

THE LAW OF SUCCESSION TO THE CROWN IN NEW ZEALAND

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I. INTRODUCTION

In recent years there has been some speculation regarding the possibility of changes to the laws governing succession to the Crown. The local news media has tended to regard this as a matter for the British authorities, or as one which can somehow be resolved by non-legal means.¹ But it is a debate which does raise important issues for New Zealand. The succession laws are not merely rules invented to amuse constitutional lawyers. They are rules which are in certain respects central to the constitution, and are important aspects of New Zealand independence.²

This article will explore three issues. Firstly, it will examine the existing New Zealand succession law. Secondly, it will discuss the ways and means by which this law can be changed. Thirdly, the article will discuss in what circumstances the succession ought to be changed.

II. THE NEW ZEALAND SUCCESSION LAW

The Constitution Act 1986 is the only piece of legislation enacted by the New Zealand Parliament which makes any direct reference to the succession law.³ Section 5 of the Constitution Act 1986 deals with the demise of the Crown.⁴ Section 5(1) states that:

[t]he death of the Sovereign shall have the effect of transferring all the powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the Act of Settlement 1700 and any other law which relates to the succession to the Throne, but shall otherwise have no effect in law for any purpose.⁵

Section 5 (2) adds that every reference in any document or instrument to the Sovereign shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign's heirs and successors.⁶

¹Though this is more a reflection of the absence of in-depth reporting which does not rely on overseas agencies for news stories.

²Both jurisdictionally and politically.

³Occasional references to the Sovereign and their successors are, at best, indirect references which give no guidance as to the actual law.

⁴The demise of the Crown meaning the transmission of the Crown from one individual to another, usually, though not implicitly, by death.

⁵The one paragraph uses the terms "Sovereign", "Throne" and "Crown". Although not synonyms, they are commonly used as equivalents.

⁶The effect of the Demise of the Crown Act 1908 was similar. It was designed to maintain imperial consistency. It excluded the operation of the rule in relation to property held by the

The Imperial Laws Application Act 1988 preserves the Act of Settlement 1700 (Eng)⁷ as part of the laws of New Zealand. But what is the "other law which relates to the succession to the Throne"?⁸ There are two possible sources of law, statute and common law.⁹

1. Statute law

Although the common law governing the succession to the Crown would appear to have remained common throughout the Queen's realms,¹⁰ the statute law may not have remained so. A germane example of this may be seen in the modern legislation governing regencies.¹¹

Since 1937 the absence, illness or incapacity of the Sovereign has been dealt with in the United Kingdom by the Regency Acts 1937 and 1943 (UK).¹² As a matter of construction of the law of England, United Kingdom Acts have not extended to New Zealand as part of New Zealand law after 1931, without an express declaration that New Zealand has requested and consented to the enactment.¹³

It is highly doubtful if the Regency Acts 1937 and 1943 originally extended to New Zealand, despite their subject matter and the failure of New Zealand to adopt the Statute of Westminster 1931 until 1947.¹⁴ But to make the matter clearer, the Royal Powers Act 1983 section 5 negates the application (if any) in New Zealand of the Regency Acts. However, by the Constitution Act 1986 it is provided that:

[W]here, under the law for the time being in force in the United Kingdom, the royal functions are being performed in the name and on behalf of the Sovereign by a Regent, the

Sovereign in a private capacity. Its provisions however were unnecessarily elaborate for a general principle. But the Constitution Act 1986 goes further. If death has no effect in law then the Sovereign in a private as well as a public capacity is immortal in New Zealand.

⁷12 & 13 Will III c 2.

⁸s 5 (1) of the Constitution Act 1986.

⁹The laws of succession are unlikely to be based on the royal prerogative, or convention, since they are clearly more than mere rules of conduct, however binding, and most probably justiciable. They are also not merely ancillary or residual rights. The royal prerogative is of course a branch of the common law, because it is the decisions of the courts which determine its existence and extent (*case of proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB)).

¹⁰Although there has been no litigation on this question, it is submitted that there are no circumstances which might create a divergence in the common law of succession. This is particularly so given the importance of the succession.

¹¹Pre-1840 regencies were generally governed by ad hoc arrangements, although for much of the early eighteenth century Lords Justices were required from time to time due to the Sovereign's absence in Hanover.

¹²1 Edw VIII & 1 Geo VI c 16, and 6 & 7 Geo VI c 42.

¹³Or in the absence of clear words or necessary implication (*Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd* (1958) 100 CLR 597). A better view is that the Statute of 1931 (22 & 23 Geo V c 4) imposes only a procedural bar, at least so far as the law of England is concerned.

¹⁴Justice, Department of, *Constitutional Reform- Reports of an Officials Committee* (1986) 28.

powers of the Sovereign in right of New Zealand shall be exercised in the name and on behalf of the Sovereign by that Regent.¹⁵

If British statutes enacted after 1931 are ineffective to regulate mere regencies, the effectiveness of any British Act of Parliament to alter the succession to the Crown of New Zealand itself must be doubted.

Be that as it may, if the British regency Acts did not extend to New Zealand, what precisely is meant by to Sovereign's successor as determined "in accordance with the Act of Settlement 1700 and any other law which relates to the succession to the Throne"?¹⁶ Can this include a Sovereign whose title depends solely upon a new, post-1931 (or 1947) Act of Parliament of the United Kingdom? What, if any, have been the consequences for the law of succession to the Crown which have occurred as a consequence of the development of the notion of a divisible Crown, and the evolution of dominion status?

Although the modern notion of a separate sovereignty would see the Crown as potentially divisible in actuality as well as in law, there has not been a division of the sovereignty of the Crown of England since Saxon times, although a separation could arguably have occurred in 1936.¹⁷ Implementing suggested changes to the law in the United Kingdom would produce just such a division, were New Zealand- and every one of the other countries which recognise Elizabeth II as Sovereign, not to follow suit.

2. *Common law*

It is commonly said that the title to the Crown was governed at common law¹⁸ by the feudal rules of hereditary descent formerly applicable to land.¹⁹ They were however subject to the

¹⁵Constitution Act 1986, s 4 (1).

¹⁶The consequences of the Act extend beyond the Crown. The prohibition on those "born out of the kingdoms of England Scotland or Ireland or the dominions thereunto belonging shall be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military" was the subject of some consideration in the *Report of the Justice and Law Reform Committee on the Imperial Laws Application Bill* (1988) Explanatory Material, 58. The authors of the Report believed that membership of the Privy Council was best left uncertain, and that the other matters were not relevant. Yet the practice has been for subjects of Her Majesty overseas to be appointed to British offices as if this were proper. The only solution is that the expression "the dominions thereto belonging" must be interpreted in light of the Statute of Westminster 1931 (22 & 23 Geo V c 4) and be assumed to have been impliedly amended accordingly.

¹⁷Due to the effect of His Majesty King Edward VIII's Declaration of Abdication Act 1937 (SA).

¹⁸Lawson, FH & Davies, HJ, *Halsbury's Laws of England* (4th ed, 1974) vol 8 para 845.

