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The Juristic Basis of Dynastic Right to the French Throne, by Ralph E. Giesey.\* 51 Transactions of The American Philosophical Society- New Series, part 5. The American Philosophical Society, Philadelphia, 1961. Pp. 47. \$1.50.

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## Book Reviews

*The Juristic Basis of Dynastic Right to the French Throne*, by Ralph E. Giesey.\* 51 Transactions of The American Philosophical Society — New Series, part 5. The American Philosophical Society, Philadelphia, 1961. Pp. 47. \$1.50.

The principle of legitimate succession to the French throne by dynastic right is, in one form or another, of very considerable age. By comparison the English notion of dynastic right is relatively modern, and in the juristic sense of right by ancient custom of the realm, the English principle has long since been abandoned. The appearance of this study offers an opportunity for historical comparison of French and English constitutional precepts.

The Christian monarchy in France dates from the fifth century. Succession of the first dynasty, the Merovingian dynasty of Clovis, was regulated by the principles of Germanic kin-right. Pepin, who usurped the throne in 751, and his Carolingian successors substituted clerical consecration as the *sine qua non* of kingship. They also revised the principle of Merovingian succession to fit their own theory. It seems that Hincmar of Rheims developed the doctrine that Clovis' baptism by St. Remi with what was termed holy oil sent from Heaven in the beak of a dove was said to give Clovis' kingship the necessary divine sanction. Hence consecrations in unbroken succession into the Carolingian age were said to supply the essence of kingly power.<sup>1</sup>

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1. "The French have a vulgar tradition of their holy Oyl and a viol of it that a Dove brought from Heaven . . . which is undiminished . . . But the truth is, they have not warrant enough to prove that either any Oyl came from Heaven for King Chlovis; or if it did, that it was imploied about anointing him King." SELDEN, *THE TITLES OF HONOR* 112 (3d ed. 1672). Selden goes on to point out that Clovis had been king fourteen years before his baptism. *Id.* at 114. The French ampulla in the shape of a dove was destroyed in 1793, but a fragment of it was preserved and used at the coronation of Charles X in 1824.

"In the later ages we have memory of a tradition (as good as that of the holy Viol at Rheims) of holy or heavenly oil given to anoint some of our Kings. The blessed Virgin (they say; and I have met it related both by itself as a single story and remembered in very good authors) gave to *Thomas* Archbishop of *Canterbury* (being in banishment under our *Henry* II) a golden Eagle full of precious Oil, inclos'd in a stone vessel, commanding him to preserve it, and foretelling him *quod Reges Anglorum qui ungerentur hoc unguento, pugiles essent Ecclesiae, & Benigni & terram amissam à parentibus pacificè recuperarent, donec Aquilam cum Ampulla haberent.*" He goes on to say that *Henry* IV was the first king to be anointed with it. He adds that all this is rather a matter for personal belief. *Id.* at 117-18. The eagle referred to is the prototype of the ampulla

When Hugh Capet and his successors usurped the Carolingian crown, the notion of continuity was preserved in the rite of consecration. Through the centuries that preceded and followed the accession of Hugh Capet there was a distinct dynastic element in the succession as well. This was the central feature in the king-right doctrine of the Merovingians. For them it answered the dual question: *Who* should rule as king and *why* should he rule? He who ruled did so *because* of kin-right, and *since* his kin were succeeded from a line of demi-gods, he *should* rule. The Carolingians changed all this. Who was consecrated depended in fact on kinship and other circumstances, but the divine sanction was supplied by consecration. The Capetians heightened the emphasis of divine intervention to explain their usurpation: God, if displeased with bungling of the incumbent dynasty, might choose a better man and his issue to receive divine consecration. At roughly the same time, insofar as there was any underlying theory of English regal power, that principle was *election*.<sup>2</sup>

Though Capetial succession was theoretically essentially sacral, the family took great care that its line was maintained. The Capetians were assisted in this by the fact that for the three hundred and twenty-seven years after Hugh Capet's accession every French king had a son to succeed him. Jean Bodin, writing in the latter half of the sixteenth century, noted that the Capetian principle that the successor must be *male* and the *nearest* male blocked the ambitions of bastards, mayors of the palace, and younger sons. Even so a great deal was made of the marriage of Philip II to a princess of Carolingian descent — *reditus regni Francorum ad stirpem Caroli*.<sup>3</sup> A nice parallel can be drawn to the marriages of Henry I and Henry VII of England whereby legitimacy was accentuated by association with the previous dynasty.

