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HOBBES AND HALE ON LAW, LEGISLATION AND THE SOVEREIGN

D. E. C. YALE

MANY years after launching *Leviathan* and towards the end of his life Thomas Hobbes composed *A Dialogue between a Philosopher and a Student of the Common Laws of England* in which he set out his final thoughts on fundamental matters of law, legislation and sovereignty. This work was published for the first time in 1681, two years after the author's death, and though it represents Hobbes's final thoughts on these questions it has received but slight study compared with his other works. *Leviathan* and other earlier works must, no doubt, take first place in interest for the political scientist. The *Dialogue*, on the other hand, is a work of a jurisprudential slant and is as deserving of the attention of lawyers as it has been largely neglected by them. To this neglect there is one important exception. Sir Matthew Hale rejoined in argument to Hobbes's thesis. His argument remained unpublished till modern times,[1] and even the enormous modern literature on Hobbes's writings has generally preserved a silence upon Hale's *Reflections*. One modern author [2] indeed remarks briefly that "Hale's short treatise is the most brilliant contemporary reply to Hobbes's theory of positive law," but the remark is not developed. The prevalent opinion may be represented by Holdsworth's view, and this supposes that Hale failed to grasp Hobbes's idea of sovereignty and that Hale's criticism therefore missed its mark.[3] It seems timely to re-examine the received opinion (if Holdsworth's may be so called) for more than one reason.

In the first place Holdsworth, in common with other commentators, believed that Hobbes's political doctrines were not fully understood and inculcated till they were taken up and spelled out by Austin and

[1] *Reflections by the Lord Cheife Justice Hale on Mr. Hobbes his Dialogue of the Lawe.* Printed from B.M. Harl. 711, ff. 418–439, by Sir Frederick Pollock in (1921) 37 L.Q.R. 274, and reprinted as Appendix III in Holdsworth's *History of English Law*, V, 499–513. Any future edition of this tract should take account of the drafts in B.M. MS.Harg. 96. Hale died in 1676 and therefore read Hobbes's *Dialogue* in unpublished manuscript form.

[2] Samuel Mintz, *The Hunting of Leviathan* (1962), p. 49.

[3] Holdsworth's discussion is in *H.E.L.*, v, 482–485, and vi, 204–207, 258–262, 294–301, and (biographical of Hale) 574–595. The current assessment of Hale is marked by a note of uncertainty, *e.g.*, G. R. Elton in *Modern Historians on British History* (1970) at pp. 174–175, commenting that Sir Gerald Hurst's article in (1954) 70 L.Q.R. 342 "somewhat depreciates the long over-valued Matthew Hale."

his followers. This belief has since been exploded.[4] There is now "considerable evidence that Hobbes's central doctrine had been received and ingested, much more fully than is generally recognised, into the mainstream of serious political thinking in his own lifetime."[5] Secondly, Hobbes's *Dialogue* has recently been reprinted with a modern commentary on the text.[6] This commentary is introspective upon the text itself. Thus we read much of Sir Edward Coke, because he is conspicuously caught in the cross-fire of the *Dialogue*, but no mention is made of Hale, who alone of contemporary common lawyers attempted a refutation of Hobbes's doctrines. Thirdly, though Hale's position is intelligible from his direct reply to Hobbes's *Dialogue* and from other printed works, the full range of his thoughts on the nature of law and government have remained locked up in unpublished writings, particularly in his writings on Crown prerogative.[7] These writings give further assistance in understanding Hale's theory of power and legality, what he understood by sovereign power, and where he understood that authority to rest in fact and in law.

How Hale became concerned to combat Hobbes is conjectural. The publication of *Leviathan* in 1651 introduced Hobbes to Selden but there is no evidence that Hobbes entered Selden's circle of scholarship to which Hale and other lawyers, such as Rolle and Vaughan, belonged. But Vaughan, it seems, had read and admired the *Dialogue* and it may be that the text of Hobbes's *Dialogue* passed from the hands of the Chief Justice of one Bench to the Chief Justice of the other and that it was from Vaughan that Hale had the text.[8] Of more general interest is how Hobbes came to write his

[4] This reversal of the old view of Hobbes as an isolated thinker was accomplished at one blow by Quentin Skinner's paper "The Ideological Context of Hobbes's Political Thought" (1966) IX *Historical Journal*, 286–317.

[5] C. B. Macpherson's edition of *Leviathan* (Pelican Classics, 1968), introduction, p. 24. All subsequent references to the text of *Leviathan* are to this edition.

[6] The text is edited with an introduction by Prof. Joseph Cropsey (University of Chicago, 1971). All subsequent references to the text of the *Dialogue* are to this edition. The editor concludes that Hobbes wrote the work between 1662 and 1675. The earlier terminus is firmly established by internal references to post-Restoration legislation (*e.g.*, the Act of Oblivion and Indemnity). The editor's *terminus ad quem* is based on some elaborate detective work in Hobbesian bibliography. Hale's rejoinder provides additional confirmation, for Hale died on Christmas Day 1676.

[7] The principal treatise is mentioned briefly in *H.E.L.*, vi, 589: "Preparatory Notes touching the Rights of the Crown." The autograph is Lincoln's Inn MS.Misc. 48. An expanded version of the earlier chapters is a work entitled *Prerogativa Regis* of which the autograph is Lincoln's Inn MS. Harg. 1. There is a complex manuscript background to these works which need not be discussed here except to say that *Prerogativa Regis* represents a third but unfinished rescension of his treatise. These MSS. were written before the Restoration but after 1641. Hereafter I refer to them as *Rights of the Crown* and *Prerogativa Regis* respectively.

[8] John Aubrey wrote a Life of Hobbes immediately after Hobbes's death. Aubrey had encouraged Hobbes to turn his talents to jurisprudence, lending him a copy of Bacon's *Elements of the Law*. "I desponded that he should make any

Dialogue. "The dry, penetrating but narrow mind of Hobbes"[9] had established in *Leviathan* a theoretical position which took no heed of history, for there Hobbes was prescribing for peace. That prescription was based on Hobbes's view of man's nature and his explanation of civil society. But his theory was inspired by history, the very recent history of the civil wars, and after the Restoration he turned his eyes back on the past twenty years in *Behemoth: the History of the Causes of the Civil Wars in England*.[10] Later in the *Dialogue* he took an even wider view, and the work can be seen as "a true retrospect on the causes of the great dissolution in English civil society."[11] For the most recent editor of this work the thesis is "the paradigm of Bacon's practical politics,"[12] for in the dialogue between the Philosopher and the Lawyer the Philosopher speaks for both Bacon and Hobbes, the Lawyer for Coke, "and Hobbes's controversy with the dead Coke is the continuation of Bacon's."[13] It may be so; Hobbes had in his youth written to Bacon's dictation, and if Aubrey is to be believed, he had in his old age been again confronted with the thoughts of his old master.[14] But Hobbes in his *Dialogue* was doing more than this. He was relating his final thoughts on the nature of law and power. And Hale's *Reflections* mirror these two aspects of Hobbes's debate, firstly on law as a body of rational rules and secondly on the nature of sovereignty. The two themes are closely connected, and indeed interdependent, though Hale found it convenient to consider them consecutively rather than concurrently.

Hobbes was a pure positivist. For Hobbes "a Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly and plainly what every of them may do and what they must forbear to do."[15] "Statutes," asserts the Philosopher,[16] "are not philosophy as is the Common Law and other disputable Arts, but are Commands or

attempt (tentamen) towards his designe. But afterwards, it seems, in the country, he writt his treatise 'De Legibus' (unprinted) of which Sir J. Vaughan, Ld. Cheife Justice of the Common Pleas, had a transcript, and I doe affirm that he much admired it." This treatise is practically certainly to be identified with the *Dialogue*; Vaughan died in 1674, which brings forward the *terminus ad quem*, above n. 6.

9 Plucknett's epithets, *Concise History*, p. 62.

10 *English Works of Thomas Hobbes*, ed. by Molesworth, VI, p. 161 *et seq.*, hereafter cited as *E.W.* There has been no edition of this work since 1840.

11 *Dialogue*, intro. p. 14.

12 *Dialogue*, intro. p. 14.

13 *Dialogue*, intro. p. 12.

14 This is not to say that Hobbes was uninfluenced when writing *Leviathan* and other works by the opinions of Bacon. *E.g.*, the second Aphorism in book 8 of *De Augmentis Scientiarum* (Ellis & Spedding, I, 803, V, 88) on the basis of civil society is very much Hobbes's doctrine.

15 *Dialogue*, p. 71.

16 *Dialogue*, p. 69.

Prohibitions which ought to be obeyed, because Assented to by Submission made to the Conqueror here in *England*, and to whosoever had the Soveraign Power in other Commonwealths; so that the Positive Laws of all Places are Statutes."

The test of what is law is therefore the expression of legislative will, not wisdom, not reason, either in law-givers or in their laws,[17] and the Philosopher, when he sat down to read the laws, did so not to reason upon them but to know them that he might better obey them. Hobbes could not admit reasonableness as a criterion, for if men being endowed with the faculty of reason might question the validity of laws on grounds of unreasonableness, how could there be habitual obedience? The authority of a command could not, for Hobbes, depend on whether it was reasonable, nor could the justice of a law depend on its being reasonable. And this last proposition was central to Hobbes's idea of law as sovereign command, for sovereign command was necessarily just. It would have been therefore a self-contradiction for Hobbes to have defined law as depending on having the quality of being reasonable. Here was the issue which brought him into direct conflict with Coke's definition of law as "perfect reason, which commands those things which are proper and necessary and which prohibit contrary things,"[18] and with Coke's idea of law as the product of reason.

In the *Dialogue* Coke's theory of artificial reason is indeed fairly set out by the Lawyer. The Philosopher replies[19] that he cannot conceive that "the Reason which is the Life of the Law, should not be Natural, but Artificial," for however much special knowledge and skill may be required to understand the common law, still reason itself is a human faculty and not the exclusive property of a profession. "But I suppose that he [Coke] 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."

Hobbes was concerned to combat Coke's theory of legal reasoning as the animating spirit of law. Where Coke wrote,[20] "Reason is the

[17] The antithesis is of course as old as discussion about the nature of law. In 1345 it was argued that judges should do as other judges, otherwise the law could not be known. Hilary J.: "Law is the Will of the Justices." Stonor J.: "No, Law is that which is right." Y.B. 18 and 19 Edw. III, R.S. 376. Maitland commented in a letter to Leslie Stephen, "I rather fancy that Hobbes's political feat consisted in giving a new twist to some well-worn theories of the juristic order and then inventing a psychology which would justify that twist": *Letters* (ed. Fifoot), no. 303, p. 304.

[18] Co.Litt. 319b, where it appears characteristically dressed up as a Latin maxim and in annotation to a highly technical passage about the difference in applying the rule in *Shelley's Case* to freehold and leasehold limitations of gift.

[19] *Dialogue*, p. 55.

[20] Co.Litt. 97b. See also Co.Litt. 232b.

life of the law, nay, the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and of experience, and not of every man's natural reason. . . . This legal reason *est summa ratio*," to this Hobbes replied that such statements were partly obscure and partly untrue. The untruth lay in the failure to conform to Hobbes's own idea of law; he was bound to deny the statement as being inconsistent with his idea of sovereign power, but the obscurity lay in a failure not of agreement but of understanding. Coke's idea of law was not essentially that of a judge-made law, as Hobbes seems to have thought, but of law as the product of intellectual reason, not of an authoritative will. Till recently this idea has received little scrutiny, though its phrases have often been used as incantations, but a recent study [21] suggests two ways in which Coke's theory differed from that of others who had held that law was a product of reason rather than will.

