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The transcendent delicacy of the circumstances under which his Royal Highness the Prince of Wales' right to the Custody Education & Guardianship of his Child the Princess Charlotte has been brought into question before the public reminds me of what Lord Chancellor Ellesmere is reported (Moore 794) to have said upon the case of the Antenati „That it was „not a question de bono but de vero — Not what was „fit to be done — but what the Law already is — „Which is — What the Law of England is" — I must however premise — that occasional family settlements arrangements & dispositions either with or without the consent of all the parties interested cannot of themselves make Law — Nothing can be Law in England but Statute or Common Law — Here is no question of Statute Law — What then is the Common Law?

Q.

If the Education Care & Custody of the Princess Charlotte do according to the Opinion of the 10 Judges in 1718 of right belong to his Majesty as King of this Realm — then cannot his R Highness possess the Common right of every Father throughout the Land & it will be requisite to trace the possession of the Prerogative by the King & the deprivation of right in the Prince beyond the time of Memory ie 6 July 1189 Sr Matthew Hale truly says — "When I call those "parts of our Laws leges non scripta — I do not mean "as if those Laws were only oral or Communicated "from the former Ages to the latter merely by Word "for all those Laws have their several Monuments in "writing — whereby they are transferred from one Age "to another — & without which they would soon lose "all kind of Certainty &c — And he tells us that "they are for the most part extant in Records of pleas

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„proceedings & judgments in books of reports & judicial
„decisions — in tractates of learned Men's Arguments
„& opinions preserved from ancient times & still
„extant in writing" — Now if this Prerogative of
the Crown & disability of the Prince (for the one
imports the other) be not to be found in any of
those sources to which that great Constitutional
Lawyer refers us — the conclusion is obvious — that
such is not the Common Law

True it is — that there is a very long elaborate
(perhaps not very impartial) report in Fortescue of
the Opinion of the 12 Judges of England on what
he calls The Grand Opinion for the Prerogative
concerning the Royal Family — Ten were for the
Prerogative — two agt it — The Opinions were given
by desire of the King — not upon any Action or
Suit — Consequently — it is no judicial decision

in that sense in which the general rule is founded
that the decisions of the Courts of Justice are the
Evidence of what is Common Law — The question
is not res judicata — if future Judges were called
upon to decide it they could not consider the
Opinion of the 10 Judges in 1718 as a precedent
which they ought to follow — nor ought they to be
otherwise influenced by it — than as far as the
facts reasons & principles set forth in their Opinion may
affect or convince the Judgments of those who may
hereafter have to decide upon it —

In addition illustration & confirmation
of the very solid Argument of the two Judges
Price & Lyre who held that this pretended
Prerogative was unknown to the Laws of England,
I have to offer — that the altum silentium of

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all our Courts & of all our Writers upon and
expounders of the Royal Prerogatives before — and
(even) since the Mooting of this Question by the
Royal Mandate — is conclusive Evidence of the
Non existence of the Prerogative in question —
Not one out of the Numerous investigators & defenders
of the Royal prerogatives at the restoration — in the
very Zenith of Royalism — Mentions any thing of
such Prerogative — and altho Mr J Blackstone
in his Chapter of the Royal family have deferred
to this Opinion of the 10 Judges — Yet in his
Chapter of the King's Prerogative, in which he
very Minutely & Methodically, details the various branches
of it — there is not the slightest Mention made
of this particular Prerogative — On the Contrary
he very justly observes that, one of the principal

bulwarks of Civil Liberty or (in other Words) of the British Constitution was the Limitation of the King's Prerogative by bounds certain & Notorious. And he Moreover adds, That it will be his business to consider this Prerogative Minutely — In the Year 1764 a most laborious & minute digest of the King's prerogatives was published intituled Droit le Roy by a Gentleman of Lincoln's Inn (M^r Brecnock as I am informed) with a most determined intent not to omit the mention of any one right or prerogative of the Imperial Crown of G^t Britain — He enumerates 34 — and he calls the 34^th the last prerogative — It is to be remarked that this sedulous digester of the Royal Prerogative can little be suspected of having overlooked any prerogative really inherent in the Crown — for he ends the postscript to his Work (which is an enumeration of the Royal attributes)

