PART FOUR

THE KING IS BOUND

CHAPTER 5

THE KING'S OATH

WHAT IS A CORONATION OATH?

The coronation of kings antedates the institution of parliament by many centuries. Professor Kern, writing on 'Law and Constitution in the Middle Ages', said:

> At his accession, the medieval monarch took a vow to the law, and personally bound himself to the law. The beginnings of the modern constitutional oath lie in this coronation oath. Anyone who wished to write the history of the origin of written constitutions, would have to take this self-binding of the medieval king as the starting point, for it is an explicit binding of the government to the law which is its superior.[1]

Professor Chrimes in his introduction to Kern's work, notes that 'institutions are largely meaningless when abstracted from the rights and duties which they embody and which give them life and purpose."[2]

The governance of the United Kingdom, and of various other realms and territories, is the king's. All judges and Ministers are the king's servants, owing allegiance to the king and bound by oaths to him, and assist in operating the king's government, and the king's justice. The king alone owes allegiance to no person. What then is this 'king' and what is his 'governance'?

Birth of the 'royal blood', selection in secret, or by a small group of people, be they the

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[1] *Kingship and Law in the Middle Ages*, Studies by Fritz Kern, translated and with an introduction by S B Chrimes, Basil Blackwell, Oxford, first printed 1939, fourth impression 1968, at p. 183.

[2] S B Chrimes, in his Introduction to Kern, *Kingship*, *loc. cit.*, at p. xxvii.

airecht, the *witan*, or a previous leader's council, or even a relatively large group of people like a 'convention parliament' or an Accession Council, is not sufficient to make a king. Nor is proclamation of the person's claim to the kingship by interested persons nor the council. What is sufficient, and is required by the common law, is that the putative king be shown to the people at large and the question asked of them whether they will accept the person as king—this is the prerogative of the people to accept or reject the person put before them as king.[1] If they answer 'Yes', then an oath of governance is put to the putative king. Under the British common law and ancient custom, there are certain requirements which must be met:

- the person about to take the oath must be asked before the people if he is willing to take it, and therefore to be bound by it
- the oath must be taken by the putative king in public in the sight of the people or peoples at large for whom he is to be king, and spoken out loud in a language understood by the people, the purport of the oath being understood by the putative king[2]
- the oath must require the king to govern according to the laws of God and the laws and customs of the peoples for whom he is to be king, and to maintain the people(s)' liberties and freedoms
- the oath must require that judgements be exercised with equity, mercy and discretion
- the oath must require that the putative king agree to maintain the worship of God

The oath is put to the person about to be king in the most sacred fashion of the religion of the peoples of whom he is to become king. It is put by one of the most senior religious figures ministering in that religion. The oath is asked of the person directly—Are you...? Will you...? The oath is a personal dedication to governance—Will you swear to govern...the people(s)? The oath both confers and directs the powers of that person's governance to the matters of the oath—Will you to the utmost of your power...? The oath itemises the matters of and restrictions on that governance. The oath requires the personal binding to the matter of the oath—I am. I will. All this I promise to do. The person is then led to a holy place, and before or upon a holy thing, abases himself by grovelling or kneeling. The person then utters the binding words before the God whose holiness is reflected in holy place and thing, and in that God's name, while touching the holy thing—The things which I have here before promised, I will perform, and keep. So help me God.[3] The person is then bound to be king of the people(s) according to the nature of the oath.

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[1] This is discussed in Chapters 4 and 5 *supra*.

[2] The putative king is asked, 'Are you willing to take the oath...' to which the individual says 'I am willing'.

[3] Cf. Hobbes on covenants and oaths—see p. 341, *infra*, and Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 31-32, pp. 94-95—'Let Jupiter kill me else, as I kill this beast'; or 'I shall do thus and thus, so help me God.'

The person then puts his signature to a copy of the oath.[1]

An oath of governance of this kind has been taken by every person crowned as king in England since at least the eighth century, and in Scotland probably for some longer time.[2] Because the oath of governance is taken before the person is anointed and crowned king, it is usually, though misleadingly, referred to as the 'coronation oath'.

It is this coronation oath of the king that is the basis of the Briton-English-British-Empire-Commonwealth Constitution.

In turn, the basis of the oath is the willingness of the people(s) to accept the person about to take the oath as king, and the willingness of the person to take the oath and to abide by it. The taking of the oath invests the governance of the people(s) in the king. The taking of the oath establishes a mutuality of obligation between the king and the people(s). The people(s), having recognised the person as king and the king having taken the oath, are bound in allegiance to the person who is king—that is, the people(s) are bound to obedience in the governance of the king. The king, having taken the oath, is bound to God and the people(s), to use his power into which he is about to come as king to :

—*rule* the people(s) according to their laws and customs

—*execute* law and justice[3] with mercy in judgements

—*maintain* the Laws of God, the true profession of the Gospel

—*maintain and preserve inviolably* the settlement of the Church of England as by law established *in England*, and preserve the rights and privileges under law of the bishops and clergy of *England*, and of the churches *in England* under their charge[4]

These are the obligations under the English coronation oath. Every English king has taken

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[1] See the text of the oath of Elizabeth II at appendix I.

[2] This is due no doubt to the early influence of the Celtic Church; the situation was probably the same in Ireland, but my researches have not extended that far.

[3] That is, the old *lex* and *jus*; Law and justice; that which *is* right, that which is done *according to the rights* of the parties.

[4] My italics.

the coronation oath from at least the time of the *Bretwaldas*, and probably for some time prior to that. British kings have taken the English coronation oath from the time of George I in 1714, Empire kings took the English oath from 1902, and Commonwealth kings have taken the English coronation oath from the time of Elizabeth II in 1953. The Scottish kings have taken a coronation oath at least since the time of the Lords of the Isles in the seventh or eighth centuries. The Scots coronation oath was enshrined in legislation in the sixteenth century, and was last taken by Anne, Queen of Scotland, in 1702; it is still extant.[1] A compendium of the coronation oaths taken by the English, Scottish, British, Empire and Commonwealth kings is at Appendix I.

Provided that the oath does these things, there was a considerable amount of discretion in the formulation of the oath. Clearly, there was also a direction in the old surviving liturgical texts which left instructions as to the consideration to be given by the 'prelates and nobles' to the text of the coronation oath.[2] Clearly also, the putative king must agree with the text, else he could not swear it, the oath being the fundamental basis of the constitution, and the king's right, his duty, and his doom[3].

THE CONTINUITY OF THE LAW

In early times, the King's Peace died with him, and all laws and all office holders were suspended, for the king from whom they derived their authority was dead. It was this which necessitated an early coronation to institute the new king into his office. And it was for this reason that the coronation oath specified that the new king would ensure the peace, uphold the old laws, and hold and strengthen any other (new) laws which may be made.

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[1] There is in my view no reason at law why this should have happened. Under the *Act of Union*, there was no requirement for the monarch of the new united entity to take the English oath, but not the Scots oath. Under the *Act of Union* on my reading *both* oaths should have been taken by the monarch of the new united entity. The Scots oath is of at least as great antiquity as the English oath; I am far from certain that the so-called doctrine of prescription would have extinguished any claims by the Scots for the monarch now to take the existing oath, or some other new coronation oath specifically relating to Scotland—the *Scots Coronation Oath Act* is still on the statute books. I do not know that the acquiescence of the Scots people and lords in the coronation ceremony where the English oath has been take, to which presumably they have contributed through consultation, could be said to have extinguished the claims of the ancient kingdom of Scotland, now part of the united Kingdom, to insist on its own coronation oath. Indeed, I can see no reason why any of the peoples of the nations of which the Queen is now Queen could not request their monarch to take a separate coronation oath for them, and specify exactly what it was they and she agreed between them would be the basis of the governance in their nation.

[2] See *Liber Regalis*, as reproduced in L W Legg, *English Coronation Records*, *op. cit.*, p. 83 (Latin) and p. 114 (English).

[3] Cf., the king as the just man, see p. 56 *supra*, and p. 189 *infra*, see also p. 71

TRIA PRECEPTA AND THE PEACE

In the days of the ***Bretwaldas***, the three promises (*tria precepta*) made by the king in his coronation oath were to maintain the peace to the church and the people, to forbid rapacity and all iniquity, and to exercise judgement with discretion and mercy.

> Ðis ge-writ is ge-writen stæf be stæfe be þam ge-write, þe Dunstan arceb. sealde urum hlaforde æt Cingestune, þa on dæg þa hine man halgode to cinge, 7 for-bead him ælc wedd to syllane, butan þysan wedde, þe he up on Cristes weofod léde, swa se b. him dihte:
>
> 'On þære halgan þrinnesse naman, Ic þreo þing be-háte cristenum folce, 7 me under-ðeoddem;
>
> án ærest, Þ Godes cyrice 7 eall cristen folc minra ge-wealda soðe sibbe healde;
>
> oðer is Þ reaf-lac 7 ealle unrihte þing eallum hádum for-beode;
>
> þridde, Þ ic be-háte 7 be-beode on eallum dómum riht 7 mild-heortnisse, þæt us eallum arfæst 7 mild-heort God þurh Þ his ecean miltse for-gife, so lifað 7 rixað'.[1] Finit.

The *tria precepta* established the that:

- The king was empowered to keep the peace— but it was to be 'true peace', kept 'at all times', to the Christian people and the church of God.
- The king was empowered to forbid rapacity, iniquity, and bad laws—but his power must be exercised without discrimination as to rank, and in a universal and equal fashion.
- The king was empowered to give and make judgements—but this power must be exercised with discretion and mercy

Each king would then make his own laws for the welfare of the country; but they would also, as in the case of Alfred, restate those laws which had already been made by their predecessors for the welfare of the country, and cause them to be enforced.

Alfred[2] established the first compendium of the laws. He introduced them by the Ten Commandments[3] and many other precepts of Mosaic law[1], as well as including a brief

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[1] see my Appendix I for translation; and see F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols.; at Vol. I, p. 214; and see William Jerdan in his Preface to the *Rutland Papers, Original Documents illustrative of the Courts and Times of Henry VII and Henry VIII, selected from the private archives of His Grace the Duke of Rutland, &c. &c. &c.*, printed for the Camden Society, 1842; reprinted with the permission of the Royal Historical Society by AMS Press, New York, 1968, at p. xi.

[2] It is thought that Alfred took a coronation oath; there is a text of a royal oath attributed to Alfred, and printed in English from an eighteenth century copy, (*Two Cartularies of.... Muchelney and Athelney, ed.* E H Bates, (London), 1899, in Somerset Record Society, p. 126; referred to in 'The Coronation ceremony in Medieval England', P L Ward, *Speculum, A Journal of Medieval Studies*, Vol. XIV, 1939, Medieval Academy of America, Cambridge, Mass., 160, at p. 166. This text is said to agree with the twelfth century oath—which is a rendering into Latin of the Old English *tria precepta*; liturgists call these interchangeably as the *promissio regis*. I have not sighted the text.

[3] Laws of Alfred, c. 1-10. See F L Attenborough, (*ed., trans.*) *The Laws of the Earliest English Kings*, 1922; reissued Russell & Russell, New York, 1963, at p. 63, and notes at p. 193.

account of Apostolic history and of Church law, as laid down by both ecumenical and English ecclesiastical councils.[2] He specifically stated that he had collected the laws of his predecessors, of Ine, Offa, and Æthelberht, and had annulled with his councillors' advice ones of which he did not approve, and had ordered some changes made be made to others, and these latter, together with those which were the 'most just' (*ryhtoste*) he collected and declared that they should be observed.[3] Subsequent Dooms of the Anglo-Saxon kings began with a reiteration of the laws of their predecessors, and the great Danish English king, **Cnut**, also reiterated the laws of his Anglo-Saxon predecessors.[4]

Documentation on the oaths of the kings before the Conquest is scanty. But it may well be that in addition to the obligations of the *tria precepta*, kings may have sworn additional things. For example, the *Leges Edwardi Confessoris*, though compiled may years after Edward's death, included an interpolation (the *Leges Anglorum*) which suggested that at his coronation **Edward the Confessor** had sworn an oath to restore all the rights, dignities, and lands which his predecessors 'have alienated from the Crown of the realm', and to recognise it as his duty 'to observe and defend all the dignities, rights, and liberties of the Crown of this realm in their wholeness.'[5] There is no reason to think that this was an innovation of the Confessor. **Cnut** the conqueror of England (who nevertheless maintained the English laws) also conquered Norway and was king of Denmark, and was constant in his efforts to secure his territory, and there is a suggestion in the *Leges Anglorum*

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[1] Laws of Alfred, c. 11-48; see Attenborough, *Laws of the Earliest English Kings, loc. cit.*, p. 193.

[2] Laws of Alfred, c. 49, § 1-7. c. 49, § 8 referred to compensations for misdeeds had been ordained at many of these councils. See Attenborough, *Laws of the Earliest English Kings, loc. cit.*, p. 193.

[3] Laws of Alfred, c. 49, § 9, Attenborough, *Laws of the Earliest English Kings, loc. cit.*, p. 62, (O.E.), p. 63 (English). *Ic ða Ælfred cyning þás togædere gegaderode, 7 awritan het monege para þe ure foregengan healden. ða ðe me licodon; 7 manege para þe me ne licodon ic áwearp mid minra witena geðeahte, 7 on oðre wisan bebead to healdanne. Forðam, ic ne dorste geðristlæcan para minra awuht fela on gewrit settan, forðam me was uncuð, hwæt þæm lician wolde, ðe æfter ús wæren. Ac ða ðe ic gemette awðer oððe on Ines dæge, mines mæges, oððe on Offan Mercan cyninges oððe on Æþelbtyhtes, þe ærest fulluhte onfeng on Angelcynne, þa ðe me ryhtoste duhton, ic þa heron gegaderode, 7 þa oðre forlét. Ic ða Ælfred Westseaxna cyning eallum minum witum þas geeowde, 7 hie ða cwædon þæt him licode eallum to healdanne...*

[4] Dooms of Edward the Elder and Guthrum of the Danes, 899-924, Preamble, (Attenborough, *Laws of the Earliest English Kings, loc. cit.*, p.102, p. 103); I Edward the Elder, Preamble (reference to Alfred's *dombec*, or *dombok*—book of laws— see Attenborough, *Laws of the Earliest English Kings, loc. cit.*, p.114-115, and p. 204); and see Edgar I, c. 2, reference to Edmund; c).

[5] See Fritz Liebermann, *Die Gesetze der Angelsachsen, Text und Übersetzung*, Unveränderter Neudruck der Ausgrabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols.; *Leges Anglorum*, at Vol. I, p. 635, 11, 1A, 2; and Vol. I, p. 640, 13 1A 1, and 13 1A 2. See also Ernst H Kantorowicz, in his *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957, reprinted by Princeton University Press 1997, with an introduction by William Chester Jordan, at pp. 346-347. For texts, see Appendix I.

that he had sworn a similar oath.[1]

The *Bretwaldas*, and before them the Heptarchic kings, were spiritual children of the Church of Rome, providing in their Dooms special laws pertaining to the church. Their laws also required the payment of Peter's Pence, or the Romescot (*Rómfeoh*).[2] It is not unlikely in these circumstance, that the *tria precepta* of the royal oath as written prescribed by Dunstan for Edgar *Bretwalda* were the *minimum* requirement, the church, the putative king and his advisers adapting those requirements for each new king according to the times.

When **William of Normandy** conquered England, he took the coronation oath as prescribed in Dunstan's *tria precepta*, and thus promised to maintain the peace,[3] but he also specifically undertook to 'keep and hold the law of King Edward [the Confessor], with the addition of those [amendments] which I have made for the benefit of the English people.'[4] Subsequent Anglo-Norman kings also took the English coronation oath and promised to maintain the peace[5], *and also* reiterated a commitment to the maintenance of the old laws of their predecessors; the outstanding example of this was **Henry I**'s Coronation Charter of 1100[6]. This twofold practice of undertaking the maintenance of the peace in the oath, then subsequently upholding the laws of the predecessor, usually in a coronation charter, continued until the time of **Richard I**[7]. Richard took the oath, but then left the country to pursue his foreign adventures in the Crusades; it would seem that his justiciars governed the country on the basis of his father's laws,[8] so while he did not specifically enact the

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[1] See *Liebermann*, Vol. 1, p. 640, the *Leges Anglorum* interpolation, at 13 1 A (1). For text see Appendix I.

[2] See for example, the Dooms of Edward and Guthrum, c. 6 § 1, in F L Attenborough, *The Laws of the Earliest English Kings*, Cambridge University Press, Cambridge, 1922, reissued by Russell & Russell, New York, 1963, at p. 105.

[3] See Maitland, *Constitutional History*, *supra*, at pp. 98-99; H G Richardson and G O Sayles, in *The Governance of Medieval England from the Conquest to Magna Carta*, Edinburgh University Press, Edinburgh, 1963, reprinted 1964, at p. 137 (Florence of Worcester, i., 229); see also *Traditio*, xvi. 161-2, 186; and see my Appendix I.

[4] see William I, 7; from the Latin, in F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols., at Vol. I, 486f., as reproduced in S&M1, at p. 37. And see references in Jolliffe, *Constitutional History of Medieval England*, *loc. cit.*, p. 175 : *Ut omnes habeant et teneant legem Eadwardi Regis in terris et in omnibus rebus* ('All men shall have and maintain the law of King Edward in lands and in all things'.)

[5] See William II, who promised to *preserve justice and equity and mercy throughout the realm, would defend against all men the peace, liberty, and security of the churches* [Stubbs, *Constitutional History*, Vol. I, §105, at p. 321]

[6] see Stubbs' *Select Charters*, p. 99; S&M1, pp. 46-48; *pacem firmam in toto suo regno posuit et teneri praecepit, legem regis Eadwardi omnibus in commune reddidit, cum illis emendationibus quibus pater suus illam emendavit*: quoted from *Flor. Wig.* II, 46 ff.

[7] Stephen, Coronation Charter, see Stubbs in *Select Charters*, p. 119; Henry II, Charter of Liberties (*Carta Regis Henrici Secundi*)—see Stubbs, *Select Charters* p. 134-135, from *Statutes of the Realm*, Charters of Liberties, p. 4;

[8] see Stubbs' *Select Charters*, pp. 249-251.

observance of his predecessors' laws, they were observed in fact.

THE OATH AND MAINTENANCE OF GOOD LAWS

But at around the time of **Henry I**, a new slant on the oath would appear to have emerged, where the king was empowered to make the laws—but he must abrogate bad laws and evil customs, and make and hold fast to good laws.[1] (This was but a logical extension of Alfred's culling of the laws some centuries earlier).

The new king would then issue a coronation charter, adopting or reinforcing the laws of his predecessor; or at least, those of them which were seen to be good and just.[2] This coronation charter replaced the specificity of the laws of, for example, Alfred, Cnut or William I, which individually ensured the keeping of their predecessors' laws.[3] The practice also arose at this time, of 'restoring' to the people, by virtue of the coronation charter,[4] the old and good laws of the king's predecessor(s), thus ensuring the continuity of the law.[5]

Now neither Richard I nor John who followed Henry II issued, so far as I can ascertain, any coronation charter; nor did Henry III, the next king, at either his first or second coronation. But the *Magna Carta* had been issued by John in 1215, and was subsequently reiterated by subsequent kings—effectively this obviated the need for a specific coronation charter, as the *Magna Carta* encompassed all those obligations on the king which kings had

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[1] See the reference in H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, from Liebermann, *Gesetze der Angelsachsen* I, 521— *Deinde iurat quod leges malas et consuetudines peruersas ... delebit et bonas custodiet.* And see my Appendix I.

[2] See the Coronation Charters of Henry I, Stephen, and Henry II at Appendix I.

[3] see Laws of Alfred, c. 49, § 9, *supra*; Cnut required adherence to the laws of Edgar, 1018 (see *Anglo-Saxon Chronicle*, 1018D: *Dene and Engle wurdon sammæle æt Oxanaforda to eadgares Lage*—quoted in Jolliffe, *The Constitutional History of Medieval England*, p. 105; and see Blair, *Anglo-Saxon England*, *loc. cit.*, pp. 100-101; and see William I, 7, from the Latin, in F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols., at Vol. I, 486f., as reproduced in S&M1.

[4] See coronation of Henry I, described in *The Chronicle of Florence of Worcester*, Thomas Forester, (*trans.* and *ed.*) , Henry G. Bohn, London, 1854; reprinted from the 1854 edition by AMS Press, New York, 1968, at pp. 207-208—*legem regis Eadwardi omnibus in commune reddidit, cum illis emendationibus quibus pater suus illam emendauit*, he restored the laws of king Edward to all in common, with such amendments as his father had made... And see Latin quotation from *Flor. Wig.* II 46 ff. in Robert S Hoyt, 'The Coronation Oath of 1308: the Background of "Les Leys et les Custumes"', *Traditio*, Vol. XI, 1955, p. 235-257, at p. 239.

[5] This practice derived from William I's undertaking to apply the laws of his predecessor, Edward the Confessor; in Henry I, who also undertook to restore those laws of Edward which had been abrogated by his immediate predecessor, William Rufus; and in Henry II, who undertook to restore the laws of his predecessor Henry I. See *Carta Regis Henrici Secundi*, Charter of Liberties ; Stubbs, *Select Charters* p. 135, from *Statutes of the Realm*, Charters of Liberties, p. 4) — probably issued at Henry's coronation, Stubbs at p. 134. For text see my Appendix I.

earlier put into their coronation charters.

However the idea of the kings 'restoring' the old laws of their predecessors, and of upholding the good laws and putting down the bad, was formalised in the coronation oath at some time between the reigns of Henry I and Edward II. All the liturgical records of the coronation oath from that time thence (the *Liber Regalis*[1]) have a new first clause to the oath:

> Will you grant and keep, and by your oath confirm, to the people of England, the laws and customs to them granted by the ancient kings of England your righteous and godly predecessors, and especially the laws, customs, and privileges granted to the clergy and people by the glorious king [saint] Edward, your predecessor?[2]

Now there is an Anglo-French text dating from about 1272 which says:

> Et puis apres prechera le erceusque et quant il auera preche si demaundera de celui que est a coroner. Si uoudra granter & garder et par sermant & confermer a seint eglise & a son people les leys & les custumus que grante furunt des aunciens roys & que a deu furent deuout & nomement les leys coustimus & les franchises que furent granteez a la clergie & al people par seint edward[3]

This text would seem to predate Edward II by some decades. There remained controversy however over the king to whose laws the (Latin) oath was referring—was it to saint Edward the Confessor, whose 'laws' at about this time had been compiled into what later became known as the *Leges Edwardi Confessori* ; or was it Edward I, (Edward II's father), who was a great law maker, and with whom the barons had had a recent struggle over the extent of the *Magna Carta* and the Charter of the Forests; or was this merely an omnibus abbreviation for the idea that the old laws which had been good were to be preserved and

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[1] The Third Recension of the English Coronation order was compiled some time in the twelfth century, (c.1100)and used to be referred to as the coronation order for Henry I. Various versions of a more elaborate oath which refers to St Edward the Confessor are to be found from the thirteenth century onwards, and these are usually referred to as the recensions of the Fourth English Coronation Order, which reached its final version c. 1351-1377, which final version is known as the *Liber Regalis* (Royal Book, King's Book, Book of the King's Office).

