APPENDIX III

GLANVILL, BRACTON, FORTESCUE, HOBBES

GLANVILL—TEXT

TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR :THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND, COMMONLY CALLED GLANVILL

1180	Rannulf Glanvill chief justiciar (==PM and chief justice) Maitland, 13 (Henry II)
1187-1189	Glanvill (Rannulf de Glanvill) attempts to codify the law.

Text

— From *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, The Treatise on the laws and customs of the realm of England, commonly called Glanvill, G D G Hall (*ed.*), Nelson in association with the Selden Society, London, 1965

p. 1 'Here begins the treatise on the laws and customs of the realm of England, composed in the time of King Henry the Second when justice was under the direction of the illustrious Rannulf Glanvill, the most learned of that time in the law and ancient customs of the realm.

PROLOGUE

p. 1 'Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and

peaceful peoples[1]; so that in time of both peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects.

'No-one doubts how finely, how vigorously, how skilfully our most excellent king has practised armed warfare against the malice of his enemies in time of hostilities, for now his praise has gone out to all the earth and his mighty works to all the borders of the world. Nor is there any dispute how justly and how mercifully, how [p.2] prudently he, who is the author and lover of peace, has behaved towards his subjects in time of peace, for his Highness's court is so impartial that no judge there is so shameless or audacious as to presume to turn aside at all from the path of justice or to digress in any respect from the way of truth. For there, indeed, a poor man is not oppressed by the power of his adversary, nor does favour or partiality drive any man away from the threshold of judgment. For truly he does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and whom he has found to be most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them.

p. 2. 'Although the laws of England are not written it does not seem absurd to call them laws - those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince - for this also is a law, that 'what pleases the prince has the force of law.' *[quod principi placet, legis habet uigorem]*[2] For if, merely for lack of writings they were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.

p. 3. 'It is, however, utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of scribes and because of the confused multiplicity of those same laws and rules. But there are some general rules frequently observed in court which it does not seem to me presumptuous to commit to writing, but rather very useful for most people and highly necessary to aid the memory. I have decided to put into writing at least a small part of these general rules, adopting intentionally ` commonplace style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language. To make matters clear, I have distinguished the kinds of secular cause in the following manner....

BOOK 1

The division of secular causes

[p. 3] Pleas are either criminal or civil. Some criminal pleas belong to the crown of the lord king [*item placitorum criminalium aliud pertinet coronam domini regis*], and some belong to the sheriffs of the counties. The following belong to the crown of the lord king.

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[1] cf. Bracton, *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine *(ed.)*, Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968; *Bracton on the Laws and Customs of England, trans.*. Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard, at p. 19; and see my pages 63 ff. especially p. 70, *infra*; and see 'This fact the Emperor Justinian carefully bears in mind when, in the beginning of the Prooemium to his book of *Institutes*, he says, Imperial Majesty ought to be not only adorned with arms but also armed with laws, so that it can govern aright in both times of peace and war.' *–Imperatoriam maiestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare* – Justinian, *Institutes*, Prooemium, as quoted by Sir John Fortescue, in *De Laudibus Legum Anglie*, p. 4, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, *De Laudibus* (OM68.583st), Cambridge Studies in English Legal History, , H D Hazeltine, (gen. ed.); reprinted by Garland Publishing New York, 1979.

[2] see G D G Hall, Glanvill, at p, 2, note 1, where he says : 'Fritz Schulz in 'Bracton on Kingship', E.H.R. LX (1945), 171, thought that the words 'those, that is, ...has the force of law' were probably interpolated. The words are in all the manuscripts. His argument, which assumes that authors always write clearly, could be used to dispose of substantial parts of the treatise.'

GLANVILL—ANALYSIS

Now under the reign of Henry II emerged that writer which English lawyers call Glanvill – Rannulf Glanvill (Ranulf de Glanvil), who was Chief Justiciar, (the equivalent of a combination of the modern positions of Chief Justice and Prime Minister:[1]) under Henry II from 1180. He wrote *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, between 1187 and 1189.[2] 'It is the first textbook of the common law, and its two great themes are the king's court at the Exchequer and writs. By common law we mean here the settled law of the king's court common to all free men in the sense that it is available to them in civil causes if they will have it, and applicable against them in serious criminal causes whether they like it or not. ... what is clear is that [the common law] is a product of the twelfth century.'[3] It was the work of Henry II to revive and intensify the general eyres, inquests and writs after the decay of Stephen's reign, and to make them a part of the normal machinery of justice, enforcing the common law. Henry II did justice in person in a court *corum rege* , it was not a settled court, and when the king was absent from England, as he frequently was in his later years, the court went with him.[4] Professor Plucknett, writing in *A Concise History of the Common Law*, said: 'He is, in fact, the first exponent of the new common law which in the course of the centuries was to supersede the ancient legal institutions of the land. Already we can see the main features of that common law in Glanvill's book: it is royal, flowing from the King's Court; it is common, for local variations receive little sympathy; it is strongly procedural, being based upon writs and expressed in the form of a commentary on them.'[5]

Glanvill said, inter alia:

> Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples[6]; so that in time of both peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects. ... [7].
>
> ...Nor is there any dispute how justly and how mercifully, how prudently he, [our most excellent king] who is the author and lover of peace, has behaved towards his subjects in time of peace, for His Highness court is so impartial towards his subjects that no judge there is so shameless or audacious as to presume to turn aside from the path of justice or digress in any way from the truth For there indeed a poor man is not oppressed by the power of his adversary, not does favour or partiality drive any man away from the threshold of judgment. For truly he [our most excellent king] does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and

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[1] see Maitland, *Constitutional History*, p. 13

[2] see *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall (ed.), Nelson in association with the Selden Society, London, 1965; [this text is the one hereinafter referred to as Glanvill]. Rannulf de Glanvill's authorship of the treatise and Maitland's original suggestion that he was probably not the author, have been discussed and, I believe, disproved by Josiah Cox Russell in 'Ranulf de Glanville', *Speculum*, XLV (1970), pp. 68-79

[3] G D G Hall, in his Introduction to his translation of Glanvill, *Ibid.*, at p. xi. He refers in footnote 3 to a 'masterly survey' of the common law by Pollock and Maitland, in Pollock, Sir Frederick, and Maitland, Frederick William, *The History of English Law before the time of Edward I*, 2nd edition, Vol. s I and II, Lawyer's Literary Club, Washington, 1959, Vol. 1, at pp. 107-110, and pp. 136-173

[4] G D G Hall, Introduction, Glanvill, *loc. cit.*., at p. xii.

[5] see Plucknett, T F T, *A Concise History of the Common Law*, 1929; 5th edn., Little Brown and Company, Boston, 1956, p. 257.

[6] cf. Bracton, see pages 63 ff. especially p. 70, *infra.*

[7] see Glanvill, p. 1

> whom he has found to be most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them.[1]

and:

> ... for his Highness's court is so impartial that no judge there is so shameless or audacious as to presume to turn aside at all from the path of justice or to digress in any respect from the way of truth. For there, indeed, a poor man is not oppressed by the power of his adversary, nor does favour or partiality drive any man away from the threshold of judgment. For truly he does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and whom he has found to be most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them.[2]

and:

> Although the laws of England are not written it does not seem absurd to call them laws - those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince - for this also is a law, that 'what pleases the prince has the force of law.' *[quod principi placet, legis habet uigorem]*[3] For if, merely for lack of writings they were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.[4]

and:

> It is, however, utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of scribes and because of the confused multiplicity of those same laws and rules. But there are some general rules frequently observed in court which it does not seem to me presumptuous to commit to writing, but rather very useful for most people and highly necessary to aid the memory. I have decided to put into writing at least a small part of these general rules, adopting intentionally a commonplace style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language. To make matters clear, I have distinguished the kinds of secular cause in the following manner:... [5]

What Glanvill says here about kingship is:

> —royal power must have arms and laws for the king to perform his office successfully;
>
> —a king must crush the unbridled and ungovernable
>
> —a king must be impartial in his justice and temper justice with equity
>
> —the king is the author and lover of peace
>
> —the king (and his judges) is guided by the laws and customs of the realm, which had their origin in reason and have long prevailed
>
> —the king is guided in the dispensation of justice by certain sober, wise, eloquent, prompt, just and clear-sighted of his subjects who are more learned in the laws and customs of the realm
>
> —while English laws (*leges*) are not written, nevertheless, they are laws those which are known to have been promulgated about problems which have been settled in council on the advice of the magnates and with the supporting authority of the prince [I think this must mean that the laws have to have been proclaimed or distributed to the shires, or in some other way made public; that they are

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[1] see Glanvill, pp. 1-2.

[2] see Glanvill, *ibid.*, p. 2

[3] see G D G Hall, Glanvill, at p., 2, note 1, where he says : 'Fritz Schulz in 'Bracton on Kingship', *EHR.* LX (1945), 171, thought that the words 'those, that is, ...has the force of law' were probably interpolated. The words are in all the manuscripts. His argument, which assumes that authors always write clearly, could be used to dispose of substantial parts of the treatise.'

[4] see Glanvill, *ibid.*, p. 2

[5] see Glanvill, *ibid.*, p. 3

about problems settled in the great council with the advice of the magnates. 'With the supporting authority of the Prince' means, I believe, not that the prince's authority is supportive only, in the sense of secondary, to the advice of his magnates; but rather that the laws or problems as settles have the authority of the Prince, which thereby supports them]

—it is possible to call such as described above laws, only because 'this is also a law' [*cum hoc ipsum* lex[1] *sit*] that 'what pleases the prince has the force of law.' [*quod principi placet*, legis[2] *habet uigorem*']. [I have accepted, in the absence of any personal expertise in the provenance of Latin texts and Glanvill *per se*, that he did include these and the above words in his treatise. Having said this, it seems to me that Glanvill is saying that as to laws (*leges*), only those problems which the council has decided to settle which have the support of the king, are or can become laws, because there is no law (*leges*) without the authority of the king to support it. That is, the king must assent to or agree in the settlement of the problem, or to the law (*leges*) – *et principis accedente auctoritate* – and the reason for this is the *lex* or greater law, that only that laws (*leges*) can have no force without the agreement, the imprimatur, the accession to, of the king. Clearly this makes sense, for the enforcement of the laws (*leges*) does not arise from a vacuum. It arises from he who has the requisite authority. The only person who has such requisite authority and jurisdiction, and the power of enforcement, is the king. Therefore there can be no laws (*leges*) without the agreement of the king, else they would be mere chimeras or ephemera. It seems to me, that much of the difficulty over this passage arises from the English translation of '*qoud principi placet*'. 'What pleases the king', does not mean (in a context such as this which is dealing with the nature of the laws (*leges*)) 'at the whim of the king'. *Placet* or 'please' had for centuries another and different meaning as well; it meant 'I am willing' or 'it is my will', or 'I agree'; as in 'Please to come here' – 'Are you willing to come here'; 'Will you marry me?' (response – *Placet* or, yes I agree, or yes I am willing, or yes I will. Thus in addition to the connotation of a personal will, there is also the connotation of an agreement in something, for the individual can have no 'pleasure' unless it is in response to something. Thus at the king's pleasure, does not mean at the king's whim, but so long as the king agrees to whatever it is. Thus, in my submission, it is not at all unlikely that what Glanvill was saying was, that there can be no laws, *leges*, legislation, without the king's agreement. This is still the constitutional position today. And while it is true that in the days of Henry II it was still possible for the king, like Alfred, to issue charters, or make grants of his own will, these acts occurred with the advise of his magnates, and bore the signatures of the members of the council present at the time. While it was still possible for the king to make grants or confer benefits without any advise at all, this was only in regard to matters pertaining to his personal prerogative, which of course in the time of Henry II was larger than it later became. However, the exercise of such prerogative without any advice at all from his magnates by the king, led inexorably towards disaster. – cf., Edward II and Piers Gaveston.

—the absence of inscription of a law does not deprive the law of force, nor make it less of a law than it is, just as the writing down of a law is not capable of conferring on it an authority greater than the justice and reason of him from whom they sprang, or of those from whence they sprang.

Now, having examined this text in some detail, it is noteworthy that Glanvill speaks of 'the laws and customs of the realm' [*legibus*, and later, *iusta et regni consuetudinibus*] ; that he speaks of the king as the author or peace; that he and his judges exercise their judgements with impartiality to all levels of society, and with equity, justice, and truth; that he says the king is guided by the laws and customs of the realm and by those more knowledgeable than he with regard to those laws and customs; that the laws are those decided upon in council on the advice of the magnates [*in concilio*] and which have the king's agreement and his support.

Then let us consider that Professor Richardson has demonstrated also the Henry took and oath to protect the estate of the crown. And then let us remember that Henry II's reign saw the flowering of the common law, the writing of Glanvill's treatise, and the entrenchment of law after the anarchy of Stephen. Let us remember also that neither the *promissio regis* (the coronation oath of the early kings), nor the recension of the coronation order said by liturgists then to be current, [the 'third recension of the English Coronation order, c. 1100][3] contains any reference at all to laws and customs, nor to laws being decided upon by people other than the king.

Then let us look at the Henry VIII/Blackstone/Stubbs oath:

This is the othe that the king shall swere at ye coronacion that he shall kepe and mayntene the right and the liberties of holie church of old tyme graunted by the rightuous Cristen kinges of Englond.

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[1] for a discussion of *lex*, see infra under Bracton, p. 63 ff.

[2] for a discussion of *legis*, see infra under Bracton, pp. 63 ff.

[3] for texts see my Appendix I.

> And that he shall kepe all the londes honours and dignytes rightuous and fre of the crowne of Englond in all maner hole wtout any maner of mynyshement, and the rightes of the Crowne hurte decayed or lost to his power shall call agayn into the auncyent astate,
>
> And that he shall kepe the peax of the holie churche and of the clergie and of the people wt good accorde,
>
> And that he shall do in his iudgementes equytee and right justice wt discression and mercye
>
> And that he shall graunte to holde lawes and customes of the realme and to his power kepe them and affirme them which the folk and people haue made and chosen
>
> And the evil Lawes and customes hollie to put out, and stedfaste and stable peax to the people of his realme kepe and cause to be kept to his power.[1]

> Ceo est serement que le roy jurre a soun coronement : que il gardera et meintenera lez droitez et lez franchisez de seynt esglise grauntez auncienment dez droitez roys christiens dEngletere, et quil gardera toutez sez terrez honoures et dignitees droiturelx et franks del coron du roialme dEngletere en tout maner dentierte sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discrecion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiair lez face garder et affermer que lez gentez du people avont faitez et esliez, et les malveys leyz et custumes de tout oustera, et ferme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair: come Dieu lay aide. Tit. Sacrementum regis. Fol. M. ij. [2] XXX

It must be noted that the oath reproduced above includes the promises of the *tria precepta*, and those of the third recension (which are almost identical) , together with promises which accord with the statements by Glanvill as to the role and duty of the king as outlined above, as well as including a provision for the maintenance of the estate of the crown, one of the causes of the bitter feud between Henry and Thomas a'Becket. Now this could of course be a coincidence. I would submit, however, that this is stretching coincidence very far. Glanvill knew Henry II; he was Chief Justice and Prime Minister. Who better than he would know what the office of kingly estate entailed? Who better than he to devise the oath for the taking by kings to confer upon them the kingly estate and the duties entailed therein? That these provisions were not reproduced in the actual liturgical ordines until the time of the recensions of the fourth coronation order two hundred years later proves nothing; it must be remembered that the ordines were inscribed and copied by monks far from the seat of power. The absence of a reference to 'Saint Edward' in this oath is also explicable in the light of the possibility that Henry III, a devotee of the Anglo-Saxon saint, was responsible for the inclusion of his name in the oath.[3] In any event, the idea that Henry II was the inspiration for this oath, and that it was well grounded in terms of his and his Chief Justice's understanding of the nature of kingship, deserves serious consideration. We must consider also, that Henry VIII was by no means a fool, and that there was quite likely some reason other than spontaneous capriciousness when he amended the oath in his own hand. It is after all quite possible that Henry VIII actually knew what he was doing, and that the oath the he was amending was the oath that he had taken.[4]

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[1] (Text examined by Henry VIII, British Museum Cotton Manuscript Tib. E. V iii. Fo. 89, as quoted and reproduced in facsimile in Legg, *English Coronation Records*, p. 240)

[2] see Blackstone, at p. 229, note h, of Vol. I of his *Commentaries on the Laws of England*, sourced to 'the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV, (*penes me*) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe.'; and Stubbs, in *Const Hist*, Vol. II, §179, p. 109, n. 2, sourced to *Statutes of the Realm*, i. 168; Taylor, *Glory of Regality*, pp. 411, 412.

[3] see my page 60, and note 360, infra.

[4] So far as I know, no-one has suggested this line of argument. It may well be, of course, untenable; but on the strength of my researches to date, it is an hypothesis worth considering.

EDWARD I AND THE OATH

Because the ramifications of this parliament are pertinent to the coronation oath, the evolution of the crown, the parliament and to the development of the common law, Bishop Stubbs' description of it is reproduced *in extenso*[1]:

> The proceedings indicate a feeling of continued mistrust on both sides. Edward, who negotiated through his clerk Roger Brabazon, attempted to guard his future action with regard to the forests by refusing to ratify the disafforestments until he had obtained a distinct assurance from the prelates and baronage that it could be done without a breach of his royal obligations and without detriment to the crown. He sent down a bill to the magnates, in which he declared that, if they would, after due examination, declare on their homage and fealty that the measures in question were well and loyally completed, and that he could confirm them without breaking his oath or injuring the crown, he would sanction them: [Stubbs' footnote here sources this to Parliamentary Writs, i.,104. He goes on to say The oath referred to is probably the coronation oath, which may have contained a promise not to alienate the crown property, such as was taken by the king of the Romans: 'Vis jura regni et imperii conservare, bonaque ejusdem injuste dispera recuperare et fideliter in usus regni et imperii dispensare?' [2] which in turn he sources to Taylor, Glory of Regality, p. 412, and p. 109, note 2.] or, if they would take some other convenient way of redressing the abuses, they should be redressed by their advice. The barons in reply declined to undertake the responsibility which the king wished to throw upon them, and, under the advice of archbishop Winchelsey, presented, through Henry of Keighley, knight of the shire for Lancashire, a bill of twelve articles[3], to each of which the king returned a formal answer.

The text of the Bill[4] is as follows:

> Bill of the prelates and nobles delivered to the lord king on behalf of the whole community in the parliament of Lincoln in the year aforesaid: -
>
> ... Thus the said community is of the opinion that, if it please our lord the king, the two charters, of liberties and of the forest, shall henceforth be entirely observed in all particulars [Response:] It expressly pleases the king.
>
> And statutes contrary to the said charters shall be annulled and voided [Response:] It expressly pleases.
>
> And the power of the justices assigned to keep the charters in the counties shall be defined by the counsel of the prelates, earls, and barons. [Response:] It tacitly pleases.[5]
>
> And the perambulation[6] that has been made and ridden by view of good men according to the form of the said charter of the forest shall stand and at the same time shall be carried out through prompt disafforestment according to the bounds determined by the perambulators, so that the community may at once be seised of them. [Response:] It expressly pleases.
>
> And offences and trespasses committed by the king's ministers against the tenor of the said charters and prises extortionately taken without consent or payment, against the form of the lord king's

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[1] *Constitutional History*, Vol. 2, pp. 156 *et seq.*

[2] cf. Kantorowicz, 'Inalienability', *supra*; and cf. the oath from Lettou and Machlinia, *Statutes of the Realm*, i, 168, as quoted by Blackstone and by Stubbs; and cf. the oath as amended by Henry VIII; for texts see my Appendix I.

[3] Stubbs sources this to 'Billa Praelatorum et procerum regni liberata domino regi ex parte totius communitatis in parliamento Lincolniensi', *Parliamentary Writs*, i. 104.

[4] taken from Stephenson, C, and Marcham, F G, (*eds.*), *Sources of English Constitutional History: Vol. I: A Selection of Documents from AD 600 to the Interregnum*, New York, Harper & Row, rev ed. 1972, at pp. 165-166, who source it to Palgrave, *Parliamentary Writs*, I, 104 f. [Latin and French], and refer to Petit-Dutaillis and Lefebvre, pp. 217 f., and Pasquet, *Origins of the House of Commons*, p. 115, on this bill.

[5] note here that this was a derogation from the king's prerogative to appoint the justices and determine their terms of appointment.

[6] S&M note that as to perambulation 'there were two steps in the procedure: juries first determined the theoretic extent of the forest; then commissioners fixed the bounds by riding along them.'; *ibid.* p. 166.

statute made at Westminster during Lent just past, shall henceforth cease. [Response:] It expressly pleases.

And any offence by a minister shall be paid for in proportion to the trespass according to [the judgement of] auditors who are not suspected on account of their past deeds and who are assigned for such purpose by the prelates, earls, and barons of the land, and this matter shall be undertaken at once. [Response:] The lord king wishes to provide another remedy in this connection, rather than through such auditors.

And henceforth sheriffs shall be answerable for their revenues according to the customary practice in the time of his father — which revenues have been and are now to the great impoverishment of the people. And sheriffs shall not be placed under increased charges. [Response:] It pleases the lord king that in this respect a fit remedy shall be provided by common counsel as quickly as possible.

And wherever the perambulation has in part been made, but has not been ridden, it shall be done between now and Michaelmas next. [Response:] It expressly pleases.

On condition that the aforesaid matters are carried out and firmly established and accomplished, the people of the realm grant to him a fifteenth in place of the twentieth recently granted — yet so that all the matters aforesaid are carried out between now and Michaelmas next; otherwise nothing is to be taken. [Response:] It expressly pleases.

.... and Stubbs, after rehearsing the above in summary, continues:

This done, they proposed to grant a fifteenth in lieu of the twentieth already granted; it was to be assessed, collected and paid to the king by knights chosen by the common consent of the county after the next Michaelmas, the date at which the reforms were to be completed Finally, the prelates, with the consent of the barons, declared that they could not assent to any contribution made from the goods of the church in defiance of the pope's prohibition. At the same time, it would seem, although the subject is not mentioned in the Bill, they petitioned for the removal of Walter Langton, bishop of Coventry, the treasurer, and made bitter complaints against the king's other servants. Edward keenly felt the ungenerous suspicions to which he was subjected, and ordered the knight who had presented the bill to be imprisoned'[And here Stubbs in a footnote reproduces a text of a letter from Edward which indicates his feelings on the occasion — outrage at his treatment, but a desire that the victim of the moment should not suffer and that his kindly treatment should be attributed to the impugned minister.] 'The disafforestment in particular was repulsive to him, for he was called on to ratify arrangements which were not yet made. He yielded however to compulsion which he did not hesitate to call outrageous, and consented, either expressly or with some modification, to all these claims, except that which recognised the necessity of the pope's consent to the clerical payment; on the 30th of January the knights of the shire were allowed their expenses and suffered to go home; and on the 14th of February Edward confirmed the charters.

'But although the baronage were disposed to press their advantage to the utmost, and perhaps even to purchase too dearly the aid of the ecclesiastical party which was headed by Winchesley, they showed themselves ready to support the king to the utmost in his resistance to the further assumptions of Boniface. The pope had now claimed Scotland as a fief of Rome and forbidden Edward to molest the Scots. The extraordinary assumption. made in a bull dated at Anagni, June 27, 1299[1], Edward determined to resist with the united voice of the nation. He had received the bull from Winchesley at Sweetheart Abbey in Galloway on the 27th of August, 1300, and , in acknowledging the receipt, had re-asserted the principle already laid down in the writ of 1295, 'it is the custom of the realm of England that in all things touching the state of the same realm there should be asked the counsel of all whom the matter concerns[2]'. He laid the bull therefore before the parliament at Lincoln, explaining that the pope had ordered him to send agents to Rome to prove his title to the lordship of Scotland; and thereon he requested the barons to take the matter into their own hands. The barons complied, and a letter was written, [12 February 1301] briefly stating the grounds of the English claim and affirming that kings of England never have answered or ought to have answered touching this or any of their temporal rights before any judge ecclesiastical or secular, by the free preeminences of the state of their royal dignity and by custom irrefragably preserved at all times; therefore, after discussion and diligent deliberation, the common, concordant and unanimous consent of all and singular has been and is and shall be, by favour of God unalterably fixed for the future, that the king shall not answer before the pope or undergo judgment touching the rights of the kingdom of Scotland or any other temporal rights: he shall not allow his rights to be brought into question, or send agents; the barons are bound by oath to maintain the rights of the crown, and they

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[1] Stubbs sources this to 'Hemingb. ii. 196; M. Westminster, p. 436; Wilkins, Cone. ii. 259; Foed. i. 907'; see p. 150, n. 1.

[2] see Stubbs, *Constitutional History*, Vol. 2, p. 159, n. 3, sourced to M. Westminster, p. 439: '*consuetudo est Angliae quod in negotiis tangentibus statum ejusdem regni requiratur consilium omnium quos res tangit.*'

will not suffer him to comply with the mandate even were he to wish it. This answer is given by seven earls and ninety-seven barons for themselves and for the whole community of the land, and is dated on the 12th of February.[1]

BRACTON

Bracton De Legibus et Consuetudinibus Angliae – Bracton on the Laws and Customs of England—Background

1250-1260 Henry de Bracton (Henricus de Brattone) wrote his treatise on the Laws of England

Bracton De Legibus et Consuetudinibus Angliae, George E Woodbine (*ed.*), Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968; *Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 1922 Yale University Press; translation copyright 1968 Harvard.

BRACTON—TEXT

Bracton, writing between 1250 and 1260[2] said[3]:

> The needs of a king.
>
> To rule well a king requires two things, arms and laws[4], that by them both times of war and of peace may rightly be observed. For each stands in need of the other, that the achievement of arms be conserved [by the laws], the laws themselves preserved by the support of arms. If arms fail against hostile and unsubdued enemies, then will the realm be without defence; if laws fail, justice will be extirpated; nor will there be any man to render just judgment.
>
> Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten laws and custom. The law derives from nothing written [but] from what usage has approved.

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[1] Stubbs, *Constitutional History*, Vol. 2, *ibid.*; he sources this in n. 1, p. 160, to 'Foed. i. 926, 927; Parl. Writs, i. 102,103; Rishanger, pp. 208-210; Hemingb, ii. 209-213; Ann. Lanerc. pp. 199, 200; Trivet, pp. 381-392; and M. Westminster, pp. 443, 444.'

[2] C H McIlwain in *Constitutionalism, Ancient and Modern*, 1940, Cornell University Press, rev. ed. 1947; third printing, Cornell paperbacks, Cornell University Press, Ithaca, New York, 1966, dates Bracton's treatise to 1259, the date preferred by Maitland and Gütterbock, see note 2 p. 69, and p. 78.

[3] *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine *(ed.)*, Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968, in 4 Volumes; *Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard.

[4] see Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall (*ed.*), Nelson in association with the Selden Society, London, 1965, at p. 1; and see 'This fact the Emperor Justinian carefully bears in mind when, in the beginning of the Prooemium to his book of *Institutes*, he says, Imperial Majesty ought to be not only adorned with arms but also armed with laws, so that it can govern aright in both times of peace and war.' –*Imperatoriam maiestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare* – Justinian, *Institutes*, Prooemium, as quoted by Sir John Fortescue, in *De Laudibus Legum Anglie*, p. 4, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, *De Laudibus* (OM68.583st), Cambridge Studies in English Legal History, , H D Hazeltine, (gen. *ed.*); reprinted by Garland Publishing New York, 1979.

Nevertheless, it will not be absurd to call English law *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law. England has as well many customs, varying from place to place, for the English have many things by custom which they do not have by law, as in the various counties, cities, boroughs and vills, where it will always be necessary to learn what the custom of the place is and how those who allege it use it.

'Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently subverted by the greater [judges] who decide cases according to their own will rather than by the authority of the laws, I, Henry de Bracton, to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men, examining diligently, not without working long into the night watches, their decisions, *consilia* and *responsa*, and have collected whatever I found therein worthy of note in a *summa*, putting it in the form of titles and paragraphs, without prejudice to any better system, by the aid of writing to be preserved to posterity forever.'[1]

The utility,.

'The utility [of this work] is that it ennobles apprentices and doubles their honours and profits and enables them to rule in the realm and sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants, in lordly order, in the place of the king, as though in the place of Jesus Christ, since the king is God's vicar. For judgments are not made by man but by God, which is why the heart of a king who rules well is said to be in the hand of God.

The end served.

'The end of this work is to quiet disputes and avert wrongdoing, that peace and justice may be preserved in the realm.[2]

Laws command and forbid

[And because] in truth these English laws and customs, by the authority of kings, sometimes command, sometimes forbid, sometimes castigate and punish offenders. Since they have been approved by the consent of those who use them and confirmed by the oath of kings, they cannot be changed without the common consent of those by whose counsel and consent they were promulgated. They cannot be nullified without their consent, but may be changed for the better, for to change for the better is not to nullify. ...[3]

What law is and what custom [Quid sit lex et quid consuetudo][4]

We must see what law (lex) is . Law (lex) is a general command, the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the *res publica*. Justice proceeds from God, assuming that justice lies in the creator. and thus *jus* and *lex* are synonymous. (*Item auctor iustitiæest deus, secundum quod iustitia est in creatore. Et secundum hoc ius et lex idem significant*). Although the law (*lex*) in its broadest sense may be said to be everything that is read (*legitur*), its special meaning is a just sanction, ordering virtue and prohibiting its opposite.*[sanctionem iustam, iubentem honesta, prohibentem contraria.]* Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed and takes the place of *lex [sic] [Consuetudo vero quandoque pro lege observatur in partibus ubi fuerit more utentium approbata, et vicem legis obtinet.]* For the authority of custom and long use is not slight.

What justice is

'Since from justice, as from a fountainhead, all rights arise and what justice commands *jus* provides, let us see what justice is and whence it is so called. Also what *jus* is and whence it is so called and

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[1] see Bracton, *loc. cit.*, Vol. 2, p. 19 [folio 1]

[2] see Bracton, *ibid.* p. 20 [folio 1b]

[3] see Bracton *ibid.* p. 21 [folio 1b]

[4] see Bracton, *ibid.*, p. 22, [folio 2]

what its precepts are, and[1] what law is and what custom, without which one cannot be just, so as to do justice and give judgment between man and man. 'Justice is the constant and unfailing will to give each his right.' This definition may be understood in two ways, according as justice is taken to be in the Creator or in the created. If in the Creator, that is, God, the matter is clear, since justice is the disposition of God which in all things rightfully orders and justly disposes. God himself gives each man according to his deserts....The definition may be understood in another way, that justice is in the created, that is, the just man. The just man has the will to give each his right, and thus that which is called justice..... As for the words 'his right', they mean his merited right, for because of delict or a past broken or the like one is [*de jure*] deprived of his right. Or say 'to each' means to him, that he live virtuously, and to God, that he love God, and to his neighbour, that he not harm him. ...[2] ....

... 'The *praecepta iuris* are three: to live virtuously, to injure no one, to give to each man his right. [Rights are infinite], because men are infinite and things are infinite, but the kinds of law are [not] infinite..... There is public law, which pertains to the common welfare of the roman res publica and deals with religion, priests and public officers....[3] ..... 'Private law is that which pertains primarily to the welfare of individuals and secondarily to the res publica. Hence we say it is in the public interest that no one misuse his own. And so conversely, that which is primarily public looks secondarily to the welfare of individuals....

