rule of law. Repeatedly refused the right to a trial by jury, imprisoned on the basis of no evidence, and kept in prison on account of government and army officials leaning on the judiciary, his case makes a mockery of Dicey's definition. But Sweetman *was* lucky: he was, at least, alive, which is more than can be said for his unfortunate servant Mr Gaffney. He had also been arrested, and was prepared to testify against his master. Sweetman was forced to offer Captain Fitzgerald a £3000 bribe - the value of his estate - to escape the noose in the first instance, as well as £500 to the secretary of the lords justices of Ireland in a forlorn attempt to secure bail. Gaffney, after summary examination by the same lords justices 'without the Ceremony of a Tryal, Judgment, or Sentence' was ordered to be hanged immediately. The man tasked with the job had pointed out 'That it would require some time to make a Gallows', so instead he was ordered to hang Gaffney 'on the Carriage of a Gun, which was done accordingly'. Our account of the unfortunate Mr Gaffney comes from Charles Hornby's *A third part of the Caveat against the Whiggs, in a short historical account of their transactions since the Revolution* published in 1712. A rising star in the exchequer pipe office, Hornby's side-line was his career as a skilled tory polemicist supporting Jonathan Swift's attacks on the whigs.[14] His searing assaults on the government cut through the veneer of its claims to have done away with the legal abuses of James's reign. If anything, Hornby thought that the situation had become far worse under William:

> The dispensing with Laws, which was the greatest Grievance of King James's Reign was continued by his Successor on divers Accounts... Punishments were inflicted by Martial law, before it was Authorised by Act of Parliament . . . the Habeas Corpus Act...frequently Invaded, Arbitrary and illegal Imprisonments excessive Bail and exorbitant Fines; were as Familiar in that Reign as in any before it, Treasons were Multiplied instead of being explain'd, Lists were kept like that of worthy Men and Men worthy, the Refuse of Jails and the cast Furniture of Pillories, and whipping Posts were laid up in Lavender, and pamper'd to Sweat Men out of their Lives and Estates[15]

If things had become worse though, how was it that the majority of the country seemed happy to put up with it? Here too Hornby had an answer:

> As religion was only one Foot on which the Revolution walk'd in, Liberty and Property being the other, it were to be hop'd they did not both remain Lame alike, and that so

[14] B. Barber, 'Hornby, Charles (bap. 1670?)', *ODNB*.
[15] C. Hornby, *A third part of the Caveat against the Whiggs, in a short historical account of their transactions since the Revolution* (1712), pp. 62-63.

> expensive a Remedy had not hazarded the Loss of one, without a visible Amendment in the other; but whoever entertain'd any such Hopes were disappointed, our Desperate Condition under King James, was rather guess'd at by prognostics than proved by diagnosis and was imagined by what we fear'd, more than what we felt; but tho' the People lay under the same, or greater Inconveniences afterwards, yet being cured of their Hypocondraic Apprehensions of Popery, they bore them patiently without any Concern.[16]

Hornby's conclusions chime with many of our own from Section I regarding James's perceived popery as being the root cause of his demise. By contrast, the Williamite regime seems to have been able to use the law in much the same way that James had wanted, but was more successful in exercising this power by hiding behind the respectable cover of parliamentary government and the 'rule of law'. Hornby had this in mind when he explained what had happened to those accused of abusing their authority with the summary execution of Gaffney. There were in fact attempts to impeach Lord Coningsby and Sir Charles Porter for the murder, and other matters, in the House of Commons, and 'tho' the Murther of Gaffney, with its Circumstances, were fairly proved, insomuch that the House thought themselves obliged to Vote his Execution without Tryal to be Arbitrary and Illegal, yet the State of Affairs, they did not think fit to ground an Impeachment against the Lord Coningsby for the same.' Far from guaranteeing that justice be done, parliament had actually acted as a screen 'from the Punishment they justly deserved.' [17] It was less an institution guaranteeing the liberties of all freeborn Englishmen, and more an elite debating chamber in which the legality of executive action could be assessed by weighing it upon the scales of political necessity. This reality seems to have been enough to convince the political classes of the merits of the revolutionary settlement, as well as to trust it to pursue policies best suited to the preservation of their land and property, the true hallmarks of their liberty. It also allowed them to turn a blind eye to abuses of legal process being committed in defence of that settlement, abuses that, according to whig propaganda, had been at the root cause of James II's downfall.

The pressures of political necessity were something Holt was all too familiar with, owing to the frequency with which he encountered blatant interference in his 'independent' administration of the law. In July 1692 for instance, Holt received a letter from the Earl of Nottingham instructing him to reprieve Mr George Peyton who was to be tried at the Dorchester assizes 'in case he should be found guilty'.[18] Peyton was accused of murdering John Meader, but had done

---

[16] Hornby, *Caveat*, p. 62.
[17] Hornby, *Caveat*, pp. 64-65.
[18] 'The Earl of Nottingham to Lord Chief Justice Holt', 14 July 1692, *CSPD* 1691-2, p. 366.

so 'in the execution of his office, in pressing men for the London', one of the larger warships in the Royal Navy. The importance of his job for the war effort ensured that he would receive preferential treatment before the law. This attitude towards press-ganging seems to have become official government policy by the late 1690s. In July 1697, the head of the Admiralty, the earl of Orford, brought a warrant before the lords justices tasked with running the country in the king's absence.[19] The warrant was from Holt 'for fetching an apprentice from a press smack.' But instead of acting on the warrant and upholding the liberty of the kidnapped apprentice through the courts, 'Their Excellencies thought it best to take no other notice of it'. Instead, Holt was to be spoken to, and informed that 'a complaint was intended to be made' through the usual back channels in order to resolve the situation. More importantly, Holt was to be instructed 'that it would be for the public service if those methods were foreborne, which might tend to lessen the authority of the Admiralty.' Five days later, the lords justices were informed that 'Lord Chief Justice Holt would "be easy" in maintaining the authority of the Admiralty; [and] when any complaint should be brought to him about pressed men, that he would direct the complainants to make their applications to the Admiralty, and give them a private intimation where he sees reason for discharges.'[20] Given what we know of Holt so far, this instruction must have stung: the jurisdiction of his court, the 'ordinary court of the land', was to be bypassed in order to hide politically embarrassing cases by brushing them under the carpet of the Admiralty courts, courts which did not use juries, and that Holt was to advise and influence behind strictly closed doors.

This delicate interplay between official concern for the superficial appearance of legality, mixed with the more pressing practical need for effective military policy, continued into the reign of Queen Anne. Given the centrality of the story of James II's abuse of martial law to the whig legend of his downfall, we would expect the tory administration of the early 1700s to be particularly image-conscious when it came to the handling of court martials. This is certainly what Attorney General Sir Edward Northey realised in the October of 1702. He had been tasked with coming up with an effective response to a highly embarrassing incident that had occurred at El Puerto de Santa Maria that summer. A central pillar of the new war effort against the French in southern Spain was the policy of not alienating the local Spanish population. The duke of Ormonde, in charge of the English land forces in the region, had guaranteed the inhabitants of 'Port St. Marie's' that no harm would come to them. Yet contrary to his

[19] 'Minutes of the Proceedings of the Lords Justices', 8 July 1697, *CSPD* 1697, p. 236.
[20] 'Minutes of the Proceedings of the Lords Justices', 13 July 1697, *CSPD* 1697, p. 248.

assurances, Santa Maria was sacked, an event fuelled by the large stores of wine warehoused there for the nearby port of Cadiz. Incensed by the incident, the government was nevertheless deeply conscious of the tortured history that previous regimes had had in dealing with matters of military discipline. So it was to the historical record that Northey first turned in his answer to Nottingham's request for a plan of action to punish the miscreants, and to establish a firm but legally watertight policy for similar events in the future.[21]

Northey began by looking back as far as the reign of Charles I and the Petition of Right. He explained that despite the complaints contained in the petition regarding the issuing of commissions to proceed with martial law in a time of peace, nevertheless 'the petition admits that that law may be exercised in an army in time of war.' The problem the government now faced was in fact far more recent, and partly of its own making. Northey noted that:

> . . . in all the Annual Acts passed during the late war for punishing officers or soldiers who should mutiny or desert, there is a declaration of Parliament saving to all men the right to be tried by their peers according to the known and established laws of the realm. This, being declared in time of war, seems to mean that even in time of war martial law cannot be exercised without an Act of Parliament.[22]

In effect, the secretary of state and attorney general found themselves being confronted by the awkward reality of the executive actually being held to its lofty claims of being 'tied up to the law' by parliament. But actually having to govern according to 'the rule of law' was an immense headache: no government would want to put martial law to a parliamentary vote, and nor would it want the embarrassing details of bungled military operations being aired in public. As Northey explained, this made establishing whether a parliamentary vote was required, and if it was, how to get around it, essential. Using the common law courts to punish the offenders was not an option 'because offences committed beyond seas cannot be tried by a jury here, nor can offences which are not offences against the common law, but against martial law.' 'If these cannot be tried by Courts-Martial' Northey concluded, 'they must go unpunished.' What was needed then was a politically favourable judicial opinion on the subject:

> This matter is of such consideration that I do most humbly propose that these questions, with such others as your lordship thinks fit, be laid before all the Queen's "Councell" in the law or a Committee of the "Privy Councell" at which both the Chief

[21] 'Sir Edward Northey to the Earl of Nottingham', 20 Oct. 1702, *CSPD* 1702-3, p. 273.
[22] Ibid., p. 273.

> Justices may be consulted. Their opinion will be of more use and authority than that of "councel" can be.[23]

Ten days later, the opinion of the judges was given to 'The Queen in Council... about the most proper way of proceeding against and punishing persons found guilty of the disorders at Port St. Marie's'. The content of the opinion is unknown, but the government clearly felt able to push the judges even further, since at the end of the meeting they were ordered to 'again meet and consider whether persons accused of such disorders may not be brought to trial by a Court-Martial in the fleet at sea before their arrival in this realm.' By 6 November Lord Chief Justice Holt had dutifully supplied an opinion in the affirmative, one he thought both 'full and direct', but 'if any doubt be made of it "upon the least intimitation" it shall be made more satisfactory.'[24] Remarkably then, by 1702 we find Holt, the man who resigned his position as recorder of London over King James's martial law policy, delivering an opinion to the government permitting it to undertake what effectively amounted to the covert off-shore rendition of members of the military accused of crimes under martial law. This episode provides clear evidence of the leeway that Holt was prepared to give the government in its punishment of members of the military, as long as such action was not undertaken in the common law courts or during peace time, the policy that James had demanded be implemented. In that sense, it demonstrates the government's understanding of how the law needed to be treated in order to maintain the impression of legality, and perhaps more importantly, political palatability in the aftermath of the revolution. We do not know if Holt agreed completely with the advisory opinion, and we have no reason to suppose he did not, but it was certainly not the only one he would be asked to give during his tenure as lord chief justice.

6.3 The Show Must Go On

[23] Ibid., p. 273.
[24] 'Chief Justice Holt to Sir Charles Hedges', 3 Dec. 1702, *CSPD* 1702-3, p. 330.

By now it should be obvious that the picture painted by scholars like Philip Hamburger of a judiciary free from external interference and the demands of providing politically favourable advisory opinions in the aftermath of 1688 is a false one. In this sense we have uncovered strong evidence of continuity between governmental attitudes towards the use of the law to validate its behaviour, and to affect its policies, either side of the Glorious Revolution. However, a major point of difference emerges when we consider that Holt and his brethren were not dismissed from their posts with anything like the frequency of their predecessors under the earlier Stuarts. Given that we now know that this cannot be explained by the emergence of a new concern for judicial independence from politics within the revolutionary government, how can we account for this shift in executive behaviour? As we shall see, the answer cannot be that Holt simply agreed with the government in every case, and so never needed to be removed. Nor can the answer be that Holt was able to hide behind the protection offered by parliamentary statute. As William Speck has pointed out, service 'during good behaviour' may have been incorporated into the Act of Settlement of 1701, but it 'did not come into force until the accession of George I in 1714', four years after Holt's death.[25] Even then, it was not protection enough to prevent Sir Thomas Trevor, 'a zealous supporter of the late Tory administration', from being removed from his position a lord chief justice of Common Pleas in 1714.[26] Instead, Speck has suggested that although William and Anne could have dismissed judges – presumably on the advice of their ministers - if they had wanted to, they were prevented from doing so for fear of offending 'revolution principles'. But even Speck relied on the circular argument that these 'principles' rested upon the fundamental belief of the 'men of 1689' in 'the rule of law' in its traditional sense: 'that James II had transgressed it, and that they had restored it.'[27] 'Revolution principles' may well have been a key factor in preventing the dismissal of judges after 1688, but as we have seen, these principles consisted more of political necessity coated with the veneer of revolutionary legalist propaganda, rather than any deep-held shift or commitment to governing according to 'the rule of law' as Dicey and others understood it. That is not to say that the veneer did not matter: as a shield against accusations of arbitrary government it was of paramount importance to the survival of the revolutionary settlement, and was central to maintaining public trust in the system. Things had to be seen to be done by the book, and every political actor had to play his part, even if behind the scenes it was business as usual.

---

[25] W. Speck, *Reluctant Revolutionaries: Englishmen and the Revolution of 1688* (Oxford, 1988), pp. 164-165.
[26] David Lemmings, *Gentlemen and Barristers, The Inns of Court and the English Bar 1680-1730* (Oxford, 1990), p. 257.
[27] Speck, *Reluctant Revolutionaries*, p. 165.

Key directors and consultants of this constitutional choreography were the judiciary, something Holt knew only too well. On the succession of Queen Anne for instance, he was ordered to 'be present and prepared to give [his] opinion on the Bill of Rights and the last Act for enlarging the Succession' and to explain 'whether there be anything in those Acts that her Majesty is required to perform at her first coming to the House of Lords' at a morning meeting of the Privy Council on 10 March 1702, two days after the death of King William.[28] In this, as in the other instances explored above, Holt's advisory opinion clearly mattered to the success of the performance, and his reputation, rank, and security of office clearly owed much to his perceived status as an oracle of 'correct' legal and constitutional procedure. Yet frequently this expertise could be as frustrating as it was useful. We can still feel the exasperation of Sir Charles Hedges in his letter to Holt of 18 December 1700. Having written to him four days earlier with instructions that it was the king's wish that Daniel MacDonnel be moved from Newgate prison to the Fleet on account of his very poor health, Hedges was forced to respond to Holt's deliberately strict interpretation of the request 'which you say you cannot do, that being not a prison for criminals'. He explained that 'His Majesty's meaning' was simply that 'he should be put into some prison where he might have more air'.[29] Hedges - a civil lawyer - and the king did not seem to care or know that technically the Fleet was not suitable. To Holt, it mattered completely, and his insistence on adherence to form must have represented a small victory. After an agonising further four days of close incarceration, MacDonnel was eventually moved to the King's Bench with Holt's blessing.

On other occasions Holt was deployed as the figurehead for specially assembled teams of the government's legal advisors, and given explicit instructions to come up with practical solutions to political problems. His room for manoeuvre on these occasions, not to mention his ability to dissent, was hugely curtailed by the presence on these advisory panels of Admiralty judges, current and former solicitor and attorney generals, as well as the ultimate oversight of the secretary of state. In February 1699 for instance, the fragile peace was being threatened by the repeated boarding of French and Dutch ships sheltering in English ports on the pretence of searching for and seizing contraband English wool. As secretary of state James Vernon explained to Holt, 'The States General of the United Provinces, as well as the French ambassador, have made repeated complaints' about these incidents, and that:

[28] 'James Vernon to Chief Justice Holt', 10 March 1702, *CSPD* 1702-3, pp. 3-4.
[29] 'Sir Charles Hedges to Chief Justice Holt', 18 Dec. 1700, *CSPD* 1700-2, p. 175.

> . . . it being a matter on which the mutual ease and security of commerce so much depends, and wherein the public faith is concerned, that the treaties with foreign Princes and States be duly observed, his Majesty would have your lordship, with the lord chief justice of the Common Pleas and the lord chief baron, and such other of the judges as you think fit, consider these cases and report your opinion what may be fitly done for the relief of foreign merchants under such circumstances. If necessary Mr. Attorney and Mr. Solicitor will attend you, and I shall signify the same to Sir Charles Hedges and Sir Richard Raines.[30]

That same day Vernon had written to Joseph Williamson, ambassador at The Hague, assuring him that Holt and his team would produce regulations 'which shall not only free the present seizures, but put it more in the king's power to prevent these disturbances upon trade, or to give speedy relief when they happen.'[31] Unlike in his letter to Holt, Vernon made it quite clear that the attorney and solicitor general, as well as Hedges and Raines, had been expressly commanded to attend upon the common law judges in their deliberations. In reality, Holt was effectively a ceremonial figurehead. By 1 March the 'opinion of the judges' had arrived.[32] They agreed that foreign ships in English ports were 'liable to be visited, if there be just cause of suspicion of their having on board goods which are by law forfeited to the king', but that the king may by that law 'discharge his interest in the forfeiture: and for the future may please to give his royal directions to his officers to take special care not to visit any foreign ships without just cause.'[33] But even this favourable opinion was not good enough. As Charles Hedges, MP and Admiralty court judge, pointed out to Vernon in an accompanying note, their advice was somewhat naive, and did not take the international dimensions of the problem into account: 'if all ships driven into his Majesty's ports may be searched by colour of a general order given to the Custom officers or others, I humbly conceive that such proceedings are not agreeable to the laws of nations, or the usage in any trading country.' There had to be more restrictions placed on the search and seizure powers of the customs officers, ensuring that they only undertook such action 'by virtue of a special warrant upon information'. The 'general practice among trading nations at this day' had to be considered, for 'if other nations deal with England no otherwise but as England does by them, they seem to me to be justified by all laws whatsoever'.[34] Vernon agreed, and five days later the lords of the Treasury were ordered to advise the commissioners of customs that special warrants would be needed for all future

---

[30] 'James Vernon to Chief Justice Holt', 24 Feb. 1699, *CSPD* 1699-1700, p. 72.
[31] 'James Vernon to Lord Ambassador Williamson', 24 Feb. 1699, *CSPD* 1699-1700, pp. 71-2.
[32] The opinion was signed by Holt, George Treby (former attorney and solicitor general, and chief justice of Common Pleas), Edward Ward (chief baron of the Exchequer and former attorney general), Thomas Trevor (attorney general, former solicitor general and future chief justice of Common Pleas), Richard Raines (of the Admiralty and Prerogative Court of Canterbury) and John Hawles (solicitor general).
[33] 'Opinion of the judges about visiting foreign ships in our ports', 1 March 1699, *CSPD* 1699-1700, p. 78.
[34] Ibid., pp. 78-9.

interventions involving foreign ships, that being the opinion of all the judges.[35] Hedges's vital behind-the-scenes intervention was not mentioned, but no doubt contributed to his appointment as secretary of state the following year, a move that seemed to bewilder contemporaries as much as it has scholars of this period.[36]

The 'legality' of Holt's advisory opinions then was always to be weighed up against their practicality and expediency. They might be distributed not to be acted upon, or made use of, but for the 'particular light' they might shed on the technicalities of a situation.[37] Similarly, Holt might be asked to sign-off on matters of constitutional procedure, such as Poynings' Law in Ireland, under the full knowledge that if his opinion were to be in the negative, it would be thought 'very tedious' by those affected.[38] Sometimes his legal scruples would rebound awkwardly, making more work for himself. When in 1695 he questioned the justifiability of taking bonds from those suspected of coming over from France 'without passes' to appear at the next sessions or assizes, he was directed to 'advise with Mr. Attorney to consider of such a form of bond as may be legal and effectual.'[39] Holt would have to come up with solutions to his own problems. Other times, however, these problems were not of his own making. When Peregrine Osborne, then marquis of Carmarthen, supposedly abducted young widow Mary Morton 'upon the high road between Hammersmith and London', and proceeded to live 'lasciviously with her', William Crispe, her father, was forced to use 'all lawful means to regain her liberty'. He petitioned 'the lord chancellor and lord chief justice', who dodged the issue, and 'directed him to apply to the lords spiritual and temporal in Parliament assembled'. But poor Mr Crispe, perhaps unsurprisingly, could not 'prevail upon any spiritual or temporal lord to present his petition.' The incident becoming embarrassing, and the petition having reached the cabinet council, Holt was ordered to 'acquaint his Majesty [with] what informations' he knew of the incident, 'and whether the petitioner be not relievable by ordinary course of law.' Rather ominously, if he were not, Vernon commanded that 'any obstruction' lying in the way 'be removed.'[40]

6.4 Too Big to Fail

[35] 'James Vernon to the lords of the Treasury', 6 March 1699, *CSPD* 1699-1700, p. 84.
[36] 'Hedges, Sir Charles (1650-1714)', in D. Hayton, E. Cruickshanks and S. Handley (eds.), *The History of Parliament: the House of Commons 1690-1715* (2002).
[37] 'Lord Jersey to the lords justices of Ireland', 5 March 1700, *CSPD* 1699-1700, p. 395.
[38] 'Minutes of the proceedings of the Lords Justices', 12 Oct. 1697, *CSPD* 1697, p. 425.
[39] 'Proceedings of the Lords Justices', 9 July 1695, *CSPD Addenda* 1694-5, p. 9.
[40] 'James Vernon to Chief Justice Holt', 1 April 1700, *CSPD* 1700-2, p. 1.

Holt might well be safely consulted about the laws surrounding philandering aristocrats, but there were other occasions when his advice had the potential to do far greater damage to the government's interests. Holt's various courtroom pronouncements concerning the monopolies granted to the East India and Royal African Companies are perhaps some of his best known, and sit at the heart of various modern studies of the two trading corporations. One of those studies, by William Pettigrew and George Van Cleve, has concluded that the success of the East India Company relative to its African equivalent stemmed from the political protection it was granted by the government from legal challenges to its monopoly enforcement powers.[41] The 'answer' to the 'differing outcomes for the Indian and African trades... cannot be found in the legal disputes both companies endured before or after 1688' the authors argue. It was the back-room support of the state that ensured the East India Company's prosperity and continued survival, not its ability to win in the courtroom. The authors' conclusions stem in part from their reading of Holt's judgments in the different cases involving the companies over the 1680s and 90s - the problematic nature of which we shall come to - but interestingly do not include one of the major out-of-court incidents involving Holt that lends support to their, and our own thesis.

1693 and 1694 were pivotal years for the East India Company's supporters and opponents. In parliament, Gilbert Heathcote, 'India and African interloper and merchant grandee', was agitating for the legal right of British subjects to sail from England for the purposes of trade, free from the blocking orders used by the East India and African Companies to protect their monopolies, and had received the backing of the Commons for a resolution stating the same.[42] In the courts, the result in the case of *Sands v Child* [1693] had gone against the East India Company, its aggressive enforcement of its forfeitable bond policy similarly coming in for criticism.[43] Yet both attacks were successfully fought off. The parliamentary resolution had no legal effect, nor did the court's decision persuade the government to drop its support of the East India Company's seizure powers. What is not mentioned in existing accounts of these incidents is Holt's unwitting part in them. On 12 September 1693, Sir John Somers wrote to the king on the queen's instructions.[44] The letter he composed offers a perfect example of behind-the-scenes management of legal opinion by high ranking government officials in an

[41] W.A. Pettigrew and George W. Van Cleve (eds.), 'Parting Companies: The Glorious Revolution, Company Power, and Imperial Mercantalism', *The Historical Journal*, vol. 57 (2014), pp. 617-638.
[42] Ibid., p. 631.
[43] *Sands v Child* [1693], 4 Mod. 176 (87 *ER* 332).
[44] 'Sir John Somers to the King', 12 Sept. 1693, *CSPD* 1693, pp. 323-4.

attempt to protect the fiscal and military interests of the state. It represents precisely the sort of manipulation that we have been focusing on in this chapter, and that Pettigrew and Van Cleve argue for in their article.

From the outset of his letter, Somers made it clear that the debate surrounding the East India Company's charter and monopoly enforcement rights was something of political nuisance, though one that now needed intervention at highest levels. It was 'an affair', Somers claimed, that he had 'always been very unwilling to meddle with', and a 'controversy' that all had hoped was 'at an end' before the king had gone abroad. But things had not gone according to plan. As Somers explained, a 'stop was put to the proceeding in this manner by the company's neglecting to pay the sum charged upon them by Act of Parliament... whereby according to the words of that act, the corporation was dissolved.' In 'strictness of law' the king had become 'entitled to all the estate which they had as a company', but he 'did not think fit to take advantage of this failure' and instead, ordered that 'as far as might be, the company should be restored to their former condition.' Yet it was appeals to another sort of 'strictness of law' outside of the immediate control of the king that was causing the present problems. There was agitation in the House of Commons and petitioning to the Council Board 'by several merchants' against the passing of a new charter. In addition, the disruption to Mediterranean trade caused by the war with France had led many of the 'Turkey merchants' to 'press very importunately that in such an unhappy juncture' they should be allowed to trade with 'the Indies'. In both cases, those opposed to the East India Company's monopoly were attempting to stand on legal precedent in favour of the necessity of parliamentary approval for any new charter. As Somers explained:

> That which is principally insisted upon against the reconstituting of the company is taken from what has happened since your departure from England, for they pretend that since it is now wholly in your power to constitute a new company, by reason of the dissolution of the former, by their own fault, you are in some sort engaged to do it by reason of a construction which they put upon a message to the House of Commons.[45]

In addition, 'Another thing which is stood upon is, that - except by Act of Parliament - the sole trade of the Indies cannot be granted to a few of your subjects exclusive of all the rest.' On top of all of this, the Turkey merchants had argued in a petition that 'by law' they could not be hindered sending out 'five ships to the Indies', and other traders were 'praying that these ships may go' to alleviate their 'deplorable condition'.

[45] Ibid., pp. 323-4.

Somers and the king needed to know, and fast, how much strength the courts might publicly give to these arguments before they could successfully come up with a way around them. It is at this point that Somers turned to Holt. As he explained to the king:

> I had a private discourse with Lord Chief Justice Holt this evening (he being the only judge in town), and by what I can collect from him, if these points were put to the judges, he thinks they would be of opinion against the East India Company, especially as to the stopping of ships at this time when there is no charter in being.[46]

This was not the answer that Somers had wanted to hear. 'All these things being laid together', he wrote, 'in my opinion, make this whole matter very nice.' This was especially the case since they were 'upon the opening of a parliament, when it is so much to your interest that everything which might be an occasion of offence, or so much as a cause of debate, should be avoided.'[47] One of the best ways to avoid any such debate was to ignore the opinion of the judges. As Somers concluded:

> . . . if you please that the charter should pass, and the ships be stayed, it must be done either without asking the judges' opinions or upon consulting them. If their opinions should be demanded, I have told you what reason I have to apprehend which way they will determine, and I must confess I should be sorry to have such a point determined against the Crown.[48]

As a result, Somers suggested that it was 'much better' the legality of any such action 'should remain a doubt as it does now'. That was not to say that this would be an easy route to take. Somers hinted at this in his parting line: 'On the other side, as it is a matter of law insisted upon I am apt to think it will be difficult to prevail with the Lords of the Council to advise her Majesty to pass the charter or stay the ships without taking the opinion of the judges.' Difficult, but not impossible; the king passed the new charter without seeking a judicial opinion soon afterwards.[49]

Somers's letter demonstrates the precise nature of the worth that was placed on the 'independence of the judiciary' and the continued political utility of their advisory opinions in the aftermath of 1688. It was certainly better to have the judges on your side, and their support might be all that was needed to tip committees, councils, and the Commons into supporting a

---

[46] Ibid., p. 324.
[47] For the background to Somers's concerns, including the losses to merchant shipping, military setbacks, and the 'uncertain auspices' that the parliamentary session of 1693-4 began under, see H. Horwitz, *Parliament, Policy and Politics in the reign of William III* (Manchester, 1977), pp. 115-119.
[48] 'Sir John Somers to the King', 12 Sept. 1693, *CSPD* 1693, p. 324.
[49] Pettigrew and Van Cleve, 'Parting Companies', p. 632.

controversial government measure. They were certainly always worth consulting. Yet what seems to have been underappreciated in the existing literature is the extent of the practice of obtaining opinions unofficially in advance of any sensitive decision, and the deliberate avoidance of seeking that advice publicly if it was likely to be unfavourable. Government ministers were also happy to take advantage of, and hide behind, the confusion caused by conflicting courtroom decisions on a subject. This crucial element of Somers's argument helps us to shed new light on the tortured and twisting nature of the cases involving the East India Company that have traditionally confused academics seeking to find some consistency in their development. These studies, including that of Pettigrew and Van Cleve's, have suffered from not placing these episodes into the wider context of governmental manipulation of judicial opinion in the aftermath of the Glorious Revolution, as we have done. They have also been over-reliant on printed reports of these cases which, at best, can be unreliable indicators of what was actually decided. Notably, none of the cases that Holt presided over, from *Beake v Terrell* [1689] to *Dockwray v Dickenson* [1696], made their way into his manuscript opinions.[50] Possibly they were included in opinions now lost to us. But their absence might also suggest that Holt was perfectly aware that the issues at stake were in reality being decided outside of his courtroom. Indeed, where we do have Holt's opinion on other branches of government fiscal policy, the true extent of judicial impotence in the face of the needs of the state become even clearer.

