CHAPTER 8

REVOLUTION AND THE OATH

1688 AND THE CORONATION OATH

[1]It is difficult from the perspective of the late twentieth century to imagine the situation in England in the years between 1685 when James II and VII succeeded, and 1688, when a Bishop and six Lords asked a foreign prince to invade their country to take, by force of arms if necessary, the crown from their lawful king.

Little has been written about the character of James II and VII,[2] and most of what has been written has been written from the English point of view[3]—a definitive study would appear

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[1] Reappraisal of the Revolution of 1688 has occurred in recent years, with much valuable material being available in, for example, the following texts: Howard Nenner, 'The Later Stuart Age', in J G A Pocock, (*ed.*), *The Varieties of British Political Thought, 1500-1800*, Cambridge University Press, Cambridge, 1993, at pp. 180-208; Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992; Corrine C Weston and Janelle R Greenberg, *Subjects and Sovereigns, the Grand Controversy over Legal Sovereignty in Stuart England*, Cambridge University Press, Cambridge, 1981; J G A Pocock, (*ed.*), *Three British Revolutions: 1641, 1688, 1776*, Princeton University Press, Princeton, 1980. See also Howard Nenner, *The Right to be King, The succession to the Crown of England, 1603-1714*, University of North Carolina Press, Chapel Hill, 1995

[2] For a recent analysis, see Charles Carlton, 'Three British Revolutions and the Personality of Kingship', in *Three British Revolutions: 1641, 1688, 1776*, J G A Pocock, (*ed.*), Princeton University Press, Princeton, 1980, 165-207, at pp. 195-198. And see F C Turner, *James II*, 1948; Maurice Ashley, *The Glorious Revolution of 1688*, (1966), and *James II*, (1977); John Miller, *James II, A Study in Kingship*, Wayland, London, 1977, reprinted Methuen, 1989; W A Speck, *Reluctant Revolutionaries: Englishmen and the Revolution of 1688*, Oxford University Press, Oxford and New York, 1988.

[3] For example, J P Kenyon's excellent *The Stuart Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1965 contains only three references to Scotland in the index, and the important observation that Charles I owed his defeat to his failure to control Scotland and Ireland, not England, is relegated to a footnote on page 4. E N Williams' *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, contains no reference to the *Act of Union*, and scarcely a mention of Scotland. While these texts deal with the constitution of England, it is extraordinary that, if England were ruled for most of a century by Scottish kings, and the thrones of the two countries united in the one person, and eventually the two countries themselves united in one nation, somewhere along the line the influence of the Scots and the Scottish constitutional and religious traditions on

yet to be written.[1] He has almost invariably been seen in popular perception through the prism of the *Declaration of Rights*, and the attribution to the Stuart monarchs of the sins of arbitrary governance through the prerogative.[2] He was the younger son of Charles I, and was created Duke of York in 1634. From an early age he proved brave and competent as a soldier and naval commander, and during the reign of Charles II showed considerable talent as the administrator in charge of the great expansion of the Royal Navy[3]. It was on his initiative that New Amsterdam was seized from the Dutch in 1664; it was renamed New York in his honour. He was admitted to the Roman catholic church in 1668 or 1669, although he continued to take the Anglican sacraments till 1672. He was a libertine, who has also been described as religious, serious-minded, stubborn, and humourless. Certainly he proved far less adept than his brother at political manoeuvring.

There was abroad in England a miasma of Anglican bigotry, which manifested itself in an almost hysterical anti-catholicism, and a consuming intolerance of non-conforming protestants. The latter had seen the exodus from England of non-conformists from the time of the Pilgrim Fathers in 1620 under James VI and I, to the grant by Charles II to William Penn[4] in 1681. The former was manifested in the fear of 'most devilish and horrid'

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the Scottish/English king should not receive more attention. One may, of course, speculate as to the reasons underlying such omissions. Even in recent studies of the Revolution of 1688, the Scottish or Jacobite view is missing—see Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, Introduction, p. 1. There, however in footnote 3 she refers to recent work on this subject by Eveline Cruickshanks (*ed.*) *By Force or by Default? The Revolution of 1688-1689*, Edinburgh, John Donald, 1989; and Eveline Cruickshanks and Jeremy Black, (*eds.*) *The Jacobite Challenge*, John Donald, 1988. I have not had the opportunity of reading these texts.

[1] Schwoerer in her Introduction, *The Revolution...*, *ed. cit.*, at p. 8, shares this view.

[2] Though note that John Dryden wrote the Jacobite drama, *Don Sebastian* in 1689 praising the defeated James II and VII rather than the victor, William of Orange. Dryden had been Poet Laureate under Charles II, and James II and VII from 1668 till James' deposition in 1688. Dryden had earlier written *Absalom and Achitophel* in 1681, supporting Charles and James during the Exclusion crisis, and satirising the Earl of Shaftesbury. Dryden had converted to catholicism in 1685, writing *The Hind and the Panther* in 1687, arguing the case for catholicism.

[3] See Michael St John Parker, *Britain's Kings and Queens*, Pitkin Pictorials, London, 1992, reprinted 1992, at p. 24. It was during this time that he became friends with Admiral Penn, father of William Penn, the Quaker.

[4] William Penn was born in 1644; his father, Admiral Penn was a parliamentarian until he fell out with Cromwell and fled to Ireland. On the restoration, Admiral Penn became a close friend of Charles II and his brother James who was responsible for the administration and reform of the navy. William Penn was expelled from Christ Church Oxford in 1662 for non-conformity, and studied law at Lincoln's Inn from 1665. He became a Quaker in 1667, was placed in the Tower of London, 1668 for blasphemy, and was jailed in 1670 [*The Trial of William Penn and William Mead*, Old Bailey, 1, 3-5 September, 1670, reproduced as *The People's Ancient and Just Liberties Asserted*, in the Everyman edition referred to *infra*, from pp. 135-152, where the judges intimidated the jury in an attempt to have Penn and Mead convicted of breach of the King's Peace by preaching to an assembly of people in the street; Penn and Mead were acquitted notwithstanding the intimidation; but the judges jailed them for non-payment of fines, and the jury was imprisoned also. The foreman of the jury who had acquitted the accused, one Edmund Bushell, sued his writ of *habeas corpus* in Common Pleas, the return saying that the verdict had been 'against the direction of the court'; Vaughan CJ found for Bushell, asserting the right of juries to find on the facts, and the truth or innocence of the accused, without the

popish 'plots and conspiracies'[1], the attempts to exclude James from the succession and to treat him as if he were 'naturally dead'[2], and the general and fanatical belief in the fabricated story of a popish plan to assassinate Charles II, put James on the throne and re-establish the catholic religion (as opposed to the real Whiggish plot which planned to assassinate them both).[3]

James successfully defended his rights against the Exclusionists, and resumed the leadership of the Anglican Tories in 1682, and exerted from then till 1685 paramount influence upon state policy. On his accession, the parliament voted him a large income, and had it not been for the Rebellions of Monmouth (Charles' illegitimate son) and Argyll, James may have succeeded in establishing religious toleration and retaining the throne. But the rebellions sharpened James' distrust of his subjects (already honed by the Exclusion Crisis), the rebellions were ferociously put down, and the army greatly increased, with catholic officers being placed in charge of the new regiments, which in turn provoked the hostility of the Commons by his (legal) use of the prerogative to dispense with certain applications of the *Test Acts*.[4]

Moreover, James' own attempts at toleration provoked vehement hostility : his friendship with William Penn and the Quakers alienated the Anglicans, and was a factor in the resignations of the Earls of Clarendon and Rochester; and his attempts to open the universities to catholics met with rigid opposition (including from Isaac Newton at

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direction of the judge—see *Bushell's case*, Vaughan, 135; 6 *State Trials*, 999 at 1013-1014, referred to in Plucknett, *Taswell-Langmead, op. cit.*, at p. 110,]. Penn was also imprisoned in 1671 for preaching. He went to Pennsylvania [named for Admiral Penn on the insistence of Charles II] in 1682, returning to England in 1684. But on the accession of James II and VII, William Penn became a close friend and adviser to James, who was a catholic, travelling to Holland on his behalf in 1686. Penn published *A Perswasive to Moderation to Church Dissenters, in Prudence and Conscience : Humbly submitted to the King and His Great Council* in 1685, urging toleration for catholics as well as for others opposing the Church of England. After the invasion by William of Orange, and the coronation of William and Mary, Penn was regarded with suspicion, and charged with treason three times in the next two years. He later returned to Pennsylvania from 1699-1701, but spent the rest of his life in England. —see William Penn, *The Peace of Europe, the Fruits of Solitude and other writings*, Everyman's Library, 1915; Everyman , London, 1993, Edwin B Bonner, (*ed.*), pp. vii-xxxiii.

[1] Words from the Exclusion Bill of 1680, quoted in C Grant Robertson, *Select Cases and Documents to illustrate English Constitutional History*, 1660-1832, Methuen & Co. Ltd., London, 1904, 5th edn. 1928, pp. 102 ff.

[2] Words from the Exclusion Bill of 1680.

[3] See note 8, p. 365 *infra*.

[4] *Test Act* 1673, 25 Car. II, c. 2, An Act for preventing dangers which may happen from popish recusants, *Statutes of the Realm*, V, 782-785; *Test Act* 1678, 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, *Statutes of the Realm*, V, 894-896; reproduced in Kenyon, *The Stuart Constitution, loc. cit.*, pp. 461-462, and pp. 465-466 , respectively.

Cambridge who subsequently was elected to the 'Convention parliament'[1]), and his subsequent imposition of a catholic head upon Oxford's Magdelan College caused immense antagonism.[2]

The birth of a son to James in June 1688 by his second and catholic wife, thus ousting from the succession his elder protestant daughter Mary by the late Anne Hyde, saw a revival of the hysteria which had characterised the Exclusion Crisis, and gave rise to the deliberate fomenting of false rumours that the heir had been delivered to the queen in a warming pan.[3] There would appear to have been a fear, passionately and probably irrationally held among the Commons, that James planned to re-establish catholicism as the received religion by the use of the armed forces.

After the 'Immortal Seven' had asked William to invade on 30 June 1688, William's reply is a masterpiece of casuistry, suggesting in the broadest terms that foreign intervention is warranted in 'any state or kingdom' where 'an alteration of Religion' occurs and 'a religion which is contrary to law, is endeavoured to be introduced', which actions were in opposition to the 'public peace and happiness.'[4] Such a view would of course have vindicated any invasion of England by any continental power from the time of Henry VIII onwards. William enumerated a number of factors, all relating to James' attempts to promote religious toleration or to overcome the impediments to public office placed in the way of catholics and other non Anglicans, which would later be used to assert that James had broken his coronation oath. William said that:

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[1] Newton was a 'fervent if unorthodox protestant', and just after the publication of his *Philosophiae Naturalis Principia Mathematica* (Mathematical Principles of Natural Philosophy) in 1687, he helped lead the resistance to 'catholicism' of Cambridge. He made the acquaintance of John Locke when a member of the 'Convention parliament'.—See Richard S. Westfall, Emeritus Professor of History of Science, Indiana University, Bloomington, author of *Never at Rest: A Biography of Isaac Newton*, 1980, reissued 1990, author in part of the section on Sir Isaac Newton in *Brittanica on CD ROM 97*, Copyright (c) 1996 Encyclopaedia Britannica, Inc.

[2] See *The New Encyclopædia Brittanica*, Encyclopædia Brittanica Inc., Chicago, 15th edn. 1992., Vol. 29, p. 63

[3] Note the similarity between this calumny heaped upon James II and VII and his wife, with the similar accusation made by the Yorkists that Margaret, wife to Henry VI, had given birth to a changeling—see p. 104 *supra*. This warming pan fabrication was never believed by Sophia, Electress of Hanover, mother of George I, who was cousin to James II and VII, and who never suffered any doubt to be raised about the legitimacy of the Prince of Wales; James had written to her, repeating the refutation of the rumour which he had made to the Privy Council. —see A W Ward, 'The Electress Sophia and the Hanoverian Succession', *EHR*, Vol. I, 1886, pp. 470-506, at p. 481, and sources at n. 5.

[4] See William of Orange, Declaration, 30 September 1688 (1689), from W Cobbett, *Parliamentary History of England*, 1806-1812, Vol.. V, p. 1, extracted in E N Williams, *The Eighteenth Century Constitution, 1688-1815, Documents and Commentary*, Cambridge University Press, Cambridge, 1st edn. 1960, reprinted 1965, 1970, pp. 10-16, at p.10.

> ...those who are most immediately concerned in [the state or kingdom] are indispensably bound to preserve and maintain the established Laws, liberties and Customs, and above all, the Religion and Worship of God, that is established among them;...
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> ...he [James] did then promise and solemnly swear at his coronation, that he would maintain his subjects in the free enjoyment of their laws, rights and liberties; and in particular, that he would maintain the church of England, as it was established by law...[1]

In fact James had not sworn at his coronation to maintain the Church of England at all. He had sworn to maintain (as had the three Stuart kings before him)

> ...the laws, and customs to them granted by y^e^ Kings of England, your lawful, and Religious predecessors; And namely y^e^ 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 the fourth clause of his oath did not include the reference to the maintenance of the laws chosen by the people. Thus any attempt by William to suggest that by his attempts at toleration he had broken his oath was simply wrong. Moreover, James' oath to protect the bishops and the churches under their government (taken immediately after the coronation oath, in the same terms as his predecessors had taken) did not preclude steps towards religious toleration; indeed for the Stuart kings it could not, as under the Scottish oath they were also sworn to sustain the church of Scotland, and at law Scots and English were equally subjects of the king.

Had William asserted that James was in breach of his Scottish undertakings, he may have had some point, as James had not taken the Scottish coronation oath, thus leaving himself open to charges against his legitimacy as king of Scotland. But William was not terribly interested in Scotland, making a much more conciliatory Declaration to the Scots, presumably because they were in the main Calvinists, or Presbyterians, as was William himself.[2] What he was interested in was obtaining the crown of England, and (despite his earlier congratulations to James and his queen on the birth of a son[3]) animadverted upon

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[1] See William of Orange, Declaration, 30 September 1688 (1689), from W Cobbett, *Parliamentary History of England*, 1806-1812, Vol.. V, p. 1, extracted in E N Williams, *The Eighteenth Century Constitution, 1688-1815, Documents and Commentary*, Cambridge University Press, Cambridge, 1st edn. 1960, reprinted 1965, 1970, pp. 10-16, at p. 10 and p. 11 respectively.

[2] The Scottish *Claim of Right Act* 1689 refers to 'A Declaration for the Kingdom of Scotland', made by William, in October the preceding year. For text see *His Majesty's gracious letter to the Meeting of the Estates of His Ancient Kingdom of Scotland*, 17 May, 1689, taken from a contemporary print, 'by order of the Convention of Estates', quoted in full in Dykes, *Source Book of Constitutional History*, *loc. cit.*, at pp. 127-128.

[3] Referred to in their invitation by the 'Immortal seven' as being a political blunder, and 'had done him injury' as 'not one in a hundred believes [the child] to be the queen's', see invitation to William of Orange, 30 June, 1688 (1689), J Dalrymple, *Memoirs of Great Britain and Ireland*, 1783, Vol. II, App. Part I, p. 228, extracted in Williams, *Eighteenth Century Constitution*, *ed. cit.*, pp. 8-10, at p. 9.

the 'Queen's pretended bigness' and the 'pretended prince of Wales', then asserting that his wife 'and likewise ourselves' had 'such a right as all the world knows to the Succession to the Crown...' that therefore he (or, as he put it, 'we')

> saw fit to go over to England, and to carry over with us a force sufficient, by the blessing of God, to defend us from those evil Counsellors; and we, being desirous that our intention in this may be rightly understood, have for this end, prepared this Declaration....[1]

How William in Holland could ever have felt threatened by James' 'evil counsellors' (not, of course by James whom he still referred to as king) stretches an imagination already extended beyond belief by his opportunistic *volte face* on the legitimacy of James' son. He then 'invit[ed] and requir[ed] all persons whatsoever...to... assist this our Design' to redress the 'violences and disorders which may have overturned the whole Constitution of the English government...in a free and legal Parliament.'[2] James meanwhile declined Louis XIV's offer of military assistance,[3] and under cover of war on the continent, William sailed for England, caught the so-called 'Protestant wind' after initially being driven back by an 'anti-Protestant' wind,[4] evaded the British fleet, and landed at Tor Bay on 5 November and advanced towards London.[5] The protestant officers deserted James. The king, whose bravery and administrative abilities were considerable,[6] would appear to have suffered a complete nervous collapse and physical breakdown at his headquarters[7], attempting to flee to France on 10 December, and succeeding on 23 December, allegedly throwing the Great Seal of England into the Thames on his way. Had he not suffered this collapse, the Revolution certainly would not have been bloodless, and the outcome cannot be

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[1] Declaration of William of Orange, 30 September, 1688, quoted from W Cobbett, *The Parliamentary History of England*, 1806-12, V, I, extracted in E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, at pp. 10-16, at p. 15.

[2] William of Orange, Declaration, 30 September 1688 (1689), *ibid.*, pp. 10-16. Of course, the Invitation to William was treasonous, and a free and legal parliament could only be called by the king of England.

[3] On James II and VII's death in 1701, Louis XIV recognised James' son as king of England.—see A W Ward, 'The Electress Sophia and the Hanoverian Succession', *EHR*, Vol. I, 1886, pp. 470-506, at p. 492.

[4] See K H D Haley, 'The Dutch, the invasion of England, and the alliance of 1689', in Schwoerer (*ed.*), *The Revolution...*, *ed. cit.*, pp. 21 ff., p. 21.

[5] For a discussion of the invasion from the Dutch point of view, see K H D Haley, 'The Dutch, the invasion of England, and the alliance of 1689', in Schwoerer (*ed.*), *The Revolution...*, *ed. cit.*, pp. 21 ff. The Dutch invasion cost 6 million guilders, which the English had to repay to the Dutch. Moreover, one can only speculate upon any personal animosity held by William of Orange for James II and VII, given the fact that James had been the prime mover in the successful British seizure of New Amsterdam (New York) from the Dutch.

[6] See for example, the description of James' courageous behaviour when he had two ships sunk under him in the Battle of Sole Bay, in John Narborough, *Journal and Narrative of the Third Dutch War*, 1917, p. 97, referred to in Carlton, 'Personality of Kingship', *art. cit.*, p. 198, n. 88.

[7] See Carlton, 'Personality of Kingship', *art. cit.*, p. 197.

conjectured.

The legal position at that stage was that James II was king of England, (but perhaps not king James VII of Scotland, having failed to take the Scots oath); the Commons and Lords had connived in treason, and William of Orange had effected an invasion of England.

Some[1] have said that an interregnum existed between the flight of James II and VII to France, and the proclamation of William and Mary as monarchs on 13 February 1689, when there 'was no king of England', citing in support the fact that the courts of law did not sit during Hilary Term from 1688-1689.[2]

This is, in my submission, incorrect. James II was king of England, but currently domiciled in France. But there was no legal government in England, senior officers of the crown being disenabled by their treason, and William incompetent as a foreign prince who had fomented the treason to issue or sustain any legal administration. It could be speculated that the judges and officers of the courts, having taken an oath to support the king (as indeed had all members of the House of Commons and the House of Lords) felt unable to act on his behalf when a foreign invader was in the land.[3]

William summoned an assembly of any members of any of the parliaments of Charles II, which on 26 December thanked him for rescuing them 'from the miseries of Popery and

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[1] Maitland is the source most often quoted for this statement. See de Smith and Brazier, *Constitutional and Administrative Law*, 7th edn., 1994, at note 38, p. 133—'From that day[11.12.68] until the day when William and Mary accepted the crown, 13 February 1689, there was no king of England.'(F W Maitland, *Constitutional History of England* (1908), p. 284.' It is true these are the words of Maitland at that place. But he says them in the context of what the 'convention parliament' was seeking to maintain, and its attempts to make illegal acts look as legal as possible. What Maitland actually says is: 'Those who conducted the revolution sought...to make the revolution look as small as possible, to make it look like a legal proceeding, as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible. Had it failed, those who attempted it would have suffered as traitors, and I do not think that any lawyer can maintain that their execution would have been unlawful. The convention hit upon the word 'abdicated' as expressing James's action, and, according to the established legal reckoning, he abdicated on the 11 December, the day on which he dropped the great seal into the Thames. From that day until the day when William and Mary accepted the crown, 13 February 1689, there was no king of England. Possibly the convention parliament would better have better have expressed the truth if, like the parliament of Scotland, it had boldly said that James had forfeited the crown. But put it either way, it is difficult for a lawyer to regard the convention parliament as a lawfully constituted assembly...'and he continues with his explication of the legal position, which asks the critical question, 'But how do they (William and Mary) come to be king and queen?', at pp. 284-285. See also my references to and discussion of Maitland's views on this subject at p. 157 and p. 160 *supra*, p. 391, and p. 400 *infra*.

[2] See T F T Plucknett's 11th edition of *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, at p. 449.

[3] This is speculation on my part. I have not come across any specific reference to why the courts did not sit during this time.

Slavery'[1], asked him to assume the administration of public affairs, and to call a Convention. On 29 December 1688, William called for elections to the Convention as a 'free parliament',[2] which met on 22 January 1689.

The Commons predictably had little difficulty with asserting that James had 'deserted the throne'[3], and that therefore the throne was 'vacant',[4] thus nicely combining the terminology used by the deposers of Edward II and Richard II.

The Lords, however, hampered by logic, had problems with this idea. Even if James had abdicated, the monarchy (they said) was hereditary and could not be vacant, as the catholic infant Prince of Wales would immediately become king as next in line. Some were for recalling James on conditions; others suggested that the Prince of Orange be appointed regent (rejected 51-49)[5]. The clincher in the arguments, however, proved to be the very useful 'warming pan' rumour, most choosing to believe that the heir was none of James'; conveniently, then, the Lords could assert that the throne descended to the protestant Mary as the next in line, thus overcoming doubts about any elective theory of the monarchy, even though William was to exercise the regal power, the throne thus technically being 'elective'. This view also obviated consideration of the unwelcome legal consequences of William's acquiring the throne by conquest.[1]

THE ORIGINAL CONTRACT THEORY

The debate in the 'Free Conference' ranged over many fronts, canvassing the ancient

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[1] The address of the assembly, 26 December 1688, *Commons Journals*, X, 6, quoted in E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, p. 18

[2] *Commons Journals*, X, 7, quoted in Williams, *Eighteenth Century Constitution, op. cit.*, pp. 19-20.

[3] Cf. the deposition of Edward II—Edward's son, Edward III, was proclaimed 'guardian of the realm, which the king had deserted.' See Stubbs, *Constitutional History*, Vol. 2, p. 377; and see Lodge and Thornton, *English Constitutional Documents*, 1307-1485, pp. 19-20. For text, see Appendix I. And see note 3, p. 213 *supra*, and the discussion at p. 213

[4] Cf. The deposition of Richard II, and Henry IV—'the royal throne, solemnly prepared with cloth of gold being vacant...' '... it being manifest from the foregoing transactions and by reason of them that the realm of England with its appurtenances was vacant,' Henry Duke of Lancaster [Henry IV] claimed the throne 'by right line of the blood'= from *Deposition of Richard II, Rot. Parl.* III. 416 [Latin], reproduced in *English Historical Documents*, 1327-1485, A R Myers (*ed.*), 1969, Eyre & Spottiswoode, London, 1969, at p. 407 ff.; translated from the original in *Rot. Parl.* III., 416 (Latin), text at Appendix I. And in *Chronicle of Adam of Usk*, translated by E M Thompson, quoted in *The Portable Medieval Reader*, edited and with an introduction by James Bruce Ross and Mary Martin McLaughlin, The Viking Press, New York, 1949, 22nd printing 1967, at pp. 276-280, Adam notes first that 'the throne being vacant,' Henry 'forthwith had enthronement'; and later refers to Henry's assertions concerning '...seeing the kingdom of England to be vacant...'

[5] Voting figures for this and other issues to be found in C Grant Robertson, *Select Cases, op. cit.*, p. 129.

constitution, the fundamental laws of the kingdom, and the deposition and election of kings. Eventually they formulated the *Declaration of Rights*, based on two resolutions:

> That King James the Second having endeavoured to subvert the constitution of this kingdom by breaking the original contract between king and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the Government and that the throne is thereby vacant.
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> That it hath been found by experience to be inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish Prince.[2]

It would appear that some interest had been expressed in substituting the words 'breaking the coronation oath' for 'breaking the original contract', in the resolution.[3]

The idea of an 'original contract' between king and people had been simmering all century. The Jesuit Parsons in Doleman's *A Conference about the Next Succession to the Crown of England*[4] of 1594 had raised the idea; James VI and I had talked of 'compacts'; the 'original contract' between the king and the people was raised in the 1627 *Five Knights case*[5]; the Lord President of the purported Court who sentenced Charles I to execution, did so on the basis that he had broken his coronation oath and thus the original reciprocal contract between king and people;[6] Hobbes had spoken of mutual covenants[7]; while Locke talked of an original compact between the people.[8]

The coronation oath is critical to any discussion of the 'original contract', as the oath represented the undertakings given by the king with respect to his governance. Most published work on the oath and the contract in the seventeenth century was based however

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[1] See discussion of *de jure belli* at p. 64 and p. 111 *supra*, and p. 366 and p. 380 *infra*.