'Natural law is defined in many ways. It may first be said to denote a certain instinctive impulse arising out of animate nature by which individual living things are led to act in certain ways. Hence it is thus defined : Natural law is that which nature, that is, God himself, taught all living things. The word 'quod' is then in the accusative case and the word 'natura' is in the nominative. ...Natural law is that taught all living things by nature, that is, by natural instinct.... That is what is meant when we say that our first instinctive impulses are not under our control, but our second impulses are. [Then he discusses venial and mortal sins].[4]

....will or impulse are the means by which natural law or justice disclose or manifest their effect, for virtues or *jura* exist in the soul. This is perhaps said more clearly, that natural law is a certain due which nature allows to each man. Natural law is also said to be the most equitable law, since it is said that erring minors are to be restored in accordance with [natural] equity.[5]

What the *jus gentium* is

The *jus gentium* is the law which men of all nations use, which falls short of natural law since that is common to all animate things born on earth in the sea or the air. ... The *jus gentium* is common to men alone, as religion observed toward God, the duty of submission to parents and country, or the right to repel violence and *injuria*. ...[6]

OF PERSONS

What freedom is

'Freedom is the natural power of every man to do what he pleases, unless forbidden by law or force.' But if so, it then appears that bondmen are free, for they have free power to act unless forbidden by force or law. But freedom is defined by that law by which it is created, by virtue of which they are called free. For though bondsmen may be free, since with respect to the jus gentium they are bond,

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[1] see Bracton, *ibid.*, p. 22 [folio 2b]

[2] see Bracton, *ibid.*, p. 23 [folio 2b]

[3] see Bracton, *ibid.*, p. 25 [folio 3b]

[4] see Bracton, *ibid.* p. 26.

[5] see Bracton, *ibid.*, p. 27.

[6] see Bracton, *ibid.* p. 27.

they are free with respect to the jus naturale, thus free and bond, but from different points of view, ... [1]

That God is no respecter of persons, though men are...

God is no respecter of any men whomsoever, free or bond, 'for there is no respect of persons with God' *[Romans 2:11]* for as to Him, 'he that is greatest, let him be as the smallest; and he that is chief as he that doth serve *[Luke 22:26]*. But with men, in truth , there is a difference between persons, for there are some of great eminence who are placed above others and rule over them: in spiritual matters which belong to the priesthood, the lord pope,....; in temporal matters which pertain to the kingdom, emperors, kings, and princes,... Various powerful persons are established under the king, namely earls, who take the name 'comites' from 'comitatus', or from 'societas', a partnership, who may also be called consuls from counselling, for kings associate such persons with themselves in governing the people of God, ..[2]...

The king has no equal

The king has no equal within his realm, .. nor *a fortiori* a superior, because he would then be subject to those subject to him. The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law[3] (*Attributat igitur rex legi,*) what the law bestows upon him,(*quod lex attribibuit ei*) namely, rule and power, for there is no *rex* where will rules rather than *lex [Non est enim rex ubi dominatur voluntas et non lex.*[4]] since he is the vicar of God, And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vice- regent on earth he is ,for ... the true mercy of God chose this most powerful way to destroy the devil's work, he would not use the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who lived under it. ... Let the king therefore, do the same, lest his power remain unbridled. There ought to be no one in his kingdom, who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend his act; if he does not, it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them [5]

OF ACQUIRING THE DOMINION OF THINGS

[Of Liberties and who may grant liberties and which belong to the king]

'[[6]We have explained above how rights and incorporeal things are transferred and quasi-transferred, how they are possessed or quasi-possessed, and how retained by actual use. Now we must turn to liberties and see who can grant liberties] ... [7] in the matter of liberties, we must consider who is able to grant them, to whom and in what manner they are transferred, in what way they are in possession or quasi-possession, and how they are retained by the user. Who, then? And you must know that it is the lord king himself, who has the ordinary jurisdiction and dignity and power over all who are in his realm. For he has in his hand all rights touching the crown, and the secular power, and the material sword which pertains to the governance of the realm. Moreover he has the justice and the judgment belonging to his jurisdiction, so that by virtue of his jurisdiction, so that by virtue of his jurisdiction as minister and vicar of God he attributes to each one what is his own [he may render to each his

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[1] see Bracton, *ibid.*, pp. 29-30 [folio 4b]

[2] see Bracton, *ibid.*, p. 32, [folio 5b]

[3] I suspect a better translation here would be 'the laws' rather the singular 'law', so as to avoid confusion between *leges* and *lex*.

[4] see Bracton, *ibid.*, Latin text, p. 33, [folio 5b]

[5] see Bracton, *ibid.*, p. 33, [folio 5b, folio 6]; McIlwain, in *Constitutionalism, Ancient and Modern, supra,* p.72, n. 1, sources this to folio 5.

[6] this in brackets from Bracton, *supra,* p. 166, [folio 55b]

[7] this translation is taken from McIlwain, *Constitutionalism, Ancient and Modern, supra,* unless the contrary is indicated; here from p. 75, sourced to Bracton, folio 55b.

due][1]. He has also those things which concern the peace, in order that the people entrusted to him may live in quiet and repose, that none should beat or wound or maltreat another, that none should carry away another's goods, that no one should maim or kill a man. For he has coercive power to punish and compel wrongdoers. Likewise he has it in his power to observe and to make his subjects observe the enactments and decrees and assizes provided, approved, and sworn to in his realm. [He in whose power it is to cause the laws, customs, and assises provided, approved and sworn in his realm to be observed by his people, ought himself to observe them in his own person[2]]{*Item habet in potestate sua ut leges et constitutiones et assisas in regno suo prouisas et approbatas et iuratas, ipse in propria persona sua observet et a subditis suis faciet observari.*}[3]. For it is useless[4] to establish rights if there is no one to maintain rights [unless there is someone to enforce them[5]] Therefore the king has the rights of this kind, or jurisdictions, in his hand. In addition he has in preference to all others in his realm privileges of his own under the *jus gentium* which are owing by the law of nature, such as treasure trove... [{By the *jus gentium*} things are his which by the *jus naturale* ought to be the property of the finder, as treasure trove...][6] Those things which belong to jurisdiction and the peace, and those which are incidental to justice or the peace, pertain to no one except to the crown alone and to the royal dignity; nor can they be separated from the crown, since they constitute the crown itself. For the *esse* of the crown is to exercise justice and judgment and to maintain the peace; and without these the crown could neither subsist nor endure. *[..et ea quæ sunt iustitiæ et paci annexa, ad nullum pertinent nisi tantum ad coronam. Est enim corona facere iustitiam et iudicium, et tenere pacem, et sine quibus corona consistere no poterit nec tenere.*[7]] Moreover rights of this kind, or jurisdictions, cannot be transferred to persons or to fiefs; they cannot be in the possession of a private person, neither the enjoyment nor the exercise of the right, except where this has been granted to him from above as a delegated jurisdiction, and it cannot be delegated in such a way as to prevent the ordinary jurisdiction's remaining in the king himself. *[nec delegare poterit, quin ordinaria remaneat cum ipso rege.*[8]]. On the other hand those things known as privileges, though they pertain to the crown, may be separated from it and transferred to private persons, but only by special grace of the king himself. If his grace and special concession should not appear, lapse of time does not exclude the king from such a claim. For time does not run against him in this case where there is no need of proof. For it ought to be clear that all things of this kind pertain to the crown unless there is someone who can prove the contrary by producing a special grant. In other matters, where proof is necessary, time runs against the king just as it would against any others. [9] *[But note that Bracton includes among 'liberties' things such as a power of pleading in his court, the liberty of inquiring into the assises of bread, or weights; or soke and sac; or the liberty of exemption from tolls and customs; and these liberties once granted by the king, cannot be resumed by him.*[10]]

[Of actions]

Of the division of jurisdictions; of the church and the realm

There are spiritual causes, in which a lay judge has neither cognisance nor ... execution..., and secular causes, jurisdiction over which belongs to kings and princes who defend the realm, with which ecclesiastical judges must not meddle, since their rights and jurisdictions are limited and separate, except when sword ought to aid sword, for there is a great difference between the clerical estate and the realm [11].

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[1] see Bracton, *supra*, p. 166 [folio 55b]

[2] see Bracton, *supra*, p. 166 [folio 55b]

[3] see Bracton, *supra*, Latin text, p. 166, [folio 55b].

[4] for this translation, see McIlwain, *Constitutionalism, Ancient and Modern*, *supra*, at p. 76, unless otherwise indicated.

[5] see Bracton, *supra*, p. 166, [folio 55b]

[6] see Bracton, *ibid.*, pp. 166-167 [folio 55b]

[7] see Bracton, *ibid.*, Latin Text, p. 167 [folio 55b]

[8] see Bracton, *ibid.*, Latin Text, p. 167 [folio 55b]

[9] see McIlwain, *Constitutionalism, Ancient and Modern*, *supra*, at p.76-77

[10] see Bracton, *supra*, p. 167-168, folio 56, 56b]

[11] see Bracton, *supra*, p. 304, [folio 107]

Of regulation of jurisdictions in the realm...

'Since nothing relating to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm,[has ordinary jurisdiction, and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him.

Of the oath the king must swear at his coronation.

In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace'[1]

For what purpose a king is created: of ordinary jurisdiction

To this end a king is made and chosen, that he do justice to all men [that the Lord may dwell in him, and he by his judgments may separate] and sustain and uphold that which he has rightly adjudged, for if there were no one to do justice, peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity, that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own. He must surpass in power all those subjected to him [He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, 'Great is our lord and great is his virtue etc.,' though in suing for justice he ought not to rank above the lowliest in his kingdom.] Nevertheless, since the heart of a king ought to be in the hand of God, let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, despite the statement that the will of the prince has the force of law,[Inst. 1.2.6; D. 1.4.1.pr.] because there follows at the end of the lex the words 'since by the lex regia, which was made with respect to his sovereignty'; nor is that anything rashly put forward of his own will, but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.] His power is that of *jus*, not *injuria* [and since it is he from whom *jus* proceeds, from the source whence *jus* takes its origin no instance of *injuria* ought to arise, and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself.] as vicar and minister of God on earth, for that power only is from God, [the power of *injuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs] whose work he performs. Therefore as long as he does justice he is the vicar of the Eternal King, but the devil's minister when he deviates into injustice. For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that [p.306] the Prince acknowledge himself bound by the laws. Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king. *[Item nihil tam proprium est imperii quam legibus uiuere, et maius imperio ets legibus submittere principatum, et merito debet retribuuere legi quod lex tribuit ei, facit enim lex quod ipse sit rex'.]* And since it is not only necessary that the king be armed with weapons and laws but [with wisdom], let the king learn wisdom that he may maintain justice, and God will grant wisdom to him, and when he has found it he will be blessed if he holds to it, for there is honour and glory in the speech of the wise and the tongue of the imprudent is its own overthrow; the government of the wise man is stable, and the wise king will judge his people, but if he lacks wisdom he will destroy them, for from a corrupt head corruption descends to the members, and if understanding and virtue do not flourish in the head it follows that the other members cannot perform their functions. A king ought not only to be wise but merciful, his justice tempered with wisdom and mercy Yet though there is greater safety in having to render a final account for mercy rather than judgment, it is safest that a judge's eyes precede his steps, that judgment become not uncertain through unconsidered discretion nor mercy debased by indiscriminate application, for mercy is indeed unjust when it is extended to the incorrigible. Nor does the grace of our august

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[1] see Bracton, *ibid.*, p. 304 [folio 107]

[2] note here the difference between *lege* and *lex*.

liberality extend to those who, having been pardoned an earlier offence, take it to be approved by custom rather than deserving of punishment. And when a judge is indulgent to the unworthy, does he not expose all to the infection of regression? Let him therefore be merciful to the unworthy in this way, as always to feel compassion for the man. And let him not in judgment show mercy to the poor man, that is, the mercy of remission, though to him there ought to be shown, as to all men, the mercy of compassion. And to whom and in what fashion a judge should be merciful, the merits or demerits of persons shall instruct him.' [1] *[All the rest of this part of Bracton is to do with the justices, the different types of king's justices, and their delegated jurisdictions, and examples of the king's writ in respect to various jurisdictions of various justices. And the following part in Bracton deals with the pleas of the crown.]*[2]

BRACTON—ANALYSIS

Bracton, writing between 1250 and 1260 in the time of Henry III,[3] said[4]:

—the prime requirements for a king to govern well are arms and the law[5];

—that the English laws are laws and custom which have been 'rightly decided and approved with the counsel and consent of the magnates and the general agreement of the res publica,' the king's assent having been first added thereto;

—that the 'English laws and customs, by the authority of kings' both command and punish, and since they 'have been approved by the consent of those who use them and confirmed by the oath of kings' they cannot be changed except by 'the common consent of those by whose counsel and consent they were promulgated';

—that 'the king himself and no other' has jurisdiction in the realm, 'for to that he is held bound by virtue of his [coronation] oath', which oath is taken 'in the name of Jesus Christ' 'to the people subject to him';

—that to 'this end a king is made and chosen, that he do justice to all men', and to sustain and uphold his right judgements, 'for if there were no one to do justice, peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them';

—that 'the king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity, that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own'[6]

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[1] see Bracton, *ibid.*, p. 305-306, [folio 107, 107b]

[2] see Bracton, p. 306 ff.; folios 108 ff.

[3] C H McIlwain in *Constitutionalism, Ancient and Modern*, 1940, Cornell University Press, rev. ed.. 1947; third printing, Cornell paperbacks, Cornell University Press, Ithaca, New York, 1966, dates Bracton's treatise to 1259, the date preferred by Maitland and Gütterbock, see note 2 p. 69, and p. 78

[4] *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine (*ed.*), Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University Press, Cambridge Mass., 1968, in 4 Volumes; *Bracton on the Laws and Customs of England, trans.*. Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard. The extracts from Bracton drawn upon are at Appendix B.

[5] cf. Glanvill, p. 1: 'Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples;' – *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall (*ed.*), Nelson in association with the Selden Society, London, 1965; written between 1187 and 1189; Rannulf Glanvill (Ranulf de Glanvil) was Chief Justiciar, (the equivalent of a combination of the modern positions of Chief Justice and Prime Minister: see Maitland, Constitutional History, p. 13) under Henry II from 1180

[6] see *infra*, 'anointing', for the Vicar of God concept discussed.; I might say here in passing that 'restored to that which is his own' could certainly encompass the king's maintenance and restoration of the rights of the crown.

> —that the king 'ought to have no peer, much less a superior, especially in the doing of justice,' 'though in suing for justice he ought not to rank above the lowliest in his kingdom.'
>
> —that nevertheless 'despite the statement that the will of the prince has the force of law', 'the *lex regia*,[1] which was made with respect to his sovereignty' is not 'anything rashly put forward of his own will, but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.', and also, 'what one [i.e. the king] is bound by virtue of his office to forbid to others, he ought not to do himself.'
>
> —that a king 'is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care.'
>
> —that the king should 'temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver.'
>
> —that 'a sovereign' should 'live by the laws, nor is there any greater sovereignty than to govern according to law,' for the sovereign 'ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.'

Elsewhere Bracton has said:

> —that 'neither justices nor private persons ought or can dispute concerning royal charters and royal acts', and 'no one can pass judgement on a charter or an act of the king, so as to make void the king's act'.[2]
>
> —that the king is under no man, (*non sub homine*) even if he is under God and the law.[3] [This summary is Professor McIlwain's; in fact Bracton said: 'The king has no equal within his realm, .. nor *a fortiori* a superior, because he would then be subject to those subject to him. The king himself should not be subject to any man but he should be subject to God and the law, because the law makes the king.[4] Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power, for there is no *rex* where will rules rather than *lex [Non est enim rex ubi dominatur voluntas et non lex]* since he is the vicar of God..[5]]

Now Professor McIlwain has noted that these apparently conflicting attitudes displayed by Bracton towards the king had led 'in later centuries to a two-fold tradition, one constitutional, the other absolutist.' He goes on to say: 'It is somewhat surprising that historians have been content to leave such an apparent discrepancy as this so largely unexplained Was Bracton, then an absolutist, or a constitutionalist, or was he just a blockhead?'[6] Professor Richardson has also noted that the oath which Bracton reproduced was certainly not the oath that Henry III actually took, but rather that reproduced in the third recension of the coronation order, and that Bracton, as to the actual text used, was very much 'in the dark'.[7]

I have reproduced the extracts from Bracton in sequence and with as little editing as possible, as they serve to demonstrate very clearly the state of the law from the middle of the thirteenth century, and an understanding of the manner in which the law was perceived.

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[1] note the later discussion *infra* of *lex*; I would argue that *lex regia* here means the laws of the kingdom, that is the laws and customs of the kingdom, rather than *lex* (the Law) alone.

[2] see Bracton quoted by Charles Howard McIlwain in *Constitutionalism, Ancient and Modern*, 1940, Cornell University Press, rev. ed.. 1947; third printing, Cornell paperbacks, Cornell University Press, Ithaca, New York, 1966, at p. 72, which he sources in note. 10 to Folio 54 of *De Legibus et Consuetudinibus Angliae, (Bracton on the Laws and Customs of England)*.

[3] see McIlwain, *Constitutionalism, Ancient and Modern*, at p. 72, where in note 11 he sources to Folio 5 of *De Legibus et Consuetudinibus Angliae, (Bracton on the Laws and Customs of England)*; and see note above and corresponding text.

[4] *Ipse autem rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem*—L B Curzon, *Dictionary of Law*, Pitman Publishing, 1983, 4th edn. 1993, reprinted with amendments 1994, reprinted 1995. And Bracton,

[5] see extract from Bracton, *supra*, at page 63-64, and n. 394.

[6] see McIlwain, *Constitutionalism, supra*, at p. 73.

[7] see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111 ff., at p. 172, and note 52, a reference to his article in *Traditio*, 6 (1948) at pp. 75-77

Firstly, the whole thrust of Bracton's exegesis is that the king is the 'fountain of justice and common right' as was later asserted by Serjeant Ashley in *Darnel's case*[1] and Charles I's Attorney General in the case of *The King against John Hampden (The Ship Money case)*[2]. It is from justice that all rights arise as from a fountainhead[3]; it is the king who has the jurisdiction to grant liberties and with respect to actions,[4] for the essence of the crown is to exercise justice and judgement and to maintain the peace, and without these the crown could neither subsist nor endure.[5] The king has this jurisdiction by virtue of his oath taken at coronation, whereby he swears 'three promises to the people subject to him' to maintain the peace, to forbid rapacity, and that he cause all judgements to be given with equity and mercy.[6] That the purpose of a king is to do justice, and enforce laws to uphold justice, so as to guarantee peace.[7]

Secondly, Bracton declares that the king is the vicar and minister of God on earth[8], and Christ's vice-regent[9]; and as Christ willed himself to be under the law, so too should the king, lest his power be unbridled[10] In this fashion, the king has no equal, and while under no man, should be under God and the law, because 'law makes the king' — *Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem*[11]. 'Law' here, is not '*leges*' — 'although in its broadest sense law (*lex*) may be said to be everything that is read (*Et licet largissime dicatur lex omne quod legitur*), its special meaning is a just sanction, ordering virtue and prohibiting its opposite. (*tamen specialiter significat sanctionem iustam, iubentem honesta, prohibentem contraria.*) Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight."[12] And, he says , 'Law (*lex*) is a general command, the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the *res publica*."[13]

Thus it seems to this writer,[14] that what Bracton is saying here is that the king enforces and judges the laws for he and only he has jurisdiction to do so; but that, as he is Christ's vicar on earth, he must submit himself to the laws which are made and which he enforces, for he holds his office by virtue of Law (*lex*), which is a general universally agreed thing, which may include customs. And that therefore the king should bestow upon

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[1] see *The Five Knights Case* (*Darnel's* case), 3 Charles I, 1627, Cobbett's Complete Collection of State Trials, Vol. III, p. 1, at p. 150

[2] *Cobbett's Complete Collection of State Trials*, Vol. III, , T C Hansard for Longman *et al*, London, 1816, 13 Ch. I, 1637, pp. 825 ff., Sir John Banks, at p. 1024.; he cited as authorities 1 Com. 240; 13 Ed.. IV, 8; Bracton, lib. 3, cap. 9, 8 Hen. 6, 20; 11 Rep. f. 72; 17 Ed.. 3, 49.

[3] see p. 62, *supra*; Bracton, p. 23.

[4] see p. 64 and p. 65, *supra*, Bracton, p. 166, and p. 304.

[5] see p. 65 *supra*, Bracton, p. 167.

[6] see p. 65-66 *supra*, Bracton, p. 304.

[7] see p. 66 *supra*, Bracton, p. 305. And see p. 62, *supra*, 'The needs of a king', Bracton, p. 19.

[8] see p. 66 *supra*, Bracton, p. 305.

[9] see p. 64, *supra*, Bracton, p. 33

[10] see *ibid.* p. 64, and Bracton, p. 33

[11] see Bracton, *supra*, p. 33 Latin Text; note, that n. 52, p. 33 shows that in differing manuscripts there are differing forms of this last clause: in two *rex facit legem*; in one, *lex facit legem*. And see *Ipse autem rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem*—L B Curzon, *Dictionary of Law*, Pitman Publishing, 1983, 4th edn. 1993, reprinted with amendments 1994, reprinted 1995.

[12] see Bracton, *supra*, p. 22, Latin and English texts, folio 2.

[13] *ibid.*

[14] Professor McIlwain, in Constitutionalism Ancient and Modern, concludes very much the same, except that he draws a distinction between *gubernaculum* (government) and *jurisdictio* (jurisdiction, or law, in the modern sense), which are two separate but complementary parts of the king's authority, the 'two together constituting the whole of the powers of the crown.'; see p. 84; discussion on pp. 73-89; the king could, but should not, act irresponsibly within *gubernaculum*, but never in *jurisdictio*.(see p. 78-79). McIlwain concludes that Bracton was not a blockhead, but rather misunderstood, and was used selectively by later, particularly seventeenth century, lawyers and polemicists, for their particular political purposes.

the laws (*legi*) the same rule and power which Law (*lex*) has bestowed upon him, for there is no *rex* (or kingship) where his will (*voluntas*) has dominion rather than Law, (lex) or the generally agreed good. *[Non est enim rex ubi dominatur voluntas et non lex.*[1]*]* There is nothing however to stop a king from arbitrarily employing his *voluntas* or will, because no writs run against the king, and the people may only petition him to correct his act; if he does not, then his punishment is that he awaits the vengeance of God.[2] It seems however, that this aspect of the king's *voluntas* is related to those matters with which Bracton is dealing in this section: that is, with the transfer and possession of rights and privileges (the acquisition of dominion over things), certain of which remain in the king, and others of which may be transferred by him. But those things belonging to jurisdiction and the peace, and those incidental thereto, which belong to the crown alone, cannot be transferred, but a person may exercise a delegated jurisdiction in their regard if given by the king; but the delegation does not negate the ordinary jurisdiction's remaining in the king.[3]

The king has ordinary jurisdiction in matters pertaining to the realm. He has this jurisdiction because he is bound by his oath; though Bracton notes that while the king could exercise this jurisdiction alone, he does not do so unaided The oath he takes is his coronation oath, which oath he takes in the name of Christ, and thereby the king is bound to uphold the promises he makes to the people subject to him. [*Et sciendum quod ipse rex et non alius, si solus ad hoc sufficere possit, cum ad hoc per virtutem sacramenti teneatur astrictus.*[4]]

Now it is immaterial that Bracton may have reproduced a copy of an oath that was out of date by Henry III's time,[5] since he undoubtedly saw as imperative the king's obligation to maintain the rights of the crown[6]. What is significant, however, is that he sees the coronation oath as giving him and him alone, the legal jurisdiction to ensure and to enforce the peace of the realm, and to act as judge, though he may delegate this authority. This passage where he speaks of the coronation oath is in this writer's opinion an explication of the jurisdiction of the king with respect to the making of laws, that jurisdiction which earlier Bracton had said was capable of delegation. The rest of this part (called 'On Actions') after the passages on the 'coronation oath' and 'for what power a king is created: of ordinary jurisdiction', is concerned with the delegation of the king's law-enforcing functions; with the nature of the delegated jurisdiction, with a specification of the justices who may exercise it, in what fashion they may exercise it, and where they may exercise it. The following part is called 'The Pleas of the Crown'.

As to the nature of the laws which the king has jurisdiction to enforce, and which he himself ought to obey, they are those *legis* which have 'been rightly decided and approved with the counsel and consent of the magnates, and the general agreement of the *res publica*, the authority of the king or prince first having been added thereto'[7], and include customs of individual places[8]. These 'English laws and customs by the authority of kings' (*leges Anglicanæ et consuetudines regum auctoritate*) sometimes command, sometimes forbid. They are laws (*leges*) and customs which having been approved by all those who use them, and confirmed by the oath of kings, cannot be nullified without the common consent of all those by whose counsel and consent they were promulgated[9] I doubt, given the context, that Bracton here adverts to the coronation oath.

His intention in his treatise is to deal with judgements[10], and to provide guidance for those who are to judge. Where he speaks here of laws, (*leges*) he is merely stating a truism of the time, since legislation as we know it

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[1] see Bracton, *ibid.*, Latin text, p. 33, [folio 5b]

[2] see p. 64 *supra*, and Bracton p. 33, [folio 5b, folio 6]

[3] see p. 65 above; and Bracton, p. 167, folio 55b.

[4] see Bracton, *supra*, Latin text, p. 304, folio 107, and p. 66 above.

[5] see Richardson, *Traditio*, 1960, p. 172, *supra*, my footnote 417.

[6] see page 65 above, and Bracton, p. 167 [folio 55b]

[7] see Bracton, p. 19, folio 1

[8] *ibid.*

[9] *ibid.* Bracton, p. 21, folio 1b.

[10] see Bracton, p. 20, folio 1b: 'Its matter consists of the judgments and the cases that daily arise... in the realm of England.' and 'The intention of the author is to .. instruct ... what action lies and what writ, ... how and by what procedure, ... suits and pleas are decided according to English laws and customs....' and 'The utility is that it ennobles apprentices... and enables them to sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants, in lordly order, in the place of the king, as though in the

did not then exist. Statements (or restatements) of the law designed to bind the king were confirmed specifically by an oath of the king—witness John's *Magna Carta*, cap. 63[1]; but others which today are thought of as law, such as Henry III's confirmation of John's Charter in 1225, (9 Henry III) was a 'gift and grant' by the king of his 'spontaneous and good will'[2]. In any event, customs were not 'confirmed by the oath of kings'. Moreover, Bracton limits their approval to 'the consent of those who use them'; he is speaking here of those laws and customs which by the authority of kings command or forbid, and in this context he speaks of confirmation by the oath of kings. Only in so far as this sentence could be seen to refer to the jurisdictional use of the laws and customs could, I believe, he be referring to the coronation oath.

And when he refers to the laws and customs not being able to be 'changed without the common consent of those by whose counsel and consent they were promulgated', it must be remembered that while the magnates gave counsel, it was only the king who consented If, however, this reading is wrong, and if Bracton was actually saying that what was accepted as law could not be changed without the consent of the magnates, and the *res publica*, as well as the king, then this would appear to provide a still further support for the currency of the 'Henry VIII/Blackstone/Stubbs' oath at about the time Bracton was writing; (it will be recalled that the text of that oath refers, in addition to the maintenance of the rights of the crown, to an obligation to 'grant to hold laws and customs of the realm and to his power keep them and affirm them which the folk and people have made and chosen'.[3]

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FORTESCUE

DE LAUDIBUS LEGUM ANGLIE— BACKGROUND

Sir John Fortescue, *De Laudibus Legum Anglie*, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, De Laudibus (OM68.583st), Cambridge Studies in English Legal History, , H D Hazeltine, (*gen. ed.*); reprinted by Garland Publishing New York, 1979.

- Fortescue born 1385-1398,
- returned as MP for variously, Tavistock, Totnes, Plympton, Wiltshire a total of 8 times, in the parliaments of 1421(twice), 1423, 1425, 1426, 1429, 1432, 1436 (lix-lx);
- became King's Serjeant, 1441, Chief Justice of King's Bench, 1442, (lx), knighted, 1443, (lxi),
- 1450 consulted with other justices in *Duke of Suffolk's case*, (*Rot. Parl.*, v, 176, lxii),

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place of Jesus Christ, since the king is God's vicar. For judgments are not made by man but by God, which is why the heart of a king who rules well is said to be in the hand of God.'

[1] 'Wherefore we wish and firmly command that the English church shall be free, and the men in our realm shall have and hold all the aforesaid liberties, rights and concessions well and peacefully, freely and quietly, fully and completely for them and their heirs of us and our heirs in all things and places for ever, as is aforesaid. Moreover an oath has been sworn, both on our part and on the part of the barons, that all these things aforesaid shall be observed in good faith and without evil intent. Witness the above-mentioned and many others. Given under our hand in the meadow which is called Runnymede between Windsor and Staines on the fifteenth day of June in the seventeenth year of our reign.' see Evans and Jack, *Sources of English Legal and Constitutional History*, p. 60.

[2] see Evans and Jack, *supra*, at p. 51; and *Statutes at Large*, Vol. I, preamble, p. 1 : 'of our meer and free will, have given and granted...'

[3] see Appendix D, p. 20, Edward I; '*et que il grauntera a tenure les leyes et custumes du royalme, et a son pouoir les face garder et affirmer, que les gentes de people averont faitz et eslies*'.

- consulted by the lords in *Thorpe's case*, (*Rot. Parl.* v, 239, p. lxiv), 1460,
- consulted with other justices in the *Duke of York's case*, (*Rot. Parl.* v, 376, lxv),
- 1461, joins forces with Queen Margaret, (lxvi)
- 1461-1463, retires with Henry VI and Margaret to Scotland, title of Chancellor, member of Henry VI's council, advises on propaganda, composes tracts on the succession and writes *De Natura Legis Nature.*; attainted by Act of Parliament. (lxvi)
- 1463 sails with Margaret, and settles at castle of Koer near St Mihiel at Bar. (lxvi)
- 1468-1471, writes *De Laudibus Legum Anglie.* (lxvi)
- 1471, writes *Governance of England.* (lxvi)
- 1471, arrives Weymouth, proclaimed traitor, captured at battle of Tewkesbury, then general pardon. (lxvi-lxvii)
- 1471-1473, member of Edward IV's council; writes *Declaration on Certain Wrytings*, (lxvii)
- 1479, dies. (lxvii)

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De Laudibus—Text

Introduction to the matter.

p. 3. Not long ago, a most detestable civil war raged in the kingdom of England, whereby, Henry the Sixth, there king most pious, with Margaret his queen consort, daughter of the king of Jerusalem and Sicily, and their only son Edward, prince of Wales, were driven out, and whereby king Henry was eventually seized by his subjects, and for a long time suffered the horror of imprisonment, whilst the queen herself, thus banished from the country with her child, lodged in the duchy of Bar in the domain of the said king of Jerusalem.

The prince, as soon as he became grown up, gave himself over entirely to martial exercises; and seated on fierce and half-tamed steeds urged on by his spurs, he often delighted in attacking and assaulting the young companions attending him, sometimes with a lance, sometimes with a sword, sometimes with other weapons, in a warlike manner and in accordance with the rules of military discipline. Observing this, a certain aged knight, chancellor of the said king of England, who was also in exile there as a result of the same disaster, thus addressed the prince.

Cap. 1

p. 3. And herein the chancellor first proposes to the prince the study of the law.

'For the office of a king is to fight the battles of his people and to judge them rightfully.' [1 Kings, 8, 20] [p. 3] 'For that reason, I wish that I observed you to be devoted to the study of the laws with the same zeal as you are to that of arms, as battles are [p. 5] determined by arms, so judgements are by laws.[1] This fact the Emperor Justinian carefully bears in mind when, in the beginning of the Prooemium to his book of *Institutes*, he says, Imperial Majesty ought to be not only adorned with arms but also armed with laws, so that it can govern aright in both times of peace and war.' [*Imperatoriam maiestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare.*[p. 4] – Justinian, *Institutes*, Prooemium]

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[1] cf. Bracton, *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine *(ed.)*, Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968; *Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard, at p. 19 – 'The needs of a king. To rule well a king requires two things, arms and laws, that by them both times of war and of peace may rightly be observed. For each stands in need of the other, that the achievement of arms be conserved [by the laws], the laws themselves preserved by the support of arms.'; and see Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall *(ed.)*, Nelson in association with the Selden Society, London, 1965, at p. 1 – 'Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples...'

p. 5 Moses commands the kings to read this book [Deuteronomy], so that they may learn to fear God and to keep his commandments, which are written in the law. Lo! to fear God is the effect of law, which man shall not be able to attain to, unless he first knows the will of God, which is written in the law.