¹⁹This is the substance of the rule as deduced by Sir William Blackstone (see *Commentaries on the Laws of England* (ed E Christian, 1978) 192, 193). The principal authority for the existence of the rule is to be found in the course of descent in the past, and in the fact that where the rule has been broken, or where any doubt as to the validity of the title has existed, it has usually been found necessary to fortify the title by statute. See 7 Hen IV c 2 (Succession to the Crown) (1405-6); 1 Mar sess 2 c 1 (Legitimacy of the Queen) (1553); 1 Eliz I c 3 (Recognition of the Queen's Title to the Crown) (1558-9); 1 Jac I c 1 (Recognition

distinctions that the ancient doctrines relating to the exclusion of the half-blood from the inheritance had no application, and that, in the case of females, the title devolved upon the eldest daughter alone and her issue.²⁰

In the legal history of those Western societies which have passed through the era known as feudalism, succession to property and succession to thrones are intimately connected. The analogy with land descent is, however, not strictly correct, it is submitted, since the only feature which the title to the Crown had in common with this was primogeniture, and this had been the developing rule in the pre-feudal Saxon dynasty.²¹ And in the sixteenth century it was established that the Salic law,²² which excluded female rulers and long thought fundamental to Western laws of succession, only applied to private law. This caused some dismay in France, though not in England, where the rule had never prevailed.²³

The analogy with land presupposed that this developed before the title to the Crown had been settled. In fact the laws developed side by side in the two centuries after the Conquest. As society became more settled in the century after the Conquest, primogeniture came to be the usual form of inheritance. But the Crown did not pass without formal election until Edward II. For practical reasons primogeniture was the most convenient means of conveying the Crown.

By the accession of Richard II, however, influenced by this misleading analogy, the then developed rule of representative primogeniture was applied to the Crown.²⁴ But the true political nature of the Crown, and the continuing right of the magnates to regulate the succession to it, was re-asserted, not twenty years later, by the deposition of the king.

of the King's Title to the Crown) (1603-4) (all repealed); and the Succession to the Crown Act 1707 (6 Ann c 41).

²⁰Unlike real property inheritance, for example, it is generally accepted that in the case of female heiresses, the title devolved upon the elder daughter of the king alone, and her issue, and was not subject to coparcenary. This is stated by Blackstone to be of necessity (he gave no other authority). In the case of land, the title devolved upon all the daughters equally as coparceners (Coke, Sir Edward, *Coke upon Littleton* ("*First Institutes*") (1979) 135a; Blackstone, *supra* note 20, at 194. See O'Farra, "The Law of the Accession" (1953) 16 Mod LR 140. Queen Elizabeth II succeeded in accordance with Blackstone's rule. Henry VIII provided for the succession of his daughters by statute, but it was therein said that the Crown should pass to females "according to their ages, as the Crown of England has been accustomed, and ought to go in cases where there be heirs female to the same" (25 Hen VIII c 22).

²¹See Truax, Jean Ann, "The making of the King 1135: Gender, family and custom in the Anglo-Norman succession crisis" (1995) unpublished University of Houston PhD thesis; Le Patourel, "The Norman Succession 996-1135" (1971) 86 *English Historical Review* 225-250; Leyser, "The Anglo-Saxon Succession 1120-1125" (1990) 13 *Proceedings of the Battle Conference on Anglo-Norman Studies* 225-241.

²²Salic or Salique Law, an ancient law of Pharamond, King of the Franks.

²³In the East, there was an elaborate succession law, but little or nothing on the Crown. This was most irreconcilable, or perhaps most explicable, in Muslim countries, because of the minute fractional division of estates. Natural selection, the triumph of the strong over the weak, prevailed as a means of settling the succession within the ruling family (Maine, Sir Henry Sumner, *Early Law and Custom* (1890) 125-144).

²⁴Taswell-Langmead, Thomas, *English Constitutional History* (9 ed AL Poole, 1929) 169.

It is submitted that, although the law of succession at common law is based on that applicable to real property, it is distinct from it, and has only adopted those principles of descent appropriate to the Crown.²⁵ The succession law was never consciously adopted; it developed, adopting the developing real property law gradually, but always restrained by the political nature of the office.

The principal authority for the existence of the rules are to be found in the course of descent in the past. It is also seen in the fact that where the rules has been broken, or where any doubt as to the validity of the title has existed, it has usually been found necessary to fortify the title by statute.²⁶

In the absence of statutory limitations, therefore, the Crown would descend lineally to the issue of the reigning Sovereign, males being preferred to females, and subject to the right of primogeniture amongst both males and females of equal degree, whilst children would represent their ancestors *per stirpes* in infinitum.²⁷ Upon failure of lineal descendants, the Crown would pass under the rule to the nearest collateral relation descended from the blood royal.²⁸

Today, descent is by primogeniture, the heir succeeding immediately.²⁹ The principle of primogeniture has been abolished with respect to real property,³⁰ and remains only in respect of the Crown and dignities.³¹

²⁵Henry Constable stated, incorrectly, that the succession was by the "ordinary course of inheritance in fee simple by lineal descent in blood" (*Discovery of A Counterfecte Conference* (1600) 44). Logically, the Crown was an estate in fee, because at common law only an estate in fee was heritable. But inherited land was freely alienable; the Crown never was, though the attempt by Edward VI to devise the Crown may be taken to have implied this.

²⁶*Halsbury's Laws of England*, supra note 19, vol 1.

²⁷Blackstone, supra note 20, at 194.

²⁸There can be no doubt that the ancient doctrine with regard to land, relating to the exclusion of the half-blood from the inheritance, never had any application to the descent of the Crown, and that collaterals were always admitted provided they could trace their descent from the first monarch purchaser (Blackstone, supra note 20, at 202; *Willion v Berkeley* (1561) 1 Plowd 223, 245; 75 ER 339). It is said also that the maxim *possessio fratris haeredem facit sorerem* (possession of an estate by a brother such as would entitle his sister [of the whole blood] to succeed him as heir [to the exclusion of a half-brother]) does not apply to the descent of the Crown, and that, therefore, in the absence of lineal issue, the brother of the half-blood may succeed to the sister of the whole blood (see Coke, supra note 21, at 15b).

²⁹As is reflected in the wording of the Accession Council, that lineal descendant of the Anglo-Saxon *Witan* (see the Appendix, Accession Proclamation 1952).

³⁰Administration of Estates Act 1925 (15 & 16 Geo V c 25) (UK); Administration Amendment Act 1944 (NZ).

