A

# VIEW

OF THE

## English Conſtitution

With Reſpect to the

Sovereign Authority of the Prince,

AND THE

Allegiance of the Subject, &c.

The Third Edition.

With a Defence of the

# VIEW,

By way of Reply to the ſeveral Anſwers that have been made to it.

By WILLIAM HIGDEN, D.D.

*London*, Printed for *S. Keble* at the *Turks-Head*, and *R. Goſling* at the *Miter* in *Fleetſtreet*. 1710.

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To the *Sovereign Authority* of the

# PRINCE,

And the *Allegiance* of the

# SUBJECT.

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

*By* WILLIAM HIGDEN, *M. A.*

*LONDON*, Printed for *Samuel Keble* at the *Turk's-Head* in *Fleet-ſtreet*, over againſt *Fetter-lane*, 1709.

*To the READER.*

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

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

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

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

Diſcourſe,



Diſcourſe, were not ſo well apprized of this Matter.

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

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

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

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

way

way relate to the Christian Faith and Manners, ought certainly to be managed, with that Charity and Meekness, which are the most Genuine Fruits of the one, and the greatest Ornaments of the other. But in what a different manner do we often see, even sacred Subjects treated, so that it may be almost a Question whether these Wars of the Pen, are not in their way, almost as Destructive to the Managers of them, as those of the Sword. 'Tis undoubted, that they who propagate Error in this way, will find it a grievous Aggravation of their Fault, and they who defend the Truth after the same manner, will at least lose that Reward, which otherwise they might have hoped for. And all who use these unlawful and unchristian Arms, may have some reason to fear, without Repentance, lest that Expression may be too properly applied to them, in a Sense beyond what the Poet intended.

*—— Animasque in vulnere ponunt.*

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The



## CHAP. I.

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

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

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

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

* *Reverſuſque in Angliam apud Londonias hominum ſibi facere, & contra omnes homines fidelitatem jurare, omnem Angliæ Incolam imperans totam terram deſcripſit, nec erat hida in Anglia quin ejus valorem & poſſeſſorem ſciret.* Hiſt. 516. See alſo *W.* of *Malmſbury de Willelmo primo fol.* 59.

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



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

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

† *Cum omnia non ſuo arbitratu (ut olim) in regno diſponi videret (nam Willelmo Wilhelmenſi Epiſcopo commendata erat rerum publicarum adminiſtratio) livore ictus & ipſe à rege deſcivit, & multos eadem ſuſurro in fecit,* Roberto *Regnum competere, qui ſit & remiſſioris animi,* &c. *De* Willielmo *ſecundo, l. 4. fol.* 67.

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

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

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

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

to



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

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

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

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

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

† *Inſtit. Part.* 3. *Ch.* 1.

Con-



Conſtitution was in their *Own* times, at leaſt better than *We* can at this diſtance, and in Charity believe that they acted agreeable to it. And if it was the Conſtitution from the Conqueſt to *Henry* the VII. as this univerſal Practice and *common Uſage* of all Orders and Degrees of Men, muſt at leaſt induce a very ſtrong Preſumption that it was; it will be found, I believe, that the *Conſtitution* has deſcended the ſame to us; for there has no Law been made, ſince that time, concerning this matter, but that of the Eleventh of *Henry* the VII. which juſtifies this Practice, and enacts the *Uſage* into a *Statute* of the Realm.

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

 to

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

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

I begin



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

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

† In *Michaelmas Term* in the 1ſt Year of *Edward* V. Fol. 1. *And upon this they were at Iſſue, and after the Iſſue the*

† *De Termini Mich. an.* 1. *Regis Eduardi K. Fol.* 1. *Et ſur ces fuer a iſſue, & apres l'iſſue le def. fuit leſſe a mayniprise par reconiſſaunce, & puis le iſſue fuit diſcontinue par le demiſe le Roy Edw. quart.*

De-

*Defendant gave Bail by* Recognizance, *and afterwards the Iſſue was diſcontinued by the* Demiſe *of King* Edward *the IV.*

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

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

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

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

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

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

*nuance*



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

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

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

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

† Thus after the Death of *Richard* the

* *Termino Michaelis anno ab incohacione regni Henrici Sexti 49. & Recaptionis Regiæ poteſtatis primo Fol. 13. En le comen banke fuit moue entre les juſtices que l'ou entrans les parties fuerunt a iſſue en temps l'autre Roi Edwarde le quarte & al niſi prius trouue fuit miſe ſans jour par demiſe le Roy. Littleton dit que il ad estre adjuge que l'ou les parties fuer. a iſſue la parole fuit miſe ſans jour per demiſe le Roy, ut ſupra.*

† *En quare impedit par la Deane de Vern. & ils fuer. a iſſue en temps le Roy Richarde le tierce & diſcontinue per demiſe le Roy.*

III.

III. in the 1ſt Year of *Henry* VII. Fol. 8. En quare Impedit *by the Dean*, &c. *againſt* &c. *they were at Iſſue in the time of K.* Richard *the III.* &c. *and it was diſcontinued by the* Demiſe *of the* King. (viz. Richard III.)

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

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



it



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

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

2ly, From the Year Books we may Obſerve that all the Grants, Licenſes, Letters Patents, Gifts, and in ſhort, all the Regal Acts of the Three *Henry's* of the Houſe of *Lancaſter*, and of *Richard* the III. are pleaded and allowed in all the Judicial Proceedings of *Edward* the IVth's, and *Henry* the VIIth's Courts of Judicature, to be as Valid as if they had been the Grants, *&c.* of any of their Progenitors of the moſt unconteſted Titles. *Bagot's* Caſe is that which has been uſually urged and debated in this Controverſy; and ſome may be apt to think, this is the only Inſtance that is to be given, but in Truth the Years Book's Furniſh us with abundance of the

like

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

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

† Now



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

† *Pluis d'assise Bagot, ore fuit le matter retiere & touche, q non obstant cet Act les Patentes de Legitimation sint bones car le Roy* Henry *fuist Roy en possession & il covient q le Roialme eit un Roy soueth q les leys serront tenus & maintein* &c. Anno IX. Ed. *IV.*

*which*

*which were not to the diminution of the Crown ſhall be made good.* † *That if he that is now King, had in King* Henry *the VIth's time granted a Charter of Pardon it would be Void now, for every one that ſhall Grant a Charter of Pardon muſt be King in Fact.*

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

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

It



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

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

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

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

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

* *Tit. Treason N.* 10.

acknow-



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

3dly. As all these Judicial Proceedings in the Year Books are agreeable to that Maxim of the Law of *England*; *That the Crown*

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



*takes*

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

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



the former, the Judges apply this Maxim, and make the *latter* a Precedent of it.

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

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

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

† *Anno III* Edward *the IV. f.* 24. *En le commen bank a autre jour le bre de* forcible Entre *sue sur l'estatute de anno* 8 Henry *VI. fuit reherce a ors. Et le bred. n. fuit en maner tiel reherceant l'estatut* quare cum in statuto Domini H. nuper Reg. &c. VIII. *Ordinant.* &c.

* *D. Term. Trin. an.* 10. Henry *VII. f.* 26. *Et le 'attourney le Roy dit que Escape Voluntarye finable fuit Enquirable devant Ju-*



*Escape*

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

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

## CHAP. II.

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

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

*stices de peace par un Novel Estatute En temps le Roy Rychards le tiers.*

† *De Term. Mich. an.* XI. Henry *VII. fol.* 2. *Nota quod fuit tenus in banke le Roy q̄ si homine ad feoffers* &c. *que est bone par lestatute R. le III.*

the



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

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

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

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

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

Again



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

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

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

Whereas

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

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

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



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

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

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

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

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

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

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

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

We may obſerve this Act of King *Henry* the



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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

 clared

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

How eaſy is it to give an Hiſtorical Account of the Legiſlative Authority of our Kings, that have reign'd without an Hereditary Title? Was not *William* the I. and *Henry* the I. &c. famous Legiſlators, and yet not Hereditary Kings. No, nor *Henry* the III. himſelf, when he granted the great Charter in the 9th Year of his Reign. And therefore when the Objector would give *the Statutes of Kings de facto, the Force of immemorial Cuſtoms*, which we ſee is not true in Fact. May it not be much more truly affirmed, that the Legiſlative Authority of Kings *de facto*, has the *Preſcription* of many Ages, has been ever acknowledged in this Realm, thro' all the Succeſſions of our Kings and Queens, and thro' all the Revolutions of Government, not only ſince the *Norman*, but in the *Saxon* times alſo, as appears from other Inſtances, as well as the Authority of *Edward the Confeſſor*'s Laws, which were held almoſt ſacred, tho' he was no more than a *de facto* King, ſo that the Authority of ſuch Kings is own'd by our Conſtitution, and woven into it long before the Statute of the 11 of *Henry* the VII.

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



anſwered, if he means an *Allowance* that gave Authority to *Richard*'s Laws, it is pure Imagination, as appears from what hath been already ſaid. Secondly, A *Non-claim* makes no great difference in his caſe, as muſt be own'd by the Objector himſelf, who hath *given him up for a* de facto *Man in the worſt Senſe*, and worſe than that, a *Claim* ſet up againſt him would not have made him. And yet thirdly, this *Non-claim* ſeems to be a Miſtake, for on the one ſide *Henry* the VII. when Earl of *Richmond*, put up a Claim againſt him, as appears from 1 *Henry* the VII. ch. 6. in *Raſtal*'s Collections, and when he prevailed againſt *Richard* in the Purſuit of his Claim, he yet acknowleged the Authority of his vanquiſh'd Rival's Laws, and on the other ſide *Edward* the IVth's Daughters fled to Sanctuary, to ſecure their Titles and their Lives.

I come now to the *Attainders*, upon which I wonder this Gentleman lays ſo great a Streſs, ſince he cannot believe thoſe Attainders, either *made* or *proved*, the Perſons *attainted* not to have been *Kings* and *Legiſlators*, whilſt they exerciſed the Regal Power, when the Inſtances he himſelf gives of the mutual Attainders of *Henry* the VI. and *Edward* IV. prove the contrary. For notwithſtanding the firſt Attainder of *Henry* VI. I know, he acknowledges him to be a King and a Law-giver, and *Edward*

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

And altho' *Henry* the VII. as the Objector ſays, in his *Attainder of* Richard *the III. cal-*

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

*led*



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

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



This

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

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

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

† *De Termino* Hillarii *anno* Henrici *VIII. f. 3. Toutes les Juſtices en l'eſcheker chamber, 1. die Termini par le Command le Roy Comminerent pur le reverſell del bill & act que baſtard les enfants le Roy E.IV.*





beth *his Wife: And gave direction that the Bill and Act was ſo falſe and ſcandalous, that they would not have the Matter, nor the Effect of the Matter recited, but only that* Richard *late Duke of* Gloceſter, *and afterwards in fact, and not of right, King of* England, *cauſed a falſe and ſeditious Bill to be preſented to him, which begins thus ---- Pleaſeth it your Highneſs to conſider theſe Articles enſuing* &c. *without reciting more, which Bill afterwards in his Parliament holden at* Weſtminſter *was confirmed and auctoriſed,* &c. *The King, at the Special Requeſt and Prayer of his Lord's Spiritual and Temporal, and the Commons of this preſent Parliament aſſembled, and by the Authority of the ſame, that the ſaid Bill Act and Record be annulled and utterly deſtroyed, and that it be ordained by the ſame Authority, that the ſame Act and Record be taken out of the Roll of Parliament, and be cancelled and burnt, and be put in perpetual Oblivion, and alſo the ſaid Bill with all the Appendancy,* &c. * Note *that the Record could*

& Eleſabeth *ſon feme. Et priſteront ſon direction pour ceo que le bill & l'act fuit cy faux & ſlanderous que ils ne voill reherſe le matter ne l'effect del matter mes tantſolement que Ric jadis Duke de Glouceſter & puis en fact & nient en droit roy d'engle terre fiſt un falx & ſeditious bill pur eſte mis a luy que Commence ſic* Pleaſeth &c.

* *Nota enſem que il ne puiſſoit eſtre pris hors de l'record ſans act de l Parlement par le indemnitre & jeopardie de eux que au les recordes*

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

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

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

*en lour garde que fueront aſſente, & puis toutes diſcharges il fuit par auctoritie de parlement.*

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



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

*fueront atteintes & fueront nomes chevaliers des counties ou citizens ou Burgeſis a ceo Parlement que ceo acte de atteinder ſerra primes revoke & adnulle. Et que eux meſmes atteintes ne ſerrount en le Parlement at reverſell de l'act, & tantoſt come les actes de atteinder vers eux fueront reverſes & adnulles que eux toutes & cheſcun de eux ceſtaſſaver Seignours & comeynes viendrount en leur lieus & donques procedount loialement & per loyals parſons, qar il neſt convenient que ceux que ſount atteintes ſerront loiales juges; Et donques fait move un Queſtion que ſerra dit pour le Roy meſme pur ceo q. il fuit atteint, &*

gether,

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

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

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

*Henry*



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

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

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

*no*

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

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

But



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

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

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

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

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

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

† *Juriſprudentia Anglica jam olim pronunciarit Coronam ſemel ſceptam omnes omnino defectus tollere. Camden p.* 10.

But



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

It may not be amiſs here to take Notice of another Objection, which is, that theſe Princes ſometimes attainted ſome of the Leaders of the oppoſite Party, for adhering to their Rivals. But when they did this, their *conſtant* way of proceeding againſt ſuch Perſons was, by Attainders in Parliament *ex poſt facto*, and not by Indictments in the ordinary Courſe of Proceedings, which ſhews, I think, at the ſame time, that to ſerve the King in Poſſeſſion was not a Fault, nor could be puniſhed as ſuch, by the Laws that were then in *Force*. But to ſerve *againſt him* was, inſomuch that 1 *Henry* the VII. ch. 6. a Pardon was enacted in Parliament, to indemnify thoſe who fought on his ſide againſt *Richard* III. Thoſe who fought for the King for *the time being*, wanted no Act of Parliament to

indem-

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

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

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



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

## CHAP. III.

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

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

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

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

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

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





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

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

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

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

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

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

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

† *Parl. Roll.* 39. *H.* 6.





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

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

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

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



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

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

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

† *See the Oath at large in Stow p.* 395.

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



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

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

Laſtly, this Declaration of the 39 of *Henry* the VI. as well as the Acts of the 1 of *Edward* the IV. were repealed and anulled by Act of Parliament, when *Henry* the VI. recovered his Throne: And altho' *Edward* the IV. forced him from it again, and attainted him; yet

*Henry*

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

Laſtly, It is objected, that the Confirmation of the Judgment of Parliament againſt the two *Spencers* 1 *Edward* the III. was repealed 21 *Richard* the II. becauſe it was Unlawful his Father *Edward* the III. being then alive, and a *Priſoner*.

This Act of Confirmation of the Judgment againſt the Two *Spencers* 1 *Edward* the III. was not *declared void* 21 of *Richard* the II. but *repealed*, and therefore *valid*, until repealed.

Secondly, That Repeal of the Judgment againſt the Two *Spencers*, and the whole Parliament, (as I have already obſerved) of the 21 of *Richard* the II. (as I obſerved before) in which it paſſed, was afterwards Repealed 1 *Henry* the IV. c. 3. Of all theſe Acts of Parliament relating to the two *Spencers*, My

* *Rol. Part.* 1 H. *VII.* N. 16. *Reſtitutio.* H. *VI.*

Lord



Lord Chief Juſtice *Coke*, gives this brief Hiſtorical Account.

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

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

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

† *Inſtitut. Pt.* 4. *Ca.* 1. *p.* 25.

Ought

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

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

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

CHAP.



## CHAP. IV.

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

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

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

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

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



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

Since

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

And ſo I come to the famous Statute of the 11 of *Henry* VII. c. 1. This Act hath lain under a great Prejudice, as if it introduced a *new Authority*, and a *new Allegiance*, not known before in our Conſtitution. But if a Law, that is made in Civil Matters, needed a Vindication, this is ſufficiently vindicated by the foregoing Diſcourſe, which hath proved, that the Authority of the King, for the time being, which this Statute ſecures, was ever acknowledged; and the Allegiance, which it declares to be due to him, was ever *paid* in this Realm, and both the *one* and the *other* juſtified by the *Common Law* and *Statute Law* of the Kingdom, in the Reigns of Hereditary Kings. So that this Act, is ſo far from being a *Breach* upon our Conſtitution, that it is *agreeable* to it. And therefore is drawn in ſuch a manner, as made only in Affirmance of what was lawful before, for immediately before the enacting Words



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

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

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

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

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

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



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

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

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

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

But not to inſiſt on this, I obſerve ſecondly that the Duke of *Northumberland* did not plead this Statute, nor indeed had he any Right to it. For being the Principal Author of this Revolt, he was by the laſt Clauſe of this Act, cut off from any Benefit of it. This Act was made for the Security of thoſe, who ſubmit to a *King for the time being*, after he is eſtabliſhed; not for thoſe that overturn Governments, who, whatever they may plead for themſelves, it can never be the 11. *H.* VII.

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



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

## CHAP. V.

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

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

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

Parliament knew that the ſupreme Authority, both Legiſlative and Executive, of the *Kings for the time being*, had ever been acknowledged at Common Law in the Courts of Judicature, and by the Acts of Parliament, of Hereditary Kings: That the Subjects of *England*, had always ſworn and paid Allegiance to the King in Poſſeſſion. And that a Statute of the Realm expreſly requir'd this, and that the Crown, during this time, notwithſtanding this, was held to be Hereditary: Since the Legiſlators, I ſay, knew all this, if they had deſign'd to have alter'd the Conſtitution, and laid a *new* obligation on the Subject, never to ſubmit to any but hereditary Kings: It had been abſolutely neceſſary for them, to have declared, and enacted, that the Subjects ſhould never hereafter ſwear, or pay Allegiance to any but Hereditary Kings; that no Statutes, for the time to come, ſhou'd be valid, but ſuch as were made by them; and that the 11 of *Henry* VII. ſhould be repealed and annulled: But ſince nothing of all this was done by them, it is evident, they had no deſign to do it. It is ſufficient for us, they have not done it: For a Conſtitution is not to be alter'd; the whole Courſe of the Common Law to be inverted; and the Statutes of the Realm repealed by Implication, and that Implication no better, than an ill-grounded Conjecture.

Indeed



Indeed this Notion, of a virtual Repeal, ſeems to proceed upon a double Miſtake. Firſt, That the 1. *James* the I. hath made the Deſcent of the Crown, more Hereditary than it was before; and 2ly. That the 11 of *Henry* the VII. can have no Place in an Hereditary Kingdom. Whereas it is certain the Crown was Hereditary, before this Act of Recognition, as well as ſince, as might be proved from ſeveral Teſtimonies, if there needed any more than this Act of Recognition it ſelf, which recognizes King *James* the Iſt's Title to the Crown, as *being rightfully, lineally, and lawfully deſcended of the Lady Margaret, &c.* So that this Act is only declarative of the old Hereditary Right, and not introductive of any new Right, and without any Alteration, leaves the Conſtitution as it found it. And therefore ſince the Crown was Hereditary before the 1. *James* the I. when the Objectors confeſs the 11 of *Henry* the VII. was in force (otherwiſe they could not ſay, it was then virtually repealed) they muſt alſo grant, that the 11 of *Henry* the VII. may have Place in an Hereditary Kingdom.

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

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

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

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



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

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

The Lawfulneſs of ſubmitting to a Prince, whom it was Unlawful to ſet up, may be illuſtrated, and proved, from the Conduct of God's own People, to whom he had given a Law, *Deut.* 17. 14. *To ſet one from among their Brethren to be King over them, not to ſet a Stranger over them, which was not their Brother:* This made it unlawful for any Jew to contribute to the advancement of a Stranger to the Throne; and yet when Strangers got the Rule over them, they conſtantly ſubmitted to them, without any cenſure for it; and when ſome of them made a Scruple of it in our Saviour's time, our Lord juſtified them, in their Submiſſion to the *Stranger* that then Ruled over them, the Heathen Emperor *Tiberius.*

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



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

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

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

*liament*

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

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

Con-



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

of

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

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

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



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

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

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

† *Sheringham* of the Kings Supremacy. *p.* 18.

CHAP.

## CHAP. VI.

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

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



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

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

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

 *that*

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

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

† 11 *H. VII. Bagot's Caſe, 9 Ed. IV.*
* *Tryal of the Regicides, p.* 146.

*deſire*



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

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

What a King?

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

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



*againſt*

*against him punishable, tho the right Heir get the Crown.*

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

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

Had I given the Opinions of Lawyers, of how great Name soever, that lived since the Revolution, they would have been received with Prejudice. It might have been said, they had too great an Interest in the Case, and could not have come to the Bench, nor the Bar, without this Doctrine; and therefore I have produced none * but such as lived in the Reigns of Hereditary Kings, where there was not the least Temptation, to *byass* them on this side of the Question. The Temptation, lay on the other side, it being no good way to make their Court, but more likely to bring themselves into Disgrace, with those Princes by whose Commission, and in whose Courts they sate; to declare in Effect, that if another

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

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

Person



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

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

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

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



*States-*

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

From what hath been ſaid, the *Caſe* of the *Oaths* will eaſily be reſolved. For the *Oath* of *Allegiance*, is a *Legal Oath*, or an *Oath* appointed by *Law*; and the *Allegiance* we ſwear, is a *Legal Obedience*, or that *Allegiance*, and no other, but *that* which the *Law* requires: And therefore, as the *Law* is the *Meaſure* of our *Allegiance*, ſo is it of the *Extent* and *Obligation* of our *Oath* of *Allegiance*. And the Law, by requiring our *Allegiance*, to be paid to the King *in Poſſeſſion*; *determines* our Allegiance, and conſequently the *Obligation* of our *Oaths*, to the Prince that is *out of Poſſeſſion*. In *Promiſſory Oaths*, all Caſuiſts agree, there is this tacit Condition, *rebus ſic ſtantibus*, and what is thus implied in the Oath, is ſupplied, and expreſſed in our *Laws*, by which the Oath is to be *interpreted*.

And ſince the *Kings for the time being*, with their Two Houſes of Parliament, have by our Conſtitution, the Legiſlative Power, they are enabled to do, whatſoever is within the Verge of that Power, for the Preſervation of the Community, and themſelves. In particular



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

## CHAP VII.

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

SOme will be apt to ſay, that in all this Diſcourſe, I have gone no higher, than the *Conſtitution*, and *human Laws*; but is this ſufficient

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

The Constitution therefore, and our Obedience according to it, is sufficiently vindicated, if



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

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

Here it will be answered, that *Tiberius Cæsar* was a *Rightful* Emperor, the Senate, and People of *Rome*, having conferr'd the whole Authority, of the Roman Government on *Augustus*, by the *Lex Regia*. If we grant the *Lex Regia* to be genuine (which hath been denied in a Tract, *De fictione Legis Regiæ*,) since it is spoken of with so much Assurance, by the Emperor *Justinian*, in his Institutes:

yet

yet what is this to *Tiberius*'s Title? the *Lex Regia*, did not entail the Empire on *Auguſtus*'s Poſterity; and if it had, *Tiberius* was none of them. And if we look into the firſt Book of *Tacitus*'s Annals, we ſhall ſee, that he durſt not, upon *Auguſtus*'s Death, lay any Claim to it; but by Fraud (of which he was a great Maſter,) and Force, he wound himſelf into the Government, and the Submiſſion of the Romans (ſuch as it was) was his only Title.

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



ſhortly break the Roman Yoke, and reſtore the Kingdom to *Iſraël.*

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

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

† In his *Votum pro Pace*, he ſaith, *And if any one in our time, had ſhew'd our Mony, and ask'd whoſe is this Image? Any Man, both the Learned, and the Unlearned, would readily Anſwer, The States of* Holland's. *I think all that live now in thoſe Territories do*

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

*que*

*owe Obedience; nay, and if they are injuriously treated, patient Submission to those, who are now the Governors of the Towns and the People: For they are in Possession of the Government.)*

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

† In his Annotations on the 22. c. of St. *Mat.* Explaining the Words, whose Image and Superscription is this? * In the 20 verse he says, *As to make Laws, so to coin Mony is a Mark of Sovereign Power, for νόμισμα Mony as* Aristotle *teaches, receives both it's Name*

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

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

† *Quia ejus imaginem præferebat nummus, præferebat certissimum hoc Indicium possessionis. vide in Historia Jenuate Bezarum l. 18.*

* *v. 20.* Τίνος ἡ εἰκὼν αὕτη καὶ ἡ ἐπιγραφὴ. *Sicut legem figere signum est summi imperii, ita ut nummum cedere, nam νόμισμα, ut docet Aristoteles, & nomen suum, & vim habet ἀπὸ τῦ νόμε.*

*and*



*and Value from νόμος the Law, hence to adulterate the Coin is ranked amongst Treasons.—— The Mony it self therefore receiving it's Value, from the Edict of* Cæsar, *and bearing* Cæsar's *Image and Superscription, declared, that* Cæsar *actually possess'd the Sovereign Power over* Judæa, *and that the Jews in using the Mony acknowledged it. It might be objected, that the Romans had the Rule over the Jews, and* Cæsar *over the Romans in fact, but not of Right. But Christ shews this doth not at all belong to the Question: for since the Peace of Nations, cannot be maintain'd without Arms, nor Arms without Pay, nor Pay without Taxes, as* Tacitus *speaks, it follows, that Tribute must be paid to him that governs, as long as he governs, as a Reward of the common Protection, which he affords us, who is in Possession of the Government, whosoever he be. Therefore, saith St.* Paul *you pay Tribute also, and not only out of*

*Hinc Majestatis criminibus accusentur nummos corrumpere. Ipse igitur nummum pretium habens ex Edicto Cæsaris, Cæsarisque nomen & vultum preferens, testabatur Cæsarem summum in Judæam Imperium reipsa obtinere, idque à Judæis nummo illo utentibus agnosci. Objici poterat, ipso quidem facto Romanos Judæis, & Cæsarem Romanis imperâsse, at nullo jure. Sed Christus ostendit hoc ad propositam quæstionem nihil pertinere. Nam cum nec quies gentium sine Armis, nec Arma sine Stipendiis, nec Stipendia sine Tributis, haberi possint, ut loquitur Tacitus, sequitur ei qui imperat, tantisper dum imperat, pendenda tributa, ut pretium communis tutelæ, quam præstat nobis quisquis est publici imperii possessor. Propterea inquit Pau-*

*Fear*

*Fear of Puniſhment, but regard into Juſtice and Equity; becauſe under the Protection of the Powers, ye live ſecure from Violence and Injuries.* † *Render* (*as due*) *as St.* Paul *explains it, who, when he was treating of Tribute, ſubjoins, render therefore to all their Dues.*

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

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

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

of



of the Kingdom, acknowledge his Regal Authority, and require the Allegiance of the Subject to be paid to him. Whether to refuſe to acknowledge him, for our King, or to pay Allegiance to him as ſuch, is not to oppoſe both Providence and Law?

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

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

of

*of Fidelity, to their natural Lord the King of* England, &c?

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

CHAP.



## CHAP. VIII.

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

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

*Poteſtas autem publicæ Juriſdictionis, ordinatur primariò in bonum publicum ipſius Communitatis, in bonum vero perſonæ tali poteſtate*

 *the*

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

*preditæ, id eſt ipſius Magiſtratûs, nonniſi ſecundariò & conſequenter, quatenus nimirum utile eſt Principi, ut Reſpublica floreat. Sanderſon de Oblig. Conſcien. Prælect. 7. §. 4.*

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

main-



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

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

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

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

## CHAP. IX.

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

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

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



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

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

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

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

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



*be on Earth, as the Days of Heaven. And the Lord will give us Strength, and lighten our Eyes, and we ſhall live under the Shadow of* Nabuchodonoſor *King of* Babylon, *and under the Shadow of* Balthaſar *his Son, and we ſhall ſerve them many Days, and find Favour in his Sight*, c. 1. v. 11. 12. Thus we ſee, when God commanded them, to ſubmit to the King of *Babylon*, he was pleaſed over and above to add this *Reaſon* for their Submiſſion, that they might thereby live ſecure under his Protection, and enjoy the Benefits of Government in Peace, and Tranquillity.

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

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

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

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

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



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

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

* *Comme ils etoient entre les Rois de Syrie, & les Rois d'Egypte ; ils obeïſſoient tantoſt aux uns & tantoſt aux autres ; ſelon que ces Rois eſtoient les plus forts.* Meurs des Iſraelites. Part. 3. Chap. 3.
† *Eccleſ. Hiſtor. l. 6. 28.*

Fa-

Father and Son, that were first saluted Emperors in *Africk*, and afterwards confirmed by the Roman Senate, met with a chearful Submission, both at *Rome* and throughout *Italy*, except in a few Cities; as well as *Maximus* and *Balbinus*, * who were created Emperors upon the Death of the two former, and before the Death of the *Maximini*. I cannot say there is any Testimony, that proves the Submission of the Christians in particular, to these Rival Emperors; Nor is there any, that proves the Christians, who were very numerous at that time, were singular in their Behaviour, amidst this general Submission: But in the 4th. 5th. and 6th. Ages we have several Instances, of the Christians becoming Subjects, to New Emperors, whilst the Dispossess'd Emperor was alive. I'll content my self with giving a Precedent of their Behaviour in each of those Ages.

In the Beginning of the 4th. Age, *Constantine* and *Licinius*, who were *Collegues* in the Roman Empire, having publish'd an Edict for the secure Profession of the Christian Religion; *Licinius* notwithstanding a while after began to persecute his Christian Subjects; for which, *Constantine* engages in a War against him, dispossesses him first of some of his Provinces, and afterwards in a Second War, of his Empire of the East, and reduces him to a private

* *See Julii Capitolini Maximini Duo.*

Life;



Life; and at last, upon his designing to raise new Commotions, puts him to Death. In the mean time, the Bishops and Christians, as well as the rest of the Subjects of *Licinius*, paid a chearful Obedience to *Constantine*, as he became Master of *Licinius*'s Division of the Empire.

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

In the Fifth Century, the Emperor *Zeno* was dispossess'd, and driven into *Isauria*, by *Basiliscus*, who, by Usurpation, mounted the Imperial Throne: And yet after he was

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

set-

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

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

* See *Vales. Not. ad vit. Conſtant. l.* 2. *c.* 6.
† See *Evagr. Eccl. Hiſt. l.* 3. *c.* 3. 4. 5. 6. 7. 8.

Pope



Pope *Gelatius*'s Epiſtle, † *ad Epiſcopos Dardaniæ*, where he takes Notice, that the Emperor *Zeno* colour'd over his Diſpleaſure againſt *Calendion*, Biſhop of *Antioch*, with a Pretext, that he had razed his Name out of the Dyptichs, in favour of the Two Rebels *Leontius* and *Illus*. *

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

* *Vid. Euſeb. In Conſtant. Life l.* 4. *c.* 20.
† *Epiſt* 13. *in the* 4. *Tome of Lable & Coſſart. Councils.*
* See *Evagr. Eccl. Hiſt. L.* 3. *c.* 16. and another Inſtance of the ſame, in his Succeſſor *Anaſtaſius. Evagr l.* 3. *c.* 34.
† It appears from *Procopius de bello Gothico l.* 1. *c. XI that Silverius*, as well as the Roman Senate, and People, took Oaths to the Gothick Kings.

ſolv'd

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

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

der-



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

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

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

* *Illud omnes fatentur, poſſe populum Regi Subjectum, ad declinandum excidium, & poſtquam in Rege nihil amplius eſt præſidii, alteri ſeſe ſubmittere.* Puffend. *de Jure naturæ & Gentium, l.* 7. *c.* 7. § 4.

In

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

*Oportet neminem eſſe ſapientiorem Legibus.*

*FINIS.*

A

# DEFENCE

OF THE

# VIEW

OF THE

# Engliſh Conſtitution

WITH

Reſpect to the Sovereign Authority of the PRINCE,

AND

The Allegiance of the SUBJECT.

By way of REPLY to the ſeveral Anſwers that have been made to it.

*By* WILLIAM HIGDEN, *D.D.*

*London*, Printed for *S. Keble* at the *Turks-Head*, and *R. Goſling* at the *Miter* in *Fleetſtreet*. 1710.

# The PREFACE.

TO reduce this Controverſy to Matter of Fact, was, I thought, the Way to bring it to a ſhort and a fair Iſſue. For, that it has been the Common Uſage of the Realm, for all Orders and Degrees of Men after Revolutions to ſubmit to the Princes that were poſſeſs'd of the Throne with the Conſent of the States: That the Authority of theſe Kings, to which the Subjects ſubmitted, ſwore, and paid Allegiance, was owned in the ſucceeding Reigns of the Kings who were their Rivals: That the Judicial Proceedings, and adjudged Caſes in the Courts of Kings *de jure*, which do fully acknowledge that *Authority*, are extant in the *Year Books* of thoſe Reigns: That the ſolemn Reſolutions, and declared Opinions of Judges, and great Lawyers, both ancient, and modern, which I have produced for this Authority, were really delivered by thoſe Judges and Lawyers: That all the publick

Statutes, which were made by Kings *de facto*, have ever had the Force of Laws of this Realm, have been always pleaded as ſuch in the Courts of ſucceeding Kings that were their Rivals, without any Confirmation, or pretended Confirmation, and have been recited as ſuch by Kings *de jure* and their Parliaments: That when the 25 *Ed.* III. was made, as well as in all times before that Statute, by the Common Cuſtom and Uſage of the Realm, the Unpoſſeſs'd, Unrecognized Heir was never ſtiled and held to be our Sovereign Lord the King by any: That the Prince in poſſeſſion of the Crown and Kingdom was always ſtiled and held to be our Sovereign Lord the King: That in the 11 Year of *Henry* VII. a Statute was made, which declares that to ſerve the King for the Time being is the true Duty and Service of Allegiance, and ſecures the Subjects in the Diſcharge of that Service; and that this Law has never been Repealed by any ſucceeding King or Queen,



Queen, but ſtands, at this day in the *Statute Book*, a Law of this Realm: Are all Matters of Fact.

Now there is but one way to anſwer Matters of Fact, which is to deny them. And tho' theſe Authors have attempted this in an inſtance or two, yet they have done it ſo faintly and unſucceſsfully, and the Evidence againſt them is ſo clear and full; that inſtead of roundly denying theſe Facts, they have had recourſe to the *Salvos* of *ſub ratione juris*, and the *Preſumptive Conſent*, &c. with which (tho' they have not the leaſt Authority for either from our Lawyers or Lawbooks) they think to turn off the force of what has been urged both from the Common Laws and the Statute Book. But this is not anſwering, but evading, 'tis ſetting up their private Opinions againſt Fact and Law, or laying the Laws aſide, and ſetting an Hypotheſis in their Place.