Cap. III Herein the chancellor defends his proposal

p. 7. 'I want you, then, to know that not only the laws of Deuteronomy, but also all human laws, are sacred, inasmuch as law is defined by these [p. 9] words, Law is a sacred sanction commanding what is honest and forbidding the contrary. [*Lex est sanccio sancta iubens honests et prohibiens contraria.* [p. 6-8] – this maxim comes from the Accursian Gloss to Justinian's Institutes, 1, 2, 3 – p. 147.]

p. 9 Hence the reason for that command was none other than because the laws are set forth in Deuteronomy rather than in other books of the Old Testament—the laws by which the king of Israel is obliged to rule his people, a fact which the circumstances of the command obviously show us. Hence, prince, the reason impels you no less than the kings of Israel to be a careful student of the laws by which you will in future rule the people. For what is said to the king of Israel must be understood figuratively to apply to every king of a people acknowledging God.

p. 9 Have I not, then, fitly and usefully proposed to you this command enjoined to the kings of Israel—to learn their law? For not only its example, but also, figuratively speaking, its [p. 11] authority, teach you and oblige you to act in the same way with regard to the laws of the kingdom which, by the permission of God, you are to inherit. [*et obligant ad consimiliter faciendum de legibus regni quod annuente Deo hereditaturus es.*' p. 10]

Cap. IV Herein the chancellor proves that the prince can become happy and blessed through the laws

p. 11 The laws, most honourable prince, not only invite you to fear God and thereby be wise...., but invite you also to their study, that you may obtain happiness and blessedness so far as they are obtainable in this life. For all the philosophers... are agreed in this respect, namely that happiness or blessedness is the end of all human desire

'Human laws are none other than rules by which perfect justice is manifested [*Leges humane non aliud sunt quam regule quibus perfecta iusticia edocetur.*' p. 10]

p. 13 ... 'This justice , indeed, is the object of all royal administration, because without it a king judges unjustly and is unable to fight rightfully. But this justice attained and truly observed, the whole office of king is fully discharged. therefore, since happiness is the perfect exercise of virtues, and human justice, which is not perfectly revealed except by the law, is not merely the effect of all virtue, it follows that he who is in enjoyment of justice is made happy by the law. Thereby he becomes blessed, for blessedness and happiness are the same in this fleeting life, and through justice he attains the *Summum Bonum* of this world. Not, indeed, that law can do this without grace, nor will you be able to learn or strive after law or virtue , without grace. ....

Verily, if these considerations do not move you who are one day to rule the kingdom, the words of the prophet shall persuade you and oblige you to the study of the law, saying, *Be instructed, ye who judge the earth.* ... But the prophet only invites kings to the study of the law by which judgements are rendered, when he uses these specific words, *Be* [p. 15] *instructed, ye who judge the earth.* It follows on, *Lest at any time the Lord be angry, and ye perish from the right away.*

Cap. V Herein he proves that ignorance of the law causes contempt for it

p. 17. .... Wherefore, prince, when you have done justice with pleasure, and have thereby become indued with the habit of law, you will deservedly be called just, and on that account it shall be said to you that *thou hast loved justice and hated iniquity, therefore the Lord thy God hath anointed thee with the oil of gladness above thy fellows*, that is to say, the kings of the earth,'

Cap. VI Herein the chancellor sums up the effect of his whole argument

p. 19. ... But because this law cannot flourish in you without grace, it is necessary to pray for that above all things; also it is fitting for you to seek knowledge of the divine law and the Holy Scripture. For Holy Writ says that *All are vain in whom subsisteth not the knowledge of God.* (Wisdom, chapter xiii).

Cap. VIII As much knowledge of the law as is necessary for a prince is speedily attainable

p. 21. ...In the laws, indeed, there is no matter and form as in physical things and in things artificially devised. But, nevertheless, there are in them certain elements out of which they proceed as out of matter and form, such as customs, statutes, and the law of nature, from which all the laws of the realm proceed as natural things do out of matter and form, just as all we read comes out of the letters which are also called elements. {p. 20 [*Sed tamen sunt in eis elementa quedam unde ipse profluunt ut ex materia et forma, que sunt consuetudines, statuta, et ius nature, ex quibus sunt omnia iura regni ut ex materia et forma sunt queque naturalia et ut ex literis que eciam elementa appellantur sunt omnia que leguntur.*]} The principles, furthermore, which the Commentator said are effective causes, are certain universals which those learned in the laws of England and mathematicians alike call maxims, just as rhetoricians speak of paradoxes, and civilians of rules of law. These principles, indeed, are not known by force of argument nor by logical demonstrations, but they are acquired, as it is taught in the second book of the *Posteriora*, by induction through the senses and the memory. Wherefore, Aristotle says in the first book of the *Physics* that *Principles do not proceed out of other things not out of one another, but other things proceed out of them* [*Physics*, i; *Auctoritates* fo. 8. – *Principia non fiunt ex aliis neque ex alterutris sed ex illis alia fiunt.*]

p. 23. .... Therefore, whoever are anxious to understand any branch of knowledge must learn thoroughly its principles. For out of them are discovered the final causes, to which one is brought by process of reasoning upon a knowledge of principles. ... Similarly, you [i.e. the prince] will deserve to be called learned in the law, if you have learned, in the role of student, the principles and causes of the law as far as the elements. For it will not be expedient for you to investigate precise points of the law by the exertion of your own reason, but these should be left to your judges and advocates who in the kingdom of England are called serjeants-at-law, and also to others skilled in the law who are commonly called apprentices. In fact, you will render judgements better through others than by yourself, for none of the kings of England is seen to give judgement by his own lips, yet all the judgements of the realm are his, though given by others. [But Chrimes in his note at p. 150 says: 'But Edward IV (*v.* Stow, *Annals*, 416), and later Richard III (*v.* C A J Armstrong, *The Usurpation of Richard III*, 156, n. 100) each sat at least once in the court of King's Bench, no doubt to emphasis their respective coups d'etat. Cf. Coke, 4 *Inst.*, c. 7: "In this court the kings of this realm have sit in the high bench, and the judges of that court on the lower bench at his feet, but judicature only belongeth to the judges of that court, and in his presence they answer all motions, etc."]

Cap IX A king ruling politically is not able to change the laws of his kingdom [*Rex politice dominans non potest mutare leges regni sui.*]

p. 25. The second difficulty, prince, of which you are apprehensive, shall be removed with ease. For you doubt whether you should apply yourself to the study of the laws of the English or of the civil laws, because the civil laws are celebrated with a glorious fame throughout the world above all human laws. Do not, king's son, let this consideration trouble you. For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that *What pleased the prince has the force of law.* But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects nor to burden an unwilling people with strange imposts, so that, ruled by laws that they themselves desire, they freely enjoy their properties, and are despoiled neither by their own king nor any other. The king, forsooth, rejoice in the same way under a king ruling entirely regally, provided he does not degenerate into a tyrant. Of such [p. 27] a king, Aristotle said (*Politics* iii) that *It is better for a city to be ruled by the best man than by the best law.* But, because it does not always happen that the man presiding over the people is of this sort, St Thomas, in the book he wrote for the king of Cyprus, *De Regimine Principum*, is considered to have desired that a kingdom be constituted such that the king may not be free to govern his people tyrannically, which only comes to pass when the regal power is restrained by political power. Rejoice, therefore, good prince, that such is the law of the kingdom to which you are to succeed, because it will provide no small security and comfort for you and the people.

[p.24 –from fo. 6 *r*] *Secundum, vero, princeps, quod tu formidas consimili nec maiori opera elidetur. Dubitas namque an Anglorum legum vel civilium studio te conferas, dum civiles supra humanas cunctas leges alias fama per orbem extollet gloriosa. Non te cunturbet, fili regis, hec mentis evagacio. Nam non potest rex Anglie ad libitum suum leges mutare regni sui, principatu namque nedum regali, sed et politico ipse suo populo dominatur.*

Si regali tantum ipse preesset eis, leges regni sui mutare ille posset, tallagia quoque et cetera onera eis imponere ipsis inconsultis, quale dominium denotant leges civiles cum dicant Quod principi placuit legis habet vigorem. [Chrimes' notes, p. 151 – from Justinian's *Institutes*, I, 2. 6; *Digest*, I iv, i.]. *Sed longe aliter potest rex politice imperans genti sue, quia nec leges ipse sine subditorum assensu mutare poterit, nec subiectum populum renitenten onerare imposicionibus peregrinis, quare populus eius libere fruitur bonis suis legibus quas cupit regulatus, nec per regum suum aut quemvis alium depilatur. consimiliter tamen plaudit populus sub rege regaliter tantum principante, dummodo in tirannidem ipse non labatur. ...*

Cap X A question by the prince.

p. 27 Then the prince said forthwith, 'How comes it, chancellor, that one king is able to rule his people entirely regally, and the same power is denied to the other king? Of equal rank, since both are kings, I cannot help wondering why they are unequal in power.'

Cap. XI A reference to the other treatise

p. 27 Chancellor: 'It is sufficiently shown. in the small work I have mentioned, that the king ruling politically is of no less power than he who rules his people regally, as he wishes: but I have by [p. 29] no means denied, either then or now, that their authority over their subjects is different..

p. 26 ... *'Non minoris esse poteatatis regem politice imperantem quam qui ut vult regaliter regit populum suum, [p. 28] in supradicto Opusculo sufficienter est ostensum, diverse tamen authoriticas eos esse in subdiitos suos ibidem aut iam nullantenus denegavi, ...'*

Cap. XII How kingdoms ruled entirely regally first began

p. 29 ...'The folk thus subject, by long endurance, and as long as they were protected, by their subjection, against the injuries of others, consented to the dominion of their rulers, thinking it better to be ruled by the government of one, whereby they were protected from others, than to be exposed to the oppressions of all those who wished to attack them. And thus began certain kingdoms, and the rulers of them, thus ruling the subject people, usurped to themselves the name of king, from the word 'regendo', and their lordship is described as entirely regal. ... Hence , when the children of Israel demanded a king as all people then had, the Lord was thereby displeased, and commanded the regal law to be explained to them by a prophet—the law which was none other than the pleasure of the king presiding over them... Now you have, most excellent prince... the form of the beginning of kingdoms possessed regally. I shall now, therefore, also try to explain how the kingdom ruled politically first began...

Cap XIII How kingdoms ruled politically first began

p. 31. 'Saint Augustine, in the 19th book of *De Civitate Dei*, chapter 23, said that *A people is a body of men united by consent of law and by community of interest.* But such a people does not deserve to be called a body while it is acephalous, i.e. without a head. Because, just as in natural bodies, what is left over after decapitation is not a body, but is what we call a trunk, so in bodies politic a community without a head is not by any means a body. Hence Aristotle in the first book of the *Politics* said that *Whensoever one body is constituted out of many, one will rule, and the others be ruled.* So a people wishing to erect itself into a kingdom or any other body politic must always set up one man for the government of all that body, who, by analogy with a kingdom, is, from "regendo", usually called a king. as in this way the physical body grows out of the embryo, regulated by one head, so the kingdom issues from the people, and exists as a body mystical, governed by one man as head. and just as in the body natural, as Aristotle said, the heart is the source of life, having in itself the blood which it transmits to all the members thereof, whereby they are quickened and live, so in the body politic the will of the people is the source of life, having in it the blood, namely political forethought for the interest of the people, which it transmits to the head and all the members of the body, by which the body is maintained and quickened.

The law, indeed, [*Lex, vero* – p. 30] by which a group of men is made into a people, resembles the nerves of the body physical, for, just as the body is held together by the nerves, so this body mystical is bound together and united into one by the law [*legem*], which is derived from the word "ligando", and the members and bones of this body, which signify the solid basis of truth by which the community is sustained, preserve their rights through the law [*legem*], as the body natural does through the nerves. And just as the head of the body physical is unable to change its nerves, or to deny its members proper strength and due nourishment of blood, so a

king who is head of the body politic is unable to change the laws [p. 33] of that body, or to deprive that same people of their own substance uninvited or against their wills. You have here, prince, the form of the institution of the political kingdom, whence you can estimate the power that the king can exercise in respect of the law [p. 32. *legem*] and the subjects of such a realm; for a king of this sort is obliged to protect the law [*legis*], the subjects, and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power ...

Cap XIV Herein the prince briefly summarises what the chancellor has already said in general terms.

p. 35. ...On the other hand I conceive it to be quite otherwise with a kingdom which is incorporated solely by the authority and power of the king, because such a people is subjected to him by no sort of agreement other than to obey and be ruled by his laws, which are the pleasure of him by the pleasure of whose will the people is made into a realm. [p. 34. *E regione, aliter esse concipio de regno quod regis solum autoritate et potencia incorporatum est, quia non alio pacto gens talis ei subiecta est, nisi ut eius legibus que sunt illius placita, voluntatis gens ipsa que eodem placito regnum eius effecta est, obtemperaret et regeretur.*] Nor, chancellor, has it thus far slipped my memory that you have shown elsewhere, with learned argument, in your treatise *Concerning the Nature of the Law of Nature,* that the power of the two kings is equal, since the power by which the one of them is free to do wrong does not increase his freedom, just as to be able to be ill or to die is not power, but is rather to be deemed impotency because of the deprivation involved. For, as Boethius said, *There is no power unless for good,* so that to be able to do evil, as the king reigning regally can more freely do than the king ruling his people politically, diminished rather than increases his power. ...

Cap. XV All laws are the law of nature, customs, or statutes [*Omnes leges sunt ius nature, consuetudines, vel statuta.*]

p. 37. ... I want you then to know that all human laws are either law of nature, customs, or statutes, which are also called constitutions. But customs and the rule of the law of nature, after they have been reduced to writing, and promulgated by sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes; and thereupon oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of the command. ...

Cap. XVI The law of nature is the same in all regions.

p. 39. The laws of England, in those points which they sanction by reason of the law of nature, are neither better nor worse in their judgements than are all laws of other nations in like cases. For, as Aristotle said, in the fifth book of the Ethics,, Natural law is that which has the same force among all men. [*Ethics,* v; *Auctoritates* fo. 36, Chrimes' note, p. 160] Wherefore there is no need to discuss it further. But from now on we must examine what are the customs, and also the statutes, of England, and we will first look at the characteristics of those customs.

Cap. XVIII Herein he shows with what solemnity statutes are promulgated in England.

p. 41. It only remains, then, to examine whether or not the statutes of the English are good. These indeed do not emanate from the will of the prince alone, as do the laws in kingdoms which are governed entirely regally, where so often statutes secure the advantage of their maker only, thereby redounding to the loss an undoing of the subjects. ... But the statutes of England cannot so arise, since they are made not only by the prince's will, but also by the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage. furthermore, it must be supposed that they are necessarily replete with prudence and wisdom, since they are promulgated by the prudence not of one counsellor nor of a hundred only, but of more than three hundred chosen men —of such number as once the Senate of the Romans was ruled by—as those who know the form of the summons, the order, and the procedure of parliament can more clearly describe. And if statutes ordained with such solemnity and care happen not to give full effect to the intention of the makers, they can speedily be revised, and yet not without the assent of the commons and nobles of the realm, in the manner in which they first originated.

Cap. XXXIII Why certain kings of England were not pleased with their laws.

p. 79. The prince, 'I do see,' he says, 'and I consider they excel among all the other laws of the whole world in the case which you have now explained. But we have heard that some of my ancestors the kings of England were little pleased with their laws, and strove to introduce the civil laws into the government of England, and tried to repudiate the laws of the land. I am indeed extremely surprised at their counsel.'

Cap. XXXIV Herein the chancellor shows the reason for the matter which the prince queries

p. 79. The chancellor: 'You would not wonder, prince, if you considered with an alert mind the cause of this attempt. For you have already heard how among the civil laws there is a famous sentence, maxim, or rule, which runs like this, *What pleased the prince has the force of law.* The laws of England do not sanction any such maxim, since the king of that land rules his people not only regally but also politically, and so he is bound by oath at his coronation to the observance of his law.

[p. 78. *Cancellarius: 'Non admireris, princeps, si causam huius conanimis mente solicita pertractares. audisti namque superius quomodo inter leges civiles precipua sentencia est maxima sive regula illa que sic canit,* Qoud principi placuit legis habet vigorem. *Qualitee non sancciunt leges Anglie, dum nedum regaliter sed et politice rex eiusdem dominatur in populum suum, quo ipse in coronacione sua ad legis sue observanciam astringitur sacremento. ...*]

This certain kings of England bore hardly, thinking themselves therefore not free to rule over their subjects as the kings ruling merely regally do, [Chrimes' note, p. 181 – 'Whom, beyond Richard II, Fortescue had in mind, I must leave to the reader's speculation.']who [p. 81] rule their people by the civil law, and especially by the aforesaid maxim of that law, so that they change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of parties at their own will and when they wish. Hence those ancestors of yours endeavoured to throw off this political yoke, in order thus to rule merely regally over their subject people, or rather to rage unchecked, not heeding that the power of the two kings is equal, as is shown in the aforesaid Treatise on the Nature of the Law of Nature, nor heeding that it is not a yoke but a liberty to rule a people politically, and the greatest security not only to the people but to the king himself, and no small alleviation of his care.

Cap. XXXVI Good that comes from the political and regal government in the kingdom of England.

p. 87. 'In the realm of England, no one billets himself in another's house against its master's will, unless in public hostelries, where even so he will pay in full for what he has expended there, before his departure thence. ... The king, indeed, may, by his officers, take necessaries for his household, at a reasonable price to be assessed at the discretion of the constables of the village, without the owners' permission. But none the less, he is obliged by his own laws to pay this price out of hand or at a day fixed by the greater officers of his household, because by those laws he cannot despoil any of his subjects of their goods without due satisfaction for them. Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones , without the concession or assent of his whole realm expressed in parliament.

... [Chrimes' note, p. 185: 'By this time, the ordinances that the king could make without parliamentary assent were not normally regarded as either changing the law of the land or making new law.' and see Chrimes, *English Constitutional Ideas in the XV Century*, 1936; reissued 1965 by American Scholar Publications, Inc, by arrangement with Cambridge University Press, AMS, New York, 1966, for discussion at pp. 269 ff. on Statutes and Ordinances, wherein he discusses all the authorities and commentators, and concludes that by the 1350s, there was a clear distinction between statutes and ordinances, the ordinance emanating from the king in council, and the statute having the agreement of the whole parliament, with the commons sometimes requesting that what had been an ordinance be enrolled as a statute; and see his reference to Richard II – 'Richard II's arbitrariness in the use of ordinances seems to have emphasised the distinction, for in 1390 the commons petitioned that neither the chancellor nor the king's council should, after the rising of parliament, make ordinances contrary to the common law, ancient customs, or statutes ordained before or during the then parliament [*Rot. Parl.* III, 266] This petition obviously suggests that an ordinance was coming to signify something like a definitely extra-parliamentary measure, and as such a possible rival to statute law; but it received no cordial response from the king, who replied merely that what was customary should be observed, saving to the king his regality, and that if anyone were thereby aggrieved, he should complain, and right would be done to him.

'A statement by Thorpe, CJ, in 1366, to the effect that an ordinance made by the lords would be held as a statute implies that the two were not the same thing, even though the courts might enforce such an ordinance as they would a statute. [*Y.B.* 39 *Edward III*, Pas. pl. 3 (App. no. 8)] Thus by the end of the fourteenth century,

people could distinguish between statutes and ordinances, although the terms were still used synonymously. [Chrimes, note 3, p. 275: 'No doubt the elaborate business of proclaiming statutes in the counties and elsewhere—not usually involved in the promulgation of ordinances—would discourage the use of statutory forms for enactments intended to be temporary. Nothing seems to be known as to the lapse of ordinances. When did an ordinance cease to be binding? Presumably ordinances (like blockades after the Crimean War) to be binding must be effective.] – Chrimes, at pp. 274-275]

Cap. XXXVII The combination of the merits of both governments.

p. 89. 'St Thomas, in the book which he wrote for the king of Cyprus, *Concerning the Government of Princes*, says that *the king is given for the sake of the kingdom and not the kingdom for the sake of the king.* [Chrimes, note, p. 190, *De Regimine Principum* iii, II.] hence, all the power of a king ought to be applied to the good of his realm, which in effect consists in the defence of is against invasions by foreigners, and in the protection of the inhabitants of the realm and their goods from injuries and rapine by natives. Therefore a king who cannot achieve these things is necessarily to be adjudged impotent. ...

p. 91 '...On the other hand, a king is free and powerful who is able to defend his own people against enemies alien and native, and also their goods and property, not only against the rapine of their neighbours and fellow-citizens, but against his own oppression and plunder, even though his own passions and necessities tempt him otherwise. For who can be more powerful and freer than he who is able to restrain not only others but also himself? The king ruling his people politically can and always does do this. Hence, prince, it is evident to you, from the effect of experience, that your ancestors, who tried to abolish political government, not only could not have obtained, as they wished, a greater power than they had, but would have exposed their own welfare, and the welfare of their realm, to greater risk and danger.

'Yet these things, which as seen in the light of experience, seem to shame the power of the king ruling merely regally, do not spring from a defect in the law but from the carelessness and negligence of such governance. So that those powers are not inferior in dignity to that of a king ruling politically. Both are equal in power, as I have clearly shown in the *Treatise Concerning the Nature of the Law of Nature* before mentioned. But all these matter now discussed show very clearly that the power of the king ruling regally is more troublesome in practice, and less secure for himself and his people, so that it would be undesirable for a prudent king to change a political government for a merely regal one. Hence St. Thomas aforementioned is deemed to wish that all realms of the earth were ruled politically.'

Cap. XLII A third case in which the aforesaid laws differ.

p. 105. '... a law is also necessarily adjudges cruel, if it increases servitude and diminishes freedom, for which human nature always craves. For servitude was introduced by men for vicious purposes. But freedom was instilled into human nature by God. Hence freedom taken away from man always desires to return, as is always the case when natural liberty is denied. In considering these matters, the laws of England favour liberty in every case. ...'

Cap. LIV The laws of England are the best for kings to know, yet it suffices for them to know these in general terms.

p. 135. The prince: ' ... [p. 137] Thus every king is stimulated to justice when he knows not only that the laws with which he does it are most just, but also that he himself is expert in their form and nature, which it suffices for a prince to know broadly or in general terms, leaving to his judges the detailed and definitive skill and knowledge of the higher branches. ... Hence the doctors of law say that, The Emperor bears all the laws in the casket of his bosom; not because he knows all the laws really and actually, but since he apprehends their principles, and their form and nature likewise,, he can be deemed to know all the laws, which he can also transform, change and abrogate; so that the laws are in him potentially, as Eve was in Adam before she was formed. ...'

THE GOVERNANCE OF ENGLAND

Sir John Fortescue , written 1471-6; (*ed.* by Charles Plummer, Oxford, 1885), pp. 109-13; from Eleanor C Lodge and Gladys A Thornton, (*eds.*), *English Constitutional Documents 1307-1485*, Cambridge, Cambridge University Press, 1935, quoted at p. 41-42

Chapter I. *The deference bitwene dominium regale and dominium politicum et regale*

Ther bith ij kyndes off kyngdomes, of the wich that on is a lordship callid in laten *dominium regale*, and that other is callid *dominium politicum et regale*. And thai diuersen in that the first kynge mey rule his peple bi suche lawes as he makyth hym self. And therfore he mey sett vppon thaim tayles and other imposicions, such as he wol hym self, withowt thair assent. The secounde kynge may not rule his peple bi other lawes than such as thai assenten unto. And therfore he mey sett vpon thaim non imposicions withowt thair owne assent. This diuersite is wel taught bi Seynt Thomas, in his boke wich he wrote *ad regem Cipri de regemine principum*. But yet it is more openly tredid in a boke callid *compendium moralis philosophie*—and sumwhat bi Giles in his boke *de regimine principum*. The childeryn of Israell, as saith Seynt Thomas, aftir that God hade chosen thaim *in populum peculiarem et regnum sacerdotale*, were ruled bi hym vndir Juges *regaliter et politice*, in to the tyme that thai desired to haue a kynge, as tho hade al the gentiles, wich we cal peynymes, that hade no kynge but a man that reigned vppon thaim *regaliter tantum*. With wich desire God was gretly offendyd, as wele for thair folie, as for thair vnkyndnes;. . .Wereby it mey appere that in tho dayis *regimen politicum et regale* was distyngued a regemine tantum regale; and that it was bettir to the peple to be ruled politekely and roialy than to be ruled only roialy. Seynt Thomas also in his said boke prasith *dorninium politicum et regale*, bi cause the prince that reigneth bi such lordshippe mey not frely falle into tyrannye, as mey the prince that reigneth *regaliter tantum*. And yet thai both bith egall in estate and in poiar, as it mey lightly be shewed and provid by infallyble reason.

Chapter II. *Whi oon king regneth regaliter, and another politice et regaliter*

Hit mey peraventur be mervellid be some men, whi on reaume is a lordeshippe only roialle, and the prince therof rulith it bi his lawe callid *Jus regale*, and a nother kyngdome is a lordshippe roiall and politike, and the prince therof rulith hit bi a lawe callid *Jus polliticum et regale*, sithin thes ij princes bith of egal estate. To this doute it mey be answerde in this maner. The first institucion of thes ij realmes vppon the incorperacion of thaim is cause of this diuersite,. Whan Nembroth be myght for his owane glorie made and incorperate the first realme, and subdued it to hymself bi tyrannye, he wolde not have it gouernyd bi any oþer rule or lawe, but bi his owne wille; bi wich and for the accomplishment þerof he made it. And therfore though he hade thus made hym a realme, holy scripture disdeyned to call hym a kynge, *quia rex dicitur a regendo;* wich thynge he did not, but oppressyd the peple bi myght, and therfore he was a tirraunt and callid *primus tirrannorum*. But holy write callith hym *robustus venator coram Domino*...Aftir hym Belus that was first callid a kynge, aftir hym is sone Ninus, and aftir hym other paynemes, þat bi ensample of Nembroth made hem realmes, wolde not haue thaim ruled bi oþer lawes then be ther owne wylles. Wich lawes ben right gode vndir gode princes, and thair kyngdomes bethe than most resembled to the kyngdome of God, . . . Wherfore mony cristen princes vsen the same lawe; and therfore it is that þe lawes seyn, *quod principi placuit, legis habet vigorem*. And thus I suppose first be gan in Realmes *dominium tantum regale*. But aftirwarde, whan mankynde was more mansuete, and bettir disposid to vertu, grete comunaltes, as was the felowshippe that came in to this lande with Brute, willynge to be vnite and made a body pollitike callid a reawme, hauynge an hed to goueme it; as aftir the saynge of the philosopher, euery comunalte vnyed on mony parties must nedis haue an hed; - then they chese the same Brute to be þer hed and kynge. And thai and he. . .ordenyd the same reaume to be ruled and justified by suche lawes as thai all wolde assent vnto; wich lawe therfore is called *polliticum*, and bi cause it is ministrid bi a kynge, it is callid *regale. Policia dicitur a poles, quod est plures, et ycos, scientia; quo regimen politicum dicitur regimen plurium scientia siue consilio ministratum*. The kynge of Scottis reignith vppon is peple bi this lawe, videlicet, *regemine politico et regali*. And as Diodorus Siculus saith in is boke *de priscis historiis*, the reawme of Egipte is ruled bi the same lawe, and therfore the kynge therof chaungith not his lawes withowt the assent of his peple. . .. Now as me semyth it is shewid openly ynough, whi on kynge reignith vpon is peple *dominio tantum regaix*, and that other reignith *dominio politico et regali*, and that oþer be ganne bi the desire and institucion of the peple of the same prince.

FORTESCUE—ANALYSIS

Professor Chrimes has noted that 'the most devastating argument Fortescue made against the Yorkist claim was surely that drawn from Lancastrian prescription. His retraction[1] provided no answer to it, although the argument appears not invulnerable.'[2]

Sir John Fortescue wrote:

> It was indupitable that a king reigns duly by God, if he is duly anointed, crowned, and sceptred according to the law and custom of the realm, in conformity with the law of God and of the Church. Neither the inhabitants of England nor of any other kingdom were allowed to transfer the realm from a duly constituted king reigning according to law and custom, to another.[3] Every dynasty, affirmed Augustine, was just, if it enjoyed divine and ecclesiastical approval, the consent of the people, and possession through a long period. The house of Lancaster had enjoyed all these advantages.[4] Any right that the Yorkists may have had was defeated by sixty years' prescription, had been renounced and adjured, and was barred by matters of record. Henry IV had been anointed and crowned king of England by the whole assent and will of the land, no man objecting, 'after the common law used in all the world'.[5]

Professor Chrimes notes: 'The prescriptive right of the House of Lancaster was indeed undeniable. But was prescription a valid title to the throne? Fortescue seems never to have refuted this argument; but York himself denied its validity,[6] and certainly it can hardly be reconciled with the common law principle that '*nullus tempus occurit regi*'[7] (time does not run against the king)[8] it must therefore have been open to grave objection.'[1]

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[1] see my footnote 548, at page 89, *supra.*

[2] see S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reissued by American Scholar Publications, New York, 1966, p. 23, sourced to *Rot. Parl.* v, 376. Fortescue was still Chief Justice in 1460. Fortescue later retracted his Lancastrian pamphlets, where he said *inter alia*, '... since these matters ... concern the right of succession in kingdoms, which is the greatest matter temporal in all the world, they ought to treated and declared by the most profound and greatest learned men that can be gotten thereto, and not by men of my simpleness that have not much laboured or studied in any faculty except the laws of this land, in which the students learn full little of the right of succession of kingdoms.' [*The Declaration upon Certayn Wrytynges*, Works, 532.] 'Nevertheless in another place {De Natura, II, ii.} he admitted that the succession was one of law only' — Chrimes, *loc. cit.*, at p. 22, and n. 2.

[3] see Fortescue, *De Titulo Edwardi Marchiae*, in *Complete Works of Sir John Fortescue, ed.* Lord Clermont, 2 Vols. London, 1869, at p. 86; quoted by Chrimes, *English Constitutional Ideas..., loc. cit.*, at pp. 64-65,

[4] *De Titulo*, p. 84; *Defensio Juris Domus Lancastriae*, pp. 501-502 in *Works, ibid.*

[5] *Defensio*, p. 500, *ibid.*

[6] see page 89 above, and my footnote 550.

[7] And here Chrimes notes that Bracton in *de Legibus* at folio 103 said: *Item de rebus et libertatibus et dignitatibus, quae pertinent ad dignitatem, domini regis et coronam, et in quibus casibus nullum tempus currit contra ipsum...*[See Bracton, *De Legibus*, {*Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine (ed.), Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968; *Bracton on the Laws and Customs of England, trans.*. Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard}, pp. 293-294: *Fere dico [f. 103] propter res quae de iure gentium pertinet ad coronam propter privilegium regis sicut de rebus quae in nullius bonis sunt nec habent dominium. Item de rebus et libertatibus et dignitatibus, quae pertinent ad dignitatem, domini regis et coronam, et in quibus casibus nullum tempus currit contra ipsum si petat cum probare non habeat necesse, et sine probatione obtinebit si implacitatus warantum non habuerit nec specialem libertatem, quia se ex longo tempore non defendet*; Translation, *ibid.*, p. 293-294: 'I say almost all, because of the things which belong to the crown by *jus gentium*, because of the king's privilege, as things which are *res nullius* and have no owner, and things and liberties which pertain to the dignity of the lord king and the crown; if he claims these time does not run against him, since he need not prove they are his, and will succeed without proof if the defendant has no warrant or special liberty, for he shall not defend himself by the exception of long use.'}; see Chrimes, *English Constitutional Ideas..., loc. cit.*, p. 65.

