CHAPTER 7

THE OATH AND THE PREROGATIVE

THE STUARTS AND THEIR OATH

ENGLAND

The transition from Elizabeth to James VI of Scotland was surprisingly smooth, the proclamation of a foreign and distant king having been made with despatch and some panache by Elizabeth's erstwhile Secretary of State. His coronation proceeded without hitch, with the Lords and the Commons subsequently reiterating their acknowledgement of James as the first king of that name of England with some considerable fulsomeness in the *Succession Act*,[1] as occurring with 'unspeakable general rejoicing and applause.'

Now this general rejoicing poses some conundrums, because the coronation oath which James took when he became king of England was quite different from that which had been included in the *Liber Regalis* some three centuries earlier, and which some scholars would wish us to believe had been followed by the English kings then and ever afterwards. It was also distinctly different from the text of the oath set out in the *Little Devices* for the coronations of Richard III and Henry VII. All the extant copies of the oath in the orders of service for James VI and I's coronation, *and* the record of the Earl of Clarendon as to the

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[1] *Succession Act*, 1604, 1 Jac. I, c. I; *Statues of the Realm*, iv, 1017, extracted in J R Tanner, *Constitutional Documents of James I, AD 1603-1625*, Cambridge University Press, Cambridge, 1930, reprinted 1961, at pp. 10-12. See discussion at p. 130 ff. *supra*.

oath which James' son took, (which scholars subsequently have maintained was the same as his father's[1]), include a clear, unambiguous omnibus saving of the royal prerogative[2]—'...will you grant ...the laws and customs ...according and conformable to the laws of God and true profession of the gospel established in this kingdom, and agreeing to the prerogatives of the kings thereof and to the ancient customs of this realm?'[3]

None of the texts of the liturgical coronation oaths mentions the prerogative; but the Lettou/Machlinia oath does, as do Henry VIII's amendments to it. It will be recalled that the former contained a specific clause safeguarding the rights of the crown, and that the latter specifically included savings as to the jurisdiction and freedoms of the crown (that is, matters pertaining to the prerogative). It will be recalled also that scholars have concluded that the coronation oath came to contain a saving of the rights of the crown from at least the time of Henry II.[4] And it will be remembered that the Scottish coronation oath also contains a saving of the prerogative and the sovereignty of the crown of Scotland. During the seventeenth century there was much controversy over the coronation oath, but, so far as I have been able to ascertain, none of it focussed on this part of the oath relating to the prerogative. And during the reign of James VI and I, no disquiet was expressed about the coronation oath's saving of the prerogative.

It is really only because of the paucity of information about the coronation oath of the

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[1] See Maitland, *Constitutional History*, p. 286—Maitland says that Charles I took the same oath as that taken by James VI and I and by Elizabeth I. Clarendon's reportage of Charles I's words about his coronation oath only support an inference that it was the same as his father's— 'the oath itself he took at his coronation, warranted and enjoined to it by the customs and directions of his predecessors; and the ceremony of their and his taking it;...This is it.' Neither Charles nor Clarendon *actually state* that the oath was the same. See Edward, Earl of Clarendon, *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, at p. 155, paragraph 293. For text see Appendix I.

[2] For texts, see Appendix I.

[3] *Juramentum Regis Jacobi*, 1603. This text is taken from the Tanner manuscript, in the Bodleian Library (Tanner MSS. (Bodl.), vol. 94, f. 121, as reproduced at p. 391 in *Select Statutes and other Constitutional Documents illustrative of the reigns of Elizabeth and James I*, edited by G W Prothero, 1st edn. 1894; 4th edn. reprinted 1963, Clarendon Press, Oxford.

[4] See the coronation oath of Henry II's son, crowned while Henry was alive, where he swore to preserve *regni consuetudines quas avitas dicunt*; quoted 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. 244; it included 'an additional promise to maintain unimpaired the ancient customs of the realm', see H G Richardson, 'The English Coronation Oath', *Speculum*, Vol. 24, 1949, p. 44, at p. 47. And see H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, at p. 166; and see Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502, at p. 501. And see texts 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, pp. 635-37.

Tudor monarchs, that the oath taken by the Stuarts springs to the eye, brandishing the prerogative. And it is my contention that this saving of the rights of the crown, that is, of the royal prerogative, was not new, and no innovation attributable to the Stuarts and their so-called concept of absolutism.

With regard to the first clause, James VI and I's oath most probably referred to 'this kingdom', so as to distinguish this coronation oath as king of England from the one prescribed for him in 1567[1] as king of Scotland, where the religion he there swore to uphold was the protestant religion as established in Scotland, a different form from that which had been established in England under the Tudors. That oath also required the king 'to root out of their lands and empires all heretics and enemies to the true worship of God that shall be convict by the true kirk of God of the aforesaid crimes'. His Scottish oath also clearly had referred to his ruling the people according to '*the will and command of God revealed in his ... word* [the old and new testaments] *and according to the lawful laws and constitutions received in this Realm nowise repugnant to the said word of the eternal God*'—that is, he was obliged in Scotland to uphold only just laws not inconsistent with the divine law; and by inference, no law or constitution could be lawful if it were in opposition to the divine law.

Leopold Wickham Legg in his work, *English Coronation Records*, translates a text which is somewhat different.[2] In the oath for Charles I, he has the words '*in the Church of England*' qualifying the words 'true profession of the Gospell'[3]—although in his introduction Legg himself refers to the words being '*in this kingdom.*'[4] It may well be that Charles I changed these words, as he was brought up in the faith of the Church of England[5]. On the other hand, according to the Earl of Clarendon, Charles himself stated that he had sworn to

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[1] See Coronation Oath Act, 1567 [Scotland], 1567 c.8, from *Statutes in Force*, Official revised Edition, Coronation Oath Act, 1567 [S], 1567 c.8, revised to 1st February 1978; HMSO, London, 1978, Short Title give by Statute Law Revision (Scotland) Act 1964 (c.80). Sch. 2. And for text see my Appendix I.

[2] See Leopold G Wickham Legg, *English Coronation Records*, Archibald Constable & Company Limited, Westminster, 1901, p. 245, MS. Harl. 5,222.

[3] See Legg, *English Coronation Records*, *op. cit.*, p. 251.

[4] See Legg, *English Coronation Records*, *op. cit.*, Introduction, p. xxix.

[5] see Charles I's statement on the scaffold, in *Trial of King Charles the First*, J G Muddiman, William Hodge & Company Limited, London, 1928, Appendix D, p. 260 ff., at pp. 262-263, and Appendix B, p. 66, and see J P Kenyon, *The Stuart Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1965, at p. 147 ff. —'In troth, Sirs, my conscience in religion I think is very well knowne to all the world : and, therefore, I declare before you all that I die a christian, according to the profession of the Church of England, as I found it left me by my father.' He was the second king of England to be a protestant member of the church of England, Edward VI being the first—James VI and I was a Calvinist. Elizabeth I was Elizabeth I.

maintain the laws granted to the clergy according to the laws of God and the true profession of the gospel 'in this kingdom'.[1] It seems more likely that in fact the words used were 'in this kingdom', as the Stuart kings up to James II and VII all swore both the Scottish and the English coronation oaths.[2] Moreover, Legg states that the laws and customs in this first clause being maintained by the king were only those granted previously to 'the clergy', and not to 'the clergy and the people', which latter words he asserts had been in James VI and I's coronation oath.[3] Certainly, there exists a manuscript which does include these words in James VI and I's oath;[4] on the other hand, Charles I implied, according to the Earl of Clarendon, that the words which he swore were the same as his predecessors had sworn.[5] The earlier *Little Devices* referred to the 'people' as well as to the 'clergy' in the first clause. The Lettou/Machlinia oath of Edward IV's time specifically confined the first clause to apply to the clergy, as did Henry VIII's amendments; but the oath drafted for Edward VI referred to only the people in its first clause. The House of Commons in its Remonstrance of 26 May 1642 did not refer to the first clause at all; nor, apparently, did William Prynne.[6] It is not unlikely that during the reform of the church in England under the Tudors, this clause of the oath was altered in accordance with the king's wishes. At all events, this first clause does not seem to have been any source of disquiet to the parliamentarians.

Legg also says that the words 'according to the Lawes of God, the true profession of the Gospell established in the Church of England, and agreable to the prerogatiue of y' Kinge therof, and the auntient Customes of this realm' was 'an addition of considerable importance to the first clause or preamble' made at the time of Charles I, which was

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[1] See Edward, Earl of Clarendon, *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, at p. 157, paragraph 296.

[2] But see p. 296 *infra*, and note 2 p. 296 *infra*, where it is suggested that Charles I did not take his Scots oath until 1633, and that the oath he took was a hybrid of both English and Scots oaths.

[3] See Legg, *English Coronation Records*, *op. cit.*, p. 251, n. 1, referring to Ashm. MS. 863, p. 269.

[4] Tanner manuscript, in the Bodleian Library (Tanner MSS. (Bodl.), vol. 94, f. 121, as reproduced at p. 391 in Prothero, *Select Statutes*, *loc. cit.*.

[5] See Clarendon, *History of the Rebellion*, *op. cit.*, at p. 155, paragraph 293— '[~~the~~] oath itself he took at his coronation, warranted and enjoined to it by the customs and directions of his predecessors; and the ceremony of their and his taking it; ...' But see my observation at note 1, p. 291 *supra*.

[6] for texts see my Appendix I. As to Prynne, I have not been able to read all of Prynne's works, but from what I have found he, together with the rest of the parliamentarians, concentrated on the last clause of the oath.

'almost a qualification to the promise to observe the laws of St Edward.'[1] But this statement is at complete odds with those of Charles I himself, and of other texts which relate to James VI and I's oath[2], and to the finding by Professor Richardson that the coronation oath for many years had included a clause about the saving of the rights of the crown[3].

P E Schramm, whose *History of the English Coronation* is still regarded as authoritative, spends only six paragraphs on the oath of the Stuart kings. He suggests that James VI and I's oath throws 'fresh light' on the history of the oath, but fails to illuminate this statement.[4] He suggests that James's oath was a 'new and independent translation of the French oath of 1308' which added on the reference to the royal prerogative. He says that the 'only real novelty' was the addition of the reference to the 'laws of God and the Gospels', which represented the 'Reformation [laying] its first mark upon the coronation oath'[5]—though indeed the oath in the *Little Devices* had referred to the 'worship of God', and the oath devised for Edward VI referred to 'the honour and glory of God', the reference to Saint Edward also having been removed in his oath.

I find myself unable to accept the statements of these scholars[6], and believe that the oaths of the Tudors and of the Stuarts and available original texts should receive more scholarly examination, in the light of the ramifications that the Stuart oath has for the pursuit of the Civil War, and the doctrine of the 'sovereignty of parliament'.

It is not the first clause, however, but the fourth clause of the Stuart oath, which attracted dispute. That clause stated that the king undertook to 'hold and keep the laws and rightful customs, which the commonalty of this your kingdom have: and will you defend, and uphold them to the honour of God, so much as in you lieth?' These were the words which

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[1] see Legg, *English Coronation Records*, *op. cit.*, Introduction, p. xxix, and p. 251, n. 2.

[2] See my Appendix I.

[3] See H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, p. 111, at 167 and 169; and H G Richardson, 'The English Coronation Oath', *Speculum*, Vol. 24, 1949, pp. 44-75, at p. 47; and Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502, at p. 501

[4] see P E Schramm, *A History of the English Coronation*, translated by Leopold G Wickham Legg, Oxford, Clarendon Press, 1937, p. 218, footnote 1—there is in fact no note to accompany the indicated footnote.

[5] Schramm, *History of the English Coronation*, *ibid.*, p. 218.

[6] See my considerable reservations about the conclusions of these scholars throughout this dissertation, for example, at p. 39, p. 113, p. 118, pp. 247, 248, 249, 251, 257, and pp. 294, 292, *supra*, and p. 314 and p. 316 *infra*.

James VI and I, Charles I, and later Charles II swore (but not James II and VII, whose oath was confined to 'customs', not 'laws and customs'.) But at the time of Charles I, they became a source of bitter controversy, because it was said that the king had taken an oath different from the ancient form. Archbishop Laud was accused of deliberately changing the oath from that of Charles' predecessors to 'hold and keep the laws and rightful customs which the communality of this your kingdom *have*...' instead of '...*shall have chosen*...'[1], so as deliberately to circumvent the power of the houses of parliament to make new laws. Laud was impeached by the Commons in December 1640, but not tried till 1644 during the war; and even though (it is said) he proved that this was the form taken by James VI and I, drawn from an older version possibly that of Edward VI or Elizabeth I,[2] he was executed. Laud himself wrote that the oath taken by Charles was the same as those 'in the Books of Coronation of Former Kings, especially those of Queen Elizabeth and King James', which it appeared had been stolen from his study by William Prynne; finally the Lords examined the text of the coronation for James was compared with that prepared for Charles, finding no discrepancy.[3]

The preoccupations of the parliamentarians during the reigns of James VI and I and Charles I were focussed not upon the existence of the prerogative, which everyone accepted, but upon what roles the king and the men sitting in the House of Commons played in the use of the prerogative, and in whom resided the sovereign power—in the king, or (as the House of Commons would have it) in the Houses of parliament.

SCOTLAND

James VI had, as discussed above, been crowned as an infant, with two Scots lords taking

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[1] see Maitland, *Constitutional History*, p. 286; my italics; but note that Legg in *English Coronation Records* at p. 245 says that Laud was (also?) accused of changing the words of *Sta et retine*. And see Schramm, *loc. cit.*, pp. 220-221.

[2] See Schramm, *History of the English Coronation*, *op. cit.*, pp. 218-219, and p. 219 note 1, sourced to 'Wordsworth (Appendix, No. 51), pp. xlii, xlvi-xlviii, lvii-lxv, 19, 89-90, 115.' It is not clear whether the Appendix referred to is that in Wordsworth, or that in Schramm; if the latter, the Appendix, No. 51, is a reference to 'Ordo for the coronation of King James I' (1603), *ed.* J Wickham Legg, *The Coronation Order of King James I*, London, 1902.' And see Maitland, *Constitutional History*, *op. cit.*, p. 287.

[3] 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, extracted in turn in Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England with Notes and introduction, with reproductions of the two celebrated pictures in medieval coronation Mss., inserted by special permission, with three pictures, viz. the Coronation of James II, and the vestments used thereat*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, pp. 83-84.

the Scots coronation oath on his behalf.[1] But the situation with his son Charles is a little more obscure. Charles was brought up in the worship of the Anglican church, and would appear to have had little understanding of his Scots subjects. It may well be that Charles did not take the Scots coronation oath until his first visit to Scotland in 1633, did not take the Scots oath in its entirety, and demonstrated a complete lack of understanding towards his Scottish people:

> [[this was demonstrated in] a spectacularly provocative coronation ceremony which was modelled on the English ceremony and which incorporated part of the English coronation oath instead of the Scottish oath laid down by Scottish statute. The setting—not Scone or Stirling, but Holyrood Palace, decked out with a railed altar and arras containing a woven golden crucifix—only added to the alarm and the gloom. This visit created a deep antipathy between Charles and many leading Scottish nobles...[2]

Given this insensitivity and the Scots' disquiet about Charles' religious policy, it is no wonder that not long afterwards they rebelled. This patronising and unsympathetic attitude of English kings towards the Scottish people has continued to this day.[3]

Charles II was crowned at Scone in 1651, and it is assumed that he took the Scots oath. James II of England (and questionably James VII of Scotland) failed completely to take the Scottish coronation oath.

THE PREROGATIVE AND THE LAW

The royal prerogative was (and is) that which accompanies the office of king; it is the powers which are vested in the king when he becomes king; these powers and

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[1] See note 2, p. 287 *supra*; and see D Harris Willson, in his *King James VI and I*, Henry Holt and Company, New York, 1956, pp. 17-18; and see J H Burns, *The True Law of Kingship, Concepts of Monarchy in early Modern Scotland*, Clarendon Press, Oxford, 1996, p. 184, p. 222.

[2] Quoted by John Morrill, in *The Oxford Illustrated History of Tudor & Stuart Britain*, Oxford University Press, Oxford, 1996, at p. 366; Morrill gives no source.

[3] For example, the proclamation of Elizabeth as Elizabeth II Queen of the United Kingdom, although she was the second queen of that name only of England, and the first of that name of Scotland, and of the United Kingdom; moreover this proclamation made on the same date (8 February 1952) as Mary Queen of Scots had been executed under the writ of Elizabeth I (8 February, 1587)—T B Smith, in his *Scotland, The Development of its Laws and Constitution*, Volume 11, *Scotland*, in *The British Commonwealth, The Development of its Laws and Constitutions*, George W Keeton, (*gen. ed.*,) Stevens & Sons, London, 1962, at p. 62, note 33a, says of the Accession Proclamation—'Which the Government directed to take place in Scotland on the anniversary of the liquidation by Elizabeth Tudor of the Queen of Scots.' The monarch is never crowned in Scotland, and the Honours of Scotland receive no dignity by general public acknowledgement.

accompanying obligations are spelled out in the coronation oath. Put shortly, the royal prerogative is the duty of the king to protect his people, his kingdom, and himself. Within this omnibus description are many individual prerogatives which derive from the overarching one. But the one which exercised the minds of the people of the seventeenth century was the royal prerogative to make laws.

Power lay in sovereignty, and sovereignty was seen to lie in the law, or to put it more precisely, with who had control over the law. He who had the power to say yea or nay clearly had control over the law, and it was for this reason that parliamentarians like William Prynne insisted that the king had no 'negative voice' over bills emanating from the two houses of parliament. There was however, a kind of schizophrenia in attitudes like Prynne's. On the one hand, the parliamentarians attacked the royal prerogative, seeing in it an unfettered power, yet at the same time claimed such an unfettered power for themselves.[1]

But by the law, over whose control (parliamentarians said) sovereignty lay, different people understood different things. And the law, which had been the divine law, then the law of nature, then the law of reason, or a mixture of all three, came to be seen by parliamentarians as statute law, their statute law, in which the king had no part to play. On the other hand, the king continued to see the making of legislation as being a joint enterprise in which he had the ultimate say in accordance with ancient custom and his coronation oath, and to assert that certain matters, such as the arming of the military, was a matter under the prerogative for him alone. It is in this context that the controversy over the Stuart coronation oath should be seen.

When Henry VIII had enlisted the Lords and Commons in their common essay to establish the supremacy of the English law and the sovereignty of the English king's jurisdiction, little did he envisage that the outcome would be the death of a king. But as a concomitant of the reformation of the English church and of the English laws to support the king's sole jurisdiction as against all comers including the pope, there occurred an increased perception by individuals and by groups of the immediacy of their own

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[1] Initially, however, Prynne, for example, was prepared to distinguish between bills of 'meere grace and favour', and bills of 'common right and justice', the king having complete power over the former, but none over the latter—see *The Sovereign Power of Parliament*, *op. cit.*, p. 75.

relationship to the Deity, unencumbered by any priestly intermediary. This in turn encouraged a stalwart and in some cases strident independence of thought. And this independence was directed not merely towards personal liberty and behaviour in the matter of religion, but also away from the king, in particular away from the king's control of the law—Sir Edward Coke in his latter incarnations was an early exemplar of this trend.

The passions aroused by personal perceptions of the requirements of the laws and commands of God according to whichever of the various sects an individual belonged to, were bound to affect the perceptions of the laws of the land.

These passions were exacerbated by a number of factors. England was becoming a power in the world, having planted colonies in the New World[1], and the idea of economic power was dawning upon those who traded and produced. The Tudors had increased the numbers of the House of Commons,[2] but the financial qualification had remained the same since the reign of Henry VI[3]—a system which had benefited the Tudor monarchs, who well knew how to flatter and cajole the House, but which worked against James VI and I, who was not merely a foreigner but a Scot who had no personal support in the Commons, and whose Scottish confreres offended English sensibilities. Moreover, Elizabeth had left the Treasury depleted, and while the Houses had countenanced her extra-parliamentary means of raising money, they were not prepared to recognise James' legitimate means to raise money, nor to tolerate *his* extra-parliamentary attempts.[4] In addition, the growing moneyed 'gentleman' class was outraged by the Court of Star Chamber's (often financial) judgements against it.[5] In many respects, the fundamentals of dispute boiled down to

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[1] A Charter had been granted to the Virginia Company, establishing a Council of Virginia to govern that colony according to the laws of England in 1606—Poore, *Constitutions*, II, 188 f, quoted in S&M1, pp. 499-500. Subsequently, Charles I in 1625 proclaimed that the 'territories of Virginia and of the Summer Islands, and also that of New England' were part of Charles' 'royal empire', and that 'our full resolution is that there may be one uniform course of government in and through our whole monarchy'; and that 'the government of the colony of Virginia shall immediately depend upon itself, and not be committed to any company,' and therefore to establish two Councils for Virginia, one in England, and one in Virginia subordinate to the one in England.—see Rymer, *Foedera*, XVIII, 72, f, quoted in S&M1, pp. 501--502. An earlier settlement in Virginia during Elizabeth I's reign had failed.

