Honi Soit Qui Mal y Pense:
Heraldry in the Courtroom[1]

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You are in court, and it is mid-afternoon. You are seated while opposing counsel drones on, referring the judge to the case authority at tab 87 of volume three of his brief of authorities. Your gaze wanders, past the inscrutable countenance of the judge, to the coat of arms behind. Questions form in your mind. What is that coat of arms? Why don't we have the coat of arms of British Columbia (you know, '*Splendor sine occasu*' and all that) or, for that matter, the coat of arms of Canada ('*A mari usque ad mare*')? What are those mottoes and what do they mean? Allow me to answer those questions.

The coat of arms displayed in all courts in British Columbia is the Royal coat of arms of the Queen, known as the Royal Arms. The use of the Royal Arms is a long-standing tradition in our courts, albeit one which has been questioned from time to time.

The use of the Royal Arms in British Columbia courts can be traced back to colonial times, to the establishment of the courts and to the granting of the original court seal. An order in council made at the court of Queen Victoria on April 4, 1856 created 'The Supreme Court of Civil Justice of the Colony of Vancouver's Island'[2] and prescribed that the court 'shall have and use as occasion may require, a Seal, bearing a device and impression of Her Majesty's Royal Arms'. On June 8, 1859 colonial

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[2] The name of the court was changed on March 1, 1869 to 'The Supreme Court of Vancouver Island'. This court had been earlier established by the Legislative Council of the colony of Vancouver Island, by Act made December 2, 1853: see Hon. David R. VERCHERE, *A Progression of Judges: A History of the Supreme Court of British Columbia*, (Vancouver: UBC Press, 1988), pp. 12-13. Criminal jurisdiction was conferred by commission dated April 2, 1860.

governor James Douglas established, pursuant to powers conferred by an imperial act of 1858, the 'Supreme Court of Civil Justice of British Columbia' (later called 'The Supreme Court of the Mainland of British Columbia') and prescribed that the court should have and use 'a Seal bearing Her Majesty's Royal Arms'. This provision survived intact through the merger of the two colonial courts in 1870 and through the many versions of the *Supreme Court Act* enacted over the years. It exists today as section 7 of the current *Supreme Court Act*.

This provision arguably provides a statutory basis for the use of the Royal Arms in British Columbia courtrooms. I will, however, return to this later.

Although the Royal Arms have been in predominant use in the superior courts of the province for nearly 150 years,[3] use of the Royal Arms in the Provincial Court of British Columbia has been less consistent. As recently as 1980 it was observed that, depending on location, courtrooms used by provincial court judges displayed the Royal Arms, the provincial coat of arms, a variety of pictures of Her Majesty and, on occasion, Canadian and provincial flags.[4] The Provincial Court then adopted a policy in favour of using the Royal Arms, both in its courtrooms and on its stationery.

There is no consistent approach in the use of arms in the superior courts of other Canadian jurisdictions. An informal survey reveals that three jurisdictions use the Royal Arms in their courtrooms (British Columbia, Nova Scotia and Newfoundland and Labrador), some display no arms at all (Manitoba, Quebec[5] and Yukon), one uses the arms of Canada (Alberta), one uses the Royal Arms in its appellate court and provincial arms in those courtrooms that have arms (New Brunswick[6]), one uses primarily its provincial arms but has in some courtrooms a mixture of provincial arms and the arms of Canada (Prince Edward Island[7]), one uses just the provincial arms (Saskatchewan) and one uses the arms of Canada in its appellate court and specifically-designed arms in the courtrooms of

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[3] I say 'predominant' because Martin TAYLOR, Q.C. recalls seeing court stationery in some smaller locations bearing the provincial arms and some courthouses where the provincial arms were displayed above the dais.

[4] Letter dated May 20, 1980 from D.R. SHEPPARD, Associate Deputy Attorney-General, to Chief Judge L.S. Goulet, unpublished.

[5] The Quebec Court of Appeal is currently considering the issue of having its own arms.

