CHAPTER 9

POLITICS AND THE KING'S OATH

THE SUCCESSION OF THE GERMAN KINGS

George I was extremely lucky to succeed to the throne of Great Britain. Anne herself had a profound distaste for the German[1] House of Hanover, and there was speculation that she favoured the Pretender.[2] Numerous approaches had been made to James Francis Edward before Anne's death, some suggesting that if he renounced catholicism or dissembled, he should obtain the throne, and there seems little doubt that Anne's sympathies were with the Pretender.[3] The Pretender resolutely refused to change his religious beliefs, and this, together with the lack of preparation by the Jacobite faction and the swift actions of the Whigs on Anne's death, meant the throne went to the Lutheran George. But the question of the legitimacy of the succession of the House of Hanover continued throughout the century, its pervasiveness being demonstrated by David Hume's essay 'Of the Protestant Succession' which discusses the respective merits of the houses of Stuart and Hanover. This essay had been prepared for the 1748 edition of Hume's *Essays Moral and Political*, but was not included because of the proximity of the Jacobite rising of '45—the essay was revised considerably in different editions before the final version published in 1777, and

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[1] For a general background to the succession of the House of Hanover, see A W Ward, 'The Electress Sophia and the Hanoverian Succession', *EHR*, Vol. I, 1886, pp. 470-506. George I was of the House of Hanover, one of the German Principalities; common parlance in England referred to him as 'German George'.

[2] See W E H Lecky, *A History of England in the Eighteenth Century*, Longmans, Green and Co., London, 1878, Vol. I, p. 135, p. 149, and pp. 154-155. And see Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, Alex. Murray & Son, London, 1869, pp. 756-758.

[3] See Lecky, *England in the Eighteenth Century*, *loc. cit.*, pp. 147-149, and the sources quoted there.

though Hume ends up supporting the Hanoverian succession, he also expounds a case for the Stuarts.[1]

When George I succeeded, he was fifty-four, and settled in his German ways;[2] he knew little English,[3] even though he had been aware of the possibility for some years of his succeeding to the throne of England, and (probably) of Scotland. He was proclaimed by the Privy Council as king immediately after the death of Anne in accordance with the *Succession Act* of 1707 and the common law, while he was still on the continent. He came to England accompanied by his mistresses[4] and his son, his wife being incarcerated at his orders at Ahlden until her death.[5]

It appears that he took the English coronation oath of 1689, enlarged by the required words from the *Act of Union* concerning the Church of England.[6] It would appear that the words of the English oath of governance were altered in the first clause to replace 'Will you govern the people of this kingdom of England...' with '...people of this kingdom of Great Britain...'[7] The authority under which this occurred is unknown; and whether the Scots were consulted or even informed is unknown also. George could just as well and equally legally have sworn the Scots coronation oath, using the words 'Great Britain' instead of 'Scotland', with the English Anglican protestation added at the end of it. More properly, he

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[1] See David Hume, 'Of the Protestant Succession', published in numerous editions and again in the posthumous collection, *Essays Moral, Political, and Literary*, in 1777. 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. 292-301, Essay XXVI, and the editors' note at p. 343..

[2] See Basil Williams, *The Whig Supremacy*, 1714-1760, *The Oxford History of England*, G N Clark, (*ed.*), Vol. XI, Clarendon Press, Oxford, 1939, reprinted with corrections 1942, 1945, 1949, p. 145.

[3] His command of English was probably greater than early twentieth century historians thought. While he communicated mainly in French, and had papers submitted to him in French, he was capable of writing clearly in English, and interspersed his French with English phrases—see Ragnhild Hatton, *George I Elector and King*, Thames and Hudson, London, 1978, at pp. 128-131.

[4] One mistress was the avaricious Ermengarda Melusina von Schulenberg, who exerted enormous influence on the king, and who when faced with heckling on the streets of London is said to have said in her broken English, 'Vy do you abuse us, ve only come for your goots!', to which the reply came from the crowd: 'Aye, damn ye, and for our chattels also!'—see Sir H M Imbert-Terry, *A Constitutional King, George the First*, John Murray, London, 1927, p. 146.

[5] See C Grant Robertson, *England Under the Hanoverians*, Methuen & Co Ltd, London, 1911, 9th edn., 1928, p. 17, and Appendix 1, The Prisoner of Ahlden, pp. 489-490.

[6] See my Appendix I; and 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 pp. 118-120.

[7] I have not been able to sight a text of the oath taken by George I. C Grant Robertson, in *Select Statutes, Cases and Documents to illustrate English Constitutional History 1660-1832*, Methuen & Co, London, 1904, 5th ed. enlarged, 1928, at p. 116, gives a text he says was used for William and Mary, which erroneously includes the words 'kingdom of Great Britain'; from this I draw an inference that this was the text used for George I.

should have sworn both coronation oaths, as required by the unamended statutes of Scotland and England respectively. But George was already a tool of the Whigs, owing his accession to their greater promptitude than the Jacobites in issuing an Accession Proclamation on Anne's death.

He made the declaration against transubstantiation, the invocation of saints and the sacrifice of the mass required by the *Second Test Act*[1] at the coronation before the coronation oath.[2] As the king knew little English, and his advisers no German, the oath was explained to him in such Latin[3] or French[4] as the advisers could command—he must have uttered it in English, the language which his people could understand, so either he learned it by rote once he understood its consequences, or his command of English was greater than he has been credited with. George I signed the oath, a practice followed by his successors.[5] It would appear that George did not take the Scots coronation oath, and one can but assume that he made the declaration concerning the maintenance of the Church of Scotland as set down in the *Act of Union*.[6]

George II had been thirty-one years old when his father succeeded to the throne of the United Kingdom, and was forty-four when he himself succeeded. He spoke English, but with an atrocious accent.[7] He too took the English coronation oath in the form that his father had taken, and made the English 'protestant declaration' before the coronation oath

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[1] See *The Second Test Act*, 1678, 30 Car. II, stat. 2, cap. 1; From *Statutes of the Realm*, V, 894-896, reproduced in *English Historical Documents*, Vol. VIII, (*ed.*) Andrew Browning, David D Douglas (gen. ed.), Eyre & Spottiswoode, London, 1966, at p. 391-394, p. 392; for Text see my Appendix I.

[2] 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, p. 140; and see my Appendix I.

[3] See The Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, pp. 100-101, and see W J Loftie, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India*, Cassell & Company, London, 1902, pp. 113-114

[4] See Sir H M Imbert-Terry, *A Constitutional King, George the First*, John Murray, London, 1927, who at pp. 151-152 suggests that all George's advisers except Walpole communicated with the king in French; Walpole, however, 'possessed no acquaintance with any language except his own', and thus communicated with George 'by means of such Latin phrases as an incomplete acquaintance with that tongue supplied; as he himself once observed, he controlled the King "by bad Latin and good punch".'

[5] 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, at p. 140.

[6] J Wickham Legg *ed. cit.* says at p. 140, that Georges I and II made the declaration against transubstantiation at the coronation. If this is so, George must have recited by rote in English, or said it in Latin or French.

[7] See Basil Williams, *The Whig Supremacy, loc. cit.*, p. 146.

at his coronation.[1].

POLITICAL IDEAS UNDER THE GEORGES

THE 'SOVEREIGNTY OF PARLIAMENT'

These two reigns saw the consolidation of the idea of the 'sovereignty of parliament', as a result primarily of five causes.

Firstly, the Jacobites were reduced as a result of the unsuccessful risings of 1715[2] and 1717,[3] on behalf of the Old Chevalier, and that of 1745, led by the Young Pretender, Charles Edward, on behalf of his father.[4] The construction of roads opened up the Highlands, (eight companies of Highlanders being raised to work on the roads, who were allowed to wear the kilt—these later became the Black Watch),[5] and after the '45 gradually the Highlanders as well as the Lowlanders began to benefit from the increase of trade with England, with general economic and social benefits to all Scots. The British government in London began a process of 'civilising the inhabitants of...the Highlands and Islands'[6], by Acts in 1747[7] which compelled the taking of the oath of allegiance, forbade the wearing of the kilt or tartan or the bearing of arms, abolished the clan chiefs' hereditary jurisdiction in their own courts, and their claim of military service from their clansmen,[8] and by the exclusion of the Scots Gaelic (Erse) from the schools.[9] (Some Scots saw these Acts as

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[1] J Wickham Legg, *ed. cit.*, p. 140. I have been able to find no evidence as to what steps George II took in relation to his obligations to Scotland under the *Act of Union*.

[2] See Basil Williams, *The Whig Supremacy*, *loc. cit.*, pp. 154-156.

[3] See Basil Williams, *The Whig Supremacy*, *loc. cit.*, pp. 166-167.

[4] See Basil Williams, *The Whig Supremacy*, *loc. cit.*, pp. 238-244

[5] See Basil Williams, *The Whig Supremacy*, *loc. cit.*, p. 265.

[6] Lord Advocate Grant, quoted by Basil Williams in *The Whig Supremacy*, *loc. cit.*, at p. 267.

[7] See for example, An Act for the Pacification of the Highlands of Scotland, 19 Geo. II, c. 39, 1746, reproduced 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. 214-221; and The Forfeited Estates Act, 1752; and The Abolition of Heritable Jurisdictions (Scotland) act, 20 Geo. II, c. 43, 1747, in C Grant Robertson, *Select Statutes, loc. cit.*, p214, and p. 221-223 respectively.

[8] Basil Williams, *The Whig Supremacy*, at p. 266.

[9] Basil Williams, *The Whig Supremacy*, at p. 268.—cf. Dr Johnson's *Journey to Western Islands of Scotland*, '...Schools are erected in which *English* only is taught...''quoted in Williams, *The Whig Supremacy*, *loc. cit.*, pp. 268-269, in turn sourced at p. 269, n. 1, to M G Jones, *Charity School Movement*, pp. 166-214. The Scots education system generally however was

being unconstitutional, in the sense of infringing the terms of the *Act of Union*).[1] The general rise in the prosperity of Scotland and the concomitant growth in security from the decline of Jacobite influence reinforced the growing predilection to rely upon the parliament in London as the bulwark of property and prosperity.

Secondly, those sitting in the House of Commons were men of wealth and property, and they quickly perceived that the idea of the sovereignty of parliament could be used to protect and advance the propertied elite from incursion by the crown, and from any threat by the 'lower orders' of society. Members of the Commons 'strove to keep their behaviour in the House secret, and insisted that they must be the independent representatives and not the instructed delegates of the people.'[2] Numerous bills designed to benefit propertied men were passed;[3] between 1711 and 1811 the annual legislative output increased from 74 acts (public and private) to 128 public and 295 local or public acts.[4] The number of offences against property that could be punished by the death sentence grew between 1688 and 1829 from about fifty, to over two hundred;[5] and a mass of legislation was passed enabling crimes affecting the gentry to be tried by summary jurisdiction, thus relieving propertied men of the need to draw up formal legal indictments.[6] The extension of the life of the parliament (effectively, the life of the House of Commons) which had been elected for

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far superior to that in England; but it had in the main been concentrated in the Lowlands, due to the inaccessibility of the Highlands.—see Williams, p. 268.

[1] 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. 207, particularly note 54, where he notes the Scots objected to The Treason Act 1709, the Patronage Act 1712, the Malt Tax Act 1713, and the Heritable Jurisdictions Act 1747.

[2] H T Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, pp. 189-210, at p. 200; source referred to is Lucy S Sutherland, 'Edmund Burke and the Relations between Members of Parliament and their Committees,' *Studies in Burke and His Time*, x, London, 1968, pp. 1005-1021. See also Basil Williams, *The Whig Supremacy*, *op. cit.*, p. 30.

[3] On matters such as turnpikes, enclosures, etc., see Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 200.

[4] Sheila Lambert, *Bills and Acts*, Cambridge, 1971, p. 52, referred to in Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *ibid.*, p. 200, and n. 37.

[5] By the end of the reign of George II, 160 felonies were punishable by death, including such minor offences as cutting down a cherry tree, being seen for a month in the company of gypsies, sheep stealing. Samuel Johnson, Oliver Goldsmith, and Blackstone all doubted the efficacy of capital punishment as a means of protecting property.—see Basil Williams, *The Whig Supremacy*, *op. cit.*, p. 60, and n. 4.

[6] Douglas Hay, 'Property, Authority and the Criminal Law,' in *Albion's Fatal Tree*, Douglas Hay, Peter Linebaugh and E P Thompson, (*eds.*), London, 1975, referred to and relied upon in Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 200, and n. 38.

three years, to seven years in *The Septennial Act* of 1716,[1] was driven by Whig fears of defeat in the elections by the Jacobites and Tories, which could jeopardise the German regime. (Later in 1719, a further extension of the life of that particular House of Commons was proposed as an inducement to their passing of the Peerage Bill, but the proposal was dropped.)[2] The Act provoked bitter resentment and a determined onslaught on the doctrine of parliamentary sovereignty,[3] particularly in the Lords, thirty-one peers signing a Protest. The Protest stated that the Bill (as it then was) was a 'subversion of an essential part of our constitution', and 'an express and absolute subversion of the third estate of the realm', because the House of Commons would be chosen not by the people, but by the parliament, the people being thus deprived of 'their only remedy...which they have against those who...betray the trust imposed in them.'[4]

Inferentially, the underlying premise accepted by those who voted for the Bill was that a parliament's power could not be curbed by the wishes of an electorate which had chosen representatives for three years only, nor by any previous statute.[5] But many commentators, including A V Dicey, saw the *Septennial Act* as 'at once the result and the standing proof of such parliamentary sovereignty.'—that is, 'in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents.'[6] But as J W Gough points out, the prevailing impression at the time was that of 'a fundamental constitution limiting the capacity of the legislature,'[7] and a concomitant disquiet about the *Septennial Act*, numerous efforts being made to repeal it during the eighteenth century.[1]

Thirdly, the inability or unwillingness of George I to speak English, and his lack of interest in the country, his preference for staying in Hanover, led to the domination in English

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[1] *The Septennial Act*, 1 Geo. I, st. 2, c. 38, 1716; reproduced in C Grant Robertson, *Select Statutes, loc. cit.*, pp. 200-203, in D Oswald Dykes, *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 182-185.

[2] See Basil Williams, *Stanhope*, 1932, pp. 410-414, referred to by Williams in his *Whig Supremacy*, at p. 158.

[3] See Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *loc. cit.*, p. 207, n. 55, sourced to T C Hansard, *The Parliamentary History of England*, London, 1806-1820, Vol. VII, pp. 304-357.

[4] Protest of the Dissentient Peers against the passing of the Septennial Act, *Lords Journals*, 14 April, 1716, reproduced in C Grant Robertson, *Select Statutes, loc. cit.*, pp. 202-203; and in Dykes, *loc. cit.*, pp. 183-185.

[5] See Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 201.

[6] A V Dicey, *Introduction to the Study of the Law of the Constitution*, 1885, 10th edn, E C S Wade, (Introduction), Macmillan, 1973, at pp. 47-48; discussion on the *Septennial Act* covers pp. 44-48.

[7] J W Gough, *Fundamental Law in English Constitutional History*, Clarendon Press, Oxford, 1955, reprinted 1961, 1971, with corrections, p. 181; Gough discusses the Septennial Act at pp. 180-186.

affairs of his Whig ministers, evidenced in particular by the passage of the *Septennial Act*. Some historians were of the view that, in addition, George I discontinued the practice of William and Anne of calling cabinet in the royal presence, he presiding over only ten or so Cabinet meetings, ceasing to attend altogether after 1718.[2] George II had presided at cabinet meetings in 1716 while his father was in Hanover, but with one or two exceptions, did not (apparently) do so after his accession. As a result, the king never heard the pros and cons of a policy debated (should he have been able to understand the English , French or Latin used), rather merely the ministers' decisions, his power thus being substantially diminished while that of the ministers and the houses of parliament grew.[3] Another view, however, is that George I continued to attend cabinet meetings throughout his reign, and that it was the Prince of Wales who absented himself from the meetings after 1717, probably in a bid to establish independent power.[4] Nevertheless, the observation about George I's ignorance of the pros and cons of a matter due to his lack of proficiency in English would still, I believe, hold true.

Fourthly, the burden of administration had grown since the time of James VI and I, due not only to the increase in mercantile power of England, but also the establishment of colonies and the almost continual pursuit of war, often to fulfil the continental ambitions of the imported continental princes, William and the first two Georges. Great Britain in 1714 held Newfoundland, Nova Scotia, Massachusetts, Connecticut, Rhode Island, New Hampshire, Virginia, Maryland, New York, New Jersey, Pennsylvania, Delaware, North and South Carolina, the Bermudas, Bahamas, Jamaica, Virgin Islands, St Kitts, Antigua, Montserrat, Barbados, Hudson Bay Territory, India, West Africa, while it also held the military posts of Minorca and Gibraltar. Georgia was settled during the reign of George II. While the American plantations exhibited a robust sense of independence, due in part to their having initially been established under royal charter granted to companies or individuals, and in part to their religious independence, by the end of George II's reign, most had been resumed by the Crown.[1] The colonies however needed the protection of the Royal navy and army from the French. Georges I and II maintained a personal and direct

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[1] See Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, p. 207.

[2] See Basil Williams, *The Whig Supremacy, loc. cit.*, p. 37.

[3] See Basil Williams, *The Whig Supremacy, ibid.*, p. 37.

[4] See Ragnhild Hatton, *George I, op. cit.*, at pp. 129-131.

control over the armed forces and foreign affairs, George II being the last British monarch personally to take the field at Dettingen. Due to their frequent absences, wars permitting, in Hanover, much of the burden of the administration of these matters fell upon the members of the Council, many of whom were in the Commons.

Fifthly, while there was considerable opposition to the doctrine of parliamentary sovereignty, it was fragmented and lacked unity. Opposition variously relied upon the law of nature, or the laws of God, or the fundamental law, or the fundamental constitution, or the idea of the social contract and the sovereignty of the people, as circumscribing the power of the legislature.[2]

It is under the first two Georges that the idea of the 'sovereignty of parliament', meaning the pre-eminence given to the two houses and in practice the commons as law makers through initiation of statutes, became entrenched. Moreover, by virtue of the aforementioned influences and the long reign of George II, (thirty-three years), the presumption that power would be exercised by ministers, usually drawn from the House of Commons, and that the king would act upon that advice, grew up—he recognised, it is said, 'his own limitations and the necessity of accepting the advice of ministers supported by 'that damned House of Commons.'[3]

As Gough has noted, the House of Commons in the eighteenth century acted 'with cynical disregard for any interests other than its own'.[4] Daniel Defoe attacked the House of Commons in *Legion's Memorial*,[5] concluding that the supreme power lodged with the people, who delegated, for the purposes of the public good, executive power to the king, and legislative power to king, lords and commons, and ultimate judicial power to the lords, but

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[1] The foregoing draws heavily on Basil Williams, *The Whig Supremacy*, *op. cit.*, Chapter 11.

[2] For a general discussion see Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, pp. 201 ff.; Gough, *Fundamental Law*, *loc. cit.*, pp. 174 ff.; and J W Gough, *The Social Contract: A Critical Study of its Development*, Oxford, 2nd edn., 1957, reprinted 1967, pp. 189 ff.

[3] Basil Williams, *The Whig Supremacy*, *loc. cit.*, at 344; the quotation is of George II.

[4] See Gough, *Fundamental Law*, *loc. cit.*, p. 175; cf. A F Pollard, *The Evolution of Parliament*, Longmans, Green, and Co., London, 1920, 2nd edn 1926, new impression 1964, at pp. 179-180, and the discussion at pp. 407, *supra* (note Pollard on the Commons preoccupations with great matters of state like fishponds and rabbits.)

[5] Daniel Defoe, *Legion's Memorial*, p. 4 in *Works*, W Hazlitt, (*ed.*), 1843, Vol. iii, quoted in Gough, *Fundamental Law*, *op. cit.*, p. 175 and n. 1.

reserved the remainder to themselves.[1] The idea of sovereignty residing in the people was derived to some large degree from the writings of Locke, and enjoyed considerable currency by the end of the century.[2] But 'the people' were almost invariably seen as men of property,[3] who, as George III noted,[4] were represented mainly in the Commons, not the Lords; or later in the century, as men who paid taxes.[5]

GEORGE III AND HIS OATH

Before his accession, George III in 1760 wrote an appreciation of the British Constitution, in which he stated:

> By the British Constitution the Legislative power is executed by the King, lords & Commons no one of which constituent part can levy Taxes or institute Laws without the consent of the other two. As to the Executive, that is administered by the King alone....
>
> Every form of Government has some principle to which its laws & rules of Action ought to be agreeable; in Democracy's & Aristocracy's this is virtue, in Monarchy, honour; in Despotism pride, avarice & sloth.
>
> The British Constitution being a mixture of the three forms of Government, honour & virtue ought to be equally thought of.[6]

George III was crowned in 1761, taking the same coronation oath as had his two immediate predecessors, and making the English protestant declaration at the coronation before the oath.[7] George was twenty-three when he succeeded, and while born and bred in England[8], was considerably under the influence of James Stuart, third Earl of Bute, a Scot.

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[1] Defoe, *Legion's Memorial, ibid.*, pp. 8, 9, quoted in Gough, *Fundamental Law, ibid.*, p. 176.

[2] See Dickinson, 'The Eighteenth-Century Debate on the Sovereignty of Parliament', *art. cit.*, pp. 202-205.

[3] See Daniel Defoe, *The Original Power of the Collective Body of the People of England, Examined and Asserted*, London, 1702, p. 18, quoted in Dickinson, *art. cit.*, p. 203, and n. 42; and see the sources quoted in Dickinson, *ibid.*, notes 40, 41, 42,

[4] See Bute MSS., Mount Stuart, in the possession of the Marquess of Bute, (12 January 1760-29 February 1760), as reproduced in Peter D G Thomas, '"Thoughts on the British Constitution", by George III in 1760', *BIHR*, Vol. LX, 1987, 361-363 (written at the age of 21, a few months before his accession to the throne; a modern copy, headed 'in the handwriting of George III'. For text see my Appendix I.

[5] See Dickinson, *art. cit.*, pp. 204-205, and the sources quoted in notes 45 and 46.

