

*First*, Admitting that the ordinary Means above-mentioned had been all used, and that they had not been sufficient; whether in this Case his Majesty, without Consent in Parliament, may in this Case of extraordinary Defence, alter the Property of the Subjects Goods for the doing thereof?

In the next Place I shall endeavour to answer some Objections which may be made to the contrary.

In the third Place, for qualifying of this, I shall admit, that in some Cases the Property of the Subjects Goods for the Defence of the Realm, may be alter'd without Consent in Parliament; and shall shew what they are in particular, and compare them and the present Occasion together.

In the fourth Place, because of some Precedents of the Matter of Fact, and likewise of all Authorities that may seem to prove a Legality in this Particular of Shipping for Defence of the Sea, whatever it be in the General, I shall therefore endeavour to answer to such of them as I have met withal.

For the *First*, that to the altering of the Property of the Subjects Goods, tho' for the Defence of the Realm, a Parliamentary Assistance is necessary. In this it must be granted in the first place, that the Law ties no Man, and much less the King, to Impossibilities: And *Secondly*, that the Kingdom must be defended.

As therefore the Law hath put this great Trust upon his Majesty, so when the Supplies which by the Ways before-mentioned it hath put into his Hands fail therein, it hath provided other Ways for a new Supply.

The first thing that I shall present unto your Lordships and this Court, are the Aids and Subsidies granted in Parliament. That amongst the *Ardua Regni negotia*, for which Parliaments are called, this of the Defence not only is one of them, but even the chief, is cleared by this; that of all the rest none are named in particular in the Summons, but only this: For all the Summons of Parliament shew the Cause of the calling them to be, *pro quibusdam arduis negotiis nos & defensionem Regni nostri Angliæ & Ecclesiæ Anglicanæ concernentibus*; and in the Conclusion the Party summoned to be there, *Sicut honorem nostrum & salvationem & defensionem Regni & Ecclesiæ diligit*. And in all the ancient Summons of Parliament, when Aid was demanded, the particular Cause of Defence, and against what Enemy in special, was mentioned.

My Lords, to gain time, I will instance but one or two of each King's Reign. *Claus. 23. Ed. I. M. 4. dorf.* that the *French ad expugnandum Regn' nostr' Classe maxima & bellatorum copiosa multitudine Regn' nostrum invadunt & linguam Anglicanam omnino proponunt, &c.* *Claus. 3 Ed. II. M. 3. dorf.* and *7 Ed. II. M. 8. dorf.* that the *Scots* had enter'd, burnt and destroy'd the *Marches*, and put them to a Tribute. *Claus. 1 Ed. III. pars 2. M. 6.* and *22 Ed. III. M. 31 dorf.* that the *Scots* and *French* had invaded the Realm. *Claus. 7 Hen. IV. M. 29. dorf.* that the *French* were with a great Fleet, *Quasi in ore Thamestis*, to invade the Kingdom, and the King to go in Person; after this King's Reign, the Summons was as now it is.

That these *Ardua defensionem Regni concernen'*, are the Aids and Means of Defence, and not the Way and Manner of doing it, as their Counsel therein, is clear. In the Parliament Roll *6 Rich. II. M. 9.* This of the Manner and Way and Prosecution of the War being given in Charge to the

Commons to advise upon, they answer this, *Nec doit, nec soluit appartaine al eux mes al Roy. Rot. Parl. 13 Ed. III. pars 1. M. 11.* the same being given in Charge to the Commons, they pray *que ils ne sont charge al Council doner al choses del queux ils n'ont pas conuzance*: And so *Rot. Parl. 21. Ed. III. M. 5.* they excuse themselves, and say, that this belongs to the King and his Council.

And that these *ardua circa defensionem*, were the Aids, is expressed in Words in some of the Summons. *Claus. 7 Ed. II. M. 8. dorf.* the Cause of the Parliament to withstand the *Scots*, and that in *tam arduis debetis extendere manus adjutrices opportun' auxili' faciendo. Claus. 31 Ed. III. M. 21. dorf.* that *circa necessariam defensionem Regni quam ad dictum negotium expediend' auxilium necessar' nos habere oportet. Claus. 5 Rich. II. M. 2. dorf.* the King being to make a Voyage *pro defensione Regni*, which could not be done without borrowing great Sums of Money; therefore the Parliament was called to advise about the Assurance. So that, my Lords, it is clear, that the Law hath provided this Parliamentary Way for supplying of the King's Wants for the extraordinary Defence, and hath likewise put the Power of using of it into his Majesty's own Hands, for he may call Parliaments when, and so often as he pleaseth.

My Lords, as the Parliament, *First*, are best qualified and fitted to make this Supply; (for some of each Rank, and that thro' all the Parts of the Kingdom, being there met, his Majesty having declared the Danger, they best know the States of all Men within the Realm, and are fittest, by comparing the Danger and Mens Estates together, to proportion the Aid accordingly;) and, *Secondly*, are fittest for the Preservation of that Fundamental Propriety which the Subject hath in his Lands and Goods; because each Subject's Vote is included in whatsoever there is done: So that it cannot be done otherwise, I shall endeavour to prove to your Lordships both by Reason and Authority.

My First Reason is this, that the Parliament by the Law is appointed as the ordinary Means of Supply upon extraordinary Occasions, when the ordinary Supplies will not do it. If this in the Writ therefore may without resorting to that be used, the same Argument will hold as before, in resorting to the Extraordinary by way of the Ordinary, and the same Inconveniency will follow.

My Second Reason is taken from the Actions of former Kings in this of the Defence. The Aids demanded by them, and granted in Parliament even for this purpose of the Defence, and that in times of imminent Danger, are so frequent, that I will spare the citing of any of them. It's rare in a Subject, and more in a Prince, to ask and take that of Gift, which he may and ought to have of Right.

The second Way was Loans and Benevolences demanded by them, with Promise of Repayment both for the ordinary and extraordinary Defence of the Realm; and that as well of all the Subjects equally, as of some few. *Pat. 48 Hen. III. M. 16.* a Commission to the Earl of *Leicester* and others, *contrabendi mutuum in nomine nostro de denariis & victualibus*, and other things *in munitioem Navium ponendis & Nautarum stipendiis contra hostilem adventum Alienigenar' in Regnum nostrum, & ad defensionem & tuitionem ejusd' Regni*; and promiseth Repayment. *Visis computis* in the *Exchequer*, *26 Ed. I. Rot. 100.* the King borrows of the Merchants

289661. *pro defensione Regni*, and promiseth Repayment, *Hil. 31 Ed. I. Rot. 4.* and *Trin. 31 Ed. I. Rot. 41.* divers Sums borrowed *pro defensione*, and Repayment promised. *Br. irrot. 34 Ed. I. Rot. 82.* ten thousand Pounds paid by the King at one time for Money borrowed, this I confess is *Arduis Regni negotiis*. *Br. irrot. 11 Ed. II. Rot. 1.* the Scots having entered the Kingdom, *diversa homicidia, incendia, & deprædationes perpetrantes*, the King being in Person to go against them, writes to his Council to provide Money; and they, *diversas vias pro denariis providendis exquirentes*, resolve to borrow. *P. 12 Ed. II. Commun'* for the same Cause a Loan upon all Merchants Strangers. *Rot. Scot. 1 Ed. III. M. 3.* the Scots having entered the Realm and taken divers Castles, and threatned a Conquest of *England*, and *Quia crescit sumptuum multitudo in tantum quod Thesaurus noster ad sustentationem exercituum nostr' nequaquam sufficit*, he borrows. *Claus. 14 Ed. III. M. 8.* the King had borrowed 3333 *l. pro salvatione & defensione Regni, & vult promptam solutionem fieri prout decet*; and now assigns it to be paid out of the Customs. *Walsingham, Pag. 179. 44 Ed. III.* the King *Sinistro usus concilio magnas summas pecuniæ of all sorts mutuo petiit, asseverans quod in defensionem Ecclesiæ & Regni illas expenderet*; but the People would not lend. *Claus. 5 Rich. II. M. 12. dorf.* the King *pro defensione Regni*, being to make a Voyage to Sea, desired to borrow Money, and a Parliament called to give Assurance. *7 Hen. IV. Rot. Franc.* Money borrowed *pro defensione, volens promptam & securam solutionem fieri. Rot. Parl. 11 Hen. VI. M. 13.* ten thousand Pounds borrowed *pro defensione* and spent, and the Parliament order the Security. *Rot. Parl. 15 Hen. VI. M. 3.* ten thousand Pounds borrowed *pro defensione* by the King. *Stat. 11 Hen. VII. cap. 10.* it appears that a Benevolence had been desired by *Hen. VII.* for the Defence of the Realm, and wherein he went in Person. The known Commission to Cardinal *Wolsey* for the Benevolence in *March, 16 Hen. VIII.* it was to withstand *Infestissimos hostes of France and Scotland*, who intended to invade the Realm; and that the King's Coffers were now empty, and therefore they have Power *Communicandi & inducendi, persuadendi & practicandi cum subditis Regis super amicabilem pecuniarum concessionem. 2 pars Pat. 37 Hen. VIII. cum pro sustentatione ingentis oneris nostrarum Copiarum, quas in presenti tam per mare quam per terram conficere, & in promptu habere cogimur ad resistend' propellend' hostem nostrum Francorum Regem, in defensionem tuiclam & securitatem dilectorum subditorum nostrorum, quorum ill' damnum & interitum omnibus viis & modis molitur, Statut' & ex consensu & scientia concilii nostri decrevimus aliquam opem de dictis subditis nostris petere, & eand' cum eorum benevolentia recipien' pro eorum cujuslibet facultate ministrand' nihil dubitans quin sponte & liberaliter quisq; pro sua portione & facultate elargiturus sit, eoque magis & citius quod id totum consumat' & cedat in suam ipsorum defensionem*; and the Power is given to levy it as a Benevolence only. By the Statute of *35 Hen. VIII. cap. 12.* it appears that for the Defence *Hen. VIII.* had borrowed divers Sums of Money.

The third Way was by anticipating their Rents. *Trin. 29 Ed. I. Rot. 58.* in the *Exchequer*, Writs went to all the Sheriffs of *England, pro salvatione Regni ejusq; incolarum salvatione, & inimicorum depressione*; that all the Profits arising out of their Counties, and the Rents of all the King's Tenants due at *Michaelmas*, be paid at *Midsummer*,

and Allowance promised in the next half Year's Rent; and that this *ad tam ardua negotia necessaria, & in consuetudinem non trebatur.*

My Lords, that not one or two, but so many Kings, and of such Power and Wisdom as many of them were, and that in a Matter of such Consequence, and in times of Necessity, should so far descend from their Greatness, or so far prejudice their Right, as to borrow that of the Subject, which, without being beholden unto them, they might take of Right, and bind themselves to Repayment, and all without any *salvo* of their Right, your Lordships will conceive that it can hardly be imagined.

My third Reason is taken from the Incertainty of the Way intended by the Writ; for the Law delighting in Certainty, to the end that the Subject might be sure of somewhat that he might call his own, hath made all those Things that the King challengeth as peculiar to himself from the Subject, either certain in themselves, or else reducible to a Certainty either by the Judges, Jury or Parliament, (or some other Way than by his Majesty himself) as indifferent between the King and his People. In this I intend not such Things as are common to the King with the Subject, of which Nature are the Aids for marrying the King's eldest Daughter, or Knighting his eldest Son; for these are due to several common Persons that are Lords of a Manor, as well as to the King, as appears by the Statute of *Westm' 1. 3 Ed. I. cap. 35. M. 28.* and are not due by any special Prerogative, but by Tenure; and yet the Common Law for avoiding Excess therein, calls it *Rationabile auxilium*; and even this by the Statute of *Westm' 1. 3 Ed. I. cap. 35.* is put into Certainty; and the Cause of making the Statute, as therein is expressed, is, because the People were grieved by paying more than was requisite; and thereby that which was reasonable, became an unreasonable Aid. This Statute was general, and named not the King in particular; but the Statute *25 Ed. III. cap. 11.* is only in case of the King, and *Na. Br. fo. 82.* gives the Reason of the making of that Statute, because the King before did distrain for more than was fit, and therefore by reason of the Excess, was restrained to a Certainty as well as the Subject. Neither are the Taxes and Talliages upon Cities and Burroughs, or ancient Demesne against this, in respect of the Benefits of their Tenures before-mention'd. And Secondly, because the Subject that is Lord of such Burrough and Mannor of ancient Demesne, hath them as well as the King, as appears by the Case of *New-Salisbury, 33 Ed. I.* in the Parliament Book, and in the New Parliament Roll, *8 Ed. II.* for the Burrough of *Cirencester*, and *Br. Trin. 33 Ed. I. Rot. 22.* and *Na. Br. 97.* These things which are peculiar to the King, either they be certain in themselves, as are Treasure-Trove, Deodands, Wrecks, and the like, where the King is to have the thing itself; and so if it be in Money, as the Demy-Mark; when in a Writ of Right the Tenant prayeth, that the Seisin may be inquired, *Fines pro licentia concordandi*, it is the tenth Part by the Law comprized in the Writ of Covenant, and the Post-Fine one half so much more, and Fines for purchasing Original Writs *ii. s. viii. d.* where the thing demanded is forty Pounds, or ten Shillings where one hundred Pounds, and so in proportion. Or else it is reducible to a Certainty, as in all Cases where the Party is to be amerced, tho' he is *miseriordia dom'*

dom' Regis, yet the Jury must find the Amercia-ment; and when he is to make Fine and Ransom *ad voluntatem Domini Regis*, yet this Fine must be set by the Judges: when the Tenant by Knight-Service makes default in the Summons *ad exercitum*, which is to pay Escuage for the Default; this cannot be set but in Parliament, as I shall prove hereafter.

My Lords, to apply all to the Thing in question, there is a Cause for raising Money for the Defence of the Realm, *non defuitur in lege*, what will serve the Turn. If his Majesty, as in the Writ, may without Parliament lay 20s. upon the Defendant's Goods, I shall humbly submit it to your Lordships, why by the same Reason of Law it might not have been 20l. and so *ad infinitum*; whereby it would come to pass, that if the Subject hath any thing at all, he is not beholden to the Law for it, but it is left entirely in the Mercy and Goodness of the King.

My Lords, I am now come to the second kind of Proofs, and that is by Authorities. The Cases which in the first Place I will insist upon, will be to prove it by Induction: for if I shall prove that his Majesty without Parliament cannot tax his People for setting forth of Land-Forces for Defence, for making and maintaining of Forts and Castles for Defence, for Victuals for a defensive Army, for Maintenance of Prisoners taken in a defensive War, for Pledges and Hostages given by Foreign States for the keeping of Peace; if it cannot be in all or any of these Particulars, the five Supports of a defensive War: I shall then offer it to your Lordships, whether it can be done at all.

Before I proceed to these Particulars, I shall observe thus much, my Lords, in the general; that if those that hold by ancient Demesne and Burgage, which are but base Tenure, cannot be taxed *nisi sur grand cause*, and that have many Privileges in point of Ease and Profit in Consideration thereof, as they have; much less then can the Tenants by Knights-Service and Socage, that are free Tenants, and have no Privilege in Support of the Charge, be taxed. And as they are not taxable, but *sur grand cause* in the general, so neither in particular for this of Defence, as is proved by that of Escuage; for if his Majesty without Consent in Parliament, cannot tax his own Tenants, nor proportion the Fine according to his Pleasure, when the Tenant holds the Land *ad exercitum*, for the Defence of the Kingdom, much less can he do it where there is no Tenure for that Purpose. That Escuage cannot be set without Parliament, is first the Statute of *Running Mead*, *Nullum Scutagium vel auxilium ponatur in Regno nostro nisi per commune concilium Regni nostri*; which tho' it be not printed, yet it is of Record, and inrolled in the *Red Book* of the *Exchequer*, and cited in *Mat. Paris*, p. 343. And that as well before the Confirmation of it, 9 *Hen. III.* as since, it hath been by the Judges reputed to be a Statute and of Force, appears by the Book of 5 *Hen. III.* *Mordam*. 53. where it is pleaded, and called by the Name of *Magna Charta*, and allowed; and *M. 19 Ed. I.* *finiente* 20. *incipiente Banc. Regis Rot.* 56. in the Case of *Ralph de Tunney*, it's pleaded by the Name of *Magna Charta Johannis Regis de Running Mead*, and allowed.

In the Book of Knights-Fees of *Ed. I.*'s Time, there is a Writ cited, which went to the Sheriff of *Hereford* thus; *Datum est nobis intelligi quod plures*

*sunt qui tenent per servitium Militarium de nobis, qui contradicunt solvere Scutagia quæ nobis sunt concessa per commune concilium Regni nostri*; therefore he is commanded to levy them. *Comm' M 8 Ed. II. Rot. dorf.* many Processes issued for the levying of Escuage granted in *Ed. I.*'s Time superseded, and quite releas'd; the Reason entered on the Roll is, *Quia dictum servitium non fuit communiter factum*; that is, as I conceive, that it was not done *per commune Concilium Regni*: The Books are express, 13 *Hen. IV. Com. Banc. Na. Br.* 83. *Institut. Sect.* 97.

My Lords, that those that held in Socage or Fee-Farm, or not by so many Knights-Fees as they were distrained for; were always discharged, as appears by infinite Precedents, I shall make no Use of it, as the manner of entering these Discharges upon the Roll; it is observable, that he is distrained *ac si teneret per servitium Militare*, whereas he holds the Lands in Socage, *pro quibus servitium aliquod Regi in exercitibus suis facere non debet*, and in some Rolls that *Ratione alicujus auctoritatis*, he ought not to be distrained; therefore *Quia Dominus Rex non vult illum in hac parte injuriam prout justum est*, the Distresses are released. Amongst divers Precedents for this, I shall cite but one or two, *Br. Trin.* 34 *Ed. I. Rot.* 20. the Abbot of *Abington* and *John Arden*, the Iter Roll of *Suffex*, 7 *Ed. I. Rot.* 107. of *Gilbert Gifford*. My Lords; if the King might have raised Money, and seized Money for finding of Soldiers, or for their Arms; this manner of Entry, as I humbly conceive, would never have been suffer'd.

I am now come to the first Particular that I have instanced; that is, the charging the Subject for finding of Soldiers to go out of their County for the Defence of the Realm. My Lords, in that I shall in the first place admit these three Things.

1. That every Man after the Statute of *Winchester*, *secundum statum & facultates*, was to find all manner of Arms, as well for the Defence of the Realm against Foreigners, as for the Peace; and that I have before proved by that of 3 *Rich. II. M.* 16. and after by the Statute 5 *Hen. IV.*

2. That upon sudden coming of strange Enemies, these are compelled to travel out of their own Counties, is the Statute of 1 *Ed. III. cap.* 5. and so for appeasing of any notable Rebellion, when the King for the doing thereof goes in Person, as appears by the Statute 11 *Hen. IV. cap.* 1, and 18.

3. I shall admit, that so long as they remain at home, and go not out of their Counties, they are to have no Wages; and that the Maritime Shires, and those that border upon *Scotland* and *Wales*, were not to be at the King's Charge, so long as they remained at home in their own Counties for the Preservation of them; but that they were in that Case themselves to bear the Charge against Foreign Invasion, as of making Hue and Cry, assisting the Sheriff when he took the *Posse Comitatus*, and all other Things concerning the keeping of the Peace.

But that the Subjects are taxable either for Wages or Victuals, or otherwise for finding of Soldiers out of their Counties, tho' for Defence of the Kingdom, or that any are compellable to do it at their own Charge, I shall humbly deny. The Statute 1 *Ed. III.* says, that in this Case it shall be done, as usually hath been done in times past, for the

the Defence of the Realm. My Lords, I shall not deny, but that before *Edward III.*'s time Commissions have issued out of the Chancery for that purpose; against which Matters of Fact, not only to ballance them, but even to weigh them down, it's as clear that whole Armies, some of them of 30000 at the least, over and above them that were summoned by their Tenure, have been maintained at the King's Charge, from the time that they have departed out of their Counties, during the whole time of their Service, and that not only with Promises of Payment, but that they were paid *ex Thesauris Regis*, out of the *Exchequer*; and many times upon failure of Payment, Victuals, Wages, and other Things, upon Suit for them in the *Exchequer*, full Payment has been made; of which sort in most Kings Reigns there are many Cases.

My Lords, this is the Answer that I give to the Commissions to the Country, That *de facto* the King was at the Charge usually for defensive War. By the Statute 19 *Hen. VIII. cap. 1.* those that have Annuities of the King, must attend him when the King in Person goes for the Defence of the Realm, or against Rebels: But there is a special *Proviso*, that they shall have Wages of the King from the time they set out till they come to the King, allowing twenty Miles a Day, and afterwards as long as they shall remain in the Service. Upon a Rebellion in the North 28 *Hen. VIII.* against which the King intended to go in Person, Privy-Seals were sent to most of the Gentry to attend the King with the best Retinue that they could make, and likewise to bring the Bills of their Expence, and Payment promised, as appears by many of those Privy-Seals remaining in the Palace-Treasury. And besides the Indentures themselves, whereof I have seen many, it appears by the Statute 2 & 3 *Ed. VI. cap. 2.* that the Retainer of Soldiers at the King's Charge, was as well for Defensive as Offensive Wars; and also by the Statute of 3 *Hen. VIII. cap. 5.*

My Lords, in the next Place I shall endeavour the Proof hereof by clear Authorities. The Statute of 25 *Edw. III. cap. 8.* is, that none shall be compelled to find Arms, but such as hold by such Service, if it be not by Grant in Parliament. That this was not *introdutivum novæ legis*, appears by a Petition whereupon the Statute is made, that it is *enconter le droit del Roylme*. That the Common Law was so before the Statute, and likewise in case of a Defensive War, appears by the Authorities following: *P. 26 Ed. I. Rot. 35. dors.* the Scots entering the Borders, a Commission issued *Reginaldo de Gray*, to press Soldiers in *Leincashire*; he certified by his Letter inrolled there, *que sans denieres prest*, he could not procure them to march out of those Parts; and therefore Order is taken in the *Exchequer* to send Money. That the Scots had now invaded the Kingdom, appears by *Br. irrol. m. 26 Ed. I. in Scaccar.* where Commissions are inrolled for many Thousands to be levied for this War at the King's Wages. *Bra. Trin. 32 Ed. I. Rot. 18. Communia.* The Wardens of the Marches of *Cumberland* and *Westmorland* write to the Barons of the *Exchequer*, that whereas the Scots lay near the Marches with a great Army, and that the People of these Counties would not march out of their Counties without Wages and Victuals, that they would provide for both. 2 *Pars Pat. 10 Ed. II. M. 26.* and 9 *Ed. II.*

*in Parl.* a Grant to find one Soldier for sixty Days at the Charge of the Town against an Invasion of the Scots. Now the King grants, *Quod hujusmodi concessio non reddat in præjudicium, nec trabatur in exemplum in futuro.* At the Time when this Aid was granted, the Scots had entered the Realm, and wasted the Bishoprick of *Durham*, as appears in 14 *Ed. II. Banc' Reg. Rot. 60. Rot. Scot. 12* and 13 *Ed. II. M. 7.* and 13. The same Indemnity upon the like Occasion of Defence, when they found the Soldiers *ad rogatum Regis*, and the King commanded the Chancellor to declare as much. *Claus. 13 Ed. III. M. 38. dors. pars 1.* the Abbot of *Ramsay* discharged *pro Custodia Maritima* in the County of *Norfolk*, because he remained in his own County of *Huntington, cum equis & armis*, for the Defence thereof, with this, that therefore it was not *rationi consonans* to charge him farther. The same it is *Rot. Fra. 21 Ed. II. M. 1. Pars 1. Oxon.* because they were *prompti & parati* at home to defend the County. But the Practice, it seems, not agreeing with the Right in the Parliament, 20 *Ed. III. M. 12.* the Commons complain, that Commissions had issued out of the Chancery to charge the People in this Particular and otherwise, without Consent in Parliament, and pray, that they may disobey such Commissions. The Answer is, that the Commons had heretofore promised to assist the King with their Bodies and Goods in the War with *France*, and likewise for the Defence of the Realm; and that the great Lords, considering the Necessity as well for Defence as for the King's Wars, agree thereunto, and yet promise that this which is done *in cess Necessitate, ne soit trait en consequence n' ensample.* My Lords, this is a full Declaration of the Right, even when for the Defence, and yet some practise to the contrary. Before the making of the Statute 25 *Ed. III.* procured the Complaints in this Particular, in the Parliament 21 *Ed. III. M. 22 Ed. III. Pat. 8 Hen. III. Fulcassus de Brent inimicus publicus & excommunicatus*, that imprisoned the Justices Itinerant in *Bedford-Castle*, and held the Castle against the King; the King, *propter graves & manifestos excessus quibus regnum multipliciter perturbavit*, besieged the Castle; and whereas the Clergy, *de mera gratia*, had granted the King Aid for the doing thereof, *Rex nolens gratiam sic nobis exhibitam ad debitum retorqueri*, declares as much by his Letters Patent. My Lords, it is here declared, that the King cannot *de debito, or de jure*, take any Aid against the Subjects Wills for besieging of a Castle, held against the King by a publick Enemy. *Rot. Inquisition' 3 Ed. I. Rot. 4. Kent' coram auditoribus querelarum post bellum Evesham & pacem proclamatum.* The Castle of *Tunbridge* being held against the King, the Hundred of *Feversham* was assessed at fifteen Pounds *per insultationem* of the Castle: The Jury presents this as a Grievance, which the Justices would never have received, nor suffered to be entered into the Roll, if this Assessment might have lawfully been made. My Lords, this Castle and Hundred they were both in the same County, and being before the Statute of *Winchester*, they are not compellable to besiege the Castle; and if they were compellable to go in Person and with Arms, yet no Assessment could be laid for the doing thereof. My Lords, I shall only offer to your Lordships Consideration the *Scottish Roll* of 20 *Ed. III. M. 6.* the Wardens of the Marches of *Scotland* were to

appoint *Exploratores & Vigiles*, which were to espy out and give notice of the Enemy's Intendments. By the Commissions in Henry IV. Henry V. and Henry VI.'s Times, they were *explorandum defensione Regni, & partium sumptibus incolarum*: But how? Only *de assensu & voluntate sua, prout fieri consuevit*.

