



The Act of Settlement and the Protestant Succession

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Author: Chris Pond/Oonagh Gay
Parliament & Constitution Centre

This Standard Note sets out the legal and historical background to the succession to the Crown. It also looks at recent parliamentary activity in this area in Westminster and the Scottish Parliament, and briefly examines (section A5) interest in the matter in the Commonwealth.

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A. The Legal Background

At common law the title to the crown of England descends lineally to the issue of the reigning sovereign, males being preferred to females, and subject to the right of primogeniture among both males and females of equal degree. The common law provisions are subject to certain statutory limitations as to religion and with particular reference to Roman Catholics. These are the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Act of Union* with Scotland of 1706, all reinforced by the provisions of the *Coronation Oath Act 1688* and the *Accession Declaration Act 1910*.

1. Bill of Rights 1688

Until the *Bill of Rights* in 1688 there was nothing on the statute book to prevent the monarch from being a Roman Catholic. The *Bill of Rights* has a curious history in parliamentary terms (the logical difficulties of which are discussed in full in Maitland's *Constitutional History of England*)¹. Shortly after his accession in 1685 James II prorogued Parliament and, although it was not dissolved until July 1687, it never met again. Thus at his departure there was no Parliament, and the Convention Parliament summoned by William of Orange before his accession was inevitably irregularly convened. The House of Commons resolved in January 1688:²

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King and people and by the advice of Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the throne is thereby vacant.

On 12 February 1688 a declaration was drawn up affirming the rights and liberties of the people and conferring the crown upon William and Mary, then Mary's children, and, failing any heirs, Princess Anne and her heirs; and failing also that, William's heirs. Once the declaration had been accepted by William and Mary, it was published as a proclamation. The declaration was subsequently enacted with some additions in the form of the *Bill of Rights 1688*, and the Acts of the Convention Parliament were subsequently ratified and confirmed by the *Crown and Parliament Recognition Act 1689* which also acknowledged the King and Queen. In this way the Bill of Rights was confirmed by a Parliament summoned in a constitutional manner and thereby acquired the force of a legal statute and appears as such on the statute book.³

The portion of the *Bill of Rights* affecting the right of succession reads as follows:

¹ FW Maitland, *The constitutional history of England: a course of lectures delivered*, 1908, p 283-5

² Commons Journal 28 Jan 1688

³ For further details on the Bill of Rights see Library Note SN/PC/293:
<http://hcl1.bclibrary.parliament.uk/notes/pcc/snpc-00293.pdf>

And whereas it hath beene found by experience that it is inconsistent with the safety and wellfaire of this protestant kingdome to be governed by a popish prince or by any King or Queene marrying a papist the said lords spirituall and temporall and commons doe further pray that it may be enacted that all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the crowne and government of this realme and Ireland and the dominions thereunto belonging or any part of the same or to have use or exercise any regall power authoritie or jurisdiction within the same [And in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance.⁴] and the said crowne and government shall from time to time descend to and be enjoyed by such person or persons being protestants as should have inherited and enjoyed the same in case the said person or persons soe reconciled holding communion or professing or marrying as aforesaid were naturally dead [And that every King and Queene of this realme who at any time hereafter shall come to and succede in the imperiall crowne of this kingdome shall on the first day of the meeting of the first Parlyament next after his or her coming to the crowne sitting in his or her throne in the House of Peeres in the presence of the lords and commons therein assembled or at his or her coronation before such person or persons who shall administer the coronation oath to him or her at the time of his or her takeing the said oath (which shall first happen) make subscribe and audibly repeate the declaration mentioned in the Statute made in the thirtieth yeare of the raigne of King Charles the Second entituled An Act for the more effectuall preserueing the Kings person and government by disableing papists from sitting in either House of Parlyament But if it shall happen that such King or Queene upon his or her succession to the crowne of this realme shall be under the age of twelve yeares then every such King or Queene shall make subscribe and audibly repeate the said declaration at his or her coronation or the first day of the meeting of the first Parlyament as aforesaid which shall first happen after such King or Queene shall have attained the said age of twelve year⁵] All which their Majestyes are contented and pleased shall be declared enacted and established by authoritie of this present Parliament and shall stand remaine and be the law of this realme for ever And the same are by their said Majesties by and with the advice and consent of the lords spirituall and temporall and commons in Parlyament assembled and by the authoritie of the same declared enacted and established accordingly

⁴ Annexed to the original Act in a separate schedule

⁵ The declaration was as follows:

I A: B doe solemnely and sincerely in the presence of God professe testifie and declare that I do believe that in the sacrament of the Lords Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of die Virgin Mary or any other saint, and the sacrifice of the masses as they are now used in the Church of Rome are superstitious and idolatrous, and I doe solemnely in the presence of God professe testifie and declare that I doe make this declaration and every part thereof in the plaine and ordinary sense of the words read unto me as they are commonly understood by English Protestants without any evasion, equivocation or mentall reservation whatsoever and without any dispensation already granted me for this purpose by the Pope or any other authority or person whatsoever or without any hope of any such dispensation from any person or authority whatsoever or without thinking that I am or can be acquitted before God or man or absolved of this declaration or any part thereof although the Pope or any other person or persons or power whatsoever should dispense with or annull the same, or declare that it was null and void from the beginning

2. Coronation Oath Act 1688

The Bill of Rights, in effect, excludes Roman Catholics or those who marry Roman Catholics from the succession and provides for the Protestant succession. It requires the monarch on his or her accession to make before Parliament a declaration rejecting Roman Catholicism. The specific connection at this stage with the Church of England came in the *Coronation Oath Act* of the same year which requires the King and Queen to swear, during the coronation ceremony, that they will to the utmost of their power:⁶

maintaine the Laws of God the true profession of the Gospell and the Protestant reformed religion established by law [...] and [...] preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them