[6] The New Brunswick Court of Appeal uses (or perhaps more correctly, merely displays) impressive Royal Arms given to the colony by King George IV (1820-1830), while in the Court of Queen's Bench, the provincial arms are displayed in those courtrooms that have arms. All courts display the Canadian and provincial standards.

[7] Most courtrooms have the provincial arms, but some display both.

its superior trial court (Ontario[8]). The Supreme Court of Canada and the Federal Court of Canada both use the arms of Canada.

Farther afield, in Australia, which has a broadly similar heritage as well as a federal system of government,[9] the practice is similarly uneven. The superior courts in South Australia and Tasmania use the Royal Arms[10]. In the state of Victoria, the superior courts, for the most part, display no arms in their courtrooms, though one Trial Division courtroom displays the Royal Arms and the Court of Appeal displays the state arms[11]. New South Wales used the Royal Arms in all aspects of government, including the judiciary, until 1995, when the government implemented a policy of gradual replacement with state arms. In March 2004 a statute was enacted in New South Wales which required that state arms replace all Royal Arms in government buildings and courthouses 'as soon as practicable'.[12]

The question of the use of the Royal Arms in British Columbia courtrooms has been debated from time to time, often prompted by courthouse construction of some sort.

The earliest mention of the subject dates from 1907 when the College of Arms in London confirmed that the Royal Arms could be displayed in all the courtrooms in the province.[13] Since it was early in 1907 that famed (and ill-fated) architect Francis Rattenbury finalized the construction plans for the Georgia Street courthouse,[14] it seems probable that the College's opinion was sought in conjunction with the planning of that courthouse.

The issue was again debated in the 1960s. Former Supreme Court judge David Verchere, in the frontispiece note of his 1988 book, *A Progression of Judges: A History of the Supreme Court of British Columbia*, reported that in 1965, 'after years of discussion', the judges of British Columbia and the Departments of the Attorney-General and of Public

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8 On January 11, 1992 arms were granted to the Ontario Court of Justice (General Division), now called the Ontario Superior Court of Justice, following the merger of the former High Court of Justice and the District Court. The Ontario Court of Appeal ceased using the Royal Arms about two years ago.

9 Though it must be borne in mind that it has a materially different constitution.

10 One courtroom of the Supreme Court of South Australia evidently displays the state arms.

11 Government policy from 1984 has been that Royal Arms are to be replaced with state arms as remodelling or renovation takes place. The three Court of Appeal courtrooms were renovated upon the establishment of the court in 1995. There are about 23 trial courtrooms with no arms displayed. The courts use the Royal Arms on their website.

12 It should be noted that the 1995 policy, and the 2004 statute, were not directed to just the courts as the Royal Arms were in use throughout all aspects of N.S.W. government.

13 VERCHERE, *A Progression of Judges*, frontispiece note.

14 Jim FAIRLEY, *The Way We Were: The Story of the Old Vancouver Courthouse* (North Vancouver: Self-published, 1986), p. 23. The Georgia Street courthouse was opened on October 19, 1911.

Works decided that the Royal Arms would be used in all courtrooms in the province.[15]

Around that same time, and perhaps as a result of the 1965 decision, Chief Justice Bird[16] informed the Provincial Court that he saw no reason why the Royal Arms should not be used at the Provincial Court in Victoria, then located on Fisgard Street.[17]

Despite the apparent finality of the 1965 decision, the subject arose again in the 1970s. In 1974 Mr. Justice Victor
Dryer researched the issue and came to the conclusion that the Royal Arms should be displayed in all courtrooms in the province. In 1975 Judges Mussallem and Bewley were asked to look into the question for the Provincial Court and came to the same view as Dryer J.[18] No doubt the investigations of this era were prompted by the construction of the courthouse at 222 Main Street, which opened later in 1975, and by the planning of the Smithe Street courthouse, which was well underway by then.[19]

The pattern of once-a-decade consideration of the issue continued into the 1980s and 1990s. The Provincial Court decision of 1980, discussed above, was made after what is described as 'extensive research', although the nature and extent of that research cannot now be ascertained. Some time after the decision was made, the provincial government's director of protocol of the time agreed that the decision was the correct one.