The Bankers' Case of 1695 represents perhaps the clearest example of the conflicting visions of the constitutional and political essence of the rule of law between Holt and the government's legal officers in the aftermath of the Glorious Revolution. The origins of the dispute lay in the ineptitude of Charles II's fiscal policy and the resulting 'Stop of the Exchequer' of 1672, the background and details of which is best explained in J. Keith Horsefield's 1982 article in *The Economic History Review*.[51] Holders of assigned government orders-to-pay pre-dating 18 December 1671, predominantly goldsmith-bankers, had taken the biggest hit in this seventeenth-century credit crunch. After much legal and parliamentary wrangling, they seemed to have secured the payment of interest on these outstanding loans, which was distributed erratically over the course of the twelve years after 1677. Yet these interest payments were terminated after 1688, when the Crown's hereditary excise, out of which they had been allocated, was instead pledged by parliament as backing for a £250,000 loan to finance the war

[50] *Beake v Terrell* [1689], Comb. 120 (90 *ER* 379); *Dockwray v Dickenson* [1696], Holt 291 (90 *ER* 1060).
[51] J.K. Horsefield, 'The "Stop of the Exchequer" Revisited', *The Economic History Review*, vol. 35 (1982), pp. 511-528.

effort. The bankers' response was twofold. First, a case was brought in the Court of Exchequer in January 1691. Simultaneously, proposals were made to parliament to lend a million pounds of their own to the war effort on the condition that a perpetual annuity be settled on them of 6 per cent on that loan and the outstanding Caroline debt. This proposal was rejected by the Committee of Supply in January 1692, and the reasons why were significant to the fate of the later court case. As Horsefield has summarised, the main objections were:

> (a) that it would be a dangerous precedent to accept responsibility for sums borrowed by the Crown without recourse to Parliament; (b) that the bankers' original loans had been made on extortionate terms; (c) that few of the original creditors remained, and that many assignments had been brought up at half their value, or less; and (d) that a similar proposal had been made earlier, and that – as then – nothing would come of it.[52]

In other words, the objections were practical and political, not legal. Yet the very next month, the Court of the Exchequer ruled in the bankers' favour. The decision would not be allowed to stand however; the attorney general immediately appealed to the Court of Exchequer Chamber, which acted as an appeal court from the Court of Exchequer in Crown cases. There, the lord keeper would assess the case, aided by the judges of the King's Bench and Common Pleas. Significantly, in March 1693, the new lord keeper was revealed to be John Somers.[53] The bankers might not have known it, but this appointment had effectively doomed their appeal before it was even heard.[54]

Holt's opinion in *The Bankers' Case* [1695] is one of his most extensive.[55] A measure of the research that went into it can be found in a letter Holt sent to his friend Sir William Trumbull in October 1695, where he noted that he was too busy to see Trumbull that afternoon, 'having many records to peruse in the Bankers' case.'[56] His argument was voluminous, but centred on establishing two key points. The first was to demonstrate that the creation of the Crown's debt was legal, and therefore still vested. The second was to validate jurisdictionally the Court of the Exchequer's jurisdiction, its ability to rule that the repayments be made. Holt did this by using Tudor precedent. Specifically he argued that the Court of Exchequer had exercised the authority to secure orders for the payment of Crown annuities with reference to past cases involving funds once controlled by the Court of Augmentations, whose jurisdiction had been annexed by

---

[52] Horsefield, 'Stop of the Exchequer', pp. 518-519.
[53] Ibid., p. 519.
[54] See Horwitz, *Parliament, Policy and Politics*, p. 113.
[55] *R v Hornby et al.* (*The Bankers' Case*) [1695], *Hardwicke I*, ff. 25r.-59r.
[56] 'Chief Justice Sir John Holt to Sir William Trumbull', 9 Oct. 1695, *HMC Finch*, vol. II, p. 561.

the Exchequer under Mary I. This second strand of Holt's argument has received the most attention by Horsefield.[57] Yet it was Holt's first line of argument that occupies the majority of his manuscript opinion, and offers us a window into Holt's motivation for arguing so strongly for the bankers' right to be compensated. As we now know from our investigation in Section II, Holt would not blindly rest his decisions purely on precedent: he knew that such examples were shaped by the historical and political forces of their time. As a result, the first half of his opinion focused on establishing the importance of the king's prerogative power to alienate his revenue as a matter of reason, something that validated its universal exercise throughout time. First, Holt sought to establish the source of the king's power to mortgage off his income from the reasoning behind the Tenures Abolition Act of 1660 that had introduced excise duty in the first place:

> I do hold that King Charles 2nd might alien or charge this revenue, and that an alienation or the grant of a rent or annuity out of it to a subject in fee simple will bind his successor. The reason I give is; because that the king in seized in fee of this revenue which is an estate that is by law alienable. And it is most apparent both by the intent of the Act 12. Car 2.
>
> 1st. The intent was to give the King a recompence for the loss of his purveyance, and the profits that did accrue to him by tenures in capite and knight service in which he had an inheritance before the act. Now unless the king had a fee simple in this new revenue, it could not be a recompence for the former.
>
> 2ndly This revenue is not given to the king under any general or particular trust, the act mentions no such thing, but indeed it is a plain purchase by the king from his people in consideration of the kings parting with and releasing to them purveyance and wardship; two revenues of which he was seized.[58]

Holt was not naive to the political reality of the times he lived in though. His next key objective was to answer the political objections that had been raised in the parliamentary Committee of Supply three years earlier:

> Objection. That if the king could alien it may happen to be a detriment to the commonwealth. For there may be a wasteful king that might dissipate the revenues, and consequently bring a charge upon the subject, for the Crown must be supported.

Holt's response revealed the core of his constitutional philosophy:

---

[57] Horsefield, 'Stop of the Exchequer', p. 519.
[58] *The Bankers' Case* [1695], ff.28r.-28v.

> Resp: No human constitution can be so exactly framed but there may be some inconvenience, yet the law doth not in the constitution of this government suppose such a dishonourable thing of the king. Therefore the expression might have been spared, for the king is invested with great powers and large prerogatives, which the law doth suppose he will use and exert in wisdom and justice for the benefit of his subjects. It's no argument to say he hath them not because they may be abused.

As we first saw in Section I, the prerogative power of the Crown was at the centre of Holt's conception of the state, and he clearly saw it as the judiciary's role to defend it. Tampering with, or undermining such powers in the name of political expediency was 'repugnant to and inconsistent with the constitution of the government, and must produce many mischiefs and inconveniences.' This is how he understood the rule of law as it related to the prerogative: the exercise of absolute power, consistently, over time, in the service of the kingdom and with the help of the courts:

> . . . in every government there ought to be a constant and standing power to defend and secure the state against all accidents. I mean such as is legal, for a natural strength may be wanting, but that is accidental and is not the fault of the constitution.... Now suppose that the nation should be in great danger and the occasion should be pressing, yet the king wanted a supply of money to enable him to encounter with it. If he could not borrow money the danger would be inevitable.

As well as embodying convenience and constancy, the rule of law also meant that this absolute power be exercised fairly, and for Holt this meant in defence of property, again, something that common law judges were perhaps best placed to assess. This had been the problem with Charles I, who had extorted loans in 'violation of property'. Yet Charles I was not the only king in English history. There had been plenty of examples of monarchs borrowing money 'in a fair way without any menace' that had not been condemned at the time:

> Cardinal Beuford in 22. H.6. lent £10,000 to the king upon the security of the customs of London and Southampton... H.5. borrowed money and pawned the Crown Jewels, and sometime the crown itself. Queen Elizabeth borrowed money to ease her subjects, and mortgaged her lands which she redeemed by her frugality without requiring any aid from her subjects: and I never heard that these kind of loans were complained of.[59]

The irony of Holt's judgement was that, in any other circumstances, it would probably have been welcome to the government.

6.5 Conclusion

[59] Ibid., f. 30r.

We spent Section II picking apart the notion that Holt was an 'ancient constitutionalist' in the whig sense of believing in parliamentary restraints on royal power. Amazingly, one of the only times Holt deployed the term 'ancient constitution' in his manuscript opinions was in defence of the Crown's prerogative right to do as it liked with its income, 'to reward those who deserve well, as to punish those who deserve ill', 'Rewards and punishments equally and justly distributed' being 'the support of every state.' As he concluded, 'this right of the crown doth appear to be part of our ancient constitution.'[60] Historically and jurisprudentially Holt was almost certainly right. But in this case, politically, he was in the wrong, and it was the politics that mattered. On the surface, Charles II's right to place the Crown in debt could be rejected as having taken place before 1688 and the era of parliamentary oversight that the Glorious Revolution had ushered in. Digging deeper, the loans were an embarrassment: a relic of the state's incompetent fiscal past. But perhaps most pressingly, the money had already been spent. Somers knew this, and that is what separated him from Holt. For Somers, the greater mischief would have been to pay the bankers. For Holt, the mischief was to establish uncertainty in the legal system by not paying them. Holt's concern was for the integrity of the courts and the blessings that this legal 'stability' bestowed on the kingdom; Somers's concern was for upholding the government of the day, and it was Somers who was able to overturn the majority decision of judges in the Court of Exchequer Chamber. As we shall see in the next chapter, this apparent imbalance in perspective and approach to the question of how the law should be used would sit at the heart of Holt's interactions with practically every branch of government throughout his career as lord chief justice. It would also come to define many of the constitutional, jurisdictional, and political battles that he was forced to fight with the various institutions of state in the name of upholding the law as he understood it, a battle he would often lose.

.....

[60] Ibid., f. 30v. Holt also claimed that the right to trial by jury formed part of the 'ancient constitution'. See Chapter 8, note 13.

Chapter 7: Trial and Error: Holt and the Authority of the Courts after 1688

7.1 Introduction

Attacks on the independence of Holt's decision making could come from all directions. As we saw in previous chapters, members of the executive required Holt to produce opinions and judgments in politically sensitive cases on an almost daily basis. These judgments might oil the wheels of government when they mirrored policy, or have to be circumvented and overruled when they did not. But it was not only Holt's ministerial masters in the corridors of Westminster who pressured him for favourable opinions, or who exploited uncertainty surrounding the jurisdictional power and independence of the King's Bench.

This chapter will focus on the ways in which Holt responded to similar challenges when he was sitting in his courtroom. It is an attempt to get to the core of Holt's understanding of the proper function, authority and procedure of the common law courts in the decades after 1688. Existing scholarship has emphasised Holt's role both as a loyal servant of the revolutionary regime in prosecuting seditious libel, and his principled stance on the development of mercantile law during England's financial revolution.[1] Our aim is to build on these studies by placing their conclusions within our wider knowledge of Holt's jurisprudence, as well as what this can tell us about the law's relationship to the state after the revolution.

We will begin by analysing how Holt attempted to uphold the security of the kingdom and the property of its subjects whilst also maintaining trust in the courts.[2] It will be argued that we can only properly explain his reputation for integrity by placing his behaviour in the courtroom in its political context. Conversely, examining the cases where Holt failed to maintain the 'integrity' of his court in the face of external pressure will help us cast light on the nature of the fraught political atmosphere, and constitutional uncertainty, that he was operating in in the aftermath of revolution. The second half of this chapter concerns Holt's role in defining the power of judicial review in relation to city corporations during the jurisdictional upheaval of the 1690s. These institutions have received recent interest from academics interested in charting the development of local government, English political culture, and party strife in the aftermath of

[1] D. Coquillette, 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law', *Boston University Law Review*, vol. 67 (1987), pp. 877-970 , M. Dylag, 'The Negotiability of Promissory Notes and Bills of Exchange in the Time of Chief Justice Holt', *The Journal of Legal History*, vol. 31 (2010), pp. 149-175, P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review*, vol. 37 (1985), pp. 661-765.

[2] For recent work on the revolutionary regime's use of different officeholders, at a local and national level, in an effort to build trust in the government, see R. Weil, *A Plague of Informers: Conspiracy and Political Trust in William III's England* (Yale, 2014). Weil focuses predominantly on JPs, not the senior judiciary.

1688.[3] Yet Holt's role in establishing the King's Bench as referees in these regional political contests, and the efforts of his rivals to frustrate this process, is yet to be properly analysed.

It is also an analysis of what the lord chief justice of the King's Bench understood 'the rule of law' to be in the decades after the Glorious Revolution, and how this historical reality differs from the ideal projected onto this period by later studies. It will also introduce a key question that we will seek to answer in the conclusion to this thesis: if the nature of the executive's and judiciary's legal behaviour actually altered very little after 1688, what role, if any, did the public perception of government according to 'the rule of law' play in the success of the revolutionary settlement?

7.2 Fair Trials: Vindicating the Public Justice of the Nation

Closely associated with the concept of 'judicial independence' is the ideal of the 'fair trial'. Chief Justice Bingham called this 'a cardinal requirement of the rule of law'.[4] Yet in the eyes of many, fair trials seemed as hard to come by in the 1690s as they had under James II. In his *Letter to the Right Honourable, my Lord Chief Justice Holt* of 1694, Robert Ferguson, critic of the Williamite regime, listed the legal abuses he believed were being carried out in the name of revolutionary government, and appealed to Holt to help end them:

> The character which you bear, and the office which you have several years discharged with so much credit to the government, reputation to yourself, and justice to the nation, have render'ed you both the object of honest men's esteem, and the sanctuary to which they fly and retreat . . . it is not possible that any can be illegally prosecuted, unduly convicted, or unjustly condemned, without your coming to suffer both in your honour, which you so sensibly value, and to forfeit that integrity which is accounted natural unto you[5]

Ferguson's description of Holt was obviously flattering, but it was also double-edged. Whilst singling Holt out for praise, Ferguson's laudatory address also implied that Holt's carefully crafted image of professional integrity and fairness, and the false image of lawful government that the regime was attempting to project, were irreconcilably intertwined. Ferguson had chosen his words carefully; he must have suspected that Holt was struggling to maintain this reputation in the face of such demands, and he was right. These matters were of grave concern to Holt, and his attempts to demonstrate that he remained true to his principles can be found throughout his manuscript opinions. Indeed, they represent another major reason why he likely wrote them. Preserving this professional image, however, was difficult. It was one thing to deliver secret opinions to ministers in the back rooms of Whitehall. It was quite another to deliver judgments in the public theatre that was the court. He had to make that theatre his own: he could not

---

[3] P. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns 1650-1730* (Cambridge, 1998).
[4] T. Bingham, *The Rule of Law* (2011), p. 90.
[5] R. Ferguson, *A Letter to the Right Honourable, my Lord Chief Justice Holt* (1694), p. 3.

afford to lose control of the script, nor could he suffer too many bad reviews. As a result, his anger at those who cast aspersions on his honesty, and the fairness of his trials, was legendary. It was an anger borne out of a personal pride, though one that was intimately linked to his belief in the importance of the judge's role in the successful preservation of law and order in civil society. It was also an anger aggravated by Holt's painful understanding of the reality of the law's frequent subordination to will, political and financial, and to the hollowness of the regime's claims that lawful government and ancient liberties had been restored by the revolution.

Roger Morrice noted this aspect of Holt's character in his account of the defamation trial of Edward Bellamy at the Surrey assizes in September 1690.[6] Bellamy, 'an inhabitant of Southwark, a citizen of great integrity, and great courage' had accused Sir Peter Rich, the London sheriff responsible for impanelling the juries connected with the trials of Lord Russell and other whig martyrs, of murdering 'those brave men', describing the trials themselves as 'ill acts'. Rich brought an action against Bellamy for £5000 at the Kingston assizes. Morrice observed that the assizes themselves were already highly politically charged. Holt's circuit partner from the Common Pleas, the recently knighted dissenter Sir Thomas Rokeby, took it upon himself to justify the revolution 'most learnedly . . . and exposed the notion of King William being only king *de facto* to the greatest contempt imaginable.' He even went as far as to deliver his own sort of assize sermon, quoting Chapter 13 of St Paul's Epistle to the Romans concerning duty to authority, leading 'divers persons' to comment that 'they had got a Presbyterian judge there.'[7] Holt was also aware of the political significance of the assizes so soon after the establishment of the new government, especially one which had put the 'restoration' of legal rights at the heart of its revolutionary agenda. Yet his defence of the regime focused less on grand theories of sovereignty and scripture, and more on the importance of upholding the reputation of the legal machinery of state. After Bellamy's defamatory words were read to the jury, Holt is said to have 'aggravated them beyond all measure'. Bellamy's claim that 'men were murdered that were tried by due form of law' were, according to Holt, the 'most dangerous words tending to the greatest disorder.' That Bellamy had uttered them against a villain in the whig history of previous regime's crimes was irrelevant. As far as Holt was concerned, his attack on the fairness of Russell's trial by judge and jury went beyond partisan politics, and threatened to destabilise the very foundations of the state's authority.

Having hammered home this point, Holt believed 'he had possessed the jury fully with his own sense' on the matter. But upon returning from their deliberations, the jury attempted to stall

---

[6] *EBRM,* vol. V, p. 518.
[7] Ibid., p. 518.

any punishment of Bellamy, demanding to know whether the plaintiff Rich was present in court. Had he not been, Holt would have been forced to nonsuit Bellamy, and delay the trial until Rich appeared. Holt was furious. He 'hectored the jury unaccountably', but they gave as good as they got, awarding Rich the measly sum of four nobles, and steadfastly arguing that they truly believed that Lord Russell had been murdered. Throughout the trial, Morrice claimed, Holt 'acted the part both of a judge, a counsel, and a witness', answering 'at large with all his power what the counsel said for Bellamy'.[8] Fortunately, Morrice went on in his account to explain the broader context for Holt's explosive behaviour at the assizes with his knowledge of rumours swirling around Westminster. He noted that:

> . . . it is credibly reported that one day the last week when the Lord Chief Justice was at the council table, his opinion was craved in a considerable case and he gave it positively in the negative, that it could not legally be done &c notwithstanding which the board made an order for it, and when the order came to be signed he made his excuse, and withdrew because he was unsatisfied with it.[9]

'This', he concluded, 'may be very reconcilable with his carriage at Kingston.' Thus, as early as 1690, Morrice and others were perfectly aware of the interconnected nature of the political and professional pressures that Holt was facing. On the one hand, he found the integrity and independence of his decisions undermined by those at the very top of the regime whose priority was the fiscal and military survival of the state. On the other, Holt was actually forced to mirror the behaviour of government ministers by attacking the jury's verdict in an effort to protect his reputation and the integrity of the court. This was especially the case here, where accusations of legal impropriety levelled at Rich also touched Holt: as we mentioned in Chapter 1, Holt had been one of Lord Russell's defence counsel. Any accusation that Russell was simply 'murdered' by the court implied that Holt had been complicit in that act, and had willingly taken part in a miscarriage of justice.[10] The Russell case was also a perfect example of why Holt and other judges like him - men who had served both regimes - could not simply bow to the will of partisan whig juries in revenge cases of this type. Any admission that the courts were corrupted during the time they had been serving under James could be deeply damaging to their reputations. It also raises the question of how much of an incentive there was for judges like Holt to emphasise any sort of legal break with the past after the revolution.

Building on this point, Morrice's comments and Holt's actions offer some evidence of what public perceptions of the 'rule of law' and 'a fair trial' actually were in 1690s. It seemed to be common knowledge – certainly in political circles - that the government was often ignoring

---

[8] Ibid., p. 519.
[9] Ibid., p. 520.
[10] For a critical reading of whig claims of procedural irregularities in Russell's trial, see L.G. Schwoerer, 'The trial of Lord William Russell (1683): Judicial murder?', *The Journal of Legal History,* vol. 9 (1988).

Holt's legal advice. It was also plain for all to see that the judiciary might still berate juries in order to secure politically or professionally favourable verdicts. Indeed, the jury at Kingston attacked Holt for his treatment of them, claiming that they had been similarly treated 'of late years', but that 'now' they had hoped they might be free to give verdicts 'according to the evidence', and 'the best of their judgment and consciences'.[11] The whig jury at Kingston clearly expected the judiciary to behave differently towards them in the aftermath of the revolution, but Holt sorely disappointed them. If judges were now supposed to interfere less with juries, and to offer them more independence, then Holt had clearly not got the message. All of this raises a major question: why did this seemingly arbitrary legal behaviour not fatally undermine public support for the revolutionary regime in the same way it had for James and his Stuart predecessors? Similarly, if it was not respect for fair trials and judicial independence that was keeping government honest in the eyes of the public, then what was generating the trust needed between rulers and ruled to secure the levels of financial support necessary to wage war on a scale only dreamt about by kings and ministers earlier in the century?

At the level of the jury trial, Holt's other cases can provide us with some answers. First, we need to challenge the assumption that the function of juries in this period was actually to provide verdicts according to their unmolested judgment and consciences. When the Kingston jury argued this point in front of Holt, they were arguably doing so with their tongues firmly in their cheeks. One way of demonstrating this is to focus on one of Holt's best known criminal cases involving the punishment of Richard Hathaway for his accusations of witchcraft at the Southwark assizes in 1702. Holt is known to have been involved in at least six cases where individuals were accused of witchcraft between 1691 and 1701, though according to Francis Hutchinson this number may well have been higher. What is important is that in every case the accused witch was acquitted.[12] Holt has therefore received attention from several scholars interested in explaining the decline of prosecutions for witchcraft in England over the seventeenth century, and the particular role that legal scepticism played in this process.[13] One line of argument that has recently attracted support states that legal standards of proof, and the quality of the scrutiny of evidence, increased over the course of the century. The result was that the crime of witchcraft – which relied heavily on hearsay and indirect proofs - became evidentially starved of the oxygen it needed to survive, and impossible to prove in the court

[11] Ibid., p. 519.
[12] F. Hutchinson, *An Historical Essay Concerning Witchcraft* (1718), p. 63.
[13] See I. Bostridge, *Witchcraft and its Transformations, c.1650-c.1750* (Oxford, 1997); C. L'Estrange Ewen, *Witchcraft and Demonianism* (1970).

room.[14] It was not that people stopped believing in witches, more that they stopped believing in the possibility of successfully convicting them.

This line of argument is particularly attractive because it circumvents the need to explain the origins and complex role that any growth in political, religious, or intellectual scepticism played in the decline in prosecutions, replacing them instead with a technical explanation that places the rules of the courtroom and procedural restrictions on persuading juries at the centre of the story of the death of the crime. This, however, is also the key weakness of the thesis. For as John Langbein has argued, and what we know of Holt's behaviour during assize trials demonstrates, judges played a far greater role in determining juries' verdicts than any 'rules' governing the admissibility of evidence in this period.[15] From his assessment of the accounts of ordinary criminal trials in the Old Bailey Session Papers, Langbein has concluded that 'there was no law of evidence' in the modern sense in this period, nor any 'body of rules designed to exclude probative information for fear of the trier's inability to evaluate it.'[16] Instead, court rooms were dominated by judges. It was the judge who played the greatest role in the adjudication of the jury, able to speak vigorously on the merits of a case in an attempt to control jury verdicts. In short, judges *were* the 'rules' of evidence. The reality of this relationship between judge and jury, the importance placed by the judiciary on preventing disorder, and Holt's jealous guarding of his professional reputation all came together in the Hathaway trial.

Hathaway's case is unusually well reported. A transcript of the case was published by Isaac Cleve, printer to Serjeant's Inn, not long after the trial.[17] It is fascinating for several reasons, not least because it provides us with a window into the mechanics of witchcraft accusations at this time, as well as the role that local politics, religious tension, and judicial scepticism played in Hathaway's eventual prosecution. It could well be interpreted as an official manifesto of scepticism towards witchcraft by those responsible for maintaining law and order at the turn of the eighteenth century. Yet one vital aspect of the trial's significance has been underemphasised, and that is the role that Hathaway's affront to Holt's professional integrity played in the initiation of the prosecution by information, as well as the publication of the trial. Moreover, if the intention behind the publication of the trial had been to demonstrate that the authorities were no longer interested in prosecuting witches, it would have made more sense to publish a

---

[14] See M. Gaskill, 'Witchcraft and Evidence in Early Modern England', *Past and Present*, no. 198 (2008), pp. 33-70; B. Shapiro, *"Beyond reasonable doubt" and "probable cause": historical perspectives on the Anglo-American law of evidence* (Oxford, 1991); O.A. Darr, *Marks of an Absolute Witch: Evidential Dilemmas in Early Modern England* (Ashgate, 2011); and C. Holmes, 'Why did the prosecution of witches cease in England?', The Historical Association (2014).

[15] J. Langbein, 'The Criminal Trial before the Lawyers', *The University of Chicago Law Review,* vol. 45 (1978), pp. 263-316.

[16] Ibid., p. 315.

[17] *The Tryal of Richard Hathaway, Upon an Information, For being a Cheat and Impostor* (1702).

report of Sarah Mordike's – the woman Hathaway accused of bewitching him – acquittal at the Guildford assizes in 1701, presided over by Holt. Hathaway's crime it seemed was not so much the nature of his accusations, but his insistence that he had 'had injustice done to him at the trial at the assizes', meaning that 'reports were spread that the woman was acquitted by favour or corruption of both judge and jury'. As Holt explained, this made Hathaway the physical manifestation of his fears that contempt and mistrust of the courts would naturally lead to social disorder. As he emphasised, it was this disorder, Moredike being 'pursued by a rabble' and coming 'to be in imminent danger of her life', that led the authorities to think it 'highly necessary that the prosecution against this man, and others concerned with him, should be speedy'.[18] This sentiment was echoed by Mr Brodrick, counsel for the Crown, who argued that 'the discovering and punishing such a cheat... is highly necessary... for vindicating the public justice of the nation.' Brodrick was equally concerned, however, with the damage that Hathaway's accusations did to spiritual order among the people, which prejudiced 'religion itself'. As he skilfully argued:

> . . . when men who are sceptically inclined, find that the generality of mankind run away with stories of this nature, and those facts afterwards prove undeniably false; they carry on their doubts much too far and are apt to conclude, that they cannot securely rely upon the relation of others, and general consent of mankind, for the certainty of any fact whatever. It is therefore the duty of all persons, that are concerned for religion in general, to endeavour to detect such practices which weaken one of its most solid foundations.[19]

Holt's judgment itself certainly contained musings on the supernatural ability of witches to inflict suffering on mankind. He questioned 'what rule' those accusing Mordike had for this power 'either in philosophy or divinity', and argued that it was 'not within the compass' of his 'understanding to conceive' how a witch might force a man to fast for forty days. Christ had managed such a feat with the assistance of 'divine power', which was itself 'evidence of the truth of Christian religion'. By contrast, there was no evidence that Holt knew of to support the notion that 'all the witches in the world, or all the Devils in Hell' could grant a man the power to do the same: 'they cannot invert the order of nature', he argued.[20] Holt's scepticism seems to have rested on a conviction that the gates of Hell were firmly shut, and that it was man's false ascribing of spiritual power to the Devil, and not the Devil himself, that was the real cause of social and spiritual disorder in this world. The only demonstrable truth he knew of in such matters was that provided by his court: 'There was a trial, and the woman was acquitted.' Hathaway's subversion of this natural legal order was what ultimately made him so dangerous, and, as with the trial of Bellamy, led Holt to berate witnesses and rubbish the defence counsel's

[18] Ibid., pp. 24-25.
[19] Ibid., pp. 2-3.
[20] Ibid., p. 25.

case throughout the proceedings. He set the tone at the beginning of his summing up, apologising to the jury for their having had to listen to 'a very long and tedious evidence.' Hathaway's conviction was assured.[21]

Holt clearly saw no contradiction in defending the reputation of the courts by publicly prosecuting their critics, or personally attacking juries and defence witnesses in order to secure the conviction of those who undermined public trust in the fairness of trials. As we have seen, this latter aspect of his behaviour was almost certainly less controversial at the time than we might otherwise think. In fact, for Holt, such actions were a central pillar of judicial responsibility, vital in order to maintain the effective functioning of the court. The Hathaway trial offers clear evidence that Holt and the government might agree on this point. But if public trust in the fairness of the judiciary after the revolution did not stem from any objective shift in judicial authority in the courtroom, then what was it about his trials that Holt thought made them fair, and gave him the public authority to prevent the disorder that he so feared?

7.3 Predictability: Building Barriers to Malice

The answer, on one level at least, appears to be their procedural certainty, and the sense of predictability this generated around the legal system. A common thread that runs throughout Holt's opinions is his concern that the proper application of the law (as he understood it) be not randomly or unduly altered for the sake of short-term expediency, something we have already seen in previous chapters. To do so, he believed, would unleash arbitrary forces, as well as accusations of arbitrariness, onto the courts as damaging to public order as any riot, murder, or criticism of the government. Importantly, this attitude seems to have marked Holt out as unusual in his own day, especially when compared to the likes of Treby and Somers. It does, however, put him in agreement with modern commentators like Bingham and John Phillip Reid. As Reid has said, 'certainty' meant that 'rulers would more easily be held to law's command and would more easily be confined by law.' He goes on to argue:

> For Anglo-American values to be ruled by the rule-of-law meant to be ruled by norms that had been promulgated prior to the application of those norms to a particular case, especially a criminal case. For rule-of-law not to be rule by men, the law must be both publicly announced and publicly known in advance of application.[22]

None of this meant that Holt was unwilling to change the law when the security of the kingdom was at stake. On the contrary, as we saw in Chapter 5, Holt was perfectly aware that the law must be responsive to the needs of state and society. For instance, Philip Hamburger has written of Holt's willingness to expand the definition of seditious libel to meet the government's

---

[21] Ibid., p. 24.