This oath has been modified without statutory authority. The present Queen swore to govern the peoples of her realms and territories according to their respective laws and customs and to maintain the established Protestant religion in the United Kingdom.⁷

3. Act of Settlement 1700

The *Act of Settlement* was deemed necessary to secure the Protestant succession following the death without heirs of Mary, the death of the then heir, Princess Anne's only surviving child, and the likelihood of William's death without heirs. The Stuarts still had claims to the throne and "it being absolutely necessary for the safety, peace and quiet of this realm to obviate all doubts and contentions in the same by reason of any pretended titles to the crown"⁸, the *Act of Settlement* was passed, devolving the Protestant succession after Queen Anne (assuming no heir) on Princess Sophia the Electress of Hanover and her heirs, who are Protestants.

This Act in section 2 reiterated the exclusion of Catholics or persons married to Catholics and the requirement for the Coronation oath:

2. The persons inheritable by this Act, holding communion with the church of Rome, incapacitated as by the former Act, to take the oath at their coronation, according to Stat 1 W & M c 6

Provided always and it is hereby enacted that all and every person and persons who shall or may take or inherit the said crown by vertue of the limitation of this present Act and is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist shall be subject to such incapacities as in such case or cases are by the said recited Act provided enacted and established. And that every King and Queen of this realm who

⁶ *Coronation Oath Act 1688* (1 Will & Mar chap 6), s 3

⁷ For further details see Library Note SN/PC/435:
<http://hcl1.hcllibrary.parliament.uk/notes/pcc/snpc-00435.pdf>

⁸ *Act of Settlement 1700* (12 & 13 Will 3 chap 2), in long title

shall come to and succeed in the imperial crown of this kingdom by vertue of this Act shall have the coronation oath administered to him her or them at their respective coronations according to the Act of Parliament made in the first year of the reign of his Majesty and the said late Queen Mary intituled An Act for establishing the coronation oath and shall make subscribe and repeat the declaration in the Act first above recited mentioned or referred to in the manner and form thereby prescribed.

It must be noted, however, that while between them the two enactments of 1688 establish an exclusion of Catholics and an obligation to uphold the established Protestant religion, the Church of England, technically they do not require the monarch to be a member of the Church of England. This was now remedied in section 3 of the *Act of Settlement* which requires active participation in the Church of England by the monarch:

3. Further provisions for securing the religion, laws, and liberties of these realms

And whereas it is requisite and necessary that some further provision be made for securing our religion laws and liberties from and after the death of his Majesty and the Princess Ann of Denmark and in default of issue of the body of the said princess and of his Majesty respectively Be it enacted by the Kings most excellent Majesty by and with the advice and consent of the lords spirituall and temporall and commons in Parliament assembled and by the authority of the same

That whosoever shall hereafter come to the possession of this crown shall joyn in communion with the Church of England as by law established

At first the effect of this was to exclude all members of other churches. However, members of certain other Protestant churches may not now be debarred. Since 1972, by the Church of England's *Admission to Holy Communion Measure*⁹, and the [Church of England] Canon (B15A) that followed it, "baptised persons who are communicant members of other churches which subscribe to the doctrine of the Holy Trinity, and who are in good standing in their own Church" shall without further process be admitted to Holy Communion in C of E churches.

This means, for instance, that a Methodist, Congregationalist, Church of Scotland, or Baptist member can take Anglican communion, though a Unitarian (who would reject the concept of the Trinity) and Quakers (who do not subscribe to the concept of the Lord's Supper) could not. Hence in the strict sense of the wording of the Act of Settlement, members of most Protestant churches would *not* now be excluded. Members of Protestant denominations outside the Church of England do not generally object to the established status of the C of E and could thus subscribe to the requirements of the *Coronation Oath Act 1688*. Such a person could therefore "join in communion", as the words of the statute decree.

⁹ GSM no.2, 1972. The canon is reprinted in *Canons of the Church of England*, 5th ed 1993 (looseleaf publication)

A Catholic would probably still be affected by this section, additionally to the specific disabilities quoted in s 2, since he or she could not remain "in good standing" in the Roman Catholic church by taking communion from an Anglican minister.¹⁰

4. Act of Union with Scotland 1706

The position of the established Protestant Presbyterian Church of Scotland was safeguarded in the Act of Union with Scotland. Article II of the Articles of Union reiterated and confirmed the provisions of the Act of Settlement:

ARTICLE II

Succession to the monarchy-That the succession to the monarchy of the United Kingdom of Great Britain and of the dominions thereto belonging after her most sacred Majesty and in default of issue of her Majesty be remain and continue to the most excellent Princess Sophia Electress and Dutchess dowager of Hanover and the heirs of her body being Protestants upon whom the crown of England is settled by an Act of Parliament made in England in the twelfth year of the reign of his late Majesty King William the Third intituled An Act for the further limitation of the crown and better securing the right and liberties of the subject And that all papists and persons marrying papists shall be excluded from and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the dominions thereunto belonging or any part, thereof and in every such case the crown and government shall from time to time descend to and be enjoyed by such person being a Protestant as should have inherited and enjoyed the same in case such papist or person marrying a papist was naturally dead according to the provision for the descent of the crown of England made by another Act of Parliament in England in the first year of the reign of their late Majesties King William and Queen Mary intituled An Act declaring the rights and liberties of the subject and settling the succession of the crown.

