

TO THE READER

Altho these pieces may appear fully to express their own real intrinsic value, as bearing the Image and Inscription of that great Man Mr. Hobbes; yet since common usage has rendred a Preface to a Book as necessary as a Porch to a Church, and that in all things some Ceremonies cannot be avoided, Mode and Custom in this point is dutifully to be obeyed.

That they are genuine, credible testimony might be produced; did not the peculiar fineness of thought and expression, and a constant undaunted resolution of maintaining his own Opinions sufficiently ascertain their Author. Besides which, they are now Publish'd from his own true Copies, [A3v] an advantage which some of his works have wanted.¹

The first of them, being an abridgement containing the most useful part of Aristotle's Rhetoric, was written some thirty years since.² Mr. Hobbes in his Book of Humane Nature had already describ'd Man, with an exactness almost equal to the original draught of Nature; and in his Elements of Law, laid down the constitution of Government, and shewn by what Arm'd Reason it is maintain'd.³ And having demonstrated in the State of Nature, the Primitive Art of Fighting to be the only medium whereby Men procur'd their ends; did in this design to shew what Power in Societies has succeeded to reign in its stead. I mean the Art of speaking, which by use of Common places of Probability, and knowledge in the manners and passions of Man=^akind,^a throu the working of Belief is able to bring about whatsoever Interest.

How necessary this Art is to that of Politic, is clearly evident from that mighty force, whereby the Eloquence of the Anci=[A4]ent Orators

¹ The reference is probably to the unauthorized versions of *Beh.* Crooke's Preface to his own edition complained 'how much both the World, and the Name of Mr. Hobbs have been abus'd by the several spurious Editions of the History of the Civil Wars; wherein, by various and unskilful Transcriptions, are committed above a thousand faults, and in above a hundred places whole Lines left out' (*Beh.*, sig.A4).

² This is *A Briefe of the Art of Rhetorique* (1637), which will be published elsewhere in HW. Crooke is evidently referring to the second edition of 1651. See p. lxvii above for the source of this error.

³ The two parts of *Elements of law* were printed separately in 1650 as *Human nature; or the fundamental elements of policy* and *De corpore politico; or the elements of law, moral and politic.*

^a Interlinear hyphen.

captivated the minds of the People. Mr. Hobbes chose to recommend by his Translation the Rhetoric of Aristotle, as being the most accomplish'd work on that Subject, which the World has yet seen, having been admir'd in all Ages, and in particular highly approv'd by the Father of the Roman Eloquence,⁴ a very competent Judge. To this he thought fit to add some small matter relating to that part which concerns^a Tropes and Figures; as also a short discovery of some little tricks of false and deceitful Reasoning.⁵

The other piece is a Discourse concerning the Laws of England, and has been finish'd many years.⁶ Herein he has endeavour'd to accommodate the general notions of his Politic to the particular constitution⁷ of the English Monarchy. A design of no small difficulty, wherein to have succeeded, deserves much Honour; to have perchance miscarry'd, deserves easie Pardon. It has had the good fortune to be much esteem'd by the greatest Men of the Profession of the Law,⁸ and therefore may be pre=[A4v]sumed to contain somewhat excellent. However 'tis not to be expected, that al Men should submit to his Opinions, yet 'tis hop'd none will be offended at the present Publishing these Papers, since they will not find here any new fantastic Notions, but only such things as have been already asserted with strength of Argument by himself, and other Persons of eminent Learning. To the Public at least this Benefit may accrue, that some able Pen may undertake the controversie, being moved with the desire of that reputation, which will necessarily attend Victory over so considerable an Adversary.

⁴ If Cicero is meant, the reference is perhaps to *De Inventione*, 15.

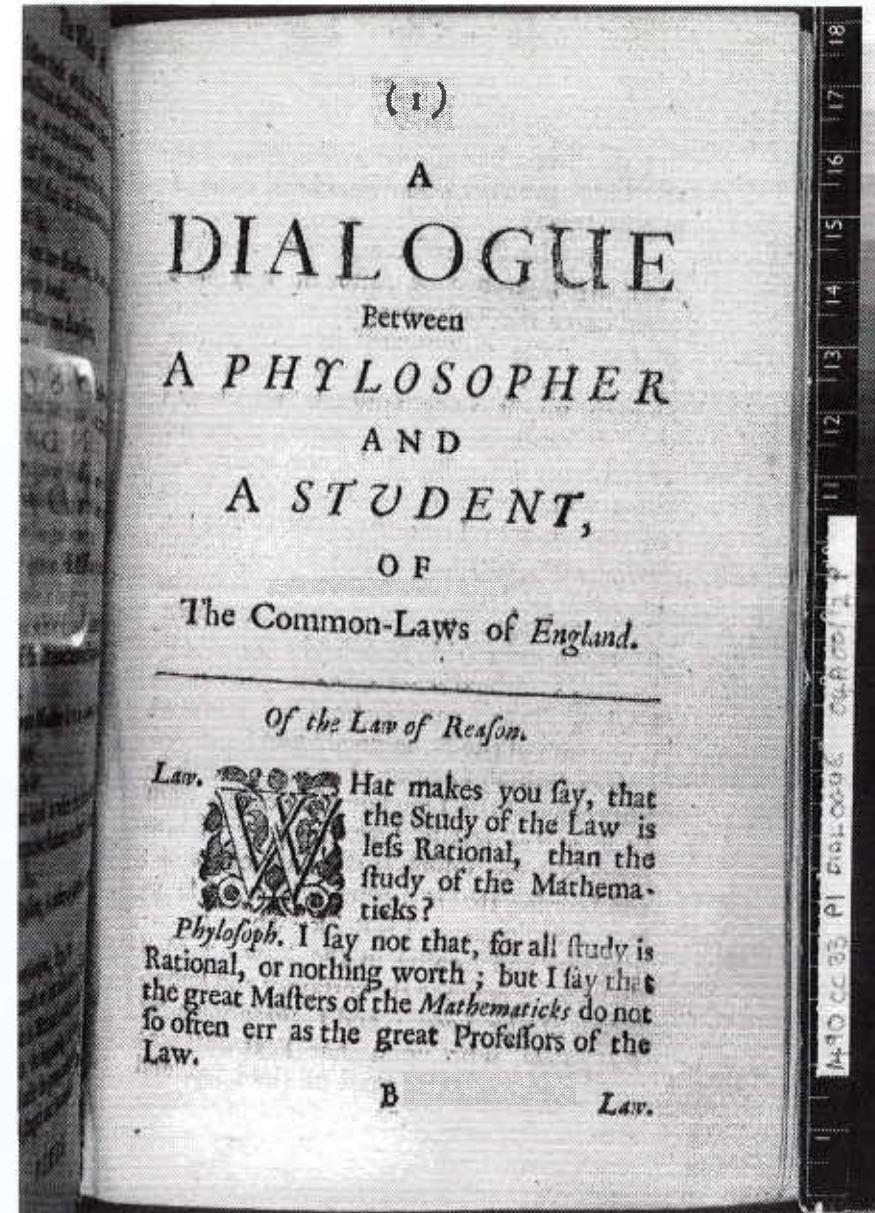
^a concern's

⁵ This matter is not by Hobbes. See above, p.lxvii.

⁶ Crooke had possessed a copy since at least 1673. See above, p. xvii, xix.

⁷ =form, make-up, character.

⁸ Cf. Blackburne's biography, which describes it as 'commentarium...doctissimis J[ur]is C[onsul]tis in pretio habitum [a commentary prized by the most learned lawyers]' (*Vita*, 98-9; OL I, xl); the probable source in both cases was John Aubrey, whose writings name Chief Justice Sir John Vaughan (1603-74) and Serjeant Robert Stevens (d. 1675) as legal admirers of H (*Brief lives*, I 342, 372).



Page 1 of *A Dialogue*

Of the Law of Reason.

Law. What makes you say, that the Study of the Law is less Rational, than the study of the Mathematicks?

Philosoph. I say not that, for all study is Rational, or nothing worth; but I say that the great Masters of the *Mathematicks* do not so often err as the great Professors of the Law.⁹ [2]

Law. If you had applied your reason to the Law, perhaps you would have been of another mind.

Ph. In whatsoever Study, I examine whether my Inference be rational, and have look't over the Titles of the Statutes from *Magna Charta* downward to this present time.¹⁰ I left not one unread, which I thought might concern my self, which was enough for me that meant not to plead for any but my self. But I did not much examine which of them was more, or less rational; because I read them not to dispute, but to obey them, and saw in all of them sufficient reason for my obedience, and that the same reason, though the Statutes themselves were chang'd, remained constant. I have also diligently read over *Littleton's* Book of *Tenures*, with the Commentaries thereupon of the Renowned Lawyer Sir *Ed. Coke*,¹¹ in which I confess I found great subtilty, not of the Law, but of Inference from Law, and especially from the Law of Humane Nature, which is the Law of reason: and I confess that it is truth which he sayes in the Epilogue to his Book; that ¹²by Arguments and Reason in the Law, a Man shall sooner come to the certainty and knowledge of the Law: and I

⁹ Given H's controversies with the Oxford mathematicians, some irony may be intended here.

¹⁰ *Magna Charta* was usually dated to the ninth year of Henry III (1225) and treated as the oldest surviving statute. As general collections of statutes were chronologically organized, it was printed at the start of all such volumes.

¹¹ Sir Thomas Littleton's *Tenures* (written c. 1470, in Law French) was a lucid introduction to land law, extravagantly admired by common lawyers. By 1600 'Littleton' was proverbially 'not now the name of a Lawyer, but of the Law it selfe' (Fulbecke, *Direction*, 27), a tag incorporated in the title of Sir Edward Coke, *The first part of the Institutes of the Lawes of England. Or, A Commentarie upon Littleton, not the name of a lawyer onely, but of the law it selfe* (London, 1628). Coke printed Littleton in full with a parallel translation into English; his commentary was keyed to specific French phrases, but the connection with the text was often no more than tangential.

¹² Quot. to 'of the Law' (*First Inst.*, 394b–95a), except that Coke wrote 'by the arguments and reasons' (the plural is of some significance).

agree with Sir *Edw. Coke*, who upon that Text [says] farther; That Reason is the Soul of the Law,¹³ and [3] upon sect. 138. ¹⁴*Nihil quod est Rationi contrarium est licitum*; that is to say, nothing is Law that is against Reason: and that Reason is the life of the Law, nay the Common Law it self is nothing else but Reason. And upon Sect. 21. *Aequitas est perfecta quaedam Ratio, quae Jus scriptum interpretatur & emendat, nulla scriptura comprehensa, sed solum^a in vera Ratione consistens*.¹⁵ i.e. Equity is a certain perfect Reason that interpreteth and amendeth the Law written, it self being unwritten, and consisting in nothing else but right Reason. When I consider this, and find it to be true, and so evident as not to be denied by any Man of right sense, I find my own reason at a stand; for it frustrates all the Laws in the World: for upon this ground any Man, of any Law whatsoever may say it is against Reason, and thereupon make a pretence for his disobedience. I pray you clear this passage, that we may proceed.