[22] J.P. Reid, *Rule of Law*, *The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Illinois, 2004), p. 5.

demands for censorship in the aftermath of the lapse of the Licensing Act in 1695.[23] In the case of *R v Bear* [1699] Holt ruled that simply writing a libel was criminal, even if there was no proof of any intention to publish it.[24] There were, according to Hamburger, 'no plausible precedents for Holt's ruling in Bear's case.'[25] Holt instead relied upon the 'principle of the preservation of all government, and the safety of all civil society', as well as the examples offered by Roman Law, another aspect of his intellectual background that we saw in the previous section, to justify this change.[26] Holt's main aim, Hamburger argues, was to 'preserve the post-Revolutionary establishment'.[27] He was attempting to silence those who cast aspersions on the government in the same way, and for the same reasons, that he attempted to silence those who criticised his court. As Holt argued, 'libelling is an offence wherever there is a politick society to which the toleration thereof is repugnant and inconsistent … [and] against the law of all governments.' He concluded that, 'if it should be no crime to write libels, the government and the magistrates must be exposed to the malice and discontent of disaffected persons', behaviour Holt was clearly not prepared to tolerate.[28]

Yet Holt was equally unprepared to tolerate any inconsistencies in the documentation used to prosecute such criminals, something which he knew would often lead to the release of guilty men. For him, it was a price worth paying to maintain the certainty, and therefore the trust in and authority of, the system. As we saw in Chapter 6, the government learned this to their cost seven years after *R v Bear*, when in the case of *R v Dr. Drake* [1706] Holt refused to prosecute the accused libeller owing to a minute mistake in the information's drafting.[29] As he stated, 'These rules of law are constant and certain in their nature'. If they were ignored, 'then have we the Queens judges given a wrong judgment.'[30] We see this striving for certainty in a variety of other cases, often ones of a political or financial nature. In the case of *R v Soley* [1707] Holt moved in arrest of the judgment of a man found guilty of riot at the Bewdly Guildhall in Worcestershire during the election of a bailiff.[31] Soley, Holt argued, could not be safely convicted of having committed a riot. He was under no doubt that if 'any one or two had made … hideous noises and clamours they would be trespassers', and 'if three or more do assemble and so the like they are rioters, for that is the definition of a riot, when three or more do meet

---

[23] Hamburger, 'Seditious Libel'.
[24] *R v Bear* [1699], *Hardwicke III*, ff. 13v.-22r.
[25] Hamburger, 'Seditious Libel', p. 731.
[26] *R v Bear* [1699], *Hardwicke* III, f. 22r.
[27] Hamburger, 'Seditious Libel', p. 743.
[28] *R v Bear* [1699], *Hardwicke III*, ff. 21v.-22r.
[29] *R v Dr. Drake* [1706], *Hardwicke II*, ff. 81v.-89v., see Chapter 6, note 43.
[30] Ibid., ff. 85v.- 89v.
[31] *R v Soley* [1707], *Hardwicke II*, ff. 95v.-99v.

together to do any unlawful act'. The problem with the information in this case was that it did not spell out the nature of the illegal act that the supposed rioters had assembled for with any certainty. It failed to provide explicit evidence that 'any franchise was invaded, infringed or hindered'. It also failed to explain what illegal purpose lay behind Soley's disturbance of the peace, nor did it identify which 'Guildhall' had been affected. As Holt concluded:

> . . . if it had been said that these defendants had in tumultuous, riotous manner with armed force *modo guerrino* assembled in *terrorem populi* and pulled down or broke an house, chapel or the like, that had been a riot. For going in company with a force is contrary to law, if it be in such a manner as may strike a terror in the people, that is an assault upon them, consequently is a riot.[32]

It was not that Holt had sympathy with those who were accused, and decided to stand on formalities to secure their acquittals. Instead, Holt's motive was to clarify the precise procedure that had to be followed in order to unleash the full authority of the law in ways that would insulate it from accusations of arbitrariness. These precise and certain definitions of crimes mattered, because they were crucial to preserving the court's monopoly on enforcing public order, and inflicting violence, within civil society. He knew that there were always those who, if they lost their trust in the certain protection of the law, were ready to take matters into their own hands:

> . . . though a man may for the safety of his house hire and arm what number of men he shall think convenient and put them therein or about the house, yet he cannot go abroad with them though he hath just cause by reason of menaces or assaults to apprehend danger from particular men, yet he ought to put himself under the protection of the law, and wholly depend on that.[33]

Hamburger has commented that Holt contributed to the 'stature' of the law in the early eighteenth century with his insistence on 'fair and standardized trial procedure.' Holt, he argues, 'administered the law with considerable concern for the rights of defendants; his name became a symbol of all that was just and equitable in English law'.[34] As we saw earlier, John Philip Reid has also emphasised the importance of 'certainty' in protecting the liberties of the subject by holding the power of those who rule to 'law's command'. Arguably though, these authors have downplayed the possibility that certainty also had the effect of legitimising and increasing the power of those in authority. It certainly did not seem to be concern for the 'rights of defendants', especially ones he thought guilty, that was motivating Holt in Soley's case. On the contrary, towards the end of his opinion, Holt cited precedent from Star Chamber to support his argument that a man might commit a riot on his own land, as long as three or more of them were armed and caused anyone who passed by them to be terrified. This massively expanded

---

[32] Ibid., f. 98v.
[33] Ibid., f. 98v.
[34] Hamburger, 'Seditious Libel', p. 755.

the definition of the crime, and lowered the bar for committing the offence.[35] In reality, it seems that Holt's insistence that formalities be observed, even if it meant the failure of the occasional prosecution, was not intended to keep people out of the courts, or to respect their rights. Instead, certainty of procedure would indeed increase the 'stature' of the law, facilitating and justifying the effective expansion of the power of the courts after 1688. As Hamburger has also said, 'In matters of procedure', Holt, 'was usually, by seventeenth-century standards, blameless.'[36] This may well be true. But the 'blameless' judge was the one who wielded the greatest authority.

The failure of the occasional prosecution was however a price that those in positions of power above Holt sometimes felt was not worth paying. Holt found this to his cost in the perjury case of *R v Graep* [1697].[37] The defendant Robert Graep stood accused of falsely swearing upon oath that a witness to deeds of lease and release connected with the property of the late Christopher Monck, duke of Albermarle (d. 1688) was not in fact present at the signing, but instead was at 'a certain house called Newnham in the parish of Plimpton St Mary in the county of Devon.' Graep had been found guilty at trial the previous term, but moved in arrest of judgment. All the judges concluded that Graep's conviction was unsafe on account of faults in the information used to prosecute him.[38] Holt, however, took perhaps the strictest view of the failings in the information's drafting, arguing that it was not clear which Newnham, and in what part of the country, was being referred to. The Crown's prosecutors appear to have leaned on Holt to ignore this problem, as Holt alluded to in his opinion:

> I do perceive by something that dropped from some of the council that were for the King in this case that they could not make the Information otherwise than it is... Their reason is apparent, for upon examination of the matter they could not prove that any question was concerning that Newnham, that either Plimpton or Devon was mentioned in the evidence, and therefore to supply that defect they put in the innuendo Newnham in Plimpton, which they knew need not be proved. So that which is not to be proved shall have the same force as that which ought to be proved.[39]

But Holt dismissed this plea: 'I am not of that Opinion. I think the Information might have been made good.' He went on to set out how he would have drafted the information so as to secure a conviction. Throughout the case, Holt made it clear that he was in no doubt of Graep's guilt. But here the threat of uncertainty in the proper prosecution of perjury, and the preciseness of the evidence required, had major ramifications for the effective functioning of the law in

---

[35] *R v Soley* [1707], *Hardwicke II*, f. 99r.
[36] Hamburger, 'Seditious Libel', p. 755.
[37] *R v Graep* [1697], *Hardwicke III*, ff. 22v.-36v.
[38] See 1 Ld. Raym. 256 for the arguments of justices Rokeby, Turton and Eyre.
[39] *R v Graep* [1697], *Hardwicke III*, f. 27v.

combating civil strife. As he said:

> I am sorry it so happens that so much pains & time should be spent in prosecuting this man who was convicted upon a full and clear evidence of so horrid a crime as perjury and that it should have no better success, we must keep to the Rules of Law, and if we should make a precedent in an ill mans case, at another time it may be the case of one that is innocent, which we ought to be as careful to protect as zealous to punish the guilty, and the verdict in this case was very good, yet we cannot give judgment for the King, because the information is bad.[40]

Holt may have displayed concern for the innocent, but again this was in the broader context of the damage that would be done to order in society if the certainty required for the prosecution of perjury be abandoned. Far from maintaining the peace:

> The mischief would be great to the people whose words & speech are liable to be by these innuendos . . . That a man should be perjured upon an interpretation made by others upon his words which may be capable of a different meaning, would be the highest injustice. The Rule of Law is contrary.[41]

As he concluded, to sacrifice the certainty of the law in order to secure a conviction in this case would be 'to put such a difficulty upon mankind which is not to be bore, and oblige them to be like & as wise as the Fox... Therefore that is a dangerous allegation founded upon no Principle of Justice and for which there is not the least spark of authority.'[42] Yet others disagreed. Holt's vehemence in arguing for the lack of any such authority can be explained by what happened next in the case. As Holt stated at the end of his opinion, his verdict was 'Reversed by the arbitrary power of the Lords, especially by the influence of the Earl of Rochester, notwithstanding any statute law or usage to the contrary.'[43] Lord Raymond's report of the case gives more detail:

> Note, this case was removed by error into the house of peers, and after hearing of council, when all the lords seemed to be of opinion to affirm the judgment, it was put to the vote, and the judgment was reversed by the majority, without giving any reason, as *Holt* chief justice told me.[44]

Holt brought the writ of error in the case into the House of Lords on 9 February 1698.[45] On 12 March judgment was indeed reversed, and Greap ordered to pay £5, and stand in the pillory in Plympton Earl and the old palace yard in Westminster. Rochester was there for the vote.[46] It is

---

[40] Ibid., f. 30r.
[41] Ibid., f. 33v.
[42] Ibid., f. 33v.
[43] Ibid., f. 35v.
[44] *R v Griepe* [1697], 1 Ld. Raym. 261 (91 *ER* 1067).
[45] *Journal of the House of Lords: Volume 16, 1696-1701* (1767-1830), p. 209.
[46] Ibid., pp. 232-234.

possible he was acting in support of fellow tory John Grenville, first Earl of Bath, who was involved in a bitter and costly legal dispute over the Albermarle estate with the whig Ralph Montagu, out of which the original Graep allegation had emerged.[47] Clearly Holt believed that the certainty of the law had been undermined by the political and personal prejudices of those in the House of Lords. As has been noted, the Lords in this period 'were slow to deal with substantial public business' as 'the biggest controversies of the session concerned a series of high-profile private cases, including further proceedings in the long-running series of disputes *Montagu v. Bath* and the claim of Charles Knollys to the earldom of Banbury.'[48] The same source goes on to state that the 'legal case between the earl of Bath and the earl of Montagu . . . was not a party matter.'[49] This claim is based on a division list that survives for an earlier episode in the dispute. Holt's accusations of Rochester's explicit involvement in influencing the later vote might require a revisiting of this assessment.

It was not only personal or party disputes in Westminster that might trample over Holt's ambition to create 'certainty' in the legal system. Sometimes, others had very different ideas of what certainty looked like. This was certainly true in matters of finance and commerce. The potential for a clash of ideology between Holt's common law conception of certainty, and the certainty merchants treasured in their own customs, came to fruition in the aftermath of the revolution. Again, modern commentators have agreed on the need for standardisation in this area of law:

> . . . the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.[50]

Bingham argued that this view was 'recognised by Lord Mansfield, generally regarded as the father of English commercial law, around 250 years ago'.[51] Yet the significance of Holt's earlier disputes and dealings with the bankers and merchants of Lombard Street have recently been reassessed by Matthew Dylag and Daniel Coquillette, particularly with reference to the cases of *Clerke v Martin* [1703] and *Buller v Crips* [1704].[52] Dylag has made the convincing case that

---

[47] V. Slater, 'Grenville, John, first earl of Bath (d.1701)', *ODNB*.
[48] R. Paley (ed.), *The History of Parliament: the House of Lords 1660-1715, Volume I: Introductory Survey* (Cambridge, 2016), p. 225.
[49] Ibid., p. 286.
[50] Bingham, *Rule of Law*, p. 38.
[51] Ibid., p. 38.
[52] Dylag, 'Bills of Exchange'; Coquillette, 'Legal Ideology'; *Clerke v Martin* [1703], 2 Ld. Raym. 758 (92 *ER* 6); *Buller v Crips* [1704], 6 Mod. 29 (87 *ER* 793).

Mansfield was in reality merely sorting out the mess caused by parliament and the merchants' ignoring of Holt's legal advice on the subject of the negotiability of promissory notes within the common law. As he has said, 'The most important figure for the development of this area was Chief Justice Holt, whose legal interpretation of the transferability of bills of exchange was based on clearly defined and long-standing principles of common law.' Holt had publicly argued against mercantile custom on this subject several times. In *Clerke v Martin* [1703] he argued that:

> The maintaining of these actions upon such notes were innovations upon the rules of the Common law . . . [which] amounted to the setting up a new sort of speciality, unknown to the Common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall.[53]

However, the problem with Holt's principled stance was that it 'was viewed as a hindrance to trade', especially at a time when merchants and bankers were crucial to the financing of the state's war effort. Parliament in response passed the Statute of Anne 1704, 'collapsing the distinction between bills of exchange and promissory notes' leading to 'numerous conceptual difficulties in the law of negotiable instruments' until Mansfield's intervention in the case of *Grant v Vaughan* in 1764.[54] Once again, as we saw with the East India Company in the previous chapter, Holt's experience shows us that when his principled interpretation of the rule of law conflicted with the short-term demands of high politics or national finance, it was Holt's view that lost out, and the 'arbitrary rule' of expediency that won.

7.4 Holt, Judicial Review, and Urban Corporations: Avoiding the Execution of Troublesome Offices

Yet Holt's principled vision of the rule of law was not always in conflict with the needs of the state after 1688. One major area where Holt was able to flex his jurisdictional muscles was in the regulation of corporate power, especially with regard to local government. Lord Chief Justice Bingham has described this power of 'judicial review' as 'lying at the very heart of the rule of law principle', arguing that 'public officers at all levels must exercise the powers conferred on them in good faith, fairly, and for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.' The courts' claims to such oversight have, he admits 'been exercised much more extensively over the past thirty to forty years than they were before'. But they are, in fact, 'old powers, exercised for centuries.'[55] The names of those powers were those of the prerogative writs used to enforce them: *habeas corpus*, *certiorari*, *mandamus*, *quo warranto*, and prohibition. Yet the antiquity of their titles – contrary to Lionel Glassey's assessment - did not blunt their effectiveness as sharp tools

---

[53] *Clerke v Martin* [1703], 2 Ld. Raym. 758 (92 *ER* 6).
[54] Dylag, 'Bills of Exchange', p. 149.
[55] Bingham, *Rule of Law*, p. 60.

of government.[56] The major academic work on this subject is Paul Halliday's *Dismembering the Body Politic*.[57] In it, he argues that corporations were not rivals to the centralising state in this period, but were instead crucial to its formation in decades after the Restoration. The standardisation and uniformity of their government that emerged under the oversight of the King's Bench, he claims, was a key process in both the political neutralisation of partisan strife, and the emergence of the 'modern' state in the eighteenth century. Holt's court, then, 'became the means for maintaining stable government in the midst of conflict, thus ensuring that even corporations divided by partisan politics would remain "the best of polities"'.[58]

Continuing to fuel such partisan politics after 1688 was the political issue of religious dissent, or more particularly, the battle to exclude non-Anglicans from positions of corporate power and responsibility. These conflicts were both symptoms and causes of the wider instability in English politics over the course of the seventeenth century, fuelled as they were by fears of popery, disagreements over the ceremonial character, jurisdictional boundaries, and political power of the Church of England, and the constitutional debates they mirrored concerning the prerogative powers of the monarchy and the legal role of parliament. One of the major achievements of the revolutionary settlement was supposedly the Toleration Act of 1689. Although it provided for religious freedom in a very limited form, Tim Harris has argued that it 'nevertheless did establish a legal liberty of conscience for those Protestant groups that had suffered persecution . . . and helped ease many of those religious tensions that had been one of the major sources of political instability during the seventeenth century.'[59] For tories, toleration had been the lesser of two evils when compared with full comprehension.[60] Yet it has also been argued that the growing 'denominalization' of dissent after the Restoration meant that by 1689, comprehension 'within a purified Church of England' had equally limited appeal for non-conformists.[61] Importantly, the Corporation and Test Acts had been 'specifically reinforced' alongside toleration.[62] This meant that although some legal restrictions on worship were lifted, with the result that non-conformists meeting houses 'mushroomed' in the 1690s, public office

---

[56] L. Glassey, 'In Search of the Mot Juste: Characterizations of the Revolution of 1688-89', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013), at p. 26.
[57] Halliday, *Dismembering the Body Politic.*
[58] Halliday, *Dismembering the Body Politic*, p. 55.
[59] T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006), p. 354.
[60] J. Spurr, 'The Church of England, Comprehension and the Toleration Act of 1689', *The English Historical Review* vol. 104 (1989), pp. 927-946.
[61] S. Taylor, 'Afterword: State Formation, Political Stability and the Revolution of 1688', in Harris and Taylor, *The Final Crisis of the Stuart Monarchy*, p. 284.
[62] W. Speck, *Reluctant Revolutionaries, Englishmen and the Revolution of 1688* (Oxford, 1988), p. 187.

continued to remain out of reach for those who were not in communion with the Church of England.[63]

The existence of the Toleration Act alongside the Corporation and Test Acts also created new legal challenges for the courts which have not been fully appreciated in the existing scholarship, but which are all contained in the case of *R v Larwood* [1694].[64] One of the most important legal consequences – though in a way, perhaps the most obvious – of the Toleration Act was that it created a new legal category of person in the eyes of the law: non-conformist Protestant dissenters. Before 1689, in terms of legal standing, these people simply did not exist. One could no more claim in court to be a dissenter from the laws passed to suppress religious nonconformity than one could be a dissenter from the law of murder. Another aspect of the struggles to exclude non-conformists from serving in local government that has not received widespread attention is the reluctance that many men actually felt to take up office. These two phenomena came together in *R v Larwood*. An information had been brought against Larwood by the mayor, sheriffs and alderman of Norwich for refusing to serve as sheriff or to pay the resulting fine 'to the great hindrance of the affairs of the King, &c.' Larwood pleaded that the Corporation Act incapacitated him from execution of the office, as 'he was a Protestant dissenter from the Church of England', and that his election was therefore void. The government disagreed. Sir Edward Ward the attorney general replied that Larwood 'ought to have received the sacrament yearly, and that he ought not to take advantage of his own wrong or default.' Larwood, in his rejoinder, pleaded that the Toleration Act 'gives liberty of conscience to all Protestant dissenters'.[65] Ward demurred, at which point the case essentially became a legal examination of what the government and its judiciary were prepared to tolerate under the Toleration Act.

Holt and his brother judges first agreed that the Toleration Act was 'a private act', which meant that 'the court could not take notice of it' because Larwood had not stated he was a dissenter in his initial plea. As they argued, 'time out of mind' there had been 'a discipline established in the Church of England, which all persons were obliged to observe by the canon law before the reformation'. Since then, 'the statutes of Edw. 6 and 1 Eliz.' governed the public's legal relationship with the church 'so that the law took no notice of any such persons as dissenters before this act'. In addition, the Toleration Act did not 'extend to all dissenters from the church, but only to those who go to the sessions, and there take the oaths, and subscribe to the

---

[63] G. Tapsell, 'Religion and the Government of the Later Stuarts' in A. Hiscock and H. Wilcox (eds.), *The Oxford Handbook of Early Modern English Literature and Religion* (Oxford, 2017), p. 105.
[64] *R v Larwood* [1694], 1 Ld. Raym. 29 (91 *ER* 916).
[65] Ibid.

declaration.' Sir Giles Eyre went even further, arguing that even if Larwood had successfully pleaded the act, it would not have helped him, 'For the intent of the act was only to give the dissenters liberty to exercise their religion, but not to exempt them from serving their country in employments agreeable to their several capacities.' Carrying on, and displaying a marvellous lack of faith in the sincerity of the public's attachment to their religious beliefs, 'if this were allowed, all the people of England would turn dissenters, to avoid the execution of troublesome offices, and so there would be nobody to discharge them, by which there would be a failure of justice.[66]

Eyre's blunt and matter-of-fact assessment, though undoubtedly representative of the government's motivation for bringing Larwood to trial, was seen as indelicate enough that 'the other two justices gave no opinion'. Sir Samuel Eyre however did speak up for the defendant, arguing that the design of the Corporation Act had been 'to exclude men, who were not of the Church of England, out of all offices, which concern the government; and therefore the defendant being a dissenter was altogether disabled.' It naturally followed by law that:

> . . . no man ought to be punished twice for the same offence; but if the court here shall punish the defendant, this rule will be infringed. For the statute punishes the defendant once, by disabling him to exercise the office; for the office of sheriff (said he) was a profitable office, and by the common law officers were honourable places and not burthens: and therefore an ambitious man, who will prefer honour before profit (admitting that these offices are not profitable) will esteem such a disability a great punishment.[67]

Staggeringly, in order get around Samuel Eyre's argument, Holt and Sir Giles Eyre were forced to argue that the Corporation Act was never designed 'to exempt any person from executing any office to which he was obliged before', but instead 'to qualify himself for execution of it.' Certainly, it was not supposed to 'favour' dissenters, which was important, because contrary to Samuel Eyre's assessment 'these offices are not profitable, but chargeable, and full of trouble', meaning that to give Larwood its benefit would be to set a precedent much to his, and other dissenters' 'advantage'.[68]

R v Larwood displays the lengths that Holt was prepared to go to maintain what he saw as effective local government. In doing so, he revealed the limits of the political and financial price that the government was willing to place on toleration, as well as the unexpected jurisprudential difficulties that were created by giving Protestant non-conformists standing in law. Perhaps most importantly, it forced the government's lawyers to argue that a man's religious beliefs and

---

[66] Ibid.
[67] Ibid.
[68] Ibid.

his political duty were separate entities, the precise opposite of the argument that had fuelled much of the constitutional instability in England since the Reformation. Finally, it highlights the reality that serving in local government was not always an attractive proposition. It suggests that some non-conformists believed that they could effectively use the Corporation Act to exempt themselves legally from the hassle of such service. More importantly, toleration as opposed to comprehension offered a potential shield from the fines they had been paying, a reliable source of income for most corporations, for not serving in the past. Yet Larwood was not the only man attempting to evade his 'civic duty' in the aftermath of 1688.

On 29 October 1695, John Locke wrote to Cornelius Lyde, the steward of his Somerset estate, with welcome news.[69] Lyde had been most worried that he might be called upon for sheriff duty, but Locke had taken action:

> As soon as I received yours of the 26th I immediately waited on my Lord Chief Justice Holt who told me you were not one of the three down upon the list last year and promised me you should not be put in the list this. So that I look upon that business as done. For my Lord Chief Justice is so much my friend that I make sure of this kindness now he has promised me and has gone so far in it, that he with his own hand took your name and the excuses you furnished me with viz a small estate and a great family.[70]

In September of the following year, Lyde wrote to Locke to confirm Holt's continuing kindness to him:

> Your Kind Letter I Received with one to the Lord chief Justice Holt which I delivered at Wells, who was very Kind to me as to Invite me to dine with him and also to take my name in his book to prevent my being in that troublesome office of high Sheriff[71]

These letters are fascinating, not only for the connection they prove between Holt and Locke, something we will explore further in the next chapter, but also because they demonstrate the power that Holt had over the election of sheriffs in this period. In addition, Holt's behaviour with Lyde could not be more different from the views he expressed regarding the importance of serving as sheriff if elected, the dangers of allowing men to avoid their civic duty, and the power of his court to force them to undertake it. These views he demonstrated most clearly in the connected cases of *City of London v Vanhacker* [1699], and *City of London v Wood* [1702].

City of London v Wood was heard in the Guildhall in 1702.[72] The defendant, Thomas Wood, had refused to serve as a sheriff for the City of London. Not only had he refused to serve, but he also refused to pay the fine for refusal that was brought in an action of debt in the Mayor's Court. This debt action was brought in the name of the Mayor, commanalty, and citizens of London. It was this point, that the Mayor was both a judge and a party to the action, that proved

---

[69] E. S. De Beer (ed), *The Correspondence of John Locke,* 8 vols. (Oxford, 1976-1989), vol. 5, p. 454: Locke to Cornelius Lyde, 29 October 1695.
[70] Ibid., p. 454.
[71] Ibid., p. 694: Cornelius Lyde to Locke, 2 September 1696.
[72] *City of London v Wood* [1702], *Hardwicke II,* ff.2r.-19v.

most significant, and led Holt to make his famous pronouncements about the broader constitutional implications of the maxim that one could not be a judge in one's own case. The printed report of Holt's judgment, in which he found for Wood, has long been identified by scholars as muddled and incoherent:

> . . . it is against all laws that the same person should be party and Judge in the same cause, for it is manifest contradiction . . . And what my Lord Coke says in Dr. Bonhams case in his 8 Cokes Reports is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.[73]

This sense of perplexity is only added to when one actually reads Coke's report of *Dr. Bonham's Case* [1610] that Holt alluded to:

> The censors cannot be judges, ministers, and parties; judges to give sentence or judgment . . . And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void. [74]

For Philip Hamburger, Holt's mentioning of Coke's report and its bold claims for the powers of judicial review in the same breath as concepts of restoring man to 'a state of nature', or the theory that an act of parliament 'can do no wrong' but also might be 'void', was the central point of confusion that he sought to clarify through a reading of the manuscript opinion of the case.[75] In the end, Hamburger came to two general conclusions. The first was that Holt believed that parliament was subject to the limitations of natural law; it had the sovereign authority to pass an act that went contrary to the laws of nature, but in doing so it would be dissolved, returning those who lived under it to a state of nature. Secondly, and building on the first point, Holt was under no illusions as to the power of King's Bench to use judicial review to void an act of parliamentary legislation: it could not. Parliament held a sovereign power over his court. These are both key issues we will come back to in the next chapter.

The flip side of this, however, was that when it came to urban corporations, Holt was equally sure that it was his court's responsibility to review and enforce the authority of their courts, and

---

[73] *City of London v Wood* [1702], 88 *ER* 1592 (12 Mod. 669). For conflicting interpretations of this judgment, see C.K. Allen, *Law in the Making* , 6th edn. (Oxford, 1964), pp. 433-34; T.F.T Plucknett, 'Bonham's Case and Judicial Review', *Harvard Law Review*, vol. 40 (1926), pp. 30-70; and F. Pollock, 'A Plea for Historical Interpretation', *Law Quarterly Review*, vol. 39 (1923), p. 165.

[74] *Dr. Bonham's Case* [1610], 8 Co. Rep. 106b (77 *ER* 638).

[75] P. Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood', *Columbia Law Review*, vol. 94 (1994), pp. 2091-2153.

thereby maintain the health of the body politic. He demonstrated this most clearly in the case of *City of London v Vanhacker* [1699], when he argued:

> Every citizen and freeman is supposed to be an inhabitant and dwelling in the city and being a member of the body politick and he is and ought to be present at the public assemblies and meetings of the city and therefore privy to all corporate acts done by the body politick. And if he should be absent at the time of the election, that is his own neglect of which he ought to take no advantage.

This was especially the case in London, which Holt singled out as being particularly important for the success of the nation as a whole:

> It is strange to observe the tempers of some men that rise up in opposition to the government of the City, and I am afraid they meet with too much encouragement by some in the City. But as we are judges, we are obliged to preserve every one's right more especially to secure the rights of the City that are of so great a consequence to the whole Kingdom, against the encroachments that are endeavoured to be made upon the government of it, who design to bring all things into disorder and confusion.[76]

Holt singled out for particular attack those:

> . . . rich and wealthy citizens who have got their estates in the City that have no mind to serve the office, when the time for electing sheriffs approacheth withdraw themselves out of the City on purpose to avoid being elected.[77]

It is possible that Holt helped Cornelius Lyde because he did not fit this description. Regardless, this does not diminish from the central message we have seen Holt repeat so far in this section of the thesis: that the government of the nation in the aftermath of the revolution was as fragile and unsettled as the authority of his courts, whose jurisdiction he sought vigorously to maintain.

7.5 Conclusion

In this chapter we have analysed Holt's understanding of the proper function of the courts, and the theory that underpinned his conception of the 'rule of law' in the decades after the Glorious Revolution. We have shown the emphasis that he placed on defending the reputation of the courts from accusations of injustice, openly berating and attacking those who did so. We have also demonstrated his belief in the importance of projecting an image of procedural regularity when it came to the application of the law, and how such belief might clash with the policy demands of those in government. Finally, we have explained the importance that Holt attached to using his courts to maintain the administrative effectiveness of local government through the regulation of its officers.