And from Article XXV:

Subjects not liable to oath, test, or subscription, inconsistent with the Presbyterian Church government; successor to swear to maintain the said settlement of religion- And further her Majesty with advice aforesaid expressly declares and statutes that none of the subjects of this kingdom shall be liable to put all and every one of them for ever free of any oath test or subscription within this kingdom contrary, to or inconsistent with the aforesaid true Protestant religion and Presbyterian Church government worship and discipline as above established and that the same within the bounds of this Church and kingdom shall never be imposed upon or required of them in any sort And lastly that after the decrease of her present Majesty (whom God long preserve) the sovereign succeeding to her in the royal government of the kingdom of Great Britain shall in all time coming at his or her accession to the crown swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion with the government

¹⁰ With certain minor exceptions, [RC] Canon 844; *Code of Canon Law*, 1997 ed.

worship discipline right and privileges of this Church as above established by the laws of this kingdom in prosecution of the claim of right.

5. Accession Declaration Act 1910

This Act specifies a new form of the declaration to be "made, subscribed and audibly repeated" by the monarch under the *Bill of Rights* and the *Act of Settlement*. It now reads:¹¹

I [monarch's name] do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of my powers according to law.

B. The current position

1. Monarch/heir's position

To sum up, the monarch/heir must join in communion with the Church of England, must declare himself to be a Protestant, and must swear to maintain the established churches in England and Scotland and take the coronation oath. If he wishes to retain the title to the throne he cannot marry a Catholic. And, by the same token, marriage to a Catholic automatically excludes anyone from the line of succession.

There are two current examples where the marriage of someone in line to the throne to a Roman Catholic has resulted in their removal from the line of succession.¹² The Earl of St Andrews and HRH Prince Michael of Kent both lost the right of succession to the throne through marriage to Roman Catholics. Any children of these marriages remain in the succession provided that they are in communion with the Church of England.

2. Monarch's or heir's wife's position

The position of the wife of the monarch or possible heir to the throne, however, is less clear cut. Where it is quite clear that monarch or heir must not only not be a Catholic but also join in communion with the Church of England, it would seem that the only restriction on the wife is that she cannot be a Catholic. So far as can be seen, the nearest requirement on a Queen consort to be a Protestant is under the *Coronation Oath Act*. The wording, reproduced below, seems to require the same promise of both King and Queen to maintain the established religion:¹³

3. Form of oath and administration thereof

¹¹ *Accession Declaration Act 1910* (10 Edw 7 & 1 Geo 5 chap 29), schedule

¹² A list of the first 25 in line to the throne is available as Parliamentary Information List – *Current order of succession to the throne* http://hcl1.hclibrary.parliament.uk/general_pdf/SuccessionList.pdf

¹³ *Coronation Oath Act 1688* (1 Will & Mar chap 6), s 3

Will you solemnly promise and sweare to governe the people of this kingdome of England and the dominions thereto belonging according to the statutes in Parlyament agreed on and the laws and customs of the same?

The King and Queene shall say,
I solemnly promise soe to doe.

Arch bishop or bishop,
Will you to your power cause law and justice in mercy to be executed in all your judgements.

King and Queene,
I will.

Arch bishop or bishop
Will you to the utmost of your power maintaine the laws of God the true profession of the Gospell and the Protestant reformed religion established by law? And will you preserve unto the bishops and clergy of this realme and to the churches committed to their charge all such rights and priviledges as by law doe or shall appertaine unto them or any of them.

King and Queene.
All this I promise to doe.

After this the King and Queene laying his and her hand upon the Holy Gospells, shall say,

King and Queene.
The things which I have here before promised I will performe and keepe
Soe help me God.

Then the King and Queene shall kisse the booke.

On the other hand, section 4 appears to detract from this, although the wording is somewhat imprecise:

4. Oath to be administered to all future Kings and Queens

And ... the said oath shall be in like manner administred to every King or Queene who shall succede to the imperiall crowne of this realme at their respective coronations by one of the archbishops or bishops of this realme of England for the time being to be thereunto appointed by such King or Queene respectively and in the presence of all persons that shall be attending assisting or otherwise present at such their respective coronations any law statute or usage to the contrary notwithstanding.

Neither is it clear whether Holy Communion is necessarily an integral part of the coronation ceremony for both monarch and consort. One might suspect not, as James II managed to avoid it. But it is certainly usual. For instance the present Queen received Communion and so did both her parents at their joint coronation. Given other provisions, this should not present a difficulty for the monarch, nor for the consort.

C. Historical Background

Until 1688 there was nothing on the statute book to prevent the monarch from being a Catholic. Indeed James II, an avowed Catholic, was in the curious position of also being supreme governor of the Church of England, a position bestowed by statute. The statutes made after this time may now sound restrictive but at the time seemed entirely reasonable and had widespread support. Their wording is a clear reflection of the genuine fears of the time, e.g. the *Bill of Rights* contains the following text:

And whereas it has been found by experience that it is *inconsistent with the safety and welfare of the protestant kingdom* to be governed by a popish prince or by any King or Queene marrying a papist...

and the *Act of Settlement* speaks of:

the succession of the crown in the protestant line for the happiness of the nation and the security of our religion.

