



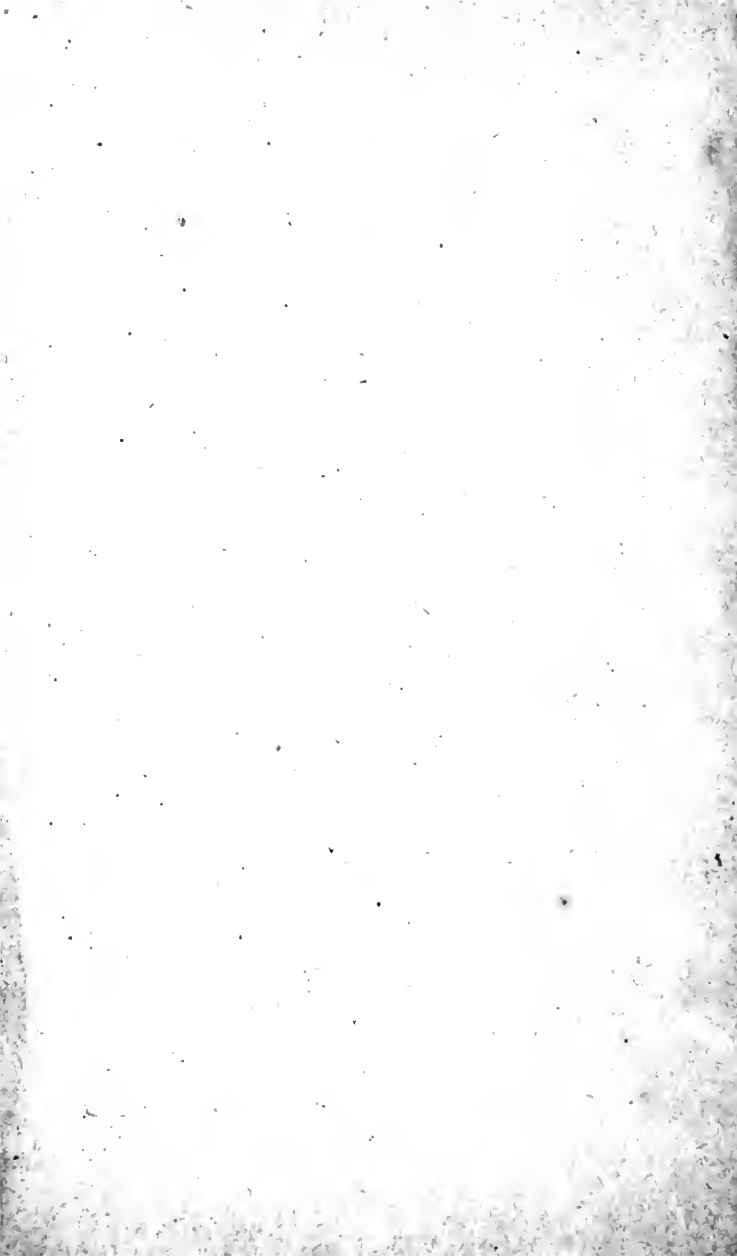
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V I E W  
O F T H E  
English Constitution,  
WITH RESPECT  
To the *Sovereign Authority* of the  
PRINCE,  
And the *Allegiance* of the  
SUBJECT.

In Vindication of the *Lawfulness* of Taking  
the OATHS, To her Majesty, by  
Law Required.

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By WILLIAM HIGDEN, M. A.

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*The Third Edition.*

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LONDON, Printed for S. Keble at the *Turk's-Head*  
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To the READER.

**A**FTER I had passed, so many Years of my Life, without being able to Reconcile my Self to the Oaths; in the Course of my Studies, I met with some Passages, which gave me Cause to suspect, that I had in some particulars mistaken the English Constitution: And altho' they did not carry so great a Weight and Evidence, as to induce me to alter my Sentiments in the main; yet I confess they made me pause, gave me occasion for Reflection, and inclined me once more to take a Review of the Judgment I had made so many Years ago; with an Intention, that if upon this Inquiry, I should find my *former Judgment* was well grounded, to sit down under it in a quiet and inoffensive way, whatever Inconveniencies might attend it: If not, then, with my Judgment, to alter my Practice.

The *Method*, and *Result* of my Inquiries, the Reader will meet with in this Discourse. And whilst I was making

To the READER.

them, I was very free, and open in discoursing with as many of my Old Friends, as were willing to talk with me upon this Head, and with Those especially, whom I took to be best acquainted with our Constitution, and most versed in this Controversy. And could I not have solved their Objections to my own satisfaction, I should have stop'd here; and these Papers, as they were never intended for the Publick at first, had never seen the Light: Part of which are Two Letters in Answer to the Objections of Two of my Friends, with little Alteration more than was necessary, to make them of a Piece, with the rest of this Discourse.

If any Gentlemen of the Law, should think this Little Piece worth their perusal; they may be apt to say, that I have labour'd some Points too much, in proving (what was obvious) the Legislative Authority of Kings, *for the time being*, but I was sensible that some, whom I should be heartily glad to serve by this Discourse,

To the READER.

Discourse, were not so well apprized of this Matter.

Now if any one asks, why I was convinced no sooner? I shall return a very short, but a very True Answer: Because I had not sooner a thorough Insight into our *Constitution*, and *Laws*, relating to this Great Point.

An Opinion, or a Practice of Twenty Years Standing; will always have the force of Prejudice on its side; but this will make but a light Impression on Minds, which have this single Important Question in their View: Whether the Thing be *Lawful* or *Unlawful*, a *Duty* or a *Sin*?

The Success which this Discourse hath met with, amongst some of those that have seen it in Mss. has been no small inducement to the Publication of it. And, I hope, I have treated the Subject in such a manner, as not to offend those, whom it may not convince.

All Subjects, Those especially, where Conscience is concern'd, or which any way

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### Advertisement.

**I**N a short time will be published  
a Defence of the View of the Eng-  
lish Constitution &c. by way of Reply  
to the Utopian Remarkers; with some  
Animadversions, on the Natural Born  
Subjects Letter by the Author of the  
View.

## C H A P. I.

*The Supreme Authority of the English Government rests in the King for the time being, and the Allegiance of the Subjects is due to him by the Common Law of this Realm.*

**I** Shall first consider the Authority of the King *for the time being*, by the *Common Law*, and then by the *Statute Law* of this Realm. Now *Common Law* is common *Custom and Usage*, or *Judicial Proceedings and adjudged Cases*, as they appear in *Judicial Records* and the *Year Books*.

As for common *Custom and Usage*, which by an uninterrupted *Practice*, through a long *Tract* of time, obtains the force of *Law*; This is so evidently on the side of the *Regnant King*, that the *People of England* always submitted, and took *Oaths of Fidelity* to the *Thirteen Kings*, who from the *Conquest* to *Henry the VII.* came to the *Throne* without *Hereditary Titles*, as well as to the *Six Hereditary Kings*, who *Reigned*

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in that Period; and this so universally, that I don't know there are any *Non-jurors* to be found in all those Reigns. Of those Kings few met with greater Opposition than *William* the I. and yet after his Government was settled, Oaths of Fidelity were universally taken to him. *Ingulph* who liv'd in his Reign, saith, *After his return into England, having commanded every Inhabitant of England to do him Homage at London, and to Swear Fealty to him against all Men; He caused the whole Land to be measured, nor was there a Hide of Land in England but he knew it's Value and Owner.* The Oaths were, it seems, as strictly, exactly, and universally tender'd, as the Lands described in *Doomsday-Book*; and yet we hear not of one Refuser. *Roger de Hoveden* speaks of another time, when he commanded, *That the Archbishops, Bishops, Abbots, Earls, Barons, and Sheriffs, should with their Tenants by Knights Service*

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\* *Reversusque in Angliam apud Londiniam hominum sibi facere, & contra omnes homines fidelitatem jurare, omnem Angliæ Incolam imperans totam terram descripsit, nec erat hida in Angliâ quin valorem ejus & possessorem scivit.* Hist. 516. See also *W. of Malmesbury de Willielmo primo* fol. 59.

† *Ut Archiepiscopi, Episcopi, Abbates, Comites, Barones, Vicecomites, cum suis Militibus sibi occurrerent Saresbrie, quò cum venissent milites illorum sibi fidelitatem contra omnes homines jurare coegerit.* In *Willielmo Seniore* p. 164.



meet him at Salisbury, and when they came thither, he made their Tenants swear Fealty to him against all Men. If we descend to the other Kings, who Reign'd without an Hereditary Title, we shall find none of their Subjects refused to Swear Allegiance to them.

It is no wonder if some, who submitted, revolted afterwards (and from what Kings have there not been Revolts ?) or that when they revolted, they objected to the King's Title, and made it a pretext for their Revolt. Thus Odo Bishop of Bayeux and Earl of Kent being, as William of Malmshury relates †, highly discontented, because the Bishop of Durham, and not himself, was Chief Minister, as he had formerly been, Rebelled against his Nephew King William the II. and with some other great Men who were discontented too, formed a powerful Party against him, in favour of Robert Duke of Normandy, who, he said, had a better Title, and would make a better King. But this is no Prejudice to what I have asserted ; since it is evident, that he himself as well

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† Cum omnia non suo arbitratu (ut olim) in regno disponi videret (nam Willielmo Dunelmensi Episcopo commendata erant rerum publicarum administratio) livore irritus & ipse à rege descivis, & multos eodem susarro infectis, Roberto Regnum competere, qui fit & revivificans animi, &c. De Willielmo secundo, l. 4. fol. 67.

as the other Great Men whom he drew into his Party, had lived as Subjects and sworn Allegiance to King *William*; otherwise their Revolt could not be charged with Perjury, as it is, by the Archdeacon of *Huntingdon*. †

Of all the great Men we meet with in our History, none were more likely to have stood out against the Government of a King *de Facto*, than *Robert* Earl of *Glocester* Base Brother to the Empress *Maud*, and afterwards the great Supporter of her Cause, and *Thomas Merks* Bishop of *Carlisle*; and yet it is certain, that the former swore Allegiance to King *Stephen*, and the latter sat in *Henry* the IVth's first Parliament, in which those Acts were pass'd that we have in the Statute Book; for it was at the close of that Parliament, he made his Speech in behalf of King *Richard*, and some time after pleaded King *Henry*'s Pardon for a Conspiracy against him, of which he stood condemned to dye.

It has been, I know, observed, that *Robert* Earl of *Glocester* did Homage Conditionally.

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† *Omnes namque Nobiliores procerum in Willelmum juniorem non sine perjurio bellum moventes, & Robertum Patrem suum in regnum assiscentes, suis quique Provinciis debacchantes. Henr. Huntingdoniensis Hist. L. 7. fol. 213.*

to King *Stephen*, which is true enough ; but then it is as true, that none of the Conditions which he interposed, had any manner of regard to the Titles, either of *Maud* or *Stephen*, as may be seen in † *William* of *Malmsbury* who lived at that time, and dedicated his History to that great Earl.

When we hear of a numerous Party that espoused the Title of the House of *York*, we are apt to look upon them to have been so many *Non-jurors* to the Kings of the House of *Lancaster*. But this is a great mistake ; for all the Partizans of that House lived in Submission, and took Oaths of Allegiance to the three *Henries* ; nay, *Richard* Duke of *York* himself, the Heir of that Family, swore Allegiance several times to King *Henry* the VI. particularly in the 29th Year of his Reign, in as full Terms as could be well expressed. His Revolt afterwards was under colour of Redressing Grievances, however he made use of his Arms, and his Power when he got it, to set up his Claim. And altho' his Son *Edward* the IV. succeeded against *Henry* the VI. and got the Throne, yet when he was driven from it,

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† *Malmsb. Historiæ Novellæ fol. 101. 6.*

Ten Years after, the Nation submitted again to *Henry* the VI. who, upon his Readeption, held a Parliament.

*Precedents*, I confess, are not always Arguments of the strongest kind, if the Persons themselves are of no great Authority, or the *Precedents* few, or as many *Precedents* may be produc'd on the other side: But that of so many Millions as have liv'd under *de facto* Kings, of so many Bishops and Clergy-men, some of them eminent for Learning and Piety; of so many Temporal Lords and Statesmen of great Abilities; of so many Lawyers and Judges, some of them renown'd for their Skill in their Profession, (particularly in *Henry* IVth's Reign, as my Lord Chief Justice *Coke* says, † *the Courts of Justice were fill'd with Men equal to any of their Predecessors in the Knowledge of the Law.*) That of all these who liv'd in so many different Reigns, to think there should be none who understood the Constitution and their Duty, or had Virtue enough to suffer for it; is to entertain a very mean, or a very hard Opinion of our Ancestors. In Modesty, we cannot but allow them to understand what the

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† *Instit.* Part. 3. Ch. 1.

Constitution was in their *Own* times, at least, better than *We* can at this distance, and in Charity we cannot but believe that they acted agreeable to it. And if it was the Constitution from the Conquest to *Henry* the VII. as this universal Practice, and *common Usage* of all Orders and Degrees of Men, must at least induce a very strong Presumption that it was, it will be found, I believe, that the *Constitution* has descended the same to us; for there has no Law been made, since that time, concerning this matter, but that of the Eleventh of *Henry* the VII. which justifies this Practice, and enacts the *Usage* into a *Statute* of the Realm.

But Secondly, if we will be so severe to our Ancestors, as to believe, that none of them understood their Duty as Subjects, or if they did, none of them practised it, and that they acknowledged an Authority which the Laws condemned; we shall then surely find this Authority disown'd in the succeeding Reigns of Hereditary Kings, those especially, who made their way to the Throne with the Destruction of their Rivals. But instead of that, we find the Subjects justified, in what they had done, by those Kings; who in all the Proceedings of their Courts of Judicature, and in their Acts of Parliament, acknowledg'd that very Authority

to which the Subjects before had sworn, and paid their Allegiance. Could it then be the Duty of Subjects to disown an Authority *for the sake of Kings de jure*, which Kings *de jure* themselves own? Nay when these Kings, after the *de facto* Government was determin'd, and their own Government establish'd, own'd the Authority of their Predecessors *de facto*, is it reasonable for Subjects to disown the Authority of such Kings, whilst they live *under* their Government, and there is no *other* Government but *That*? Or can any of the Subjects do so, without opposing their *private Opinions* in matters of Government, to that which they themselves confess to be the *supreme Authority* and *Judgment* of the Kingdom? And can the Peace of Communities be maintain'd, or any Government subsist on these Terms?

Now that Kings *de jure* have acknowledged the Authority of Kings *de facto* in as ample a manner as they have done that of their Progenitors of the most undoubted Right; I appeal to the *Common Law*, and *Statute Law* of this Realm; to the *Year Books* for the one, and the *Statute Book* for the other, which will reduce this Controversy to *Matter of Fact*.

I begin with the *Year Books* of the Reigns of such Kings *de jure*, who cut out their way to the Throne with their Swords, and the Destruction of their Rival Kings *de facto*, and therefore the most unlikely of any to acknowledge them ; and yet we find their Authority as much acknowledged by these Kings *de jure*, in all their Courts of Judicature, as that of any of their Ancestors of the clearest Title.

I. Upon the Death or *Demise* of any King of *England*, (by whose Authority and in whose Name the Laws are administered) all Actions, Suits, &c. which were depending in any of the King's Courts, were discontinued, and the Parties put off, so that the Plaintiffs were compell'd to begin their Actions again, or to sue a *Resummons* to revive their Actions until the 1 of *Edward* the VI. C. 7. provided a Remedy. Thus it was after the Death of *Edward* the IV. in the Courts of *Edward* the V.

† In *Michaelmas Term* in the 1st Year of *Edward* V. Fol. 1.

And upon this they were at Issue, and after the Issue the Defendant gave Bail

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† De Terminis Mich. an. 1. Regis Edwardi V. Fol. 1. Et sur ces fuer a issue, & aprs. l'issue le def. fut. lisse a maynprise par reconnaissance, & puis le issue fait discontinue par le demise le Roy Édou. quart.

by Recognizance, and afterwards the Issue was discontinued by the Demise of King Edward the IV.

\* Thus in the Courts of Edward the IV. after the Dispossession of Henry VI. viz. in the 1st Year of Edward IV. Fol. 2.

They were at Issue in Hilary Term in the 39th Year of K. Henry VI. and the Plea was discontinued by the Change of the King. And in Trinity Term the said A. B. came into the Court, and was committed to the Fleet, and now he comes and pleads ut supra. And to this it was said, that he could not have the said Plea now, because by the Demise of the King, the Plea was discontinued and the Bail discharged, &c.

† In Trinity Term in the 2d. Year of Edward IV. fol. 10.

Billing affirm'd, that one brought a cui in Vita, in the time of the other King, and the Tenant pleaded an Entry since the last conti-

\* Ils fueront a issue & ces fuit le terme de St. Hillarii l'an 39. Roy Henry VI. & le ple fuit discontinue per eschaunge le Roy. Et al terme de Trinite veigne le dit A. B. en Court & fuit comise al flete; & ore il vient & pled ut sup. Et a ceo fuit dit que il ne poit aver le dit ore pour ces que par le demise le Roy le plee fuit discontinue, & ceux mainparnours discharge, &c.

† De Termino Trinitatis anno 2d. Edwardi quarti Fol 10. Billing nra comt. un avoit un cui in vita en temps l'autre Roy, & le T. avoit pled un enti. puis darr. contin. & dd. judg. de bre. & sur ceo fuer. a issue, & tout puis fuit discontinue per demise le Roy.

nuance,



nuance, and demanded Judgment of the Writ, whereupon the Parties were at Issue. But all after was discontinued upon the Demise of the King (that is, King Henry VI.)

