

ROYAL INCAPACITY AND CONSTITUTIONAL CONTINUITY: THE REGENT AND COUNSELLORS OF STATE

RODNEY BRAZIER*

I. INTRODUCTION

THE British monarch has legal duties to perform, as well as ceremonial and representative functions to discharge. For example, the monarch's assent is legally required before a Bill or an Order in Council can pass into law; some appointments only take effect when they are formally approved by the monarch, which is sometimes signified by the Queen's personal signature, the royal sign manual, or at others by personal delivery by the monarch of seals of office. Some types of document require as a matter of law the affixing of the Great Seal, which can usually be done only by virtue of a warrant under the royal sign manual: examples include royal proclamations (say to dissolve Parliament), or Letters Patent (say to confer a peerage or to ratify a treaty). Because the monarch is part of the legal machinery of government it is essential that the monarch is always available to function as such; but because a monarch is only human there will be times when, because of absence or illness, this is impossible. As a result, as Sir David Keir put it:

The law has had to find ... devices for reconciling the abstractions connected with kingship with the practical inconveniences resulting from the fact that the office is held by a human being liable to various incapacities.¹

Very little has been published on such devices: the main piece remains an eight-page appendix to Sir John Wheeler-Bennett's official biography of George VI published nearly fifty years ago.² The purpose of this article is, therefore, to examine how constitutional law and practice ensure constitutional continuity during times of a monarch's incapacity, and to assess how apt that provision is today.

* Professor of Constitutional Law in the University of Manchester. I am very grateful to Professor Sir David Williams for reading an earlier draft.

¹ *The Constitutional History of Modern Britain since 1485*, 8th ed. (London 1966), p. 376.

² *King George VI: His Life and Reign* (London 1958), Appendix A, "A Regent and Counsellors of State".

As will be seen, the Regency Act 1937 was enacted to be a complete code to provide for all cases in which the monarch might be, or was, unable to perform royal functions. The historical background to that statute will be sketched. That Act (as amended in 1943 and 1953) has been in place for nearly 70 years during the reigns of two monarchs. The constitutional position will be examined in the light of that legal code, but it would not be sensible to do so without reference to the *dramatis personae*. The Queen is now 79 years old, and the Prince of Wales is 56; if the Queen enjoys anything like her mother's longevity the Prince of Wales might be in his seventies before his accession to the throne, and would succeed a very elderly monarch. Those respective ages mean that the adequacy of current arrangements for royal incapacity should be analysed with the Queen and the Prince in mind. Moreover, practices and procedures that might have been acceptable earlier in constitutional history to cope with the limitations of an ill or elderly monarch would not be acceptable today. The public now expects the monarchy as an institution to be visible, and to be seen to be doing good around the United Kingdom and further afield; and what might once have been arranged discreetly by courtiers and Ministers faced with an incapacitated monarch would not today survive the intensive scrutiny of the media and the insatiable appetite for information about the doings of the whole royal family. And so possible changes in aspects of law and practice will be canvassed.

II. CONTINGENCIES AND RESPONSES

As with any other natural person a monarch can lack legal capacity to act as the result of illness or minority. Unlike such a person, however, absence from the country is also assumed to prevent a monarch from carrying out royal duties efficiently. Until as late as 1937, under the English, and later the British, constitution such contingencies were dealt with on an *ad hoc* basis whenever they arose or were likely to arise in a particular case. Might that disinclination even to contemplate an incapacitated monarch, and to make legal provision prospectively, have been an inaccurate reflection of the notion that the king can do no wrong, a notion which perhaps implied perfection? Or did it result from a refusal by monarchs to permit the impression of potential weakness, given that—at least before the English revolutions in the seventeenth century—monarchs reigned on the basis of the possible use of force to assert royal authority? Reconciling virtually unlimited royal power with the future possibility of a monarch being physically or

mentally feeble, or a mere child, or away from the realm, would not have been easy before (say) the eighteenth century.

The illness of the king, especially when he has found it impossible to express the royal will in writing, caused the greatest constitutional problems before the existence of standing statutory provision. A vivid illustration of this was provided by George III's illnesses (whether insanity or porphyria).³ In 1788 this arose in an especially difficult set of circumstances.⁴ Parliament stood prorogued. Then (as now) the monarch had to appoint the time of the next meeting and had to deliver a Speech from the Throne, or appoint commissioners to do so: until all that was done neither House could proceed with any business.⁵ And, of course, Bills which had been passed by both Houses required royal assent in order to translate them into statutes. Royal assent to a Bill is signified by royal commissioners appointed for the purpose under Letters Patent, signed by the monarch and bearing the Great Seal.⁶ That requirement of the royal sign manual is necessary by statute.⁷ George III's indisposition in 1788 rendered him incapable of doing any of those things himself, and no law provided for a deputy or for any other way of curing the problem. The possible appointment of a deputy, a Regent, would require legislation: but the King was incapable of assenting to it. It was of such an impasse that Sir William Anson commented that "all that can be done under such circumstances is to supply, as soon as may be, the deficiency of the constitution."⁸ William Pitt as Prime Minister devised a scheme under which the Lord Chancellor would be authorised, under a resolution to be approved by each House of Parliament, to affix the Great Seal to a royal commission for the meeting and opening of Parliament, and to a Regency Bill once it had passed both Houses. In that way Parliament would supply an entirely fictitious expression of the royal will and assent.⁹ The scheme was implemented up to the point of the House of Commons passing a Regency Bill and the House of Lords giving it a second reading, but happily for constitutional legitimacy (though not for the Prince of Wales and his supporters who were anxiously waiting for him to

³ On that question see the authorities cited in Christopher Hibbert, *George III: A Personal History* (London 1998), p. 267, n.

⁴ Keir, *Constitutional History*, p. 377.

⁵ Erskine May, *Parliamentary Practice*, 21st ed. (London 1989), p. 59.

⁶ Royal assent has not been signified in person in the House of Lords by a monarch since Queen Victoria on 12 August 1854: Erskine May, *Parliamentary Practice*, p. 529.

⁷ 33 Henry VIII, c. 21; see also the Great Seal Act 1884, ss. 2(1), 4, Royal Assent Act 1967, s. 1(1).

⁸ *The Law and Custom of the Constitution*, 5th ed., by Maurice Gwyer (Oxford 1922), i, p. 334.

⁹ W.C. Costin, *The Law and Working of the Constitution* (London 1952), ii, pp. 154–9; Erskine May, *Parliamentary Practice*, pp. 59–60. Asa Briggs, *The Age of Improvement* (London 1959), pp. 86–87 notes the view of Charles James Fox that, given the King's complete incapacity, he was legally dead, so that the Prince of Wales should succeed to the throne.

assume the Regency) no further fictitious action was needed on that occasion because the King recovered.¹⁰ But the scheme was revived in 1810 with the onset of George III's final illness. The same fiction was used to summon the prorogued Parliament, to permit commissioners to deliver the King's Speech, and to express royal assent to the Regency Bill under which the Prince Regent was to exercise royal functions, in the event for ten years until his father's death in 1820.¹¹ While constitutional purists will look askance at such devices, what else could the King's Ministers and Parliament have done in the circumstances? Necessity was father of the deed.

Yet it is not necessary to go back so far for examples of further, and different, constitutional ingenuity. George V fell so ill in 1928 with a streptococcal infection of the chest—in a world yet to know penicillin—that the Prince of Wales was summoned back from an African safari in case the King should die. Meanwhile, a quorum of Privy Counsellors was assembled outside the King's bedroom so that he could authorise the appointment of Counsellors of State who would act for him. He was just able to sign to show his approval of an Order in Council directing the Home Secretary to prepare a Commission appointing the Counsellors.¹² The King recovered, but in what was to prove his terminal illness in 1936 a similar procedure was followed, although this time his doctor helped to guide his hand in signing, and Counsellors of State were thereby put into office.¹³ There had been twentieth-century precedents for the appointment of such Counsellors. In 1911, before George V left London for his Coronation Durbar in India, Counsellors had been appointed to act for him during his impending absence, as they had been in 1925 when the King took a Mediterranean cruise on medical advice. It was assumed that the royal prerogative, as part of the common law, gave authority for the appointment of Counsellors of State on those four occasions. No challenge was ever made to the legal validity of that innovation, and (as will be seen later) statutory provision was made early in George VI's reign for any appointment of Counsellors of State, thus making such a query moot.¹⁴

¹⁰ Hibbert, *George III*, pp. 272–274, 292–293.

¹¹ Anson, *Law and Custom*, p. 335; Herbert Morrison, Home Secretary, on second reading of the Regency Bill 1943, HC Deb. vol. 392 col. 1248 (22 September 1943).

¹² Wheeler-Bennett, *King George VI*, p. 810; Kenneth Rose, *King George V* (London 1983), pp. 356–357.

¹³ Rose, *King George V*, p. 402. After several minutes two marks were made on the paper that could be read as "GR". The Counsellors were the Queen and the four princes: Philip Zeigler, *King Edward VIII* (London 1990), p. 240.

¹⁴ The Regency Act 1937 was relied on for the appointment of Counsellors in October 1951 during the King's illness: Sarah Bradford, *King George VI* (London 1989), p. 455. No common-law power to appoint Counsellors of State survives that Act because that power must be taken to have been impliedly abrogated by the 1937 Act: *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508.

Rather different considerations apply if a monarch succeeds to the throne while still a minor. On the death of the monarch, or on the coming into effect of legislation giving effect to a monarch's abdication,¹⁵ there is a demise of the Crown and it passes immediately to the person next in the line of succession who is entitled to receive it.¹⁶ It is in that sense that "the King never dies".¹⁷ From the moment of accession the monarch is entitled at common law to exercise all the royal powers and prerogatives.¹⁸ It follows that, at common law, the monarch can be under no disability by virtue only of minority.¹⁹ It would stretch the elasticity of the doctrine that the King can do no wrong to argue that that concept can cover a monarch's minority at common law so as to cure the minority. Be that as it may, common sense dictates that a child cannot be expected to act as monarch and, as will be seen shortly, Parliament often made contingent provision as it deemed necessary when a monarch's heir was a child. In fact, though, the only statutory provision providing for that outcome which appears actually to have been used in English and British constitutional history existed during the minority of Edward VI.²⁰ The age of 18 was fixed in a succession of *ad hoc* statutes as the age of a monarch below which a Regency would be necessary, and at which age the monarch would be permitted to assume full royal authority.²¹ It was not until the Regency Act 1937 was enacted that minority was made, by statute, a disability in so far as it requires a Regent to take office until an infant monarch comes of age.

Legal adjustments have also been made as required to provide for continuity during the monarch's absence from the realm. Statutory provisions for the purpose can be traced back several centuries. In the reign of William and Mary, for example, the Queen Regnant was given power to act alone while William III was abroad.²² Similar statutes were enacted down to the accession of

¹⁵ Thus Edward VIII's abdication was effective at the moment he gave royal assent to His Majesty's Declaration of Abdication Act 1936: see s. 1(1).