What this signifies is that Catholics were discriminated against because, in people's minds, they represented a threat to the security of the nation and its religion. Some might argue that the Catholic subjects of England did not in fact represent a real threat and were entirely loyal to the state. But there were reasons for believing the contrary which, considering the political climate, were understandable. At the time we are considering, the religious settlement of Elizabeth I was not much more than a hundred years old, and that century had seen grave unrest. In Elizabeth's reign the religious settlement of Henry VIII was restored after its complete overturn (and brutal punishment of Protestants) in the reign of Mary I. Soon after Elizabeth's succession was complete, and the religious direction of her reign established, the Pope excommunicated Elizabeth, incited her subjects to rebellion and absolved them from their oaths of fidelity and allegiance, in the papal bull of 1570. This placed English Catholics in an intolerable position, virtually compelling them to choose between their country and their religion:¹⁴

The dual obedience and tacit compromise of conscience, on which the vast majority of Catholics in England had hitherto acted, was for ever destroyed, and in its place was restored the duty of unqualified allegiance to the Church of Rome.

The bull of 1570 provoked Parliament to bring in repressive legislation against Catholics. (This was against Elizabeth's personal wishes, but she was obliged to comply). An 'invasion' of England by Jesuit missionaries sent by the Pope in 1580, Catholic 'plots' and so on simply had the effect of worsening still further the position of English Catholics both in law and in practice. The Gunpowder Plot of 1605, whether a genuine attempt at Catholic rebellion or, as some commentators have alleged, a put-up job, exacerbated fear of Catholicism.

¹⁴ J.C. Black, *The reign of Elizabeth I*, 2nd ed., 1959, p.168

The next hundred years saw stirring times, with civil war, the execution of Charles I, and exile of his heir, the Commonwealth and the Puritan revolution, and eventually in 1660, the restoration of the monarchy with Charles II. It is not altogether surprising that amid such turmoil, 'dangerous' sections of the population such as Catholics (but also others) should attract unwelcome attention and suffer persecution. There was already plenty of repressive legislation on the statute book and to it James I added more. However, as J.P. Kenyon remarks in *The Stuart Constitution*:¹⁵

it was only rarely that any of this legislation was enthusiastically or efficiently enforced and except during a brief period immediately after the Gunpowder Plot in 1605, the Crown was unco-operative.

The Commons' attitude, on the other hand, was pretty ferocious. Those Catholics who fought for the King in the Civil War lost all their estates, and were not allowed to proceed to composition like Protestant royalists. Even those who remained neutral lost two-thirds, and on top of this had to pay double taxes. Parliament also devised, and introduced in 1643, a more detailed and specific oath of allegiance, the model for the Tests of 1673 and 1678.

A relatively relaxed period followed the end of the Civil Wars. At the Restoration, perhaps because of Charles II's benevolent attitude, the Catholics were again in bad odour.¹⁶

Nevertheless, there is no evidence to suggest that the penal laws were executed with any new vigour in the 1660s and some to suggest that they were not.

Both Charles II, apparently secretly an adherent of the Catholic faith, and particularly James II, who was an avowed Catholic, attempted to prevent extant anti-Catholic legislation from being used, but both were eventually overruled by Parliament. In 1673 Charles II assented to the first Test Act, which applied to all office holders. It required of them an anti-Catholic declaration, but, much more, that they must henceforth take the oaths of allegiance and supremacy in open court, and produce written evidence of having taken the Anglican Communion. Many Catholics were forced to resign (including the future James II, then Duke of York) and others to appoint deputies to carry on the business of their offices. However, despite the urgings of higher authority, the execution of the old penal laws remained as lax and inefficient as ever. An attempt in 1675 to confiscate two-thirds of all recusants' estates foundered on corruption and the sheer impossibility of establishing the facts. Since the jury presentation usually did not distinguish the types of recusant (most of the laws involved attacked all kinds of dissenter) it was well nigh impossible to know exactly who was Catholic.

Then in 1678 came the scare over the Popish Plot, which resulted in the second *Test Act* of that year. This included the declaration laid down in the 1673 Act abjuring transubstantiation, worship of the Virgin Mary and the celebration of mass: clearly unacceptable to any Catholic.

¹⁵ J.P. Kenyon, *The Stuart Constitution*, 1966

¹⁶ Kenyon, *op. cit.*, p.450

Catholics suffered ups and downs in the ensuing years, partly owing to the confusion arising out of the accession of a Catholic monarch, James II. He fled in the "Glorious Revolution" of 1688 and Kenyon writes:¹⁷

So the reaction after the Revolution was mixed. A panic measure passed in May 1689 forbade recusants to come within ten miles of London, but when the Lords in December discussed the enforcement of the penal laws the minority in favour of toleration was strong enough to block any action. Catholics were obliged to pay double land-tax, but this seems to have been accepted in lieu of their liabilities under the Act of 1581. In 1723 an additional aid of £100,000 in one year was levied on recusants, but after ten years only £63,000 had been collected, and the experiment was not repeated. An Act of 1700 made Catholics incapable of inheriting or purchasing land, but the continued existence of a flourishing Catholic nobility and gentry testifies to its ineffectiveness. The last priest was executed in 1680, and nothing more is heard of Popish plots except during the brief hysteria of the Gordon Riots in 1780. The Catholic problem was no longer a political issue.

Generally speaking matters continued with less anti-Catholic hostility from that time. A mass of penal legislation against Catholics (and others, but less severely) remained on the statute book, probably largely to calm public fears, but its enforcement was lax. The eighteenth century was a good deal more liberal than those preceding it and towards its close actually saw the removal of a few pieces of restrictive legislation. It was not until 1828-29 that the main body of penal laws was removed. The few disabilities remaining after the *Roman Catholic Emancipation Act* of 1829 have gradually been cleared up in the process of statute law revision. Almost no restrictions now remain (except for obvious reasons *e.g.* ecclesiastical appointments) other than the succession to the throne.

D. The Case for Change

Politicians, and others, have over the years called for the law regarding succession to be changed, particularly to remove the exclusion of Roman Catholics. A few specific issues merit attention when contemplating what changes might be brought forward.