My Lords, I am now come to that of Victuals. The Statute 14 Ed. III. cap. 19. is, That for the Wars the Provision for them shall be done by Merchants without Commission or other Power from the King, or any other Power, that the People may not be compelled to sell against their Wills. That this was as well for Defensive as Offensive War, and that this was not *introducivum novae legis*, but was so at Common Law, is by your Lordship's Favour, clear. *Pat. 29 Ed. I. M. 16, 19. ad reprimendam malitiam Scotorum*, and to repel them, Commissions to most Counties to provide Victuals; and because they refuse to do it, the King then offers them Security. *Br. Trin. 8 Ed. II. Rot. 99. Victuals bought juxta forum patriae, pro munitione marchiae Scotiae*, and there Payment upon Suit adjudged. Sometimes at *Newcastle*, sometimes at *Carlisle*, sometimes at *Berwick*, as the War required, were Store-Houses, where the Victuals were laid, and Clerks of the Stores to issue them out. That the King not only paid for the Victuals, but for the Houses where they were laid, appears. *Br. Trin. Ed. III. about the End of the Roll, dorf. the Burgeffes of Newcastle complain in Parliament, that their Houses had been taken up long time for the keeping of those Victuals; this was transmitted into the Exchequer by Writ, which says, Volumus hiis pro domibus suis praedictis sic occupatis, satisfacere, prout debet & prout justum fuerit, & prout temporibus Progenitor' nostror' fieri consuevit.*

My Lords, in the next place for the Defence. When those that served with Horse *ad vadia Regis* lost their Horses in the Service, the Owners did not bear the Loss, but they were always paid for by the King; and therefore when they were first entered into the Service, the Marshal, or else the Wardens of the Marches, who had the Command of them, did set down in a Roll the Horse of each Man, and the Mark and Price of each Horse, to the intent that the Owner by this Certificate might be assured of the full Value to be paid him, in case the Horse was lost. This appears *Claus. 34 Ed. I. M. 16. where the custodes Marchiae Scotiae assigned pro defensione Marchiae were to do it. Br. irrot. in the 26 Ed. I. Rot. 105, 106. the Scots having entered the Realm divers homicidia, incendia & alia facinora perpetrantes, there the Horses ad vadia for Defence were to be appraised. 2 Pars Pat. 10 Ed. II. the same; and the Scottish Roll of the 21 Ed. III. M. 7. the same, prout jus est. That thereupon, since, the Subject hath recovered of the King, are many Cases. I will instance but in two or three. In 24 Ed. I. Rot. 16. dorf. Robert Heibam recovered twenty Marks in the Exchequer, *pro equo perduto in conflictu Dover inter homines Regis & inimicos Franciae*; at which time the French had assaulted Dover, and burnt the Priory and a great part of the Town. *Br. Hil. 17 Ed. II. pro restauratione trium equorum perditor' at Carlisle. 9 Ed. II. Com. P. 9 Ed. II. Richard Waldgrave recovered for Horses lost at**

*Carlisle. Com. Hil. 2 Ed. III. for Wages pro restauratione equorum perditor' and burying of the Dead when the Scots had entered the Realm at Stanope-Park, for one Troop fifty eight thousand Pounds allowed, habita inde deliberatione, and adjudged.*

For Castles the antient Forts and Bulwarks for Defence, the Statute 14 Ed. III. cap. 13. says, that Merchants without any Commission or Power from the King shall victual them, so that the People shall not be compelled to sell against their Will. That this Statute in this Particular is not *introducivum novae legis*, is cleared by the Case *Trin. 16 Ed. I. Rot. 93. Wilts*, in a little Roll, and in a great Roll of the same Year, *Rot. 19. when in Trin. by John Evesborne against John Flavell, Quia blada & garbas suas cepit*, the Defendant says, he was Constable of the King's Castle of the *Devises*, and that he had *in praecipis Domini Regis, quod mur' faceret to the Castle de morturo stauro vel de bladiis*; and of these things, and that by Virtue of this Writ, he took an Inquest to know where he might have best these Provisions, *ad minus nocumentum patriae*; and the Jury found it, that the Defendant might take it *ad minus nocumentum patriae* of the Plaintiff; and that he came to the Plaintiff's House, and offered to buy *pro Denariis & ad usum Regis*; and that because the Plaintiff refused to sell, they departed from his House; the Issue joined, and found against the Defendant; 100 Mark Damages given the Plaintiff, and adjudged. There were always antiently *visores operationum*, and they upon Oath certified, that they saw the King's Money expended, which was demanded in the Exchequer. And for Victuals, as they were bought with the King's Money, so when they grew stale, or the Danger was passed, they were sold again to the King's Use.

My Lords, that even in the Time of War, when the Frontier Towns and Castles were besieged, and the Borders invaded, that even then the King did bear the Charges, appears by the Allowances in the Exchequer, *Trin. 27 Ed. I. Rot. 47. pro tuitione Newcastle contra Scotos, qui hostiliter Regnum in partibus illis invaserunt. M. 31. Ed. I. Rot. 2. the Scots besieged Carlisle, 26 Ed. I. and Allowance now de exitibus Castr' which was the King's. And in the 27 Ed. I. 75. ten thousand Pounds allowed pro ingen' and Trin. 32 Ed. I. Rot. 11, 12. Visis comput. 28 Ed. I. Rot. 71. prout justum, quia Scoti contra Regem hostiliter insurgunt, therefore de thesauro Regis, Berwick is fortified; & Rot. 78. dorf. it appears that the Sheriff of Yorkshire had carried ten thousand Pounds de thesauro Regis to those Parts. *Br. M. 17 Ed. II. propter frequentes egressus Scotorum in Regno, the Castle of Sandall at the King's Charge is fortified prout justum, and Allowance given. And Brevia Hil. that Year the Castle of Horney for the same Cause was fortified, the Scots having entred circa praedict' Castrum & apud Lancaster. 3 & 4 Phil. & Mar. Dyer. 162. b. One in Execution for Debt in the Fleet, who, as the Book saith, was a Man very necessary for the War; and it was moved by the King's Attorney, per mandatum concilii, If the Prisoner might be licensed with a Keeper by the Queen to go to Berwick for the Defence of it, or no: and it was held by all the Judges of the King's-Bench and Common Pleas, that the License**

was not good; and 4 & 5 the same Case cited accordingly to have been the Opinion of all the Judges.

My Lords, for Prisoners taken in defensive Wars, and likewise for Pledges and Hostages for securing the Peace, that the Charge and Maintenance, and the carrying them to the several Places of their Abode, have been always borne by the Kings of this Realm, the Allowances thereof in the *Exchequer* are so frequent, that I intend to cite none of them, save that for the Prisoners taken in the Conflict at *Dover* before spoken of, which is *Comm' 4 Ed. II. Rot. 22. dorf.* neither do I find it at any time stood upon, save only 8 *Ed. II.* among the *Br. Trin. 8 Ed. II. Rot. 88. dorf.* But the Reason is, because that after the Death of *Ed. I.* in the Commission of granting the Constableship of the Castle, no mention was made of the Prisoners, and yet even in that Case upon a *Monstravit Regi*, a Writ of Privy-Seal is awarded for Allowance *prout Justum.*

My Lords, if in all these Particulars of Soldiers, Victuals, Castles and Forts, Horses, Prisoners and Pledges in case of a Defensive War, the main Supports of them, the Kings could not tax their Subjects, but have borne the Charge thereof themselves; I shall then offer it to your Lordships to be so for the Defence in General.

My Lords, the Allowances in the *Exchequer* in all the Particulars before-mentioned are frequent. In the Case of Mines, the Profits of Silver Mines, that they upon an Accompt in the *Exchequer* were always answered unto the King, was one of the principal Arguments for the King's Right thereunto; and there *fo. 320.* it is held, that in all Things that concern the Revenue of the Crown, because they are there debated, the Record of the *Exchequer* shews not only the Course of the Court, but what the Law is thro' the Kingdom.

My Lords, that in Cases of War and Embassies the *Chequer* made Allowances, and with what great Consideration, appears by the Statute 5 *Rich. II. cap. 10.* that they were not allowed by the Court, till the Party brought the Great Seal, or the Privy-Seal for it. And if a Writ of Allowance came to the *Exchequer* before the Court had examined the Accompt, yet they never made Allowance until the Court had examined it. *Hill. 25 Ed. I. Rot. 22. Licet breve de allocatione pendit de 1000 l. allocandis tamen ante allocationem factam oportet inquirend' si pecunia illa ad opus Regis devenit & quod ipsi doceant super hoc Curiam Regis.* And *Trin. 25 Ed. I. Rot. 47.* the Allowances are never in Gross, but by Particulars.

My Lords, the next Proof that I shall humbly offer unto your Lordships, is in that of borrowing of Money by the King for the Defence of the Realm, which as they have usually done it, so it is as clear, that not only upon Petitions, their own Pleasure, and upon Grace, but likewise upon Suit they have been adjudged so to do in the ordinary Courts of Justice. *Comm' Pasch. 31 Rot. 41.* one hundred and forty nine Pounds borrowed of *Henry Tompson, pro defensione totius Regni* was sued for, and Repayment ordered. *M. 10 Ed. II. Rot. 160. Grandes pecuniæ summæ* borrowed by the King for that Purpose, and order for Repayment. *Br. 3 Ed. III. Comm' Princip. Rot. 664 l.* My Lords, in this Particular I shall cite but this one Case more, *Comm' Pasch. 29 Ed. I. Rot. 18.* the King

*pro urgentissimis Regni negotiis & defensione totius Regni,* had seized divers Sums of Money in all the Abbies and Cathedrals, and other religious Houses in the Realm, & *quo citius commode poterit* promised Payment. In the Parliament 29 *Ed. I.* at *Lincoln* the King is petitioned for Repayment of these Monies, who promiseth Repayment, *Ita quod Regis conscientia super hoc exoneret'* and there, and *Rot. 19.* divers Sums are adjudged to be paid.

My Lords, I shall thus humbly offer this unto your Lordships, that if the King had conceived, that when himself wanted Money for the Defence, that he might have charged his Subjects, he would never have made this Answer of Repayment, *ad exonerandum Conscientiam,* for then in Equity and Conscience the Parliament should have taken Care for the Satisfaction of these Debts, or should at leastwise have distributed part of the Charge upon all his Subjects; neither should the Parties have had full Satisfaction for all their Debts, but should have borne part themselves. By the Statute 35 *Hen. VIII. cap. 12.* the King for the Defence of the Realm had divers great Loans made to him. Now likewise there being great Cause of new Defence against *France* in *Scotland* in Aid of the King, they release these Assurances given by the King, and likewise release to the King all Suits and Petitions concerning those Moneys.

My Lords, I am now come to the other Authorities for proof thereof, which is by Acts of Parliament. My Lords, before I come to the Acts of Parliament themselves, I shall humbly offer unto your Lordships, the Summons and Preparatives to them.

*First,* The *Ardua Regni negotia* for which they are called, are principally *defensionem concernentia;* that these are not the Way and Manner of Defence, and their Advice therein, but the Supplies and Aids for this Defence, I have presented clear Proofs to your Lordships before. That these Aids cannot be raised without their Consents, is strongly inferred in this, that the Knights of the Shires are to have *plenam & sufficientem auctoritatem pro se & comitate Comitatus p'ced' ad faciend' & consentiend'*, to the Things in *negotiis ante dictis.* If this might be done without consent of the Commons, this in the Writ would be needless. But that this cannot be done without their Consents is cleared by the Words following in the Negative, *Ita quod pro defectu potestatis hujusmodi dicta negotia infecta non remaneant quovismod.* This, my Lords, is the constant form of modern, and all the antient Writs, and shews clearly that the Commons without their Consents in Parliament, are not chargeable to a defensive War.

In the Acts of Parliament, I will begin with that of *William* the Conqueror, *Anno quarto* of his Reign; which besides that it is cited in the Preface of the 8th Report, and *Instit. fol. 75.* and by *Ingulphus fo. 519,* and *Mr. Selden* in his *Eadmerus, Page 171.* it's likewise upon Record, and inrolled in the Red Book in the *Exchequer.* The words are these, *Volumus & firmiter præcipimus & concedimus quod omnes liberi homines totius Monarchie Regni nostri Angliæ, habeant & teneant terras suas & possessiones suas bene & in pace libere ab omni exactione injusta & ab omni tallagio. Ita quod nihil ab eis exigatur vel capiatur nisi servitium*

*suum liberum quod de jure nobis facere debent & facere tenentur & concessum jure hereditario in perpetuum per Commune concilium totius Regni nostri predicti.*

My Lords, the Words by reason of the Disjunctive *& ab omni tallagio* are plain, that the King shall not exact, nor take any Thing of any Freeman, but what his Tenure binds him unto. As in words by reason of the generality of them, it extends to Cases of the Defence of the Realm; that it doth so in intent, I shall endeavour thus to present it to your Lordships.

The Military Services before mentioned for the Defence of the Realm, they are by *Bracton* attributed to the Conqueror's Institution; for in his second Book *fo. 36.* speaking of them, he saith, *Secundum quod in Conquestu fuit adinventum. Ploveden* in the Argument of *Sir Thomas Tresham's Case.* Means the Conqueror had to do it by reason of the many Attainders of those that took part with *Harold*, and after his Death with *Edgar Atheling.* That he did it in a great part, appears by *Matth. Paris fo. 8.* that he put all the Clergy that before held in *Franke Almogne sub servitute Militari* to do Service *tempore hostilitatis*, and by the County Palatine of *Durham* and *Chester* in those Places of Danger. In the Book of Knights Fees in *Henry III's* Time, it appears by the Certificates, they had sometimes *de veteri Feoffamentis* and sometimes *de novo.* And by some of them it appears, that the Tenures *de novo Feoffamentis* were before King *Stephen's* Time, and therefore 'tis probable that the *Veteri* might be those created by the Conqueror. The Provision for Soldiers Pay by Tenures was likewise of his Institution, as appears by that before cited out of the Black Book, *lib. 1. cap. 27.* that *in primitivo regni statu post conquestum ad stipendia & donat' militum* out of the Cattles and other Lands *in quibus agricultura non excercebatur pecunia numerata succrescebat.* The Policy and Provision of the Conqueror for the Defence being by Tenures, when in this Act of Parliament he says, *quod nihil ab iis, exigatur vel capiatur, nisi servitium suum quod de jure nobis facere tenentur,* I humbly conceive shews plainly, that the Subject was not otherwise to be charged for the Defence, nor further than by their Tenure. This, my Lords, further appears by others Parts of that Act of Parliament, where speaking of any thing of Charge that is to be done according to their Tenures, as that all *bene se teneant in equis & armis ad servitium suum integrum faciend'.* But in the next Place speaking of the Defence it saith, that all within the Realm *sunt fratres conjurati pro viribus & facultatibus* to defend the Kingdom and the Peace, *& ad iudicium rectum, & justitiam faciend'.* the coupling of the Defence with that of the Peace, and doing Justice, shews the personal Care that all by their Oath of Allegiance ought to bear to the common Peace and Good of the Realm.

The next Statute that I shall present to your Lordships, is that of *Running Mead*, 17 *Johannis Regis*, the words are these, *Nullum Scutagium vel auxilium ponat' in Regno nostro nisi per Commune Consilium Regni nostri nisi ad corpus nostrum Redimend'*, and to knight his eldest Son, and to marry his eldest Daughter. As in Words these extend to the Defence; because all Supplies for that Purpose from the Subject, they are only in *auxilium*, or in *subventionem expensor'* of the King, who, as before is proved, is principally bound thereunto: So may the Intent likewise be further gathered, *First* from this, that the Word *auxilium* is joined with that of

Scutage, which is for the Defence; and likewise from this, that particular Satisfaction is made, by other parts of that Statute, to those that had been disseised by *Richard II.* and King *John*, which were things done only for the Increase of their Revenue, without shew of the Common Defence. That both before 9 *Hen. III.* and afterwards 20 *Edw. I.* this was a Statute, and so accounted, I have before proved. And in the Book 5 *Hen. III.* it is called by the Name of *Magna Charta sans addition.* So 37 *Hen. III.* in that solemn Confirmation observed by *Matth. Paris*, p. 115. this of *Running Mead* is confirmed by the Name of *Mag. Char.* and 50 *Hen. III.* p. 1220, which I note only to this purpose; that of speaking of *Mag' Chart'*, this of *Running Mead* is intended as well as that of 9 *Hen. III.* as part thereof, and bodied both together; yet that neither of them were observed either in King *John's*, or *Hen. III's* time, our Histories are full of it. And by the Pope's Bulls of 12 and 13 *Hen. III.* the Pope absolving the King from his Oath in their Confirmation, doth it because, as the words of the Bulls are, *Juramentum peccati vinculum esse non debet:* neither till after 29 *Edw. I.* as I shall hereafter prove, were they at all observed in the things concerning the King's Prerogative.

The next that I shall cite, are the Statutes of 25 *Edw. I.* and the Statute *de tallagio non concedendo.* That of the 25 *Edw. I. cap. 5 & 6.* the Grievance is for Aids, Tasks and Prizes taken thro' the Realm, for the Wars, shall not be brought into any Custom for any thing before done, be it by Roll or any other Precedent that may be found; and further grants, that for no Business from henceforth, he will take any such Aids, Tasks and Prizes but by common Consent in the Parliament of the Realm, and for the common Profit, saving the antient Aids and Prizes due and accustomed. My Lords, tho' by the Copulative it is clear enough, that there must be a Consent and common Profit concurring, and altho' the saving of the antient Prizes and Aids accustomed, might well enough have been satisfied in the Aid excepted in *Running Mead*, and the prizing of Wines and Purveyance; yet to out these and all other Scruples, the Statute *de tallagio, &c.* made afterwards for that purpose is absolute and general: That no Talliage or Aid shall be taken by the King, nor that any of his Officers shall take any Corn, Leather, Cattel, or any other Goods without the consent of the Party.

My Lords, to bring these Statutes to the Thing in question, that these Things cannot be done tho' for the Defence, the times of the making of them, and the Circumstances concurring thereunto, I shall present unto your Lordships.

That of the 25th of *Edw. I.* by the Date appears, was the 10th of *Octob. 25 Edw. I.* My Lords, the King, the 12th of *Aug.* before being at *Odimer* ready to go over into *Flanders*, the Parliament being then summoned by his Letters Patents, *Rot. pat. 25 Ed. I. M. 7.* taking notice of the Constables and Marshals departure from the Court in Displeasure, and of the Rumors of the People, that the King refused to seal Articles sent him for the common Profit, for the Redress of divers Grievances done to the People. For the Grievance he saith, that without those things he could not have defended the Realm, and yet saith, that he is sorry for it, and prayeth that this may be his Excuse, as he that hath done those Things, neither to buy Lands nor Tenements, nor Castles, but to defend

defend himself and the whole Realm; and that if he returned again, he would have all know, that he had an Intent to amend all those things, to the honour of God, and Content of his People; that if he dies in this Service, his Heirs shall make amends. Hereby it appears, that the Grievances that procured this Statute, were for the Defence of the Realm; therefore from hence it follows, that the Aid and Taxes there mentioned were for the Defence. So likewise that the Exception of the antient Aids extends not to those of the Defence, that being the Thing wholly complained of. This Declaration of the King was the 12th of August; the September after the King being at *Winchelsea*, those Articles are sent unto him, to which he deferred for the present to give his assent unto them, because his Council was not there, and so sails over into *Flanders*. This Statute of the 25th of *Edw. I.* is past, the King beyond the Sea, the *Teste Edvardo Filio nostro*; at his return, as appears by *Walsingham*, page 42. the King is desired to confirm these Articles, which in *Walsingham*, page 40. are the same Word for Word as the Statute *de tallagio*, which the King then deferred. 27 *Edw. I.* they desire it again, which the King doth with a *Salvo jure Coronæ nostræ in fine adjecto, quod cum audissent Comites cum displacentia ad propria discesserunt*, saith the Author, *sed revocatis ipsis ad Quind' Pasch' omnia sunt concessa*.

That the Statute *De tallagio* was after that of 25 *Edw. I.* is plain in this, by the King's going over into *Flanders* without assenting unto any Articles in *Septemb.* and 10 *Octob.* following, as appears by that Statute 25 *Edw. I.* itself, it was made; and likewise by the Statute *De tallagio* itself, the King's releasing all Rancour to the Earl-Marshal and Constable who had most offended him, and first presented these Articles to the King. My Lords, I shall add this only, as I conceive it will not be proved, that this King either before or after the making of this Statute, or any of his Successors since, ever claimed this absolute Power over their Subjects, as to lay Aids and Tallages upon them for the Supportation of their own private Estates abstracted from the common Defence or Good of the Kingdom. This King at this time we see by his own Declaration, was far from it. This last Statute fully satisfied those that desired it; for as *Walsingham* saith, *Ad eorum votum absolute omnia sunt concessa*. If therefore it extends not to that of Defence, I shall humbly offer it by what Construction of it our Ancestors Judgments and Discretions will be freed from a great deal of Censure, that were so well contented with it.

My Lords, *Mag. Chart.* being confirmed at the same time when the Statute 25 *Edw. I.* was made, and both that and the Statute *De tallagio*, being only Articles upon *Mag. Chart.* they were all of them, as I conceive, intended in the subsequent, and so often Confirmation of *Magna Charta*.

My Lords, the next is the Statute of the 14 *Edw. III. cap. 1.* that the People shall not be compelled to make any Aid, or to sustain any Charge but in Parliament. That this cannot be done for the Defence, will, as I conceive, be enforced from the Words; for a great Subsidy having been granted as well for the War on this side the Sea, that is for Defence, as for the *French Wars*, it's declared, that this shall not be drawn into Example, and that out of Parliament they shall not be compelled to sustain any Charge; and then it is further enacted, that this Subsidy and all the Profits of Ward-

ships, Escheats, and other Profits of the Realm, shall be spent for Defence and Safeguard of the Realm, and the Wars in *Scotland* and *France*, and not elsewhere; so that this Statute, as I conceive, all put together, bears this Sense, That the Subsidies granted in Parliament, and the Wardships being a Fruit of the Tenures created for the Defence of the Realm, and other Profits arising to the King by way of Prerogative, are to be spent for the Defence of the Realm, and the King's other Wars; but that no Aid or Charge for any of these, can be laid upon the Commons without consent in Parliament. My Lords, that the Practice of the King, I mean *Edw. III.* was contrary to these Statutes, and that they were not kept appears by the Parliament Roll, 15 *Edw. III. M. 9.* the next Year after, where the Commons shew that their Goods were seized, and their Bodies imprisoned without any Suit commenced against them.

My Lords, the next which I shall cite are the Statutes of 25 *Edw. III.* and 1 *Rich. III.* against Loans and Benevolences, which I shall humbly offer unto your Lordships on this Ground, *Ad ea quæ frequentius acciderint adparantur leges*. As for my part I have seen general Loans and Benevolences, but they were for the Defence; so I conceive if they were otherwise, they were but few in respect of the others. The common Grievances therefore being by Loans and Benevolences of that Nature, these Statutes, I conceive, were made against them; for these not being within the words of any of the former Statutes, that therefore the Kings might with the more Colour put them in Practice, and on the other side being as equally dangerous to the Subjects, because of the Displeasure by denial, they procured the Statutes. That Loans for the Defence were after 25 *Edw. III.* counted unlawful, appears by *Walsingham*, pag. 179. that 44 *Edw. III.* the King *Sinistro Consilio magnas summas pecuniæ* of all Sorts *petiit, asserens, quod in defensionem Ecclesiæ & Regni illas expenderet*, but that the People would not lend.