¹⁶ A person is disentitled if he or she does not satisfy the religious tests required by law: Bill of Rights 1689, Act of Settlement 1701, ss. 2, 3, Accession Declaration Act 1910, s. 1 and Schedule.

¹⁷ *Calvin's Case* (1608) 7 Co. Rep. 1a at 10b.

¹⁸ *Ibid.*

¹⁹ *Ibid.*; *Duchy of Lancaster Case* (1561) 1 Plowd. 212; *Willion v. Berkley* (1561) 1 Plowd. 223 at 244.

²⁰ E.C.S. Wade, "Regency Act 1937" (1937) 1 M.L.R. 66.

²¹ See the account given by the Home Secretary, Herbert Morrison, on the second reading of the Regency Bill 1943, HC Deb. vol. 392 col. 1250 (22 September 1943). Viscount Simmonds L.C. said during the passage of the 1953 Regency Bill that at common law "[t]he Sovereign attains full age on reaching eighteen years ...": HL Deb. vol. 184 col. 302 (17 November 1953). Possibly he meant that, from that age, monarchs had reigned without Regents.

²² Keir, *Constitutional History*, p. 376.

Victoria in 1837 to provide for the dispatch of royal business during the monarch's absence overseas.

Statutes were passed, then, to meet royal disability which necessitated a Regency in a particular reign either when an incapacity arose (such as George III's illness), or when it was anticipated as a possibility (as when a monarch had an infant heir). The earliest such statute was the Regency Act passed in 1536 to provide for the Duke of Somerset to be Protector during the minority of Edward VI. Over the last 250 years other statutes were enacted as required, in 1751, 1765, 1811, 1830, 1837, 1840, and 1910. The office of Counsellor of State, by contrast, was a twentieth-century creation of the royal prerogative, relied upon four times before statute occupied the field.²³ The reliance before 1937 on such *ad hoc* action caused a Home Secretary to remark that legislation had had to be initiated in circumstances which were likely to be the most difficult to deal with.²⁴ But there were wider concerns. It should surely be for Parliament—not the monarch and his or her closest advisers—to establish rules for the conduct of royal business during the incapacity of the head of state. Constitutional rules, moreover, should apply prospectively for foreseeable circumstances, and should not be adopted as a reaction to a particular state of affairs. The family circumstances of George VI at his accession proved the spur for such principles to be acted on.

III. THE REGENCY ACTS 1937–1953

It was clear at the time of the unexpected accession of George VI in 1936 that a Regency Act of some kind was necessary. Such an Act would have to embrace the possibility of the new King's death while his elder daughter, the eleven-year-old Princess Elizabeth, was still a minor. A new Act could also be used to enact rules about Counsellors of State, just as his father and Edward VIII had envisaged that they should be.²⁵ The Government was happy to cooperate, and the new King sent a message to Parliament just two weeks into his reign.²⁶ The resultant Regency Act 1937 was designed as a permanent code, obviating any future need for legislation to provide for a Regent in any given reign and any need to rely on the royal prerogative to find Counsellors of State. But two further Regency Acts proved to be necessary within the ensuing

²³ Wheeler-Bennett, *King George VI*, p. 810.

²⁴ Herbert Morrison, note 21 above, col. 1248.

²⁵ Wheeler-Bennett, *King George VI*, p. 811–812.

²⁶ For the text, see Wheeler-Bennett, *King George VI*, p. 811, and the summary of it in the preamble to the Regency Act 1937.

sixteen years. What, then, was the general scheme of the 1937 Act, and why did it prove to be a not wholly adequate code?

The structure of the Act may be summarised this way.²⁷ First, and for the first time, infancy is made a general statutory disability for any monarch who succeeds to the throne under the age of 18. Such a monarch is, indeed, King or Queen, but must reign with a Regent who will perform the royal functions on his or her behalf, and provision is made for the guardianship of such a monarch. Secondly, a scheme provides for the declaration of a Regency in other cases of royal incapacity, whether caused by illness or by the monarch not being available to perform his or her functions. Thirdly, general provision is made for the appointment and duties of Counsellors of State when a monarch is ill (but not so ill as to justify a Regency) or is absent from the United Kingdom. Perhaps such Counsellors are required to act jointly—although, as will be seen, that point is not beyond dispute, and it could have particular importance later in the Queen's reign.

Within a few years two anomalies in the 1937 Act became apparent. The first concerned the new provisions for Counsellors of State. The Act provided for a specific and closed class of five persons all of whom had to be appointed Counsellors when they were needed.²⁸ George VI's visit to the United States in 1939 disclosed a deficiency in that approach. The King was accompanied by Queen Elizabeth, but the Act required that she be appointed one of the Counsellors. The statute did not permit the exemption of anyone in the specified class for any reason, nor any way of topping-up the class of Counsellors if anyone in it could not act. The other anomaly concerned the different ages which were specified for different purposes in the statute. The Regency Act 1937²⁹ requires a Regency if a monarch succeeds before reaching the age of eighteen. That in itself raises an immediate query, given that the general age of majority was then 21: it was not to be lowered generally to 18 until 1970.³⁰ But leaving that aside, the incongruity was that the 1937 Act required any Regent or Counsellor of State to be "of full age" in order to qualify, that is 21 or over.³¹ This, too, was odd, for why should a minor monarch receive full powers on reaching the age of 18, whereas no one could achieve the lesser offices of Regent or Counsellor unless aged 21 or over?³² It was here that George VI decided that a change should be

²⁷ For a brief statute note, see E.C.S. Wade, "Regency Act 1937".

²⁸ 1937 Act, s. 6(2).

²⁹ Section 1(1).

³⁰ Family Law Reform Act 1969, s. 1(1).

³¹ 1937 Act, ss. 3(2), 6(2).

³² An exception was subsequently made for the heir apparent or presumptive.

made. Princess Elizabeth, the heiress presumptive,³³ would turn 18 in 1944. But she would not be able to act as a Counsellor of State before 1947. The King wished her, however, to get some earlier experience of royal duties, experience which he had not had before Edward VIII's abdication. Fresh legislation would be needed to permit it.³⁴ The War Cabinet accordingly agreed to promote a Regency Bill in 1943.³⁵ The Regency Act 1943, s. 1, substitutes a new section 6(2) and (2A) in the 1937 statute. In doing so special treatment was accorded to the heir apparent or heir presumptive, who is permitted to be a Counsellor of State if aged 18 years or over.³⁶ Thus was Princess Elizabeth permitted, from her 18th birthday in 1944, to act as a Counsellor of State. Now it could be objected that this was a partial reversion to the old habit of legislating *ad hominem*, although the provision attaches to any heir apparent or presumptive. The wartime Act also partially addressed the difficulty exposed at the time of the King's United States visit by allowing the monarch to exempt a person from being a Counsellor of State if he or she is or intends to be absent from the United Kingdom during the period in which Counsellors are required.³⁷ But that limited initiative failed to allow exemption on any other ground (for example, that the potential Counsellor is ill, or is otherwise engaged in full-time duties). Nor did it permit any substitution for anyone exempted.

The family circumstances of Elizabeth II at the time of her accession in 1952 disclosed further shortcomings in the 1937 Act. This time the focus was on a potential Regency. If a Regency had been required on account of the succession of Prince Charles before his 18th birthday in 1966, Princess Margaret, as next in line to the throne, would have been Regent under the 1937 Act, and as such she would have become his legal guardian.³⁸ The Duke of Edinburgh, not being in the line of succession from which Regents would be drawn exclusively, could not have been Regent or guardian, a situation that pleased neither the Queen nor the Duke nor Princess Margaret.³⁹ It would have seemed odd to the general public in such a case that a young boy's aunt would be his

³³ An heir apparent is an heir, such as an eldest son, whose right to succeed cannot be defeated by the birth of anyone having a better right to succeed. An heir presumptive is an heir, such as a daughter who is the eldest child, whose right to succeed could be defeated by the subsequent birth of someone with a better right, such as a son.

³⁴ Ben Pimlott, *The Queen: A Biography of Elizabeth II* (London 1996), pp. 70–71. Lord Simon L.C. accepted that the then law and common sense did not coincide.

³⁵ The reasons were rehearsed in a royal message to Parliament: see HC Deb. vol. 392 cols. 263–264 (22 September 1943).

³⁶ The age requirement for a Regent was not altered until 1953.

³⁷ Regency Act 1943, s. 1.

³⁸ Regency Act 1937, s. 1(1), 3(1), 5(c).

³⁹ C. D'Olivier Farran, "The Regency Act 1953" (1954) 17 M.L.R. 146, 146–147.

guardian rather than his father. There was a less important difficulty, too, over the class of Counsellors of State: George VI's death had removed his widow from the statutory list of potential Counsellors.⁴⁰ And so the second Regency Bill since 1937 was prepared. In explaining the necessity, the Home Secretary, Sir David Maxwell-Fyfe, told the House of Commons that what had been meant to be the general code in the 1937 legislation had not provided for every contingency, because "... the wit of man cannot foretell every contingency, or every set of circumstances, which may arise."⁴¹ But he faced careful questioning about the "exclusion" of Princess Margaret. For under the 1953 Regency Bill the Duke of Edinburgh would be Regent if a child of the Queen and the Duke were to accede while under 18, or if a Regency were needed for any other reason unless or until a child or grandchild of theirs qualified to be Regent.⁴² The Duke would also be guardian of a minor monarch. Maxwell-Fyfe simply asserted that Princess Margaret agreed fully with the change,⁴³ and he also stressed that the Government took responsibility for the royal message from the Queen to Parliament seeking the legislation.⁴⁴ (That last point is a confirmation of the constitutional principle that a monarch cannot speak directly to Parliament without ministerial advice to do so.) The Regency Act 1953 also included Queen Elizabeth the Queen Mother in the class of persons who would be Counsellors of State,⁴⁵ and provides that the heir apparent or presumptive is to be deemed for all purposes of the 1937 Act to be of full age on attaining the age of eighteen,⁴⁶ so that such an heir can be Regent at that age as well as a Counsellor of State.⁴⁷ The Act is to be construed as one with the Acts of 1937 and 1943. The 1953 Act, like its immediate predecessor, was again a return to legislation *ad hominem*. With the exception of the rule that an heir apparent or presumptive is of full age at 18, most of the rest of the 1953 Act became redundant with the coming of age of the Queen's children and of her grandchildren who could be Regent, and with Queen Elizabeth the Queen Mother's death in 2002.

⁴⁰ Queen Elizabeth had qualified as "... the wife ... of the Sovereign ...": 1937 Act, s. 6(2).

⁴¹ HC Deb. vol. 520 col. 951 (11 November 1953) (second reading of the Regency Bill).

⁴² This was enacted as the Regency Act 1953, s. 1(1), (2). Section 1(2) referred to "... the Duke of Edinburgh, if living, ...", two of the most otiose words to appear in a statute.

⁴³ HC Deb. vol. 520 col. 992 (11 November 1953).