It is certain, that the Schemes of Government which have been form'd by

ſome Men of leiſure, are perfect Strangers to our Laws. Laws are Rules given by the Supreme Authority, obliging the Subjects to regulate their Actions by them, in order to the Publick Peace and Tranquility of the Realm; without any regard to the Patriarchal, or Popular Scheme. And therefore to ſuch as dictate from either of theſe Schemes, that Maxim of Law is a ſufficient Anſwer, *Lex non dicit, neque tu dicere debes.*

Some, I know, doubt, whether Human Laws are ſufficient to juſtify our Actions in *foro interno*, and to ſatisfy Conſcience. But they are to conſider, that Conſcience is to be directed by ſome Rule. In Matters of Faith, and Divine Inſtitutions, Divine Revelation is our Rule; In Eccleſiaſtical Matters, as diſtinguiſhed from Divine Inſtitutions, the Laws of the Church; In Civil Matters, the Laws of the State, ſo long as they enjoin nothing contrary to the Law of God: If they do



do, we have a plain Apoſtolical Rule, *To obey God rather than Man*; If they do not, we have another Apoſtolical Rule, as plain, *To obey Magiſtrates.*

God has given no particular Laws in Civil Affairs as to the Form of Government, or the Meaſures of Obedience, except it were to the Jewiſh Nation. Neither has the Revelation of the Goſpel made any Alteration in this Matter. We are therein, I ſay, commanded in general *To obey Magiſtrates*, &c. but are left to learn from the Laws of every Country, who the Magiſtrate is, and what Obedience is due to him. Our Bleſſed Lord himſelf ſubmitted to the Government under which he lived, and made no Change in the Governments of the World, but left them in the ſame State in which he found them. His Apoſtles, and their Succeſſors after them did the ſame, whether they propagated the Goſpel within, or without the Limits of the Roman Empire. The Advantage which Divine Revelation has

brought to Government, and the Security it gives to the Thrones of Princes, is not by altering the Object, or the Measures of Civil Obedience, but by Establishing that Obedience, which human Laws exact for fear of Punishment, on a higher and a surer Principle, and with a more weighty and awful Sanction, than they can give; whilst it obliges us to *be Subject, not only for Wrath, but also for Conscience Sake.* Could it be proved that a particular Model of Government and Rule of Succession to it, hath been Instituted by God as a Law to Mankind, I should think my self not only obliged to Submit to it, but obliged to Submit to no other; since no humane Authority can prescribe against a Divine Institution: But till that is proved, I shall think my self obliged to submit to *every Ordinance of Men*, or, as it may be rendred, to *every Human Constitution, for the Lord's sake*, and to make the Laws of my Country, the Rule of my Obedience in Civil Matters.

It



It has been objected that the Act of the 13 *Eliz. c.* 1. is expired. If that were true; it is never the less true, that the Legislature of the Realm hath in that Act asserted the Limitation of the Descent and Inheritance of the Crown to be within the Verge of its Power. But it is not true that the Act 13 *Eliz. c.* 1. is expired: The Penalty of High Treason indeed was Temporary, that Act making it *High Treason, only during the Queen's Life, for any one to affirm that the Queen and her Two Houses of Parliament could not make Laws of sufficient Force and Validity to bind the Descent and Inheritance of the Crown.* But the Act it self was so far from being Temporary, or expiring with the Queen's life, that it expresly makes it *forfeiture of Goods and Chattels, for any one to affirm the same after the Queen's Death.* *

After I have proved the Legislative Authority of the King for the time being, with his two Houses of Parlia-

* *See Number V. in the Appendix.*

ment:

ment: I think, I need ſay no more of the Hereditary Deſcent of the Crown being limitable by Act of Parliament, which is the principal Queſtion betwixt me and theſe Authors on this Head. Not whether the Crown is Hereditary? For that it is ſo, is agreed on both Hands: And the aforeſaid Act is ſo far from making it Elective, that it plainly acknowledges the Inheritance of the Crown, whilſt it aſſerts that its *Inheritance may be limited by Parliament*; nay the Act † expreſly makes it equally penal, *for any to affirm or maintain that the Common Laws of this Realm, not altered by Parliament, ought not to direct the Right of the Crown of England*, as to affirm *that the Queen and her two Houſes of Parliament could not limit the Deſcent and Inheritance thereof.* *

And therefore the Queſtion betwixt theſe Authors and me is, whether the Hereditary Right and Deſcent of the

* *See the beginning of the Clauſe of the Act* Numb. V.

Crown



Crown is indefeazible and unalienable? as they affirm: Or under the Direction of the Legiſlative Power? as I have not only affirmed, but I think, fully proved.

Having referr'd in p. 7. to *Lethington* the Scotch Secretary's Letter, and to Sir *Thomas Craig*'s Book of *the Right of Succeſſion*, for farther Proof that *Henry* VIII. did not execute the Power given him by Parliament, to nominate a Succeſſor by his laſt Will and Teſtament, Signed with his own Hand, I have thought fit to Print a Citation from each of them in the *Appendix*. *

What *Lethington* ſays, carries the greater Weight, becauſe he appeals for the Truth of it, not only to Sir *William Cecil*, the Miniſter of State to whom he writes, but to ſeveral Noblemen then alive, who could not but know, whether what he affirms to have been done in open Parliament thirteen Years before, was really done, or not; for his Letters

* *Number VI, VII.*

bear

bear date *Jan.* 14. 1566, and that was done in Parliament in the firſt Year of Queen *Mary*, which was in 1553. I need ſay nothing of Sir *Thomas Craig*, who wants no Authority with the Writers on that ſide of the Queſtion: And therefore let me put the *Remarker* in mind that how little ſoever the Caſe of *Barbaricus* or *Barbarius*, which he cites from *Hottoman*, was to his purpoſe, he'l find by *Craig* * that it is miſtaken too. If the *Remarker* has not miſtaken *Hottoman*, *Hottoman* has miſtaken the Caſe in Law.

I have been larger in my Reply to the Author of the *Remarks on Mr.* Higden's *Eutopian Conſtitution*, as he is pleaſed to call it, than to the Author of A *Letter from the Natural Born Subject*, becauſe he does not ſo frequently and ſo long wander from the Queſtion, as the latter, who ſometimes

* *Right of Succeſſion*, p. 297.

loſes



loſes Sight of it for many Pages together, however what is ſaid to one of them, is generally a Reply to both.

As to *the Engliſh Conſtitution fully ſtated* which came very late tomy Hands, I have only taken ſo much notice of it, as to ſhew, it would not have deſerved more, had it come ſooner.

I cannot but think my *Anſwerers* after they have read my *Defence*, muſt be convinced they have made very many and great Miſtakes in our Engliſh Hiſtory, which yet they have delivered with as great Aſſurance, and drawn important Conſequences from them. It may poſſibly not be ſo eaſy to convince them of their Miſtakes in Law, becauſe the Senſe of Laws will more eaſily bend to an Hypotheſis, than Matters of Fact, which are inflexible. However a Conviction of their Miſtakes in Hiſtory ſhould, methinks, lead them to ſuſpect they may be miſtaken in the Senſe of our Laws, where their Aſſurance cannot be greater, than it has been in the former,

former, and their Study, I believe, has been leſs. They ſhould ſuſpect this the rather, when they conſider, that they differ from thoſe, whoſe Profeſſion it is, and who are in a manner unanimous in theſe Points of Law, whilſt themſelves who differ from them, do in ſeveral of theſe Points differ from one another too.

But whether the Writers ſhall make theſe Reflections or no, methinks ſome of their Readers, who are apt too implicitely to take things upon truſt, ſhould not, if they read on both ſides, fail to make them. However I think neither ſhould eſteem it (as my *Anſwerers* have done) an ill Office in thoſe, who believe them miſtaken, to endeavor to ſet them right, and to bring them into an Eſtabliſhment, which (if they could lay down their Scruples) they themſelves would believe was for the Intereſt of their Country, and for the Intereſt and Preſervation of a Community, that ought to be yet ſtill dearer to us, I mean, that of our excellent Chuurch.

The

# The CONTENTS.



CHAP.

## The CONTENTS.



THE



*A Defence of the View of the Engliſh Conſtitution, &c. by way of Reply to the* Utopian Remarker, *with ſome Animadverſions, on the Natural Born Subjects Letter.*

## *A Reply to the* Remarker's *Preface.*

IN the Preface we meet with nothing to detain us, unleſs it be this Remark, *I might have ſaid, that ſome Acts made even by Kings de Jure, (as ſome made by* Hen. VIII. *a King de Jure and his Parliaments,) were never Repealed, and yet no more Notice taken of 'em in following Reigns, than if they had never been made, being againſt the Engliſh Conſtitution, and that Mr.* H. *knew this well enough, but wiſely took no notice of it, becauſe it would have ſpoil'd his Hypotheſis.*

The *Remarker*, I think, ought to have been more particular, and told us what were theſe *Laws of King* Henry VIII. *which were never Repealed, and yet no more Notice taken of 'em in following Reigns, than if they had*

*had never been made.* However, I doubt not but he means thoſe Acts, which were made by King *Henry* VIII. to Limit the Deſcent of the Crown; ſince he ſays, that *all Acts made to Diſinherit the next Heir, are Null and Void, being againſt the Conſtitution of an Hereditary Monarchy.*

Remark p. 84.

But the *Remarker* was a little too forward, in ſaying, that I *knew there was no notice taken of theſe Acts in ſucceeding Reigns.* I know indeed there is a like Remark in the Preface to *Jovian*, (a Book which he recommends to me) but I knew it to be a miſtake there, and ſhall prove it to be ſo here. In the Opinion of the learned Author of that Preface, there is *a fundamental Law of the Monarchy, which ſeems to Invalidate all Acts of Parliament that limit and bind the Succeſſion. It was by this Law,* ſaith he, *that the Act of Parliament, which Impower'd King* Henry *VIII. to diſpoſe of the Crown by his laſt Will and Teſtament, to what Perſon or Perſons he pleaſed, proved Ineffectual to the Houſe of* Suffolk, *to which he bequeathed it after the Death of Queen* Elizabeth. *If,* ſaith he, *theſe Statutes of King* Henry *VIII. were not Null and Void, by what Authority was the Houſe of* Suffolk *Excluded, and King* James *admitted, contrary*



*trary to ſo many Statutes?* To which Queſtion this ſhort Anſwer might ſuffice, that there was no Statute for the Admiſſion of the Houſe of *Suffolk*, nor for the Excluſion of King *James*, and the Houſe of *Scotland*; nor was that Power of diſpoſing of the Crown, which was given *Henry* the VIII. by Act of Parliament, ever put in Execution by that King for the Admiſſion of the former Houſe, or Excluſion of the latter. And therefore to ſay, *that the Houſe of* Suffolk *was excluded and King* James *admitted to the Throne contrary to many Statutes*, is a Miſtake both in Law and Hiſtory.

But becauſe this imaginary *Nullity* of the Acts of Settlement made by King *Henry* the VIII, has been urged with ſo much Aſſurance, to prove, that the Deſcent of the Crown cannot be limited by Act of Parliament: I ſhall ſhew, that thoſe Acts were held valid in ſucceeding Reigns, and put in Execution according to their true intent and meaning.

The laſt of thoſe Acts paſſed in the Thirty fifth of *Henry* the VIII. which made ſome Alteration in the former Acts of Settlement, and fixt the Deſcent of the Crown;

Pref. to Jovian p. 43. 44.

and which the Author of *Jovian* expreſly referrs to in the Margen, as *an Act that was null in it ſelf*.-----This Act, I ſay, conſiſted of two Parts. Firſt, the Crown was to deſcend to that King's Son, Prince *Edward*, and the Iſſue of his Body; in default of ſuch Iſſue, to the Heirs of the Kings Body by his preſent Marriage, whether Male, or Female; in default of ſuch Iſſue, to the Lady *Mary* and her Heirs; and if ſhe dyed without Iſſue, to the Lady *Elizabeth* and her Heirs.

Secondly, In caſe all theſe ſhould die without Iſſue, the King had full Power and Authority given him by this Act, to diſpoſe and limit the Crown to deſcend on ſuch Perſon, and Perſons in Remainder, and Reverſion, as he ſhould name, and declare in his Letters Patents under his Great Seal, or by his laſt Will in writing ſigned by his own Hand.

And was there *no Notice* taken of this Act of Settlement in ſucceeding Reigns? Not in *Utopia* it ſeems, but in *England* moſt ſignal Notice was taken of it, both in *Fact*, and in *Law*. Firſt, in *Fact*; for Queen *Mary* * claimed the Crown chiefly by

* See her Letter to the Privy Council in *Heylin's* Hiſtory of the Reformation p. 157.

Virtue



Virtue of this Act, and She, or Queen *Elizabeth* could have no other Title to it. Both of them could not have a Title by Birth, and yet Both ſucceſſively aſcended the Throne by this Act of Settlement. Both had been declared by Law Illegitimate, in the Twenty Eighth of *Henry* the VIII. and one of them was not of Legitimate Birth, and therefore could have no other Title to the Throne, but what this Act gave her.

Secondly, In *Law*, there was as ſignal Notice taken of it; for the very Act of Recognition of Queen *Elizabeth*, part of which the *Remarker* has printed in his Appendix Num. 13. doth, in the other part, which he hath left out, declare, *that in and to the Princely Perſon of Queen* Elizabeth, *and the Heirs of her Body lawfully to be begotten, the Royal Eſtate, Crown, and Dignity of this Realm, with all Juriſdictions*, &c. *are, and ſhall be, moſt fully and rightfully inveſted and annexed, as rightfully and lawfully to all Intents, Conſtructions, and Purpoſes, as they were in her Father the late King* Henry *the VIII.* * *or her Brother King* Edward *the* VI. *or her*

* Here the Remarker breaks off.



*Siſter*

*Sister Queen* Mary, *at any time since the Act of Parliament made in the 35th Year of King* Henry *the VIII. intituled, an Act concerning the Establishment of the King's Majesty's Succession in the Imperial Crown of this Realm. ----- And that it may be enacted by the Authority aforesaid, that as well this Declaration, as also the Limitation and Succession of the Imperial Crown of this Realm contained in the said Act, made in the said 35th Year of her most noble Father, shall remain and be the Law of this Realm for ever.*

Could there be greater *Notice* taken of an Act of Parliament, than there was of this Act of Parliament, of which the *Remarker* saith, *no Notice was taken?*

But why was the other Part of that *Act of Succession in the 35th of* Henry *the VIII. which impower'd that King to dispose of the Crown by his last Will, ineffectual to the House of* Suffolk; *and why did the House of* Scotland *succeed to the Crown of* England? Not by reason of any *Nullity* of that Act of Succession, as the Author of *Jovian* imagines, but because King *Henry* the VIII. never executed the Power, which that Act gave him. He did not *by his last Will, signed with his own Hand*, exclude the House of *Scotland*, and bring



bring the House of *Suffolk* into the Succession. There was indeed a Will drawn for that purpose, but it was never signed by the King, as the Act of Parliament expresly required, and such an extraordinary Power, as that was, must have been executed according to the precise Form of the Statute, that gave that Power; otherwise it was not valid. There was indeed a Stamp put to this Will by a mean Person, named *Clerk*, which would, not for the Reason aforesaid, have been a legal Ratification of the Will according to the Statute, had it been done by the King's Order, much less when it was done without his Order, or Knowledge. For tho' by this Act the King might, yet *Clerk* could not dispose of the Crown. Of all which there are undeniable Proofs in the Scotch Secretary *Lethington's* * Letter to Sir *William Cecil* the English Secretary, and in Sir *Thomas Craig's* Right † of the Succession. The former calls this a *forged Will*, and the latter, *a Forgery*, and both of them by undoubted Evidence prove it to be so.

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* Appendix to the 1 vol. of the History of the Reformation N. 30.

† P. 343, 344, 345.



Thus

Thus the *Remarker*'s *no Notice*, and the Author of *Jovian's Nullity of* King *Henry* the VIIIths. Acts of Succeſſion, and the *Houſe of* Suffolk's *Excluſion, and King* James's *Admiſſion to the Throne, contrary to the Authority of many Acts of Parliament*, appear to be, what I ſaid they were, Miſtakes both in Law and Hiſtory.

How candid a Cenſure then was this of the *Remarker*, *that I concealed what I knew to be true?* which yet no Man could know to be true, becauſe it was falſe, and which I knew to be falſe. What a handle has he given me, (were I diſpoſed to lay hold on it) by breaking off in the Recognition Act of Queen *Elizabeth*, with an *&c.* * in the midſt of a Sentence, which Sentence, (as the Reader might have ſeen had he printed it entire) doth take moſt remarkable Notice of this Act, of which the *Remarker* ſaith, *no Notice was taken.* It is not impoſſible, but it might be an overſight; and I ſhall be glad if it was ſo.

It is evident, as I have ſaid, that either Queen *Mary*, or Queen *Elizabeth*, was Illegitimate, and therefore could have no other but a Parliamentary Title to the

* Remarkers Appendix Num. XIV.

Crown:



Crown: And yet it is certain, that Queen *Mary* was brought to the Throne chiefly by the Aſſiſtance of her Proteſtant Subjects, who yet generally did not believe her of Legitimate Birth; and Queen *Elizabeth* was proclaimed by the Authority of a Popiſh Parliament, who as generally believed her Illegitimate. Which ſhews that both Proteſtants and Papiſts agreed in maintaining the Act of Succeſſion, that was made in the 35th of King *Henry* the VIII. and conſequently Both, believed the Deſcent of the Crown of *England* was limitable by Act of Parliament.

And as theſe Acts were held to be of force in ſucceeding Reigns: So none doubted of their Validity in the Reign of King *Henry* the VIII. when they were made; but all ſwore to the Succeſſion as it was eſtabliſhed by Act of Parliament; even Biſhop *Fiſher*, and Sir *Thomas More* that had been Lord Chancellor, who choſe to lay down their Lives rather than take the Oath of Supremacy; and abſolutely refuſed to ſwear to the Preamble of the Act of Succeſſion, which affirmed the Nullity of the King's Marriage with Queen *Catherine*, the Lawfulneſs of his Divorce, and the Validity of his Marriage with Queen *Anne*: Yet both theſe Great Men voluntarily offer'd

to

to ſwear to the Succeſſion, as it was eſtabliſhed by the 25th of *Henry* the VIII. which limited the Deſcent of the Crown to the King's Iſſue by Queen *Ann*, which according to their Opinions of the King's Marriage and Divorce they muſt believe Illegitimate, and excluded the Lady *Mary* whom they believed his Legitimate Iſſue.

Biſhop *Fiſher* in a Letter to Secretary *Cromwell*, gave the reaſon of his Conduct in this Matter: *I muſt beſeech you, good Mr. Secretary, to call to your Remembrance, that at my laſt Being before you and the other Commiſſioners, for taking of the Oath concerning the King's moſt noble Succeſſion; I was content to be ſworn unto that Part concerning the Succeſſion. And there I did rehearſe this Reaſon which I ſaid moved me. I doubted not but that the Prince of any Realm, with the Aſſent of his Nobles and Commons, might appoint for his Succeſſion Royal ſuch an Order as was ſeen unto his Wiſdom moſt according. And for this reaſon I ſaid I was content to be ſworn unto that Part of the Oath as concerning the Succeſſion. This is a very Truth as God help my Soul; albeit I refuſed to ſwear to ſome other Parcels, becauſe that my Conſcience would not ſerve me ſo to do.*

As



As Sir *Thomas More* made the ſame Offer with Biſhop *Fiſher*, ſo we cannot doubt but he made it on the ſame Principle; or if any one doth doubt this, his doubt will ſoon be ſatisfied, when he reads the Conference betwixt Sir *Thomas More* and *Rich* the King's Solicitor, as it is related by my Lord *Herbert*. *

I need not deſcend to the Laws made in Queen *Elizabeth*'s Reign, which declare the Deſcent of the Crown to be under the direction of the Legiſlative Power, or go to prove from Reaſon *that the Supreme Power can limit the Deſcent of the Crown*; tho' this one Reaſon I think is ſufficient, becauſe it cannot limit it ſelf. Indeed nothing can limit the Supreme, but a ſuperior Power, nothing but a Law of God: and let any one produce a Divine Law for Hereditary Succeſſion in Kingdoms, and I'll grant it unalterable by any Humane Power, but ſince no ſuch Divine Law can be produced, we muſt own the Deſcent of the Crown to be under the Direction of the Legiſlative Power.

This is more than was neceſſary for my own Vindication, againſt the *Remarker*'s

* Hiſtory of King *Henry* the VIII. p. 183.

Cenſure;

Cenſure; but I have at the ſame time vindicated alſo that part of our Oath to maintain the Succeſſion, as it ſtands limited to the next Proteſtant Heirs of the Houſe of *Hannover*.

## CHAP. I.

The Title of my firſt Chapter was this.
*The Supreme Authority of the Engliſh Government reſts in the King for the Time being, and the Allegiance of the Subject is due to him by the Common Law of this Realm.*

AS in the *View of the Engliſh Conſtitution*, I laid down certain Propoſitions, which I made the *Titles* of ſo many Chapters, ſo I wiſh theſe Gentlemen had anſwer'd me in the ſame Method, that the Reader might have ſeen what were the Points in Debate betwixt us, and thereby have more eaſily judged, how far my Arguments, or their Anſwers, amounted to a Proof or a Diſproof thereof. However, I ſhall keep to my own Method, and begin with the Defence of the firſt Chapter: Wherein I proved the *common Cuſtom and Uſage of the Realm* was ſo evidently on the ſide of the Regnant King, that the People of *England* always ſubmitted, and took Oaths of



of Fidelity to the Thirteen Kings, who from the Conqueſt to *Henry* the VII. came to the Throne without Hereditary Titles, as well as to the Six Hereditary Kings, who reign'd in that Period.

The *Remarker* in Anſwer to this is very unfortunate in his firſt Argument, where he ſays, *that Allegiance is not due to a King de facto by Common Law; for what Common Law had the firſt King de facto to plead? Could he plead Cuſtom before there was any ſuch thing? This would be abſurd in the firſt King de facto, whatever it were in others.* Now I never ſaid or imagined, that Allegiance was due, to the firſt Non-hereditary King, by Common Law, but that it is *Now*, and for many Ages has been due to the King for the time being. * The firſt Non-hereditary King could not challenge Allegiance by common Uſage; no more could the firſt King in the Hereditary Line, no nor by Inheritance neither; and yet the *Remarker* will not ſay Allegiance is not due to Hereditary Kings by common Law or Uſage,, Indeed, according to this way of arguing, *Common Law* or *Uſage* could never be pleaded for any

* Remarks p. 3.

thing,

thing, becauſe it could not be pleaded for the firſt thing of that kind; and the longeſt Series of Precedents could ſignify nothing; becauſe the firſt Precedent had no Precedent. Thus his Argument by proving too much proves nothing, and would however have been ill employed againſt me in this Place, where I had expreſly aſſerted (as the *Remarker* himſelf takes notice) *that common Cuſtom and Uſage doth not obtain the Force of a Law till after a long Tract of time.*

The Remarker goes on. *We will grant all this* (i. e. *the common Cuſtom and Uſage of taking Oaths of Fidelity to all theſe* 13 *Non-hereditary Kings*;) *and yet the People of* England *might take Oaths of Fidelity to them, as coming to the Throne with an Hereditary Title for all that: For moſt if not all thoſe* &c. *claimed as Heirs or Conquerors, or both*; *as* William *the Conqueror*; *and always declared they held the Crown by Title of Blood, and as ſuch their Parliaments recognized them, and the People ſwore to them. In ſhort, they were Kings de facto and Uſurpers, but Allegiance was paid them as pretended Heirs of the Crown.* † *They claimed and reigned* ſub ratione

‡ Remarks p. 4.

juris



juris, *and therefore Oaths were taken to them as Kings* de jure, *and not* de facto. * William *the Conqueror and all his Succeſſors reigned by an Hereditary Title, or a pretext to it.* William *the Conqueror declared himſelf King by Hereditary Title as well as Conqueſt.* William Rufus *claimed as Teſtamentary Heir to his Father*, &c. *p.* 24.

† The *Remarker* has here jumbled together three things, that are of a diſtinct Nature, and require a diſtinct Conſideration, *viz.* The *Claims* of theſe Princes, the *Recognitions* of *Parliament*, and the *Submiſſion* of the *People.*

1ſt, As to the Claims of theſe Princes, he ſaith, *that they all claimed ſub ratione juris, that they all claimed and reigned by an Hereditary Title, or a pretext to it.* That they all claimed *ſub ratione juris*, under the Notion of ſome Right or other I readily grant: But that they all claimed by an He-

* Ibid. p. 14. ‡ Ibid p. 21.

[ The Natural Born Subject *falls in with the ſame Hypotheſis p.* 38. *& ſays there will be left but three, that is* Henry I. *King* Stephen, *and King* John, *upon whom it can be alledged that they came to the Crown, without Pretence of an Hereditary Right, and in the* 39*th and* 40 *Page he attempts to prove that theſe three alſo came to the Throne with the ſame Pretences.*]

*juris*

reditary Right, or a Pretence to it, I deny. I further grant, that moſt of them claimed by Hereditary Right or a Pretext to it ; but then the *Remarker* knows, or ought to know, that ſeveral of theſe who claimed by Hereditary Right, did not mean what he does throughout his Book, when he ſpeaks of Hereditary Right, as the only Right to the Crown, *viz.* a Right as next Heir by Proximity of Blood. To inſtance in *William* I. with whom the *Remarker* begins, and *who*, as he ſays, *declared he held the Crown by Hereditary Right as well as Conqueſt*, for which he refers us to a Charter of that King mentioned by Dr. *Hicks*.* Was *William* the Conqueror, or doth the *Remarker* believe that he was, or that he by theſe Words meant that he was, next Heir by Blood, to any of his Predeceſſors in the Engliſh Throne either *Saxons* or *Danes* ; Who, as all the World knew, was not Heir to any one of them by Proximity of Blood, and as a Baſtard was Heir to no body ? What then doth that King mean by his Hereditary Right to the Crown ? If we will give him leave to explain himſelf, he tells us in another Charter, *That he was conſtitu-*

* *Literat. Septentrion. Diſſert. Epiſtol.* p 72.

*ted*



*ted by King* **Edward the Confeſſor the adoptive Heir of his Kingdom*; which agrees with the account that *Ordericus Vitalis* † gives of this Matter; ſo that there was not ſo much as a Pretence to what is commonly meant by Hereditary Right, but only to a Donation of the Crown from *Edward* the Confeſſor a King *de facto*, which was a Claim againſt the Hereditary Right of *Edgar Atheling*.

*William Rufus*, ſaith the *Remarker*, *was Heir to his Father by Will* ; and can he ſay this was a Claim by Hereditary Right, or any Pretext to it, which was no other than a Claim by Will, againſt the Hereditary Right of his eldeſt Brother *Robert* ?

But I need not particularly conſider the ſeveral Claims, or Pretexts of the reſt of theſe *Thirteen* Non-hereditary Kings, ſince the *Remarker* acknowledges, *that ſeveral of them claimed by Conqueſt, or by Will*, ſometimes by a Nuncupative Will, and that atteſted but by one Witneſs, as in the caſe of *Stephen*'s Succeſſion, which amounts to no more than this, which I never denyed, that

* A Charter in the Tower C. C.
*In Regnum ſuum adoptivum hæredem inſtituerat.*
† *Ordericus Vitalis* 492.

all theſe Kings *de facto*, or their Friends for them, ſet up the Pretences to Hereditary Right, or made ſome other Claims, in order to gain the Conſent of the States, and the Poſſeſſion of the Throne; and I do freely own this to be true of *William the Conqueror, and all his Succeſſors* de facto, as the *Remarker* ſays, and if He pleaſes, of all his *de facto* Predeceſſors too.

But Secondly, will the *Remarker* ſay that theſe Claims, or Pretences were the Grounds upon which the States, or Parliaments of the Kingdom, placed theſe Princes in the Throne, or recognized them in it, which he ought to have proved?

As for inſtance, ſuppoſe it was as certain (which is much to be doubted) that *Hugh Bigod* did make Oath, that *Henry* the I. gave the Crown from his Daughter *Maud* to *Stephen*, as it is certain that his Oath, (if he did ſwear it) was falſe, which, I think no body doubts. If the Archbiſhop of *Canterbury* was induced by this Oath to crown *Stephen*, can the *Remarker* prove, that the Great Men of the Realm were induced by the ſame Motive to recognize him? He may find in Mr. *Colliers* Eccleſiaſtical Hiſtory, * that they pro-

* p. 326.



proceeded upon other Motives, as did the Pope afterwards in his Bull of Confirmation of his Title. The Biſhop of *Wincheſter* who was *Stephen*'s Brother, and had been the great Inſtrument of his Advancement, declar'd * in the Council of *Wincheſter, that becauſe it ſeemed too long to wait for* Maud, *who delay'd her coming from* Normandy *into* England, *they provided for the Peace of the Kingdom by permitting his Brother to Reign.* Nay *Stephen* himſelf in his Oath (which *William* of *Malmſbury* hath inſerted in his Hiſtory) enumerating his Titles, pretends to None, prior to a National Conſent; and will the *Remarker* ſay, this was an Hereditary Right, or any Pretext to it? No, the *Natural Born Subject* is againſt the *Remarker* here, ſaying, *when all other Pretences fail'd, they* [ſome of theſe Thirteen Kings of whom he was ſpeaking] *pleaded the Choice of the People.* † The *Remarker* will poſſibly ſay, that as the *Natural Born Subject* departs from him here, ſo doth he at the ſame time contradict him-

* *Itaque quia longum videbatur Dominam expectare; quæ moras ad veniendum in Angliam nectebat (in Normannia quippe reſidebat) proviſum eſt paci patriæ & regnare permiſſus eſt frater meus.* William of Malmsbury. *Hiſt. Novellæ l.* 2. *p.* 106. who ſaith, he was preſent and heard this Speech.

† A Letter. p. 40.

ſelf, who had alſo affirmed, and been endeavouring to prove in the preceding Pages, that all theſe Thirteen Non-hereditary Kings, *came to the Crown with Hereditary Right, or a Pretence to it.* And the *Remarker* has reaſon to charge him with this Contradiction; for the Conſent of the People is neither Hereditary Right, nor any Pretence to it. But I ſhall leave theſe two Friends to reconcile this matter betwixt themſelves.

Of all theſe Kings none made ſo direct a Claim by Proximity of Blood, as *Hen.* IV. and yet that Parliament, which was ſo well inclined to ſet the Crown upon his Head, made no expreſs Recognition of this Hereditary Right, which he pretended to, and they knew he had not. He had too much power to be told, he had it not; but on the other hand they paſs'd no Act to Recognize it, but contented themſelves to declare in general terms, *That the Duke ſhould reign over them.* And accordingly in the Act of Parliament the 7. *Hen.* IV. c. 2. made to Entail the Crown to that King and his Four Sons by Name, there is not one word, that implies that *Hen.* IV. held it by Hereditary Right.

3dly. It doth not appear, that the People in their Submiſſion had any regard to theſe Claims. The *Remarker* ſays indeed, the *Peo-*



*People ſubmitted to 'em as of Right,* but has not proved that they ſubmitted to theſe Kings upon the ſcore of Hereditary Right, or of any Right at all antecedent to their Poſſeſſion; which of all things he ought to have done, if he would have anſwered *the View*, which concerns itſelf only with the Subject's Duty. He acknowledges theſe Kings *de facto, knew there were better Titles than their own.* And did not the People, who liv'd at the ſame time, know this as well as thoſe Princes, or as the *Remarker* doth at this diſtance? If they ſubmitted to the Regnant Princes only on the account of the Claims they made, why did they ſubmit to the Prince, who had the worſe Claim; and not reſerve their Allegiance for the Prince, who they knew had the better Title? Why did they always ſubmit to that Prince, who poſſeſs'd the Throne with the Conſent of the States, or the Recognition of the Parliament, whatſoever his Claim was; and not to the Unpoſſeſs'd, Unrecogniz'd Prince?

So that all this ſtir which he has made about Claiming *ſub ratione juris*, has only raiſed Duſt about the Queſtions which are betwixt us on this Head; whether theſe *Thirteen* were really Non-hereditary Kings, or not? and whether, notwithſtanding, this the Peo-

p'e of *England* ſubmitted to them or no? That the People ſubmitted to theſe Kings, he owns, where he ſo often aſſerts, *that they ſubmitted to them, becauſe they claimed ſub ratione Juris*; tho' that they ſubmitted for this Reaſon, he has no where proved. And own he muſt alſo, on his own Principles, that they were Non-hereditary Kings: For will the *Remarker* ſay, a Teſtamentary Heir is the right Heir? That *William* the Conqueror was King by Hereditary Right, becauſe he declared, he was ſo, in another ſenſe than the *Remarker* underſtands it? That *Henry* I. was next in Blood, becauſe *choſen as next by a Faction?* That *Stephen* was Heir to *Henry* I. becauſe one falſly ſwore, he made him Heir by a Nuncupative Will? If he will not ſay this, then theſe will ſtill be *de facto* Kings, and the aſſertion of the View will ſtill hold good, that, by the common Uſage of the Realm, Allegiance is due to Kings *de facto*. * q. e. d.

