

## Erskine May, Chapter III, pp. 184-195

### The Regency Crisis 1788-9 (Part II)

#### The Prince's Response

The prince's reply to this communication was a most skilful composition, written by Burke and revised by Sheridan.<sup>(1)</sup> He regarded the restrictions as 'a project for producing weakness, disorder, and insecurity in every branch of the administration of affairs,—a project for dividing the royal family from each other, for separating the court from the state,—a scheme disconnecting the authority to command service, from the power of animating it by reward, and for allotting to the prince all the invidious duties of government, without the means of softening them to the public, by any act of grace, favour, or benignity.' And he repudiated as unnecessary, the restriction upon his granting away the king's property,—a power which he had shown no inclination to possess.

[185] But before Mr. Pitt was able to bring his proposals before Parliament, fresh discussions were raised by the opposition on the state of the king's health, which resulted in another examination of his physicians by a select committee. The inquiry lasted for several days: but while it disclosed much party spirit, intrigue, and jealousy, it established no new facts concerning the probable recovery of the royal patient. The least hopeful physicians were popular with the opposition: the more sanguine found favour with the court and ministers. At length, on the 19th January, Mr. Pitt moved in committee on the state of the nation, five resolutions on which the Regency Bill was to be founded. After animated debates they were all agreed to, and communicated at a conference to the Lords, by whom they were also adopted: but not without a protest signed by fifty-seven peers, headed by the Dukes of York and Cumberland.

The next step was to lay these resolutions before the prince; and to ascertain whether he would accept the regency, with the conditions attached to it by Parliament. The resolutions were accordingly presented by both Houses; and the prince, out of respect for his father, the interests of the people, and the united desires of the two Houses, consented to undertake the trust, though he felt the difficulties which must attend its execution. The resolutions were also presented to the queen and received a gracious answer.

#### The 'Forgery' of the Commissions

[186] Another technical difficulty was still to be overcome before the Regency Bill could, at last be introduced. Parliament had not yet been opened, nor the causes of summons declared, in a speech from the throne,—formalities always held to be essential to enable Parliament to proceed with its legislative business. It was now proposed, by a vote of both Houses, to authorise the passing of letters patent under the great seal, for the opening of Parliament by commission. The necessity of adopting this expedient had been already intimated, and had been described as a 'phantom' of royalty, a 'fiction,' and a 'forgery.' It was now formally proposed, by ministers, on the ground that the opening of Parliament, by royal authority, was essential to the validity of its proceedings: that during the king's incapacity such authority could only be signified by a commission under the great seal: that without the direction of both Houses, the Lord Chancellor could not venture to affix the seal; but that the commission being once issued, with the great seal annexed to it,—the instrument by which the will of the

king is declared—no one could question its legality. It was also stated that the royal assent would hereafter be signified to the Regency Bill by commission, executed in the same way. A precedent in 1754 was further relied on, in which Lord Hardwicke had affixed the great seal to two commissions,—the one for opening Parliament, and [187] the other for passing a bill, during a dangerous illness of George II.(2)

It was contended on the other side, with much force, that if this legal fiction were necessary at all, it ought to have been used for the opening of Parliament two months ago: that hitherto the time of Parliament had been wasted,—its deliberations unauthorised, irregular, and fruitless. But this fiction was also an assumption of royal authority. The Houses had already agreed to allot one portion of the prerogatives to the queen, and another to the regent, and now they were about to take another portion themselves: but, after all, the fictitious use of the king's name would be illegal. By the 33rd Henry VIII., it was declared that a commission for giving the royal assent to a bill must be by letters patent under the great seal, and signed by the king's own hand. The great seal alone would not, therefore, make the commission legal; and the Act for the Duke of Norfolk's attainder had been declared void by Parliament, because the commission for giving the royal assent to it had wanted the king's sign-manual, his name having been affixed by means of a stamp.(3) The course proposed by ministers, however, was approved by both Houses.

According to invariable custom, the names of all the royal dukes, having seats in the House of Lords, had been inserted in the proposed commission: but the Duke of York [188] desired that his own name and that of the Prince of Wales might be omitted as he 'deemed the measure proposed, as well as every other which had been taken respecting the same subject, as unconstitutional and illegal.' The Duke of Cumberland also desired the omission of his name, and that of the Duke of Gloucester.

On the 3rd February, Parliament was at length opened by commission. Earl Bathurst, one of the commissioners who sat as speaker, in the absence of the chancellor, stated that the illness of his Majesty had made it necessary that a commission in his name should pass the great seal; and when the commission had been read, he delivered a speech to both Houses, in pursuance of the authority given by that commission, declaring the causes of summons, and calling attention to the necessity of making provision for the care of the king's person, and the administration of the royal authority.

