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The common law and the 'rightfulness' of the duke of York's claim to the throne in 1460

On 10 October 1460, Richard Plantagenet, duke of York, strode into Parliament before all the assembled spiritual and temporal lords, and, in the king's absence, advanced upon the throne, placing his hand upon it. As he did so, the archbishop of Canterbury challenged him, asking had he come to see the king? The duke replied, 'I do not recall that I know of anyone within the kingdom whom it would not befit to come sooner to me and see me rather than I should go and visit him'.[1] While the verbosity is slightly confusing to modern ears, there is no doubt that this amounts to a claim of his right to the throne. As we survey the wider contemporary literature concerning this event, we cannot help but note this repeated emphasis on dynastic *right*. A letter written a few days later to Sir John Tiptoft, who was then in Venice, describes independently how the duke arrived at Westminster at ten o'clock that day with eight hundred mounted men, and entered the palace where he 'gave them knowledge that he purposed not to lay down his sword but to challenge his right… that no man should have denied the crown from his head'.[2]

The basis of the duke's 'right' was no mystery. It was well known that the duke was descended from Lionel, the second son of Edward III, whereas King Henry VI was descended from John of Gaunt, the third son. However, it had not previously been promulgated by the duke in person. The lords in Parliament sought advice from the leading lawyers, but the lawyers as a body replied that 'the said matter was so high and of such great weight that it surpassed their learning, and also that they dared not enter into any discussion of it, to give any advice or counsel on it'.[3] The lords then took matters into their own hands and, having put several written questions to the duke and received his answers, they declared that his claim 'could not be defeated' and was 'rightful'. Even so, they could not take the drastic action of deposing an anointed king and treating his royal forebears as interlopers and thereby casting doubt on every royal action since 1399. They opted to compromise. Henry VI, they decided, should be

[1] Michael Bennet, 'Edward III's entail and the Succession to the Crown, 1376-1471', *English Historical Review*, 113 (1998), 580-609, at p. 580.
[2] P. A. Johnson, *Duke Richard of York, 1411-1460* (Oxford, 1988), 214.
[3] Chris Given-Wilson (ed.), *The Parliament Rolls of Medieval England* (16 vols, 2005), v, 376.

allowed to rule for the rest of his life and the duke should be 'entitled, called and reputed from henceforth, very and rightful heir to the crown'.[4]

This emphasis on dynastic right was repeated by the Yorkists in later years. Edward IV even referred to his father after his death as 'king in right of the realm of England'.[5] But it was by no means a novelty, nor solely claimed by the Yorkists. When Henry IV had claimed the throne in 1399, he too had done so not by conquest but because he was 'descended by right line of the blood coming from the good lord King Henry the Third', to quote the relevant Parliament Roll.[6] Such statements leave no doubt that fifteenth-century people believed there really was a *de jure* right to the throne as well as a *de facto* one. However, just because they believed there was a law determining the rightful succession does not mean that they understood it. In all ages, many more people uphold political and legal concepts than understand them. Their support for a particular idea is generally underpinned by two things: the vagueness of the idea itself, which unifies those with differing interpretations of it, and the widespread conviction that, in a civilised society, important matters should be governed by legal principles. Thus it was with the law of the succession in the fifteenth century. It was not written down or otherwise codified, except in specific instances. Therefore its very vagueness concealed the difficulty of determining what rightful inheritance actually meant.

What is interesting about the duke's claim in 1460 is that the lawyers could not find a legal solution to the problem but the lords *did*, even though they were presumably less experienced in the law than the lawyers. In concluding that the duke was indeed the 'rightful' heir, the lords were effectively giving a judgement based on the common law, which was the only law with which most of them were familiar. Many historians subsequently have delivered a similar verdict: that the duke was indeed in the right due to his being the heir of the Mortimer earls of March. As Nigel Saul put it in his study of Richard II, 'by tradition, if not by law, the throne of England descended by primogeniture; and if tradition were followed, and Richard were to remain childless, the heir would have been the young earl of March, Roger Mortimer'.[7] By that token, the duke of York would have been the rightful heir ever since the death of his uncle, Edmund Mortimer, earl of March, in 1425. However, as the lawyers' reticence in 1460 indicates, it was not as simple as that. The fundamental reason is that it was not possible to base a judgement about the succession to the throne on the common law, for reasons discussed below. If it had been, and if the law had

[4] Given-Wilson (ed.), *Parliament Rolls*, v, 379.
[5] C. A. J. Armstrong, 'The Inauguration Ceremonies of the Yorkist Kings and their Title to the Throne', *Transactions of the Royal Historical Society*, 30 (1948), 51-73, at p. 52.
[6] Given-Wilson (ed.), *Parliament Rolls*, viii, 25.
[7] Nigel Saul, *Richard II* (1997), 397. See also *ibid.*, p. 419, where he states unequivocally that Edmund Mortimer, not Henry, was Richard's 'nearest male heir'.

been in favour of the duke's claim, then those lawyers would have had every incentive to state that the duke was in the right. Logically, either the law was not clear on the matter or the law *was* clear but it was not in the duke's favour.