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with a quotation from Sr Thomas Smith to prove that it is the Custom of this Realm, "That no Man speaketh "to the Prince, nor serveth at the table but in adoration "& kneeling &c (Lib: 2: C: 1) — The learned Commentator Blackstone follows Sr Henry Finch (L: 85) in laying it down as a Maxim, That the Prerogative is that Law in Case of the King — which is Law in no Case of the Subject —

Let the Authorities of Bracton & Fleta so strongly insisted upon by the 10 Judges — be considered with a fair bearing upon this Maxim — The denial of their Authority by Price & Lyre — as borrowed from the Civil Law is unquestionable — But supposing that it were Evidence of the Common Law of England it could only be so according to the import & meaning of the Words themselves — They are evidently spoken of the rights of Grandfathers over the Grand Children

as a General Law equally affecting all Subjects — Not at all as a Prerogative in the Case of the King Which is Law in No Case of the Subject — These Authorities had (they clearly have not) any weight in the Law of England — they evidently go directly to establish the right of Grandfathers generally to educate their Grand Children — which is admitted by the 10 Judges not to be the Law of England — but can by no construction be tortured into a prerogative in the Sovereign — & of course differing from the Law affecting all Subjects — of which Prerogative alone the Question is ——————

On like grounds must be rejected all the inferences drawn by the 10 Judges in favor of this Prerogative from the Metaphorical attribute of the King — as Parens Patriæ —— If any rational Consequence

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can be deduced from this General and Metaphorical attribute
it is to invest the King with a general parental Authority
over all his Subjects — & not merely over the Grand
Children — Nephews or other remoter relatives of the
Royal blood — For if according to the reasoning of
Baron Fortescue (the Reporter) we consider the Royal
family by Excellence as the Queen was called Wife
by Excellence amongst the Saxons & was therefore endowed with peculiar and
great prerogatives — therefore shd the King have been
stiled Pater familias & not Parens patriæ — & so there
might have been some plausible pretext or ground
for investing him with an exclusive parental power
or Authority over the Royal family (by Excellence)
which his Majesty further enjoyed over any other
of his Subjects — for any of his Subjects enjoyed
over any other of his relatives than his Sons &
Daughters

It appears puerile in the extreme to draw legal inferences from Metaphorical premises — Undoubtedly the Nation is deeply interested in the Welfare of all the Royal family & that in proportion as each of them approaches the probability of furnishing the heir to the Crown — But does that General interest create a prerogative in the Sovereign which deprives each Parent of the Royal family of the right of educating his own Children — The advocates of the Prerogative know not where to stop — The attribute of Parens patriæ affords them no datum by which to limit the Prerogative to Grand Children Nephews or tenth Cousins — And yet it is the boast of our Constitution — That the prerogative Royal — which is a part of the Common Law of England is certain & notorious — And the limits of this

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certain & notorious Prerogative are attempted to be fixed by the sapient Observation that the Latin Word Nepos signifies indiscriminately a Grandson or a Nephew Still more absurd — if possible — are the Arguments drawn from the fictitious & Metaphorical identification of the King & the Prince of Wales — No Argument can falsify these simple positions — The King is the Sovereign & No Subject — The Prince of Wales is No Sovereign — but a Subject — Tho the first of Subjects The Staunchest Advocates for the Prerogative have not attempted to extend this identification with the Sovereign beyond the Person of the Prince of Wales And as they themselves state the Question — the Prerogative goes to all his Majesty's Grand Children indiscriminately — or to None — Yet not one of the 10 Judges has attempted even to hint where the Prerogative Stops