To be doubly sure of maintaining their succession the earlier Capetian rulers nominated a successor *rex designatus* in the lifetime of the ruling sovereign. Therefore on the king's death

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of the current English coronation regalia. The existing English ampulla dates from 1660.

2. See JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 30-32 (3d ed. 1954). Tanistry or seniorat—succession of the eldest relative of the deceased monarch—also prevailed in England from time to time (i.e., from 858 to 900 and in 946). KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 12, n. 3 (Chrimes transl. 1939).

3. *Id.* at 17-18.

there was a *king* to succeed him, though not yet *rex consecratus*. Philip II (1180-1223) was the last king to hold the title *rex designatus*; his successors merely relied on a quick coronation to assure the succession. In 1270, however, the barons recognized Philip III as a king in full right prior to consecration on the death of St. Louis.<sup>4</sup> This was merely a recognition of the significance of primogeniture in dynastic succession — giving it the same place that it held in feudal law generally.

The hint of a crisis in French dynastic succession came in 1316, when the inept Louis X died survived by a daughter (dubiously his) and a pregnant wife. Louis' brother, Philip V, was named regent, and after the birth and short life of Louis' son, Philip was crowned at Rheims. At the time nothing was said of the "Salic law,"<sup>5</sup> and Philip V's accession was ratified by the Estates General shortly thereafter. On Philip's death without issue his brother Charles IV ascended the throne without incident. On his death in 1328 with only female heirs<sup>6</sup> the real crisis was reached. For the third time in a decade a French king had died without a male heir. There were two leading claimants. Queen Isabella of England, the sister of the last three French kings, asserted the claim for her infant son Edward III as the closest male relative of the deceased king. The other claimant was Philip of Valois, son of Charles of Valois, second son of Philip III (1270-1285). Philip II's eldest son Philip IV (1285-1314) was, of course, the parent of Louis X, Philip V, Charles IV, and Isabella of England. The Estates General was called and Philip VI's claim was approved.<sup>7</sup> Over the next decade various indications were given that Edward would do homage to Philip for his French domain, thus recognizing the legitimacy

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4. But St. Louis seems to have been so dubious of the succession should his son Philip predecease him or die with him on crusade that before leaving on the crusade of 1269 he took great care to provide for the rights of Philip's son.

5. Louis' son, John, lived but a few days. It is notable, however, that it was not until two centuries had passed that this unconsecrated and unproclaimed "king" was listed as a king of France. He is listed as John I. The author remarks: "Legitimacy via consecration is here completely eclipsed." At p. 41. Louis XVII is also numbered as a king of France though not consecrated.

On the death of the infant John, some of the barons thought that the rights of Louis' daughter should be considered, but Philip was able to arrange for his coronation, nonetheless.

6. Again the widow of the king was pregnant but later gave birth to a daughter. Philip V had had a son who predeceased him.

7. Giesey remarks: "We may presume that actually the legal arguments in 1328 centered around feudal custom — at least that much law the barons would have known. The *Libri Feudorum* called for male succession only, but not so all the French *coutumiers*." At p. 11. In the early fourteenth century, an Assembly of Notables was called on several occasions to settle the succession.

of his claim. For military reasons, however, in 1339 Edward asserted his claim as king of France<sup>8</sup> and sent Pope Benedict and the College of Cardinals an elaborate justification of his claim to the French throne, an asserted dignity of the English crown perpetuated until the eighteenth century.

