PATRIARCHA

OR THE

NATURAL POWER OF KINGS

By

THE LEARNED SIR ROBERT FILMER, BART.

[1680]

Libertas .... populi, quem regna coercent Libertate perit .... — Lucan, Lib. iii.

Fallitur egregio quisquis sub principe credit Servitium; nunquam libertas gratior extat Quam sub Rege pio .... — Claudian.

CHAPTER I
THAT THE FIRST KINGS WERE FATHERS OF FAMILIES

1. SINCE the time that school divinity began to flourish there hath been a common opinion maintained, as well by divines as by divers other learned men, which affirms:

"Mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please, and that the power which any one man hath over others was at first bestowed according to the discretion of the multitude."

This tenet was first hatched in the schools, and hath been fostered by all succeeding Papists for good divinity. The divines, also, of the Reformed Churches have entertained it, and the common people everywhere tenderly embrace it as being most plausible to flesh and blood, for that it prodigally distributes a portion of liberty to the meanest of the multitude, who magnify liberty as if the height of human felicity were only to be found in it, never remembering that the desire of liberty was the first cause of the fall of Adam.

But howsoever this vulgar opinion hath of late obtained a great reputation, yet it is not to be found in the ancient fathers and doctors of the primitive Church. It contradicts the doctrine and history of the Holy Scriptures, the constant practice of all ancient monarchies, and the very principles of the law of nature. It is hard to say whether it be more erroneous in divinity or dangerous in policy.

Yet upon the ground of this doctrine, both Jesuits and some other zealous favourers of the Geneva discipline have built a perilous conclusion, which is, that the people or multitude have power to punish or deprive the prince if he transgress the laws of the kingdom; witness Parsons and Buchanan. The first, under the name of Dolman, in the third chapter of his first book, labours to prove that kings have been lawfully chastised by their commonwealths. The latter, in his book *De Jure Regni apud Scotos*, maintains a liberty of the people to depose their prince. Cardinal Bellarmine and Calvin both look asquint this way.

This desperate assertion whereby kings are made subject to the censures and deprivations of their subjects follows — as the authors of it conceive — as a necessary consequence of that former position of the supposed natural equality and freedom of mankind, and liberty to choose what form of government it please.

And though Sir John Heywood, Adam Blackwood, John Barclay, and some others have learnedly confuted both Buchanan and Parsons, and bravely vindicated the right of kings in most points, yet all of them, when they come to the argument drawn from the "natural liberty" and "equality of mankind," do with one consent admit it for a truth unquestionable, not so much as once denying or opposing it, whereas if they did but confute this first erroneous principle the whole fabric of this vast engine of popular sedition would drop down of itself. The rebellious consequence which follows this prime article of the natural freedom of mankind may be my sufficient warrant for a modest examination of the original truth of it. Much hath been said, and by many, for the affirmative; equity requires that an ear be reserved a little for the negative. In this discourse I shall give myself these cautions: First, I have nothing to do to meddle with mysteries of state, such *arcana imperii*, or cabinet councils, the vulgar may not pry into. An implicit faith is given to the meanest artificer in his own craft; how much more is it, then, due to a prince in the profound secrets of government. The causes and ends of the greatest politic actions and motions of state dazzle the eyes and exceed the capacities of all men, save only those that are hourly versed in the managing public affairs. Yet since the rule for each man to know in what to obey his prince cannot be learnt without a relative knowledge of those points wherein a sovereign may command, it is necessary when the commands and pleasures of superiors come abroad and call for an obedience that every man himself know how to regulate his actions or his sufferings; for according to the quality of the thing commanded an active or passive obedience is to be yielded, and this is not to limit the prince's power, but the extent of the subject's obedience, by giving to Caesar the things that are Caesar's, etc.

Secondly, I am not to question or quarrel at the rights or liberties of this or any other nation; my task is chiefly to inquire from whom these first came, not to dispute what or how many these are, but whether they were derived from the laws of natural liberty or from the grace and bounty of princes. My desire and hope is that the people of England may and do enjoy as ample privileges as any nation under heaven; the greatest liberty in the world — if it be duly considered — is for a people to live under a monarch. It is the Magna Charta of this kingdom; all other shows or pretexts of liberty are but several degrees of slavery, and a liberty only to destroy liberty.

If such as maintain the natural liberty of mankind take offence at the liberty I take to examine it, they must take heed that they do not deny by retail that liberty which they affirm by wholesale. For if the thesis be true, the hypothesis will follow that all men may examine their own charters, deeds, or evidences by which they claim and hold the inheritance or freehold of their liberties.

Thirdly, I must not detract from the worth of all those learned men who are of a contrary opinion in the point of natural liberty. The profoundest scholar that ever was known hath not been able to search out every truth that is discoverable; neither Aristotle in philosophy, nor Hooker in divinity. They are but men, yet I reverence their judgments in most points, and confess myself beholding to their errors too in this. Something that I found amiss in their opinions guided me in the discovery of that truth which — I persuade myself — they missed. A dwarf sometimes may see that which a giant looks over; for whilst one truth is curiously searched after, another must necessarily be neglected. Late writers have taken up too much upon trust from the subtile schoolmen, who, to be sure to thrust down the king below the pope, thought it the safest course to advance the people above the king, that so the papal power might take place of the regal. Thus many an ignorant subject hath been fooled into this faith that a man may become a martyr for his country by being a traitor to his prince; whereas the new coined distinction of subjects into royalists and patriots is most unnatural, since the relation between king and people is so great that their well-being is so reciprocal.

2. To make evident the grounds of this question about the natural liberty of mankind, I will lay down some passages of Cardinal Bellarmine that may best unfold the state of this controversy.

> Secular or civil power is instituted by men, it is in the people, unless they bestow it on a prince. This power is immediately in the whole multitude, as in the subject of it; for this power is in the divine law, but the divine law hath given this power to no particular man. If the positive law be taken away, there is left no reason why amongst a multitude — who are equal — one rather than another should bear rule over the rest. Power is given by the multitude to one man or to more by the same law of nature; for the commonwealth cannot exercise this power; therefore it is bound to bestow it upon some one man, or some few. It depends upon the consent of the multitude to ordain over themselves a king, or consul, or other magistrates; and if there be a lawful cause, the multitude may change the kingdom into an aristocracy or democracy.

Thus far Bellarmine, in which passages are comprised the strength of all that ever I have read or heard produced for the natural liberty of the subject.

Before I examine or refute these doctrines, I must a little make some observations upon his words[:]

First, He saith that by the law of God power is immediately in the people; hereby he makes God to be the immediate author of a democratical estate; for a democracy is nothing else but the power of the multitude. If this be true, not only aristocracies but all monarchies are altogether unlawful, as being ordained — as he thinks — by men, whereas God himself hath chosen a democracy.

Secondly, He holds that, although a democracy be the ordinance of God, yet the people have no power to use the power which God hath given them, but only power to give away their power, whereby it followeth that there can be no democratical government, because he saith the people must give their power to one man, or to some few; which maketh either a regal or aristocratical estate, which the multitude is tied to do, even by the same law of nature which originally gave them the power. And why then doth he say the multitude may change the kingdom into a democracy?

Thirdly, He concludes that, if there be a lawful cause, the multitude may change the kingdom. Here I would fain know who shall judge of this lawful cause? If the multitude — for I see nobody else can — then this is a pestilent and dangerous conclusion.

3. I come now to examine that argument which is used by Bellarmine, and is the one and only argument I can find produced by my author for the proof of the natural liberty of the people. It is thus framed: “That God hath given or ordained power, is evident by Scripture; but God hath given it to no particular person, because by nature all men are equal, therefore he hath given power to the people or multitude.”

To answer this reason, drawn from the equality of mankind by nature, I will first use the help of Bellarmine himself, whose very words are these: “If many men had been together created out of the earth, they all ought to have been princes over their posterity.” In these words we have an evident confession that creation made man prince of his posterity. And indeed not only Adam, but the succeeding patriarchs had, by right of fatherhood, royal authority over their children. Nor dares Bellarmine deny this also. That the patriarchs, saith he, were endowed with kingly power, their deeds do testify; for as Adam was lord of his children, so his children under him had a command and power over their own children, but still with subordination to the first parent, who is lord-paramount over his children’s children to all generations, as being the grandfather of his people.

4. I see not then how the children of Adam, or of any man else, can be free from subjection to their parents. And this subjection of children being the fountain of all regal authority, by the ordination of God himself; it follows that civil power not only in general is by divine institution, but even the assignment of it specifically to the eldest parents, which quite takes away that new and common distinction which refers

only power universal and absolute to God, but power respective in regard of the special form of government to the choice of the people.

This lordship which Adam by command had over the whole world, and by right descending from him the patriarchs did enjoy, was as large and ample as the absolutest dominion of any monarch which hath been since the creation. For dominion of life and death we find that Judah, the father, pronounced sentence of death against Thamar, his daughter-in-law, for playing the harlot. "Bring her forth," saith he, "that she may be burnt." Touching war, we see that Abraham commanded an army of three hundred and eighteen soldiers of his own family. And Esau met his brother Jacob with four hundred men at arms. For matter of peace, Abraham made a league with Abimelech, and ratified the articles with an oath. These acts of judging in capital crimes, of making war, and concluding peace, are the chiefest marks of "sovereignty" that are found in any monarch.

5. Not only until the Flood, but after it, this patriarchal power did continue, as the very name patriarch doth in part prove. The three sons of Noah had the whole world divided amongst them by their father; for of them was the whole world overspread, according to the benediction given to him and his sons: "Be fruitful and multiply, and replenish the earth." Most of the civilest nations of the earth labour to fetch their original from some one of the sons or nephews of Noah, which were scattered abroad after the confusion of Babel. In this dispersion we must certainly find the establishment of regal power throughout the kingdoms of the world.

It is a common opinion that at the confusion of tongues there were seventy-two distinct nations erected, all which were not confused multitudes, without heads or governors, and at liberty to choose what governors or government they pleased, but they were distinct families, which had fathers for rulers over them, whereby it appears that even in the confusion God was careful to preserve the fatherly authority by distributing the diversity of languages according to the diversity of families, for so plainly it appears by the text. First, after the enumeration of the sons of Japhet, the conclusion is: "By these were the isles of the Gentiles divided in their lands, every one after his tongue, after their families, in their nations." So it is said: "These are the sons of Ham, after their families, after their tongues, in their countries, and in their nations." The like we read: "These are the sons of Shem, after their families, after their tongues, in their lands, after their nations. These are the families of the sons of Noah after their generations in their nations, and by these were these nations divided in the earth after the Flood."

In this division of the world, some are of opinion that Noah used lots for the distribution of it; others affirm he sailed about the Mediterranean Sea in ten years and, as he went about, appointed to each son his part, and so made the division of the then known world into Asia, Africa, and Europe, according to the number of his sons, the limits of which three parts are all found in that Midland Sea.

6. But howsoever the manner of this division be uncertain, yet it is most certain the division itself was by families from Noah and his children, over which the parents were heads and princes.

Amongst these was Nimrod who, no doubt, as Sir Walter Raleigh affirms, was by good right lord or king over his family; yet against right did he enlarge his empire by seizing violently on the rights of other lords of families; and in this sense he may be said to be the author and first founder of monarchy. And all those that do attribute unto him the original regal power do hold he got it by tyranny or usurpation, and not by any due election of the people or multitude, or by any faction with them.

As this patriarchal power continued in Abraham, Isaac, and Jacob, even until the Egyptian bondage, so we find it amongst the sons of Ishmael and Esau. It is said, "These are the sons of Ishmael, and these are their

names by their castles and towns, twelve princes of their tribes and families. And these are the names of the dukes that came of Esau, according to their families and their places by their nations."

7. Some, perhaps, may think that these princes and dukes of families were but some petty lords under some greater kings, because the number of them are so many that their particular territories could be but small and not worthy the title of kingdoms; but they must consider that at first kings had no such large dominions as they have nowadays. We find in the tune of Abraham, which was about three hundred years after the Flood, that in a little corner of Asia nine kings at once met in battle, most of which were but kings of cities apiece, with the adjacent territories, as of Sodom, Gomorrha, Shinar, etc. In the same chapter is mention of Melchisedek, king of Salem, which was but the city of Jerusalem. And in the catalogue of the kings of Edom, the names of each king's city is recorded, as the only mark to distinguish their dominions. In the land of Canaan, which was but a small circuit, Joshua destroyed thirty-one kings, and about the same time Adonibesek had seventy kings whose hands and toes he had cut off, and made them feed under his table.[1] A few years after this, thirty-two kings came to Benhadad, king of Syria, and about seventy kings of Greece went to the wars of Troy. Cæsar found more kings in France than there be now princes there, and at his sailing over into this island he found four kings in our county of Kent. These heaps of kings in each nation are an argument their territories were but small, and strongly confirms our assertion that erection of kingdoms came at first only by distinction of families.

By manifest footsteps we may trace this paternal government unto the Israelites coming into Egypt, where the exercise of supreme patriarchal jurisdiction was intermitted because they were in subjection to a stronger prince. After the return of these Israelites out of bondage, God, out of a special care of them, chose Moses and Joshua successively to govern as princes in the place and stead of the supreme fathers; and after them likewise for a time He raised up judges to defend His people in tune of peril. But when God gave the Israelites kings, He re-established the ancient and prune right of lineal succession to paternal government And whensoever He made choice of any special person to be king, He intended that the issue also should have benefit thereof, as being comprehended sufficiently in the person of the father, although the father only was named in the grant.