First, many people are deeply offended by the religious discrimination apparent in the exclusion of Catholics from the throne. However, the matter is not quite so simple as it might appear (and, as has been pointed out, Catholicism is not the only religion affected). Certainly the alteration of the monarch/heir's personal position would entrain considerable constitutional complications, involving in particular the established status of the Church of England. Anson comments:¹⁸

¹⁷ *op.cit* p.456

¹⁸ Sir William R Anson, *Law and custom of the constitution*, 4th ed., 1935, vol. II, Pt. II, pp 249-51

§ 1. THE STATE AND RELIGIOUS SOCIETIES

THE relations of the Established Church, and other Churches in England, to the Crown in Council and to the Crown in Parliament are very apt to be misunderstood, and it may be well to consider the relations which must subsist between any and every religious society and the Crown.

A religious society exists, one must suppose, for the purpose of maintaining and enforcing definite articles of faith and of doctrine, rules of conduct corresponding to its belief, and forms of worship designed to influence faith and conduct. But such a society is in necessary subordination, so far as English law is concerned, to Parliament, because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its members for office or franchise. Parliament in its omnipotence may do what it will with any religious society; it may pass righteous laws forbidding the public expression of opinions which are shocking or painful to the majority of citizens, or the public use of forms or rituals which disturb or demoralize them; or it may pass unrighteous laws interfering with freedom of religious opinion, or of worship, or with the free action of voluntary societies.

And again, every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of law, though that liability may be greatly reduced by the adoption of a suitable constitution. If two persons engage a third to preach a certain doctrine to them for a sum named, and refuse to pay him on the ground that his teaching has not conformed to the opinions which they engaged him to enforce, a court of law can duly settle the matter between the disputants by comparing the doctrine which the preacher undertook to teach with the doctrines which he taught. Nor can any State avoid deciding to what extent it should allow property to be devoted to religious ends, such as masses for the dead, or to propaganda for the destruction of all religion.

§ 2. ESTABLISHMENT

But the Established Church has a closer connexion with the State than this necessary subordination to Parliament and liability to have its doctrine discussed and interpreted in courts of law. The King is Head of the Church, not for the purpose of discharging any spiritual function, but because the Church is the National Church, and as such is built into the fabric of the State. The Crown itself is held on condition that the bolder should be in communion with the Church of England as by law established. The Convocations of the Church are summoned, prorogued, and dissolved by the Crown; they, cannot enter on ecclesiastical legislation without royal permission, nor make canons without the royal licence and assent. The royal assent must be given to the Church Measures passed by the Church Assembly and approved by Parliament.

The Crown appoints the great officers of the Church, and of these the Bishops are not only administrators and judges of ecclesiastical law, but constitute the Lords Spiritual in the House of Lords.

The courts of the Church are not private tribunals for determining the internal differences of a voluntary society: the law of the Church is a part of the law of the

land, and the King is over all persons in all causes, as well ecclesiastical as temporal, within his dominions supreme.

For not only is the Church unable to make new canons without the royal assent, but its liturgy and Articles of Religion have a Parliamentary sanction: though not made by Parliament, they have been accepted by Parliament, and therefore they need the combined action of Church and State for their alteration.

Presumably the monarch/heir's own position could be changed, but it would undoubtedly involve a lot of constitutional and ecclesiastical unscrambling if his position with regard to the established churches is to be changed. But, assuming that there is no desire to upset the constitutional position of the Church of England, this might help in that what was left would simply amount to a statement of the monarch/heir's (in present terms) necessary relationship with that church.

As already explained, it looks as though, as far as a Queen consort or wife of the heir to the throne is concerned, it is only Catholics who are affected. However, if the speculation about the coronation oath is justified, there might be women of some Protestant denominations and non-Christian religions who would not wish to promise to maintain the established religion. (There is also the uncertainty over Communion in the coronation service). Old statutes are often curiously worded but it is often stated now to be anachronistic to exclude one religion out of so many. Many in Mr Norman Hogg's words reported in the press, may find this "discriminatory, offensive and insulting to the Catholic community of the United Kingdom".¹⁹

There are two main perceived problems relating to the exclusion of Catholics in particular from the line of succession:

(1) the impassioned reaction to any change in their position on the part of some Protestant groups who might see such moves as a Catholic attempt to overthrow the constitution. Some Anglicans might also be concerned as to the effect of any changes in the established church's position.

(2) the concern widely expressed about the position of the children of a mixed marriage. Although no promise is now required of the non-Catholic partner, the Catholic partner must promise to do all in his power to have the children brought up as Catholics. Clearly, this cannot be enforced, since it is up to the individual to decide what the limits of his or her power are. But it does present a problem in that unless an absolute undertaking were given (and in some people's minds this might still be dubious), there could be no assurance that the heir to the throne was not being brought up as a Catholic, making it impossible (assuming no change in the monarch's own position) for him to inherit the throne in due course. This would certainly be a very

¹⁹ "Bar stays on royal marriage to Catholics", *The Times*, 9 July 1980

difficult position to be in and one perhaps likely to undermine the stability of the throne.

The objections to Catholics in particular have already been well rehearsed and certainly arouse strong emotions in some areas. Northern Ireland is a case in point. In strict logic, there would also be similar objections to other religions - the Jewish or Moslem faiths, for instance, and no doubt others. It seems invidious, if historically capable of explanation, to single out one religion when what is presumably required is that the heirs to the throne should themselves demonstrably be Protestants. Apart from this, it can hardly be of interest what the wife's religious views are in private. It would seem both less offensive to Catholics, and also more honest, to exclude all religions other than that established, either by requiring the wife to be in communion with the established church or by devising some form of undertaking securing the position of the children in a way which would satisfy the sceptics.