[2] *Commons Journals*, X. 14 and 15, quoted in C Grant Robertson, *Select Cases*, *op. cit.*, p. 129.

[3] According to a report by the Dutch Ambassador, referred to in Lois G Schwoerer, 'The Coronation of William and Mary, April 11, 1689', in Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, pp. 108-130, at p. 122.

[4] R Doleman, aka Robert Parsons, a Jesuit priest, *A Conference About the Next Succession To The Crowne 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 Temporall Lawyer, about the particular titles of all such as do or may pretende within Ingland or without, to the next succession* 1594. Also see p. 134, and p. 323 *supra*.

[5] *The Five Knights Case* (*Darnel's case*), 3 Charles I, 1627, *State Trials*, Vol. III, 1, at 65.

[6] 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.

[7] See discussion on Hobbes, *supra* at p. 339 ff.

[8] See Locke, *Second Treatise*, Chapter 19, paragraph 226, see Goldie, *ed. cit.*, at pp. 229-230. And see discussion at p. 347 ff., *supra*.

on an old Latin/French version which had successfully been peddled by William Prynne in the 1640s.

Also central to the contract theory, were polemical re-renderings of and elliptical quotations from old legal texts, such as Bracton and Fleta, and the acceptance of old apocryphal texts such as *The Mirrour of Justices*[1] and the *Leges Edwardi Confessoris*[2] as 'real law', following the example of Sir Edward Coke earlier in the century. Numerous tracts were written before and after the Revolution of 1688 in order to justify it on the basis of the contract theory,[3] often drawing on the polemic of the Civil War.[4]

And *Two Treatises of Government*, the work of John Locke[5], Whig and discreet radical, had been published in 1689. It propagated the ideas of contract, dissolution of government, and the right of the people to resist a tyrannical king, specifically including a situation where the 'supreme executive power...abandons [his] charge...'.[6] The *Two Treatises* had been seen as a defence and vindication of the Revolution, mainly because Locke in his Preface adverts to William 'our great restorer', and to an application of his text to 'make good his title, in the consent of the people'.[7] But it had been written in 1679-1683, with the *Second Treatise* probably being a clandestine and audacious tract justifying resistance to Charles II during and after the Whig plots to assassinate Charles and James.[8] (After the Revolution, Locke in fact has been reported as saying that the 'Convention parliament' should be 'restoring our

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[1] Dated 1290-1138. *The Mirrour of Justices*, written originally in the Old French, long before the Conquest, and many things added, by Andrew Horne, to which is added The Diversity of Courts and their Jurisdictions, translated into English by W. H. [William Hughes], of Gray's Inn, Esq, 1642, John Byrne & Co, Washington DC, 1903; reprinted from the 1903 edition by Rothman Reprints, Inc, N J; Augustus M Kelley, Publishers, New York NY, 1968. And *The Mirror of Justices*, edited for the Selden Society by William Joseph Whittaker, with an introduction by Frederic William Maitland; Publications of the Selden society, Vol. VII, 1898; reissued, 1978. See my Appendix I for extracts.

[2] See Janelle Greenberg, 'The Confessor's Laws and the Radical Face of the Ancient Constitution,' *The English Historical Review*, Vol. 104, 1989, pp. 611-637, at pp. 636-637 for the *Leges*; and see Weston and Greenberg, *Subjects and Sovereigns.*, *op. cit.*, pp. 78-79, and pp. 214-215.

[3] As to tracts, this draws heavily on the work of Weston and Greenberg, *Subjects and Sovereigns.*, *op. cit.* generally, and pp. 255-257 in particular, and Lois G Schwoerer, 'The *Bill of Rights*: Epitome of the Revolution of 1688-89', in J G A Pocock, (*ed.*), *Three British Revolutions: 1641, 1688, 1776*, Princeton University Press, Princeton, 1980, 224-243.

[4] See Schwoerer, Introduction, *The Revolution...*, *ed. cit.*, p. 12.

[5] On Locke, see also *supra*, Locke and Filmer, p. 347 ff.

[6] See Locke, *Second Treatise*, Chapter 19, paragraph 219, see Goldie, *ed. cit.*, at p. 225.

[7] See Locke, *Second Treatise*, Preface, see Goldie, *ed. cit.*, at p. 4.

[8] See Mark Goldie, (*ed.*), John Locke, *Two Treatises of Government*, Everyman, London, 1993, at p. xx. The plots were those involving Locke's mentor, Shaftesbury, who was tried but acquitted of treason in 1681, and the Rye House plot to assassinate Charles and James during 1681-1683.

ancient government, the best possibly that ever was.'[1])

The basis of the theory was that the beginnings of government were from the people, who entered into a popular contract to set up a government and assign to a king certain prerogatives, who held those powers in trust for the people; but those powers were limited by the contract, the laws of God, the law of nature and the king's oath to uphold the law; if the king broke the terms of the contract, the people were released from their obligation to obey, and they could depose him.[2]

The 'Convention parliament' itself drew heavily on this theory for its justification, telling itself it was a 'surrogate for all the people', having a 'higher capacity' than parliament, because it could make 'laws for the constitution', whereas parliament could only make laws for the administration of government.[3] The Lords were less impetuous than the Commons in their embrace of the theory, and following the practice of kings, sought the advice of the judges as to the precise nature of the original contract. None of the judges could find any authority among the law books for the idea. However, Montagu J and Dolben J conveyed the impression that they believed a contract underlay government; Atkyns J believed the original contract referred to 'the first original government', the result being that the king took government with the consent of the people, as the head of a body politic which was a limited monarchy; Holt CJ believed that government was by contract; Peyt J implied that the king had no legal and constitutional rights independent of parliament; while Nevill J thought that government originated in conquest, with the conqueror imposing laws upon the governed which in time became an original contract. (Peyt had earlier in 1680 written 'in all probability the most influential piece of political writing made public in the decade ending with the' Revolution[4]—*The Antient Right of the House of Commons Asserted*. In this he had asserted that the House of Commons dated from before 1189, and adhered therefore to the theory that the king, lords, and commons were the three estates, and were equally

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[1] See J Marshall, *John Locke: Resistance, Religion, and Responsibility*, Oxford, 1994, quoted and referred to by Goldie, *John Locke...*, *ed. cit.*, p. xxxvii.

[2] See Schwoerer, *'Bill of Rights'*, *art. cit.*, p. 230.

[3] See Schwoerer, *'Bill of Rights'*, *art. cit.*, p. 230, and n. 20, with reference to the tract *Advice Before It Be Too Late ; or, a Breviate for the Convention*, London, 1689, by John (?) Humphrey, pp. 2-3,

[4] See Weston and Greenberg, *Subjects and Sovereigns.*, *op. cit.*, at p. 187.

the law-making body, and that therefore sovereignty resided in the three of them together.[2] Sir Robert Atkyns had just published a tract asserting the antiquity of the House of Commons.[3]) This opinion of the judges, for it could hardly be called a judgement, may be found in the *Historical Manuscripts Commission, Manuscripts of the House of Lords*, and for convenience I shall refer to it at *The Opinion of the Judges on the Original Contract.*[4] The Lords' tender consciences thus being assuaged, they voted in favour of the Commons' language asserting the 'original contract'.[5]

The theory of original contract was based on a community-centred ideology, whose political purpose was to underpin and to authorise the acts of the Commons in particular, and of the 'Convention parliament' generally, in their actions to overturn the existing constitution by inviting a foreigner to replace the legal king.

The tracts of the time also propounded, as a corollary of the idea that the Commons was an ancient institution, that the Commons was coeval in power with the king and the lords, if not superior to them; and that the law-making capacity under the constitution was vested in the king, commons and lords equally—this idea has been called the 'co-ordination principle'[6], and naturally resulted in the conclusion that sovereignty rested in the king, commons and lords together. (Ironically, this polemic drew heavily for its justification not only upon a re-reading of the ancient authorities, but also upon the writings of James VI and I, and Charles I's *Answer to the Nineteen Propositions*[7], where he referred to the laws being jointly made by the king, lords and commons—though Charles had made it clear that 'the

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[1] William Peyt, *The Antient Right of the House of Commons Asserted, or a discourse proving by Records and the best Historians, that the Commons of England were ever an Essential Part of Parliament*, London, 1680, quoted and referred to in Weston and Greenberg, *Subjects and Sovereigns., op. cit., passim* (see index).

[2] See Weston and Greenberg, *Subjects and Sovereigns., op. cit.*, at p. 188 and pp. 190-191, Peyt, *Antient Right*, reference in notes 16-28 to p. 188, on pp. 342-344.

[3] Sir Robert Atkyns, *The Power, Jurisdiction, and Priviledge of Parliament; and the Antiquity of the House of Commons Asserted*, London, 1689, referred to in Weston and Greenberg, *Subjects and Sovereigns, op. cit.*, particularly p. 256 and p. 380.

[4] *The Opinion of the Judges on the Original Contract*, 4 James II, 1689-90, *Historical Manuscripts Commission*, Twelfth report, Appendix part VI, The manuscripts of the House of Lords, 1689-1690, pp. 15-16; quoted and cited in Weston and Greenberg, *Subjects and Sovereigns., op. cit.*, at pp. 255-256, n. 101, and n. 102.

[5] See Weston and Greenberg, *Subjects and Sovereigns., op. cit.*, p. 256.

[6] For a very useful exposition of the theory and its origins, see Weston and Greenberg, *Subjects and Sovereigns., op. cit., passim*, and see Schwoerer, *'Bill of Rights' art. cit.*.

[7] See Weston and Greenberg, *Subjects and Sovereigns, op. cit.*, p. 35 ff., and p. 256.

government according to these laws is entrusted to the king'.[1])

Thus it was on the foundations of the idea of the 'original contract' and this 'co-ordination principle' that the *Bill of Rights* was framed. The laws of God were not completely forgotten in these analyses, the general view being that God had ordained that man should have some kind of government, and that therefore the ultimate sovereignty resided in the people, thus effective replacing the notion of divine right of kings with that of the divine right of the 'people',[2] which in real terms translated as the divine right of the House of Commons.

Having come thus far, the 'Convention parliament' needed to find a reason for asserting that James II of England had broken this original contract. They found it in the king's use of the prerogative.

THE ORIGINAL CONTRACT AND THE KING'S OATH

James' use of the dispensing power under the prerogative to exempt certain individuals (usually catholic) from the stringencies of the *Test Acts*, and his attempt to use the suspending power to suspend the penal operation of laws on matters of religion (the *Declaration of Indulgence*) was seen as a breach of the contract, because he was bound by his coronation oath to rule according to the law, and they had just shown that the law could only be made or repealed by the king, lords and commons, not by one of them alone (the king). Moreover, the argument ran, the king was bound by his coronation oath to maintain the laws which the lords and commons had chosen; his attempt to suspend those laws was therefore a breach of the contract. Thus the coronation oath, and its interpretation, was central to the idea of the 'original contract', and to the evolution of the revolutionaries' ideas about 'sovereignty' and the location of 'sovereign power', just as it had been during

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[1] See The King's Answer to the Nineteen Propositions, 18 June, 1642, quoted in J P Kenyon, *The Stuart Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1965, pp. 21-23, from Rushworth, v, 728, 730-732.

[2] Sir Robert Howard, a member of the convention, spoke of a 'divine right of the people to their lives, estates and liberty', quoted in Schwoerer, *'Bill of Rights'*, *art. cit.*, p. 233, and n. 35, where she sources this to her work, Lois G Schwoerer, 'A' Journall of the Convention at Westminster begun the 22 of January 1688/9,' *BIHR*, 49, (1976), 250; cf. Grey, *Debates*, IX, 20. And see generally, 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, 189-210, at pp. 193-195.

the Civil War. The idea of 'absolute rule' as meaning arbitrary rule rather than complete or sovereign,[1] now began to be used, both as a meansto discredit the use of the prerogative (although the king's use of the prerogative was quite legal), and to taint the concept of 'sovereign' when associated with the Sovereign.

In order to sustain these ideas of co-ordination and coevality, the coronation oath taken by the king was again subject to scrutiny. The authors of a recent book—*Subjects and Sovereigns*—analysing the co-ordination theory, refer to the coronation oath as being an integral part of the argument about the location of sovereignty and sovereign power.[2] The authors of this book, however, rely completely upon the fictionalised versions of the oath which were then in currency, rather than upon the oaths which were actually taken by the kings. This, however, is due to their reliance upon contemporary texts and tracts, which in turn were propaganda vehicles which either through ignorance or wilfully based their theories on this fictional oath.

The entire post-1660 discussion of the oath turned upon that version popularised by Prynne in his *Soveraigne Power of Parliament* in 1643[3], by which he attempted to prove that the king was required to assent to any bill agreed to by the lords and commons. As I have already shown, this oath was not the oath which any of the Stuarts had actually taken, nor

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[1] See Howard Nenner, 'Later Stuart Age', *art. cit.*, p. 181. See also the influence of John Locke, *supra* at p. 344; Locke of course changed his view from supporting an 'absolute and arbitrary power' in the king, to opposing it.

[2] 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, references to coronation oath as indexed.

[3] 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 Order of the Committee of the House of Commons concerning Printing, 28 March 1643. Facsimile copy made from the copy in the British Library (1129.h.6) by Garland Publishing Inc, New York, 1979. The text of the oath propagated by Prynne is at my Appendix I, the relevant part stating : *Concedis justas leges et consuetudines esse tenendas et promittis eas per te esse protegendas, et ad honorem Dei corroborandas, quas vulgas elegerit, secundum vires tuas* ? This was the text reproduced in the Commons' Remonstrance of 26 May 1642, which Prynne says he also had manifested 'at large'. (*Soveraigne Power, loc. cit.*, p. 75) The Commons sourced the oath to the 'Rot. Parliament. 1 H. IV. n. 17 n. 1, Rot. Parl. vol. III. p. 417'. This text is identical to that contained in the *Liber Regalis*, which dates from 1351-1377, earlier versions (recensions) of the *Liber Regalis* dating from 1307-1308. Sir Matthew Hale, in his *Prerogatives of the King* (edited for the Selden Society by D E C Yale, Selden Society, London, 1976), written in 1640-1649, refers to this oath as being in the parliament rolls for

indeed had it been taken by any king of England for at least three hundred years, (if even then); and if it had ever been taken, it certainly had not been taken in Latin, but in the vernacular of the time. Moreover, the argument about this old oath concentrated upon semantic differences between meanings attributed to the words *quas vulgus elegerit.* It will be remembered that these words were to be found in the fourth clause relating to the 'just laws and customs'—*iustas leges et consuetudines*—of the old Latin text of the liturgical device for the coronation service called the *Liber Regalis*,[1] although other (later) texts, such as that relating to the coronation of Richard II, refer to *quas vulgus iuste et racionabiliter elegerit*[2].

The argument raged about whether the words meant that the king was obliged to maintain the laws which the people shall (in the future) choose, with the parliamentarians and the later Whigs of the 1680s applying the phrase only to statute law—on this basis they could argue that at the least, the law-making capacity was in the commons, lords, and the king; and at the most, that the king was obliged to assent to any law which the two houses agreed upon. Moreover, the word *vulgus* was interpreted by the parliamentarians and the Whigs to mean 'the people' or 'the commons', hence the endeavours like Peyt's mentioned earlier to show that the House of Commons had existed from time immemorial. But this Latin was a rendition of the French *la communite de vostre roiaume*, (the community of the realm) which, whatever it meant, certainly did not mean the House of Commons.

It was these convenient fictions about the coronation oath of the Stuart kings which enabled the parliamentarians, and later the Whigs, to argue for the 'sovereignty' of the two houses of parliament as the 'law-making sovereign', and to try to alter the long accepted notion of the 'three estates' as being the lords, the clergy, and the commons, to become the king, the lords (temporal and spiritual), and the commons. It was a short step from there to assert that the two houses were sovereign, not just in law-making, but in the exercise of all power—this was the step which Prynne had taken when he argued that the two houses had

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Henry IV, and notes that it is in substance the same as that in French on the Rolls for Edward II—sourced by Hale to Rot. claus. 1 Edw. 2, m.10 (schedule); Cal C.R. (1307-1313) p.12 ; *Foedera*, iii, 63.

[1] *The Liber Regalis*, or *The Royal Book* is an ordine prescribing the performance of a coronation ceremony, and dates from about 1351-1377, according to H G Richardson, 'The Coronation in Medieval England', *Traditio*, Vol. 16, 1960, 111-202, see p. 112, and p. 149—*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*—from *Liber Regalis*, p. 88 of Legg, *English Coronation Records*.

[2] From the *processus factus* of Richard II, from Close Roll I Ric. II, Mem. 45 in the Public Records Office, reproduced in L W Legg, *English Coronation Records*, Archibald Constable & Co Ltd, London, 1901, pp. 131 ff., my underlining.—*ac de faciendo per ipsum dominum Regem eas esse protigendas et ad honorem dei corroborandas quas vulgus iuste et racionabiliter elegerit iuxta uires eiusdem domini Regis.*

the right to arm the militia, a sovereign power resting only in the sovereign, and a fundamental royal prerogative for the protection of the people. And it was yet a shorter step to argue that in fact it was the House of Commons which was sovereign alone, as the lords were hereditary and not representative of 'the people'—although of course, neither was the Commons, its membership being circumscribed by property and gender qualifications.

This idea, then, of the sovereignty of the king in parliament, and later, the idea of the 'sovereignty of parliament' meaning the 'sovereignty of the two houses', and even later, of the 'sovereignty of the House of Commons', originated in a device whose foundations were neither legal nor historical, neither factual nor honest, but rather pretended, convenient and polemical, whose driving purpose was religious prejudice and fear, and whose end was to secure protestant Britain against enemies, real or imagined, and to accrue power to those who had formulated the idea. Moreover, this idea of 'sovereignty' rested entirely on the location of the legislation-making power, since this was the only power in which the House of Commons could legitimately claim a share. It overlooked other *indicia* of sovereignty, such as the capacity to enter into treaties, the declaring of war and peace, the enforcement of the statute laws, the existence of and the enforcement and protection of the common law and custom, and maintenance and protection of the realm and people generally, all of which were prerogative powers which lay at law and custom with the king. (Though it should be noted that Locke in his *Second Treatise* heroically attempted to show that these prerogatives and *indicia* of sovereignty lay under the original compact in 'the whole community [as] one body in a state of nature,' by virtue of what he called the 'federative' power, which in turn must be in the hands of the holder of the 'executive' power, else the commonwealth faces 'disorder and ruin'.[1])

Armed with these convenient pretences[2], it was not hard for the 'Convention parliament' to decide that James II of England had broken the 'contract'. But these words ('original contract') did not appear the in *Declaration of Rights*, nor in the later *Bill of Rights*, as they got lost in the debate over whether the king had deserted or abdicated the throne. Their absence was not however due to any ideological reason, and the 'contract' idea became

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[1] See John Locke, *Second Treatise*, Chapter 12, paragraphs 145-146, in Goldie, Everyman, *ed. cit.*, p. 189.

[2] For an further examination of the idea of the Revolution of 1688 as pretence, see Nenner, 'Later Stuart Age, *art. cit.*, pp. 198 ff.

fundamental to Revolution and post-Revolution thinking[1]—shortly after the Revolution, the judges apparently held to the view of something like the sovereignty of the two houses of parliament, and that the king was made by the people.[2]

THE SCOTTISH CORONATION OATH

The situation in Scotland was somewhat different. James VII of Scotland had failed to take the coronation oath as prescribed by the Scottish *Coronation Oath Act* of 1567.[3] That oath had reference throughout to the maintenance of the true religion of the Kirk of Scotland, and to rooting out and punishing heretics according to that religion. Naturally as a catholic, James was unable to take the oath, or at least, to take it without forswearing himself. At all events, he did not take it. It could well be argued that he was therefore no king of Scotland.

Indeed this was the view of the Scottish Estates, which in the preamble to the *Claim of Right Act* of 1689[4] said that James had 'assume[d]' the regal power and 'acted as king' without ever taking the coronation oath, and had invaded the fundamental constitution of the kingdom and altered it from a 'legal limited monarchy to one arbitrary despotic power...'. The Estates found that James the Seventh had therefore 'forfeited the right to the crown and the throne is become vacant.' The *Claim of Right* rehearsed the alleged sins of James and reasserted the legal and religious rights as understood by the Estates, and resolved that William and Mary, 'King and Queen of England and France and Ireland, be and be declared King and Queen of Scotland...'

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[1] See Weston and Greenberg, *Subjects and Sovereigns, op. cit.*, pp. 256-257, and notes 103 and 104, p. 372.

[2] See Weston and Greenberg, *Subjects and Sovereigns, op. cit.*, p. 257, and note 104, p. 372. The authors refer to '...Robert Harley declared in a private letter (July 27, 1689), with regard to a recent judicial case: "The judge's charge would have been high treason eighteen months ago. The assertion was that kings are made by the people."' The authors do not cite the case, but in note 104, they source it to *Historical Manuscripts Commission, Portland Manuscripts*, III, 439. I have not been able to sight the text of the case. In addition they note that J W Gough in *The Social Contract:: A Critical Study of its Development*, Oxford University Press, Oxford, 2nd edn, 1957, reprinted 1967, at p. 91 asserts the common place nature of the 'contract theory' by the time of the Revolution.

[3] This specific omission is cited in the *Claim of Right (Scotland)* 1689, as a reason for James' forfeiting the throne. See *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; and see preamble to *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.

[4] *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.

William had issued on 10 October 1688 a 'Declaration for the Kingdom of Scotland'— (*The Proclamation of William of Orange to the People of Scotland*)[1] which the Scots found acceptable. On 7 January 1689 William addressed such Scots Lords and gentlemen as were in London, seeking their advice as to the best means of securing the protestant religion and restoring the Scots laws and liberties according to his Declaration.[2] The Scottish nobility and gentry then presented an address to William on 10 January 1689, requesting him to assume the administration of Scotland, and to call a 'general meeting of the States of the Nation' in Edinburgh on 14 March.[3] (This Address of the Scots Lords was approved by Act of the Estates in Edinburgh on March 14, 1689).[4] William responded agreeing to issue the orders for the meeting, and saying that 'you will always find me ready to concur with you in everything that may be found necessary for the securing of the protestant religion...'[5]

The Scots Convention of Estates met on 14 March and approved on 11 April 1689 (the day of William's English coronation) a Declaration of the Estates of the Kingdom of Scotland, containing the *Claim of Right*, and the Offer of the Crown of Scotland to their Majesties King William and Queen Mary[6] similar to the English *Declaration of Rights*,[7] but with some additional matters peculiar to Scotland, including a provision 'That by the law of

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[1] See *Claim of Right Act (Scotland)*, (1689, c. 28) [1689, c. 13]. The date for the day in 'October last' on which William made his Declaration is blank in the HMSO text of the Act.— But D Oswald Dykes, (Professor of Constitutional Law and Constitutional History in the University of Edinburgh), reprints the text in his *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 95-100, and the date is 10 October 1688; Dykes notes (n. 1), 'This is evidently an adaptation of the English Proclamation to the Scottish conditions, and should be compared with the English version. It is reprinted from a contemporary print.' The Declaration was similar to that of 10 October 1688 which William had made to the English people, but shorter and more conciliatory in tone. For extracts see my Appendix I.

[2] See Dykes, *Source Book of Constitutional History, loc. cit.*, His Highness the Prince of Orange his Speech To the Scots Lords and Gentlemen, With their Address and his Highness' Answer, pp. 120-122, taken from a contemporary print. William's speech was made at 3.00 p.m. on Monday 7 January.

[3] See Dykes, *Source Book of Constitutional History, ibid.*, pp. 120-121. —Dated at the Council Chamber in White-Hall the tenth day of January, 1689'.

[4] See Dykes, *Source Book of Constitutional History, ibid.*, p. 121, n. 1, sourced to Thomson's *Acts of the Scottish Parliament*, vol. ix, p. 14. The Convention of Estates, however, had (at least at that time), no authority to ratify the address, as it was not called by a legitimate king of Scotland.

[5] See Dykes, *Source Book of Constitutional History, ibid.*, pp. 121-122. See also Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869, p. 823.

[6] *Declaration of the Estates of the Kingdom of Scotland, containing the Claim of Right, and the Offer of the Crown of Scotland to their Majesties King William and Queen Mary*, usually referred to as the *Claim of Right*, adopted by the Scottish Estates, April 11, 1689; see Dykes, *Source Book of Constitutional History, loc. cit.*, pp. 122-127, sourced to Thomson's *Acts of the Scottish Parliament*, Vol. IX, p. 37..