[2] Maitland, *Constitutional History*, p. 239.

[3] 40 shillings, —'a qualification that, as the value of money fell, was becoming somewhat low and very capricious'—see Maitland, *Constitutional History*, p. 240

[4] For this and supporting information and documents, see Kenyon, *Stuart Constitution*, *op. cit.*, pp. 53 ff.

[5] see Kenyon, *Stuart Constitution*, *op. cit.*, pp. 117 ff. cf.—men like Prynne, Bastwick, Burton, and Wiseman: Star Chamber could not inflict the death penalty, and in the absence of a prison system, was reduced to imposing penalties of fines (often severe), corporal punishment, or public penance.

money. The Stuart kings wished to pursue a successful war[1], for which they needed money preferably voted by parliament, and the outbreak of the Thirty Years War and the dangers of the Counter Reformation should have ensured their success; but the lack of clarity in particularly Charles I's enunciation of foreign policy, together with passionate religious intolerance and suspicion, meant that parliament continued obdurate. The kings were forced to fall back upon prerogative levies (that is, means without the consent of parliament under the king's seal) to raise the money. There was in fact no legal reason why they should not do this, particularly if they were raising money for the purposes of a war. But the Houses', particularly the Commons', *amour propre* could not countenance this, and besides, the Stuarts were rude foreigners, so legal argument as to the rights of the king, the extent of the prerogative, and the privileges and rights of the House of Commons, proliferated to the extent where any attempt at rational discussion was doomed to failure.

This tension between the commons and the gentleman class, and the king and his prerogative, can clearly be traced through the cases of the time, leading inexorably towards either mutual accommodation of purpose (which is probably what Elizabeth I would have orchestrated)[2], or outright opposition (which is what happened)—Charles I proving far less adept at dealing with the houses of parliament and explaining his position that either James or Elizabeth before him.

BATE'S CASE

In *Bate's case* (the *Case of Impositions,* 1606*)*, the merchant Bate refused to pay under James VI and I an 'imposition' which had first been issued under Elizabeth, and merchants prophesied doom if these impositions continued, threatening to trade elsewhere should

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[1] This draws on Kenyon, *Stuart Constitution, op. cit.*, and other Stuart texts referred to in the bibliography, but represents my own admittedly very truncated view of the situation.

[2] Though even Elizabeth's hypothetical capacity to deal with a fractious and ever more puritanical and commercially-minded Commons has been doubted—see reference to Godfrey Davies, *The Early Stuarts, 1603-1660*, Oxford, 1959, p. 15, quoted by J C A Gaskin, (*ed.*), in his Introduction to his edition of Thomas Hobbes' *Leviathan, or The Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill*, [written 1648-1650 in France] printed for Andrew Crooke, at the Green Dragon in St Paul's Churchyard, London, 1651, Oxford University Press (World Classics paperback), London, 1996, at p. xiii, and note 5.

they stand.[1] Chief Baron Fleming delivered the court's judgement and held for the king, noting that this matter was one of importation which as with 'all commerce and affairs with foreigners, all wars and peace, all acceptance and admittance for current, foreign coin, all parties and treaties whatsoever, are made with the absolute power of the king';[2]—these matters had been the king's prerogative since the time of the *Bretwaldas*.[3] He noted a difference between the 'ordinary' prerogative, which was for particular subjects, and included justice and equity; and the 'absolute' prerogative, which included that which is applied for the benefit of the general body of the people; the king may not change the first without parliament; but the second he may. Now Sir Edward Coke was either a member of the court which heard this case, or was consulted extrajudicially. Coke had been an ardent supporter of the royal prerogative under Elizabeth (see *Cawdrey's case*[4], and the prosecutions of Essex and Raleigh[5]), and under James VI and I (see the *Case of Non Obstante*[6]) in the early years, so it would be no matter for surprise that he supported this view. But Coke later was to attempt to rewrite history, and to suggest that he (then Chief Justice of Common Pleas) and the other Chief Justice (Popham of King's Bench) had privately dissented from the view.[7]

The case law of this time is dominated by Sir Edward Coke, partly because he wrote the casebooks. (Sir Francis Bacon, a skilful lawyer, a great jurist and a philosopher, gave only remnants of his time to the law, and whose perceived reputation as a lawyer would

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[1] *Commons Journals*, I, 297 (11 April, 1606)—The merchants offer to leave all, rather than this shall stand, go beyond seas.'—quoted in Kenyon, *Stuart Constitution*, *op. cit.*, p. 55, n. 5. Chief baron Fleming noted in his judgement that 'it is well known that the end of every private merchant is not the common good but his particular profit, which is the only means which induceth him to trade and traffic; and the impost to him is nothing, for he rateth his merchandise according to that...'; *Bate's case*, Kenyon, *Stuart Constitution*, *op. cit.*, p. 62-64, at 63..

[2] *Bate's case*, 1606, *State Trials*, II, 387-394, quoted in Kenyon, *Stuart Constitution*, *op. cit.*, p. 62-64, at 63.

[3] See discussion in Chapters 1-2, *supra*.

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

[5] (1603) 2 *State Trials*, 1; and see Sir William Holdsworth's *A History of English Law*, Methuen & Co, London, 1903, 7th edn., revised, 1956, reprinted 1966, 12 Vols., edited and with an introduction by S B Chrimes, Vol. V, at p. 427 and n. 1; and see Stephen, *HCL* I, 333, n. 2.

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

[7] See Kenyon, *Stuart Constitution*, *op. cit.*, p. 55, sourced to 12 Co. Rep. 33-35 (vi, 237-240); and see Maitland, *Constitutional History*, at pp. 258-259, and H Hallam, *Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869, at p. 240; and see 2 Co. Inst., p. 57, where Coke declares the judgement in the case to be contrary to law.

doubtless have been greater than Coke's had he like Coke devoted all his energies to it[1]. But Bacon did not write any law reports.) It was said of Coke when he was chief Justice of King's Bench that

> He doth not so much insinuate that this court (the King's Bench) is all sufficient in itself to manage the state; for if the King's Bench may reform any manner of misgovernment (as the words are), it seemeth that there is little or no use, either of the King's royal care and authority exercised in his person and by his proclamation ordinances and immediate directions, not of the Council Table, which under the king is the chief watch tower for all points of government, nor of the Star Chamber, which hath ever been esteemed the highest court for extinguishment of all riots and public disturbances and enormities; and besides the words do import as if the King's Bench had a superintendency over the government itself, and to judge wherein any of them do misgovern...[2]

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

THE FIVE KNIGHT'S CASE

In 1627 Charles I having dissolved parliament, attempted to raise money to prosecute the war by means of raising loans through the prerogative. Certain gentlemen, including one

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[1] Sir Francis Bacon, Baron Veralum and Viscount St Albans, (1561-1626), a sadly neglected philosopher and legal and political commentator, was a parliamentarian from 1584 (Melcombe Regis 1584; Taunton 1586, Liverpool, 1589; Middlesex, 1593; Southampton, 1597; Ipswich, 1604; Cambridge University, 1614); first ever Queen's Counsel, (EI) 1597; Solicitor General, 1607 (James VI and I); Attorney-General (James VI and I) 1613; he was not liked by Elizabeth, and was a rival and critic of Sir Edward Coke; his legal writings, particularly those in which he argued for the codification of English law, have been in the main overlooked by later generations' concentration on his philosophical, literary and scientific works, and by their veneration of Bacon's rival, Coke—see A W B Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984; and for extracts of his work, see Edwin A Burtt, (*ed.*), *The English philosophers from Bacon to Mill*, The Modern Library, New York, 1994. And see the assessment of Sir William Holdsworth, *A History of English Law*, Vol. V, *op. cit.*, at pp. 434-435.

[2] See the writer of the Observation on Coke's Reports, pp. 11-12, quoted in Holdsworth, *A History of English Law*, Vol. V, *op. cit.*, p. 430, n. 3.

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

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

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

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

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

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

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

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

in 34 Eliz.,[1] and on Stamford.[2]

Coke immediately rose to justify himself, saying that that report was 'under age' being not yet 21 years old, and that though he had once accepted Stamford, now he had changed his mind, and in any event, the time of the thirteenth year of James VI and I was an ill one, when many traitors[3] were committed for the Gunpowder Plot, and Chancery and King' Bench were fighting (the inference being that it was all right in those circumstances to commit people on unbailable writs), and moreover his old guide Stamford had deceived him and now he had better guides, namely, Acts of parliament; and moreover the so-called report of his was not his but 'some other' wrote the report which was wrong, and 'I persuade myself that Mr Attorney drew it'; and furthermore the *Resolutions of the Judges* was Apocrypha.[4] A note to an old edition of *State Trials* observes—'Coke of one mind, when a Judge, and in favour, of another, when out of court, and discontented.'[5]

At a conference with the Lords, Serjeant Ashley for the king used the words 'State' and 'State Government' with regard to the king, and urged an accommodation to the conference, for which impertinence he was committed to custody.[6] The judges were called before the Houses to justify their decision with regard to the writ, which they did, noting that their action was in accordance with all precedents, and that they had done nothing either to enlarge the king's prerogative, or to trench on the liberties of the subject.[7] By 1628 the houses were still debating the matter, having drawn up five propositions on liberty and the prerogative, to which the king answered on 28 April.[8] The Commons rejected the king's answer, planning to respond by a Bill, to which the king replied again, noting that time was passing and affairs needed dealing with.[9] A further exchange occurred between

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[1] See p. 302, note 2 *supra*.

[2] This is a reference to Sir William Staunford, *An Exposicion of the Kinges Prerogative*, 1548, published London, 1567, facsimile copy of C.38e.2[2] in the British Library, by Garland Publishing, Inc., New York, 1979

[3] Coke was prosecutor in the trials of Essex and Raleigh for treason, and also was involved in the prosecutions relating to the Gunpowder plot.

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

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

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

[7] See *Five Knights case*, 3 *State Trials*, at pp. 161-164..

[8] See *Five Knights case*, 3 *State Trials*, at pp. 170-171.

[9] See *Five Knights case*, 3 *State Trials*, at pp. 180-181.

the Commons and the king, with the king undertaking to confirm a Common's Bill reaffirming *Magna Carta* and other statutes for the subjects' liberties. Some were then for letting the matter rest, but Sir Edward Coke prevailed to the contrary :

> Let us put up a *Petition of Right* : not that I distrust the king, but that I cannot take his trust, but in a parliamentary way.[1]

The king responded, noting that he had allowed a debate on his prerogative, which none of his predecessors had, and that he had declared a resolution which met all of the Commons' points.[2] But the Commons said the 'the people will only like of that which is done in a parliamentary way', and proceeded with the *Petition of Right*.[3] The Lords attempted an amendment which would 'leave intire that Sovereign Power, wherewith your Majesty is trusted for the protection, safety and happiness of the people'[4]. But Alford objected to 'sovereign power' on the basis of Bodin, which, he said, would acknowledge a regal as well as a legal power, and Pymm said 'we cannot leave him [the king] a sovereign power when we were never possessed of it.' And Coke said that the inclusion of this phrase would 'overthrow all our petitions', that old petitions never had a saving of the king's sovereignty, and that

> I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. ...it weakens *Magna Carta*, and all our statutes; for they are absolute, without any saving of sovereign power. And shall we now add it, we shall weaken the foundation of law, and then the building must fall; let us take heed what we yield unto; *Magna Carta* is such a fellow, that he will have no sovereign. I wonder this sovereign was not in *Magna Carta*, or in the confirmations of it: if we grant this, by implication we give a sovereign power above all these laws: power, in law, is taken for a power with force: the Sheriff shall take the power of the county, what it means here God only knows.[5]

Coke of course was talking through his hat. For centuries, statutes post-dating *Magna Carta* had contained a saving of the king's sovereign power, that is of the rights of the crown[6], as had the coronation oath[7]; and at least two of the confirmations of the *Magna Carta* had

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[1] See *Five Knights case*, 3 *State Trials*, at p. 188.

[2] See *Five Knights case*, 3 *State Trials*, at pp. 190-191.

[3] See *Five Knights case*, 3 *State Trials*, at p. 192.

[4] See *Five Knights case*, 3 *State Trials*, at p. 193.

[5] See *Five Knights case*, 3 *State Trials*, at pp. 193-194; and sovereign power is also discussed at 198, 206.

[6] See for example, 12 Henry II (*Constitutions of Clarendon*); 1301 *Statute of Lincoln*; 1322, *Revocation of New Ordinances*; 1341, 13 Edward III; 1411, Henry IV.

[7] See Ernst H Kantorowicz, 'Inalienability,' *Speculum*, Vol. XXIX, 1954, pp. 488-502, at p. 501; and H G Richardson, *Speculum*, XXIV, 1949, 44-75.

included savings of the rights of the crown.[1] And Coke and the other members had a very good idea of what 'sovereign power' was, as their oaths as members of Commons obliged them to assist and defend it, as the Commons eventually acknowledged[2]; they spent the next nine days debating it, distinguishing aspects of the king's sovereign power or prerogative royal. They attempted to show that the king's prerogative could override statutes which imposed penalties, but not those which enshrined rights.[3] They attempted to distinguish those confirmations of the *Magna Carta* with savings, falling back on saying that the saving could not be proved.[1] The *Petition of Right* was presented to the king on 26 May 1628, the Commons professing constantly that they had no intention to diminish the royal prerogative. The *Petition of Right* contained the following basic precepts:

- No tax, aid or any other like charge to be made without common consent by act of parliament (X1);
- None be molested or confined or required to make answer 'concerning the same or refusal thereof'; (X2)
- No freeman be imprisoned or detained 'in any such manner as aforementioned'; (X3)
- The king to declare that his ministers will serve him according to the laws and statutes of the realm, and that the king undertake 'that the awards, doings and proceedings to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example. (XI)

The king returned an answer on 2 June, saying he was willing that right be done according to the laws and customs of the realm, and that he held himself obliged to preserve the rights and liberties of his subjects in conscience as well as of his prerogative. The house dallied, and found his answer insufficient; Charles, anxiously in need of funds to prosecute the war, came to the Lords on 7 June, and agreed to the *Petition of Right—Soit droit fait come il est desiré par le Petition C.R.*, saying also that his maxim was that 'the people's liberties strengthen the king's prerogative, and the king's prerogative is to defend the people's liberties.'

As soon as the *Petition of Right* was passed Coke relinquished his hold on the Commons, which then attempted to deny the king tunnage and poundage, on the basis that the houses of parliament, not he, had control over them, and actively encouraged the citizenry to refuse to pay. Charles prorogued the parliament, saying while it was his intention to abide by the *Petition of Right* there was therein no mention of tunnage and poundage. Charles was

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[1] 1297, 25 Edward I, and 1299, 27 Edward I.

[2] See *Five Knights case*, 3 *State Trials*, at pp. 214-215.

[3] See *Five Knights case*, 3 *State Trials*, at p. 206.

almost certainly right, and the Commons had blatantly encouraged merchant groups not to pay tax, and were seen to be encouraging self-interested men to break the law. But by 1629[2], the Commons were in open revolt against Charles' religious policy and continued opposed to his levying of tunnage and poundage, and after defiance of the king's order of adjournment, forcibly held the Speaker down till they had passed their resolutions. Charles dissolved parliament on 10 March 1629, and no parliament was to be called until 1640, Charles raising money for his foreign adventures by writs under the prerogative. (It should be noted here that at least one scholar has noted that Charles I ruled during these years 'by the royal prerogative with great care and economy').[3]

The influence of Sir Edward Coke at this time should not be underestimated. It was he who orchestrated the *Petition of Right*, and he who so vehemently promoted the power of the houses of parliament over the king, whom he could not trust but 'in a parliamentary way.' Coke's view had been that when he was a judge, he knew the law better than the king and should therefore prevail. As a parliamentarian, his view was that bills promoted by the representatives in parliament were more reliable than any judgement of the king under his prerogative, and should therefore prevail over any view of the king. It was thus Coke, in my view, who sowed the seeds, so successfully, for the propagation of the idea which bore such bitter fruit in later decades, when parliamentarians came to see themselves as the only and absolute arbiter of the common weal.

THE SHIP-MONEY CASE

The other land-mark case of Charles I's reign was the *Ship-Money case, The King v John Hampden, Esq.*[4] The case grew out of the right of the king to demand ships from the maritime counties and towns for the defence of the realm and the suppression of piracy. The right had been exercised in 1627 and 1634, but in 1635 Charles extended the writs to the inland counties, demanding money in lieu of ships. The landed classes were being

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[1] See *Five Knights case*, 3 *State Trials*, at p. 208.

[2] For a discussion of these times, see Kenyon, *Stuart Constitution, op. cit.*, pp. 60-62, and S B Chrimes, *English Constitutional History*, Home University Library, Oxford, 1948; 4th edn. Oxford Paperbacks University Series, Oxford, 1967, pp. 108-110.

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

[4] The *Ship-Money case*, 13 Charles I, 1637, *The King v John Hampden*, 3 *State Trials*, pp. 825 ff.

obliged virtually to subsidise the merchant class, who would profit by the protection offered by the king's ships; but more vitally, they were in effect being asked to support the king's foreign policy with which they disagreed. This policy involved the use of the ships supplied by virtue of the ship-money tax to support the Catholic side and Spain in particular in the Thirty Years war, and was seen by many as part of a pro-Catholic plot. It is in this context that Hampden and others refused to pay the tax, although it had been paid willingly in previous years.[1]

Charles had consulted the judges before issuing the levies in 1635, a procedure which had been followed by kings before him, and the judges had supported the tax. The judges' extrajudicial opinion was that 'when the good and safety of the whole kingdom in general is concerned, and the whole kingdom in danger,' the king may issue writs under the great seal requiring the provision and furnishing of ships, and that the king is the sole judge of the danger, and of when and how the danger is to prevented and avoided.[2] Some have indicated that the judges ruled in favour of Charles because of the dismissal of Chief Justice Heath in 1634; but there is no evidence to support a view that Heath was dismissed because of any failure to countenance ship-money[3]—rather, many of the younger generation of lawyers who had earlier supported Coke on the *Petition of Right* were now supporting the king.[4]

But whatever Hampden's motivations, the case became a *cause célèbre*, the judges finding by a majority for the king, primarily on the same basis as their earlier opinion. The case is pertinent because it dealt with the issue of sovereignty and sovereign power:—

> This is one of the greatest cases that ever came in judgement before judges of the law. The king's right and sovereignty, in a high point, is concerned, and the honour and safety of the kingdom on one side; and the liberty of the subject, in the property of his goods, on the other side...[5]

The judges clearly stated that 'if [the king] be a sovereign in right of his sovereignty from the crown', impositions of the like of the ship-money without parliamentary approval in

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[1] This exegesis draws heavily upon Kenyon, *Stuart Constitution*, pp. 88-89; and pp. 104-105.

[2] See *Ship-Money case*, 3 *State Trials*, at pp. 1261-1262.

[3] See Kenyon, *Stuart Constitution*, *op. cit.*, pp. 103-104, sourced to Gardiner, *History of England*, vii, 112-113, 361.

[4] See Kenyon, *Stuart Constitution*, *op. cit.*, p. 104. Such lawyers included Edward Lyttelton, William Noy, Dudley Diggs, and John Selden.

[5] See *Ship-Money case*, 3 *State Trials*, per Crawley J, (judge of Common Pleas) at p. 1078.

times of necessity were the king's right[1]. The law of nature was advanced for one of the reasons of the king's sovereignty:

> ...the king is *pater patriæ*, therefore, by the law of nature he is entrusted with the defence of the kingdom; and this power to tax his people, is but a consequence of that.[2]

The case is also significant for its analysis of the prerogative, both in counsels' argument to the court and the judges' decisions—the major distinction drawn between opposing counsel, both of whom agreed that the king had a prerogative of the kind claimed, was that Hampden denied that there was an emergency existing at the time of the writs for the levy.[3]

Professor Maitland, commenting on the *Ship-Money case*, said:

> Parliament depends for its constitution, for its very existence, on the king's will. After all, is not this body but an emanation of the kingly power? The king does well to consult parliament—but is this more than a moral obligation, a dictate of sound policy ?...The high water mark of this theory can be found in some of the judgements delivered in the *Ship-Money case*, (and he quotes Crawley J, Berkley J, Vernon J, Finch, CJ) 'Acts of parliament,' even Finch admitted, 'may take away the flowers and ornaments of the crown, but not the crown itself.'
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> Now this goes far indeed, but as it seems to me, from a lawyer's point of view, the fatal flaw is that it does not go far enough. If the judges had grasped the modern notion of sovereignty, the notion which Hobbes was just giving to the world—had said the question really is, Who is sovereign? had answered boldly, 'The king is sovereign, it is to him (not to him and parliament) that this nation renders that habitual obedience which is the fact which constitutes the relation of subject and sovereign; this is clear from the nation's prolonged acquiescence in breaches by the king of the plain words of the statutes; no act of parliament binds or can hold him, no, not though he himself assented to it yesterday; he is in short, a perfectly absolute monarch.'—had they said this, it would have been difficult to find any logical flaw in their judgements.
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> ...the contest was to be between the sovereignty of a king, and the sovereignty of a king in parliament. We know how the contest was decided—by the Civil War and the Revolution...so long as Jacobitism survived, and certainly it survived in 1745, there survived the doctrine that the title of king, and some of the powers of the king, are above statute. The fatal theoretic fault of Jacobitism was that it could not say, dared not say, the king is utterly above all law, law is but the king's command.[4]

Some of the judges did, in my view, go as far as saying unequivocally that sovereignty lay with the king, and that the parliament was not and could not be sovereign, being called, prorogued and dissolved at the king's pleasure.[5] But at the same time Sir Robert Berkley

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[1] See *Ship-Money case*, 3 *State Trials*, per Crawley J, at p. 1085.