[2] For text, see Appendix I. See also Stubbs, *Constitutional History*, Vol. II, §249, p. 331, sourced to *Foedera* ii. 32-36; *Parl. Writs*. II. ii. 10; *Statutes*, I. 168; and S&M1, 192; from the French, *Statutes of the Realm*, I, 168; and Sir Matthew Hale, *The Prerogatives of the King*, 1640-1660, D E C Yale (*ed.*), Selden Society, London, 1976, at p. 66. I include here the Latin of the *Liber Regalis*, so that interested persons may make their own translation : Si leges et consuetudines ab antiquis iustis et deo deuotis regibus plebi anglorum concessas cum sacramenti confirmacione eidem plebi concedere et seruare uoluerit. et presertium leges consuetudines et libertates a glorioso rege edwardo clero populoque concessas.

[3] from J Wickham Legg, (*ed.*) *Three Coronation Orders*, for the Henry Bradshaw Society, Vol. XIX, printed for the society by Harrison and Sons, London, 1900, p. 40, from a manuscript, No. 20, belonging to corpus Christi College, Cambridge. Legg calls this an Anglo-French Version of *Liber Regalis*, says it could date from as early as 1272. He notes that the king spoken of therein is called 'Edward'. I speculate in Appendix I that this may well have been Edward I. If so, this version of the oath was abroad among clerics some considerable time before 1307, which is usually the earliest date given for the first recension of the *Liber Regalis*.

observed by the king? That the oath, (if indeed it were the text of the oath, which is doubtful), refers to Edward I, makes a great deal more sense, in the light of the effect of the coronation oath in perpetuating the positive effects of the preceding legal jurisdiction. The first and last propositions make less sense, as it is to suggest that the advisors to the king were governed more by some kind of romanticism than by any practical considerations. But it is the first proposition referring to St Edward which was reproduced for centuries by clerics and ecclesiaticals in the *Liber Regalis* and its offshoots, and which was definitely included in the coronation oath sworn by the Stuart kings (though one cannot say with any certainty what the Tudor kings swore).[1]

Whatever the motivation, all clerical records of the coronation order of service down to the time of James II and VII[2] continued to include a reference to the sainted Edward the Confessor, and to the maintenance of his laws.

THE CORONATION OATH AND THE EARLY LAW

At times of constitutional change, or internal upheaval, the coronation oath became a focus of political and legal attention.

Sir Matthew Hale in 1640-1649, noted that 'the king ...is bound...by his oath at coronation where he swears to govern according to the laws'.[3] He also noted that : 'The king's

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[1] One is very tempted here by the notion that clerics busily scratching away at their scribing put into the oath that which they thought should be in the oath, and that which in their opinion reflected glory upon the only canonised English king—although it is also possible that a reference to the laws of Edward the Confessor was introduced by Henry III, who was an ardent admirer of the Saxon king, and who named his son after him, and that his son and grandson in turn followed his example merely because they were named Edward.

[2] There is a great gap during the period from Henry VIII to William and Mary. There are no concrete texts available as to what the Tudor kings actually swore; nor indeed any reliable evidence as to what the Plantagenet kings swore. We do know what the privy Council would have liked Edward VI to swear, but whether he did or not, it included no reference to Edward the Confessor. My own interpretation of this phenomenon—that is, of Edward the Confessor turning up in the Stuarts' coronation oaths— is that James VI of Scotland was in Scotland when he received the commission to the kingship; he was more familiar with the civil law that with the common laws of England, and, notwithstanding that he was a Calvinist, or indeed, perhaps because he was a Calvinist, probably looked for guidance when he came to England, to the church (which still operated in its canon law upon broadly civil law procedures), and the church would have had a vested interest in promoting the text of the oath which it had been reproducing, rightly or wrongly, for the previous three hundred years. Moreover, as James was in Scotland when he was proclaimed king, and as Elizabeth had reigned for a very long time (44 years), it was highly unlikely that any of her old council had any personal recollection of the coronation oath sworn by her immediate predecessors, and were thus more likely to be at the direction of the clergy. Or alternatively, it may well have been, that being confronted with a foreign king, the old queen's privy council deliberately chose an old text of the oath to reinforce the idea of the supremacy of England and its English laws, the English religion and the English saint, over the Scottish king who had already sworn a coronation oath for Scotland.

[3] Sir Matthew Hale, *The Prerogatives of the King*, edited for the Selden Society by D E C Yale, Selden Society, London, 1976; at pp. 14-15

coronation oath was various in ancient times according to the variety of the occasions and the prevalence of parties that sought thereby to secure some particular interest."[1]

Thus after the Conquest, **William I** after his election by the *witan*, swore to 'to protect the holy churches of God and their governor, and to rule the whole kingdom subject to him with justice and kingly providence, to make and maintain just laws, and straitly to forbid every sort of rapine and all unrighteous judgments.'[2] Not only was this a significant step in legitimating William's kingship, as he swore the same oath that his Saxon predecessors had, but it also established the continuity of the law.[3] William proceeded to make enactments establishing his peace,[4] and formally enjoining the upholding of the laws of Edward the Confessor: 'This likewise I wish and enjoin: that in [cases affecting] lands, as in all other matters, all shall keep and hold the law of King Edward, with the addition of those [amendments] which I have made for the benefit of the English people,'[5] **William II**, obtained the throne only on the basis of his coronation oath[6]; while his successor in turn **Henry I**, in effect purchased the crown by seizing the Treasury and by swearing in his coronation oath and coronation charter to

> ...in the first place make the holy church of God free... And I henceforth remove all the bad customs through which the kingdom of England has been unjustly oppressed;... I establish my firm peace throughout the whole kingdom and command that it henceforth be maintained. I restore to you the law of King Edward, together with those amendments by which my father, with the counsel of his barons, amended it...' [7]

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[1] Hale, *Prerogativa, loc. cit.*, p. 66

[2] see *The Chronicle of Florence of Worcester*, Thomas Forester, (*trans.* and *ed.*) , Henry G. Bohn, London, 1854; reprinted from the 1854 edition by AMS Press, New York, 1968, and my Appendix I.

[3] Note here that Richardson and Sayles, in H G Richardson, and G O Sayles, *The Governance of Medieval England from the Conquest to the Magna Carta*, Edinburgh University Press, Edinburgh, 1963, reprint 1964, at pp. 26-29 say: 'The Normans had little statecraft and little foresight The Normans had very little to teach even in the art of war, and they had very much to learn They were barbarians who were becoming conscious of their insufficiency. That the Normans had little statecraft and little foresight, that they had very little to teach and very much to learn, seems to us the obvious conclusion from their history; but so to declare we recognise, to fly in the face of settled convictions of successive generations of historians to whom the Conqueror has appeared as a heroic figure of almost superhuman proportions.' This observation is endorsed by J H Baker, in his *An Introduction to English Legal History*, 3rd edn., Butterworths, London, 1990, at p. 14—'The Norman invaders were warlike, uncultured and illiterate...they found in England a system of law and government as well developed as anything they had left in Normandy. Certainly they had no refined body of jurisprudence to bring with them...'

[4] see William I, 1 and 3, from the Latin, in F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols., at Vol. I, 486f., as reproduced in S&M1, at p. 37.

[5] see William I, 7; from the Latin, in Liebermann, *ibid.*, as reproduced in S&M1 *ibid.*, at p. 37.

[6] see my Appendix I, and Stubbs, *Constitutional History*, Vol. I, §105, at p. 321

[7] see my Appendix I; see also S&M1, pp. 46-48, translated from the Latin text from in F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen,

This coronation charter was in many ways a precursor of *Magna Carta*.[1] Again in times of upheaval, **Stephen** took the crown, and maintained his right by virtue of his coronation oath and anointing, as did **Henry II**, both of them confirming their oaths in a coronation charter specifically reiterating the confirmation of the grants of liberties and customs to the church and people issued by their predecessors, and confirming also the laws of their predecessors[2], Henry I and Edward the Confessor. The coronation, particularly the oath and the anointing, was what established these men as kings.[3] Henry II appears to have added an additional promise to those rehearsed above in that he promised to maintain the rights of the crown[4]. Moreover, either as an adjunct to this promise, or as an addition, he appears to have undertaken to restore the inheritances of those displaced in the civil war of Stephen's reign.[5]

HENRY II'S OATH AND GLANVILL

Now under the reign of Henry II emerged that writer whom English lawyers call Glanvill—Rannulf Glanvill who was Chief Justiciar[6] under Henry II from 1180. He wrote

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Germany, 1960; in 3 Vols., Vol. I, 521 ff. Full Latin text also in Stubbs, *Select Charters*, pp. 99-102, sourced to *Ancient Laws and Institutes*, p. 215.

[1] see my Appendix I.

[2] For Stephen see Stubbs, *Select Charters*, p. 119, from *Statutes of the Realm* – Charters of Liberties, p. 4. Stephen's charter was witnessed by William Martel, and endorsed the charters and laws of Henry I and Edward the Confessor. For Henry II, see Stubbs, *Select Charters* p. 135, from *Statutes of the Realm*, Charters of Liberties, p. 4—Henry specifically endorsed the charter granted by his predecessor, Henry I; his charter was witnessed by Ricardo de Luci—see texts at Appendix I.

[3] see *From Doomsday Book to Magna Carta, 1087-1216*, A L Poole, Oxford University Press, Oxford; first published 1951 as volume three of *The Oxford History of England*; 2nd edn. 1955; paperback edition 1993, at p. 3: '... in fact of the six kings who followed the Conqueror, Richard I alone succeeded in accordance with the strict rule of hereditary succession, and the title of four of them was challenged by a rival. Until the chosen successor was crowned he was merely *dominus*, the territorial lord and head of the feudal state; after his coronation he became *rex* with all the attributes of regality. [N.1 The Empress Matilda (who was never crowned) usually adopted the style *Anglorum domina*. Both Richard I and John in the interval between their election and coronation use the title *dominus Angliae*.]

[4] see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, at p.166, after rehearsing all the evidence, states: '... for it seems hardly open to doubt that Henry II gave an undertaking [to safeguard the rights of the Crown] at his coronation.'; and see Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502; and see H G Richardson, *Speculum*, 1949, *art. cit.*, 'The English Coronation Oath', at p. 47, where he refers to Henry II's son's oath ('the young king Henry', who died in an insurrection against his father and did not succeed — see my Appendix I) which included a promise to 'maintain unimpaired the ancient customs of the realm', which in part gave rise to the controversy with a'Becket, as the pope said that this oath 'imperilled the authority of the church.'— see the quotations and the sources in note 4, p. 180, and see also note 3, p. 267 *infra*. For a'Becket's letter to Henry, see note 3, p. 180 *infra*.

[5] See J H Baker, *An Introduction to English Legal History*, 3rd edn., Butterworths, London, 1990,p. 264; he gives no source. And see the Royal web-site, Henry II, at http://www.royal.gov.uk—The Angevins, Henry II, cited at p. 180, *infra*.

[6] The equivalent of a combination of the modern positions of Chief Justice and Prime Minister : see Maitland, *Constitutional History*, p. 13

his *Tractatus de legibus et consuetudinibus regni Anglie* between 1187 and 1189.[1] (A detailed examination of Glanvill's text and its relevance to the coronation oath is at Appendix III.)

Glanvill is commonly seen as the first textbook on the common law—common law here meaning 'the settled law of the king's court common to all free men in the sense that it is available to them in civil causes if they will have it, and applicable against them in serious criminal causes whether they like it or not.'[2]

Glanvill speaks of 'the laws and customs of the realm' [*legibus*, and later, *iusta et regni consuetudinibus*] ; he speaks of the king as the author or peace; that the king and his judges exercise their judgements with impartiality to all levels of society, and with equity, justice, and truth; he says the king is guided by the laws and customs of the realm and by those more knowledgeable than he with regard to those laws and customs; that the laws are those decided upon in council on the advice of the magnates [*in concilio*] and which have the king's agreement and his support. The first official mention of 'customs' had been in Henry I's coronation charter (and thus probably in his oath). And certainly 'laws and customs' spoken of jointly do not occur in the clerics' records of the coronation oath until the *Liber Regalis*, or the Anglo-French version c.1272[3] referred to above, (although they are of course in the oath published by Lettou and Machlinia in c.1483 and whose translation was amended by Henry VIII). It seems not unlikely that Henry II's oath included a reference to 'laws and customs'.

Now, it has been demonstrated that Henry II took an oath not to alienate the estate of the crown.[4] If one examines the text of the coronation oath considered by Henry VIII

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

[2] See G D G Hall, in his Introduction to his translation of Glanvill, *ibid.*, at p. xi. And also see Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the time of Edward I*, 2nd edition, Vols. I and II, Lawyer's Literary Club, Washington, 1959, Vol. 1, at pp. 107-110, and pp. 136-173. And see T F T Plucknett, *A Concise History of the Common Law*, 1929; 5th edn., Little Brown and Company, Boston, 1956, p. 257

[3] see text at p. 175, and source at note 3 , *supra*. For text see Appendix I.

[4] See p. 178 and note 4 *supra*, and the sources there quoted. And see Appendix I.

(hereinafter called 'the Henry VIII oath'[1])the conjunctions between that oath and the precepts set out by Glanvill as to the king's duties and role, are remarkable.

The 'Henry VIII oath' includes the promises of the *tria precepta*, and those of the third recension[2] (which are almost identical), together with promises which accord with the statements by Glanvill as to the role and duty of the king as outlined above, as well as including a provision for the maintenance of the estate of the crown, one of the causes of the bitter feud between Henry II and Thomas a'Becket[3], and between Henry II and the pope[4]. Moreover, as the Royal web-site notes, Henry II concentrated on restoring to the crown those estates lost during the anarchy of Stephen.[5]

Now this could of course be a coincidence. I would submit, however, that this is stretching coincidence very far. Glanvill knew Henry II; he was Chief Justiciar—who better than he would know the nature of the office of king and the governance he was sworn to? That these provisions were not reproduced in the actual liturgical Ordines until the time of the recensions of the fourth coronation Order two hundred years later proves nothing; it must be remembered that the Ordines were inscribed and copied by clerics far from the seat of power. The absence of a reference to 'Saint Edward' in this oath is also explicable in the light of the possibility that Henry III, a devotee of the Anglo-Saxon saint, was responsible

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[1] For text see Appendix I, and p. 216, *infra*. H G Richardson and G O Sayles, in their article on 'Early Coronation records' in *Bulletin of the Institute of Historical Research*, [BIHR] Vol. 13, 1935-36, 129, at p. 144, state : it is safe to say that this form was never used, whether in medieval or modern times, and can be dismissed from consideration by the constitutional historian.' H G Richardson, *Traditio*, Vol. 16, 1960, *art. cit.*, at p. 149, n. 49, refers to Henry VIII' 'manipulation of the oath' as a well known and ludicrous incident'. I find it difficult to accept these findings for the reasons outlined at p. 262, *infra*.

[2] The 'Henry I Ordo'—the 'Twelfth century Coronation Order', c. 1100. For text see Appendix I.

[3] See Thomas a'Becket Letter to Henry II, 1166—as quoted in J B Ross and M M McLaughlin (*eds.*), *The Portable Medieval Reader*, The Viking Press, New York, 1949; 22nd printing, 1967, at pp. 248-250; sourced to *St Thomas of Canterbury*, W H Hutton, *ed.* (London: D Nutt, 1889). H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, pp 111-202, t p. 125-26, n. 68 sources this to *Materials for the History of Thomas Becket* [Rolls Series 1881] V 282.—'...you have not the power to [abrogate certain customs pertaining to the church] and many other things of this sort which are written among your customs which you call ancient. ... Remember also the promise which you made, and which you placed in writing on the altar at Westminster when you were consecrated and anointed king by my predecessor, of preserving to the Church her liberty....' at pp. 249-250. (Text at Appendix I).

[4] See letter from Pope Alexander III to Henry II, c. 1170?, about alleged breach of coronation oath—*In coratione autem illius nulla ex more de conservanda ecclesie libertate cautio est prestita, vel, sicut aiunt, exacta; sed iuramento potius asseritur confirmatum ut regni consuetudines, quas avitas dicunt, sub quibus dignitas perticlitur ecclesie, illibatas debeat omni tempore conservare*—quoted in H G Richardson, 'The English Coronation Oath', *Speculum*, Vol. 24, 1949, p. 44, at p. 47, n. 17; sourced to 'Jaffe, n. 11836; printed in *Materials for the History of Thomas Becket* I, 93; VII, 366 *Foedera*, I, I, 26, from Roger of Howden (*ed.* Stubbs, II. 7-9). And see Appendix I, and other sources cited there.

[5] See The Royal web-site, Henry II, at http://www.royal.gov.uk—The Angevins, Henry II.

for the inclusion of his name in the oath.[1]

In any event, the idea that Henry II was the inspiration for the 'Henry VIII oath', and that it was well grounded in terms of his and his Chief Justice's understanding of the nature of kingship, deserves serious consideration. We must consider also, that Henry VIII was by no means a fool, and that there was quite likely some reason other than spontaneous capriciousness when he amended the oath in his own hand. It is after all quite possible that Henry VIII actually knew what he was doing, and that the oath that he was amending was the oath that he had taken.[2]

THE OATH AND THE COMMON LAW

THE OATH, *MAGNA CARTA* AND THE *LEX TERRAE*

Richard I, an absentee king whose kingdom was governed by a series of justiciars[3], nevertheless took the oath[4]. **John**, his successor, also swore the oath, but as a result of the barons' war, also subscribed to a document responding to Articles submitted by the barons[5], which was known as the Great Charter (***Magna Carta*** or the ***Carta de Runnymeade***).[6] This charter granted by John, (in essence 'a pact concluded between the king and the baronage, strengthened by the king's oath"[7], has been seen as being a direct descendant of the coronation oath and charter of Henry I[8], (although this view has been

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[1] see page 186, *infra*.

[2] See the text of the 'Henry VIII oath' at p. 216, *infra*. So far as I know, no-one has suggested this line of argument. It may well be, of course, untenable; but on the strength of my researches to date, it is an hypothesis worth considering.

[3] see Stubbs, *Select Charters*, at pp. 249-250

[4] see my Appendix I.

[5] see Stubbs, *Select Charters*, p. 289 ff.

[6] see Stubbs, *Select Charters*, p. 296 ff.; the charter was in its earliest days described as *Carta Libertatum*, *Carta Baronum*, or *Carta de Runnymeade*: see Ray Stringham, *Magna Carta*, Fountainhead of Freedom, Aqueduct Books, Rochester, New York, 1966, at p. 2

[7] see Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, Methuen & Co Ltd, London, 1961, 2nd edn. 1966, at p. 170.

[8] Blackstone related how the chronicler Matthew Paris attributed the movement towards the charter as a result of the sudden discovery of Henry I's Coronation Charter of Liberties (Blackstone, *The Great Charter*, p. vii,) quoted in W S McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 1905, 2nd edn., revised and in part rewritten, Glasgow, 1914, reprinted by Burt Franklin, New York, at p. 48; Ray Stringham, *Magna Carta, loc. cit.*, at p. 10 and p. 119 says it was Stephen Langton, Archbishop of Canterbury, who discovered Henry's charter, and read it to the barons in

questioned[1]). John's charter included a provision for the establishment of a council of twenty-five barons, 'who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our present charter'[2], who had the power to 'distrain and distress us in every way they can' to redress any breach of the charter which having been brought to the attention of the king or his justiciar was not redressed within forty days.[3] And in clause 63 it said:

> Wherefore we wish and firmly command that the English Church shall be free, and the men in our realm shall have and hold all the aforesaid liberties, rights and concessions well and peacefully, freely and quietly, fully and completely for them and their heirs of us and our heirs in all things and places for ever, as is aforesaid. Moreover an oath has been sworn, both on our part and on the part of the barons, that all these things aforesaid shall be observed in good faith and without evil intent. Witness the above and many others. Given under our hand in the meadow which is called Runnymede between Windsor and Staines on the fifteenth day of June in the seventeenth year of our reign.[4]

John had, however, in 1213 made an act of submission to the pope, and had sworn an oath of fealty to him[5]; after the signature of the Great Charter, and amid growing arrogance on the part of the council of twenty-five[6], John requested assistance from the pope.[7] A papal bull dated 24 August arrived in September whereby Innocent annulled and abrogated the Charter under pain of excommunication; a supplementary bull dated one day later reminded the barons that 'the suzerainty of England belonged to Rome, and that therefore

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November 1214; and see T F T Plucknett, *A Concise History of the Common Law*, 5th edn. Little Brown and Company, Boston, 1956, at p. 22.

[1] see McKechnie, *Magna Carta, loc. cit.*, at pp. 93-94: 'The simple formula for solving all problems of English constitutional origins by assuming an unmixed Anglo-Saxon ancestry, has been challenged from more sides than one. Magna Carta, like the Constitution itself, is of mixed parentage, tracing its descent not entirely from Teutonic, but partly from Norman, and even Danish and Celtic sources. In the first place, John's Charter derives some of its vital clauses from documents not couched in charter form. The Constitutions of Clarendon of 1164 and the *Forma Procedendi* of 1 194 are as undoubtedly antecedents of Magna Carta as is the Coronation charter of Henry itself. The same is true of many grants made by successive kings of England to the Church, to London and other cities, and to individual prelates and barons. In a sense, the whole previous history of England went to the making of Magna Carta.'; and at p. 95: 'Looking both to the contents and the formalities of execution of John's Great Charter, the safer opinion would seem to be, that, like the English Constitution, it is of no fixed origin, deriving elements from ancestors of more races than one; but that the traditional line of descent from the oaths and writs of Anglo-Saxon kings, through the Charter of Henry I., is one that cannot be neglected.'

[2] Clause 61, reproduced at p. 59 of *Sources of English Legal and Constitutional History*, Michael Evans and E Ian Jack, (*ed.*), Butterworths, Sydney, 1984.

[3] Evans and Jack, *Sources, loc.. cit., ibid.*, p. 59.

[4] Evans and Jack, *Sources, loc.. cit.*, p. 60.

[5] see Stubbs, *Select Charters*, at pp. 284-286: source *Foedera*, I. III, 112.

[6] see McKechnie, *Magna Carta, loc. cit.*, p. 44.

[7] McKechnie, *Magna Carta, loc. cit., p.* 44,.; John had originally sought aid from the pope on 29 May before Runnymede; he did so again shortly after 19 June.

nothing could be done in the kingdom without papal consent."[1]

John died on 19 October 1216. In a striking innovation (given the preceding turbulence), perhaps because they saw the reins of government as theirs in reality to seize, or perhaps in fear of excommunication, the barons opted for an hereditary succession and John's nine year old son became king **Henry III**. The barons appointed the Earl of Pembroke *rector regis et regni* , (who died within 3 years but the government was carried on by the council who had been associated with him)[2]. The regent and the council made the boy of nine years old take the solemn constitutional oaths, dictated by the bishop of Bath, and to do homage also to the pope in the person of the legate Gualo.[3] (It would seem that Henry III at one or both of his coronations when he took the oath, included in it a specific reference to maintain the rights of the crown.[4])The barons in Henry's name reissued the Great Charter in 1216; since, however, they were now the *de facto* rulers, the charter was 'very much modified in favour of the crown'[5], and this time they obtained the pope's consent[6]. It was reissued again in 1217 with 'numerous, important, and minute changes whose general tendency was again in favour of the crown."[7].