> When someone such as Aquinas, for example, says that law is the work of reason he does so because he thinks that the primary function of law is to guide or direct men to act in ways necessary for attaining or preserving the "common good" and that what those ways are can be determined only by the lawmaker's reasoned judgments, not by mere fiat. For Coke, on the other hand, law is a work of reason in this sense, that it is the nature of law to be reasonable; and the test of its reasonableness, he thinks, is its ability to withstand the test of time.

Moreover, in Coke's thinking, men should obey the law not because it is socially desirable that they should, but because of its reasonableness, and again the reasonableness of a law is attested by its endurance in terms of time.

It would be easy to see here a mere love of antiquity irrespective of utility, but it would be wrong so to do as well as being unjust to Coke. The type of law for Coke was the common law seen not as case-law but as customary law. This customary law had superseded the various local customs of the land and those local customs which remained were themselves allowed only on condition of reasonableness,[22] even if they were not in correspondence with the common custom of the realm, as for example, gavelkind contrasted with primogeniture. But in Coke's theory the common custom of the realm was totally reasonable, in the sense that it represented the product of a professional skill working a refinement and co-ordination of

[21] J. U. Lewis, "Sir Edward Coke: his Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory" (1968) 84 L.Q.R. 330 at p. 339.

[22] "Every custom supposes a law, and if it be not irrational, and entertains no contradictions, it is good," *per* Vaughan C.J., *Collsherd* v. *Jackson* (1672) Freem.K.B. 63 at p. 64. And Littleton (s. 80), writing of manorial customs, applies the same test: "et tout ce que n'est pas encounter reason poit bien estre admitte et allow."

social habits into a system of rules. Coke did not claim that the common law was perfect, only that it was the perfection of this reason, a product of a reasoning process. Coke, however, never explained his doctrine in a consecutive way: it is to be gathered from scattered passages in his writings and reported judgments.[23] In the face of Hobbes's refutation it was left to Hale to restate the theory and to give it a new direction.

Hale adhered to Coke's position, which was indeed the classical common law theory, that the laws were "the Production of long and iterated Experience,"[24] that sufficient knowledge of the laws was not acquirable by "the bare Exercise of the Faculty of Reason" and that complete knowledge was obtainable only by reading, study and observation. Nevertheless Hale was obliged to consider what reasonableness signified. By the beginning of the seventeenth century "there was no longer universal agreement on what was 'reasonable.' Rationality is a social conception, and social divisions in England (and elsewhere) were producing conceptions of what was 'rational' which were so different that in the last resort only force could decide between them."[25] And amid the welter of precedents and the variety of interpretations produced in the constitutional conflict, "the question that mattered, as Hobbes saw, was Who is to interpret?"[26]

Hale certainly agreed with Hobbes that the law could not be left to interpretation by individual reason. Law was a moral science, and therefore in regulating civil society and in measuring right and wrong "it is not possible for men to come to the same certainty, evidence and demonstration . . . as may be expected in Mathematicall Sciences."[27] The best that can be achieved is a set of rules which, given the complexities of life, produce satisfactory results in the largest possible number of cases. Hale certainly did not believe in a "sovereign" remedy for all ills, taking, as he was fond of doing, a biological analogy that because "the texture of Humane affaires is not unlike the Texture of a diseased bodey labouring under Maladies, it may be of so various natures that such Phisique as may be proper for the Cure of one of the maladies may be destructive in relation to the other, and the Cure of one disease may be the death of the patient."[28] Laws should therefore be based on as large a variety

[23] C. Hill, *Intellectual Origins of the English Revolution*, pp. 250–254, gathers together many of Coke's pronouncements in convenient summary.

[24] *Reflections*, p. 505.

[25] Hill, *op. cit.*, p. 254.

[26] Hill, *op. cit.*, p. 254.

[27] *Reflections*, p. 502. For an extended discussion of Hale's method of analysis and particularly his theory of knowledge in the context of contemporary scientific thought, see Barbara J. Shapiro, "Law and Science in Seventeen-Century England" (1969) 21 Standford L.R. 727.

[28] *Reflections*, p. 503.

of experience as possible. Obviously the experience of many is more valuable than the experience of few, and it follows that, given reason is founded in experience, the reason of many is more reliable than the reason of one man or of few. Such extended experience may be best found on the plane of time, that is, in history. Hale was then to Hobbes what Burke later was to Bentham.[29] Abstract or *a priori* reasoning is repudiated. "Hale follows Selden in implying that the lawyer's knowledge is historical knowledge: in knowing the judgments and statutes of the past, he knows what ills they were designed to remedy and what the state of the law was which they remedied. In this way his understanding of the law's content is deepened, and he comes to see a greater part—never, perhaps, the whole—of the accumulated wisdom with which the refining generations have loaded it." [30]

Where Hale differed from Coke was in the possession of a truly historical sense. Custom was based on immemorial usage,[31] but that meant for Hale little more than the fact that it was not possible to discern the inception of most rules of customary origin and that usage time out of mind was the way social custom passed into common law. It did not mean for him that those rules had preserved an unchanging content and that the law had existed in its present form from the beginning of time,[32] or a legal world without beginning.

Coke had believed with Fortescue that the common law was aboriginal, at least as old as the ancient Britons and the Druids.[33] For Coke "the grounds of our common laws at this day were beyond the memory or register of any beginning, and the same which the Norman conqueror then found within this realm of England." [34]

[29] With the caveat that Bentham did not subscribe to Hobbesian doctrines of sovereignty but accepted the possibility of limited or divided sovereignty on grounds of a limited disposition to obey. See H. L. A. Hart, "Bentham on Sovereignty" (1967) *Irish Jurist*, Vol. 2 (N.S.) p. 327, and his comments at pp. 334–335 on the faulty correlation.

[30] J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, p. 173.

[31] What was the required proof of immemorial usage was worked out in medieval public law principally through franchises (see D. W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I*, Chap. IV) and in medieval private law through copyhold (see C. M. Gray, *Copyhold, Equity and Common Law*, pp. 199–201). There was a conflict between the idea of immemoriality as depending on living memory, *i.e.*, the local jury, or on a rule of law, a "legal" memory back to 1189.

[32] The inability to point to temporal acts of creation led some lawyers to ascribe even earlier origins to the common law. "Comen ley ad estre puis le creacion del monde," says a yearbook lawyer in 1470. Y.B.Pasch. 10 Edw. 4, SS. vol. 47, p. 38. And this was no verbal flourish in argument, for Fortescue in the same age could write (*De Laudibus*, Chap. XVII) that English law was the best in the world because it was the most ancient, older than the laws of Rome and Venice.

[33] Thus in his introduction to 2 Rep. pp. vii–viii he echoes Fortescue and writes, "If the ancient laws of this noble island had not excelled all others it could not be but some of the several conquerors and governors thereof, that is to say, the Romans, Saxons, Danes or Normans, and specially the Romans . . . would have altered or changed the same." In the introduction to 6 Rep. he reiterates and elaborates on this.

[34] 8 Rep., intro., p. iv.

Coke did not deny the fact of change but he seems to have thought of change in the law as being inherently of an aberrant quality, and his theory attributed to the common law an inherent tendency to return to the first state of a legal rule. While it is true, writes Coke,[35] " some time by acts of parliament, and some time by invention and wit of man, some points of the ancient common law have been altered or diverted from its due course, yet in the revolution of time the same [points of law] (as a most skilful and faithful supporter of the Commonwealth) have been with great applause, for avoiding of many inconveniences, restored again." All this was part of Coke's work in creating a theory of the constitution. " His tremendous labours achieved what Camden, Stow, Speed, and Ralegh had failed to do: they gave Englishmen an historical myth of the English constitution parallel to Foxe's myth of English religion." [36] The English had had ideal laws before the Conquest and since the cataclysm the political struggle had been to recover them as safeguarding the subjects' liberty against the king's power.

Hale, on the other hand, felt no need to ascribe this perpetual and unbeginning character to the common law. The purpose of laws was to further and protect social needs, and the nature of laws " being to be accommodated to the conditions, exigencies and conveniences of the people, for or by whom they are appointed, as those exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time; and hence it is, that though for the purpose of some particular part of the common law of *England*, we may easily say, that the common law, as it is now taken, is otherwise than it was in that particular part or point in the time of Henry II when Glanville wrote, or than it was in the time of Henry III when Bracton wrote, yet it is not possible to assign the certain time when the change began. . . ." [37] And Hale did not hypothesise an original body of law, but saw instead a series of accretions. In his view,

> it is almost an impossible piece of chymistry to reduce every Caput Legis to its true original, as to say, this is a piece of the Danish, this of the Norman, or this of the Saxon or British law; neither was it, or indeed is it much material, which of these is their original; for 'tis very plain, the strength and obligation, and the formal nature of a law, is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them, but they

[35] 3 Rep., intro., p. xxxiii.

[36] Hill, *op. cit.*, p. 257.

[37] Hale, *The History of the Common Law of England* (4th ed.), p. 60. A reprint of the third edition has recently appeared (Univ. of Chicago, 1971) with an Introduction by C. M. Gray, which discusses Hale's legal and historical thought, especially p. xxxii *et seq.* in relation to Hobbes's views. This discussion has come to my attention too late to permit more than this reference.

> became laws, and binding in this kingdom, by virtue only of their being received and approved here.[38]

The absence or paucity of evidence, Hale argued, may prevent us from learning when and how a particular custom arose, but we need not doubt that some customs are older than others, and all have a beginning as custom is imperceptibly formed. Hale's view of the common law therefore involved him in the idea of historical flux and change. Custom is as creative of law as much as legislative command or judicial interpretation, and though it may be an insensible process compared with the conscious activity of legislator or judge, it is as law-making as the others, and its creative force was continuous.

Though the sources of the common law might be in Hale's words "as undiscoverable as the head of the Nile," [39] the common law was in effect common and general custom [40] as contrasted with local and particular custom. Here he spoke the traditional language of common lawyers in considering the force and effect of local customs.[41]

> First, the common law does determine what of those customs are good and reasonable, and what are unreasonable and void. Secondly, the common law gives to these customs, that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is the continuance of time that is sufficient to make such a custom. Fourthly, the common law does interpret and authoritatively decide the exposition, limits and extensions of such customs.
> This common law, though the usage, practice and decisions of the king's courts of justice may expound and evidence it, and be of great use to illustrate and explain it, yet it cannot be authoritatively altered or changed but by act of parliament.

This last remark has a modern ring but it may be doubted whether Hale intended to remit all reform of the common law to parliament and to absolve the common law from the need to adjust and amend through its own processes. Elsewhere in considering especially the means and modes of law reform [42] he was of the opinion that "what

[38] Hale, *op. cit.*, p. 64.

[39] Hale, *History of the Common Law*, p. 59. The figure is taken from Davies' report of *The Case of Tanistry* (1608) at p. 32, where it is said that "le commencement del custome (car chescun custome ad un commencement coment que le memorie del home ne extend a ceo; come le river Nilus ad un fountaine, coment que les geographers ne poent trover ceo) doet estre reasonable ground & cause."