8. It may seem absurd to maintain that kings now are the fathers of their people, since experience shows the contrary. It is true, all kings be not the natural parents of their subjects, yet they all either are, or are to be reputed, the next heirs to those first progenitors who were at first the natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction; and such heirs are not only lords of their own children, but also of their brethren, and all others that were subject to their fathers. And therefore we find that God told Cain of his brother Abel, "His desires shall be subject unto thee, and thou shalt rule over him." Accordingly, when Jacob bought his brother's birthright, Isaac blessed him thus: "Be lord over thy brethren, and let the sons of thy mother bow before thee." [2]

As long as the first fathers of families lived, the name of patriarchs did aptly belong unto them; but after a few descents, when the true fatherhood itself was extinct, and only the right of the father descends to the true heir, then the title of prince or king was more significant to express the power of him who succeeds only to the right of that fatherhood which his ancestors did naturally enjoy. By this means it comes to pass that many a child, by succeeding a king, hath the right of a father over many a greyheaded multitude, and hath the title of *Pater Patriae*.

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1 [1 Kings xx. 16.]

2 [Gen. xxvii. 29.]

9. It may be demanded what becomes of the right of fatherhood in case the Crown does escheat for want of an heir, whether doth it not then devolve to the people? The answer is:

First, it is but the negligence or ignorance of the people to lose the knowledge of the true heir, for an heir there always is. If Adam himself were still living, and now ready to die, it is certain that there is one man, and but one in the world, who is next heir, although the knowledge who should be that one man be quite lost.

Secondly, this ignorance of the people being admitted, it doth not by any means follow that, for want of heirs, the supreme power is devolved to the multitude, and that they have power to rule and choose what rulers they please. No, the kingly power escheats in such cases to the princes and independent heads of families, for every kingdom is resolved into those parts whereof at first it was made. By the uniting of great families or petty kingdoms, we find the greater monarchies were at the first erected; and into such again, as into their first matter, many times they return again. And because the dependency of ancient families is oft obscure or worn out of knowledge, therefore the wisdom of all or most princes have thought fit to adopt many times those for heads of families and princes of provinces whose merits, abilities, or fortunes have ennobled them, or made them fit and capable of such regal favours. All such prime heads and fathers have power to consent in the uniting or conferring of their fatherly right of sovereign authority on whom they please; and he that is so elected claims not his power as a donative from the people, but as being substituted properly by God, from whom he receives his royal charter of an universal father, though testified by the ministry of the heads of the people.

If it please God, for the correction of the prince or punishment of the people, to suffer princes to be removed and others to be placed in their rooms, either by the factions of the nobility or rebellion of the people, in all such cases the judgment of God, who hath power to give and to take away kingdoms, is most just; yet the ministry of men who execute God's judgments without commission is sinful and damnable. God doth but use and turn men's unrighteous acts to the performance of His righteous decrees.

10. In all kingdoms or commonwealths in the world, whether the prince be the supreme father of the people or but the true heir of such a father, or whether he come to the crown by usurpation, or by election of the nobles or of the people, or by any other way whatsoever, or whether some few or a multitude govern the commonwealth, yet still the authority that is in any one, or in many, or in all these, is the only right and natural authority of a supreme father. There is and always shall be continued to the end of the world a natural right of a supreme father over every multitude, although, by the secret will of God, many at first do most unjustly obtain the exercise of it.

To confirm this natural right of regal power, we find in the Decalogue that the law which enjoins obedience to kings is delivered in the terms of "Honour thy father," as if all power were originally in the father. If obedience to parents be immediately due by a natural law, and subjection to princes but by the mediation of a human ordinance, what reason is there that the laws of nature should give place to the laws of men, as we see the power of the father over his child gives place and is subordinate to the power of the magistrate? If we compare the natural rights of a father with those of a king, we find them all one, without any difference at all but only in the latitude or extent of them: as the father over one family, so the king, as father over many families, extends his care to preserve, feed, clothe, instruct, and defend the whole commonwealth. His war, his peace, his courts of justice, and all his acts of sovereignty, tend only to preserve and distribute to every subordinate and inferior father, and to their children, their rights and privileges, so that all the duties of a king are summed up in an universal fatherly care of his people.

CHAPTER II
IT IS UNNATURAL FOR THE PEOPLE TO GOVERN OR CHOOSE GOVERNORS

1. By conferring these proofs and reasons, drawn from the authority of the Scripture, it appears little less than a paradox which Bellarmine and others affirm of the freedom of the multitude, to choose what rulers they please.

Had the patriarchs their power given them by their own children? Bellarmine does not say it, but the contrary. If then the fatherhood enjoyed this authority for so many ages by the law of nature, when was it lost, or when forfeited, or how is it devolved to the liberty of the multitude?

Because the Scripture is not favourable to the liberty of the people, therefore many fly to natural reason, and to the authority of Aristotle. I must crave liberty to examine or explain the opinion of this great philosopher; but briefly, I find this sentence in the third of his *Politics*, chap. 16:
δοκει δε τισιν ουδε κατα φυσιυ ειναι το κυριον ενα παντων ειναι των πολιτων, οπου συνεστηκε ν εξ ομοιων η πολις. It seems to some not to be natural for one man to be lord of all the citizens, since a city consists of equals. D. Lambine, in his Latin interpretation of this text, hath omitted the translation of this word τισιυ, by this means he maketh that to be the opinion of Aristotle, which Aristotle allegeth to be the opinion but of some. This negligence, or wilful escape, of Lambine, in not translating a word so material, hath been an occasion to deceive many who, looking no further than this Latin translation, have concluded, and made the world now of late believe, that Aristotle here maintains a natural equality of men; and not only our English translator of Aristotle's *Politics* is, in this place, misled by following Lambine, but even the learned Monsieur Duvall, in his *Synopsis*, bears them company; and yet this version of Lambine's is esteemed the best, and printed at Paris, with Causabon's corrected Greek copy, though in the rendering of this place the elder translations have been more faithful; and he that shall compare the Greek text with the Latin shall find that Causabon had just cause in his preface to Aristotle's works to complain that the best translations of Aristotle did need correction. To prove that in these words, which seem to favour the equality of mankind, Aristotle doth not speak according to his own judgment, but recites only the opinion of others, we find him clearly deliver his own opinion that the power of government did originally arise from the right of fatherhood, which cannot possibly consist with that natural equality which men dream of; for in the first of his *Politics* he agrees exactly with the Scripture, and lays this foundation of government:

> The first society made of many houses is a village, which seems most naturally to be a colony of families or foster-brethren of children and children's children. And, therefore, at the beginning, cities were under the government of kings, for the eldest in every house is king. And so for kindred sake it is in colonies.

And in the fourth of his *Politics*, chap. 2, he gives the title of the first and divinest sort of government to the institution of kings, by defining tyranny to be a digression from the first and divinest.

Whosoever weights advisedly these passages will find little hope of natural reason in Aristotle to prove the natural liberty of the multitude. Also before him the divine Plato concludes a commonweal to be nothing else but a large family. I know for this position Aristotle quarrels with his master, but most unjustly; for therein he contradicts his own principles, for they both agree to fetch the original of civil government from the prime government. No doubt but Moses' history of the creation guided these two philosophers in finding out of this lineal subjection deduced from the laws of the first parents, according to that rule of St. Chrysostom: "God made all mankind of one man, that he might teach the world to be governed by a king, and not by a multitude."

The ignorance of the Creation occasioned several errors amongst the heathen philosophers, Polybius, though otherwise a most profound philosopher and judicious historian, yet here he stumbles; for in searching out the original of civil societies, he conceited that multitudes of men after a deluge, a famine, or a pestilence, met together like herds of cattle without any dependency, until the strongest bodies . and boldest minds got the mastery of their fellows, "even as it is," saith he, "among bulls, bears, and cocks."

And Aristotle himself, forgetting his first doctrine, tells us the first heroical kings were chosen by the people for their deserving well of the multitude, either by teaching them some new arts, or by warring for them, or by gathering them together, or by dividing land amongst them; also Aristotle had another fancy that those men who prove wise of mind were by nature intended to be lords and govern; and those which were strong of body were ordained to obey, and to be servants. But this is a dangerous and uncertain rule, and not without some folly; for if a man prove both wise and strong, what will Aristotle have done with him? As he was wise, he could be no servant, and as he had strength, he could not be a master; besides, to speak like a philosopher, nature intends all things to be perfect both in wit and strength. The folly or imbecility proceeds from some error in generation or education; for nature aims at perfection in all her works.

2. Suarez, the Jesuit, riseth up against the royal authority of Adam, in defence of the freedom and liberty of the people, and thus argues:

> By right of creation Adam had only economical power, but not political. He had a power over his wife, and a fatherly power over his sons, whilst they were not made free. He might also, in process of time, have servants and a complete family, and in that family he might have complete economical power. But after that families began to be multiplied, and men to be separated and become the heads of several families, they had the same power over their families. But political power did not begin until families began to be gathered together into one perfect community; wherefore, as the community did not begin by the creation of Adam, nor by his will alone, but of all them which did agree in this community, so we cannot say that Adam naturally had political primacy in that community; for that cannot be gathered by any natural principles, because by the force of the law of nature alone it is not due unto any progenitor to be also king of his posterity. And if this be not gathered out of the principles of nature, we cannot say God by a special gift or providence gave him this power, for there is no revelation of this, nor testimony of Scripture — Hitherto Suarez.

Whereas he makes Adam to have a "fatherly power" over his sons, and yet shuts up this power within one family, he seems either to imagine that all Adam's children lived within one house and under one roof with their father, or else, as soon as any of his children lived out of his house, they ceased to be subject and did thereby become free. For my part I cannot believe that Adam, although he were sole monarch of the world, had any such spacious palace as might contain any such considerable part of his children. It is likelier that some mean cottage or tent did serve him to keep his court in. It were hard he should lose part of his authority because his children lay not within the wails of his house. But if Suarez will allow all Adam's children to be of his family, howsoever they were separate in dwellings, if their habitations were either contiguous or at such distance as might easily receive his fatherly commands; and that all that were under his commands were of his family, although they had many children or servants married, having themselves also children, then I see no reason but that we may call Adam's family a commonwealth, except we will wrangle about words, for Adam, living nine hundred and thirty years, and seeing seven or eight descents from himself, he might live to command of his children and their posterity a multitude far bigger than many commonwealths and kingdoms.

3. I know the politicians and civil lawyers do not agree well about the definition of a family, and Bodin[3] doth seem in one place to confine it to a house; yet in his definition he doth enlarge his meaning to all persons under the obedience of one and the same head of the family, and he approves better of the propriety of the Hebrew word for a family which is derived from a word that signifies a head, a prince, or lord, than the Greek word for a family which is derived from οικοις, which signifies a house. Nor doth Aristotle confine a family to one house, but esteems it to be made of those that daily converse together; whereas, before him, Charondas called a family *homosypioi*, those that feed together out of one common pannier. And Epimenides the Cretian terms a family *komocapnoi*, those that sit by a common fire or smoke. But let Suarez understand what he please by Adam's family, if he will but confess, as he needs must, that Adam and the patriarchs had absolute power of life and death, of peace and war, and the like, within their houses or families, he must give us leave, at least, to call them kings of their houses or families; and if they be so by the law of nature, what liberty will be left to their children to dispose of?

Aristotle gives the lie to Plato and those that say political and economical societies are all one and do not differ *specie*, but only *multitudine* and *paucitate*, as if there were no difference betwixt a great house and a little city. All the argument I find he brings against them is this:

The community of man and wife differs from the community of master and servant, because they have several ends. The intention of nature, by conjunction of male and female, is generation; but the scope of master and servant is preservation, so that a wife and a servant are by nature distinguished, because nature does not work like the cutlers of Delphos, for she makes but one thing for one use. If we allow this argument to be sound, nothing doth follow but only this: that conjugal and despotical communities do differ. But it is no consequence that therefore economical and political societies do the like; for though it prove a family to consist of two distinct communities, yet it follows not that a family and a commonwealth are distinct, because, as well in the commonweal as in the families, both these communities are found.[4]

And as this argument comes not home to our point, so it is not able to prove that title which it shows for; for if it should be granted — which yet is false — that generation and preservation differ about the *individuum*, yet they agree in the general, and serve both for the conservation of mankind; even as several servants differ in the particular ends or offices, as one to brew and another to bake, yet they agree in the general preservation of the family. Besides, Aristotle confesses that amongst the barbarians — as he calls all them that are not Grecians — a wife and a servant are the same, because by nature no barbarian is fit to govern. It is fit the Grecians should rule over the barbarians; for by nature a servant and a barbarian is all one. Their family consists only of an ox for a man-servant and a wife for a maid; so they are fit only to rule their wives and their beasts. Lastly, Aristotle, if it had pleased him, might have remembered that nature doth not always make one thing but for one use. He knows the tongue serves both to speak and to taste.

4. But to leave Aristotle and return to Suarez. He saith that Adam had fatherly power over his sons whilst they were not made free. Here I could wish that the Jesuit had taught us how and when sons become free; I know no means by the law of nature. It is the favour, I think, of the parents only, who when their

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3 [John Bodin (1530-1596) was a *politique*, and one of a group of Catholic Frenchmen who believed that the unity and welfare of the state should not be sacrificed on behalf of the church. He is most famous for his *Six Livres de la République* (1577) in which he expounded the doctrine of monarchical sovereignty and developed the first major systematic treatment of politics since Aristotle.]