Of the original 63 clauses of John's charter, twenty-six had disappeared by the time of

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[1] McKechnie, *Magna Carta, loc. cit.*,, pp. 45-46; The first bull is in the British Museum (Cotton, Cleopatra E I), and is printed by Bémont, *Chartes*, 41, and is reproduced in Rymer and Blackstone. The text of the second bull is given by Rymer. Later Innocent excommunicated the English barons who had persecuted 'John, King of England, crusader and vassal of the Church of Rome, by endeavouring to take from him his kingdom, a fief of the Holy See.' (*ibid.*)

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

[3] see Stubbs, *Constitutional History*, Vol. II, at p. 18; and p. 18 n.1 sources this to 1 *Rot. Claus.* I. 335; *Foed.* I. 145; *Ann Waverley*, p. 286; *W. Cov.* ii. 233. Matthew Paris, *Chronica Majora*, iii. 1, gives the form of the oath: *'Quod honorem, pacem ac reverentiam portabit Deo et sancte ecclesiae et ejus ordinatus, omnibus diebus vitae suae; quod in populo sibi commissio rectam justiciam tenebit; quodque leges malas et iniquas consuetudines, si quae sint in regno, delebit et bonas observabit et ab omnibus faciet observari'.* But H G Richardson in 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, disagrees that this was the oath taken by Henry III; he says at p. 172 '... We are driven to conjecture, and our ignorance reflects the slight regard that was had to the precise wording of the spoken oath. It is a striking fact that Bracton was without knowledge of the oath that Henry III had taken and that his sources of knowledge were the Third recension and the *Leges Edwardi Confessoris*: that he chose the former, which gave a simpler form, as representative shows how much in the dark he was.' [note. 52. *Traditio*, 6 (1948) 75-77]' -for the text of the oath quoted by Bracton, see my Appendix I.

[4] see H G Richardson, 'The English Coronation oath', *Speculum*, XXIV, 1949, pp. 44-79, at p. 51; he quotes a letter to Henry from pope Gregory IX dated 10 January 1233 : *'cum coronationis tue tempore de regni Anglie iuribus et honoribus conservandis ac revocandis alienatis illicite vel distractis prestiteris corporaliter iuramentum.'* [Shirley, *Royal Letters of Henry III*, I, 551; *Cal. Papal Registers*, I, 131]; and a further letter from Gregory of 21 June 1235: *'Cum igitur in coronatione tua iuraveris, ut moris est, iura, libertates et dignitates conservare regales.'* [*Foedera*, I, i, 229; *Cal. Papal Registers*, I, 148.]

[5] see Plucknett, *A Concise History of the Common Law, loc. cit.*, at p. 23

[6] see Plucknett, *A Concise History of the Common Law, loc. cit.*, p. 23

[7] see Plucknett, *A Concise History of the Common Law, ibid.*, p. 23.

Edward I, including the council of twenty-five barons (clause 61), which had been among the first to go.[1] However it ended up 'as it now stands on the statute books of common law jurisdictions ... a sober, practical and highly technical document'[2], and John's original guarantee of freedom of the church and of its rights and liberties, and of the grant of all the liberties specified to freemen in perpetuity remained throughout, although the number of those liberties was reduced.

It has been argued that John's Great Charter was basically a feudal document,[3] or a pact between the barons and the king in his feudal as opposed to his theocratic capacity.[4] Professor Ullmann has noted that *Magna Carta* used a new designation for the law which it was supposed to enforce: it did not use the terms such as *legem regni nostri*, nor *constitutio antecessorum nostrorum*, nor *consuetudo terrae*; rather it used the term *lex terrae*—that is, not royal law, nor customary law of the land, but something which they designated as *the* law of the land. Ullmann has argued that the *lex terrae* was the early thirteenth-century expression for the English common law.'[5] But he says :

> The *lex terrae* contained the sum-total of the general principles deducible from the feudal contract. It abstracted all feudal law, according to which the one could not do without the other, according to which the rights and duties of king and barons were raised to the level of enforceable rights and duties. It incorporated the consent of both parties... As far as the European development of legal theory goes, the importance of the step taken by the barons in fixing the *lex terrae* as a constitutional principle cannot be overrated.[6]

This seems an unduly Euro-centric continental view.[7] Whatever the Normans may have

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[1] see Evans and Jack, *Sources of English Legal and Constitutional History*, *op. cit.*, at pp. 55-60.

[2] See Plucknett, *A Concise History of the Common Law*, *loc. cit.*, at p. 23

[3] see Bruce Lyon, *A Constitutional and Legal History of Medieval England*, 1960, 2nd edn., 1980, W W Norton & Company, New York, at p. 321; Plucknett, *A Concise History of the Common Law*, *loc. cit.*, at p. 25; and Ullmann, *Principles of Government*, *loc. cit.*, at pp. 164 ff., esp. p. 170 ff.

[4] Ullmann, *Principles of Government and Politics in the Middle Ages*, *loc. cit.*, at p. 174.— '[s]ince this pact was feudal, in his feudal function alone the king was legally part of the pact, and in this capacity was "getatable". In his feudal function he was a member of the feudal community; in his theocratic function he stood outside it.' The theocratic nature of kingship is not dealt with in this dissertation.

[5] Ullmann, *Principles of Government and Politics in the Middle Ages*, *loc. cit.*, at p. 166; see Stubbs, *Select Charters* for the text of Magna Carta 1215: clause 39 (at p. 301) *Nullus liber homo capitur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exultur, aut aliqou modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae. Legem terrae* appears also in clause 55, and *legem Angliae* in clause 56. (p. 303) Clause 39 reappears in 9 Hen. III, confirmed 25 Edw. I, as clause 29 — *vel legem terrae* or the 'law of the land'. (see *Statutes at Large*, Ruffhead, Vol. I, p. 8.)

[6] Ullmann, *Principles of Government and Politics in the Middle Ages*, *loc. cit.*, p. 167. R C van Caenegem in his *The Birth of the English Common Law*, Cambridge University Press, Cambridge, 1973, also argues that the common law was an outcome of the feudal system imported by the Normans.

[7] See also note 1, at p. 182, *supra*.

brought with them to England, it had long been anglicised.[1] Rather than observing the *Magna Carta*[2] as an outcome of a feudal compact, it could equally be said that the activities of the pope and the clergy, together with the taxes imposed by Rome, were a contributing factor to the baron's demands at Runnymede, which coincidentally were driven by Archbishop Langton, who had been himself one of the origins of the conflict between the king and the pope.[3]

But the main impetus towards a Charter stemmed from the rediscovery of Henry I's Coronation Charter[4], allegedly by Langton, who persuaded the barons to require a similar charter from John.[5] Now Henry's Coronation Charter was *not* a feudal document, being a continuation of the undertakings made by kings in Britain for many hundreds of years at their coronations; moreover, Henry's Coronation Charter itself abolished or restricted many of the remaining feudal usages.[6] *Magna Carta*'s first provision, like that of Henry I's, was that 'the English church shall be free...' In other words, Professor Ullmann's *lex terrae* was an outcome, not of feudalism, but of the coronation oaths of the English kings.

From the time of Henry III onwards, there were no more issues of coronation charters. Kings continued to take the coronation oath, but there was no longer any need for a coronation charter, as its basic statement of principles, as for example outlined in Henry I's

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[1] Cf. Richardson's and Sayles" comment in their *The Governance of Medieval England from the Conquest to the Magna Carta*, Edinburgh University Press, Edinburgh, 1963, reprint 1964, at pp. 26-29, reported at n. 3, p. 177, *supra*.

[2] see Stubbs, *Select Charters*, p. 296 ff.; the charter was in its earliest days described as *Carta Libertatum*, *Carta Baronum*, or *Carta de Runnymeade*— see Ray Stringham, *Magna Carta*, Fountainhead of Freedom, Aqueduct Books, Rochester, New York, 1966, at p. 2

[3] For a discussion of the relations with Rome, see T F Tout, *An Advanced History of Great Britain from the Earliest Times to the Death of Queen Victoria*, Longmans, Green, and Co., London, 1906, pp. 140-145 (John), and pp. 159-169 (Henry III), and pp. 183-184 (Edward I).

[4] *Coronation Charter of Henry I*, also called the *Charter of Liberties*, 1100; for text see Appendix I, and also p. 177, *supra*; see also S&M1, pp. 46-48, translated from the Latin text from in F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols., Vol. I, 521 ff. Full Latin text also in Stubbs, *Select Charters*, pp. 99-102, sourced to *Ancient Laws and Institutes*, p. 215.

[5] Blackstone related how the chronicler Matthew Paris attributed the movement towards the charter as a result of the sudden discovery of Henry I's Coronation Charter of Liberties (Blackstone, *The Great Charter*, p. vii,) quoted in W S McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 1905, 2nd edn., revised and in part rewritten, Glasgow, 1914, reprinted by Burt Franklin, New York, at p. 48; Ray Stringham, *Magna Carta, loc. cit.*, at p. 10 and p. 119 says it was Stephen Langton, Archbishop of Canterbury, who discovered Henry's charter, and read it to the barons in November 1214; and see T F T Plucknett, *A Concise History of the Common Law*, 5th edn. Little Brown and Company, Boston, 1956, at pp. 22-26.

[6] See S&M1, p. 46, note 2, and see Henry I's Pipe Roll, 1130, reproduced in S&M1, at p. 49 ff.

coronation charter[1], were enshrined in the revised *Magna Carta*, which was reaffirmed by each king at the beginning of his council meetings.[2] The *Magna Carta* had a turbulent history during the thirteenth century.

During the reign of Henry III it was confirmed at least nine times[3]; at the 1253 confirmation Henry was required to take an oath reminiscent of his coronation oath: 'So help me God, all these will I faithfully keep inviolate as I am a man, a Christian, a knight, a crowned and anointed king,'[4]. Henry III venerated the Anglo-Saxon Saint Edward the Confessor; he rebuilt Edward's Westminster Abbey[5]; and in 1269, Henry had Edward's body placed ceremonially in a new coffin which he shouldered himself when it was carried to its new exotic shrine in Westminster Abbey.[6] Henry III named his eldest son Edward, a name theretofore unbestowed upon the sons of the Anglo-Norman dynasties; he caused the legendary meeting between St John the Evangelist and Edward to be painted on the walls of the Chapel of St John in the Tower of London.[7] The authors of *The Oxford Illustrated History of the British Monarchy* assert that Saint Edward the Confessor's name was inserted in the coronation oath shortly after Edward's body had been interred in the shrine.[8] This of course is entirely possible if one accepts my hypothesis advanced above[9], that a form of the coronation oath not unlike that later examined by Henry VIII, was in fact devised in the reign of Henry II: all that Henry III would have to do would be to add a reference to Saint Edward in the clause relating to the 'righteous Christian kings of

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[1] see p. 177 *supra.*

[2] see for example first *parlement* of Richard II, *Rotuli Parliamentorum*, III, 5-7 [French], reproduced in S&M1, at p. 232-234; I Henry IV c. 1 (*Statutes at Large*, p. 393); 2 Henry VI, c. 1 (*Statutes at Large*, p. 466); and see the note in *Statutes at Large* which refers to *Co. Litt.* 81, and the list of confirmations of the Charter, which number thirty after the Confirmation of 25 Edward I, up to the time of the fourth year of Henry V; all of these citations are cap. 1 —that is, the first statement or enactment of the meeting of that council or *parlement.*

[3] 1216, 1217, 1218, 1218 (Stubbs, *Constitutional History* Vol. 2, p. 31), 1223 (— '*spontanea et bona volantate nostrd' ibid.* p. 37), 1225 (*ibid.* p. 37), 1253 (*ibid.* p. 68), 1265 (Stubbs, *ibid.*, p. 97), 1266 (*ibid.* p. 102)

[4] Stubbs, *Constitutional History*, Vol. 2, p. 68-69.

[5] Edward the Confessor had been responsible for enlarging the church on a grand scale, but he was too ill to attend its consecration in December 1065, and he died a month later. Henry III, in addition to rebuilding the Abbey, built within it a great shrine to Edward. – see *The Oxford Illustrated History of the British Monarchy, loc.. cit.*, p. 650-651

[6] see *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Griffiths, OUP, New York, 1988, reprinted with corrections, 1989, 1992, at p. 202

[7] see Marc Bloch, *The Royal Touch, Sacred Monarchy and Scrofula in England and France*, translated by J E Anderson, Routledge & Kegan Paul, London, 1973; translated from *Les Rois thaumaturges*, 1961, Max Leclerc et Cie, p. 94

[8] see *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Griffiths, OUP, New York, 1988, reprinted with corrections, 1989, 1992, at p. 202. They give no source.

[9] see p. 178 ff., *supra.*

England.'[1]

BRACTON AND THE OATH

Under Henry III, between 1250 and 1260[2] Bracton[3] edited the treatise on *The Laws and Customs of England*, which had been written some decades earlier, probably in the 1220s or 1230s[4]. This treatise (usually known as 'Bracton') has been the subject of many conflicting interpretations over the years.[5]

Essentially, the whole thrust of Bracton's exegesis is that the king is the 'fountain of justice and common right'.[6] It is from justice that all rights arise as from a fountainhead[7]; it is the king who has the jurisdiction to grant liberties and with respect to actions,[8] for the essence of the crown is to exercise justice and judgement and to maintain the peace, and without

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[1] See text of the 'Henry VIII oath', and Henry's amendments to it, compared with the oath from the *Liber Regalis* at p. 216, *infra*.

[2] C H McIlwain in *Constitutionalism, Ancient and Modern*, 1940, Cornell University Press, rev. edn. 1947; third printing, Cornell paperbacks, Cornell University Press, Ithaca, New York, 1966, dates Bracton's treatise to 1259, the date preferred by Maitland and Gütterbock, see note 2 p. 69, and p. 78. John H Baker dates Bracton's editing of the text to the 1250s—see note 4, at p. 187 below.

[3] Henry de Bracton was a writer and a judge of the court *coram rege* until 1257; he served in west country judicial commissions until 1268 when he died, having become chancellor of Exeter in 1264. *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine (*ed.*), Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University Press, Cambridge Mass., 1968, in 4 Volumes; *Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 19122 Yale University Press; translation copyright 1968 Harvard—hereinafter called Bracton. The extracts from Bracton drawn upon are at Appendix III.

[4] See John H Baker's note on Bracton, 69-71, at p. 70 in A W B Simpson, (*ed.*) *Biographical Dictionary of the Common Law*, Butterworths, London, 1984. Baker says that modern research shows the original text probably to have been written 1220-1230, and that Bracton himself was probably the later editor during the 1250s, but as Baker says, 'it seems charitable to assume that the editorial work was never finished.' This would account for the considerable mistakes, muddles and errors in the text; and it would also account for the failure of the text accurately to reproduce Henry III's coronation oath. .

[5] Cf. Professor McIlwain's famous question: 'Was Bracton then an absolutist, a constitutionalist, or was he just a blockhead?' in *Constitutionalism, loc. cit.*, at p. 73, and his preceding discussion. My detailed analysis of Bracton is at Appendix III. McIlwain was writing when it was still thought that Bracton himself had written the fundamental text, and a later hand had made erroneous amendments.

[6] as was later asserted by Serjeant Ashley in *Darnel's case* (*The Five Knights Case* (*Darnel's* case), 3 Charles I, 1627, *Cobbett's Complete Collection of State Trials*, Vol. III, p. 1, at p. 150), and by Charles I's Attorney General in the case of *The King against John Hampden* (*The Ship Money case*), 3 State Trials, 825 ff.; (Sir John Banks, at p. 1024.; he cited as authorities 1 Com. 240; 13 Edw. IV, 8; Bracton, lib. 3, cap. 9, 8 Hen. 6, 20; 11 Rep. f. 72; 17 Edw. 3, 49.)

[7] see Bracton, *loc. cit.*, p. 23.

[8] see Bracton, *loc. cit.*, p. 166, and p. 304.

these the crown could neither subsist nor endure.[1] The king has this jurisdiction by virtue of his oath taken at coronation, whereby he swears 'three promises to the people subject to him' to maintain the peace, to forbid rapacity, and that he cause all judgements to be given with equity and mercy.[2] The purpose of a king is to do justice, and enforce laws to uphold justice, so as to guarantee peace.[3]

Jurisdiction and the responsibility for the peace, things which are the king's alone by virtue of his coronation oath, cannot be transferred, but remain in the king,[4] and by his coronation the king is bound. [*Et sciendum quod ipse rex et non alius, si solus ad hoc sufficere possit, cum ad hoc per virtutem sacramenti teneatur astrictus.*[5]] However, a person may exercise a delegated jurisdiction in matters belonging to the king's jurisdiction and peace, such authority being given him by the king; but the delegation does not negate the original jurisdiction remaining in the king.[6]

Now Bracton appears to have reproduced a copy of an oath that was out of date by Henry III's time[7] (he cites the *tria precepta*),[8] which does not include any reference to maintenance of laws and customs.

But he speaks of 'English laws and customs by the authority of kings' (*leges Anglicanæ et consuetudines regum auctoritate*) commanding and forbidding, which laws and customs have been 'confirmed by the oath of kings'.[9] Now the only oath of a king which confirmed laws and customs was the oath of governance—the coronation oath. It is of course true that an oath of a king would confirm a particular charter, like *Magna Carta*, but it is not of these that Bracton speaks. He is giving directions for lesser judges as how best to decide on suits that come before them in accordance with 'English laws and customs'.[10] It is these laws and

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[1] See Bracton, *loc. cit.*, p. 167.

[2] See Bracton, *loc. cit.*, p. 304.

[3] See Bracton, *loc. cit.*, p. 305. And see 'The needs of a king', Bracton, p. 19.

[4] See Bracton, *loc. cit.*, p. 167, folio 55b.

[5] see Bracton, *loc. cit.*,, Latin text, p. 304, folio 107.

[6] See Bracton, *loc. cit.*, p. 167, folio 55b.

[7] see Richardson, *Traditio*, 1960, *art. cit.*. quoted at note 4, at p. 183 *supra*.

[8] See Bracton, *loc. cit.*, p. 304, folio 107.

[9] See Bracton, p. 21, folio 1b. '...Quae quidem, ...et sacramanto regum cofirmatae...'

[10] See Bracton, *loc. cit.*, p. 20, folio 1, and p. 19, folio 1b.

customs which he says have been confirmed by the oath of kings.[1]

I have suggested earlier,[2] that Henry II swore a coronation oath to uphold laws and customs; Bracton's text on the *Laws and Customs of England* would certainly seem to suggest that Henry III swore such an oath. Moreover, he undoubtedly saw as imperative the king's obligation to maintain the rights of the crown[3]. Thus the text itself of Bracton's *Laws and Customs* suggests that the coronation oath of the king was different from the one which is quoted in the manuscript as being that oath; Professor Richardson had certainly concluded that Henry III's oath was far different from that quoted in Bracton.[4] I can offer no simple explanation for this contradiction, except to suggest that Bracton knew what the king had sworn and based his editing of the original text on his personal knowledge, and had not completed his editing of that part where the original writer had in error copied the text that was set out in the old twelfth century Ordine, (which of course need bear no resemblance to the actual oath taken by the king.) That part where the old oath is set out is far into the text at folio 107, and Bracton's editing may well not have got to that point.

Bracton's treatise demonstrates that the coronation oath was, in his time, a commonplace *indicia* of the basis of kingly jurisdiction, and because it was an fearful oath, sworn in the name of Jesus Christ and on holy relics upon the altar, it also provided a basis (indeed, the only basis) for judging the king, as he stood before the people as the anointed of Christ, and it was in return for these promises that he received his imprimatur before God and the people.

The king by taking the coronation oath became 'the just man'[5] *id est in homine iusto*— 'The just man has the will to give each his right, and thus that will is called justice. His will to give each his right refers to what is intended, not to what is done...'[6] The king as the just man then stands *in loco parentis*, or as *parens patriæ*, who has the jurisdiction to do justice and

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[1] See Bracton, *loc. cit.*, p. 21, folio 1b.

[2] See discussion under Henry II and Glanvill, *supra*, at p. 178 ff..

[3] See Bracton, *loc. cit.*, p. 167 [folio 55b]

[4] See H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, especially p. 172, and his note 52, referring to *Traditio*, 6 (1948) 75-77.

[5] Cf. The 'lawful man' of Anglo-Saxon law, see p. 56, *supra*, and particularly, note 7 at p. 56.

[6] *Homo enim iustas habet voluntatem tribuendi unicuique ius suum, et ita ella voluntas dicitur iusta. Et dicitur voluntas tribuere ius suum, non quantum ad actum sed quantum ad affectionem.* See Bracton, *loc. cit.*., p. 23 [folio 2b]

the will to give each his right. The whole of Bracton's subsequent treatise is about how this jurisdiction is or should be exercised, both by the king, and by those to whom he delegates his power of judgement.

The coronation ceremony is the means through which the king's election is made or ratified by the people, in which he undertakes with the oath of governance to assume responsibility for the laws and customs of the realm, and to see to their enforcement with equity and mercy; and in which as a result of the foregoing he is solemnly anointed and thereby assumes the status of 'the just man'; and at the end of which as an earnest and tangible symbol of his entry into this peculiar and unique estate, he is provided with the indicia of power (the crown, the sword, the ring etc.) Insofar as this coronation ceremony is an English custom, antedating both parliament and statute law, one of antiquity which has been religiously followed for at least 1200 years, and without which no king of England and its dominions has ever taken his office, I would also argue that the coronation ceremony, and in particular the recognition, the oath, and the anointing, has and have the force of law. To quote Bracton, *Consuetudo vero quandique pro lege observatur in pertibus ibu fuerit more utentium approbata, et vicem legis obtinet. longævi enim usus et consuetudinis non est vilis auctoritas.*[1] The ceremony was always and still is approved by those who use it, approved by the magnates and the *res publica*, and by the king. In my opinion therefore, the coronation ceremony is part of the law of the land.

Having regard to the discussion above on *Magna Carta*, and the influence of the coronation oath upon it, I would also submit that the coronation ceremony not only is part of the law of the land, but that the coronation oath also was in part responsible for the evolution of what is still known today to lawyers as the common law, and that the oath, together with the rest of the ceremony, today still stands as part of that common law.

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[1] 'Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight.'—see Bracton, p. 22, Latin text, folio 2; and see English text at p. 22.

EDWARD I AND THE OATH

Edward I, sometimes known as the 'English Justinian'[1], was 'by instinct a lawgiver, and he lived in a legal age.'[2]. He presided over significant constitutional, legislative and administrative change in England, 'organised on the principle of concentrating local agency and machinery in such a manner as to produce unity of national action, and thus to strengthen the hand of the king, who personified the nation.'[3] Stubbs' proposition is that Edward I made the interests of the crown and the realm identical[4], and that in his legislation, which was considerable, 'the 'spirit of the Great Charter' was discernible.[5] Edward called to his *parlement* of November 1295 the archbishops and bishops, the earls and barons, two knights of each shire, two citizens of each city, and two burghers of each borough; the time and purpose of the gathering are clearly expressed, as the Great Charter prescribed.[6] Edward's writ to the prelates quotes part of the Code of Justinian—*ut quod omnes similter tangit ab omnibus approbetur*—transmuted by Edward from a mere legal maxim into a great political, and (Stubbs says) constitutional principle[7]:

> As the most righteous law, established by the provident circumspection of the sacred princes, exhorts and ordains *that that which touches all shall be approved by all*, it is very evident that common dangers must be met by measures concerted in common; the whole nation, not merely Gascony is threatened; the realm has already been invaded; the English tongue,

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[1] see Maitland, *Constitutional History*, p. 18, though Maitland says the suggested comparison 'is not happy' since, while Justinian attempted to give final form to a system 'which had already seen its best days', ... 'Edward, taking the whole nation into his counsels, legislated for a nation which was only just beginning to have a great legal system of its own.' Maitland says: 'Sir M. Hale, writing late in the seventeenth century, says that more was done in the first thirteen years of that reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together. We can hardly say so much as this; still we may say the legislative activity of those years remains unique until the reign of William IV; for anything which may compare with his statutes we must look forward from his day to the days of the Reform Bill.' And later Maitland says: 'In Edward's day all becomes definite = there is the Parliament of the three estates, [note here that Maitland echoes Stubbs' words, at *ibid.* p. 305] there is the King's Council, there are the well known courts of law. Words have become appropriated = the king in parliament can make statutes; the king in council can make ordinances; a statute is one thing, an ordinance is another. It is for this reason that any one who would study the constitution of older times, should make certain that he knows the constitution as it is under Edward I.' ; see pp. 18-21

[2] see Stubbs, *Constitutional History*, Vol. 2, p. 111.