My Lords, the next which I shall cite is direct in Words, which tho' it be not an Act of Parliament, yet the Weight of the Authority by putting of it will appear. In the Second Part of the Parliament Roll, 2 *Rich. II. M. 3, 4, 5.* the King being beset with the Enemies of *France* and *Spain*, and *Scotland*, who all three by Land and Sea invaded the Realm, the Privy-Council not willing in a thing so much concerning the Realm, to take the whole Charge of it upon themselves, nor desiring so soon to call a Parliament, a Parliament but a little before being dissolved; they therefore resolved to assemble a great Council of most of the Bishops, Lords, and other great Men and Sages of the Realm, who meeting and finding the absolute Necessity of a Preparation for Defence, and that the King wanted Money to do it; what their full and final Resolution in this Case of Extremity for Defence was, I shall read the words of the Roll; they say, *Pur conclusion final quilz ne poient cest mischief remedier sans charger les Comm' del Royalme, quel charge ne poient de fait ne grant sans Parliament*: and therefore the Necessity being urgent, the great Men lend Money for the present, with advice presently to call a Parliament, as well to provide for the Repayment of this Loan, as for further Supply. It's true, my Lords, that this King was at this time within Age, and it is likely that many of his Council had been *Edw. III.* his Grand-



Grandfather's Privy-Council, who well knew his Prerogative, and extended it as far, by reason of his great Wars, to the charging of his Subjects, as any before him, or since his time. And that not only the Privy-Council, but likewise, as the Record saith, almost all the Prelates and others, Dukes, Earls, Barons, Bannerets, and other Sages of the Realm, which I conceive were the Judges, should be so far from putting this in Execution, that they declare in the Negative upon full Deliberation, that the Commons cannot be charged herein but in Parliament, themselves likewise thereby being to undergo a present Charge, by lending to supply that Necessity; the Authority must needs be weighty: And upon second Thoughts afterwards, the same was declared in full Parliament by the Lord Chancellor, and so afterwards entered upon the Roll without any Qualification at all, which adds farther to the Authority thereof.

*Ult. Feb. 3. Car.* A Commission issued to divers great Lords, the End, as appears by the words, was for aiding the King's Allies beyond Sea, and for the Defence and Safety of the Kingdom and People. They were, by the Commission, to raise Money by Imposition or otherwise, which without extreme Danger to the King, Kingdom, and People, can admit no long delay, wherein Form and Circumstances are to be dispensed with rather than the Substance lost. This, my Lords, was a Commission to tax the Subjects in time of Necessity for Defence. The last Parliament, this Commission as against the Law was condemned by both Houses, and cancelled in his Majesty's Presence.

*Philip Comines* in his 5th Book, *cap. 8.* observing the same, above all other commends the Policy of the *English* Laws and Government; and both he and *Bodin* *Reipublic. lib. 6. cap. 11.* and *Pasquerus* Advocate-General in the King of *France* his Chamber of Accompts in his second Book, *cap. 6,* and 7. all shew this likewise to be the antient Law of *France*; and how the Practice comes now to be otherwise there, *Pasquerus* shews at large; and that the Kings sometimes endeavouring to the contrary, found so much Difficulty, that they afterwards, especially *Charles* the Fifth, procured by the Consent of the three Estates these Aids for Defence to be granted for three or four Years together: And that this Consent of the People at the first, was afterwards that which gave the occasion to the King to take it without Consent; and therefore he concludes that *France* being *Un Roy-alme de Consequence*, that they must not easily promise any thing, tho' but once, which they will not be willing to permit for ever.

My Lords, I have now done with the Proofs; in the next place I shall endeavour an answer to some few Objections that are obvious, both from Reason and Authorities.

For those of Authorities, 13 *Hen. IV. 14, 16.* *Gascoigne's* Opinion that the King may charge his People without Parliament, to a thing that is for the common Profit of the People; the thing that he applies it to, is, that the King may grant Pontage and Murage, &c.

My Lords, that the King may grant both these, and Tolls upon erection of a new Fair or Market, or Paveage, I shall not deny. The Answer that I shall give to them is, *First*, That these Grants do charge *venalia* only, that is, Goods carried to those Places for Merchandize; but that any

Tax may be laid *secundum statum & facultates*; either upon the Hundred or County, I shall humbly deny it.

It is true, my Lords, by the Conqueror's Laws it appears, that Cities and walled Towns were for the Defence of the Country, and therefore by those Laws no Fair or Market might be kept but in *Civitate aut Burgo muro walliat*. Therefore in *Doomsday-Book* in all such Cases it is found, that there are so many *Mansiones Murales*, which by their Tenure, when need was, were bound *ad murum reficiend*. That no other Land that holds not by that Service is liable, appears by the Parliament Roll. 1 *Ric. II. pars 2. M. 76.* where all the Cities and Burroughs of *England* petition, that in this time of Danger they not being able with their Merchandize to do it, that others that had Lands within the Towns might be made Contributaries, who before were at no part of the Charge.

The Answer is, that all according to their Tenure, as they have antiently done, so shall they still; and if this might be done, there would have been no need of the Statutes of 2 & 3 *Phil. & Mar. cap. 1.* 23 *Eliz. cap. 4.* for giving Power to tax Men *secundum statum & facultates*, to repair Castles and Towns within twenty Miles of *Scotland*.

For the Tolls and Pontages and Paveages, as there is a great deal of Equity that those which receive Benefit by bringing their Goods to the Market, and over the Bridge, should contribute to the Charges that make and maintain the Market-Places and the Bridges; so neither are they compulsory, but voluntary Charges: For as no Man pays, but he that receives the Benefit, so none is compellable thereunto, but is left to his Liberty. Neither is there any Colour in respect of the Town itself, to whom the Murage or Paveage is granted, why they should not be charged, because the Grant cannot be but at their own Suits; for if it be not at the Suit of *tot Burgensum*, the Grant is void, and to be revoked.

It may be further objected, that as the Law hath intrusted the Way and Manner of managing of Defence wholly and independently to his Majesty, so likewise of Aids and Means, as the *Causa sine qua non*; and therefore his Majesty should not be dependent upon the Parliament for them.

My Lords, the near Relation between his Majesty and the Parliament, that they are but one Body, hath been presented unto your Lordships, and that his Majesty did exercise the *summum Imperium* there. *Bodin lib. 1. cap. ult.* says, *quod ejusd' esset potestat' tributa nova imponere cujus est legem terræ*; but that the Legislative is not in his Majesty, out of Parliament, will be granted.

The Subjects Interest being as nearly concerned in the Defence, as his Majesty's is; as there is no Cause to fear that they should not be willing to proportion the Aid to the Occasion; so neither can the Law presume otherwise, which hath so high an Opinion of the Judgment and Integrity of this Court, that as it is in the *Comm' 398.* it's unlawful for any Man to conceive any dishonourable Thing of it.

My Lords, my last Answer thereunto is, that by the Law the King hath as independent a Power to make a foreign War, as to make a defensive. It will, as I conceive, be granted, that in this Case his Majesty hath not Power to tax the Subject; for then it would follow that as well as to the con-

quering of the next adjacent Realm, so of all *Europe*, the Subject should be at the Charge, and yet the Land conquered be only his Majesty's; and yet upon this Ground, in respect of the equality of the Powers, it might be done.

Neither, as I humbly conceive, doth this only answer the Objection, but returns upon the other side; for his Majesty has Power to make an Offensive War, which for the most part causeth a Defensive; by this means it should be in his Majesty's Power to make a Defensive War, and to tax the Subject for the Maintenance of it.

My Lords, the last Objection whereto I shall endeavour an Answer, stands thus. The Parliament is a great Body, and moves slowly; and that the Case may be such, that the Cause may be lost before the Parliamentary Supplies come.

My Lords, how Means of effecting so sudden and so great a Surprize can be so secretly carried, I shall not examine it in Reason, but shall humbly offer unto it these Answers.

That the Service whereby the Law hath provided for the Defence both for Land and Sea, they have both the same limitation of Time with the Parliamentary Supplies in the Summons of the Tenants by Knight's-Service *ad exercitum*, and of the *Cinque Ports*; forty Days warning is to be given, as is for the Parliament. And so it is probable, for that of *Mould*, 13 *Ed. I.* it was for others that held by Sea-Service. And anciently the Summons *ad exercitum* to the Ports, and for the Parliament, went out together, or much about the same time, that the Parliament might assess the Escuage; and in case the Tenures and other Revenues were not able to maintain the War, that the Parliament might provide for further Supplies, as appears *Hil. 28 Ed. I. M. 15.* 31 *Ed. I.* and 44 *Ed. I. M. 15, & 16. & oportet neminem legibus esse sapientiores.*

The Tonnage and Poundage when first granted for Life, was, that the Kings might always have Money ready upon such sudden Occasions. In the Parliament Roll, 4 *Ric. 2. M. 42.* the Commons desire Payment of *Edward* the Third's Debts, that they might be encouraged to lend the King in Aid of the Realm, if a sudden Cause of Necessity should fall out. The Answer is, that it shall be done *selon le petition.* My Lords, by this it appears, that this Objection was not then taken to be of Weight, many of the Loans are in *Causa necessitatis in Articulo.* The Authorities that further answer this Objection are great, and full in the Point.

The first is that of the Parliament Roll of 2 *Ric. II.* before cited; the Business of Defence could not stay so long as for a Parliamentary Supply, yet agreed, that the Commons without a Parliament could not be charged; and therefore the same Men that gave the Judgment, presently lend Money for that Purpose.

In the Statute 31 *Hen. VIII.* for Proclamations, the Cause of making the Statute is expressed in these Words. Considering that sudden Causes and Occasions fortune many times, which do require speedy Remedies; and that by abiding for a Parliament, in the mean time might happen great Prejudice might ensue to the Realm; therefore the King's Proclamation is by that Act made equivalent to an Act of Parliament, but with a full exception of their Lands, Goods and Chattels: which as it shews that before that, by the Com-

mon Law, the King could not, in Cases of Exigency that could not stay for a Parliament, take or seize their Goods, so they were careful still to preserve their Rights.

My Lords, after the Statute of 31 *Hen. VIII.* the Maxim of *Justinian* was verified in *Hen. VIII.* as of the *Roman Emperors* after the *Lex Regia*, whereby the People transferred their Suffrage to the Emperor, *Quod Principi placet legis vim habet*; so all that time was that other as true on the Subjects part here, as there in the Digest, *Lege omnia de Regalis: quod meum est non est universitatis, & quod nostrum est sine facto nostro ad alienos transferri non potest.* The 7 *Prædict.* of *Spain*, *titul' 1. particular' 2.* gives something more to the King, for he may take from the Subject, *pro necessitate, Reipublicæ dato primum tali causa dictæ rei bono lancia ejusd' vel majoris pretii bonorum virorum arbitrio*; he may in this Case take, giving a Pawn to the Subject for the assurance of a future full Satisfaction. *Lyme* in his 6th Book, *cap. 35.* *Bodin* in his 6th Book, *fo. 655.* affirms, that when *Hannibal* had put *Italy* and *Rome* itself into so great a hazard, and that there was not Money left in the common Treasury, that yet the Senate without their Consent could not charge the People, but that *unusquisque* of the Senate *mutuo dabat aliquid in usum publicum.*

My Lords, the last Authority for the answering of this Objection, and the clearing of the whole Business, is the Commission of the Loan. 2 *Car. pars 4. Pat. Roll*, the Words are these. 'The great and mighty Preparations both by Sea and Land, did daily threaten the Kingdom; that the Safety and Subsistence of the King and People, and the common Cause of Christendom were in apparent Danger of suffering irreparably; that the King's Treasure is exhaust, and the Coffers empty: That the Business of Supply cannot endure so long delay as the calling of a Parliament, and enquiring into all means just in Cases of such unavoidable Danger; the King is now resolved to borrow of the Subject, to enable his Majesty for their Safeties, and promise Repayment.'

My Lords, the borrowing of Money only is the thing required, that is for Defence, the King had no Money left; the Exigency such, that it would not stay for a Parliament. This Commission afterwards in the Parliament 3 *Car.* was questioned, and upon Debate adjudged by both the Houses of Parliament to be void in Law; by the Petition of Right presented so to the King, his Majesty denies it not.

My Lords, from this Objection of sudden Danger, I come to the next, which is the third Thing before offered unto your Lordships, which is an Admittance, that the Danger sometimes may be such, that the Subjects Goods sometimes without their Consent may be taken from them; for Property being both introduced and maintained by human Laws, all Things by the Law of Nature being common, there are therefore some times, like the *Philistines* being upon *Sampson*, wherein these Cords are too weak to hold us, *Necessitas enim* (as *Cicero* saith) *magnum humanæ imbecillitatis patrocinium omnem legem frangit*; at such times all Property ceaseth, and all things are again resolved into the common Principles of Nature. These Times, as sometimes they are only *instanti*, and concern but some few, as in Cases of killing one other

other Mens Lands, or with their Goods upon sudden Assaults; so sometimes they are longer in Continuance, and larger in Extent, and concern the whole Kingdom, as it is in Times of War, *quando agitur pro aris & focis flagrante Bello*. And as on the Particulars before mentioned, which are but for a short Time, and that concern some few only, the Law hath no Power for that Time, nor maintains any Property, so in the other Case it loseth this Power for a longer Time, and over all. A Dissent upon Disseisin in time of War, takes not away the Entry of the Disseisee. *Littl. Sec. 412.* no Plenary after the six Months bars the Patron of his *Quare Impedit* upon a Presentation in time of War. *43 Ed. III. Quare Impedit 135. Na. Br. 31.* And in a Writ of Right, where the Seisin makes the Title, the taking of Explees must be alledged to be done *tempore pacis*, the Law allowing no Estate in such Times, but calls it an Occupation in time of War. *Littl. fo. 12.* And as *inter arma leges silent*, so that of *Bract. lib. 4. fo. 240.* that *tempus Guerre est tempus Injurie*, is likewise true; for after the War is ended, the Law, as not having Cognizance of things then done, gives no Remedy for Wrongs in that time sustained, as the Case is adjudged in the Roll of *Kent. 7 Ed. I. inter placita de querelis*, one Parleton *de Petro Randal quod ipse die Mercurii ante festum Sti' Thomae, 46 Hen. III.* came to the Town of *Cleve*, and took of the Plaintiff's Goods three Oxen, four Cows, and three Heifers, and yet detains them; the Defendant alledgeth the Pardon of *Henry III.* of *Omnes transgressiones fact' ratione turbationis tunc in Regno existent'*, and that it was *tempus Guerre* when the Goods were taken; the Plaintiff replies, that the King pardons only Offences done to himself, & *non transgressiones aliis illatas*; the Defendant rejoins, that *tempus illud* was *tempus Guerre*, & *non tempus pacis*, and upon this the Issue was joined; the Jury finds that when the Defendant took the Goods, *fuit tempus belli*, & *non tempus pacis*, and therefore it was adjudged for the Defendant. *Tempus belli*, when Property ceaseth, is not upon every Intestine or Defensive War, but only at such times when the Course of Justice is stop'd, and the Courts of Justice shut up: and this is *tempus belli* in the *Institutes. Sec. 412. 39 Ed. III. Banc. Regis Rot. 49.* the Attainder of Treason of *Thomas Earl of Leicester* reversed, Error assigned, *Quia tempora pacis maxime cum per totum tempus præd' Cancellar' & al' curie Dom' Regis apertæ fuerunt, Et in quibus jus cuicumq; fiebat prout fieri consuevit, Nec prædictus Dominus Rex in tempore illorum cum illis explicatis equitavit.* That there were great Armies on foot on both Sides in this Business when the Earl was taken at *Barrowe-Bridge*, our Histories are full, but yet it was not that *tempus Guerre* intended by the Law, because the Courts of Justice were open, and the King with Banners displayed was not in Person in the Field.

My Lords, in these times of War I shall admit not only his Majesty, but likewise every Man that hath Power in his Hands, may take the Goods of any within the Realm, pull down their Houses, or burn their Corn, to cut off Victuals from the Enemy, and do all other things that conduce to the Safety of the Kingdom, without respect had to any Man's Property. *12 Hen. VIII. 2 Br. transf. 406. 8 Ed. IV. 23.* that in such times a Subject may make a Bulwark in other Men's

Lands, and that the Laws already established are silent in such times. And although in that foreseen and lingring War of *Hannibal's*, whereof I have before spoken, the Senate could not charge the People, yet when there was a *Tumultus Gallicus*, that is, when the *Cisalpani* their Neighbours, on the sudden, as sometimes they did, assaulted the City; by the same Author the Case was otherwise.

My Lords, besides this sudden and tumultuous War, which shuts the Courts of Justice, and brings his Majesty in Person into the Field, and wherein Property ceaseth; the Law takes notice likewise of other times of War, as when his Majesty upon just Cause known unto himself by Proclamation proclaimeth War against any foreign State, and likewise the Law taketh notice of the Effects thereof; that is, that no Subject of such Prince or State is capable to prosecute any Suit in any his Majesty's Courts; and likewise, that then it is lawful for any his Majesty's Subjects to seize and keep to their own use, the Goods of the Subjects of any such Prince or State, as in the Books are adjudged. *7 Ed. IV. 13. 13 Hen. VIII. Br. Property, 38, 22 Ed. III. 16.* My Lords, it appears not by any thing in this Writ, that any War at all was proclaimed against any Prince or State, or that if any of his Majesty's Subjects had taken away the Goods of any Prince's Subjects in Chutterdom, but that the Party might have recovered them before your Lordships in any of his Majesty's Courts. So that the Case in the first place is, whether in time of Peace his Majesty may without Consent in Parliament, alter the Property of the Subjects Goods for the Defence of the Realm. The Time that will serve the turn for the bringing in of the Supplies and Means of the Defence, as to your Lordships appears judicially by the Writ, that is seven Months within four Days. For the Writ went out *Aug. 4.* and commands the Ship to be at *Portsmouth*, the Place of Rendezvous, the first of *March* following; and thereby it appears, that the Necessity in respect of Time was not such, but that a Parliament might in that time have been called for the effecting of the Supply.

Yet in the next place it is averred, that *Salus Regni periclitabatur*, and that was the cause of issuing forth the Writ; and this by the Demurrer if it should be confessed, yet this is but in general; how, or in what manner *periclitabatur non constat*. By the Law the Defendant may have a Protection when he is in *Negotiis Regni*; but when he will make use of it, it's not allowable in that Generality, but he must shew in particular, in what Town or Castle, or other particular Service he is in, that so the Court may judge whether the Cause be sufficient, yea or no; and yet that is his Majesty's Writ too, as well as that in question. The Books for it are, *36 Hen. VI. 28. 39 Hen. VI. 1.*

Yet in the next place, if your Lordships shall give any heed to this General, as to the Particular of Pirates infesting the Coasts, and Preparations further *ad Regnum gravand'* mentioned in the Writ, the Case then, as I conceive, is this.

In a time of Peace, his Majesty's Vigilancy foresees a Danger likely to ensue; the Supplies for prevention of this Danger will serve, if brought in in seven Months after within four days; yet whether in this their Case without Consents in

Parlia-

Parliament, his Majesty may alter the Property of the Subjects Goods?

Mr. St. John's second Day's Argument for Mr. Hampden.

My Lords, having done with the Defence in general, I shall now endeavour to prove, that this of the Sea hath no such Peculiarity in it, but that it will fall within that of the Defence in general: wherein, in the first place, I will endeavour an Answer to some Objections both from Authority and Reason, that may seem to prove a Right: And secondly, to some Precedents concerning the Use and Practice.

Of the first Rank, I shall begin with *Danegelt*. It may be said, that the *Danes* infesting the Realm, that *Ethelred*, for the resisting of them first by his own Authority, laid this upon the Subject, and made it an annual Charge. That after the Conquest they seldom infesting the Coasts, the Conqueror took it not annually as at first, but at such times only as it is in the Black Book, *lib. 1. cap. 11. when ab exteris gentibus bella vel opinionibus bellorum fuerunt*. And that after *Henry* the Second's time, the Kingdom being altogether freed from the *Danish* Invasions; altho' *Danegelt* lost the Name and Use, it never after his time being taken by Hides of Land as before; yet the succeeding Kings, by the same Authority, did lay Taxes upon the Subjects for Defence of the Sea.

My Lords, for Answer hereunto, I shall in the first place observe this only by the way, that the best and certainest Authorities agree not what it was, I mean the Laws of *Edward* the Confessor, *cap. 11*, and the Black Book. For the Confessor's Laws say, it was one Shilling upon every Hide of Land, and the Black Book two Shillings; by which it should seem it was little in use in *Henry* the Second's time, nor much known. That *11 Cap.* in the Confessor's Laws, where this is mention'd, was no part of the ancient Laws themselves, but something afterwards added, appears by the Words themselves. *First*, it speaks of the Freedom which the Church, in the first Institution of it, had; Freedom, we know, was not lost till after the Conquest; and likewise of the granting of it by *William Rufus* in Parliament: and therefore it should seem to be inserted in those Laws afterwards out of the Laws of *Henry* the Second; for this *11 Cap.* and that of *Danegelt* in *Henry* the Second's Laws, are the same, *De verbo in verbum*, as appears in *Hoveden fo. 344*.

But admitting the thing, I shall endeavour Answers to each Part of the Objection: As *First*, that the *Danegelt* was granted in Parliament. Mr. *Cambden's Brit.* p. 142. observes, that the *Danes* first infested the Coasts *Ann. Dom. 800*, and, as his Words are, with such Hurliburlies, as the like was never hear of, Havock was made of all, razing of Cities, and burning of Churches; and for their continual Piracy, they had got the Nick-name of *Necugii*, that is, Pirates. The *Danegelt* first began in *Ethelred's* time, almost 200 Years after the *Danes* first Invasion, for he began his Reign *Anno Domini 978*. That Provision was made for Sea-Defence in the Interim, and before *Ethelred's* time, appears by the many Sea-Fights of *Alfred* and other Kings. That this Provision was usually in Parliament, is probable from that of *Ingulphus*, *London print. fol. 488*, where *Anno Dom. 833*, which was 33 Years after the *Danes* first Invasion,

a Deed to the Abbot of *Crowland* is dated thus; *Coram Pontificibus Proceribus & Majoribus totius Anglie in Civitate London, ubi omnes congregati sumus pro consilio capiendū contra Danicos Piratas littora Anglie assidue infestantes*. If King *Ethelred*, by his own Authority, might have imposed this, it is like some of his Predecessors, the Case so necessarily requiring it, in almost two hundred Years Space would have done it before this time. That this of *Danegelt* was done in Parliament, the Words carry as much; for the Words of the Law are, *Danegeldi redditio primitus Statut' fuit*, a Word most proper for the Parliamentary Authority. But fully by the Laws of that King, I mean *Ethelred's* Laws, in Mr. *Lambert's Saxon Laws, fo. 58*, there *ex sapient' sacrum consilio*, Peace is made with the *Danes*, and a certain Sum of Money granted to the Army, as our Historians observe. The *Danes*, by Composition, were to send away the whole Fleet, saving 45 Ships, which were to remain to defend the Kingdom against other Enemies, and the King was to maintain them at his Charge. That the *Danegelt* was paid to the *Danes* for this Defence, many of our Historians observe. My Lords, that at the same Parliament this was provided for, appears by the Words of the Law, *Si quis igitur posthac Navalis aspirat' in Anglia praedam fecerit, hic nobis auxilium ferat exercitus nosq; ei quamdiu in fide manserit que ad Comitatu' suppent' paramus omnia*. That this was a Parliament, as the Words shew it, so it is held in the Preface to the *9th Report*, and *Huntington fo. 205*. If this was not the *Danegelt*, yet this is clear, that in that King's time then Provision *contra Navales apparatus* was made by Parliament. *Primum statuerunt Angli' in sausto consilio quod ipsi Danis Censum persolverent; Regibus namq; nostris modo per servitia ex consuetudine quod Danis persolvebatur ex ineffabili terrore*. That *Danegelt* which after the Conquest was paid to the King, we see by that Author, *Primum statuerunt Angli'; statutum Angli'*, must needs be by Parliament. If the *Danegelt* in such time of great Danger, was not imposed without Parliament, it must strongly make against those that shall object it.

The *Danes* having quitted the Realm; that the *Danegelt* was released by *Edward* the Confessor, as *Ingulphus fo. 520*, and *Hoveden 253*, and all our later Historians. That of *Ingulphus*, my Lords, alone, is without Exceptions, who lived in those times; he was brought up in *England* in the Confessor's Days, and therefore knew what he wrote; he afterwards went over into *Normandy*, and was the Conqueror's Secretary, came over with him to the Conquest, and at his own Charge maintained twelve Horses: he was so great at the Court, that, as himself writes, *fo. 514, quos voluit humiliavit, quos voluit exaltavit*; and *pag. 518*, a Charter of the Conqueror's to the Abbey of *Crowland* was made, *ad petitionem Familiaris mei Ingulphi*; and therefore, in all likelihood, would not report this partially against the King.

My Lords, that we are not to put out our Fires upon ringing of the *Cur Feu Bell*, we have no other Law for it but *Disuse*; and the Testimony of Historians, that *Henry I.* released it.

For that of the Black Book, that *William* the Conqueror retained it, *Quando Bella vel opinionibus Bellorum fuerint*, as that Book is mistaken in the thing, saying it was 2 s. every Hide of Land, being in truth but one; so it is possible he might mistake in the other too. That it was released *in aeternum* is apparent. That many things were done *de facto*,

to the infringing of the Liberty of the Subjects both in his time, and the times of *Hen. I.* and *Hen. II.* too, it is clear by Historians; and if it were not released before, yet that King *Stephen* released it, is, *Huntingdon fo. 221. Hoveden fo. 276. Hoc deo voluit*, say these Historians, *sed nihil horum tenuit*: and, as all our Historians agree, that after *Hen. II.*'s time, in whose Reign the Black Book was compiled, it was never paid; so it may be collected out of the Red Book, for all or most of the Aids and Escuages in *Hen. II.*'s time, and King *John*'s time, are there mention'd. In *8 Hen. II.* 'tis said, *quod Danegeldum assessum fuit*; but after that, neither in his time, nor in the time of King *John*, or of any other King, is any more Mention of it. Sir *Henry Spelman*, in his *Glossary*, saith, that when it was taken in the Conqueror's time, and since, it was *Consultis magnatibus & Parliamentar' decemum auctoritat' diminut' sunt*.