The issue arose again in 1995 (but not, this time, due to any courthouse construction) and, at the request of Esson C.J.S.C. (as he then was), the question was considered by Martin Taylor, Q.C., then recently retired from the bench. After carefully analyzing the issues and arguments Mr. Taylor concluded that there was a sound basis for the continued use of the Royal Arms and an insufficiently compelling argument against the practice.

The argument against the use of the Royal Arms centres on the assertion that Canada, as a sovereign nation, ought not to use the arms of another country. Since Canada was granted its own arms in 1921,[20] and since in 1931 the Statute of Westminster removed the remaining vestiges of imperial authority, it is either the arms of Canada or the arms of the

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[15] No direct record of this decision can be located. However, VERCHERE J. was a judge of the Supreme Court from 1959 to 1981 so presumably he had fairly direct knowledge of the decision.

[16] Chief Justice of British Columbia from 1964 to 1967.

[17] It is not clear why this location was singled out, but perhaps construction or renovations were then underway.

[18] Memorandum dated January 22, 1975 from Judge Mussallem to Judge Bewley, unpublished. There is no record of Judge Bewley's opinion but circumstances indicate he shared the view of Judge Mussallem.

[19] Work on the Victoria courthouse also may have prompted some investigations since that courthouse was just beginning two years of refurbishment.

[20] By proclamation of King George V made November 21, 1921.

province that we ought to use. Heraldic expert Conrad Swan, in his book, *Canada: Symbols of Sovereignty*, states that when arms were granted to Canada in 1921 they were the arms of the sovereign in right of Canada, but that they were only royal arms for restricted and internal purposes. According to Dr. Swan, the effect of the Statute of Westminster, in giving further legal sovereignty to Canada, was to impliedly change the status of the arms of Canada such that they became what are known as 'royal arms of dominion and sovereignty as borne by the sovereign in right of Canada and used in the federal administration and government' or, in short, arms of a general purpose.[21]

Provincial arms, however, remain as arms of a particular purpose, identifying always an authority which is something less than the supreme sovereign authority of the state. They are arms of the sovereign in right of the province.[22]

Those opposed to the use of the Royal Arms, which seems to include many heraldic experts or enthusiasts, thus maintain that the correct arms to use are those of either Canada or the province, and that the continued use of the Royal Arms is improper.

Opponents of the Royal Arms sometimes describe the Royal Arms as 'the Royal Arms of Her Majesty in right of the United Kingdom', thus emphasizing that these arms are, in their view, foreign arms.[23] But it is not clear that this is so. The Garter Principal King of Arms, the principal officer of the College of Arms in London (and thus, arguably, the foremost expert on the subject in the world), has stated that the Royal Arms, when displayed in Australia, are the 'Arms of the Queen as Sovereign of Australia',[24] and, with some exceptions, are used throughout the Commonwealth where the Queen is head of state. It would seem from this that the Royal Arms are not specific to any one country. For present purposes it is sufficient to say that there are differing opinions on the point.[25]

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[21] Conrad SWAN, *Canada: Symbols of Sovereignty* (Toronto: U. of Toronto Press, 1977), pp. 7-8.

[22] SWAN, *Symbols*, p. 9.

[23] One argument occasionally made, that the Queen is a foreign monarch, can be readily refuted since, by our constitution, executive government and authority of and over Canada continues to be vested in the Queen: *Constitution Act*, 1867, s. 9.

[24] Letter from P. Ll. Gwynn-Jones, of the College of Arms, dated May 8, 2002, referred to in *Report on the Proposed State Arms Bill*, New South Wales Parliament, Legislative Council, Standing Committee on Law and Justice (Sydney, 2002), p. 38. Curiously, on this point Mr. Gwynn-Jones draws a distinction between Canada and Australia, noting that Canada is one of the exceptions because Canada had armorial bearings established by Royal Warrant in 1921. Yet the Commonwealth of Australia, too, has its own arms by virtue of a Royal Warrant and has had these since 1912.

[25] The Committee (see previous endnote) concluded that there was contradictory evidence on the law of arms on this point and therefore it could not settle the issue: see Committee Report, pp. 43-44.

