# PART THREE

## THE KING OF THE PEOPLE

# CHAPTER 3

# THE PEOPLE AND THEIR KING

## THE PEOPLE'S KING

Kings in Britain initially described themselves as king *of a people*,[1] who by virtue of this *ruled* over them within a specified area of land.[2] This was the why the *Bretwalda* sometimes styled themselves king of a people *and Bretwalda*—one who ruled over the island of Britain or of the Britons.[3] Cnut was the first to style himself king of all the English lands, or all of England,[4] as his was the first successful effort to apply universal laws to all the people, Danes as well as the English.[5] 'Kingdom', it will be remembered, derives from the O.E. *cyning* and *dom*—where the king exercises his law and judgements, or to put it in a medieval sense, where the king's writ runs.

How then, does one become a *cyning*, and on what authority does he make his *dome*? To this

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[1] For example, Alfred styled himself *Westseaxna cyning*, (king of the West Saxons), and later as *Angul-saxonum rex* (king of the English Saxons), see p. 46, and note 2, *supra*; Æthelstan styled himself *Onglosaxna cyning* (king of the Anglo-Saxons), see p. 42, *supra*; William I styled himself 'king of the English', see p. 92, *infra*.

[2] See Æthelstan, 'ÆÐELSTAN Onglosaxna cyning and brytenwalda ealles þyses iglandæs þurh Godæs gifæ', and (*Bretwalda* Britain-ruler of all this island), p. 42 *supra*. This kind of styling is reminiscent of the Celts, who were king of a people and by virtue of that had rule over a particular area of jurisdiction (*tuath*)—see discussion at p. 37, *supra*.

[3] e.g. Æthelstan, see p. 42, *supra*.

[4] Cnut, 1027, Proem.: *Canutus, rex totius Angliae*; I Cnut, Proem: *Cnut cyning, ealles Englalandes cyning;* quoted in Jolliffe, *Constitutional History of Medieval England, loc. cit.*, at p. 105; and *Rationabili consideratione decrevit, quatinus sicut uno rege, ita et una lege universum Angliae regnum regeretur*—Consiliatio Cnuti (1110-1130), Proem., 2; quoted in Jolliffe, *Constitutional History of Medieval England, ibid.*, p. 105. And see my observations at p. 62, and p. 62, note 5.

[5] See discussion at p. 62, *supra*.

day Elizabeth II speaks of 'My peoples'[1], and was proclaimed

> ...Queen Elizabeth II by the Grace of God, Queen of this Realm, and of Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith, to whom Her Lieges do acknowledge all Faith and constant Obedience with hearty and humble Affection, beseeching God by whom all Kings and Queens do reign, to bless the Royal Princess, Elizabeth II, ... [2]

History demonstrates three ways in which a person can become a king—by divine appointment, by conquest, and by election. But an examination of these three avenues also shows that in fact there is only one way—by the election or consent of the people.

The archetypal divine appointment (that of Saul of the Israelites) is clearly shown to have occurred 'by lot', the people both desiring him as and acclaiming him king.[3] Religious authentication of the selected person as king (the anointing of the king) reflects at the most deep level commitment by people to king and king to people; while this is not without significance for the law (all British kings being anointed[4] and styling themselves king 'by the grace of God'[5]), it will not be examined in this place.[6]

Conquest occurs only under the *aegis* of a king or person who already has the support of his people who serve under him in the conquest, and in Britain, all kings who have taken the land and the British people by conquest have subsequently been ratified and recognised by

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[1] See Elizabeth II, Formal Declaration of Sovereignty to the Accession Council (Special Meeting of the Privy Council) 8 February, 1952; for texts see Appendix I, and Appendix II.

[2] See *When the Queen was Crowned*, Brian Barker, Routledge & Kegan Paul Ltd., London, 1976, p. 26; for full text see Appendix I and Appendix II, *infra*. See also John W Wheeler-Bennett, *King George VI, His Life and Reign*, Macmillan & Co Ltd, London, 1958, at p. 728.

[3] See 1 *Samuel* Chapter 10, *passim*, and see p. 30, *supra*. References to Saul occurred, and still occur, in the coronation ceremony of British Kings, —see *Liber Regalis*, Legg, *English Coronation Records*, and the Coronation Order for Elizabeth II, in John Arlott and others, *Elizabeth Crowned Queen, The Pictorial Record of the Coronation*, Odhams Press Limited, London, 1953.

[4] See the coronation ceremony for Elizabeth II, under anointing, in Arlott, *Elizabeth Crowned Queen*, *loc. cit.*

[5] *Deo gratia*—see p. 86 *supra*, and p. 152, and p. 266, *infra*, and see 'Elizabeth, the Second, by the Grace of God, Queen of Australia and Her other Realms and Territories, Head of the Commonwealth...'—*Royal Style and Titles Act* (Cth.), 1973; and see Dooms of Ine, c.688, *supra*, p. 44, *mid Godes gife*...

[6] Discussion of this aspect of kingship may be found in the various liturgical publications on the coronations of kings, which are cited in Appendices I and II, and in John Neville Figgis, *The Divine Right of Kings*, 1896, Cambridge University Press, Cambridge; 2nd edn. 1914, reprinted by Harper Torchbook, New York, 1965, with an Introduction by G R Elton, reprinted by Peter Smith, Publisher, Gloucester, Mass., 1970; Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, Methuen & Co Ltd, London, 1961, 2nd edn. 1966; S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936, reissued by American Scholar Publications, New York, 1966; and in Ernst H Kantorowicz, *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957; first Princeton paperback printing, 1981; 7th paperback printing with a new preface by William Chester Jordan, 1997. It is also explicated upon in almost every sermon by the Archbishop of Canterbury on the occasion of the coronation of the king.

the consent of the British people.[1]

How then does this choice, this election, this recognition by the people of a king occur?

## THE PEOPLE RECOGNISE THE KING

A British king is crowned only after his recognition by the people as the person they are willing to have and to serve as their king.

The Recognition is that part of the Coronation when the Archbishop of Canterbury in a loud voice asks the people assembled four times to the four corners of the Abbey, (while the putative king shows himself simultaneously to the four corners of the assembly), whether they are willing to serve and do homage to that person as king. And if the people are willing, they cry, God save the king![2]

The earliest Coronation Order[3] known for an English[4] King, dates from the time of Echberht, Archbishop of York c. 734 , and includes certain prayers known to have been used at the first Coronation of which any record exists: that of Judith daughter of Charles

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[1] Cnut, William I, Henry IV, Henry VII, William III, were all formally recognised by the people in the Recognition of the coronation ceremony, and in some cases were also endorsed by the acclamation of the people. Conquest, however, entails the possibility that the conqueror may completely change the law of the conquered land and apply his laws; no conqueror of England, has, however done this, instead swearing to maintain the laws of the land—see the discussion at p. 64 and note 1 *supra*, and p. 111, p. 366, p. 380 *infra*.

[2] See the order reproduced in *Elizabeth Crowned Queen, The Pictorial Record of the Coronation*, Arlott, John, and others, Odhams Press Limited, London, 1953, at p. 53; and see Sarah Bradford, *Elizabeth, A Biography of Her Majesty the Queen*, Heinemann, London, 1996, p. 190; and see *The Coronation of their Majesties King George VI and Queen Elizabeth, May 12th 1937*, Official Souvenir Programme, King George's Jubilee Trust, Odhams Press Limited, London, 1937, at p. 25; and see *The Crowning of the Sovereign of Great Britain and the Dominions Overseas*, by the Sacrist of Westminster Abbey, Dr Jocelyn Perkins, Methuen & Co, London, 1937, 2nd edn., 1953; and see Harold Nicolson, *King George the Fifth, His Life and Reign*, Constable & Co Ltd, London, 1952, at p. 145; and also the *Liber Regalis*, at L G W Legg, *English Coronation Orders*, Archibald Constable & Company Limited, Westminster, 1901, p.116; in the Coronation Order of Charles I, Legg, *ibid.* at p. 250; in the Coronation Order of James II of England, Legg, *ibid.* at p. 293; in the Coronation Order of William and Mary, Legg, *ibid.* at p. 322; and in the Coronation Order of Victoria, Legg, *ibid.* at p. 364; and see W J Loftie, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India, 1902*, Cassell & Company, London, 1902, at p. 175

[3] These Orders for the ceremony for the consecration and crowning of the king are called *Ordos*, or *Ordines*. They are set out as a guide for the conduct of the coronation by the clerical and temporal officials. See Appendix I.

[4] Though there may well have been earlier Orders for the consecration of Celtic kings—see The Marquess of Bute, *Scottish Coronations*, London, 1902, referred to and summarised in Herbert Thurston, *Coronation*, from the *Catholic Encyclopedia*, the Encyclopedia Press, Inc., 1913; transcribed by Douglas J Potter for the Electronic version, copyright 1997 by New Advent, Inc.

the Bald and Consort of Æthelwulf King of Wessex in 836[1]. It is entitled 'The Mass for Kings on the Day of their Hallowing'[2] and provides for 'The Blessing over the king *newly elected*'.[3]

What is usually known as the First English Coronation Order[4] and was known to liturgists[5] as the 'Lanalet Pontifical' , uses language of election almost identical to that in the Echberht Pontifical, and dates from some time in the ninth century.[6]

The Second English Coronation Order, sometimes known as the Coronation order of Æthelræd II and for which St Dunstan may have been responsible, is attributed to the year 973[7]. (Modern scholars now refer to this as the 'Edgar Ordo'.[8]) The king is described at the outset by the word '*futurus*' but after his anointing he becomes '*rex ordinatus*'[9]; and in the context of the oath, he is referred to as 'the king chosen by the bishops and the people'[10].

The Third English Coronation Order is said to be of twelfth century provenance, and is known as the Coronation Order of Henry I, c. 1100[11]. In this the king is referred to as 'the king elect'.[12] These Coronation Orders are procedures to be followed for the 'consecration' of the king'[13].

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[1] Perkins, *The Crowning of the Sovereign, op. cit.*, p. 85.

[2] See my Appendix I; Legg, *English Coronation Records, op. cit.*, p. 9 (English) and p. 3 (Latin)—*Missa pre rege inde benedictionis eius*; and see the text reproduced in *Two Anglo-Saxon Pontificals*, edited by H M J Banting, , Boydell Press for the Henry Bradshaw Society, London, 1989, from MS Lat. 10575 in the Bibliotheque Nationale.

[3] Legg, *English Coronation Records, op. cit.*, at p. 9, my italics; Latin, at p. 4 : *Benedictio super regem nouiter electum*

[4] as printed in Legg, *English Coronation Records, op. cit.*, at p. 3.

[5] For a discussion of the Coronation orders and their dates and nomenclature, see John Brückmann, 'The Ordines of the Third Recension of the Medieval Coronation Order', in T A Sandquist and M R Powicke (*eds.*), *Essays in Medieval History presented to Bertie Wilkinson*, University of Toronto Press, Toronto, 1969, 99-115

[6] Legg, *English Coronation Records, op. cit.*, p. 3.

[7] see Perkins, *The Crowning of the Sovereign, op. cit.*, pp. 85-6

[8] see P L Ward, 'The Coronation ceremony in Medieval England', *Speculum*, Vol. XIV, 1939, pp. 160-178, at p. 166

[9] Perkins, *The Crowning of the Sovereign, loc. cit.*., p. 86.

[10] Legg, *English Coronation Records, op. cit.*, p. 23 (English) and p. 15 (Latin) : *Et ab Episcopis et a Plebe electus hec*

[11] Legg, *English Coronation Records, op. cit.*, p. 30; note that Legg says there is no evidence it was used for the coronation of Henry I; and see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, pp. 111-202, at p. 124 notes that this recension of the Order can give no guide to the developments in the twelfth and thirteenth centuries.

[12] Legg, *English Coronation Records, op. cit.*, English, p. 39; Latin, p. 30: '*electum regem*' and '*electus rex*'

[13] Legg, *English Coronation Records, op. cit.*, e.g. p. 39

The longest enduring coronation Order was the Fourth English Coronation Order, of which there were a number of versions[1] dating from the time of Edward II, (c. 1307-1308[2]) which in turn culminated in the form (c.1355-1377) which is known as the *Liber Regalis*.[3] It is this version of the coronation Order that contains the formalisation of the election of the king by the people in the Recognition, in the manner still used today.[4]

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[1] Versions of coronation orders are called by liturgists 'recensions'; this can at times be confusing, however, as they speak of the four main recensions of the coronation orders, and then within each main recension, various 'sub' recensions. For the versions of the 'fourth' coronation order, see Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, *art. cit.*; he notes at p. 141 that an early version of the Fourth Order was extant at about 1307 (at p. 141), but that a number of revisions occurred which culminated in the *Liber Regalis* some time between 1351 and 1377.( at p. 112, and p. 149). However, J Wickham Legg published in 1900 *Three Coronation Orders*, for the Henry Bradshaw Society, Vol. XIX, printed for the society by Harrison and Sons, London, 1900; in Appendix XI, pp. 121-124 he included a text of a *Corounement de nouel Roi*, an extract from a Chancery Miscell. Roll 18/3 (dors.), Public Record Office, whose writing is of the first half of the fourteenth century.'—see *infra* p. 239, note 4; and at p. 40 he included an Anglo-French Version of *Liber Regalis* dating from about 1272, from a manuscript, No. 20, belonging to Corpus Christi College, Cambridge.—see p. 175 *infra*, and p. 175 note 3 *infra*. There are therefore, grounds for believing that some recension of what later became known as the *Liber Regalis* may have been extant long before 1307, and perhaps as early as the coronation of Edward I. (For texts, see Appendix I).

[2] Legg, *English Coronation Records*, *op. cit.*, at p. 81; and see Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, *art. cit.*.

[3] Text of *Liber Regalis* to be found in Leopold G Wickham Legg, *English Coronation Records*, Archibald Constable & Company Limited, Westminster, 1901, at p. 81 (Latin Text); translation of Oath at p. 117; Legg uses a manuscript held by the Dean of Westminster, dated at about the time of Richard II; Legg gives no specific date. Texts of the oath in Latin, and the English translation, together with other major variants including the French text of the English *Liber Regalis* oath(s) are to be found in Appendix I, *post*. The text of the final recension of the *Liber Regalis* dates from 1351-1377, according to H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, 111-202, see p. 112, and p. 149. *Liber Regalis*, literally, The King's Book, or The Royal Book, or The Book of the Royal Office—'This is the order to which a king must be crowned and anointed'—see Legg, *English Coronation Records*, *op. cit.*, p. 112. Note that Walter Ullmann, writing in *Principles of Government and Politics in the Middle Ages*, Methuen & Co London, 1961, 2nd edn. 1966, at p. 203 says 'The fourteenth century *Liber Regalis* directs — assuredly in consonance with established practice — that very early on the day of the coronation there is to be at the Palace of Westminster what might be called a meeting of the accession council. Here the prelates and nobles were to treat "about the consecration of the new king and about his election as well as about the laws and customs to be confirmed". However diluted, there still remains just a shade more than a whiff of populism in this meeting.' And see the translation of the *Liber Regalis* in Legg, *op. cit.*, at p. 114: 'On the day appointed on which the new king is to be consecrated, early in the morning the prelates and nobles of the realm shall assemble in the royal palace of Westminster to consider about the consecration and election of the new king, and also about confirming and surely establishing the laws and customs of the realm.' I can find no evidence in Legg, nor in the orders for Edward VII, George VI nor Elizabeth II, of there being any such meeting prescribed in the Ordines from the time of Charles I onwards. However, the Accession Council, (a special meeting of the Privy Council, which would appear to include representatives of the members of the British Commonwealth), does meet after the death of each monarch, and hears the formal Declaration of Sovereignty from his successor — see my Appendix I, Elizabeth II, and see Sarah Bradford, *Elizabeth, A Biography of Her Majesty the Queen*, Heinemann, London, 1996, at pp. 167-168; and Harold Nicolson, *King George the Fifth, His Life and Reign*, Constable & Co Ltd, London, 1952, (2nd imp 1952), at p. 123, and chapter 4 *passim*. After the meeting of the Accession Council and the Declaration of Sovereignty by the monarch, the king establishes a Coronation Commission, which is to be responsible for all matters relation top the coronation—see Appendix I, under Elizabeth II. A Coronation Committee of the Privy Council is also established.

[4] See Appendix II, under *Liber Regalis*, and see Legg, *English Coronation Records*, *loc. cit.*, English translation, p. 116. And see text of Elizabeth II's Recognition at Appendix II, and at p. 477 *infra*.

## ELECTION OF THE KING PRIOR TO THE CONQUEST

Seventeenth century politicians and lawyers distorted the old records,[1] creating the myth of the 'Ancient' or 'Gothick' constitution. This consisted in 'pristine Anglo-Saxon polity in which popular representation in the *witangemot* was an entrenched right', the House of Commons being a direct descendant of the *witan*. The doctrine involved a celebration of the Germanic tribes and their simplicity and communal virtue. Whigs embracing these ideas saw history as a contest of simple, communal, German-descended patriots against despots, giving rise to 'Whig historiography'.[2]

This myth was but a convenient polemic fit to suit and to justify the political ambitions of the time which has unfortunately and erroneously coloured discussion on the topic of kingship and parliaments ever since.[3]

The facts are otherwise. As has been demonstrated in Chapter 1[4], prior to the Anglo-Saxon and Roman invasions the Celts had a long history of hero-kings, or god-kings, with the kings being associated with both law and divinity.[5]

In addition to the kings of pre-Augustinian Britain appearing to have acquired a notion of 'sanctity', or 'sacredness', it would seem that the most important qualification for a king was that a claimant should be 'born to his office'[6], and that a king's genealogy came to be

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[1] For example, William Peyt, *The Antient Right of the House of Commons Asserted, or a discourse proving by Records and the best Historians, that the Commons of England were ever an Essential Part of Parliament*, London, 1680; and Sir Robert Atkyns, *The Power, Jurisdiction, and Priviledge of Parliament; and the Antiquity of the House of Commons Asserted*, London, 1689.

[2] See J G A Pocock, *The Ancient Constitution and the Feudal Law*, Cambridge University Press, Cambridge, 1957, 1987, referred to by Mark Goldie, (*ed.*), John Locke, *Two Treatises of Government*, Everyman, London, 1993, at p. xix. It is not without interest that the full flowering of this view came to pass under Germanic princes—with the invasion by the Dutch William of Orange, and under the German Georges I and II.

[3] Not until the publication in 1907 of H M Chadwick's book *The Origin of the English Nation* were these misconceptions finally exposed—see Peter Hunter Blair, *An Introduction to Anglo-Saxon England*, Cambridge University press, Cambridge, 1956 (reprint 1966), at p. 194. This idea of the 'Germanic' tribes as being the fundamental basis of the English constitution pervaded even into the twentieth century—see my remarks at pp. 39-41.

[4] See *supra*, Chapter 1, 'Celts and Kingship', p. 31 ff.

[5] And see, for a concise account of early British kings, David Lambert and Randall Gray, *Kings and Queens*, Harper Collins Publishers, 1991, p. 1 for Ancient British kings and queens; p. 9 for Roman and Romano-British rulers; p. 66 for Welsh kings and princes; p. 76 for Irish kings; and p. 82 for Scottish kings and queens.

[6] Blair, *Anglo-Saxon England, op. cit.*, p. 196; and for the Celts, see D A Binchy, *Celtic and Anglo-Saxon Kingship*, The O'Donnell Lectures for 1967-68, delivered in the University of Oxford on 23 and 24 May 1968, Clarendon Press, Oxford, 1970, at p. 21, and pp. 26-27.

regarded as the most important of his possessions[1]; and inevitably the ancestry of the king is traced back to the gods.[2] But while an hereditary aspect was significant, the principle of primogeniture played no part in the succession—it was not necessary for a son to succeed a father. The *Anglo-Saxon Chronicle* speaks of *feng to rice*, meaning that someone 'acquired the kingdom'; it also mentions *ceosan to cyninge*, meaning 'chosen as king'. The appointment of a successor was not automatic according to a given rule of succession; but neither was it an act of election; rather was it something between the two, consisting in the choice or selection of the most suitable man[3] from among those who were otherwise qualified, the most important qualification being royal birth[4] (of the blood royal, or (O.E.) *cynecynn*[5] or (Celtic) *rígdomnai*[6]). Recent commentators have suggested that the role of the *witan*, like that of the Celtic chieftains earlier (the *airecht*[7] or assembly of notables), was rather to ratify a choice already made by the king during his lifetime from those of the blood royal who were eligible and appropriate, having regard to the exigencies of the time.[8] But it was essential that someone be chosen by common consent and put into the position of leader, ruler, lawgiver, and patron, because without such a leader the people would fall into disarray, and they and their land lie prey to any enemy. This leader was the *cyning*, the *rí*, the *Bretwalda*, the overking—the king.

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[1] See The Marquess of Bute, *Scottish Coronations*, London, 1902, p. 34. referred to and summarised in Herbert Thurston, *Coronation*, from the *Catholic Encyclopedia*, the Encyclopedia Press, Inc., 1913; transcribed by Douglas J Potter for the Electronic version, copyright 1997 by New Advent, Inc. And see K. Sisam, 'Anglo-Saxon Royal Genealogies', *Proc. Brit. Acad.* XXXIX (1953), 287-348, as quoted in Blair, *Anglo-Saxon England*, *op. cit.*, p. 196.

[2] The *Anglo-Saxon Chronicle* traces the genealogy of Offa, King of Mercia, back to Woden; see *English Historical Documents*, Vol. I, c.500-1042, Dorothy Whitelock, (*ed.*); David D Douglas (*gen. ed.*), Eyre Methuen, London, 1955; 2nd edn., 1979, at pp. 176-177. And see Blair, *Anglo-Saxon England*, *op. cit.*, p. 197.

[3] It was almost invariably a man, although Boadaciea (Boudicca) had been recognised as Queen of the Iceni after the death of her husband, and during a revolt against Rome; and Æthelflæd, sister of Edward the Elder and of Alfred the Great, governed Mercia in her own right after the death of her husband, Æthelræd, governor of Mercia and defender of London, appointed by Alfred; some say she was the driving force behind Edward the Elder's victories in the north of England.

[4] Blair, *op. cit.*, p. 198; and see Whitelock, *ed. cit.*, at p. 24. And see T F T Plucknett, *A Concise History of the Common Law*, 5th edn., Little, Brown and Company, Boston, 1956, at pp. 30-32

[5] See J E A Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, Adam and Charles Black, London, 1967, at p. 30.

[6] See D A Binchy, *Celtic and Anglo-Saxon Kingship*, The O'Donnell Lectures for 1967-68, delivered in the University of Oxford on 23 and 24 May 1968, Clarendon Press, Oxford, 1970, at pp. 9-10.

[7] See Binchy, *Celtic and Anglo-Saxon Kingship*, *ibid.*

[8] That is, that the British election by the *witan* was more akin to the Celtic selection of the *tanist*, or the *tánaise rig*, by the *rígdomnai* than had heretofore been thought. See Binchy, *loc. cit.*, at pp. 26-30.

The king was 'elected' in this sense by the *witan*[1]; (strong kings like Offa attempted to inaugurate a dynasty by having a son consecrated king while he was yet king himself, invariably without success).[2] But once the king/*ri*/*cyning* was chosen by the people, all people in the kingdom/*rice*/*cynedom* owed him fealty and homage[3], this being demonstrated in both physical and symbolic fashions. These processes came to be known as 'election' and 'recognition'.

William of Normandy claimed to be 'king of the English'[4] as the heir of Edward the Confessor; William relied on Edward's gift or devise: Edward had given him the kingdom. But the English did not admit this claim, as it had 'not been law among them that a king might appoint his successor'[5], and consequently the *witan* chose Harold as king.[6] William subsequently maintained his claim by force of arms and defeated Harold at Hastings. William, though a conqueror, sought the recognition of the *witan*, and took the coronation oath.[7]

## ELECTION OF THE KING FROM THE CONFESSOR TO THE TUDORS

'Election' of the king, or his endorsement by the *witan*, appears to have been an (almost) indispensable condition precedent to his coronation as king and a recognition of the legitimacy of his kingship.

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[1] The death of a king meant that his nobles were deprived of the offices which they had previously held and consequently the profits arising therefrom. These nobles were the king's councillors. It was imperative that a person be chosen or elected as king as soon as possible, for new office holders to hold their office.

[2] It would seem that every king who had his son crowned king during the old king's lifetime, was dooming him to death—Offa's son died very early in his reign; Henry II's eldest son died before he acceded to the throne.

[3] See my Appendix I for the coronation orders, and the oath of allegiance required by Edmund.

[4] see this description of himself in for example, Ordinance of Church Courts, 'William, by the grace of God king of the English...' as quoted in S&M1, at p. 35.

[5] See F W Maitland, *The Constitutional History of England*, Cambridge University Press, Cambridge, 1908, reprint 1950, at pp. 60-61, and see also p. 97.

[6] Another view may well have been however, that Harold was present at Westminster for the consecration of the cathedral at the time of Edward's death, the Vikings were threatening in the north, and the requirement for a leader was immediate

[7] For a discussion of William's succession in England, see 'Coronation and Propaganda: some Implications of the Norman Claim to the Throne of England in 1066', by George Garnett, *Transactions of the Royal Historical Society*, fifth series, Vol. 36, London, 1986, p. 9, at p. 93, and n. 13.

**Edward the Confessor** was elected[1]; **Harold** was elected by the *witan* already assembled for the consecration of Westminster Abbey[2]; **William the Conqueror** was elected[3]; his son **William II** (Rufus) was not[4]; **Henry I** (the younger of Rufus' two brothers) seized the royal treasure and was elected 'by a few prelates and other nobles', though his election was no mere form as there were divisions among even those few who were present[5], and he was required to take the coronation oath and proclaim a charter of liberties;[6] **Stephen** also stole the royal treasure and was hailed and elected king;[7] **Henry II** was elected[8]; as was **Richard I**[9], and his brother[1] **John**.

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[1] 1042, Edward the Confessor elected in London in June, in a ceremony performed even before Harthnacut's funeral [*Anglo-Saxon Chronicle*, (E) *s.a.* 1041 (*recte* 1042); as referred to in 'Coronation and Propaganda: some Implications of the Norman Claim to the Throne of England in 1066', by George Garnett, *Transactions of the Royal Historical Society*, fifth series, Vol. 36, London, 1986, p. 91 at p. 93. From then till his coronation and anointing he described himself as '*Ego Eadward rex, regali fretus dignitate...*' [Sawyer, P. H, *Anglo-Saxon Charters: an Annotated List and Bibliography*, (Royal Historical Society), Guides and Handbooks, viii, 1968), n. 998; and S Keynes, as referred in Garnett, *art. cit.*, at p. 93.)

[2] Harold's election and consecration occurred very quickly, in the context of military insecurity, and his dubious claim to the English throne; see Garnett, 'Coronation and Propaganda', *art. cit.*, at p. 93 and especially note 12.

[3] see Stubbs, *The Constitutional History of England*, in 3 Volumes, Clarendon Press, Oxford, 3rd edn., 1884; reprinted by William Hein & Company, Buffalo, New York, 1987, Vol. I, p. 280.

[4] see Stubbs, *Constitutional History, loc. cit.*, Vol. I, p. 321; he was not elected as most barons were opposed to his succession; he was crowned by the 'head of *witangemot*', the Archbishop of Canterbury, Lanfranc, in return for the coronation oaths; and see for greater detail and references, Barbara English, 'William the Conqueror and the Anglo-Norman Succession', BIHR, Vol. LXIV, 1991, p. 221, especially at pp. 229-231.

[5] Robert the Crusader, Henry's absent older brother, had claims on the throne which were discussed, but the claims of Henry (who had been brought up in England) were preferred, a 'rule' enunciated that as Robert had been born before William I became king, and Henry in 1068, Henry had been *porhyrogenite*, born in the purple, and was therefore to be preferred. But this 'rule', having served its purpose, was never heard of again in England.—see T F T Plucknett, 11th edn., *Taswell-Langmead's English Constitutional History*, Sweet & Maxwell, London, 1960, p. 479, sourced in n. 24 to William of Malmesbury, *Gesta Regum*, v, 393, and Schramm, 154. Schramm, in fact, says the deciding factor was that Henry had been born 'after his father's *coronation*...' (Schramm, p. 154, my italics.) Although a shade of this theory arose in the *Titulus Regius* of Richard III, '...and how that you were born within this land; by reason whereof, as we judge in our minds, you are more naturally inclined to the prosperity and common welfare of the same,...', see p. 110, note 1 *infra*.

[6] see Stubbs, *loc. cit.*, at Vol. I, p. 329, and n. 4 where he quotes William of Malmesbury G R v. §393 'In regem electus est, aliquantis tamen ante controversiis inter proceres agitatis atque sopitis, annitente maxime comite Warwicensi Henrico'. And see F W Maitland, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1st edn., 1908; reprinted 1950, at p. 9, p. 60. and p. 159; And see Coronation Charter at my Appendix I. And see 1100 Henry I letter to Anselm, Archbishop of Canterbury, wherein he refers to himself as 'a clero et a populo Angliae electus' , quoted in Percy E Schramm, *A History of the English Coronation*, English translation by Leopold G Wickham Legg, Clarendon Press, Oxford, 1937, at p. 154, sourced to *Epp. Anselmi*, iii, no. 41; and Migne, Pat. lat., Vol. clix, cols. 75-76; and see Stubbs, *Select Charters*, p. 102.