⁴⁴ *Ibid.*, col. 996.

⁴⁵ Regency Act 1953, s. 3.

⁴⁶ *Ibid.*, s. 2.

⁴⁷ Such an heir could act as a Counsellor of State from the age of 18 under the 1943 Act.

IV. THE REGENT⁴⁸

The Regency Act 1937 continued the dual solutions to royal incapacity of relying either on a Regent or on Counsellors of State, depending on the gravity of the incapacity. Thus the Act envisages that a Regency would be declared almost as a last resort (albeit that there would be a Regency automatically on the accession of a minor Sovereign⁴⁹), whereas Counsellors of State would be appointed more generally to ensure continuity of government when a monarch was temporarily unable through illness or absence from the United Kingdom to perform royal duties. More specifically, the 1937 Act provides for a Regency in any of three circumstances, namely, the accession of a monarch who is under the age of 18, the total incapacity of the monarch, or the monarch not being available to perform royal functions.⁵⁰ These Regency provisions remain unused since they were enacted; whether they are wholly satisfactory is a question which will be addressed once the legislation has been analysed.

It is unlikely that a Regency on account of a monarch's minority will be necessary in foreseeable circumstances. The immediate line of succession is through the Prince of Wales, Prince William (who turned 21 in 2003), Prince Harry (who will turn 21 in 2005), and the Duke of York. Only if a catastrophe in the next few years were to propel to the throne the fifth or sixth in the line of succession, Princess Beatrice or Princess Eugenie of York (aged 17 and 15 respectively), would a Regent be put in place by operation of law.⁵¹ True, any child of Prince William would be in the line immediately after him, but in the ordinary run of events he or she would be an adult before any possibility of succession arose. In any event, though, what is the current law? As already noted, infancy has never barred accession to the throne. But the Regency Act 1937 establishes that a Regent will be put in office until a minor monarch reached the age of 18, and the royal functions would be performed by the Regent in the name and on behalf of the Sovereign.⁵² The Regency would cease by operation of law on the monarch's 18th birthday.⁵³ During such a Regency a minor

⁴⁸ Wheeler-Bennett, *King George VI*, pp. 809–810, 815–816. He writes only briefly about a Regency and at greater length about Counsellors of State, perhaps reflecting the greater practical importance of Counsellors up until that time.

⁴⁹ The Act uses the word Sovereign for the monarch for the time being.

⁵⁰ 1937 Act, ss. 1, 2.

⁵¹ The Regent in that case would be the Earl of Wessex. If the gatecrashing of Prince William's 21st birthday at Windsor Castle in 2003 by a "comedy terrorist" had actually been achieved by a real terrorist who was able to murder all members of the royal family present, the absent Earl of Wessex (7th in the line of succession) would have succeeded to the throne.

⁵² 1937 Act, s. 1(1).

⁵³ *Ibid.*

monarch would have the status of King or Queen Regnant, but the Regent would exercise all royal functions. Those functions (which would fall to a Regent in office for any reason under the 1937 Act) include “all powers and authorities belonging to the Crown, whether prerogative or statutory, together with the receiving of any homage required to be done to” the Sovereign.⁵⁴ And such a Sovereign would not take the oath required by the Accession Declaration Act 1910⁵⁵ until he or she reached the age of 18, for which purpose that anniversary is deemed to be the date of that Sovereign’s accession.⁵⁶ The Act is silent on the question of whether or when a coronation would be held while a Regent was in office in this circumstance. A coronation ceremony has no legal significance.⁵⁷ It would seem right that the coronation should be postponed until after the Sovereign had taken the Accession Declaration Act oaths. While a Regent discharges the royal functions for a minor Sovereign, the 1937 Act makes provision for his or her guardianship.⁵⁸ A minor unmarried Sovereign’s mother is guardian; a married Sovereign’s spouse—if of full age⁵⁹—is guardian,⁶⁰ or otherwise the Regent is guardian, as a Regent would be if (say) the Sovereign’s mother were dead,⁶¹ or if the spouse were under 21.⁶² When such a Sovereign reaches the age of eighteen the Regent becomes *functus officio*; the Sovereign assumes all the royal functions and, it is suggested, proceeds to a coronation. (Indeed, because an heir apparent or presumptive is of full age at 18 for all purposes of the 1937 Regency Act,⁶³ he or she could be Regent (or a Counsellor of State) if required for an ill or absent Sovereign. Anyone else who might be Regent or a Counsellor must be aged 21 or over.⁶⁴) So a young Sovereign can succeed at 18, and as heir apparent or presumptive can provide any necessary

⁵⁴ 1937 Act, s. 8(2).

⁵⁵ The new Sovereign thereby professes Protestantism and swears to uphold the enactments which secure the Protestant succession to the throne.

⁵⁶ 1937 Act, s. 1(2).

⁵⁷ Save for the oaths which are required by law at a coronation.

⁵⁸ 1937 Act, s. 5, “unless Parliament otherwise determines” (*ibid.*)—more otiose words.

⁵⁹ That is, aged 21 or over: the Family Law Reform Act 1969, s. 1(4) and Schedule 2 exempted the Regency Acts from the general reduction of the age of majority to 18.

⁶⁰ As he or she would be if such a Sovereign were declared incapable of performing the royal functions: 1937 Act, s. 5(b).

⁶¹ If a minor Sovereign were a widow or widower he or she would be unmarried and, if his or her mother were dead, the Regent would be guardian.

⁶² Section 1 of the Regency Act 1953 is now spent. Under it the Duke of Edinburgh would have been Regent for any child of the Queen’s and of his who succeeded while under 18. And it provides that any Regent during the Queen’s reign would have been the Duke of Edinburgh until a child or grandchild of the Queen and the Duke could be Regent under the 1937 Act. There are now many children and grandchildren aged over 21.

⁶³ Regency Act 1953, s. 2.

⁶⁴ See note 59 above.

continuity for an incapacitated Sovereign from that age, whereas other candidates to do so must be aged over 21.⁶⁵

The second situation which would trigger a Regency under the 1937 Act would flow from the Sovereign being incapable of performing the royal functions by reason of infirmity of mind or body. The 1937 Act, s. 2(1), provides for this case⁶⁶ in a single sentence running to 161 words. This case has been described as one involving the Sovereign's "permanent incapacity",⁶⁷ but that is incorrect. Section 2(1) refers to incapacity "for the time being"; the subsection explains that such a Regency would be ended by the Sovereign's recovery, and the marginal note to that subsection speaks of a "Regency during total incapacity of the Sovereign", not permanent incapacity.⁶⁸ In essence, if specified persons "declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the Sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions," those functions shall be performed by a Regent.⁶⁹ A Regency would be ended by a declaration made in like manner.⁷⁰ The procedural steps which would be required will be examined shortly. The central question, clearly, is what degree of infirmity would justify or require a Regency.

The declaration of a Regency is of more profound constitutional significance than the appointment of Counsellors of State. As will be seen, a Regency is effected by a much more formal process than that which is involved in appointing Counsellors; a Regency cannot be declared by the Sovereign alone, but is done by others—indeed, the Sovereign might not agree that a Regency should be declared, but has no power to prevent it; a Regency provides a single deputy, whereas plural Counsellors are appointed; a Regent is subject to few limitations on his or her powers, whereas Counsellors are subject to many; the declaration of a Regency must be declared to the Privy Council and to the Commonwealth realms, but no such communication announces the appointment of Counsellors. And, in providing for a case of illness, Counsellors are to be appointed if that illness is not such as would justify a Regency.⁷¹ Those factors would surely weigh heavily with those responsible for replacing the Sovereign's authority with a

⁶⁵ If a Regency were required because of a Sovereign's illness, and the heir were aged under 18, the Regent would be the next in line who (among other things) was aged over 21.

⁶⁶ And that of the Sovereign not being available, a contingency to be dealt with below.

⁶⁷ Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford 1995), p. 47.

⁶⁸ Marginal notes can occasionally be used as part of an Act to help interpretation: *D.P.P. v. Chandler* [1971] A.C. 1 at 28.

⁶⁹ 1937 Act, s. 2(1).

⁷⁰ *Ibid.*

⁷¹ 1937 Act, s. 6(1).

Regent's. They would have to be sure that the statutory grounds were satisfied, especially if the Sovereign objected to being moved aside. The 1937 Act is silent about the standard of proof required, but it should be very high.

It would be fruitless to try to suggest a catalogue of infirmities, one class of which would justify a Regency while the other would not, for too much would turn on the facts which would have to be judged by those responsible for declaring any Regency. But the main possibilities can be examined briefly. Some cases involving mental incapacity would clearly necessitate a Regency, for example if a Sovereign were to go into a coma with no or no certain prospect of recovery, or if the Sovereign met the requirements of compulsory detention under mental health legislation.⁷² But even mental incapacity cases could, of course, have degrees of difficulty. What, for example, of a Sovereign who was succumbing to Alzheimer's disease? Physical infirmity alone might make the declaration of a Regency harder to justify, for as Franklin Roosevelt triumphantly showed lack of mobility of itself is no bar to carrying out the functions of a head of state, at least as they existed in the 1930s and 1940s.⁷³ Clearly, an immobile Sovereign or one suffering from reduced mobility would find it impossible or harder to carry out ceremonial or representative duties at home and especially overseas, but could it be said that such infirmity prevented a Sovereign from performing the royal functions as defined in the 1937 Act? It should be remembered that the statutory definition of royal functions is not exhaustive: the Act says that "the expression 'royal functions' *includes* all powers and authorities belonging to the Crown."⁷⁴ It could be argued that in the sixty years and more that have passed since the enactment of the Regency Act a much greater part of a Sovereign's duties has come to consist of travelling and meeting people, around the United Kingdom and abroad in the Commonwealth and elsewhere. So it may, indeed, be said that a Sovereign who (say) could not leave Buckingham Palace or Sandringham, or only with difficulty, even though mentally fully fit could not perform all the royal duties as required in the twenty-first century. As the Queen and the heir apparent get older, this particular possibility becomes greater. If the question of a Regency were to arise in such a case, no doubt those responsible for making the declaration would wish to take into account the views of the Queen and the Prince of Wales before

⁷² Mental Health Act 1983, Part II. The Sovereign's person is said to be inviolable, and is immune at common law from civil and criminal actions: could a Sovereign be detained under this legislation?

⁷³ Presumably blindness need not be a bar either.

