

Kings Two Bodies

DIGNITAS NON MORITUR

to a large extent. Those features of a highly abstract nature originated, in their entirety, in Canon Law and Roman Law where they served to characterize the only one-man corporation which the two Laws had constructed and which they described as *Dignitas*. The English lawyers adopted the essence of that notion and, while making little use of the notion as such in the sense of a fictitious person, they ingeniously adapted all its characteristics to existing English conditions and transferred all its ingredients to the most prominent office, that of the king, and to this office's symbol, the Crown.

3. *Dignitas non moritur*

A continuity of the king's natural body—or of individual kings acting in hereditary succession as “guardians of the Crown”—was vouched for by the dynastic idea. The perpetuity of the sovereign rights of the whole body politic, of which the king was the head, was understood to be resting in the Crown, hazy though this notion may have been. Both principles—that of continuous succession of individuals and that of corporate perpetuity of the collective—seem to have coincided in a third notion without which the speculations about a king's “two bodies” would remain almost incomprehensible: the *Dignitas*.

It will be recalled that ever since the twelfth century the custom arose to emphasize in some groups of writs (especially those concerned with the courts Christian, but others as well) that certain legal cases pertained *ad coronam et dignitatem regis*.²²⁸ Moreover, kings not rarely were charged—we may think of Edward II or Richard II—with having “blemished and prejudiced the Crown and the royal Dignity and the heirs Kings of England.”²²⁹ It would be a mistake, though, to understand the word Dignity only in its moral or ethical qualifications, that is, as something contrary to an “undignified” conduct—although this connotation was by no means absent. Likewise, it would be a mistake to assume that the terms Crown and Dignity were co-terminous and exchangeable, or simply redundant, even though,

²²⁸ Above, nos. 107f.

²²⁹ See, e.g., *Rot. Parl.*, III, 360, the cancellation (in 1397) of the judgment against the Despensers which was said to have been “*emblemissement et prejudice de sa corone et sa dignitee royale et de ses heires roys d'Engleterre.*” See Hartung, “Krone,” 17f; also 18, n. 4.

and unambiguously what the Crown was. Crown, after all, was then a live conception, and owing to its lifelike complexity it resisted all efforts to grasp its essence in unambiguous terms: what appeared as correct from one angle, was felt to be wrong from another.

What can be said is, as Sir Francis Bacon put it, that king and Crown were "inseparable, though distinct."²²⁶ Also another thing seems to emerge quite clearly: that the Crown was rarely "personified" but very often "bodified." Comparable to the *corpus mysticum*, the Crown was and remained a complex body, a body politic which was not separated from either its royal constituent as the head nor from those co-responsible for the *status coronae* as limbs. Who those limbs were depended upon the occasion: they were sometimes the councillors, sometimes the magnates, and sometimes the Lords together with the Commons in Parliament. The surprisingly long survival in England of the mediaeval organological concept of government was sanctioned by the existence of the representative body of Parliament in which the *corpus morale et politicum* of the kingdom really lived and became visible. To be sure, the Crown was individually ever present in the king; but the Crown could become also quasi-corporate *ad hoc*, for some purpose of taxation or jurisdiction or administration,²²⁷ and corporately it became visible when actually the king wore the insignia (as Henry VIII said) "in the time of Parliament, wherein we as head and you as members are conjoined and knit together in one body politic."

At any rate, the Crown in late mediaeval England was not the fictitious person which the continental "State" became during and after the sixteenth century, a personification in its own right which was not only above its members, but also divorced from them. This step, apparently, was not taken in mediaeval England. For all that, however, fiction or traits of fictitiousness came into the picture also in England when the Tudor lawyers began to distinguish between the king's body natural and the king's body politic, and began to identify the latter, which bore all the features and attributes of an "angel" or other supernatural being, with the "body politic of the Crown"—not wholly perhaps, but

²²⁶ *Ibid.*, 670.

²²⁷ Cf. Post, "Quod omnes tangit," 223, nos. 125f.

more often than not, they were lacking precision and were applied thoughtlessly and confusingly. The Crown, as we have tried to explain, was something that referred chiefly to the sovereignty of the whole collective body of the realm, so that the preservation of the integrity of the Crown became a matter "that touches all." The Dignity, however, differed from the Crown. It referred chiefly to the singularity of the royal office, to the sovereignty vested in the king by the people, and resting individually in the king alone. This, to be sure, did not imply that the royal Dignity was something that touched the king alone and did *not* touch all. Since the king's Dignity, together with his prerogative rights, had to be maintained and respected for the sake of the whole realm, the Dignity too was of a public, and not merely private, nature. It was as little a private matter as the *officium regis*, with which it largely coincided.

Officium and *Dignitas*, however, were not precisely the same thing either, and the distinction between the two notions sometimes caused trouble. The jurists—Bartolus, for example, or Baldus—pointed out most correctly that a person might have the Dignity of Senator or Proconsul, or have the Dignity of a *super-illustris, illustris, spectabilis, or clarissimus*, and yet be without Office. Bartolus, therefore, held that, strictly speaking, we would have to say "that the Office itself was not a Dignity, but had a Dignity attached (*habet dignitatem annexam*)."²³⁰ For all the correctness of these distinctions, the jurists at large had yet to succumb to the terminology which the Church and Canon Law had been developing at least since the thirteenth century. For according to canonical usage it was, so far as the notions were distinguished at all,²³¹ the *Dignitas* rather than the *Officium*

²³⁰ Bartolus, on *C.12,1,rubr.,n.38*, fol.537: "proprie enim loquendo aliud est officium, aliud dignitas," and *ibid.*, n.44: "vere enim officium ipsum non est dignitas, sed habet dignitatem annexam." Baldus, on *c.8 X 1,2,n.9*, *In Decretales*, fol.19: "Dignitas est in habendo officium et in illud exequendo. Et nota quod de iure civili sunt quatuor dignitates tantum proprie loquendo, scilicet superillustris, illustris," etc.

²³¹ The canonists seemed to be quite ready to identify *officium* and *dignitas*; see, e.g., Johannes Andreae, on *c.28 X 3,5,n.13*, *Novella*, fol.35: "Sciendum est quod dignitas et personatus et officium videntur synonyma." His reference is Innocent IV, *Apparatus*, on the same decretal, nos.6-7 (Lyon, 1578), fol.237, who makes a certain restriction with regard to *personatus*, "quia personae ecclesiarum dicuntur in Anglia, quae praesunt ecclesiis" (that is, *parsons*). See, for the connection of "parson-person" with the Corporation sole, Maitland, *Sel.Essays*, 87.

which became the subject of those legal speculations from which the *Dignitas* finally emerged as a corporate entity.

PHOENIX

As usual, it was on the basis of an individual and very concrete case that the canonistic theory reached its full growth. Under the pontificate of Pope Alexander III, the abbots of Leicester and Winchester served as delegate judges. When Winchester died, Leicester waited for the election of a new abbot and then resumed his work together with the successor, the newly-elected Abbot of Winchester. The pope approved of that substitution because, he explained, the power of delegate judge had originally been conferred on *The Abbot of Winchester*, mentioning only the place name, but without mentioning an individual name; the commission, therefore, carried over automatically to the new abbot, Winchester's successor.²³² Though the practice itself may have been observed long before, it was nevertheless Pope Alexander III—himself an outstanding jurist—who rationalized the existing practice and formulated a legal principle, the implications of which the jurists were quick to grasp and expand upon. The author of an *Ordo iudiciarius*, a book on canonical procedure, of the beginning of the thirteenth century stressed the difference between a delegation made with the mention of a proper name and one omitting the proper name; that is, in technical language, the difference between a delegation *facta personae* and one *facta dignitati*.²³³ At the same time, a canonist, Damasus (ca. 1215), in a gloss on Pope Alexander's decretal, produced the decisive phrase: *Dignitas nunquam perit*, "The Dignity never perishes, although individuals die every day."²³⁴ When included in the *Liber Extra* of Gregory IX, the decretal—known as *Quoniam abbas*—received the succinct heading: "A delegation made to the Dignity without expressing a proper name, passes

²³² See c.14 X 1,29, ed. Friedberg, II,162: ". . . quia sub expressis nominibus locorum et non personarum commissio literarum a nobis emanavit."

²³³ [Damasus], *De ordine iudiciario*, c.42, ed. Agathon Wunderlich, *Anecdota quae processum civilem spectant* (Göttingen, 1841), 84: "Item de persona ad personam, puta, si scribatur abbati Sancti Proculi, nomine proprio non expresso, extenditur ad eius successorem" (see also c.43). Gierke, *Gen.R.*, III,271,n.73; also Kuttner, *Repertorium*, 428,n.3, who (with H. Kantorowicz) doubts that Damasus was the author of the *Ordo iudiciarius*, although it was written ca. 1215.

²³⁴ Damasus, on c.14 X 1,29 (quoted by Gierke, *loc.cit.*): ". . . quia dignitas nunquam perit, individua vero quotidie pereunt."

ssa ordinaria, composed paraphrasing that head-isting practice: "... be-lerstood as one person, iction of the identity of had been formulated in IV in his Apparatus on phrase of the glossators ne.²³⁷

does not die"—this, of ot only to the appointee ointment. For the dele- the delegation likewise her from his person, in te on the pope's death; hich case the delegation eding pope as well, quia Holy See] See itself does not s maxim—though quite cause he inserted it into at a benefice given to a nless revoked, "will last not die."²³⁸ In this case, e Holy See which makes use, says the glossator of papacy or Dignity may m is forever."²³⁹

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refers to *Quoniam abbas* when aedecessoribus (not substituted Dignity)." Cf. Gierke, *Gen.R.*,

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5 (quoted by Gierke, *Gen.R.*, corruptibilis, papatus tamen, l. (Johannes Andreae), on that he whole doctrine, of course, and the imperial chancery was pal propaganda offered by the ce to this decretal that (pre-

Once the principle was established that a Dignity never dies, the jurists could not fail to notice that certain similarities prevailed between the *Dignitas quae non moritur* and a corporation, an *universitas quae non moritur*. By maintaining the fictitious oneness of the predecessors with potential successors, all of whom were present and incorporated in the actual incumbent of the Dignity, the jurists constructed a fictitious person, a "corporation by succession" composed of all those vested successively with that particular Dignity—a fiction which makes us think of the witches in Shakespeare's *Macbeth* (IV,i,112ff), who conjure up that uncanny ghostly procession of Macbeth's predecessor kings whose last one bears the "glass" showing the long file of successors. By this fiction, at any rate, the plurality of persons necessary to make up a corporation was achieved—a plurality, that is, which did not expand within a given Space, but was determined exclusively by Time.²⁴⁰ This was doubtless the prevailing theory until early modern times.²⁴¹

Perhaps no less profound an aspect of the nature of that corporation by succession was produced by a philosophic afterthought. When commenting on the decretal *Quoniam abbas*, Bernard of Parma, the composer of the ordinary Gloss, very ingeniously

sumably) Petrus de Vinea writes (*MGH, Const.*, II,297,23ff): "non in contemptu papalis officii vel apostolice dignitatis . . . set persone prevaricationem arguimus." See Brian Tierney, *Foundations of Conciliar Theory* (Cambridge, 1955), 87,n.4, who in general stresses the competence of Petrus de Vinea with regard to Canon Law.

²⁴⁰ See above, pp. 312f, and below, n.241. For the corporation by succession, see Gierke, *Gen.R.*, III,271f. Dr. R. Walzer, in Oxford, kindly called my attention to a passage in Al-Fārābī's *Model State* in which somewhat similar ideas are expressed: "The kings of the excellent state, who succeed each other at different times, one after the other, are all like one soul (!) as if they were one king, who remains the same all the time." See Al-Fārābī, *Idées des habitants de la cité vertueuse*, trans. by R. P. Jaussen, Youssef Karam, and J. Chlala (Publications de l'Institut français d'archéologie orientale: Textes et traductions d'auteurs orientaux, IX [Cairo, 1949]), 87. The idea of the Arabian author may be styled a qualitative monopsychism: if all kings are equally excellent, an individuation makes no sense because they are all like one king; and this would be true (as the author points out in the same chapter) not only with regard to Time—that is, to successive kings living at different times—but also with regard to Space, to all excellent kings living in various places at the same time. In the case of *Dignitas*, however, the unifying qualitative element is in the *Dignitas* itself rather than in the individual incumbents, who are "dignitaries" regardless of their personal merits. On the other hand, it would be difficult to identify without qualification the *Dignitas* with the Soul. At any rate, the parallel is interesting enough to be recorded here.

²⁴¹ Gierke, *Gen.R.*, IV,30, where the definition is found (n.32): "universitas . . . ratione pluriūm de futuro saltem."

on to the successor."²³⁵ Finally, the *Glossa ordinaria*, composed around 1245 by Bernard of Parma, while paraphrasing that heading, gave also the clear reason for the existing practice: ". . . because predecessor and successor are understood as one person, since the Dignity does not die."²³⁶ The fiction of the identity of the persons of predecessor and successor had been formulated in those very years also by Pope Innocent IV in his *Apparatus* on the Decretals, and it remained the stock phrase of the glossators and post-glossators for generations to come.²³⁷

Dignitas non moritur, "the Dignity does not die"—this, of course, was a principle which referred not only to the appointee but also to the dignitary making the appointment. For the delegating sovereign, the Pope, could make the delegation likewise in two ways: he could let it originate either from his person, in which case the delegation would terminate on the pope's death; or from the Dignity of the Holy See, in which case the delegation of power would be binding to the succeeding pope as well, *quia Sedes ipsa non moritur*, "because the [Holy] See itself does not die." Through Pope Boniface VIII this maxim—though quite current before—became authoritative because he inserted it into a decretal of his *Liber Sextus*, saying that a benefice given to a prelate on the part of the Holy See, unless revoked, "will last perpetually because the Holy See does not die."²³⁸ In this case, it is the perpetuity of the Dignity of the Holy See which makes the renewal of grants unnecessary because, says the glossator of the *Liber Sextus*, "the incumbent of the papacy or Dignity may die, but the *papatus*, *dignitas*, or *imperium* is forever."²³⁹

²³⁵ Friedberg, II, 162: "Delegatio facta dignitati non expresso nomine proprio transit ad successorem."

²³⁶ *Glos.ord.*, on c.14 X 1,29, v. *substitutum*: ". . . quia [praedecessor et successor] pro una persona intelliguntur: quia dignitas non moritur."

²³⁷ Innocent, *Apparatus*, on c.28 X 1,6, n.5, fol.39, refers to *Quoniam abbas* when he says: "finguntur enim eadem personae cum praedecessoribus (not substituted canons though, because they do not succeed to a Dignity)." Cf. Gierke, *Gen.R.*, III, 272, n.77; see above, Ch.vi, n.97.

²³⁸ See c.5 VI 1,3, Friedberg, II, 939: "Tunc enim, quia sedes ipsa non moritur, durabit [beneplacitum] perpetuo, nisi a successore fuerit revocata [sc. gratia]."

²³⁹ Johannes Andreae, *Novella*, on c.5 VI 1,3, n.5 (quoted by Gierke, *Gen.R.*, III, 271, n.73): "tenens papatum vel dignitatem est corruptibilis, papatus tamen, dignitas vel imperium semper est." See also *Glos.ord.* (Johannes Andreae), on that decretal, vv. *Apostolice sedis* and *non moritur*. The whole doctrine, of course, deepened the split between office and office-holder, and the imperial chancery was not slow at recognizing the advantages for anti-papal propaganda offered by the decretal *Quoniam abbas*. It is clearly with reference to this decretal that (pre-

introduced, or merely borrowed, a metaphor both curious and striking. He said that a Dignity—as, for example: Abbot of Winchester—was not the proper name of a person, but only singled a person out; it designated “a singular, like the *Phoenix*, and [was] likewise an appellative.”²⁴² This parallel between Dignity and the fabulous bird of Classical and Christian myths may strike us as rather abstruse; later glossators, however, such as Johannes Andreae and Baldus, not only accepted that simile but drew from it some rather enlightening conclusions.

We have to remember that the mythical bird was indeed an extraordinary creature: there was always only one Phoenix alive at a time, who, after having lived his cycle of many years—500 or more—set his nest ablaze, fanned the fire with his wings, and perished in the flames, while from the glowing cinders the new Phoenix arose.²⁴³ The lore of that bird, contradictory in many respects, is of minor importance here. In pagan as well as in Christian art the Phoenix usually signified the idea of immortality, of *perpetuitas* and *aevum* (*αἰών*).²⁴⁴ The “self-begott'n bird,” however, exemplified also virginity²⁴⁵ and it served further as a symbol

²⁴² See *Glos.ord.*, on c.14 X 1,29, v. *substitutum*: “[hoc nomen: abbas talis loci] non est proprium nomen, sed singulare, ut phoenix, et appellativum similiter.” It is possible, of course, that Bernard of Parma borrowed the metaphor from another author; but it was he, after all, who incorporated it into the ordinary Gloss and therefore made it widely known.

²⁴³ The modern literature on the Phoenix, insufficiently rendered by H. Leclercq, “Phénix,” *DACL*, xiv:1 (1939), 682-691, is considerable. See the thesis of Mary Cletus Fitzpatrick, *Lactantii De Ave Phoenix* (University of Pennsylvania thesis, Philadelphia, 1933), with a good bibliography; also E. Rapisarda, *L'Ave Fenice di L. Cecilio Firmiano Lattanzio* (Raccolta di studi di letteratura cristiana antica, 4, 1946), 10, n.1. The most important study is by Jean Hubaux and Maxime Leroy, *Le mythe du Phénix* (Bibl. de la faculté de philosophie et lettres de l'université de Liège, lxxxii [Liège and Paris, 1939]), who reprint a great number of relevant texts; for some important remarks on that study, see A.-J. Festugière, “Le symbole du Phénix et le mysticisme hermétique,” *Monuments Piot*, xxxviii (1941), 147-151; further Paul Perdrizet, “La tunique liturgique historiée de Saqqara,” *Mon. Piot*, xxxiv (1934), 110ff, for the representation of a Phoenix on a liturgical garment; and Jean Lassus, “La mosaïque du Phénix provenant des fouilles d'Antioche,” *Mon. Piot*, xxxvi (1936), 81-122; see further Carl-Martin Edsman, *Ignis divinus* (Lund, 1949), 178-203, and Henri Stern, *Le calendrier de 354* (Institut français d'archéologie de Beyrouth, Lv [Paris, 1953]), 146f. For the later Middle Ages, see Burdach, *Rienzo*, 83ff, and *passim*.

²⁴⁴ Hubaux-Leroy, 38f; Stern, 145f; Festugière, 149f.

²⁴⁵ Below, nos.251ff. The virginal bird suitably became an emblem of the virgin queen, Elizabeth; see Yates, “Queen Elizabeth as Astraea,” 37, 55f, 62, 74, 79, with pls. 17g, 18b. Virginity, of course, was not all that the Phoenix signified in Elizabethan state symbolism; for the bird was also a paragon of royalty on account of its uniqueness or singularity, and by the sixteenth century it served for more than one reason as a royal emblem; see, e.g., Henry Green, *Shakespeare and the Emblem Writers*, 380ff.

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of the resurrection of Christ, and of Christians in general.²⁴⁶ To the resurrection motif Johannes Andreae actually alluded in his lengthy Phoenix gloss.²⁴⁷ This, however, was only a side issue; for juristically the singleness and uniqueness of the bird appeared to be of greater importance. Baldus, at any rate, when epitomizing the arguments about the decretal *Quoniam abbas*, availed himself of that aspect of the symbol, which allowed him to draw the accurate philosophic conclusion: "The Phoenix is a unique and most singular bird in which the whole kind (*genus*) is conserved in the individual."²⁴⁸ Evidently, Baldus had a clear analogy in mind. To him the Phoenix represented one of the rare cases in which the individual was at once the whole existing species so that indeed species and individual coincided. The species, of course, was immortal; the individual, mortal. The imaginary bird²⁴⁹ therefore disclosed a duality: it was at once Phoenix and

²⁴⁶ This, of course, was the standard interpretation on the part of Christian authors; see Fitzpatrick, 24ff,n.67; Lassus, 108ff, and others. Of great influence was, as might be expected, *Physiologus*, c.1x: "Est aliud volatile quod dicitur phoenix; huius figuram gerit dominus noster Iesus Christus, qui dicit in evangelio suo: Potestatem habeo ponendi animam meam et iterum sumendi eam (John 10: 18)." See *Physiologus latinus*, ed. F. J. Carmody (Paris, 1939), 20f; also Hubaux-Leroy, pp.xxxiiff, esp. xxxv: Φοινίξ . . . τὴν τοῦ Κυρίου τριήμερον ταφήν καὶ ἀνάστασιν ὑπογράφων. See also next note.

²⁴⁷ Johannes Andreae, on c.14 X 1,29,nos.30f, *Novella*, fols.206v-207: "[et ibi, Phenix] fertur esse avis ex qua mortua nascitur alia, et non invenitur nisi una . . ." He then reproduces the narration of St. Ambrose, *Hexaemeron*, v,23, *PL*, xiv,253, and says: "et ex hoc invehit ibi Ambrosius contra illos, qui non credunt resurrectionem." There follows the story of St. Cecilia who "ad exemplum phenicis convertit beatum Maximum et eo postmodum decollato pro fide, in eius tumulo fecit sculpi phenicem, cuius exemplo animatus Christianus fieri et Christi martyr esse promeruit." Cf. *Vita et martyrium S. Caeciliae*, c.21, ed. L. Surius, *Historiae seu vitae Sanctorum* (Turin, 1879), xi (Nov.22), 651; also Paolo Aringhi, *Roma subterranea novissima* (Rome, 1651), II,451. He then refers to Isidore of Seville, *Ethymol.*, xii,7,22, and concludes his long gloss with the story about the appearance of a Phoenix in the time of St. Peter under the emperor Claudius, a story which ultimately may go back to Tacitus, *Ann.*, vi,28. To this catalogue of authorities, Baldus then adds Seneca, *Epist.*, xlii,1, and Albertus Magnus, *De proprietatibus rerum*, xii,15.

²⁴⁸ Baldus, on c.14 X 1,29,n.3, *In Decretales*, fol.107, quotes the Gloss (above, n.242), and adds: "Est autem phoenix avis unica singularissima, in qua totum genus servatur in individuo."

²⁴⁹ Whether Baldus believed in the bird or not, is irrelevant, since he and the other jurists used it merely as a metaphor. Frederick II actually refused to believe the Phoenix story as narrated by Pliny (cf. his *De arte venandi*, II,c.2, trans. C. A. Wood and F. M. Fyfe, *The Art of Falconry* [Stanford University, California, 1943], 109), nevertheless, he was one of the first mediaeval princes to be compared to that unique bird; see Nicholas of Bari, ed. Kloos, in *DA*, xi,170,85: "Magnus est dignitate honoris . . . Ipse est sol in firmamento mundi . . . Ipse est cui flectitur omne genu . . . Unus est et secundum non habet, fenix pulcherrima pennis aureis decorata."

Phoenix-kind, mortal as an individual, though immortal too, because it was the whole kind. It was at once individual and collective, because the whole species reproduced no more than a single specimen at a time.

This queer ornithological dualism had not passed unnoticed by pagan and Christian mythographers. Quite the contrary, they never failed to indicate it. They interpreted the Phoenix, since he engendered himself, as ἀρρετόθηλος, a creature having two sexes, a hermaphrodite.²⁵⁰ Lactantius apostrophed him "female or male or neither or both," for the Phoenix entered into no compacts with Venus: he sired himself by his death.

He is son to himself, is his own father, and his own heir.

He is his own nurse, and is ever a foster-child to himself.