If the position of the monarch/heir himself were changed, then the personal position of the consort would obviously not cause problems. However, as has been pointed out, such an alteration would raise both constitutional and ecclesiastical problems. It would also raise the question of whether the monarch/heir could subscribe to any religion of his choice. If one were to include Catholics but exclude other religions, one would surely be operating against them just as specifically and unfairly, as the law now seems to operate against Catholics. This is a difficult position in a multi-racial state. On the other hand, complete freedom of religious belief for the monarch could open up some curious prospects.

E. Legislative changes?

To remove legislative restrictions against Roman Catholics in relation to succession to the throne, the statutes mentioned in section I of this note would have to be amended. If the position of the established church were affected, many others would be included too. It is clear that drafting any piece of legislation to change the situation would not be straightforward. Dealing with amendments to the legislation concerning the union of Scotland and England could open up extremely complex constitutional issues, quite apart from the problems inherent in trying to disentangle matters of religion and politics, being, as they are, at the heart of core aspects of the British constitution.

If one looks only at the restrictions on the **monarch's wife**, there appear to be four main statutes placing restrictions on the religion of the monarch's spouse that would need to be amended: the *Bill of Rights 1688*, the *Coronation Oath Act 1688*, the *Act of Settlement 1700* and the *Act of Union 1706*.

1. Bill of Rights 1688

References to the religion of the monarch's spouse appears as follows:

- Section 1 includes the following text –

And whereas it hath beene found by experience that it is inconsistent with the safety and welfare of this Protestant kingdome to be governed by a popish prince or by any King or Queene marrying a papist the said lords spirituall and temporall and commons doe further pray that it may be enacted that all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the crowne and government of this realme and Ireland and the dominions thereunto belonging or any part of the same or to have use or exercise any regall power authoritie or jurisdiction within the same

Section 1 also refers to the coronation oath (which does involve the spouse - see below) and requires the monarch on his or her succession to make a declaration before Parliament rejecting Roman Catholicism. The declaration, (set out on page 2 above), makes no explicit reference to the monarch's spouse.

2. Coronation Oath Act 1688

The Act requires the King and Queen to swear an oath during the coronation ceremony; the form of the oath is set out in section 3. The text includes the promise that they will to the utmost of their power to -

maintaine the Laws of God the true profession of the Gospell and the Protestant reformed religion established by law [...] and [...] preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them

While there is no direct exclusion of Roman Catholic spouses in the Act, the requirement to make the above promise could well prove problematic.

It is worth noting that the coronation oath has been modified without statutory authority. The present Queen swore a slightly different version of the oath, although it still included a promise to maintain the established Protestant religion in the United Kingdom.

3. Act of Settlement 1700

The sections referring to the monarch's spouse are as follows:

- The preamble refers to the restrictions placed on the heirs to the throne already passed in the Bill of Rights including that:

... all and every person and persons that ... should professe the popish religion or marry a papist should be excluded and are by that Act made forever incapable to inherit posses or enjoy the crown ...

- Section 2 reaffirms the incapacities enacted and established in the *Bill of Rights* in relation to persons who "*shall profess the popish religion or shall marry a papist*". It too

includes the provision that Kings and Queens shall have the coronation oath administered, as set out in the *Coronation Oath Act 1688* (see above).

4. Union with Scotland Act 1706

To preserve the position of the established Presbyterian Church of Scotland in the Act of Union, the relevant provisions of the *Act of Settlement* and *Bill of Rights* were reiterated and confirmed:

- Article II includes the following –

And that all papists and persons marrying papists shall be excluded from and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the dominions thereunto belonging or any part, thereof and in every such case the crown and government shall from time to time descend to and be enjoyed by such person being a Protestant as should have inherited and enjoyed the same in case such papist or person marrying a papist was naturally dead according to the provision for the descent of the crown of England

5. Other relevant statutes

It has been suggested that four other Acts may also need amending:

- *Princess Sophia's Precedence Act 1711* (10 Ann, chap 8)
- *Royal Marriages Act 1772* (12 Geo 3, chap 11)
- *Union with Ireland Act 1800* (39 & 40 Geo 3, chap 67)
- *Regency Act 1937* (1 Edw 8 & 1 Geo 6, chap 16)

It might also be necessary, by the *Statute of Westminster 1931*, to obtain the consent of the Commonwealth on any alteration to the succession to the throne:²⁰

848. **Assent of Parliaments to alterations.** Any alteration by Parliament in the law touching the succession to the throne would, except perhaps in the case of Canada and Australia, be ineffective to alter the succession to the throne in respect of, and in accordance with the law of, any other independent member of the Commonwealth which was within Her Majesty's dominions at the time of such alteration, unless the alteration were effected by legislation expressly reciting the request and consent of the member concerned. Constitutional convention therefore requires that the assent of the Parliament of each member of the Commonwealth within Her Majesty's dominions be obtained in respect of any such alteration in the law.

The matter has recently been tested in the Canadian courts, by way of an action in the Superior Court of Ontario by a private individual, who was aggrieved by the attitude taken by

²⁰ *Halsbury's Laws of England*, 4th ed., vol. 8, para. 848

the Act of Settlement and allied constitutional statutes to Roman Catholics. This case, *O'Donohue v. Canada*, was decided in June 2003²¹. The judge, Mr Justice Roleau, decided the case was non-justiciable. He dismissed the application. Some of the *obiter dicta* of the judge are however instructive.