La. I clear it thus out of Sir *Edw. Coke*. I *Inst. Sect.* 138. that this ¹⁶is to be understood of an artificial perfection of Reason gotten by long Study, Observation and Experience, and not of every Mans natural Reason; for *Nemo nascitur Artifex*.¹⁷ This Legal Reason is *summa Ratio*;¹⁸ and therefore if all the Reason that is dispersed into so many several heads were united into one, yet could he [4] not make such a Law as the Law of *England* is, because by so many successions of Ages it hath been fined and refined by an infinite number of Grave and Learned Men.

¹³ This was Coke's gloss on Littleton's phrase 'the Arguments and the Reasons'.

¹⁴ P/phrase to 'but Reason' (*First Inst.*, 97b). Coke's immediate qualification of this statement is discussed by H below.

^a *solus*

¹⁵ Coke's gloss on Littleton's phrase 'the equity of the statute' (a narrower conception than the one that H invokes). As Coke's discussion went on to explain, 'Equitie is a construction made by the Judges, that cases out of the letter of a stat., yet being within the same mischiefe, or cause of the making of the same, shall bee within the same remedie that the Statute provideth: And the reason hereof is, for that the Law maker could not possibly set down all cases in expresse termes' (*First Inst.*, 24b). The translation that follows is H's; a slightly different version is offered at p. 61.

¹⁶ Quot. to end of speech (*First Inst.*, 97b). The words 'artificial...experience' are quoted, with an accurate page reference, at *Lev.*, 140.

¹⁷ 'No one is born a craftsman.' Coke saw a close connection between 'artificial' and *artifex* (=craftsman). In ordinary usage, the word could mean 'displaying special art or skill' (OED 6–7) and 'according to the rules of art' (OED 10).

¹⁸ 'The highest Reason.'

Ph. This does not clear the place, as being partly obscure, and partly untrue;^a that the Reason which is the Life of the Law, should be not Natural, but Artificial I cannot conceive. I understand well enough, that the knowledge of the Law is gotten by much study, as all other Sciences are, which when they are studyed and obtained, it is still done by Natural, and not by Artificial Reason. I grant you that the knowledge of the Law is an Art, but not that any Art of one Man, or of many how wise soever they be, or the work of one and more Artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law.¹⁹ Obscure also are the words Legal Reason; there is no Reason in Earthly Creatures, but Humane Reason; but I suppose that he means, that the Reason of a Judge, or of all the Judges together (without the King) is that *Summa Ratio*, and the very Law, which I deny, because none can make a Law but he that hath the Legislative Power. That the Law hath been fined by Grave and Learned Men, meaning the Professors of the Law is manifestly untrue, for all the Laws [5] of *England* have been made by the Kings of *England*, consulting with the Nobility and Commons in *Parliament*, of which not one of twenty was a Learned Lawyer.

Law. You speak of the Statute^b Law, and I speak of the Common Law.

Ph. I speak generally of Law.

La. Thus far I agree with you, that Statute Law taken away, there would not be left, either here, or any where, any Law at all that would conduce to the Peace of a Nation; yet Equity, and Reason which [are] Laws Divine and Eternal, which oblige all Men at all times, and in all places, would still remain, but be Obeyed by few: and though the breach of them be not punished in this World, yet they will be punished sufficiently in the World to come.²⁰ Sir

¹⁹ Cf. *Lev.*, 143, a passage condensed by *Lat. Lev.* into 'Authoritas, non Veritas, facit Legem [Authority, not Truth, makes Law]' (*Lat. Lev.*, 133: OL III 202). Cf. also St German's statement that the law-maker needs 'wysdom & auctorite wysedom that he may Iuge after reason . . . Auctorite that he have auctorite to make lawes. For the lawe is named of Ligare: that is to say to bynde. But the sentence of a wyse man doth not bynde the commynaltie yf he hath no rewle over theym' (*Dr and student*, 27).

^b Statute

²⁰ According to *Lev.*, the good will live forever, while the resurrected wicked will endure a period of torment before a second death (*Lev.*, 244-5, 344-6). But *Lev.* also maintains that

Edw. Coke for drawing to the Men of his own Profession as much Authority as lawfully he might, is not to be reprehended; but to the gravity and Learning of the Judges they ought to have added in the making of Laws, the Authority of the King, which hath the Sovereignty: for of these Laws of Reason, every Subject that is in his Wits, is bound to take notice at his Peril, because Reason is part of his Nature, which he continually carryes about with him, and may read it, if he will.²¹ [6]

Ph. 'Tis very true; and upon this ground, if I pretend within a Month, or two to make my self able to perform the Office of a Judge, you are not to think it Arrogance; for you are to allow to me, as well as to other Men, my pretence²² to Reason, which is the Common Law (remember this that I may not need again to put you in mind, that Reason is the Common Law) and for Statute Law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in two Months.²³

Law. But you will be but an ill Pleader.

Ph. A Pleader commonly thinks he ought to say all he can for the Benefit of his Client, and therefore has need of a faculty to wrest the sense of words from their true meaning; and the faculty of *Rhetorick* to seduce the Jury, and sometimes the Judge also, and many other Arts, which I neither have, nor intend to study.

La. But let the Judge how good soever he thinks his Reasoning, take heed that he depart not too much from the Letter of the Statute: for it is not without danger.

Ph. He may without danger recede from the Letter, if he do not from the meaning and sense of the Law, which may be by a Learned Man, (such as Judges commonly [7] are) easily found out by the Preamble, the time when it was made, and the Incommodities for which it was made:²⁴ but I pray tell me, to what end

it would still be rational to obey the law of nature even without this powerful incentive (*ibid.*, 72-3).

²¹ Cf. *El.*, II x 10; *De C.*, xiv 14; *Lev.*, 140-1.

²² =claim.

²³ All public statutes were printed as a matter of course as soon as they were passed. H clearly had access to an edition of *The Statutes at large*, ed. Ferdinando Pulton (London, 1618), which printed every statute from Magna Charta onwards, including enactments subsequently repealed.

²⁴ Cf. *Lev.*, 145. This way of finding out the 'meaning and sense' was perfectly acceptable to lawyers; Coke himself believed that judges should identify 'the mischief and defect for

were Statute-Laws ordained, seeing the Law of Reason ought to be applied to every Controversie that can arise.

La. You are not ignorant of the force of an irregular Appetite to Riches, to Power, and to sensual Pleasures, how it Masters the strongest Reason, and is the root of Disobedience, Slaughter, Fraud, Hypocrisie, and all manner of evil habits; and that the Laws of Man, though they can punish the fruits of them, which are evil Actions, yet they cannot pluck up the roots that are in the Heart. How can a Man be Indicted of Avarice, Envy, Hypocrisie, or other vitious Habit, till it be declared by some Action, which a Witness may take notice of; the root remaining, new fruit will come forth till you be weary of punishing, and at last destroy all Power that shall oppose it.

Ph. What hope then is there of a constant Peace in any Nation, or between one Nation, and another?

La. You are not to expect such a Peace between two Nations, because there is no Common Power in this World to punish their Injustice: mutual fear may keep them quiet for a time, but upon every visible [8] advantage they will invade one another, and the most visible advantage is then, when the one Nation is obedient to their King, and the other not; but Peace at home may then be expected durable, when the common people shall be made to see the benefit they shall receive by their Obedience and Adhaesion to their own Sovereign, and the harm they must suffer by taking part with them, who by promises of Reformation, or change of Government deceive them. And this is properly to be done by Divines, and from Arguments not only from Reason, but also from the Holy Scripture.²⁵

Ph. This that you say is true, but not very much to that I aim at by your Conversation, which is to inform my self concerning the Laws of *England*: therefore I ask you again, what is the end of Statute-Laws?

which the common law did not provide' and then 'make such construction as shall suppress the mischief . . . according to the true intent of the makers of the Act' (*Third reports*, 7b; ER LXXVI 638).

²⁵ Cf. *De C.*, xiii 9; *Lev.*, 175-7; *Beh.*, 96, 116 (EW VI 237, 252).

Of Sovereign Power.

La. I say then that the scope²⁶ of all Humane Law is Peace, and Justice in every Nation amongst themselves, and defence against Forraign Enemies.

Ph. But what is Justice?

La. Justice is giving to every Man his own. [9]

Ph. The Definition is good, and yet 'tis *Aristotles*;²⁷ what is the Definition agreed upon as a Principle in the Science of the Common Law?

La. The same with that of *Aristotle*.²⁸

Ph. See you Lawyers how much you are beholding to a Philosopher, and 'tis but reason, for the more General and Noble Science, and Law of all the World is true Philosophy, of which the Common Law of *England* is a very little part.

La. 'Tis so, if you mean by Philosophy nothing but the Study of Reason, as I think you do.²⁹

Ph. When you say that Justice gives to every Man his own, what mean you by his own? How can that be given me which is my own already? or, if it be not my own, how can Justice make it mine?

La. Without Law every thing is in such sort every Mans, as he may take, possess, and enjoy without wrong to any Man, every thing, Lands, Beasts, Fruits, and even the bodies of other Men, if his Reason tell him he cannot otherwise live securely: for the dictates of Reason are little worth, if they tended not to the preservation and improvement of Mens Lives.^a Seeing then without Humane Law all things would be Common, and this Community a cause of Incroachment, Envy, Slaughter, and continual

²⁶ A common term in biblical hermeneutics. Literally 'a mark for shooting or aiming at' (OED1a), referring to the white patch at the centre of the target. Figuratively 'object, purpose, aim' (OED2a).

²⁷ Aristotle's definition of commutative (as opposed to distributive) justice (*Aristotle, Ethics*, 277).

²⁸ 'Constans & perpetua voluntas suum cuique tribuens [a constant and perpetual will giving each his own]' (Bracton, *De legibus*, 2v).

²⁹ *Lev.* defines philosophy as 'the Knowledge acquired by Reasoning, from the Manner of the Generation of any thing, to the Properties; or from the Properties, to some possible Way of Generation of the same; to the end to bee able to produce, as far as matter, and humane force permit, such Effects, as humane life requireth' (*Lev.*, 367).

^a ~, seeing

War [10] of one upon another,³⁰ the same Law of Reason Dictates to Mankind (for their own preservation) a distribution of Lands, and Goods, that each Man may know what is proper to him, so as none other might pretend³¹ a right thereunto, or disturb him in the use of the same. This distribution is Justice, and this properly is the same which we say is [ones own]^a: by which you may see the great Necessity there was of Statute Laws, for preservation of all Mankind.³² It is also a Dictate of the Law of Reason, that Statute Laws are a necessary means of the safety and well being of Man in the present World, and are to be Obeyed by all Subjects, as the Law of Reason ought to be Obeyed, both by King and Subjects, because it is the Law of God.

Ph. All this is very Rational; but how can any Laws secure one Man from another? When the greatest part of Men are so unreasonable, and so partial to themselves as they are, and the Laws of themselves are but a dead Letter, which of it self is not able to compel a Man to do otherwise than himself pleaseth, nor punish, or hurt him when he hath done a mischief.