[7] see Stubbs, *Constitutional History*, Vol. I p. 487, n. 6., sourced to *Gervase* I. 94. Sir Matthew Hale in his *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976) calls Stephen an usurper, because he had no legal title, this belonging to Henry's daughter Matilda, and 'he assumed his title by election of the people and by confirmation of the pope.' At p. 71 [Hale's original, 97]

[8] see Stubbs, *ibid.*, at p. 487

[9] see Stubbs, *Select Charters*, p. 249 —he says that although Richard 'had not been fully acknowledged by Henry II as his successor until a few days before his death, and had never been formally received as such by the English baronage, he succeeded without any difficulty in obtaining recognition, ...'

The election of John was much more than a mere formality, as his nephew, Arthur, son of Henry II's third son, Geoffrey, was next in any strict hereditary succession. Eleanor of Aquitaine, mother to both Richard and John, took to the field herself at the age of eighty against her grandson to support John's claim.[2] John's son **Henry III**, succeeded during his minority, and he was selected by the barons.[3] Henry III was not technically 'elected', there being no member of the royal house capable of urging any alternative claim; surprisingly, given the turmoils of John's reign, the barons, in whose power John's son was, followed an hereditary principle. Henry was crowned, and the barons appointed the Earl of Pembroke *rector regis et regni* and associated certain councillors with him.[4] Thus, as a result of circumstance and self interest on the part of the barons (who effectively ruled during Henry's minority) the foundation was laid for the 'elective' principle to give way to the hereditary principle. Partly, perhaps, as a result of Henry's long reign[5], his son **Edward I** was elected, and homage made and fealty sworn to him even though he was not in the realm[6].

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[1] Richard I *Coeur de Lion* was married to Berengaria, daughter of the King of Navarre while on crusade in Cyprus [see Schramm, *loc. cit.*, at p. 40.] but, according to Michael St John Parker in *Britain's Kings and Queens*, Pitkin Pictorials, London, 1974; further edition 1990, reprinted 1992, at p. 11, Richard was a homosexual and left no issue.

[2] John was the fourth son of Henry II, and Richard the second, the eldest son, Henry, who had been crowned by his father, dying before succeeding. But the third son, Geoffrey, had died leaving a son, Arthur; pure hereditary descent should have seen the crown go to him. Stubbs in *Constitutional History*, §151 Vol. I p. 553, says '..the form of election and the solemn promises of good government were repeated. But a speech is preserved by Matthew Paris, which, whether or no the words are genuine, seems to show there was something exceptional in the proceedings; some attempt on the archbishop's part to give the formality of election a real validity, which perhaps might be useful if the claims of Arthur should ever be revived. Hubert declared, the historian tells us, that the right to reign is conferred by the election which the nation makes after invoking the grace of the Holy Ghost: ... Richard died without an heir; the grace of the Holy Ghost had been asked for: in John were united royal blood, and the good qualities of prudence and energy: all together then elected John. The cry "Vivat rex" was the answer of the assembled crowd. The archbishop moreover, when he received the coronation oath, adjured him on God's [554] behalf that he would not take the honour to himself without a full purpose to keep his oath, and John replied that by God's help in good faith he would keep all he had sworn.' [n.1 *Matthew Paris*, ii. 454,455. 'In the declaration made by Lewis, on his invasion of England in 1216, long before Matthew Paris wrote, this speech of Hubert is distinctly referred to as affecting the claim of inheritance. See *Foedera*, I. 140'] And for Eleanor's activities, see Stubbs, *Constitutional History*, Vol. I, p. 535, pp. 556-557, and p. 604.

[3] see Maitland, *Constitutional History*, *op. cit.*, p. 200

[4] Maitland, *ibid.*, p. 200.

[5] 1216-1275; though the lack of questioning of Edward's right to succeed was probably due also to his long involvement in his father's counsels.

[6] 'The new king's reign began on the date of his father's funeral, 20 November 1272, when, without waiting for his return or coronation, the earl of Gloucester, followed by the barons and prelates, swore to observe the peace of the realm and their fealty to their new lord. [n. 2. November 20; *Foedera*. i. 497; *Ann. Winton*, p. 112. The earl had sworn to Henry on the day of his death to do this; *Liber de Antt. Legg*. p. 155] For the first time the reign of a new king began, both in law and in fact, from the death of his predecessor; and, although in the coronation service the forms of election and acceptance were still observed, the king was king before coronation; the preliminary discussion, which must have taken place on every vacancy since the Norman Conquest, was dispensed with, and the right of the heir was at once

Edward had taken the cross[1] in 1270, but '[e]very precaution was taken to secure Edward's succession and the establishment of the provisional administration which was to rule until his return.'[2] Prior to his departure he had appointed three agents to act for him, and on Henry III's death on 16 November 1272 these three became virtual regents. It would appear that shortly after the old king's death the regents issued a proclamation announcing the devolution of the throne by hereditary succession to Edward, and proclaiming the King's Peace in the new king's name.[3] In early 1273 a *parlement* of magnates and representatives of the shires and boroughs took oaths of allegiance to the new king, and continued the regents' authority; thus by the double authority of Edward's personal delegation and by recognition of the estates, the regents governed in the king's name until his return some two years later.[4]

This marked a major change. Stubbs has asserted that from thenceforth, 'all kings' reigns began, in both law and fact'[5], from the death of their predecessor. This statement is not true. As to fact, Henry VII dated his reign from *before* his predecessor's death.[6] As to law, one would have to say that the actions of Edward I's agent/regents merely established a precedent, which by virtue of its manifest common sense (that is, the immediate declaration of the new King's Peace, and thus the maintenance of the law and its enforcement on the demise of the old king in whose name the King's Peace had previously run), was followed thereafter, and thus became a custom, and as such earned its place as

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recognised. The doctrine of the abeyance of the King's Peace during the vacancy of the throne was thus deprived of its most dangerous consequences, although it was not until the reign of Edward IV that the still newer theory was accepted, that the king never dies, [says Stubbs] that the demise of the crown at once transfers it from the last wearer to the heir, and that no vacancy, no interruption of the peace occurs at all.' '... on 23 November 1272 the royal council issued a proclamation in the name of the new king announcing that the kingdom had, by hereditary succession and by the will and fealty of the 'proceres,' devolved on him, and enjoined the observance of the peace.' [n. 2 *Liber de Antt. Legg.* p. 155; *Foed.* I. 497] see Stubbs, *Constitutional History*, Vol. II, pp. 106-107.

[1] Gone on crusade to the Holy Land.

[2] see T F Tout, *The History of England from the Accession of Henry III to the Death of Edward III, (1216–1377)*, Longmans, Green, and Co., London, 1905, Vol. III in *The Political History of England*, in twelve volumes, William Hunt and Reginald L Poole, (*eds.*), p.139.

[3] see Stubbs, *Constitutional History*, Vol. II, pp. 106-107; and see Stubbs, *Select Charters*, pp. 447-448; Stubbs says that the date of Edward I's reign is from 20 November 1272, the date the 'oath of fealty was taken by the barons at Westminster.' See also Sir Matthew Hale, *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976, p. 65, writ of 23 November, 1 E. 1, *de pace regis proclamatio.*

[4] See Tout, *The History of England, loc. cit.*, at p. 139; Edward did not hasten his return once he had tidings of the maintenance of the peace, and spent the time in engaging in personal negotiations relating to his foreign policy.

[5] See Stubbs, *Constitutional History*, Vol. II, *loc. cit.*, pp. 106-107.

[6] See discussion at p. 116, *infra.*

part of the common law[1]. There had also been a somewhat limited precedent in the past, at the time of Richard I's accession—he was abroad at the time of the death of Henry II, but his mother, Eleanor of Aquitaine, went at once on provincial progress and received the homages of all freemen to Richard as *Dominus Angliae*, and, acting in conjunction with the justiciar (Ranulf Glanvill[2]), in her own name issued a proclamation claiming the nation's allegiance for Richard and proclaiming the new King's Peace[3]. The vacuum left by the ending of the old King's Peace on the death of the king before the coronation of the new king and the proclamation of the new King's Peace resulted in suspension of the law, as the *Anglo-Saxon Chronicle* noted on the death of Henry I:

> (*anno* 1135): 'The king died on the following day after S. Andrew's mass day, in Normandy: then there was tribulation soon in the land, for every man that could forthwith robbed another. Then his don and his friends took his body and brought it to England and buried it at Reading. A good man he was and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold and silver, no man durst say to him aught but good...'[4]

By declaring the new King's Peace as soon as practicable after the old king's death, and before the coronation of the new king, Edward I's agents/regents were able to ensure the continuity of the law and its enforcement, even though the new king in whose name the new peace ran was absent from the country. Legally however, they were only able to do this because Edward had appointed them as his agents before his departure from the country. They, then, acting as the putative king's agent, could exercise his prerogative and proclaim his peace—subject, of course, to the later ratification by the people of their actions in the Recognition, when Edward became king indeed. All law and law

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[1] Since writing this, I have found support for my doubts as to Stubbs' assertions 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, p. 478, n. 17.

[2] He had been Henry II's justiciar and had written a treatise of the law, now commonly called *Glanvill*; but on Richard's return to England was imprisoned until he had paid a heavy fine, and then resigned the justiciarship.

[3] See Stubbs, *Constitutional History*, Vol. I, p. 535, and p. 604, sourced to Benedictus Abbas, ii., 74, 75. Eleanor of Aquitaine was a redoubtable woman, later again maintaining the peace in England from 1192-1193 (Stubbs, *ibid.*, p. 538); though nearly 80 when her son John succeeded Richard I, she had headed an army against Arthur (son of Henry II's third son Geoffrey—John was Henry II's fourth son; Henry's first son and heir, Henry, whom he had crowned, dies before succeeding), and personally fetched Blanche of Castille to marry John. She died in 1204 at the age of 83.—see Stubbs, *Constitutional History*, Vol. I, pp. 556-557.

[4] See text of the *Anglo-Saxon Chronicle, ad. ann.* 1135, as quoted in Stubbs *Select Charters* at p. 98; this text is also quoted in Frederick Pollock, 'The King's Peace', *The Law Quarterly Review*, Vol. I, 1885, pp. 37-50, at p. 49.; and by T F T Plucknett, *A Concise History of the Common Law*, Lawyers Co-operative Publishing Company, New York, 1929; 5th edn., Little, Brown and Company, 1956, at p. 16. Richard I's peace died with him, leading to 'open rapine'—see Stubbs, *Constitutional History*, Vol. I, p. 552, sourced to R Coggeshale, pp. 98, 99. Plucknett notes that 'This same principle of the king's peace dying with him haunted the books long after: Y.B. Edward II, Selden Society, xx. 159, no. 7 (no date).'

enforcement officers were the king's; if there were no king, then there was no law[1] nor any law enforcement officers, who held their office of the dead king.

Effectively, then, the device used by Edward I's agents was one specifically appropriate to his particular circumstances; it is only because of the political and administrative efficacy of the actions of his agents that one can claim that any precedent was set, not because of some fundamental change to the law. This precedent did not mean that election of the king ceased to have any role to play. Election still retained significance, particularly in times of constitutional difficulty, or internal upheaval.

**Edward II** succeeded his father (who had reigned for thirty-five years) immediately upon his death, with the receipt of homage from the English magnates at Carlisle, and at once reversed his father's policies, apparently with the barons' approval.[2] There would appear to have been no election as such (prior to the recognition at his coronation), Edward II having taken up every royal function immediately on his father's death, (and thus incidentally securing the peace.) It is Edward II, rather than Edward I, who set any precedent followed by later sovereigns of dating their accession from the day succeeding the death of their predecessor, rather than the date of their coronation,[3] and from whose time the idea of an entrenched hereditary principle in my view more properly dates. This precedent was established, however, only with the consent of the magnates; and it was they in turn who saw to it that Edward II was deposed[4], or technically 'unelected' by 'the prelates, earls, barons, and other nobles, and of the whole community of the realm', the 'great men' doing homage to his son[5], [**Edward III**][6] still in his minority, who was then

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[1] For a discussion of the evolution of the King's Peace see J E A Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, Adam and Charles Black, London, 1967, at pp. 107-116; and see Pollock, *art. cit.*, *ibid.*

[2] See T F Tout, *The History of England from the Accession of Henry III to the Death of Edward III, (1216-1377)*, Vol. III of *The Political History of England in Twelve Volumes*, William Hunt and Reginald L Poole, (*eds.*) Longmans, Green, and Co., London, 1905, at p. 238.

[3] See Tout, *History of England, loc. cit.*, at p. 239.

[4] see Eleanor C Lodge, and Gladys A Thornton, (*eds.*), *English Constitutional Documents 1307-1485*, Cambridge, Cambridge University Press, 1935, (*De Pace Regis proclamanda* in Latin and French), from **Foedera**, IV, 243, at pp. 20-21; and see M V Clarke, 'Committees of Estates and the Deposition of Edward II,' in *Historical Essays in Honour of James Tait*, J G Edwards, V H Galbraith, and E F Jacob, (*eds.*), Printed for the Subscribers, Manchester, 1933, pp. 27-45.

[5] see Clarke, *art. cit.*, at p. 31: '...Parliament was again asked to choose between father and son and apparently the great majority declared for the young prince. Homage was sworn to him forthwith, and Reynolds [archbishop of Canterbury] preached on the text, *Vox populi, vox Dei...*'; and see my Appendix I.

[6] Sir Matthew Hale in his *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976, nominates Edward III as an usurper, see p. 72 [97]

crowned king. In turn, Edward III's son, **Richard II**, succeeded in his minority in accordance with the hereditary precedent.

However, because of Richard's 'evil rule'[1] and 'bad government', whose particulars were itemised, the 'lords spiritual and temporal', and other notable persons requested his renunciation of the throne. Richard agreed. Subsequently, the Archbishop of Canterbury asked 'the estates of the people' gathered for a *parlement* if they would accept the renunciation, and they 'each one singly, and then in common with the people, unanimously and cordially gave his consent'. A representative deputation[2] was sent 'to carry out [the] sentence of deposition and to depose King Richard from all his royal dignity majesty, and honour, on behalf of, in the name of, and by authority of, all the estates, as has been observed in similar cases by the ancient custom of the realm.' They deposed the king thus:

> And we, the proctors of all these estates and people, as we are charged by them, and by their authority given to us, and in their name, yield you up, for all the estates and people aforesaid, liege homage and fealty, and all allegiance and all other bonds, charges, and services which belong to it. And none of all these estates and people from this time forward shall bear you faith, nor do you obedience as to their king.[3]

'And at once, it being manifest from the foregoing transactions and by reason of them that the realm of England with its appurtenances was vacant,'[4] Henry Duke of Lancaster [**Henry IV**] claimed the throne 'by right line of the blood' 'after which both archbishops seated him on the throne, amid great applause'.[5] This could well be seen as attaining the throne by election. However, the lords were concerned that he might claim kingship by conquest. But Henry said '[let] no man think that by way of conquest I would disinherit any man of his heritage...'[6] and certainly not, (as Henry protested), 'by way of conquest'[7]; and

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[1] All quotations here are from *Deposition of Richard II*, *Rot. Parl.* III. 416 [Latin], from *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, at p. 407 ff.; translated from the original in *Rot. Parl.* III., 416 (Latin); for text see also my Appendix I.

[2] 'the Bishop of St Asaph for archbishops and bishops, the Abbot of Glastonbury for abbots and priors, and all other men of holy church, secular and regular; the Earl of Gloucester for dukes and earls; Lord Berkeley for barons and bannerets; Sir Thomas Erpingham, chamberlain, for all the bachelors and commons of this land of the South, Sir Thomas Grey for all the bachelors and commons of the North; and my colleague John Markham and me'—*ibid.*

[3] *English Historical Documents*, 1327-1485, *ibid.*

[4] *English Historical Documents*, 1327-1485, *ibid.*

[5] *English Historical Documents*, 1327-1485, *ibid.*

[6] See *Rot. Parl.* iii, 423b; and see Sir Matthew Hale, *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976, p. 76 [103-104]—Hale calls Henry a usurper who had engaged in a successful rebellion. And see *English Historical Documents*, 1327-1485, *loc. cit.*, pp. 407 ff.

[7] See Henry IV's declaration of sovereignty, text at Appendix II.

though he claimed the throne by right of the blood royal, this claim was false.[1] It has been said however, that the lords spiritual and temporal and the estates present at the time 'neither committed themselves' to Henry's view, 'nor took it upon themselves formally to elect him king.'[2] Henry however later attempted to seal the succession through a device which is represented on the statute books as 7 Henry IV, c. 2.[3] It was this device that served as a precedent for the *Titulus Regius* acts of Richard III and Henry VII.[4] The need for such a device points to the vulnerability of the hereditary principle (on which basis alone Henry IV could not have succeeded), and the continued significance of the notion of the approval of the people to the succession.

Henry IV's sons followed him under the hereditary precedent established in Edward I's time interpreted in the light of the *Titular Regius*, until Edward IV claimed the crown by indefeasible hereditary right of descent from Henry III[5], with 'no formal election nor parliamentary recognition'[6], proclaiming himself king[1] on 4 March 1461[2], and crowned in

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[1] see S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reissued by American Scholar Publications, New York, 1966, at p. 23.

[2] Chrimes, *English Constitutional Ideas*, *loc. cit.*, p. 23; especially see n. 3, *Rot Parl.* III, 423: '*...iidem Status, cum toto Populo, absque quacumque difficultate vel mora ut Dux prefatus super eos regnaret unanimiter consenserunt.*'

[3] 7 Henry IV, c. 2, *Rot. Parl.* III, 525; see Chrimes, *English Constitutional Ideas*, *loc. cit.*, at pp. 24-25. The device was that the speaker came before the king and lords in *parlement*, and prayed that the commons have communication with the lords, and the king granted the prayer. The lords and commons then put forward a petition in the name of the lords and the commons touching the inheritance and succession to the crown, and prayed the king to affirm the petition in *parlement*, and that it should be enacted and enrolled on the *parlement* roll, and held and proclaimed as a statute. It was then assented to by the lords and the king that the petition be exemplified under the great seal, and also sealed under the seals of the lords and the speaker, and in their name. Chrimes says it was not a statute, but a declaration in affirmation of the estates of Henry and the princes, ordaining that the inheritance of the realms of England and France not merely *was* in the person of Henry and his heirs, but *should be settled* and remain so. He says the 'statute did nothing but determine the line of succession; it recognised but did not create Henry IV's title'. He says 'But whether we regard it as a statute making new law or as one declaring existing law, it is clear that henceforth there was a title to the throne at least recognised by statute. It remained to be seen whether a title by statute would be strong enough, in the face of political exigencies, to stand against a claim not merely of hereditary, but of indefeasible hereditary, right.'

[4] See discussion *infra*, under Richard III and Henry VII, at p. 105 ff., and p. 111 ff., respectively.

[5] See *The Title of the Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8, as quoted in Lodge and Thornton, *English Constitutional Documents*, *ed. cit.*, pp. 34-36.

[6] These are the words used by both Stubbs, *Constitutional History*, Vol. 3, p. 195, and Maitland, *Constitutional History*, p. 194; Stubbs explains, at p. 194, that '...bishop Neville called a general assembly of the citizens of Clerkenwell, and explained to them the title by which Edward, now Duke of York, claimed the crown. The mob received the instruction with applause, and proclaimed that he was and should be king.' The previous Duke of York, Richard, had made a claim to the crown in 1460, (*The Duke of York's case*) which the Justices (including Sir John Fortescue) had refused to entertain, it being a 'mater so high, and touched the Kyngs high estate and regalie, which is above the law and passed their lernyng, wherefor they durst not enter into any communication therof, for it pertained to the Lordes of the Kyngs blode, and th'apparge of this his lond..; and therfore they... bysought all the Lordes, to have them utterly excused...' (*Rot. Parl.* v, 376-8, as quoted in *English Constitutional Documents, 1307-1485*, Eleanor C Lodge and Gladys A Thornton, (*eds.*), Cambridge University Press, Cambridge, 1935, at p. 34.)

June that year,[3] even though Henry VI was yet alive and retook the crown for a brief period from 1470 to 1471. (It was after Edward IV came to the throne that Sir John Fortescue [Chief Justice of the King's Bench in 1422 under Henry VI and a judge in *The Duke of York's Case*[4]] wrote *The Governance of England*, wherein he maintained that the king of England is no absolute monarch.[5] These developments all stemmed from the only juristic decision to dispose of the crown as between two living persons, each of whom claimed to be, and was recognised as king while the other lived.

## THE DUKE OF YORK'S CASE[6]

**Henry VI** had succeeded as a nine month old baby in 1422; he was crowned king of England on 6 November, 1429, and king of France on 16 December, 1431.[7] His long minority (which was never officially ended) provided the lords with 'a golden opportunity for taking over the reins of government.'[8] When York assumed the protectorate in 1454 (during Henry's imbecility) he did so 'of the due and humble obedience that he owed to the king and to the peerage of the land, to whom by the occasion of the infirmity of the king

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[1] 'By counsaill of the lords of the south;' Hardyng, p. 406; and 'By the advice of the lords spiritual and temporal and by the election of the commons,' Gregory, Chr. p. 215, as quoted by Stubbs, in *Constitutional History*, Vol. 3, p. 195, note 1.

[2] But note that Bertie Wilkinson in *Later Middle Ages* says that Edward 'sought the consent of the "people" at St John's Field on Sunday, 1 March 1461'. *loc. cit.*, p. 288.

[3] see Stubbs, *ibid.*, at pp. 195-196. Wilkinson (ibid. p. 288) gives the date of the coronation as 28 June, 1461.

[4] See *The Title of the Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8, as quoted in Lodge and Thornton, *English Constitutional Documents*, pp. 34-36; and see 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. 495-498. Sir John Fortescue served the House of Lancaster 'in good and evil fortune until all was lost'—see Maitland, *Constitutional History, op. cit.*, p. 198.

[5] see Sir John Fortescue, *The Governance of England, ed.* Charles Plummer, Oxford, 1885 at p. 109; also *De Laudibus*, cc. 34-7, quoted by Maitland, *loc. cit.*, at p.198—for text see Appendix III. But it should be noted in any discussion of *The Governance of England*, that it was written after *De Laudibus Legum Anglie*, and after Fortescue had become adapted to the reign of Edward IV, despite his long association with Henry VI and his son Edward, who had been killed, and for whom he had in the first place written *De Laudibus*. Moreover, while the *Governance of England* is mostly quoted to support the idea of the supremacy of parliament, this would be a most misleading view of the work which in many respects supported the king's prerogatives, and looked towards an effective elitist governance.

[6] *The Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8. All this discussion is greatly indebted to S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reissued by American Scholar Publications, New York, 1966.

[7] See Ralph A Griffiths, *The Reign of King Henry VI, The Exercise of Royal Authority 14422-1461*, University of California Press, Berkley and Los Angeles, 1981, p. 2.

[8] see Chrimes, *English Constitutional Ideas, loc. cit.*, p. 146-147; and see the Chancellor's address in Star Chamber, 1427 to Bedford, (Cott. MS. Cleop., fo. iv, and Titus, E iv, printed in Procs. and Ords. III, 237, and *Rot. Parl.* v, 409). at p. 150 which asserts that 'the observance and keeping of his [the king's] laws belong to the Lords temporal and spiritual of his land, at such time as they be assembled in *parlement* or in the great council; and else, them not being assembled, unto the lords chosen and named to be of his continual Council.'

rested the exercise of his authority."[1]

Henry VI was a most unfortunate king, a peaceful but weak man who went mad a number of times but recovered., and who was the only king in English history to be still king regnant while another was 'legally recognised'[2] as king, but who was restored, (there thus being alive two kings who had each been recognised as such), and who died on the eve of his rival's reclamation of the crown, murdered in the Tower of London in 1471. His period marks a time of naked pretensions to power where the Houses of Lancaster and York battled for the crown both in blood and law.

On 16 October 1460, six years after becoming effective ruler as Protector[3], Richard Duke of York formally sued before the Lords in *parlement* for recognition of his claim to the crown on the grounds of indefeasible hereditary right alone.[4] The Lords refused to pursue the matter without Henry VI's 'high commandment, agreement and assent' because the 'matter was so high and of such weight.' The king commanded the Lords to find 'all things as may be objected' against the Duke's claim. The Lords then consulted the judges telling them to ascertain the objections as the king had commanded. (Amongst them was Sir John Fortescue, [5] who had become Chief Justice of King's Bench in 1422.) The judges said that the king's high estate was above the law and passed their learning; that it was a matter pertaining to the Lords of the King's blood and 'th'apparage [peerage] of this lond' to have communication and meddle in such matters. The Lords then sent for the king's serjeants and Attorney, and commanded them in similar terms; but they too demurred.

The Lords, forced to arbitrate (and most of them present Yorkists),[6] decided (on the basis

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[1] Chrimes, *English Constitutional Ideas*, *loc. cit.*, p. 151; *Rot. Parl.* v, 242a.

[2] see Stubbs, *Constitutional History*, Vol. 3, p. 195.

[3] Though the Protectorate formally lasted only some 12-18 months.

[4] *The Title of the Duke of York's case*, *Rot. Parl.*, v, 375-379, extracted in *English Historical Documents 1327-1485*, A R Myers (*ed.*) Eyre & Spottiswoode, London, 1969, at pp. 415-419. Direct quotations following are from that text, except the Middle English, which is quoted from Chrimes, *Constitutional Ideas*, *loc. cit.*, pp. 23-30.

[5] see Chrimes, *English Constitutional Ideas*, *loc. cit.*, p. 23; *Rot. Parl.* v, 376; Fortescue was still Chief Justice in 1460. Fortescue later retracted his Lancastrian pamphletts, 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 [the law of nature]only'"—Chrimes, at p. 22, and n. 2].]

[6] See discussion in Chrimes, *English Constitutional Ideas*, *loc. cit.*, at p. 29.

of conscience) against the Duke for five reasons : they could not break their 'great oaths' to the king; acts of parliament barred the Duke's claim—'the which Acts be of much more authority than any Chronicle and also of authority to defeat any manner [manere] title made to any person.'; as did 'divers entails made to their heirs male as for the crown as may appear from divers chronicles and *parlements*'; the Duke did not bear the arms of Lionel from whom he claimed his title; and 'King Harry the Fourth' had claimed he took the throne as right inheritor of Henry III,[1] not as conqueror.

In reply, the Duke said any oath contrary to God's commandment and the observation of truth and justice was null and void; that there were no such acts or entails as the Lords had cited, since the so-called Act of 1406 (7 Henry IV c. 2)[2] was null and void—

> ...if Henry might have obtained ... the said crown etc., by title of inheritance, descent or succession, he neither needed nor would have desired or made them to be granted to him in such wise, as they be by the said Act, the which takes no place, neither is of any force or effect against him that is right inheritor of the said crown, as it accordeth with God's law, and all natural laws, how it be that that all other Acts and Ordinances made in the said parliament and since, be good and sufficient against all other persons.'.. Further, his right being well-grounded, was imperishable, though it had been in abeyance; while Henry's claim had never been more than a pretence. [3]

In effect York claimed that *parlement* had given Henry IV a title he would otherwise not have had, and that this was *ultra vires* being opposed to the laws of God and man. He said he had forborne to bear the arms of Lionel or of England and France 'for causes not unknown to all this realm'[4]; and that the alleged saying of Henry IV was untrue, 'the contrary thereof' being true.

The Lords then decided that York's claim could not be defeated, and proposed a compromise which would overcome 'great inconvenience..., save the king's honour and estate, and ...appease the...duke'. The king was to keep the 'crowns and his estate and royal dignity during his life and the said duke and his heirs shall succeed him in the same.'[5] The king, a prisoner, unable to make even a protest for his son, but according to the record 'inspired with the grace of the Holy Ghost, and in eschewing of effusion of Christian

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[1] Henry Bolingbroke appears to have encourages the dissemination of the story that his ancestor, Edmund of Lancaster, was Henry III's eldest son, not Edward I; he could not claim hereditary descent from Edward III.

[2] See discussion *supra*, at p. 99, and note 3.

[3] *Rot. Parl.* v., 377; Chrimes, *English Constitutional Ideas*, *loc. cit.*, p. 30

[4] Presumably he meant his role as Protector during Henry's imbecility.

[5] see Stubbs, *Constitutional History*, Vol. 3, p. 192.

blood...' was prevailed on to ratify the agreement. The 1406 7 Henry IV 'Act' was repealed. But the king remained captive, hostilities continued, York was killed, his son Edward Earl of March seized the crown and sceptre, and proclaimed himself **Edward IV**, dating his reign from that day, 4 March 1461.[1]

This whole dispute clearly was a result of conflicting interpretations of the succession to the throne. Lancaster relied upon the device of 7 Henry IV c. 2 to attempt to determine the succession[2], and also on the doctrine of prescription[3]; but York even as early as 1406 was committed to legitimism by hereditary right, to restore '*coronam regni Angliae suae lineae vel cursui*'.[4] So on the one hand, title recognised by *parlement* and buttressed by the passage of time opposed a so-called undefeatable title of hereditary right.[5] Both York and Lancaster recognised that it was the laws of God and/or nature which determined the kingship.[6] But there was a fatal flaw in York's case, in that so far as Richard had acknowledged Henry IV's claim by conquest,[7] then at law, any changes Henry had made to the law were binding on the realm, did he make them as conqueror (by *jure belli*).[8] The determining factor supporting the Lancastrian position in my view is that it was the recognition by the people, the taking of the oath of governance, and anointing, which was recognised as the crucial component in making a king.[9]

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[1] See Maitland, *Constitutional History*, p. 194, and Stubbs, *Constitutional History*, p. 195.