* *I need not go on to prove, that, upon the* Remarker's *Principles, the reſt of theſe Thirteen were Non-hereditary Kings, ſince he in effect owns it of them all by Name, except of* Henry II *and* Henry III. *But doth he not know, that* Henry II *came to the Throne without an Hereditary* Title, *his Mother,* Maud *the Empreſs, being alive; and that* Henry III. *did the ſame, his elder Brother's Daughter* Eleanor *being alive? both which I ſhall prove in another Place.*

The



The Queſtion, as I ever underſtood it, was What theſe Princes really were: Not, What they pretended to be. What Claims they truly had, or at leaſt the People believed they had: Not, what Claims they made, or what Pretences were made for them? But ſince the *Remarker* has thought fit to change the ſtate of the Queſtion, I'll joyn Iſſue with him upon it, as he has ſtated it. Let us ſuppoſe then for once, that they all claimed *ſub ratione Juris*. Was this alone a ſufficient Reaſon for the Subjects to ſwear Allegiance to them? Yes; he poſitively affirms it. Theſe are his Words, *ſo that 'tis plain, that all thoſe Kings* de facto *claimed as* de jure, *which is, if there were no other, a good Reaſon for the Subjects not refuſing to ſwear Allegiance to them.* p. 23. If the *Remarker* will abide by his Aſſertion, there's an end of the Controverſy, and no Subject now ought to refuſe to ſwear Allegiance to the Queen, who claims as *de jure*: And there is a better Reaſon ſtill to take Oaths to Her Majeſty, becauſe ſhe doth not only Claim *de Jure*, but is *de Jure* too. Tho' barely to Claim as ſuch, is with the *Remarker*, and all the *ſub ratione Juris* Men, a ſufficient Reaſon to take Oaths of Allegiance now, and which they cannot refuſe without renouncing this Principle. I do

not ſee, but their Cauſe is loſt either way. If to ſave their Hypotheſis, they'll ſtick to their Principle of *ſub ratione Juris*, they are in conſequence of it oblig'd to take the Oaths now; but if to avoid the conſequence, they'll let go this Principle, which is the main Salvo of their Hypotheſis, their Hypotheſis will fall with it, and they will, it is to be hoped, come into the Doctrine of the *View*, that it is the Cuſtom and Uſage, which is the Common Law of the Realm, to ſubmit, and take Oaths of Fidelity to the Regnant Prince, whether with, or without an Hereditary Title.

His 3d. Anſwer is, *That theſe were Popiſh Times, in which the Pope with his Popiſh Clergy had a very great ſtroke in pulling down and ſetting up Kings, and had, or at leaſt pretended to have, a Power of Abſolving Subjects from their Oaths of Allegiance: and no wonder, if Subjects miſled by the Pope and his Clergy, paid their Allegiance where they directed them.* p. 14. *

* *The* Natural Born Subject *has the ſame Anſwer.* Another Conſideration, *ſaith he*, in Favour of our Anceſtors in thoſe Times, may be the Great Power of the Popes in thoſe Days, who took upon them to diſpoſe of all Crowns, particularly that of *England*, which they had once put in Subjection to them by King *John*. Letter p. 70.

That



That Popes have both taught and practiſed the depoſing Doctrine, and have pretended to abſolve Subjects from their Oaths of Allegiance, is beyond Diſpute: But this has been generally done by them, when Princes have been Hereticks, or Fautors of Hereticks, or have made ſome Attempts on the *Regalia* of St. *Peter*, but they have rarely employed their Thunder, or their Graces in the Conteſts of Princes betwixt one another about their Titles.

And therefore the *Remarker* ſhould have proved, that the ſeveral *Popes*, in theſe Times, did put in practice their pretended Power of abſolving Subjects from their Allegiance, not barely that *Popes* pretended to ſuch a Power of Abſolution.

Nay 2ly. He ſhould have proved farther, that our Anceſtors in *Popiſh* Times had recourſe to the *Popes* for ſuch Abſolutions; or that it was in conſequenee of ſuch Abſolutions granted by *Popes*, that they took Oaths of Allegiance to Non-hereditary Kings. But this he hath not proved, nor attempted to prove.

Our Anceſtors, 'tis true, too eaſily ſubmitted to the *Pope*'s Supremacy, which was a Uſurpation upon the Prerogatives of Kings, as well as upon the Rights of all Chriſtian *Biſhops*, who were his Collegues.

How-

However, they never permitted that Abſolute Juriſdiction, which Popes claimed, to take place in *England*; but reſolutely withſtood many Papal Encroachments both in Church and State, and raiſed Digues and Banks againſt the Inundation of the Plenitude of their Power. I muſt always except the ſcandalous Submiſſions, that were made in the time of King *John*, to the more ſcandalous Uſurpations and Impoſitions of the Pope and his Legate *Pandulphus*, to which a Gap was open'd by the unhappy Circumſtances of that Reign.

The Pope, as Supreme Paſtor, pretends that all Chriſtians, as being his Sheep, are under an Obligation to hear his Voice. He ſpeaks to them by his *Legats à latere*, in his *Canons*, or Laws, and in his *Bulls*.

As for his *Legats à latere*, it appears by the † *Year Books*, as well as our Hiſtories, that they were not permitted to come into *England* without the King's leave, and were obliged to take an Oath, that they *would attempt nothing that was derogatory to the King, and his Crown*.

As for the Popes *Canons* or Laws, they were never held Obligatory in *England*,

† 11. Hen. VII. fol. 10.

unleſs



unleſs they were received. When the Parliament was moved to admit the Papal Canon, which Legitimates Children born before Marriage, provided the Perſons were married afterwards: All the Earls and Barons anſwer'd with one Voice, *that they would not change the Laws of* England *that have been hitherto uſed and approved.* †

The Pope, as Head of the Church, pretends to be the * Ordinary of Ordinaries, and the Collator of Collators. Notwithſtanding which by the Statutes of *Proviſors*, all Perſons were prohibited to procure or accept of any Eccleſiaſtical Dignities, or Benefices from the Pope, by Collations, Proviſions, or Reſervations, under the pain of being impriſoned, till they had made Fine and Ranſom at the King's Pleaſure, *&c.* 25*th Edw.* III. and of being baniſhed, and their Goods and Cattels confiſcated, 13*th Rich.* II. ch. 2. Nay, all Licences from the King to execute ſuch Proviſions, are declared void by the 7*th Hen.* IV. ch. 8. and the Diſturbers by ſuch Proviſions, notwithſtanding the King's Licences, incurred a *Præmunire* 3. *Hen.* V. c. 4.

† 20*th Hen.* III. *c.* 9.
* See P. Simon's *Hiſt. of Eccleſiaſtical Revenues.* p. 86.

As

As for the *Bulls* of Popes, they have been as little regarded. Their Bulls to exempt Religious Persons from Obedience, by the *3d. Hen.* IV. c. 3. and their Bulls to discharge the *Cistercians* or other Persons, from the payment of Tythes by the *3d. Hen.* IV. c. 8. the *7th. Hen.* IV. c. 6. were declared void; And those that purchased, or put in Execution the said Bulls, incurred a *Præmunire*. Even those Bulls, wherein the Popes enforced their Legislative by their Coercive Power, their Bulls of Excommunication, were declared to be of no force in *England* by all the Judges, as appears in the *Year Books* 8*th. Hen.* VI. fol. 3. 12*th. Edw.* IV. fol. 16. and 1*st. Hen.* VII. fol. 11. And any Persons that purchased, or executed the Popes Bulls of Excommunication against the Bishops of *England*, for executing Sentences given in the King's Courts, incurr'd a *Præmunire* by the 16*th. Rich.* II. ch. 5. And those that brought Summons, or Excommunications into the Realm in Derogation of the Statutes of *Provisors*, Forfeited all their Lands and Tenements, Goods and Chattels for ever, and incurred the pain of Life and Member by the 13*th. Rich.* II. ch. 3. And therefore in the Oath, which the Pope's *Collector* in *England* was obliged to take, amongst other things,



things, there were Two Clauses *that he would not execute, nor suffer to be executed any Papal Bulls, or Mandates that were prejudicial to the King, or his Regality, his Laws, or the Kingdom.*

*And that he would immediately deliver to the King's Council all the Letters he should receive from the Pope, or any other Person, before he published them,* † *or delivered them to any Person living.*

Before any Bishop's Temporalties were restored, he was obliged to Renounce upon * Oath *all the Words, contained in the Pope's Bull, that were prejudicial to the King and his Crown:* As well as to take the Oath of Homage to the King. † After which the Writ was

† Nullam executionem literarum vel mandatorum Domini Papæ per me, vel alium faciam, nec fieri permittam, quæ poterit esse præjudicialis Regiæ Majestati dicti Domini nostri Regis, aut Regalia, legibus, vel juribus suis, vel eidem Regno.

Nullas Literas Papales nec alias recipiam, nisi eas citiùs, quo potero, deliberavero Concilio dicti Domini nostri Regis antequam publicentur, seu deliberentur alicui personæ viventi. Fœdera, Conventiones, &c. Tom. 8. p. 86.

* The Form of the Oath of Renunciation. *I renounce all the Words, comprized in the Popes Bull, made unto me of the Bishoprick of Bathe which be contrary and prejudicial to the King, our Sovereign Lord and to his Crown. The Book of Oaths* p. 137.

† Eo quod idem Episcopus omnibus & singulis verbis, in dictis literis Bullatis contentis, nobis & Coronæ nostræ

issued

issued out for the Restitution of his Temporalties.

When Pope *Boniface* VIII. sent a Monitory Bull to King *Edw.* I. to desist from his War against *Scotland*, pretending the Sovereignty of that Kingdom was held of the Apostolick See; The Lords, assembled in Parliament, declare in a Letter to the Pope, That their Sovereign Lord the King is, *by no means obliged to acknowledge the Pope's Jurisdiction, or submit to his Sentence with respect to the Sovereignty of* Scotland, *or indeed in any other temporal Matter whatsoever.* † And in one of the Statutes of *Premunire*, for bringing, or pursuing any Papal Instruments of Process, or Sentences of Excommunication for Executing the King's Commands, *&c.* It is declared, that *the Crown of* England, *which hath been so free at all times, that it hath been in no Earthly Subjection, but immediately subject to God in all Things, touching*

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præjudicialibus, palam & expresse renunciavit Anno Regni Rich. secundi 21. Fœdera Conventiones, &c. Fol. 8. p. 20.

† Quod præfatus Dominus noster Rex super juribus Regni sui Scotiæ, aut aliis suis Temporalibus nullatenus judicialiter respondeat coram vobis, nec judicium subeat quoquo modo, &c. Fœdera, Conventiones &c. Tom. 2. p. 873. *signed by about an Hundred Earls, & Barons.*

*the*



*the Regality of the same Crown; and to no other, ought not to be submitted to the Pope. And the Lords Spiritual as well as the Lords Temporal, and the Commons engage, that they will and ought to be with the King in those Cases, in lawfully maintaining of his Crown, and in all other Cases touching his Crown and his Regality, as they be bound by their Ligeance.* 16*th.* Rich. II. ch. I could, were it necessary, produce from our Histories, and Laws, a great many more Instances of the same kind. But these are sufficient to convince the *Remarker*, that our Popish Ancestors had not that Deference he imagines they had, to the Authority of the Popes in all their Encroachments: That they had no Deference at all to their Authority in Temporal Matters: And that it was not upon Papal Absolutions, as he supposes, that they took Oaths of Allegiance to Kings *de facto.*

Lastly, The Government was generally settled, and the People had submitted, before there was any time for the Pope's Intervention.

What time had the Pope to interpose, when *W. Rufus* was kill'd the second of *August* in *Newforest*, buried the third at *Winchester*, where

where * *Henry* I. was choſen the fourth day, and Crowned the fifth † at *London*, and the whole Nation immediately ſubmitted to him? What Room was there here for the Pope's Interpoſition, or Diſpenſation?

All *England* is ſaid, by *Henry* of *Huntington*, to *have ſubmitted to* Stephen *in the twinkling* † of an Eye, who was Crowned, ſaith *William* of *Malmſbury*, the Twenty ſecond Day after the Death of *Henry* I. All was over without the Pope's Interpoſition, who in his Bull afterwards took notice of his Election by the Nobility and Commons.

But the *Remarker* ſaith, *that* Henry *VII. got his Title twice confirmed by the Pope* p. 22. which is true: But it is as true,

* Occiſo vero Rege Willielmo, poſt juſta funeri regio perſoluta in Regem Electus, (Henricus ſcil. primus) aliquantis tamen ante controverſiis inter proceres agitatis atque ſopitis. W. Malmsb. Hiſt. l. 5. fol. 88.

† Quapropter certatim plauſu plebeio concrepante in Regem coronatus eſt Londoniæ Nonis Auguſti 4to poſt obitum fratris die. Ibid.

Vid. Hen. Huntindon l. 7. fol. 26. b. Hoved in Henrico I. f. 268. b. plenario conſenſu & conſilio totius communitatis Regni ipſum ſc. Robertum refutaverunt & Henricum fratrem in Regem erexerunt. H. de Knyghton col. 2374.

* Repente omnis Anglia ſine mora, ſine labore quaſi ictu oculi ei (Stephano ſc.) ſubjecta eſt, Hen. Huntind. l. 8. fol. 221. b.

Coronatus eſt ergo in regem Angliæ Stephanus undecimo Kalendas Januarii Dominica viceſima ſecunda die poſt, exceſſum avunculi. W. Malmſ. Hiſt. Novell. l. 1. f. 101.

that



that he did not procure even the firſt Bull in Confirmation of his Title, till the ſecond Year of his Reign, long before which time the whole Nation had ſubmitted to him, and the Parliament entailed the Crown on him, and the Iſſue of his Body, which was done in the firſt Parliament, and firſt Year of his Reign. So that the *Remarker*'s own Inſtance is againſt him, and proves, as well as thoſe which I have given, that in ſubmitting to thoſe Kings, they acted as *Engliſh Men*, not as *Papiſts*.

But whilſt the *Remarker* is giving Reaſons, why the People might, and ought to, have ſubmitted, he is endeavouring to prove, that ſome did not ſubmit, or that the Submiſſion was not ſo univerſal, as I have repreſented it, and as he, at other times himſelf ſeems to grant it was, and ought to have been. I had ſaid, *that in all theſe Thirteen Reigns of Non-hereditary Kings, I did not know there were any Non-jurors to be found.* Before theſe Anſwers to my Book were publiſh'd, I was told by ſome of my old Friends, that *I ſhould find there were Non-jurors heretofore*; and I believe, ſome expected a long Liſt of Lords Spiritual, Lords Temporal, and Commons, who had refuſed Oaths of Fidelity in every one of thoſe

† *See the Lord Bacon's Hiſt. of Henry VII.*

Reigns: But they may now ſee, after the *Remarker*'s Inquiries thro'out all thoſe *Thirteen* Reigns, he has been ſcarce able to name *Thirteen* Non-jurors; and when I have examined thoſe he has named, they may find that Moſt, if not All were certainly no Nonjurors, and that he has not been able clearly to prove One of them was ſo.

I began with *William* I. and * proved Oaths of Fidelity were univerſally taken to him. The *Remarker* † thinks *the Teſtimony of* Ingulph *which I alledged doth not prove this.* It proves what I alledged it for, *that the Conqueror iſſued out an Order for every Inhabitant of* England *to ſwear Fealty to him, as well as all their Lands to be meaſured and valued.* I added, that *we hear not of one Refuſer*; nor has the *Remarker* been able to produce one. He would indeed have the Abbot of St. *Albans* to be a Nonjuror. What did he refuſe to take an Oath of Fealty to K. *William* I? No, but *he offer'd oppoſition to Duke* William. He may as well reckon *Harold*'s Army for Non-jurors, who oppoſed Duke *William* when he Invaded *England*; and yet as well as others that oppoſed him, ſubmitted to him, after he was King of *England*. So that I may ſtill ſay, *we do not yet hear of one Refuſer* amongſt all his Subjects. But what can be more expreſs, than *Hoveden*'s Teſti-

* *View p.* 2. † *Remarks p.* 15. * *Remarks p.* 122.



mony, which I produced at the ſame time, **That the great Men and Tenants by Knight's Service ſwore Fealty to him at* Saliſbury? But of this the *Remarker* has taken no notice: To theſe I will only add one Teſtimony of *William* of *Malmſbury*, who ſaith, † *that* William *I. without any oppoſition bound all the Freeholders, whatſoever their Tenure was, by an Oath of Fidelity to him*: and another of *Ranulph Higden*, who, ſpeaking of ſome of the greateſt Men of the Nation, ſaith, *all* || *theſe, with the reſt of the Nobility having given Hoſtages, and ſworn Fealty, ſubmitted to the Conqueror.*

I could by the like poſitive Teſtimonies of the moſt Authentick Hiſtorians prove, that the People of *England* ſubmitted, and took Oaths to ſuch of his Succeſſors, who came to the Throne as he did, without an Hereditary Title. As to his immediate Succeſſor, *William Rufus*, He, as *Brompton* † relates it, *was advanced to the Throne in a great Council of the Kingdom.* After which *the whole Nation chearfully ſubmitted to his Government, and took Oaths of Fealty to him*, as *William* of

* *View p.* 2.

† Ut ſine ulla contradictione—omnes liberos homines cujuſcunque eſſent, ſuæ fidelitati ſacramento adigeret. *de Willielmo I. p.* 59. b.

|| Hi omnes cum cæteris nobilibus, datis obſidibus, cum fidelitate ei jurata, manus ei dederunt. Polychron. l. 6. in fine.

† Convocatis Terræ Magnatibus Col. 983.

 *Malmſbury*,

* *Malmſbury*, and the *Annals of* † *Waverley* aſſure us.

But I am unwilling to tire the Reader with what is not neceſſary, for thoſe who are well ſkilled in the Engliſh Hiſtory know this to be true; and thoſe who are not, will be convinced of it, when they ſhall ſee, that thoſe few, whom the *Remarker* has gleaned for Non-jurors thro' all theſe Reigns, are after all no Non-jurors.

I ſaid ‖ *there had been Revolters in ſome of thoſe Reigns*, and the *Remarker*'s Non-jurors will I believe prove to be no better, and ſome of them, thoſe very Perſons whom I named, or had in my Eye, when I ſaid ſo. *Odo* Biſhop of *Baieux*, who was the chief Author of the Revolt from *William Rufus*, had aſſiſted at his Coronation, as Earl of *Kent*, and Juſticiary of *England*; and muſt, as well the great Men whom he drew into his Party, have ſworn Allegiance to *William Rufus*; otherwiſe their Revolt could not, as I ſaid, ‡ have been charged

* Moxque volentibus animis Provincialium exceptus eſt,& claves Theſaurorum nactus eſt, quibus fretus totam Angliam animo ſubjecit ſuo. De *Willielmo* II. l. 4. p. 67.

† Omnis gens Angliæ ei ſubdita eſt, & fidelitatem juravit. Ad An. 1087.

‖ *View* p. 3.

‡ *View*. p. 4.





with Perjury, as it is by the Archdeacon of *Huntington*.

But the *Remarker* will not have this *Revolt charged with Perjury*, but call'd * *Repentance*. However this Teſtimony proves, they had taken Oaths of Fidelity (which was what I alledged it for) otherwiſe there had been no colour for the *Charge* of *Perjury*. And whilſt the *Remarker* ſtiles it *Repentance*, he ſeems to have overlook'd my Citation † from *William* of *Malmsbury*; which ſhews, that Ambition, Picque, and Diſcontent, were the Springs of this Rebellion. But let not theſe Perſons ſtand, or fall by the *Remarker*'s judgment, or mine; let us rather hear, what judgment our Ancient Engliſh Hiſtorians have paſſed upon Them, and their Enterpriſe.

*William* of ‖ *Malmsbury* calls It a *Revolt*, and *Perfidiouſneſs*, and Them *Renegado's*, *and perfidious Perſons*. The Archdeacon of

* *Remarks* p. 21.

† *View* p. 3.

‖ Ita totis *defectionis* viribus in eum cui nec prudentia nec fortuna deerat, fruſtra ſæviebatur. De *Willielmo ſecundo*. l. 4. fol. 68.

Quientiam Willielmus Dunelmenſis Epiſcopus, quem Rex à ſecretis habuerat, in eorum *perfidiam* conceſſerat. ibid. fol. 67. b.

*Deſertores*, *perfidos* ibid. b. p. 68.

* *Huntington* brands It with the Note of *Wickedneſs*, *Perjury*, *and* Rebellion, and gives Them the *Character* of *Traytors* and *faithleſs Perſons*. Roger de *Hoveden* † calls it *an execrable Fact*, *the Treaſon of the Normans*. And having deſcribed their Conſpiracy, he ſays, *Odo Biſhop of Baieux*, *Geoffry Biſhop of Conſtans*, *and* Roger *Earl of Shrewsbury*, &c. *were the chief Authors of this accurſed Enterprize*.

The *Annals of Waverley* || compare *Odo*'s *Treachery againſt the King*, *to that of* Judas Iſcariot *againſt our Bleſſed Saviour*. And almoſt every one of theſe Hiſtorians have obſerved, that the famous * *Wulſtan* Biſhop of *Worceſter*, who was eſteem'd the Holieſt Perſon of his time, eſpouſed the King's Cauſe with the greateſt Fidelity and Zeal.

* Non ſine *perjurio* bellum moventes. l. 7. fol. 213.

Rogerus in caſtello Nordaic *ſceleris exercitium* non ſegnius inchoavit ib. Gilebertus ei *rebellabat* ib. Rex verò terras *infidelium* fidelibus ſuis diſtribuit ib. Epiſcopus verò multique *proditorum* propulſi ſunt in Exilium ib.

† *Execrabile* factum, *Traditionem* Normannorum. *Roger de Hoveden in Willielmo juniore*. fol. 268. b.

Hujus *execrandæ* rei principes extiterunt Odo Baiocencis Epiſcopus, Gaufridus &c. ib.

|| Ipſe verò volebat Regi quemadmodum *Judas Iſcariot* fecit Servatori noſtro. Annal. Waver. ad An. 1088.

* Wulſtanus in ſanctitate noſtro ſæculo nominatiſſimus. *W. Malmſb. de Epiſcopis Wigernienſibus*.

By



By this time the *Remarker* may be convinced, that *Odo* and his Party were not Non-jurors, and were ſo far from being eſteemed Penitents by our Hiſtorians of greateſt Antiquity and Note, that they are ſet forth by them in the blackeſt Colours, and ſtigmatized for Revolters; and conſequently, that the Notions of Government in the Ages wherein they wrote, were very different from the *Remarker*'s: † That Subjects then believed Allegiance, and Oaths of Allegiance, were due to the Regnant Prince, and that it was a very heinous Crime to revolt from him, and their Oaths, tho' it were in favour of a lineal Heir. It may be obſerved, that theſe Hiſtorians (except the Compiler of that part of the *Annals of Waverley*) did not write under *William Rufus*, but the Two firſt of them in the Reign of *Henry* II. and the IIId. in that of *Henry* III.

The *Remarker* doth not deny, that *Robert* Earl of *Gloceſter* took an Oath to King *Stephen*, and doth not pretend to find any more Non-jurors, till he comes to *Hen.* IV*th*'s. Reign.

As for *Thomas Merk*, Biſhop of † *Carliſle*, who as I ſaid, accepted, and pleaded K. *Hen.* IV*ths.* Pardon, which is extant in Rymer's † *Fœdera*, I urged it to the *Objector* as an Argu-

† Epiſcopi Karliolenſis de omnimodis Proditionibus Pardonatio. &c. Fœdera Conventiones T. VIII. p. 165.

ment *ad Hominem*, who ſaid, he *could no believe ſo great a Man had made ſuch an acknowledgment of Henry the IVth's Authority.* But certainly his obeying that King's Summons to Parliament, and doing all that was required of the Lords, at that time, in order to their Admiſſion, and Seſſion in Parliament; and his ſitting in that Parliament, where ſo many Acts of *Richard* II. and the whole Parliament of the 21ſt of his Reign was repealed, was much more: And whether he could be a Member of *H.* IVth's Parliament, and not a Subject of his Government, I leave to the *Objector*, and the Reader to determine.

The *Remarker* goes on. *The ſame may be ſaid for* Richard Scroop *Archbiſhop of* York, (here the *Remarker* cites his Declaration againſt K. *H.* IV. and ſaith upon it) *would the Archbiſhop have thus lain before the People the heinouſneſs of Perjury, and violation of Oaths, if he had ſworn to K.* Henry? *If he had done ſo, he had been ſelf condemned.* * That I cannot help; the *Remarker* muſt look to that, but I doubt not, notwithſtanding all he has ſaid, to prove againſt him, that Archbiſhop *Scroop* acknowledged *H.* IVth's Authority, and was as zealous in his Service, as any of the reſt of his Subjects.

* *Remarks p* 17.

He



* He was one of thoſe who went to the Tower to King *Richard*, to put him in mind of his Promiſe to quit the Government, and was conſtituted one of the King's Proxies to declare his Renunciation. † He aſſiſted at the Coronation of K. *H.* IV. at which time, he, *muſt take the Oath of Homage to him.* He aſſiſted at the great Council || which K. *H.* IV. ſummoned in the firſt Year of his Reign, to demand Aids of the Lords Spiritual, and Temporal againſt his Adverſaries, the Kings of *France*, and *Scotland*, who were making Preparations of War againſt him. In which Council this Archbiſhop of *York*, * as well as the Archbiſhop of *Canterbury*, and other Biſhops, granted the King a Tenth to ſupport him in this War, which was undertaken by *Charles* IX. of *France*, in order to reſtore his Father in Law, *Richard* II. who was then alive ||. In the fifth Year of this King's Reign, the Archbiſhop's Name ſtands firſt in the Liſt

* Collier Eccleſ. Hiſt. p. 606.
† Ibid. p. 609.
|| *Rymers* Fœdera &c. Tom. VIII. p. 125, 126. Memoranda de magno Concilio &c.
* Les Erceveſques de { Canterbiri & d' Everwick } *ſtand foremoſt in the Liſt of the Perſons, who at this great Council granted the King Aid for this War.*
|| Collier's Eccleſ. Hiſt. p. 613.

of

of the Privy * Counſellors, who were commiſſioned to treat on the King's Part, with the Earl of *Northumberland*, about the Exchange of Caſtles, Lands, &c. The *Remarker*, it ſeems, knew nothing of all this, and therefore proceeds.

*And as he in all probability was a Non-juror, ſo doubtleſs were moſt of his Party, for it would have argued great weakneſs in him, to impart his great Deſign of reſtoring* K. *Rich. againſt Henry the* IVth. *in poſſeſſion, unleſs his Partizans had been Men of the ſame Principles with himſelf, that is, either Non-jurors, or true Penitents.* † The *Remarker* here goes no higher than probability. Is not this at beſt, to give us Conjectures inſtead of Hiſtory? He might e'en as well have taken *the Natural Born Subjects* ſhort Hiſtorical way, who ſays, *that we muſt ſuppoſe the Oppoſers*, whom, in the next ſentence, he calls *Non-complyers, were likewiſe Non-jurors, at leaſt, ſome of them*; ‖ but Suppoſals and Hiſtory are very different Things.

But what does the *Remarker* mean, when he talks of *Archbiſhop* Scroop's *great Deſign of reſtoring* K. *Richard*, who was murther'd five Years before this Deſign? For *Richard*'s Death was in the firſt Year of K. *H.* IV. and the Archbiſhop's Conſpiracy was not till the ſixth Year of that King.

* Fœdera Conventiones, &c. Tom. 8. p. 364.
† *Remarker* p. 18.
‖ *Letter* p. 40, 41.



But let us now come to *the Archbiſhop's Party*, who, as the *Remarker* ſaith, *were doubtleſs moſt of them Non-jurors too*; and they were indeed much ſuch Non-jurors, as the Archbiſhop himſelf. The Earl of *Northumberland*; his Son, the Lord *Piercy*; commonly called *Henry Hotſpur*; his Brother the Earl of *Worceſter*; the Biſhop of *Bangor*; and the Lord *Bardolph* were, with the Archbiſhop, the Heads of the Party. The Earl of *Northumberland*, and his Son *Henry Hotſpur* joyn'd *H.* IV. when he * was Duke of *Lancaſter*, immediately upon his landing at *Ravenſpur* in *Yorkſhire*, and march'd with him againſt K. *Richard*; went with Archbiſhop *Scroop* to that King, to put him in mind of his Promiſe to reſign: Had † the Iſle of *Man* given to him, and his Heirs, by K. *Henry* IV. to hold by the Service of carrying the *Lancaſter* Sword at the Coronation of the King, and his Heirs;

* Collier Eccleſ. Hiſt. 601.
† *Rymer's* Fœdera Tom. p. 89, 90, 91. Ibid. 126.

and

and was made Conſtable of *England* for his great Services : || And at the great Council aforeſaid, engaged to aſſiſt the King with ninety Men, and Twenty Archers. As for his Brother, the Earl of *Worceſter* ; it appears by a Paſſage in the ſame great Council, that he was K. *H.* IVth's Ambaſſador to the King of *France :* And by the Subſcriptions, in the Council ſo often mention'd, we find, that the Biſhop of *Bangor* granted the King a Tenth, and the Lord *Bardolph* engaged to ſerve the King in Perſon, without Pay, in his War againſt *France.*

He adds, *'tis to be hoped, Mr.* H. *will not deny thoſe Four to be Nonjurors,* * *who, as mention'd by* Stow, p. 32. *oppoſed* Henry *the* IVths. *being made King,* which they might very well do, and yet ſubmit to him after he was ſo. Their Oppoſition to him before he was made King, is no manner of proof of their Non-ſubmiſſion afterwards.

*Was not,* † ſaith the *Remarker,* Owen Glendour, *the famous Welſh Captain, who maintain'd a War againſt* H. IV. *in behalf of his lawful King, a Non-juror ?*

The *Remarker* ſeems here to be in *Utopia.* Whom doth he mean, by *this lawful*

|| Rymer's Fædera, &c . p, 125, 126.
* *P.* 19.
† Ib.

*King,*



*King, on whoſe behalf* Glendour *maintain'd a War againſt* K. *H.* IV ? Doth he mean K. *Richard* II ? He was dead before *Glendour* took Arms : Nay, before K. *H.* IV. went into *Scotland,* when *Glendour,* as Mr. *Collier* * ſaith, took advantage of that King's Abſence, and raiſed a Rebellion ? Doth he mean then, *Edward Mortimer* Earl of *March ?* He took the Field for *Henry* IV. againſt *Owen Glendour,* who made him Priſoner, as the ſame Hiſtorian obſerves. And, as both Sir *John* † *Hayward,* and *Stow* || tell us, *put him in Irons, and caſt him into a deep and vile Dungeon.*

*Owen Glendour*'s War, which the *Remarker* ſeems to juſtify, began with a Riot, and ended in *Rebellion,* which is the Name Mr. *Collier* gives it. And *Stow,* and Sir *John Hayward* give us both the occaſion, and deſign of his *Rebellion* : The former takes notice, that * *he had a Controverſy with* Reginald *Lord Grey of* Ruthine, *and becauſe he was not favour'd in his Cauſe, he began firſt to ſpoil that Lord's Lands,* &c.

* Collier Eccleſ. 614.
Ib. 678.
† *Life of K.* H. IV. 143.
|| *Stow p.* 327.
* *Stow p.* 326.

And

And the latter * gives him the Character of *an ill Man, and ſaith, he and thoſe Welſh that joyn'd him, deſign'd to recover their Freedom and throw off the Engliſh Government.* And ſo much for the *Remarker*'s *famous Welſh Captain.*

As for *Frisby* the Monk's Anſwer, it is not ſufficient to prove he had never ſubmitted, no more than Archbiſhop *Scroop*'s Declaration proves he was a *Non-juror.* Beſides, this was in ihe 3d. Year of *H.* IVth's. Reign, two Years after the Death of *Rich.* II. when there was no Claim ſet up againſt *H.* IV.

Well! But if they were not *Non-jurors*, he will have them to be *Penitents, as repenting of their raſh and unadviſed Oaths, and returning to their Allegiance*, as a Teſt of their Repentance. † I anſwer 1ſt. The *Remarker* himſelf will not eſteem thoſe Penitents, that acted upon ſuch Motives, as the Earl of *Northumberland*, and his Son Lord *Piercy*, and his Brother, the Earl of *Worceſter* did, who, as *Holingſhead* relates, *in the Beginning of his* Reign, *were faithful Friends, and earneſt Aiders of* K. *H.* (and I have

* *Life of* Henry *IV. p.* 140.
† *Remarks p.* 19.

proved,



proved, they were ſo from Authentick Memoirs,) *but began now to envy his Wealth and Felicity; and eſpecially they were grieved, becauſe the King demanded of the Earl and his Son, ſuch Scotch Priſoners, as were taken at* Homeldon *and* Weſtmoreland, *which they claimed as their Prize*; * (being the Kings Generals in thoſe Actions.) I will not ſay, that all revolted upon the ſame Motives; but whatever were their Motives, that their Revolt was unjuſtifiable, I dare appeal to Mr. *Collier*; nay, to the *Remarker* himſelf.

Mr. *Collier*, after he had taken notice of *the Earl of March's unfortunate Expedition againſt Glendour, in Defence of* K. *H.* IV. adds, *and tho' this Earl upon a Diſguſt for not being ranſomed, engaged afterwards with that Welſh Gentleman, againſt the King: Yet it does not appear, that he ſet up any Claim to the Crown. And in the next Reign, when* Richard *Earl of* Cambridge, *who married the Daughter* (it † ſhould be Siſter) *of this Earl of* March, *form'd a Deſign to diſpoſſeſs King* Henry, *and ſet*

* Holingſhead *p.* 521.
† *Anne Wife to* Richard *Earl of* Cambridge, *was the Siſter, not Daughter, of* Edmund Mortimer *Earl of* March.

*the*

*the Crown upon his Father in Law's* * *Head. The Earl of* March *was ſo far from aſſerting his Right, and abetting the Enterprize, that he immediately went to King* Henry V. *and made a Diſcovery. Now the Branches of* March *and* York, *letting their Claim ſleep all this while; the Subjects had no reaſon to begin a War, or quarrel the Government in the Houſe of* Lancaſter. † What then becomes of Biſhop *Merk*, of Archbiſhop *Scroop*, with the Earl of *Northumberland*, and the reſt of that Party, of *Friſby*, and all the *Revolters* of this Reign? It is certainly no ſmall Crime for Subjects to begin a War with their Prince, and throw a Nation into Blood and Confuſion, when they had no reaſon for it, and this was what they did, and what they had no reaſon to do, as Mr. *Collier* has ſtated the Caſe of this, and the next Reign, and he might have added of *H.* VIth's. Reign too. But all theſe Revolters the *Remarker* has produced, are condemned by his own Principle too, *viz.* That

* *It ſhould be, Brother in Law's Head. Eccleſ. Hiſt. p.* 678.

† *We have alſo this account of the Earl of* March's *diſcovery of this Conſpiracy to King* Henry *V. in* Stow, *p.* 346. *But I often chuſe to cite Mr.* Collier's *Eccleſiaſtical Hiſtory, when I could cite other Hiſtorians, becauſe the* Remarker *will not ſuſpect, that Mr.* C. *has neglected that ſide of the Queſtion, whichhe maintains.*

*Kings*



*Kings* de facto *claiming as* de jure, (as he ſays, *all our Kings* de facto *did*) *is, if there were no other, a good Reaſon for the Subjects not refuſing to ſwear Allegiance to them.* And will he ſay, thoſe Subjects had good reaſon to repent of Oaths of Allegiance, which they had good reaſon to take, and therefore good reaſon to keep? Or that they are *true Penitents* by revolting from ſuch Oaths, and the Princes to whom they took them? Let him ſhew how they can be at the ſame time inexcuſable Revolters, and true Penitents. And could he have produced Non-jurors, he had produced them only to condemn them, for refuſing to take Oaths of Allegiance, which in another place, he ſays, they had good reaſon not to refuſe.