Obviously the immediate political situation was very much in the lords' minds in 1460. The duke had been declared a traitor in the previous year's Parliament and all his family honours had been declared forfeit. The Wheel of Fortune had then dramatically turned. In the summer: the duke had defeated the king's forces at the Battle of Northampton and the king was now in his custody. In addition, the lords could hardly ignore the fact that he had eight hundred men-at-arms with him. Notwithstanding the tensions thus created, they also had to respect that military victories and huge bodyguards did not have any bearing on his lineage. Unless they wished to throw out his petition on the basis that he was a condemned traitor, they had to consider his case on its merits. Hence the written questions. These were not legal in their nature but merely circumstantial. The duke's petition implied he had been the rightful heir to the throne since the death of his uncle in 1425; so why had he let more than thirty years pass before mentioning it? How could he claim the throne from Lionel, the second son of Edward III, when until the previous month he had always born the arms of Edmund, duke of York, the fourth son? Why had he sworn oaths of loyalty to Henry VI if he believed that the Lancastrian claim was weaker than his own? What about the 'various entails made to the heirs male with regard to the crown of England' made by earlier kings, both inside and outside Parliament? The obvious point that the lords did *not* raise – at least, not in the form of written questions – was that the duke's claim was through two females. His great-grandmother had been Phillipa, the daughter of Edward III's second son, Lionel. She had married Edmund Mortimer, third earl of March, and had a son Roger Mortimer, fourth earl of March, the duke of York's grandfather. Then the royal claim from Lionel passed to Anne Mortimer, the duke's mother. As a result, he could only claim to be the heir general of Richard II, not the heir male. If the succession to the throne was governed by the laws concerning male entailment, the duke had no claim until every heir male was dead. That included the king, who might have had his bouts of mental sickness but in all other respects was still very much alive.

The common law and the law of succession

Given the lords' doubts, it is tempting to set aside the rights and wrongs of the duke's case and simply state that people did not really know in 1460 what the law of the succession was, even if they believed they did. That would be to stand shoulder to shoulder with the least-well educated of them in prejudice and ignorance; it would not reveal the views of the well-informed minority. It would

also underestimate the constitutional problem that caused the confusion. The crux of the matter was that the succession of the kingdom was not like the inheritance of a parcel of land, which in England was governed by the common law. Indeed, the rules governing the succession and the common law were mutually incompatible. But most people did not realise this. The result was a peculiarly English problem. The law of inheritance that everyone in England understood applied to his or her own estate did not apply to the most important inheritance of all – that of the throne. It was literally a case of one law for the royal family and another law for everyone else.

There were at least five reasons why the rules governing the succession and the common law were incompatible.

1. Unlike a parcel of land, the kingdom could not be divided. While the common law declared that the estate of a man who died leaving only daughters should be divided equally between those daughters, this was not possible when the inheritance concerned the whole kingdom. Obviously, the division of England into two or more parts would have divided men's estates between two political entities, which would inevitably have led to divided loyalties. It would also have made the administration of the kingdom impossible, especially when further subdivision took place in later generations.
2. When a lordship was left between daughters, the title fell into abeyance, only to be resumed when there was a sole heir. This process sometimes took hundreds of years, and there was no guarantee it would ever be achieved. Clearly this was incompatible with the royal title.
3. The question of who should inherit when the king's eldest son had legitimate children but died before his father was also incompatible. The common law dictated that the principle of representation applied, so the sons and daughters of an ordinary lord's deceased eldest son and heir, as his representatives, took precedence over the lord's second son. If the deceased eldest son left male children, the eldest simply took his father's place. However, if the deceased eldest son only left daughters, a legal separation of the lands of the lordship was the rightful outcome, with the title falling into abeyance. This was unsupportable in the case of the succession to the throne. Even when the king's eldest son left an only daughter as his representative, the succession was problematic. That daughter's eventual status as sole heiress could not be known before her father had died – because it was impossible to know whether she would be his sole representative, one of two or more coheiresses or supplanted by a younger brother – and so it was very difficult to arrange an appropriate dynastic marriage for her in her father's lifetime. Given that solo representation would mean that her husband would have the rule

of her and thus the realm, if the principle of representation was applied to females, this was not something that could be left to chance.

4. The common law only considered inheritance from a domestic point of view whereas royalty was an international status. Royal inheritance had to conform to principles recognised in countries where Roman Law prevailed. It had to be convincing to foreign leaders with dynastic connections to England – not least because, if they felt they had a better claim, they might invade, as had happened in 1216-17. The need for international credibility, if not compatibility, also concerned international marriage agreements, where foreign kings might insist on the rights of their daughters' descendants. The political need to guarantee the succession as a matter of international diplomacy was one of the reasons why formal settlements of the throne started to be drawn up across Europe in the thirteenth century.
5. The common law held that an Englishman was legally responsible for all his wife's children born after their marriage. That included any children conceived due to his wife having had an adulterous relationship with another man. The implication was that a married lord's eldest son was legally his heir even if the boy was not biologically his offspring. But did that rule also apply to the royal family? Clearly people thought not. It was inappropriate for the product of a sinful union to be anointed in a sacred coronation ceremony. The king's illegitimate progeny were barred from inheriting, so it seemed wrong that the product of a queen's indiscretions should be rewarded with her cuckolded husband's crown. Certainly, people circulated stories of switching children in their cradles in the fourteenth century to undermine the legitimacy of various members of the royal family (John of Gaunt being the most famous example), so it was widely thought that, in this respect, rightful succession meant more than the provisions of the common law.

The common law did inform the law of rightful succession in one important respect: legal precedent. In essence, what had been lawful in the past remained lawful unless something had happened in the intervening years to render it unlawful, such as an Act of Parliament. As a result, it is necessary to consider the various successions to the throne since the Conqueror's reign to see how the set of rules governing royal inheritance developed as precedents were set and superseded.

The developing law of succession, 1087-1290

When William the Conqueror died, the succession was almost entirely a matter of the late king's will. He divided his estates as if they were his personal fiefs,

leaving Normandy to his eldest son, Robert Curthose, and England to his second son, William II. Primogeniture was not a priority. Nor was it when William II died, for it was not his elder brother or his elder brother's son who inherited the crown but his younger brother, Henry. Capability and character were more important than primogeniture. In 1135 Stephen was not even the Conqueror's eldest living grandson: he had two older brothers, William and Thibault, and it was Thibault who was initially chosen to be duke of Normandy by the barons. Primogeniture did not direct the inheritance of the throne of England once between the Conquest and Richard I's accession in 1189.