[6] See Bute MSS., (12 January 1760-29 February 1760), in Peter D G Thomas, '"Thoughts on the British Constitution", by George III in 1760', *art. cit.*, 361-363 And see my Appendix I. There is some suggestion that Bute may have secured a manuscript copy of Blackstone's work which was later published in his *Commentaries*; Blackstone had been giving lectures at All Souls in Oxford from 1753 (See Basil Williams, *The Whig Supremacy, op. cit.*, p. 61, and p. 134.), and that he had tutored George on the basis of the manuscripts. (See C Grant Robertson, *England Under the Hanoverians, op. cit.*, p. 219.)

[7] See J Wickham Legg , *Three Coronation Orders, ed. cit.*, p. 140.

[8] 'born and bred an Englishman,' says C Grant Robertson, *England Under the Hanoverians*, p. 217.

Samuel Johnson remarked that 'he had long been in the hands of the Scots'; Fox thought the King's speech in the King's Speech used 'the Scots pronunciation'; and because George therein had said : 'Born and educated in this country, I glory in the name of Britain,' he was seen as giving Scotland too much emphasis because he had not gloried in being English ('Scotchman' [to use English parlance] at this time was a synonym for undesirable immigrant).[1] In this connection, there may have been some truth in the suggestion that Charles Edward, the young Chevalier, was present at the coronation of George III, allegedly saying that 'the person who is the object of all this pomp and magnificence is the person I envy least.'[2] I have not been able to find any reference to George making the Scots protestant declaration, which he must have done; nor to any views which he or Bute may have had concerning the Scots coronation oath.

IRELAND AND QUEBEC

George III was a pious man, and took the coronation oath seriously. In 1793, the king agreed to legislation giving the vote to Irish Catholics, but 'further the king was not prepared to go, believing that Catholic Emancipation must lead to the separation of the two kingdoms, and that his coronation oath to uphold the Protestant constitution in Church and state could not be broken.'[3] The king expressed concern about possible conflict between the coronation oath, the *Act of Settlement* and the *Articles of Union with Scotland*, and catholic emancipation in a letter to Lord Kenyon dated 7 March 1795.[4] The conflict stemmed from his oath made in 1761:

> Will You to the utmost of Your power maintain the Laws of God the true Profession of the Gospel and the Protestant Reformed Religion established by Law? And will You maintain and Preserve inviolately the settlement of the Church of England and Ireland and

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[1] The preceding quotations are taken from Stephen Ayling, *George the Third*, Collins, London, 1972, p. 67, and pp. 69-71.

[2] See discussion at p. 159, *supra*—for sources, see J Heneage Jesse, *Memoirs of the Life and Reign of King George the Third*, in three volumes, Tinsley Brothers, London, 1867, Vol. I, p. 104; sourced to a letter from 'Hume the historian'—presumably David Hume, to Sir John Pringle, 10 February, 1773, in Nichol's *Literary Anecdotes of the 18th Century*, vol. ix, p. 401.

[3] John Cannon and Ralph Phillips, *The Oxford Illustrated History of the British Monarchy*, Oxford University Press, Oxford, New York, 1988; reprinted with corrections 1989, 1992, p. 526.

[4] Letter from George III to Lord Kenyon, from Queen's House, dated March 7th, 1795, from H Philpotts (*ed.*), Letters from His late Majesty to the late Lord Kenyon on the Coronation Oath, etc, (1827). p. 5; as quoted in *The Eighteenth Century Constitution, Documents and Commentary*, complied and introduced by E N Williams, Cambridge University Press, Cambridge, 1960; reprinted 1965, 1970; at pp. 347-348. See also *Historical Manuscripts Commission*, Lord Kenyon, pp. 542-543, and G T Kenyon, *The Life of Lloyd, First Lord Kenyon*, London, 1873, pp. 305-320, 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. 210, and note 63.

> the doctrine, worship, discipline, and government thereof as by law established, within the Kingdoms of England and Ireland, [the dominion of Wales, and the town of Berwick-upon-Tweed][1] and the territories thereto belonging?[2] And will you preserve unto the Bishops and Clergy of this Realm and to the Churches there committed to their Charge all such Rights and Privileges as by Law do or shall appertain unto them or any of them?

Lord Kenyon advised the king that the person who had taken the coronation oath must decide whether a particular proposal would violate it.[3] Dundas (Lord Melville) had tried to suggest that an Act of parliament could not be deemed contrary to the coronation oath[4]—but this is hardly the point : an Act of parliament can only be an Act if the king consents, and the question of whether or not a matter is in opposition to the coronation oath is one to which the king must address his mind *before* giving his assent. This was exactly what George III was doing, and is probably why he dismissed Dundas' claims as 'Scotch metaphysics'[5]. But some saw the king's conscience as not being his own property, the contention of the Foxite Whigs being that 'like everything else about him, it [the king's conscience] had been turned into an institution controlled by his responsible advisers.'[6] But this was again a wishful craving, the repeated iteration of which it was hoped, would turn it magically into a realty.

Pitt had orchestrated the United Kingdom of Great Britain and Ireland in 1801[7], envisaging there being a trade-off of Catholic Emancipation; he had however, been aware of the king's views, and had been aware of promises made to the Irish catholics concerning the granting of emancipation, which in turn he knew he was in no position to honour. It would appear

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[1] These words in brackets were probably not in George III's oath. *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 p. 1014 *Halsbury* states that: 'any need for specific mention [of Wales or Berwick-on-Tweed] disappeared on the enactment of the *Wales and Berwick Act* 1746, s 3, (later repealed) which provided that references in Acts to England should be taken to include the town of Berwick upon Tweed' and Wales. See my Appendix I for full references to *Halsbury*.

[2] 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.

[3] See G T Kenyon, *Life of Lord Kenyon*, London, 1873, pp. 308 *seqq.*, referred to in Richard Pares, *King George III and the Politicians*, The Ford Lectures delivered in the University of Oxford, 1951-1952, Clarendon Press, Oxford, 1953, reprinted 1954, 1959, at p. 140, note 3.

[4] See this statement in Pares, *King George III and the Politicians*, *ibid.*, p. 140.

[5] This is the king's phrase as quoted in Pares, *ibid.*; but I doubt that George would have used the word 'Scotch', this never being an appellation applied by the Scots to themselves, but rather an English term used confusingly and indiscriminately to apply to an alcoholic drink and a people.

[6] See speech of Lord Erskine, *Parliamentary Debates*, ix, 362—'The king as chief magistrate, can have no conscience which is not in the trust of responsible subjects'; quoted and referred to in Pares, *King George III and the Politicians*, *loc. cit.*, p. 140

[7] An Act for the Union of Great Britain and Ireland, 39 & 40 Geo. III, c. 67, Royal assent, 2 July, 1800, see D Oswald Dykes, *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, pp. 169-176.

that he had not discussed this specifically with the king beforehand; George, while supporting union,[1] was strenuously opposed to catholic emancipation.[2] When the king heard of the proposal (apparently quite suddenly)[3], he repeated his formula of 1783, (that any man who voted for it would be his enemy)[4]. Pitt wrote to the king on 31 January 1801, in ambiguous terms,[5] offering to resign.[6] The king responded to Pitt, putting his position clearly:

> I should not do justice to the warm impulse of my heart if I entered on the subject most unpleasant to my mind without first expressing that the cordial affection I have for Mr Pitt, as well as high opinion of his talents and integrity, greatly add to my uneasiness on this occasion; but a sense of religious as well as political duty had made me, from the moment I mounted the throne, consider the Oath that the wisdom of our forefathers has enjoined the Kings of this realm to take at their coronation, and enforced by the obligation of instantly following it in the course of the ceremony with taking the Sacrament, as so binding a religious obligation on me to maintain the fundamental maxims on which our Constitution is placed, namely, the Church of England being the established one, and that those who hold employments in the State must be members of it, and consequently obliged not only to take Oaths against Popery, but to receive the Holy Communion agreeably to the rite of the Church of England.
>
> This principle of duty must therefore prevent me from discussing any proposals tending to destroy this ground work of our happy Constitution, and much more so that now mentioned by Mr Pitt, which is no less than the complete overthrow of the whole fabric.[7]

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[1] It would appear that bribery played a great role in securing the passage of the Union bill through the two houses, some of this being in the form of promises of peerages in return for services rendered.; as a result, 19 men were given Irish peerages, and 15 were promoted in the Irish peerage, and 4 received English titles. H M Hyde, p. 364, referred to in Donald Grove Barnes, *George III and William Pitt, 1783-1806*, 1939, reprinted Octagon Books, New York, 1965, p.364, and n. 47.

[2] See Minute of George III, 31 January, 1799, Clements Transcripts, IX, 021, quoted in Donald Grove Barnes, *George III and William Pitt, 1783-1806*, 1939, reprinted Octagon Books, New York, 1965, p. 362, and n. 43.

[3] See Barnes, *George III and William Pitt, loc. cit.*, p. 370.

[4] The issue in 1783 had been with regard to the India Bill, which by transferring the political and patronage powers of the East India Company to seven Commissioners (which included financial patronage calculated at £300,000 annually) was seen as transferring this financial patronage from the company, not to the crown, but to a political party (the Foxite Whigs) who would use the money to debauch parliament. The king brought pressure to bear on the lords not to pass it; Lord Temple [Earl Temple, Lord Lieutenant of Ireland] is reported to have said, after an audience with the king, that the king had authorised him to say that 'the King disapproved of the Bill, as unconstitutional, and subversive of the rights of the Crown, and that he should consider all who voted for it as his enemies.'—Letter from Mr Fitzpatrick to Lord Ossory, Monday, 15 December, 1783, in Lord J Russell, *Memorials and Correspondence of C J Fox*, ii, 220, quoted and reproduced in Costin and Watson, (*eds.*), *Law and Working of the Constitution: Vol. I 1660-1783*, pp. 403-404. On hearing about the catholic emancipation proposal, at a levee, the king said that the proposed measure was '...the most Jacobinical thing I ever heard of! I shall reckon any man my personal enemy who proposes any such measure.'— quoted in Barnes, *George III and William Pitt, loc. cit.*, p. 370, and sourced to Stanhope, *Pitt*, III, 274.

[5] See the discussion by Barnes, *George III and William Pitt, loc. cit.*, pp. 372-377.

[6] For text of Pitt's letter to George III, 31 January, 1801, see W C Costin, and J Steven Watson, (*eds.*), *The Law and Working of the Constitution: Documents 1660-1914, Vol. II 1784-1914*, Adam & Charles Black, London, 1952, 2nd edn. 1961, reprint 1967, at pp. 349-352, sourced to Stanhope's *Pitt*, III, xxiii; and Barnes, *George III and William Pitt, ibid.*, pp. 372-377.

[7] Letter from George III to William Pitt the Younger, written between 1 and 2 February, 1801, quoted in Donald Grove Barnes, *George III and William Pitt, 1783-1806*, 1939, reprinted Octagon Books, New York, 1965, pp. 377-378, and sourced to Stanhope, III, xxviii-xxx. [Barnes gives no date for this letter in the text of his work on George and Pitt at the pages referred to.]

The king made strenuous efforts to persuade Pitt not to go, but Pitt resigned. The king thereupon had a second severe attack of illness.[1] Pitt and the king remained however on good terms, Pitt promising not to raise the issue of catholic emancipation during the king's lifetime.[2]

George III has been traduced as being a bigoted arch-wrecker of Pitt's Irish policy,[3] and his concern about the conflict between Pitt's policies and his oath as being 'a scruple, ... [of] a mind, honest indeed, and religious, but narrow and obstinate by nature, and at once debilitated and excited by disease.'[4] These are the views of Sir C(harles) Grant Robertson and Lord Macaulay respectively, Robertson being heavily influenced by Macaulay.[5] Macaulay's view was formed after reading the debates of the 'Convention parliament' on the form of the oath, his interpretation being that 'Every person who has read these debates must be fully convinced that the statesmen who framed the coronation oath did not mean to bind the King in his legislative capacity.'[6] This of course is the old Whig interpretation, and there is considerable doubt as to what those 'statesmen' actually meant when they framed the oath—the Church of England was not consulted on its terms and gave it no ecclesiastical authority.[7] It is all very well for Macaulay to make these assertions that the oath was not meant to bind the king in his legislative but only in his executive capacity—this is but another way of raising the ghost of the king's two bodies. When the king swears his oath, the king is bound by it, and bound in all of the fullness of the entire oath. Certainly, George III was entitled to take his oath seriously,[8] as it was that which made him king, and not to abide by it would both make him foresworn, and (if past history

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[1] For details of the episode in the relationship of George III and Pitt, see Barnes, *George III and William Pitt, loc. cit.*, pp. 360-385. And see *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Phillips, Oxford University Press, Oxford, New York, 1988; reprinted with corrections 1989, 1992.,1997, pp. 526-527

[2] See Barnes, *George III and William Pitt, loc. cit.*, pp. 382-383 and the sources referred to there.

[3] See C Grant Robertson, *England Under the Hanoverians, op. cit.*, p. 404.

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

[5] See C Grant Robertson, *Select Statutes, op. cit.*, at p. 117 [re the coronation oath] 'The authorities cited by Macaulay (I, 712) prove beyond question that the oath to maintain the Church of England and Ireland "as by law established" was not intended in 1689 to bind the sovereign in his legislative, but only in his executive, capacity. Hence the interpretation put upon these words by George III was neither historically nor legally tenable.'

[6] Macaulay, *The History of England*, 1836, *loc. cit.*, p. 712.

[7] See discussion *supra* concerning the use of the veto by the king after the revolution, under 'William's Government', at p. 408, and 'Anne's Prerogative' at p. 424 ; and see the discussion concerning the Anglican church, at p. 383 *supra*.

[8] See the view of John Cannon and Ralph Phillips, in *The Oxford Illustrated History of the British Monarchy*, Oxford University Press, Oxford, New York, 1988; reprinted with corrections 1989, 1992, 1997, pp. 526-527.

were any guide) enable sections of the people to argue for his deposition for breaking the oath—indeed, on its terms, it is difficult to see how George could have held any view other than that which he did.

The situation on catholic emancipation contrasted however with that which obtained with regard to Quebec, which had fallen to the British in 1759 when General Wolfe had defeated the Marquis de Montcalm.[1] In George III's statement to parliament shortly after his accession, he reflected on the 'reduction of the vast province of Canada'[2] as being 'a heavy blow to my enemies' and 'a conquest most glorious to us'.[3] By Proclamation of 7 October 1763 the king undertook (*inter alia*) to summon general assemblies, and erect courts '...as near as maybe, agreeable to the laws of *England*,'[4] in the territories which France had ceded to the United Kingdom by the Treaty of Paris of 10 February, 1763, which marked the end of the French and Indian Wars and the Seven Years War.[5]

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[1] The whole question of the disposition of Canada was decided in the protracted negotiations held between the nations at the end of the Seven Years War and the French and Indian Wars, which resulted in the Treaty of Paris of 10 February, 1763. The English wanted Canada, but were unsure what to do with it, Pitt apparently considering trading off Canada for Guadeloupe. The French were not unwilling to cede Canada, Montcalm writing in his diary, 'If Canada was to be ceded, it would not be an irreparable loss.'—Montcalm to Berryer, Minister of Marine, 4 April, 1757, copy from the original in the Dartmouth Papers on deposit in Ottawa: National Archives of Canada, Manuscript Group (MG) 23 A1, Vol. 4, p. 4883, quoted and referred to by Philip Lawson, in 'A Perspective on British History and the Treatment of Quebec,' *Journal of Historical Sociology*, III, Oxford, 1990, 253-271, at p. 261, and n. 26 , reprinted in Collected Studies Series, Philip Lawson, *A Taste for Empire and Glory, Studies in British Overseas Expansion, 1660-1800*, Variorum, Aldershot, 1997, V. And for the Guadeloupe controversy, see Philip Lawson, *ibid.*, p. 261, and Philip Lawson, "The Irishman's Prize": Views of Canada from the British Press, 1760-1774', *The Historical Journal*, XXVIII, Cambridge, 1985, 575-596, pp. 579 ff., reproduced in Lawson, *A Taste for Empire an Glory, loc. cit.*.

[2] For a discussion of the history of Britain's claim to Canada dating from Cabot, see Philip Lawson, 'The Treatment of Quebec', *art. cit.*, at pp. 258-261. On 5 March 1496, Henry VII authorised John Cabot to undertake a northern voyage to Asia, despite the pope's bull that all new lands should be divided between Spain and Portugal. Cabot landed on the North American continent on 24 June, 1497, claiming the land for Henry VII.

[3] George III's accession statement in parliament, 18 November, 1760, from the text of the speech printed in *The British Magazine*, 1 November 1769, 660, quoted by and referred to in Philip Lawson, "The Irishman's Prize": Views of Canada from the British Press, 1760-1774', *The Historical Journal*, XXVIII, Cambridge, 1985, 575-596, at p. 587, and n. 34; reprinted in Collected Studies Series, Philip Lawson, *A Taste for Empire and Glory, Studies in British Overseas Expansion, 1660-1800*, Variorum, Aldershot, 1997, IV.

[4] For the relevance of the proclamation to the American native peoples, see p. 456 *infra*. George III's Proclamation, October, 1763, establishing guidelines for the civil government of Quebec, from the text of the Proclamation that appeared in *The Gentleman's Magazine*, XXXIII, October 1763, 477-479, as quoted and referred to in Philip Lawson, 'The Irishman's Prize...', *art. cit.*, p. 587 and n. 35. My emphasis; note the reference to laws of 'England', not 'Great Britain', or 'Scotland', or 'England or Scotland'. For text of the Proclamation, see also, The Avalon Project at the Yale Law School, http://www.yale.edu/lawweb/avalon/proc1763.html; and see also http://www.island.net/~hgroup/royal.html.

[5] By the terms of the treaty, France renounced to Britain all the mainland of North America east of the Mississippi, excluding New Orleans and environs; the West Indian islands of Grenada, Saint Vincent, Dominica, and Tobago; and all French conquests made since 1749 in India or in the East Indies. Britain, in return, restored to France the West Indian islands of Guadeloupe, Martinique, Marie-Galante, and Désirade; the islands of St. Pierre and Miquelon off Newfoundland; the West African colony of Gorée (Senegal); and Belle-Île-en-Mer off Brittany; Britain also ceded Saint

This Proclamation had been framed however in ignorance of the true situation in Quebec, and the settled religious, legal and law enforcement institutions already entrenched under French rule. The Treaty of Paris had made religious and civil guarantees to the French speaking population, the honouring of which clearly would be in breach of all those anti-catholic sentiments which had fanned the revolution of 1688, and which were still abroad in the populace. It would appear that George III supported religious toleration in Quebec.[1] A catholic Bishop for Quebec was quietly consecrated on the continent in 1766, and returned to Quebec. And eventually the *Quebec Act* of 1774[2] granted religious toleration to catholics, and established French civil law with rule by executive council.[3] This was in clear opposition to all underlying English policy for the preceding hundred years, and in stark contrast to the situation in Ireland. How could George reconcile assenting to the *Quebec Act* with refusing Catholic emancipation in Ireland? How could he agree to the Quebec Bill, and maintain his position of not doing anything to breach his coronation oath?[4]

It seems to me that the answer again lies in the coronation oath itself. The oath had been taken in 1761, after the fall of Quebec but before the conclusion of the peace treaty, and thus before the incorporation of Canada as a British possession or territory. The first clause of the oath refers to the king's governing the kingdom of 'Great Britain and the Dominions thereto belonging according to the Statutes in Parliament agreed on and the laws and customs of the same'; but when George III succeeded, and when he took the coronation

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Lucia to France. Spain at the same time recovered Havana and Manila, ceded East and West Florida to the British, and received Louisiana, including New Orleans, in compensation from the French. The French, moreover, evacuated Hanover, Hesse, and Brunswick. The British concessions to France in the West Indies were made partly in order to secure the French evacuation of Prussian exclaves in western Germany that France felt obliged to occupy pending Austria's settlement with Prussia (in the Treaty of Hubertusburg of 15 February, 1763). A vociferous section of the British public, however, would have preferred to retain the lucrative West Indian islands or to retrocede Canada instead. Spain ceded Florida to Britain but in return received the Louisiana Territory (i.e., the western half of the Mississippi River basin) and New Orleans from the French.— Copyright (c) 1996 *Encyclopaedia Britannica*, Inc. All Rights Reserved, *Britannica CD* ROM, 97.

[1] See letter from Murray in 1764, referring to the opposition between the 'humane heart of the king," and 'popular clamours'—National Archives of Canada, MG. 123, G 11, series 1, Vol. 2, p. 171, quoted in Lawson, 'The Treatment of Quebec,' *art. cit.*, p. 266 and n. 35.

[2] *The Quebec Act*, 1774, 14 Geo. III, c. 83, *Statutes at Large*, XXX, 549 ff. For text see S&M2, pp. 661-663.

[3] See Lawson, 'The Treatment of Quebec,' *art. cit.*, p. 256.

[4] One commentator at least has noted that the *Quebec Act* would appear to be in contradiction to George III's coronation oath; though it is not clear from the context whether this is the author's own view, or whether he is summarising a view prevalent in the American colonies at the time—see Philip Lawson, at p. 316 of his article, "'Sapped by Corruption" : British Governance of Quebec and the Breakdown of Anglo-American Relations on the Eve of

oath, Quebec was not a dominion of Great Britain; Ireland was in a different position, the king of England being the king of Ireland and the laws of England having been applied in Ireland since the time of John in 1211, and specifically after the enactment of Poynings law in 1495.[1] Moreover, the oath specifically required the king to '*maintain and preserve* inviolately the settlement of the Church of England and Ireland...as by law established...within the Kingdoms of England and Ireland and the territories thereto belonging.[2]' So the king had no option but to maintain the existing religious settlement in Ireland. But he could hardly maintain and preserve a religious settlement in a territory he did not have. Thus this part of the oath did not affect what was to be enacted with regard to any new territory. The oath required the king to uphold law and justice with mercy, and to maintain the laws of God, as well as 'the true profession of the gospel.' Under the well understood terms of the law of nations, when a territory was conquered, it was at the discretion of the conqueror what laws he ultimately applied, the existing law continuing until he had applied some other law. Blackstone had said

> The law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and is held to be part of the law of the land.[3]

Moreover, the terms of the Treaty of Paris were unequivocal in their requirement for protection of the existing religion and civil laws in Quebec. Again, as it was (and is) a principle of the law of nations that covenants were made to be kept, it could be said that the treaty and the legal situation arising therefrom was a binding obligation on the king and his advisers under both the common law and international law. Moreover, as George entertained the view that 'honour and virtue' were the underlying principle of the British

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Revolution', *Canadian Review of American Studies*, XXII, Calgary, 1991, p. 316; reprinted in Philip Lawson, *A Taste for Empire and Glory, ed. cit.*

[1] The Irish kings had submitted to Henry II of England in 1171, (all except Connaught) and 1175 (king of Connaught submits); and the kings of England had been styled kings of Ireland since the act of 33 Henry VIII c.1, 1541. And see Poynings law, 1495, 10 Henry VII, c. 4.