[8] see Chitty, J, *A Treatise on the Law of the Prerogatives of the Crown and the Relative duties and Rights of the Subject*, Joseph Butterworth and Son, London, 1820; facsimile copy from British Library copy 514.113; reproduced by Garland Publishing, Inc., David s Berkowitz and Samuel E Thorne, (*eds.*) New York, 1978; at pp. 379-380; sourced by Chitty to 'Staunford, 32, 3; Plowdens Commentaries, 243, a, 263, b; and Com. Dig. Prerog. D 86; and Godb. 297' – see Sir William Staunford, *An Exposicion of the Kinges Prerogative*, 1548, published London, 1567, facsimile copy of C.38e.2[2] in the British Library, by Garland Publishing, Inc., New York, 1979; at Fol. 32, *The eygthe chapiter* and ff.

Professor Maitland has said:

> So far as I can understand it, the confusing struggle which we call the War of the Roses is not to any considerable extent a contest between opposite principles — it is a great faction fight in which the whole nation takes sides. Still the House of Lancaster was in a measure identified with a tradition of parliamentary government, had been placed on the throne to supplant a king who had a plan of absolute monarchy, had been obliged to rely on parliament and more especially on the commons, perhaps owed its fall to its having allowed both lords and commons to do what they pleased, to get on with government. On the other hand, the claim of the House of York was bound up with a claim to rule in defiance of statutes. It might be argued that the statutes were void as having never received the assent of any rightful king, but an assertion that the laws under which a nation has been living for the last half century are not laws, because you or your ancestors did not assent to them, is practically an assertion that you have a right to rule in defiance of any laws however made.
>
> It is fortunate for us that Edward IV did not leave a son old enough to step into his father's shoes, and that no sooner had the crown been acquired by the legitimist family that the succession was again disturbed by the crimes of Richard III.[2]

Later he says: '...in Edward IV's reign torture begins to make its appearance; we hear of it in 1468. It never become part of the procedure of the ordinary courts, but free use is made of it by council, and the rack becomes one of our political institutions. The judicial iniquities of Edward IV's reign are evil precedents for his successors.'[3] And later: 'Towards the end of the Wars of the Roses we find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all cases of treason "summarily and plainly, without noise and show of judgment on simple inspection of fact,"... They show something very like contempt for the law — the constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts and restrictions to the contrary notwithstanding...'[4]

Although we know next to nothing about either the coronations or the coronation oaths taken by Richard II and the Lancastrian kings, and, in the absence of verifiable evidence, can only constructively assert that Edward was crowned and took the oath (else how could he be accepted as king?), we can deduce a number of things about what must have been in the oath, what people thought had been in it, and what people thought it signified.

For example, in the parliament of 1388, articles advanced by Lancastrian lords against the archbishop of York and two others, alleged that they had had usurped royal power by 'disenfranchising the king of sovereignty, had degraded his royal prerogative by causing him to swear to be governed and counselled by them, 'notwithstanding that the king ought not take any oath unless it were at his coronation or for the common profit of himself and his realm', and in other fashions they had encroached on his honour, estate, regality, royal power, lordship, and sovereignty, to the great dishonour and peril of the crown and of the realm.[5]

During the time now under examination, as Professor Chrimes states, the term 'estate of king' was used to denote 'the mass of traditions, attributes, rights, powers, and perhaps duties also, which were deemed to centre in the monarch.[6], and the attributes of this royal estate was 'stated repeatedly in the various transactions involved in Richard II's abdication'. The fact that those transactions represent the Lancastrian view points towards the existence of admitted attributes of regality, endorsed by, so to speak, the political

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[1] Chrimes, *English Constitutional Ideas...*, *loc. cit.*, p. 65. I note in passing that Fortescue was opposed to women succeeding to the crown, because it 'is uncustomary, inconvenient, and unlawful'. ... 'That no woman could be anointed on the hands and thus could not exercise the thaumaturgical powers of a king; nor could she bear a sword, nor be fitted to act as a judge in criminal cause. Besides it was unlawful for women to rule over men; God had made a law that women should not have power directly form him over man, and so be without a sovereign on earth. God's word to females was: *Eris sub potestate viri et ipse dominabitur tui.*' — quoted by Chrimes, *English Constitutional Ideas...*, *loc. cit.*, at pp. 62-63, from *De Titulo*, 78, 80-81; *Defensio*, 511, 513; *Of the Title of the House of York*, 498.

[2] see Maitland, *op. cit.*, p. 194-195

[3] see Maitland, *ibid.*, p. 221

[4] see Maitland *ibid.*, at pp. 266-267

[5] see Chrimes, *English Constitutional Ideas...*, *loc. cit.*, p. 5; Rot. Parl. III, 230

[6] see Chrimes, *ibid.*, at p. 3; and see my footnote 557, *supra*, on page 90. The following passage draws heavily on Chrimes, *English Constitutional Ideas...*, *loc. cit.*, p. 4 ff.

opposition. In his declaration of renunciation, Richard was made to declare absolution from or renunciation of, as the case may be:

- every oath of fealty and homage
- every bond of allegiance, regality, and lordship by which they were bound to him
- every obligation or oath 'quantum ad suam personam attinet'
- and every effect of law ensuing therefrom
- renounced the royal dignity, majesty and crown
- and lordship, power, rule, governance, administration, empire, jurisdiction
- and the name , honour, regality, and highness of king.

In the articles of deposition[1] Richard was impeached *inter alia* for breaking his coronation oath; for failing to administer justice; for failing to keep the peace; for alienating the crown estates; for subjugating the right of the crown to the pope; for failing to keep and defend the just laws of the realm—

> 'Sometimes – and often when the laws of the realm had been declared and expressed to him by the justices and others of his council and he should have done justice to those who sought it according to those laws – he said expressly, with harsh and determined looks, that the laws were in his own mouth, sometimes he said that they were in his breast[2], and that he alone could change or establish the laws of his realm. And deceived by this idea, he would not allow justice to be done to many of his lieges, but compelled very many persons to desist from suing for common justice by threats and fear;
>
> and for his perpetration of many other evils.

Sir John Fortescue was deeply imbued with the real property notion of kingship, not surprisingly since the bulk of his writings was devoted to the question of the succession to the crown, the right to which was the burning question of the age. Professor Chrimes states that to the men of the fifteenth century, the notion of the kingship as 'the highest estate temporal'[3] was a necessity: 'the idea that a monarchy could be dispensed with appears only as a reverse of arguments on its necessity.'[4] Writing in *De Natura Legibus Naturae (Treatise of the Nature of the Law of Nature)*, Fortescue concluded that the 'law of nature' was 'the only law in the light of which the succession to kingdoms can be decided'. He also concludes that the idea of kingship as a public office is subordinated to the idea of it as property, albeit public property. Chrimes says that the fact that Fortescue was able to discuss an hypothetical judgement on the succession to the kingship in *De Natura*, in terms of the rules of succession to real property restricted to the agnatic line [related to or through males on the father's side] on the grounds of the public nature of the property in dispute, (in support of course for the Lancastrian claim) testifies to the absence of any accepted legal principles of royal succession. Fortescue was able to exclude women altogether from the succession (because their succession 'is uncustomary, inconvenient, and unlawful'[5]) only by distinguishing between private and public property, and so designating the kingdom as real property of a public character. Fortescue argued that the prince was a public person;[6] his office was public because the kingship was office and had duty attached to it. There were however no legal

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[1] see my page 86 above.

[2] Note here, though, that Sir John Fortescue in his *De Laudibus Legum Anglie*, 1468-1471, [edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, De Laudibus (OM68.583st), Cambridge Studies in English Legal History, , H D Hazeltine, (*gen. ed.*); reprinted by Garland Publishing New York, 1979] in Cap. LVI has the prince state: '...Hence the doctors of law say that, The Emperor bears all the laws in the casket of his bosom; not because he knows all the laws really and actually, but since he apprehends their principles, and their form and nature likewise, he can be deemed to know all the laws, which he can also transform, change and abrogate; so that the laws are in him potentially, as Eve was in Adam before she was formed. ...' at p. 137.

[3] Fortescue, *Governance*, viii, *loc. cit.*.

[4] see Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 4

[5] see my footnote 567, p. 91 above.

[6] *A Dialogue between Understanding and Faith, Works, loc. cit.*. 489; Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 13

rules for acquiring the duties of that office, except in so far as the office itself was an object of the law of property.[1]

But, said Fortescue, 'though the king's estate be the highest estate temporal in the earth, yet it is an office in which he ministereth to his realm defence and justice'[2]; because duty attached to kingship he was able to see it at once as private property and public office[3] — 'Lo!' he says 'To fight and to judge are the office of a king'[4]. He saw the king also as being judge, holding the pure authority, a magistrate, distinguished by honour, dignity and his administration of the state (*rei publicae*); he has the power of coercion and punishment, he possess jurisdiction, and can appoint other judges under him, and since the office of magistrate is held by him to whom the administration of the state is committed, he is also magistrate.[5]

This concept of the kingship (the estate of king) as property was held by lawyers other than Fortescue. Thus it seemed to Chief Baron Fray in 1441 (Henry VI) that the law courts, including the court of parliament, were the king's inheritance, and that the law itself was a part of that inheritance. The money grants in the parliament were the revenues of his court and equally an heriditament.[6] And Nottingham, CB, as late as 1482 (Edward IV) asserted of a tenth granted in convocation that it was an inheritance and duty to the king;[7] and it could be argued whether or not the collectors of tenths were the king's debtors.[8] And in a further case all the justices found that a safe-conduct granted by the king to an alien was a covenant between him and the king.[9]

On the other hand, Fortescue said that by virtue of his coronation oath the king was bound to the observance of the laws — 'a circumstance which was not wholly agreeable to some kings.'[10] This gloss on Fortescue's words in *De Laudibus* is taken from Professor Chrimes' book, *English Constitutional Ideas in the Fifteenth Century*, which was published originally in 1936. He also edited and translated *De Laudibus Legum Anglie* published in

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[1] *De Natura Legis Naturae*, *Works*, *loc. cit.*., 115-248; see Chrimes, *English Constitutional Ideas...*, *loc. cit.*., pp. 9-13.

[2] *Governance*, viii; Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 14.

[3] Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 14

[4] *De Natura*, II, vii, *Works*, 122; Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 14. Of course, Bracton had said exactly this same thing more than two hundred years earlier – see page 62, and my note 385 above; and pages 62-72 above; and see *Bracton De Legibus et Consuetudinibus Angliae*, written between 1250 and 1260:_*To rule well a king requires two things, arms and laws*, at folio 1. But note that Chrimes, in *English Constitutional Ideas...*, *loc. cit.*., Chapter IV, Excursus I on *Fortescue and Bracton*, at p. 324 ff. says no reference to Bracton is to be found in any of Fortescue's writings, and while this may seem incredible for a chief justice of king's bench from 1422-1462, no copies of Bracton were made after 1400, and Bracton was apparently held in the 15th century as no authority on the law. Chrimes compares their respective doctrines of kingship and concludes that it is 'unlikely that Fortescue, despite all his zeal for citation and authorities, made any use of Bracton's work.' [Though, of course, (my opinion) Fortescue was essentially a political player; and a familiarity with a work which has no contemporary currency, (and to which he was in time much closer than the rediscoverers of Bracton in the 17th century) is likely to make any plagiarist's job the easier. It must be said, however, that Fortescue himself in *De Laudibus Legum Anglie*, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, *De Laudibus* (OM68.583st), Cambridge Studies in English Legal History, H D Hazeltine, (*gen. ed.*); reprinted by Garland Publishing New York, 1979], sources this to the Old Testament, 1 Kings, 8, 20 (Vulgate)—'For the office of a king is to fight the battles of his people and to judge them rightfully.' (at p. 3, English translation), and to the Prooemium of Justinian's *Institutes*, (see p. 4 (Latin) and p. 5 (English translation) — 'Imperial Majesty ought to be not only adorned with arms but also armed with laws, so that it can govern aright in both times of peace and war' '*Imperatoriam maiestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare.*'

[5] see Chrimes, *Ideas... loc. cit.*., at p. 15; and *De Natura*, II, liii, *Works*, *loc. cit.*., p. 170. cf. Bracton; see the discussion mentioned in my footnote 581 above.

[6] see 1441, the *Rector of Eddington's case*, per Chief Baron Fray, *Y.B.* 19 Henry VI, Pas. pl. i (App. no. 25); cited at Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 13.

[7] *Y.B.* 21 Edward IV, Mich. pl. 6 (App. no. 63), cited at Chrimes, *English Constitutional Ideas...*, *loc. cit.*., p. 13.

[8] *Y.B.* 1 Henry VII, Hil. pl. 5 (App. no. 76), cited at Chrimes, *English Constitutional Ideas...*, *ibid.*

[9] *Y.B.* 13 Edward IV, Pas. pl. 5 (App. no. 58), Chrimes, *English Constitutional Ideas...*,*ibid.*

[10] *De Laudibus*, xxxiv, 363; quoted in Chrimes, *English Constitutional Ideas...*, *loc. cit.*., at p. 20, Latin text in his n. 1.

1942 by Cambridge University Press[1], with his editor's note being dated '3 George VI' – 1939. Extracts from this edition of *De Laudibus* are at Appendix C.

De Laudibus was written between 1468-1471 after Fortescue had gone into exile in 1463 with Queen Margaret, wife to Henry VI, and their son, Prince Edward, at castle of Koer near St Mihiel at Bar[2] ; the *Governance of England* was written from 1471.[3] *De Laudibus* was written in the form of a dialogue between the Prince (Edward) and the Chancellor (Fortescue), probably after the restoration of Henry VI, as it is clear from the text that the writer expects the prince to succeed to the throne. Fortescue was then some eighty years of age.[4] In form and in terms of philosophy he anticipated Christopher St German's *Dialogue between a Doctor of Divinity and a Student of the Laws of England*[5], which refers to Fortescue's work[6]; and also to some degree the standpoint of Machiavelli, who wrote *The Prince* c.1513-1514[7]. His perception of the body politic:

> 'Saint Augustine, in the 19th book of *De Civitate Dei*, chapter 23, said that *A people is a body of men united by consent of law and by community of interest.* But such a people does not deserve to be called a body while it is acephalous, i.e. without a head. Because, just as in natural bodies, what is left over after decapitation is not a body, but is what we call a trunk, so in bodies politic a community without a head is not by any means a body. Hence Aristotle in the first book of the *Politics* said that *Whensoever one body is constituted out of many, one will rule, and the others be ruled.* So a people wishing to erect itself into a kingdom or any other body politic must always set up one man for the government of all that body, who, by analogy with a kingdom, is, from "regendo", usually called a king. as in this way the physical body grows out of the embryo, regulated by one head, so the kingdom issues from the people, and exists as a body mystical, governed by one man as head. and just as in the body natural, as Aristotle said, the heart is the source of life, having in itself the blood which it transmits to all the members thereof, whereby they are quickened and live, so in the body politic the will of the people is the source of life, having in it the blood, namely political forethought for the interest of the people, which it transmits to the head and all the members of the body, by which the body is maintained and quickened.
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> The law, indeed, [*Lex, vero* – p. 30] by which a group of men is made into a people, resembles the nerves of the body physical, for, just as the body is held together by the nerves, so this body mystical is bound together and united into one by the law [*legem*], which is derived from the word "ligando", and the members and bones of this body, which signify the solid basis of truth by which the community is sustained, preserve their rights through the law [*legem*], as the body natural does

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[1] Professor Chrimes in his editor's note said, *inter alia*, '...The translation now supplied is, of course, a fresh one, and in executing it my purpose has been to avoid rendering the Latin text into what might justly be described as normal twentieth-century prose, which could only have been done by way of paraphrase. Instead my aim has been to translate into plain English as closely as I could the letter and the spirit of Fortescue's words. Only in this way, in my view, is it possible to refrain from interposing modern ideas and implications between ourselves and the original...'; see Sir John Fortescue, *De Laudibus Legum Anglie*, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, De Laudibus (OM68.583st), Cambridge Studies in English Legal History, , H D Hazeltine, (*gen. ed.*); reprinted by Garland Publishing New York, 1979, at p. lvi.

[2] see Chronology of Fortescue's life in Chrimes' translation of *De Laudibus, loc. cit.*, at p. lxvi.

[3] see *ibid.*, p. lxvi; Chrimes suggests that *Governance* was written for Edward IV, not Henry VI. After the defeat of the Lancastrians at Tewkesbury in 1471, Fortescue, after capture, was pardoned, became a member of Edward IV's council, and after writing his retraction of his former position (*Declaration on Certayn Wrytings*) was restored to his estates: see *ibid.*, p. lxviii, and p. lxxiv-lxxv.

[4] see *ibid.*, p. lxxxviii.

[5] published 1523 in Latin; published by St Germain in English in 1530, reprinted by William Marshall, 1815, referred to by Chrimes in *Constitutional Ideas, loc. cit.*, at p. 203, and p. 204, n. 1.

[6] see *Dialogue, ibid.*, ii, c.46, '...but after such manner as Mr Fortescue in his book that he entituleth the book *De Laudibus legum Angliae*...', quoted in Chrimes' Introduction to *De Laudibus, loc. cit.*, at p. lxxxvi.

[7] Niccolò Machiavelli, *The Prince*, written 1513-1514, dedicated to the 'Magnificent Lorenzo de' Medici', translated by George Bull, Penguin Books, 1961, reprinted (with revisions, 1981), 1988 reprint: 'We said above that a prince must build on sound foundations; otherwise he is bound to come to grief. The main foundations of every state, new states as well as ancient or composite ones, are good laws and good arms; and because you cannot have good laws without good arms, and where there are good arms, good laws inevitably follow, I shall not discuss laws but give my attention to arms.'—at p. 77. And see the comparison made by Chrimes, in his Introduction to *De Laudibus, loc. cit.*, p. ci.

> through the nerves. And just as the head of the body physical is unable to change its nerves, or to deny its members proper strength and due nourishment of blood, so a king who is head of the body politic is unable to change the laws [p. 33] of that body, or to deprive that same people of their own substance uninvited or against their wills. You have here, prince, the form of the institution of the political kingdom, whence you can estimate the power that the king can exercise in respect of the law [p. 32. *legem*] and the subjects of such a realm; for a king of this sort is obliged to protect the law [*legis*], the subjects, and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power .....[1]

foreshadows Hobbes' *Leviathan, or the Matter, Form and Power of a Commonwealth ecclesiastical and Civil*[2] of 1641:

> For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE, in Latin CIVITAS, which is but an artificial man; though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which the *sovereignty* is an artificial *soul*, as giving life and motion to the whole body; the *magistrates*, and other *officers* of judicature and execution, artificial *joints*; *reward* and *punishment*, by which fastened to the seat of sovereignty every joint and member is moved to perform his duty, are the *nerves*, that do the same in the body natural; the *wealth* and *riches* of all the particular members, are the *strength*; *salus populi*, the *people's safety*, its *business*; *counsellors*, by whom all things needful for it to know are suggested unto it, are the *memory*; *equity*, and *laws*, an artificial *reason* and *will*; *concord*, *health*; *sedition*, *sickness*; and *civil war*, *death*. Lastly, the pacts and covenants, by which the parts of this body politic were at first made, set together, and united, resemble that *fiat*, or the *let us make man*, pronounced by God in creation.[3]

Nevertheless, Fortescue's vision of the kingship and of the estate of king, as he transmitted it to Prince Edward in *De Legibus*, is more complex than might be supposed from a recollection of the most often quoted Fortescuean passage, which is taken from *The Governance of England*:

> There bith ij kindes of kingdomes of the wich that on is a lordship callid in laten *dominium regale* and that other is callid *dominium politicum et regale*. And thai diversen in that the first kynge may rule his people bi such lawes as he mayketh himself, and therefor he may sette uppon them tayles and other imposicions, such as he woe hymself, without their assent. The secounde king may not rule his peple bi other lawes than such as thai assenten unto. And therefore he may sett upon them non imposicions without thair assent...[4]

Fortescue saw the laws (*legibus*)[5] of the realm proceeding out of 'customs, statutes, and the law of nature'[6], and that the laws of England were better than the civil law because

> ... the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only regal but also political. If he were to preside over them with a power entirely regal, he would be able to change the laws of his realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that *What pleased the prince has the force of law*. But the case is far otherwise with the king ruling his people politically, because he is not able himself to change the laws without the assent of his subjects nor to burden an unwilling people with strange imposts, so that, ruled by laws that they themselves desire, they freely enjoy their properties, and are despoiled neither by their own king nor any other.[7]

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[1] see Sir John Fortescue, *De Laudibus Legum Anglie*, 1468-1471, edited and translated with Introduction and Notes by S B Chrimes, Cambridge University Press, Cambridge, 1942, [translated from Edward Whitchurch's edition, 1545-1546,] facsimiles made from copies in the Yale University Library, De Laudibus (OM68.583st), Cambridge Studies in English Legal History, H D Hazeltine, (*gen. ed.*); reprinted by Garland Publishing New York, 1979, cap. XIII, at p. 31; and see Appendix C, p. 5

[2] Thomas Hobbes, *Leviathan, or the Matter, Form and Power of a Commonwealth ecclesiastical and Civil*, 1651, edited and abridged by John Plamenatz, Collins, The Fontana Library, 1962, third impression, 1967.

[3] Hobbes, *Leviathan, ibid.*, Introduction, p. 59; note also resemblances in relation to the law of nature – see. e.g., *ibid.*, p. 173.

[4] quoted in Maitland, *Constitutional History, loc. cit.*, at p. 198, from *The Governance of England, ed.* by Charles Plummer, Oxford, 1885, p. 109

[5] *De Laudibus, op. cit.*, p. 20.

[6] *De Laudibus, ibid.*, p. 21

[7] *De Laudibus, ibid.*, p. 25; and see Appendix C.

He draws a clear distinction between the civil law, which he sees as enabling and perhaps promoting arbitrary rule by a king, and the English law, which he sees as complying with the precepts of St Thomas Aquinas, that a king should govern his people with his 'regal power...restrained by political law ...*potestas regia lege politica cohibitur.*'[1] Such a king has no less power than one who rules purely regally, but 'their authority over their subjects is different.'[2] Civil law had interpreted the maxim *What pleased the prince has the force of law* as enabling a purely regal government[3]. But a body politic grows as does a physical body from an embryo to be regulated by one head, with the kingdom growing from the embryo of 'the people', and existing as a mystical body governed by one man, the king, as head, with 'the will of the people' being the heart and source of life of the body politic, and the law being the nerves and nourishment of it.[4] Such a body politic is a 'political kingdom', where the king is 'obliged to protect the law, the subjects and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power.'[5]

England is of this latter kind, because, while the law of nature is the same everywhere[6], and while English customs are 'the best'[7], with regard to the third arm of the law, statutes, English statutes are made 'not only by the prince's will, but also with the assent of the whole realm, so they cannot be injurious to people nor fail to secure their advantage.'[8] It is only when Fortescue has the prince question why some of his ancestors were so little pleased with these excellent English laws that they tried to introduce the civil laws to England, that he adverts to the coronation oath. (Though it has to be said that other than Richard II[9], it is difficult to think of any king of England who tried to introduce civil law to the kingdom—William the Conqueror re-enacted the Confessor's laws, and even Richard II achieved his position with the full agreement and consent of his parliaments; one suspects that Fortescue is setting up a false premise to prove his own.) Fortescue then says:

> The chancellor: 'You would not wonder, prince, if you considered with an alert mind the cause of this attempt. For you have already heard how among the civil laws there is a famous sentence, maxim, or rule, which runs like this, *What pleased the prince has the force of law.* The laws of England do not sanction any such maxim, since the king of that land rules his people not only regally but also politically[10], and so he is bound by oath at his coronation to the observance of his law.[11]
>
> [Cancellarius: 'Non admireris, princeps, si causam huius conanimis mente solicita pertractares. audisti namque superius quomodo inter leges civiles precipua sentencia est maxima sive regula illa que sic canit, Qoud principi placuit legis habet vigorem. Qualitee non sancciunt leges Anglie, dum nedum regaliter sed et politice rex eiusdem dominatur in populum suum, quo ipse in coronacione sua ad legis sue observanciam astringitur sacremento.][12]
>
> This certain kings of England bore hardly, thinking themselves therefore not free to rule over their subjects as the kings ruling merely regally do, who rule their people by the civil law, and especially by the aforesaid maxim of that law, so that they change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of parties at their own will and when they wish. Hence those ancestors of yours endeavoured to throw off this political

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[1] *De Laudibus, ibid.*, p. 27 and p. 26, my underlining; and see Appendix C for text in context.

[2] *De Laudibus, ibid.*, p.28-29

[3] *De Laudibus, ibid.*, p.25; and see Appendix C.

[4] *De Laudibus, ibid.*, p.31; and see Appendix C.

[5] *De Laudibus, ibid.*, p.33; and see Appendix C.

[6] *De Laudibus, ibid.*, p.39; and see Appendix C.

[7] *De Laudibus, ibid.*, p.41; and see Appendix C.

[8] *De Laudibus, ibid.*, p.41; and see Appendix C. Fortescue himself had been elected as a member of Parliament on 8 occasions, which may account for his touching faith in the probity and altruism of the 'more than three hundred chosen men'—see *ibid.*

[9] see also Chrimes' endnote, *De Laudibus, ibid.*, at p. 181 – 'Whom, beyond Richard II, Fortescue had in mind, I must leave to the reader's speculation.'

[10] my underlining.

[11] *De Laudibus, ibid.*, p.79; and see Appendix C.

[12] *De Laudibus, ibid.*, p.78; and see Appendix C.

> yoke, in order thus to rule merely regally over their subject people, or rather to rage unchecked, not heeding that the power of the two kings is equal, as is shown in the aforesaid *Treatise on the Nature of the Law of Nature*, nor heeding that it is not a yoke but a liberty to rule a people politically, and the greatest security not only to the people but to the king himself, and no small alleviation of his care.[1]

Clearly Fortescue saw the coronation oath as the mechanism whereby the king's regal *imperium* becomes a political one *as well*; that it is the oath he swears at his coronation which binds him to political rule, and to the observance of 'his law'. Because the king receives his kingship as a result of the will of the people, and as the law is the nervous system of the body politic, binding all parts of it together, the king is obliged to maintain and protect the laws, and not to change the laws himself without the assent of his subjects. The authority which the English king has, which is different from that of a king under the civil law who rules entirely regally, is not spelled out by Fortescue[2], but clearly the major significant difference is that the source of the king's authority in a body politic comes from the people, and the nature of this distinction is made clear in his coronation oath, where the aforementioned obligations are clearly stated, and by which he enters into his estate of king.

None of Fortescue's writing, as such, seeks to diminish the estate of the king, nor the prerogatives which came with it. Indeed, Professor Hazeltine, in his general Introduction to Professor Chrimes' translation of *De Laudibus*, states:

> Fortescue possessed the practical insight and the broad vision of a statesman, which he had gained from his own share in the public life of the nation as judge, parliamentarian, and courtier. First in *De Laudibus Legum Angliae* and then later in the *Governance of England*, he not only advocated a strong executive based on the prerogative, but advanced the view that the executive, in legislation and taxation, must be limited by parliament. This duality in his constitutional policy, which favoured both the kingship and the parliament, resulted in a twofold influence of his books on later constitutional development. His books anticipate some of the reformative measures which in fact led to the establishment of the Tudor kingship in the sixteenth century as the strongest English monarchy since the time of the Normans and the Angevins; they also furnished the arguments that were effectively used in the seventeenth century by the parliamentary opponents of arbitrary rule.[3]

Fortescue in fact says in the *Governance of England* when discussing an ordinance for the king's routine charges:

> ...so is the kynges power more, in that he may not put ffrom him possesciones necessaries for his own sustenance, than yff he myght put ham ffrom hym, and aliene the same to his owne hurte and harme. Nor this is ayen the kynges prerogatiffe, be wich he is exaltid above his subgettes; but rather this is to hym a prerogatiff. Ffor no man saue he mey haue ayen the land þat he hath onis aliened.[4]

And later in *Governance*, after his oft-quoted statements about *dominium politicum et regale*[5], he advocates a monarchy greater than any of its parts; where the king is so endowed financially as to obviate the necessity of asking parliament for much money; where the king's income over and above the revenues assigned to the ordinary expenses of government be 'greater than the livelihood of the greatest lord in England'. He says that the king's council should be composed of the wisest of the kingdom's men, not factious noblemen, and that it have power to amend the laws, and thus guide parliament by presenting bills 'riped to their hands.'[6] Clearly, these views were heavily influenced by Fortescue's own observations and experiences of the lawlessness and confusion during the Wars of the Roses. He was, however, nothing if not a pragmatist; his experience of justice and the executive, not to mention politics, warfare, exile, return and recantation, meant that he had a realistic grasp of the necessities for good and effective government. In no fashion could he be said, overall, to

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[1] *De Laudibus, ibid.*, p. 79, and p. 80; and see Appendix C

[2] see *De Laudibus, ibid.*, p.29; and see Appendix C

[3] *De Laudibus, ibid.*, p. l; Hazeltine refers to Holdsworth's *History of English Law*, II, 3rd edn., 566-71, and his *Makers of English Law*, pp. 59-68, as useful references on these aspects of Fortescue's influence.

[4] *Governance of England*, vi; quoted in Chrimes, *English Constitutional Ideas...*, at p. 42.

[5] see page XXX 106 and n. 43, *supra*.

[6] see Sir John Fortescue, *Governance of England*, Charles Plummer, (*ed.*), Oxford, 1885, Chapters 8-13, and Chapter 15, and p. 148; as quoted in Le Van Baumer, *Early Tudor Theory of Kingship*, *loc. cit.*, at p. 19

have been an advocate of the supremacy of parliament. It could thus be ventured that instead of a *dominium politicum et regale*, what Fortescue was really on about was a *dominium pragmaticum et regale*[1].

Indeed, there exists an interpretation of Fortescue's assertion that all laws are the law of nature, customs, or statutes[2], is nothing more than a statement that the king in parliament, no less than the king alone, is subordinate to the fundamental law, since statutes and constitutions are nothing more than the law of nature and custom reduced to writing.[3] On the basis of Professor Chrimes' translation, it seems to me that what Fortescue says in *De Laudibus* is that *when* custom and rules of nature are reduced to writing and promulgated by the authority of the prince, and required to be kept, they take on the colour of a statute and thereby impose a greater obligation on the subjects than if they had not been so reduced and promulgated. The real importance of Fortescue's statement here in cap. xv of *De Laudibus* is his unequivocal understanding that a statute must be rendered in writing, bruited abroad (promulgated) so that people may know of it, and that this is done by the authority of the prince.[4]

On the other hand, Fortescue stated elsewhere, in *De Natura*, that 'What things soever are either recorded in customs or comprehended in writings, if they be adverse to natural law, are held to be null and void.'[5]—that is, parliament's duty is to declare the fundamental law, and to give it practical application, as it cannot create 'new' law, since all law is implicit in the fundamental law promulgated by God at the beginning of time.[6]

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FORTESCUE, THE LAW AND THE OATH

Taking these various statements by Fortescue together, what can we deduce about the coronation oath?

Firstly, Fortescue saw a king as reigning 'duly by God, if he is duly anointed, crowned, and sceptred according to the law and custom of the realm, in conformity with the law of God and of the Church.' Secondly, he saw the king as being the head of the body politic, but as head he is subject to a political yoke, being obliged to protect the law [*legis*], the subjects, and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power; nor can he change the law without the assent of his subjects, nor to burden them with imposts without their consent. Thirdly, he subjects himself to this political yoke by binding himself by oath at his coronation to the observance of his law.

Yet the king still rules regally, for his office is to fight the battles of his people and to judge them rightfully; and if perfect justice is attained and truly observed then the whole office of king is fairly discharged.[7] The law to which he binds himself is his law. It would seem almost indisputable that Fortescue saw the coronation ceremony, including the recognition, the oath, and the anointing, as fundamental to the assumption of office of king. I would submit that, despite his later retraction of all his earlier writings under Henry VI, including *De Laudibus*, when in his extreme old age he wished to recover his property from the crown of Edward IV, he saw these parts of the coronation ceremony as part of the law and custom of the realm—as part of the common law. And that this part of the common law emanated from both the law of nature and the law of

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[1] My phrase; the Latin *pragmaticus* is derived from the Greek *pragmatikós*, meaning 'versed in state affairs' – see *Macquarie Dictionary*.