[2] See *Ship-Money case*, 3 *State Trials*, per Crawley J, at p. 1084; and per Jones J (judge of King's Bench), at 1185

[3] For a recent examination of the Ship-Money case, in the context particularly of tax, see Ian Ferrier, 'Ship-Money Reconsidered', 1984 *British Tax Review*, 227-236.

[4] Maitland, *Constitutional History*, *op. cit.*, pp. 298-300.

[5] See *Ship-Money case*, 3 *State Trials*, per Berkley J, (Justice of King's Bench)at p. 1098 and p. 1101.

noted the king's maxim, that 'the people's liberties strengthen the king's prerogative, and that the king's prerogative is to defend the people's liberties', in the context of reiterating what he understood to be the king's coronation oath, in order to absolve himself from any aspersions of favouritism towards the king—

> Though the king of England hath a monarchical power, and hath '*jura summæ majestatis*,' and hath an absolute trust settled in his crown and person, for government of his subjects; yet his government is to be '*secundum leges regni*'—it is one of the questions in the '*juramentum regis*', at his coronation, (see the Magna Charta, fol. 164) '*Concedis justa leges et consuetudines regni esse tuendus?*' And the king has to answer, *Concedo*—By those laws the subjects are not tenants at the king's will, of what they have—They have in their lands '*Feodum simplex*', which by Littleton's description is '*hæreditas legitima, vel pura*—They have in their goods a property, a peculiar interest, a '*meum et tuum*'. They have a birthright in the laws of the kingdom. No new laws can be put upon them; none of their laws can be altered or abrogated without common consent in parliament.[1]

Now this text of the coronation oath as quoted by Sir Robert Berkley inserts the qualifier *regni*, which I have not been able to find in any of the texts of the oath, and I have also been unable to find the folio 164 of *Magna Carta* to which he refers. Such a qualifier could be seen to be to the king's advantage, or to parliament's advantage, depending on whether one translated *regni* to mean 'realm' or 'royal/of the crown'; and it is not unlikely that because of this quotation, the parliamentarians began their search for and scrutiny of all the old coronation oaths. But the immediate cause of disquiet was the suggestion that parliament had no sovereignty, coupled with the animadversions of one of the judges[2] upon the conduct of the last parliament which caused grave offence in the Commons, which then proceeded to impeach the judges in 1641.

The judges and the common law thus brought low, and the king seeking money for the war against the Scots who rose in protest against the imposition of English ecclesiastical policy upon them, the king called a parliament in April 1640, which he shortly dissolved when it was apparent no supply would be forthcoming without redress of grievances. But although a subsequent parliament met from August 1641 (the Long parliament), and curtailed the royal prerogative of dissolution of parliament by the preservation of itself, and the enactment of the *Triennial Act*,[1] religious differences within the Commons grew to a point where any accommodation on religious policy became impossible. The Irish rebellion exacerbated anti-papal feeling, and the king's monumental error in attempting (and

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[1] See *Ship-Money case*, 3 *State Trials*, per Berkley J, at p. 1090.

[2] Sir John Finch, Chief Justice of Common Pleas, formerly Speaker of the House of Commons.

spectacularly failing) to arrest five members of the House of Commons for treasonous correspondence with the Scots, led the Houses to raise a military force, and to require the king's assent to the Militia Bill, in an attempt to assert the sovereignty of the houses of parliament over the king.

THE OATH AND THE CIVIL WAR

In support of this end, (and also perhaps because the text of the old oath referred to by Sir Robert Berkley in the *Ship-Money case* in 1637 was not agreeable to them) parliamentarians resurrected a version in Latin and French of the '1308' oath, in the hopeful belief that this was the oath which the Stuart kings, particularly Charles I, had taken, and if he had not, then he should have done so. It was the last three clauses of that coronation oath which were quoted in the Latin by the Lords and Commons in the Remonstrance of 26 May, 1642, and upon which it based its assertion that the king had no 'negative voice' to bills which had passed the Commons and the Lords.[2] They asserted that under the king's coronation oath, he was obliged to uphold laws which the people shall choose, that the people in both houses of parliament were 'the most proper judges' in matters concerning the public weal and the good of the kingdom, and that therefore the king was obliged to assent to any bill passed by both Houses.[3] In support of this contention, they adduced the preamble to the *Statute of Provisors of Benefices*[4] which says that the king is 'bound by his oath, with the accord of his people in his parliament, thereof to make remedy and law' to mischieves and damages.[5]

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[1] *Triennial Act*, 1641, 16 Car. I, c. 1

[2] See Edward, Earl of Clarendon in his *History of the Rebellion and Civil Wars in England*, written between 1641 and 1648, in Book V paragraphs 225 and 226, at Vol. II, (Books V and VI), pp. 123-125, paragraphs 225-231. And see text at Attachment I.

[3] Remonstrance of 26 May 1642, Clarendon, *History of the* Rebellion, *loc. cit.*, p. 123, paragraphs 224-226.

[4] 25 Edward III, stat. 6, 1350; For text see my Appendix I, and see p. 260 of Vol. I of *The Statutes at Large*, The text as quoted in the 'Remonstrance' appears in the original French and the English translation at p. 262.

[5] Remonstrance of 26 May 1642, Clarendon, *History of the Rebellion*, *op. cit.*, p. 124, paragraph 227.

Earlier that year, the Houses had passed the *Militia Ordinance*[1], purporting to act for safety of the king's person, the parliament and the kingdom, and assumed to themselves the prerogative power to arm forces, and reinforced the garrison of Hull. The king, naturally, had refused to assent to any such bill. The two Houses on 20 May 1642 resolved that 'it appears that the king, seduced by wicked counsel, intends to make war against the Parliament,' and drew up the Remonstrance on the 26th, the purpose of which was to attempt to demonstrate that the king was compelled to assent to any bill passed by both Houses of parliament, and thus had no right not to assent to the former Militia Bill.

After rehearsing the old Latin coronation oath, and reiterating that the king must assent to Bills proceeding from the Houses, the Remonstrance asserted:

- that the 'sovereign power' resides in the 'high court of parliament'[2], (the word 'parliament' being used throughout the Remonstrance to mean the two houses only[3]);
- that the king's directions to the Hull garrison entailed a 'resisting and despising of the sovereign authority'[4];
- that the king's declaration of the Hull garrison's commander (who was a member of the House of Commons) as a traitor was a breach of the privilege of parliament[5];
- that the houses were not levying war against the king—'the levying of force against [the king's] personal commands, though accompanied by his presence, and not against his laws and authority but in the maintenance thereof, is no levying war against the king, but for him';[6]
- that the old *Statute of Treason* (an Act originally devised to protect subjects going to the wars in obedience to a king 'for the time being')[7] to support parliament's actions, by saying that allegiance is due not to the king, but to parliament, since it is parliament who recognises the king and determines the best service of the king and kingdom.[8]

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[1] *The Militia Ordinance*, 5 March 1642, Journals of the House of Lords, iv, 587; quoted in S R Gardiner, *The Constitutional Documents of the Puritan Revolution*, 1625-1660, Oxford University Press, Oxford, 1889, 3rd edn., revised, Clarendon Press, Oxford, 1951, at p. 245-247

[2] See Remonstrance, in Clarendon, *History of the Rebellion, op. cit.*, p. 125, paragraph 231.

[3] The houses had taken to using this formulation in its earlier Declaration or Remonstrance of the Lords and Commons, 19 May 1642, to which Charles had retorted: ...[parliament] '(still misapplying the word *Parliament* to the vote of both Houses,) ... If, as in the usage of the word *Parliament* they had left his majesty out of their thoughts, so by the word *kingdom* they intended to exclude all his people who were not within their walls, (for that was grown another phrase of the time, the vote of the major part of both house, and sometimes of one, was now called *the resolution of the whole kingdom*,)...'—quoted in Clarendon, *History of the Rebellion, op. cit.*, p. 138, paragraph 255.

[4] See Remonstrance, in Clarendon, *History of the Rebellion, op. cit.*, p. 125, paragraph 231.

[5] See Remonstrance, in Clarendon, *History of the Rebellion, op. cit.*, p. 131, paragraph 244, and p. 134, paragraph 247.

[6] See Remonstrance, in Clarendon, *History of the Rebellion, op. cit.*, p. 130, paragraph 241.

[7] 11 Henry 7, c. 1, 1495, *Statute of Treason*, sometimes misleadingly called The *de facto* Act; see discussion at p. 117, and note 3, p. 117, and p. 143, *supra*, and for text see J R Tanner, *Tudor Constitutional Documents A.D. 1485-1603, with an historical commentary*, Cambridge University Press, Cambridge, 1922; republished by Cedric Chivers Ltd., Bath, 1971, p. 5, and text at p. 6; and see discussion in T F T Plucknett's 11th edition of *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, pp. 224-226.

[8] See Remonstrance, in Clarendon, *History of the Rebellion, op. cit.*, pp. 133-134, paragraphs 246-247.

Thus the House of Commons had moved radically from its position in 1628 when it feigned not to know what 'sovereign power' was, to asserting that they themselves, not the king, and not the king in his parliaments, (and probably not even the Lords with the Commons) had it. Not surprisingly, Charles found these sentiments abhorrent, and immediately prepared a response.[1] He decried the ingenious use of an old Latin record of an oath, which the framers of the Remonstrance knew well that 'many of his subjects could not, and many of themselves did not, understand',[2] in order to support spurious allegations that an 'obligation lieth upon the kings of this realm to pass all such bills as are offered to them by both Houses of parliament.[3]' He said :

> could it be imagined that he should be bound by oath to pass such laws, (and such a law was the bill they brought to him of the militia,) as should put the power wherewith he was trusted out of himself into the hands of other men, and divest and disable himself of all possible power to perform the great business of the oath, which was, to protect them? If his majesty gave away all his power, or it were taken from him, he could not protect any man ; and what discharge would it be for his majesty, either before God or man, when his good subjects, whom God and the law had committed to his charge, should be worried and spoiled, to say that he trusted others to protect them, that is, to do that duty for him which was essentially and inseparably his own.[4]

And he directly went on the reproduce the oath in English which he had taken at his coronation—'a matter notorious enough'— 'warranted and enjoined to it by the customs and directions of his predecessors.'[5] He acknowledged himself bound to remedy by law mischieves and damages which happen to his people, but questioned

> whether the king were bound by the preamble of that statute [25 Edward III] to renounce his own judgement, his own understanding in those mischieves, and of those remedies? How far forth he was obliged to follow the judgement of his parliament, that, the declaration still confessed to be a question. Without question none could take upon them to remedy even [mischiefs] but by law, for fear of greater mischieves than those they go about to remedy. ... he was sure no new law could be made without his consent.[6]

Meanwhile, Charles issued a proclamation on 27 May 1642, recalling the obedience of his subjects to him and the laws of the land, and restating the right of the king to protect his people and maintain the peace and the king's prerogative to bear arms to defend the people

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[1] Charles I's reply to the Remonstrance of 26 May 1642, and his statement of his oath.—See Clarendon, *History of the Rebellion*, *op. cit.*, pp. 149-164, paragraphs 280-317, and p. 156, paragraph 293

[2] Charles I's reply to the Remonstrance of 26 May 1642, Clarendon, *History of the Rebellion*, *op. cit.*, p. 156, paragraph 293.

[3] Charles' Reply, Clarendon, *History of the Rebellion*, *ibid.*, p. 156, paragraph 293.

[4] Charles' Reply, Clarendon, *History of the Rebellion*, *ibid.*, p. 156, paragraph 293.

[5] See Charles' Reply, Clarendon, *History of the Rebellion*, *ibid.*, pp. 156-159, paragraphs 293-308, and text at my Appendix I.

[6] Charles' Reply, Clarendon, *History of the Rebellion*, *ibid.*, pp. 157-158, paragraphs 305-305

and the peace, and condemning the purported Ordinance as illegal and against the peace of the kingdom.[1] The two Houses, or what was left of them, responded with the Declaration of 6 June 1642, asserting that their *Militia Ordinance* 'ought to be obeyed by the fundamental laws of this kingdom', and while acknowledging the king as 'the fountain of justice and protection' said these functions are not exercised in his own person, but by his courts and ministers, and in the high court of parliament, where the king's 'supreme and royal pleasure' is exercised 'after a more eminent and obligatory manner than it can be by personal act or resolution of his own.' Moreover, the king's subjects are, by law, bound to be obedient to the two Houses of parliament and to obey the parliament's laws, that obedience being deemed to be obedience in aid of the king.[2] On this distinction between the king's two bodies[3]—his body politic and his natural body—the Houses attempted to base their pursuit of power. Sir Edward Coke had explicated upon this distinction initially in *Cawdrey's case*,[4] and at length in *Calvin's case* [the *Postnati case*][5], and in *Sutton's Hospital case*,[6] but he had never suggested that the king's functions were exercisable by the Houses alone, and had made it clear that allegiance was not capable of being paid to a corporation or a body politic, but only to an individual. Indeed, he condemned as a 'damnable and damned opinion' which has 'execrable and detestable consequences' the very idea (first invented by the Spencers in the time of Edward II) of allegiance being give to the king's crown (that is his body politic) and not to him personally.[7]

Charles responded to the Declaration and to the Nineteen Propositions (the acceptance of which would have made him a puppet of the remnants of the House of Commons) with a document dated 18 June 1642 which outlined the constitution of England as a 'regulated

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[1] See The King's Proclamation Condemning the Militia Ordinance, 27 May, 1642, *Journals of the House of Lords*, v. 111, reproduced in Gardiner, *The Puritan Revolution*, *loc. cit.*, pp. 248-249.

[2] A declaration of the Lords and Commons in parliament concerning His Majesty's proclamation of the 27th May, 1642, dated 6 June 1642; from the *Lords Journals*, v, 112-113; reproduced in J P Kenyon, *The Stuart Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1965, at pp. 248-249.

[3] For a detailed examination of the subject of the king's two bodies, see Ernst H Kantorowicz, *The Kings Two Bodies, A Study in Medieval Political Thought*, Princeton University Press, 1957, first Princeton Paperback printing, 1981, seventh paperback printing with an introduction by William Chester Jordan, 1997. And see my discussion at pp. 142, 161, and p. 162 *supra*.

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

[5] *Calvin's case, the Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, at 10 a-10 b, 77 ER (KB) 377, at 389.

[6] *Sutton's Hospital case*, Mich. 10 Jac. 1, Rot. 574, King's Bench, 10 Co. Rep. 1a- -

[7] See *Calvin's case, the Postnati*, (1610) Trin. 6 Jac. 1, 7 Co. Rep. 1 a, at 11a-11b, 77 ER (KB) 377, at 390.

monarchy', a mixed one of three parts, the restriction of one of which would damage the whole, and presciently described the outcome were that to occur.[1]

Civil War followed, with Charles raising the standard on 22 August 1642.[2]

CHARLES I'S OATH

What was it about Charles I's English oath that raised such ire?

The answer is, Nothing.

Ire was raised and passions inflamed by conflicting translations and interpretations of the old '1308 oath', as set out in various texts, including the *Liber Regalis*. Parliamentarians and lawyers then debated heatedly[3] the meanings of :

> grauntez vous a tenir et garder les leyes et les custumes droitureles, les quils la communaute de vostre roiaume aura eslu, et les defendrez afforcerez al honor de Dieu a vostre poer?

and

> 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 [4]

though Charles had certainly made his oath in neither Latin nor French, and these forms had become outmoded long before Richard III came to the throne and made his oath in English.

Schramm in his *History of the English Coronation*, saw the debate on the meaning of Charles I's coronation oath as being between two principles : that of the divine right of kings, and

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[1] See The King's Answer to the Nineteen Propositions, 18 June, 1642, quoted in Kenyon, *The Stuart Constitution, loc. cit.*, pp. 21-23, from Rushworth, v, 728, 730-732. The King's answer was penned by Sir John Culpeper, (Chancellor of the exchequer), Lucius, Viscount Falkland, (Secretary of State), and approved for publication by Sir Edward Hyde—see Corrine C Weston and Janelle R Greenberg, *Subjects and Sovereigns, the Grand Controversy over Legal Sovereignty in Stuart England*, Cambridge University Press, Cambridge, 1981, p. 36.

[2] Joyce Lee Malcolm has written a text—*Caesar's Due, Loyalty and King Charles, 1642-1646*, Royal Historical Society, London, 1983—which is unsympathetic to Charles, coming to the view that Charles could command little loyalty from his English subjects, and was a persistent liar. She does not mention the coronation oath.

[3] And still do. See 'The 1308 controversy' *supra*, and associated footnotes to articles and books.

[4] for texts see my Appendix I.

that of the sovereignty of the people, the former having its origin in heathen Anglo-Saxon beliefs and in Christianity, and the latter in the 'assent of the Teutonic tribes which reappeared in the share of parliament in legislation', and Roman political theory.[1] This view, in addition to ignoring the Celtic influences on the British ideas of kingship to which I have adverted elsewhere[2], is founded also upon an interpretation of the old 1308 oath similar to that of Prynne—that is, that the oath bound the king to observe future legislation by the people.[3]

William Prynne, (he who had been tried by Star Chamber, who later tried Archbishop Laud in 1643,[4]), published in 1643 a tract supporting the *Sovereign Power of Parliament etc*, whose prime aim was to provide justification for the power which the two houses had purported to assert over the military. Prynne interpreted this clause to apply prospectively, and to '[extend] 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,'[5] and thus the king was inescapably bound by his coronation oath to assent to any legislation which the two houses of parliament should choose. But of course, the oath which Charles I and James VI and I had actually sworn said no such thing, each of them promising to 'hold and keep the laws and rightful customs which the commonalty of your kingdom have, and to defend and uphold them to the honour of God.' (It seems quite

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[1] Schramm, *History of the English Coronation*, *op. cit.*, p. 219.

[2] See p. 31 ff., *supra*.

[3] See Schramm, *History of the English Coronation*, *op. cit.*, pp. 206-207.

[4] Prynne was a rigid puritan, who had been twice sentenced by Star Chamber; he had lost his ears, been branded on the cheek, had stood in the pillory, and had been prohibited from practising law. But he was also a legalist, who later refused to countenance the infringements of parliamentary privilege which had been practised on a small scale by the king being practised on a large scale by the army. He was excluded from the parliament in the Purge, and became a vehement opponent of the army, and a supporter of the king in his stand against the pretended jurisdiction of the purported Court set up to try the king—see C V Wedgwood, *The Trial of Charles I*, Collins, London, 1964, reprinted by The Reprint Society Ltd, London, 1966, at pp. 53-54, and pp. 114-115.

[5] 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, Privie 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 Oarder 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; page 76, point 4.

likely that Prynne himself was aware of this, as it would appear that it was he who had been responsible for the removal of the Books of the Coronation of the earlier kings from Archbishop Laud's study and the Exchequer.)[1] Moreover, their oaths in the first clause contained the specific maintenance of the existing laws conforming to the laws of God and not inconsistent with both the royal prerogative and ancient custom; and a subsequent fifth clause constrained them to protect and defend the bishops and churches, 'as every good King in his Kingdom in right ought' to do.[2]

Schramm's and Prynne's views as to the so-called constitutional effect of the old 1308 oath would appear to have been finally laid to rest by Robert S Hoyt and Professor Walter Ullmann. Hoyt has demonstrated that the fourth clause of the oath obliged the king to support those laws and customs which are *droitureles* :[3] this term in the French meaning a 'safeguarding effect' so that 'the addition of *droitureles* excepts from the promise any laws and customs which conflict with existing and recognised rights, including those of the king himself'; moreover, such *droitureles* laws and customs must be capable of being strengthened and defended to the honour of God.[4] This view is supported by Walter Ullmann, who notes that the clause refers to both written and unwritten laws, and to maintain that the 'people' [community of the realm (*la communaute de vostre roiaume*)] will in the future choose customs, 'is simply to do violence to language'.[5]

Moreover, Schramm's reduction of the dispute over the oath to a conflict between the 'divine right of kings' and the 'sovereignty of the people' is simplistic and misleading.