[7] See Hallam, *Constitutional History, loc. cit.*, p. 824.

this Kingdome no papist can be King or Queen of this realme nor bear any office whatsoever therein nor can any protestant successor exercise the regal power until he or she swear the Coronation Oath"[1], which was a clear reference to the Scottish coronation oath as prescribed back in 1567. The Convention justified its existence as a 'full and free representative of this nation', and 'declared' the matters in the Declaration part of the *Claim of Right* by virtue of a fictitious precedent[2] in 'their ancestors' who in 'like cases [had] usually done for the vindication and asserting of their ancient rights and liberties.'[3] This Convention of Estates then sent the document to William, together with a copy of the coronation oath, and an Address desiring William to turn them into a parliament. William responded by letter on 17 May 1689, saying that

- The Claim of Right and the Address had been read in his and Mary's presence;
- He and Mary then took the Scots coronation oath;
- 'you shall always find us ready to ... assist you in making such laws as may secure your religion, liberties, and properties...'
- 'We...shall always account that Our greatest prerogative, to enact such laws as may promote truth, peace, and wealth in our Kingdoms.'
- 'At your desire, We have resolved to turn you (who are the full Representatives of the Nation) into a Parliament;...' He authorised them to adjourn, and to meet as a parliament in accordance with the necessary instructions which he would send, on 5 June 1689.[4]

William also sent a further letter suggesting a union between Scotland and England.[5] The Estates responded by letter to William , saying they would '...fall upon such resolutions as may be acceptable to Your Majesty...', and with regard to his proposal for union they said,

> As to the proposal of the Union, We doubt not, your Majesty will so dispose that matter that there may be an equal readiness in the Kingdom of England to accomplish it, as one of the best means for securing the happiness of these Nations, and settling a lasting Peace.[6]

This Scottish parliament continued ('rather contrary to the spirit of a representative

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[1] See *Claim of Right Act (Scotland)*, 1689

[2] See A V Dicey and R S Rait, *Thoughts on the Union*, 1920, pp. 63 *et seq.*, referred to in Plucknett, *Taswell-Langmead, op. cit.*, p. 470, and n. 72.,

[3] See *Claim of Right Act (Scotland)*, 1689.

[4] See *His Majesty's gracious letter to the Meeting of the Estates of His Ancient Kingdom of Scotland*, 17 May, 1689, taken from a contemporary print, 'by order of the Convention of Estates', quoted in full in Dykes, *Source Book of Constitutional History, loc. cit.*, at pp. 127-128.

[5] See William's letter to the estates in Vol. IX, Thomson's *Acts of the Scottish Parliament*, p. 9, referred to in the response by the Estates and referred to by Dykes, *Source Book of Constitutional History, loc. cit.*, at p. 129, n. 2.

[6] See *A Letter from the Meeting of the Estates of the Kingdom of Scotland to the King of England*, from Thomson's *Acts*, Vol. IX, p. 20, quoted in full in Dykes, *Source Book of Constitutional History, loc. cit.*, at pp. 129-130.

government', as Hallam puts it) to sit throughout the reign of William III.[1]

It is not clear whether William's letter of 17 May 1689 constituted assent to the *Claim of Right Act* (or whether he was required under Scots law to do so[2])—but his taking of the Scots coronation oath could be taken as constructive assent to the *Claim of Right.* Moreover, from a perusal of the correspondence it can be seen that William saw himself as the one to 'enact (such) laws', while the Estates undertook to make 'such resolutions as may be acceptable' to William. Therefore, it can be said that the assent of the Scots king was necessary for legislation to have effect.

It must be remembered that the Scots coronation oath contained provisions quite different from the English oath, either as taken by the Stuart kings, or as drafted by the Commons committee in 1689. It required the king to preserve and keep inviolate the *rychtis and rentis with all iust priulegeis of the Crowne of Scotland*—that is, a saving of the prerogative and the king's jurisdiction; to rule the people *according to the will and command of God* revealed in the old and new testaments, and according to the 'lawful laws and constitutions received in Scotland' that were not contrary to the word of God—that is, according to the laws of Scotland not contrary to divine law; to abolish and *gainstand all fals Religioun contrare to* the 'true religion'—that is, Presbyterianism; and to *ruite out all heretykis and enemeis to the trew worschip of God that salbe conuict be the trew Kirk of God of the foirsaidis crymis*—that is, to oppose in Scotland all non-Presbyterians. The royal prerogative of Scotland had also been specifically preserved by a number of (lawful) Scottish Acts which are still on the statute books,[3] *viz.*

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[1] See Hallam, *Constitutional History, loc. cit.*, p. 825.

[2] For a view on this, see J A Lovatt-Fraser, 'The Constitutional Position of the Scottish Monarch Prior to the Union,' 17 *LQR*, 1901, 252-262. The author asserts that the assent of the king was not necessary, either to the calling of a parliament or to enactments, the estates deeming it sufficient to touch the bill with the royal sceptre to symbolise royal assent. But his conclusion is 'that it was doubtful whether his [the king's] assent was necessary to Acts of Parliament', at p. 261. But note this article must be treated with caution, as the editor's endnote suggests that the views in the article are reminiscent of 'all the prejudice of a Whig of the middle of the nineteenth century.'

[3] Note, however, the contrary view J A Lovatt-Fraser, 'The Constitutional Position of the Scottish Monarch Prior to the Union,' 17 *LQR*, 1901, 252-262. The author asserts that the Scots estates were always jealous of the prerogative, and had themselves the powers of declaring war and peace and entering into treaties, and that the Scots king could not do any of these things without the assent of the estates. (see pp. 255-256, p. 259, p. 261) But the article does not refer at all to the acts cited below; and see the caveat in the note immediately *supra*. Lovatt-Fraser clearly is relying upon the later Scots acts passed during the reign of Anne, e.g., The *Act Anent War and Peace*, 1703, c. 5, 16 September 1703, reproduced in D Oswald Dykes, (Professor of Constitutional Law and Constitutional History in the University of Edinburgh), *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 137-138; and the *Act for the Security of the Kingdom*, 1704, (Act 1704, c. 3, Passed 5 August, 1704), reproduced in Dykes, *Source Book of*

- the *Sovereignty Act*, 1606,[1] recognising the king's 'sovereign authority, princely power, royal prerogative and privilege of his Crown over all...' perpetually, to his 'heirs and successors';
- the *Sovereignty Act*, 1633,[2] confirming the preceding Act 'perpetually' and 'absolutely';
- the *Crown Appointments Act*, 1661, 'The Estates of Parliament, considering the great obligations that do lie upon them from the law of God, the laws of nations, the municipal laws of the land, and their oaths of allegiance to maintain and defend the Sovereign authority of the King's Majesty...' declared that it was 'an inherent privilege of the Crown and an undoubted part of the Royal prerogative' for the king and his 'heirs and successors' to have sole right of appointment of officers of the Estate, privy councillors, and nomination of the Lords of the Session, by virtue of the 'Royal power which they hold from God Almighty over this kingdom.'[3]
- *The Prerogative Act* of 1661,[4] referred to the 'obligation' of the Estates to assert 'the Royal Prerogative of the Imperial Crown of this Kingdom which the King's Majesty holds from God Almighty alone', declaring it in particular with regard to peace and war, the militia, and treaties, and for the king's 'heirs and successors';
- the *Parliament Act*, 1661, defending with the lives of the Estates the king's 'sacred person' and his 'sovereign authority, princely power and prerogative royal,', particularly the prerogative solely with the king and his 'heirs and successors' of 'calling holding proroguing and dissolving of parliaments and all conventions and meetings of the Estates'—this Act specifically states that :

> 'As no parliament can be lawfully kept without the special warrant and presence of the King's Majesty or his Commissioner, So no acts sentences or statutes to be passed in any Parliament can be binding upon the people or have the authority and force of laws without the special authority and approbation of the King's Majesty or his Commissioner interponed thereto at the making thereof...'[5]

But William apparently took the oath 'after assuring himself that the maintenance of the Scottish religious institutions did not involve the persecution of non-presbyterians'.[6] How he in conscience could be so assured is difficult to see; but most assuredly, the taking of the Scottish coronation oath was no mere 'formality'[7], William being unentitled under Scottish

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Constitutional History, loc. cit., pp. 138-140; and see my Appendix I. Both these Acts were impliedly repealed by the *Act of Union*, 1707.

[1] *The Sovereignty Act*, 1606, (1606, c. 1) [1606, c. 1], Act anent the kingis maiesties prerogatiue, Short Title given by *Statute Law Revision (Scotland) Act*, 1964, c. 80, sch. 2, *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, HMSO, London, 1978.

[2] *The Sovereignty Act*, 1633, (1633, c. 3) [1633, c. 3], Act anent his Majesties royall prerogative and Apparell of kirkmen, Short Title given by *Statute Law Revision (Scotland) Act*, 1964, c. 80, sch. 2, *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, HMSO, London, 1978.

[3] *The Crown Appointments Act*, 1661, (1661, c. 6) [1661, c. 2], Act anent the Kingis Majesties prerogative in choiseing and appointing of the Officers of State, Lords of Privy Council and Session, Short Title given by *Statute Law Revision (Scotland) Act*, 1964, c. 80, sch. 2, *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, HMSO, London, 1978.

[4] *The Prerogative Act*, 1661, (1661, c. 130 [1661, c. 5], Act anent his Maiesties Prerogative in the Militia and in the making of Peace and War or treaties and leagues with forraine Princes or Estates, Short Title given by *Statute Law Revision (Scotland) Act*, 1964, c. 80, sch. 2, *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, HMSO, London, 1978.

[5] *The Parliament Act*, 1661, (1661, c. 7) [1661, c. 3], Act anent his Maiesties Prerogative in calling and dissolveing of Parliaments and making of Lawis, Short Title given by *Statute Law Revision (Scotland) Act*, 1964, c. 80, sch. 2, *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, HMSO, London, 1978.

[6] See Plucknett, *Taswell-Langmead, ibid.*, p. 458.

[7] This is Plucknett's term—see *Taswell-Langmead, ibid.*, p. 458.

law to lay claim to the sovereign power of Scotland had he not taken it. For this reason, the statements of the Scottish Estates declaring that James had forfeited the crown had, in my view, some legal basis, as he had not taken the Scottish coronation oath.

There is, however, another impediment to William's kingship of Scotland, and that lies in the legality of the *Claim of Right Act.*

Firstly, it would seem that under the law of Scotland itself, the so-called 'Convention of Estates' had no legal basis at all, it being completely illegal under the terms of the Scots *Parliament Act* of 1661, (since William had not taken the Scots coronation oath and was not king when he authorised its meeting); nor could any so-called declarations or acts of the 'Convention Estates' have any authority without the imprimatur of a legitimate king.

If one accepts that James II of England was not king James VII of Scotland at any time, because of his failure to take the Scottish coronation oath, then there was no king in Scotland until someone had taken the oath—that person would be William, after he had taken it, if all other legal prerequisites of Scotland with regard to the kingship had been met. But clearly they had not, since the Scots Acts cited *supra* clearly place the kingship as being in a king's 'heirs and successors'. It would appear that the Estates had therefore constructively recognised James as James VII of Scotland, notwithstanding his failure to take the coronation oath, as he is described throughout the *Claim of Right* as 'King James the Seventh', and that he '*has* forfeited the *right* to the Crown' and that the throne '*is become* vacant.'[1] Up until the Scottish *Declaration of Right* and the *Claim of Right* of 11 April 1689, then, the Estates recognised James' right to the throne, and by the use of the present tense in the *Claim of Right*, clearly they imply that the throne had theretofore been filled. Or that the legal right to fill it lay with James.

If James were suddenly no king in Scotland in 1688/1689, or had lost his right to the kingship, then the next heir according to Scots law should have been his infant son, James Frances Edward, on the basis that the oath could be taken on his behalf, as it had been done in the case of the infant James VI (baptised as a catholic son of the catholic Mary queen of Scots) when he succeeded on his mother's deposition. (Doubtless, the 'warming pan' rumour wrought its required end with the Scots, enabling them to disavow the Prince

of Wales[2].)

If James had never been king of Scotland, (or if one were to accept the veracity of the 'warming pan' rumour), then the next heir in the succession after Charles II's death in 1685 would have been William of Orange, and after him in the absence of legitimate issue, the children of Henrietta Anne, daughter of Charles I, and married to Philip, duke of Orleans, brother of Louis XIV of France, Marie Louis (d. 1689) or Anna Maria (d. 1728).

In the absence of a thorough knowledge of Scots customary (common) law, it is difficult to know what the position of the kingship under Scots law was, or if a coronation oath had played a central and legal role in that law, as it had in the English common law, prior to the enactment of the Scots *Coronation Oath Act* in 1567.[1] But on the assumption that the Scots common law on the oath of kings was not too different from that of England, then once a person had been recognised by the Estates, and had taken the coronation oath, (and perhaps had been anointed), then he would I think under Scots law legally be king. William then would have been king, despite any doubts about the directness of his succession; and by virtue of being a 'successor' he would have entered into all the prerogatives as outlined in the Scots Acts for the kingdom of Scotland; these were not infringed upon by the *Claim of Right* (assuming for the moment that it is a legal enactment).

Therefore, once William had been recognised by the Estates, as he certainly was in the *Declaration* and *Claim of Right*, and taken the oath, then he was king of Scotland. But then we are still faced with the variation of the Maitland conundrum—how could the *Claim of Right* become an Act if it was brought into being by an illegal body, the 'Convention of Estates' meeting in direct contravention of Scots law (William not being king when he issued the orders for the Meeting of the Estates)? Did William or his Commissioner issue fresh writs for the Scots parliament after taking the Scots oath? (It would appear not; rather he appears to have issued instructions to his Commissioner to 'turn' the Estates 'into a parliament') Did William assent to the *Claim of Right* after taking the Scots oath? (Constructively, yes.) If

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[1] My emphasis.

[2] Although James II and VII's cousin, the Electress Sophia, daughter of Charles I's sister, never entertained any doubts about the legitimacy of the Prince of Wales—see A W Ward, 'The Electress Sophia and the Hanoverian Succession', *EHR*, Vol. I, 1886, pp. 470-506.

so, was the parliament of Estates legally called by him or his Commissioner? (This is debatable.) If the answer to all these questions is 'yes', then the *Claim of Right* was a legal enactment. But if the answer to any of them is 'no', then the *Claim of Right* was no legal nor binding Act, being in contravention of Scots statute law.

If the *Claim of Right* was no legal Act, then its deficiencies could have been rectified by later enactment by a legally constituted Scots parliament after the king had taken his Scots oath. (The retrospective ratification by the Convention of Estates on 14 March 1689 of the request to William to by the Lords to call it, has no legal validity, since William was not king of Scotland nor king of England when he issued to procedures for its calling). But if such rectification were required, and had not been validly enacted, then, although William would still have been king of Scotland, (by virtue of his recognition and oath), none of the legislation purportedly passed by the purported Scots legislature would have been valid under Scots law, including the *Claim of Right*, and (if Hallam is right,[2] and the 'Convention Estates' continued to sit as a parliament during all of William's reign, and no fresh and legal writs were issued for it after William took the Scots coronation oath) neither would any Scottish 'acts' up until the 'free elections' of 1703 in Anne's reign.[3] An alternate view would be that by virtue of his prerogative as king of Scotland, William's letter of 17 May 1689 and subsequent actions 'turning' the Convention of Estates into a parliament both called it into being and retrospectively legitimated all its previous actions. This is probably the better interpretation.

The *Crown and Parliament Recognition Act* of 1690 was an English Act which retrospectively ratified only English 'acts' of the 'Convention parliament', and had no operation in Scotland.

THE ENGLISH DECLARATION OF RIGHTS

The final text of the English *Declaration of Rights* of 12 February 1689 concentrated on the sins, both real and imagined, of James II of England, and drew upon the idea in the earlier

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[1] Towards then end of editing this work, I became aware of J H Burns, *The True Law of Kingship, Concepts of Monarchy in early Modern Scotland*, Clarendon Press, Oxford, published in 1996; but I have been unable to take account of that work here.

[2] See Hallam, *Constitutional History*, *op. cit.*, p. 825.

[3] See Plucknett, *Taswell-Langmead*, *op. cit.*, p. 470.

resolution that 'having withdrawn himself out of the kingdom...' he had therefore 'abdicated the Government', and that the throne was 'thereby vacant'. This was of course just so much casuistry. Had James really abdicated the throne (which he had not), he would have done so in favour of his son, the heir apparent; had he rendered himself ineligible to remain king, which in terms of his coronation oath he had not, then the result would have been the same. Had James been defeated in a bloody battle, as had Harold by the earlier William the conqueror, then there would have been no question of the throne being vacant, the conqueror taking by force of arms, *de jure belli*. But there had been no bloody battle, thanks to the unforeseeable but fortuitous eventuality of James' physical and mental collapse; and the Conventioneers, the lords in particular, shrank from any acknowledgement that there had been any invasion (with its attendant legal consequences), or any possibility that bloodshed may have resulted from their actions.

The concept of the 'vacancy' of the throne was unknown to the law,[1] even as it had been propounded by that doyen of parliamentary lawyers, Sir Edward Coke, and was a novel, convenient and ephemeral fiction, specifically designed to circumvent the presence of a catholic king in England, and which never saw the light of day again. The Conventioneers 'pretended that James had deposed himself, and that the political nation was not obliged to bear any responsibility for rebelling against its king...'[2] The existence of a foreign invading army on British soil was quietly forgotten (except for the necessity to pay 6 million guilders to the Dutch as fee for the invasion[3], and the idea of conquest being a legitimator of the law as Sir Edward Nevill had propounded in *The Opinion of the Judges on the Original Contract*, was overlooked for good. (The consequences for the law by recognising William as a conqueror holding the crown by *de jure belli*, were large, and could have seen the complete overturn of the English legal system).[4]

The Conventioneers, although suspicious of any divine right in a catholic king, managed to see the Prince of Orange as he 'whom it has pleased almighty God to make the glorious

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[1] Although it had been used as a justification for Henry IV taking the throne. But in his case, there was a gathering in front of the throne, which was literally at the time vacant, so Henry was raised up to it and sat in it.—see p. 98, p. 222, p. 363, and note 4, p. 363, *supra*.

[2] See Nenner, 'Later Stuart Age', *art. cit.*, p. 198.

[3] See K H D Haley, 'The Dutch, the Invasion of England, and the alliance of 1689', in Schwoerer, *The Revolution...*, *ed. cit.*, p. 21 ff. And see note 4 p. 361, and note 5 p. 361, *supra*.

[4] See discussion of *de jure belli* in the context of Henry VII, *supra* at p. 64, p. 111; and see p. 366 for Nevill's views.

Instrument of delivering the Kingdom from Popery and Arbitrary Power'[1]. They purported to declare William and Mary king and queen, with William 'Prince of Orange' exercising the regnal power. This of course properly belonged to Mary, but William, the second conqueror and soldier of that name, refused to be his wife's gentleman usher;[2] the all male members of the Convention doubtless having no difficulty in thinking that even though Mary was the one with the regnal power by descent, she was wife to William, and that as her husband at common law he had all rights and control over her and her property, including the regnal power. It was as if the throne were a piece of property owned by the Convention which they were at liberty to dispose of as they saw fit.[3] From then on, 'property' was increasingly to become the guiding light of English parliamentarians.

The *Declaration of Rights* also included statements that the use of the suspending and dispensing powers under the prerogative alone was illegal[4]; that the raising of money by the prerogative without parliamentary consent was illegal; that protestant subjects could bear arms; no standing army could be kept in peacetime without parliamentary consent; parliamentary freedom of speech was not impeachable in courts of law or anywhere else; and that parliaments should be held frequently. The Declaration had nothing to say about the coronation oath. William and Mary having agreed to the terms of the Declaration on 13 February, and the 'Convention parliament' thereupon proclaimed them king and queen. Five days later, on 18 February 1689, William garbed himself in regal robes, placed the crown of England upon his head, sat on the throne in the House of Lords, and proclaimed the 'Convention' to be a 'Parliament'. This was a violation of custom and provoked a great

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[1] See *Declaration of Rights*, 13 February, 1688, reproduced in C Grant Robertson, *Select Cases and Documents to illustrate English Constitutional History*, 1660-1832, *op. cit.*, pp. 129-144, at p. 132.

[2] See Williams, *Eighteenth Century Constitution*, *op. cit.*, p. 26, quoting from Dartmouth's Notes on Burnet's *History*, quoted in turn by J Dalrymple, *Memoirs of Great Britain and Ireland*, (1783), II, App. part I, p. 342.

[3] Cf. See my discussion *supra* at pp. 104, and p. 137. From 1688, the concept of 'property' increasingly dominates all avenues of political and legal thought. See also the reference to 'property' in the preamble to the *Coronation Oath Act* 1689, *infra*, at p. 384, and p. 386.

[4] It would appear that the Declaration or the *Bill of Rights* qualified the exclusion of the dispensing power with the words 'as it has been exercised of late', because the lords were reluctant to dispense completely with a royal prerogative which had actually proved quite useful, and upon which exercise many private rights and titles depended. Hallam in his *Constitutional History* [Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869] places this qualification as emanating from the debates of 11 and 12 February 1689, with regard to the Declaration text, but not actually included in the Declaration text. He says that as a result of this doubt, the subsequent *Bill of Rights* included these words. (see Hallam, p. 678, sourced to *Commons Journals*, 11. 12 Feb., 1688-9, and to *Parliamentary History*, 345) On the other hand, Hallam refers to the declaration having been presented to William and Mary on 18, not 13 February (see Hallam, p. 677).Other authorities which I have read are equivocal, or leave the entire question of dates with regard to the *Bill of Rights* out of consideration—Schwoerer has also noted this phenomenon in her article, '*Bill of Rights*', *art. cit.*, p. 226 and n. 9.

deal of adverse comment, the king of England not being entitled to wear the crown before his coronation[1]; but William clearly had a fondness for wearing the English crown, doing it again when he assented to the Coronation Oath bill on 9 April.[2] Moreover, the theory propounded earlier in the century by the Jesuit priests that the king of England had no legal authority until after the coronation[3], apparently had been revived[4], and William may have taken to wearing the crown in order to buttress his pretensions to royal authority.

But this was not the end of the matter.

THE 1689 CORONATION OATH

The 'Convention parliament' then tried to pull itself up by its bootlaces, immediately declaring itself a proper parliament as if it had been called by valid writs, abjuring the old oaths of allegiance to James II, and requiring new oaths of allegiance to William and Mary.[5] In the light of the controversy over the preceding forty years about the coronation oath, and the convenient interpretation put upon it by the parliamentarians and the Whigs, the so-called House of Commons established a committee to draft a new text for a coronation oath to be taken by the putative king and queen. This was the first time that the House of Commons[6] had been responsible for the drafting of a coronation oath, the responsibility in the past having fallen to the Privy Council, nobles and the clergy, in the light of liturgical

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[1] Though Richard III wore the crown on the day he acceded to the estates' petition to become king and before his coronation; but he apparently took a coronation oath at the same time as he placed the crown on his head.

[2] See *Extract from Parliament Rolls of William and Mary*, British Museum, Harl. MS. 7104, 9 April, 1689 (1688), folio 198b, and folio 199b, extracted in J Wickham Legg, *Three Coronation Orders*, *loc. cit.*, Appendix D, p. 75.

[3] See 3 Co. Inst. 7, Hil. I Jac. In the case of Watson and Clark seminary priests. (9F.4.I.b) [This case is the case reported as *Sir Griffin Markham's Trial*, in 2 *State Trials*, 61-69] See pp. 134, 134, 139, 141, 144, and 329 *supra*. Note also the influence of the Jesuit Parsons, writing as R Doleman in his *Conference about the Next Succession of England* throughout the century—see discussion at p. 134, and p. 323 *supra*.

[4] See reference to BL., Hargreaves MS. 497, folios 20r.-v, referred to in Schwoerer, 'The Coronation...', art *cit.*, p. 111, n. 16.

[5] An Act for removing and preventing all questions and disputes concerning the assembling and sitting of this present parliament, 1 Will. & Mary, c. 1, *Statutes at Large*, IX, 1, quoted in Williams, *Eighteenth Century Constitution*, *op. cit.*, pp. 33-34.