He is himself, yet not himself, who is the same, yet not the same.²⁵¹

Claudian described the bird in similar terms: the rise of the newborn Phoenix from the ashes was caused by neither conception nor semen; he is his own father and his own son with none to create him: "He who was father, leaps forth now the same as son, and succeeds as a new one. . . ." Claudian stresses the "twin-life" (*gemina vita*) of the Phoenix, separated only by the pyre, but claims that the borderline between those two lives is hardly discernible—*O felix heresque tui*, "Oh happy one and heir to thyself."²⁵² That the bird was always the same and "heir to its own body" was emphasized, a third time, by Ambrose.²⁵³ On the

²⁵⁰ Festugière, in *Mon. Piot*, xxxviii, 148f; Hubaux-Leroy, 7, 12f. See also above, Ch. I, n.8.

²⁵¹ Lactantius, *Carmen de ave Phoenixe*, 163ff:

Femina seu mas sit seu neutrum seu sit utrumque,
Felix quae Veneris foedera nulla colit . . .
Ipsa sibi proles, suus est pater et suus heres,
Nutrix ipsa sui, semper alumna sibi.
Est eadem sed non eadem, quae est ipsa nec ipsa est. . . .

The text is that revised by Hubaux-Leroy, p.xv, which deviates in some instances from the edition of Samuel Brandt, in *CSEL*, xxvii (1893), 146f.

²⁵² Claudian, *Phoenix*, 23f, 69ff, 101, ed. Hubaux-Leroy, xxiff:

Hic neque concepto fetu nec semine surgit,
Sed pater est prolesque sui nulloque creante . . .
Qui fuerat genitor, natus nunc prosilit idem
Succeditque novus: geminae confinia vitae
Exiguo medius discrimine separat ignis . . .
O felix heresque tui. . . .

²⁵³ Ambrose, *Expositio in Ps. CXVIII*, c.13, ed. Petschenig (*CSEL*, LXII), 428, 19: ". . . et sui heres corporis et cineris sui factus."

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ne creante . . .
osilit idem
ia vitae
ignis . . .

etschenig (CSEL, LXII), 428,19:

other hand, Tertullian remarked that the Phoenix's dying day was also his birthday, "another, yet the same."²⁵⁴ The coincidence of dying day and birthday, finally, was stressed also by Zeno of Verona, who however added that the Phoenix was "his own genus, his own end, his own beginning."²⁵⁵ But already Ovid had said that whereas "other birds originate from others of their genus," there is one bird, the Phoenix, which renews itself and reseeds itself.²⁵⁶

The ancient mythographers and apologetics thus clearly recognized that some kind of duality was an essential feature of the Phoenix; but when expanding on that duality, they thought chiefly of the bird's androgynous character, and this concept, in its turn, had the backing of Orphic and Hermetic doctrines—relations interesting by themselves, though hardly relevant here.²⁵⁷ It is relevant, however, to understand how the mediaeval jurists resuscitated, as it were, the tenets of ancient mysticism by their speculative fiction theory and how they made the lore of many hues of the fabulous Phoenix useful and applicable to legal thought.

If, according to Lactantius, Claudian, and Ambrose, the Phoenix was "heir to himself," it will be appropriate to recall the importance which the law of inheritance had for the corporational doctrines in general. We have to recall, in the first place, the gloss on the *Institutes*: "Father and son are one according to the fiction of law."²⁵⁸ But there were other passages as well suggesting the

²⁵⁴ Tertullian, *De resurrectione carnis*, 13, *PL*, II, 857B: "semetipsum lubenter funerans renovat, natali fine decedens atque succedens; iterum phoenix, ut iam nemo; iterum ipse, qui non iam, alius idem."

²⁵⁵ Zeno of Verona, *Tract.*, I, 16, 9, *PL*, XI, 381AB: ". . . ipsa [avis] est sibi uterque sexus, . . . ipsa genus, ipsa finis, ipsa principium, . . . mors natalicius dies, . . . non alia, sed quamvis melior alia, tamen prior ipsa." We should remember that the *natalicium* of saints and martyrs was the day of their death, and not their natural birthday.

²⁵⁶ Ovid., *Metam.*, xv, 391f:

Haec tamen ex aliis generis primordia ducunt:
Una est, quae reparat seque ipsa reseminet, ales . . .

²⁵⁷ See Festugière, *op.cit.*, 149f, for *αὐτόγονος*, *αὐτοπάτωρ*, and other epithets; also for the *aeuum* as represented by the Phoenix.

²⁵⁸ *Glos.ord.*, on *Inst.* 3, 1, 3, v. *quasi*; see above, n. 78. Cf. Giovanni Bortolucci, "La *Hereditas* come *Universitas*: Il dogma della successione nella personalità giuridica del defunto," *Atti del Congresso internazionale di Diritto Romano*, Section Rome, I (Pavia, 1934), 431-448, who summarizes the legal material and demonstrates strikingly that the theory descended, in the last analysis, from Plato and Greek philosophy in general.

oneness of father and son. When Frederick II, in a charter for his son Conrad, said that "by the benefice of an innate grace [the son] is held to be one person [with the father],"²⁵⁹ he—or the responsible clerk—may have had Justinian's *Code* in mind where it is said that "father and son are understood to be by nature almost the same person."²⁶⁰ Moreover, a similar remark was found in the *Decretum*.²⁶¹ In these cases, the fiction of law was actually supported by the philosophers—Aristotle and, in his wake, Aquinas—according to whose biogenetic doctrines the "form" (εἶδος) of the begetter and the begotten were the same owing to the seed's active power, which derived from the soul of the father and impressed itself upon the son.²⁶² Legal and philosophical doctrines then were combined with other arguments which were supposed to prove that a king's first-born son was even more than other sons the equal of his ruling father because he was, while the father still was living, one with the father in the royal Dignity. Again the jurists could refer to the *Decretum* where the king's son was called *rex iuuenis*²⁶³ and where the prerogatives of the first-born were enumerated, for instance, the privilege of sitting at the right hand of the father.²⁶⁴ An ardent

²⁵⁹ Böhmer, *Acta imperii selecta*, 1,265, No.301 (a.1233): ". . . [pure dilectionis obtentu] qua pater filium, sicut innato beneficio gratie una persona censetur . . ." For a fuller discussion of the theory and its application under Frederick II, especially in connection with the Kaiser-saga, see my paper "Zu den Rechtsgrundlagen der Kaisersage," *DA*, XIII (1957) 115-150.

²⁶⁰ C.6,26,11: "Natura pater et filius eadem esse persona pene intelliguntur." The jurists referred also to *Glos.ord.*, on *D.50,16,220*, v. *Quam filii*: ". . . plus diligit filium pater, quam filius patrem. Sed quare hoc est? . . . nam cum quaelibet res conservationem sui desideret, et videat pater suam naturam in filio conservari . . ." Further to *D.28,2,11*: "[heredes] etiam vivo patre quodammodo domini existimantur" (referred to, e.g., by Petrus de Ancharano, *Consilia*, LXXXII,n.2, fol.40).

²⁶¹ See c.8,C.I,q.4, ed. Friedberg, 1,419: ". . . unus erat cum illo," an idea often repeated by later canonists; see, e.g., *Glos.ord.*, on *Extravag. Joannis XXII*, III ('Execrabilis'), v. *sublimitatem eorum*: ". . . cum eadem persona fingatur esse [pater et filius]."

²⁶² Cf. Lesky, *Zeugungs- und Vererbungslehren* (above, n.61), 139, cf.134ff, 143ff, also 148ff; A. Mitterer, "Mann und Weib nach dem biologischen Weltbild des hl. Thomas und dem der Gegenwart," *ZfKT*, LVII (1933), 491-556, esp. 515 ("omne agens agit simile sibi"). See also above, n.258.

²⁶³ See c.42,C.xxiv,q.1, ed. Friedberg, 1,983; also Andreas of Isernia, *Usus feud.*, praelud.,n.33, fol.4v: "Filius talium regum dicitur rex etiam vivo patre" (with reference to the *Decretum*). Also Albericus de Rosate, on *D.28,2,11,n.2*, fol.101v, refers to the *Decretum* ("propter . . . spem succedendi filius Regis dicitur Rex, et sic de aliis dignitatibus"), but he stresses also the fact that, though the sons are "domini rerum patris, . . . non tamen possunt alienare nec de eis aliquid facere invito patre."

²⁶⁴ *Glos.ord.*, on c.8,C.VII,q.1, v. *primatus*: "ius ergo primogeniturae (ut dicunt

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defender of primogeniture such as Jean de Terre Rouge then could demonstrate that between a first-born son (*primogenitus*) and an only-begotten son (*unigenitus*) there sometimes was hardly a difference and that the one sitting at the right hand of the father was "one and the same in species and nature."²⁶⁵ In other words, he could build up almost a theology of primogeniture by using arguments of Aristotle and Aquinas, the *Code*, the *Institutes*, and the *Decretum*, and referring also to Alexander III's decretal *Quoniam abbas*, which had become a cornerstone of the doctrine of the oneness of predecessor and successor with regard to the Dignity.²⁶⁶

With all that, the lore of the Phoenix tied in smoothly, since it stressed almost without exception the personal identity of the dead Phoenix with his living successor; and other popular legal maxims strengthened that comparison. *Mortuus aperit oculos viventis*, "The dead opens the eyes of the living," said a proverb quoted by Baldus in order to show that one born unfree could become a freedman on the death of his master,²⁶⁷ and the proverb was quoted—with reference to Baldus—later by a French jurist,

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[cf. Deuteronomy 21:17]) est dignitas talis: quia primogeniti prae aliis in festis sacrificia offerebant, et quod sedebant ad dexteram patris et quia cibos duplicatos recipiebant."

²⁶⁵ Terre Rouge, Tract.1,art.2,concl.10, p.40, points out that Christ was called by Luke (2: 7) the *primogenitus* "et tamen nullus fuit inde genitus," whereas Solomon (Prov. 4: 3) styled himself *unigenitus* although he was preceded by a brother who died (II Kings 12: 15-24). See further, *ibid.*, concl.1, p.35: ". . . quod pater et filius, licet distinguantur, supposito tamen unum idem sunt specie et natura nedum communi (quia uterque homo est), sed etiam in natura particulari patris . . ." Cf. concl.2: "Filiatio enim nihil aliud est, quam illa identitas particularis naturae praesens penetrans in filium [reference to *D.50,16,220*, v. *Quam filii*; see above, n.260] . . . Et pro hac consuetudine facit dictum Apostoli: 'Si filius, ergo heres' [Rom. 8: 17; Gal. 4: 7]." Cf. concl.3: ". . . quod filius vivente patre est secundum naturam dominus cum patre rerum patris. Probatur conclusio: nam ex quo . . . est eiusdem naturae cum patre, et idem cum patre vivente: ergo dominus cum patre . . . Pro hac conclusione facit etiam quod scribitur in Evangelio: 'Omnia quaecumque habet Pater, mea sunt' [Joh. 16: 15] . . . Et Luc.15 [31]: 'Fili tu semper mecum es: scilicet per identitatem paternae naturae. Et omnia mea tua sunt . . .'" Cf. p.39 (concl.4): ". . . sedere autem a dextris patris, nihil aliud est, secundum Augustinum, quam conregnare patri: sicut ille qui considet regi ad dexteram, assidet ei in regnando et iudicando . . ." The Augustine place referred to must be an interpretation of Psalm 109, though it is not found in the *Enarratio in Ps. CIX*.

²⁶⁶ For Terre Rouge's reference to *Quoniam abbas*, see concl.2, p.35; for his references to Aristotle and Aquinas, see concl.1, and above, n.61; the legal passages, of course, were quoted over and over again.

²⁶⁷ Baldus, on *C.7,15,3,n.2*, fol.12.

André Tiraqueau, in order to elucidate the famous maxim of French law of inheritance, *Le mort saisit le vif*, "The dead seizes [with regard to the inheritance] the living."²⁶⁸ Not unfittingly, therefore, was the successor to the French throne occasionally called *Le petit Phénix*.²⁶⁹

At any rate, the Phoenix metaphor fitted not badly to illustrate the nature of the *Dignitas quae non moritur*: the *Dignitas* of abbot, bishop, pope, or king appeared as a Phoenix-like *species* which coincided with the individual because it reproduced no more than one individuation at a time, the incumbent. Moreover, the Phoenix was, so to speak, a "natural" one-individual corporation, and thus there arose from the ashes of the Phoenix metaphor the prototype of that spectre called the "Corporation sole" which was at once immortal species and mortal individuation, collective *corpus politicum* and individual *corpus naturale*. What Maitland has said about the origins of that fiction of English Law—its connection with the parson, the patron, and the *Eigenkirche*—remains valid throughout.²⁷⁰ We notice, however, that other factors—factors more philosophical than practical—deserve consideration as well. The Phoenix metaphor of the Italian jurists allows us perhaps to comprehend more fully, because in a different scheme of reference, the nature of that strange "Body corporate" which never dies, is never under age, never senile, never sick, and is without sex,²⁷¹ and therein resembles "the holy sprites and angels."²⁷² A frame of mind working with notions such as androgyny and self-

²⁶⁸ André Tiraqueau (Tiraquella), *Le mort saisit le vif*, declar.3 (in Tiraquella, *Tractatus varii*, Frankfurt, 1574), iv,70. Tiraqueau mentions also the oneness of father and son; see, e.g., *De iure primogenitorum*, q.40,n.31, vol.I,p.453: "patrem et filium censi unam et eandem personam etc." He denies, however, that the maxim *Le mort saisit le vif* (below, n.319) applies to *successio . . . nomine dignitatis*; *ibid.*, declar. v,73.

²⁶⁹ Cf. A. Valladier, *Parennes royales* (Paris, 1611), 15, referring to Henry IV's son Louis XIII, a place kindly mentioned to me by Dr. Ralph E. Giesey.

²⁷⁰ See Maitland, *Sel. Essays*, 73ff, for the parson as a prototype of the corporation sole; see also below, n. 308. Actually, Johannes Andreae mentions as an English peculiarity the fact that parochial priests were called "persons"; cf. *Novella*, on c.28 X 3,5,n.13, fol.35 (cf. above, n. 231), where he discusses the synonymy of *dignitas* and *personatus*: "*fere ideo dictum est, quia in Anglia rectores parochialium dicuntur personae*" (with a reference to c.6 X 3,7, ed. Friedberg, II,485). This is not a pun ("parson-person"), since "parson" actually derives from *persona*; see, for Innocent IV, above, n.231.

²⁷¹ See above, Ch.II,n.93, for queens bearing the title "king." Where the succession of females to the throne was barred, as in France, or later the so-called Salic Law dominated, the king's "Body corporate" could probably not claim sexlessness.

²⁷² See above, Ch.I,n.3.

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ted not badly to illustrate *moritur*: the *Dignitas* of as a Phoenix-like *species* because it reproduced no the incumbent. Moreover, "one-individual corpora- of the Phoenix metaphor "Corporation sole" which l individuation, collective *naturale*. What Maitland of English Law—its con- the *Eigenkirche*—remains r, that other factors—fac- —deserve consideration as lian jurists allows us per- e in a different scheme of dy corporate" which never ever sick, and is without sprites and angels."²⁷² A ch as androgyny and self-

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reproduction could attribute similar features also to the Phoenix: Rabbinic tradition, for example, ascribed to the bird immortality because it refused to share in Eve's sin by tasting of the forbidden fruit, and therewith preserved its paradisaean state of innocence— indeed, "sex perishes for perpetual bodies."²⁷³ On the other hand, a frame of mind trained by scholastic philosophy might argue that it was the privilege or under-privilege, at any rate the peculiarity, of angels to be at once species and individual, since those sempiternal beings (lacking matter, though not individuation) did not reproduce their kind, but remained each, as a species, a single individual, though not in succession.²⁷⁴ This may account for certain features which apparently Angels, Phoenixes, and Bodies corporate had in common.

The concept of a *Dignitas* in which species and individual coincided, naturally brought into focus two different aspects of the dignitary himself—his "dual personality." Pope or bishop were not corporate *per se*: they became corporate as the sole representatives of their species only insofar as something supra-individual and perpetual was attached to them, namely the *Dignitas quae non moritur*. How that attachment was explained by the jurists remains to be seen. Here it may just be mentioned that the jurists actually did arrive at a distinction of two personalities in the dignitary. It sounds very simple and straightforward when Cynus of Pistoia writes: "A bishop has two personalities, one so far as he is a bishop, and another so far as he is [the individual] Peter or Martin."²⁷⁵ What Cynus puts forth is, in fact, conven-

²⁷³ See Fitzpatrick, *Lactantii De ave Phoenixe*, 16,n.5. The verse "Sexus perpetuis corporibus perit" (see for similar statements above, Ch.II,n.93) is found in *Obitus Baebiani*, v.60, ed. W. Brandes, "Studien zur christlich-lateinischen Poesie," *Wiener Studien*, XII (1890), 283. This 4th-century poem has nothing directly to do with the Phoenix, since it tells the story of Baebianus' resurrection from the dead and visit to heaven; but it was inspired also by Lactantius' *Phoenix*; see Brandt's edition of Lactantius and his notes on lines 2 and 164 (*CSEL*, XXVII, 135 and 146), as well as Rapisarda, *Fenice*, 40 and 86.

²⁷⁴ Above, Ch.VI,nos.17-18.

²⁷⁵ Gierke, *Gen.R.*, III,363,n.34, quotes several passages from Cynus, who distinguished also in the judge a *duplex persona*, one public and the other private. The distinction is important, and its importance was recognized already by the 12th-century jurists in connection with the problem of conscience in court; that is, the question whether a judge was to try a case exclusively on the ground of the evidence produced in court or also on the ground of private knowledge he may have happened to obtain: "aliud facit aliquis in eo quod iudex est, aliud in eo quod homo est," says the ordinary Gloss on the *Decretum* (c.4,C.III,qu.7, v. *Audit*),

tional: it is merely another application—so to speak, the reverse side—of the canonistic distinction between a delegation *facta personae* and one *facta dignitati*, which had been expounded over and over again in connection with the decretal *Quoniam abbas*. His remark is nevertheless valuable because it shows that emphasis could easily be shifted from the dual aspect of the delegation of power onto the dual personality of the delegating as well as the delegated dignitary, and finally onto every office-holder both spiritual and secular. Hence, from the canonistic theory new political theories began to spread out, as the secular Dignities likewise were interpreted as corporate and immortal entities.

The immortality of the Holy See as a *Dignitas quae non moritur* was based on a rational juristic fiction. That, however, did not prevent the canon lawyers from lapsing into irrational thought and interpreting the perpetuity of the *Sancta Sedes* also transcendently along traditional lines. Johannes Andreae, for example, when glossing the phrase *Sedes ipsa non moritur* of Pope Boniface's decretal, declared: "For it cannot be that there be no See, since the Lord has prayed for it."²⁷⁶ That is to say, the sempiternity of the Holy See here appears as an effluence of the divine power and of the sempiternity of the Church whose domination knows no vacancy *quia Christus non moritur*, "because Christ does not die."²⁷⁷ Contrariwise, the empire, we recall, was understood to be sempiternal for similar metaphysical reasons: it was the fourth world monarchy which was to last until the end; it had been constituted from high heaven by God himself; and the Justinian Law attributed to it sempiternity (*imperium semper*

and a maxim attributed to Christ reads: "non nisi per allegata iudex iudicet." See, for the problem, Max Radin, "The Conscience of the Court," *Law Quarterly Review*, XLVIII (1932), 506-20; Hermann Kantorowicz, *Glossators*, 21; Ullmann, *Lucas de Penna*, 126ff, also 130, where Lucas blames Pilate for having judged only on the basis of evidence, and not in accordance with his knowledge and his conscience.

²⁷⁶ See *Glos.ord.*, on c.5 VI 13, v. *moritur*: "non enim potest esse nulla [sedes]... quia dominus pro ea oravit." Cf. c.33,C.XXIV,q.1; above, Ch.vi,nos.36-37.

²⁷⁷ "Licet moriatur praelatus et omnes clerici in ecclesia, dominium illorum non vacat, quia Christus non moritur, nec potest ecclesia deficere." Johannes Andreae, *Novella*, on c.4 X 2.12.n.5, quoted by Pierre Gillet, *La personnalité juridique en droit ecclésiastique* (Malines, 1927), 178. Andreae depended upon Innocent IV, on c.4 X 2.12.n.4 (Lyon, 1578), fol.145v: "... quantumcunque moriatur praelatus et omnes clerici, ecclesiae tamen proprietas et possessio remanet penes Christum, qui vivit in aeternum, vel penes universalem, vel singularem ecclesiam, quae nunquam moritur."

on—so to speak, the reverse between a delegation *facta* which had been expounded over the decretal *Quoniam abbas*. Because it shows that emphasis on the aspect of the delegation of the delegating as well as the to every office-holder both the canonistic theory new it, as the secular Dignities and immortal entities.

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est).²⁷⁸ It is noteworthy, however, that those arguments now were supplemented, or even superseded, by the new legal theory concerning the immortality of the Dignity. Thus Godfrey of Trani, when glossing (ca. 1241-43) the decretal *Quoniam abbas*, could reverse the argument, and say: "Since the Dignity does not perish on the death of the incumbent, therefore the *imperium* is perpetual."²⁷⁹ And later authors declared straightforwardly that the phrase *imperium semper est* referred to the *Dignitas*.²⁸⁰ This is a secularization of old ideas: the perpetuity of the empire no longer derived from God and the divine dispensation, but from the fictitious, if immortal, personage called *Dignitas*, from a Dignity created by the policy of man and conferred upon the Prince or present office-holder by a likewise immortal polity, by an *universitas quae nunquam moritur*.²⁸¹ It is manifest that the value of perpetuity no longer centered primarily in the Deity, nor in the immortal idea of Justice, nor in the Law, but rather in the *universitas* and the *Dignitas* each of which was immortal.

Naturally the civilians referred in the first place to the *imperium* when expounding their theories, just as papacy and episcopate would have been the first thought of canonists who explained the nature of *Dignitas*. By that time, however, almost everything that was valid with regard to the empire was valid also with regard to the kingdoms. Baldus, for example, when discussing—along the lines of *Quoniam abbas* and of Boniface's decretal²⁸²—the binding power of contracts and obligations, first chose the tradi-

²⁷⁸ Above, Ch.vi, nos. 38ff,41ff.

²⁷⁹ Godfrey of Trani, *Summa super decretalibus*, on c.14 X 1,29,n.29, quoted by Gierke, *Gen.R.*, III,271,n.73: "Quia dignitas non perit decedente persona, unde imperium in perpetuum est."

²⁸⁰ For the interpretation of *imperium* in the sense of *dignitas* in the 16th and 17th centuries, see Gierke, *Gen.R.*, IV,240,n.124. The idea of perpetuation is rather strongly formulated by Albericus de Rosate, on *D.5,1,76,n.1* (Venice, 1584), fol.304v: "Sedes apostolica non moritur, sed semper durat in persona successoris . . . , et dignitas imperialis semper durat . . . et idem in qualibet dignitate, quia perpetuatur in persona successorum . . . [allegation of *Quoniam abbas*], fiscus etiam perpetuo durat locuplex . . ." Angelus de Ubaldis, on *D.5,1,76,n.2* (Venice, 1580), fol. 136, considers the insignia of a *societas*, such as *baculus* or *vexillum*, substantial with regard to the perpetuity: "quod licet mutantur caporales magnae societatis, et uni detur baculus et alteri vexillum, ut est moris, tamen adhuc durat eadem societas."

²⁸¹ See below, nos.284ff, 295.