[2] see *De Laudibus, op. cit.*, cap. XV, p. 37: '...all human laws are either laws of nature, customs, or statutes, which are also called constitutions. But customs and the rule of the law of nature, after they have been reduced to writing, and promulgated by sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes; and thereupon oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of the command. ...'; and see Appendix C.

[3] see Franklin Le Van Baumer, *The Early Tudor Theory of Kingship*, 1940, Yale University Press; reissued by Russell & Russell, New York, 1966, at p. 9.

[4] It is of course, only *changes* to the existing law (of nature, existing customs and statutes), and burdens on the people in the form of imposts, for which Fortescue says the assent of the people must be obtained. He says nothing about otherwise limiting the king's power to restate the law; nor (in *De Laudibus*) about any curtailment of his prerogative.

[5] *De Natura*, p. 67; quoted in Le Van Baumer, *The Early Tudor Theory of Kingship, loc. cit.*, at p. 9.

[6] see Le Van Baumer, *ibid.*, *The Early Tudor Theory of Kingship*, p. 9.

[7] see *De Laudibus, op. cit.*, p.13; and see Appendix C.

God. The political yoke put upon the king was part and parcel of the church's (and God's) view of the proper nature of the office of king. [In this context it is worth noting that in the case of R *v Bishop of Ely* (1475, *Y.B.* 15 Edward IV, *Mich.* pl. 17)[1], Littleton J and Choke J both held that the *Prerogativa Regis*[2] could not be held as a true statute, but only as 'an affirmance of the common law.'[3] Littleton J did not see the king's prerogative (at least in that case which was to do with wardship) as dependant on, derived from, or derivable from, a statute.][4]

Given also Fortescue's view of the role of parliament in the requisite giving of assent on behalf of the people to any change in statute, and also to his ready acceptance of the king's prerogative and of the king's inability to alienate the estate, or any part of the estate, of the crown, I would submit that this is yet another argument for the likelihood of the 'Henry VIII oath'[5], or something very like it, to have been extant in Fortescue's day.

It can be seen from the indicative references to writings, enactments, statements and cases adduced above, that the protection of the king's prerogative was a matter which preoccupied not only Richard II, whom history has chosen to know as a king with pretensions to absolutism (although the terms of his indictment are in many respects somewhat childish and questionable), but also the Lancastrian kings. In speaking of the office of kingship, or the estate of the king or crown, it must be remembered that it was these appurtenances which were bestowed upon the king by his coronation. Among these appurtenances which constituted the estate of king, was the royal prerogative. This is probably most aptly demonstrated by the statute repealing a previous statute that was enacted in 1341, which said the earlier enactment had been 'expressly contrary to the Laws and Customs of our Realm of England, and to our Prerogatives and Rights Royal,...', and that the king 'by the Bond of our Oath we be tied to the Observance and Defence of such Laws, Customs, Rights, and Prerogatives,...', and that the repeal was done with the advice and consent of the wise men of the realm solely for the purpose of 'the Conservation and Reintegration of the Rights of our Crown, as we be bound, ...'.[6]

Thus while Fortescue could say that the kingdom of England was a *dominium politicum et regale,* and that being the case the 'king may not rule his peple bi other lawes than such as thai assenten unto. And therefore he may sett upon them non imposicions without thair assent', much of, (as Maitland has said) '...the real meaning of kingship varie[d] from decade to decade. The character of the king, the wants of the time, these decide not merely what he will do but what he can do: this we must learn by tracing history step by step, — by seeing that the kingship is practically a different thing in almost every reign.'[7]

In real terms, absolutism probably reached its height under Edward IV, and as Maitland has suggested, it is probably fortunate for the future of western civilisation as we know it, that Richard III took the crown and that Henry VII in turn took it from him.[8] The great change that occurred with both these kings is that both of them felt they needed the consent of the realm through parliament to ratify their claim to the estate of the king. They both thought it necessary in the light of the manner in which they came to the estate of king. These two precedents, occurring so closely together, gave a certain amount of power to the assembled estates in parliament, a power which from thenceforth was only to grow.

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[1] see discussion in Chrimes, *Constitutional Ideas...*, *loc. cit.*., at p. 44, and the text reproduced in his Appendix at p. 373

[2] cited as 17 Edw. II; see Ruffhead, Owen, (ed.), *The Statutes at Large, Magna Charta to the Twenty-fifth year of the reign of George III inclusive*, Charles Eyre and Andrew Strahan, London, 1786, Vol. I, p. 180; but see also *Statutes in Force*, Official Revised Edition, *Prerogativa Regis Of the King's Prerogative*, (temp. incert.) Cc. 13, 17, Revised to 1st February 1978, Her Majesty's Stationery Office, London, 1978.

[3] see Chrimes, *Constitutional Ideas...*, *loc. cit.*., at p. 44; per Littleton J, '*...mes come un affirmance del comon ley*', see Chrimes at p. 373; and *Y.B.* 15 Edw. IV, *Mich.* pl. 17, at pp. 44, 254, 256.

[4] Chrimes, *Constitutional Ideas, ibid.*, p. 44.

[5] see Chapter X, p. XXX, *supra.* It will be recalled that Blackstone had found the text in Lettou and Machlinia's revised *Statutes of the Realm*, dating from the time of Edward IV.

[6] see 15 Edward III, and my page 94 *supra*, and n. 535.

[7] Maitland, *Constitutional History*, p. 197.

[8] see Maitland, *Constitutional History*, p. 194-195; and page 101 and notes 12-14, *supra.* But note that more recent constitutional historians have tended to take a different view; for example, Bertie Wilkinson in his *The Later Middle Ages in England, 1216-1485*, Longmans, green and Company, London, 1969, views Edward IV as a 'remarkable ruler'—see Chapter 9 *passim*, and p. 286.

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HOBBES

Thomas Hobbes, *Leviathan, or The Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill*, [written 1648-1650 in France] printed for Andrew Crooke, at the Green Dragon in St Paul's Churchyard, London, 1651, J C A Gaskin, (*ed.*), Oxford University Press (World Classics paperback), London, 1996

- Man in a state of nature (not living in a civil commonwealth with a sovereign power) lives in a state of war whose consequence is 'continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short.'[1]
- The right of nature (*jus naturale*) is liberty for self preservation; the law of nature (*lex naturale*) is a rule found out by reason which forbids that which is destructive of life.[2]
- The fundamental law of nature is to seek peace, to defend ourselves, and (as a result of this) the second law of nature is that man be willing for the sake of peace and self defence to lay down each these rights to all things, and be content with so much liberty against other men as he would allow other men against himself.[3]
- The second law is fulfilled by divestment of his right—men may mutually transfer or renounce a right for consideration of some reciprocal right or perceived good. Mutual transference of right is called a contract. But transfer of a right by one party for future performance by the other is a pact or covenant, which may be indicated by the words 'I will give', 'I grant', which constitute a promise.[4]
- Some rights are inalienable and incapable of renunciation or transference, such as the right to defend oneself from force.[5]
- Security of performance of a covenant is secured in both civil and pre-civil societies by the fear of the invisible power of the God man worships, or an Oath, which is a form of speech added to a promise meaning that failure of performance will put the swearer out of the mercy of God, or bring vengeance upon him.[6]
- The third law of nature is that men perform their covenants, from which flows justice.[7]
- But without some common power, notwithstanding the laws of nature, security and peace cannot be obtained; this can only be achieved if all by simultaneous mutual covenant submit their wills and judgements to one who is the real unity of them all, thus giving him the power and strength of them all to perform the wills of all for peace at home and security against enemies abroad, this one being the sovereign, and the others being subjects.[8]
- Men covenanting with each other to confer on one man or body the right of representing them all thus form a commonwealth or a civil society for the purposes of peace and protection [9]
- The representative has sovereign power by the consent of the people[10]
- By virtue of this covenant the people are required to be obedient to the sovereign and cannot transfer that obedience to another without the sovereign's consent[1]

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[1] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIII, paragraphs 8-9, pp. 84-85

[2] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 1-3, p. 86.

[3] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 4-5, pp. 86-87.

[4] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 8-14, pp. 88-89.

[5] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraph 8, and paragraphs 29-30, p. 88, and p. 93.

[6] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 31-32, pp. 94-95—'Let Jupiter kill me else, as I kill this beast'; or 'I shall do thus and thus, so help me God.'.

[7] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XV, paragraphs 1-2, p. 95.

[8] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVII, paragraphs 13-15, pp. 114-115.

[9] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVIII, paragraph 1, p. 115

[10] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVIII, paragraph 2, p. 115

- The sovereign by virtue of the covenant has the *indicia* of sovereignty (law making, judicature, peace and war etc.)[2]
- Sovereignty is incommunicable, inseparable, and indivisible, unless in direct terms renounced by the sovereign.[3]
- Sovereignty may be by acquisition (conquest) or institution, but the conditions of sovereignty are the same in both.[4]
- Sovereignty must be absolute, for the consequences of the alternative are much worse, no greater inconvenience happening to a commonwealth than by the disobedience of subjects.[5]
- 'The skill of making, and maintaining commonwealths, consisteth in certain rules, as doth arithmetic and geometry; not (as tennis-play) on practice only ; which rules, neither poor men have the leisure, nor men that have had the leisure, have hitherto had the curiosity , or the method to find out.'[6]
- The liberty of subjects is subject to the civil laws;[7] the subject has liberty in all those rights he has under the law of nature which are inalienable (not bound to hurt themselves, or to incriminate themselves),[8] or on which the civil law is silent.[9]
- Subjects have liberty to disobey a sovereign thus : 'When therefore our refusal to obey, frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse ; otherwise there is.'[10]
- Subjects have obligations of obedience to the sovereign only so long as the sovereign has power to protect them, and are absolved of them : if the subject is taken prisoner of war of condition of subjection to the victor; if the monarch relinquish his sovereignty for himself and his heirs, or has no known heir and has not declared one; if the subject is banished; if a monarch subject himself to a victor in war, but not if he is merely taken prisoner.[11]
- Factions within the structure of a government (papists, protestants, patricians, plebeians etc.) are unjust, 'as being contrary to the peace and safety of the people, and a taking of the sword out of the hand of the sovereign.'[12]
- Natural laws are divine laws, which may be declared by the sovereign power; subjects are bound to obey laws declared to be laws by the sovereign power 'in all things not contrary to the moral law (that is to say, the law of nature)'.[13]
- Subjects are bound to uphold fundamental laws, which are those without which the commonwealth would fail, which are the prerogatives attaching to the sovereign power (war and peace; justice; the discretionary doing of things necessary for the public good).[14]

The third part of *Leviathan* is called 'Of a Christian Commonwealth', and is devoted to a forensic study of the scriptures, showing that, because of the institution of kings in Israel who replaced the priests (who had ruled of divine right) as the rulers and arbiters of the people, the church is subject to the civil sovereign.[15] (Hobbes had earlier indicated that:

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[1] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVIII, paragraph 3, p. 115

[2] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVIII, paragraphs 4-15, pp. 115-120.

[3] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVIII, paragraphs 16-18, pp. 120-121, and Chapter XIX, paragraph 3, pp. 123-124..

[4] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XVII, paragraph 15, pp. 114-115 ff., and Chapter XX, especially paragraph 3, pp. 132-139, especially p.132..

[5] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XX, paragraphs 18-19, pp. 138-139.

[6] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XX, paragraph 19, p. 139.

[7] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXI, paragraph 5, p. 141.

[8] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXI, paragraphs 11-13 p. 144.

[9] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXI, paragraph 18, p. 146.

[10] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXI, paragraph 18, p. 146.

[11] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXI, paragraphs 21-25, pp. 147-148.

[12] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXII, paragraph 32, p. 158.

[13] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXVI, paragraphs 37-39 and paragraph 40, pp. 189-190, and pp. 190-191.

[14] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XXVI, paragraphs 41-42, pp. 191-192..

[15] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XL, paragraphs 9-11, pp. 317-319.

> Therefore the civil and ecclesiastical power were both joined together in one and the same person, the high-priest; and ought to be so, in whosoever governeth by divine right; that is by authority immediately from God.[1])

Moreover, since Christ's kingdom is not of this world, a priest or minister of Christ can claim no right to rule nor to obedience in his name in this world, unless he is a king.[2] Subjects of a king, who include ecclesiastics, must obey the laws of the king in matter of religion, irrespective of their own consciences in the matter.[3] In a civil society, pastors execute their offices by the authority of the commonwealth, given to him by the king :

> All pastors, except the supreme, execute their charges in the right, that is by the authority of the civil sovereign, that is, *jure civili*. But the king, and every other sovereign, executeth his office of supreme pastor, by immediate authority from God, that is to say, in *God's right*, or *jure divino*. And therefore none but kings can put into their titles (a mark of their submission to God only) *Dei gratia rex, &c.*[4]

> From this consolidation of the right politic and ecclesiastic in christian sovereigns, it is evident, that they have all manner of power over their subjects, that can be given to man, for the government of man's external actions, both in policy, and religion; and may make such laws, as they themselves shall judge fittest, for the government of their own subjects, both as they are the commonwealth, and as they are the Church ; for both State and Church are the same men.[5]

Hobbes had earlier discussed the kinds of civil government, showing empirically that monarchy was the most efficient form. After demonstrating that the only role which the pope, his bishops, the church of Rome or any other church could have was purely educative and evangelical, and subject to the civil sovereign authority, he discussed again the types of sovereign power, concluding that so far as the church was concerned, it did not matter which kind of government was the best, for they all were 'absolute sovereignty(s)', 'governments, which men are bound to obey, ...simple and absolute'.[6] Finally, in the fourth part of *Leviathan*, called 'Of the

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[1] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XL, paragraph 9, p. 317.

[2] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapters XL-XLII, and Chapter XLII, paragraph 6, p. 330.

[3] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLII, paragraphs 10-12, pp. 331-333, and paragraphs 67-71, pp. 360-362.

[4] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLII, paragraph 71, p. 362.

[5] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLII, paragraph 79, p. 366.

[6] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLII, paragraph 82, p. 367..

Kingdom of Darkness', he inveighs against the church of Rome, (which he identifies with the kingdom of darkness) in one particularly biting part likening it to the 'kingdom of fairies.'[1]

[1] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLVII, paragraphs 21-34, pp. 463-465.

APPENDIX IV

SIR EDWARD COKE'S LEGACY

SIR EDWARD COKE

Sir Edward Coke was a choleric, splenetic, intemperate man, brilliant, erratic and passionate. By virtue of all these qualities, and his propensity for writing down his views of the law in his *Reports* and *Institutes*, he has had a disproportionate effect on jurisprudence, and on the interpretation of the law, not only in his own time, but even to our own time, and in lands far from his. His character and temperament intimidated most of his contemporaries—'We shall never see his like again, praises be to God!', said his widow on his death.[1]

He made his reputation in *Shelley's case*[2], ably reported by himself, and was appointed Solicitor-General to Elizabeth I in 1592, Speaker to the House of Commons in 1593, and was Attorney-General from 1594 until 1606 under both Elizabeth and James I. He became immensely rich.[3] For the crown, he prosecuted the Earl of Essex[4] and Sir Walter Raleigh[5] for treason, in the process acquiring the odium of the people for his brutality towards the accused[6]. He began publishing his *Reports* in 1600, but they are not reports as such, incorporating as they do his own comments of what the cases should have decided, and even his notes on earlier cases.

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[1] S E Thorne, *Sir Edward Coke, 1552-1952*, Selden Society, 1952, p. 4; sourced to BM Harl. MS. 7193, fol. 16.

[2] *Wolfe v Shelley* (1581) B. & M. 143-149, 1581, referred to in *Biographical Dictionary of the Common Law*, A W B Simpson, (*ed*), Butterworths, London, 1984, at p. 117.

[3] See T F T Plucknett, *A Concise History of the Common Law*, 5th edn., Little Brown and Company, Boston, 1956, at p. 242. And see Sir William Holdsworth, *A History of English Law*, Methuen & Co, London, 1903, 7th edn., revised, 1956, reprinted 1966, Vol. V, p. 426,

[4] 1600, *Biographical Dictionary, op. cit.*, p. 117.

[5] (1603) 2 *State Trials*, 1; and see Holdsworth, *A History of English Law*, Vol. V, *loc. cit.*, at p. 427 and n. 1; and see Stephen, *HCL* I, 333, n. 2, —'the extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court of justice, except perhaps those in which Jeffries presided.' And see *Biographical Dictionary, ibid.*, p. 117.

[6] See Hallam, *Constitutional History, loc. cit.*, p. 239.

The correctness of his view of the law assumed pre-eminence over mere historical precision.[1] Coke's personal authority was sufficient initially to enable him to get away with this lack of method, despite strong opposition from contemporaries, such as Chancellor Lord Ellesmere. Because of his mastery of the Year Books, his penchant for exhaustive statement of 'authorities' and broadsides of citations, his personal pre-eminence and his choleric personality, 'there was almost immediately a tendency not to go behind Coke'.[2] Maitland has remarked in relation to *The Mirrour of Justices*[3], a pseudo-legal work created by a romantic lunatic and liar[4], that Coke credulously filled his *Institutes* with tales from the *Mirrour*, and '[t]hat it would be long to tell how much harm was thus done to the sober study of English legal history.[5]

COKE AND THE PREROGATIVE

As Speaker and Attorney-General under Elizabeth, he was the queen's nominee; and during the time of his service to her (and as Attorney-General to James I) he was a firm supporter of the royal prerogative.[6] His original view was that '[a]mong other things the queen may levy taxes for the repair of bridges[7] etc., impose restraints on the landing of goods for the better collection of customs, and "prohibit things hurtful to the state".'[8] He had supported an extraordinary discretionary power of the crown.[9] At that time, of course, Coke as Attorney-General was himself in a position to exercise many of these powers on behalf of the crown. According to Hallam, 'before he had learned the bolder tone of his declining years',[10]

> Lord[11] Coke...lays it down that no act of parliament can bind the king from any prerogative which is inseparable from his person, so that he may not dispense with it by *non-osbtante;* such is his sovereign power to command any of his subjects to serve him for the public weal, which solely and inseparably is annexed to his person, and cannot be restrained by any act of statute.[12]

In fact this *Case of Non Obstante*[13], or Dispensing Power, is to be found at folio 18 in the Twelfth part of Coke's *Reports*, which were published posthumously. The Introduction to the Twelfth Part shows that some believed that folios 18 and 19 were 'not fit to be allowed' and 'were not intended for the press by the writer.'[14]

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[1] See J H Baker, *An Introduction to English Legal History*, Butterworths, London, 1990, at p. 210.

[2] See Plucknett, *op. cit.*, at pp. 280-282.

[3] *The Mirrour of Justices, written originally in the Old French, long before the Conquest, and many things added, by Andrew Horne, to which is added The Diversity of Courts and their Jurisdictions*, translated into English by W. H. [William Hughes], of Gray's Inn, Esq, 1642, John Byrne & Co, Washington DC, 1903; reprinted from the 1903 edition by Rothman Reprints, Inc, N J; Augustus M Kelley, Publishers, New York NY, 1968. And for another text, see *The Mirror of Justices*, edited for the Selden Society by William Joseph Whittaker, with an introduction by Frederic William Maitland; Publications of the Selden Society, Vol. VII, 1898; reissued, 1978.

[4] To use some of Maitland's words, at p. xlviii of his Introduction.

[5] Maitland's Introduction to *The Mirror of Justices*, *loc. cit.*, p. x.

[6] See Plucknett, *Common Law*, *op. cit.*, p. 50, and pp. 242-243.

[7] This of course was part of the old Anglo-Saxon *trinoda necessitas*.

[8] See Coke's notes on the prerogative in S.P. Dom. 1598-1601, 521, cclxxvi 81, quoted in Holdsworth, *loc. cit.*, at p. 427, n. 3.

[9] He had even at one time supported the use of torture—see Holdsworth, Vol. V, *loc. cit.*, p. 427.

[10] H Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869.

[11] Sir Edward Coke is often referred to as 'Lord Coke' by later judges and historians, though he was never elevated to the peerage. His descendants have been earls of Leicester since 1837—*Biographical Dictionary of the Common Law*, *op. cit.*, at p. 121.

[12] Sourced by Hallam to Coke, 12 *Rep.* 18, see Hallam, *ibid.*, p. 650. See also Sir William Holdsworth, *A History of English Law*, Methuen & Co, London, 1903, 7th edn., revised, 1956, reprinted 1966, Vol. I, p. 475; Holdsworth calls this the *Case of Non Obstante*.

[13] See *Case of Non Obstante*, 12 Co. Rep., folio 18, at 77 ER (KB) 1300.

[14] See 77 ER (KB) 1283, per Serjt. Hill., and Hargrave, 11 State Trials, 30.

But a note dated 2 February 1655 states that the work is indeed Coke's and that the printing of it 'will be for the good of this nation, and of the professor of the common law.'[1] Coke's statements here are more sweeping than even Hallam allows. He asserts that:

> No Act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*, as a sovereign power to command any of his subjects to serve him for the public weal..., and this Royal power cannot be restrained by any Act of Parliament, neither in *thesi* nor in *hypothesi*, but that the King by his Royal prerogative may dispense with it; for upon commandment of the King and the obedience of the subject doth his government consist.'[2]

Coke does confine this, however, to prerogatives which are 'incident, solely and inseparably to the person of the King', such as mercy and power to pardon; but in things which 'belong to every subject, and may be severed', an act may absolutely bind the King.[3] There is no date on *Non Obstante*.[4]

In *Cawdrey's case*[5], which interpreted *The Act of Supremacy* ('An act restoring to the Crown the ancient jurisdiction over the state ecclesiastical and spiritual, and abolishing all foreign power repugnant to the same')[6] reported by Coke in the Fifth Report, held that:

> ...that act doth not annex any jurisdiction to the Crown but that which in truth was, or of right ought to be, by the ancient laws of the realm parcel of the King's jurisdiction, and united to his imperial crown...
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> ...by the ancient laws of this realm this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the King, and of a body politic compact and compounded of many and almost infinite several and yet well agreeing members; all of which the law divideth into two parts, the clergy and the laity, both of them, next and immediately under God, both of them subject and obedient to the head. Also the kingly head is instituted and furnished with plenary and entire power, prerogative and jurisdiction to render justice and right to every part and member of this body, of what estate, degree or calling whatsoever, otherwise he would not be head of the whole body.[7]

Coke's approach to both law and history was that of a strenuous advocate, of both legal doctrines and political causes. His work is therefore subject to the shortcomings inherent in this mind-set: those of using (or sometimes twisting) authorities to suit his purpose; and of convincing himself of the certainty of his position. Given his long life and his adoption of differing political positions according to his perceived advantage or perceived affront, inevitably there are inconsistencies and contradictions is his positions.[8] Early in his career, as illustrated above, he supported the king's prerogative, initially unremittingly, and later if it were exercised for the good of the people[9]. Still later, however, in his incarnation as Chief Justice of the Common Pleas, he asserted the power of the courts over the royal prerogative.

In the *Commissions of Enquiry case*,[10] Coke and the eight other judges laid down that it was unlawful for the king under his prerogative to confer powers on commissions of inquiry to hear and determine offences

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[1] Note by Edw. Bulstrod, 2 February, 1655, 77 ER (KB), 1283; reproduced by the editor of the *English Reports* taken from the 1826 edition 'as bearing on the authority of the cases contained in this part.' 77 ER (KB) 1283.

[2] 12 Co. Rep., folio 18, 77 ER (KB) 1300.

[3] 12 Co. Rep., folio 19, 77 ER (KB), 1301.

[4] But Coke refers in the 'case note' to 7 Co. 36, 37; 8 Co. 38; Vaugh. 333, 347; Cumberb. 22, 23.

[5] *Cawdrey's case, casus caudreii*, 1591, 5 Co. Rep., 1a, at 77 ER (KB), 1; and see 5 Co. Rep. 344-5, extracted in Elton, *op. cit.*, pp. 226-227.

[6] *Act of Supremacy*, 1559, 1 Eliz. I, c. 1; *Statutes of the Realm*, IV, 350353.. This was the first Act of Elizabeth's reign.

[7] *Cawdrey's case*, extracted in Elton, *loc. cit.*, at pp. 226-227.

[8] See Sir William Holdsworth, *A History of English Law*, Methuen & Co, London, 1903, 7th edn., revised, 1956, reprinted 1966, Vol. I, p. 474 ff. p.

[9] See *Bate's case*, 1606; Court of the Exchequer; *State Trials*, II, 382-94; extracts quoted at 435 ff. of S&M1. Both Maitland in his *Constitutional History*, (at pp. 258-259), and Hallam in his *Constitutional History* (*op. cit.*, at p. 240) state that this case came extrajudicially before Coke. Hallam refers to a citation for *Bate's case* in 12 *Rep.*, but notes that later in his life in 2 *Institutes*, p. 57, Coke declares the judgement in the case to be contrary to law. [The court held for the king.]

[10] *Commissions of Enquiry case*, (1608) 12 Co. Rep. 31; referred to and quoted in Holdsworth, *op. cit.*, pp. 432-433, nn. 1 and 2.

determinable in the ordinary courts, or even to inquire into such offences.[1] In addition, it would seem that Coke instigated the suppression[2] of *The Interpreter*, a dictionary published by Dr John Cowell, the Professor of Civil Law at Cambridge.[3] The dictionary contained definitions offensive to the House of Commons, and it was ordered to be burned by the common hangman.[4]. Among those definitions were:

> **King**: ...He is above the law by his absolute power...And though for the better and equal course in making laws he do admit the three estates...unto counsel, yet this, in divers learned men's opinions, is not of constraint but of his own benignity, or by reason of his promise made upon oath at the time of his coronation. For otherwise were he subject after a sort, and subordinate, which may not be thought without breach of duty and loyalty. For then must we deny him to be above the law, and to have no power of dispensing with any positive law or of granting especial privileges and charters to any, which is his only and clear right...
>
> **Prerogative of the King** (*praerogativa regis*): is that especial power, pre-eminence, or privilege that the king hath in any kind over and above other persons, and above the ordinary course of the common law, in the right of his crown... Only by the custom of this kingdom he maketh no laws without the consent of the three estates, though he may quash any law concluded of by them...[5]

(It should be noted here that this definition of the prerogative is virtually identical to that enunciated by Blackstone some 150 years later:

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity... And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, and not to those which he enjoys in common with his subjects: for if any one prerogative of the crown could be held in common with the subject, it would cease to be a prerogative any longer. And therefore Finch[6] lays it down as a maxim, that the prerogative is that law in case of the king, which is no law in case of the subject.[7])

As to the prerogative, the commons had petitioned the king in 1610[8], because they perceived 'their common and ancient right and liberty to be much declined and infringed in these late years...[9]'; that essential to the 'happiness and freedom' of the subjects was

> ...to be guided and governed by certain rule of law, which giveth both to the Head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government... Out of this root hath grown the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land or the Statutes made by their common consent in

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[1] *Commissions of Enquiry case, ibid.*, 12 Co. Rep. 31;—'only to enquire, which is against law, for by this a man may be unjustly accused of perjury, and he shall not have any remedy'. Quoted by Holdsworth, *ibid.*, p. 433, n. 1, referring also to Co. Fourth institute, 242-243, and 245-246. But Holdsworth also notes that this case is of doubtful authority, and internally inconsistent.

[2] See Holdsworth, *op. cit.*, p. 432, and n. 6; sourced by him to Gardiner, *History of England*, ii, 66-67.

[3] *Dr Cowell's Interpreter*, 1607, reproduced in J R Tanner, *Constitutional Documents of James I, AD 1603-1625*, Cambridge University Press, Cambridge, 1930, reprinted 1961, at pp. 12-14. And see Tanner's commentary in ...*James I, op. cit.*, at p. 6.

[4] See Tanner, ...*James I, ibid.*, p. 6.

[5] See text reproduced in Tanner, ...*James I, loc. cit.*, pp. 12-14.

[6] Blackstone sources this to Finch, L. 85.

[7] See William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, with an introduction by Stanley N Katz, University of Chicago Press, Chicago, 1979, in 4 Volumes, Vol. 1, Book I (The Rights of Persons), Chapter 7, 'Of the King's Prerogative', p. 232.

[8] *Commons' Petition of Grievances*, presented to the King, 7 July, 1610, from Peyt, *Jus Parliamentarium*, pp. 321-331, extracted in Tanner, ...*James I, op. cit.*, pp. 148-156.

[9] Tanner, ...*James I, ibid.*, p. 149.

> Parliament. [and the commons complained on a number of points about the increase in number of, and the increasingly punitive nature of, proclamations.][1]

The king sought the judges' advice, submitting to Coke and his colleagues test questions covering the grounds the Commons had raised. Coke has recorded the extrajudicial response of the judges in the *Case of Proclamations*[2], yet another of Coke's posthumously published twelfth reports. They stated that:

> The law of England is divided into three parts: common law, statute law, and custom, but the King's proclamation is none of them:
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> Also *malum aut est malum in se aut prohibitum*; that which is against the common law is *malum in se* [wrong of itself]; *malum prohibitum* [wrong by prohibition] is such an offence as is prohibited by Act of Parliament and not by proclamation.
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> ...the King hath no prerogative but what the law of the land allows him.
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> But the King, for prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend them; upon punishment to be inflicted by the law, etc.[3]

But it should be noted that this case, appearing as it does in his twelfth reports published after his death, must suffer from the same disadvantage as that related with regard to *Prohibitions del Roy*[4]—that is, one can never know with any certainty whether what Coke is writing is what really happened, or what he wished had happened. It is interesting that lawyers have embraced the views of Coke in the *Case of Proclamations*, but have expressed doubt as to his views in the *Non Obstante*[5] case, which was supportive of the prerogative.

THE LAW OF NATURE, AND STATUTE

SIR EDWARD COKE AND NATURAL LAW

The prerogative was not, however, the only source of power that Coke examined critically in the light of his own power base as Chief Justice of Common Pleas in 1606. He also asserted the supremacy of the common law over parliament. The most often-quoted instance of this is his judgement in *Dr Bonham's case.*[6] Here Coke said:

> 4. The censors [of the College of Physicians who had imprisoned Dr Bonham] cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suæ rei esse judicem*; and one cannot be Judge and attorney for any of the parties [and here he refers to authorities]. And it appears in our books, that in many cases the common law will [and here Coke refers as an authority to *Calvin's case*, 7 Co. Rep. 14a, 2 Brownl. 198, 265, and Hard. 140] controul 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 controul it, and adjudge such Act to be void; and therefore, in 8 E. 3 30 a. b. *Thomas Tregor's case*... Herle saith, some statutes are made against law and right, which those who made them perceiving, would not put it into execution:...and yet it is adjudged in 33 E. 3. Cessavit

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[1] Tanner, ...*James I*, *ibid.*, p. 149.

[2] *Case of Proclamations*, 1611, 12 Co. Rep. 74; referred to in Holdsworth, *op. cit.*, p. 433, n. 7. And see extracted text at Tanner, ...*James I*, *op. cit.*, pp. 187-188.

[3] *Case of Proclamations*, 1611, 12 Co. Rep. 74; see Tanner, ...*James I*, *ibid.*, p. 188; the text reproduced above is identical with that in Tanner, (...*James I*), with two exceptions: I have bulleted the paragraphs, to make the points more obvious; and I have translated Coke's Latin.

[4] *Prohibitions del Roy*, 12 Co. Rep., 64; Prohibitions, 1607, an *ex post facto* account by Coke in his twelfth Report (published posthumously), quoted in Tanner, ...*James I*, *op. cit.*, pp. 186-187, and in S&M1, at 437-438; and referred to in Hallam, *op. cit.*, p. 240.

[5] *Case of Non Obstante*, 12 Co. Rep., folio 18, at 77 ER (KB) 1300.