The choice of Philip over Edward was justified by a rule of the Salic law, the ancient Frankish private common law dormant since the time of Charlemagne. The rule found in the title *de alodis* is plain enough, but its applicability to dynastic right is far from clear. The rule appealed to is as our author renders it: "Of the Salic land let no portion pass to a woman, but all the land of this nature, let belong to the virile sex."<sup>9</sup> This was taken to mean that the throne could not be ascended by a woman or a claim made through a woman. But the author remarks perceptively that there probably would have never been any dynastic principle of Salic law had the choice not been between an infant king of England and an adult French prince.<sup>10</sup> The rule of the *Lex Salica* enjoyed a real renaissance during the fifteenth and sixteenth centuries:<sup>11</sup> Louis XII succeeded Charles VIII (1499) and Francis I succeeded Louis XII (1515) in accordance with the principle. But the crucial passage itself appeared in substantially doctored form to fit the claim of the male line. By the time the next crisis developed on the death of the Duke of Anjou, Henry III's younger brother and heir, in 1584, the fundamental law of dynastic right seemed fixed, though political considerations spawned juristic differences of opinion. Before his death Henry III designated as his heir a kinsman nineteen degrees<sup>12</sup> removed

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8. See Lowe, *The Considerations which Induced Edward III to Assume the Title King of France*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 537 (1901).

9. The author's note reads, in part, as follows: "De terra vero Salica nulla in muliere hereditatis transeat porcio, sed ad virile sexus tota terra proprietatis sine possedeant, ed. K.A. Eckhardt, 234, Weimar, 1953; for the sake of ease of translation, I have assumed *perteneat* for *possedeant*, as is found in the edition of J. F. Behrend, 78, Berlin, 1874." At p. 17, n. 56.

10. Giesey quotes from 2 Viollet, *Histoire des Institutions Politiques et Administratives de la France* 81 (Paris 1898): "If the French heir has been a relative through males, our public law, modeling itself on the interest of the fatherland, would not have failed to proclaim the rights of women." At p. 11.

11. But even if the written rule of the *Lex Salica* had been contrary to current usage, it might have been put aside in favor of presumably more ancient unwritten custom evidenced by current practice. This curious line of reasoning of an earlier era is explained in KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 160-61, 169 (Chrimes transl. 1939).

12. Giesey says twenty-one degrees. Giesey is not always consistent or accurate in his counting of degrees of kinship. See, for example, pp. 35-36. At p. 36 he says that "Henry IV was actually three degrees closer to St. Louis than Henry

from him, but the nearest claimant in the direct male line from Hugh Capet and the nearest common ancestor, St. Louis.<sup>13</sup> The contemporary writer François Hotman regularized this juristically in his theory of *suitas regia*. But Salic law was still the prevailing slogan, for it was, as Giesey puts it, "incisive, explicit, patriotic — an all-in-one policy."<sup>14</sup>

Of course in the meantime the succession had been tampered with by Charles VI in the Treaty of Troyes in favor of Henry V of England, but the renounced Dauphin had, with much effort, finally achieved his coronation at Rheims. After his French grandfather and his father died in quick succession in 1422, the claimant was again an infant English king, Henry VI. A later instance of tampering with dynastic right by treaty came in Louis XIV's renunciation of claim to the French throne by the Bourbon ascendant to the Spanish throne and his heirs at the Treaty of Utrecht. This, of course, accounts for the ultimate succession of the Orleans branch of the French house rather than the Spanish branch.<sup>15</sup> But when the break came in 1830 any other result would have been unthinkable, and it was, after all, a legislative act. The author does not discuss post-eighteenth century developments apart from writings of that period.

When compared with the French doctrine of dynastic succession, its English counterpart appears shabby indeed. For four centuries after the conquest no juristic principle had developed in England. Neither strict primogeniture nor the "Salic law" doctrine had been clearly enunciated. An entry in the Close Rolls of 1229<sup>16</sup> enunciates the rule that claims through women

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III was." Henry III was in the ninth degree in descent from St. Louis; Henry IV, in the tenth.

13. Cardinal Bourbon, Henry IV's uncle, had the next best claim. Henry and his uncle were the sole male claimants in the male line from Hugh Capet. It is to be regretted that the author has not furnished a graphic representation of the genealogy. Nor does the author adequately explain the genealogy in his text.