²⁸² Those two decretals, above all *Quoniam abbas*, are quoted over and over again by Baldus; see e.g., *Consilia*, III,121,n.6,fol.34; III,159,n.4,fol.45v; III,217,n.3, fol.63v, etc.

tional examples of emperor and pontiff: "The emperor in his person may die, but the Dignity itself, or the *imperium*, is immortal, just as the supreme pontiff dies, whereas the supreme pontificate does not die." But while pointing out that things proceeding from the person were personal matters whereas those proceeding from the Dignity were "perennial and eternal," Baldus switched as a matter of course from the *imperium* to the *regnum*, and from the emperor to the emperor-like king, "who in his realm holds the supreme principate, because he does not recognize a superior."²⁸³ Contracts of kings, too, when made *sub nomine Dignitatis*, bind the successor:

And in the contracts of kings it is expressed on whose part [person or Dignity] they are [made]; and they pass on to the successor in the kingdom if they are quoted in the name of the Dignity. . . . Nor is this surprising, because in the kingdom there has to be considered [not only] the Dignity which does not die, but also the *universitas* or *respublica* of the kingdom, which continues steadfastly even when kings have been expelled: for the *respublica* cannot die; and therefore one says that the *respublica* has no heir, because she always lives in herself.²⁸⁴

It is a minor point only when we notice that the whole canonistic doctrine of *Dignitas* has been transferred to kings—to be sure, not for the first time. It is, however, a point of major interest to find that in Baldus' reflections two distinct factors determine the responsibilities of kings: the immortality of *Dignitas* as well as the immortality of *universitas*; and that accordingly the Prince

²⁸³ Baldus, *Consilia*, III, 159, n.3, fol. 45v: "Imperator in persona mori potest: sed ipsa dignitas, seu Imperium, immortalis est, sicut et summus Pontifex moritur, sed summus Pontificatus non moritur, et ideo quae procedunt a persona, et non a sede, personalia sunt, si a successiva voluntate dependent. . . . Quaedam vero procedunt a sede: et ista sunt perennia et aeterna, donec superveniat casus extinctivus, seu terminus vitae ipsius concessionis. Huiusmodi sunt contractus Regum, qui contrahunt nomine suo et Regni, seu gentis suae." *Ibid.*, n.4: "Rex, qui in Regno suo tenet principalissimum principatum: quia non cognoscit superiorem, est totum continens, et potest contrahere nomine suo, et totius terrae, et populorum suorum. Habet enim plenissimam potestatem. . . . Unde is qui contraxit sub nomine dignitatis, obligat successores." The whole paragraph is extremely interesting. See next note.

²⁸⁴ *Ibid.*, nos. 4-5: "Et in contractibus regum est expressum, quod partium sunt, et transeunt ad successores in Regno, si celebrati sunt nomine dignitatis. . . . Nec mirum, quia in Regno considerari debet dignitas, quae non moritur; et etiam universitas, seu respublica ipsius Regni, quae etiam exactis Regibus perseverat. Non enim potest respublica mori. Et hac ratione dicitur, quod respublica non habet haerem: quia semper vivit in semetipsa." Cf. above, Ch. VI, n. 59.

tiff: "The emperor in his f, or the *imperium*, is imdies, whereas the supreme pointing out that things pronal matters whereas those enial and eternal," Baldus e *imperium* to the *regnum*, or-like king, "who in his because he does not recogoo, when made *sub nomine*

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was said to act by virtue of both the Dignity and the *respublica*,²⁸⁵ that is, of two entities credited to be sempiternal. We can hardly avoid recalling the political concepts of earlier jurists, epitomized, for example, by John of Paris, who held that the king depended on God and the people, *populo faciente et Deo inspirante*.²⁸⁶ In Baldus' political scheme, however, the notion of *populus* was changed into the legalistic *universitas quae non potest mori*; at the same time, *Deus* was fittingly replaced by the likewise legalistic *Dignitas quae non potest mori*. How closely interrelated God and Dignity actually were may be gathered from Baldus' gloss on the coronation oath of kings and emperors by which they promised not to alienate the possessions of the Crown: "Hence, the emperor . . . is under no obligation to man, though he is obligated to God and his Dignity which is perpetual."²⁸⁷ We should probably recall the juxtaposition of *Deus* and *Fiscus* to understand that *Dignitas*, owing to its perpetuity, became, just as *Fiscus*, comparable to God or was "equiparated" with God. And it is also apposite to think of Bracton's famous words saying that "the king must be, not under man, but under God and the Law,"²⁸⁸ in order to be aware of the shift from Law-centered to Polity- and Corporation-centered kingship.

The placing side by side of God and Dignity will require further attention.²⁸⁹ What matters here is the incessant repetition of the catchword saying that the royal Dignity does not die, or, as Baldus occasionally put it, ". . . the Dignity is something regal . . . , and the regal quality does not die even if the individual [king] dies."²⁹⁰ Pursuantly, Matthaeus de Afflictis, while

²⁸⁵ Below, n.295.

²⁸⁶ See above, Ch.vi,nos.51-54; Ch.vii,nos.25ff.

²⁸⁷ "Unde imperator rei suae potest dare legem quam vult et non obligatur homini, sed Deo et dignitati suae, quae perpetua est." Baldus, on c.33 X 2,24,n.5 (the decretal of Honorius III; above, nos.143f,147,150), *In Decretales*, fol. 261v.

²⁸⁸ Bracton, fol.5b, ed. Woodbine, n.33: "Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem." See also above, Ch.iv,n.298.

²⁸⁹ See below, n.423.

²⁹⁰ Baldus, on C.6,51,1,6a,n.4, fol.180v: "Vel ibi non est novum feudum, quia dignitas est quid regale, cum feudum regni sit concessum omnibus regibus, et qualitas regia non moritur, licet individuum moriatur." On the other hand, a diminution of actual power did not affect the immortality of the *Dignitas* itself. See, e.g., Albericus of Rosate, on D.const.Omnem (= *prima const.* or *prooemium*), rubr.,n.8 (Venice, 1585), fol.3v. While disapproving of the Donation of Constantine (he actually quotes approvingly Dante, *Inf.*, xix,115ff), he does not accept all the reasons put forth against its validity: "Non obstat quod dignitas imperialis sit

referring to Baldus, declared in a gloss on the Sicilian Constitutions: "The royal Dignity never dies."²⁹¹ There were, of course, slight variations of the theme. Baldus himself said occasionally: *Regia maiestas non moritur*, "The royal Majesty does not die."²⁹² And he, too, arrived at distinguishing two persons in the king: a *persona personalis*, "which is the soul in the substance of man," that is the individual king; and a *persona idealis*, "which is the Dignity."²⁹³ Here, then, Dignity—the *persona idealis*—is clearly personified. *Dignitas* is, like *Iustitia*, an "ideal" person having an independent existence even in the case of a vacancy, though otherwise she is inseparably attached to the ruler, so long as he lives or rules; she is attached to him as his permanent companion—not unlike an ancient deity, god or goddess, which appears on coins as *comes Augusti*.²⁹⁴

The duality resting in the king was the theme of Baldus on yet another occasion. When discussing the king's obligation to observe contracts made in the names of *Dignitas* and *respublica*, he explained that, "intellectually speaking," the predecessor king, who contracted the obligation, was not dead because neither his *Dignitas* nor the *respublica*, in whose names he acted, were dead.

For it is true to say that the *respublica* does nothing by itself, whereas he who rules the *respublica*, acts in virtue of the *respublica* and of the Dignity conferred on him by that very *respublica*. Moreover, two things concur in the king: the person and the signification [i.e. the Dignity]. And that signification, which is something appealing to the intellect, miraculously perseveres forever, though not corporeally: for let the king be deficient with regard to his flesh, he nevertheless functions holding the place of *two* persons.²⁹⁵

perpetua et non moriatur: quia per talem donationem non est mortua nec eius potestas in aliis locis non donatis ecclesiae."

²⁹¹ Mattheus de Afflictis, on *Lib. aug.*, II, 35, n. 23, vol. II, fol. 77: "Quae dignitas regia nunquam moritur."

²⁹² Baldus, on c. 7 X 1, 2, n. 78, In *Decretales*, fol. 18: ". . . quia ibi iuramentum fuit praestitum a dignitate dignitati. Nam regia maiestas non moritur."

²⁹³ Baldus, *Consilia*, III, 217, n. 5, fol. 63v: "[persona] personalis, quae est anima in substantia hominis, et non persona idealis, quae est dignitas."

²⁹⁴ See A. D. Nock, "The Emperor's Divine Comes," *Journal of Roman Studies*, XXXVII (1947), 102ff. The *comes* idea was not alien to Frederick II, not only with regard to *Iustitia*, but also to the *Fortuna Augusti*; cf. Franz Kampers, "Die *Fortuna Caesarea* Kaiser Friedrichs II," *Hist. Jahrb.*, XLVIII (1928), 208ff.

²⁹⁵ Baldus, *Cons.*, III, 159, n. 5, fol. 45v: "Unde cum intellectu loquendo, non est mortua hic persona concedens . . . Nam verum est dicere, quod *respublica* nihil per se agit, tamen qui regit rem publicam, agit in virtute reipublicae et dignitatis sibi collatae ab ipsa republica. Porro duo concurrunt in rege: persona et signifi-

gloss on the Sicilian Constitutions."²⁹¹ There were, of course, Baldus himself said occasionally: "Royal Majesty does not die."²⁹² King two persons in the king: "one in the substance of man," the *persona idealis*, "which is the *persona idealis*—is clearly *idea*, an "ideal" person having the case of a vacancy, though attributed to the ruler, so long as he is regarded as his permanent comitatus, god or goddess, which

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Jones," *Journal of Roman Studies*, ien to Frederick II, not only with *Augusti*; cf. Franz Kampers, "Die *ahrb.*, XLVIII (1928), 208ff.

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In other words, the King survives the king, and in that sense Baldus then could declare that, while there is no will in a corpse, the dead Prince "seems to will even after his death"—as *Dignitas*, of course.²⁹⁶

However that may be, it is easy to recognize now to what extent the simple canonistic doctrine concerning the "Abbot of Winchester" and his Dignity influenced legal thought in general, especially after that theory had been transferred, in the course of the fourteenth century, to the secular sphere, to emperors and kings. In the much admired arguments of Baldus,²⁹⁷ whose scholastic accent is unmistakable, we believe we hear already the Tudor jurists putting forth their arguments about the king's "two Bodies."

CORPORATIONAL SYMPTOMS IN ENGLAND

There is hardly a phrase or metaphor in the picturesque speeches transmitted by Plowden which could not be traced back to some antecedents in the legal writings of the thirteenth and fourteenth centuries, even though it would often be cumbersome to demonstrate how exactly one or the other detail found its way to the English legal language. It is perfectly true that in most cases in which the word *Dignitas* was used together with the word *Corona*, a corporational character of Dignity was *not* intended; nor can any intention of that kind be read into the texts. For all that, however, the doctrines of the Italian canonists left some traces in England, even at an early date. William of Drogheda, writing around 1239 on the procedure in ecclesiastical courts, was fully aware of the difference whether an abbot signed with his own seal or with that of his convent.²⁹⁸ In the Year Books under

catio. Et ipsa significatio, quae est quoddam intellectuale, semper est perseverans enigmatische: licet non corporaliter: nam licet Rex deficiat, quid ad rumbum, nempe loco duarum personarum Rex fungitur, ut ff. de his, qui. ut ind. l. tutorum [D. 34.9.22: 'Discreta sunt enim iura, quamvis plura in eandem personam devenerint, aliud tutoris, aliud legatarii']."

²⁹⁶ Baldus, on C. 10.1. rubr. n. 16, fol. 232v: ". . . et velle videtur [imperator] etiam post mortem, quia etiam post mortem suam verba contulisse videtur . . ." See below, n. 349.

²⁹⁷ The *Repertorium in Consilia*, p. 82 (forming vol. VI of Baldus, *Cons.*), s.v. "rex," refers to *Cons.*, III, 159, and says: "Hic vide multa pulchra de dignitate regali." Also Gierke, *Gen.R.*, IV, 239, admires, with reference to that *Consilium*, Baldus' *unübertreffliche Schärfe*.

²⁹⁸ Post, "Quod omnes tangit," 217ff.

Edward II, in which we find much talk about the king's Dignity without ever suggesting corporational aspects, we find nevertheless a perfectly clear knowledge of the canonistic significance of *Dignitas*. In the case against the Prior of Kirkham, which was heard in 1313, Justice Inge referred, time and time again, to *Dignitas* in the sense of the canonists:

Abbot and Prior are names of Dignity; and in virtue of the Dignity the right that was in the predecessor will so wholly vest itself in the person of the successor after his creation that none other than he can defend the rights of his Church.

Justice Inge, tacitly referring to *Quoniam abbas*, played up the fact that "the present Prior [of Kirkham] comes to the court as Prior," and that he had been summoned "by his name of Dignity." Emphatically Inge finally exclaimed: "And so let men learn to [be wary how to] bring a writ against a Prior by his name of Dignity."²⁹⁹

These quotations show that English jurists around 1300 were very familiar with the idea of Dignity in the legalistic sense, as well as with the idea of the virtual identity of predecessor and successor—at least with regard to ecclesiastical persons. Justice Inge indeed pointed out that the personality of an abbot "or other man of Dignity" was not "as it is with secular persons"³⁰⁰—an indication, it seems, that the idea of the continuous personality was as yet not commonly transferred to secular office, but was more or less restricted to spiritual dignitaries. It may well have taken some time before the secular dignitaries, too, were drawn into the magic circle of corporational doctrines. Nevertheless, by the fifteenth century the main distinctions were carried over to

²⁹⁹ *Year Books, 6-7 Edward II (1313)*, Y.B. Ser., xv (Selden Society, xxxvi), 175, 177, 178, 182; cf. Holdsworth, III, 472, n. 4. Whereas in this case the corporational substratum is evident, the mentions of the royal Dignity are lacking any corporational connotations; see, e.g., *Year Books, 5 Edward II (1311)*, Y.B. Ser., x (Selden Society, lxxiii, 1944), 122f. Bracton's usage of *Dignitas* does not suggest corporational meaning either. It seems that the notion *status regis* or *status regalis*, either alone or in connection with *dignitas*, took over the functions which in canonistic doctrines and in those of the Italian jurists were vested in the abstract *Dignitas*. This, at least, would be suggested by Jean Gerson (above, Ch. v, n. 76), when he talks about the king's "second life," the "*vita civilis et politica, que status regalis dicitur aut dignitas*." All those notions should be studied far more thoroughly than has hitherto been the case, though a good start has been made by Post (see, e.g., "Two Laws," 432ff).

³⁰⁰ *Year Books, 6-7 Edward II*, 181.

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the secular sphere as well, as, for example, in a lawsuit under
 Edward IV when the judges pointed out that a mayor contracted
 an obligation, not as mayor, but *par son propre nosme*.³⁰¹

Under Edward IV, of course, corporational modes of thinking
 reached in England a state of full consciousness, and they were
 displayed most curiously by the king himself in the case of the
 Duchy of Lancaster.³⁰² The Duchy, as is commonly known, had
 been the private possession of the House of Lancaster, and the
 Lancastrian kings held it by hereditary right. On his accession in
 1399, Henry IV ordained with the consent of Parliament that all
 the lands of the Duchy of Lancaster were to be governed and
 treated by the king "as though we would never have achieved
 the height of royal Dignity," since those lands had come to him,
 Henry of Lancaster, personally by right hereditary "before God
 called us to the Estate and Dignity royal."³⁰³ A private property,
 disconnected from the Crown—so the Duchy was and remained
 under Henry V and Henry VI; it was held, as Plowden later re-
 ported, by the Lancastrians in their Body natural.³⁰⁴ When, in
 1461, the Yorkist Edward IV seized power, the status of the
 Duchy changed. Shortly after his accession, Edward IV had his
 Lancastrian predecessor convicted and attainted of high treason,
 a verdict resulting in the forfeiture of all the former sovereign's
 possessions and titles, including the private possession of the
 Duchy of Lancaster. Edward IV himself had no title to the Duchy
 except in right of the Crown, since it had been confiscated for
 treason committed against the Crown.³⁰⁵ Yet Edward apparently
 did not intend to abandon all the advantages which a *Hausmacht*
 brought to the king's power and purse. To overcome those diffi-
 culties, the king or his legal advisers contrived a startling device:
 they "incorporated" the confiscated Duchy. By Act of Parliament
 it was decreed, on March 4, 1461, that the manors, castles, lord-

³⁰¹ Maitland, *Sel. Essays*, 226, n.1.

³⁰² Robert Somerville, *History of the Duchy of Lancaster* (London, 1953), 231ff.,
 barely renders the content of the Act of Incorporation. On the whole, the strange
 action taken by Edward IV seems not to have attracted in modern times the
 attention it undoubtedly deserves.

³⁰³ William Hardy, *The Charters of the Duchy of Lancaster* (London, 1845),
 99f., 102.

³⁰⁴ See Plowden, *Reports*, 200b, and passim; also Chrimes, *Const. Ideas*, 352f.
 (*App.* n.11), for the opinions of the judges under Henry IV.

³⁰⁵ The fullest discussion of the case is still found in Plowden's *Reports*, 212b-
 223; for Edward IV, see 219a.

ships, towns, and other possessions, with their appurtenances in the Duchy, henceforth

make, and from the seid fourth day of Marche be, the seid Duchie of Lancastre corporat, and be called THE DUCHIE OF LANCASTRE.

Moreover, Parliament granted Edward IV the right to keep those lands

by the same name of Duchie, from all other his enheritauncez separate . . . to him and to his heires Kyngs of Englund perpetually.³⁰⁶

The Duchy, now corporate, was to become, as a corporation, parcel of the Crown without being merged with other Crown property. That is to say, in order to preserve the former extent of the Duchy, with all its rights and appurtenances unimpaired, and also to keep it *en bloc* apart from other Crown property and place it under special administration, it was converted by Act of Parliament into a juristic person. THE DUCHY OF LANCASTER (one is inclined to add: LTD. or INC.) was to have a status exempt from central government and belong as a corporation to the Crown, whereby the king as King, and not the king privately, was to be hereditarily the head—or, as it were, “Director”—of that legal corporation, to whom the proceedings from that corporation accrued as though he were the private owner—to be sure, only by right of the Crown.³⁰⁷

Thus entered corporational thought into constitutional practice on the highest level. To conceive of a realm, a shire, a duchy, or even a fee, metaphorically in terms of a corporation (*universitas*), or a juristic person, was anything but unusual in the speech of the jurists; but the actual incorporation of a whole duchy by means of an Act of Parliament was something unique in mediaeval practice. We may consider that step perhaps a forerunner of the later incorporation of whole ecclesiastical dioceses, or of provinces of the spiritual orders, in those countries in which, owing to the separation of State and Church, the Churches form private corpo-

³⁰⁶ For the Charter, see W. Hardy, *op.cit.*, 282 (English text), 323f (Latin text). The words spelt out in capitals in the quotation are in capitals in the Latin text: “. . . dictus ducatus Lancastriae corporatus, et DUCATUS LANCASTRIAE nominentur [sc. castra, maneria, et cet.]”

³⁰⁷ In Plowden, 220b, the distinctions are put forth neatly: “The three [i.e. the Lancastrian kings] held it in their Body natural separate from the Crown, and the fourth [i.e. Edward IV] in his Body politic in right of the Crown, and separated in the Order and Government of the Crown, and not otherwise.”

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set forth neatly: "The three [i.e. the
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rations; this would be true, above all, in the United States where
archbishops and bishops are—or were—recognized as "Corpora-
tions sole" and where, for example, the Benedictines are registered
as *The Order of St. Benedict, Inc.*, while the Jesuit Provinces are
incorporated statewide, e.g., as *The Society of Jesus of New Eng-
land*, etc.³⁰⁸ Here, then, secular corporational law had its retro-
active effects on the status of the Church: in fact, the canonistic
doctrine has run the full circle.

However that may be, by the latter half of the fifteenth century
corporational ideologies had gained a firm footing in England,
and apparently it was not unknown to the jurists what profits
might be derived also in secular matters from corporational
theories. The incorporation of Lancaster, in other respects per-
haps without tangible effect,³⁰⁹ left its indelible mark on legal
thought insofar as it was in connection with the *Case of the
Duchy of Lancaster*, argued in court in 1561, that the Tudor
judges produced their most striking formulations concerning the
king's "two Bodies." Since those formulations eventually passed
into juristic textbooks and dictionaries such as those of Crompton,
Kitchin, Cowell, and perhaps also of other authors around 1600;
and since they were quoted by authorities such as Coke, Bacon,
and later on by countless others, for instance Blackstone, they
naturally penetrated quickly into political and popular parlance
and were repeated over and over again.³¹⁰ Plowden, in his *Reports*,
clearly demonstrates how lively and general was the interest in the
principles involved in the Lancaster case, and how vivid were the
discussions in the course of which distinctions between the "two

³⁰⁸ Cases in which the United States recognized the Roman Catholic bishops
and archbishops as "Corporations sole" are enumerated in *Corpus Juris* (New
York, 1919), xiv, 71, nos. 73 and 78 (= 14 C.J. Corporations §38). In the new edition
(*Corpus Juris Secundum*, xi, 350 [Bishop]) it is said that the "Bishop has been
regarded a corporation sole; but as the conception . . . seems to be passing out
of the American Law, a Bishop is here no longer regarded as a corporation sole."
A liturgical review, however, called *Orate Fratres*, is edited "by the Monks of St.
John's Abbey, Collegeville, Minnesota (*The Order of St. Benedict, Inc.*)," and
the American Jesuits are statewide incorporated; see, e.g., *Catalogus Provinciae Novae
Angliae Societatis Jesu* (ineunte anno 1955), p. 143.

³⁰⁹ Somerville, *Lancaster*, 232.

³¹⁰ Richard Crompton, *L'Authoritie et Jurisdiction* (London, 1594), fols. 134f;
Joseph Kitchin, *Le Court Leete et Court Baron* (London, 1598), 1v; John Cowell,
The Interpreter (Cambridge, 1607), s.vv. "King (Rex)" and "Prerogative." See, for
Dr. Cowell, whose absolutist views were uncomfortable even to James I (cf. Godfrey
Davies, *The Early Stuarts* [Oxford, 1952], 12), also the article by Chrimes, "Dr. John
Cowell," *EHR*, LXIV (1949), 472ff. See, for Coke, Bacon, and Blackstone, above, Ch. I.

Bodies" were advanced. The coinages of the English judges were not lacking originality when they pointed out that the King's Body politic "contains his royal Estate and Dignity" or was "adorned and invested with the Estate and Dignity royal," even though the Italian jurists had fathered those ideas. The originality of the Tudor lawyers should be sought chiefly in the fact that they replaced the commonly used notion of *Dignitas* by the notion of "Body politic," and thereby were led to certain elaborations and conclusions which the civilians and canonists had not deemed it necessary to indulge in.

Fortunately, we are not deficient in early examples illustrating the replacement of *Dignitas* by *Corpus*. Maitland mentioned a case heard under Henry VII, in 1487, in the course of which Justice Vavasor argued that "every abbot is a body politic, because he cannot take anything except for the use of the house."³¹¹ The argument itself is weak, but it discloses a parlance which must have been fairly common by that time. In fact, we find a similar utterance in an earlier case, heard under Edward IV, in 1482. Again an abbot was involved; Justice Fairfax, arguing in his favor, dropped a remark concerning "that mystical body of the abbot which never dies," since the office and the house continued in the successors of the abbot.³¹² The judge's remark is interesting: the abbot is not mentioned as a member of the general *corpus mysticum* of either the Church or the realm, but as a mystical body *per se*, because he "never dies" and has "continuity." It is clear that the corporational notion of *Dignitas* was confused with the likewise corporational notion of *corpus mysticum*, or that the "mystical body" was fused with what otherwise was called "Dignity"—a fusion or confusion which was certainly not customary in Italian legal language. However, when we consider the influence which the "abbot" as a model exercised on legal and political thought in general, it will not be really surprising to find that in English secular practice the two notions were used almost synonymously also with regard to the king.