\* Thus after the Dispossession of Edward the IV. by Henry the VI.

In Michaelmas Term in the 49th Year, from the beginning of the Reign of Henry VI. and the first of the Readeption of his Regal Power Fol. 13.

In the Court of Common-pleas, it was moved amongst the Judges, where the Parties were at Issue, in the time of the other King Edward the IVth, and at Nisi prius it was found to be put off without a Day by the Demise of the King. ¶ Littleton saith that it was adjudged, that were the Parties were at Issue, &c. it was discontinued by the Demise of the King, ut supra.

† Thus after the Death of Richard the

\* Termino Michaelis anno ab incohacione regni Henrici Sexti 49. & Recaptionis Regie potestatis primo Fol. 13. En le comen banke fuit move entre les Justices que l'onentrans les parties fuerunt a issue en temps l'autre Roi Edward le quart & al nisi prius trouve fuit mise sans jour par demise le Roy. Littleton dit que il ad estre adjuge que l'ou les parties fuer. a issue la parole fuit mise sans jour per demise le Roy, ut supra.

¶ This was the famous Author of the Book of Tenures.

† En quare impedit par le Deane & Vers. & ils fuer a issue en temps le Roy Richard le tierce & discontinue per demisee, le Roy.

III. in the 1st Year of *Henry VII.* Fol. 8.

En quare Impedit *by the Dean, &c. against &c. they were at Issue in the time of K. Richard the III. &c. and it was discontinued by the Demise of the King, (viz. Richard III.)*

From all these Cases I observe, that as *Edward the Vth's* Judges by allowing the Actions depending in *Edw.* the IVth's Reign were discontinued by his Death, did thereby acknowledge *his Authority* by which, and *in whose Name* the Laws were administered in his Reign: So when *Edward the IVth's*, and *Henry the VIIth's* Judges, allowed all the Actions and Suits depending in the Reigns of *Henry the Vth*, and *Richard the III.* were discontinued by their Death or Demise, they likewise acknowledged thereby the Authority of those Two Kings, by which and in whose Name the Laws had been administered in their respective Reigns.

But as the Law makes no distinction betwixt the Authority of a King *de Jure*, or a King *de Facto* in the Administration of the Laws, so we may hence make this farther Observation, That the Law makes no difference betwixt the *Death* or *Dispossession* of a King, when another is in *Possession*; but looks on the latter, as well as the former, to be a *Demise of the King*, and that without any distinction whether  
it

it be the Dispossession of a King *de Facto* or a King *de Jure*, of Henry the VIth; or Edward the IVth.

And as the Law puts no difference betwixt the *Death* and *Dispossession* of a King, but makes both to be a *Demise*: So from these *Cases* we may in the Third Place observe, that by the *Demise* of a King, whether *de Facto* or *de Jure*, his Authority is by Law *determined* and at an End, and the Laws thence-forward legally Administer'd by the Authority of the King in Possession, and by his Authority *only*.

2dly, From the *Year-Books* we may observe, that all the Grants, Licenses, Letters Patents, Gifts, and in short, all the Regal Acts of the Three Henry's of the House of Lancaster, and of Richard the III. are pleaded and allowed in all the Judicial Proceedings of Edward the IVth's, and Henry the VIth's Courts of Judicature, to be as Valid as if they had been the Grants &c. of any of their Progenitors of the most uncontested Titles.

*Bagot's Case* is that which has been usually urged and debated in this Controversy; and some may be apt to think, this is the only Instance that is to be given; but in Truth the *Year Books* furnish us with abundance of the like Cases.

*Bagot's*

*Bagot's Case alone* was cited, I suppose, by my Lord Chief Justice *Coke*, not only because he thought that Case was of it self *Decisive*, but because it was the *only Case* in the Year Books, where the Authority of a King *de Facto* had ever been *disputed*, and yet Judgment given for it; and because several *Points of Law* relating to that Authority were there *maintained*.

The *only Case*, I say, where this Authority had ever been *disputed*, and yet even *then* not disputed at *Common Law*: for the Council against *Bagot* seem'd well enough aware, that the Authority of a King *de Facto* was *good* at *Common Law*, and therefore what they endeavour'd, was only to Oppose *Henry* the VIth's Authority, and to set aside his Patent of Naturalization granted to *Bagot*, by Implication from the Statute made 1 *Edward IV.* Chap. i. which declared what Grants &c. of the three *Henries* of the House of *Lancaster* should be Valid, and having made no Provision therein to Confirm *Patents of Naturalization*, they would therefore have *Bagot's* Patent to be *Implicitely annulled* by this Statute.

† Bagot's Council pleaded, that notwithstanding this Act; Henry the VIth's Letters Patents of Legitimation are good, because King Henry was King in Possession, that it was necessary that the Realm should have a King under whom the Laws should be kept and maintained. Therefore altho' he was in but by Usurpation, yet every Judicial Act done by him concerning the Royal Jurisdiction shall hold good, and shall bind the King de Jure, when he returns to the Crown, &c. Thus Charters of Pardon, Licenses of Mortmain, &c. shall be good. That the King that now is shall have the Advantage of all Forfeitures made to King Henry VI. and for a Trespass committed in Henry VI. time, the Writ shall run contra pacem Henrici VI. nuper de facto & non de Jure, and that a Man shall be arraigned for Treason against King Henry VI. in compassing his Death, because the said King was not meerly a Usurper, for the Crown was entailed upon him by Parliament, that any Gifts, or Grants, made by King Henry which were not to the diminution of his

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† Plus d'assise Bagot, ore fuit le matter reherce & touche, q non obstant cet Act, les Patentés de Legitimation snt bones car le Roy Henry fust Roy en possession & il covient q le Roialme eie un Roy seuth que les leys serront tenus & maintein &c. Anno IX. Ed. IV.

*Crown shall be made good. † That if he that is now King, had in King Henry the VIth's time granted a Charter of Pardon it would be Void now; for every one that shall Grant a Charter of Pardon must be King in Fact.*

A Learned Person, who in a Book \* published some Years since, opposed the Authority of *Bagot's Case*, was mistaken in translating these Words, which he (leaving out the Word *Now*) renders thus, *That if Edward the IV. in King Henry the VIth's Reign had granted a Charter of Pardon it would be void, for every one that Grants a Charter of Pardon ought to be King de facto*; and from this Mistake explains these Words to signify no more than that a Pardon granted by a King *de jure* out of Possession cannot have its Effect, and be pleaded and receiv'd in Court, whilst he is out of Possession. Whereas they plainly say, that had *Edward IV.* granted a Pardon when he was out of Possession, it would be void even *Now*, not only void when *King Henry the VI.* was in the Throne, but even *Now* when he himself is King, and in Possession, and therefore is void *in Law*, not void for want of Power to enforce it.

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† *Et fuit dit q. si cesty q. est ore Roy en temps le Roy H. ust fait chart. de pardon ces serra void a ore car chescun q. serra chartr. de pardon covient estre Roy en fait, &c*

\* *The Case of Allegiance to a King in Possession p. 16, 24, 25.*

It was indeed *Bagot's* Council that urged these Points of Law. But can any Man believe, that in the *Courts of Edward IV.* who had waded through so much Blood to the Throne; and was so jealous of any thing that favour'd the *Lancastrian* Kings; they durst have made this Plea, if they had not known it to be *Law*? Or that the Council on the other side, would not have contradicted, or answer'd it, if they could, as it concern'd their Clients Cause? or the *Judges* have over-ruled it, as they ought, in behalf of the Right of their Prince, by whose Commission they sat, if it had not been *Law*? But as the opposite Council did not deny any of these Points of Law maintain'd in this Plea: So the Judges were so far from over-ruling it, that *Billing*, who was then Lord Chief Justice of the Kings Bench, delivers his Opinion agreeably to it in these Words, *that to every King by reason of his Office* (in which Office he took *Henry VI.* to be invested,) *it belongs to do Acts of Justice and Grace; Justice in executing the Laws, Grace in granting Pardon to Felons, and such a Legitimation as this.* And after consulting with the Judges of the Common-pleas, the Court accordingly gave Judgment for *Bagot*, that is, for the Validity of the King *de Facto's* Patent; and consequently of his Royal

Jurisdiction, though not confirmed by the King *de Jure*, in a Statute made expressly for that purpose.

I need make no Remarks on the Points of Law maintain'd in this Case, they are so plain, and the force of them so fully, though briefly contain'd in my Lord Chief Justice *Coke's* Notes upon the Words, *Seignior le Roy*, in the Statute of Treason, which I shall have occasion to cite afterwards, and therefore shall only add the Abridgment of this Case, as it is given and recommended with a special Note by *Brooke* who was Lord Chief Justice of the Commonpleas under Queen *Mary*.

\* *Nota, Dicitur & non negatur quod de proditione facta tempore Hen. VI. que fuit Usurper del Crown, le party sera arraigne pour ceo tempore E. 4. vel hujusmodi, pour compassant le mort de Roy Hen. VI. quod nota, & sic vide quod trespasse tempore unius Regis poet estre puny tempore alterius Regis comment que l'un fuit Usurper.*

The *Year Books*, as I said, especially those of *Edward* the IV. and *Henry* the VII. abound with Cases wherein the Authority of Kings *de facto* (of *Henry* the VI. and *Richard* the III. in particular) is fully acknowledged: You may find their Grants indeed sometimes Disputed; but then it is in such a manner, as

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*Tit. Arcajon N. 10.*



that their Authority is at the same time fully acknowledged. They who would set aside any of their Grants, or oppose some Right that was claimed by Vertue of them, (as of *Richard* the III<sup>d</sup>'s for Example) did not pretend, no not in *Henry* the VII<sup>th</sup>'s Courts, where they might safely have done it, if it had been Law, they did not pretend, I say, that *Richard* had not the Regal Authority, and consequently his Grants were void: But they either made exceptions to some legal Defects in the form of the Grant; or pleaded that such a thing did not pass in the Grant; or that King *Richard* the III. was deceived in granting a Reversion, when there was no Reversion, † as may be seen in the Abbot of *Tewkesbury's* Case: In short, they made no other Exceptions, but such as they might have made to the Grants of *Henry* VII. in his own Courts. But if you would be thoroughly convinced of the legal Authority of a King *de facto*, and the Validity of his Acts, I recommend to your perusal some of those Cases in the *Year Books*, which will give you a clearer Idea of it, than you can receive by any short Accounts or Citations from them.

3dly. As all these Judicial Proceedings in the *Year Books* are agreeable to that Maxim

† See the Abbot of *Tewkesbury's* Case. *De Term. Trin. an. 8. Henr. VII. fol. 1.*

of the Law of England; That the Crown takes away all manner of defects and stops in Blood, which is, I think, Decisive for the Authority of the King in Possession: so the Authority of this Maxim it self, is very conspicuous in the same Books, where we read that all the Judges of the Realm, when they were solemnly consulted by the King in Parliament about the Attainder of Henry the VII. unanimously deliver'd it for Law, That the King is a Person able and discharged from any Attainder *Eo facto* that he takes upon him the Government and is King; and alledged for a Precedent Henry the VIth's holding a Parliament in his Readeption, notwithstanding he was attainted, and that *Eo facto* that he assumed the Regal Dignity and was King, all was void, and there was no need of any Act to Reverse his Attainder. D. Term. Mich. an. 1 Henry VII. fol. 4. b.

It is to be observed, that according to the Opinion of all these Judges, whose Judgments, especially when Unanimous, as in this Case they were, make part of the Common Law of the Realm, this Maxim is not to be Restrained to those Kings, who come to the Crown by Proximity of Blood, as some have imagined, but is to be Extended to all Kings in Possession, particularly to such who come to the Crown as Henry the VII. and Henry  
the

the VI. did in his Readeption, since to the former, the Judges apply this Maxim, and make the latter, a Precedent of it.

The last Observation I shall make from the Year Books is, that by the Common Law of this Realm, Kings *de facto* are Legislators, or are vested with the Legislative Authority. For in the Year Books of Edward the IV. the Statutes of the Lancastrian Kings; and in those of Henry the VII. the Acts of Parliament made by Richard III. are pleaded as Statutes of the Realm of Equal Force and Validity, with those made by Edward the IV. and Henry the VII. themselves.

† In the 3d Year of Edward the IV. In the Common Pleas on another Day the writ of forcible Entry sued upon the Statute of the 8th Year of Henry the VI. was now rehearsed. And the Writ was after this manner rehearsing the Statute, whereas in the Statute of our Lord Henry late King in the 8th Year of his Reign, Ordaining, &c.

\* In the 10th Year of Henry the VII. And the King's Attorney said, that a voluntary

† Anno III. Edward the IV. f. 24. En le commen bank a autre jour le bre de forcible entre sus sur l estatute de anno 8 Henry VI. fuit reheerced a ore. Et le bred. m. fuit en maner tiel reheercedant l estatute que re cum in statuo Domini H. nupre: Reg. &c. VIII. Ordinant. &c.

\* D. Term. Trin. an. 10. Henry VII. f. 26. Et le attourn y le Rry dit que Escape Voluntarye fistabl. fuit Enquirable devant Fu-

*Escape finable, was Enquirable by the Justices of Peace, by a new Statute in the time of King Richard the III.*

*In the 11th Year of Henry the VII. † Nota that it was held in the King's Bench, that if a Man has feoffed, &c. It is good by the Statute of Richard the III.*

## C H A P. III.

*The Sovereign Authority particularly the Legislative Authority of Kings for the time Being, and their Two Houses of Parliament, acknowledged by the Statute Law of this Realm.*

**H**AVING shewn, that the Legislation of Kings *de facto* is own'd to be good at Common Law, own'd in the Courts of succeeding Kings *de Jure*, whose Rivals they were, I need not proceed to any more of their Acts; for when *This*, which is the highest Act of Government, is valid, none of the rest of their Regal Acts can reasonably be

*Justices de' peace par un Novel Estatute En temps le Roy Rycharde le tiers.*

† *De Term. Mich. an. XI. Henry VII fol. 2. Nota quod fuit tenus in banke le Roy q si homme ad feoffers &c. que est bone par l' estatute R. le III.*

disputed.

disputed. And therefore I shall go on to the next thing I propos'd, to take a view of the Authority of Kings *de facto* by Statute Law. And here I shall begin where I ended under the foregoing Head, with the Legislative Power of these Kings; and if I shall make it appear, that Kings *de facto*, as well by Statute Law, as Common Law, have the Legislative Power of this Realm; This Argument will be of it self Decisive, for nothing beneath the Sovereign Power can give Laws to a Community: The Legislative Power being in all forms of Government Essential to the supreme Power (in a Monarchy to the Regal Power) and inseparable from it. And therefore those Words in the dying Patriarch's Blessing, *That the Scepter shall not depart from Judah, nor a Law-giver from between his Feet till Shiloh come,* are, as Bishop Sander-son hath observed, a Prophetick Description, that his Tribe should be advanced to the Regal Dignity; the Scepter being the known Ensign, and Legislation the Highest Prerogative of Regal Power. Now Kings *de Jure*, and their Parliaments, have Recited the Laws made by Kings *de facto* and their Parliaments, in such a manner, as acknowledges the Validity of their Laws, and Them to be Legislators, of Equal Authority with Themselves, or any of their Progenitors of Undoubted Right.

To this it has been Objected. *That a King de facto, as Richard the III'd's Acts are Legal, not by the Authority of those that made them, but by the Allowance of subsequent Governments, Lawful Kings and Parliaments, by reciting them in their Statutes, and suffering them to be pleaded in Westminster-Hall, have given them the Strength of Immemorial Custom and Common Law. Kings de Jure were willing that Richard's Acts should pass for Laws.*

As this Hypothesis is *not supported* by any Authority; so it seems to be a *Stranger* to our Constitution; *Inconsistent* with it self; contrary to fact; and is entirely *confuted* by these Recitals themselves.

It is a *Stranger* to our Constitution, in which Customs are sometimes by Acts of Parliament turn'd into Statute Law; but not Statutes, into Common Law or Custom.

It seems to be *Inconsistent* with it self; for if Kings *de jure*, by Reciting the Statutes of Kings *de facto*, and suffering them to be pleaded, gave them their Authority; then it is not true, that they received their Authority from Immemorial Custom. And if they acquired their Strength by Immemorial Custom, then they had it not from the Recital and Allowance of these Kings.

Again

Again, That they did not Receive their Authority from the Recital of *de Jure* Kings is evident, in that those Statutes of Kings *de facto*, which are not cited by them, are of Equal Force with those that are.

And if they had received their Authority by the Strength of Immemorial Custom, they would not have been in Force till after a long tract of time, and yet it is certain they were pleaded as Laws in force, some of them in a little time after they were made, and others a long time within the Memory of Man. But in truth, the longest Tract of time will not make that a *Statute* of the Realm, which *ab initio* was no Statute of the Realm; nor will the allowance of Lawful Kings, or their *being willing that Richard's Acts should pass for Laws*; make them so if they were not Statutes before, they must be enacted in a Parliamentary way before they can be such.

It is contrary to fact; for as the Laws we are speaking of have been in force ever since they were enacted, so they have always been pleaded in *Westminster-hall*, not as *Immemorial Customs*, but as *Statutes* of the Realm, and been constantly cited in all our Acts of Parliament, not as common Law, but as Statutes of the Kingdom, made by such Kings in their Parliaments holden at *Westminster*, or elsewhere, in such a Year of their Reigns:  
Whereas

Whereas when they recite any part of the Common Law they recite it in a very different manner as the 27 of *Henry the VIII. Ch. 10. Whereas by the Common Laws of this Realm, Lands, Tenements, &c.*

But nothing more effectually confutes this notion of these Laws receiving their Authority from being Recited than a View of some of these Recitals themselves, without which we shall but talk without Book. Now the *Manner* in which they are Recited evidently shews, that those Kings and Parliaments did not Recite them to *make* them Laws, or to *Confirm* them, but because they *were* Laws *already* in force, and for no other reason.

