England, and to recognize the public grievance committee established to insure that his promise was kept.

But King John had no sooner set his hand to this document than he determined to repudiate it. He hired bands of mercenaries to come to his aid. In the battle that ensued with the barons King John was killed. Pope Innocent III also used his influence, and threatened to excommunicate the barons if they persisted in enforcing the provisions of the charter. The Pope's "nullification" of *Magna Carta* had revived the civil war, but which had now ended with John's death in October, 1216.

The incident surrounding King John and Magna Carta showed for all time that if a king did not rule as the people wished, and respect the Law of the Land and rights of the people, he could be made to do so by force.

LAW ABOVE GOVERNMENT

The history of the conflict over Life, Liberty and Property has been a conflict over what law will prevail as paramount in the land—fundamental law or acts of government, laws of God or laws of men. It thus has been a conflict between the Law of the Land and the powers of rulers and governments. The Law of the Land is that which both government and persons are bound to follow. In England *Magna Carta* had recognized this law and it bound the king to act within certain limitations. Thus the law could control the king because it was superior to him. King John found this out the hard way.

Though almost forgotten during the fifteenth and sixteenth centuries, *Magna Carta* was revived and used in the seventeenth century by jurists like Sir Edward Coke and others to counter the Stuart kings' theory of "divine right of kings." Those who pleaded the charter asserted that the king was not above the law but was subject to it.

King James I (1603-1625) "constantly proclaimed the doctrine of the *divine right of kings.* This theory, which was unknown to the English constitution, declared that the king derived his power and right to rule directly from God, and in no way from the people." [6]

> King James took offense at the independence of his judges and, in rage, declared: "Then I am to be *under* the law — which is treason to affirm." Chief Justice Coke replied: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law, because the Law makes the king.'"[7]

The "divine right of kings" implied that God demands blind obedience by citizens to the will of the king, as his right to rule is not from people. But in the Bible it was the people who wanted the king, not God. Also, King Saul and David and other kings had to be confirmed by the people to be king. In fact many of the early kings of England were confirmed by the people. Yet it was a favorite saying of James I that: *"God makes the king, the king makes the law."* This was truly a distortion as it was recognized that the common law was developed by Divine Providence, and existed before the king.

The *divine right of kings* concept was merely a cover and excuse for the king to violate the Life, Liberty and Property of the people. God actually prescribed certain rules or laws for kings to follow and thus were bound to. They were to rule in righteousness, hate covetousness, exact justice, be truthful, and be a terror to evil doers. So while the role of king did have some connection to God, the king himself was limited by God's law. Thus the whole theory of 'divine right' was a gross distortion. Just as today the government uses the idea of "public safety" to enact all sorts of oppressive and

6 D. H. Montgomery, *The Leading Facts of English History,* Boston: Ginn & Co., 1893, p. 232.

7 12 Coke 65; and see *Youngstown Co. v. Sawyer,* 343 U.S. 579, 655, note.

dictatorial measures. While there is a valid principle behind public safety, it is being grossly distorted for the same reason —to control the Life, Liberty and Property of the people.

To counter this concept of the divine right of kings, Samuel Rutherford had written a book called *Lex Rex* (*The Law and the Prince*) in 1643. The book caused a great offense to the Crown as it asserted that the Law (Lex) preceded the King (Rex), and thus was superior to the king. Rutherford's book provided a philosophy whereby the people could resist persecution and protect their Life, Liberty and Property from arbitrary acts of the king. The book was so popular it was ordered to be burned. Any one found with a copy was to be considered an enemy of the government. Rutherford himself was arrested, charged with treason and found guilty. But before the government could execute him he died in prison.

With the revived concept of due process of law there developed in England the doctrine that certain laws and principles—either of the common law or natural law—were paramount and superior over the king and Parliament. The great champion of the supremacy of the common law was Lord Coke. The great champion of the supremacy of natural law was the philosopher, John Locke.

Sir Edward Coke, who held the positions of Chief Justice of England, Attorney General and speaker of the House of Commons, was removed from office by King James for upholding the Common Law and the citizens' rights against kingly prerogatives. Later, when Coke entered Parliament, he drew up a declaration containing fourteen points of grievance. King James rejected the petition asserting that freedom of speech and to petition "were derived from the grace and permission" of the king's ancestors only. Coke responded with *Magna Carta,* asserting that it is "called the Charter of Liberty because it makes free men. When the

King says he cannot allow our liberties of right, this strikes at the root." King James then sent for Coke, stripped him of his place at the Council table and imprisoned him. The king then sent for the House Journals and he tore the Petition from the book. Coke was later cleared of all charges, and when he again entered Parliament he often quoted *Magna Carta* and its famous 39th chapter.