³¹¹ Maitland, *Sel. Essays*, 83, n. 2 (quoting *Y.B.*, 3 *Henry VII*): ". . . chescun abbe est corps politike, car il ne poet rien prendre forsque al use del meason."
³¹² *Year Books*, 21 *Edward IV* (printed by Tottell, London, 1556-1572), fol. 38b: ". . . pur ceo que cest misticall corps d'l abbe ne unque morust et le office et le meason continua a les successours en fee . . ." The case has been quoted by Coke, *Rep.*, vii, 10a, *Calvin's Case* (not quite correctly: f. 39b for 38b), and I am much obliged to Mr. H. G. Richardson for helping me to verify the quotation.

es of the English judges were pointed out that the King's "Estate and Dignity" or was "Estate and Dignity royal," even "and those ideas. The originality of the notion chiefly in the fact that the notion of *Dignitas* by the judges were led to certain elaborations by civilians and canonists had not

in early examples illustrating *corpus*. Maitland mentioned a case in 1287, in the course of which the abbot is a body politic, bound for the use of the house."³¹²

It discloses a parlance which was in vogue at that time. In fact, we find a similar case heard under Edward IV, in which Justice Fairfax, arguing in support of the office and the house connected with it.³¹² The judge's remark is

that the king is a member of the general Church or the realm, but as the king never dies" and has "continual notion of *Dignitas* was the original notion of *corpus mysticum* fused with what otherwise was the notion of infusion which was certainly in vogue. However, when we compare the king as a model exercised on the king, it will not be really surprising to find in practice the two notions combined with regard to the king.

3 Henry VII: ". . . chescun abbe ne forsque al use del meason."

(Cottell, London, 1556-1572), fol.38b: "ne unque morust et le office et le . . . The case has been quoted by Coke, 12th ed. (1802), p. 39b for 38b), and I am much obliged to you to verify the quotation.

How the transition from the royal "Dignity" to the royal "Body politic" worked in legal arguments can be easily grasped from the case *Hill v. Grange*, which was heard in the Court of Common Pleas in 1556 and 1557, that is, about five years before the Lancaster case.³¹³ *Hill v. Grange*, a case of trespass, is itself of no interest here; but the trespassed land happened to have belonged originally to one of the monasteries dissolved by Henry VIII, and therewith the king came into the picture. The hearing, in certain sections, amounted to a rehearsal of the whole compound matter of *Quoniam abbas* and of the glosses on that decretal. The judges tried to find out whether King Henry VIII had acted as a person or as *Dignitas*, because in the latter case his actions would have bound his successors. Chief Justice Brook argued that statutes have commonly been "expounded to extend to a king's heirs and successors, to give them benefit or to bind them" even when the king's individual name was cited or referred to; he adduced *Magna Carta*, c. 17: "Common Pleas shall not follow *our* court,"³¹⁴ to prove that the word "our" did not refer to King John individually, but to the king as King; and finally, when summarizing, he said:

And the reason is because *the King is a Body politic*, and when an act says "the king," or says "we," it is always spoken in the person of him as King, and *in his Dignity royal*, and therefore it *includes all those who enjoy his function*.³¹⁵

Thereafter other justices—Staunford, Saunders, and Brown—took up the matter, likewise arguing that, although King Henry VIII was referred to by name, the reference was to him as King:

And *King is a name of continuance, which shall always endure as the head and the governor of the people, as the Law presumes . . . , and in this the King never dies.*

For that reason, opined the judges, the king's death is in law not called death, but demise,

because thereby he demises the kingdom to another, and lets another enjoy the functions, so that the *Dignity always continues*. . . . And

³¹³ Plowden, *Reports*, 164ff.

³¹⁴ Chief Justice Brook (Plowden, *Reports*, 175b) quotes "c.11" of *Magna Carta*; in fact, however, the reference is to *M.C.*, c.17 (King John), or c.12 (re-issue of 1216).

³¹⁵ Plowden, *Reports*, 175b-176.

then when . . . the relation is to him as King, *he as King never dies, although his natural Body dies*; but *the King* in which name it has relation to him, *does ever continue*, and therefore . . . the word King shall extend [from Henry VIII] to King Edward VI [that is, to the successor]. . . . From whence we may see that where a thing is referred to a particular king *by the name of King*, in that case *it may extend to his heirs and successors*. . . .³¹⁶

No commentary is needed to demonstrate to what extent the passages rendered here in italics for purposes of emphasis, were derived from arguments which the glossators and post-glossators had advanced long before: we recognize the catchword *Dignitas non moritur*, that is, the continuity of the *Dignitas* despite the death of the incumbent; the unity of predecessor and successor; the binding power of obligations made in the name of the Dignity; the importance of mentioning or omitting the "name"; and all the other implications which had been exploited for three centuries and more in connection with the decretal *Quoniam abbas*, or on similar occasions. Only in one respect did the English legal jargon deviate noticeably from the language of the glossators: the notion of Dignity, though mentioned by the English judges several times in its proper legal setting, was usually replaced by that of "Body politic." Here, at any rate, there is a striking parallel with the abbot's "mystical body which never dies."

Coke, when pleading in *Calvin's Case*, aptly remarked: "It is true that the King *in genere* dieth not, but, no question, *in individuo* he dieth."³¹⁷ We know those distinctions from the arguments of the Italian jurists, who, on the whole, were careful to point out that they were talking about the Prince *in genere*, about the *regia Dignitas* or *regia Maiestas*, when they said that a dignitary "never dies," and they refrained, very logically, from saying that "the King never dies." Perhaps Baldus went a little farther than others when he personified the *Dignitas* and said that the *persona idealis* never dies; but then that was, after all, only an "ideal person." The English lawyers, too, made it perfectly clear that not the king pure and simple was immortal, but that only as *King*—as "Dignity" or "Body politic"—he never died. Nevertheless, it was in the pleadings of the English lawyers that the phrase

³¹⁶ *Ibid.*, 177. See above, n.195.

³¹⁷ Coke, *Calvin's Case*, fol.10b.

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"The King never dies" seems to have made its first appearance;
and probably one could afford being a little careless, since the
distinctions between the King's immortal Body politic and his
mortal Body natural were so well established that misunderstand-
ings were practically impossible. However that may be, where so
much talk had been going on about immortal royal Dignities and
Majesties, and where—as especially in France—the tendency was
so strong to read into the individual living king features of a
living *persona idealis*,³¹⁸ it was almost to be expected that one day,
sooner or later, also the phrase *Le roi ne meurt jamais* would
make its appearance.

LE ROY EST MORT . . .

Very little attention, if any, has been paid to the indisputable
fact that the famous device *Le roi ne meurt jamais*, current in
France since the sixteenth century,³¹⁹ descended in direct succes-
sion from the legal maxim *Dignitas non moritur*, and therefore
ultimately from Pope Alexander's decretal *Quoniam abbas*. In
other words, it represented merely another twist of the well-worn
corporational doctrines of mediaeval canonists and civilians. That
this quite unambiguous genealogy has so rarely been noticed may

³¹⁸ Church, *Constitutional Thought*, 94,n.41, 197,247ff. and passim.

³¹⁹ It would be difficult to tell when exactly the slogan first appears in France.
Cf. Jean Bodin, *Les six livres de la république*, 1,c.8 (Paris, 1583; first edition 1576),
160: "Car il est certain que le Roy ne meurt jamais, comme l'on dit, ains si tost que
l'un est decedé, le plus proche masle de son estoc est saisi du Royaume et en
possession d'iceluy au paravant qu'il soit couronné." This shows that by the time
Bodin wrote (ca.1576) the maxim was well known (*comme l'on dit*). It is also
interesting that Bodin raises the device *le mort saisit le vif* (above, n.268) from the
sphere of private legal inheritance to the public sphere by replacing *le mort* by
le Royaume: the kingdom itself seizes the heir to the throne. The same connection
of *le Roy ne meurt jamais* with *le mort saisit le vif* is found in Charles Loyseau,
Cinq livres du droit des offices, 1,c.10,n.58 (Lyon, 1701; first published in 1610), 66,
quoted by Church, *Const. Thought*, 319,n.44. By that time, of course, *le Roy ne*
meurt jamais had become a religious dogma of the French nation, which, e.g.,
Bossuet, while still relying on the juristic doctrines, flamboyantly interprets in a
new fashion: the image of God, visible in the king, cannot be but immortal;
cf. Bossuet, *Oeuvres oratoires*, ed. J. Lebarq (Lille and Paris, 1892), IV,256ff ("Sur
les devoirs des rois," a Palm Sunday Sermon delivered before the king, on April 2,
1662), who renders (p.262) an exposition of Psalm 81: 6, *Ego dixi: dii estis* (see my
paper "Deus per naturam," 274,n.72): "Vous êtes des dieux . . . Mais ô dieux de
chair et de sang, ô dieux de terre et de poussière, vous mourrez comme des
hommes. N'importe, vous êtes des dieux, encore que vous mouriez, et votre autorité
ne meurt pas: cet esprit de royauté passe tout entier à vos successeurs . . . L'homme
meurt, il est vrai, mais le roi, disons-nous, ne meurt jamais: l'image de Dieu est
immortelle."

have been caused—at least, to some extent—by the fact that the legal maxim has far too often been combined, for deceptively obvious reasons, with the cries heard at the burials of French kings in the Abbey of St.-Denis: *Le roi est mort! Vive le roi!*³²⁰ Unduly, however, have those two slogans of legalistic and dynastic continuity been coupled together and finally confounded—for each has its own peculiar history. *Le roi ne meurt jamais* is dynastic only accidentally; *le pape, l'évêque, l'abbesse ne meurt jamais* would have been valid maxims even though in these cases dynastic dignity was not involved. Nor does the far-famed French device, which after all was daily bread in the jargon of English jurists of that time, appear in the burial ceremonial of French kings, since the funerary cries at St.-Denis originated in a totally different setting.³²¹

By the Treaty of Troyes, in 1420, the sick King Charles VI of France and Queen Isabeau recognized King Henry V of England as the legitimate successor presumptive to the French throne; the English claims were acknowledged in northern France, including the city of Paris. Two years later, on August 31, 1422, Henry V died at Vincennes, leaving his French claims to his son Henry VI. While the dead king's body was being conveyed first to St.-Denis, thence via Rouen to London, King Charles VI of France died also, on October 21, 1422. The Duke of Bedford, in his capacity of Regent of France for the infant Henry VI of England, returned to Paris, on November 5th, where the *Conseil* seems to have awaited his arrival to make the arrangements for the funeral and to conduct the funerary rites.³²²

Other events, however, imperiled the English succession to the French throne. South of Paris, at Méhun-sur-Yèvre, the Dauphin

³²⁰ See, e.g., Robert Holtzmann, *Französische Verfassungsgeschichte* (Munich and Berlin, 1910), 311; Schramm, *English Coronation*, 1, and *König von Frankreich*, 1,260. Bloch, *Rois thaumaturges*, 218f, stresses mainly the dynastic aspect of the St.-Denis cries, which is important but not decisive. The two notions have been confused already by the French authors around 1600.

³²¹ Much, and sometimes most, of the following paragraphs are drawn from the forthcoming book of Ralph E. Giesey, *The Royal Funeral Ceremony in Renaissance France*, a thorough and comprehensive study (based upon his University of California Ph.D. dissertation, Berkeley, Cal., 1954), which I quote according to chapter and footnote numbers. I am greatly indebted to Dr. Giesey not only for allowing me to use his manuscript freely, but also for contributing additional relevant passages and for placing liberally at my disposal his own excerpts from hitherto unpublished material collected by him abroad.

³²² Giesey, *Royal Funeral*, Ch.vi,nos.87ff.

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Charles VII was acclaimed by his officers with the cry *Vive le roi!* while the banner of France was hoisted.³²³ The Duke of Bedford, therefore, was pressed to act quickly and efficiently to protect and proclaim the rights of his sovereign lord, King Henry VI of England. When Charles VI was entombed at St.-Denis, on November 11th—just four days after Henry V had been buried at Westminster Abbey—the ceremony was concluded by the customary short prayer for the deceased king: "*Priez pour l'âme de tres-excellent prince Charles VI, roy de France.*" Then, after a short pause, a king-of-arms proclaimed the rights of the child Henry VI, and cried with loud voice: "*Vive Henry par la grace de Dieu roy de France et d'Angleterre!*" Whereupon the other heralds responded with the cry: *Vive le roy Henry!* to which the English added *Noël!*—"as if the Lord were descending from heaven," according to the French chronicler.³²⁴

Here, for the obvious purpose of forestalling the claims of the rival Dauphin and his party, the prayer for the dead king was coupled with the acclamation of the new king in the form in which normally it would be heard at royal coronations and on other occasions. Henceforth that procedure remained the custom in France: the prayer for the dead king was said and then, after a short silence "long enough to say a *Pater noster*,"³²⁵ the acclamation of the new king followed. However, the prayer for the dead king as well as the proclamation of the new king were gradually reduced in length, until finally the brief impersonal cries, interrupted only by short ceremonial, were heard: *Le roi est mort! . . . Vive le roi!* This brief and depersonalized version seems to have made its first appearance at the interment of Louis XII, in 1515, whereas an intermediary formula—the short successive cries with the mention of the individual names of both the dead king and

³²³ This ceremony is described in detail by Monstrelet, *Chroniques*, ed. Douët d'Arco (Soc. de l'hist. de France, Paris, 1857-62), IV,310: "Sy fu lors levée une banière de France dedans la chapelle, et donc lesditz officiers commencèrent a cryer hault et cler par plusieurs fois Vive le Roy!" For the date (Oct. 30th instead of Oct. 24th), see Giesey, *op.cit.*, Ch.VIII,n.20f.

³²⁴ The cries for Charles VI and Henry VI reported here are from the "original" version of the *Cérémonial de l'inhumation de Charles VI*, the oldest ms of which (Paris, BN.,fr.18674,fols.119f) is reproduced by Giesey, *Royal Funeral*, Appendix II. The cry "Noël" is reported, e.g., in *Chronique du Religieux de Saint-Denis*, ed. M. L. Bellaguet (Coll. des documents inédits, Paris, 1852), v,1496.

³²⁵ Mathieu d'Escouchy, *Chroniques*, ed. G. du Fresne de Beaucourt (Soc. de l'hist. de France, Paris, 1863-64), II,443f, relating the funeral of Charles VII in 1461.

the new king—apparently was used before 1515.³²⁶ This is all the more likely, since in 1509, on the death of Henry VII of England, the English funerary ceremonial observed that intermediary style. The stewards broke their staves, the vault was closed,

and incontinent all the herauds did [take] of their cotearmours and did hange them upon the Rayles of the herse: crying lamentably in French "The Noble kynge Henry the Seaventh is deade." And as soone as they had so done, everie heraud putt on his cote-armour againe and cryed with a loude voyce: "Vive Le noble Roy Henry le VIII^{me}," which is to say in englyshe tonge "God send the noble Kynge Henry the eight longe life."³²⁷

The English procedure which, in all likelihood, followed the example of the French ceremonial, suggests that the short succession of the two brief cries, though as yet with the invocations of the kings' names, actually was the French custom before 1509, a consideration which sends us back to the funeral of Charles VIII, in 1498.³²⁸ The later omission of the individual names certainly brought into prominence the perpetuity of the *Dignitas* as such, severed from its impersonators; but it is impossible to tell whether this was intended or not. What matters here is that the cries "The king is dead! Long live the king!" which—with or without mention of proper names—powerfully demonstrated the perpetuity of kingship, were introduced in England at a time when in the Inns of Court the maxim saying that "the king as King never dies" was just about to be formulated.

A broad political idea has been given expression through the funerary ceremonial in lapidary terms and in a dramatic display. Nevertheless, the famous cries were neither the first nor the only

³²⁶ It is commonly assumed that those cries were heard, in their shortest form, for the first time at the funeral of Francis I, in 1547; see, e.g., Bloch, *Rois thaumaturges*, 218f; Schramm, *Frankreich*, II, 125 (= I, 260, n.4). The depersonalized cries, however, are actually found already in a contemporary report of the funeral of Louis XII in 1515: *L'obsèque et enterrement du Roy* (Paris, 1515), reprinted in L. Cimber and F. Anjou, *Archives curieuses sur l'histoire de France* (Paris, 1835), 1^{er} sér., II, 69f. Cf. Giesey, *Royal Funeral*, Ch. VIII, nos. 50f, for further detail.

³²⁷ The relation is preserved in Brit. Mus., *Harley MS 3504*, fol. 259^{r-v} (ancient 271), a copy of which Dr. Giesey kindly placed at my disposal.

³²⁸ French, being the language of heraldry, cannot, of course, be taken as evidence of the French origin of the ceremony. The cries, however, are not found in the ceremonial of the interment of Edward IV, in 1483 (cf. Brit. Mus., *Egerton MS 2642*, fols. 186^v-188^v), while they are almost verbatim the cries used in 1498 at the funeral of Charles VIII of France; cf. Jean de Saint-Gelais, *Chronique*, in Th. Godefroy, *Histoire de Louys XII* (Paris, 1622), 108; cf. Giesey, *op. cit.*, Ch. VIII, n. 45.

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utterance of the idea of immortal kingship within the framework
 of royal funerals.

Coins, or coin-like productions, of the sixteenth and seventeenth
 centuries displaying a Phoenix are not rare. The mythological
 bird was, for example, an emblem of Queen Elizabeth signifying
 her virginity as well as her singularity: SOLA PHOENIX is the in-
 scription on some of her coins, and as UNICA PHOENIX she is
 celebrated in a medallion issued in the year of her demise,
 1603 (fig. 22).³²⁹ A different idea was expressed by a Phoenix
 medallion struck by English royalists in 1649, after the execution
 of Charles I. The obverse shows the profile head with the legend
 CAROLVS·I·D·G·MAG·BR·FR·ET·HI·REX. The reverse has the legend
 CAROLVS·II·D·G·MAG·BRIT·FRAN·ET·HIBER·REX; but instead of a por-
 trait, it shows the Phoenix rising from his burning nest, and the
 inscription: EX·CINERIBVS (fig. 23). About the meaning of this
 memorial medal there can be no doubt; it was struck with the
 clear intention to assert against the Lord Protector and the Com-
 monwealth the perpetuity of hereditary kingship and of the royal
 Dignity in general: the king's son rising as a Phoenix *ex cineribus*,
 from the ashes of his father—or, though less likely, from the
 shambles of the monarchy.³³⁰ Even more telling is the design of a
 jetton for the French king, devised a few years earlier, in 1643,
 to announce the death of Louis XIII and the accession of Louis
 XIV (fig. 24). It shows the Phoenix in his mountain nest, illumined
 by the rays of the Sun. The inscription, borrowed from Vergil's
 Fourth Eclogue, reads: *Caelo demittitur alto*, "He is sent from
 high Heaven"—as dynasts were supposed to be ever since the
 thirteenth century.³³¹ The gist of the design, however, is given in
 an additional explanatory note, saying:

³²⁹ Hawkins, *Medallic Illustrations*, Pl. vi, 7, 8, 9; cf. viii, 17, and, for the medallion,
 J. D. Köhler, *Munz Belustigung* (Nürnberg, 1729ff), XXI, 225ff. Cf. above, n.245.

³³⁰ Hawkins, *op.cit.*, Pl. xxx, 19. My reproduction (fig. 23) is of the copy in the
 Hunterian Museum at Glasgow, a cast of which was kindly provided by Mr. G. K.
 Jenkins, of the British Museum. The royal Phoenixes were said to make England
 another Arabia, at least according to Ben Jonson, "A Speech presented unto King
 James on the Birth of the Prince," in *The Poems*, ed. B. H. Newdigate (Oxford,
 1936), 281:

Another Phoenix, though the first is dead,
 A second's flowne from his immortal bed,
 To make this our *Arabia* to be
 The nest of an eternal progeny.

³³¹ See above, n.58.

THE KING NEVER DIES

The Phoenix is born and soars from the cinders of his father by the influx sent to him from heaven and the sun. In the same way, the king is given to us miraculously from on high: and from his father's *lit funèbre* he soars to his own *lit de justice*.³³²

The metaphor was not badly chosen, for we have to recall that the French king made his first solemn appearance in the Court of Parlement as legislator and supreme judge—that is, held his first *lit de justice*—almost immediately after his accession, and sometimes even before his predecessor king was buried.³³³ The richly decorated throne couch with its baldachin was said to be the place where “one sees *Lex et Rex* reposing under the canopy . . . , sees them together on that bed of Justice,”³³⁴ and accordingly a medallion displaying the *lit de justice* (fig. 25) pro-

³³² Paris, *Bibl. Mazarine MS 4395*, fol.1^v (I owe the photograph [fig. 24] to Dr. Giesey), contains a series of designs proposed for the royal jetton for New Year's day, 1644. The note on the Phoenix design reads:

Le Phoenix naist et s'eleve des Cendres de son pere par l'Influence qui luy est envoyée du Ciel et du Soleil. Ainsy le Roy nous a esté miraculeusement donné d'en-haut: Et du lict funèbre de son pere il s'eleve à son lict de Justice.

The Phoenix symbol was not infrequently used in the French court ceremonial of the 16th century. For example, the Order of the Holy Ghost, founded by Henry III in 1579, was originally to be called *Order of the Phoenix*, because, argued the courtiers, that bird was “the only creature of his kind, and without any paragon,” and therein resembled the French king who “was the Phoenix of all kings in the world.” See André Favin, *The Theater of Honour and Knighthood* (first published in 1620; English version, London, 1623), 416. Moreover, in 1600, at the *entrée* of Maria de' Medici into Avignon—she came as a bride to marry Henri IV—a triumphal arch was erected showing in a spandrel the Phoenix with the inscription addressing Maria: *O felix haeresque tui* (quotation from Claudian; see above, n.252), making allusion to the hope of an heir to the throne from the marriage, eventually *Le petit phénix* (above, n.269); cf. André Valladier, *Labyrinthe de l'Hercule Gaulois* (Avignon, 1601), 187 (cf. 200); cf. Giesey, *Royal Funeral*, Ch.x.

³³³ Both Louis XIV and Louis XV, infants at the time of their accession, were carried to a *lit de justice* before their predecessors were buried; cf. Holtzmann, *Französische Verfassungsgeschichte*, 315. On the *lit de justice*, see Church, *Constitutional Thought*, 150ff; F. Funck-Brentano, *L'ancienne France: Le roi* (Paris, 1913), 158ff; see next note.

³³⁴ Bernard de la Roche Flavin, *Treize livres des Parlemens de France*, IV,c.1 (Geneva, 1621), 353ff, gives the fullest description of the *lit de justice*; cf. §9, p.355: “. . . on void que *Rex et Lex* se reposent sous le couvert [= ciel ou daix; cf. §3, p.353] de ceste sale . . . on les void ensemblement en ce lict de Iustice . . .” Needless to say, Justice is considered by the author to be almost a French monopoly; cf. §15, p.356 (talking about the *main de Justice*, which is claimed to be an exclusively French attribute), “pource que la Iustice est nee avec la France, et a son droit hereditaire en la terre de France, comme il y a des pays qui sont dotiés de choses rares, et qui ne peuvent venir ailleurs.” India has odoriferous trees; Persia has pearls; only the North has amber. “Aussi il n'y a qu'une France, ou s'exercent les vrayes fonctions de la Iustice.”

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ed for the royal jetton for New Year's day,
ds:

de son pere par l'Influence qui luy est
Roy nous a esté miraculeusement donné
e il s'eleve à son lict de Justice.

ly used in the French court ceremonial
Order of the Holy Ghost, founded by
ed *Order of the Phoenix*, because, argued
creature of his kind, and without any
nch king who "was the Phoenix of all
the Theater of Honour and Knighthood
ondon, 1623), 416. Moreover, in 1600, at
on—she came as a bride to marry Henri
ing in a spandrel the Phoenix with the
esque tui (quotation from Claudian; see
pe of an heir to the throne from the
e, n.269); cf. André Valladier, *Labyrinthe*
(cf. 200); cf. Giesey, *Royal Funeral*, Ch.x.
nts at the time of their accession, were
edecessors were buried; cf. Holtzmann,
the *lit de justice*, see Church, *Consti-
L'ancienne France: Le roi* (Paris, 1913),

livres des Parlemens de France, IV,c.1
ription of the *lit de justice*; cf. §9, p.355:

soubs the couvert [= ciel ou daix; cf.
ensemblement en ce lict de Iustice . . ."
author to be almost a French monopoly;
le Justice, which is claimed to be an
Justice est nee avec la France, et a son
me il y a des pays qui sont doués de
rs." India has odoriferous trees; Persia
ssi il n'y a qu'une France, ou s'exercent

claims: *Hinc suprema lex*, "From here there emanates the supreme
law."³³⁵ The kingdom could not be left for ever so short a time
without the continuity of Law and Justice which the king per-
sonified, and therefore the new Phoenix had to soar instantly and
directly, without loss of time, "from his father's deathbed to his
own bed of Justice." Once more, the notion of Justice was destined
to have some bearings as a symbol of sempiternity.