La. By the Laws, I mean, Laws living and Armed: for you must suppose, that a Nation that is subdued by War to an absolute submission of a Conqueror, it may by [11] the same Arm that compelled it to Submission, be compelled to Obey his Laws. Also if a Nation choose a Man, or an Assembly of Men to Govern them by Laws, it must furnish him also with Armed Men and Money, and all things necessary to his Office, or else his Laws will be of no force, and the Nation remains, as before it was, in Confusion. 'Tis not therefore the word of the Law, but the Power of a Man that has the strength of a Nation, that makes the Laws effectual. It was not *Solon* that made *Athenian* Laws (though he devised them) but the Supream Court of the People;

³⁰ Cf. *El.*, I xiv 11; *De C.*, i 11-12; *Lev.*, 64. H has put his best-known doctrine into *La.*'s mouth. He simplifies the classic statements of his argument by omitting the important postulate that some (though not all) human beings are motivated by a wish to do their fellows down (*El.*, I xiv 3; *De C.*, i 4; *Lev.*, 61).

³¹ =claim.

^a one owns

³² 'And this they well knew of old, who called that Νόμος, (that is to say, *Distribution*), which we call Law; and defined Justice, by *distributing* to every man *his own*' (*Lev.*, 128). Cf. Finch, *Law*, 1.

nor the Lawyers of *Rome* that made the Imperial Law in *Justinian's* time, but *Justinian* himself.³³

Ph. We agree then in this, that in *England* it is the King that makes the Laws, whosoever Pens them, and in this, that the King cannot make his Laws effectual, nor defend his People against their Enemies, without a Power to Leavy Souldiers, and consequently, that he may Lawfully, as oft as he shall really think it necessary to raise an Army (which in some occasions³⁴ [may] be very great) I say, raise it, and Money to Maintain it. I doubt not but you will allow this to be according to the Law (at least) of Reason.

La. For my part I allow it. But you have heard how, in, and before the late Trou- [12] bles³⁵ the People were of another mind. Shall the King, said they, take from us what he please, upon pretence of a necessity whereof he makes himself the Judge?³⁶ What worse Condition can we be in from an Enemy! What can they take from us more than what they list?

Ph. The People Reason ill; they do not know in what Condition we were in the time of the Conqueror, when it was a shame to be an *English-Man*, who if he grumbled at the base Offices he was put to by his *Norman* Masters, received no other Answer but this, Thou art but an *English-Man*, nor can the People, nor any Man that humors them in their Disobedience, produce any Example of a King that ever rais'd any excessive Summs^a, either by himself, or by the Consent of his Parliament, but when they had great need thereof; nor can shew any reason that might move any of them so to do. The greatest Complaint by them made against the unthriftiness of their Kings was for the enriching now and then a Favourite,³⁷ which to the Wealth of the Kingdom was inconsiderable, and the Complaint but Envy. But in this point of raising Souldiers, what is I pray you the Statute Law?

La. The last Statute concerning it, is 13 *Car.* 2. c. 6. By which the Supream Government Command, and disposing of the [13]

³³ Cf. *Lev.*, 139.

³⁴ 'Occasions' bears a connotation of 'necessity' (OED II 5 a).

³⁵ A conventional and politically neutral way of referring to 1640-1660.

³⁶ King Charles I had justified demanding Ship Money, a non-parliamentary levy, by reference to an emergency of whose existence only he could judge.

^a Summ's

³⁷ Cf. *El.*, II v 5; *De C.*, x 6; *Lev.*, 96-7.

Militia of *England* is delivered to be, and always to have been the Antient Right of the Kings of *England*.³⁸ But there is also in the same Act a Proviso, that this shall not be Construed for a Declaration, that the King may Transport his Subjects, or compel them to march out of the Kingdom, nor is it, on the contrary declared to be unlawful.³⁹

Ph. Why is not that also determined?

La. I can imagine cause enough for it, though I may be deceiv'd. We love to have our King amongst us, and not be Govern'd by Deputies,⁴⁰ either of our own, or another Nation: But this I verily believe, that if a Forraign Enemy should either invade us, or put himself into^a a readiness to invade either *England*, *Ireland*, or *Scotland* (no Parliament then sitting) and the King send *English* Souldiers thither, the Parliament would give him thanks for it. The Subjects of those Kings who affect the Glory, and imitate the Actions of *Alexander* the Great, have not always the most comfortable lives, nor do such Kings usually very long enjoy their Conquests.⁴¹ They March to and fro perpetually, as upon a Plank sustained only in the midst, and when one end rises, down goes the other.

Ph. 'Tis well. But where Souldiers (in the Judgment of the Kings Conscience) are indeed necessary, as in an insurrection, or [14] Rebellion at home; how shall the Kingdom be preserved without a considerable Army ready, and in pay? How shall Money be rais'd for this Army, especially when the want of publick Treas-

³⁸ 13 Car II st.1 c.6 (SR V 308-9) on which see *Beh.*, 337-8 (EW VI 417-8). This was 'An Act declaring the sole Right of the Militia to be in [the] King and for the present ordering & disposing the same'. The statute noted that 'an Act is under consideration for exercising the Militia with most safety and ease to the King and His People'. Existing arrangements depending on the King's prerogative powers were confirmed till March 25 1662; the principle of royal control was then reaffirmed by 14 Car II c.3 (SR V 358), an Act that H seems to have missed.

³⁹ 'Provided That neither this Act nor any matter or thing therein contained shall be deemed construed or taken to extend to the giving or declaring of any Power for the transporting of any the Subjects of this Realme or any way compelling them to march out of this Kingdome otherwise then by the Lawes of England ought to be done' (SR V 309). As H correctly noticed, the Act does not identify or expound the laws referred to.

⁴⁰ =representatives, substitutes.

^a int

⁴¹ Cf. *El.* II ix 9; *De C.*, xiii 14; *Lev.*, 174.

ure inviteth Neighbour Kings to incroach, and unruly Subjects to Rebel?

La. I cannot tell. It is matter of Polity,⁴² not of Law; but I know, that there be Statutes express, whereby the King hath obliged himself never to Levy Money upon his Subjects without the consent of his Parliament.⁴³ One of which Statutes is. 25 Ed. I. c. 6. in these words, *We have granted for us, and our Heirs, as well to Arch-Bishops, Bishops, Abbots, and other Folk of the Holy Church, as also Earls, Barons, and to all the Commonalty of the Land, that for no Business from henceforth, we shall take such Aids, Taxes, or Prizes, but by the common Consent of the Realm.*⁴⁴ There is also another Statute of Ed. I. in these words, *No Taxes, or Aid shall be taken or Levied by us, or our Heirs in our Realm, without the good will, and assent of the Arch-Bishops, Bishops, Earls, Barons, Knights, Burghesses, and other Freemen of the Land;*⁴⁵ which Statutes have been since that time Confirmed by divers other Kings, and lastly by the King that now Reigneth.⁴⁶

Ph. All this I know, and am not satisfied. I am one of the Common People, and [15] one of that almost infinite number of Men, for whose welfare Kings, and other Sovereigns were by God Ordain'd: For God made Kings for the People, and not People for Kings. How shall I be defended from the domineering of Proud and Insolent Strangers that speak another Language, that scorn us, that seek to make us Slaves? Or how shall I avoid the Destruction that may arise from the cruelty of Factions in a Civil War, unless

⁴² =practical statecraft.

⁴³ *Beh.* denied the existence of laws to this effect, conceding only that 'amongst the Statute Laws there is one called *Magna Charta* . . . in which there is one Article, wherein a King heretofore hath granted, That no man shall be distrained . . . otherwise than by the Law of the Land'; H explained away this solitary exception as 'securing of every Man from such as abused the King's power by surreptitious obtaining the King's Warrants' (*Beh.*, 61: EW VI 210). Unless he was attempting a deception in which he was unlikely to succeed, this error must have stemmed from ignorance; it follows that he wrote the *Dialogue* later.

⁴⁴ SR I 123.

⁴⁵ *Ibid.*, 125. An undated measure described in *Statutes at large* as 'a Statute concerning certaine liberties graunted by the King to his Commons' (Pulton, *Statutes at large*, 56), but normally referred to as *De Tallagio non Concedendo*; it was cited as such in the 1628 'Petition of Right', printed in statute books as 3 Car. I c.1 (SR V 23).

⁴⁶ Charles II had never in fact formally conceded this general principle. His closest approach to doing so was probably 12 Car. II c.4 §6 (SR V 182), which denied that customs duties could be levied without parliament's consent.

the King, to whom alone, you say, belongeth the right of Levying, and disposing of the Militia; by which only it can be prevented, have ready Money, upon all Occasions, to Arm and pay as many Souldiers, as for the present defence, or the Peace of the People shall be necessary? Shall not I, and you, and every Man be undone? Tell me not of a Parliament when there is no Parliament sitting, or perhaps none in being, which may often happen; and when there is a Parliament if the speaking, and leading Men should have a design to put down Monarchy, as they had in the Parliament which began to sit Nov. 3. 1640.⁴⁷ Shall the King, who is to answer to God Almighty for the safety of the People, and to that end is intrusted with the Power to Levy and to dispose of the Souldiery, be disabled to perform his Office by virtue of these Acts of Parliament which you have [16] cited? If this be reason, 'tis reason also that the People be Abandoned, or left at liberty to kill one another, even to the last Man; if it be not Reason, then you have granted it is not Law.

La. 'Tis true, if you mean *Recta Ratio*,⁴⁸ but *Recta Ratio* which I grant to be Law, as Sir *Edw. Coke* says, I *Inst. Sect.* 138. ⁴⁹Is an Artificial perfection of Reason gotten by long Study, Observation, and Experience, and not every Mans natural Reason; for *Nemo nascitur Artifex*.⁵⁰ This Legal Reason is *summa Ratio*;⁵¹ and therefore, if all the Reason that is dispersed in so many several Heads were united into one, yet could he not make such a Law as the Law of *England* is, because by many Successions of Ages it hath been fined and refined, by an infinite number of Grave and Learned Men. And this is it he calls the Common-Law.

Ph. Do you think this to be good Doctrine? though it be true, that no Man is born with the use of Reason, yet all Men may grow up to it as well as Lawyers; and when they have applyed their Reason to the Laws (which were Laws before they Studyed them, or else it was not Law they Studied) may be as fit for, and capable of Judicature as Sir *Edw. Coke* himself, who whether he had more,

⁴⁷ The Long Parliament, which sat continuously until April 1653 and formally dissolved itself only in February 1660.

⁴⁸ 'Right Reason'.

⁴⁹ Quot. to 'Learned Men' (*First Inst.*, 97b). The words 'Artificial . . . Experience' are quoted at *Lev.*, 140.

⁵⁰ 'No one is born a Craftsman'.