[3] see Stubbs, *Constitutional History*, Vol. 2, p. 305

[4] Stubbs, *Constitutional History*, Vol. 2, p. 303

[5] see Stubbs, *Constitutional History*, Vol. 2, p. 113; for his legislation see also Stubbs, *Constitutional History*, Vol. 2, Chapter XIV, and *Select Charters*, Part VII.

[6] see Stubbs, *Constitutional History*, Vol. 2, pp. 133-4; and see *Select Charters*, p. 482 ff.

[7] see Stubbs, *Constitutional History*, Vol. 2, pp. 133-134; the quotation is from the fifth book of the Code, title 56, law 5, quoted by Stubbs, *ibid.*, and see his footnote 4, p. 133; and see *Select Charters*, p. 484-5

> if Philip's power is equal to his malice, will be destroyed from the earth; your interests, like those of your fellow citizens, are at stake.[1]

In 1297, Edward I's son, (in Edward's absence abroad) under pressure from the clergy and the earls confirmed Henry III's 1225 Charter[2] with six additional provisions insisted upon by the earls[3], but with a saving provision for the crown[4] (the ***Confirmatio Cartarum***). Edward I again confirmed the charter in 1299, with a saving for the crown with regard to his forest rights[5], but was forced to reconfirm it without the saving.[6] In 1300 the king again confirmed the charter at the request of 'his prelates earls and barons assembled in his parliament'[7] with an addition of twenty further articles, but with a saving of the king's prerogative.[8]

> *XX. ... And notwithstanding all these things before mentioned.... both the king and his council and all they that were present at the making of this Ordinance, will and intend that the Right and Prerogative of his Crown shall be saved to him in all things.*[9]

Conflict between Edward and his earls culminated in his calling a *parlement* in Lincoln in 1301.[10] The conflict stemmed from two main issues: the barons wanted considerable

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[1] This is Stubbs' translation in his *Constitutional History*, Vol. 2, p. 134-5 of the following Latin original, reproduced in *Select Charters*, pp. 484-5—'Sicut lex justissima, provida circumspectione sacrorum principum stabilita, hortatur et statuit ut quod omnes tangit ab omnibus approbetur, sic et nimis evidenter ut communibus periculis per remedia provisa communiter obvietur. Sane satis noscis et jam est, ut credimus, per universa mundi climata divulgatum, qualiter rex Franciae de terra nostra Vasconiae nos fraudulenter et cautelose decepit, eam nobis nequiter detinendo. Nunc vero praedictis fraude et nequitia non contentus, ad expugnationem regni nostri classe maxima et bellatorum copiosa multitudine congregatis, cum quibus regnum nostrum et regni ejusdem incolas hostiliter jam invasit, linguam Anglicam, si conceptae iniquitatis proposito detestabili potestas correspondeat, quod Deus avertat, omnino de terra delere proponit. ...'—Edward's writ of summons of 30 September 1295 to the Archbishops and clergy.

[2] 'that is, to wit, the great Charter as the Common Law, and the Charter of the Forest, according to the assise of the Forest, for the wealth of our realm'—see the inscribed addendum in *Statutes at Large*, 9 Henry III, p. 10; the original 1215 document (*Magna Carta*) included both the charter of liberties and the charter of the forest, but were split in the confirmations in Henry III's reign. The *Confirmatio Cartarum* reunited them.

[3] see the text of the *Confirmatio Cartarum*, articles II - VII, Stubbs, *Select Charters*, p. 494-497; and see *Statutes at Large*, 25 Edward I, stat. 1, p. 131-133

[4] i.e., of 'the ancient aids and prises due and accustomed'—see 25 Edw. I, stat. 1, cap. VI, *Statutes at Large*, p. 133.

[5] see Stubbs, *Constitutional History*, Vol. 2, p. 154-155, and *Statutes at Large*, p. 133, (Statute De Finibus Levatis, 27 Edward I, stat. 1, 1299, *Statutes of the Realm*, i, 126).

[6] Stubbs, *Constitutional History*, Vol. 2, p. 155; *Statutes of the Realm*, i, 131.

[7] *Articuli super Chartas*, 28 Edward I, stat. 3, 1300, *Statutes at Large*, p. 139

[8] II (XI). Nevertheless the King and his Council do not intend, by reason of this Estatute, to diminish the King's Right, for the ancient Prises due and accustomed, as of Wines and other Goods, but that his Right shall be saved to him in all Points—*ibid.*, *Articuli super Chartas*, *Statutes at Large*, 28 Edw. I, stat. 3, c. 2(xi), p. 142

[9] *Articuli super Chartas*, *ibid.*, *Statutes at Large*, 28 Edw. I, stat. 3, c. 20, p. 147.

[10] He summoned the magnates, the prelates, representatives sent by the sheriffs, persons who had complaints or claims in connection with his proposed forest reforms (who were to attend to show their grievances), and lawyers from Oxford and Cambridge—see Stubbs, *Constitutional History*, Vol. 2, p. 157, and *Select Charters*, p. 499

disafforestment of the king's forests so that the land could be seised by the community (that is, the barons); the clergy refused to make payments to the king which the pope had prohibited. As to the first, Edward I saw disafforestment as a breach of his coronation oath[1], which required him to maintain the rights of the crown. Maintenance of the rights of the crown included not only an inalienable right of sovereignty, but also the preservation of the prerogatives of the king. The second was both a breach of the clergy's allegiance to the king, and (were he to acquiesce in the failure to pay) also an infringement on his coronation oath, which required him to maintain the inalienable sovereignty of the land.[2]

Between 1275 and 1307 Edward I referred on many occasions[3] to his duty to maintain the rights of the crown, to which he was sworn in his coronation oath. Most of these occurred when he was combating perceived incursions, or attempted incursions, on to his sovereignty by the pope or the church in Rome, or onto the royal estate or ancient demesne by the barons, the most telling being:

> [in a letter to Gregory X, in response to his request for the payment of the annual Peters-pence due to Rome:] ... *et iureiurando in coronacione nostra presito sumus astricti quod iura regni nostri servabimus illibata nec aliquid quod diadema tangat regni eiusdem absque ipsorum* [sc *prelatorum et procerum*] *requisito consilio faciemus.*[4]

Having pointed out that in his view the most recent baronial demands were in breach of his coronation oath, Edward under protest agreed to most. Meanwhile, pope Boniface had claimed Scotland as a fief of Rome, and forbade Edward to molest the Scots; Edward had received the bull[5] at Sweetheart Abbey[6] in 1300, and in acknowledging receipt, reasserted the principle he had laid down in 1295—'it is the custom of the realm of England that in all things touching the state of the same realm there should be asked the counsel of all whom the matter concerns[7]'. Edward laid the bull before the Lincoln *parlement*. The *parlement*

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[1] See Stubbs, *Constitutional History*, Vol. 2, pp. 156 *et seq* ; Stubbs' sources are: *Parliamentary Writs*, i.,104, and Taylor, *Glory of Regality*, p. 412, and p. 109, note 2.

[2] This is perforce a very brief summary of a complex time in history.

[3] The instances are set out in Professor Richardson's article, 'The English Coronation Oath' of 1949—H G Richardson, 'The English Coronation oath', *Speculum*, XXIV, 1949, pp. 44-79, at pp. 49-50.

[4] H G Richardson, *Speculum*, 1949, *ibid.*, p. 49; sourced to *Parliamentary Writs*, I, 381-382

[5] Bull of Boniface, dated 27 June 1299 at Anagni, see Stubbs, *Constitutional History*, Vol. 2, p. 150, n. 1, sourced to 'Hemingb. ii. 196; M. Westminster, p. 436; Wilkins, Cone. ii. 259; Foed. i. 907"

[6] Sweetheart Abbey, Galloway, received there by Edward on 27 August, 1300—see Stubbs, *Consititutional History*, Vol. 2, p. 150.

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

thereupon wrote a letter dated 12 February 1301 to the pope:

> affirming that kings of England never have answered or ought to have answered touching this or any of their temporal rights before any judge ecclesiastical or secular, by the free preeminences of the state of their royal dignity and by custom irrefragably preserved at all times; therefore, after discussion and diligent deliberation, the common, concordant and unanimous consent of all and singular has been and is and shall be, by favour of God unalterably fixed for the future, that the king shall not answer before the pope or undergo judgment touching the rights of the kingdom of Scotland or any other temporal rights: he shall not allow his rights to be brought into question, or send agents; the barons are bound by oath to maintain the rights of the crown, and they will not suffer him to comply with the mandate even were he to wish it. This answer is given by seven earls and ninety-seven barons for themselves and for the whole community of the land, and is dated on the 12th of February.[1]

It is difficult to see these developments as other than statements of sovereignty emanating from the king's commitment to maintain the rights of the crown in his coronation oath.

But as a result of continual frustration with the English clergy and the archbishop of Canterbury in particular, and in part to evade the execution of the forest article to which he acceded under protest in 1301[2], in 1305 Edward sought and was granted by the pope Clement V a bull of absolution from the grants, oaths, and undertakings with regard to the charters (including the *Confirmatio Cartarum*) that he had taken. In this bull dated 29 December 1305, Clement states, *inter alia*:

> *... presertim cum, quando coronationis tue susepisti sollempia, de honore et iuribus corone prefate servandis, icut ex parte tua asseritur, prestiteris iuramentum.*[3]

While the seeking of such a papal bull could be seen as a voluntary derogation from the sovereignty which Edward had been at such pains to assert, the text of the bull proves that Edward's coronation oath did contain an undertaking not to alienate the rights of the crown.

Now early historians had thought that the forms set out in the coronation Orders represented what the kings had sworn[4]. More recent study has demonstrated that this is not

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

[2] see Stubbs, *Constitutional History*, Vol. 2, p. 50.

[3] see Richardson, *Speculum*, XXIV, 1949, *art. at.*, at p. 50; he sources this to *Foedera*, I, ii, 978; Bémont, *Chartres des libertés anglaises*, p. 111.

[4] see for example, Legg, *English Coronation Records*, 1901.

the case.[1] As P L Ward states, there had been in earlier centuries a diversion of interests and preoccupations as between the annalists and chroniclers, the liturgists and the historians[2]; and in this century, 'a regrettable lack of contact between liturgists and general historians.'[3] (One could also add, a regrettable lack of cross-fertilisation as between modern liturgists, historians and lawyers, the last of whom, with the notable exception of Maitland, appear to have almost ignored the existence of the coronation oaths.) The flurry of detailed, minute and (almost overwhelming) exhaustive examination of the coronation oath of Edward II which occurred from the 1930s to the 1960s bears witness to the significance which historians have given to it, in the light of what they considered to be its constitutional significance.[4]

But it is the oath of Edward I [somewhat unknown quantity though it is] and the grants, ordinances, and embryonic statutes which he granted, authorised or acquiesced in, in pursuit of his notions of kingship, sovereignty, and the peace and good government of his realm, which is of the greater constitutional significance. It was the coronation oath of Edward I (and also those of John and Henry III) which was his (and their) prime motivator and directive. It was this oath, a direct descendant of the oaths of the pre-Conquest kings, and the only continuous thread of duty, obligation, and constraint, which provided both the fundamental basis for, and the only restraint upon, the promulgation and observance of

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[1] see for example Richardson and Sayles, *BIHR*, 1936, at p. 129-130; Richardson, *Traditio*, 1960, p. 162; and see W. Jerdan's prefatory remarks at p. 1 of *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.

[2] see P L Ward, 'The Coronation ceremony in Medieval England', *Speculum*, Vol. XIV, 1939, pp. 160-178, at p. 161

[3] see Janet L Nelson, 'The Earliest Surviving Royal Ordo: some Liturgical and Historical Aspects', in *Authority and Power: Studies on Medieval Law and Government presented to Walter Ullmann on his seventieth birthday*, Brian Tierney and Peter Linehan, editors, Cambridge University Press, Cambridge, 1980, pp. 29-48, at p. 31

[4] see Bertie Wilkinson, 'The Coronation Oath of Edward II,' in J G Edwards, V H Galbraith, and E F Jacob, (*eds.*), *Historical Essays in Honour of James Tait*, Manchester, Printed for the Subscribers, 1933; H G Richardson and G O Sayles, 'Early Coronation Records,' *Bulletin of the Institute of Historical Research*, XIII, 1935-36, pp. 129-145; H G Richardson and G O Sayles, 'Early Coronation Records, (concluded),' *Bulletin of the Institute of Historical Research*, XIV, 1936-37, pp. 1-9, and pp. 145-148; P L Ward, 'The Coronation Ceremony in Mediaeval England,' *Speculum*, XIV, 1939, pp. 160-178; H G Richardson, 'The English Coronation Oath,' *Transactions of the Royal Historical Society*, Vol. 23, 4th series, 1941, pp. 129-158; B Wilkinson, 'The Coronation Oath of Edward II and the Statute of York,' *Speculum*, Vol. XIX, 1944, pp. 445-469; H G Richardson, 'The English Coronation Oath,' *Speculum*, Vol. XXIV, 1949, pp. 44-75; Robert S Hoyt, 'Recent Publications in the United States and Canada on the History of Representative Institutions before the French Revolution,' *Speculum*, Vol. 29, 1954, pp. 356-377; Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502; L B Wilkinson, 'Notes on the Coronation Records of the Fourteenth Century,' *English Historical Review*, Vol. 70, 1955, pp. 581-600; Robert S Hoyt, 'The Coronation Oath of 1308,' *English Historical Review*, Vol. 71, 1956, pp. 353-383; Robert S Hoyt, 'The Coronation Oath of 1308: the Background of "Les Leys et les Custumes",' *Traditio*, Vol. XI, 1955, pp. 235-257; H G Richardson, 'The Coronation in Medieval England,' *Traditio*, Vol. 16, 1960, pp. 111-202; Walter Ullmann, '"This Realm of England is an Empire"', *Journal of Ecclesiastical History*, Vol. 30, No. 2, April 1979, 175-203

the law.

One can conclude then:

- that the coronation oath sworn by English kings prior to the time of Edward II included an undertaking to maintain the rights of the crown, which was perceived by the kings as including not only an inalienable right of sovereignty, but also preservation of the prerogatives of the king; and that this oath could have been not unlike the 'Henry VIII oath'.[1]
- that the common law, as it evolved up to the time of but especially under Edward I[2], can be seen as directly derivative from the coronation oath of the English kings, particularly from their undertaking to keep the peace, to forbid rapacity and iniquity without discrimination as to rank, to temper judgement with mercy and equity[3], and to enact and hold fast right (just) law[4], to restore to the people the laws of Edward the Confessor, as amended by his successors[5], and to maintain the rights of the crown.[6]
- that written law, as represented by the grant of *Magna Carta* by John and its subsequent confirmations, together with the adumbration of its principles in 'estatutes'[7] under Edward I, also

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Diarmaid MacCulloch, 'Henry VIII and the Reform of the Church', in *The Reign of Henry VIII, Politics, Policy and Piety*, Diarmaid MacCulloch (*ed.*), Macmillan Press Ltd., Basingstoke, 1995, 159-180

[1] Bishop Stubbs had noted long ago the possibility that Edward I may have taken such an oath—see William Stubbs, *The Constitutional History of England in its Origin and Development*, 3 Volumes, 3rd edn., Clarendon Press, Oxford, 1884; reprint edition, William S Hein & Co Inc., Buffalo, New York, 1987; Vol. II, §179, p. 109, n. 2. Stubbs sources this to Machlinia's edition of the Statutes, *Statutes of the Realm*, I. 168 [this is the text I refer to as 'the Henry VIII oath']; and to Taylor, *Glory of Regality*, pp. 411, 412. He goes on to say: 'This oath certainly has a transitional character, and may possibly be that of Edward I. Trokelowe, p. 37, says of him, "Nihil erat quod rex Edwardus IIItius pro necessitate temporis non polliceretur," possibly referring to some novelty in the oath. The following extract from a MS. Chronicle perhaps may illustrate the point ; "Qui statim coronam deposuit, dicens quod nunquam capiti suo redideret donec terras in unum congregaret ad coronam pertinentes quas pater suus alienavit, dando comitibus et baronibus et militibus Angliæ et alienigenis." MS. Rawlinson, B. 414; and Ann Hagnebie.'

[2] see Maitland, *Constitutional History*, *supra*, p. 22-23: 'Still we note that from the middle of the thirteenth century our common law has been case law, that from 1292 onwards we have law reports, that from 1194 onwards we have plea-rolls. This term common law which we have been using, needs some explanation. I think it comes into use in or shortly after the reign of Edward the First. The word "common" of course is not opposed to "uncommon": rather it means "general", and the contrast to common law is special law. Common law is in the first place unenacted law; thus it is distinguished from statutes and ordinances. In the second place, it is common to the whole land; thus it is distinguished from local customs. In the third place, it is the law of the temporal courts; thus it is distinguished from ecclesiastical law, the law of the Courts Christian, courts which throughout the middle ages take cognisance of many matters which we should consider temporal matters [e.g. marriages and testaments]. Common law is in theory traditional law — that which has always been law and is still law, in so far as it has not been overridden by statute or ordinance.' But note my analysis of Ullmann's observations in *Principles of Government and Politics in the Middle Ages*, *op. cit.*, 1961 *supra* at note 4, p. 184, note 5 at p. 184, and note 6 at p. 184, which I believe indicates that the pre-existing common law was consolidated as the *lex terrae* at the time of John's Great Charter, both Henry III and Edward I acknowledging this, but the underlying source of the common law, the coronation oath, remained a prerequisite for any governance or law.

[3] up to the time of William I, see my Appendix I.

[4] see the coronation oath of William I, my Appendix I.

[5] see the coronation charter of Henry I, the coronation charter of Stephen, coronation charter of Henry II, see my Appendix I.

[6] see Henry III and Edward I in my Appendix I.

[7] See the use of the word 'estatute', in *Articuli super Chartas*, *Statutes at Large*, 28 Edw. I, stat. 3, c. 2(xi), p. 142, II (XI).— 'Nevertheless the King and his Council do not intend, by reason of this Estatute, to diminish the King's Right, for the ancient Prises due and accustomed, as of Wines and other Goods, but that his Right shall be saved to him in all Points.' The word 'statute' would seem to be an abbreviation of the word 'estatute', which at that time would seem to have

grew directly from the commitments undertaken by the king in his coronation oath. This in turn reinforces the hypothesis that the old coronation oath replicated for Henry VIII *was* an oath taken by kings at their coronation[1], for that oath, in addition to the preservation of the rights of the crown, contained and undertaking by the king to 'graunte to holde lawes and customes of the realme and to his power kepe them and affirme them which the folk and people haue made and chosen'[2] (*'et que il grauntera a tenure les leyes et custumes du royalme, et a son pouoir les face garder et affirmer, que les gentes de people averont faitz et eslies'*[3])—this is exactly the kind of operation that Edward I engaged in with his estates, and represents the primary jurisdiction of the king to maintain the laws and customs of the realm (Henry II, Henry III) and could also be a reference to the continual reaffirmation of the *Magna Carta* under Henry III and (particularly as the *Confirmatio Cartarum*) under Edward I.

- that the ultimate, and indeed the only sanction, which the people had against their king, or that the king had against incursions on his and/or their sovereignty and that of the realm, lay in the coronation oath.

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meant the agreement by the king and his council to petitions from the three estates of the realm (the lords, clergy, and the laity holding non-hereditary positions, this last category becoming known eventually as 'the commons').

[1] see the discussion at pages 178-180, and pp. 187-190 *supra*, and see my Appendix I, Edward I, Edward IV, and Henry VIII.

[2] see p. 216, *infra* for English translation submitted to Henry VIII; and see p. 250, *infra* for the French original. See also Appendix I.

[3] see Stubbs' text, sourced to *Statutes of the Realm*, i, 168, which he speculates could be the oath of Edward I, and see his footnotes, *Constitutional History*, Vol. II, §179, p. 109, n. 2; and see Blackstone's text, my Appendix I.