[40] Hale, *History of the Common Law*, p. 68, links together "the common law and custom of the realm" as "the great substratum." He also thought that some parts of the common law might have originated in legislation now lost and forgotten, but he would not have agreed with the extravagant thesis of Wilmot C.J. (*Collin* v. *Blantern* (1767) 2 Wilson K.B. at p. 348) that "the common law is nothing else but statutes worn out by time; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing. . . ."

[41] Hale, *History of the Common Law*, p. 25.

[42] *Considerations touching the Amendment or Alteration of Lawes*, cap. iv. Hargrave's Law Tracts 249 at p. 272.

can be done by the power and authority of the court and judges, without troubling a parliament for such things . . . would go a very great way in the reformation of things amiss in the law," adding that " sometimes it falls out that an unnecessary application to parliament in things that are otherwise curable breeds unexpected inconveniences." Nevertheless Hale undoubtedly considered that the principal vehicle for reform should be legislation,[43] but considering the history of the common law he saw a process of perpetual change, both growth and decay. In addressing students of the common law he put it in this way: [44]

> If any Man shall object that if there be that Excellency in the English lawes, What is the reason there have been many changes therein in succession of Times? I Answer in General, that it cannot be supposed that Humane lawes can be wholly exempt from the common fate of Humane things which must needs be subject to particular defects and mutabilities, time and experience, as it hath given it the perfection it hath, so it must and will advance and improve it. But more particularly, the mutations that have been in this kind, hath not been so much in the law, as in the subject matter of it [45]; the great wisdome of Parliaments have taken off, or abridged many of the Titles about which it was conversant: Usage and disusage hath antiquated others, and the various accesses and alterations in point of Commerce and dealing, hath rendered some proceedings, that were anciently lesse in use, to be now more useful; and some that were anciently useful to be now less useful,

and he then discusses " several great Titles in the law which . . . are at this day in a great measure antiquated, and some that are much abridged and reduced with a very narrow compass and use."

We need not follow Hale into the details descriptive of such changes. He has been credited with advancing a properly historical theory of legal development and in particular advancing beyond the theory held by Coke. Hale's " vision of a historical flux seems as far from the thought of Coke as could very well be. Hale seems to have escaped the pitfalls which trapped his great predecessor into treating custom as immemorial and immutable; all his emphasis is placed not on antiquity but on process and continuity." [46] Yet Hale's

[43] For Hale's activities as law reformer, see Mary Cotterell, " Interregnum Law Reform: the Hale Commission of 1652 " (1968) Eng.Hist.Rev., Vol. lxxxiii, 689. For Hale's reasons for the failure of the reform movement, *Considerations*, *supra*, n. 42, at pp. 274–275, and more generally Donald Veall, *The Popular Movement for Law Reform 1640–1660*, pp. 228–235.

[44] Rolle's *Abridgment* (1668), introduction pp. iii-iv.

[45] A dark saying but relatable to this passage in his tract on law reform (*supra*, n. 42) at p. 258, writing of " such alterations, as do not so much constitute a new law, as amend the old; so that it still morally continues the same law, notwithstanding these appendications, as the Argonauts' ship was the same ship at the end of their voyage as it was at the beginning, though there remained little of the old materials but the chine and ribs of it."

[46] Pocock, *op. cit.*, p. 178.

view was not as original as select but representative quotations from Fortescue and Coke might suggest, for custom in the tradition of common law both made and unmade rules of law. The source of most seventeenth-century professional thinking on this question returned to the treatment of custom as discussed and reported in Sir John Davies' reports,[47] and Hale borrowed heavily from this source. Davies, in his introduction, writes that "a *custome* doth never become a *law* to bind the people untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a law."[48] And in writing of custom Davies had in mind principally the *Case of Tanistry*[49] which he himself had argued in Ireland and which was perhaps the most ample opportunity afforded to the judges of the seventeenth century to consider the place of local custom in the general law.

In this case the Irish court of King's Bench had to decide whether the custom known as tanistry was a part of Irish law. The custom (which was certainly part of the indigenous law of Ireland) provided for descent of land upon the eldest and worthiest male relative of the blood and name of the deceased and excluded females from the inheritance. The judges decided to reject the custom. It was found unreasonable and so void *ab initio*. We need not pause upon the absurder aspects of this opinion, *e.g.*, the invalidity of ancient Celtic custom because it permitted abeyance of seisin. The principal reason adduced was the objection of "usurpation," that the custom was objectionable because it encouraged the use of force and oppression.[50] The whole argument is riddled with artificiality when the initial validity of the custom is under discussion, but it is another case when the argument turns on whether such a custom could survive the introduction of English law into Ireland. Here the court was faced with the effect of conquest on the native laws and customs of Ireland.

[47] Published in 1615. A selection of Irish cases litigated while the reporter was Attorney-General there.

[48] It is for this reason that Davies thought customary law better than legislative acts "which are imposed upon the subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no."

[49] (1608) Davies 28. A clear summary of the case is given by F. H. Newark in (1952) 9 *Northern Ireland Legal Quarterly* 215.

[50] Davies 34: "Car le antient Breton ley fuit que tiel terre irroit al plus eigne del sept que fuit le veray tanist & appel en Latine secundus, esteant successor apparant mes pur ceo que le pluis eigne ne fuit touts foits le plus active, ou ne avoit le greinder number des followers, un auter plus powerfull person per faction & fort main intrudoit sur le pluis eigne, & procuroit luy mesme destre elect, come esteant pluis digne." The testing of custom by reference to oppression by the stronger of the weaker was of course familiar to English lawyers in the context of manorial custom. The cases from the Y.BB. onwards are set out in C. K. Allen, *Law in the Making*, 7th ed. (1964), Appendix at pp. 614–632.

After the most elaborate review of records the lawyers of 1608 decided that conquest carried in the laws of England to the supersession of the common custom of Ireland. In reaching this desired conclusion it was necessary to explain why tanistry should be treated differently from other customary laws of descent. The answer provided was [51]: "auxy cest custome ne poit estre resemble al custome de gavelkind en Kent que avoir continuance apres le Norman Conquest [52]; car le common ley Dengleterre ne fuit introduce per le Conqueror, come ad estre observe and prove tresdoctment per le Seignior Coke in le Preface al Tierce Part de ses Reports." Here was the difference. Gavelkind was said to be allowable because it was said to be pre-existent to the Conquest of 1066 and according to the received opinion the Conqueror succeeded to the old monarchy and preserved the old laws, but by contrast the conquest of Ireland was a triumph of one legal order over another. Tanistry whether general or local custom "esteant repugnant a les rules del common ley serroit abolish per le introduction and establishment del common law en cest realm." [53] According to this view of the past the conquest of England was, juridically considered, a very different matter from the conquest of Ireland [54]; in England the common law had priority before the conquest, in Ireland its imposition was the result of conquest and subjugation of the people.

All this was no more than the legal commonplace of the time. Not only the common law, but Parliament,[55] together with much else,

[51] Davies, 40.

[52] This treatment of gavelkind was not a novelty in the common law tradition, *e.g.*, in Y.B. (Mich.) 14 Hen. 4 f. 2, pl. 6, at f. 7a, *per* Hankford J. with regard to unity of possession where the lord acquires the tenant's gavelkind land by purchase or escheat. This and other customs, he said, belonged to places where William the Conqueror had confirmed their ancient customs and laws, and therefore they must be allowed as valid.

[53] Davies 40.

[54] But the two events had this similarity, from the view point of 1608, they neither of them effected *per se* confiscation of land by the conqueror. Queen Elizabeth was not in possession of these Irish lands by virtue of the first conquest, nor was William of English lands. "Car revera le Norman Conquerour, coment que il fesoit plus absolute a entire Conquest Dengleterre que Henr. 2 fesoit de Ireland, uncore il ne seisist tout, ne avoit le actual possession de touts des terres deins le realme Dengleterre vest en luy per le Conquest. . . ." True, Bodin and Choppinus had asserted otherwise, "mes nostre record de domesday est, en cest point, de melieur credit que touts les forrein discourses ou chronicles de mounde." Davies 41. The matter had not gone undiscussed in the fifteenth century. *E.g.*, on a Reading on Merton, c. 4 (Sel.Soc. vol. 71, p. civ): "Sur cest estatut fuit move que quant William Conquerrour ust conquerre cell terre per le conquest tout la terre fuit en son mayn donquez apres il done a sez homez queux fueront ove luy en son viage divers maners ove certein seigniores. . . ."

[55] Coke's explanation in the introduction to 9 Rep. is an excellent example of his method. He argues that as the Saxon monarchs held deliberative assemblies, so they must have included representatives of the commons. Why? Because Domesday shows there were tenants in ancient demesne of the Crown before the Conquest. The earliest information we have shows that they were exempt

preceded the cataclysm of conquest. To the question why the earlier common law should not have suffered abrogation by conquest in England (as the Irish "common law" did in Ireland) the answer was constant. The conquest in England was not a conquest over the people, conferring an absolute title on the conqueror. To have admitted that would have been

> to admit an indelible stain of sovereignty upon the English constitution. A conquest was therefore not admitted in the eye of Blackstone any more than in the eye of Coke. William was no conqueror, said the lawyers and antiquaries and the parliamentarians in chorus; he was a claimant to the crown under ancient law who vindicated his claim by trial of battle with Harold, a victory which brought him no title whatever to change the laws of England.[56]

Hale on this matter followed the general opinion and he spent much time in arguing the point.[57] Maitland [58] and Holdsworth [59] both regretted this. And the latest commentator on Hale's historical method believes too that here Hale's sense of historical change abandoned him; there was an inability to see the significance of the Conquest historically in terms of its own time and age and "he was not able to persuade himself that a right won by the sword did not descend untouched through the centuries; conquest remained an absolute which the history of England as he saw it could not absorb." [60] And these criticisms are true enough if Hale is to be understood as writing of historical facts alone, but they seem to miss the point that this was a discussion about contemporary constitutional law. None of the protagonists was much interested in the Conquest as a historical event, they were interested in it as an episode of the past which had to be interpreted as the basis of a constitutional theory. This may be called "myth-making" but every age creates in this way. Hale and his contemporaries debated the significance of the Conquest of 1066 in much the same manner as later generations discussed the significance of the Revolution of 1688.

Hobbes was not afraid of the Norman Conquest; it suited his

from the parliamentary duties imposed on other freeholders, "therefore there were Parliaments unto which the Knights and Burgesses were summoned both before and in the reign of the Conqueror."

[56] Pocock, *op. cit.*, p. 53.

[57] The principal printed source is the earlier part of his *History of the Common Law*. The argument is also fully set out in Chap. II of the *Prerogativa Regis*.

[58] *Coll. Papers*, vol. 2, p. 5: "Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage. . . ."

[59] *H.E.L.*, vi, 586 "a purely academic discussion—the question in what sense, if at all, William I could be said to be a conqueror."