At the king's funeral, the privilege of carrying the four corners
of the mortuary pall fell to the four "Presidents of Parlement,"
that is, the four highest judges of the kingdom's supreme court.
This custom can be traced back to the fourteenth century,³³⁶ and
the reason for this distinction is given unanimously by later
authors, who explained

that they [the presidents] represent his [the king's] person or the
doing of Justice [in Parlement], which is the principal member of
his Crown and by which he reigns and has sovereignty. . . .³³⁷

that they, who represent in Parlement the person of the king and
govern the sovereign Justice of the realm, should be closest to the
body of the king. . . .³³⁸

The four presidents, however, were not only metaphorically *un
vray pourtraict de Sa Majesté*, but also their regalia passed as

³³⁵ Claude-François Menestrier, *Histoire de Louis le Grand* (Paris, 1691), pl.28.
The design is patterned after the paleo-Christian and pagan *Etimasia*, the empty
throne of gods and rulers, later of Christ; it here is adapted for the legislating
king: canopied, displaying on the seat the scepter and *main de justice*, showing
on the back the emblem of the sun, and flanked by Justice and Faith. For another
pattern of representation, the *lit de justice* at Vendôme, in 1458, see Le Comte Paul
Durrieu, *Le Boccace de Munich* (Munich, 1909), 51ff, and pl. 1. An idea closely
related to the medallion of Louis XIV is expressed by the device of James I:
A Deo rex, a rege lex; cf. Schliermann, "Sakralrecht des protestantischen Herr-
schers," 344.

³³⁶ See next note, referring to 1364. Giesey, *Royal Funeral*, Ch.v,nos.3ff, is
inclined to believe that the privilege goes back to 1350 (burial of Philip VI), or
possibly to 1328 (Charles IV).

³³⁷ "Et portèrent le corps dudit Roy les gens de son Parlement . . . pour ce que
ilz representent sa personne ou fait de justice, qui est le principal membre de sa
coronne, et par lequel il regne et a seigneurie." *Chroniques des règnes de Jean II
et de Charles V*, ed. R. Delachenal (Société de l'histoire de France, 1910), 1343.

³³⁸ ". . . ilz qui en parlement representent la personne du roy et qui gouvernent
la justice souveraine du royaume, soient au plus près du corps du roy." Cf. *Céré-
monial de l'inhumation de Charles VI*, ed. Giesey, *Royal Funeral*, Appendix II; in
the same passage the four presidents are described: "vestus de leurs manteaux
vermeils fourrez de menu vair."

*le vray habit dont estoient vestues Leurs Majestez.*³³⁹ The costume of the justices consisted of a bright red robe trimmed with miniver and probably reflecting the royal purple, just as the cardinal's red tunic reflected an authority affiliated to the *cappa rubea* of the pope; it can likewise be traced back to the fourteenth century.³⁴⁰ Moreover, as a special mark of distinction, the justices were entitled to wear three pendants of gold ribbon or silk attached to their shoulder, called sometimes *le bouton d'or*; there is reason to believe that this decoration derived from the three pendants of the royal (originally imperial) shoulder-clasp, the *fibula*, often mentioned by the mediaeval jurists as one of the four insignia of imperial majesty, the others being the purple, the scepter, and the diadem.³⁴¹ There can be little doubt that the red

³³⁹ Funck-Brentano, *Le roi*, 151f, has collected a number of interesting remarks concerning the identity of the robes of the king and of the presidents, drawn chiefly from La Roche Flavin, *Parlemens*, x, cc.24-25, pp.792ff.

³⁴⁰ See Giesey, *Royal Funeral*, Ch.v,nos.9,15, for a miniature of the funeral procession of Queen Jeanne de Bourbon (d.1378).

³⁴¹ For the *bouton d'or*, see La Roche Flavin, *Parlemens*, x,c.25, §12, p. 796; also Funck-Brentano, *Le roi*, 152,n.5. For the Roman imperial *fibula*, see, e.g., Richard Delbrück, *Consulardiptychen und verwandte Denkmäler* (Berlin, 1926-29), 40 (plainly visible in the Justinian mosaic at San Vitale in Ravenna). Cf., e.g., Lucas de Penna, on C.11,8,4,n.5 (Venice, 1582), 393: "quatuor sunt insignia regalia, scil. purpura, fibula aurea, sceptrum et diadema"; see also Lucas de Penna, on C.11,11,1, n.2, p.401; Mattheus de Afflictis, on *Lib.aug.*, 1,20 (21),n.1, fol.104v. Further Isidore of Seville, *Ethymol.*, xix,24,2, quoted, e.g., in *Graphia libellus*, c.5, ed. Schramm, *Kaiser, Rom und Renovatio*, II,95. De la Roche Flavin, *loc.cit.*, refers also to the Hellenistic and Biblical model, I Macc., 10: 89: "Et misit [rex] ei [Jonathae] fibulam auream, sicut consuetudo est dari cognatis regum" (also I Macc., 11: 58, and 14: 44). That is to say, Jonathan received the *fibula aurea* as *amicus regis* (συγγενής τοῦ βασιλέως), which was an official title designating a high-ranking member of the privy council; see John Crook, *Consilium Principis* (Cambridge, 1955), 21f. Now, the *consilarii* of king or emperor were officially *amici regis* or *imperatoris*, a fact well known to the mediaeval jurists; see, e.g., Lucas de Penna, on C.12,16,rubr., n.1, p.706, who, *vice versa*, interprets John 15: 14f (Christ addressing the Apostles: *Vos autem dixi amicos*), almost constitutionally: *amici Christi* = privy councillors of Christ. Since the French presidents—just like the chancellor and two or three other high-ranking officials—were of course *consilarii regis*, they received the badge apparently in their capacity of *amici regis*. This hypothesis perhaps finds support in *Graphia libellus*, c.21, ed. Schramm, II,104: at the investiture of a judge the emperor "convertat fibulam [manti] ad dextram partem," signifying that on the open right side of the mantle "lex ei debeat esse aperta." Cf. La Roche Flavin, *Parlemens*, x,c.25, §12, p.796, for the restriction of the *bouton d'or* to the right shoulder; see also, for a few remarks (not always correct) on the history of the insignia, J. Quicherat, *Histoire du costume en France* (Paris, 1877), 324. How and why the pendants of the *fibula* turned into three golden or red ribbons, can be gathered from Carolingian miniatures; see Schramm, *Kaiser und Könige in Bildern*, II, pl.17, also pls.9b,18a,28; cf. Deér, "Ein Doppelbildnis Karls des Grossen," *Forschungen zur Kunstgeschichte und christlichen Archäologie*, II (1953), 111.

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robes as well as the *bouton d'or* were supposed to mirror royal
insignia on a smaller scale. Not in vain were these high judges
called *pars corporis principis*, "part of the king's body."³⁴²

This digression into the study of costumes was necessary to
understand yet another privilege enjoyed by the justices. While
at the royal funerals all the mourners and the whole *cortège* were
clad in black or displayed signs of mourning, the pall-bearing
Presidents of the Paris Parlement alone appeared in their bright
red robes. They were *exempt de porter le deuil*, "exempt from
wearing mourning," as an eye-witness of the funeral procession
of Francis I (1547) explained, "because the Crown and Justice
never die."³⁴³ This exemption of the high judges from wearing
mourning, first mentioned in 1422 in connection with the funeral
of Charles VI, goes back to the fourteenth century as the minia-
tures disclose.³⁴⁴ The explanation of this custom, however, was
always the same.

Aucuns avoient leur manteau rouge,
En exemple et signifiante
Que Justice jamais ne bouge
Pour trespas du Roy, ne muance. . . .

writes Martial de Paris, describing the funeral of Charles VII, in
1461,³⁴⁵ while Jean du Tillet, writing a century later, remarks

³⁴² Charles de Grassaille, *Regalium Franciae libri duo*, I, jus XII (Paris, 1545),
116: "Item illud magnum consilium dicitur proprie consistorium principis . . . et
in corpore unde sumitur." Cf. Church, *Constitutional Thought*, 54. The termi-
nology clearly derives from C.9,8,5, where the emperor styles his *consilium* the
consistorium, and understands the senate as *pars corporis nostri*; see above, Ch.v,
n.42; also Ch.IV,nos.188 and 195.

³⁴³ Vieilleville, *Mémoires*, ed. J. Michaud, and P. Poujoulat, *Nouvelle collection
des mémoires sur l'histoire de France* (Paris, 1836-39), IX,63: ". . . car les presidents
et conseillers de la cour de Parlement l'environnoient [that is, the king's effigy; see
below] de toutes partes, en leurs robes rouges, exempts de porter le deuil, avec
cette raison, que la couronne et la justice ne meurent jamais; de laquelle justice
ils sont, soubz l'autorité des roys, premiers et souverains administrateurs." See below,
n.376, for Vieilleville as onlooker in the suite of Henry II. Also De la Roche Flavin,
Parlemens, XIII,c.88, §10, p.1181: "La Justice, et mesmes l'autorité des Parlements
est estimee tousiours durer en ce Royaume, soit le Roy mort, prins, ou absent. Et
en signe de ce, les officiers des Parlements és obseques des Roys ne sont vestus de
deuil, comme tous les autres, ains d'escarlate . . ."; cf. *ibid.*, §29, p.1186f, where the
rubric says "Le Parlement en corps ne porter jamais deuil," and the text stresses
once more: "Mais la Cour y assiste [aux obseques] en corps en robe rouge, et
marche avec l'effigie du Roy, qui est dans un lict, comme accompagnant le Roy
en son lict de iustice."

³⁴⁴ See above, nos.338,340.

³⁴⁵ Martial de Paris, dit d'Auvergne, *Les Vigilles de Charles VII*, in the edition
of his *Les poésies* (Paris, 1724), II,170.

that it was the duty of the four Presidents to demonstrate by their colourful robes "that by the death of the king Justice does not cease."³⁴⁶

The underlying ideas are obvious, and they were obvious to the contemporaries, too. The justices in their costume mirroring that of the king himself displayed no signs of mourning because "Crown and Justice never die." They represented, and were part of the body of, a king who as King never died; and they were administrators of a Justice which likewise never died and whose ministry never suffered interruption. *Iustitia enim perpetua est et immortalis*, says the Book of Wisdom (1:15), and on the strength of that verse Baldus, using Aristotelian definitions, glorified Justice as a *habitus qui non moritur*, something divine and immortal like the soul.³⁴⁷ The individual king may die; but the King who represents sovereign Justice and was represented by the supreme judges, was not dead; he continued his jurisdiction ceaselessly through the agency of his officers even though his natural body had passed away. *Parlamentum Franciae non servat ferias*, "The Parlement, the supreme court, of France does not observe holidays," ran a French legal maxim based on Roman Law.³⁴⁸ Hence, the Presidents of Parlement showed by their red

³⁴⁶ Jean du Tillet, *Recueil des Roys de France* (written ca. 1560, first published in 1578; Paris, 1618) 1,341: "Le principal office desquels [membres du Parlement] est bien administrer la justice . . . et faire cognoistre que par la mort desdits Rois elle ne cesse."

³⁴⁷ Baldus, on *D.1.1.1.n.2*, fol.7r, and *D.1.1.10.n.1*, fol.15r; cf. Ullmann, "Baldus' Conception of Law," 390; above, Ch.IV,nos.70 and 159. The definition of Justice as *habitus*, stimulated by the words "Iustitia est constans et perpetua voluntas" (actually the opening words of the *Institutes*), was known to the glossators through Cicero, *De inventione rhetorica*, 11,53, but goes back to Aristotle.

³⁴⁸ Grassaille, *Regalia Franciae*, I, ius XII, ad quartum (Paris, 1545), 120: ". . . quod parlamentum Franciae non servat ferias: imo ex consuetudine, omnibus diebus etiam feriatis (aliquibus exceptis) reddit ius . . . Ideo, de curia Franciae potest dici, quod de Romana dicit[ur] . . . , quod solennibus diebus solennes processus facit." See De la Roche Flavin, *Parlemens*, XIII,c.87, pp.1174ff, for the exceptions (including a king's funeral when *les Cours de Parlement assistent en corps*) which match, by and large, those enumerated in C.3,12,6 and 9. On that basis, already Frederick II ordered, *Lib.aug.*, 150 (52), that "iustitiiarii . . . continue curias . . . regere debeant, causas audiant et decident." See the glosses on that law by Andreas of Isernia, ed. Cervone, 108f, and by Matthaeus de Afflictis, 1,fol.195.n.3, who refer for that ideal of uninterrupted activity of the law courts to C.3,12,9. In France, that principle had been valid ever since the 13th century; see Durandus, *Speculum iuris*, II, partic.I, "De Feriis," §1,n.10, p.506: ". . . quia nulla lex potest curiam Principis coarctare, quin possit quolibet tempore ius reddere, etiam diebus feriatis . . . Nam ipse est lex animata in terris . . . Et pro hoc potest excusari consuetudo curiae regis Franciae quo[d] tempore parlamentorum omni die ius reddit. . . ."

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robes that the king's death did not affect Justice "who never dies."
Those were ideas formulated long before by the mediaeval jurists,
and the French Presidents of Parlement actually may have ap-
peared, when acting as pall-bearers, like a *tableau vivant* illus-
trating Baldus' remark: "The power of ordinary jurisdiction lives
even when in the meantime the emperor dies." It is true, added
Baldus, that a corpse does not will, but the dead emperor, his
Dignitas, "seems to will even after his death, because . . . every-
thing pleases the Prince that is done by his judges even after his
death, provided that they do not act against the Law."³⁴⁹ How then
could the justices wear mourning, since *their* King did not die?

Yet another feature connected with the burial rites deserves
attention here. Charles VIII, in 1498, was entombed as customary
at St.-Denis. Pierre d'Urfé, Master of the Horse, bore the sword
of the realm at the funeral, and the First Chamberlain carried the
banner of France. D'Urfé has left an account of the final burial
scene: as the coffin slipped into the vault—that is, at the lament
Le Roy est mort!—the stewards broke their batons and threw
them into the tomb, while the heralds and sergeants-at-arms de-
posed their coats-of-arms and maces. The banner of France, how-
ever, just as the sword, was only dipped for a short moment, and
at the cry *Vive le roy!* it was quickly raised again because, as
d'Urfé explains, "the banner never dies," *car elle [la bannière] ne
meurt jamais.*³⁵⁰ Thus, the famous formula was transferred to the
banner of France as well. In other words, insofar as the king as
King was identifiable with "sovereign Justice" or with the "Banner
of France" the funerary rites suggested indeed that "the King
never dies."

EFFIGIES

With this symbolism of the King's survival despite the king's
death there fell in one of the most startling features of royal

³⁴⁹ Baldus, on C.,10,1,rubr.,n.16, fol.232v: ". . . quia non ex vi talis mandati
fuit facta delegatio, sed ex vi ordinariae iurisdictionis, quae viget licet moriatur
interim imperator . . . Et velle videtur [imperator] etiam post mortem, quia etiam
post mortem suam verba contulisse videtur: omnia enim placent principi quae
per suos iudices etiam post mortem suam fiunt, nisi contra legem sint." See above,
n.296.

³⁵⁰ See Th. Godefroy, *Le cérémonial de France* (Paris, 1619), 39f, for the
Ordonnance of Pierre d'Urfé ("L'Ordre tenu à l'enterrement du Roy Charles VIII,
l'an 1498, par Messire Pierre d'Urfé, grand escuyer de France").

duplication contrived in modern times: the rites connected in France with the king's effigy.³⁵¹

It is fortunate that, in this case, we are fairly accurately informed about the origins of the usage: it was borrowed from England where the display of effigies at royal funerals is on record since 1327.³⁵² On September 21st of that year, King Edward II died or was murdered (we do not know) at Berkeley Castle; some time later, his disemboweled and embalmed body, accompanied by an effigy, was taken to Gloucester and buried, on December 20th, in the abbey church of St. Peter. Was it the defaced appearance of the king which made the use of an image advisable? Had some profound changes taken place in Western burial customs? We might think, of course, of purely practical reasons, since the entombment of Edward II was delayed for three months (September 21 to December 20); however, the long delay of the burial cannot have been the only reason for replacing the body by the visible effigy: no effigy was used at the funeral of Edward I who was buried at Westminster almost four months after he died at Burgh-upon-the-Sands on the Solway (July 7 to October 28, 1307).

No matter how we may wish to explain the introduction of the effigy in 1327, with the funeral of Edward II there begins, to our knowledge, the custom of placing on top of the coffin the "roiall representation" or "personage," a figure or image *ad similitudinem regis*, which—made of wood or of leather padded with bombast and covered with plaster—was dressed in the coronation garments or, later on, in the parliamentary robe. The effigy displayed the insignia of sovereignty: on the head of the image (worked apparently since Henry VII after the death mask) there was the crown,

³⁵¹ On the effigies in connection with death masks and at large, see Ernst Benckard, *Das ewige Antlitz* (Berlin, 1927); English version by Margaret M. Green, *Undying Faces* (New York, 1929); W. H. Hope, "On the Funeral Effigies of the Kings and Queens of England," *Archaeologia*, LX:2 (1907), 518-565; E. Bickermann, "Die römische Kaiserapotheose," *Archiv für Religionswissenschaft*, xxvii (1929), Excursus, pp. 32f; J. Schlosser, "Geschichte der Porträtbildnerei in Wachs," *Jahrbuch der kunsthistorischen Sammlungen des allerhöchsten Kaiserhauses* (Vienna), xxix (1910), 195f; Giesey, *Royal Funeral*, Ch. vi. Andreas Pigler, "Portraying the Dead," *Acta historiae artium Academiae scientiarum Hungariae*, iv (1956), 1-75, quoted by Harald Keller, "Effigie," in *Reallexikon zur Deutschen Kunstgeschichte*, iv (1956), 743-749, was not yet accessible to me.

³⁵² See, in addition to Hope, "Funeral Effigies," 530f, also S. Moore, "Documents relating to the Death and Burial of King Edward II," *Archaeologia*, L:1 (1886), 215-226.

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while the artificial hands held orb and scepter.³⁵³ Wherever the
 circumstances were not to the contrary,³⁵⁴ the effigies were hence-
 forth used at the burials of royalty: enclosed in the coffin of lead,
 which itself was encased in a casket of wood, there rested the
 corpse of the king, his mortal and normally visible—though now
 invisible—body natural; whereas his normally invisible body
 politic was on this occasion visibly displayed by the effigy in its
 pompous regalia: a *persona ficta*—the effigy—impersonating a
persona ficta—the *Dignitas*.

Ideas such as these, though perhaps not totally absent from the
 English funerary ceremonial either, became very pronounced in
 France once the usage of the effigy was introduced in that country
 in the course of the fateful year 1422. King Henry V of England,
 we recall, died at Vincennes. In agreement with English custom an
 effigy was prepared for display on the coffin—perhaps already in
 St.-Denis, and most certainly in Rouen.³⁵⁵ When, a few weeks after
 the demise of Henry V, Charles VI of France also died, the Duke
 of Bedford, as mentioned before, was responsible, directly or in-
 directly, for arrangements for the French king's funeral. On
 Bedford's return to Paris on November 5th, or just before his
 return, order was given to prepare an effigy of Charles VI for his
 funeral on November 11th. The records of the funerary expenses
 show that this order was executed in considerable hurry.³⁵⁶ That
 is to say, as a result of the peculiar circumstances of the year
 1422, when simultaneously the Anglo-French and the native
 French kings died and were buried, the English custom of ex-
 hibiting the king's funerary effigy was transplanted to France.

Henceforth the royal effigy literally "played a rôle" in the
 funerary ceremonial of French kings. In fact, it played an inde-
 pendent rôle of its own, apart from the king's dead body. In 1538,
 a prominent French jurist, Charles de Grassaille, asserted that
 "the King of France has two good angels as guardians: one in

³⁵³ Hope, "Funeral Effigies," 531.

³⁵⁴ As, e.g., in the cases of Richard II, Henry VI, Edward V, and Richard III.

³⁵⁵ For the display of the effigy in Rouen, see Monstrelet, iv, 112f; for the rites
 at St.-Denis, the French chronicles do not mention an effigy specifically; see, how-
 ever, the very detailed *Vita Henrici Quinti* (ed. T. Hearne, Oxford, 1727), 336f,
 which implies that an effigy was used from the outset; see Giesey, *Royal Funeral*,
 Ch. vi, nos. 100f.

³⁵⁶ See Giesey, Ch. vi, nos. 96f, for details.

reason of his private person, and the other in reason of his royal Dignity."³⁵⁷ Indeed, if the king according to Jean Gerson had "two lives," he could not have less than two angels to protect them; nor will it be too hazardous to conjecture that at the king's funeral the second angel hovered presumably around the effigy. At any rate, we notice that the distinction between a ruler's person and his Dignity, disseminated for centuries by Italian jurists, was not absent from French political thought either.³⁵⁸ But whereas the nature of the Dignity was normally expounded in court and in council only, it was a peculiar knack of the French to make the *Dignitas* also visible and expose it to the eye in pageant and ceremonial. The King "himself is not the Dignity, but acts the person of the Dignity," said Pierre Grégoire, a French legist writing in the last quarter of the sixteenth century,³⁵⁹ and he pursued that idea in a remarkable fashion. Crown and diadem, he remarked, were external accessories of a mortal human head, and the purple was an external accessory of a mortal human body which was exposed to disease and any freak of fortune; true, the regalia "have the divinity of the Dignity," but they do not deliver man of his human nature.³⁶⁰ And in that connection, Grégoire arrived at an unexpected statement: "The Majesty of God appears in the Prince *externally*, for the utility of the subjects; but *internally* there remains what is human."³⁶¹ Grégoire, when relegating the "Majesty of God" to the external display of regalia,

³⁵⁷ Grassaille, *Regalia Franciae*, I, ius xx, p.210: "Item, Rex Franciae duos habet bonos angelos custodes: unum ratione suae privatae personae, alterum ratione dignitatis regalis."

³⁵⁸ For Jean Gerson, see above, Ch.v,n.76. See further Church, *Constitutional Thought*, 253,n.1, who quotes François Grimaudet distinguishing between the Prince as Prince and the individual Caesar; or René Choppin, *De dominio Franciae*, III,tit.5,n.6 (Basel, 1605), p.449: ". . . dignitati magis quam personae concessa." See also Pierre Grégoire, *De republica*, IX,c.1,n.11 (Lyon, 1609; first published in 1578), p.266C: all belongs to the Prince in times of an emergency "in qua principis dicuntur ut principis . . . non principis privati." See, however, Church, *op.cit.*, 309, who emphasizes that by the end of the 16th century "the extreme absolutists reduced drastically the traditional significance . . . of the distinction between the king and the crown . . ."

³⁵⁹ Grégoire, *op.cit.*, VI,c.3,n.7: "Docendus est itaque princeps separatim prius se ipsum cognoscere, postea dignitatem quam gerit. Nam ipse non est dignitas: sed agit personam dignitatis." The whole chapter (pp.137ff) is devoted to the *Dignitas*.

³⁶⁰ Grégoire, *loc.cit.*, n.7 (quoted by Church, *op.cit.*, 248,n.12), also n.3: "Principum insignia . . . quae habent dignitatis numen, non adimunt hominis naturam et quod humanum est . . ."

³⁶¹ Grégoire, *loc.cit.*, n.1: "Maiestas Dei in principibus extra apparet in utilitatem subditorum, sed intus remanet quod humanum est."