3 of *Henry the VII. c. 3.* Repeals part of the 1 of *Richard the III. c. 3.* which had given Power to one Justice of the Peace to admit Prisoners to Bail, in these words, *Where in the Parliament holden at Westminster the first Year of Richard, late in deed and not of right, King of England the Third; It was Ordained, and Enacted, among other divers Acts, that, &c. Wherefore the King, with the Advice and Assent of the Lords Spiritual and Temporal, and at the Prayer of the Commons in this present Parliament assembled, That the aforesaid Act giving Authority and Power in the Premisses, to any Justice of Peace by himself be, in that behalf, utterly void*  
and



and of none effect, by Authority of this present Parliament.

We may hence observe first, that tho' *Richard* is styled *in deed*, and not of right King of *England*, yet they acknowledge that he *Enacted Laws*, and that his Acts of Parliament gave Authority and Power in the Premises.

2ly, That notwithstanding there were some Abuses committed under colour of this Law, as *Henry* the VIIth's Statute Recites, yet the Abuses could not be Redressed, nor the Law annulled, but by a like Authority of King *Henry* the VII. and his Parliament.

3ly, That so much of *Richard's* Statute, as was not Repealed, continued in it's Original Force.

21. of *Henry* the VIII. c. 16. Against Aliens occupying their Trades, without paying like Charges with others in these Words, *where notwithstanding many good and necessary Statutes and Acts of Parliament have been published, ordained, and made, and especially one in the first Year of King Richard the III. and the other being made in the first year of the Reign of our dearest Father of Noble Memory, late King of this Realm, and in the 14th and 15th year of our own Reign concerning Strangers, Artificers, the said Strangers and Artificers*

*Artificers nothing dreading the said Statutes ne the Penalties therein contained, &c.*

Doth Henry the VIII. make the least Difference in the manner of citing the Statutes made by King Richard, and those made by his Father and Himself? If we can believe he cited his Father's and his own Laws, in order to confirm them, we may then believe he cited Richard's for the same purpose. But if he cited his Father's and his own, because they were in Force already, he alledged Richard's for the same Reason.

28 of Henry the VIII. Ch. 14. Enforces a Statute of King Richard the III. against some Abuses. *Whereas in the Parliament holden at Westminster, in the first Year of the Reign of King Richard the III. among other things it was establish'd and enacted, that &c. Nevertheless great Deceit is daily used in selling of Wines and Oyls. For Remedy whereof, it is enacted by the Authority of this present Parliament, that the said Statute and all other Statutes made for true gauging and measuring of Wine, &c. Which Statutes before this time be not repeal'd, or expir'd, shall stand in their Strength and Virtue, and be put in due Execution according to their Tenor and Effects in every Behalf.*

We may observe this Act of King Henry the

the VIII. declares, that this Statute of King *Richard*, as well as those other Statutes of King *Edward* the III. &c. referr'd to, was not before this time repealed, nor expired, which Words plainly signify, that it was in Force *before this time*, and therefore did not receive its Force from this Recital.

Nor secondly, could it receive it's Force from Custom, for the Abuses it seems were so great, that Custom was rather against the Statute than for it.

Thirdly, The Act expressly says, this Statute of *Richard*, as well as those others, shall stand in their Strength and Virtue, which is as much as to say, that they had an Original Strength and Virtue of their own, derived from their proper Legislators, and consequently not from this Citation.

32 of Henry the VIII. Ch. 16. The King our most Sovereign Lord calling to his blessed Remembrance the infinite Number of Strangers and Aliens. --- Remembring also the manifold Acts, and good Estatutes have been heretofore made, as well by his own most noble Progenitors, as by his own most Royal Majesty, for Reformation of the same in sundry and divers Parliaments, that is, viz. first, in the first Year of the Reign of King *Richard* the III. where it was enacted that, &c. and whereas also in the 14th and 15th Years of the Reign  
of

of our Sovereign Lord the King that now is, it was enacted that, &c.

14 of Car. the II. Ch. 13. Against the Importation of forreign Manufactures, *contrary* (saith the Act) *to several Statutes made in the first Year of King Richard the III. in the third Year of King Edward the IV. in the 19. Year of King Henry the VIII. and in the 5th Year of Queen Elizabeth.* Here we see King Richard's Laws put in the same Rank, and acknowledged by Two Kings *de jure*, King Henry the VIII. and King Charles the II. to be of the *same Authority* with their own; and will any Man say that King Richard's Laws are cited, because they *want Authority*, and theirs because they *have Authority*? That his Laws are alledged in order to be *made Laws*, and theirs because they are *Laws already*? Which is to make the same Words, pronounced at the same time, and in the same Respect, to intend the most different things in the World, when there is no reason to be given, why any of those Laws were cited at all, but because they were Laws in Force antecedent to that Citation.

The Objector confin'd us to Richard the III's Laws, because of all our Kings, he'll give up none but him for a King *de facto*. However, we may observe, that altho' Edward the IV. cites the Statutes of Henry the IV.

IV. V. and VI. under the Titles of Kings indeed, and not of right, yet at the same time he owns them to be Legislators, and their Laws to be of *equal* Force and Authority with the Laws of any of his Ancestors, or with his own.

Thus 14 of *Edward* the IV. Ch. 2. Recites at large a Statute made the 9th of *Henry* the V. for the Protection of all Persons, that should go with the said King into *France*, or were there in his Service, from being non-suited at the Assizes, &c. whilst they were absent, which Act was to continue till the first Parliament after the King's Return into *England*. After this Recital King *Edward* the IV. and his Parliament enact, that the same Order and Protection shall be observed, and be as available for all manner of Persons that should pass into *France* with him, as it was for such Persons which did pass over the Sea, with the said late King *Henry* the V. and that all such Persons as shall now pass over the Sea with our Sovereign Lord the King, shall have and enjoy in every point, all manner of Advantages, as the said Persons to passing over the Seas, with the said late King had, should have had, and might have had, by the said Statute.

This Act of *Henry* the V. expired at the next Parliament that was holden after his Return,

Return, and therefore could not derive its validity from immemorial *Custom*. And as it expired long before this Recital of it by *Edward* the IV. it could not receive from the Recital that *Force*, which expired before the *Recital*, and yet *Edward* IV. declares the validity of that Statute during the time for which it was made, to be equal to this made by himself, and challenges no more Authority for his *own* Law, than he acknowledges *that* had.

Had Kings *de jure*, saith the Objector, *declar'd explicitly, that a King de facto had the same Legislative Authority with themselves, this would have been satisfactory*. So many Kings *de jure* introducing Kings *de facto*, under the same Characters of Legislators with themselves, and their Progenitors; acknowledging *Their* Statutes when they cite them to be of *Equal* Authority with their *Own*, or with those of their Progenitors, is in *truth and effect* the same.

If it should be replied, with respect to the Statute last cited, that *Henry* the V. was, by the *Submission* of the House of *York*, a King *de jure*, this will not affect the Argument; because he was not so in the Opinion of the Legislator *Edward* the IV. who calls him a King *in deed* and not of *right*, at the same  
time

time, that he so fully asserts His Legislative Power, as to make his *Own* but *Equal* to it.

Instances might be given of Statutes made by Kings *de jure*, in matters of the greatest Importance to Government, and where the Prerogative has been concerned, that have been afterwards Repealed by Kings *de facto*, and have stood Repealed ever since ; and no *Authority less*, than that which *made*, can *Repeal* a Law. Thus the whole Parliament holden 21. of *Richard* the II. is Repealed 1 of *Henry* the IV. Ch. 3. Thus the Statute of *Richard* the II. which had multiplied the kinds of Treason stands Repealed by the 1 of *Henry* the IV. Ch. 10. which has reduced Treasons to the Old Standard of the 25 of *Edward* the III.

Instances might be given of Laws made by Kings *de facto* in favour of the Subject, which have afterwards been intrenched on by the Prerogative of a King *de jure*, which *Intrenchment* hath been declared by a King and Parliament *de jure*, to be against *those Laws* and Statutes of the Realm. So far is the *Will* of a King *de jure*, or *Custom* from giving such Laws their Authority, that the *Awards and Proceedings* of a King *de jure*, with some *Custom* on his side, were not able to controul those *Laws*, but have been de-  
 D

clared *Illegal*, when they have been contrary to them.

How easy is it to give an Historical Account of the Legislative Authority of our Kings, that have reign'd without an Hereditary Title? Were not *William* the I. and *Henry* the I. &c. famous Legislators, and yet not Hereditary Kings? No more was *Henry* the III. himself, when he granted the great Charter in the 9th Year of his Reign. And therefore when the Objector would give *the Statutes of Kings de facto, the Force of immemorial Customs*, which we see is not true in Fact; may it not be much more truly affirmed, that the Legislative Authority of Kings *de facto* has the *Prescription* of many Ages, has been ever acknowledged in this Realm, thro' all the Successions of our Kings and Queens, and thro' all the Revolutions of Government, not only since the *Norman*, but in the *Saxon* times also? As appears from other Instances, as well as the Authority of *Edward the Confessor's* Laws, which were held almost sacred, tho' he was no more than a *de facto* King, so that the Authority of such Kings is own'd by our Constitution, and woven into it long before the Statute of the 11 of *Henry* the VII.

As to the *Allowance* which he conceives was given to *Richard's* Laws, because there was no Claim set up against him. It may be answered,



answered, if he means an *Allowance* that gave Authority to *Richard's* Laws, it is pure Imagination, as appears from what hath been already said. Secondly, A *Nonclaim* makes no great difference in his case, as must be own'd by the *Objector* himself, who hath given him up for a *de facto* Man in the worst Sense; and worse than that, a *Claim* set up against him, would not have made him. And yet thirdly, this *Nonclaim* seems to be a Mistake, for on the one side *Henry* the VII. when Earl of *Richmond*, put up a *Claim* against him, as appears from 1 *Henry* the VII. ch. 3. in *Rastal's* Collections; and when he prevailed against *Richard* in the Pursuit of his *Claim*, he yet acknowledged the Authority of his vanquish'd Rival's Laws; and on the other side *Edward* the IVth's Daughters fled to Sanctuary, to secure their Titles and their Lives. I come now to the *Attainders*, upon which I wonder this Gentleman lays so great a Stress, since he cannot believe those *Attainders*, either made or proved the Persons *attainted* not to have been *Kings* and *Legislators*, whilst they exercised the Regal Power, when the Instances he himself gives of the mutual *Attainders* of *Henry* the VI. and *Edward* IV. prove the contrary. For notwithstanding the first *Attainder* of *Henry* the VI. I know, he acknowledges him to be a King and a Law-giver, and *Edward*

the IV. to have been the same in his Turn, notwithstanding the Attainder, that afterwards passed against him by *Henry* the VI. And the second *Attainder* of *Henry* the VI. by *Edward* IV. proves no more than the first, and leaves the Cause entire to be examined by the Merits of it. Not to mention, that *Edward* the IVth's Attainders of *Henry* the VI. were reversed and annulled, and *Henry* the VIth's † Title restored by Act of Parliament in the first Parliament of King *Henry* the VII. However, he that owns *Henry* the VI. and *Edward* the IV. to have been Kings and Legislators, maugre those subsequent Attainders, has no reason to draw such a consequence, as he doth from their Language and Expressions which as well as some of the Attainders themselves, seem to be Stretches beyond Law, in the Heat of the Victor's Rage against his Rival, and are no more to be drawn into Consequence or Argument, than some of the Executions on the Scaffold without Process or Form of Law, in the Bloody Contest between those Two Houses.

And altho' *Henry* the VII. as the *Objector* says, in his *Attainder* of *Richard* the III. called him only *Duke of Gloucester*. It is certain

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† 1 *Hen VII.* 16. Entituled *Restitutio N. Henrici sexti* in the unprinted Rolls.

in his sedater Acts, and after this Attainder, he always gives him the Regal Title, styling him *Richard late in deed, and not of right, King of England*; and all succeeding Kings in their Acts constantly give him the Title of King of *England*, without that or any Abatement: Nay, in *Henry* the VIIth's Courts of Judicature, as appears from the Cases I have cited above, and from a great many more I could produce, He is stiled King *Richard* the III. without that Addition.

'Tis certain farther, that the *Attainders* of their Persons did not *disanul* their Laws (which two Things the Objector seems to confound) for *Edward* the IV. owns the Authority of *Henry* the VIth's Laws, notwithstanding his first and second Attainder; and so likewise would the Authority of those Laws, which *Henry* the VI. made on his Readeption of the Regal Dignity, have been owned, if they had not been Repealed by *Edward* the IV: For these Statutes made in the 49 of *Henry* the VI. did not sink of themselves, as some have imagined, and urged for an Argument; but were Repealed and Reversed as my Lord Chief Justice *Coke* says; for *Edward* the IVth's Act doth not *declare* them void, but *ordain and establish* them to be void, as may be seen in *Rastall's* Collections.

This is a sufficient Answer to the Argument against King *Richard's* Legislative Power, drawn from his Posthumous Attainder, and the Language of it, and which without this Answer would have been no Confutation of those Undeniable Proofs that have been given of his Legislative Authority, from the Acknowledgment of Legislators, whom the *Objector* owns for such. To which may be added two famous Instances more, wherein the *Validity* of King *Richard's* Laws was own'd, in a most solemn Manner by King *Henry* the VII. and that very Parliament that attainted him, as well as by all the Judges of the Kingdom. Of which we have this account in the Year Books.

The first is the Method that was taken by the Advice of all the Judges, for the Reversing *Richard's* Act of Parliament that had bastardized *Edward* the IVth's Children.

† In Hilary Term in the first Year of *Henry* the VII. All the Judges in the Exchequer Chamber on the first day of the Term, by the King's Command, consulted about the Reversal of the Bill and Act that bastardized the Children of King *Edward* the IV. and *Eliza-*

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† De Termino Hillarii, an. 1. Henrici VIII. f. 5. Toutes les justices en l'eschequer chamber 1. die Termini par le Command le Roy Commintrent par le reversell del bill & act que bastard les enfans le Roy E. IV.



not be taken off the Roll, without an Act of Parliament for the Indemnity of those who had the Records in their keeping; but afterwards all was discharged by Authority of Parliament.

The Second is the Order that was taken for Reversing the Acts of Attainder passed by Richard the III.

† In Michaelmas Term in the 1 Year of Henry the VII. a Question was put to the Judges, what Order shall be taken in this Parliament to Repeal certain Attainders, forasmuch as several Members of Parliament were attained. Memorandum, that on the first day of the Parliament of King Henry the VII. viz. on the 7th of November, in the first Year of his Reign, the Judges in the Chamber, call'd the Exchequer Chamber, agreed, that all

en leur garde qui fueront assente, & puis toutes dischargedes il fuit par auctoritie de parlement.

† D. Termino Michaelis anno 1. Henrici VII. Un question fuit move des Justices quel Order serra en ceo Parlement de proceder de adnuller certain atteinders Entaunt que plusours que fueront en le Parliament fueront atteintes. Memorandum quod 1. die Parliamenti regis H. VII. videlicet 7. die Novembris anno regni sui 1. Justiciarii in Camera vocata le Escbeker chamber accorderont que toutes ceux queux those

those Persons who were attainted, and were chosen Knights of the Shires, or Citizens, or Burgeses to this Parliament, that this Act of Attainder shall be first repealed, and annulled; and that the attainted Persons themselves shall not be in Parliament at the Reversal of the Act, and forthwith, when the Acts of Attainder against them shall be reversed and annulled, that all and every one of them, that is to say, the Lords and Commons shall come and take their Places, and then proceed legally, and as legal Persons. For those that are attainted, cannot be legal Judges. And then a Question was put, what shall be said for the King himself, since he is attainted also; and after consulting to-

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fueront atteintes & fueront nommes chevaliers des counties ou citizens ou Burgesis a ceo Parlement que ceo act de atteinder serra primes revoke & adnulle. Et que eux mesmes atteintes ne serront en le Parlement at reversell de l'act, & tantost come les actes de atteinder vers eux fueront reversees & adnullees que eux toutes & chescun de eux cest assaver Seignours & comeynes viendront en leur lieux & donques procedont loialement & per loyals parsons, qar il nest convenient que ceux que sont atteintes serront loiales juges; Et donques fait move un Question que serra dit pour le Roy mesme pur ceo q. il fuit atteint, & gether,

gether, they all agreed, that the King is a Person able and discharg'd of any Attainder eo facto, that he takes the Regal Dignity upon him, and is King. Townsend said that King Henry the VI. upon his Readeption, held his Parliament, notwithstanding he was attainted, and the Attainder not reversed. And the other Judges said, that he was not attained, but disabled from his Crown, Kingdom, Dignity, Lands and Tenements: and said, that eo facto, that he assumed the Regal Dignity and was King, all this was void. And so in this Case the King can Enable himself, and has no need of any Act to reverse the Attainder.