[2] see Chrimes, *English Constitutional Ideas*, *loc. cit.*, p. 24, and p. 26;

[3] See Sir John Fortescue, *De Laudibus*, discussed *infra* under 'The Oath and the Wars of the Roses' at p. 224 ff., particularly at p. 226.

[4] see Chrimes, *English Constitutional Ideas*, *ibid.*, p. 26—succession to the crown of England through the direct line of descent. But *contra* Maitland, *Constitutional History*, p. 193, where he notes that York lived in apparent harmony with Lancaster until the time of Henry V, and that disputation arose over the Lancastrian title only when Henry VI succeeded, but more particularly when he married Margaret of Anjou.

[5] But *contra* Maitland, who at p. 194 of his *Constitutional History* says : 'So far as I can understand it, the confusing struggle which we call the Wars of the Roses is not to any considerable extent a contest between opposing principles—it is a great faction fight in which the whole nation takes sides.' With the greatest respect to Maitland, a 'faction fight' is almost invariably about conflicting principles, or ideologies.

[6] See Fortescue, *infra*, at p. 226 ('the law of nature') ; and see Richard Duke of York's statement to the Lords at p. 102 ('God's law, and natural law') *supra*, and see also the Recognition prepared for Richard III (a Plantagenet), *infra* at p. 109;

[7] See the fifth point of the Duke of York's response to the Lords' initial finding.

[8] See discussion of *de jure belli* at note 1 p. 64, and p. 64 *supra*, and p. 111, p. 366, and p. 380 *infra*. Of course, Henry IV disclaimed any right as conqueror.

[9] See Fortescue—it is '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.'—discussed at p. 226, and the source quoted there. On the perusal of the extracts available of the *Duke of York's case*, it appears that the questions of recognition, the king's oath, and the anointing, were not discussed by the Lords.

Henry VI's position had not been aided by his wife Margaret whose indomitable will and faithfulness were offset by her poor politics, policies and advisers,[1] and when calumnies were spread about her, (that she was an adulteress and/or that her child was a changeling[2]), people wanted to believe them, and this only assisted a disposition to support the Yorkist claims.

But the civil war continued; in 1471 'without regret and without enthusiasm the nation recognised the Lancastrian restoration."[3], the crown being settled like a piece of property[4] on Henry and his son with remainder in the case of the extinction of the House of Lancaster to the House of Clarence[5]; the war went on; in 1471 at the battle of Tewkesbury, Edward, son of Henry VI and pupil of Fortescue, was killed[6]; Edward IV reclaimed London, and Henry VI was conveniently killed.

**Edward Plantagenet,**[7] known as Edward V, the elder son of Edward IV, would have succeeded his father, but was disenabled by illegitimacy recognised by the *parlement* of the new king, **Richard III.**

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[1] see Stubbs, *Constitutional History*, Vol. 3, p. 197-198

[2] Note here the similar calumnies which were to be spread some two hundred years later about James II and VII's wife. See p. 157, p. 359, and p. 363 *infra.*

[3] see Stubbs, *loc. cit.*, Vol. 3, p. 214;

[4] Note here: Chrimes gives a detailed explication at pp. 3 ff. of the meaning of the words 'estate of the king' or 'estate of king'. It was a term used during the fifteenth century 'to designate the mass of traditions, attributes, rights, powers, and perhaps duties also, which were deemed to centre in the monarch'. it was the 'Astate of Kyng' of which Richard II was deprived [Rot. Parl. III, 424]; the speaker of Henry IV's 6th *parlement* professed he had spoken nothing against the 'prerogative or estate royal' [Rot. Parl. III, 572];i n 1452 the Duke of York swore not to attack the 'Roiall Estate' [Rot. Parl. v, 346]; Fortescue wrote that the king's estate is 'the highest estate temporal' [*Governance of the Laws of England*, viii]; in 1470 it was stated in court that 'it is necessary for the realm to have a king under whom the laws shall be held and maintained.' [*Y.B.* 9 Edward IV, Pas. pl. .2 (App. No. 53 (i) in Chrimes]

[5] No records have survived of this period - see Stubbs, *Constitutional History, loc. cit.*, Vol. 3, p. 214-215

[6] Note here though, that Chrimes, in his notes to his translation of *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. 143 says 'accounts differ as to how he met his death. According to one version he was killed in battle, and to another and more circumstantial but later version, he was captured and then murdered by several Yorkist nobles in the presence of Edward IV.'

[7] I use the designation Edward Plantagenet for the elder son of Edward IV. Usually, however, most writers use the designation 'Edward Plantagenet' to describe Edward, Earl of Warwick, son of George, Duke of Clarence and brother to Edward IV, on the assumption that Edward IV's son Edward either was in fact murdered, or was not illegitimate. Edward earl of Warwick was beheaded in the Tower of London in 1498.

# RICHARD III—USURPER OR SUCCESSOR?

The title of Richard III to the crown has given rise to controversy over the centuries[1]. He has most often been seen as an usurper, the apparent hereditary male heirs (his brother Edward IV's sons) having first been declared illegitimate and then disappearing from history, allegedly murdered by him or on his direction in the Tower of London, Richard thus succeeding as his brother's eldest surviving legitimate heir.[2] (Edward IV's daughter, Elizabeth, who would have been next heir were it not for her declared illegitimacy, of course survived to become wife to Henry Tudor.)

The situation is far more complex than such a brief statement can summarise, and has been explicated by many writers of differing Ricardian affiliations.[3]

Questions do arise as to whether indeed Edward Plantagenet, called Edward V, was deposed by Richard, or whether in fact Richard was the legitimate heir.

So far as the succession is concerned, it appears that there may well have been evidence to show or suggest that Edward IV[4] had entered into a betrothal contract prior to his marriage to Elizabeth Woodville, which would thus at canon law have been invalidated, and rendered her issue by him illegitimate.[5] But had that been the case, then Edward of Warwick, the Duke of Clarence's son, was the next in lineal descent. (Warwick was 10 in

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[1] See also the peculiar position of Sir Edward Coke, *infra*, at p. 143, and p. 144 and the notes there.

[2] For a recent examination of some of the issues involved, see Phillips' Brief, (1992)16 *Criminal Law Journal*, 415-418

[3] See, for example, V B Lamb, *The Betrayal of Richard III, An Introduction to the Controversy*, 1959, revised edition published by Alan Sutton Publishing Limited, Stroud, with notes and Introduction by P W Hammond, 1990; Anthony Cheetham, *The Life and Times of Richard III*, Weidenfeld and Nicolson, London, 1972, reissued, 1992; Allison Weir, *The Princes in the Tower*, The Bodley Head, London, 1992; Pimlico edition, London, 1993; Paul Murray Kendall, *Richard III*, George Allen & Unwin, London, 1955, reprinted 1956, 1957, 1961, 1965, 1968, 1973; published in paperback by Unwin Paperbacks, London, 1987; Sir Francis Bacon, *History of the Reign of King Henry VII*, written 1621-1622, published 1622, based in turn on a fragment written some time earlier and drawn upon by John Speed in his 1609 *History of Great Britain*, reprinted with notes by Rev. J Rawson Lumby, as *Bacon's History of the Reign of King Henry VII*, Cambridge University Press, Cambridge, 1876, reprinted 1880, 1881, 1885, 1888, 1889, revised edn. 1892, reprinted 1902 And see 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 499-500.,

[4] See discussion on Fortescue and Edward IV's oath, at p. 229, and note 1, at p. 230 *infra*.

[5] For the strongest arguments to this effect, see Kendall, *Richard III*, *loc. cit.*, pp. 215-223, and notes 4-20 at pp. 474-477. For a statement that 'there is no truth in the precontract story', see Weir, *Princes...*, *loc. cit.*, p. 121 [no sources given by Weir].For details of the possibility of other precontracts, see the discussion in Sir George Buck, Master of the Revels, *The History of King Richard the Third*, 1619, edited and with an introduction and notes by Arthur Noel Kincaid, Alan Sutton Publishing, London, 1982, at pp. 175-187

1483, and showed signs of being mentally retarded.[1]) And even had the rumours that Edward IV himself was a bastard been true[2], Edward of Warwick would still have been the heir apparent. His succession had however been barred by the attainder placed upon Clarence and his issue after Clarence's conviction for treason in 1478.[3] But the attainder and the illegitimacy of Edward's children[4] meant that Richard was the sole remaining member of the blood royal capable of succeeding.

Richard's right in these circumstances was put to the Lords and clergy and the citizens of London by the Duke of Buckingham.[5] A *parlement* had been called under writs issued by the Protector in Edward Plantagenet's name for 25 June; while it appears that Richard had stopped the issue of the writs[6] after the execution of Lord Hastings[7], many were already in London, together with others who had come to attend the coronation of Edward Plantagenet scheduled for Sunday 22 June. (It is not known when Richard had been

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[1] See Cheetham, *Richard III, loc. cit.*, p. 165.

[2] See Kendall, *Richard III, loc. cit.*, pp. 220-221, and note 17, p. 477, sourced to Domenico Mancini, *The Usurpation of Richard III*, (1483), edited by C A J Armstrong, Clarendon Press, Oxford, 1936, p. 75, (2nd edn. Oxford, 1969), and Philippe de Commynes, *Mémoires de Philippe de Commynes*, edited by B de Mandrot, Paris, 1901-1903, I, p. 305. One of the origins of this rumour appears to be a report by Mancini that in 1464, the Duchess of York on learning that her son had married Elizabeth Woodville, '... fell into such a frenzy, that she offered to submit to a public inquiry and asserted that Edward was not the offspring of her husband the Duke of York, but was conceived in adultery, and therefore in no wise worthy of the honour of kingship.' After 1475, Charles the Rash, Duke of Burgundy began calling Edward IV 'Blaybourne' in token of his being the son of an archer of that name; Louis XI of France knew of the allegations, as of course did the Duke of Clarence, who bruited abroad the same allegation. Weir (*Princes*, p. 117) dismisses the rumour as mere politicking that is unsupported by contemporary evidence.

[3] See Weir, *Princes, loc. cit.*, p. 125, and Plucknett in *Taswell-Langmead*, at p. 500..

[4] The *Titulus Regius* (1484, 1 Richard III, *Rot. Parl.* vi. 240-242), enacted by the *parlement* in 1484, affirmed the illegitimacy of Edward IV's children.

[5] See Kendall, *Richard III, loc. cit.*, p. 221. Buckingham addressed the lords and clergy on 23 June, and the chief citizens of London in the Guildhall on 24 June 1463.

[6] See Anne F Sutton, and P W Hammond, (*eds.*) *The Coronation of Richard III, the extant Documents*, Alan Sutton Publishing Limited, Gloucester, 1983, p. 24, where they note on the basis of *York Civic Records*, 75-76, that York received its *supersedeas* on 21 June (no mention of delay of coronation), while New Romney received their *supersedeas* on 22 June, referring to Historical Manuscripts Commission, 4, *Fifth Report*, 547a. (Sutton and Hammond at n. 89, p. 24 infer that the postponement applied to both the coronation and the *parlement*.) Kendall says some time between 13 and 18 June, probably on 17-18 June—see *Richard III*, note 16, pp. 476-477. On the timing of the writs of *supsedeas*, see also James Gairdner, *History of the Life and Reign of Richard the Third, to which is added the story of Perkin Warbeck from original documents*, Cambridge University Press, Cambridge, 1878, revised edition 1898, pp. 84-87 (Gairdner, not a supporter of Richard, suggests that the writs could have been despatched by Richard's enemies). Weir says that the writs were stopped by Richard on 17 June. (*Princes, op. cit.*, p. 114)

[7] William, Lord Hastings, the Lord Chamberlain, was executed for conspiracy and treason on Friday, 13 June—conspiring with Elizabeth Woodville the Queen mother to depose Richard from the Protectorate. See Kendall, *op. cit.*, pp. 200-213.

apprised by Stillington, Bishop of Bath and Wells, of Edward IV's pre-contract[1], but as late as 13 June, Privy Councillors were meeting to discuss Edward's coronation[2], and the writs were not issued delaying the coronation until some time between 17 and 21 June[3].) Richard proposed to consult the lords and commons assembled about his bid for the throne. A petition was brought before the estates assembled at St Paul's[4], which rehearsed Edward IV's secret marriage without permission in a profane place to Elizabeth Woodville under the alleged influence of her sorcery[5], the existence of the precontract which invalidated the marriage and rendered his children by her illegitimate, the attainder disbarring Warwick, and the evils wrought upon the nation by the Woodvilles. The petition noted that Richard was the 'undoubted son and heir of Richard late Duke of York'[1] and declared

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[1] Lamb (*Betrayal of Richard III*), suggests that this occurred some time in mid-June—see p. 22; Weir suggests that this (the pre-contract) was an invention by Richard—see *Princes*, pp. 118-121; Kendall says that Richard was probably told by Stillington before June 13, but did not discuss it with others until the securing of Richard, Duke of York, on 16 June—see *Richard III*, *op. cit.*, note on p. 469.

[2] See Kendall, *Richard III*, *op. cit.*, p. 205.

[3] See Weir, *Princes*, p. 115, who says Richard decided to postpone the coronation indefinitely some time between 17 and 21 June; Kendall, *Richard III*, in his note 4 at p. 474, records that writs of *supersedeas* (postponement of the *parlement*) were received in York on June 21, and also in New Romney (inferentially on the same date). But New Romney also received a writ postponing the coronation (inferentially at the same time as it received the writ of *supersedeas*)—sourced for New Romney to Historical Manuscripts Commission, V, p. 54; for York, to *York Records*, Extracts from the Municipal Records of the City of York, R Davies (*ed.*), London, 1843, p. 154. This leads to an inference (by me) that Richard's decisions to postpone the *parlement* and to postpone the coronation occurred simultaneously, and that the story (real or fabricated) of the precontract was discussed by Richard with the Council over the weekend of June 14 and 15, with the Archbishop of Canterbury securing the person of the Duke of York on 16 June, Richard then despatching the writs. Certainly the whole concept of the precontract and its legal results was rehearsed in the petition presented both to the estates on 25 June, and to Richard at Baynard Castle on 26 June; and was recorded in whole in the *Titulus Regius* (1 Richard III, c. 1, 1484, *Rot. Parl.* VI, 238-242) passed by Richard's only *parlement* in 1484. And see Sutton and Hammond, *ed. cit.*, *Coronation of Richard III*, p. 24, where they infer at n. 89, p. 24 that at least for New Romney the postponement applied to both the coronation and the *parlement*.

[4] While those present had in the main been called in response to Richard's writs as Protector issued in Edward Plantagenet's name, the stopping of the writs, and the fact that the putative king did not preside over it probably means that this was not a legal parliamentary assembly; though Richard was at all times up until his coronation Protector of the realm in right of the rightful heir, Edward Plantagenet, unless or until the illegitimacy of Edward IV's children could be proved. For the reference to St Paul's, see T F T Plucknett, 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), p. 499.

[5] Edward IV married Elizabeth Woodville, a widow and an English-born commoner, in secret, with only a few members of her family present, and by a local priest, in the forest of Wychwood, after stealing away during the night of 30 April/1 May, 1464, which was Walpurgis night, a grand sabbath in the witches' year —see Jeremy Potter, *Good King Richard?, An Account of Richard III and his Reputation 1483-1983*, Constable and Company, London, 1983, at p. 43. Edward only revealed the marriage some months later when negotiations for a marriage with a continental noblewoman had almost reached finality. And see Robert Fabyan, *The New Chronicles of England and France*, Henry Ellis (*ed.*), London, 1811, p. 654; and see Sir George Buck, Master of the Revels, *The History of King Richard the Third*, 1619, edited and with an introduction and notes by Arthur Noel Kincaid, Alan Sutton Publishing, London, 1982, at pp. 177-178; and see Edward Hall, *Chronicle*, Henry Ellis (*ed.*), London, 1809, p. 264.

> ...we have chosen in all that that in us is, and by this writing choose you into our king and soveraigne lord, to whom we know for certain it appertaineth of inheritance so to be chosen...[2]

> We humbly desire, pray and require your noble said Grace, that, according to his election of us three estates of this land, as by your true inheritance, ye will accept and take upon you the said crown and Royal Dignity.[3]

The estates recorded their unanimous approval, and resolved to present the petition to Richard, which they did the following day, 26 June, 1483, at Baynard's Castle. Buckingham read the petition, Richard acceded, and was hailed as Richard III. He then rode with many people to Westminster Hall, where he seated himself in the marble chair of the King as Justiciar of King's Bench. Richard 'took possession and declared his mind that same day he would begin to reign upon his people'[4]. He took an oath, called variously 'the sovereign's oath', 'the royal oath', or 'the coronation oath'[5]. He then made a speech declaring his right as 'hereditary and elected king',[6] and that all men of whatever degree must be treated equally in the sight of the law, and directing all judges to dispense justice without fear or favour.[7]

This was not the end of the matter. Richard was crowned king on 6 July, 1483, preparation having already been at an advanced stage for the coronation of Edward Plantagenet.[8] Both

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[1] While the petition did not refer at all to the rumours of Edward IV's illegitimacy, the wording of the petition directly relating Richard to his father, rather than to his brother, may well not be without significance.

[2] See Plucknett's *Taswell-Langmead's English Constitutional History*, *op. cit.*, p. 499, sourced to *Rot. Parl.* Vi, 240, 241.

[3] See Kendal, *Richard III*, *loc. cit.*, p. 222, sourced to *Rot. Parl.* VI, 240-242. Kendall says, based upon Sir James Ramsey, *Lancaster and York*, 2 Vols., Oxford, 1892, Vol. II, p. 488 and n. 2, that Bishop Stillington drew up the petition—see Kendall, p. 477, note 20. See also Stubbs, *Constitutional History*, Vol. 3, pp. 230-231, using as a source *Rot. Parl.* vi. 238, 239.

[4] Writ of 28 June 1463, Harl. 433, f. 238, printed in *Letters and Papers Illustrative of the Wars of the English in France during the Reign of Henry the Sixth*, J Stevenson (*ed.*), 2 Vols., Rolls Series, 1864, Vol. I, pp. 11-16; and also printed in *Original Letters*, Henry Ellis (*ed.*), 2nd series, London, Vol. I, pp. 148-149—see Kendall, *Richard III*, p. 222, and note 22 at p. 477

[5] See Plucknett, *Taswell-Langmead*, *op. cit.*, at p. 499 (coronation oath), and Weir, *The Princes in the Tower*, *op. cit.*, p. 128 (sovereign's oath), and James Gairdner, *History of the Life and Reign of Richard the Third, to which is added the story of Perkin Warbeck from original documents*, Cambridge University Press, Cambridge, 1878, revised edition 1898, (royal oath), p. 94. None gives a source for the taking of the oath, nor of the nature of the oath.

[6] Stubbs, *Constitutional History*, *loc. cit.*, Vol. 3, p. 231; sourced to *Cont. Croyl.* p. 566; and *Letters of Richard III*, i, 12

[7] See Kendall, *Richard III*, p. 223.

[8] Edward Plantagenet's coronation had been scheduled for 22 June, see letter from Edward, 5 June 1483, to Otes Gilbert, squire, MS. Harl. Brit. Mus. 433. Fol. 227, reproduced as Letter XLVII, at p. 147 of *Original Letters Illustrative of English History, including numerous Royal Letters from Monographs in the British Museum*, with notes and illustrations by Henry Ellis, Keeper of the Manuscripts in the British Museum, 2nd series, in 4 volumes, Vol. I, reproduced at Appendix II. Richard cancelled the coronation apparently some time about 17 June, see p. 107 and note 3. It would appear that Edward Plantagenet was present at the coronation of Richard III, see the references in the wardrobe account itemising provisions for his apparel at the coronation—see Sutton and Hammond, (*eds.*), *The Coronation of Richard III, the Extant*

Richard and his wife, Anne, were crowned and anointed as king and queen, with Richard being formally recognised by the people, and then taking the coronation oath. The 'Order' for the coronation was for the first time rendered in English, in a document known as the *Little Device*.[1] The Recognition in the *Little Device* states:

> ... the Cardinall as Archbussop of Canterbury shewinge the Kinge the people at the iiij parties of the seide pulpitt shall say in this wise, Syrs, her' is present Richard rightful and undoughted enheritor by the lawes of God and man to the corone and roiall dignitie of Engelande with all thinges therunto annexid and apperteynynge, elected chosen and required by all of the iij estates of this same lande to take apon him the saide crowne and royall dignyte, wher apon ye shall understand that this day is prefixid and appointyd by all the peeris of this lande for the consecracion, enunccion and coronacion of the saide most excellent prince Richard. Woll ye syris at this tyme geve your willys and assenttes to the same consecracion enunccion and coronacion, wherunto the people shall say with a great voise Kinge Richard, Kynge Richard, Kinge Richard ye ye ye soo be it ets., Kynge Richard Kinge Richard Kyng Richard.[2]

This form of the Recognition specifically notes that the king is 'elected' by the three estates of the realm (the lords, the clergy and the commons), which of course had occurred on 25 and 26 June, and was reiterated in the formal Recognition at the coronation. It also notes that Richard was the Richard '*rightful* and *undoubted* inheritor by the laws of God and man...'[3]

Moreover, at the banquet after the coronation, the King's Champion made an appearance, issuing the challenge as to whether anyone disputed Richard's title; no-one did.[4]

Richard's only *parlement* as its first action passed a *Titulus Regius*,[5] which rehearsed the terms of the petition put to Richard on 26 June, but omitted the references to Edward IV's

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*Documents*, Alan Sutton Publishing, Gloucester, 1983, p. 171, notes concerning 'To Lord Edward, son of late King Edward the fourth, for his apparel...' and also for his 'henchmen'...see p. 172.

[1] This is the earliest known order rendered into English. Having regard to the timing involved (Richard apparently proceeding on the basis that Edward Plantagenet would be crowned on 22 June, up until about 17 June, and Richard himself being crowned on 6 July 1485), one would have to assume that either he had set in train the translation of an old Ordo into English for use on June 22, or else that some other document in English used by an earlier king was already in existence, but knowledge of it has since been lost. Alternatively, of course, scribes could have worked day and night to produce the *Little Device*.

[2] This is taken from *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

[3] Clearly, this is an inference to the illegitimacy of either Edward IV, or to that of his children, or to both, and to the attainder disbarring Clarence's son Warwick from the succession..

[4] See BL Additional MS. 6113 ff. 19-22b, collated with other contemporary and near contemporary manuscripts by Sutton and Hammond, in *The Coronation of Richard III, the extant documents*, *op. cit.*, pp. 270-282, at pp. 281-282.

[5] *Rot. Parl.* 1 Ric. 3, n. 1, *titulus regni*—as referred to in Hale, *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976), p. 77 [105]

alleged illegitimacy; the lords and commons then stated :

> Beyond this we consider how that you are the undoubted son and heir of Richard late Duke of York, truly inheritor to the said crown and dignity royal, and as in right King of England, by way of inheritance, and how that you were born within this land; by reason whereof, as we judge in our minds, you are more naturally inclined to the prosperity and common welfare of the same, and all the three estates of this land have, and may have, more certain knowledge of your birth and filiation abovesaid.[1] We consider also the great wit, prudence, justice, princely courage, and memorable and laudable acts in diverse battles, which as we know by experience you have hitherto done, for the salvation and defence of this same realm; ...
>
> ...by authority of the same, be it pronounced, decreed, and declared, that our sovereign lord the king was and is true and undoubted king of this realm of England...as well by right of consanguinity and inheritance, as well by lawful election, consecration, and coronation. And moreover at the request and by the assent and authority abovesaid, be it ordained, enacted and established, that the said crown and royal dignity of this realm...rest and abide in the person of our said sovereign lord the king, during his life, and after his decease in his heirs begotten of his body.[2]

Richard's title was thus by virtue of the blood royal, inheritance, election, consecration, and coronation, and was in addition endorsed and rehearsed by the lords and commons in *parlement*, because 'the court of parliament is of such authority and the people of this land is of such a nature and disposition, as experience teaches, that the manifestation and declaration of any truth and right made by the three estates of this realm assembled in parliament, and by authority of the same, makes, before all other things, most faith and certainty and, quieting men's minds, removes the occasion of all doubts and seditious language'.[3] This same *parlement* attainted Henry Earl of Richmond[1], which attainder was

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[1] This could well be an indirect reference to the alleged illegitimacy of Edward IV himself. But what is also interesting, is that this formula sees the partial resurrection of the means by which the people elected Henry I rather than his elder brother Robert after the death of William Rufus. It was said that Henry's claims to the throne were superior, because he had been born and brought up in England and had been born after his father William I had been crowned. Robert, who had taken Normandy, had been born abroad, and before William I's coronation. Part of this finding was that Henry had been *porhyrogenite*, born in the purple, (after his father's coronation)and was therefore to be preferred. But this 'rule', having served its purpose, was never heard of again in England.—see T F T Plucknett, 11th edn., *Taswell-Langmead's English Constitutional History*, Sweet & Maxwell, London, 1960, p. 479, sourced in n. 24 to William of Malmesbury, *Gesta Regum*, v, 393, and see Schramm, *History of the English Coronation*, 154 (Schramm's source is Freeman, *Reign of William Rufus*, Oxford, 1882, (2 Vols.) Vol. II, pp. 459 *et seq.*, and pp. 343 *et seq.*, and p. 680) However, that part of the 'rule' relating to birth and upbringing in England is more than pertinent to the estates' *Titulus Regius* for Richard III—he had been born in England, while Edward IV had been born in Rouen ('The Rose of Rouen'); after 1475, Charles the Rash, Duke of Burgundy began calling Edward IV 'Blaybourne' in token of his being the son of an archer of that name—see p. 106 and note 2 *supra*.

[2] See *Titulus Regius*, 1484, 1 Ric. III, *Rot. Parl.* VI, 240-242, text at Appendix II; also quoted in S B Chrimes, *English Constitutional ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reprinted by American Scholar Publications, New York, 1965, at p. 124; and see Speed's *History*, 724, quoted in John Neville Figgis, *The Divine Right of Kings*, 1896, Cambridge University Press, Cambridge; 2nd edn. 1914; reprinted by Harper Torchbook, New York, 1965, with an Introduction by G R Elton; reprinted by Peter Smith, Publisher, Gloucester, Mass., in 1970, Appendix A, pp. 317-318; and see *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, p. 340.

[3] See Richard III *Titulus Regius*, *ibid.*

then bruited throughout England by royal proclamation.[2]

Richard was killed at Bosworth on 22 August 1485, attempting to engage Henry Tudor in personal combat.[3] Henry's first action as king in *parlement*, was to order the destruction of all copies of Richard's *Titulus Regius*, and replace it with his own *Titulus Regius*.

## HENRY VII—CONQUEROR

**Henry VII**'s legal title to the crown was extremely dubious,[4] as he could claim hereditary descent only through the female line from John of Gaunt, Duke of Lancaster, brother of Edward III.. Henry took the crown by force of arms[5], and claimed the crown by *jure belli*—by right of conquest. He was proclaimed *Henricus rex Angliae, jure divino, jure humano, et jure belli.*[6](One commentator has seen this as Henry's assertion of ruling by divine right;[7] it is more correct that Henry saw his conquest at Bosworth as recognition of his right from the God of battles.[8])

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[1] See *Rot. Parl*, VI, I Ric. III, c. 3, 244-249; a list of the attainders passed by Richard's *parlement* is to be found in S B Chrimes, *Henry VII*, Eyre Methuen, London, 1972, reprinted 1977, Appendix C, pp. 328-329.

[2] See letter from Richard III to the Bishop of Lincoln, Chancellor, (text at Appendix II), requiring proclamation of the attainder of 'Henry Tidder',—see for full text, *Original Letters Illustrative of English History, including numerous Royal Letters from Monographs in the British Museum*, with notes and illustrations by Henry Ellis, Keeper of the Manuscripts in the British Museum, 2nd series, in 4 volumes, Vol. I, letter LIV, pp. 162-164, letter from Richard III taken from MS. DONAT. MUS. BRIT. 4616. ART. 98. EX BUND. INFRA TURR. LOND. TEMP. RIC. III. N. 28.

[3] See Sir George Buck, *The History of King Richard the Third*, pp. 98-100, and p. 274.

[4] Sir Matthew Hale in his *Prerogatives of the King* (1640-1660, D E C Yale (*ed.*), Selden Society, Volume 92, London, 1976), reluctantly calls Henry an usurper, see pp. 77-78 [105-106].