⁷⁴ Section 8(2), *my italics*.

taking the momentous step of declaring a Regency for the first time in about two hundred years. The evidence of physicians—medical evidence—in all such cases would only take so far those charged with deciding whether the law permitted or required a Regency. But such evidence must be considered,⁷⁵ and in some cases would be conclusive. They could certainly consider the Sovereign's wishes, if he or she were able to express them, for such wishes would constitute evidence. A particularly unfortunate kind of case, resulting from the 1937 Act itself, would involve a mentally fully fit Sovereign who, as the result of accident or illness, could not write, at least for the time being. Royal assent, for example, could not be signified in the manner required by law. If, say, the Sovereign were so rendered as the result of a riding accident, from which she would recover fully in due course, the obvious solution would be to appoint Counsellors of State rather than to resort to the novelty and full panoply of a Regency. But such Counsellors could not be appointed: the Sovereign alone appoints Counsellors of State, and the Sovereign would not be able to sign the necessary Letters Patent; that requirement (as will be seen) cannot be dispensed with under the 1937 Act. The only way to ensure the smooth flow of written public business would be for a Regency to be declared, which would last until the Sovereign could write again. Might any doctrine of necessity clothe with legality what would otherwise be legally deficient in such a situation?⁷⁶ Could it be said that, if a fully sentient Sovereign were merely physically unable to write a signature, thus setting in train a delegation to Counsellors of State, then that small disability, and any subsequent taint of illegality, should be ignored? Possibly; but necessity has been recognised in English law only in very narrow circumstances, and a legal objection could not be ruled out.⁷⁷

The third and final possible trigger for a Regency found its way into the Regency Bill in 1937 as it was progressing through Parliament. The reason given on behalf of the Government for the added ground was perhaps rather implausible, but it has come by events to be rather less so. The trigger turns on the Sovereign "for some definite cause" being "not available for the performance of" the royal functions.⁷⁸ Now this cannot refer to the Sovereign's simple absence, because the 1937 Act provides for the appointment

⁷⁵ The requirement of considering the evidence of physicians did not appear in the Regency Bill as first introduced into Parliament. It was added on a Government motion during its passage.

⁷⁶ See S.A. de Smith and R. Brazier, *Constitutional and Administrative Law*, 8th ed. (London 1998), pp. 72–73.

⁷⁷ The principle of necessity in constitutional matters was rejected by the Judicial Committee of the Privy Council as applied by the Rhodesian Appellate Division following that colony's unlawful declaration of independence: *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645.

⁷⁸ 1937 Act, s. 6(1).

of Counsellors of State in that circumstance,⁷⁹ and the marginal note refers to “total incapacity”, which scarcely describes the voluntary absence of the Sovereign. Nor can unavailability be meant to cover indisposition caused by illness, because the 1937 Act deals specifically with that. During the passage of the Regency Bill the Attorney-General explained the need for this additional provision by alluding to the possibility of the Sovereign becoming a prisoner of war or being shipwrecked abroad.⁸⁰ A Regency Bill being debated in (say) 1737 might well have required such a provision, for was not George II to head his army at the Battle of Dettingen in 1743 (admittedly the last occasion on which a British monarch was to take to the field)? But such possibilities must have seemed rather remote in 1937. A Regency Bill which was being drafted today, however, would sensibly contain an equivalent provision, given that the scourge of terrorism might result in the kidnapping of a head of state, or given that an aircraft might crash in a remote place requiring time to establish the whereabouts and condition of the passengers. Lapses in royal security arrangements, notably in 2003,⁸¹ strengthen that suggestion. The Attorney-General was right in 1937 to justify the use of the broad phrase of a Sovereign being for some definite cause not available, and was right not to approve any more precise provision: flexibility was written in to provide for unforeseeable circumstances. Indeed, the Civil Contingencies Act 2004 reflects the possibility that the Sovereign might be unable to be present at a Privy Council to approve any Orders in Council to deal with a civil emergency, and provides for another way to make urgent legislation during such an emergency.⁸²

A novel use to which this “unavailability” provision might be put has been mooted recently.⁸³ It has been suggested that a fit and available monarch could be said to be “not available” to perform the function of granting royal assent to legislation to which, in conscience, he or she could not assent. The example is cited⁸⁴ of the King of the Belgians who refused in 1990 to sign a Government Bill which would legalise abortion. He stood down for a brief period, enabling the Council of Ministers to assent in his stead on

⁷⁹ At least, for an absence from the United Kingdom.

⁸⁰ Sir John Simon at HC Deb. vol. 321 cols. 107–111 (1 March 1937).

⁸¹ When someone managed to get into Prince William’s 21st birthday party (see note 51 above), and when a newspaper reporter obtained a job as a footman at Buckingham Palace and published information and photographs obtained in it. The following year a protestor managed to reach an outside ledge next to the balcony of Buckingham Palace.

⁸² Section 20 permits a senior Minister of the Crown to make emergency regulations (in lieu of an Order in Council) if satisfied that it would not be possible, without serious delay, to arrange for an Order in Council under the Act.

⁸³ Robert Blackburn, “The Royal Assent to Legislation and a Monarch’s Fundamental Human Rights” [2003] P.L. 205.

⁸⁴ *Ibid.*, p. 207.

the ground that he was “unable to reign”, an explicit provision in the Belgian Constitution. A Sovereign’s European Convention right to freedom of conscience could be protected, it is argued, by the declaration of a Regency for the sole purpose of granting royal assent to the controversial legislation, after which the Regency would be declared to have ended. Those responsible for declaring a Regency would have to be satisfied that the Sovereign was not available, for whatever reason. One problem with such a solution might be that the Regent might share the Sovereign’s objection;⁸⁵ but the person next in line and not otherwise disqualified must be Regent: he or she cannot refuse to take up the office or resign it. Possibly a Sovereign might think that his or her conscience would be salved by strong and private objections to the Prime Minister about such a Bill, and then by reliance on the doctrine that the Sovereign acts on ministerial advice, and assenting, however reluctantly, to it.

While wide discretion is vested in those who have the responsibility to declare whether a Regency is required, the identity of the Regent is rigidly defined in the 1937 Act. Under it the Regent will be that person who is next in line of succession to the Crown, excluding anyone who is disqualified by the Act.⁸⁶ Since his 18th birthday the Prince of Wales has been that person. Just as a new monarch cannot disclaim the Crown short of the passage of an Abdication Act, so a Regent succeeds to that office⁸⁷ and cannot avoid it. It is a potential office imposed by law on the heir apparent or presumptive. The Regency Act 1937, however, specifies five disqualifications which would prevent a person in the line of succession from becoming Regent. First, no one could be Regent if he or she were not a British citizen.⁸⁸ This is an intriguing provision, not only because it imposes on a Regent a quality that the law does not explicitly require of a Sovereign, but also because it seems unlikely that anyone in the line of succession to the throne would be anything but British—at least those in the first dozens of places in the line of succession.⁸⁹ All such heirs were British in 1937, and so it cannot have been designed to exclude a potential Regent who was then near to the point of succession. Rather, its purpose must simply be to remove automatically from a potential Regency anyone who ceased to be British. Secondly, a person domiciled outside the United Kingdom would be disqualified, and

⁸⁵ A point acknowledged by Blackburn.

⁸⁶ 1937 Act, s. 3(1).

⁸⁷ The 1937 Act, s. 4(1) refers to the Regent entering “upon his office”.

⁸⁸ 1937 Act, s. 3(2).

⁸⁹ The first 40 or so are conveniently listed in *Whitaker’s Almanack*.

similar observations to those just made apply to that provision.⁹⁰ Thirdly, also disqualified would be anyone aged under 21 (except for the heir apparent or presumptive who qualifies at 18). Fourthly, the Regent must also be capable of satisfying the religious tests for the Crown specified in the Act of Settlement 1701, ss. 2 and 3.⁹¹ It would be wrong for the Sovereign to be required by law to be in communion with the Church of England as its Supreme Governor yet for the law also to allow a non-Anglican to deputise as Regent for the Sovereign.⁹² This express disqualification is, however, strictly unnecessary as a matter of law. If, for example, the Prince of Wales were to convert to Catholicism, the Act of Settlement and the Bill of Rights would disqualify him from becoming Sovereign, and he would no longer be (as the 1937 Act puts the qualification for Regent) “next in the line of succession to the Crown”. Finally, if a person who would have become Regent (call him “A”) was under the necessary age at that time and subsequently becomes of full age during the Regency of “B”, then “A” thereupon becomes Regent in place of “B”, who is then disqualified from the office.⁹³ The aim is to have as Regent that person who is as high as possible in the line of succession.

How, then, is a Regency declared?⁹⁴ The Regency Act 1937 vests the responsibility of declaring a Regency in five people, or any three or more of them, namely, the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice of England, and the Master of the Rolls.⁹⁵ That list calls for comment.

No potential Regent is in that list, and so no conflict of interest could arise on that ground. Indeed, the inclusion of the Sovereign’s spouse may be justified as including someone whose loyalty would be unambiguously to the monarch, and who would know him or her much better than any of the other notables. The presence in the group of two senior judges underlines the quasi-judicial nature of the work: certainly, they can be expected to know how to deal properly with evidence, as the notables are required to do. In 1937 they were heads of division (although the third head, the then President of the Probate, Divorce and Admiralty Division, does not

⁹⁰ Occasionally a *residence* requirement had been imposed in earlier regency legislation, e.g. the Regency Act 1910, s. 5 (Queen Mary would have ceased to be Regent if she had ceased to reside in the United Kingdom).

⁹¹ 1937 Act, s. 3(2).

⁹² Whether there should remain religious tests for the monarch is a separate question. For the arguments see the Fabian Society, *The Future of the Monarchy* (London 2003), chapter 5.

⁹³ 1937 Act, s. 3(3), provided that the new Regent is under no other disqualification under s. 3(2).

⁹⁴ As noted, no declaration is necessary in the case of a monarch’s minority: the Regent is put into office by operation of law: 1937 Act, s. 1(1).

⁹⁵ 1937 Act, s. 2(1).

feature in the 1937 Act). Parliament is represented by the Speaker of the Commons and by the Lord Chancellor. The inclusion of the Lord Chancellor in the list of notables in 1937 made perfect sense given the unique constitutional position of the office. He had judicial, parliamentary, and ministerial functions to perform, as head of the judiciary, Speaker of the House of Lords, and as a Cabinet Minister; and he was keeper of the King's conscience.⁹⁶ But the Constitutional Reform Bill as introduced into Parliament in the House of Lords provided for the abolition of the office of Lord Chancellor.⁹⁷ That Bill did not seek to amend the Regency Act: the Government intended to produce an amendment to the Bill about that, but no such amendment has been forthcoming. This is no doubt due to the reprieve of the office, insisted on by the House of Lords. At the time of writing the Constitutional Reform Bill as introduced into the Commons⁹⁸ would continue the Lord Chancellorship, but provides that the holder would cease to be head of the judiciary, would not sit as a judge, and would not have to preside in the House of Lords (for the Bill paves the way for a separate Speaker). The two Houses are in dispute about whether the Lord Chancellor must continue to be legally qualified and a member of the Lords: the Government opposes those requirements. Perhaps it suffices to say that the case for keeping within the list of notables a departmental Minister who might be an MP and not a lawyer is much weaker than the original case for including the Lord Chancellor in the 1937 Act. It might be preferable to delete the reference to such a Lord Chancellor from that Act. One potential difficulty with that would then be that an even number of people would be charged with deciding whether to declare, or to declare ended, a Regency, with the potential risk of a tied vote.⁹⁹ Alternatively, a new Speaker of the House of Lords¹⁰⁰ could be given this duty, complementing that of Commons Speaker. Or the Lord President of the Council might be the replacement, given that he or she has regular contacts with the Privy Council and thus with the monarch. The Prime Minister has close personal contacts with the monarch at weekly audiences when Parliament is sitting, thus providing another candidate. The Attorney-General, moreover, could mirror the quasi-judicial role of the traditional Lord

⁹⁶ That designation refers to no more than the Lord Chancellor's equitable jurisdiction in the Court of Chancery.