Here are Acts of Parliament made by Richard, which the Objector will easily grant

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puis Communication ewe entre eux tous accorderont q. le Roy fuit person able & discharge dascun atteinder eo facto que il prist sur luy l'reign & este Roy. Town- dit que le Roy H. VI. en son readeption seignoit son Parlement, & uncore il fuit atteint & ne fuit reverse. Et les autres justices disoient que il ne fuit atteint mes disable de son Coron reign dignite terres & tenements, & disoient que eo facto que il prist sur luy le royalle dignite il este Roy que tout ceo fuit voide, & issint icy que le Roy puit luy mesme Enable & ne besoign ascun act de le reverseil de son Atteinder.

that



that *Henry the VII. was not willing should pass for Laws*; and yet the Validity of these Acts was acknowledged, not only by all the Judges of the Realm, but also by the King and Parliament, who accordingly passed an Act to reverse them, before the Persons attainted could sit in Parliament.

These Acts of Attainder subjected the Persons attainted, to the Penalties of *High Treason*, tho' that Treason was nothing but conspiring, or bearing Arms against the late King, when in possession, for the Service of the King, who was now on the Throne: And yet the Judges, who had the Administration of the Laws, under the present King, were so far from acquitting them of this Treason, that they declar'd they were not *legal* Persons, and therefore subject to the Penalties of it, till a *new Law* was made to relieve them.

Had King *Henry the VII.* and his Parliament, had the same Notion of a King *de facto's* Acts, which this Gentleman hath, they would never have put the Question to the Judges *What Method should be taken in Parliament to reverse Richard's Acts of Attainder*; or had the Judges known any thing of this Notion, and been perswaded it was *Law*, they would have answer'd in this Gentleman's Language, *that Richard was not le Roy, but only Duke of Gloucester, that he had*

no Right to send out Writs for Elections, and by consequence the Two Houses being illegally convened, could have no Authority to vote and pass Bills; and having not the Legislative Authority, their Acts of Attainder, as well as all their other Acts, were so many Nullities. That to repeal them, and for the Persons attainted not to take their Places in Parliament, till their Attainders were repealed, would be to acknowledge the *Validity* of his Acts and his Legislative Authority.

And truly, considering how odious Richard had rendered himself to the whole Nation, to the Friends of the House of York, as well as to those of the House of Lancaster, and what a mortal Hatred Henry the VII. bore to him, and his Memory; considering he was now safe in his Grave without Posterity, or Friend left behind him to revenge his Quarrel; and considering the very Reversal of these Attainders, was, as my Lord Bacon observes in his History of Henry VII. a *tacit Reflection on the King's Party*, the Judges were, without doubt, well enough disposed to have given, and the King and Parliament to have received such an *Answer*, if the *Constitution* would have born it; nay, they could have given *no other*, if they had had the same *Notion of the Constitution*, which this Gentleman hath.

But

But how different is the *Answer* which they gave? An *Answer* which expressly and fully own'd the *Validity* of King *Richard's* Laws, and his *Legislative Power*, viz. That the Acts of Attainder, pass'd in King *Richard's* Parliament, must be repealed by King *Henry* the 7th's Parliament; and that not *ex abundanti Cautelâ*, but because the Persons attainted by King *Richard* were not legal Persons, nor could sit in Parliament, untill their Attainders were reversed. And there can be no reason given for this unanimous *Resolution* of all the *Judges* of the Kingdom, and of the Proceedings of the *King* and *Parliament*, perfectly agreeable to it, but that they all knew, the *Constitution* required it.

The *Resolution* of the *Judges* is as remarkable upon the other *Question*, that was put concerning the King himself, who was likewise attainted: That the King is a Person able and discharged of all Attainders and Disabilities ipso facto, that he assumed the Regal Dignity and was King. Of which I need say no more here, having already made a remark upon it, except it be that this Maxim of the Law has not only the *Authority* of the *Judges*, but also of the *King* and *Parliament*, who proceeded agreeably to it, in not Reversing the Attainder of the King, when they Reversed those of the Subjects: And by the way it furnishes

shes us with a new Argument for the Legislative Authority of the King for *the time being.*

Thus we see by the Repeal of the Act, which bastardized Edward the IVth's Children, that Richard's Acts affected those, who by Proximity of Blood, had a better Title to the Crown than himself. His Acts are owned to be *valid* against the Heirs of the House of York, as well as that of Lancaster; in short, against *every Person*, but the Person who became King, after he became so, and then they were all *ipso facto* void.

But had the Lady Elizabeth assumed the Regal Dignity, instead of Henry the VII. this Act of *Illegitimation*, need not have been reversed, no more than Henry the VIIIth's Attainder: For as his Attainder *was*, so her *Illegitimation* would have been, *ipso facto* void, had she been Queen.

Thus the Act that illegitimated Queen Elizabeth, was never reversed, by Sir Nicholas Bacon, the Lord Keeper's Advice, founded on this antient Maxim of the Law, that the Crown entirely takes away all manner of Defects, † as Camden relates it in the History of that Queen.

† *Furisprudencia Anglica jam olim pronunciabat Coronam semel susceptam omnes omnino defectus tollere.* Camden p. 10.

But

But besides the Consequence, that immediately follows from this Resolution of the Judges, and the Parliament's Proceedings thereupon, it furnishes us with a new Answer, to the Argument drawn from the Attainders pass'd against *Henry the VI.* and *Richard the III.* for if an *Antecedent* Attainder will not affect the Prince attainted, in the Exercise of the Regal Power *subsequent* to it, then certainly a subsequent *Posthumous* Attainder, cannot affect a Prince's *Past Exercise* of the same Regal Power.

It may not be amiss here to take Notice of another Objection, which is, that these Princes sometimes attainted some of the Leaders of the opposite Party, for adhering to their Rivals. But when they did this, their constant way of proceeding against such Persons was, by Attainders in Parliament *ex post facto*, and not by Indictments in the ordinary Course of Proceedings; which shews, I think, at the same time, that to serve the King in Possession was not a Fault, nor could be punished as such, by the Laws that were then in Force. But to serve *against him*, was, in so much that *I Henry the VII. ch. 6.* a Pardon was enacted in Parliament, to indemnify those, who fought on his side against *Richard III.* Those who fought for the King for *the time being*, wanted no Act of Parliament to indemnify

indemnify them, nor had they any. King *Henry* the VII. indeed to quiet their Minds, passed a Pardon for them under the great Seal. But those who fought against the King in Possession, tho' in Pursuit of *Henry* the VIIth's Right, as it is worded in this Act, did not think themselves safe, till they had their Pardon passed in Parliament for it.

There is indeed no mention of Treasons in this Act of Pardon; no more is there in that of the 1 of *Edward* the III. or the 1 of *Henry* the IV. which were Acts passed for the Pardon of those, who fought for *Edward* the III. against *Edward* the II. and for *Henry* the IV. against *Richard* the II. and seem to have been Precedents for this Act of *Henry* the VII. However, we have seen, that the Persons who were attainted of Treason, for joyning with *Henry* the VII. against *Richard* the III. did, in the Opinion of all the Judges, remain under those Convictions of Treason, and subject to the Penalties thereof, even after *Henry* the VII. was in Possession, till their Attainders were reversed by Authority of Parliament.

But now on the other side, did the King in Possession, or his Parliament, or the Parties concerned, ever think an Act of Pardon was wanting for those who fought for Him, against a Person out of Possession, whatsoever

ever Title he had, or pretended to have? Can there be one Instance given of this, in all our Laws or History?

### C H A P. III.

*The most material Objections to the Legislative Authority of these Kings answered.*

**A**N Objection has been made, to the Legislative Authority of Kings for the time being, from the 1<sup>st</sup> of Edward the IV. ch. 1. which declares what *judicial Proceedings* of the *Three Henries* should stand good. The Objection is, that *some Acts of Parliament, relating to the Town of Shrewsbury, and to the founding of some religious Houses, are there confirmed*; whence they infer, that *the rest were in the same Condition, and wanted the like Confirmation*. But since the numerous Acts of Parliament, that were made by those Kings, during the Space of Threescore Years, have been always held valid, tho' never confirm'd; they ought to have made an Inference directly contrary, That those *Acts relating to Shrewsbury, and some Religious Houses, tho' confirm'd, (thro' the Caution probably, & at the Desire of those, that were concerned in them,) did not however stand in need of that Confirmation,*

mation, any more than all the other Acts of those Three Reigus, which have been valid, and (except such as have been repeal'd) are *valid at this Day, tho' never confirmed.*

So likewise from *Bagot's Case*, it has been made appear, that those Judicial Proceedings, and Regal Acts of the *Three Henries*, which were not confirmed by the aforesaid Act of *Edward the IV.* were yet in his own *Courts*, held as *good and effectual*, as if they had been confirmed by him.

Others say, that the *Laws of Kings de facto* are suffered to continue, because they are, or may be, for the publick Good.

How then came such *Laws* as were not *beneficial*, to continue in force? And yet we see that the *Laws of Kings de Facto*, which have been found inconvenient, and against the publick Good, have continued in *Force*, till they were repealed, as well as their most *Beneficial Statutes*. And as for their *Laws*, that were for the publick Good, if they were not *Laws* by Virtue of the Legislative Authority of those that made them, the suffering them to continue, will not make them so. They must, as I have said, all be *enacted*, or *confirmed*, in a *Parliamentary way*, before they can be *Laws*. These Persons, I believe, will not say, that the publick Good will make *Laws*, least it should be made to serve some



some other Purposes, which they are not willing to allow. It is indeed for the publick Good, that *Good Laws* should be continued, but not upon an *illegal* and *defective Authority*, for that would be a publick Mischief. Nor is there any Necessity for it: One Act of Parliament made (for Example) by *Edward* the IV. would have been sufficient to have *confirmed*, all the *beneficial Statutes* of the Three *Henries*, and to have *declared* all the rest *void*: And there can be no reason given, why Kings *de jure* never did this, but because they knew, they were valid without it.

Having mentioned the Statute of 1 of *Edward* the IV. ch. 1. where we *first* meet with the famous Distinction of Kings *in deed*, and *not of right*, give me leave to repeat an Observation, I have made already, that *before* this time, tho' *others* pretended a better Right to the Throne, than the Persons that possess'd it, yet they never assumed the *Regal Title* against the *Regnant King*, nor did the Constitution ever know any other King, but the *King* that possessed the Throne.

And since the Kings of the House of *Lancaster*, had been Sixty Years in Possession of the Kingdom, and the Heirs of the House of *York*, had almost all this time liv'd as *Subjects* under them, without setting up any

Claim; Obe<sup>y</sup>'d their Summons to Parliament; and taken *Oaths* of Allegiance to them, particularly *Richard* Duke of *York* (who was the first of that House, that put in his Claim to the Crown,) it must be own'd that the *Lancastrian* Kings, at least *Henry* the Vth, and Vith, were not only *in deed*, but of *right* Kings of *England*; and therefore I may observe in the second place, that the *first time*, this Distinction of Kings *in deed*, and not of *right*, was ever used, it was *misapplied*.

Thirdly, That altho' *Edward* the IV. calls the Three *Henries*, no more than *Kings in deed*; yet he doth not *now* pretend that his Ancestors were Kings of *Right*, during the time the Three *Henries* were Kings *in deed*.

Lastly, it may be observed from what has been said, that, even since the time this Distinction has obtained, the *Sovereign Authority* of the English Government, as well *Legislative* as *Executive*, hath been ever acknowledged, both by our *Laws*, and *Lawyers*, to be lodged in the King *for the time being*; and the Allegiance of the Subject to be due to him, and to him *alone*.

It is objected farther, that when *Richard* Duke of *York*, put in his Claim in † Parliament in the 39 of *Henry* the VI. The Lords up-

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† *Parl. Roll.* 39. H. 6.

on hearing the Cause betwixt the King and him, declared, that *his Title could not be defeated.*

In answer to this Objection, we must take Notice, that altho' the Lords knew well enough the Duke of York's Pedigree, yet they say, *this matter was so high, and of such Weight, that it was not for any of the Subjects to enter into Communication thereof, without the King's high Commandment, Agreement, and Consent had thereto.* Whereupon they go to the King, who being not able to help himself, gave way to their hearing of the Cause, betwixt Himself and the Duke. After this, the Lords order the Judges, to offer what they could in Maintenance of the King's Title, who excuse themselves, saying *It hath not been accustomed to call the Justices to Counsel in such Matters, the Matter was too high, and toucht the King's high Estate and Regaly, which is above the Law and passed their Learning, wherefore they durst not enter into any Communication thereof, for it pertained to the Lords of the King's Blood, and the Appa-  
 rage of this Land to have Communication and meddle in such Matters.* If the Judges excused themselves from meddling with the King's Title, as a Matter too high for them, whose Office was only to administer the Laws under him: And if the Peers would not under-

take to judge of the King's Title, without his Leave first obtained, tho' considering his Condition, this Application might perhaps be little more than Complement in them, and the King's leave only the Effect of the force he was under; yet from what the *Peers* did, as well as what the *Judges* said, it follows, that, according to their Opinions, to judge, or over-rule the Title of the Regnant King, must be much above the Sphere of *private Subjects*, and what no Government ever allowed. The Peers, after they heard what the Kings Attorney, and other Council could offer, for their Master's Title, declared, *That the Title of the Duke of York, could not be defeated.* Which how *partial* soever, was sufficient, after the King had submitted his Title to the Judgment of Parliament, to conclude private Subjects *then*: But has never been esteemed of Force to over-rule subsequent *Parliaments*, much less to justify *private Persons* to over-rule the Title of a Regnant Prince, and the Decisions of Parliaments *in their own times*, when they once have declared who has *Right*, and *who* has not *Right*, in a *disputed Succession*.

It is not without reason, that I have called this a *Partial Declaration*: For during the Space of 60 Years, that the H. of *Lancaster* had sat in the Throne, we never heard of such a Title in the House of *York*, as could not be defeated

ted till *this time*, when the King's Army was *first defeated*, the King himself a *Prisoner*, and the Parliament, tho' call'd in the Kings Name, yet not by *his*, but the *Duke of York's Order*: And when the Debates were awed with the Presence of a Victorious Prince, it is no Wonder that they ended in a Declaration, That *his Title could not be defeated*.

Otherwise they might have declared, upon the *Principles* of the Gentlemen, with whom we are disputing, That the Title of the *Duke of York*, not only *could be*, but *actually was* defeated by his long *Submission*; by *obeying Summons* to Parliament; and by *Oaths of Allegiance* to King *Henry the VIth.* particularly that which he took in the 29. Year of his Reign, in these Words, *I Richard Duke of York, confess, and be known that I am, and ought to be humble Subject and Liege-man, to you my Sovereign Lord King Henry the VI. and owe therefore to bear your Faith, and Truth, as my Sovereign Liege Lord; and shall do always to my Lives End, &c. I never shall any thing attempt by way of feat, or otherwise, against your Royal Majesty and Obedysance that I owe thereto, &c. †*

They must, I say, acknowledge the *Duke of York's Title* was defeated upon their

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† See the Oath at large in Strom p. 395.

own Principles: for when they are press'd with the Commands of Holy Scripture, *To render to Cæsar the things that are Cæsars, &c.* They think it a sufficient Answer, to say, that *Tiberius Cæsar* was a *Rightful* Governor. And when it is demanded, how he acquired a *Right* over the Roman Senate, and People, or the Romans a *Right* to the Government of *Judea*; They reply by the *Submission*, and *Oaths*, of the Roman Senate and People, to *Tiberius*; and the like Submission of the Jews, to the Romans. Let us then borrow their own Principles and Answers, and apply them to the present Case. Had not the Heirs of the House of *York*, as well as all the People of *England*, lived longer in *Subjection* to the Kings of the House of *Lancaster*, when this Declaration was made; than the Senate and People of *Rome*, had to *Tiberius*, and *Augustus* together, when our Saviour gave this Command? Have we not more *certain Evidence* of the Oaths, which *Richard Duke of York* took to *Henry the VI.* than we have of the *Truth*, of the *Lex Regia*, of the Romans; or of any Act of *Resignation* of the Regal Family of the Jews? And was not the forementioned Oath of *Richard Duke of York*, a more full *Recognition* of *Henry the VI.* *Right* and *Renuntiation* of his own Right; than the Oaths of the Jews, were to the Romans, or the Oaths  
of

of the Romans, to *Tiberius*? If all this be true, as it is, they must then confess, the Duke of *York's* Right was *defeated*, and *Henry* the VI. was a *rightful* King. If they will not, they must *never more* say, that the Rights of the Jews, and of the Roman Senate, were *defeated*, or that the Roman Emperors were *rightful* Governors. And so they will lose more, than they could gain by this Denial, and will be hard put to it for a Plea, to justify their own Practice against those Positive Commands of Scripture, that enjoyn Subjection.

But if these Gentlemen will abide by their own Answer, they must then acknowledge the Duke of *York's* Title was *defeated* upon their own *Principle*, notwithstanding this *Declaration* of Parliament: And so notwithstanding the same, might be defeated, as it *actually* was (tho' the Lords durst no more assert this, than the other) by the *Legislative Power* of the Realm, which had settled the Crown in the House of *Lancaster*. In short they must acknowledge this Declaration of Parliament proves *too much*, and therefore proves *nothing* at all.

Lastly, this Declaration of the 39 of *Henry* the VI. as well as the Acts of the 1 of *Edward* the IV. were repealed and annull'd by Act of Parliament, when *Henry* the VI. recovered his Throne: And altho' *Edward* the IV. forced him

him from it again, and attainted him; yet *Henry* the VII. in the first Year of his Reign, passed an Act of Parliament, wherein it is enacted, *that all Acts of Attainder, or Disablements, against the late King Henry the VI. to be void, annulled, and repealed, &c.\** So that the Force of all the former Declarations, and Acts of Parliament, against *Henry* the VI. is taken off by this last Act of Parliament, which restores his Title.

Lastly, It is objected, that the Confirmation of the Judgment of Parliament against the two *Spencers* & *Edward* the III. was repealed in the 21 of *Richard* the II. because it was unlawful his Father *Edward* the II. being then alive, and a Prisoner.