As a whole, what this chapter has illustrated are the difficulties Holt faced in attempting to serve the needs of the state at both a national and a local level, while also maintaining the integrity of the law as he perceived it, both in theory and practice. In an age of such constitutional uncertainty, this was a hard task, though one in which he believed the courts played a vital role.

---

[76] *City of London v Vanhacker* [1699], *Hardwicke III,* ff. 70v.-71r.
[77] Ibid., f. 70v.

Holt considered the certainty provided by the common law to be one of the central pillars of the English state, promoting confidence in the security of men's property, and with it the maintenance of civil order and good government. Any cracks in, or worse, attempts to remove that pillar, would spell disaster for the whole nation. Yet as we shall see in the next chapter, there were those who Holt believed, for their own selfish or partisan ends, had designs to do just that.

Chapter 8: The Constitutional Unsettlement

8.1 Introduction

Throughout this thesis we have spoken of the revolutionary 'settlement'. In this final chapter we will investigate just what it was that was 'settled' in constitutional terms after 1688, and what role the law played in that settlement. This is not an easy question to answer, not least because England's constitutional identity continues to be an active source of academic and political disagreement today. Some historians have even disagreed with themselves over the constitutional consequences of the Glorious Revolution. Writing in 1993, Tim Harris argued that apart from marking a 'belated victory for the policy of Exclusion' and establishing 'the legislative sovereignty of Parliament', it was 'difficult to agree with those historians who see 1688-9 as a major watershed in early modern English history, which altered the basic issues of political life at both the national and local level.'[1] Moreover, it was not the 'legal constraints' of the Bill of Rights that ensured regular parliaments, but 'the Crown's chronic shortage of money.'[2] Harris revisited this assessment in 2006, arguing that it was wrong to view the revolution settlement 'as of limited constitutional significance.' The Bill of Rights had in fact 'settled a number of issues that had been matters of dispute between the Crown and parliament over the course of the seventeenth century, and settled them decisively in parliament's favour.' The monarchy 'became limited, bureaucratic and parliamentary', the Declaration of Rights in particular providing 'the sort of legal clarity on a number of points of controversy that would make the types of experiments in royal absolutism that the Stuarts had engaged in impossible in the future.'[3] The Glorious Revolution therefore 'truly brought about a revolutionary transformation of the English state.'[4]

Not surprisingly, it is debatable just how much 'legal clarity' there was in constitutional matters in this period, especially in the decades immediately following the revolution. For a start, and as we have argued throughout this thesis, 'lawful government' was not a side in the struggle between Crown and parliament over the course of the seventeenth century. Instead, the struggle was over the definition of what 'lawful government' – particularly the relationship between the

[1] Tim Harris, *Politics under the Later Stuarts, Party Conflict in a Divided Society 1660-1715* (1993), p. 140.
[2] Ibid., p. 135.
[3] T. Harris, *Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006), pp. 353-354.
[4] Ibid., p. 494.

royal prerogative and the rights of parliament– actually meant. If the Crown was confined to 'lawful government' after 1688, then the definition of what 'lawful' actually meant was never going to be immediately clear. Nor could any such definition be politically neutral, despite the Declaration of Rights supposedly being a non-partisan affirmation of agreed ancient liberties. And as we saw in Chapter 7, even if the person of the king no longer had the freedom to exercise his prerogative powers in the way that the earlier Stuarts believed he did, it was not at all clear after 1688 what powers the judiciary or parliament had to restrain the exercise of those prerogatives by the king's ministers. This left ample room for continued constitutional controversy, something that the government's opponents were often able to exploit. Equally, even if it was generally agreed that parliament had now achieved sovereign legislative superiority, the nature of its 'lawful government' was also going to be a point of contention, not least because it was an almost wholly new phenomenon. Given this fact, and bearing in mind the ongoing ability of the executive to manipulate judicial opinion, it is highly doubtful that the law itself was ever going to be able – or permitted - to provide a definitive answer to any of these questions in this period.

In its most extreme interpretation, parliament's triumph made it an all-powerful absolute sovereign, capable of being just as much of an arbitrary threat to Englishmen's liberty and property as the Stuart monarchs had been. This was certainly one of Holt's concerns. The question was, what could he do about it? It is at this point that even John Philip Reid and Chief Justice Bingham become sceptical. As Reid has said, 'The most unique-or most "English"-aspect of rule-of-law in the seventeenth and eighteenth centuries... was the elusive maxim that rule-of-law best promotes liberty by regulating and restraining state authority.'[5] Yet he is forced to conclude that the rule of law as 'understood in Great Britain . . . may not have restrained parliamentary power so much as guided it.' Perhaps the only 'universally recognized element' of the rule of law introduced after 1688 was 'certainty of procedure.' But as we saw in the last chapter, even procedural certainty might not survive a contest with political expediency when it came to the needs of the fiscal-military state. Only towards the end of his work does Reid reveal the major dividing line between his American understanding of the rule of law, and the English historical reality:

> The realization that many of Britain's rulers, even some who were common lawyers, now equated law, liberty, and constitutionalism with parliamentary legislation could have staggered American constitutionalists had the fact sunk into their legal

[5] J.P. Reid, *Rule of Law*, *The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb, Illinois, 2004), p. 6.

> consciousness. They would never break free of the fundamentals of anti-Stuart constitutionalism in which power unrestrained was not legal. They could not see what difference it made for arbitrary decisions to be legislative rather than monarchical.[6]

Lord Chief Justice Bingham came to similar conclusions. He argued that 'respected and authoritative voices now question whether parliamentary sovereignty can coexist with the rule of law.'[7] True, there are those who seek to undermine the principle of parliamentary sovereignty by drawing 'sustenance from the observation of Sir Edward Coke in *Dr Bonham's Case* in 1610 that a statute contrary to common right and reason would be void.' But as Bingham rightly points out, Coke's decision was unclear, and unpopular. Some measure of protection after the Glorious Revolution was provided by the requirement that 'Crown, Lords and Commons, each of them powerful independent players, should assent to legislation before it became law.'[8] Yet the independence of the relationship between these three trustees has nearly always been in doubt, especially during periods of political crisis. Crucial to the maintenance of this image of a balance of power has been the fact that, historically, few of these assumptions have ever been tested to destruction in the courts. Yet in the aftermath of 1688, many of these issues did come before Holt. It is hoped that his responses will help to shed light on the unsettled nature of constitutional change and continuity in the decades immediately after the revolution.

8.2 The Arbitrary Legislative Power of Parliament

Writing nearly sixty years after Holt's death, William Blackstone came to a startling and controversial conclusion. Parliament's power, he realised, was as arbitrary as it was absolute. Paraphrasing Sir Edward Coke, Blackstone argued that the 'power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.'[9] It had 'uncontrollable authority' with regard to laws, 'concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal.' Parliament, he believed, was 'the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.' This meant that it could 'regulate or new model the succession to the Crown' and 'alter the established religion of the land.' In addition, it could 'change and create afresh even the constitution of the kingdom and of parliaments themselves' as it had demonstrated with 'the act of union, and the

---

[6] Reid, *Rule of Law*, p. 79.
[7] T. Bingham, *The Rule of Law* (London, 2011), p. 161.
[8] Ibid., p. 163.
[9] W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-1769), vol. 1, pp. 156-157.

several statutes for triennial and septennial elections.' It could 'in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.' The only barriers preventing parliament from using its power to 'ruin' the nation were the 'probity', 'fortitude' and 'knowledge' of its members. As Montesquieu had presaged, 'as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish, whenever the legislative power shall become more corrupt that the executive.'[10] Blackstone's assessment was, and arguably remains, profoundly disturbing. His view of parliament's power totally undermined the image of England's balanced constitution, crafted by the events of 1688, that had banished the spectre of arbitrary rule to the history books along with the Stuarts. Blackstone was forcing the nation to confront a constitutional possibility that it had chosen to ignore, or at the very least forget: that the liberties Englishmen enjoyed were not guaranteed by any legal limitations or institutional restrictions placed on parliament, but by the good will of those who were in power. It was as if the Glorious Revolution, which had supposedly separated the arbitrary will of the ruler from the exercise of authority, had never happened. Yet sixty years earlier, none of these sentiments would have shocked Holt.

Holt unquestionably gave great weight to the authority of parliament and its pronouncements. Its two houses mirrored 'the two states of men', and represented the true 'high court' of the country.[11] As such, it was perfectly capable of erecting any 'new jurisdiction' that it saw fit, as it had done when it established the commission responsible for selling forfeited lands once owned and distributed by James II in Ireland. Yet Holt was also adamant that it was the role of his court to make sure that those granted such a jurisdiction did not overstep the boundaries of their authority. This was one way that Holt was able to maintain at least a semblance of judicial review over arbitrary parliamentary power. As he said in his opinion in the case of *Annesley v Dixon* [1706], the commissioners appointed to sell James II's land in Ireland had 'a new jurisdiction erected by act of parliament' but 'none can pretend to have more or greater than is given.'[12] Yet the commissioners in that case had sold lands without first using Irish juries to determine titles. As far as Holt was concerned, by not checking the titles properly, the commissioners had breached their jurisdiction: 'Jurisdictions are confined to place, persons and things. This is a jurisdiction concerning things, vizt. land. What lands? Not all the lands of Ireland, but the land of King James the second and persons attained.' The identity of these lands

[10] Ibid.
[11] *City of London v Wood* [1702], *Hardwicke II*, f. 13r.
[12] *Annesley v Dixon* [1706], *Hardwicke II,* ff. 90r.-95r.

could only be 'tried and determined... by a jury.' As with Holt's attitude to the royal prerogative, he believed that this requirement was part of 'the ancient and fundamental constitution of the kingdom.'[13] It was not a phrase that Holt used in connection with parliament's powers anywhere in his opinions.

Instead, Holt seemingly projected deference by describing his own court as not being 'fit' to interfere with the laws made by parliament. By contrast, Thomas Powys had argued that it would 'be a great mischief and inconvenience to ravel into these sales', meaning that 'those sales . . . without title' must be made 'good' by the courts, 'because it is very convenient it should be so.' Holt's response was clear, 'Suppose some inconvenience. It is not fit for us to supply the defect of the law by judgment. It is beyond that trust which is reposed in us, for that would be not to execute a judicial power, but would be an encroachment on the legislature.'[14] Holt therefore attempted to dampen parliament's legislative ambitions by making it clear that he could not be expected to clean up the mess caused by their ill-designed judgments. They had a great power, and after 1688 more opportunity to use that power. But they would have to be careful in how they used it: the courts were not going to hold their hand.

One obvious limitation on the arbitrary legislative power of parliament would have been for the judiciary to declare simply offensive statutes void. But as Philip Hamburger has argued, Holt did not think that this was possible.[15] Both he and the legal philosopher Jeffrey Goldsworthy have agreed that Holt's discussion of parliament's inability to pass a law that made a man 'judge in his own case' did not extend to his voiding such a statute, as Coke supposedly claimed was possible in *Dr Bonham's Case* [1610].[16] Instead they argue that Holt was strongly influenced by recent natural law theory and the writings of John Locke when he argued that:

> It is true that saying in . . . Bonham's Case may seem to be carried too far, that an Act of Parliament can't make a man to be judge in his own case. Yet it is not so harsh a saying as some may imagine, but it is a true and orthodox proposition, for a judge and a party are in their nature and jurisdiction different and distinct, for the being of the one doth necessarily exclude the other. Therefore an Act of Parliament that should make a man to be a judge in his own case would be an absolute contradiction. But an Act of

---

[13] Ibid., f. 94r. For Holt's reference to the royal prerogative being part of the ancient constitution, see Chapter 7, note 63.
[14] Ibid., f. 92r.
[15] P. Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood', *Columbia Law Review*, vol. 94 (1994), pp. 2091-2153. Chief Justice Bingham also believed this to be impossible today, see Bingham, *Rule of Law*, p. 167.
[16] J. Goldsworthy, *The sovereignty of parliament: history and philosophy* (Oxford, 1999), pp. 197-198; *Dr. Bonham's Case* [1610], 8 Co. Rep. 106b (77 *ER* 638).

> Parliament may be to leave a man at liberty to do what he will and to exempt him from any judicature and return him to a state of nature.[17]

Again, both authors agree that Holt's conception of this 'state of nature' drew heavily on the post-Hobbesian scholarship of Locke, and the writings of Pufendorf:

> For by the law of nature before the foundation of statutes and erection of tribunals every man that was injured by another might seek his own satisfaction, but it was still with that caution that he kept himself within the bounds of reason, otherwise he made himself obnoxious to other for his excess. But that was not as a judge that he did it, but for want of a judge.[18]

Yet as we saw in Chatper 4, Holt did not have to rely on the work of seventeenth-century philosophers to arrive at an understanding of mankind imbued with God-given reason in a state of nature, reason which would guide him in the absence of statutes and tribunals. This he could have constructed from the work of St. German, something Christopher Brooks has also suggested.[19] That is not to say that we should reject Hamburger's claim to a link between Holt and Locke. As we saw in the last chapter with his efforts to excuse Cornelius Lyde from his duty as sheriff, Holt certainly knew Locke, something Hamburger does not mention in his article. There is another aspect to Holt's judgment which Hamburger does not mention, and which should go some way to altering our opinion of his meaning behind it. Holt was present during the Convention Parliament when debates over the 'dissolution of government' received a wide airing. But as Richard S. Kay has rightly pointed out, 'the Convention was in near total agreement' that Locke's theories were of no use to them.[20] In fact, to the extent that returning to a 'state of nature' was raised, it was not by its Lockean or whig enthusiasts, 'but by Tories who presented it as the inevitable, and obviously unacceptable, consequence of a declaration that the throne was vacant.' The prospect of true dissolution was 'terrifying' to these 'men of substance'.[21] Heanage Finch probably spoke for them all when he cried that 'If we were in the state of nature, we should have little title to any of our estates'.[22] Holt must surely have known this when he wrote his opinion in *City of London v Wood*. This means that he was almost certainly not presenting the return to a state of nature as a viable option or safety valve in the event of arbitrary government. Instead, he was warning parliament of the truly devastating personal and

---

[17] *City of London v Wood* [1702], *Hardwicke II*, ff. 15v. -16r.
[18] Ibid., 16r.
[19] See Chapter 4, note 125.
[20] R.S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington, 2014), p. 113.
[21] Ibid., p. 114.
[22] *Greys Debates of the House of Commons: Volume 9* (London, 1769), p. 18.

national consequences of their legislating in a way that breached the bonds of trust between themselves and those they now governed with absolute power. Yet again, he was making it clear to parliament that his courts could not fix their mistakes. The sheer practical impossibility of Locke's theory was also commented on by Blackstone:

> It must be owned that Mr. Locke, and other theoretical writers, have held, that "there remains still inherent in the people 'a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused; it is thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot adopt it . . . No human laws will . . . suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.[23]

8.3 Parliamentary Privilege and the Right to Vote

Parliament could only legislate while it was sitting, however, a fact the Stuart monarchs knew all too well. Yet the power to call and dissolve parliaments at will was one of the greatest prerogative powers to slip out of the hands of the king after 1688.[24] Perhaps the most visible consequence of the revolutionary settlement was the emergence of annual sessions of parliament, chosen by frequent and regular elections. Arguably the Bill of Rights and Triennial Act merely stated this new constitutional reality rather than created it. It was a change that would have profound consequences for Holt and his courts. Battles over the legal privileges enjoyed by the members of the two houses of parliament were not new after 1688. Neither were partisan struggles at elections, which would often tip over into the court room, leading parties, counsel, and judges to face the wrath of either house. What was new after 1688 was the frequency of opportunity for such battles to take place. We might therefore expect there to have been a collective political desire to settle such jurisdictional matters in the years after the revolution.

The case of *Ashby v White* [1703] demonstrates just how difficult this was, as well as the destabilising forces that regular parliaments introduced into the constitutional landscape. The

---

[23] Blackstone, *Commentaries*, vol. 1, p. 157.

[24] For analysis of the impact of annual sessions of parliament after 1688 on the volume of legislation produced, see J. Hoppit, 'Patterns of Parliamentary Legislation, 1660-1880', *The Historical Journal*, vol. 39 (1996); and J. Innes, 'Legislating for three kingdoms: how the Westminster parliament legislated for England, Scotland and Ireland, 1707-1830', in J. Hoppit (ed.), *Parliaments, nations and identities in Britain and Ireland, 1660-1850* (Manchester, 2003), pp. 15-47.

best modern analysis of the case is by Eveline Cruickshanks, who explains the complex background to Ashby's case. Ashby was in effect a cipher in a broader struggle between the tory Sir John Pakington and whig Thomas Wharton for control of the elections at Aylesbury.[25] This local contest then spilled over into a much larger conflict between the tory Commons and whig Lords after 1701. Holt's first involvement in the dispute came in the autumn of 1703, when he heard an appeal by William White against Ashby's award of damages for having being deprived of his vote at the 1698 elections. Holt – 'a Whig' according to Cruickshanks - found for Ashby, arguing that any freeholder, regardless of value, had a right to a vote. The other judges disagreed, arguing that Ashby had no standing in the case, the right of election being a matter squarely within the jurisdiction of the House of Commons. An appeal was then brought to the House of Lords, who reversed the judgement with a large majority. As Cruickshanks argues, 'the Lords' decision would have transferred the final determination of a parliamentary election from the lower House to the upper.'[26] The Commons responded by voting in agreement that the qualification of electors was a power that belonged to them. For the next two years, a jurisdictional battle royal ensued between the two houses, involving joint committees, threats, propaganda and imprisonment. Given what we have seen in this thesis, it is notable that the Lords premised much of their argument on the basis that the votes of the Commons were inherently 'arbitrary'.[27]

The ferocity of the struggle demonstrates just how little had been settled by the revolution. This was despite Holt's best efforts to use his reputation to argue that the vote was a property right which fell within the jurisdiction of the common law courts. It revealed profound anxieties within parliament and the courts over what rights individuals had at these new, frequent elections, and mistrust over which institution should be responsible for preventing their abuse or manipulation. Far from settling matters, the revolution had unleashed forces that had been bubbling under the surface for decades. For our purposes, what is most interesting is the reporting of Holt's involvement in these affairs. Cruickshanks seems to understand Holt's behaviour in purely partisan terms: he was a whig, therefore he argued for Ashby and his patron Wharton. Yet as we have shown, this assessment is inaccurate both in description of Holt's character, and his political leanings. Another underappreciated aspect of this seismic contest between the Commons and the Lords is that it actually ended in a stalemate. When the whigs

---

[25] E. Cruickshanks, 'Ashby v. White: the case of the men of Aylesbury, 1701–4', in C. Jones (ed.), *Party and management in parliament, 1660–1784* (Leicester, 1984).
[26] Ibid., p. 91.
[27] R. Paley (ed.), *The History of Parliament: the House of Lords 1660-1715, Volume I: Introductory Survey* (Cambridge, 2016), pp. 239-242.

won a majority in the general election of 1705, the matter was effectively dropped. There was now no incentive for them to trim the powers of the Commons, meaning that its jurisdictional claims over elections were left unchallenged. Holt had not won, nor had the courts been able to settle matters. That we might think Holt had been victorious comes from the later reporting of the case.

Reports of *Ashby v White* [1703] exist in two main printed editions. The first is Lord Raymond's from the 1740s. This is the edition that Rayner used for his career biography of Holt in the 1760s.[28] The second is an 1837 printed copy of a manuscript version of Holt's opinion purchased at some point in the 1790s.[29] The introduction to this edition is particularly interesting. Setting the scene for Holt's decision, the editor noted that:

> There had been frequent conflicts of jurisdiction not long before the period when Holt pronounced this memorable judgement. The House of Commons had been in the habit of questioning judges as to their proceedings in Court, in cases where the members had a personal interest!

'The proceedings of every Court in Westminster Hall' he added 'must have been subject to perpetual interruption by the Serjeant-at-Arms'. The 'Judges' meanwhile, 'so recently made independent of the Crown, might have given such offence, by the honest performance of their duty, to another branch of the Legislature, as to be condemned to imprisonment in jail'. This interpretation of events is fascinating in that it matches our own analysis in so many ways. Writing almost two hundred years ago, it was clear to the publisher that the Glorious Revolution had in no way brought about the end of political interference with the judiciary. The threat of the Crown had simply been replaced by the threat of the Commons. If anything, matters had become worse: 'the representatives of the people of England persuaded themselves that their dignity required them to hunt down such audacious practitioners of the law.'[30] This was no different to the 1670s, when 'Holt himself had been personally affected by a similar assumption of power by the House of Commons' in relation to the impeachment of the Earl of Danby.[31] But in one crucial respect, the situation after 1688 was different: 'Direct interference with the course of law', the publisher argued, 'or restraint of any judicial person, was not likely to be

---

[28] *Ashby v White* [1703], 2 Ld. Raym. 930 (92 *E*R 126); J. Rayner, *The Life of the Right Honourable Sir John Holt* (1764), pp. 72-95.
[29] *The Judgements delivered by the Lord Chief Justice Holt in the Case of Ashby v. White and Others, and in the Case of John Paty and Others* (1837), p. iii.
[30] *Ashby v White* (1837), p. xii.
[31] Ibid., p. xi.

repeated after the settlement of the Constitution. Such startling violence defeats itself by a direct appeal to that public opinion, which has been sometimes represented as the sole security against arbitrary power'. We will return to the full importance of this statement in the conclusion to this thesis. At this stage, the publisher's admiration for Holt's opinion is what concerns us:

> Besides his learning and reasoning, who can fail to admire his plain and solemn statement of the sense of judicial duty; his far-sighted appreciation of the consequences of the disputed privilege on the whole frame of government in England; and the manly spirit which vindicates the right of all Englishmen to assert their claim, and that of their advocates to maintain them, and that of sworn judges of the land to decide upon them?[32]

Holt's judgment then had been a 'far-sighted' attempt to remedy the damage that such jurisdictional battles were inflicting on the fragile post-revolutionary 'frame of government'. His solution had been to try and remove such conflicts from the theatre of parliament and into his courts, arguing that voting rights were simply matters of property that need not concern or distract parliament from its important work. In the end, Holt lost this argument: the Commons were never likely to cede power to the common law courts, and nor was it practical to treat every vote as a piece of property. But as Rayner concluded, the affair had 'made a great noise, and the heroical resolution of the Lord Chief Justice was no less applauded than his integrity, penetration, and learning universally acknowledged.'[33] It was this 'heroism' that ended up being remembered more than the historical outcome of the case, a perfect example of how the myth of the 'independent judiciary' came into being after the revolution, contrary to political reality. The legend of *Ashby v White* had been born, soon to become a vital episode in the whig history of the Glorious Revolution.

Evidence of careful curatorship of this legend, and Holt's role in it, can be seen in the later printed reports themselves. The publisher of the 1837 edition noted that the manuscript report he had was noticeably 'fuller' than that of Lord Raymond, but that it authenticated itself by its 'form and style'.[34] It is unclear whether the author ever had the luxury of comparing the report to Holt's own draft opinion, as we are able to. Important differences emerge within the first few lines. Whereas in the 1837 report, Holt supposedly argued that Ashby's right to sue for his vote at common law was 'supported by the grounds, reasons, and principles of the ancient common laws of England', Holt's draft opens with the clear statement that 'the plaintiff hath a

---

[32] Ibid., p. vii.
[33] Rayner, *Life of Holt*, p. 95.
[34] *Ashby v White* (1837), p. iv.

right to give his vote. This is the general right, which subsists upon principles of the state and is part constitution of the government.'[35] This more matter-of-fact approach continues in an acidic line not present in the 1837 version: 'Though it might seem very extraordinary to propose such a point to be discussed, for thereby it may seem to draw at that which is evidently clear into some question, yet since an occasion is given, it will be very necessary to maintain it and to show the nature of it.'[36]

On the very next page, another significant difference can be seen. The 1837 report has Holt opine that 'It is very well known that always the Commons of England had, and still have, so considerable a share in the property of the nation, that from thence, in this well-balanced Government, they become justly entitled to an equal share in the legislature of this kingdom.' Holt's draft contains no such reference to 'well-balanced Government', nor this power of the Commons being something they had 'always' had. Instead, he simply states that 'It is not to be doubted, that the commons of England have so great and considerable property that they are one part of the legislature'.[37] As we know, the likelihood that Holt considered the government in 1703 to be 'well-balanced' is minimal, and bears all the hallmarks of a later eighteenth-century reporter projecting such triumphalist sentiment onto Holt's analysis. Similar embellishments can be seen later in the report. In his draft opinion, Holt argued that:

> It should look very strange to all mankind, that have heard of, or do know our English Constitution, to be so informed that the Commons of England have a right in the legislature, which is to be managed and executed by representatives chosen by themselves, in which every freeholder hath a right to vote for the county; every citizen for city, and every burgess for the borough, and if a sheriff or other officer of a city or a borough [were] to deprive any of these of their right, that person so deprived shall have no remedy. This must be to construe the law or constitution of our government to be very precarious and in consequence ridiculous. Which is to establish a right without a remedy and especially a right of so great consequence.[38]

In the 1837 version, 'our English Constitution' becomes 'this ancient English Constitution', and the Commons' 'right in the legislature' transforms into 'an undoubted share in the legislative authority.' Holt's concern for the 'precarious' state of the 'constitution of our government' is erased, as are his worries that the nation was being made to look 'ridiculous' in the eyes of 'all mankind'.[39] None of this is to say that the manuscript copy purchased in the 1790s or the 1837 printed report is based on is some sort of forgery. Plenty of sentences and phrases from Holt's

---

[35] Ibid., p. 3; *Ashby v White* [1703], *Holt's Drafts*, f. 138v.
[36] *Ashby v White* [1703], *Holt's Drafts*, f. 138v.
[37] *Ashby v White* (1837) p.3; *Ashby v White* [1703], *Holt's Drafts*, f. 139r.
[38] *Ashby v White* [1703], *Holt's Drafts*, f. 145r.
[39] *Ashby v White* (1837), p. 10.

draft opinion can be found in the later edition. Holt's draft is also precisely that, a draft. He may well have produced a much fuller report at a later date. Yet it is telling that Holt never oversaw the publication of any such report during his lifetime. The effect of the changes we have identified might also lead us to surmise that over the course of the eighteenth century, commercial copies of Holt's manuscript opinions underwent a gradual process of sedimentary alteration. The impact of the changes was to make Holt's judgment fit later conceptions of the heroic whig judge, battling to preserve the 'ancient constitution', supporting the undoubted legislative rights of the Commons, and confident in the strength of the revolutionary settlement. Holt's own words paint quite a different picture, of a judge and a country under strain, and with far less confidence in the ability of the government to function properly in the wake of the constitutional upheavals caused by the revolution.

8.4 The House of Lords: 'A Danger of Partiality'

A battle needs at least two sides, and the fight in *Ashby v White* was only possible because of the willingness of the Lords to become involved in the dispute over privilege between the courts and the Commons. Another underappreciated consequence of regular sitting parliaments after 1688 was that the Lords were now in a position to exploit their role as the ultimate appellate jurisdiction as never before.[40] This was especially important given that in this period, appeals were still decided 'in the traditional manner', that is 'with the Lord Chancellor on the Woolsack, the judges from the lower courts present as assistants, and the lay Members voting', a system that was only abandoned in 1834.[41] The opportunity for appeals to be decided upon party or personal lines was, therefore, immense, a problem that we saw Holt identify with Rochester's influence over the case of *R v Graep*. In some cases, the power of the House of Lords might even be appealed to as part of an attack upon the jurisdiction of the courts themselves.