At that time there was some speculation whether Henry IV stood as senior male claimant in representation of his father or whether his uncle's claim was really superior. Such thoughts chiefly plagued the Papists who were troubled by Henry's Protestantism.

14. At p. 21. Aegidius who died in 1316, when the failure of male lines in the senior Capetian line could scarcely have been anticipated (see note 6 *supra*), suggested the solution in case of contested succession in favor of one standing in the genealogical position of Philip VI. Baldus (1327-1406) anticipated the precise situation of this ultimate succession of the House of Bourbon.

15. Writing in the early years of this century Henri de la Perrière concluded that Don Jaime of the Spanish Bourbon-Angevins is theoretically king of France by divine right. *LE ROI LÉGITIME* 158 (Paris 1910).

16. Close Rolls of 13 Hen. III, memb. 15, dorso: "*non est consuetudo vel lex in terra nostra Angliae, quod filia fratris alicujus primogeniti fratrem juniorem*

could not bar younger sons to the throne, but this is but an isolated expression of sentiment prompted by current political considerations,<sup>17</sup> and the problem which it anticipated never arose. The more acute problem of two claimants — one from a woman and the other by a woman — had already arisen long since in the dispute between Stephen and Mathilda. But the resolution of that dispute could scarcely amount to juristic precedent and Stephen had asserted that he held the throne by election.<sup>18</sup> Primogeniture may be said to be the general rule from Henry II through Richard II, but there are notable irregularities in the accession of John and in the process of succession within that period (1327) as well as at its end (1399).<sup>19</sup>

Thereafter irregularity can almost be said to be the rule until the accession of James I. It never seems to have occurred to Henry IV to assert the Salic law notion later espoused by Fortescue in favor of the Lancastrian title in contrast to that of the Yorkists.<sup>20</sup> Rather Henry IV invented the story that his mother's ancestor, Edmund of Lancaster, was the eldest son of Henry III (thus older than Edward I). He therefore claimed through a woman in a spurious senior male line. He did not assert himself as an heir of Edward III from whom he actually stood in the senior male line. His was, in fact, a Parliamentary title. The first real assertion of a juristic basis in dynastic right to the English throne came in 1460 with the claim of Richard of York. From Edward III his was the eldest line headed by a male (Lionel of Clarence, third son of Edward III) but there were two women in his chain of title, his mother Anne and his

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*patri suo succedentem haereditarie super haereditate suo possit vel debeat impetere.*" See HARDY, A DESCRIPTION OF THE CLOSE ROLLS IN THE TOWER OF LONDON 140 (1833). But what precedent might have been cited for such a custom?

17. At the time Henry III had attained his majority just two years before and was as yet unmarried as was his brother Richard of Cornwall. Richard was clearly better fit to succeed than an infant daughter of Henry III. At the time Eleanor of Brittany was probably still imprisoned. Her line was senior to that of Henry III.

18. Henry I's coronation charter implies hereditary right — *post obitum patris Dei gratia rex Anglorum*. Stephen's asserts election — *Dei gratia assensu cleri et populi electus*. JOLIFFE, THE CONSTITUTIONAL HISTORY OF THE MEDIEVAL ENGLAND 202-03 (3d ed. 1954).

19. There had also been talk of deposing John and Henry III. The idea of deposing John had, in fact, gone much further than talk when Prince Louis of France landed in England five months before John's untimely death in 1216. Louis claimed the English crown not only by election but through his wife Blanche of Castile the daughter of John's sister, Eleanor. Such notions can scarcely square with a developed principle of strict, dynastic descent, divinely ordained.