[6] The House of Commons was also present at the coronation ceremony, Christopher Wren having been ordered to build a special gallery to house them in the Abbey—see PRO, LC 2/13, p. 10, referred to in Schwoerer, 'The Coronation...', *art. cit.*, p. 117, n. 47.

drafts from the clerics and from the College of Arms, then being submitted to the putative king for his views. The College of Arms protested that for the coronation of William and Mary they had not been called upon to advise the Committee.[1] As late as the beginning of the twentieth century, the lack of consultation rankled also with the Church of England, the Church, at least as of 1902, refusing to acknowledge the oath as having any ecclesiastical authority (many bishops, including the archbishop of Canterbury, refusing to take the oath of allegiance to William and Mary, were therefore not present in the 'parliament' which passed the *Coronation Oath Act*,[2] nor in the parliament called which passed the *Crown and Parliament Recognition Act*[3]):

> We need not dwell upon the terms and nature of the present existing Oath. It is administered under the statute of 1 William III cap. 6, passed when the kingdom was in a very unsettled condition. The Church is in no way responsible for its terminology, as shown by the employment of the word, 'Protestant', a word never once used in any official document of the Church of England.[4]
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> The existing form of the oath is administered under the statute of 1 William III cap. 6, and has no ecclesiastical authority. The Church is not responsible for the terms under which the Church of England is designated in the third question.[5]

It seems clear from the Commons' debates that they continued to hold to the view that the king was bound to give his assent to any bill which was agreed to by both houses. The Commons' debates record that the basis of their view was that 'Any compact may be annulled by the free consent of the party who alone is entitled to claim the performance.'[6]

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[1] See 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 VIII, Herald's note at p. 111. And see Schwoerer's reference to CA. MS. L 19, ceremonials, p. 117, and CA. Ceremonials Steer, n. 14, fol. 14, referred to in Lois G Schwoerer, 'The Coronation of William and Mary, April 11, 1689', in Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, at p. 110, n. 13.

[2] An Act for Establishing the Coronation Oath—*Coronation Oath Act*, 1 Will. & Mary c. 6, 1688, [This is the citation given by HMSO 1978, and 1991], *Rot. Parl.* Pt. 5, nu. 3, from *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act*, 1948, (c. 62), Sch 2.

[3] *Crown and Parliament Recognition Act* 1689, (1690) 2 Will. & Mary c. 1, an act for recognizing king William and queen Mary and for avoiding all questions touching the acts made in the parliament assembled at Westminster the thirteenth day of February one thousand six hundred and eighty eight— from *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act*, 1948, (c. 62), sch. 2.

[4] See the 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, p. 15.

[5] See Pemberton, *The Coronation Service, loc. cit.*, p. 43, note 1.

[6] See Commons' discussion of the oath March 28, 1688 (1689), from *The History of England*, by Lord Macaulay, 1836; (Popular Edition in Two Volumes), Longmans, Green, and Co., London, new impression 1906; Vol. I, at p. 712. For full relevant text, see my Appendix I.

This is a restatement of the 'contract theory', but put in the guise that the only party to the contract entitled to claim performance of the contract was the people, or its representatives in the commons, or in the two houses. This also was a fiction, as allegiance by the people to the king was the people's part of the contract (if there were one), which the members of the 'Convention Parliament' had completely abrogated by their acquiescence in and subsequent ratification of the invitation to a foreign prince to invade the realm.

The preamble to the *Coronation Oath Act* is worth considering in some detail. It said:

> Whereas by the Law and Ancient Usage of this Realme the Kings and Queens thereof have taken a Solemne Oath upon the Evangelists at Their respective Coronations to maintaine the Statutes Laws and Customs of the said realme and all the People and Inhabitants thereof in their Spirituall and Civill Rights and Properties But forasmuch the Oath it selfe on such Occasion Administred hath heretofore beene framed in doubtfull Words and Expressions with relation to ancient Laws and Constitutions at this time unknowne To the end therefore that One Uniforme Oath may be in all Times to come taken by the Kings and Queens of this realme and to Them respectively Administred at the times of Their and every of Their Coronation.

This preamble inferentially relies upon the interpretation of the old Latin oath by Prynne, which I have discussed earlier. Moreover the fondness of the Conventioneers for the words 'ancient constitution' or 'fundamental laws', more often than not referred to the convenient re-rendering of Bracton and Fleta (who drew heavily on Bracton), the influence of Locke's *Two Treatises of Government*, and an acceptance of the apocryphal texts, *The Mirrour of Justices* and the *Leges Confessoris Edwardi*, despite the deletion of any mention of the Confessor from the oath which they drafted.[1]

No coronation oath had used the words 'statutes laws and customs'. Every coronation oath mentioned the words 'laws' and 'customs', the word 'law' being inclusive of all types of law, written and unwritten. Indeed, the closest that any oath comes to mentioning statutes is the Lettou/Machlinia oath as redrafted by Henry VIII, where he referred to 'laws and approved customes of the realme...which the nobles and people have made and chosen with his consent'. It will be remembered that I have suggested that there are considerable circumstantial grounds for considering that the oath which Henry amended in fact had been taken by the English kings, perhaps as far back as Edward I; but even that oath did not refer to statutes, referring instead to 'laws...which the folk and people have made and

chosen.' Nor did the oath for Edward VI, which specifically referred to 'new laws' use the word 'statute', using rather the words '...new laws ...that ...shall be made by the consent of your people as hath been accustomed.' There is a reference in one of the texts of the *Little Device* for the coronation of Richard III to 'laws as to the worship of God shall be (made) chosen by your people (in parliament)';[2] but this would appear to be an interpolation, which does not appear in other texts of the same *Little Device*. But even if Richard had sworn his oath in those terms, he was swearing only to maintain laws chosen by the people in parliament (to which he had chosen to assent, else they would not be 'laws'), and which were either acceptable in the sight of God (that is just), or which were to do with the 'worship of God.'

In addition, all coronation oaths had almost invariably referred to the laws which the king swore to maintain, as 'just' laws, or 'laws to the worship of God'. There was no requirement on the king ever to maintain a law which was unjust, merely because some people in the two houses of parliament thought that he should do so.

None of the words in the coronation oaths of the Stuart kings contained 'doubtful' words and expressions relating to unknown ancient laws and constitutions—the Stuart oath had been debated fiercely in tracts for the preceding fifty years, and was used as the point to put to death a king. It was not the fault of the kings that polemicists chose to discuss arcane ancient Latin and French texts rather than the English words actually sworn by the monarchs, as Charles I acerbically pointed out in his reply to the Common remonstrance of 1642.[3] Nor, (given the ambiguity of the phrasing of the preamble) were the words of the Stuart oath in any opposition to any ancient laws or constitutions which might be held dear by the Conventioneers, the thrust of the oath concerning the peace and protection of the

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[1] See Janelle Greenberg, 'The Confessor's Laws and the Radical Face of the Ancient Constitution,' *The English Historical Review*, Vol. 104, 1989, pp. 611-637. This is discussed in the Chapter on 'Election'.

[2] The *Little Device* for the Coronation of Richard III, as reproduced in *The Coronation of Richard III, the Extant Documents*, edited by Anne F Sutton and P W Hammond, Alan Sutton Publishing Limited, Gloucester, 1983, at p. 213; British Library: Add. Ms. 18669, at p. 220. And see my Appendix I.

[3] See discussion at p. 311, *supra*, and for texts see Appendix I. 'His majesty said, 'he was not enough acquainted with records to know whether that were fully and ingenuously [n. 1. 'ingeniously,' MS.] cited:...But that all his good subjects might see how faithfully these men, who assumed this trust from them, desired to discharge their trust, he would be contented to publish, for their satisfaction, a matter notorious enough, but what he himself never thought to have been put to publish, and of which the framers of that Declaration might as well as made use as of a [Latin] record they knew many of his subjects could not, and many of themselves did not, understand, 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

people and the worship of God remaining unchanged over a thousand years.

None of the English coronation oaths ever referred to 'spiritual and civil rights and properties';[1] they did of course refer to maintaining the worship of God, and to the maintenance of the laws, customs and liberties of the people and the clergy, and to justice with mercy and equity, but no reference is ever made to 'property'. Again, the oath that comes closest to this kind of undertaking is the Lettou/Machlinia oath, which binds the king to the maintenance of the estate of the crown.

In short, it is not the coronation oath of the Stuart kings which was doubtful, but rather the premises upon which the purported 'Convention parliament' was attempting to erect a new one. To say that the Preamble is misleading is to be more than charitable. This would appear to have been the view also of Blackstone, who when speaking of the coronation oath, said 'the wording of it was changed at the Revolution, because (*as the statute alleges*) the oath itself had been framed in doubtful words and expressions...'[2] Blackstone, (who was himself of Whig persuasion[3]), however, was in turn seduced by the idea of the 'ancient' constitution and the 'contract' theory, apparently accepting *The Mirrour of Justices* as accurate, and seeing the coronation oath as the contract between king and people.[4]

Accordingly, the Commons drafted a new oath, (later to be incorporated into the *Coronation*

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and his taking it; they might find it in the records of the Exchequer. This is it:[oath]—from p. 155, para. 293 of Clarendon's *History of the Rebellion, op. cit.*

[1] Cf. See p. 104, p. 137, and p. 381 for discussion of the increasing use of the word 'property'.

[2] William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, with an introduction by Stanley N Katz, University of Chicago Press, Chicago, 1979, Vol. I, at pp. 228-229. My italics.

[3] See 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. 189. But note that Dickinson refers here to Blackstone's acceptance of the idea of the sovereignty of parliament. He is referred to as 'an Old Whig whose ideals were enshrined in the Glorious Settlement of 1688' in A W B, Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, p. 59. But Daniel Boorstin, in *The Mysterious Science of the Law, An Essay on Blackstone's Commentaries*, President and Fellows of Harvard College, 1941, copyright renewed by Boorstin, 1969, republished with new foreword by Boorstin, University of Chicago Press, Chicago, 1996, at p. xv, refers to Blackstone as offending Thomas Jefferson because of his 'Toryism'.

[4] Blackstone, *Commentaries*, Vol. I, pp. 228-229, *ibid.*,:— 'This is the form of the coronation oath, as it is now prescribed by our laws: the principle articles of which appear to be at least as ancient as the mirror of justice (cap. I. §.2), and even as the time of Bracton (l. 3. tr. I. C. 9.): but the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been *[229]* framed in doubtful words and expressions, with relation to antient laws and constitutions at this time unknown *[and here Blackstone footnotes with the text of an old coronation oath, the Lettou/Machlinia oath]*. However, in what form soever it be conceived, this is the most indisputably a fundamental and original express contract;...'

Oath Act)[1], which stated:

> The Coronation Oath
>
> Will You solemnely Promise and Swear to Governe the People of the Kingdome of England and the Dominions thereto belonging according to the statutes in Parlyament Agreed on and the Laws and Customs of the same?
>
> I solemnly Promise soe to doe.
>
> Will You to Your power cause Law and Justice in Mercy to be Executed in all Your Judgments.
>
> I will.
>
> Will You to the utmost of Your power maintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion established by Law? And will You Preserve unto the Bishops and Clergy of this Realme and to the Churches committed to their Charge all such Rights and Priviledges as by Law doe or shall appertaine unto them or any of them.
>
> All this I Promise to doe.[2]

The first observation to make is that the personal interrogatory form is used, as has been used for all other oaths of governance—*Will you...? I will.* And that both the governance and justice are maintained as the king's, as they had been from time immemorial.

This oath, compared with the one taken by the first four Stuart monarchs, clearly required the maintenance of the protestant reformed religion, that is, the religion of the church of England, both by specific mention, and by removal of the reference to the laws granted by Edward the Confessor. William had announced that he supported repeal of the *Test Acts* so that Dissenters could serve him in good conscience; this, of course, had been James II and VII's intention also with regard to both catholics and Dissenters in his *Declaration of Indulgence*, designed to suspend the *Test Acts*' operations. So it was no surprise that William's announcement led to alarm among both Whigs and the Tories. Disappointment with the Dutch prince was reflected in the vote in the coronation oath committee of 188 to 149 supporting the specific reference to the 'Protestant Reformed Religion established by Law', meaning the Church of England, thus rejecting William's earlier intimations of enabling tolerance of Dissenters.[3]

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[1] An Act for Establishing the Coronation Oath—*Coronation Oath Act*, 1688, 1 Will. & Mary c. 6, Rot. Parl. Pt. 5, nu. 3, from *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act*, 1948, (c. 62), Sch 2.

[2] See *Coronation Oath Act*, 1688, (1689) *ibid.*; and see W C Costin and J Steven Watson, (*eds.*) *The Law and Working Documents of the Constitution: Documents 1660-1914*, 2 Vols., Vol. I, 1660-1783, Adam & Charles Black, London, 1952; 2nd ed. 1961; reprinted 1967, at pp. 57-59. And see my Appendix I.

[3] See Schwoerer, 'The coronation...', *art. cit.*, pp. 124-125.

The oath also extended the effect of the jurisdiction of the king (should there have been any doubt) to include the 'dominions' belonging to England. And it removed the specific reference to the royal prerogative.

This oath omitted the first and fourth clauses of the Stuart oath, thus removing the reference to the kings of England 'granting' laws and freedoms, or 'granting' to hold and keep laws which the commonalty of the kingdom either had or shall have. In this fashion, they eliminated room for debate of the kind that had preoccupied parliamentarians for half a century concerning the meaning of *quas vulgus elegerit*. But it could not avoid restating the ultimate authority in the king, since it asked 'Are *you* willing to *govern*...'; government of the kingdom remained in the king, according to the laws of man and of God as it had ever done.

The effect of the oath was to constrain the sovereign to govern the people of the kingdom of England and its Dominions according to the statutes in parliament agreed on, and according to the laws and customs England and of the dominions, and in addition required him to maintain the 'laws of God', as well as the religion of the Church of England.

The new oath removed the reference to the king executing 'law, justice and discretion, in mercy and truth' in his judgements, by replacing it merely with his execution of 'Law and Justice in Mercy', perhaps because they were concerned that a reference to 'discretion' may legitimate the use of the dispensing prerogative, which they had so hated when exercised by James II and VII in favour of individual catholics, and, perhaps, because 'truth' was one of the things which they considered to be 'doubtful'.

But in many ways, the new oath was in fact a broader statement of the king's power than that uttered by Charles I. William and Mary's oath draws a clear distinction between statute, law, and custom, making it clear that statute law is the 'Statutes in Parlyament Agreed on.' 'Law', and 'custom' are clearly something other than statute law, for to read this part of the oath as to require the king to govern according to the statutes, laws, and customs of parliament, rather than of England and its dominions, would be to strain the language to absurd lengths, and effectively overturn any pretence to the existence of the common law, the law of God (which is elsewhere mentioned in the oath), or custom. The fact that this clause was not meant to be read in this way can be seen from the inclusion in later versions of the oath of specific mention of the city of Berwick-on-Tweed, by virtue of the customs

pertaining to that particular city.[1]

Now it may well be that the framers of the oath had in mind when they used the word 'parliament' merely the two houses of parliament, or the House of Commons alone, as did the parliamentarians in their Remonstrances back in May 1642[2]. If this were the case, then the king would be promising under oath to agree to anything which the two houses proposed. This interpretation, however, is incapable of operation, since there can be no statute without the agreement of the king, (it is merely a Bill else) and the terminology of the oath refers to 'statutes in parliament agreed on', therefore clearly including the king in the making of the statutes. Moreover, I doubt that it could be said on any reading that this terminology required the king to agree to anything proposed by the two houses, for the use of the word 'agree' necessarily implies the capacity in any of the makers of a putative statute to disagree. In addition, the oath as framed preserves custom, common law, and the laws of God, and it could not be doubted that under any or indeed all of these three, that the king had a role in legislating, particularly as the oath adverted to the king's power to make judgements—clearly a legal power. Finally, after the coronation, when legal parliaments could be called and valid legislation could be enacted, the words used were:

> ...we do most humbly beseech your majesties that it may be enacted and be it enacted by the King and Queen's most excellent majesties by and with the advice and consent of the lords spiritual and temporal and Commons in this present parliament assembled and by authority of the same...[3]

—that is, it is the king that does the enacting, with the advice and consent of the lords, prelates, and commons, by the authority of the king.

Charles I's oath had made no explicit mention of statutes, they being inferred from the

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[1] see for example, Article XXV (III) of the *Act of Union* (the Act for an Union of the two kingdoms of England and Scotland), (6 *Annae*, cap. 11; 1707), p. 680 ff. of *English Historical Documents*, Vol. VIII, which required the monarch specifically to mention Berwick, along with Wales and Ireland, with regard to the promise to maintain the religion of the Church of England—Scotland was not included in this promise, because under Scottish law, the religion of that country was that of the Kirk, or Presbyterianism. For the reference relation to Berwick-on-Tweed, see notes in my Appendix I under 'William and Mary'; and see C Grant Robertson, *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, Methuen & Co, London, 1904, 5th ed. enlarged, 1928, at p. 116. And see *Halsbury's Statutes of England and Wales*, Fourth edition, Volume 41, 1995 Reissue, Butterworths, London, 1995, in relation to the *Interpretation Act* 1978, (p. 985 ff.), at pp. 1004-1005.

[2] The Remonstrances of the House of Commons of 19 and 26 May 1642.

[3] *Crown and Parliament Recognition Act* 1690, 2 Will. & Mary c. 1, an act for recognizing king William and queen Mary and for avoiding all questions toughing the acts made in the parliament assembled at Westminster the thirteenth day of February one thousand six hundred and eighty eight— from *Statutes in Force*, Official Revised Edition, Revised to 1st "

reference to 'laws' in the fourth clause of his oath. But the new draft of the oath by the Commons, whatever their intentions as to binding the king to consent to bills emanating from the two houses, and transferring the sovereign power from the king to them, maintained quite clearly distinctions between the common law, custom, the law of God and statute law. It also acknowledged the king as the fountain of justice. And by the maintenance of custom, the common law, and the laws of God, the prerogative of the king—which was conferred on the king by the coronation oath and ceremony under both custom and common law and in the sight of God— was also maintained. (The *Crown and Parliament Recognition Act* later specifically referred to the lords spiritual and temporal and the commons recognising that the 'Royal State Crown and Dignity of the said Realms with all Honours, Styles Titles Regalities Prerogatives Powers Jurisdictions and Authorities to the same belonging and appertaining' were 'most fully rightfully and entirely invested and incorporated united and annexed' in the persons of William and Mary.[1])

This new oath was, however, much more restrictive than James II's oath, in which there was no mention of laws chosen by the commonality of the realm at all, merely of 'just customs'. This phrasing in James II's oath could have legitimated in his mind his attempts to legislate for religious toleration by the royal prerogative alone when the houses proved recalcitrant—under the terms of his oath, he was in no way bound to defend or maintain any statute passed by the king, the commons and the lords, either during his own reign or those of his predecessors.[2]

But the new oath provoked dissension among all religions, from high Anglicans to the Dissenters and Jacobites, with many clergy refusing to take the oath of allegiance to the new monarchs,[3] and the archbishop of Canterbury, Sandford, refusing to officiate at the coronation or to administer the coronation oath, because he felt bound by his oath of

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February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act*, 1948, (c. 62), sch. 2.

[1] see *Crown and Parliament Recognition Act* 1690, 2 Will. & Mary c. 1.

[2] 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]; and see my Appendix I.

[3] See H T Dickinson, 'The Eighteenth Century Debate over the Sovereignty of Parliament,' *Transactions of the Royal Historical Society*, 5th series, Vol. 26, 189-210, at 193

allegiance to James II.[1] Feelings against the Prince of Orange ran high on the day of the coronation, with one man almost being killed by soldiers for celebrating the event.[2]

It must be steadily remembered that during all this time, there was no legal basis for the commons or the lords or William or Mary to assert the power to make laws of any kind. All that existed was the declaration by the commons and lords in the 'Convention parliament' that they were in fact a parliament, and William's asserting that they were a 'parliament' while wearing the crown of England in the House of Lords on 18 February—and as Professor Maitland observed, merely declaring something does not give it legal force if there is no legal basis for the declaration. Maitland had seriously questioned the legality of the actions of the 'Convention parliament', of the 'kingship' of either William or Mary, and of the validity of the subsequent 'confirming' statute of 1690, the invalidity of which of course in turn would have rendered both the *Coronation Oath Act* and the *Bill of Rights* invalid.[3]

The 'Convention parliament' had on 22 February 1689 received the assent of William and Mary to a so-called 'Act'—the *Legalisation of the Convention Parliament*.[4] But this was no Act at all, it occurring before William and Mary had been crowned. They were crowned on 11 April 1688. The statute to which Maitland refers is the Act passed in 1690 after the coronation, which is now known as the *Crown and Parliament Recognition Act*.[5]

It has been, and remains my contention, that it is the recognition of the people of the putative king, the taking of the coronation oath by that person or persons, and the subsequent anointing which make an English king. Thereafter, any actions taken by the king are perfectly legal, and the coronation ratifies any just acts taken in the name of the

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[1] See Schwoerer, 'The Coronation...', *art. cit.*, p. 114, and p. 126; and see W A Speck, 'William – and Mary?', *art. cit.*, in Schwoerer, *The Revolution of 1688...*, *ed. cit.*, p. 131 ff., at p. 131.

[2] *CSPD, 1689-1690*, p. 61; referred to in Schwoerer, 'The coronation...', *art. cit.*, p. 126 and n. 85.

[3] See Maitland, *Constitutional History*, at p. 285. See my discussion of Maitland's proposition at p. 157, p. 160, p. 362, and note 1 p. 362 *supra*, and p. 400 *infra*.

[4] *Legalisation of the convention parliament*, 1 Will. and Mary, c. 1, 1689 (assented to by William and Mary 22 February 1689), extracted and date of assent given in C Grant Robertson, *Select Cases and Documents to illustrate English Constitutional History*, 1660-1832, Methuen & Co. Ltd., London, 1904, 5th edn. 1928, pp. 105-106.

[5] *Crown and Parliament Recognition Act* 1689, (1690) 2 Will. & Mary c. 1, An Act for recognizing king William and queen Mary and for avoiding all questions touching the acts made in the parliament assembled at Westminster the thirteenth day of February one thousand six hundred and eighty eight— from *Statutes in Force*, Official Revised Edition, Revised

king between the coronation and the death, deposition, or abdication of his predecessor. But it could be argued, if the *Coronation Oath Act* requiring this particular oath was passed by the so-called 'parliament' before William and Mary were crowned (as it was), how could the oath which they took be in any way binding or legal? (The Church of England, as late as 1902, continued to see the oath as drafted by the 'Convention parliament' without any consultation with the church as having 'no ecclesiastical authority', and treated it with disdain.[1])

The answer, in my submission, lies in the common law, and what I have elsewhere described as the prerogative of the people.

Thus there is no legal difficulty with the text of the English coronation oath as taken by William and Mary, as it was formulated by the advisors to the putative king, and agreed to by the putative king and queen, and taken out loud and in English in the sight of the people they were to govern. Neither can the Church of England sustain any legal appeal against it on the grounds of its having no ecclesiastical authority—not only was the statute ratified by a properly crowned and anointed king in his parliament called by him, but it was taken by that king and therefore bound him, both at common law and in conscience before God.

But it could be argued, what of James II and VII, still alive and living in France—he did not die until 1701—who had also been recognised, taken a coronation oath and anointed? This of course was the question asked continually by the Jacobites, and was to remain a matter of division and war until the defeat of Charles Edward, the Young Pretender, at the Battle of Culloden in 1746.[2] At (English) law, when one king who has been recognised, taken the oath anointed, and crowned, is replaced by the people by another who has been recognised, taken the oath, anointed and crowned, then the office of king has passed into that second person's keeping. Homage must be withdrawn from the old king, and homage and allegiance given to the new king. If this is done, then in my view, the legal title of the

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to 1st February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act, 1948*, (c. 62), sch. 2.

[1] See Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England with Notes and introduction, with reproductions of the two celebrated pictures in medieval coronation Mss., inserted by special permission, with three pictures, viz. the Coronation of James II, and the vestments used thereat*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, at p. 15, and p. 43, note 1 and note 2.

[2] Bonnie Prince Charlie was defeated by William, Duke of Cumberland; the flower Sweet William was named after him in England; but in Scotland to this day it is known as 'stinking Willie' or 'sour Billie'.

new king is perfected.[1] The old king has lost his jurisdiction, together with the prerogatives and duties that went with the office of king, which have been conferred upon his successor. This situation under Scots law has already been discussed,[2] and it would appear that William became king of Scotland after he had taken the Scots coronation oath some time in May 1689.[3]

THE BILL OF RIGHTS

THE BILL'S LEGALITY

Once William and Mary had accepted the *Declaration of Rights*, the Convention purported to proclaim them king. It would appear that, after the coronation, the convention continued to sit as a 'parliament' under the purported writs issued by William before the coronation.[4] This continued 'Convention parliament' in its second session which reassembled on 25 October 1689 redrafted the *Declaration of Rights* into what is now known as the *Bill of Rights*, which was passed by the Convention lords and commons some time during that session, and apparently received the royal assent on 16 December 1689.[5] There continued to be doubt, however, as to the legality of this Act, together with others which had been passed by the 'Convention parliament' even after William and Mary's coronation, because of the fact that no legal king had issued the writs for its calling. Consequently, the *Crown and Parliament Recognition Act* [6] was passed in 1690 by what is called the second parliament of

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[1] The ramifications of the anointing for kingship is not discussed in this dissertation.