4 [Aristotle, *Politics*, Bk. i. chap. 2.]

children are of age and discretion to ease their parents of part of their fatherly care, are then content to remit some part of their fatherly authority. Therefore the custom of some countries doth in some cases enfranchise the children of inferior parents, but many nations have no such custom, but, on the contrary, have strict laws for the obedience of children. The judicial law of Moses giveth full power to the father to stone his disobedient son so it be done in presence of a magistrate, and yet it did not belong to the magistrate to inquire and examine the justness of the cause, but it was so decreed lest the father should in his anger suddenly or secretly kill his son.

Also by the laws of the Persians and of the people of the Upper Asia and of the Gauls, and by the laws of the West Indies, the parents have power of life and death over their children.

The Romans, even in their most popular estate, had this law in force, and this power of parents was ratified and amplified by the laws of the Twelve Tables, to the enabling of parents to sell their children two or three times over. By the help of the fatherly power Rome long flourished, and oftentimes was freed from great dangers. The fathers have drawn out of the very assemblies their own sons when, being tribunes, they have published laws tending to sedition.

Memorable is the example of Cassius, who threw his son headlong out of the Consistory publishing the law *Agraria* for the division of lands in the behoof of the people, and afterwards, by his own private judgment, put him to death by throwing him down from the Tarpeian Rock, the magistrates and people standing thereat amazed and not daring to resist his fatherly authority, although they would with all their hearts have had that law for the division of land — by which it appears it was lawful for the father to dispose of the life of his child contrary to the will of the magistrates or people. The Romans also had a law that what the children got was not their own but their father's, although Solon made a law which acquitted the son from nourishing of his father if his father had taught him no trade whereby to get his living.

Suarez proceeds, and tells us that in process of time Adam had complete economical power. I know not what this complete economical power is, nor how or what it doth really and essentially differ from political. If Adam did or might exercise the same jurisdiction which a king doth now in a commonwealth, then the kinds of power are not distinct, and though they may receive an accidental difference by the amplitude or extent of the bounds of the one beyond the other, yet since the like difference is also found in political estates, it follows that economical and political power differ no otherwise than a little commonweal differs from a great one. Next, saith Suarez, community did not begin at the creation of Adam. It is true, because he had nobody to communicate with; yet community did presently follow his creation, and that by his will alone, for it was in his power only who was lord of all to appoint what his sons should have in proper and what in common; so that propriety and community of goods did follow originally from him, and it is the duty of a father to provide as well for the common good of his children as the particular.

Lastly, Suarez concludes that by the law of nature alone it is not due unto any progenitor to be also king of his posterity. This assertion is confuted point-blank by Bellarmine, who expressly affirmeth that the first parents ought to have been princes of their posterity. And until Suarez bring some reason for what he saith, I shall trust more to Bellarmine's proofs than to his denials.

5. But let us condescend a while to the opinion of Bellarmine and Suarez, and all those who place supreme power in the whole people, and ask them if their meaning be that there is but one and the same power in all the people of the world, so that no power can be granted except all the men upon the earth meet and agree to choose a governor.

An answer is here given by Suarez, that it is scarce possible nor yet expedient that all men in the world should be gathered together into one community. It is likelier that either never or for a very short time that this power was in this manner in the whole multitude of men collected, but a little after the creation men began to be divided into several commonwealths, and this distinct power was in each of them.

This answer of "scarce possible nor yet expedient" — it is likelier begets a new doubt how this distinct power comes to each particular community when God gave it to the whole multitude only, and not to any particular assembly of men. Can they show or prove that ever the whole multitude met and divided this power which God gave them in gross by breaking into parcels and by appointing a distinct power to each several commonwealth? Without such a compact I cannot see — according to their own principles — how there can be any election of a magistrate by any commonwealth, but by a mere usurpation upon the privilege of the whole world. If any think that particular multitudes at their own discretion had power to divide themselves into several commonwealths, those that think so have neither reason nor proof for so thinking, and thereby a gap is opened for every petty factious multitude to raise a new commonwealth, and to make more commonweals than there be families in the world. But let this also be yielded them, that in each particular commonwealth there is a distinct power in the multitude. Was a general meeting of a whole kingdom ever known for the election of a prince? Is there any example of it ever found in the whole world? To conceit such a thing is to imagine little less than an impossibility, and so by consequence no one form of government or king was ever established according to this supposed law of nature.

6. It may be answered by some that if either the greatest part of a kingdom, or if a smaller part only by themselves, and all the rest by proxy, or if the part not concurring in election do after, by a tacit assent, ratify the act of others, that in all these cases it may be said to be the work of the whole multitude.

As to the acts of the major part of a multitude, it is true that by politic human constitutions it is oft ordained that the voices of the most shall overrule the rest; and such ordinances bind, because where men are assembled by a human power, that power that doth assemble them can also limit and direct the manner of the execution of that power, and by such derivative power, made known by law or custom, either the greater part, or two thirds, or three parts of five, or the like, have power to oversway the liberty of their opposites. But in assemblies that take their authority from the law of nature, it cannot be so; for what freedom or liberty is due to any man by the law of nature no inferior power can alter, limit or diminish; no one man nor a multitude can give away the natural right of another. The law of nature is unchangeable, and howsoever one man may hinder another in the use or exercise of his natural right, yet thereby no man loseth the right of itself; for the right and the use of the right may be distinguished, as right and possession are oft distinct. Therefore, unless it can be proved by the law of nature that the major or some other part have power to overrule the rest of the multitude, it must follow that the acts of multitudes not entire are not binding to all but only to such as consent unto them.

7. As to the point of proxy, it cannot be shown or proved that all those that have been absent from popular elections did ever give their voices to some of their fellows. I ask but one example out of the history of the whole world: let the commonweal be but named wherever the multitude or so much as the greatest part of it consented, either by voice or by procuration, to the election of a prince. The ambition sometimes of one man, sometimes of many, or the faction of a city or citizens, or the mutiny of an army, hath set up or put down princes; but they have never tarried for this pretended order by proceeding of the whole multitude.

Lastly, if the silent acceptation of a governor by part of the people be an argument of their concurring in the election of him, by the same reason the tacit assent of the whole commonwealth may be maintained; from whence it follows that every prince that comes to a crown, either by succession, conquest, or

usurpation, may be said to be elected by the people, which inference is too ridiculous; for in such cases the people are so far from the liberty of specification that they want even that of contradiction.

8. But it is in vain to argue against the liberty of the people in the election of kings, as long as men are persuaded that examples of it are to be found in Scripture. It is fit, therefore, to discover the grounds of this error. It is plain by an evident text that it is one thing to choose a king, and another thing to set up a king over the people; this latter power the children of Israel had, but not the former. This distinction is found most evident in Deut. xvii. 15, where the law of God saith: "Him shalt thou set king over thee whom the Lord shall choose"; so God must *eligere*, and the people only do *constituere*. Mr. Hooker, in his eighth Book of *Ecclesiastical Policy*, clearly expounds this distinction; the words are worthy the citing:

> Heaps of Scripture are alleged concerning the solemn coronation or inauguration of Saul, David, Solomon, and others, by nobles, ancients, and the people of the commonwealth of Israel; as if these solemnities were a kind of deed, whereby the right of dominion is given, which strange, untrue, and unnatural conceits are set abroad by seedmen of rebellion, only to animate unquiet spirits, and to feed them with possibilities of aspiring unto the thrones, if they can win the hearts of the people, whatsoever hereditary title any other before them may have. I say these unjust and insolent positions I would not mention were it not thereby to make the countenance of truth more orient. For unless we will openly proclaim defiance unto all law, equity, and reason, we must — for there is no other remedy — acknowledge that in kingdoms hereditary, birthright giveth right unto sovereign dominion, and the death of the predecessor putteth the successor by blood in seisin. Those public solemnities before-mentioned do either serve for an open testification of the inheritor's right, or belong to the form of inducing of him into possession of that thing he hath right unto.

This is Mr. Hooker's judgment of the Israelites' power to set a king over themselves. No doubt but if the people of Israel had had power to choose their king, they would never have made choice of Joas, a child but of seven years old, nor of Manasses, a boy of twelve; since, as Solomon saith, "Woe to the land whose king is a child." Nor is it probable they would have elected Josias, but a very child and a son to so wicked and idolatrous a father, as that his own servants murdered him; and yet all the people set up this young Josias, and slew the conspirators of the death of Ammon, his father, which justice of the people God rewarded by making this Josias the most religious king that ever that nation enjoyed.

9. Because it is affirmed that the people have power to choose as well what form of government as what governors they please, of which mind is Bellarmine in those places we cited at first. Therefore it is necessary to examine the strength of what is said in defence of popular commonweals against this natural form of kingdoms which I maintained. Here I must first put the Cardinal in mind of what he affirms in cold blood in other places, where he saith: "God, when he made all mankind of one man, did seem openly to signify that he rather approved the government of one man than of many." Again, God showed his opinion when he endued, not only men, but all creatures with a natural propensity to monarchy; neither can it be doubted but a natural propensity is to be referred to God, who is author of nature. And again, in a third place, what form of government God confirmed by his authority may be gathered by that commonweal which he instituted amongst the Hebrews, which was not aristocratical, as Calvin saith, but plainly monarchical.

10. Now, if God, as Bellarmine saith, hath taught us by natural instinct, signified to us by the Creation, and confirmed by His own example, the excellency of monarchy, why should Bellarmine or we doubt but that it is natural? Do we not find that in every family the government of one alone is most natural? God did always govern his own people by monarchy only. The patriarchs, dukes, judges, and kings were all

monarchs. There is not in all the Scripture mention or approbation of any other form of government. At the time when Scripture saith: "There was no king in Israel, but that every man did that which was right in his own eyes", even then the Israelites were under the kingly government of the fathers of particular families; for, in the consultation after the Benjamitical war for providing wives for the Benjamites, we find the elders of the congregation bear only sway (Judges xxi. 16). To them also were complaints to be made, as appears by verse 22. And though mention be made of all the children of Israel, all the congregation, and all the people, yet by the term of "all" the Scripture means only all the fathers, and not all the whole multitude, as the text plainly expounds itself in 2 Chron. i. 2, where Solomon speaks unto all Israel, to the captains, the judges, and to every governor, the chief of the fathers, so the elders of Israel are expounded to be the chief of the fathers of the children of Israel (1 Kings viii. 12; 2 Chron, vs. 2).

At that time also, when the people of Israel begged a king of Samuel, they were governed by kingly power. God, out of a special love and care to the house of Israel, did choose to be their King Himself, and did govern them at that time by His Viceroy Samuel and his sons, and therefore God tells Samuel: "They have not rejected thee but Me, that I should not reign over them." It seems they did not like a king by deputation but desired one by succession like all the nations. All nations belike had kings then, and those by inheritance, not by election; for we do not find the Israelites prayed that they themselves might choose their own king. They dream of no such liberty, and yet they were the elders of Israel gathered together. If other nations had elected their own kings, no doubt but they would have been as desirous to have imitated other nations as well in the electing as in the having of a king.

Aristotle, in his book of *Politics*, when he comes to compare the several kinds of government, he is very reserved in discoursing what form he thinks best: he disputes subtilely to and fro of many points, and judiciously of many errors, but concludes nothing himself. In all those books I find little commendation of monarchy. It was his hap to live in those times when the Grecians abounded with several commonwealths, who had then learning enough to make them seditious. Yet in his *Ethics*, he hath so much good manners as to confess in right down words that "Monarchy is the best form of government, and a popular estate the worst." And though he be not so free in his politics, yet the necessity of truth hath here and there extorted from him that which amounts no less to the dignity of monarchy; he confesseth it to be, first, the natural and the divinest form of government; and that the gods themselves did live under a monarchy. What can a heathen say more?

Indeed, the world for a long time knew no other sort of government but only monarchy. The best order, the greatest strength, the most stability, and easiest government are to be found all in monarchy, and in no other form of government. The new platforms of commonweals were first hatched in a corner of the world, amongst a few cities of Greece, which have been imitated by very few other places. Those very cities were first, for many years, governed by kings, until wantonness, ambition, or faction of the people, made them attempt new kinds of regimen; all which mutations proved most bloody and miserable to the authors of them — happy in nothing but that they continued but a small time.

11. A little to manifest the imperfection of popular government, let us but examine the most flourishing democracy that the world hath ever known — I mean that of Rome. First, for the durability: at the most it lasted but four hundred and eighty years; for so long it was from the expulsion of Tarquin to Julius Caesar, whereas both the Assyrian monarchy lasted without interruption at the least twelve hundred years, and the empire of the East continued one thousand four hundred and ninety-five years.

Secondly, For the order of it, during these four hundred and eighty years, there was not any one settled form of government in Rome; for after they had once lost the natural power of kings, they could not find upon what form of government to rest. Their fickleness is an evidence that they found things amiss in every change. At the first they chose two annual consuls instead of kings. Secondly, those did not please

them long, but they must have tribunes of the people to defend their liberty. Thirdly, they leave tribunes and consuls, and choose them ten men to make them laws. Fourthly, they call for consuls and tribunes again, sometimes they choose dictators, which were temporary kings, and sometimes military tribunes, who had consular power. All these shiftings caused such notable alteration in the government, as it passeth historians to find out any perfect form of regimen in so much confusion; one while the Senate made laws, another while the people. The dissensions which were daily between the Nobles and the Commons bred those memorable seditions about usury, about marriages, and about magistracy. Also the Grecian, the Apulian, and the Drusian seditions filled the market places, the temples, and the Capitol itself, with blood of the citizens; the Social War was plainly civil; the wars of the slaves, and the other of the fencers; the civil wars of Marius and Sylla, of Cataline, of Cæsar, and Pompey the Triumvirate, of Augustus, Lepidus, and Antonius — all these shed an ocean of blood within Italy and the streets of Rome.