[2] Note here the assumption that the territories will belong to England or Ireland, and not Scotland, and not Great Britain. Scotland may well have acquired or wished to acquire territories; but as the king never took the Scots coronation oath, but only the oath to maintain the Presbyterian religion in Scotland, the inference is that any new territories will belong to England or Ireland. A better reading is however that that part of the oath has no prospective effect at all—nevertheless, the underlying sentiment exists..

[3] William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, with an introduction by Stanley N Katz, University of Chicago Press, Chicago, 1979, in 4 Volumes, Vol. IV, p. 55, quoted in I A Shearer, (*ed.*) *Starke's International Law*, 11th edn., Butterworths, London, 1994, at p. 68. Shearer notes (p. 68, n. 16) that the following eighteenth century cases supported this doctrine: *Barbuit's case*, (1737) Cas temp Talb 281; *Triquet v Bath* (1764) 3 Burr 1478, *Heathfield v Chilton* (1767) 4 Burr 2015.

constitution,[1] he personally would have wanted to uphold the terms of the treaty, exercising 'law and justice with mercy'. The fourth part of the coronation oath referred to the king's *maintaining* 'the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion established by Law', then separately dealing with the Anglican church settlement for England and Ireland. Clearly this referred to the previous statutes establishing the Church of England, and could not, I think, be read as extending to maintaining what had not been enacted. In addition, English law officers declared that the English anti-papist legislation did not apply to Quebec.[2]

But, in addition to provoking outrage at home because of the extension of religious toleration to the Canadian catholics,[3] the *Quebec Act* had another and more immediate effect. The Act ensured, in accordance with the Treaty of Paris of 1763, that all former French land east of the Mississippi and north of the Ohio was now vested in Quebec, thus limiting the western expansion of the American seaboard colonists. Americans viewed the *Quebec Act* as menacing, and as re-establishing to the north and west an area despotically ruled, predominantly French and Roman Catholic, with an alien form of land tenure. For example, the American Arthur Lee wrote to his brother saying: 'the principles of this act are abominable beyond expression', and 'every tie of allegiance is broke by the Quebec act, which is absolutely a dissolution of this Government, the compact between the king and the people is totally done away with.'[4] Lee's brother, Richard, was a representative at the First American Continental Congress (1774), which in October 1774 petitioned the crown for a redress of grievances accumulated since 1763. The *Quebec Act* was among them, Richard Lee describing it as 'the worst grievance', and establishing 'the institution of arbitrary government.'[5] Americans saw the *Quebec Act* as evidence of a conspiracy to force a

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[1] See Bute MSS., Mount Stuart, in the possession of the Marquess of Bute, (12 January 1760-29 February 1760), as reproduced in Peter D G Thomas, "'Thoughts on the British Constitution", by George III in 1760', *BIHR*, Vol. LX, 1987, 361-363 (written at the age of 21, a few months before his accession to the throne; a modern copy, headed 'in the handwriting of George III'—text at Appendix I.

[2] See Lawson, 'The Treatment of Quebec,' *art. cit.*, p. 265.

[3] See Philip Lawson, 'The Treatment of Quebec', *art. cit.*, *passim*.—For example, *The Public Advertizer* commenting on the Quebec Act on 19 May 1774 stated 'Thus at one stroke, they mediate the subversion of the church, the law, and the constitution of England.' —Lawson, at p. 266.

[4] Quoted in Philip Lawson, "'Sapped by Corruption" : British Governance of Quebec and the Breakdown of Anglo-American Relations on the Eve of Revolution', *art. cit.*, p. 314, in note 38 sourced to W C Ford, (*ed.*) *Letters of William Lee*, (1891), I, 89-91.

[5] See Lawson, 'Sapped by Corruption' *art. cit.*, p. 315, and sourced to E C Burnett, (*ed.*), *Letters of Members of the Continental Congress*, Washington, 1921, 77-78.

political and religious submission in the thirteen colonies, and as another part of a legislative program designed to deprive them of the liberties guaranteed under the Revolution of 1688-1689.[1] The Act helped push the Americans to open revolt—indeed, the first act of the Second American Continental Congress (1775-1781) in 1775 was not to declare independence but to declare war on Canada.[2]

GEORGE III AND HIS PREROGATIVE

George III has been seen as being an arch and unconstitutional promoter and user of the prerogative, and subverter of the constitution[3]—although this view was largely discredited by more modern research and the work of the Namier school.[4]

The king, while having a clear grasp of his prerogatives, was also mindful that he was obliged to govern according to statutes agreed on in parliament, as well as the laws and customs of Great Britain and its dominions. George called the British constitution 'the most beautiful combination that ever was framed,'[5] but exactly how the combination worked was perceived differently by different eyes. Charles Fox declaimed in the House of Commons—'Has not a majority of the House of Commons, almost from time immemorial, governed this country?'[6] By 1780, a Mr Dunning was proposing a motion that 'it is necessary to declare that the influence of the crown has increased, is increasing, and ought to be diminished'.[7]

Certainly, George III did not act only on the advice of his ministers, though he sought for

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[1] See Lawson, 'Sapped by Corruption' *art. cit.*, p. 320.

[2] See Philip Lawson, 'Sapped by Corruption', *art. cit.*, *passim.* —And see 1996 *Encyclopaedia Britannica*, Inc. All Rights Reserved, *Brittanica on CD ROM*, 97.

[3] See for example the observations of C Grant Robertson, *England Under the Hanoverians*, 1911, 9th edn., Methuen & Co., Ltd., London, 1928, pp. 301-305, and p. 218; and C Grant Robertson, *Select Statutes, ed. cit.*, p. 260.

[4] See Sir Lewis Namier, *The Structure of Politics at the Accession of George III*, 2nd edn., 1957, and 'Monarchy and the Party System', Essay in Personalities and Power, 1955; and see also the discussion thereon in H Butterfield, *George III and the Historians*, Collins, London, 1957, *passim*, especially Book Three, 'George III and the Namier School'.

[5] See Sir John Fortescue, (*ed.*) *Correspondence of George III*, London, 1927-1928, no. 2991, quoted in Richard Pares, *King George III and the Politicians*, The Ford Lectures delivered in the University of Oxford, 1951-1952, Clarendon Press, Oxford, 1953, reprinted 1954, 1959, at p. 31 and n. 1.

[6] W Cobbett, *Parliamentary History of England*, 1808-1814, xxiv, 597, quoted in Pares, *George III and the Politicians*, *loc. cit.*, p. 35, and note 1.

[7] Mr Dunning's motion of 6 April, 1780, Cobbett, *Parliamentary History*, *loc. cit.*, xxi, 340-386, extracted in Costin and Watson, Vol. I., *op. cit.*, at p. 239. The motion was passed by a majority of 18 (For, 233, Against, 215).

strong ministers to support him.

PHILOSOPHERS AND LAWYERS

During the reign of George III, William Blackstone[1] published his *Commentaries* (1765-1769), which have been analysed elsewhere[2]. Blackstone saw the coronation oath as being 'most indisputably a fundamental and original express contract', enunciating 'all the duties that a monarch can owe to his people; viz. to govern according to law: to execute judgment in mercy : and to maintain the established religion.'[3] Blackstone, has been seen as a Whig[4] because of the attribution to him of the support of the inviolable supremacy of parliament,[5]; (although his 'Toryism' offended Thomas Jefferson[6]). It is not therefore surprising that he saw the oath as 'the original contract', so beloved of the revolutionaries of 1688. It should be noted, however, that when Blackstone summarises the oath as requiring the king to govern according to law, he clearly included in that idea that the king would govern not only in accordance with statutes agreed on, but also in accordance with the law of nature, or divine law, on which he had explicated at length in his Introduction.[7]

HUME

David Hume, a Scot, (1711-1776)[8] published his *A Treatise of Human Nature* in 1739-1740,

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[1] William Blackstone, (1723-1780), graduated All Souls, Oxford, 1750; called to the bar 1746, at which he was not a success, 'my temper, constitution, inclinations, and a thing called principle have long quarrelled with active life, at least the active life of Westminster Hall.'; undistinguished career in parliament and on the bench—entered House of Commons in 1761, judge of Common Pleas, 1770. For an appreciation of Blackstone, see Daniel J Boorstin, *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.

[2] See references to Blackstone *supra* at p. 71, p. 79, and *infra* at p. 386, p. 481, and note 2 at p. 493, and p. 493.

[3] 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.

[4] Blackstone is described as 'an Old Whig whose ideals were enshrined in the Glorious Settlement of 1688.—see A W B Simpson, (*ed.*), *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, p. 59.

[5] 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.

[6] See Daniel Boorstin, in *The Mysterious Science of the Law, op. cit.*, at p. xv.

[7] See discussion of Blackstone and natural law *infra*, particularly at note 2 at p. 493 *infra*.

[8] Hume took the scientific method of physicist Sir Isaac Newton as his model and built upon the epistemology of John Locke.

recasting the text which had fallen 'dead-born from the press'[1] into *An Inquiry Concerning Human Understanding* (1748) and *An Inquiry Concerning the Principles of Morals* (1751)[2]. In 1741-1742 he published *Essays, Moral and Political*, the third edition of which in 1748 included his essay 'Of the Original Contract'[3]. His view was that there were certain 'moral duties' which arose from a 'natural instinct' in man, such as love of children;[4] and a further set of 'moral duties' which are 'performed entirely from a sense of obligation, when we consider the necessities of human society, and the impossibility of supporting it if these duties were neglected'—such duties are justice and fidelity, and also allegiance.[5] These duties in turn are founded upon obedience to the sovereign, whom Hume sees as being the king, for the reason that 'society could not otherwise subsist'. [6] Thus society was established of and by necessity, and is kept operational by virtue of necessity.[7] (This is of course a circular argument which takes us nowhere except to Hume's conclusion at the end of this essay that 'there is really no other standard' than 'general opinion' by which questions of morals can ever be decided.[1]) His attack on the idea of the original contract was in keeping with the bulk of his philosophy, which was that, as human beings themselves are a mere bundle of perceptions, there is no such thing as objective right or wrong; what exists is a 'feeling'

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[1] See Introduction to A D Lindsay, *(ed.)*, David Hume, *A Treatise of Human Nature*, in two Volumes, 1739-1740, Everyman's Library, J M Dent & Sons Ltd, London, 1911, reprint, 1964, p. vii.

[2] See Introduction and Chronology to *David Hume, Principle Writings on Religion Including Dialogues Concerning Natural Religion* and *The Natural History of Religion*, J C A Gaskin, *(ed.)*, The World's Classics, Oxford University Press, Oxford, 1993, at pp. ix-xxxii.

[3] David Hume, *Essays Moral and Political*, 1741-1742, third edition, 1748; republished with other essays posthumously as *Essays Moral, Political, and Literary*, in 1777. 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.

[4] See Hume, 'Of the Original Contract', *loc. cit.*, p. 286.

[5] See Hume, 'Of the Original Contract', *ibid.*, pp. 286-287.

[6] See Hume, 'Of the Original Contract', *loc. cit.*, pp. 287-288—though Hume asks the question 'To whom is allegiance due, and who is our lawful sovereign?', he answers really only the second part of the question inferentially as being the monarch established by force, prescription, and 'present possession' (p. 291), and does not specifically respond to the first except again by the inference that it is due to the sovereign who happens to be in possession; but by his frequent references to kings, and his passing reference to aristocracies and democracies (p. 291), it could be concluded that he saw the sovereign as being the king. Later, in his further Essay, 'Idea of a Perfect Commonwealth', [*Selected Essays, loc. cit.*,, pp. 301-315] Hume advocates an hypothetical mathematical model, based on hundreds (100 counties being the basic electorate, every county being 'a kind of republic within itself' [p. 307]), over which would rule representatives chosen on a strict property qualification, divided into three classes, the senate, who would have all the prerogative powers of the king except his negative; the magistrates, who have certain judicial and fiscal responsibilities; and the county representatives, who would have certain legislative powers, the senate selecting from its members a 'protector' who would represent 'the dignity of the commonwealth.' Hume however does not disagree with the British king's existing negative over bills, as it can only be exercised after the bills have been discussed in both houses, and 'few princes will venture to reject the unanimous desire of the people' [p. 303]

[7] See Hume, 'Of the Original Contract', *loc. cit.*,, pp. 288-289. See also Hume, 'Of the First Principles of Government,' in David Hume, *Selected Essays, loc. cit.*, pp. 24-28.

of 'sympathy' towards an action, and its tendency towards the feeling of happiness or unhappiness in the larger group of people is what gives the action its validity. Thus 'moral norms' are generated by interactions between largely self-interested individuals, 'rational' actions being 'rational' only in so far as they are means of attaining some goals of the agent. Consequently, there could be no contract as all human actions were a result of perception and sympathy, and over a period of time, continued similar perceptions of self interested men for the happiness of themselves become a habit and it this habit which is the basis of duty and obedience.[2]

BENTHAM

Hume's theories were drawn upon by the group which became known as the Utilitarians, whose prime movers were Jeremy Bentham and James Mill. Bentham (1748-1832), an infant prodigy, entered Oxford to read law at the age of twelve, but conceived an immediate and lasting antipathy to Blackstone and his view of the law, and to the law and lawyers, after hearing him lecture at Oxford when Bentham was fifteen. Bentham wrote his *Fragment on Government*[3] attacking Blackstone in 1776 at the age of twenty-eight.[4] In the *Fragment*, (or, as he referred to it himself, *A Comment on the Commentaries*)[5] he determinedly dismembered Blackstone's work, while at the same time propounding his theory of utility, drawing upon David Hume's principle of utility[6]—that is, 'this fundamental axiom, *it is the greatest happiness of the greatest number that is the measure of right and wrong...*'[7] This '*greatest happiness* principle', he said, was the 'standard of right and wrong in the field of morality in general, and of Government in particular.'[8] He attacked that 'fable of the whig lawyers', the

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[1] See Hume, 'Of the Original Contract', *loc. cit.*, pp. 291-292.

[2] See Hume, 'Of the First Principles of Government,' *art. cit.*, pp. 24-28; See "Hume, David," *Microsoft® Encarta® 97 Encyclopaedia.* © 1993-1996 Microsoft; and see J W Gough, *The Social Contract, A Critical Study of its development*, Clarendon Press, Oxford, 1936, 2nd edn., 1957, reprinted 1963, 1967, at Chapter XII, 'The Contract Theory in Decline', pp. 186-189 for Gough's gloss on Hume.

[3] See Jeremy Bentham, *A Fragment on Government*, J H Burns and H L A Hart, (*eds.*), Cambridge University Press, Cambridge, 1988.

[4] See Edwin A Burtt, (*ed.*), *The English Philosophers from Bacon to Mill*, The Modern Library, Random House, New York, 1939, reprinted 1967, 1994, p. 825.

[5] See Jeremy Bentham, *A Fragment on Government*, Burns and Hart, (*eds.*), *loc. cit.*, Bentham's Preface, at p. 7.

[6] See Bentham's Preface to the second edition of the *Fragment*, reproduced in Burns and Hart, *loc. cit.*, Appendix A, p. 116. [from Hume, *Treatise of Human Nature*, III, iii, 1 and 6, and *An Enquiry concerning the Principles of Morals*, II, ii, and III, ii.]

[7] See Bentham, *Fragment*, Burns and Hart (*eds.*), *loc. cit.*, Preface, p. 3. And see also p. 116, *ibid.*

[8] See Bentham, *Fragment*, Burns and Hart (*eds.*), Preface to the second edition, *loc. cit.*, p. 116.

original contract, as being mendacious, sinister, and a 'power-stealing system'.[1]

Bentham's view of the world[2] may be summed up in his *An Introduction to the Principles of Morals and Legislation* :

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. ... The principle of utility recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law.[3]
>
> The business of government is to promote the happiness of society by punishing and rewarding.[4]

and in his *Constitutional Code*[5] where he says :

> Chapter II, 'Ends and Means'
>
> Art. 1. Of this constitution, the all-comprehensive object, or end in view, is, from first to last, the greatest happiness of the greatest number; namely, of the individuals, of whom, the political community, or state, of which it is the constitution, is composed; strict regard being all along had to what is due to every other.[6]
>
> Chapter III, 'Sovereignty, in Whom'
>
> Art. 1. The sovereignty is in the *people*...[7]

The *Constitutional Code* is a work so complicated, lengthy, and abstruse, that it is no wonder that no nation ever actually took up Bentham's desire to achieve a practical working model state based upon the theories expounded therein. In contradistinction, Blackstone's *Commentaries* were easily readable, and formed the backbone of legal thinking in the emergent United States of America.[8]

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[1] See Bentham, *Fragment*, Burns and Hart (*eds.*), Preface to the second edition, *loc. cit.*, pp. 116-117.

[2] For a general discussion of Bentham, his life and views, see Shirley Robin Letwin, *The Pursuit of Certainty, David Hume, Jeremy Bentham, John Stuart Mill, Beatrice Webb*, Cambridge University Press, Cambridge, 1965, Part II, 'Jeremy Bentham: Liberty and Logic.'

[3] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter I, 'Of the Principle of Utility', paragraph 1, in Burtt, (*ed.*), *The English Philosophers from Bacon to Mill, ed. cit.*, p. 827.

[4] Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter VII, 'Of Human Actions in General', in Burtt, *loc. cit.*, p. 842.

[5] Jeremy Bentham, *Constitutional Code; for the use of All Nations and All Governments professing Liberal Opinions*, printed for the author and published by Robert Heward, 2 Wellington Street, the Strand, 1830, reprinted by Clarendon Press, Oxford, 1983, F Rosen and J H Burns, (*eds.*)

[6] Bentham, *Constitutional Code*, in Rosen and Burns, *loc. cit.*, p. 11.

[7] Bentham, *Constitutional Code*, in Rosen and Burns, *loc. cit.*, p. 25.

[8] See Boorstin, *The Mysterious Science of the Law*, *loc. cit.*, pp. xiii-xv; and Edmund Burke's observation referred to therein that by 1790 more copies of Blackstone had sold in America than in Britain. And for a full discussion of Blackstone and

AMERICA

The ideas of John Locke, David Hume, Jeremy Bentham, and William Blackstone all contributed to that grand rhetorical statement drafted by Thomas Jefferson, aided by David Hume's friend Benjamin Franklin, and adopted by the Second American Continental Congress (1775-1781) on 4 July 1776, as the 'unanimous'[1] declaration of the thirteen United States of America.

The American *Declaration of Independence* is based upon the idea that 'the laws of Nature and of Nature's God' entitle a People to a 'separate and equal station' 'among the Powers of the Earth'; that there exist 'self-evident'[2] 'Truths', namely—all men are created equal; that God has endowed men with certain inalienable rights, (life, liberty, and the pursuit of happiness); that governments are instituted among men to secure these rights, and derive their just powers from the consent of the governed. As a corollary to this proposition, if any government becomes destructive of 'these ends', (those rights which government is instituted to secure), the people have a 'Right' and 'Duty' to alter or abolish it, and institute a new government. When the necessity for such action arises, a 'decent respect for the opinions of mankind' requires the declaration of the causes for such action. Therefore, the representatives of the United States of America called upon God to witness the rectitude of their intentions, repudiated allegiance to the British Crown, dissolved all political connection with Great Britain, declared themselves to be free and independent States, and appropriated to themselves all prerogatives of independent States (*inter alia*, levy war, conclude peace, contract alliances, establish commerce).[1]

The *Declaration of Independence* clearly blames George III, 'the present king of Great Britain', for a 'history of repeated injuries and usurpations' with 'the direct object' of establishing

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America, see Beverly Zweiben, *How Blackstone Lost the Colonies, English Law, Colonial Lawyers and the American Revolution*, Garland Publishing, Inc., New York, 1990.

[1] The Second American Congress (1775-1781) on 2 July 1776 'unanimously' by the votes of 12 colonies, not 13, (New York abstained) had resolved that 'these United Colonies are, and of right ought to be Free and Independent States, etc.' in accordance with the Declaration crafted by Jefferson. Accordingly, the day on which final separation was officially voted was 2 July, and the *Declaration of Independence* was adopted by the Congress on 4 July 1776.

[2] Originally Jefferson had written, 'sacred and undeniable', toned down by Benjamin Franklin to 'self-evident'—see Paul Johnson, *A History of the American People*, Weidenfeld & Nicolson, London, 1997, p. 129. And see the amendment on the facsimile of the hand-written draft of the declaration of Independence at http://www.law.emory.edu/FEDERAL/declar.html and http://www.law.emory.edu/FEDERAL/pict/in1.jpg.

'absolute tyranny' over the colonies, and itemises his twenty-seven alleged injuries and usurpations. These included

- 'abolishing the free system of English laws in a neighbouring Province', establishing there an arbitrary government, and enlarging its boundaries as a mean for introducing 'the same absolute rules into these Colonies';

– this is a clear reference to the *Quebec Act*;

- exciting 'domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages...'