My Lords, in the last place, if the succeeding Kings, *mutato nomine* only, have in lieu thereof laid other Taxes upon the Subjects, they must hold Proportion with that of *Danegelt*; that is, that they have been equally set upon all the Inland Towns throughout the Kingdom, as that was, and *xii d.* upon every Hide of Land; and likewise in time, and that there was no Intermiſſion, but that in *Rich. I.*'s time, and King *John*'s, which were active, that then it was put in Execution. *Claus. 15. Joh' M. 3. dorf. & 7. and Mar. Paris Pag. 312, 313.* The Pope had granted the Crown of *England* to the *French King*, who was ready to invade the Realm; great Provision of Shipping was made, *ad illiberationes Regis & ad stipendia Regis*: so far was this King in this time of Necessity, from imposing any Aid upon the Subjects for the Defence of the Sea, as that he himself bore the Charge.

My Lords, the next Authority that I shall insist upon, is, that in the Terms of the Law, *fo. 114.* in the Title of *Hidage*, the taxing by Hides was used much in old Times, and that chiefly in King *Ethelred*'s Days, who in the Year 1006, when the *Danes* landed at *Sandwich* in *Kent*, taxed all the Realm by Hides, and every 910 Hides of Land should find a Ship.

My Lords, my first Answer to this is, that this was done when there was a formidable Enemy, and which soon after conquer'd the Kingdom, was upon the Shore, as by the Book appears; and therefore 'tis likely that the Courts of Justice were shut, and that the King was then in Person in the Field.

Secondly, This was but *Actus unicus*, and even by the Common Law, that easily admits of Customs not good; it's *Actus binus* that hath any Colour *introducendi consuetudinem*.

Thirdly, It appears not by any thing in the Book, but that this might be done by Parliament, many of the antient Acts of Parliament are *statuit Rex*; and whereas the Book saith, Taxing by Hidage was much used in old Time, that these were by Parliament, appears both by the Use and Authority express in the Point in Print, *Doomsday-Book* in *Berks*, *Quando geldum dabatur*, *Matth. Paris 780.* many *Corneagia & Hidagia*, recited in Parliament, that had been formerly given to that King in Parliament. *Braet.* in his second Book, *fol. 37.* is express in the Point, that they cannot be taken but by Grant in Parliament, his Words are these; *Sunt quedam communes preestations quae servitia non dicuntur, nec de consuetudine veniunt nisi cum necessitas intervenerit, sicut sunt Hidagia & Corneagia de*

*necessitate & consensu totius Regni introducta.* *Rot. Parl. 8 Hen. III. M. 4.*

My Lords, the next Authority I shall insist on, is the Case of the Abbot of *Robertbridge* in *Kent*; which, because *prima facie*, it seems to be to the Point, I will put it at large. *M. 25 Ed. I. finient. l. Banc. Rot. 77.* The Abbot brought a Replevin against *Adam de Bridland* and others, for taking his Cattel; the Defendants avow in these Words, *Dicunt enim occasione turbationis inter Regem, & Regem Francie suborta, assignatus fuit Willielmus de Leighbourne ex parte Regis ad Custodiam Marie faciend' ratione cujus custodie faciend' terra & tenementa hominum ejusd' Comitatus agistata fuerunt ad custod' faciend'.* And the Abbot was assessed, *22 Ed. I. at 7 s. the 23 Ed. I. at 13 s. and 24 Ed. I. at 15 s. ad preed' custod' faciend'*; and because he refused to pay, that the Defendants being Collectors for the Town, distrained the Abbot. The Abbot, in Bar of the Avowry, says, that for his Lands he was assessed to find a Horse and Man in *subsidiu Custod' preed'*, and that he found his Horse and Man accordingly, *ad eand' Custodiam faciend'*; and therefore demands Judgment, *se una & ead' occasione custod' preed'*, he ought to find the Horse, *& nihilominus preed' pecuniam solvere.* The Defendants maintain their Avowry, and say, that the Abbot had divers other Lands within the Town, that he was assessed for them, for the Money, and that he was not assessed for those for the Man and Horse; thereon Issue is joined, and Day given, without any more thereupon that I have seen.

My Lords, besides the Authority of it in point, these two things may be further objected from this Case. The County was agisted *ad Custodiam maris*, and likewise to find Forces. My Lords, for the last, I have before admitted, and by the Statute of *Winchester* that may be done, for the Service was to be performed in *Kent*, the same County where the Land lay.

My Lords, because this Case *prima facie* hath some shew of Authority in Point, I shall endeavour a full and clear Answer unto it. By the Case it self it appears, that these Sesses were in time of War, the Words are, *occasione turbationis inter Regem & Regem Francie*; neither was the War with *France* only at that time, but likewise with *Scotland* and *Wales*, and all the Effects of War accompanied it. The *French* had landed in divers Parts of the Realm, and in particular, *23 Ed. I.* in this County of *Kent*, and had burnt the Priory, and the greatest Part of *Dover*; the Havens were shut up for a great part of that time; the Goods both of the *French* and *Scottish* Nation were seized through the whole Kingdom; the Lands of all Priors Aliens were seized, and those that were upon the maritime Parts removed, and Natives put into their Houses, and all Strangers whatsoever, that landed within the Kingdom, to be arrested. All these, if any of them should be denied, will be made good, not only by our Histories, but likewise by the publick Records of the Kingdom. So that my first Answer is, that these Sesses were in the time of an actual defensive War from the two next and greatest States unto the Realm.

My second Answer is, that it appears not at all, by any thing in this Case, that these Sesses were made by any Authority from the King; for the Words are only in the general, that the County was agisted, and that the Abbot himself was agisted, but says not by whom, or whose Authority. That it was not by the King's Authority, appears

by Leighborne's Commission appointed *ad custodiam præd' faciend'*, as the Words of the Case are; for by his Commission whereby he was to do this, which is *Rot. 22 Ed. I. M. 8.* he was so far from having any Power to tax the County hereunto, that he's commanded for Victuals, Arms, or other things that he shall need in this Business, that he shall pay those from whom he shall have any such thing, which likewise is enter'd in the *Communia*, 23 *Ed. I. Rot. 77.* My Lords, that there were Parliaments in every one of these Years, appears by the Summons, and those in Words not usual; for the great Fleet of France being mention'd, and that the French did intend *Linguam Anglicanam omnino delere*, they were now called *ad tractand' ordinand' & faciend' nobiscum*, and the Lords, *& aliis Incolis Regni qualiter sit hujusmodi periculis obviend'*, as it is in the Close Roll, 23 *Ed. I. M. 4. dorf.* and 24 *Ed. I. M. 7. dorf.*

My Lords, that accordingly Order was taken *cum Incolis*; and that the Gentry and other Inhabitants, by way of By-law or Agreement amongst themselves, did make Provision in this Particular, I shall endeavour to prove to your Lordships: that it hath been done at other times, and that such By-laws are good, appears, 14 *Ed. II. Banc. Regis, Rot. 60.* The Scots entering *Durham*, a By-law was made by the Inhabitants for the raising of Money, and one that refused it was adjudged to pay it: besides Leighborne, who was Admiral of all the English Fleet, there were *Custodes maris* in each maritime County; these, as appears by *Communia*, 24 *Ed. I. Rot. 78. dorf.* were chosen by the Commonalty of each County; and that these, together with the Sheriff and Inhabitants, did make Orders for those things, appears by the *Communia*, 23 *Ed. I. Rot. 79.* where Writs are directed to the Sheriff of *Kent*, and to the Sheriff of other maritime Counties, commanding them that *circa maris custod' visis presentibus Milites & potentiores liberos homines de Balliva tua evoces, & cum ipsis provida circumspessione deliberes*, how he should do it. This, I conceive, is expressed in Point, and the Practice grounded upon that in Parliament, *ad ordinand' cum Incolis.*

My Lords, my third Answer to this Case is, that these Sesses were for Land-Service only, and not for Shipping. And this appears, *First*, by the Case it self; for the Abbot, in Bar of the Avowry, says, that he was sessed to find a Man and Horse *in subsidium custod' præd'*, which must be for Land-Service; and therefore demands Judgment, *si una ead' occasione custod' præd'*, he ought both to find the Horse and to pay the Sess. This is not denied by the Defendants, but they say that the Abbot had other Lands; and that this Sess was for those other Lands; so that it is admitted that the Sess for the Horse, which must be for Land-Service, and that for which they avow, were both for the same Use; all the Difference is, whether the Sess were upon the same Land or no.

My Lords, if the Sess, for which the Defendants avow, had been for Shipping, they might have admitted all that the Abbot had said, in Bar of their Avowry; that is, notwithstanding he found Arms for Land-Service, that yet he might, for the same Land, have been sessed again to the finding of Shipping. Neither do I doubt, but that the Parties, in the Action now before your Lordships, do find Arms, and yet they are sessed for Shipping; and that it will be stood upon by the

other Side, that the finding of Arms for Land-Service excuseth not for Shipping.

But it may be said that the very Words are, that the Sesses were *pro Custod' maris*. My Lords, by divers Records it appears expressly, that the Custody of the maritime Part of the Land is called *custod' maris*. *Claus. 23 Ed. I. M. 4. dorf.* A Writ directed *Collectoribus pecunie ad custodiam maris*, in this County of *Kent*, commanding them, that in respect that the *Cinque Ports* were at the Charge of Shipping, *quod quieti sint de custod' maris faciende*, which must needs lie at Land. *Communia*, 24 *Ed. I. Rot. 79.* A Writ to *William Bonell, & sociis suis ad custodiam Maris in Com' Suff' assignatis*, and yet all that they are to do in that Office is for Defence at Land. So *Trin. 31 Ed. I. M. 20. Communia.* This *Custodia Maritima*, how it is to be done appears, *Rot. Parl. 46 Ed. I. M. 49.* and by the Statute 5 *Hen. IV. cap. 3.* it is to be done as heretofore it hath been done according to the Statute of *Winchester.*

My fourth Answer to this Case is, that the Plaintiff was a Clergyman, and the Clergy having denied in Parliament to aid the King, as the Laity did this Year, at this time they stood in the King's Disfavour; and in *Hil. Term. 25 Ed. I. Rot. 17.* the King commanded all his Courts of Justice, that if any Clergyman was Plaintiff in any Action, *quod nullum ei fiat Remedium.* And therefore *Walsingham*, in his *Annualis Consiliis* of this Year of 25 *Ed. I.* says, that it was *Clero Angliæ importabilis, quia de protectione Regia est exclusus, & per Regem nihilominus depredatum.*

But, my Lords, if I should let all go that hath been said, yet, under your Lordships Favours, the Case is of no Authority at all: for, admitting that the Sesses were for Shipping, and that by the King's Authority; yet had the Plaintiff no Reason to put himself upon the Point of Law when the Matter of Fact would help him; for the Plaintiff says, that he had been sessed before for those Lands, the other Party says no, but that it was for other Lands, and upon this the Issue is joined.

Nay, my Lords, if there be any Authority at all in the Case, under favour, it is strong the other Way; for if the Sesses were for Shipping, the Abbot says, that before he had found Arms for the Land-Service, and demands the Judgment of the Court, if therefore he ought to pay this Sess too. The other Party, if the Law had been clear, might have demurred thereupon; so that the Authority sways this Way, that none for the same Land are chargeable for Arms at Land, and Shipping too.

My Lords, not only for the clearing of this Case, but all other things that concern it, either in the mere Right, or Matter of Fact before the 29 *Ed. I.* that before the Parliament at *Lincoln* 29 *Ed. I.* all things concerning the King's Prerogative, and the Subjects Liberties, were altogether upon Incertainties. The Statute of *Running Mead*, *Magna Charta*, *Charta de Foresta*, had been confirmed at least eight times, from 17 *Job.* unto 29 *Ed. I.* and yet not only the Practice, but likewise the Judges, in the Courts of Justice, went clear contrary to the plain, both Words and Meaning of them. By the second Chapter of *Magna Charta*, a Baron, *pro Baroniam integra*, was to pay but one hundred Marks for his Relief; the Practice and Process of the *Exchequer* till

29 *Ed. I.* was always for this Relief one hundred Pounds. *Michaëlis 28 Ed. I. Rot. 34. Communia*, after the Death of *John Gray*, that held *per Baroniam*, the Question was, whether he should pay 100*l.* as the Record says, *prout antebac onerari solbat*, or 100 Marks, *propter Confirmationem secundum Magnam Chartam*; and this the Court would not determine before they had consulted with the King; and yet the Statute of *Magna Charta* had been confirmed by 25 *Ed. I.* and likewise the same Year, as appears by the Statute *de Articulis super chartas. Communia. M. 13. Ed. I. Rot. 26.* *Philip Mermion* died, and 100*l.* paid for his Relief. It was now 29 *Ed. I.* and in question, whether 100*l.* or 100 Marks Admittance, *licet hætenus*, they were always 100*l.* because the King had confirmed *Magna Charta* 29th of his Reign, and by his Writs had commanded his Courts to inroll it, and would have it *de cætero in omnibus suis Articulis observari*. My Lords, of this kind there be many Cases. The Charter of King *John*, and of the *Forest*, cap. 10. is *Nullus de cætero amittat vitam vel membrum pro venatione nostra*; and yet against the plain Letter and Meaning, *Communiam Trin. 29 Ed. I. Rot. 44.* *Adam Gower* of *Scarborough*, as appears, had in this King's Reign been beheaded, *pro venatione*, in the *Forest of Danby*; and now an Inquisition went out to find, what Lands and Goods he had, and then upon the Return, the Question was, whether his Land was forfeited, and should escheat upon such an Attainder, and resolved that the Land was not forfeited. *Pasch. 22 Ed. I. Rot. 48.* The King's Shepherd had put the King's Sheep into a Man's Ground, who had distrained them; and for this Process went out of the *Exchequer* to punish the Man, who there pleads, that he knew not that they were the King's Sheep. And there *Rot. 51. dorf.* Lessee for Life of a Manor of the King's, with an Advowson excepted, the Court declared, that he had forfeited the Manor it self. By these Cases it appears, that neither the Practice, nor the Proceedings in the Courts of Justice in those Times, in Things between the King and the Subject, are so much to be relied upon, as the Words of the Law.

My Lords, it may further be objected, that at Common Law, before the Statute of *Winchester*, the King might compel the Subject to find Arms for the Defence of the Kingdom, and therefore by the same Reason, he may charge them to find Ships for the Defence of the Sea.

My Lords, not granting the Thing, yet for the present admitting it, I shall thereunto give these Answers.

That his Majesty, by Tonnage and Poundage, and the other Duties at Common Law mentioned, hath a particular Supply for that of Shipping, but hath nothing in particular for the other of Arms; and therefore that may with more Reason be laid upon the Subject than the other. And yet for one of the principal Things in that Statute of *Winchester*, that is, for Watching and Warding, the King before that Statute, had a particular and certain Farm or Sum of Money of each County for the doing of it, which after that Statute, the County was discharged of, because by that Statute the Counties took the Charge of doing of it upon themselves, as the Cases are. *Comm. Hil. 20 Ed. I. Rot. 10.* and *Br. Trin. 43 Ed. I. Rot. 22. dorf. 181. pro Com' Northumb'* and *161. pro Cumber-land.*

My second Answer is, that each Subject, and that *secundum statum & facultates*, is already chargeable for that of Shipping, as hath been before proved; and therefore if he be chargeable both in Money and Kind too, the Charge is double in the one, and but single in the other. Neither could it hold Proportion with these Cases of Watching and Warding, where the Counties were discharged of the Money, when they took the Thing in Kind upon themselves. And therefore this Objection cannot, as I conceive, be made, unless his Majesty first quit all the before-mentioned Duties laid upon Merchandize.

My third Answer is, that in that of Arms, there is only *Mutatio Speciei*, changing of Money into Arms, for they remain the Subjects still in Property, and are in his own Custody; he may sell them, or employ them at his Pleasure to his own Use: but in this way of Shipping there is *ablatio rei*, in respect of the Victuals and Mariners Wages.

My fourth Answer is, that that of Arms is not only for the Defence against Foreigners, but in Watching and Warding, upon Hue and Cry, and otherwise to keep the Peace within the Realm, and for the Execution of Justice, by assisting the Sheriff when he shall have occasion to use the *Posse Comitatus*, and otherwise, all which do fail in the other. And as the use of Arms is more general, so are they for the more immediate Defence of that Element, wherein we have our usual and certain Livelihood. And yet the ordering of these for three hundred Years and upwards, was by Authority of Parliament.

Lastly, my Lords, in respect of the Victuals and Mariners Wages to be found for xxvi Weeks, the Case in question, as I conceive, cannot be compared to that of Arms, but rather to that of taxing the Country for finding of Soldiers to go out of their Counties.

My Lords, the next Objection that I shall endeavour to give Answer unto, is, that it is in his Majesty's Power, for the Safety of the Realm, to shut up the Ports and Havens of the Kingdom, and thereby to make a general Stoppage of all manner of foreign Trade; and therefore as his Majesty may anticipate Gain, by barring Men from the exercising of their Callings, so by the same Reason may he take something away.

My Lords, My first Answer is, that the Law therein doth trust the King only with that, which being done, is most to his own Loss, as in respect of the Customs and other Duties this of prohibiting foreign Trade would be.

My second Answer is, that this cannot be done but in time of War, and imminent Danger, and that therefore this Objection will not be seasonable till the other be put in Execution.

The last Objection is, that in divers old Charters of Liberties and Exemptions, the Patentees are freed *de Danegeldo & Navigio*, hereby is implied Right.

My Answer is from the same Charters, it may as well be inferred, the Subject is bound to make and repair the King's Parks and Houses, and to make up new Bridges, and divers other Things, these Charters of Exemption freeing them *ab operationibus omnium Regalium Parcorum & Pontium*, and from divers other Things which by Law the Subject is bound unto.

My Lords, for the Precedents that, from Matter of Fact and Charge, may be brought for proof

of the Use and Matter of Fact, as I do not profess to know them all, so if I did, yet Time would not permit to give a particular Answer to each of them; I shall therefore offer these general Answers to them.

The most of them, or all of them, are for charging the Sea Towns, and Haven Towns which have Ships, and many great Privileges, and are enfranchised for that Purpose, as is declared in the Parliament-Roll of 13 Ed. III. M. 11. before cited. These that are to find Ships; besides the main Prescriptions for Wrecks and Benefit of Fishing, are discharged of Arrays and Defence at Land, as appears not only by the Parliament-Roll, but by the Scotch Roll 10 Ed. III. M. 28. dorf. The Town of Shoreham, in the County of Sussex, time out of mind had found Ships, and therefore being by the Commissioners of Array taxed to Arms for the Land-Service, a *Superfed'* for that Cause awarded. *Iter Sussex*, 7 Ed. I. Rot. 63. dorf. William de Bruce, Lord of Shoreham, upon his Claim adjudged, that all the Customs of Merchants at Shoreham belonged to him. *Rot. Pat.* 26 Ed. I. M. 16. the Town of Yarmouth, *pro servitio Navium impenso & impendendo*, are discharged of all Subsidies granted in Parliament, *pro Corporibus Navium, & attito: & Communia Trin.* 31 Ed. II. Rot. 30. The Town of Baldsey, in the County of Sussex, for the same Cause discharged by Judgment of the Court. *Iter Kant.* 21 Ed. I. Rot. 44. dorf. Certain Land-holders within the Cinque-Ports have Tailage *de quolibet homine applicante*, upon their Lands. *Petitions* 1 Ed. III. Rot. 9. *Office de Pat'*. In Consideration of the Charge of providing Ships, the Town of Southampton Petition, that their Privileges of having Customs within their Ports be confirmed to them; that they had these, appears *Hil.* 13 Hen. IV. *Banc. Regis Rot.* 39. where they are indicted for Extortion, for taking more Custom than was due. *Rot. Parl'* 45 Ed. III. The Commons pray, that the Franchises of the Sea Towns and Havens may be allowed them as heretofore, and that by default thereof, the Navy of England is much decay'd, to the Disaffurance of all the Realm if need should be. That these that are not Maritime Towns ought not to be charged, which is the very Case of the Defendant, I shall cite to your Lordships express Precedents. *Claus.* 13 Ed. III. M. 14. par. 2. The Town of Bodmin in Cornwall discharged of Ships, because in *dicta villa Portus non est & longe a Mari & distat*, and hath not used before-time to find Shipping, and an Inquisition awarded to inquire of these Particulars; whereby it appears, that the Inland Counties had not so much as *de facto* been usually charged with Ships. *Rot. Fra.* 21 Ed. III. M. 17. those Towns *quæ Naves non habent, & quæ aliis Naves habentibus contributoria non existunt*, that they should be discharged; it appears thereby that some Towns that are Members of great Sea Towns, are contributory to Shipping, and other Inland Towns are not contributory. 2 *Pars Rot.* 2 *Rich. II.* M. 42. in which 51 Ed. III. is recited, whereby it is likewise recited, that the Burgeſſes of Beverly had, by their Petition in Parliament, complained, that their Town is in *loco arido & a mari*, that *ad sinistram procuracionem quorund' machinantium ipsos indebite prægravare ad contribuend' hominibus de villa de Kingston super Hull*, to the making of a Barge *per Mandatum Regis*; now they pray *de omnibus & singulis hujusmodi oneribus insolitis*, to be discharged by their Charter, and it appears they are

discharged accordingly, and this now exemplified. 2 *Rich. II.*

To those of 48 Hen. III. both for Taxes for Soldiers and for Shipping, I shall give a particular Answer, that it was then *Tempus belli*, when the Courts of Justice were shut; for the Commission went out after April, and in the Red Book fo. 241. 6. it was *tempus belli* from 4 Sept. 48 Hen. III. until the 10th of Sept. 49 Hen. III. and that the Courts of Justice were shut up, appears 49 Hen. III. Rot. 4. *Comm' Scaccario non fuer' Barones residentes in Scaccario, ad Pas.* 48 Hen. III. *ad Comm' Pas.* 49 Hen. III. *propter turbationem nuper habitam*, there were no Sheriffs in *aliquibus Comitatus*, 48 Hen. III. and those that were *non poterint sic facere quæ ad officium vic' pertinebant*.

To the Commissions 30 Ed. I. M. 9. in the Patent Roll, *de puniendo homines* that refused, it is *quia ad Rogatum mittere non concesserint*, so many Ships. And if a By-Law were good to bind them, as is before proved, as well as their own Promise, it may be so; but I have never seen any legal Proceedings against any of those that refused at that time, save only against the Cinque-Ports that are summon'd by their Service. *P.* 33 Ed. I. *Banc. Regis Rot.* 82. against Seaford, as a Member of the Ports, and the Charge is, that *per servitium tenentur invenire unam Navem*.

For those of Ed. the Third's time, his Reign, for the most part, was a time of War; and that the Offensive brought a Defensive upon the Kingdom, is plain. *Walsingham* saith, Page 119, 131, that 10 Ed. III. the French burnt Southampton. And *Stowe*, Page 234. says, that 12 Ed. III. they assaulted Southampton, and burnt part of Plymouth. 13 Ed. III. they assaulted the Isle of Wight; *Rot. Parl'* 13 Ed. III. pars 1. M. 9. that they had done much Mischief in the West Coasts, and conquer'd the Isle of Guernsey. *Rot. Sco.* 10 Ed. III. M. 5. dorf. and M. 2. and all the Ports of England were shut up.

My Lords, in these Years wherein most of these Writs issued, the great Danger appears; and yet that the Charge laid upon the County was by By-Law and Agreement, I shall cite to your Lordship the Scotch Roll, 10 Ed. III. M. 3. The French riding at Anchor at the Isle of Wight, the King sends divers Privy-Counsellors to Dover, and commanded all the Officers, Masters of Ships, Mariners and Inhabitants from the Thames Mouth to the West, to come thither, *ad tractand'* with those Lords of the Council for the Defence of the Sea by Ships; and in the Record it is cited, that notwithstanding the King's former Command, *hactenus quicquid non facer' impress'*, the Writs for Shipping issued before, and were not executed; and therefore now a Commission, if so it might be done with Consent. 20 Ed. III. other Writs went out, *Rot. Franc. pars 2.* M. 24. 20 Ed. III. a Writ to Yarmouth *propter pericula Maris* to stop up their Haven, and *Rot. Franc. pars 1.* M. 19. that no Fishermen go out to Sea.

I shall endeavour a particular Answer to this. *Claus.* 10 Ed. III. M. 23. the Writ says, that *valida defensionis super Mare solvi non solebant temporibus Progenitorum* of the King. To this I shall give this Answer, that these Wages were demanded before their time of going to the Service; and the Record is, *hujusmodi vadia* have not been paid.