[2] See *supra*, 'The Scottish Coronation Oath', p. 372 ff..

[3] See *His Majesty's gracious letter to the Meeting of the Estates of His Ancient Kingdom of Scotland*, 17 May, 1689, taken from a contemporary print, 'by order of the Convention of Estates', quoted in full in Dykes, *Source Book of Constitutional History*, *loc. cit.*, at pp. 127-128; and see discussion under 'The Scottish coronation Oath', *supra*.

[4] See *The History of England*, by Lord Macaulay, 1836; (Popular Edition in Two Volumes), Longmans, Green, and Co., London, new impression 1906; Vol. I, at pp. 712-713—see my Appendix I.

[5] The *Bill of Rights*, 1 Will. & Mar. Sess. 2 c. 2, 1688 (1689); See C Grant Robertson,, *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, Methuen & Co, London, 1904, 5th edn. enlarged, 1928, at p. 129; and see S B Chrimes, *English Constitutional History*, Home University Library, Oxford, 1948; 4th edn. in Oxford Paperbacks University Series, 1967, p. 118; and see T F T Plucknett's 11th edition of *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, at p. 449. The actual dates as to when the Declaration was passed by the 'Convention parliament' seem obscure.

[6] *Crown and Parliament Recognition Act* 1689, (1690) 2 Will. & Mary c. 1, an act for recognizing king William and queen Mary and for avoiding all questions toughing the acts made in the parliament assembled at Westminster the thirteenth day of February one thousand six hundred and eighty eight— from *Statutes in Force*, Official Revised Edition, Revised to 1st February, 1978, Her Majesty's Stationery Office, London, 1978. Short title given by *Statute Law Revision Act, 1948*, (c. 62), sch. 2.

William and Mary, but which in fact was the first summoned by writs issued by William after his coronation. This Act retrospectively legitimated all acts passed by the 'Convention parliament' assembled at Westminster on 13 February 1688 (1689).

The *Bill of Rights* as it stands today is specifically noted to have been 'declared to be a Statute by *Crown and Parliament Recognition Act*, 1689 [*sic*—1690] (c. 1).'[1] What is interesting to note, is that the *Coronation Oath Act*, which is also printed by Her Majesty's Stationery Office and is recorded amongst the current *Statutes in Force*,[2] does not bear the same notification that it was declared to be a statute by the *Crown and Parliament Recognition Act*. This may well be because the *Coronation Oath Act* was passed by the 'Convention parliament' after the proclamation of William and Mary as monarchs on 13 February, but assented to by William on 9 April, two days before the coronation on 12 April,[3] and that therefore any purported assent given by them to the so-called act before their coronation was inoperative.[4] On the other hand, the *Crown and Parliament Recognition Act* specifically applied to 'all and singular the Acts made and enacted' by the 'late Parliament assembled at Westminster the thirteenth day of February one thousand six hundred and eighty-eight(*sic*)'. I can find no reason for the apparently different treatment by HMSO of these two Acts (the *Bill of Rights* and the *Coronation Oath Act*), and can see no reason why the *Crown and Parliament Recognition Act* should not effectively have legitimated the *Coronation Oath Act*.

But to return to the *Bill of Rights*. The effect of the Act, once it had been legitimated, was to specify :

- the matters as established in the *Declaration of Rights*[5]
- that His Majesty William would exercise the regnal power
- the categories of person who could succeed to the throne

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[1] See *Statutes in Force, Official Revised Edition, Bill of Rights*, An Act declaring the Right and Liberties of the Subject and Setleing the Succession of the Crowne. (*Rot. Parl.* pt. 3, *nu.* 1), revised to 1st February 1978; HMSO, London, 1978; Short Title give by *Short Titles Act 1896*, (c. 14), Sch. 1; Act declared to be a Statute by *Crown and Parliament Recognition Act* 1689 (1690) (c.1). [no date for the enactment of the Bill of Rights is given].

[2] *Coronation Oath Act*, 1688 (1689), 1 Will. 7 Mary, c. 6, *Statutes in Force*, Official Revised Edition, Revised to 1st February 1978, Her Majesty's Stationery Office, London, 1978; note that it states that the 'Short Title given by *Statute Law Revision Act 1948* (c. 62), Sch. 2.

[3] See *Extract from Parliament Rolls of William and Mary*, British Museum, Harl. MS. 7104, 9 April, 1689 (1688), folio 198b, and folio 199b, extracted in J Wickham Legg, *Three Coronation Orders*, *loc. cit.*, my Appendix I, p. 75.,

[4] See *The History of England*, by Lord Macaulay, 1836; (Popular Edition in Two Volumes), Longmans, Green, and Co., London, new impression 1906; Vol. I, at p. 712-713. And see my Appendix I.

[5] See 'The English Declaration of Rights', at p. 379 ff., *supra*.

- only the heirs of Mary's body, and in default of such issue, to Anne of Denmark and the heirs of her body, and in default, to the heirs of Williams body

  - the proscription from succession or enjoyment of the throne any popish prince, or any person married to a papist or holding communion with the church of Rome, the people being absolved of their allegiance to any such person, and that person to be treated as if they were 'legally dead'

- this was a recollection of the words of the Exclusion bills during the Exclusion Crisis

  - a requirement in an annexed schedule that the person succeeding to the throne make the anti-papal Declaration[1]

- the only mention of the coronation oath in the *Bill of Rights* is in this schedule. By stating that the putative king 'shall' audibly make the anti-papal declaration on the first day of the first parliament after his accession, or 'at his coronation before such person or persons who shall administer the Coronation Oath to him...at the time of his ...taking the said Oath (which shall first happen)'...raises the inference that the putative king shall take the Oath, but the wording itself does not place an unequivocal requirement upon the king to take the Oath—he could make the declaration to parliament, and not make the oath at all under the *Bill of Rights*, as the directive in the schedule in the Bill is towards only the anti-papal declaration. Were this to occur, however, the person would be no king of England under the law.

  - the avoidance of any dispensation to a statute except as allowed in the statute itself, and except as provided for in any Bill to be passed by that session of parliament (i.e. in 1689)

  - a saving of grants and pardons granted before 23 October 1689

  - an attempted entrenchment of the precepts in the *Bill of Rights* 'to stand and remain the law of this realm for ever.'

It should be noted here, that the *Bill of Rights* did not confer on the House of Commons or the two Houses together, the 'power of the purse'. What it did do, was to make illegal 'levies by the prerogative', for longer time or in a fashion other than the houses had agreed to. This did not apply to the king's revenues, to which he had been entitled, which included an hereditary excise which had been granted to the king and his heirs and successor in perpetuity after the abolition of military tenures.[2] Appropriations, in the sense of the two Houses specifying the purposes for which monies granted were to be spent, first occurred in 1624 by stipulation by Charles I's parliament that certain monies were to be spent specifically for the relief of the Palatinate, and in 1665, for the purposes of the Dutch war.[3] There was then a clear distinction drawn between the king's revenues, and monies raised by taxation. It was over these latter that the Houses on occasion during the latter Stuarts, had exercised a nominating capacity as to how it should be spent. But the king's hereditary revenues (for example, excise, fines, treasure trove etc.) were his alone.

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[1] This was the declaration set out in *The Second Test Act*, 1678, 30 Car. II, stat. 2, cap. 1. This requirement is stated in the *Bill* in brackets with the notation ' in the HMSO 1991 issue of *Statutes in Force*, with the annotation ' annexed to the Original act in a separate Schedule.' This part of the Bill of Rights was amended by the *Accession Declaration Act*, 1910. 10 Edw. 7 and 1 Geo. 5, c. 29, s. 1.

[2] See Maitland, *Constitutional History*, *op. cit.*, pp. 433-434.

[3] See Maitland, *Constitutional History*, *op. cit.*, pp. 399-340.

THE BILL ASSESSED

There have been conflicting views of the *Bill of Rights*. In turn the views of the *Bill of Rights* have been coloured by the attitudes of writers towards the Revolution of 1688. For the Jacobites, the whole sorry history of the revolt of the English against their legal (Scottish) kings was one which left lasting scars, and still colours Scottish nationalism to this day. For the parliamentarian and English Whigs, the 1688 Revolution was 'Glorious', and 'Bloodless', and because it appeared that the two houses of parliament and the Commons in particular, had succeeded in placing on the throne a king of their choice—the word 'glorious' first being used by a Whig radical, one John Hampden (son of the John Hampden of *Ship-Money* fame).[1] Depending upon the degree of radicalism in their thought, it was represented as a victory for 'the parliament', meaning, in decreasing degrees (in Whiggish thought), either the supremacy of the House of Commons in law-making; or the supremacy of the two houses in law-making; or the supremacy of the king in parliament in law-making. It is from this Revolution that most commentators date the idea of the 'sovereignty of parliament', which in turn means different things according to the definition of 'parliament' to which one holds. For the Anglican Tories, it was sometimes seen either as enshrining the doctrine of the king-in-parliament as law-maker, or for the high Anglican Tories, as a rebuff for the prerogative and position of the king. But the predominant interpretation has always been sympathetic to the Whig point of view. As Lois G Schwoerer has noted:

> For almost three hundred years, the so-called Whig view of the Glorious Revolution prevailed, virtually unchallenged. Historians, with but a few exceptions, were content to perceive the context, political process, leadership, ideology, and consequences of the Revolution in much the same terms that Lord Macaulay laid out in his famous History of England, first published in the mid-nineteenth century.[2]

Commentators also have differing views.[3] The authors of *Subjects and Sovereigns*[1] see the

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[1] See Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, Introduction, p. 3, and n. 12..

[2] Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, Introduction, p. 1, and p. 1 ff.

[3] As Lois G Schwoerer notes in her Introduction to Lois G Schwoerer, (*ed.*), *The Revolution of 1688-1689, Changing Perspectives*, Cambridge University Press, Cambridge, 1992, p. 7, reappraisal of the Revolution had to wait upon historians asking different questions about the Revolution, and re-examining the sources. A recent re-documentation of the sources is in David Lewis Jones, (*ed.*) *A Parliamentary History of the Glorious Revolution*, London, HMSO, 1988, and in Robert Beddard, (*ed.*) *A Kingdom without a King: The Journal of the Provisional Government in the Revolution of 1688*, Oxford, Phaidon, 1988.

Revolution and the *Bill of Rights* as representing a triumph for the community-centred ideology, which in turn meant in their view, acceptance of the co-ordination principle in law-making, and a theory of legal sovereignty in king, lords, and commons equally and together. Lois Schwoerer refers to recent commentators[2] who have seen the Revolution and the *Bill of Rights* as being highly conservative, with the Bill doing little more than setting forth certain points of the existing laws, and simply secured to Englishmen the rights of which they were already legally possessed. Her own view is that while the *Bill of Rights* did restore certain ancient rights, it was essentially a radical document, representing a change in the nature of kingship.

HUME'S VIEW

David Hume in his essay 'Of the Original Contract' in 1748 wrote of no 'more terrible event than a total dissolution of government, which gives liberty to the multitude...', and went on to say:

> Let not the establishment at the *Revolution* deceive us, or make us so much in love with a philosophical origin to government, as to imagine all others monstrous and irregular. Even that event was far from corresponding to these refined ideas. It was only the succession, and that in the regal part of the government, which was then changed : and it was only the majority of seven hundred, who determined that change for near ten millions....was it not justly supposed to be, from that moment, decided, and every man punished, who refused to submit to the new sovereign? How otherwise could the matter have ever been brought to any issue or conclusion?[3]

He went on to maintain that the 'original contract' was a chimera, and any pretensions to popular consent mere vanity, because 'human affairs will never admit of this consent...but that conquest and usurpation, that is, plain force, by dissolving the ancient governments, is the origin of almost all the new ones... And in the few cases where consent may seem to have taken place, it was commonly so irregular, so confined, or so much intermixed either with fraud or violence, that it cannot have any great authority.'[4]

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[1] Corrine C Weston and Janelle R Greenberg, *Subjects and Sovereigns, the Grand Controversy over Legal Sovereignty in Stuart England*, Cambridge University Press, Cambridge, 1981

[2] See Schwoerer, '*Bill of Rights*', *art. cit.*, at p. 226—Mark Thompson, Lucile Pinkham, Jennifer Carter, Robert Frankle.

[3] 'Of the Original Contract' was published in the 1748 third edition of *Essays, Moral and Political*. For text see David Hume, *Selected Essays*, Stephen Copley and Andrew Edgar (*eds.*), The World's Classics, Oxford University Press, Oxford, 1993, 'Of the Original Contract', pp. 274-291, essay XXVI, at p. 280.

[4] David Hume, 'Of the Original Contract', *loc. cit.*, p. 281.

BENTHAM'S VIEW

Jeremy Bentham, writing in a preface to his *Fragment on Government* in 1776, saw the Revolution as the result of a 'power-stealing system', a 'sort of partnership' between the force of the monarch (William) and the fraud of the lawyers (the Whigs) to extract in 'the largest quantity possible ...the produce of the industry of the people out of the pockets of the people.'[1] He said:

> The existence of that pretended agreement [the original contract] (need it now be said?) was and is a fable ; the authors of the fable, the whig lawyers. The invention...had been made by them for their own purposes, and nothing could have been better contrived: for the existence of the contract being admitted, the terms remained to be settled: and these of course would be, on each occasion, what the interest of the occasion demanded they should be. It was in this offspring of falsehood and sinister interest, that the Fragment beheld the phantom, on the shoulders of which, the Revolution, that substituted Guelphs to Stuarts, and added corruption to force, had till then had its sole declared support. ... it was the offspring of Fiction; meaning here...that which is meant by it in law-language.
>
> A fiction of law may be defined—a wilful falsehood, having for its object the stealing of legislative power, by and for hands, which could not, or durst not, openly claim it,—and, but for the delusion thus produced, could not exercise it.[2]

BURKE'S VIEW

Edmund Burke, writing in his 1790 *Reflections on The Revolution in France*,[3] denied any interpretation of either the Revolution of 1688 or the *Bill of Rights* as conferring a right 'to choose our governors, to cashier them for misconduct, or to frame a government for ourselves.' He said :

> This new and hitherto unheard of bill of rights, though made in the name of the whole people, belongs to those gentlemen and their faction only[i.e. members of the Revolution Society.] The body of the people of England have no share in it. They will resist the practical assertion of it with their lives and fortunes. They are bound to do so by the laws of their country, made at the time of that very Revolution, which is appealed to in favour of fictitious rights claimed by the society which abuses its name.[4]

Burke maintained that the *Declaration of Rights* bound indissolubly together the 'rights and liberties of the subject' and the settlement of the *succession* to the crown,[5] and had nothing to

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[1] See Jeremy Bentham, *A Fragment on Government*, J H Burns and H L A Hart, (*eds.*), Cambridge University Press, Cambridge, 1988, Bentham's Preface to the second edition of the *Fragment*, reproduced in Burns and Hart, *loc. cit.*, Appendix A, p. 117

[2] See Bentham, *A Fragment on Government*, Bentham's Preface to the second edition of the *Fragment*, reproduced in Burns and Hart, *loc. cit.*, Appendix A, pp. 116-117.

[3] Edmund Burke, *Reflections on The Revolution in France*, 1790, published in *Reflections on the Revolution in France* by Edmund Burke, and *The Rights of Man*, by Thomas Paine, Dolphin Books, New York, 1961.

[4] Burke, *Reflections...*, *loc. cit.*, pp. 27-28.

[5] Burke, *Reflections...*, *loc. cit.*, p. 28, Burke's emphasis.

do with election, the passage of the crown to William being 'a small and temporary deviation from the strict order of a regular hereditary succession', but that this was not from *choice*, but rather from *necessity*.[1] Further he said that the Declaration maintained '*all* the legal prerogatives of the crown,'[2] and that the 'Revolution was made to preserve our ancient indisputable laws and liberties, and the ancient constitution of government which is our only security for law and liberty.'[3]

PAINE'S VIEW

Thomas Paine, that great supporter of republican principles, when writing *The Rights of Man*[4] in passionate response to Burke's *Reflections*, hotly denied that the people of 1688 or of any other period could bind future generations in any shape whatsoever,[5] because

> the illuminating and divine principle of the equal rights of man (for it has its origins from the Maker of man), relates not only to the living individuals, but to generations of men succeeding each other. Every generation is equal in rights to the generation which preceded it, by the same rule that every individual is born equal in rights with his contemporary.[6]

He saw a constitution as a thing *antecedent* to government[7]; in England, government had grown out of the conquest by William of Normandy, but England had never regenerated itself, and was therefore without a constitution,[8] and furthermore, if the succession runs in the line of the Conqueror, (as Paine says Burke said it did), then 'the nation runs in the line of being conquered, and it ought to rescue itself from this reproach.'[9] Speaking then, of the argument that any heritage relating to war and conquest is held in check by the power of the parliament to withhold supplies, he said:

> It will always happen, when a thing is originally wrong, that amendments do not make it right; and it often happens, that they do as much mischief one way as good the other: and

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[1] Burke, *Reflections...*, *loc. cit.*, p. 29, Burke's emphasis.

[2] Burke, *Reflections...*, *loc. cit.*, p. 31, Burke's emphasis—see *Bill of Rights*, [William and Mary are] '...our sovereign liege lord and lady king and queen of England...with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging...'

[3] Burke, *Reflections...*, *loc. cit.*, p. 43, and see pp. 42-45.

[4] Thomas Paine, *The Rights of Man*, dedicated to George Washington, published 13 March, 1791. Republished in *Reflections on the Revolution in France* by Edmund Burke, and *The Rights of Man*, by Thomas Paine, Dolphin Books, New York, 1961.

[5] Paine, *The Rights of Man*, *loc. cit.*, p. 278.

[6] Paine, *The Rights of Man*, *loc. cit.*, pp. 303-304.

[7] Paine, *The Rights of Man*, *loc. cit.*, p. 309, Paine's emphasis.

[8] Paine, *The Rights of Man*, *loc. cit.*, p. 309.

[9] Paine, *The Rights of Man*, *loc. cit.*, p. 316.

> such is the case here; for if the one rashly declares war as a matter of right, and the other peremptorily withholds the supplies as a matter of right, the remedy becomes as bad, or worse than the disease.[1]

Finally, on the Revolution of 1688, he said:

> As the estimation of all things is by comparison, the Revolution of 1688, however from circumstances it may have been exalted beyond its value, will find its level. It is already on the wane, eclipsed by the enlarging orb of reason, and the luminous revolutions of America and France. In less than another century, it will go, as well as Mr Burke's labours, "to the family vault of the Capulets." Mankind will then scarcely believe that a country calling itself free, would send to Holland for a man, and clothe him with power, on purpose to put themselves in fear of him, and give him almost a million sterling a year for leave to submit themselves and their posterity, like bond-men and bond-women forever.[2]

Paine would have found it even more remarkable that the Revolution of 1688 has been revered in the fashion that it has almost to the third millennium, or, indeed, that the British monarchy has survived.

THE VICTORIAN VIEW

Macaulay saw the glory of the Revolution as residing in a constitution that had been restored[3]—that

> the ancient laws by which the prerogative was bounded would henceforth be held as sacred as the prerogative itself...; that the executive administration would be conducted in conformity with the sense of representation of the nation; that no reform, which the two houses should, after mature deliberation, propose, would be obstinately withstood by the sovereign... [4]

Henry Hallam saw the Revolution as 'remedial', and as representing the triumph of liberal and constitutional principles over those of absolute monarchy, a scenario in which William of Orange was 'the most magnanimous and heroic character of that age.'[5] Others have seen the Revolution as designed specifically to end the monarchy as it had been restored in 1660.[6]

MAITLAND'S VIEW

Professor Maitland's view was that the actions of 1688 and 1689 constituted a Revolution,

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[1] Paine, *The Rights of Man*, *loc. cit.*, pp. 316-317.

[2] Paine, *The Rights of Man*, *loc. cit.*, p. 330.

[3] See reference to Macaulay in Nenner, 'Later Stuart Age', *art. cit.*, p. 189.

[4] Macaulay, *History*, iii, 1310, quoted in Plucknett, *Taswell-Langmead's* 11th edn., *op. cit.*, pp. 458-459.

[5] See Henry Hallam, *Constitutional History*, *op. cit.*, pp. 677-680.

[6] See C Grant Robertson, *Select Cases and Documents*, *op. cit.*, p. 117.

being completely illegal, which in turn raised doubts about the legality of the kingship of William and Mary, which in turn raised doubts as to the validity of all acts passed by 'parliaments' called by them (which would of course include the *Bill of Rights*.) Being a Revolution, he said it 'could not be worked into our constitutional law'.[1] He said:

> Those who conducted the Revolution sought, and we may say were wise in seeking, to make the Revolution look as small as possible, to make it seem like a legal proceeding, as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible. Had it failed, those who attempted it would have suffered as traitors, and I do not think that any lawyer can maintain that their execution would have been unlawful.[2]

But in the end, he suggests that the Revolution merely effected a restoration of the Lancastrian constitution, in that all the prerogatives were saved except in so far as they had been expressly abolished by statute—essentially this meant an end to the suspending and dispensing powers, and reduction in the king's power to keep a standing army in peacetime (he could not do this without parliamentary consent).

NAIRN'S VIEW

Tom Nairn saw the Revolution of 1688 as being a 'brilliant *coup d'etat*' which 'set up a new state which pretended to be creakingly old'; as being the tacit settlement of 'sovereignty on the elite', as a result of which, 'the aristocracy and patrician class which was literally in parliament could do what it liked—in effect it became a "collective Monarch", unbound by written rules or any competing focus of sovereign authority. ... By 1689, we find this collective inward certainty of divine origins had settled down for good into the House of Commons; it had become "the Establishment".' He refers with approval to Christopher Hill's view[3] that the real purpose of the Revolution was 'the premature burial of popular sovereignty—the ruling class erected a state with no house room for democracy.'[1]

BOGDANOR'S VIEW

Recently, Vernon Bogdanor in *The Monarchy and the Constitution* has seen the Revolution in a slightly different way. He said:

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[1] Maitland, *Constitutional History*, p. 285. See my discussion of Maitland's conundrum, at p. 157, p. 160, note 1 p. 362, p. 362, and p. 391 *supra*

[2] Maitland, *Constitutional History*, p. 284.

[3] From Christopher Hill, 'God and the English Revolution', *History Workshop Journal*, Spring 1984, quoted in Tom Nairn, 'The Burial of Popular Sovereignty', *New Statesman*, 11 March, 1988, p. 16 ff.

> This process of constitutional evolution from the Magna Carta to the Bill of Rights and the Act of Settlement established the principle that in Britain the sovereign owed his or her position not only to hereditary right, but also to the consent of parliament, and that it could be taken away if he or she misgoverned. The implication of the 1689 settlement, enshrined in the coronation oath in which the sovereign promised to govern 'according to the statutes in parliament agreed upon and the laws and customs of the same,' is that the sovereign rules through the consent of parliament. Allegiance to the sovereign is not unconditional but the sovereign's keeping to the terms of this oath. Thus the Glorious Revolution not merely altered the succession; it also fundamentally changed the basis on which the sovereign reigned. The sovereign was deprived of the ability to attack the position of parliament or the independence of parliament in the constitution. Since 1689, indeed, parliament has met every year and the monarchy has owed its title to parliament. Thus the new settlement made the monarchy into a parliamentary, and therefore constitutional monarchy.[2]

The Revolution did not alter the basis on which the sovereign reigned. The sovereign did not, and does not rule by the consent of parliament. In 1688 the appointment of William and Mary as putative king and queen was not by parliament, there being no parliament in existence, as a parliament can only be called by a legal king. The basis on which William and Mary finally became the legal king and queen was the same as it always had been—recognition by the people, the taking of the coronation oath, and anointing, together with the receipt of homage. The sovereign rules by the consent of the people, and in accordance with the common law, not by virtue of any act of parliament. Nor were the laws which the sovereign was to uphold altered. He had always been sworn to maintain the just laws and customs of his people, and under the oath as drafted after the Revolution, he still was. It is true that if a sovereign broke his coronation oath, the people (not parliament) would be entitled should they wish, to depose him. (But James had not broken his English coronation oath, and had never taken the Scottish one.) Nor did the new coronation oath deprive the monarch of any of his ability to 'attack the position of parliament', should that be necessary for the protection of the people. Should there be an eventuality where the two houses of parliament attempted to subvert the peace and happiness of the people at large, the monarch would rather under his oath have an obligation to support the people as against the two houses. Nor did the coronation oath require the monarch always to assent to any bill put up by the two houses.