[60] Pocock, *op. cit.*, p. 180.

book and he derived sovereignty from it.[61] As to that idea Hobbes's doctrine was the psychological offspring of his dismay at civil discord, and it was his prescription for domestic peace. Hobbes's figure or model of commonwealth emerged from the anarchy of men in the aboriginal state of nature. Men combined to form a commonwealth and by their submission conferred power on a sovereign. This determinate sovereign, whether man or assembly of men, was a necessary part, the essence of Hobbes's scheme of commonwealth. The sovereign ruled by power and once submission had initially conferred that power there could be no ensuing contract between sovereign and subject. In this theory of extreme concentration of power, the sovereign power was strictly indivisible, and unlimited, and though transferable, irrevocable. It followed for Hobbes that the sovereign's commands or laws must be absolutely binding,[62] and must be accounted necessarily just. The sovereign's laws might be iniquitous or detrimental to the welfare of the commonwealth, but unjust they could not be. In the *Dialogue* [63] Hobbes has the Lawyer agree with the Philosopher on this point, that a just action is that which is not against the law, and therefore, says the Philosopher, "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 any laws, and consequently before there was any justice...." Hobbes's sovereign was then a power above the law and his laws were anterior to and defined the idea of justice. Sovereignty was a fact, the basic fact of political power. This was *summa potestas* and its possessor was *legibus solutus*.

This indeed was the reason why Hobbes was then and later so widely disliked and distrusted as a teacher of politics. The loss of power and of the ability to protect discharged civil obligation [64] and indeed legitimised successful revolution. Despite Hobbes's monarchical prejudices, his theory is perfectly plain, and the final page of *Behemoth* [65] sufficiently surveys the historical scene in the light of this theory.

[61] *Supra*, n. 16. *Dialogue*, p. 160, also draws the conclusion of complete confiscation of land by the Conqueror, in contrast with the inference of the theory of the common lawyers, *supra*, n. 54.

[62] The one qualification Hobbes allowed was that the need for self-preservation could justify resistance to the sovereign. [63] p. 72.

[64] As Clarendon pointed out Hobbes's doctrine allowed the sovereign's subjects to abandon him at the very time he needed their assistance. *A Brief View and Survey of . . . Leviathan* (1676) p. 90.

[65] *E.W.* VI, 418. In *Leviathan* (p. 375) the limits of obligation are clearly expressed. The subject while protected by his sovereign "is obliged, without fraudulent pretence of having submitted himself out of fear, to protect his protector so long as he is able," but when "there is no further protection of subjects in their loyalty, then is the commonwealth DISSOLVED, and every man at liberty to protect himself by such courses as his own discretion shall suggest unto him."

> I have seen in this revolution a circular motion of the sovereign power through two usurpers, from the late King to this his son. For . . . it moved from King Charles I to the Long Parliament; from thence to the Rump; from the Rump to Oliver Cromwell; and then back again from Richard Cromwell to the Rump; thence to the Long Parliament; and thence to King Charles II, where long may it remain.

It appears something of a paradox that a power designed to prevent civil discord should prove so peripatetic and the sovereign so perishable, but Hobbes would have denied an incongruity. In his scheme authority was a result of political power and effective power was self-legitimating. But before pursuing this question of *de facto* power as raising constitutional authority, it is necessary to consider further the notions of sovereignty as conceived by Hobbes and controverted by Hale.

Though Hobbes's theory has never squared easily with the facts of federal constitutions, it has been made to square more comfortably with the British Constitution by the axiomatic proposition that the King in Parliament is omnipotent as far as physical control extends and is legally without limit.[66] The more recent questions raised by modern jurisprudential writings are concerned with matters of recognition, and it has been claimed that before the sovereign can be identified as such and before his acts can be recognised as his authoritative commands, it must be a body of law which supplies the rules enabling such identification and recognition. It follows that it is still ultimately for the judges to say what the sovereign is and what are or are not his or its acts. The success of these attempts to harness *Leviathan* of course depends on how the idea of sovereignty is conceived in the first place, how far and in what way the title or authority can be derived from the fact of power.[67]

[66] As Hart (*Concept of Law*, p. 65) points out with regard to the theory of illimitability " the legally unlimited power of the sovereign is his by definition: the theory simply asserts that there could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign." The theory therefore is not that there are no limits, only that there are no legal limits on sovereign power. The author concludes his chapter on Sovereignty with the opinion " there is no absurdity in the notion of a hereditary monarch . . . enjoying limited legislative powers which are both limited and supreme within the system." This is a very exact way of summarising the common law theory as held by Hale and discussed below.

[67] It may be argued, as does H. W. R. Wade in " The Basis of Legal Sovereignty " [1955] C.L.J. 172, that obedience to a sovereign is ultimately a political fact and that the political reality imposes the constitutional relationship between Parliament and the courts, but against that it has urged that " it is indeed difficult to maintain the position that the existence of a sovereign authority does not involve the statement of a rule but only a statement about the behaviour

Hobbes's theoretical figure of the sovereign is the sum of its necessary attributes and no more, but the more practical question is where in terms of historical interpretation and location did Hobbes place English sovereignty? It is usually supposed that in the chapter [68] on Civil Laws in *Leviathan* Hobbes affirmed the sovereignty of *Rex in parliamento.*[69] Among "some foolish opinions of lawyers" which Hobbes was there concerned to refute was "*That the Common Law hath no Controller but the Parliament*"; which assertion is true, says Hobbes,[70]

> only where a Parlament has the Soveraign Power, and cannot be assembled, nor dissolved, but by their own discretion. For if there be a right in any else to dissolve them, there is a right also to controule them, and consequently to controule their controulings. And if there be no such right, then the Controuler of Lawes is not *Parlamentum*, but *Rex in Parlamento*. And where a Parlament is Soveraign, if it should assemble never so many, or so wise men, from the Countries subject to them, for whatsoever cause; yet there is no man will believe, that such an Assembly hath thereby acquired to themselves a Legislative Power.[71]

This important passage seems textually amiss. We may suppose Hobbes to have meant this. The right to summon and dismiss belongs to the king, so he is "controuler" and sovereign, since the parliamentary assembly exists at his pleasure. The sovereign is therefore *Rex* and, Hobbes adds, *in Parlamento.*[72] But this presents a further difficulty because the king clearly exists both before and after Parliament and when Parliament dissolves, the king lives on. Sovereignty cannot be viewed as an intermittent phenomenon of political fact as if it were a clock which periodically is put in motion after running down or a sun-dial which works only when the sun is up and out. This difficulty [73] can only be resolved by saying that

of courts," Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, pp. 43–46, discussing Professor Wade's argument. See further, for more recent comment by Mr. Marshall, *Constitutional Theory* (1971), Chap. 3, "Legislative Power and Sovereignty," pp. 35 *et seq.*

[68] Part II, Chap. xxvi, pp. 315–316.

[69] Oakeshott in his introduction of the Blackwell edition of *Leviathan* (1946), p. xxxix, n. 3: "Hobbes dismisses all mixed forms of sovereign authority, but he considered the sovereign in England was *Rex in parlamento.*"

[70] p. 316.

[71] This last sentence poses very great difficulties because Hobbes seems to be saying that a kingless Parliament cannot acquire a legislative power even if sovereign. The sense can be made to square with Hobbes's definition of sovereignty by amending the opening words "And where a Parlament is [not] Soveraign . . ."

[72] The sense is achieved in this line by deleting a negative in the penultimate sentence. "And if there be such right, then the Controuler . . . is not *Parlamentum* but *Rex* . . ." The textual amendments in this and the previous note are not warranted by any edition of the text. Hobbes may have written the words as printed; if so, they must be accounted slips of the pen.

[73] Maitland was very conscious of this difficulty and in his *Constitutional History*, p. 298, writing of the seventeenth century, enjoins us to "consider how very

the king is sovereign but that he possesses legislative power only in company with his Parliament or in Parliament, but such a statement cannot properly lie in Hobbes's mouth because it asserts a limitation upon the power of the sovereign. It was this difficulty which probably induced the incoherence in the particular passage of *Leviathan*. In the *Dialogue*, on the other hand, Hobbes speaks more surely and logically. Here the king is "sole legislator" [74]; he is legislator "both of statute-law and of common law," and the Philosopher remarks that

> 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.

This example lacks full force because the Philosopher is made to say that the final decision not to pass laws belongs to the king and does not go so far as to assert that the king could reintroduce the Marian Church laws without the assent of the Houses,[75] but that this is the drift of the argument may be gathered by pursuing the debate.

> Lawyer: I grant you that the King is sole Legislator, but with this Restriction, that if 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. Philosopher: We are Agreed upon that already. Since therefore the King is sole Legislator, I think it also Reason he should be sole Supream Judge. Lawyer: There is no doubt of that. . . .

much that assembly depends for its constitution, for its very existence on the king's will," and asks "after all, is not this body but an emanation of the kingly power?" It was this question that mainly worried Austin in the nineteenth century and he attempted to solve the difficulty by vesting sovereignty in the king, the Lords and the Electors of the House of Commons. This solution has been repeated with the refinement that Austin has described a "political" sovereign, though the "legal" sovereign must be the king in Parliament (Dicey, *Law of the Constitution*, 9th ed., pp. 72–76). But the sovereignty of Hobbes and Austin is not divisible between an electorate and a representative assembly, and the refinement is a desperate device to avoid deciding the basic nature of sovereignty. This problem of "continuity" is most profoundly handled in Hart's *Concept of Law*, Chap. 4.

[74] *Dialogue*, pp. 67–68.

[75] Maitland, writing to Leslie Stephen (*Letters*, ed. Fifoot, no. 368, p. 369), raised this question without answering it. "I have been speculating as to what T.H. would have said had he lived until 1688. If it becomes clear that your 'sovereign' is going to acknowledge the pope's claims, this of course is no breach of any contract between ruler and ruled (for there is no such contract), but is there not an abdication? Putting theory out of the question, which would the old gentleman have disliked most, Revolution against Leviathan or a Leviathan with the Roman fisherman's hook in his nose?"

And after a discussion about the nature and definition of law, which the Philosopher defines in terms of command and prohibition, the Lawyer remarks [76] that "by your Definition of a Law, the King's Proclamation under the Great Seal of England is a Law: for it is a Command, and Publick, and of the Soveraign to his Subjects. Philosopher: Why not? If he think necessary for the good of his Subjects. . . ." Hobbes therefore reached a position, consistent with his theory, which identified within the English constitution the sovereign with the king, though with some difficulty over legislative power, a difficulty resolved by excluding the Houses of Parliament from any higher role in the business of legislation than that of advice, counsel and formal assents.

Hobbes did not overlook the problems of recognition in identifying the commands of the sovereign. The essence of a law as announced by a Hobbesian sovereign was that it should carry "manifest signs that it proceedeth from the will of the Soveraign." [77] And in the *Dialogue* [78] after discussing public and private capacities of a sovereign, whether man or assembly of men, he adds that

> for in the making of Laws (which necessarily requires his assent) his assent is natural: Also those Acts which are done by the King previously to the passing of them under the Great Seal of England, either by word of Mouth, or warrant under his Signet, or privy Seal, are done in his natural Capacity; but when they have past the Seal of England, they are to be taken as done in his politick Capacity.