*The office of the Queen is such a fundamental part of our constitutional structure that amendments to the Constitution in respect of that office require the unanimous consent of the federal and provincial governments (see s. 41(a) of the Constitution Act, 1982)*²².

*Applying that reasoning to the present case, it is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected*²³

And most importantly, the judgment contained the following interpretation of the Statute of Westminster on the need for unanimity in the Commonwealth in order to change the "foundation documents":

*As a result of the Statute of Westminster it was recognized that any alterations in the rules of succession would no longer be imposed by Great Britain and, if symmetry among commonwealth countries were to be maintained, any changes to the rules of succession would have to be agreed to by all members of the Commonwealth. This arrangement can be compared to a treaty among the Commonwealth countries to share the monarchy under the existing rules and not to change the rules without the agreement of all signatories.*²⁴

It is thus evident that any change in the succession provisions, according to this Canadian interpretation, would require legislation, at least in Canada, to validate its application there.

A further note in *Halsbury's Laws* explains the reservation on Australia and Canada:²⁵

5 In respect of Canada and Australia sovereignty is declared to reside in "the Crown of the United Kingdom of Great Britain and Ireland" (British North America Act 1867; preamble; Commonwealth of Australia Constitution Act (1900), preamble) (cf. para. 819, note 2. post), and references to the Queen in the Commonwealth of

²¹ The authors are indebted to Mr D Doherty of Nepean, Ontario, for drawing this judgment to their attention. Its reference is 2003 CanLII 41404 (ON S.C.) and is reported at [2003] O.T.C 623 and (2003) 109 C.R.R., References are to the Internet version; <http://www.canlii.org/on/cas/onsc/2003/2003onsc11019.html>

²² *Ibid*, para 23

²³ *Ibid*, para 27

²⁴ *Ibid*, para 33

²⁵ *Halsbury's Law of England*, 4th ed., vol. 6, para. 817, Note (5)

Australia Constitution Act (1900) extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom: s. 2.

F. Recent parliamentary activity

1. Private Members' Bills

There have been a number of Private Members' Bills and Ten Minute Rule Bills that have attempted to address the issue of succession to the Crown and Royal marriages. There were attempts made by three separate Bills in the 2004-05 session. Ann Taylor MP presented a Private Member's Bill to the House on 12 January 2005. This was not reached for debate and was objected to on reading of the Remaining Orders on 4 March 2005.²⁶ Clause 2 of the Bill would have removed the prohibition on Roman Catholic consorts (see section B2 above). Lord Dubs had previously presented a Bill in the Upper House on 8 December 2004 with a similar provision to enable Monarchs and heirs to the throne to have Roman Catholic consorts.²⁷ However, Lord Dubs withdrew his motion for a second reading following a debate on 14 January 2005 and subsequently withdrew the Bill.²⁸ Edward Leigh MP presented a Bill entitled Royal Marriages (Freedom of Choice) under the ten-minute rule on 8 March 2005²⁹. The Bill (Bill 79, 2004/05) had not been printed at the date of revision. Mr Leigh stressed he did not wish to change the rules relating to the religion of the monarch, but only those relating to the religion of a spouse.

Other attempts had been made by Kevin McNamara MP in 2001 and Lord Forsyth of Drumlean in 1999. The *Treason Felony, Act of Settlement and Parliamentary Oath Bill*, was a ten-minute rule bill introduced by Kevin McNamara MP.³⁰ The debate on the motion to allow the Bill to be introduced was agreed to by 170 votes to 32 on 19 December 2001.³¹ The Queen's consent to the Bill was signified on 19 July 2002 but the Bill failed to gain a second reading by the end of the session.

The Bill had three purposes: to amend section 3 of the *Treason Felony Act 1848* to establish that it be no longer an offence to express an opinion in favour of republicanism or advocating the abolition of the monarchy; to amend the *Act of Settlement 1700* to provide that persons in communion with the Roman Catholic Church are able to succeed to the Crown; and to amend the Parliamentary Oath.

²⁶ *Succession to the Crown (No 2) Bill* (Bill 36 of 2004-05), available to view here: <http://www.publications.parliament.uk/pa/cm200405/cmbills/036/2005036.pdf>

²⁷ *Succession to the Crown Bill* (HL Bill 11 of 2004-05), available to view here: <http://www.publications.parliament.uk/pa/ld200405/ldbills/011/2005011.pdf>

²⁸ For the full debate, see HL Deb 14 January 2005, cc495-515

²⁹ HC Deb vol 431 cc1392-4, available at http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm050308/debtext/50308-06.htm#50308-06_head1

³⁰ Available at: <http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/077/2002077.pdf>

³¹ HC Deb 19 December 2001, cc 319-323

Section 2 of the *Act of Settlement*, described above, confirmed the exclusion of Catholics from the throne; clause 2(1) of Mr McNamara's Bill would have repealed this section. During the introductory speech, Mr McNamara described sections 2 and 3 of the *Act of Settlement* as "extremely offensive" (col. 320). He was opposed by Dr Ian Paisley, who gave examples of continental countries where particular religious tenets were required of the monarch, and stated that a Private Member's Bill was an unsuitable vehicle for such a change.