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[1] See Laud's comments in *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, extracted in Pemberton, *The Coronation Service according to the use of the Church of England, op. cit.*, p. 83; And see text at my Appendix I

[2] For text, see my Appendix I.

[3] See also discussion of this term at p. 239, *supra*.

[4] See Robert S Hoyt, 'The Coronation Oath of 1308,' *English Historical Review*, Vol. 71, 1956, 353-383, at pp. 363-364.

[5] See Walter Ullmann, in *Liber Regie Capelle*, Manuscript in the *Biblioteca Publica*, Evora, edited by Walter Ullmann, Printed for the Henry Bradshaw Society at the University of Cambridge Press, 1961, Henry Bradshaw Society, Vol. XCII, at p. 32, and particularly note 1, where he refers to Schramm, p. 206.

THE DIVINE RIGHT OF KINGS[1]

It has become customary for people from all walks of life and times since the Revolution of 1688 to advert to the 'divine right of kings' in association with the monarchy and with the Stuarts in particular, without defining the term, on the assumption that everyone knows what the term means; but in reality, while undefined, it is burdened with pejorative overtones pertaining to tyranny, arbitrary or absolute rule, and to the idea that kings ruled on the basis of the maxim 'what pleases the prince has the force of law'—*quod principi placuit habet legis vigorem*, which maxim itself was a misquotation from the *Institutes* of Justinian, as had been recognised by Bracton in the twelfth century,[2] though it has been convenient for polemicists to overlook this fact. (An example of this kind of subliminal polemic is to be found in the title of the recent book by Richard Tomlinson, which is called *Divine Right, the Inglorious Survival of British Royalty*[3], and which includes on the frontispiece an elliptical misquotation from James VI and I —'Kings are gods'[4].)

As John Neville Figgis said in the introduction to his book, *The Divine Right of Kings*[5]:

> A modern essayist has said with truth, that 'never has there been a doctrine better written against than the Divine Right of Kings'.[6] But those, who have exhausted their powers in pouring scorn upon the theory, have commonly been at little pains to understand it. ...The rival doctrine of the original compact was no whit less ridiculous in theory, and (if we

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[1] The most significant proponent of Divine Right in the seventeenth century was Sir Robert Filmer; see discussion *infra*, under 'Locke and Filmer', at p. 347 ff.

[2] *Sed et quod principi placuit, leges habet vigorem, 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 *THE INSTITUTES OR ELEMENTS OF OUR LORD JUSTINIAN, PERPETUAL AUGUSTUS*, Etc., 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.*) And see *Bracton De Legibus et Consuetudinibus Angliae*, George E Woodbine (*ed.*), Yale University Press, 1922, reproduced with translation by Samuel E Thorne, Selden Society and Harvard University press, Cambridge Mass., 1968; Bracton on the Laws and Customs of England, *trans.* Samuel E Thorne; Latin text copyright 1922 Yale University Press; translation copyright 1968 Harvard., p. 305-306, [folio 107, 107b].

[3] Richard Tomlinson, *Divine Right, the Inglorious Survival of British Royalty*, Little Brown and Company, London, 1994; updated version in paperback by Abacus, London, 1995.

[4] James actually said, '...in the scriptures kings are called gods...', and went on to adumbrate upon the similitude between the powers of God and of the king, such as judgement, pardon etc, and to liken the king to God in the sense of *parens patriae*, but noted such power is for edification, not destruction—see James VI and I speech to parliament, 21 March 1610, from *James I, Works*, pp. 529-531, quoted in Kenyon, *Stuart Constitution*, *op. cit.*, at p. 12.

[5] John Neville Figgis, *The Divine Right of Kings*, 1896, Cambridge University Press, Cambridge; 2nd edn 1914; reprinted by Harper Torchbook, New York, 1965, with an Introduction by G R Elton; reprinted by Peter Smith, Publisher, Gloucester, Mass., in 1970.

[6] Figgis sources this to Gairdner and Spedding, *Studies in English History*, 245.

> consider its influence upon Rousseau) infinitely more explosive in practice than the notion of Indefeasible Right and Passive Obedience. [1]

Professor Tanner[2] similarly notes that:

> We are too ready these days to regard the whole system of argument by which Divine Right was defended in the seventeenth century as absurd, and to think little of the intelligence of the generation which accepted it. But like the equally unhistorical theory of the original contract between King and people, which was the philosophical justification of the Revolution of 1688, divine Right played a necessary part in the history of political thought.[3]

Figgis noted that the doctrine, judged in relation to the circumstance which produced it, and to the rival doctrines it was formed to extirpate (papal supremacy), may well prove to have been necessary and even sensible, and that the method of Whig historians in dealing with the phenomenon is to observe it *in vacuo*. He identified four major components of the doctrine:

- Monarchy is a divinely ordained institution;
- Hereditary right is indefeasible;
- Kings are accountable to God alone; and
- Non-resistance and passive obedience are enjoined by God.[4]

G R Elton notes that in Figgis' view, the idea of the divine right of kings led to the development of 'a true theory of sovereignty', but Elton, in the light of scholarship after Figgis' time of writing in 1896, notes that the concept of sovereignty did exist in the middle ages[5]—(I believe it to be arguable that the concept of sovereignty in Britain dated from the time of the *Bretwaldas*.[6]) But it is certainly clear that the idea of divinity informing kingship was of ancient lineage, Elton tracing it from the time of Charlemagne, who in 800 A. D. styled himself king and emperor *Deo gratia*, a phrase used by kings ever since. However, in Britain, kings had been styling themselves kings by the grace of God for many years before

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[1] Figgis, *Divine Right*, *op. cit.*, pp. 1-2.

[2] J R Tanner, *Constitutional Documents of the Reign of James I, A.D. 1603-1625*, Cambridge University Press, Cambridge, 1st edn. 1930; reprinted 1952, 1960, 1961.

[3] Tanner, ...*James I*, *loc. cit.*, pp. 8-9.

[4] See Figgis, *Divine Right*, *op. cit.*, pp. 5-6.

[5] See G R Elton, Introduction to Figgis' *Divine Right*, at pp. xxiv-xxvii; Elton's Introduction was reprinted in G R Elton, *Studies in Tudor and Stuart Politics and Government, Papers and Reviews, 1946-1972*, in 2 Volumes, Vol. 2, Parliament/Political Thought, Cambridge University Press, Cambridge, 1974, pp. 193-214.

[6] See discussion of early kingship in Chapters 1-2, *supra*.

Charlemagne.[1]

The idea of 'divine right' was always inextricably tied to politics, and politics until recent times was conceived as a branch of theology. The 'Holy Roman Empire' is the most obvious example of this phenomenon, which was a natural extension of the concept that the ideal state is the kingdom of God on earth, which in turn was based upon the universal acceptance in the European world of the position of Christ as Lord of the Christian commonwealth.[2] Underpinning the doctrine was the corollary that theology could teach the true theory of government, and the mutual obligations between ruler and the ruled. Therefore, there had to be one universal supreme authority on earth, and this position popes appropriated for themselves, asserting a capacity to make and unmake kings and emperors. In England, however, kings since the *Bretwaldas* had seen themselves as independent fiefs answerable to no-one but God, and capable of dealing as equals with any continental prince or prelate—due in no small part to the early influence of the Celtic church, and prior to that of pagan Celtic beliefs.

The ideas of 'divine right', and of 'sovereignty' or 'empire' as meaning supreme and independent control, grew inseparably in tandem.

The first manifestation of this on the continent lay in the pretensions of popes to papal supremacy, with assertions of universal jurisdiction, and a requirement of absolute obedience. This concept led to the Great Schism in the catholic church, between the western and the eastern fraternities; it was not until December, 1965, that the mutual excommunications were cancelled by Pope Paul VI and Patriarch Athenagoras I as part of a larger effort to draw the two churches together.[3]

Gratian's *Decretum* c.1140[4] maintained that the pope was superior to and incapable of being bound by the emperor, and that any imperial law was void if it conflicted with canon law.[5]

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[1] See my discussion at pp. 86, 152,and 266 *supra*., and see Hobbes' views at p. 340, *infra*

[2] See Figgis, *Divine Right*, *op. cit.*, pp. 40 ff.

[3] "Schism, Great," *Microsoft® Encarta® 97 Encyclopaedia*. © 1993-1996 Microsoft Corporation. All rights reserved.

[4] "Gratian (c. 1090-1155)," *Microsoft® Encarta® 97 Encyclopaedia*. © 1993-1996 Microsoft Corporation. All rights reserved. Gratian collected all the canon law from the earliest popes and councils up to the Second Lateran Council (1139) in his *Decretum*, or *Concordance of Discordant Canons*.

[5] See Gratian, *Decretum*, Dist. X, c. 4, quoted and referred to in Figgis, *Divine Right*, *op. cit.*, at pp. 47-48, and n. 2, p. 47.

The scientific study of law stimulated by the *Decretum* encouraged the development on the continent the *ius novum* [new law] which replaced the *ius antiquum* [the antique law, or continental customary law]. Popes issued thousands of decretals which were collected into compilations,[1] the substance and effect of which amounted to an assertion of the pope's claim to sovereign power, the *plenitudo potestatis*, in support of a universal monarchy under the pope, who was answerable to God alone. No resistance was allowable to him as divinely ordained sovereign; and in pursuit of their aims, popes claimed as a corollary of absolute obedience the power of releasing subjects from their allegiance and deposing kings—the threat used to enforce their view was the sanction of excommunication and eternal damnation,[2] a course pursued with regularity by popes against English kings.[3]

A concept of indigenous sovereignty arose to sustain the independence of kings and emperors from the pope, its fundamental premise being that 'a kingdom divided against itself cannot stand'[4], and that sovereignty was inalienable and indivisible— major early proponents being Marsiglio of Padua[5], Dante Alighieri[6] and William of Ockham.[7] These writers saw monarchy as being a natural form of government given divine sanction, and the king holding his crown from God, in Dante's case in *De Monarchia*, from God alone, with the electors acting merely as instruments in announcing God's choice, while Ockham and Marsiglio saw the empire/kingdom as originating in the people.[8]

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[1] *Compilatio Tertia* of Innocent III in 1210, to be used in courts and law schools, the first collection in the West to be officially promulgated; Gregory IX commissioned Raymond of Peñafort to organize the five *compilationes* in one collection, which was promulgated in 1234 and became known as the *Extravagantes*. Two other official collections were made later: the *Liber Sextus* (1298) of Boniface VIII, and the *Constitutiones Clementinae* (1317). The *Extravagantes of John XXII* and the *Extravagantes Communes* were privately compiled.

[2] See Figgis, *Divine Right*, *op. cit.*, pp. 46 ff.

[3] For example, John was excommunicated, as was Henry VIII, and Elizabeth. Popes claimed suzerainty over England from the time of John until Edward I and his barons on behalf of the realm unequivocally asserted the independent sovereignty of England. Henry VII obtained a papal support for his *Titulus Regius*, and a papal bull excommunicating his enemies.

[4] The Biblical reference is to *Matthew*, 12, 25—[King James Version, 1611] 'And Jesus knew their thoughts, and said unto them, Every kingdom divided against itself is brought to desolation; and every city or house divided against itself shall not stand:...'

[5] Marsiglio, of Padua, *Defensor Pacis*, I, 17, quoted and referred to in Figgis, *Divine Right*, *op. cit.*, pp. 55 ff., and p. 55 n. 1.

[6] Dante Alighieri, 1265-1321, Florentine, in *De Monarchia*, III, quoted and referred to in Figgis, *Divine Right*, *op. cit.*, p. 56 ff., and p. 56 n. 1.

[7] William of Ockham, c. 1285-c. 1349, born Surrey, England, in *Dialogus*, Pars. III. Tr. II Lib. III c. 19, and Pars. III Tr. II Lib. I c. 31, referred to and quoted in Figgis, *Divine Right*, pp. 55 ff., and p. 55 n. 2, and p. 58 n. 1 respectively.

[8] See Marsiglio, *Defensor Pacis*, II, 30, and William of Ockham, *Dialogus*, Pars. III. Tr. II, L. I c. 8, and Dante, *De Monarchia*, III, 16, referred to in Figgis, *Divine Right*, *op. cit.*, pp. 62-63, and p. 63, notes 1, 2, and 3 respectively.

In England, John Wycliffe[1] in Richard II's time wrote *De Officio Regis*, in which he maintained that the king had no superior but God, nor was he subject to any positive law; while he should obey his own laws, his obedience was voluntary, not compulsory, for the king is *solutus legibus*. Wycliffe interpreted Bracton as meaning that it is the moral or divine law, not positive law, that is to govern the king.[2] All these writers in opposing to the divine right of the pope to command obedience, erected the divine right of kings in order to oppose papal pretensions and to propound the idea of obedience to the king in order to secure the nation state.

Gratian's *Decretum* together with the compilations of decretals was printed in 1503 as *Corpus Iuris Canonici*, which, along with the decrees of the Council of Trent (1545-1563), remained the fundamental law of the Roman catholic church[3] until the *Codex Iuris Canonici* appeared in 1917. This republication of the *Decretum* coincided in England with growing dissatisfaction with the activities of the representatives of the church of Rome, and religious polemic coincided with Henry VIII's desire for a divorce under the law. In order to sustain opposition to papal authority in the sixteenth century, the doctrine of divine right of kings came to full flower, and in Figgis' words, 'was an indispensable handmaiden of a national reformation.'[4]

On the continent, Jean Bodin wrote *Le Six Livres de la République* in 1576,[5] and devoted an entire chapter to 'Sovereignty', claiming to be the first to write on the idea. To him, sovereignty lay in the king and was indivisible and perpetual, and was derived from the law of God and of nature. He too, was writing for political reasons, to secure the succession of Navarre. But in the course of substantiating his thesis, Bodin drew heavily on the coronation oaths of monarchs—from the apocryphal oath of Aragon, the oath of the great king of Tartary, the ancient Oath of Carinthia, an old French coronation oath, the oath of Philip I of France in 1058, the 1420 oath of Henry V of England when he married into

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[1] Richard III had a personal copy of Wycliffe's translation of the Bible into English.

[2] John Wycliffe, 1330-1384, *De Officio Regis*, Wycliffe Society's edition, as summarised and quoted in Figgis, *Divine Right*, *op. cit.*, pp. 67-72, and quotations and references in the footnotes thereto.

[3] The *Corpus* continues to have some validity for the Church of England, which issued a Code of Canons in 1603—the medieval law is presupposed except where it has been affected by contrary statute or custom in England, the revised Code of Canons promulgated by the Convocations of Canterbury and York in 1964 and 1969 operating upon the same understanding. See Canon Law, *Microsoft® Encarta® 97 Encyclopaedia.* © 1993-1996 Microsoft Corporation. All rights reserved.

[4] See Figgis, *Divine Right*, *op. cit.*, p. 92.

[5] Jean Bodin, *Le Six Livres de la République*, Paris, 1576, Book I, Chapter 8, p. 136 [French edition], Julian H Franklin, (*ed.* and *trans.*) Book I, Chapter 8, 'On Sovereignty' from *Jean Bodin, On Sovereignty, Four Chapters from The Six Books of the Commonwealth*, Cambridge University Press, Cambridge, 1992

France, and the coronation oath of Henry III of Poland and France in 1573,[1] therein finding both the conferring of sovereignty, and the source in God.

In Scotland, however, the situation was somewhat different. John Knox [c. 1513-1572], originally a Roman catholic priest, converter to protestantism and royal chaplain to Edward VI, fled after Mary I's accession and converted to Calvinism. On his return to Scotland, he published *The First Blast of the Trumpet Against the Monstrous Regiment of Women* in 1558,[2] and argued for the lawfulness of resistance and the duty of deposing 'idolatrous' kings.[3] He founded Presbyterianism in Scotland, and after protestant success in regaining control of the Scots Estates, they adopted in 1560 the protestant reformers' Confession of Faith, written chiefly by Knox, which was to remain the authorized Scottish creed for two centuries.[4] But after the accession of Mary Queen of Scots and the French dauphin to the throne of Scotland, the Scottish Estates passed the *Discours Particulier*,[5] which maintained that the king and queen of Scotland recognised no superior except God, the king of kings.

Two divergent theories of the position of kings thereafter emerged. On the one hand, writers like John Major (or Mair) had written earlier in the sixteenth century that all civil authority was derived from the people, and that the king was a mere delegate of the people who could be deposed or put to death if he misused his power.[6] George Buchanan wrote in 1570 his *De Jure Regni apud Scotos*,[1] mainly in order to justify the deposition of Mary Queen of Scots, in which he asserted that the king was responsible to the people and under the law, and could be deposed if he flouted the law.

However, when Mary Queen of Scots was forced to abdicate in favour of her infant son

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[1] Bodin, *Sovereignty*, Franklin (*ed.*), *loc. cit.*, p. 9, p. 8, pp. 9-10, p. 16, p. 18, and p. 17 respectively.

[2] A polemic against government by women. This work was directed chiefly against the Roman catholic regent of Scotland, Mary of Guise, ruling for her daughter Mary, queen of Scots.

[3] See reference in Figgis, *Divine Right*, *op. cit.*, p. 98.

[4] For a discussion of the Scottish reformation, see F W Maitland, 'The Anglican Settlement and the Scottish Reformation', *Cambridge Modern History*, Vol. II, Ch. XVI, 1903, reproduced in Helen M Cam, (*ed.*), *Selected Historical Essays of F W Maitland*, Cambridge University Press, Cambridge, 1957, pp. 152-210.

[5] Referred to in David M Walker, *A Legal History of Scotland*, Volume III, The Sixteenth Century, T & T Clark Ltd., Edinburgh, 1995, at p. 120, and sourced to Stair Soc. Misc., II. 87, 101.

[6] John Major (Mair), *History of Greater Britain*, A Constable, (*ed.* and *trans.*) S.H.S., 1892, referred to in Walker, *A Legal History of Scotland*, *loc. cit.*, p. 120 and n. 1.

James VI in 1567, the protestant Scottish Estates passed the *Coronation Oath Act*[2], which confirmed the king in his prerogatives and jurisdiction, but also imposed his duties, the main one of which was to maintain the kirk of Scotland, and to root out heretics; and the infant James was crowned at Stirling five days after the abdication. A series of Calvinist/Presbyterian regents effectively ruled Scotland until 1581, when James at the age of fifteen assumed the rule. This could well explain the saving of the prerogatives, since they were to be exercised during James' minority by the Presbyterians.

In 1581, Adam Blackwood published *Apologia Pro Regibus*,[3] influenced by Bodin and responding to Buchanan, asserting the necessity for unlimited sovereignty in the state for the purposes of securing peace and order. James VI published his *Trew Law of Free Monarchies* in 1598, and William Barclay published his *De Regno et Regali Potestate* in 1600, stating in essence that authority to rule came from God, and the people could not take away what they did not confer. Sir Thomas Craig wrote *Concerning the Right of Succession to the Crown of England* on 1 January, 1603, just before James VI became James I of England. This was a response to the allegations by the Jesuit Parsons in Doleman's *A Conference about the Next Succession to the Crown of England* 1598[4], reasserting in opposition to the idea of the people's capacity to alter the succession, that hereditary monarchy could not be altered by legal process, as the right of inheritance was absolute under natural law.[5]

After the execution of Mary Queen of Scots in 1587, the Calvinist James VI of Scotland became heir presumptive to the English throne; catholic polemicists began attacking the idea of divine right of kings, particularly in so far as it could be seen as supporting hereditary succession. Doleman's *Conference* had constructed a new alliance between papal sovereignty and popular rights, arguing that forms of government were variable and may be

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

[2] *Coronation Oath Act*, 1567 [Scotland], c.8, from *Statutes in Force*, Official revised Edition, *Coronation Oath Act*, 1567 [S], 1567 c.8, revised to 1st February 1978; HMSO, London, 1978, Short Title give by Statute Law Revision (Scotland) Act 1964 (c.80). Sch. 2.

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

[4] R Doleman, *A Conference about the Next Succession to the Crown of Ingland, Divided Into Two Partes. Whereof the First Conteyneth The discourse of a civill Lawyer, how and in what manner propinquity of blood is to be preferred. And the second the speech of a Temporal Lawyer, about the particular titles of all such as do or may pretende within Ingland or without, to the next succession*, published posthumously in 1598, written by the Jesuit Robert Parsons c.1593.