My Lords, if this Answer be not sufficient, my Second is by denying the Thing; for besides that of 15 *Johan.* in that Time of Necessity, the Ships were to serve *ad liberationes & ad stipendia Regis*; and 46 *Hen. III. M. 4.* both in *Ed. I. Ed. II.* and this King's time before the tenth Year of his Reign, Wages for Defence were frequently paid.

My Lords, because I know not how far this will be stood upon, I shall spare the citing of any of them, and to this purpose shall cite to your Lordships only this Case. It is amongst the Parliament Petitions 1 *Ed. III.* and transmitted into the *Exchequer, Hil. 2 Ed. II. dorf.* the Fishermen upon the Coasts of *Yarmouth*, 20 *Ed. II.* were daily robbed and killed, and for rescous of them, those of *Yarmouth* were commanded to set out some Ships to Sea; and *Adam Bridlington*, the King's Clerk, sent with 300*l.* to set out this Fleet, which the Men of *Yarmouth* intended they should have as Wages for the Voyage; but the Clerk would not let them have above 230*l.* and that as Money borrowed of the King, and for this they gave their Bond of Repayment thereof. 1 *Ed. 3.* they complain in Parliament, and pray that they may be discharged of the 230*l.* and that the Bond may be cancelled; which is adjudged accordingly, and transmitted into the *Exchequer* for a Trial, whether the Service was done or not.

My last Answer to these Precedents is, that the Matters of Fact in these Years, to the Violation of the Subjects Rights, procured upon fresh Suits, not only the before-mentioned Statute of 14 *Ed. III. cap. 1.* against any Charge to be laid upon the Subject without Assent in Parliament, but afterwards they complain in Parliament, 15 *Ed. III. M. 9.* that their Goods were seized, and their Bodies taken without any Suit commenced against them, contrary to *Magna Charta*, and the Statutes and Ordinances made thereupon with so much Discretion of their Ancestors; and in particular in the Parliament-Roll of 22 *Ed. III. M. 4.* for the guarding of the Sea, and in 36 *Ed. III. M. 9.* and 37 *Ed. III. M. 2.* as before in 15 *Ed. III.*

My Lords, I now come to the last Thing, which is the Proofs in the Point, which I shall humbly offer to your Lordships. The first Authority that I shall offer unto your Lordships, is the Patent-Roll, 26 *Ed. I. M. 21.* whereby I shall endeavour to prove to your Lordships these two Things.

The Confession of that King and his Council, that he was so far from having Power to tax the People for the Custody of the Sea, as that he is bound to make Satisfaction for any thing taken from the People for this Purpose. The second, that the Charges laid upon the People for the Custody of the Sea, were the principal Grievances that occasioned the making of the Statute of 25 *Ed. I.* and the Statute of *de tallagio non concedendo.*

For the First, that the King declares that he had a Desire to redress the Grievances made to the People in his Name, and instanceth what they were, *veluti de rebus captis in Ecclesiis, & de aliis rebus captis & asportatis tam de Clericis quam de Laicis, sive pro custodia Maris vel alio modo quocunque*; whereby, my Lords, there's an Acknowledgment that it is Grievance, and to be redressed, to lay any Tax upon the Subject for the Defence of the Sea.

Commissioners are there named throughout all *England* to inquire of these Grievances; herein they

are to proceed according to certain Instructions from the King and the Council, which are these three.

*First*, Whether the Things were taken without Warrant, and if so, then the Party that took the Goods is to make Satisfaction, and further to be punished for the Trespass. *Secondly*, If there were no Warrant allowed, then the Officer was to make Satisfaction. *Thirdly*, If all were done according to, and in Pursuance of the Warrant and no more; then what upon Certificate thereof is, the Words are *& enferra tant que il se fenere appais pur reason*: The King hereby promiseth, that whatsoever Things were taken from the People by any Command of his for the Custody of the Sea, that he will make reasonable Satisfaction to the Party for such Things.

My Lords, for the second Thing, that is, that these Grievances occasioned the making of these Statutes, is clear from the Words of the Patent; for they were made *post guerram inter Regnum & Regem Franciæ*, which, as appears by the Case of the Abbot of *Robertbridge*, were from the 22d to the 25th of *Edward* the First, and by all our Historians, and many Records. It appears likewise, by those other Words, that the King, before his going into *Flanders*, intended to have remedied those Grievances; he went over in *September*, 25 *Ed. I.* and the Statute 25 *Ed. I.* was made the 10th of *October* after. Hence likewise it follows, that the Exception of the King's antient Aids and Prizes, mentioned in the Statute of 25 *Ed. I.* extends not to this of charging the People to the Custody of the Sea, that being one of the principal Grievances that occasioned the making of it. That the same Grievances caused the making of the Statute *de tallagio, &c.* I have before offered to your Lordships.

My Lords, the next Authority which I shall present, is the *Communia Hil. 23 Ed. I. Rot. 77.* there the King commanded thirty Gallies to be made by several great Towns, every Galley was to have sixscore Men a-piece, these were *pro defensione Regni & securitate maris.* My Lords, the Cases are many in the *Exchequer*, where the Money for making these Gallies was recovered against the King. I confess, my Lords, that the King had promised Payment to those that made them, which I shall thus submit to your Lordships. That in case the King might have commanded the making of them, at the Charge of the Towns, that then the King's Promise was but *nudum pactum*, for promising of Payment for that which by Law they might have been forced to do, and so the Payment rested only the King's Grace and good Pleasure. But, my Lords, upon Suits in his own Time, and in the Times of *Ed. II.* and *Ed. III.* the Monies for making these Gallies was received by several Towns, *M. 29 Ed. I. Rot. 29. dorf.* for *York*, *M. 31 Ed. I. Rot. 77.* *Ipswich* and *Dunwich. P. 5 Ed. III. Rot. 31.* for him *prout justum fuer'* nothing having been paid before. *Braff. M. 16 Ed. II. Rot. 14.* both for the Galley made at *Southampton*, and the bringing her to *Winchelsea*, at their own Charge, *Præcept. P. 1 Ed. III.* all the Money from *Southampton* not being paid, now order'd that it should be paid.

My Lords, the next Authority that I shall present to your Lordships, is, the Parliament-Roll, 13 *Ed. III. pars 1. M. 9, & 11.* The Causes of calling the Parliament are declared to be these. *First*, the keeping of the Peace. *Secondly*, the Defence of the Marches. *Thirdly*, the Safeguard

of the Sea, that the Enemy might not enter the Realm to destroy it: these were the three Points for the Commons to advise on, which are put into Writing, and entered upon the Roll. My Lords, By the Articles themselves propounded on the King's Part, it appears, That the Commons are not chargeable to the guarding of the Sea; and they pray, that this Advice of theirs may not be prejudicial to them to bind them thereunto, and that there are Ships enough in *England* to do it, if the People were willing. *M. 11.* The Commons afterwards in debating of these Articles, when they came to this of the Sea, notwithstanding the Caution before, they are afraid, that if they should debate it, it might imply, that they are chargeable to do it; and therefore they protest against giving any Advice therein, as a Thing whereof they have no Cognizance: and do further declare, that the *Cinque Ports*, and other great Towns, that have Franchises, are bound thereunto, that they should do it. And therefore the Merchants, Masters of Ships, and Mariners, throughout *England*, are summoned to be at the next Parliament for Advice about Shipping.

My Lords, The next Authority is the Parliament Roll, 22 *Ed. III. M. 21.* The Commons petition in these Words, *que le guard de la mere se face deservies Res soit le guard fit man ad refait amant vis senois ut semble que mellieur guard ne poit estre fait que le Roy ne fait ne qu'il demeritissent de la sur la guer & par de fair de c'est ter.* The Commons having formerly granted the King divers Aids and Subsidies upon Wool, Wool-fells, and Leather and otherwise, for the guarding of the Seas, they now grew weary of it, and desire, that the King himself from thenceforth should bear the whole Burden, and charge him with his Promise to that purpose.

My Lords, This Petition, tho' in the Name of the Commons, yet the Lords joined in it; for otherwise all Acts of Parliament of those Times being made upon Petition and Answer, should be without the Lords Assent. Hence it appears, that the whole Kingdom, at this time, was so far from thinking, that the King could charge them, without their Consents, to the guarding of the Sea, as that they alledge, the King himself ought to bear the whole Charge. Neither doth the King deny his Promise, nor wholly deny the thing; for tho' he saith, it should be done as it hath been done before, yet it is with a Qualification, because the Sea cannot be better kept than he hath kept it, by reason of his being so often at Sea in Person, in going and returning from *France*, and diverting the Enemy by his Wars in *France*. If the King had given his absolute Denial, yet here is the Judgment of both Houses of Parliament express in the Point.

*Rot. Francie 2. Ed. III. pars 2 M. 9 & 11.* The Merchants had granted 2s. 8d. upon their Goods till *Michaelmas*, for providing 120 great Ships *pro secura Conductione Navium & Marchandiarum, & pro defensione ceterarum maritimarum partium Regni, & aliis periculis his guerrinis temporibus regno imminuentibus.* This Grant being made, the King alledging that this was not sufficient for the Service, and to remove the Causes of the stopping of the Trade by reason of the Wars; the King now lengthens out the same from *Michaelmas* to *Easter* following, and to satisfy the People, the King by his Proclamation declares

that the 2s. 8d. shall cease at *Easter*, according to the Grant; which, as it should seem, not satisfying the People, or the King continuing the taking thereof, the Commons in Parliament, 22 *Ed. III. M. 16.* pray that it may cease, and that by procurement of no Merchant, *plus l'argent soit continue.* An Imposition but for half a Year, and that upon Merchandize, and by consent of the Merchants for the Defence, yet taken off upon Complaint. The Answer is, that it should cease.

My next Authority is the Parliament-Roll, 2 *Rich. II. pars 2 M. 5.* before cited, where the great Council and Sages of the Kingdom resolve, that the Commons are not chargeable to the Defence of the Realm without Parliament; which extends to this Particular of the Sea, for the present Preparation whereunto the Commons are not chargeable, was for Defence at Sea; and therefore the Money lent, was to provide an Army for the Sea, *en defence & salvation del dit Royalme & de la Navy & des costiers del mere.*

My Lords, the next Authority is the Parliament-Roll 2 *Hen. IV. M. 22.* Commissions to charge the People to make Ships for the Defence of the Realm without consent of Parliament, repealed by the King and the whole Parliament for that very Cause.

*Item pur ceo quere tarde divers Commissions furent foist an divers Cities Burroughs & Villages du Royalme pur faire certaines Rarges & Ballingers sans assent du Parliam' & ont mt' pr' nad estre fast devant ces hents' nr' les Commons pray nr' sur' le Roy que les Ditz Commissions soient repeals & que ils ne soient forces ne fait a quore loir fuit respos' que le Roy vest que in les Commissions soient repeals in tout points mes pur le grand necessity que ad des tiels vessels pur defence du Royalme in case que les Quens sint priment le Roy vost communer de rest matter ouesque les Surs' & puis apres le mre' al' dits Commons pur intifuner loir Council & advise tiel party.* The first Commissions repealed, because the Commons were not chargeable without a Parliament. And now the King will put it in a Parliamentary Way, by doing it with the Assent of the Lords and Commons.

My Lords, my next Authority is the Parliament-Roll 9 *Hen. IV.* The Cause of the calling the Parliament is for the Safeguard of the Sea, and of the *North* Marches; and *M. 17.* great Mischief shewn for Default of keeping the Sea; and *M. 21.* it is there inrolled by the King's Command, that there was Communication had between the King and the Lords for the Defence of the Realm, and for resisting of the Enemies, who made Preparations on all sides; whereunto sufficient Resistance cannot be provided, unless the King have in his Parliament some notable Aid granted unto him. My Lords, the King hereby acknowledgeth, that he cannot without the Parliament charge the People for the safe keeping of the Sea, that being the principal Part for the Defence there intended, the same with the Summons, that without the Consent of the Commons *negotia prae'd' insecta remanent*, and with the Summons in the Close Roll 23 *Ed. I.* before-mentioned, *Quod omnes tangit per omnes debet supportari.*

My Lords, the next Authority is the Parliament-Roll 4 *Hen. IV. M. 28.* The Lords Spiritual and Temporal, and the Commons, grant the King a Subsidy upon the Staple Commodities, and Ton-

nage and Poundage, and likewise a Tenth and Filteenth, with this Protestation, *Protestant que cest grant in temps avener ne soit point en exemple de charger les dits Surs' ne Commons du Royaume de nul maner del Subsidy ne 10th ne 15th a les guerris descoragees, ou safeguard del Mere sans soit per les volents des Seig' & les Commons de Reaume & ceo a novel grant faire in pleine Parliament. Rot. Parl' 6 Hen. IV. M. 12. and Rot. Parl' 1 Hen. V. M. 17. the same Protestation as before.*

My Lords, that the Charge of the Defence at Sea, and that in a large Proportion, by reason of the before-mentioned Duties, is to be borne by his Majesty, I conceive that it will not be deny'd; that in *Subsidium* and Aid of his Majesty therein, the Commons are not chargeable without their Consent in full Parliament. In these three Records there are not only these Protestations of the whole Realm being made by the Lords and Commons, but likewise the King's Consent by accepting the Things granted, and that without any Qualification of the Protestations. Those Protestations, that they are not chargeable to the guarding of the Sea in a certain Way, as are *10ths* and *15ths*, do much more fail in a way uncertain as here.

My Lords, my next Proof is from the Practice of former Kings in their frequent Demands of Aids from Parliaments for the Defence of the Sea, as well before the Statutes of Tonnage and Poundage, as then and since; Moneys borrowed by former Kings for Ships and Defence at Sea, and Indentures of Retainer for that purpose at the King's Charge; and not only so, but upon Suit allowance in the *Exchequer* for Victuals, Mariners Wages, Anchors, Prisoners taken in Fights *pro defensione*, and also other Things necessary for Shipping when for Defence of the Realm. Whereupon the same Argument may be made in this Particular for the Sea, as was before for the Defence in general.

The First Thing that I shall press, is that of the *Cinque Ports*. Their Service is certain in respect of the Time, but fifteen Days in a Year; and in respect of the Charge, but twenty Men and a Master; and the Number of Ships certain: besides, that they are discharged of Arms for the Land-Service, they have likewise divers other Privileges for the doing hereof; they were free from all Aids and Subsidies granted in Parliament, and are by Privy-Seals discharged thereof. *Hil. 2 Ed. III. Comm'* about the end of the Roll; they are freed from all Tolls, Murage and Pontage throughout the Realm, which bringeth a greater Charge upon the rest of the Subjects.

My Lords, I shall thus offer it unto your Lordships: If they that have these Privileges shall serve but fifteen Days in a Year, how the others that have no Privilege at all, shall do it for twenty six Weeks, as in the Writ?

*Secondly*, Their Charge is certain in the Number of Men and Ships; how the rest of the Commons that are so far from having any Privileges or Recompence for it, as that they do contribute to this Charge of the *Cinque Ports*, shall, as by the way in the Writ, be altogether uncertain in the Matter of Charge, both in the Number of Men and Ships, and of every other Thing.

My Lords, I shall press this further, that when the Ports exceed their Charge in the Number of Men or Ships, Allowance by the King is to be made unto them, as appears by the Quire of *Dover*, and *Pat. Roll'* of 7 Hen. VII. before cited,

that after the fifteen Days they were to be at the King's Charge; so in the *Pat. Roll'* 19 Hen. III. M. 14. because they found forty Men in the Ship, the King promiseth payment for all over and above the Number of twenty. *Banc. Regis Trin. 33 Ed. I. Rot. 22. allowance to Service in Scotland. The Scots*, as appears by *Walsingham*, Pag. 53. and other where, having about that time burnt divers *English* Towns and Ships, and a School-House, with 200 Scholars in it, *Visus Camp. P. 33 Ed. I. pro ingenti Ro. Scotland P. 34 Ed. I. Rot. 37. Comm' le Composition.*

My Lords, if the Ports who are bound to the Defence at Sea, when they have performed their Service, be not compellable to any further Charge, I shall humbly offer it to your Lordships, whether those that be not bound at all, from the same Reason, are chargeable at all.

My Lords, I have now done, and shall not further press upon the Patience of your Lordships; I know that *Nullum tempus occurrit Regi*; the dislike thereof, I shall press it no otherwise than that it is an Interpretation of the Statute made against all Aids and Tailages in general; and of the Complaints of the Parliament of 15 Ed. I. M. 9. 30 Ed. III. M. 19, and 37 Ed. III. M. 9. that those Statutes had not been kept; and further, as it is an Interpretation likewise of the before-mentioned Declaration, Petitions and Protestations against this in particular; and as it is an Execution of them, and putting them into Practice: *Praxis Sanctorum*, as the Divines say, *si interpretis preceptorum.*

The Claims which antiently the Subjects have made upon the Crown, that none of the great Officers of the Kingdom could be chosen but in Parliament, nor that the King had Power to sell any of the ancient Crown-Lands, the Dislike shews, that those Claims of theirs were not legal. *Br.* in his fourth Book *fol. 209.* saith, that *longa patientia trahitur ad consensum.* The Non-Claims therefore of so many Kings and Queens I shall present unto your Lordships, as so many *Le veets* and Declarations of their general Consents, that without Assent in Parliament they could not have laid the like Sels upon any of their Subjects, as is now laid upon my Client.

*The First Day's Argument of Sir Edward Littleton, Kt. His Majesty's Solicitor-General, in the Exchequer-Chamber, before all the Judges, on the Behalf of his Majesty, in the Great Case of Ship-Money.*

*May it please your Lordships,*

**M**AY the 22d last, issued a *Sciri facias* out of the *Exchequer* to the Sheriff of the County of *Bucks*, to warn Mr. *Hampden* to shew Cause why the 20 s. should not be charged on him toward the finding of a Ship of War, with Men, Munition, and Victuals, expressed in a Writ dated 4 Aug. 11 Car. And the Sums and the Names of the Defaulters were certified into the *Exchequer* by a *Mittimus*, dated 5 May 13 Car. to be there proceeded upon for the Levying of the 20 s. according to the Law and Custom of *England*: Mr. *Hampden* appeared, and desired that all the Writs might be read unto him; they being read, he demurred, and Mr. Attorney joined with him in Demurrer, and adjourned out of the *Exchequer* into

into this Court, to have the Advice of all the Judges of *England*.

Before I enter into my Argument, because the true stating of the Question in this and all other things doth exceedingly conduce to the clearing of the thing in question; I shall, in the first place, observe the Writ, dated 4 *Aug.* 11 *Car.* the Ground of this Assess, which was directed into *Bucks*, and others into all the Counties of *England*, and this was for raising Aids for Ships, for the Defence of the Kingdom, with a notable Circumstance, *quia salus Regni periclitabatur*; which being expressed in the Record, is confessed by the Demurrer, and not only so, but testified by the King himself under the Great Seal in the *Mittimus*: and in all Matters, especially in Matters concerning the publick Safety, the King is *Recordum superlativum* & *preexcellens*, as in the great Case of the Earls of *Gloucester* and *Hereford*, 20 *Ed.* I. so that the Question is only this,

Whether the King, in his Judgment, finding the Safety and Preservation of the Kingdom and People, necessarily and unavoidably to require the Aid commanded by the Writ, may not command such Aid by the Writ, for saving and preserving the Kingdom and People?

Having stated the Question, I shall now discard many Things as impertinent to the Question, not that I that am sworn Council for the King, do agree in those things against the King; but that they are not now in Question.

It is not now in Question, What may be imposed by the King upon the Subject for Defence, at their Charge, for Conquest or Conservation of foreign Countries or Territories beyond the Seas.

Neither is it in Question, what may be laid by the King upon his Subjects, for vindicating Injuries done by foreign Princes or States.

Neither is it in Question, whether arbitrary Impositions or Taxes may be laid at pleasure upon the Subject for the mere Increase of the Revenue of the King's Treasure.

Neither, whether in ordinary and common Defence, for Preservation of the Kingdom, tho' necessary, it may be thus imposed.

But the Question is, *Quando Salus Regni periclitabatur*; in truth, the Question is, whether we can be charged *pro Salvatione nostrâ & nostrorû*.

Again, it is not in Question, whether the Subject hath a Property in his Goods, or can lose them without Consent in Parliament. I shall shew that his Property shall remain unto him notwithstanding this Assess; and the Argument on the contrary favours more of Malignity than Reason, to say that by this the Subject shall lose his Property in his Goods.

It was rightly admitted, that the Law of Property must give place to the Law of Nature, for common Defence; the levying of a Debt or Duty publick or private, upon any Subject, is so far from destroying the Property, that it doth confirm it. He hath as good Property that payeth Debts to the King, as he that doth not.

We are agreed *de Re*, the Kingdom is to be defended; no Man in his five Senses will deny that *de personis*, according to the equitable Rule in the Writ, *quod omnes tangit per omnes debet supportari*: we are in this as in the Conqueror's Laws, *sumus fratres conjurati ad Regnum defendendum*. *De persona* whom the Law hath intrusted with the Defence of the Kingdom, *viz.* the King,

we are likewise agreed. The only Difference is *De modo*, whether the right *Media* be observed by the King? And whilst we are disputing whether he may do it, I am told he may do it in Parliament; true, he that may do it every where, may do it in Parliament. And I shall be sorry to hear there shall be no Salvation for the People but in Parliament.

And whilst this was the Question, tho' a great deal of Care was had, and tho' it was done with Advantage and Policy, yet the Bulk and Mass of what was said, shall appear to fall quite off as nothing to the purpose. There were Multiplicity of Particulars, and a pretty Survey of the King's Revenues, no ways concerning the Case, and as much mistaken in it, as he that reckoned without his Host. He hath done like a discreet Gentleman, and went as near the Question as his Client would let him; he hath agreed Cases more prejudicial than this, as thus: It was admitted, that if there be any actual War, tho' there be but light Skirmishes, the King may do it; nay, if there be but a War denounced, tho' there be never a Blow struck, surely then can it not be done when *Salus Regni periclitabatur*? This is the true State of the Question.

Before I go further, I am not ignorant, and therefore cannot but be sensible with what Disadvantage I come to argue this Case, every Man being a Party interested that hears me; but I fear not but that I shall satisfy all Parties, I have Truth to conduct me, *Et magna est veritas & praevalabit*.

The Method whereby I may maintain the Right of my Master, and the Crown, is this; I shall first ground it upon Reason; every human Proposition is of equal Authority, only Reason makes the Difference.

I shall ground my Reasons, *First*, upon the Law of Nature: *Secondly*, of State; and *Thirdly*, of publick Safety, Necessity, and Conveniency. Neither shall it be against the Statute Law, Common Law, or any of the Hereditary Rights and Liberties of the Subjects of *England*, but consonant to, and warranted by all. I shall not only prove it *ex rationibus cogentibus*, or as Lawyers say, *ex visceribus cause*, but *de similibus ad similia*. I shall confirm it by a Beadroll of Examples and Precedents of former Ages, and compare them with this, and see if the Case be altered.

*First*, I shall shew it from the Foundation of the Kingdom, to that which they call the *Norman* Conquest; from the *Norman* Conquest to the time of *Magna Charta*, made 9 *Hen.* III. from *Magna Charta* to the Statute *De tallagio non concedendo*, made 25 *Ed.* I. from the Statute *De tallagio non concedendo* to the first granting of Tonnage and Poundage; from Tonnage and Poundage to this very Day, and that the Petition of Right doth no ways concern the Dispute. I shall confute all Precedents, Objections, Reasons, Inconveniencies, Authorities or Records, of which a great Number were cited, that there shall not be a Syllable left; and in that, *First*, I will either shew that the Record is mistaken, or impertinent and not to the Question: Or *Secondly*, Those that are pertinent, I will either agree them, or take the Force of them away, that none of them shall be able to stand in the way of the King in this way of Defence.

The fundamental Reason is the exact Rule of the Law in the 10th Report cited by that learned Gentleman Mr. *St. John*, *Salus populi suprema lex*. All other Laws positive are subordinate to this Law, and are to be regulated by it. We are not to talk of positive Laws, till we have a Kingdom to use them. *Glanville* saith, *Regiam Majestatem non solum Armis oportet esse decoratam sed & legibus*; Arms to defend us, Laws to protect us. *Braeton* fo. 1. In *Regibus duo sunt necessaria, Arma & leges*; and gives the Reason: If no Arms, the Kingdom would be left as a Prey to the Enemies. And truly it is a strange Imposture, that the Law should so provide, that the King by his Writ can give us a Remedy for White-Acre and Black-Acre for a Clod of Earth, and not be able to give a Writ to defend the Kingdom when it is in imminent Danger. Nay, positive Laws are abrogated by Reason, when the Safety of the Kingdom and People are in Danger. As in *Rome*, in the Night a Man might not come over the Walls, but if an Enemy did approach the City, then it was lawful for him to do it.

In the next place, I take that Ground which is taken in all Laws; the Common-wealth is to be prefer'd before all private Estates. 13 *Hen. III.* fo. 15. the Opinion of *Shelley*. Rather than this shall suffer, the Law will turn some Prejudice to particular Persons, who are but a part of the Common-wealth. 21 *Hen. VII.* fo. 28. 8 *Ed. IV.* fo. 23. 29 *Hen. VIII.* *Dyer* 36. If the Enemy doth approach, for the Defence of the Kingdom one Man may make Bulwarks and Forts on another Man's Soil; and shall not the King keep the Outwarks at Sea, lest the Enemy should land at our Doors?