⁹⁷ HL Bill 30 (2003–2004).

⁹⁸ HC Bill 18 (2004–2005).

⁹⁹ If the Prince of Wales had succeeded while unmarried the number in the class would have fallen to four.

¹⁰⁰ The House of Lords has been recommended to elect a Lord Speaker to succeed to the Lord Chancellor's presiding duties in the House: see Report of the Select Committee on the Speakership of the House of Lords (HL 199 (2002–2003)).

Chancellor in a Regency decision, and might be the best replacement. Decisions over a Regency should be quasi-judicial, and in no sense political. The notables would be charged with questions about a monarch's capacity, and, had that question fallen to a Lord Chancellor of the traditional type, he would have refused to countenance any suggestion that he should have taken political considerations into account, or that he should have consulted any Cabinet colleagues about the matter.

The phrase in the Regency Act "any three or more of" the notables can be seen to apply to two contingencies. One would be where up to two of the specified persons could not act, for example because of any vacancy in any relevant office, or because the holder of an office was unable to act, perhaps through illness. The other would be to allow for a majority decision, three votes to two, or four votes to one. No doubt a unanimous decision would be striven for given the gravity of the decision, but it is equally clear that a Regency could be declared by just three of the people designated. Such a split decision could be highly controversial, especially if the Sovereign's spouse were in the minority. The Regency Act makes no provision for deputies to act for any of the named persons. In case of vacancy or inability—and, indeed, of the monarch being unmarried—the number of people who would take Regency decisions would simply reduce. But in the case of an unmarried monarch, and the absence of one specified notable, the decision would have to be unanimous among the remaining three, the minimum number required for a Regency decision under the Act. If the number of available notables fell below three in any case, no decision could be validly taken under the Act.

In deciding whether they were satisfied that the Sovereign's infirmity justified a Regency, or whether the Sovereign was not available to perform the royal functions,¹⁰¹ the notables would have to consider evidence. If health were at issue they would presumably visit the monarch to compare his or her state with the medical evidence which they would be bound to consider. The Act does not require that such "evidence of physicians"¹⁰² be in writing, but it would be inconceivable that they would be prepared to act without it, albeit that the physicians might give them evidence orally as well. Evidence might be taken from others, if appropriate, such as the monarch's Private Secretary, and other courtiers and servants in close contact with the monarch. If the difficulty were the unavailability of the monarch—the prisoner of war, or shipwreck, or kidnapping or similar scenarios—presumably the notables would

¹⁰¹ 1937 Act, s. 2(1).

¹⁰² *Ibid.*

seek evidence about the monarch's whereabouts, the measures that had been taken to locate or free him or her, and would seek opinions about how long the unavailability would be likely to last. The Regency Act makes the notables the sole judges of the evidence. The monarch—whose evidence would undoubtedly be considered by the notables if he or she were well enough to testify¹⁰³ and were present—would have no decisive role in the decision. If a monarch dissented from the decision of the notables, could a legal challenge be mounted against it? The Act is silent on that prospect: it provides neither for any appeal nor does it seek to make the notables' decision judge-proof.¹⁰⁴ In principle there seems no reason why a dissatisfied monarch could not seek judicial review. Whether such a monarch would choose to exacerbate a constitutional tussle in that way might be another matter.

A Regency would be ended "in like manner" to its declaration.¹⁰⁵ In certifying such an ending the notables must be satisfied that the Sovereign "has so far recovered His health as to warrant His resumption of the royal functions or has become available for the performance thereof."¹⁰⁶ If a monarch were to suffer intermittently from a disabling illness which would cause repeated declarations and endings of Regencies, it would be open to that monarch to abdicate. A monarch—but not a Regent¹⁰⁷—can, of course, give royal assent to an Abdication Bill.

While no potential Regent can disclaim or resign the Regency, the 1937 Act is careful to provide for a change of Regent in certain circumstances. One such—the coming of age of an heir to the throne who thereby supplants the existing Regent—has already been noted. Additionally, if the Regent dies, or becomes disqualified,¹⁰⁸ "that person shall become Regent in his stead who would have become Regent if the events necessitating the Regency had occurred immediately after the death or disqualification."¹⁰⁹ By neatly deeming a reversal in the timing of events the next qualified person automatically becomes Regent on the death or disqualification. Moreover, provision is made for the total incapacity of a Regent.¹¹⁰ Just as section 2 of the Regency Act provides for a declaration of a Regency in the event of the monarch's infirmity or unavailability, so that section would apply in relation to a Regent who became incapacitated on the same

¹⁰³ The Act does not require evidence to be given under oath.

¹⁰⁴ Unlike, say, the Speaker's certificate given under the Parliament Act 1911, s. 3.

¹⁰⁵ 1937 Act, s. 2(1).

¹⁰⁶ *Ibid.*

¹⁰⁷ 1937 Act, s. 4(2).

¹⁰⁸ Under the 1937 Act, s. 3(2).

¹⁰⁹ *Ibid.*, s. 3(4).

¹¹⁰ *Ibid.*, s. 3(5).

grounds. In such an event—with a declaration duly made by the notables—then that person will be Regent who would have become Regent if the original Regent had died.¹¹¹ Thus on a Regent's total incapacity he or she is deemed to have died: a later recovery or return to availability would not reinstate him or her as Regent: the Act sensibly avoids any possibility of having a Regent acting for an incapacitated Regent acting for an incapacitated monarch. But it seems that a *potential* Regent cannot be disqualified. An infirm heir, therefore, would have to be appointed as Regent and then, if necessary, disqualified for incapacity.

The exact moment when a Regency would come into effect, or would be ended, is slightly unclear. It could be when the notables “declare in writing” that they are satisfied that there should be a Regency, or when such a declaration is “made to the Privy Council and communicated to the Governments of His Majesty's Dominions”.¹¹² And, if the latter, would the material time be when the declaration was received by the Clerk of the Privy Council, or when the Clerk communicated it to the Privy Council¹¹³ (presumably at a meeting convened for the purpose), or when it had been communicated to the Commonwealth realms?

In office the Regent performs the royal functions¹¹⁴ in the name and on behalf of the Sovereign.¹¹⁵ He or she would be subject to the same constitutional conventions as the monarch, so that in particular he or she would act on ministerial advice. The Regent is, in effect, acting monarch, but does not have all of the monarch's powers. All seven statutes that were passed in the 250 years before 1937 to provide *ad hoc* for Regencies prohibited the Regent from giving royal assent to two types of Bill, namely, to change the order of succession to the Crown, and to repeal or alter the Act of the fifth year of the reign of Queen Anne entitled “An Act for Securing the Protestant Religion and Presbyterian Church Government”.¹¹⁶ Why has Parliament for at least 250 years denied those two powers to a potential Regent, currently under the Regency Act 1937, s. 4(2)? As far as the first prohibition is concerned, it is suggested that it harks back to less stable times when a Regent might well not have been in the line of succession.

¹¹¹ *Ibid.*

¹¹² 1937 Act, s. 2(2). The words “and the Government of India” which ended that subsection were repealed by the Statute Law (Repeals) Act 1995, s. 1 and Schedule 1.

¹¹³ All the notables, incidentally, are likely to be Privy Counsellors.

¹¹⁴ Partially defined in the 1937 Act, s. 8(2).

¹¹⁵ 1937 Act, s. 2(1).

¹¹⁶ Some Regency Acts prohibited other matters as well. For example, the Lords Justices Act 1837 (which provided for a panel of notables to act for Queen Victoria's successor if he or she were out of the country at the time of the accession) denied the Lords Justices any power to make peers or to dissolve Parliament. That Act was only repealed 100 years later: Regency Act 1937, s. 7.

Then, there was the risk that such a Regent might try to pull himself up by his own bootstraps, displacing the heir in the line of succession and perhaps even removing the monarch in favour of the Regent. But the Regent would be unable to give royal assent to any Bill for that purpose, because it would alter “the order of succession” to the throne. Any justification along those lines, however, makes little sense in the scheme of the Regency Act 1937. True, under that Act, and in turn, the Duke of Gloucester, then Princess Margaret, and then (from 1953 to 1966¹¹⁷) the Duke of Edinburgh would have been Regent, and theoretically might have engineered a change in the line of succession away from Princess Elizabeth or from Prince Charles. But for the past forty years and for the foreseeable future the Regent has been and will be the heir apparent. The chances of an overweening Regent and a conniving Parliament trying to alter the line in favour of the Regent were as unlikely in 1937 as they would be today. Perhaps, therefore, at best a comparison may have been drawn in 1937 with the Parliament Act 1911, s. 2(1), which retains the veto of the House of Lords over any Bill to extend the life of Parliament beyond its maximum term of five years. The chances of any Government and House of Commons actually promoting legislation to put off a General Election without good reason were as remote in 1911 as they are now, but section 2(1) of the 1911 Act provides a symbolic constitutional long-stop against a theoretical risk.¹¹⁸ The prohibition against a Regent assenting to legislation altering the order of the succession could sensibly be repealed, especially because it contains a potential disadvantage. It would prevent a Regent consenting to a Bill properly passed by Parliament to remove a permanently incapacitated Sovereign from the throne when the Sovereign was unable to give royal assent to it. Now it could be argued that a Bill to remove a monarch and to replace him or her with the heir would *not* be a Bill “for changing the order of succession to the Crown”, unless the phrase “order of succession” implies one that will only be altered by the natural process of time and the death of the Sovereign. Yet whoever was second in the line of succession becomes the first (and everyone else moves up one place) when the heir accedes to the throne: at that moment the order of succession *is* altered. The Regent is, indeed, debarred from giving royal assent to such a Bill, regardless of how desirable that Bill might be.

¹¹⁷ As a result of the Regency Act 1953.

¹¹⁸ Parliament’s life was extended beyond the maximum term during both world wars with all-party agreement.