This is what happened in the case of *Bridgman v Holt* [1693].[42] William Bridgman brought an action of *novel disseisin* in King's Bench, claiming that he was the rightful clerk for the enrolling

[40] There is no equivalent for our period of Robert Steven's extensive work on the Lords as a judicial body in the nineteenth and twentieth centuries. See R. Stevens, *Law and Politics, The House of Lords as a Judicial Body, 1800-1976* (1979). The recent introductory survey of the history of the Lords between 1660 and 1715 does not cover their role as an appellate court, see Paley, *House of Lords*. For the earlier part of the seventeenth century, see J. Hart, *Justice upon petition: the House of Lords and the reformation of justice, 1621-1675* (1991). Philip Loft has recently examined the role of the Lords as a high court in relation to Scottish litigation, see P. Loft, 'Litigation, the Anglo-Scottish Union, and the House of Lords as the High Court, 1660-1875', *The Historical Journal* (2017), pp. 1-25.
[41] G. Dymond, *House of Lords Library Note: The Appellate Jurisdiction of the House of Lords* (2009).
[42] *Bridgman v Holt* [1693], Shower 111 (1 *ER* 76).

of pleas in that court, as opposed to Rowland Holt - Sir John's brother - who was occupying the post at the time. The confusion in the case stemmed from yet another legacy of the impecunity of Charles II. Bridgman claimed that Charles had granted the right to nominate the office to Silas Titus in the 1670s, and that since then the patent had descended to him as trustee of the Duchess of Grafton's estate. Rowland Holt's defence counsel decided not to fight the case on the basis of an inconsistency they claimed to have found in the king's letters patent, but instead went into battle on the ground that the clerk's office was a post that could only be granted by the chief justice. Holt did not sit on the bench for the trial, but instead sat near to his brother's counsel 'upon a chair uncovered.' At the end of the trial the court actually proposed that the plaintiff's case be thrown out as a nonsuit, but after some negotiation, the jury were allowed to deliberate and brought back a verdict in Holt's favour. In response Bridgman's team asked that a Bill of Exceptions be granted, that is, a document listing their complaints about the judge's handling of the trial that could be handed to the House of Lords as part of their appeal. The court refused.[43]

Grafton and Bridgman brought a writ of error to the House of Lords, setting the scene for yet another post-revolutionary jurisdictional showdown between a House of Parliament and the common law courts. The petitioners first demanded that the Lords order the judges to seal their Bill of Exceptions. The judges refused, arguing that the whole case was 'altogether improper for your Lordships Examination or Consideration, not being any more triable by your Lordships than every Information or Action for Breach of any Statute Law is; all which Matters are by the Common Law, and Justice of the Land, of Common Right to be tried by a Jury.'[44] Moreover, the whole case threatened not only the right to trial by jury, but what they saw as their 'sacred' and 'solemn Obligation of an Oath to do Justice', which, should the Lords interfere 'may endanger the Breaking of it.' The petitioners countered, claiming that 'this Proceeding of the Judges' was designed to 'stifle the Matter of Law', and 'to keep the Law within the Bounds or Walls of Westminster-hall, and effectually to prevent its ever coming' to the Lords.[45] The judges were not prepared to back down however. That close to the events of 1688, they must have understood the significance of the case as a precedent for their future relationship with the Lords. As they argued in relation to their willingness to challenge the upper house's jurisdiction in this matter:

---

[43] Ibid.
[44] Ibid.
[45] Ibid.

> Some Persons perhaps have from a Confidence of Success, or from a slavish Fear, or private Policy, forborne to Question the Power of their Superiors; but the Judges must betray their Reputation and their Knowledge of the Laws, if they should own a Jurisdiction, which former Times and their Predecessors were unacquainted with. [46]

The judges' 'knowledge of the laws' had led them to understand the nature of the arbitrary threat the Lords were posing to their court. For despite the assistance of the judges during such appeals, the lay members of the Lords were ultimately free to determine both the law and the facts of each case that came before them. This was unlike the basic procedure of the common law courts where those roles were split between the judge and the jury. The danger of the 'facts' of a case being deliberately misinterpreted by the Lords was immense, something the judges gently attempted to point out: 'Not that any Jealousy can be supposed . . . [or] Mischief by it in this House: But the Practice of it now may give Precedent to future Reigns and Ages, in which there may be Danger of a Partiality.'[47] What had begun as a financial challenge to judicial nepotism on Holt's part had turned into a struggle to preserve the judiciary's independence and oversight of their own courts, and to prevent the House of Lords from becoming something of an eighteenth-century Star Chamber.

The House of Lords adjourned the debate, before resuming it on 22 December 1693. By that point, the judge's warnings seem to have won over most of the members of the upper house. A question was proposed regarding whether the Duchess of Grafton should have leave to withdraw her petition. In addition, several amendments to the question were also proposed, one of which must have been immensely troubling for Holt:

> And that, by what hath arisen upon the Debate which hath happened on the Duchess of *Grafton's* Petition, and the Answer put in by the Judges, there are Grounds to apprehend that the Proceedings of the Justices of the King's Bench, in the Case between the Duchess of *Grafton* and the Lord Chief Justice *Holt,* have occasioned a Precedent, which may straighten the Jurisdiction of this House, and the Rights of the People; and do therefore think fit to take a further Consideration of that Matter.[48]

Fortunately for the judges, this was resolved in the negative. There was, however, one last sting in the tail of the case. Eleven peers protested at the withdrawing of Duchess's petition 'without enquiring further into the Conduct of the Judges of the King's Bench.' Their reasons were:

---

[46] Ibid.
[47] Ibid.
[48] *Journal of the House of Lords, Volume 15: 1691-1696* (1767-1830), pp. 327-328.

> Because we conceive it proper, at the Time that Leave was granted to withdraw the Petition, that an Order should be given to have a further Information brought before this House, of the Proceedings of the Judges of the King's Bench, in the Case of *William Bridgman* and *Rowland Holt* others, in order to have directed a Criminal Prosecution against the said Judges, in case the House should have thought fit to proceed so far against them.[49]

Notable among the eleven peers who advocated making preparations to prosecute the judges were Lord Charles Gerard, 1st earl of Macclesfield, Charles Seymour, 6th duke of Somerset, Thomas Bruce, 2nd earl of Ailesbury, John Churchill, 1st earl of Marlborough, and as ever it would seem, Laurence Hyde, 1st earl of Rochester. This was a curious mixture, though one probably centred on a shared sympathy for the duchess of Grafton originating from their political and military connections to her late husband, the 1st Duke Henry FitzRoy, illegitimate son of Charles II. It certainly seems to have been bonds of personal loyalty that dictated their behaviour, rather than any strong constitutional convictions, something which only served to prove the judges' point. And although Holt and the other judges might have escaped imprisonment by the Lords on this occasion, it would not be the only time that they incurred their wrath.

In many ways, Holt's relationship with the Lords got off to a bad start almost immediately following the revolution. In May 1689, just before his death in Newgate prison, the disgraced former Lord Chief Justice of the King's Bench Sir Robert Wright was hauled in front of the Lords to answer for the £30,000 fine he had inflicted on the earl of Devonshire just two years previously.[50] Devonshire had been imprisoned, overruling his plea of privilege, for assaulting Colonel Colepeper at Whitehall in the presence of the king and queen. The earl of Macclesfield took the opportunity to sneer at Wright and the other two late justices of the court assembled there, asking whether 'they were not ashamed to appear at the bench.' The question arose at this ceremonial humiliation as to 'whether a peer in such a case might not be imprisoned at the king's suit'. Having clearly not read the script, Holt replied that he was of the opinion that 'he might.'[51] Later that month, instead of Holt being allowed to deliver the joint opinion of the judges in connection with Titus Oates's imprisonment to the Lords, 'the Lord President Halifax moved that the judges might deliver their opinions every one of them *Viva Voce* at the bar',

[49] Ibid.
[50] *EBRM*, V, p. 110.
[51] Ibid.

which again amounted to a mass judicial humiliation and admission of previous failings by their brethren.[52]

Holt's closest brush with imprisonment seems to have come with his involvement in the legal proceedings connected with Charles Knollys, 'styled fourth earl of Banbury... peerage claimant and duellist'.[53] Knollys had been battling to secure his title since before the revolution, though without success. In 1692, having returned from the court at St Germain, Knollys killed his brother in law Captain Philip Lawson in a duel, probably due to 'his callous behaviour towards his wife', whom he had married at the Nag's Head Coffee House in Covent Garden three years earlier. He petitioned the Lords, claiming that his indictment at the Middlesex assizes as 'Charles Knollys, esquire' was inaccurate.[54] The Lords again rejected his plea, but it was enough to move his trial to the King's Bench, where Holt and the other judges unanimously threw out the indictment on the basis that he was in fact a peer in 1694. By 1698, Knollys was petitioning the Lords yet again to recognise his title. The Lords were most displeased with Holt's behaviour, a fact recorded in the State Papers.

The notes of the proceedings in the House of Lords from 10 February record how Holt and Justice Eyre 'refused to inform the committee what were the reasons they gave for that judgment' in 1694, and had to be reminded that 'they sat entrusted with the distribution of justice according to law, and acted upon their own oaths.'[55] The results of any further intransigence were well advertised: if their judgement 'betrayed any weakness, it would be fit to displace them; if there appeared anything of corruption, there was another way of proceeding against them; if their judgments were erroneous, they were reversible by a writ of error.' Yet Holt and Eyre 'were satisfied they had done nothing but according to a good conscience and the best of their understanding; but they could not submit to be schooled and catechized on all the decisions they should make, and they thought none would accept of a judge's place on those terms.' Neither side seemed likely to back down, though it was hoped the issue would 'not be revived again, or at least that it will not be prosecuted to extremity, since it would be a great embroilment of the two Houses, if either of these judges should be committed.'[56]

---

[52] Ibid., p. 123.
[53] V. Stater, 'Knollys, Charles, styled fourth earl of Banbury (1662-1740)', *ODNB*. For a full report of the case, see Anon., *The Arguments of the Lord Chief Justice Holt and Judge Powell in the controverted point of Peerage in the case of the King and Queen against Charles Knowles, otherwise Earl of Banbury* (1716).
[54] Slater, 'Knollys', *ODNB*.
[55] 'Notes of proceedings in the House of Lords', 10 Feb. 1698, *CSPD* 1698, pp. 81-2.
[56] Ibid.

Yet the very next day it was reported that the Lords 'are fallen severely upon Lord Chief Justice Holt on account of the pretended Earl of Banbury'. Worryingly:

> They had like to have sent him to the Tower, but have adjourned the matter till Monday, in hopes he may be persuaded, by that time, to more compliance with the House, which if he does not then use, he will surely be sent to the Tower, which may prove a matter of ill consequence, if he should appeal to the Commons, as he may do, being a commoner.[57]

How was the matter resolved? As with the jurisdictional clash in *Ashby v White*, the answer seems to be that it never was. On 14 February, 'The adjourned debate against the Lord Chief Justice Holt was not taken up, so that matter is over, which it was feared would give a great disturbance to the public affairs.'[58] Instead of attacking Holt, the Lords had 'let the matter quite fall, without making any mention of it.'[59] Once again, it appears to have been a fear of disturbing 'public affairs' or public 'opinion' that restrained the Lords from destroying Holt in the same way that previous Stuart monarchs had dispensed with their 'insubordinate' judges, not any constitutional barriers imposed on them by the revolutionary settlement. 1688 it seems was less about containing absolute power, and more about deploying it in politically acceptable ways, an observation that we shall return to in the conclusion to this thesis.

8.5 The Bench, the Bishop, and the Bastards: A Case Study of the Legal Position of the Church of England after 1688

The jurisdictional upheaval caused by the revolution was not only confined to the common law courts and parliament; the Church of England's legal authority was also thrown into doubt. As with Holt's court, this was further complicated by the Lords' new position as an annually sitting court of appeal. Although it was only lay members who could vote in such matters, as we shall see, this did not stop bishops using their influence and position in the House of Lords to secure favourable outcomes in cases involving the Church, often at the cost of the common law courts. As we have seen throughout this thesis, there is no reason to doubt Holt's commitment as a loyal son of the Church by law established. Yet as Richard S. Kay has shown, when it came to enforcing that law, Holt was prepared to defend vigorously the jurisdictional claims of his own

[57] 'J. Ellis to Lord Ambassador Williamson', 11 Feb. 1698, *CSPD* 1698, p. 84.
[58] 'Newsletter, House of Commons', 15 Feb. 1698, *CSPD* 1698, p. 90.
[59] 'J. Ellis to Lord Ambassador Williamson', 15 Feb. 1698, *CSPD* 1698, p. 91.

court against those of the Church. This was especially the case with regard to those complex property disputes occasioned by the deprivation of non-jurors after the revolution.[60] Holt's relationship with Bishop Edward Stillingfleet also seems to have had two sides to it. In Section I we noted those reports that Stillingfleet had consulted with Holt over his planned attack on the legal status of the Ecclesiastical Commission. Yet by April 1697, it was reported that Holt had 'held forth' in the 'commendation' of John Locke's *Letter to the Bishop of Worcester*.[61] The source of Holt's pleasure at Locke's attack on Stillingfleet's *Vindication of the Doctrine of the Trinity* (1696) may well have been connected with both men's role in the case of *Philips v Bury* [1694], a dispute which combined jurisdictional rivalries and anxiety between the Church and common law courts, as well as the decisive role of the Lords and government ministers in ultimately settling legal disputes after the revolution. As such, it represents a microcosm of the themes connected with 'the rule of law' after 1688 that we have been exploring in this final section of the thesis.

During the turbulent years of the 1690s, the wars within the colleges of the University of Oxford were every bit, if not more, ferocious than those taking place at Westminster and Whitehall. One of these titanic struggles had begun even before William had landed at Torbay. The efforts of Jonathan Trelawny, Bishop of Exeter, to expel Arthur Bury, long-time rector of Exeter College, generated enough interest and scandal to merit fist-fights, book burning and six years of cripplingly expensive legal action. The conflict between Bury and his high Church foes has not gone unnoticed in recent scholarship. The episode forms most of a chapter in M. G. Smith's 1985 biography of Trelawny, providing by far the most detailed modern narrative of the dispute, though with few conclusions as to its wider importance.[62] Brent Sirota's more recent article on the Trinitarian Crisis provides far more context for the dispute.[63] Sirota's thesis centres on his persuasive claim that the late seventeenth-century controversy over the doctrine of the Trinity within the Church of England was as much a 'disciplinary crisis' as it was a 'doctrinal dispute', not a 'mere paper war' suitable for study only by scholars of the early Enlightenment, but instead a struggle between two rival 'political ecclesiologies' or 'competing apprehensions of the functional relationship between church and state.'[64] To back up his claims, Sirota places the

[60] Kay, *The Glorious Revolution*, pp. 218-219.
[61] 'John Freke and Edward Clarke to Locke', 6 April 1697, in E. S. De Beer (ed.), *The Correspondence of John Locke,* (8 vols., Oxford, 1976-1989), vol. 6, p. 80.
[62] M.G. Smith, *'Fighting Joshua': A Study of the Career of Sir Jonathan Trelawny, bart, 1650-1721, Bishop of Bristol, Exeter and Winchester* (Redruth, 1985).
[63] B. Sirota, 'The Trinitarian Crisis in Church and State: Religious Controversy and the Making of the Postrevolutionary Church of England, 1687-1702', *Journal of British Studies*, vol. 52 (2013).
[64] Ibid., pp. 27-29.

Trinitarian crisis in its institutional context, firmly in the centre of the political struggles in the years following the Glorious Revolution.

The dispute began in the University of Oxford of the late 1680s, capital of the tory-Anglican alliance, and 'veritable citadel of the Church'.[65] Yet in the eyes of both its supporters and opponents, it was a citadel surrounded by foes without, and undermined by enemies within. The story of the university under James II had become, and has remained, central to the mythology of his downfall. The expulsion of the Magdalen fellows provided the perfect example of passive obedience that all good loyalists could follow. By contrast, the conversion of Obadiah Walker, master of University College, to Roman-Catholicism, along with the lukewarm resistance offered to James's efforts in statecraft, uncovered what many believed to be the rotten core of the institution, a core that King William had cause to fear as much as detest. As an institution, the university's fate was intimately bound with that of the Church in the early years of the revolutionary settlement. The attacks on its position soon came. Campaigns for toleration and, more worryingly, comprehension, threatened the political influence and legal standing of the established Church in a way that few in Oxford were prepared to accept. As M.G. Smith put it, in the aftermath of the revolution, most bishops:

> . . . accepted the Act of Toleration . . . acknowledged the supremacy of Parliament, but . . . still adhered to the belief that the Church of England had a divine right, derived from the Apostolic Succession of bishops, to administer the discipline of Christ to all its members. They saw no justification in acquiescing in the recent shift in public opinion which wanted to see the church courts powerless to deal with many routine lapses of discipline among the laity and they strongly resented the tendency of Whig lawyers to obstruct or ignore the church courts.[66]

Leading the charge against this assault on their power was Henry Aldrich of Christ Church and William Jane who, along with Bishop Sprat, Thomas Long and the tory earls of Rochester and Clarendon, battled against William's efforts in parliament and convocation. Yet, while all eyes were on the battles in the capital and Canterbury, an Oxford college scandal was brewing that would test the Church's legal authority in its own back yard.

Arthur Bury had been rector of Exeter College since the Restoration, and by 1688 he seemingly considered himself to be its undisputed master, or at the very least, an indispensable part of the

---

[65] G.V. Bennett, 'Loyalist Oxford and the Revolution', in L.S. Sutherland and L.G. Mitchell (eds.) *The History of the University of Oxford, Volume V: The Eighteenth Century* (Oxford, 1986), p. 9.
[66] Smith, *Fighting Joshua*, p. 60.

college's fabric. Yet his efforts in December of that year to influence the election of the college's new chaplain so 'that the sole absolute power of determination in all causes should fall upon him-self' was considered by at least one other member of college to be a step too far.[67] James Colmar, holder of a Cornish fellowship since 1683, proceeded to vote against the appointment of Bury's nominee Dr. Kingston, a move which convinced Bury that Colmar needed to be removed.[68] At first Bury's attacks on Colmar were in private: accusations of impropriety and incontinence, especially with regards to fathering the bastards of the college maids Ann Aris and Ann Sparrow. When these failed, Colmar was dragged in front of the vice-chancellor who, thinking Bury's accusations 'trivial and incoherent', saw fit to dismiss the case, not least because Colmar's servant Ferdinand Smith (also the suspected father of one the bastard children) testified to his innocence. Bury, convinced there was a conspiracy afoot, decided to dispense with 'the troublesome course of examining Witnesses before a Magistrate' and called a meeting of seven senior fellows on 10 October 1689. There Bury took on the role of accuser, witness and judge, claiming that he had it on good authority that Colmar was the father of Ann Sparrow's bastard, and that he had been generally uncivil to college staff. He expelled Colmar with immediate effect.

Yet for Colmar, the battle was far from over. With the support of the college's professor of Civil Law, Dr. Bouchier, he appealed to the visitor of the college, the Bishop of Exeter, for aid. Trelawny received Colmar's appeal on 24 October 1689. After considering his options over the winter, Trelawny resolved to send his chancellor, Dr. Masters, to Oxford with a commission to hear Colmar's appeal in the March of 1690. Perhaps not surprisingly, Masters' visit was not well received. Colmar, contrary to Masters' command, was not reinstated. Instead, Bury launched a highly legalistic written attack on Trelawny's interpretation of the college statutes, his attempts to discipline the fellows, and the nature of his and the Church's jurisdictional power over the college.[69] Aside from Bury's developed claims for independent legal authority, the date of his letter, 4 April 1690, is also highly significant. On 1 April he had published *The Naked Gospel*. The relative importance of this event is critical to our understanding of this dispute. Bury's work was thought to reek of Socinianism, an accusation that he strenuously denied:

> I protest before God who is the searcher of the heart that I had no design to oppign any article of the Church of England but am ready to renounce any unhappy word that

[67] J. Harrington, *An Account of the Proceedings of Jonathan, Lord Bishop of Exeter, in his late Visitation* (Oxford, 1690), p. 5.
[68] Much of narrative that follows is taken from Harrington, *An Account*, pp. 5-8.
[69] Exeter College Archive, F.IV.3 (4a): 'Bury to Trelawny', 4 April 1690.

> may give just offence by any appearance of a contrariety thereto. And indeed I cannot but be amaz'd to find myself so generally reputed a Socinian, where there is not one word in the book that may prove me to be such.[70]

Many others disagreed, especially Trelawny and his high Church allies. Yet Bury's decision to publish the *Naked Gospel* was not the main cause of this conflict, but a provocative episode during a much larger struggle by high Church authorities in their attempt to preserve their jurisdiction over the nursery of the Church. Bury's decision to publish when he did can only be explained if it is viewed as a deliberate attempt to escalate this crisis, and a jurisdictional challenge to those high Church forces that he was determined to break free from. It was a calculated move, designed to take full advantage of the political and legal instability in Church and state generated in the aftermath of 1688.

Trelawny formally informed Bury and the fellows of Exeter College of his intended visitation on 6 May 1690.[71] When he arrived at Exeter College on 16 June, the scenes that resulted, as Trelawny was denied admittance to the college, bordered on farce. Rather than maintain some sort of protracted siege of the college, Trelawny withdrew to London. Armed with legal advice from his Westminster lawyers, Trelawny returned to Oxford in July, apparently declaring that he had no intention of doing so for a visitation. Then, suddenly, he sent a citation to Exeter College, summoning 'the rector and the fellows…by name to appear before the bishop at his visitation in the common hall of the college on Thursday 24 of July following.'[72] That this declaration was unexpected is evidenced in its coming as a shock even to Dr. Masters who, still stuck in London dealing with the bishop's other cases at Serjeants' Inn, declared himself 'not a little surprised to hear you Lordship designs a 2nd attempt' to visit the college, and hoped that it would indeed be 'Thursday before your Lordship begins'.[73] On 23 July, Trelawny received his orders of battle from veteran lawyers Sir Francis Pemberton and Sir Cresswell Levinz. Perhaps unsurprisingly, they advised caution:

> We cannot advise my Lord to break the college gates or otherwise force his way into the college to keep his visitation. We are of the opinion that regularly the visitation ought to be kept within the college, but if he be denied entrance into the college, we apprehend he may keep the visitation at some other convenient place within the City.

---

[70] A. Bury, 'An Apology for the Author of the book Entitl'd the Naked Gospel', Exeter College Archive, F.IV.3 (5). This manuscript of two pages in length, though undated and unsigned, is written in Bury's hand, and proceeds in the first person.
[71] *Philips v Bury* [1694], *Hardwicke I*, f. 3r.
[72] Ibid., f.3v.
[73] Exeter College Archive, F.IV.3 (4a): 'Masters to Trelawny', 21 July 1690.

Moreover, they were all 'of the opinion that in this case it is convenient that the visitor should proceed with as much moderation as the case will bear.'[74] Their advice was not heeded.[75] In the end, despite Bury ordering the gates to be nailed shut on the Wednesday night, Trelawny's supporters, after 'broken heads, loss of periwigs and some blood' managed to open them.[76] Trelawny, along with Dr. Masters and Dr. Bouchier, proceeded to the college hall and opened proceedings, the outcome of which were, naturally, a foregone conclusion: Bury was both expelled and excommunicated. Trelawny had literally besieged and invaded the college in his attempt to reconquer it for the jurisdiction of the Church, regardless of the 'advice' of the common lawyers that he had consulted. It proved a mistake: Bury remained where he was. He was also not without allies, and many were concerned with the bishop's behaviour. Henry Compton, the Bishop of London, wrote to warn Trelawny of the danger of the dispute spilling over into King's Bench, beyond the influence of the Church at court:

> The opinion of all your friends was, if possible, to keep the matter within the prerogative and without Westminster Hall. And truly I would advise you to desire, that it might be determined by the Queen in Council or otherwise, as she shall direct. One thing then is that some of your friends boggle at, and that is you excommunicating upon a pure secular action. I would therefore entreat you to be well prepared in that point.[77]

Compton's warning that his excommunicating of Bury had 'boggled' some of the members of court was not without foundation. On 19 November, the Solicitor-General, John Somers, moved for a writ of prohibition in King's Bench against Trelawny's excommunication of Bury.[78] Somers's argument was that since the matter was of 'temporal cognizance only' then 'the Bishop could not proceed against the Doctor by ecclesiastical censures.' The court apparently granted the prohibition 'very easily'. The reasoning of the court was that bishops, in their capacity as visitors, could not excommunicate, since this would in theory grant a power of excommunication to lay visitors as well; that the bishop could not excommunicate in his capacity as ordinary because Exeter College lay in the diocese of Oxford, where the Bishop of Oxford had power as ordinary; and finally that even if Exeter College lay in the diocese of Exeter, the bishop would not be able to excommunicate the rector using his power as visitor,

---

[74] Ibid., 'Levinz and Pemberton to Trelawny', 23 July 1690.
[75] Given that the letter was dated 23 July, it is entirely possible that Trelawny did not receive it until *after* he had broken into the college. In any event, it displays how Trelawny appears to have undertaken the second visitation in haste, and without proper consultation.
[76] Smith, *Fighting Joshua*, p. 85.
[77] Exeter College Archive, F.IV.3 (4a): 'Bishop of London to Trelawny', 19 August 1690.
[78] The following information about the prohibition case comes from *The Epistolary Correspondence of the Right Reverend Francis Atterbury, D.D., Lord Bishop of* Rochester, ed. J. Nichols, 2nd edn. (4 vols., London, 1789-90), vol. IV, pp. 449-451.

as he had done, but only as ordinary. This case was undoubtedly a psychological, not to mention a financial, defeat for Trelawny, but it would not affect the case that was to come to court the following term regarding Bury's physical expulsion from college. For by the spring of 1691 Bury had still not left the Rector's Lodgings.[79] Paradoxically, this worked in Trelawny's favour. It was devised that William Paynter, the new rector, would lease the lodgings to Robert Philips. Because Philips could not gain access to the lodgings, he was able to bring an action for ejectment into King's Bench. Any such action would automatically force the issue of who was the rightful rector of the college, as Francis Pemberton and Bury's other legal counsel well knew: the court could only rule on the validity of Philips' claim if it could establish whether Paynter was the rightful rector, which in turn depended on whether Bury's deprivation had been valid.

Existing scholarship places the first hearing of *Philips v Bury* in Trinity Term 1693, with the final judgement being given on 16 June 1694.[80] The length of the proceedings was due to the case becoming bogged down by the need for a 'special verdict', a procedure reserved for cases of particular complexity and significance. With a special verdict, the jury essentially handed over control of the case to the bench, with their role being restricted to finding, and agreeing on, the facts of the case, before the judges themselves were left to interpret the legal issues the case raised and to find for either the plaintiff or defendant. The trigger for this process appears not to have occurred in 1693 however, but in 1691. An unsigned letter in the archives of Exeter College, dated 14 May 1691, records that:

> At a full hearing before a jury of the best quality of Oxfordshire, the court, which consisted of my Lord Chief Justice Holt, Mr. Justice Gregory, and Mr. Justice Eyre (Mr, Justice Dolben being then indisposed, though afterwards owning his agreement with his brethren) declared themselves for these following particulars.[81]

The letter goes on to list the points that the judges apparently agreed upon: that Trelawny was visitor, that fellows might appeal to him and that contumacy was a good cause of deprivation. Yet the two key pronouncements from this hearing were that 'a visitor held a court, and that they would follow the Lord Chief Justice Hales and not look into his sentence' and that 'the assent of <u>none</u> of the fellows was requisite for the deprivation of the rector.' With these two points Trelawny had effectively won. But Bury's counsel had thrown a spanner into the works:

---

[79] Exeter College Archive, F.IV.3 (4a): 'Newton to Charlett', 20 November 1690.
[80] Smith, *Fighting Joshua*, p. 89.
[81] Exeter College Archive, F.IV.3 (4b): 'Letter concerning the trial at King's Bench', 14 May 1691.

> The counsel for Dr. Bury, after making some small objections to the process, prayed a special verdict. Chief Justice Holt said it was a cause of no difficulty, but being of consequence, would not deny it. Mr Justice Eyre (now the elder) said that they must have it, if they insisted on it, but he could not tell what they would prove or argue unless they would make a visitor a Jack of Lent and throw sticks at him. Mr. Justice Eyre further more declared himself warmly for the incident powers of a visitor and said no lawyer could dispute them. A special verdict thereupon was granted.[82]

The dating and events of this letter are backed up by a printed petition of 1694, produced in support of Trelawny's eventual appeal to the House of Lords.[83] The cause of the two year gap between the first hearing in King's Bench, and the eventual decision there being reached in Bury's favour, can only be inferred from the limited evidence that has survived. In terms of the legal and political machinations behind the case, it is notable that the bench began from a unanimous position of agreement in Trelawny's favour, a position that Holt would later maintain, only then to end up disagreeing. Pressure to delay the case until a pro-Bury bench could be secured could have come from any one of the multiple individuals and institutions we have already come across, not least John Somers who, as lord keeper, used the death of Justice Dolben in January 1694 to replace him with the far less sympathetic Sergeant Samuel Eyre, whose 'puritan background and association with Shaftesbury' was well known.[84] The simple issue of costs may have also played a part. Though successful in securing a special verdict, by November 1692, the Exeter College accounts show that a total of nearly £500 had been expended 'in defence of the college's liberty against the pretended power of an ordinary', the special verdict hearing alone costing £116.[85] These accounts may show that Bury had run out of financial steam by 1692, yet the description of the expenditure also shows us precisely what he thought he was fighting for. Two years later, it seemed he might have won.

The final judgement in *Philips v Bury*, delivered on the 16 June 1694 in Bury's favour, does not suffer from a lack of coverage. At least four printed reports survive, along with variants on the manuscript report that one of these printed reports seems to be based on.[86] We also have Holt's own manuscript opinion of the case, as well as a manuscript 'summary' apparently written at the time of the trial.[87] Only the printed reports give us an indication of what the other justices

---

[82] Ibid.
[83] Exeter College Archive, F.IV.3 (3a): 'The Lord Bishop of Exeter his Case'.
[84] C.G. Lewin, 'Eyre, Sir Samuel (1638-1698)', *ODNB*.
[85] Exeter College Archive, F.IV.3 (4e): 'Dr. Paynter's state of the college debts, as they were March 7th 1689 before the troubles with the visitor'.
[86] *Philips v Bury* [1694] 4 Mod. 106 (87 *ER* 289); *Philips v Bury* [1694] Holt 714 (90 *ER* 1294), largely similar to two manuscript reports of the case found in Exeter College Archive, F.IV.3 (3c); *Phillips v Berry* [1694] 1 Salk. 403 (91 *ER* 349); and *Philips v Berry* [1694] 1 Ld. Raym. 5 (91 *ER* 900).
[87] Exeter College Archive, F.IV.3 (3c).

in the case argued.[88] Perhaps the most important aspect of the case, and the one that places it at the heart of the constitutional crisis that we have been studying, was that delivering a special verdict forced King's Bench itself to consider the limits of its own jurisdictional authority over cases of this type. The uncertainty and insecurity on the part of the Church that had triggered this crisis now seemed to have infected the institution that it had been forced to appeal to for legal support, and it is one of the great advantages of studying this case to its conclusion that it demonstrates how the constitutional uncertainty of the 1690s manifested itself in institutional conflict, cooperation, and often interdependence.