Stephen's succession in 1135 introduced several novelties. The first was that the late king might be succeeded by his nephew despite having left heirs of his body. The second was that a man could become king even though he had previously sworn an oath to support a rival's succession (Stephen having sworn to support Matilda's right to the throne in Henry I's lifetime). The third was that the lords could set aside the late king's will. None of these novelties became firmly established. Doubts about the legal basis for Stephen's accession grew throughout his reign and magnates increasingly supported the regnal legitimacy of Matilda's son, Henry of Anjou. As a result, we may look at the Treaty of Wallingford (1153) as establishing the principle that heirs of the body should take precedence over collateral lines even when inheritance was through a woman. The treaty could also be said to have established the principle that if the throne had wrongfully passed to someone other than the rightful heir, there was a moral duty to rectify the situation. This implies a distinction between the *de jure* right to the throne and the *de facto* one. As to how the correction was to be done without creating grave political disquiet, it set a precedent for this too. It decreed Stephen should remain king for life but that Henry should be recognised as his heir. In this respect, the events of 1153 clearly foreshadowed those of 1420, when Henry V displaced the dauphin as heir apparent to the French throne by the terms of the Treaty of Troyes. It also adumbrated the political solution proposed in 1460.

Henry II's own method of settling the throne was to have his eldest surviving son, Henry the Young King, crowned king in his lifetime – a policy that failed due to the young king predeceasing his father, leaving no offspring. Richard I's subsequent succession was a straightforward case of primogeniture – the first instance since 1040 – but that of his brother John was much more complicated. In October 1190 Richard had designated his nephew Arthur, son of his deceased brother, Geoffrey of Brittany, as his heir, when negotiating Arthur's marriage with the king of Sicily. This was in line with the principle of primogeniture, as Arthur was the son of Henry II's fourth son whereas John was the fifth and youngest son. However, in 1196, Arthur's Breton protectors placed him in the safekeeping of the French court, where he remained for the rest of

Richard's reign. Thus in 1197 Richard altered his view on the succession to favour his brother John. He named him as his successor shortly before he died. John himself acted quickly, taking control of the royal treasury at Chinon and dashing to England to be crowned as soon as possible. Thus the principle of primogeniture was disregarded once again. The principle of representation was similarly ignored.

John's actions prompted the furrowing of many legal brows, and not just in England. His inheritance of the throne was seen as setting a precedent by Baldwin, count of Flanders and Hainault, who did homage to John for his Norman estates in August 1199. The following year Baldwin drew up a set of laws for Hainault that included the rules governing inheritance within the county and which were taken to apply to the inheritance of the county itself. These followed John's precedent.

> A daughter succeeds if there is no son; the son of a second marriage succeeds rather than the daughter of a first; if an elder son or daughter dies before the parent who holds the fief and leaves a child, this grandchild of the fief-holder is passed over in favour of the next younger brother or sister of the deceased heir, thus keeping the line of succession in the first generation of descendants. If there are no heirs of the body, the fief passes to the nearest living relative of the family from which the fief was inherited by the deceased proprietor…[8]

Furthermore, although these rules only applied to Hainault and Holland, they would also have directed the enquiries of ambassadors dealing with royal marriages between the ruling house of Hainault and the heirs of other nations.

When it came to John's own death, a view of the royal family tree might give the impression that there were no candidates except his sons, Henry and Richard, to inherit the throne. However, although Arthur of Brittany was dead, his sister, Eleanor, countess of Richmond, was still alive. If John had acted unlawfully in taking the throne then the correct action should have been to set Eleanor set on the throne. No one acted to make Eleanor queen, however. As an unmarried woman, it is likely that the majority of the magnates did not consider her suitable. Prince Louis of France believed he had a claim to the throne of England in right of his wife, Blanche, daughter of Henry II's daughter Eleanor, who had married Alfonso of Castile. As the French denied the validity of female inheritance (thus ruling out Eleanor) and as John had been branded a traitor by the French king, Louis could argue that Blanche's claim was the only rightful one. As things turned out, the support of the pope and almost all the

[8] Robert Lee Wolff , 'Baldwin of Flanders and Hainaut. First Latin Emperor of Constantinople: his life, death and resurrection, 1172–1225', *Speculum*, 27 (1952), 281-322, at p. 284.

bishops, plus the influential figure of William Marshal, resulted in John's elder son, Henry, succeeding to his father's throne. People were forced to accept primogeniture as the primary factor – which meant that a nine-year-old boy took precedence over a grown man with a lesser claim and a woman with a stronger one.

Henry III's own view of the succession was inevitably affected by his father's case. It was always going to be a key point: did he endorse his father's mode of succession or deprecate it? Another consideration was the situation in which his father-in-law, Raymond Berengar, count of Provence, had found himself. Raymond died in 1245, leaving four daughters. Recognising that he could only leave his county to one of them, Raymond willed that he be succeeded by the youngest, Beatrice. It followed that her future husband would be the next count. A discussion took place between the pope and the king of France as to whom this should be. It was agreed that the lucky man was Charles of Anjou. If they had children, their offspring would succeed; if not, the deceased count's third daughter, Sanchia, would become countess of Provence, to be succeeded by her children; and if Sanchia died childless, the county would go to the king of Aragon. Henry III protested to the pope about these terms, so he was clearly familiar with the arrangement. He was ignored. But the dispute may well have precipitated his thinking about the settlement of his own throne. On 24 May 1253 he commissioned two sets of ambassadors to negotiate two marriages: one was the marriage of Edward, his son and heir, to the sister of the king of Castile, and the other the marriage of his daughter Beatrice to the heir to the kingdom of Aragon.[9] In the wake of his father's seizure of the throne, the first of these would inevitably have touched on the principle of representation and it is highly likely that both of them did. If the heir apparent died before his father, would his children stand in the line of succession? Although negotiations for Beatrice's marriage came to nothing, Edward was married to Eleanor of Castile in 1254. Whatever terms had been agreed in the course of arranging the marriage, they would have been given an enduring quality, of which the English as well as the Castilians needed to remain mindful.