This Act of Confirmation of the Judgment against the Two *Spencers* & *Edward* the III. was not *declared void* in the 21 of *Richard* the II. but *repealed*, and therefore *valid*, until repealed.

Secondly, That Repeal of the Judgment against the Two *Spencers*, and the whole Parliament, (as I have already observed) of the 21 of *Richard* the II. in which it passed, was afterwards Repealed & *Henry* the IV. c. 3. Of all these Acts of Parliament relating to the two *Spencers*, My

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\* *Rel. Parl. 1. H VII. N. 16. Restitutio. H. VI.*



Lord Chief Justice Coke, gives this brief Historical Account.

*The Judgment of Parliament in 15 of Edward the II. against the Spencers was in the same Year by Act of Parliament Repealed. That Repeal was Repealed by Authority of Parliament in Edward III. That Repeal of Edward the III. was Repealed, 21 of Richard the II. and that of the 21 of Richard the II. was Repealed by Authority of Parliament in the 1 of Henry the IV. and so the Judgment against the Spencers stands in force, saith Sir Edward Coke, † so that this is so far from being an Objection, that it is a Proof of the Sovereign Legislative Power of a King *de facto*, and his Parliament; since they can repeal Acts, passed in Parliaments, holden under Hereditary Kings.*

Thirdly, All the other Acts of Parliament that were made in the 1 of *Edward the III.* whilst his Father was alive, were ever held for Laws of the Realm, and one of them cited as such 16 *Charles the I. c. 16.* about the Boundaries of Forests. *Whereas by Act of Parliament made in the 1 Year of the Reign of King Edward the III. &c.*

Since therefore the Authority of Kings for the time being is so fully owned by Hereditary Kings and their Parliaments, owned in the highest Act of Government, in their Le-

† *Instit. c. 11. s. 1. p. 25.*

gillation : Ought not this to conclude all Private Subjects ? Can they disown this Authority, without opposing their Private Sentiments to that, which themselves acknowledge to be the supreme Authority, and Judgment of the Kingdom.

Secondly, Since the Kings for the *time being*, with their two Houses of Parliament, have the Legislative Power, they must also have the supreme Power, the former being, as I have said, always Essential to, and inseparable from the latter. And therefore they can make any Laws, and do every thing that is within the Verge of that Power, for the Safety of the Kingdom, and of themselves.

Lastly, If the King, for the *time being*, hath, both by the Statute and Common Law, the Legislative Power of this Kingdom; then the Obedience of the Subjects, is due to his Laws ; and their Allegiance, which is no more than Obedience according to Law is due to his Person.

C H A P.

## C H A P. IV.

*The Allegiance of the Subject due to the King, for the Time being, by the Statute or Law of this Realm. With an Answer to the most considerable Objections.*

**B**UT the Allegiance which is due to the King in Possession, doth not only follow by consequence, from his being invested with the Legislative Power, but we have *express Statutes* for it. The first is the Statute of *Treasons* in the 25 of *Ed. III. c. 2.* Which Statute declares what Offences shall be adjudged *Treason.* And we have the Opinions of Two great Lawyers, my Lord Chief Justice *Coke*, and Lord Chief Justice *Hales*, (and no great Lawyer's Opinion, as far as I know, to the contrary) that by our *Sovereign Lord the King*, in this Statute, against whom these Offences are *Treason*, is to be understood only *the King in Possession of the Crown and Dignity*, though he be *Rex de facto, & non de jure.*

And truly, if we consider, that this Statute did not make *new Species* of *Treason*, but declare and fix those by *Statute*, which were before *Treason at Common Law*; and if we consider farther, that of the *Eleven Kings* that

that reigned from the Conquest, to *Edward III.* there were no less than *Eight*, who were *Kings de facto*, some through their whole *Reigns*, others in the beginning thereof, one of which Number, was *Edward III.* himself; and yet by the *Common Usage*, or *Law*, of the Kingdom, those Offences in the Statute, had always been esteemed *Treason*, and punished as such, when they were committed against those *Eight*, as well as against the *Three Hereditary Kings*: We may conclude, that as *Edward the III.* and his Parliament intended to declare those Offences *Treason*, which were so before by *Common Law*, or *Usage*; so by King in the Statute against whom these *Offences* shall be adjudged *Treason*, they must intend the King, against whom they were held to be *Treason* before, by *Common Law*, or *Usage*, which was always the *Regnant King*, altho' without an *Hereditary Title*, especially when the *Legislator* himself *Edward III.* was no other, in the Beginning of his *Reign*.

But we shall easily be determined to this Sense, if we consider farther, that from the Conquest to *Edward the III.*'s *Reign*, and for a 100 Years after, the Distinction of *King de facto*, and *King de jure* was not known; but the *Regnant King* was the *King*, and there was no other King but *he*. There were of-

ten others, that pretended a better Right to the Throne, than the Prince that was in Possession of it, and forned Alliances, and raised Armies to recover it. Thus *Robert*, the eldest Brother, set up his Claim, first against *William Rufus*, and afterwards against *Henry the I. Maud* against King *Stephen* : *Arthur* against King *John* : But in the mean time, they contented themselves with the Titles of Dukes of *Normandy*, &c. None of their Friends gave them the *Regal Title*, nor did they themselves assume it (no not the Heirs of the House of *York* some Ages after) against the King in Possession of the Throne and Kingdom, who alone was esteemed the *King*. And therefore, as those Offences only were declared *Treason*, by this *Statute*, which were so by the *Common Usage*, and *Custom* of the Realm : So by our *Lord the King* in this *Statute*, must be intended the *King in Possession*, since by the *Common Custom* and *Usage* of the Kingdom, He was the *King*, and there was no other King but *he*. Unless any one will run into so great an *Aburdity*, as to say, that for the greatest Part of the time from the *Conquest* to *Edward the III's* Reign, *England* was a *Monarchy*, without a *Monarch* ; and there was *Allegiance* and *Treason* ; but no *King* to whom one was *due*, and against whom the *other* might be committed.

Since

Since therefore *Treason*, can be committed only against the *King in Possession*, and the Constitution knows no other King but him, *Allegiance* can be due only to him. For *Treason*, which is the highest Violation of *Allegiance*, can be committed against none, but him, to whom *Allegiance* is due.

And so I come to the famous Statute of the 25th of *Henry VII.* c. 1. This Act hath lain under a great Prejudice, as if it introduced a *new Authority*, and a *new Allegiance*, not known before in our Constitution. But if a Law, that is made in Civil Matters, needed a Vindication, this is sufficiently vindicated by the foregoing Discourse, which hath proved, that the Authority of the King, for the time being, which this Statute secures, was ever acknowledged; and the Allegiance, which it declares to be due to him, was ever paid in this Realm, and both the one and the other justified by the *Common Law* and *Statute Law* of the Kingdom, in the Reigns of Hereditary Kings. So that this Act, is so far from being a *Breach* upon our Constitution, that it is agreeable to it. And therefore is drawn in such a manner, as made only in Affirmance of what was lawful before; for immediately before the enacting

Words

Words, it is expressly affirmed, and declared that it is not reasonable, but against all Laws, Reason, and good Conscience, that the Subjects, attending upon the King for the time being, in his Wars, or being in other Places by his Command, anything should lose, or forfeit; and the reason given for this, is because, says the Act, this is doing their true Duty and Service of Allegiance; and then it follows, be it therefore ordained, enacted, &c. In the enacting Part also, this Service and Obedience, to the King for the time being, is again stiled, the true Duty of Allegiance.

This Law never appears with so great Advantage, as after such a view, as we have taken of the Legal Authority, of the King for the time being; for it's Conformity to the Constitution, is a sufficient Answer to the Objections, that have been urged against it. However, it may not be amiss to give a more particular Answer, to the most considerable of them.

First, they have objected to the Authority of the Legislator Henry VII. as not being a King *de Jure*. Were this true, we have seen that the Kings for the time being, have ever been own'd for Legislators in our Constitution, and neither Common Law, nor Statute Law, do make, or allow any difference to be made, betwixt the Legislative Power of a King *de*  
F
*Jure*

*Jure*, and a King *de facto*. But a Learned Gentleman, who in his Remarks on this Statute, made this Objection, has since acknowledged that *Henry VII.* was a *Rightful King*. Indeed in his own, or his Wife's Right, he had all the Titles that could be to the Crown.

2ly, It has been objected, that this Act doth only *indemnify* the Subjects, for serving the King for the time being. It doth not indemnify them in that Sense, as to *indemnify* signifies, to exempt them from the Punishment due to a *Crime*; but as it signifies, to save them *harmless* for doing their *Duty*, if a Competitor should get the Throne; and to indemnify them after this manner, is to *justify* them: As the Act truly doth, by expressly declaring, *that, to serve the King for the time being, is their true Duty and Service of Allegiance*; nay, the Act further declares, *it is against all Laws, Reason, and good Conscience, that the Subjects should lose, or forfeit any thing for serving the King for the time being*; whereas were it a *Crime*, it would not be contrary, but *agreeable* to all these that they should suffer for it.

3dly, It has been farther objected, that this was a *Temporary Statute*, design'd only for *Henry the VIIth's* Reign. May we not make any Law, when it doth not serve our  
Hypo-



Hypothesis, Temporary as well as this? Is there any Expression, or Word, that determines our Allegiance, to any particular Person or Time? What can be more indefinite, than the King for the *time being*, which reaches to *all Kings* of this Realm, and *all times*? Besides what the Law requires, the *true Duty and Service of Allegiance*, is not Temporary, but must last as long as Government lasts. And what the Law provides against, it declares, as I observ'd before, to be *contrary to all Laws, Reason, and good Conscience*; and therefore the Law, was design'd to be of perpetual Obligation; unless *Reason, and good Conscience* are Temporary Things.

4thly, Another Objection has been formed upon the Duke of Northumberland's Case, who was condemned for commanding an Army against Queen *Mary*, notwithstanding his Plea, that he acted by a Commission from the Lady *Jane Grey*, under the great Seal. Which shews they had no regard to this Statute of *Henry VII.* since that Lady was *Queen de facto*.

It is to be observed first, That Queen *Mary* in a Letter She writ to the Lords of the Council Notified her Claim, and Required them upon their Allegiance, to Proclaim Her Title at *London*: That this Letter was Deliver'd to the Lords, not en-

ly before they had Proclaim'd the Lady *Jane*, but before they had Published King *Edward's* Death, or so much as acquainted the Lady *Jane* with their Design, to set Her up to succeed Him, as appears both from the Bishop of *Sarum's* History of the Reformation, and Dr. *Heylin's*. The latter has printed this Letter at large, in which there is a Passage that would induce one to believe, that She had been proclaimed somewhere, before She writ it.

But not to insist on this, I observe secondly that the Duke of *Northumberland* did not plead this Statute, nor indeed had he any Right to it. For being the Principal Author of this Revolt, he was by the last Clause of this Act, cut off from any Benefit of it. This Act was made for the Security of those, who submit to a *King for the time being*, after he is established; not for those that overturn Governments, who whatever they may plead for themselves, it can never be the *II. H. VII.*

Lastly the Lady *Jane* was never settled in the Throne, but till whilst the Duke of *Northumberland*, and his Faction, were struggling to thrust her into it against her own, as well as the Nation's Sense. Her Government was but in *feri*, she was not Queen *de facto*, She was no Lawful Queen, (as the Judges implied in their Answer to that Duke.) For She had no consent of the Estates, no Recognition by  
Act

Act of Parliament, as all those Kings have had, whose Regal Authority has been own'd by the Laws, without an Hereditary Title; and therefore has had no Place allow'd her, in the Succession of the Kings and Queens of *England*. This, by the way, may serve for a sufficient Answer to another Objection, that is drawn from the *1. M. c. 4.*

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C H A P. V.

*An Objection from the Act of Recognition the 1. of Jac. I. answer'd.*

**I**T is objected, that the *11* of *Henry* the *VII.* is virtually repealed, by the Act of Recognition, *1.* of *Jac. I.* which declares, and enacts, that the Crown Descended on King *James* the *I.* by *inherent Birthright, as the next and sole Heir, of the Blood Royal of this Realm;* and then they desire the King to accept this, as the first Fruits of their Loyalty to his Majesty, and to his Royal Progeny and Posterity for ever,

I answer first, that it is not pretended by those who make this Objection, that the *11* of *Henry* the *VII.* is expressly repeal'd by this, or any other Law. Nor is there any Reason to believe the Legislators design'd to repeal it by this Act of Recognition. For since the

Parliament knew that the supreme Authority, both Legislative and Executive, of the *Kings for the time being*, had ever been acknowledged at Common Law in the Courts of Judicature, and by the Acts of Parliament, of Hereditary Kings: That the Subjects of *England*, had always sworn and paid Allegiance to the King in Possession: And that a Statute of the Realm expressly requir'd this, and that the Crown, during this time, notwithstanding this, was held to be Hereditary: Since the Legislators, I say, knew all this, if they had design'd to have alter'd the Constitution, and laid a new obligation on the Subject, never to submit to any but hereditary Kings; It had been absolutely necessary for them, to have declared, and enacted, that the Subjects should never hereafter swear, or pay Allegiance to any but Hereditary Kings; that no Statutes, for the time to come, shou'd be valid, but such as were made by them; and that the *Act* of *Henry VII.* should be repealed and annulled: But since nothing of all this was done by them, it is evident, they had no design to do it: It is sufficient for us, they have not done it: For a Constitution is not to be alter'd; the whole Course of the Common Law to be inverted; and Statutes of the Realm repealed by Implication, and that Implication no better, than an ill-grounded Conjecture.

Indeed

Indeed this Notion, of a virtual Repeal, seems to proceed upon a double Mistake, First, That the I. *James* the I. hath made the Descent of the Crown, more Hereditary than it was before Secondly, That the II of *Henry* the VII. can have no Place in an Hereditary Kingdom. Whereas it is certain the Crown was Hereditary, before this Act of Recognition, as well as since, as might be proved from several Testimonies, if there needed any more than this Act of Recognition it self, which recognizes King *James* the Ist's Title to the Crown, as *being rightfully, lineally, and lawfully descended of the Lady Margaret, &c.* So that this Act is only declarative of the old Hereditary Right, and not introductive of any new Right, and without any Alteration, leaves the Constitution as it found it. And therefore since the Crown was Hereditary before the I. *James* the I. when the Objectors confess the II of *Henry* the VII. was in force (otherwise they could not say, it was then virtually repealed) they must also grant, that the II of *Henry* the VII. may have Place in an Hereditary Kingdom.

2ly, That it may, and actually had Place in such a Kingdom, in the Judgment of a King and Parliament, is evident, from their Acts: For after the Crown had been entailed

in the 1st Year of *Henry* the VIIth's Reign, on the Heirs of his Body, can we believe, that he designed by this Act of the 11 of his Reign, to break the Hereditary Succession of his own Children? Undoubtedly he did not: And therefore he and his Parliament did believe, that a Law which required the Allegiance of the Subjects to the *King for the time being*, might have Place in an Hereditary Kingdom; and so the 11 of *Henry* the VII. is as consistent with the Hereditary Act of the 1 *James* the I. as with the Hereditary Act of the 1. of *Henry* the VII: and the 1 *James* the I. is no more a virtual Repeal of the 11 of *Henry* the VII, than the 11 of *Henry* VII, is a virtual Repeal of the 1 of *Henry* the VII.

Wherefore as the 11 of *Henry* the VII. was not design'd to interrupt the Descent of the Crown, but to provide for the Peace of the Community, and the Security of the Subject, if the Hereditary Succession should happen to be interrupted: So the 1 *James* the I. which was to secure the *antient Succession*, was not design'd, in case that failed, to take away the *antient Provision*, which had been made for the Preservation of the Community, and the Safety of the Subject.

The Distinction is very obvious, betwixt our advancing one that is not the next Heir

to the Throne, and submitting to such a one when he is advanced, and possess'd of it. The first is unlawful by the 1 of *Jac.* I. and so it was before; and the latter is as lawful since that Act, as it was before; seeing that Act doth not meddle with it. The utmost, I think, that can be inferr'd from the 1 of *Jac.* I. is, that it is a Direction, and Obligation, on the States of the Realm, and on the Subjects upon the Death of the King, to recognize the next Heir (tho' the Word *Heir* is not express'd in the Act, when they speak of King *James's* Posterity.) But suppose the States should mistake the next Heir, or should place another in the Throne, or another should thrust him into it, and they Recognize him for King; (as the Legislators knew had been often done :) Doth this Act say the Subjects shall submit to none, but the next Heir? or shall none submit to him that possesses the Throne, as they knew they had always done? No such thing. Does it direct them what to do in this Case? Not that neither: And therefore it leaves them to that Course, which had been ever held through all such Revolutions of Government in this Realm; A course which had been warranted by the highest Authority in it; and which was afterwards enacted into a Statute, under King *Henry VII.* and not yet

yet repealed, but continues a Part of the Law of this Kingdom.

The Lawfulness of submitting to a Prince, whom it was Unlawful to set up, may be illustrated, and proved, from the Conduct of God's own People, to whom he had given a Law, *Deut. 17. 15. To set one from among their Brethren to be King over them, not to set a Stranger over them, which was not their Brother* : This made it unlawful for any Jew to contribute to the advancement of a Stranger to the Throne; and yet when Strangers got the Rule over them, they constantly submitted to them, without any censure for it; and when some of them made a Scruple of it in our Saviour's time, our Lord justified them, in their Submission to the *Stranger* that then ruled over them, the Heathen Emperor *Tiberius*.