In addition, Professor Bogdanor has quoted the coronation oath elliptically, giving rise to the possibility of misinterpretation. As I have demonstrated above, the king did not and does not swear to govern according to the statutes in parliament agreed on and the laws

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[1] All these quotations from Tom Nairn, 'Burial of Popular Sovereignty', *art. cit.*

[2] see Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, p. 8.

and customs of parliament. What the king swears to do is much more complex than that, and even if one looked only at the first clause of the oath, one sees quite clearly that what the king swears is

> Will You solemnely Promise and Sweare to Governe the People of the Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same?

The king and queen in 1689 swore to govern the people of the kingdom (and its dominions) according to the statutes agreed in parliament and the laws and customs—of parliament? or of the kingdom and dominions? Clearly, the text on its face means the laws and customs of the kingdom and dominions. Firstly, the parliament does not have laws and customs applicable to the people of the kingdom and the dominions; it has standing orders applicable to itself and privileges attaching to members of the houses, but these do not affect the people at large. Secondly, the use of the words 'statutes' and 'laws' in the sentence means that they are distinct things, and all that parliament (the two houses and the king) could do in 1689 was make statutes and no other sorts of laws. Thirdly, there are other laws beside those which are made in parliament, according to which the monarch must govern, for example, common law principles which the monarch must uphold in his courts, or ecclesiastical laws decided in convocation, the monarch being the head of the Church of England, and the clergy presumably being people. Fourthly, by using the word 'statute' the monarch himself is included in the word 'parliament' since no bill from the two house can become law without his assent, and as I have said elsewhere, the capacity to agree coexists with the capacity to disagree in any of the entities necessary to make a statute. Therefore on its face the oath's first clause is incapable of sustaining any interpretation that by it the monarch rules through the consent of parliament.

The oath sworn by the queen of England today supports my contention: she swore to 'govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, and the Union of South Africa, Pakistan and Ceylon, and of {My} Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs.'[1]

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[1] See p. 487 *infra* for full text; also see Appendix I.

THE BILL, THE LAW, AND POLITICS

What the Revolution of 1688 did, in my view, was to strengthen, not to weaken, the existing constitution. Tom Paine was right when he pointed to the ludicrous nature of the actions of the Conventioneers, in getting themselves a king from Holland in order to submit themselves to him. For this is what they did, despite the proselytism of the rubric of the 'sovereignty of parliament'. The Conventioneers did not, despite some considerable republican sympathies abroad in the 1680s, abandon the monarchy. What they did was depose one king and replace him with another. The actions of the Conventioneers did not create the new king. Nor in my view did they establish, as Lois Schwoerer suggests and Professor Bogdanor implies, a 'new kingship'. The new king and queen were inaugurated into their office according to the age-old requirements of the common law—through recognition by the people, the taking of the coronation oath, and by anointing and the giving by the representatives of the people of homage. When the new and legal parliament was called by the king in 1690, all members still took the oath of service and support to the king; the Houses continued to be called by the king's writ, and statutes to be formulated in the same fashion, being passed by the Houses, assented to by the king, and proclaimed by the king. The coronation oath maintained the common law, the position of the king, and did nothing to disturb the prerogatives of the king. Thus at law, in my view, the Revolution of 1688-1689 maintained, continued, and probably strengthened the legal position of the king, in that, despite the revolution, the Houses at law continued to be the creature of the king's writs, and statutes of the king's assent.

The *Bill of Rights*, passed after the coronation and legitimated by the *Crown and Parliament Recognition Act* of 1690, made, in my opinion, no sweeping changes in the law. The prerogative was limited, but only in certain narrow respects, and the proscription on a standing army in peacetime without consent of parliament was no impediment to the exercise of the prerogative to protect the people from external threats. The prescription by the 'Convention parliament' in the *Bill of Rights* of the categories of person who could succeed to the throne was new in its reliance upon religion as a criterion, but in law it was the same kind of endeavour as enacted by the parliaments of Henry IV, Richard III, and Henry VII in their *Titular Regni*, and of Henry VIII in the *Succession Act*, whereby they attempted to secure the succession of the throne in a certain fashion in perpetuity. The circumscribing of the power of the monarch to raise money was not new either, nor the

emphasis on the privileges of parliament. Nor was the attempt to 'entrench' the Bill as law 'for ever'.

It was not in the law that the *Bill of Rights* was significant. It was in its politics. By this I mean, *at law*, it was quite clear that a parliament was summoned by the king, and that statutes were made law after Bills or petitions had passed through both Houses with their assent, and the king also had assented to them. The authority under which the statute was promulgated was the king's authority.[1] The legal positions of the king, the two Houses, and of the king and the two houses together, remained the same as it had been before the Revolution.

Now while over the centuries, there had been variations upon the exact formulation used in a statute to signify the authority under which it was made,[2] until the seventeenth century there had never been any doubt that the sovereign authority lay in the king, and that the prime law-making and law-enforcing capacities also lay in the king, through various avenues—the prerogative, (the source of the equitable and extraordinary jurisdictions such as pardon, suspension, dispensation, and *parens patriæ*); the king's courts of Common Pleas and King's Bench, Chancery and Exchequer; the king's proclamations; the king's officers of the peace; and the king's parliaments.

With regard to the king's parliaments, they had grown from being advisers to the king, periodically called, similar to the king's council, but drawn from a broader base to represent the views of the people (the three estates of Lords, clergy and commons) to the king, to being an active part of the law-making process—this was the greatest legacy of Henry VIII. In tandem with this development, the physical presence of the king in his parliaments became less frequent, he acting often through messengers, or friends of the court in the commons or lords. Where once the word *'parlement'* had connoted the representatives of

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[1] see Maitland, *Constitutional History*, p. 423. This is still legally the case.

[2] Some enactments had referred to their being enacted by the king the Lords spiritual and temporal and the Commons in the present parliament assembled, for example, 28 Henry VIII, c. 10, 1538.; others to their being enacted by the king's royal assent and the assents of the Lords spiritual and temporal and the Commons, for example, 24 Henry VIII, c. 12, 1533; and yet others to their being enacted by the authority of parliament, for example 1& 2 Philip & Mary, c. 6, 1554; and see 16 Car. I, c. 10; but the usual formulation was for the bill to call for the enactment by the king, with the assent and/or consent of the Lords spiritual and temporal and the Commons, for example, 13 Eliz. 1, c. 2, 1571; 13 Car. II, c. 6, 1661. Maitland dates the use of the words 'by the authority of the same" in enactments, meaning by the authority of the king, from 1445—see Maitland, *Constitutional History*, p. 423.—'But to this day the form makes the statute the act of the king.'

the three estates advising and working with the king, 'parliament' came to be seen in the seventeenth century as an entity separate from the king, whose members were jealous of their privileges, liberties, and perceived powers. Hence Charles I's disbelief when the commons began to speak of 'parliament' as the Houses alone, or even as the Commons alone. Hence too, the common use of the word 'parliamentarian', to describe those who spoke vehemently either against the king or for the privileges of the House of Commons before, during and after the civil war.

The idea of the 'sovereignty of parliament', meaning pre-eminent law-making power in the two houses, and probably only in the Commons, to which the king must comply, was propagated most fiercely before and during the civil war. Lawyers and parliamentarians such as Coke, who changed his colours like a chameleon, were adept at finding, making up, or distorting both history and precedent to fit this idea. (The continuing and passionate misinformation during the seventeenth century about the coronation oath is merely one, though a crucial, example.)

I must reiterate that the concept of 'sovereignty of parliament' as it emerged in and after the Revolution of 1688 was, at law, a complete chimera; a fabrication of false premises, but an ingenious appeal to the instincts for power of the few who were entitled to sit in the Houses of parliament. The Houses had no life of their own motion; they could not make laws without the king; nor were statutes which originated in them the only source of law, the king being bound by his coronation oath to uphold, even on the terms of the 1689 coronation oath, the laws and customs of the realm and dominions, and the laws of God, as well as the statutes agreed in parliament.

But the idea wrought then, and still wrings, a Circean seductive song on men interested in power. This was the great success of the *Bill of Rights* and of the Revolution of 1688-1689. They gave the illusion of power to those who effected them, who in turn projected their presumptions as if they were truths. They were so successful that they, and generations to this present day, accept the mirage as reality. The use of the terms *Whig* and *Tory* date from the time of the Exclusion Crisis, with the Whigs seeking to exclude James, and the Tories to support him. These terms have been used ever since, the Revolution of 1688-1689 being seen as a great Whig victory; but it has seemed to many that the vast majority of later historians who have shaped later generations' perceptions of the events of 1665-1689

appear to have been 'protestant, progressive, and Whig.'[1] Whatever the legal and constitutional outcome of the Revolution of 1688-1689 in reality, it would seem that the Whigs certainly won the propaganda war, and it is worth remembering that history 'will lie to us till the very end of the last cross-examination'[2], and that it is wise 'not [to] allow any sympathies or antipathies to interfere with our statement of the law.'[3]

Thus the greatest victory was not legal, (that is, not constitutional), but rather political (that is, propagandist), and a resounding triumph for the House of Commons. While monetary qualifications attached to representation in the Commons, also attached were extraordinary privileges, both financial and libertarian. These had been abused on numerous occasions in the past, but after the Revolution, the excesses and pretensions of the Commons grew large. A F Pollard in his *Evolution of Parliament* saw the Revolution as robbing the crown of its liberty of conscience and imposed upon it a decalogue of prohibitions, while elevating the liberties of parliament; while bounds were set on the freedom of the crown, none was set on that of parliament, particularly on the vaunted privileges of the Commons. He says:

> For three quarters of a century after the Revolution the house of commons asserted an independence and irresponsibility as great as that which the Stuarts had claimed for themselves. It interpreted its liberties as including powers to deny the right of petition to the crown,[4] to refuse as a matter of privilege the right of electors to vote, to exclude members whom they had elected, and to admit candidates they had rejected.[5] To report speeches and to publish division lists taken in parliament was denounced as countenancing the mischievous idea that members were responsible to an authority outside the walls of

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[1] See H Butterfield, *The Whig Interpretation of History*, G Bell and Sons, London, 1931, 1963, at p. 3. And see S B Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge University Press, Cambridge, 1936; reissued by American Scholar Publications, Inc., NY, 1965, at p. 2— '...the parliamentary preoccupations of constitutional historians, and the Whiggish outlook of nearly all historians except the more recent...'

[2] See Butterfield, *The Whig Interpretation of History*, *loc. cit.*, p. 132.

[3] Maitland, *Constitutional History*, *op. cit.*, p. 282.

[4] For these actions, see the extracts in Costin and Watson, *ed. cit.*, pp. 191-192, Resolution of the House of Commons against Petitions, *Commons Journals*, xiii, 518, 8 May, 1701, and Resolution of The Commons on elections, *Commons Journals*, xiv, 308, 26 January, 1704, Costin and Watson, *ed. cit.*, pp. 193-194. And see Williams, *Eighteenth Century Constitution*, *ed. cit.*, pp. 221-248. In the *John Wilkes case*, (1768-1782)—19 *State Trials*, 989, and *Commons Journals* xxix, 667, 675, 723, xxxii, 178, 228, 387, xxxviii, 977, and *Lords Journals*, xxx, 426, xxxii, 417— John Wilkes was thrice elected as a member of the house of Commons, and twice rejected, the third time his opponent being entered by the commons in his place, the commons attempting to change the law of the land by its own resolution; finally the commons attempted to expunge all records of this sorry episode as being 'subversive' (*CJ*, xxxviii, 977, Williams, *Eighteenth Century Constitution*, *ed. cit.*, p. 244).

[5] See *Ashby v White*, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 14 *State Trials*, 695. And see *Paty's case*, Ld Raym. 1105, and see the Commons' Resolutions in the case of *Ashby v White*, *Commons Journals*, xiv, 308, extracted in S&M2, pp. 621-622.. See discussion *infra*, at '*Ashby v White*', p. 420 ff.

the two houses; and their parliamentary liberties were even invoked to give extra-legal protection to members' fishponds and rabbits.[1]

WILLIAM'S GOVERNMENT

After the Revolution, and the coronation of William and Mary, the constitution continued pretty much as before, the major difference being in the psyche of the English people—the deposition of a king upon convenient fictions, and the acquiescence in a foreign invasion which could have led to war on English soil again between Englishmen, are not things which can occur without leaving major stains and scars upon the conscience and soul of a nation, particularly upon the prime movers. Tom Nairn was of course right when he saw the Revolution as being elitist; the concept of 'the people' for whom the Whigs purported to speak bore no resemblance to reality. In addition to being religiously intolerant, the revolutionaries were male, educated, propertied, and wealthy, and represented the views of the last parliaments of Charles II—they had no valid or legal pretensions to power, merely their own belief that they should have it and wield it.

William was no mere tool of the Houses, and had they intended that the king were to be required to agree to every piece of legislation emanating from them, in this they were mistaken.[2] While he acquiesced in the appointment of judges 'for good behaviour' rather than at the king's pleasure, he refused to assent to a Bill to this effect,[3] and he twice rejected Bills to which both houses had agreed.[4] Before accepting the crown, William had 'had a great jealousy of being thought to be governed, [which] apprehension', said Lord Halifax, 'will give great uneasiness to men in great places.' He had thought the government was to reside in the Privy Council; he said that 'the Commons used him like a dog.—Their coarse usage boiled so upon his stomach that he could not hinder himself from breaking

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[1] A F Pollard, *The Evolution of Parliament*, Longmans, Green, and Co., London, 1920, 2nd edn 1926, new impression 1964, at pp. 179-180; Pollard refers to McIlwain, p. 376 as corroborating.

[2] See Resolution of the House of Commons to William III, complaining about the king's refusal of assent to Bills agreed to by the houses, *Commons Journals*, xi, 72, 27 January, 1693, reproduced in W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914*, Vol. I, 1660-1783, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at pp. 190-191. The king's reply flattered the commons, but did not resile from his ability not to assent to bills (*Commons Journals*, xi, 74, 31 January, 1693, Costin and Watson, I, *ibid.*, p. 190); the house accepted the king's response and did not persist (*Commons Journals*, xi, 75, 1 February, 1693, Costin and Watson, *ibid.*, p. 190).

[3] See Maitland, *Constitutional History*, *op. cit.*, p. 313.

[4] In 1692, to the Bill for Triennial Parliaments, and in 1694, to the Place Bill—see Plucknett, *op. cit.*, p. 624, n. 26.

out, sometimes, against them'. Ten days after his coronation, and over two months after his acceptance of the *Declaration of Rights* and the crown, he said: '...it was to be considered whether all the articles in the Declaration [of Rights] were to be confirmed in the bill of Succession[1]—He had no mind to confirm them, but the conditions of his affairs overruled his inclinations in it.'

Moreover, it would appear from his conversations with Lord Halifax, that his preoccupation with waging war against France was so great, that this alone may have been the 'greatest inducement to his undertaking' of the crown.[2] In any event he immediately thrust England into the Nine Years War (1689-1698) with France, receiving more than £4.5 million from parliament in a two-year period alone. Louis XIV concluded the Treaty of Rijswijk with William in 1699, recognising William as king of England.[3] But by the time William died in 1702, England was again plunged into war [Spanish Succession (1702-1715)],and was more than £14 million in debt, which in turn was being financed by the Bank of England, which had been created in 1694 under a joint Whig-London mercantile establishment plan.[4]

William spoke of himself as a 'Trimmer'[5] between the conflicting and opposing parties in the Houses of parliament, and the entrenchment of political parties may be dated from this time. Moreover, the sense of constraint, or debt, the peculiar 'conditions of his affairs' in the sense that he was king of England, not of right, but of political manoeuvrings by certain members of the Houses, clearly informed his actions with regard to those Houses, and this constraint left a lasting impression to the detriment of the perception of the king's position, which was only to reinforced later on the accession of German House of Hanover to the throne.

The two houses of 1694 under William and Mary succeeded in perpetuating themselves

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[1] He was referring to the *Bill of Rights*.

[2] All these quotations from 'Spencer House Journals' of conversations between William and Halifax, quoted by H C Foxcroft, *Life and Letters of Halifax*, (1898), Vol. II, pp. 203-247; reproduced in E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, pp. 60-64.

[3] See *The New Encyclopædia Brittanica*, Vol. 29, Encyclopædia Brittanica Inc., Chicago, 15th edn. 1992., p. 64.

[4] See *The New Encyclopædia Brittanica*, Vol. 29, *ibid.*, p. 64.

[5] William of Orange in conversation with Lord Halifax, quoted in Williams, *The Eighteenth Century, loc. cit.*, pp. 60-64.

until 1696 by the passage of the *Triennial Act*,[1] and required that a parliament be called within three years of the dissolution of the preceding parliament (repeating the provisions of the earlier *Triennial Act* of 1664[2]), and stating that no (English) parliament shall continue for longer than three years. William had refused to assent to a Bill for this purpose in 1693,[3] but assented in 1694—its purpose was primarily to guard against long parliaments.

The threat of foreign wars in support of the deposed James II and VII had been reinforced by the proclamation of James as king by a parliament called in Dublin, after James had landed in Ireland with an Anglo-French army in March 1690. William defeated this army at the Battle of the Boyne in July 1690, and William's generals retook Ireland in the following year. Fear still remained about the possibility of invasion, or the restoration of catholicism. The recognition by France of William as English king in the Treaty of Rijswijk 1698 at the conclusion of the Nine Years War did not last, Louis XIV proclaiming the Old Chevalier, James Francis Edward, king James III of England on the death of James II and VII in September 1701, and accepting the crown of Spain for his grandson.[4]

ACT OF SETTLEMENT

The final major legal change occurred in the English *Act of Settlement* of 1701[5], when, after the death in 1700 of the Duke of Gloucester, the heir presumptive under the English revolutionary settlement, it became clear that there would be no legitimate issue from either William and Mary, or William alone, and a perceived necessity arose to eliminate the claims of the Old Chevalier, and to reiterate the fact that the succession to the crown of England was entailed upon only protestants. The Act required every king to come to take the

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[1] *Triennial Act*, 1694, 6 & 7 Will. and Mary, c. 2, *Statutes at Large*, IX, 331, extracted in Williams, *Eighteenth Century Constitution*, *ed. cit.*, pp. 49-50.

[2] *Triennial Act*, 1664, 16 Car. II, c. 1—this act did not provided for any means of calling a parliament should the king not act in accordance with the statute and call a parliament within three years of the dissolution of the previous one. The first *Triennial Act.*, enacted by the long parliament in 1641, (*Triennial Act*, 1641, 16 Car. I, c. 1) had also provided for the calling of a parliament within three years of the dissolution of the previous one, and if the king did not do so, then it would meet without his summons. This act was repealed in 1664 as being in derogation of the king's just rights, 16 Car. II, c. 1, taking its place.

[3] See Maitland, *Constitutional History*, *op. cit.*, p. 296.

[4] The Old Chevalier, James III of England was also, of course, James VIII of Scotland; I have been unable to ascertain if he took any oath in relation to the governance of Scotland, or was recognised by the Scottish estates.

[5] 12 & 13 Will. III, c. 2— *Act of Settlement*, 12 & 13 Will. 3 c. 2; *Statutes in Force*, *Official Revised Edition*, An Act for the Further Limitation of the Crown and better securing the Rights and Liberties of the Subject. (*Rot. Parl.* 12 & 13 Gul. III. p.1, n.2.), revised to 1st February 1978; HMSO, London, 1978; Short Title give by *Short Titles Act 1896*, (c. 14), Sch. 1

coronation oath as set out in the English *Coronation Oath Act*, and to make the anti-catholic Declaration. It required that the king shall join in communion with the Church of England (William of Orange was a Calvinist); stated that there was no obligation upon a king who was a foreigner to engage in war in support of any country not belonging to the crown of England, without the consent of parliament; stated that 'placemen'—men holding an office or place of profit under the king or in receipt of a crown pension, could not sit in the House of Commons; that judges' tenure to be for 'good behaviour', but capable of removal by both houses of parliament; and that a royal pardon under the great seal was to be no protection against impeachment by the House of Commons. It stated that the Laws of England were the birthright of the people, and that all kings of England should administer the government according to those laws, and then confirmed all 'laws and statutes...for securing the established religion, rights and liberties of the people, and all other laws and statutes ...in force...'.

It also included a clause designed to vest the Privy Council with the major tasks of administration of government and to require signature by the Councillors of all resolutions taken in the Council. The 'object of this clause was to restore the Privy Council as the legal and constitutional organ of policy, to condemn the nascent Cabinet, which was unknown to the law, to secure that ministers as Privy Councillors should be legally responsible (i.e. liable to impeachment) for their share in advising measures disapproved of by Parliament, and to obtain a record provable in a court of law.'[1] But this clause was repealed under Anne and George I.

The Scots, however, did not accept the *Act of Settlement*, nor had they enacted (assuming that they were a legal entity and capable of enacting legislation[2]) any act of their own disposing of the succession of the Scots crown. Rather they insisted upon the right of the Scots Estates to choose—it would appear that the accession of Anne to the Scots throne, though she was a Stuart, was not automatic.

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[1] See C Grant Robertson, *Select Cases and Documents to illustrate English Constitutional History*, 1660-1832, Methuen & Co. Ltd., London, 1904, 5th edn. 1928, p. 156. He says, 'The investigations into the responsibility for the partition treaties and the revelation that Somers' act in affixing the great seal to a blank draft lie behind the form of words, finally adopted. But the clause proved quite unworkable, and was very soon repealed.' It was repealed by 4& 5 Ann. c. 20, s. 27, and 1 Geo. I, st. 2, c. 51.

[2] See discussion *supra* p. 372, 'The Scottish Coronation Oath', on the legality of the Scots parliament in the context of the *Claim of Right*.

COMMONS' MYTHS

Finally, after the Revolution, the Houses invariably followed the practice of appropriating monies raised by taxation for specific purposes. At the beginning of his reign, William had held free all the hereditary excise and traditional revenues of the crown. But before the end of William's reign, the Houses had granted a new tax and an annual sum of £700,000 to the king, but stated that if any of the king's revenues from the hereditary excise, and the crown lands and many of the smaller prerogatives (the traditional revenues of the crown) exceeded £700,000, then no more of that revenue was to be issued to the king without the agreement of the houses.[1] William had from the very beginning of his reign been resentful of the House of Commons' intentions to control the revenues of the crown—'...he now discovered' he said, 'plainly there was a design for a Commonwealth. ...he saw the design, in the managing of his revenue in the house.'[2]

Maitland has noted that the commons had in addition asserted, not merely that money bills must be first introduced into their house, but also that the lords could not make any amendments in them.[3] The claim cannot be traced back before the restoration, and, said Maitland, 'It is difficult to find any principle upon which this so-called privilege of the House of Commons can be founded.'[4] But legitimacy of claims never stood in the way of

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[1] 9 & 10 Will. III, c. 23. See Maitland, *Constitutional History*, *op. cit.*, p. 435.

[2] Quotations from 'Spencer House Journals' of conversations between William and Halifax, quoted by H C Foxcroft, *Life and Letters of Halifax*, (1898), Vol. II, pp. 203-247; reproduced in Williams, *Eighteenth Century Constitution*, *op. cit.*, pp. 60-64, at p. 62.

[3] See Maitland, *Constitutional History*, *op. cit.*, p. 310. And see Initiation of the Commons on money bills, *Commons Journals*, viii, 311, 24 July , 1661; Resolution of the House of Commons that the Lords cannot amend money bills, *Commons Journals*, ix, 235, 13 April, 1671; and Commons Resolution of the sole right of the Commons with regard to money bills, *Commons Journals*, ix, 509, 3 July, 1678, reproduced in W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914*, Vol. I, 1660-1783, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at p. 153, p. 154, and p. 154 respectively.

[4] See Maitland, *Constitutional History*, *ibid.*, p. 310. Note that the authority for money bills to originate in the Commons is said to be 9 Henry 4, 1407— the king declared that (following the Lords alone specifying subsidies as necessary for the national defence, to which the Commons had to comply), that the Lords and the Commons individually could commune concerning necessary remedies for the state of the realm, provided that neither 'shall [ ] make any report to the king of any grant by the Commons granted, and by the Lords assented to, nor of the communications of the said grant, before the Lords and Commons shall be of one assent and one accord in such matters, and then in manner and form accustomed, that is to say, by the mouth of the Speaker of the House of the Commons, in order that the Lords and Commons may have their will (*lour gree*) of ...the king.'—*Rotuli Parliamentorum*, iii, 611, no. 21, quoted in T F T Plucknett, (*ed.*), *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, at pp. 187-188, and see n. 15—'The sense of the last line is that the Houses should not compete for royal favour by making separate offers, but that both should share equally in the king's

the revolutionary House of Commons, and by the end of William's reign, it was using this so-called principle to coerce the House of Lords by 'tacking' policy matters to money bills,[1] thus forcing the lords to pass the objectionable policy together with the money if they did not want to leave the king without supply.[2] It was the use of this 'principle' dating from the time of the reign of William III, which established the House of Commons as the superior political power between the two Houses.[3] The Lords however, protested against the 'tacking' manoeuvre after the Commons had aggregated sole power to themselves,[4] and it would appear that it was never adopted after the death of William III.[5]

This outright conflict between the two Houses had been in evidence since the civil war. In *Skinner v The East India Company*,[6] the Lords had attempted to act as a civil court of first

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good will.'. I have to say that the text on its face would appear to allow the Lords to institute money bills, provided that the Commons agreed and the matter was transmitted through the Speaker of the Commons. But in no way could it be suggested that the Lords were prevented from making any amendment to such a suggestion from the Commons. In 1539, Francis Bacon asserted that 'the custom and privilege of this House hath always been, first to make offer of the subsidies from hence, then to the Upper House;' but then he immediately goes on to say '*except* it were that they present a bill unto this House, with desire to our assent thereto, and then send it up again.' (my emphasis).—D'Ewes *Journal*, 483, 486, quoted in Plucknett, *Taswell- Langmead, loc. cit.*, p. 324, n. 6. Bacon's exception would seem to recognise some power in the Lords to originate money bills. But just before the civil war, the Lords admitted to a right in the Commons to initiate bills of subsidies—see Plucknett, *Taswell- Langmead, loc. cit.*, p. 391, n. 86, sourced to *Lord's Journals*, iv, 76 and to Gardiner, *History of England*, ix, 110.