⁵¹ 'The highest Reason'.

or less use of Reason, was not thereby a Judge, but because [17] the King made him so: And whereas he says, that a Man who should have as much Reason as is dispersed into so many several Heads, could not make such a Law as this Law of *England* is; if one should ask him who made the Law of *England*;^a Would he say a Succession of *English* Lawyers, or Judges made it, or rather a Succession of Kings; and that upon their own Reason, either solely, or with the Advice of the Lords and Commons in Parliament, without the Judges, or other Professors of the Law? You see therefore that the Kings Reason, be it more, or less, is that *Anima Legis*,⁵² that *Summa Lex*,⁵³ whereof Sir *Edw. Coke* speaketh, and not the Reason, Learning, or Wisdom of the Judges; but you may see, that quite through his Institutes of Law, he often takes Occasion to Magnifie the Learning of the Lawyers, whom he perpetually termeth the Sages of the Parliament, or of the Kings Council:⁵⁴ therefore unless you say otherwise, I say, that the Kings Reason, when it is publickly upon Advice, and Deliberation declar'd, is that *Anima Legis*, and that *Summa Ratio*, and that Equity which all agree to be the Law of Reason, is all that is, or ever was Law in *England*, since it became Christian, besides the Bible.⁵⁵ [18]

La. Are not the Canons of the Church part of the Law of *England*, as also the Imperial Law used in the Admiralty, and the Customs of particular places, and the by-Laws of Corporations, and Courts of Judicature.

Ph. Why not? for they were all Constituted by the Kings of *England*; and though the Civil Law used in the Admiralty were at first the Statutes of the *Roman* Empire, yet because they are in force by no other Authority than that of the King, they are now the Kings Laws, and the Kings Statutes.⁵⁶ The same we may say of the

^a ~ ?

⁵² 'The Soul/Life of the law'.

⁵³ 'Highest Law'.

⁵⁴ Coke does sometimes refer to judges as 'Sages of the law' (at *Fourth Inst.*, 72, for instance), but 'perpetually' is an exaggeration.

⁵⁵ Cf. *Lev.*: 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent' (*Lev.*, 138).

⁵⁶ Cf. *De C.*, xiv 5; *Lev.*, 336. That alien law in England was the King of England's law was not in itself a controversial statement. In Coke's opinion, 'albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved and

Canons; such of them as we have retained, made by the Church of *Rome*, have been no Law, nor of any force in *England*, since the beginning of Queen *Elizabeth's* Reign, but by Virtue of the Great Seal of *England*.⁵⁷

La. In the said Statutes that restrain the Levying of Money without consent of Parliament, Is there any thing you can take exceptions to?

Ph. No, I am satisfied that the Kings that grant such Liberties are bound to make them good, so far as it may be done without sin: But if a King find that by such a Grant he be disabled to protect his Subjects if he maintain his Grant, he sins; and therefore may, and ought to take no Notice [19] of the said Grant: For such Grants as by Error, or false Suggestion are gotten from him, are as the Lawyers do Confess, Void and of no Effect, and ought to be recalled.⁵⁸ Also the King (as is on all hands Confessed) hath the Charge lying upon him to Protect his People against Forraign Enemies, and to keep the Peace betwixt them within the Kingdom; if he do not his utmost endeavour to discharge himself thereof, he Committeth a Sin, which neither King, nor Parliament can Lawfully commit.⁵⁹

La. No Man I think will deny this: For if Levying of Money be necessary, it is a Sin in the Parliament to refuse, if unnecessary,^a it is a sin both in King and Parliament to Levy: But for all that it may be, and I think it is a Sin in any one that hath the Sovereign Power, be he one Man, or one Assembly, being intrusted with the safety of a whole Nation, if rashly, and relying upon his own

allowed here, by and with a general consent, are aptly and rightly called, the King's ecclesiastical laws of England' (Coke, *Fifth Reports*, Caudrey's case, 9a: ER LXXVII 11).

⁵⁷ The Act for the submission of the clergy (25 Henry VIII c.19; SR III 460-1) had envisaged a reform of canon law, ending with ratification by the Great Seal of all surviving Roman principles; in fact, however, this had never happened, and so the English monarchy had never formally endorsed the canons it inherited from the medieval church.

⁵⁸ Noy, *Compleat lawyer*, 37. H may have been thinking particularly of *Third Inst.*, 236, where charters of pardon are said to be void if based on false suggestion.

⁵⁹ *Lev.*, 113 states that 'If a Monarch, or Sovereign Assembly, grant a Liberty to all, or any of his Subjects, which Grant standing, he is disabled to provide for their safety, the Grant is voyd; unlesse he directly renounce, or transferre the Sovereignty to another . . . it is to be understood it was not his will; but that the Grant proceeded from ignorance of the repugnancy between such a Liberty and the Sovereign Power.' This suggests the stronger thesis that grants of this type are always and utterly void.

Natural sufficiency, he make War, or Peace without Consulting with such, as by their Experience and Employment abroad, and Intelligence by Letters, or other means have gotten the Knowledge in some measure of the strength, Advantages and Designs of the Enemy, and the Manner and Degree of the Danger that may from thence arise.⁶⁰ In like man-[20]ner, in case of Rebellion at Home, if he consult not with [men] of Military Condition, which if he do, then I think he may Lawfully proceed to Subdue all such Enemies and Rebels; and that the Souldiers ought to go on without Inquiring whether they be within the Country, or without: For who shall suppress Rebellion, but he that hath Right to Levy, Command, and Dispose of the Militia? The last long Parliament denied this. But why? Because by the Major part of their Votes the Rebellion was raised with design to put down Monarchy, and to that end Maintained.

Ph. Nor do I hereby lay any Aspersion upon such Grants of the King and his Ancestors. Those Statutes are in themselves very good for the King and People, as creating some kind of Difficulty for^a such Kings as for the Glory of Conquest might spend one part of their Subjects Lives and Estates, in Molesting other Nations, and leave the rest to Destroy themselves at Home by Factions. That which I here find fault with, is the wresting of those, and other such Statutes to a binding of our Kings from the use of their Armies in the necessary defence of themselves and their People. The late long Parliament that in 1648,⁶¹ Murdered their King (a King that sought no greater Glory upon Earth, but [21] to be indulgent to his People, and a Pious defender of the Church of *England*) no sooner took upon them the Sovereign Power, then they Levied Money upon the People at their own Discretion. Did any of their Subjects Dispute their Power? Did they not send Souldiers over the Sea to Subdue *Ireland*,⁶² and others to Fight against the Dutch at Sea,⁶³ or made they any

⁶⁰ H may be toning down his real antipathy to parliaments. He had earlier contrasted the rational practice of taking advice from individual experts within the area of their expertise with the counterproductive expedient of collecting them together in a council (Cf. *De C.*, x 10; *Lev.*, 96, 135-6).

^a , or

⁶¹ 30 January 1648/9 (H dates the year from 25 March).

⁶² In August 1649; English troops were stationed in Ireland down to the Restoration.

⁶³ The First Dutch War (May 1652-April 1654).

doubt but to be obeyed in all that they Commanded, as a Right absolutely due to the Sovereign Power in whomsoever it resides? I say^a not this as allowing their Actions, but as a Testimony from the Mouths of those very Men that denied the same Power to him, whom they acknowledged to have been their Sovereign immediately before, which is a sufficient Proof, that the People of *England* never doubted of the Kings Right to Levy Money for the Maintenance of his Armies, till they were abused in it by Seditious Teachers, and other prating Men, on purpose to turn the State and Church into Popular Government, where the most ignorant and boldest Talkers do commonly obtain the best preferments;⁶⁴ again, when their New Republick returned into Monarchy by *Oliver*, who durst deny him Money upon any pretence of *Magna Charta*, or of these other Acts of Parliament which you have Cited?⁶⁵ You may therefore think it good Law, for [22] all your Books; that the King of *England* may at all times, that he thinks in his Conscience it will be necessary for the defence of his People, Levy as many Souldiers, and as much Money as he please, and that himself is Judge of the Necessity.

La. Is there no body harkning at the door?

Ph. What are you afraid of?

La. I mean to say the same that you say: but there be very many yet, that hold their former Principles, whom, neither the Calamities of the Civil Wars, nor their former Pardon⁶⁶ have throughly cur'd of their Madness.

Ph. The Common People never take notice of what they hear of this Nature, but when they are set on by such as they think Wise; that is, by some sorts of Preachers, or some that seem to be Learned in the Laws, and withal speak evil of the Governors. But what if the King upon the sight, or apprehension of any great danger to

⁶⁴ Cf. *El.*, II ii 5; *De C.*, x 7; *Lev.*, 96–7.

⁶⁵ Cromwell became Lord Protector and possessor of a quasi-monarchical power on 16 Dec. 1653. Contrary to what H implies, some of his subjects openly denied that he was entitled to tax without consent; a test case was brought by a merchant named George Cony in 'Upper' [King's] Bench in 1655. But the upshot was what H would have expected; Cromwell imprisoned Cony and his lawyers until their resistance collapsed (Gardiner, *Commonwealth and Protectorate*, III 298–302).

⁶⁶ 'An Act of Free and General Pardon Indemnity and Oblivion' of 1661 (12 Car II c.11: SR V 226–34), a measure discussed by H at pp. 39–40 below.

his People; as when their Neighbours are born down with the Current of a Conquering Enemy, should think his own People might be involved in the same Misery, may he not Levy, Pay, and Transport Souldiers to help those weak Neighbours by way of prevention, to save his own People and himself from Servitude? Is that a sin? [23]

La. First, If the War upon our Neighbours be Just, it may be question'd whether it be Equity or no to Assist them against the Right.

Ph. For my part I make no Question of that at all, unless the Invader will, and can put me in security, that neither he, nor his Successors shall make any Advantage of the Conquest of my Neighbour, to do the same to me in time to come; but there is no Common Power to bind them to the Peace.

La. Secondly; when such a thing shall happen, the Parliament will not refuse to Contribute freely to the safety of themselves, and the whole Nation.

Ph. It may be so, and it may be not: For if a Parliament then sit not, it must be called; that requires 6 Weeks time; Debating and Collecting what is given requires as much, and in this time the Opportunity perhaps is lost. Besides, how many wretched Souls have we heard to say in the late Troubles; What matter is it who gets the Victory? We can pay but what they please to Demand, and so much we pay now: and this they will Murmur, as they have ever done whosoever shall Raign over them, as long as their Coveteousness and Ignorance hold together, which will be till Dooms-day^a, if better order be not taken for their [24] [In]struction^b in their Duty, both from Reason and Religion.

La. For all this I find it somewhat hard, that a King should have Right to take from his Subjects, upon the pretence of Necessity what he pleaseth.

Ph. I know what it is that troubles your Conscience in this Point. All Men are troubled at the Crossing of their Wishes; but it is our own fault. First, we wish Impossibilities; we would have our Security against all the World, upon Right of Property, without Paying for it: This is Impossible. We may as well Expect that Fish, and Fowl should Boil, Rost, and Dish themselves, and

^a Interlinear hyphen.

^b First syllable supplied from catchword: 'In-'.

come to the Table; and that Grapes should squeeze themselves into our Mouths, and have all other the Contentments and ease which some pleasant⁶⁷ Men have Related of the land of *Cockaigne*.⁶⁸ Secondly, There is no Nation in the World where he, or they that have the Sovereignty do not take what Money they please, for Defence of those respective Nations, when they think it necessary for their safety. The late long Parliament denied this; but why? Because there was a Design amongst them to Depose the King. Thirdly, There is no Example of any King of *England* that I have Read of, that ever pretended any such Necessity for Levying of Money, against [25] his Conscience. The greatest summs^a that ever were Levyed (Comparing the value of Money, as it was at that time, with what now it is) were Levied by King *Edm.* 3d. and King *Henry* the 5th. Kings of whom we Glory now, and think their Actions great Ornaments to the *English* History.⁶⁹ Lastly, As to the enriching of now and then a Favourite, it is neither sensible to the Kingdom,⁷⁰ nor is any Treasure thereby Conveyed out of the Realm, but so spent as it falls down again upon the Common People.⁷¹ To think that our Condition being Humane should be subject to no Incommodity, were Injurious to Quarrel with God Almighty for our own Faults; for he hath done his part in annexing [a reward to]^b our own Industry and Obedience.