The second prohibition, which is designed to protect the Church of Scotland, is unsurprising. The articles of union between England and Scotland declared that the two kingdoms would be united “for ever”.¹¹⁹ In relation to the Church of Scotland, the articles provided for an Act to secure the Protestant religion and Presbyterian Church government within Scotland, which would be a “fundamental condition for the Union . . . in all times coming.”¹²⁰ The Sovereign was placed under a statutory duty to maintain and preserve inviolably both the Church of England and the Church of Scotland.¹²¹ Given that the Sovereign is directed in such solemn and enduring terms to safeguard the special position of the Scottish church, it is scarcely surprising that the ability to assent to any changes to those terms has been denied to a Regent in every Regency Act passed since the union, including that of 1937. Although no legal impediment is placed on a Regent preventing royal assent being given to a Bill to disestablish the Church of England, the Regent’s oaths include one inviolably to “maintain and preserve in England . . . the Settlement of the true Protestant religion as established by law in England . . .”.¹²² This puts a Regent in the same position as the monarch, who takes equivalent oaths at the accession and coronation.¹²³ A Regent or a monarch could lawfully assent to such a Bill, but both would face the conscientious question of whether to do so would be compatible with that oath.

Before a Regent acts in or enters upon his or her office he or she must take and subscribe before the Privy Council¹²⁴ three oaths. The Regent must (i) swear allegiance to the Sovereign and his heirs and successors,¹²⁵ (ii) swear that he will truly and faithfully execute the office of Regent and govern according to law, and will consult and maintain the safety, honour and dignity of the Sovereign and the welfare of his people, and (iii) swear that he will inviolably maintain and preserve the Church of England and the Church of Scotland—“So help me God.”¹²⁶

¹¹⁹ Article I.

¹²⁰ Article XIX, section 5.

¹²¹ Article XIX, section 3.

¹²² 1937 Act, s. 4(1) and Schedule.

¹²³ Accession Declaration Act 1910, s. 1 and Schedule; Coronation Oath Act 1689.

¹²⁴ In 1811 the Prince Regent took his oaths before 90 or so Privy Counsellors: Saul David, *Prince of Pleasure: The Prince of Wales and the Making of the Regency* (London 1998), pp. 318–319.

¹²⁵ The Regent could well be the heir and successor.

¹²⁶ 1937 Act, s. 4(1) and Schedule.

V. COUNSELLORS OF STATE¹²⁷

There has been no Regent in the United Kingdom since the death of George III in 1820 translated the Prince Regent (who had held the office for ten years) into King George IV. By contrast, Counsellors of State have been appointed frequently under the Regency Act 1937 and will continue to be so as required. Clearly, then, Counsellors play a significant part in ensuring continuity of royal functions. It is also possible that there is within the office of Counsellor of State a means through which royal responsibilities could be discharged during the Queen's (and, indeed, Charles III's) old age.

The 1937 Act deals in just one section, section 6, with all of the law relating to Counsellors of State, which contrasts with the five substantive sections which provide for a Regency. Counsellors may be appointed for two reasons, either on account of the Sovereign's illness, or of absence from the United Kingdom. Section 6(1) of the 1937 Act explains by using the negative sense the degree of illness which justifies the appointment of Counsellors. They may be appointed "[i]n the event of illness not amounting to such infirmity of mind or body as is mentioned in section two" of the Act (that is, the section providing for a Regency in case of total incapacity or unavailability).¹²⁸ In that case the monarch "may" delegate royal functions to Counsellors of State: the provision is permissive: the monarch is sole judge of his or her own illness, and whether to appoint Counsellors, and it is for the monarch alone to appoint them. There is very little experience of the use of Counsellors of State under the 1937 Act on account of a monarch's illness. George VI delegated powers to Counsellors during his illness in 1951,¹²⁹ but the Queen has appointed none for that reason—not even, for example, when she was to undergo surgery on her knees under general anaesthetic on two separate occasions in 2003.¹³⁰ By contrast, Counsellors of State have been appointed frequently during the Queen's reign to cover her "absence or intended absence from the United Kingdom"¹³¹ on official business. While the Act provides for such appointment in the event of the monarch's actual absence from the United Kingdom, Counsellors have always in fact been appointed before the absence has taken place. The only

¹²⁷ Wheeler-Bennett, *King George VI*, pp. 810–815.

¹²⁸ The short title of the Act casts no light on what degree of illness is needed: it refers to "the performance of certain functions ... in certain other events" (*i.e.*, other than those requiring a Regency); the preamble merely refers to "certain other events".

¹²⁹ Wheeler-Bennett, *King George VI*, pp. 789, 798.

¹³⁰ The second operation was more elective than the first and was carried out at a time when few royal functions had to be performed.

¹³¹ 1937 Act, s. 6(1).

absence provided for in section 6(1) is absence from the United Kingdom.¹³² Being away from London, say on an official tour anywhere in the United Kingdom, or on holiday at Balmoral, might seem an appropriate circumstance to justify the appointment of Counsellors “in order to prevent delay or difficulty in the dispatch of public business”¹³³ because that would allow others to carry out royal functions during either case. But the 1937 Act does not apply in such cases.

The drafters of the 1937 Act were careful to ensure that any Regent could appoint Counsellors of State for exactly the same reasons as a monarch.¹³⁴

While at common law the monarch had a free choice of whom to appoint as Counsellors of State, the 1937 Act is prescriptive—probably overly so. When the monarch decides to make a delegation of functions to Counsellors of State, they “shall be”¹³⁵ the wife or husband of the Sovereign and the four persons who are next in line of succession to the Crown (and from 1953 until her death in 2002 Queen Elizabeth the Queen Mother), excluding any persons who are disqualified. If there are fewer than four such eligible persons, then all will be appointed.¹³⁶ That arrangement invites several observations.

First, providing for a closed class of Counsellors of State—so that there can be no picking and choosing between any group of designated persons—was justified by the Home Secretary at the time of the 1943 Regency Bill on the ground that any such choosing would be discriminatory, invidious, controversial, and would serve no practical purpose.¹³⁷ Certainly, the statutory prescription of persons who are to be Counsellors avoids any possible allegation that a particular individual had been chosen for any improper purpose. Secondly, the provision that, if there were less than four eligible persons all would be appointed is most odd, given the large number of people who are in the direct line of succession: it would require an unprecedented catastrophe to reduce the number in that line to below four. Does that provision disclose drafting by an ultra-cautious lawyer who wanted to ensure that in this dire situation there could be no legal challenge to the *vires* of

¹³² A visit in any part of the British Islands outside the United Kingdom, such as to the Channel Islands, would constitute such an absence: Interpretation Act 1978, s. 5 and Schedule 1.

¹³³ 1937 Act, s. 6(1).

¹³⁴ *Ibid.*, s. 6(4).

¹³⁵ *Ibid.*, s. 6(2), as substituted by the Regency Act 1943, s. 1, Regency Act 1953, s. 3. The mandatory nature of s. 6(2) is reinforced by the 1953 Act, s. 3: it speaks of the persons whom that provision “requires” to be Counsellors of State.

¹³⁶ 1937 Act, s. 6(2).

¹³⁷ Herbert Morrison, second reading of the Regency Bill 1943, HC Deb. vol. 392 col. 1249 (22 September 1943).

Counsellors just because four could not receive a delegation of authority? If so, and as will be seen, the drafter was not as prescient in other aspects of the scheme. But at least all delegations to Counsellors are kept within the royal family. The common law position allowed the monarch to appoint notables such as the Archbishop of Canterbury, the Lord Chancellor and the Prime Minister. The 1937 Act took account of objections that had been made by the Irish Free State in 1928: in Irish eyes, the inclusion as Counsellors of British Ministers implied that the British Government could act as intermediaries between the Crown and the countries of the Commonwealth.¹³⁸ Thirdly, a delegation is made to all five Counsellors of State, who then carry out their duties in pairs, the pairs being drawn from the pool of five as convenient. A person can be excepted from that delegation if it appears to the Sovereign that he or she is or will be absent from the United Kingdom during the whole or part of such delegation and for the period of the absence,¹³⁹ but not otherwise. The Act does not permit the appointment of substitutes to make up for any excepted Counsellor. This can be unfortunate, as was seen acutely in 1946.¹⁴⁰ The King was due to visit South Africa, but of those eligible to be Counsellors of State the Queen and Princess Elizabeth were to accompany him, the Duke of Gloucester was serving as Governor-General of Australia, and Lord Lascelles was an aide to the Duke, leaving the Princess Royal alone. Because mere absence does not disqualify a person from being a Counsellor, all those absent royals remained eligible. Accordingly, the Duke of Gloucester ended his term of office prematurely so that he and Lord Lascelles could be in London to assist the Princess Royal.¹⁴¹ Today, the five Counsellors will be the Duke of Edinburgh, the Prince of Wales, Prince William,¹⁴² the Duke of York, and the Earl of Wessex (who will be replaced by Prince Harry from his 21st birthday in 2005). That Prince William was a full-time student, and is to enter Sandhurst, did not and will not exempt him from the list, because mere absence from London (rather than absence from the United Kingdom)—or, indeed, a pursuit that is incompatible with royal

¹³⁸ The Imperial Conference had agreed in 1930 that in future Counsellors should only be drawn from the royal family: Bogdanor, *Monarchy and the Constitution*, p. 47.

¹³⁹ 1937 Act, s. 6(2A), as substituted by the Regency Act 1943, s. 1.

¹⁴⁰ Wheeler-Bennett, *King George VI*, p. 812.

¹⁴¹ Whether the law permits one Counsellor to act alone will be considered shortly. Why was Lord Lascelles not exempted in 1944 when he was a prisoner of war in Germany? The King was to visit the Allied armies in Italy, and Lascelles was simply not appointed, apparently because he was no longer domiciled in the UK. Lord Jowitt L.C. later acknowledged that he should have been included, as mere absence does not affect domicile: Wheeler-Bennett, *King George VI*, p. 812.

¹⁴² He qualified on his 21st birthday in 2003, and thereby displaced the Princess Royal who had served before.

duties—does not avoid the delegation. Prince William is routinely included in the delegations to Counsellors of State, even though normally he will be unable to act unless he happens to be in London. In 1937 it was no doubt assumed that the immediate royal family would have no such distractions. Similarly, Queen Elizabeth the Queen Mother was routinely included in the delegations even in her extreme old age.¹⁴³ Although absence from the United Kingdom is the only ground on which a person may be excepted from acting as a Counsellor, he or she will be disqualified from so acting if he or she is disqualified under the 1937 Act from being Regent.¹⁴⁴

The method of making formal appointments of Counsellors is very simple.¹⁴⁵ A written request from the Private Secretary's Office is sent to the Department for Constitutional Affairs asking that Letters Patent be prepared under which a delegation would be made to Counsellors of State. A minute is issued by the Department specifying (in the case of absence) the duration of the absence and delegation, and accompanies the Letters Patent. Those Letters Patent, signed by the monarch, are issued under the Great Seal delegating specified royal functions to Counsellors of State.¹⁴⁶ Such a delegation may be revoked or varied in a like manner.¹⁴⁷ But what if a monarch were physically unable to sign anything, say as the result of an accident, albeit that he or she were otherwise fully fit? Counsellors could not be appointed in that situation. Now under the general law a person so disabled can (as a principal) delegate legal powers to another (as an agent) in such a case, at the principal's oral direction and in the presence of witnesses.¹⁴⁸ But where a transaction is required by statute to be evidenced by the principal, or where a duty is imposed on a person which he or she is not free to delegate, there can be no delegation to such an agent.¹⁴⁹ A monarch's power to appoint Counsellors does stem from statute. Under current legislation, therefore, the only unimpeachable way forward in the situation posed—a monarch who cannot write—would be the declaration of a Regency, surely a disproportionate result in such circumstances.