If this Prerogative exist in the Crown — then every Father of the blood Royal loses by means of it the Natural right & Authority over his Children which the Common Law & Statute Law of England give to every other Subject indiscriminately — It annihilates the general Relations & the reciprocal rights & duties between Parent & Child founded in the Natural Social & Christian Laws — The same right cannot subsist in two distinct persons at the same time — The Father's right to Command & the infant's obligation to obey are Commensurate & Coeval — By the Common Law this Tutelary Relation ceases only When the Child becomes Sui juris — which in England is at the Age of 21 — Till then (at least) the Child is entitled to claim Nurture & Maintenance from its Father & that draws with it the Father's right to educate the Children whom he is obliged to maintain —

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Even the Worthy Commentator before alluded to has fairly
drawn this Conclusion „that the Powers which are vested
„in the Crown by the Laws of England are Necessary
„for the support of Society & do not intrench any further
„upon our Natural Liberties — than is expedient for the
„Maintenance of our Civil" — Now it is absolutely
impossible — that the Common Law should for 600 or
700 Years have deprived every Parent of the Royal
Family of the right of educating their own Children
& that there should not have been discovered any
written trace of such Law till the Year 1718 — &
no other evidence of such Law than the Opinion of
those 10 Judges since that Period — True it was
that the only Prince of Wales since the Black
Prince who had Children alive during his Father's
Reign was his present Majty's Grand Father Geo. II.

who had several Children living in 1718 — Jacob
to Sollingshead the Black Prince educated his own
Son Richard — But there are numerous instances
of other branches of the Royal family having
issue during the life of the King their Father
& this Prerogative if it exist at all is not pretended
to be confined to the Children of the Prince of
Wales but is common to all the Grand Children
(if it is to be presumed from parity of reasoning) to
all persons being of the blood Royal —

When it was urged that the Prince of
Wales — as a subject not specially excepted — was within
the operation of the Statute of the 12 Car. II &
therefore entitled to the Guardianship of his Children
~~[illegible]~~ no other Answer was given — than that the
was not a guardianship by Tenure & therefore not

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within the Statute — Whereas it is evident — That the Statute Unexceptionably recognizes the right to be in the Father & therefore invests every Father with the right of perpetuating his Authority over his Children even beyond the Grave by enabling him to appoint testamentary Guardians — It would be directly against the received Rules of Construing Statutes to pretend that all or any Fathers of the blood Royal were excepted out of the benefit or operation of this Statute without a Special exception — Were it even expedient that they should be deprived of this common right of all other subjects (I deny the expediency) yet all that could be legally urged upon it would be that it was Casus omissus — Which no power short of the Legislative can rectify — The Advocates for the Prerogative admit That by Common Law every Subject who is a Father is entitled to the

Custody & Education of his own Children — & it is an invariable rule of Law that the Common Law can only be altered by express Statute —

In the Father's right to educate his Children are founded his duty & obligation to maintain & protect them — The Law therefore gives to the Father a right of Action for the abduction ravishment or other injury of his Child —

In the Case of Barham v Dennis (Coo: Elz 770) tho the Case went off on Arbitration — Glanville Ch: Justice held, that a Father had an Interest "in every of his Children to educate & provide "for them & he hath his Comfort by them Therefore "it is not reasonable that any should take them "from him & to do him such an injury but he "should have his remedy to punish it" —

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An Argument in favor of the Prerogative has been borrowed from Sr Jno Fortescues commend of the „ of the riches & magnificence of the King's Court „ because it is the supreme School for the Nobility „ of the Land — Whereby the Realm flourishes & „ is preserved — This proves too much or nothing — It does not prove — that because many of the Young Noblemen were in those days of Chivalry educated at Court — therefore their Fathers had not a right to educate them — but that the King had that right independant of th' Fathers — It is on the contrary admitted, that all Noblemen (unless Princes of the Royal family) have the Common Law right of educating their own Children — This reference to Sr Jno Fortescue has in fact a bearing pointedly opposite to that which those who made

it intended it should have — This learned Author treating of the Education given in his days to the Wards in Chivalry in the Houses of the Lords of the fees says (De Laud: Leg: Ang: f. 101) The Princes of the Realm are under the same Regulations as other Lords who hold immediately of the King — Now it is well known that all Military Tenures with all the Consequences were abolished by the Act of Car: II — as well with reference to the Princes of the Realm as to all other Subjects — No part of them survived to these princes after their Extinction in all other Subjects — This Equiparation then (with reference to Education) of the Princes of the Realm with other Young Noblemen subsisted after the passing of the Act of Car: II as it did before — because no Alteration in that respect was made by that Act — I conclude therefore that as notwithstanding the Education formerly