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

changed according to the will of the community,[1] and that 'succession to government by nearness of blood is not by law of nature or Divine, but by human and positive laws only of every particular government, and consequently may upon just causes be altered by the same.'[2] Doleman insisted upon the importance of the coronation oath as both imposing the conditions upon which kings take their crowns, and as implying allegiance from the people to the king.[3] The tract was motivated by the doctrine of papal sovereignty, and designed to acquire popular support for the installation of a catholic king, rather than by any concern for the 'people' or 'liberty'; but it expressed the doctrines of resistance and of popular sovereignty (the will of the community), and may be seen as an early example of the contract theory later used by the revolutionaries of 1642 and 1688. Indeed, the puritans made much of Doleman's tract in 1647, and it ironically was republished by supporters of the Exclusion bill as an argument against inherent right.[4]

Henry VIII had been excommunicated by the pope in 1533 and again in 1538. Elizabeth I was excommunicated in 1570—Mary Queen of Scots still then being alive, and as the direct descendant of Margaret Tudor, sister to Henry VIII, she was recognised by catholics as being the rightful inheritor of the crown of England after Edward VI's death, the annulment of the Aragonese marriage never being recognised at Roman catholic canon law.

This was the nub—it was English law, not Roman, civil or canon law, which governed England. As Henry had pointed out to his exchange of correspondence with pope Paul III[1], he was constrained by his coronation oath to support the laws of England; nor would he submit matters pertaining to England to any foreign jurisdiction; nor could he do so without the consent of the realm, being astricted by his oath. The question for England was not so much the divine right of the king as against the divine right of the pope, but the obedience of the people to the king rather than to the pope, and the sovereignty of English

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[1] Doleman's *Conference about the Next Succession to the Crown of England*, p. 10 ; 'The Commonwealth hath power to choose their own fashion of government, as also to change the same upon reasonable causes', quoted in Figgis, *Divine Right*, *op. cit.*, p. 102, and n. 1.

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

[3] Doleman's conference, *op. cit.*, p. 136;—the coronation and admission maketh a perfect and true king', quoted by Howard Nenner, *The Right to be King, The succession to the Crown of England, 1603-1714*, University of North Carolina Press, Chapel Hill, 1995, at p. 63.

[4] See Figgis, *Divine Right*, *op. cit.*, p. 103, and note 2.

laws made for the English by the English, rather than foreign laws made in foreign places to further foreign ends. The sole governing factor here was the king's coronation oath, which he swore before the English people and God.[2]

Catholics generally were at this time explicating the view that the coronation oath formed the basis of a compact or a contract between the king and the people, but from the point of view that the coronation oath required the king to maintain the Roman catholic religion, and failure to do so was a 'break' with both God and the people, which justified the people in opposing and if necessary deposing him.[3] This interpretation was designed to promote again papal supremacy.

Much depends upon the text of the coronation oath which was being discussed. The uncertainty surrounding the oaths taken by the Tudor kings does not make this exercise any easier. But if the Tudors took an oath based on the *Little Devices* or the *Liber Regalis*, it would have been open to interpretation by catholics that it required the maintenance of the catholic faith, by virtue of its references to St Edward the Confessor, and laws granted by him and his successors. On the other hand, it could also be interpreted to mean maintenance of the Anglican faith, because of the references to the Confessors' successors, who of course included Henry VIII, and because the fourth clause of the oath referred to the laws and customs which the people had, which included of course those laws relating to the supremacy of the Church of England.

If the kings had taken the Lettou/Machlinia oath, again there was sustenance for catholics, as it referred to the king's keeping and maintaining 'the right and the liberties of holy church of old time granted by the righteous Christen kings of England.' But again, protestants could have pointed to the fourth clause of that oath which required the king to

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[1] See pp. 269-269, and p. 273 *supra*. I have not been able to find texts of these letters, and am relying here on Franklin le Van Baumer, *The Early Tudor Theory of Kingship*, Yale University Press, 1940; reissued 1966, New York, Russell & Russell, p. 167, where he sources the text of Henry's letter to Pocock, *Records of the Reformation*, II, 438-439.

[2] Pope Paul III was fomenting reprisals against England from 1535, urging continental kings to 'enforce justice' against Henry; the threat of foreign invasion, together with spiritual and emotional blackmail of the excommunication of Henry's subjects who obeyed the English laws, brought into sharp focus the questions of sovereignty. For Paul's letters to the princes, see le van Baumer, *Early Tudor Theory of Kingship, loc. cit.*, p. 88, and p. 87, n. 8.

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

maintain the laws and customs chosen by the people. The Privy Council draft oath for Edward VI omitted any reference to old times or the Confessor, and could only by stretching the words be supposed to apply to maintenance of the catholic faith.

In the light of the continuing controversy over papal as opposed to monarchical national sovereignty, it can be seen that Henry VIII's amendments to the Lettou/Machlinia oath were more than mere whim, they being specifically directed towards obviating any possible interpretation of the oath as requiring the king to maintain catholicism, and supporting the maintenance of the changes made by English law in England by Englishmen—Henry specifically refers to the 'church in England'[1] and to the maintenance of his jurisdiction and prerogative, (not any one else's, least of all the pope's), and to the maintenance of laws chosen by the nobles and the people with his consent (which would include of course the reformation settlement worked out by the king, lords and commons).

Given the Jesuit attacks upon James VI's succession at the end of the sixteenth century, in Doleman's *Conference* and other tracts, and the emphasis given therein to the import of the coronation oath, and the assertion by the Jesuit priests Watson and Clarke that James was no proper king before his coronation,[2] it is therefore also no surprise that on James' succession to the English throne, his English coronation oath specifically referred to his maintaining of laws and customs granted to the people and the clergy by his predecessors, including Edward the Confessor, but with the qualifier *according and conformable to the laws of God and true profession of the gospel established in this kingdom, and agreeing to the prerogatives of the kings thereof and to the ancient customs of this realm*—thus the profession of the gospel in England was upheld, but subject to the sovereign jurisdiction of the English king—making it clear that it was the laws relating to the Church of England according to the laws of England, and not any foreign or Roman catholic canon law which held sway.

Fundamentally, the essence of the divine right of kings theory was that of obedience to the sovereign, who happened to be the king, to ensure the uniform promulgation and enforcement of the law, and thus the peace of the people, the kingdom, and the state. In essence, this too was the basis of the theories of Hobbes, Locke, and the revolutionaries of

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[1] This does not necessarily mean that Henry examined the oath after the reformation.

[2] See *The Trial of Sir Griffin Markham... William Watson, Priest, William Clarke, priest, for High Treason*, 1 Jac. I, Nov. 15, 1603, 2 *State Trials*, 61-69. And see discussion at p. 134, p. 139, p. 141, p. 144, and p. 329, *supra*.

1688-1689—all agreed on the necessity for there to be some sovereign power, and for there to obedience to it; the distinctions between them were the bases upon which they found the sovereign power, and where they found it to lie.

A recent article has analysed Figgis' work and the doctrine of 'divine right' anew, concluding that during the seventeenth century, advocacy of the 'divine right of kings' did not preclude belief in the view that kings should rule through the common law, and that it had the legitimate use of justifying the duty of obedience, and condemning the resistance theory.[1] With this I would agree, but I base my agreement upon the binding oath of the king at his coronation (the aforementioned article makes no reference to the coronation oath or coronation ceremony.)

Figgis accepted the tattered maxim that the 'king never dies', and therefore believed that the development of an hereditary kingship removed the 'significance and necessity of the coronation ceremony.'[2]

I have argued elsewhere that those bedfellows, 'the king never dies', and 'the king's two bodies', have no grounding in law, and that in fact the king has only one body which does indeed die.[3] The law which governs the succession of kings is the prerogative of the people, a king is made by his recognition by the people and his taking the oath of governance, and the continuity of the peace, the law and jurisdiction are by virtue of these two things assured.[4]

There was not, and still is not, any such thing as indefeasible hereditary right.[5] There is merely a presumption that the people will agree to the enthronement of the next lineal heir. Should, for example, the eldest son of a reigning monarch be a cretin, or insane at the time

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[1] See Glenn Burgess, 'The Divine Right of Kings Reconsidered', 1992 *English Historical Review*, October 1992, pp. 836-861, at p. 860.

[2] Figgis, *Divine Right, op. cit.*, pp. 26-27. Figgis has only passing references to the coronation oath, see Figgis, pp. 9, 58, 122.

[3] See 'The King Never Dies,' at pp. 130-146, 'The King Must Die' at p. 146ff., and pp. 161-162 *supra*.

[4] There is, of course, the anointing, and the bestowal of the symbols of kingship, the tangible indicia of the king's intangible prerogatives (the crown, the sword, the orb, the sceptre, the ring, the spurs, the stole). Without the latter the person would be king; but the British king is a Christian king, and could not become king of his Christian people without being anointed, according to long custom and the common law. But this aspect of kingship is not here dealt with, though it is not without legal ramifications.

[5] See also discussion *infra*, at p. 481

of the succession[1], it is beyond belief that people in the late twentieth century would choose to enthrone such a person, when so-called more primitive people like the Anglo-Saxons certainly would not have. The presumption of direct hereditary succession can be displaced by the people's exercising their prerogative to choose their king, as it was in, for example, the case of John, or in 1688. But the *Act of Settlement*,[2] it could be said, would require the next hereditary heir, insane or not, to succeed.[3] On any indefeasible hereditary right and 'statutory' view of the law, the insane person would already be king immediately on the death of his predecessor ; it would be too late to alter the Act at the time of the succession. But statute law does not govern the making of kings; the common law does. Thus the people could exercise their prerogative through a proclamation of the Accession Council to proclaim the second in line, or indeed, anybody else, king, and provided this choice was ratified in the Recognition at the coronation, and the putative king took the oath and was anointed, then he would be king indeed. Indeed, one could argue that since the taking of the coronation oath is a prerequisite to entry into the office of king, then a person incapable of understanding the purport of the oath is incapable of becoming king.[4]

JAMES VI AND I, AND DIVINE RIGHT

Now I have argued elsewhere that James became king only by the exercise by the people of

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[1] Neither the *Act of Settlement* 1700 (12 & 13 Will. 3, c. 2) nor the *Succession to the Crown Act* 1707 (6 Ann. c. 41) stipulated as one of the constraining factors on the succession, sanity or full possession of mental faculties.

[2] *Act of Settlement* 1700 (12 & 13 Will. 3, c. 2)

[3] The *Regency Act* of 1937, (1 Edw. 8 & 1 Geo. 6, c. 16 [assented to 19 March 1937]) as amended speaks in s. 2 (1) of the possibility of 'the Sovereign' being declared by three persons drawn from the spouse of the Sovereign, the Lord Chancellor, the speaker, the Lord Chief Justice and the Master of the Rolls 'by reason of infirmity of mind or body incapable for the time being of performing the royal functions or that they are satisfied by evidence that the Sovereign is for some definite cause not available for the performance of those functions, then, until it is declared in like manner that His Majesty has so far recovered His health as to warrant His resumption of the royal functions or has become available for the performance thereof, as the case may be those functions shall be performed in the name and on behalf of the Sovereign by a Regent.' This section assumes that the 'Sovereign' is already 'Sovereign' when the regency is called for; and also assumes that the sovereign has been at the time previous exercising and capable of exercising the royal functions, since it speaks of his 'resumption' of them. It could not, I think, be interpreted as applying to a person who, though meeting the criteria laid down in the *Act of Settlement*, could not meet the common law criterion of being capable of taking the coronation oath. *Contra* Vernon Bogdanor, in *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995 at p. 47—he interprets this section as meaning the 'permanent incapacity of the sovereign'; but I do not think on its face this interpretation can stand; the marginal note refers to 'Regency during total incapacity of the sovereign', but it clearly also envisages the resumption, or the becoming available for performance of the royal functions; that is, it has a necessary implication of capability of performance of the functions. Moreover, one cannot become a sovereign until one has been recognised by the people, and taken the oath of governance.

[4] The only king of England who did not take the oath of governance on or reasonably soon after his accession was Henry VI, who succeeded at the age of nine months. Although there exist, I believe, some doubts as to whether Edward IV took the coronation oath.

their prerogative of the people to declare who was king[1], and that the coronation is vital in the ratification of the people's choice. What made him king was the Recognition by the people, the taking of the coronation oath, the anointing, and the receipt of homage.

The Jesuits had attempted firstly to prevent James VI of Scotland succeeding to England, and then to displace him from the throne before he had been crowned, arguing against any idea of divine right of kings as it tended to support hereditary succession. After the trial of the traitors in *Sir Griffin Markham's trial*[2] of 1603, it is perhaps understandable that the idea of 'divine right of kings' became associated with this particular king, since the Houses of parliament subsequently in 1604 declared that they were bound by the laws of God and man to recognise that 'by the goodness of God Almighty and lawful right of descent under one Imperial Crown your majesty is of the realms of England, Scotland, France and Ireland the most potent and mighty king...'[3] It is significant that parliament passed the 1604 *Succession Act* only after James had been crowned[4], (else the parliament could not be a legal entity), but mere declaration by the parliament could not make or legitimate James king.

Many have seen in James VI and I the high point of the 'divine right' doctrine,[5] extrapolating usually from a publication of his in 1598 called *The Trew Law of Free Monarchies*, while he was still king of Scotland, and written concerning the monarchy in Scotland[6]: but in many respects this reputation is undeserved. He said there:

> For albeit be true, that I have at length proved, that the King is above the law as both the author and giver of strength thereto, yet a good king will not only delight to rule his subjects by the law, but even will conform himself in his own actions thereunto; always

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[1] See Chapter 4, The Prerogative of The People, p. 123 ff., *supra*.

[2] See discussion also at p. 134, p. 139, p. 141, p. 144, *supra*. *The Trial of Sir Griffin Markham... William Watson, Priest, William Clarke, priest, for High Treason*, 1 Jac. I, Nov. 15, 1603, 2 State Trials, 61-69; Coke refers to this case of the *Case of Watson and Clerke, seminary priests*—see Sir Edward Coke in *Calvin's case, loc. cit.*, at 7 Co. Rep., 10 b-11 a, ; 77 ER (KB) 389-390; and Coke in 3 Co. Inst. 7, Hil. I Jac. *In the case of Watson and Clark seminary priests*. (9F.4.I.b)—Sir Edward Coke, *The Third Part of the Institutes of the Laws of England*, printed at London by M Flesher for W Lee and D Pakeman, MDCXLIV (1644), p. 7, reprinted by Garland Publishing, New York, 1979, from facsimiles in the British Library, 508.f.g[2].

[3] see *Succession Act*, 1604, 1 Jac. I, c. I; *Statues of the Realm*, iv, 107, extracted in J R Tanner, *...James I*, at pp. 10-12; and in Figgis, *Divine Right, op. cit.*, Appendix A, pp. 319-320.

[4] He was crowned on 25 July 1603.

[5] See for example, Edmund S Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America*, W W Norton & Company, New York, 1987, Norton paperback, 1989, in Chapter 1, 'The Divine Right of Kings', at p. 18.

[6] James VI of Scotland, *The Trew Law of Free Monarchies*, published anonymously in 1598, in *James I, Works*, (edn. of 1616), pp. 201-203, reproduced in Tanner, *...James I, op. cit.*, pp. 9-10. Note that at p. 201 of *Trew Law*, and at p. 9 of Tanner, James specifically confines his remarks to *Scotland*, which had a different history and heritage, as well as a different law, from those of England.

> keeping that ground, that the health of the commonwealth be his chief law. And where he sees the law doubtsome or rigorous, he may interpret or mitigate the same, lest otherwise *summum jus* be *sumna injuria*....[1]

Neither Bracton nor Elizabeth I would have any quarrel with this statement of the law.

In *The Trew Law*, James also referred to the idea a compact between king and people,

> '...grounded upon the mutual paction and adstipulation...between the King and his people, at the time of his Coronation: for there, they say, there is a mutual paction, and contract bound up, and swome betwixt the king and the people...[James denies any such contract was made then, though he admits that at his coronation the king freely promises to his people] 'to discharge honourably and trewly the office given him by God over them'. [And that even if there were a contract] 'no man that hath but the smallest entrance into the civill law' [will doubt that one of the parties to a contract is not freed from it because he thinks the other party has broken it] 'except that first a lawful trial and cognition be had of the ordinary Judge of the breakers thereof; or else every man may be both party and Judge in his own cause.[2]' [This consideration, which is undoubtedly a sound criticism of the practical operation of the contract theory, leads him to conclude that between king and people God is the only judge.][3]

As king of Scotland, (which James was when *The Trew Law* was written), James' coronation oath had constrained him to rule his people 'according to the will and command of God', and that oath contained no reference at all to any role at all to be played by his subjects in the making of the law. When, however, he had become king of England, and had sworn the English coronation oath (which was quite different from the Scots oath) he said he was:

> bound by a double oath to the observance of the fundamental laws of his kingdom: tacitly, as by being king, and so bound to protect as well the people as the laws of his kingdom, and, expressly, by his oath at his coronation; so as every just king in a settled kingdom is bound to observe that paction made to his people by his laws in framing his government agreeable thereunto...[4]

Clearly James saw his English governance as being ruled by his English coronation oath and by God, and it is here in the coronation ceremony that is to be found the real origin of the 'divine right of kings' doctrine. Moreover, James quite clearly saw that, though he may be king by the grace of God, he was to govern the people with the aid of the people, and

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[1] James VI of Scotland, *The Trew Law of Free Monarchies*, published anonymously in 1598, in *James I, Works*, (edn. of 1616), pp. 201-203, reproduced in Tanner, ...*James I, op. cit.*, pp. 9-10.

[2] This was the approach later used by Coke in *Dr Bonham's Case*, (1610) Pleadings and argument at 8 Co. Rep., 107a ff., Mich. 6 Jac. 1, 77 ER (KB) 638. Report at 8 Co. Rep. 113b, Hil. 7 Jac. 1, 77 ER (KB) 646.

[3] These quotations are from James VI of Scotland, *The Trew Law of Free Monarchies*, in *Works*, C H McIlwain, (*ed.*), Harvard Political Classics, Mass., 1918, p. 68, and referred to and quoted in J W Gough, *The Social Contract, A Critical Study of its Development*, Clarendon Press, Oxford, 1936, 2nd edn. 1957, reprinted 1963, 1967, at pp. 64-66. The words in square brackets are Gough's words.

[4] James VI and I, Speech to parliament, 21 March, 1610, Whitehall, *James I, Works*, (edn. of 1616), pp.. 528-531, reproduced in Tanner, ...*James I, op. cit.*, pp. 14-17.

he made clear distinction between the theoretical idea of the king's power 'in *Abstracto*...in *Divinitie*', and the king's power in reality, which was to be used according to 'the ancient forme' with the help of parliament, according to the 'the settled and established state of this Crowne and Kingdome'.[1]

It was in reality Anglican clerics who embraced the idea of 'divine right of kings' most passionately, just as the Roman catholic clerics had enunciated the 'divine right of popes', both for the same purposes of securing obedience to the laws propagated by their respective heads, the king for the former, and the pope for the latter. Anglican Bishop Overall's *Convocation Book* of 1606[2], carried the idea of divine right to such an extent that the church would have recognised as divine the right of Philip of Spain had he succeeded in invading England. James VI and I was so alarmed that he wrote to the archbishop, telling him not to meddle in affairs too high for him, and as a consequence this *Convocation Book* was not published until 1690.[3] The Anglican canons of 1640 stated that 'the most high and sacred Order of Kings is of Divine Right, being the Ordinance of God himself, founded in the prime laws of nature...'[4], and Anglican clerics preached the accompanying doctrine of non resistance to the king from the pulpits. Kings tended towards a more pragmatic view, their interests being in the maintenance of their prerogative and jurisdiction against foreign encroachment.

But the Anglican church had to contend not only with catholic opposition from home and abroad, but also with local Dissenter and non-conforming opposition, and for this reason it embraced the divine right of kings theory as a means of continued support for the king, which in turn meant continued support for the Church, fearing clearly that should the Commons get the upper hand and promote its doctrines of resistance to the king, then the

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[1] James VI and I, Speech to parliament, 21 March, 1610, Whitehall, *James I, Works*, pp. 529-530, quoted in Glenn Burgess, 'The Divine Right of Kings Reconsidered', 1992 *English Historical Review*, October 1992, pp. 836-861, at p. 848.

[2] *Bishop Overall's Convocation Book*, MCDVI (1690), pp. 55-59, cited in H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', Paper read 17 October, *Transactions of the Royal Historical Society*, 5th Series, Vol. 26, 1976, pp. 189-210, at p. 198 and n. 29. See further discussion, *infra*, at p. 417.