Thirdly, It is acknowledged by some of those who make this Objection of a *virtual* Repeal, that notwithstanding this Act of Recognition, 1 *Jac.* the I. the Succession of the Crown may be limited by the Legislative Power; and since I have proved that the *Kings for the time being, with their Two Houses of Parliament, have the Legislative Power*; and are acknowledged to have it by *Kings de jure* and their Parliaments, even since

the



the 1 of K. *James I.* it undeniably follows, they can, notwithstanding the so often mention'd Act, transfer the Right of Succession, and the Allegiance of the Subject with it, from the Next to a Remoter Heir, which cannot be deny'd, without transgressing a Rule allowed by all Laws, † without distinguishing (where the Law makes, nor allows any Distinction to be made) betwixt the Legislation of a King *de jure*, and of a King *de facto*; without pulling our legal Constitution to pieces, which has the Legislative Power of such Kings *woven* into it; and without opposing, as I have often said, their private Sentiments to that, which they themselves confess to be the publick Judgment, as well as the supreme Authority of the Kingdom.

In the mean time, these Persons know there are others, who concur with them in disallowing the 11 of *Henry the VII.* but do differ however with them in the other Point, and deny, that the Limitation of the Right of the Crown, is within the Verge of the Legislative Power: and when they are press'd with the Statutes, made in the Reign of *Henry the VIII.* which empower'd him to limit the Descent of the Crown, and the 13 *Eliz. c. 1.* which makes it High Treason during the Queen's Life, and Forfeiture of Goods and Chattels after her Death, to say that an Act of Par-

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† *Ubi lex non distinguit, neque nos distinguere debemus.*

liament is not of sufficient Force to limit and bind the Descent of the Crown: They argue from the 1 of *Fac.* the 1. in the same way, and think it a sufficient Answer to say, that those Laws of King Henry the VIII. and Queen Elizabeth were virtually declared null and void, or virtually repealed by the 1 of James the 1. The Persons to whom I address this Argument do, I know, look on this Answer to have no Foundation. But I desire them to consider, what better Foundation they themselves have for their virtual Repeal of the 11 of Henry VII. by the 1 *Jam.* 1. than the former have for their virtual Repeal of those Statutes of Henry VIII. and Qu. *Eliz.* and to consider withal, how easy it is by virtual Repeals, to erect our selves into Legislators, and repeal as many Laws as we do not like. It is but to force a Consequence from a subsequent Law, and to say the Preceding Laws are not consistent with this Consequence, and are therefore virtually or consequentially repealed by it.

But this way of arguing is no where less allowable than in *Acts of Recognition*, in which Parliaments have ever been very liberal of their Expressions, as may be seen in the Act of Recognition of *Richard* the III. and those of *Queen Mary* and *Queen Elizabeth* compared together. So that we ought not to draw Consequences

quences from them, beyond the Express Letter of the Law; much less ought we to go about by such Consequences to alter the Constitution, and repeal Laws, which the Lawgivers never intended to Repeal. There is no more reason to believe K. *James* the I. and his Parliament, did design by this Act of Recognition, to Repeal the 11 of *Henry* the VII. than Queen *Elizabeth* and her Parliament, did by the Act of Recognition in the first of her Reign, which runs in very high Terms, declares *her lineally, rightfully, and lawfully descended of the Blood Royal of this Realm*; and then they oblige themselves, and their Posterity for ever, to the Queen and the *Heirs* of her Body, (whereas the 1 of *James* the I. is in more general and looser Terms to his *Royal Progeny and Posterity for ever.*) And yet, whilst this Act of Recognition was passing in Parliament, it was debated, whether they should not Repeal the Statute of King *Henry* the VIII. which had declared the Queen Illegitimate, as Queen *Mary* had before Repealed, so much of it as concerned herself. But this, as I have taken notice before, was judged to be unnecessary by the Lord Keeper *Bacon* (and the Queen and Parliament acquiesced in his Judgment) upon this Maxim, *That the Crown entirely takes away all manner of Defects.* So that in the Judgment of the Legislators, this Maxim

of the common Law of *England*, which is Equivalent to the Statute of the 11 of *Henry the VII.* has Place in an Hereditary Kingdom. And therefore we have no more reason to believe, that King *James* and his Parliament, did by the Act of Recognition, design to abolish this Maxim of the Law, or Repeal the 11 of *Henry the VII.* than Queen *Elizabeth* and her Parliament, who acknowledged it, at the same time, that they enacted the Crown to be Hereditary in as High Terms at least as King *James* and his Parliament.

This Act of Recognition, which declared Queen *Elizabeth* rightfully, lineally, and lawfully descended of the Blood Royal of this Realm; was, one would have thought, a virtual Repeal of that Act of her Father, which made her illegitimate; but the Parliament knew so little of virtual Repeals, tho' some lay so great a Stress upon them, that they passed an Act, to restore the Queen in Blood, to her Mother: For tho' the Crown took away all defects as she was Queen; yet as she was the Grand-daughter of the Earl of *Wiltshire*, she must be restored in Blood, to be capable of inheriting the Estate of that Family.

To conclude against this imaginary Repeal of the 11 of *Henry the VII.* by the 1 of *James I.* The greatest Lawyers in the Kingdom have declared, since that Act of Recognition,

nitition ; That Allegiance is due to the King in Possession, and have supported their Opinions by the Eleventh of *Henry* the VII. and therefore did not believe it repealed by the 1 of *James* the I.

It has been said that the Oaths of Allegiance Enjoyn'd in the Beginning of *K. Jam. I.* Reign, was form'd on this Act of Recognition, and has tyed the Subject more strictly to the next Heir, than he was tyed before.

But this is a Mistake, for 1<sup>st</sup> the Oath of Allegiance was made in the 3. *K. 7. I.* on the Occasion of the Gunpowder Plot, for the Discovery of Popish Recusants ; and the Additions which are in it, to the former Oath of Allegiance, were all of them levelled against some Popish Tenets. And as for the Word *Heirs*, to which the Subject was sworn in that Oath, it is no Addition, but was in the old Oath of Allegiance, that is extant in *Britton*, who wrote under *Edward* the I. and was taken by the Subjects in the Court Leets, several Hundred Years before King *James I.* Reign : So that the Oath of Allegiance framed in his Reign, makes no Alteration in this Matter.

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† *Sheringham* of the Kings Supremacy. p. 182

## C H A P. VI.

*This Account of our Constitution, and Laws, supported by the Opinions and Authorities, of some of the greatest Modern Lawyers, who lived in the Reigns of Hereditary Kings. And the Case of the Oaths resolved, from this Account of our Legal Constitution.*

**W**E have already had the Opinions of the Lawyers, and Judges of *Elder Reigns*, for the Authority of the *King for the time being*, in their Judicial Proceedings, Adjudged Cases, and in the unanimous Resolutions, which they have given, when they were consulted by the King and Parliament, in those Deigns, where that Authority was least likely to be favour'd. I will now produce the Opinions of the Lawyers of *later Reigns*, and of such only as lived *since* the Act of Recognition made in the 1 of *James* the I. whereby we shall see, that they knew nothing of this imaginary virtual Repeal of the 11 of *Henry* the VII. by that Act of Recognition: And be convinced at the same time, that the greatest *Modern Lawyers* have entertained the same Notion of the Constitution, which the Ancient had; perfectly agreed with them in this great *Point of Law*, concerning the *Authority* of

of the King in Possession, and the *Allegiance* of the Subject which is due to him; and that the foregoing Discourse is supported with their Authority.

I begin with my Lord Chancellor *Bacon*, who in his History of *Henry the VII.* speaking in Praise of the Statute, made in the 11th Year of his Reign, which ordained, that no Person should be impeached, or attainted, for assisting in Arms, or otherwise, *the King for the time being*, saith, *That it was agreeable to Reason of State, that the Subject should not enquire, into the Justness of the King's Title, or Quarrel, and it was agreeable to good Conscience, that whatsoever the Fortune of the War was, the Subject should not suffer for his Obedience. The Spirit of this Law was certainly pious, and noble, being like in Matter of War, unto the Spirit of David in Matter of Plague, who said, if I have sinned, strike me; but what have these Sheep done?* Hist. H. VII. p. 241.

The Lord Chief Justice *Coke*, in his Comment on the 25 of *Edward the III.* ch. 2. the Statute of Treasons, saith, *This Act is to be understood of a King in Possession of the Crown and Kingdom, for if there be a King Regnant in Possession, though he be Rex de facto, and non de jure, yet he is Seigneur le Roy within the Purview of this Statute: And the other*

that has Right, and is out of Possession, is not within the Act: Nay, if Treason be committed against a † King de facto, and after the King de jure cometh to the Crown, he shall punish the Treason committed, against the King de facto. And a Pardon granted by a King de jure, that is not also de facto, is void. Inst. part. 3. p. 7.

The Lord Keeper Bridgeman, in the Trial of Cook the \* Regicide, The last thing you have said for your self is this, that admitting there was nothing to be construed of an Act, or an Order, yet there was a Difference. It was an Act de facto, that you urged rightly upon the Statute of the 11 of Henry the VII. which was denyed to some. God forbid it should be deny'd you. If a Man serve the King in the War, he shall not be punish'd, let the Fact be what it will. King Henry took care for him who was King de facto, that his Subjects might be encouraged to follow him, to preserve them, whatever the Event of the King was, Mr. Cook, you say, to have the Equity of that Act, that here was an Authority de facto, these Persons had gotten the supreme Power, and therefore what you did under them, you do

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† 11 H. VII. Bagots Case, 9 Ed. IV.

\* Trial of the Regicides, p. 146.



*desire the Equity of that Act. For that clearly the Intent and Meaning of that Act is against you, it was to preserve the King de facto, how much more to preserve the King de jure. He was owned by these Men and you, as King, you charged him as King, and you sentenced him as King. That that King Henry the VII. did, was to take care of the King de facto, against the King de jure. It was for a King, and Kingly Government; you proceeded against your King, your own King, and as yet King, and called him in your Charge Charles Stuart K. of England. I think there is no Colour you should have any Benefit of the Letter, or of the Equity of the Act. They had not all the Authority at that time, they were a few of the People that did it, they had some part of the Army with them; the Lords were not dissolved then, when they had adjourned for some time, they did sit afterwards, so that all the Particulars you alledge, are against you.*

The Lord Chief Justice Hales, in his Pleas of the Crown, in the Chapter of High Treason, says as follows,

*What a King?*

*First, A King before his Coronation, a King within this Statute, when the Crown descends upon him.*

*Secondly, A King de facto & non de jure, a King within this Act; and a Treason*

against him punishable, tho' the Right Heir get the Crown.

Thirdly, a Titular King that is not Regnant, as the Husband of the Queen, not a King within this Statute.

Fourthly, The right Heir to the Crown, yet not in Possession, therefore is not a King within this Act. †

Had I given the Opinions of Lawyers, of how great Name soever, that lived since the Revolution, they would have been received with Prejudice. It might have been said, they had too great an Interest in the Case, and could not have come to the Bench, or the Bar, without this Doctrine; and therefore I have produced none \* but such as lived in the Reigns of Hereditary Kings, where there was not the least Temptation, to *byass* them on this side of the Question. The Temptation lay on the other side, it being no good way to make their Court, but more likely to bring themselves into Disgrace, with those Princes by whose Commission, and in whose Courts they sat; to declare in Effect, that if another

† Pleas of the Crown, 1 Ch. of Treason, p. 11. 12. Licensed by the Lord Chief Justice *Rainsford*.

\* The first, Lord Chancellor; and the second, Lord Chief Justice of both Benches in the Reign of King *James* the I. The third, Lord Keeper; and the fourth, Lord Chief Justice of the King's Bench, in the Reign of King *Charles* the II.

Person got the Throne, who had no antecedent Right to it, he would be to all Intents and Purposes, as much a King as themselves, or their next Heirs; and the Allegiance of the Subject, would be due to him, and not to them. And therefore nothing but a *full Conviction*, that this was the *Law* of the Realm, could induce them, to *declare it* such.

And as these great Lawyers delivered this for Law, so no Lawyer of Note, that I know, has contradicted them, no not in *those* Reigns, when they might have done it with *Safety* and *Advantage*: So that were this Case *doubtful*, as, I think, it is not, the *unanimous Opinions* of great Lawyers, and Judges, of former, and later Reigns, Men of Probity, eminent in their Profession, and under no Temptation to be corrupted, is a *safe* and *legal* Resolution of this Case.

I have said a *legal* as well as *safe* Resolution; for the Judges by their *Office*, have Authority to interpret the Laws, and their Judgments judicially given are *Law*. So that, if what *Grotius* says, † *That the Interpretation of the Force, and Obligation of an Oath, whereby Subjects are bound to the Civil Magistrate, belongs to*

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† *Tam vero super vi jurisjurandi, quo Cives Magistratibus obligantur, interpretationem Politicorum & Jurisconsultorum esse arbitror non Theologorum. Vosum pro pace, p. 63.*

*Statesmen, and Lawyers, and not to Divines,* be true in the general; it is still of greater Force in our Constitution, where the Judgments of Judges; as I said before, especially when they are unanimous, are *Law*.

From what hath been said, the *Case* of the *Oaths* will easily be resolved. For the *Oath* of *Allegiance*, is a *Legal* Oath, or an Oath appointed by *Law*; and the *Allegiance* we swear, is a *Legal Allegiance*, or that *Allegiance*, and no other, but that, which the *Law* requires: And therefore, as the *Law* is the *Measure* of our *Allegiance*, so is it of the *Extent* and *Obligation* of our *Oath* of *Allegiance*. And the *Law*, by requiring our *Allegiance* to be paid to the King *in Possession*; determines our *Allegiance*, and consequently puts an end to the *Obligation* of our *Oaths*, to the Prince that is *out of Possession*. So that here is no danger of taking *Contrary Oaths*, since the *New Oath* was not Enjoyn'd before the *Obligation* of the *Old Oath* ceased.

In *Promissory Oaths*, all *Casuits* agree, there is this tacit Condition, *rebus sic stantibus*; and what is thus implied in the *Oath*, is supplied; and expressed in our *Laws*, by which the *Oath* is to be *interpreted*.

And since the *Kings* for the time being, with their *Two Houses* of *Parliament*, have by our Constitution, the *Legislative Power*, they

they are enabled to do, whatsoever is within the Verge of that Power, for the Preservation of the Community, and themselves. In particular, they can by Virtue of the Supremacy of their Power, (which cannot be bound by any prior Law, or Settlement; for then the *supreme* Power, would be *superior* to its self) cut off, and extinguish old Rights, and create, and establish new *legal Rights*, and *Titles*, not only to private Inheritances, but to the Crown it self: The Right of the Crown having ever been, and by several *Statutes* of the Realm, expressly declared to be, under the Direction of the Legislative Authority. So that, whosoever stands excluded by the Legislative Authority, whatsoever they may have had, have now no longer any Right, or Title, to the Crown; and they, on whom the Crown has been settled in Reversion, as it has been on the Queen, will be, in the Possession of it, as her Majesty now is *rightful* and *lawful* Kings, or Queens of this Realm. *Right* being nothing but a Conformity to Law.

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#### C H A P. VII.

*Our Laws in this Point not contrary to the Holy Scriptures and the Doctrine of our Church, but rather agreeable to Both.*

**S**OME will be apt to say, that in all this Discourse, I have gone no higher, than the

*Constitution, and human Laws*; but is this sufficient to satisfy *Conscience*? Yes, in matters of Civil Obedience, of which *human Laws* are the *Measure*, so long as there is nothing therein contrary to the *Law of God*. When our *Blessed Lord* was upon Earth, He *submitted* to the Government under which he lived, made no *Alteration* in Matters of Government, but *left* the Governments of the World as he found them. In his Holy Gospel, and the Writings of his Apostles, we have Commands given us in general *to render to Cæsar, the Things that are Cæsars; To obey Magistrates; To be Subject to the higher Powers*; but we are left to learn, from the *Laws* of our Several Countries, who these *Magistrates, and higher Powers* are, to whom we are to be Subject: And this without doubt is the Reason of *Grotius's Rule, That the Interpretation of the Obligation of the Oaths, taken to the Civil Magistrate, is the Province of Statesmen and Lawyers, not of Divines*: because the *former*, are generally better acquainted with the *Laws* of their Country, than the latter. What the Gospel adds in this Matter, is to set our Duty upon a higher Principle, by enjoying us to pay for *Conscience sake*, that Obedience which human Laws exact, for *Fear* of Punishment.

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The Constitution therefore, and our Obedience according to it, is sufficiently vindicated, if there is nothing in it, *contrary to the Law of God*; for then the Laws of the Kingdom (which the Divine Law commands us to obey) do bind our Consciences as Subjects, and we are not only warranted, but *obliged* to pay our Allegiance, as the Law directs.

But we may venture a Step farther, and affirm, That our Constitution, by requiring Allegiance to be paid to the King in Possession, is so far from being *contrary*, that it is *agreeable* to the Holy Scriptures, as appears from our Blessed Saviour's Resolution of the Case, that was put to him, *whether it was Lawful to pay Tribute to Cæsar or not?* He bad them *shew him the Tribute Mony*, and only ask'd them *whose Image and Superscription is it?* (i. e. who is in Possession of the Government?) And when they answer'd him *Cæsar's*, he immediately determines, *Render therefore to Cæsar, the things that are Cæsar's, &c.*

Here it will be answered, that *Tiberius Cæsar* was a *Rightful* Emperor, the Senate, and People of *Rome*, having conferr'd the whole Authority, of the Roman Government on *Augustus*, by the *Lex Regia*. If we grant the *Lex Regia* to be genuine (which hath been denied

denied in a Tract, *De fictione Legis Regiæ*,) since it is spoken of with so much Assurance, by the Emperor *Justinian* in his *Institutes*: yet what is this to *Tiberius's* Title? the *Lex Regia* did not entail the Empire on *Augustus's* Posterity; and if it had, *Tiberius* was none of them! And if we look into the first Book of *Tacitus's* Annals, we shall see, that he durst not, upon *Augustus's* Death, lay any Claim to it; but by Fraud (of which he was a great Master,) and Force, he wound himself into the Government, and the Submission of the Romans (such as it was) was his only Title.