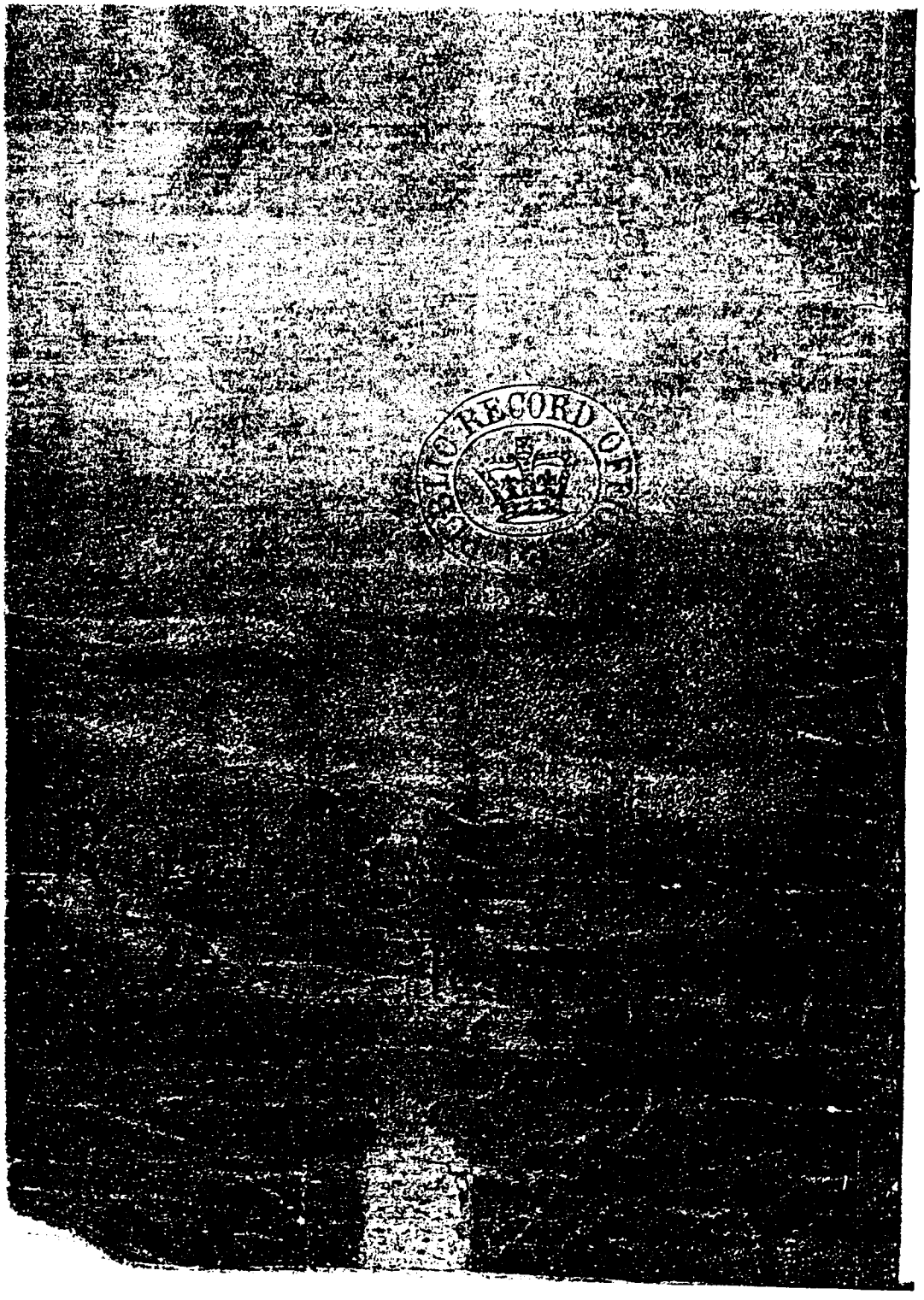
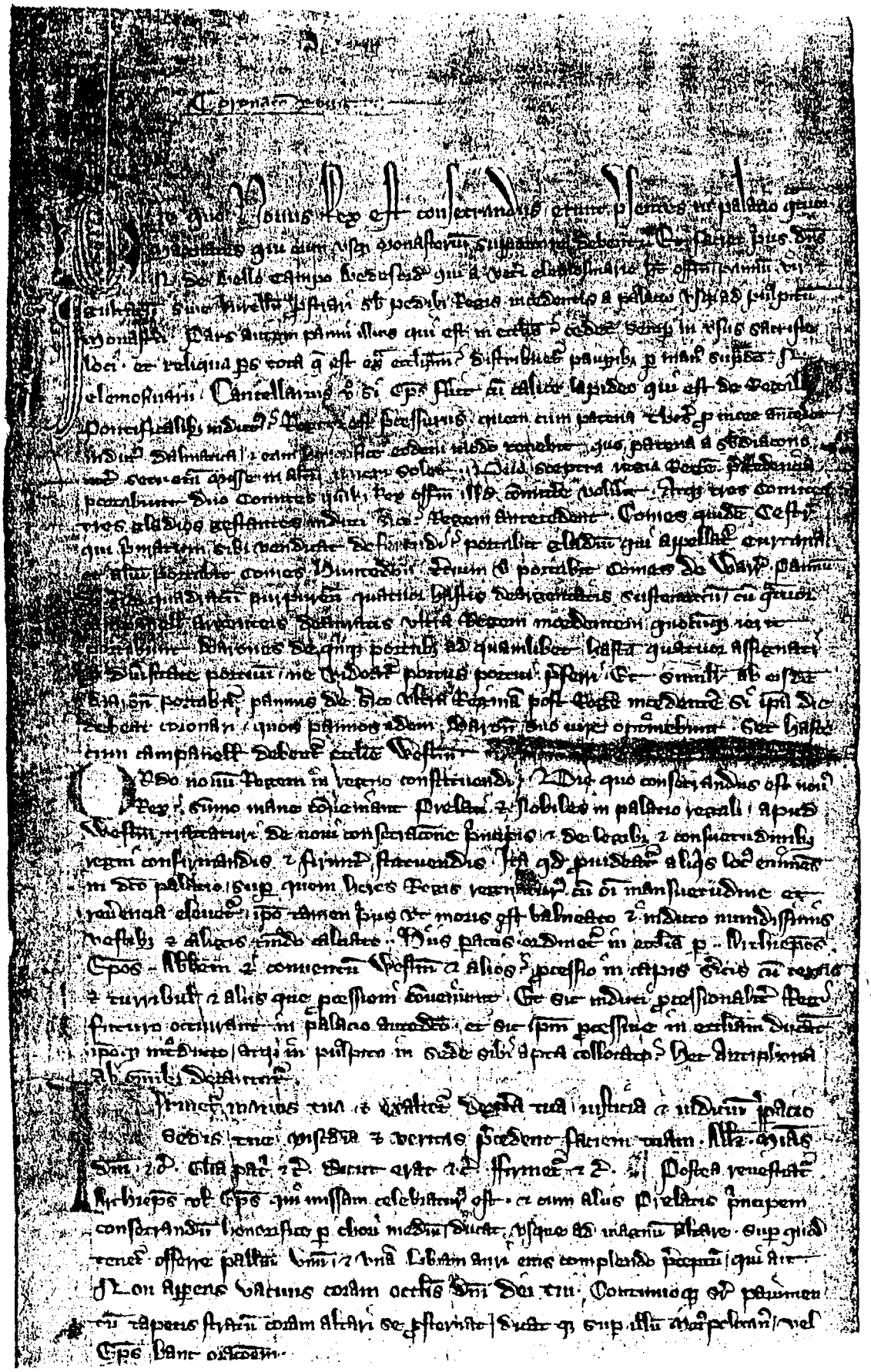
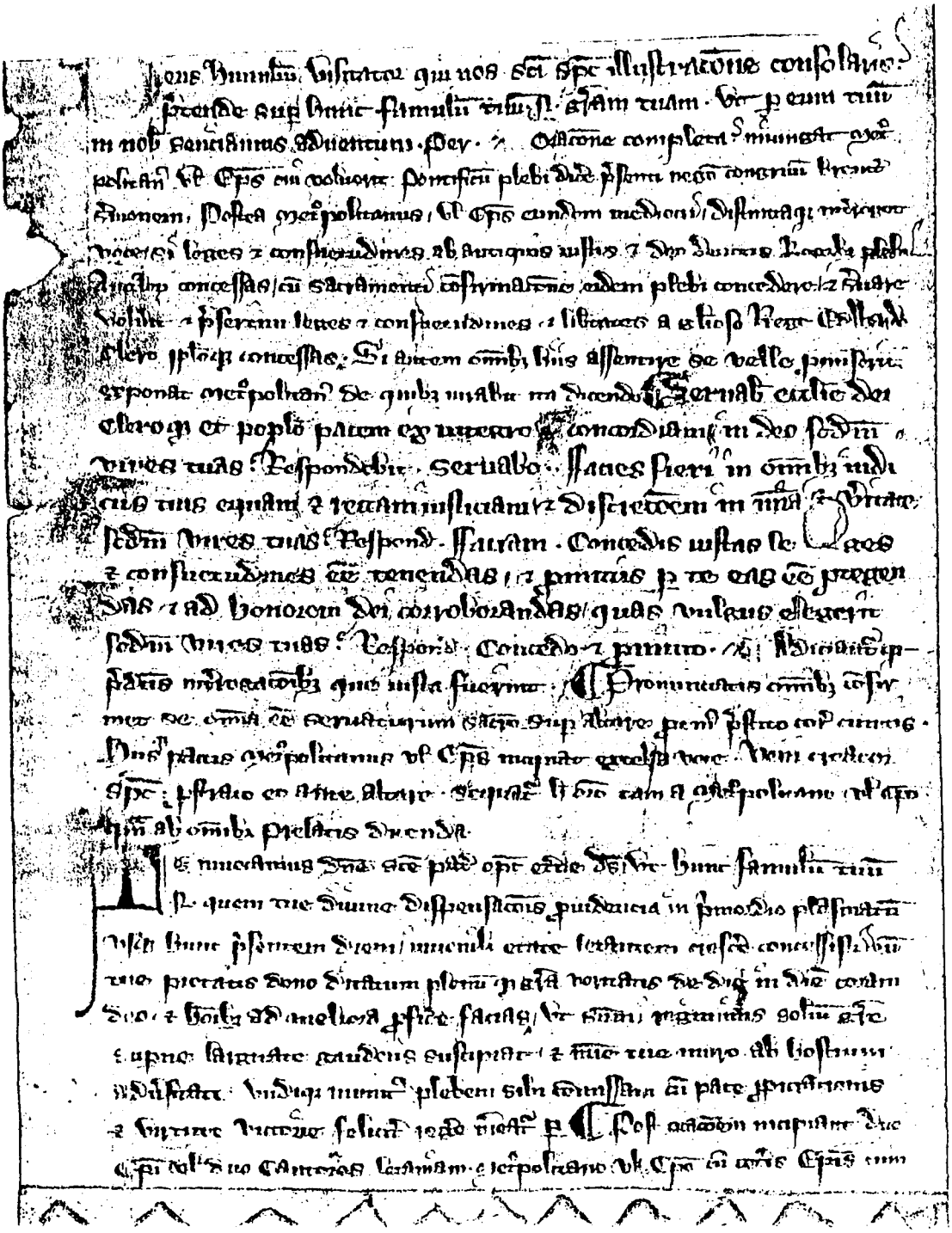


Illustration 1

Rotulus Coronationis Regis Edwardi II

[PRO C 57 1, Edward II]





Mem^{d} quod vicesimo tertio die Martii anno regni
illustrissimi Regis Angliae Jacobi Secundi primo
Iste Rotulus de coronacione Regis Edw^{i} Secundi
liberatus erat per praenobilem virum Franciscum
Dnum Guildford Dnum Custodem magni sigilli
Angliae ad mandatum ipsius Dni Regis, qui manu
propria eundem rotulum eidem Custodi &
tradidit pro Recordo infra Curiam suam
Londini reponendum et servandum.

THE '1308 OATH' CONTROVERSY

EDWARD II'S OATH

From the 1930s to the present time, historians debated the texts of the medieval coronation oaths, most particularly that alleged to have been take by Edward II.[1]

The debate occurred for two reasons. Firstly, it was from about then that the earliest surviving recensions of the clerical Ordo, the *Liber Regalis*, date, and that Ordo contained within it a coronation oath far different from that in the earlier surviving Ordines. Secondly, it was this text of the coronation oath which was so hotly debated by the parliamentarians in the seventeenth century, because it was interpreted as *requiring* the king to assent to bills coming from the houses of parliament, or alternatively because it *did not require* the king to assent to bills passed by the two houses.

Most commentators argue that there appears to have been a change to the coronation oath at Edward II's coronation. It will be remembered that Edward I had been forced into the *Confirmatio Cartarum* in 1297 and the subsequent endorsement in 1301,[2] when he had received the unqualified support of the magnates and the community of the realm for his rights of the crown against the pope in 1301. But in a fit of pique he had thereafter obtained a bull from that pope's successor in 1305 annulling the 1301 confirmation.

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[1] see Bertie Wilkinson, 'The Coronation Oath of Edward II,' in J G Edwards, V H Galbraith, and E F Jacob, (*eds.*), in *Historical Essays in Honour of James Tait*, Manchester, Printed for the Subscribers, 1933; H G Richardson and G O Sayles, 'Early Coronation Records,' *Bulletin of the Institute of Historical Research*, XIII, 1935-36, pp. 129-145; H G Richardson and G O Sayles, 'Early Coronation Records, (concluded),' *Bulletin of the Institute of Historical Research*, XIV, 1936-37, pp. 1-9, and pp. 145-148; P. L Ward, 'The Coronation Ceremony in Mediaeval England,' *Speculum*, XIV, 1939, pp. 160-178; H G Richardson, 'The English Coronation Oath,' *Transactions of the Royal Historical Society*, Vol. 23, 4th series, 1941, pp. 129-158; B Wilkinson, 'The Coronation Oath of Edward II and the Statute of York,' *Speculum*, Vol. XIX, 1944, pp. 445-469; H G Richardson, 'The English Coronation Oath,' *Speculum*, Vol. XXIV, 1949, pp. 44-75; Robert S Hoyt, 'Recent Publications in the United States and Canada on the History of Representative Institutions before the French Revolution,' *Speculum*, Vol. 29, 1954, pp. 356-377; Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502; L B Wilkinson, 'Notes on the Coronation Records of the Fourteenth Century,' *English Historical Review*, Vol. 70, 1955, pp. 581-600; Robert S Hoyt, 'The Coronation Oath of 1308,' *English Historical Review*, Vol. 71, 1956, pp. 353-383; Robert S Hoyt, 'The Coronation Oath of 1308: the Background of "Les Leys et les Custumes",' *Traditio*, Vol. XI, 1955, pp. 235-257; H G Richardson, 'The Coronation in Medieval England,' *Traditio*, Vol. 16, 1960, pp. 111-202; Walter Ullmann, '"This Realm of England is an Empire"', *Journal of Ecclesiastical History*, Vol. 30, No. 2, April 1979, 175-203 Diarmaid MacCulloch, 'Henry VIII and the Reform of the Church', in *The Reign of Henry VIII, Politics, Policy and Piety*, Diarmaid MacCulloch (*ed.*), Macmillan Press Ltd., Basingstoke, 1995, 159-180

[2] Although as Stubbs has remarked, it is strange that such a concession should be 'extorted from a king like Edward I', whose 'ordinary exactions were small', and whose 'reign had been devoted to legislation in the very spirit and on the very lines of the charters.'—see Stubbs, *Constitutional History*, *loc. cit.*, pp. 150-151.

No text of the actual oath which Edward II took is extant[1] and undeniably identifiable as such, the proliferation of the coronation orders and alleged texts of the oath[2] later in the century before the succession of Edward III (and the subsequent reiteration of the texts over many years) have suggested that there was a change in the oath.[3] Some argue that the oath was revised because of Edward I's reliance on his coronation oath to obtain the bull from the pope annulling his previous confirmation of the charters, the barons wishing to ensure that the new king's oath bound him to observe the charters.[4] (Edward I had seen the disafforestment of the ancient demesne endorsed in the 1301 Charter reaffirmation for the barons' benefit as being a breach of his coronation oath, as it alienated the rights of the crown; but his seeking of the papal bull was also in breach of the oath, as it too amounted to an alienation of the rights of the crown, in that case, of the sovereignty which Edward had been at such pains to protect.)

The most reliable of the texts of the '1308' oath, are those which were promulgated in French, this possibly being the vernacular in which the king would have sworn[5]; but Edward I's concern for the English language suggests the strong likelihood that Edward

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[1] But the Coronation Roll for Edward II is preserved in the Public Records Office, *Rotulus Coronationis Regis Edwardi II*, PRO C 57 1, Edward II—see Illustration 1, at pp. 199-202. Note however that the beginning of this roll is described as *Coronatio Prerogative(a)*? I have to confess that at this stage neither my knowledge either of Latin as it was used by clerics then, nor my knowledge of forensic textual dating , nor indeed of internal literary and manual textual flourishes, is sufficient for me to begin to make any statement at all with regard to this text.. But in the light of the later discussion in this work upon the importance of the royal oath of governance for the constitutional developments in the seventeenth century, and given that the end note on this roll appears to be dated from its internal evidence to the time of James II and VII, and given the intense political, polemical and controversial debate about the royal oath of governance and its meaning at that time, I can only suggest that scholars with more expertise in these forensic areas than myself examine this text.

[2] though Robert S Hoyt, in 'The Coronation Oath of 1308: the background of "Les Leys et les Custumes', *Traditio*, Vol. XI, 1955, p. 235-257, at p. 236 says: '... First there is the wording of the oath. On this deceptively simple question all that is necessary to say here is that there is little doubt that we know what Edward II actually swore..' But Richardson, writing in *Traditio*, 1960, *art. cit.*, at p. 165 says 'The precise words put into the king's mouth we cannot recover, ...', and that the oath was 'spoken, in the vernacular..' (p. 171).

[3] see texts at my Appendix I.

[4] see Richardson, *Speculum*, XXIV, 1949, *loc. cit.*, p. 59 and p. 74.

[5] This text is that reproduced by Robert S Hoyt, in 'The Coronation Oath of 1308: the background of "Les Leys et les Custumes', *Traditio*, Vol. XI, 1955, 235-257, at p. 237, n. 6; he gives sources as: *The Parliamentary Writs and Writs of Military Summons*, (*ed.* Francis Palgrave, n.p. 1827-34) II 2 Appendix, p. 10; and at p. 236 in n. 2 as *Foedera* (Record Commission *ed.* London 1816-69) II 1.22-6], and for 'the oath itself in French', the Close Rolls of the Chancery. [n. 3]. Hoyt's text is almost identical with that quoted by Sir Matthew Hale in *The Prerogatives of the King*, 1640-1660, D E C Yale (*ed.*), Selden Society, London, 1976, at p. 66, quoted from 'Rot. claus. 1 Edw. 2, m. 10 (schedule); *Cal. C. R.* (1307-1313), p. 12; *Foedera*, iii, 63, for coronation oath.', see n. 3 at p. 66 of the Selden Society text, p. 84 of Hale's original. Hale goes on to say [p. 66-67 Selden Society text, p. 85 his original text] 'This is the entry of the oath, *[rot claus,] 1 E. 2, m. 10 dorso* [n. 4. *Supra*, p. 65, n. 6, {i.e. *Cal. C.R.* (1307-1313), p. 53} and *supra*, n. 3.] 'The entry of the oath *in veteri magna carta*, fol. 164, agrees in substance with the former..' Note, though, that Hale's text has *seint* in brackets before 'Edward' in clause 1.

and his son swore the oath in English.[1]

The first promise is:[2]

> *Sire, volez vous graunter et garder, et per vostre ser[e]ment confirmer au people d'Engleterre, les leyes et les custumes a eux grauntees par les auncien[t]s rois d'Engleterre voz predecessours droitures et devotz a Dieu, et nomement les lois, et custumes et les fraunchises grauntez au clerge et au people par le glorieus roi [seint] Edward, vostre predecessor?* *Respons. Jeo les graunt et promette.*
>
> 'Sire, will you grant and keep and by your oath confirm to the people of England the laws and customs given to them by the previous just and God-fearing kings, your ancestors, and especially the laws, customs, and liberties granted to the clergy and people by the glorious king, the sainted Edward, your predecessor?' 'I grant and promise them.'[3]

There is some confusion as to the intention of this promise. First, did the king say '..king Edward..', or '...King saint Edward...' . If the first, then this affords some support for those arguing that the barons wished to ensure the observation of the reaffirmation of the charters by Edward I; though it could be argued that this was hardly necessary, since Edward II had on his father's behalf, attested to the *Confirmatio Cartarum*. (On the other hand, his predecessors Henry I and Stephen had in their Coronation Charters specifically undertaken to 'restore the laws of King Edward.'[4]) If the second, it could be argued that it was intended that the new king observe the *Leges Edwardi Confessoris*, a compilation of laws dating from before the conquest, and which 'represented the law of the first half of [the twelfth] century.'[5] On the other hand, there was nothing new in the *Leges*; rather, as Maitland said, 'The Confessor has by this time become a myth— a saint and a hero of a golden age, of a good old time..'[6] Edward the Confessor had enacted no laws. The *Leges* were essentially outmoded, except insofar as they represented some nostalgia for the times of a sainted English king—Glanvill had written his compilation of the laws under Henry II

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[1] See Edward's remarks in his writs of 30 September 1295 to the archbishops calling them to his *parlement* in November, translated *supra* at p. 191, and see note 1, p. 192 *supra* for the Latin.

[2] For the text, and a comparison with the 'Henry VII oath' and Henry's amendments to the latter see p. 216. Note that the text here, and which I refer to hereafter as the '1308 oath' is in fact the text as it appears in the *Liber Regalis*, or 'Fourth English Coronation Order', the final form of which was settled in 1351-1377; there were however, four recensions of this fourth coronation order, the earliest dating from about 1307 or 1308—for a detailed discussion see Richardson, *Traditio*, 1960, *art. cit.*,' a note had been appended to the *Liber Regalis* noting that the king should in his coronation oath include a provision for the protection of the rights of the crown'— see page 263 *infra*, and note 5; and see Kantorowicz, *Speculum*, p. 490, and Kantorowicz, *The Kings Two Bodies* , p. 167, and Richardson, *BIHR* XVI, p. 11.

[3] English translation from S&M1, p. 192; from the French, *Statutes of the Realm*, I, 168.

[4] see my Appendix I.

[5] Maitland, *Constitutional History*, p. 108. The *Leges Edwardi Confessoris* continued to be quoted by lawyers as 'real law' down to the end of the seventeenth century—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

[6] see Maitland, *Constitutional History, loc. cit.*, p. 100

in 1187-1189, and Bracton edited the treatise on the *Laws and Customs of England* less than fifty years earlier in 1250-1260.

But the *Leges Edwardi Confessoris* did contain very specific provisions about the coronation of kings, and about the maintenance of the rights of the crown, in that part called by Liebermann *Leges Anglorum Londoniis collectae*, and which appears with the title *De iure et de appendiciis corone regni Brittannie.*[1] This interpolation has been seen by commentators as establishing beyond doubt that earlier kings in their coronation oaths promised to maintain the rights of the crown.[2] And if indeed a reference was in the oath which Edward II swore to the laws of the Confessor, then this has been interpreted by some commentators as being a constructive swearing to maintain the laws of the crown.[3]

The second clause states:

> *Sire, garderez vous a Dieu et saint eglise et au clerge, et au people peas et acord en Dieu entierment solonc vostre poer?*[4]
>
> 'Sire, will you in all your judgements, so far as in you lies, preserve to God and Holy church, and to the people and clergy, entire peace and concord before God?' 'I will preserve them.'[5]

This clause reiterates the first clause of the *tria precepta* in the ancient oath (or the *promissio regis*) of Edgar *Bretwalda.*[6]

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[1] see F Liebermann, *Die Gesetze der Angelsachsen*, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, Scientia Aalen, Sindelfingen, Germany, 1960; in 3 Vols.; at Vol. I, pp. 635-37; Liebermann notes that this addition in connection with the coronation bears resemblance to what I have alluded to for convenience sake as the 'Henry VIII' oath, which both Blackstone and Stubbs thought may well have been taken by the old kings; and which is the text examined by Henry VIII. = *Il gardera toutez ses terres, honours et dignitees droitturelx et franks del coron du roialme d'Englitere en tout maner d'entierte sans nul maner d'amenusement; et les droites disperges dilides ou perdus de la corone a son pouoir reappeller en l'auncien estate* [Liebermann, footnote c.]

[2] see for example, Hoyt, 'Les Leys et les Custumes', XI *Traditio*, 1955, *art. cit.*, at p. 249; and Richardson, *Speculum*, XXIV, 1949, *art. cit.*, pp. 60 ff.

[3] see Hoyt, 'Les Leys et les Custumes', XI *Traditio*, 1955, *art. cit.*, at p. 249; and Richardson, *Speculum*, XXIV, 1949, *art. cit.*, pp. 60 ff.

[4] see Hoyt, *art. cit.*, 'The Coronation Oath of 1308: the background of "Les Leys et les Custumes', *Traditio*, Vol. XI, 1955, p. 235-257, at p. 237, n. 6; and my Appendix I.

[5] see S&M1, *loc. cit.*, , p. 192; from the French, *Statutes of the Realm*, I, 168.; and my Appendix I.