Again, by the King's Command, Suburbs may be razed: In 88, when three great Land-Armies, 20000 Foot and 1000 Horse, 30000 Foot and 1000 Horse, and 20000 Foot and 1000 Horse were raised. Now lest any Army should land in other Places, Directions were given to keep them from landing; but if they could not keep them from landing, then that they should burn down Houses, and come and destroy all whatsoever, that they might not have Food and Provision to stay there. Where is the Law of Property in this Case, which is so much talked of? The Publick and Private are so nearly connext, that they can hardly be separated; the publick Loss falls immediately, and by Consequence upon particular Persons. Be a Man in what Condition he would be, if a publick Loss comes to the State, tho' it falls on his Wedding-Day he shall suffer in it. It is impossible to save private Fortunes if the publick be lost, *unaquaque amat Comm' bona totius*, &c. And another says very well, no Man repines at that which is done for the good of the Common-wealth. If a Subject then can be enabled without Parliament to make Bulwarks and Forts in another Man's Ground, shall not the King that is *Pater Patrie*, do the like for the Defence of the whole?

My third Reason is to confirm, or rather mind your Lordships, that the Crown hath many Powers and Prerogatives over the Estates of private Persons. May not the King enter into another Man's House, or at least Out-Houses, and dig for Salt-Peter, because it is for the Defence? 11 *Report* fo. 81. *Bowles* Case, and enter into his Lands and dig Royal Mines?

There is *Proprietas Domini* belongs to the Subject, but he hath not the Power over all, without the Property *Ratione Protectionis, Jurisdictionis,*

&c. Private Interest must give place to a common Good; the private Prejudice that any Man hath, is very well repaired by the publick Utility that comes to the Kingdom. Fishermen may justify their going into the Lands of others, to fish, because it is *pro bono publico*. 8 *Ed. IV.* 18, 19. 29 *Hen. VIII.* *Dyer* 36. 21 *Hen. VII.* 28. A Man may pull down the House of another Man, when the next House to it is on Fire; *Jam tua res agitur paries cum proximus ardet*, the private must suffer for the publick Cause. 22 *Ed. IV.* fo. 2. b. 26 *Ed. I.* fo. 45. If two Men are fighting, a Man may part them, and put them into several Houses, because it is for the good of the Common-wealth. If a Madman be abroad, he may be taken, whipp'd and imprisoned, lest he do Violence to himself and others. 22 *Ed. IV.* fo. 45. A Chirurgeon may cut off one Member to save the rest, 22 *Ass. Plewden* 56. Necessity is the Law of the Time and Action, and Things are lawful by Necessity, which otherwise are not; *Quicquid necessitas cogit, defendit*: and the Law of the Time must regulate the Law of the Place in such publick Things. If a Storm arise at Sea, to cast out Goods into the Sea is lawful for the Safety of the other Goods; and they whose Goods are not lost, shall be Sharers with the others. If it be for safety of Lives, all must be cast out, *Duffield's* and *Mowse's* Case; but if the Party hath taken more in than is fitting, and that be the Cause of casting away the Goods, and not the Tempest, there the Party hath his Remedy. 48 *Hen. III.* there was a sudden Summons to be in Arms both at Sea and Land; they plead, that there was not a just time of Summons; the King tells them, that no Man shall excuse himself for want of convenient time of Summons; nay, they shall not alledge the time of Harvest, &c. it being safer to be somewhat diminish'd in Estate, than the Publick to suffer: *Necessitas est Lex temporis*, whatsoever is done for publick Safety is best; other Laws are Tributary, and must give way to the Law of Necessity: What talk we of Formalities, when we are like to lose the Kingdom, when the keeping of the Laws would end the Common-wealth.

But this needs not, for I shall shew that his Majesty hath trod in the Steps of all those Kings who have worn the Diadem, and sway'd the Scepter of this Kingdom.

In the next place, I shall shew divers Exemptions à *Custodia Maritima*, not only antient but late: I will put you one, that is, *King's College* in *Cambridge*, 21 *Hen. VI.* When these Grants are made, it extends to the ordinary Defence of the People, and not extraordinary; no more than if the King grants an Exemption to a Man that he shall not be of a Jury, yet if there be no other, that shall not excuse him. *Matth. Paris* 838, he speaks of Privileges granted to the Archbishop of *Canterbury*, *London*, &c. All are granted in *liberam Eleemosynam*; they are bound to do nothing but to pray, and yet are not exempted from publick Defence, *Nec adeo libertates & propter publicam utilitatem Regni & per ea resisteret bestem*. I shall give Mr. *St. John's* Argument, an Answer by and by; yet by the way, if *Tenures feud' Militar'* did begin as was alledged out of *Britton* in the Conqueror's Time, how was the Kingdom defended before? If Wards and Marriages, and Accidents thereupon did not go to the Foundation of the Kingdom, what was before?

The King is as much Lord of the Sea as Land, *æque Dominus Maris & Telluris*. *Selden* *Maræ Clausuræ*,

*Clausum*, 6 Ric. II. *Doctor and Student*, lib. 2. fo. 51. 5 *Report* fo. 108. It is observed by a great Lawyer, of what Consequence it is to have Power at Sea. The Naval Dominion of *England* is of great Consequence and Use; for it is called *Dotem Regni*. If therefore the Kingdom of *England* consists of Land and Sea, I hope we shall not stand at half Defence, to defend the Land and leave the Sea. *Rot. Parl.* 2 Ric. II. M. 25. It is a great Advantage to have Defence at Sea, else we should have hot War at our Thresholds; while the Sea is open, Men may go to plow, and have the Courts of Justice open.

The Kings of *England* of themselves, by their Prerogative Royal, in Times of War, denounced, intended or suspected, for the preservation of the publick Safety, may seize the Lands of Prior Aliens, 48 *Ed.* III. fo. 10. 22 *Ed.* IV. 43, 44. 14 *H.* IV. 36. And can a King of *England* take the Possessions of Aliens, and cannot he enforce his natural-born Subjects to defend the Land and Sea? God forbid; nay, if we would *parva componere magnis*, we should find in Cases of lesser Consequence, if they have relation to the Defence, he may do it. As the King may lay a Charge upon the Subject for walling a Town, the Reason is, because they have Benefit by it in time of Danger; and hath not all the Kingdom Safety by the Navy at Sea? 3 *Ed.* III. *Aff.* 445. *Westm.* 1. cap. 3. 13 *Hen.* IV. fo. 14, 15. Sir *John Davies* Reports fo. 13. *Littl.* fo. 58. 33 *Ed.* I. 105. *Parl. Book, Walsingham*, 14 *Ed.* I. 60. 7 *Ed.* III. *Pat. M.* 2. And the King did not only command it, but took an Account of it, if it was not done, and took it into his own Hands, *Trin.* 27 *Ed.* I. M. 14. *ex thesaur' Murage of Carlisle* taken into the King's Hands. *Pat.* 14 *Edw.* I. pars 1. M. 14. and the Surplufage paid into the *Exchequer*. And this agrees with the Reason of all Laws, where they have a Benefit they must contribute to the Charge; 10 *Report* fo. 141. out of 44 *Ed.* III. nay for lesser things, as for Paveage and Pontage, the King may impose that for a publick Good, and the King may distrain all the *terr' tenants*, and Land-Owners, to make Contribution *secundum statum & Facultates*.

The King may dispose of the Preparation for Defence, he may compel Men to be Knighted, because it was for Defence. *Rot. Claus.* 19 *Ed.* II. M. 16. *Mat. Paris*, fo. 12. 37 *Westm.* 465. no Man is exempted from Defence, Judges are not exempted, yet Judges are not to fight; yet when it comes to necessity, they are not exempted. *Trin.* 5 *Ed.* IV. *Moyle*, 13 *Hen.* IV. fo. 23. Clergymen compelled; nay a Serjeant at Common-Law sworn at Common-Pleas, is compellable. Sir *John Hulbert* in *Hen.* VII. Time was compelled to be a Knight: 9 or 29 *Hen.* VI. *Rolfe* a stout Serjeant pleaded that he was a Serjeant at Common-Law, and not bound to be a Knight, but he is forced to it. But why talk we of these? there ought to be a Commonwealth before there are Laws, and Private ought to give way to Publick.

Again, imminent Dangers and Perils to a State do dispense with ordinary Proceedings in Law; *inter Arma silent leges*. Nay, if there be but Rumours of Wars, Laws are silent; we must look then to the Kingdom, upon Rumours and Opinions of Wars. *Pasch.* 15 *Ed.* I. *Banc. Regis Rot.* 70. *dors.* the *Scotch* Army they besieged *Rippon*, the People they promise a Sum of Money to them to depart, and give them in Hostages, and that Money should be levied among themselves; when the

War was over they would not do it, but were compelled to it. In 14 *Ed.* II. *Banc. Regis Rot.* 60. The *Scots* besiege *Durham*, but they must have ready Money, they would not take Hostages to depart; while this Peril was on them, they met together and swore, that what should be agreed amongst themselves every Man would stand to. It was ordered they should go into the Houses of others, and take what Money they could find for that Purpose; they took from one Man 60*l.* oh, he was not satisfied, he had a Property in his Goods, he brought an Action, and at *Durham* it was adjudged for him; but when by a Writ of Error it was brought to *Westminster-Hall* into the *King's-Bench*, Judgment was reversed. And in the time of *Queen Elizabeth*, greater things were done upon lesser Occasions.

The next thing is the Ships taken from time to time, and the Command of Persons, Watches, Beacons, shutting up of the Ports, which are the Gates of the Kingdom. 14 or 10 *Ed.* IV. *Pasch.* M. 12. *dors.* 3 *Hen.* V. 18. *dors.* A number of other things commanded by the King for Safety; when the Law considers what may happen, it is not material what doth happen; nay, if there be but a *vulgaris opinio*, it is enough; much more when the King, by his own Judgment, foresees it. 6 *Report* fo. 64. *Clark's Case*, there they are compelled to build a Hall at *St. Albans* for the Judges to sit in, much more in this Case. See *Clegate's Case* for Triumphs; and if for State, shall not the King command for Safety of the Kingdom? *Hil.* 12 *Jac.* *Haroks's Case*, for paving of the Way, he may take Corn out of the Sacks of those that come by.

Again, it is a *Droit Royal* to meddle with War and Peace, Subjects have nothing to do with it. *Rot. Parl.* 13 *Ed.* III. M. 5. 19 *Ed.* IV. fo. 160. or 6. *Brian*, Chief Justice, saith, That if all the Subjects of *England* do war with the Subjects of another Kingdom, this is no War; but if the King denounce it, it is War. 22 *Ed.* I. *Rot. Vaf. con.* M. 16. or 10. they must have a Power from the King: True, *Hen.* VII. brought Military Discipline to the Parliament to advance his own Ends. Sometimes Dangers are fit to be communicated to the People, and sometimes not. The King should best know what is done abroad, who hath his close Council of War; he knows what is done abroad, what can the People tell of these things? and it is very fit that Preparation be made before-hand. It is not good to find the Kingdom without a Navy, especially when such Combustion is abroad. 18 *Eliz.* cap. 23. It is as much to prevent Danger, as to remove it when it is in being. 1 *Ed.* VI. & 1 *Mar.* A desired Provision to be made beforehand, and this hath been the Practice of all Times. *Gervasius Tilburicens.* Black Book *Hen.* Ild's Time. *Danegelt* before the Conquest paid annually; but afterwards, when there was *Bellum*, or *Opiniones bellorum*, *Datum est nobis intelligere, audito rumore, &c.* are frequent in the Records; nay, if there be but *vulgaris opinio*. Ay, but perhaps Dangers will not come; but if they come unawares, where are we then? In the Case between the Earls of *Glocester* and *Hereford*, there was a great Turnult between them about the Marches of *Wales*; and this was contrary to the King's Command, and Exception was then taken; that there was no Record to warrant the *Sciri Facias*; the King did affirm it, *Et Dominus Rex in multis casibus est su-*

*Na' que fuit pur Salvatione del Royalme.*

*pra legem, &c. Dominus Rex est Recordum superlativum & praeexcellens.* It is Treason for any Subject to raise an Army, unless a Town be besieged. *Henry* the Seventh was a wise King, and he had his Spies abroad in times of Peace to see how things went; and his Army prepared; and the Preparation of a Navy does much more Good than the spilling of Blood. And so hath our Navy these two Years done a great deal of Good to the Kingdom; and Honour to the King.

Now I come to the Authorities; but first we shall observe what an Authority shall be in this Case. *First*, I conceive there may be, and are direct and full Examples in Point, for compelling the Subjects at their own Charge to guard the Sea and Land, tho' they are not ruled in particular Courts of Justice; nay, under favour, they are stronger than any Judgment: there were then no need of Suits in the Courts of Justice; if Men would pay, what need Judgments?

*Secondly*, I conceive, that tho' I find not direct Authority in printed Books, yet Records are as good Testimonies, and greater than Reports, that are but Extracts, and second Authorities drawn out of them; and those that concern *Jus Publicum*, come not into ordinary Debate, but remain *inter arcana Imperii*, and those will speak fully.

*Thirdly*, I shall observe that our Precedents are not only in open War and Hostility, but upon Opinions, Rumours, Relations, and Informations of Wars.

I shall shew this in all Ages to Queen *Elizabeth's* time; and if it be not so full in the Years of King *Stephen* and *Henry IV.* who were Usurpers, it's no wonder. If they had had Right to the Crown, as his Majesty hath, they would not have used Compliments, but *Fide & legiantia quibus nobis tenemini.*

Before the Conquest, I find that King *Edgar* had his Tenants, who swore to co-operate with him, *per terram & per mare.* King *Ethelred* he did command, that he that had 310 Hides of Land should find a Ship, and those that had lesser, should find other Arms, and at their own Charge, for every Ship eight Oars, *ut tempore Patris*, that was *Canutus*; and it was *Tributum Classiale.*

My Lords, for *Danegelt*, if those Kings that were called in by the People, did lay this on the People, much more our natural-born King, which shews it to be an undoubted Right; for it is not likely they would put that in practice which was not an undoubted Right. In the Laws of the Confessor by Mr. *Lambert*, and the Black Book in the Exchequer, it was sometimes one, sometimes 2 s. annually, *in usus Maritim'*; and still the Charge lies on the Subject: this shews an inherent Right in the Crown, and it was paid for several Purposes, but still at the Subjects Charge. And to say it should not be so because of the Word *Statutum* (*De Regibus Angliæ statutum*) cannot be, for in those times *statutum*, as in *Cicero*, was a Constitution, there was no Parliament then; and if it now doth alter from that way, truly petty Circumstances, when the Substance is observed, alter not the Case. There must be a Defence, and it was not certain; doth not the Danger *suscipere majus & minus?* and the King may say as *Edward* the First said, nay, I have heard him say, that he hath bought neither Manors, Lands nor Castles with it.

After the Conquest, *Danegelt* is supposed to be released by the Conqueror, because he dreamed he saw the Devil dancing upon the *Danegelt*; but the Black Book saith it was paid in the Conqueror's

time. It was then quitted, till there was *Bellum* or *opiniones Bellorum*; neither was it released by *William Rufus*, or *Henry* the First. King *Stephen* swore that he would release it at his Coronation, but *nihil horum tenuit*; nay, it was paid in *Henry* the Second's time, 4 *Hen. II.* Pipe Roll: and tho' the Name be alter'd; yet other things came in the room of it.

And now I will begin with *Doomsday-Book*, which began in the 14<sup>th</sup> of the Conqueror, and ended the twentieth Year. There were divers Towns and Shires charged, and there we see what Assistance they did give both for Sea and Land. In the Black Book fo. 56. he that waited on the King's Revenue, *liber non erit* for publick things. And in King *John's* time, which was a troublesome time, 5 *Johannis Pat' M.* 17. and *Johannis Claus. M.* 9. they gave a fourth part of their Revenues for Defence; and there was a Command for staying of all Ships, and to repair to a certain place appointed.

And to come to those great things when King *John* was deposed by the Pope; the King of *France* made Preparation, and the King of *England* made Preparation, and all Ships were imbreviated, because he would not put all upon Land-Forces: and so in 88. *Mat. Paris* fo. 312. it is said, the People were *ad liberationes nostras*; but that Voyage was to *Poitou*; if it were *ad liberationes nostras*, yet the Command of the Persons and Ships were the King's; and true, all Mariners were to be paid, and no question immediately at the King's Hand, but it was first raised and levied of the People.

Whereas for Escuage and Knight's-Service, the Summons was *quod interstitis cum equis & armis, &c. exinde proficiscend' nobiscum*; but this was only to come with their Horses and Arms, by reason of their Tenures. And it further appears, that Earls, Barons, Knights and Freemen, and all that had Arms, were to come *ad defendendum caput suum & Regis, & quod nullus remaneat qui arma portare possit*; nay, those that had neither Lands nor Arms, yet all must come, and if they had nothing to maintain themselves withal, they were to be *ad solidatos nostros*, which shews all the rest were not at the King's Charge. 5 *Johannis Claus. M.* 1. *Quia ad arma jurat vel qui honorem poss'*: if the King could command for Land, he may for Sea, for both are one Kingdom. In *Henry* the Third's time there are divers Arrays. 14 *Hen. III. Claus. 7. dorf.* When the King went into *France*, there went a Command to all the Sheriffs of *England* to swear those that staid behind, as they were sworn in King *John's* time; all this shews they were bound to Arms.

In the Statute of the Conqueror, which they stiled a Statute, that there should be no Taillage, Taillage must not be understood of those kind of Aids. That famous Year of 48 *Hen. III.* (and observe when) that Year is not only after *Magna Charta*, but after it was confirmed by him, 20 *Hen. III.* when he was of full Age. 48 *Edw. III. Claus. M. dorf.* Divers Captains and others not able to maintain themselves, the King commands they should be paid. *De Comm' Comitatus.* 48 *Ed. III. M. 2. de pecunia levand' circa tuitionem maris*, the King commands there, that they should come out of their Counties: the Summons is twofold; *First*, of Escuage, which is *secundum debitum.* *Secondly*, General for Defence, *Cum necesse fuerit.* 48 *Hen. III. Claus. M. 3. pro Militib' Sancti Johannis & M. 6. dorf. quod omnes qui nobis & Co-*

*romæ nostræ jure astringant*, &c. all Freemen must do this Service. 48 Hen. III. *Claus. M. 3. dorf. Nul-  
lus excludatur sexus vel ordo.* 48 Hen. III. *Claus.  
M. 7.* the Citizens of London, and the Men of Green-  
wich, were commanded to keep the Thames that  
none should enter *per ora eorund'*; the Men of  
Greenwich plead, that they were distrained upon  
common Summons for their Service in Kent; and  
the King commanded that they should be freed in  
Kent, and join in Defence of the Thames. *Claus.  
48 Hen. III. M. 11. dorf.* to excuse one who pre-  
tended he did attend at another Place with all his  
Strength; this shews that he ought to attend the  
Defence: nay, 48 Hen. III. *M. 4.* when they re-  
fused to come, the King commanded to seize their  
Lands, and take the Profits, and answer them in-  
to the Exchequer. 48 Hen. III. *Pat. M. 5.* he com-  
mands them to attend, setting all things apart.  
48 Hen. III. *Pat. M. 10. or 5.* like Writ to Ips-  
wich, Dover and *per Costera Maris*; nay, when  
some went away when their 40 Days were expired,  
the King tells them, that *propter inopinatos causus*,  
they should stay. *Pat. 48 Hen. III. M. 4.* one  
hundred Marks by the Abbot of St. Austin's for  
Stipends for those at Sea, for Defence of the Sea.  
*M. 3. dorf.* when they would have gone away,  
they were commanded upon pain of Forfeiture  
of all they had to stay. *Bract. lib. 5. fo. 336.*  
*Cum fuer' in exercitu cum Domino Rege*, &c. speak-  
ing there of Law-Suits, what may be a good  
Excuse for Absence, saith, *ex causa necessitatis Rei-  
publicæ causa, aut cum Rege in Armis.* In the Time  
of Edward the First, Statute of Winchester, find-  
ing of Arms began not upon that Statute; but  
how, and in what manner they ought to be rated,  
was there appointed. 23 Edw. I. *Claus. M. 4. de  
contributione faciend'* to Yarmouth, a Command to  
the Collectors of Money *ad Custod' Maris*; and  
he that was in Gascoigne was discharged of Grace,  
but not of Right. *Pat. 23 Ed. I. M. 4. Ita quod  
omnes compellere possitis ad custod' Maris cum necesse  
fuerit.* *Pat. 23 Ed. I. M. 6. pro Willielmo de Stoaks  
fuer' custodes Maritimæ* & *M. 5, & 7. Custodes  
Maris de Fernemouth*, and divers Men taken both  
Archers and Slingers. *Pat. M. 5. de hominibus eli-  
gendis ad arma, M. 7. omnibus & singulis Mari-  
nettis*, between London and the Mouth of the  
Thames. *M. 6. de Navibus capiendis, Claus. 23 Ed.  
I. M. 5. Maritt' faciend' in diversis Civitatibus.*  
*Pat. 24 Ed. I. M. 16. de partibus Maritimis in-  
veniend' & custodiend'.* *M. 6, & 17. de Navibus &  
Galleis inter villam de Lyn & Barwicke.* Trin.  
24 Edw. I. *Rot. 62. Inter B. pro Rege*; there a  
Writ issued to such and such Men to find ten  
Horsemen; one affirmed, that he had some in  
Scotland, and some at Cobham in Kent; the King  
makes Inquiry whether it were so or no, and  
finding he had not so many as he said, commanded  
that he should be distrained, not only for the  
Contempt to the King, but for the Danger the  
Kingdom might lie in for want thereof. 24 Ed.  
I. *Rot. 78.* Power to compel Men to make De-  
fence *juxta facultates*; and the County of Berks,  
which is an Inland County, upon refusal a *Capias  
in manus* was awarded to answer it in the Exche-  
quer, and the form of Wages to be set down.  
24 Ed. I. Lord Treasurer's Remembrancer. A  
Writ from the Barons to assess all the People  
without the King, News being of 10000 Men  
coming. *Claus. 25 Ed. I. M. 26. dorf. William de*

*Ripo.* It was recited, that the People have been at  
a great Charge; and because Winter came on, the  
King willing to spare them, Watches and Beacons  
were commanded to be set up and kept, and the  
People to depart, but to return again upon no-  
tice. *Rot. Pat. 25 Ed. I. M. 5.* Custody of the  
*Maritime* was with six Ships; by which it appears  
that *Custodia Maris*, and *Custodia Maritima*, are  
Terms convertible. The Abbot of Robertbridge's  
Case, 25 Ed. I. *Rot. 70.* the Abbot brought a  
Replevin against one in — that lies in the Con-  
fines of Kent and Suffex. The Officers did own,  
by reason of the War between France and Eng-  
land, the Abbot was assessed three several Years,  
at several Sums, nay, the fourth time, and no  
hurt done; but now if the Writ goes out but two  
Years together (*ob inauditum*) but what doth he  
plead, doth he deny the Writ? no, he pleads he  
was assessed for other Lands; he found a Horse *ad  
custodiam prædictam*, so that the Horse was for the  
Land Service, and the Money for the Sea. I  
conclude as Selden, *aut ad ipsum Mare, aut ad tam  
littus quam Mare.*

After the Statute *de tallagio non concedendo*, *Pat.  
27 Ed. I. M. 3. de Navibus congregandis.* *Pat. 31  
Ed. I. M. 20. Malefacientibus in Marchiis Angliæ*,  
a Commission went out that all shall be in Arms  
against Scotland. In antient Times there was such  
a Connection between France and Scotland, that  
we had always a double War, and therefore could  
not expect all Forces in one Place. In the Time  
of Ed. II. *Pat. 2 Ed. II. pars 9. M. 26. pro Rege  
de Navigio providendo vestris sumptibus faciend'.* I  
see with what Policy Mr. St. John went, and what  
multiplicity of Records he cited, and opened them  
with as much Skill as ever I knew any Man; but  
I desire to go in the Path of naked Truth. I shall  
make it appear to all the World, that the King  
hath done nothing but what his Predecessors have  
done; and that there is not more Testimony to  
prove Littleton's first Case, that the Heir at Law  
shall have his Patrimony, than there is to prove  
this the King's Right. *Pat. 15 Ed. II. M. 15. dorf.*  
all between sixteen and sixty to be ready. *Parl'  
Rot. 5 Ed. II. M. 4.* Ordinance that the King  
without the Assent of the Barons could not make  
War, but that was repealed and damned. *Rot. Parl'  
15 Ed. II. M. 31.* It's said it was prejudicial to  
the Royal Power of the King, and a Blemish of  
his Royal Sovereignty. *Rot. Claus. 17 Ed. II. M. 10.*  
when they were warned to be ready. 19 Ed. II.  
*Rot. Pat. pars 2. M. 6.* to all Bishops in England  
to be ready for the Defence. *Claus. 20 Ed. II. M.  
2, & 7. de hominibus qui domi remanserunt*, &c.  
should contribute to those that went, it was to  
forty or fifty Counties; *Nos considerantes, quod  
justum & consonum rationi non est*, that those should  
expose both Body and Purse for the Utility of the  
Kingdom. In the Time of Edward the Third,  
*Rot. Claus. 2 Ed. III. de Navibus inveniend'*, a Com-  
mand that all Ships of 40 Tuns and upwards,  
with Men Munition and Victuals, should be in  
readiness at their own Charge. *M. 2.* Mariners  
are warned to come *per duos menses*, at their own  
Charge. 7 Ed. III. *Scotch Roll M. 19. de Portubus  
contra adventum*, &c. & *datum est nobis intelligi*, &c.  
it appears it was done *tam per mare quam per ter-  
ram*; and a Direction to all Archbishops to be at-  
tending, and the *Posse Comitatus* to be array'd, *se-  
cundum statum & facultates.* *Claus. 9 Ed. III. M. 13.  
dorf.*



dors. all from 16 to 60, to be array'd *armis competentibus*.