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given to the Princes of the Realm in common with other persons who held immediately of the King in the King's Court — as other Wards in Chivalry were educated in the houses of the Lords of the fees — for special feudal reasons — so when by the abolition of Military tenures these reasons ceased — the Natural right devolved upon the Father to educate his own Child precisely as if such Military tenures had never existed — And from that time no scintilla of the feudal system can be traced to have been reserved to the Princes of the Realm any more than to other Subjects

No Conclusion of Law can be drawn from any historical fact establishing the actual interference of the Crown in the Education of any of the Royal Family — The Consent or acquiescence of the Father

must ever be presumed — & that he did not set up his legal rights in opposition to the Will of the Sovereign — But that Will (however to be revered) makes not Law — The Motion therefore for an address to his Majesty for removing Bishop Burnett from being Preceptor to the Duke of Glocester made on the 13th Decr 1699 & negatived by 173 agt 133 proves no legal point — either for the prerogative or in derogation of the Rights of the Father — Many special circumstances attended that case — In the first place his Highness the Duke of Glocester was in that predicament — which is made a Special Exception out of the Act for regulating the future Marriages of the Royal family (12 Geo: III) — viz — he was the issue of a Princess who had married into a foreign family — And this Exception appears rather declaratory of the old than introductory of a new Law — And it would

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be a difficult task for the Advocates of this Prerogative to prove — that the King had a right to educate that Child who could validly contract Marriage without the Royal assent — Sir Price & Lyce admitted the necessity of the Royal Assent to the Marriages of the Royal Grand Children — tho' sub modo — viz — With the Consent also of the Father — His Highness the Duke of Glocester had then a National Establishment — for we learn from the History of those times that 16000 £ P A^m had been granted by the Commons in the Estimate of the Civil List for the Maintenance of his Highness' family — & great Objections were taken that his Highness had but the scanty allowance of 7000 or 8000 £ given him — His Father was a Foreigner — his Mother sub protestate viri & not an independent person like a Queen

consort — his Highness an infant — The King might
have Considered himself the Natural & proper dispen
of the Monies voted by the Commons for his Highness
Establishment & the Commons felt a right to see to the
due appropriation of their own Vote — Politics then
ran very high — And the Motion made in the Commons
was never meant by either party to touch the right
of the Crown to appoint a Preceptor to the Duke
but only to have the Bishop removed (by whomever
appointed) as a person unfit for that situation —
The Tory Interest — to which Bp Burnett was
peculiarly obnoxious was then gaining ground a
& the Revd Bishop in the History of his own
times (2 V. 122) gives the fully Account of this
transaction — which proves it to have been more
merely as a political party Matter — "The
"King before his leaving England settled a

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" household about the Duke of Glocester — The Earl
" of Marleborough who was restored to favor was made
" his Governor — And I was Warned by the King to be
" his Preceptor — I used all possible endeavours to
" excuse myself &c — & (p. 138) " The next attempt was
" to turn me out from the Trust of educating the Duke
" of Glocester — Some objected to my being a Scotchman
" others remembered the book that was ordered to be
" burnt — So they Presented an Address to the King for
" removing me from that Post — but this likewise
" was lost by the same Majority that had carried
" the former Vote "

Reverence & delicacy forbid the presumption
of any such Unconstitutional deviation from
the parental duties of a Prince of Wales which
alone would authorize the two houses of Parlt

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to concur with his Majesty in checking or abridging
the legal Parental rights of that illustrious
Personage

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Essex St Temple
3 Jan^{y} 1805

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Provedori Opinion
on the
Guardianship
of Prince Charlotte