⁶⁷ =amusing, lighthearted, facetious.

⁶⁸ More often 'Cockaigne': an imagined land of plenty.

^a sounds

⁶⁹ Sir Mathew Hale's 'Reflections' commented: 'they write and speak at randome that tell us the two most eminent kinges of this Realme Edward the 3^d and H 5 tooke the greatest freedome in impositions upon theyre Subjects. For hee that is but little conversant with the parliament Rolls of Historyes of those kinges will finde that though they did great thinges yet [it: deleted] was theyre warres and armyes maintained by parliamentary supplyes and those kinges had the fewest of parliamentary imposition[s] of any that preceded or succeeded them' (Lambeth MS 3479, fo.78).

⁷⁰ =the Kingdom does not feel it.

⁷¹ Cf. *El.*, II v 5; *De C.*, x 6; *Lev.*, 96–7.

^b The unexpanded text embodies the impeccably Calvinist thought that industry and obedience are themselves a gift from God, while our faults must be regarded as our own. H might conceivably have written this, but both the argument and its expression are odd and uncharacteristic; elsewhere in his writings, in English and in Latin, he prefers to speak of annexing x to y. Cf. *Lev.*'s account of 'natural punishments': 'he that will do any thing for his pleasure, must engage himselfe to suffer all the pains annexed to it' (*Lev.*, 193). In this case, the reward annexed would be a state of peace.

La. I know not what to say.

Ph. If you allow this that I have said; then, say that the People never were, shall be, or ought to be free from being Taxed at the will of one or other; being hindred, [in] that if Civil War come, they must Levy all they have, and that Dearly, from the one, or from the other, or from both sides.^a Say, that adhering to the King, their Victory is an end of their Trouble; that adhering to his Enemies there is no end; for the War will continue by a perpetual Subdivision, and when it ends, they will be in the same [26] Estate they were before. That they are often Abused by Men who to them seem wise, when then their Wisdom is nothing else but Envy to those that are in Grace, and in profitable Employments, and that those Men do but abuse the Common People to their own ends, that set up a private Mans Propriety against the publick Safety. But say withal, that the King is Subject to the Laws of God, both Written, and Unwritten, and to no other; and so was *William the Conqueror*, whose Right is^b all Descended to our present King.⁷²

La. As to the Law of Reason, which is Equity, 'tis sure enough there is but one Legislator, which is God.

Ph. It followeth then that which you call the Common-Law, Distinct from Statute-Law, is nothing else but the Law of God.

La. In some sense it is, but it is not Gospel, but Natural Reason, and Natural Equity.

^a Like *Ph.*'s previous sentence, this appears to be corrupt, but emendation should be very cautious. Suspicion centres on 'being hindred' and 'Levy', but both embody analogous inversions of the conventional wisdom. Hobbesian liberty is absence of hindrance ('a FREEMAN, is he, that . . . is not hindred to doe what he has a will to': *Lev.*, 108), but the state of war is full of hindrances. In peace, kings levy money from their subjects' property; in war, the subjects do the 'levying', in that they lose control of all their goods and need to ask for them to be returned.

^b it

⁷² The *Dialogue* is the only work in which H attaches importance to the historical fact of William's conquest. *Beh.* says 'by right of a descent continued above 600 years' down to 1640 (*Beh.*, 2; EW VI 165–6); if the figure 600 is taken literally, it implies that the Duke was no conqueror, but the legitimate heir of Edward the Confessor. *Lev.* casually refers to 'a descent of 600 years' (*Lev.*, 95), but in general it discourages attention to the historical origins of states: 'as if, for example, the Right of the Kings of England did depend on the goodness of the cause of *William* the Conquerour, and upon their lineall, and directest Descent from him' (*ibid.*, 391).

Ph. Would you have every Man to every other Man alledge for Law his own particular Reason? There is not amongst Men an Universal Reason agreed upon in any Nation, besides the Reason of him that hath the Sovereign Power;⁷³ yet though his Reason be but the Reason of one Man, yet it is set up to supply the place of that [27] Universal Reason, which is expounded to us by our Saviour in the Gospel, and consequently our King is to us the Legislator both of Statute-Law, and of Common-Law.

La. Yes, I know that the Laws Spiritual, which have been Law in this Kingdom since the Abolishing of Popery, are the Kings Laws, and those also that were made before; for the Canons of the Church of *Rome* were no Laws, neither here, nor any where else without the Popes Temporal Dominions, farther than Kings, and States in their several Dominions respectively did make them so.

Ph. I grant that. But you must grant also, that those Spiritual Laws [abroad were made by]^a Legislators of the Spiritual Law; and yet not all Kings, and States make Laws by Consent of the Lords and Commons; but our King here is so far bound to their Assents, as he shall Judge Conducing to the Good, and safety of his People; for Example, if the Lords and Commons should Advise him to restore those Laws Spiritual, which in Queen *Maries* time were in Force, I think the King were by the Law of Reason obliged, without the help of any other Law of God, to neglect such Advice.

La. I Grant you that the King is sole Legislator, but with this Restriction, that if [28] he will not Consult with the Lords of Parliament and hear the Complaints, and Informations of the Commons, that are best acquainted with their own wants, he sinneth against God, though he cannot be Compell'd to any thing by his Subjects by Arms, and Force.⁷⁴

⁷³ Cf. *El.*, II x 8; *De C.*, xiv 17; *Lev.*, 19.

^a *Ph.* must be expressing a more extreme position than *La.*'s view that canon law is made by the secular state. If the proposed addition is correct, his point is that the canon law is valid even when made by monarchs who make laws without consent. He goes on to concede ('but our King . . .') that English Kings are bound to take their subjects' good advice. *Moral works* and *EW* both suggest 'were made by'. Cropsey prefers 'were enacted in England by consent of the Lords and Commons assenting in the Kings' actions as sole'.

⁷⁴ At *Lev.*, 184-5 H stresses the importance of hearing complaints in rather similar phrasing; he deplores the claim, however, that nobles have a right to be consulted.

Ph. We are Agreed upon that already;^a since therefore the King is sole Legislator, I think it also Reason he should be sole Supream Judge.

La. There is no doubt of that; for otherwise there would be no Congruity of Judgments with the Laws. I Grant also that he is the Supream Judge over all Persons, and in all Causes Civil, and Ecclesiastical within his own Dominions,⁷⁵ not only by Act of Parliament at this time, but that he has ever been so by the Common-Law: For the Judges of both the Benches⁷⁶ have their Offices by the Kings Letters Patents, and so (as to Judicature) have the Bishops. Also the Lord Chancellour hath his Office by receiving from the King the Great Seal of *England*; and to say all at once, there is no Magistrate, or Commissioner for Publick Business, neither of Judicature, nor Execution in State, or Church, in Peace, or War, but he is made so by Authority from the King. [29]

Ph. 'Tis true; But perhaps you may think otherwise, when you Read such Acts of Parliament, as say, that the King shall have Power and Authority to do this, or that by Virtue of that Act, as *Eliz. c. 1.* ⁷⁷That your Highness, your Heirs, and Successors, Kings, or Queens of this Realm shall have full Power and Authority, by Virtue of this Act, by Letters Patents under the Great Seal of *England* to Assign, &c. Was it not this Parliament that gave this Authority to the Queen?

La. No; For the Statute in this Clause is no more than (as Sir *Edw. Coke* useth to speak) an Affirmance of the Common-Law;⁷⁸ for she being Head of the Church of *England* might make Commissioners for the deciding of Matters Ecclesiastical, as freely as if

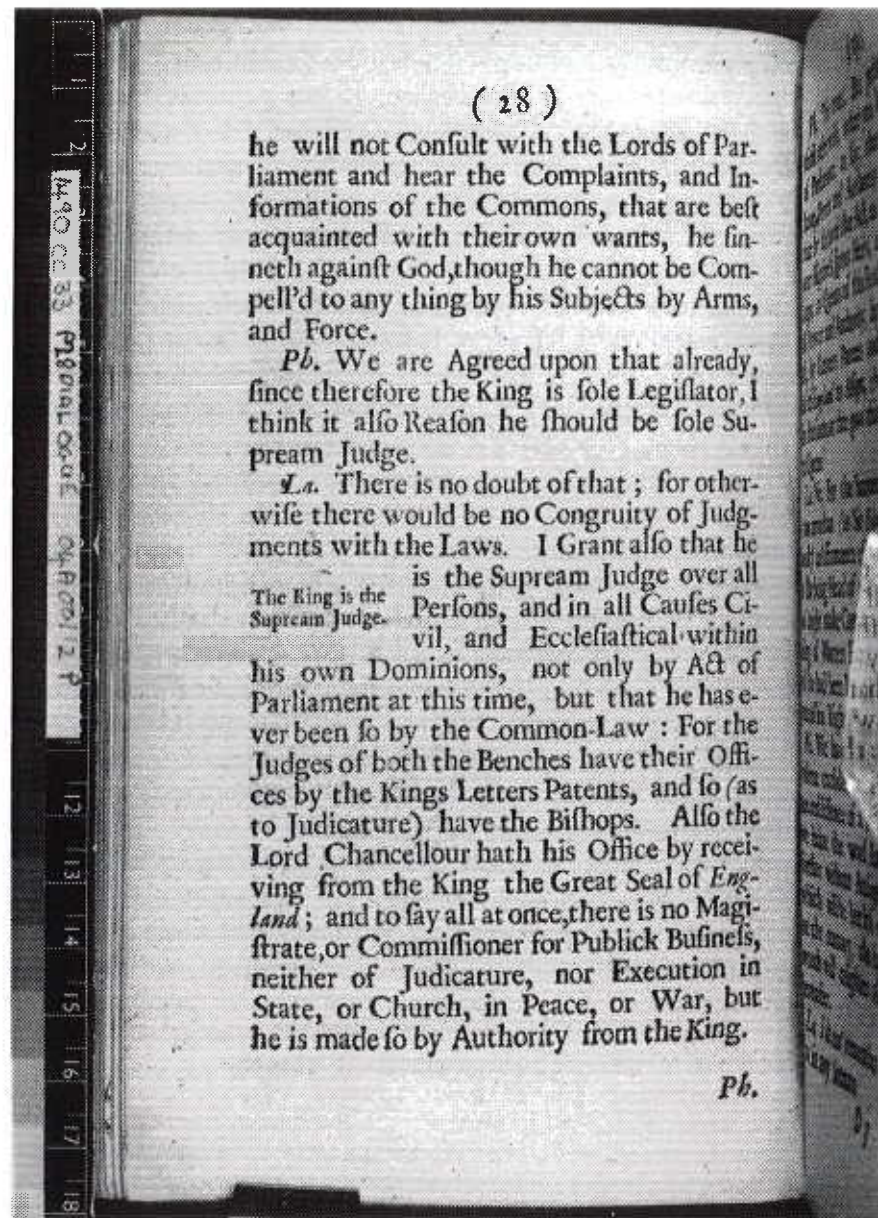
^a ~,

⁷⁵ Marginal note: 'The King is the Supream Judge.' See Illustration 5.