[6] *Dr Bonham's Case*, (1610) Pleadings and argument at 8 Co. Rep., 107 a ff., Mich. 6 Jac. 1, 77 ER (KB) 638. Report at 8 Co. Rep. 113b, Hil. 7 Jac. 1, 77 ER (KB) 646.

> 42... [he details the case], and because it would be against common right and reason, the common law adjudges the said Act of Parliament on that point to be void...[1]

Calvin's case[2], sometimes referred to as the *Postnati*[3], because lawyers drew a distinction between the *Anti-nati* (persons born in Scotland before James's accession to the English throne) and the *Post-nati* (those born in Scotland after his accession), dealt with the question of alienship or allegiance of the *Postnati*. Here, Coke said:

> [after discussing the law of nature] Seeing that faith, obedience, and liegance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature,...yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true, that *jura naturalia sunt immutabilia*.[4]

> ...By the statute of 25 Ed. 3. Cap. 22 a man attainted in a præmunire, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth in Littleton, fol. 43, for the Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him. ... A man outlawed it out of the benefit of the municipal law; and yet he is not out of his natural liegance, or of the King's natural protection; for neither of them is tied to municipal laws. ... By these and many other cases that might be cited out of our books, it appeareth, how plentiful the authorities of our laws be in this matter.[5]

There can be no doubt that the views expressed in *Dr Bonham's case* were Coke's considered view at the time.[6] Some have suggested that all Coke was doing in *Dr Bonham's case* was explicating a rule of statutory construction,[7] merely meaning that the courts would interpret an act of parliament 'in such a way as not to conflict with those principles of reason and justice... which were presumed to underlie all law[8]'; but that this does not mean that Coke therefore claimed for courts a general power to declare statutes void on the ground of a conflict with a higher law. Or to put it another way, that all Coke was doing was explicating a rule that the courts will interpret statutes *stricti juris*, so as to give them a meaning in accordance with established principle, a rule which would be accepted at the present day.[9]

These statements sound all very well; but what do they mean? Firstly, it seems clear that, even on these assessments, Coke saw 'principles of reason and justice' as underlying the law. What exactly are these 'principles of reason and justice'? Who has them? From whence do they derive their origin and authority? And what does 'established principle' mean? Principles established by the parliament, principles established by the common law, or principles upon which the common law is based? It seems to me quite beyond dispute that Coke, at least in his incarnation as Chief Justice at Common Pleas, saw the natural law as establishing these principles. He draws a clear distinction between municipal law and natural law.

It will be remembered that *Calvin's case* was on the matter of allegiance. Coke analysed the case under five headings: '*Ligeantia* (concerning ligeance); 2. *Leges* (for the laws). 3. *Regna* (as touching the kingdoms). 4.

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[1] *Dr Bonham's Case*, 8 Co. Rep., 118 a, 77 ER (KB) 646, at 652.

[2] *Calvin's case, Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, 77 ER (KB) 377

[3] see 7 Co. Rep. 1 a; 77 ER (KB) 377; and references to the following reports which cite it thus: Moor 790; Dyer fo. 304; 2 Jon. 10; Vaugh. 286. 279. 301. 11 Lev. 59; Plowden case of the *Dutchy*.

[4] *Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, at folio 13 b; 77 ER (KB) 377, at 392-393.

[5] *Postnati*, *ibid.*, at folio 14 a; 77 ER (KB) 377, 393.

[6] See Baker, *English Legal History*, *op. cit.*, p. 241, n. 85, and the references cited there.—Coke wrote out the passage twice in his own autograph.

[7] See J W Gough, *Fundamental Law in English Constitutional History*, Clarendon Press, Oxford, 1955, reprinted 1961, 1971, with corrections, at p. 35; and see his reference to Sir Carleton Allen, who also took this view in *Law in the Making*, 5th edn., p. 426.

[8] See Gough, *ibid.*, p. 35.

[9] Sir William Holdsworth, *A History of English Law*, Methuen & Co, London, 1903, 7th edn., revised, 1956, reprinted 1966, Vol. II, p. 443.

Alienigena (of an alien born). 5. What legal inconveniences would ensue on either side."[1] On allegiance he says that:

> Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birthright ligeance and obedience to his Sovereign. ... But between the Sovereign and the subject there is without doubt a higher and greater connexion [than between a lord and his tenant]: for as the subject owes to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects.[2]

Then speaking of the second part ('the laws)', he asserts unequivocally, and demonstrates from his sources that:

> First, that ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the laws of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.
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> The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is the *lex æterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of the law in the world.[3]
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> And the reason hereof is, that God and nature is one to all, and therefore the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior. And Aristotle 1, Politicorum proveth, that to command and to obey is of nature, and that magistracy is of nature: for whatever is necessary and profitable for the preservation of the society of man is due by the law of nature: but magistracy and government are necessary and profitable for the preservation of the society of man; therefore magistracy and government are of nature ...This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws. And certain it is, that before judicial or municipal laws were made, Kings did decide cases according to natural equity, and were not tied to any rule or formality of law, but did *dare jura*[4].
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> Now it appeareth by demonstrative reason, that ligeance, faith and obedience to the Sovereign was before any municipal or judicial laws. 1. For that government and subjection were long before any municipal or judicial laws. 2. For that it had been in vain to have prescribed laws to any but to such as owed obedience, faith and ligeance before, in respect whereof they are bound to obey and observe them... Seeing then that faith, obedience and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisteth in commanding or prohibiting, without any certain punishment or penalty) yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true, that *jura naturalia sunt immutabilia.*[5]
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> ...By the statute of 25 Ed. 3 cap. 22, a man attainted in a *præmunire*, is by express words out of the King's protection generally; and yet this extendeth only to legal protection, as it appeareth by Littleton, fol. 43. For the Parliament could not take away that protection which the law of nature giveth unto him; and therefore, notwithstanding the statute, the King may protect and pardon him. ... A man outlawed is out of the benefit of the municipal law;... and yet he is not out of his natural liegance, or of the King's natural protection; for neither of them is tied to the municipal laws, but is

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[1] See 7 Co. Rep. , 4 a; 77 ER (KB) 377, 382.

[2] See 7 Co. Rep. , 4 b; 77 ER (KB) 377, 382.

[3] See 7 Co. Rep., 11 a; 77 ER (KB) 377, 391-392.

[4] *Calvin's case, ibid.*, folio 13 a; 77 ER (KB) 377, 392. Coke cites as authorities Bracton, Fortescue, Aristotle, Virgil, Pomponius, Tully, and the apostle Paul.

[5] *Calvin's case, the Postnati, op. cit.*, 7 Co. Rep., 13a-13b; 77 ER (KB) 377, 392-393.

> due to the law of nature, which (as hath been said) was long before any judicial or municipal law. And therefore if a man were outlawed for felony, yet was he within the King's natural protection...[1]

It can be seen, then, that taking his remarks in context, Coke was clearly committed to there being an anterior law of nature, which commanded or prohibited; this law is the 'eternal law', or the moral law, and it is immutable. And in Coke's view, municipal laws (which include statutes) may impose penalties for the breach or non-observance of the law of nature, since the law of nature itself does not impose the penalties. (Presumably Coke would also agree that statutes or other municipal law may impose methods by which the positive injunctions of natural law are carried out.) But municipal law is incapable of altering the law of nature. And the law of nature itself may enable or require that municipal laws be overridden.

SIR FRANCIS BACON AND NATURAL LAW

Sir Edward Coke's two greatest rivals appeared in *Calvin's case*, although one would never know this from reading Coke's Report.

Sir Francis Bacon, Solicitor-General, lawyer, philosopher, writer and courtier, appeared as counsel for Calvin. Lord Ellesmere,[2] Chancellor of England from 1595 till 1617, also delivered a judgement in *Calvin's case*. This judgement was, except for a student essay, his only authenticated published work.[3]

J W Gough in his valuable *Fundamental Law in English Constitutional History*[4] quotes Bacon as saying:

> The law favoureth three things, life, liberty, and dower...because our law is grounded upon the law of nature, and these three things do flow from the law of nature...
>
> By the law of nature all men in the world are naturalized one towards another...it was civil and national laws that brought in these words and differences of 'civis' and 'exterus', alien and native. And therefore because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly... So...all national laws whatsoever are to be take strictly and hardly in any point wherein they abridge and derogate from the law of nature.[5]

And Lord Ellesmere as saying:

> ...the Common Law of England is grounded upon the law of God, and extends itself to the original law of nature and the universal law of nations.'[6]

Now one may argue, as Gough does[7], that all this means is that these statements by three quite disparate men represent only a 'willingness to adopt a strict interpretation of the law;'[8] and that moreover no-one has ever 'accused Bacon of believing that the legislative powers of parliament were subject to judicial review in the interest of fundamental or natural law', and that there is no reason to think that Coke believed this either. Gough holds this view as at that time there was no distinction between the judicial and legislative functions of Parliament.[9] When one reads what these men actually said, one is faced with quite a different conclusion.

Bacon's entire argument is founded upon 'the foundations and fountains of reason' not 'the positions and eruditions of municipal law'; as this course 'adds a dignity unto [the laws], when their reason appearing as well

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[1] *Calvin's case*, the *Postnati*, *op. cit.*, 7 Co. Rep., 14 a; 77 ER (KB) 377, 393. Coke goes on to discuss the King's dispensing power, by a *non obstante* [see *ibid.*, fol. 14 a; 77 ER (KB) 377, 393].

[2] Formerly Sir Thomas Egerton, and later Viscount Brackley, Chancellor from 1595-1617; Coke referred to him slightingly as 'Egerton'.

[3] See Plucknett, *A Concise History of the Common Law*, *op. cit.*, p. 698.

[4] J W Gough, *Fundamental Law in English Constitutional History*, Clarendon Press, Oxford, 1955, reprinted 1961, 1971.

[5] *Calvin's case*, as reported in 2 *State Trials*, 594, 595, quoted in Gough, *Fundamental Law*, *op. cit.*, pp. 45-46. Coke's report of the case appears in *State Trials* at ii, 611-658—see Tanner, *op. cit.*, p. 24, n. 1. Coke's own report (7 Co. Rep. 1 a ff.) does not include any of Bacon's argument, or Ellesmere's judgement.

[6] *Calvin's case* (1610), *Postnati*, 2 *State Trials*, 670; quoted in Gough, *op. cit.*, p. 46, n. 1.

[7] J W Gough, *Fundamental Law in English Constitutional History*, Clarendon Press, Oxford, 1955, reprinted 1961, 1971, with corrections, at pp. 45-46.

[8] Gough, *ibid.*, p. 45.

[9] See Gough, *ibid.*, p. 46.

as their authority doth shew them as fine moneys, which are current not only by stamp, because they are so received, but by the natural metal that is the reason and wisdom of them'.[1] Bacon distinguishes between commonwealths and monarchies. The former are

> where authority is divided among many officers, and they are not perpetual, but annual and temporary, and not to receive their authority, but by election and certain persons to have voice only to that election; these are busy and curious frames, which of necessity do presuppose a law precedent, written or unwritten, to guide and direct them.[2]

But in hereditary monarchies, where families submit themselves to one royal or imperial line, 'submission is more natural and simple, which afterwards by laws subsequent is perfected and made more formal; but that is grounded in nature.'[3] As to the law, he said: 'for as the common law is more worthy than the statute law; so the law of nature is more worthy than both of them.'[4] He said that *Calvin's case* should be decided upon favour of law, reasons and authorities of law, and former precedents and examples. He then said:

> Favour of law. What mean I by that? The law is equal, and favoureth not. It is true, not persons; but things or matters if doth favour. Is it not a common principle, that the law favoureth three things, life, liberty and dower! And what is the reason of this favour? This, because our law is grounded upon the law of nature. And these three things do flow from the law of nature, preservation of life natural; liberty, which every beast or bird seeketh and effecteth naturally; the society of man and wife, whereof dower is the reward natural. ... It was civil and national laws that brought in these words and differences of 'civis' and 'exterus', alien and native. And therefore because they tend to abridge the law of nature, the law favoureth not them, but takes them strictly; even as our law hath an excellent rule, that customs of towns and boroughs shall be taken and construed strictly and precisely, because they do abridge and derogate from the law of the land. So by the same reason all national laws whatsoever are to be take strictly and hardly in any point wherein they abridge and derogate from the law of nature.

On the question of law and authority, Bacon said that

> Allegiance is of a greater extent and dimensions than laws or kingdom, and cannot consist by the laws merely; because it began before laws, it continueth after laws, and it is in vigour where laws are suspended and have not their force.[5]

And Bacon supports this assertion by reference to a case known to the judges of treason being held effective against one who conspired the death abroad of an English king expulsed from his kingdom, after the recovery of the kingdom, even though at the time of the offence the king had had no kingdom.[6] Moreover, in wartime, when the laws are silent, and the power of law has ceased, allegiance is still in vigour and force, and 'the sovereignty of and imperial power of the king is so far from being then extinguished or suspended, as contrariwise it is raised and made more absolute; for then he may proceed by his supreme authority and martial law, without observing formalities of the laws of his kingdom.'.[7]

As to precedents and examples, Bacon refers to the *Act of Recognition*[8] and the *Act of Hostilities*[9] passed in the first years of James I's reign saying, 'these two acts declare the common law as it is, being by words of recognition and confession.[10]':

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[1] Sir Francis Bacon, Speech in the Exchequer Chamber as Counsel to Calvin, ['from the last 4th edition of his Works, Vol. II. p. 514.] reprinted in *State Trials*, Vol. II, 575-606, at 577-578.

[2] Bacon, *ibid.*, p. 578.

[3] Bacon, *ibid.*, p. 578.

[4] Bacon, *op. cit.*, p. 581.

[5] Bacon, *ibid.*, p. 596.

[6] Bacon, *ibid.*, p. 596. (This case must have related to Henry VI). Cf. Charles II *Declaration of Breda* and the *Act of Oblivion.*

[7] Bacon, *ibid.*, p. 596.

[8] This is now known as the *Act of Succession*, 1604, 1 Jac. I, c. 1, Statutes of the Realm, iv, 1017; extracted in Tanner, *ed. cit.*, pp. 10-12. It is significant that Bacon refers to this as the Act of *Recognition*, not 'succession'.

[9] Act for the Removal of Hostility, 1607, 4&5 Jac. I, c. 1; *Statutes of the Realm*, iv, 1134; extracted in Tanner, ed. *cit.*, pp. 38-43.

[10] Bacon, *loc. cit.*, p. 600.

> These two are judgments in parliament by way of declaration of law, against which no man can speak. And certainly there are righteous and true judgments to be relied upon; not only for the authority of them, but for the verity of them; for to any that shall well and deeply weigh the effects of law upon this conjunction, it cannot but appear that although partes integrates of the kingdom, such as the laws, the officers, the parliament, are not yet commixed; yet nevertheless there is but one and the self-same foundation of sovereign power depending upon the ancient submission, whereof I spake in the beginning [the law of nature]...
>
> ...states were reduced to a more exact form [when monarchies were but heaps of people without any exact form of policy];... but...these more exact forms, wrought by time and customs and laws, are nevertheless still upon the first foundation, and do serve only to perfect and corroborate the force and bond of the first submission, and in no sort to disannul or destroy it.[1]

He ends his submission to the court by saying:

> Wherefore I am now at an end. For us to speak of the mischiefs, I hold it not fit for this place, lest we seem to bend the laws to policy, and not take them in their true and natural sense. ...; for I will not press any opinion or declaration of late time which may prejudice the liberty of this debate; but '*ex dictis, et ex non dictis*,' upon the whole matter I pray judgment for the plaintiff.[2]

Having considered Bacon's words in context, then, there seems to me to no other conclusion than that he saw the common law of England as being grounded in natural law, and that natural law was greater than both the common law and statute. The formalisation of laws and customs can only be declaratory of the natural law, to 'perfect and corroborate' it, and in no sense to annul or destroy it. The statutes quoted above he saw as 'judgments in parliament,' and it is against such judgements by way of declaration of law that no man can speak. He does not suggest that there are no acts of parliament against which a man may not speak; he certainly implies that so long as the acts or judgements of parliaments are 'righteous and true', they may be relied upon, but the foundation of all English law, including law declared by parliament, is founded upon the 'first foundation' of natural law.

LORD ELLESMERE AND NATURAL LAW

We have available to us Lord Ellesmere's judgement in the *Postnati* case as a result of James I's request.[3] Lord Ellesmere noted that judges in the Lords had already decided that the *postnati* were no aliens[4], but that some had said those judges were not acting in their proper capacity[5], while others had said the matter should be decided by parliament.[6] But the 'country gentlemen' of the parliament had already refused to pass a Bill naturalising the *antenati*, but only declaring it for the *postnati* (they already being subjects at common law).[7] As to them, Ellesmere said,

> ...let them demmure, and die in their doubts: for, the case being adjourned hither before all the judges of England, is now to be judged by them according to the common law of England; and not tarrie for a parliament: for, it is no transcendent question, but that the common law can and ought to rule it, and over-rule it, as Justice Williams said well.—But then this question produceth another; that is, what is the common law of England? Whether it be *jus scriptum* or *non scriptum*? And other such like niceties: for we have in this age so many questionists; and quo modo and quare, are so common in most men's mouths, that they leave neither religion, nor law, nor king, nor counsell, nor policy, nor government out of the question.

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[1] Bacon, *loc. cit.*, p. 600.

[2] Bacon, *loc. cit.*, p. 606.

[3] See *State Trials*, Vol. II, 659; text of an introduction 'to the loving reader' by 'T. Ellesmere, Canc.' Abridged versions of Ellesmere's speech had currency, and James requested a written copy for himself, and 'taking occasion thereby, to remember the diligence of the Lord Chief Justice of the Common-Place, for the summary Report he had published of the Judges arguments, he gave me in charge to cause this to be likewise put in print, to prevent the printing of such mistaken and unperfect reports of it, as were alreadie scattered abroad.' Ellesmere's judgement contains numerous reference to the civil (i. e. continental) law, as well as to the common law.

[4] *State Trials*, *ibid.*, Vol. II, p. 663.

[5] *State Trials*, *ibid.*, Vol. II, p. 666.

[6] *State Trials*, *ibid.*, Vol. II, p. 670.

[7] See Tanner, *ed. cit.*, p. 23.

> And the end they have in this question, what is the common law, is to shake and weaken the ground and principles of all government...[1]

> The common law of England is grounded upon the law of nature, and extends itself to the originall law of nature and the universall lawe of nations.—When it represents the church, it is called *Lex Ecclesiæ Anglicanæ*, as Magna Charta, ca. 1....—When it respects the crown, and the king, it is sometimes called *Lex Coronæ*, as in stat. 25 Edw. 3, cap. 1...; And it is sometimes called *Lex Regia*, as in Registro fo. 61...—When it respectes the common subjects, it is called *Lex Terræ*, as in Magna Charta ca. 29...—Yet in all these cases , whether it respects the church, the crown, or the subjects, it is comprehended under this general terme, the common lawes of England: which although they be for the great part reduced to writing; yet they are not originally *leges scripta*.[2]

How then do we know what the common law is, if it is not written? He said:

> ...it is the common custom of the realm..., and it standeth upon two main pillars and principal parts, by which it is to be learned and known.—1. The first is, certain known principles and maxims, and ancient customs, against which there never hath been, nor ought to be, any dispute [and he gives examples];—2. The second is, where there be no such principles, then former judgements given in like cases: and these be but '*arbitria iudicium, et responsa prudentum*,' received, allowed, and put in practice and execution by the king's authority.[3]

> I say, that when there is no direct law, nor precise example, we must '*recurrere ad rationem, et ad responsa prudentum*.' for, although '*quod non lego, non credo*,' may be a true and certain rule in divinity; yet for interpretation of laws, it is not always so: for we must distinguish between '*fidem moralem*', and '*fidem divinam*' or else we shall confound many things in the civil and politic government of kingdoms and states.[4]

He noted that

> ...most of the cases which we have in our year books, and books of reports, which are in effect nothing but *responsa prudentum*, as Justice Crooke did truly say.—Upon this reason it is, some laws, statute as well as common law, are obsolete and worn out of use: for all human laws are but *leges temporis*: and the wisdom of the judges found them to be unmeet for the time they lived in, although very good and necessary for the time wherein they were made. And therefore it is said '*leges nascuntur, vigent, et moriuntur, et habent ortum, statum, et occasum*.'

> By this rule also, and upon this reason it is, that oftentimes ancient laws are changed by interpretation of the judges, as well in cases criminal as civil.[5]

And he goes on to say that:

> By this rule it is also that words are taken and construed, sometimes by extension, sometimes by restriction; sometimes by implication; sometimes a disjunctive for a copulative, a copulative for a disjunctive; the present tense for the future, the future for the present; sometimes by equity out of reach of the words; sometimes words taken in a contrary sense; sometime figuratively, as *contines pro contento*, and many other like; and all of these examples be infinite...[6]

Now it is true that here in this last excerpt, Ellesmere speaks of interpretation of words. But this is in the context of the basic rule, ('by this rule') of *recurrere ad rationem, et ad responsa prudentum*, which refers to the application of reason and prudence, which may enable judges to find statute and common law obsolete; to change the interpretation of ancient laws; and to adopt a limitless flexibility in their interpretation and application of the law, even resorting in equity to results out of reach of the words in question, in order to reach the result dictated by reason and prudence. What reason, then?—for Ellesmere finds for Calvin on the basis of 'reason, and the common law of England'[7] Ellesmere says:

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[1] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 669.

[2] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 670.

[3] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 671.

[4] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 674.

[5] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 674

[6] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 675.

[7] Per Ellesmere, L C, *Calvin's case*, *State Trials*, *ibid.*, Vol. II, p. 696.

> But if examples and arguments *à simili* do fail, then it remaineth *recurrere ad rationem;* and what reason that ought to be, and how to be understood, is to be considered: for it is said, that *'lex est ratio summa, iubens ea quæ facienda sunt, et prohibens contraria.'* So it must be the depth of reason, not the light and shallow distempered reasons of common discoursers walking in Powles, or at ordinaries, in their feasting and drinking, drowned with drink, or blown away with a whiff of tobacco.[1]

He concludes that only those with gravity, learning, experience, and authority, should be the interpreters of the laws, and that a man by study and labour may find this deep reason. But clearly, he saw the law of nature as being the foundation of all law, at least of the law in England. Both the common law and the statute law are capable of being evaluated by judges, and of being stated to be obsolete, or changed, and even, in cases where equity may demand it, the words of the law in question may be ignored altogether.

He also suggests as *obiter* that in cases where there are no precedents of any kind, or where the judges are unable to decide, that, there is a 'true and certain rule' that under the 'ancient common law of England' the king may arbitrate, not so as to make new law, or alter old laws, but to decide on the interpretation of an entirely new question[2]. In this context he hastens to say:

> Neither do I mean hereby to derogate any thing from the high court of parliament; (far be it from my thought) it is the great council of the kingdom, wherein every subject hath interest. And to speak of the constitution or form of it, or how, or when, it was begun, is for busy questionists: it ought to be obeyed and reverenced, but not disputed; and it is at this time impertinent to this question:—But certain it is, it hath been the wisdom of the kings of this realm to reserve to themselves that supreme power to call their nobles, clergy, and commons together, when they saw great and urgent causes, and by that great counsel to make edicts and statutes for the weale of their people, and safety of the kingdom and state...[3]

In concluding, then, it seems that to Ellesmere, as well as to his antagonist Coke, the common law, based upon the law of nature, is the ultimate authority. By virtue of the law of nature and reason judges may interpret, change, and declare obsolete laws, and under it the king may have ultimate authority in certain extreme circumstances to decide on the interpretation of the law; and that while parliament as a court is the great council of the realm representing every subject, it owes its existence to the wisdom of the king, and the supreme power of the realm vests in the king.

COKE ON NATURAL LAW *PER SE*

Despite, however, his being 'overbearing, a flatterer and tool of the court till he had obtained his ends,'[4] obstinate, obdurate, and consumed by enmity towards his peers, like Sir Francis Bacon, he did make an effort to ascertain the roots of the law. He said, on the completion of his *Institutes* (using, probably not by any mischance, the royal plural):

> Wherein we have strengthened our opinion with our two great guides, Authority and Reason, and not trusted Abridgements, Polyanthea's, or taken any thing upon trust, but have searched the Fountaines themselves, alway holding this Rule, *Quod satius petere fontes, quam sectaririvulos.* And our desired end is, that all these [courts] may prosper and flourish in the distribution of Justice, which they shall assuredly doe, if they derive all their power and strength from their proper roots.[5]

Coke's viewed the 'Law' as 'perfect reason, which commands those things that are proper and necessary and which prohibits contrary things.'[6] He added:

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[1] See Ellesmere in *Calvin's case, ibid.*, at p. 686.

[2] Per Ellesmere, L C, *Calvin's case, State Trials, ibid.*, Vol. II, p. 693.

[3] Per Ellesmere, L C, *Calvin's case, State Trials, ibid.*, Vol. II, pp. 693-694.

[4] See Hallam, *loc. cit.*, p. 239.

[5] Sir Edward Coke, *The Epilogue, The Fourth Part of the Institutes of the Laws of England, concerning the Jurisdiction of Courts*, Printed at London by M Flesher for W Lee, and D Pakeman, 1644 [MDCXLIV]; Facsimile made from *The Fourth Part*, (508.g.5[2]), in the British Library, by Garland Publishing, Inc., New York, 1979, at p. 365.

[6] 1 *Inst.* (Thomas, *ed.* London, 1818), Vol. I, p. 15; folio paging 319b; as quoted in J U Lewis in 'Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory', in Vol. 84 *The Law Quarterly Review*, July 1968, pp. 330-342, at p. 331.

> Reason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study... This legal reason *est summa ratio.* And therefore if all the reason that is dispersed into many several heads were united into one, yet he could not make such a law as the law of England is; because by many successions of ages, it hath been... refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified by it, *neminem opportet esse sapientiorem legibus*: no man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason.[1]

In speaking of the jurisdiction of the Court of Star Chamber[2], Coke said '...the jurisdiction of this court dealeth not with any offence that is not *malum in se*, against the common law, or *malum prohibitum*, against some statute.'[3] Here he is clearly identifying a deed which is wrong of itself, with a deed contrary to the common law; that is, he has gone far towards seeing the common law, and the law of nature, as being interchangeable, and furthermore, both of them being equated with reason. The common law is 'artificial perfection of reason, gotten by long study'[4]. It must be remembered, however, that Coke here was speaking as a lawyer and a judge, and that he was doubtless enamoured of this phrase as it figured in his *riposte* to James I in *Prohibitions del Roy*[5].

Hence, in *Calvin's case*[6] he held:

> The Law of Nature is part of the laws of England ... the Law of Nature was before any municipal law in the world ... the Law of Nature is immutable and cannot be changed.
>
> The Law of Nature is that which God at the time of the creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex Aeterna*, the moral law, called also the Law of nature ... this law, written with the finger of God in the heart of man.[7]

In *Dr Bonham's case*[8], he held:

> And it appears in our books, that in many cases the common law will controul 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 controul it and adjudge such act to be void.[9]

In *Rowles v Mason*[10] he said that the common law:

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[1] Coke, 1 *Institutes*, p. 1, (folio 97 b); Coke's parentheses; quoted in Lewis, 'Coke's Theory of Artificial Reason...', art *cit.*, p. 337.

[2] Which incidentally, appears to have been the first to enable cross-examination of an accused upon oath, by virtue of the Act 3 Hen. 7, (that is, the act added a capacity to the court), prior to this it adopting the old custom from time immemorial (or at least from Saxon times) of the accused's answer being complete 'upon [his] oath'. —see Coke, 4 Inst. 62-63, in Elton, *loc. cit.*, p. 167. And see Chapter . p. , *supra.*

[3] See Coke, 4 *Inst.*, 62-63, reproduced in Elton, *loc. cit.*, p. 167. And see Coke's report of the opinion in the *Case of Proclamations*, 1611, 12 Co. Rep. 74; referred to in Holdsworth, *op. cit.*, p. 433, n. 7. And see extracted text at Tanner, *op. cit.*, pp. 187-188.

[4] Lord Ellesmere would have agreed with this point of view on study—see his comments in *Calvin's case*, *State Trials* II, at p. 686.

[5] *Prohibitions del Roy*, 12 Co. Rep., 64; Prohibitions, 1607, an *ex post facto* account by Coke in his twelfth Report (published posthumously), quoted in Tanner, *op. cit.*, pp. 186-187, and in S&M1, at 437-438; and referred to in Hallam, *op. cit.*, p. 240. See extracts referred to *supra.*

[6] *Calvin's case*, (C.P. 1610) 7 Coke Rep. I, 4b, 12a, 12b

[7] *Calvin's case*, (C.P. 1610) 7 Coke Rep. I, 4b, 12a, 12b; quoted in Chester James Antieau (Emeritus Professor of Constitutional Law, Georgetown University), *The Higher Laws: the Origin of Modern Constitutional Law*, William S Hein & Co., Inc., New York, 1994, at pp. 63-64

[8] *Dr Bonham's case*, (C.P. 1610) 8 Coke Rep. 1182,

[9] *Dr Bonham's case*, (C.P. 1610) 8 Coke Rep. 1182, quoted in Antieau, *The Higher Laws*, *ibid.*, p. 63.

[10] *Rowles v Mason*, 1612, 2 Brownl. 198 (C.B.), quoted by J U Lewis in 'Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory', in Vol. 84 *The Law Quarterly Review*, July 1968, pp. 330-342, at 334.

> corrects, allows, and disallows both Statute and Custom, for if there be a repugnancy in a statute, or unreasonableness in Custom, the Common Law disallows and rejects it...[1]

COKE AND THE COMMON LAW JURISDICTION

In his role as champion of the common law judges and the common law, Coke also acted strenuously against perceived encroachments on the common law by the ecclesiastical jurisdiction in the High Commission.[2] (The judges of the courts of common law were the recognised legal advisers to the Crown, analogous to that role as performed by the Solicitor- and Attorney-General today, and it was to them that all political questions involving points of law were referred.[3]) He promoted the use of the prerogative writs, particularly those of *habeas corpus* and *prohibition*, against decisions of the High Commission and the clerical courts.[4] The judges of Common Pleas, in response to growing Puritan recourse to their court to overturn what they saw as unfavourable decisions in the ecclesiastical courts, resorted increasingly to writs of prohibition on the ecclesiastical courts, and to asserting their right to determine whether a case was one of lay or clerical jurisdiction.[5]

The clergy protested to the king, who sought the views of the judges on the grounds of their protest. Coke, who had just become Chief Justice, would appear to have written the 'unanimous' response, which Coke in his Twelfth Report called *Articuli Cleri*[6]. While admitting that both clerical and temporal jurisdictions 'are lawfully and justly in his Majesty'[7], Coke asserted that the jurisdiction of prohibition lay with them in Common Pleas; he denied that because of its 'original' jurisdiction (that is, a writ under the prerogative), the writ of prohibition should be confined to the Chancery. He asserted that the form of prohibitions could not be altered, but by Parliament.

Judges were bound by oaths to do nothing to the 'dishersion of the Crown', and 'to their power [to] assist and defend all jurisdictions, privileges, preeminences, and authorities united and annexed to the Imperial Crown of [the] realm.'[8] The clergy not unnaturally suggested that the temporal judges were thus bound by their oaths to protect the ecclesiastical jurisdiction, not to undermine it. Coke replied with choler that this was a 'foul imputation' and a 'scandal', and 'for less scandals...divers have been severely punished.'[9]

At this time in his career, Coke came to see the judges as supreme; it was they who determined what the law was. Because of the repeated prohibitions by Common Pleas on the ecclesiastical jurisdiction, the Archbishop of Canterbury raised with James I (as a means of solving the *impasse* reached between the two courts) the question of the king's deciding in person on disputed ecclesiastical matters, and matters where there was no authority in law. The king, as usual, sought the judges' advice. If *Prohibitions del Roy*[10], an *ex post facto* account by Coke of this request in his twelfth Report (published posthumously), can be believed, Coke dismissed James

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[1] *Rowles v Mason*, quoted by Lewis, 'Coke's Theory...', *ibid.*, at p. 334`

[2] See Kenyon, *The Stuart Constitution*, *op. cit.*, p. 91. The High Commission in fact dealt mainly with matters brought by private litigants involving drunken, immoral or eccentric clergymen; but the 1630s it was dealing with matrimonial causes, fining and imprisoning adultery, incest, lack of maintenance etc., to both rich and poor.—see Kenyon, p. 179.