When the King heard that Coke was about to write another book on the law, he ordered his Lord Keeper to halt production. The King feared the impact the book would have on the people as Coke was held as a great oracle among the people. Even when Coke died he was dangerous. The King ordered Coke's study sealed, as he supposed that his works "contained many monuments of the subject's liberties." It was not until years after his death that the House of Commons had his works dug up from hiding and published. This is another story of how a corrupt leader or government will violate the "law of the land" so as to undermine private rights and liberties. The acts of King George III over Americans in the mid 1700's is another example, as is the government that prevails today in America.

King James II (1685-1688) during his reign also exercised all of the old arbitrary principles of government. The tyranny of King James II brought about the "Revolution of 1688," causing the people to pressure Parliament to have him deposed. The act allow William and Mary, by popular election, to ascend to the throne on the condition that they endorse the famous *"Petition of Right"* which was adopted in 1689. It was this document which Blackstone styled, "That second Magna Carta and stable bulwark of our liberties," as it redefined and re-established the liberties of the people in the face of governmental usurpation. This "Bill of Rights" of 1689 was the last significant positive event that would have an effect on American law and jurisprudence.

By the eighteenth century the supremacy of the common law over the king was completely and finally established. However the supremacy of the common law, or *law of the land,* over acts of Parliament was never soundly or completely established. The concept was asserted by Lord Coke in the *Dr. Bonham Case* in 1610,[8] and by Coke in his *Institutes* and by a few other writers. But despite this, the doctrine of Parliamentary supremacy was generally admitted, though in theory it never was the true law, as asserted by the New Hampshire Supreme Court in 1868:

> In England even, the legislative authority of parliament is practically, if not in theory, subject to this limitation that no law shall be passed which is contrary to common right and natural justice. Lord Coke, in *Dr. Bonham's Case,* says: "It appears in our books that in many cases the common law will control acts of parliament and adjudge them to be utterly void; for, when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." In his *Life of Coke,* Lord Campbell, with characteristic flippancy, calls this "a foolish opinion;" but the same doctrine is laid down in *Day v. Savadge,* Hobart 85, 87, where Hobart says: "Even an act of parliament made against natural equity, as to make a man judge in his own case, is void in itself, for natural laws are immutable, and they are *leges legum.*"[9]

The court also stated that the power to make laws which are wholesome and reasonable, is not a power to make laws contrary to reason or the constitution. This grant of power "is in its nature a limited, restricted power." It also said that the object of its state constitution "was to adopt and confirm that maxim of the common law," which allowed the common law to "adjudge void" an act of parliament against "common right and reason." There thus was significant

8 8 Coke Rep. 113b, 118a.

9 *East Kingston v. Towle,* 48 N.H. 57, 60 (1868).

recognition of the supremacy of "the law of the land" in England up to this period of time.

But the doctrine of Parliamentary supremacy was reasserted in 1871 in the case of *Lee v. Bude, etc., Railway.*[10] Ever since this decision the doctrine of legislation over the law of the land had been followed in England, though it was based on an unfounded legal precedence.

Generally, in England, the meaning of "the law of the land" had never been extended to the point of controlling legislation. Any act of Parliament was usually regarded to be the law of the land, or due process of law. But it should be noted that in England the phrase "due process of law" has received practically no judicial construction in litigated cases.[11] It thus appears this doctrine of Parliamentary supremacy existed merely by fiat.

The idea that government is superior to Fundamental Law, and that such Law is changeable and repealable, has only been maintained during the course of governmental tyranny or usurpation. The doctrine is not sound, nor was it part of the English Constitution. The truth of the supremacy of the Law of the Land over government was to be resolved and acknowledged not in England, but in America.

The conflict over Life, Liberty and Property came to a showdown with the oppressive acts that King George III and Parliament brought upon the American colonies. It was with this episode in history that the protection of Life, Liberty and Property by Due Process of Law was firmly and fully established. It was here that the Law of the Land was upheld supreme over acts of government.

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10 L.R. 6 C.P. 576, 582.

11 Hugh E. Willis, *Constitutional Law of the United States,* Bloomington, Ind., Principia Press, 1936, p. 647.