³¹A peerage is an incorporeal and impartible hereditament, inalienable and descendable according to the words of limitation in the grant, if any (*Nevil's Case* (1604) 7 Co Rep 33a; 77 ER 460; *R v Purbeck (Viscount)* (1678) Show Parl Cas 1, 5; 1 ER 1; *Norfolk Earldom Case* [1907] AC 10; *Rhondda's (Viscountess) Claim* [1922] 2 AC 339). If the peerage is a barony by writ, there will, of course, be no words of limitation. In English law, letters patent purporting to create a peerage without including words of limitation will be held to be bad. A

III. POWER TO CHANGE DESCENT OF THE CROWN

The first formulation of the doctrine of the demise of the Crown dates from some time between 25 and 29 September 1399. This doctrine was held to invalidate the parliamentary writs that had been issued by the authority of the former king. The last Parliament of Edward II had become the first of Edward III, and the a new Parliament was afterwards called on the demise of the Crown without the issue of writs until 1867.³² Thereafter there was to be no interregnum on the death of one king, and the succession of the next.

Succession was now direct and automatic. It followed that there was no room for parliamentary intervention. But the common law right of inheritance was always liable to be defeated by parliamentary grant, or by the election of the *Witan* or *Commune Concilium*.³³ This parliamentary intervention normally took place when the king's ability to rule (or in some cases his right to rule) was challenged.

The Crown now descends according to the statutory limitations, but retains its hereditary and descendible qualities as at common law, subject to the statutory provisions.³⁴ Title by descent, and title by choice of Parliament expressed two different views of kingship. This came to the fore under James II, and the solution settled the supremacy of the statutory title. The question as to whether the king could vacate the Throne by his misconduct, as James was held to have done, is not one which can be examined here. So far as the succession was concerned the immediate solution was a return to the ancient device of election by the magnates, or as it now was, by Parliament, *ex post facto*.

From this point forth we have two competing views of the title to the Crown: by inheritance, and by grant of Parliament. A king relying in fact on one would invoke the other to reinforce his title. For several centuries more there remained conflict between title by parliamentary choice, and title by inheritance. The old form of election gave way to parliamentary title, but several kings claimed hereditary title despite statutory bars, James I among them.³⁵

peerage is descendable as an estate in fee tail (*Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 ER 942).

³²Lapsley, "The Parliamentary Title of Henry IV" in Barraclough, Geoffrey & Cam, Helen (eds) *Crown Community and Parliament in the Later Middle Ages* (1951) 273-336, reprinted from (1934) 94 *English Historical Review* 423-49, 336.

³³*Halsbury's Laws of England*, supra note 19, vol 8 para 846.

³⁴These are contained in the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng), and His Majesty's Declaration of Abdication Act 1936 (1 Edw VIII & 1 Geo VI c 3 (UK); now repealed in New Zealand by the Imperial Laws Application Act 1988. The Legitimacy Act 1959 (7 & 8 Eliz II c 73) (UK) does not affect the succession to the Throne (s 6 (4)). While the Status of Children Act 1969 does not expressly exclude the Crown, since it is not expressed as binding the Crown, this interpretation may freely be arrived at.

³⁵Indeed, the succession of James in such circumstances appeared to suggest that hereditary right was indeed indefeasible. He was also an alien, and thereby debarred by common law from possessing land in the kingdom (Nenner, Howard, *The Right to be King- The Succession to the Crown of England, 1603-1714* (1995) 3).

Dunham and Wood have argued that two centuries of depositions led to the formulation of a new theory of parliamentary monarchy, based on the principle that any aberrant settlement of the succession had to be justified by the consent of the estates of the realm. They concluded that by 1485 it had "established and then reiterated principles that were, in the end, to form a constitutional doctrine legitimating a right to depose and a right to rule".³⁶ But the Crown was not yet at the disposal of Parliament.

The Tudor dynasty could appeal neither to the theory of hereditary right which had been the basis of the Yorkist claim nor the statute law on which a Lancastrian claim might have been maintained.³⁷ But Henry VII was at least de facto king.³⁸ There is no assertion of hereditary right in the Act for the Recognition of the title of Henry VII 1485.³⁹ It merely recognises a fact, it does not elect or create the king.⁴⁰ That the Parliament which passed the statute was summoned by a usurper did not matter since he was de facto king at least. Henry relied on possession.

As the son of Elizabeth of York, Henry VIII had the best hereditary claim of anyone. The new king obtained from Parliament a power to dispose of the Crown by will, and devised it, failing issue of Edward, Mary or Elizabeth, to the grandchildren of his younger sister. The reigns of Henry's three children all rely on statutory right. This is of necessity the case since the statute of 1536,⁴¹ making Mary and Elizabeth illegitimate, was not repealed.⁴² The first

³⁶Dunham and Wood, "Right to Rule in England: Deposition and the Kingdom's Authority, 1327-1485" (1976) 81 *American Historical Review* 738-61.

³⁷It was not clear by what right Henry VII was king, but there could be no denying that he was king. Heredity, election, nomination, conquest and prescription could each have been pleaded, but reliance on too many grounds showed the weakness of the title.

³⁸Under an Act to regulate the Succession 1405-6 (7 Hen IV c 2) (Eng), Henry VII's line were legitimate, but excluded from the succession. However, it is unclear whether this conditional legitimation was effective. Though there are a number of instances which suggest that illegitimacy was not a bar to succession to the Saxon Throne, since the Conquest all monarchs had been legitimate. Henry VII did not claim the Throne by inheritance, neither did Elizabeth (though hers was a legitimate birth subsequently invalidated).

³⁹Act for the Recognition of the title of Henry VII 1485 (1 Hen VII c 1) (Eng), printed at the beginning of the Statutes of Henry VII in *Statutes of the Realm* (1816) II, 499. [extract only]: "for comfort of realm, and to avoid all ambiguities and questions... ordained, established and enacted that by the authority of this present parliament, that the inheritances of England and France, with all the permanence and royal dignity to the same pertaining... rest, remain and abide in the most royal person of our now sovereign lord King Henry VII and in the heirs of his body lawfully coming, perpetually with the grace of God so to endure in none other." This does not rely on hereditary title- it recognises a political fact or fait accompli.

⁴⁰Keir, Sir David Lindsay, *The Constitutional History of Modern Britain since 1485* (8th ed 1966) 8.

⁴¹28 Hen VIII c 7 (Eng).

⁴²Mary was legitimated by statute (1 Mar St 2 c 1) (Eng), and also relied on a statute to confirm her title to the Throne (1 Mar St 3 c 1) (Eng). Elizabeth remained illegitimate in canon law, and therefore in the eyes of her Catholic subjects, as well as under 28 Hen VIII c 7 (Eng) (although her title to the Throne was also confirmed, by 1 Eliz c 3 (Eng)). Henry may have wanted to protect the rights to succession of any future female children born after Mary and Elizabeth. He did however allow them the right to succeed under the statutory entail of 35 Hen VIII c 1 (Eng).

Act of Succession of Henry VIII 1534⁴³ made the king's marriage to Katherine of Spain void and annulled, and affirmed that to Anne Boleyn.⁴⁴

An Act fixing the succession 1544 refers to the statute of 1536, and makes Jane's heirs the king's heirs, and enacted:

that the King should and might give, will, limit, assign, appoint or dispose the said imperial Crown and the other premises... by letters patent or last will in writing.⁴⁵

This is the title on which Mary and Elizabeth relied. The king bequeathed the Throne to the Suffolk line, descendants of his younger sister Mary, by Will in 1546.