[3] See Tanner, *op. cit.*, at pp. 173-174.

[4] See *Pierrepoint's case*, Hil. 6 Jacobi [1609], Common Pleas, Godbolt, p. 158, reproduced in Kenyon, *op. cit.*, p. 95; And see *Candict and Plomer's case*, Pasch. 8 Jacobi [1610], Common Pleas, Godbolt, pp. 163-164, reproduced in Kenyon, *ibid.*, pp. 95-96; and see *The Archbishop of York and Sedgwick's Case*, Trin. 10 Jacobi [1612], Godbolt, pp. 201-202, reproduced in Kenyon, *ibid.*, pp. 96-97.

[5] See Tanner, *loc. cit.*, p. 176; there is some suggestion that the judges may have been, at least in part, motivated by religious prejudice.

[6] *Articuli Cleri*, 1605, 12 Co. Rep. (1777 edn.), extracted in J R Tanner, *Constitutional Documents of the Reign of James I, A.D. 1603-1625*, Cambridge University Press, Cambridge, 1961, at pp. 177 ff.

[7] *Articuli Cleri*, *ibid.*, Answer of the Judges, 1; Tanner, ...*James I*, *ibid.*, at p. 178.

[8] *Articuli Cleri*, *ibid.*, Objection of the Clergy, 24; Tanner, ...*James I ibid.*, at p. 185.

[9] *Articuli Cleri*, *ibid.*, Answer of the Judges, 24; Tanner, ...*James I ibid.*, at p. 185.

[10] *Prohibitions del Roy*, 12 Co. Rep., 64; Prohibitions, 1607, an *ex post facto* account by Coke in his twelfth Report (published posthumously), quoted in Tanner, ...*James I*, *op. cit.*, pp. 186-187, and in S&M1, at 437-438; and referred to in Hallam, *op. cit.*, p. 240.

I's contention that '[James] thought the law was founded upon reason, and that he and others had reason as well as the judges.' He said to James, that the king was not learned in the laws of his realm of England, and that 'causes which concern the life or inheritance or goods or fortunes of his subjects were not to be decided by natural reason, but by the artificial reason [1]and judgement of law...which requires long study and experience...[which of course Coke had, but the king in Coke's view did not][2]'; and 'that law was the golden metwand and measure to try the causes of his subjects, and which protected his Majesty in safety and peace.'[3] The king was offended, and said that this would mean that he would be under the law, which was treason to affirm. To which, Coke said, he quoted Bracton: *quod Rex non debet esse sub homine sed sub Deo et lege*[4]. (The king himself should not be subject to man but he should be subject to God and to the law, for the law makes him king.)

There is considerable doubt as to whether matters passed as Coke said they did.[5] Coke's *amour propre*, and his overweening view of judges in the scheme of things, were clearly offended. Moreover, Coke was somewhat free with Bracton. As I noted above, Bracton made this observation in the context of the king having no equal, nor any superior; moreover, Bracton says the king should be subject to God and to the law, because law makes him king, and therefore the king should bestow on the law what the law has bestowed on him—rule and power. But these additional adumbrations of Bracton would not have suited Coke's purpose.

In respect of *Prohibitions del Roy*, Dicey has said: 'Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning by which Coke induced or compelled James to forgo the attempt to withdraw cases from the courts for his Majesty's personal determination.'[6] James, as a Scot and a Calvinist, was from birth more familiar with civil (Roman) law, which in England was then practised only in the church courts and the court of the Admiralty. Some have suggested that because of this affiliation, James tended to favour the prerogative courts, and the High Commission.[7] Certain it is, that James above all desired peace in his two realms, and a union between Scotland and England[8]—

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[1] Coke's idea of the common law as 'artificial reason' has been disagreed with by T R S Allan in *Law, Liberty, and Justice, The Legal Foundation of British Constitutionalism*, Clarendon Press, Oxford, 1993, at p. 15, n. 64, though he supports what he quotes as Coke's view that judges may control the executive by interpreting statutes in accordance with 'the rule and reason of the common law.' *Ibid.*, at p. 15.

[2] James I had, like the Tudors, been precocious, and was a genuine scholar, his ability and learning both being real, and he was capable of appreciating large ideas and taking a statesman-like view. Tanner has said that 'anyone reading the King's speeches to his Parliaments with a mind free from the influence of a hostile tradition, might very well come to the conclusion that James I has been underrated by historians.' (...*James I, loc. cit.*, at p. 3). He was ahead of his time in his views on union with Scotland, and religious toleration.

[3] See *Prohibitions del Roy*, Prohibitions, 1607, an *ex post facto* account by Coke in his twelfth Report (published posthumously), quoted in Tanner, ...*James I, op. cit.*, pp. 186-187.

[4] *Prohibitions del Roy, ibid.* See my discussion on the passage of Bracton *post*, in Chapter 8 , p. .

[5] Holdsworth *op. cit.*, at pp. 430-431 suggests, referring to an article in *EHR* xviii 673, at 675, that this account is untrue, or at best, the most favourable gloss that Coke could put on the exchange, it being reported elsewhere (letter from Sir Roger Boswell to Dr Milbourne, *ibid.*, 669-670), that Coke fell 'flatt on all fower.' Hallam, *op. cit.*, also refers to contemporary authority [a letter dated 25 November 1608, quoted in Lodge, iii, 364, and reproduced in n. 1, Hallam, p. 240] which states that Coke used 'offensive speech' to the king, and said the king 'was defended by his laws; the king responding that he was not defended by the laws but by God. Coke criticised Sir Thomas Crompton (judge in Admiralty); and 'the king withal told him that sir Thomas was as good a man as Coke.'

[6] A V Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co. Limited, Edinburgh, 1885, p. 18; quoted in Tanner, ...*James I, op. cit.*, p. 174

[7] see Kenyon, *op. cit.*, p. 91.

[8] See James I's speech to Parliament, 19 March, 1604, from James I, *Works*, (1616 edn.), pp. 485-497, extracted in Tanner, ...*James I, op. cit.*, at pp. 24-30, particularly at pp. 25-27. See also *Act for Commissioners of Union*, 1604, 1&2 Jac. I, c. 2; *Statutes of the Realm*, iv, 1018, extracted in Tanner, ...*James I, op. cit.*, at pp. 31-33; and see James I, *Proclamation of Union*, 20 October, 1604, Rymer, *Foedera*, xvi, 603, extracted in Tanner, ...*James I, op. cit.*, pp. 33-35.

> I desire a perfect union of laws and persons, and such a naturalizing as may make one body of both kingdoms under me your king... I mean of such a general union of laws as may reduce the whole island, that as they live already under one monarch, so shall they be governed by one law.[1]

By Proclamation in 1604, three years earlier, he assumed the 'Name and Stile of King of Great Brittaine.'[2] But there was great opposition in the commons even to the change of name to Great Britain,[3] fear of an extension of the prerogative to that of 'the British kings before Caesar'[4], and much invective and obloquy against the Scots, one member remarking with unconscious ironic prescience: 'They (the Scots) have not suffered above two kings to die in their beds these 200 years.'[5] The judges 'declined to authorise his assumption of the title of King of Great Britain,'[6] and that style and title was abandoned.[7]

It is in this context, then, that Coke's notes on *Prohibitions del Roy* should be read. James did not 'claim a divine right to sit as judge and to develop common law as he thought appropriate', as Professor Loveland says in his *Constitutional Law*[8]. Nor did 'prerogative powers in the administration of justice [pass] into the hands of Her Majesty's judges'[9] by virtue of this opinion.[10]

COKE, ALLEGIANCE AND SOVEREIGNTY

It should, I believe, be remembered, that *Calvin's case* was a test case raised on behalf of the *Postnati* as a whole, to counteract prevailing 'blind hostility to the alien', whereby the landed English gentry argued that a Scot born in Scotland owed allegiance to the king only as king of Scotland, and was therefore an alien in the king's kingdom of England.[11]

The fundamental issue in *Calvin's case* was, in my submission, sovereignty, and the nature of it. It is in this context that Coke's comments should be read. He is unambiguous that allegiance is grounded in the law of nature; that it is something inherited at birth, and is a duty owed to the Sovereign or superior. In return for this allegiance, the Sovereign has a duty to govern and protect his subjects. These reciprocal duties stem from the law of nature, and antedate any judicial or municipal law. Such a law of nature is fundamental because else it would be 'vain to have prescribed laws to any but to such as owed obedience, faith and ligeance before, in respect whereof they are bound to obey and observe them...'.

In essence, then, Coke is saying that municipal law depends upon the law of nature; that there can be no effective municipal law imposing upon the people, unless there is an anterior compact between Sovereign and

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[1] James I, Speech to Parliament, 31 March 1607, On the Union with Scotland, James I, Works, (1616 edn,), pp. 509-525, extracted in Tanner, ...*James I, op. cit.*, pp. 35-37, at pp. 35-36

[2] By the King. *A Proclamation concerning the King's Majesties Stile, of King of Great Britaine*, &c., Westminster, 20 October, 1604, reproduced in *Stuart Royal Proclamations*, Vol. I, *Royal Proclamations of King James I*, 1603-1625, James F Larkin, Paul L Hughes (*eds.*), Clarendon Press, Oxford, 1973, at pp. 94-96.

[3] See Hallam, *loc. cit.*, at p. 234, n. 2, sourced to Commons Journals, 1604, 1606, 1607, 1610.—'we cannot legislate for Great Britain' (p. 186).

[4] Hallam, *ibid.*, p. 224, n. 2.

[5] *Parliamentary History*, I, p. 1082, and p., 1097, quoted in Tanner, ...*James I, op. cit.* p. 23.

[6] D H Wilson, 'King James I and Anglo-Scottish Unity', in Conflict in Stuart England, W A Aiken and B D Thomas (*eds.*), 1960, pp. 43-55, referred to in Kenyon, *op. cit.*, p. 91.

[7] See Hallam, *op. cit.*, p. 224, n. 2, sourced to Rymer, xvi. 603, and Bacon, i. 621.

[8] Ian Loveland, *Constitutional Law, a Critical Introduction*, Butterworths, London, 1996, at p. 104.

[9] See S de Smith and R Brazier, *Constitutional and Administrative Law*, Penguin Books, London, 1971, 7th edn. 1994, at p. 141, n. 67.

[10] However, most commentators have been content to accept Coke's assessment of what passed as the truth—see, for example, Ronald Walker and Richard Ward, editors of *Walker and Walker's English Legal System*, 7th edn., Butterworths, London, 1994, p. 121, where *Prohibitions del Roy* is cited as part of the process of 'whittling away' the prerogatives of the Crown.

[11] See Tanner, ...*James I, op. cit.*, at pp. 23-24 for a detailed discussion of the whole 'naturalisation' question.

subject, the one to protect and govern, the other to believe and obey. For this reason, the law of nature is part of the law of England. For once, all the major law officers in the state were agreed that the law of England was grounded upon the law of nature, and that its purpose was to protect life, liberty, and dower. Coke's comments on *non obstante*, and the capacity of the Sovereign to override statutes are made in passing towards his conclusion:

> Wherefore to conclude this point (and to exclude all that hath been or could be objected against it) if the obedience of the subject to his sovereign be due by the law of nature, if that law be parcel of the laws, as well of England, as of all other nations, and is immutable, and that *postnati* and we of England are united by birth-right, in obedience and ligeance (which is the true cause of natural subjection) by the law of nature, it followeth that Calvin the plaintiff being born under one ligeance to one king cannot be an alien born...[1]

Sir Francis Bacon also was unequivocal, that allegiance rose from natural law, that it both antedated and post-dated municipal law[2], and has force even when there was a suspension of law. Lord Ellesmere agreed completely with the Lord Chief Baron, and 'the lord Coke' on allegiance. He had nothing further to add to Coke's observations, except to say that 'several laws [Scotland and England having differing legal systems] can make no difference to a sovereign; and in the bond of allegiance and obedience to one king.'[3] He found that Calvin was 'in reason, and by the common law of England' within the allegiance of the king of England, and as such could deal as a subject in England, and as no alien.

Thus not only did these three agree that the law of nature was the foundation of the common law, and superior to both common law and statute, but they agreed that allegiance rose from the law of nature, and that it was owed to the person of the king.

In a monarchy, therefore, the law of nature exacts both duty and obedience from a subject to the person of the king. This duty and obedience is called allegiance. It is the foundation of municipal laws in a monarchy, as it provides the basis upon which the legal structure of the state is erected. It enables the sovereign to declare and to enforce the premises of the natural law through his courts and parliaments, because to him his subjects owe obedience. Allegiance is owed to the Sovereign as his birthright, as it is the subjects' birthright to give it. Allegiance is owed whether the subject or the Sovereign is within or without the kingdom. In return, the Sovereign has a duty to protect his people, to ensure the peace of the realm, and to maintain the law, whether the subject or the Sovereign is within or without the kingdom. Moreover, allegiance is owed from the subject to the Sovereign, and the sovereign duty owed by the Sovereign to the subject, even if there were no kingdom.[4]

In many ways, the concept of allegiance from the subject's point of view, is very like the Anglo-Saxon concept of the *trinoda necessitas*, the three things owed by all freemen to the king. In wartime or invasion, allegiance is the fundamental necessity of the Sovereign, until he be Sovereign no longer, or his state fails. And even then, it could be argued, allegiance persists—if Hitler had won World war II and occupied Britain, would the British have lost their allegiance to the king, even though the territory over which he was king was no longer his? Would the fundamental allegiance of the people to their king be overthrown? Would the king's duty to his people cease because he and his country had been conquered by an enemy? Would the Commonwealth countries who owe allegiance to the king suddenly owe it no longer?[5]

Lords Bacon, Coke and Ellesmere would all have answered these questions in the negative. Because allegiance was part of the law of nature. Because in a monarchy allegiance was owed by each person on their birth to the person of the king, and in relation to each of whom the king stood as protector, as *parens patriæ*[6], and each party was united in a bond under the natural law, and neither would but have a duty to oppose any thing or

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[1] See *Calvin's case*, 7 Co. Rep., 14 a-14 b; 77 ER (KB) 392. It is noteworthy that Coke even makes a reference to the 'violent passion' rather than 'reason grounded upon the law of nature' that had inspired opposition to the *postnati*. (see *ibid.*, 14 b).

[2] see his comments in *Calvin's case, supra.*

[3] see Lord Ellesmere, *Calvin's case, State Trials* II, 659, at 684.

[4] See Sir Francis Bacon's comments at in *Calvin's case*, discussed *supra.*

[5] I would answer all these questions in the negative. But the discourse on this occurs under the Chapters on the Coronation oath.

[6] i.e. the parent of his country, the Sovereign as guardian, see definition in *Dictionary of Law*, and reference there to *T v T* [1988] 2 WLR 189.

any body which contravened the fundamental principles of that law, or threatened the peace of either party, until or unless people, king , or the natural law were extirpated.

The doctrine on allegiance enunciated in *Calvin's case* remains the common law:

> [a]t common law, one who owes allegiance to the Crown is entitled to the Crown's protection; allegiance and protection are said to be correlative duties. The basic legal consequences of these principles at common law are as follows.
>
> Violation of allegiance by levying war against the Queen within the realm or adhering to the Queen's enemies[2] is high treason, an offence still attracting the death penalty.
>
> One who enjoys the protection of the Crown (a) is entitled to be physically protected by the Crown against armed attack within Her Majesty's dominions;[3] (b) is entitled to be afforded diplomatic protection by the Crown;[4] (c) may be entitled to be made a ward of court, if a minor;[5] and (d) can sue the Crown or its officers if the Crown commits or orders, authorises or ratifies unlawful acts in relation to him, inasmuch as act of State is not generally available as a justification for *prima facie* wrongful interference with the legal rights of a person owing allegiance.[6] [an Act of State is a prerogative act, primarily in the area of external affairs, in one aspect being a manifestation of national sovereignty by the executive branch of government[7], and has been described as 'an act of the executive as a matter of policy'[8] and as 'an exercise of sovereign power.'[9]]

With regard to British citizenship and aliens, as opposed to allegiance, however, the common law has been altered by statute. In 1948 the British Nationality Act recognised as British subjects nationals of all Commonwealth states owing allegiance to the King. But this was altered in 1962[10] after a rapid rise of coloured immigrants[11] into Britain from the West Indies, India, and Pakistan,[12] with further complex legislative changes being made with regard to British citizens, British dependent territories citizens, and British overseas citizens.[13]

COKE, THE BODY POLITIC, AND THE CROWN

The preoccupation of *Calvin's case* with sovereignty may be demonstrated also by Coke's seminal exegesis on the 'king's two bodies'. Coke said:

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[1] This quotation and the footnotes therein are taken from S de Smith and R Brazier, *Constitutional and Administrative Law*, Penguin Books, London, 1971, 7th edn. 1994, at p. 489 ff.

[2] acquisition of enemy nationality by a British citizen in wartime is treasonable: *R v Lynch* [1903] 1 KB 444.

[3] See generally *China Navigation Co. v Attorney-General* [1932] 2 KB 197, and *Mutasa v Attorney-General* [1980] QB 114.

[4] *Joyce v DPP* [1946] AC 347

[5] *Re P. (G E) (an Infant)* [1965] Ch. 568

[6] *Johnstone v Pedlar* [1921] 2 AC 262; see also *Nissan v Attorney-General* [1970] AC 179; and see de Smith and Brazier, *op. cit.*, pp. 158-164 for discussion of Act of State.

[7] see de Smith and Brazier, *op. cit.*, at p. 158.

[8] E C S Wade (1934) 15 *BYIL* at 103, quoted by de Smith and Brazier, *op. cit.*, at p. 160, n. 41.

[9] *Salaman v Secretary of State for India* [1906] 1 KB 613 at 639, quoted in de Smith and Brazier, *op. cit.*, at p. 160, n. 42.

[10] Commonwealth Immigrants Act (UK), 1962.

[11] Sir Francis Bacon addressed this aspect in his argument in *Calvin's case*, counsel for the defendant having raised, as a point of opposition, the possibility of West Indians becoming naturalised, their being not only a people *alterius soli* but also *alterius cæli*. Bacon said this involved a political, not a legal question; but that if the case should eventuate, parliament could make an act of separation 'if we like not their consort'—see *State Trials*, II, *op. cit.*, p. 590.

[12] See de Smith and Brazier, *Constitutional and Administrative Law*, *op. cit.*, p. 476.

[13] See de Smith and Brazier, *ibid.*, at pp. 476-497.

...it is manifest that the protection and government of the King is general over all his dominions and kingdoms, as well in time of peace by justice, as in time of war by the sword, and that all be at his command and under his obedience.[1]

...this ligeance is due only to the King;... It is true, that the King hath two capacities in him: one a body natural, being descended of the blood Royal of the realm; and this body is of the creation of the Almighty God, and is subject to death, infirmity, and such like; the other is a politic body or capacity, so called, because it is framed by the policy of man (and in 21 E. 4 39 b is called a mystical body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, nonage, &c. Pl. Com. in the case of *The Lord Barkley*[2], 238. and in the case of *The Duchy* 213. 6 E. 3. 291. and 26 Ass pl. 54. Now, seeing that the King hath but one person, and several capacities, and one politic capacity for the realm of England, and another for the realm of Scotland, it is necessary to be considered to which capacity ligeance is. And it was resolved, that it was due to the natural person of the King (which is ever accompanied with the politic capacity, and the politic capacity as it were appropriated to the natural capacity), and it is not due to the politic capacity only, that is to the Crown or kingdom distinct from his natural capacity, and that for divers reasons.

First, every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person, and likewise the King is sworn to his subjects, (as it appeareth in Bracton, lib. 3. De Actionibus, cap. 9, fol. 107) which oath he taketh in his natural person: for the politic capacity is invisible and immortal; nay the politic body hath no soul, for it is framed by the policy of man.[3]

4. A body politic (being invisible) can as a body politic neither make nor take homage...

6. The King holdeth the kingdom of England by birthright inherent, by descent from the blood Royal, whereupon succession doth attend;... But the title is by descent; by Queen Elizabeth's death the Crown and kingdom of England descended to His Majesty, and he was fully and absolutely thereby King, without any essential ceremony or act to be done *ex post facto*: for coronation is but a Royal ornament and solemnization of the Royal descent, but no part of the title. In the first year of His Majesty's reign, before his Majesty's coronation Watson and Clerke, seminary priests, and others, were of the opinion, that His Majesty was no complete and absolute King before his coronation, but that coronation did add a confirmation and perfection to the descent; and therefore (observe their damnable and damned consequent) that they by strength and power might before his coronation take him and his Royal issue into their possession, keep him prisoner in the Tower, remove such counsellors and great officers as pleased them, and constitute others in their places, &c. [*Sir Griffin Markham's Trial*][4]. And that these and other (acts) of like nature could not be treason against His Majesty, before he were a crowned king. But it was clearly resolved by all the Judges of England, that presently by the descent His Majesty was completely and absolutely King, without any essential ceremony or act to be done *ex post facto*, and that coronation was but a Royal ornament, and outward solemnization of the descent.[5] And this appeareth evidently by infinite precedents and book cases, as (taking one example in a case so clear for all) king Henry VI was not crowned until the 8th year of his reign, and yet divers men before his coronation were attainted of treason, of felony, &c. and he was as absolute and complete a King both for matters of judicature, as for grants, &c. before his coronation, as he was after, as it appeareth in the Reports of 1, 2, 3, 4, 5, 6, and 7 years of the same King. And the like might be produced for many other Kings of this realm, which for brevity in a case

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[1] *Calvin's case*, 7 Co. Rep., 9 a; 77 ER (KB) 388.

[2] Coke refers here to *Willion v Berkley*, 1562, 1 Plowden 223; 1 Eliz. 75 ER (KB) 339.

[3] *Calvin's case*, *loc. cit.*, at 7 Co. Rep., 10 a-10 b; 77 ER (KB) 389.

[4] See footnote below. And see 3 Co. Inst. 7—Sir Edward Coke, *The Third Part of the Institutes of the Laws of England*, printed at London by M Flesher for W Lee and D Pakeman, MDCXLIV (1644), p. 7, reprinted by Garland Publishing, New York, 1979, from facsimiles in the British Library, 508.f.g[2].

[5] *Sir Griffin Markham's Trial*, 2 *State Trials*, 61-69. Coke does not refer to his own reports as a source for these assertions. There is a report of the Trial of Sir Griffin Markham and others, including William Watson and William Clarke, priests, for High Treason, in *State Trials*, Vol. II, 1816, at pp. 61-69, [taken from a MS. In the Bodleian Library, *Rotulæ in Archivo.* 3033.44.8]. But there is nothing of what the judges said reported. Sir Griffin Markham referred to Watson's (one of the priests) view that 'the king before his coronation was not an actual, but a political king.' (*ibid.*, at p. 64). But the trial was a jury trial, the jury finding all except one guilty, and this reported very shortly. There *is* reported at length the response to James's pardon of three of the condemned men, and a record of his autograph warrant of pardon. Certainly there is no indication here that the judges said what Coke asserts they did about the coronation.

> so clear I omit. But which it manifestly appeareth, that by the laws of England there can be no interregnum within the same.[1]

With respect to Coke's last point—it is not surprising that Henry VI was not crowned until 1429, seven years after he became king, as he was only nine months old at the time of his accession.[2] He was the only king to succeed as an infant; all other kings who succeeded in their minority (Henry III, Edward III, Richard II, Edward V, and Edward VI) were all crowned immediately and took the coronation oath, except Edward V, who was declared illegitimate. During their infancy, Regents were appointed by the Privy Council, who could be the king's mother[3], a relative[4], or a high official[5], or a group of high officials[6].

These young kings almost invariably took the coronation oath again[7] when they came to their teens, at an age when they could consummate a marriage. On their coming of age, or achieving their majority, they could if they wished, repudiate the acts of their regents during their minority—for example the Privy Council on the accession of Edward VI proceeded to carry out Henry VIII's Will, 'not doubting that "our sovereign will when he cometh of age of knowledge and judgement ... graciously weigh our considerations, and accept benignly both that we do in this and in all other things during his ... minority"'[8] But in most cases the kings reaffirmed the acts of the regents—for example, Henry III's reaffirmation of the Magna Carta in 1225, when he was pronounced to be of age.[9]

In addition, those adult kings who on their accession were abroad and were not crowned immediately, either had a member of the Royal family act as Regent and proclaim the peace in the name of the putative king—as in the case of Eleanor of Aquitaine for her sons Richard and John; or had legally appointed agents to act on his behalf—as in the case of Edward I.[10]

Kings after their accession and before their coronation had been known to assume and to be given titles consonant with their incomplete state. For example, Edward the Confessor referred to himself during this time as '*Ego Eadward rex, regali fretus dignitate...*'[11]; the Twelfth Century Coronation Order, prior to the swearing of the coronation oath refers to 'the king elect' (*electum regum*)[12]; both Richard and John are referred to before

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[1] *Calvin's case, loc. cit.*, at 7 Co. Rep., 10 b- 11 a, ; 77 ER (KB) 389-390.

[2] See Stubbs, *Constitutional History*, p. 113; and see Appendix Y. As will be seen in the Chapters on the Coronation Oath *post*, coronations of kings who acceded to the throne in their minority did not occur until they were of an age to understand and to take the Oath.

[3] Cf. Edward III

[4] cf. Richard II (John of Gaunt), Edward V (Richard Duke of Gloucester and later King).

[5] Cf. Henry III (Earl of Pembroke)

[6] cf. Henry VI.

[7] Henry III, made coronation oath on accession in 1215 when he was 9; and again in 1220 when he was 14; he 'came of age' in 1223 when he was 17, and achieved his majority in 1227 at 21. Edward III was 10 in 1327 when he made his coronation oath. Richard II made his first coronation oath on accession in 1377 when he was 11, and his second in 1388 when he was 21. Henry VI was 9 months old when he succeeded in 1422, was crowned in 1428 when he was 8, and achieved his majority when he was 21 in 1442; but during his bouts of imbecility the Duke of York acted as Regent. Edward VI made his coronation oath in 1547 when he was 9; he died in 1553 at 15.

[8] from *Acts of the Privy Council*, [A.P.C]. II, 22, quoted in W K Jordan, *Edward VI: The Young King*, George Allen & Unwin, London, 1968, at p.64-65

[9] See Appendix Y, and Stubbs, *Constitutional History*, p. 353. Although Richard II attempted to undo much of what his uncle John of Gaunt had done during his Regency.

[10] See Chapter 5, p. *post.*

[11] Sawyer, P H, *Anglo-Saxon Charters: an Annotated List and Bibliography*, (Royal Historical Society, Guides and Handbooks, viii, 1968), n. 998; and Keynes, S, as referred to by George Garnett in 'Coronation and Propaganda: some Implications of the Norman Claim to the Throne of England in 1066', *Transactions of the Royal Historical Society*, fifth series, Vol. 36, London, 1986, p. 91 at p. 93..

[12] c. 1100, 'Twelfth century Coronation Order', ['Third recension of the English Coronation order'] from Legg, *English Coronation Records*, at p. 30(Latin), and p. 39 (translation). Legg sources this text to a manuscript pontifical in the British Museum, dating from the twelfth century [Brit. Mus. Cotton. MS. Tib. B. viii. fo. 81

taking the coronation oath as *dux Normanniae*[1] (Duke of Normandy), and no other title; Richard of Gloucester and Henry Tudor were introduced to the people assembled for their coronation as 'Here is [name] *elected chosen and required by all of the iij estates of this same lande to take apon him the saide crowne and royall dignyte*[2]'—the inference being that the person had not yet taken upon him the royal estate and dignity, and would only do so after the people had in the Recognition accepted him.

Moreover, it should be noted that Coke himself in his *Institutes* was careful to draw a distinction between kings *de facto* and kings *de jure*, saying that a king *de facto* in possession was yet *Seignior del Roy*, and that if a treason were done to a king *de facto*, on 'coming to the Crown' the king *de jure* shall punish the treason done against the king *de facto*[3]—just what this difference was, and what constituted a king *de jure* as opposed to a king *de facto*, however, Coke failed to elaborate.

From the context one may infer that he believes that the parliament may be able to cure any ills in a *de facto* king's title, since he refers to an act of Henry VII. That Act was 11 Henry 7, c. 1, known as the *Statute of Treason*[4], a statute for the security of the subject under a king *de facto*[5] which provided that [as Sir Francis Bacon put it] 'no person that did assist in arms or otherwise the king for the time being, should after be impeached therefor or attainted...but if any such act of attainder did hap to be made, it should be void and of none effect.'[6]

The actual text stated:

> The King our Sovereign Lord, calling to his remembrance the *duty of allegiance* of his subjects of this his realm, and that they by reason of the same are bounden to serve their prince and Sovereign Lord *for the time being* in his Wars for the defence of him and the land against every rebellion, power and might reared against him, and with him to enter and abide in service in battle if the case so require; And that for the same service what fortune ever befall by chance in the same battle against the mind and weal of the Prince, as in this land sometime past hath been seen, That it is not reasonable but against all laws, reason, and good conscience that the said subjects going with their Sovereign Lord in Wars, attending upon him in his person, or being in other places by his commandment within his land or without, any thing should lose or forfeit for doing their *true duty and service of allegiance*. It be therefore... enacted...that from henceforth no manner of person or persons...that attend upon the King and Sovereign Lord of this land for the time being in his person, and do him true and faithful service of *allegiance* in the same, or be in other places by his commandment, in his Wars within this land or without, that for the same deed and true service of allegiance he or they be in no wise convict or attaint of high treason nor of other offences for that cause by Act of Parliament or otherwise by

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[1] see Stubbs, *Select Charters* at p. 251, quoted from *Bened. Abb.* [Benedictus Abbas] ii. 78, A.D. 1189. *Ricardus dux Normanniae* ;and see Stubbs, *Select Charters* at p. 270-271, quoting Matthew Paris, (ed. Watts), A. D. 1199, p. 197, *Dux Normanniae Johannes.*

[2] See *The Little Device* for the Coronation of Richard III, as reproduced in *The Coronation of Richard III, the extant Documents*, edited by Anne F Sutton and P W Hammond, Alan Sutton Publishing Limited, Gloucester, 1983, at p. 213; British Library: Add. Ms. 18669. A very similar text would appear to have been used for Henry Tudor.

[3] See 3 Co. Inst. 7; Garland reprint, *op. cit.* Clearly here he speaking of the one person who was king *de facto*, and then becomes king *de jure.*

[4] See J R Tanner, *Tudor Constitutional Documents A.D. 1485-1603, with an historical commentary*, Cambridge University Press, Cambridge, 1922; republished by Cedric Chivers Ltd., Bath, 1971, p. 5, and text at p. 6.

[5] 11 Hen. 7, c. 1 (1495); J R Tanner, *Tudor Constitutional Documents*, pp. 5-6; referred to and discussed in T F T Plucknett's 11th edition of *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, pp. 224-226.

[6] Sir Francis Bacon, *Works*, vi, 270, quoted in Tanner, *Tudor Constitutional Documents*, p. 5. Sir Francis Bacon, Baron Veralum and Viscount St Albans, (1561-1626), a sadly neglected philosopher and legal and political commentator, was a parliamentarian from 1584 (Melcombe Regis 1584; Taunton 1586, Liverpool, 1589; Middlesex, 1593; Southampton, 1597; Ipswich, 1604; Cambridge University, 1614); first ever Queen's Counsel, (EI) 1597; Solicitor General, 1607 (James I); Attorney-General (James I) 1613; he was not liked by Elizabeth, and was a rival and critic of Sir Edward Coke; his legal writings, particularly those in which he argued for the codification of English law, have been in the main overlooked by later generations' concentration on his philosophical, literary and scientific works—see A W B Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984; and for extracts of his work, see Edwin A Burtt, (*ed.*), *The English philosophers from Bacon to Mill*, The Modern Library, New York, 1994.