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no more sought to be paradoxical than did his contemporary across the Channel, Coke, who made the striking observation that the mortal king was God-made, but the immortal King, man-made.³⁶² However, the visibility of God in the regalia "for the utility of the subjects" makes us think of Thackeray's caricature (fig. 26) in which the great novelist pokes fun at Rigaud's famous painting of Louis XIV by juxtaposing the final pompous state portrait and its two components: the king's pitiful body natural and a dummy decorated with the regalia.³⁶³ In fact, for the utility of the subjects, the Majesty might as well be vested externally in the funerary effigy by the means of which the king's person seemingly doubled: the two bodies, unquestionably united in the living king, were visibly segregated on the king's demise.

Actually, the importance of the king's effigy in the funerary rites of the sixteenth century soon matched or even eclipsed that of the dead body itself. Noticeable as early as 1498, at the funeral of Charles VIII, and fully developed in 1547, at the rites held for Francis I, the display of the effigy was connected successively with the new political ideas of that age, indicating, for example, that the royal Dignity never died and that in the image the dead king's jurisdiction continued until the day he was buried. Under the impact of those ideas—strengthened by influences deriving from the mediaeval *tableaux vivants*, the Italian *trionfi*, and the study as well as the application of classical texts—the ceremonial connected with the effigy began to be filled with new contents and to affect fundamentally the funerary mood itself: a new triumphal element came into the ceremony which was absent in earlier times.

Apart from other changes, that new mood led to the replacement of the simple bier on which in former days the corpse had been carried, by the triumphal "chariot d'armes" on which henceforth the effigy rode—at first on top of the coffin, later alone and separated from the corpse.³⁶⁴ Hence, to the lugubrious aspects

³⁶² Coke, *Calvin's Case*, fol.10: ". . . one a natural body . . . , and this body is of the creation of Almighty God, and is subject to death . . . ; and the other is a politic body . . . framed by the policy of man . . . and in this capacity the King is esteemed to be immortal, invisible, not subject to death . . ."

³⁶³ Marianna Jenkins, *The State Portrait* (Monographs on Archaeology and Fine Arts, III [New York, 1947]), fig.63, cf. p.46. See Thackeray, *Paris Sketch Book*, in the Charterhouse edition of the *Works of Thackeray* (London, 1901), XVI, facing p.313.

³⁶⁴ While at the funerals of Charles VII (1461) and Charles VIII (1498) the

which formerly dominated the funerary ceremonial, a new triumphal element was added, which may not have been caused by the introduction of the effigy, but which certainly received from the introduction of the funerary image, and through it, new and unexpected impulses. It should be emphasized, however, that the new triumphal idea differed profoundly from that substratum of triumph which, of course, gave a certain tinge also to the mediaeval funeral rites; for that new concept of triumph did not mean to anticipate the king's future *conregnatio* with Christ in heaven, but to celebrate and display the dead king's *conregnatio* with the immortal royal *Dignitas* on earth of which the substance had passed on to the successor, but which still was visibly represented by the effigy of the deceased ruler.³⁶⁵ For the last time, the dead king "acts the person of the Dignity." Moreover, the deceased king now approached the eternal Judge in heaven in a different attire: in the Middle Ages the king was buried with his crown and his regalia, or copies thereof; now, however, he was naked or in his winding sheet, and he came to heaven as a poor wretch, whereas the regalia were reserved for the effigy, the true bearer of royal glory and the symbol of a Dignity "which never dies."³⁶⁶

effigy was still lying on top of the coffin, a separation took place at the funeral of Louis XII. With Francis I's funeral (1547), the coffin in a black draped chariot went in the van of the procession, while the effigy, in full royal triumph, was carried near the rear, the position of honor. For the details of a complicated development, see Giesey, Ch.vii,n.42ff.

³⁶⁵ This antithesis was felt apparently as early as the 1560's by Du Tillet, *Recueil des Roys de France* (ed. 1617), 1341, when he remarks that with Francis I and Henry II "a commencé estre divisé le corps de l'effigie, et mis dedans le chariot d'armes, ou de parement, pour faire (comme est vray-semblable) l'effigie plus eminent: par ce moyen à l'effigie seule ont depuis esté rendues les honneurs appartenans au corps mis en arrière: combien que par la future resurrection il sera immortel." That is to say, the eminence of the image which receives on earth all the honors, is set over against the now decaying corpse which nevertheless will be the truly immortal body after the Day of Resurrection. For the *conregnatio* with Christ in the future life (a privilege of the Redeemed at large, but especially of kings), see the material collected by Schramm, "Herrscherbild," 222-224; also O. Treitinger, *Die oströmische Kaiser- und Reichsidee* (Jena, 1938), 155f.

³⁶⁶ When the tombs of the French kings were opened during the Revolution, the skeletons of all the kings up to Charles VII were found in royal robes, and also enclosed were crown, scepter, hand of justice and ring (not always all of these items, but always some of them). Beginning with Charles VIII, however, the corpses were found to have been buried without any royal attire or insignia. Cf. A. Lenoir, *Musée des Monumens Français* (Paris, 1801), II,xcixff: "Notice historique sur les inhumations faictes en 1793 dans l'abbaye de Saint-Denis." The same account is in G. d'Heilly (pseud. for E. A. Poincot), *Extraction des cercueils royaux à Saint-Denis en 1793* (Paris, 1868). See Giesey, *Royal Funeral*, Ch.vii,nos.14,15,34. [See Addenda, below, p.568.]

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Byzantium, as the saying is, was liturgically bifocal: a "liturgy of the court" had been developed side by side with the normal liturgy of the Church. At the French funerary rites, another bifocality developed: one ritual of the Church, observed by the clergy for the misery of the naked or half-naked man *in* the coffin ("internally there remains what is human"), and another ritual of the state, celebrating through the effigy the immortal and regal Dignity exposed *on* the coffin ("externally there appears the Majesty of God"). The triumph of Death and the triumph over Death were shown side by side.

Only a few features of the ceremonial connected with the effigy shall be mentioned here to illustrate the continuous juxtaposition of the dead king's earthly remains and his undying Dignity, each of which alternately was given prominence. At the funeral of Francis I, the encoffined body in the flesh was exhibited for about ten days in the hall of the palace. Then the scenario changed: the coffin containing the corpse was placed in a small chamber while in the hall the lifelike effigy of the king, made by François Clouet, took its place and lay in state—the so-called "imperial" crown on its head, the hands folded, scepter and *main de justice* on pillows on either side of it (fig. 27).³⁶⁷ No signs of mourning were visible in the colorfully decorated room in which cloth of gold,

³⁶⁷ The picture shows not Francis I, but Henry IV on his *lit d'honneur* (cf. Benkard, *Undying Faces*, pl.I, facing p.18, with the notes on p.59), since Clouet's effigy of Francis is not preserved; however, from the extracts of accounts, published by L. Delaborde, *La renaissance des arts à la cour de France* (Paris, 1850), 185-90, the makeup of the effigy of Francis I can be completely reconstructed; see Giesey, *Royal Funeral*, Ch.I,n.17f. For the "imperial" crown of the French kings, see the two fundamental studies by Josef Deér, "Die abendländische Kaiserkrone des Hochmittelalters," and "Der Ursprung der Kaiserkrone," *Schweizerische Beiträge zur allgemeinen Geschichte*, VII (1949), 53-86, and VIII (1950), 51-87; but the transition of that emblem to the kings of France and England (cf. Schramm, *König von Frankreich*, 1,210) has as yet to be studied in detail, whereby interesting aspects may be gleaned from the French jurists. For the *lit d'honneur* of Francis I, see Giesey, who stresses the triumphal character. It is interesting to note in this connection that the so-called *Castrum doloris* (liturgically called also *tumba*) of the Prussian kings (Frederick William I and Frederick the Great) displayed the triumphal idea exclusively, as the picture published by Benkard (*Undying Faces*, pl.vi, and pp.34ff) shows clearly: a canopy of gold brocade vaulted the effigy *in* the show coffin; on the back of the canopy was the dead king's "State Portrait" (below, n.371), while a trumpet-blowing Victory or winged Genius (taking the place of the Roman *consecratio* eagle or of a Christian angel) ascended from the top of the canopy and carried as an *imago clipeata* the monogram flourish (which by that time had joined the heraldic emblems) of the dead king to heaven—a weird conglomeration of many symbols (excepting Christian symbols, which apparently did not fit the mood of an apotheosis).

gold lilies on blue ground, and other heraldic emblems dominated. On either side of the *lit d'honneur* were altars on which the clergy, almost incessantly, celebrated masses, and at the foot of the bed was a vessel with holy water for the visitors who came to asperse—that is, keep away the demons, not from the dead man's soul on its journey to heaven or from the flesh destined to return to dust, but from the Dignity in effigy which had its own guardian angel anyhow.³⁶⁸

During that period, the image (according to the description of Pierre du Chastel, which was repeated by Jean du Tillet) was attended as though the dummy were the living king himself:

The table being set by the officers of the commissary; the service carried by the gentleman servants, bread-carrier, cup-bearer, and carver, with the usher marching before them and followed by the officer of the cupboard, who spread the table with the reverences and samplings that were customarily made. After the bread was broken and prepared, the meat and other courses were brought in. . . . The napkin was presented by the steward to the most dignified person present, to wipe the hands of the Seigneur [i.e., the king in effigy]. The table blessed by a Cardinal; the basins of water for washing the hands presented at the chair of the Seigneur, as if he had been living, and seated in it. The three courses of the meal were carried out with the same forms, ceremonies, and samplings as they were wont to do during the life of the Seigneur, without forgetting those of the wine, with the presentation of the cup at the places and hours that the Seigneur had been accustomed to drink, two times at each of his meals. . . .³⁶⁹

These services rendered to an image are as startling as is the active participation of the Cardinal and the clergy. To be sure, there were ritual services proffered to sacred images—anointing, censuring, aspersing, laving.³⁷⁰ And to transfer quasi-religious honors

³⁶⁸ For the guardian angels, see above, n.357. For the meaning of the aspersion of the dead, see Ludwig Eisenhofer, *Handbuch der katholischen Liturgik* (Freiburg, 1932), 1,308. The aspersion of holy images at their dedication was common practice, just like the annual washing of some images; see, e.g., for the washing of the *Volto santo*, W. F. Volbach, "Il Cristo di Sutri e la venerazione del SS. Salvatore del Lazio," *Rendiconti della Pont. Accademia Romana di Archeologia*, xvii (1940-41), 97-126. See also below, n.370.

³⁶⁹ Pierre du Chastel, *Le Trespas, Obseques et Enterrement de très hault, très puissant et très magnanime Francoys, par la grace de Dieu, Roy de France* (Paris, 1547), reprinted in Godefroy, *Cérémonial de France* (Paris, 1619), 280f; Jean du Tillet, *Recueil des roys de France* (Paris, 1618, first published 1578), follows Du Chastel very closely. Cf. Giesey, *Royal Funeral*, Ch.1,n.20.

³⁷⁰ Hofmeister, *Heilige Öle*, 212f, for the anointings of holy images; see above, n.368, for lavings of images. Aspersion and censuring of images, of course, was common usage.

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from the holy images to the images of kings and princes would not have been quite foreign to a century in which the "State Portrait" just began to make its reappearance, in which images beautifying the divine cult appeared on one level—or were "equiparated"—with those "appertaining to Civile discipline," and in which the ground was laid for the later renewal of the antique custom of displaying the ruler's image in court rooms and council chambers and thereby signifying the king's ubiquity in court.³⁷¹

The veneration of the funerary effigy of the French king, though trimmed with some ecclesiastical exterior, was not of ecclesiastical origin. In his *Roman Histories*, Herodian, when describing the apotheosis of Emperor Septimius Severus, described also a series of ceremonial services which were rendered to the effigy of the dead ruler: the effigy, treated like a sick man, lies on a bed; senators and matrons are lined up on either side; physicians pretend to feel the pulse of the image and give it their medical aid until, after seven days, the effigy "dies."³⁷² Herodian's *Histories*, and especially his chapter on Septimius Severus in the Latin translation of Angelo Poliziano, were not unknown in France around 1500. Moreover, in 1541, the first full version of Herodian in

³⁷¹ For the fluctuations between ruler image and holy image in the 16th century, see Jenkins, *State Portrait*, esp. p.6 (with n.39), for the English version of Lomazzo's *Trattato dell'arte*, published in 1598, rendering straightforwardly the words *culto divino* by "Civile discipline" and thus changing the reference point of images. See also Jacques de la Guesle and Joys Buysson, *Remonstrances faites à Nantes en l'an MDXCIV en la presence du deffunct Henry IV* (Paris, 1610), 42, where Buysson, a French jurist of the Crown, says in his *Remonstrance* of 1594 quite plainly "que leurs [the kings'] statues estoient tenues comme saintes" and attributes to them the right of asylum. What he refers to are, in fact, the laws collected in C.1,24 and 25, also 8,11,13. By glossing on those laws the jurists again prepared the way leading toward the modern valuation of the ruler images; see above Ch.IV,n.72, and, for the crime of lese majesty in case of the injuring of imperial statues and images, e.g., Lucas de Penna, on C.12,20,5,n.28, p.624b, and 11,40,4,n.3, p.446, though similar remarks may be gathered in great numbers. See also Nicolas Sanders, *A Treatise of the Images of Christ and His Saints* (Louvain, 1567), 109, quoted by Yates, "Elizabeth as Astraea," 77,n.3, who defended against John Jewel the images of Christ and the saints: Why, asked Sanders, if the images of Christ are to be destroyed, are the images of rulers to be respected? But "breake . . . if you dare the image of the Queenes Maiestie or the Armes of the realme." For the "holiness" of the "Armes of the realme," there is a line leading back to the French *garda regis*, symbolized ever since the 13th century by the king's coat-of-arms; cf. Kern, *Ausdehnungspolitik*, 40f, passim. The problem of holy images versus ruler images, of course, was ardently discussed in the period of Byzantine Iconoclasm; see the studies of Ladner, in *Mediaeval Studies*, II (1940), 127-149, esp. 137ff, and in *Dumbarton Oaks Papers*, VII (1953), 1-34. I shall discuss the rather complex problem elsewhere.

³⁷² Herodian, *Hist.Rom.*, IV,2; cf. Bickermann, "Kaiserapotheose," 5f.

French—by Jehan Collin—was published in Paris, followed by a second edition in 1546, a year before the death and burial of Francis I.³⁷³ Now, the French law clerk and historian Jean du Tillet, who himself attended the funeral of Francis I, preceded his description of the modern effigy ceremonial with a detailed account of Herodian's report on Septimius Severus, adding a few scattered passages from other ancient authors as well as Eusebius' report of the *post mortem* government of Constantine the Great.³⁷⁴ Directly, or through the medium of Du Tillet, the classical authors began to exercise a considerable influence on the imagination of the French who were tempted to believe that the French custom had survived from ancient Rome.³⁷⁵ But to what extent they influenced the French ceremonial itself is a different matter. For the stimuli emanating from the study of Antiquity—undeniable though they were in Renaissance France—should not be overestimated, since the French ceremonial had been developing the forms and rites of royal funerals quite independently: the effigy was introduced after the English model, and not after the Roman model, and it was only subsequently that the image ceremonial was perhaps enlarged and embellished also after the pattern of ancient Rome.

Moreover, the relation between the effigy and the legalistic Dignity "which never dies" led to the emphasis of certain features which were within the compass of contemporary jurists and political thinkers, but not within that of the Roman historians. When, for example, Francis I's successor, King Henry II of France, came to asperse the body of his father, it was not the body in effigy but the real corpse which finally replaced again the effigy lying in state. It seems that the new king could not come to visit the image

³⁷³ See F. Saxl, "The Classical Inscription in Renaissance Art and Politics," *Warburg Journal*, iv (1940-41), 26 and 45, for Poliziano's translation of the Herodian chapter, and, for the French versions, Giesey, *Royal Funeral*, Ch. ix.

³⁷⁴ Du Tillet, *Recueil*, 1336f, mentions, in addition to Herodian, iv, 2, also Cassius Dio, lvi, 34, and Eusebius, *Vita Const.*, iv, 72. See, for the Constantinian funerary ceremonial and its peculiarities, A. Kaniuth, *Die Beisetzung Konstantins d. Gr.: Untersuchungen zur religiösen Haltung des Kaisers* (Breslauer historische Forschungen, 19 [Breslau, 1941]); P. Franchi de' Cavalieri, "I funerali ed il sepolcro di Constantino Magno," *Mélanges d'archéologie et d'histoire*, xxxv (1915), 205-261; and also Hubaux and Leroy, *Le mythe du Phénix*, 192ff. Cf. Giesey, *Royal Funeral*, Ch. ix.

³⁷⁵ This, apparently, was the opinion of Du Tillet himself, and it became a common misunderstanding on the part of French humanists who believed in the survival of Roman customs.

had the lugubrious appearance which one would expect: everything was draped in black, the banners were furled, the sword of the realm was sheathed, and the other emblems were kept covered. When, however, upon the entry into Paris, the effigy was placed on top of the coffin, the mood changed fundamentally: the naked sword now preceded the image adorned with the regalia and royal insignia; the unfurled Banner of France "which never dies" followed the effigy; likewise unfurled standards paraded alongside the coffin; clad in their regal scarlet robes, the four Presidents of Parlement (these services eventually were shifted from the corpse to the effigy) carried the four corners of the cloth of gold on which the figure rested—in short, the effigy representing the Dignity "which never dies" made its *Entrée* into Paris: a triumphal *Adventus* rather than a mourning procession.³⁷⁷ Later on, when image and corpse were transported separately, it remained the custom to attach all the mournful elements to the naked body in the coffin and to assemble all the triumphal pageantry around the effigy, which alone was paraded under a canopy (fig. 29).³⁷⁸ It was apparently in this intellectual climate that there originated the triumphal chariot for the dead, the modern funeral car, which until the beginning of the motorized age was used in practically all Western countries—or rather, it was reintroduced from classical models as interpreted by the taste of the Renaissance.³⁷⁹ At the funeral of the Emperor Charles V, in 1559, the triumphal idea was carried so far that a float recalling the em-

³⁷⁷ Cf. Giesey, Ch.v.n.goff, where successive French royal funeral processions of the 15th and 16th centuries are reconstructed, showing the increasing pomp and display. The chivalrous elements may have been influenced by the sumptuous Burgundian processions of the 15th century, but the elements of triumph were decidedly in Italian neo-antique style, and come only after the French expeditions into Italy in 1494. In general on French Renaissance entrées, see J. Chartrou, *Les entrées solennelles et triomphales à la renaissance* (Paris, 1928).

³⁷⁸ See above, n.365; also nos.359f, for Pierre Grégoire's distinction between Prince and regalia; for an illustration of the canopy over the effigy, separated from the wagon carrying the corpse, see *Pompe funerals fatte in Parigi nella morte dell' invitissimo Henrico III Re di Francia et Navarra* (Francesco Vallegio et Catarin Doyno D.D.D.), reproduced in Giesey, *Royal Funeral*, pls. XIV-XV. The woodcut (fig. 29) forms the frontispiece of a pamphlet on the funeral of Louis XII, *L'obsèque et enterrement du roy* [Paris, 1515].

³⁷⁹ See, for a few good remarks on the subject, Leopold Ettlinger, "The Duke of Wellington's Funeral Car," *Warburg Journal*, III (1939-40), 254ff; also A. Alföldi, "Chars funéraires bacchiques dans les provinces occidentales de l'empire romain," *Antiquité classique*, VIII (1939), 347-359, and A. L. Abaecherli, "Fercula, Carpentaria and Tensae in the Roman Procession," *Bolletino dell' associazione internazionale di studi mediterranei*, VI (1935-36), 1-11.

which one would expect: every banner was furled, the sword and the other emblems were kept in the effigy. On the entry into Paris, the effigy was in a mood changed fundamentally: the image adorned with the furled Banner of France "which likewise unfurled standards paraded their regal scarlet robes, the here services eventually were (by) carried the four corners of the effigy were rested—in short, the effigy "never dies" made its *Entrée* into Paris more than a mourning procession.³⁷⁷ The effigies were transported separately, it was the mournful elements to the effigy. It seems all the triumphal pageantry was paraded under a canopy in the intellectual climate that there was the dead, the modern funeral in the motorized age was used in the funeral or rather, it was reintroduced in the taste of the Renaissance. Emperor Charles V, in 1559, the effigy on that a float recalling the em-

French royal funeral processions of the 16th century, showing the increasing pomp and grandeur, have been influenced by the sumptuousness of the effigy but the elements of triumph were introduced only after the French expeditions of the Renaissance entrées, see J. Chartrou, *Les entrées de France* (Paris, 1928).

Grégoire's distinction between Prince of Condé over the effigy, separated from the effigy (*li fatte in Parigi nella morte dell' imperatore* (Francesco Vallegio et Catarin Vallegio), pls. xiv-xv. The woodcut (fig. 1) of the funeral of Louis XII, *L'obsèque et*

act, Leopold Ettlinger, "The Duke of Burgundy" (1939-40), 254ff; also A. Alföldi, *Les occidentales de l'empire romain*, p. 10. L. Abaecherli, "Fercula, Carpentino dell' associazione internazionale

peror's victories paraded in the funeral procession—a blending of Renaissance *trionfi* and mediaeval *tableaux*.³⁸⁰

The juxtaposition of the lugubrious and the triumphal, the mourning for the dead king and the exaltation of the effigy, must have responded to some very general and very deep feeling of the late Middle Ages and the early Renaissance, since the sepulchral monuments of that age reflect similar ideas. From the times of Louis XII onward (d. 1515), the tomb monuments of the French kings at St.-Denis began to display the king or the royal couple as they were in life, kneeling in their regal attire before a *prie-Dieu* on top of the temple-like portico of the monument; within the portico, however, lay the dead king in his human misery, naked (except for a drapery) and his eyes closed.³⁸¹ That with the spreading of Renaissance ideas this nakedness tended to become a *nudité heroïque* rather than a symbol of man's naked misery is a different matter: Caterina de' Medici, disgusted and horrified by a macabre naturalistic tomb effigy of her own self, commissioned a second tomb figure more to her taste which represented her as a reclining Venus.³⁸² Those, however, were not the ideas which had governed the "high Gothic" sentiments of the fifteenth century at the beginning of which that type of duplicated tomb monuments, or at least a certain type of dual representations of the dead, made its first appearance.

Without entering into any details of a complicated development in Western sepulchral art, it may at least be mentioned that in the late twelfth century the reclining effigy of the deceased—the *gisant*—began to replace the hitherto customary sculptured or incised plates which showed the dead standing in an upright position, no matter whether the plate itself was placed in the wall of a church or in the floor.³⁸³ Moreover, double monu-

³⁸⁰ Ettlinger, *op.cit.*, 255, n. 1.

³⁸¹ See the magnificent reproductions of the tombs at St.-Denis by Jean-François Noël and Pierre Jahen, *Les gisants* (Paris, 1949).

³⁸² The macabre first model by Girolamo della Robbia (cf. A. Michel, *Histoire de l'art* [Paris, 1905-28], IV:2, 670f, also P. Richer, *L'art et la médecine* [Paris, 1902], p. 14f and fig. 322) is now in the Louvre and therefore, ironically, far better known today than the Venus-like tomb effigy itself, which can be viewed in the abbey of St.-Denis only from a distance.