The succession of Mary was unprecedented.⁴⁶ To a sixteenth century mind this was a guarantee of a disputed succession, a civil war or at least domination by a foreign power by marriage. Henry VIII may indeed have briefly considered in 1525 recognising as his heir his six year old son by Mary Blount. The boy, who died in 1536 at the age of seventeen, was made Duke of Richmond, and Lord High Admiral.⁴⁷

In 1533 Mary was declared illegitimate by Act of Parliament,⁴⁸ but was reinstated in 1544, after Prince Edward.⁴⁹ Philip, son of Charles V claimed the style king in 1553, but this was granted with strict limitations and was to not last beyond the duration of his marriage to

⁴³25 Hen VIII c 22 (Eng).

⁴⁴The First Act of Succession of Henry VIII 1534 (25 Hen VIII c 22) (Eng) [extracts only]: VI.. issue of Anne shall be your lawful children, and be inheritable, and inherit, according to the course of inheritance and laws of this realm, the imperial Crown of the same, with all dignities, honours, pre-eminences, prerogatives, authorities, and jurisdictions to the same annexed or belonging, in as large and ample manner as your highness at this present time has the same as King of this realm; the inheritance thereof to be and remain to your said children and right heirs in manner and form as hereafter shall be declared, that is to say... heirs of Anne's son, then subsequent wives' sons... then the issue female by Anne... then to the second issue female (and so on)... according to their ages, as the Crown of England has been accustomed, and ought to go, in cases where there be heirs female to the same; and for default of such issue, then the said imperial Crown, and all the other premises, shall be in the right heirs of your highness for ever."

⁴⁵35 Hen VIII c 1 (Succession to the Crown Act 1543-4) (Eng).

⁴⁶The disastrous reign of Matilda, the only earlier instance of a female Sovereign, tended to reinforce the idea that while a man could inherit the Throne through a woman, a woman was not fit to reign herself. Whilst men looked back at the reign of Elizabeth with some satisfaction, they were by no means conducive to the idea of a female Sovereign as a regular occurrence. Because of Eve's perfidy in seducing Adam with the forbidden fruit, women were forever to be subject to the dominion of men (Knox, John, *First Blast of the Trumpet* in Laing, David (ed), *The Works of John Knox* (Edinburgh, 1846-64) vol IV, 377-8.

⁴⁷Patent Roll, 17 Hen VIII pt 1 m 42.

⁴⁸Succession to the Crown Act 1533 (2 Hen VIII c 22) (Eng), repealed by the Succession to the Crown: Marriage Act 1536 (28 Hen VIII c 7) (Eng) s 1 and the Legitimacy of the Queen Act 1553 (1 Mar sess 2 c 1) (Eng) s 2 [repealed by Statute Law Reform Act 1948].

⁴⁹Succession to the Crown Act 1543 (35 Hen VIII c 1) (Eng).

Queen Mary.⁵⁰ In the conditions of the day, it was impossible that a husband, foreign or English, would not attempt to exercise real authority.⁵¹

Elizabeth claimed the Crown under the third Act of succession of Henry VIII.⁵² The question of the succession dominated much of Elizabeth's reign, colouring, if not dictating, her attitude towards marriage, foreign relations and the religious settlement.⁵³

When Elizabeth died, she was succeeded by James I, the descendant of the elder daughter of Henry VII- and not by a representative of the younger daughter as the statute of 1544 required. Until Elizabeth's death it was unclear who should succeed her, and by what right.⁵⁴

There was, in fact, general agreement only that the rule of primogeniture applied to the Crown.⁵⁵ The Treasons Act 1571⁵⁶ asserted that Parliament possessed the right to settle the Crown,⁵⁷ and rendered it treason to deny this right.⁵⁸ The Act was designed to forestall claims by Mary Queen of Scots to the Crown.⁵⁹

James also had to step warily lest he himself contravene the Act of Association 1584.⁶⁰ This provided that anyone involved in attempts on the Queen's life would be disbarred from

⁵⁰The Queen Regents Prerogative Act 1554 (1 Mar sess 3 c 1) (Eng), repealed by the Statute Law (Repeals) Act 1969, and Queen Mary's Marriage Act 1554 (1 Mar sess 3 c 2) (Eng), repealed by the Statute Law Reform Act 1863.

⁵¹Cannon, John, & Griffiths, Ralph, *The Oxford Illustrated History of the British Monarchy* (1988) 341.

⁵²Succession to the Crown Act 1543-4 (35 Hen VIII c 1) (Eng).

⁵³Cannon and Griffiths, *supra* note 52, at 334-335.

⁵⁴Burghley actually proposed a legislated interregnum upon the death of Elizabeth I, and for Parliament to decide who had the best right to succeed (Collinson, "Monarchical Republic of Queen Elizabeth I" (1987) 69 *Bulletin of the John Rylands University Library of Manchester* 394-424).

⁵⁵Craig, Sir Thomas, *The Right of Succession to the Kingdom of England* (1703, first published 1602) 11; Doleman, R (pseudonym for Fr Robert Parsons), *Conference About the Next Succession* (1594) 129; Harington, Sir John, *A Tract on the Succession to the Crown (AD 1602)* ed Clements R Markham (1880).

⁵⁶13 Eliz I c 1 (Eng).

⁵⁷"[T]o limit and bind the Crown of this realm and the descent, limitation, inheritance, and government thereof". An assertion to this effect was made, perhaps prematurely, by Sir Thomas Smith (*De Republica Anglorum; A Discourse on the Commonwealth of England* ed L Alston (1970, first published 1583) 49). Even earlier, in 1535, Thomas More had told Richard Rich that an Act of Parliament was competent to make Rich, or any other man, king. (Nenner, *supra* note 36, at 251).

⁵⁸Earlier legislation had provided for the settlement of an uncertain title, as 7 Henry IV c 2 (Eng), and 35 Hen VIII c 1 (Eng) allowed the king to dispose of the Crown, but the Treason Act 1571 (13 Eliz I c 1 (Eng)) was a much more general statement of legislative authority.

⁵⁹Levine, Mortimer, *Tudor Dynastic Problems, 1460-1571* (1973) 119-20; Hurstfield, "The Succession Struggle in Late Elizabethan England" in Bindoff, SJ et al (eds), *Elizabethan Government and Society* (1961) 107.