⁷⁶ The courts of King's Bench and Common Pleas.

⁷⁷ Quot. to 'Assign, &c.' (1 *Eliz. c. 1* §8: SR IV 352). The famous clause H quotes confers authority upon the monarch to nominate commissioners to exercise 'all manner of Jurisdiction Privileges and Preheminences in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction' and to 'visite refourme redres order correcte and amende all such Erroures Heresies Schismes Abuses Offences Contemptes and Enormities whatsoever' within the scope of such a jurisdiction. It is discussed below (p. 99).

⁷⁸ Coke frequently treats statutes as 'confirmations' of the common law. In his report on *Caudrey's* case, printed as *De jure regis ecclesiastico* at the start of his *Fifth Reports*, he argued that this very clause simply confirmed existing royal power (5 *Coke: De jure regis ecclesiastico*, 8a-b: ER LXXVII 10).



Page 28 of *A Dialogue*

- she had been Pope, who did you know pretend⁷⁹ his Right from the Law of God.
- Ph.* We have hitherto spoken of Laws without considering any thing of the Nature and Essence of a Law; and now unless we define the word Law, we can go no farther without Ambiguity, and Fallacy, which will be but loss of time; whereas, on the contrary, the Agreement upon our words will enlighten all we have to say hereafter.
- La.* I do not remember the Definition of Law in any Statute. [30]
- Ph.* I think so: For the Statutes were made by Authority, and not drawn from any other Principles than the care of the safety of the People. Statutes are not Philosophy as is the Common-Law, and other disputable Arts, but are Commands, or Prohibitions which ought to be obeyed, because Assented to by Submission made to the Conqueror here in *England*,⁸⁰ and to whosoever had the Sovereign Power in other Common wealths; so that the Positive Laws of all Places are Statutes. The Definition of Law was therefore unnecessary for the makers of Statutes, though very necessary to them, whose work it is to Teach the sence of the Law.
- La.* There is an Accurate Definition of a Law in *Bracton*, Cited by Sir *Edw. Coke* ([*Second Inst.*, 588]) *Lex est sanctio justa, iubens honesta, & prohibens contraria*.⁸¹
- Ph.* That is to say, Law is a just Statute, Commanding those things which are honest, and Forbidding the contrary. From whence it followeth, that in all Cases it must be the Honesty, or Dishonesty that makes the Command a Law, whereas you know that but for the Law we could not (as saith *St. Paul*)⁸² have known what is sin; therefore this Definition is no Ground at all for any farther Discourse of Law. Besides, you know the Rule of Honest, and [31] Dishonest refers to Honour,⁸³ and that it is Justice only, and Injustice that the Law respecteth. But that which I most except

⁷⁹ =claim.

⁸⁰ See p. 25 n.72 above.

⁸¹ *Bracton*, *De legibus*, 2r; *Second Inst.*, 588.

⁸² 'I had not known sin, but by the law' (*Romans* vii 7).

⁸³ 'Honourable is whatsoever possession, action, or quality, is an argument and signe of Power' (*Lev.*, 44); the 'Lawes of Honour', the principles that restrain societies at war with one another, are 'to abstain from cruelty, leaving to men their lives, and instruments of husbandry' (*Lev.*, 85; for a slightly different account, cf. *El.* I xix 2).

against in this Definition, is, that it supposes that a Statute made by the Sovereign Power of a Nation may be unjust. There may indeed in a Statute Law, made by Men be found Iniquity, but not Injustice.⁸⁴

La. This is somewhat subtil; I pray deal plainly, what is the difference between Injustice and Iniquity?

Ph. I pray you tell me first, what is the difference between a Court of Justice, and a Court of Equity?

La. A Court of Justice is that which hath Cognizance of such Causes as are to be ended by the Positive^a Laws of the Land; and a Court of Equity is^b that, to which belong such Causes as are to be determined by Equity; that is to say, by the Law of Reason.

Ph. You see then that the difference between Injustice, and Iniquity is this; that Injustice is the Transgression of a Statute-Law, and Iniquity the Transgression of the [Common-Law, which]^c was nothing else but the Law of Reason, and that the Judges of that Law are Courts of Justice, because the breach of the Statute-Law is Iniquity, and Injustice also.⁸⁵ But perhaps you mean by Common-Law, not the Law it self [32], but the manner of proceeding in the Law (as to matter of Fact) by 12 Men, Free-holders,^d though those 12 Men are no Court of Equity, nor of Justice, because they determine not what is Just, or Unjust, but only whether it be done, or not done;⁸⁶ and their Judgment is nothing

⁸⁴ Cf. *El.*, II ii 3, ix 1; *De C.*, vii 14; *Lev.*, 90, 109.

^a Positive

^b in

^c < Law of Reason > Three considerations converge to recommend this emendation: (i) 'the transgression of a Statute-Law' is naturally contrasted with the transgression of a common law; (ii) the later reference to 'Common-Law' suggests that the phrase has recently been used; and (iii) H frequently reminds the reader of Coke's belief that common law is reason, and actually says 'the Common-Law (which is the Law of Reason)' at p. 122 below.

⁸⁵ If the above emendation is sound, 'that Law' is common law (if it is not, the phrase is likely to refer to 'the Law of Reason', which comes to the same thing). The argument appears to run as follows: H has equated common law with reason/equity and 'justice' with observance of positive law; he now explains that courts of common law (equity) are nonetheless courts of justice (positive law). Judges of common law can deal with breaches of positive law, as any disobedience to the latter is a breach of the natural law of covenant-keeping. Cf. *Lev.*'s maxim that 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent' (*Lev.*, 138).

^d Interlinear hyphen.

⁸⁶ Contrast *Lev.*, 146, where juries are said to be judges 'not onely of the Fact, but also of the Right'.

else but a Confirmation of that which is properly the Judgment of the Witnesses; for to speak exactly there cannot possibly be any Judge of Fact besides the Witnesses.⁸⁷

La. Seeing all Judges in all Courts ought to Judge according to Equity, which is the Law of Reason, a distinct Court of Equity seemeth to me to be unnecessary, and but a Burthen to the People, since Common-Law, and Equity are the same Law.

Ph. It were so indeed; If Judges could not err, but since they may err, and that the King is not Bound to any other Law but that of Equity, it belongs to him alone to give Remedy to them that by the Ignorance, or Corruption of a Judge shall suffer damage.

La. How would you have a Law defin'd?^a

Ph. Thus; A Law is the Command of him, or them that have the Sovereign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every⁸⁸ of them may do, and what they must forbear to do. [33]

La. By your Definition of a Law, the Kings Proclamation under the Great Seal of *England* is a Law; for it is a Command, and Publick, and of the Sovereign to his Subjects.⁸⁹

Ph. Why not? If he think it necessary for the good of his Subjects: For this is a Maxim at the Common-Law Alledged by Sir *Edward Coke* himself. 2^b *Inst.* c 306. *Quando Lex aliquid concedit, concedere videtur & id per quod devenitur ad illud.*⁹⁰ And you know

⁸⁷ Few if any early modern common lawyers would have accepted this; in principle juries were judges of the facts whether or not they heard some testimony. Coke actually distinguished between trial 'by witnesses' and trial 'by jury' (*Third Inst.*, 26-7). Though it is true that witnesses were playing a growing role in criminal trials, juries remained entitled to draw on their personal knowledge in reaching a verdict. As late as 1670, in his famous judgment upon *Bushel's case*, H's friend Sir John Vaughan successfully maintained that juries could base their decisions on information never produced in court; it followed that no judge could punish them for verdicts that defied a judicial direction (Vaughan 147; ER CXXIV 1012).

^a In copy-text, this question and *Ph.*'s answer is found before the previous exchange (between 'the Witnesses' and 'Seeing all Judges'). The emendation (Cropsey's) restores them to their logical position.

⁸⁸ =each (cf. *Lev.*, 137).

⁸⁹ Cf. *Answer to Bramhall*, 113-4 (EW IV 370) and see below, p. 139.

^b 1

^c < *Sect.* > *First Inst.* (unlike *Second*) has numbered sections. Somebody who thought that the (correct) page reference was to the earlier work might well assume that '306' was in fact a section number.

⁹⁰ 'When the law allows something, it seems to allow also the means by which that thing has come about.'

out of the same Author, that divers Kings of *England* have often, to the Petitions in Parliament which they granted, annexed such exceptions as these, unless there be necessity, saving our Regality;⁹¹ which I think should be always understood, though they be not expressed; and are understood so by Common Lawyers,⁹² who agree that the King may recall any Grant wherein he was deceiv'd.

La. Again, whereas you make it of the Essence of a Law to be Publickly and plainly declar'd to the People, I see no necessity for that. Are not all Subjects Bound to take notice of all Acts of Parliament, when no Act can pass without their Consent?

Ph. If you had said that no Act could pass without their knowledge, then indeed they had been bound to take notice of them; but none can have knowledge of them but [34] the Members of the Houses of Parliament, therefore the rest of the People are excus'd; or else the Knights of the Shires^a should be bound to furnish People with a sufficient Number of Copies (at the Peoples Charge) of the Acts of Parliament at their return into the Country; that every man may resort to them, and by themselves, or Friends take notice of what they are obliged to; for otherwise it were Impossible they should be obeyed: And that no Man is bound to do a thing Impossible is one of Sir *Edw. Cokes* Maxims at the Common-Law.⁹³ I know that most of the Statutes are Printed, but it does not appear that every Man is bound to Buy the Book of Statutes, nor to search for them at *Westminster* or at the *Tower*,⁹⁴ nor to understand the Language wherein they are for the most part Written.⁹⁵

La. I grant it proceeds from their own Faults; but no Man can be excused by the Ignorance of the Law of Reason; that is to say, by Ignorance of the Common-Law, except Children, Mad-men, and Idiots: But you exact such a notice of the Statute-Law, as is almost Impossible. Is it not enough that they in all Places have a sufficient number of the Poenal Statutes?

⁹¹ See below, pp. 60–1, 130

⁹² See above, p. 20 n.58.

^a Copy-text prints 'Sheirs', but BL 884.k.5 and some other copies have 'Shires'. This is the only variant between copies arising from deliberate intervention.

⁹³ *First Inst.*, 92a.

⁹⁴ The possible locations of legal records.

⁹⁵ Latin and Norman French.

Ph. Yes; If they have those Poenal Statutes near them, but what Reason can you give me why there should not be as many [35] Copies abroad of the Statutes, as there be of the Bible?

La. I think it were well that every Man that can Read had a Statute-Book; for certainly no knowledge of those Laws, by which Mens Lives and Fortunes can be brought into danger, can be too much. I find a great Fault in your Definition of Law; which is, that every Law either forbiddeth or Commandeth something. 'Tis true that the Moral-Law⁹⁶ is always a Command or a Prohibition, or at least Imphieth it; but in the Levitical-Law, where it is said; that he that Stealeth a Sheep shall Restore four Fold;⁹⁷ what Command, or Prohibition lyeth in these words?