– this is a reference to George III's Proclamation of 7 October 1763 made at the cessation of the French and Indian Wars and the conclusion of the Treaty of Paris; which recognised Indian land titles, and forbade colonial settlement or trading on Indian lands.[2] These commitments led finally to the *Quebec Act*.[3]

- 'Abdicating Government' in the colonies, by 'declaring us out of his protection and waging War against us'

– this is redolent of the phraseology used by the 'Convention parliament' to justify the deposition of and opposition to James II and VII, and by the Long parliament with regard to Charles I.[4]

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[1] This is all drawn from *The Declaration of Independence.*

[2] In addition to the matters outlined *supra* at p. 446, the Proclamation of 7 October 1763 was intended to conciliate the Indians by checking the encroachment of white settlers on their lands. For text of the Proclamation, see The Avalon Project at the Yale Law School, http://www.yale.edu/lawweb/avalon/proc1763.html; and see also http://www.island.net/~hgroup/royal.html. [This latter is among the supporting documentation disseminated by Hul'qumi'num Treaty Group, which at their website, describe themselves thus: 'Hul'qumi'num is the Salish dialect spoken on the western part of the Saanich peninsula, the east coast of Vancouver Island from the Malahat to Comox and by the Musquem people at the mouth of the Fraser River. Formed in 1991 for the purpose of negotiating a treaty with the federal and provincial governments, the Hul'qumi'num Treaty Group consists only of those Hul'qumi'num speaking people from the Chemainus and Cowichan valleys. The six member communities are the Chemainus First Nation, Cowichan Tribes, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation and Penelakut Tribe. These communities have strong kinship ties and share the same language and culture. They have come together in order to have a stronger voice at the negotiating table.'] British authorities determined to subdue intercolonial rivalries and abuses by dealing with Indian problems as a whole. To this end, the proclamation organised new British territories in America—the provinces of Quebec, East and West Florida, and Grenada (in the Windward Islands)—and a vast British-administered Indian reservation west of the Appalachians, from south of Hudson Bay to north of the Floridas. It forbade all white settlement on Indian territory, ordered those settlers already there to withdraw, and strictly limited future settlement; it marked the limit of settlement from the British colonies, beyond which Indian trade was to be conducted strictly through British-appointed commissioners. These steps were not in time to prevent a serious uprising under the Ottawa chief Pontiac, however, as a result of Indian grievances (Pontiac's War 1763-64); and the proclamation, which sprang in part from a respect for Indian rights, caused consternation among British colonists for two reasons. It meant that limits were being set to the prospects of settlement and speculation in western lands, and it took control of the west out of colonial hands. The most ambitious men in the colonies thus saw the proclamation as a loss of power to control their own fortunes. For the first time in the history of European colonisation in the New World, the proclamation formalised the concept of Indian land titles, prohibiting issuance of patents to any lands claimed by a tribe unless the Indian title had first been extinguished by purchase or treaty. Although not intended to alter western boundaries, the proclamation was nevertheless offensive to the colonies as undue interference in their affairs. Treaties following Pontiac's War drew a more acceptable line of settlement, and the balance of territory north of the Ohio River was added to Quebec in 1774 in the *Quebec Act.* The proclamation, however, failed to stem the westward movement of pioneers, whose disregard of its provisions evoked decades of continued Indian warfare throughout the area. See 1996 *Encyclopaedia Britannica*, Inc. All Rights Reserved. *Britannica CD* ROM, 97.

[3] See reference to George's Proclamation in Preamble to *Quebec Act* 1774, 14 Geo. III, c. 83, *Statutes at Large*, xxx, 549 ff..

[4] This is typical of the phraseology used in the deposition of kings, see *supra* p. 213 (Edward II, 'deserted the kingdom'); p. 98, p. 222 (Richard II, 'throne vacant'); p. 364, p. 380 (James II and VII, 'abdicated the government'); p. 363, (James II and VII, 'deserted the kingdom'); p. 363, (James II and VII, 'vacant throne'); '(...Charles I) hath traitorously and

- After the skirmishes at Concord and Lexington Green on 19 April 1775 between British regulars and American provincials, the Second Continental Congress issued a *Declaration of the Causes and Necessity of Taking Up Arms* and appointed General George Washington Commander-in-Chief of the Continental Army on 15 June, George III declared in August 1775 a state of rebellion; the Americans invaded Canada in the autumn of 1775.[1]

This *Declaration* represented a different gloss on the situation from that enunciated by Jefferson as Virginia's delegate to the First Continental Conference, where he advocated the autonomy of colonial legislative power on the basis that the American colonies and other members of the British Empire were distinct states united under the king and thus subject only to the king and not to parliament, and asserting that the king should not assent to bills on America put up by his British ministers.[2]

Up until 1776, Washington was using the terminology 'Ministerial forces' to describe the British troops, indicating a civil war, not a war looking to separate national identity. However, on 10 January 1776, Thomas Paine[3] produced his inflammatory propaganda pamphlet, *Common Sense*, arguing that hereditary monarchy had undermined the independence of the Commons and was aiming at despotism at home and abroad, and stating that the cause of America should not be just a revolt against taxation but a demand for independence. Paine continued his support of American independence through the *American Crisis* papers during the war. The war moved at that juncture from being a civil war to being a revolution.

AMERICA, THE KING AND PARLIAMENT.

George III had come to the throne having imbued through Bute's tutelage a sound if naïve grasp of the role of the king, concerned to secure liberty and abhor despotism, and to

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maliciously levied war against the present Parliament, ...' The charge against Charles I, quoted in *The Constitutional Documents of the Puritan Revolution 1625-1660*, selected and edited by S W Gardiner, Oxford University Press, Oxford, 1889; 3rd ed. 1906; reprinted, Clarendon Press, Oxford, 1951; at p. 371 ff., sourced to 'January 20 1648/9, Rushworth, vii. 1396, See Great Civil War, iv, 299'

[1] George Washington had himself planned an invasion of Canada by Lake Champlain, to be entrusted to Gen. Philip Schuyler, he approved of Benedict Arnold's proposal to march north along the Kennebec River and take Quebec, giving him 1,100 men. Copyright (c) 1996 *Encyclopaedia Britannica*, Inc. All Rights Reserved. *Britannica CD* ROM, 97

[2] See Thomas Jefferson, *A Summary View of the Rights of British America* (1774), referred to in Copyright (c) 1996 *Encyclopaedia Britannica*, Inc. All Rights Reserved, *Britannica CD* ROM, 97. This view was shared by several other delegates, notably James Wilson and John Adams, and strongly influenced the First Continental Congress. For complete text, see The Avalon Project at the Yale Law School, *Summary View of the Rights of British America*, http://www.yale.edu/lawweb/avalon/jeffsum.html.

[3] Paine had been in America only since November 1774.

ensure government was carried out with 'honour and virtue'.[1] From his father he had absorbed a dislike of his German predecessors,[2] and the idea of the patriot king.[3]

He was proud of being British, unlike his two predecessors, who were proud to be Hanoverian. After a tentative beginning in the kingship at the age of twenty-three, he grew into an accomplished politician, despite youthful indications of lack of application. He was conscientious. He supported the Revolution settlement, and as a religious man, felt bound by the terms of his coronation oath, which among other things made it clear that it was the king who was to govern. Before he became king, he wrote : 'By the British Constitution the Legislative power is executed by the King, lords & Commons'. While this may seem to be an endorsement by George of the Commons' own view that now the three estates were the king, lords and commons, rather than the lords, clergy and commons, it is much more likely that he was merely stating the obvious, the 'lords' incorporating the lords spiritual and temporal. He held to this view that legislation was made by the agreement of the three estates and the king throughout his life. But there was only one sovereign, and it was him. He learned to play Whiggery well, looking continually for a strong man to support him in the Commons, and was capable of bringing his own pressure to bear on the hereditary Lords.

With regard to the (old) American colonies, his was the view enunciated by the *Declaratory Act* of 1766, which reiterated that the colonies were subordinate to the Crown and parliament of Great Britain, and that 'the King's Majesty, by and with the consent of the Lords Spiritual and Temporal, and the Commons...in Parliament assembled had, have, and of right ought to have, full Power and Authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of

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[1] See Bute MSS., Mount Stuart, in the possession of the Marquess of Bute, (12 January 1760-29 February 1760), as reproduced in Peter D G Thomas, "Thoughts on the British Constitution", by George III in 1760', *BIHR*, Vol. LX, 1987, 361-363 (written at the age of 21, a few months before his accession to the throne; a modern copy, headed 'in the handwriting of George III'. For text see my Appendix I.

[2] See Stephen Ayling, *George the Third*, Collins, London, 1972, pp. 67-68; and see Donald Grove Barnes, *George III and William Pitt, 1783-1806*, 1939, reprinted Octagon Books, New York, 1965, p. 27. And see Basil Williams, *The Whig Supremacy*, 1714-1760, *The Oxford History of England*, G N Clark, (*ed.*), Vol. XI, Clarendon Press, Oxford, 1939, reprinted with corrections 1942, 1945, 1949, pp. 320-321, and p. 352.

[3] See Stanley Ayling, *George the Third*, Collins, London, 1972, p. 70. He was also introduced to Bolingbroke's *Idea of a Patriot King* from a early age—see C Grant Robertson, *England Under the Hanoverians*, 1911, 9th edn., Methuen & Co., Ltd., London, 1928, p. 219. George's father, Frederick, had certainly imbued Bolingbroke's precepts. He said to Lord Lichfield in May 1749, in the context of an inquiry about Bolingbroke's book, —'Well, my lord, I shall be that patriot

Great Britain, in all cases whatsoever."[1] This view was in accordance with the king's coronation oath which stated that he was to 'govern the people of the kingdom of Great Britain and the Dominions thereto belonging according to the statutes in Parliament agreed on and the laws and customs of the same.' It was his commitment to these precepts in his oath which drove George III to maintain his position on the American colonies until the bitter end—'I,' he said, 'am fighting the battle of the legislature."[2]

But it was the British parliament and its claim of legislative sovereignty over the American colonies which lay at the nub of the American Revolution. Parliament had been raising taxes in America to finance the heavy burden of debt resulting from, as George III had described it, the 'bloody and expensive war' against the French in America and elsewhere, and from the cost of maintaining the garrisons in the American colonies to guard against French, Spanish, and Indian depredations. The American colonies had become accustomed to their own governance, originally under the chartered proprietors, and later under assemblies established under the prerogative and later under legislation. But they were still British subjects, subject to the laws enacted by the British parliament, in which they had no representation, and to which they were indebted (for the reduction of the catholic French in America), and of which they were simultaneously suspicious (for the establishment of toleration for catholics in the huge area of Quebec and the curtailment of colonial settlement.)

The original idea of Jefferson for American sovereignty in the king, rather than in the King and the two British parliamentary houses raises the whole concept of 'sovereignty of parliament.' The Commons rested their assertion of sovereignty solely on their ability, with the king, to make statute law. During the period of the first two Georges, an expectation had grown up that the king would not refuse assent to a Bill passed by the two houses, and that the king would always act upon the advice of his first minister. But this was an expectation only, based in large part on those monarchs' lack of acquaintance with Britain,

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King.' See John Byrom, *Journal*, Vol. II, part 2, p. 492, quoted in J C D Clark, *English Society 1688-1832*, Cambridge University Press, Cambridge, 1985, reprinted 1986, 1988, 1991, p. 182.

[1] See the *Declaratory Act*, 1766, An Act for the better securing the Dependency of his Majesty's Dominions in America upon the Crown and parliament of Great Britain, 6 Geo. III, c. 12, reproduced in D Oswald Dykes, *Source Book of Constitutional History from 1600*, Longmans, Green and Co., London, 1930, p. 322

[2] Reported statement of George III in December 1775, quoted in *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Phillips, Oxford University Press, Oxford, New York, 1988; reprinted with corrections 1989, 1992, 1997, at p. 508.

its language, and in particular, British laws, and their frequent absences in Hanover, thus enabling ministers to taste the fruit of power. It was an error to assume that because the first two Georges had in large part abrogated their powers of decision (except in matters of foreign affairs), that the third would also, particularly when men still living could recall that neither Anne nor William had acted, nor were expected to act, in this way. (Forty-six years, was not enough time, even for the House of Commons, to argue that prescription had deprived the king of his own intelligence.)

But George III was British born and bred, and was fully alive to his obligations under his coronation oath. He would agree to nothing which was in opposition to it—witness his refusal to contemplate catholic emancipation in Ireland.

All the (old) American colonies had been colonies at the time of George's accession when he took the oath. There was nothing in the common law, the law of nations, the laws of God, the laws of nature, or the customs of the colonies (except the customs of the native Indians whose rights in the newly ceded territories George had recognised in his Proclamation of 1763), to enable George to contemplate acting in regard to those colonies except in accordance with the statutes as passed in London. To have done otherwise would have been ruling solely by the prerogative. This is not to say that George III accepted the idea of the 'sovereignty of parliament'; what he did accept was his duty under his coronation oath to govern in accordance with the tenets laid down in it, and that once all parts of the legislature had accepted a measure, it could not be undone except by the concerted action of all of them.

When the King's Peace was disturbed by the skirmishes at Lexington and Concord, and his other (new) subjects in Quebec menaced by the declaration of war on them by the Continental Congress in 1775, the common law and his oath required that he protect his subjects. This he did; but in so doing, he forfeited the possibility raised by Jefferson in 1774 of establishing either by prerogative or with the advice and consent of the Houses of parliament,[1] independent states in America under the crown, not subject to the Houses in London.

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[1] This latter consent would probably have never been forthcoming in that time, due to the mercantile connections of many members of parliament with the colonies; and because of the views of the Commons that it was they who were

In any event, prompted at least in part by the pamphleteering radicals Tom Paine in America and John Wilkes in London, the Continental Congress turned its vituperation from the two Houses of parliament to the king, oversetting its previous views of a wicked parliament and a benign king to adopt Paine's caricature of 'the royal brute.' Tactically, this was clearly the best way to go, as the history of England over the preceding hundred and thirty years afforded two instances where a people had ridded themselves of a king by accusing him of tyranny, despotism, and imposing arbitrary and absolute rule—accusing the two Houses of parliament of these things, even be they true, would achieve nothing; accusing the king of these things, though they be false, provided a justification for revolution. The change in attitude of the American Congress clearly points to where the colonists saw the real sovereignty whose yoke they now wished to overthrow as lying—with the king; and it was allegiance to him which they renounced.[1]

The basing of the *Declaration* on the supposed misdeeds of the king, rather than any depredations of the Commons and Lords and the imposition of statutes upon the colonies, points to the reality—the so-called doctrine of parliamentary sovereignty was a complete fiction (I can see nothing to be gained from calling the doctrine of the sovereignty of parliament a *legal fiction*, as does Professor Dickinson,[2] and by inference, Jeremy Bentham[3]—either something is a fiction, or it is not—it occasions nothing but confusion to call a spade an artefact of iron with a handle instead of calling it a spade.[4])

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sovereign. Not could it have been imagined at that time that they would willingly have given up one whit of their perceived sovereignty to their cousins in America.

[1] It is interesting to note that the American Constitution steered completely away from the idea of 'king in parliament' beloved of the Whigs in the Commons; it gave the President a clear power of veto; and it made sure that the Constitution did not specify the following of any particular branch of the christian religion. It gave to the President exactly those powers which Jefferson had hoped that George III would have exercised with regard to the Colonies, when he wrote his memorandum for Virginia in 1774.

[2] This is the conclusion of H T Dickinson, in his article, '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. 209; Dickinson's italics.

[3] See Jeremy Bentham, *A Fragment on Government*, Bentham's Preface to the second edition of the *Fragment*, reproduced in Burns and Hart, (*eds.*), Appendix A, pp. 116-117. And see discussion in at p. 398 ff., 'Bentham's view', *supra*..

[4] With apologies to Robert Burton (*The Anatomy of Melancholy*, 1621-1651, 'Democritus to the Reader', p. 31—'I call a spade a spade'), and Oscar Wilde, *The Importance of Being Earnest*, Act Two, Cecily: '...When I see a spade I call it a spade.' Gwendolen: 'I am glad to say that I have never seen a spade.' [Penguin Plays, Harmondsworth, 1967, Oscar Wilde, *The Importance of Being Earnest*, (first produced, 1895, first published 1899), p. 292]

GEORGE IV AND WILLIAM IV

The Act for Union with Ireland, 39 & 40 Geo. III, c.67, 1800, provided that from 1 January 1801 Ireland and Great Britain to be united and known as The United Kingdom of Great Britain and Ireland. Consequently, when George IV succeeded after his father's final descent into mental aberration and death in 1820, his coronation oath referred to the 'United Kingdom of Great Britain and Ireland' in the first clause, and include a reference to the Church in Ireland along with the church in England in the third clause. George IV had been handsome in his youth, a political intriguer, a spendthrift all his life, and gross and unmourned when he died, yet had been a patron of architecture and the arts.

The whole question of the coronation oath arose again in the context of the repeal of the Test and Corporation Acts, and in relation again to catholic emancipation. In 1825 the heir presumptive to the throne, the Duke of York, argued against emancipation on the basis of the coronation oath,[1] while Whigs argued along the lines first outlined by Francis Jeffrey, editor of the *Edinburgh Review*, that the oath bound the king only in his 'executive' and not his 'legislative' capacity[2]; it was this latter view that was propagated by Lord Macaulay in his *History*.[3] The Duke of York, whose stance was largely credited with stiffening George IV's resolve to uphold his oath, died in January 1827; the Act repealing the Test and Corporation Acts was passed in 1828,[4] and immediately catholic emancipation was raised again. The debate over the oath was raised once more;[5] there were fears again of 'revolution under the name of reform'[6], and George IV gave in :

> the king pleaded his coronation oath and the respect he had for his father's opinions on the matter. He threatened abdication, could not stop talking about the question, and was reported to have worked himself into a frenzy. In the end, after an audience of several

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[1] See Duke of York's statement to the Lords, 25 April, 1825, on presenting a petition from the Dean and Canons of Windsor, in Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon*, 2nd edn., (3 Vols.) London, 1844, Vol. ii, p. 514, quoted in J C D Clark, *English Society 1688-1832*, Cambridge University Press, Cambridge, 1985, reprinted 1986, 1988, 1991, p. 390.

[2] See Clark, *English Society, loc. cit.*, p. 356.

[3] See Lord Macaulay, *The History of England*, 1836; (Popular Edition in Two Volumes), Longmans, Green, and Co., London, new impression 1906; Vol. I, at p. 713.

[4] 9 Geo. IV, c. 17, 1828, Toleration Act.

[5] See the Rev. Dr Henry Phillpotts, *A Letter to an English Layman on the Coronation Oath*, 1828, quoted in Clark, *English Society, loc. cit.*, pp. 355-356, and p. 390.

[6] See Lord Eldon, in Twiss, *Eldon, loc. cit.*, Vol. III, p. 107, quoted in Clarke, *English Society, loc. cit.*, at p. 399.

hours, he dismissed Wellington's government, climbed down in the evening, and gave way.[1]

The King's Speech on 5 February 1829 effectively announced a Bill for catholic Emancipation, provoking an enormous hostile reaction;[2] but George assented to the Bill in 1829, and it became law.[3] George's assent to the Repeal and Emancipation Bills has correctly been seen as a breach of the terms of his coronation oath[4] which had been designed by the Conventioneers in 1689 specifically to entrench the Protestant religion and to deprive Roman catholics of any political power. While progress towards religious toleration in the parliamentarians of the 1820s was to be admired, their facility in reinterpreting the oath served both to highlight the narrow-minded bigotry of their predecessors in thus binding the king, and simultaneously to undermine any integrity of the 'Revolution settlement' by 'unbinding' the king through sleight of hand. The acquiescence by the king in this chicanery doubtless contributed to the growth of a view that the conscience of the king was the Commons' to command. Legally, what should have occurred, is that the Coronation Oath Act should have been amended by the king and his Houses of parliament to remove the impediment, the king take the new oath of governance, and then the repealing legislation be agreed to.

George's brother William IV, who had become heir apparent at the age of sixty-two on the death of the Duke of York in 1827, emerged from obscurity and poverty to the throne in 1830, and took the coronation oath. This sad and peculiar man was variously described as mad, foolish, erratic, tipsy, but had the overwhelming virtue (not surprisingly) of having 'enough common sense to accept political advice.'[5] He was immediately confronted with the Reform crisis, which followed hard upon catholic emancipation. The populace generally resented the disregard of their views by the passage of catholic emancipation;[6] petitions flooded the Commons demanding the abolition of tithes and taxes, with reform in third place.[7] But there was great civil unrest and rampant anti-clericism, involving

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[1] See *The Oxford Illustrated History of the British Monarchy*, John Cannon and Ralph Phillips, Oxford University Press, Oxford, New York, 1988; reprinted with corrections 1989, 1992, 1997, p. 539.

[2] See Clark, *English Society*, *loc. cit.*, p. 397.

[3] 10 Geo. IV, c. 7, 1829, Catholic Emancipation Act.

[4] See Clarke, *English Society*, p. 410.

[5] See Cannon and Philips, *Oxford Illustrated History of the British Monarchy*, *op. cit.*, p. 548.

[6] See Twiss, *Eldon*, *loc. cit.*, Vol. III, p. 123, quoted in Clark, *English Society*, *loc. cit.*, p. 404.

[7] See *Parliamentary Debates*, 3rd ser., Vol. III, col. 88, quoted in Clarke, *English Society*, *loc. cit.*, p. 404.

antipathy to tithes, the burning of church property and threats to bishops, all of which seemed to some a precursor of civil war. Versions of a Reform Bill were debated in the Houses, with William, imbued with notions from Bolingbroke's *Patriot King*, trying ineffectively to control events[1]; he reluctantly granted a dissolution in 1831, remarking that while he personally held different views, '...as a sovereign it was his duty to set those feelings and prejudices aside.'[2] This attitude horrified many, Wellington believing that no king of England had taken any step so fatal to the monarchy since Charles I consented to the Bill depriving himself of the power to dissolve parliament.[3] From this it was wrongly inferred that the king was a supporter of the Bill, and a pro-reform majority was returned. William continued to blunder about, effectively surrendering control of appointment of peerages to the parties in May 1832.[4] The Reform Bill was finally put up for the Royal assent, which was given on 7 June 1832.[5] 'We all of us mean well,' said William.[6] His exquisite ineffectiveness continued; he dismissed his ministers in 1834 in an act of supreme failure; he died in 1837.