Thirdly, For their government, let it be allowed that for some part of this time it was popular, yet it was popular as to the city of Rome only, and not as to the dominions or the whole empire of Rome; for no democracy can extend further than to one city. It is impossible to govern a kingdom, much less many kingdoms, by the whole people or by the greatest part of them.

12. But you will say, yet the Roman empire grew all up under this kind of popular government, and the city became mistress of the world. It is not so; for Rome began her empire under kings, and did perfect it under emperors; it did only increase under that popularity. Her greatest exaltation was under Trajan, as her longest peace had been under Augustus. Even at those times when the Roman victories abroad did amaze the world, then the tragical slaughter of citizens at home deserved commiseration from their vanquished enemies. What though in that age of her popularity she bred many admired captains and commanders — each of which was able to lead an army, though many of them were but ill requited by the people — yet all of them were not able to support her in times of danger; but she was forced in her greatest troubles to create a dictator, who was a king for a time, thereby giving this honourable testimony of monarchy that the last refuge in perils of states is to fly to regal authority. And though Rome's popular estate for a while was miraculously upheld in glory by a greater prudence than her own, yet in a short time, after manifold alterations, she was ruined by her own hands: *suis et ipsa Roma viribus mil*; for the arms she had prepared to conquer other nations were turned upon herself, and civil contentions at last settled the government again into a monarchy.

13. The vulgar opinion is that the first cause why the democratical government was brought in was to curb the tyranny of monarchies. But the falsehood of this doth best appear by the first flourishing popular estate of Athens, which was founded, not because of the vices of their last king, but that his virtuous deserts were such as the people thought no man worthy enough to succeed him — a pretty wanton quarrel to monarchy! For when their king Codrus understood by the oracle that his country could not be saved unless the king were slain in the battle, he in disguise entered his enemy's camp and provoked a common soldier to make him a sacrifice for his own kingdom, and with his death ended the royal government; for after him was never any more kings of Athens. As Athens thus for love of her Codrus changed the government, so Rome, on the contrary, out of hatred to her Tarquin did the like. And though these two famous commonweals did for contrary causes abolish monarchy, yet they both agreed in this, that neither of them thought it fit to change their state into a democracy; but the one chose archontes, and the other consuls, to be their governors; both which did most resemble kings, and continued until the people, by lessening the authority of these their magistrates, did by degrees and stealth bring in their popular government. And I verily believe never any democratical state showed itself at first fairly to the world by any elective entrance, but they all secretly crept in by the back-door of sedition and faction.

14. If we will listen to the judgment of those who should best know the nature of popular government, we shall find no reason for good men to desire or choose it. Xenophon, that brave scholar and soldier,

disallowed the Athenian commonweal for that they followed that form of government wherein the wicked are always in greatest credit, and virtuous men kept under. They expelled Aristides the Just; Themistocles died in banishment; Miltiades in prison; Phocion, the most virtuous and just man of his age, though he had been chosen forty-five times to be their general, yet he was put to death with all his friends, kindred, and servants, by the fury of the people, without sentence, accusation, or any cause at all. Nor were the people of Rome much more favourable to their worthies. They banished Rutilius, Metellus, Coriolanus, the two Scipios, and Tully. The worst men sped best; for as Xenophon saith of Athens, so Rome was a sanctuary for all turbulent, discontented, and seditious spirits. The impunity of wicked men was such that upon pain of death it was forbidden all magistrates to condemn to death or banish any citizen, or to deprive him of his liberty, or so much as to whip him, for what offence soever he had committed, either against the gods or men.

The Athenians sold justice as they did other merchandise, which made Plato call a popular estate a fair, where everything is to be sold. The officers, when they entered upon their charge, would brag they went to a golden harvest. The corruption of Rome was such that Marius and Pompey durst carry bushels of silver into the assemblies to purchase the voices of the people. Many citizens under their grave gowns came armed into their public meetings, as if they went to war. Often contrary factions fell to blows, sometimes with stones, and sometimes with swords. The blood hath been sucked up in the market places with sponges; the river Tiber hath been filled with the dead bodies of the citizens, and the common privies stuffed full with them.

If any man think these disorders in popular states were but casual, or such as might happen under any kind of government, he must know that such mischiefs are unavoidable and of necessity do follow all democratical regimens; and the reason is given, because the nature of all people is to desire liberty without restraint, which cannot be but where the wicked bear rule; and if the people should be so indiscreet as to advance virtuous men, they lose their power; for that good men would favour none but the good, which are always the fewer in number, and the wicked and vicious — which is still the greatest part of the people — should be excluded from all preferment, and in the end, by little and little, wise men should seize upon the state and take it from the people.

I know not how to give a better character of the people than can be gathered from such authors as lived amongst or near the popular states. Thucydides, Xenophon, Livy, Tacitus, Cicero, and Sallust have set them out in their colours. I will borrow some of their sentences:

> There is nothing more uncertain than the people; their opinions are as variable and sudden as tempests; there is neither truth nor judgment in them; they are not led by wisdom to judge of anything, but by violence and rashness; nor put they any difference between things true and false. After the manner of cattle, they follow the herd that goes before; they have a custom always to favour the worst and the weakest; they are most prone to suspicions, and use to condemn men for guilty upon any false suggestion; they are apt to believe all news, especially if it be sorrowful; and, like Fame, they make it more in the believing; when there is no author, they fear those evils which themselves have feigned; they are most desirous of new stirs and changes, and are enemies to quiet and rest; whatsoever is giddy or headstrong, they account manlike and courageous; but whatsoever is modest or provident seems sluggish; each man hath a care of his particular, and thinks basely of the common good; they look upon approaching mischiefs as they do upon thunder, only every man wisheth it may not touch his own person; it is the nature of them, they must serve basely or domineer proudly; for they know no mean.

Thus do they paint to the life this beast with many heads. Let me give you the cipher of their form of government: as it is begot by sedition, so it is nourished by arms; it can never stand without wars, either

with an enemy abroad or with friends at home. The only means to preserve it is to have some powerful enemies near who may serve instead of a king to govern it, that so, though they have not a king amongst them, yet they may have as good as a king over them; for the common danger of an enemy keeps them in better unity than the laws they make themselves.

15. Many have exercised their wits in paralleling the inconveniences of regal and popular government; but if we will trust experience before speculations philosophical, it cannot be denied but this one mischief of sedition, which necessarily waits upon all popularity, weighs down all the inconveniences that can be found in monarchy, though they were never so many. It is said, "Skin for skin, yea, all that a man hath will he give for his life"; and a man will give his riches for the ransom of his life. The way then to examine what proportion the mischiefs of sedition and tyranny have one to another is to inquire in what kind of government most subjects have lost their lives. Let Rome, which is magnified for her popularity, and vilified for the tyrannical monsters, the emperors, furnish us with examples. Consider whether the cruelty of all the tyrannical emperors that ever ruled in this city did ever spill a quarter of the blood that was poured out in the last hundred years of her glorious commonwealth. The murders by Tiberius, Domitian, and Commodus, put all together, cannot match that civil tragedy which was acted in that one sedition between Marius and Sylla, nay, even by Sylla's part alone — not to mention the acts of Marius — were fourscore and ten senators put to death, fifteen consuls, two thousand and six hundred gentlemen, and a hundred thousand others.

This was the height of the Roman liberty; any man might be killed that would — a favour not fit to be granted under a royal government. The miseries of those licentious times are briefly touched by Plutarch in these words:

> Sylla fell to shedding of blood, and filled all Rome with infinite and unspeakable murders. This was not only done in Rome, but in all the cities of Italy throughout there was no temple of any god whatsoever, no altar in anybody's house, no liberty of hospital, no father's house, which was not embrued with blood and horrible murders; the husbands were slain in the wives' arms, and the children in the mothers' laps; and yet they that were slain for private malice were nothing in respect of those that were murdered only for their goods.... He openly sold their goods by the crier, sitting so proudly in his chair of state, that it grieved the people more to see their goods packed up by them to whom he gave or disposed them than to see them taken away. Sometimes he would give a whole country, or the whole revenues of certain cities, unto women for their beauties, or to pleasant jesters, minstrels, or wicked slaves made free. And to some he would give other men's wives by force, and make them be married against their wills.

Now let Tacitus and Suetonius be searched, and see if all their cruel emperors can match this popular villany in such an universal slaughter of citizens, or civil butchery. God only was able to match him, and over-matched him, by fitting him with a most remarkable death, just answerable to his life; for as he had been the death of many thousands of his countrymen, so as many thousands of his own kindred in the flesh were the death of him, for he died of an impostume which corrupted his flesh in such sort that it turned all to lice. He had many about him to shift him continually night and day; yet the lice they wiped from him were nothing to them that multiplied upon him; there was neither apparel, linen, baths, washings, nor meat itself, but was presently filled with swarms of this vile vermin. I cite not this to extenuate the bloody acts of any tyrannical princes, nor will I plead in defence of their cruelties; only in the comparative I maintain the mischiefs to a state to be less universal under a tyrant king; for the cruelty of such tyrants extends ordinarily no further than to some particular men that offend him, and not to the whole kingdom. It is truly said by his late Majesty King James: A king can never be so notoriously vicious but he will generally favour justice, and maintain some order, except in the particulars wherein his inordinate lust carries him away. Even cruel Domitian, Dionysius, the tyrant, and many others are

commended by historians for great observers of justice. A natural reason is to be rendered for it. It is the multitude of people and the abundance of their riches which are the only strength and glory of every prince. The bodies of his subjects do him service in war, and their goods supply his present wants; therefore, if not out of affection to his people, yet out of natural love to himself, every tyrant desires to preserve the lives and protect the goods of his subjects, which cannot be done but by justice, and if it be not done, the prince's loss is the greatest; on the contrary, in a popular state every man knows the public good doth not depend wholly on his care, but the commonwealth may well enough be governed by others though he tend only his private benefit, he never takes the public to be his own business. Thus, as in a family, where one office is to be done by many servants, one looks upon another, and every one leaves the business for his fellow until it is quite neglected by all; nor are they much to be blamed for their negligence, since it is an even wager their ignorance is as great. For magistrates among the people, being for the most part annual, do always lay down their office before they understand it; so that a prince of a duller understanding, by use and experience, must needs excel them. Again, there is no tyrant so barbarously wicked but his own reason and sense will tell him that though he be a god, yet he must die like a man; and that there is not the meanest of his subjects but may find a means to revenge himself of the injustice that is offered him. Hence it is that great tyrants live continually in base fears, as did Dionysius the elder; Tiberius, Caligula, and Nero are noted by Suetonius to have been frightened with panic fears. But it is not so where wrong is done to any particular person by a multitude. He knows not who hurt him, or who to complain of, or to whom to address himself for reparation. Any man may boldly exercise his malice and cruelty in all popular assemblies. There is no tyranny to be compared to the tyranny of a multitude.

16. What though the government of the people be a thing not to be endured, much less defended, yet many men please themselves with an opinion that though the people may not govern, yet they may partake and join with a king in the government, and so make a state mixed of popular and regal power, which they take to be the best-tempered and equallest form of government. But the vanity of this fancy is too evident, it is a mere impossibility or contradiction; for if a king but once admit the people to be his companions, he leaves to be a king, and the state becomes a democracy; at least, he is but a titular and no real king that hath not the sovereignty to himself; for the having of this alone, and nothing but this, makes a king to be a king. As for that show of popularity which is found in such kingdoms as have general assemblies for consultation about making public laws, it must be remembered that such meetings do not share or divide the sovereignty with the prince, but do only deliberate and advise their supreme head, who still reserves the absolute power in himself: for if in such assemblies the king, the nobility, and people have equal shares in the sovereignty, then the king hath but one voice, the nobility likewise one, and the people one, and then any two of these voices should have power to overrule the third; thus the nobility and commons together should have power to make a law to bind the king, which was never yet seen in any kingdom, but if it could, the state must needs be popular and not regal.

17. If it be unnatural for the multitude to choose their governors, or to govern or to partake in the government, what can be thought of that damnable conclusion which is made by too many that the multitude may correct or depose their prince if need be? Surely the unnaturalness and injustice of this position cannot sufficiently be expressed; for admit that a king make a contract or paction with his people, either originally in his ancestors or personally at his coronation — for both these pactions some dream of but cannot offer any proof for either — yet by no law of any nation can a contract be thought broken, except that first a lawful trial be had by the ordinary judge of the breakers thereof, or else every man may be both party and judge in his own case, which is absurd once to be thought, for then it will lie in the hands of the headless multitude when they please to cast off the yoke of government — that God hath laid upon them — to judge and punish him, by whom they should be judged and punished themselves. Aristotle can tell us what judges the multitude are in their own case,
πλειστοι φαυλοι κριται περι των οικειων. The judgment of the multitude in disposing of the

sovereignty may be seen in the Roman history, where we may find many good emperors murdered by the people, and many bad elected by them. Nero, Heliogabalus, Otho, Vitellius, and such other monsters of nature, were the minions of the multitude and set up by them. Pertinax, Alexander, Severus, Gordianus, Gallus, Emilianus, Quintilius, Aurelianus, Tacitus, Probus, and Numerianus, all of them good emperors in the judgment of all historians, yet murdered by the multitude.