⁶⁰Act for the Safety of the Queen etc (27 Eliz I c 1) (Eng), repealed by the Statute Law Revision Act 1863 (26 & 27 Vict c 125) (UK).

succeeding. James relied solely on inheritance,⁶¹ as had Lady Jane Grey when she was forced to claim the Crown on the death of Edward VI.⁶² Edward's attempt to devise the Crown by letters patent had no legal effect; he had purported to exclude all females and Catholics, and devise the Crown to the heirs male of Jane.⁶³

Although James I was not seriously opposed as successor,⁶⁴ it was necessary to reinforce his title by statute, since it contravened an earlier Act.⁶⁵ The Act of Recognition of the King's title 1603-4⁶⁶ was an attempt to explain the contravention of the Succession to the Crown Act 1543-4,⁶⁷ an assertion of the hereditary title as stronger than the statutory one.⁶⁸

In two of the three Parliaments from 1679-81, bills intended to exclude James Duke of York from the succession were introduced and debated in the House of Commons.⁶⁹ The bill of May 1679 was worded so as to include Scotland and Ireland, in case their respective

⁶¹He was regarded as the next heir since the death of his mother, Mary Queen of Scots. The claimant under Henry VIII's Will (authorised by 35 Hen VIII c 1 (Eng)), Catherine, representative of this line, had died in 1568, and her sons were of questionable legitimacy. The descendants of Eleanor, cadet branch of the Suffolk line, remained however (Levine, Mortimer, *Early Elizabethan Succession Question, 1558-1568* (1966) 1, 10-11). If the prohibition of the Scottish line was upheld, then the heir was Lady Catherine Grey, younger sister of Lady Jane Grey and granddaughter of Mary, younger sister of Henry VIII. If the claims of the Scottish line were allowed the next heir was Mary Queen of Scots.

⁶²Since Mary and Elizabeth were illegitimate, by inheritance alone Jane did have a prior claim. The pope might, in any case, grant a dispensation from the canon law which would allow inheritance in accordance with Church law. This would of course present a problem if Church and national laws were to conflict.

⁶³Efforts were made to ensure her succession under an interlineation. The actual attempt to convey the Crown by act of nomination was thought to be even less satisfactory than a claim by conquest. Only God could make an heir, and nearness of blood was not a matter of choice but of divine intervention. It was only with the Statute of Wills 1540 (32 Hen VIII c 1) (Eng) that the right to freely dispose of property was accorded ordinary people; it is hardly surprising that there should be even stronger opposition to giving a similar freedom to kings. Conquest might have been acceptable to give a foreign prince a good title to the Crown, but a subject would be a usurper (Walpole, "Historic Doubts on the Life and Reign of Richard III" in Kendall, Paul (ed), *Richard III: The Great Debate* (1965) 198).

⁶⁴James was proclaimed king "by law, lineal succession, and undoubted right" (Larkin, James & Hughes, Paul (eds), *Stuart Royal Proclamations* (1973) vol I, iv, 2-3).

⁶⁵A point not lost on his contemporaries (Harbin, *Hereditary Right to the Crown of England Asserted* (1713) 208-9).

⁶⁶Act of Recognition of the King's title 1603-4 (1 Jac I c 1) (Eng) [extract only]: "We do recognise and acknowledge that immediately upon the dissolution and decease of Elizabeth, late Queen of England, the imperial Crown of the realm of England... did, by inheritance birthright and lawful and undoubted succession, descend and come to your most excellent majesty, as being lineally, justly and lawfully next and sole heir of the blood royal of this realm as is aforesaid."

⁶⁷35 Hen VIII c 1 (Eng).

⁶⁸Sir Thomas Craig, a Scots legal scholar, exhaustively laid the ground for James's hereditary claim in *The Right of Succession to the Kingdom of England* (1703, first published 1602). He was, in any case, practically the only reasonable choice.

⁶⁹Nenner, *supra* note 36, at 10.

Parliaments neglected to enact similar measures. In 1680 a similar measure was introduced, received three readings in the Commons, but was defeated in the House of Lords.⁷⁰

The Exclusion Crisis lasted from November 1679 till March 1682.⁷¹ Ironically, a doctrine condemned as papist in the sixteenth century was now adopted by Protestants.⁷² It was supposed that a Catholic monarch would not respect the law, and so could not be effectively bound to preserve the Protestant Church of England. Attempts were made to exclude the Duke of York and "all other popish successors", and it was proposed "that no King shall marry a popish Queen".⁷³

Anti-Exclusionists argued for a heritable Crown, but saw in it features of a life tenancy that made it impossible for the king to affect the disposition of the estate after his death.⁷⁴ The Exclusionists argued that there was no law of succession (or at best there was an hereditary expectation to succeed), and that the king and Parliament were empowered to make one (or that the hereditary expectation to succeed was rebuttable by Parliament for cause). While denying that there was a fundamental law of succession, they maintained that there was a fundamental right of self-defence against a king who was opposed to the liberty of the Protestant Church.⁷⁵ They would have acknowledged their debt to Hobbes but that he stood for secular absolutism. A elective monarchy would have led to an arbitrary and uncertain succession.⁷⁶ Sir Algernon Sidney was less concerned in who should succeed as who should decide.⁷⁷

The Jesuit Robert Parsons stated in 1594 that:

⁷⁰Cannon and Griffiths, *supra* note 52, at 414.

⁷¹Locke himself was involved, see Ashcraft, "The Two Treatises and the Exclusion Crisis" in Pocock, JGA and Ashcraft, R (eds), *John Locke* (1980). Sir Algernon Sidney was involved in the Rye House Plot in 1683 to assassinate both royal brothers. It is not clear however to what extent this indicated a desire on his part to revive the Commonwealth. He was however executed for his trouble.

⁷²An critics were not slow to identify Exclusion with the teachings of the sixteenth century Jesuit Robert Parsons.

⁷³Cobbett, William (ed), *The parliamentary History of England* (1806-20) vol IV, 1132, 1196, 1250, 1332.

⁷⁴The traditional view of the Crown as a property of the king to be transmitted to his posterity by right of descent was being eroded, but was still the majority view.

⁷⁵W.G., *Case of Succession to the Crown of England Stated* (1679) 14. Sovereignty became an issue because in countering the assertions of a fundamental law of succession the Exclusionists were pressed to contend for the even more basic right of self-protection.

⁷⁶Comber, Revd Thomas, *Religion and Loyalty Supporting each other* (1681) 11, 34.

⁷⁷Scott, Jonathon, *Algernon Sidney and the Restoration Crisis, 1677-1683* (1991) 53. Sidney argued in *Discourses concerning Government* that unless the succession could be grounded in the consent of Parliament, there was no hope of political stability. By this standard any other rule of succession, hereditary right included, would be effectively futile. Sidney maintained that there could be no stability in a political system dependent on the random abilities of an hereditary prince (*Discourses concerning Government* ed Thomas West (1990) chap 2 sect 11 pp 136-7).

no man is King or Prince by instrument of nature, but every King and kings sonne hath his dignity and prehemine above other men, by authority only of the common wealth.⁷⁸

What was a heresy in late Tudor times came to be orthodoxy in the next century. In the 1590s Peter Wentworth proposed that Parliament, as the High Court of Parliament, be charged to sort through the potential complex of hereditary claims, to choose whoever had the best right, not to elect the heir.⁷⁹ The opportunity to formulate a rule for future successions was lost.