The *Remarker* however, is ſo well pleas'd with his Argument on this Head, that at the end of his Book, he reſumes it, and goes over again with theſe Non-jurors, in a Liſt of *Queries*. He ſays in his Preface, *I have at the end of the* Remarks *added ſome Queries, which may be of Uſe, and give light to ſome Paſſages in the Book; but I am aware, it will be ſaid by ſome captious Readers, that I forget my ſelf, becauſe I propoſe ſome things by way of Queries, that were urg'd in the Remarks as Arguments to prove, that there were anciently ſuch People, as we now*



*call*

*call Non-jurors*, &c. *but I can aſſure them, there is no ſuch matter. I did not forget my ſelf, but did it deſignedly, and for reaſons beſt known to my ſelf, which I am reſolv'd, I will not give.* The *Remarker* ſaith, he will not give us his Reaſons for adding theſe Queries, after he had told us a little before, that he *added them, that they may give light to ſome Paſſages in the Book.* Theſe Paſſages do not want light, we underſtand them well enough, but ſtrength; and that the *Queries* do not afford 'em. But whatſoever the *Remarker's* Reaſons were for propoſing theſe Queries, which he is reſolved not to tell us, if the Teſtimonies I have given him, are not taken from *Utopian*, but Engliſh Hiſtory, he had very good reaſon to have ſpared both his *Remarks*, and his *Queries* about *Non-jurors of former Reigns*. However, tho' he has, I ſhall not repeat the ſame things, for the Reply I have made to his Remarks, will be an Anſwer to all that is pertinent in his Queries.

I ſaid *that the* Partizans *of the Houſe of* York * *took Oaths of Allegiance to the three* Henries; *that the Heir of that Family,* Richard *Duke of* York, *had ſeveral times*

* *View page* 5.

*ſworn*



*ſworn Allegiance to King* H. *the* VI. *particularly, in the* 29*th Year of his Reign, and this I added, becauſe no Body I ſuppoſed, would ſuſpect that any* would ſcruple to take Oaths to King *Henry.* VI. upon the ſcore of a Perſon, who had himſelf ſworn Allegiance to him. The *Remarker* doth not pretend to produce any one that refuſed the Oaths in this Reign; nor does he deny, that the Duke of *York* himſelf did ſwear Allegiance to King *Henry* VI. He only diſputes the conſequence, that I drew from his long Submiſſion, and repeated Oaths of Fidelity, and faith, he did not by ſwearing give up his Right, which ſhall be conſider'd in its proper place, the Queſtion here, being only this, Whether he, and all the Partizans of that Houſe, had lived in Subjection, and taken Oaths of Fidelity to King *H.* VI. which the *Remarker* grants. So that I have, I think, ſufficiently made good what I aſſerted in the View, *that it has been the cuſtom and uſage of the Subjects of this Realm to ſubmit, and take Oaths to Non-Hereditary, as well as to Hereditary* Kings; and the *Remarker's* fruitleſs Enquiries after Non-jurors in theſe Reigns, have only ſerved for a further confirmation of this Aſſertion.

Having proved this univerſal Submiſſion; I added, that if the Subjects had thereby

acknowledg'd an Authority which the Laws condemned, we ſhould then have found this Authority diſowned in the ſucceeding Reigns of Kings *de jure*. But inſtead of this, we find Kings *de jure* in their Courts of Judicature, and their Acts of Parliament acknowledging this Authority, to which the Subjects before had ſworn, and paid their Allegiance; for the truth of which, I appealed to the common Law, and ſtatute Law of the Realm; to the *Year Books* for the one; and the *Statute Book* for the other: Which reduced this Controverſy to matter of Fact.

From the *Common Law*, I produced ſeveral Caſes, (I could have produced many more) out of the *Year Books* of the Reigns of Kings *de jure*, wherein their Judges declared, that all Pleas, Actions, *&c.* that were depending in the Courts of their immediate Predeceſſors, Kings *de facto*, were diſcontinued by their Deaths; in the ſame manner, as the Judges of Kings *de jure*, declar'd the Actions, *&c.* depending in the Courts of their immediate Predeceſſors, Kings *de jure*, were diſcontinued by their Deaths; and conſequently hereby acknowledged, the Laws were as legally adminiſtred by the Authority of Kings *de facto*, as they were by Kings *de jure*. The *Remarker*'s Anſwer to this is, that *theſe Laws*



*Laws had their Authority from the preſumed Conſent of the King* de jure. p. 32, 35.

*Claiming ſub ratione Juris*, and the *preſumptive Conſent* of the King *de jure*, are the two Machines that have been invented to Salve this Hypotheſis of Government. The former, as we have ſhewn, is of no uſe, becauſe they have no ground to fix it on; and the latter is a meer *Chimera*. For is there in all theſe proceedings, the leaſt Intimation of this ſuppoſed Authority, or preſumptive Conſent? Is every thing done by it, and yet nothing ever ſaid of it? Are not theſe Proceedings at Common Law, a plain Confutation of it? The Laws certainly are adminiſtred, and legally adminiſtred by the Authority of that King, by whoſe *Demiſe* all Pleas *&c.* depending in his Reign, are legally diſcontinued. And did not the Common Law, as it was held, for Inſtance, in the Courts of *Edward* IV. declare, that all the Actions, depending in *Henry* VIth's Reign, were diſcontinued by his Diſpoſſeſſion and declared it for this reaſon, becauſe it was *a Demiſe of the King*. Whereas, had the Laws been adminiſtred in *Henry* VIth's Reign, by *the Authority of the preſumptive Conſent* of *Edward* IV. before he was in Poſſeſſion, why were not all Actions continued by the ſame Authority, after he was

in Poſſeſſion? Why diſcontinued by the Demiſe of Him, by whoſe Authority they were not adminiſtred? It would have ſaved the Subjects much time, trouble, and expence to have had their Suits continued, and not to begin all anew upon *Edward* IVth's coming to the Throne. But how much ſoever this would have tended to the publick Good, (which is the caſe where they ſet up this Authority of a preſumptive Conſent) the Judges of *Edward* IVth's Courts knew nothing of this Authority; and therefore declared, according to the Common Law of this Realm, that all the Proceedings at Law were diſcontinued by the Diſpoſſeſſion of *H.* VI. becauſe it was a *Demiſe* of the Crown. For from the ſeveral Caſes which I alledged, I obſerv'd that the Law makes no difference betwixt the Death, or diſpoſſeſſion of a King; but holds the latter, as well as the former, to be a *Demiſe* of the King, and that, whether he was a King *de jure*, or *de facto*.

Againſt the Authority of *Bagot*'s Caſe, he urges from the Author of the Caſe of Allegiance to a King in Poſſeſſion. *That Bagot*'s *Counſel in their Plea do not urge the validity of a King* de facto's *grants without a Limitation, that it be no Injury to the Legal Right of the Crown*, and thence ſuppoſes, they



they are not valid againſt a King *de jure*. In Anſwer to which, I muſt take notice, that the words here are not truly tranſlated by that Author, for the Limitation is to ſuch Grants of a King *de facto*, *que ne fuen en menyſhement de ſon Corone*, which were not to the miniſhment of *His* Crown, calling it at the ſame time, the King *de facto*'s Crown. 2dly. This *Limitation* of Grants doth not reſpect the Rights of any Perſon; but the Rights, Lands, Honours, and Dignities of the Crown it ſelf. Which Limitation held as well in Grants made by Kings *de jure*, as in thoſe made by Kings *de facto*. As far as thoſe Legal Rights of the Crown were prejudiced by them, ſo far they were invalid. And therefore in the ancient Oath, taken by the Kings of *England* at their Coronation, the King ſwears, *that he ſhall keep all the Lands, Honours, and Dignities, righteous and free of the Crown of* England *in all manner holy without any manner of Miniſhments*, (the word uſed in *Bagot*'s Caſe,) *and the Rights of the Crown hurt, decay or loſs to his Power, ſhall call again into the ancient Eſtate* &c. This Clauſe of the Oath, * fully explains the limitation of Grants in *Bagot*'s Caſe, and may at the ſame

* *It is the firſt Oath in the Book of Oaths.*

time ſerve for an Anſwer to what is urged by the *Remarker*, in the next Page from *the Caſe of Allegiance*, and by the *Natural Born Subject*, * concerning *Henry* IId's Revocation of King *Stephen*'s Grants † of Crown-Lands.

I obſerv'd, it was urg'd as Law by *Bagot*'s Council, *that if he that is now King* (meaning *Edward* IV. and implying he was not King then) *had in King* Henry *the* VIth's *Reign granted a Charter of Pardon, it would be void* Now, *for every one that grants a Charter of Pardon, muſt be King in fact*; and that the Author *of the Caſe of Allegiance*, leaving out, probably by an Overſight, the Particle *Now* in his Tranſlation of thoſe Words, would have them ſignifie no more, than that *a Pardon granted by* Edward *the IV. when out of Poſſeſſion, could not have its Effect, and be pleaded and received in Court, whilſt out of Poſſeſſion, for want of Power to enforce it.* In Anſwer to which, I obſerv'd, that *Bagot*'s Council did not ſay, if *Edward* IV. had granted ſuch a Pardon, before he was in Poſſeſſion, it would have been void in *Henry* VIth's Reign, whilſt he was

* *Remarks p.* 34.
† *Letter p.* 37.

out



out of Poſſeſſion, (that might indeed be for want of Power,) but it would be void *Now* in the 9th Year of *Edward* the IVth's Reign, when he is in Poſſeſſion, and the whole Power of the Kingdom in his Hands; and was therefore void in Law, not void for want of Power to enforce it. What ſays the *Remarker* to this? Why, he repeats the Objection without taking any notice of my Anſwer to it, and roundly affirms, *it was void for want of Power, and for no other reaſon.* * *i. e.* he underſtands the Law better than it was underſtood in *Edward* the IVth's Court. He may think ſo. In the mean time however he muſt grant, that his Author was miſtaken in the Tranſlation, and in the point of Law that was maintain'd in that Court. But what Authority doth the *Remarker* oppoſe to it? None at all: Nor any thing, but an inconcluſive Argument of his own. *That a Prince who had granted a Pardon to a Subject, when out of Poſſeſſion; would not after he came to the Throne yield, that he ſhould be tryed, condemned, and executed; becauſe he was out of Poſſeſſion, when he granted it.* † It is very likely that he would not. But doth

* *Remarks p.* 35.
† *Remarks. p.* 36.

it

it therefore follow, that the Subject is *Rectus in Curia*, and pardon'd in Law? It certainly doth not; for tho' the Prince will not ſuffer him to be executed; and tho' the Pardon which was granted before he was in Poſſeſſion was void; yet this Disjunctive admits a *medium*, which is, that he may, and probably would, grant a new Pardon now he is in Poſſeſſion, to ſecure him.

I obſerv'd, that as the oppoſite Council did not deny any one of thoſe Points to be Law, which were maintain'd in the Plea for *Bagot*: So *Billing*, who was Lord Chief Juſtice of the *King*'s *Bench*, deliver'd his Opinion agreeably to it, and after he with the reſt of the Judges of that *Bench* had conſulted with the Judges of the *Common Pleas*, who agreed with them, the Court gave judgment for the validity of *Bagot*'s Patent, *i. e.* for *the Royal* Juriſdiction of the *King de facto*. There are, as I ſaid, a multitude of Caſes where the ſame Authority is acknowledged. It was never diſputed but in *Bagot*'s Caſe, and there, as we ſee, judgment given for it. None of theſe things are denyed by the *Remarker*, and he is ſenſible they are againſt him, and therefore calls them *Pretended Authorities out of my Year* * *Books*. Why *Pretended Authorities*, are

* *Remarks p.* 32.

they



they not in the Year Books of the Reigns of Kings *de jure*? But theſe too it ſeems, are *Pretended* Authorities when they do not ſuit with the *Remarker*'s Hypotheſis.

* He ſays, he owns and knows no one that denies, *that the Crown takes away all manner of Defects and Stops in Blood*, to be a Maxim of the Law; but then he would reſtrain it to Hereditary Kings without any Authority, nay, againſt the Authority of all the Judges of *England*, who, as I obſerved in two famous Caſes, have applyed this Maxim to Non-Hereditary Kings, to which having nothing to anſwer, he takes ſanctuary † in his Maxim *ſub ratione juris*.

## CHAP. II.

*Being a Defence of the ſecond Chapter of the View.* That the Sovereign Authority, particularly, the Legiſlative Authority of Kings for the Time being, and their Two Houſes of Parliament, is acknowledged by the Statute Law of this Realm.

HAving towards the End of the firſt Chapter of the View, proved by the

* *Remarks p.* 37.
† *Remarks p.* 38.

Common

Common Law of this Realm. That the Legiſlative Power is lodged in the King's for the time being, and their Two Houſes of Parliament. In the ſecond Chapter, I proceeded to prove the ſame, by the Statute Law of this Realm.

For the Legiſlative Authority being eſſential to the Supreme Authority and inſeparable from it, (ſince no Power that is leſs than the Sovereign Power can give Laws to a Community,) if I could make it appear, that Kings *de facto*, with their Two Houſes of Parliament, had the Legiſlative Power of the Realm, this of it ſelf would be a deciſive Argument in this Controverſy, and the *Remarker* himſelf at the latter end of the Book, where he reſumes this Queſtion, owns, that *the whole Cauſe depends upon the* * *Legiſlature.*

The Argument, which I urg'd in maintainance of the Legiſlative Authority of theſe Kings, was this, That Hereditary Kings and their Parliaments, have cited the Laws made by Non-Hereditary Kings and their Parliaments, in ſuch a manner, as acknowledges them to be Legiſlators equally with themſelves, or any of their Progenitors.

The *Remarker* acknowledges, *the Acts*

* *Remarks p.* 100.

*made*



*made under Kings* de facto *to be Statutes, and Laws of the Land, but not by the Authority of Kings* de facto, *but by the Allowance, and preſumptive Conſent of the King* de jure. * At the latter end of his Remarks, where he reſumes this Subject, he doth not deny thoſe *Laws are in force; but denies, that they derive their Force from the Authority of thoſe that made them.* This he repeats over and over again, as often as he has occaſion, to ſpeak of the Laws of Kings *de facto.* So that the ſingle Queſtion betwixt us is, whence theſe Laws derive their Force, whether from the Authority of the Kings and Parliaments that enacted them, or from *the preſumptive Conſent*, as he ſays, *of Kings* de jure.

And 1ſt. It is to be obſerved, that altho' the *Remarker* owns them to be Laws, yet he knows not what to call theſe Laws. *Statute Laws*, he durſt not call them; for he ſaith, *they were not Laws of* England, *be-*

* *The Natural Born Subject agrees with the* Remarker. There was a neceſſity, *ſaith he*, not to vacate the judicial Proceedings in the Reigns of *H.* IV. V. VI. and this could not be done without *allowing* the Acts of Parliament upon which the judicial Proceedings did depend, and thoſe Acts being good in themſelves, ſo far as they related to the Subject, the lawful Kings when they came in, *were willing they ſhould be continued. Letter p.* 43.
*Remarks* p. 40. P. 101.

*cauſe*

*cauſe made by Kings* de facto, *but becauſe the King* de jure, *without the formality of a Confirmation, ſuffer'd them like our Common Laws, by uſage to become Laws of the Land, being for the benefit of his Subjects,* and again, *they may obtain the force of Statute-Laws made by Kings* de jure, *by uſe as Cannon Laws* * *do.* Are they then Common-Law? No, he durſt not affirm that neither, nay, he yields to the Truth of what I affirm'd, that tho' Cuſtoms are ſometimes by Act of Parliament turn'd into Statute-Law; yet *Statutes are not turned into Common Law or Cuſtom,* and adds, *the Objector doth not ſay, that theſe Statutes of Kings* de facto, *receive their Authority from immemorial Cuſtom*: and yet he himſelf ſaith, *that Kings and Parliaments, by reciting them in their Statutes, and ſuffering them to be pleaded in* Weſtminſter-Hall, *have given them the ſtrength of Immemorial Cuſtom, i. e. have made them as good Laws as others, even our Common Laws, which are ſo by immemorial* † *Cuſtom.*

So that here's a 3d. ſort of Laws not known in *Weſtminſter-Hall. They are not Statute-Laws,* but *have the force of*

* *Remarks p.* 38, 39.
† *Remarks p.* 40.

*Statute-*



*Statute-Law*: They do not *receive their Authority from immemorial Cuſtom,* but *have the ſtrength of immemorial Cuſtom,* and are *not Common,* but *as good as our Common Laws.* To repeat this Hypotheſis, is to confute it. It is a ſort of a Riddle, at leaſt, it puts me in mind of the famous *Ænigma* of *Ælia Lælia Criſpis, nec mas nec fæmina, ſed omnia.* Theſe Laws, which he at the ſame time owns to be in Force, are neither Statute Law, nor Common Law, and yet they are both: They partake of the ſtrength of both, and are neither. They are no Laws as they are made, and yet for uſe, are all Laws, *i. e.* they are *preſumptive,* they are *Hypotheſis-Law.*

But 2dly. The *Remarker* is not only at a loſs to know under what Claſs to reduce theſe Laws, at the ſame time that he owns them to be in Force; but leaves us at as great an uncertainty to know which of them are in Force. When he affirms, that theſe Statutes do not derive their Authority from the Kings and Parliaments that enacted them, but from the Authority of Kings *de jure,* could he have produced an Act of a King *de jure,* and his Parliament in confirmation of theſe Statues, (which alone could have given them Authority, had they had none originally) we ſhould then have known

known which of these Laws were in Force; because we should have known, which had been confirmed. Or, could he have produced some express publick Consent, given some other way by Kings *de jure* out of Parliament, tho' this would not have made them Laws of the Realm, if they had not been so before, yet we might have known, at least, according to this Hypothesis, which of these Statutes had been in Force; because we should have known to which such an express Consent had been given. But when the *Remarker* derives the force of these Statutes, not from any express and publick, but from a secret Consent, that we are to presume on, or guess at; He has left us no way to know which of these Laws are valid, and which are null.

The restriction, that the † *Remarker* adds to the validity of these Laws, that *they be not in diminution of the Crown*, and *for* || *the benefit of the Subject*, is so far from ascertaining their Obligation, that it leaves it still more doubtful; for as every Man before was left to guess at the Prince's Consent, so here Men are made Judges

† *Remarks p.* 41. || *Remarks p.* 41.

of



of what Laws are to the diminution of the Crown, or against the publick Good; of which different Men, as well as different Parties, having entertain'd different Notions, those Laws which are obligatory with some, would be esteemed Nullities with others. The safety of the Prince, the Peace of the Community, the Lives, Liberties, and Fortunes of the Subjects depending on the Laws, nothing ought to be more certain, and better known than their Obligation (to which therefore Promulgation has ever been held to be essential) whereas nothing is more obscure, uncertain, and precarious, than is the obligation of Laws by this Hypothesis, which leaves it in the dark, and makes it all over Guess, and Presumption.

Some, who have not throughly consider'd this matter, may wonder, how these Persons ever came to take up with so precarious an Hypothesis. But the truth is, they did it not on Choice, but were driven upon it by necessity. For not being able to deny the validity of the Statutes of Non-Hereditary Kings, and yet not knowing at the same time, how to acknowledge their Legislative Authority, without destroying their Cause, they were forced to look out for some Authority of Kings *de Jure*, for these Laws: But not finding any Confirmation, or

 publick

publick expreſs Conſent given to theſe *Laws* by ſuch Kings, either in Parliament, or out of Parliament; there was no other way left, but to preſume on their ſecret Conſent to give Authority to them.

But this Notion of a *preſumptive Conſent* giving Authority to Laws, is as great a Secret, as the ſecret Conſent it ſelf. The *Remarker* agrees with me, *that Kings and Parliaments, Judges, and Lawyers have owned theſe Laws to be in Force*; but he has not been able to produce one Act of any King, or Parliament, or the Opinion of any Judge, or Lawyer, that aſcribes their force to this Preſumptive Conſent. No, he flies to the Caſe of one *Barbaricus*, a ſubordinate Officer in the Roman State, which is no ways parallel to the Caſe before us, either in the Reaſon, or the Circumſtances of it; and which proves nothing, but that the Engliſh Law-Books afford him not the ſemblance of any Authority. And what can be more abſurd, than to derive the validity of ſo great a part of our Statutes from a preſumptive Authority, which neither the Statute Book, nor any Law-Book doth acknowledge, nor take the leaſt notice of?

4thly. This Legiſlation of the preſumptive Conſent, is not only utterly unknown to our Laws, but utterly inconſiſtent with them.



them: For it reſolves the Legiſlature, which by our Conſtitution is lodg'd in the King, or Queen, and the Two Houſes of Parliament, into the ſole Will of the Prince; and that (which makes it as ridiculous, as it is illegal) into his ſecret Will.

5thly. All the Lawyers, Judges, Kings, and Parliaments, who have owned the validity of theſe Statutes, have at the ſame time acknowledged the Authority of the Kings, and Parliaments that made them. They have not pleaded them, nor recited them in Acts of Parliament as Statutes in general, nor as Laws that obtain'd their force by Cuſtom, or preſumptive Conſent: But they pleaded, and recited them as Statutes of the Realm, enacted by ſuch Kings in their Parliaments holden at *Weſtminſter*, or elſewhere, in ſuch a Year of their Reigns. Of ſuch Recitals, I have given ſeveral Inſtances in the 11. Chapter of the View, which the *Remarker* ſaith, *might have all been ſpared*; and ſo it was indeed neceſſary they ſhould have been ſpared, that his Hypotheſis might be ſpared, theſe Recitals being ſo many Demonſtrations againſt it. For by theſe Recitals it appears, that at the ſame time thoſe Kings and Parliaments acknowledge the validity of the Laws, they acknowledge the Authority of their reſpective Legiſlators:

nay they acknowledge no other validity in thoſe Laws, than what is derived from the Legiſlative Authority of thoſe Kings and Parliaments that enacted them. And this they do as fully acknowledge (for they acknowledge it in the very ſame Terms) as they do the validity of the Statutes, and the Legiſlative Authority of any of their *de jure* Progenitors.

I referr'd to Laws made by Kings *de facto* in favour of the Subject, which had been afterwards intrenched on by the Prerogative of Kings *de jure*. Now if the Laws of Kings *de facto* were null in themſelves, and had no Authority, but what they received from the conſent of ſucceeding Kings *de jure*; then the Awards, and Proceedings of a King *de jure*, in oppoſition to the Laws of a King *de facto*, would be legal. But ſuch Awards, and Proceedings have been declared by a King *de jure*, and his Parliament, to be illegal. Whence it follows, that the Laws of Kings *de facto*, are ſo far from receiving their Authority from the preſumptive Conſent of Kings *de jure*, that they are valid even againſt a King *de jure*'s expreſs Diſſent to them. See the I. *Rich.* III. ch. 2. and the *Petition of Right* 3. *Car.* I. But theſe Inſtances, as well as all the Recitals, the *Remarker*, and the *Natural Born Subject* wiſely paſs over.

When



When the *Remarker* has not been able to give the leaſt ſhadow of a proof from our Laws, or Law Books, for this *Chimæra* of a preſumptive Conſent; I may be allowed to paſs over his inconcluſive Reaſons, *why the Statutes of Kings* de facto *ſhould remain in Force, and yet the Authority of thoſe Kings not be acknowledged.* Only one of his Reaſon, I ſhall take notice of, becauſe he repeats it, and lays great ſtreſs upon it, *viz. That Kings* de jure *ſuffer the Laws of Kings* de facto *to be in Force, becauſe 'tis not ſafe to unravel things too far, to unhinge the Government, and to deveſt them of Laws they have been uſed to, and chooſe themſelves.* * But ſuppoſing, as the *Remarker* doth, that ſuch Laws had originally no Authority, to give them Authority by Act of Parliament, would be ſo far from *unravelling things, and deveſting the People of their Laws*, that it would have been the only way to fix every thing, and ſecure their Laws to them. And one Act of Parliament in the beginning of *Edward* the IVth's Reign, for inſtance, which a Committee would have drawn up at two or three Sittings, would have confirmed all the Laws made by the Three Kings of the

* *Remarks p.* 40, 104.

Houſe of *Lancaſter*. And there can be no reaſon why this Confirmation was not given, but becauſe *Edward* IV. his Parliament, and Judges, knew they were valid without it. For when there has been reaſon to doubt of the validity of Acts of Parliament, it has been always thought fit to confirm them. As the Acts made 12. *Car.* II. becauſe that Parliament was not call'd by the King's Writs, were all enumerated, and confirmed in an Act paſs'd 13. *Car.* II. ch. 7. Entitled, *An Act to confirm publick Acts.* The *Natural Born Subject*, with great Aſſurance, aſks me, *can you give one ſingle Inſtance out of all our Records of any Act of Parliament made by a Rightful* * *King that ever was confirmed for want of ſufficient Authority?* Here's one Inſtance for him, and a famous one; and he may find another 13. *Car.* II. ch. 13. But neither He, nor the *Remarker*, have been able to produce one publick Act, of all the numerous Acts that were made by the Three Kings of the Houſe of *Lancaſter* in 60. Years, that was confirm'd by *Edward* IV. or eſteemed to want his Confirmation, (thoſe few private Acts which were confirm'd, were confirmed for private Reaſons) for without it, they were held to

* *Letter p.* 49.

be



be of as good Authority, as his Own Acts. But the *Natural Born Subject* will have it, *that they are ſtill liable to be queſtion'd.* What! liable to be queſtion'd by Law? By his, and the * *Remarker*'s Hypotheſis-Law, they may be liable to be queſtion'd: Not by the Law of the Realm: No, not as it was held even in the Courts, and by the Judges of *Edward* the IV. for when it was urged, that *Bagot*'s Patent of Naturalization granted by *Hen.* VIth was not good; becauſe Patents of Naturalization were not confirmed in the Act of the 1. *Ed.* IV. ch. 1. which was made to confirm the judicial Proceedings of the Three *Henries*; This Plea was rejected, and judgment given for the validity of *Bagot*'s Patent of Naturalization, which ſtood ſolely upon *Henry* the VIth's Authority. As this *judgment* of *Edward* the IVth's Judges may convince the *Natural Born Subject*, that the Doctrine he lays down with ſo much Aſſurance, *that ſuch Acts, unleſs confirm'd, were ſtill liable to be queſtion'd for want of ſufficient Authority*, is not Law: So is it a full Determination againſt His, and the *Remarker*'s preſumptive Conſent-Authority; for here was no Room left to preſume on *Edward* the IVth's Conſent

* *Letter p.* 48.

to this Patent, ſince he had left Patents of Naturalization out of that Act, wherein he gave his expreſs Conſent to ſuch Acts of the Three *Henries*, that he would have ſtand: And yet this Act by *Henry* the VIth's Authority, which had not *Edward* the IVth's Conſent, was held valid without it, as valid as thoſe that had it, or as any of his own Acts.

The *Objector* according to this Notion of the preſumptive Conſent-Legiſlation, ſaid *Richard* III. *Acts of Parliaments paſs'd for Laws, becauſe* H. *VII. was willing they ſhould paſs for Laws.* To convince him of his Miſtake, I inſtanced in two Acts of Parliament made by *Richard*, One which baſtardized *Edward* the IVth's Children, Another that attainted *Henry* the VIIth's Friends, which (the laſt eſpecially) *Henry* the VIIth was certainly not *willing* ſhould paſs for Laws: Nay he was *unwilling*, as my Lord *Bacon* obſerves, ſo much regard ſhould be paid to *Richard*'s Attainders, as to have them formally repealed. And yet when the Judges were conſulted, they unanimouſly declared, that the Perſons attainted could not take their Places in Parliament, until their Attainders, tho' paſſed by a King *de facto*, were reverſed by Act of Parliament.

The Author of *the Caſe of Allegiance* having ſaid, that theſe Attainders were reverſed,



verſed, not becauſe they were valid, but *out of Caution.* I obſerved, that the reaſon the Judges gave for the Reverſal, *that they were not legal Perſons, till their Acts of Attainder were reverſed*, ſhews, that it was not *Caution*, but the *Conſtitution that required it.* Upon which the *Remarker* ſays, *what* Mr. *H. drives at, I know is this, that the Attainder of a* de facto, *muſt be reverſed, otherwiſe the Perſon attainted, is not a Legal Perſon.* * Mr. *H.* only cited the unanimous Reſolution of all the Judges, who declared, that the Perſons who were *attainted by* Richard III. *King in Fact, and not of Right, were not Legal Perſons till their Attainders were reverſed.* Which, ſaith *the Remarker, is a groſs Miſtake, and they were reverſed only out of abundant Caution.* What, notwithſtanding the King and Parliament proceeded agreeably to the Opinion of the Judges? Yes, notwithſtanding this, He ſays, *it is a groſs Miſtake*, that is, the King and Parliament, and all the Judges of the Realm, were of One Opinion; and the *Remarker* is of Another. By which Authority are we to be concluded?

But the *Remarker* has another Anſwer,

* *Remarks p.* 46. Ibid. P. 48.

*that*

*that the Judges knew H.* VII. *had no Right.* If one ſhould aſk him, how he knows that the Judges knew this, he would be hard put to it to prove it. However, let us for once grant that they might believe ſo, and then he will be diſtreſſed by the Judges Reſolution of the ſecond Queſtion, touching the King's Attainder, *that the King* [Henry *VII.* whom the *Remarker* ſays, they believed, had no Right] *was a Perſon able and diſcharged of all Attainders, and Diſabilities* ipſo facto, *that he was inveſted with the Regal Dignity, and was King*, and thus all the Objections againſt his Perſon, or his Title, from Attainders, or other ſtops, and defects of Blood, were entirely removed: So that let the *Remarker* take which ſide of the Queſtion he pleaſes, that *H.* VII. had a Right antecedent to his Poſſeſſion, or that he had not; one of the two Reſolutions of the Judges, is directly againſt him, and neither of them for him. If he ſays, *H.* VII. had a Right antecedent to his Poſſeſſion; their firſt Reſolution concludes againſt him. But if he ſays, he had no antecedent Right; their latter Reſolution is deciſive againſt the *Remarker*, and for the Sovereign Authority of the King *for the time being*.

Towards the lattter end of the Book, where the *Remarker* reſumes this Argument, he makes



makes an objection to the Legiſlative Power of the Three *Henries*, from the 1. *Edward* IV. ch. 1. where he calls them *pretenſed* Kings, and other Statutes where he calls them Kings *indeed*, and not *of Right*; but this Objection was obviated by what was ſaid in the view, as the *Remarker* might have obſerved, but ſince he did not, I muſt repeat part of it.

1ſt. Whenever *Edward* IV. cites the Laws of the Houſe of *Lancaſter*, he always gives them the Title, of *late Kings of this Realm in* Deed, *and not of* Right; whereby he owns them to have been Kings of this Realm, but withal, that they ought not to have been ſo. Nay, he doth not even now pretend, that his great Uncle, *Edmund* Earl of *March*, or his Father *Rich.* Duke of *York*, according to the *Remarker*'s Hypotheſis, were Kings of Right during the time, that the Three *Henries* were Kings in Deed. Neither He, nor his Parliament, nor Judges, ever imagined, (as the *Remarker* and *Natural Born Subjects* do,) that the unpoſſeſſed, unrecognized Heirs were Kings *de jure*, ſubſiſting at the ſame time, that others were Kings *in Fact*. But notwithſtanding this abatement of Title, whenever *Edward* IV. cites their Laws, he acknowledges their Legiſlative Authority to be equal to that of any of his Predeceſſors, and challenges no

other

other Authority for his own Laws, *than he owns theirs had, and ought to have* * *had.*

2dly. As we never meet with this diſtinction of Kings *in Deed*, and *not of Right*, throughout all the Revolutions of Government, till in this Statute of *Edward* IV. So it is to be obſerved, that it is in the Statutes only of the immediate Rivals and Succeſſors that we meet with it, but never afterwards. It is only in the Statutes of *Edward* IV. that the Three *Henries*; and in thoſe only of *Henry* VII. that *Richard III.* is ſtiled King in *Deed*, and not of *Right*. In the Statutes of all the ſucceeding Kings and Queens, the Three *Henries*, and *Richard* III. are ſtiled Kings of *England*, without the leaſt diminution of Title.

3dly. At common Law, in the Courts even of their Rivals, the Regal Title is conſtantly given them without any Abatement. Whenever *H.* VI. is mention'd in the Courts of *Edward* IV. the ſame Title is given to him, that is given to *Edward* IV. when He is mention'd in the Courts of *Edward* V. When *Henry* VI. is mention'd in the Courts of *Edward* IV. He is ſtyl'd *l'auter Roy*, as *Edward* IV. himſelf is ſtiled *Roy qui ore eſt.* All the difference betwixt them is, One, is

* *See* 14. Edward *IV. ch.* 2. *printed at the end of this Book.*



*the late King*; and the Other, the *preſent King* The ſame ſtile is obſerved in the Courts of *Hen.* VII. when *Richard* III. is named.

Another Objection has been drawn by conſequence from the *Attainders*, and the Language of them; which, as I had ſaid, was no confutation of thoſe full and direct Proofs, which I had made of the Legiſlative Authority of the Kings for the time being. Nor could the *Objector*, with whom I was then engaged, ſay they were: Who acknowledged both *H.* VI. and *Edward.* IV. to be in their Turns, Kings and Legiſlators, notwithſtanding their mutual Attainders of each other. Nay, the *Remarker* himſelf p. 44. ſays, *as for Attainders there is no great ſtreſs to be laid upon them, becauſe they are uſed on both ſides.* However, towards the end of his Remarks, not knowing well what elſe to lay a ſtreſs upon, he is for laying a very great ſtreſs upon the Attainders. But before he had done this, he ought to have conſider'd.

1ſt. That the very ſame Parliament, that attainted *Richard* III. did however, as I have obſerved already, ſo fully acknowledge his Legiſlative Authority, that they had, as we have ſeen, no other way to relieve the Perſons who lay under the Penalty of his

his Acts of Attainder, but by repealing them. They did not say, with the *Remarker*, and *Natural Born Subject*, that they were not Kings, nor Legislators; that their Acts were Nullities, or had no legal Effects: No, they expresly acknowledged they had such legal effects, as could not be vacated, but by an Act of Parliament: Which plainly shews, that whatever other Consequences may be drawn from the Attainders of these Kings, there can be no consequence drawn from them, that will affect their Legislative Power.