Hobbes indeed regarded it as no part of the business of a subject to make question of the identity of the sovereign,[79] but he did regard the verification of sovereign commands as permissible and that verification depended "on the knowledge of the publique Registers, publique Counsels, publique Ministers, and publique Seales." [80] Such were the means by which the sovereign's laws were to be known, but they did not, so Hobbes insisted, have anything to do with the authority of the command, "for the Verification is but the Testimony and Record; not the Authority of the Law, which consisteth in the Command of the Soveraign only." [81] For Hobbes then, obedience to the sovereign's command was not an obligation until it was effectively to be known. The sovereign could choose the mode of communicating, though he must publish his command before it

[76] *Dialogue*, p. 71.
[77] *Leviathan*, pp. 318–319.
[78] p. 162.
[79] *Leviathan*, p. 230. "The Author, or Legislator, is supposed in every Commonwealth to be evident, because he is the sovereign, who having been constituted by the consent of everyone, is supposed by everyone to be sufficiently known."
[80] *Leviathan*, p. 320.
[81] *Leviathan*, p. 320.

assumed the quality of legislation. There is no evidence that Hobbes ever considered the forms of legislation as limiting the operation of sovereignty or indeed of supplying necessary information as to identifying the sovereign or the announcements of the sovereign's will. He would have rejected all modern attempts to harness *Leviathan* in this way. His sovereign was not only free from legislative trammels, he was free also from prior legal requirements as to forms of commands which indeed were within the sovereign's power alone to choose and employ. And the question was further pursued in the *Dialogue* [82] where the Lawyer advances the view that subjects ought to be bound by legislative acts irrespective of actual knowledge. "Are not," he asks, "all Subjects Bound to take notice of all Acts of Parliament, when no Act can pass without their Consent." To which the Philosopher replies that "if you said that no Act could pass without their knowledge, then indeed they had been bound to take notice of them; but none of them can have knowledge of them but the Members of the Houses of Parliament, therefore the rest of the People are excus'd. . . ." Obligation depended on knowledge or the reasonable means of knowing the sovereign's command after that command was published, but the mode of publication Hobbes insisted was a matter of "verification," not "authority." [83]

To this attribution of sole legislative power to the King, Hobbes appears to have allowed but one exception. In the course of the *Dialogue* [84] the interlocutors are discussing the post-Restoration Act of Oblivion which they agree was passed to pardon two kinds of offence, the offence against the King and the offences against his subjects generally. And the Philosopher refers to the actions of the Long Parliament against Charles I, "for which divers of them were Executed, and the rest by this our present King pardoned. Lawyer: Pardoned by the King and Parliament. Philosopher: By

[82] *Dialogue*, p. 71.

[83] It follows that for Hobbes the antecedent way in which the sovereign will was formed had nothing to do with the validity of command. English judges have generally taken the same view of this matter. In 1653 John Streater was imprisoned by the Long Parliament for publishing seditious pamphlets and objected that he was imprisoned by virtue of an order of Parliament which lacked the authority of a regularly enacted statute. The judges of the Upper Bench, including Rolle C.J., dismissed his objection, Nichols J. saying: "Now what the parliament does, we cannot dispute or judge of: their laws are to bind all people; and we are to believe they had cause for what they did. And for that you say an Order should be read three times: when I was a Parliament Man, divers acts passed with one reading. In the next place you did distinguish between an order and an Act of Parliament. Why, their power is a law, and we cannot dispute any such thing." (5 *State Trials* 365 at p. 387). This was the command of an unicameral legislature, but the command of one chamber of a bicameral legislature raises a different question, and later lawyers had no difficulty in asserting that a resolution or order of one chamber could not be allowed the force of law, any more than the commands of both chambers could acquire legislative force without the king's assent.

[84] pp. 76–77.

the King in Parliament if you will, but not by the King and Parliament . . . ," but he goes on to argue that where the subject was injured and no restitution made, then as to pardon "neither King, nor Parliament, nor any earthly Power can do it. Lawyer: You see by this your own Argument, that this 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 necessary that it should be done in Parliament, and by the assent of the Lords and Commons. Philosopher: I grant it. . . ."

This concession nevertheless seems an entirely exceptional admission by Hobbes and indeed more of a curiosity than a matter for concern. What is more of concern is that it was apparently very difficult to fit his theory to the facts of English constitutional law and practice. It was absurd by the latter part of the seventeenth century to make out a case which put the king's proclamation and the king's statute on the same legislative footing. Hale had little difficulty in demonstrating that Hobbes's treatment of English public law was faulty, though it is another matter as to his success in challenging Hobbes on the nature of sovereign power.

Hale's theory of legislative power [85] was that the binding force of laws depended on the consent of those to be bound by the enacted laws. That consent might be manifested in one of three ways, first, "by the immediate consent of all the persons concerned in the law to be made, as where upon the first coalition of a company of men, every man should agree to some certain laws which should be the rule whereby their intended governor should distribute justice to them." Though Hobbes had admitted the force of consent in the institution of a commonwealth, Hale could not regard it as the validation of all subsequent laws, for the English Constitution was too ancient, he thought, for it to be known as a matter of fact whether such consent ever existed. He preferred to find obligation and the power to bind "by the immediate consent of that person or those persons in whom by the constitution of the commonwealth that power is placed for the government monarchical, aristocratical, democratical, or mixed." This, he thought, was the origin of all positive law. As for customary law, that depended on such long and continued usage as implied such consent.[86]

We need not pause to consider Hale's analysis of types of legislation. He distinguished measures making new laws and abrogating

[85] *Rights of the Crown*, Chap. 11.
[86] *Cf.* Hobbes's explanation of the continued existence of customary law as being a tacit command by the sovereign.

old laws as contrasted with those declaratory of existing law, but the power to make a declarative law was not the same in effect as the power to declare law. The former was a legislative function whereas the latter might be judicial. "The former binds all according to the extent of the act. The latter doth not extend *ultra partes litigantes*. If all the judges of England deliver their opinion in a point of law, it weights far as an authority in the like case, but yet it is not binding further than the parties concerned in that case." [87]

Hale approached the question of legislative sovereignty by separating three propositions.

> 1. The King by the advice and assent of the Lords and Commons duly assembled in Parliament may make any new or declarative law, or repeal or abrogate any old law. 2. The King without any such advice cannot make any new, declarative or repealing law. 3. No power can make any binding law without the King's express authority, concurrence and consent.[88]

Upon the first proposition Hale canvassed a variety of opinions upon the location of legislative power in the parliamentary context.

> Some would have the power originally to reside in the Commons, and the consent to be only in the Lords and King as a convenient ceremony or formality, which, if it may be had, will do well, if not, it may be spared. Some would have this power in the Lords radically and the Commons to be only petitioners or proposers. Some would have it in the King, Lords and Commons co-ordinately, but yet so that either two should outbalance the third and carry the law.

These views he dismissed as "clearly false and frivolous, contrary to the constant usage and law of Parliament and the law of this Kingdom."

He then contrasted two further views, one that the legislative power is "radically and co-ordinately in all three but so that all their concurrence is requisite in the making of a law," the other that the legislative power is "solely in the King but yet so qualified, as he cannot enact without the advice of the Lords and Commons in Parliament assembled." Hale refused to attribute such significance to the difference between these propositions, "for what great odds is it whether Caius, Titius and Sempronius have power to make law

[87] *Cf.* in his *History of the Common Law*, at pp. 67–68.

[88] As Chief Justice he had occasion to refute judicially the third proposition. *Colledge of Phisitians* v. *Cooper* (1675) 3 Keble 587, a judgment wretchedly reported but containing very valuable information on the courts' requirement for proof of a statute. Coke's opinion was that an omission to record the assent of one of the houses prevented the court from accepting a faultily expressed enactment as an Act of Parliament: the *Prince's Case*, 8 Co.Rep. at 20b. But this opinion has not been unchallenged. Hale thought that the record of the King's assent was essential to the body of an Act, but that the assent of the Lords and Commons was sufficiently implied in the royal assent.

by all their assents, or Caius to make the law with the assent of Titius and Sempronius, only in point of dignity?" Nevertheless he selected the latter proposition as nearer the historical truth and as "more suitable to the frame of government here." After discussing at great length the various procedural changes in parliamentary history as to method and form, petitions and bills, enacting clauses, and so forth, he concluded that this evidence "joined with the sole power of summoning, continuing and ending of Parliaments in the King . . . seems to enforce that the power legislative resides in the King alone, though so qualified that he cannot enact a new law without the advice and assent of the three estates assembled in Parliament." [89]

Elsewhere Hale in considering the consent of Lords and Commons wrote,[90]

> to supply and make up this qualification or limitation of the supreme power in the King is this concurrence necessary. And yet this concurrence without the King's consent makes not a law, and although by the duty of his kingly office he is bound to assent to all such laws, as likewise counsels, which are propounded and conduce to the good of the kingdom, yet is he likewise judge of what is good, wherein if he err, as it is possible he may, yet the counsel or law propounded wants that which makes it binding, if it wants that consent.

Hale therefore ascribed to the King legislative supremacy but not unqualified sovereignty as that attributed to Hobbes's sovereign. The limitless legislative power of Hobbes's sovereign was naturally deduced from the axiomatic idea that a person or body having supreme legislative power must by definition be free from and not subject to any higher control. Though Hobbes's sovereign was not necessarily a patriarchal monarch, he would have agreed with Sir Robert Filmer's assertion [91]:

> We do but flatter ourselves, if we hope ever to be governed without an arbitrary power. No: we mistake; the question is not, whether there shall be an arbitrary power, but the only point is, who shall have that arbitrary power, whether one man or many? There never was, nor ever can be any people governed without a power of making laws, and every power of making laws must be arbitrary: for to make a law according to law is *contradictio in adjecto.*

To argue thus is essentially to deny the coercive force of any "fundamental" law in the sense of constitutional limits on legislative competence and to assert that there is no "fundamental" law

[89] The chapter continues with detailed discussion of proclamations, medieval petitions and other legislative material.
[90] *Prerogativa Regis,* Chap. 14.
[91] *The Anarchy of a Limited or Mixed Monarchy* (1648) Laslett's ed. of *Patriacha, and other Works,* p. 277.

beyond the reach of sovereign power. This question of fundamental law was at the centre of seventeenth-century constitutional controversies, and the literature is large,[92] but here it is sufficient to understand what Hobbes meant by "fundamental" law. He defined it in *Leviathan*[93] in these terms:

> a Fundamentall Law in every Common-wealth is that, which being taken away, the Common-wealth faileth, and is utterly dissolved; as a building whose Foundation is destroyed. And therefore a Fundamentall Law is that, by which Subjects are bound to uphold whatsoever power is given to the Soveraign, whether a Monarch, or a Soveraign Assembly without which the Common-wealth cannot stand, such as is the power of War and Peace, of Judicature, of Election of Officers, and of doing whatsoever he shall think necessary for the Publique good. Not Fundamentall is that the abrogating whereof, draweth not with it the dissolution of the Common-wealth; such as are the Lawes concerning Controversies between Subject and Subject.

Hobbes adhered to this definition which is consistent with his doctrine of sovereignty,[94] but which is not consistent with fundamental law as defined with reference to a higher authority to which a supreme legislator or legislature must conform. Hobbes nowhere supposes that his idea of fundamental law is one which can control his sovereign.