But were the Romans themselves Rightful Governors of *Judea*? The Law given by God, *Deut.* 17. seems to have been a fundamental Bar to the Right of any Heathen to govern the Jews; and was probably the ground of this Question, which the Pharisees put to our Saviour. And tho' the Jews, had generally submitted to the Roman Government; for the Law, that prohibited them to set up a Stranger, to rule over them, did not, as I observed before, prohibit them to submit to a Stranger, when he had by Force set himself over them: However, there appears no Express Act of the Resignation of the Sovereign Power to the Romans, like that of the *Lex Regia* Conferring the Sovereign Power on *Augustus*: Nothing but a forced Submission to



to a Superior Power, which many of them still scrupled; and the generality of the Nation, were in the mean time in Expectation, that a Prince of the Tribe of *Judab* would shortly break the Roman Yoke, and restore the Kingdom to *Israel*.

But not to insist on this, let it be granted, that *Tiberius* was a Rightful Governor of the Roman Empire in general, and of *Judea* in particular; This will not weaken the Argument, that is drawn from our Saviour's Resolution of the Case. For our Saviour, doth not resolve the Lawfulness of their Subjection to *Cesar*, into his *Right* to the Government of *Judea*, but into his *Possession* of it; the Coining of Money and raising of Taxes, which our Saviour lays down for a sufficient *Ground* of their Subjection, being no manner of proof of the *former*, but an undeniable *Sign* of the *latter*.

And this is the Opinion of the Learned *Grotius*, as he has deliver'd it, in three several Books, written at different times, which shews it was the Result of his most deliberate Thoughts.

† In his *Votum pro Pace*, he saith, *And if any one in our time, had shew'd our Money, and ask'd whose is this Image? Any Man,*

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† Et si quis nostro tempore nummum ostendisset, & quaesisset, Cujus hæc est Imago? quilibet & doctus & indoctus responsurus fuit, Ordinum Hollandiæ. Ego omnes qui nunc in illis terris vivunt sentio Ob-

both

both the Learned, and the Unlearned, would readily Answer, The States of Holland's. I think all that live now in those Territories do owe Obedience; nay, and if they are injuriously treated, patient Submission to those, who are now the Governors of the Towns and the People: For they are in Possession of the Government.

\* In his Admirable Book *de Jure Belli & Pacis*, he saith, Especially in a controverted Case, a private Person, ought not to take upon himself to judge, but to follow Possession. Thus Christ commanded Tribute to be paid to Cæsar, because the Mony had his Image, that is, because he was in Possession of the Government. This being (as he says in his Note) the most certain Sign of Possession. †

In his Annotations on the 22. c. of St. Mat. Explaining the Words. *whose Image and Superscription is this?* \* In the 20th verse he

*dientiam, imo & si quid mali ipsis inseratur, patientiam debere iis qui nunc sunt oppidorum populorumque Rectoribus: Sunt enim in Possessione Imperii. Pot. pro pace p. 62.*

\* Maxime autem in re controversa, judicium sibi privatus sumere non debet, sed possessionem sequi. Sic tributum solvi Cæsari Christus jubebat, quia ejus imaginem nummus præferbat, id est, quia in possessione erat Imperii, De Jure B. & P. l. 1. c. 4. § 20.

† Quia ejus imaginem nummus præferbat ] certissimum hoc Indicium possessionis. vide in Historia Genuate Bezarum l. 18.

\* v. 20. Τὸ ἢ εἰχὼν αὐτῆ καὶ ἡ ἐμπεραφῆ; Sicut legem figere signum est summi Imperii, ita & nummum eudere, nam νόμισμα, ut dicit Aristoteles, & nomen suum, & vim habet ἀπὸ τοῦ νόμου.

says,

says, As to make Laws, so to coin Money is a Mark of Sovereign Power; for νόμισμα Money as Aristotle teaches, receives both it's Name and Value from νόμος the Law; hence to adulterate the Coin is ranked amongst Treasons. — The Money it self therefore receiving it's Value from the Edict of Cæsar, and bearing Cæsar's Image and Superscription, declared, that Cæsar actually possess'd the Sovereign Power over Judea, and that the Jews in using the Money acknowledged it. It might be objected, that the Romans had the Rule over the Jews, and Cæsar over the Romans in fact, but not of Right. But Christ shews this doth not at all belong to the Question: for since the Peace of Nations, cannot be maintain'd without Arms, nor Arms without Pay, nor Pay without Taxes, as Tacitus speaks, it follows, that Tribute must be paid to him that governs, as long as he governs, as a Reward of the common Protection, which he

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Hinc Majestatis criminibus accensetur nummos corrumpere. Ipse igitur nummus pretium habens ex Edicto Cesaris, Cesarisque nomen & vultum præferens, testabatur Cesarem summum in Judæam Imperium reipsâ obtinere, idque à Judæis nummo illo utensibus agnosci. Objici poterat, ipso quidem facto Romanos Judæis, & Cesarem Romanis imperasse, ac nullo jure. Sed Christus ostendit hoc ad præpositam quæstionem nihil pertinere. Nam cum nec quies gentium sine Armis, nec Arma sine Stipendiis, nec Stipendia sine Tributis, haberi possint, ut loquitur Tacitus, sequitur ei qui imperat, tantisper dum imperat, pendenda tributa, ut pretium communis tutelæ, quam præstat nobis quisquis est publici imperii possessor. Propterea inquis Pau-

affords

affords us, who is in Possession of the Government, whosoever he be. Therefore, saith St. Paul, you pay Tribute also, and not only out of Fear of Punishment, but in regard to Justice and Equity; because under the Protection of the Powers, ye live secure from Violence and Injuries. † Render (as due) as St. Paul explains it, who, when he was treating of Tribute, subjoins, render therefore to all their Dues.

It is not my Design here, to examine those Texts of Scripture, nor the Argument from Providence, which has been drawn from them, and so much debated in this Controversy: how far, and in what manner, the Divine Providence is concern'd, in the Revolutions of States and Kingdoms, and how far it will, or will not justify Subjection, after the Revolution is past, and the new Government established. But without entering into this Dispute, after the View that I have given of the Constitution, I may take the Liberty to set the Controversy on a new Foot, and without incurring the least Suspicion, of committing Providence with Law, propose this

*lus, etiam tributa penditis nec sola pœnæ formidine sed juris & æqui respectu, quia potestatum præsidio tuti estis à vi atque injuriâ.*

† v. 21. Ἀπόδοτε, tanquam debitum, ut Paulus explicat, nam cum de tributis egisset, subjicit, ἀπόδοτε ἕν πᾶσι ταῖς ὀφειλάς.

single

single Question: That after the *divine Providence* has placed, permitted, at least, a Person to be placed in such a Station, that the *Laws* of the Kingdom acknowledge his Regal Authority, and require the Allegiance of the Subject to be paid to him; Whether to refuse to acknowledge him, for our King, or to pay Allegiance to him as such, is not to oppose both *Providence* and *Law*?

From the holy Scriptures, I come to the Judgment of our Church, as it may be collected from the Homilies. I do not pretend, that the Church has given her Judgment, by way of an exprefs Decision of this Question; only that there are some Passages, to be met with there, which plainly favour that side of the Question which we maintain; of which I shall here mention but one.

In the Sixth Homily against Rebellion, we have these Words: *The Bishop of Rome — cursing King John, and discharging his Subjects, of their Oath of Fidelity, unto their Sovereign Lord. Now bad Englishmen, at that time, known their Duty to their Prince, set forth in God's Word, would a great many of Nobles, and other Englishmen, natural Subjects, for this foreign and unnatural Usurper his vain Curse of the King, and for his feigned discharging of them of their Oath, and Fidelity to their natural Lord, upon so slender, or no Ground*

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*at all, have rebelled against their Sovereign Lord the King? Would they have sworn Fidelity to the Dauphine of France, breaking their Oath of Fidelity, to their natural Lord the King of England, &c?*

It is well known, that King *John* was no more than a *King in Possession*; for *Arthur*, who was his elder Brother's Son, and put in a Claim against him, with his Sister *Eleanor*, whom he kept in Prison all his Reign, were nearer in Blood to the Throne, than himself; and yet we see the Homily calls him the Subject's *Sovereign Lord the King*, and their *Natural Lord the King of England*: Condemns those Subjects, that broke their Oath of Fidelity to him, and therefore justifies those that took, and kept their Oaths to him; and consequently Justifies others, who take and keep Oaths, to such Kings as he was. In a Word, had you lived in the Reign of King *John*, would you have given your Oath of Allegiance to him? If you would, you need not have refused it to *any* King since. If you would not, you would have refused an Oath, that the *Church* has judged *lawful*.

## C H A P. VIII.

*Our Laws in this Point, agreeable to the great End, and Design of Government.*

**B**UT our Constitution in this Point has the Suffrage of *Reason*, as well as *Authority*, on it's side. For if we impartially examine the *Reasons* and *End* of *Government*, we are soon convinc'd, that the several Communities of the World were not design'd, as so many Scenes for a *few* Persons to display their Glory in, and all the rest of Mankind to be only Instruments of their Power; but that Government was instituted for the Security, and Welfare, of all the Members of Civil Society. Our Church in the first Homily against Rebellion, has affirmed, *that the Government of a Prince, is a Blessing of God given for the Common-wealth, especially of the good and godly, for the Comfort and cherishing of whom, God giveth and setteth up Princes, and on the contrary part, to the Fear and Punishment of the Wicked.* A learned Bishop, and Casuist of our Church saith, *that publick Authority was instituted primarily for*

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*Potestas autem publica Jurisdictionis, ordinatur primario in bonum publicum ipsius Communitatis, in bonum vero personae tali potestate*

the publick Good of the Community it self; and but secundarily and consequentially only, for the Good of the civil Magistrate, as it is profitable to the Prince, that the Commonwealth should flourish. † Fortescue Lord Chancellor of England under King Henry the VI, quotes, and approves, Thomas Aquinas for the same Doctrine. St. Thomas, saith he, in the Book which he writ to the King of Cyprus, of the Government of Princes, saith, that the King is given for the Kingdom, and not the Kingdom for the King. Had Government been instituted, for the Sake of the Prince, and Subjects design'd to be only the Instruments of his Grandeur and Power; if the Prince came to be dispossest'd of his Kingdom, it would have then been reasonable for the Subjects still to adhere to him, and his Posterity after him, tho' with the Loss of all the Benefits of Government, because they were all this while answering the End of it. But if Government was instituted, for the Sake of all the Members of the Community, then after they have done what they are able, to

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*predita, id est ipsius Magistratus, non nisi secundario & consequenter, quatenus nimirum utile est Principi, ut Respublica floreat. Sander-  
son de Oblig. Conscien. Prælect. 7. §. 4.*

† Sanctus Thomas, in Libro quem Regi Cypri, scripsit, de Regimine Principum dicit, quod Rex datur propter Regnum, & non Regnum propter Regem. Fortescue De Laud. Legum Angliæ. c. 37.



maintain their Prince in the Throne, if he happens to be disposseſs'd, and cannot afford them any of the Benefits of Government, can defend neither *himself, them,* nor his *Right* to govern them; It is not reasonable that they, for whom Government was instituted, should lose all the Benefits of it, and live *Outlaws* at home, or *Exiles* abroad, for the Sake of him, for whom it was not instituted, at least, not *primarily* instituted. The Consequence is as *necessary*, as the Principle, whence it is drawn, is *true*; which in short is this, that Government was made for *Man*, and not *Man* for *Government*; and both the one, and the other are countenanc'd, by our Saviour's Decision, of the Lawfulness of what his Disciples did on the Sabbath Day, upon this Principle, *that the Sabbath was made for Man, and not Man for the Sabbath.*

If it should be said, that this Argument, hath been made use of by some, to justify the Resistance of the supreme Magistrate, when he does not pursue, as they think, the Ends of Government. I answer, there is this great Difference, betwixt the *Two Cases*, that the Laws of the Land, which allow, and require Submission, forbid Resistance,

Secondly, They who employ this Argument for Resistance, are so far from pursuing the Ends of Government, by their Hypothe-

sis, that they destroy the very Notion of it. For by making as they do any of the Subjects, as much Judges of the *publick Good*, as those, who are invested with the Authority of the Government; and by giving them a Liberty, to overturn both the Laws, and Law-makers, when they do not pursue, what they think to be, the *publick Good*: They leave no *Authority* in the *Laws*, which according to this Opinion, are no more than *Counsels*, that the Subjects may take, or refuse, as they think fit: They leave no Difference, betwixt the *Governors* and *Governed*: † In a word, they have no such thing as Government, by not leaving a *Dernier Resort*, from which there is no Appeal.

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## C H A P. IX.

*Our Laws in this Point, agreeable to the Practice of all Mankind, particularly, of God's own People, the Jews, and of the Christians of the Earlier Ages.*

**A**ND that this is a reasonable Notion of Government, we shall be farther convinced, now we come in the last place, to

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† Si ubi jubeantur, quærere singulis liceat, pereunte obsequio, imperium etiam intercidit. Tacit. Hist. 3.

consider the Practice of Mankind. And here, I shall first consider the Behaviour of those, who may serve for Examples to us, I mean, of Gods peculiar People the *Jews*, and then of the *Christians*, (of the *earlier Ages* especially) who succeeded them in that Relation.

That the *Jews* lived in Subjection to the *Midianites*, the *Moabites*, and other neighbouring Nations, when they were subdued by them, is evident from the Old Testament. That they became Subjects to *Pharaoh Necoh*, K. of *Egypt*, who carri'd away *Jeboabaz* their King Captive into *Egypt*, and set up *Eliakim*, to whom he gave the Name of *Jeboiakim*, to be King over them. After this, they came under Subjection to the King of *Babylon*, who carried away King *Jeboiakim* Captive into *Babylon*, and set his Son *Jeconiah* on the Throne; whom after a Reign of 3 Months, he likewise removes to *Babylon*, and puts his Uncle *Zedekiah* in his Place, who in a while followed the rest into Captivity; after which the Remnant of the *Jews*, that were left in *Judea* lived Subjects to the King of *Babylon's* Governors, as the Captives in *Babylon* did to his Government there.

If it be said, that God by his Prophet *Jeremiah*, commanded the *Jews* to be subject to the King of *Babylon*. It may be answered, that they had submitted to the *Moabites*, to the

King of *Egypt*, &c. without any such Command, that we know of, nay to the King of *Babylon himself*, before this Command was given, which was not till the Reign of *Zedekiah*, who was the second King, that the King of *Babylon* had set over them.

In the next place, it is to be considered, that altho *God's* Command, was of it self abundantly sufficient, to oblige them to submit, yet he was pleased to condescend to give them a Motive, or Reason, for this Submission, *I spake to Zedekiah King of Judah, according to all these Words, saying, bring your Necks under the Yoke of the King of Babylon, and serve him, and his People, and live. Why will ye dye, thou and thy People by the Sword, the Famine and the Pestilence, as the Lord hath spoken against the Nations that will not serve the King of Babylon.---- Wherefore should this City be laid wast? Jer. 27. 12. 13. 17.* And thus the Prophet *Jeremiah*, in his Letters to the Captives at *Babylon*, saith, *Seek ye the Peace of the City; where I have caused you to be carried away Captive, and pray unto the Lord for it, for in the Peace thereof, ye shall have Peace, Jer. 29. 7.* Which is thus expressed by *Baruch*, in his Exhortation to the *Jews*, *Pray for the Life of Nabuchodonosor King of Babylon, and for the Life of Balthasar his Son, that their Days may be*

be on Earth, as the Days of Heaven. And the Lord will give us Strength, and lighten our Eyes, and we shall live under the Shadow of Nabuchodonosor King of Babylon, and under the Shadow of Balthasar his Son, and we shall serve them many Days, and find Favour in his Sight, c. I. v. II. 12. Thus we see, when God commanded them, to submit to the King of Babylon, he was pleas'd over and above to add this Reason for their Submission, that they might thereby live secure under his Protection, and enjoy the Benefits of Government in Peace, and Tranquillity.

Whether the Jews thought this Command of God, or at least the Reason of it, the Preservation of themselves under the Protection of Government, did extend to, and would justify their Submission in the like Cases; we find, that after the Destruction of the Babylonish Empire, without any such particular Command, they successively became Subjects of the Persian, after that of the Grecian, and at last, of the Roman Empire, which swallowed up all the rest.

Their Behaviour under that, which is call'd the Grecian Monarchy, deserves a more particular Reflection. After the Death of Alexander, (to whom the Jews had submitted) several Kingdoms having been formed out of his Conquests, Judea was unhappily scituated,

betwixt two of the most powerful of those Kingdoms: *Egypt*, where the *Ptolomyes*; and *Syria*, where the *Seleucidaë* reign'd. And as these great Kings, were engaged in frequent Wars against one another; the most successful way, that either of them had to invade each others Dominions, was first to subdue *Judea*, as sometimes one, sometimes the other of those Kings did; and if you look into *Josephus's* Antiquities, you will find, that the Jews became Subjects of the *Egyptian*, or of the *Syrian* Kings, according as those Kings, recover'd or lost the Possession of *Judea*, and yet were so far from being reproached for this, that they were highly esteemed by both for their Fidelity, because they continued firm in their Obedience to the King of *Egypt*, or to the King of *Syria*, as long as the one, or the other, could defend his Government over them.