2dly. That, as an antecedent Attainder cannot touch a Prince in his subsequent Exercise of the Regal Power: So for the same reason, a subsequent Attainder cannot affect a Prince in the Exercise of his Regal Power antecedent to the Attainder. And for both these, I have produced undeniable Authorities, to which the *Remarker* has given no other, but the thred-bare Answer of *sub ratione juris*.

3dly. The *Remarker* has affirmed, but not proved, that these Kings were attainted for their Exercise of the Regal Power. *Henry* VI. was not, as he supposes, p. 70. attainted by *Edward* IV. for that reason, but for the Death of *Richard* Duke of *York*, at the Battle of *Wakefield*. And as the *Remarker* may see



see, by what hath been said, what unjust Consequences he draws from the Language of the Attainders: So there needs nothing more to convince him of the Injustice of this Attainder, than the History of it as it is related by the Author of the *Ecclesiastical History*, which I have so often cited. After this Author had given some account of the Agreement made in Parliament between King *H.* VI. and *Richard* Duke of *York*, he adds, *the Duke of* York's *next Point was to secure the Queen. This Lady, he had reason to imagine, would not sit down tamely, and see her Husbands Royalty Eclipsed, and her Son disinherited without some Attempt for their Recovery. To prevent being embaras's'd from this Quarter: The Duke prevail'd with the King to send for the Queen, and her Son to* London. *The Queen instead of obeying the Order, levied an Army in the North, under the Command of the Dukes of* Exeter, *and* Sommerset. *The Protector* (for so the Duke of *York* had got himself made in Parliament) *receiving Intelligence of this Preparation, leaving the King under the Guard of his* * *Friends, the Duke of* Norfolk, *and the Earl of* Warwick, *march'd down with a small Force to Wakefield, where fighting rashly at a great Disadvantage of Numbers, he*

* *i. e. The Duke of* York's *Friends.*

*lost*

*loſt his Life and the Battle.* * Now it was for the loſs of the *D.* of *York*'s Life, that *H.* VI. was attainted in the firſt Parliament of *Eward* IV. And therefore our Eccleſiaſtical Hiſtorian goes on, *in this Parliament* Margaret *the late Queen*, Edward *call'd Prince of* Wales, *and ſeveral others, were attainted for the Death of Richard D. of* York. *And which is more remarkable, the Act of Attainder paſs'd upon the late King* Henry *the* VI. † So that *H.* VI. you ſee, was attainted, not for his paſt Exerciſe of the Regal Power, but for the Death of the D. of *York*. Wonderful Juſtice! attainted for the Duke's Death, who was ſlain at *Wakefield*, when *H.* VI. was a Priſoner at *London*; and ſlain by an Army, that was raiſed not only without, but againſt his expreſs Order; for *H.* VI. even by this Account, was ſo far from giving any Encouragement to his Queen's Attempt, that he commanded her to come to *London* with her Son, and acquieſce.

It will not be improper here to anſwer an Argument of *Prinn*, and the *Remarker*, *That* Richard *Duke of* York *was King* de jure, *tho' never in Poſſeſſion, becauſe Per-*

* Collier's *Eccleſiaſtical Hiſtory p.* 677.
† Ibid. 679.

*ſons*



*ſons were attainted of* High Treaſon for his Death; but theſe Attainders are no proof, that he was King *de jure*; for the Attainders were founded on the Act of Parliament 39. *H.* VI. by which *Richard* was declared Heir apparent of the Crown, and it was made High Treaſon to compaſs his Death: and therefore the Lord Chief Juſtice *Coke* ſays, *if the Heir apparent to the Crown be a collateral Heir apparent, He is not within the Satute of the* 25*th Edw.* III. *untill he be declared by Parliament, as it was in the Duke of* York's *Caſe.* †

Laſtly, This Attainder, as well as another poſthumous Attainder of *Henry* VI. were reverſed 1. *Henry* VII. wherein it is declared, * *that the King, our Sovereign, remembring how againſt all Righteouſneſs, Honour, Nature, and Duty, an inordinate ſeditious and ſlanderous Act was made againſt the moſt famous Prince of Bleſſed Memory, King* Henry *his Uncle, at the Parliament holden at* Weſtminſter *the* fourth *day of November in the* 1*ſt. Year of the Reign of Edw.* IV. *late King of* England, *whereby his ſaid Uncle contrary to the due Allegiance, and*

† Coke's *Inſt. Part.* 4. *c* 1. *p.* 7.
* *In the unprinted Rolls* 1 Hen. *VII. N.* 16. *Reſtitutio* Henrici Sexti.



*all*

*all due Order was attainted of High Treaſon. Wherefore our Sovereign Lord, by the Advice and Conſent of the Lords, &c. ordaineth that the ſame Act, and all Acts of Attainders, Forfeiture, or Diſablement, be void, annulled and repealed, and of no Force, nor Effect.* This was the laſt Act of Parliament, relating to this Attainder of *Henry* VI. which gives us an *Idea* of it, very different from what the *Remarker* has given, and leaves theſe Attainders without any force to bear the great weight he lays upon them.

I obſerv'd, that when Princes proceeded againſt any Perſons for adhering to the King for the time being, their conſtant way of proceeding was by Acts of Attainder in Parliament *ex poſt facto*, and not by Indictments in the ordinary Courſe of Proceedings; which ſhews, that to ſerve the King in Poſſeſſion, was not a Fault, nor could be puniſh'd as ſuch, by the Laws that were then in Force. The *Remarker* doth not deny the the Fact, but ſaith, the *true reaſon why they were attainted, and not tryed as other Malefactors, was becauſe they were ſuch notorious Rebells, that they ought to be made Examples of, by an extraordinary way of proceeding to deter others from the like*; * *but*

* *Remarks p.* 47.

*not*



*not for want of Laws in Force againſt them.* He has not yet proved, that to ſerve the King for the Time being makes Men notorious Rebels, or Rebels at all; nor by what Law they can be convicted of High Treaſon for doing that Service. But to paſs by that and come to his Argument: Were there ever more notorious Traytors, and Rebells in this Nation, than the Gun-powder Conſpirators, and the Regicides of 48? And yet both the former, and the latter were convicted, in the ordinary courſe of Proceedings, by Indictments on the 25. *Edward* III.

The *Natural Born Subject* denies the Fact, ſaying, *this was not the conſtant way of proceeding; for many were put to Death without Attainders: The Duke of* Sommerſet, *and ſeveral other Lords, and* * *Gentlemen were put to Death without Attainders, by* Edw. *IV. for fighting for* Henry *VI.*

There were Executions indeed, as I took notice, in the Heat of the Victors Rage, without any Colour of Proceſs; and I ſaid, that ſome of the Attainders were no more to be drawn into conſequence, than thoſe Executions: And if this be what the *natural born Subject* means, when he ſays there

* Letter *p.* 95.

*were Perſons put to Death without Attainders*, he ſays true, but trifles at the ſame time; for this is ſtill a more violent Courſe than Attainders themſelves. But if he means, the Duke of *Sommerſet* and the reſt were put to Death upon a Sentence after a Conviction by a Jury, in the ordinary Courſe of Proceedings by Indictment, why did he produce no Teſtimonies from Hiſtory in Proof of it? If this Author expects to be believed without Authorities, yet it is too much to believe him againſt Authorities. Now *Stow* relates the Matter thus. *After the Battel of* Tewkſbury, *King* Edward *entering a Church in* Tewkſbury *with his Sword drawn, a Prieſt brought the Sacrament againſt him, and would not let him enter until he had granted his Pardon to theſe that follow*; Edmund *Duke of* Sommerſet, Strother *Lord St.* John's *(whom the natural born Subject* ſplits into ſeveral other Lords,) *Sir* Humphrey Audley, *and twelve more. All theſe, where they might have eſcaped, tarried in the Church, truſting in the King's Pardon, from Saturday till Monday, when they were taken out and beheaded.* * Sir William *Dugdale*, in his Account of this Duke of *Sommerſet*, ſaith, *that notwithſtanding*

* *Stow in Edward IV. p.* 44.
† Coke's *Inſt. Part* 4. *c.* 1. *p.* 7.



*ding he fled from the Battel of* Tewksbury, *he was overtaken and there loſt his Head. Some ſay that he got into the Church for Sanctuary and there was killed*, Leland's *Itinerary* Vol. 6. 93. And will the *natural born Subject* call this putting Men to Death in the ordinary way of Proceedings? *Hollingſhed* indeed makes mention of a Trial of the Duke of *Sommerſet*, &c. And ſuppoſe we ſhould take his Account of this Matter, rather than that which is given by the other Hiſtorians (which is not reaſonable) yet even this I think will do the *natural born Subject* no Service; for *Hollingſhed* tells us, what Perſons ſat as *High Conſtable*, and *Earl Marſhal*; which plainly ſhows, that if there was any Trial, it was before a *Court Martial flagrante Bello*, where abſolute Power, and not the Laws of the Land take place, and which is as far from the ordinary Courſe of Proceedings, as that of Attainders.

* *Dugdale*'s Baronage *Tom.* 2. *p.* 125.

## CHAP. III.

*A Defence of the third Chapter wherein ſome other Objections to the Legiſlative Authority of theſe Kings are anſwer'd.*

THE Objection from *Edward* IVth's Confirmation of a few *private* Acts I have anſwered in the foregoing Chapter, and turned it upon the Remarker, in that there was not one of the numerous *publick* Acts that were made in the Reigns of the three *Henries* ever confirmed, and yet ſtood, and, except ſuch of them as have been repealed, do ſtand in Force to this Day. But the Remarker ſays, that *King* Edward *IVth's Non-repealing their Acts, was ſufficient to give them the Force of Laws, being beneficial to the* Subject. This is but his *Crambe* of preſumptive Conſent in other Words, and as he has expreſs'd it, he might with as much reaſon have ſaid, that a Falſhood, by not being contradicted, becomes a Truth; or that the many Errors of the *Remarks* and the *Letter* would, if they had not been confuted, have commenced ſo many Truths, as that the *Non repealing of an Act*, which was originally null, gives it the Force of a Law.

* Rem. p. 51.

*As*



As for their Laws *being beneficial to the Subject, and for the publick Good*, to which he partly aſcribes their Obligation (for he knows not well where to place it) this he often repeats, without taking the leaſt notice of what I had ſaid in Confutation of that Notion, or giving any Account how thoſe Laws which were not for the publick Good, but prejudicial to it, came to be in Force, and to continue in Force in the Reigns of their Rivals (and they continued in Force till they were repealed) as well as their moſt beneficial Statutes.

Inſtead of conſidering the Anſwers I gave to the Objection that is drawn from the Revocation made 21 *Richard* II. of the Confirmation of the Judgment againſt the two *Spencers* 1 *Edward* III. he has referred me to a learned Author, who had not himſelf conſider'd thoſe Arguments I offer'd.

And as before I gave the Lord Chief Juſtice *Cokes*'s Opinion for the Validity both of the Judgment againſt the two *Spencers* 1 *Edward* III. and of the Repeal of 1 *Henry* IV. of the Revocation of that Judgment 21 *Richard* II. So let the Remarker try where he can name any Lawyer of note that has been of a different Opinion; nay, let him look into the Statute Book, and ſee whether all

* Rem. p. 41.



the

the Statutes made 1 *Ed.* III. whilſt his Father was alive, are not this day in Force, (as one of them is cited for a Law of this Realm 16 *Car.* 1. *c.* 15.) and whether all the reſt of the Acts made 21 *Rich.* II. as well as that of the Revocation of the Judgment againſt the two *Spencers*, have not ever ſince ſtood Repealed, and do ſtand repealed at this day by the Authority of *Henry* IV. and his firſt Parliament. As for inſtance, an Act of the 21. *Richard* II. had multiplied the Kinds of Treaſon, which Act was Repealed 1 *Henry* IV. *c.* 10. and Treaſon reduced to the old Standard of the 25. *Edward* III. * And can the *Remarker*, or *natural born Subject* ſhow that any Man was ever tryed for Treaſons upon the Statute of *Richard* II. after that Statute was Repealed by *H.* IV? Or will they ſay that notwithſtanding that Repeal of *Henry* IV. any Man may be now, or might at any time ſince have been tryed for Treaſon by the 21. *Rich.* II. and not by the 25. *Edward* III?

After this, I need not ſay that this Repealed Parliament of the 21. *Rich.* II. on which theſe two Authors lay ſo great a Streſs, was

* *Witneſs the Statute of* 1 H. 4. *c.* 10. *Whereby all thoſe Facts which were made Treaſons in the divided time of* R. *II. were reduced to this of* Ed. *III.* The Argument of A. B. *Laud's* Council. Hiſt. of his Trial p. 425.

not



not duly elected, and ſummoned, the Knights being not choſen by the Commons, *prout Mos exigit, ſed per Regiam Voluntatem.* And as for the Lords, *ſummoneri fecit* Rex *omnes Dominos ſibi adherentes.* And as it was not regularly call'd; ſo neither did it act with Freedom, but was held *viris armatis & Sagittariis immenſis*, as is declared in the Parliament Roll 1 *Henry* IV. *n.* 21, 22.

Another Objection, which I conſidered, was the Declaration of Parliament 39. *Henry* VI. *That the Duke of* York's *Title could not be defeated.* This I ſaid was a partial Declaration of an awed Parliament, when the King's Army was defeated, and the King himſelf the Duke's Priſoner: Otherwiſe they might have declared, that his Title was defeated by Acts of his own, as well as by Acts of Parliament. They might, I ſaid, have declared this, upon the Principles of thoſe with whom we are diſputing; who when they are preſs'd with the Commands of Holy Scripture *to render unto Cæſar the things that are Cæſar*'s, &c. think it a ſufficient Anſwer to ſay, that *Tiberius Cæſar* was a rightful Governor by the Submiſſion and Oaths of the Roman Senate and People to him, as the Romans had before acquired a Right to the Government of *Judæa* by the Submiſſion of the Jews. Since therefore the Title of the

Regal

Regal Family of the Jews was defeated by their ſubmiſſion to the Romans; and the Title of the Roman Senate and People defeated by their Submiſſion and Oaths to *Tiberius*: Upon the ſame Principle, the Duke of *York*'s Title was defeated by his long Submiſſion, obeying Summons to Parliament, accepting and executing Commiſſions under *H.* VI. and repeated Oaths of Allegiance to him, particularly that in the 30th Year of *H.* VIth's Reign.

In Anſwer to which, the *Remarker* firſt repreſents the Duke of *York* in *Dureſs*, when he did all this, and therefore would have it to be void. *What our Kings* (calling the Duke of *York* King, who never call'd himſelf ſo, no, not when he had *H.* VI. Priſoner) *are forced to do in Dureſs againſt themſelves and their own Right, is of no Force, p.* 26. Again, *all this might be, and and yet the Houſe of* York *might not give up their Right, and quit their Claim; but waited only for a more favourable Opportunity when they ſhould get out of Dureſs. d.* 53. Who would not imagine by this Account, that the Heirs of the Houſe of *York*, (at leaſt *Rich.* Duke of *York*) had paſs'd their time in Priſon? I have ſhew'd already, that *Edmund* Earl of *March* put himſelf at the Head of an Army, for *H.* IV. againſt *Glendour*, and diſcovered to *H.* V. the Con-



ſpiracy of the Earl of *Cambridge*, his Brother in Law againſt that King: I might ſhew further from Sir *William* * *Dugdale*, That he ſerved King *Henry* Vth in his Wars in *France*; from *Rymer* † that he was in the fifth Year of *Henry* Vth. made Admiral at Sea. That in the ſixth Year of that King, He was conſtituted Lieutenant of *Normandy*, and Warden of the Marches. And that in the firſt Year of *H.* VI. He was made Lieutenant of *Ireland* by that King, as appears both from * *Dugdale* and † *Rymer.* And to ſhew you how good a Subject he was, and what an entire Confidence theſe two Kings had in him, I'll give you ‖ Part of a Commiſſion from each of theſe Kings to *Edmund* Earl of *March* who dyed in *Ireland. Jan.* 19. in the * third Year of *Henry* VI. after he had lived in this en-

* Baronage *Tom.* 1. *under the Title of* March.
† *Rymer*'s Fœdera, Tom IX. p. 472.
* *Baronage* ut ſupra.
‖ *A. D.* 1418. An. 6. H. 5. Rex omnibus ad quos &c ſalutem. ſciatis quòd nos de fidelitate, probitate, & circumſpectione cariſſimi conſanguinei noſtri *Edmundi Comitis Marchiæ* pleniùs confidentes, ordinavimus & conſtituimus ipſum Comitem Locum tenentem & Cuſtodem generalem omnium Terrarum & Marchiarum totius Ducatus noſtri Normanniæ, &c. habendum occupandum regendum & exercendum officium prædictum quamdiu nobis placuerit, &c. *Rymer*'s Fœd. Tom. IX. p. 592.

tire

tire Subjection to the Three Kings of the Houſe of *Lancaſter*.

I might obſerve alſo from † *Rymer*, that *Richard* Earl of *Cambridge*, who married the Siſter and Heir of the Earl of *March*, and who was Father to *Richard* Duke of *York*, aſſiſted *K. H.* V. in his Wars in *France*. But I come to *Richard* Duke of *York*, who one would almoſt think, by the *Remarker*'s way of ſpeaking of his *Dureſs*, that he was ſcarce ever out of Priſon. But the *Remarker* may find in Sir *William Dugdale*, that in the eighth Year of K. *H.* VI. He was Conſtable of *England*. In the 10th of that King, he was ſent with a Commiſſion to ſecure the Sea Coaſts of *Normandy*. In the 12th. He was ſent General, with the Duke of *Sommerſet*, to ſuppreſs an Inſurrection in *Normandy*. In the 13th was joyned with

* A. D. 1423. An. 1. H. 6. Rex omnibus ad quos &c. ſalutem, ſciatis quòd nos, de fidelitate & circumſpectione cariſſimi conſanguinei noſtri *Edmundi Comitis Marchiæ & Ultoniæ* pleniùs confidentes, de Aviſamento & Aſſenſu magni Concilii noſtri, ordinavimus & conſtituimus ipſum Comitem Locum tenentem Terræ noſtræ Hiberniæ, habendum &c. à primo die quo idem comes, vel deputatus ſuus in terra noſtra prædicta applicabit uſque ad finem novem annorum proximo ſequentium & plenariè completorum. *Rymer*'s Fœdera Tom. 10. p. 282.

† Dugdale *Baronage under the Title of* March.

‖ Fœdera &c. Tom. 9. p. 250.

him



him in Commiſſion to govern *France*. In the 18th of K. *H.* VI. was conſtituted Lieutenant and Captain General for all *France* and *Normandy*. In the 23d of that King was made Regent of *France* and *Normandy*. In the 29th of *H.* VI. was conſtituted Lord Lieutenant of *Ireland*. In the 32 of *H.* VI. was made Protector of the Realm, and in the 35th *H.* VI. made Lord Lieutenant of *Ireland*. *

And let me now aſk the *Remarker*, whether theſe were not Inſtances of an entire Subjection in the Heirs of the Houſe of *York*? Could they have given greater proofs of a voluntary Subjection, than by undertaking and executing theſe great Charges? And will the *Remarker* ſtill ſay, they were in Dureſs? In Dureſs, when they were Admirals at Sea, Generals of great Armies in remote Countries, Regents, and Lieutenants of Great Kingdoms?

Not to enquire how many times the Duke of *York* repeated his Oath of Fidelity to K. *H.* VI. when he was admitted to thoſe great Offices, or how often he took Oaths to him upon other Occaſions, as that Oath which the Duke of *York*, and *Buckingham*, the Two Archbiſhops, Eleven Biſhops, Six

* *Sir William* Dugdale's *Baronage*, Tom. 2. *p.* 159. 160. 161, &c. *under the Title of* York.

Earls,

Earls, Two Viſcounts, Eighteen Abbots, Two Priors, and Seventeen Barons took in Parliament unto *Henry* VI. in the 33d. Year of his Reign, *Novemb.* 25. for their Allegiance unto the King. * Not to make this Enquiry, ſince that Oath ‖ which the Duke of *York* took in the 30th Year of *H.* VIth's Reign at St. *Paul*'s Croſs, being a Renunciation of his Own, and a Recognition of *H.* VI. Right, was, as well his accepting, and executing thoſe great Commiſſions, abundantly ſufficient to defeat his Title. The *Remarker*, to avoid this conſequence, will have the Duke of *York* to be in † *Dureſs* when he took this Oath but let him look into *Stow* * and he will find, that he was at *full Liberty* at that time; nay, that in the 31ſt. Year of that Reign, he *took this Oath again at Weſtminſter, and at Coventry at ſundry Times.* † Since then he was not in Dureſs, but at full Liberty, when He took and repeated this Oath, the Conſequence ſure is unavoidable. No ſaith the *Remarker*, *Grant this too that he was at Liberty, what then? Why then you'll*

* *See the Book of Oaths p.*145.
‖ *See* Stow *p.* 395.
† *See Remarks p.* 26, 53.
* Stow ibid.
† Stow *p.* 396.

*ſay*



*ſay he had quitted his Claim. I beg Mr. H's. pardon, no ſuch matter I can aſſure you, but the quite contrary; for the very ſwearing of Allegiance upon an* Agreement, *was ſo far from weakning his Title, that it rather ſtrengthened it.* * *That Oath which Mr. H. calls a Recognition of* Henry *VI. Right, was indeed or* de facto Henry *VI. Recognition of* Richard *Duke of* York's *Right*, for ſaith he, *Richard* Duke of *York took this Oath upon an Agreement.* † He goes on, *if all be true which I have ſaid, as it is, the Gentlemen may ſtill ſay, that the* Right *of the Jews and* Roman *Senate was defeated, and that the* Roman *Emperours were rightful Governours, becauſe the Jews and* Roman *Senate had ſubmitted and ſworn Allegiance to them; and yet nevertheleſs the Houſe of* York, *tho' they had ſworn Allegiance to the Poſſeſſor, had ſtill a good Title, and ſuch as the Uſurper by the* Agreement *owned. The Gentlemen he ſpeaks of may abide by their Anſwer, and yet not own that the Duke's Title was defeated, and may boldly aſſert, that his Title was not actually defeated by the Legiſlative Power of the* Realm. *Neither need they acknowledge, that this Declaration*

* *Remarks p.* 26, 27. † *Remarks p.* 59.

*of*

*of Parliament proves too much, for it proves what it was brought to prove, and no more.* †

But now if all this be *false*, which the *Remarker* ſays is true, that *Richard Duke of York took this Oath upon an Agreement which acknowledged his Right:* And if the contrary to it be true, that this Oath mention'd in the *View*, was not taken upon the Agreement, but taken and repeated ſeveral Years before the Agreement; then it follows, upon the *Remarker's*, and theſe Gentlemens own Principles, and way of Reaſoning, That as the Right of the Jews and Roman Senate was defeated by their ſubmiſſion to the Roman Emperors: So was the Duke of *York*'s Title defeated by his long and abſolute Submiſſion and repeated Oaths of Allegiance to K. *H.* VI. That as the Duke's Title was thus defeated by the aforeſaid Oath, ſince the Oath was taken before the Agreement, Defeated I ſay, upon their own Principles by the Duke's own Act and Deed, notwithſtanding this Declaration of Parliament: So, notwithſtanding the ſame, it might be defeated, as it actually was, by the Legiſlative Power of the Realm, and there-

* *Remarks p.* 60.

fore



fore this Declaration of Parliament proving too much, proves nothing at all.

Theſe Conſequences are unavoidable, and this Declaration, *that the Title of the Duke of* York *could not be defeated*, muſt be given up on their own Principles, if that be falſe, which the *Remarker* affirms to be true, *that this Oath was not taken untill the Agreement*: And falſe it certainly is; for the Agreement in Parliament between K. *H.* VI. and *Richard* Duke of *York* was made in the 39th Year of K. *H.* VIth's Reign; but this Oath was taken a great many Years before it; the firſt time at St. *Paul*'s Croſs in the 30th Year of *H.* VI. which was 9 Years before the Agreement, and again at *Weſtminſter*, and *Coventry* at ſundry times * in the 31 Year of *H.* VI. which was 8 Years before it.

'Tis true, that the Duke of *York* took an Oath upon the Agreement; but as this was taken ſeveral Years after the Oath, which I cited and inſiſted on in the *View:* So was it a different Oath, and of a different Nature from that, as is known to all who are well acquainted with the Hiſtory of that Age, and as the *Remarker* might have known by

* *See* Stow *as cited before.*



thoſe

those Words of the Oath which I cited, or might have seen in *Stow* p. 365. (whether I referr'd the Reader,) and may see in the *Appendix* * to this Book, where he'll find both these Oaths. And whatever the *Remarker* thinks, I was not so very absurd, as to go about to prove, that the D. of *York* had defeated his Title 9 Years before the Declaration of Parliament by an Oath, which he did not take till after that Declaration.

I cannot but wonder, that the *Remarker* and some others do so boldly adventure to pronounce upon our Behaviour in this Age, from the Proceedings of that Age, which they appear to be so little acquainted with. The *Remarker* puts the Duke of *York* in *Duress*, when he took this Oath of Recognition to *H.* VI. so often mention'd, tho' *Stow* expressly takes notice he was then *at full Liberty*. He makes him not to take this Oath till after the Agreement; when it is evident from *Stow*, that he had taken it the third time eight Years before it: And by a complication of these Mistakes, (to pass by the rest that he has made in this Matter) He makes the D. of *York* to be in Duress, when he took this Oath to *H.* VI. in the 39th Year of his Reign; when every one, who knows any thing of this History, cannot but know the Reverse of this to be

* *Numb. II. III.*

true,



true, and that when the Agreement was made and this Oath taken, the Duke of *York* was at full Liberty, and in full Power; and *H.* VI. not in the *Remarker*'s imaginary *Duress*, but the Duke of *York*'s real Prisoner.

The *Remarker*'s Hypothesis indeed required, that the Duke should never have taken any Oath of Fidelity to *H.* VI. till after the Agreement, or that he should be in Duress when he took it; otherwise his Title would on the *Remarker*'s Principles be defeated by his Oath. Far be it from me to say the *Remarker* knew this to be false, I rather charitably believe he did not know it to be so; but that he was so possess'd with his Hypothesis, that he thought he knew that to be true, which any History of that Time could have told him was false; and did not see those Facts, which almost every Body else does see.

Every Body, I mean, who is not to the same Degree possess'd with his Hypothesis. For here's very lately come to my Hands a 3d. Answer, under the Title of *The English Constitution fully stated, with some Animadversions on Mr.* Higden's *Mistakes about it*, in which the Author falls into the *Remarker*'s Mistakes, that the Duke of *York* did not take the Oath to *H.* VI. cited in the View till after the Agreement, saying, *when*

 *Richard*

*Richard Duke of* York *took that Oath (which Mr.* Higden *lays ſo much ſtreſs on) the Parliament was ſitting, to whom he made his Claim.* * Enough has been already ſaid in confutation of this Miſtake. I ſhall only obſerve from the Repetition of it by the *full Stater*, that when Men write from an Hypotheſis, they almoſt as naturally fall into the ſame Track of Errour, as thoſe that write from certain Memoirs, agree in a true relation of Facts. For the *full Stater* did not, it ſeems, take up his Miſtakes in this matter from the *Remarks*; ſince he tells us † that Book came not to him, till he was got to the 69th. Page of his own Book; nor could he, any more than the *Remarker* himſelf could, take them from any Hiſtorian: Nay, which is more ſurprizing, he tells us, that *by my directing them to* Stow, *I had help'd him to ſee at large that whole Agreement between the King and the Duke.* || Now it is not plainer in Numeration, that 31 goes before 32, and that 39 is after both thoſe Numbers, than it is in *Stow*, that the Duke's Oath, on which I laid ſo great a ſtreſs, was taken by him in the 30th. Year, repeated twice in the 31

* *Engliſh Conſtitution fully ſtated p.* 23.
† *Engliſh Conſtitution fully ſtated p.* 69.
|| *Ibid. p.* 25.

Year



Year of *H.* VI. and that the Agreement was not made till the 39th. Year of that King. And yet while the *full Stater* is animadverting on my Miſtakes, as if he had read *Stow* backwards, he makes the Agreement to be before that Oath, *i. e.* he makes what paſs'd in the 39th Year, to be done before that which paſs'd in the 30th and 31 Years of that Reign, and upon this Miſtake he forms his Argument to prove me miſtaken.

I have more charity for him too than to believe he ſaid this, becauſe his Argument required it; but I may ſay if he did not read *Stow* backwards, he read him under the moſt violent Impreſſions of his Hypotheſis.

Under theſe Impreſſions, he goes on, ſaying, *in ſuch a Caſe as this, 'tis no wonder, if they who eſpouſed the Title of* Richard *Duke of* York *ſubmitted,* * *and took Oaths to* Henry *VI. while there could be no Injury thereby done to the right Heir, he himſelf conſenting and doing the ſame.* Here he ventures further than his Friend the *Remarker*, who has not pretended to produce any Non-jurors in Henry VIth's Reign: Whereas the *full Stater* here ſuppoſes, that all, who eſpouſed the Duke of *York*'s Title in the 39th Year of *Henry* VI. had never ſubmitted, or taken

* *The Engliſh Conſtitution fully ſtated p.* 24.

 Oaths

Oaths before that time: altho' at the ſame time he is not able to produce one Non-juror in that Reign, or a ſingle Authority to ſupport his Aſſertion, for which he has no better Foundation than his own Miſtake, that the Duke himſelf never ſubmitted, or took an Oath to *H.* VI. before that time. *Then*, ſaith he, *they ſubmitted and took Oaths, the Duke conſenting and doing the ſame*, as if he had not done the ſame long before. He knew nothing it ſeems of the entire Submiſſion in which the Duke had lived; nothing of the many important Commiſſions that he had accepted; nothing of thoſe great Offices that he had executed under *Henry* VI. (of all which I have given ſome account above) no more than of the Oaths that he had taken to him before this time: by which the Reader may judge how well ſkilled he is in the Engliſh Hiſtory, and well qualified to give the *full State* of the Engliſh Conſtitution. Before I read this Book, I thought I muſt have excuſed my ſelf to the Author, for not having taken notice of it ſooner (Several Sheets of this *Defence* having paſſed the Preſs before I ſaw it) but after this, the Reader, may poſſibly think I ſhall want his Excuſe, if I ſhould take any farther notice of it. When the *full Stater* ſent his Book in MS. to his Friend, of



of whom it ſeems he had borrowed the *Statute* Book, and ſome other Books in order to make his Animadverſions on the *View*, he ſays to him, *excuſe me I pray, for keeping them ſo long; a Buſineſs one's unaccuſtomed to, was like but to go on ſlowly, and to be but aukwardly done at laſt*, *p.* 1. and as he ſaid this of his Book, after he had writ it; ſo in this I perfectly agree with him, after I have read it, and ſhall therefore take my leave of him, leaving the reſt of his Miſtakes to be corrected by what is ſaid to *the Watchmen on higher ground*, as he calls the *Remarker*, and N. B. *Subject.*

Having proved in the *View*, that Kings for the Time being with their Two Houſes of Parliament had the Legiſlative Power, they muſt have alſo the Supream Power, the former being always eſſential to, and inſeparable from the latter. To which the *Remarker* anſwers, *therefore* Cromwell *having the Legiſlative Power, was ſupream and King for the time being.* * And to his Anſwer I reply, therefore *Cromwell* was not Supreme and King for the Time being, and for this Reaſon among others, becauſe he had not, nor ever was acknowledged by our Kings and Parliaments to have had the Le-

* *Remarks p.* 62.

giſlative Power. The Acts of Parliament of all our Kings *de facto* have ſtood, as I have ſhewn, by their original Force and Virtue without a Confirmation; but the *Remarker* cannot but know that *Oliver*'s Acts ſunk of themſelves without a Repeal; or if he doth not know it, he may be convinced of it by the Statute Book, and *Scobel*'s Collections.

If *Mr.* H. *ſays, that* Cromwell's *Acts were not fully owned by the Hereditary King, that will not anſwer the Difficulty.* *

What does the *Remarker* mean? Does Mr. *H.* ſay, *Cromwell*'s Acts were *not fully* own'd? Mr. H. ſays, they were not own'd *at all* by any of our Hereditary Kings. The *Remarker* goes on.

*For if he had* the *Authority, and was the Legiſlator, the Heir ought according to Mr.* H's *Hypotheſis to have own'd his as well as any other King* de facto's *Acts,* † *i. e.* if *Cromwell* had had, what he had not, he would have been, what he was not. But according to Mr. *H*'s. Hypotheſis, *Cromwell* had not the Legiſlative Power, nor was King for the Time being, and therefore the Hereditary King was not oblig'd to acknowledge his Acts, as he never did.

* P. 61.

† P. 62.

*Ought*



*Ought not this then, (to uſe Mr.* H's. *Words) to conclude all private Subjects? Can Mr.* H. *then diſown this Authority, without oppoſing his private Sentiments to that which himſelf acknowledges to be the Supreme Authority and judgment of the Kingdom?* Yes, Mr. *H.* can diſown *Cromwell*'s Authority, without oppoſing his Sentiments to that which himſelf acknowledges to be the Supreme Authority and Judgment of the Kingdom: And may yet very well affirm, what he has proved, that the *Remarker* cannot diſown the Legiſlative Authority of Kings for the Time being, which is own'd by Hereditary Kings and their Parliaments, without oppoſing his private Sentiments to that which himſelf acknowledges to be the Supreme Authority and Judgment of the Kingdom.

Laſtly, I obſerv'd, that ſince Kings *for the Time being* have by the Statute and Common Law, the Legiſlative Power of this Realm, the Obedience of their Subjects is due to their Laws, and their Allegiance to their Perſons. *And then, ſay I,* anſwers the *Remarker, the Obedience of the Subjects was due to Cromwell.* He ſhould have proved it, as well as have ſaid it; but that he never can do from my Principles, or our Conſtitution, by which *Cromwell* had not the Legiſlative

giſlative Power, and therefore the Obedience of the Subjects was not due to his Laws. This as well as the reſt of his Conſequences, do not follow from my Principles, but from his own Miſtakes about 'em.