It was under these two kings—the profligate regency of the Prince of Wales during the mental incapacitation of George III, (1810-1820), his boorish and irresponsible reign as George IV, and the sad maladroit maunderings of William IV—that the kingship was finally captured by the politicians, and perceptions have held the king political prisoner ever since.

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[1] See Henry, Earl Grey, (*ed.*), *The Correspondence of the Late Earl Grey and King William IV and with Sir Herbert Taylor*, 2 Vols., London, 1867, Vol. I, pp. 381-2 and *passim*, referred to in Clark, *English Society*, *loc. cit.*, p. 411.

[2] William IV to Lord Grey, quoted in Cannon and Philips, *The Oxford Illustrated History of the British Monarchy*, *op. cit.*, pp. 547-548.

[3] Cannon and Philips, *Oxford Illustrated History of the British Monarchy*, *op. cit.*, pp. 548-549.

[4] See Cannon and Philips, *Oxford Illustrated History of the British Monarchy*, *op. cit.*, p. 549.

[5] 2&3 William IV, c. 45, 1832, *Reform Act.*

[6] William IV to Lord John Russell, quoted in Cannon and Philips, *Oxford Illustrated History of the British Monarchy*, *op. cit.*, p. 549.

CONCLUSION

THE CROWNÉD KING

CHAPTER 10

THE KINGLESS CROWN

THE MODERN AGE

The nineteenth century was schizophrenic; it combined on the one hand Romanticism, Pre-Raphaelitism, the growth of fiction and poetry, the veneration of the old Arthurian legends, wit, religion, and the art of governance, with, on the other, utilitarianism, liberalism, Marxism, Darwinism, *laissez faire*, evolution, and the art of war; it was moralistic on the one hand, and depraved on the other; it both venerated and attempted to destroy that which was venerated.

The twentieth century defies description. This century saw the improvement in medical science, the cloning of life, artificial insemination, and the transplant of human organs; it saw an unprecedented rise in education, literacy, and the dissemination of propaganda and information; it saw extraordinary developments in science, which led to the development of nuclear weapons and nuclear power; and the exploration of space; it saw the mechanisation and electrification of war, the killing of millions in two world wars, and the systematic practice of genocide; it saw the globalisation of capital, and the development of an international *realpolitic*; it saw the decline of the worship of God in the West, and the rise of Allah in Islam; it saw the destruction of monarchies, the collapse of empires, the proselytism of democracy, the belief in 'the sovereignty of parliament', and the spread of capitalism, socialism, communism, and tyranny; and it saw the survival of the British monarchy—but at a price.

VICTORIA TO ELIZABETH

Victoria became queen in 1837 at the age of eighteen, and reigned until 1901. It was her reign that saw the establishment of the modern age, with rapid industrial expansion, extension and regulation of the franchise, and the dominance of the party system.[1] Those with political power were male, propertied, and Anglican, the only woman with any recognised political voice being the queen.

She was recognised by the people, and took her coronation oath in the form as it had been taken by George IV and William IV.

Her successor, Edward VII, had objected to the making of the declaration against transubstantiation required under the *Bill of Rights* and the *Act of Settlement*, saying that is discriminated against his catholic subjects[2], but failed to obtain its removal. This was achieved by his son, George V, with the enactment of the *Accession Declaration Act* 1910[3], which merely requires the monarch to swear that he is a 'faithful protestant'.[4] The substance[5] of the coronation oath as to governance has remained unchanged from the time of Victoria to the present day.

But all modern British kings have been recognised by the people, just as had the kings in Britain for hundreds of years. The major distinction in the election of the modern kings, is that everyone except Tony Benn appears to have failed to appreciate its significance.

ELECTION AND RECOGNITION

The first action of any modern king of England on their accession is to appear, as had their

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[1] The changes to the electoral system are very complex, with their resulting growth in political corruption, and the eventual control of the electoral rolls by the party. A concise discussion can be found in H J Hanham, (*ed.*), *The Nineteenth Century Constitution, Documents and Commentary*, Cambridge University Press, Cambridge, 1969, under 'The Franchise and the Electoral system', p. 256 ff., and under 'Government and Parliament', p. 106 ff.

[2] See Sir Richard Holmes, *Edward VII, His Life and Times*, 2 Vols., The Amalgamated Press, Ltd., London, 1911, Vol. II, p. 487; but see also Holmes, at p. 482.

[3] *The Accession Declaration Act*, 1910, 10 Edw. 7 and 1 Geo 5 c. 29; *Statutes in Force, Official Revised Edition*, revised to 1st February 1978.

[4] See schedule to *Accession Declaration Act*, 1910.

[5] But see discussion *infra*, on 'The Royal Oath', p. 487 ff.

predecessors, before the Accession Council, (that special meeting of the Privy Council, at which also is present the Lord Mayor of London and Aldermen of the City of London and other persons of distinction which dates from the time of James VI and I, among whom modern usage includes the High Commissioners for the Dominions as representing people overseas) to make their Declaration of Sovereignty.[1]

DECLARATION OF SOVEREIGNTY[2]

Edward VII stated '...I am fully determined to be a Constitutional Sovereign in the strictest sense of the word...[3]

Edward of Windsor's Declaration of Sovereignty included the following:

> The irreparable loss which the British Commonwealth of Nations has sustained by the death of His Majesty My beloved Father, has devolved upon Me the duty of Sovereignty....
>
> When My Father stood here twenty-six years ago He declared that one of the objects of His life would be to uphold constitutional government. In this I am determined to follow in My Father's footsteps and to work as He did throughout His life for the happiness and welfare of all classes of My Subjects. ...[4]

That of George VI on 14 December 1936 was:

> I meet you to-day in circumstances which are without parallel in the History of our Country. Now that the duties of Sovereignty have fallen to Me, I declare to you My adherence to the strict principles of constitutional government and My resolve to work before all else for the welfare of the British Commonwealth of Nations....[5]

That of Elizabeth II was:

> On the sudden death of My dear Father I am called to fulfil the duties and responsibilities of Sovereignty... ...I shall always work, as My Father did throughout His reign, to uphold

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[1] This declaration would seem to be of some considerable antiquity. The oldest formal statement I been able to find, is that of James II of England; but Henry IV's statement immediately after his acclamation by the people must count as a declaration of sovereignty, albeit less formal—see Appendix II.

[2] The texts of Declarations of Sovereignty, and of Accession Proclamations, are at Appendix II.

[3] See Sir Richard Holmes, *Edward VII, loc. cit.*, Vol. II, p. 477.

[4] See *Supplement to the London Gazette Extraordinary*, HMSO, London, Tuesday, 21 January, 1936, Numb. 34245, p. 451; taken from Australian Archives, Series CP4/10/1, Item 5, 'Spares, Abdication of King Edward VIII'. For full text see my Appendix I.

[5] see John Wheeler-Bennett, *King George VI, His Life and Reign*, Macmillan & Co., Ltd., London, 1958, at p. 288; and see Schramm, *A History of the English Coronation, loc. cit.*, p. 273; and *The Coronation of their Majesties King George VI and Queen Elizabeth*, King George's Jubilee Trust, 1937, p. 11. Full text at Appendix II.

> the constitutional Government and to advance the happiness and prosperity of My Peoples, spread as they are the world over.[1]

The proclamation by the people of the accession of a new king, the Accession Proclamation, is made only after *inter alia* such a Declaration of Sovereignty.[2] It is at this meeting of the Accession Council that the putative king indicates the name by which he will be known as king.[3] This naming of the king has caused difficulties in Britain since the Union of Scotland and England, the Scots objecting to Edward VII taking that nomenclature, as he was Edward I of Scotland;[4] the Scots made a similar objection with regard to Elizabeth, she being the first Queen of Scotland to bear that name.

ACCESSION PROCLAMATION

The Proclamation states that 'the Imperial Crown of Great Britain, Ireland and all other His late Majesty's Dominions[5] is 'solely and rightfully come' to a person, identified by all their names, and referred to as 'Prince', or 'Princess'[6]. It then states that the persons assembled publish and proclaim the named individual to be 'king' or 'queen'; then proceeds to declare allegiance, and to nominate the realms and territories over which the person is to be king or queen:

> ...the Imperial Crown of Great Britain, Ireland and all other His former Majesty's Dominions is now solely and rightfully come to the High and Mighty Prince Albert Frederick Arthur George; We, therefore, the Lords Spiritual and Temporal of this Realm, being here assisted with these of His former Majesty's Privy Council, with numbers of other principal Gentlemen of Quality, with the Lord Mayor, Aldermen, and citizens of London, do now hereby with one Voice and consent of Tongue and Heart publish and proclaim, that the High and Mighty Prince Albert Frederick Arthur George is now become

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[1] See Helen Cathcart, *Her Majesty*, W H Allen, London, 1962, at p. 130. Full text at Appendix II.

[2] See Wheeler-Bennett, *King George VI, loc. cit.*, at p. 288; and see circular cablegram B.202 from Secretary of State for Dominion Affairs of 11 December, 1936, 5.16 p.m. received Australia 12 December, 1936, for Prime Minister from Prime Minister, marked SECRET, from Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folio 141, which states that the Accession Council would meet at 11.00 a.m. and the proclamation would be made at 3.00 p.m.

[3] See Holmes, *Edward VII, loc. cit.*, at p. 478.

[4] See Holmes, *Edward VII, loc. cit.*, p. 479. The names of the British kings in the twentieth century have been Edward, Elizabeth, and George. No problem of nomenclature arises with regard to the Scots from the use of the name George, since the first George was king of both Scotland and England, after the Act of Union in 1707 (though no king of Scotland since Anne has taken the Scots coronation oath).

[5] This terminology used for Edward of Windsor ; for George VI— '...Imperial Crown of Great Britain, Ireland and all other His former Majesty's Dominions...'; Edward VII's proclamation did not refer to 'Dominions'; but his title was altered by the Royal Style and Titles Act, assented to 30 July 1901, to nominate him as : 'King of Great Britain and Ireland and the British dominions beyond the Seas.'—see Holmes, *Edward VII, loc. cit.*, p. 487.

[6] This is consonant with my view that the putative king is just that, until his choosing at first instance by the Council, and then its ratification by the people at the Recognition; then he is king.

> our only lawful and rightful liege Lord George VI by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India; to whom we do acknowledge all faith and obedience, with all heart and humble affection: beseeching God, by whom Kings and Queens do reign, to bless the Royal prince George VI with long and happy years to reign over us.[1]

The Proclamation for Edward of Windsor was made in identical terms, with the exception of the insertion of all his names as Prince, and giving him his regnal name, Edward VIII.[2]

On Edward's Abdication, the *Abdication Act*[3] being assented to by Edward himself at 1.52 p.m. on 11 December 1936[4], the Accession Council on 12 December 1936 met to hear George VI's Declaration of Sovereignty and to sign the Accession Proclamation. The Proclamation was made in the afternoon, in the traditional form which dates from the time of James VI and I.[5] In addition to the members of the Privy Council, and the Lord Mayor and aldermen of London, the High Commissioners in London for the Dominions and India attended and signed the proclamation,[6] which was made in London on 12 December 1936, and in all the dominions of the Commonwealth on the same day, all of them swearing obedience to the new king.[7]

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[1] Accession Proclamation for George VI, 12 December 1936, —see circular cablegram G.13 from Secretary of State for Dominion Affairs of 11 December, 1936, 5.10 p.m. received Australia 12 December, 1936, marked SECRET, from Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folios 143-142. Full text at Appendix II.

[2] See *Supplement to the London Gazette Extraordinary*, HMSO, London, Tuesday, 21 January, 1936, Numb. 34245, p. 449; taken from Australian Archives, Series CP4/10/1, Item 5, 'Spares, Abdication of King Edward VIII'. For full text see my Appendix I. Note the virtually identical wording of this proclamation with that proclaiming James VI and I king— see p. 123, *supra*.

[3] See 1 Edw. 8 and 1 Geo. 6 c. 3, from *Statutes in Force*, Revised to 1 February, 1978, HMSO, 1978.

[4] See *Commonwealth of Australia Gazette Extraordinary*, No. 101, Canberra, Saturday, 12th December, 1936; from Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folio 137.

[5] See Wheeler-Bennett, *King George VI, loc. cit.*, at p. 288; for text see my Appendix I; and see circular cablegram B.202 from Secretary of State for Dominion Affairs of 11 December, 1936, 5.16 p.m. received Australia 12 December, 1936, for Prime Minister from Prime Minister, marked SECRET, from Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folio 141, which states that the Accession Council would meet at 11.00 a.m. and the proclamation would be made at 3.00 p.m.; see also circular cablegram G.13 from Secretary of State for Dominion Affairs of 11 December, 1936, 5.10 p.m. received Australia 12 December, 1936, marked SECRET, from Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folios 143-142; and see *Commonwealth of Australia Gazette Extraordinary*, No. 102, Canberra, Saturday, 12th December, 1936; and see the references to James VI and I *supra* at p. 123

[6] See cablegram dated 11 December 1936, 5.16 p.m., received 12 December, 1936, marked SECRET, from the Prime Minister of Great Britain to the Prime Minister of Australia, Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folio 141.

[7] The Proclamation made in Australia rehearses the names in full of the Governor-General, the Prime Minister and the Treasurer as swearing obedience to the new king.—see Proclamation, Commonwealth of Australia Gazette Extraordinary, No. 102, Canberra, Saturday, 12th December, 1936, Australian Archives, Series CP4/10/1, Item 3, 'Abdication of King Edward VIII', folio 144.

In October 1951, before the death of George VI, the British Cabinet met to discuss the Accession Proclamation of his successor, particularly in view of the fact that India, though a member of the Commonwealth, no longer owed allegiance 'to the Crown'.[1] After lengthy discussion, they concluded :

> although from the legal standpoint, the Accession Proclamation was of no significance, it was of great symbolic importance, and there were compelling reasons against advancing the suggestion that the ancient tradition of identifying the new Sovereign in this way should be abandoned.[2]

Now, the analysis *supra*[3] showed that the Accession Proclamation does have some legal significance, by being the first step in exercise of the people's prerogative in choosing their king, which may or may nor be ratified by the people as a whole at the Recognition in the coronation; it is also the initial uttering of allegiance and obedience to the putative king, which allegiance is a necessary prerequisite both to the continuation of the king's peace and law enforcement, and to his taking of the coronation oath and becoming king.

This formulation is virtually identical to the one used for James VI and I. There had been considerable argument then about how 'the crown' 'descended', and that particular formulation of the proclamation was designed to buttress James' claims to the throne on the basis of 'indefeasible hereditary right'[4], a concept seen by Figgis to be an essential component of the 'divine right of kings.'[5]. The Accession Proclamation still maintains the assertion that 'the crown' is 'come to' the designated person, who is said to be the 'lawful' and 'rightful' successor. The whole problem of ascertaining the 'law' by which the 'crown' is 'come' to the person has continued to be overlooked by scholars. My submission is that it is only by the exercise by the people of their prerogative to choose their king that the person actually becomes king.[6] Thus the Proclamation by the Accession Council remains but an assertion until the ratification of the Council's proclamation by the people at large at

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[1] See PRO CAB 130/72; Minutes of a Meeting held in Conference Room 'B', Cabinet Office, Thursday, 25th October, 1951, at 10.30 a.m., marked SECRET, including representatives of the Cabinet Office, Office of Parliamentary Counsel, Commonwealth Relations Office, Privy Council Office, Lord Chancellor's Office, and the Colonial Office.

[2] See PRO CAB 130/72, *ibid.*, 'The Accession Proclamation', (dated 7th November, 1951) p. 1.

[3] See discussion *supra*, in Part Two, King and Crown, especially Chapter 2; and Part Three, The King of the People, especially Chapter 4, 'The Prerogative of the People', p. 123 ff.

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

[5] See discussion *supra*, under 'The Divine Right of Kings', p. 317 ff.

[6] See discussion *supra*, Chapter 3, The People and their King, p. 85 ff.; and at Chapter 4, The Prerogative of the People, p. 123 ff.

the coronation.

In the past, Accession Proclamations also used to establish specifically that particular king's peace, as the offices for justice and law enforcement were held of a particular king. The passage of Acts maintaining all office holders under the crown at the time of the death of a king (the *Demise of the Crown Acts*—the last of these being passed in 1901), has rendered unnecessary a specific declaration in the Proclamation for the maintenance of the peace in so far as office holders are concerned.[1] But the recognition and the entry by the king into his office of king by taking the coronation oath remains a necessity for the continuity of the laws—in essence, the individual King's Peace has now become the Kings' Peace, ensuring the maintenance of good laws, and justice in mercy and truth from the governance of one king to another.[2]

That the Accession Proclamation does have some legal force (pending its acceptance by the people at the coronation) is (contradictorily) evidenced in the desire of the Cabinet Office meeting itself to accommodate the High Commissioner of India, now an independent republic, but still a member of the Commonwealth, and to recognise the position of the independent Dominions, who owed allegiance to the monarch, and whose representatives signed the Accession Proclamation for Elizabeth II. The words, 'Emperor of India', which had been included for George VI, were dropped and the words 'Head of the Commonwealth' inserted.[3] The words 'with representatives of other countries of the Commonwealth' were included along with the recital of those others who were making the proclamation, and the words 'to whom we do acknowledge all faith and obedience, with all heart and humble affection' altered to state 'to whom Her lieges do acknowledge all Faith and Obedience, with all hearty and humble Affection', so that India, who had repudiated allegiance to the king in becoming a republic, could sign the proclamation also, as a

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[1] See *Demise of the Crown Act*, 1901; the *Succession to the Crown Act* of 1707 had ensured that parliaments sitting at the death of a king could continue for a six month period; while 1 Geo. III, c.23, 1760, had ensured that judges need not be reappointed after the demise of the crown, thus securing the independence of judges. And see discussion *supra* concerning the 'publique peace', at p. 123, p. 129.

[2] See discussion *supra*, 'The Continuity of the Law', p. 170 ff.; and 'Continuing Jurisdiction', p. 242 ff. And see particularly discussion at note 1, p. 242 *supra*.

[3] In 1949, the king's Style and Title altered to reflect the independence of India and Ireland, and became 'George VI, king of the United Kingdom of Great Britain and Northern Ireland, British Dominions and Head of the Commonwealth.'

member of the Commonwealth.[1]

In due course, Elizabeth II was proclaimed Queen after her Declaration of Sovereignty to the Accession Council on 8 February 1952 by the Garter King of Arms, thus:[2]

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[1] See PRO CAB 130/72, *loc. cit.*, 'The Accession Proclamation', (dated 7th November, 1951), p. 3, Annex.

[2] Following illustrated text is taken from Brian Barker, *When the Queen was Crowned*, Routledge & Kegan Paul Ltd., London, 1976, p. 26; see also Sarah Bradford, *Elizabeth*, *loc. cit.*, at p. 168; and Ben Pimlott, *The Queen, a Biography of Elizabeth II*, Harper Collins, London, 1996, (paperback), pp. 181-182, sourced to PRO CAB 128, 6.2.51.

PROCLAMATION OF ACCESSION

Whereas it has pleased Almighty God to call to His mercy our late Sovereign Lord King George VI, of blessed and glorious memory, by whose Decease the Crown is solely and rightfully come to THE HIGH AND MIGHTY PRINCESS ELIZABETH ALEXANDRA MARY:

We, therefore, the Lords Spiritual and Temporal of this Realm, being here assisted with these His late Majesty's Privy Council, with representatives of other Members of the Commonwealth, with other Principal Gentleman of Quality, with the Lord Mayor, Aldermen and Citizens of London, do now hereby with one Voice and Consent of Tongue and Heart publish and proclaim, THAT THE HIGH AND MIGHTY PRINCESS ELIZABETH ALEXANDRA MARY is now, by the death of our late Sovereign of happy memory, become Queen Elizabeth II by the Grace of God, Queen of this Realm, and of Her other Realms and Territories, Head of the Commonwealth, Defender of the Faith, to whom Her Lieges do acknowledge all Faith and constant Obedience with hearty and humble Affection, beseeching God by whom Kings and Queens do reign, to bless the Royal Princess, Elizabeth II, with long and happy years to reign over us.

GOD SAVE THE QUEEN

Illustration 3
Accession Proclamation
Elizabeth II

After the proclamation, the putative king sets in train arrangements for his coronation. Elizabeth established a Coronation Commission, which included representatives of all the realms and territories of which she was to be queen.[1]

THE RECOGNITION OF THE KING

Elizabeth's proclamation as queen by the Accession Council was subsequently ratified by her Recognition by the people at her coronation, where she was presented to the Peoples gathered in the Abbey by the Archbishop thus:

> *Sirs, I here present unto you Queen Elizabeth, your undoubted Queen*[2]*: Wherefore all you who are come this day to do your homage and service, Are you willing to do the same?*
>
> *The People signify their willingness and joy, by loud and repeated acclamation, all with one voice crying out,*
>
> GOD SAVE QUEEN ELIZABETH.[3]

The Recognition of modern Kings has been modified in the light of the changed constitutional arrangements following upon the *Statute of Westminster*, 1931.[4] That statute stated, *inter alia*, that:

> ...inasmuch as the crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as such they are united by a common allegiance to

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[1] See Appendix I, Elizabeth II. And see *Background to the Coronation*, Earl Marshall's Press Bureau 1953, in the Australian Archives, Series A462/4, Item 821/1/27, 'Royalty—Coronation of Her Majesty Queen Elizabeth the Second—Policy'.