No document giving details of a settlement of the throne by Henry III has survived. This does not mean he did not have a settlement drawn up, of course. The sensitivity of such documents meant that their destruction was normal. All the originals of known medieval settlements of the English throne have been destroyed. It is likely that Henry III did make a ruling – for the benefit of the Castilians, at least – as to whether the principle of representation would apply if Prince Edward were to predecease him and leave children. Almost as soon as he was able to rule in his own right, in 1228, he started making grants

[9] T. D. Hardy (ed.), *Syllabus of Ryler's Foedera* (3 vols, 1885), i, 49.

that directed that estates should be inherited by the heirs of the body of the grantee, clearly distancing himself from his father's succession strategy.[10] Two decades later, in 1249, he made a grant of the whole of Gascony to his eldest son, 'to be held by him and the heirs of his body', thereby demonstrating that, in respect of a major lordship, he believed that the principle of representation did apply and that it related to both the lord's male and female grandchildren by his deceased heir.[11] Gascony was not a kingdom, however, and there is evidence that, with regard to the throne itself, he viewed male entailment as correct. In his will, drawn up on 1 July 1253, five weeks after commissioning the diplomats to arrange the Spanish marriages, Henry referred only to his sons as his heirs. Perhaps his father-in-law's example had made him cautious of the problems of female inheritance. Either way, the text of his will refers to 'the custody of Edward my first-born son and heir, and of my *other boys*… until my heirs reach legal age'.[12] At this point, Henry and Eleanor only had one other boy, Edmund, so this provision for his unborn sons to be considered his heirs but not his daughters or any other future daughters strongly suggests a male-only approach to the principle of representation.

This interpretation of representation – that it applied only to the *sons* of a deceased heir – became the norm among other European ruling houses. In 1281, in the course of discussing the marriage of Alexander, son and heir apparent of Alexander III of Scotland, to the daughter of the count of Flanders, the Scottish great council of six earls, five bishops and five barons declared that if the prince were to have sons and then die before his father, the eldest of the boys would become king, but if he left only daughters, they would not inherit.[13] Given the terms of Henry's will and the fact that Alexander's queen, Margaret, was Henry III's daughter, it is likely that these provisions for the succession mirror the views of Henry III himself.

The first extant text of an entailment of the English throne comes from the next generation. In March 1290 Edward I's negotiators were making arrangements for his son, the future Edward II, to marry Margaret, the infant queen of Scotland. This too must have dealt with the principle of representation, especially given the abovementioned decision in 1281. The marriage was ultimately thwarted by the young queen's death in September of that year but before that, on 17 April, Edward I made his future sons-in-law swear to abide by his plans for the succession. The text of Gilbert de Clare's oath has survived. He acknowledged that (1) Edward of Carnarvon would be his liege lord after the

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[10] For example, *Cal. Charter Rolls 1226–57*, 81.
[11] *Cal. Charter Rolls 1226-57*, 345.
[12] Nichols (ed.), *Collection of all the…Royal Wills*, 15.
[13] G. W. S. Barrow'A kingdom in crisis: Scotland and the Maid of Norway', *Scottish Historical Review*, 69 (1990), 120-141 at p. 122.

king's death; (2) if Edward of Carnarvon were to die without heirs of his body during Edward I's lifetime, then the throne would pass to any other sons which may be born to Edward I; (3) if Edward I died without leaving a son and if Edward of Carnarvon died without leaving an heir, then the throne was to pass to Eleanor, eldest daughter of Edward I, and the heirs of her body, she being able to reign in her own right; (4) if any other sons that Edward I might yet have died without leaving an heir, then Eleanor was to inherit, and her heirs after her; (5) if Eleanor died without heirs of her body, then Joan was to inherit; (6) if Joan were also to die without heirs of her body, then the throne was to pass to her nearest sister.[14] By prioritising the heirs of the body of Edward of Carnarvon, not just his sons, this introduced the novelty that the principle of representation in the royal family could apply to daughters of the deceased heir apparent as well as sons. The problem of subdivision between coheiresses was avoided by adopting the principle of female primogeniture.

To recapitulate, the law of succession changed radically over the post-Conquest period. Four main stages may be identified:

1. In the early twelfth century, the only absolute requirement was that the candidate for kingship be a legitimate male member of the Conqueror's family. Beyond that, inheritance was a matter of political support. The principle of primogeniture did not normally carry weight.
2. By 1153, rightful inheritance had come to be restricted to the male heirs of the body of the late king, although the principle of representation did not necessarily apply.
3. By 1253, the principle of representation had come to be accepted with regard to the sons of the deceased heir apparent. In addition, the principle of male primogeniture had been accepted.
4. By 1290, the principle of representation was proposed to apply to the daughters of a deceased heir apparent as well as the sons. In order to get around the common-law problem of coheiresses, the principle of female primogeniture was proposed in the absence of any male heirs of the body. This novelty had yet to be tested, however, and was never publicly promulgated (as far as we know), so it is impossible to say whether it would have been accepted. Nor is it possible to judge whether it would have been considered appropriate in other kingdoms at this time. In this respect France was a benchmark – and the French did not accept inheritance through females, as demonstrated on the death of Charles the Fair in 1328.

[14] T. Rymer, Robert Sanderson, George Holmes (eds), *Foedera* (1745), i, part 1, 75-6.