[5] 'But that night King Richard lost much of his people, ...., leaving him almost alone. ...King Richard...continued his journey till he came unto a village called Bosworth where, in the fields ajoining, both hosts met, and fought there a sharp and long fight whereof in the end, the victory fell unto King Henry. In this battle was slain King Richard, the Duke of Norfolk, the lord Lovell, with Brackenbury and many others, and incontinently, as it was said, Sir William Stanley, which won the possession of King Richard's helmet with the Crown being upon it, came straight to King Henry, and set it upon his head saying, Sir here I make you King of England.' Quoted from *The Great Chronicle of London*, A H Thomas and I D Thornley (*eds.*), 1938, in *English Historical Documents*, Vol. V, 1485-1558, C H Williams, (*ed.*), David C Douglas, (*gen. ed.*), Eyre & Spottiswoode, London, 1967, at p. 110. [It was actually Thomas, Lord Stanley, who put Richard's crown on Henry in the field—see Buck, *loc. cit.*, at p. 100, and Kincaid's notes on Buck, at p. 274, based on the writings of Henry VII's friend and chronicler, Polydore Vergil.]

[6] See Sir George Buck, *Richard III*, *op. cit.*, pp. 87-88.

[7] Henry Pickthorn, *Early Tudor Government, Henry VII*, Cambridge University Press, Cambridge, 1934, reprinted by Octagon Books, New York, 1967, p. 13.

[8] See S B Chrimes, *Henry VII*, *loc. cit.*, at p. 50.

This *jure belli* claim to the throne threw the lords into furore, as title by conquest gave the conqueror right to do virtually anything; moreover, the lords justly remarked that Henry could not have won against Richard had they not deserted Richard and supported Henry.[1] At law, a conqueror could impose his own laws upon the conquered populace, and moreover, could assume title to all land within the conquered territory by right of conquest—this effectively would have entailed the resumption of all the lords' lands. Henry persisted in styling himself king *jure belli*, and set out to achieve his ends.

Firstly, he arranged to have himself crowned as soon as possible. His coronation occurred on 30 October 1485.

The documentation concerning Henry's coronation is meagre. Henry VII was the first English monarch to designate an authorised 'biographer' in Polydore Vergil.[2] Vergil's work, the *Anglica Historia*, was designed to put a favourable interpretation of the rise of the Tudors,[3] and clearly he had no first hand knowledge of what happened before 1502. Nevertheless, it is extraordinary that his commentary on Henry VII's coronation and subsequent events is so slight—he devotes a whole seven sentences to Henry's activities after Bosworth[4].

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[1] See Appendix II for texts—from Sir George Buck, Master of the Revels, *The History of King Richard the Third*, 1619, edited and with an introduction and notes by Arthur Noel Kincaid, Alan Sutton Publishing, London, 1982, pp. 87-89; and from *Croyland Chronicle*, from *Ingulph's Chronicle of the Abbey of Croyland with continuations by Peter of Blois and Anonymous writers*, Henry T Riley (*trans.*), London, 1854, at p. 571.

[2] Polydore Vergil, an Italian who arrived in England in 1502, and who in 1504 was prosecuted for illegal speculation in foreign currency, was asked by Henry VII in 1506 to undertake 'the deeds of his people'—see Denys Hay, Introduction to his translation and edition of Polydore Vergil, *The Anglica Historia of Polydore Vergil A.D. 1485-1537*, Vol. LXXIV Camden Society, London, 1950, at p. x, and at p. xx, and note 1 to p. xx.

[3] See Denys Hays, *Anglica Historia*, Introduction, *ibid.*, p. xxix. Moreover, it would appear that Vergil had had access to Sir Thomas More's work in progress on Richard III (Sir Thomas More, *The History of King Richard III*, written c. 1513; Vergil completed his manuscript c. 1513); at the least scholars have concluded that More, Richard Fox (Bishop of Winchester), and C Urswick (Dean of Windsor and ambassador for Henry VII) provided information on the events leading up to Henry's taking of the crown to Vergil—see Denys Hays, Introduction to *Anglica Historia*, *loc. cit.*, p. x, p. xix, relying in turn in part on C L Kingsford, *English Historical Literature in the XV^th^ Century*, Oxford, 1913, pp. 191-192..

[4] See Polydore Vergil, *Historica Anglica*, Denys Hay, *ed.* and *trans.*, *loc. cit.*, at Book XXIV, pp. 3-5 (English); and p. 2-4 (Latin)—from '*Interea Henricus more...Henricus eius appellationis, Septimus.*' On a reading of the English translation, one is tempted to see some deliberate use of irony in the text for example, 'after all his toils...', and 'Then at length...' After these sentences, Vergil immediately goes into a recounting of fabulous prophecies concerning Henry VII; Hay notes that Vergil was extremely sceptical about the fabulous ideas circulating in England at that time (see *ibid.* p. xxiv, and pp. xxx-xxxiv), particularly on the recrudescence of the Arthurian legends, and the renewed popularity of *The Brut* (c. 1200), a romance-chronicle by Layamon, an early Middle English poet, which was the first work in English to treat of the 'matter of Britain' (the legends surrounding Arthur and the knights of the Round Table). His source was the *Roman de Brut* by Wace, an Anglo-Norman verse adaptation of Geoffrey of Monmouth's *History of the Kings of Britain*. *The Brut* relates the legendary history of Britain from the landing of Brutus, great-grandson of the Trojan Aeneas, to the final Saxon victory over the Britons in 689; one-third of the poem deals with Arthurian matter, and includes the first

Moreover, the texts available concerning Henry's coronation are at the very least ambiguous. Legg and Schramm assert[1] that the text of the *Little Device* which was originally written with references to the coronation of a king and queen, and with references to 'King Richard', was used by Henry VII, because the words 'King Richard' were crossed out, and the words 'King Henry' or 'King Harry' inserted. On all the evidence, this is very difficult to accept.

Firstly, as I noted earlier,[2] it is by no means certain that this *Little Device* first saw the light of day for Richard III's coronation. Secondly, *all* the extant *Device* texts allegedly for the coronation of Henry VII refer to the coronation of a king *and* queen.[3] It is notorious that Henry VII was not crowned with his queen—he had none when he was crowned;[4] as Sir Francis Bacon noted, he wanted it this way to ensure that he was king in his own right, and that there could not be any suggestion that he took the crown by virtue of his wife's royal blood.[5] Thirdly, the extant texts for the so-called *Little Device* for Henry VII refer to the coronation of the queen as 'noble Princess dame Elizabeth his wife'[6] or 'the noble princess Dame [blank] his wife'[7]. Henry did not marry Elizabeth of York until some months after his coronation.[8] This surely is an indication that either the *Little Device* was deliberately rewritten after Henry's coronation to give the impression that he and Elizabeth of York were crowned together; or that the *Little Device* was rewritten some considerable time after

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account of the founding of the Round Table and details connected with the lives of Lear, Cymbeline, and Merlin. It may well be not without significance that these old legends found a new popularity under the Welsh Henry Tidder/Tudor, Arthur, of course, being Pendragon (*Bretwalda*) and Welsh.

[1] By L W Legg, in *English Coronation Records, ed. cit.*, pp. 222-223, and by P Schramm, *History of the English Coronation* (L W Legg *trans.* ), Clarendon Press, Oxford, 1937 at p. 88, p. 175, and p. 213, relying in turn on Legg's text attributed to Henry VII, see Schramm, p. 88, note 1, referring to his Appendix No. 44, which is the reference to Legg's *Little Device* for Henry VII. This assertion would appear to have been accepted by S B Chrimes,—see his *Henry VII*, (Eyre Methuen, London, 1972, reprinted 1977), p. 60, note 1, and p. 59, note 2.

[2] See footnote 1 at p. 109, *supra.*

[3] See Appendix II, under Henry VII; refer to Legg, *English Coronation Records, loc. cit.*, p. 220; and see *Rutland Papers, Original Documents*, William Jerdan, (*ed.*), Printed for the Camden Society, 1842; reprinted with permission of the Royal Historical Society, by AMS Press, New York, 1968, p. 2.

[4] Elizabeth of York was not crowned as queen until some two years after Henry, on 25 November, 1487; see Bacon, *History of Henry VII, loc. cit.*, p. 40.

[5] See Sir Francis Bacon, 'he would not endure any mention of the lady Elizabeth...', *History of the Reign of King Henry VII*, written 1621-1622, published 1622, reprinted with notes by Rev. J Rawson Lumby, as *Bacon's History of the Reign of King Henry VII*, Cambridge University Press, Cambridge, 1876, reprinted 1880, 1881, 1885, 1888, 1889, revised edn. 1892, reprinted 1902, at p. 15.

[6] See Legg, *loc. cit.*, p. 220.

[7] See Jerdan, *loc. cit.*, p. 2.

[8] Henry married Elizabeth of York on 18 January, 1485-1486,; see Bacon, *History of Henry VII*, p. 19, and note 17, p. 239.

the coronation, probably as a guide for the next coronation. In this regard, it should be noted that the text of the *Little Device* edited by William Jerdan had not Henry VII as the king who was to be crowned, but *Henry VIII.*[1] Jerdan himself notes that there is no contemporary narrative of Henry VII's coronation, and that the *Little Device*, is just that, a device.[2] These facts, taken together with Polydore Vergil's *lacuna* on the coronation, must raise serious questions as to whether the kind of coronation set down in the *Little Device* was even contemplated for Henry VII.

Sir Francis Bacon, in his *History of Henry VII*, also passes over the coronation with celerity, and there is little record on any recognition of Henry by the people.[3] Indeed, on Bacon's own account, Henry saw the necessity on the day of his coronation to have present an armed bodyguard :

> At which day also, as if the crown upon his head had put perils into his thoughts, he did institute, for the better security of his person, a band of fifty archers, under a captain, to attend him, by the name of yeomen of his guard : and yet, that it might be thought to be rather a matter of dignity, after the imitation of what he had known abroad, than any matter of diffidence appropriate to his own cause, he made it to be understood for an ordinance not temporary, but to be held in succession for ever after.[4]

This would strongly suggest that if Henry did proceed with a coronation in the ancient form which required the recognition by the people, that he felt the need to intimidate the people into saying 'Yes'. There is also no contemporary record of any Champion appearing to issue the challenge in Henry's name as there had been for Richard III.[5]

Henry's insecurity concerning his title is demonstrated also by the fact that the men in his first *parlement* held on 7 November 1485 required that he marry Elizabeth of York.[6]

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[1] See Jerdan, *op. cit.*, p. 2, note b—'...cristen prince, Henry 'viij$^{th}$...'; and see text at Appendix II.

[2] 'The following paper is not an account of Henry VII's coronation, of which there has not yet been discovered any narrative, but, in accordance with its title, is a device for that ceremony, prepared probably by some officer at the College of Arms, *and intended to be submitted to the correction of the King and his aduisers...*' my italics; see Jerdan, *Rutland Papers*, *op. cit.*, p. 1

[3] See Bacon, *History of Henry VII*, *loc. cit.*, pp. 13-14. Reading Bacon's text, again one has to wonder at whether or not Bacon was entirely serious in this 'History', as the tone frequently could give one to believe that he was deploying an understated irony.

[4] See Bacon, *History of Henry VII*, *ibid.*, pp. 13-14. And see Appendix II.

[5] But S B Chrimes, *Henry VII*, *loc. cit.*, asserts at p. 60 that Dymoke the champion did appear for Henry as he had done for Richard. But he gives no source for this. The Champion is not mentioned in the *Little Devices* edited by Jerdan and Legg.

[6] See *Rot. Parl.* VI, 278; referred to by Chrimes, *Henry VII*, *op. cit.*, p. 65. And see Sir Francis Bacon in his *History of the Reign of King Henry VII*, who notes that there had been a 'precedent pact with the party that brought [Henry] in [to the throne]' to marry Elizabeth of York. This pact was an oath which Henry of Lancaster had given to Elizabeth

Elizabeth had been declared illegitimate by Richard III's *Titulus Regius*. The estates with singular austerity passed Henry's *Titulus Regius*, [1] which endorsed his title and repealed Richard's. By virtue of this repeal, the illegitimacy of Edward IV's children was revoked; this meant that Edward Plantagenet and his brother Richard (were they still living) and their sister Elizabeth were next in the hereditary line to the throne, not Henry. Moreover, it is a nice question as to whether the repeal also reversed the attainder on Edward Earl of Warwick, which had been clearly stated in Richard III's *Titulus Regius* as disbarring him from the succession.[2] In any event, Henry executed Warwick.[3]

Bacon sapiently but somewhat disingenuously remarks that Henry's motivation in his *Titulus Regius* was 'that it was fit for him to hasten to let his people see, that he meant to govern by law, howsoever he came in by the sword; and for also to reclaim them to know him for their King, whom they had so lately talked of as an enemy or banished man.' Bacon goes on :

> for he did not press to have the act penned by way of declaration or recognition of right; as, on the other side, he avoided to have it by new law or ordinance, but chose rather a kind of middle way, by way of establishment, and that under covert and indifferent words; "that the inheritance of the crown should rest, remain, and abide in the King,", etc., which words might equally be applied, that the crown should continue in him ; but whether as having former right to it, which was doubtful, or having it then in fact and possession, which no man denied, was left fair to interpretation either way.[4]

There could be no starker contrast than with the *Titulus Regius* of Richard III. Moreover,

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Woodville (Edward IV's widow)while he was in Brittany to marry her eldest daughter; moreover, this compact had apparently been agreed to by Margaret, Henry's mother, and was known to the duke of Buckingham before his revolt against Richard III. See *History of the Reign of King Henry VII*, written 1621-1622, published 1622, based in turn on a fragment written some time earlier and drawn upon by John Speed in his 1609 *History of Great Britain*, reprinted with notes by Rev. J Rawson Lumby, as *Bacon's History of the Reign of King Henry VII*, Cambridge University Press, Cambridge, 1876, reprinted 1880, 1881, 1885, 1888, 1889, revised edn. 1892, reprinted 1902, at p. 8, and note 3, pp. 227-228, sourced to Dugdale, Vol. I, p. 168, Lingard IV, pp. 119-120, and Grafton, p. 864. Henry's *parlement* did indeed press him to marry Elizabeth, as there had been some indication by Henry of a desire to wed Anne of Brittany, leaving a suspicion that Henry was not sincere—see Bacon, *Henry VII*, *ibid.*, pp. 11-12. Moreover, there had been rumours that Henry was planning to kill Edward of Warwick; if this were true perhaps Elizabeth's claim to life was tenuous.

[1] 1 Henry VII, *Titulus Regius*, 1485, *Rot. Parl.*, VI, 268-270, at 270b, quoted in *English Historical Documents*, Vol. V, 1485-1558, C H Williams, (*ed.*), (*ed. cit.*), at p. 445; see also S B Chrimes, *Henry VII*, Eyre Methuen, London, 1972, reprinted 1977, at p. 62.

[2] See discussion at note 4, p. 117 *infra*.

[3] Henry executed Edward Earl of Warwick on 28 November, 1499. S B Chrimes says : 'The most innocent sprig of the white rose was thus lopped off' (p. 92). He also notes, at p. 337 of his *Henry VII*, that Edward was attainted before his execution; this could hardly have occurred had not his earlier attainder under Richard III been reversed, presumably by Henry's *Titulus Regius*, or possibly at some later date (see note 4, p. 117 *infra*). Moreover, rumours abounded early in Henry's reign that he was proposing to kill Warwick, and these gained some considerable currency when he appeared to be delaying unconscionably Elizabeth of York's coronation—see Bacon, *Henry VII*, *op. cit.*, p. 19 and pp. 38-40.

[4] See Bacon, *History of Henry VII*, *loc. cit.*, pp. 14-15. And see Appendix II.

Henry in *parlement* ordered destroyed all copies of Richard's *Titulus Regius*, insisting moreover that this document be unread[1] even though *parlement* was to order its destruction; he refused a request by the lords to interview Bishop Stillington concerning the matter of Edward IV's pre-contract (recited in Richard's *Titulus Regius*), and, having ordered a warrant for the Bishop's arrest immediately after Bosworth, imprisoned him, but then pardoned him at the coronation.[2] Henry then proceeded to attaint Richard and his followers, and to remove the attainder on his own followers. These actions were fraught with legal difficulty.

First Henry himself had been attainted. The judges in Exchequer Chamber decided[3] that any prior disablement was voided by Henry's becoming king, and thus no attainder could apply to the king. But this in turn gave rise to the difficult question, how then could Henry attaint Richard III, who had been crowned and anointed king? Henry overcame this difficulty by dating his reign from 21 August 1485, the day before Richard was killed at Bosworth.[4] This was of course, flying in the face of reality[1]; but it is a demonstration of the

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[1] Henry consulted the judges about the reversal of the *Titulus Regius* of Richard III, especially that part which bastardised Edward IV's children by Elizabeth Woodville. S B Chrimes, in his *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reprinted by American Scholar Publications, New York, 1965, at p. 266, note 4, says: 'All the justices in the Exchequer Chamber, by command of the king, discussed the reversal and destruction of the act which bastardised the children of Edward IV and his wife. This act was considered so scandalous that they were unwilling to rehearse it, and advised against its recital in the repealing act in order to avoid the perpetuation of its terms. "*Nota* icy bien le policy", wrote the reporter. "*Nota* ensement," he continued, "que is (i.e. the offensive act) ne puissoit estre pris hors del record sans act de le *parlement* pur l'indemnity et jeopardie d'eux qui avoient les records in lour gard." The authority of *parlement* was needed to discharge them. The lords in the *parlement* chamber thought well of this counsel, and some of them wished to summon the bishop of Bath (Stillington), who had made the false [this is Chrimes' term] bill, to answer for it, but the king said he had pardoned him and did not wish to proceed against him.' See extracts from *Y.B.* I *Henry VII*, Hil. pl. 1, Chrimes' Appendix No. 75, at p. 379. In terms of Ricardian sympathies, it must be said that Chrimes appears here firmly in the anti-Richard camp. In a much later work, his *Henry VII*, (Eyre Methuen, London, 1972, reprinted 1977), Chrimes notes that Stillington, Bishop of Bath and Wells, officiated at Henry VII's coronation, see *Henry VII*, p. 60. Chrimes gives no source however for this, and both Jerdan and Legg appear to make it clear that references in the *Little Device* to the Bishop of Bath were replaced with references to the Bishop of Norwich—see Jerdan, *op. cit.*, pp. 11-12, note a, and Legg, *op. cit.*, p. 227 ff. On the other hand, elsewhere, Chrimes appears to be aware of Legg's text of the *Little Device*—see p. 59, note 2.

[2] See V B Lamb, *The Betrayal of Richard III, An Introduction to the Controversy*, 1959, revised edition with an Introduction and Notes by P W Hammond, published by Alan Sutton Publishing, Stroud, 1990, published in the USA 1991, pp. 33-34; and see note 22 at p. 96 by P W Hammond. And see Kendall, *Richard III*, *op. cit.*, p. 385, and note 14 on p. 475. Stillington, Bishop of Bath and Wells, had been Lord Chancellor under Edward IV from 1467-1470, and from 1471-1475, and had had a peculiar history of accusations of treason and pardon under Edward IV—see Kendall, *Richard III*, *op. cit.*, pp. 217-218. He had also been prone to giving philosophical sermons, making it clear that all laws are grounded on 'the law of God, the law of nature, and positive law...'—see S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, at pp. 121-122. See also footnote 1, at p. 116, *supra*.

[3] *Y.B.* I *Henry VII*, Mich. pl. 5, reproduced in Chrimes, *English Constitutional Ideas*, *loc. cit.*, at Appendix No. 74, and discussed by him at p. 51, and p. 35—*Et lez autres Justices disent que il ne fuit attaint, mes disable de son coron, Regne, dignite, terres, et tenements; et disent que* eo facto *que il prist sur lui le Roial dignite estre roy, tout ce fuit void et issint icy le Roy puit luy mesme inabler et ne besoigne ascun act de le reversel de son atteindre.*

[4] See *Rot. Parl.* VI, 289.—see Sir Francis Bacon, *History of the Reign of King Henry VII*, *loc. cit.*, at p. 16 ; and see Alison Hanham, *Richard III and his Early Historians*, Clarendon Press, Oxford, 1975, p. 96 and n. 4.; and see Jeremy Potter, *Good*

capacity of the lords, clergy and commons with the king's agreement, if not urging, retrospectively to recreate history. (Though some doubts must exist as to the legality of Henry's *parlement*, as he had issued the writs on 15 September, before he was crowned, which in turn raises doubts about the legality of any acts or actions in or by that *parlement*.[2] This may be one reason for the passage of Henry's *Statute of Treason*[3] in 1495 that any action in support of the king 'for the time being' was no treason.[4])

This was still not sufficient substantiation for Henry's claims. He obtained a papal bull which recognised his title to the crown *inter alia* as *de jure belli*,[5] and pronounced anathema and excommunication upon any who opposed Henry. Henry's shoring up of his title was the ultimate belt and braces exercise.

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*King Richard?, An Account of Richard III and his Reputation 1483-1983*, Constable and Company, London, 1983, p. 44; and see Lamb, *The Betrayal of Richard III*, *loc. cit.*, pp. 33-34

[1] Henry had already been styling himself King of England in early 1485; see letter sent by Henry 'Under our Signet, H R' reproduced in S B Chrimes, *Henry VII*, *loc. cit.*, sourced to Caroline A Halstead, *Richard III*, 1844, II, 566, from Harl. MS. 787, fo. 2.

[2] See Chrimes, *Henry VII*, *loc. cit.*, p. 53 for the date of the writs, sourced to *Materials for a History of the reign of Henry VII*, William Campbell (*ed.*), 2 Vols., Rolls Series, 1873-1877, Vol. I, 6.

[3] The *Statute of Treason*, often misleadingly called the *De facto* Act, 1495, 11 Henry 7, c. 1, *Statutes of the Realm*, ii, 568; extracted in 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. 6. And see the discussion *infra* at p. 143 ff., and p. 311.

[4] For a discussion of this enactment, see G R Elton, (*ed.*) *The Tudor Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1960, reprinted 1965, at p. 2; and see S B Chrimes, *Henry VII*, at pp. 178-179; and see A F Pollard, 'Tudor Gleanings—The *'de facto'* act of Henry VII, *BIHR*, Vol. VII, (1929), at 1-12. There can be no doubt of the legality of the *Statute of Treason*, it being passed long after Henry was crowned, and presumably, in accordance with writs that post-dated his coronation. But if Henry's first *parlement* was *ultra vires*, so then too was his *Titulus Regius*, the retrospective dating of Henry's reign to the day before Bosworth, the attainting of Richard and his followers, and the repeal of Richard's *Titulus Regius*, which in turn would have meant that Richard's attainder of Henry and his followers for treason stood, thus disenabling them and their heirs from any succession or inheritance, and moreover, that the illegitimacy of Edward IV's children stood also. But the *Statute of Treasons* would remove any taint of treason on those of Henry's followers who had supported him at Bosworth and before. This Act is now thought to have been enacted to cover the fighting against Perkin Warbeck, and formerly had been thought to be an earnest of Henry's goodwill towards Richard's erstwhile supporters (even though Henry had attainted most of them, executed a lot of them, and resumed most of their lands and possessions.) But it is interesting that Edward Earl of Warwick, who had been attainted by Edward IV, and again by Richard III's *Titulus Regius*, had apparently been unattainted by Henry at some later date. (See S B Chrimes, *Henry VII*, *op. cit.*, p. 337, and discussion at p. 115, note 3 *supra*). Were Henry's *Titulus Regius* invalid, even though Henry and Elizabeth of York would have had any disability removed by their coronation and anointing as king and queen, Warwick's attainder would have stood. If after removing the (Edward IV's) attainder in the belief that he had removed Richard's *Titulus Regius* from the light of day, Henry found the possibility of his own *Titulus* being invalid, then not only would the passage of the *Statute of Treasons* at that time rectify the aforementioned difficulties, but it would account for Henry's re-attainting Edward (see Chrimes, *Henry VII*, p. 337), and for Edward's subsequent execution on a fabricated charge of treason aged 26 on 28 November, 1499. (see Chrimes, *Henry VII*, p. 92). Edward's sister, Margaret, survived to be butchered in the Tower under Henry VIII.

[5] See Bacon, *Henry VII*, *op. cit.*, p. 15; Sir George Buck, *Richard III*, *op. cit.*, pp. 88-89; and see S B Chrimes, *Henry VII*, *op. cit.*, Appendix D, pp. 330-331.

Little is known of the actual words of the coronation of **Henry VIII** who came to the throne at the age of eighteen[1], but it would appear that at his accession there was an almost automatic recognition of his kingship (his elder brother Arthur having died after being betrothed to Katherine of Aragon). Henry was the result of the union of York and Lancaster, being thus indisputably the direct lineal inheritor[2] of the realm. It is possible that the *Little Device* for Richard III was used for Henry VIII.

I do not place any great emphasis on this however, as, due to lack of evidence as to what Henry VIII actually said at his coronation, texts on this subject are unreliable. For example, Schramm in his *History of the English Coronation* asserts that '...even Henry VIII himself was represented not only as the heir but also as the elect of the three estates, as his father had been."[3]; but Schramm relies in turn on the assertion by Legg in *English Coronation Records* that Henry VIII's coronation used the *Little Device* which was drawn up for Henry VII.[4] Both Schramm and Legg ignore the fact that the *Little Devices* were just that—devices to assist at a coronation[5]. There is, however, the possibility that the *Little Device* for Richard III was revised during the reign of Henry VII with a view to use by Henry's heir,[6] as it refers to the joint coronation of a king and queen.[7]

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[1] See Edward Hall's *Chronicle of England*, pp. 502-512, reproduced in *English Historical Documents, 1485-1558*, C H Williams, (*ed.*), Eyre and Spottiswoode, London, 1967, p. 141 ff., at p.145.

[2] Assuming here that in fact Elizabeth of York was the legitimate daughter of Edward IV, and assuming that Edward IV himself was not illegitimate.

[3] see Schramm, Percy E, *A History of the English Coronation*, English translation by Leopold G Wickham Legg, Clarendon Press, Oxford, 1937, at p. 176, and n. 1

[4] see Schramm, *ibid.*, 176, n. 1, referring to Legg in *English Coronation Records*, at p. 220, where Legg states that the manuscript Brit. Mus. Harl. 5111 (fo. 77), containing a copy of the *Little Device* for Henry VII (which is of a much later date than those manuscripts containing the other copies), also contains a copy of the *Little Device* for Henry VIII. [see pp. 219-20] He says that this manuscript agrees with one of the others in its main variants. From looking at Legg's footnotes on p. 230-231, he has noted some distinctions between the text of the oath printed above for Henry VII and some of the other manuscripts. He does not note any differences in the text from that in the manuscript Brit. Mus. Harl. 5111 (fo. 77), which he says contains a *Little Device* for Henry VIII. It seems then that the text for Henry VII's oath in both copies of the *Little Device* is identical; but whether this also means that the text of the oath in the *Little Device* for Henry VIII reproduces the same words, is not stated. The implication Legg makes by omission is that the texts are the same.

[5] See William Jerdan's prefatory remarks to his edition of the *Little Device* for Henry VII in *Rutland Papers, Original Documents*, William Jerdan, (*ed.*), Printed for the Camden Society, 1842; reprinted with permission of the Royal Historical Society, by AMS Press, New York, 1968, at p. 1

[6] See my remarks at p. 114 and note 1, *supra*; for text see Appendix II.

[7] Arthur, Henry VII's son was to marry Catherine of Aragon. On his death, Henry (VIII to be) married her, and they were crowned together as king and queen.

For the same reason, I cannot necessarily state with certainty (as does Schramm[1]) that the recognition for **Edward VI**, Henry VIII's successor, was deliberately truncated to remove the reference to the elective nature of the kingship[2]. It is certain that to one extent at least Edward VI's succession was by election, in that he succeeded not merely by an hereditary right, but also by the assent of the estates of the land in parliament. In 1543 parliament, four years before the death of Henry VIII, enacted the *Third Act of Succession*, which *inter alia* confirmed the king's right to settle the crown by will, and confirmed the succession to Edward[3], and, failing heirs of his body, upon Mary and Elizabeth successively, and failing heirs of their bodies, upon the descendants of Henry's younger sister, Mary, his elder sister Margaret being Queen of the Scots. With the exception of this last provision, the succession as determined by Henry and supported by his parliament, followed Henry VIII's blood line and hereditary principles.

Edward VI, following the precedent set by his father of devising the crown by will, attempted to devise the crown by will to the **Lady Jane Grey**[4], who was proclaimed Queen in London on 10 July 1553, under the *aegis* of the Duke of Northumberland.[5] She was not crowned, and was executed on 12 February 1554. Jane Grey has never been referred to as 'Queen Jane'[6] in any major texts, unlike **Edward Plantagenet**, who was also proclaimed king, but never crowned, who is invariably referred to as Edward V.

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[1] see Schramm, *loc. cit.*, at p. 176 and note 2.