[2] The words 'the undoubted King of this Realm' were used for George V (see Harold Nicolson, *King George the Fifth, His Life and Reign*, Constable & Co Ltd, London, 1952, at p. 145). The form 'the undoubted King of the realm' was first used for William and Mary, due to some apprehension about the legality of their claim according to the laws of God and man [see pp. 156-158, *supra*], and would appear to have been used for every monarch up to the time of George V. This form was used for Edward VII, (see W J Loftie, *The Coronation Book of Edward VII, King of All the Britains and Emperor of India, 1902*, Cassell & Company, London, 1902, at p. 175), and it was used for Victoria (see Legg, *op. cit.*, at p. 364). But the words 'your undoubted King' were used for the coronation of George VI, see *The Coronation of their Majesties King George VI and Queen Elizabeth, May 12th 1937*, Official Souvenir Programme, King George's Jubilee Trust, Odhams Press Limited, London, 1937, at p. 25; this alteration occurred because of constitutional changes consequent upon the Statute of Westminster, 1931, and also because there present at the coronation were representatives of the self governing dominions, and the words 'of the realm' were not appropriate having regard to their presence. Of course, representatives of India, now a republic, were present also; one can only assume that they did not contribute to the Recognition—although it has been noted that foreign journalists were so influenced by the atmosphere that they too joined in the shouts of 'God save Queen Elizabeth.' (see Robert Lacey, *Majesty, Elizabeth II and the House of Windsor*, Avon Books, New York, 1977, at p. 200.)

[3] See the order reproduced in *Elizabeth Crowned Queen, The Pictorial Record of the Coronation*, John Arlott, and others, Odhams Press Limited, London, 1953, at p. 53; and see Sarah Bradford, *Elizabeth, A Biography of Her Majesty the Queen*, Heinemann, London, 1996, p. 190.

[4] *Statute of Westminster*, 1931, 'An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930', 22 Geo. 5, c. 4, assented to 11 December 1931.

> the crown, it would be in accord with the established constitutional position of all the members of the commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom...
> [1]

John Wheeler-Bennett, the biographer of George VI, stated that the old formula of recognition used since the time of William and Mary— 'the undoubted King of this realm'—no longer sufficed, as: '[The King] was as much King of Canada, Australia, New Zealand, South Africa and Eire as of Great Britain, and each Dominion wished their King to be crowned and consecrated at the same time and with the same ancient usage.' After consultation between the Dominions Office in London and the Dominion Governments, the difficulty was overcome by omitting the words 'of this realm.'[2] This new form, 'your undoubted queen', was followed for Elizabeth II.[3]

A Berriedale Keith has stated that the meeting of the Accession Council is 'a representative of the Anglo-Saxon *Witan* or the Norman *Magnum Counsilium*, meeting to choose and proclaim the new King'. I believe that this is not an inaccurate statement. To be more accurate, however, I would think that on the evidence mustered to date, the actions of the Accession Council receive their authority from the people's prerogative at common law to select their sovereign, and that the Council's actions in proclaiming a certain person as king are subsequently ratified by the people (or peoples) as a whole in the Recognition at the coronation. The fact that the category of persons who may be king has been determined by statute[4] does not of its own motion, nor can it, in my view, make the person next in line according to those statutes, king.

The concepts of election, the proclamation of the succession on behalf of the people, and the ceremony of the Recognition have received considerable investigation here, as an examination of the legal basis of the making of the king leads, it seems to this writer, to the conclusion that the concept of election of the king by the people still has currency. The status of the Recognition has received very little detailed consideration from scholars, as indeed has practically every other aspect of the making of a king, primarily, it would seem,

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[1] *Statute of Westminster*, 1931, preambular clause 2.

[2] Wheeler-Bennett, *King George VI, loc. cit.*, at p. 307

[3] For texts see Appendix II.

[4] See *supra*, Chapter 4, 'The Prerogative of the People', p. 123 ff., especially p. 125 and p. 126, and p. 130.

from a propensity of all kinds of people to assume a certain inevitability about the kingship. The almost religious belief held by politicians and judges in the 'sovereignty of parliament', and the concentration in the law on statutes, and in politics upon opposing political parties and the policies that they espouse, has led to a certain 'taking for granted' of the kingship, without any investigation as to the basis of that kingship. The legal position of the king has become practically invisible; indeed, it would seem that for most writers the king does not have a legal position, the king apparently having somehow mystically sprung up fully formed, wise and armed, like Pallas Athene from the brow of Zeus.

But the concepts of election and recognition were and still are inextricably intertwined, and some clear notion of their status at law would seem not undesirable. It is not sufficient to say that the English kingship is determined by statute. There is no statutory basis for the Accession Proclamation[1] by the assembled representatives of the people or peoples; nor is there any basis for it under the royal prerogative; rather its authority lies in the common law, in what I have called 'the prerogative of the people.'

This 'elective' element is formalised in the Recognition in the coronation ceremony, whereby the gathered representatives of the people ratify the people's choice as proclaimed (by a much smaller representative group) in the Accession Proclamation. It would, of

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[1] See discussion at p. 419, *supra*. The *making of* the Accession Proclamation for George I was governed by the (GB)*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, *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), formerly known as the (English) *Regency Act*. The act extended only to the proclamation of the immediate next successor, Sophia, or her son George, and no further; it provided for the making of a proclamation with regard to the next protestant successor 'in such manner and form as the preceding Kings and Queens respectively have been usually proclaimed'. It did not override or replace the common law 'election' and proclamation of the king and the King's Peace by the Accession Council, nor the subsequent Recognition or otherwise of that person by the people. It specifically applied the existing common law situation with regard to the Accession Proclamation to the next and immediate protestant succession. This was a maintenance of the common law position; but all provision in this Act relating to the succession and to the Accession Council, have been repealed, leaving only those parts relating to the continuance of parliament and state office-holders on the demise of the crown: see *Statutes in Force*, HMSO, 1978. It should also be noted that the original (English) *Regency Act* required that the English Accession Council proclaim the protestant Electress Sophia, or her son George, who were next in line under the *Act of Settlement*. The Scots at that time had not accepted the *Act of Settlement*, it being an English Act, and they had in fact enacted with the queen their own legislation requiring that the Scots Estates select their own successor to Anne, and that whoever it was, that it *not* be the monarch of England. Moreover, they required by legislation, to which they had more or less forced Anne to agree, that any successor would not have any of the prerogatives of declaring war or peace or entering into treaties without the consent of the Estates. (—see Scots *Act for the Security of the Kingdom*, 1704, (Act 1704, c. 3, Passed 5 August, 1704), and Scots *Act Anent Peace and War*, 1703, c. 5, 16 September 1703, both 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 pp. 138-140.)While these Scots acts were overtaken by the *Act of Union*, the English feared a restoration of the catholic Stuarts in Scotland after Anne's death; and had it not been for the refusal of James Francis to recant his religion, he could well have been king of both countries.

course, still be possible for the people to object to the succession. Indeed, in 1994, the British Labour member of parliament, Tony Benn, a republican, 'wrote to the Lord President of the Council, Tony Newton, declaring that, upon the summoning of the Privy Council to proclaim a new sovereign, he would express his opposition to the proclamation.'[1] This would be a perfectly proper exercise of his individual prerogative, (as was recognised by the President of the Privy Council[2]). Whether his view was shared by the rest of the Accession Council, or the people who later assemble for the king's coronation, would be another matter; if it was so shared, then the person nominated by the Accession Council could not, in my view, become king.

The President of the Privy Council, Tony Newton, responded to Mr Benn saying

> As you know, the right of succession was set out in the Act of Settlement of 1701. The arrangements enshrined in that Act could be changed only by act of Parliament. The position therefore remains that the Heir Apparent would succeed immediately and automatically to the Throne on the death of the Sovereign.[3]

In my submission, this misstates the law.

Certainly, the 'right of succession' is set out in statute, in the sense that only certain people in certain categories may become king. Entrenching the succession has been attempted many times—for example, by Henry IV, Richard III, Henry VII, Henry VIII, Mary I, Elizabeth I, and William III and Mary II; and by the House of Commons where it connived at the deposition of a king and the installation of a new ruler, as in the cases of His Highness, Oliver Cromwell Lord Protector, William III and Mary II, William III, Anne I, George I, and his successors. But as history has proved, the mere statement of future succession, even in legislation, can never be immutable. Why? Firstly, because it is the people who choose the king and the king is king of the people. And secondly, if one accepted the myth of 'the sovereignty of parliament', which presumably the president of the Privy Council did, the houses of parliament with the king (legally) and without the king (through revolution as was the case in 1649 and 1689), can change the succession any time

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[1] see Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at p.45; he notes that the correspondence can be found in Peter Hennessy's lecture, 'The Monarchy: Britain as "Disguised Republic"?' fo. 28, in his series, 'In the Steps of Walter Bagehot: a Constitutional Health-Check', to be published by Cassell.

[2] See the correspondence as quoted in Peter Hennessy, *The Hidden Wiring, Unearthing the British Constitution*, Victor Gollanz, London, 1995; paperback edition by Indigo of the Cassell Group, London, 1996, at pp. 71-72. Letters are dated Benn to Newton, 27 June, 1994; Newton to Benn , 19 July, 1994.

[3] Hennessy, *Hidden Wiring, ibid.*, p. 72. And see Bogdanor, *The Monarchy and the Constitution, loc. cit.*, at p. 45.

they want—but always with the caveat that the people must agree to and accept the change in the leadership of themselves.

Moreover, heirs apparent do not succeed automatically to the throne. There is no concept of indefeasible hereditary right known to the law; the Wars of the Roses and Revolution of 1689 were testimony to a rejection of this view. All that exists now is a presumption of hereditary succession by the heir apparent.[1]

The only law which governs the succession of kings, is the common law—the person must be 'elected', and proclaimed under the common law; must submit to the Recognition, also at common law; and to take the Coronation oath, both under the common law[2] and under statute (the Coronation Oath Act, 1689[3]); and then, and only then, to be anointed and crowned and enter into the office of king. Moreover in this context it should be noted that the Coronation Oath Act recognised that '*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 Sprirtuall and Civill Rights and Properties...*'; that Act did nothing to abrogate that common law basis of the coronation oath, but merely set down a text for the oath.[4]

Until the ratification by the people at common law of the person proclaimed by the Accession Council occurs at the coronation, then in my submission, at law, the person nominated is only a putative king: he is a king in waiting (*de facto*, to use the old

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[1] See discussion *supra*, at p. 327; and see also observation at p. 120, re Mary I.

[2] See Blackstone's view, Book 1, Chapter 3, p. 184, in William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, with an introduction by Stanley N Katz, University of Chicago Press, Chicago, 1979, in 4 Volumes—'the crown is, by common law and constitutional custom, hereditary; and this *in a manner peculiar to itself*, but that the right of inheritance may from time to time be changed or limited by act of parliament...' (my italics).

[3] 1 Will. & Mary c.6, 1688; *Statutes in Force*, Official Revised Edition, Revised to 1st February 1978, Her Majesty's Stationery Office, London, 1978. And see Ruffhead, (*ed.*), *The Statutes at Large*, Vol. 3, at p. 393

[4] Moreover it should be noted that there is some significant doubt about the validity of the Coronation Oath Act, it being 'enacted' before William and Mary were crowned king and queen, they then taking the coronation oath as set down in that 'Act', and the 'Act' subsequently being ratified by the king, queen and two houses of parliament in the (real) Act of 2 Will. & Mary, c. 1, *Statutes at Large*, IX, 75, 'Legalisation of the Acts of the Convention, 1690'; reproduced in E Neville Williams, *The Eighteenth Century Constitution, 1688-1815, Documents and Commentary*, Cambridge University Press, Cambridge, 1970, at pp. 46-47. Professor Maitland doubted the legality even of this latter Act—see p. 157, *infra*. But in my view, this latter Act had legal effect, but only because William and Mary had been recognised, taken the coronation oath, were anointed and crowned.

terminology[1]), but not king indeed (*de jure* and *de facto*), all the necessary requirements of the law not yet having been observed. Once however, he is recognised by the people, takes the coronation oath, and is anointed and crowned king, then he is king absolutely[2]. These acts retrospectively ratify any actions taken by the king or in the king's name. Thus in my submission, neither Edward Plantagenet nor Edward of Windsor was ever king at law. Any actions, however, that were made or taken in their names, or purportedly enacted while they were king in waiting, were ratified by the next person who became king when they took the oath of governance (the coronation oath)[3].

THE ABDICATION OF EDWARD OF WINDSOR

Edward of Windsor was the only king since Alfred, (other than Edward Plantagenet who had been declared illegitimate by parliament and apparently subsequently murdered) who was never crowned.[4] He acceded on the death of George V, and made his Declaration of Sovereignty to the Accession Council on 21 January, 1936, and was proclaimed by them to be king that same day. But, while preparations for his coronation went ahead, he abdicated before ever being formally Recognised by the people; he never took the Coronation Oath, nor was he anointed or crowned.

In my view therefore, Edward of Windsor was never king *de jure*, merely king *de facto*. What then of the office of the king and the continuity of the laws? In my submission, once his successor, George VI, was recognised, took the oath, anointed and crowned, then that at common law retrospectively ratified the actions done by and in the name of Edward the king in waiting before he was crowned.

Professor Maitland wondered whether a king could abdicate.[5] He said:

> There is, I think, no way in which a reigning king can cease to reign save by his death, by holding communion with the Church of Rome, professing the Popish religion or marrying

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[1] In the sense meaning 'in fact, in deed, in actuality' existing under colour of right, but without lawful title;—see *Black's Law Dictionary*, opposite to *de jure*.

[2] Cf. 'absolute king'— see the discussion at p. 348, and p. 369 *supra*.

[3] See the discussion at p. 128, p. 155, p. 328, p. 329, p. 391, *supra*.

[4] Although Edward Carpenter in his book, *Cantaur, The Archbishops and their Office*, Cassell & Company, London, 1971, at p. 32 suggests that Edmund, king from 942-946, was not crowned. Neither Edward Plantagenet nor Edward of Windsor were, in my view, kings.

[5] See Maitland, *Constitutional History*, *op. cit.*, p. 344.

> a Papist, and possibly by abdication....Even the king's power to abdicate, except by giving his assent to a statute declaring his abdication may, as it seems to me, be doubted.

Here Maitland specifically refers to a 'reigning' king. What is a 'reigning' king as opposed to some other kind of king? A 'reigning' king is one who has been recognised by the people, taken the oath of governance, and been anointed and crowned. Now on this common law basis, Edward was not a 'reigning' king, as he had not fulfilled the requirements.

Was it really necessary for him to assent to a bill for his own abdication? Indeed, *could* he assent to a Bill for his own abdication? After all, had not the 'Convention parliament' in 1689 asserted that James II had 'abdicated', without James ever assenting to it, nor ever executing in word or deed any act of abdication? But Maitland would say (and does)[1] that this was no legal act, and that revolution can not be fitted into any scheme of constitutional law.

Was Edward of Windsor then a reigning king according to the statute law? I think the answer has to be *No.* The *Act of Settlement* 1701 enunciates the categories of people who may succeed to the Crown, and enacts that all the prerogatives etc. of the crown 'shall be remain and continue' in Sophia and her heirs, then states '...and thereunto the Lords...and Commons shall and will in the name of all the people of This realm...submit themselves, their heirs and posterities and do faithfully promise...to stand to defend...the heirs...*provided always* ...that every King...of this realm who shall come to and succeed in the ...Crown of this kingdom by virtue of this Act shall have the Coronation Oath administered to him...at their respective coronations...'[1] Edward had not taken the coronation oath, nor had he received the homage of the people at large in a Recognition, nor of the Lords and clergy at large at the coronation, nor had he been crowned at a coronation. If he had not taken, did not take, and would never take, the coronation oath, how could the prerogatives etc. of the crown 'be, remain and continue' in him? The short answer is that they did not, and for the purposes of the Act of Settlement, Edward of Windsor was not an 'heir' or a 'successor' of Sophia. On the other hand, George VI did take the coronation oath, and the prerogatives of the crown would therefore have remained and continued in him, as from the king before him, George V, even though they had not been, remained or continued in Edward. This seems to be the meaning of the Act.

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[1] See Maitland, *Constitutional History, ibid.*, at p. 344, and see also p. 285.

A far simpler solution, that reaches the same conclusion, is that it is the common law that manages the continuation of the powers of the crown, (that is, the prerogatives of the king necessary for governance), and ensures the maintenance and continuity of the law and jurisdiction of the king.[2]

It could be said that an enactment probably was necessary to exclude any legitimate issue of Edward and his putative wife from the succession, although this is doubtful in view of the clear unambiguous words of the *Act of Settlement* as to who shall be 'heirs'—if Edward was never an 'heir', his issue could not be 'heir' either. The enactment of the *Abdication Act* was not therefore necessary.

However, after the enactment of the Statute of Westminster, 1931,[3]

> ...inasmuch as the crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as such they are united by a common allegiance to the crown, it would be in accord with the established constitutional position of all the members of the commonwealth in relation to one another *that any alteration in the law touching the succession to the throne or the royal style and titles* shall hereafter require the assent as well of the parliaments of all the dominions *as of* the parliament of the United Kingdom...[4]

On its face these words appear to mean that *to the extent that* the assent of the United Kingdom parliament (bearing in mind that parliament consists in the king, lords temporal and spiritual, and the commons), is needed to any change in 'the law' regarding the succession or the Royal Style, the Commonwealth parliaments also need to assent. This of course (wrongly) carries the inference that it is 'statute law' which determines the succession and the royal title.

But to consider the position under statute law only—Firstly, if Edward were not any legal king, not fitting the requirements of the *Act of Settlement*, he could not give any legal assent to any Bill; therefore the *Abdication Act* is null and void as an Act of a king and the two houses. Secondly—Let us assume for the moment that William of Orange and Mary had

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[1] *Act of Settlement*, 1701, I and II, my emphasis.

[2] See discussion *supra* at Chapter 5, 'The Continuity of the Law', p. 170 ff.; and also Chapter 6, 'Continuing jurisdiction,' p. 242 ff. Note also that all English, British, and subsequently, UK Acts always are cited by reference to the regnal years of the king or kings. Note also that no U K Act exists of Edward of Windsor alone; the *Abdication Act*, (which was assented to by Edward of Windsor on 11 December 1936) is cited as 1 Edw. 8 *and* 1 Geo. 6 c. 3.

[3] *Statute of Westminster*, 1931, 'An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930', 22 Geo. 5, c. 4, assented to 11 December 1931.

[4] *Statute of Westminster*, 1931, preambular clause 2.

had two sons, both protestant and otherwise meeting the criteria of the statutes as to the succession. Suppose that the elder married and had a legitimate son who also met the criteria. But suppose that William and Mary died together in a coach crash, with their elder son and his wife, leaving behind the infant grandson, and the grown second son. While the 'doctrine' of strict hereditary succession would require the crown to descend to the grandson, the 1689 revolutionaries had expended much effort in attempting to prove that no such doctrine existed, being tainted they said with the heresy of 'divine right'. Why could they not then proclaim the second son as king, and see him recognised, take the oath and be anointed? There would be no reason according to either statute law or the common law in my view why that could not occur; the statute does not recognise strict hereditary succession, merely that the successor must be from the 'heirs' of Sophia of Hanover, and *must* take the coronation oath (an infant could not of course take the oath). There would be no need for yet a further enactment. Once crowned according to the coronation ceremony, the second son would be king. Of course, future political difficulties could well erupt over the succession. But legally, I can see no impediment to this occurrence.

Therefore, at law, there is, I think, no *compulsion* for the question of the succession to be agreed by the British two houses of parliament with the king. The judges in the *Duke of York's case* in 1460, noted that the kingship was a matter pertaining to the 'Lords of the King's blood' and 'th'apparage of this lond'[1]—for this reason Edward's Instrument of Abdication was witnessed only by his brothers of the blood royal.[2]

The intention, however, of the *Statute of Westminster* (in this aspect) was to make more immediate the relationship between the king and the individual Commonwealth nations. In that sense, the king was seen directly afterwards as king of each of the Commonwealth dominions quite separately from his being king of the United Kingdom. This being so, no change to the succession, nor accession, nor proclamation of the putative new king could occur without there being present representatives of those countries, as representing their people. Moreover, no Recognition at the coronation would be valid with regard to those dominions if there were no people from those countries present. All the Commonwealth

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[1] *The Duke of York's case*, 1460, *Rot. Parl.*, V, 376-8, as quoted in Lodge and Thornton, *English Constitutional Documents*, pp. 34-36; and see p. 99, and note 6; and discussion at p. 100 ff., *supra*; and see Chrimes, *English Constitutional Ideas*, *op. cit.*, p. 23; *Rot. Parl.* v, 376.

[2] See text at Appendix I, and Appendix II.

countries were represented at the Accession Council for George VI and signed the Accession proclamation, and at the recognition, and heard him make his oath of governance—this is what made George VI king, not only of the United Kingdom, but also of the other countries who gave him allegiance during these common law processes. It is therefore, I think, strictly speaking, questionable whether legislation was needed. However, it would be a brave man who would place the necessary trust in the English parliamentarians and Councillors to ensure that the right thing were done, their demonstrated predilection being to consider themselves and only themselves as the 'owner' of the king. Legislation at least safeguards the positions of the independent Commonwealth countries with respect to the king as their king.

If the people have rendered allegiance, and continue to do so, then there is no way in which a king who has taken the coronation oath can, in my view, abdicate. He has sworn a mighty oath for the governance of the people, and he no longer has any individual will in that regard. This consideration was one which Edward of Windsor said was in his mind when he was considering the possibility of abdication. He said, on considering a suggestion by Duff Cooper that Edward be crowned, wait until Mrs Simpson's divorce was absolute, wait until the furore had died down, and then marry her:

> This was the counsel of a sophisticated man of the world. But as I considered it I realised that there was an aspect of the Coronation service that he had overlooked. It is essentially a religious service. The King is anointed with holy oil; he takes the sacrament; and as Defender of the Faith he swears an oath to uphold the doctrines of the Church of England, which does not approve of divorce. For me to have gone through the Coronation ceremony while harbouring in my heart the secret intention to marry contrary to the Church's tenets would have meant being crowned with a lie on my lips...My soul contained enough religion for me to comprehend to the full the deep meaning attached to the Coronation service.[1]

Of course, the parliamentarians effectively prevented the people from having any voice with regard to Edward of Windsor's giving up of the throne. The English people were through censorship kept in the dark about Edward's problems with regard to Mrs Simpson. He was prevented by the Prime Minister from speaking directly to the people until after he had abdicated. It is possible, that had the people been aware of Edward's difficulties, they may well have urged him to remain.[2] One can only think that, while the departure of

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[1] HRH The Duke of Windsor, *A King's Story, the Memoirs of HRH The Duke of Windsor*, 1951, Cassell and Co Limited, 1951; reprinted by the reprint Society, London, 1953, p. 313.