And now I come to that famous Year of 10 Ed. III. Rot. Sco. M. 21, or 33. Men for Land and Sea. Rot. Sco. 10 Ed. III. M. 21. dors. *omnes ex debito defensionem astringuntur*. Rot. Sco. 10 Edw. III. M. 23. *De proclamatione faciend'*, to all Inland and other Counties. M. 20. to Lynne. M. 14. dors. to all, *prout fieri consuevit* to all Counties, *nos considerantes quod ratione legiantie sue astringuntur*. M. 1. dors. through all Counties the like observed, especially *nequimus resistere Correctiones, &c. sine auxiliis vestris*, M. 2. *de Navibus supervidendis*, and in that are the very Words of the Writ. M. 25. *de portibus custodiend'* Inland Counties as well as others, Berks, Wilts, Licesst. Northam. &c. M. 16. *Navibus supervidendis nos advertentes circumquaque aut hæc tempore*. Rot. Alman. 10 Ed. III. pars 1. M. 13. Rot. Claus. 12 Ed. III. pars 1. M. 13. dors. Rot. Alman. 12 Ed. III. M. 33. pars 2. *versus boreales duplici eskipamento*; and to contribute, and those that refuse, to assies them *juxta statum*. Rot. Claus. 12 Ed. III. M. 14. Archers. Rot. Alman. 12 Ed. III. pars 2. M. 6. Order that but one Bell should be rung. Rot. Alm. 12 Ed. III. pars 2. M. 3. *supervidend' quod omnes' ariat' considerantes quod omnes, &c. se & sua exponere astringuntur pro salvatione*. Alman. 12 Ed. III. pars 2. M. 10. because *hostes nostri multitudine non modica, &c.* All that have *Redditus, &c.* were to attend. Alman. 13 Ed. III. M. 1. *de supervidend' vill' Southamp.* Claus. 13. Ed. III. M. 38. dors. A Writ directed *Custodibus terræ maritimæ*. The Abbot of *Ramsfey* lived at *Huntington*, yet distrained for Sea-Service in *Norfolk*. Rot. Claus. 13 Ed. III. M. 14. the County of *Oxon*, an Inland County, and yet commanded *Custod' terræ maritimæ*. M. 17 Ed. III. *Banco Regis* Rot. 15. a *Superfedeas* granted one. 17 Ed. III. M. 24. Wages recovered of a Town for forty Days. Scot. 20 Ed. III. M. 14. *versus Scotos*. M. 21 Ed. III. Rot. 4. *Banco Regis quam, deteine Soldiers pay, ergo, complain*, M. 31. Payment of Wages. Rot. Parl. 22 Ed. III. M. 4. there the Commons were at great Charge for guarding the Sea, and pray Remedy, but not for the Right but for the Excess. Rot. Franc. 21 Ed. III. M. 24. dors. 22 Ed. III. Rot. Pat. pars 2. M. 1. Rot. Franc. 22 Ed. III. M. 5. dors. *pro Johanne Coke*. Rot. Franc. 26 Ed. III. M. 5 & 4. *quia est vulgaris opinio*; and this recited, *nos considerantes, &c. quod omnes per juramentum, &c.* and this was for the Sea, and goes to all Inland Counties. And as they talk of Kings in the Field, Kings use not to go into the Field in Person. Rot. Franc. 34 Ed. III. M. 34. *pro Clero arriando*. Rot. Claus. 33 Ed. III. M. 89. dors. Rot. Claus. 43 Ed. III. M. 1. *de Navibus arrestand'*. Rot. Claus. 43 Ed. III. M. 14, or 13. *de hominibus arriandis*. Rot. Claus. 45 Ed. III. M. 8. *ut intelleximus*. Rot. Parl. 46 Ed. III. M. 20. the Commons complain of their Charge, and say, that the Sea was so noble, that all the World called the King, the King of the Sea, &c. they pray as of Grace, &c. Rot. Franc. 47 Ed. III. M. 20. for guarding of the Sea-shore. 50 Ed. III. pars 1. M. 105. 31 Ed. III. pars 5. M. 25. the Charge is not put upon the People without common Consent. The King is not to do it but for the grand Necessity and Defence of the Realm. In *Richard* the Second's Time, Rot. Claus. 1 Ric. II. pars 1. M. 7. *Scarborough*. Rot. pat. 1. Ric. II. pars 1. M. 12. Rot. pat. 1. Ric. II. pars 1. M. 42. dors. *Beacons*. Rot. pat. 1 Ric. II. M. 13. dors. Rot. Franc. 2 Ric. II. M. 15. Rot. Scot.

4 Ric. II. M. 9. King of *Castile*, *pro compellendo homines pro custod' maritim'*. 7 Ric. II. M. 9. *Totus Clerus apponere manus adjutrices*, Archbishop of *York*. 8 Ric. II. M. 5. Archers.

*The second Day's Argument of Sir Edward Littleton, Knight, his Majesty's Solicitor-General, before all the Judges, in the Exchequer-Chamber, on the behalf of his Majesty.*

*May it please your Lordships,*

THE laist Day I left off at the End of *Richard* the Second: I do not love to repeat, yet in regard the Records that are of weightiest Evidence for the King to Men of Understanding, are perhaps not so clearly understood by every one that hears them, I shall sum up what hath been read. It hath appeared by the Records that have been read, that the Sea and the Land have been guarded by the Commons, when Danger did appear to the King: If the Danger was great, all the Commons, no Age, no Sex, no Order to be spared, all Ecclesiastical Persons bound to defend. If the Danger were less, those Parts nearest unto it to defend, no Reason to trouble the whole Kingdom, when a few will serve the turn: Those that refused were compelled by Imprisonment, Seizure of Goods and Lands. The Writs have expressed fully and significantly, that no Wages ought to be paid by the King; that when there was apparent Danger, it appeareth by some Records, that one Man should not serve for another; Care taken by Commission, that all Equality should be used in making of Contribution; and when Complaint, as 25 Ed. I. was made against it, it was remedied; yet it was not *Ratione Contributionis*, but *violentiæ extortionis*.

This constant Usage of former Kings is of much more Authority and Weight, than scatter'd Judgments here and there, or judicial Proceedings in any Court, and these are not wanting. Notwithstanding, I shall now proceed and come to the Time, wherein so many great Lords did die, and so much noble Blood was spilt in Civil War, from *Henry* the Fourth to *Henry* the Seventh; *Henricus Rosas, Regna Jacobus*. There was not then such great Cause to look to Preparation for Sea, for the War was then in the Bowels of the Land; and the Sea and the Land make but one Kingdom, and the Reasons are the same for both. And for *Henry* the Fourth, when he was newly come to the Crown, it appears Rot. Claus. 1 Hen. IV. pars 1. M. 12. dors. Writs are directed to the Archbishops of *Canterbury* and *York*, and other Bishops; and it recites, that the *French* had prepared a great Navy which was seen on the Coasts, and intended to invade the Kingdom; and that Abbots and Priors should be array'd, *sine deliberatione, &c. & juxta statum & possessionem, &c. & triand' Millenis centenis*. Rot. viagij begins 1 Hen. IV. to 11 Hen. IV. M. 20. *de Proclamatione faciend'* to go against the Rebels of *Wales*, *de arraiatione faciend'* in the same, and Barons assigned to the Custody of the Marches called *Battelfield*; less Reason for this Place of any, for they say there were Lords Marches to defend it. M. 14, 23. *de proclam' faciend'*, to go with the King in Person against *Henry Percy* a Rebel; and there was an Array of Men by the Sea Coasts to resist the Enemies, &c.

and

and in the same Roll, *De hominibus congregandis*, divers other Proclamations, *de hominibus defensibil'* In the same Roll, *De Militibus infra Comit' Lancastriæ arriand'*, upon the Insurrection of the Earl of Northumberland, to bring them to *Pomfret*. *M.* 10, & 27. again to go to the Prince Henry the Fifth. And in 1 Hen. IV. this goes to Northumberland, Derby, Lancaster, by Robert Duke of . . . . to invade the Kingdom. My Lords, Noblemen, Valets, &c. & *omnes homines defensibiles*, between 16 and 60, that was *juxta statum*, upon warning of two Days, which was in *defensione Regni nostri*, to go with the King. *M.* 20. *de hominibus levandis & congregandis*; and of this Nature 4 Hen. IV. *M.* 11. *dors.* & 10. 5 Hen. IV. *pat. M.* 28. *dors. pars 2.* Principal Men joined together to array and muster all over England. This hath appeared by the constant Common Law of the Kingdom.

Before *Part' 5 Hen. IV.* 24. the Commons pray that the Commissions of Array should be considered, and the Judges advised with, and a Commission made for the future, *ad arriand' & triand' qui de Corpore sunt habiles*, &c. *juxta statum & facultates*, &c. & *ad assidend' & proportionand'*, with Power to distrain. 7 Hen. Fitz. Her. Thorney Title Protection, the Subjects of England not to go out of England with their King. This was upon the King's going to aid the Duke of Flanders, Report 7. fol. 7. Calvin's Case, not to go without Wages when they were to follow the King. In Henry the Fifth's time there were great Wars with France; but when the King went, he took great Care that England should be provided for. *Pat.* 3 Hen. V. *M.* 17. *dors. pars 2. de araiatione faciend'*, Care is taken that all should be arrayed, and being arrayed, should continue so arrayed. *Stat.* 1 Ed. I. it provides that they shall not go out of their Counties but upon the sudden coming of strange Enemies; and upon Warning, they were not only to array them, but to lead them to the Sea-Coasts out of their Countries, when and where it should be necessary, *cum aliquid periculum eveniat*, notwithstanding the Statute, which is our Case; nay, our Case is much stronger: And 3 Hen. VI. is *verbatim* with the other. 6 Hen. V. *Pat. M.* 8. *dors. pars 101.* 3 Hen. V. 16. *dors.* this was upon the Threatening of the King of Castile, to all the Counties of England. 7 Hen. V. *Vaga Regis*, divers Privy-Seals to all the Counties of England, to inform the King what able Men of Ancestry there were, *ad defensionem nos in propriis personis suis ad defensionem Regni*, and the Return is *pur defence de son Roalme*. In the time of Hen. VI. *Rot. Pat. M.* 37. *dors. pars 2. de Araiatione faciend'*. 7 Hen. VI. *pars 1. M.* 7. *dors. Rot. Pat.* there is *quia datum est nobis intelligi*, for the Isle of Wight. *Rot. Pat.* 7 Hen. VI. *M.* 5. *dors. pars 1.* 13 Hen. VI. *M.* 3. *dors. de Militibus congregandis & ducendis versus Scotland.* *Pat.* 13 Hen. VI. *pars 1. M.* 13. *dors. Contra Militiam Inimicorum*, a full Command to array all, and to bring them *ad Costeram Maris* and other Places, & *juxta gradus suos*. 14 Hen. VI. *pars 1. M.* 20. 21 Hen. VI. *M.* 40. *dors. Rot. Pat.* 28 Hen. VI. *M.* 11. *dors. Rot. Pat.* 29 Hen. VI. *pars 1. M.* 45. *dors. Rot. Pat.* 37 Hen. VI. *M.* 6. *pars 1. dors.* all Arrays, A Book-Case 28 Hen. VI. 11. *b. pl'* 22. Divers of the Clergy had Churches to be freed from the Payment of Tenths for the Defence of the Kingdom, and the Clergy did grant ii s. in the Pound without Act of Parliament, and this sent by *Mittimus* into the Exchequer. *P.* 26 Hen. VI. *Rot.* 10. & *Trin.* 11. for levying of Money upon *Sciri Facias*. 36 Hen. VI. *M.* 2. *dors.*

*Regis 1. Part.* Array in the Isle of Thanet, and compel them by Distress, *pro defensione Regni.* 37 Hen. VI. *Pat. M.* 1, & 6. *dors.* A Writ to many Counties, because of the great Hurt done to the People by the Sea-Coasts, and the great Preparation to do more Hurt; thereupon Command to train and array all Parts of England, *pro defensione*. And the 39 Hen. VI. *Pat. de potestate* to array the Isle of Wight, being invaded *juxta gradus & conditiones*, &c. 39 Hen. VI. *M.* 9, & 11. *dors.* A Commission to Edward Duke of York, who claimed the Crown, and it was adjudged him. 31 Hen. VI. *Pro araiatione faciend' quaed' person' fil' iniquitatis dissentientes*, &c. therefore is a Command *pro securitate persone nostræ & populi nostri ad invocandum omnes defensibiles* to destroy them. *Pat. M.* 9. *dors. de villa de Stamford ad custodiend'*. *M.* 1. *dors.* a Commission and Command given to Edward Duke of York, Ed. IV. which gave Power to raise Men and Money at Bristol, Hereford, and other Places; which was cancelled, and other Commissions given in the Room. In the Time of Edward IV. *Rot. Pat.* 1 Ed. IV. *M.* 8. *dors.* for reducing Henry the Sixth's Power, *Congregare* all the People. 1 Ed. IV. *M.* 8. *South-Wales* on the Marches 1 Ed. IV. *Scot. Rich.* Duke of York, *Custos West-Marchiæ ad omnes homines defensibiles*, in Cumberland and Westmorland between 16 and 60, *sint prompti in defensionem Marchiarum*, &c. against Percy Earl of Northumberland. *Rot. Scot.* 10 Ed. IV. there are *Custodes generales vers. Scot.* for arraying all Men as there should be Cause. *Pat.* 3 Ed. IV. *M.* 3. *dors. continue parati ad defensionem persone nostræ & Regni.* 8 Ed. IV. fol. 23. a Book-Case, a Subject hath Power to make a Bulwark in another Man's Ground; the King hath as much Power over all the Kingdom, as any particular Man to make Defence. 9 Ed. IV. *Pat. M.* 11. Arrays. 10 Ed. IV. *Pat. M.* 13. Arrays in *salvationem Regni*, when he was like to lose his Kingdom. A Commission to raise Power against his great Adversary and Rebel Henry VI. who did lately enjoy the Crown by Usurpation. 22 Ed. IV. *Rot. Pat. pars 1. M.* 2. *pro Conducto-ribus & Waffatoribus Piscatorum*, and at the Subjects Charge. *Pat.* 1 Rich. III. *pars 1. dors.* against the Duke of Buckingham *quocunqu' Comitat'* and this *juxta statum & facultates*. In Henry the Seventh's Time. Henry VII. was a wise Prince, his Majesty's Progenitor as well as his Predecessor; he staid not till he saw the Tops of the Ships, or the Drums beat; he provided for the Safety of the Kingdom betimes; when the War was denounced between Charles King of France and the King of the Romans, tho' he was allied to both, he prepared to defend his Kingdom. *Rot. Pat.* 1 Hen. VII. *dors.* a Command to the Sheriff to make Proclamation throughout all England, That because we are informed of the War between Charles King of France and the King of the Romans, and great Hurt may happen to this Realm, and the Subjects thereof; commanding all Subjects to keep Watch and Ward upon the Sea-Coasts, and all Beacons to be made ready to be set on Fire, as in old Times, and this after Tonnage and Poundage was granted to him for Safety: and I am sure there are greater Wars about us now, than there were at that Time. *Rot. Pat.* 7 Hen. VII. *Intus de potestate commissa* to the Earl of Surrey to go to conquer France. 7 Hen. VII. *cap.* 1. a Statute in Print. 8 Hen. VII. *Rot. Pat. pars 1.* a Command to Richard Fitz-Hugh and others, to keep all in Array for Defence against Scotland, which intend to invade the Realm,

*ut informatur. Stat. 1 Hen. VII. cap. 16.* every Subject is bound by his Allegiance, to assist when need requires, In the time of *Hen. VIII. Rot. Pat. 4 Hen. VIII.* a Proclamation to the Maritime Counties to be in a readines, considering the *French King* had in readines a great Navy to enter this Kingdom the next Month ensuing, &c. and certain Captains deputed to lead them; and they were all to be in a readines at an Hour's Warning upon their Allegiance. *Rot. Pat. 4 Hen. VIII.* the same Commission to *Boucbiers, &c.* in Latin, 14th of *Hen. VIII.* which is not in this Roll, but a Book of Proclamations; for before *Edward the Fourth's* time all between sixteen and sixty were to be ready at an hour's warning. 15 *Hen. VIII.* the Inhabitants of *Stamford, Nottingham and Salop, &c.* to attend the Earl of *Surrey* upon an hour's warning. 30 *Hen. VIII. Pallace treasur' omnes homines ad arma, to be ready ad serviend' nobis in Scotland, as need shall be. Stat. 35 Hen. VIII. cap. 13.* Remissions of Loans, reciting and considering, *est Duty & honor del People,* to assist their King in Body, Goods, Lands and Substance in his Wars; and there it was only for offensive Wars. *Rot. Pat. 36 Hen. VIII. pars 2. 37 Hen. VIII.* in Mr. *Moyle's* Book. 4 & 5 *Phil. & Mar.* Commissions of Array to go to all Gentlemen, but now but one Lieutenant of a County; and that Power which the Lieutenant now hath in *England,* was the same with the antient Commissions of Array in Substance, for it is no new thing. These are in force by 5 *Hen. IV.* and Common-Law in Queen *Mary* and Queen *Elizabeth's* time; and they did not go by the legal Array, but by the Power of the Council-Board. 3 & 4 *Phil. & Mar. 1557.* Council-Board. *Calais* was besieged on the sudden, the Enemy making Pretence of going into the Low-Countries, there went presently a Command to the Lord *Warden* of the *Cinque Ports* 5 *Jan.* to make Proclamation in *Kent,* that all from 16 to 60 should repair to *Dover* to save *Calais,* upon pain of Death. 8th of *Feb. 1557.* Letter of Thanks given to Sir *John Edgecombe* for diligently mustering 1000 Men. 19 *Sept. 1558.* *Northumberland* served without Wages. 1 *Sept.* To continue Watch. 8 *April 1558.* *Whitty poole* for not finding *Demy-lance,* is called to the Council-Table. These are to shew what Proceedings there have been in former times. *Rot. Pat. 7 Eliz. pars 5.* A Commission to muster all Men against *Scotland.* 11 *Eliz. Rot. Pat.* tho' not on Record, yet in a Book in the *Crown-Office* in the *Chancery* with Mr. *Willis:* A Commission to array Men, and to provide all things necessary, *prout Necessitas, &c.* and to inform themselves what Armour they had, and this to be done for our better Service: but with those Commissions there went Instructions, amongst which, observe this one; 'We require you to consider how necessary this Service committed to you is at this time, for the Benefit and Safety of our Realm, wherein we think the more earnestness is the more requisite, because of our Subjects long continuance in Peace, and the notorious being in Arms of our Neighbours about our Realm.' If these Times be not worse, I leave it to any indifferent Man's Consideration. 27 *Eliz. Watson Roll.* A Warrant to the Lord Chancellor to make Lieutenants and Deputy-Lieutenants, which are the old Commissioners of Array turned into *English.* And in 1588, when that great Armada came, all the Realm was in Arms, and at the Subjects Charge. 31

*Eliz. cap. 14, 15.* the Subjects granted a Subsidy, in Consideration of the Queen's Charge. And the Subjects were then at great Charge, both for Land and Sea, and she took it by the Power of her Council-Table. The City of *London* was desired to find ten Ships, and of themselves they desired to find twenty; this was the Affection of those Times, they did not dispute but were ready to obey. 28 *April 1558,* a Letter to Sir *Robert Wingfield,* whereas divers Towns in *Suffolk* were charged to fit out a Ship, and that divers were poor and could not, a Command that the richer should do it. A Letter to the Earl of *Huntington,* that *York* should contribute to a Ship charged on *Hull.* A Letter to other Towns to contribute to *Colchester;* they refused, yet were compelled to do it for advancement of so necessary a Service. The Clergy in eighty eight joined, and the Archbishop was Captain. And there were Letters for demolishing of Suburbs. *Statute 3 Jac. cap. 6.* where the Charge of the People in Queen *Elizabeth's* Time was remembered, *London* was charged, and Foreigners and Strangers were charged also to contribute, for that the Charge was common. In 1588, 3000 *l.* Conduct-Money levied for the Earl of *Bath;* they did not stay here till the Tops of the Ships were seen, but they made Preparations in 87. In 1599, great Troops were assembled at *London,* for Defence of the Queen, when the Tumult was about the Earl of *Essex;* and in 1598, the Charge being common, the Charge ought to be borne in common: Nay, the Inns of Court were charged with Arms; upon the apprehending the Earl of *Essex,* a Letter went to the Benchers of the *Inner-Temple* for that purpose, and all the Gentlemen found Arms. Amongst these Letters great Levies of Horse and Foot at the Country's Charge. And where she would not have their Persons, she had their Purfes and Power to extend accordingly. 1595, Amongst the Papers of the Lord *Nottingham,* the People set forth a Ship at their Charge; we have the Letter only to shew they did it, and how much each Man did contribute. In King *James's* Time there was not much; the Times were not only peaceable but pacificous, his Motto was *Beati Pacifici.* 10th of *July, 2 Car.* A Proclamation issued, that all People should make speedy repair to several Places, and should continue during the Danger. And for a binding Authority, 12 *Car.* the Resolution of all the Judges under their Hands, and inrolled in every Court at *Westminster:* a Man should have thought that that should have given Satisfaction, it would have done so in former Times. And truly, that the King hath done nothing more, but what the Kings of this Realm have done before, is most apparent to all those who will read our Law-Books. How often have the Judges been assembled by the King's Command, both in the outward and inward Star-Chamber, and there asked Questions? 2 *Rich. III. fo. 10.* 8 *Hen. VIII. 190. b. 101.* the King was there, and reasoned there. Is this a new Thing for Judges to deliver their Opinions? But his Majesty hath been pleased likewise to give way, that it might be brought to a publick Debate in a judicial Way; he hopes there are very few that oppose it, do it out of any averfeness from the publick Service, but to satisfy themselves, and so to submit.

To answer Mr. *St. John's* Argument; before I come to answer in particular to what was objected by this learned Gentleman, who hath taken a great deal of Pains, and made as much use of it as was possible for a Cause of this Nature to bear; I shall in the first place give a general Answer.

I say, that the Testimony by Records given on the other side, whereof many are vouched, which I am glad to hear of; and that Men look into a Business of this Nature. To make such a Search is for the Honour of the King, that there is, according to Law, the freest Access to the Records, that ever was in *England*;

\* *The Lord of Holland.* and that great \* Lord doth know

that the King commanded with his own Mouth, that free Access should be to the Records in this Business; and I appeal to the Officers that keep the Records, whether I did not only deliver that Command from the King unto them, but desired them my self to shew to the other Party whatever I had.

I say, these Records, take them at the best, they are not of such Weight in point of Right, as the other are which are for the King; for if a King shall voluntarily, and in case of his Subjects, or special Grace, do any thing, yet I conceive that is not of such Weight, as when he produces a constant use of compulsive Power from the Crown, and obey'd by the People: for if any of the Kings have spoken in gentle Language, as King *John* when he was deposed from his Crown; I conceive that will not be so much as gentle Words used in the Writs.

I shall answer particularly to all the Records that have been cited: it doth much concern the King, that this Argument be answered fully.

The first Thing that was said, was, that to seize Goods without Suit or Cause, is void in Law; but this was not used as an Argument, but an Introduction. But in the next place, he comes to a high Objection, that in his Majesty there is *voluntas interna*, and *externa*; his inward Will which he doth declare in his Chamber, and his legal Will, and withal, that the King cannot judge himself, 2 *Rich. 2. fo. 10, 11*, which was grounded upon that Book-Case.

The King cannot judge in his own Person, but hath left it to your Lordships, that are sworn to do equal Justice between him and his People; but to say, that the King cannot judge himself, I question. Can that be wanting in the Fountain, that issues in the Stream? that I utterly deny. Is it not said, *Coram Rege* in the *King's-Bench*, and in the *Star-Chamber*, *Coram Conciliis nostris*? This is a new Doctrine; and shall not the King judge? Did not *Ed. 4.* sit in Person in the *King's-Bench*, in a Trial of *Rape*? and that famous Justice *Popbam* sat at the King's Feet, and other Judges at the King's Side, and therefore called *Justiciarii a latere Regis*? Sure he forgot King *James*, who adjudged two Cases in the *Star-Chamber*, that of *Bellingham's* and Sir *Tho. Lake's* Case. The Book doth no way warrant his Inference; the Book doth say, the King shall not judge, but saith, that if a Man be convicted before the Judges, the King shall not set the Fine, because he heareth not the Case. This no way concerns our Case.