The question of representation, 1376-1399

The above stages of development were not irreversible. It was always possible for legal precedents and principles to be set aside. The dying Prince Edward of Woodstock clearly feared there might be a complete refusal of the principle of representation in 1376, with the result that his young son Richard might be overlooked in favour of his brother John of Gaunt, for he asked that his father and brothers swear an oath to uphold Richard's right.[15] That his father permitted this to be done shows that Edward III accepted the principle as far as it applied to males but, as revealed by his own entailment of the throne, drawn up in October 1376, he did not accept it with regard to females.[16] His view of the succession was in accord with that of the Scottish great council in 1281. He stipulated that he should be succeeded by Richard of Bordeaux, and, if Richard died without legitimate sons, then John of Gaunt was to succeed, his third son, not the representatives of his second son. If John of Gaunt were to die without any legitimate sons, then Edmund of Langley was to inherit; and if Edmund were to die without legitimate sons, then Edward's youngest son Thomas was to succeed. Finally, if Thomas were also to die without legitimate sons, then the throne should pass to the next nearest descendant. He might have meant Roger Mortimer, the son and heir of his granddaughter Philippa, the representative of his deceased second son, by this last condition but he did not state this was the case. Given his refusal to accept the principle of representation in respect of females, it is possible that he believed that any sons of his eldest daughter Isabella (who was still alive), should be regarded as his next heirs after all his sons' male issue had expired, not the Mortimers. (In the event, Isabella only had daughters.) It also should be noted that this concentration on male-only inheritance mirrors his strategy with regard to grants of earldoms.[17] His policy with great lordships was to entail them on the grantee's male line. In such circumstances, it was clearly preferable that they should revert to the Crown to be granted out anew rather than be divided between coheiresses, and, in the case of titles, lost in the limbo of abeyance.

As a result of Edward III's entailment of the throne and the measures taken to secure the succession in his lifetime, Richard II's inheritance was unproblematic, despite his youth. The question of the next in line, however, was anything but simple. The problems first started to emerge in the bitter disputes of the Wonderful Parliament of 1386, when Richard II was nineteen. His uncle,

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[15] Mark Ormrod, *Edward III* (2011), 558-9.

[16] Michael Bennett, 'Edward III's entail and the succession to the Crown, 1376-1471', *English Historical Review*, 113 (1998), 580-609.

[17] For Edward III converting earlier grants to royal family members into male-only entailments, see *Cal. Patent Rolls 1374-7*, 327, 337, 355, 359. For the completion of the process, see K. B. McFarlane, *The Nobility of Later Medieval England* (Oxford, 1973), 72, 272–3.

Thomas, duke of Gloucester, threatened him with deposition if he did not attend the sitting at Westminster. This raised the question of who would be king if Richard were deposed. It was widely thought that John of Gaunt was the heir apparent, which would have been in line with Edward III's entail, although that document may not have been widely known. However, in the heat of the debate in that 1386 Parliament, Richard II named Roger Mortimer, fourth earl of March, and his brother, Edmund Mortimer, as his heirs – even though they were aged just twelve and ten.[18] This declaration was a rhetorical flourish designed to thwart and antagonise the duke of Gloucester and the Lancastrians: Richard did nothing to advance the position of the Mortimers officially at this time or at any later date. Nevertheless, people took the king's rhetoric seriously. The threat was enough to push Henry of Lancaster firmly into the camp of the opposition lords. In addition, Roger Mortimer was encouraged to think of himself as a potential heir to the throne. In 1394, when John of Gaunt requested that his son Henry be recognised as heir apparent, the young Roger Mortimer objected that he had the greater right. On that occasion Richard demanded both men be quiet. In the end, in a typically Ricardian move, he rejected both claims.[19]

The evidence that Richard refused to accept either the common law claim of Roger Mortimer or the Lancastrian claim, following Edward III's entail, is to be found in his official appointments to the position of keeper of the realm. Ever since the start of Edward III's reign, this had fallen to the next in line to the throne, even when the heir was a child. The only exception was in April 1331, during Edward III's brief and sudden dash to France, when his son and heir was only ten months old; on that occasion, the second in line, John of Eltham, was appointed keeper. In 1338, the eight-year-old Prince Edward was named as keeper, as he was again in 1342-3. In 1345-7, when the prince was with Edward III in France, the king's second-eldest son, Lionel, was appointed even though he was only seven years old. The five-year-old Thomas, duke of Gloucester, was appointed keeper of the realm in 1360, he being then the only one of the king's sons remaining in England. In 1372, Edward III had named the future Richard II himself – second in line to the throne after Prince Edward – as keeper of the realm during his and the prince's absence overseas. Thus the keepership of the realm was a highly sensitive appointment in 1394, when Richard planned to go to Ireland. According to Edward III's entailment, the next in line should have been John of Gaunt but John was about to set sail for Gascony. This is why John requested that his son Henry be officially recognised as the heir and appointed keeper in his stead. That Richard promoted his uncle,

[18] Although this appears in the continuation of the *Eulogium Historiarum* under 1385, it appears to have been displaced by an interpolation from its original temporal location, in 1386. See Ian Mortimer, 'Richard II and the Succession to the Crown', *History*, 91, 303 (2006), 320-36 at pp. 327-9.

[19] This is discussed in Mortimer, 'Richard II and the Succession', 328-9.

Edmund duke of York, must have shocked the Lancastrians. It marked the beginning of a period in which Richard consistently preferred the duke of York as his likely heir, as shown by the duke being appointed keeper again during Richard's later overseas journeys to France and Ireland.

Further evidence for Richard's preference from 1394 for the house of York over the families of Lancaster and Mortimer lies in the witness lists of royal charters. These reflect the order of precedence that would have been obvious to everyone near to the royal family observing the correct etiquette. Roger Mortimer, fourth earl of March, first appears as a witness of a royal charter on 5 March 1394. At that time, his name appeared second among the earls, after that of Edward, earl of Rutland, the eldest son of the duke of York.[20] In other words, he was *not* regarded as the representative of Edward III's second son; he was placed below the son of Edward III's fourth son, in line with Edward III's entailment of 1376. Similarly, wherever the names of Henry of Lancaster, earl of Derby, and Edward, earl of Rutland, appear in the same witness list, Henry is always given the pre-eminent position, implying his higher status.[21] Despite Richard II's announcement in Parliament regarding the Mortimers in 1386, in the years following, the house of Lancaster stood above that of York, and York above that of Mortimer, in the order of seniority in the royal family. In 1397, Roger Mortimer found himself further demoted in the order of precedence when Richard II created dukes of the heirs of the houses of Lancaster and York – Henry and Edward became the dukes of Hereford and Aumale respectively – and by his creation of three more non-royal dukes (Surrey, Exeter and Norfolk) and a marquis (Dorset). Richard then set about manipulating Roger Mortimer into a compromised position, requiring him to arrest his own uncle for treason, an act of betrayal that no loyal nephew could contemplate. If Mortimer had not died in fighting in Ireland in July 1398, he would no doubt have been brought back to England in disgrace. Finally, just before Mortimer died, Richard II discussed the succession with Sir William Bagot. Only two of his cousins were named as potential successors, Henry of Lancaster and Edward of York. The Mortimers do not feature in the record of the discussion. In retrospect, they were only regarded as potential heirs on account of a few loose words spoken by Richard II in the Wonderful Parliament, and the mistaken assumption by the populace and a few chroniclers that the succession was governed by the common law.