The judiciary has taken the view that judges dispense the Queen's justice, acting on behalf of the sovereign herself, and thus it is the arms of the sovereign under which judges should sit. Dryer J. noted that, in early times, the King himself sat in judgment of his subjects wherever he might have been at any particular time. In due course the
King delegated this authority but it was nonetheless the King himself for whom his chosen delegates acted and spoke.

In making the same point, Mr. Taylor referred to the following excerpt from Blackstone's *Commentaries on the Laws of England*: 'His Majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected.'[26]

The principle is described in Halsbury's as follows: 'By virtue of the [royal] prerogative the monarch is the source and fountain of justice, and all jurisdiction is derived from her. Hence, in legal contemplation, the Sovereign's Majesty is deemed always to be present in court… .'[27]

Allan McEachern reminds us that the special relationship between the sovereign and the judiciary was affirmed in October 1987, on the occasion of the Queen's visit to the Vancouver Law Courts, by a Loyal Address to Her Majesty from the judges of British Columbia, part of which went as follows:

> The special responsibility which the judges bear to Your Majesty serves as a reminder to everyone that whatever their previous commitments or personal persuasions, Your Majesty's judges in the performances of their duties serve no cause or faction or party, neither majority nor minority, but discharge instead a solemn obligation which the Sovereign has assumed to the public as a whole. The responsibility of the judges is to fulfill the oath which Your Majesty made at Her Coronation, that 'law and justice in mercy' would be administered to all people, throughout Your Majesty's realms, without fear of favour.[28]

Mr. Taylor made a further point in favour of the use of the Royal Arms based on the status of the judiciary within our system of government. He said:

> The significance of the use of 'royal' arms by the legislative and executive branches of government appears to be that under our constitutional system the principal institutions of state function in

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[26] BLACKSTONE, *Commentaries on the Laws of England*, (21st edn., 1844, J.F. HARGRAVE, editor), Vol. 1, pp. 269-270.

[27] *Halsbury's Laws of England*, Fourth Edition Reissue, 1996, Vol. 8 (2), para. 305. For this reason, historically all writs ran in the sovereign's name; writs of summons in British Columbia still do.

[28] See (1988), 46 *Advocate* 17. It is thought that this might have been the only Loyal Address from the judiciary anywhere in the Commonwealth to a reigning monarch since Queen Victoria's Diamond Jubilee in 1897.

> the name of the sovereign. Acts of Parliament and the Legislature, and orders-in-council of the executive, are made on behalf of the sovereign herself by her personal representatives. For this reason the two senior governments exhibit their respective royal arms at their offices and on their official documents.[29]

However, for the courts to display these arms would, according to Mr. Taylor, 'be to identify the court with one or other of the two litigants frequently before it, these being also parties who, under our federal constitution, can be opposed in interest'.[30]

That the judiciary stands separate from the other branches of government cannot be doubted. Sir William Holdsworth, the great legal historian, put the matter this way:

> The judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the judiciary forms one of the three great divisions into which the power of the State is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers. ... The judges have powers of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the constitution.[31]

Not only must the judiciary be separate, it must also be *seen* to be separate. Farris C.J.B.C. emphasized this principle in a 1977 speech (although he was not speaking of coats of arms in particular):

> As a result of a long struggle between the Courts and the Crown, the revolution of 1688 thoroughly established the independence of the Judges. The separation of powers and the independence of the Judiciary are at the foundation of our constitutional polity. The common-law Courts exercise the Royal power of keeping the Queen's Peace, vindicating the Queen's authority and administering justice. It is settled that the Queen cannot administer

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[29] M. R. Taylor, Q.C., 'Further Observations on the use of the Royal Arms by the Supreme Court of British Columbia', unpublished memorandum dated November 20, 1995.

[30] *Ibid*.

[31] Sir W.S. HOLDSWORTH, 'His Majesty's Judges' (1932), 173 *Law Times* 336 at pp. 336-337. Although Holdsworth was writing of the situation in the United Kingdom, the intention disclosed by the *British North America Act* was to reproduce superior courts in Canada in the image of the English central royal courts: W.R. LEDERMAN, 'The Independence of the Judiciary' (Part II) (1956), 34 *Can. Bar Rev*. 1139 at p. 1160.