³⁸³ Professor Erwin Panofsky kindly pointed out to me that from the genuine *gisant* another kind of tomb figure has to be distinguished which might be called *pseudo-gisant*. The latter is really an upright statue (known from the earlier

ments in which the deceased appeared both as a dead human being (though not as yet as a "corpse") and in the costume of his social rank in life are found sporadically during the late thirteenth and the fourteenth centuries.³⁸⁴ Finally, a new feature was added. By the very end of the fourteenth century, the skeleton or cadaverous body began to appear in mediaeval art, a definitely late-mediaeval feature; we may recall, for example, that the first *Danse macabre*, the one in the cloisters of Saints Innocents in Paris, was executed under Charles VII, in 1425 or 1426.³⁸⁵ By that time, however, this grim theme of high Gothic art was combined with the sepulchral representation of both the *gisant* and the (as yet rare) double representations of the dead. The result was a species of monuments showing the reclining dead as a putrefying skeleton-like corpse, whereas on some higher level, or superimposed on the tomb, the deceased would be seen pictured such as he had been during his life. The *gisant*, thereby, was often transformed into a kneeling, or sometimes sitting, figure.³⁸⁶

It is usually said that the first to have himself represented as a cadaverous corpse was a physician of Charles VI, Guillaume de Harcigny, who died in 1393 and was buried in the episcopal chapel at Laon; in fact, not too much will be lost if we forget about the

sculptured or incised tomb plates) laid horizontal: the drapery hangs stiffly down to the feet as on a standing figure, over the head there is often a sculptured niche, and the eyes are open. The genuine *gisant*, however, is truly a reposing figure; the eyes are closed, and the folds of the gown fall naturally to either side of the recumbent body. Probably the earliest tomb effigies of the genuine *gisant* pattern are those in the Abbey of Fontevrault of the Plantagenets Henry II and Richard I as well as their queens, and the Brunswick tombs of Henry the Lion and his wife, a daughter of Henry II of England. The *pseudo-gisant*, however, dominated (see, e.g., the tombs of the English bishops, figs. 30, 31), lasting in some places until the 16th century, although in the early 14th century the genuinely reposing *gisant* became more and more popular.

³⁸⁴ For one of the earliest specimens—the tomb of Philip de Courtenay, pretender to the Latin Empire (d. 1283), at San Francesco in Assisi—see W. R. Valentiner, "The Master of the Tomb of Philippe de Courtenay in Assisi," *The Art Quarterly*, XIV (1951), 3-18.

³⁸⁵ For the latest monograph on this subject, see James M. Clark, *The Dance of Death in the Middle Ages and the Renaissance* (Glasgow, 1950), who could not yet profit from Robert Eisler, "Danse Macabre," *Traditio*, VI (1948), 187-225, a study on the basis of which a few items in the brilliant chapter on "Das Bild des Todes" by J. Huizinga, *Herbst des Mittelalters* (3rd ed., Stuttgart, 1938), 193-213, may be revised.

³⁸⁶ For the kneeling figure atop the reclining dead, see above, n.381; a seated statue of William the Silent in addition to the reclining sarcophagus figure (made between 1614 and 1621) is found in the Nieuwe Kerk at Delft.

appeared both as a dead human (corpse") and in the costume of his radically during the late thirteenth century, the skeleton or cadaver. Finally, a new feature was added. In the thirteenth century, the skeleton or cadaver of mediaeval art, a definitely late- Gothic, for example, that the first *Danse des Saints Innocents* in Paris, was in 1425 or 1426.³⁸⁵ By that time, the Gothic art was combined with both the *gisant* and the (as yet) the dead. The result was a species of reclining dead as a putrefying skeleton—higher level, or superimposed on the dead, to be seen pictured such as he had been, thereby, was often transformed into a reclining figure.³⁸⁶

to have himself represented as a reclining figure of Charles VI, Guillaume de Selve was buried in the episcopal chapel at Brou. It will be lost if we forget about the

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the tomb of Philip de Courtenay, pretender to the throne, who died in 1217, and who was buried in Assisi—see W. R. Valentiner, "The Tomb of Philip de Courtenay in Assisi," *The Art Quarterly*,

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reclining dead, see above, n.381; a seated figure of the reclining sarcophagus figure (made of stone) at Delft.

slightly earlier tomb of Francis I de La Sarraz, in La Sarraz (Canton of Vaud), the horrors of which would spoil the appetite even of an inveterate ghoul.³⁸⁷ There followed, within a decade after the Harcigny tomb, the now destroyed sepulchral monument, in Avignon, of Cardinal Lagrange, who died in 1402. The arrangement of this monument is complicated in many respects, and so is the reconstruction of details. One important feature of the composition, however, is indisputable: Lagrange was represented both as a naked, skeleton-like corpse and as a cardinal adorned with all the pomp and the regalia of his *Dignitas*.³⁸⁸ A slightly different type of tomb architecture, or perhaps only a more condensed and more dialectical version of Lagrange's monument, became famous in the early sixteenth century through the mausoleum tombs, at Brou, of Philibert II of Savoy and his Duchess Margaret of Austria, although here the horror of death was mitigated.³⁸⁹ But the pattern of those princely tomb figures was probably first developed in England.

Canterbury Cathedral harbors, as it should, the body of Archbishop Henry Chichele, Primate of England for 29 years—from 1414 to 1443. In 1424, ten years after his accession, Chichele began to build the tomb in which finally he was buried. Within the tomb, and barely screened by the Gothic trelliswork, the dead Henry Chichele's mortal body is exposed: naked, all skin and bones, the eyes gazing with a vacant stare, the pitiful corpse lying without a pillow on a linen sheet (fig. 30).³⁹⁰ On the top of the tomb, however, magnificently attired, rests the *gisant*: Archbishop-Primate Henry Chichele in dalmatic, the pallium around his shoulders,

³⁸⁷ For Harcigny, see C. R. Morey, *Mediaeval Art* (New York, 1942), 390. For the tomb of La Sarraz, see H. Reiners, *Burgundisch-alemannische Plastik* (Strasbourg, 1943), p.70 (with notes 99 and 100, on p.319) and figs. 86, 370; the date of this tomb, which in its nauseating repulsiveness is far from being "realistic," may be about 1370, as Professor Panofsky kindly pointed out to me.

³⁸⁸ Eugène Müntz, "A travers le comtat Venaissin: Le mausolée du Cardinal de Lagrange à Avignon," *L'Ami des monuments et des arts*, iv (1890), 91-95, 131-135, esp. 132; see also Mâle, *L'art religieux de la fin du moyen âge*, 431, fig. 194.

³⁸⁹ For the tombs at Brou, see Victor de Mestral Combremont, *La sculpture à l'église de Brou* (Paris [191?]), pls.23,24,26,27.

³⁹⁰ I am greatly indebted to Professor William A. Chaney, in Lawrence College, who first called my attention to this tomb, provided me with photographs, and gave me other valuable information. On Chichele, see the works of E. F. Jacob, and for the present purpose especially his essay on "Chichele and Canterbury," *Studies in Mediaeval History Presented to Frederick Maurice Powicke* (Oxford, 1948), 386-404.

the precious mitre on his head, the feet in pontifical shoes. His eyes are wide open, his hands folded in prayer. Nor is he in the miserable loneliness of the emaciated body below: angels are near the pillow on which his mitred head rests, and kneeling attendants near his feet join him in prayer.

The funerary ceremonial observed on his death has to be considered too. Chichele died in Lambeth from where his remains were transferred in solemn procession to Canterbury, escorted by scores of torchbearers and two hundred gentlemen on horseback with their retinues. Whereas in later times it was the custom to carry four banners of saints at the four corners of the coffin, the usage still prevailed in the fifteenth century to have instead the bishop's personal banner as well as the banner of his bishopric displayed by a gentleman mounted on a charger. One feature, in particular, attracts our attention: the coffin, shouldered on a bier, was topped by Chichele's effigy dressed in full pontificals and adorned with all the insignia of his office.⁸⁹¹ It is true, the display of a bishop's effigy fell in desuetude in sixteenth-century England; but it was the common custom in the fifteenth to parade at funerals the dead body of a high dignitary of the Church together with his image.⁸⁹² Hence, the sepulchral monument of Archbishop Chichele, showing the effigy on the top of the tomb and the corpse within the tomb, was the naturalistic reproduction of reality, rendering simply what was seen at the funerary procession: the effigy in regalia on top of the coffin which contained the almost naked corpse.

Since the parading of the effigy was the general usage at a bishop's funeral in fifteenth-century England, it might be expected to find more episcopal tombs worked during that period after

⁸⁹¹ Jacob, "Chichele and Canterbury," 388. For the banners displayed, see next note.

⁸⁹² Brit.Mus., Egerton MS 2642, fol.194 (I could avail myself of Dr. Giesey's ms copy), contains a *Note of the Manner of the Burieng of a Bysshop in old Tyme used*, of ca. 1560, which describes 15th-century customs no longer practiced:

The Corpse to bee Layed in th'aforesayd charre, and to have upon the corse a figure apparelled in a Bisshopps araye Mytred, and in his hand a Croyseser, and on his hands red gloves, and on his feet red shewes, and the said gloves to bee garnyshed with Rynges. The figure is not nowe used. And in tymes past a gentleman was wonte riding apon a goodly coursier trapped to beare a Banner of the Armes of the said Bishopp and of the Byshoppricke to be parte in palle. But now the usage is to have but the iiii banners of Saynts at the fower corners of the charet borne by fower gentlemen in morning habitts with hoods over their faces.

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the Canterbury pattern. There is, for example, in addition to the
 tomb of Bishop Richard Fleming (d. 1431), in Lincoln Cathedral,
 the monument of Bishop Beckington of Bath and Wells (d. 1465),
 which probably was finished in 1451, fourteen years before the
 bishop's death (fig. 31).³⁹³ His monument is less sumptuous than
 Chichele's tomb at Canterbury, but again we recognize the strong
 contrasts: the naked corpse in the tomb and the effigy in full
 pontificals lying on top of the tomb. Nor was this fashion restricted
 to princes of the Church. John Fitzalan, 17th Earl of Arundel
 (d. 1435), was buried in a tomb showing the body in corruption
 below the effigy in glory (fig. 28); and King Edward IV decreed
 in his will (June 20, 1475) very circumstantially how he wanted
 to be buried in the Chapel of Saint George, at Windsor: his body
 was to be buried low in the ground, "and upon the same a stone
 to be laied and wrought with the figure of Dethe," and on the
 vault over the tomb there was to be "an Image of oure figure,
 which figure we will be of silver and gilte," or, may be, in cop-
 per.³⁹⁴ In all those cases, one is tempted to say with the poet:
 "Of marble is the stone, and putried ther he lies."³⁹⁵

We may think, though, of other words as well when contem-
 plating those tombs of powerful princes spiritual and secular.
 For the decrepit and decaying body natural in the tomb, now
 separated from the awe-inspiring body politic above it, appears
 like an illustration of the doctrine expounded over and over again
 by mediaeval jurists: *Tenens dignitatem est corruptibilis, DIGNI-
 TAS tamen semper est, non moritur*—"The incumbent of a

³⁹³ For the tomb of Bishop Richard Fleming, see G. H. Cook, *Portrait of Lincoln Cathedral* (London, 1950), fig. 62, to which Professor Panofsky kindly called my attention; the tomb is dated by E. S. Prior and A. Gradner, *An Account of Mediaeval Figure-Sculpture in England* (Cambridge, 1912), 717, fig. 816, erroneously ca. 1370; but, as Professor Panofsky and Mr. Francis Wormald, in London, inform me, the date of the tomb is ca. 1430. For the Beckington tomb, see Lawrence Stone, *Sculpture in Britain: The Middle Ages* (Penguin Books: 1955), 213f. Professor W. A. Chaney was kind enough to provide me with a photograph and to give me additional information about date and some details. On Beckington, see the introduction to *Official Correspondence of Thomas Bekynton*, ed. George Williams (Rolls Series, 56:1; London, 1872); also W. F. Schirmer, *Der englische Frühhumanismus* (Leipzig, 1931), 66ff, with literature in n.35.

³⁹⁴ I would have missed the Arundel tomb without the kind help of Mr. Francis Wormald, who not only mentioned it to me, but also provided me with the photo. See, for the will of Edward IV, W. H. St. John Hope, *Windsor Castle* (London, 1918), II, 376; see also L. Stone, *Sculpture* (above, n.393), 213f.

³⁹⁵ Hope, "Funeral Effigies," 529, quoting Robert of Bourn's translation of Bridlington's Chronicle.

Dignity may decay, the Dignity itself is nonetheless forever; it does not die."

Our rapid digression on funerary ceremonial, effigies, and sepulchral monuments, though not directly related to the rites observed for English kings, has nevertheless yielded at least one new aspect of the problem of the "two Bodies"—the human background. Never perhaps, except in those "late Gothic" centuries, was the Western mind so keenly conscious of the discrepancy between the transience of the flesh and the immortal splendor of a Dignity which that flesh was supposed to represent. We understand how it could happen that the juristic distinctions, though developing quite independently and in a totally different thought compartment, eventually fell in with some very general sentiments, and that the jurists' imaginative fictions met with certain feelings which in the age of the *Danses macabres*, where all Dignities danced with Death, must have been peculiarly close to the surface. The jurists, as it were, discovered the immortality of the Dignity; but by this very discovery they made the ephemeral nature of the mortal incumbent all the more tangible. We should not forget that the uncanny juxtaposition of a decaying corpse and an immortal Dignity as displayed by the sepulchral monuments, or the sharp dichotomy of the lugubrious funeral train surrounding the corpse and the triumphant float of an effigy-dummy wrapped in regalia, was fostered, after all, in the same ground, came from the same world of thought and sentiment, evolved in the same intellectual climate, in which the juridical tenets concerning the "King's two Bodies" achieved their final formulation. In both instances, there was a body mortal, God-made and therefore "subject to all Infirmities that come by Nature or Accident," set against another body, man-made and therefore immortal, which is "utterly void of Infancy and old Age and other Defects and Imbecilities."

In short, one revelled in strong contrasts of fictitious immortality and man's genuine mortality, contrasts which the Renaissance, through its insatiable desire to immortalize the individual by any contrivable *tour de force*, not only failed to mitigate, but rather intensified: there was a reverse side to the proud reconquest of a terrestrial *aevum*. At the same time, however, immortality—the decisive mark of divinity, but vulgarized by the artifice

elf is nonetheless forever; it

ceremonial, effigies, and sepulchral monuments, or even its funeral train surrounding the same ground, came from the same ground, evolved in the same radical tenets concerning the final formulation. In both modes made and therefore "substance or Accident," set against the immortal, which is "utterly free of Defects and Imbecilities." The contrasts of fictitious immortality which the Renaissance immortalized the individual only failed to mitigate, but fell on the same side to the proud reconsecration of the same time, however, immortalized the individual without vulgarized by the artifice

of countless fictions—was about to lose its absolute, or even its imaginary, values: unless it manifested itself incessantly through new mortal incarnations, it practically ceased to be immortality. The King could not die, was not allowed to die, lest scores of fictions of immortality were to break down; and while kings died, they were granted the comfort of being told that at least "as King" they "never died." The jurists themselves, who had done so much to build up the myths of fictitious and immortal personalities, rationalized the weakness of their creatures, and while elaborating their surgical distinctions between the immortal Dignity and its mortal incumbent and talking about two different bodies, they had to admit that their personified immortal Dignity was unable to act, to work, to will, or to decide without the debility of mortal men who bore the Dignity and yet would return to dust.³⁹⁶

Nevertheless, since life becomes transparent only against the background of death, and death against the background of life, the bone-rattling vitality of the late Middle Ages appears not devoid of some deeper wisdom. What one did was to build up a philosophy according to which a fictitious immortality became transparent through a real mortal man as its temporary incarnation, while mortal man became transparent through that new fictitious immortality which, being man-made as immortality always is, was neither that of life eternal in another world nor that of the godhead, but that of a very terrestrial political institution.

REX INSTRUMENTUM DIGNITATIS

It had been difficult enough to distinguish between man and his Dignity, and to separate one from the other. It was no less difficult to put them together again and to introduce theories which made it plausible that "one person sustains in the place of

³⁹⁶ See, e.g., Baldus, on *C.7,61,3,n.1*, fol.91v: ". . . sine quo dignitas nihil facit." Also Baldus, *Cons.*, III,121,n.6, fol.34: "quia dignitas sine persona nihil agit," with the additional remark "quia persona facit locum actui," that is, the person actualizes the potentialities resting in the Dignity. See further *Cons.*, III,159,n.5, fol.45v: "nam verum est dicere quod respublica nihil per se agit, tamen qui regit rem publicam agit in virtute reipublicae et dignitatis sibi collatae ab ipsa republica." Concerning different concepts of capability and incapability of a fictitious person to act or to will, see Gierke, *Gen.R.*, III,461ff. The English jurists, of course, made similar statements concerning the body politic which became capable of action only through the body natural.

two, one a real and the other a fictitious person,"³⁹⁷ or that a king has "two bodies" though he has "but one person."³⁹⁸ Once more it was theology as well as Canon Law which produced the similes by means of which the jurists could venture to explain the oneness of the two bodies—of the mortal in the immortal, and of the immortal in the mortal.

That the king as King was "incorporated with his subjects, and they with him,"³⁹⁹ was a saying at which the jurists, despite the ominous word "incorporated," could have arrived easily from the relatively safe grounds of organological concepts or of the *corpus mysticum* doctrine in its secularized form; it meant that the king as the head and the subjects as the members together formed the body politic of the realm. It was a slightly different matter, however, when this "together" of a composite body—plausible within the limitations of the metaphor—was transferred from "head and members" to the head alone, and when that composite nature was reduced to the king alone, that is, to his "two Bodies." In the case of the Duchy of Lancaster, the jurists argued that the king's body natural was "neither divided by itself nor distinct from his office or the royal Dignity," but that they were

a Body natural and a Body politic together indivisible; and [that] these two Bodies are incorporated in one Person, and make one Body and not divers, that is, the Body corporate in the Body natural, *et e contra* the Body natural in the Body corporate.⁴⁰⁰

Once this, so to say, monistic formula was coined, implying neither more nor less than the king's incorporation with himself, with his Dignity or his Body politic, it was naturally quoted by others as well—for example, by Francis Bacon:

There is in the king not a Body natural alone, nor a Body politic alone, but a body natural and politic together: *corpus corporatum in corpore naturali, et corpus naturale in corpore corporato*.⁴⁰¹

³⁹⁷ Baldus, on c.3 X 2.19,n.5, *In Decret.*, fol.201v: "nota hic quod una persona sustinet vicem duarum, unam vere, alteram fide, et quandoque utramque personam vere propter concursum officiorum." Cf. Gierke, *Gen.R.*, III,435,n.74, who mentions other similar places.

³⁹⁸ Maitland, *Sel.Essays*, 110,n.4; see also Bacon, *Post-nati*, 667 (referring to Plowden, 285): ". . . not a body natural alone, nor a body politic alone, but a body natural and politic together." See also below, n.400: "two Bodies incorporated in one Person."

³⁹⁹ See above, Ch.I,n.13, also n.5.

⁴⁰⁰ Plowden, *Reports*, 213; see above, Ch.I,n.5.

⁴⁰¹ Bacon, *Post-nati*, 667.

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w, n.400: "two Bodies incorporated

It is easy to see how one arrived at that new formula: the "subjects plus King," being incorporated with each other and forming together the body politic of the realm, were replaced by the "King's Body politic" which now was incorporated with the "king's Body natural."

Actually, the very long history of a very old theological formula may well have culminated in this ultra-fanciful maxim of English jurists. In 1062, at the beginning of the Struggle of Investiture, Petrus Damiani, the purest mind of that revolutionary period, developed a program of mutual support and understanding to prevail between papacy and empire and, while summarizing his arguments, he demanded that henceforth there be found "the king in the Roman pontiff, and the Roman pontiff in the king."⁴⁰² This was a political utterance on an almost cosmic level suggesting that the two universal powers be incorporated with each other just as kingship and priesthood were one, and quasi "incorporated" with each other, in the divine model of both powers, in Christ. Petrus Damiani, of course, was not the source of the Elizabethan jurists, for his works were hardly within the compass of juridical thinking. Instead, we are sent back to the jurists. "The Prince is in the *respublica*, and the *respublica* is in the Prince," wrote, at the beginning of the sixteenth century, Matthaeus de Afflictis, an author incessantly quoted by the French jurisprudents;⁴⁰³ and yet he repeated only what Lucas de Penna, in the fourteenth century, and Andreas of Isernia, around 1300, had said before: "Just as the Church is in the prelate, and the prelate is in the Church . . . , so is the Prince in the *respublica*, and the *respublica* in the Prince."⁴⁰⁴ With this "equiparation" of prelate and Prince, Lucas de Penna indicated his source, to which Andreas of Isernia had already referred;⁴⁰⁵ that is, to Gratian's *Decretum*, to

⁴⁰² Petrus Damiani, *Disceptatio synodalis*, in *MGH, LdL*, 1,93,34ff: ". . . quatinus, sicut in uno mediatore Dei et hominum haec duo, regnum scilicet et sacerdotium, divino sunt conflata mysterio, ita sublimes istae duae personae tanta sibimet invicem unanimitate iungantur, et quodam mutuae caritatis glutino *et rex in Romano pontifice et Romanus pontifex inveniatur in rege . . .*," a place to which Professor Theodor E. Mommsen kindly called my attention. See Fridolin Dressler, *Petrus Damiani: Leben und Werk* (Studia Anselmiana, xxxiv; Rome, 1954), 97,n.66.

⁴⁰³ Matthaeus de Afflictis, on *Lib.aug.*, II,3,n.62, fol.11v: "quod princeps est in republica et respublica in principe" (quoting Lucas de Penna).

⁴⁰⁴ See above, Ch.v,n.60.

⁴⁰⁵ Andreas of Isernia, on *Feud.*, I,3,n.16 (*Qui success.ten.*), fol.21v: "Princeps et Respublica idem sint . . . Est princeps in Republica sicut caput, et Respublica in

⁴⁰¹ Bacon, *Post-nati*, 667.

a famous chapter in which it is said that "the bishop is in the Church, and the Church in the bishop."⁴⁰⁸ Gratian, of course, and other canonical collections before him—such as that of Ivo of Chartres⁴⁰⁷—merely reproduced a famous letter of St. Cyprian, Bishop of Carthage in the third century, which has always been taken as a cornerstone of the doctrine of the "monarchic episcopate" and in which Cyprian declared: "The bishop is in the Church, and the Church in the bishop."⁴⁰⁸ This form of inversion goes back to the Fourth Gospel (John 14:10): "I am in the Father, and the Father is in me," a verse to which (together with John 10:30) not only Andreas of Isernia referred, but also—very long before him, and in a most curious fashion—the staunchest fighter against Arianism, Athanasius of Alexandria. When defending the Pauline doctrine of Christ as the Image of God and, therewith, the divinity of the Son and his coequality with the Father, Athanasius resorted to the simile of the emperor's image, which he called "the idea (εἶδος) and form (μορφή) of the emperor," and said: "The image might well speak: 'I and the emperor are one, I am in him and he is in me.'"⁴⁰⁹

eo sicut in capite, ut dicitur de praelato in Ecclesia, et Ecclesia in praelato." Andreas of Isernia repeats that image in *Prooem. ad Lib. aug.*, ed. Cervone, p. xxvi, and carried the "equiparation" of Prince and prelate even further in his gloss on *Feud.*, II, 56, n. 81 (*Quae sunt regalia*), fol. 306. The passage is interesting because Andreas in fact combines and twists two passages of the Fourth Gospel (John, 10:30, and 14:10)—just as Athanasius had done long before him (below, n. 409). The jurist, however, does not refer to the Gospel but to the Decretum (c. 7, C. vii, q. 1; see next note) and to a decretal of Innocent III (c. 19 X 540, where only the *Glos. ord.* on the *casus* and v. *et si capitulum* explain the reference). Moreover, in all three passages Andreas quotes Seneca, *De clementia*, I, 5, 1—faithfully repeated by Lucas de Penna, on C. 11, 58, 7, n. 8, p. 564 (see above, Ch. v, n. 65).

⁴⁰⁸ See c. 7, C. VII, q. 1, ed. Friedberg, 1, 568f.

⁴⁰⁷ See Friedberg, 1, 568, n. 106, for the earlier collections.

⁴⁰⁸ Cyprian, *ep. 66, c. 8*, ed. Hartel (*CSEL*, III), II, 733.