[20] The National Archives (TNA): C53/164 nos 1-4.

[21] Henry, earl of Derby, took precedence over Edward, earl of Rutland on 15 February 1392 (TNA E40/5925), 26 July, 11 and 22 September 1395 (TNA C53/165 nos 3, 10 and 11), 10 and 23 February 1397 (TNA C53/166 nos 1–3), and 5 July 1397 (TNA C53/167 no. 25).

Richard did not hide his preference for the house of York over that of Lancaster in the late 1390s. He lavished gifts on the duke of York and his son. He gave nothing to his cousin Henry except a title – the dukedom of Hereford – and this was probably only part of an attempt to lure him into a potentially lethal ambush.[22] Shortly afterwards, Richard acted to rid himself of his cousin altogether: exiling him to France on account of his argument with Thomas Mowbray. On 18 March 1399, following the death of John of Gaunt, Richard confiscated the entire Lancastrian inheritance, revoked Henry's pardon, and banished him from England for life. In this way he cleared the path for the elevation of the duke of York to the position of heir apparent. In two of the last charters which Richard granted, on 20 March 1399 and 6 April 1399, the name of 'Edmund, duke of York, our very dear uncle' appears above the bishops in the witness lists.[23] This was very unusual – an unprecedented level of preferment. As for Edmund's son, Edward, now duke of Aumale, after September 1397 Richard often had his clerks refer to him as 'our very dear brother', although they were actually first cousins.[24] The bond this implies undoubtedly arose on account of the marriage proposed in 1395 between Edward and the queen's sister; nevertheless, the king continued to refer to Edward as his 'very dear brother' long after plans for that marriage had been abandoned and Edward had married Philippa Mohun. It obviously reflected a genuine closeness between the two men. Then there is the evidence of Richard's will, dated 17 April 1399, in which the king made arrangements to leave the residue of his money to his 'successor'. By this he meant Edmund, duke of York, unless he refused or was unable to act.[25] The fact that Edmund was also keeper of the realm while Richard was in Ireland underlines the fact that, in Richard's mind, he was next in line to the throne in 1399.

As a result of these shifts in 1386 and 1394, it could be said that Richard II attempted to reinstate the Norman prerogative of directing the succession, last exercised by Richard I. In truth, however, he had to work within fixed parameters. In the 1380s and early 1390s he had attempted to play off one family against another. But in the end he was forced to employ two widely recognised rules rather relying purely his own authority. The first of these was the well-established preference for male entailment in respect of lordly grants and international marriage agreements, by which he undermined the Mortimers' common law claim. The second was the law of treason, which he used to destroy

[22] Given-Wilson (ed.), *Parliament Rolls*, vii, 421.
[23] TNA: C53/167 nos 2 and 4.
[24] Edward duke of Aumale is described as 'our very dear brother' in TNA: C53/167 nos 5–10 (23 April, 1 May and 9 May 1399), nos 16–17 (13 and 24 April 1398). See also J. Nichols (ed.), *A Collection of all the Wills now known to be extant of the Kings and Queens of England* (1780), 196, 199.
[25] Mortimer, 'Richard II and the Succession', 134.

the Lancastrian one. The overarching framework of succession law remained too strong for Richard simply to appoint his successor.

The Lancastrian succession

On Henry of Lancaster's return to England in 1399, Edmund, duke of York, the keeper of the realm, surrendered to him at Berkeley Castle. In so doing he effectively gave up any claim to be Richard's heir. Following the capture of the king, there was an intense period of discussion as to what to do next – whether to depose him or allow him to reign but not rule, and, if the former, on what basis Henry should claim the throne. Eventually, the decision was taken to depose the king. Henry officially succeeded because he was 'descended by right line of the blood from the good lord King Henry the third'.[26] Some fifteenth-century commentators took this to mean that Henry was relying on the idea that his maternal great-great grandfather, Edmund Crouchback, was actually the elder son of Henry III. As Adam Usk's chronicle reveals, this was not the case, and Henry's advisors knew it.[27] Instead, he claimed descent from Henry III because he was that king's male heir. Several contemporary sources overtly state this. Two relate in Latin and English how Henry in Parliament 'read in a bill how he descended and came down lineally of King Harry the son of King John, and was the next heir male'.[28] Another says he claimed the throne as 'the nearest male-heir and worthiest blood-descendant of the good King Henry the third, son of King John'.[29] The subtlety of this male-line claim was that it allowed Henry to claim the thrones of both England and France. Taking the position that the principle of representation did not apply with respect to women – as adopted by Baldwin of Hainault and Alexander of Scotland, and subsequently adopted by Edward III and Richard II and all four Scottish entailments of the fourteenth century (those of 1315, 1318, 1324 and 1373) – the Mortimers were ruled out of the English inheritance. But as Isabella of France had been the only surviving child of Philip IV of France and had outlived him and her brothers, so she was his sole heiress. That meant her son, Edward III, was the true heir to the throne of France (in English eyes, at least). In this way Henry could claim the throne of France through a woman – on the same basis as Edward III had

[26] Given-Wilson (ed.), *Parliament Rolls*, viii, 25.
[27] Chris Given-Wilson (ed.), *The Chronicle of Adam Usk 1377-1421* (Oxford, 1997), 64-7.
[28] E. S. Haydon (ed.), *Eulogium Historiarum sive Temporis* (3 vols, 1858-63), iii, 383; J. S. Davies (ed.), *An English Chronicle of the Reigns of Richard II, Henry IV*…, Camden Soc., 64 (1856), 18.
[29] Chris Given-Wilson (ed.), *Chronicles of the Revolution* (Manchester, 1993), 166, quoting Corpus Christi College MS 59.

done – while at the same time legally denying the Mortimers any possibility of claiming the throne of England through a woman.