[6] for text see my Appendix I; and see William Jerdan in his Preface to the *Rutland Papers, Original Documents illustrative of the Courts and Times of Henry VII and Henry VIII, selected from the private archives of His Grace the Duke of Rutland, &c. &c. &c.*, printed for the Camden Society, 1842; reprinted with the permission of the Royal Historical Society by AMS Press, New York, 1968. at p. xi.; Jerdan says sources this (identified as 'Oath of King Edgar'), to the *Relique Antiquæ*, Vol. ii. p. 194, where it is given from a contemporary MS.; and see the text quoted from MS. Cotton Cleopatra B XIII, from c. 1100, f. 56 compared with MS. Cotton Vitellius A VII, from c.1100), which though burned, is copied in MS. Oxford Bodley Junius 60) in F Liebermann, *Die Gesetze der Angelsachsen, loc. cit.*, at Vol. I, p. 214

The third clause stated:

> *Sire, freez vous faire, en toutz vos jugementz, ouele et droite justice et discrecion in misericorde et verite, a vostre poer?*[1]
>
> 'Sire, will you, so far as in you lies, cause justice to be rendered rightly, impartially, and wisely, in compassion and in truth?' 'I will do so.'[2]

This is similar in intent to the third of the *promissio regis*.[3]

The fourth and final clause of the '1308 oath' was:

> *Sire, grauntez vous a tenir et garder les leyes et les custumes droitureles, les quils la communaute de vostre roiaume aura esleu, et les defendrez et afforcerez al honor de Dieu a vostre poer?*[4]
>
> 'Sire, do you grant to be held and observed the just laws and customs that the community of your realm shall determine, and will you, so far as in you lies, defend and strengthen them to the honour of God?' 'I grant and promise them.'[5]
>
> *Concedis iustas leges et consuetudines esse tenendas. et promittis eas per te esse protegendas. et ad honorem dei roborandas quas uulgus elegerit secundum uires tuas. Respondabit. Concedo et promitto.*[6]

This clause to some extent replicates in a positive fashion the negative imprecation of the second of the *tria precepta*: '...I will forbid rapine and all injustice to all classes of society'[7], and also the 'unusual' part of the oath taken by William I (to rule the whole kingdom subject to him with justice and kingly providence, to make and maintain just laws,[8]). And Henry I, Stephen, Richard I, and perhaps John and Henry III, had undertaken in their coronation oaths to abolish evil laws and customs and to hold fast to the good.[1]

The real significance of this clause however, is that the king promises to grant that the just laws and customs which the community of his realm shall determine, will be held and observed, and he undertakes to defend and strengthen them to the honour of God, as

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[1] see Hoyt, 'Les Leys et les Custumes', XI *Traditio*, 1955, *art. cit.*

[2] see S&M1, *loc. cit.*

[3] see Jerdan, and Liebermann, *loc. cit.*

[4] see Hoyt, 'Les Leys et les Custumes', XI *Traditio*, 1955, *art. cit.*

[5] see S&M1, *loc. cit.*

[6] see Leopold G Wickham Legg, *English Coronation Records*, Archibald Constable & Company Limited, Westminster, 1901, at p. 88 (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 date.

[7] see Jerdan, and Liebermann, *loc. cit.*

[8] see my Appendix I; and in particular, *The Chronicle of Florence of Worcester*, Thomas Forester, (*trans.* and *ed.*), Henry G. Bohn, London, 1854; reprinted from the 1854 edition by AMS Press, New York, 1968, at p. 171; (*Florenti Wigorniensis monachi chronicon ex chronicis* , *ed.* B Thorpe, English Historical Society, London, 1848-1849; at I, 229)

much as lay in his power. Controversy erupted in the seventeenth century, and continues to this day, as to whether the correct interpretation of this clause is in application with regard to laws and customs which the community already have; or to laws and customs which the community shall choose.[2] An argument could be put that the fourth clause would be redundant if it did not have prospective application, since the first clause already commits the king 'to grant and keep and confirm by oath to the people of England the laws and customs given to them' by his ancestors, especially the 'laws, customs, and liberties granted to the clergy and people by the glorious king, the sainted Edward.' But even if this explication is accepted, it must be conceded that previous kings had undertaken to enact or to hold fast to just laws; and that this process usually occurred on the counsel and consent of the magnates.

The revolutionary impact of the prospective interpretation of the alleged 1308 oath is two-fold. According to this view, the stream of enactment of laws is diverted, and rather than proceeding from the top down, they are to be chosen from below, and be supported from above. Secondly, this interpretation gave comfort to those in the House of Commons in the 1640s, who saw it as *compelling* the king to assent to *any* law which the community of the realm shall choose.[3] For example, William Prynne in his tract published in 1643 on *THE SOVERAIGNE POWER OF PARLIAMENTS & KINGDOMS..., Wherein the Parliaments and Kingdomes Right and Interest in, and Power over the Militia, ... That the King hath no absolute negative voice in passing publicke Bills of Right and Iustice for the safety peace and common benefit of the People, when both Houses deeme them necessary and just (etc. etc.)* says, with regard to the king's capacity to withhold his assent, or rather, with regard to his incapacity not to agree, that he has 'no negative voice'[4]:

> because it is repugnant to the very Letter and meaning of the kings Coronation Oath solemnly made to his subjects; TO GRANT , FULFILL, and defend ALL RIGHTFULL LAWES which THE COMMONS OF THE REALMNE SHALL CHVSE, AND TO STRENGTHEN AND

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[1] see my Appendix I; it must be borne in mind that of these kings we can really speak with no certainty as to what they swore.

[2] see Prynne, *The Soveraigne Power of Parliament*, 1643, *loc. cit*, p. 75 (text at Appendix I); Charles I's response to the Commons' Remonstrance, 16 May 1642, in Clarendon's *History of the Rebellion*, Book V, paragraph 293, at p. 155 of the Macray 1888 edition as reprinted by OUP 1958 (text at Appendix I); Stubbs, *Constitutional History*, *op. cit.*, pp. 331-2; and the articles cited at note 4 p. 195, and note 1 p. 203, *supra*.

[3] see Prynne, *The Soveraigne power of Parliament*, and see Hoyt, 'The Coronation Oath of 1308', *The English Historical Review*, Vol. 71, 1957, pp. 353-383

[4] This is one of numerous instance which resulted from the reinterpretation of the origins of English polity, to which I have adverted at p. 90, *supra*.

> MAINTAINE THEM after his power. Which Clause of the Oath (as I formerly manifested at large, and the Lords and Commons in their Remonstrance of May 26 and 2 November [1642] prove most fully, extens onely, or most principally to the kings Royall assent to such new rightfull and necessary Lawes as the Lords and Commons in Parliament (not the king himself) shall make choice of.[1]

Further controversy existed, and still does, as to what 'community of the realm' (*communaute de vostre roiaume*) meant. To seventeenth century parliamentarians it meant the two houses of parliament, but particularly the commons; but whatever it meant, it seems certain that it did not mean the house of commons as it was understood then, mainly because in the fourteenth century such an entity did not exist, and the extension of the people's representation by the Tudors was still long in the future. Moreover, any new oath would, in accordance with the *Liber Regalis* itself (if one were to rely on it), have been developed by the magnates[2]. In a feudal society it could perhaps be said that these magnates represented the community of the realm[3]; but this would be a very narrow reading, and prove no real constitutional change, as struggles had been continuing between the baronage and the kingship since the time of John. Professor Bertie Wilkinson[4] also suggested that probably by the time of the Statue of York in 1322, and certainly by the time of Edward III, the

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[1] see William Prynne, *THE SOVERAIGNE POWER OF PARLIAMENTS & KINGDOMS, or Second Part of the treachery and Disloilty of Papists to their Soveraignes. Wherein the Parliaments and Kingdomes Right and Interest in, and Power over the Militia, Ports, Forts, Navy, Ammunition of the Realme, to dispose of them unto Confiding Officers hands, in the times of danger; Their Right and Interest to nominate and Elect all needful Commanders, to exercise the Militia for the Kingdomes safety and defence : As likewise, to Recommend and make choice of the Lord Chancellor, Keeper, Treasurer, Privy Seale, Priue Counsellors, Iudges and Sheriffes of the Kingdome, when they see just cause; That the King hath no absolute negative voice in passing publicke Bills of Right and Iustice for the safety peace and common benefit of the People, when both Houses deeme them necessary and just : are fully vindicated and confirmed, by pregnant Reasons and variety of Authorities, for the satisfaction of all Malignants, Papists, Royallists, who unjustly Censure the Parliaments proceedings, Claims and Declarations, in these Particulars*; 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. 75

[2] See the translation of the *Liber Regalis* in Legg, *English Coronation Records*, *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.'

[3] c.f. see W A Morris, 'Magnates and Community of the Realm in Parliament, 1264-1327' *Medievalia et Humanistica*, I, (1943), 58-95; referred to in Robert S Hoyt, 'Recent Publications in the United States and Canada on the History of Representative Institutions before the French Revolution,' *Speculum*, Vol. 29, 1954, pp. 356-377; at p. 363, Hoyt quotes Morris as concluding: 'that, generally, and with few exceptions, "the assembled magnates are the community of the realm" in the thirteenth century. But "after 1300 the representatives in parliament entered upon a new stage of participation in national affairs. This development clearly came through the guidance of the magnates, originally the entire community of the realm."'

[4] Professor Wilkinson could be held responsible for all the dead trees that have assisted in this debate, as he started the controversy with his original monograph in 1933 in *Historical Essays in Honour of James Tait*; see Bertie Wilkinson, 'The Coronation Oath of Edward II', *Historical Essays in Honour of James Tait, eds.* J G Edwards and E F Jacob, Printed for the Subscribers, Manchester, 1933, pp. 405-416

community of the realm included the knights and burgesses.[1]

It seems pre-emptive to ascribe to the alleged 1308 coronation oath characteristics of a much later century. What does seem apparent is that this clause speaks of 'just laws and customs' [*les leyes et les custumes droitureles; iustas leges et consuetudines*] What are these 'laws and customs'?

Now Bracton in *The Laws and Customs of England* had made it plain that 'customs' or unwritten laws in order to command or forbid, must have 'the authority of kings' (*regum auctoritate*), they must have been 'approved by all those who use them, and confirmed by the oath of kings.' And the *leges* or written laws were those which had 'been rightly decided and approved with the counsel and consent of the magnates, and the general agreement of the *res publica*, the authority of the king or prince first having been added thereto'—in short, there can be no law without the authority of the king, and this must come *before* the thing could become a law.[2] Glanvill had earlier said the same thing.[3]

It seems therefore, that all the fourth clause was doing restating the existing law: here the king grants and promises to defend and strengthen to the honour of God the laws and customs that the community of his realm either have (that is, laws and customs to which the oath of previous kings has been given) or shall determine (laws and customs to which his oath shall apply in the future). Now nothing can become a 'law' (*lege*) without the prior authority of the king. And customs do not require the choice or endorsement of the community of the realm.[4] But both are governed by the king's oath, and in taking the oath the king is bound to uphold and strengthen only those *just* laws and customs,[5] either already held, or to be agreed upon by the community of his realm; (*quas vulgus elegerit; la communaute*

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[1] see Bertie Wilkinson, 'The Coronation Oath of Edward II and the Statute of York,' *Speculum*, Vol. XIX, 1944, pp. 445-469, at p. 460

[2] see Bracton, *op. cit.*, p. 19, folio 1; p. 21, folio 1b. see discussion *supra*, under 'Bracton and the Oath', at pp. 187 ff.

[3] See discussion on Glanvill in Appendix III.

[4] It is not conceivable that customs in Bracton's sense either had been or would be established through the advice and consent of those meeting in the king's *parlements*—unless the meaning of the word were to be confined to those prises and aids which fell by long usage and prerogative to the king, and which were called customs [hence the common meaning today, as in 'customs and excise']. Customs were and continued to be in the main those peculiar to particular areas, such as for example, to Berwick-on-Tweed, or to particular institutions, like the universities, and any advice of the magnates on custom would be confined to their continuing equity and utility.

[5] cf. Mary I's preoccupation that the laws she would swear to uphold in her coronation oath were just – see my Appendix I

de vostre roiaume). It is these that he swears shall be observed, strengthened and defended—this allows for the continuity in jurisdiction between one king and the next, and also allows for either repudiation or alteration of the laws or customs endorsed by previous kings which changes in circumstance have rendered unjust.[1] It could even be argued that all the king here was doing was undertaking to ensure the just enforcement of the laws of the land. I can see no radical departure in the statement in the fourth clause of the '1308 oath' from what Bracton had outlined half a century before.

Historians have been seduced into believing that there was something unique about the oath taken by Edward II, because of the proliferation of texts of the *Liber Regalis* during the fourteenth century, and the constant referral to the coronation oath in that century's constitutional crises. But currency of the *Liber Regalis* could have occurred merely because that particular text was used for copying by the clerics, and because of the increasing demand for scholastic texts in that century. It cannot be emphasised too much that the clerical Ordines were just that—proposed orders of service. The coronation oath itself was always uttered in the vernacular, and inscribed on a separate piece of paper which of its nature had but a doubtful longevity.[2] For this reason, while the chroniclers cannot always be relied upon, the firmest evidence for what was said by kings at their coronation lies in what the kings themselves said that they had said, and in contemporary records. Moreover, political upheavals of every century have focussed on the coronation oath—for example, those involving William I, Stephen, John, Henry II, Henry III, Edward I, Edward II, Edward III, Richard II, Henry IV, Richard III, Henry VII, Charles II, James II and VII, George III, George V[3], and Edward of Windsor.[4]

Edward II's reign was tumultuous, marked by constant struggle between the king and the barons.[5] In 1310 the king under duress agreed to the election of 'Ordainers' who purported

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[1] See the discussion *supra* under 'The Continuity of the Law' at pp. 170 ff., especially at p. 176, and under "Bracton and the Oath' at p. 187; and see discussion also *infra*, under Richard III, 'Continuing Jurisdiction' at p. 242.

[2] See H G Richardson, *Traditio*, 1960, *art. cit.*

[3] Cf. *The Accession Declaration Act*, 1910, concerning the ant-papal/protestant declaration.

[4] See the discussion under these monarchs. Cf. Also, Sir Matthew Hale pointed out, 'The king's coronation oath was various in ancient times according to the variety of the occasions and the prevalence of parties that sought thereby to secure some particular interest'— see Hale, *Prerogatives of the King*, p. 66.

[5] See Stubbs' *Constitutional History*, and to the articles appearing in his footnotes for detail.

to make 'Ordinances' in 1311[1] to the 'honour' of the king, church and people, 'according to the oath which the king took at his coronation.'[2] The Ordainers in particular adverted to the 'impoverishment' of the crown, and the fact that :

> the king through evil counsel so lightly grants them his peace against the provisions of law; we ordain that henceforth no felon or fugitive shall be protected... by the king's charter granting his peace,[3] except only in case the king can give grace according to his oath, and that by process of law and the custom of the realm. ...[4]

The king's favourite, Piers Gaveston, the apparent cause of much of this discord, was murdered in 1312[5]; civil war threatened. Edward presented a Bill of Exceptions in 1313 which among other thing asserted that the Ordinances were contrary to reason, derogated from the king's rights, and were contrary to the charters and the coronation oath;[6] the barons responded that as a principle 'England is not governed by written law but by ancient custom, and that if that were not enough , the king, his prelates, earls and barons, *ad querimoniam vulgi* were bound to amend it and reduce it to a certainty'[7]; but nothing was settled. Edward regarded his assent to the Ordinances as being obtained under duress, and that he had been treated like an idiot[8]. In 1322 Edward II called a *parlement* at York at which were present the lords, the clergy and the commons, together with representatives from Wales. By the *Statute of York*, which is still in force,[9] the Ordinances were repealed because 'the Royal Power of our said Lord the King was restrained in divers Things, contrary to what ought to be, to the blemishing of his Royal Sovereignty, and against the Estate of the

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[1] see *Statutes of the Realm*, i., 157; *Rot. Parl.* i. pp. 281-286;

[2] Stubbs, *Constitutional History*, Vol. 2, p. 342; he sources this to 'Parl. Writs., II, ii. 27, where the importance of the coronation oath is especially insisted on, and to M. Malmsb. p. 104; and Chron. Edw. ii. 163." and see B Wilkinson, 'The Coronation Oath of Edward II and the Statute of York', *Speculum*, Vol. XIX, 1944, pp. 445-469, at p. 459.

[3] Cf. the Anglo-Saxon *cyninges hand-grið*, 'king's peace given under his hand', see p. 59 *supra*. This essentially is the use by the king of his prerogative to extend his peace to certain persons, i.e., to pardon them, or exempt them from the application of certain penalties laid down by the law; in the seventeenth century, this prerogative was referred to as the 'dispensing power'.

[4] see S&M1, pp. 193-198; and for text in French, see Lodge and Thornton, *English Constitutional Documents*, 1307-1485, pp. 12-17; sourced to *Rot. Parl.* I, 281-6

[5] Stubbs sees this as the beginning of the bloody deluge known later as the wars of the roses, which ended in 1485—see *Constitutional History*, Vol. 2, p. 348.

[6] see Stubbs, *Constitutional History*, Vol. 2, p. 353

[7] see Stubbs, *Constitutional History*, Vol. 2, p. 353

[8] *sicut providetur fatuo, totius domus suae ordinatio ex alieno dependeret arbitio*: M. Malmsb., p. 117; Chron. Edw. ii. 174, Stubbs, *Constitutional History*, Vol. 2, p. 347.

[9] 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; and for text see S&M1, 204-205; and see my Appendix I.

Crown'.

This does indicate that there was fundamental disagreement between the magnates and the king as to what the king swore at his coronation, or at least, as to what it meant—but fundamentally and as always, the dispute was about who was to exercise the power conferred by the coronation oath. It does not, however, follow, that the oath in question was the one reproduced in the *Liber Regalis*. It could just as well have been the 'Henry VIII oath'. It specifically bound the king to maintenance of the estate of the crown, and also to 'graunte to holde lawes and customes of the realme and to his power kepe them and affirme them which the folk and people haue made and chosen."[1]

As a passing aside, a purely structural grammatical analysis of the '1308 oath', at least in its English translation, gives rise to the sneaking suspicion that it is an amalgam, a 'cut-and-paste' job, lending some support to the notion suggested earlier[2] that it represents more the product of clerical copying than the utterance of any flesh and blood king.

THE OATH AND THE DEPOSITION OF KINGS

But civil war followed after the York *parlement*. In October 1326 the young Edward was proclaimed 'guardian of the realm, which the king had deserted'[3], and in 1327 the king's son issued writs for a *parlement* in his name, at Westminster, with the same roll of attendees as at York in 1322. The proceedings were revolutionary; the great seal had been wrested from the king; the king was not heard, as he was a prisoner at Kenilworth; the Londoners declared for Edward's son [**Edward III**], who was then ten years old; and six articles then drawn up justifying the deposition of Edward II. They were: that he was incompetent to govern, unable to distinguish good from evil; that he had rejected good counsel and neglected the business of the kingdom; that he had lost Scotland, Ireland and Gascony; that he had injured the church and put to death many noble men; that he had broken his coronation oath, especially in the point of doing justice to all; and that he had ruined the

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[1] See text at Appendix I, and also at p. 216, *infra*.

[2] See note 1 p. 176 *supra*, and p. 211 *supra*.

[3] see Stubbs, *loc. cit.*, *Constitutional History*, Vol. 2, p. 377; Foed. ii. 646; and for text see Lodge and Thornton, *English Constitutional Documents*, 1307-1485, pp. 19-20, French, sourced to *Foedera*, IV, 237-8; cf. the similarity of the later justification for the deposition of James II and VII—see p. 363 *infra*.

realm and was himself incorrigible without hope of amendment.[1] Edward II was requested to 'consent to his son's election'; homage and fealties were renounced by a proctor for the whole *parlement*;[2] news of Edward's 'abdication' was reported in *parlement* on Saturday, January 24, and the new king's peace was at once proclaimed.[3] Edward II's 'abdication' was proclaimed,[4] and Edward III's reign formally began on 25 January.[5]

No one knows what oath Edward III swore, though Professor Schramm has asserted that he took the same oath as Edward II word for word.[6]

From what both king and magnates said, it seems that Edward II had undertaken to maintain the rights of the crown—hence his repeal of the Ordinances, which he and his *parlement* saw as restraining the royal power, blemishing royal sovereignty, and against the estate of the crown, and hence the justification of his deposition in terms of his loss of parts of the estate of, and his ruination of, the realm. It seems his coronation oath required him to do justice to all, as his breach of this also was a particular item justifying his deposition. The specific terms of Edward II's deposition tend to argue for a rather different coronation oath from that included in the *Liber Regalis*. Below is a comparison of the text of the oath in the *Liber Regalis*[7] (c.1351-1377) allegedly taken by Edward II, with that which Henry VIII examined and amended. This text, on which is written in his own

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[1] For this in more detail see Stubbs, *Constitutional History*, Vol. 2, p. 378-381.

[2] see Stubbs, *Constitutional History*, p. 380.

[3] see *Historical Essays in Honour of James Tait*, J G Edwards, V H Galbraith, and E F Jacob, (*eds.*), Manchester, Printed for the Subscribers, 1933, 'Committees of Estates and the Deposition of Edward II', by M V Clarke, at pp. 27-45, at p. 36.

[4] see Lodge and Thornton, *English Constitutional Documents*, 1307-1485, Latin and French, p.20-21, from **Foedera**, IV, 243); *De Pace Regis proclamanda*, and see my Appendix I.

[5] see Stubbs, *loc. cit.*, *Constitutional History*, p. 381. Maitland has noted, with regard to Edward's deposition: 'On the whole it seems to me, these proceedings, so far from strengthening the notion that a king might legally be deposed, demonstrated pretty clearly that there was no body empowered by law to set the king aside.'— see Maitland, *Constitutional History*, pp. 190-191; Maitland in a note a p. 191 says however that there is such a thing as 'civil death' as when for example, in medieval times, a man became a monk, he died to the world, and his heir immediately inherited, and that 'it might well be considered that a king who had abdicated was dead to the law.'

[6] see Percy E Schramm, *A History of the English Coronation*, English translation by Leopold G Wickham Legg, Clarendon Press, Oxford, 1937, at p. 211. Schramm at pp. 203-211 asserts that is was the oath in the *Liber Regalis* and its recensions that was used for Edward II. At pp. 214-216 Schramm discusses the 'Henry VIII oath', but dismisses it as having been included in a book of statutes in error, and that it was not authoritative.

[7] 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 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.

hand his amendments, is reproduced in facsimile in L G W Legg, *English Coronation Records*,[1] from British Museum Cotton Manuscript Tib. E. V iii. fo. 89. The text is an English translation of the oath published in French by Lettou and Machlinia in *Abbreuiamentum Statutorum* 1482-3.[2] (There is one thing we can be absolutely sure of, and that is that Henry VIII did in his own hand hold, with his own mind consider, and in his own writing amend, the text here reproduced.)

[1] See Illustration 2, at p. 255; L G Wickham Legg, *English Coronation Records*, *op. cit.*, p. 240.

[2] See discussion *infra* at p. 250, and text in French at p. 250 *infra*.

The 'Henry VIII Oath'

The Othe of the kinges highnes	The Othe of the kinges highnes *at every coronacion*	*Liber Regalis*
This is the othe that the king shall swere at y[e][1] coronation that he shall kepe and mayntene the right and the liberties of holie church of old tyme graunted by the rightuous Cristen kinges of Englond.	The king shall *then* swere that he shall kepe and mayntene the *lawfull* right and the libertees of old tyme graunted by the rightuous Cristen kinges of Englond *to the holy chirche of ingland nott preiudyciall to hys Jurysdiccion and dignite ryall*	'Sire, will you grant and keep and by your oath confirm to the people of England the laws and customs given to them by the previous just and God-fearing kings, your ancestors, and especially the laws, customs, and liberties granted to the clergy and people by the glorious king, the sainted Edward, your predecessor?' 'I grant and promise them.'
And that he shall kepe all the londes honours and dignytes rightuous and fre of the crowne of Englond in all maner hole wtout any maner of mynyshement,	and that he shall kepe all the londes honours and dignytes rightuous *nott preiudiciall to hys Jurysdiction and dygnite ryall*[2] and *fredommes* of the crowne of England in all maner hole wtout any maner of mynyshement,	
and the rightes of the Crowne hurte decayed or lost to his power shall call agayn into the auncyent astate,	and the rightes of the Crowne hurte decayed or lost to his power shall call again into the auncyent astate,	
And that he shall kepe the peax of the holie churche and of the clergie and of the people wt good accorde,	And that he shall *Indevore hymself to kepe vnite in hys clergy and temporell subiec[ts]* And that he shall *according to hys consienc[e]* in *all* his iudgementes *mynystere* equytee right Justice *shewing wher is to be shewed mercy*	'Sire, will you in all your judgements, so far as in you lies, preserve to God and Holy church, and to the people and clergy, entire peace and concord before God?' 'I will preserve them.'
And that he shall do in his iudgementes equytee and right justice wt discression and mercye		'Sire, will you, so far as in you lies, cause justice to be rendered rightly, impartially, and wisely, in compassion and in truth?' 'I will do so.'
And that he shall graunte to holde lawes and customes of the realme and to his power kepe them and affirme them [fo. 89b] which the folk and people haue made and chosen	And that he shall graunte to holde lawes and *approvyd* customes of the realme *and lawfull and not preiudiciall to hys crowne or Imperiall Juris[diction]* to his power [fo. 89b] kepe them and affirme them which *the nobbys and people* haue made and chosen *wt hys consent,*	'Sire, do you grant to be held and observed the just laws and customs that the community of your realm shall determine, and will you, so far as in you lies, defend and strengthen them to the honour of God?' 'I grant and promise them.'[3]
And the evil Lawes and customes hollie to put out, and stedfaste and stable peax to the people of his realme kepe and cause to be kept to his power.	And the evill Lawes and customes hollie to put out, and stedfaste and stable peax to the people of his realme kepe and cause to be kept to his power *in that whych honour and equite do require.*	

[1] Possibly 'yr'?—abbreviation for 'your'?