Meanwhile, it became necessary that the usual commission should issue for holding the assizes. Although the sign-manual could not then be obtained, the urgency of the occasion was so great that Lord Thurlow, the chancellor, affixed the great seal to a commission for that purpose, by virtue of which the judges went their circuits.

## **The King's Recovery**

After all these delays, Mr. Pitt now brought the [189] Regency Bill into the House of Commons.(4) The provisions which attracted most observation were the nomination of the queen's council, the restriction upon the creation of peers, the power of the privy council to pronounce his Majesty's restoration to health and capacity, and a clause by which the regent's authority would cease if he married a Roman Catholic. But, as the measure was not destined to pass, the lengthened debates to which it gave rise, need not be pursued any further. The bill had been sent to the Lords,—its clauses were being discussed in committee,—and politicians in expectation of its early passing, were busily filling up the places in the prince regent's first administration,—when on the 19th February, the lord chancellor announced that his Majesty was convalescent; and further proceedings were arrested.

The king's recovery was now rapid: on the 25th, he was pronounced free from complaint, and, on the 27th, further bulletins were discontinued by his Majesty's own command. On the 10th

March, another commission was issued, authorising 'the commissioners, who were appointed by former letters patent to hold this Parliament, to open and declare certain further causes for holding the same,' thus recognising the validity of the previous commission, to which the great seal had been affixed in his name.(5) [190] He thanked Parliament for its attachment to his person, and its concern for the honour of the crown, and the security of his dominions. Loyal addresses were agreed to by both Houses, *nem. con.*, as well as a message of congratulation to the queen.

The 23rd April was appointed as a day of public thanksgiving, when the king and royal family, attended by both Houses of Parliament, the great officers of state, and foreign ambassadors, went in procession to St. Paul's. It was a solemn and affecting spectacle: a national demonstration of loyalty, and pious gratitude.

Thus ended a most painful episode in the history of this reign. Had no delays been interposed in the progress of the Regency Bill, the king, on his recovery, would have found himself stripped of his royal authority. He was spared this sorrow, partly by the numerous preliminaries which the ministers had deemed necessary; and partly by the conduct of the opposition, who though most interested in the speedy passing of the bill, had contributed to its protracted consideration. By asserting the prince's right, they had provoked ministers to maintain the authority of Parliament, as a preliminary to legislation. Twice they had caused the physicians to be examined; and they discussed the bill in all its stages, in full confidence that his Majesty's recovery was hopeless.

### **Comments Upon These Proceedings**

Many of the preliminaries, indeed, would seem to have been superfluous: but the unprecedented circumstances with which ministers had to deal,—the entire want of [191] confidence between them and the Prince of Wales,—the uncertainty of the king's recovery,—the conduct of the opposition, and their relations to the prince,—together with several constitutional considerations of the utmost difficulty, contributed to the embarrassment of their position.

If it was necessary to authorise the opening of Parliament by a commission under the great seal, this course ought to have been at first adopted; for the law of Parliament does not recognise the distinction then raised, between legislative and any other proceedings. No business whatever can be commenced until the causes of summons have been declared by the crown.(6) The king having been unable to exercise this function, Parliament had proceeded with its deliberations for upwards of two months, without the accustomed speech from the throne. And if any doubt existed as to the validity of these proceedings, it is difficult to understand how they could be removed by the commission. As the king's authority could not in fact be exercised, and as the great seal, intended to represent it, was affixed by direction of the two Houses, why was the fiction needed? The only real authority was that of Parliament, which might have been boldly and openly exercised, during the incapacity of the king.

The simplest and most direct course would, undoubtedly, have been for both Houses to agree upon an address to the Prince of Wales, praying him to exercise the royal authority, subject to [192] conditions stated in the address itself; and on his acceptance of the trust, to proceed to give legal effect to these conditions by a bill,—to which the royal assent would be signified by the regent, on behalf of the crown. Either in earlier or in later times, such a course would probably have been followed. But at that period, above all others, lawyers delighted in fiction, and Westminster Hall was peopled with legal 'phantoms' of their creation.(7)

In proposing to proceed by address, the opposition relied upon the precedent of the Revolution of 1688. On the other side it was contended, and particularly by Sir John Scott, the Solicitor-General,—by whose advice the government were mainly guided,—that after the

throne had been declared vacant, Parliament solicited the Prince of Orange to assume the royal powers: but here the rights of the lawful sovereign could not be passed by, and superseded. His name must be used in all proceedings: his great seal affixed by the chancellor of his appointment, to every commission; and his authority recognised and represented, though his personal directions and capacity were wanting. It is obvious, however, that whatever empty forms were observed, the royal authority was, of necessity, superseded. As the throne was not vacant, no stranger was sought to fill it, and [193] all parties concurred in calling upon the heir apparent to exercise his father's royal authority. The two occasions differed in regard to the persons whom Parliament, in times of nearly equal emergency, proposed to invest with the supreme power: but why a simple and direct course of proceeding was not as appropriate in the one case as in the other, we need the subtlety and formalism of the old school of lawyers to perceive.