18. Whereas many out of an imaginary fear pretend the power of the people to be necessary for the repressing of the insolences of tyrants; wherein they propound a remedy far worse than the disease, neither is the disease indeed so frequent as they would have us think. Let us be judged by the history even of our own nation. We have enjoyed a succession of kings from the Conquest now for above six hundred years — a time far longer than ever yet any popular State could continue — we reckon to the number of twenty-six of these princes since the Norman race, and yet not one of these is taxed by our historians for tyrannical government. It is true, two of these kings have been deposed by the people and barbarously murdered, but neither of them for tyranny; for, as a learned historian of our age saith: "Edward II and Richard II were not insupportable either in their nature or rule, and yet the people, more upon wantonness than for any want, did take an unbridled course against them." Edward II by many of our historians is reported to be of a good and virtuous nature, and not unlearned; they impute his defects rather to fortune than either to counsel or carriage of his affairs. The deposition of him was a violent fury, led by a wife both cruel and unchaste, and can with no better countenance of right be justified than may his lamentable both indignities and death itself. Likewise the deposition of King Richard II was a tempestuous rage, neither led or restrained by any rules of reason or of state. Examine his actions without a distempered judgment, and you will not condemn him to be exceeding either insufficient or evil; weigh the imputations that were objected against him, and you shall find nothing either of any truth or of great moment. Hollingshed writeth:

> That he was most unthankfully used by his subjects; for, although, through the frailty of his youth he demeaned himself more dissolutely than was agreeable to the royalty of his estate, yet in no king's days were the commons in greater wealth, the nobility more honoured, and the clergy less wronged, who, notwithstanding, in the evil-guided strength of their will, took head against him, to their own headlong destruction afterwards, partly during the reign of Henry, his next successor, whose greatest achievements were against his own people in executing those who conspired with him against King Richard. But more especially in succeeding times when, upon occasion of this disorder, more English blood was spent than was in all the foreign wars together which have been since the Conquest.

Twice hath this kingdom been miserably wasted with civil war, but neither of them occasioned by the tyranny of any prince. The cause of the Barons' wars is by good historians attributed to the stubbornness of the nobility, as the bloody variance of the houses of York and Lancaster, and the late rebellion sprang from the wantonness of the people. These three unnatural wars have dishonoured our nation amongst strangers, so that in the censures of kingdoms the King of Spain is said to be the king of men, because of his subjects' willing obedience; the King of France king of asses, because of their infinite taxes and impositions; but the King of England is said to be the king of devils, because of his subjects' often insurrections against and depositions of their princes.

CHAPTER III
POSITIVE LAWS DO NOT INFRINGE THE NATURAL AND FATHERLY POWER OF KINGS

1. HITHERTO I have endeavoured to show the natural institution of regal authority, and to free it from subjection to an arbitrary election of the people. It is necessary also to inquire whether human laws have a superiority over princes, because those that maintain the acquisition of royal jurisdiction from the people do subject the exercise of it to positive laws. But in this also they err; for as kingly power is by the law of God, so it hath no inferior law to limit it.

The father of a family governs by no other law than by his own will, not by the laws and wills of his sons or servants. There is no nation that allows children any action or remedy for being unjustly governed; and yet, for all this, every father is bound by the law of nature to do his best for the preservation of his family. But much more is a king always tied by the same law of nature to keep this general ground, that the safety of the kingdom be his chief law; he must remember that the profit of every man in particular, and of all together in general, is not always one and the same; and that the public is to be preferred before the private; and that the force of laws must not be so great as natural equity itself, which cannot fully be comprised in any laws whatsoever, but is to be left to the religious achievement of those who know how to manage the affairs of state, and wisely to balance the particular profit with the counterpoise of the public, according to the infinite variety of times, places, persons. A proof unanswerable for the superiority of princes above laws is this, that there were kings long before there were any laws. For a long time the word of a king was the only law; and if practice, as saith Sir Walter Raleigh, declare the greatness of authority, even the best kings of Judah and Israel were not tied to any law; but they did whatsoever they pleased in the greatest matters.

2. The unlimited jurisdiction of kings is so amply described by Samuel that it hath given occasion to some to imagine that it was but either a plot or trick of Samuel to keep the government himself and family by frightening the Israelites with the mischiefs in monarchy, or else a prophetical description only of the future ill-government of Saul. But the vanity of these conjectures are judiciously discovered in that majestical discourse of the true law of free monarchy, wherein it is evidently shown that the scope of Samuel was to teach the people a dutiful obedience to their king, even in those things which themselves did esteem mischievous and inconvenient; for by telling them what a king would do he, indeed, instructs them what a subject must suffer, yet not so that it is right for kings to do injury, but it is right for them to go unpunished by the people if they do it. So that in this point it is all one whether Samuel describe a king or a tyrant, for patient obedience is due to both; no remedy in the text against tyrants, but in crying and praying unto God in that day. But howsoever in a rigorous construction Samuel's description be applied to a tyrant, yet the words by a benign interpretation may agree with the manners of a just king, and the scope and coherence of the text doth best imply the more moderate or qualified sense of the words; for, as Sir Walter Raleigh confesses, all those inconveniences and miseries which are reckoned by Samuel as belonging to kingly government were not intolerable, but such as have been borne, and are still borne, by free consent of subjects towards their princes. Nay, at this day, and in this land, many tenants, by their tenures and services, are tied to the same subjection even to subordinate and inferior lords: to serve the king in his wars and to till his ground is not only agreeable to the nature of subjects but much desired by them, according to their several births and conditions. The like may be said for the offices of women servants, confectioners, cooks, and bakers; for we cannot think that the king would use their labours without giving them wages, since the text itself mentions a liberal reward of his servants.

As for the taking of the tenth of their seed, of their vines, and of their sheep, it might be a necessary provision for their king's household, and so belong to the right of tribute; for whereas is mentioned the taking of the tenth, it cannot agree well to a tyrant, who observes no proportion in fleecing his people.

Lastly, the taking of their fields, vineyards, and olive trees, if it be by force or fraud or without just recompense to the damage of private persons only, it is not to be defended; but if it be upon the public charge and general consent, it might be justified as necessary at the first erection of a kingdom, for those who will have a king are bound to allow him royal maintenance by providing revenues for the Crown, since it is both for the honour, profit, and safety, too, of the people to have their king glorious, powerful, and abounding in riches. Besides, we all know the lands and goods of many subjects may be ofttimes legally taken by the king, either by forfeitures, escheat, attainder, outlawry, confiscation, or the like. Thus we see Samuel's character of a king may literally well bear a mild sense, for greater probability there is that Samuel so meant, and the Israelites so understood it; to which this may be added that Samuel tells the Israelites: "This will be the manner of the king that shall reign over you, and ye shall cry because of your king which ye shall have chosen you" — that is to say, thus shall be the common custom or fashion or proceeding of Saul your king; or, as the vulgar Latin renders it, "This shall be the right or law of your king" — not meaning, as some expound it, the casual event or act of some *individuum vagum*, or indefinite king, that might happen one day to tyrannize over them. So that Saul, and the constant practice of Saul, doth best agree with the literal sense of the text. Now that Saul was no tyrant, we may note that the people "asked a king, as all nations had." God answers, and bids Samuel to "hear the voice of the people in all things which they spake," and "appoint them a king." They did not ask a tyrant, and to give them a tyrant when they asked a king had not been to hear their voice in all things, but rather when they asked an egg to have given them a scorpion, unless we will say that all nations had tyrants.

Besides, we do not find in all Scripture that Saul was punished, or so much as blamed, for committing any of those acts which Samuel describes; and if Samuel's drift had been only to terrify the people, he would not have forgotten to foretell Saul's bloody cruelty in murdering eighty-five innocent priests, and smiting with the edge of the sword the city of Nob, both man, woman, and child. Again, the Israelites never shrank at these conditions proposed by Samuel, but accepted of them as such as all other nations were bound unto; for their conclusion is: "Nay, but we will have a king over us, that we also may be like all the nations, and that our king may judge us, and go out before us to fight our battles" — meaning he should earn his privileges by doing the work for them, by judging them and fighting for them. Lastly, whereas the mention of the people's crying unto the Lord argues they should be under some tyrannical oppression, we may remember that the people's complaints and cries are not always an argument of their living under a tyrant. No man can say King Solomon was a tyrant, yet all the congregation of Israel complained that Solomon made their yoke grievous, and therefore their prayer to Rehoboam is: "Make thou the grievous service of thy father Solomon and his heavy yoke which he put upon us lighter, and we will serve thee." To conclude: it is true Saul lost his kingdom, but not for being too cruel or tyrannical to his subjects, but by being too merciful to his enemies. His sparing Agag when he should have slain him was the cause why the kingdom was torn from him.

3. If any desire the direction of the New Testament, he may find our Saviour limiting and distinguishing royal power, "By giving to Cæsar those things that were Cæsar's, and to God those things that were God's." *Obediendum est in quibus mandatum Dei non impeditur*. "We must obey where the commandment of God is not hindered"; there is no other law but God's law to hinder our obedience. It was the answer of a Christian to the Emperor: "We only worship God, in other things we gladly serve you." And it seems Tertullian thought whatsoever was not God's was the Emperor's, when he saith: *Bene opposuit Cæsari pecuniam, te ipsum Deo, alioqui quid erit Dei, si omnia Cæsaris* ("Our Saviour hath well apportioned our money for Cæsar, and ourselves for God, for otherwise what shall God's share be if all be Cæsar's"). The Fathers mention no reservation of any power to the laws of the land or to the people. St. Ambrose, in his apology for David, expressly saith: "He was a king and therefore bound to no laws, because kings are free from the bonds of any fault." St. Augustine also resolves: *Imperator non est subjectus legibus, qui habet in potestate alias leges ferre* ("The Emperor is not subject to laws who hath power to make other laws"). For, indeed, it is the rule of Solomon that "We must keep the king's

commandment," and not to say, "What dost thou?" because "Where the word of a king is there is power," and all that he pleaseth he will do.

If any mislike this divinity in England, let him but hearken to Bracton, Chief Justice in Henry Ill's days, which was since the institution of Parliaments. His words are, speaking of the King: *Omnes sub eo, et ipse sub nullo, nisi tantum sub Deo, etc*. ("All are under him, and he under none but God.") If he offend, since no writ can go against him, their remedy is by petitioning him to amend his fault, which, if he shall not do, it will be punishment sufficient for him to expect God as a revenger; let none presume to search into his deeds, much less to oppose them.

When the Jews asked our Blessed Saviour whether they should pay tribute, He did not first demand what the law of the land was, or whether there was any statute against it, nor inquired whether the tribute were given by consent of the people, nor advised them to stay their payment till they should grant it. He did no more but look upon the superscription and concluded: "This image you say is Cæsar's, therefore give it to Cæsar." Nor must it here be said that Christ taught this lesson only to the conquered Jews, for in this He gave direction for all nations who are bound as much in obedience to their lawful kings as to any conqueror or usurper whatsoever.

Whereas "being subject to the higher powers" some have strained these words to signify the laws of the land, or else to mean the highest power, as well aristocratical and democratical as regal. It seems St. Paul looked for such interpretation, and therefore thought fit to be his own expositor, and to let it be known that by power he understood a monarch that carried a sword: "Wilt thou not be afraid of the power?" — that is, the ruler that carrieth the sword, for "he is the minister of God to thee ... for he beareth not the sword in vain." It is not the law that is the minister of God, or that carries the sword, but the ruler or magistrate; so they that say the law governs the kingdom may as well say that the carpenter's rule builds a house, and not the carpenter, for the law is but the rule or instrument of the ruler. And St. Paul concludes: "For this cause pay you tribute also, for they are God's ministers, attending continually upon this very thing. Render therefore tribute to whom tribute is due, custom to whom custom." He doth not say give as a gift to God's minister, but αποδοτε — render or restore tribute as a due. Also St. Peter doth most clearly expound this place of St. Paul, where he saith: "Submit yourselves to every ordinance of man for the Lord's sake, whether it be to the king as supreme or unto governors as unto them that are sent by him." Here the very self-same word — supreme or υπερεχουσαις — which St. Paul coupleth with power, St. Peter conjoineth with the king, Βασιλει ως υπερεχοντι, thereby to manifest that "king" and "power" are both one. Also St. Peter expounds his own words of human ordinance, to be the king who is the *lex loquens*, a speaking law; he cannot mean that kings themselves are a human ordinance since St. Paul calls the supreme power the ordinance of God, and the wisdom of God saith: "By Me kings reign." But his meaning must be that the laws of kings are human ordinances. Next, the governors that are sent by him, that is, by the king, not by God, as some corruptly would wrest the text, to justify popular governors as authorized by God; whereas, in grammatical construction "him," the relative, must be referred to the next antecedent, which is king; besides, the antithesis between "supreme" and "sent" proves plainly that the governors were sent by kings, for if the governors were sent by God, and the king be a human ordinance, then it follows that the governors were supreme and not the king; or if it be said that both king and governors are sent by God, then they are both equal, and so neither of them supreme. Therefore St. Peter's meaning is, in short: obey the laws of the king or of his ministers. By which it is evident that neither St. Peter nor St. Paul intended other form of government than only monarchical, much less any subjection of princes to human laws.