> any process of law...And [any Act, Acts, or other process of law]... made contrary to this ordinance ...shall be...utterly void[1]

The emphasis is on the king *for the time being*[2]. Contrary to any modern idea of this act's being some kind of liberal, magnanimous or humane response to the tragically difficult and moral problem of how much obedience is due to a *de facto* government, it was a very specific political response by Henry VII to the threat posed by Perkin Warbeck, and did not attempt to deal with those problems.[3] Indeed, it could be said that Henry VII, pragmatist that he always was, faced this problem in a way that has not been seen ever since; he was capable of examining the difficulties that might arise during an interregnum, but only with regard to safeguarding his own (the king *de jure*'s) followers in circumstances which he could envisage occurring. Moreover, there is the distinct possibility that Henry had other motivations associated with his own dubious title to the crown.

Coke's view represents what came to be accepted as a constitutional maxim in the seventeenth century that 'possession of the throne gives sufficient title to the subject's allegiance, and justifies his resistance to those who may pretend a better right.'[4] If Coke were referring to 'rectification' of a king's title being made by parliament, this however is impossible of legal substantiation since it was the king who called the parliament into being, so the parliament would itself be an illegal entity if the king were also illegal[5], and therefore incapable of conferring any validity. Coke then went on to say that

> *If* the crown descend to the *rightful* heir, he is Rex before coronation; for by the Law of the England there is no interregnum: and the Coronation is but an ornament or solemnity of honour.[6]

Again, here Coke make an inference that there is a difference between a rightful and an illegitimate king, but he does not explicate on the differences, nor how one can determine the rightful heir. Moreover he says that by the law there is no interregnum, but he does not say by what law. Perhaps he was (as was his habit), enunciating as a principle what it seemed to him the law *should* be. Clearly however, there *was* an interregnum, and this had been recognised by the Privy Council when they proclaimed James I king[7]. (There is of course a further inference to be drawn from this statement by Coke, and that is that if the crown came to one who was *not* the rightful heir, then the coronation would no longer be a mere ornament.)

In *Calvin's case*, Coke attempts to show that the king's body politic is the one that never dies[8]; with this I would agree; but only because the people and common law through the coronation ratify a person in the office of king.

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[1] Tanner, *Tudor Constitutional Documents*, p. 6. As to the non-voidance of this Act, Sir Francis Bacon pointed out: 'But the force and obligation of this law was in itself illusory, as to the latter part of it (by a precedent act of Parliament to bind or frustrate a future). For a supreme and absolute power cannot conclude itself, nor can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that if he made any later will it should be void. ... But things that do not bind may satisfy for the time.' Bacon, *Works*, vi, 160, quoted in Tanner, *Tudor Constitutional Documents*, p. 6, n. 2. Of course, for Bacon the 'supreme and absolute power' to which he was referring, was the *king in parliament*; not to parliament in the sense that it is understood latterly to mean the houses of parliament. Bacon (like Coke in his early days) was a great supporter of the prerogative.

[2] My italics.

[3] This is the view put forward by Plucknett in his edition of *Taswell-Langmead's English Constitutional History*, *op. cit.*, at p. 225, with which I agree.

[4] See Plucknett, in 11th edition of *Taswell-Langmead's English Constitutional History*, p. 225. This maxim and the Act of Henry VII were used by Cromwell's supporters as a reason for him to assume the crown; and was advanced by the regicides as a justification for the killing of Charles I (this argument was rejected by the judges as the government they were adhering to was a non-regal government); the Act was also advanced by the revolutionaries of 1688 as a reason for accepting William III as king.

[5] Cf. the problem of William and Mary, *post*, p. xxx.

[6] 3 Co. Inst. 7, *op. cit.*, my italics. Coke cites as reference 'Hil. I Ja. In the case of Watson and Clark seminary priests. (9F.4.I.b) [This case is the case reported as *Sir Griffin Markham's Trial*, in 2 *State Trials*, 61-69].

[7] see p. xxx post.

[8] In *Calvin's case*, 7 Co. rep. 10a, drawing upon *Sir Thomas Wroth's case*, Trin. 15 Eliz. 1; 2 Plowden 452, at 456; 75 ER (KB) 678, at 685.; see discussion *post*, at p. xxx.

In Coke's own time, the question of an elective element in the kingship was receiving ever greater prominence[1]. The whole question of the nature of the estate of kingship and its duties and responsibilities was about to receive the most emotional, political, and legal examination in the history of England. While this aspect of the kingship is dealt with in detail in the later parts of this thesis, it is worth noting here in passing that firstly, many able lawyers of the seventeenth century, including parliamentarians like William Prynne, did not see the question of the coronation as a mere 'ornament'[2]; and further, if Coke's view as to the nature of allegiance taken together with his views of the coronation were correct, then after the 'Glorious Revolution', William and Mary were never any rightful kings, but rather James II and his heirs remained and would remain kings to this day.

Moreover, in the absence of any other precedents quoted by Coke, and in the light of the inadequacy of his reference to Henry VI to support his assertions, and in the light of the fact that I have been unable to find any other of the 'infinite precedents and book cases' which Coke 'for brevity in a case so clear' omitted, and the fact that I have been unable to find any record of what the judges actually said in *Sir Griffin Markham's Trial*[3], it seems to me that this is yet another instance of Coke's choler getting the better of his judgement. In my opinion these statements by Coke about the legal status of the coronation should therefore be treated with the utmost caution. It would certainly appear true that Markham had been persuaded by the priest Watson to believe that before his coronation James I was 'not an actual, but a political king.' There is in fact, however, considerable substance to Watson's contention, which amounts to saying that before the coronation a putative king is king *de facto* but not *de jure*, and which will be discussed *post* in the Chapters on Election and Recognition of kings, and on the Coronation Oath. But the record in *State Trials* does not substantiate Coke's assertions as to the judges' stating that the 'coronation was but a Royal ornament, and outward solemnization of the descent'; nor do the authorities substantiate his assertion that this so-called judges' statement 'appeareth evidently by infinite precedents and book cases...' Indeed, not only was Coke misguided in his reference to Henry VI, (as demonstrated above), but also (as will demonstrated throughout the rest of this thesis), the authorities tended in fact to support the opposing view.

Coke then explicated at length on the nature of this 'body politic' as opposed to 'the Crown'. He said:

> Therefore if you take that which is signified by the Crown, that is, to do justice and judgment, to maintain the peace of the land, &c. and to separate right from wrong, and the good from the ill: that is to be understood of that capacity of the King, that *in rei veritate* hath capacity, and is adorned and endued with endowments as well of the soul as of the body, and thereby able to do justice and judgment according to right and equity, and to maintain the peace, &c. and to find out and discern the truth, and not of the invisible and immortal capacity that hath no such endowments; for of itself it hath neither body nor soul. [allegiance if due to the King personally, not to 'England']...
>
> And oftentimes in the reports of our book cases, and in Acts of Parliament also, the Crown or kingdom is taken for the King himself... that is the person of the King.
>
> The reasons and cause wherefore by the policy of the law the King is a body politic are three, viz. 1. *causa majestatis*, 2. *causa necessitatis*, and 3. *causa utilitatis*. First, *Causa majestatis*, the King cannot give or take but by matter of record for the dignity of his person. Secondly, *causa necessitatis*, as to avoid the attainder of him who that hath right to the Crown...lest in the *interim* there should be an *interregnum*, which the law will not suffer... Lastly, *causa utilitatis*, as when lands and possessions descend from his

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[1] See Chapters 5 and 6 *post*.

[2] See Prynne's view, in Chapter 7, p. , *post*. —'...*their [the kings'] right by Election of their Subjects (the footsteps whereof doe yet continue in the solemne demanding of the peopls consents at our Kings Inaugurations)*... , in William Prynne, '*The Soveraigne Power of Parliaments & Kingdoms* or Second Part of the Treachery and Disloilty of Papists to their Soveraignes. (etc.)' printed by Michael Sparke, Senior, by Order of the Committee of the House of Commons concerning Printing, 28 March 1643. Facsimile copy made from the copy in the British Library (1129.h.6) by Garland Publishing Inc, New York, 1979, at p. 57.

[3] See p. XXX, *supra*. *Sir Griffin Markham's Trial*, 2 *State Trials*, 61-69. Coke does not refer to his own reports as a source for these assertions. There is a report of the Trial of Sir Griffin Markham and others, including William Watson and William Clarke, priests, for High Treason, in *State Trials*, Vol. II, 1816, at pp. 61-69. But there is nothing of what the judges said reported. Sir Griffin Markham referred to Watson's (one of the priests) view that 'the king before his coronation was not an actual, but a political king.' (*ibid.*, at p. 64). But the trial was a jury trial, the jury finding all except one guilty, and this reported very shortly. There *is* reported at length the response to James's pardon of three of the condemned men, and a record of his autograph warrant of pardon. Certainly there is no indication here that the judges said what Coke asserts they did about the coronation.

> collateral ancestors, being subjects, as from the Earl of March &c. to the King, now is the King seised of the same *in jure Coronæ*, in his politic capacity; for which cause the same shall go with the Crown;...But to conclude this point, our ligeance is to our natural liege Sovereign, descended of the blood royal of the Kings of this realm.[1]

This lengthy critique followed upon a series of cases under Elizabeth, where judges had attempted an analysis of the nature of the estate of the king, or 'the Crown'. The leading cases are *The Duchy of Lancaster case*[2], *Willion v Berkley*[3], and *Sir Thomas Wroth's* case[4]. In all these cases the judges struggled with the concept of the king as head of state holding sovereignty, even though he may be a minor, while simultaneously (because of the alternation of the succession to the crown between the houses of York and Lancaster during the Wars of the Roses) attempting to enunciate a rule as to the nature of the estate of king, as opposed to the former estate of him who had become king. Thus, in *The Duchy of Lancaster case* (1561), the court held that, under the common law:

> the king has in him two bodies, viz., a body natural, and a body politic. His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government and constituted for the direction of the people and the management of the public weal, and this body is utterly void of infancy and old age, and other natural defects and imbecilities, which the body natural is subject to, and for this cause what the King does in his body politic cannot be invalidated or frustrated by any disability in his natural body.[5]
>
> His body politic, which contains his royal estate and dignity, and the body politic includes the body natural, but the body natural is the lesser, and with this the body politic is consolidated. So that he has a body natural, adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated into one person, and make one body and not divers, that is the body corporate in the body natural, *et e contra* the body natural in the body corporate. So that the body natural, by the conjunction of the body politic to it (which contains the office, government and Majesty royal), is magnified, and by the said consolidation has in it the body politic, for which reason the acts which the King does touching the things that he possesses or inherits in the body natural, require the same circumstance and order as the things which he possesses or inherits in the body politic do, for the thing possessed is not of such consideration to change the King's person, but the person who possesses it changes the course of the thing possessed.[6]

Moreover, the court said, notwithstanding attempts by Henry IV 'to take away the common law' through a Charter by authority of Parliament[7] to retain the Duchy lands for his heirs in such fashion as if he had not become king,[8] this was ineffective, as the 'prerogative which the common law gives to the person of the King'[9] annexed to him as king, not as duke, for a king cannot be duke in his own realm, 'since the name and dignity of king drowns the name and dignity of duke.'[10] And thus even though the charter was given by the

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[1] *Calvin's case, loc. cit.*, at 7 Co. Rep., 11 b, 12 a, 12 b; 77 ER (KB) 390-391.

[2] *The Duchy of Lancaster case*, 1561, 1 Plowden 212; 75 ER 325; [1558-1774] All ER, 146.

[3] *Willion v Berkley*, 1562, 1 Plowden 223; 1 Eliz.; 75 ER (KB) 339.

[4] *Sir Thomas Wroth's case*, 1574, 2 Plowden 252; 75 ER (KB) 678.

[5] *The Duchy of Lancaster case*, 1561, 1 Plowden 212; 75 ER 325; [1558-1774] All ER, 146, at p. 147.

[6] *Duchy case, ibid.*, p. 147.

[7] It should be remembered that 'parliament' in the time of Henry IV did not have the meaning ascribed to it by Coke in his Fourth Institute (High Court of Parliament, consisting of the king, and the three estates); rather it was the king's '*parlement* ', a meeting of advisers from the three estates, and at that time did not include the king himself in the common understanding of the term, as an integral part of 'parliament'.

[8] See [1558-1774] All ER, 146, 149: the Charter was *Carta Regis Henrici quarti de separatione Ducatus Lancastriæ a Corona Auctoritate Parliamenti, anno Regni sui primo.* The court noted that this was a 'politic scheme' of Henry, because he knew his title to the Duchy lands was indefeasible, while his title to the crown was 'not so good.' (*ibid.* at 150)

[9] *Duchy case, op. cit.*, p. 150.

[10] *Duchy case, op. cit.*, p. 151.

authority of parliament, yet it was ineffective. This meant, then, that neither the king of his own will, nor the king with the consent of Parliament, had the authority to override the prerogatives attached to the person of the king; that is that under the common law the body politic of the king has precedence over the body natural of the king, and over the parliament.

In *Willion v Berkley*[1] the court after hearing extensive argument, held, per Dyer CJ, that

> *King* is the highest name of honour in this realm, which for the greatness of it drowns all other names of honour or dignity... and because there is not, or ought not to be, more than one that bears the name of King in this realm, the name of King contains certainty enough, to signify who it is that has this name...
>
> Further, the King has two bodies, viz. A body natural and a body politic, and he has capacity in both the one and the other. And the name (*King*) contains them both, and *heirs* implies both heirs and successors, for it is but of late time that *successors* have been added in the King's grants. [2]

In *Sir Thomas Wroth's case*[3] the Barons of the Exchequer held that by virtue of the 'descent of the Crown', an annuity granted by the king 'shall bind his successors for it was granted in the body politic capacity of the king which never dies'[4]:

> ...the body politic of the king is charged, which body politic is perpetual, and has perpetual continuance and never dies, although the body natural, in which the body politic is reposed, dies, as other bodies natural do; for the body politic is a body immortal, and not subject to death, and therefore if he that is King dies, such death is not called in law the death of the King, but the demise of the King, not signifying by the word (*demise*) that the body politic of the King is dead. (for death extinguishes life in everything it comes to, which it does not with regard to the body politic of the King) but that there is a separation of the two bodies, and the body politic has left the body natural now dead or now removed from the dignity-Royal, and is conveyed over to, and reposed in, another body natural.[5]

COKE AND INDEFEASIBLE HEREDITARY RIGHT

It will be recalled that in the first year of James' reign, Sir Griffin Markham and certain Jesuits had been tried for treason for asserting that James was 'no complete and absolute King before his coronation, but that coronation did add a confirmation and perfection to the descent'; he was merely a 'political king.'[6] Sir Edward Coke asserted that James was 'absolute and complete a King' before the coronation because:

> The King holdeth the kingdom of England by birthright inherent, by descent from the blood Royal, whereupon succession doth attend; and

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[1] *Willion v Berkley* 1 Plowden 223 (facts and argument) 75 ER (KB) 339; 1 Plowden 241, Trin. 4 Elizabeth 1, 75 ER (KB) 368 (case)

[2] *Willion v Berkley* 1 Plowden 241, 250; Trin. 4 Elizabeth 1, 75 ER (KB) 368, per Dyer CJ at 382-383. Dyer CJ also held at 75 ER (KB) at 386 (1 Plowden 249) that while it is a general principle that an Act can not bind the King except by express words, this is not so when the Act involves restitution, for the king's prerogative provides him with no exception to restitution to another to that which the king has no right (and the purpose of the Act in question there [*Statute de Donis Conditionalibus*] was to restore the common law where it had been misused).

[3] *Sir Thomas Wroth's case*, Trin. 15 Eliz. 1; 2 Plowden 452; 75 ER (KB) 678.

[4] *Sir Thomas Wroth's case*, Trin. 15 Eliz. 1; 2 Plowden 452, at 456; 75 ER (KB) 678, at 685.

[5] *Sir Thomas Wroth's case*, Trin. 15 Eliz. 1; 2 Plowden 452, at 457; 75 ER (KB) 678, at 685.

[6] See *The Trial of Sir Griffin Markham... William Watson, Priest, William Clarke, priest, for High Treason*, 1 Jac. I, Nov. 15, 1603, 2 *State Trials*, 61-69, at p. 64 [taken from a MS. in the Bodleian Library, *Rotul in Archivo.* 3033.44.8]. And see Sir Edward Coke in *Calvin's case, loc. cit.*, at 7 Co. Rep., 10 b-11 a, ; 77 ER (KB) 389-390; and Coke in 3 Co. Inst. 7—Sir Edward Coke, *The Third Part of the Institutes of the Laws of England*, printed at London by M Flesher for W Lee and D Pakeman, MDCXLIV (1644), p. 7, reprinted by Garland Publishing, New York, 1979, from facsimiles in the British Library, 508.f.g[2].

> presently by the descent His Majesty was completely and absolutely King, without any essential ceremony or act to be done *ex post facto*, and that coronation was but a Royal ornament, and outward solemnization of the descent.[1]

Having established this point to his satisfaction, Coke goes on to demonstrate that the king's protection and the subject's allegiance are mutually interdependent:

> the Parliament could not take away that protection which the law of nature giveth unto him [a man attainted in a *præmunire*]; and therefore, notwithstanding the statute, the King may protect and pardon him. ... A man outlawed is out of the benefit of the municipal law;... and yet he is not out of his natural liegance, or of the King's natural protection; for neither of them is tied to the municipal laws, but is due to the law of nature, which (as hath been said) was long before any judicial or municipal law.

Here, then, we have no less an individual than Sir Edward Coke, that multi-faceted latter-day legal Procrustes, endorsing indefeasible hereditary right and a version of the divine right theory, and his justification for the former is to be found in the law of nature—' the *lex æterna*, the moral law, called also the law of nature.'[2] (In addition, it is worth noting that then use of the word 'absolute' here by Coke with regard to the kingship reflects the understanding of that term in those days: that is, it meant complete, having all jurisdiction, being sovereign and able to command the allegiance of his subjects.)

COKE ON KINGS BENCH

In 1613 Sir Francis Bacon procured Coke's removal from Common Pleas to Chief Justice of Kings Bench, where he began gradually to abandon the idea of precedent, and to adopt an attitude antipathetic to the king.[3] In *Peacham's case*, he insisted in the face of established precedent that the king had no right to consult the judges individually before they tried a case.

Sir Edward Coke continued to dominate the case law at this time, partly because he wrote the casebooks. (Sir Francis Bacon, a skilful lawyer, a great jurist and a philosopher, gave only remnants of his time to the law, and would doubtless have been a greater lawyer than Coke had he like Coke devoted all his energies to it[4]. But Bacon did not write any law reports.) It was said of Coke when he was Chief Justice of King's Bench that

> He doth not so much insinuate that this court (the King's Bench) is all sufficient in itself to manage the state; for if the King's Bench may reform any manner of misgovernment (as the words are) it seemeth that there is little or no use, either of the King's royal care and authority exercised in his person and by his proclamation ordinances and immediate directions, not of the Council Table, which under the king is the chief watch tower for all points of government, nor of the Star Chamber, which hath ever been esteemed the highest court for extinguishment of all riots and public disturbances and enormities; and besides the words do import as if the King's Bench had a superintendency over the government itself, and to judge wherein any of them do misgovern...[5]

The outcome of Coke's successful proselytism of his own views at any given point in time has been discussed earlier. The essence of Coke's view of the world was that he really wanted to be king—he was the one who knew all the law, not the king, and did not shrink from saying so; he was the one who knew all the precedents, and displayed them to his advantage; and in whatever position he occupied, he sought out all means to aggrandise the power which he had: the prerogative over all, when he was Attorney-General; the common law over the prerogative and over parliament when he was Chief Justice. So that when he came to be a member of parliament, it was a forgone conclusion that he would attempt to assert the power of the houses of parliament over the king and over the law. This is exactly what he did.

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[1] See Coke, *Calvin's case*, *loc. cit.*, at 7 Co. Rep., 10 b-11 a ; 77 ER (KB) 389-390.

[2] See Coke, *Calvin's case*, *loc. cit.*, 7 Co. Rep. , 11 a; 77 ER (KB) 377, 391-392.

[3] See Kenyon, *op. cit.*, pp. 92-93; Coke's position under the Stuarts will be discussed in Chapter 11, *post.*

[4] See the assessment of Sir William Holdsworth, *A History of English Law*, Vol. V, *op. cit.*, at pp. 434-435.

[5] See the writer of the Observation on Coke's Reports, pp. 11-12, quoted in Holdsworth, *op. cit.*, p. 430, n. 3.

COKE IN PARLIAMENT

THE FIVE KNIGHT'S CASE AND THE *PETITION OF RIGHT*

In 1627 the king, having dissolved parliament, attempted to raise money to prosecute the war by means of raising loans through the prerogative. Certain gentlemen, including one Darnel, refusing to give monies for the loan, were imprisoned under warrant from the Attorney-General, and sought to remedy their incarceration by writ of *habeas corpus*, which had been denied on the basis they were detained by special command of the king. This case raised fundamental questions relating to the liberty of the subject and the extent of the royal prerogative, and is known as *The Five Knights Case*.[1] The case was argued on precedents, the plaintiffs adducing the *Magna Carta* in their support, which in c. 29 stated that no man should be imprisoned except by lawful judgement or the law of the land; but precedents existed to show that the common law countenanced such imprisonment in four cases: on the death of a man; by commandment of the king[2], or of his justices, or of the forest.[3] The Lord Chief Justice Hyde of King's Bench delivered the joint judgement, holding that: a) the judges were bound by their oaths both to maintain all the prerogatives of the king, and to administer justice equally to all; b) the precedents supported the king. Hyde CJ added, in a reference to the coronation oath, that 'the king hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law, as we are sworn to do, and so is the king...'[4]

The king released the men by writ, but many who had suffered under the loan were elected to the next parliament. The king needed supply for the wars with France and Spain, but the House of Commons propounded its grievances on the liberty of the subject arising out of the imprisonment of Darnel and the billeting of soldiers. All members of the Commons had taken an oath, which included a commitment to defend the king's prerogatives.[5] The debate concentrated on the liberties enshrined in the *Magna Carta*, and on the extent of the king's prerogative. Selden referred to an earlier case[6] in the thirteenth year of James I concerning a writ identical to that which had held Darnel, in which Coke had held that the writ was good, and that cause need not be disclosed as the matter was one of *arcana regni* (pertaining to the royal prerogative), and Coke basing his view on the *Resolution of the Judges* in 34 Eliz., and on Stamford.

Coke immediately rose to justify himself, saying that that report was 'under age' being not yet 21 years old, and that though he had once accepted Stamford, now he had changed his mind, and in any event, the times of the thirteenth year of James I was an ill one, when many traitors were committed for the Gunpowder Plot and Chancery and King' Bench were fighting (the inference being that it was alright in those circumstances to commit people on unbailable writs), and moreover his old guide Stamford had deceived him and now he had better guides, namely, Acts of Parliament; and in any event, the so-called report of his was not his but 'some other' wrote the report which was wrong, and 'I persuade myself that Mr Attorney drew it'; and moreover the *Resolutions of the Judges* was Apocrypha.[7] A note to an old edition of *State Trials* observes—'Coke of one mind, when a Judge, and in favour; of another, when out of court, and discontented.'[8]

A conference with the Lords followed on the subject of the liberties of the subject. Serjeant Ashley for the king used the words 'State' and 'State Government' with regard to the king, and urged an accommodation to the conference, for which impertinence he was committed to custody.[9] The judges were called before the Houses to justify their decision with regard to the writ, which they did, noting that their action was in

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[1] *The Five Knights Case* (*Darnel's case*), 3 Charles I, 1627, *Cobbett's Complete Collection of State Trials*, Vol. III, p. 1.

[2] In particular the attorney-General relied on the Resolution of all the Judges in 34 Elizabeth, where they unanimously held that if a man is committed by 'her majesty's command, from her person, or by order from the Council board; and if any...of her Council commit one for High Treason' he is not bailable by *habeas corpus*—see references in *Five Knight's case*, *ibid.*, at pp. 43-44, and at pp. 58-59, and pp. 76-77.

[3] Five Knights case, 3 State Trials, at p. 43.

[4] Five Knights case, 3 State Trials, at p. 59.

[5] See Selden's speech, *Five Knights case*, 3 *State Trials*, at p. 78.

[6] Mich. 13 Jac., quoted in *Five Knights case*, 3 *State Trials*, at p. 81-82.

[7] See speech of Sir Edward Coke, *Five Knights case*, 3 *State Trials*, at pp. 81-82.

[8] See note † at p. 81, *Five Knights case*, 3 *State Trials*.

[9] See Five Knights case, 3 State Trials, at p. 151.

accordance with all precedents, and that they had done nothing either to enlarge the king's prerogative, or to trench on the liberties of the subject.[1] By 1628 the houses were still debating the matter, having drawn up five propositions on liberty and the prerogative, to which the king answered on 28 April.[2] The House rejected the king's answer, planning to respond by a Bill, to which the king replied again, noting that time was passing and affairs needed dealing with.[3] A further exchange occurred between the House and the king, with the king undertaking to confirm a Common's Bill reaffirming *Magna Carta* and other statutes for the subjects' liberties. Some were then for letting the matter rest, but Sir Edward Coke's reason prevailed to the contrary:

> Let us put up a *Petition of Right*: not that I distrust the king, but that I cannot take his trust, but in a parliamentary way.[4]

The king responded, noting that he had allowed a debate on his prerogative, which none of his predecessors had, and that he had declared a resolution which met all of the Commons' points.[5] But the Commons said the 'the people will only like of that which is done in a parliamentary way', and proceeded with the *Petition of Right*.[6] The Lords attempted an amendment which would 'leave intire that Sovereign Power, wherewith your Majesty is trusted for the protection, safety and happiness of the people'[7]. But Alford objected to 'sovereign power' on the basis of Bodin, which, he said, would acknowledge a regal as well as a legal power, and Pymm said 'we cannot leave him [the king] a sovereign power when we were never possessed of it.' And Coke said that the inclusion of this phrase would 'overthrow all our petitions', that old petitions never had a saving of the king's sovereignty, and that

> I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. ...it weakens *Magna Carta*, and all our statutes; for they are absolute, without any saving of sovereign power. And shall we now add it, we shall weaken the foundation of law, and then the building must fall; let us take heed what we yield unto; *Magna Carta* is such a fellow, that he will have no sovereign. I wonder this sovereign was not in *Magna Carta*, or in the confirmations of it: if we grant this, by implication we give a sovereign power above all these laws: power, in law, is taken for a power with force: the Sheriff shall take the power of the county, what it means here God only knows.[8]

Coke of course was talking through his hat. For centuries, statutes post-dating *Magna Carta* had contained a saving of the king's sovereign power, that is of the rights of the crown[9], as had the coronation oath[10]; and at least two of the confirmations of the *Magna Carta* had included savings of the rights of the crown.[11] And Coke and the other members had a very good idea of what 'sovereign power' was, as their oaths as members of Commons obliged them to assist and defend it, as was eventually acknowledged by the Commons[12], and they spent the next nine days debating it, distinguishing aspects of the king's sovereign power or prerogative royal. They attempted to show that the king's prerogative could override statutes which imposed penalties, but not those which enshrined rights.[13] They attempted to distinguish those confirmations of the *Magna Carta* with savings, falling back on saying that the saving could not be proved.[14] The *Petition of Right* was presented

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[1] See Five Knights case, 3 State Trials, at pp. 161-164..

[2] See Five Knights case, 3 State Trials, at pp. 170-171.

[3] See Five Knights case, 3 State Trials, at pp. 180-181.

[4] See Five Knights case, 3 State Trials, at p. 188.

[5] See Five Knights case, 3 State Trials, at pp. 190-191.

[6] See Five Knights case, 3 State Trials, at p. 192.

[7] See Five Knights case, 3 State Trials, at p. 193.

[8] See *Five Knights case*, 3 *State Trials*, at pp. 193-194; and sovereign power is also discussed at 198, 206.

[9] See for example, 12 Henry II (Constitutions of Clarendon); 1301 Statute of Lincoln; 1322, Revocation of New Ordinances; 1341 13 Edward III; 1411, Henry IV.

[10] See Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502, at p. 501; and H G Richardson, *Speculum*, XXIV, 1949, 44-75—this is discussed at length in Chapter 12.

[11] 1297, 25 Edward I, and 1299 27 Edward I.

[12] See Five Knights case, 3 State Trials, at pp. 214-215.

[13] See Five Knights case, 3 State Trials, at p. 206.

[14] See Five Knights case, 3 State Trials, at p. 208.

to the king on 26 May 1628, the Commons professing constantly that they had no intention to diminish the royal prerogative. The *Petition of Right* contained the following basic precepts:

- No tax, aid or any other like charge to be made without common consent by act of parliament (X1);
- None be molested or confined or required to make answer 'concerning the same or refusal thereof'; (X2)
- No freeman be imprisoned or detained 'in any such manner as aforementioned'; (X3)
- The king to declare that his ministers will serve him according to the laws and statutes of the realm, and that the king undertake 'that the awards, doings and proceedings to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example. (XI)

The king returned an answer on 2 June, saying he was willing that right be done according to the laws and customs of the realm, and that he held himself obliged to preserve the rights and liberties of his subjects in conscience as well as of his prerogative. The house dallied, and found his answer insufficient; Charles, anxiously in need of funds to prosecute the war, came to the House of Lords on 7 June, and agreed to the *Petition of Rights—Soit droit fait come il est desiré par le Petition C.R.*, saying also that his maxim was that 'the people's liberties strengthen the king's prerogative, and the king's prerogative is to defend the people's liberties.'

As soon as the *Petition of Right* was passed Coke relinquished his hold on the House of Commons, which then attempted to deny the king tunnage and poundage, on the basis that the parliament, not he, had control over them, and asserted justification in the citizenry not paying them. Charles prorogued the parliament, saying while it was his intention to abide by the *Petition of Right* there was therein no mention of tunnage and poundage. Charles was almost certainly right, and the Commons had blatantly encouraged merchant groups not to pay tax, and were seen to be encouraging self-interested men to break the law. But by 1629[1], the Commons were in open revolt against Charles' religious policy and continued opposed to his levying of tunnage and poundage, and after defiance of the king's order of adjournment, forcibly held the Speaker down till they had passed their resolutions. Charles dissolved parliament on 10 March 1629, and no parliament was to be called until 1640, Charles raising money for his foreign adventures by writs under the prerogative. (It should be noted here that at least one scholar has noted that Charles I ruled during these years 'by the royal prerogative with great care and economy').[2]

The influence of Sir Edward Coke at this time should not be underestimated. It was he who orchestrated the *Petition of Right*, and he who was so vehemently promoting the power of the houses of parliament over the

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[1] For a discussion of these times, see Kenyon, *Stuart Constitution*, *op. cit.*, pp. 60-62, and S B Chrimes, English *Constitutional History*, Home University Library, Oxford, 1948; 4th edn. Oxford Paperbacks University Series, Oxford, 1967, pp. 108-110.

[2] See J C A Gaskin, (*ed.*), in his Introduction to his edition of Thomas Hobbes' *Leviathan, or The Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill*, [written 1648-1650 in France] printed for Andrew Crooke, at the Green Dragon in St Paul's Churchyard, London, 1651, Oxford University Press (World Classics paperback), London, 1996, at p. xiii.

king, whom he could not trust but 'in a parliamentary way.' Coke's view had been that when he was a judge, he knew the law better than the king and should therefore prevail. As a parliamentarian, his view was that bills promoted by the representatives in parliament were more reliable than any judgement of the king under his prerogative, and should therefore prevail over any view of the king. It was thus Coke, in my view, who sowed the seeds, so successfully, for the propagation of the idea which bore such bitter fruit in later decades, when parliamentarians came to see themselves as the only and absolute arbiter of the common weal.

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