The only problem with Henry's claim was that it was so complicated that there was little chance of persuading the country as a whole of its correctness. From the forty-shilling freeholder to the market stall trader, the common law was the code by which they all lived and prospered. It stated that the daughters of a man's eldest son took precedence over the sons of his second. As far as they could see, Henry IV's accession over and above Lionel's representatives was against the law. In the wake of Richard's death, support for the Mortimer claim was a form of popular revolt and a means to combat the Lancastrians' illegal claim as much as it was to promote the supposed legality of the Mortimer one.

Henry IV's own arrangements for the inheritance of the throne were simplified by virtue of him having four sons. The eldest, Henry, was created Prince of Wales and declared heir to the throne in Henry's first Parliament, in 1399. In 1406, a year after first experiencing the severe ill-health that was to plague him for the rest of his life, Henry drew up a settlement of the throne. Wisely he took the precaution of having it passed as an Act of Parliament. This Act settled the throne on his male descendants, in the same way that Edward III's entailment had done. It did not meet with everyone's approval, however. It implied that, if Prince Henry were to die before his father leaving only daughters, then they would be passed over for Henry's brother, Thomas. This seems not to have been acceptable to the prince or his supporters. Henry IV was forced to pass a second Succession Act later that same year, reversing the first and allowing the throne to pass to the heirs of Prince Henry's body and those of his brothers in turn. Having done this, the line of succession was clarified and officially recognised. The only doubts about the legitimacy of the Lancastrian dynasty between 1406 and 1460 did not arise from a legal basis but from a political one, when the rightfulness of an alternative claim to the throne became a justification for political rebellion.

To recapitulate, the rules governing the succession hardly changed between the reign of Henry III and Edward III. The exceptional case was Edward I, who was prepared to allow the principle of representation to apply to the daughters of deceased heirs as well as sons. That exceptional case was never tested and fell by the proverbial wayside. Richard II did not noticeably deviate from Edward III's position. He may have spoken freely in 1386 about the Mortimers' having a claim to the throne but he never officially recognised such a claim, and officially he too followed the principles of male primogeniture and male-only representation in his consideration of the future succession. It was Henry IV who finally opened the door to succession through women, albeit reluctantly, in his second Succession Act of 1406. This remained in force on 10 October 1460, when the then duke of York raised the question all over again.

Richard of Conisbrough

William Serle – the man who faked Richard II's survival in Scotland – was executed in 1404. In fact, he was 'executed' many times: he was drawn and hanged and cut down unconscious but alive in every town he passed through on the way to London, where he was finally drawn, hanged, disembowelled, quartered and beheaded. The publicity as well as his actual death did much to quell the calls for Edmund Mortimer, earl of March, and his brother, Roger, to be recognised as rightful heirs to the throne. An attempt by Constance of York in 1405 to spring them from their custody in Windsor Castle was thwarted. Gradually they lost their potency as potential opposition leaders as Henry IV's reign inched away from disaster towards a series of modest successes. The reopening of the war with France by Henry V in 1415, however, was not universally popular, and once again the Mortimers became the focus of attention. If Henry could be replaced by rivals, the war would be stopped in its tracks. In addition, there were personal interests at stake, most clearly displayed by the actions of Richard of Conisbrough, the younger son of Edmund, duke of York, and the brother-in-law of Edmund Mortimer, earl of March.

Richard was baptised on or about 20 July 1385, ostensibly the second son and third child of the duke of York and Isabella of Castile.[30] The duke and Isabella had had their first child, Edward, in 1372. Their daughter, Constance, had followed in about 1374. Richard was thus conceived more than ten years after his sister. One has to suspect that the boy was not his father's true offspring. Contemporary suspicions were inflamed further by his mother's background: she was the illegitimate daughter of Pedro, king of Castile, by a mistress, Maria de Padilla. The author of Isabella's entry in *ODNB* quotes Thomas Walsingham in describing her as 'worldy and sensual' and suggests that she found her husband 'boring'.[31] A manuscript copy of Chaucer's *The Complaint of Mars* was annotated by its owner, John Shirley, with the information that the inspiration for the poem was a love affair between the duchess and John Holland, the womanising, murderous half-brother of Richard II. This was no mere passing comment: Shirley was a gentleman in the service of Richard Beauchamp, earl of Warwick, who was then married to Isabel Despenser, the granddaughter of the supposedly cuckolded duke.[32] Interestingly, Isabel's mother, Constance of York, had herself been the mistress of John Holland's nephew, Edmund Holland, earl of Kent, and had had an illegitimate daughter by him. Thus, when Shirley was writing, it was treated as an open secret in the

[30] G. L. Harriss, 'Richard, earl of Cambridge', *ODNB*, version revised 24 May 2012.
[31] Anthony Tuck, 'Edmund, first duke of York', *ODNB*., revision (3 January 2008).
[32] T. B. Pugh, *The Southampton Plot* (1988), 90, 106 n,6.

Warwick household that Lady Warwick's mother and grandmother had both had illicit affairs with members of the Holland family.

Edmund of Langley hardly took any notice of this belated third child. He did not mention him in his will, even though the boy was fifteen when it was written, in 1400.[33] He seems to have made no financial provision for him at all, which was unusual in the upper reaches of the royal family. Edmund's eldest son also took no notice of his much younger brother in his will. The duchess left her possessions to the king, asking only that he provide her younger son Richard with a life annuity of 500 marks, seemingly knowing that her husband would never make any provision for the boy.[34] Henry IV also ignored Richard, despite him being supposedly his first cousin. Not until the reign of Henry V was Richard given a title – and then only after the king was petitioned to do so – and he was left with his paltry 500 marks per year, which was hardly the £1,000 that was then considered suitable for an earl. No significant positions of authority were entrusted to him by the royal family. Nor was he given a wealthy bride. When he married Anne Mortimer, the sister of the earl of March, he did so in secret and without the king's permission. In short, there is every indication that the royal family believed him to be illegitimate. They simply could not say so without one of his parents making it a matter of public record – and both of them were dead by 1402.