[1] 'Tacking' first occurred under Charles II in 1667 (Plucknett, *Taswell- Langmead, loc. cit.*, p. 549), and again in 1671 (Plucknett, *Taswell- Langmead, loc. cit.*, p. 432) and in 1678, when Charles II stated that he would veto any tacking bill. (Plucknett, *Taswell- Langmead, loc. cit.*, p. 432, sourced to David Ogg, *Charles II*, ii, 472, *Commons Journals*, ix, 239, 509, and *Lords Journals*, xiii, 223)

[2] The Commons used tacking in 1692, 1698, and in 1701, when they tacked to the Land Tax Bill sensitive matters concerning the disposition of Irish forfeited estates, coercing the lords and the king to consent if the government were not to be financially crippled by rejection of the financial measures. (Plucknett, *Taswell-Langmead, loc. cit.*, p. 549, sourced to Ogg, *Charles II*, ii, p. 472, and M A Thomson, *Constitutional History*, iv, 97-100, 204-205.)

[3] See Maitland, *Constitutional History, op. cit.*, pp. 310-311.

[4] See Lords' protest against the Commons' tacking, as being 'highly dangerous, both to the undoubted Prerogative of the Crown and the Right of this House...', *Lords Journals*, xvi, 569, 4 April, 1700, reproduced in Costin and Watson, *ed. cit.*, p. 192. And see the Lords' order against 'tacking' by the Commons as being 'Unparliamentary, and tend[ing] to the Destruction of the Constitution of this Government', *Lords Journals*, xvii, 185, 9 December, 1702, reproduced in Costin and Watson, *ed. cit.*, p. 192.

[5] See Plucknett, *Taswell-Langmead, loc. cit.*, p. 549, and see Maitland, *Constitutional History*, 399. Maitland notes that these sorts of 'rules', that the lords may not make changes to a money bill but either accept or reject it, and prohibitions against 'tacking', are not rules of law (p. 399); they 'may' be called 'rules of constitutional morality, or the customs or conventions of the constitution,' (p. 398). Since the *Parliament Act* of 1911 (1 & 2 Geo. V, c. 13) [and its amending Act, the *Parliament Act* 1949, 12, 13, & 14 Geo VI, c. 99] which deprived the Lords of any power of amendment or rejection, the Speaker is the sole determinant of what is a money bill.

[6] See *Skinner v The East India Company*, 6 *State Trials*, 711, March 1666, reproduced in Costin and Watson, *ed. cit.*, p. 157 ff. And see Resolutions of the House of Commons, 24 April, 1668, and 9 May 1668, and 8 December 1669, Hatsell, *ed.* 1818, iii, 369 and 376, and 387, reproduced in Costin and Watson, *ed. cit.*, p. 159 and p. 160; and see Resolutions of the House of Lords, 7 May 1668, *Historical Manuscripts Commission*, viii, App. Pt. 1, 172 ff. The king ordered the records to be razed—see King's Speech, 22 February, 1670, *Commons Journals*, ix, 126, 22 February, 1670, reproduced in Costin and Watson, *ed. cit.*, p. 161.

instance; but though the king ordered the erasure of all proceedings, the Commons tacitly won, the Lords abandoning their claim to an original civil jurisdiction. In 1675 in the case of *Shirley v Fagg*,[1] the Commons attempted to deny that the Lords could sit in appeal from Chancery. Both Fagg and Shirley were imprisoned by the Commons for breach of Commons' 'privileges', but at the end of the day this time the Commons tacitly gave way, Maitland noting:

> The truth seems to be that the commons were getting frightened by their own arguments. The historical investigations into which they plunged might show them that the claim of the House of Lords to an inherent power of hearing appeals from the chancery was a new claim, but such investigations could only bring out into clearer relief the ancient doctrine that the only source of all jurisdiction is the king. They did not want to exalt the king's power and they gave way without however conceding that they were in the wrong.[2]

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It must always be remembered, however, that all these Acts—attempting to entrench the succession to certain classes of people, and to restrict the ambit of the king's dispensing and suspending prerogatives and his revenues—were agreed to by the king; it was not the action of merely the two Houses, but of the two Houses and the king. William of Orange, king of England, was the fundamental arbiter of whether or not these matters became law. He agreed, and law they became. At the end of the day, it is for historians to conclude upon the nature of his motives, (since the motives of the Commons are apparent), but quite clearly the enactments post-Revolution were ones of political compromise between persons reluctant to see yet a further deposition or removal of a king who disagreed with them, and a person who in the interests of holding on to what he had gained, was willing to make concessions to secure his position. There was no guarantee that future generations would continued to hold to the same compromises; in this Tom Paine was again correct. But fortuity and foreign kings would see the myths of the 1688 Revolution harden into what passes for political reality.

By the time he died, William was much disliked, due to his being a foreigner with a partiality to his Dutch favourites, but also because he, as a continental prince, was embroiling England in ruinous continental wars—'few English sovereigns have ever sunk

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[1] See Resolution of the Lords, 6 May, 1675, *Lords Journals*, xii, 680, and 694, and Resolutions of the Commons, reproduced in Costin and Watson, *ed. cit.*, pp. 167-171, and in Kenyon, *Stuart Constitution*, *op. cit.*, p. 419.

[2] See Maitland, *Constitutional History*, p. 317.

to the tomb less regretted by the mass of the English nation than William III.'[1]

ANNE, THE LAST STUART

Anne, 'a resolutely ordinary woman'[2], and 'one of the smallest people ever to set in a great place',[3] succeeded as queen of England in accordance with the *Act of Settlement* on 8 March 1702 and was crowned on 23 April 1702, taking the same English coronation oath as William and Mary, and as prescribed in the English *Coronation Oath Act*, making her anti-catholic Declaration before taking the coronation oath at the ceremony itself.[4] Anne, as the second and protestant daughter of James II and VII, was the last Stuart monarch of England.

Under the Scottish *Claim of Right*, (if it were a legal document) the succession to the Scots throne went in the absence of heirs to William and Mary, to Anne of Denmark, and in the absence of heirs of her body to the heirs of the body of William II, and was silent thereafter.[5] The next heir and according to the Jacobites, the 'proper king', James Francis Edward (the Old Chevalier or Pretender)[6] was still alive, and had already been proclaimed king of England by Louis XIV of France in 1701 on the death of James II. Had he converted to Protestantism and taken the Scots coronation oath (if the *Claim of Right* were

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[1] See W E H Lecky, *A History of England in the Eighteenth Century*, Longmans, Green and Co., London, 1878, Vol. I, p. 23, and pp. 30-31. See also Richard Pares, *Limited Monarchy in Great Britain in the Eighteenth Century*, The Historical Association, London, 1957, reprinted, 1972, at p. 10.

[2] See Michael St John Parker, *Britain's Kings and Queens*, Pitkin Pictorials Ltd, first published 1974; further edition 1990, reprinted 1992, at p. 25.

[3] See Walter Bagehot, *The English Constitution*, Fontana Press, London, 1993, p. 234; Bagehot went on to say of Anne— 'But of large thought and comprehensive statesmanship she was as destitute as Mrs Masham.' [Mrs Masham was Lady Masham, lady of the bedchamber to Queen Anne in 1704, replacing Sarah Churchill as the Queen's favourite in 1710]

[4] See J Wickham Legg (*ed.*) *Three Coronation Orders*, for the Henry Bradshaw Society, Vol. XIX, printed for the society by Harrison and Sons, London, 1900, in his notes on William and Mary's coronation order notes that Anne, George I, George II and George II made the declaration against transubstantiation, invocation of saints and the sacrifice of the mass at the coronation before the coronation oath—see p. 140. There is an inference that all these monarchs, and all later ones down to the time of Victoria took the coronation oath in the same form as did William and Mary, though these later kings made their declarations against transubstantiation etc to the parliament.

[5] *Claim of Right Act (Scotland)*, 1689.

[6] Charles Edward, the Young Chevalier or Pretender, was not born until 31 December, 1720. Whigs tended to describe James Francis as 'the Old Pretender', while the Tories tended to describe him as 'the Old Chevalier'. To the Jacobites, he was James VIII of Scotland, and James III of England.

legal); or if he had merely taken the Scots coronation oath (if the *Claim of Right* were illegal), then there was no legal impediment to his acceding to the throne of Scotland. The next lineal heir was James II and VII's daughter Anne, by Anne Hyde, an enthusiastic Anglican. In order to be queen of Scotland, Anne had to take the Scottish coronation oath—this she did in the presence of some twelve of William's Scottish ministers in 1702.[1]

Indeed the Scots were fierce in their individual sovereignty. They were justifiably sick and tired of having their king permanently resident in another country, being influenced in his policy towards his realm of Scotland by those foreign ministers. The Highlanders were still loyal to James III, king over the water after James II and VII's death in 1701, and no Scot ever forgot the massacre at Glencoe in 1692.[2] But Scotland had been poor, and the increase in trade resulting from the union in the crowns had materially assisted the Scots.

It seems likely that the Scots Estates agreed to Anne's accession provided she agreed to certain conditions.[3] The last of the Scottish parliaments met in 1703, and insisted on Anne's agreement to two Scots Acts before granting her supply. The first, the Scots *Act Anent Peace and War* of 1703[4], stated that, after Anne, no king of Scotland could declare war, or peace, or make any treaty, without the consent of the Estates; and the *Act for the Security of the Kingdom*, 1704,[5] which stated that after the death of Anne, the Scots Estates were to nominate her successor, provided that he be of the royal line of Scotland, was of the true protestant religion, and had been administered the Scots coronation oath by the Estates or their nominee, and had accepted the *Claim of Right*; and provided the nominated person was not the monarch of England, unless certain condition were met as to Scots sovereignty, trade, and religion.[6]

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[1] See P Hume Brown, *History of Scotland*, in Three volumes, Vol. II, *From the Revolution of 1689 to the Disruption, 1843*, Cambridge University Press, Cambridge, 1909; reprinted by Octagon Books, New York, 1971, p. 77, and n. 1, sourced to Burnet, *History of his own Time*, Oxford, 1822, V, 20.

[2] See discussion at p. 425 *infra*.

[3] This is an inference I have drawn from Plucknett, *Taswell-Langmead*, *op. cit.*, p. 470.

[4] Scots *Act Anent Peace and War*, 1703, c. 5, 16 September 1703, reproduced in D Oswald Dykes, (Professor of Constitutional Law and Constitutional History in the University of Edinburgh), *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 137-138.

[5] Scots *Act for the Security of the Kingdom*, 1704, (Act 1704, c. 3, Passed 5 August, 1704), reproduced in Dykes, *Source Book of Constitutional History*, *loc. cit.*, pp. 138-140; and see my Appendix I.

[6] See text at my Appendix I.

Between the Revolution and Anne's accession, the Whig propaganda effort had had increasing success. Nevertheless, numerous Anglicans and Tories still adhered to a concept akin to that of 'divine right of kings', as of course did numerous Scottish Jacobites. A considerable number of Tories, however, were making attempts to reconcile the 'divine right of kings' idea with the 'divine right of parliament' idea, so as to avoid the possibility of a resurgence of civil unrest on the death of Anne due to the conflict between indefeasible hereditary right, which would see the throne go to the catholic Chevalier, and the *Act of Settlement*, which saw the throne going to the protestant German Electors of Hanover. The *Convocation Book* of Bishop Overall, which had been traduced by James VI and I because of its inherent danger of legitimating *de facto*, particularly invading *de facto*, regimes, by prescription, was now used by these Tories to confirm the idea that the Church of England would recognise the legitimacy and sanctity of *any* settled government, by virtue of prescription; this necessarily meant recognition of 'parliamentary sovereignty'.[1] The writings of Offspring Blackall[2] epitomised this compromise, which essentially was:

- government was ordained by God and so was the submission of subjects
- But God allowed for a variety of forms of government
- 'An absolute ruler, who had voluntarily agreed to share his sovereignty with a representative assembly, could not subsequently recover his previous unlimited authority without the express consent of that assembly'[3]
- 'Conversely, if a government had been set up by a social contract, then the people could never reclaim their original authority but must render unqualified obedience to the sovereign power that they themselves had created'[4]
- 'the best title to government is that which has prevailed by prescription.'[5]...

This accommodation was most evident in the *Trial of Dr Henry Sacheverell*[6]. Sacheverell was

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[1] See reference to Overall's *Convocation Book*, *supra*, at p. 331; and see 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 nn. 28 and 29.

[2] Offspring Blackall, Bishop of Exeter, *The Subject's Duty*, London, 1705, and *The Divine Institution of Magistracy*, London, 1709, quoted and referred to 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. 196, and n. 25.

[3] H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *ibid.*, p. 196.

[4] H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *ibid.*, p. 196.

[5] Offspring Blackall, *The Divine Institution of Magistracy*, London, 1709, pp. 2-3, quoted in H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', art, *cit.*, p. 198.

[6] *The Impeachment of Henry Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, extracted 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. 421-437. Extracted also in W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914*, Vol. I, 1660-1783, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at pp. 197-212.

impeached by the Commons for preaching the doctrine of non-resistance, and thus against the Revolution and William III—in effect for attempting to 'persuade the world that the glorious work of the Revolution was the fruit of rebellion, and the work of traitors.'[1] The Commons asserted that :

> The nature of our constitution is a limited monarchy, wherein the supreme power is communicated and divided between Queen, Lords, and Commons, though the executive power and administration be wholly in the crown The terms of such a constitution do not only suppose, but express an original contract between the crown and the people... The nature of such an original contract of government proves that there is not only a power in the people, who have inherited its freedom, to assert their own title to it, but they are bound in duty to transmit the same constitution to their posterity also.[2]

and that it was 'the peculiar right' of the Commons to 'pursue the evil instruments of [oppression] till public vengeance be done.'[3]

In reply, counsel for the defence said that when Sacheverell was advocating non-resistance to the supreme power, he meant non-resistance to 'the Queen in parliament'.[4] In answer again, the Commons had to reiterate that Sacheverell was preaching against non-resistance against the king (James), and that this flew in the face of the 'fundamental principle' of the 'original contract', the 'truth and certainty' of which may be demonstrated by 'the nature, antiquity, and history of the Coronation Oath, and the oath of Allegiance, and the mutual obligations and consequences arising from them to the prince and the people.'[5] Dr Sacheverell was found guilty by 69-52 votes, and his sermons burned by the common hangman. In short, as Professor Dickinson has observed:

> Fear of anarchy and dread of civil war made the acceptance of parliamentary sovereignty appear to be a political necessity. The concepts of the divine right of the legislature and of prescriptive right, provided this necessity with the respectable cloak of religious and legal justification.[6]

Though Anne's reign was short, numerous constitutional alterations occurred during it.

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[1] *The Trial of Dr Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, argument of Mr Lechmere, for the Commons, in C Grant Robertson, *Select Statutes, Cases...*, *loc. cit.*, at p. 426.

[2] *The Trial of Dr Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, argument of Mr Lechmere, for the Commons, in C Grant Robertson, *Select Statutes, Cases...*, *loc. cit.*, at pp. 424-425.

[3] *The Trial of Dr Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, argument of Mr Lechmere, for the Commons, in C Grant Robertson, *Select Statutes, Cases...*, *loc. cit.*, at p. 426.

[4] *The Trial of Dr Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, at 203, argument of Samuel Dodd, for Sacheverell, quoted in H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 197.

[5] *The Trial of Dr Sacheverell*, 9 Anne, 1710, XV *State Trials*, 1-522, argument of Mr Lechmere, for the Commons, in C Grant Robertson, *Select Statutes, Cases...*, *loc. cit.*, at pp. 435-436.

[6] H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 199.

First, there was the passage of the *Regency Act*, 1706[1], which was required as the expected next king would be at a great distance from England. (This Act was substantially re-enacted after the union with Scotland as the *Succession to the Crown Act* of 1707.[2]) Accordingly, the *Regency Act* provided that neither the Privy Council nor the parliament was to be automatically dissolved by the demise of the crown (as was the situation under the common law), the parliament to run for six months after that event, with a specific saving of the royal prerogative to summon and dissolve parliament[3]. The act provided for the Privy Council to proclaim 'in such manner and form as the preceding Kings and Queens respectively have been usually proclaimed' the next protestant successor in accordance with statute, and provided that any and all Privy Councillors who neglected or refused to cause such proclamation to be made were traitors and guilty of treason, and 'shall suffer pains of death';[4] and also provided for the establishment of Seven Officers to carry out the administration of government in the name of the successor, should he be abroad.[5] The Act also repealed that section of the *Act of Settlement* prohibiting placemen from the House of Commons, (which would have stopped officers like the chancellor of the exchequer from sitting in the House of Commons), and replacing it with a section excluding certain offices only, and the holders of any new offices of profit which the crown may create in the future. This was designed to protect current political officers and practices from complete replacement by a new dynasty. It also repealed the provision requiring the Privy Council both to have charge of and to be legally responsible for, the administration of government.

The Privy Council was losing its political importance, partly due to the fact that Anne, a lazy woman, dropped the practice of removing from the Council ministers or persons out of office or out of favour. On the other hand, the most important meeting of any council during Anne's reign was that of the Privy Council as she lay dying when it seemed almost certain that a Jacobite restoration would occur, in which she handed the staff to Shrewsbury who had signed the 1688 Invitation to William, who took immediate steps to

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[1] *Regency Act*, 1706, 4 & 5 Ann., c. 20, see Plucknett, *Taswell-Langmead, op. cit.*, p. 467.

[2] *Succession to the Crown Act*, 1707, c. 41, An Act for the security of Her Majesties Person and Government and of the Succession to the Crown of Great Britain in the Protestant Line, *Rot. Parl.*, 6 Anne., c. 41, p. 5, n. 6, *Statutes in Force, Official Revised Edition*, revised to 1st February 1978; HMSO, London, 1978; Short Title give by Short Titles Act 1896, (c. 14), Sch. 1. And see Plucknett, *Taswell-Langmead, op. cit.*, p. 467 and pp. 566-567.

[3] *Succession to the Crown Act*, 1707, c. 41, § VII, Costin and Watson, *ed. cit.*, p. 113.

[4] *Succession to the Crown Act*, 1707, c. 41, § X, Costin and Watson, *ed. cit.*, p. 114.

[5] *Succession to the Crown Act*, 1707, c. 41, § XI, Costin and Watson, *ed. cit.*, p. 114.

secure the Hanoverian succession, thwarting the plans of Jacobite sympathisers.[1]

Anne's reign saw the evolution of 'the cabinet', which had operated as an institution from the time of Charles II, when it had been referred to as the 'Cabal'. William III had continued this practice of using a small group of confidential advisers, which in his time, because of its solid Whig composition, was called the 'Junto'. But the existence of this cabal or cabinet meant that the Privy Council was not being consulted which in turn meant that the Houses knew little of what was actually occurring. It was for this reason that the *Act of Settlement* had tried to prescribe that the Privy Council was to be the organ of administration in government. But under Anne, the cabinet, or 'the committee' (and later in the century, 'the closet') as an adviser to the crown would seem to have become tolerated, and the clause dealing with the Privy Council in the *Act of Settlement* was repealed. Both houses of parliament by this stage were familiar with both the terms 'cabinet' and 'ministers', though the terms were not interchangeable, the 'cabinet' being apparently more exclusive than 'ministers', and not necessarily totally comprised from ministers. Of the cabinet, the Earl of Peterborough had remarked that : 'he had heard a distinction between the cabinet council and the privy council; that the privy councillors were such as were thought to know everything, and knew nothing, and those of the cabinet council thought nobody knew anything but themselves'; while Lord Cowper noted that the term cabinet was 'unknown in our law.'[2]

The practice of William III's parliament of conveying certain monies to the king for his personal use was continued in Anne's reign; she, too, was conveyed certain sources of revenue for the support of the queen's household and the honour and dignity of the crown, in a fashion similar to that which occurred at the end of William's reign.[3]

Ashby v White

Anne's reign saw continued efforts by the Commons to entrench their position. This was

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[1] See Plucknett, *op. cit.*, p. 473. Shrewsbury has been described as 'the baffling duke whom no-one could understand, but who always knew his mind in an emergency'—from G N Clark, *The Later Stuarts*, 237, quoted at p. 473, n. 82 of Plucknett.

[2] For this see Plucknett, *op. cit.*, pp. 612-615 ; quotation from *Parliamentary History*, vi, 971-974, quoted in Plucknett, *op. cit.*, p. 615 and n. 54.

[3] See Maitland, *Constitutional History*, op. cit., p. 435.

most evident in the cases of the Aylesbury men (*Ashby v White* and *Paty's case*).[1] A voter at Aylesbury (Ashby) had his vote maliciously rejected by a returning officer, the Court of Queen's Bench holding for the returning officer and the Commons, Holt CJ dissenting—Holt held that the right to vote was a proprietary right, and 'we must not be frighted when a matter of property comes before us, saying it belongs to parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England...'[2]. The House of Lords on appeal endorsed Holt CJ's views, and found that the voter was entitled to damages. The Commons saw this as an infringement of its liberties, committed the voter to prison, and also subsequent appellants in the same cause, together with their legal representatives when they attempted to free the men by *habeas corpus*.[3] The Lords protested against the actions of the House of Commons 'deterring Electors from prosecuting Actions in the ordinary Course of Law, where they are deprived of their Right of Voting, and terrifying Attornies, Solicitors, Counsellors, and Serjeants at Law, ...in such cases voting their so doing to be a Breach of privilege of the House of Commons, is a manifest assuming a Power to control the Law, to hinder the Course of Justice, and subject the Property of Englishmen to the arbitrary vote of the House of Commons.'[4]

The Commons said that the exercise by the Lords of this jurisdiction was 'directly contrary to the fundamental maxim of the law and custom of parliament, that the two houses are mutual checks to each other, and sole judges of their own privileges... and excellent constitution, and admirably well contrived for the common safety.'[5] This raised the spectre

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[1] See *Ashby v White*, 1702-1704, 2 Lord Raymond, *Report of Cases*, 4th edn., 1790, 938, 3 Ld. Raym. 320, 14 *State Trials*, 695. And see R *v Paty et alios*, 1704, Lord Raymond, *Report of Cases*, 4th edn., 1790, vol. II, 1105. See texts at E N Williams, (*ed.*), *The Eighteenth Century Constitution, 1688-1815*, Cambridge University Press, Cambridge, 1960, reprinted 1965, 1970, pp. 221-232. *Paty's case* is also known as *The case of the Aylesbury men*, in Queen's Bench, 14 State Trials, 854, reproduced in W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914*, Vol. I, 1660-1783, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at pp. 279-284..

[2] See *Ashby v White*, 1702, 2 Lord Raymond, *Reports of Cases*, 4th edn., 1790, at p. 950, extracted in Williams, *Eighteenth Century Constitution*, *ed. cit.*, pp. 224-226. And see 14 *State Trials*, 695. And see text in Costin and Watson, *ed. cit.*, pp. 278-279.

[3] See *Ashby v White*, 1702, 2 Ld. Raym. 938, 3 Ld. Raym. 320, 14 *State Trials*, 695. And see *Paty's case*, 1704, 2 Ld Raym. 1105, where the court supported the House of Commons; but see also Holt CJ's dissent, at 2 Ld. Raym. 1105, where he makes it plain that mere declaration by the Commons of privileges is not sufficient if there is no legal ground for it. And see the Commons' Resolutions in the case of *Ashby v White*, *Commons Journals*, xiv, 308, extracted in S&M2, pp. 621-622.

[4] See the Resolution of the Lords, *Lords Journals*, xvii, 534, 27 March, 1704, reproduced in Costin and Watson, *ed. cit.*, pp. 194-195.