¹⁴³ Queen Elizabeth qualified as the wife of the King, and after his death by virtue of the Regency Act 1953, s. 3. From 1953 to 2002, therefore, the pool consisted of six Counsellors of State.

¹⁴⁴ 1937 Act, s. 3(2).

¹⁴⁵ "It might have been designed to cause the least possible effort to a sick man, ..." Wheeler-Bennett, *King George VI*, p. 813.

¹⁴⁶ 1937 Act, s. 6(1).

¹⁴⁷ *Ibid.*

¹⁴⁸ Powers of Attorney Act 1971, s. 1.

¹⁴⁹ *Re Great Southern Mining Co.* (1883) 48 L.T. 11.

The custom at common law was that, from the pool of Counsellors of State, two acted together. This custom has survived the passing of the Regency Act 1937 which—perhaps—wrote that custom into law. That Counsellors act in pairs can be seen in any Court Circular which records audiences given by them on the Queen's behalf, and two sign any document which requires the royal sign manual. Why have Counsellors routinely acted in pairs under the Act rather than (at least occasionally) alone? It must strike a new ambassador, arriving at Buckingham Palace to present his or her credentials, as odd to be received in the Queen's absence by two members of the royal family. In the Queen's absence the Prince of Wales acts on his own—but only at investitures, which are not taken by Counsellors of State.¹⁵⁰ Convenience might suggest that one Counsellor should be able to act alone, if, say, only one were in London on a particular day, or in order to give the Prince of Wales an enhanced role (a suggestion that will be returned to later). What does the 1937 Act prescribe? Section 6(3) states, "Any functions delegated under this section shall be exercised jointly by the Counsellors of State, *or by such number of them as may be specified in the Letters Patent*, and subject to such conditions, if any, as may be prescribed therein."¹⁵¹ I suggest that that subsection does not require two Counsellors always to act jointly—even though the Letters Patent which are issued under section 6 direct that the delegated functions "be exercised jointly by not less than two of their number". The word "jointly" may have been used in the Act so as to reflect the common-law practice, meaning "two acting together"; in that case, the phrase "or by such number of them as may be specified" would have been added to cover a case in which a number greater than two might be wanted for a particular occasion. But leaving aside the pre-Act custom, and just reading the words of the Act, it is arguable that the alternative contained in the phrase "or such number as may be specified" could embrace the number "one", just one Counsellor, as opposed to any greater number of Counsellors acting jointly. The Act does not use, say, the word "greater" to qualify the number as the alternative to Counsellors acting jointly. That interpretation is perfectly tenable, so that a single Counsellor could be nominated if that were the monarch's wish. There could be no risk of making an error of law in the nomination of a single Counsellor when he or she was to exercise functions which had no legal consequences, such as receiving a new ambassador, or conducting an investiture. But where Counsellors were to be involved in royal functions which

¹⁵⁰ Unusually the Princess Royal conducted an investiture in 2004.

¹⁵¹ My italics.

had legal consequences the validity of nomination would be more important. For example, if a single Counsellor were to signify royal assent to legislation there could be the risk of a legal challenge to the validity of that legislation on the ground that royal assent had not been properly given to it. The parliamentary debates on the Regency Bills throw no light on this question. An opportunity to shed some illumination arose when the 1953 Bill was being debated. Patrick Gordon Walker, a former Secretary of State for Commonwealth Relations, suggested that the law should be made flexible enough to permit the Queen to designate a Governor-General for the United Kingdom during her absences overseas.¹⁵² He did this on the ground that all countries of the Commonwealth, including the United Kingdom, were equal, and on the ground that during the Queen's absence from her other realms a Governor-General discharges her functions, and so they should be discharged in the United Kingdom. He moved a paving amendment to the Regency Bill to the effect that any reference in the Regency Acts to Counsellors of State should not be construed so as to exclude one such person. The Home Secretary objected to the amendment, which was withdrawn, on the ground that complete equality would mean that there would have to be a permanent Governor-General in the United Kingdom, as there was in each of the Commonwealth realms. But the Home Secretary did not address the issue of whether one Counsellor of State could act alone.¹⁵³

Counsellors of State cease to hold office in the usual case when the delegation is revoked.¹⁵⁴ In practice the Letters Patent which are issued to cover the monarch's intended absence make it clear that the delegation is to last for the duration of the absence. Otherwise, they would become *functus officio* in two situations. A delegation to Counsellors ceases on a demise of the Crown.¹⁵⁵ If, therefore, Counsellors were in office for what turned out to be a monarch's terminal illness—as with George V in 1936—the death of the monarch would discharge the Counsellors at the same moment at which the new monarch succeeded to the throne. If the new monarch were absent from the United Kingdom at his or her accession, as the Queen was in 1952, or were ill and unable to perform the royal functions, the new monarch could then and there delegate authority to Counsellors of State.¹⁵⁶ But this is unlikely to be necessary now solely on grounds of absence: no Counsellors

¹⁵² HC Deb. vol. 520 cols. 960–964, 1148–1149 (12 November 1953).

¹⁵³ *Ibid.*, cols. 1149–1152.

¹⁵⁴ Revocation is the first of three events which discharge Counsellors and which are provided for in the Regency Act 1937.

¹⁵⁵ *Ibid.*, s. 6(5).

¹⁵⁶ *Ibid.*, s. 6(1).

were appointed in 1952 to cover the time which it took the new Queen to fly back from Kenya, and with modern communications such an interim appointment might well be unnecessary. A delegation to Counsellors would also cease “on the occurrence of any events necessitating a Regency or a change of Regent”.¹⁵⁷ Plainly, if Counsellors were in place during a monarch’s infirmity which deteriorated so as to require a Regency, a Regent’s authority should not be sullied in any way by the continuance in office of Counsellors. But when exactly would such a discharge take place? The law seems to dictate that it could not be before a Regent had taken the oaths required by the 1937 Act, for he or she is required to take them *before* he or she acts in or enters upon the office.¹⁵⁸ But the point is not beyond doubt. If, say, a monarch had appointed Counsellors and were subsequently seized by terrorists, that event would make the monarch “for some definite cause not available” to perform the royal functions,¹⁵⁹ thus triggering a Regency and arguably discharging the Counsellors. Would the exercise of royal functions then be in limbo pending the appointment of a Regent following the procedures indicated earlier? The unsatisfactory wording of section 6(5) of the 1937 Act on this point makes such undesirable results possible. Similar uncertainties could arise if there were to be “events necessitating ... a change of Regent.”¹⁶⁰

What, then, is the status, and what are the powers, of Counsellors of State? The Regency Acts refer simply to Counsellors of State (or to a Counsellor of State).¹⁶¹ It has been emphasised that the Counsellors do not form a Council of State. Thus Wheeler-Bennett is clear that “it is a matter of importance that, though the powers delegated to Counsellors of State are exercised by them jointly, or by such number as may be specified, they do not at any time constitute a Council of State.”¹⁶² He does not explain what the matter of importance is. Similarly, a textbook on constitutional law¹⁶³ is careful to refer to the monarch’s power to “appoint Counsellors of State (not a Council of State)”. That certainty was reflected by the Home Secretary during the second reading of the 1953 Regency Bill. He said that “There is no such thing as a Council of State. There are Counsellors ... but they have no corporate capacity.”¹⁶⁴ There is one commentator for whom the

¹⁵⁷ *Ibid.*, s. 6(5).

¹⁵⁸ *Ibid.*, s. 4(1).

¹⁵⁹ *Ibid.*, s. 2(1).

¹⁶⁰ *Ibid.*, s. 6(5).

¹⁶¹ The singular is used in the Regency Act 1943, s. 1.

¹⁶² *Op. cit.*, p. 813, note.

¹⁶³ de Smith and Brazier, *Constitutional and Administrative Law*, p. 132.

¹⁶⁴ Sir David Maxwell-Fyfe at 520 HC Debs. 996 (11 November 1953).

phrase Council of State holds no terrors, and he uses it interchangeably with Counsellors of State.¹⁶⁵ Do the more fastidious reject the notion of a Council because of inappropriate resonances with the republican Council of State which was in place during the Commonwealth of England?¹⁶⁶ Or is the notion spurned in order to underline the fact that Counsellors do not have the kind of independent executive powers which a Council of State might typically have? Such a Council (to use the republican Commonwealth analogy) might embrace the powers of a central executive and even of a head of government or head of state. Counsellors in the United Kingdom exercise royal, not republican, powers, and those powers are limited. The statutes avoid giving any impression that a separate source of power is enjoyed by the Counsellors or State.

The Regency Act 1937 explicitly limits two functions that in theory could be given to Counsellors of State. No power may be delegated to dissolve Parliament otherwise than on the express instructions of the Sovereign,¹⁶⁷ or to grant any rank, title or dignity of the peerage.¹⁶⁸ Necessarily implicit in the first limitation is the belief that a monarch would always be capable of assenting to a dissolution, an assumption strengthened by the reference to the means of communication. But how would Parliament be dissolved if the monarch were too ill to assent? The Counsellors could not do it. A declaration of a Regency would be the only way forward, which, again, might seem a disproportionate response to a problem which in practice would be resolved in most cases by the acceptance of ministerial advice. The inability of Counsellors to create peers is less important today, given that, although it might cause inconvenience and delay to individuals, it has long been unnecessary to create peers in order to break any legislative deadlock between the two Houses, which can be resolved through the rules in the Parliament Acts. Why, then, are the Counsellors prevented by the 1937 Act from doing those two things? As a matter of constitutional convention, both initiatives depended on ministerial advice as much in 1937 as before or since: decisions to dissolve Parliament or to create peers are effectively for the Prime

¹⁶⁵ Bogdanor, *Monarchy and the Constitution*, pp. 46–50, 54.

¹⁶⁶ Keir, *Constitutional History*, pp. 222–229.

¹⁶⁷ 1937 Act, s. 6(1). Such instructions “may be conveyed by telegraph” (*ibid.*). In 1966 the request and assent for the dissolution of that year were contained in letters exchanged directly between the Prime Minister and the Queen who was on a Caribbean tour: the Counsellors were not involved: Harold Wilson, *The Labour Government 1964–1970: A Personal Record* (London 1971), p. 215. Before the 1951 General Election George VI gave express instructions to the Counsellors to prorogue Parliament, although the King completed all the formalities himself for the actual dissolution: Wheeler-Bennett, *King George VI*, p. 794.

¹⁶⁸ 1937 Act, s. 6(1).

Minister of the day.¹⁶⁹ It is likely that these limitations reflect what in the early twentieth century remained prerogatives especially personal to the Sovereign.