The right of Parliament to vary and limit the descent of the Crown, in cases of misgovernment amounting to a breach of the original contract between the Crown and the people, cannot be said to be admitted as a definite constitutional principle.⁸⁰ But due weight must be attributed to the fact that the tenure of the Crown since 1688 has depended upon the action taken by the Lords and Commons convened in an irregular manner.⁸¹

On the flight of James II in 1688, all those who had served as members of the Parliaments of Charles II, together with the Court of Aldermen and members of the Common Council of the City of assembled on 26 December 1688, at the desire of the Prince of Orange. They requested the Prince to take over the civil and military administration and the disposal of the public revenue, and likewise to summon a Convention Parliament.

A Convention Parliament was accordingly summoned by the Prince of Orange by letters directed to the Lords Spiritual and Temporal, being Protestants, and to the coroners, clerks of the peace, and others. This Convention Parliament met on 22 January 1688 (old style). On 28 January the Commons so convened recorded that:

King James II having endeavoured to subvert the constitution of the kingdom by breaking the original contract between the King and people and by the advice of Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the Throne is thereby vacant.⁸²

⁷⁸Specifically, he argued that the presumption of the hereditary right of the next in blood could be rebutted in some circumstances. Title is determined by Parliament. Parliament is, in the first instance, guided by common law rules of hereditary succession, as modified by historical experience. Upon consideration of the personal qualities and circumstances of those in the line of succession, it may qualify the succession further. According to his reading of the precedents, there was in fact a form of election each time a Sovereign succeeded. This, in fact, amounted to an interregnum (Doleman, R (pseudonym for Fr Robert Parsons), *Conference About the Next Succession* (1594) 142, 198-9).

⁷⁹Wentworth, Peter, *A Pithie Exhortation to Her Majestie for Establishing Her Successor to the Crowne. Whereunto is Added a Discourse Containing the Authors Opinion of the True and Lawfull Successor to her Majestie* (1598) 5, 48, 51.

⁸⁰The title to the Crown was originally elective, and the notion of the hereditary right grew gradually. What survives of the elective principle is still to be seen in the terms of the coronation ceremony. The true nature of the title of William and Mary was elective, but this was cloaked in the legitimacy of heredity. James II was deemed to have abdicated by having withdrawn himself from the country (*Some Considerations Touching Succession And Allegiance* (1689) 7).

⁸¹Maitland, Frederic, *The Constitutional History of England- a course of lectures* (1931) 283-5.

⁸²Commons Journals dated 28 January 1688.

On 12 February a declaration was drawn up and agreed by the Lords and Commons affirming the rights and liberties of the people, and settling the Crown and regal government of England, France and Ireland upon William and Mary of Orange, during their joint lives and the life of the survivor. The further limitations were: (1) to the heirs of the body of Mary; (2) to the Princess Anne of Denmark and the heirs of her body; (3) to the heirs of the body of William, Prince of Orange.

This declaration was offered on the following day to William and Mary, who accepted its terms, and the declaration was then published to the nation in the form of a proclamation.⁸³ The declaration was subsequently enacted with certain additions in the form of the Bill of Rights 1688 (Eng),⁸⁴ and the Acts of the Convention Parliament were subsequently ratified and confirmed by the Crown and Parliament Recognition Act 1689 (Eng),⁸⁵ which also acknowledged the king and queen.

Since William and Mary were monarchs de facto at the time Parliament was summoned, it was validly summoned (whereas the Convention Parliament was not), and the confirmatory Act was legally effective to do what it purported to do, validate the royal title and the Acts of the Convention Parliament.⁸⁶

The Bill of Rights, being thus confirmed by a Parliament summoned in the constitutional manner, acquired the force of a legal statute, and appears upon the statute books as such.

The present succession is affected largely by the Revolutionary Settlement still.⁸⁷ As from the dates of the Unions of England with Scotland and Ireland, the succession of the imperial Crown of the United Kingdom of Great Britain, and of Great Britain and Northern Ireland respectively, is to be as it then stood limited and settled under the Act of Settlement.⁸⁸ This succession is vested in the heirs of the body of the Princess Sophia⁸⁹ who are Protestants.⁹⁰

⁸³ Commons Journals dated 12 February 1688 and 13 February 1688.

⁸⁴ 1 Will III & Mary sess 2 c 2.

⁸⁵ 2 Will & Mary c 1.

⁸⁶ So far as the royal title was concerned, the Act merely "recognised and acknowledged" title, whereas enacting rather than declaratory language was used in confirming the Acts of the Convention Parliament. See Brookfield, FM, "Some aspects of the Necessity Principle in Constitutional Law" (1972, unpublished University of Oxford DPhil thesis, Parliaments of the de facto king, 278). They could have claimed the Crown by conquest, but William and Mary disavowed any intention to do so.

⁸⁷ *Halsbury's Laws of England*, supra note 19, at para 847.

⁸⁸ Union with Scotland Act 1706 (6 Anne c 11) (Eng), art II; Union with Ireland Act 1800 (39 & 40 Geo III c 67) (Eng) art 2; Ireland Act 1949 (12 & 13 Geo VI c 41) (UK) s 1 (1). In Scotland a convention offered the Throne jointly to William and Mary, though conditional upon the abolition of episcopacy and the institution of a Presbyterian church order.

⁸⁹ The Princess Sophia having predeceased Anne, the Crown descended, under this provision, to George I, son of Sophia. It then descended lineally to George IV, from George IV to his brother William IV, from whom it descended to Queen Victoria, niece of William IV, then lineally to Edward VIII, who on 10 December 1936, executed an Instrument of Abdication, and, on 11 December 1936, gave his assent to His Majesty's Declaration of Abdication Act 1936 (1 Edw VIII & 1 Geo VI c 3) (UK). Thereupon His Majesty ceased to be king, and the Crown passed to George VI (s 1 (1)), from whom it descended lineally to Her present

The settling of the succession on the heirs of the Electress Sophia was an extension of this elective approach, but the succession thereafter proceeded by inheritance. The Succession to the Crown Act 1707⁹¹ itself expressly affirmed the power of Crown and Parliament to limit and bind the succession.

After the triumph of hereditary title over election, the possibility of intervention by the successors of the *Witan* remained. The modern position is that the statutory provisions settle the Crown in the present line of succession, and provides certain statutory conditions on tenure.⁹²

The descent of the Crown in the present Protestant line is secured by the Act which regulates the succession, the Act of Settlement 1700.⁹³

William Henry Duke of Gloucester, son of Anne, died in 1700 at the age of eleven. The Act of Settlement⁹⁴ was introduced to meet the situation, although other restrictions were tacked on also.⁹⁵ Consent was required for the king to engage in war or to leave the country. Privy counsellors were to sign any advice which they gave. No foreigners were allowed to hold office under the Crown, or occupy a seat in Parliament.⁹⁶ No person holding office of profit or a pension were to be a Member of Parliament. To limit the Crown's freedom to appoint ministers of their choice no pardons were to be available on impeachment.⁹⁷

Majesty Queen Elizabeth II. The Duke of Windsor (the former King Edward VIII) and any issue he might have were excluded from the succession: s 1 (2).