[2] This phrase inserted, then struck out by Henry.

[3] S&M1 192; from the French, *Statutes of the Realm*, I, 168

Bearing these two texts steadily in mind, we shall examine what happens in the time of Edward III.

His first action was to enact legislation, which, 'Beginning with the statement that the legislation was suggested by the commons and completed by the assent of the magnates, the king, in the spirit of the coronation oath, confirms the charters with their adjuncts, and renounces the right, so often abused, of seizing the temporalities of the bishops. Having thus propitiated the clergy, he proceeds to forbid the abuse of royal power in compelling military service, in the exaction of debts due to the crown, and of aids unfairly assessed; he confirms the liberties of the boroughs and reconstitutes the office of conservator of the peace....'[1] In 1341 he repeals a previous enactment because

> *certain Articles expressly contrary to the Laws and Customs of our Realm of England, and to our Prerogatives and Rights Royal, were pretended to be granted by us by the Manner of a Statute; we, considering how that by the Bond of our Oath we be tied to the Observance and Defence of such Laws, Customs, Rights, and Prerogatives, and providently willing to revoke such Things...'* and *'therefore by their [the earls, barons, and other wise men of the realm] Counsel and Assent we have decreed the said statute to be void, and the same in as much as it proceeded of Fact, we have agreed to be adnulled; willing nevertheless That the Articles contained in the said pretended Statute, which by other of our Statutes, or of our Progenitors Kings of England, have been approved, shall, according to the Form of the said Statute in every Point, as convenient is, be observed. And the same we do only to the Conservation and Reintegration of the Rights of our Crown, as we be bound, and not that we should in any wise grieve or oppress our Subjects, whom we desire to rule by Lenity and Gentleness.*[2]

And in the 1350 *Statute of Provisors of Benefices*, it was said:

> *Whereupon the said Commons have prayed our said lord the King, That sith the right of the Crown of England, and the law of the said realm, is such, that upon the mischieves and damages which happen to this realm, he ought, and is bound by his oath, with the accord of his people in his Parlement, thereof to make remedy and law, and, in removing the mischieves and damages which thereof ensue, that it may please him thereupon to ordain remedy...*[3]

And in 1353 in the *Ordinance and Statute of Praemunire*, it was said:

> *...grievous complaint of his lords and commons.. how numerous persons have been.. taken out of the kingdom to respond in cases of which the cognizance pertains to the court of (the king); and also how the judgements rendered in the same court are being impeached in the court of another, to the prejudice and dishersion of our lord king and of his crown and of all the people of his said kingdom, and to the undoing*

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[1] see Stubbs, *Constitutional History*, Vol. 2, p. 388; *Statutes of the Realm*, i, 255.

[2] see 1341 Anno 15 Edw. III; p. 233 of Vol. I of *The Statutes at Large, from Magna Carta to the twenty-fifth year of the reign of George III*, by Owen Ruffhead, Eyre, Strahan, Woodfall and Strahan, His Majesty's Printers, London 1764; revised edition, Charles Runnington, (*ed.*), 1786, Eyre, Strahan, Woodfall and Strahan, His Majesty's Printers, London

[3] see Anno 25 Edw. III. Stat. 6, and Anno Dom. 1350 at p. 260 of Vol. I of *The Statutes at Large, from Magna Carta to the twenty-fifth year of the reign of George III*, by Owen Ruffhead, Eyre, Strahan, Woodfall and Strahan, His Majesty's Printers, London 1764; revised edition, Charles Runnington, (*ed.*), 1786, Eyre, Strahan, Woodfall and Strahan, His Majesty's Printers, London; and see *Rot Parl.* Vol. II. pp. 232-3; in French.

and annulment of the common law of the same kingdom at all times customary: therefore....(anyone taking people out of the kings courts is to face the kings courts)[1]

It was during the time of Edward III that the text of the *Liber Regalis* was finally settled.[2] The coronation oath (the '1308 oath') contained therein[3] made no reference at all to the royal prerogative, nor to maintenance of the rights of the crown. The 'Henry VIII oath' certainly did; as did the later oaths contained in the Ordines for the coronations of Stuart kings, which included a specific reference to the prerogative.[4] The oath of the Stuart kings was said at the time to be the same as that sworn by Elizabeth I.[5] Some modern writers, when quoting the coronation oath by reference to the *Liber Regalis*, also include this sub-paragraph on the prerogative.[6] Given the emphasis on the rights of the crown and the prerogative in the context of the coronation oath in Edward III's reign, it seems likely that his coronation oath did contain such a reference, and was thus not that reproduced in the *Liber Regalis*.

Edward III was succeeded in 1377 by his ten year old son **Richard II**, under the Regency of John of Gaunt, Duke of Lancaster. We do not know what his coronation oath was either, but there are a number of versions of a form of coronation procedure, in which the '1308 oath' is reproduced, but with some alterations to the fourth clause.[7] *If*, (and in my

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[1] *Ordinance and Statute of Praemunire* (27 Edward III, st. 1, c 1), 1353. This was an act against the usurpations of Rome; see S&M1, pp. 227-228), and Hale, *Prerogativa*, p. 12.

[2] see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, pp. 111-202, see p. 112, and p. 149; he ascribes it a date sometime between 1351 and 1377.

[3] See columns at p. 216, *supra* for the English version. For the Latin and French, see Appendix I.

[4] They all contain an additional sub-paragraph to the first promise of the oath: 'according to the laws of God, the true profession of the Gospel established in this Kingdom, and agreeing to the prerogative of the Kings thereof, and the ancient Customs of the Realm?'—see texts at Appendix I. And see Charles I's reply to the Remonstrance of 26 May 1642, and his statement of his oath in Edward, Earl of Clarendon in his *History of the Rebellion and Civil Wars in England*, written between 1641 and 1648, in Book V, paragraphs 292 ff., at Vol. II, (Books V and VI), p. 155 of the 'edition re-edited from a fresh collation of the original MS. in the Bodleian Library', by W Dunn Macray, in six Volumes, Clarendon Press, Oxford, 1888; reprinted Oxford University Press, Oxford, 1958.

[5] Archbishop Laud recorded this in his diary; see extract from *The Tryal of the most Reverend Father in God, William Laud, Archbishop of Canterbury*, which began March 12, 1643. Wrote by himself during his imprisonment in the Tower, from *State Tryals*, London, 1719, Vol. IV, p. 427, see 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 the vestments used thereat*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, pp. 83-84. See also Maitland, *Constitutional History*, p. 286. For text see Appendix I.

[6] see, for example, Francis C Eeles, (D. Litt, LLD) *The Coronation Service, Its Meaning and History*, A R Mowbray 7 Co. Ltd, London, 1952, at p. 51; and Lewis Broad, *Queens, Crowns and Coronations*, first published as *Crowning the King* in 1937; revised and reprinted edition, Hutchinson & Co, London, 1952, at p. 28. — texts at my Appendix I under *Liber Regalis*.

[7] Professor Richardson commented : 'If the official account of Richard II's coronation is reliable the fourth clause of the oath (which is translated from the French into Latin with some help from the liturgical form) departed noticeably from

opinion it is a big *if*) this is remotely like the oath Richard II took, then there is a considerable qualification: that is, the laws which he shall enforce, protect and strengthen which the people may have chosen, or may choose, shall be only those which the people *justly and reasonably* choose; and insofar as he is to do the same with regard to the laws and customs of the church, he shall do so only with regard to those *just* laws and customs. Richard either renewed, or made another, coronation oath in 1388.[1] In 1389 he declared his minority at an end, having been previously under the control of the Regent his uncle John of Gaunt; Gaunt died in 1399.

In 1386, Richard II in responding to his *parlement*, made it clear that nothing done by the *parlement* should derogate from 'his prerogative and liberties of his said crown.'[2] In 1393 the *Second Statute of Praemunire*,[3] recited the mischiefs of papal usurpations, and added the following words:

> *And so the crown of England which hath been so free at all times that it has been in no earthly subjection but immediately subject to God in all things touching the regality of the same Crown, and to none other should be submitted to the Pope and the laws and statutes of the realm by him defeated and avoided at his will in perpetual destruction of the sovereignty of the king our sovereign lord his crown and regality and of all the realm which God did defend*[4]

before proceeding to a 'sharp remedy.'[5]

In 1390 and 1391, at the petition of the lords and the commons it was declared 'that the king's prerogative was unaffected by the legislation of his reign or those of his progenitors, even of Edward II himself'.[6] The 1398 Shrewsbury *parlement* by solemn oath before St

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the oath of 1308. ... Here *ecclesie* is a mistaken rendering of *droiturales*, for which there is no equivalent in the liturgical oath. The qualification *iuste et rationabiliter* is new and important.'—see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, at p. 171, n. 50. Richardson's source was source is *Munimenta Gildhalle Londoniensis* II 478. This source is different from that used by Legg in his English Coronation records, at p. 131 ff.—Court Claims of Richard II, (*Processus factus ad Coronacionem domini Regis Anglie Ricardi secundi post conquestum Anno regni sui primo*), which he sources to 'Close Roll I Ric. II, Mem. 45 in the Public Records Office'. But there is yet another source, again slightly different—see *English Historical Documents, 1327-1485*, A R Myers, *ed.*, Eyre & Spottiswoode, London, 1969, translated from Rymer, *Foedera*, III, iii, 63 (Latin), from Close Roll, I Richard II, m. 44, at pp. 404-405.

[1] See Bertie Wilkinson, *Later Middle Ages*, p. 174; he does not give text. See also T F Tout, *Chapters in the Administrative History of Medieval England*, in 6 Vols., Manchester University Press, Manchester, 1928; reprinted Barnes & Noble, Inc., New York, 1967, Vol. III, pp. 437-438

[2] see Lodge and Thornton, p. 23-25, from *Chronicon Henrici Knighton*, (R.S.) (1895), II, 216-20; and see S&M1, p.237-239, sourced to *Rotuli Parliamentorum*, III, 216-224 (French).

[3] *Second Statute of Praemunire*, 16 Ric. II, c 5, 1393. (*Statutes of the Realm*, II, 84, praemunire), (see S&M1, p. 246)

[4] see Hale, *Prerogatives of the King*, p. 12; 16 Richard II, c. 5, *Statutes of the Realm*, II, 84 (praemunire)

[5] see S&M1, p. 246, (French), *Statutes of the Realm*, II, 85 ff.

[6] see Stubbs, *Constitutional History*, Vol. 2, p. 510, and pp. 508-536..

Edward's shrine recognised the undiminished and indefeasible power of his prerogative.[1] Every step taken by Richard II was, however, taken with cautious reference to precedent and respect to the formal rights of the estates, and with the apparent unanimous consent and at the petition of the estates.[2] Of Richard II's actions, Stubbs has recorded:

> Neither documentary record, nor the evidence of writers, who both at the time and since the time have treated the whole series of phenomena with no pretence of impartiality, enables us to form a satisfactory conclusion. Richard fared ill at the hands of the historians who wrote under the influence of Lancaster, and he left no posterity that could desire to rehabilitate him.[3]

Within the year Richard was deposed; he was thirty-three. On the death of John of Gaunt in January 1399, Richard had seized the Lancastrian estates; Richard went to Ireland; and Henry the heir of Lancaster invaded England in July 1399. Richard 'saw at once that all was over', and offered to resign the crown.[4] He was placed in the Tower, and issued double writs for *parlement* (so that the it could 'legally' meet after Richard's 'resignation' was announced). Richard executed the deed of resignation on 29 September; he absolved all his people from their oaths of fealty and homage, and renounced in the most explicit terms every claim to royalty in every form, saving the rights of his successors, and the sacred character of the anointing.[5] The *parlement* met on 30 September, and the archbishop and the estates and people present assented to acceptance of the resignation. Then a form containing articles of objection against Richard was read. First the coronation oath was recited. Professor Richardson noted in 1960 that '(e)ven more striking ... is the fact that when Richard II was charged with violating his coronation oath, its terms were sought in

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[1] see Stubbs, *Constitutional History*, Vol. 2, p. 522. Stubbs calls this *parlement* 'suicidal' and says: 'The suicidal parliament of 1398 at Shrewsbury made Richard to all intents and purposes an absolute monarch... he held the parliament in his own hand; he had obtained a revenue for life; he had procured from the estates a solemn recognition by oath before the shrine of St Edward of the undiminished and indefeasible power of his prerogative, and from the pope a confirmation of the acts of parliament. He, believing in the casuistry which the age accepted, refused to regard himself bound by promises made on compulsion; but went further, and stated, and obtained the consent of the nation to the statement, that his regal power was supreme.'

[2] Stubbs, *Constitutional History*, Vol. 2,, p. 519, and p. 524

[3] Stubbs, *Constitutional History*, Vol. 2, p. 524

[4] Stubbs, *Constitutional History*, Vol. 2, p. 527

[5] 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 cessare.' Apparently Thirnyng was obliged tacitly to admit that this spiritual character had not been renounced by the cessation.

bishops' pontificals, which certainly did not contain it.' [1]

Richard was indicted primarily for breaking his coronation oath : by refusing justice to Henry of Lancaster; by diminishing the rights of the crown by seeking approval of English statutes from the pope, and by alienating crown lands; by refusing to keep and defend the just laws and customs of the realm; by doing many things contrary to statutes which had never been repealed, this last being done 'expressly and knowingly against his oath made in his coronation.'[2]

Adam of Usk had been involved in the deposition of Richard, and noted in his *Chronicle* (1399-1400) that he had been set aside 'in accordance with the chapter: *Ad apostolicae dignitatis* under the title *De re judicata* in the Sextus.' Adam had seen Richard in the Tower, just prior to the proclamation of Henry of Lancaster as king; he had been 'much moved', and penned this epitaph :

> Richard, farewell! ... though well endowed as Solomon, though fair as Absalom, though glorious as Ahasuerus, though a builder excellent as the great Belus, like Chosroes, king of Persia, who was delivered into the hands of Heraclius, didst thou in the midst of thy glory, as Fortune turned her wheel, fall most miserably into the hands of Duke Henry, amid the curses of thy people.

Adam of Usk noted that Richard was murdered 'as he lay in chains in the castle of Pontefract, tortured by Sir N. Swinford with scant fare...'[3]

Maitland notes:

> Apparently it did not enter the heads of any concerned that the estates lawfully summoned could not depose a king for sufficient cause — though he had resigned, they put it to the vote whether his resignation should be accepted and ex abundanti, as they said, proceeded formally to depose him. Perhaps they feared to let the matter rest upon an act of resignation, for this might leave it open for Richard to say at some future time, and not

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[1] see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111; at p. 172; [note. 53 ; he refers to *Rotuli Parliamentorum* (London, without a date) III, 417, as the source, where there is also a reference to the Chancery Rolls.] Richardson claims this, with some justice I believe, after all of his articles, because the king took his oath in the vernacular, which was written on a piece of paper or parchment, and which was placed on the altar after he had taken it. (This is the practice still.) No care was necessarily taken with it; nor were the precise words written down, as they were already written down, but in an ephemeral form. The text in *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, at p. 407 ff., on the Deposition of Richard II, and which is reproduced in my Appendix I, is said to be translated from the original in *Rot. Parl.* III., 416 (Latin).

[2] For full text see extracts from *English Historical Documents*, *loc. cit.*, in Appendix I. And see Stubbs, *Constitutional History*, Vol. II, pp. 530-531.

[3] For this text see *Chronicle of Adam of Usk*, translated by E M Thompson, quoted in *The Portable Medieval Reader*, edited and with an introduction by James Bruce Ross and Mary Martin McLaughlin, The Viking Press, New York, 1949, 22nd printing 1967, at pp. 276-280. See text also at Appendix I.

> without truth, that the act was not voluntary, but had been extorted from him by duress. Still the deposition could really stand on no better footing than the abdication; if Richard was coerced into resigning he was coerced into summoning the parliament, and only by virtue of the king's summons had the parliament which deposed him any legal being. This perhaps is the reason why very soon afterwards Richard disappears from the world.[1]

Henry Bolingbroke—**Henry IV**—immediately took the crown, in what has been described as 'the revolution of 1399.'[2] Again we do not know the text of the coronation oath he took[3], though Sir Matthew Hale published a text almost identical to that of the '1308 oath'[4]. We do know that he apparently made a Declaration of Sovereignty on getting into the 'vacant' throne:

> In the name of the Fadir, Son and Holy Gost, I Henry of Lancastre chalenge yis Tewme of Yngland and the Corone with all ye members and ye appurtenances, als I yt am difendit be right lyne of the Blode comyng fro the gude lorde Kyng Henry therde, and thorghe yat ryght yat God of his grace hath sent me, with helpe of my Kyn and of my Frendes to recover it: the whiche Rewme was in poynt to ne undone for defaut of Governance and undoyng of the gode Lawes.[5]

Lancastrian propaganda has suggested that Henry IV was anointed with Thomas a'Becket's holy oil, an ampoule of oil mystically and miraculously given to a'Becket by the Virgin Mary, the essential virtue of which would confer on a foretold prince the power to 'reconquer the holy land from its pagan inhabitants.' After the time of Edward II it had been lost, and apparently never used, until Richard II rediscovered it long after his accession. Being prevented by his clergy from a second anointing, Richard enclosed the ampoule in a golden eagle which he wore as a talisman.[6] Anointing with this chrism, (had it

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[1] see Maitland, *Constitutional History*, p. 192. Richard was probably murdered at Pontefract castle in early 1400.

[2] see Chrimes, *Constitutional Ideas*, *loc. cit.* p. 140

[3] note here that Schramm, *History of the English Coronation*, at p. 88 says that 'the Wars of the Roses, as in many other cases, made a breach in tradition between the fourteenth and sixteenth centuries' [with reference to the keeping of adequate clerical records of the coronation.] And that at p. 213 he assumes cavalierly that Henry IV had taken the 'old text' —i.e. the '1308 oath'; he says : 'Presumably Henry congratulated himself that the estates did not seize the opportunity of enlarging the demands made on the king in the coronation oath.' For reasons given elsewhere, the writer prefers the stance taken by Richardson as to the reliability of the liturgical texts (the '1308 oath') in considering what kings actually swore.

[4] see Hale, *The Prerogatives of the King*, *op. cit.*, p. 67, sourced to 1 Henry IV, n 17, R. P. iii, 417b. This is the text that was used by the seventeenth century house of commons in their Remonstrance of 1642.

[5] for this text see Lodge and Thornton, *supra*, at p. 31, sourced to *Rot. Parl.*, III, 422-3 (53, 54); and see text in *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, at p. 407 ff., on the Deposition of Richard II, and which is reproduced in my Appendix I, is said to be translated from the original in *Rot. Parl.* III, 416 (Latin).

[6] For a full account of the original story, and the story as retold by the House of Lancaster, see Marc Bloch, *The Royal Touch, Sacred Monarchy and Scrofula in England and France*, translated by J E Anderson, Routledge & Kegan Paul, London, 1973; translated from *Les Rois thaumaturges*, 1961, Max Leclerc et Cie, pp. 137-140. See also T A Sandquist, 'The Holy Oil of St Thomas of Canterbury', in T A Sandquist, and M R Powicke, (*eds.*), *Essays in Medieval History presented to Bertie Wilkinson*, University of Toronto Press, Toronto, 1969, 330-344.

ever occurred)[1] would have bolstered substantially Henry's security on the throne.[2]

But Henry IV's usurpation with the apparent support of the people did not mean that he had any lesser a view of his prerogative than had Richard II. In 1411 he defended his prerogative before the commons and the lords:

> *[The king] said that he wished to maintain his liberty and prerogative in all points, as fully as any of his noble ancestors or predecessors had done, or enjoyed or used them before this time. To which the speaker, in the name of the commons, and the commons themselves, of their common assent were well agreed: therefore the king thanked them and said that he wished to have and to enjoy as great a liberty, prerogative, and franchise as any of his ancestors had had in times gone by.*[3]

Henry V (1413) was crowned but there is no record of his oath,[4] and **Henry VI** succeeded as a nine-month old infant in 1422, and was crowned in 1429, but there is no record of his oath either.[5] In 1465, the lords admitted that the 'high prerogative, pre-eminence and authority of his majesty royal, and also the sovereignty of them and all the land was resting and always must rest in his excellent person.'[6] Due to the vicissitudes in the success of York or Lancaster at persuading the people and the judges[7] that each was the proper king of England, Henry VI was king from 1422 till 1461, when Edward IV took the crown until 1470; Henry VI was king again from 1470 till 1471 when he was deposed by Edward again. Henry VI was murdered a month after his deposition, and Edward IV reigned until his death in 1483.

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[1] Sandquist notes that Adam of Usk, who was present at Henry IV's coronation, does not mention any anointing with St Thomas a'Becket's oil—see Sandquist, 'Holy Oil of St Thomas', *art. cit.*, at p. 339

[2] see Chrimes, *Constitutional Ideas*, *op. cit.*, p. 7. Thomas a'Becket's holy oil was used in the unction of all kings from the time of Henry IV to James VI and I, who being a strict Calvinist with an abhorrence of the cult of the Virgin Mary and the saints, refused to use it. (Bloch, *loc. cit.*, p. 139) (Ordinary holy oil consecrated by the English clergy was used instead). But the golden ampoule evaded destruction during the Interregnum, and was last used in the coronation of Elizabeth II. For a discussion of the legend of the holy oil, see T A Sandquist, 'The Holy Oil of St Thomas of Canterbury', in T A Sandquist, and M R Powicke, (*eds.*), *Essays in Medieval History presented to Bertie Wilkinson*, University of Toronto Press, Toronto, 1969, 330-344.

[3] see *English Historical Documents*, Myers, (*ed.*): 1411 The king defends his prerogative, 1411, p. 415, (*Rot. Parl.* III, 658 [French])

[4] though Schramm, *History of the English Coronation*, *loc. cit.*, does refer in his appendix at p. 236 to an unpublished 'Coronation Roll of Henry V, 1413, in the Public Records Office'.

[5] see Schramm, *History of the English Coronation*, he makes no reference to Henry VI at all in his index, and Henry VI is not accounted for in his Appendix.

[6] see Chrimes, *loc. cit.*, p. 6, *Rot. Parl.* v, 376.

[7] See the discussion of *the Duke of York's case*, *supra*, at p. 100 ff.