That familiar distinction of the schoolmen, whereby they subject kings to the directive but not to the co-active power of laws, is a confession that kings are not bound by the positive laws of any nation, since the compulsory power of laws is that which properly makes laws to be laws by binding men by rewards or

punishment to obedience; whereas the direction of the law is but like the advice and direction which the king's council gives the king, which no man says is a law to the king.

4. There want not those who believe that the first invention of laws was to bridle and moderate the over-great power of kings; but the truth is, the original of laws was for the keeping of the multitude in order. Popular estates could not subsist at all without laws, whereas kingdoms were governed many ages without them. The people of Athens, as soon as they gave over kings, were forced to give power to Draco first, then to Solon, to make them laws not to bridle kings but themselves; and though many of their laws were very severe and bloody, yet for the reverence they bare to their law-makers they willingly submitted to them. Nor did the people give any limited power to Solon, but an absolute jurisdiction, at his pleasure to abrogate and confirm what he thought fit, the people never challenging any such power to themselves. So the people of Rome gave to the ten men, who were to choose and correct their laws for the Twelve Tables, an absolute power without any appeal to the people.

5. The reason why laws have been also made by kings was this: when kings were either busied with wars, or distracted with public cares, so that every private man could not have access to their persons to learn their wills and pleasure, then of necessity were laws invented, that so every particular subject might find his prince's pleasure deciphered to him in the tables of his laws, that so there might be no need to resort unto the king; but either for the interpretation or mitigation of obscure or rigorous laws, or else in new cases, for a supplement where the law was defective. By this means both king and people were in many things eased. First, the king, by giving laws, doth free himself of great and intolerable troubles, as Moses did himself by choosing elders. Secondly, the people have the law as a familiar admonisher and interpreter of the king's pleasure which being published throughout the kingdom doth represent the presence and majesty of the king. Also the judges and magistrates — whose help in giving judgment in many causes kings have need to use — are restrained by the common rules of the law from using their own liberty to the injury of others, since they are to judge according to the laws, and not follow their own opinions.

6. Now albeit kings who make the laws be, as King James teacheth us, above the laws, yet will they rule their subjects by the law; and a king, governing in a settled kingdom, leaves to be a king, and degenerates into a tyrant, so soon as he seems to rule according to his laws; yet where he sees the laws rigorous or doubtful he may mitigate and interpret. General laws made in Parliament may, upon known respects to the king, by his authority be mitigated or suspended upon causes only known to him. And although a king do frame all his actions to be according to the laws, yet he is not bound thereto but at his good will and for good example, or so far forth as the general law of the safety of the commonweal doth naturally bind him; for in such sort only positive laws may be said to bind the king, not by being positive, but as they are naturally the best or only means for the preservation of the commonwealth. By this means are all kings, even tyrants and conquerors, bound to preserve the lands, goods, liberties, and lives of all their subjects, not by any municipal law of the land so much as the natural law of a father, which binds them to ratify the acts of their forefathers and predecessors in things necessary for the public good of their subjects.

7. Others there be that affirm that, although laws of themselves do not bind kings, yet the oaths of kings at their coronations tie them to keep all the laws of their kingdoms. How far this is true, let us but examine the oath of the kings of England at their coronation, the words whereof are these: "Art thou pleased to cause to be administered in all thy judgments indifferent and upright justice, and to use discretion with mercy and verity? Art thou pleased that our upright laws and customs be observed, and dost thou promise that those shall be protected and maintained by thee?" These two are the articles of the king's oath, which concern the laity or subjects in general, to which the king answers affirmatively, being first demanded by the Archbishop of Canterbury:

> Pleaseth it you to confirm and observe the laws and customs of ancient times, granted from God by just and devout kings unto the English nation, by oath unto the said people, especially the laws, liberties, and customs granted unto the clergy and laity by the famous King Edward?

We may observe in these words of the articles of the oath that the king is required to observe not all the laws, but only the upright, and that with discretion and mercy. The word "upright" cannot mean all laws, because in the oath of Richard II, I find evil and unjust laws mentioned which the king swears to abolish; and in the old "Abridgment of Statutes," set forth in Henry VIII's days, the king is to swear wholly to put out evil laws, which he cannot do if he be bound to all laws. Now, what laws are *upright* and what *evil*? Who shall judge but the king, since he swears to administer upright justice with discretion and mercy or, as Bracton hath it, *æquitatem præcipiat, et misericordiam*. So that, in effect, the king doth swear to keep no laws but such as, in his judgment, are upright, and those not literally always, but according to equity of his conscience joined with mercy, which is properly the office of a chancellor rather than of a judge; and if a king did strictly swear to observe all the laws, he could not, without perjury, give his consent to the repealing or abrogating of any statute by Act of Parliament which would be very mischievable to the state.

But let it be supposed for truth that kings do swear to observe all the laws of their kingdom, yet no man can think it reason that kings should be more bound by their voluntary oaths than common persons are by theirs. Now, if a private person make a contract, either with oath or without oath, he is no further bound than the equity and justice of the contract ties him; for a man may have relief against an unreasonable and unjust promise, if either deceit, or error, or force, or fear induced him thereunto; or if it be hurtful or grievous in the performance. Since the laws in many cases give the king a prerogative above common persons, I see no reason why he should be denied the privilege which the meanest of his subjects doth enjoy.

Here is a fit place to examine a question which some have moved: whether it be a sin for a subject to disobey the king if he command anything contrary to his laws? For satisfaction in this point we must resolve that not only in human laws, but even in divine, a thing may be commanded contrary to law, and yet obedience to such a command is necessary. The sanctifying of the Sabbath is a divine law; yet if a master command his servant not to go to church upon a Sabbath Day, the best divines teach us that the servant must obey this command, though it may be sinful and unlawful in the master; because the servant hath no authority or liberty to examine and judge whether his master sin or no in so commanding; for there may be a just cause for a master to keep his servant from church, as appears Luke xiv. 5. Yet it is not fit to tie the master to acquaint his servant with his secret counsels or present necessity; and in such cases the servant's not going to church becomes the sin of the master, and not of the servant. The like may be said of the king's commanding a man to serve him in the wars: he may not examine whether the war be just or unjust, but must obey, since he hath no commission to judge of the titles of kingdoms or causes of war; nor hath any subject power to condemn his king for breach of his own laws.

8. Many will be ready to say it is a slavish and dangerous condition to be subject to the will of any one man who is not subject to the laws. But such men consider not (1) that the prerogative of a king is to be above all laws, for the good only of them that are under the laws, and to defend the peoples' liberties, as his Majesty graciously affirmed in his speech after his last answer to the Petition of Right. Howsoever some are afraid of the name of prerogative, yet they may assure themselves the case of subjects would be desperately miserable without it. The Court of Chancery itself is but a branch of the king's prerogative to relieve men against the inexorable rigour of the law which without it is no better than a tyrant, since *summum jus* is *summa injuria*. General pardons at the coronation and in parliaments are but the bounty of the prerogative. (2) There can be no laws without a supreme power to command or make them. In all aristocracies the nobles are above the laws, and in all democracies the people. By the like reason, in a

monarchy the king must of necessity be above the laws; there can be no sovereign majesty in him that is under them; that which giveth the very being to a king is the power to give laws; without this power he is but an equivocal king. It skills not which way kings come by their power, whether by election, donation, succession, or by any other means; for it is still the manner of the government by supreme power that makes them properly kings, and not the means of obtaining their crowns. Neither doth the diversity of laws nor contrary customs, whereby each kingdom differs from another, make the forms of commonweal different unless the power of making laws be in several subjects.

For the confirmation of this point, Aristotle saith that a perfect kingdom is that wherein the king rules all things according to his own will, for he that is called a king according to the law makes no kind of kingdom at all. This, it seems, also the Romans well understood to be most necessary in a monarchy; for though they were a people most greedy of liberty, yet the senate did free Augustus from all necessity of laws, that he might be free of his own authority and of absolute power over himself and over the laws, to do what he pleased and leave undone what he listed; and this decree was made while Augustus was yet absent. Accordingly we find that Ulpian, the great lawyer, delivers it for a rule of the civil law: *Princeps legibus solutus est* ("The prince is not bound by the laws").

9. If the nature of laws be advisedly weighed, the necessity of the princes being above them may more manifest itself. We all know that a law in general is the command of a superior power. Laws are divided — as Bellarmine divides the Word of God — into written and unwritten, not for that it is not written at all, but because it was not written by the first devisers or makers of it. The common law, as the Lord Chancellor Egerton teacheth us, is the common custom of the realm. Now, concerning customs, this must be considered that for every custom there was a time when it was no custom, and the first precedent we now have had no precedent when it began. When every custom began, there was something else than custom that made it lawful, or else the beginning of all customs were unlawful. Customs at first became lawful only by some superior which did either command or consent unto their beginning. And the first power which we find, as it is confessed by all men, is the kingly power which was both in this and in all other nations of the world long before any laws or any other kind of government was thought of; from whence we must necessarily infer that the common law itself, or common customs of this land, were originally the laws and commands of kings at first unwritten.

Nor must we think the common customs — which are the principles of the common law, and are but few — to be such, or so many, as are able to give special rules to determine every particular cause. Diversity of cases are infinite, and impossible to be regulated by any law, and therefore we find even in the Divine laws which are delivered by Moses, there be only certain principal laws which did not determine, but only direct, the High Priest or magistrate, whose judgment in special cases did determine what the general law intended. It is so with the common law, for when there is no perfect rule judges do resort to those principles or common law axioms whereupon former judgments in cases somewhat like have been delivered by former judges, who all receive authority from the king in his right and name to give sentence according to the rules and precedents of ancient times; and where precedents have failed the judges have resorted to the general law of reason, and accordingly given judgment without any common law to direct them. Nay, many times where there have been precedents to direct, they, upon better reason only, have changed the law both in causes criminal and civil, and have not insisted so much on the examples of former judges, as examined and corrected their reasons; thence it is that some laws are now obsolete and out of use, and the practice quite contrary to what it was in former times, as the Lord Chancellor Egerton proves by several instances.

Nor is this spoken to derogate from the common law, for the case standeth so with the laws of all nations, although some of them have their laws and principles written and established; for witness to this we have Aristotle — his testimony in his *Ethics* and in several places in his *Politics*. I will cite some of them:

> Every law is in the general, but of some things there can be no general law.... When therefore the law speaks in general, and something falls out after besides the general rule, then it is fit that what the lawmaker hath omitted, or where he hath erred by speaking generally, it should be corrected or supplied as if the lawmaker himself were present to ordain it. The governor, whether he be one man or more, ought to be lord over all those things whereof it was impossible the law should exactly speak, because it is not easy to comprehend all things under general rules.... Whatsoever the law cannot determine, it leaves to the governors to give judgment therein, and permits them to rectify whatsoever upon trial they find to be better than the written laws.

Besides, all laws are of themselves dumb, and some or other must be trusted with the application of them to particulars, by examining all circumstances, to pronounce when they are broken, or by whom. This work of right application of laws is not a thing easy or obvious for ordinary capacities, but requires profound abilities of nature for the beating out of the truth — witness the diversity and sometimes the contrariety of opinions of the learned judges in some difficult points.

10. Since this is the common condition of laws, it is also most reasonable that the lawmaker should be trusted with the application or interpretation of the laws, and for this cause anciently the kings of this land have sitten personally in courts of judicature, and are still representatively present in all courts; the judges are but substituted, and called the king's justices, and their power ceaseth when the king is in place. To this purpose Bracton, that learned Chief Justice in the reign of Henry III, saith in express terms: "In doubtful and obscure points the interpretation and will of our lord the king is to be expected, since it is his part to interpret who made the law"; for, as he saith in another place, *Rex et non alius debet judicare, si solus ad id sufficere possit, etc*.: "The king, and nobody else, ought to give judgment, if he were able, since by virtue of his oath he is bound to it. Therefore the king ought to exercise power as the vicar or minister of God; but if our lord the king be not able to determine every cause, to ease part of his pains by distributing the burden to more persons, he ought to choose wise men fearing God, etc., and make justices of them." Much to the same purpose are the words of Edward I in the beginning of his book of *Laws*, written by his appointment by John Briton, Bishop of Hereford:

> We will that our own jurisdiction be above all the jurisdictions of our realm, so as in all manner of felonies, trespasses, contracts, and in all other actions, personal or real, we have power to yield such judgments as do appertain without other process wheresoever we know the right truth as judges.

Neither may this be taken to be meant of an imaginary presence of the king's person in his courts, because he doth immediately after in the same place severally set forth by themselves the jurisdictions of his ordinary courts, but must necessarily be understood of a jurisdiction remaining in the king's royal person. And that this, then, was no new-made law, or first brought in by the Norman Conquest, appears by a Saxon law made by King Edgar in these words, as I find them in Mr. Lambert:

> *Nemo in lite regem appellato, nisi quidem domi justitiam consequi, aut impetrare non poterit, sin summo jure domi urgeatur, ad regem ut is onus aliqua ex parte allevet, provocato*. ("Let no man in suit appeal to the king unless he may not get right at home; but if the right be too heavy for nun, then let nun go to the king to have it eased.")

As the judicial power of kings was exercised before the Conquest, so in those settled times after the Conquest, wherein parliaments were much in use, there was a high court following the king, which was the place of sovereign justice both for matter of law and conscience, as may appear by a parliament in Edward I's time taking order, "That the Chancellor and the Justices of the Bench should follow the King, to the end that he might have always at hand able men for his direction in suits that came before him."