The Reader may obſerve, that when the *Remarker*, and *Natural Born Subject* are diſtreſſed for an Anſwer, and cannot relieve themſelves by *ſub ratione juris*, or the preſumptive Conſent, they frequently call in *Oliver* to their Aſſiſtance. This is what is call'd arguing *ab abſurdo*. But when they firſt miſtake or miſrepreſent my Opinion, and then draw abſurd Conſequences from it, the Abſurdities, as well as the Miſtakes, are their Own.

But once for all to diſpatch *Oliver*, who is ſo often introduced by theſe Writers. Firſt, as I have obſerved, that as by our Conſtitution he had not the Legiſlative Authority of the Kingdom, nor was ever acknowledged by our Kings to have had it, and therefore could not have the Sovereign Authority of the Kingdom: So 2dly. It is as true *è converſo*, that he who had not the Regal Title and Office, could not have the Legiſlative Authority in this Monarchy, in which by our Conſtitution, a Law cannot be made without a King or Queen; and therefore all the *Ordinances* of the Two Houſes of Parliament,



liament, all the *Acts* of the *Rump*, and all *Oliver*'s Acts ſunk of themſelves as Nullities *ab origine*. Such a Protector as *Oliver* was, is a Monſter not known to our Conſtitution or Laws; but King and Queen are not meer Titles, but carry with them the Regal Office and the Sovereign Authority and Juriſdiction of the Realm, which is known to our Laws, and is the Soul of them.

3dly. Thoſe only have been acknowledged for Kings, *for the Time being*, who have been placed in the Throne by the States of the Realm, and recognized by Parliament. Whereas *Oliver* had not the Conſent of the 3 Eſtates of the Realm, even for his Protectorſhip: Two of the 3 Eſtates, the Lords Spiritual and Temporal, had been long before laid aſide, and it was no better, than a Mock-repreſentation of the 3d. Eſtate, the baſe and ignominious Tools of his Ambition, with the help of his Fanatick Army, that made him Protector.

CHAP.

## CHAPTER IV.

*A Defence of the fourth Chapter, in which the Allegiance of the Subject was proved to be due to the King for the Time being, by the Statute Law of this Realm, with an Answer to the moſt conſiderable Objections.*

ALthough the Allegiance of the Subject to Kings for the Time being doth follow as a neceſſary Conſequence from their being inveſted with the Legiſlative Authority, yet I took notice, that we had alſo expreſs Statutes for it.

As firſt, the Statute of Treaſons made 25. *Edw.* III. which declares what Offences are Treaſon againſt our Sovereign Lord the King. And that by *our Sovereign Lord the King* in this Statute, is underſtood *only the King in Poſſeſſion of the Crown and Kingdom, tho' he be* Rex de facto, *and not* de jure, we had the Opinions of two great Lawyers, the Lord Chief Juſtice *Coke* and *Hale*; and no great Lawyer's Opinion, as far as I knew, to the contrary. Could the *Remarker* have produced any great Lawyer that has contradicted either of theſe chief Juſtices, he would not have produced *Prin*, at



leaſt he would not have produced him alone, who never had any great reputation either for Skill or Integrity. But becauſe *Prin* makes both Pages in the Remarks, let the *Remarker* read Mr. *Collier*'s Preface to his * *Eccleſiaſtical Hiſtory*, where he examines *Prin*'s 2d. Vol. of Records, and *thinks he finds him light upon the Scale, and that there lye ſtrong preſumptions againſt his Skill or Integrity, or both, which may ſerve*, ſaith he, *as a Caution of that Author in other Matters.*

The *Remarker* † cites however *Moor*'s Reports where it is ſaid, *that Allegiance follows the* Natural *Perſon*, (*and that muſt*, ſaith the *Remarker*, *be underſtood of the King de jure*, as if a King *de facto* had not a Natural Perſon,) *for if the King is by Force driven out of his Kingdom, and another uſurps; notwithſtanding this, the Allegiance of the Subject does not ceaſe, tho' the Law does.* I could in this very *Caſe* cite a Paragraph, which I am ſure the *Remarker* will not ſubſcribe to: But to go no farther than his Ciation, in which *by another that uſurps under whom the Law does ceaſe*, he would underſtand a King *de facto*, but this cannot

* *Preface p.* 4. † *Remarks p.* 65, 66.

be,

be, becauſe the Law is ſo far from ceaſing under a King *de facto*, that it is adminiſtred not only actually, but legally adminiſtred by him, and diſcontinued only by his *Demiſe*, as I have ſhewn not only from *Bagot*'s but ſeveral other Caſes. And therefore by *another that uſurps*, muſt be underſtood a *Simon Monfort*, a Lady *Jane Grey*, or an *Oliver* under whom the Laws did ceaſe, and no judicial Proceedings were valid farther than they were afterwards confirmed.

He cites *Coke*'s Report of *Calvin*'s caſe, where it is ſaid, *true and faithful Legiance, and Obedience is an Incident inſeparable to every Subject as ſoon as he is born.* And he calls it *Natural Allegiance*, ſaith the *Remarker*, which *can never be due to a King* de facto, *in oppoſition to a King* de jure. * Theſe laſt Words are the *Remarker*'s Gloſs, but the Words of the Report amount to no more than this, that every Perſon is born in ſubjection to Government, and to whomſoever the Laws of that Government under which he is born, direct him to pay his Allegiance, to him he ought to pay it: And why that may not be to the King for the Time being, if the Laws require it, I ſee no reaſon; for certainly the Laws of Nature do neither tell us who is our Prince, nor what meaſures of Obedience are due to him. If they did, as



as the Laws of Nature are every where the ſame, Perſons would be entitled to Sovereignty by the ſame way, and the meaſures of Obedience would be the ſame in all Countries, in *England*, in *France*, and in *Poland*, which no Man ſure will ſay: And therefore Natural Allegiance is the ſame with Legal Allegiance, and *go both together*, as the *Remarker* has obſerv'd from Sir *Edw. Coke*. p. 81.

But ſince he has cited *Calvin*'s Caſe, let me put him in mind of a Maxim laid down there (than which there is not a clearer in the whole Caſe) *Protectio trahit ſubjectionem, & ſubjectio trahit protectionem:* Which being underſtood, as it ought to be by the whole tenor of the Caſe, of the Protection of a King, is of it ſelf ſufficient to determin the Senſe of the 25 *Edw.* III. againſt the *Remarker*, and to put an end to the whole Controverſy.

*Judge* Hale's *Opinion, as 'tis repreſented in his Pleas of the Crown, is of no value in the World*, ſaith the Remarker, *becauſe it was a Poſthumous Work written in his younger Years about the End of K.* Charles *I.* p. 65. The Work indeed was Poſthumous, but genuine; and he in his younger Years, tho' not ſo very young towards the latter End of K. *Ch.* I. but as young as he was, he was at that time one of the brighteſt Men of his Profeſſion; otherwiſe he would not have been

been choſen of Council to the E. of *Strafford*, and Archbiſhop *Laud*, and deſign'd for the Bleſſed Martyr himſelf, had he thought it fit to have pleaded in that villainous Court. Tho' he was probably the youngeſt of Archbiſhop *Laud*'s Council, yet Archbiſhop *Sancroft* has put this Note in the Margin of the Hiſtory of that great Prelate's Tryal. *That the Lord Chancellor* Finch *told him, that the Argument which was deliver'd by Mr.* Hern. *at A. B.* L. *Tryal was not his (tho' he pronounced it) but Mr.* Hale's, *afterwards Lord Chief* * *Juſtice.* But, becauſe the *Remarker*, ſpeaking with the laſt contempt of this Book, ſays, *no one that is a Lawyer would make, uſe of ſuch a Work, tho' Mr.* H. † *does*, he may find it cited as a good Authority by the late Lord Chief Juſtice *Holt* in a printed Tryal; and I am told by thoſe that frequent the Courts, that it is frequently cited with Authority both from the Bench and Bar.

As the *Remarker* has attacked the Reputation of the Book, the *N. B. Subject* attacks the reputation of the Author. *Then for* Hales, ſaith he, *He was a Judge under* Oliver, *as you may ſee in his Life by Dr.* Burnet. *And therefore there lay not the leaſt Tem-*

*The Troubles and Tryals.*

* *Hiſtory of A. B.* Laud's *p.* 422.

† *Remarks p.* 65.

*ptation*



*ptation* (he means, there lay a great Temptation in his way,) *to palliate and ſmooth over a Cauſe, wherein he had been ſo far concerned.* * But he ſhould have told us how little Sir *Matthew Hale* had been concerned; he ſhould have told us, that before he took this Commiſſion, he *was much urged to accept it by ſome eminent Men of his own Profeſſion, who were of the Kings Party, as Sir* Orlando Bridgeman, *and Sir* Geoffery Palmer; *and was alſo ſatisfied concerning the lawfulneſs of it by ſome famous Divines, in particular, Dr.* Sheldon *and Dr.* Henchman, *who were afterwards promoted to the Sees of* Canterbury *and* London. *That tho' he did accept this* Commiſſion from *Oliver, he would make no Declaration acknowledging his Authority, nor try any State Priſoners* †; and he was conſtant to his Reſolution, and never did either of them. Had the *Natural Born Subject* told us this, as he might have done from the Book that he cites, he had done Juſtice to this great Man's Memory, and would have let the Reader ſee, that the Chief Juſtice did, as our Laws do, make a manifeſt Difference betwixt a King *de facto*, and an *Oliver*; and that the former is within the purview of

* *Letter p.* 76.

† *See the Biſhop of* Sarum's *Life of Sir M.* Hale, *p.* 36, 37, &c.

the 25th *Edw.* III. and the latter is not. In the mean time, how ſcrupulous is the *N. B. Subject* in his Chronology, who makes the Judge tempted to deliver this Opinion in his *Pleas of the Crown*, to ſmooth over a Commiſſion that he did not accept till many Years after that Book was written? for the Commiſſion was not taken till 1653, and the Book was written in K. *Charles* the firſt's Reign, as he may ſee in the *Remarks*.

The *Natural Born Subject* mentions a MS. of the Chief Juſtice's, which yet I don't perceive he has ever ſeen; for he doth not tell us where it is to be found, nor cites any thing from it, and therefore I need ſay nothing to it.

2dly. This appeared, I ſaid, to be the ſenſe of the Statute, not only from the Opinions of the greateſt Lawyers, but alſo from the nature and deſign of the Law, which was only declarative; not to make new *Species*'s of Treaſon, but only to declare thoſe Offences to be Treaſon by this Statute, which were ſo before by common Law and Uſage. And therefore as thoſe Offences only are Treaſon by this Statute, which were ſo before by the Common Law and Uſage of the Realm: So by the *King* in this Statute, againſt whom thoſe offences are Treaſon, He only muſt be underſtood, who was King by the ſame common Law and Uſage, which I have prov'd to be the Regnant King. Upon which the *Remarker* ſays,



ſays, Mr. *H. is a bold Man to aſſert this, for I believe, he has not one Lawyer (ſince the Conqueſt, (provided he can find one Regnant King without an Hereditary Title or a Pretence to it) that will ſtand by him in this Aſſertion,* * and yet he himſelf has juſt before been oppoſing the Authority of two Chief Juſtices, *Coke*, and *Hale*, for aſſerting the ſame; and who aſſerted it, without his Proviſo, or any thing like it; and has not been able in the mean time to produce one Lawyer, unleſs it be *Prin*, a very indifferent one, that has contradicted either of them.

But, I ſaid, we ſhould eaſily be determined to this ſenſe of the Statute, when we conſider that as before this Statute, and a long time after it, the diſtinction of King *de jure* and de *facto* was not known: So the Regnant King only could be King in this Statute, ſince there was no other King but He: Others indeed ſometimes pretended a better Right to the Throne, than the Prince that poſſeſs'd it; but they never aſſum'd the Regal Title, nor did their Adherents ever give it them, nor the Hiſtorians who wrote in thoſe Times or of them, and of this I have given ſeveral Inſtances.

* *Remarks p. 67.*

The *Remarker* talks of *the Right Heirs not aſſuming the Regal Title, becauſe in Dureſs* p. 52. and ſays, *there are Caſes when a Man dare not ſay, his Soul is his own*, p. 69. What does the *Remarker* mean? Was this the Caſe of *Robert* Duke of *Normandy*, when he claimed either againſt his Brother King *William Rufus*, or *Henry* I? Of *Maud* when ſhe claimed againſt King *Stephen*, and had him for ſome time in real Dureſs? Of *Arthur*, againſt King *John?* Which were the very Inſtances I gave. Were not theſe Sovereign Princes in Poſſeſſion of large Territories, and *Maud* the Wife of a Sovereign? And were not every one of them, in their times, at the Head of powerful Armies, when they ſet up their Claims? But in *Utopia*, it ſeems, this is to be in Dureſs. But to bring the *Remarker* thence into *England*, what hinder'd theſe Claimants from taking the Regal Title, when they invaded the Kingdom with ſtrong Armies? Was it not becauſe they knew, that the Realm knew but one King, who was the Regnant King? and who therefore, as I ſaid, muſt be the King in this Statute, ſince there was no other King but He.

The learned and ingenious Eccleſiaſtical Hiſtorian, whom I have ſo often cited, when he comes to the Reign of King *Stephen*, makes



makes it the Reign of *Maud*, and dates all the occurrences of that Time by the Years of her Reign, until the Compromiſe betwixt *Stephen* and her Son *H.* I. But in this he ſtands alone without any Authority either ancient or modern, nay, againſt the Authority of all the ancient Hiſtorians from whom he collects the Hiſtory of this Reign, who conſtantly call it the Reign of King *Stephen*. A ſtrong Preſumption, that this Author's notion of Government was no more known to the Writers of that Time, than *Maud*'s Reign was. Why did he not alſo make it the Reign of King *Edgar Atheling*, and not of King *William* I? Of King *Robert*, and not of King *William* II. or King *Henry* I. before the Compromiſe made with his two Brothers ſucceſſively? Why not the Reign of King *Arthur*, and not of King *John?* Of Queen *Eleanor*, and not of King *John*, or King *Henry* III. until *Eleanor*'s Death? *&c.* He had as much Authority and Reaſon for this Change in all thoſe Reigns, as in that one in which he has made it.

But to return to the *Remarker*, who produces ſome Inſtances to prove, that Treaſon may be committed againſt a King out of Poſſeſſion. As it was by the Murderers of King *Charles* I. and others that were executed, and pardoned for Treaſon againſt

King *Charles* II. tho' out of Poſſeſſion. * But I do not ſee how theſe Inſtances are to his purpoſe; for it is certain King *Charles* I. was both King *de jure* and *de facto* too: And therefore the Lord Chief Baron *Bridgeman* ſaith to *Cook* the Regicide, *King* Charles *was owned by theſe Men and you as King, you charged him as King, and you ſentenced him as King, you proceeded againſt him as King, and as yet King.* *

As for the Caſe of King *Charles* II. tho' he was not in Poſſeſſion, yet there was no King in Poſſeſſion againſt him; and therefore he did, what *Edward* IV. durſt not, aſſume the Regal Title before he was in Poſſeſſion, and dated the beginning of his Reign from his Fathers Death, and call'd the Year of his Reſtoration, the 12th. Year of his Reign. Whereas *Edward* IV. did not aſſume the Regal Title till the 4th. Day of *March*, on which he took Poſſeſſion of the Throne with the conſent of the States; from which Day, and not from the Day of his Fathers Death, he began the Date of his Reign. Nay, *Henry* VI. himſelf who had before been almoſt 39. Years in Poſſeſſion, doth not, upon his *Readeption*, reckon the 10 intermediate Years of *Edward* the IVth's

* *The Trial of the Regicides, p.* 146.
* *Remarks p.* 69, 70.

Poſſeſ-



Poſſeſſion, as part of his own Reign; and therefore in the Year Books, the Date runs thus; *Anno ab inchoatione Regni Henrici VI quadrageſſimo nono, & Readeptionis Regiæ poteſtatis primo*, and not *Anno Regni Henrici ſexti quadrageſſimo nono.*

As to the caſe of the Murderers of *Edw.* II. who were put to Death for Treaſon, tho' he was out of Poſſeſſion, Sir *Edw. Coke* ſays, *it appeareth by* Briton *to compaſs the Death of the Father of the King is Treaſon, and ſo was the Law holden after that; for after* Edward *II. had diſmiſſed himſelf of his Kingly Office and Duty, and his Son by the Name of* Edward *II. was crowned, and King Regnant, thoſe curſed Caitifs,* Thomas Gourney *and* William Ocle, *and others were attainted of high Treaſon for murthering the King's Father, who had been King by the Name of* Edward *II, and had judgment to be drawn, hang'd and quartered; the like judgment was given againſt Sir* John Matrevers *Knight, and others as being guilty of the Death of the King's Uncle* Edmund *Earl of* Kent, *which at that time (being ſo near of the Blood) was by ſome alſo holden Treaſon: But now this Act of the 25th.* Edward *III. hath reſtrained High Treaſon in caſe of Death* la nôtre Seignior le Roy la-

compagnie, & al eigne fitz & heire le Roy. Inſtit. Pt. 4. c. 1. p. 7.

The *Remarker* proceeds to the famous Statute of the XI. of *Henry* VII. chap. 1. and ſays, *I might ſend* Mr. *H. and his Friends to a Book entitl'd, Animadverſions upon the Modern Explanation* of the 11. of *Henry* VII. *chap.* 1. *or* &c. *and to the Caſe of Allegiance to a King in Poſſeſſion*, * &c. The firſt of theſe Books is little more than an Abridgment of the ſecond, and I do not know any thing conſiderable in either, but what was, or might be anſwer'd from the *View*. Some of the moſt conſiderable Arguments in both were anſwer'd there, without mentioning the Books in which they were urged, which I thought the civileſt way, and to give a true Account of the Engliſh Conſtitution ſupported by Law and Hiſtory, I took to be the ſhorteſt way of anſwering the reſt.

That, the King who is in Poſſeſſion of the Throne, and the full Adminiſtration of the Government and Laws, with the conſent of the Eſtates and a Recognition of Parliament, is the King for the time being, to whom this Statute declares Allegiance is due,

* *Remarks p.* 72.

and



and ſecures the Subject in the Diſcharge of it, was the *Ancient* Explanation of this Statute; and if the Arguments of this Author's Book had not been otherwiſe anſwer'd, the Title alone which calls this a *Modern Explanation* (whilſt his own is in truth the *Modern*) was ſufficient to ſhew how much he was miſtaken in the Controverſy. If this *Explanation* of the Statute obtain'd ſince the Revolution only, why did he not give us the Opinions of elder Lawyers for that which he would have paſs for the Ancient Explanation of it? Which had been the only way to have made good the Title of his Book. But indeed, it was not poſſible for him to give us the Opinions of Lawyers, which they themſelves had never given.

And to ſhew this was not poſſible for him, I'll briefly repreſent the Traditionary ſenſe of the Lawyers upon this Queſtion. And we need go no higher than the Reign in which this Statute was made, when the Judges, as I have obſerved, upon *Henry* the VIIth's coming to the Throne, unanimouſly deliver'd it as a Maxim of the Law of *England*, that *the Crown takes away all Defects and Stops in Blood*, which Maxim being at common Law, as it were, the Counter-part to this Statute, ſhews, that this

Statute

Statute and the Explanation of it which he calls *Modern*, was the Law of *England* before this Statute was made.

In *Henry* VIII. Reign the Conference abovemention'd, betwixt Sir *Thomas Moor*, who had been Lord Chancellor, and *Rich*, who was then Sollicitor General, is a ſufficient Evidence, that thoſe great Lawyers, howſoever they differ'd in another Point, yet agreed in this, that the Regnant King with a Parliamentary Authority, was entitled to the Allegiance of the Subject.

In Queen *Mary*'s Reign we have the Opinion of the Lord Chief Juſtice *Brook*, who recommends his Abridgment of *Bagot*'s Caſe with a *Nota* (that contains much the ſame Doctrine at common Law, which is declared and enacted in this Statute,) and no Lawyer in that, or any other Reign ſince, has ſo ſo much as put a *Query* upon it.

In Queen *Elizabeth*'s Reign, we have Sir *Nicholas Bacon*, her Lord Keeper, aſſerting in Parliament the aforeſaid Maxim, which, as I have ſaid, was at common Law the Counterpart to this Statute, and the Queen and Parliament proceeding agreeably to his judgment.

In the Reign of King *James*, we have that Lord Keeper's Son, the Lord Chancellor *Bacon*, who at the ſame time that he gives this



this Explanation, gives the higheſt Character of the Statute it ſelf.

In King *Charles* I. Reign, we have the Lord Chief Juſtice *Coke*.

And in King *Charles*. II. Reign, the Lord Keeper *Bridgeman*, and Lord Chief Juſtice *Hale*, all bearing Teſtimony to the Authority of the Law, and to this Explanation of it; which had the Animadverter conſider'd, he certainly would never have call'd it the *Modern Explanation* in the Title of his Pamphlet, and poſſibly never have publiſhed his Pamphlet at all.

As to the Objection againſt the Title of *Henry* VII. the Legiſlator, which is inſiſted on by the *Remarker*, and the *Animadverter on the Modern Explanation*, if there needs any further Anſwer than what has been already given in the *View*, Mr. *Collier* will give it, and I hope, conclude the *Animadverter* at leaſt by what he ſays: * *As to* Henry *VIIths Birth, it may be obſerved, that he was deſcended from a younger Branch, and that the Houſe of* York *ſtood foremoſt in the Succeſſion: But if his Title appears queſtionable upon this Score, the Quee*n *by her Acquieſcence ſeems to have*

* *Eccleſiaſtical Hiſtory in H. VII. p.* 703.

*dropt*

*dropt her Claim, and transferr'd her Right to him*, ſaith Mr. *Collier*. Nay, we find that after her Death, *Henry* VII. quietly enjoyed the Crown according to the Act of Settlement made in the firſt Year of his Reign.

The *Remarker* here, as well as in other Places, ſometimes repeats their Objections without adding any new Force to them, or diſarming my Anſwers of their Force, and ſometimes without ſo much as taking any notice of my Anſwers; particularly that which has been eſteemed the moſt conſiderable Objection againſt this Statute, the Duke of *Northumberland*'s Caſe, which was fairly and fully anſwered in the *View*, p. 67, 68, 69, he has, without taking notice of any of my Anſwers, urged anew, * as if there had been nothing ſaid to it.

And therefore, inſtead of reinforcing my former Anſwers to the Objections againſt this Statute or this Explanation of it, I ſhall only deſire the Reader to give himſelf the Trouble to read them in the ‖*View*, and with them the Statute it ſelf, which I ſhall print at the end of this Defence, † becauſe I have met with ſome, who have taken upon them

* *Remarks p.* 78.
† Appendix Numb. IV.
‖ *View p.* 65, 66. *&c.*





to judge of this Queſtion, without ever ſeeing that Statute.

The *Remarker* gives this Law hard Names, ſaying, *it is a very ridiculous Act, if deſign'd to be perpetual*, p. 79. and that *the Conſtitution, if Mr.* Hs. *Notion be allowed to be good, is not only the moſt ridiculous, but moſt unrighteous and pernicious Conſtitution in the World, p.* 7. Not to obſerve here, what the Reader may obſerve in ſeveral other places of this Writer, that he, as well as ſome others, takes both Mr. *Hs.* Notion and the Law by halves; but in Anſwer to the hard Names that he gives this Law, I need only ſhew, that the Lord Chancellor *Bacon*, who was one of the greateſt Men of his Age, and who lived under a Prince of an undoubted Title, had a very different notion both of the Juſtice and Wiſdom of this Act of Parliament. He ſays, *it was agreeable to reaſon of State, and to good Conſcience too, That the Spirit of this Law was pious and noble, juſt and magnanimous.* But how great a Man ſoever my Lord *Bacon* was, he may not be of ſo great Authority with the *Remarker*, as a Writer of his own ſide: And ſince he has recommended one of that Anthors's Tracts to my Peruſal, I ſhall recommend to him a later, and, I think, a better Piece that came from the ſame Hand,

where the *Remarker* will find a Character of this Statute, very different from that which himſelf has given of it. After this Author had taken notice of the Severities of ſome former Revolutions, which yet he ſays, had been only againſt Men who had been in Arms, and not the thouſandth part of them neither, much leſs of any others, and that by way of Attainders; he adds, *and even theſe Severities were thought by* Henry *VII. and his Parliament ſo harſh and cruel, ſo contrary to Reaſon and Humanity, againſt all Law, Reaſon and good Conſcience, as the Act expreſs'd it, that they did all that Men and Law could do to put a final End to it, that ſuch Proceedings and Practices might never more be ſeen in the Engliſh Nation. This is that famous Statute,* (11. *Henry* VII. c. 1.) *which expreſly provides, that from henceforth no manner of Perſon or Perſons that attend the King for the Time being in his Wars, or act by Commiſſion from him, be in no wiſe convict,* &c. *This is certainly the utmoſt Proviſion of Law, and 'tis impoſſible, that any ſtronger can be made by Men. And whatſoever other Conſtructions may be made of this Statute, 'tis evident that thereby all violent Exceſſes of Revolutions are not only reſtrained, but perfectly taken away; that however it may happen in the Field, and in the Heat of*



*of War, yet that no after Ravages ſhould be committed, and Men ſhould not be deſtroyed by Law who had eſcaped the Sword. I need not reflect, how ſuitable this Law is to the mutable Eſtate of Mankind, and the Viciſſitudes that conſtantly accompany all humane Affairs.* * This Author wrote this Book with a Temper, which I could wiſh for their own ſakes the *Remarker* and *Natural Born Subject* had imitated.

## CHAP. V.

*A Defence of the Fifth Chapter of the View, wherein the Objection from the Act of Recognition,* 1. Jac. *I. is anſwer'd.*

IN the fifth Chapter of the *View* I anſwer'd the Objection of the Virtual Repeal of the 11. *Henry* VII. Chap. 1. by the 1. *Jac.* Ch. 1. And yet the *Remarker*, who thinks this Statute 1 *Henry* VII. ch. 1. was *virtually, if not actually repealed by the* 1. Jac. *I.* p. 79. ſays, it *was null and void in itſelf, p.* 87. But certainly if it was repealed, it was in Force before it was repealed; and therefore not null and void in it ſelf: Or if it was null in itſelf from the time it was

* *The preſent State of* Jacobitiſm. *A ſecond part in Anſwer to the firſt. p.* 12, 13.

enacted

enacted by King *Henry* VII. it could not be repealed above 100 Years after by his great Grandſon K. *James* I. But the pretended Nullity, and imaginary Repeal of this Law, as well as the real Contradiction betwixt theſe two, are all the *Remarker*'s own.

And yet the *Remarker* is ready to yield all that is inferr'd from the 11 of *Henry* VII. *if we had*, ſaith he, *a Law wherein it was declared and enacted, that ſuch a one* (he is ſpeaking of a King that is not the next Heir) *was to be King to all Intents and Purpoſes.** Is not the 11th of *Henry* VII. ſuch a Law? And why then is this Law null in it ſelf, any more than that Law would be? And why will not this juſtify the Subjects, as he grants that would, when it is to all Intents and Purpoſes ſuch a Law, as that which the *Remarker* ſuppoſes would not be null, but would juſtify the Subjects in recognizing ſuch a King.

The reſt of his *Remarks* on this Chapter of the View are ſo confuſed perplexed and inconſiſtent, that they want no other Confutation. But becauſe he lays a great ſtreſs upon one of them, it ſhall be particularly conſider'd. *To ſhew* ſaith he, *that*

* *Remarks p.* 85.

*King*



*King* James *I. was Rightful Heir, the Act of Recognition does not ſay, that he was Rightfully deſcended of* Henry *VII. but of* Margaret (mark that) *who was rightfully deſcended from* Elizabeth *Daughter of* Edward *IV.* * The *Remarker* here uſes too great a Liberty in deducing King *James*'s Deſcent, leaving out ſome Words, and putting in others, which are not in the *Act*: For the Act doth expreſly derive his Deſcent from K. *Hen.* VII. his Grandfather (tho' he ſays it doth not) as well as from Queen *Elizabeth* his Grandmother; and doth not affirm, (as he ſays it doth) that the Lady *Margaret* was any more rightfully deſcended from Queen *Elizabeth*, than from King *Henry* VII. This Act of Recognition takes notice of the Happineſs of this Kingdom firſt in the Union of the Two Houſes of *York*, and *Lancaſter*, and then in the Union of the Two Kingdoms of *England*, and *Scotland*, in the Kings Perſon, † *who*, as it follows in the Act, *is lineally, rightfully, and lawfully deſcended, of the Body of the moſt Excellent Lady* Margaret *Eldeſt Daughter of the moſt renowned King* Henry *VII.* (let the Remarker mark this) *and the High and*

* *Rom. p.* 82. † *See the Act of Recognition* 1 *Jac. c.* 1.

*Noble Princeſs Queen* Elizabeth *his Wife, Eldeſt Daughter of King* Edward *IV. the ſaid Lady* Margaret *being Eldeſt Siſter of King* Henry *VIII. Father of the High and Mighty Princeſs of famous Memory,* Elizabeth *late Queen of* England. Indeed, according to the *Remarker's* Hypotheſis, King *James* I. Deſcent ſhou'd have been derived by the Lady *Margaret*, only from Queen *Elizabeth* Eldeſt Daughter of King *Edward* IV. by her Huſband *Henry* Earl of *Richmond*; and the Act ſhould not have ſaid, that King *James* was Rightfully deſcended of the Lady *Margaret* Eldeſt Daughter of the moſt renowned King *Henry* VII. *&c.* And therefore the *Remarker* agreeably to his Hypotheſis, ventures to affirm that the Act doth not ſay ſo, whereas we ſee the Act doth as much ſay that he was Rightfully deſcended from K. *Henry* VII. as from Queen *Elizabeth* that King's Wife, ſince it expreſly affirms *that he was Rightfully deſcended of the Body of the moſt Excellent Lady* Margaret, *Eldeſt Daughter of the moſt renowned King* Henry *VII. and the High and Noble Princeſs Queen* Elizabeth *his Wife.* And the *Remarker* may find in *Lethington* the Scotch Secretary's Letter to Sir *William Cecil*, that the Houſe of *Scotland* inſiſted on their Claim to the Crown of *England*, as being



being the Eldeſt remaining Iſſue of King *Henry* VII. *

I ſaid, in Concluſion, againſt this imaginary Repeal of the 11. of *Henry* VII. by the 1 of *James* I. C. 1. that the greateſt Lawyers in the Kingdom have declared ſince that *Act* of Recognition, that Allegiance is due to the King in Poſſeſſion, and have ſupported their Opinions by the 11. of *Henry* VII. and therefore did not believe it Repeal'd by the 1. of *James* I. *And have not as good Lawyers declared the contrary?* ſaith the *Remarker.* † If they have, it would have been of Service to his Cauſe to have named ſome of them, as I have named Lawyers in the next Chapter, who have not believed this Statute of King *Henry* VII. Repeal'd by the Act of Recognition of King *James* I. But the *Remarker* had a good reaſon why he did not Name his ſeveral good Lawyers, and I Challenge him to Name one good Lawyer, who has maintain'd this Chimerical Repeal, which brings me to the Sixth Chapter.

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* *Appendix to the* 1 *Volume of the Hiſtory of the Reformation.*
† *Rem. p.* 90.

## CHAP. VI.

*A Defence of the Sixth Chapter, wherein this Account of our Conſtitution and Laws was ſupported by the Opinions and Authorities of ſome of the greateſt Modern Lawyers, who Liv'd in the Reigns of Hereditary Kings, and, the Caſe of the Oaths reſolved from this Account of our Legal Conſtitution.*

HAving, as occaſion ſerv'd, given the Opinions of great Lawyers and Judges of Elder Reigns, I proceeded in this Chapter to the Opinion of great Lawyers of later Reigns, whereby it appeared that the greateſt Modern Lawyers Entertain'd the ſame Notion of our Conſtitution with the Antient; and have perfectly agreed with them in this great Point of Law, concerning the Authority of the King for the time being, and the Allegiance of the Subject, which is due to him. And here I produced the Opinions of ſuch only as Flouriſh'd ſince the *Act of Recognition* of King *James* I. to ſhew alſo, by the way, that they who Liv'd ſince that Act, have had the ſame Notion of our Conſtitution in this matter, with thoſe that Liv'd before it. And even amongſt theſe, I produced the Opinions of ſuch only as Liv'd under Hereditary



ditary Kings, as of the Lord Chancellor *Bacon*, and Lord Chief Juſtice *Coke*, in the Reign of King *James* I. of the Lord keeper *Bridgeman*, and Lord Chief Juſtice *Hale*, in the Reign of King *Charles* II. where there was no Temptation to Byaſs them on that Side of the Queſtion, and as theſe great Lawyers deliver'd this for the Law of *England*, ſo, I ſaid, no Lawyer of Note has ever contradicted them in thoſe Reigns, where they might have done it with Safety and Advantage.

What ſaith the *Remarker* to this? Does he deny theſe were great Lawyers? That he does not. Does he deny theſe were their Words which I cited? Not that neither. Has he produc'd any Lawyers of Note that have contradicted them? Not one, except his Friend Mr. *Prin*, who need not be excepted out of that Number. What then doth the *Remarker* ſay. *Why*, he ſays, *he doth not think, whatever Mr.* H. *may do, Lawyers to be the beſt Caſuiſts, and knows but too well, that what is Law in one Judges Time, is not ſo in another.* * If that were true in ſome Points, yet I hope He'll allow, That to be Law, which has been held for ſuch in all

* *Rom. p.* 92.

Judges Times, and which he cannot ſhew has been contradicted by any Judges at any Time, which is the Caſe of this Point of Law before us. I never ſaid, *Lawyers were Univerſally the beſt Caſuiſts*, I think Divines much better, only where the Caſe of Conſcience depends, as it doth here, on the Caſe in *Law*, he that is the beſt Lawyer, is certainly the beſt Caſuiſt.