⁴⁰⁹ Athanasius, *Oratio III contra Arianos*, c. 5, PGr, xxvi, 332A, quoted by Ladner, "The Concept of the Image," 8 and 24, n. 31: εἴποι ἂν ἡ εἰκών· Ἐγὼ καὶ ὁ βασιλεὺς ἐν ἐσμεν. Ἐγὼ γὰρ ἐν ἐκείνῳ εἰμι κακείνος ἐν ἐμοί. See also Ladner for the later repetitions of that passage by John of Damascus and the Second Council of Nicaea (787). With that passage one may compare the London Magical Papyrus, ed. K. Preisendanz, *Die griechischen Zauberpapyri* (Leipzig and Berlin, 1928-31), II, 47 (P. VII, 37ff): σὺ γὰρ ἐγὼ καὶ ἐγὼ σὺ· τὸ σὺν ὄνομα ἐμὸν καὶ ἐμὸν σὺν ἐγὼ γὰρ εἰμι τὸ εἶδωλόν σου. See also, for parallels, Preisendanz, II, 123 (P. XIII, 795ff). Wilfred L. Knox, *Some Hellenistic Elements in Primitive Christianity* (Schweich Lectures of the British Academy, 1942; London, 1944), 78, n. 3, considers those passages "the nearest parallel to the Johannine language" (i.e., John 10: 30, and 14: 10); see also E. Norden, *Agnostos Theos* (Berlin, 1923), 305, for the language of John. All those parallels, however, do not contain the word ἐν (*in*), which is essential for the development from John 14: 10, to Cyprian, *ep. 66, c. 8*, and thence to the corporational doctrines of the later Middle Ages.

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We now understand where in the last analysis the christological undercurrent in the jurists' language derived from. At any rate, when the English judges in the sixteenth century tried to conjoin again what they had separated, and declared that the body politic was incorporated with the body natural, and vice versa, they clearly applied theological and christological language as well as canonical thought to their fictions. Once more, as so often before, the bishop in his relation to his church served as a pattern for expounding the relation of the king to his kingdom as well as to his body politic. No doubt, St. Cyprian's coinage had been changed, but the original die and the die-sinker are still recognizable. Moreover, his doctrine of the monarchic episcopate did not fit badly as a model for the maturing absolutist monarchies in which the king became, in more than one respect, pontifical.⁴¹⁰

The manner of speech which the English jurists sported suggests, however, yet another layer of theological thought. When those judges argued in court about the consolidation of the two bodies in one and thereby used phrases such as "together indivisible" or "two Bodies in one Person," they arrogated a set of distinctions found in the language of the Creed and normally reserved for christological definitions. To be sure, those lawyers were not talking about the king's "two Natures" but about his "two Bodies." However, we may recall that the theologians, ever since the twelfth century, explained that Christ had two bodies (one his individual natural body in the flesh, and the other his mystical collective body of which he was the head)⁴¹¹ though indeed but one person. Arguments concerning the "two Bodies" thus became applicable to the "two Natures" as well, and vice versa, even though the two notions did not coincide completely. Now those arguments served, by transference, to explain the "two Bodies" of the king; and in that practice the English lawyers had their predecessors in the fourteenth century.

In one of his *Consilia*, Baldus, as we recall, distinguished between the "Majesty" and the "person in Majesty," and while discussing very elaborately the Majesty or Dignity as something distinct from the person of the individual king, he remarked:

Here we are aware of the Dignity as the principal, and of the person

⁴¹⁰ Concerning the "Pontificalism" of the absolute monarchs, see my remarks in "Mysteries of State," 67ff.

⁴¹¹ See above, Ch.v,nos.14ff.

as the instrumental. Hence, the fundament of the [king's] acts is that very Dignity which is perpetual.⁴¹²

Baldus must have considered the distinction between the *principalis* (the perpetual Dignity) and the *instrumentalis* (the mortal king) peculiarly useful, for he applied those notions in other places as well. But what did those notions really mean and whence did Baldus borrow them?

The question is interesting enough to justify a brief digression into Thomas Aquinas' teaching about the manhood of Christ. Through Aristotle, Aquinas became acquainted with the various meanings of *organon* or *instrumentum* and learned how to distinguish between the "conjoined instrument" (for example, the hand) and the "separate instrument" (for example, a hammer or axe). Moreover, Aquinas adopted also the distinction between the *instrumentum animatum* (a helmsman, for instance) and the *instrumentum inanimatum* (the rudder).⁴¹³ Mainly through the medium of John of Damascus, Aquinas then became acquainted with a tenet of the Greek Fathers according to which Christ with regard to his human nature, that is, the incarnate Christ, was the instrument of the Godhead, that is, the triune Deity as well as his own divine nature—*humanitas instrumentum divinitatis*.⁴¹⁴ Aquinas, by combining those two strands (and he seems to have been the first to do so consistently), naturally gained new aspects

⁴¹² Baldus, *Consilia*, III, 121, n. 6, fol. 94: "Ibi attendimus dignitatem tanquam principalem et personam tanquam instrumentalem. Unde fundamentum actus est ipsa dignitas quae est perpetua." In the same paragraph, Baldus makes also the distinction "quod persona sit causa immediata, dignitas autem sit causa remota," whereby it should be recalled that God is often said to act as the *causa remota*.

⁴¹³ The most famous passage is *Politics*, 1253b, 27 to 1254a, 1; see Aquinas' *Expositio in Polit. Arist.*, §§52-55, ed. Spiazzi, 15f; also 1255b, 11-12, and §88, p. 25. See also *De anima*, 432a, 1-2, for the hand as the organ of organs, and *De partibus animalium*, 687a, 19-21; further *Nicom. Ethics*, 1161b, 4-5; *Endemian Ethics*, 1241b, 22-24; and the *Ps. Arist. Problemata*, 955b, 23ff. I am greatly indebted to Professor Harold Cherniss for his help and advice in this matter. Tschipke (see next note), ⁴¹⁴ seems to underestimate the Aristotelian influence on Aquinas in this particular case.

⁴¹⁴ The whole subject has been treated and thoroughly investigated by Theophil Tschipke, O.P., *Die Menschheit Christi als Heilsorgan der Gottheit unter besonderer Berücksichtigung der Lehre des Heiligen Thomas von Aquin* (Freiburger Theologische Studien, LV [Freiburg, 1940]); see also M. Grabmann, "Die Lehre des Erzbischofs und Augustinertheologen Jakob von Viterbo (†1307-8) vom Episkopat und Primat und ihre Beziehung zum Heiligen Thomas von Aquino," *Episcopus: Studien über das Bischofsamt . . . Kardinal von Faulhaber . . . dargebracht* (Regensburg, 1949), 190, n. 10, for further literature on the subject; for Johannes Damascenus, see Tschipke, 115ff.

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concerning the economy of salvation. He pointed out, for example,
that

the manhood of Christ is the instrument of the Godhead: not,
however, as an inanimate instrument which itself acts in no way but
is only acted on, but as an animated instrument [endowed] with a
rational soul, which is so acted on that it also acts.⁴¹⁵

That is to say, the incarnate Christ acts as the *instrumentum ani-*
matum of the Deity, his own divinity included. Or else, Aquinas
might distinguish three different grades: God was the *causa*
principalis, Christ being a mortal man was the *instrumentum*
coniunctum, whereas the sacraments of the Church appeared as
instrumenta separata:

The principal effecting cause of grace is God himself, to whom the
manhood of Christ compares like a conjoined instrument, and the
sacrament as a separate instrument.⁴¹⁶

In a similar fashion, Aquinas then interpreted the bishop or priest
as an *instrumentum coniunctum* of the mystical Body of Christ;
but the bishop could appear also vicariously as an *instrumentum*
animatum of the Deity, whereas the sacrament which he dispensed,
appeared as the *instrumentum separatum*.⁴¹⁷ Aquinas himself
transferred that metaphor also to his philosophical anthropology
when he said that "insofar as the soul is the mover of the body,
the body serves the soul as an instrument."⁴¹⁸ It seems that what
matters chiefly here is not only the functional character of the
manhood of Christ, but also the concept of the bishop who acts
as the animate instrument of the Deity and, at the same time,
as a conjoined instrument of the *corpus mysticum*.

Aquinas could not have foreseen to what extent his teaching
might serve the purposes of the jurists when they enlarged upon

⁴¹⁵ Aquinas, *Summa theol.*, III,q.7,a.1,ad 3: "quod humanitas Christi est instru-
mentum divinitatis, non quidem sicut instrumentum inanimatum, quod nullo modo
agit, sed solum agitur, sed tanquam instrumentum animatum anima rationali,
quod ita agitur quod etiam agit."

⁴¹⁶ Aquinas, *Summa theol.*, III,q.62,a.5: "Principalis autem causa efficiens gratiae
est ipse Deus, ad quem comparatur humanitas Christi sicut instrumentum con-
iunctum, sacramentum autem sicut instrumentum separatum." Aquinas introduces
that passage by distinguishing between the various instruments: "Est autem duplex
instrumentum: unum quidem separatum ut baculus, aliud autem coniunctum ut
manus . . ."

⁴¹⁷ *Summa theol.*, III,q.64,a.8,ad 1: "instrumentum animatum sicut est minister."

⁴¹⁸ *Summa theol.*, III,q.8,a.2: "in quantum vero anima est motor corporis, corpus
instrumentaliter servit animae" (with regard to soul and body of Christ).

their political doctrines concerning the *Dignitas*. It is, however, obvious what Baldus had in mind when he described the immortal Dignity as the "principal" and the mortal person of the individual ruler as the "instrumental," and declared at the same time that the Dignity, which was perpetual, was the fundament (the "mover") of the king's actions. Baldus was perhaps not the very first—and certainly not the last—to apply the notion of "instrumentality" to the relation between the king and the Dignity,⁴¹⁹ but he certainly applied it frequently and consistently. The question was raised whether a provincial governor asking the emperor for advice but finding that the emperor had died in the meantime, might expect an answer from the emperor's successor. Wrote Baldus in his opinion:

I answer "Yes," because the [governor's] consultation concerned principally the Dignity which does not die, whereas the person is the instrument of that very Dignity without which the Dignity cannot act anything.⁴²⁰

Baldus' application of Thomistic teaching concerning the instrumentality of the incarnate Christ is even more obvious and direct on another occasion. When discussing the fact that two things concur in the king, the individual person and the Dignity—which is "something intellectual lasting forever miraculously, though not corporeally"⁴²¹—he adds a brief commentary on the king and

⁴¹⁹ Oldradus de Ponte, *Consilia*, cLXXX, n.15, fol.67^v (cf. Ullmann, *Lucas de Penna*, 174, n.7) holds that, though the empire "is from God as of the first cause," it still is the pope who as *vicarius Dei* promotes the emperor to the empire and therefore acts "tanquam causa secunda et quasi quoddam agens instrumentale" of the first cause. It may be doubted, however, that Oldradus had either Aquinas or Aristotle in mind. The vicar of God was in a very conventional fashion the minister and instrument of God, just as the king when styled the "finger of God" (cf. Luke 11: 20, and, e.g., the coronation *conductus* for Philip II of France, in 1223), was not considered the *instrumentum coniunctum* in a technical philosophic-scholastic sense; see, for the coronation hymn *Beata nobis gaudia*, Leo Schrade, "Political Compositions in French Music of the 12th and 13th Centuries," *Annales musicologiques*, I (1953), 28 and 56. Baldus, on the other hand, was certainly aware of the fact that he applied technical language; see, e.g., his remark on c.34 X 1.6, n.8, *In Decretales*, fol.78^r: "Ibi, 'manus,' dicit Aristoteles quod manus est organum organorum" (*De anima*, 432a, 1-2). Without Aquinas, however, he could hardly have maintained that the king in the flesh was the instrument of the Dignity. For later repetitions of Baldus' arguments, see Gierke, *Gen.R.*, IV, 239, n.122; also III, 694, n.19.

⁴²⁰ Baldus, on C.7, 61, 3, n.1, fol.91^v: "Quaero si Praeses consuluit Principem et Princeps moritur, an debeat expectari responsum successoris? Respondeo sic, quia consultatio concernit principaliter dignitatem quae non moritur . . . licet persona sit organum ipsius dignitatis sine quo dignitas nil facit."

⁴²¹ See above, n.295.

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his two persons, and says: "The king's person is the organ and instrument of that other person which is intellectual and public." And then he continues:

It is that intellectual and public person [sc. the *Dignitas*] which principally causes the actions; for the mind is turned more to action, or to the principal power, than to the instrumental power.⁴²²

We should probably recall that in Baldus' system of thought *Deus* and *Dignitas* were interrelated anyhow⁴²³ so that there is no reason to be surprised how easily they could replace one another. The theological field of coordinates directing Baldus' arguments is obvious: Aquinas' *Divinitas* is replaced by the likewise "immortal" *Dignitas*, and the Humanity of Christ by the mortal king. The king, in former days often called *digitus Dei*,⁴²⁴ was juristically the *digitus Dignitatis*, and whereas the bishop was said to be the "animate instrument" of the Deity, the king appeared as the animate instrument of a fictitious, and therefore immortal, person called Dignity. In other words: *Humanitas instrumentum Dignitatis*—the incarnate king the instrument of the *Dignity* or of the King. Not without some inner logic and some inner necessity have both separation and union of the "King's two Bodies" produced the dogma of a political Incarnation, a noetic incarnation of the *Dignitas* or of the Body politic, and therewith a new secularized version of the hypostatic union of the first and second persons, of *Dignitas* and *rex*.

Without doubt, it was from this general stratum that the English lawyers borrowed also the language which they applied so lavishly when arguing about the body natural and the body politic "together indivisible" or maintaining that there were "two bodies but only one person."⁴²⁵ The theological, or even christo-

⁴²² Baldus, *Consilia*, III,159,n.6, fol.45v: ". . . loco duarum personarum Rex fungitur . . . Et persona regis est organum et instrumentum illius personae intellectualis et publicae. Et illa persona intellectualis et publica est illa, quae principaliter fundat actus: quia magis attenditur actus, seu virtus principalis, quam virtus organica" (*organicus = instrumentalis*, just as *organum* equals *instrumentum*). Baldus, on c.9 X 2,14,n.3, fol.189, applies the same doctrine to hand and foot as instruments of the soul with regard to the act of taking possession of a thing: "et anima per se sine organo corporali [that is, without the hand as the *organum organorum* and without the foot as the *organum possidendi*] non potest incipere possidere per se."

⁴²³ See above, n.287.

⁴²⁴ For *rex digitus Dei*, see above, n.419.

⁴²⁵ See above, nos.398,400. Bacon, *Post-nati*, 657, says that "generally in corporations

logical, patterns by which they tried to make their intellectual creations comprehensible to themselves and to others, differed hardly from the world of thought of their Italian predecessors and from the juristic method of reasoning developed by the leading figures in that field. Maitland, therefore, was perfectly correct when he said that those English Crown jurists of the sixteenth century were building up "a creed of royalty which shall take no shame if set beside the Athanasian symbol." It was indeed a "royal Christology" which the jurists established, and which they were almost bound to establish once they started to interpret consistently the relation between the individual king and his immortal Dignity by means of the metaphor of the "two Bodies."

This expression itself remains startling even now after we have become familiar with its historical background. From factors historically given to all European nations and therefore common to all, it was nevertheless in England alone that there had been developed a consistent political, or legal, theory of the "King's two Bodies," just as the correlated notion of the "corporation sole" was a purely English device. It is true, of course, that the other European nations harboured in their constitutional thought kindred ideas; however, they were displayed in a different form. France, for example, though fully aware of the different manifestations of individual king and immortal Dignity, eventually interpreted the absolutist rulership in such a fashion that the distinctions between personal and supra-personal aspects were blurred or even eliminated; Hungary carried the distinction between the mystical Crown and a physical king to great refinement, but the material relic of the Crown of St. Stephen seems to have prevented the king from growing his own super-body; and in Germany, where constitutional conditions were most unclear and complicated anyhow, it finally was the personified State which engulfed the romano-canonical notion of Dignity, and it was the abstract State with which a German Prince had to accommodate

the natural body is but *suffulcimentum corporis corporati*, it is but as a stock to uphold and bear out the corporate body." Since, however, Bacon tries to prove the union of the Crowns of England and Scotland through the king's natural body, he has to attribute greater importance to the king in the flesh, because (p.665) "his natural person, which is *one*, has an operation upon both [Crowns]."

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corporis corporati, it is but as a stock to Since, however, Bacon tries to prove the otland through the king's natural body, o the king in the flesh, because (p.665) operation upon both [Crowns]."

himself. At any rate, the theory of the "King's two Bodies" in all its complexity, and sometimes scurrilous consistency, was practically absent from the Continent; and even the Italians, who first developed the legal theory of two persons concurring in the Prince, did not pursue this concept consistently nor in all directions. Nowhere did the concept of the "King's two Bodies" pervade and dominate the juristic thinking so generally and so enduringly as in England, where, not to mention other aspects, that notion had also its important heuristic function in the period of transition from mediaeval to modern political thought.

Any effort to "explain" a historical phenomenon, even though one may hope to understand some factors by which it was conditioned and with which it was interrelated, remains a hopeless task because there are too many layers of life effective at the same time and actively concatenated as to permit any straightforward explanation; and to answer the question why certain potentialities actualized in one way and why they did not crystallize in another will necessarily be an undertaking of limited and doubtful value. It seems, however, that the notion of the "King's two Bodies" cannot be severed from the very early development and the last- ing momentum of Parliament in English constitutional thought and practice. Parliament was, by representation, the living "body politic" of the realm. That is to say, the English Parliament was never a *persona ficta* or *persona repraesentata*, but always a very real *corpus repraesentans*. "Body politic of the realm," therefore, had in England far more than in any other European kingdom a uniquely concrete meaning, and there was no need to render it more comprehensible by making of it an artificial abstraction, by transforming that concrete political body of Parliament into a fictitious person, or by talking about the realm as a *persona politica* in the way in which Aquinas occasionally talked about head and members of the Church community as *persona mystica*.⁴²⁰ In other words, owing to the absolute reality, concreteness, and plain visibility of England's "body politic" in this world; owing also to its very material existence and its ever recurrent self-manifestations when the king as the head and the lords, knights, and burgesses as members were constituted "in Parliament," the old organo- logical metaphor of "head and limbs" survived in England sur-

⁴²⁰ See above, Ch.v,n.24.

prisingly long. As a result, the notion "body politic of the realm" remained valid and preserved its concrete meaning at a time when in other countries that particular notion no longer was current.

On the other hand, the old *corpus mysticum* idea, with all its consequences and implications, continued to determine—especially after the Supremacy Act (1534)—some facets of the *corpus politicum* idea in England. It is comprehensible that especially in times of parliamentary weakness, when the king and council were quite obviously the mainspring of government, the notion of "body politic" was made to refer also to the king alone, to the *pars pro toto*. A certain terminological confusion existed certainly in the ecclesiastical sphere where the "mystical Body of Christ" and the "mystical Body of the Church" were used interchangeably; and the same "confusion of tongues," as Bacon called it, existed also in the secular sphere where notions such as Crown, kingdom, body politic of either the realm or the king as King were used interchangeably and often inefficiently distinguished.⁴²⁷ In those ambiguities—increased by the fact that the king actually became the head of the mystical body of the *Ecclesia Anglicana*—the terminological peculiarity of stressing the two *bodies* of the king, and not, for example, the two *persons* (as was the custom of Italian jurists), may have its roots.

In a more technical sense it would appear that a fusion, and an indeed pardonable confusion, of Crown and Dignity was at the bottom of the legal fiction of the "King as Corporation" or as "Corporation sole." The Crown, we recall, was interpreted often enough in mediaeval England as a composite body made up of the parliamentary estates with the king as their head.⁴²⁸ The same parliamentary estates together with the king formed, however, in other respects also the "body politic and mystical" of the realm—or, as the French called it, the "body civil and mystical."⁴²⁹ Hence,

⁴²⁷ See Bacon, *Post-nati*, 651: "Some say . . . to the Law, some to the crown, some to the kingdom, some to the body politic of the king: so there is a confusion of tongues amongst them, as it commonly cometh to pass in opinions that have their foundations in subtlety and imagination of man's wit, and not in the ground of nature."

⁴²⁸ Above, nos. 168ff. See, for the estates, Chrimes, *Constitutional Ideas*, 126ff. esp. 123, the Parliamentary Sermon of Bishop Russel, in 1483, who identifies repeatedly the "politike body of Englonde" with the "iii estates as principalle membres undir oone hede."

⁴²⁹ The identification of estates and king with the *corpus civile et mysticum* is found time and again as an expression of French constitutionalism; see, e.g., Jean

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Crown and body politic of the realm frequently had their chief components in common. With this organic-corporational concept of Crown and body politic, however, there interfered the concept of Dignity, that is, of a "corporation by succession." Whereas the Crown could appear "corporate" because it encompassed all the members of the body politic living at the same time, the Dignity was a Phoenix-like one-man corporation encompassing in the present bearer of the Crown the whole *genus*, the past and future incumbents of the royal Dignity. What apparently happened was that the English jurists failed to make a clear-cut distinction between the corporate body of the Crown and the supra-individual personage of the Dignity, and instead equated each with the body politic—tempted perhaps by the current formula "Crown and Dignity royal." That is to say, they fused two different concepts of the current corporational doctrines: the organic and the successional. And from this fusion of a number of interrelated corporational concepts there originated, it seems, both the "King's body politic" and the king as a "corporation sole."

This assumption is not contrary to what Maitland put forth so ingeniously when he derived the English "corporation sole" from the model of the *persona*, the parson, who in his village church was the only priest and who, with regard to the landed property of his prebend, took the place of the corporate cathedral chapters or monastic communities in their relation to church property. It is certainly correct to say that the model of the parson had subsidiary effects in conceiving of the king as a corporation sole, and Maitland struck with his pun at the very root of the problem when he joked about the king who had been "parsonified." However, the common basis of both parson and king was probably the *Dignitas*, which, in the case of the king, was fused with the organic body politic whose head he was—comparable rather to abbots and bishops who were also both Dignities and heads of corporate bodies. Hence, it was said that every abbot was a "body politic," and when Coke referred to the "mystical body" of an abbot in

de Gerson, *De meditationibus*, 37: "Habes illos de primo statu tanquam brachia fortissima ad corpus tuum mysticum, quod est regalis policia, defendendum" (follow the other two estates). Also Terre Rouge, Coquille, and others make that identification; Church, *Constitutional Thought*, 29,n.20; 278,n.16, and passim. The expression *corpus politicum* is not completely absent (see, e.g., Church, 278,n.16), but *corpus civile* seems to prevail in France, whereas it is hardly found in England.

order to explain the meaning of the king's "body politic," he merely referred to another, though similar, confusion between *corpus mysticum* and *Dignitas*, which was current as early as the fifteenth century.⁴⁸⁰ It appears that Blackstone was, after all, not quite wrong when he boasted that the idea of corporations, which he derived from the Romans, had been considerably refined and improved "according to the usual genius of the English nation," especially what concerns "sole corporations, consisting of one person only, of which the Roman lawyers had no notion."⁴⁸¹

Legal speculation of the thirteenth and fourteenth centuries, for the sake of interpreting the nature of *Dignitas*, introduced a simile which, being individual and species at the same time, appeared as a prefiguration of the corporation sole: the mythical bird Phoenix. To what extent these characteristics had validity in theological thought as well is a question which shall not be raised here. However, it should not be forgotten that a genuine corporation sole has actually existed, even "historically," if we may say so. It existed in Adam, the first man, who being the then only existing man was at the same time individual and the totality of the then existing *genus humanum*. He was at once man and mankind. In order to recognize, however, some of the implications linked with the myth of Adam, we had best entrust ourselves to the guidance of Dante.

⁴⁸⁰ See above, nos. 311 and 312.

⁴⁸¹ Blackstone, *Commentaries*, I.c.18, p.469; above, *Introd.*, n.7.