Ph. Such Sentences as that are not in themselves General, but Judgments;^a nevertheless, there is in those words Implied a Commandment to the Judge, to cause to be made a Four-fold Restitution.⁹⁸

La. That's Right.

Ph. Now Define what Justice is, and what Actions, and Men are to be called Just.

⁹⁶ Theologians used the phrase 'the moral law' to refer to that part of God's law for the Jews that continues to be binding everywhere (i.e. that overlaps with natural law), in contrast to the 'ceremonial' and 'judicial' laws. H liked to point out that natural law was 'moral' (from the Latin *mores*=customs, manners), on the grounds that it concerned 'mens manners and conversation one towards another' (*El.*, I xviii 1; cf. *De C.*, iii 31, *De H.*, xiii 9).

⁹⁷ *Exodus* xxii 1; alluded to II *Samuel* xii 6.

^a ~,

⁹⁸ *Lev.* distinguishes 'distributive' laws, addressed to every subject and defining private rights at positive law, from 'penal' laws defining punishments, addressed 'to publike Ministers appointed to see the Penalty executed. And these Penal Lawes are for the most part written together with the Lawes Distributive; and are sometimes called Judgements' (*Lev.*, 148; cf. *El.*, II x 6). *Lat. Lev.* states: 'Distributivae sunt, quibus Iura Civium definiuntur; quaeque Civibus praescribuntur universis. [New line] Poenales sunt quae poenas violatoribus Legum infligendas definiunt; quaeque Ministros quorum officium est poenas exequi solos alloquuntur, et cum Legibus Distributivis conjunguntur' [Distributive laws are those by which the rights of subjects are defined; and which are prescribed to the whole citizen body. Penal laws are those which define the pains to be inflicted on violators of the law; and which are addressed to the officers alone, whose duty is to implement the pains, and which are joined together with the distributive laws] (*Lat. Lev.*, 135: OL III 207). *De C.* held that 'distributive' (*distributiva*) and 'vindicative, or penal' (*vindicativa, sive poenaria*) were properly not labels for different types of law, but the inseparable parts of every positive law (*De C.*, xiv 6–7).

La. Justice is the constant will of giving to every Man his own;⁹⁹ that is to say, of giving to every Man that which is his Right, in such manner as to Exclude the Right of all Men else to the same thing. A Just Action is that which is not against the Law. [36] A Just Man is he that hath a constant Will to live Justly;¹⁰⁰ if you require more, I doubt¹⁰¹ there will no Man living be Comprehended within the Definition.

Ph. Seeing then that a Just Action (according to your Definition) is that which is not against the Law; it is Manifest that before there was a Law, there could be no Injustice, and therefore Laws are in their Nature Antecedent to Justice and Injustice, and you cannot deny but there must be Law-makers, before there were^a any Laws, and Consequently before there was any Justice, I speak of Humane Justice; and that Law-makers were before that which you call Own, or property of Goods, or Lands distinguished by *Meum, Tuum, Alienum*.¹⁰²

La. That must be Granted; for without Statute-Laws, all Men have Right to all things; and we have had Experience when our Laws were silenced by Civil War,¹⁰³ there was not a Man, that of any Goods could say assuredly they were his own.

Ph. You see then that no private Man can claim a Propriety in any Lands, or other Goods from any Title, from any Man, but the King, or them that have the Sovereign Power; because it is in virtue of the Sovereignty, that every Man may not enter [37] into, and Possess what he pleaseth; and consequently to deny the Sovereign any thing necessary to the sustaining of his Sovereign power, is to destroy the Propriety he pretends to. The next thing I will ask you is, how you distinguish between Law and Right, or *Lex* and *Jus*.

La. Sir *Ed. Coke* in divers places makes *Lex* and *Jus* to be the same, and so *Lex Communis*, and *Jus Commune*^b to be all one; nor do I find that he does in any places distinguish them.

⁹⁹ See above, p. 13.

¹⁰⁰ Like Aristotle, H always insisted a man does not cease to be just because he commits the occasional unjust action (*Lev.*, 74; *De C.*, iii 5; *El.*, I xvi 4).

¹⁰¹ =I am sure.

^a was

¹⁰² See above, pp. 13–14.

¹⁰³ 'It is a proverbial saying, *inter arma silent leges* [amid arms the laws are silent]' (*El.*, I xix 2).

^b *Communis*

Ph. Then will I distinguish them, and make you judge whether my distinction be not necessary to be known by every Author of the Common Law: for Law obligeth me to do, or forbear the doing of something; and therefore it lies upon me an Obligation; but my Right is a Liberty left me by the Law to do any thing which the Law forbids me not, and to leave undone any thing which the Law commands me not.¹⁰⁴ Did Sir *Ed. Coke* see no difference between being bound and being free?¹⁰⁵

La. I know not what he saw^a, but he has not mention'd it, though a man may dispense with his own Liberty, that cannot do so with the Law.

Ph. But what are you better for your Right, if a rebellious Company at home, or an Enemy from abroad take away the Goods, [38] or dispossess you of the Lands you have a right to? Can you be defended, or repair'd, but by the strength and authority of the King? What reason therefore can be given by a man that endeavours to preserve his Propriety, why he should deny, or malignly contribute to the Strength that should defend him, or repair him? Let us see now what your Books say to this point, and other points of the Right of Sovereignty. *Bracton*, the most authentick Author of the Common Law, fol. 55. saith thus: *Ipse Dominus Rex habet omnia Jura in manu suâ, est Dei Vicarius; habet ea quae sunt Pacis, habet etiam coercionem ut Delinquentes puniat; habet in potestate suâ Leges; nihil enim prodest Jura condere, nisi sit qui Jura tueatur*.¹⁰⁶ That is to say, our Lord the King hath all Right in his

¹⁰⁴ Cf. *El.*, II x 5; *De C.*, xiv 3; *Lev.*, 64.

¹⁰⁵ A common etymology derived *lex* (law) from *ligare* (to bind). Cf. Fortescue, *De laudibus*, 31; St German, *Dr and Student*, 27.

^a was

¹⁰⁶ A composite quotation. Phrases reproduced have been italicised: 'Et sciendum quod ipse dominus Rex, qui ordinariam habet jurisdictionem & dignitatem & potestatem super omnes qui in regno suo sunt, habet enim omnia jura in manu sua, quae ad coronam & laicalem pertinent potestatem & materialem gladium, qui pertinet ad regni gubernaculum, habet etiam iustitiam, & iudicium quae sunt jurisdictiones, ut ex jurisdictione sua, sicut dei minister et vicarius, tribuat unicuique quod suum fuerit. Habet etiam ea quae sunt pacis, ut populus sibi traditus in pace sileat & quiescat, & ne quis alterum verberet, vulneret, vel male tractet, ne quis alienam rem per vim & roberiam auferat vel asportet, ne quis hominem mahemiet vel occidat. Habet etiam coercionem, ut delinquentes puniat & coerceat. Item habet in potestate sua leges, & constitutiones, & assisas in regno suo provisatas & approbatas, & juratas, ipse in propria persona sua observet, & a subditis suis faciat observari. Nihil enim prodest iura condere nisi sit qui jura tueatur' (*Bracton*, *De legibus*, 55v).

own Hands; is Gods Vicar; he has all that concerns the Peace; he has the power to punish Delinquents; all the Laws are in his power; To make Laws is to no purpose, unless there be somebody to make them obeyed. If *Bracton's* Law be Reason, as I, and you think it is; what temporal power is there which the King hath not? Seeing that at this day all the power Spiritual which *Bracton* allows the *Pope*, is restored to the Crown; what is there that the King cannot do, excepting sin against the Law of God? The same *Bracton Lib. 1^a. [39] c. 8.* saith thus; *Si autem a Rege petitur (cum Breve non currat^b contra ipsum) locus erit supplicationi, quod factum suum corrigat, & emendet; quod quidem si non fecerit, satis sufficit [ei] ad poenam, quod Dominum expectet Ultorem; nemo quidem de factis ejus praesumat disputare, multo fortius contra factum ejus venire.*¹⁰⁷ That is to say, if any thing be demanded of the King (seeing a Writ lyeth not against him) he is put to his Petition, praying him to Correct and Amend his own Fact; which if he will not do, it is a sufficient Penalty for him, that he is to expect a punishment from the Lord: No Man may presume to dispute of what he does, much less to resist him. You see by this, that this Doctrine concerning the Rights of Sovereignty so much Cryed down by the long Parliament, is the Antient Common-Law, and that the only Bridle of the Kings of *England*, ought to be the fear of God. And again *Bracton, c. 24.* of the second Book sayes, That the Rights of the Crown cannot be granted away; *Ea vero quae Jurisdictionis & Pacis, & ea quae sunt Justitiae & Paci annexa, ad nullum pertinent, nisi ad Coronam & Dignitatem Regiam, nec a Corona separari possunt, nec a privata persona possideri.*¹⁰⁸ That is to say, those things which belong to Jurisdiction and Peace, and those things that are annexed to Justice, and [40] Peace, appertain to none, but to the Crown and Dignity of the King, nor can be separated from the Crown,

^a 21

^b curret

¹⁰⁷ *Bracton, De legibus, 5v-6.*

¹⁰⁸ Another composite: *'Ea vero quae jurisdictionis sunt & pacis, & ea quae sunt justitiae et paci annexa, ad nullum pertinent, nisi ad coronam & dignitatem regiam, nec a corona separari poterunt, cum faciant ipsam coronam. Est enim corona Regis facere iustitiam & iudicium, & tenere pacem, & sine quibus, coronam consistere non potest, nec tenere. Huiusmodi autem iura sive iurisdictiones ad personas vel tenementa transferri non poterunt, nec a privata persona possideri.'* (ibid., 55v).

nor be possess by a private Person. Again you'll find in *Fleta* (a Law-Book written in the time of *Edw. 2.*)¹⁰⁹ That Liberties though granted by the King, if they tend to the hinderance of Justice, or subversion of the Regal Power, were not to be used, nor allowed: For in that Book *c. 20.* concerning Articles of the Crown, which the Justices Itinerant are to enquire of, the 54th Article is this, you shall inquire *De Libertatibus concessis quae impediunt Communem Justitiam, & Regiam Potestatem subvertunt.*¹¹⁰ Now what is a greater hindrance to Common Justice, or a greater subversion of the Regal Power, than a Liberty in Subjects to hinder the King from raising Money necessary to suppress, or prevent Rebellions, which doth destroy Justice, and subvert the power of the Sovereignty? Moreover when a Charter is granted by a King in these words, *Dedita & coram pro me & Haeredibus meis,*¹¹¹ the grantor by the Common-Law (as Sir *Edw. Coke* sayes in his Commentaries on *Littleton*) is to warrant his Gift;¹¹² and I think it Reason, especially if the Gift be upon Consideration of a price Paid. Suppose a Forraign State should lay^b claim to this Kingdom ('tis no Matter as to the Question I am putting, whether the Claim be unjust) how would you have the King to warrant to every Free-holder in *England* the Lands they hold of him by such a Charter? If he cannot levy Money, their Estates are lost, and so is the Kings

¹⁰⁹ The treatise known as 'Fleta' was an account of common law, believed by Coke to date from the reign of Edward II. H's acceptance of this date reveals his knowledge of the work was second-hand or very superficial. Selden's edition of 1647 (the only printed version) not only argued for an earlier date (Selden, *Ad Fletam dissertatio*, 177-85), but stated it upon the title page: *Fleta, seu Commentarius juris Anglicani sic nuncupatus, sub Edwardo Rege Primo . . . ab anonymo conscriptus* [Fleta, or the commentary on English law thus titled, composed by an unknown hand under King Edward I].