[2] For Edward of Windsor's own views, see HRH The Duke of Windsor, *The Crown and the People, 1902-1953*, Funk and Wagnells, London, 1945, and HRH The Duke of Windsor, *A King's Story, loc. cit.*. For a view very sympathetic to

Edward of Windsor from the ranks of kings may well have been with hindsight a very good thing,[1] it does not redound in any way to the credit of the parliamentarians involved. It is yet another example of the belief of the English parliamentarians in their, not the people's, 'ownership' of the king.

THE ROYAL OATH OF GOVERNANCE

MODERN ALTERATIONS TO THE OATH

The Coronation oath, or oath of governance, was supposed to be entrenched into the constitution by the Revolution Settlement, and the statement concerning the Church of England by the *Act of Union*.[2] But in fact it has been changed a number of times over the centuries, firstly for George I to refer to the new Great Britain; then for George IV to refer to the United Kingdom of Great Britain and Ireland; for Edward VII, to add a reference to the Empire of India; for George VI, to refer specifically to Great Britain, Ireland, Canada, Australia, New Zealand, the Union of South Africa and India, and his possessions and the other territories; and for Elizabeth to refer specifically to Great Britain and Northern Ireland, Canada, Australia, New Zealand, and the Union of South Africa, Pakistan and Ceylon, and Her Possessions and the other Territories.

This is Elizabeth II's oath of governance :

> Will you solemnly promise and swear 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 your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?
>
> Elizabeth. I solemnly promise so to do.
>
> Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?

Edward, written from the point of view of a critic of monarchy generally, see Kingsley Martin, *Britain in the Sixties, The Crown and the Establishment*, Hutchinson, London, 1962; published by Penguin Books, Harmondsworth, Middlesex, 1963, Chapter 5, 'Strange Interlude', *passim*. And see Frances Donaldson, *Edward VIII*, Weidenfeld and Nicolson, London, 1974; reprinted by Futura Publications Limited, 1976, *passim*.

[1] Cf. Recent television documentaries concerning Edward's relations with the German Third Reich. And see very brief summary of the embarrassments caused by Edward in Cannon and Philips, *The Oxford Illustrated History of the British Monarchy*, *op. cit.*, pp. 609-613.

[2] The Scottish church declaration is to be made on accession under the *Act of Union*, and while the oath was changed after the Union to refer to Great Britain, I am unable to tell what if any consultation occurred with the Scots, who had there own coronation oath (and still do).

Elizabeth. I will.

Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will You preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them, or any of them?.

Elizabeth. All this I promise to do.

Then [Elizabeth] [rose] out of her Chair, ... the Sword of State being carried before her, [went] to the Altar, and [made] her solemn Oath in the sight of all the people to observe the premisses: laying her right hand upon the Holy Gospel in the Great Bible, ...(which was... tendered to her as she [knelt] upon the steps), [and said] these words :

The things which I have here before promised, I will perform, and keep. So help me God.

Then [Elizabeth] [kissed] the Book, and [signed] the Oath.

The references to the religion as established by law have been restricted from the time of George I depending on the establishment or disestablishment of the Irish church, and the territory in which it applies, (i.e. England and Ireland or Northern Ireland).[1]

In addition the words 'according to the Statutes in Parliament agreed on and the respective laws and customs of the same' were altered for the coronation of George VI to 'their respective laws and customs,' (the words used by Elizabeth) in order to represent the true legal position of the Commonwealth countries after the enactment of the Statute of Westminster in 1931.

The putative king presumably is consulted about the proposed changes, as it is he who has to swear to the words. The agreement of the king was necessary for any change to the terms of the oath until the revolution of 1689. But it is doubtful whether Anne, George I, II, III, or IV, or William IV or Victoria made any alteration or were consulted on the form of the oath. Edward VII probably was consulted, as he objected to making the Declaration against transubstantiation, as he thought it offensive to his catholic subjects. George V was probably consulted, as he insisted upon the transubstantiation declaration being removed; instead there is now a declaration of protestantism, under the *Accession Declaration Act*, 1910. George VI and Elizabeth II were definitely consulted, because of the changes in the

[1] By the *Irish Church Act 1869* the Irish Church was disestablished. See A Berriedale Keith, *The King and the Imperial Crown, the Powers and Duties of His Majesty*, Longmans Green and Co, London, 1936, at p. 7

constitutional status of the Commonwealth nations.[1]

But none of these changes to the oath of governance was enabled by legislation.

A concerned subject attempted to bring an action against the archbishop of Canterbury before the coronation of George VI, seeking a declaration that the proposed oath was unlawful, and for an order commanding him to administer the oath in the 1689 Act. The action apparently never commenced, because the Attorney-General refused to lend his name to the action.[2] But in fact, concern was expressed about the legality of changes to the oath by the Secretary to the Australian Attorney-General's Department when the Australian government was consulted about the terms proposed for Edward of Windsor's oath (which became George VI's oath). He said :

> As a matter of strict law I should have thought it doubtful, in view of the fact that the exact form of oath is prescribed by statute, the form can be altered without express statutory authority. Apparently, however, the British Government have been advised that the oath may be altered under the implied authority given by legislation making the form of the oath no longer appropriate, so long as the alteration which is made is limited to what is essential to give effect to the alteration in the constitutional position.[3]

There had been considerable cable traffic between the United Kingdom and the Dominions, particularly South Africa, on the text of the oath. But the Dominions were advised that the legal advice the UK government had received was that the *Statute of Westminster* altered the constitutional position, and that it 'may properly be treated as an authority for making such alteration'.[4]

Clearly, *any* change to the oath is of vital concern to the putative king's people. He will be king long after most of the few Privy Councillors, UK politicians and civil servants, churchmen, and Commonwealth ministers and their advisers who are consulted about it have left office (this is particularly so of the politicians). Indeed, most of the king's subjects have no idea that he even takes a coronation oath. Nor of the long, torrid, and bloody

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[1] see *Background to the Coronation*, Earl Marshall's Press Bureau 1953, in the Australian Archives, Series A462/4, Item 821/1/27, 'Royalty—Coronation of Her Majesty Queen Elizabeth the Second—Policy'.

[2] See *Discoveries in the Statute Book*, E Stewart Fay, Sweet & Maxwell, Limited, London, 1937, 1939, pp. 270-271. The applicant was a Mr J A Kensit of the United Protestant Council.

[3] See Memorandum from Secretary, Attorney-General's Department, Canberra, Mr. G S Knowles, to The Secretary of the Department of External Affairs, 14 July, 1936 —Australian Archives, Series CP4/2/1, item 58, 'Coronation Oath'.

[4] See Decode of cable from the Secretary of State for Dominion Affairs to Prime Minister's Department, Canberra, dated 24 June 1936, received 25 June 1936, —Australian Archives, Series CP4/2/1, item 58, 'Coronation Oath'.

history associated with it.

The clergy were never consulted in the formulation of the 1689 oath by the Conventioneers, and it rankled for centuries, it being said that the oath had 'no ecclesiastical authority'.[1] The Archbishops of Canterbury (Carey) and York (Habgood) in 1993 raised the question of revision of the coronation oath, because, as Dr Habgood said : 'it [gives] a very privileged position to the Church of England, and it is some possible embarrassment'—but they both apparently later backtracked because of political pressure.[2]

Even if there were no legal requirement for parliamentary acceptance of change,[3] which I think is highly debatable, there seem to be compelling political and religious reasons for public expressions of view on the terms of the oath. For example, a minor cleric, one George Austin, Archdeacon of York, did no service to either church or the law, when he said that HRH Prince Charles was 'unfit to become king' because of his admitted adultery during his marriage to the late Diana Spencer, Princess of Wales—'He has broken the trust on one thing, and broken his vows to God on one thing. How can he then go to Westminster Abbey and take the Coronation vows?'[4] This is to misread completely the nature of the royal oath of governance. Its prime purpose is to secure the government of the people by the king, to invest him with the prerogative power to ensure the people's peace and protection, and to maintain the continuity of the just laws of the realm. Austin's attitude is representative of the modern muddle-headed attitude towards the king : on the one hand, they hold to absurd fictions like 'the king can do no wrong', whose prime effect is to protect the maladministration of people other than the king,[5] that the king is merely a

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[1] See the caustic observations of the Rev. Joseph H Pemberton, *The Coronation Service according to the use of the Church of England*, 2nd edn., Skeffington & Son, Piccadilly, (Publishers to His Majesty the King), London, 1902, p. 43, notes 1 and 2

[2] See the quoted statements reported in Jonathan Dimbleby's biography of HRH Prince Charles, *The Prince of Wales, A Biography*, Little, Brown and Company, London, 1994, at p. 531. And see discussion *supra* at 'Charles II Breach of Oath?', pp. 345 ff., particularly at p. 346.

[3] Possible changes to the anti-transubstantiation declaration were debated in the parliament prior to Edward VII's coronation; but no change was made at that time—see Holmes, *Edward VII, loc. cit.*, p. 487.

[4] George Austin on *Today*, BBC Radio 4, 7 December 1993, reported in Dimbleby, *The Prince of Wales, op. cit.*, at p. 535. Dimbleby notes (his note * to p. 535) that the ostensible reason for the invitation to Austin, who was 'well known for his eagerness to animadvert on public issues', a completely false report which had appeared in the *Sun*, to the effect that the Archbishop of Canterbury had told other church leaders that the Prince may have to 'consider his position' as a prospective 'Defender of the Faith', in the light of his separation from his wife, and the adultery. (Lambeth Palace denounced this report as a 'complete fabrication.')

[5] That is, the Ministers of the Crown and others deploying the delegated powers of the royal prerogative, see p. 497 *infra*, and see also discussion under 'Justiciability of the Oath', p. 492 *infra*.

'figurehead' of no importance to the constitution, but simultaneously demand a standard of conduct from the king which they themselves are incapable of achieving, elevating him to that position of *supra*-humanity which the revolutionaries of 1688 had been so keen to eradicate. The legal position of the king, from which the legality of all other offices flow, is completely overlooked, leading to mistaken conclusions, like that of Jonathan Dimbleby, that were the Anglican church to be disestablished '...the coronation, which in its present form gives sacred meaning and symbolic expression to the relationship between Church and Crown, would theoretically become redundant.'[1]

But if clergy, politicians, and public figures supposedly knowledgeable about the legal position of the king so consistently get it wrong, then the people are not merely in the dark, but are involuntarily in the dark. Public examination of the words, the meaning and effect of the royal oath of governance would have beneficial effects on the understanding of all sectors of society about the kingship.

Moreover, as the king is king not only of the United Kingdom, I can see no reason why the king's other (non British) subjects could not set out a completely different form of oath for their governance, rather than the one which English parliamentarians continue to devise.

The coronation oath both binds the king, and endows him with his powers, his royal prerogatives, by which the governance of his peoples is carried out.

THE OATH'S LEGAL STATUS

Does the oath bind the king? *Yes.* Does it impose obligations? *Yes.* Is it a prerequisite for office? *Yes.* (at both common law and under statute). Is there a penalty for breach of the oath? *Yes*—two. The first is the likelihood of removal, deposition, or execution, and the certainty of the odium and distrust of the people. The second is the account to be made by the oath-taker before the judgement of the deity by whom he swore (God, in this case)[2]. The only quasi-judicial examination of the oath of governance occurred in 1649, with the purported trial of Charles I.

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[1] See Dimbleby, *The Prince of Wales*, *op. cit.*, p. 529.

[2] See Sir Gerard Brennan's comments on the binding nature of the oath of the Chief Justice, at note 2, p. 22

THE 'TRIAL' OF CHARLES I

The parliamentarians of 1649 purported to erect a court to try the king, charging him thus:

> ...and by his trust, oath, office, being obliged to use the power committed to him for the good and benefit of the people, and for the preservation of their rights and liberties; yet nevertheless... hath traitorously and maliciously levied war against the present Parliament...[1]

and indeed purported to find him guilty of High-Treason, 'a Tyrant, Traitor, Murderer, and a Public Enemy...'[2] The king, Charles I, had refused to answer any of the purported charges, challenging the jurisdiction of the purported court, saying:

> therefore let me know by what lawful authority I am seated here, and I shall not be unwilling to answer. In the mean time, I shall not betray my trust; I have a trust committed to me by God, by old and lawful descent; I will not betray it, to answer to a new unlawful authority...[1]

Charles was without doubt correct that the court had no jurisdiction to try him, but this was because the court was not a court of law legally established, nor was the trial in any fashion conducted according to the law, nor had Charles committed any breaches of his oath or trust as he was accused, nor any crimes known to the law. It was not because the king is incapable of answering to any court, on any grounds. Had the court been a lawful one, and had Charles actually have been in breach of his oath, then a different issue arises. That is, how may the sovereign be tried by his subjects? Who has jurisdiction as against the king? The question has never been aired in a legally constituted court of law in England.

JUSTICIABILITY OF THE OATH

The king is king, and has no peer. But he has voluntarily, publicly, and audibly bound himself in the face of God and his people to govern according to the laws and customs of his people(s). He has thus subjected himself to judgement by the people in the terms of what he has sworn before the people.

As the oath was put into an Act of parliament, (which, though not a legal Act at the time it

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[1] The Charge against Charles I—taken from *The Constitutional Documents of the Puritan Revolution 1625-1660*, selected and edited by S W Gardiner, Oxford University Press, Oxford, 1889; 3rd ed. 1906; reprinted, Clarendon Press, Oxford, 1951; at p. 371-372, sourced to [January 20 1648/9. Rushworth, vii. 1396. See Great Civil War, iv, 299].

[2] The purported sentence made upon Charles I—from *The Trial of Charles I, Cobbett's Complete Collection of State Trials*, Vol. IV, pp. 959 ff., p. 1017. [* 'Note: In the original all the Proceeding in this Case are stated to occur in 1648, agreeably to the old computation of the commencement of the year from March 25th. But here the year is computed to begin on January 1st, and the dates are altered accordingly. Similar alterations are made generally throughout this work.', p. 959]

was made, was later legitimated by the *Crown and Parliament Recognition Act* 1690), whether or not its terms had been complied with seem capable of scrutiny by a court of law in the event of a breach by a king of a kind completely opposed to the laws of God and nature (which he is sworn to maintain)—such an eventuality might occur, if the king were say, to become a serial murderer and be caught in the act, or if the king assented to a Bill put up by the two houses completely opposed to the laws of God and nature—such as, for example, the extermination of all blue-eyed babies.[2]

It is often argued that 'the king can do no wrong'. This is one of those maxims which has sprung up as a result of the fiction of the 'sovereignty of parliament'. The king, it is said, governs through his ministers. Therefore, the actions of the king's ministers are no actions of the king's. Therefore, the Ministers are 'responsible' for their actions, not the king. This cannot however, mean that the king is not responsible, or can be irresponsible.

There is no maxim that the king can never do wrong; the *presumption* that the king can do no wrong was articulated best by Blackstone in his *Commentaries*, in Book Three, Chapter 17[3]. He says, 'That the king can do no wrong is a necessary and fundamental principle of the English constitution.' And in Book One, Chapter 7,[4] he says again, the king can do no

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[1] *The Trial of Charles I, State Trials, loc. cit.*, 20 January 1649, p. 946

[2] Cf. See the lengthy discussion in Blackstone, *Commentaries*, on the nature of law, and the distinction which so irritated Jeremy Bentham that he wrote a voluble treatise on it (*Fragment on the Constitution*) between divine and natural rights and duties which are incapable of being destroyed, and 'things in themselves indifferent', at Introduction, Section the Second, pp. 54-55. '...the declaratory part of the municipal law, ...depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislature. This doctrine...deserves a more particular explication. Those rights then which God and nature have established, and are therefore called natural rights, such as life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has the power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemesnors, that are forbidden by the superior laws, and are therefore *mala in fe*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that on the whole, the declaratory part of the municipal law has no force or operation with regard to actions that are naturally right or wrong. But with regard to things in themselves indifferent, the case is entirely different. These become either right or wrong... according as the municipal legislature see proper, for promoting the welfare of society, and more effectively carrying on the purpose of civil life.' For a discussion of what Blackstone means by 'indifferent', in the context of the Aristotelian initial use of the term [*adiaphora*]—'things naturally indifferent', which are based on convention and expediency, and differ in different *milieu* , which *adiaphora* he counterpoises to those natural rights which have validity everywhere, see John Finnis, *Natural Law and Natural Rights*, Clarendon Press Oxford, 1980, 1993, at p. 295

[3] Blackstone, *Commentaries*, Book 3, Ch 17, Of Injuries proceeding from or affecting the Crown, pp. 254-255.

[4] Blackstone, *Commentaries*, Book 1, Ch 7, Of the King's Prerogative, p. 237.

wrong. But read in context, both these statements do *not* amount to any blanket statement of invulnerability in the king.

He does not say that an action will *never* lie against the king; he confines this principle to invasion of private rights, because in respect of public rights he implies that the king cannot be commanded '(for who shall command the king?)'[1], and he concedes that action could lie against the prince for a *personal* injury by the prince to a subject.[2] He depends upon the prudence of the times to produce new remedies for new emergencies.[3]

In Chapter 7, he is discussing the prerogatives of the king and the needs of society, hedging about the 'maxim' with qualification. He makes it clear firstly, that it is merely a *supposition* that the king in parliament can do no wrong (a version of the doctrine of the 'sovereignty of parliament)'[4]; secondly that the king in his *political capacity* can do no wrong—this does *not* mean, he hastens to add, that 'everything transacted by the government was of course just and lawful'. What it does mean is that 1) whatever is exceptional in public affairs is not to be imputed personally to the king, nor is he personally responsible for it to his people. 2) the prerogative of the crown does not extend to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.[5] He adverts the possibility of the original compact between king and people being broken by the king[6]. He is quite clear that the coronation oath

> [this] is the most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before the coronation as after : in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people; viz. to govern according to law: to execute judgment in mercy : and to maintain the established religion.[7]

Now the omnipresent Sir Edward Coke said of the king's oath;

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[1] Blackstone, *Commentaries*, Book 3, Ch 17, Of Injuries proceeding from or affecting the Crown, p. 255.

[2] Blackstone, *Commentaries*, Book 3, Ch 17, Of Injuries proceeding from or affecting the Crown, p. 255.

[3] Blackstone, *Commentaries*, Book 1, Chapter 6, Of the King's Duties, p. 228

[4] Blackstone, *Commentaries*, Book 1, Ch 7, Of the King's Prerogative p. 237.

[5] Blackstone, *Commentaries*, Book 1, Ch 7, Of the King's Prerogative pp. 238-239

[6] Blackstone, *Commentaries*, Book 1, Ch 7, Of the King's Prerogative p. 237-238.

[7] Blackstone, *Commentaries*, Book 1, Chapter 6, Of the King's Duties, p. 228

> First, every subject (as it hath been affirmed by those that argued against the plaintiff) is presumed by law to be sworn to the King, which is to his natural person, and likewise the King is sworn to his subjects, ... which oath he taketh in his natural person: for the politic capacity is invisible and immortal; nay the politic body hath no soul, for it is framed by the policy of man.[1]

And

> that capacity of the King, that *in rei veritate* hath capacity, and is adorned and endued with endowments as well of the soul as of the body, and thereby able to do justice and judgment according to right and equity, and to maintain the peace, &c. and to find out and discern the truth, and not of the invisible and immortal capacity that hath no such endowments; for of itself it hath neither body nor soul.[2]

And

> Seeing then that faith, obedience and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and imposed in several places, or at several times, divers and several punishments and penalties, for breach or not observance of the law of nature, (for that law only consisteth in commanding or prohibiting, without any certain punishment or penalty) yet the very law of nature itself never was nor could be altered or changed. And therefore it is certainly true, that *jura naturalia sunt immutabilia.*[3]

That the king has no equal, does not mean that he is not subject to any *thing*, merely that he is not subject to any *person*. The king is quite clearly bound by the law. This is *not* statute law, though he is bound by that if he assents to Bills specifically binding him. But the law by which he is bound is the common law under which he takes his prerogative and position from the recognition of the people and the taking of his oath, and under the laws of God, or the laws of nature. I can see no reason why what Bracton said in c. 1250 is not still applicable to the king; it is unexceptional:

> The king has no equal within his realm, .. nor *a fortiori* a superior, because he would then be subject to those subject to him. The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law (*legi*)[4] (*Attribuat igitur rex legi,*) what the law (*lex*) bestows upon him,(*quod lex attribibuit ei*) namely, rule and power, for there is no *rex* where will rules rather than *lex [Non est enim rex ubi dominatur voluntas et non lex.*[5]] since he is the vicar of God, And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vice- regent on earth he is [6]

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

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

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

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

[5] Bracton; *Bracton on the Laws and Customs of England, trans.* Samuel E Thorne; Latin text copyright 1922 Yale University Press; translation copyright 1968 Harvard., Latin text, p. 33, [folio 5b]

[6] Bracton, *ibid.*, p. 33, [folio 5b, folio 6];

> For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, despite the statement that the will of the prince has the force of law, because there follows at the end of the *lex* the words 'since by the lex regia, which was made with respect to his sovereignty'.[1]
>
> Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the Prince acknowledge himself bound by the laws. Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.[2]

The idea that the 'king can do no wrong' grew up because, whenever the king did do wrong, the members of his *parlements* attributed his actions to the influence of 'evil counsellors', for to attribute those failings directly to the king would be to accuse him of a breach of his oath of governance, with all of the attendant consequences. But in extreme cases, the people did directly accuse the king of doing wrong, which inevitably resulted in the deposition or death of that king.[3] In more modern times, the 'maxim' would seem to owe a lot not only to the Whig supremacy under George I and George II, but also to the witticism of Charles II in response to Rochester:

> Here lies a great and mighty king / Whose promise none relies on; / He never said a foolish thing,/ Nor ever did a wise one.[4]
>
> 'This is very true : for my words are my own, and my actions are my ministers'.[5]

The king's oath binds him to govern his people according to their laws and customs, but binds him to an equal degree to maintain the 'laws of God and the true profession of the Gospel.' On the basis of both Coke and Blackstone's views, and the plain interpretation of his oath, rather than adherence to any hackneyed 'maxim', I can see no reason for the oath

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[1] This is the corrupted text (from the early transcriber) of Bracton, which is usually elliptically referred to merely as 'what pleases the prince has the force of law.' In fact what Justinian actually said was: *Sed et quod principi placuit, leges habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium potestatem < concessit >*. 'A pronouncement of the emperor also has legislative force because, by the Regal Act relating to his sovereign power, the people conferred on him its whole sovereignty and authority'.—see Justinian's *Institutes*, *The Institutes or Elements of Our Lord Justinian*, Book 1, 1.2, p. 36 (Latin), and p. 37 (*trans.*), translated with an introduction by Peter Birks and Grant McLeod, with the Latin text of Peter Krueger, Gerald Duckworth & Co. Ltd., London, 1987, 2nd impression 1994. Justinian's Introduction to his *Institutes* was addressed to 'Young Enthusiasts for Law', and dated 21 November 533, at Constantinople. The misuse of Justinian is due partly to enthusiastic supporters of the English common law as against the civil law in the middle ages, and was also fuelled and fanned by religious and political passions and personal ambitions during the seventeenth century.