And this was after the time that the Court of Common Pleas was made stationary, which is an evidence that the king reserved a sovereign power by which he did supply the want or correct the rigour of the common law, because the positive law, being grounded upon that which happens for the most part, cannot foresee every particular which time and experience bring forth.

[11.] Therefore, though the common law be generally good and just, yet in some special case it may need correction by reason of some considerable circumstance falling out, which at the time of lawmaking was not thought of. Also sundry things do fall out, both in war and peace, that require extraordinary help and cannot wait for the usual care of common law, the which is not performed but altogether after one sort, and that not without delay of help and expense of time; so that, although all causes are, and ought to be, referred to the ordinary process of common law, yet rare matters from time to time do grow up meet, for just reasons, to be referred to the aid of the absolute authority of the prince; and the statute of Magna Charta hath been understood of the institution then made of the ordinary jurisdiction in common causes, and not for restraint of the absolute authority serving only in a few rare and singular cases, for though the subjects were put to great damage by false accusations and malicious suggestions made to the king and his council, especially during the time of King Edward III, whilst he was absent in the wars in France, insomuch as in his reign divers statutes were made that provided none should be put to answer before the king and his council without due process. Yet it is apparent the necessity of such proceedings was so great that both before Edward Ill's days and in his time, and after his death, several statutes were made to help and order the proceedings of the king and his council. As the parliament in 28 Edward I, cap. 5, did provide: "That the Chancellor and Justices of the King's Bench should follow the King, that so he might have near unto him some that be learned in the laws which be able to order all such matters as shall come unto the court at all times when need shall require." By the statute of 37 Edward III, cap. 18, taliation was ordained, in case the "suggestion to the King proved untrue." Then 38 Edward III, cap. 9, takes away taliation and appoints imprisonment till the king and party grieved be satisfied. In the statutes of 17 Richard II, cap. 6, and 15 Henry VI, cap 4, damages and expenses are awarded in such cases. In all these statutes it is necessarily implied that complaints upon just causes might be moved before the king and his council.

At a parliament at Gloucester, 2 Richard II, when the Commons made petition, "That none might be forced by writ out of Chancery or by Privy Seal to appear before the King and his Council to answer touching freehold," the king's answer was:

> He thought it not reasonable that he should be constrained to send for his lieges upon causes reasonable; and albeit he did not purpose that such as were sent for should answer (finalment) peremptorily touching their freehold, but should be remanded for trial thereof as law required, provided always that at the suit of the party where the King and his Council shall be credibly informed that, because of maintenance, oppression, or other outrages, the common law cannot have duly her course, in such case the counsel for the party.

Also in the thirteenth year of his reign, when the Commons did pray that, upon pain of forfeiture, the chancellor or council of the king should not, after the end of the parliament, make any ordinance against the common law, the king answered:

> Let it be used as it hath been used before this time, so as the regality of the king be saved, for the king will save his regalities as his progenitors have done.

Again, in the fourth year of Henry IV, when the Commons complained against subpoenas and other writs grounded upon false suggestions, the king answered:

> That he would give in charge to his officers, that they should abstain more than before time they had, to send for his subjects in that manner. But yet, it is not our intention that our officers shall so abstain that they may not send for our subjects in matters and causes necessary, as it hath been used in the time of our good progenitors.

Likewise when, for the same cause, complaint was made by the Commons, anno 3, Henry V, the king's answer was: *Le roy s'advisera* ("The king will be advised"), which amounts to a denial for the present by a phrase peculiar for the king's denying to pass any Bill that hath passed the Lords and Commons.

These complaints of the Commons, and the answers of the king, discover that such moderation should be used that the course of the common law be ordinarily maintained, lest subjects be convented before the king and his council without just cause, that the proceedings of the council-table be not upon every slight suggestion, nor to determine finally concerning freehold of inheritance. And yet that upon cause reasonable, upon credible information in matters of weight, the king's regality or prerogative in sending for his subjects be maintained, as of right it ought, and in former times hath been constantly used.

King Edward I, finding that Bogo de Clare was discharged of an accusation brought against him in parliament, for that some formal imperfections were found in the complaint, commanded him nevertheless to appear before him and his council, *ad faciendum et recipiendum quod per regem et ejus concilium fuerit faciendum*; and so proceeded to an examination of the whole cause. — 8 Edward I.

Edward III, in the Star Chamber — which was the ancient Council Chamber at Westminster — upon the complaint of Elizabeth Audley, commanded James Audley to appear before him and his council, and determined a controversy between them touching lands contained in the covenants of her jointure — "Rot. Clause," de anno 41, Edward III. Henry V, in a suit before him and his council for the titles of the manors of Seere and St. Lawrence, in the Isle of Thanet in Kent, took order for sequestering the profits till the right were tried, as well for avoiding the breach of the peace, as for prevention of waste and spoil — "Rot. Patin," anno 6, Henry V.

Henry VI commanded the justices of the bench to stay the arraignment of one Verney, of London, till they had other commandment from him and his council, because Verney, being indebted to the king and others, practised to be indicted of felony, wherein he might have his clergy, and make his purgation, of intent to defraud his creditors — 34 Henry VI "Rot. 37 in Banco Regis."

Edward IV and his council in the Star Chamber heard the cause of the master and poor brethren of St. Leonards in York, complaining that Sir Huge Hastings and others withdrew from them a great part of their living, which consisted chiefly upon the having of a thrave of corn of every plough land within the counties of York, Westmoreland, Cumberland, and Lancashire — "Rot. Paten" de anno 8, Edward IV part iii., memb. 14.

Henry VII and his council, in the Star Chamber, decreed that

> Margery and Florence Becket should sue no further in their cause against Alice Radley, widow, for lands in Woolwich and Plumstead in Kent, for as much as the matter had been heard, first, before the council of King Edward IV, after that, before the President of the Requests of that King, Henry VII, and then, lastly, before the council of the said King — 1 Henry VII.

What is hitherto affirmed of the dependency and subjection of the common law to the sovereign prince, the same may be said as well of all statute laws; for the king is the sole immediate author, corrector, and moderator of them also; so that neither of these two kinds of laws are or can be any diminution of that

natural power which kings have over their people by right of fatherhood, but rather are an argument to strengthen the truth of it; for evidence whereof we may in some points consider the nature of parliaments, because in them only all statutes are made.

12. Though the name of "parliament," as Mr. Camden saith, be of no great antiquity, but brought in out of France, yet our ancestors, the English Saxons, had a meeting which they called "the assembly of the wise," termed in Latin, *conventum magnatum*, or *praesentia regis, procerumq., prelaterumq. collectorum* ("The meeting of the nobility, or the presence of the king, prelates, and peers assembled"), or, in general, *magnum concilium* or *commune concilium*; and many of our kings in elder times made use of such great assemblies for to consult of important affairs of state, all which meetings in a general sense may be termed "parliaments."

Great are the advantages which both the king and people may receive by a well-ordered parliament. There is nothing more expresseth the majesty and supreme power of a king than such an assembly, wherein all his people acknowledge him for sovereign lord, and make all their addresses to him by humble petition and supplication; and by their consent and approbation do strengthen all the laws which the king at their request and by their advice and ministry shall ordain. Thus they facilitate the government of the king by making the laws unquestionable either to the subordinate magistrates or refractory multitude. The benefit which accrues to the subject by parliaments is that by their prayers and petitions kings are drawn many times to redress their just grievances, and are overcome by their importunity to grant many things which otherwise they would not yield unto; for the voice of a multitude is easier heard. Many vexations of the people are without the knowledge of the king, who in parliament seeth and heareth his people himself; whereas at other times he commonly useth the eyes and ears of other men.

Against the antiquity of parliaments we need not dispute, since the more ancient they be, the more they make for the honour of monarchy; yet there be certain circumstances touching the forms of parliaments which are fit to be considered.

First, We are to remember that until about the time of the Conquest there could be no parliaments assembled of the general states of the whole kingdom of England, because till those days we cannot learn it was entirely united into one kingdom, but it was either divided into several kingdoms or governed by several laws. When Julius Cæsar landed, he found four kings in Kent, and the British names of Dammonii, Durotriges, Belgæ, Attrebatii, Trinobantes, Iceni, Silures, and the rest, are plentiful testimonies of the several kingdoms of Britains when the Romans left us. The Saxons divided us into seven kingdoms. When the Saxons were united all into a monarchy, they had always the Danes their companions or their masters in the empire till Edward the Confessor's days, since whose time the kingdom of England hath continued united as now it doth; but for a thousand years before we cannot find it was entirely settled during the time of any one king's reign. As under the Mercian law, the West Saxons were confined to the Saxon laws, Essex, Norfolk, Suffolk, and some other places were vexed with Danish laws; the Northumbrians also had their laws apart. And until Edward the Confessor's reign, who was next but one before the Conqueror, the laws of the kingdom were so several and uncertain that he was forced to cull a few of the most indifferent and best of them, which were from him called St. Edward's laws. Yet some say that Edgar made those laws, and that the Confessor did but restore and mend them. Alfred also gathered out of Mulmutius laws such as he translated into the Saxon tongue. Thus during the time of the Saxons the laws were so variable that there is little or no likelihood to find any constant form of parliaments of the whole kingdom.

13. A second point considerable is whether in such parliaments as was in the Saxons' times the nobility and clergy only were of those assemblies, or whether the Commons were also called? Some are of the opinion that though none of the Saxon laws do mention the Commons, yet it may be gathered by the word

"wisemen," the Commons are intended to be of those assemblies, and they bring, as they conceive, probable arguments to prove it from the antiquity of some boroughs that do yet send burgesses, and from the proscription of those in ancient demesne not to send burgesses to parliament. If it be true that the West Saxons had a custom to assemble burgesses out of some of their towns, yet it may be doubted whether other kingdoms had the same usage, but sure it is that during the Heptarchy the people could not elect any knights of the shire because England was not then divided into shires.

On the contrary, there be of our historians who do affirm that Henry I caused the Commons first to be assembled by knights and burgesses of their own appointment, for before his time only certain of the nobility and prelates of the realm were called to consultation about the most important affairs of state. If this assertion be true, it seems a mere matter of grace of this king, and proves not any natural right of the people originally to be admitted to choose their knights and burgesses of parliament, though it had been more for the honour of parliaments if a king, whose title to the Crown had been better, had been author of the form of it, because he made use of it for his unjust ends. For thereby he secured himself against his competitor and elder brother by taking the oaths of the nobility in parliament and getting the crown to be settled upon his children. And as the king made use of the people, so they, by colour of parliament, served their own turns; for after the establishment of parliaments by strong hand and by the sword, they drew from him the Great Charter, which he granted the rather to flatter the nobility and people, as Sir Walter Raleigh, in his "Dialogue of Parliaments," doth affirm in these words:

> The Great Charter [Magna Carta] was not originally granted legally and freely, for Henry I did but usurp the kingdom, and therefore the better to assure himself against Robert, his elder brother, he flattered the nobility and people with their charters; yea, King John that confirmed them had the like respect, for Arthur, Duke of Britain, was the undoubted heir of the Crown, upon whom King John usurped, and so to conclude, these charters had their original from kings *de facto*, but not *de jure* ... the Great Charter had first an obscure birth by usurpation, and was secondly fostered and showed to the world by rebellion.

[14.] A third consideration must be that in the former parliaments, instituted and continued since King Henry I's time, is not to be found the usage of any natural liberty of the people; for all those liberties that are claimed in parliament are the liberties of grace from the king, and not the liberties of nature to the people; for if the liberty were natural, it would give power to the multitude to assemble themselves when and where they please, to bestow sovereignty, and by pactions to limit and direct the exercise of it. Whereas the liberties of favour and grace which are claimed in parliaments are restrained both for time, place, persons, and other circumstances, to the sole pleasure of the king, the people cannot assemble themselves, but the king, by his writs, calls them to what place he pleases; and then again scatters them with his breath at an instant, without any other cause shown than his will. Neither is the whole summoned, but only so many as the king's writs appoint. The prudent King Edward I summoned always those barons of ancient families that were most wise to his parliament, but omitted their sons after their death if they were not answerable to their parents in understanding. Nor have the whole people voices in the election of knights of the shire or burgesses, but only freeholders in the counties, and freemen in the cities and boroughs; yet in the City of Westminster all the householders, though they be neither freemen nor freeholders, have voices in their election of burgesses. Also during the time of parliament, those privileges of the House of Commons of freedom of speech, power to punish their own members, to examine the proceedings and demeanour of courts of justice and officers, to have access to the king's person, and the like, are not due by any natural right, but are derived from the bounty or indulgence of the king, as appears by a solemn recognition of the House; for at the opening of the parliament, when the Speaker is presented to the king, he, in the behalf and name of the whole House of Commons, humbly craves of his Majesty, "That he would be pleased to grant them their accustomed liberties of freedom of speech, of access to his person, and the rest." These privileges are granted with a condition implied that

they keep themselves within the bounds and limits of loyalty and obedience; for else why do the House of Commons inflict punishment themselves upon their own members for transgressing in some of these points; and the king, as head, hath many times punished the members for the like offences. The power which the king giveth in all his courts to his judges or others to punish doth not exclude him from doing the like by way of prevention, concurrence or evocation, even in the same point which he hath given in charge by a delegated power; for they who give authority by commission do always retain more than they grant. Neither of the two Houses claim an infallibility of not erring, no more than a general council can. It is not impossible but that the greatest may be in fault, or at least interested or engaged in the delinquency of one particular member. In such cases it is most proper for the head to correct, and not to expect the consent of the members, or for the parties peccant to be their own judges. Nor is it needful to confine the king in such cases within the circle of any one court of justice, who is supreme judge in all courts. And in rare and new cases rare and new remedies must be sought out; for it is a rule of the common law: *In novo casu, novum remedium est apponendum;* and the Statute of Westminster, 2, cap. 24 giveth power, even to the clerks of the Chancery, to make new forms of writs in new cases, lest any man that came to the King's Court of Chancery for help should be sent away without remedy. A precedent cannot be found in every case; and of things that happen seldom and are not common, there cannot be a common custom. Though crimes exorbitant do pose the king and council in finding a precedent for a condign punishment, yet they must not therefore pass unpunished.