The argument of the special verdict was essentially two pronged. The first question was whether King's Bench had the authority 'not only to correct errors in judicial proceedings, but other errors and misdemeanours extrajudicial tending to the oppression of the subject.'[89] For the assenting justices, the answer was an unequivocal 'yes'. The next question was, whether Trelawny had in fact proceeded according to 'the law' in his visitation. This demanded yet another pronouncement of precisely what sort of law governed visitations in the first place. Arguably they were a creation of, and proceeded according to, canon law. This, as far as the puisne judges were concerned, was the first major flaw in Trelawny's, and the Church's, claims to visitorial jurisdiction. They argued that the common law 'takes no notice of visitors, but that they were introduced by the canon law, which law obliges not the subjects of this realm, unless it be incorporated into the common law by act of parliament, or received time out of mind, &c. and then it is become part of the common law.' Yet this had not happened with canon law, and so 'consequently is not binding to the subject.'[90] This was an outright rejection of the Church's legal authority in matters of private property. Instead, the justices would have to be guided by the statutes of the college, which were part of the common law. On this matter, they resolved that Trelawny had not followed correct procedure and that judgement, therefore, should be, and was, given for the defendant Arthur Bury.[91]

Holt approached the case quite differently. In his dissenting opinion in favour of Trelawny's power to expel Bury, he first tackled the issue of whether Trelawny's visitation had, in fact, been permissible under the college statutes. Holt admitted that, had the bishop visited twice within the space of five years without being called, then that visit would be 'void and insignificant' as

[88] Sir William Gregory, Sir Giles Eyre and Sir Samuel Eyre assenting.
[89] 1 Ld. Raym. 5, at 6.
[90] Ibid.
[91] Ibid.

a plain contradiction of the intention of the founder. However, Masters' going to the college was not a visitation as far as Holt was concerned 'but the hearing of an appeal of a particular person that removed from his fellowship by the rector and fellows, and the commission that Dr. Masters had from the bishop was no more'. To back this point up he quoted from Littleton's *Tenures*, but further reinforced his argument with reference to *Appleford's Case* [1672] which had been heard by his predecessor Sir Matthew Hale.[92] Holt then went about tackling the more significant of the two arguments raised by the majority of the bench: the jurisdiction of King's Bench to examine the legality of Trelawny's visitation. On this crucial matter Holt justified his opinion by reference to his belief in there were two distinct types of corporation. The first sort of corporation:

> . . . which are public corporations or communities, they are wholly created for the public, and are sufficient bodies politic though they have no revenues, such are these, for the government of cities and towns and for trades and mysteries and without any particular constitution or provision in their charter.

These 'public' corporations, as we saw with the City of London in the last chapter, 'not being governed by any particular statutes are not liable to any visitation but are wholly under the power and regulation of the king's courts of justice and more especially under this.'[93] Exeter College however was not a public corporation. Instead, it qualified as a corporation 'founded upon charity, and for that purpose endowed' meaning that 'the founder is patron and visitor which descends to his heirs who have the same right of disposing of all vacant places, and visiting and depriving as the founder is their ancestor.'[94] In addition, the puisne judges were simply wrong in their assertion that the common law took no notice of visitors:

> . . . this visitatorial power is not introduced by the cannon [sic] or any foreign law, but is formed settled and established by the common law of the realm, and arises from that property which the founder had, and is a right, still remaining in him and his heirs, to visit and reform those abuses and misemployments that are committed by any person that receives a benefit or partakes of that charity, or shall pervert the end for which it was given.[95]

From this common law right of the founder emanated the jurisdictional power of the visitor, whose independent authority was designed to defend the founder's property rights against the members of the incorporate charity, who, as Littleton had rightly said 'should not be their own

---

[92] *Philips v Bury* [1694], *Hardwicke I*, ff. 4v-5r; *Appleford's Case* [1672], 1 Mod. 83 (86 *ER* 750).
[93] *Philips v Bury* [1694], *Hardwicke I*, f. 7v.
[94] Ibid., f. 8r.
[95] Ibid., f. 8r.

judges, for that they may be apt to break the rules and orders of the foundation; and there will be none to call them to an account and oblige them to conform to order.'[96] Holt's argument was cunning in that it both captured the jurisdiction of the visitor from the canon law, whilst simultaneously following Hale's advice in *Appleford's Case*. In that case, Hale had argued that the writ of *mandamus* was a double edged sword for King's Bench. It granted them great jurisdictional power, but also threatened to overwhelm the court with controversial and contentious disputes within private, especially spiritual, corporations. These were best left to be resolved by the parties themselves. As counsel in *Appleford's Case* had mused:

.....

> . . . there were no judicial *mandamus's* till *Bagg's Case*; and…only when…of public concern; now a fellowship of a college is for a private design only to study; and if you grant a *mandamus* in this case, whither will it go at last? If a *mandamus* shall lie for a mastership . . . it will in time come to lie for turning out of the Commons; and what a combustion will this raise then?

Or, as Hale pithily put it, 'I never heard of a *mandamus* for a *monk*.'[97] Holt, recognising the uncertain position of his court during the 1690s, was determined to prevent his court from becoming entangled in such cases that might endanger its effectiveness: he had to protect the court from 'combustion'. This meant leaving the Church to govern, as best it could, its own mess, and not granting *mandamus* in this case.

In the aftermath of the decision in King's Bench, Trelawny's dismay - Holt's dissent notwithstanding - would have been short lived. On the 20 November 1694, Holt brought in a writ of error concerning the case into the House of Lords.[98] By 10 December, the judgment of the King's Bench had been reversed.[99] However, the reasons for Trelawny's success seem to stem not from the Lords being swayed by the powers of Holt's reasoning in the earlier case, as might be supposed. Instead, Trelawny was aided in the Lords by the intervention of one of his brother bishops, Edward Stillingfleet. It was the success of Stillingfleet's arguments concerning the power and control of the Church in such cases, and not Holt's claims that the supervision of King's Bench was unnecessary, that appear to have swung the Lords in favour of Trelawny's position. This is important, especially when we consider that Holt expressly rejected the argument that a visitor's power came from the canon law. Stillingfleet's victory therefore represents yet another occasion when the Lords were persuaded to flex their growing judicial

---

[96] Ibid., f. 8v.
[97] *Appleford's Case* [1672], 1 Mod. 83 (86 *ER* 750).
[98] *Journal of the House of Lords, Volume 15: 1691-1696* (London, 1767-1830), p. 432.
[99] Ibid., p. 441.

muscles by overturning a judgment of the King's Bench, but also of Holt struggling to convince them of his vision of the jurisdictional powers of his court.

So pleased was Stillingfleet with his intervention that he, like Holt with his own opinions, would later record his speech for posterity.[100] Again like Holt, Stillingfleet made it quite clear that the major point of contention in the case centred not on the events at Exeter College per se, 'but whether his [Trelawny's] judicial proceedings against the Rector of that college, may be examined and reversed by the court of King's Bench? For it comes hither by a *Writ of Error* . . . and the main error is, that they gave judgment in a matter that did not legally come before them.'[101] Stillingfleet was perfectly aware that what was at stake in the case was the future ability of the Church to exercise any sort of independent legal power, power which it needed if it were ever to exert any sort of political or spiritual authority in the aftermath of the revolution. The arguments he deployed showed just how effectively he was able to use historical and legal sources, skills which made him more than a match for Holt. To begin with, Stillingfleet showed great political sensitivity over the subject of arbitrary power and the Church's authority:

> I am sensible of a very great prejudice which lies in the way, before I enter upon the debate, which is, that if the judgement of the bishop be not reversible at common law, then his power is absolute and conclusive, being without any farther appeal; which seems to be the setting up an arbitrary power among us, which is against law.
>
> But there is a great difference to be made between an arbitrary power against law, and a conclusive power by law. I cannot understand how a power given by the law, should be power against law. And the question before your lordships is, whether the law hath not given such a power to visitors, as to determine matters, without the liberty of appeal, and if there be no appeal, their judgment must be final.[102]

Yet it was what Stillingfleet did next that should interest us most. He trashed Holt's arguments:

> But it hath been urged with great plausibleness, that the visitor's power is nothing other than the founder's power, for he acts as founder, and by his right; but no founder can establish such an arbitrary power, and therefore it is illegal.
>
> I confess my lords, I am of opinion that if the visitor hath no other power but the founders, he could not settle such an arbitrary method of proceeding, that the visitor's judgment should not be called into question by the courts of law. For the founder was but a private subject in the present case; and I do not see how the founder of Exeter

[100] E. Stillingfleet, 'The Case of Visitation of Colleges, in the House of Lords, in Exeter-College Case', in E. Stillingfleet (ed.), *Ecclesiastical Cases* (London, 1704), pp. 411-436.
[101] Ibid., p. 411.
[102] Ibid., p. 412.

> College, by an inherent power in himself can debar any person from an appeal, in case of injury done to him, in a society settled by law.[103]

Stillingfleet went on, going for the jugular of Holt's line of thinking:

> I know very well how much it hath been pleaded, and what weight hath been laid upon it by the learned council at the bar, *viz.* that the right of ownership or the property of the lands in the founder, gives him a visitorial power in law; which he may leave to such as he shall think fit to intrust with it, and that this power comes not from any ecclesiastical canons, (which I freely grant) but from the common law, which placeth it in the founder and his heirs, unless he settle it upon others.
>
> This seems to be a very fair and reasonable account of this matter, but if we look narrowly into it, we shall find that it will not clear the difficulties of the present case; which relate to a society incorporated by law, and not to a mere arbitrary society, depending on the will of the founder.[104]

Stillingfleet set about showing not only how Holt had oversimplified matters, but also how he had misunderstood the intentions of all parties involved, dating back to the founding of the colleges themselves. This was vital. Stillingfleet had to achieve two distinct objectives with his argument. The first, and most obvious, was to ensure that the appeal was successful. Had the appeal failed, then the results would have been disastrous for the Church, leading to a crippling loss of control of the nurseries of their tribe to the King's Bench. The second was to undermine Holt's line of argument that the visitor's power stemmed from the common law. This half-way house represented both a threat and an opportunity to Stillingfleet. As a result, we find Stillingfleet simultaneously having to out argue both the victorious justices and the dissenting lord chief justice using every tool at his disposal. The results were evidently successful.

His first argument concerned the founding of the colleges themselves, demonstrating the ways in which they had been established in law:

> We must therefore go farther than the mere power of the founder in this matter [that is, Holt's argument]. And I take for granted, that every such corporation must have a legal authority, besides the will of the founder, and that must be either by common law or by prescription (which is not pretended in the case of colleges) or by Act of Parliament . . . or by Royal Charter; for the King by his authority can make a society to be incorporated so as to make the rights belonging to persons as to legal capacities.[105]

---

[103] Ibid., p. 413.
[104] Ibid., pp. 413-415.
[105] Ibid., p. 415.

As an example, 'In the charter of the foundation of Lincoln College, A.D. 1427 H. 6. gave the founder authority to found a college, consisting of a rector, scholars and chaplains.' In the case of Exeter College, 'the society was incorporated by a charter under the Broad Seal 10 *May*, 7. E. 2. *An.* 1314.' Yet once founded, 'although the several kings made the colleges to be such in law, i.e. legal corporations, yet they left the particular founders authority by their charters to appoint what statutes they thought fit for the regulation of them.'[106] This was not the same as saying that there should be no legal supervision of these bodies. Instead, Stillingfleet plausibly argued:

> . . . that these founders of colleges did take special care to prevent, as much as possible, all law suits among members of their societies, as most destructive to the peace and unity of their body, and the tranquillity necessary for their studies: for they knew very well, that if any encouragement were given to suits at law, those places would in time become nurseries for attorneys and solicitors, which were to pervert the main design of their foundation.[107]

This is why the visitor's power to intervene in such disputes was so necessary: to contain costs and fallout from collegiate strife:

> And so in the statutes of Exeter College it is expressly mentioned, that if the Rector be deprived by the commissary, he may appeal to the bishop as visitor, but if he be deprived by the visitor himself, then no farther appeal is allowed, nor any remedies, *Juris aut Facti.*[108]

Yet Stillingfleet could not stop there. His next arguments offer further evidence of the extent to which assumptions concerning the power of the common law courts to intervene at nearly every level of political life, especially as interpreted through Coke's writings, were being questioned and destabilised in the aftermath of 1688: 'it hath been said with great appearance of reason, that whatever the intentions and design of these founders of colleges might be, yet the law of the land is to set all things right which are amiss'. For instance, 'we have been told of a notable precedent in *Dr. Coveney's Case* in Dyer, often mentioned by my Lord Coke, who was deprived of the president-ship of Magdalen College by the visitor'.[109] Yet Stillingfleet believed that Coke's intentions, and those of the King's Bench justices of his own day, were more than just to uphold the rule of law:

---

[106] Ibid., p. 417.
[107] Ibid., pp. 418-419.
[108] Ibid., p. 420.
[109] Ibid., p. 420.

> I cannot deny that my Lord Coke several times refers to it, and seems to insinuate it as a foundation that the courts might proceed upon; but he never mentions one assize that was brought upon this ground. But he had that property of a good judge, *ampliare jurisdictionem*, and everyone knows that in his time, there were great endeavours used to enlarge the jurisdiction of the courts in Westminster Hall; and Sir James Bagg's his case is an evident proof of it, which some great lawyers have denied to be law.[110]

Far from the Glorious Revolution having settled the jurisdictional boundaries and independence of the common law courts, Stillingfleet saw in Holt's ruling the latest effort in a century-long conspiracy to 'enlarge the jurisdiction of the courts in Westminster Hall', echoing the complaint we saw earlier in the Bridgman case. To defeat such efforts, Stillingfleet did his best to undermine both the reasonableness of any such jurisdictional claims, as well as emphasising both the incoherence and novelty of the case law used to support them. Most cases of deprivations coming before the King's Bench seemed only to come after the Restoration:

> It is a great argument to me, that the law was far from being clear in this matter, that the learned judges were so much divided in their opinions, when those cases were brought before them, soon after the Restoration they could produce no precedents above 10 years standing.[111]

Stillingfleet even cunningly emphasised Lord Chief Justice Hale's dismay at the increase in cases of this sort coming before his court as an argument against the common lawyers' greed: 'And at this rate, saith he [Hale], we may examine all suspensions and deprivations, and so where will there be an end?'[112] Driving this increase in traffic before the common law courts he argued was greed, and unscrupulous power grabbing:

> [it] is a very tempting thing in case of jurisdiction, where there is not a mind that values right more than power. But some such there were among the judges of that time, who refused to concur in such proceedings that had no warrant from ancient practice . . . for all petty controversies among them must be brought to Westminster Hall: which might bring some advantage to the lawyers, but certainly none to the universities.

This lust for power had come at the cost of the rightful overseers of such disputes: the Church courts. Yet again undermining Holt's argument, especially his division of corporations into different classes, Stillingfleet made the historical case for the ecclesiastical right to exercise power over the colleges:

---

[110] Ibid., p. 421.
[111] Ibid., p. 427.
[112] Ibid., pp. 426-427.

> I think the resolution of this case doth not depend on the nature of the corporations, whether they be lay, or ecclesiastical, or mixt; but upon the ancient right of jurisdiction over them. There is no question but colleges as well as other schools of learning were generally esteemed as parts of the ecclesiastical body. For they were set up in these western parts by the bishops in their several churches.[113]

The universities, he argued, had always been part of the ecclesiastical body. Any attempt to undermine the Church's authority was part of the general trend that Stillingfleet feared, of the diminishing power of the Church in England ever since the Reformation, an event that, for him, was supposed to have restored power to the Church after centuries of papal (i.e. foreign) usurpations, not to have left it to the mercy of the king's courts.[114] Underpinning Stillingfleet's argument was a clear sense that in the aftermath of 1688 the jurisdictions of the different courts of the kingdom had been unsettled, but that King's Bench was exploiting this uncertainty, threatening to return the nation to the struggles for control of the law that had been the cause of so much strife in preceding generations. In his eyes, it was the role of the Lords to put the common lawyers back in their place:

> The King's Bench is the supreme court; but it is not so unlimited a court as the ancient *Curia Regis* was before the time of Ed. I. That was indeed a sovereign court, wherin the king himself was present and all his great lords, and they had the right of appeal in all great causes, and there the capital, general, and perpetual justices attended the king and gave judgment, as *Bracton* speaks. And the remainder of this, is in the Supreme Judicature of this noble house . . . Which is not derived from any later precedents of appeals, as some have weakly imagined, but from the fundamental constitution of this government, which always had a supreme court of appeal; which as the laws of Edward the Confessor say, was in the king and his nobles.[115]

As a consequence:

> . . . the court of King's Bench; although its dignity and authority be great as to breaches of the peace, correcting the errors of other courts etc. (and I have not the least design to lessen the just honour and privileges which belong to it) yet it hath but a limited power, and cannot extend its jurisdiction as far as it pleases, and break it upon other jurisdictions which are equally derived from the Crown, and settled by the ancient law and custom of England.[116]

---

[113] Ibid., pp. 427-428.
[114] See his discussion in 'Discourse I: Of the Nature of our Ecclesiastical Jurisdiction and the Law on which it Stands', in E. Stillingfleet (ed.), *Ecclesiastical Cases* (1704), pp. 1-60.

[115] Stillingfleet, 'Exeter College Case', p. 433-434.
[116] Ibid., p. 434.

Not only in England though, but even in Europe, Stillingfleet was able to list learned scholars of Roman and Civil law to support his cause: Baldus de Ubaldis, Accorso di Bagnalo, Scipio Gentilis and Jacques Rebuffi, experts ranging from the twelfth right up until his own century, who all argued that in the most 'civilised nations' universities have been exempt 'from the jurisdiction of the temporal courts'.

This led Stillingfleet onto his dramatic, closing appeal:

> How then come our universities and colleges to be in a worse condition than any abroad; when there are not greater privileges given to any, nor enjoyed for a longer time than have been by ours? Shall the noble endowments of our colleges, which are the honour of our nation, the nurseries of our church, the envy of foreigners, and the eyesore of none but such as hate learning and ingenious education, make them become an easier prey to such unquiet sprits, as by lawsuits and unstatutable appeals, would overthrow that power which preserves them in a state of peace and tranquillity, without which they can never attain the end of their institution?
>
> If then your Lordships would consult (as I know you will) the good of those societies, which have an influence on the whole kingdom; if you would promote learning and virtue and unity among them, there must be a timely check given to these tedious, expensive and troublesome suits at law, which disquiet the thoughts, eat our time, exhaust the purses of all that are concerned in them, and lay the foundation in colleges of perpetual feuds and animosities.
>
> .....
>
> And therefore although it be possible for a visitor to go beyond his bounds, (for none are infallible) yet if such a case be put, it is better that one person suffer, than that the discipline, government, and peace of the college be in danger of being utterly destroyed.[117]

8.6 Conclusion

Though it would take some months to evict finally Bury from the Rector's lodgings, and despite the black-hole that was left in the college's finances, Trewlany's victory following the Lord's decision seemed total. According to M.G. Smith, 'It was a victory for the Church of England in the University of Oxford. It preserved the University as an orthodox seminary for future clergy, and it inflicted a serious setback to the campaign of the anti-clerical common lawyers in Westminster Hall.'[118] Yet the victory also demonstrated the uncertainty which surrounded such questions of legal jurisdiction in the 1690s, and the ways in which partisan interests could triumph through clever manipulation of the House of Lords. Stillingfleet's victory would also

[117] Ibid., pp. 435-436.
[118] Smith, *Fighting Joshua*, p. 91.

seem to demonstrate the importance of appeals to the 'honour of the nation' as much as the fate of 'our church' when settling such disputes, and the political currency that could be gained by attacking the ambitions of the common lawyers in the aftermath of the revolution, none of which points to a country united under a settled constitution, or protected and governed by 'the rule of law'.

Despite Holt's best efforts, he had not been the ultimate victor in the case, his attempts to preserve the jurisdictional integrity of his court clashing with the similar priorities of those seeking to shore up the legal authority of the Church in the aftermath of the revolution. Whether this demonstrated an 'anti-clerical' streak in his thinking is open to dispute however. His attitude in the Exeter College case was far more complex, resting as it did on a sophisticated argument which separated public and private corporations into their respective legal spheres, a jurisprudential framework he deployed consistently in other cases not involving the Church, as we saw in the last chapter. Yet this framework could not hope to contain every case Holt was forced to deal with, nor the ambitions of every rival institution within the legal and political environment in which he operated. This brings us back to a question we posed earlier about the nature of the rule of law in this period: if such constitutional matters remained unsettled, and clashes over religion, politics and the law continued after 1688, then what was it that brought about the transformation in the state's capacity to tax and wage war in the years following the Glorious Revolution? It is to potential answers to that question that we now turn in the conclusion to this thesis.

Conclusion

On 24 January 2017, the United Kingdom Supreme Court ruled that the executive government of the United Kingdom could not exercise its prerogative powers to initiate withdrawal from the European Union without first obtaining an act of parliament permitting it to do so.[1] The Supreme Court justices based their jurisdictional assessment of the sovereignty of parliament in such matters on the 'leading account' of 'the constitutional jurist Professor A.V. Dicey'. Using Dicey, they argued that the 'extent of the powers of the Crown under its prerogative (often called the royal prerogative) are delineated by UK constitutional law.' This 'subordination of the Crown (i.e. the executive government) to law', the justices went on to say, 'is the foundation of the rule of law in the United Kingdom.' The 'roots' of this 'rule of law' apparently stretch back 'well before the war between the Crown and Parliament in the seventeenth century,' but were, 'decisively confirmed in the settlement arrived at with the Glorious Revolution in 1688 and have been recognised ever since.'

For good measure, and to round off their account, the justices quoted Sir Edward Coke, in particular his claim that 'the King hath no prerogative, but that which the law of the land allows him.' This 'position' we are told 'was confirmed in the first two parts of Section 1 of the Bill of Rights 1688'. The court's historical interpretation of 'the rule of law' was, therefore, based on 'principles' that 'are not only well settled but are also common ground. It is therefore not necessary to explain them further.'[2] Given our findings in this thesis, we might wish to challenge the confidence of this statement in relation to the justices' historical interpretation of the constitutional powers that they were reviewing in this case. Legal scholar Richard Ekins shares this view, arguing that the Supreme Court was 'confusing what may be good constitutional practice with valid constitutional law.' The 'majority', he argues, had 'confused the two – or distorted the latter to secure the former'.[3]

At its heart, this thesis has been an analysis of this 'distortion' of the historical account of the relationship between law and politics before and after the constitutional 'settlement' of 1688, an exercise we have approached through an interdisciplinary analysis of the career and

---

[1] *R (Miller) v Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin).
[2] Ibid.
[3] R. Ekins, 'Constitutional practice and principle in the Article 50 litigation', *Oxford University Research Archive* (2017), ora.ox.ac.uk/objects/pubs:723885.

judgments of Lord Chief Justice Sir John Holt. To do this, we have used a wide variety of sources from different scholarly traditions, including political theory, intellectual history, and jurisprudence. As well as attempting to combine these often disparate academic approaches to our subject, we have also concentrated on a close analysis of key manuscript sources, barely utilised by academics up until now, and in the case of the *Harvard Opinions*, seemingly untouched until our investigation. The cases found in these sources have ranged from grand constitutional matters of state, to everyday incidents involving disagreements over livestock and fencing. Taken together, they have permitted us to construct an image of the architecture of the post-revolutionary state, and Holt's involvement with its construction and maintenance at a variety of levels. Thus cases ostensibly about witchcraft have taught us about contemporary fears for the authority of the courts, and of the fear of social disorder, while quotidian disputes over shooting rights have illustrated the pressures that the common law faced in adapting to the demands of an increasingly mercantile society. Holt's career as a government administrator has also been uncovered through our use of state papers, helping to place his involvement in criminal and financial trials into their political contexts. We have therefore attempted to promote studies of the law as of central interest within the constitutional and structural development of the state in this period. The aim of this conclusion is to summarise our findings, before suggesting possible directions for future research that can build on our answers to some of the key questions that we have been exploring. Those questions centre on the interrelated issues of the importance of the law in the downfall of James II, the intellectual relationship between law, history and politics in the minds of early eighteenth-century lawyers, and the role of the law in the success of the revolutionary settlement after 1688. As we shall see, many of our answers to these questions pose profound problems for the Supreme Court's analysis of the 'common ground' upon which their judgment rests, a judgment that is symbolic of many of the wider assumptions which we have sought to challenge in this study.

Much of our later analysis and understanding of Holt's career rests upon our early discovery that, contrary to practically every existing account of his political allegiances, Holt was not in fact a whig. His rise to professional prominence appears to have rested on the back of both his father's loyal commitment to the Crown during the Exclusion Crisis, as well as his own service in court delivering technically rigorous arguments in support of the king's prerogative powers during the 1680s. There is nothing in his early career to suggest an overriding attachment to the rights of parliament, to an 'ancient constitution', or to an interest in the sufferings of dissenters. He was appointed to a leading position in the machinery of James's government, as its key legal

representative in London, at a time when James needed loyal servants whom he could trust to support his use of the law. Our analysis of the trajectory of his career therefore supports the growing body of recent scholarship that has emphasised the strength of James's legal position at the start of his reign. It also helps to explain what James did to lose that position so quickly.

Put simply, James lost his throne because he became the papist the whigs had always argued he was. The tories, we have argued, were prepared to tolerate James as long as his absolutism was used in their interests. Yet when James used his prerogative powers against them, and in an effort to break their monopoly of power within Church and state, all of this changed. What we have also shown is that James not only 'broke the law' in the general sense of using his powers in a way that politically alienated his former supporters, but also in the technical sense of being in breach of common law jurisprudence and jurisdiction. His was 'absolute arbitrary power' as Locke understood it, the power of which Sir Matthew Hale believed the imposition of martial law in peace time to be a symptom.[4] It was as much an attack on legal principles as it was on the common law's own monopoly of power regarding the defence of lives and property within the state. It was not a coincidence that it was over this issue that both Holt and Herbert, otherwise strong supporters of the king's prerogative, felt obliged to abandon him, thus further weakening his increasingly paralysed administration. We have also helped to explain this process by emphasising the differences between contemporary understandings of absolute and arbitrary power, and the limitations imposed on James's government by such a distinction. James was popish not because his rule was absolute, but because it was viewed as arbitrary, the fatal result of a perceived toxic intermingling of the Catholic doctrine of blind obedience to authority, and his possession of the legal tools necessary to enforce that authority without restraint. As a result, James's policies shattered the legal and political consensus that had allowed him to ascend the throne in the first place.

If Section I of this thesis attempted to correct these misunderstandings of the narrative of Holt's early career, and the role of the law in the emergence of political dissatisfaction with James's rule, then Section II aimed to provide the intellectual background to Holt's position on these matters. The misunderstanding in this instance stems from J.G.A. Pocock's seminal study on the 'common law mind' during the seventeenth century.[5] What we have shown, through a detailed analysis of Holt's manuscript opinions, is that very little of Pocock's assessment of the

[4] John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, 1988), p. 359; Sir Matthew Hale, *The History of the Common Law of England*, ed. C.M. Gray (Chicago, 1971), pp. 26-27.
[5] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law,* 2nd edn. (Cambridge, 1987).

political, historical or jurisprudential underpinnings of that 'mind' seem to have applied in Holt's case. Holt understood social and political change in historical terms, believed that it was the law's responsibility to alter and adapt to fit those ever-changing needs, and was prepared to draw on the authority of reason, as well as natural and Roman law, in order to emphasise the strength of his opinions. He did not simply argue for the power of 'immemorial custom', or appeal to a shared belief in the necessity of preserving a hallowed 'ancient constitution' with parliament at its centre. We have also demonstrated the influence of earlier authors such as St German and Selden on Holt's thinking, men whose intellectual impact on seventeenth-century legal thought Pocock seriously underestimated. Overall, what we have shown is that Holt believed that the careful application of law was essential to the maintenance of an ordered civil society, a belief that required him to act as both its jealous custodian, as well as its strong advocate when interacting with the political demands of government before and after the revolution.