[3] See Overall's *Convocation Book*, Canons xxviii -xxxiii, referred to in John Neville Figgis, *The Divine Right of Kings*, 1896, Cambridge University Press, Cambridge; 2nd edn. 1914; reprinted by Harper Torchbook, New York, 1965, with an Introduction by G R Elton; reprinted by Peter Smith, Publisher, Gloucester, Mass., in 1970, at p. 139, and nn. 1 and 2. Figgis says that the edition of the *Convocation Book* in the Library of Anglo-Catholic theology contains James VI and I's letter, and for this reason was not published until 1690.

[4] The Canons of 16 June 1640, from Cartwright, *Synodalia*, I, 380-392, reproduced in Kenyon, *The Stuart Constitution*, *op. cit.*, p. 167.

Anglican Church would be doomed. On the other hand, the puritans seized upon the arguments advanced earlier by the Jesuits against divine right to support their own position of opposing any shadow of catholicism—that while government was from God, kings ruled not of God, but of the people, that they in the Commons were the representatives of the people, and that therefore the king was obliged to do what they said, or else break his coronation oath and suffer the consequences of dismissal as a result of right resistance by the people to a tyrant.

Thus the theory of divine right, used variously by popes, kings, Jesuits and Anglicans to locate sovereignty in pope or king, was now being used by puritan parliamentarians as reason to oppose the king and to place sovereignty and the right to obedience and allegiance with themselves.

THE OATH AND THE 'TRIAL' OF CHARLES I

After the success of the parliamentary army against Charles I, the House of Commons established a purported High Court of Justice to try the king.[1] The charge against Charles drew heavily on what the Commons purported to understand by the coronation oath which they thought that Charles had taken, or ought to have taken:

> That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and by his trust, oath, office, being obliged to use the power committed to him for the good and benefit of the people, and for the preservation of their rights and liberties; yet nevertheless.... hath traitorously and maliciously levied war against the present Parliament, ...
>
> ... All which wicked designs, wars, and evil practices of him, the said Charles Stuart, have been, and are, carried on for the advancement and upholding of a personal interest of will, power, and pretended prerogative to himself and his family, against the public interest, common right, liberty, justice, and peace of the people of this nation, by and for whom he was entrusted as aforesaid.[2]

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[1] The best account of the trial of Charles I is to be found in C V Wedgwood, *The Trial of Charles I*, Collins, London, 1964, reprinted by The Reprint Society Ltd, London, 1966.

[2] 20 January, 1648/9; See *The Constitutional Documents of the Puritan Revolution 1625-1660*, selected and edited by S W Gardiner, Oxford University Press, Oxford, 1889; 3rd edn. 1906; reprinted, Clarendon Press, Oxford, 1951, at pp. 372-373; sourced to 'Rushworth, vii. 1396. See *Great Civil War*, iv, 299'. This and following texts may be found in my Appendix I.

The king, relying on the coronation oath which he had actually taken, refused to recognise the jurisdiction of the purported Court:

> Having already made my protestations, not only against the illegality of this pretended Court, but also, that no earthly power can justly call me (who am your King) in question as a delinquent, I would not any more open my mouth upon this occasion, more than to refer myself to what I have spoken, were I in this case alone concerned : but the duty I owe to God in the preservation of the true liberty of my people will not suffer me at this time to be silent : for, how can any free-born subject of England call life or anything he possesseth his own, if power without right daily make new, and abrogate the old fundamental laws of the land which I now take to be the present case?...
>
> ...I cannot but to my power defend the ancient laws and liberties of this kingdom, together with my own just right.[1]

At the time of the purported trial of Charles, his most ardent defender was none other than William Prynne,[2] who argued for the sufficiency of Charles' reply—by this time Prynne, who had been a rabid supporter of the sovereignty of parliament, had been excluded from the parliament in the Purge and detained, but nevertheless had managed from his place of confinement to distribute a pamphlet denouncing the army and its officers as rebels and traitors, subverters of the laws and liberties of the people, and Jesuitical murderers.[3]

Charles relied again on his coronation oath, and refuted the power of the purported court to try him:

> ...therefore let me know by what lawful authority I am seated here, and I shall not be unwilling to answer. In the mean time, I shall not betray my trust; I have a trust committed to me by God, by old and lawful descent; I will not betray it, to answer to a new unlawful authority: therefore resolve me that...
>
> I am sworn to keep the peace, by that duty I owe God and my country, and I will do it to the breath of my body; and therefore ye do well to satisfy first God, and then the country, by what authority you do it; ... Satisfy me in that and I will answer; otherwise I betray my trust, and the Liberties of the People: ...
>
> For the charge, I value it not a rush; it is the Liberty of the People of England that I stand for. For me to acknowledge a new court that I never heard of before, I that am your king, that should be an example to all the people of England, for to uphold justice, to maintain the old laws; indeed I do not know how to do it. You spoke very well the first day that I came here.. of the obligations that I had laid upon me by God, to the maintenance of the Liberties of my people; the same obligation you spake of, I do acknowledge to God that I owe to him and to my people, to defend as much as in me lies the antient laws of the

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[1] 21 January, 1649, from Rushworth, vii. 1403; quoted in *The Constitutional Documents of the Puritan Revolution 1625-1660*, by S W Gardiner, Clarendon Press, Oxford, 1889, 3rd edn., 1906; revised and reprinted 1951, pp. 374-376, at p. 374 and p. 376.

[2] See Trial of Charles I, *State Trials*, Vol. IV, pp. 959 ff., at p. 959.

[3] See C V Wedgwood, *The Trial of Charles I*, Collins, London, 1964, reprinted by The Reprint Society Ltd, London, 1966, at pp. 114-115, and n. 40, p. 115. Prynne and Clement Walker wrote *A Declaration and Protestation of William Prynne and Clement Walker against the present proceedings of the Army*, January 19th 1649. *Thomason Tracts* 669.f.13(74). Charles was killed on 30 January, 1649.

> kingdom: therefore, until that I may know that this is not against the fundamental laws of the kingdom, by your favour I can put in no particular [answer]..[1]

John Bradshaw, an undistinguished judge in Wales, had been appointed 'Lord President' of the purported court, and in his address before passing sentence, based his view that Charles had 'subvert[ed] the fundamental laws of the land' by reference to an alleged breach of his coronation oath. He went on:

> There is a contract and a bargain made between the king and his people, and your oath is taken: and certainly, sir, the bond is reciprocal... Whether you have been, as by your office you ought to be, protector of England, or the destroyer of England, let all England judge, or all the world that hath look'd upon it.[2]

This was the prime articulation of the 'contract theory' which was to be used years later as the excuse for the deposition of Charles' son James, although there was no support for the theory in any of the legal texts. The purported Court passed sentence upon Charles for breach of his 'trust, oath and office', and for maliciously levying war upon the parliament, and for being a 'tyrant, traitor, murderer, and public enemy to the good people of this nation'[3], and on 29 January 1649, Oliver Cromwell, John Bradshaw, and Thomas Grey signed the king's death warrant.[4] Charles maintained his idea of sovereignty to the bitter end, dying with both grace and courage on the thirtieth day of January 1649; on the scaffold he said:

> ...For the people. And truly I desire their liberty and freedom as much as anybody whomsoever. But I must tell you that their liberty and freedom consists in having of government; those laws by which their life and their goods may be most their own. It is not for having a share in government, sir, that is nothing pertaining to them. A subject and a sovereign are clean different things, and therefore until they do that, I mean, that you do put the people in that liberty as I say, certainly they will never enjoy themselves.... In troth, Sirs, my conscience in religion I think is very well knowne to all the world : and, therefore, I declare before you all that I die a Christian, according to the profession of the Church of England, as I found it left me by my father. ...[5]

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[1] See *State Trials*, Vol. IV, pp. 959 ff., at p. 996, and p. 997, and at p. 1002-3.

[2] Referred to and quoted in C V Wedgwood, *The Trial of Charles I*, Collins, London, 1964, reprinted by The Reprint Society Ltd, London, 1966, at pp. 160-161.

[3] 27 January, 1649, from Rushworth, vii. 1418, and *Great Civil War*, iv, 312; quoted in *The Constitutional Documents of the Puritan Revolution 1625-1660*, by S W Gardiner, Clarendon Press, Oxford, 1889, 3rd ed. 1906; revised and reprinted 1951, pp. 377-380, at p. 377, and p. 380.

[4] 29 January, 1649, see Gardiner, *Constitutional Documents*, *loc. cit.*, p. 380, from Rushworth, vii. 1426, and *Great Civil War*, iv, 309.

[5] Speech of Charles I on the scaffold, 30 January 1649, from *The Trial of King Charles the First*, by J G Muddiman, William Hodge & Company Limited, London, 1928, my Appendix I, p. 260 ff., at pp 262-263.

THE INTERREGNUM AND THE OATH

Now it could be thought that the old ideas of coronation oaths, kings and sovereignty passed away with the Interregnum. But in fact no such thing happened.

The Commonwealth abolished the office of king, purporting to absolve the people of England and Ireland from their homage and allegiance to the king, and replacing it with obedience and subjection to 'the government of this nation', which was '*of right* due unto the supreme authority hereby declared to reside in this and successive representatives of the people of this nation and in them only'.[1] In effect, the House of Commons was drawing upon some kind of amorphous 'right' which was never defined as a justification for this new allegiance and new sovereignty, but which in essence was no different from that upon which they had criticised the king for relying—that is the law of nature, and/or the laws of God. The *Declaration of the Commonwealth* made it clear that the supreme authority in the nation was 'the representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them for the good of the people, and that without any King or House of Lords,'[2] which it had also purported to abolish.[3]

But of course, the 'representatives of the people' in the House of Commons, the only remaining House of parliament, were a very mixed bunch, and far from representative. And the idea of the supreme authority residing solely in the representatives in parliament did not survive long, the so-called *Instrument of Government* of 16 December 1653 placing the 'supreme legislative authority' in 'one person, and the people assembled in parliament',[4] and placed the chief magistracy and executive power, together with the prerogatives of sovereignty, in the Lord Protector, which powers, if parliament were sitting, had to

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[1] Purported Act Abolishing the Office of King, 17 March, 1649, see Gardiner, *Constitutional Documents, loc. cit.*, at pp. 384-387, my italics.

[2] See the purported Act Declaring England to be a Commonwealth, 19 May, 1649, in Gardiner, *Constitutional Documents, loc. cit.*, at p. 388.

[3] See the purported Act Abolishing the House of Lords, 19 March, 1649, in Gardiner, *Constitutional Documents, loc. cit.*, at pp. 387-388.

[4] See the purported *Instrument of Government*, 16 December, 1653, Clause I, in Gardiner, *Constitutional Documents, loc. cit.*, at pp. 405-417.

exercised with its consent, and if it was not, then with the consent of a council.[1] And although it said that no law could be altered nor any new law made without the consent of parliament, nevertheless, power was given to the Lord Protector with the council's advice to raise monies for defence purposes and for the peace and welfare of the nation, prior to a parliament's sitting.[2] These, of course, were the very powers which the House of Commons had denied Charles I for the prosecution of his foreign policies.

Moreover, by 1655, the House of Commons was speaking of the Lord Protector, Oliver Cromwell, as 'His Highness'. A 'Constitutional Bill of the First Protectorate' for a Constitution was drawn up in 1655[3], which provided for an elected Protector, the present Protector being required to :

> take and subscribe a solemn oath for the due calling of Parliaments, and the good government of these nations, and every future Lord protector, immediately after his election, and before he enter upon the government, shall take and subscribe the same solemn oath for the due calling of Parliament, and the good government of these nations; that such solemn oath shall be taken in Parliament, if the Parliament be then sitting, and in the intervals of Parliament in such public place and manner as the Council shall appoint.
>
> That this shall be the oath to be ministered to the Lord Protector, viz. :[4]
>
> 'I do, in the presence and by the name of God Almighty, promise and swear that to the uttermost of my power, I will uphold and maintain the true reformed Protestant Christian religion in the purity thereof, as it is contained in the Holy scriptures of the Old and New Testament, and encourage the profession and professors of the same;
>
> and will duly cause Parliaments to be summoned and called;
>
> and that I will not wittingly or willingly violate nor infringe the liberties and privileges of Parliament, or any of the matters or things contained in the Act of Parliament declaring and settling the government of the Commonwealth of England, Scotland and Ireland;
>
> and will in all things, to the best of my understanding, govern according to the laws, statutes, customs, and liberties of the people of these nations; and will seek their peace and welfare according to those laws, customs and liberties;
>
> and cause justice and law to be equally and duly administered.
>
> ...
>
> ...the exercise of the Chief Magistracy over this Commonwealth and the people thereof shall be in the Lord Protector assisted with the council, and the exercise of which power shall be in according to the respective laws and customs of these nations of England Scotland, and Ireland, and the dominions thereunto belonging.[5]

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[1] See purported *Instrument of Government*, Clauses II, III, IV, V, and VI, in Gardiner, *Constitutional Documents*, *loc. cit.*, at p. 406.

[2] See purported *Instrument of Government*, Clauses VI and XXX.

[3] From a MS. in the possession of Lord Braye, quoted in full in Gardiner, *Constitutional Documents*, *loc. cit.*, at pp. 427-447.

[4] I have separated the clauses of the proposed oath, so as to enable clearer comparison with the Stuart coronation oath.

[5] See the proposed *Constitutional Bill of the First Parliament of the Protectorate*, Clause 7, Clause 8, and clause 10, quoted in Gardiner, *Constitutional Documents*, *loc. cit.*, at pp. 427-447, at p. 429.

This draft Constitution provided that should either the Lord Protector, or the parliament, not agree to it, then it would be null and void.[1] But it limited the grant of money for military finance, and Cromwell objected to those clauses as taking military finance and control of the army out of his hands after 1659;[2] consequently he dissolved his parliament, and this bill never became law of any colour.[3]

The new parliament (from which 'undesirable elements had been carefully excluded')[4] requested Cromwell to become king[5]; Cromwell did not agree, but the amended versions of the *Humble Petition and Advice* enabled him to choose his successor, and to name life-long members of 'the other House', which was to replace the old House of Lords.[6] The first Petition again noted that it would not become law if Cromwell did not assent; and also reiterated the need for him and his successors to take an oath, 'in such form as shall be agreed upon by your Highness and this present parliament, to govern these nations according to the law.'[7] The Additional Petition spelled out the oath which he and his successors were to take 'according to the usage of former Chief Magistrates in these nations,... for the better satisfaction of the people':

> I do, in the presence and by the name of God Almighty, promise and swear, that to the utmost of my power I will uphold and maintain the true reformed Protestant Christian religion, in the purity thereof, as it is contained in the Holy scriptures of the Old and New testament, to the uttermost of my power and understanding, and encourage the professions and professors of the same;
>
> And that to the uttermost of my power I will endeavour as Chief Magistrate of these three nations, the maintenance and preservation of the peace and safety, and of the just rights and privileges of the people thereof;
>
> And shall in all things according to my best knowledge and power, govern the people of these nations according to law.[8]

To both these Petitions, Cromwell appended his consent : 'The Lord Protector doth

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[1] See proposed *Constitutional Bill of the First Parliament of the Protectorate*, Clause 59, quoted in Gardiner, *Constitutional Documents, loc. cit.*, at pp. 427-447, at p. 447

[2] See proposed *Constitutional Bill of the First Parliament of the Protectorate*, Clauses 18-23 and 45-50, quoted in Gardiner, *Constitutional Documents, loc. cit.*, at pp. 427-447, at p. lviii and p. lx, and at pp. 431-432, and pp. 444-445.

[3] See Gardiner, *Constitutional Documents, loc. cit.*, at p. lx.

[4] See Chrimes, *English Constitutional History, op. cit.*, p. 114.

[5] See the first draft of Humble Petition and Advice, referred to in Gardiner, *Constitutional Documents, loc. cit.*, at p. lxi.

[6] See Gardiner, *Constitutional Documents, loc. cit.*, at p. lxi, and p. 448, and Humble Petition and Advice, 25 May, 1657, Clause 1, and Clauses 2 and 5 (Gardiner, pp. 448-449, and p. 452).

[7] See Humble Petition and Advice, 25 May, 1657, Clause 18 and 17 respectively, Gardiner p. 458.

[8] The Additional Petition and Advice, 26 June, 1657, amendments to Article 7, at Gardiner, pp. 461-462.

assent.' It would appear that on the same day as he assented to the *Amended Petition and Advice*, His Highness Oliver Cromwell was invested formally with the dignity of his office with trappings appropriate to a king, and took an oath, which presumably was the one which had been outlined in the *Petition*—

> His Highness being entred on the place, and standing under the Cloth of Estate, Master Speaker did in the name of the Parliament, present severall things (ready laid upon the table) to his Highness, viz. A Robe of purple Velvet, lined with Ermine, being the habit anciently used at the solemn investiture of princes. Next a large Bible richly guit and boss'd; next a sword; and lastly a Scepter, being of Massy Gold: which being so presented, Mr Speaker came from his Chair, took the Robe, and therewith vested his Highnesse, being assisted therein by the earle of Warwick, the Lord Whitelock and others. Which being done, the Bible was delivered unto his Highness; after that, mr Speaker girt about him the sword; and lastly, delivered his Highness the Scepter.
>
> These things being performed, Mr Speaker returned to his Chair, and administred the Oath to his Highness, prepared by the Parliament, the form whereof is as followeth. [and here Legg unfortunately ceases his quotation from the tract][1]

It was not the people who either elected or appointed Cromwell as Lord Protector; it was the army, masquerading as the House of Commons and the parliament.

Now the significant thing about the oath which Cromwell took, as opposed to the one which the Commons had drafted for him two years earlier, is that it omits all reference to the parliament, and to acts of parliament, and to any nonsense such as governing with the advice of anyone, let alone a council or the parliament. It committed him to governing 'to his best knowledge and power...according to law', and to 'endeavour' 'to the utmost of his power' to maintain and preserve the 'peace and safety', and 'the just rights and privileges' of the people. This was an oath with much more latitude than any of the oaths which kings of England had taken. There was no reference to governing according to the laws of God or man, or to maintenance of existing laws, nor to any involvement of the people in the framing of any laws, past present or future, nor even to the exercise of judgements with justice and mercy. Nor did he promise to maintain the Christian church, but only 'true reformed Protestant Christian religion...in the purity thereof'. The only arbiter of what was the 'law', 'peace and safety' and 'just rights and liberties' and religion was no longer the constitution of England as it had developed over the centuries in accordance with the laws of God, nature and the common law, but rather whatever Cromwell's 'best knowledge' and

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[1] This information is from a note in 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. xxix, note 1, from a 'description of this affair in a tract with this general title: *A Further Narrative of the Passage of these times in the Common-Wealth of England...An exact relation of the ...solemn Investiture...of His Highness the Lord Protector* at Westminster, June 26 1657, printed by M S for Thomas Jenner, at the South entrance of the Royal Exchange.[British Museum press mark: E. 1954] p. 30.

his 'endeavours' may happen to be.

In short what Cromwell had established was a recognition of an indefeasible hereditary right in himself (he nominated his son Richard as his successor), and an aggrandisement of the old powers of the crown to himself as dictator under naked military rule. Cromwell 'threw over every pretence at constitutional rule. He levied taxes without parliamentary grant, and turned out the judges who seemed too outspoken in their criticisms of his system.' He took 'the chief powers of a king, including the right of naming his successors.' And he re-established the House of Lords (of life peers nominated by Cromwell), to be called *The Other House.*[1] Moreover, the oath which he had taken was one to which he himself had to agree, a prerogative not later bestowed upon William and Mary by the Convention 'parliament'.

But Cromwell died in September 1658, and the Commonwealth fell into anarchy and chaos. The irresponsibility of the republicans and the 'sheer incompetence' of the army high command, together with the threat of a recession in trade, resulted in a demand for a return to some kind of acceptable government, and under the guidance of George Monk, the Commander-in-Chief of the army in Scotland, Charles II was restored to the throne.[2]

SOVEREIGNTY AND THE OATH

HOBBES, SOVEREIGNTY, COVENANT, AND DIVINE RIGHT

Now it was during this time that Thomas Hobbes, who in 1646 had been appointed tutor in mathematics to Charles II in France, wrote from 1648-1650 *Leviathan, or The Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil,* published in 1651 when Hobbes was sixty-three.[3] The book being badly received by the court in exile, he returned to England,

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[1] See T F Tout, *An Advanced History of Great Britain from the Earliest times to the Death of Queen Victoria,* Longman, Green, and Co., London, 1906, at p. 467, and p. 470, respectively.

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

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

making his submission to the Council of State. But Hobbes was neither a royalist nor a parliamentarian.