### **The Political Parties**

As regards the conduct of political parties, it can hardly be questioned that, on the one hand, Mr. Fox and his party incautiously took up an indefensible position; while, on the other, Mr. Pitt was unduly tenacious in asserting the authority of Parliament,—which the Prince had not authorised any one to question,—and which his brother, the Duke of York, had admitted. Yet the conduct of both is easily explained by the circumstances of their respective parties. The prince had identified himself with Mr. Fox and the Whigs; and it was well known to Mr. Pitt, and offensively announced by his opponents, that the passing of the Regency Act would be the signal for his own dismissal. To assert the prince's rights, and resist all restrictions upon his authority, was the natural course for his friends to adopt; while to maintain the prerogatives of the crown,—to respect the feelings and dignity of the queen, and at the same time to vindicate the paramount authority of Parliament,—was the becoming policy of the king's minister. Mr. Pitt's view, being favourable to popular rights, was supported by the people: Mr. Fox, on the other hand, committed [194] himself to the assertion of prerogative, and inveighed against the discretionary power of Parliament. Well might Mr. Pitt exultingly exclaim, 'I'll unwhig the gentleman for the rest of his life.' The proceedings on the regency confirmed the confidence of the king in Mr. Pitt, and his distrust of Mr. Fox and his adherents; and the popular minister had a long career of power before him.

### **Proceedings in Ireland**

While these proceedings were pending, the Parliament of Ireland, adopting the views of Mr. Fox, agreed to an address to the Prince of Wales, praying him to take upon himself 'the government of this realm, during the continuance of his Majesty's present indisposition, and no longer, and under the style and title of Prince Regent of Ireland, in the name and on behalf of his Majesty, to exercise and administer, according to the laws and constitution of this kingdom, all regal powers, jurisdictions and prerogatives to the crown and government thereof belonging.' The lord lieutenant, the Marquess of Buckingham, having refused to transmit this address, the Parliament caused it to be conveyed directly to his Royal Highness, by some of their own members; and censured the conduct of the lord lieutenant as unconstitutional.(8)

To this address the prince returned an answer, in which, after thanking the Parliament of Ireland for [195] their loyalty and affection, he stated that he trusted the king would soon be able to resume the personal exercise of the royal authority, which would render unnecessary any further answer, except a repetition of his thanks.

## Failure to Plan for the Future

Soon after his recovery, the king said to Lord Thurlow, 'what has happened may happen again: for God's sake make some permanent and immediate provision for such a regency as may prevent the country from being involved in disputes and difficulties similar to those just over.' Lord Thurlow and Mr. Pitt agreed as to the expediency of such a measure: but differed as to the mode in which it should be framed. The former was soon afterwards out of office, and the latter thought no more about the matter. It is indeed singular that the king's wise foresight should have been entirely neglected; and that on three subsequent occasions, embarrassments arising from the same cause should have been experienced.

### Footnotes

1. Moore's Life of Sheridan, ii. 50. Lord Stanhope assigns the authorship to Mr. Burke alone.—Life of Pitt, ii. 18.
2. Speeches of Mr. Pitt and Lord Camden. In the latter this precedent is erroneously assigned to 1739. See also Lord Colchester's Diary, ii. 283.
3. 1 Mary, Sess. 2, c. 13 (Private).
4. 5th February, 1789 .
5. While the proceedings upon the Regency Bill were pending, several other bills were introduced into both Houses of Parliament, which received the royal assent after his Majesty's recovery.
6. Even the election of a speaker and the swearing of members in a new Parliament, are not commenced until the pleasure of the crown has been signified.
7. See Chap. XVIII. Lord John Russell says, 'All reasonable restrictions might have been imposed by Act of Parliament, with the royal assent given by the regent, acting on behalf of the crown.'—Mem. of Fox, ii. 265. He ridicules the 'absurd phantom of a royal assent given by the Houses of Parliament to their own act, by a fiction of their own creation.'
8. Debates of the Parliament of Ireland; Parl. Register of Ireland, ix. 119. The speech of Mr. Grattan was peculiarly forcible and well reasoned.

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