20. Fortesque later recanted his adherence to the Lancastrian claim in order to get a reversal of his attainder.

great-grandmother Philippa, daughter of Lionel. When the Chancellor at the King's request submitted the question to the judges for counsel they denied that giving such counsel was their function and the matter was "above the lawe and passed ther lernyng."<sup>21</sup> But though the Yorkist claim prevailed, contemporary opinion does not seem to recognize a fixed juridical principle, either before or after 1460.<sup>22</sup> The Tudors soon followed by usurpation, and Henry VIII's successors were fixed by act of Parliament, giving Henry the ultimate power to fix the succession by will in case of extinction of his line. This will was almost certainly executed in favor of the heirs of his younger sister, Mary, rather than his elder sister Margaret. It is a strong indication of a general recognition of the principle of dynastic succession as a matter of custom in favor of the elder blood, though the claim was made through women, that James I's accession to the English throne occurred without incident. But this juristic principle is limited to the seventeenth century. Thereafter the succession has been arranged by Parliamentary act though the principle of the elder in blood and transmission of the crown to and through women operates in the Parliamentary system.

The crucial dates in French succession are 1328, 1589 and 1830. Due to later development of English juristic principles the crucial comparative dates for English constitutional history are 1689 and 1715. At both these times the English solution was a Parliamentary one with religion as the controlling issue. In 1589 religion was a vital factor in France, but Henry IV's political choice was personal. In 1715 and 1830 on both sides of the Channel the succession was ordained by legislative act, with a variety of factors operating. Slow to take up a juristic concept of succession, the English proved themselves better able

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21. 5 Rot. Parl. 376. When the advice of seargents and attorneys was then sought, they responded that if the matter was "soo high that it passed the lernyng of the Justices, it must nedes excede their lernyng." *Ibid.*

But when Richard's son finally seized the throne as Edward IV he reckoned his reign from his own proclamation. Parliamentary recognition of his position then rendered Henry IV, V and VI pretended kings. See MATTLAND, CONSTITUTIONAL HISTORY OF ENGLAND 194 (1908).

22. In the charges against the Duke of Suffolk in 1450 it is stated that he proposed to marry Margaret Beaufort to his son, John, so that John would become king through his wife "presumyng and pretending her to be next enheritable to the crone." 5 Rot. Parl. 177.

Warkworth says that there was an idea of marrying Edward IV's eldest daughter to the son of Warwick's brother, Montague, "whiche, by possibylite, shuld be kyng of Englande." CHRONICLE OF THE FIRST THIRTEEN YEARS OF THE REIGN OF EDWARD IV 4 (1839).

to cope with anticipated breach in advanced planning for what would otherwise have been a crisis in 1715. Finally, in 1873 the Bourbons of France ("Henry V") managed to be as intransigent as their seventeenth century counterparts in Britain and thus lost out completely.

Another contrast between English and French usage may be pointed up in the attitude toward the coronation. Apart from the sanctity of the coronation oath, I cannot see that the English in their essentially secular attitude have ever attached any primary importance to regal consecration, though there is one medieval instance of a son's coronation in his father's lifetime.<sup>23</sup> To an Englishman an oath or an instrument under seal is very much more important than canonical incantation. In the seventeenth and eighteenth centuries the doctrine of divine right was certainly vital to many, but the ultimate issue for them was *sangre not sacre*.

The number of pages of this work belies the extent of the study which is published in quarto size in closely printed eleven point type in two columns. Anyone interested in constitutional history should find the study quite absorbing.

*Joseph W. McKnight*†

*Competition in the Regulated Industries: Transportation*, by Carl H. Fulda. Little, Brown and Company, Boston, 1961. Pp. xxviii, 533. \$20.00.

This is the fourth volume in a Trade Regulation Series, presenting the subject "with the greatest possible clarification, as a guide for the general practitioner who has little experience in this field, for the economist or business executive who wants to be quickly orientated . . . and for the specialist who desires a ready reference tool." This volume, dealing as it does with the tangled skein of present-day transport regulation is hardly a beginner's volume; it will be invaluable to the economist and business executive, however, and to the specialist searching for

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23. To insure the succession for his son Henry, Henry II had his son crowned King of England in 1170, an event that is of little importance except with respect to the part it played in the struggle between Henry II and Becket. Henry predeceased his father, who was succeeded in the normal course of things by Richard I.

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