Hobbes had been amanuensis for Francis Bacon in the 1620s, and had association with powerful men, so the dangers of the political situation would have been known to him. He fled England in 1640 to avoid the civil strife. He enunciated the theory of absolute civil sovereignty and of the requirement for religious beliefs of individuals, and offices of the church to be subordinated to the sovereign, together with the requirement for obedience to the sovereign[1]. This would appear to be an almost complete response to the civil discord in England at the time. I say 'almost', because there were circumstances in which Hobbes envisaged that the subject could legitimately, in support of sustaining his own inalienable rights, refuse to obey the sovereign. These circumstances did not include any purported liberty to disobey on the grounds of religion; but they did include circumstances where the sovereign power made laws contrary to the law of nature.[2]

Hobbes subscribed unequivocally to the view that the sovereign power was one which was of 'divine right' or *jure divino*.[3] But he also states unequivocally that the civil government is erected as the simultaneous consequence of a covenant between the people erecting the government. There is no discrepancy between these two conclusions within the structure he has imposed upon his examination. Firstly, he relies upon the law of nature,[4] the second law of which he says is for men to agree mutually to divest themselves of their rights and confer those rights upon one (or a group) which will represent them all, for the purpose of effectuating the achievement of the first law of nature, which is self preservation through internal and external peace and mutual protection. This mutual divesting for this purpose he calls a covenant. Then he says that the result of this covenant is the commonwealth, the

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[1] The Fourth part of *Leviathan* is called 'Of the Kingdom of Darkness', a diatribe against the church of Rome, (which he identifies with the kingdom of darkness); in one particularly biting part he likens it to the 'kingdom of fairies.' — Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLVII, paragraphs 21-34, pp. 463-465.

[2] Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraph 8, and paragraphs 29-30, p. 88, and p. 93; Chapter XXI, paragraph 18, p. 146—'When therefore our refusal to obey, frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse ; otherwise there is.'

[3] 'But the king, and every other sovereign, executeth his office of supreme pastor, by immediate authority from God, that is to say, in *God's right*, or *jure divino*. And therefore none but kings can put into their titles (a mark of their submission to God only) *Dei gratia rex, &c.*'—Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XLII, paragraph 71, p. 362. See discussion of *Deo gratia* at pp. 86, 152, 266, and 318 *supra*.

[4] For Hobbes' three laws of nature, and his views of them, see Hobbes, *Leviathan*, (Gaskin (*ed.*)), Chapter XIV, paragraphs 4-5, pp. 86-87 (first law); Chapter XIV, paragraphs 8-14, pp. 88-89 (second law); Chapter XV, paragraphs 1-2, p. 95(third law).

civil society, the Leviathan, the State, a body politic, an 'artificial man' of which the sovereign is the soul.[1]

The third law of nature is that men keep their covenants; he specifically discusses the nature of an oath sworn in the name of God for the purpose of signifying willingness to keep the covenant, and the nature of the trust and responsibility involved in a covenant, noting that covenants are revealed by words in a promise. Security of performance of a covenant is secured in both civil and pre-civil societies by the fear of the invisible power of the God man worships, or an Oath, which is a form of speech added to a promise meaning that failure of performance will put the swearer out of the mercy of God, or bring vengeance upon him.[2]

The sovereign created by the operation of these three laws of nature and in accordance with them, must (it logically follows) be created in accordance with the divine law, or law of God, which is the same as the law of nature. Sovereignty however cannot lie in or with the people as a whole, as sovereignty for its existence requires the divestments of rights by the individuals comprising the people which once divested cannot be taken back, except in very rare circumstances. But sovereignty does arise from the consent of the people, as a result of the immediate mutual covenant they all enter into for the purposes of living in a civil society for their individual and collective preservation.

Hobbes noted that the sovereign power could reside in one, or in a group, provided the person or the group had all the *indicia* of sovereignty, but to him on the merits monarchy[3] was the least dangerous form of government—but only a monarchy which was hereditary, or, if elective, which enabled and entitled the person to nominate their successor, and which was subject to no other power nor to limitations on its power, is sovereign, for the artificial man of the commonwealth requires an artificial eternity (called the 'right of succession')[4] in order to prevent the condition of 'war' which would occur should the sovereignty lapse.

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[1] See Hobbes' Introduction to *Leuiathan*, Gaskin (*ed.*), *loc. cit.*, p. 7.

[2] Hobbes, *Leuiathan*, (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.'

[3] Hobbes, *Leuiathan*, (Gaskin (*ed.*)), Chapter XIX.

[4] Hobbes, *Leuiathan*, (Gaskin (*ed.*)), Chapter XIX, paragraphs 10-23, pp. 127-131.

All civil governments were 'absolute sovereignty(s)', 'governments, which men are bound to obey, ...simple and absolute'.[1]

Despite Hobbes' couching his philosophy on the basis of divine right, he was abhorred by the Anglican clergy, who were to become the most ardent proponents of divine right. His works were ordered to be burnt by the common hangman; he was reviled for his 'atheism' his 'pernicious books' being 'heretical and blasphemous, infamous of the Christian religion, and destructive of all government in church and state.'[2] This was partly because Hobbes subordinated theology to politics, and the church to the state, and found his basis for the Leviathan in the law of nature (though of course he makes it clear that this was the same as the divine law), rather than in assertion of some kind of lineal spiritual descent from the Judaic kings or the kingship of Christ (neither of which Hobbes logically could do). But the fact that he also found the evidence of the sovereign power in a mutual covenant, gave sustenance to those parliamentarians and later Whigs who advocated the original contract theory.

Hobbes saw the necessity of an absolute, indivisible and perpetual sovereignty to secure the protection of the people if they were not to live lives which are nasty, brutish and short. This sovereignty rose from the people's recognition of the necessity for it, and was created by the consent of the people, by mutual divesting covenants which in turn creates the grand covenant, the creature of the people, the Leviathan, the purpose of whose existence is in turn to secure maximum peace and protection for the people; the Leviathan's sovereignty is exercised by virtue of God's right (*jure divino*) and the consent of the people, having a plenitude of prerogative power derived from the mutual divesting covenants of the people, which in turn is fundamental to the existence of the civil state.

The similarities between Hobbes' philosophy and the creation of the British kings are obvious. From the *Bretwaldas* to the modern day, the English, British, Empire and Commonwealth peoples have acted in exactly this same fashion, mutually covenanting in recognising a person as king, giving obedience to the king, and the king created by their

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

[2] In 1683, see *The Judgement and Decree of the University of Oxford Past in their Convocation*, Oxford, 1683, quoted in S I Minz, *The Hunting of Leviathan*, Cambridge, 1969, referred to by Gaskin in his introduction to *Hobbes, Leviathan*, 1996, *ed. cit.*, p. xi. And see Figgis, *Divine Right*, *op. cit.*, pp. 248-251.

wills and consents utters the binding covenant to the people in his oath of governance, the coronation oath. Once done, the people are bound to him, and him to the people.

Hobbes like Coke was wedded to the notion of the artificial person, the artificial eternity of the sovereign, which he saw as necessary to prevent a descent by the people into a state of nasty brutish war between themselves, determined by the assertion of each man's natural rights in isolation as against every other man's. But continuity in sovereignty and the perpetuation of the good laws made for the benefit of all can be, and is, ensured by the will of the people, when each new king recognised by the people makes his covenant, and takes his oath of governance.[1] There is no need for artificial eternities, or metaphysical bodies—although the idea may give some comfort to those who distrust the people's capacity to decide for themselves.

THE LATER STUARTS AND THE PREROGATIVE

Charles II of England had already been crowned at Scone in 1651 after his father's murder,[2] and his regnal years date from 1649. He was crowned in England in 1661, taking the same coronation oath as his father and grandfather before him, with the saving of the laws of God and of the king's prerogative, it being far more acceptable to both king and Commons than the one which had been taken by Cromwell. His reign saw the restoration of the continuity of the common law of England[3] by virtue of his recognition and taking of the royal oath. But the passionate self-absorption of the preceding two decades left its legacy in the evolution of raw, rude and crude party politics, where the old enmities of the Civil War were transmuted into manoeuvres for the capture of power.[1] Charles II, as skilful a political general as Cromwell had been militarily, refused to be captured, and it is to him that the English are indebted for the perpetuation of government by king and people that stands to this day.

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[1] See the discussion *supra*, at p. 142, p. 161, and p. 162.

[2] That Charles I was murdered was the legal view in 1702, and is still the legal view; see Maitland, *Constitutional History*, *op. cit.*, p. 282.

[3] I am unaware of the position of the Scots customary law during the Interregnum, but, given that Charles II was crowned king of Scotland in 1651, I assume that in Scotland, the law continued as it had before. I do not know the status of Scots Acts made from 1649-1660.

English religious bigotry bedevilled the later Stuart kings. Charles wished to implement the undertaking of religious tolerance which he had given in his *Declaration of Breda*.[2] He attempted to support toleration for his catholic subjects in a Declaration of 1662[3], and followed this up with a *Declaration of Indulgence* under the prerogative in 1672, suspending the operation of penal ecclesiastical laws against either 'nonconformists or recusants'.[4]

On Charles' restoration, John Locke wrote his first political treatise, *Two Tracts on Government*,[5] endorsing 'an absolute and arbitrary power[6]' in the king, in anything not contrary to the law of God.[7] Locke now emerged in support of religious toleration in *Essay on Toleration* (1667), and helped his patron, the Earl of Shaftesbury, defend the king's *Declaration*, (though Shaftesbury was more interested in obtaining toleration for non-conformists than for catholics).[8] The Commons, rabidly opposed to any toleration of catholics, or indeed of non-conforming protestants, violently objected to any move which could be seen as benefiting Dissenters, particularly by use of the prerogative of suspending statutes, which they said could only be suspended by subsequent statutes. They requested Charles to cancel the *Declaration* and assent to the *Test Act*.

Charles expressed himself troubled by the Commons' request, noting that he was entrusted (by his coronation oath) with the peace and establishment of the Church of England, and the ease of his subjects in general and that 'his only design was to take off the penalties

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[1] See Chrimes, *English Constitutional History*, *loc. cit.*, pp. 114-115.

[2] Charles II, *Declaration of Breda*, 1660, 4/14 April, 1660, in the twelfth year of his reign (*Lords Journals*, XI, 7-8; and see my observations at p. 71, *supra*.

[3] Charles II, Declaration of 26 December, 1662, from Cardwell, *Annals*, II, 312-313, 316-319, quoted in Kenyon, *Stuart Constitution*, *op. cit.*, pp. 403-406.

[4] *Declaration of Indulgence*, Charles II, 15 March, 1672, from Cardwell, *Annals*, II, 333-337, quoted in Kenyon, *Stuart Constitution*, *op. cit.*, pp. 407-408. Kenyon says at p. 397 that Charles II had secretly undertaken to declare himself a Roman catholic, perhaps as part of the Treaty of Dover with the French in 1670.

[5] John Locke, *Two Tracts on Government*, c. 1660; not published until 1967—P Abrams, (*ed.*), Cambridge University Press, Cambridge; referred to and summarised in Mark Goldie, (*ed.*), John Locke, *Two Treatises of Government*, Everyman, London, 1993, pp. xvi-xvii. *Two Tracts* was it an attack on an Oxford colleague who had pleaded for liberty of conscience. Locke only supported the prerogative at this stage as means of combating popery and non-conformism; he changed his mind with *Essay on Toleration*, (but only to support his patron, Shaftesbury, a non-conforming anti-papist). *Two Treatises* saw the culmination of his attack on 'absolute power' through any divine right, and proposed his variant of the 'original compact'.

[6] It is from this time that the use of 'absolute' begins to have the pejorative connotations it has today; see also p. 348 *supra*, and p. 369, *infra*..

[7] From Locke, *Two Tracts on Government*, quoted in Mark Goldie, (*ed.*), John Locke, *Two Treatises*..., p. xvi

[8] John Locke, *Essay on Toleration*, written 1667, published 1876, referred to in Mark Goldie, (*ed.*), John Locke, *Two Treatises*..., *loc. cit.*, p. xvii.

which the statutes inflict upon Dissenters, and which he believe[d], when well considered of, you yourselves would not wish executed according to the rigour and letter of the law.'[1] But Charles backed off and assented to the *Test Act* of 1673,[2] requiring an anti-catholic declaration by all office holders. This in turn was followed by the second *Test Act* of 1678,[3] excluding catholics from the houses of parliament.

CHARLES II BREACH OF OATH?

The *Test Acts* were discriminatory on a religious basis, and prevented any Roman catholic or dissenter or non-conformist from taking any part in the governance or political life of the nation. They flew in the face of the basis on which Charles had been asked to return to the throne, as witnessed in his *Declaration of Breda*, and his undertaking therein to promote peace and tolerance among his people, which had only been partly implemented in the *Act of Oblivion*. (That Act had secured the peace by absolving the people (except the still living regicides) from their treason during the time of the Interregnum.) They also appear to be in direct contravention of his oath of governance.

Charles had sworn in his oath to confirm all the preceding laws 'according to the laws of God, the true profession of the Gospel established in this kingdom... agreeing to the prerogative of the kings...and the ancient customs of the realm;'[4] to 'keep peace and godly agreement entirely to God, the ...church, the clergy and the people;'[5] to execute law, justice and discretion in mercy and truth;[6] and to hold and keep the laws and rightful customs which the commonalty have and to defend and uphold them 'to the honour of God.'[7]

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[1] Charles II reply of 24 February, 1673 to the Commons' address of 14 February, 1673, requesting him to withdraw the *Declaration of Indulgence*, from *Commons Journals*, IX, 256, quoted in Kenyon, *Stuart Constitution, op. cit.*, pp. 408-409.

[2] First *Test Act*, 1673, 25 Car. II, c. 2, An Act for preventing dangers which may happen from popish recusants, 1673, extracted in Kenyon, *Stuart Constitution, op. cit.*, pp. 461-462, from *Statutes of the Realm*, V, 782-785.

[3] Second *Test Act*, 30 Car. II, st. 2, c. 1, An Act for the more effectual preserving the King's person and government by disabling Papists from sitting in either House of Parliament, 1678, extracted in Kenyon, *Stuart Constitution, op. cit.*, pp. 465-466, from *Statutes of the Realm*, V, 894-896

[4] See first clause of oath, in C Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History, 1660-1832*, Methuen & Co., London, 1904, 5th edn. Enlarged, 1928, p. 118, and Costin and Watson, *The Law and Working of the Constitution : Documents 1660-1914*, Vol. 1, pp. 57 ff., sourced there to *The Forms of Prayers etc. of the Coronation...*, London, printed for Randall Taylor, 1689. For text see Appendix I *post*.

[5] Second clause of Charles II's oath, *ibid.*

[6] Third clause of Charles II's oath, *ibid.*

[7] Fourth clause of Charles II's oath, *ibid.*

To some extent, religious persecution was a legacy of the papal imperium,[1] which lasted for hundreds of years over Europe, and which saw the limitation of application of the king's oath and his peace in the earliest times to the king's 'Christian people.'[2] It really only with the advent of the Stuart kings, who were personally acquainted with the vicissitudes of the Roman catholic, presbyterian, and Anglican versions of Christianity partly by virtue of being the first kings to rule over different nations with different religions simultaneously, that any real attempt is made by the kings to come to grips with the meaning and effect of the laws of God in the context of their oath to their peoples.[3]

But while Charles II may well have seen himself as breaching his oath in assenting to the *Test Acts* because of their breach of the First Commandment and their fostering of disaffection rather than peace, he clearly saw the maintenance of the peace his pe-eminent prerogative under his oath, and made the pragmatic decision that failure to assent to the *Test Acts* was more likely to provoke great disturbances in the peace and the possibility of civil war, than agreement to them. But in acquiescing in this legislatively enshrined religious discrimination, he opened the way for the revolutionaries of 1688 to curtail the religious freedom of the king in the 1689 coronation oath, and to impose religious discrimination as a fundamental premise of the British system of governance for centuries to come. The latter has now been wiped from the statute books, in accordance with domestic implementation of principles (derived from the laws of nature/God/reason) now enshrined universally in the International Covenant on Civil and Political Rights, but the former remains to this day, the British/Commonwealth Queen being the only living person amongst Her own peoples, whose personal freedom of religion is curtailed specifically by statute.[4] One may only speculate as to the outcome, had Charles held hard to his

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[1] See discussion *supra*, at p. 134, p. 265 ff., and p. 319 ff.

[2] See the Echberht Pontifical, c.732-736, and the oath of Edgar *Bretwalda* in 975—for texts see Appendix I.

[3] The religious aspect of the oath, and its ramifications for the law are not investigated herein, due to space constraints. See my remarks in the Preface at p. viii, and see also my note 6, p. 16 *supra*, note 4, p. 152 *supra*., and note 1 at p. 242 *supra*.

[4] See the *Bill of Rights*, 1689, as ratified in 1690, and see the discussion *infra*, under '*Bill of Rights*', particularly at pp. 394 ff. And see *The Accession Declaration Act*, 1910, 10 Edw. 7 and 1 Geo 5 c. 29; *Statutes in Force, Official Revised Edition*, revised to 1st February 1978, and discussion in relation to Edward VII and George V *infra*, at p. 468. Note also that the heir apparent, Prince Charles, has indicated his preference for the British/Commonwealth king the be nominated as 'Defender of Faith' rather than as 'Defender of the Faith'—see text of HRH Prince Charles' remarks to Jonathan Dimbleby during the television documentary, *Charles : The Private Man, the Public Role*, of June 1994, reproduced by Jonathan Dimbleby in his biography of HRH Prince Charles, *The Prince of Wales, A Biography*, Little, Brown and Company, London, 1994, at p. 528; and note the disquiet express by the Anglican Church reported in the pages following. This title had been bestowed on Henry VIII by pope Clement VII for his book, *Assertio Septum Sacramentorum*

understanding of his oath, and refused to assent to the *Test Acts*.

Now the only office to which the *Test Acts* did not then apply, was the office of king. The Duke of York, the heir presumptive to the throne, had converted to catholicism, and the Commons[1] strove to exclude him from the succession, by thrice introducing Exclusion Bills from 1679-1681 designed to bar his accession. Fears of popish plots were rife, with irrational beliefs and hatreds, particularly of the Jesuits,[2] fuelling vehement antipathy to any colour of catholicism. This Exclusion Crisis relating to the heir to the throne could have led to civil war again, but internal dissension and retrospective abhorrence of Charles I's execution prevented this eventuality.[3] (The *Test Acts* were effectively applied to the office of king by the 1688 revolutionaries, with the passage of the *Bill of Rights* in 1689, and its ratification in 1690.)[4]

LOCKE AND FILMER

It was during the Exclusion Crisis that the distinctions 'Whig' and 'Tory' were introduced. 'Whig', whose origin was Scottish Gaelic, was a term of abuse applied to horse thieves, used later to apply to Scottish Presbyterians, and to non-conformists and rebels, and more specifically was applied to those seeking to exclude James from the succession. 'Tory' was an Irish term suggesting a papist outlaw, and was applied to those who supported James' right to succeed despite his catholicism.[5] John Locke's mentor, the Earl of Shaftesbury, had

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in July 1521, which had responded to Martin Luther's tract, *De Captivate Babylonica*. (See Virginia Murray, 'The Literature and Propaganda of Henry's First Divorce', in *The Reign of Henry VIII, Politics, Policy and Piety*, Diarmaid MacCulloch (*ed.*), Macmillan Press Ltd., Basingstoke, 1995, pp. 135-158, at p. 145.) 1543 After, however, the establishment of Henry VIII as 'the only supreme head in earth of the Church of England called the *Anglicana Ecclesia*...' by the *Supremacy Act*, 1534 26 Hen. VIII, c. 1, *Statutes of the Realm*, III, 492, saw Henry appropriating the title to himself in his new capacity, see the *Third Act of Succession*, 1543 35 Hen. VIII, c. 1, *Statutes of the Realm*, III, 955, and see Will of Henry VIII, 1546, Rymer, *Foedera*, XV, 110-115, in S&M1, pp. 323-324.

[1] Recent scholarship has demonstrated that much of the impetus during the Exclusion Crisis, came from the City of London Whigs, who, during a period of unprecedented trade expansion and capital accumulation, espoused essentially radical libertarian views—see Gary S de Krey, 'The London Whigs and the Exclusion Crisis reconsidered,' in *The First Modern Society, Essays in English History in Honour of Lawrence Stone*, A L Beier, David Cannadine, James M Rosenheim (*eds.*), Cambridge University Press, Cambridge, 1989, 457-482, at especially pp. 478-482.

[2] A belief was abroad that the Jesuits were the cause of the Great Rebellion by their influence on the Puritans, and were now the inspiration of the protestant dissenters—this was not without some degree of historical foundation—see the references to *Sir Griffin Markham's trial* at pp. 134, note 1 p. 139, p. 141, and p. 329, *supra*.

[3] For a discussion of the exclusion crisis and supporting information, see Kenyon, *Stuart Constitution*, *op. cit.*, pp. 452-453.

[4] See note 1, p. 395 *infra*. Both Edward VII and George V objected to making this declaration as it was they thought offensive to the Roman catholic subjects. It was repealed, and replaced with the protestant declaration which requires the king to be a faithful protestant, by the *Accession Declaration Act*, 1910, 10 Edw. 7 and 1 Geo. 5, c. 29, s. 1.