The 1937 Act permits the Sovereign, in order to prevent delay or difficulty in the dispatch of public business, by Letters Patent under the Great Seal, to delegate such of the royal functions as may be specified in the Letters Patent.¹⁷⁰ The phrase “royal functions” is defined in the Act,¹⁷¹ as already noted, as including “all powers and authorities belonging to the Crown, whether prerogative or statutory, together with the receiving of any homage required to be done to” the monarch. The Letters Patent customarily recite the statutory limitations just noted. They then make a delegation of authority to the Counsellors as specified in the first schedule to the Letters Patent. In summary, these are to conduct Privy Council business; to sign Letters Patent signifying royal assent to Acts of Parliament (except any Bill touching any of the matters covered by the Act of Settlement, or the royal style and titles), and signifying royal assent to Bills passed by the Scottish Parliament and the Northern Ireland Assembly; to sign on the monarch’s behalf any document relating to the affairs of the United Kingdom, and to do anything which the monarch is authorised to do for the safety or good government of the United Kingdom or overseas territories. The Letters Patent deny the Counsellors authority to receive any homage due to the monarch, and also state that if the monarch signifies, or if it appears to the Counsellors, that they should not act in any matter or for any purpose without the monarch’s previous special approval, they should not act in that matter. The Letters Patent also specify, in a second schedule, matters which require the monarch’s signature but concerning which the Counsellors may not sign for the monarch. The list covers awards of honours and decorations, precedence, the use by British subjects of foreign titles, determination of peerage claims, reorganisation of Army units, matters relating to the General Assembly of the Church of Scotland, and the amendment of Statutes of Orders of Chivalry. It is noteworthy that, apart from the restrictions noted, the Counsellors appear to have general authority to exercise the constitutional prerogatives, not only over signifying royal assent to legislation (with exceptions), but also, for example, over the appointment of a Prime Minister, should that fall for decision. Counsellors of State do not give audiences to the

¹⁶⁹ Exceptions to that proposition include peerages for members of the royal family and for former Prime Ministers: Rodney Brazier, *Constitutional Practice*, 3rd ed. (Oxford 1999), p. 240.

¹⁷⁰ 1937 Act, s. 6(1).

¹⁷¹ Section 8(2).

Prime Minister as the monarch does. This is not because they are prohibited from doing so, but because the relationship between the monarch and the Prime Minister is a personal one which could not be replicated during the temporary presence of Counsellors.

In the light of these statutory limitations, taken together with the restrictions routinely placed on Counsellors in the Letters Patent, was Sir Edward Ford right to characterise Counsellors as “merely a piece of constitutional machinery—the nearest thing to a human rubber stamp that has perhaps yet been devised”?¹⁷² Indeed, he went on to say that Counsellors are nothing “other than the instrument by which the Sovereign’s will is proclaimed during her absence or indisposition.” Moreover, Bogdanor asserts that “they have no decision-making power”.¹⁷³ A Lord Chancellor has said that “... [t]he duties of Counsellors of State are almost entirely formal”.¹⁷⁴ All that, I suggest, is too sweeping. Take a situation in which a delegation to Counsellors had taken place on account of the monarch’s illness. In 1928, 1936, and 1951 there would have been no question of the Counsellors seeking the King’s wishes about public business and deferring to them because he was too ill to express any view. Or take a case of unforeseen events happening when Counsellors were in office, such as the rushing through Parliament of unforeseen emergency legislation, or an unexpected request for a dissolution of Parliament, or the sudden death of the Prime Minister. No instructions could exist to preordain how the Counsellors should act in such circumstances: there could well be situations in which Counsellors would have to act on their own initiative. Naturally, Counsellors could seek ministerial advice to guide them where that was appropriate, just as the monarch could; but this would not be possible in very awkward cases, such as on the Prime Minister’s sudden death. In that case the Counsellors would no doubt wish to leave the choice of a permanent replacement to the relevant political party, but even deciding to do that would be a matter for the Counsellors’ judgment. In general, then, Counsellors will have instructions to follow; in some situations they may be able to seek the monarch’s view, certainly if Counsellors were merely covering for absence; but if the monarch were too ill to express an opinion, they would either have to decide for themselves (in which case they would be rubber-stamping nothing), or to decline to do so (in which case the only way forward under the present law would be the declaration of a

¹⁷² Quoted in Bogdanor, *Monarchy and the Constitution*, p. 49.

¹⁷³ *Ibid.*

¹⁷⁴ Viscount Simon L.C., second reading of the Regency Bill 1943, HL Deb. vol. 129 col. 165 (12 October 1943).

Regency). Once again it would be more fitting to acknowledge that Counsellors of State should be able to act in their own discretion in certain cases in order to ensure the efficient royal dispatch of public business and to avoid resort to a Regency.

VI. PROBLEMS AND SOLUTIONS

This survey of the law and practice under the Regency Acts has disclosed a number of matters which ought to be addressed if fresh legislation is contemplated. It is convenient first to summarise defects in the Act of a general kind, and then to look at possible changes that might be made to reflect the particular positions of the Queen and of the Prince of Wales.

The Regency Acts have been seen to be deficient in several ways in relation to Counsellors of State. The class of persons to whom delegations may be made is too prescriptive; exemption is allowed on the ground of absence from the United Kingdom, but not otherwise; no substitution is allowed for any exempted person, which will result in a smaller pool of Counsellors. The Acts do not permit delegation when the Sovereign is away from London but within the United Kingdom. Delegation would be impossible if the Sovereign were physically unable to affix a signature, even though he or she were mentally fully competent to make the decision: in order to avoid resort to a Regency in such a case, legislation might permit a Sovereign to direct orally that Letters Patent be issued, provided that the Sovereign were mentally competent and that the direction was evidenced by others in some specified way. In preparing any revising legislation, consideration might be given to the powers which Counsellors should possess, and especially whether the statutory limitations on them should be maintained. The appointment of a Regent under the Acts would entail fewer procedural difficulties. It is not clear, though, which officer, if any, ought to replace the Lord Chancellor in the list of persons who declare a Regency in the event of the office of Lord Chancellor being reformed. The resort to deputies for the persons who declare a Regency is not permissible, and there could be difficulties in making a timely appointment if, by chance, fewer than three were available to act. There may be some doubt as to the exact moment when a Regent receives his or her powers, because the Act is ambiguous as between several determinatives. It would be for consideration whether the two statutory restrictions on a Regent's powers need to be preserved.

None of that, however, touches what may be seen as the main lacunae in the provisions for constitutional continuity at this stage of

the Queen's reign, and indeed during Charles's reign. Is the scheme of the Regency Act 1937 still apt nearly 70 years on? Although envisaged as a general code, it was drafted when a middle-aged (albeit not robust) King was on the throne who had a young heiress presumptive. It has been amended twice by legislation to take account of the changed circumstances of the royal family. The Queen is now in her eighth decade, and may be succeeded by an elderly heir apparent. The last long-lived monarch, Victoria, died aged 82 (having experienced very little illness during her life); public expectations of the ceremonial and representative functions which a monarch should perform were much lower then.¹⁷⁵ Modern expectations of monarchy, however, make no allowance for the limitations of old age: the public and the media may well expect the monarchy to continue to be seen doing all that they have come to expect it to do. Abdication can be ruled out, because for the Queen hereditary monarchy imposes a life-long duty. What should be contemplated, therefore, is a flexible procedure through which royal functions could be delegated formally to the heir apparent or presumptive as a deputy for the Sovereign, and at a time or times of the Sovereign's choosing. The Sovereign would remain head of state; he or she might wish to retain core constitutional functions, such as appointing the Prime Minister, signifying royal assent to legislation, dissolving Parliament, and so on; but delegation to the heir of particular duties might be wanted, especially those which require travel around the country and overseas and which are physically taxing. Provision should continue for specific and periodic delegations to other members of the royal family as Counsellors of State, to supplement the work of the Sovereign and the heir. Such a scheme would be general to any Sovereign and heir. To an extent such a delegation to the Prince of Wales could take place without further legislation. If the interpretation of the 1937 Act offered earlier is correct, the Prince of Wales could be nominated as a single Counsellor of State. His powers would be those of Counsellors under the Act, although the restrictions customarily made in the Letters Patent might be reduced or even largely scrapped. He might even be given, under the prerogative, a title to mark out that role, perhaps Chief Counsellor of State. As with delegations to Counsellors of State, such a delegation to him could be varied or revoked at any time under the 1937 Act. There would be drawbacks, it is true, in relying on existing law for such a move, including the query of whether such an officer could do acts with legal consequences for the

¹⁷⁵ Her Government was considering necessary steps for a Regency during Victoria's terminal illness, but her death vitiated the need: Jerrold M. Packard, *Farewell in Splendour: The Death of Queen Victoria and Her Age* (Stroud 2000), pp. 104–105.

Sovereign during her presence in the United Kingdom. Alternatively, the 1937 Act would permit a rather different approach. The Sovereign cannot declare a Regency: that is a duty exclusively for the specified notables. There is no equivalent in our law to the 25th Amendment to the United States Constitution, under which the President of his own volition may transfer authority temporarily to the Vice President. It would, however, be open to a monarch to initiate the process for a Regency by inviting the notables to declare a Regency on the grounds (say) that physical weakness did not allow the monarch to perform enough of the royal functions, as a result of restricted mobility. This would require an interpretation of section 6(1) that “by reason of infirmity of . . . body [the Sovereign was] incapable for the time being of performing the royal functions” which accepted that an unavoidable part of those functions today involves carrying out duties around the United Kingdom and overseas.

But fresh legislation at some stage would be desirable, partly to sweep away the difficulties identified in the Regency Acts, and perhaps to make explicit provision for the suggested Chief Counsellor of State (under any monarch), but also to permit any Sovereign to put a Regent into office and in a much more flexible regime than is possible now. It should be left to the monarch’s discretion to decide the circumstances in which the appointment of a Chief Counsellor, or Counsellors of State, or a Regent, should be made. The monarch might be enabled to reserve specified functions to himself or herself—thus avoiding the all or nothing aspect of Regencies under the 1937 Act—while delegating the more onerous tasks to the heir apparent or any other members of the royal family who might form a pool for the purpose.¹⁷⁶ This would both lighten the load for an elderly monarch and make it possible for the heir apparent to fulfil a central constitutional role. It would avoid the great unmentionable of abdication. Power to end such a delegation or such a Regency by the monarch could be included. Such a scheme would be *in addition* to current Regency provisions, so that if a monarch were incapable of performing royal functions (or of personally designating a Regent) a Regency could be declared in the standard way. Greater flexibility in all this would be the key to a revised system which should ensure that, for the current and next Sovereign, the duties cast by law and practice on the monarch could continue to be discharged satisfactorily in foreseeable circumstances.

¹⁷⁶ Given that such a scheme might fall to be implemented when Prince Charles was King, the appointment of Chief Counsellor or Regent should be possible from a pool of candidates in the line of succession, so that, *e.g.*, Prince William might act for his father as King.