[5] See the argument of Sir Humphrey Mackworth, speaking on behalf of the Commons, *Paty's case*, 14 *State Trials*, 764, quoted in J W Gough, referred to by *Fundamental Law in English Constitutional History*, Clarendon Press, Oxford, 1955, reprinted 1961, 1971, with corrections, at p. 177, and n. 3.

of a whole new branch of law, previously unknown[1] (to all but Sir Edward Coke, who invented it along with the *lex Coronæ* when he was scribing his *Institutes*[2]) called *lex et consuetudo parlimenti*, (law and custom of the parliament), against which the common law and the courts had no jurisdiction.[3] In *Paty's case* following on the men's incarceration by the House of Commons, Powell J delivered the majority opinion, holding that they were committed under 'another law than we proceed by', the *legem et consuetudinem parlimenti*,[4], and 'the House of Commons is superior to all courts of law', and therefore the court could not interfere. Holt CJ again brilliantly dissented,[5] saying that the courts could examine the privileges of the Commons, as any laws and customs of parliament were as much the law of the land as any other law, and the commons could not deprive a man of his property or liberty, except in concert with the lords and the queen, which was the security of the constitution. Paty petitioned the Queen for a writ of error, the queen seeking advice from the judges, who found that a writ or error should be granted of right not of grace, but

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[1] Though Holdsworth apparently in his *History of English Law*, Vol. II, 445, n. 5, referred to a medieval precedent, referred to and quoted in Gough, *Fundamental Law*, *loc. cit.*, p. 178, n. 1.

[2] See 1 Co. Litt., *loc. cit.*, § 3, at p. 10-11. [*The First Part of the Institutes of the Laws of England (etc.), Commentary on Littleton* , Ed. Coke Milite, in 2 Volumes, Printed for the Society of Stationers, London, Anno 1628, reprinted in facsimile by Garland Publishing, New York, 1979] Among his twelve kinds of law, the first two Sir Edward Coke nominated are the *lex Coronæ* followed by the *Lex & consuetudo Parliamenti*. The *lex Coronæ* it will be seen from the discussion *supra* at p. 136, was one of Coke's inventions; so too was the *Lex & consuetudo Parliamenti*, Coke having worked indefatigably while he was a parliamentarian to acquire as much antiquity, status, power and sovereignty for the Commons, and even more indefatigably and with more embellishment when he enshrined his authentical views in his *Institutes*—see my comments at note 5 at p. 136 *supra*. Coincidentally Coke's *Commentary on Littleton* was published in the same year as he orchestrated the *Petition of Right*. See also comments in note 5, p. 422 *infra*

[3] See the majority judgement in *Paty's case*, 14 *State Trials*, 764, delivered by Powell J, referred to by Gough, *Fundamental Law*, pp. 177-178..

[4] Powell J, drawing on Coke, noted that there were a number of laws in England besides the common law, 'viz., the ecclesiastical law, the admiralty law, etc, and there is the law and customs of parliament where they have particular laws and customs for their directions.' —See *The case of the Aylesbury Men*, 14 *State Trials*, 854, quoted in Costin and Watson, *ed. cit.*, at p. 280.

[5] See *The case of the Aylesbury Men*, 14 *State Trials*, 854, quoted in Costin and Watson, *ed. cit.*, at pp. 281-284. —per Holt CJ : This was not such an imprisonment as the freemen of England ought to be bound by; the people should not be bound by a declaration of the Commons in a matter that was before lawful; Neither house of parliament has power to dispose of the liberty of the subject, which cannot be done but by queen, lords, and commons, which is the security of the constitution; When subjects have a right of action it cannot be stopped by privilege of parliament, for no privilege can intend so far as to destroy a man's right; The privileges of the Commons are limited; and nothing can make a privilege that was not so before for breach of which a man may lose his liberty, except by act of parliament; If the privileges of either house come incidentally before the courts, they will decide it.' He refers to Coke's statement in 1 *Institutes*, that *Lex et Consuetudo Parliamenti ad omnibus querenda, a multis ignorata, a paucis cognita* (every man looks for the law and custom of parliament, but few can find it) and says that why it known to so few is that they do not seek it; the courts are bound to take notice of the customs of parliament, for they are part of the law of the land. [Of course, one of the reasons why the *Lex et Consuetudo Parliamenti* could not be found was for the very reason that Coke had just invented it.] The *lex et consuetudo parliamenti* is as much the law of the land as any other law; if the ecclesiastical court exceed their jurisdiction a prohibition will lie; and even the king's acts if contrary to law, are void. He said that *Banbury's case* was a great authority for him. [Unfortunately, (shades of Jack Worthing and Oscar Wilde) I have not been able to track *Banbury* down.] It

simultaneously saying that whether a writ of error did lie properly should be determined in parliament, where the writ and record are returned and certified.[1]

The Lords then sent a formal address of protest to the Queen against these usurpations of the Commons, requesting the Queen to issue writs of error to free the men imprisoned by the House of Commons.[2] The Queen responded, saying she would have granted the Writ of Error requested by the Lords, but she found it 'an absolute necessity' to dissolve the parliament, thus ending the Commons' privileges (which lasted only as long as the parliament).[3] The end of the session meant the men were released and the matter then dropped.

The House of Commons' conceit grew large, and was to grow only larger. This concept of the immunity of Commons' privileges survives to the present day, with the courts (with some honourable exceptions) reluctant to confront the Commons, who persisted in asserting their power to determine their own privileges, judge on their alleged infraction, and sentence for alleged breaches thereof, denying innocent men (that is, men convicted of no offence at common or statute law) their liberty by imprisonment, particularly (but probably not exclusively confined to the circumstance) where the terms of the alleged contempt are spelled out in the warrant for arrest.[4]

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would appear that Holt CJ was almost immediately brought up on an indictment for petitioning the Lords to sit, but he pleaded that he was a peer, and he was not tried.

[1] See *Opinion of the Judges on Granting of Writ of Error in Paty's case*, reproduced in Costin and Watson, *ed. cit.*, p. 284. Majority 12 (including Holt CJ), minority 2.

[2] See Lords address to the Queen on the Commons' Claim in the Case of the Aylesbury men, *Lords Journals*, xviii, 705, 13 March, [N.S.] 1705, extracted in Costin and Watson, *ed. cit.*, pp. 195-196.

[3] See the Queen's Reply to the Lords, *Lords Journals*, xvii, 716, 14 March [N.S.] 1705, extracted in Costin and Watson, *ed. cit.*, p. 196.

[4] See *Stockdale v Hansard*, (1839) 9 Ad & E 1; 112 ER 1112, and *Stockdale v Hansard*, (1840) 11 Ad & E 253; 113 ER 411; and see *The Case of the Sheriff of Middlesex*, (1840) 11 Ad & E 273; 113 ER 419; and *Bradlaugh v Gossett*, (1884) 12 QBD 271; *Parliamentary Papers Act*, 1840 , 3 & 4 Vic., c. 9; *G R Strauss case*, 1957-1916, *Re Parliamentary Privilege Act 1770*, [1958] AC 331 (advisory opinion of the Judicial Committee of the Privy Council, relation to free speech and the *Bill of Rights*); Select Committee of Parliamentary Privilege, 1967, HC [House of Commons] 34 (1967-1968), xxvii; and see *R v Richards; ex parte Fitzpatrick & Browne*, (1955) 92 CLR 157; and see *Commonwealth of Australia Constitution Act*, 63 & 64 Victoria, c. 12, s. 9, *Constitution of the Commonwealth of Australia*, s. 49; and see *Parliamentary Privileges Act (Cth.)*, 1987. For discussion of these issues see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory, Commentary and Materials*, The Federation Press, Sydney, 1996, 2nd edn., 1998, at 335-344; and see R Brazier, and S de Smith, *Constitutional and Administrative Law*, Penguin Books, London, 1971, 7th edn., R Brazier (*ed.*) 1994, at pp. 354-358, and p. 343-344; and see T F T Plucknett, (*ed.*), *Taswell-Langmead's English Constitutional History From the Teutonic Conquest to the Present Time*, Sweet & Maxwell Limited, London, 1875, 11th edn. 1960, at pp. 580-595. The Commonwealth *Parliamentary Privileges Act* of 1987, s. 7, still perpetuates the ability of either of the (Australian) Houses of parliament to imprison a person for an offence against it, the only requirement being that the particulars of the offence be set out in the warrant (s. 9)—only to this extent would any imprisonment appear to be judiciable. In

ANNE'S PREROGATIVE

Anne, like William, also refused automatically to assent to any and all bills coming from the two Houses. She refused the royal assent to a Scottish Militia Bill in 1707.[1]

The growth of party politics during Anne's reign, and the volatility of party sentiments and allegiances threw into relief the situation of the Lords, wherein a number of ministers felt that their policies were insufficiently represented, a reason sufficient in their minds to require the exercise of the prerogative to create new peers. This occurred in 1703, when on the advice of a composite Tory government dependent on a Tory majority in the Commons, Anne created four new peers, three Tory and one Whig.[2] Anne exercised the prerogative again in 1712, creating twelve new Tory peers, on the advice of a coalition divided among itself, and in the light of a House of Lords in which a Whig majority might have eventuated.[3] The situation in the Lords was exacerbated by the position of the sixteen Scottish peers, who had to be elected under the *Act of Union*, and who in some cases held the balance of power.[4] The Lords subsequently in 1719 and 1720 attempted to limit the king's power to create new peers; the king himself was willing to agree to the proposition, but a large majority in the House of Commons rejected it.[5]

SCOTLAND

The major constitutional change during the reign of Anne was, however, the union between the kingdoms of Scotland and England.

Scotland had effected its own settlement after the Revolution of 1688, through the *Claim of Right Act* of 1689, (assuming it to be a legal document),[6] declaring that the king and queen

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England, the House of Commons still has all the powers at common law with regard to imprisonment of persons for alleged breaches of privilege (see Brazier and de Smith, *ed. cit.*, pp. 357-358).

[1] See Plucknett, *op. cit.*, p. 642, n. 26.

[2] See A S Turberville, *House of Lords in the Eighteenth Century*, Oxford, 1927, p. 44, referred to in Plucknett, *Taswell-Langmead, loc. cit.*, p. 541.

[3] See Plucknett, *Taswell-Langmead, loc. cit.*, pp. 541-542, and his references at p. 541, n. 60, to A S Turberville, *House of Lords in the Eighteenth Century*, pp. 111-118, p. 155, and Sir Keith Feiling, *The Tory Party*, (? *sic*) 424-445.

[4] For a discussion of the Scottish peers, see Plucknett, *Taswell-Langmead, loc. cit.*, pp. 539-541.

[5] See Maitland, *Constitutional History*, p. 348.

[6] *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)*

of England were to be king and queen of Scotland, as James VII of Scotland being a papist had acted as king even though he had failed to take the Scottish coronation oath, and had exercised arbitrary despotic power to the subversion of the protestant religions, and of the laws and liberties of Scotland. But many Scottish clans, particularly the Highlanders, had remained loyal to James VII. An indemnity was offered to those chiefs who took an oath of allegiance to William and Mary before 1 January 1692, 'Letters of Fire and Sword' being drawn up which authorised savage attacks on recalcitrants. All chiefs took the oath, except MacDonald of Glencoe, who was unable to take his oath till January 6, due to the absence of a magistrate at Fort William to receive it. An order for military attack under William's signature was issued, and the Massacre of Glencoe occurred on 13 February 1692. The massacre left an indelible impression upon the Scots, and was a factor in their subsequent reluctance to continue with the 'dual crown', and in Scots nationalism ever since.

As a result of the *Claim of Right* in Scotland,[1] the Scottish parliament assumed a significance it had not theretofore (assuming it to be a legal parliament)[2]. But a dual crown and two distinct parliaments caused difficulties. It became obvious after a scheme was approved by the Scottish parliament involving what was effectively a Spanish colony (the Darien scheme of 1695), that conflict between William II of Scotland[3] and William III of England was inevitable, and the dual monarchy would have to be split—(England was a ally of Spain at that time, while Scotland was at war with Spain). England saw the dismaying possibility of a restoration of the Stuarts to the throne of Scotland; Scotland refused to agree to the Hanoverian German succession without safeguards which in turn were refused by England[4]; the English parliament decreed all Scots aliens (suspending the common law operation of the decision in *Calvin's case*) and suspended trade with Scotland,[5] with these

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Act 1964 (c.80). Sch. 2. As to the legality of the *Claim of Right*, see discussion *supra* The Scottish Coronation Oath , p. 372 ff., particularly p. 377 *supra*.

[1] This paragraph draws heavily upon Plucknett, *op. cit.*, pp. 469-471.

[2] See discussion as to legality p. 372 ff., particularly p. 377 *supra*.

[3] The first William king of Scotland was William the Lion, king 1165-1214.

[4] See the Scots *Act for the Security of the Kingdom*, 1704, (Act 1704, c. 3, Passed 5 August, 1704), discussed p. 372 ff., *supra*, reproduced in Dykes, *Source Book of Constitutional History*, *loc. cit.*, pp. 138-140; and see my Appendix I.

[5] See (English) *Act for the Security of the Realm*, 1706, 3 & 4 Anne, c. 7, An Act for the effectual securing the Kingdom of England from the apparent Dangers that may arise from several Acts lately passed in the Parliament of Scotland, 1704, reproduced in Dykes, *Source Book of Constitutional History*, *loc. cit.*, pp. 140-141.

bans being rendered inoperative if Scotland accepted the *Act of Settlement*.[1] After much negotiation and amid fierce controversy, the Scottish parliament passed on 16 January 1707 a treaty of union between England and Scotland, the same treaty becoming an English statute on 6 March 1707, and the union of England and Scotland came into force on 1 May 1707.[2] Thus under the last of the Stuart kings of England and Scotland, the great dream of the first such Stuart king, James VI and I—a united Great Britain—was realised.

James VI and I above all had desired peace in his two realms, and a union between Scotland and England[3]—

> I desire a perfect union of laws and persons, and such a naturalizing as may make one body of both kingdoms under me your king... I mean of such a general union of laws as may reduce the whole island, that as they live already under one monarch, so shall they be governed by one law.[4]

He had assumed by proclamation in 1604 the 'Name and Stile of King of Great Brittaine.'[5] But the commons had opposed bitterly even the change of name to Great Britain,[6] citing a fear of an extension of the prerogative to that of 'the British kings before Caesar'[7], and there was much invective and obloquy against the Scots, one member remarking with unconscious ironic prescience: 'They (the Scots) have not suffered above two kings to die in their beds these 200 years.'[8] In the end, the judges 'declined to authorise his assumption

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[1] See Plucknett, *Taswell-Langmead*, *op. cit.*, p. 471.

[2] *The Act of Union*, The Act for the union with Scotland, 6 Ann. c. 11, 1706, or 5 & 6 Ann. c. 8, 1707 (NS). *Statutes of the Realm*, VIII, pp. 566-577; 6 Annae, cap. 11; An Act for an Union of the Two Kingdoms of England and Scotland; *English Historical Documents*, Vol. VIII, 1660-1714, Andrew Browning (*ed.*) Eyre and Spottiswoode, London, 1966, p. 680 ff.

[3] See James VI and I's speech to parliament, 19 March, 1604, from *James I, Works*, (1616 edn.), pp. 485-497, extracted in J R Tanner, *Constitutional Documents of the Reign of James I, A.D. 1603-1625*, Cambridge University Press, Cambridge, 1961, at pp. 24-30, particularly at pp. 25-27. See also *Act for Commissioners of Union*, 1604, 1&2 Jac. I, c. 2; *Statutes of the Realm*, iv, 1018, extracted in Tanner, *loc. cit.*, at pp. 31-33; and see James VI and I, *Proclamation of Union*, 20 October, 1604, Rymer, *Foedera*, xvi, 603, extracted in Tanner, *loc. cit.*, pp. 33-35.

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

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

[6] See H Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869, at p. 234, n. 2, sourced to Commons Journals, 1604, 1606, 1607, 1610.—'we cannot legislate for Great Britain' (p. 186).

[7] Hallam, *Constitutional History*, *loc. cit.*, p. 224, n. 2.

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

of the title of King of Great Britain,"[1] and that style and title was abandoned.[2]

The union of the two nations under Anne was, however, less than that of which James had dreamed, though more than most had expected. James had wished for one country, one law, and (probably) one religion. What was achieved was one nation, one king, and one parliament, with Scotland and England both sending peers to the House of Lords and representatives to the House of Commons, the English parliamentary model effectively being perpetuated in the parliament of Great Britain. The enactments of the parliament of Great Britain apply equally to both Scotland and England, with the exception that if an Act is not to apply to Scotland, or to apply only to Scotland, the Act says so expressly. But the each country retained its own legal and court system, its own customs, and its own common law, the Scottish system of law drawing more from Roman law than the English common law. Each country retained its old statutes in so far as they were not later abrogated by statutes emanating from the parliament of Great Britain.

Each country also retained its own religion. Presbyterianism had become the Church of Scotland, while Anglicanism had become the Church of England. The *Act of Union* in Article XXV:(II) provides for the monarch of Great Britain to preserve inviolate the religion of Scotland, and on his accession to the throne, shall 'swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, with the government, worship, discipline and privileges of the Church as above established by the laws of this kingdom in prosecution of the Claim of Right.' In Article XXV:(III) it states that the monarch of Great Britain 'at his or her coronation shall in the presence of all persons who shall be attending, assisting or otherwise then and there present, take and subscribe an oath to maintain and preserve inviolably the said settlement of the Church of England and the doctrine, worship, discipline and government thereof as by law established within the kingdoms of England and Ireland, the dominions of Wales and town of Berwick-upon-Tweed and the territories thereunto belonging.'

Scotland cherishes its own royal regalia, called the Honours of Scotland,[1] which were last

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

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

used at the coronation of Charles II at Scone in 1651. The *Act of Union* provided that they were to remain in Scotland for all time,[2] but the Scots, remembering how Edward I had stolen the *Lia Fail* on which all Scottish kings had been crowned, (the Stone of Scone, sometimes called the Stone of Destiny, which was returned by the English to the Scots in 1996 after some 700 years) hid the Honours of Scotland, and they disappeared from sight. Sir Walter Scott traced the Honours in the early part of the nineteenth century to an old chest in the Crown Room of Edinburgh Castle.

It would appear that after the *Act of Union*, no king of Great Britain, while taking the coronation oath devised by the Englishmen of 1689, and being crowned according to the rites of the Church of England, has ever again taken the Scottish coronation oath, (although it remains on the statute book), nor been crowned according to the rites of the Church of Scotland, nor been invested with the Honours of Scotland.[3].

The *Act of Union* says nothing about the coronation oath to be taken by the king of Great Britain, merely stating in Article XXV (II) that 'the sovereign succeeding...in the royal government of the kingdom of Great Britain in all time coming at his or her accession to the crown swear' to maintain the true protestant religion as established by the laws of Scotland in prosecution of the *Claim of Right* ; and in Article XXV (III) that 'forever hereafter every king or queen succeeding in the royal government of the kingdom of Great Britain at his or her coronation' in the presence of all assisting subscribe an oath to maintain the settlement of the church of England. The *Act of Union* also stated that all laws and statutes of either kingdom inconsistent or contrary to the Act ceased and became void.[4]

The effect of these provisions were that both the English *Coronation Oath Act* of 1688 and the Scots *Coronation Oath Act* of 1567 continued on foot, the Scots oath in particular having a perpetuated life by the reference to it in the *Claim of Right* which in turn is specifically

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[1] For a discussion of Scotland in the context of the coronation ceremony, see Randolph Churchill, *The Story of the Coronation*, Derek Verschoyle, London, 1953, Chapter 15, 'Scotland and the Coronation.'

[2] See *Act of Union*, Article XXIV, in Dykes, *ed. cit.*, pp. 150-151.

[3] The Honours of Scotland were hidden again during the Second World War, and were presented to HM The Queen in 1953 in a thanksgiving ceremony in Scotland. For some details of the Honours of Scotland, see the Royal Web Site, under 'Frequently asked Questions', at http://www.royal.gov.uk.

[4] See *Act of Union*, Article XXV, in Dykes, *ed. cit.*, p. 151.

mentioned in the *Act of Union's* requirements concerning the Church of Scotland. But what happened was that the coronation oath taken by the monarch of Great Britain was the *English* oath to which was added the requirement concerning the *Church of England* as spelled out in the *Act of Union*, the coronation being conducted according to the rites of the Church of England.[1] The Scots coronation oath was to apply 'hereafter in any time'[2], with the *Claim of Right* maintaining that no protestant successor could exercise the regal power in Scotland until they had taken the Scots coronation oath[3]; while the English coronation oath was to be taken by kings of England 'in all Times to come'.[4] The English *Act of Settlement* provided that every king of England shall have the coronation oath administered to them at their coronation.[5]

I can see no reason why the English coronation oath alone appears to have been administered since the union of Scotland and England. P E Schramm in his *History of the English Coronation* says that as a result of the *Act of Union*, 'the Scottish coronation, disused since the reign of James II, can no longer be held.'[6] I find this assertion difficult to accept, as the Scottish coronation would appear not to have been used at all for James II and VII, and he did not take the Scots coronation oath; but William and Mary did take the Scots coronation oath, and so did Anne.

There is, in my view, no legal impediment to the use of the Scottish coronation ceremony, or the Scottish coronation oath for the monarch of Great Britain/United Kingdom.

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[1] The full text can be seen in my Appendix I, sourced to 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. 118-120.

[2] Scots *Coronation Oath Act*, 1567. [Scotland], 1567 c.8, see *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] *Claim of Right Act* [Scotland , (1689 c. 28), [1689 c. 13]], see *Statutes in Force*, Official Revised Version, revised to 1st February 1978; HMSO, London, 1978; 'The Declaration of the Estate of the Kingdom of Scotland containing the Claim of Right and the offer of the Croune to the King and Queen of England.' Short Title given by Statute Law Revision (Scotland) Act 1964 (c. 80), Sch. 2.

[4] See English *Coronation Oath Act*, 1 Will. & Mary c. 6, 1688 (This is the citation given by *Statutes in Force*, Official Revised Edition, Revised to 1st February 1978, Her Majesty's Stationery Office, London, 1978, Short Title given by Statute Law Revision Act 1948 (c.62), Sch. 2.

[5] *Act of Settlement*, 1700, c. 2; 12 & 13 Will. 3 c. 2—this is the citation given by *Statutes in Force, Official Revised Edition, Bill of Rights*, An Act for the Further Limitation of the Crown and better securing the Rights and Liberties of the Subject. (*Rot. Parl.* 12 & 13 Gul. III. p.1, n.2.), revised to 1st February 1978; HMSO, London, 1978; Short Title give by *Short Titles Act* 1896, (c. 14), Sch. 1.

[6] Percy E Schramm, *A History of the English Coronation*, English translation by Leopold G Wickham Legg, Clarendon Press, Oxford, 1937, p. 103.

Indeed, it would seem quite likely that there is still as great a requirement for the king of Great Britain/United Kingdom to take the Scots oath as there is for him to take the English oath. The *Act of Settlement* requires the king of England to be 'in communion with' the Church of England; but this was no impediment to George I's succession, he being a Lutheran. (Any protestant may take communion in any protestant church, there being no prerequisite of membership of a particular sect, as there is for the church of Rome). The mere fact that the requirement in the *Act of Union* is for the king to make his declaration about the Church of England at his coronation, while it says he must make his declaration about the Church of Scotland at his accession is not, I would think, sufficient to oust the Scots coronation oath, or the Scots coronation rite, or to confirm the English coronation oath and the English coronation rite as the only rite for the monarch of Great Britain. Indeed, in terms of precedence, one could argue that because the Scots declaration was to be taken at the king's accession, the Scots bindings of the king were perceived to have a higher priority than those of the English, who were to impose their religious restrictions only some time later at the coronation.

It seems constitutionally and legally possible and probably desirable if not necessary that the monarch of Great Britain/United Kingdom be crowned according to the rites of the church of Scotland in Scotland. If this were to occur, then under Scottish law it seems to me that the monarch would have to swear the Scottish coronation oath under the *Coronation Oath Act*, Scotland, of 1567,[1] which has never been amended or overridden by any later statute of the Union of Great Britain established in 1707, or of the United Kingdom. Under the law of England, he would also have to swear at his coronation the coronation oath of 1689—that oath of course confined its operation to the kingdom of England and the dominions thereunto belonging. Practice since the Union of England and Scotland appears however to have been that the monarch makes his Scottish 'declaration' as to the Church of Scotland on his accession before the Accession Council, while making his statement about the Church of England as part of the English coronation oath during the coronation ceremony.

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By the time Anne died, the Whigs had succeeded very well in their propaganda war, and

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[1] Scots *Coronation Oath Act*, 1567

the commons appeared to have the upper hand over lords and king. All that remained was for the king to retire from the lists, and the commons would have won the day. The German George I succeeded to a throne he apparently didn't want, spent as much of his time as he could in Hanover, to which he seemed to see England and Scotland as appendages, and the commons set about getting what they wanted.