It is just possible that Richard did not know whether or not he was illegitimate. We, however, have the additional benefit of DNA analysis to guide us. Although Richard's grandson, Richard III, was purportedly the great-great-grandson of Edward III, at least one of the intervening male-line generations was the result of an adulterous affair, as shown by Richard III's Y-chromosome DNA.[35] It seems likely that John Holland was the true biological ancestor of the Yorkist dynasty, as John Shirley's copy of *The Complaint of Mars* suggests. Moreover, the failure of Edmund, duke of York, to mention Richard in his will, Isabella's modest legacy to him, and his rejection by the rest of the royal family strongly suggests that they believed he was illegitimate, and belief here is the crucial thing. Hence Richard's disaffection with the royal family and his attempted coup in 1415, on the eve of the Agincourt campaign, when he discussed with Sir Thomas Gray putting his brother-in-law, the earl of March, on the throne. Inevitably, he paid for his treason with his life.

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[33] Nichols (ed.), *Collection of all the Wills*, 187-9; Pugh, *Southampton Plot*, 90-1.
[34] Pugh, *Southampton Plot*, 106 n. 8.
[35] Turi E. King *et al.*, 'Identification of the Remains of Richard III', *Nature Communications* (2014), https://doi.org/10.1038/ncomms6631 downloaded 3 December 2021; W.M. Ormrod, 'The DNA of Richard III: False Paternity and the Royal Succession in Later Medieval England', *Nottingham Medieval Studies,* 60 (2016), 187-226.

This brings us to his son, Richard Plantagenet, duke of York, the man with whom we began. Did he suspect his father's illegitimacy? Given that it was talked about within his cousin's family and known to Chaucer, it seems highly likely that he did. Besides, it is difficult to see otherwise why he did not advance his claim to the throne before reaching the age of forty-nine. In 1451, his supporter Thomas Young urged that the duke be acknowledged as the heir apparent – almost certainly acting on behalf of the duke – but, when the petition was dismissed, the duke accepted the decision.[36] When the duke was appointed Protector of the Realm in 1453, after the king suffered a mental collapse, he still did not advance his royal claim. Even in 1455, when he rode against the king with banners unfurled at the Battle of St Albans – the very definition of treason – he did not lay claim to the throne. Only after the Lancastrians succeeded in having him declared a traitor in the 1459 Parliament, did he finally make his case. It was a last-ditch attempt to save his position and his authority. In other words, his claim was a tactic in his wider war against the Lancastrians. The war came first, not his dynastic ambitions. Just as Edward III had claimed the throne of France as a tactic in his war against the French king in 1340, so Richard claimed the throne of England as a tactic in his war against Henry VI.

The 'rightfulness' of the Yorkist claim

Prior to the duke making his claim on 10 October 1460, the Lancastrians were undoubtedly the rightful occupiers and heirs of the English throne. They had in their favour both the principle of male primogeniture and several past precedents that excluded inheritance through a female representative of a deceased heir, such as Philippa, countess of March. Their claim was also recognised by statute law – namely, Henry IV's second Settlement Act of 1406. The duke of York in marked contrast had neither precedent nor law on his side. Although he actually had two claims to the throne – one through the house of York and another through the house of Mortimer – he could draw on neither. The former, which had been given weight by Richard II, had been relinquished by Duke Richard's grandfather, the first duke of York, in 1399 and overturned by Parliament the same year. In addition, it could be called into question because of the dubious paternity of his father, Richard of Conisbrough. Therefore the duke had to rely on his Mortimer claim, through his mother, which could only be justified as 'rightful' by recourse to the common law. But the lawyers in 1460 were aware that the succession to the throne was incompatible with the common law and therefore not governed by it. This claim also ran directly against the Settlement Act of 1406. It was thus a novelty, a departure from the existing law of succession. There was nothing 'rightful' about it.

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[36] P. A Johnson, *Duke Richard of York 1411-1460* (Oxford, 1988), 98-99.

The crucial point in all of this is that the law of succession was not static but responsive. It was always possible for the law to change – as it had done several times over the post-Conquest period. The legal experts in 1460 who found themselves facing the duke of York's challenge knew they were not in a position to deem the duke's claim rightful, so they declined to give an opinion. But they also knew that Parliament could change the law. The lords could adapt the law of succession so that it better reflected common law principles, even if it could not entirely mesh with them. This is why the lawyers could not find a legal solution in 1460 but the lords *could*, despite them having less legal experience. With the lords' acknowledgment of the duke as heir to the throne, the law can be said to have changed, and a new precedent set.

From 1460 it was lawful for a member of the royal family to claim the throne through descent from the daughter of a king's son who had predeceased his father. In other words, the principle of representation came to be applicable to the granddaughters as well as the grandsons of English kings. This permitted Edward of York to claim the throne in 1461 and become Edward IV. The whole process provides a vivid example of how the law of succession developed over the medieval period. It is also another example of how much the broadening of the medieval outlook contributed to the making of the modern world. For the legal basis of the duke's claim in 1460 was the same as that which brought Queen Victoria to the throne in 1837. Victoria's father, Edward, duke of Kent, died on 23 January 1820, a few days before his father, George III, leaving only one child, Victoria. If the law of succession had not changed since the fourteenth century, the heir to the throne in 1837 would not have been Victoria but Ernest, George III's fifth son, the king of Hanover. What was unlawful in 1376 and not yet 'rightful' at the time of the duke of York's claim in 1460 was, from then on, regarded as lawful.

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