⁹⁰As to the effect of the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) and the subsequent statute, 4 Anne c 4 (Princess Sophia, naturalisation) (1705) (otherwise 4 & 5 Anne c 16) (Eng) (repealed) on the lineal descendants of Princess Sophia, see *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, [1957] 1 All ER 49, HL (lineal descendants are British subjects). Indeed, Blackstone maintained that this Act actually re-asserted the rule of hereditary succession. But it really provided for the Crown to continue in the hereditary line, but by right of Parliament. Blackstone, Sir William, *Commentaries on the Laws of England* ed Christian (1978).

⁹¹6 Ann c 41.

⁹²*Halsbury's Laws of England*, supra note 19, at para 850.

⁹³Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) s 1: the lords spiritual and temporal and commons shall and will, in the name of all the people of the realm, most humbly and faithfully submit themselves, their heirs and posterities, and faithfully promise [in the event of the decease of King William III and of Queen Anne and the failure of the heirs of their respective bodies] to stand to, maintain and defend the heirs of the body of the Princess Sophia, being Protestants, according to the limitation and succession of the Crown in the Act specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

⁹⁴12 & 13 Will III c 2 (Eng).

⁹⁵Without the Act, on the death of Queen Anne the Elector of Hanover would still have succeeded, but only if none of the intervening Catholics had renounced his or her religion.

⁹⁶This prohibition is the subject of some consideration in the *Report of the Justice and Law Reform Committee*, supra note 17, at 58; Section 3 would appear to prevent New Zealanders (and others of Her Majesty overseas subjects) from being appointed members of the Privy Council.

⁹⁷Cannon and Griffiths, supra note 52, at 440.

Anyone who adheres to the Roman Catholic Church, or who marries such a person, cannot inherit the Crown, nor can they remain Sovereign if they are disqualified after succeeding to the Crown.⁹⁸ In such a case the people are absolved of their allegiance, and the Crown is to descend to such person or persons, being Protestants, as would have inherited it in case the person so reconciled were dead.⁹⁹ As a consequence of the wording used in the Act of Settlement 1700,¹⁰⁰ there is no requirement that someone whose spouse joins the Roman Catholic Church after marriage loses their right to the Crown.¹⁰¹ It would appear that the operation of the Act is irreversible, although to be effective the marriage must be a legal one.¹⁰²

Since the time of the Act of Settlement there has been but one statutory alteration of the succession law. King George VI was a case of succession upon abdication, although he was the heir apparent¹⁰³. His Majesty's Declaration of Abdication Act 1936¹⁰⁴ was passed in

⁹⁸The actual wording used says that any person "who shall be reconciled to, or hold communion with, the see or Church of Rome, or profess the popish religion, or marry a papist", is excluded from "inheriting, possessing or enjoying the Crown".

⁹⁹This is the joint effect of the Act of Settlement 1700 (12 & 13 Will III c 2) (Eng) s 2, as amended by the Accession Declaration Act 1910 (10 Edw VII & 1 Geo V c 29) (UK), and the Bill of Rights 1688 (1 Will III & Mary sess 2 c 2) (Eng) s 1, as amended by the Juries Act 1825 (6 Geo IV c 50) (UK) s 62.

¹⁰⁰12 & 13 Will III c 2 (Eng).

¹⁰¹Thus Prince Edward Duke of Kent retains his position (21st in 1999) in the line of succession despite his wife Katharine having been received into the Roman Catholic Church on 11 January 1994. However, their son George Earl of St Andrews lost his right to the Throne when he married the Roman Catholic Sylvana Palma Tomaselli 9 January 1988. Similarly, Prince Michael of Kent lost his own right to the Throne when he married Baroness Marie-Christine von Reibnitz in 1978. Anyone who is disqualified loses his or her title to the Crown by operation of law, and without the need for any procedures to be followed. Children of such parents retain their right to succeed so long as not otherwise disqualified.

¹⁰²Thus the marriage of George Prince of Wales to Mrs Maria Fitzherbert, a devout Catholic and twice a widow, did not disqualify him from succeeding as king in 1820, as the marriage was contrary to the Royal Marriages Act 1772 (12 Geo III c 11) (GB), and legally null and void. The Imperial Laws Application Act 1988 preserves for the purposes of New Zealand law sections 1 and 2 of the Royal Marriages Act 1772 (12 Geo III c 11) (GB). They are also preserved in the United Kingdom, New South Wales, Victoria and the Australian Capital Territory (*Report of the Justice and Law Reform Committee*, supra note 17, at 61). The Act itself is archaic and badly drafted. It has been argued that the Act does not apply to any of Queen Victoria's descendants- O'Farra, supra note 21, at 140. The Royal Marriages Act 1772 applies to all the descendants of George II, other than the issue of princesses who have married into foreign families. Their marriages are void unless the consent of the Queen has been formally signified. Such a person may, however, marry without consent if they are over twenty-one, provided that they give twelve months' notice to the Privy Council and the two Houses of Parliament do not register objection during that period.

¹⁰³There was however some consideration given to the Duke of Kent succeeding, as he had a son and heir. See also the Accession Proclamation of His Majesty King George VI 12 December 1936.

¹⁰⁴1 Edw VIII & 1 Geo VI c 3; now repealed in New Zealand by the Imperial Laws Application Act 1988.

accordance with the procedures of the Statute of Westminster 1931,¹⁰⁵ and so was applicable in New Zealand. Since then however, there have been no statutory alterations to the law of succession in either New Zealand or the United Kingdom, nor is the procedure in the Statute of Westminster 1931 and the Statute of Westminster Adoption Act 1947 (NZ) likely to be used again, even solely for the purpose of altering the law of succession.

However, the development of a distinct New Zealand Crown means that the succession law in New Zealand must be seen to be separate from that in the United Kingdom, though they presently have identical provisions. Whether they remain identical is a matter yet to be decided.

IV. CIRCUMSTANCES IN WHICH THE SOVEREIGN OUGHT TO BE CHANGED

At common law the accession of the Sovereign may be automatic, so that there is no interregnum, though the accession does involve a number of legal procedures.¹⁰⁶ On the death of the reigning Sovereign the Crown vests immediately in the person who is entitled to succeed, it being a maxim of the common law that the king never dies.¹⁰⁷ The new Sovereign is therefore entitled to exercise full prerogative rights without further ceremony.¹⁰⁸

The fact of the new Sovereign's accession is published by a proclamation which is issued as soon as conveniently may be after the death of the former Sovereign. It is made in the name of the lords spiritual and temporal, members of the late Sovereign's Privy Council and the principal gentlemen of quality, with the Lord Mayor, aldermen and citizens of London.¹⁰⁹

Any alteration in the succession laws has therefore to take place during the reign of a Sovereign whose own title will not be affected. It is clear that, since the advent of separate Crowns, the right to alter and amend the laws of succession of the New Zealand Crown belongs to the Parliament of New Zealand. But, it is also clear that any such alteration would have to take into account the trans-national nature of the Crown.