But this definition was not the definition of the common lawyers nor was it Hale's. They believed in governmental powers (including legislative powers) defined by a form of constitution or commonwealth which in its essential features was static and fixed. This fixed form was of course not to be found in any single document, not even (*pace* Coke) in Magna Carta, not even in any contemporaneous *Instrument of Government*. And in the absence of a written constitution it could only be found in the time-tested forms of the ancient constitutional practices of English government. One striking illustration of this belief was the occasion when after the inauguration of Cromwell's Protectorate, his Council

> sent to the judges to consider and deliver their opinions whether the three kingdoms, by the fundamental laws of the kingdom, could be governed by the power and authority that is incident to a protector by the laws of the land. And Mr. Hales and most of the rest of the judges answered that the three kingdoms could not by the fundamental laws or by the constitution of the government of the three kingdoms be governed by a less power and

[92] The modern work is J. W. Gough's *Fundamental Law in English History* (1955).

[93] Chap. 26, p. 334.

[94] In *Behemoth* (*E.W.*, vi, pp. 248–249) he writes: "I understand not how one law can be more fundamental than another, except only that law of nature that binds us all to obey him, whosoever he be, whom lawfully and for our own safety, we have promised to obey; nor any other fundamental law to a King but *salus populi*, the safety and well-being of his people."

> authority than that due to the title or person of a King or Emperor.[95]

There was, on this theory, a fundamental constitutional framework[96] which was beyond the power of a Hobbesian sovereign to alter so as to confer legitimacy on radical departures from that structure or framework. The lawyers did not deny that the sovereign (in their sense of that term) was "absolute"; he had complete and indeed supreme authority to act at his discretion within the legal framework of the constitution; they denied that he had "arbitrary" power, that is, power to act without reference to that constitutional framework. Since the constitution at any one time defines what is the legitimate exercise of power, the "common law sovereign" cannot, they reasoned, redefine the nature of his own being.

In advancing this theory of ultimate authority Hale's reply to Hobbes has incurred the reproach that he failed to understand Hobbes's position. Thus Holdsworth writes[97] that Hale

> seems to have thought that the sovereignty, analysed and explained by Hobbes, necessarily meant that sovereignty of the king, which the royalist lawyers of the earlier Stuart period had maintained. To the term sovereignty he attached quite a different meaning. He interpreted it as simply meaning a supremacy, which was not incompatible with the supremacy of Parliament or the law in their respective spheres. As the king was personally above the law, as the sphere of his supremacy was wider, more active, and more general than the sphere of the supremacy of Parliament or the courts, it was natural to speak of the king as sovereign, and of his supremacy as sovereignty. Because Hale was a common lawyer, his political conceptions were naturally of a somewhat medieval type. In fact, neither the common lawyers, nor the majority of statesmen of this period had really assimilated Hobbes's theory of sovereignty or attempted to apply it to the concrete facts of English public law. . . .

[95] Sir Edward Nicholas to the Earl of Rochester, 7 April 1654, *Nicholas Papers* (Camden Soc., 1892), ii.64. It may be acknowledged that Hale himself took the Engagement of loyalty to the republican Commonwealth in 1649 and accepted judicial appointment in January 1654 (this latter fact did not escape the notice of the Rhodesian judges in 1968, *vide infra*, p. 153, n. 25). It is enough to say that Hale never conceded that his acceptance of a Cromwellian appointment carried an implication that he considered Cromwell entitled *de jure*. In so acting on the advice of royalist friends he justified himself on the ground that the ordinary civil and criminal law must continue to be administered "for the public necessity of the kingdom". But it is less easy to reconcile his subscription to the Engagement with his opinions on the inherently monarchical nature of the English constitution.

[96] On this question Bacon was in the common law tradition and Hobbes's definition of fundamental law did not owe anything to Bacon. See Aphorism 3 in book 8 of *De Augmentis* (Ellis & Spedding I, 804): "Magistratuum autem auctoritas pendet ex majestate imperii et fabrica politiae et legibus fundamentalibus."

[97] *H.E.L.*, vi, pp. 206–207.

> "No doubt," continued Holdsworth, Hale "would have admitted, with Sir Thomas Smith,[98] that king and Parliament acting together were the most 'absolute' power in the constitution. But in this part of his tract he was concerned with the king and his prerogative, and not with the power of king and Parliament; and, if we look at the position of the king as the head and director of the government, we must admit that it was not a wholly false representation of the facts to describe him as sovereign, *i.e.*, supreme, in his own sphere, although his powers were limited by law and by the necessity of getting the consent of Parliament to some of his acts."

This criticism is just in so far that it points out the historical bases of Hale's theory. He did believe in a "feudal" constitution and his "royalist" interpretation of the constitution was far removed from the idea that the king ruled as an unlimited sovereign and that there was no fundamental law. On the contrary, for Hale there was a fundamental law and the King's prerogative was one of the most important parts of it. But the criticism errs in attributing to Hale a misunderstanding of Hobbes's political theory. He understood it; he denied it as factually correct and he rejected it as politically desirable.[99]

Of the factual correctness of the supremacy of the King in Parliament there could by the seventeenth century be no doubt. Before the Reformation there had existed Fortescue's doctrine of *dominium politicum et regale*,[1] but with Henry VIII's assumption of Royal Supremacy over the Church that theory had become an inadequate explanation of royal authority.[2] A long step had been taken from feudal and pre-Reformation kingship, but the modern notion of unlimited sovereignty was still far in the future.[3] In the

[98] Sir Thomas Smith, *De Republica Anglorum* (1583) asserts the "absolute" power of Parliaments, but Smith's work is more valuable as a description than as an analysis of sovereign powers. Alston in his edition of 1906 (pp. xli–xliii) discusses the relationship between Smith and Jean Bodin. Bodin's *De Republica*, perhaps the most influential theoretical work of the late sixteenth century, contains a strong attack on Smith's vague views on the doctrine of sovereignty. Bodin refused to recognise mixed forms of polities and attributed sovereignty in the English polity to the monarch alone. For the English reception of Bodin's theory, see G. L. Mosse, "The Influence of Jean Bodin's Republique on English Political Thought," *Medievalia et Humanistica* (1948) v, pp. 73–83.

[99] The conclusion that Holdsworth was mistaken is fortified by the opinion of C. H. McIlwain in his paper on "Whig Sovereignty and Real Sovereignty," in *Constitutionalism and the Changing World* (1939), pp. 61–85.

[1] Most fully discussed in H. D. Hazeltine's General Preface pp. xxx–xl, to S. B. Chrimes' ed. of *De Laudibus Legum Anglie* (1949).

[2] Fortescue had allowed the Pope a part in the making of English law. See G. L. Mosse "Sir John Fortescue and the problem of papal power," *Medievalia et Humanistica* (1952) vii, pp. 89–94.

[3] Christopher St. German wrote a number of pamphlets in defence of Royal Supremacy, 1533–35 (S.T.C. 21559–21588), advocating parliamentary control over the extended authority of the King, but significantly the exact relation between the Crown and Parliament is not fully explored. Modern discussions are J. J. Scarisbrick, *Henry VIII*, Chap. 12, on Royal Supremacy, esp. at pp. 508–515,

Tudor age, an age of peculiarly rapid transition in parliamentary power, constitutional ideas following events were in flux and had yet to harden,[4] but "a lawyer's theory" of legislative authority did emerge, and one of the clearer statements may be found in the words of a future justice of the King's Bench, James Whitelocke, speaking in Parliament in 1610,[5] upon the right of the king to impose import duties by letters patent.

> "It will be admitted," he said, "for a rule and ground of state that in every government and commonwealth there be some rights of sovereignty, *jura majestatis*, which regularly and of common right do belong to the sovereign power of that state; unless custom or the provisional ordinance of that state do otherwise dispose of them: which sovereign power is *potestas suprema*, a power that can control all other powers, and cannot be controlled but by itself.[6] It will not be denied that the power of imposing hath so great a trust in it, by reason of the mischiefs [that] may grow to the commonwealth by the abuses of it, that it hath ever ranked among those rights of the sovereign power. Then is there no further question to be made, but to examine where the sovereign power is in this kingdom; for there is the right of imposition.
>
> The sovereign power is agreed to be in the King: but in the King is a two-fold power; the one in Parliament, as he is assisted with the consent of the whole state; the other out of Parliament, as he is sole and singular, guided merely by his own will. And if of these two powers in the King one is greater than the other, and can direct and control the other, that is *suprema potestas*, the sovereign power, and the other is *subordinata*, it will then be easily proved, that the power of the King in Parliament is greater than his power out of Parliament; and doth rule and control it; for if the King make a grant by his letters patent out of Parliament, it bindeth him and his successors; he cannot revoke it, nor any of his successors; but by his power in Parliament he may defeat and avoid it; and therefore that is the greater power. If a judgment be given in the King's Bench, by the King himself, as may be, and by the law is intended, a writ of error to reverse

and his comments on G. R. Elton's article "The Political Creed of Thomas Cromwell" T.R.H.S., 5th ser., vi (1956), p. 69, reprinted in *Historical Studies of the English Parliament* (1970) vol. 2, p. 193, where Thomas Cromwell is discussed as a constitutionalist of the Marsilian School and a protagonist of the true political and legislative sovereignty of " the modern mixed sovereign, the King in Parliament, created by the deliberate infusion of the modern principle of sovereignty into those two great achievements of the middle ages—the assembly of king, lords and commons, and the common law of the realm."

[4] One of the best (though little quoted) discussions is William Dunham's "Regal Power and the Rule of Law: a Tudor Paradox," *Journal of British Studies* iii (May 1964) pp. 24–56.

[5] *H.E.L.*, vi., pp. 84–85. *State Trials* attributes the speech to Yelverton, but see Prothero, *Statutes and Constitutional Documents, 1558–1625*, pp. 351–353.

[6] Whitelocke did not enlarge on this remark. He does not seem to contemplate the enactment of irrepealable legislation; on the contrary the more plausible interpretation is that the sovereign's laws are inherently repealable or alterable by the sovereign.

> this judgment may be sued before the King in Parliament. . . . So you see the appeal is from the King out of Parliament to the King in Parliament . . . for in acts of Parliament, be they laws, judgments [7] or whatsoever else, the act and power is the King's but with the assent of the Lords and Commons, which maketh it the most sovereign and supreme power above all and controllable by none."

This was substantially Hale's view and the deduction of sovereignty from not only legislative but judicial supremacy was likewise part of Hale's thinking. In discussing the claim of the House of Lords to be a final court of appeal,[8] Hale wrote,

> if this should be, that the supreme jurisdiction without appeal, the denier resort, were to the House of Lords, then is the legislative power virtually and consequently there also; or at least that power lodged in the King and both houses were insignificant. For what if the Lords will give judgment against an act of parliament, or declare it null and void? If they have the denier resort, this declaration or judgment must be observed and obeyed and submitted unto irremediably; for no appeal lies from their judgment, if they be the supreme court. . . . The truth is it is utterly inconsistent with the very frame of a government that the supreme power of making law should be in the King with the advice of both his houses of Parliament, and judgment should be in one of the houses without the King and the other.

Therefore, " wherever the denier resort is, there must needs be the sovereignty and so this word is constantly used and joined with it." [9] In so saying he was doubtless distinguishing between a legislative and a judicial function, but he was also thinking of " the high court of parliament," the body which both ultimately made and interpreted the law, and which indeed was the descendant of a body not of legislators or judges but of lawgivers.