> justice or sit in Court, indeed English and Canadian judges are able to assert the supremacy of the law against the Crown itself. Accordingly, it is essential that it be recognized that the Courts are not a department of Government, they are entirely independent of Government. Thus, it is important that the building where they exercise their functions be separate from Government buildings and that the Judicial staff should be separate from Government staff. It is a visual demonstration to the public that the Courts are their protection of their basic freedoms.[32]

The arms used by our courts are, arguably, the strongest 'visual demonstration' of all. Thus the judiciary has taken the view that its independence must not be compromised on any level, even symbolically.

Two examples serve to illustrate the depth of feeling on this issue. McRuer C.J.H.C.[33] once refused to commence proceedings in a rural Ontario courtroom, which displayed only the Ontario arms, until those arms were replaced by the Royal Arms. He took the position that the powers he exercised did not derive from the province but from the Crown.[34] More recently, a judge of the Supreme Court of the Yukon Territory protested against the newly-displayed territorial arms by draping his robes over the offending arms while he sat in court. The legacy of this protest is that no arms are displayed in the courtrooms of the Supreme Court of the Yukon Territory, and none are displayed anywhere on the courthouse itself.

Some have suggested that our courts ought to follow the lead of the Ontario Superior Court of Justice and obtain a grant of newly-designed arms from the Canadian Heraldic Authority. The difficulty with this suggestion is that the new arms would no longer serve to identify the courts with the sovereign, or with the power of the sovereign, as the Royal Arms do currently. The new arms would not be 'arms of dominion and sovereignty' or 'arms of a general purpose', to use Dr. Swan's characterizations of the arms of Canada, or even the lesser arms of sovereignty 'for a particular purpose' that are the provincial arms. As Mr. Taylor observed, any new arms would not be 'royal' arms in substance, even with the addition of a crown above the shield, but would be more akin to the arms used by municipal, regimental or other organisations having royal approval, patronage or support. It does not seem fitting that one of the pillars of our system of government should have arms with no greater significance than those granted to a municipality or a yacht club, even a 'royal' yacht club.

Mr. Taylor concluded as follows:

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[32] Speech given upon the sitting of the Court of Appeal in Victoria on September 12, 1977, after an absence of three years from that city: (1977), 35 *Advocate* 525.

[33] Chief Justice of the High Court of Ontario from 1945 to 1964.

[34] Patrick BOYER, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: U. of Toronto Press, 1994), p. 181.

> Given the need to adapt heraldic and other English customs and usages to the requirements of Canada's federal constitution – under which the federal and provincial governments are frequent, and sometimes adverse, litigants – it seems highly sensible that the courts should seek both to avoid identifying themselves with either and yet continue to show that they speak for the sovereign, as they do – being supreme, indeed, in constitutional matters, over the legislative and executive arms of both of the senior orders of government. The present practice of our court appears to accomplish this purpose and at the same time serves as a reminder of a connection of much importance to the history of our province.[35]

Ultimately, the question comes down to the efficacy of the Royal Arms, or any other arms, as a symbol. Simply put, no arms other than the Royal Arms adequately symbolize the constitutional position and authority of our courts.

There is a final basis upon which it has been argued that the Royal Arms are the proper arms for use in the courts of British Columbia, that being the statutory designation of the Royal Arms in the seal of the Supreme Court. It is perhaps significant that British Columbia is the only Canadian jurisdiction in which the Royal Arms are designated for the court seal by statute.[36] Dryer J. based his opinion, at least in part, on this statutory designation, reasoning that it would follow from it that the Royal Arms ought to be displayed in all Supreme Court courtrooms. Although the coat of arms may be different in kind from the formal seal of the court, it would seem, at minimum, inconsistent to have one heraldic design for the seal of the court and another for the arms displayed in each courtroom. The existence of the statutory designation of the Royal Arms in the Supreme Court seal is thus an additional factor which weighs in favour of the use of the Royal Arms in our courtrooms.