[2] for the text of the Coronation order for the recognition for Edward VI, see *English Historical Documents*, Vol. V, 1485-1558, C H Williams, (*ed.*), David C Douglas (gen. *Ed.*), Eyre & Spottiswoode, London, 1967, pp. 466-470; taken from Dasent, *Acts of the Privy Council*, (A.P.C.), N.S., II, (1547-50), London, 1890, 1873, pp. 29-33; the text is reproduced at Appendix II— *Sirs, here present is Edward, rightful and undoubted inheritor by the laws of God and man to the crown and royal dignity of this realm*; this text omits the words from the *Little Device* for Henry VII (and Richard III): *electe, chosen, and required by all thre estats of the same lande to take uppon hym the said coroune and roiall dignite.*

[3] see 35 Henry VIII, c 1, 1543, *Statutes of the Realm*, III, 955, the *Third Act of Succession*; An act concerning the establishment of the king's Majesty's succession in the imperial crown of the realm... (see for text S&M1 p. 320), which confirmed the king's right to bestow the crown by will, and directed the crown to Edward, then to Mary and Elizabeth, in that order, if both Henry and Edward should die without further heirs, and failing heirs of the bodies of Mary or Elizabeth, the crown should go, under the terms of Henry VIII's will [*Will of Henry VIII*, 1546, Rymer, *Foedera*, XV, 110-115; text in S&M1, pp. 323-324]to the descendants of his younger sister, Mary, his elder sister Margaret being Queen of the Scots, a fact which Henry felt disqualified her descendants from ascending the English throne.

[4] see *The Will of King Edward the Sixth, and his Devise* [entirely autograph] for the succession of the Crown, reproduced in the my Appendix I to *The Chronicle of Queen Jane, and of Two years of Queen Mary, written by a Resident in the Tower of London*, edited by John Gough Nichols, printed for the Camden Society, MDCCCL (1850); reprinted by AMS Press, New York, 1968. at pp. 85 ff.

[5] see *The Chronicle of Queen Jane (etc), ibid.* for text see Appendix II.

[6] Sir Matthew Hale, *Prerogatives of the King, loc. cit.*, says '...a small usurpation was made by the lady Jane in the time of Queen Mary, which lasted but a few days and soon went out.' p. 78 [107-108] But Hale does refer to her twice as

**Mary I** proclaimed herself Queen on 10 July 1553 in letters to the Privy Councillors demanding their obedience, and was proclaimed Queen in London on 19 July.[1] Despite Mary's Catholicism, there would appear to have been a disinclination on the part of the people to support Jane, and even Protestant towns which were later to suffer under Mary's persecution, declared for her.[2] In Mary's case therefore, the people indicated their support for her, as opposed to another contender.

This proves, given the disinclination of the majority of the English to support Catholicism after the reigns of Henry VIII and Edward VI, a two-pronged point—firstly that the English people had accepted a presumption of hereditary right, but secondly that they totally rejected any attempt by the king or his advisers, or the king's council, to determine the succession to the crown without their, the people's, consent and agreement, whether it was in accordance with an hereditary principle or not. In this case, the people clearly (and accurately) saw Mary as the hereditary heir of the blood royal, and Jane Grey as the mere pawn of politically ambitious men. This consent of the people ensured the succession of Elizabeth and the Stuarts, but it also was responsible for the Revolution of 1688.

It is possible that Mary's recognition included the words recorded by the Resident in the Tower :

> In the churche, before she was anoynted, the lorde chauncellour went to the foure comers of the no..(?) and cried, "Yf eny man will or can alledge eny cause whie quene Mary shoulde not be crowned, let theym speke now:" and then the people in every place of the churche cryed, "Quene Mary! Quene Mary!"[3]

It is however more probable that the Resident confused the words of the recognition with those uttered by the King's Champion, as did that later observer at Charles II's coronation,

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'Queen Jane', see p. 80 and p. 83. He and the Resident of the Tower are the only two commentators I have been able to find who refer to her thus.

[1] see C.S.P. Spanish II, 103, London, 20 July, report to the emperor, and other dates of Mary's proclamation, together with text, at p. 3 of *Tudor Royal Proclamations*, Vol. II, *The Later Tudors (1553-1587)*, Paul L Hughes and James F Larkin (*eds.*), Yale University Press, New Haven, 1969; and for other dates and details see *The Chronicle of Queen Jane etc.*, Nichols (*ed.*), *loc. cit.*, at pp. 110-111.

[2] see *The Chronicle of Queen Jane etc, ibid.* at p. 111 ff.

[3] See *The Chronicle of Queen Jane and of two years of Queen Mary, and especially of the Rebellion of Sir Thomas Wyat, written by a Resident in the Tower of London, 1553-1554*; John Gough Nichols, esq., editor, Camden Society, London, 1850; reprinted by AMS Press, New York, 1968, Camden Society; Harlean MS. 194, a pocket diary., at pp. 30-31. And see text at Appendix II.

Samuel Pepys.[1] On the other hand, it may be that both the Resident in the Tower and Pepys are correct, and that these were the words of the Recognition used for those two monarchs, rather than the prescriptions preserved by clerics in the *Liber Regalis*—if that were the case, the element of the people's consent (without which, as has been demonstrated, no pretender could ascend the throne) was included in the coronation ceremony not only by requiring a positive avowal by the people, but also by allowing for any dissent to be voiced.

On the day of Mary's death, parliament being in session, the Chancellor Archbishop Heath immediately called the Commons to the bar of the Lords and said, *inter alia*:

> that **Elizabeth** was the 'true and rightful inheritress to the crown of this realm', of whose 'most lawful right and title in the succession of the Crown, thanks be to God! we need not doubt. Wherefore the lords of this House have determined, *with your assents and consents*, to pass from hence to the palace, and there to proclaim the said Lady Elizabeth Queen of this realm without further tract of time.' And the Commons answered, "God save Queen Elizabeth! long may she reign over us!"[2]

This was not an act, nor a resolution of the parliament, there legally being no parliament immediately from the death of Mary. It was rather an articulation of the representatives of the people of their consent to Elizabeth's accession; thus even before the coronation or formal proclamation of accession, the estates of the realm had acclaimed Elizabeth as queen. A proclamation was subsequently authorised by Sir William Cecil, declaring Elizabeth 'the only right heir by blood and lawful succession,' and declaring the new Queen's Peace.[3] The proclamation was ratified by the overwhelmingly positive response by the populace at large during her coronation.[4]

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[1] Samuel Pepys on the coronation of Charles II, in his *Diaries*, for 23 April, 1661, in *The Concise Pepys*, Wordsworth classics, 1997, under Coronacion Day, 23 April, 1661, at pp. 101-104. And see text at Appendix II.

[2] see J A Froude, *History of England from the Fall of Wolsey to the Defeat of the Spanish Armada*, Vol. VI, *Mary, Elizabeth*, Longmans Green and Co., London, 1893; reissued 1907; at pp. 103-104, my emphasis. After this, the parliament automatically dissolved, because of the death of the queen.

[3] See J A Froude, *History of England from the Fall of Wolsey to the Defeat of the Spanish Armada*, Vol. VI, *Mary, Elizabeth*, Longmans, Green, and Co., London, 1907, at p. 104. For a discussion of the legal authority for the proclamation, see *infra*.

[4] see A L Rowse, 'The Coronation of Queen Elizabeth I,' *History Today*, Vol. 3, 1953, pp. 301-310, at p. 308; and Ann Somerset, *Elizabeth I*, Weidenfeld and Nicolson, London, 1991, at p. 72

# CHAPTER 4

# THE PREROGATIVE OF THE PEOPLE

## JAMES VI AND I

One hour after the death of Elizabeth, a Proclamation (which Robert Cecil, her first Secretary had previously sent to James VI in Scotland for his approval[1]) was read by Cecil at 4 a.m., 24 March 1603 at Richmond, which stated, *inter alia*:

> ...We therefore the Lords Spirituall and Temporall of this realme, being here assembled, united, and assisted with those of her late Majesties Privie Counsell, and with great numbers of other principall Gentlemen of quality in the Kingdome, with the Lorde Maior, Aldermen, and Citizens of London, and a multitude of other good Subjects and Commons of this Realme, thirsting now after nothing so much as to make it knowne to all persons, who it is that *by Law, by Lineall succession, and undoubted Right* is now become the onely Soveraigne Lord and King of these Imperiall crownes...*doe now hereby with one full Voyce and Consent of tongue and Heart, publish and proclaime*, that the High and Mightie Prince, James the sixt King of Scotland, is now by the death of our late Soveraigne, Queene of England of famous memorie, become also our Onely, Lawfull, Lineall and Rightfull Liege Lord, James the first, king of England, France and Ireland, defender of the faith, to whome... we doe acknowledge all faith and constant obedience,...both during our natural lives for our selves, and in the behalf of our posteritie... Hereby willing and commanding in the name of our sovereign Lord James the first, King..., all the late Lieutenants (etc...) that they be ayding and assisting...all things that are or shalbe necessary for the preventing...of...any other unlawfull Acte...against the publique peace of the realm... God save King James.[2]

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[1] Robert Cecil was the son of Sir William Cecil; see James F Larkin and Paul L Hughes, (*eds.*), *Stuart Royal Proclamations*, Vol. I, *Royal Proclamations of King James I, 1603-1625*, Clarendon Press, Oxford, 1973, at p. 1, n. 1, sourced to Salisbury 99/43, and *The Secret Correspondence of King James VI of Scotland with Sir Robert Cecil, ed.* J Bruce, Camden Society Publications, lxxvii (1861), 47.

[2] see James F Larkin and Paul L Hughes, (*eds.*), *Stuart Royal Proclamations*, Vol. I, *Royal Proclamations of King James I, 1603-1625*, Clarendon Press, Oxford, 1973, pp. 1-3 (my emphasis) for full text and the sources for the various times and places of the proclamation.

The proclamation raises the question: by what law, what lineal succession, and what undoubted right, did James succeed? (A similar question may asked by what 'right of blood and lawful succession' had Elizabeth been said to succeed). Certainly James was of the blood royal, being the grandson of Margaret Queen of Scots, the elder of Henry VIII's sisters, and thus lineally descended from both branches of the earlier English kings.

But what was the law by which he succeeded? If it was statute law which was to be followed, then the succession should have gone to the descendants of Henry VIII's younger sister Mary, as laid down in Henry's third Act of Succession[1], since James was the grandson of Henry's elder sister Margaret, and son of Mary Queen of Scots, whose claim to the throne of England, together with that of her progeny, had been extinguished by 27 Elizabeth I, c. 1[2]. It cannot have been by royal edict under the prerogative, as Elizabeth had made none with regard to the succession, and in any event, every attempt by any English king, whether it be Edward the Confessor, Henry VIII, or Edward VI, to will away the crown, had always been negated by the people unless the people had agreed to the validity of such a succession. The royal prerogative did not extend to any kind of personal ownership of the crown; rather the crown was held in trust for the people, and the prerogative followed the crown.

What was James's 'undoubted right' to succeed? Was his lineal descent[3] sufficient to give him such a right? It had not been enough for the elder son of William the Conqueror; nor for Matilda, daughter of Henry I, although England, unlike many continental countries, did not adhere to the Salic law which forbade a woman succeeding; nor would it later be sufficient for the son of James II and VII; John had followed his brother Richard I despite the next in lineal succession being Arthur, son of John's older brother Geoffrey; and Henry IV had become king in disregard of lineal descent altogether.

The entire Wars of the Roses had been fought over what lineal right of succession meant— whether York had a better claim, being descended through the female line from Clarence the third son of Edward III; or Lancaster, being descended through the female line from John of Gaunt, the fourth son of Edward III. After the king's justices declaring the *mater*

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[1] 35 Henry VIII, c. 1, 1543, *Statutes of the Realm*, III, 955, the *Third Act of Succession*

[2] See *Stuart Royal Proclamations*, *loc. cit.*, p. 2, n. 1

[3] The proclamation traced James's descent through Margaret back through Elizabeth of York to Edward IV; *ibid.*, pp. 1-2.

*was so high, and touched the king's high estate and regalie, which is above the law and passed ther lernying*, the House of Lords sitting as a court (after discussions with the king [Henry VI]), had recognised the right of the Duke of York's claim[1] as an indefeasible hereditary right. But this legal recognition in turn did not avail Richard III. Henry VII's lineal descent was dubious; and only Henry VIII could claim legitimate lineal descent, being the son of York and Lancaster.[2]

So neither statute law, nor prerogative, nor judge-made law, nor the so-called hereditary principle itself, was sufficient for James's claim. What then was? The answer must be, the will of the people.

The queen was dead; there was no parliament; there was no King's Peace; and the old queen's office-holders legally no longer held office. By what right and under what authority then did Cecil issue the proclamation?[3] The answer lies in the common law.

It had been the practice from time immemorial in Britain for the magnates of the realm to choose the king, or to ratify the old king's choice of a successor[4]; the *airecht* or the *witan* would elect (or confirm) the most appropriate member of the blood royal to be the king, and this election was in turn ratified by the people by their assents and acclamation at the coronation in a formal Recognition.[5] The person recognised then took the coronation oath, was anointed, and entered into the office of king.

Cecil, the old queen's Privy Council, and, most importantly, the other representatives of the various interested groups in the society, here were acting effectively as the *airecht* or *witan* previously had done. They decided who was to be king, (in this case, endorsing the old

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[1] See *The Duke of York's Case, 1640, Rot., Parl.*, V, pp. 376-8, quoted at Lodge and Thornton, *ed. cit.*, at p. 35.

[2] This, of course, is so only if Edward IV was not himself illegitimate, and if the marriage between Edward IV and Elizabeth Woodville was not bigamous, and their children not illegitimate; and also upon whether or not the Act of Richard III (his *Titulus Regius*)declaring the children of that marriage illegitimate had ever been legally repealed (see my observation at p. 117, *supra*).

[3] It will be remembered that Edward I's agents issued the proclamation proclaiming him king; that Eleanor of Aquitaine issued the proclamation proclaiming Richard I king; that regents, themselves often of the blood royal, issued the proclamation in the minority of boy kings (Henry III, Edward III, Richard II, Edward VI); Mary proclaimed herself Queen; but William Cecil proclaimed Elizabeth Queen.

[4] See p. 32 and p. 92, *supra*.

[5] See the early English coronation Ordos at Appendix I; and also the reference to the Celtic coronation ceremonies in Bute, also at Appendix I.

queen's wishes), made homage on behalf of the people, and issued the proclamation in the people's name. This is the only proclamation which is not issued under the king's name; the only proclamation which is not dependant on the king's prerogative. This proclamation predates the king's prerogative, since the king can only come into his prerogative after he has become king. It is this proclamation which, in the name of the people, putatively confers the title of kingship upon the king. But only if the people as a whole subsequently agree with the choice of the representative council/group issuing the proclamation in their name does it have any lasting effect.[1]

Thus the proclamation alone is not sufficient to ensure that the nominated person actually becomes king. What then is? The answer here, I believe, must be the subsequent ratification by the conglomerate gathering of the putative king's people as a whole at the coronation, where they recognise him as king, and where he undertakes the duties entailed in kingship by swearing the coronation oath.

If this analysis is correct, then the proclamation by the Accession Council of the new king thus has its authority in the people's prerogative at common law. Similarly, the coronation ceremony itself, by virtue of the people's (or peoples', as in the twentieth century) ratification as a whole of a decision earlier made on their behalf in the Recognition, and by virtue of the king's undertaking given under the most solemn of oaths as to the governance of the people(s), is in turn binding on both king and people under the common law, until any such time as the king, or the people as whole, decides otherwise—but any such decision cannot be arbitrary, and because of the legally binding nature of the covenant entered into between the king and the people at the coronation[2], it may only be broken as a result of failure to keep the covenant. For example, the king may retract his protection[3] from the people if they betrayed their undertakings of allegiance to him, or broke his peace—hence the crimes of treason and others formerly known as the king's pleas;[4] but this retraction of the king's protection has applied only to individuals who by their actions

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[1] Cf. Lady Jane Grey was proclaimed queen; but the people did not accept her; they recognised Mary as queen instead.

[2] For discussion of this assertion, see *infra* under the chapters on the Coronation oath.

[3] Cf. the king's *mund* (O.E.)

[4] E.g. *Rex (Regina) v. Bloggs*; and see Glanvill's list of pleas of the crown at Glanvill, i, 2; and see the exegesis in T F T Plucknett, *A Concise History of the Common Law*, New York 1929; 5th edn., Little Brown and Company, Boston, 1956, at p. 426 ff., where he states that a typical plea of the Crown was, *inter alia*, breach of the King's Peace.

are 'outlaws', or acting outside the law.[1]

I can think of no instance, nor have I been able to find record of any, when the king himself removed his protection from the people, or a people, as a whole. At the time of the *Duke of York's case*[2], it may well have been difficult for the people to know which particular King's Peace was in force—that of Henry VI or that of Edward IV—but at least one or either of them obtained. During the time of the English civil war, there existed a situation where the parliamentary revolutionaries purported to govern on behalf of the people; clearly the King's Peace was not proclaimed by parliament on behalf of Charles II after Charles I's execution. What happened was that the King's Peace was in abeyance, while the revolutionaries attempted to sustain an alternative system of law. The people however, rejected the parliamentary attempt at governance[3], and the restoration of Charles II in 1660[4] saw the law re-established[5] as it had been in 1642, with none of the parliamentary

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[1] For a discussion of the evolution of outlawry, see J E A Jolliffe, The Constitutional History of Medieval England, 4th edn., Adam and Charles Black, 1967, at pp. 3-4, and pp. 107-108; and see T F T Plucknett, *A Concise History of the Common Law*, 5th edn., Little Brown and Company, 1956, p. 385, p. 387, p. 409, pp. 430-431, and p. 471, n. 1. And see Frederick Pollock, 'The King's Peace', *The Law Quarterly Review*, Vol. I, 1885, pp. 37-50, at p. 43—' The peace-breaker, if he fled, was reckoned an outlaw;...' The only available remedies for an outlaw in the middle ages lay either in the king's pardon, or in sanctuary under the church laws and liberties.

[2] See *The Title of the Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8, as quoted in Lodge and Thornton, *English Constitutional Documents*, pp. 34-36; and see discussion at 'The Duke of York's Case', p. 100 ff., *supra*.

[3] Cromwell himself had no real republican sympathies, (see H Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869, pp. 456-457); The Protectorate of Cromwell could not be said to operate upon the rule of law as known to the common law, but rather under 'naked military rule'; on the other hand, the actual processes of the law in the provinces 'proceeded under the old forms, or something very close to them, through every military and constitutional upheaval.' (see J P. Kenyon, *The Stuart Constitution, loc. cit.*, at p. 336). Cromwell 'threw over every pretence at constitutional rule. He levied taxes without parliamentary grant, and turned out the judges who seemed too outspoken in their criticisms of his system.' He took 'the chief powers of a king, including the right of naming his successors.' And he re-established the House of Lords (of life peers nominated by Cromwell), to be called *The Other House*. —see T F Tout, *An Advanced History of Great Britain from the Earliest times to the Death of Queen Victoria*, Longman, Green, and Co., London, 1906, at p467, and p. 470, respectively.

[4] For a very concise account of the events leading up to the restoration, see J P. Kenyon, *The Stuart Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1965, at pp. 338-339; for the doings of the Interregnum, see *ibid.*, pp. 328-339.

[5] See the Declaration of Breda, 1660, by Charles II, 4/14 April, 1660, in the twelfth year of his reign (*Lords Journals*, XI, 7-8—'Not do we desire more to enjoy what is ours, than that all our subjects may enjoy what by law is theirs, by a full and entire administration of justice throughout the land, and extending our mercy where it is wanted and deserved. ...we do grant a free and general pardon...to all our subjects [excepting those who shall be excepted by parliament]... ...we desiring and ordaining that henceforward all notes of discord, separation and difference of parties be utterly abolished among all our subjects, whom we invite and conjure to a perfect union among themselves, under our protection, for the resettlement of our just rights and theirs in a free Parliament, by which, upon the word of a king, we will be advised...' The general pardon received the imprimatur of the houses of parliament and the king in the *Act of Oblivion*, 12 Car. II, c. 11, 1660, with primarily only those regicides still living named as exempt. (see section xxxiv). For texts, see Kenyon, *The Stuart Constitution, loc. cit.*, p. 357-358, and pp. 365-371.

attempts at law-making receiving any recognition on the statute books[1]—in essence then, there was a retrospective ratification by the people of the King's Peace, and on this basis were certain individual revolutionaries charged with treason.

A more difficult situation arose at the revolution of 1688, where there was a recognised, and anointed king in existence (James II and VII) at the same time as his successors (William and Mary) were recognised, crowned and anointed. The only justification put forward for this revolution was:

> That King James the Second having endeavoured to subvert the constitution of this kingdom by breaking the original contract between King and People, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, had abdicated the Government and that the throne is thereby vacant.[2] – *Journals of the House of Commons*, 1547-1832, x. 14[3]

In my view, James II's English peace continued after the proclamation of William and Mary as king and queen on 13 February 1688 up until their formal recognition by the people and their taking of the coronation oath at the coronation. Only this procedure, together with their anointing and crowning, at common law made them kings. After that their peace reigned, and was supported by any retrospective legislation or decree which they, or they and their estates, might make. Thus the actions of the select group of Conventioneers who initially proposed them as sovereigns were subsequently ratified by the people in the Recognition at the coronation ceremony.[4]

The people may of course retract their allegiance from the king if it can be proved that he has broken his undertakings—hence the deposition of kings.[5] Of course, the people could

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[1] The first Acts of Charles II's parliament bore the numbering 12 Car. II, c. n (see for example *The Act of Oblivion*), with his reign being dated as beginning from his father's execution in 1649.

[2] This 'vacancy' of the crown was first advanced in support of the deposition of Richard II, and the taking of the throne by Henry IV; the 'throne' was noted to be 'vacant', which later translated into 'the realm' being 'vacant'—see Deposition of Richard II, *Rot. Parl.* III. 416 [Latin], from *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, at p. 407 ff.; translated from the original in *Rot. Parl.* III., 416 (Latin), text at Appendix I.

[3] Resolution of the Lords and Commons, 28 January, 1688, for text see C Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, Methuen & Co, London, 1904, 5th edn. enlarged, 1928, at p. 129; and see my Appendix I.

[4] So perhaps, Henry VII's justices in taking their decision in *Y.B. 1 Henry VII* Mich. pl. 5 (see p. 116, and note 3, *supra*) that becoming king effectively cures all ills, were not wrong; merely their basis for the decision was misconceived, arising then out of political necessity, rather than from a clear undiluted perception of the common law.

[5] Although most depositions in Britain had in my view only flimsy (if any)bases in law, in so far as they relied on the king's breaking of his undertaking, particularly in the case of James II and VII; for this reason most legal historians

decide to abolish the institution of kingship altogether; but again, for such an event to be legal, at least under the common law, all the people would need to decide this without any equivocation, as such a move would strike at the underpinning established over centuries of the law itself. And because any such move would be contrary to the established law, it would be denoted as a revolution. On the other hand, it is difficult to see how a king, once anointed and crowned, can cease to be a king, unless he has broken his coronation oath to God and the people, or is in breach of the Protestant declaration.[1]

Robert Cecil's proclamation of James VI and I's accession had an urgency which had not applied in the case of his father's proclamation of Elizabeth as queen—James was still in Scotland, and the succession needed to be proclaimed so as to secure the King's Peace: the proclamation went on to adjure all law enforcement office holders to maintain '...the publique peace of the Realme.' This proclamation was signed by all those present, and it is from this aggregation of people, which included not only the Privy Councillors, but also the Lord Mayor of London, certain aldermen and members of the Commons, that the precedent was established which has been followed ever since, of the meeting of a special Accession Council on the death of a sovereign.[2]

James VI and I was alive to the defects (at statute law, under any purported royal prerogative, according to judge-made law, and under the hereditary principle itself ) of his

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refer to the depositions of Edward II, Richard II, and James II and VII, as revolutions. The civil war of the 1640s, on the other hand, was a civil war, where it seems beyond doubt that what purported to be a parliament acted illegally.

[1] Maitland appeared to view as doubtful whether a king could cease to be king, 'save by his death, by holding communion with the church of Rome, professing the Popish religion or marrying a Papist, and possibly by abdication.'—see *Constitutional History*, p. 344. This is one of those areas of kingship which is not examined in this dissertation. It is quite certain that all those persons who have become king of England, Scotland, Ireland, Wales, or of any of the realms, territories or dominions which recognise that king, (which includes, for example, Australia, Canada, New Zealand, *et al*)or of any or of all of them, once they have been recognised, taken the coronation oath, been anointed and crowned, take that position as being conferred by God's grace, *deo gratia*, their most solemn oath having been taken before the people in a holy place, and they having been anointed with most serious adjurations, which results in their becoming king, thus entering into a peculiar and solitary state, in which they have all the powers of the people(s) for the peace and protection of that people(s), and which duty they are required and bound both to requite and acquit. See that Richard II, though pressed to renounce the throne, did so with the saving that he *could not* renounce the spiritual character of his kingship= see S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 1936, Cambridge University Press, Cambridge; reissued, American Scholar Publications, New York, 1965, p. 7 n. 2 *Annales Henrici Quarti*, 286 *Ubi vero Dominus Willelmus Thirnyng dixit ei quod renunciavit omnibus honoribus et dignitati Regi pertinentibus, responabit quod noluit renunciare spirituali honori characteris sibi impressi, et inumctioni, quibus renunciare nec potuit, nec ab hiis cessar* ; and see also William Shakespeare, *The Tragedy of King Richard the Second*, Act III, Scene II, ll. 35-63: '...So when this thief, this traitor, Bolingbroke...shall see us rising in our throne, the east...his treasons shall sit blushing in his face...Not all the water in the rough rude sea Can wash the balm from an anointed king; The breath of worldly men can not depose The deputy elected of the Lord...'

[2] *Stuart Royal Proclamations*, *loc. cit.*, p. 3, n. 2.

asserted rights to the crown as outlined by Robert Cecil in the proclamation, as the first act of his reign was a *Succession Act*[1], whereby parliament articulated in detail James's descent from Edward IV, and went immediately on to state:

> In consideration whereof[2], albeit we your Majesty's loyal and faithful subjects, of all estates and degrees, with all possible and public joy and acclamation, by open proclamations within five hours after the decease of our late Sovereign Queen acknowledging thereby with one full voice of tongue and heart that your Majesty was our only lawful and rightful liege Lord and Sovereign, by unspeakable and general rejoicing and applause at your Majesty's most happy Inauguration and Coronation, by the affectionate desire of infinite numbers of us of all degrees to see your Royal person, and by all possible outward means have endeavoured to make demonstration of our inward love, zeal, and devotion to your most excellent Majesty our undoubted rightful liege Sovereign Lord and King; ... in this High Court of Parliament, where the whole body of the realm, and every particular member thereof, either in person or by representation (upon their own free elections), are by the laws of this realm deemed to be personally present... we therefore [and the Act restates James's right and succession to the throne.]

Thus James ensured the validity of his succession not only by virtue of the people's prerogative evidenced in his Accession Proclamation and its subsequent ratification in the Recognition at the coronation ceremony, but also by a formal acknowledgement of these actions by the representatives of the people in the estates in parliament. Significantly, the parliament itself in the *Succession Act* makes it perfectly clear that it was the people's actions, by proclamation, and by applause and acknowledgement at the coronation (that is, the Recognition) which declared James to be king, and that the Act was merely a *recorded* further acknowledgement of the people's decision.

## 'THE KING NEVER DIES'

In a series of cases under Elizabeth I, 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*[3], *Willion v Berkley*[4], and *Sir Thomas Wroth's* case[5]. In all these cases the judges struggled with the

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[1] *Succession Act*, 1604, 1 Jac. I, c. I; *Statues of the Realm*, iv, 1017, extracted in J R Tanner, *Constitutional Documents of James I, AD 1603-1625*, Cambridge University Press, Cambridge, 1930, reprinted 1961, at pp. 10-12.

[2] That is, James's lineal right of descent from Edward IV.

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

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

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

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.[1]

In *Sir Thomas Wroth's case*[2] 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'[3]:

> ...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.[4]

I have quoted from these cases, because they provided the basis upon which Sir Edward Coke later developed the idea the 'the king never dies' in the fashion that it is still accepted today.

The great problem with the cases cited *supra*, is that they were looking *backwards*—it is easy to say with hindsight who was the successor to the crown. But none of the cases could say

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[1] *The Duchy of Lancaster case*, 1561, 1 Plowden 212; 75 ER 325; [1558-1774] All ER, 146, at p. 147. At p. 147 the court also said : '[The King has] a body natural and a body politic together indivisible...' This is still quoted today as being the basis of the doctrine of the 'Indivisibilty of the Crown'—see Paul Lordon, *Crown Law*, Butterworths Canada in co-operation with the Federal department of Justice and the Canadian Government Publishing Centre, Toronto and Vancouver, 1991, at p. 3, 1.1.3.1.

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

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

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

with certainty who it was that *would be* the next king.

The most pertinent enunciation of principle at this time was, however, that of Brown J in *Hill v Grange*[1]:

> The King is a Name of Continuance, which shall always endure as the Head and Governor of the People (as the Law presumes) as long as the People continue...; and in this Name the King never dies.

The king is only and ever *king of a people*, and as the preceding sections have demonstrated, it is the people who choose the king.

The people and the judges were concerned about the succession for three reasons. Firstly, Elizabeth had neither married nor named a successor.[2] Secondly, James VI, the putative successor, was a foreigner and a Scot. Thirdly, the succession was inextricably bound to religion.