One would wonder what this Writer has been doing, in making a Book of *Remarks*, chiefly upon the Opinion of Lawyers, and the Senſe of our Laws, whilſt he has ſo mean an Opinion of both. Whenever he is preſs'd Home, he cry's out both againſt the Lawyers and the Laws. If I cite the common Laws of the Realm; they are *my Old Cuſtoms*, *Muſty Year Books*, p. 8. and the *pretended Authorities of the Year Books*, p. 32. If I cite the Reſolutions and Opinions of the greateſt Judges and Lawyers: *Then Lawyers are not the beſt Caſuiſts*, p. 92. *Lawyers are but private Men and fallible, and their Opinions are but private Opinions, and ſo of no Authority on either Side*, p. 90. If I cite Acts of Parliament; *they are Null and Void in themſelves*, when they are againſt him, *p.* 87. It is no News, I ſuppoſe, to the Reader, that the *Natural Born Subject* has as little regard for the Laws. If it is, he may take this Paſſage



Paſſage for a Specimen of his regard to them, where this Writer arguing, in his way, on the Statute of *Henry* VII. ſaith, *there were always ſuch Fools as thought an Act of Parliament a great matter on their Side.* *

Theſe Paſſages would give an impartial Reader a Suſpicion, that, when Men are ſo much againſt the Lawyers and the Laws, they are a little Conſcious to themſelves, that the Lawyers and the Laws are againſt them; and that, whilſt they are putting in their Exceptions to the Antient Cuſtoms of the Realm, to the Year Books, to the Opinions of Lawyers, to the Reſolutions of Judges, and to Acts of Parliament, they would leave us no other way to Learn what is Law, but from their Hypotheſis.

I need add nothing, to what is ſaid in the View, concerning the Oaths; for ſince the Oaths are appointed by Law, and muſt therefore be interpreted according to Law, the Points in Law being once Eſtabliſh'd, the Lawfulneſs of taking the Oaths follows as a Concluſion from it's Premiſſes.

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* *Letter p.* 90.

## CHAP. VII.

*A Defence of the Seventh Chapter of the* View, *that our Laws, in this Point, are not contrary to the Holy Scriptures, and the Doctrine of our Church, but rather agreeable to both.*

THE Law-point, being thus Eſtabliſhed, was, I ſaid, a ſufficient Direction for Conſcience in matters of Civil Obedience, ſo long as there was nothing in it contrary to the Law of God. Here then the *Remarker*, and *Natural Born Subject* ſhould have tried their Strength, and ſhewn that our Laws, in this Point, are contrary to God's Laws. This was the Place to have proved, what one of them does plainly, and I think both of them do ſuppoſe, that there is a certain Form of Civil Government and of Succeſſion to it, of Divine Inſtitution, and if they had done this, they had, I confeſs, effectually anſwered the *View*; ſince no Human Laws can Preſcribe againſt a Divine Inſtitution. In the mean time, whilſt they only beg the Queſtion, which they have not ſo much as attempted to prove here, and by what has been attempted elſewhere, I am ſatisfied, they never can prove, the Poſition of the *View* does ſtand, and is like to ſtand good,



good, that the Conſtitution, and our Obedience according to it, is ſufficiently vindicated, if there is nothing in it contrary to the Law of God: for then the Laws of the Kingdom (which the Divine Law Commands us to Obey,) do, as I ſaid, bind our Conſciences as Subjects; and we are not only warranted, but obliged to pay our Obedience, as the Law directs.

This was ſufficient for my purpoſe, that our Conſtitution, as I repreſented it, was not contrary to God's Law. However, I ventured a ſtep farther, that our Laws, by requiring Obedience to the King in Poſſeſſion, are agreeable to the Holy Scriptures, according to our Saviours Reſolution of the Lawfulneſs of Subjection to the Roman Emperor *Tiberius*, becauſe he was in Poſſeſſion of the Government. This theſe Authors grant was our Saviours Reſolution, but they are in the mean time, for giving other Reaſons for the Subjection of the Jews to the Romans, *i. e.* they are for giving Reaſons, which our Saviour did not give, and which therefore I need not conſider; ſince our Lord did not here determine the Lawfulneſs of Subjection to the Roman Emperor, for any of thoſe Reaſons which they ſuppoſe, but for this one Reaſon which he gave, (as they themſelves can-

cannot deny,) namely, that he was in Poſſeſſion of the Government.

I cannot but, by the way, take notice, that this Command of our Bleſſed Saviour to the Jews, to be Subject to the Roman Monarchy, which was Elective, is an Invincible Argument againſt thoſe, who maintain, that which is call'd, the Patriarchal Scheme of Government, to be of Divine Inſtitution, and obligatory to all Mankind: For had it been ſo, our Saviour without doubt, when the Queſtion was put to him about the Roman Government, and the Lawfulneſs of Submiſſion to it, would have recall'd his Hearers to the Divine Original Inſtitution, and told them, that *from the beginning it was not ſo*, that the Government under which they lived, was a Deviation from the Divine Inſtitution: As when the Caſe of Divorce was put to him, notwithſtanding the general Practice both of Jews and Gentiles, He reduced Mankind from the Deviation, to the Divine Original Inſtitution of Marriage. But ſo far was our Bleſſed Saviour from delivering any ſuch Doctrine, that He Commands Subjection to the Roman Emperor, and acknowledges his Authority was from God, St. *John* 19. 11.

I ſaid, our Church had not given her Judgment by way of an Expreſs deciſion of the Queſtion, but that the Paſſage I cited from our



our *Homilies*, favour'd our Side of the Queſtion, and if the *Remarker*, and *Natural Born Subject* are not Conſcious it does ſo, why doth the former throw in, not over decently, ſo many Abatements to the Authority *of the* * *Homilies*, and the latter ſay *the Compilers of the Homilies might think* Eleanor *was Dead?* † As if thoſe Learned Perſons, were not as well acquainted with the Hiſtory of that Age, as we, who are above a Century and half farther diſtant from it, than they were. *But they had the Pope, and the Dauphine of* France *in their* View. They might have them, and yet have King *John* and his Niece *Eleanor* in their View too. Let me ask the *Natural Born Subject*, whether, if he had Liv'd at that Time, he would have acknowledged himſelf a *Natural Subject* of King *John*, as the *Homilies* call *the Engliſh Men his Natural Subjects*? Let me ask both theſe Writers, whether they would have call'd King *John their Natural Lord, the King of* England? Whether they would have call'd the Oath, which the Engliſh Men took to him, their *Oath of Fidelity to their Natural Lord?* And whether they would, without any limitation or reſtraint

* *Remarks p.* 96, 97.

† *Letter p.* 102.

have

have condemned the Breach of it, as the Homilies do? If not, they do as good as confeſs, that theſe Paſſages do favour our ſide of the Queſtion.

## CHAP. VIII.

*A Defence of the Eighth Chapter of the* View, *that our Laws, in this Point, are agreeable to the great End and Deſign of Government.*

THat Government was inſtituted for the publick good of the Community, and the ſecurity and welfare of all the Members of it, is what the *Remarker* grants p. 97. and what he adds, *yet Care was always taken primarily of the Prince*, is what I have aſſerted too in this Chapter, and * elſewhere, and doth not in the leaſt weaken the Conſequence which I have drawn from this Principle; for if Government was inſtituted for the ſake of all the Members of the Community, it will ſtill follow, that after they have done their utmoſt to maintain their Prince in the Throne, and he happens to be

* *See View at the foot of p.* 98, &c. *and p.* 112.

diſ-



diſpoſſeſs'd, and cannot afford them any of the Benefits of Government, can neither defend Himſelf, Them, nor his Right to govern them, it is not reaſonable, that they for whom Government was inſtituted, ſhould loſe all the Benefits of it, for the ſake of him, for whom it was not, at leaſt, not primarily inſtituted.

However this Principle, which the *Remarker* ſaith, *no Body queſtions*, the *Natural Born Subject* calls *the Thred-bare Cant of the Common Wealths-men.* * The *Remarker* grants the Principle, but denies the neceſſary Conſequence of it, which, it ſeems was eaſier for him to do, than to deny a Principle, which all, who have writ reaſonably of Government, have ever allowed. But the *Natural Born Subject*, to avoid the Conſequence, is hardy enough to deny the Principle, as he does in effect, when he calls it, *the Thred-bare Cant of the Common Wealths-men*, without any regard to the great Authorities, of the Church in her Homilies, of Biſhop *Sanderſon*, *Thomas Aquinas*, and Lord Chancellor *Forteſcue*, which were produced for it. † And I deſire him to take the Reverſe of this Prin-

* *Letter p.* 103. † *View p.* 97. 98.

ciple,

ciple, and try what Proſelytes he can make to it.

I took notice, that ſome had made an ill uſe of this Argument, to juſtify the Reſiſtance of the Supreme Magiſtrate, when he does not, as they think, purſue the publick Good of the Community. But this is to abuſe the Principle, and draw a falſe Conſequence from it; and muſt therefore the *Natural Born Subject* draw another falſe Conſequence, and deny the Principle it ſelf to be True? Eſpecially when he owns at the ſame Time, that, *I have guarded againſt this falſe Conſequence*, * he ſhould have ſaid, I have ſhewn † that the Laws, which require Submiſſion, have guarded againſt it, by forbidding Reſiſtance; and that the very Reaſon of Government has guarded againſt it; for if there is not a *Laſt Reſort*, from which there is no Appeal, and againſt which there muſt be no Reſiſtance, it is not Government, but Anarchy.

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* *Letter p.* 103. † *View p.* 99, 100.

CHAP.



## CHAP. IX.

*A Defence of the Tenth Chapter of the* View, *that our Laws in this Point are agreeable to the Practice of all Mankind, particularly of Gods own People, the Jews, and the Chriſtians, of the earlieſt Ages.*

I Gave an Account of the behavior of the Jews, in their Subjection to the *Midianites*, *Moabites*, the Kings of *Egypt*, and after that ſucceſſively to the *Babyloniſh*, *Perſian*, *Grecian*, and *Roman* Empires. To which the *Remarker* ſays, *the Midianitiſh, and Moabitiſh Princes, Ruled over them as Conquerors, not as Uſurpers.* * The *Natural Born Subject* ſays, *your laſt Chapter beginning at Page* 100. *tells us to Page* 105. *That the Jews ſubmitted when they were Conquered,* † (after I had proved it again Lawful for the Jews to ſubmit to Princes, whom it was not Lawful for them to ſet up) he ſays, *but what was this Caſe, it was only that of Conqueſt, when Strangers got the Rule over the Jews.* || So that, after all that has been ſaid on that Side, againſt the Title of Conqueſt, theſe

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* *Rem. p.* 99. † *Letter p.* 106. || *Letter p.* 97.

Two

Two Authors fall in with it, and juſtify Submiſſion on that Score.

But what does the *Natural Born Subject* mean, by ſaying, *though the Jews conſtantly ſubmitted, they as conſtantly Revolted, whenever they could get the opportunity, as you may ſee in the Hiſtory of the* Judges, *and of the* Maccabees. * Had he truly repreſented their Caſe, he would gain little by it; for if their Submiſſion was juſtifyable, their Revolt was ſtill inexcuſable. But their Caſe is very falſely repreſented; for the Jews did not Revolt under their greateſt Oppreſſions, from thoſe Strangers who got the Rule over them, but Liv'd Subject to them, till upon their Cry unto God, he particularly rais'd up and appointed them Deliverers, to whom he gave Authority to Reſcue them, as is evident from the Hiſtory of the *Judges*, to which he appeals. Thus *Ehud* † was particularly Authoriſed by God, to deliver them from the *Moabites*; and *Gideon* || from the *Midianites*, which were the Two Inſtances I gave from the Book of *Judges*. In Biſhop *Overall's* Convocation Book, it is ſaid, *the* Iſraelites *had been Eighteen Years in Subjection to the* Moabites, *as they had been a*

* *Letter p.* 97. † Judges 3. 15.
|| Judges 6. 11, 12, 13, 14, *&c.*

*little*



*little before Eight Years to the* Aramites. *They knew that it was not Lawful for them of themſelves, and by their own Authority, to take Arms againſt the Kings, whoſe Subjects they were, though indeed they were Tyrants: And therefore they* cried unto the Lord for Succor. *Who, in Compaſſion of their Servitude and Miſeries, appointed* Othoniel *to deliver them from the* Aramites; *and afterwards* Ahud *from the* Moabites. *In the Choice of which Two Judges it is to be obſerv'd, that the Scriptures do tell us that* God raiſed them up, *(and therefore it is moſt certain he did ſo,) and alſo that in ſuch raiſing of them to their Places, he made them* Saviours to his People, *(as the Scriptures ſpeak) giving them thereby Authority to Save and Redeem the* Iſraelites, *from the Tyrants that oppreſſed them; without both which Prerogatives, it had been altogether Unlawful for them to have done as they did.* * This was evident enough from thoſe Places in the *Judges*, which I referr'd to, but the *Natural Born Subject* having, as I have good reaſon to believe, a high Eſteem for the *Convocation-Book*: I thought a Citation from it might more Effectually convince him, of the Senſe

* *Page* 51. 52.

of thoſe Places, and of his Error in Point of Fact, that the *Jews conſtantly Revolted from the Strangers that got the Rule over them, when they could get an Opportunity*; and in Point of Right, that they might Lawfully do ſo; for if he did not think ſo, he had no reaſon to mention their Revolt at all.

What he referrs to in the *Maccabees*, is, I ſuppoſe, the Revolt from *Antiochus* the Great, but if he looks into the aforeſaid *Convocation-Book*, * he'll find a very different Account of that matter, from what is commonly given of it; and ſuch an Account, as will do him no Service; but if he'll not be concluded by That, the Common Account, he knows, is as little to his Purpoſe.

In Anſwer to my Argument, that it was Lawful for the *Jews* to Submit to a Stranger, though it was not Lawful for them to ſet a Stranger to Rule over them, as appeared from the Law, *Deut.* 17. 15. The *Remarker* ſays, *but if Mr.* H. *had Read on, he would have found, that they were* to ſet over them him, whom the Lord their God ſhould Chooſe. *They had nothing to do to ſet up, or pull down Kings.* † Nor did I ſay they had, and what he ſays, *ſhould have been added*, is ſo

* *Page* 67. † Remarker *p.* 87.

far



far from taking off the force of my Argument, that it adds to the force of it. For if they might not *in any Wiſe ſet a Stranger, i. e.* a Heathen *King over them, but one from among their Brethren*, and that *One whom the Lord their God ſhould chooſe*; and yet notwithſtanding this, they might live in ſubjection to *Strangers*, to Heathen Princes, who were not their Brethren, and whom the Lord their God did not chooſe; this undenyably proves, what is aſſerted, that it was lawful to ſubmit to Princes, whom it was not lawful to ſet up.

The *Remarker* goes on, *but if God for their Wickedneſs ſet a Stranger over them, they were bound to ſubmit to him, becauſe it was his doing, as it was in ſetting the Babylonians, Grecians, Romans to rule over them, to chaſtiſe them for their Idolatry and Rebellion againſt him.* * But how did God ſet the *Romans, Grecians, &c.* to rule over the *Jews*? Not by an expreſs Nomination, as he did *Saul, David*, &c. but by his Providence governing the Events of War. So indeed, and no otherwiſe, it was God's doing. And was this a ſufficient reaſon for the Submiſſion of the *Jews*? Yes, the *Re-*

* Ibid.

*marker* ſays, *they were bound to Submit to them, becauſe it was God's doing.* And what is this more or leſs, than to reſolve the Reaſon of Submiſſion into Providence, and to ſet up a Providential Title? But this was *when God ſet Princes over the Jews for their Wickedneſs, to Chaſtiſe them for their Idolatry, and their Rebellion againſt him.* And had God thus by his Providence, ſet Princes over the *Jews*, to Reſcue them from Idolatry, or to ſecure them from the danger of falling into it, would it not have been equally God's doing? And is not this the ſame Reaſon in General, which the *Remarker* gives, for their Submiſſion: And as good a Reaſon in particular, when it is for their Safety, as when it is for their Chaſtiſement? Both theſe Writers have particularly enumerated the ſeveral Anſwers that were made to Dr. *Sherlock*'s *Caſe of Allegiance*, and have loudly call'd upon me for a Reply to them, though for what Reaſon I know not, unleſs it be, becauſe I never medled with the Argument of *Providence.* How far, and in what manner the Divine Providence is concerned in Revolutions of Government, or how far it will, or will not juſtify Subjection, after the Revolution is paſſed, and the New Government Eſtabliſhed, which was the great debate betwixt the Doctor, and his Anſwerers,



rers, and which, as my Deſign did not oblige me, I never entered upon, but ſet the Controverſy entirely upon a New Foot, as I took Notice in the *View.* * If they ſtill think a Reply is neceſſary to thoſe Anſwers, which were made to *the Caſe of Allegiance to Soveraign Powers*, the *Remarker*, who has here taken up that Hypotheſis, is the only Perſon, that I know, who is obliged to give it.

I proceeded to ſhew, that the Behavior of the Primitive Chriſtians, was agreeable to that of the *Jews.* To all which the *Remarker* only ſays, *that Mr.* H. *may Conſult Biſhop* Uſher's *Power of the Prince*, *Dr.* Hick's *Jovian*, *Dr.* Sherlock's *Caſe of Reſiſtance*, *Dr.* Digg's *Unlawfulneſs of Subjects taking Arms.* † And when the *Remarker* Conſults them again, I believe he'll only find, that they have given numerous Exemples of the Non-reſiſtance of the Primitive Chriſtians to the Emperors, and Kings, under which they Lived, but not one Example of Non-ſubjection to them, on any pretence of a defect in their Titles.

The *Natural Born Subject*, ſeems to think it ſome Advantage to his Cauſe, that I ſay

* *Page* 94. † *Rem. p.* 109.

in the Three firſt Centuries, there is no other Inſtances of Diſpoſſeſs'd Emperors claiming againſt Rivals, but that of the Two *Maximini*.

But ſince, in this Inſtance, I have proved a general Submiſſion to the Emperors in Poſſeſſion, and he has not pretended to prove the Chriſtians were not comprehended in that general Submiſſion. Nay ſince *Julius Capitolinus*, who Writes the Hiſtory of the Two *Maximini*, excepts only *Capelianus* a Governor in *Africk*, and a few * Cities, as adhering to theſe diſpoſſeſſed Emperors, can we believe, if the Chriſtians had done the ſame, he would not much rather have excepted them, who at that Time, and before that Time, made a great part of the Empire, fill'd *their Cities*, *their Senate*, *their Armies*, *and all Places*, as *Tertullian* ſays, † but *their Temples*? And therefore this, tho' the only Inſtance in this Period, is a very conſiderable one.

It is Obſervable that the Author of *Jovian*, is entirely on the Side of the Emperors in Poſſeſſion. After he hath related *how the Army in* Africk, *upon hearing* || *of the barba-*

* Paucæ civitates fidem hoſti publico ſervaverunt. Julii Capitolini Maximini Duo.

† Apologet. c. 37. || *See* Jovian *p.* 34. 35.





*rous Pride and Cruelty of the Emperor* Maximinus, *brought the Purple to the Proconſul* Gordianus *and made him Emperor, and how the Senate at* Rome *out of hatred to* Maximinus, *Confirm'd the Choice of the* African *Souldiers, and declared* Gordianus, *and his Son* Auguſti, *and denounced* Maximinus, *and his Son, Enemies to the Empire*, he adds, *at the ſame time* Capelianus *in* Africk, *Rebels againſt* Gordian, that is, he Rebell'd when he took up Arms againſt the Emperor in Poſſeſſion, on behalf of the Diſpoſſeſs'd Emperor *Maximinus*, under whom *Capelianus* had been made Governor of the *Mauritania's*. For this is what *Capelianus* did, as is evident from * *Capitolinus*, and what the Author of *Jovian* here calls Rebellion.

In the Fourth, Fifth, and Sixth Centuries, I ſaid, we had ſeveral Inſtances of Emperors Diſpoſſeſs'd, and of the Chriſtians becoming Subjects to New Emperors, whilſt the Diſpoſſeſs'd Emperors were Alive; as in

* Sed *Gordianus* in *Africa* primùm à *Capitolino* quodam agitari cæpit, cui Mauros regenti ſucceſſorem dederat. Tunc *Capelianus* Victor pro *Maximino*, omnes *Gordiani* partium, motu partium in *Africa*, interemit, &c. *Julii Capitolini, Maximini duo.*

the Caſe of *Licinius*, and *Conſtantine* in the Fourth; of *Zeno*, and *Baſiliſcus* in the Fifth; and of *Juſtinian*, and *Vitiges* in the Sixth Century.

What doth the *Natural Born Subject* mean, by ſaying, that theſe *Diſpoſſeſs'd Emperors, who had no Right but Poſſeſſion, loſt their Right with their Poſſeſſion*, * when they had the ſame Right that any of their Predeceſſors had, or Succeſſors either? Or, by ſaying that theſe *Caſes are Forreign to an Hereditary Monarchy*, † when we are not ſpeaking of the Heirs or Sons of Emperors, but of Diſpoſſeſs'd Emperors themſelves? And when he cannot ſay, if the Empire had been Hereditary, that their Heirs would have had better Pretenſions after their Fathers Deaths, than theſe Diſpoſſeſs'd Emperors, though Elective only, had during their Lives.

The *Remarker* alſo may Obſerve, as a further Anſwer to what he has advanced *p.* 87. that here are Inſtances of Emperors that did not ſubmit, but claimed and made War after their Diſpoſſeſſion, which he might have obſerved alſo in ſeveral other Inſtances that I gave, where the *Jews* notwithſtanding

* *Letter p.* 106. † *Ibid.*

be-



became Subjects to the Princes in Poſſeſſion.

I ſaid this had been the Practice of all Mankind, as well as of the *Jews* and Chriſtians, upon Revolutions to ſubmit to New Governments after they were Eſtabliſh'd.

The *Remarker* ſaith, *if he ſhould follow me in Revolutions that no way Concern us, he is Confident he ſhould find them much more favourable to his Point, than mine.* * But he muſt firſt follow me in thoſe Revolutions, before he can have any Grounds for this Confidence, and when he ſhall do ſo, and take a ſurvey of the Behaviour of all the Nations of the World, upon Revolutions both in former and later Ages, he'll ſee Reaſon to abate of his Confidence, and confeſs his Miſtake. He'll find that upon theſe Events, the great Queſtion has been, not, whether they ſhall Submit or no? But whether they ſhall obtain good Terms upon their Submiſſion, and preſerve their Antient Immunities and Privileges, under their New Maſters? Let Subjects preſerve an Inviolatible Fidelity to their Prince, and do their utmoſt to preſerve him in his Throne, and then, if after they have run the greateſt hazards for him,

* *Remarker p.* 88.

he

he happens to be Diſpoſſeſs'd, neither their Prince, the World, nor their own Conſciences can Reproach them, if they Endeavor to preſerve the Community and themſelves. And if ſome will be Singular in their Behavior, and inſtead of calmly conſidering the Nature and Ends of Government, and the Viciſſitudes, to which it ever hath, and from the Luſts and Paſſions of Men, ever will be expoſed, will frame Schemes of Government without Authority, either from Scripture, or the Laws of their Country, that are ſo far from promoting the great Ends of Government, that they would render That, which was Deſign'd for the Eaſe, Security, and Welfare of Mankind, to be a Snare, a Rack, and oftentimes Ruine to them, under thoſe Viciſſitudes which ſo frequently happen. If Men I ſay, will frame ſuch Schemes, they may I think be modeſtly contented to Practice upon them themſelves, and not raſhly to Cenſure (as theſe Two Authors do) all who differ from them, which is almoſt all Mankind.

CHAP.



## CHAP. X.

*Reflections on ſome of the Errors of the* Natural Born Subject, *and on his Oppoſition to the* Remarker *in ſome Points.*

AS theſe Two Authors Arguments and Errors are generally the ſame: So what has been ſaid to the one, is commonly a Reply to the other, as well as to what is Material in the *Extract of Prin's Plea*: Yet becauſe I have taken more Notice of the *Remarker*, than of the *N. B. Subject*, I ſhall beſtow ſome Conſiderations upon him in Particular.

To complain of his Miſrepreſentations, or to take Notice of all his Miſtakes in Hiſtory, would be almoſt endleſs: I ſhall therefore only Animadvert on ſome of his Miſtakes, about the Thirteen Kings, from the Conqueſt to *Henry* VIII. who I ſaid came to the Throne without Hereditary Titles. And to make me miſtaken in the Number, he takes it Excluſively of *William* I. and *Henry* VII. the firſt and laſt King in that Period. Whereas it is plain, I included them in this Number, otherwiſe there could not be Thirteen, who came to the Throne without, and Six, with Hereditary Titles, as I affirmed there did in that Period: A leſs haſty Writer would have given himſelf the Leiſure to have counted Nineteen, rather than

than have made a Miſtake, by Endeavouring to Charge his Adverſary with one. He therefore begins with *William* II. and ſays.

*But* Robert *the Eldeſt Son of the Conqueror, contended with his Brother* William *II. for* England, *and at laſt came to a Compromiſe with him, to have it after his Death.* * And is it ever the leſs True, that *William* II. came to the Throne without an Hereditary Title, becauſe there was a Compromiſe afterwards; which Compromiſe this Author entirely Miſtakes, when he ſays that by it, *Robert* was to have the Crown after *William's* Death: For by the Compromiſe *William's* own Son's, were to have it after his Death; only in Caſe he ſhould leave no Son, *Robert* was to ſucceed him in the Kingdom of *England*; as *William* was to Succeed *Robert* in the Dukedom of *Normandy*, in Caſe he ſhould Dye without a Son. Which is Evident from the Terms of the Compromiſe, as it is tranſmitted to us by the Arch-deacon of *Huntington*, † *Roger de Hoveden*, ‖ and *Hemingford.* *

* *Letter Page* 36.

† Rex fecit concordiam cum fratre ſuo. Statuerunt, ſiquis eorum moreretur prior alrero ſine Filio, quod alter fieret hæres illius, *Hen. Huntindon* Hiſt. L. VII. *p.* 213.

‖ Inter ſe conſtituerunt ut ſi Comes (*Sc. Robertus*) abſque Filio legali matrimonio genito moreretur, hæres ejus fieret Rex (*Sc. Willielmus junior*) ſimilique modo ſi Regi contiJuiſſet mori, hæres illius fieret Comes. *Rogeri* de *Hovedẽ* Annal, *Pars*, I. *p.* 265. * Hemingford ad An. 1090.

The



The *Natural Born Subject* goes on, *he made the like Compromiſe with his Brother* Henry *I. who Marry'd the Heireſs of the Saxon Time*, Edgar Atheling *having before ſubmitted.* * Not the *like* Compromiſe, as he has miſrepreſented it, but the like Compromiſe as I have related it, from our Ancient Hiſtorians: For by the Terms of it, *Robert* was not to Succeed *Henry*, as the *Natural Born Subject* Imagines, but his own Sons: But if he ſhould Dye without a Son, then *Robert* was to Succeed him in *England*, as he, in the like Caſe, was to Succeed *Robert* in *Normandy*; as the *Compromiſe* is given us in the *Annals* of *Waverley*; † and by *Henry* of *Huntington.* ‖

In theſe Three Lines he commits another great Miſtake, when he ſays *Henry* I. *Married the Heireſs of the Saxon Line.* He Married indeed *Maud* the Daughter of *Margaret* Queen of *Scotland*, Siſter to *Edgar Atheling*. But for *Maud's* being the Heireſs

* *Letter* Ibid.

† Quod Conſul unoquoque Anno tria mille, marcas argenti ab *Anglia* haberet, & qui diutius viveret foret Hæres alterius, ſi alter ſine recto hærede moreretur. Annal Traver. 1001.

‖ Quod *Robertus* unoquoque Anno tria mille, marcarum argenti haberet ab *Anglia*, & qui diutius viveret, hæres alterius eſſet ſi alter abſque Filio moreretur.

of

of the Saxon Line, I believe he has no better than *Almanack Authority*, for in the Chronological Tables of our Kings in ſome *Almanacks*, I have ſeen this Remark upon *Henry* I. Marriage, *The Saxon Line reſtored.* But had the *Natural Born Subject* known, as he eaſily might, that *Maud* * had Four Brothers, *Edgar*, *Alexander*, *David*, and *Edward*, (of † whom *Edgar*, *Alexander*, and *David* were ſucceſſively Kings of *Scotland*, and that the Race of the Scotiſh Kings were deſcended from † *David*,) he would never have made *Maud* an Heireſs. For tho' he Streins his Hypotheſis, I think, to make a Daughter an Heir to a Crown, yet he will I doubt not Confeſs his Miſtake, in making *Maud* the *Heireſs of the Saxon Line*, now he knows ſhe had Four Brothers. Here I might ask this Author (ſince he ſometimes doth not allow Ceſſion, to transfer the Right to a Crown,) when the Right to the Engliſh Crown, was Extinguiſhed in the Heirs of the *Saxon* Line, of the Houſe of *Scotland*? And when our Kings of

* *Henricus* majores natu *Anglia* congregavit *Londoniæ*, & Regis *Scotorum* Malcolmi & *Margarete* Reginæ, Filiam *Matildem* Nomine, ſororem etiam Regum, *Edgari*, *Alexandri*, & *David* in conjugem accepit. *Roger* de *Hoveden*, Page 268. *b.* 270. *a.* &c.

† *Simon* of *Durham* Names Six Brothers of *Maud.* Inter Decem Scriptores, *p.* 202.

*England*



*England* upon his Principles commenced Rightful? Or whether ever before King *James* VI. came to the Crown of *England*? He proceeds.

*And* Stephen *the Uſurper made the like Compromiſe with* Maud *the Empreſs, Heireſs of* Henry *I. and with her Son* Henry *II. who accordingly did Succeed him.* * Now this which he calls a *Like*, was a different Compromiſe from the Two former: For by the Terms of it, *Henry* II. was immediately to Succeed upon the Death of *Stephen.* It is another Miſtake to ſay that *Stephen* made a Compromiſe with *Maud*: For he made the Compromiſe only with her Son *Henry*, and we cannot find that his Mother had any ſhare in it. The Compromiſe it ſelf is preſerved in the Tower, and is Printed by Mr. *Rymer.* † In which there is no mention of any Reſignation or Ceſſion of *Maud*, nor is there any Plenipotentiary or Agent for her, or her Huſband, the Duke of *Anjou*, amongſt the Names of thoſe that Sign'd that Agreement. How much ſoever Dr. *Brady*, in his Anſwer to the late very Learned Biſhop of *Worceſter*, was concerned to prove *Maud's* Ceſſion, being not able to produce any Teſtimony of it,

* *Letter* Ibid. † Conventiones Fœdera, *Vol.* 1. *p.* 13.

from

from any of our Hiſtorians, he is contented only to ſuppoſe it as probable. * And therefore *Maud* having never Reſign'd that we know of, either before, or after the Compromiſe, and being Alive, when her Son *Henry* came to the Throne, (and living to the Fourteenth Year of his Reign,) † he could not be ſaid to Aſcend it as the next Heir. I might laſtly take Notice, that this Author as well as the *Remarker*, are Miſtaken in the Terms of the Agreement betwixt *Stephen*, and *Henry* II. as they may themſelves be convinced by the aforeſaid Charter of || Agreement, and the Account that is given of it by *Henry* of *Huntington*, * and *Roger* de *Hoveden*. †

* *An Inquiry into the Remarkable Inſtances of Hiſtory and Parliament Records. p.* 27. 28.

† Anno 14 *Henrici* Regis obiit, Matildis Imperatrix Mater Ejus. Annal. *Waver*, 1167.

|| Sciatis quod Ego Rex *Stephanus*, *Henricum* ducem *Normaniæ* poſt me Succeſſorem Regni Angliæ, & Hæredem eum jure Hæreditario conſtitui, & ſic ei & Hæredibus ſuis, Regnum *Angliæ* donavi & Confirmavi, Conventiones, *&c. p.* 13.

* Ipſum (*Henricum Sc.*) ſiquidem Rex in Filium ſuſcepit adoptivum, & hæredem regni Conſtituit. *Hen. Huntindon, p.* 258.

† Pax *Angliæ* reddita eſt, pacificatis ad invicem Rege *Stephano*, & *Henrico* duce *Normannie*, quem Rex *Stephanus* adoptavit ſibi in Filium & Conſtituit hæredem & Succeſſorem Regni. *Hoveden, p.* 281.

*Arthur*



*Arthur* Duke of *Britanny*, ſaith the *Natural Born Subject, did Homage to his Uncle King* John, *and ſoon after Dyed.* But did not *Eleanor* Survive her Brother, and King *John* too, and Live a cloſe Priſoner to the Day of her Death? Which was in the Twenty Fifth Year of King *Henry* III. as we are aſſured by *Matthew Paris*, * a Witneſs beyond exception: ſo that *Henry* III. as well as *Henry* II. (of whom only there could be any doubt of all theſe Thirteen Kings,) notwithſtanding what this Author Imagines, did not come to the Throne as the next Heirs.

Some may ſuſpect that I have ranſackt the *Natural Born Subject's* Book, for theſe Miſtakes, to preſent them here at one View; but if they Pleaſe to turn to the latter End of the Thirty Sixth, and the beginning of the Thirty Seventh Page, they'll find them altogether, in the Order I have cited them, within the Compaſs of Twenty Two Lines: and I cannot but Obſerve, that whilſt he is ſo much in the Dark, that he Stumbles almoſt at every Step he takes, he is yet triumphing over my imaginary Miſtakes about

* Et Circa idem tempus Obiit *Alienora*, Filia *Galfridi* Comitis *Britanniæ*, in Clauſura diuturni carceris ſub arcta Cuſtodia reſervata, *Anno* 1241. *Matthew Paris, p.* 574.

 theſe

theſe Thirteen Kings, and with a more than ordinary Air of Aſſurance ſays, *was the* * *Thirteen then that Mr.* Higden *Speaks of, a Miſtake of the Printer for Three, that it ſhould have been? And I will take even theſe Three from him in the next Page, and leave his Summ Total a Naught.*

But to purſue him no farther in his Errors on this Head, and to Correct them at once, I'll ſet before the Reader a Table of theſe Thirteen Kings, in one Column; and of the Lineal Heirs, in another.

* *Letter p.* 38.

