[?1804]

The right of the King, to the custody and education of the Prince's infant children, during the Prince's life, has twice, particularly engaged the public attention, — in 1771, when King George the first referred it to the opinion of the twelve Judges, and ten of them, against the other two, were of opinion, that it belonged of right to him, as King of this realm; — and in 1772, when, during the pendency of the Bill, "for better regulating the marriages of the Royal Family," it was discussed in both houses of parliament. 1)

I.

Whatever may be the importance of the question, the discussion of it lies within a narrow compass. By the universal law of the land, where a child has not that kind of property, which attracts another guardian, the custody of his person, and the care of his education belong solely and exclusively, to his Father. The Princess Charlotte has no such property; — presumptively, therefore, and of common right, the Prince, has the sole and exclusive right to her custody and education.

If he have not this right, it must be, because the law of the land, in this particular and solitary instance, derogates from its general rules

1) Fortescue's reports the life of Judge Price, Mr. Just. Blacks. Comment. 8. edit. 1 vol. 225; new Edition of State Trials Vol. 29 5. —

of Guardianship, by vesting the right to it, in another.

II.

It is said to be vested in the King:— If it be vested in him, it must be by an act of Parliament, or as a branch of his Royal Prerogative, at common law. But, Nil hil Record; there is no such act: his title to it therefore, must be at common law. As such, it can only be proved by long and immemorial usage, or an universal reception into our Law. [1]

Now, previously to 1717, when the prerogative claim was opposed by the Prince, with the advice of his council, the event of a Prince Royal having, a child during his Father's life, had occurred twice only, in our history from the time of the conquest. But, does the law of England consider any right to be established by usage or reception, if two instances only of a possible exercise of it have occurred.

To this objection, his Majesty's claim would be liable, if both instances adduced in its support were in point. But this is by no means, the fact; the first favours neither side of the question, the last is favorable to the Prince.

The first of them occurred, on the embarkment of Edward the first, then the Prince royal of England, for the Crusade. Previously to his embarkment, having one daughter, and Henry the 3d, his Father, being then living, by an instrument dated the 2d day of

[1] 1. Black. Comment. 8 Edit. p. 64.

August 1270, he, "with the leave and assent of the
"King his Father, ordained and established, respect=
"=ing the guardianship of his children, and of his
"castles, and of his lands and of his seignories in
"England, in Wales, in Ireland, in Gascogny, and in
"the Islands of Guernesey and Jersey, with all their
"appurtenances, together with the issues of the lands,
"and the things before mentioned, in the form therein
"mentioned that is to say.

"That the noble Richard, King of the Romans, -
"should have the guardianship of his children, till
"his return, if it should please God, from the holy
"land, for the security of him and his aforesaid -
"children; so that, if by accident, it should happen,
"that God should dispose of him, before his return to
"England, the same guardianship should remain -
"with the same King his uncle, till the lawful -
"age of the same children, together with the govern=
"=ment and direction of all his lands aforesaid."

He then proceeds to assign persons to act under the King of the Romans; and makes particular provisions for the different events of his surviving or dying in the lifetime of his Father.[1]

It may be urged, that, from the appointments being expressed to be made "with the leave and assent "of the King", it follows, that His Majesty's leave and assent were necessary to its legal validity; as an ac-

[1] 2 Rymer, 114.

appointment by the Prince of a guardian to his children, during his own life. But to this, there is an easy answer:— the appointment extends to two distinct classes of cases; those, in which his Majesty's concurrence was necessary, and those, in which his concurrence was unnecessary. As an instance of the former, it may be observed, that, if Prince Edward had died in the lifetime of His Majesty, as his lands in Chivalry would have descended to his heir, his Majesty would be entitled to the custody of the person and lands of the heir, by his Prerogative at common law; so that, to enable the Prince, to appoint, on this event, a guardian to his heir, his Majesty's leave was absolutely necessary.— As an instance of the latter, it may be observed, that, except as Lord of the fee, with which the appointment did not in anywise interfere, his Majesty had not, during the life of the Prince, the slightest interest or concern in his Castles Seignories or other possessions; so that, to enable his Royal Highness to delegate the custody and management of them to another, while he himself should live, his Majesty's concurrence was wholly unnecessary. Now, to which of these classes, his Majesty's assent to the appointment, so far as it related to the guardianship of the Prince's children, during his life, should be referred, is neither expressed, nor to be implied from the instrument. In respect, therefore, to the point under

consideration this precedent is dead letter, and neither party can cite it as an evidence of his title.

The second of the two instances took place, on the birth of the two children of Edward the Black Prince. The first of them, Edward Duke of Angoulesme, died very young: the second of them Richard, who afterwards succeeded to the throne, was born in 1366, in the lifetime both of the Black Prince his father, and of Edward the 3d, his grandfather. The Black Prince lived till 1371, – so that there was a period of five years, during which, the education and care of the person of the infant Richard, were open to the Royal Prerogative. But there is not the slightest evidence that it was claimed; on the contrary, it appears, 1st, that Prince Richard lived, with his Father, as part of his Family; 2dly that, his Father appointed his Tutor; and 3dly that, after his Father's decease, he continued with his mother, during the remainder of his grandfather's life. 1)

Thus, of the two only instances, which can be cited, the first proves nothing; the other is an authority in support of the Prince's title. – It should be added, that, in all cases, of a claim against common right, as that of the King, in the present case, the claimant is always held to the strictest proof.

III.

It may be said, that thō proof of the royal prerogative in the point in question, cannot be made, by producing

1) See the Argument of Mr. Justice Eyre and Mr. Justice Price in the State trials.

particular instances, in which the exercise of it has been recognised by the law of England, still, among the Prerogatives, with which the law confessedly invests the royal person, enough may be found, from which it may be proved by inference.

But which of these Prerogatives is it, from which his Majesty's alledged right of guardianship is inferrible. Let that, and the supposed deduction from it, be accurately described; and let both be provedbylegal evidence. The Royal title will then be clear; but till then, the Prince's title, by common right, is beyond controversy.—

Thus the Prince's title to the sole and exclusive custody and education of the Princess Charlotte rests on a solid foundation.— It belongs to him of common Right he has not been deprived of it by any statute, and there is nothing that shews it to be in any other person at common law.

Where there has not been usage, there cannot be Prerogative.