Sections I and II also provide a key introduction for our broader discussion of the nature of the 'rule of law', and its importance in the success of constitutional settlement, after 1688. Again, contrary to the narrative found in much of the existing literature on this subject, our investigation in Section III has uncovered very little evidence of any substantial alteration in the attitude or behaviour of the executive towards the law in the aftermath of the revolution. The law and its practitioners remained tools of government. Holt was required to use his skill to make politically sensitive legal problems disappear, or was ignored if he could not. There is also little sign of the other Diceyan pillars of 'the rule of law' being erected in this period. 'Fair trials' were unheard of as they are understood today. The courts were still the domain of the judge, who might openly berate the jury, or twist the evidence to ensure a verdict that was favourable to the regime's interests. Statutes were interpreted narrowly to ensure the continued persecution of religious minorities, or broadly to secure the financial needs of the state. The jurisdictional boundaries and legal privileges of the two Houses of Parliament were blurred and abused in the service of personal and partisan rivalry in equal measure. Judges continued to be dismissed for political reasons. The picture that has emerged from our research is thus remarkable for its similarity to that painted of the supposed legal abuses of James II. Our stark conclusion is that tory and Jacobite critics of the regime, such as Robert Ferguson and Charles Hornby, were closer to the truth with their complaints and accusations than we might have previously imagined.

Yet if the executive was not subordinated to the law, and the 'rule of law' failed to be 'decisively confirmed' by the post-revolutionary settlement, then what was it about the constitutional landscape after 1688 that, as Stephen Taylor has put it, created 'a sense of identity between ruler and ruled . . . [which] underpinned the emergence of one of the most powerful states in eighteenth-century Europe'?[6] According to the political theorist Thomas Ertman, the answer lies in the 'revival of parliamentary power which was the Glorious Revolution's most significant achievement [and] created conditions under which the reformed administrative system introduced between 1660 and 1688 could be preserved and expanded.'[7] This new 'standing parliament' sat at the centre of a network of systems, along with 'a freer press and a more informed public opinion' which 'mutually reinforced one another in the role of watchdogs intent on preventing those within the charmed circles of central administration from profiteering from the war at the expense of the country as a whole.'[8] However, Philip Hamburger has argued that the relative 'freedom' of the press after 1688 was not a cause of this newfound stability, but rather a by-product of it. By the 1720s, he argues, 'many men began to realize that ministers and factions, with all their petty squabbles and scurrilous printed attacks on one another, would come and go, but the English Establishment, a Protestant, parliamentary monarchy, would be secure in spite of all the liberties taken by the press.' Holt's contributions to strengthening the laws of seditious libel in an effort to defend the revolutionary regime from criticism were gradually forgotten, with 'the political parties' from the reign of George I onwards maintaining 'an embarrassed, politic silence' around the precedents he set in such cases.[9] Thus paradoxically, we are presented with an example of Holt's being too involved in politics leading to his erasure from the historical record, as opposed to his distance from such matters of state being the root cause of his being neglected, as suggested by one of his Victorian biographers.[10]

Taylor himself offers a number of answers as to what it was that changed in England to bring about a remarkable level of agreement about war and financing in the decades after the revolution, especially when compared with similar disastrous attempts to do the same under the early Stuarts. Although there were shifts in demographics, bureaucratic efficiency and public

---

[6] S. Taylor, 'Afterword: State Formation, Political Stability and the Revolution of 1688', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013), p. 280.
[7] T. Ertman, *Birth of the Leviathan, Building States and Regimes in Medieval and Early Modern Europe* (Cambridge, 1997), p. 208.
[8] Ibid., p. 211.
[9] P. Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review*, vol. 37 (1985), pp. 756-7. Yet if Holt was gradually 'forgotten' by politicians, as we saw in Chapter 3, his legal opinions continued to be used by generations of Georgian and early-Victorian lawyers.
[10] W.N. Welsby, *Lives of eminent English judges of the seventeenth and eighteenth centuries* (1846), p. 90.

perceptions of how hard the English were being taxed relative to those on the continent, the major reason he gives is the 'willingness' of 'the nation's *élite*' to 'trust the post-revolutionary monarchs with the money needed to raise and maintain an army and navy large enough to play a major role in a European war'.[11] The cause of this willingness to be taxed, he argues, was the emergence of a consensus in constitutional and religious matters. Throughout the Restoration, Taylor states, 'popery and the constitution were the open sores of English politics, generating instability time and again.'[12] Yet after 1688 these open sores were finally closed. In his assessment, Taylor makes some of the definitional errors that we identified in Chapter 2. He argues correctly that, in relation to the Declaration of Rights, what triumphed 'was not 'the law' over the illegalities of James II; rather it was the triumph of a particular interpretation of the law, one which limited the prerogative in ways that Charles II, James II and many of their supporters would have found unacceptable.' Yet Taylor then goes on to argue that 'looking to the future, it embedded in English law an interpretation of the prerogative which did much to reassure Englishmen that their rights and liberties could no longer be invaded by the exercise of arbitrary power.'[13] But as we concluded in Section I, it was not the prerogative power in and of itself that represented the destabilising threat, nor has the constitutional debate over the power of the prerogative ever truly ended, as the *Miller* Article 50 case has so recently demonstrated.

What did change after 1688 was the practical replacement of a papist with 'not merely a protestant, but arguably *the* leader of the protestant interest in Europe.' Subsequently, with the Act of Settlement of 1701, parliament used its absolute control of the law to bar Catholics from the throne entirely, a constitutional act unthinkable to many tories just over ten years earlier, and the most 'remarkable act of the revolution' as Taylor sees it.[14] It is difficult to disagree with this aspect of his assessment. James's reign had conclusively demonstrated that absolute power could not safely be left in the hands of the king alone as long as the king was also permitted to be a Catholic. The result of this realisation was the rapid emergence of a previously elusive political consensus among political elites: absolute legal power in the future would have to be parliamentary, and that same power needed to be used in order to secure the Protestant line of succession. The result was that both of the constitutional ingredients necessary for popery were expunged from the constitution. Yet as we have shown, this was not the same thing as the

[11] Taylor, 'Afterword', p. 283.
[12] Ibid., p. 285.
[13] Ibid., p. 290.
[14] Ibid., p. 291.

establishment of 'the rule of law' after the revolution. After 1688, parliament established itself as an absolutist and potentially destabilising sovereign force. At the same time, the executive veered dangerously close to arbitrariness in its handling of the prerogative. Yet as long as this power was being exercised in the Protestant 'national interest', and a Catholic king was unable to get his hands on the reins of government, then the spectre of popery could never fully materialise. In this sense, the major achievement of the revolution was an agreement on the basic terms by which absolute power could be exercised. The side effect of this agreement seems to have been that the nation's 'Hypocondraic Apprehensions of Popery', as Hornby put it, were cured forever.[15]

Where might we go from here? This thesis raises a whole series of questions beyond those that we have been able to address and settle here. Many of these concern the precise nature of the relationship between law and politics over the course of the early eighteenth century. To what extent were the whigs able to manipulate the law before the reign of George III? How did the House of Lords develop and deploy its judicial powers? What was the nature of the relationship between the Crown and the executive, and what position did lawyers take on this matter? Perhaps most importantly, how did attitudes towards the consensus on the exercise of absolute power achieved in 1688 evolve over the course of the century? One obvious route into these issues would be to broaden our research to take in the careers of different judges, and to use our methods of intellectual and political investigation on individuals who were perhaps less legally principled than Holt. One set of candidates for the earlier part of this period would be Sir George Treby (1642-1700) and Baron John Somers (1651-1716). Both men were friends who between them held nearly all of the highest legal offices of state, as well as positions in local government, on parliamentary committees, and in the Lords and the Commons. As such they represent the perfect launch-pad for a deeper investigation into the relationship between the way absolute sovereign parliamentary power was constructed and exercised, and how the judiciary cooperated with this programme in an effort to provide a veneer of legal legitimacy.

Another understudied aspect of the relationship between law and politics in this period is the emergence of the concept of judicial independence, and in particular, how this concept emerged not out of any practical freedom from political interference, but instead from the successful integration of the judiciary into the post-revolutionary political system. Such a study would build

---

[15] C. Hornby, *A third part of the Caveat against the Whiggs, in a short historical account of their transactions since the Revolution* (1712), p. 62.

on our observations regarding the potential incompatibility between the rule of law and parliamentary sovereignty, and offer historical explanations for the apparent success of this seemingly contradictory relationship. Other scholars have already scratched the surface of this issue. As Jeffrey Goldsworthy has argued 'It is not surprising that judges took the same view of Parliament's authority as a majority of parliamentarians. British courts have never enjoyed the institutional independence they would have needed to mount a successful challenge to the sovereignty of Parliament.' After all, he continues, 'The judges, like parliamentarians, were men of property, equally attached to the prevailing ideology of their social class.'[16] David Lemmings has also written on how the emergence of parliament as the source of sovereign authority within the state after 1688 affected the patterns of promotion and preferment within the judiciary. He argues this contributed heavily to the comparative rarity of purges of the bench after 1688, since 'after the Revolution governments could be fairly sure that their appointments to senior positions in the judiciary were 'safe' politically, because aspiring candidates had to prove themselves publicly by loyal service in parliament.' Indeed, 'Before 1689 the careers of Pemberton, Scroggs, Saunders, and Jeffreys demonstrate that it was perfectly possible for a barrister who was not an MP to aspire to the highest places on the bench, but only six of the twenty-six judges in office from 1689 to 1730 who reached a senior place had not been MPs.'[17]

In essence, both ideas for future projects represent an effort to establish just what Lord John Somers meant when he claimed that 'Our happiness then consists in... our Princes... [being] tied up to the law, as well as we' in the aftermath of the revolution.[18] As we have shown, the precise nature of these ties, and the identity of those who were doing the tying, remain key questions that need to be answered.

[16] J. Goldsworthy, *The sovereignty of parliament: history and philosophy* (Oxford, 1999), pp. 199-200.
[17] D. Lemmings, *Gentlemen and Barristers, The Inns of Court and the English Bar 1680-1730* (Oxford, 1990), p. 257.
[18] J. Somers, *A Vindication of the Proceedings of the Late Parliament A.D. 1689* (1689).

Bibliography

MANUSCRIPT AND ARCHIVAL SOURCES

Cambridge, Massachusetts: Harvard University Law School [680]

HLS Ms. 4039: *Sir John Holt, Reports of cases, 1677-1701:*
https://iiif.lib.harvard.edu/manifests/view/drs:42157315O$1i

London: The British Library [681]

Add Ms. 34125: *CASE-BOOK of Sir John Holt, Chief Justice of the King's Bench containing his notes of, and judgments in, eleven cases tried before him from 1701 to 1703.*
Add Ms. 35979-81: Hardwicke Papers.
Add Ms. 40061–72: Redgrave Hall Papers.

London: The National Archives

PRO, PROB 11/516, ff. 197–201: Will of Sir John Holt.
SP 34/3/135, ff. 215-16: 'Chief Justice Holt to [?Earl of Nottingham]', 30 March 1704.
SP 34/3/140, ff. 222-223: 'Chief Justice Holt to Earl of Nottingham', April 1704.
SP 34/11/7, f. 9: 'Copy of letter dated 27 July 1709 from Lord Chief Justice Holt to Earl of Sunderland'.
SP 36/42/72, f. 72: 'Earl of Sunderland to Sir John Holt', 9 May 1709.

Matlock: Derbyshire Record Office

.....
D239/M/O/1049-1693: Treby Papers, Correspondence.
1217: 'Holt to Treby', April/May 1696.
1229: 'Holt to Treby', 7 Sept. 1696.
1278: 'Holt to Treby', 23 Feb. 1700.

Oxford: Exeter College

F.IV.3: Rectors, 1689-1695: Rector Arthur Bury v. Robert Philips.
(3 a-e) Printed papers and petitions.
(4 a-e) Correspondence and papers.
(5) A. Bury, 'An Apology for the Author of the book Entitl'd the Naked Gospel'.
.....

Oxford: University College

UC: V4/L13-18: The Case of Charles Usher, 1698-9.

---

[680] See Tables 5-6 for full details.
[681] See Tables 1-4 for full details.

Preston: Lancashire Record Office

FRL 1/1/27/12: 'Lord Chief Justice Holt's ruling against vicars, rectors and priests charging for marrying, christening and burying'.

PRINTED PRIMARY SOURCES

The English Reports

The House of Lords (1900-01)*:*

Volume 1: Shower, and Brown vols. 1-3.
Volume 2: Brown, vols. 4-6.

King's Bench (1907-10):

Volume 77: Coke, parts 5-13.
Volume 86: Modern 1 and 2.
Volume 87: Modern 3 to 7.
Volume 89: Freeman 1.
Volume 88: Modern 8 to 12.
Volume 90: Skinner, Comberbach, Carthew, Holt.
Volume 91: Salkeld, vols. 1-3, Lord Raymond 1.
Volume 92: Lord Raymond 2 and 3, Comyns 1 and 2.
Volume 100: Term Reports, vols. 2-4.
Volume 101: Term Reports, vols. 5-8.
Volume 102: East, vols. 1-6.

Law Reports

Anon., *The Arguments of the Lord Chief Justice Holt and Judge Powell in the controverted point of Peerage in the case of the King and Queen against Charles Knowles, otherwise Earl of Banbury* (1716).

Anon., *The judgements delivered by the lord chief justice Holt in the case of Ashby v. White and others, and in the case of John Paty and others, with an introduction* (1837).

Anon., *Modern cases argued and adjudged in the Court of King's Bench at Westminster, in the reign of Her late Majesty Q. Anne, in the time when Sir John Holt sat chief-justice there* (1716).

Anon., *A report of all the cases determined by Sir John Holt, knt., from 1688 to 1710, during which time he was Lord Chief Justice of England* (1738).[682]

---

[682] Reproduced in *English Report 90*.

Brown, J., *Reports of Cases upon Appeals and Writs of Error determined in the High Court of Parliament*, 2nd edn. (8 vols., Edinburgh, 1900-01).[683]

Carthew. T., *Reports of Cases Adjudged in the Court of King's Bench, from the Third Year of King James the Second, to the Twelfth Year of King William the Third*, 2nd edn. (1741).[684]

Coke, E., *The Reports of Sir Edward Coke, Knt . . . A New Edition* (13 vols., 1826).[685]

Comberbach, R., *The Report of Several Cases Argued and Adjudges in the Court of King's Bench at Westminster; from the First Year of King James the Second, to the Tenth Year of King William the Third* (1724).[686]

Comyns, J., *Reports of Cases Argued and Adjudged in the Courts of King's Bench, Common Pleas, and Exchequer*, 2nd edn. (2 vols., 1792).

Durnford, C., and Hyde East, E., (eds.), *Term Reports in the Court of King's Bench* (7 vols., 1817).[687]

Freeman, R., *Reports of Cases Argued and Determined in the Courts of King's Bench and Common Pleas, from 1670 to 1704*, 2nd edn. (1826).[688]

Holt, J., (ed.), *A Report of Divers Cases . . . Collected by Sir John Kelyng . . .* (1708).

Howell, T.B, and Howell, T.J. (eds.), *Cobbett's Compete Collection of State Trials* (34 vols., 1809-28).

Hyde East, E., *Reports of Cases Argued and Determined in the Court of King's Bench* (11 vols., 1800-1809).[689]

Leach, T., (ed.), *Modern reports: or, Select cases adjudged in the Courts of King's Bench, Chancery, Common Pleas and Exchequer*, 5th edn. (12 vols., 1793-96).[690]

Raymond, R., *Reports of cases argued and adjudged in the courts of King's Bench and Common Pleas, in the reigns of the late King William, Queen Anne, King George the First, and King George the Second*, 4th edn. (3 vols., 1792).[691]

Salkeld, W., *Reports of cases adjudged in the Court of King's Bench: with some special cases in the courts of Chancery, Common Pleas and Exchequer, from the first year of K. William and Q. Mary, to the tenth year of Queen Anne*, 6th edn. (3 vols., 1795).[692]

Shower, B., *Cases in Parliament resolved and adjudges upon Petitions and Writs of Error* (1698).[693]

---

683 Reproduced in *English Reports 1-2*.
684 Reproduced in *English Report 90*.
685 Reproduced in *English Reports 76-7*.
686 Reproduced in *English Report 90*.
687 Reproduced in *English Reports 99-101*.
688 Reproduced in *English Reports 89*.
689 Reproduced in *English Report 102-3*.
690 Reproduced in *English Reports 86-88*.
691 Reproduced in *English Reports 91-92*.
692 Reproduced in *English Report 91*.
693 Reproduced in *English Report 1*.

Skinner, R., *Reports of Cases Adjudged in the Court of King's Bench, from the Thirty-Third Year of King Charles the Second, to the Ninth Year of King William the Third* (1728).[694]

Calendar of State Papers, Domestic Series

Charles II: 1660-85, (eds.) F. Bickley, F. Blackburne Daniell, and M. Green (1860-1939).

James II: 1685-89, (ed.) E. Timings (1972).

William and Mary: 1689-1702, (eds.) E. Bateson and W. Hardy (1895-1937).

Anne, 1702-6: (eds.) C. Knighton and R. Mahaffy (1916-2006).

Parliamentary Journals

Journal of the House of Commons (1802-3):

Volume 9, 1667-1687.
Volume 10, 1688-1693.
Volume 11, 1693-1697.
Volume 12, 1697-1699.
Volume 13, 1699-1702.
Volume 14, 1702-1705.
Volume 15, 1705-1708.
Volume 16, 1708-1711.

Journal of the House of Lords (1767-1830):

Volume 12, 1666-1675.
Volume 13, 1675-1681.
Volume 14, 1685-1691.
Volume 15, 1691-1696.
Volume 16, 1696-1701.
Volume 17, 1701-1705.
Volume 18, 1705-1709.
Volume 19, 1709-1714.

Reports of The Royal Commission on Historical Manuscripts

The Fifth Report of The Royal Commission on Historical Manuscripts (1876).

The Seventh Report of The Royal Commission on Historical Manuscripts (1879).

The Eight Report of The Royal Commission on Historical Manuscripts (1881-1909).

[694] Reproduced in *English Report 90*.

The Twelfth Report of The Royal Commission on Historical Manuscripts, The Manuscripts of His Grace the Duke of Rutland, vol. II (1889).

House of Lords Manuscripts 1695-97, vol. II (1903).

Report on the Manuscripts of Allan George Finch, vols. II-III (1922-1957).

Report on the Manuscripts of the Marquess of Downshire, vol. I (1924).

Works First Published Before 1800

Anon., *An Exact account of the proceedings at Guild-Hall upon the election of the Right Honourable Sir William Prichard the present Lord Mayor of the City of London* (1682).

Anon., *A full and true account of the apprehending and taking of Mrs. Sarah Moordike, who is accused for a witch* (1701).

Anon., *The Tryal of Richard Hathaway . . . for being a cheat and imposter* (1702).

Ashmole, Elias, *The visitation of Berkshire 1664-6*, ed. W.C Metcalfe (1882).

Bernard, R., *A Guide to Grand-Jury Men* (1627).

Blackstone, W., *Commentaries on the Laws of England* (4 vols. Oxford, 1765-1769).

Burnet, Gilbert, *Bishop Burnet's history of his own time*, ed. O. Airy (2 vols., Oxford, 1897-1900).

Coke, E., *The first part of the Institutes of the Lawes of England*, 2 edn. (1629).

Evelyn,. J., *The Diary of John Evelyn*, ed. E.S de Beer (2006).

Ferguson, R., *A Letter to the Right Honourable, my Lord Chief Justice Holt* (1694).

Grey, A. (ed.), *Debates of the House of Commons* (10 vols., 1763).

Hale, Matthew, preface to H. Rolle, *Abridgment des Plusieurs Cases et Resolutions del Common Ley* (1668).
———*A Short Treatise Touching Sheriffs Accompts* (1683).
———*The History of the Common Law of England*, ed. C.M. Gray (Chicago, 1971).
———*Sir Matthew Hale's the Prerogatives of the King*, ed. D.E.C. Yale (1976).

Harrington, J., *An Account of the Proceedings of Jonathan, Lord Bishop of Exeter, in his late Visitation* (Oxford, 1690).

Hatton, C., *A Treatise Concerning Statutes, or Acts of Parliament: And the Exposition thereof* (1677).

Hornby, C., *A third part of the Caveat against the Whiggs, in a short historical account of their transactions since the Revolution* (1712).

Hutchinson, F., *An Historical Essay Concerning Witchcraft* (1718).

Hyde, Henry, and Hyde, Laurence, *The correspondence of Henry Hyde, earl of Clarendon, and of his brother Laurence Hyde, earl of Rochester*, ed. S.W. Singer (2 vols., 1828).

Johnson, S., *An Argument Proving . . . the abrogation of King James . . . was according to the Constitution of the English Government and Prescribed by it* (1693).

Lambarde, W., *Archaionōmia, sive, De priscis Anglorum legibus libri* (Cambridge, 1644).

Lloyd, D., *State Worthies: Or, the Statesmen and Favourites of England from the Reformation to the Revolution* (2 vols., 1767).

Locke, John, *Two Treatises of Government*, ed. P. Laslett, 3rd edn. (Cambridge, 1988).
———*The Correspondence of John Locke*, ed. E.S. de Beer (8 vols., Oxford, 1976-89).

Morrice, Roger, *The Entring Book of Roger Morrice*, gen. ed. M. Goldie (7 vols. Woodbridge, 2007)

Nelson, W., *The Law of Evidence* (1735).

Philips, G., *Lex Parliamentaria; or, A Treatise on the Law and Custom of the Parliaments of England* (1698).

Rayner, J., *The Life of the Right Honourable Sir John Holt* (1764).

Ridley, T., *A view of the Civil and Ecclesiastical Law* (1607).

Sheridan, C., *Observations on the Doctrine laid down by Sir William Blackstone respecting the extent of the power of the British Parliament* (1779).

Somers, J., *A Brief History of the Succession* (1681).
———*A Vindication of the Proceedings of the Late Parliament A.D. 1689* (1689).

St German, Christopher, *Doctor and Student*, eds. T.F.T. Plucknett and J.L. Barton (1974).

Stillingfleet, E., (ed.), *Ecclesiastical Cases* (1704).

Swift, Jonathan, *The Correspondence of Jonathan Swift*, ed. H. Williams (5 vols., Oxford, 1963-5)

Tindal, M., *An Essay Concerning the Power of the Magistrate and the Rights of Mankind, in Matters of Religion* (1697).
———*A Letter to the Reverend Clergy of both Universities, concerning the Trinity and the Athanasian Creed* (1694).

Trinder, C., *The Speech of Charles Trinder, Esq; Recorder of Gloucester, at his Entrance upon that Office* (1688).

Usher, C., *A letter to a member of the Convocation of the University of Oxford: containing the case of a late fellow elect of University-college* (1699).

Washington, R., *Some Observations upon the Ecclesiastical Jurisdiction of the Kings of England* (1689).

Willis, B., *Notitia Parliamentaria . . . a series or lists of the representatives in the several Parliaments held from . . . 1541 . . . to . . . 1660 . . .* (1750).

Wood, Anthony, *The Life and Times of Anthony Wood, antiquary, of Oxford, 1632-1695*, ed. Andrew Clark (5 vols, Oxford, 1891-1900).

PRINTED SECONDARY WORKS

Adamson, J., 'Review: A. Cromartie, *Sir Matthew Hale*', *The Cambridge Law Journal,* vol. 55 (1996), pp. 141-44.

Apps, L., 'Motive Hunting the Case of Richard Hathaway', *Preternature: Critical and Historical Studies on the Preternatural*, 1 (2012), pp. 72-99.

Ashcraft, R., and Goldsmith, M., 'Locke, Revolution Principles, and the Formation of Whig Ideology', *The Historical Journal*, vol. 26 (1983), pp. 773-800.

Baker, J., *An Introduction to English Legal History*, 4th edn. (Oxford, 2007).

Beattie, J.M., *Crime and the courts in England, 1660-1800* (Oxford, 1986).

Beddard, R., (ed.), *A Kingdom Without a King, The Journal of the Provisional Government in the Revolution of 1688* (Oxford, 1988).

———'The Unexpected Whig Revolution of 1688', in R. Beddard (ed.), *The Revolutions of 1688* (Oxford, 1991).

Bennett, G.V., 'Loyalist Oxford and the Revolution', in L.S. Sutherland and L.G. Mitchell (eds.), *The History of the University of Oxford, Volume V: The Eighteenth Century* (Oxford, 1986) pp. 9-30.

Berman, H.J., 'The Origins of Historical Jurisprudence: Coke, Selden, Hale', *The Yale Law Journal*, vol. 103 (1994), pp. 1651-1738.

Bingham, T., *The Rule of Law* (2011).

Bogdanor, V., 'Brexit and our unprotected constitution', *The Constitution Society* (2018).

Bostridge, I., *Witchcraft and its Transformations, c.1650-c.1750* (Oxford, 1997).

Brooks, C.W., 'The place of Magna Carta and the ancient constitution in sixteenth -century English legal thought', in E. Sandoz (ed.), *The roots of liberty : Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, 1993) pp. 57–88.

Brooks, C.W., and Sharpe, K., 'History, English Law and the Renaissance', *Past & Present*, vol. 72 (1976), pp. 133-142.

Buller, F., *An introduction to the law, relative to trials at nisi prius*, (ed.) R. W. Bridgman, 7th edn. (1817).

Burgess, G., Hodson, S., and Lloyd, H., (eds.), *European Political Thought 1450-1750* (Yale, 2007).

Bush, J., 'Free to Enslave: The Foundations of Colonial American Slave Law', *Yale Journal of Law & the Humanities*, vol. 5 (1993), pp. 417-470.

Campbell, I., 'Aristotelian Ancient Constitution and Anti-Aristotelian Sovereignty in Stuart Ireland', *The Historical Journal*, vol. 53 (2010), pp. 573-591.

Campbell, J., *The lives of the chief justices of England: from the Norman Conquest till the death of Lord Mansfield* (1849-1857).

Cavanagh, E., 'Infidels in English Legal Thought: Conquest, Commerce, and Slavery in the Common Law from Coke to Mansfield, 1603-1793', *Modern Intellectual History* (online edn., Nov. 2017), https://doi.org/10.1017/S1479244317000580.

Childs, J., *The Army, James II and the Glorious Revolution* (Manchester, 1980).

Claydon, T., 'The Sermon Culture of the Glorious Revolution: Williamite Preaching and Jacobite Anti-Preaching, 1685-1702', in H. Adlington, P. McCullough and E. Rhatigan (eds.), *The Oxford Handbook of the Early Modern Sermon* (Oxford, 2011).

Cockburn, J.S., *A History of English Assizes 1558-1704* (Cambridge, 1972).
———'Early-Modern Assize Records as Historical Evidence', *Journal of the Society of Archivists*, vol. 5 (1975), pp. 215-231.

Coquilette, D., 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law', *Boston University Law Review*, vol. 67 (1987), pp. 877-970.

Cromartie, A., *Sir Matthew Hale 1609-1676, Law, Religion and Natural Philosophy* (Cambridge, 1995).
———'The Constitutionalist Revolution: The Transformation of Political Culture in Early England', *Past & Present*, vol. 163 (1999), pp. 76-120.
———*The Constitutionalist Revolution, An Essay on the History of England, 1450-1642* (Cambridge, 2006).

Cruickshanks, E., 'Ashby v. White: The Case of the Men of Aylesbury, 1701-1704', in C. Jones (ed.), *Party and Management in Parliament, 1660-1784* (Leicester, 1984).

Darr, O.A., *Marks of an Absolute Witch: Evidential Dilemmas in Early Modern England* (Ashgate, 2011).

Darwall-Smith, R., *A History of University College, Oxford* (Oxford, 2008).

Dicey, A.V., *An Introduction to the Study of the Law of the Constitution* (1885).

Dickinson, H., 'The Eighteenth-Century Debate on the 'Glorious Revolution'', *History*, vol. 61 (1976), pp. 28-45.
———'How Revolutionary was the 'Glorious Revolution' of 1688?', *Journal for Eighteenth-Century Studies*, vol. 11 (1988), pp. 125-142.

Dixon, D., 'Godden v Hales Revisited - James II and the Dispensing Power', *Journal of Legal History*, vol. 27 (2006), pp. 129-152.

Dunbar, W. H., and Pound, R., 'Ezra Ripley Thayer', *Harvard Law Review*, vol. 29 (1915), pp. 1-12.

Dunn, M., and Dunn, R., (eds.), *The Papers of William Penn, Volume Three, 1701-1718* (Pennsylvania, 1987).

Dylag, M., 'The Negotiability of Promissory Notes and Bills of Exchange in the Time of Chief Justice Holt', *The Journal of Legal History*, vol. 31 (2010), pp. 149-175.

Dymond, G., *House of Lords Library Note: The Appellate Jurisdiction of the House of Lords* (2009).

Edie, C., 'Revolution and the Rule of Law: The End of the Dispensing Power, 1689', *Eighteenth-Century Studies*, vol. 10 (1977), pp. 434-450.

Ekins, R., 'Constitutional practice and principle in the Article 50 litigation', *Oxford University Research Archive* (2017), (ora.ox.ac.uk/objects/pubs:723885).

Ertman, T., *Birth of the Leviathan, Building States and Regimes in Medieval and Early Modern Europe* (Cambridge, 1997).