[5] See *The New Encyclopædia Brittanica*, Vol. 12, Encyclopædia Brittanica Inc., Chicago, 15th edn. 1992.

supported the *Test Act* of 1673, and was later that year dismissed by Charles II as Chancellor . He then published a *Letter from a Person of Quality* in 1675,[1] denouncing 'absolute and arbitrary government'. He was a prime mover in the Exclusion Crisis, supporting Monmouth, Charles' illegitimate son, rather than James for the succession, and rode to the 1681 parliament with an armed following, and was tried and acquitted of treason later that year, fleeing in 1682 and dying in Holland in 1683.

In 1683, a number of prominent Whigs conspired to assassinate Charles and James, in a plot known as the Rye House Plot, some being tried for treason and executed, including the republican, Algernon Sidney, and Lord William Russell. Recent scholarship has suggested that it was these trials of Shaftesbury, Sidney and Russell which propelled Locke to write the second of the *Two Treatises on Government*,[2] in which he advocated resistance in certain circumstances to a prince, contrary to his views in *Two Tracts on Government*, and which theory was not mentioned at all in the first of the *Two Treatises*—a tract which he wrote to answer Sir Robert Filmer.[3]

In 1681 *Patriarcha*, or *The Natural Power of Kings Asserted*,[4] written by Sir Robert Filmer before the civil war[5], was published posthumously. Filmer, it has been said, was 'as a political thinker, far more profound and far more original than was Locke.'[6] In this tract Filmer propounded the divine right of kings as based on the idea of the king as *pater patriae*, and the identification of the kingdom with the family, and the king to the father of his people, with obligations to preserve and protect the people and their rights and privileges, as a father his children. Filmer also saw the common law as the common custom of the realm, which dates from time immemorial when there had once been no custom; therefore, he

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[1] Recent scholarship suggests that Locke may have written this for Shaftesbury—see Mark Goldie, *John Locke, Two Treatises, ed. cit.*, p. xviii.

[2] John Locke, *Two Treatises of Government, in the Former, The False Principles and foundation of Sir Robert Filmer and His Followers are Detected and Overthrown, The Latter is an Essay Concerning the True Original, extent and End of Civil-Government*, London, written 1679-1683, published 1689, 3rd edn., Printed for Awnsham and John Churchill, at the Black Swan in Pater-Noster-Row, 1698, Mark Goldie, (*ed.*), Everyman, London, 1993.

[3] See Mark Goldie, (*ed.*), John Locke, *Two Treatises*, p. xvii, and pp. xx-xxi.

[4] See also Peter Laslett, (*ed.*) *Patriarcha and Other Political Works of Sir Robert Filmer*, Basil Blackwell, Oxford, 1949, pp. 60-63, and pp. 106-107, reproduced in J C Smith and David N Weisstub, *The Western Idea of Law*, Butterworths, Toronto, 1983, at pp. 169-171.

[5] Filmer wrote *Patriarcha* prior to Hobbes' *Leviathan*.

[6] J W Allen, in Peter Laslett, (*ed.*) *Patriarcha and Other Political Works of Sir Robert Filmer*, Basil Blackwell, Oxford, 1949, at pp. 20-26.

infers, the common law, or customs, originally emanated from the laws and commands of kings at first unwritten.[1] But Filmer's greatest contribution was to move the debate away from its basis in Biblical texts, which in the past had rendered the concept impregnable of criticism. His view was rather based in natural law. His thesis was expressed in a syllogism—

> What is natural to man exists by Divine Right. Kingship is natural to man. Therefore Kingship exists by divine Right.[2]

Filmer saw Scripture as an historical document, giving authentic information on the nature of primitive society, and from *Genesis* found evidence that society is as old as humanity, that kingship is an expansion of family life, and that monarchy is the inalienable power of the father—which view contained the pregnant implication that the state is an organism, not a machine[3]. Thus under the law of nature, Filmer found that man is not born free, but born into the subjection of a father, both literally and metaphorically[4]. But the protection of divine injunction is abandoned, as the divinity claimed for kingship under Filmer's thesis was purely constructive. Filmer thus raised a completely different kind of question, relating to the nature of the law of nature, and what constitutes natural law.[5] Filmer saw political society as growing from the natural state of man, that natural rights are divine rights and as such are inalienable and may not be taken from man by the society of which he forms part; but Filmer found that both the one inalienable right and the foundation of society was the authority of the father, both to protect and to require obedience. He noted that this did not leave any place for 'imaginary pactions between Kings and their people as many dream of.'[6] He also expounded upon the notion of sovereignty—he said that 'a law in general is the command of a superior power'[7], and that 'acts of judging capital crimes, of making war,

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[1] See Filmer, *Patriarcha*, in Laslett, *loc. cit.*, at pp. 106-107.

[2] See Figgis, *Divine Right*, p. 155. This discussion draws heavily on Figgis' discussion of Filmer, Locke, and natural law at pp. 148-172.

[3] Cf. Hobbes' *Leviathan*.

[4] This is not so different from Coke's assertion of the king having powers of natural protection over his subjects by virtue of the law of nature—see *Calvin's case*, 7 Co. Rep., 11a *passim*.

[5] This draws on the discussion in Figgis, *Divine Right*, p.157.

[6] Sir Robert Filmer, *Patriarcha*, Peter Laslett, (*ed.*) *Patriarcha and Other Political Works of Sir Robert Filmer*, Basil Blackwell, Oxford, 1949, pp. 57-59, reproduced in J C Smith and David N Weisstub, *The Western Idea of Law*, Butterworths, Toronto, 1983, at p. 171.

[7] Filmer's *Patriarcha*, in Peter Laslett, (*ed.*) *Patriarcha*, *loc. cit.*, p. 106, see Smith and Weisstub, *loc. cit.*, p. 173.

and concluding peace, are the chiefest works of sovereignty...'[1], all acts of sovereignty tending only to preserve and distribute rights and privileges.[2] Filmer did not restrict the regal patriarchal (or sovereign) authority to kings only, but notes that it extends to any, (person or group) who has supreme authority or sovereignty, for the only supreme authority is that of the father.[3]

It was on the ground of natural law that John Locke joined issue with Filmer. Locke published the *Two Treatises on Government* in 1689 ,[4] the *First Treatise* being a refutation of Filmer's *Patriarcha*, which Locke had written c.1679-1681. Locke too believed that true principles of political life could be discovered in the natural law. But he said Filmer had misconceived *Genesis*, and rejected Filmer's conclusion that 'men are not naturally free' because they are 'born in subjection to their parents.'[5] Locke looked instead to his own conscience to find the natural instincts of man, which he found in the equality of men (that is, of males) and their desire for preservation of self and possessions (which include their wives).[6] Locke's rebuttal of Filmer in the *First Treatise*, however, is essentially pedantic, and logically unconvincing.[7] Moreover, while he attempted to demolish Filmer's patriarchal structure based on Adam, nevertheless, he too supported a patriarchy; by splitting political from paternal power he created a paternal political power (because the females have no political power, their husbands having this power), and a paternal conjugal power:

> [rebutting Filmer on the words in Genesis subjecting Eve to Adam]...But if these words here spoke to Eve must needs be understood as a law to bind her and all other women to

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[1] Filmer's *Patriarcha*, in Peter Laslett, (*ed.*) *Patriarcha*, *loc. cit.*, p. 59, see Smith and Weisstub, *loc. cit.*, p. 171-172.

[2] Filmer's *Patriarcha*, in Peter Laslett, (*ed.*) *Patriarcha*, *loc. cit.*, p. 63, see Smith and Weisstub, *loc. cit.*, p. 172.

[3] Filmer's *Patriarcha*, paragraph 11, quoted by Locke *First Treatise*, at Chapter 11, paragraphs 131-134, in Mark Goldie, (*ed.*), Everyman, pp. 90-91. Filmer also said that 'the making of war and peace are marks of sovereignty', [*Patriarcha*, paragraph 7]

[4] John Locke, *Two Treatises of Government, in the Former, The False Principles and foundation of Sir Robert Filmer and His Followers are Detected and Overthrown, The Latter is an Essay Concerning the True Original, extent and End of Civil-Government*, London, written 1679-1683, published 1689, 3rd edn., Printed for Awnsham and John Churchill, at the Black Swan in Pater-Noster-Row, 1698, Mark Goldie, (*ed.*), Everyman, London, 1993.

[5] See Locke, *First Treatise*, Chapter 2, paragraph 6, in Goldie, *ed. cit.*, at p. 7.

[6] See Locke, *First Treatise*, Chapter 1, paragraph 2, in Goldie, *ed. cit.*, p. 5; and see John Locke, *The Second Treatise on Government—An Essay Concerning the True Original Extent and End of Civil Government*, published 1689 (1690), Chapter II, paragraphs 4, 5 and 6, and Chapter V, paragraphs 25-30, reproduced in *The English Philosophers from Bacon to Mill*, Edwin A Burt, (*ed.*), The Modern Library, New York, 1994, pp. 424-527, at pp. 425-426, and p. 434; and see *Second Treatise*, Chapter 2, paragraphs 4, 5, and 6, and Chapter 5, paragraphs 25-30, and Chapter 19, paragraph 222, in Goldie, *ed. cit.*, at pp. 116-117, pp. 127-129, and pp. 226-227..

[7] See for example, his attempted rebuttal of Filmer's augments on sovereignty and sovereign power at paragraphs 131-134, Chapter 11, *First Treatise*, see Goldie, *ed. cit.*, at pp. 90-91.

> subjection, it can be no other subjection than what every wife owes her husband, ... If therefore these words give any power to Adam, it can be only a conjugal power, not political, that power that every husband hath to order the things of private concernment in his family, as proprietor of the goods and land there, and to have his will take place before that of his wife in all things of their common concernment...[1]
>
> ...the rule [between husband and wife] should be placed somewhere, it naturally falls to the man's share, as the abler and stronger.[2]

The *Second Treatise* written c. 1681-1683 continues in part his attacks on Filmer, and asserts the right of resistance in certain circumstances.[3] Locke saw the 'original compact' as being one between the people, voluntarily consenting to form a society and each giving his obedience to the whole. The people choose their government, and may change it if the government infringes upon the trust of the people, particularly their property.[4] But any kind of government is circumscribed by the laws of nature, which are the laws of God, and municipal laws are only right in so far as they are in accordance with these laws.[5] Locke enunciated a version of the separation of powers,[6] but even though he saw the sovereign power as originating in the people, he was content to ascribe its use to a single executive (a king), and specifically preserved the prerogative, which he saw as being used for the benefit of the people in accordance with 'this fundamental law of nature and government, *viz.* that as much as may be, all members of the society are to be preserved'[7] :

> 160. This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called the prerogative....
>
> 161. This power whilst employed for the benefit of the community, and suitably to the trust and ends of government, is undoubted prerogative, and never is questioned.[8]

Locke's views are profoundly contradictory;[9] this view just enunciated would have supported the extension of religious toleration and the use of the suspending prerogative

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[1] Locke, *First Treatise*, Chapter 5, paragraph 48, see Goldie, *ed. cit.*, at p. 35.

[2] Locke, *Second Treatise*, Chapter 7, paragraph 82, see Goldie, *ed. cit.*, at p. 155.

[3] See Locke, *Second Treatise*, Chapters 17-19, see Goldie, *ed. cit.*, at pp. 215-240.

[4] See Locke, *Second Treatise*, Chapter 19, paragraph 226, see Goldie, *ed. cit.*, at pp. 229-230

[5] See Locke, *Second Treatise*, Chapter 2, paragraphs 12-13, see Goldie, *ed. cit.*, at pp. 120-121.

[6] See Locke, *Second Treatise*, Chapters 12-14, see Goldie, *ed. cit.*, at pp. 118-202.

[7] See Locke, *Second Treatise*, Chapter 14, paragraph 159, see Goldie, *ed. cit.*, at p. 197

[8] See Locke, *Second Treatise*, Chapter 14, particularly paragraphs 160-161, see Goldie, *ed. cit.*, at pp. 197-202.

[9] Note that his views on the nature of the law of nature are vastly different in *An Essay Concerning Human Understanding* (written 1671 ff., published 1689), and in *The Two Treatises on Government* (written c. 1680-1683, published 1689)—see Goldie's comments at p. xxvii—in the *Essay*, he says that at birth the mind is a *tabula rasa*, and knowledge comes only from experience; whereas in the *Second Treatise* he says that the law of nature is the law of God revealed to man by reason and scripture—see Goldie, pp. xxv-xxvii.

for the benefit of the community as a whole; but Locke and other Whigs saw themselves, not the king, nor his advisers, as the arbiters of what was best for the community.

JAMES II AND VII

When James II and VII succeeded, he was a professor of the catholic religion. He succeeded of course to both the Scottish and the English thrones. But while he was willing to take the English coronation oath, he did not take the Scottish coronation oath which had been prescribed by the Scottish *Coronation Oath Act* of 1567, which, it will be recalled, required the king to 'ruite out all heretykis and enemeis to the trew worship of God that shalbe conuict be the trew Kirk of God of the foirsaidis crymis.'[1] This was later to be cited against him in the Scottish *Claim of Right Act* of 1689, when the Scots bestowed the crown on William and Mary.[2]

He used the same English Coronation Oath as did Charles I, but with one major distinction, which appears to have passed unnoticed both by contemporary commentators, and more recent legal historians. James undertook in the fourth clause of his oath only to maintain and defend to the honour of God only those *Rightfull Customs which the Communality of this Your Kingdom have*, not the 'rightful *laws and* customs'[3]. This was certainly a departure from the oaths of his Stuart predecessors, and would appear to have at the very least legitimated an idea that the king was not obliged to uphold the laws which either were or had been made by his or his predecessors' assents to bills emanating from the lords and Commons.

As a catholic, James also had the Coronation service curtailed so as not to include the

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[1] *Coronation Oath Act*, 1567 [Scotland], c.8, from *Statutes in Force*, Official revised Edition, *Coronation Oath Act*, 1567 [S], 1567 c.8, revised to 1st February 1978; HMSO, London, 1978, Short Title give by *Statute Law Revision (Scotland) Act* 1964 (c.80). Sch. 2.

[2] *Claim of Right Act* (Scotland), 1689, c. 28 and c. 13; The declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the croune to the King and Queen of England; from *Statutes in Force*, Official Revised Edition, revised to 1st February 1978; HMSO, London, 1978, Short Title give by *Statute Law Revision (Scotland) Act* 1964 (c.80). Sch. 2.

[3] My underlining and italics; see text of James II's English oath in J Wickham Legg, (*ed.*) *Three Coronation Orders*, for the Henry Bradshaw Society, Vol. XIX, printed for the society by Harrison and Sons, London, 1900, Appendix 1, p. 65; [Taken from Francis Sandford, *The History of...James II.* In the Savoy, Thomas Newcombe, 1687, p. 88]. See text at my Appendix I.

Communion, which it is said[1] he could not take[2]. The vehement anti-catholicism then current could well have been exacerbated by the references remaining in the coronation oath to the

> ...Laws Customs and Franchises granted to the Clergy by y^e^ glorious King St. Edward, your predecessor, According to y^e^ Laws of God, y^e^ true profession of y^e^ Gospel establish'd in this Kingdom, and agreeing to y^e^ prerogative of y^e^ Kings thereof, and y^e^ ancient Customs of y^e^ realm'.

These phrases could have supported a thrust by the king to restore the laws and ancient customs of the church as they stood under Edward the Confessor, who of course, had been catholic. This is particularly so, since, under James' oath, the reference to 'laws' in the fourth clause having been deleted, he was not obliged to maintain the laws which the people had chosen (which of course included the anti-catholic and Anglican establishment laws), but only the 'rightful customs' which the people had chosen. James, moreover, by his use of the prerogative to dispense with the requirements of the *Test Acts* for individual army officers who were catholic, fuelled suspicion that he was planning to use the army to reintroduce the catholic religion.

GODDEN V HALES

The Commons opposed the use of the dispensing power for this purpose, and the judges were called upon to decide the issue in the case of *Godden v Hales* in 1686.[3] Eleven of the twelve judges held that:

- The kings of England are sovereign princes
- The laws of England are the king's laws
- Therefore it is an inseparable prerogative in the kings of England to dispense with penal laws in particular cases and for particular necessary reasons
- That the king is sole judge of those reasons
- This is not a trust invested or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England, which never yet was taken from them, nor can be.

Herbert CJ based his view on a comparison between the laws of man and the laws of God, and that as the laws of God may be dispensed with by God, so the law of man may be

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[1] By L G W Legg in *English Coronation Records*, at p. 286.

[2] Although he had communicated in the Anglican Church as late as 1672.

[3] *Godden v Hales*, King's Bench, 16 June, 1686, *State Trials*, XI, 1195-1199, reproduced in Kenyon, *Stuart Constitution*, op. cit., at pp. 438-439, and in C Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, Methuen & Co, London, 1904, 5th edn. enlarged, 1928, at pp. 384-387.

dispensed with by the legislator, but this does not apply to offences against the law of God, which are *malum in se*, nor to statutes conferring a benefit on the subject.[1]

James II and VII, whatever his reason, continued to attempt to promote religious tolerance, but in a fashion which spilt both catholic and protestant English people. He issued a *Declaration of Indulgence* in 1687 under the prerogative, attempting to suspend the application of penal legislation against all non-conformists, protestant as well as catholic, but this received little support, and when he ordered it to be read from the pulpit, the clergy refused, and seven bishops (including the archbishop of Canterbury)[2] petitioned the king. The seven bishops were then prosecuted for seditious libel, the petition being the libel.

THE SEVEN BISHOPS' CASE[3]

This case was a jury trial heard in June 1688, and of the four judges before whom it was heard, two directed the jury leaning to the crown[4], and two towards the accused.[5] The jury acquitted the bishops.[6] The case turned on whether or not the petition was a seditious libel, and the suspending power was discussed as *obiter* only (it being referred to throughout the directions as 'dispensing' power). Essentially, even those judges who directed towards the crown relied upon very fine legal niceties as to such a power being found within the royal prerogative, the Chief Justice suggesting that had the king, the commons and the lords jointly declared against this power, then the king certainly would not have it; but in fact all that had occurred in 1672 was that the Commons alone had declared against it, and this was not sufficient; but he did not find it necessary to decide upon the issue as he thought that the petition stirred up mischief, and was therefore a libel. The catholic Justice, Alibone, also refused to debate the prerogatives of the king, but indicated his view that the proper

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[1] *Godden v Hales*, per Herbert CJ, quoted in Grant Robertson, *loc. cit.*, at p. 885. .

[2] William Cantaur, Thomas Bath & Wells, John Chichester, Jonathan Bristol, William St Asaph, Francis Ely, Thomas Peterborough—see Kenyon, *Stuart Constitution*, *op. cit.*, p. 441-442

[3] *The Trial of the Seven Bishops*, King's Bench, 29 June 1688, *State Trials*, XII, 416-417, 424-429, as quoted in Kenyon, *Stuart Constitution*, *op. cit.*, pp. 442-447.

[4] The Chief Justice, and Alibone J.

[5] Powell J and Holloway J.

[6] Notwithstanding the fact that the case of the seven bishops seems to have loaned a kind of impetus and quasi legitimacy to the invitation to William of Orange, it should be borne in mind that many of the bishops and other clergy refused to take the oath of allegiance to William and Mary, the archbishop of Canterbury refusing to officiate at their coronation because of his allegiance to James II of England.

means of disagreeing with the government (that is, the king) was through parliament. But the obvious doubt of the judges as to the capacity of the prerogative to extend to wholesale suspension of a number of laws which had previously been passed by the Commons, Lords, and the king himself, was remembered when it came to the framing of the *Bill of Rights*.

It so happened that during the month of June, the birth to James II and VII and his wife of a son inflamed those anti-catholic prejudices and fears which had been obvious during the Exclusion Crisis, and on the very same day that the jury delivered their verdict acquitting the bishops, 30 June 1688, the 'Immortal Seven'[1] despatched their Invitation to William of Orange to invade England, because 'the people are so dissatisfied with the present conduct of the government'[2].

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[1] Shrewsbury, Devonshire, Danby, Lumley, Russell. Sidney, and the Bishop of London; see Letter of Invitation to William of Orange, 1688, in *English Historical Documents, ed. cit.*, Vol. VIII, pp. 120-122.; and see Lois G Schwoerer, Introduction to *The Revolution of 1688-1689, Changing Perspectives*, (Lois G Schwoerer, *ed.*), Cambridge University Press, Cambridge, 1992, pp. 1-20, at p. 5.

[2] See the Invitation to William of Orange, 30 June 1688, from J Dalrymple, *Memoirs of Great Britain and Ireland*, 1783, Vol. II, App. Part I, p. 228, quoted in E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, pp. 8-10.