¹⁰⁵22 & 23 Geo V c 4 (UK).

¹⁰⁶*Halsbury's Laws of England*, supra note 19, at vol 8 para 851.

¹⁰⁷*Calvin's Case* (1608) 7 Co Rep 1a, 10b; and 3 Co Inst 7; 4 Co Inst 156, 201, 352. The acceptance of this doctrine appears to have been gradual, the importance of the ceremonies of the oath of recognition and coronation being originally far greater than it is now. Edward I commenced to reign in 1272, although his coronation did not take place until 1274. Edward II dated his reign from the day after his father's death. See Stubbs, *The Constitutional History of England in its origin and development* (4th ed 1906) 102.

¹⁰⁸According to Coke, the Crown descends to the rightful heir before coronation, for by the law of England there is no interregnum, and the coronation is but an ornament or solemnity of honour; and so it was resolved by all the judges (*Calvin's Case* (1608) 7 Co Rep 1a). Coronation is a solemn recognition on the part of the nation that the regal authority is vested in the person of the Sovereign, and on the part of the Sovereign a solemn recognition of the fundamental rights of the people. Coke based his conclusion, not in itself unreasonable, on the grounds of *causa necessitatis*.

¹⁰⁹This is the established practice, for which there appears to be no direct legal authority other than usage. For the form of proclamation used on the accession of Her Majesty Queen Elizabeth II, see the *London Gazette*, 8 February 1952, 787.

There are two possible scenarios for such a change. The first is changing attitudes to succession in general, the other is the position of the Prince of Wales. In respect of the first, primogeniture has been abolished with respect to private property.¹¹⁰ The presumption that a son should succeed in preference to daughter is at odds with modern attitudes, and in conflict with the Human Rights Act 1993.¹¹¹ Were a succession law to be drawn up today, it is likely that it would provide for the succession of the eldest child of the Sovereign, irrespective of sex.¹¹² Although some of the statutes of Henry VIII approached this, there has never been a statement of a generally applicable law of succession, except in the limitations of the Revolutionary Settlement. Whether the time has come for such a restatement, perhaps accompanied by significant change, is by no means proven.

One possible ground for alteration in the law of succession relates to the Prince of Wales. The present position is that whoever he marries would become Queen when he succeeded to the throne. Were he to marry Camilla Parker-Bowles, there would doubtless be calls for him to renounce his right to succeed in favour of his eldest son. Such a renunciation would not, of course, be effective unless accompanied by legislation in each of the countries acknowledging the Queen as Sovereign.

Changing the succession law in such a way would be likely to follow the example of 1936, with Parliament(s) implementing a decision already taken by the royal family. This is in accordance with the tradition of Parliament reinforcing doubtful claims. Excepting 1688-89, Parliament itself has never taken the initiative. To do so now might be to raise questions about the proper balance of the constitution, questions which Parliament might prefer unasked.¹¹³

On 27 February 1998, in London, Lord Wilson of Mostyn, QC, Parliamentary Under Secretary of State for the Home Office, announced that the British Government supported changing the law of succession to the Crown, in favour of the succession of the eldest child irrespective of sex. This came in a debate on a private members' Bill sponsored by Jeffrey Lord Archer, intended to allow provide for the succession of the eldest child of the Sovereign regardless of sex.¹¹⁴

¹¹⁰Administration of Estates Act 1925 (15 & 16 Geo V c 25) (UK); Administration Amendment Act 1944 (NZ).

¹¹¹Discrimination on the grounds of sex being unlawful; see also the Human Rights Commission Act 1977.

¹¹²Norway and the Netherlands have in recent decades instituted these changes. Given modern life spans, borough-English, in which land descended to the younger son to the exclusion of all other children, would actually make more sense. See Cheshire, GC, *Modern Law of Real Property* ed EH Burn (13th ed 1982) 25; Coke, *supra* note 21, at ss 165, 211; Blackstone, *supra* note 20, at vol ii, 83. A similar rule applied in Swaziland.

¹¹³This is particularly significant in the United Kingdom, at a time when the House of Lords is undergoing reform, and significant powers are being devolved to a Scottish Parliament and a Welsh Assembly, though not an English Parliament. See Mirfield, "Can the House of Lords Lawfully be abolished?" (1979) 95 LQR 37; Winterton, "Is the House of Lords Immortal?" (1979) 95 LQR 386.

¹¹⁴Bills which affect the royal prerogative, hereditary revenues, personal property or interests of the Crown, or the Duchy of Lancaster require the Queen's consent, or the Prince of Wales's consent for Bills affecting the Duchy of Cornwall. These consents are customarily given, and

While he acknowledged that any change would have to receive the support of all countries of which The Queen is Sovereign, it is inappropriate that Lord Wilson, who had special responsibility for revision of the British Constitution, should propose such a fundamental change for purely party political reasons. While his colleagues in the Scottish and Welsh Offices were busy dismembering the United Kingdom, in the name of devolution, doubtless he felt that he had to make his own mark on the constitution.

The British Government should not let its own desire for change be the reason for such a fundamental move. The Crown has evolved gradually, and there has been quite enough disruption already in the last decade. Any proposal for change is risky, and there is no evidence of a need or desire for any change in the succession law.

The present rules are a compromise, the result of centuries of evolution. It is half-way between the extremes of the strict rule of primogeniture of the so-called Salic law, and the modernist eldest child rule, as adopted recently in Norway and the Netherlands.

Any move to change the law would be seen as defensive, an attempt to counter criticism. Yet criticism has never focused upon the fundamental nature of the Crown. Any change would be controversial. No good grounds for change have been advanced, aside from claims of sexual inequality.

Any change in the law of succession would have to be enacted in each of Her Majesty's realms, requiring detailed consultation to avoid the possibility of error. Such a proposal should be discussed in private first, not announced by the British Government almost as a fait accompli. The succession law in New Zealand is that of the United Kingdom prior to 1931, subject to potential statutory alteration by the New Zealand Parliament.

In the past Parliament has legislated for the succession for reasons of expediency. With the exception of the settlement and exclusion provisions of the Act of Settlement, the succession remains strictly hereditary. Although the continued exclusion of Catholics, as the basis of the three-hundred-year-old Revolutionary Settlement, may be unjustified in the New Zealand environment, any change in this country would be dependent upon events in the United Kingdom. So long as the king or Queen of the United Kingdom remains Head of the Established Church of England, no change is likely. Were New Zealand to unilaterally amend the Act of Settlement, it is unlikely that any division of the Crown would occur, but it would emphasise the separateness of the Crown.

The problem with altering the Act of Settlement is that the Act was a deliberate and conscious rebalancing of the constitution, one which also brought us the sovereignty of Parliament. Tampering with one aspect might encourage calls for the other to be reconsidered also. Indeed, in light of claims that the Treaty of Waitangi or the 1835 Declaration of Independence guaranteed Maori sovereignty, or rangatiratanga, such calls could not be ignored.

do not imply actual approval of the proposed measure (Erskine May, *Parliamentary Practice* (1989) 237, 561).