The sovereign power, as defined by Whitelocke and Hale, was therefore supreme and uncontrollable, that is, " absolute," but it was, for them, a power within and not above the constitutional framework. Here was the crucial difference between their sovereignty and the sovereignty envisaged by Hobbes. As a matter of constitutional history there can be little doubt that their sovereignty bore a nearer relation to the facts, but Hobbes was not principally concerned with description. He was prescribing a model, for such was his artificial man and mortal god, *Leviathan*. Moreover, Hobbes's idea of sovereignty has in the modern world achieved such success that today it represents the conventional wisdom, not just of many political theorists, but of most modern common lawyers, from Mansfield

[7] In the printed versions " grounds " for which the substitution is offered.
[8] *The Jurisdiction of the Lords' House of Parliament* (ed. Hargrave 1796) at pp. 206–207.
[9] *Op. cit.*, p. 205.

onwards. Sovereignty is generally no longer thought of as a principle of authority defined by existing legal bounds; it is political fact.[10] And the ensuing difficulties have been very considerable, *e.g.*, the legitimacy of successful rebellion in Rhodesia.[11] Hobbes himself would have found no difficulty at all. The recognition of his sovereigns was simply that their sovereignty was a matter of their capacity successfully to protect and command obedience of their subjects and it followed that sovereignty was an attribute of whomever could be identified as actually holding power to protect and command obedience.

Since Hobbes's sovereign stood above and anterior to the legal order, the principle of recognition was therefore simple. It was purely a matter of effective political control. As *Leviathan* was a mortal god, he might be reincarnated not once but many times. But the old common law idea of sovereignty which existed only within the existing legal framework could not accommodate and account for usurpation and successful rebellions so simply or so easily. It is not to be expected that a legal order can provide for the event of its own overthrow and supersession and the common law ideas of Hale and likeminded believers in the ancient constitution did not provide a general solution to the fact of revolutionary change. But the common lawyers of course recognised that as a matter of historical fact there had been successful rebellions and revolutions, not only the rebellion against the Stuart monarchy but the dynastic revolutions of earlier centuries. How did they deal with the question of obedience to usurped but established power? [12]

To establish Hale's reply to this critical issue, the question of civil obligation in the event of successful revolution in the legal order, it is desirable initially to restate his definition of sovereignty. He analyses in the first place the effect of laws upon the King.[13]

[10] The present Lord Chancellor (extra-judicially, on adhering to the Treaty of Rome, *The Times*, 14 July 1971): "Like domicile or sex, sovereignty is a question of fact." Or if an extra-judicial utterance is not sufficient evidence of current judicial philosophy, *vide per* Lord Denning M.R. affirming as true the view of Professor H. W. R. Wade in [1954–55] C.L.J. at p. 196, that "sovereignty is a political fact for which no purely legal authority can be constituted" (*Blackburn* v. *Att.-Gen.* [1971] 1 W.L.R. 1037 at p. 1040).

[11] See especially from the extensive literature, R. W. M. Dias, "Legal Politics: Norms behind the Grundnorm" (1968) 26 C.L.J. 233, and the most recent discussion, J. W. Harris, "When and Why does the Grundnorm change?" (1971) 29 C.L.J. 103. The general attempt has been to reconcile Kelsen's positivist theory with a denial of validity to the new legal order in Rhodesia. The latter article argues that such attempts have failed. There can be no doubt where Hobbes would have placed Rhodesian sovereignty today.

[12] How Hobbes and other political writers of the Interregnum debated the question has now been discussed by Quentin Skinner, *Conquest and Obligation: Thomas Hobbes and the Engagement Controversy*, in *The Interregnum*, ed. G. E. Aylmer (1972).

[13] *Reflections*, pp. 507–508. And more fully in *Prerogativa Regis*, Chap. 11.

> 1. *Potestas Coerciva.* This extends to all the King's subjects, but doth not extend to the King, he is not under the Coercive Power of the Lawes. 2. *Potestas Directiva,* and this oblidges the King and wee need not goe further for Evidence thereof then that Solemn Oath which he takes at his Coronation, the Iterated Confirmation of the greate Charter and those other Laws and Statutes that Concerne the Liberties of his subjects. 3. *Potestas Irritans,* and thus the Laws also in many cases bind the Kinge's Acts, and make them void if they are against Lawe. . . .[14] No good subject that understands what he sayes can make any Question where the Soveraigne Power of this Kingdome resides. The Laws of England and the Oathes of Supremacy teach us that the King is the only Supreame Governour of this Realme and as Incident to that Supreame Power he hath among others these greate Powers of Sovereignty.

He then enumerates six such powers, the power of making peace and declaring war,[15] the power of giving value and legitimation to the coinage, the power of pardoning the punishment of public offences, the power of distributing justice, the power of militia [16] and raising forces by land and sea, the power of making laws. And he explains in some detail that there are certain qualifications upon these powers, especially in relation to the power of legislating and taxing. These powers were "the great *jura summi imperii* that the laws of this kingdome have fixed in the Crown of England," and his whole treatment of sovereign powers in his reply to Hobbes and in the *Prerogativa Regis* makes it plain that he saw sovereignty as a bundle of rights, a concept of public authority, but that he did not define it in terms of a political theory which placed that collection of powers in an ultra-legal context. This being so he had to face the question of what happened to his sovereignty in the event of successful rebellion, the problem posed by the actual exercise of *de facto* power derived from conquest or civil revolution.

In the context of a legal definition this was a problem of the scope of treason and the limits of allegiance. In the fourth chapter of *Prerogativa Regis* he discussed the nature of allegiance, and since the

[14] The reference is not to parliamentary acts of the sovereign, but to the numerous rules of law which voided the King's acts if not carried out in due form, *e.g.*, alienation of royal lands without the use of the Great Seal and so forth.

[15] In placing this power first, Hale probably did not intend to imply its primacy, but other lawyers did ascribe that status to this prerogative. *E.g.*, Lord Nottingham in a parliamentary speech in 1678 (Sel.Soc. 79, p. 993) asserts "the right of making war and peace is so much the king's that in all kingdoms and states in the world this and this only is the true and essential mark where the sovereignty rests."

[16] Hobbes himself saw the shift of sovereignty in the rebellion against Charles I in the seizure of military power, for in his view "the legislative power, and indeed all power possible, is contained in the power of the militia." (*Behemoth, E.W.*, vi, p. 290).

nature of allegiance was a matter of fidelity to the sovereign, the critical question was the effect of usurpation. This he discussed in the sixth chapter of *Prerogativa Regis.*

The " root of title " was the Norman Conquest but history related " several usurpations of the Crown of England upon various pretences " [*i.e.*, claims of title] " since the acquest of King William." He relates in minute detail these historical episodes, particularly the depositions of Edward II and Richard II, and the transfers of regal powers between the dynasties of York and Lancaster in the fifteenth century, down to the seizure of regal power by the Tudor dynasty. The doctrine he evolved from his understanding of these vicissitudes of royal power may be summarised thus. First, there was the relation between two claimants for regality, and, secondly, there was the relation between any successful disseisor and the people. Upon the first relation, there were ten deductions. First, a king who voluntarily resigned was no longer king and was no longer owed allegiance. In the case of a king who was involuntarily deposed, Hale took the view that he was a king *de jure* but not *de facto*, but he was troubled by the case of Edward II whose murder after deposition had been later treated as treason. In this instance and for that reason he thought some character or element of regality survived deposition, though he did not resolve the question satisfactorily to himself or to others,[17] and indeed his hesitant conclusion about the allegiance due to a deposed monarch was inconsistent with his general explanation of the effect of usurpation. As will be seen later, this general theory was that loss of *de facto* authority involved the loss of allegiance. But as between competing monarchs, it was clearly Hale's opinion that loss of power did not amount to forfeiture of title. Secondly, the heir of the deposed king who had never gained actual possession of the Crown, though he might assert a claim and attempt to regain the Crown, " yet till such regaining of his Crown, he is in the nature of a subject if he acquiesces to the possession of the usurper." As such, treason could not be committed against him.

Thirdly, if the heir regained possession of the Crown, " those acts that tend to the diminution of the royal power or revenue and are not merely transient acts nor executed in the time of the usurper, are not at all binding to the rightful heir of the Crown after his reassumption

[17] This particular conclusion, that some element of regality survived deposition, caused Hale a severe and extended rebuke from Sir Michael Foster in his Fourth Discourse upon Crown Law, because Hale's opinion as published in the *Historia Placitorum Coronae* in 1736 naturally could be referred to the effect of the deposition of James II. Mr. Peter Glazebrook has recovered further unpublished passages on *de facto* kings in the *Hist. Plac. Coronae* from Hale's autograph and the transcript from which the printed work was published. These form an appendix to his edition of a new reprint of the *Historia.*

thereof."[18] Fourthly, those charters "as did not impair the revenue or regality of the King stood good if executed, in the time of the usurper. . . ."[19] But if these charters were not executed in the time of the usurper but executory after his death, as a licence to alienate in mortmain or by a tenant *in capite*, not executed in the usurper's time, [such charters] bind not."

Fifthly, grants which do not bind the heir after regaining the Crown did not bind him even if they had been confirmed or granted by consent of Parliament. This was because where such Parliament had been called by a usurper, "though the laws be good to bind any that stand in the capacity of a subject," the Acts of such Parliament could not bind the particular interest of the heir who regains the Crown. Sixthly, the heir regaining the Crown from the usurper is not bound by the grants of the usurper in matters of regal power or revenue "no more than the true lord is bound by the original grants by copy or otherwise of the disseisor." On the other hand "the usurper comes in under the title of the right King, and therefore is bound by his grants; he is quodammodo a successor to the right prince, though not an heir or lawful successor." Seventhly, "such things as are naturally avoided by the King's death are avoided by a plenary usurpation." Examples are judicial commissions and judicial process. Eighthly, "but where the usurpation is not complete but the rightful prince kept his ground, though there were a usurper in the kingdom, there was no determination of commissions or discontinuance of process, because when two are in possession the law adjudgeth him in possession that hath the right, and thus it was in the sixteen days' usurpation of Queen Jane, for Queen Mary, the rightful possessor upon whom Jane usurped, still continued in the kingdom and held her regal title."[20] Ninthly, "acquisitions made by the usurper whether by purchase or by conquest as King of England, do belong to the rightful prince reassuming the kingdom. And the reason is because he [the usurper] is *de facto* King and doth sustain the politic capacity of a King, though not to prejudice his successor."[21] Tenthly, Hale considered whether in relation to foreign

[18] Examples of voided acts were grants of land and offices. Acts of resumption when enacted were therefore "to prevent the danger by provisoes and exceptions for those of the King's friends rather than otherwise."

[19] Pardons to criminals and presentations of clergymen were examples.

[20] The problem of two competing *de facto* exercisers of regality is further explored by Hale in the recovered passages from the manuscript of *Historia Placitorum Coronae*, *supra*, n. 17. Accordingly Jane was not even a *de facto* queen in 1553 because she never gained undisputed control over the kingdom.

[21] Since there is no question of inheritance, for the rightful prince is not heir to the usurper, Hale takes the principle of succession from the usurper as a corporation sole. This rule of acquiring benefits but not burdens by succession to the wrongful occupant of a corporation sole had been worked out originally in connection with ecclesiastical corporations sole, *e.g.*, abbacies.

affairs, the acts of a usurper "engage the rightful prince after his regress." He reached no decided opinion on this question "but doubtless *de facto* the foreign peace or the foreign war continues till a new capitulation, treaty" or other settlement.