## SUCCESSION AND RELIGION

After Henry VIII's cutting of the ties with the Church of Rome in the 1530s and the establishment of the Church of England of which he was head, England had seen monarchs who were almost non-conformist (Edward VI), Roman Catholic (Mary and Philip), and Anglican (Elizabeth). The Puritans had become a force to be reckoned with, particularly the Presbyterians in Scotland, and wanted a protestant king. The counter-reformation had seen the establishment of the Society of Jesus, who viewed Elizabeth's death as an opportunity to return England to the Church of Rome, catholic canon law never having recognised the annulment of the Aragonese marriage.

In **Scotland**, John Major (Mair) wrote that all civil authority was derived from the people, and that the king was a mere delegate of the people who could be deposed or put to death

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[1] *Hill v Grange*, 2 & 3 Philip and Mary, Plowden Reports, 177a, quoted in Kantorowicz, *The King's Two Bodies*, *op. cit.*, p. 23, and referred to at p. 13.

[2] See Edmund Plowden, 'A Treatise proving that if our Soveraigne Lady quene Elizabeth (whom god blesse with long lyffe and many children) should dye without issue, that the Quene of Scotte by her birthe in Scotlande is not disabled by the lawe of England to receive the crown of Ingland by descent' British Library, Harleian MS. 849, fols. 9-11; referred to in Keechang Kim, '*Calvin's Case* (1608) and the Law of Alien Status', 17 *Journal of Legal History*, 1996, 155-171, at note 24.

if he misused his power.[1] George Buchanan wrote in 1570 his *De Jure Regni apud Scotos*,[2] mainly in order to justify the deposition of Mary Queen of Scots, in which he asserted that the king was responsible to the people and under the law, and could be deposed if he flouted the law. After her deposition, a series of Calvinist/Presbyterian regents effectively ruled Scotland until 1581, when James VI at the age of fifteen assumed the rule. In 1581, Adam Blackwood's *Apologia Pro Regibus*,[3] influenced by Bodin and responding to Buchanan, asserted the necessity for unlimited sovereignty in the state for the purposes of securing peace and order. James VI published his *Trew Law of Free Monarchies* in 1598, and William Barclay published his *De Regno et Regali Potestate* in 1600, stating in essence that authority to rule came from God, and the people could not take away what they did not confer.

In **England**, Sir Thomas Craig wrote *Concerning the Right of Succession to the Crown of England* on 1 January, 1603, just before James VI became James I of England. This was a response to the allegations by the Jesuit Parsons in Doleman's *A Conference about the Next Succession to the Crown of England* of 1594, asserting the idea of the people's capacity to alter the succession, in opposition to the idea that hereditary monarchy could not be altered by legal process, as the right of inheritance was absolute under natural law.[4]

After Mary Queen of Scots was executed in 1587, and the Calvinist James VI of Scotland became heir presumptive to the English throne, catholic polemicists began attacking the idea of divine right of kings, particularly in so far as it could be seen as supporting hereditary succession. Doleman's *Conference about the Next Succession to the Crown of England*[5] had constructed a new alliance between papal sovereignty and popular rights, arguing that

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[1] John Major (Mair), *History of Greater Britain*, A Constable, (*ed.* and *trans.*) S.H.S., 1892, referred to in David M Walker, *A Legal History of Scotland*, Volume III, The Sixteenth Century, T & T Clark Ltd., Edinburgh, 1995, p. 120 and n. 1.

[2] George Buchanan, *De Jure Regni apud Scotos*, referred to in Walker, *A Legal History of Scotland*, *loc. cit.*, p. 120 and n. 2, sourced to W S McKechnie, 'De Jure Regni apud Scotos', in *George Buchanan: Glasgow Quartercentenary Studies*, 1907, 211-297. *De Jure* was written in 1570, but not published until 1578.

[3] See Walker, *A Legal History of Scotland*, *loc. cit.*, p. 120.

[4] See Walker, *A Legal History of Scotland*, *loc. cit.*, p. 121.

[5] R Doleman, *A Conference about the Next Succession to the Crown of Ingland, Divided Into Two Parties. Whereof the First Conteyneth The discourse of a civill Lawyer, how and in what manner propinquity of blood is to be preferred. And the second the speech of a Temporal Lawyer, about the particular titles of all such as do or may pretende within Ingland or without, to the next succession*, published posthumously in 1598, written by the Jesuit Robert Parsons c.1593. This work is referred to and quoted in Figgis, *Divine Right*, *op. cit.*, pp. 101-104, and notes thereto. It also features prominently in Howard Nenner, *The Right to be King, The Succession to the Crown of England 1603-1714*, University of North Carolina Press, Chapel Hill, 1995. This tract is not mentioned at all in the book *Subjects and Sovereigns, the Grand Controversy over Legal Sovereignty in Stuart England*, by Corrine C Weston and Janelle R Greenberg, Cambridge University Press, Cambridge, 1981, which otherwise deals with the array of tracts influential about this time. See also p. 323, and p. 364 *infra*.

forms of government were variable and may be changed according to the will of the community,[1] and that 'succession to government by nearness of blood is not by law of nature or Divine, but by human and positive laws only of every particular government, and consequently may upon just causes be altered by the same.'[2] Doleman insisted upon the importance of the coronation oath as both imposing the conditions upon which kings take their crowns, and as implying allegiance from the people to the king (this foreshadowed the 'contract theory' later used by the revolutionaries of 1642 and 1688).[3] The Jesuit thesis was that the coronation oath[4] required the king to maintain the Roman catholic religion, and failure to do so was a 'break' with both God and the people, which justified the people in opposing and if necessary deposing him.[5] This interpretation was designed to restore papal supremacy.

The Jesuits' continued attack on the succession of James VI led to a trial for treason of two priests and certain gentlemen. Sir Edward Coke's view on this, when he was Chief Justice of the Common Pleas and in favour with James VI and I was:

> 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*

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[1] Doleman's *Conference about the Next Succession to the Crown of England*, p. 10 ; 'The Commonwealth hath power to choose their own fashion of government, as also to change the same upon reasonable causes', quoted in John Neville Figgis, *The Divine Right of Kings*, 1896, Cambridge University Press, Cambridge; 2nd edn. 1914; reprinted by Harper Torchbook, New York, 1965, with an Introduction by G R Elton; reprinted by Peter Smith, Publisher, Gloucester, Mass., 1970, p. 102, and n. 1.

[2] Doleman's *Conference...*, *ibid.*, c. I, title; see Figgis, *ibid.*, p. 102 and n. 2

[3] Indeed, the puritans made much of Doleman's tract in 1647, and it ironically was republished by supporters of the Exclusion bill as an argument against inherent right—see Figgis, *Divine Right*, *op. cit.*, p. 103, and note 2.

[4] Much depends upon the text of the coronation oath which was being discussed. The uncertainty surrounding the oaths taken by the Tudor kings does not make this exercise any easier. See the discussion at Chapter 7, p. 244 ff., *infra*.

[5] See Cardinal Allen, *Defence of the English Catholics*, p. 113, quoted in Figgis, *Divine Right*, *op. cit.*, p. 103, and n. 3—'Upon these conditions [the oath to preserve the Catholic faith] therefore, and no other, kings be received of the Bishop that in God's behalf anointeth him; which oath and promise not being observed, they break with God and their people; and their people may, and by order of Christ's supreme minister their chief Pastor in earth, must needs break with them; heresy and infidelity in the Prince tending directly to the perdition of the Commonwealth'.

> *Trial*][1]. And that these and other (acts) of like nature could not be treason against His Majesty, before he were a crowned king.[2]

## THE DESCENT OF THE CROWN

It was in this context that Coke explicated his view of the succession and the 'king never dies'.

> ... 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...[3]

Coke says the succession is by indefeasible hereditary right:

> ... 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.[4]

Succession, to Coke, was 'by birthright inherent, by descent from the blood royal.' Now this was an extrapolation from the common law of inheritance (hereditary succession), or 'descent'. The most convenient summary of this law is in Blackstone's *Commentaries*[5]—the major authority upon which Blackstone relies being Sir Edward Coke, particularly in his *Commentary on Littleton*[6]. The doctrine of descents, or law of inheritance or hereditary succession, had a number of fundamental principles—descent was by consanguinity, of the full blood; bastards and children of the half blood could not inherit, nor could aliens,

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[1] See *Sir Griffin Markham's Trial*, 2 *State Trials*, 61-69. 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]. See discussion at pp. 134, 139, and note 1, p. 139, and pp. 141, 144, and p. 329, *infra*.

[2] *Calvin's case, The Postnati*, (C.P. 1610) Trin. 6 Jac. 1, 7 Co. Rep. 1a-28b, at 10b; 77 ER (KB) 377-411, at 389; 2 *State Trials*, 575-669.

[3] *Calvin's case, loc. cit.*, 7 Co. Rep., 10a; 77 ER (KB) 388

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

[5] See Blackstone, *Commentaries, op. cit.*., Vol. 2, (Book 2) *Of the Rights of Things*, Chapter 14 'Of Title by Descent', and Chapter 15, 'Of Title by Purchase, and by Escheat'.

[6] Sir Edward Coke, *Commentary on Littleton*, 1628, *An Abridgement of the Lord Coke's Commentary on Littleton*, Sir Humphrey Davenport, London, 1651, reprinted by Garland Publishing, New York, 1979, a facsimile from copy in the British Library, 519.a.32.

having no 'inheritable blood' in them; males took precedence over females; but in the absence of male heirs, a daughter could inherit, but in the case of more than one daughter, they inherited conjointly.[1] Clearly, this common law of descent did not apply to the succession to the kingship, which had been fraught with so many aberrations.[2]

Now Coke's *Commentary on Littleton* was published in 1628,[3] the same year Coke put up the *Petition of Right*.[4] It was in this *Commentary* that Coke identified the fourteen kinds of law that in his view obtained in England.[5] One of these laws was the *lex Coronæ*[6] (the law of the Crown), which he elsewhere refers to as *jure coronæ*—'All lands and possessions whereof the King is seised in *Jure Coronæ* shall *secundum jus Coronæ*, attend upon and follow the Crown.'[7] In essence this means, 'All...possessions whereof the King is seised in right of the Crown shall according to the rights to the Crown attend upon and follow the crown.' As an exercise in tautology, this would have to take the cake. In short, there was no *lex Coronæ* other than that which Coke devised in his own mind in order to erect a peculiar 'law of descent' for the crown to clothe the naked inconsistencies between the succession of the crown and common law succession to any other thing.

The first intimation of the idea of the 'crown' being a 'thing' arose with Edward the

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[1] See Blackstone, *Commentaries*, *op. cit.* Vol. 2, Chapters 14 and 15.

[2] See the accessions of William II, Henry I, Matilda, Stephen, Henry II, John, Henry IV, Edward IV, Edward Plantagenet, Richard III, Henry VII, Mary I, Elizabeth I, James VI and I (up to Coke's time). (William I is excluded, he taking by conquest).

[3] Coke's *Commentary on Littleton* was published in 1628 as *The First Part of the Institutes of the Laws of England*, the only part to be published in his lifetime, the remaining three parts of the *Institutes* being published in the 1640s. Of his Reports, the first ten were published before his dismissal as Chief Justice of King's Bench in 1616, no further of his reports being published in his lifetime. The Eleventh and Twelfth reports were published posthumously in 1658 and 1659 respectively; but some of Coke's reports remain unpublished to the present day—see John H Baker's Note on Coke in *Biographical Dictionary of the Common Law*, A W B Simpson (*ed.*), Butterworths, London, 1984, pp. 117-121.

[4] For Coke and the *Petition of Right*, see *infra*, pp. 304 ff.

[5] See Co. Litt., *loc. cit.*, § 3, at p. 10-11—*lex Coronæ*, *Lex & consuetudo Parliamenti*, *Lex naturæ*, *Lex communis Angliæ*, Statute Law; *Consuetudines*; *Jus belli, in republica maxime conservanda sunt jura belli*; Ecclesiastical, or Canon law in Courts in certain cases; Civil law in certain cases, only in the Courts Ecclesiastical, but in the Courts of the Constable, and Marshall, and of the Admiralty; *Lex Forestæ*, The Law of Marque or Reprisal; *Lex Mercatoria*, The Laws and Customs of the Isles of Jersey, Gernsey, and Man; The Law and priviledge of the Stannery; The Laws of the east, west, and Middle Marches, which are now abrogated.' On the long term influence of the *Lex & consuetudo Parliamenti*, see p. 422, especially note 2, at p. 422, and note 5 at p. 422 *infra*.

[6] See Co. Litt., *loc. cit.*, § 3, at p. 11.

[7] See Co. Litt., *loc. cit.*, § 8, at p. 13.

Confessor in the use of 'the crown' as a metaphor for his jurisdiction,[1] and in that part of the king's oath of governance where he swore not to alienate and to restore and to maintain the rights of the crown,[2] which also may date from as early as the Confessor's time.[3] It is not a large step to translate this metaphoric use into something more concrete. This is what occurred when Henry IV attempted to entail 'the crown' upon his sons,[4] which in turn gave rise to the Wars of the Roses and eventually to judges attempting to find some law applicable to this metaphorical property in *The Title to the Duke of York's case*[5] and subsequent cases.[6] But if the 'crown' is an hieroglyphic of the laws, as Coke said, it surely is not something that can be regulated by the laws of property and descent which are in turn but a part of the whole, this whole in turn being that which gives the crown its metaphorical existence—the disposition of the whole cannot be regulated by merely a part of it, but is regulated by all that makes that whole.

Moreover as to the descent of the crown being hereditary, Coke elsewhere in his *Fourth Institutes*[7] explodes this for the myth it is.

There, in demonstrating the 'transcendent and absolute' power of parliament[8], he makes it plain that one of, if not the prime, reasons for this transcendent power, is because to his mind it had been the *parliament* which had determined the descent of the crown, because it had adjudged infants to be of full age, daughters and heirs to inherit during the life of the ancestor, legitimated the illegitimate, bastardised the legitimate, attainted a man after his

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[1] *Ealle tha gyltas tha belimpeth to mine kinehelme; omes forisfacturae quae pertinent ad regiam coronam meam*: quoted in Jolliffe, *Constitutional History of Medieval England, loc. cit.*, sourced to charter of Edward the Confessor to Ramsey, from J Earle, *Land Charters*, p. 344. Cf. Coke—'a King's Crown is an hieroglyphic of the laws.' *Calvin's case*, 1610, 7 Co. Rep, 11b.

[2] See discussion at pp. 65, 177, 178 *supra*, and p. 263 *infra*.

[3] See p. 172 *infra*.

[4] 7 Henry IV, c. 2, see p. 99, p. 102, and p. 104 *supra*.

[5] *The Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8; see discussion at p. 100 *supra*.

[6] See discussion *supra* at 'The King Never Dies', p. 130 ff.

[7] See Coke, *Fourth Institute*, c. 1, pp. 36-38, 'The power and jurisdiction of parliament'.—Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England, concerning the Jurisdiction of Courts*, MDCXLIV (1644) Printed at London by M Flesher for W Lee and D Pakeman, facsimile copy of this Fourth Part (508.g.5[2]) in the British Library, by Garland Publishing Inc., New York, 1979.

[8] 'Of the power and jurisdiction of the Parliament for making laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.'... 'And to take one example for many. ...' [and here he traces the descent of the crown as parliament attainted, legitimated, bastardised, or otherwise recognised a person as king].—see Coke, *Fourth Institutes, loc. cit.*, c. 1, p. 36, 'The power and jurisdiction of parliament'.

death, and secured the crown for those without 'the right of the crown'[1] (*viz.* Henry IV and Henry VII). How Coke could maintain that parliament, which he himself said consisted in the king, (in his politic capacity)[2] the lords spiritual and temporal and the commons[3], could legally determine the nature of the king (politic or natural) when it required a legal writ of a legal (natural) king to bring it into being[4], beggars belief. But mere bagatelles like this never stopped Coke from playing his own tunes, be they never so discordant.

So. Was the succession to the crown determined according to Coke 'by birthright inherent, by descent from the blood Royal', as he said in *Calvin's case* in 1610, when he was Chief Justice of the Common Pleas and a defender of the king? Or was it determined by the 'power and jurisdiction of parliament', as Coke said in his *Fourth Institutes*, written after his dismissal by the king and during his parliamentary career?

## COKE AND THE CORONATION

In *Calvin's case*, Coke castigated the priests Watson and Clerke[5], then gives his gloss on the case :

> 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

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[1] Presumably here Coke meant those persons to whom the crown should have descended, had his apprehension of the idea of descent of the crown according to the blood royal were followed, as he says that at the time of Henry IV, the crown should have descended from Philippa, daughter of the Duke of Clarence, and at the time of Henry VII, the crown should have resided in Elizabeth, daughter of Edward IV—see Coke, *Fourth Institute*, c. 1, p. 37. Coke's marginal notes at p. 37 are interesting, as he says that the *Titulus Regius* of Henry VII, 1 Henry 7, c. 1, was not in print, and he fails altogether to refer to Richard III's *Titulus Regius*; in the body of his text, by adverting to the right of the crown being in Edward IV's daughter Elizabeth, he is assuming that her brothers are dead, and is either operating in ignorance of Richard's *Titulus Regius* which bastardised Edward IV's children or is deliberately overlooking it [this latter is more likely, since he refers to Henry's *Titulus Regius*, one aim of which was to repeal Richard's *Titulus Regius*]; and he is ignoring completely both the attainder of Edward Earl of Warwick by Edward IV and Richard III, and its subsequent reversal by Henry VII's *Titulus Regius*, to which he refers selectively.

[2] See Coke, *Fourth Institutes*, *loc. cit.*, c. 1, p. 1 'Of what persons this Court consisteth'.

[3] Coke, *Fourth Institutes*, *loc. cit.*, c. 1, p. 1 'Of what persons this Court consisteth'.

[4] See Coke, *Fourth Institutes*, *loc. cit.*, c. 1, 'The summons of parliament', p. 4, and c. 1, 'The beginning of the parliament', p. 6.

[5] See quotation at p. 134, *supra*.

> solemnization of the descent.[1] 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 so clear I omit. But which it manifestly appeareth, that by the laws of England there can be no interregnum within the same.[2]

Coke is clearly striving with every means at his disposal to support the idea that James was king from the moment of Elizabeth's death. He is asserting here that the 'laws of England' admit of no interregnum in the succession because it descends by inherent birthright in the blood royal. But the facts examined in the preceding sections (*supra*) argue against him. So too does the 'evidence' which Coke adduces.

Firstly, it is not surprising that Henry VI[3] was not crowned on his accession, as he was only nine months old at the time.[4] He is the only English[5] king to succeed as an infant; all other kings or putative kings who succeeded in their minority (Henry III, Edward III, Richard II, Edward Plantagenet, and Edward VI) were crowned immediately, being old enough to understand the purport of the coronation oath, except Edward Plantagenet, who was declared illegitimate. During their minority, Regents were appointed by the Privy Council,

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[1] *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. Elsewhere, in Coke's *Third Institutes*, *loc. cit.*, c.1, *Per overt Fait*, at p. 12, he refers to this case thus: 'And so it [preparation to depose, imprison or blackmail a king, or to imagine the death of the king is treason] was resolved by all the judges of England. Hil. 1 Jac. Regis, in the case of the Lo. Cobham, Lord Gray, and Watson and Clark seminary priests : And so it had been resolved by the Justices Hill. 43 Eliz. in the case of the Earls of E. and of S....' The trial of the earl of Essex for treason, in which Coke was the prosecutor, occurred in 1600, while that of Sir Walter Raleigh for treason, in which Coke again was prosecutor, occurred in 1603 (2 *State Trials*, 1). Coke incurred much obloquy for the ferocity of his personal attacks on the accused. See also pp. 134, 134 *supra*, and pp. 141, 144, and p. 329 *infra*.

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

[3] See discussion of his accession at p. 100, *supra*.

[4] See Stubbs, *Constitutional History*, p. 113; 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—see, for example, p. 328, *infra*.

[5] It would appear that the practice in Scotland was different. James VI had been christened a Catholic by his mother Mary Queen of Scots, but he was crowned as a baby under 12 months according to protestant ceremony, John Knox preaching the sermon, with Morton and possibly Lord Hume swearing the coronation oath on behalf of the infant king that he would maintain the protestant religion.—See David M Walker, *A Legal History of Scotland*, Volume III, The Sixteenth Century, T & T Clark Ltd., Edinburgh, 1995, at p. 84, and note 156, sourced to R.P.C., I, 537

who could be the king's mother[1], another relative[2], a high official[3], or a group of high officials[4].

These young kings almost invariably took the coronation oath again[5] when they came to 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.[6] But in most cases the kings reaffirmed the acts of the regents—for example, Henry III's reaffirmation of the *Magna Carta* in 1225, after he was pronounced to be of age.[7]

Kings after their accession and before their coronation were known by titles consonant with their incomplete state—e.g. '*Ego Eadward rex, regali fretus dignitate...*'[8]; 'the king elect'[9]; *dux Normanniae*[10]; Richard of Gloucester and Henry Tudor were (probably) introduced to the people assembled for their coronation as 'Here is [name] *elected chosen and required by all of*

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[1] Cf. Edward III

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

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

[4] cf. Henry VI.

[5] 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.

[6] 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"'—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

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

[8] Edward the Confessor, see P H Sawyer, *Anglo-Saxon Charters: an Annotated List and Bibliography*, (Royal Historical Society, Guides and Handbooks, viii, 1968), n. 998; and S Keynes, 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. See also the discussion *supra*, at pp. 88-89.

[9] *electum regum* —probably William II, Henry I, Henry II—see 'Twelfth century Coronation Order', c. 1100, ['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

[10] 'Duke of Normandy', Richard I and John—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.*

*the iij estates of this same lande to take apon him the saide crowne and royall dignyte*[1]'—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.

And James VI and I himself became king of England by virtue of 'all possible and public joy and acclamation, by open proclamations within five hours after the decease of our late Sovereign Queen acknowledging thereby with one full voice of tongue and heart that your Majesty was our only lawful and rightful liege Lord and Sovereign', and 'by unspeakable and general rejoicing and applause at your Majesty's most happy Inauguration and Coronation,...'[2]

During the seventeenth century, the question of the nature of the office of kingship and its duties and responsibilities would receive the most emotional, political, and legal examination in English history. Many able lawyers, including parliamentarians like William Prynne, did not see the question of the coronation as a mere 'ornament'[3]; and further, if Coke's view as to the nature of allegiance taken together with his views of the coronation in *Calvin's case* were correct, then after the 'Glorious Revolution', William and Mary were never any rightful kings, but rather James II and VII and his heirs remained and would remain kings to this day.

Coke's reference to Henry VI is incapable of supporting his assertions. I have been unable to find any record of what the judges actually said in *Sir Griffin Markham's Trial*[4] in support

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[1] 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.

[2] See *Succession Act*, 1604, 1 Jac. I, c. I; *Statues of the Realm*, iv, 1017, extracted in J R Tanner, *Constitutional Documents of James I, AD 1603-1625*, Cambridge University Press, Cambridge, 1930, reprinted 1961, at pp. 10-12. And see p. 130, *supra*. The Succession Act was merely an additional parliamentary recognition of the preceding recognition of James as king by the people.

[3] 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.

[4] See p. 134, 134, and p. 139 *supra*, and pp. 144 and 329 *infra*. *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

of Coke's assertion concerning it. Nor have I been unable to find any other of the 'infinite precedents and book cases' which Coke 'for brevity in a case so clear' omitted.

In my opinion these statements by Coke about the legal status of the coronation should therefore be treated with the utmost caution. The facts tend rather to support the view of the seminary priests.[1]

## THE KING'S TWO BODIES[2]

Coke was not satisfied with asserting indefeasible hereditary right as 'proving' the lack of an interregnum. Coke had to come to grips with the fact that indeed kings do die, and therefore the king had to have a body politic to 'prove' that there was no interregnum. He said:

> 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[3] to the Crown as it appeareth in 1 Henry 7 4[4] 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 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;...[5]

Now this would have come as a surprise to Henry VII who was so conscious of his defective title that he attempted to extirpate any possibility of any interregnum by dating

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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.

[1] See discussion also *infra*, at p. 144.

[2] For an examination of the king's two bodies, see Ernst H Kantorowicz, *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957, first Princeton Paperback printing, 1981, seventh paperback printing with an introduction by William Chester Jordan, 1997. And see discussion herein at pp. 162, 161, 311, 313, 313, and pp. 341-343.

[3] Note here that Coke did not consider that Henry VII had any right to the crown by descent, which in his view properly lay with Elizabeth daughter of Edward IV—see Coke's *Fourth Institutes*, *loc. cit.*, c. 1, p. 37.

[4] This is a Year Book case, *Y.B.* 1 *Henry VII*, Mich. pl. 5, reproduced in Chrimes, *English Constitutional Ideas*, *loc. cit.*, at Appendix No. 74, and discussed by him at p. 51, and p. 35—see also note 3, p. 116, and note 4, p. 128 *supra*. Coke's citation is wrong, as *Y.B.* 1 Henry VII, Mich. pl. 4 does not deal with attainder, as does pl. 5, but rather with statute overriding customs of the exchequer—see Chrimes, *loc. cit.*, Appendix No. 73, and p. 284.

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

his reign from the day before Richard died[1]. Would Coke say that the body politic passed from Richard to Henry on 21 August 1485 even though Richard was still alive?[2]—but on Coke's own argument, Englishmen's allegiance would have been given to the natural body of the king, who was at that time Richard III.

This powerful anomaly probably led Coke to attempt to draw a distinction in his *Institutes*[3] 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*[4]—however just what this distinction was between a king *de jure* as opposed to a king *de facto*, and how one 'came to the crown' Coke failed to elaborate.

From the context one may infer that he believed that the parliament may be able to cure any ills in a *de facto* king's title since he refers to 11 Henry 7, c. 1, known as the *Statute of Treason*.[5] But the *Statute of Treason* does not speak of kings either *de facto* or *de jure*; it speaks of the king 'for the time being'. Moreover 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[6], and therefore incapable of conferring any validity (except, of course, that of election.) Nevertheless, Coke's view led to 11 Henry 7 c. 4 being known misleadingly as the *De facto* Act, and came to be accepted as a constitutional maxim in the seventeenth century that 'possession of the throne gives sufficient title to the

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[1] See *Titulus Regius* of Henry VII, examined pp. 115-115, *supra*. Note that the actions of Henry's first parliament are of questionable legality, as Henry had issued the writs before he was crowned—see p. 117 *supra*.

[2] Coke in fact astonishingly said nothing at all—see discussion at p. 144, *infra*, and the notes therein

[3] Coke, Sir Edward, *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), reprinted by Garland Publishing, New York, 1979, from facsimiles in the British Library, 508.f.g[2].

[4] See 3 Co. Inst., c. 1, *'Le Roy'*, 7, Garland reprint, *op. cit.* This is one of the least easily comprehensible passages in Coke. He is explicating a position obtaining under the kingship of Mary I and Philip (1&2 Phil. & Mar. c.10), in the context of 25 Edw. 3, and then, (a marginal note saying 'Vide 11 H.7.c.1') uttering his cryptic contradistinctions of kings *de jure*, *de facto*, *de facto et non de jure* and *de jure et non de facto*, and the coming to the Crown. Only God and Coke know what he thought he meant. See the discussion of *The Statute of Treason* at p. 117 *supra*, and at p. 311 *infra*.

[5] 11 Hen. 7, c. 1 (1495), An Act that no person going with the King to the wars shall be attaint of treason; G R Elton, *The Tudor Constitution*, Documents and Commentary, Cambridge University Press, Cambridge, 1965, pp. 4-5; see also 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] Cf. the problem of William and Mary, *post*, p. 157, p. 160, and p. 391.

subject's allegiance, and justifies his resistance to those who may pretend a better right'[1]—this argument was favoured by the regicides of Charles I[2].

Coke then immediately went on to say :

> *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.[3]

Here Coke implies that there is a difference between a rightful and an un-rightful heir, but he does not explicate on the differences, nor how one can determine the rightful heir. Moreover he reiterates that by the law there is no interregnum, but he does not say by what law[4]. 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 VI and I king[5]. (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.)

There was an inherent contradiction between Coke's acceptance of indefeasible hereditary right as making the king, and his espousal of the king's two bodies—for the truth of either one would render the other unnecessary. This may have been one this reason why he developed the idea of *de facto* and *de jure* kings.

But there may well have been another. Coke courageously and consistently wrote as if Richard III, Henry VII's predecessor, had never existed. For a parliamentarian so wedded

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[1] See Plucknett, in 11th edition of *Taswell-Langmead's English Constitutional History*, p. 225. This maxim and the *Statute of Treason* 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. See particularly p. 311, *infra*.

[2] See the discussion *infra*, at pp. 311, 313, and 313.

[3] 3 Co. Inst. 7, *op. cit.*, my italics. Coke cites as reference 'Hil. I Jac. 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]. See p. 134, note 1 at p. 139, and p. 141, *supra*, and p. 329 *infra*.

[4] In *Calvin's case*, he espoused unequivocally the view that the law of nature was before any municipal law, that the law of nature was immutable, that the law of nature was part of the law of England, and that allegiance was due to the physical person of the king by virtue of this law of nature, from which all other laws follow—see *Calvin's case*, *loc. cit.*, 7 Co. Rep., f. 12b, 13a, 13b; and 77 ER (KB) 391-392.