[2] Bracton, c. 1250-1260: p. 305-306, [folio 107, 107b] *Item nihil tam proprium est imperii quam legibus vivere, et maius imperio ets legibus submittere principatum, et merito debet retribuuere legi quod lex tribuit ei, facit enim lex quod ipse sit rex*

[3] Cf. Edward II, Richard II, Charles I, James II and VII.

[4] John Wilmot, Earl of Rochester, 1647-1680, 'The King's Epitaph'; see *The Oxford Dictionary of Quotations*, 4th edn., Oxford University press, Oxford, 1992.

[5] Charles II, quoted in *The Oxford Dictionary of Quotations*, *loc. cit.*

not to be justiciable in the event of a breach by the king.

To Be a King

As Elizabeth I said, 'the title of a king is a glorious title' but 'to be a king and to wear a crown is more glorious to them that see it, than it is pleasure to them that bear it.'

To be a king, there must be a people to be king of. And to be a king, the king must have, as Justinian said long ago, arms and the law. It is the people who, by recognising an individual as their ruler, by giving to him their obedience and loyalty, elevate him into a position where he may do for all of them that which each alone cannot do either for himself or for others. That which he can do for them, is to provide peace and protection for them all, by virtue of the obedience and loyalty they give to him.

To become a king, after the people have chosen an individual, he must enter into the most solemn undertakings known to that people, to maintain the peace and protection of them all, in a fashion agreed upon by all the people. In this way, the king becomes king because he has the power to rule, to make laws, to govern and to direct the people as a whole for their mutual peace and protection, in accordance with the precepts which bind that people together and make them a people.

In the making of the British kings, these forms are known as the Recognition, and the Oath of Governance (the Coronation Oath), and the powers into which the king comes when he becomes king are known as the royal prerogatives. The obedience which the people give to the king is known as their allegiance, their homage and fealty. In Britain, the precepts which have bound the people together have been the laws of God, interpreted of late to mean the 'protestant religion'.

In the British system of governance, the king is assisted by judges, law enforcement officers, councillors, ministers and advisers. These people act as delegates of the king in carrying out his governance through the use of the royal prerogatives. Some of these advisors occupy hereditary positions of honour, bestowed upon their forebears by previous

kings; some are members of the clergy; and some are elected representatives of the people. Of late centuries, these advisors have been increasingly found in the House of Lords and the House of Commons. Those of the king's advisors to be found in the House of Commons are elected by the people, usually on the basis of a choice between two or three conflicting political party platforms rather than in relation to any necessarily inherent talent in the person elected. These representatives in these Houses of parliament are called together by the king's writ, and senior advisers to the king drawn from within their ranks. But the king it is said by convention[1] may only choose his closest advisors, those who will act as his delegates in the exercise of the prerogative, from that political party which has the most members in the House of Commons, and is thus said to represent most closely the will of the people. These senior advisors are known as Ministers of the Crown, and hold their positions as the king's advisors by virtue of a solemn oath they take to the king. The most senior of these advisors is called the Prime Minister.

The British system described above is usually called, democracy, it being believed that the elected representatives of the political parties in the House of Commons are representative of the will of the people. It has further come to be believed, that since the revolution of 1688, there exists a thing called, the 'sovereignty of parliament', by which it is usually understood that there is nothing that the 'parliament' cannot do. Synonymous with this belief, is that that the king must do whatever his Prime Minister tells him to, for this is the will of the people. The word 'parliament' therefore has come to mean just what the parliamentarians under Charles I in 1642 wanted it to mean—that is, the House of Commons.

This is clearly incorrect, as every statute enacted by the parliament makes it clear that the parliament that is enacting it is the King, the lords spiritual and temporal, and the commons, by the authority of the king.[2] It is the authority of the king that makes a statute law. Nor must a king do whatever he is told by his first Minister. What the king must do, and the only thing a king *must do*, is to hold fast to the terms of his oath of governance. Thus any thing which is in opposition to his coronation oath should not be accepted by the king. There is no requirement for a king to assent to any Bill agreed to by the two Houses

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[1] The conventions have not been able to examined in this work.

[2] See discussion *supra*, at note 1, p. 403, and note 2, p. 405.

if it is in opposition to his oath, for it is this oath which he has taken for the people, and it is this which makes him king.[1]

But these convenient fictions have led to the Prime Minister assuming the guise of an 'elected monarch'[2] while the real monarch has come to be politically perceived merely as a ceremonial figurehead, and faded into constitutional invisibility.[3]

Few other than The Queen are familiar with the Oath of Governance. A recent question in the House of Lords illustrates the problem:

> Lord Kennet asked Her Majesty's Government: Whether they consider that they are bound by the Queen's Coronation Oath.
>
> The Parliamentary Under-Secretary of State, Ministry of Defence (Earl Howe): The Coronation Oath is personal to Her Majesty. Members of Her Majesty's Government are not required on appointment to swear a ministerial equivalent of the Coronation Oath but they do of course take very seriously the moral duties and responsibilities associated with their position in that Government. Ministers would not advise Her Majesty to take any action which contradicted her Oath.[4]

The question raises the nature of the relationship between the Ministers and the queen; the response avoids answering the implications of the question, and indeed, the question itself; it suggests by the use of the words 'personal to Her Majesty' without spelling out what is in

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[1] I will not explicate on this here; but refer to Blackstone in his *Commentaries*, see discussion and references in notes *supra* under ' Justiciability of the Oath', p. 492 ff.; and see Coke, in *Dr Bonham's Case*, (1610) Pleadings and argument at 8 Co. Rep., 107a ff., Mich. 6 Jac. 1, 77 ER (KB) 638. Report at 8 Co. Rep. 113b, Hil. 7 Jac. 1, 77 ER (KB) 646.

[2] This is Benemy's phrase—see F W G Benemy, *The Elected Monarch*, George Harrap & Co, London, 1965.

[3] See for example constitutional discussions which raise this modern misleading doctrine of the invisible king in varying ways in the following works: David E Smith, *The Inuisible Crown, The First Principle of Canadian Government*, University of Toronto Press, Toronto, 1995; See the removal of the Royal Command from the Writ of Summons in 1979, and the correspondence in *The Times* for 14, 17, 18, and 20 December 1979. This removal sparked a controversy, and led to the resignation of R E Ball from his position in protest at this stealthy removal of 'the Queen'; and see R E Ball's Preface to his *The Crown, The Sages and Supreme Morality*, Routledge and Keegan Paul, London, 1983; Letter to the Editor, Hailsham of St Marylebone, *The Times*, Monday, 17 December, 1979; see Joseph M Jacob, particularly his Epilogue in his *The Republican Crown, Lawyers and the Making of the State in Twentieth Century Britain*, Dartmouth Publishing Company Limited, Aldershot, 1996; F W Maitland, 'The Crown as Corporation', *The Law Quarterly Review*, Vol. 17, 1901, 131; Edmund S Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America*, W W Norton & Company, New York, 1987, Norton paperback, 1989; R F V Heuston, 'Sovereignty', in *Oxford Essays in Jurisprudence*, (First Series), Guest, A G (*ed.*), Clarendon Press, Oxford, 1961, 2nd impression 1968, at p. 198; Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, Clarendon Press, Oxford, 1957, reprinted Oxford, 1962; E T Brown, *The Sovereign People: analysis of an illusion*, F W Cheshire, Melbourne, 1954; Herbert Butterfield, *George III and the Historians*, Collins, London, 1957; Herbert Butterfield, *The Whig Interpretation of History*, G Bell and Sons, London, 1931, 1963; and see David Cannadine, 'The Context, Performance and Meaning of Ritual : The British Monarchy and the "Invention of Tradition", c. 1820-1977,' in Eric Hobsbawm, and Terence Ranger, (*eds.*), *The Invention of Tradition*, Cambridge University Press, Cambridge, 1983, Canto edn. 1992, reprinted 1993, 1994, 1995; David Cannadine, and Simon Price, (*eds.*), *Rituals of Royalty. Power and Ceremonial in Traditional Societies*, Cambridge University Press, Cambridge, 1987. And from a post-modern perspective, see Peter Fitzpatrick, *The Mythology of the Modern Law*, Routledge, London, 1992;

[4] *House of Lords*, Hansard, Written Answers text for 21 Mar 1997 : Column WA125

the oath, that it is a private matter, rather than the great matter of the nature of the governance of the nation, while simultaneously managing to suggest that it is the Ministers who determine what is and is not in accordance with the oath, and them the queen must obey—the response subtly propagates a notion of the irrelevancy of the queen.

The Oath of Governance is usually only considered these days behind closed doors among the political elites in the context of the death of a king, or when churchmen consider the binding nature of the oath, usually from the perspective of the church of England. But the king is the protector of the peoples' liberty, and is bound to the people by his oath, which establishes the government of that people.

Instead of being seen as the bastion of the people's liberties, the king has become depersonalised. The king has become 'The Crown'—a phrase which has meaning only by virtue of the context of the person using it.

Lawyers and politicians speak of The Crown in familiar but confusing terms—Lord Simon has said that 'the Crown' is 'a corporation aggregate...headed by the Queen'[1]—but in the same case, Lord Diplock said 'the Crown is in law a corporation sole[2].'[3] Lord Simon said also that

> 'the Crown' and 'Her Majesty' are terms of art in constitutional law. They correspond, though not exactly, with terms of political science like 'the Executive', or 'the Administration', or 'the Government', barely known to the law, which has retained the historical terminology. So it comes about that ... 'Crown' includes all Departments of the Central Government.[4]
>
> ...it only remains to note also the fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible. ... 'The Queen' and 'Her Majesty' reflects the ancient distinction between 'the King's two bodies', 'natural' and 'politic'...The Minister...and the Secretary of State...are also aspects or members of the Crown.[5]

If 'the crown' and 'Her Majesty' are terms of art in constitutional law, it is a very strange

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[1] See *Town Investments v Department of the Environment* [1979] 1 All ER 813—held that the Crown includes ministers and their departments—see L B Curzon, *Dictionary of Law*, definition of 'Crown.' Also quoted in quoted in Jacob, *Republican Crown*, *op. cit.*, but using the reference 1978 AC 359, at p. 254.

[2] Note that the concept of the 'corporation sole' was the invention of Sir Edward Coke—see *Sutton's Hospital case*, Co. Lit. 2 a, 250 a; 10 Co. Rep. 26 b, 1613; 77 ER 960, 968; and referred to in F W Maitland, 'The Crown as Corporation', *art. cit.*, 131.

[3] *Town Investments v Department of the Environment* [1978] AC 359, per Lord Diplock, at 384, as quoted in Jacob, *Republican Crown*, *op. cit.*, p. 253.

[4] *Town Investments*, per Lord Simon of Glaisdale, [1978] AC 359, 398, as quoted in Jacob, *Republican Crown*, *op. cit.*, p. 254

[5] *Town Investments*, per Lord Simon of Glaisdale, [1978] AC 359, 400, as quoted in Jacob, *Republican Crown*, *op. cit.*, p. 254

picture which is being painted, bearing more resemblance to Sir Edward Coke's chimera of the king's two bodies which had been invented for purely political and polemical purposes, than to any sober consideration of the legal situation. We find a proliferation of crowns—the 'Crown of the United Kingdom of Great Britain and Ireland', 'Crown prerogative'[1], 'the Crown in right of the Commonwealth', 'prerogative of the crown in right of the States'[2], the 'Territory crown'[3], 'the shield of the Crown', 'Crown immunities', 'liability of the Crown', 'the Crown is not bound'[4], 'Crown privilege', 'reserve powers of the Crown', 'the divisible Crown'[5], the 'indivisible Crown', 'Minister of the Crown', and to people holding office 'under the Crown'[6]. 'The Crown' is also used to refer almost indiscriminately by people at large, as well as in statutes, to encompass government, the Government, the Executive Government, the king, the 'sovereign power', the 'sovereign', and the 'state'. All criminal cases are conducted in the name of the Crown. In 1979 Lord Hailsham went do far as to say that 'The Queen' equalled 'the Government'.[7]

The doctrine of 'the sovereignty of parliament' in the guise of representative government of the people, has effectively removed the crown from the king, and placed it upon the political party with the most votes in the Commons. This results in quasi-dictatorship by party, for the Prime Minister takes no oath to the people, the Prime Minister does not represent all the people, he is not the leader of the people, and the people are not his people. The Prime Minister stands or falls on the votes of his party members in the Commons, and on the votes of the people in his electorate.

But the king stands for all his people, and is bound to them by his oath. A king is not a king by virtue of his crown, but by virtue of the will of the people, his oath of governance,

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[1] See Dixon J, *Australian Railways Union v Victorian Railways Commissioners (ARU) case* (1930) 44 CLR 319, at 390.

[2] See Dixon J, *West v Commissioner of Taxation* (NSW) (1937)56 CLR 657, at 682

[3] Crown Proceedings Act 1992, referred to by Higgins J, in *The Queen v Sam Scott* (1993) 114 ACTR 20; 65 A Crim R 182, at paragraph 81.

[4] see Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Bropho v Western Australia* (1990) 171 (CLR) 1 *passim*.

[5] Cf. *The Royal Style and Titles Act*, 1953, 1 & 2 Eliz. 2 cap. 9; see *Statutes in Force*, Official Revised Version, Revised to 1st February 1978, Her Majesty's Stationery Office, London, 1978, enabling the Queen to take different titles in different States.

[6] See *Sykes v Cleary* (1992) 176 CLR 77

[7] See Letter to the Editor, Hailsham of St Marylebone, *The Times*, Monday, 17 December, 1979—'the defendant must not be misled into thinking that the Queen (i.e. the Government) has taken sides...'

and his anointing. It is time that the word 'Crown' disappeared from the political and legal lexicon, and the word 'king' re-entered it; and it is time that the people and their king entered into a dialogue about that great matter of mutual obligation upon which their society is built, the oath of governance.

THE FINDINGS

THE KING'S CROWN

THE KING AND THE PEOPLE

The coronation oath, the oath of governance taken by the king, is the basis of the English/British Constitution.

The basis of the coronation oath is the willingness of the people(s) to accept the person about to take the oath as king, and the willingness of the person to take the oath and to abide by it.

The person who takes the oath has been recognised by the people(s) as king.

The person recognised by the people(s) is willing to take the oath and to adhere to it.

The taking of the oath invests the governance of the people(s) in the king.

The taking of the oath establishes a mutuality of obligation between the king and the people(s).

The people(s), having recognised the person as king and the king having taken the oath, are bound in allegiance to the person who is king—that is, the people(s) are bound to obedience in the governance of the king.

THE KING'S OBLIGATIONS UNDER THE OATH

The king, having been recognised by the people(s) and taken the oath, and being therefore about to enter into his royal powers, is bound to the people(s), to use those powers to

- *rule* the people(s)according to their laws and customs
- *execute* law and justice[1] with mercy in judgements
- *maintain* the Laws of God, the true profession of the Gospel
- *maintain and preserve inviolably* the settlement of the Church of England as by law established *in England*, and preserve the rights and privileges under law of the bishops and clergy of *England*, and of the churches *in England* under their charge.[2]

These are the obligations under the English coronation oath, which has been used by the monarchs of Britain since the time of George I. The Scots coronation oath, last taken by Anne, Queen of Scotland, is still extant.[3]

The peoples for whom Elizabeth II swore to exercise these powers are the peoples of England, Scotland, Wales, and Northern Ireland (the peoples of the United Kingdom of Great Britain and Northern Ireland), the peoples of Australia, the peoples of Canada, the peoples of New Zealand, the peoples Pakistan, the peoples of Sri Lanka (formerly Ceylon), and the peoples of all the king/queen's possessions, and the peoples of other territories belonging or pertaining to any of them.[4]

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

[2] My italics.

[3] There is in my view no reason at law why this should have happened. Under the *Act of Union*, there was no requirement for the monarch of the new united entity to take the English oath, but not the Scots oath. Under the *Act of Union* on my reading *both* oaths should have been taken by the monarch of the new united entity. I am unsure of the antiquity of the Scots oath prior to the time of its enshrining in Scots legislation at the coronation of James VI—but it is surely ancient (see The Marquess of Bute, *Scottish Coronations*, London, 1902, p. 34). But even if the Scots oath dated only from the time of James VI's coronation, I am uncertain whether the so-called doctrine of prescription would have extinguished any claims by the Scots for the monarch now to take the existing oath, or some other new coronation oath specifically relating to Scotland—the Scots Coronation Oath Act is still on the statute books. I do not know that the acquiescence of the Scots people and lords in the coronation ceremony where the English oath has been taken, to which presumably they have contributed through consultation, could be said to have extinguished the claims of the ancient kingdom of Scotland, now part of the united Kingdom, to insist on its own coronation oath. Indeed, I can see no reason why any of the peoples of the nations of which the Queen is now Queen could not request their monarch to take a separate coronation oath for them, and specify exactly what it was they and she agreed between them would be the basis of the governance in their nation.

[4] South Africa, which was a member of the Commonwealth at the time of Elizabeth II's coronation, is now an independent republic; it was not part of the Commonwealth during the apartheid regime; but has rejoined the Commonwealth under the presidency of Dr Nelson Mandela. India, which was part of the Empire when George VI took his coronation oath, became an independent republic, and her people no longer owe allegiance to the Queen, though they remain part of the Commonwealth of Nations. Most of the 'territories and possessions' which were referred to in Elizabeth II's 1953 oath have since become independent self-governing nations, many of which still owe allegiance to the Queen and many of which remain in the Commonwealth of nations.

When any of the latter categories of peoples formed their own independent governments, any of them still choosing to owe allegiance to the Queen, remain under the protection of her oath, and are obliged to give her obedience.

The king is then anointed, and consecrated as king.[1]

THE KING'S POWERS

By the taking of the oath of governance, the king enters the office of king and is bestowed with his powers, the royal prerogatives, by which he is to carry out the governance of his people(s), for their peace and protection. These intangible prerogatives are symbolised after his oath-taking and anointing in the bestowal of tangible objects:

- the sword of state : to do justice, stop iniquity, protect the church of God, help and defend widows and orphans, restore things decayed, maintain things restored, confirm what is good.
- bracelets of sincerity and wisdom : as symbols of God's protection, and of the bond uniting the king with his peoples
- the robe : for knowledge and wisdom, majesty and righteousness
- the orb and cross : for remembrance of the subjection of the world to 'the power and empire of Christ our redeemer.'
- the ring : of dignity and the seal of Catholic[2] faith, to defend Christ's religion
- the sceptre : of power and justice
- the rod : of equity and mercy
- the crown : for royal majesty

The king is then king indeed, and wearing his crown, is lifted up above everybody else on to the throne.

PUBLIC HOMAGE AND FEALTY[3]

The bishops of the people(s),[4] the Archbishop of Canterbury leading them, do their fealty

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[1] Because of the complexity of the issues involved and space constraints, the anointing and its legal consequences, together with its religious consequences, have unavoidably but reluctantly been omitted from this exegesis.

[2] This part of the order does not say '*the* Catholic faith', but 'Catholic faith'; the word 'catholic' means 'universal'

[3] The Lords and Clergy, and representatives of the Commonwealth countries have already recognised the king at the Accession Council, and given their private and personal allegiance directly to the person to be proclaimed as king. But they too, also give their Recognition at large together with other representatives of the clergy and peoples of the countries which the Queen is to goveern in the Recognition.

[4] Only the leaders of the Church of England participate in this fealty; members of the Church of Scotland are present at the coronation ceremony, with the Moderator of the Church of Scotland presenting the Bible to the Queen during the

(their allegiance) to the king, his heirs and successors according to law, swearing an oath.[1]

The Consort, Princes, and peers do their homage (their allegiance) to the king, his heirs and successors according to law, swearing an oath, and touching the crown on the head of the king.[2] The people(s)' allegiance has already been demonstrated publicly at the Recognition.

THE KING

Thus is the king made, and the peoples and their king bound by the king's oath of governance in a common cause, for the peace and protection of all of them. This is the foundation of the British constitution.

Finis

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coronation—see Randolph Churchill, *The Story of the Coronation*, Derek Verschoyle, London, 1953 at p. 30 and p. 81. In May 1901 before his coronation, Edward VII received representatives of other religious groups who made commitments of loyalty to the throne—'For the first time since the days of the Reformation the Roman Catholics of England, through their representatives of the Catholic Hierarchy, were received in audience, and by the mouth of the Cardinal Archbishop expressed their loyalty to the Throne. They were followed immediately afterwards by the presbyterians, who in turn were succeeded by the representatives of the Jewish community.'—see Sir Richard Holmes, *Edward VII, His Life and Times*, 2 Vols., The Amalgamated Press, Ltd., London, 1911, Vol. II, p. 486

[1] The clergy (Cantaur. only) kiss the king's right hand. The clergy do not touch the crown, as their duties are not temporal duties.

[2] The Consort and princes of the blood kiss the king's left cheek, and touch the Crown; the peers (senior peer of each degree for the rest) kiss the king's right hand and touch the Crown.