THE OATH AND THE WARS OF THE ROSES

There is no record of **Edward IV**'s coronation oath,[1] and the sources seem also strangely silent on his coronation.[2]

The struggle during the War of the Roses was over power; power lay in the crown; and both Lancaster and York wanted it. Who had the better claim? Who was really the king?

Sir John Fortescue, variously member of *parlement*, the King's Serjeant, Chief Justice of King's Bench and Chancellor to Henry VI, wrote three major works during this period, all of which are concerned with the succession to the crown and governance of the kingdom—*De Natura Legis Nature* (1461-1463),[3] *De Laudibus Legem Anglie* (1468-1471),[4] and *De Dominio Regale et Politico*, usually known as *The Governance of England* (1471)[5].

De Laudibus was written in the form of a dialogue between the Prince (Edward) and the Chancellor (Fortescue), probably after the restoration of Henry VI, as it is clear from the text that the writer expects the prince to succeed to the throne. Fortescue was then some eighty years of age.[6] In form and in terms of philosophy he anticipated Christopher St

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[1] Schramm in his *History of the English Coronation* has no reference at all to either Edward IV's coronation or his oath, nor in the index nor his Appendix. It is possible that Edward IV did not take the coronation oath at all, which could account for the elliptical reference by Sir John Fortescue in his *De Laudibus*, to kings who endeavoured to 'throw off ' the 'political yoke' of the coronation oath—see note 1, p. 228, *infra*. Indeed, given Edward IV's cavalier attitude towards his responsibilities concerning his marriage, (see p. 107 ff. and note 5 *supra*), and Maitland's animadversions on his autocracy (see Maitland, *Constitutional History*, p. 195, p. 221, and pp. 266-267) it would not be surprising if Edward IV did not take the coronation oath at all. If he did not, this could account for Richard III's almost over-conscientious following of all the common law forms.

[2] Stubbs says that 'it was said that [Edward] had chosen 1 November 1460 as the date for his coronation, in case the lords had accepted him as king', *Constitutional History of England*, Hein & Company reprint, 1987, Vol. 3, p. 192. And Michael St John Parker, *Britain's Kings and Queens*, Pitkin Pictorials Ltd, first published 1974; further edition 1990, reprinted 1992, at p. 17 says Edward IV was crowned at Westminster. *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Griffiths, OUP, New York, 1988, reprinted with corrections, 1989, 1992, makes no mention of Edward IV's coronation.

[3] Sir John Fortescue, *De Natura Legibus Naturae (Treatise of the Nature of the Law of Nature)*, in *Complete Works of Sir John Fortescue, ed.* Lord Clermont, 2 Vols. London, 1869

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

[5] Sir John Fortescue, *The Governance of England, ed.* by Charles Plummer, Oxford, 1885, 1926.

[6] see *De Natura*, quoted in Chrimes' Introduction to *De Laudibus*, *loc. cit.*, p. lxxxviii.

Germain's *Dialogue between a Doctor of Divinity and a Student of the Laws of England*[1], which refers to Fortescue's work[2]; and also to some degree the standpoint of Machiavelli, who wrote *The Prince* c.1513-1514[3]. Fortescue's perception of the body politic[4] bears an uncanny resemblance to that articulated almost two centuries later by Thomas Hobbes' *Leviathan, or the Matter, Form and Power of a Commonwealth ecclesiastical and Civil.*[5] (Indeed, Fortescue actually uses the image of Leviathan.[6])

Fortescue was a committed Lancastrian who had written numerous tracts justifying the title of Lancaster to the throne,[7] and, as tutor to prince Edward, son of Henry VI, was preoccupied with kingship—'Lo!' he says 'To fight and to judge are the office of a king.'[8]

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[1] Christopher St Germain's *Dialogue between a Doctor of Divinity and a Student of the Laws of England* , published 1523 in Latin; published by St Germain in English in 1530, reprinted by William Marshall, 1815, referred to by Chrimes in *Constitutional Ideas, loc. cit.*, at p. 203, and p. 204, n. 1. Another text is *St German's Doctor and Student*, T F T Plucknett and J L Barton, (*eds.*), Selden Society, Vol. XCI, Selden Society, London, 1974.

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

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

[4] see Fortescue, *De Laudibus, loc. cit.*, cap. XIII, at p. 31; and see Appendix III, for text and detailed commentary.

[5] Thomas Hobbes, *Leviathan, or the Matter, Form and Power of a Commonwealth ecclesiastical and Civil*, 1651, edited and abridged by John Plamenatz, Collins, The Fontana Library, 1962, third impression, 1967, Hobbes' Introduction, p. 59.

[6] See *De Laudibus, loc. cit.*, p. 79, folio 16v.

[7] See for example, *De Titulo Edwardi Marchiae, Defensio Juris Domus Lancastriae*, in *Complete Works of Sir John Fortescue, ed.* Lord Clermont, 2 Vols. London, 1869

[8] Fortescue, *De Natura*, II, vii, *Works*, 122; Chrimes, *English Constitutional Ideas..., loc. cit.*, p. 14. Of course, Glanvill in c.1187 and Bracton c. 1250 had said exactly this same thing—see Appendix III : Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanuilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall (*ed.*), Nelson in association with the Selden Society, London, 1965, Prologue, p. 1 : 'Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples'; and *Bracton De Legibus et Consuetudinibus Angliae*, written between 1250 and 1260: *To rule well a king requires two things, arms and laws*, at folio 1. But note that Chrimes, in *English Constitutional Ideas in the Fifteenth century, loc. cit.*, Chapter IV, Excursus I on *Fortescue and Bracton*, at p. 324 ff., says no reference to Bracton is to be found in any of Fortescue's writings, and while this may seem incredible for a chief justice of king's bench from 1422-1462, no copies of Bracton were made after 1400, and Bracton was apparently held in the 15th century as no authority on the law. Chrimes compares their respective doctrines of kingship and concludes that it is 'unlikely that Fortescue, despite all his zeal for citation and authorities, made any use of Bracton's work.' [Though, of course, (my opinion) Fortescue was essentially a political player; and a familiarity with a work which has no contemporary currency, (and to which he was in time much closer than the rediscoverers of Bracton in the 17th century) is likely to make any plagiarist's job the easier. It must be said, however, that Fortescue himself in *De Laudibus* sources this to the Old Testament, 1 Kings, 8, 20 (Vulgate)—'For the office of a king is to fight the battles of his people and to judge them rightfully.' (at p. 3, English translation), and to the Prooemium of

On kingship, put briefly,[1] Fortescue concluded in *De Natura Legibus Naturae*, that the 'law of nature' was 'the only law in the light of which the succession to kingdoms can be decided'.[2] He said that it was 'indupitable that a king reigns duly by God, if he is duly anointed, crowned, and sceptred *according to the law and custom of the realm*, in conformity with the law of God and of the Church."[3] He concluded that because the House of Lancaster had enjoyed all the stipulations of just kingship set out by Saint Augustine—divine and ecclesiastical approval, the consent of the people, and possession through a long period[4]—any right that the Yorkists may have had was defeated by sixty years' prescription, had been renounced and adjured, and was barred by matters of record. Henry IV had been anointed and crowned king of England by the whole assent and will of the land, no man objecting, 'after the common law used in all the world'.[5]

Fortescue admits of a number of avenues by which a man could become king[6] : by the law of nature; by hereditary right (the Yorkist claim); and by prescription (the Lancaster claim). But there is one common denominator to all three : the person had to be accepted by the consent of the people, anointed and crowned according to the law and custom of the land, in accordance with God's law and that of the church. The law and custom of England demanded that before a king could be crowned in the sight of God and the people, he had

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Justinian's *Institutes*, (see p. 4 (Latin) and p. 5 (English translation) — 'Imperial Majesty ought to be not only adorned with arms but also armed with laws, so that it can govern aright in both times of peace and war' *'Imperatoriam maiestatem non solum armis decoratam, sed et legibus oportet esse armatam, ut utrumque tempus bellorum et pacis recte possit gubernare.'*

[1] A full discussion of Fortescue and the major relevant parts of his text in *De Laudibus* are at Appendix III.

[2] Fortescue, *De Natura Legibus Naturae (Treatise of the Nature of the Law of Nature)*, in *Complete Works of Sir John Fortescue, ed.* Lord Clermont, 2 Vols. London, 1869; all this discussion is heavily indebted to Professor S B Chrimes' explication of Fortescue and his works in Chrimes' Introduction and Notes to Sir John Fortescue, *De Laudibus Legum Anglie, op. cit.*

[3] My italics; quotation from *De Titulo Edwardi Marchiae*, in *Complete Works of Sir John Fortescue, ed.* Lord Clermont, 2 Vols., London, 1869, at p. 86; quoted by Chrimes, *English Constitutional Ideas..., loc. cit.*, at pp. 64-65. Fortescue immediately went on to say that 'Neither the inhabitants of England nor of any other kingdom were allowed to transfer the realm from a duly constituted king reigning according to law and custom, to another.'

[4] Fortescue, *De Titulo*, p. 84; *Defensio Juris Domus Lancastriae*, pp. 501-502 in *Works, ibid.* St Augustine's treatise *On Kingship* has been lost.

[5] Fortescue, *Defensio, loc. cit.*, p. 500

[6] Fortescue would not however, have seen the crown passing to any female of the blood royal, and the succession of Mary and Elizabeth would have filled him with dread, as would also the anointing of Anne, Richard III's queen. Fortescue was opposed to women succeeding to the crown, because it 'is uncustomary, inconvenient, and unlawful'. ... 'That no woman could be anointed on the hands and thus could not exercise the thaumaturgical powers of a king [though all female English monarchs up to Anne did so]; nor could she bear a sword, [though Eleanor of Aquitaine had done so] nor be fitted to act as a judge in criminal cause. Besides it was unlawful for women to rule over men; God had made a law that women should not have power directly form him over man, and so be without a sovereign on earth. God's word to females was: *Eris sub potestate uiri et ipse dominabitur tui.*' — quoted by Chrimes, *English Constitutional Ideas..., loc. cit.*, at pp. 62-63, from *De Titulo*, 78, 80-81; *Defensio*, 511, 513; *Of the Title of the House of York*, 498.

to be accepted by the people and to take the coronation oath.

What was this law and custom of the land? This is first spelled out in *De Laudibus.*

Fortescue saw the laws (*legibus*)[1] of the realm proceeding out of 'customs, statutes, and the law of nature'[2], and that the laws of England were better than the civil law because he sees English law as complying with the precepts of St Thomas Aquinas[3], that a king should govern his people with his 'regal power...restrained by political law ...*potestas regia lege politica cohibitur.*'[4] Such a body politic is a 'political kingdom', where the king is 'obliged to protect the law, the subjects and their bodies and goods, and he has power to this end issuing from the people, so that it is not permissible for him to rule his people with any other power.'[5]

England is such a political kingdom because, while the law of nature is the same everywhere[6], and while English customs are 'the best'[7], with regard to the third arm of the laws, statutes, English statutes are made 'not only by the prince's will, but also with the assent of the whole realm, so they cannot be injurious to people nor fail to secure their advantage.'[8] It is only when Fortescue has the prince question why some earlier kings were so little pleased with these excellent English laws that they tried to introduce the civil laws

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[1] *De Laudibus, op. cit.*, p. 20. See also *De Laudibus* Cap. XV All laws are the law of nature, customs, or statutes [Omnes leges sunt ius nature, consuetudines, vel statuta.]p. 37. '... I want you then to know that all human laws are either law of nature, customs, or statutes, which are also called constitutions. But customs and the rule of the law of nature, after they have been reduced to writing, and promulgated by sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes; and thereupon oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of the command. ...'

[2] *De Laudibus, loc. cit.* p. 21

[3] See St Thomas Aquinas, *On Kingship, to the King of Cyprus, De Regno, Ad Regem Cypri*, (c. 1260), Gerald B Phelan, (*trans.*), revised with introduction and notes by I Th. Eschmann, Pontifical Institute of Medieval Studies, Toronto, 1949, reprinted 1967, 1978, 1982. It should be noted that Eschmann's revision and translation is of only the work of Aquinas. Previously, editors had followed medievalists who had erroneously compiled *De Regno* with another and quite different work, *De Regimine Principum (On the Governance of Rulers)*, by Tolomeo of Lucca (d. 1327), publishing both fragments under the name of Aquinas, and calling them *De Regimine Principum*—see Introduction, pp. ix-x.

[4] *De Laudibus, loc. cit.*, p. 27 and p. 26,; and see Appendix III for text in context.

[5] *De Laudibus, loc. cit.*, p. 33; and see Appendix III.

[6] *De Laudibus, loc. cit.*, p.39; and see Appendix III.

[7] *De Laudibus, loc. cit.*, p.41; and see Appendix III.

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

to England,[1] that he adverts to the coronation oath:

> 'You would not wonder, prince, if you considered with an alert mind the cause of this attempt. For you have already heard how among the civil laws there is a famous sentence, maxim, or rule, which runs like this, *What pleased the prince has the force of law*.[2] The laws of England do not sanction any such maxim, since the king of that land rules his people not only regally but also politically, and so he is bound by oath at his coronation to the observance of his law.[3]

Clearly Fortescue saw the coronation oath as the mechanism whereby the king's regal *imperium* becomes a political one *as well*; that it is the oath he swears at his coronation which binds him to political rule, and to the observance of 'his law'. Because the king receives his kingship as a result of the will of the people, and as the law is the nervous system of the body politic, binding all parts of it together, the king is obliged to maintain and protect the laws, and not to change the laws himself without the assent of his subjects. The authority which the English king has, which is different from that of a king under the civil law who rules entirely regally, is not spelled out by Fortescue[4], but clearly the major significant difference is that the source of the king's authority in and as a body politic comes from the people, and the nature of this distinction is made clear in his coronation oath, where the aforementioned obligations are clearly stated, and by which he enters into his office of

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[1] Though it has to be said that it is difficult to think of any king of England who tried to introduce civil law to the kingdom—William the Conqueror re-enacted the Confessor's laws, and even Richard II achieved his position with the full agreement and consent of his *parlements*; one suspects that Fortescue is setting up a false premise to prove his own; or that alternatively he is animadverting subtly upon Edward IV. This hypothesis is strengthened by Fortescue's referring in the paragraph following hard upon the mention of the coronation oath that 'certain kings of England bore hardly' the taking of the coronation oath, 'thinking themselves therefore not free to rule over their subjects as the kings ruling merely regally do…', and hence they 'endeavoured to throw off this political yoke' i.e. the coronation oath.—see *De Laudibus, loc. cit.*., p. 79, and p. 80, and see discussion *infra*. I have not been able to find any reliable report of Edward IV taking the coronation oath, although Lettou and Machlinia published the 'Henry VIII oath' at the end of his reign. See also Chrimes' endnote, *De Laudibus, loc. cit.*., at p. 181 – 'Whom, beyond Richard II, Fortescue had in mind, I must leave to the reader's speculation.'

[2] This misinterpretation of Justinian's maxim was perpetuated by English common lawyers (e.g. Glanvill, Bracton, and Fortescue), as a polemical device to elevate the English common law system favourably when compared with the continental civil law, which they saw as being based in part on the maxim: *quod principi placet, legis habet uigorem*—'what pleases the prince has the force of law', see Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, The Treatise on the laws and customs of the realm of England, commonly called Glanvill*, G D G Hall (*ed.*), Nelson in association with the Selden Society, London, 1965, p. 2. Bracton [*Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 1922 Yale University Press; translation copyright 1968 Harvard, *op. cit.*,] at p. 305-306, [folio 107, 107b], however gives a fair rendition of the maxim : what Justinian actually said was: *Sed et quod principi placuit, leges habet uigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium potestatem < concessit >*. 'A pronouncement of the emperor also has legislative force because, by the Regal Act relating to his sovereign power, the people conferred on him its whole sovereignty and authority'.—see Justinian's *Institutes*, translated with an introduction by Peter Birks and Grant McLeod, with the Latin text of Peter Krueger, Gerald Duckworth & Co. Ltd., London, 1987, 2nd impression 1994, book 1, 1.2, p. 36 (Latin), and p. 37 (*trans.*). Fortescue's particular political and polemical reasons for misinterpretation of the maxim are discussed immediately below.

[3] *De Laudibus, loc. cit.*., p. 79; and see Appendix III.

[4] see *De Laudibus, loc. cit.*, p. 29; and see Appendix III.

king.

Now why is Fortescue elaborating so on the duties of kingship to Prince Edward in *De Laudibus*? Henry VI had been deposed by Edward IV in 1460, but regained the throne in 1470. Edward seized it again in 1471, and Henry was murdered.

Professor Maitland has observed that Edward IV's claim to rule was 'practically an assertion that you have a right to rule in defiance of any laws however made.'[1] Later he says: '...in Edward IV's reign torture begins to make its appearance; we hear of it in 1468. It never become part of the procedure of the ordinary courts, but free use is made of it by council, and the rack becomes one of our political institutions. The judicial iniquities of Edward IV's reign are evil precedents for his successors.'[2] And later: 'Towards the end of the Wars of the Roses we find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all cases of treason "summarily and plainly, without noise and show of judgment on simple inspection of fact,"... They show something very like contempt for the law—the constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts and restrictions to the contrary notwithstanding...'[3] In short, Edward IV was an autocrat, without any respect for the law.

In this context, Fortescue's biting comparison between the king who takes his coronation oath and thus rules his people according to law, and the king who does not, bears scrutiny:

> This [taking the coronation oath] certain kings of England bore hardly, thinking themselves therefore not free to rule over their subjects as the kings ruling merely regally do, who rule their people by the civil law, and especially by the aforesaid maxim of that law, so that they change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of parties at their own will and when they wish. Hence those ancestors[4] of yours endeavoured to throw off this political yoke, in order thus to rule merely regally over their subject people, or rather to rage unchecked, not heeding that the power of the two kings is equal, as is shown in the aforesaid Treatise on the Nature of the Law of Nature, nor heeding that it is not a yoke but a liberty to rule a people

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[1] see Maitland, *Constitutional History*, *op. cit.*, p. 194-195

[2] see Maitland, *Constitutional History*, *op. cit.*, p. 221

[3] see Maitland, *Constitutional History*, *op. cit.*, pp. 266-267

[4] Fortescue's Latin here is *progenitores tui*, (folio 17v, *De Laudibus*, *loc. cit.*, p. 80), referring back to the prince's question (at folio 17r) as to why 'his ancestors the kings of England' tried to 'repudiate the law of the land'—*tamen progenitorum meorum Anglie regum quosdam audivimus, in legibus suis minime delectatos, satagentes proinde leges civiles ad Anglie regimen inducere, et patrias leges repudiare fuisse conatos*. Chrimes has translated this as 'ancestors'; but it may also be possible that in context Fortescue means not merely the prince's ancestors by blood, but his predecessors in the crown, thus allowing of a subtle condemnation of Edward IV as discussed immediately *infra*.

> politically, and the greatest security not only to the people but to the king himself, and no small alleviation of his care.[1]

So here Fortescue talks of a king who refuses to take the coronation oath, who has contempt for the law, just after writing at length and with passion about someone contracting a clandestine marriage, and afterwards betrothing himself to another woman, and as a result how *Leviathan's testicles are perplexed.*[2] Now the pre-contract of Edward IV, a notorious libertine, to Lady Eleanor Butler before his clandestine marriage to Elizabeth Woodville was the *cause célèbre* of 1464,[3] later in 1483 causing Richard III to take the throne because of the consequent illegitimacy of Edward IV's sons. This same Edward was castigated by Maitland for his contempt for the law. It may well be that there is no record of Edward IV's coronation oath, because he did not take one.

In 1471 Prince Edward was killed at the Battle of Tewkesbury, Fortescue was proclaimed a traitor by Edward IV, captured, then given a general pardon.[4] He became a member of Edward IV's Council and recanted all his Lancastrian pamphletts in *The Declaration upon Certain Wrytings.*[5] He then wrote *The Governance of England.*[6]

The most often used quotation from *The Governance of England* is that referring to his distinction between a *dominium regale* and a *dominium politicum et regale*[7] which invariably is used to support some idea of parliamentary sovereignty. But clearly from the foregoing analysis, what Fortescue had in mind in making such a distinction was the difference between a king bound by his coronation oath to observe the laws, and one who was not. Moreover Fortescue in fact says in the *Governance of England* when discussing an ordinance for the king's routine charges:

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[1] *De Laudibus, loc. cit.*, pp. 79-80, folios 17r and 17v.

[2] See *De Laudibus, loc. cit.*, p. 79, folio 17r, ostensibly quoting Job, *Perplexi sunt testiculi Leviatan.* Job Chapter 3, verse 8 says: 'Let those curse it who curse the day, who are skilled to rouse up Leviathan.'

[3] See *supra*, pp. 105-107 *passim*, and particularly note 2, p. 106, and note 5, p. 107, *supra.*

[4] See Chrimes, Introduction to *De Laudibus*, pp. lxvi-lxvii

[5] 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.]

[6] Chrimes in his Introduction, suggests that this was written for Edward IV not Henry VI, after Fortescue's' rehabilitation on recantation. —see Introduction to *De Laudibus, loc. cit.*, p. lxvi.

[7] See *The Governance of England, ed.* by Charles Plummer, Oxford, 1885, p. 109, and see Appendix III.

> ...so is the kynges power more, in that he may not put ffrom him possesciones necessaries for his own sustenance, than yff he myght put ham ffrom hym, and aliene the same to his owne hurte and harme. Nor this is ayen the kynges prerogatiffe, be wich he is exaltid above his subgettes; but rather this is to hym a prerogatiff. Ffor no man saue he mey haue ayen the land þat he hath onis aliened.[1]

And later in *Governance*, after his oft-quoted statements about *dominium politicum et regale*, he advocates a monarchy greater than any of its parts; where the king is so endowed financially as to obviate the necessity of asking *parlement* for much money; where the king's income over and above the revenues assigned to the ordinary expenses of government be 'greater than the livelihood of the greatest lord in England'. He says that the king's council should be composed of the wisest of the kingdom's men, not factious noblemen, and that it have power to amend the laws, and thus guide *parlement* by presenting bills 'riped to their hands.'[2] Clearly, these views were heavily influenced by Fortescue's own observations and experiences of the lawlessness and confusion during the Wars of the Roses. He was, however, nothing if not a pragmatist; his experience of justice and the executive, not to mention politics, warfare, exile, return and recantation, meant that he had a realistic grasp of the necessities for good and effective government. In no fashion could he be said, overall, to have been an advocate of the supremacy of parliament—rather was he a supporter of effective kingship.

These excerpts tend to support the view that he saw the *coronation oath* as being the means by which the king was bound to the observance of his laws, and by virtue of which the *dominium politicum et regale* was established.[3] Fortescue's references to the king's being bound by his oath to observe his laws, and to the maintenance of the king's prerogative and the non-alienation of the rights of the crown, also support my hypothesis that something like the 'Henry VIII oath' was taken by the kings prior to Edward IV.

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

[2] See Sir John Fortescue, *Governance of England*, Charles Plummer, (*ed.*), Oxford, 1885, Chapters 8-13, and Chapter 15, and p. 148; as quoted in Franklin le Van Baumer, *The Early Tudor Theory of Kingship*, Yale University Press, 1940; reissued 1966, New York, Russell & Russell, at p. 19

[3] *Qualiter non sancciunt leges Anglie, dum nedum regaliter sed et politice rex eiusedem dominatur in populum suum, quo ipse in coronacione sua ad legis sue observanciam astringitur sacremento...* *De Laudibus*, folio 17r p. 78 *loc. cit.*, and see translation at note 3 at p. 228 *supra*.