[5] see p. 123, and p. 129, *supra*.

to the idea of the supremacy of parliament, and for a judge who prided himself on 'searching the fountains', it is extraordinary to say the least that there is practically no reference to Richard III in his cases and *Institutes*. He refers to and cites none of Richard's legislation in his *parlement*[1]. He knows of Henry VII's *Titulus Regius*, which he notes had not been printed, but apparently lies in ignorance of Richard's *Titulus Regius*, which had rendered Henry's *Titulus* necessary and in turn was repealed by it.[2] In his *Third Institutes* discussing high treason, he does not refer to the treason of Henry Tudor and his attainder by Richard's *parlement*, and he astonishingly does not refer to Richard III at all, not even to Richard's attainder by Henry which referred to 'treasons...in shedding infants blood'.[3] Nor does he mention the trial and execution of Sir James Tyrell in 1502, allegedly for composition of treason, after which execution it was given out that Tyrell had murdered Edward IV's sons on Richard's instructions.[4] He omits completely any reference to Richard in his discourse on the succession of the crown in his *Fourth Institute*.[5] This must stand as one of the greatest and most mysterious lacuna in any writing on the 'descent' of the crown

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[1] I have been able to locate only two passing references to decisions of judges under Richard, and none at all to his legislation; one reference is buried among many others—'2 Rich. 3. 2. and 12', in *Calvin's case*, *loc. cit.*, 7 Co. Rep., at f. 26a, 77 ER (KB) 408 : clearly a reference to a Year Book decision, since Richard held only one *parlement*. The other is to a decision 1 R.3.1, apparently concerning counterfeiting, as a marginal note to '*Ou sa monye*', at 3 Co. Inst., *op. cit.*, c. 1, p. 16. There is no reference to enactments under Richard III in his *First Institutes* (*Commentary on Littleton*) published in 1628—see *The First Part of the Institutes of the Laws of England (etc.)*, Ed. Coke Milite, in 2 Volumes, Printed for the Society of Stationers, London, Anno 1628, reprinted in facsimile by Garland Publishing, New York, 1979. There are however two references to the laws of Richard III in the 1832 edition of the *First Institutes*, inserted by later editors.

[2] See Coke's *Fourth Institute*, *loc. cit.*, c. 1, pp. 36-37, 'The power and jurisdiction of parliament', marginal note *a* at p. 37—'Nota, pro corona. Rot. Parl, Anno 1 H.7. not in print.' Had Coke perused the Parliament Rolls and found Henry's *Titulus Regius*, he must of necessity have seen Richard III's *Titulus Regius*. As V B Lamb, *The Betrayal of Richard III, An Introduction to the Controversy*, 1959, revised edition with an Introduction and Notes by P W Hammond, published by Alan Sutton Publishing, Stroud, 1990, published in the USA 1991, at pp. 33-34 notes : Henry 'repealed the Act unread, giving orders that it should be deleted from the statute book and that all copies should be destroyed under pain of heavy punishment 'so that all things said and remembered in the said Bill and Act thereof may be for ever out of rememberance and also forgot.' (*Rolls. Parl. 1 Hen. VII*). We owe our knowledge of this important Act to the fact that the original draft was overlooked in the general destruction, and only came to light in the seventeenth century among a mass of documents in the Tower, while at about the same time, its gist was found in the manuscript of the contemporary Chronicle of Croyland, a remote monastery buried in the fen country of Lincolnshire. ...' And P W Hammond states in Note 22 at p. 96 : '[This quotation] from the Rolls of Parliament come[s] from vol. 6 ...p. 289. The act of Henry VII does in fact go so far as to order the removal of Richard's *Titulus Regius* from the "Roll and Records of the said Parliament". Since it was not, we can now quote it as above. The Rolls of Parliament (final versions rather than drafts), were among the documents stored in the Tower.' See my Appendix I for quotations in context.

[3] The only reference is inferential and elliptical—'And so by woeful experience in former times it hath fallen out in the cases of King E.2 R.2 H.6 and E.5 that were taken [and] imprisoned *by their subjects*.' My italics. See Coke's *Third Institutes*, *loc. cit.*, c. 1, High Treason, *Per overt fait*, at p. 12. Richard's attainder is in Rot. Parl. VI, 289, Henry VII's *Titulus Regius*, 1 Henry VII, c. 1. Coke clearly was aware of this document, so it is remarkable that he fails to mention the most notorious attainder of a king, albeit of a dead one leaving no legitimate issue—see Coke's *Fourth Institute*, *loc. cit.*, c. 1, marginal note *a* at p. 37—'Nota, pro corona. Rot. Parl, Anno 1 H.7. not in print.' And note 2 at p. 145 *supra*.

[4] See Kendall, *Richard III*, *op. cit.*, p. 401, and p. 409; and see 3 Co. Inst., *loc. cit.*, High Treason for absence of reference.

[5] See Coke's *Fourth Institute*, *loc. cit.*, c. 1, pp. 36-37, 'The power and jurisdiction of parliament', pp. 36-37; and see my observations at note 1, p. 138 *supra*.

and treason, and the capacity of the king with his estates—one may only speculate as to what enigmatic arcane purpose animated Coke.

However his and Bacon's views[1] of the *Statute of Treason* have long been exploded;[2] but the concepts of kings *de jure* and *de facto*, and that the king never dies because he has two bodies have lived on.

The fact is that there is only one kind of king, and that is he who has been recognised as king by the people, taken the coronation oath, anointed and crowned. The king must die. And the people must choose and recognise another.

## THE KING MUST DIE

But Coke was not alone in his view of the two bodies. It was supported to some extent by Sir Matthew Hale,[3] who wrote that

> The king of England has a double capacity, a natural and a politic capacity. He hath the former as he is a man. He hath the latter by a legal constitution whereby he is a corporation, a sole corporation[4] having a perpetual succession ... [he distinguishes kings from mayors{election} and parsons{donation} and goes on] ... in the case of the king the only ordinary and legal means of uniting these two capacities natural and politic is by hereditary descent. And though sometimes ... a person that comes in by usurpation sustains the succession, yet it is illegal and extraordinary ... this hereditary descent hath certain qualifications and privileges not common to descents of other inheritances ... there is a peculiar law directing the descent of the crown, and thereby uniting the body natural to the politic, as it descends to the eldest female where no male heir...[5]

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[1] See Sir Francis Bacon, *Works*, vi, 270, quoted in Tanner, *Tudor Constitutional Documents*, p. 5.

[2] See A F Pollard, 'Tudor Gleanings, The *de facto* Act of King Henry VII', Vol. VII, *BIHR*, 1-12; and see S B Chrimes, *Henry VII*, Eyre Methuen, London, 1972, reprinted 1977, pp. 178-179.

[3] Sir Matthew Hale, *The Prerogatives of the King*, 1640-1660, D E C Yale (*ed.*), Selden Society, London, 1976. Surprisingly, Ernst H Kantorowicz appears not to have taken Hale's extensive writing of the king's two bodies into account in his work, and gives only passing mention to Blackstone: but perhaps this was because he did not see either of these writers as falling into the 'medieval' period (he does however, draw upon Coke): *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957, first Princeton Paperback printing, 1981, seventh paperback printing with an introduction by William Chester Jordan, 1997—see Bibliography and index. Hale's writing on the issue is better argued and supported than Coke's, but it is also less sweeping, and much more qualified—see Hale, *Prerogatives*, Chapter VII *passim*.

[4] Cf. See F W Maitland, 'The Crown as Corporation', *The Law Quarterly Review*, Vol. 17, 1901, 131.

[5] Sir Matthew Hale, *The Prerogatives of the King*, 1640-1660, D E C Yale (*ed.*), Selden Society, London, 1976, at p. 84 [114-115 in original] And see discussion at p. 162, note 4, and p. 162, note 5 *infra*. And note Blackstone's observations in his *Commentaries, op. cit.*, Book 1, chapter 3, p. 184, ('the crown is, by common law and constitutional custom, hereditary; and this *in a manner peculiar to itself*, ...') referred to at p. 481, *infra*.

Hale was plainly influenced by Coke.[1] He is however, far less sweeping in his analysis of these 'two bodies' of the king, and confines them quite strictly.[2]

Sir Matthew Hale was a lifelong churchman with puritan sympathies, who accepted office as Justice of Common Pleas in 1654 under the Commonwealth, later assisting in the restoration and became Chief Justice of Kings Bench in 1671.[3] He wrote his *Prerogativa Regis* (*Prerogatives of the King*) between 1640 and 1660.[4] But he does not advert to the constitutional developments of the 1640s-1660s,[5] rather confining himself to oracular statements[6]—he says :

> There remains two kinds of usurpation whereof we shall not write. ...2. An attempt of the change not only of the person but of the nature of the government, with what effect it may have after the regress of the rightful prince, is neither seasonable nor necessary to enquire. Provision is now sufficiently made by act of parliament to quiet that inquiry.[7]

Hale saw two means of a king acquiring title—lawful conquest, and lawful hereditary descent.[8] Any other purported title, whether by election or investiture, was an usurpation and therefore unlawful and such kings were kings *de facto* only—into this latter category he placed William II, Henry I, Stephen, Edward III, Henry IV, Edward IV, Richard III, and Henry VII, and the Lady Jane Grey[9]. William I was the only lawful title by conquest. As to

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[1] There are thirteen references to Coke's writings in chapter 7 from which the above quotation comes.

[2] This is not surprising, given the reliance upon this fiction by the parliamentarian revolutionaries and regicides in the 1640s—see discussion *infra* at pp. 311, 313, and 313.

[3] See A W B Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, at pp. 220-222. Hale was highly regard by contemporaries as both practitioner and judge, but his judicial work is poorly reported and he wrote no reports of his own cases. He wrote much, but many of his treatises are still unpublished, his *Prerogatives of the King* being published for the first time only in 1976. Sir William Holdsworth considers Hale to be Coke's superior. Contemporaries wrote of Hale as being a 'good man', and 'not only just, but wonderfully charitable and open handed, and did not sound a trumpet neither, as the Hypocrite doe.'—see D E C Yale's Introduction to his editing of Hale's manuscript, at p. lvii. Maitland considered him to be without peer for his age as a legal historian—see Maitland, *Collected Papers* ii, 5, at Yale's Introduction, *loc. cit.*, p. xxxviii.

[4] Hale used primary not secondary sources, and they are now in Lincoln's Inn to which he bequeathed his library.

[5] See Yale's introduction to Hale's *Prerogativa*, *loc. cit.*, p. xxxi ff.

[6] '...and these [customs and their sources]...are the best evidence both *facti* and *juris* of the nature and extent of government, by which every rational [and] upright man may easily understand what are the rights both of prince and people without entering into notions and fancies, as if men were now to be making of governments and new models thereof.'—Hale, *Prerogativa*, *loc. cit.*, p. 7.

[7] See Hale, *Prerogativa*, *loc. cit.*, p. 83; he is referring possibly to the enactments 12 Car. 2, c. 1, *Statutes of the Realm* V, 179 (parliament), or to 12 Car. 2, c. 12, *Statutes of the Realm* V, 234 (legal proceedings during the Commonwealth)—this is editor Yale's observation at n. 2, p. 83. But Hale may also have been referring to the *Act of Oblivion*, 12 Car. II, c. 11, 1660.

[8] Hale, *Prerogativa*, *loc. cit.*, p. 62.

[9] See Hale, *Prerogativa*, *loc. cit.*, p. 64, and pp. 71-83.

title by descent, he says 'lawful title' is by virtue of 'lawful succession of the rightful heir'; but this descent is not according to the common law, but according to the peculiar law directing the descent of the crown[1], which in turn Hale has identified as common custom and usage.[2]

However, Hale substantiates this assertion by reference to the *Succession Acts* of James VI and I and Elizabeth, and by 'constant usage', this latter being demonstrated by the dead king's heir dating his reign from the day of the old king's death;[3] this latter practice is, however, to 'avoid the pretence of an interregnum'.[4] As a result of these conclusions, Hale proceeds to state that therefore 'before the king is proclaimed or crowned he is by descent of the crown upon him to all intents completely king,"[5] and '...this before any of the coronation solemnity or suffrage of the people, for that solemnity doth not give the title but only declare it.'[6]

Now it is quite clear that Hale is wrong in these assertions. For many years, kings had dated their reigns from the date of their coronations, not the date of their predecessor's death.[7] Moreover, Henry VII dated his reign from before his predecessor's death. The 'custom' is the one which had been fostered by Coke for political purposes, and the successions from Henry VIII through to that of Charles II could not be said to have followed any certain pre-destined pattern. Moreover, the source he gives for the 'law against the interregnum' was quite recent.[8]

Moreover, it is noteworthy that he refrains from stating that 'the suffrage of the people' *does not* give any title.[1] This is because he acknowledges that usurpers come to their titles by consent of the people, (though he calls them 'pretexts of election') and strives particularly

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[1] See Hale, *Prerogativa, loc. cit.*, p. 13, p. 64. See my observations in note 5, p. 162, *infra.*

[2] See Hale, *Prerogativa, loc. cit.*, p. 7. See my observations in note 5, p. 162, *infra.*

[3] See Hale, *Prerogativa, loc. cit.*, p. 13, and pp. 64-65

[4] See Hale, *Prerogativa, loc. cit.*, pp. 64-65

[5] See Hale, *Prerogativa, loc. cit.*, p. 65.

[6] See Hale, *Prerogativa, loc. cit.*, p. 13.

[7] See, for example, the case of Henry II.

[8] See Hale, *Prerogativa, loc. cit.*, p. 65; he cites 1 *Eliz., Dyer* 165, which is *The Resolution of the Judges upon 1 Edw. 6, c. 7, Dyer* 165a. (This can be found in *Reports from the Lost Notebooks of Sir James Dyer*, Vol. II, J H Baker (*ed.*), Selden Society Vol. CX, Selden Society, London, 1994, see reference at p. xliv to 'Dyer, 165a, para 51, (1558), p. xlvii, n. 16, 26)

to discredit the election of John as being a 'false and bold insinuation' by the then Archbishop of Canterbury 'to magnify his own office.'[2] And Hale does acknowledge that the Recognition by the people, which he calls 'a kind of susception[3] of the king by the people', though he hastens to add that this 'doth neither give nor weaken the king's natural title by descent, but only adds a greater obligation, or at least a sign of profession thereof by the people.'[4]

Now Hale had definitely seen a king die.[5] He nowhere adverts to this directly. But in speaking of the maxim 'the king never dies' as being a corollary of the conjunction of the king's natural and politic bodies, he says:

> Again, another effect of this conjunction is that *to many purposes* the king never dies[6] and as to many purpose the [law] takes notice of his death. And here I shall decline that vulgar opinion that tells us that it is not the death of the king but the demise of the king. The plain truth of it is that phrase, *dominus rex se a regimine hujus demisit* hath been of latter times applied to the king's death. But the truth is that in its first use it was to signify those extorted resignations, especially of Edward the second and Richard the second.[7]

The fact is, that the king *must* die, being merely human.

Both Hale and Coke assert that the king becomes king by indefeasible hereditary right; that is by virtue of his birth. And both say that he is completely an absolutely king at the time he succeeds (though he may be a king *de facto*, or an usurper, or a king *de facto et non de jure*, and even possibly a king *de jure et non de facto*.). And both say the coronation has no legal effect.

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[1] See Hale, *Prerogativa, loc. cit.*, p. 13.

[2] See Hale, *Prerogativa, loc. cit.*, p. 62, n. 9, and p. 65..

[3] a taking up of; or a submitting to.

[4] Elsewhere, Hale says : 'After the oath made the archbishop comes to the people, acquaints them with the king's oath [but from at least Richard III, and certainly including all the Stuarts, the Recognition by the people came *before* the coronation oath—see Appendix II]and enquires of them si ipsi consentire vellent ad habendum regem et dominum suum ligeum, et ad obediendum ei tanquam regi et domino suo ligeo, qui utique unanimiter consenserunt. Though in truth thay have not any negative voice, yet this formality is used of the oath on the king's part, and a consent on the people's to superadd a mutual stipulation between them and to signify the same to the kingdom. But it contributes nothing to the essence of the king's regality when lawfully descended to him.'= See Hale, *Prerogativa, loc. cit.*, p. 67.

[5] The *Prerogativa Regis* was probably composed sometime during the Interregnum, and possibly not finished till the early 1660s. [Yale, Introduction to *Prerogativa, loc. cit.*, xxiv-xxv]. But Burnet says of Hale: (*The Life and Death of Sir Matthew Hale*, 1682, at 24), that 'after the King was murthered, he laid by all his Collections of the Pleas of the Crown; and that they might not fall into ill hands, he hid them behind the wainscotting in his Study, for he said there was no more occasion to use them, till the King should be restored to his right; and so upon his Majestie's Restoration, he took them out, and went on in his design to perfect that great Work.'

[6] My italics. Hale does not say 'the king *never* dies', even in his politic capacity. Most of the discussion following in Hale is to do with the continuity in certain but not all transfers of land, or grants, by the king.

[7] See Hale, *Prerogativa, loc. cit.*, p. 85.

But both also state unequivocally that the king is bound by his *coronation oath.*

> ...the king is not under the coercive power of the law... But as to the directive power of the law, the king is bound by it (1) By his office...(2) By his oath at his coronation, whereby he swears to govern according to the laws...Whereby he is bound in conscience and before God to whom only he is accountable for his misgovernment and breach of that trust and oath.[1] ...the solemn oath of the king for the due government and protection of the people...[2]

Coke says :

> ...every subject...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[...Bracton, book 3, Of Actions, c. 9, f. 107[3]]which oath he taketh in his natural person[4]

and

> [persons] doing their office in administration of justice, ... represent the king's person, who by his Oath is bound that the same be done.[5]

Coke died in 1634. Hale died in 1676. Charles I was killed in 1649. James II and VII was deposed in 1688, and died in 1701. The death of kings, election and succession did not run by virtue of some kind of unspecified 'law' or 'custom' dependent upon the blood royal, no matter how much Coke and Hale may have wished it did. The people never were, nor are not now, innocent bystanders in the matter of the making and succession of kings. It may be convenient for sectors of society to ignore the people, but kings never have. To the king, the people are always 'my people' and to the people the king is always and only 'king of the [ ___ ] people(s)', as Brown J[6] pointed out so many years ago.

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[1] See Hale, *Prerogativa, loc. cit.*, pp. 14-15

[2] See Hale, *Prerogativa, loc. cit.*, p. 66.

[3] 'It is clear that it is the king himself and no other [who acts as judge], 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.'—Bracton, f. 107, p. 34 in *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.

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

[5] See 3 Co. Inst. *op. cit.*, High Treason, c. 1, p. 18.

[6] See *Hill v Grange*, 2 & 3 Philip and Mary, Plowden Reports, 177a discussed at p. 132, *supra.*

# ELECTION AND THE SUCCESSION

Election continued to dominate the thoughts of both monarchs and subjects. James VI and I asserted that 'for his kingdom he was beholden to no elective power, neither doth he depend upon any popular applause.'[1] But William Prynne, writing in *The Soveraigne Power of Parliament*[2] in 1643 asserted:

> ...admit the King should dye without Heire, no doubt the kingdome and Parliament have a just right to alter the government, or dispose of the crown to what family they please...[3]

and

> .... that popish Parliaments, Peeres, and Subjects, have deemed the Crowne of England not meerely successive and hereditary, though it hath usually gone by descent, but arbitrary and elective, when they saw cause, many of our Kings coming to the Crowne without just hereditary Title, by the Kingdomes, Peeres, and peoples free election onely confirmed by subsequent Acts of Parliament, which was then reputed a sufficient Right and Title; by vertue whereof they then reigned and were obeyed as lawfull Kings, and were then and yet so acknowledged to be; their right by Election of their Subjects (the footsteps whereof doe yet continue in the solemne demanding of the peopls consents at our Kings Inaugurations) being seldom or never adjudged illegal usurpation in our Parliaments; ...[4]

Prynne clearly saw the Recognition in the coronation ceremony as being the people's election of and formal consent to an individual's kingship. Prynne also had history on his side, Henry IV, Edward IV, Richard III and Henry VII[5], all being put up by acclamation of the people, and all also obtaining subsequent parliamentary ratification of their kingship. And certainly, the people had deposed kings:

> ...if the king, through any evil counsel, or foolish contumacy, or out of scorn, or some singular petulant will of his own, or by any other irregular means, shall alienate himself from his people, and shall (refuse to be governed and guided by the laws of the realm, and the statutes and laudable ordinances thereof,) together with the wholesome advice of the lords and great men of his realm, but persisting headstrong in his own hair-brained counscils, shall petulantly prosecute his own humour, that then (it shall be lawful for them,

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[1] The Earl of Salisbury, speaking on behalf of the king, from Gardiner, *Parliamentary Debates in 1610*, p. 24, quoted in J P Kenyon, *The Stuart Constitution*, Cambridge University Press, Cambridge, 1965, at p. 12.

[2] 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.

[3] Prynne, *loc. cit.*, at p. 50.

[4] Prynne, *loc. cit.*, p. 57.

[5] See my pages XXX, *supra*.

> with the common assent and consent of the people of the realm,) to depose that same king from his regal throne, and to set up another of the royal blood in his room.[1]

But James had history on his side as well, all kings of England styling themselves, 'King, by the grace of God *Deo gratia...*'[2], as does Elizabeth today— 'Elizabeth the Second, by the Grace of God ... Queen...'[3] This divergence in view is merely representative of differing emphases placed by different persons at different times on one or other of the prerequisites of kingship, the one choosing to emphasise the elective element, the other the sacred character bestowed by the anointing. Both however (together with the coronation oath) are inseparable in the English kingship.[4]

On 20 January 1649, the Lord President of the High Court of Justice established to try Charles I referred to him as being 'elected King' of England, a statement strenuously denied by Charles[5]. During the time of the Stuarts, the apocryphal texts, *The Mirrour of*

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[1] See 'A Speech delivered from the parliament, by the Lord Thomas de Woodstock, Duke of Gloucester, and Thomas de Arundell, Bishop of Ely, to King Richard II, in the 11th year of his reign, on his absenting himself from his Parliament', 1363, from *Collection of Scarce and Valuable Tracts ... selected from...libraries, particularly that of the late Lord Somers*, 2nd edition, revised and arranged by Walter Scott, Vol. I., London, 1809; reprinted by AMS Press, Inc., New York, 1965, at pp. 20-21.

[2] See for example, *In Godes name ich Apelstan God gyuing welding eal Brytone...* [In the name of God, I, Æthelstan, by the grace of God ruling all Britain...] Charter of King Æthelstan (king 925-939) to Milton Abbey, Dorset, reproduced in *Anglo-Saxon Charters*, A J Robertson, (*ed.* and *trans.*), Cambridge University Press, Cambridge, 1956, at p. 44: see Chapter 1, p. 13 *supra*.; *Ic Ine, mid Godes gife , wesseaxna kyning...* [I, Ine, by the grace of God king of Wessex...] [king c. 688] F L Attenborough, (*ed., trans.*) *The Laws of the Earliest English Kings*, 1922, reissued Russell & Russell, New York, 1963; pp. 40-45; *Edward by the Grace of God, King of England...*, 15 Edw. 2; *Statutes in Force*, Official revised Edition, *Revocation of New Ordinances* (15 Edw. 2), revised to 1st February 1978; HMSO, London, 1978; known as the Statute of York; see also *Statutes of the Realm*, I, 189; *Henry, by the grace of God king of England...*— Will of Henry VIII, S&M1 323; *James, by the grace of God, king...*— James VI and I, Levy of Impositions, 1608, S&M1, p. 424-425, sourced to Prothero, *Constitutional Documents*, pp. 353 ff. Cf., see Hobbes' vies, at p. 340 *infra*.

[3] See also discussion at p. 86, *supra*. *Proclamation of HM The Queen* of 28 May 1953, pursuant to section 1 of the *Royal Titles Act* 1953, 1 and 2 Eliz. 2, c. 9: 'The assent of the Parliament of the United Kingdom is hereby given to the adoption of her Majesty, for use in relation to the United Kingdom and all other the territories for whose foreign relations Her Government in the United Kingdom is responsible, of such style and title as Her Majesty may think fit having regard to the said agreement, in lieu of the style and titles at present appertaining to the Crown, and to the issue by Her for that purpose of Her Royal Proclamation under the Great Seal of the Realm.'—see *Statutes in Force*, Official Revised Edition, Revised to 1st February 1978, HMSO, London, 1978; and see John W Wheeler-Bennett, *King George VI, His Life and Reign*, Macmillan & Co Ltd, London, 1958, at p. 728. For similar style for Australia see *Royal Style and Titles Act* 1973 (Cth.)

[4] The sacred character of kingship is not discussed in this dissertation. Every English king is anointed in the coronation ceremony, and takes holy communion. This is partly the conferring of God's grace upon the king, and partly the dedication of the king to the service of his people who have just recognised him, and for whom he has taken the coronation oath. It is in this part of the coronation that the king was thought to take upon himself the character of a *persona mixta*. The coronation ceremony itself is the 'Consecration' of the king, or the 'Sacring' of the king. The anointing of the king could also be seen as the sacrifice of the king for his people, as he is deprived of his status as a subject of a monarch, and is made king himself, having no peer, but becomes in a sense public property, and protector of his people and their peace. See also my observation at p. 129, and note 1.

[5] 'England was never an elective kingdom, but an hereditary kingdom for near these thousand years;' see *Cobbett's Complete Collection of State Trials*, Vol. IV, pp. 959 ff., at p. 996; and see my Appendix I.

*Justices* and the *Leges Edwardi Confessoris* were accepted as genuine law by lawyers, including Sir Edward Coke[1], Twysden, Sir Henry Spelman, Sir William Dugdale, and John Selden[2], by Edward Hyde the Earl of Clarendon, by Robert Brady[3], and by polemicists such as Nathaniel Bacon[4], John Sadler and John Milton.[5] Chapter 17 of the Confessor's Laws ('The Office of a King') said, *inter alia*:

> The King, because he is the vicar of the highest king, is appointed for this purpose, to rule the earthly kingdom, and the Lord's people, and, above all things, to reverence his holy church, and the Lord's people, to govern it, and to defend it from injuries; to pluck away wicked doers, and utterly destroy them: which, unless he do, the name of a king agreeth not unto him, but he loseth the name of king.[6]

This text neatly combined both the sacred and the elective elements of kingship, but it was the elective element that was seized upon by polemicists like Bacon, purporting to draw on Saxon 'laws' enabling the people to depose a king who misruled and elect another.[7] By the time of James II and VII's deposition and the invasion by William of Orange, these views were again receiving considerable attention, with the 'Confessor's Laws' being used as proof of elective kingship, a contractual government, and the right of the community or its representatives to resist and depose a tyrannical ruler.[8]

## THE DECLARATION OF SOVEREIGNTY

All modern kings immediately after their accession and before their proclamation, make a

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[1] see Maitland, at pp. ix and x of his Introduction to *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, where he says: 'Coke obtained [a manuscript copy], and, as his habit was, devoured its contents with uncritical voracity. "I have, " he said, "a very ancient and learned treatise of the laws and usages of this kingdom whereby the commonwealth of our nation was governed about eleven hundred years past."' [n. 1 Coke, preface to 9 Rep.]

[2] see Janelle Greenberg, 'The Confessor's Laws and the Radical face of the Ancient Constitution,' *The English Historical Review*, Vol. 104, 1989, pp. 611-637, at p. 619.

[3] Greenberg, *art. cit.*, p. 620

[4] Greenberg, *art. cit.*, p. 622

[5] Greenberg, *art. cit.*, pp. 624-631.

[6] quoted Greenberg, *art. cit.*, p. 617.

[7] Greenberg, *art. cit.*, p. 622; although in actuality I have been unable to find a record of this occurring in Anglo-Saxon times— kings resigned the throne to take holy orders or go on pilgrimage, or they were defeated in battle; but no Anglo-Saxon king was 'unelected', so far as I can ascertain. But medieval kings were deposed (as in the case of Richard II), or 'unelected', as in the case of Edward II—but these were political coups, and are treated by Maitland, together with the events of 1688, as 'precedents for revolution, not for legal action', and that being the case, he 'can deduce no rule of law from them.'—see *Constitutional History*, p. 344.

[8] see Janelle Greenberg, 'The Confessor's Laws...', *art. cit.*, at pp. 636-637.

Declaration of Sovereignty[1] to representatives of the peoples they are to govern in the Accession Council.

This declaration is of considerable antiquity. The oldest such statement by a king which has borne that nomenclature that I have been able to find, is that of James II and VII, in 1685:

> He began with a expostulation for all the ill character that had been entertained of him. He told them, in very positive words, that he would never depart from any branch of his prerogative; But with that he promised, that he would maintain the liberty and property of the subject. He expressed his good opinion of the Church of England, as a friend to Monarchy. Therefore, he said, he would defend and maintain the Church, and would preserve the Government in Church and State, as it was established by law..[2]

But earlier kings had made not dissimilar declarations asserting their sovereignty to the people immediately on their accession. In the earliest kings, the coronation oath certainly stood as their ultimate declaration of sovereignty, those kings dating their reigns from the dates of their coronations, and the subsequent issues of the *de pacis regis proclamatio* were formal confirmations of their sovereignty. But every king who took the throne not by immediate hereditary descent, invariably and immediately made a statement as to their title and the nature of their rule to the assembled people—the pre-eminent exemplar here is the statement of Henry IV.[3]

Only after the Declaration of Sovereignty is made, does the Accession Council promulgate the new king as king with his style and title, in the Accession Proclamation. All present at the Accession Council sign the Proclamation, and it is issued first in London by one of the Heralds of the College of Arms, and promulgated as soon as may be thereafter throughout the territories of the peoples over whom the king is to rule. This is the only proclamation not made under the Royal prerogative. It is rather, made under what I have called the prerogative of the people.[4]

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[1] See Chapter 10, at p. 469, ff., *infra.*

[2] See the Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, p. 93: Extract from Burnet's *History of His own Time*, London, 1714. Text at Appendix II.