These propositions on the face of them appear to fail to answer the question how one is to distinguish "the rightful prince" from "the usurper," since as a matter of fact the successful usurper will require the courts to treat him as the rightful prince. The explanation seems to be that Hale was applying to the question of rightfulness in relation to the Crown familiar ideas of seisin and disseisin. The disseisor acquired all the substantial benefits of possession and retained them while seised; the disseisee was left with a mere claim. Disseisin did not confer title as a matter of ultimate right but the law accorded to the fact of seisin even if wrongfully acquired recognition to an extensive degree, and this idea apparently formed the background to Hale's thinking on this question.

But the more important question, in relation to the obligation of the subject, was the consequence of usurpation as affecting the relation between the usurper and the people. Hale on this point had no doubt that a successful usurper was a king *de facto* and sustained "the politic capacity of a king, at least in reference to the people who have submitted to him." In the first place, he held that "if there be a plenary usurpation and possession of the Crown, those acts of voluntary jurisdiction that are transient and for the public necessity of the kingdom stand good notwithstanding the regress of the lawful prince." To this proposition there was the exception that acts executory but not executed in the time of the usurper "would not hold in the time of regress," but otherwise the ordinary acts of government remained valid. Secondly, in the case of a plenary usurpation "the acts of Parliament not relating to the particular propriety of the rightful prince stand good notwithstanding the regress of the rightful prince."[22] Thirdly, judicial process and judicial commissions came to an end by usurpation "as well as they would have done by the death of the king," but judicial process and commissions revived on resummons and recommission by the usurper. Fourthly, judicial proceedings in the name of the usurper retained validity after the regress of the rightful prince, even without the aid of an Act of Parliament,[23] and existing proceedings might be revived

[22] In 1660 the whole legislation of the Interregnum was considered as no longer in force, but this was on the theory that no Act which had not received the assent of Charles I or Charles II could be considered an Act of Parliament, and there was no attempt to treat as illegal ordinary acts of government executed under the authority of that legislation.

[23] Acts of ratification, such as 4 Edw. 4, c. 1, were therefore not acts of necessity but merely *in abundantiorem cautelam*. If the usurpation was not complete or the usurper was not in effective control, Hale was of the opinion that "there

by resummons. " And the reason is because it is an act of necessity, though by the usurpation the people have lost the fruition of their rightful prince and his protection, yet they have not lost the interest they have in their laws." [24]

All these propositions Hale advanced to determine the legal results of a usurpation where one king superseded another. He did not proceed to consider the effect of a change in " the nature of government," a republic superseding a monarchy or the like. His treatise was concerned with the powers of monarchy and it was enough for him to consider *de facto* power in that context. And he believed that allegiance was owed to a *de facto* king.

It is at this point that Hobbes and Hale may be said to join hands. As widely separated as they were on the theory of sovereignty, and the issue of its illimitability, it is quite clear that within the framework of the monarchical government of England Hale asserted the duty of present obligation to obey the present and plenary power of a *de facto* king whatever the hereditary or other defects in his title.

Since this opinion has been recently subject to serious challenge both on grounds of history and law with reference to the Treason Act of 1495,[25] some comments may be offered in conclusion. Debate has centred around the meaning to be given to the 1495 statute of Treason. The Act of 1495 (11 Hen. 7, c. 1), which Henry VII passed in the shadow of invasion by the Yorkist pretender, provided that any person or persons

> that attend upon the King our sovereign lord of this land for the time being in his person and do him true and faithful service of allegiance . . . be in no wise convicted or attainted of high treason nor of other offences for this cause by act of parliament or otherwise by any process of law, whereby he or any of them shall forfeit life, lands, tenements, rents, possessions, hereditaments, goods, chattels, or any other thing, but to be for this deed and service utterly discharged of any vexation, trouble or loss; and if any act or acts or other process of the law hereafter . . . happen to be made contrary to this ordinance, then that act or acts or other process of the law . . . should be void. Provided always that no person or persons shall take any benefit or

an Act of Parliament might be of necessity to confirm the transactions judicial in the time and place of such usurpation, and cites 1 Mar. c. 4, which " though as to bonds and indentures dated in the year of Queen Jane was needless, yet possibly, it might be of some use as to statutes and recognizances."

[24] Hale's analogies at this point are instructive. " A disseisor of lands may assign dower to one that is lawfully entitled thereunto and it shall bind the disseisee after his re-entry. A disseisor of a copyhold manor may make admittances. A disseisor of a manor to which there is a leet appendant may hold his court baron or leet, and determine plaints and take presentments as to matters determinable by those jurisdictions, and such judgments are effectual."

[25] A. M. Honoré, " Allegiance and the Usurper " [1967] C.L.J. 214. The judgment of the Appellate Division of the Rhodesia High Court in *Madzimbamuto* v. *Lardner-Burke*, 1968 (2) S.A. 284 is largely an exegesis on the Act of 1495.

> advantage by this act which shall hereafter decline from his or their said allegiance.

Professor Honoré has argued that this was a promise by Henry that should the pretender oust him, he (Henry) on regress would not treat as treasonable any adherence to the usurper after the usurper had gained power, but it left at risk and unprotected those who actively assisted the pretender to usurp.[26] Historically, this seems implausible. In the autumn of 1495 it seem improbable that Henry and his Council should be planning for such contingencies, the aftermath of a second Bosworth. The statute seems rather a rallying measure and read in that light it makes sense.

The preamble opens with the words "the King our sovereign lord calling to his remembrance. . . ." This means Henry and the statute must be read as if spoken by Henry himself. Subjects must serve "the prince and sovereign lord for the time being." This means Henry and his successors, but surely only successors who on Henry's reckoning were legitimate, *e.g.*, his son Arthur if he himself fell in battle. He could not have referred in the phrase "sovereign lord of the land for the time being" to a person who had from his standpoint no claim whatsoever to that title. To the supporters of himself and his dynasty he addresses himself and promises protection if they join his standard. The proviso makes it clear that this promise is not extended to those turncoats who join him and subsequently desert him, persons who might otherwise claim the protection of the Act by virtue of having actually joined Henry in the field before deserting him.

The objection to this reading of the text is that such a promise is valueless in the event of Henry's overthrow by the usurper. The successful usurper would repeal the statute and then attaint Henry's adherents. It may well be for this reason that the Act contains the words purporting to avoid future acts of attainder and to nullify future contrary statutes. Even if such an attempt to pass unrepealable legislation would have been ineffective, it affords evidence of what was intended. Moreover, Henry's Act would stand until the usurper was sufficiently established to call a Parliament[27] and pass punitive

[26] Honore at p. 220 argues that "the promise of immunity might actually help Henry recover the throne from a future Richard IV because moderate men who had not rebelled in the first place would know that their support for Richard in the interim period would cost them nothing provided they returned to their first allegiance." But Henry's promise as construed by Honoré does not stop at "moderate men." It includes all those who for the first time join the usurper after he has gained possession and then fight to the last stroke to repel Henry's regress; it excludes only those who helped to turn Henry out.

[27] Henry may well have recalled that on his own accession in 1485 he had found it necessary on the advice of the judges to secure the reversal of the attainders on his own supporters before it was possible for them to assist in the measures of his first Parliament, which included the parliamentary confirmation of his own title to the Crown. See Bacon, *infra*, n. 29, pp. 37–38.

legislation, and a limited degree of protection would be better than none. But the practical consideration was to rally support[28] and raise the spirits of Henry's supporters. It seems correct therefore to construe the statute as a thoroughly "lancastrian" measure.[29] Henry was taking immediate measures for the protection of his Crown; he was not writing into the Statute Book an advance pardon to some adherents of a successful usurper.

But in the hands of lawyers seeking a legal sense of the text the statute has become a statement that allegiance is due to a *de facto* king.[30] And apart from doubts expressed by Blackstone, this has been the theme of the textbooks from Coke onwards. And even Professor Honoré's interpretation reaches the conclusion that the statute "endorses the general principle of allegiance to the king for the time being" in the sense that it is no breach of allegiance against the dispossessed king to adhere for the first time to a usurper after he gained a plenary power.

The difficulty about the Act, and that which troubled Blackstone, is that the full *de facto* interpretation seems to make a shifting sand of the idea of allegiance. Even if it be allowed that Henry and his Parliament had no thought of pardoning adherence to his enemies in the slightest degree, it is impossible to deny that such has been the general interpretation of lawyers who in later ages could not or did not place themselves imaginatively in the exigencies of 1495 and who instead construed it as a mere text. They generally treated the question as one of law, not of history, and arrived at the conclusion that the *de facto* monarch was entitled to allegiance and to obedience. And this was certainly Hale's view.

But apart from the problems of the statute, the last question to be answered was whether sovereignty could survive a successful and plenary usurpation. On Hobbes's definition of sovereignty, his answer was a clear negative, for his sovereignty was not ultimately a right or a rule, but the very political fact of effective power to command obedience. Hale likewise returned a negative answer, but

[28] See also the proximate Act of 11 Hen. 7, c. 18; *cf.* 19 Hen. 7, c. 1.

[29] As does Reeves, *History of English Law*, vi, p. 132, and Bacon in his *History of the Reign of Henry VII*, Ellis & Spedding, vi, pp. 159–160, writing, it may be noticed, from the standpoint of historians. The *de facto* interpretation, on the other hand, occurs in works which are expositions of law. The most cogent argument based on the phrase "king for the time being" is Thomas Carte's in his *General History* (1750), Vol. 2, pp. 847–848, contrasting the implied legitimacy of title with the use of *de facto* descriptions. But he admits that Henry in encouraging his supporters followed "his own way, ever dark, double and mysterious."

[30] Hale, *Historia Placitorum Coronae*, i, p. 273, observes "this act extendeth to a king *de facto*, though not *de jure*, for such in truth was Henry VII." This amounts to saying that Henry did not regard himself as a king *de jure* and that he passed the Act to protect his supporters as adherents to a *de facto* king. Historically considered, this is of course absurd.

on very different grounds, for in his eyes sovereignty was a title to rule and govern and only recognisable in this country within the system of monarchical government, and that title had to be based on principles of public law, on the principles which themselves determined the framework of the system. The system had nevertheless to provide for political realities which included historically not a few usurpations of the Crown. To assimilate the fact of usurpation he had resort to the notion of disseisin.[31] The usurper was likened to the disseisor. But while disseisin conferred on the disseisor the very estate and the legal authority to use, to enjoy, to dispose, it did not extinguish the claim of the disseised. The disseisor's heirs might inherit and his and their title was good against all save the claimant who could prove a better, because it was the more ancient, seisin of his ancestors. How then might that claim to the Crown be vindicated? The answer must be by force, that is, by battle. And if it be thought that that answer could not properly lie in the mouth of a common lawyer, we may press the analogy further and recall that where in the primeval common law the issue arose which of two contenders was entitled as a matter of hereditary right, that ultimate right was in the last resort put to the judgment of God, that is, to battle.

[31] This was no new way of considering the question; see the case of Bagot's Assize, Y.B. Pasch. 9 Edw. IV, f. 1b, pl. 2. The case is discussed at length in an editorial note to the *Historia Placitorum Coronae*, p. 101, n. (f). But Hale in the *Prerogativa Regis* was the first to apply the idea generally to constitutional theory and to deduce in detail its implications.