If you would be satisfied in the particulars of what I have here affirmed in general, you need only read the 1, 2, 3, 4, and 5 Chapters of the 12th Book of *Josephus Antiquities*, where you will also find they took Oaths of Fidelity to those Princes.

M. *Fleury*, in his *Manners of the Israelites* has given much the same Account of their Behaviour under these Kings. As they were situated betwixt the Kings of *Syria* and the Kings of *Egypt*; they obeyed sometimes the  
former,

former, and sometimes the latter, according as these Kings were most powerful. \* The Submission of the Jews to *Alexander*, under their High Priest *Jaddus*, has been much disputed, and Books have been written upon it, *pro* and *con* in this Controversy: But their interchangeable Submission to the Kings of *Egypt*, and of *Syria*, according as the *former*, or the *latter*, became Masters of *Judea*, is clear, and admits of no Dispute.

As for the Behaviour of the *Primitive Christians*, after the Revolutions of Government, in the earliest Ages of the Church, we have no Instance of dispossest'd Emperors, claiming against their Rivals; (except it be that of *Maximinus Thrax*, and his Son) and the Empire, not being Hereditary, there could be no claims of *Heirs*. That *Maximinus Thrax*, raised a Persecution against the Christians, out of Hatred to the late Emperor, *Alexander Severus's* Family, of which many were Believers, we learn from *Eusebius*. † But how the Christians behaved themselves under the Rival Emperors, that were set up against the Two *Maximini*, we have no certain Account. Only in general we find that the two *Gordiani*,

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\* Comme ils estoient entre les Rois de Syrie, & les Rois d'Egypte; ils obéissoient tantost aux uns & tantost aux autres; selon que ces Rois estoient les plus forts. Meurs des Isiaelites. Part 3. Chap. 3.

† Eccles. Histor. l. 6. 28.

Father and Son, that were first saluted Emperors in *Africk*, and afterwards confirmed by the Roman Senate, met with a chearful Submission, both at *Rome* and throughout *Italy*, except in a few Cities; as well as *Maximus* and *Balbinus*, \* who were created Emperors upon the Death of the two former, and before the Death of the *Maximini*. I cannot say there is any Testimony, that proves the Submission of the Christians in particular, to these Rival Emperors; Nor is there any, that proves the Christians, who were very numerous at that time, were singular in their Behaviour, amidst this general Submission: And is it probable that so great a Body of Men should adhere to the Dispossess'd Emperors, and no notice should be taken of it in a History, which takes notice of a few Cities that did so? However, in the 4th. 5th. and 6th. Ages we have several Instances, of the Christians becoming Subjects, to New Emperors, whilst the Dispossess'd Emperor was alive. I'll content my self with giving a Precedent of their Behaviour in each of those Ages.

In the Beginning of the 4th. Age, *Constantine* and *Licinius*, who were *Colleagues* in the Roman Empire, having publish'd an Edict for the secure Profession of the Christian Religion: *Licinius* notwithstanding a while after began to persecute his Christian Subjects; for which,

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\* See *Julii Capitolini Maximini Duo.*



*Constantine* engages in a War against him, dispossesses him first of some of his Provinces, and afterwards in a Second War, of his Empire of the East, and reduces him to a private Life; and at last, upon his designing to raise new Commotions, puts him to Death. In the mean time, the Bishops and Christians, as well as the rest of the Subjects of *Licinius*, paid a chearful Obedience to *Constantine*, as he became Master of *Licinius's* Division of the Empire.

Some learned Men have said, that *Constantine* was superior in the Empire to *Licinius*: But it is evident from *Eusebius*, that they were not Joint Emperors, in one Throne: \* But the *Roman Empire* was divided in two Parts betwixt them. *Constantine*, as elder Emperor, when they met, might have Precedency in Place; but each Emperor was, in his own Part, *absolute*, and *independent* on the other; and therefore, when they were both Consuls, in the West that Year is inscrib'd, *Constantine the fourth, and Licinius the fourth time Consul*. But in the East, *Licinius's* Name stands first, in this manner. *Licinius Augustus the fourth, and Constantine the fourth time Consuls*. As *Valesius* proves out of the *Excerpta de gestis Constantini*. †

\* *Eccl. Hist.* l. 10. c. 8. & in *Vita Constant.* l. 1 c. 49.

† *Vale. Not. ad vitam Constant.* l. 2. c. 6.

In the Fifth Century, the Emperor *Zeno* was dispossess'd, and driven into *Isauria*, by *Basiliscus*, who, by Usurpation, mounted the Imperial Throne: And yet after he was settled in it, had so general a Submission, that we find no less than 500 Bishops, and amongst them, Three of the Four Eastern Patriarchs, subscribing to *Basiliscus's* Circular Letters, for anathematizing the Council of *Chalcedon*, and *Leo's Tome*. It must be confess'd, that these Bishops, who discover'd such Pusillanimity, and Levity, in condemning the Council of *Chalcedon*, are not to be set up for Examples: And yet I do not find but the rest of the Subjects, particularly the great *Acacius*, Patriarch of *C. S.* a Man of inflexible Resolution and Courage, who maintain'd the Authority of the Council of *Chalcedon*, and could not be induced, by all the Menaces of *Basiliscus*, to subscribe his Circular Letters, did, at the same time, acknowledge his Imperial Authority, as much as those that had subscribed. †

Some, I know, have said that the Emperors were not pray'd for, *by Name*, in the earlier Ages. That they were pray'd for when they were Pagans we are sure; whether by Name I'll not be positive: But that they were pray'd for by name, after they were Christians, I think there is no doubt\*. That they were

† See *Evagr. Eccl. Hist. l. 3. c. 3. 4 5. 6 7. 8.*

\* *Vid. Euseb. In Vita Constant. l. 4. c. 20.*

prayed for by name in the Age, we are now speaking of; we are assur'd by a Passage in Pope *Gelasius's* Epistle, † *ad Episcopos Dardaniae*, where he takes Notice, that the Emperor *Zeno* colour'd over his Displeasure against *Calendion*, Bishop of *Antioch*, with a Pretext, that he had razed his Name out of the Diptychs, in favour of the Two Rebels *Leontius* and *Ilius*. \*

In the Sixth Century after the *Goths*, had establish'd themselves in *Italy*, and made *Rome* the Capital of their Kingdom, and the *Romans* had lived a good while in Subjection to the *Gothick* Kings: The Emperor *Justinian*, about the Year 535. sends an Army into *Italy*, under his famous General *Belizarius*, upon whose approach *Theodatus*, K. of the *Goths*, quits *Rome*, and the *Romans* to avoid ruin, open'd their Gates to *Belizarius*. However, in a little while, the *Goths* return'd under their new K. *Vitiges*, and laid Siege to *Rome*, which *Belizarius* defended, and forced them to raise the Siege, after they had lain above a Year before it. † *Silverius* was Bishop of *Rome*, when it was reduced by *Belizarius*, having been promoted to that See by *Theodatus*, late King of the *Goths*. He was at this time, under the Dis-

† *Epist.* 13. in the 4. Tome of Labl. & Cossart. Councils.

\* See *Evagr. Eccl. Hist.* L. 3. c. 16. and another Instance of the same, in his Successor *Anastasius*. *Evagr.* l. 3. c. 34.

† It appears from *Procopius de bello Gothico* l. 1. c. XI. that *Silverius*, as well as the Roman Senate, and People, took Oaths to the *Gothick* Kings.

pleasure of the Empress *Theodora*, who resolv'd to deprive him of his See, because he would not communicate with the Heretical Bishop *Anthimus*, and to advance his Deacon *Vigilius*, who was then at C. S. and had promised the Empress, he would communicate with *Anthimus*, if she would make him Bishop of *Rome*. This was resolved on, but she wanted a plausible Pretext for the Deprivation of *Silverius* : The true Cause, his not communicating with *Anthimus*, the *Acephalists*, she durst not own to the Emperor. But could she want a fair Pretence ? Had not *Silverius* lived a Subject, under the *Gothick* Kings, and been advanc'd by one of them to the Roman See ? And if this was a Fault, was not he more obnoxious than any Man, not only as he was Bishop, but also as the first Citizen of *Rome* ? But this was so far from being esteemed a Fault then, that in the Account of his mortal Enemies, who were seeking his Ruin, it would not bear an Accusation : And therefore *Theodora's* Instruments, were forced, to have recourse to the Subornation of Witnesses, and to forged Letters, to prove him guilty of a Conspiracy, to betray *Rome* into the Hands of the *Gothick* King, when he laid Siege to It : \* For to un-

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\* *Liberati Diaconi Breviar. c. 22. who lived at the same time, Anastasius Bibliothec. in Vita Silverii.* der

dermine a Government by Treachery, or to Revolt from it whilst it stands, were ever esteemed Crimes; but to submit to a superior Power never was, even their Enemies being Judges, when a Prince could no longer defend his Government, nor People against it.

I should now in the last Place, alledge the Practice of all Mankind; but this would be to write a History of the Revolutions, that have happen'd in all Ages, and Countries of the World, and of the Submission of Nations, to the new Governments after their Establishment. We need only look abroad, and see what is practis'd in our own time, in the several Parts of the Spanish Dominions, in *Italy*, in the Isles of the *Mediterranean*, in the *Spanish Netherlands*, and in *Spain* it self: In all which the Inhabitants take Oaths of Fidelity to the one, or the other, of their Rival Kings, as they come under their Power.

And what has been thus universally practis'd; is, as a learned foreign Lawyer affirms, as universally justified: 'Tis acknowledged by all, saith Puffendorf, that Subjects, after their Prince can afford them no Protection, may submit to another, to preserve themselves from Ruin. \*

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\* *Illud omnes faciunt, posse populum Regi Subiectum, ad declinandum excidium, & postquam in Rege nihil amplius est praesidii, alteri sese submittere. Puffend. de Jure naturae & Gentium, l. 7. c. 7. § 4.*

In Answer to this Argument, from the Practice of other Nations. It has been said, *that we know not what their Constitutions are, at least, they differ very much from ours.* There is no doubt, but their several *Constitutions* differ, in several Points from ours, and from each other too; and yet how much soever they differ, we find, that upon the common Reasons and End of Government, and from the Nature of the Obligations to it, the several Nations of the World, have *agreed* in this: That after they have done what they can to preserve their *Prince*, they are at Liberty to *preserve themselves*, under a new Government, when the Prince can neither defend himself, them, nor his Government over them. And without examining into the particular Constitutions of other Countries, after the foregoing Discourse, I may venture to say with some Assurance, that there is no Country in the World, where the Laws, after the Care they have first taken, to secure the Prince in his Throne, have made a better Provision, for the Peace of the Community, and the Security of its Members upon Revolutions; or do more expressly *allow, justify, and require* the Subjects to submit to the Prince in Possession, than *our own*; because, perhaps, no Country in the World, has had more Revolutions of Government, than *ours*. And to end where I began, since the *Laws*, which are the Rule of Civil Subjection, require This,

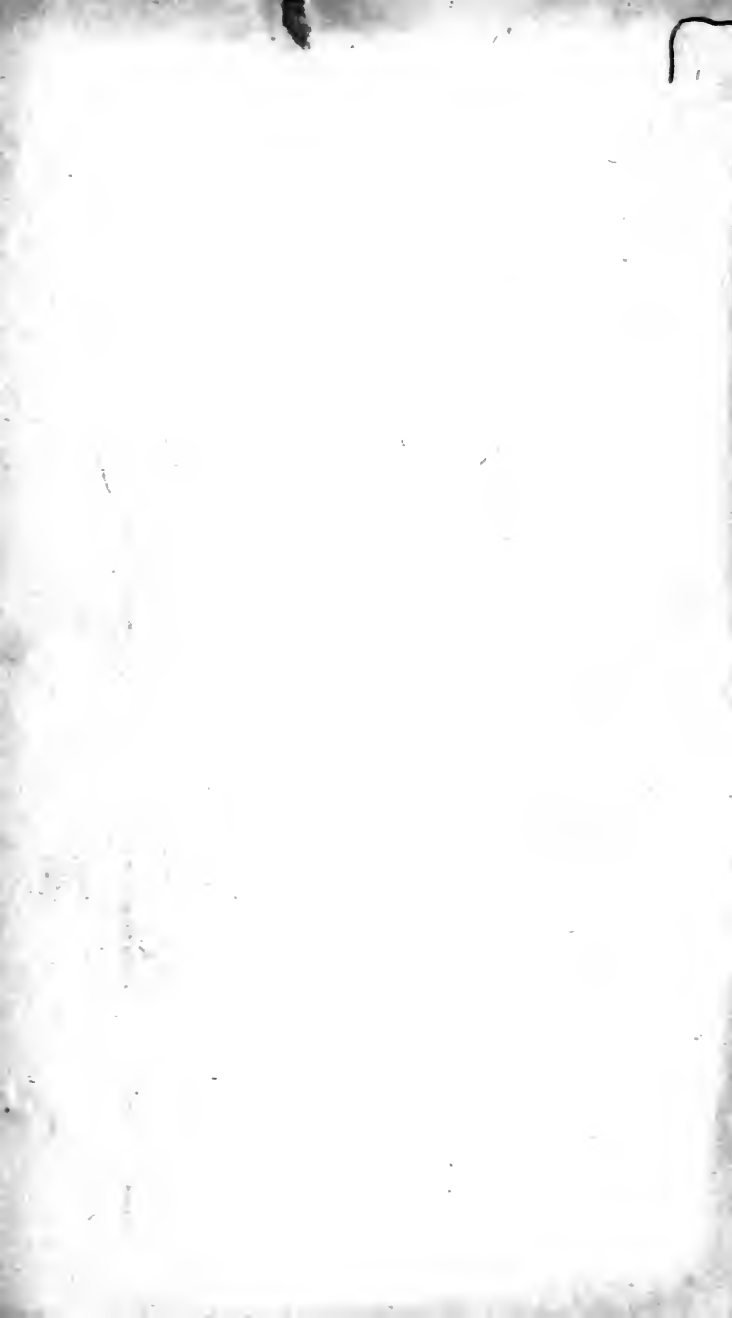
*Oportet neminem esse sapientio rem Legibus.*

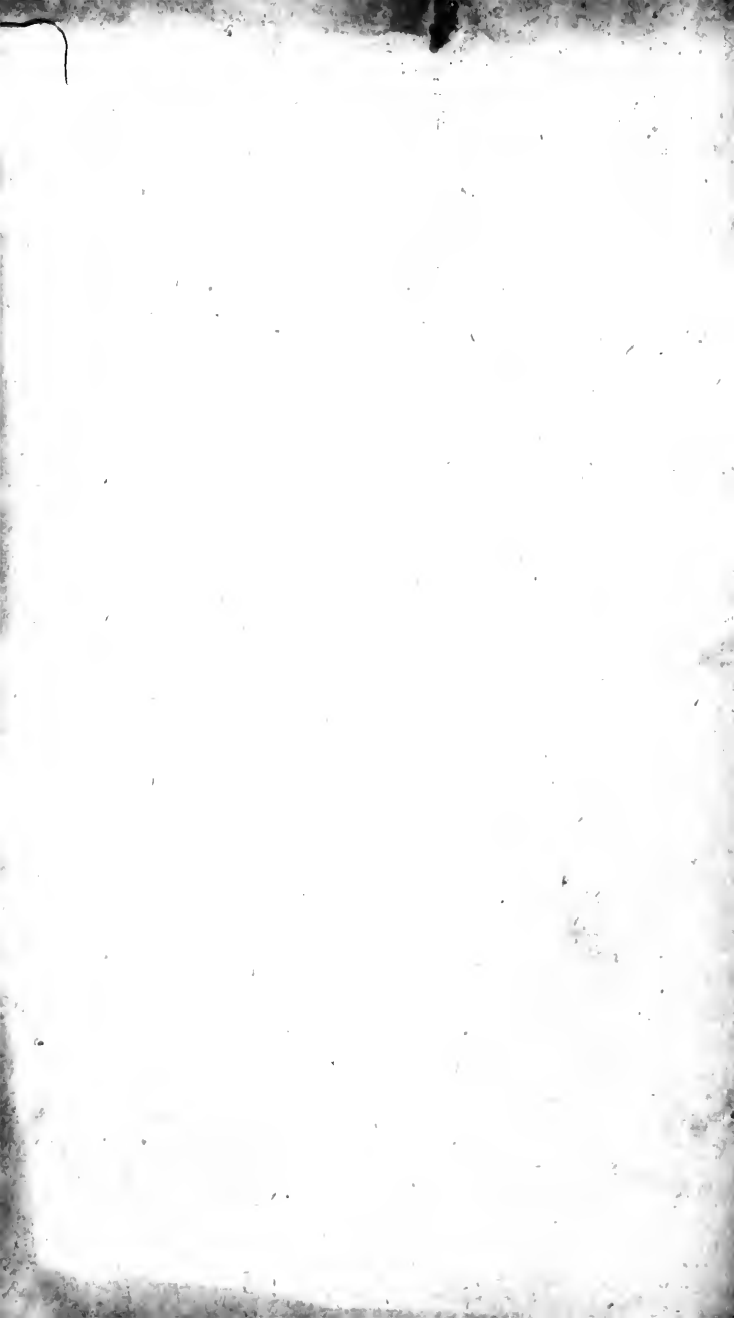
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