How the issue could be conclusively decided is an open question. Historically, the common law courts had no jurisdiction in disputes over armorial bearings, that jurisdiction being exclusively within the purview of the Court of Chivalry. The Court of Chivalry is not a busy court as its last two sittings were in 1954 and 1737, respectively.

The 1954 case, *Manchester Corporation v. Manchester Palace of Varieties Ltd*., [1955] P. 133, did confirm, however, that the Court of Chivalry still exists and that it has jurisdiction to deal with complaints relating to the usurpation of armorial bearings.[37] One difficulty, among several at least, in

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[35] See n. 28.

[36] Two Australian states, South Australia and Victoria, have similar statutory provisions --South Australia: s. 15 of the *Supreme Court Act*; Victoria: s. 76 of the *Constitution Act*, 1975. Newfoundland and Labrador is unique in that the Royal Arms are designated by statute for use in the courts (s. 44 of the *Judicature Act*).

[37] For a brief, but interesting, account of the proceedings see (1954), 12 *Advocate* 213.

having the Court of Chivalry consider the propriety of the use of the Royal Arms in British Columbia courtrooms is that in 1907 our judiciary received permission to do so from the College of Arms, the delegate of the sovereign for this purpose. Thus no question of 'usurpation' arises. Mr. Taylor has noted that, if history is to be our guide, the only other dispute resolution alternative is knightly combat!

As to the other questions posed at the beginning of this article — the mottoes on the Royal Arms — *Dieu et mon droit* ('God and my right') is the motto of the sovereign. It is said to have originated at the Battle of Gisors (1198) between Richard I (The Lionheart) and Philip II of France. It is described in some sources as being the password coined by the King for the battle, while other sources describe it as a cry of war. In either case it was a declaration by the King that he was no vassal of France but derived his territorial claim from the right granted him by God. The phrase also appears, in slightly modified form, in a contemporary account in which the King's report of the battle is quoted, a report which concludes with the words, 'Thus we have defeated the King of France at Gisors; but it is not we who have done the same, but rather God, and our right ….'[38] *Dieu et Mon Droit* was adopted as the Royal motto by Henry VI (1422-1461).[39]

Honi Soit Qui Mal y Pense is the motto that is partly obscured in the Royal Arms. Translated variously as 'evil to him who thinks evil', 'evil to him who thinks evil of it' and 'shame on him who thinks this evil',[40] it is the motto of the Order of the Garter. Founded by Edward III in or around 1348, the Order of the Garter is the highest and most exclusive of the chivalric orders, its membership being limited to the monarch and 25 knights.[41] Its origins, and that of its chief symbol, a blue garter, remain shrouded in the mists of time, but legend has it that the King's mistress lost a garter while dancing at a court ball held near Calais. The King picked up the garter and tied it around his own leg, admonishing those who smirked at the event by exclaiming to them, '*Honi soit qui mal y pense*'. It is said that Edward III created the Order in emulation of the Knights of the Round Table of Arthurian legend.[42]

Now back you go to your courtroom. Your friend is now on tab 93.

Summaries: See p. 200.

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[38] *The Annals of Roger of Hoveden*, translated by Henry T. RILEY (London, 1853), which quotes a report of the battle by Richard I to the Bishop of Durham.

[39] [In fact it is commonly thought to have been adopted by Henry V, possibly on the eve of the Agincourt campaign in 1415. (Ed.)]

[40] [The correct literal translation is '*Shamed be he who thinks ill of it*'. (Ed.)]

[41] The Prince of Wales is always one of the knights.

[42] [This story, dating from nearly two centuries later, is now dismissed by scholars as a piece of French propaganda. On the foundation of the Order, see D'A. J. D. BOULTON, *The Knights of the Crown: The Monarchical Orders of Knighthood in Later Medieval Europe, 1325-1520* (Woodbridge, 1985; 2nd edn. 2000), pp. 101-117; and Hugh E. L. COLLINS, *The Order of the Garter 1348-1461: Chivalry and Politics in Late Medieval England* (Oxford, 2000), pp. 6-33. (Ed.)]