The



## A TABLE Shewing,

| *1ſt.* The Time when theſe 13 Kings came to the Throne. | *2ly. The Lineal Heirs that were Alive at that Time, and when they Dyed.* | |
|---|---|---|
| *William* I. *Anno* 1066. Brompton | *Edgar Atheling* Heir of the *Saxon* Line, ſurvived both *William* I. and *William* II. and, as is Evident from the *Annals of Waverley*, was Alive in the 6 Year of *H.* I. His Siſter *Margaret*, who Married the King of *Scotland*, beſides her Daughter *Maud* Married to K. *H.* I. had 4 Sons, of which 3 were Succeſſively Kings of *Scotland*, *Edgar*, *Alexander*, and *David*, from whom deſcended the Race of the Kings of the *Scots*. *Hoveden.* | *Malcolm* IV. |
| *William* II. *Anno* 1088. Brompton | *Robert* Duke of *Normandy* the Eldeſt Son of *Wm.* I. who after a Compromiſe with *W.* II. | *William* *Alexan.* II. *Alexan.* III. |



and

*Henry* I. Anno 1100. Brompton

and another with *Hen.* I. was upon a New Breach, and War, brought a Prisoner into *England*, where he Dyed, 1134. being the 34*th.* Year of his Brother *H.* I. Reign. Ann. *Waver.* *Prior Hagustald.*

*John Balial*
*Rob. Bruce*
*Dav. Bruce*
*Ro. Stuart*, &c.
Sir *George Mackensey.*

*Stephen* Anno 1135. *W.* Malmsb. *Henry* II. Anno 1155. Brompton

*Maud* the Empress, Daughter of *H.* I. who was not only before *Stephen*, but also before her own Son *Hen.* II. in the Line, Dyed in the Year 1167. which was the 14*th.* Year of *Hen.* II. Reign. Annals of *Waverley.*

*John* Anno 1199. Mat. Paris *Henry* III. Anno 1216. Mat. Paris

*Arthur* the Son of *Geoffery.* *Joh.* Elder Brother Dyed, 1203. the 4*th.* Year of *John's* Reign, *Mat. Paris.* But his Sister *Eleanor* Dyed not till the Year 1241. which was the 25. Year of *H.* III. *Matthew Paris.*

*Edward* III. Jan. 1326. Henry de Knyghton

*Edward* II. his Father was Murdered the *September* following, *Circa festum beati Mathei.* *Knyghton*

*Richard*



*Henry* IV. Septem. 29. 1399. Stow

*Richard* II. Dyed the *February* following. *Stow*

*Edmund Mortimer* Earl of *March*, descended from *Lionel* Duke of *Clarence*, the 3*d.* Son of *Hen.* III. Dyed in 1425. being the 3*d.* Year. of *Henry* VI. *Dugdale's Baronage*

*Henry* V. Anno 1412. Stow

*Henry* VI. Anno 1422. Stow

*Richard* D. of *York*, the Son of *Anne*, Sister to the E. of *March*, and of *Rich.* E. of *Camb.* Slain in the Battle of *Wakefield* 1460. being the 39*th.* Year of *Hen.* VI. *Stow*

*Richard* III. Anno 1483. Sr. Thomas More.

*Edward* V. and his Brother the Sons of *Edward* IV. Murdered the first Year of *Richard* III. Reign. Sir *Thomas More*

*Henry* VII. Anno 1485. *Ld.* Bacon.

*Elizab.* Daughter of *Edw.* IV. whom *Hen.* VII. Married in the first Year of his Reign. His Mother the Countess of *Richmond*, who was then Alive, was before him, in the Line of *Lancaster.* Lord *Bacon*

But of the *Natural Born Subjects* Errors of all kinds, (which from his *unmoved Primum Mobile*, to his Modeſt Exhortation in the End of his Book, are not a few) I ſhall take Notice only of one more.

When I was Speaking of the Submiſſion of the *Jews* to the *Romans*? I added that the generality of the Nation were in Expectation, that a Prince of the Tribe of *Judah*, would ſhortly break the *Roman* Yoak, and Reſtore the Kingdom to *Iſrael*. Upon which the *N. B. Subject* ſays. *And that Prince did come, and was then among them. And he gave it up too, and commanded them to Submit to* Tiberius, *though he call'd himſelf the Son of* David. *

After our Bleſſed Saviour had ſo expreſly Diſclaimed a Temporal Kingdom, and † ſo fully declared the Nature of his Kingdom, I wonder how this Author could fall into this Error, that Chriſt *had a Temporal Kingdom, which he gave up, and Commanded the* Jews *to Submit to* Tiberius. Chriſt, as God, is King of Kings, and Lord of all Creatures, but I am ſure the *Natural Born Subject* will not ſay, that he gave up this Eternal Kingdom. Chriſt, as Man, has a Spiritual Kingdom, but

* *Letter p.* 98. † Mat. 20. 25, &c. Jo. 18. 36.





neither will this Author ſay that he gave up this Kingdom, which he doth, and will retain, *till the End cometh, when he ſhall have deliver'd it up to God even the Father.* 1 *Cor.* 15.

But Chriſt, as Man, had no Temporal Kingdom, and utterly Diſclaimed any; ſo that the Temporal Kingdom, which the *Natural Born Subject* ſays *he gave up*, he never had. And therefore at that Time, when he Commanded them to Submit to *Tiberius*, or at any other Time, He could not give up a Kingdom, which he never had.

This Error is ſeverely cenſured in Biſhop *Overal's* Convocation Book. *'Tis many ways very plain and evident that the Jews did expound all thoſe Places of the Prophets, which do notably ſet forth the Spiritual Kingdom of our Saviour Chriſt, to be meant of a Temporal Kingdom, which he ſhould erect upon Earth.--- There are ſome ſo much addicted in theſe Days unto the ſaid erroneous Opinion of the Jews, as for the Advancement of the Glory of the Biſhop of* Rome, *they will needs have Chriſt to have been here upon Earth a Temporal Monarch. Inſomuch as ſome of them ſay in effect that neither* Auguſtus Cæſar *nor* Tiberius *his Succeſſor were lawful Emperors from the time of Chriſts Birth, for above the Space of Thirty Years, until our Saviour had required the Jews to pay Tribute to* Cæſar.---

*But thoſe are Men not to be feared, for to ſay the Truth of them, they are all in effect either groſs and unlearned Canoniſts or elſe but new upſtart* Nerians, *and with great Affinity with the Canoniſts; who meaning as it ſeemeth to outſtrip the* Jeſuits, *do labour as much to make the Pope a Temporal Monarch, as the* Jeſuits *have done for his pretended ſpiritual Monarchy.* * I do not in the leaſt ſuſpect this Author of any Deſign of advancing theſe Papal Pretenſions, nor is his Notion with reſpect to the *Temporal Kingdom*, which he *ſaith Chriſt gave up*, altogether the ſame with theirs; and yet, as far as he eſpouſes the Notion of a Temporal Monarchy that our Saviour had, ſo far is he cenſured by this *Convocation-Book*. An unfortunate Writer! Who thinks a particular Scheme of Government is laid down in the Scriptures as a Law to Mankind; and yet in interpreting ſome Paſſages of Scripture with Relation to Government, has, we ſee, more than once fall'n into Errors, that ſtand Condemned in that very Book, for which, this is good reaſon to believe, he has the greateſt deference.

* *Page* 110. 112, 113, 114.

Tho'



Tho' theſe two Authors in many things agree ſo well, as if they wrote in Concert, yet we have ſeen, that they ſometimes differ from one another, as well as contradict themſelves: I ſhall take notice of a few more of their mutual Differences, and their ſelf-Contradictions, and ſo take my Leave of them for this time.

They differ about the Reputation of the Book which they anſwer. The *Remarker* tells us, he made his Remarks on the View, *becauſe he heard wherever he came, that it was applauded by Men of deep Reach, and profound Judgment, and ſuch as made a Figure in their ſeveral Profeſſions*, * tho' by the way it ſeems all theſe Perſons, of whom he gives ſo great a Character, were not able to diſtinguiſh *Utopia* from *England*. Or, if they were able, he is not: According to the *Title* of his Book, he, or they muſt be Viſionaries.

But the *Natural Born Subject* differs from the *Remarker*, and ſays *neither Whig, nor Tory is pleas'd with the View.* † If ſo I am at a loſs to know for what Reaſon he ſhould give himſelf the Trouble to anſwer a Book that

* *Preface to the Remarks.* † *Letter p.* 4.

no

no body was pleas'd with, unleſs it were to ſhew his great Skill in Engliſh Hiſtory.

*There were ſometimes Diſputes about Titles of which*, the *Remarker* ſays, *the Populace were not competent Judges and in ſuch Caſes the Poſſeſſor was ſworn to as rightful, and it was but reaſonable, if the Right Heir could not be diſcover'd, or his Title cleared to the Satisfaction of the Subjects, who were to ſwear to him; for in this* melior eſt Conditio Poſſidentis. * Again ſpeaking of the Duke of *York's* Title, *what would Mr.* H. *have more? Here the Great Men (who were then the proper Judges) declare his Right and Title.* † If the Populace were never competent Judges about *diſputed Titles*, how come they to be ſo at this time? And if the Great Men were the Judges heretofore, why are they not ſo now, and *what would the* Remarker *have more?* Why is he not concluded by their Judgment now? Both theſe Authors ſometimes, but the *Remarker* very often to get rid of an Argument gives up his own Cauſe. But the *Natural Born Subject* denys the great Men are Judges, and ſays, *in a Competition for the Crown, there is nothing elſe to be done*

* *Remarks p.* 15. † Ibid *p.* 26.

*but*



*but every Man to ſatisfie his own Conſcience the beſt he can, as to the Right of the Competitors. But as to any judicial Determination, there can be none upon Earth*; * He is here diametrically oppoſite to the *Remarker.* But the great Error of this Author is, that he doth not conſider Men as Members of Civil Society, who in civil Matters in order to the publick Peace of it, muſt be concluded by a Publick Judgment; but looks upon them as ſo many Independent Individuals, I may rather ſay, as ſo many Independent Governors, whilſt he cenſures not only the Judgment of other Men, but the Publick Judgment too, when it differs from his own: But I am not here to diſpute, but only to ſhew how he differs from the *Remarker.*

There is nothing perplexes theſe two Authors more, than Oaths, Ceſſions, and Submiſſions, about which they ſometimes differ from one another, and ſometimes contradict themſelves; tho' in the main they agree in their Management, making Submiſſions, Ceſſions, and Oaths, to give up, or not to give up a Right or Claim, as it ſerves their preſent Argument. Thus the Submiſſion of the Jews, and the Submiſſion and Oaths of

* *Letter p.* 74. 75.

the

the Senate, and People of *Rome*, ſhall give up their Right; but the long Submiſſion Oaths, *&c.* of the Houſe of *York* ſhall not abate their Right, nor Prejudice their Claim as the *Remarker* ſays, *p.* 26. And the *Natural Born Subject* ſays, *That Age will be a Precedent of the moſt inflexible Loyalty, which the Uſurpation for ſixty Years Continuance together, nor Succeſs, nor Preſcription, nor Acts of Parliament, no nor the Submiſſion or Reſignation of thoſe who had the* Right *could abate, they ſaw theſe were not free and voluntary, and therefore would lay no Streſs upon them*; p. 70, 71. And yet at another time to get rid of the Argument from the Homilies, and to favour King *John*'s Title, he ſays, Arthur *was dead and his Siſter* Eleanor *a Priſoner in King* John's *Hand, and her Life at his Mercy every Hour*; *ſo that there was no Claim made by her, or for her* p. 102. The Heirs of the Houſe of *York* could never quit their Claim by ſixty Years Subjection, accepting Commiſſions, or repeated Oaths, tho' at perfect Liberty; (For by this time the *Natural Born Subject* may be ſenſible, that he had no more reaſon to put them under Conſtraint, than the Remarker had to put them in Dureſs.) And yet here the bare Non-claim of *Eleanor*, who was a Priſoner, ſhall ſerve the turn. At another time *Edgar Atheling*, who, I ſuppoſe, even he will not



not ſay, was more free than the Heirs of the Houſe of *York*, ſhall by Submiſſion and an Oath of Fidelity transfer his Right to *William* the Conqueror. William *the Conqueror*, ſays the *Natural Born Subject*, *obtain'd a* Right, *becauſe* Edgar Atheling *the true Heir ſubmitted and ſwore Fidelity to him*, p. 38, 39. Is not this δελεαζειν τη ἀληθειᾳ to have a greater regard to an Hypotheſis, than Truth. And here, by the way, I might obſerve, how he paſſes by *Edgar Atheling*'s Sifter, *Margaret* Queen of *Scotland*, who was then truly the Heireſs of the *Saxon* Line, tho' at another time, we ſee, he can make her Daughter *Maud* to be the Heireſs of the *Saxon* Line, who was no Heireſs at all, having Four Brothers alive.

Whether the Hereditary Deſcent of the Crown is Limitable by Act of Parliament, is a Queſtion, upon which the Writers of that ſide are as much divided: But to confine my ſelf chiefly to thoſe with whom I have been engaged in this Controverſy. The *Objector* holds the Deſcent of the Crown is limitable by Act of Parliament. The *Natural Born Subject*, and *Remarker* both deny it. The *Natural Born Subject* denies it; becauſe he believes the Right of Succeſſion by Primogeniture, is of Divine Inſtitution, and a Law of the whole Earth. If the *Remarker* is of

the

the ſame Opinion, (which he doth not plainly declare) he differs very much from the Learned Author, whoſe Book * he hath ſo often recommended to me, who in his *Preface* goes no higher than human Authority, or a fundamental Law of the Monarchy, which he ſuppoſes has fix'd the Succeſſion. He ſaw there were no grounds in the Holy Scriptures to fix the Succeſſion on divine Inſtitution or Law. On the other hand, the *Natural Born Subject* is, I believe, convinced, that it cannot be unalterably fix'd by human Law, ſince he appears to be of my Lord *Bacon's* Opinion, || which I think is very true, that the Supreme Power may diſſolve, but cannot bind it ſelf, ſo that I have thus far both theſe Authors with me againſt each other: The Author of *Jovian* agreeing with me againſt the *Natural Born Subject*, that the Succeſſion to the Crown is not eſtabliſh'd by a Divine Law; and the *Natural Born Subject* agreeing with me againſt that Author, that the Succeſſion cannot be unalterably fix'd by human Law.

But to ſatisfie the *Natural Born Subject* and the *Remarker*, that I have not miſtaken that Author's Senſe in his Preface, they may

* Jovian || *Letter* p. 18.

find



find in the Book it ſelf (which I deſire the *Natural Born Subject* eſpecially to obſerve) that he is ſo far from making Succeſſion to a Crown by Primogeniture to be of Divine Right, that he denies Monarchy it ſelf to be of divine Right, excluſive of other forms of Government. For after he has run thro' other Forms of Government, whether *Ariſtocracys*, or *Democracy's*, as the Government of *Sparta*, of *Venice*, and of the Cantons of *Switzerland*, and obſerved wherein the Sovereignty was, and is reſpectively lodged in each of them, he ſays, *I was the more willing to make this Obſervation, that when I ſpeak of Sovereign Princes, I may not be maliciouſly traduced, as if I ſpoke of them excluſively of other Sovereigns, as if Monarchy were of ſole Divine Right. For want of this Diſtinction, other Authors have had this invidious Imputation laid upon them.* *

But if the *Remarker* ſhall ſay, he Agrees with the Author of *Jovian*, he muſt then at the ſame Time Confeſs, that he is directly Oppoſite to his Partner in this Controverſy, the *Natural Born Subject*.

* *Jovian* 240, 241.

'Tis

'Tis True, that amidſt all theſe Differences, they at this Time happen to agree (tho' ſome of them not very conſiſtently with themſelves) in one Concluſion, deduced from Premiſes, as different as their Principles; but had they lived in ſome of the Reigns, we have before diſcourſed of, and purſued their different Principles, they would have form'd (for they would not have found any) different Parties, and been ſome of them Jurors, and others Non-Jurors then.

As I have hitherto taken no notice of the hard Words, Angry Invectives, and raſh and uncharitable Cenſures, which make ſo many Pages of both theſe Anſwers; ſo I ſhal always neglect them; being perfectly ſatisfied, that there was nothing provoking in the *View*, which, whatever it wanted, did not want Temper; and I hope I have made no Retaliation in this *Defence*: For to forgive the Authors, aud not to imitate them, is the beſt uſe that can be made of that way of Writing.

*F I N I S.*



# APPENDIX.

## Number. I.

*Anno* XIV. *Edwardi Quarti.*

*Item*, Our ſaid Soveraigne Lord the King remembring that it was Ordained, Enacted, and Eſtabliſhed, by Authoritie of the Parliament holden at *Weſtminſter*, the Second Day of *May*, in the Ninth Yeere of the Reigne of the Noble King *Henry* V. late in Deed and not of Right, King of this Noble Realme of *England*, as heereafter followeth. * *Item*, whereas the taking of Aſſiſes generally, hath long ceaſed throughout this Realme of *England*, becauſe of a Statute and Ordinance made by our ſaid Soveraigne Lord the King, at his Second Paſſage towards the Partes of *Normandie*, and by his Counſell: Our ſaid Soveraigne Lord conſidering the great Diſeaſes and Damages, which divers of his Liege People have had and ſuſtained by the ſame ceaſing, hath ſtraightly Commanded, and Commandeth, that his Juſtices ſhall hold the Aſſiſes through the Realme of *England*, in

* *Here begins the Recital of* Henry *the Vth's Statute.*

the manner uſed and accuſtomed. And to Eſchew the diſheriſons of the ſame Perſons, which now be paſſed and ſhall paſſe in this Voiage Royall of the King, (which God Speed,) and alſo of the Perſons which be abiding in the Service of our Soveraigne Lord the King, in the Partes of *Normandie* and of *France*, it is ordained and provided, that in every Protection with the Clauſe of *Volumus* to be made for every of the ſame Perſons, there ſhall be in the Clauſe of the Exception of the ſame contained Omiſſion of theſe Words, *aſſiſe nove diſſeiſine*. And that all Protections be allowable for them, and every of them, in all the Counties of our Sovereigne Lord the King, in any Place where ſuch Protection is caſt forth for any ſuch Perſon, in all the Pleas of Aſſiſes as well of *No. diſs.* as of *Freſh Force*, without any difficulty. *Provided always*, that the Judgements to bee given from henceforth in ſuch Aſſiſes Arraigned or to be Arraigned, ſhall not be prejudicial to any of the ſaid Perſons ſo abiding in the King's Noble Service beyond the Sea, as is aforeſaid, which hath any thing in Reverſion or Remainder in ſuch Lands or Tenements, whereof ſuch Aſſiſes be or ſhall be Arraigned, if they that have in Reverſion or Remainder of ſuch Lands or Tenements be not Named in the ſame Aſſiſes, but that they bee againſt them Voyde.



Voyde. And this Ordinance ſhall endure till the Parliament, which ſhall be next holden after the next coming againe of our Soveraigne Lord the King into this Realme of *England*. And if this Ordinance touching the ſaid Perſons, abiding in the King's Service beyond the Sea, and alſo touching the ſaid Perſons, which have paſſed and ſhall paſſe in the ſaid Voyage, be not ſufficient for the Eaſe and Surety of them, it is accorded and aſſented, that the Lords of the King's Counceil for the time being, ſhall have full Power by Authority of this preſent Parliament, to ſet, ordaine and provide ſufficient Remedy for the Eaſe and Suretie of all the ſaid Perſons and every of them, as to the ſaid Lords ſhall ſeeme Availeable and Expedient in the caſe, after their good Adviſe and Diſcretion. * Our Sovereigne Lord the King will and hath Ordained, Enacted, and Eſtabliſhed, by the Adviſe and Aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament Aſſembled, and by Authority of the ſame, that the ſame Order and the ſame Lawe, compriſed in the ſaid Statute and Ordinance, ſhall be now obſerved and kept, and ſhall be as Availeable for all manner of Per-

* *Here ends the Recital of* Henry *the VIth Statute.*

 ſons,

ſons, which now ſhall paſſe over the Sea with our Soveraigne Lord the King in this Voyage Royall, and there ſhall abide in his ſaid Noble Service as they were, for ſuch Perſons which did paſſe over the Sea with the ſaid late King, and there did abide in his Noble Service. And that all ſuch Perſons, which now ſhall paſſe over the Sea with our ſaid Soveraigne Lord the King, ſhall have and Enjoy in every pointe all manner of Advantages, as the ſaid Perſons ſo paſſing over the Sea with the ſaid late King, had, ſhould have, and might have had by reaſon of the ſaid Statute. This Act and Ordinance to endure till the next Parliament, which ſhall be firſt holden after the next coming of our Soveraigne Lord the King into *England*.

*Raſtall's Collections* Vol. 1. *p.* 316.

## Number II.

*The Oath which* Richard *Duke of* York *took, to be True, Faithful, and Obedient Subject, to King* Henry *the Sixth, at St.* Pauls *Croſs, in the Preſence of the King and moſt of his Nobility, in* 1452. *being the* 30*th. Year of* Henry *the Sixths Reign.*

I *Richard* Duke of *York*, Confeſs and Beknow, that I am, and ought to be, humble



humble Subject, and Liege-Man, to you my Soveraign Lord King *Henry* VI. and owe therefore to bear you Faith and Truth, as to my Soveraign Liege Lord, and ſhall do all Days unto my Lives End, and ſhall not at any Time Will or Aſſent, that any thing be Attempted or done againſt your moſt Noble Perſon, but whereſoever I ſhall have Knowledge of any ſuch thing imagined or propoſed, I ſhall with all Speed and Diligence poſſible to me, make that your Highneſs ſhall have Knowledge thereof, and over that, do all that ſhall be poſſible to me, to the withſtanding and let thereof, to the uttermoſt of my Life. I ſhall not any thing take upon me againſt your Royal Eſtate; or Obeyſance that is due thereto, nor ſuffer any other Man to do, as far forth as ſhall be in my Power to let it: And alſo ſhall come at your Commandement whenſoever I ſhall be call'd by the ſame, in Humble and Obeyſant Wiſe, but if I be letted by any Sickneſs, or Impotence of my Perſon, or by ſuch other Cauſe as ſhall be thought by you my Soveraigne Lord Reaſonable, I ſhall never hereafter take upon me to gather any Rowt, or to make any Aſſembly of your People, without your Commandment or Licenſe, or in my Lawful Defence, I ſhall report me at all Times to your Highneſs, and if the Caſe require, to my

Peers, nor any thing Attempt againſt any of your Subjects, of what Eſtate, Degree or Condition that they be. But whenſoever I find my ſelf Wronged and Agrieved, I ſhall ſue Humbly for Remedy to your Highneſs, and proceede after the Courſe of your Lawes and in none otherwiſe, ſaving in my own Lawfull Defence in manner aboveſaid, and otherwiſe have to your Highneſs, as an Humble and True Subject ought to have to his Soveraigne Lord. All theſe things aboveſaid, I Promiſe you truly to Obſerve and Keep, by the Holy Evangeliſts contained in the Book that I lay my Hand here upon, and by the Holy Croſs I here Touch, and by the Bleſſed Sacrament of the Lords Body, that I ſhall now with his Mercy Receive. And over, I agree me, and will, that if I any Time hereafter, as by the Grace of our Lord God I never ſhall, any thing Attempt by way of Feate, or otherwiſe againſt your Royall Majeſtie, & the Obeyſance that I owe thereto, or any thing take upon me otherwiſe than is above expreſſed, I from that Time forth be unabled held, and taken as an untrue and openly foreſworn Man, and unable to all manner of Worſhip, Eſtate and Degree, be it ſuch as I now occupy, or any other that might in any Wiſe grow unto me hereafter. And this I have heere promiſed and Sworn, pro-



proceeded of mine own deſire and free Volunte, and by no conſtraining or Coaction. In Witneſs of all theſe things above Written, I *Richard* Duke of *York* above Writ, Subſcribe with my own Hand and Seal.

*This Oath he alſo took at* Weſtminſter, *and at* Coventrie *at ſundry Times in the 31ſt Year of K.* Henry *VI.* *Stow. Page* 396.

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## Number III.

*The Oath which* Richard *Duke of* York *took, upon the Agreement in* 1460. *in the* 39*th. Year of King* Henry *the Sixth.*

IN the Name of God *Amen*, I *Richard* Duke of *York*, Promiſe and Swear by the Faith and Truth, that I owe to Almighty God, that I ſhall never Conſent, Procure or Stir, directly or indirectly, in Privy or apart, neither (as much as in me is) ſhall ſuffer to be done, conſented, procured or ſtirred any thing, that may ſound to the Abridgement of the Natural Life of King *Henry* VI. or to the hurt or diminiſhing of his Reign, or Dignity Royal by Violence, or any otherwiſe againſt his Freedom or Liberty, but if any Perſon or Perſons, would do or preſume any thing to the contrary, I ſhall with

all my Might and Power withſtand it, and make it to be withſtood, as far as my Power will ſtretch thereunto. So help me God and his Holy Evangeliſts.

*Stow P.* 410.

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## Number IV.

*Anno Undecimo Henrici Septimi.*

## CHAP. I.

THE King our Soveraign Lord calling to his Remembrance the Duty of Allegiance of his Subjects of this Realm, and that they by Reaſon of the ſame, are bound to ſerve their Prince and Sovereign Lord for the Time being, in his Wars, for the Defence of him and the Land, againſt every Rebellion, Power, and Might, reared againſt him, and with him to enter and abide in Service of Battel if Caſe ſo require; and that for the ſame Service, what Fortune ever fall by Chance in the ſame Battel, againſt the Mind and Will of the Prince, (as in this Land ſometime paſſed hath been ſeen) that it is not Reaſonable, but againſt all Laws, Reaſon, and good Conſcience, that the ſaid Subjects going with their Sovereign Lord in Wars,



Wars, attending upon him in his Perſon, or being in other Places by his Commandement within this Land, or without, any thing ſhould loſe or forfeit for doing their True Duty and Service of Allegiance. It be therefore Ordained, Enacted, and Eſtabliſhed by the King our Soveraign Lord, and by the Advice and Aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament Aſſembled, and by Authority of the ſame, that from henceforth no manner of Perſon or Perſons, whatſoever he or they be, that attend upon the King and Soveraign Lord of this Land for the Time being, in his Perſon, and do him True and Faithful Service of Allegiance in the ſame, or be in other Places by his Commandement in his Wars, within this Land or without: That for the ſaid Deed and True Duty of Allegiance, he or they be in no wiſe Convict or Attaint of High Treaſon, nor of other Offences for that Cauſe, by Act of Parliament or otherwiſe by any Proceſs of Law, whereby he or any of them, ſhall Loſe or Forfeit Life, Lands, Tenements, Rents, Poſſeſſions, Hereditaments, Goods, Chattels or any other things, but to be for that Deed and Service utterly diſcharged of any Trouble Vexation or Loſs. And if any Act or Acts or other Proceſs of the Law, here-

hereafter thereupon for the ſame happen to be made contrary to this Ordinance, that Act or Acts or other Proceſs of the Law whatſoever they ſhall be, ſtand and be utterly void. Provided alway, that no Perſon or Perſons ſhall take any Benefit or Advantage by this Act, which ſhall hereafter decline from his or their ſaid Allegiance.

## Number V.

*Anno Decimo tertio Reginæ Elizabethæ c. I.*

*An Act whereby certain Offences be made Treaſon.*

AND be it further enacted that if any Perſon ſhall any ways hold and affirm or maintain that the Common Laws of this Realm, not altered by Parliament, ought not to direct the Right of the Crown of *England*; or that our ſaid Sovereign Lady *Elizabeth* the Queen's Majeſty that now is, with and by the Authority of the Parliament of *England*, is not able to make Laws and Statutes of ſufficient Force and Validity to limit and bind the Crown of this Realm, and the Deſcent, Limitation, Inheritance, and Government thereof. Every ſuch Perſon



ſon ſo holding, affirming or maintaining during the Life of the Queen's Majeſty ſhall be judged a high Traitor, and ſuffer or forfeit as in Caſes of High Treaſon is accuſtomed; and every Perſon ſo holding, affirming or maintaining after the Deceaſe of our ſaid Sovereign Lady, ſhall forfeit all his Goods and Chattels.

## Number VI.

*A Citation out of a Letter of* Lethington *the Secretary of* Scotland *to Sir* William Cecil *the Queen of* England's *Secretary.*

NOW let us examine the Matter and Circumſtances how King *Henry* VIII. was by Statute enabled to diſpoſe the Crown. There is a Form in two ſorts preſcribed him which he may not tranſgreſs, that is to ſay, either by his Letters Patents ſealed with his Great Seal, or by his laſt Will ſigned with his own Hand: For in this extraordinary Caſe he was held to an ordinary and preciſe Form; which being not obſerved, the Letters Patents, or Will cannot work the Intent or Effect ſuppoſed. And to diſprove that the Will was ſigned with his own Hand; you know that long before his Death

Death he never uſed his own Signing with his own Hand; and in the time of his Sickneſs, being divers times preſſed to put his Hand to the Will written, he refuſed to do it. And it ſeemed God would not ſuffer him to proceed in an Act ſo injurious and prejudicial to the Right Heir of the Crown, being his Neice. Then his Death approaching, ſome as well known to you as to me, cauſed *William Clark*, ſometimes Servant to *Thomas Heneage*, to ſign the ſuppoſed Will with a Stamp (for otherwiſe ſigned it was never) and yet notwithſtanding ſome reſpecting more the Satisfaction of their Ambition, and others their private than juſt and upright Dealing, procured divers honeſt Gentlemen, attending in ſeveral Rooms about the King's Perſon, to teſtify with their Hand-writings the Contents of the ſaid pretended Will, ſurmiſed to be ſigned with the King's own Hand. To prove this diſſembled and forged ſigned Teſtament, I do refer to ſuch Trials as be yet left. Firſt; the Atteſtation of the late Lord *Pagel* publiſhed in the Parliament in Queen *Mary*'s Time for the Reſtitution of the Duke of *Norfolk*. Next, I pray you on my Sovereigns behalf, that the Depoſitions may be taken in this Matter of the Marqueſs of *Winchester*, Lord Treaſurer of *England*, the Mar-



Marqueſs of *Northampton*, the Earl of *Pembroke*, Sir *William Petre*, then one of King *Henry*'s Secretaries, Sir *Henry Nevell*, Sir *Maurice Barkley*, Doctor *Buts*, *Edmond Harman Baker*, *John Osborn* Groom of the Chamber, Sir *Anthony Dennis*, if he be living, *Terris* the Chirurgion, and ſuch as have heard *David Vincent* and others ſpeak in this Caſe; and that their Atteſtations may be enrolled in the *Chancery*, and the *Arches*, *in perpetuam rei memoriam*.

*Collection of Records at the End of the* 1 *Vol. of the Hiſtory of the Reformation.*
*Page* 269.

## Number VII.

*A Citation out of Sir* Thomas Craig's *Book of* the Succeſſion *in Anſwer to* Doleman *alias* Parſons *the Jeſuit, who endeavoured to ſet up King* Henry *VIIIth's Will, p.* 334, 345.

THis good Man (*meaning Doleman*) like himſelf always adds that the Seal or Stamp was enough in this Affair, ſo that with him it is ſufficient to anſwer the Intention of the Parliament, ſays he, that his

his laſt Will had his Seal (his *Stamp* *) put to it, tho' at the ſame time there is no mention in the ſaid Statutes of the Seal (*Stamp*) to his Teſtament, but of his Subſcription, and in an Affair of that Importance as that laſt Will was, that it ſhould be ſubſcribed by the King's Hand was the leaſt that might be, ſeeing the Seal (*Stamp*) could be put to it by his *Amanuenſis* even after his Death. Yet I ſhall ſay nothing of thoſe two Acts or Statutes, tho' they exceed the Condition and Power of Mortals, nor how ſuch Power could be given to any Man, whatever his Dignity be, in an Hereditary Kingdom; ſeeing at that time many things may happen which may diſturb his Judgment; yet tho this might be diſpenced with in ſo great a Prince; who could ever endure than an Affair of the greateſt conſequence ſhould be entruſted to his *Amanuenſis*, and to his report that he was commanded by the King to ſet the Seal (*Stamp*) to it, or that ſuch Power could be given to him as that by his ſetting the Seal (*Stamp*) to it, the true and lawful Succeſſion of the Kingdom ſhould be taken away: Who will believe it? Certain-

* I have taken the Liberty after the Word (*Seal*) to add (*Stamp*) for ſo it ought to have been expreſſed.

ly



ly the Houſe of *Suffolk* at this rate, ſhould they get the Kingdom, could not owe it to the Right of Succeſſion, but to *Clark*, one of the loweſt ſort of the People, who acknowledged openly before Queen *Mary* and her *Privy Council*, and alſo before the *Parliament*, that he put the Seal (*Stamp*) to it, after King *Henry* had loſt the Uſe of his Reaſon, or was paſt Senſe and Memory, and who alſo was forgiven for that Crime, and obtain'd the Queen's Pardon upon his Confeſſion. For who can be better believed in *Crimine falſi*, that is, in Forgery, than the Author and Forget himſelf?

But *Doleman* ſays, that the two Acts of Parliament cannot in reaſon be eluded or overthrown by the Teſtimony of that *Clark*, or of others, concerning himſelf or his own Fact, wherein they ſay that the King's Memory was gone when the Stamp was put to the Teſtament. But the Forgery in putting the Seal (*Stamp*) to that Paper may be evidently enough made appear even from thoſe two Acts of Parliament themſelves remaining in their Force. And it is quite another thing, the King could have done ſuch a thing, and the King did it. The King alſo could by virtue of thoſe two Acts have nominated his Succeſſors: But who will ſay that he ever did name his Succeſſors? Moreover had that Seal (*Stamp*) been put to the Paper by his Command, yet even that did not come up to the Intention and Purport of thoſe Two Statutes. For as the Biſhop of *Roſs* obſerves and all the Lawyers * if the Form appointed be omit-

* *Si Forma a lege tradita ſit omiſſa, eâ totus actus vitiatur.*

ted,

ted, the whole Proceeding is nulled by that Omiſſion. * Eſpecially when that Form that is preſcribed for any reaſon ought to be obſerved, † even after the reaſon ceaſes, for which it was introduced. Wherefore unleſs the King had obſerved and kept himſelf, to that Form in making his laſt Will, which was appointed in thoſe two laſt Acts, the transferring of the Kingdom from the true Heir could never have been eſtabliſhed or confirm'd by ſuch his Will. But ſeeing this reaſon hath been fully explained both by the Biſhop of *Roſs*, and by my ſelf, I forbear to ſay any more of it here.

But our Author ſays, that this laſt Will of King *Henry*, which was not only authorized by Two Acts of Parliament, but enrolled in the Chancery, ought not to be overthrown by one or two Witneſſes. But it's evidently falſe that that Will was Authorized by two Parliaments, tho' the Power of making ſuch a Will was granted to that King by thoſe Parliaments, yet that Will was never Ratified. For what was done a long time before, cannot ratify what is done after, eſpecially if it be done in a different Form. This Man is an ill Lawyer, a worſe Hiſtorian, but the worſt of all Divines, who thus perverts Law, Hiſtory, and the Sacred Scriptures.

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* *Bald. in L. non dubium C. de Legibus.*

† *L. Si fundus de rebus eorum, qui ſub tutela & cura ſunt, non alienandis.*

*FINIS.*