I have not heard that the people by whose voices the knights and burgesses are chosen did ever call to an account those whom they had elected. They neither give them instructions or directions what to say or what to do in parliament; therefore they cannot punish them when they come home for doing amiss. If the people had any such power over their burgesses, then we might call it the natural liberty of the people with a mischief. But they are so far from punishing that they may be punished themselves for intermeddling with parliamentary business; they must only choose, and trust those whom they choose to do what they list, and that is as much liberty as many of us deserve for our irregular elections of burgesses.

15. A fourth point to be considered is that in parliament all statutes or laws are made properly by the king alone, at the rogation of the people, as his Majesty King James, of happy memory, affirms in his true *Law of Free Monarchy*, and, as Hooker teacheth us, "That laws do not take their constraining force from the quality of such as devise them, but from the power that doth give them the strength of laws." *Le roy le veult* ("the king will have it so") is the interpretive phrase pronounced at the king's passing of every Act of Parliament. And it was the ancient custom for a long time, till the days of Henry V, that the kings, when any Bill was brought unto them that had passed both Houses, to take and pick out what they liked not, and so much as they chose was enacted for a law; but the custom of the later kings hath been so gracious as to allow always of the entire Bill as it hath passed both Houses.

16. The parliament is the king's court, for so all the oldest statutes called it, "the king in his parliament." But neither of the two Houses are that supreme court, nor yet both of them together; they are only members and a part of the body whereof the king is the head and ruler. The king's governing of this body of the parliament we may find most significantly proved, both by the statutes themselves as also by such precedents as expressly show us how the king, sometimes by himself, sometimes by his council, and other times by his judges, hath overruled and directed the judgments of the Houses of Parliament. For the king, we find that Magna Charta and the Charter of Forests, and many other statutes about those times, had only the form of the king's letters-patents, or grants under the great seal, testifying those great liberties to be the sole act and bounty of the king. The words of Magna Charta begin thus: "Henry, by the grace of God, etc. To all our Archbishops, etc., and our faithful subjects, greeting. Know ye, that we, of our mere free will, have granted to all freemen these liberties." In the same style goeth the Charter of Forests and other statutes. *Statutum Hiberniæ*, made at Westminster, 9 February, 14 Henry III, is but a letter of the king to

Gerard, son of Maurice, Justice of Ireland. The Statute *de anno bissextili* begins thus: "The King to his Justices of the Bench, greeting, etc. *Explanationes statuti Glocestriæ*, made by the king and his justices only, were received always as statutes, and are still printed amongst them.

The statute made for correction of the twelfth chapter of the Statute of Gloucester was signed under the great seal and sent to the justices of the bench, after the manner of a writ-patent, with a certain writ closed, dated by the king's hand at Westminster, requiring that "they should do and execute all and everything contained in it, although the same do not accord with the Statute of Gloucester in all things."

The Statute of Rutland is the king's letters to his treasurer and barons of his Exchequer and to his chamberlain.

The Statute of *Circumspecte Agis* runs: "The King to his judges sendeth greeting."

There are many other statutes of the same form, and some of them which run only in the majestic terms of, "The King commands," or "The King wills," or, "Our Lord the King hath established," or, "Our Lord the King hath ordained," or, "His Especial Grace hath granted," without mention of consent of the Commons or people, insomuch that some statutes rather resemble proclamations than Acts of Parliament. And indeed some of them were no other than mere proclamations, as the Provisions of Merton, made by the king at an assembly of the prelates and nobility, for the coronation of the king and his Queen Eleanor which begins: *Provisum est in curia domini regis apud* Merton. Also a provision was made 19 Henry III, *De assisa ultimæ præsentationis*, which was continued, and allowed for law, until Tit. West 2 an. 13 Edward I, cap. 5, which provides the contrary in express words. This provision begins: *Provisum fuit coram dom, rege, archiepiscopis, episcopis et baronibus quod*, etc. It seems originally the difference was not great between a proclamation and a statute. This latter the king made by common council of the kingdom. In the former he had but the advice only of his great council of the peers or of his privy council only. For that the king had a great council besides his parliament appears by a record of 5 Henry IV about an exchange between the king and the Earl of Northumberland whereby the king promiseth to deliver to the earl lands to the value, by the advice of parliament or otherwise by the advice of his grand council and other estates of the realm which the king will assemble in case the parliament do not meet.

We may find what judgment in later times parliaments have had of proclamations by the statute of 31 of Henry VI, cap 8, in these words:

> Forasmuch as the King, by the advice of his Council, hath set forth proclamations which obstinate persons have condemned, not considering what a king by his royal power may do, considering that sudden causes and occasions fortune many times which do require speedy remedies, and that by abiding for a Parliament in the meantime might happen great prejudice to ensue to the realm, and weighing also that his Majesty, which by the kingly and regal power given him by God may do many things in such cases, should not be driven to extend the liberties and supremacy of his regal power and dignity by wilfulness of froward subjects: It is therefore thought fit that the King, with the advice of his honourable Council, should set forth proclamations for the good of the people and defence of his royal dignity, as necessity shall require.

This opinion of a House of Parliament was confirmed afterwards by a second parliament, and the statute made proclamations of as great validity as if they had been made in parliament. This law continued until the government of the state came to be under a Protector, during the minority of Edward VI, and in his first year it was repealed.

I find also that a parliament in the eleventh year of Henry VII did so great reverence to the actions or ordinances of the king that by statute they provided a remedy or means to levy a benevolence granted to the king, although by a statute made not long before all benevolences were damned and annulled for ever.

Mr. Fuller, in his arguments against the proceedings of the High Commission Court, affirms that the statute of 2 Henry IV, cap. 15, which giveth power to ordinaries to imprison and set fines on subjects, was made without the assent of the Commons because they are not mentioned in the Act. If this argument be good, we shall find very many statutes of the same kind, for the assent of the Commons was seldom mentioned in the elder parliaments. The most usual title of parliaments in Edward III, Richard II, the three Henrys, IV, V, VI, in Edward IV and Richard Ill's days, was: "The King and his Parliament, with the assent of the Prelates, Earls, and Barons, and at the petition, or at the special instance, of the Commons doth ordain."

The same Mr. Fuller saith that the statute made against Lollards was without the assent of the Commons, as appears by their petition in these words: "The Commons beseech that whereas a statute was made in the last Parliament, etc.," which was never assented nor granted by the Commons, but that which was done therein was done without their assent.

17. How far the king's council hath directed and swayed in parliament hath in part appeared by what hath been already produced. For further evidence we may add the Statute of Westminster, the first which saith:

> These be the Acts of King Edward I, made at his first parliament general by his Council, and by the assent of Bishops, Abbots, Priors, Earls, Barons, and all the Commonalty of the Realm, etc.

The Statute of Bigamy saith:

> In presence of certain Reverend Fathers, Bishops of England, and others of the King's Council, forasmuch as all the King's Council, as well Justices as others, did agree that they should be put in writing and observed.

The Statute of Acton, Burnel saith: "The King, for himself and by his Council, hath ordained and established."

In Articuli super Chartas, when the Great Charter was confirmed, at the request of his prelates, earls, and barons, we find these passages:

> 1. Nevertheless the King and his Council do not intend by reason of this Statute to diminish the King's right, etc.; 2. And notwithstanding all these things before-mentioned or any part of them, both the King and his Council and all they that were present at the making of this ordinance will and intend that the right and prerogative of his Crown shall be saved to him in all things.

Here we may see in the same parliament the charter of the liberties of the subjects confirmed and a saving of the king's prerogative. Those times neither stumbled at the name, nor conceived any such antipathy between the terms as should make them incompatible.

The Statute of Escheators hath this title: "At the Parliament of our Sovereign Lord the King, by his Council it was agreed, and also by the King himself commanded." And the Ordinance of Inquest goeth thus: "It is agreed and ordained by the King himself and all his Council."

The Statute made at York, 9 Edward III, saith,

> Whereas the knights, citizens and burgesses desired our Sovereign Lord the King in his Parliament, by their petition, that for his profit and the commodity of his Prelates, Earls, Barons, and Commons, it may please him to provide remedy; our Sovereign Lord the King desiring the profit of his people by the assent of his Prelates, Earls, Barons, and other nobles of his Council being there, hath ordained.

In the parliament primo Edward III, where Magna Charta was confirmed, I find this preamble:

> At the request of the commonalty, by their petition made before the King and his Council in Parliament, by the assent of the Prelates, Earls, Barons, and other great men assembled, it was granted.

The Commons, presenting a petition unto the King which the King's council did mislike, were content thereupon to mend and explain their petition; the form of which petition is in these words:

> To their most redoubted Sovereign Lord the King praying the said Commons that whereas they have prayed him to be discharged of all manner of articles of the Eyre, etc. Which petition seemeth to his Council to be prejudicial unto him and in disinherison of his Crown if it were so generally granted. His said Commons, not willing nor desiring to demand things of him which should fall in disinherison of him or his Crown perpetually, as of escheators, etc., but of trespasses, misprisions, negligences, and ignorances, etc.

In the time of Henry III an order or provision was made by the king's council, and it was pleaded at the common law in bar to a writ of dower. The plaintiff's attorney could not deny it, and thereupon the judgment was *ideo sine die*. It seems in those days an order of the council board was either parcel of the common law or above it.

The reverend judges have had regard in their proceedings that before they would resolve or give judgment in new cases, they consulted with the king's privy council. In the case of Adam Brabson, who was assaulted by R. W. in the presence of the justices of assize at Westminster, the judges would have the advice of the king's council. For in a like case, because R. C. did strike a juror at Westminster, which passed in an inquest against one of his friends, "It was adjudged by all the council that his right hand should be cut off and his lands and goods forfeited to the king."

Green and Thorp were sent by judges of the bench to the king's council to demand of them whether by the statute of 14 Edward III, cap. 16, a word may be amended in a writ; and it was answered that a word may well be amended, although the statute speak but of a letter or syllable.

In the case of Sir Thomas Oghtred, knight, who brought a "formedon" against a poor man and his wife, they came and yielded to the demandant, which seemed suspicious to the court, whereupon judgment was stayed; and Thorp said: "That in the like case of Giles Blacket it was spoken of in Parliament, and we were commanded that when any like case should come we should not go to judgment without good advice." Therefore the judges' conclusion was: *Sues au counseil et comment ils voillet que nous devomus faire, nous volume faire, et auterment nient en cest case* ("Sue to the council, and as they will have us to do, we will; and otherwise not in this case").

18. In the last place we may consider how much hath been attributed to the opinions of the king's judges by parliaments, and so find that the king's council hath guided and ruled the judges, and the judges guided the parliament.

In the parliament of 28 Henry VI, the Commons made suit:

> That William de la Poole, Duke of Suffolk, should be committed to prison for many treasons and other crimes. The lords of the Higher House were doubtful what answer to give; the opinion of the judges was demanded. Their opinion was that he ought not to be committed, for that the Commons did not charge him with any particular offence but with general reports and slanders.

This opinion was allowed.

In another parliament, 31 Henry VI — which was prorogued — in the vacation the Speaker of the House of Commons was condemned in a thousand pounds damages in an action of trespass, and was committed to prison in execution for the same, when parliament was reassembled the Commons made suit to the King and Lords to have their Speaker delivered; the Lords demanded the opinion of the judges, whether he might be delivered out of prison by privilege of parliament? Upon the judges' answer it was concluded: "That the Speaker should still remain in prison according to the law, notwithstanding the privilege of parliament and that he was the Speaker," which resolution was declared to the Commons by Moyle, the king's serjeant-at-law; and the Commons were commanded, in the king's name, by the Bishop of Lincoln — in the absence of the Archbishop of Canterbury, then Chancellor — to choose another Speaker.

In septimo of Henry VIII a question was moved in parliament, "Whether spiritual persons might be convented before temporal judges for criminal cases." There Sir John Fineux and the other judges delivered their opinion: "That they might and ought to be"; and their opinion was allowed and maintained by the king and lords and Dr. Standish, who before had holden it. The same opinion was delivered from the bishops.

If a writ of error be sued in parliament upon a judgment given in the King's Bench, the lords of the Higher House alone — without the Commons — are to examine the errors; the lords are to proceed according to law, and for their judgment therein they are to be informed by the advice and counsel of the judges, who are to inform them what the law is, and so to direct them in their judgment, for the lords are not to follow their own opinions or discretions otherwise, So it was in a writ of error brought in parliament by the Dean and Chapter of Lichfield against the Prior and Covent of Newton-Panel, as appeareth by record. See Flower Dew's case, p. l, h. 7, fol. 19.