Foss, E., *The Judges of England: with sketches of their lives, and miscellaneous notices connected with the courts at Westminster, from the time of the conquest* (1848–64).
———*Biographica juridicia: a biographical dictionary of the judges of England* (1870).

Foster, J., (ed.), *Alumni Oxonienses 1500-1714* (Oxford, 1891).

Garnett, G., "The ould fields': Law and History in the Prefaces to Sir Edward Coke's Reports', *Journal of Legal History*, vol. 34 (2013), pp. 245-284.

Garrett, J., *The Triumphs of Providence, The Assassination Plot 1696* (Cambridge, 1980).

Gaskill, M., 'Witchcraft and Evidence in Early Modern England', *Past and Present*, vol. 198 (2008), pp. 33-70.

Glassey, L., 'In Search of the Mot Juste: Characterizations of the Revolution of 1688-89', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013) pp. 1-32.

Glickman, G., 'Political Conflict and the Memory of the Revolution in England 1689-c. 1750', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013) pp. 243-271.

Goldie, M., *Roger Morrice and the Puritan Whigs* (Woodbridge, 2016).

Goldsworthy, J., *The sovereignty of parliament: history and philosophy* (Oxford, 1999).

Green, D., *Queen Anne* (1970).

Greenberg, J., *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern Political Thought* (Cambridge, 2001).

Halliday, P., *Dismembering the Body Politic: Partisan Politics in England's Towns 1650-1730* (Cambridge, 1998).
———*Habeas Corpus: From England to Empire* (Harvard, 2010).

Hamburger, P., 'The Development of the Law of Seditious Libel and the Control of the Press', *Stanford Law Review*, vol. 37 (1985), pp. 661-765.
———'Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood', *Columbia Law Review*, vol. 94 (1994), pp. 2091-2153.
———*Law and Judicial Duty* (Cambridge, Mass., 2008).

Harris, T., *Politics under the Later Stuarts, Party Conflict in a Divided Society 1660-1715* (1993).
———*Revolution, The Great Crisis of the British Monarchy, 1685-1720* (2006).

Harris, T., and Taylor, S.,(eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013).

Havighurst, A. F., 'The Judiciary and Politics in the Reign of Charles II', *Law Quarterly Review*, vol. 66 (1950), pp. 62-78, 229-252.
———'James II and the Twelve Men in Scarlet', *Law Quarterly Review,* vol. 69 (1953), pp. 522-546.

Holdsworth, W.S., *A History of English Law* (12 vols., 1903-72).

Holmes, C., 'G. R. Elton as a Legal Historian', *Transactions of the Royal Historical Society*, Six Series, vol. 7 (1997), pp. 267-279.
———'The Strange Case of the Misplaced Tomb: Family Honour and the Law in Late Seventeenth Century England', *Midland History*, vol. 31 (2006), pp. 18-32.
———'Why did the prosecution of witches cease in England?', *The Historical Association* (2014).

Holmes, G., *British Politics in the Age of Anne* (1967).
———(ed.), *Britain after the Glorious Revolution 1689-1714* (1969).
———*The Trial of Henry Sacheverell* (1973).
———*Augustan England, Professions, State and Society 1680-1730* (1982).

Hoppit, J., 'Patterns of Parliamentary Legislation, 1660-1800', *The Historical Journal*, vol. 39 (1996), pp. 109-131.
———(ed.), *Parliaments, nations and identities in Britain and Ireland, 1660-1850* (Manchester, 2003).

Horsefield, J. K., 'The "Stop of the Exchequer" Revisited', *The Economic History Review*, vol. 35 (1982), pp. 511-528.

Horwitz, H., *Parliament, Policy and Politics in the Reign of William III* (Manchester, 1977).

Hulsebosch, D., 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence', *Law and History Review*, vol. 21 (2003), pp. 439-482.

Ibbetson, D., 'Natural Law and Common Law', *Edinburgh Law Review*, vol. 5 (2001), pp. 4-20.

Innes, J., 'Legislating for three kingdoms: how the Westminster parliament legislated for England, Scotland and Ireland, 1707-1830', in J. Hoppit (ed.), *Parliaments, nations and identities in Britain and Ireland, 1660-1850* (Manchester, 2003), pp. 15-47

Jansson, M., 'Matthew Hale on Judges and Judging', *Journal of Legal History*, vol. 9 (1988), pp. 201-213.

Jones, J.R., 'James II's Revolution: royal policies, 1686-92', in J. Israel (ed.), *The Anglo-Dutch Moment* (Cambridge, 1991).

Kay, R.S., *The Glorious Revolution and the Continuity of Law* (Washington, 2014).

Kelley, D., 'History, English Law and the Renaissance', *Past & Present*, vol. 65 (1974), pp. 24-51.

Kenyon, J.P., 'The Earl of Sunderland and the Revolution of 1688', *Cambridge Historical Journal*, vol. 11 (1955), pp. 272-296.
———*Robert Spencer, Earl of Sunderland, 1641-1702* (1958).
———*Revolution Principles, The Politics of Party 1689-1720* (Cambridge, 1977).

Kerr, M., Forsyth, D., and Plyley, M., 'Cold Water and Hot Iron: Trial by Ordeal in England', *The Journal of Interdisciplinary History*, vol. 22 (1992), pp. 573-595.

Klein, K., 'The ancient constitution revisited', in N.T. Phillipson and Q. Skinner (eds.), *Political discourse in early modern Britain* (Cambridge, 1993).

Knights, M., *Representation and Misrepresentation in Later Stuart Britain: Partisanship and Political Culture* (Oxford, 2005).
———'The Tory Interpretation of History in the Rage of Parties', *Huntington Library Quarterly*, vol. 68 (2005), pp. 353-373.
———'John Locke and Post-Revolutionary Politics: Electoral Reform and the Franchise', *Past & Present*, vol. 213 (2011), pp. 41-86.
———'Introduction: The View from 1710', *Parliamentary History*, vol. 31 (2012), pp. 1-15.

Landau, N., *The Justices of the Peace, 1679-1760* (Berkeley, 1984).

Landon, M., *The Triumph of the Lawyers* (Alabama, 1970).

Langbein, J., 'The Criminal Trial Before the Lawyers', *The University of Chicago Law Review,* vol. 45 (1978), pp. 263-316.

Lemmings, D., *Gentlemen and Barristers, The Inns of Court and the English Bar 1680-1730* (Oxford, 1990).
———'Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers', *The Journal of Legal History*, vol. 26 (2005), pp. 73-82.

L'Estrange Ewen, C., *Witchcraft and Demonianism* (1970).

Levack, B.P., 'English Law, Scots Law and the Union, 1603-1707', in A. Harding (ed.), *Law-Making and Law-Makers in British History* (London, 1980).

Levin, J., *The Charter Controversy in the City of London 1660-1688 and its Consequences* (London, 1969).

Levitin, D., 'Matthew Tindal's *Rights of the Christian Church* (1706) and the Church-State Relationship', *The Historical Journal*, vol. 54 (2011), pp. 717–740.

Lewis Jones, D., (ed.), *A Parliamentary History of the Glorious Revolution* (1988).

Loft, P., 'Litigation, the Anglo-Scottish Union, and the House of Lords as the High Court, 1660-1875', *The Historical Journal* (2017), pp. 1-25.

MacNamara, H.T.J., *A Practical Treatise on Nullities and Irregularities in Law, Their Character, Distinctions and Consequences* (1842).

Mathias, P., O'Brien, P., 'Taxation in Britain and France, 1715-1810. A Comparison of the Social and Economic Incidence of Taxes Collected for the Central Governments', *Journal of European Economic History*, vol.5 (1976), pp. 601-650.

McAlpine, W., *A Catalogue of the Law Library at Hartwell House* (1865).

McIlwain, C.H., 'The Tenure of English Judges', *The American Political Science Review*, vol. 7 (1913), pp. 217-229.

Miller, J., *Popery and politics in England 1660-1688* (Cambridge, 1973).
———'The Potential for 'Absolutism' in Later Stuart England', *History*, vol. 69 (1984), pp. 187-207.

Milton, J.R., and Milton, P., 'Selecting the Grand Jury: A Tract by John Locke', *The Historical Journal*, vol. 40 (1997), pp. 185-194.

Monod, P., 'Jacobitism and Country Principles in the Reign of William III', *The Historical Journal*, vol. 30 (1987), pp. 289-310.
———*Jacobitism and the English people, 1688-1788* (Cambridge, 1989).
———'A Restoration? 25 Years of Jacobite Studies', *Literature Compass*, vol. 10 (2013), pp. 311-330.

Morgan, E.M., 'A Brief History of Special Verdicts and Special Interrogatories', *The Yale Law Journal*, vol. 32 (1923), pp. 575-592.

Mortimer, S., *Reason and religion in the English revolution: the challenge of Socinianism* (Cambridge, 2010).

Nenner, H., 'The Convention of 1689: A Triumph of Constitutional Form', *American Journal of Legal History*, vol. 10 (1966), pp. 282-296.
———*By Colour of Law, Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago, 1977).
———'The Traces of Shame in England's Glorious Revolution', *History*, vol. 73 (1988), pp. 238-247.

Oldham, J., 'Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports', *American Journal of Legal History*, vol. 31 (1987), pp. 9-42.
———'The Indispensability of manuscript case notes to eighteenth-century barristers and judges' in M. Musson and C. Stebbings (eds.), *Making Legal History* (Cambridge, 2012).

Owers, G., 'The Common Law Mind and the Eighteenth Century, *History of European Ideas*, vol. 40 (2013), pp. 598-601.

Parker, D., *The Making of French Absolutism* (1983);
———'Sovereignty, Absolutism and the Function of the Law in Seventeenth-Century *France*', *Past & Present*, no. 122 (1989), pp. 36-74.

Pettigrew, W., 'Corporate Constitutionalism and the Dialogue between the Global and Local in Seventeenth-Century English History', *Itinerario*, vol. 39 (2016), pp. 487-525.

Pettigrew, W., and Van Cleve, G., (eds.), 'Parting Companies: The Glorious Revolution, Company Power, and Imperial Mercantilism', *The Historical Journal*, vol. 57 (2014), pp. 617-638.

Pincus, S., *1688: The First Modern Revolution* (New Haven, 2009).

Plucknett, T.F.T., 'Bonham's Case and Judicial Review', Harvard Law Review, vol. 40 (1926), pp. 30-70.

Pocock, J.G.A., *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century,* 2nd edn. (Cambridge, 1987).
———'Quentin Skinner: The History of Politics and the Politics of History', *Common Knowledge,* vol. 10 (2004), pp. 532-550.

Powell, D., 'Coke in Context: Early Modern Legal Observation and Sir Edward Coke's Reports', *Journal of Legal History*, vol. 21 (2000), pp. 33-53.

Prest, W., 'Judicial Corruption in Early Modern England', *Past and Present*, 133 (1991), pp. 67-95.
———'Blackstone as Historian', *Parergon*, vol. 32 (2015), pp. 183-203.

Prior, C.W.A., and Burgess, G., (eds.), *England's wars of religion, revisited* (Farnham, 2011).

Reid, J.P., *Rule of Law*, *The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*

(DeKalb, Illinois, 2004).

Resnick, D., 'Locke and the Rejection of the Ancient Constitution', *Political Theory*, vol. 12 (1984), pp. 97-114.

Rudolph, J., *Common Law and Enlightenment in England, 1689-1750* (Woodbridge, 2013).

Sachse, W.L., *Lord Somers, A Political Portrait* (Manchester, 1975).

Sainty, J., *A list of English Law Officers, King's Counsel and holders of Patents of Precedence* (1987).
———*The Judges of England: 1272-1990: a List of Judges of the Superior Courts* (1993).

Sandoz, E., (ed.), *The roots of liberty : Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, 1993).

Schiffman, Z.S., 'Renaissance Historicism Reconsidered', *History and Theory*, vol. 24 (1985), pp. 170-182.
———'Etienne Pasquier and the Problem of Historical Relativism', *Sixteenth Century Journal*, vol. 18 (1987), pp. 505–17.
———'An Anatomy of the Historical Revolution in Renaissance France', *Renaissance Quarterly*, vol. 42 (1989), pp. 507–33.

Schwoerer, L., *The Declaration of Rights 1689* (Baltimore, 1981).
———'The trial of Lord William Russell (1683): Judicial murder?', *The Journal of Legal History*, vol. 9 (1988), pp. 142-168.
———'Locke, Lockean Ideas, and the Glorious Revolution', *Journal of the History of Ideas*, vol. 51 (1990), pp. 531-548.

Sharpe, J.A., *Crime in Early Modern England 1550-1750* (Harlow, 1984).

Shapiro, B., *"Beyond reasonable doubt" and "probable cause": historical perspectives on the Anglo-American law of evidence* (Oxford, 1991).

Shiffman, Z., 'Renaissance Historicism Reconsidered', *History and Theory*, vol. 24 (1985), pp. 170-182.
———'Etienne Pasquier and the problem of historical relativism', *Sixteenth Century Journal*, vol. 18 (1987), pp. 505–17.
———'An anatomy of the historical revolution in Renaissance France', *Renaissance Quarterly*, vol. 42 (1989), pp. 507–33

Simpson, A., 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature', *The University of Chicago Law Review*, vol. 48 (1981), pp. 632-679.

Sirota, B., 'The Trinitarian Crisis in Church and State: Religious Controversy and the Making of the Post-revolutionary Church of England, 1687-1702', *Journal of British Studies*, vol. 52 (2013), pp. 26-54.

Skinner, Q., 'History and Ideology in the English Revolution', *The Historical Journal*, vol. 8 (1965), pp. 151-178.

Slaughter, T., "Abdicate' and 'Contract' in the Glorious Revolution', *The Historical Journal*, vol. 24 (1981), pp. 323-337.

Smith, J.H., 'An Independent Judiciary: The Colonial Background', *University of Pennsylvania Law Review*, vol. 124 (1976), pp. 1104-1156.

Smith, M. G., *'Fighting Joshua': A Study of the Career of Sir Jonathan Trelawny, bart, 1650-1721, Bishop of Bristol, Exeter and Winchester* (Redruth, 1985).

Smith, P., 'Points of Law and Practice Concerning Ecclesiastical Visitations', *Ecclesiastical Law Journal*, vol. 2 (1991), pp. 189-212.

Sommerville, J.P., *Royalists and Patriots, Politics and Ideology in England*, *1603-1640*, 1st edn. (1986).

Sotheby's, *A Valuable Collection of Oriental Manuscripts from the Library of a Well Known Collector*, London, 8 – 9 November, (1888).

Southcombe, G., and Tapsell, G., *Restoration Politics, Religion and Culture* (Basingstoke, 2010).

Sowerby, S., *Making Toleration, The Repealers and the Glorious Revolution* (Harvard, 2013).

Speck, W.A., *Reluctant Revolutionaries, Englishmen and the Revolution of 1688* (Oxford, 1989).

Spurr, J., 'The Church of England, Comprehension and the Toleration Act of 1689', *The English Historical Review*, vol. 104 (1989), pp. 927-946.

Stern, P.J., *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford, 2011).

Stevens, R., *Law and Politics, The House of Lords as a Judicial Body, 1800-1976* (1979).

Stump, W.D., 'An Economic Consequence of 1688', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 6 (1974), pp. 26-35.

Tapsell, G., 'Parliament and Political Division in the Last Years of Charles II, 1681-5', *Parliamentary History*, vol. 22 (2003), pp. 243-262.

———'Laurence Hyde and the Politics of Religion in Later Stuart England', *English Historical Review*, vol. 125 (2010), pp. 1414-1448.

———'Not So Revolutionary', *The Review of Politics*, vol. 72 (2011), pp. 717-23.

———'Review: R.S. Kay, *The Glorious Revolution and the Continuity of Law*', *English Historical Review,* vol. 121 (2017), pp. 714-15.

———'Religion and the Government of the Later Stuarts' in A. Hiscock and H. Wilcox (eds.), *The Oxford Handbook of Early Modern English Literature and Religion* (Oxford, 2017), pp. 102-116.

Taylor, S., 'Plus ça change...? New Perspectives on the Revolution of 1688', *The Historical Journal*, vol. 37 (1994), pp. 457-470.

———'Afterword: State Formation, Political Stability and the Revolution of 1688', in T. Harris and S. Taylor (eds.), *The Final Crisis of the Stuart Monarchy, The Revolutions of 1688-91 in their British, Atlantic and European Contexts* (Woodbridge, 2013), pp. 273-304.

Thompson, M., 'The Reception of Locke's "Two Treatises of Government 1690-1705"', *Political Studies*, vol.24, (1976), pp. 184-91.

Tierney, B., *Religion law and the growth of constitutional thought 1150-1650* (Cambridge, 1982).
———'Hierarchy, Consent, and the "Western Tradition"', *Political Theory*, vol. 15 (1987), pp. 646-652.

Tubbs, J. W., *The common law mind: medieval and early modern conceptions* (Baltimore, 2000).

Waddel, B., 'The Politics of Economic Distress in the Aftermath of the Glorious Revolution, 1689-1702', *English Historical Review,* vol. 130 (2015), pp. 318-351.

Wallace, J.W., *The Reporters Chronologically Arranged, with Occasional Remarks upon their Respective Merits*, 2nd edn., (Philadelphia, 1845).

Warren, E.H, 'Serjeants-at-Law; The Order of the Coif', *Virginia Law Review*, vol. 28 (1942), pp. 911-950.

Weil, R.J., *A Plague of Informers: Conspiracy and Political Trust in William III's England* (Yale, 2013).

Welsby, W.N., *Lives of eminent English judges of the seventeenth and eighteenth centuries* (1846).

Weston, C.C., and Greenberg, J.R., *Subjects & Sovereigns, The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge, 1981).

Zook, M., 'Early Whig Ideology, Ancient Constitutionalism, and the Reverend Samuel Johnson', *Journal of British Studies*, vol. 32 (1993), pp. 139-165.

The History of Parliament

Commons:

Henning, B.D., (ed.), *The History of Parliament: the House of Commons 1660-1690* (1983).

Biographies:

'Arnold, John (c.1635-1702)', E. Cruickshanks.

'Cotton, Sir Robert I (1644-1717)', J.P. Ferris.

'Holt, Sir John (1642-1710)', J.S. Crossette.

'Somers, John (1651-1716)', E. Rowlands.

'Treby, George (1642-1700)', J.S. Crossette.

'Wright, Robert (c.1634-89)', E. Cruickshanks and G. Jaggar.

Hayton, D., Cruickshanks, E., and Handley, S., (eds.), *The History of Parliament: the House of Commons 1690-1715* (2002).

Biographies:

'Cropley, Sir John, 2nd Bt. (1663-1713)', P. Watson.

'St. John, Henry II (1678-1752)', S. Handley.

'Frankland, Thomas I (1665-1726)', E. Cruickshanks and I. McGrath.

Lords:

Paley, R., (ed.), *The History of Parliament: the House of Lords 1660-1715, Volume I: Introductory Survey* (Cambridge, 2016).

.....

Abingdon Area Archaeological and Historical Society

.....

Sir Thomas Holt: http://www.abingdon.gov.uk/history/people/sir-thomas-holt.

Oxford Dictionary of National Biography

'Addison, Joseph (1672–1719)', P. Rogers.

'Aldrich, Henry (1648–1710)', S. Handley.

'Allibone [Allibond], Sir Richard (1636–1688)', J.R. Collins.

'Arnold, John (c.1635-1702)', M. McClain.

'Atkyns, Sir Edward (1630/31–1698)', E. Cruickshanks.

'Atkyns, Sir Robert (bap. 1621- d.1710)', J. Greenberg.

'Bacon, Nathaniel (bap. 1593, d. 1660)', J. Greenberg.

'Berkeley, George, first earl of Berkeley (1626/7–1698)', A. Warmington.

'Berkeley, Lady Henrietta [Harriett] (b. in or after 1664-1706)', D. Turner.

'Bethel, Slingsby (bap. 1617- d.1697)', G.S. De Krey.

'Birch, Peter (1651/2–1710)', R.D. Cornwall.

'Blackstone, Sir William (1723–1780)', W. Prest.

'Blathwayt, William (bap. 1650-1717)', B.C. Murison.

'Blencowe, Sir John (1642–1726)', A.A. Hanham.

'Bouchier [Bourchier], Thomas (1633–1723)', B.P. Levack.

'Boyle, Henry, Baron Carleton (1669–1725)', A.A. Hanham.

'Bradbury, George (bap. 1643- d. 1696)', S. Handley.

'Brady, Robert (c.1627–1700)', P. Wallis.

'Bratton [Bracton], Henry of (d. 1268)', P. Brand.

'Bridgeman, Sir Orlando, first baronet (1609–1674)', H. Nenner.

'Buller, Sir Francis, first baronet (1746–1800)', J. Oldham.

'Bury, Arthur (1623/4–1713)', J. Benedict.

'Bury, Sir Thomas (bap. 1652- d. 1722), S. Handley.

'Campbell, John, first Baron Campbell of St Andrews (1779–1861)' G.H. Jones and V. Jones.

'Charnock, Robert (1663–1696)', P. Hopkins.

'Clarges, Sir Thomas (1617?–1695)', A.A. Hanham.

'Clarke, Edward [called Edward the Grave, Standard Clarke] (1649x51–1710)', M. Goldie.

'Compton, Henry (1631/2–1713)', A.M. Coleby.

'Croke, Sir George (c. 1560–1642)', C.W. Brooks.

'Dolben, Sir William (bap. 1627- d. 1694)', S. Handley.

'Duck, Arthur (1580–1648)', P. Stein.

'Eyre, Sir Giles (bap. 1635- d. 1695)', S. Handley.

'Eyre, Sir Robert (1666–1735)', D. Lemmings.

'Eyre, Sir Samuel (1638-1698)', C.G. Lewin.

'Finch, Daniel, second earl of Nottingham and seventh earl of Winchilsea (1647–1730)', H. Horwitz.

'Foss, Edward (1787–1870)', M. Lobban.

'Freke, John (1652–1717)', R.A. Anselment.

'Gerard, Charles, first earl of Macclesfield (c. 1618–1694)', R. Hutton.

'Gould, Sir Henry (1643/4–1710)', S. Handley.

'Graham, Richard, first Viscount Preston (1648–1695)', J. Callow.

'Gregory, Sir William (1625–1696)', N.E. Key.

'Godolphin, Sidney, first earl of Godolphin (1645–1712)', R.A. Sundstrom.

'Grenville, John, first earl of Bath (d.1701)', V. Slater.

'Halton, Timothy (bap. 1633- d. 1704)', A.J. Hegarty.

'Harley, Robert, first earl of Oxford and Mortimer (1661–1724)', W.A. Speck.

'Harrington, James (1664–1693)', J. Pritchard.

'Hatsell, Sir Henry (bap. 1641- d. 1714)', S. Handley.

'Hedges, Sir Charles (bap. 1650, d. 1714)', S. Handley.

'Herbert, Edward [styled Sir Edward Herbert], Jacobite earl of Portland (1645–1698)', J.R. Collins.

'Holdsworth, Sir William Searle (1871–1944)', H.G. Hanbury, D. Ibbetson.

'Holloway, Sir Richard (bap. 1627, d. 1699)', S. Handley.

'Holt, Sir John (1642–1710)', P. Halliday.

'Hornby, Charles (bap. 1670?)', B. Barber.

'Hyde, Laurence, first earl of Rochester (bap. 1642- d. 1711)', W.A. Speck.

'Jane, William (bap. 1645- d. 1707)', R.A. P.J. Beddard.

'Jeffreys, George, first Baron Jeffreys (1645–1689)', P. Halliday.

'Jenner, Sir Thomas (1638–1707)', R.S. Kay.

'Johnson, Samuel (1649–1703)', M. Zook.

'Knollys, Charles, styled fourth earl of Banbury (1662-1740)', V. Slater.

'Lambarde, William (1536-1601)', D. Alsop.

'Lechmere, Sir Nicholas (bap. 1613- d. 1701)', S.K. Roberts.

'Lee, Sir William (1688–1754)', D. Lemmings.

'Levinz, Sir Creswell (1627–1701)', D.E.C. Yale.

'Littleton, Sir Thomas (d. 1481)', J.H. Baker

'Locke, John (1632–1704)', J.R. Milton.

'Lutwyche, Sir Edward (1634–1709)', S. Handley.

'Manwood, Sir Roger (1524/5–1592)', S.M. Jack.

'Maynard, Sir John (1604–1690)', P. Halliday.

'Middleton, Charles, styled second earl of Middleton and Jacobite first earl of Monmouth (1649/50–1719)', E. Corp.

'Moore, Sir John (bap. 1620-1702)', R. Grassby.

'Montagu, Charles, earl of Halifax (1661–1715)', S. Handley.

'Montagu, Charles, first duke of Manchester (c.1662–1722)', J.M Rigg and M. Kilburn.

'Mordaunt, Charles, third earl of Peterborough and first earl of Monmouth (1658?–1735)', J.B. Hattendorf.

'Morrice, Roger (1628/9–1702)', M. Goldie.

'Nevill, Sir Edward (d. 1705)', M.S.R. Magnotta.

'Northey, Sir Edward (1652–1723)', S. Handley.

'Oates, Titus (1649–1705)', A. Marshall.

'Osborne, Thomas, first duke of Leeds (1632–1712)', M. Knights.

'Parker, Thomas, first earl of Macclesfield (1667–1732)', A.A. Hanham.

'Parkyns, Sir William (bap. 1649- d. 1696)', P. Hopkins.

'Paynter [Cambourne], William (1637–1716)', J.H. Curthoys.

'Pemberton, Sir Francis (bap. 1624- d. 1697), P.D. Halliday.

'Penn, William (1644–1718)', M.K. Geiter.

'Petyt [Petit], William (1640/41–1707)', J. Greenberg.

'Pollexfen, Sir Henry (c.1632–1691)', P.D. Halliday.

'Powell, Sir John (1645–1713)', S. Handley.

'Powys, Sir Thomas (1649–1719)', R. Turner.

'Pritchard [Prichard], Sir William (1631/2–1705)', G.S.de Krey.

'Radcliffe, John (bap. 1650, d. 1714)', R.L. Martensen.

'Raymond, Robert, first Baron Raymond (1673–1733)', D. Lemmings.

'Raymond, Sir Thomas (1626/7–1683)', S. Handley.

'Rokeby, Sir Thomas (c.1631–1699)', S. Handley.

'Rolle, Henry (1589/90–1656)', S. Handley.

'Sacheverell, Henry (1674-1724)', W.A. Speck.

'Sacheverell, William (1637/8–1691)', S. Handley.

'Sancroft, William (1617-1693)', R.A. P.J. Beddard

'Saunders, Sir Edmund (d. 1683)', S. Handley.

'Sawyer, Sir Robert (bap. 1633, d. 1692)', P.D. Halliday.

'Scroggs, Sir William (c.1623–1683)', L.G. Schwoerer.

'Selden, John (1584–1654)', P. Christianson.

'Shower, Sir Bartholomew (1658–1701)', R.J. Frankle.

'Sidney, Henry, first earl of Romney (1641–1704)', D. Hosford.

'Smith, John (1657–1726)', N.G. Jones.

'Somers, John, Baron Somers (1651–1716)', S. Handley.

'Spencer, Charles, third earl of Sunderland (1675–1722)', H.L. Snyder.

'Spencer, Robert, second earl of Sunderland (1641–1702)', W.A. Speck.

'St German, Christopher (c.1460-1540/41)', J.H. Baker.

'Stillingfleet, Edward (1635–1699)', B. Till.

'Street, Sir Thomas (1625-1696)', P. Halliday.

'Talbot, Charles, duke of Shrewsbury (1660–1718)', S. Handley.

'Tenison, Thomas (1636–1715)', W. Marshall.

'Tillotson, John (1630–1694)', I. Rivers.

'Tracy, Robert (1655–1735)', S. Handley.

'Treby, Sir George (bap. 1644, d. 1700)', P.D. Halliday.

'Trelawny, Sir Jonathan, third baronet (1650–1721)', A.M. Coleby.

'Trenchard, Sir John (1649–1695)', R. Clifton.

'Trevor, Thomas, first Baron Trevor (bap. 1658, d. 1730)', R.J. Frankle.

'Trumbull, Sir William (1639-1716)', A.A. Hanham.

'Vernon, James (bap. 1646, d. 1727)', A. Marshall.

'Villiers, Edward, first earl of Jersey (1655?–1711)', S. Handley.

'Ward, Sir Edward (1638–1714)', S. Pyeatt Menefee and S. Handley.

'Watson, Thomas (1637–1717)', S. Handley.

'Welsby, William Newland (1803–1864)', W.P. Courtney and P. Polden.

'Wharton, Thomas, first marquess of Wharton, first marquess of Malmesbury, and first marquess of Catherlough (1648–1715)', J.K. Clark.

'Williams, Sir William, first baronet (1633/4–1700)', P.D. Halliday.

'Williamson, Sir Joseph (1633–1701)', A. Marhsall.

'Wright, Sir Robert (c. 1634–1689)', S. Handley.

'Wythens, Sir Francis (c. 1635–1704)', S. Handley.

'Yorke, Charles (1722–1770)', J. Cannon.

'Yorke, Philip, first earl of Hardwicke (1690–1764)', P.D.G. Thomas.