¹¹⁰ 'Concerning liberties granted which impede Common Justice and subvert Royal Power' (*Fleta*, 26).

^a ~. The

¹¹¹ 'Given to and in the presence of for me and my Heirs.'

¹¹² The law of warranties was intricate and H may not have troubled to understand its technicalities. To warrant a gift is to promise that you and your heirs will defend the donee's title against 'eviction' (that is, against all other legal claimants), or else will substitute real property of at least equivalent value. One function of a warranty was thus to extinguish the claims of the donor's heirs. Monarchs were never warrantors, but in their natural capacities they could inherit such an obligation. Coke's detailed discussion (*First Inst.*, 365a-93b) does not explicitly state that donors are obliged to warrant their gifts.

^b say

Estate, and if the Kings Estate be gone, how can he repair the Value due upon the Warranty?¹¹³ I know that the Kings Charters are not so meely Grants, as that they are not also Laws,¹¹⁴ but they are such Laws as speak not to all the Kings Subjects in general, but only to his Officers; implicitly forbidding them to Judge, or Execute any thing contrary to the said Grants. There be many Men that are able Judges of what is right Reason, and what not; when any of these shall know that a Man has no Superiour, nor Peer in the Kingdom, he¹¹⁵ will hardly be perswaded he can be bound by any Law of the Kingdom, or that he who is Subject to none but God, can make a Law upon himself, which he cannot also as easily abrogate, as he made it. The main Argument, and that which so much taketh with the throng of People, proceedeth from a needless fear put into their minds by such Men as mean to make use of their Hands to their own ends; for if (say they) the King may (notwithstanding the Law) do what he please, and nothing do^a restrain him but the [42] fear of punishment in the World to come, then (in case there come a King that fears no such punishment) he may take away from us, not only our Lands, Goods, and Liberties, but our Lives also if he will: And they say true; but they have no reason to think he will, unless it be for his own profit, which cannot be; for he loves his own Power; and what becomes of his power when his Subjects are destroyed, or weakned, by whose multitude, and strength he enjoys his power, and every one of his Subjects his Fortune?¹¹⁶ And lastly, whereas they sometimes say the King is bound, not only to cause his Laws to be observ'd, but also to observe them himself; I think the King causing them to be observ'd is the same thing as observing them himself: For I never heard it taken for good Law, that the King may be Indicted,¹¹⁷

¹¹³ The argument implied appears to be: (i) At common law gifts must be warranted (ii) Kings make gifts at common law (iii) Common law must therefore allow the King the resources to meet the obligations a warranty implies.

¹¹⁴ Contrast *Lev.*, 150: 'Charters are Donations of the Sovereign; and not Lawes, but exemptions from Law.'

¹¹⁵ i.e. the man who can judge right reason.

^a to I owe this emendation to Noel Malcolm.

¹¹⁶ Cf. *El.*, II v 1; *De C.*, x 2; *Lev.*, 182.

¹¹⁷ Indictment is 'a Bill or Declaration in form of Law, exhibited by way of Accusation against one for some Offence either criminal or penal, and preferred to Jurors, and by their Verdict found and presented to be true before a Judge or Officer.' (*Termes de la ley*, 306).

or Appealed,¹¹⁸ or served with a Writ, till the long Parliament practised the contrary upon the good King *Charles*, for which divers of them were Executed, and the rest by this our present King pardoned.¹¹⁹

La. Pardoned by the King and Parliament.¹²⁰

Ph. By the King in Parliament¹²¹ if you will, but not by the King, and Parliament; you cannot deny, but that the pardoning of Injury,¹²² [belongs] to the Person that is Injur'd.^a Trea-[43]son, and other Offences against the Peace, and against the Right of the Sovereign are Injuries done to the King; and therefore whosoever is pardoned any such Offence, ought to acknowledge he owes his Pardon to the King alone: But as to such Murders, Felonies, and other Injuries as are done to any Subject how mean soever, I think it great reason that the parties endammaged ought to have satisfaction before such pardon be allow'd.¹²³ And in the death of a Man, where restitution of Life is Impossible, what can any Friend, Heir, or other party that may appeal, require more than reasonable satisfaction some other way? Perhaps he will be content with nothing but Life for Life; but that is Revenge, and belongs to God, and under God to the King, and none else;¹²⁴ therefore if there be reasonable satisfaction tendred, the King, without sin (I think) may pardon him. I am sure, if the pardoning him be a sin, that neither King, nor Parliament, nor any earthly Power can do it.

¹¹⁸ A largely obsolete procedure, in which an accusation of felony or treason was levelled by a private individual.

¹¹⁹ The King was not in fact so merciful; those who had signed his father's death warrant but were not executed were actually left to die in prison (Hutton, *Charles II*, 172).

¹²⁰ By an 'Act of Free and General Pardon Indempnity and Oblivion' (SR V 226-34: 12 Car II c.11).

¹²¹ By a King who happens to act within a parliamentary setting, as opposed to a King who has some need of parliament's consent. Cf. *Lev.*, 139.

¹²² 'Injury' is a term of art for H, referring, 'in the proper signification', to breach of covenant (*Lev.*, 90; cf. *El.*, I xvi 2; *De C.*, iii 3).

^a ~,

¹²³ Cf. *Lev.*, 180.

¹²⁴ Some puritans insisted, following *Gen.* ix 6 ('whoso sheddeth man's blood, by man shall his blood be shed') that it was always wrong to pardon murder. H's talk of royal revenge should probably not be taken literally; his previous unambiguous opinion was that 'Revenge without respect to the Example, and profit to come' is against the law of nature (*Lev.*, 76; cf. *El.*, I xvi 10; *De C.*, iii 11).

La. You see by this your own Argument, that the Act of *Oblivion*, without a Parliament could not have passed; because, not only the King, but also most of the Lords, and abundance of Common People had received Injuries; which not being pardonable, but by their own Assent, it was absolutely ne-[44]cessary that it should be done in Parliament, and by the assent of the Lords and Commons.

Ph. I grant it; but I pray you tell me now what is the difference between a general Pardon, and an Act of *Oblivion*?

La. The word Act of *Oblivion* was never in our Books¹²⁵ before; but I believe it is in yours.

Ph. In the State of *Athens* long ago, for the Abolishing of the Civil War, there was an Act agreed on; that from that time forward, no Man should be molested for any thing (before that Act done) whatsoever without exception, which Act the makers of it called an Act of *Oblivion*; not that all Injuries should be forgotten (for then we could never have had the story) but that they should not rise up in Judgment against any Man.¹²⁶ And in imitation of this Act the like was propounded (though it took no effect) upon the death of *Julius Caesar*, in the Senate of *Rome*.¹²⁷ By such an Act you may easily conceive that all Accusations for offences past were absolutely dead, and buried,^a and yet we have no great reason to think, that the objecting one to another of the Injuries pardoned, was any violation of those Acts, except the same were so expressed in the Act it self.¹²⁸ [45]

La. It seems then that the Act of *Oblivion* was here no more, nor of other nature than a General Pardon.¹²⁹

¹²⁵ Books of common law.

¹²⁶ The obvious authority was Xenophon's continuation of Thucydides, which H had surely read when translating the latter (Xenophon, *Hellenica*, 169). It lists exceptions to the amnesty. H may have been influenced by Sir Walter Raleigh (*History of the World*, III ix 3), who stated that 'a law was passed by which all injuries past should be forgotten'.

¹²⁷ Plutarch, *Cicero*, xlii; Cicero, *Philippics*, 21.

¹²⁸ 12 Car II c. 11 §24 made it illegal, for a three-year period, 'malitiously to call or alledge of, or object against any other person or persons any name or names, or other words of reproach any way tending to revive the memory of the late Differences or the occasions thereof' (SR V 230).

¹²⁹ This statement is qualified at pp. 133-4 below.

Of Courts.

Ph. Since you acknowledge that in all controversies, the Judicature originally belongeth to the King, and seeing that no Man is able in his own person to execute an Office of so much business; what order is taken for deciding of so many, and so various Controversies?

La. There be divers sorts of Controversies, some of which are concerning Mens Titles to Lands, and Goods; and some Goods are Corporeal, as^a Lands, Money, Cattel, Corn, and the like, which may be handled, or seen; and some Incorporeal, as Priviledges, Liberties, Dignities, Offices, and many other good things, meer Creatures of the Law, and cannot be handled or seen: And both of these kinds are concerning *Meum*, and *Tuum*. Others there are concerning Crimes punishable divers wayes; and amongst some of these, part of the punishment is some Fine, or Forfeiture to the King, and then it is called a Plea of the Crown, in case the King sue the party, otherwise it is but a private Plea, which they call an Appeal: And though upon Judg-[46]ment in an Appeal the King shall have his Forfeiture; yet it cannot be called a Plea of the Crown, but when the Crown pleadeth for it.¹³⁰ There be also other Controversies concerning the Government of the Church, in order to Religion, and virtuous Life. The offences both against the Crown, and against the Laws of the Church are Crimes; but the offences of one Subject against another, if they be not against the Crown, the King pretendeth¹³¹ nothing in those Pleas, but the Reparation of his Subjects injur'd.

Ph. A Crime is an offence of any kind whatsoever, for which a penalty is Ordain'd by the Law of the Land: But you must understand that dammages awarded to the party injur'd, has nothing common with the nature of a penalty, but is meerly a Restitution, or satisfaction due to the party griev'd by the Law of Reason, and consequently is no more a punishment than is the paying of a Debt.¹³²

La. It seems by this Definition of a Crime you make no difference between a Crime, and a sin.

^a and

¹³⁰ Cf. *Lev.*, 125.

¹³¹ =claims.

¹³² Cf. *Lev.*, 164.

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- 12: Writings on religion, heresy, and church history
- 13: Writings on liberty and necessity
- 14, 15: *Anti-White* (with 'Objections' to Descartes)
- 16, 17: *De corpore* (with related manuscripts)
- 18: Later writings on physics
- 19: Writings on optics (including *De homine*)
- 20, 21, 22: Writings on mathematics
- 23: Translation of Thucydides
- 24: Translation of Homer
- 25: Cavendish-related writings
- 26: Index

THOMAS HOBBS

A DIALOGUE BETWEEN
A PHILOSOPHER AND
A STUDENT, OF THE
COMMON LAWS OF
ENGLAND

EDITED BY
ALAN CROMARTIE

QUESTIONS RELATIVE
TO HEREDITARY RIGHT

EDITED BY
QUENTIN SKINNER

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