[3] See text at Appendix II. And see p. 222, *infra.* This is true of Henry IV, Edward IV, Richard III, Henry VII, William of Orange, and George I. (Sir Matthew Hale would have called all these kings usurpers). William II, Henry I, Stephen and John, who were not the strict hereditary successors, took the coronation oath almost immediately, this standing as their statement of sovereignty.

[4] See discussion at p. 126, *supra.*

The newly proclaimed king then sets in train arrangements for his coronation,[1] and begins to act as king. At his coronation, he is formally Recognised by the people as their king, and allegiance given to him by the people at large, in the recognition at his coronation, before he takes the coronation oath and is crowned.

## RECOGNITION OF KINGS

The Recognition has been a formal part of the inauguration of kings in the coronation ceremony, since about 1307, when one of the first recensions of the *Liber Regalis* was written down. It post-dates the choosing or election of the king on the part of the people's representatives in the Accession Council, and constitutes (if such recognition is given) a formal ratification of the choice made by that Council on behalf of the people, and simultaneously, is the legal articulation of the people's formal subjection to and allegiance to the king.

Each of the Stuart kings was proclaimed and Recognised by the people. The people of 1483 had been presented with

> '...Richard, rightful and undoubted inheritor by the laws of God and man to the crown..., elected chosen and required by all of the 3 estates of this same land to take upon him the said crown...Will you sirs at this time give your wills and assents to the same consecration enuncion and coronation...'[2]

But some change appears to have occurred under the Tudors, Edward VI apparently[3] being presented for his recognition to the people as '...*King* Edward, the rightfull inheritor of the Crown of this Realm...'[4] In 1603, it appears that James VI and I was presented to the

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[1] These involve the establishment of a Coronation Commission, on which in the twentieth century has been represented all members of the Commonwealth nations over whom the king is to be king; it also involves the establishment of a Court of Claims, whose role from ancient times is to determine who is to do what at the coronation in support of the king at his coronation. Documents relating to Elizabeth II's Coronation Commission and Court of claims may be found in the Australian Archives, Series A462/4, Item 821/1/19, Coronation of HM Queen Elizabeth II, Appointment of Australian representatives to the Coronation Commission; and see references in Chapter I, p. 477, *supra*.

[2] From the *Little Device* for Richard III, see Sutton and Hammond, *op. cit.*; for text see Appendix II.

[3] I say 'apparently', because the *Little Devices*, and the coronation *ordos*, and the *Processus Facti* for kings' coronations (like that for Edward VI) are not definitive of what was actually said at the coronation, being merely an outline of the Order of service.

[4] The Coronation of King Edward the Sixth on Shrove Sunday, being the 20th day of February A° 1546, at Monastery of Westminster. Written with Archbp. Cranmer's own hand; taken from "Extracts out of MSS. In Bennett College Library," in the Library of the Church of Ely, and reproduced in Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England* with Notes and introduction, with reproductions of the two celebrated pictures in medieval coronation Mss., inserted by special permission, with three pictures, viz. the Coronation of James II, and

people either as 'King James, the rightful inheritor of the crown of this realm', or possibly as 'this worthy Prince, James, right heir of the Realm', or as 'King James the rightfull and undoubted heir by the laws of God and man to the crown', and even possibly by some words completely unrecorded.[1] But we do know that the people accepted him as king 'with all possible and public joy and acclamation' and 'unspeakable and general rejoicing and applause' at his Recognition.[2] Charles I was put to the people thus:

> My masters and friends, I am heere come to present unto you your king to whome the Crowne of his ancestors and predecessors is now developed by lineall right; and hee himselfe come hither to bee settled in that throne which God and his birth have appointed for him: and therefore I desire you by your general acclamation to testifie your consent and willingness thereunto.[3]

Forms similar to those used for James VI and I and Charles I were used for Charles II and James II and VII.[4]

But none of these forms was used for William and Mary. A contemporary text drawn up by an officer of arms on duty at the coronation says that Bishop of London barely asserted :

> Sirs I here present unto you King William and Queen Mary, undoubted King and Queen of this realm,; wherefore all ye that are come this day to do your Homage, service and bounden duty, be ye willing to do the same.[5]

It is a moot point whether this is a direction as opposed to a question. Insofar as the hereditary succession was deliberately bypassed in the revolution of 1688, the lords spiritual

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the vestments used thereat, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, pp. 21-26. For text see Appendix II. Records are sparse for the Tudor coronations

[1] These options are recorded in Legg, *English Coronation Records*, *op. cit.*, p. 250, which in turn are variants based on the *Liber Regalis*.

[2] *Succession Act*, 1604, 1 Jac. I, c. I; *Statues of the Realm*, iv, 107, extracted in J R Tanner, *Constitutional Documents of James I, AD 1603-1625*, Cambridge University Press, Cambridge, 1930, reprinted 1961, at pp. 10-12.

[3] From *Queen Elizabeth's Coronation Book*, Colourgravure Publications, Melbourne, 1953, at p. 2; This account, for which no source is given in that publication, is supported by Sir Simonds D'Ewes, who was at the coronation, and whose description in identical terms (with the addition of the words 'King Charles' after 'your king', and whose words are quoted by Lewis Broad in *Queens, Crowns and Coronations*, Hutchinson & Co, London, first published as *The Crowning of the King*, 1937; revised and reprinted 1952, at p. 26. Dr Jocelyn Perkins in *Crowning of the Sovereign*, *loc. cit.*, p. 97, notes that 'at the Coronation of Charles I a most uncanny incident occurred according to one of the onlookers, Sir Symonds d'Ewes. For some reason unexplained the first proclamation made by Archbishop Abbott was received in deadly silence and the people had to be requested to cry out their response. This omen of coming evil was never forgotten.' It seems much more likely that the rather informal form of words quoted above was used, rather than the more formal texts reproduced in Legg, which occur, after all, only in the Ordos.

[4] See Appendix II.

[5] This is the text recorded by one of the officers of arms on duty at the coronation, taken from a collection of heraldic papers in Add. MS. 6338 in the British Museum, and printed by J Wickham Legg, as Appendix VIII of his *Three Coronation Orders*, for the Henry Bradshaw Society, Vol. XIX, printed for the Society by Harrison and Sons, London,

and temporal and the commons resolving to pass the crown from James II to his daughter Mary (by his first wife, the Protestant Ann Hyde) and not to his son by James' second and Catholic wife,[1] and declaring that the regal power should be exercised by Mary's husband, William, in the names of both of them,[2] it could be said the crown of England was an 'elective' crown, in so far as it was decided by some of the people.

This theory, however, is disputed by Maitland, who says:

> Grant that parliament may depose a king, James was not deposed by parliament; grant that parliament may elect a king, William and Mary were not elected by parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament. The act which declares it to be a parliament depends for its validity on the assent of William and Mary. The validity of that assent depends on their being king and queen; but how did they come to be king and queen? Indeed this statute very forcibly brings out the difficulty — an incurable defect. So again as to the confirming statute of 1690.[3]

The *category of persons* who may succeed to the English crown has, since the time of William and Mary, been determined by statute[4], and to that extent one could say that the putative

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1900, at p. 99-100 (p. 114 of MS.) Note that this is rather different from the text by L Wickham Legg in his 1901 *English Coronation Orders*, *op. cit.*, at pp. 322-23.

[1] One of the attempted justifications for this was that James' son was no son of the Queen, he having been smuggled into the Queen's bed in a warming pan; see Schwoerer, Introduction, *ed. cit.*., at p. 15. Only if this myth were accepted could there be any colour of legitimacy to the invitation to Mary and William. See William of Orange's Declaration of 30 September 1688:—'...But to crown all,... those evil Counsellors...have published, that the Queen hath brought forth a Son; though there hath appeared, both during the Queen's pretended bigness, and in the manner in which the Birth was managed, so many just and visible grounds for suspicion, that not only we ourselves, but all the good subjects of those kingdoms, do vehemently suspect, that the pretended Prince of Wales was not born by the Queen...'; for text see, E N Williams, *The Eighteenth Century Constitution, Documents and Commentary*, Cambridge University press, Cambridge, 1960, reprinted 1965, 1970., at p. 15.

[2] see *Bill of Rights*, 1 Will. and Mar. Sess. 2, cap. 2, 1689; and see text at my Appendix I.

[3] see Maitland, *Constitutional History*, at p. 285. For my discussion on Maitland's conundrum, see p. 157, p. 160, note 1 p. 362, p. 362, p. 391, and p. 400 *infra*; and see *Legalisation of the Convention Parliament*, 1 Will. and Mary, c. 1, 1689 (assented to by William and Mary 22 February 1689); and the Act ratifying the 'Acts' of the Convention 'Parliament', 2 Will. & Mary, c. 1, 1690—'An Act for recognizing King William and Queen Mary, and for avoiding all questions touching the acts made in parliament assembled at Westminster, the thirteenth day of February, one thousand six hundred and eighty-eight' ; *Statutes at Large*, IX, 75; reproduced in E Neville Williams, *The Eighteenth Century Constitution, 1688-1815, Documents and Commentary*, Cambridge University Press, Cambridge, 1970, at pp. 46-47; for other texts see C Grant Robertson, (*ed.*) *Select Statutes Cases and Documents to Illustrate English Constitutional History, 1660-1832*, Methuen & Co. Ltd., London, 1904, 5th edn., enlarged, 1928, at pp. 105-106; and see *Statutes in Force*, revised to 1 February 1978, HMSO, which gives the citation of this latter Act (2 Will. & Mary, c 1, 1690)as the *Crown and Parliament Recognition Act* 1689, 2 Will. and Mary, c. 1 c. 1, Rot. Parl., Pt. 1, nu. 1, the new short title being given by the *Statute Law Revision Act* 1948, c. 62, Sch. 2.

[4] 1689, *Bill of Rights*, An Act declaring the Right and Liberties of the Subject and Setleing the Succession of the Crowne. (*Rot. Parl.* pt. 3, *nu.* 1), *Statutes in Force, Official Revised Edition*, revised to 1st February 1978; HMSO, London, 1978; Short Title give by *Short Titles Act 1896*, (c. 14), Sch. 1; Act declared to be a Statute by *Crown and Parliament Recognition Act* 1689 (1690) (c.1). [no date for the enactment of the Bill of Rights is given]; *Act of Settlement*, 1701[But note that *Statues in Force*, HMSO, 1978, gives the citation as 'Act of Settlement 1700, c. 2') , 12 and 13 Will. 3 c. 2; *The Second Test Act*, 1678, 30 Car. II, stat. 2, cap. 1, from *Statutes of the Realm*, V, 894-896, reproduced in *English Historical Documents*, Vol. VIII, (*ed.*) Andrew Browning, David D Douglas (gen. *ed.*), Eyre & Spottiswoode, London, 1966, at pp. 391-394, p. 392; this last Act was repealed by *The Accession Declaration Act* 1910 , 10 Edw. 7 and 1 Geo. 5 c. 29, *Statutes in Force, Official Revised*

successors the crown have been established by election, in that those who passed the acts regulating the category of successors were elected by some of the people. This alone however, does not cure the defects in William and Mary's title remarked upon by Professor Maitland. In essence the Act of 1690 ratifying the 'Acts' of the Convention 'parliament' prior to the coronation of William and Mary on 1 April 1689[1], could, in my view, only be efficacious because of the fact of William's and Mary's Recognition by the people. That is, only the recognition by the people of their claim to kingship, and assertion of willingness to serve them, served to ratify the earlier unilateral actions of the 'Immortal Seven'[2] and the Convention 'parliament'. This having occurred, however, *and* William and Mary having taken the coronation oath and been anointed, they were legally king and queen, and thus any bill of a parliament called thereafter by them to which they then assented had the force of law, and retrospectively rectified the defects of the actions of the convention 'parliament'.[3] But as the Recognition precedes the taking of the coronation oath, there is no way that William's and Mary's claim could legitimately be described in the Recognition as being 'rightful, by the laws of God and man', as at that time they had not fulfilled the common law requirements of the English king—hence the bare assertion that they were the 'undoubted king and queen of this realm.'

The words 'rightful' and 'by the laws of God and man' have, by a concession to Jacobitish sentiment, never since been restored to the Recognition,[4] and the 'William and Mary' Recognition was used up until the time of George V.[5]

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*Edition*, revised to 1st February 1978; HMSO, London, 1978; *Act of Union*, 1707, Statutes of the Realm, VIII, pp. 566-577, 6 Annae, cap. 1.; *Succession to the Crown Act*, 1707, 6 Ann., c. 41, (short title given by *Short Titles Act* 1896), formerly known as *The Regency Act*—but all provision in this Act relating to the succession and to the Accession Council, have been repealed, leaving only those parts relating to the continuance of parliament and state office-holders on the demise of the crown: see *Statutes in Force*, HMSO, 1978.

[1] 'An Act for recognizing King William and Queen Mary, and for avoiding all questions touching the acts made in parliament assembled at Westminster, the thirteenth day of February, one thousand six hundred and eighty-eight,' 2 Will. & Mary, c. 1; Statutes at Large, IX, 75; reproduced in E Neville Williams, *The Eighteenth Century Constitution, 1688-1815, Documents and Commentary*, Cambridge University Press, Cambridge, 1970, at pp. 46-47

[2] See p. 355, *infra*.

[3] It should also be noted that the Act of 2 Will. & Mary c I, of 1690 (*Crown and Parliament Recognition Act* 1689, 2 Will. and Mary, c. 1 c. 1, Rot. Parl., Pt. 1, nu. 1, the new short title being given by the *Statute Law Revision Act* 1948, c. 62, Sch. 2.), purports to 'recognize and acknowledge, your Majesties were, are, and of right ought to be, by the laws of this realm, our sovereign liege lord and lady King and Queen...'. This is only true because of the antecedent coronation of William and Mary on 11 April, 1689.

[4] Legg, *English Coronation Records*, *op. cit.*, at p. 317. Legg also notes that there may even have been a hesitation over including even the words 'undoubted King and Queen of this realm'.

[5] See Chapter 1, *supra*, especially note 2, at p. 474, *supra*.

# THE KING'S CHAMPION

The King's Champion, who, at the coronation banquet, threw down the gauntlet and asked three times if anyone would gainsay the right of the king to be king, also highlights the fact that not only was a positive affirmation of the person as king by the people needed, but also the opportunity for positive opposition by the people was offered. But Samuel Pepys[1], a reasonably reliable observer, in his record of Charles II's coronation, noted the following occurrence apparently during the coronation service:

> And three times the King-at-Arms went to the open places on the scaffold, and proclaimed, that if any one could show any reason why Charles Stewart should not be King of England, that now he should come and speak. And a General Pardon also was read by the Lord Chancellor, and medals flung up and down by my Lord Cornwallis, of silver, but I could not come by any.[2]

Traditionally, the King's Champion appeared during the banquet after the coronation. The Herald-at-Arms would cry:

> If any person, of what degree soever, high or low, shall deny or gainsay, our sovereign lord king George III, king of Great Britain, France, and Ireland, defender of the faith &c., (grandson) and next heir to sovereign lord king (George II) the last king deceased, to be the right heir to the imperial crown of the realm of Great Britain, or that he ought not to enjoy the same; here is his champion who saith that he lyeth, and is a false traitor being ready in person to combat with him; and in this quarrel will adventure his life against him, on what day soever shall be appointed[3]

But the King's Champion may have had more than mere symbolic significance. Richard III acted as his own Champion at Bosworth to defend his crown. And there is a suggestion in a letter from David Hume that Charles Edward, the Young Chevalier[4], was present at the

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[1] The interpretations of Pepys' observations are discussed at p. 121, *supra*.

[2] see Samuel Pepys, *The Concise Pepys*, Wordsworth classics, 1997, under Coronacion Day, 23 April, 1661, at pp. 101-104; and see *The Story of the Coronation*, by Randolph S Churchill, Derek Verschoyle, London, 1953, at p.119; and see text at Appendix II.

[3] see Letter by James Heming, published in the Annual Register for 1761, reproduced in *The Story of the Coronation*, by Randolph S Churchill, Derek Verschoyle, London, 1953, p122 ff., at p.125-127. The history of the role of King's champion can be found in some detail in W J Loftie, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India*, 1902, Cassell & Company, London, 1902, at pp. 77-84. In England it dates from the time of William I, who granted certain land, including the manor of Scrivelsby, to Robert de Marmion, Lord of Fontenay, for his services as Royal Champion, as his ancestors had been champion to the Dukes of Normandy. The title and obligations of Royal Champion followed the title to the manor of Scrivelsby. The last Champion appeared at the coronation banquet of George IV. And for the Champion for James II of England, see Lawrence E Tanner, *The History of the Coronation*, Pitkin Pictorials Ltd., London, 1952, at p. 65, and for Elizabeth I's Champion, see Tanner, *ibid.*, at p. 75, sourced to *Holinshed's Chronicles* of 1587; for Charles II, Champion see Samuel Pepys' diaries for Coronation Day, 1661, reproduced in Randolph Churchill, *The Story of the Coronation*, *loc. cit.*, at pp. 119-120

[4] Charles Edward Stuart, the Young Pretender, styled 'Prince of Wales', son of James Francis, son of James II and VII.

challenge of the King's Champion at George III's coronation in 1761, and was spoken to by Earl Marischal. Hume noted—*What if the Pretender had taken up Dymock's*[1] *gauntlet?*[2] What, indeed?—but the Pretender apparently professed that 'the person, who is the object of all this pomp and magnificence, is the person I envy least.'[3]

The banquet was discontinued after the coronation of George IV, and no Champion has appeared since.[4] But while the challenge of the King's Champion provided an opportunity for the people to disagree with the election of the king, so too did the Recognition, although in some cases the people may have thought their liberty to choose was restricted:

> In the early part of the 18th century when many were Jacobite at heart, it was, perhaps, understandable for Lady Dorchester (Catherine Sedley), at George I's Coronation, to turn to her neighbour when the Archbishop at the Recognition was asking the consent of the people, and say "Does the old fool think that anybody here will say No when there are so many drawn swords?"[5]

Nevertheless, if the people withheld their consent at the time of the Recognition during the coronation ceremony, it is in my view doubtful whether the king legally could be crowned and enter into his office.

The consent of the peoples to be governed by the British king is still required today.[6]

## ELECTION OF THE KING AND THE LAW

In 1888, Professor Maitland posed a conundrum : how did William and Mary in 1689 come

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[1] The Champion.

[2] The episode is referred to in J Heneage Jesse, *Memoirs of the Life and Reign of King George the Third*, in Three Volumes, Tinsley Brothers, London, 1867, Vol. I, at p. 104, and sourced to a 'letter from Hume to Sir John Pringle, dated 10 February, 1773; *Nichol's Literary Anecdotes of the 18th Century*, Vol. ix, p. 401.'

[3] J Heneage Jesse, *Memoirs of... George the Third, ibid.*, p. 104.

[4] see Loftie, W J, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India*, 1902, Cassell & Company, London, 1902, at p. 81

[5] see Lawrence E Tanner, *The History of the Coronation*, Pitkin Pictorials Ltd., London, 1952, at p. 62, (no source given). But this quotation is also stated at p. 148 in Sir H M Imbert-Terry, *A Constitutional King, George the First*, John Murray, London, 1927, and is sourced there to *Lady Cowper's Diary*, p. 5.

[6] See *infra*, Chapter 10, The Kingless Crown, 'Election and Recognition', p. 468 ff.

to be king and queen?[1]

Maitland, referring to the maxim, 'the king never dies', says: 'in other words, under the Act of Settlement, and for some centuries before it, the heir begins to reign at the moment of the ancestor's death. The coronation ceremony does not seem to be a legally necessary ceremony.'[2]

To a large extent Maitland's judgement depends upon the maxim 'the king never dies' being soundly based in law—Maitland accepted Stubbs'[3] assertion that this maxim was 'fact and law' from the time of Edward I. But Stubbs was in error—an examination of the circumstances surrounding the succession of Edward I leads to a different conclusion. Neither Stubbs' assertions, nor those of Blackstone[4], nor of the indefatigable Coke[5], nor the more temperate judgements of Hale, are sufficient in my view to establish a legal principle that 'the king never dies'—nor, indeed, its corollary, that the king has two bodies[6].

These reiterated assertions seem to have been adhered to unquestioningly by commentators and lawyers ever since.[7]

The justification for the maxim is the need for there to be no interregnum in the laws.[8]

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[1] Maitland, *Constitutional History*, p. 285. See my discussion on Maitland's conundrum at p. 157 *supra*, and note 1 p. 362, and p. 362, p. 391 and p. 400 *infra*.

[2] Maitland, *ibid.*, at p. 343. Maitland was, of course, writing before much of the recent investigations into Anglo-Saxon society, and into the theories of natural law and their consequences. He was essentially a pragmatic thinker, thinking about the meaning and origin of things in the light of the knowledge available to him at his time. I myself have not yet come across any thinker who was more objective on the basis of information available to him, than Maitland. This is in my opinion an indictment of modern so-called thinkers.

[3] Stubbs, *Constitutional History*, Vol. II, p. 106-107, and Stubbs *Select Charters*, pp. 447-448.

[4] See Blackstone, *Commentaries*, *op. cit.*, Vol. I, (Book 1, Ch. 7) p. 242.

[5] See the discussion under The King Never Dies at pp. 130-146 *supra*. Refer to *Calvin's case*, 7 Co. Rep. 10a, 10b, 11a, 11b; and to *The Duchy of Lancaster case*, 1561, 1 Plowden 212; 75 ER 325; [1558-1774] All ER, 146; and to *Sir Thomas Wroth's case*, Trin. 15 Eliz. 1; 2 Plowden 452; 75 ER (KB) 678.

[6] Though this was relied upon by the parliamentarians at the beginning of the Civil War to justify their position—see *infra*, p. 311, p. 313, and p. 313.

[7] See for example, Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at p. 45, where he quotes the President of the privy Council as expressing this view. And see Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, Penguin Books, 1971; 7th edn., Penguin Books, 1994, p. 133. But since writing this, I have found support for my doubts as to Stubbs' assertions 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, see p. 478, n. 17.

[8] See Sir Edward Coke, *Calvin's case*, 7 Co. Rep. 11a '...by the laws of England there can be no interregnum within the same.' And see Hale, *Prerogativa*, *loc. cit.*, pp. 64-65.

But my view on the examination of the evidence is that there has always been an interregnum in the law between the death of one king and the coronation of the next. This was the reason why the election or public endorsement of the next king was so vital—so that the new king could secure his peace, and the new king's laws and his officers could operate. Demise of the Crown Acts, which have been enacted by parliaments from at least the time of Edward VI[1], rectified defects for office holders appointed under the previous monarch, and others regulated the holding of parliaments called by the previous monarch.[2]

The maxim—*the king never dies*—and its corollary, the king's two bodies, as hoped for by Hale, propounded by Coke for political reasons, and struggled with by Elizabeth's courts after the Wars of the Roses, and historically said to have dated from the time of Edward I, are, in my view, mere metaphysical conceits, and have nothing to do with the law.

It avails not merely to assert, as did Coke, that the laws of England will allow no interregnum in themselves. One has to ask, what is this law? For Coke and Hale it was indefeasible hereditary descent, even though this flew in the face of the facts, and certainly no such principle could be said to apply after 1688. But indefeasible hereditary descent was never a *law*—it achieved the colour of a law with the *Duke of York's case*,[3] which however faded away with the conquest of Henry VII. Nor was the law the '*lex æterna*, the moral law, called also the law of nature'[4] as Coke would have preferred, nor custom and peculiar usage, as Hale thought.[5]

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[1] 1547, 1 Edw. VI. c. 7; 7 Will. IV & 1 Vic. C. 31; 1760, 1 Geo. III, c. 23 (re judges); 1 Edw. VII, c. 7, *Demise of the Crown Act* 1901;

[2] See 6 Ann., c. 41, *Succession to the Crown Act*, 1707; 30 & 31 Victoria, c. 102, s. 51, §§ 8, 9, *Representation of the People Act*, 1867; *Representation of the People Act*, 1985 (Imp.)

[3] *The Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8, as quoted in Lodge and Thornton, *English Constitutional Documents*, pp. 34-36; and see p. 99, and note 6; and discussion at p. 100 ff., *supra*.

[4] See Coke, *Calvin's case*, *loc. cit.*, 7 Co. Rep. , 11 a; 77 ER (KB) 377, 391-392. Any 'moral' or 'eternal' law would have seen the crown descend to the person nominated by the people, as it had when Samuel anointed Saul who had been chosen by lot, and to this extent, Coke was right, as it is in my opinion the election of the people which is the first step in the making of the king. But Coke would have none of any election, saying that the crown descended by virtue of the blood royal, without any need for the people to be involved. Any 'moral' law of descent as Coke would have had it, would have seen the crown 'descend' to the next of the blood royal, irrespective of sex. But this had not occurred in Britain, Matilda, eldest surviving issue of Henry I being ousted by Stephen, her uncle and Henry I's brother. Stephen's claim was that he was elected and crowned, having taken the coronation oath; Matilda was not elected and crowned, nor took the oath.

[5] See Hale, *Prerogativa*, *loc. cit.*, p.7, p. 13, p. 64, p. 84. Hale thought that the crown was acquired by 'hereditary descent,' but' that this descent had 'certain qualifications and privileges not common to descents of other inheritances...there is peculiar law directing the descent of the crown, and thereby uniting the body natural to the politic, as it descends to the eldest female where [there is] no male heir...' (p. 84) This 'peculiar law' of Hale is dependent on his restatement of the

The only law which governs the kingship is the common law in the coronation.[1] The choice of king is the prerogative of the people; a king does not spring up by virtue only of his birth. The people must choose him. And the people do choose him. Their representatives hear the person's declaration as how he will govern, and choose whether or not to proclaim him. If they do so, then the person behaves as if he were king (he is 'king for the time being') until the Recognition at the coronation—he acts as king. Then at his coronation he is presented to the broad cross-section of the people. They may choose, if they wish, not to agree with the decision of the Accession Council. If they do agree to accept the person as king, they say so, and give him their allegiance and obedience. The person then takes the coronation oath, is anointed and crowned, receives the homage of the blood royal and the peers and clergy, and is then king indeed. The king does die; the king has only one body, his mortal frame. But the people never die. If there is any such thing as a body politic, then it is that of the people's many bodies combined into one[2], through, perhaps, as Hobbes thought[3], mutual covenants, which then in turn elevates one of their number to a pre-eminent position to act and to do for all what each alone could not do—they make one of them a king. The king becomes king by the nomination and acceptance of the people, who recognise him at his coronation, which, far from being any mere ornament, is the law which makes him king. After he has been recognised by the people as king, he takes his solemn oath as to the nature of his governance of the people, and is then king indeed. It is this recognition by the people, and his taking of the oath, which at law makes the king king, and once the oath is taken, and the king crowned and anointed, then any actions taken by him, or in his name with his consent, are retrospectively ratified and prospectively enabled by his coronation, the continuance of the laws of his predecessors is secured, and his jurisdiction to make laws for the people is

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king's two bodies maxim, and is clearly not any law at all, witness the case of Matilda referred to in note 4 *supra*. The common law pertaining to inheritances of land would not have enabled a female to succeed to her father's property, this going to the next male heir either of the blood, or by bequest; if there were no sons, and more than one daughter, both daughters would succeed equally; but neither son nor daughter of the half blood could succeed. (see Blackstone, *Commentaries*, *op. cit.*, Vol. 2, Book 2, chapter 14, p. 212, p. 214, and p. 227 ff.) Nor could a bastard succeed (see Blackstone, *Commentaries*, *op. cit.*, Vol. 2, Book 4, Chapter 15, p. 247, sourced to Co. Litt. 8, and Finch. Law 117, {Blackstone's notes m and n}) or an alien succeed to land. (see Blackstone, *Commentaries*, *op. cit.*, Vol. 2, Book 4, Chapter 15, p. 247 and p. 249 ff., sourced to Co. Litt. 8, and Co. Litt. 2 {Blackstone's notes w and x}) The only custom and peculiar usage which allowed for the descent of the crown was the election and recognition of the person by the people, and his taking the coronation oath. (Cf. See Blackstone, quoted at p. 481, *infra*.

[1] This was certainly Charles I's view in response to the parliamentarians' use of 'the king's two bodies' myth as a foundation for their seizure of power at the beginning of the Civil War—see *infra*, p. 311, p. 313, and p. 313.

[2] Cf. Blackstone's observations in his *Commentaries*, *op. cit.*, Vol. 1, Chapter 7, at 257, quoted at p. 80, *supra*.

[3] See discussion at p. 339 ff., *infra*.

conferred.