Going further back, an attempt to amend the Act had been made by Lord Forsyth of Drumlean in 1999. Press reports had suggested that Lord Forsyth of Drumlean and Lord Fraser of Carmyllie were intending to introduce a Private Member's Bill in the House of Lords to amend the *Act of Settlement* and to allow the monarch to marry a Roman Catholic.³² Lord Forsyth's motion seeking the Queen's consent to present a Bill was not agreed to.³³ *Erskine May* explains that where a Peer wishes to introduce a Private Member's bill which is "directed substantially to the Royal prerogative or interests [...] an Address is moved asking for the Queen's consent before the Bill is introduced."³⁴ The text of Lord Forsyth's motion read as follows:³⁵

Moved, That an humble Address be presented to Her Majesty praying that Her Majesty may be graciously pleased to allow that Her undoubted prerogative and interest may not stand in the way of the consideration by Parliament during the present Session of any measure to remove the bar on a person who is not, or who is married to a person who is not, a Protestant to succeed to the Crown, and for connected purposes.

Lord St John of Fawsley, who spoke against this motion, voiced an opinion that it was not appropriate that a change of this nature should be effected by a Private Member's bill.³⁶

My second point is that this is a matter of extreme complexity. The status of the Sovereign's Coronation Oath, made in 1952, is brought into the issue. The Address involves the amending of not only one statute, but of many, including the Act of Union with Scotland of 1706. Under the Statute of Westminster 1931, if the Address were to lead to legislation, that legislation would have to be approved by all the relevant Commonwealth governments and by their parliaments. Therefore I ask your Lordships to draw the conclusion that surely such a major matter is best set in train-- and should be set in train by the Government and Opposition parties officially acting together and not by a single Peer, even one so respected as my noble friend, whose intentions are beyond reproach.

³² eg, see "Tory peers aim to lift monarchy ban on Catholics", *Scotsman*, 8 November 1999

³³ HL Deb 2 December 1999, cc917-919

³⁴ *Erskine May Parliamentary Practice* (22 ed.), 1997, p465

³⁵ HL Deb 2 December 1999, c917

³⁶ *Ibid*, c918

This view had also been expressed in the closing speeches on the second reading motion on Lord Archer's *Succession to the Crown Bill [HL]* in February 1998, where Lord Williams of Mostyn, Home Office Minister, stated that the Government intended taking the matter forward and that a Private Member's bill was not "an appropriate vehicle for so important a change".³⁷

2. Government position

Despite continuing pressure from individuals and sporadic press attention, the Government announced in December 1999 in answer to a parliamentary question that it had no plans to legislate in this area:

Ms Roseanna Cunningham: To ask the Prime Minister if he will make it his policy to seek to amend the law to (a) allow members of the Royal family to marry a Catholic without losing their right to inherit the throne and (b) allow Roman Catholics to inherit the throne; and if he will make a statement. [99658]

The Prime Minister [holding answer 26 November 1999]: The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and it will continue to do so.

The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would raise other major constitutional issues. The Government have no plans to legislate in this area.³⁸

More recently, in the debate on Lord Dubs' Bill, the Lord Chancellor stated that although the *Act of Settlement* and other associated Acts that exclude Roman Catholics from the succession could be seen as 'discriminatory', he remained opposed to what would be a complex and controversial procedure to change them:

To bring about changes to the law would be a complex and controversial undertaking, raising major constitutional issues which would involve the amendment or repeal of a number of pieces of related legislation. Legislation that would need to be reviewed includes the Bill of Rights 1688, the Coronation Oath Act 1688, the Union with Scotland Act 1707, the Princess Sophia's Precedence Act 1711—I hope no one will intervene on that one—the Royal Marriages Act 1772, the Union with Ireland Act 1800, the Accession Declaration Act 1910, and the Regency Act 1937. I recognise that my noble friend's Bill deals with obvious aspects of the Union with Scotland Act and, indeed, the parallel Union with England Act of the pre-Union Scottish

³⁷ HL Deb 27 February 1998, c917

³⁸ HC Deb 13 December 1999, c57-8W

Parliament, but it has not addressed any of the issues raised by the other Acts to which I have referred.

(...)

I should make it clear that this Government stand firmly against discrimination in all its forms, including discrimination against Catholics, and will continue to do so. The Government would never support discrimination against Catholics, or indeed any others, on the grounds of religion. The terms of the Act are discriminatory, but we should be clear that for all practical purposes, its effects are limited.

(...)

There is a difference between applying new legislation such as the Human Rights Act to existing legislation, and altering legislation which is part of the backbone of our constitutional arrangements. Indeed, this legislation is interwoven within the very fabric of the constitution and has evolved over centuries. It is not a simple matter that can be tinkered with lightly. While we would wish to remove all forms of discrimination, for a variety of reasons that have been well understood in the course of this debate, this is not the appropriate form.³⁹

3. Scottish Parliament

Matters relating to the Crown are reserved matters under the terms of the *Scotland Act 1998* and the Scottish Parliament has no power to legislate in this area. However, the Scottish Parliament debated a motion on the *Act of Settlement* in December 1999⁴⁰ and resolved as follows:⁴¹

Resolved,

That the Parliament believes that the discrimination contained in the Act of Settlement has no place in our modern society, expresses its wish that those discriminatory aspects of the Act be repealed, and affirms its view that Scottish society must not disbar participation in any aspect of our national life on the grounds of religion, recognises that amendment or repeal raises complex constitutional issues, and that this is a matter reserved to UK Parliament

For further details on the views of the Scottish churches etc. on this issue, see *Scottish Parliament Information Centre Research Paper 99/17 - The Act of Settlement*.⁴²

³⁹ HL Deb 14 January 2005, cc510-511

⁴⁰ Scottish Parliament Official Report, 16 December 1999, c1633-80:
http://www.scottish.parliament.uk/official_report/session99-00/or031602.htm#Col1633

⁴¹ *Ibid*, c1754

⁴² http://www.scottish.parliament.uk/whats_happening/research/pdf_res_papers/rp99-17.pdf