That no Law can be changed but by Act of Parliament, as a Naturalization, and a Legitimation; nay, no Writ of Error but in Parlia-

ment, till by the Statute of 27 *Eliz.* and that the Parliament is *Curia Regis*, and cited 34 *Hen. 8th Crompton's* Jurisdiction; the King is at no time in such State-Royal as in Parliament: All that was made out of this, was, that this was a Change of the Law, *viz.* the Writ for Shipping.

We believe it is so far from being a Change of the Law, as that it was the Custom of all Ages in former Times. Now he says the Parliament is the highest Court, and the King is there at highest both for Magnificence and Power; but yet out of the Parliament, the King is King of *England*. It doth not follow, because he may do it in Parliament, that therefore he can do it no where else; and it is to prove a Comparison, to say, that the King should have the ordering of War as a Generalissimo over his Subjects and Vassals; all the Generals have their Power from him.

Oh! but the King hath Provision for War.

This is but a cunning Insinuation, to make a Survey of the King's Revenue, and to insinuate with the People; and he begins with Knight's-Service, Tenures, and these in dangerous Places, as *Dover, Durban, Chester. 35 Hen 6. Britt.* that the King should not only have his Wards Lands to breed them up, but to maintain the Wars in the mean time; and that Knights-Service 37 *Hen. 6.* were instituted for ordinary Defence as Horsemen. And because the Kings of *England*, out of their Care to have Men trained up, had Horsemen to follow them, that therefore they shall have no Aid when the Kingdom is in Danger, is a strange Inference; shall we have no Footmen, no Archers, no Slingers to be used in War, no Guard at Sea, because he hath some Tenures of Horsemen? This doth not discharge the Subject; this is but for forty Days, and was instituted to suppress the sudden Incurfion from *Scotland. 19 Rich. 2. Guard. 165. pl'* Tenure; they do restrain particularly Escuage and Knights-Service to *Scotland* and *Wales. 22 Ed. 1.* for *Gascoigne* afterwards discharged, but not for Mr. *St. John's* Reason. *Rot. Claus. 5 Ed. 2. M. 27.* these were discharged of Escuage, because the King was not there in Person, and because it was extraordinary. *Rot. Scot. 5 Ed. 1. M. 27.* that Record doth shew the Kings of *England* did conceive that they were somewhat less than Enemies that refused it; for foreign Service I never meant to object it.

Then he saith, that Escuage is to be assessed in Parliament, though for the Defence of the Kingdom.

If that were the proper Question, I could shew when Escuage was not by Parliament, for it was by another Reason. It was altered by an Act of Parliament, 17 *Johannis Statute de Running Mead, Nullum Scutagium*; for it was not so before.

Also it concerneth the Subject as well as the King. 9 *Hen. 3. cap. 37.* The true Reason of assessing in Parliament is this, other Men were to have Escuage as well as the King; now it is true that Rule, No Man shall be Judge in his own Case, but therefore not the King; that holds no Proportion: and Kings are said to do no Wrong. The true Reason why it was assessed in Parliament, was, because the Lords would take too much. This is from the Business, I pass it over.

Then he alledged, that the King is in actual Possession of the Wards.

That they should go towards the Maintenance of the War, he cannot shew any Authority worth the valuing, neither *Brañon* nor *Britton* hath any such Thing; for 35 *Hen. 6.* the Words are *purco, &c.* The Argument will be but thus; because the King out of his especial Care, out of his own Land provided some Tenures for that Purpose, therefore he shall have nothing from the Subject. The King did never give, nor could give other Mens Lands for those Tenures; for it is most apparent, the *Normans* came not in by Conquest. *William* was no Conqueror; for after he came in, Men did recover the Lands which were their Ancestors. That was the Wisdom when *Henry* the Fourth took the Crown by Conquest, when he would have alter'd the Laws; No! take our Laws, and take our Lives. This is an Argument no way conducing to the Purpose, because he hath some Horse by Tenure, therefore neither Foot, nor Provision for Sea-fight, nor Trained Bands, because Provision is made by Tenure. This is contrary to all Reason and Experience: What Obligation hath the Soakman and the Plowman's Tenures, what do they pay to defend them? no Consideration for it; these are rather Insinuations than Arguments.

Then it was said, there were like Tenures for Sea, and he cited two or three; one to hold the King's Head at Sea, and some such like, as if two or three Tenures were like to defend the Sea.

It was also said of the *Cinque Ports*, that they have many Privileges allowed them for that Purpose, 13 *Ed. 3. Par' Roll.* 11.

Is the *Cinque Ports* Service a competent Provision to defend a Kingdom against Hostility? I know no Reason but the whole Body should defend itself. 13 *Ed. 3. M. 9.* it appears expressly, that the Commons made Defence at their own Charge. No Man can be discharged of keeping a Thing, that he did not keep; so because the Subject is said to be discharged, is an Argument that he was charged. That of the *Cinque Ports* is not for the Defence of the Kingdom, but for Intercourse of Merchants, not *Quando Salus Regni periclitabatur.*

Then they object, that Tenures in ancient Demesne were talliable without Consent, and their Service for the King's Provisions in their House.

No Reason that should excuse them from the General Service; for tho' it be true, that the King's House employs such Tenants, yet the Kingdom must be supported by them and the rest of the Subjects together.

Then he did object, there was another Way of Supply of extraordinary Means, as Mines in other Mens Lands; and here he remembered *M. 3 Rich. 2. Prerogative Comm'*, difference taken between annual and casual Revenues for Defence.

Then he objected, *Rot. Parl' 6 Rich. 2. 11, 42.* that the King would live of his own Revenues, and that the Mines, &c. should be for the Defence of the Kingdom.

*Onslowe*, who argued the Case, said that the King was the most excellent Person both at Sea and Land; therefore the Royal Fish at Sea, and the Gold and Silver Mines at Land, were given to him, because he was able to give a Stamp on Money. And so 2 *Rich. 2.* they of *London* pray'd that the King would not put them to Charge, but live on his own, and so your Authority vanisheth into Smoak.

The King must live, forsooth; of his ordinary Revenues. *M. 3. Rich. 2.* which expresseth, that the King at that time would do so; that the King, by Advice for Salvation of the Kingdom, would use these things given unto him; that indeed was a reasonable thing for that time, but must it be now turned for a Necessity?

6 *Rich. 2. M. 42. pars 42.* that good Government be about the King; then they petition that he would live upon the Revenues of the Crown, and that all Wardships, Releases, Marriages, &c. should be for the Defence.

The King is very willing to do and ordain in this Case, as by the Lords of the Realm may be thought best for his Honour and Profit; this is not a granting of the thing, but a referring it to his Lords, at best it is but a temporary Desire!

But oh! he hath the old Customs, and Petty-Customs, Tonnage and Poundage; of the Legality of taking of it he will not speak. If the King doth impose it on the Merchants, he needeth not to take it of his other Subjects. Duties to the King in this Year, came to 300,000*l.* and that Tonnage and Poundage was granted for ordinary and extraordinary Defence. 3 *Rich. 2. 5 Rich. 2. 1 Mar.* granted on Condition, that by the Statute of *Winchester*, they were bound to have Arms, and no such Statute for the Sea.

I shall answer all this; but for Tonnage and Poundage, I shall refer it for a particular Place. They say, the Courts of Justice are maintained by the King, the King hath a Profit thereby, but the Maintenance of them cometh out of the Subjects Purse; and the First-Fruits were for the Defence of the Faith, that no Heresy should creep into the Church. Therefore, because the King is Lord of the *English* Sea, he must defend it at his own Charge, and not command the Body nor Purse of his Subjects towards it. A pretty Argument! He saith, the King hath the old Customs, which are the ancient Inheritance of the Crown, and so for Petty Customs, and that these must go for the Defence of the Sea. See a Judgment in the *Exchequer*, in *Edward* the First's Time; search into the Fine Roll 3 *Ed. 1.* and see for what Causes these old Customs were. It was never said till he spake it, the old Customs or lesser were for this Purpose. And for this saying that the Statute of *Winchester*, 13 *Ed. 1.* doth enjoin keeping of Arms, and thereupon all Defence comes, that Statute was repealed by *Philip* and *Mary*, and set a foot by King *James*, and again by him repealed. I shall shew before the 13 *Ed. 1.* many Records for Land-Service long before; for that Statute doth only set a Form of Arms, and is not the Beginning of Arms. So for the Objection of the King's Revenues, be it more or less.

Now I shall come to Tonnage and Poundage, the darling Argument; which I affirm was never given nor taken, of itself simply, on extraordinary Defence; I have seen all the Grants of it: it may be when there have been Wars abroad, and then the Subjects in Parliament have given Tonnage and Poundage with Tenths and Fifteenths, they have been all said to have been for the Defence. Tonnage and Poundage hath been given and taken merely for an Intercourse of Merchants; and in that Sense the King said, we do and must pursue those Ends for which it was granted to the Crown. I shall make that appear by Reason, and out of the Grants themselves and other Authorities.

If Tonnage and Poundage were merely for the Defence of the Sea, how was the Kingdom to be defended before in the Time of the Saxons? At the first it was 6*d.* a Year, then to 2*s.* and 3*s.* for Tonnage and Poundage; then 3*s.* upon a Ton of Wine, and 8*d.* a Pack on Merchandize, that was all for Tonnage and Poundage, the rest was for old Customs. If this was for Extraordinary, how was the Kingdom defended when this was given for half a Year? Truth, it was for Defence of the Kingdom, that is, with relation to the Intercourse of Merchandize; the Recital 1 *Jac.* saith, it hath been taken time out of mind. Hath Tonnage and Poundage been given time out of mind? Then it was before *Richard* the First's Time: *H. VI.* he had it for Life, the Statute doth express it as plain as may be; Time out of mind is beyond the Memory of any Man living. The very Interpretation of the Statute explains it to be for the Safety of the Sea, and Intercourse of Merchants. In all Ages before the granting of Tonnage and Poundage, the Kings, upon a general Defence, have had other Aids than this by their own Power. Ordinary Charge for an ordinary Defence.

I could have given a legal Answer, that it was not given unto the King; no Act of Parliament for it.

Yea, but it is taken *de facto*. Shew your Instruments then by which it was taken; that had been a general Answer.

But I shall carry the King's Honour along with his Power and Practice: *Rot. Franc. 2 Ric. 2. 7 Hen. 4. M. 23. Rot. 11.* Tonnage and Poundage granted to Merchants to guard the Sea for Intercourse of Merchandize; which sheweth plainly it was for that Purpose. To put it without all manner of Question, 6 *Ric. 2. M. 8. Franc. Roll. pars 2.* Merchants and Mariners had *Custodia maris*, and the King granted them 6*d.* a Pound: Doth any Man think that he would trust the Safety of his Kingdom with Merchants and Mariners? It was merely for the Guard of the Sea for Merchandize; express Exception in the very Grant, that they should not be bound by this to help against Invasion of Enemies, unless a Royal Power come, *regali potestate excepta*; therefore this was no extraordinary Service. 7 *Hen. 4. Rot. Parl.* is in the same manner. And in the *Close Roll*, that the *Custodes maris* should put there a lawful Power for the Safeguard of the Sea against the Enemies of the King, except a Royal Power; then Notice to the King, so it must be understood merely for Intercourse of Merchants. I can shew you a Book-Case for this, 9 *Hen. 6. 12. Quer. Case Title Custom. Brañ. 26.* he saith, That Aids and Subsidies are granted to the King, to the Intent that the King, by his Admiral, should guard the Sea, to the end that Merchandize may pass and repass; not a Word of the Defence of the Kingdom. And in *Anno 11.* the King was at great Charge with his Navy; cast up the Accounts of the Sea-Duties, and then it will appear there is not left to him a Penny for the Defence of the Sea. Impositions and Prizage of Wine was to furnish his House, and not for Defence of the Sea. Not only upon this, but there was an ancient Writer that wrote the *Doctor and Student*, whose Name was *St. Fermine*, who wrote in *Henry* the Eighth's Time; he tells you, *lib. 2. cap. 15. fo. 153.* The King, out of the old Customs of the Realm, as Lord of the Narrow Seas, is bound twice in the Year to scour the Seas, but not against all outward Enemies, but only to

put away Pirates and Petty-Robbers. History of Tonnage and Poundage. 25 *Ed. 3. Parl. Roll. M. 11*, the Commons did pray, that 6*d.* of the 2*s.* a Sack of Wool, and of a Ton of Wine granted, that the Merchants might have safe Conduct over the Sea, if it would please the King; the Merchants for that would make their own Conduct. All the Rolls go in that manner. 3 *Ric. 2. 2 Hen. 4.* and they cannot shew that Tonnage and Poundage was ever granted for extraordinary Defence, unless for some great Defence.

Next he alledged that Sea-Duties were born by every Man in the Kingdom, and that *secundum statum. 22 Ed. 3. M. 4. Parl. Roll.* which says it was in Charge of the People, & *niemy des Merchants.*

All Men must bear proportionably their Share in the Charge of Defence; what Consequence is this? because the first or second Year out of the Subjects Purse for their Commodities, therefore their Lands shall be discharged in Cases of extraordinary Defence.

Oh! say they, but this *may be* done by Parliament.

By a *May-be* a Man may answer any Argument; but a *May-be* will never answer a Bill. 23 *Ed. 1. Rot. 3. dorf.* the Writs were in *October*, the Parliament at *St. Martin's* in Winter. In that to the Archbishop of *Canterbury*, the King doth but a little compliment with the Clergy, and telleth them he knoweth what Dangers were abroad; the Business of Shipping was done before the Parliament, so the Parliament might consider of it afterwards. That it was done afore, appears; this Parliament was not held at the Day, but the King doth prorogue it till after *St. Andrew's Day*, because he was busy in preparing his Shipping; so they came about Shipping when it was gone to Sea before, for the Writ of Summons was the 1st of *October*, the Day of Meeting after *St. Martin's*; that to the Archbishop was the 31st of *September*; the Ship-Writs *Aug. 28.* and *Sept. 31.* then the rest, the 3d and 6th of *October*; but all long before the Meeting of the Parliament, and so all grounded upon [it may be.] And to say that the King, because he did a thing voluntarily, therefore he must be necessitated to it, I know not what Argument it is. *Henry VII.* indeed did bring things to Parliament for the Advancement of his own Ends; did *Queen Elizabeth* send any of her Commands out of Parliament? and yet the Subjects gave her Subsidies.

24 *Ed. 1.* Summons there for the Clergy to come if the Truce did not hold with *France*.

I think it not fit at all times, when it standeth upon Intelligence, to communicate it to the whole People. 26 *Aug.* Summons to Parliament, divers Writs in *February* and *April* before, no Money granted in these Parliaments; therefore to tell us it might be by Parliament, is a poor Argument.

*Walsingham* saith, Allegiance bindeth the King to Protection, as well as it doth the Subject to Tribute.

The Subject hath a double Protection from Injury and Wrong, in Times of Peace by his Laws, and in Times of War by his Power: Must this be done by the King's single Person? No, it must be done by the Bodies of his Subjects at their Charges. Indeed it is fit that particular Soldiers should be paid.

Oh! but they tell us, that *Fortescue*, Chief Justice of the *King's-Bench*, to shew the Law of *England* to be better than the Law of *France*, saith,

that nothing could be taken from the Subjects but by Parliament.

That is in the ordinary Way; doth he say, that no Man shall contribute to defend himself in imminent Danger? *Ne verbum quidem.* 27 Ed. 1. M. 7. Pat. there the King saith he did not buy Lands, Manors, or Castles with it, but did it to defend the whole Realm; no more doth our King, but only to defend himself and the Kingdom.

In 33 Ed. 1. Rot. 10. It is objected that a Clerk sued for his Salary, and had it allowed him: And the King supports his Courts by the Fines.

But they came from the Subject. And may not the King give a Salary when he pleaseth?

14 Ed. 3. cap. 1. and this were prest to prove, that Aids, tho' granted in Parliament for Defence, should not be brought into Example.

These were not to be spent for the Safeguard of England, but Scotland and France; and so it comes not to our Case.

48 Hen. 3. When the Tenants came with greater Charge than their Service required, *non trabatur in exemplum.*

True, if Tenants by Knights-Service at that time did no greater Service than they were bound in time of Danger, it is but Reason that it should not be drawn to be yearly, to make their Tenures higher.

*Plowden* fo. 315. *Wiseman's Case.* A Covenant to stand seized to the Use of the Queen, in Consideration she is Head of the Commonwealth, held no good Consideration to raise an Use, because there wanteth *quid pro quo*; and the King, *ex officio*, is bound to do that.

Under my Lord *Coke's* Favour, it was not in the Case. The Case was upon divers good Considerations, and he put this in by way of Admittance. I can shew when this was declared to be no Law.

Next, they alledge, the King is in Possession of the Service of the *Cinque Ports*, and of Tonnage and Poundage, and this appears not to be expended; and of other Duties for the Defence of the Sea, and *Lex non facit scilicet.*

*Tempus belli*, I reserve for another Place, for that is one of the three Things considerable in this Argument. That learned Gentleman, Mr. *St. John*, did confess that (as Necessity requires) when the Safety of the Kingdom is in danger, the Subject is bound. If it were material to make it appear whether any thing were spent or not, it should have been pleaded at the *Exchequer*, if he would have taken any Advantage upon it.

But admitting they had been all expended, yet the Property of the Subjects Goods, saith he, cannot be altered out of Parliament. He did agree the Kingdom must be defended, and did yield, that for the Manner of it, it did not belong to the People. 6 Ric. II. 2 Ed. I. Men and Money belong to the Wars; the Commons did acknowledge it belonged to the King for ordering in all times; the Caution of former Ages was to demand it in Parliament.

We shall shew in all Ages, the King did it without Parliament. This is a pretty thing, that the King is to direct the War, and yet shall have neither Men nor Money without asking his Subjects Leave. And for that of Property being taken away, in the opening of my Argument I cleared it, I shall not trouble you with Repetition of it.

Oh! but they tell us, the King hath borrowed Money to spend in the Wars, and promised to repay it, and that without a *Salvo* of his Right;

this is an Argument they think worth Consideration. 48 Hen. 3. 16 Pat.

I know no Law that barreth the King from borrowing of Money, as he hath Occasion. Is it not of Necessity that the King must borrow, notwithstanding both Ordinary and Extraordinary? Must the King carry Millions about him? His Occasions may be such as he must borrow, and also fit it is that it should be paid again. Doth any Man think, that if the King doth borrow 10000*l.* of any particular Man, he must not be repaid again? 48 H. 3. M. 15 or 16. Power is given to the Earl of *Leicester* to resort to the City to borrow Money. Great Reason, because it is the Chamber of the King.

But the King's Money not coming in, he desireth to borrow so much of the City, and it shall be paid when the other Money cometh in; the End was for the Defence of the Kingdom.

But that therefore the King cannot command Aid from his Subjects, because he borrows of his Subjects, is no good Argument.

Then he saith, the Law delights in Certainties, as in the Aids *pur fle marier*, and to make his eldest Son a Knight; these are certain, 25 Ed. 3.

All Defence is uncertain, till we know the Offence; certainly he must be a wise Man that can do it. How shall a Man know how to defend, and not know what the Defence will require? whether ten or twenty Thousand? and must it not be proportionable to the Offence? Is not this *suscipere majus & minus*? where is the Argument, that because Aids, which were uncertain at Common Law, are made certain by Act of Parliament, therefore must this be certain, for which there is no Act of Parliament?

Oh! but the *Taillage* in ancient Demesne and Burgage, they are certain; and Mr. *Hampden* he was assessed at xx*s.* it might have been as well xx*l.* this is uncertain, it doth rest only in the King's Mercy.

The Writ taketh care they shall not assess unequally: If Mr. *Hampden* be too high assessed, Mr. *Hampden* might call the Sheriff in question; but the Sheriff of *Bucks* is rather to be fined for setting him at so low a Rate as xx*s.* We know what House Mr. *Hampden* is of, and his Estate too; for any thing I know it might have been 20*l.* well enough.

But to the legal Part, some must be trusted with it, and who should be but the Sheriff? and the Parties not without Remedy if over-rated.

Then they come to Authority by Jurisdiction, and that they that have Privileges are not Tailable, *nisi pur grand Cause*, and that Escuage must be set by Parliament, which is by Act of Parliament; 17 *Johannis*, that it was called *Magna Charta*; and so it was in *Matth. Paris*, and confirmed by *Hen. 3.*

He speaketh of it as a Thing of Story, and these were for foreign Wars, as so not to our Case.

Oh! but it was admitted every Man was to keep Arms. 13 Ed. 3. 11 H. 7. cap. 18, and whilst they are in their own Counties, to be drawn out of their own Charge; but not to be drawn out of their own Counties without Wages.

*Henry* the Seventh, afraid of his own Title, makes a Law, that no Man should be questioned for being with the King in Arms: this was to take away the Occasion of the People's talking, whether they went upon just Ground.

That

That many Armies have been paid by the King. 2 Ed. 6. cap. 2. 28 Hen. 8. the Rebels in the North the King promiseth Satisfaction. 11 Hen. 7. cap. 1. the Duty of the Subject is recited in it.

What Argument is this? we shew in all Ages where the King commanded his People to attend him or his Lieutenant, and you tell us that he paid other Armies. 19 Hen. 7. doth extend to Wars without the Kingdom, as well as within. 11 Hen. 7. this last did expire with his Death, this doth appear plainly, this was by especial Gift by the King. 4 Eliz. Dyer 211. Expressly it did not extend to the Service of any other King but him.

25 Ed. 3. cap. 8. None constrained to find Men at Arms, but those that held by such Service.

This must be understood with relation to the Tenure, they were not to come upon common Summons for Escuage; but when the whole Kingdom was in Danger, that they should not come, was no Excuse.

Oh! 26 Ed. 1. Reynold de Gray durst not levy Men without Pay\*. The Marginal Note clears this, and so no part of our Question; and it appears by *Walsingham*, fo. 74, 75. that the King was actually then in Scotland, where he fell from his Horse, and lost two of his Ribs.

In the next place they say, Trin. 31 Ed. 1. there is a Refusal to go without Pay. The Wardens of the Marches of Cumberland and Westmerland writ to the Barons, that whereas the Scots lay near the Marches with a great Army, that the People would not march out of their Counties without Pay.

This is easily answered; there were the East Marches, and the West Marches of Scotland, several Counties belonging to each: What Reason had they to go out of their own Marches, unless they had Money for the keeping of them in their Absence? Rot. Pat. 10, or 11 Ed. 2. pars 2. M. 26. for War of Scotland. 9 Ed. 2. the same discharged in the County of Norfolk. 13 Ed. 3. M. 38. the Abbot of Ramsey, because he remained in his own County discharged; it was no absolute Discharge, but *dum sic intendit*. 21 Ed. 3. Rot. Franc. Some are discharged from the Custody of the Sea, because they were *prompti* at home; some for finding Hobellers and Archers, and this was by reason of a Grant in Parliament; some were discharged, because of their Stay at home to guard the Coasts. This proveth the Right of the personal Service, and of the Contribution.

Another Objection is that of 21 Ed. 3. Rot. Franc. that they should not be kept continually in Array, but suffer them to stay in their own Counties; but they were to go as soon as there was any notice of an Enemy.

This was for the Wars of France, and not for the Defence of the Kingdom.

Oh! but 20 Ed. 3. M. 6. Rot. Scot. there were *Exploratores & vigiles*, which were *Incolarum*; but how *de assensu & voluntate*? But this was nothing, for it was with Assent in the Northern Parts, and had been done in former Times against Scotland. Then the 100 Roll of *Feverham*, which I conceive rather maketh for us, than against us; for the Castle of Tunbridge is to levy 15*l.* for the King, *pro salvatione* of the Castle, and to levy it by Distress. 14 Ed. 4. cap. 19.

the King could not compel the Subject to sell Victuals for Wars, nor to provide for the Castle in the Town, 29 Ed. 1.

That was for Scotland for Payment of Victuals, and who can command a Purveyance but the King? and that of the Castle, it was the Victualing of his own Castle, and Subjects were bound to victual their Castles. 8 Ed. 2. Rot. 99. the Marches provided for Victuals, and particular Men paid for Victuals, but they do not shew from whence that Money came.

The next is Horses for the King's Service marked, that if they were lost they might be satisfied for. 24 Ed. 1. Robert — lost a Horse worth 2*x* Marks, and received Satisfaction in the Exchequer, somewhat also for Wages, M. 26 Ed. 1. Rot. 105, 106.

That is only a *Concordat* how Men should be paid, what the Horsemen should have, and what the Footmen; for Yorkshire, Northumberland, and Cumberland, were to have no Wages from the King, but to go against Scotland: yea, that is another thing, *Si contra Scotos*; and that Distinction, upon stating of the Case, will go throughout. 14 Ed. 3. 34. for Castles. 24 Ed. 2. 72, 78. *dors.* John de Sandall. Berwick was taken from the Scots, and for furnishing of Berwick Castle, the People are compelled to trust him.

Oh! but the Prisoners taken in the War, and Hostages, were at the King's Charge. 8 Ed. 3. Allowances in the Exchequer for it. 5 Ric. 2. cap. 11. examined in the Exchequer.

The King, if he hath a Prisoner taken in the War, he is to have his Ransom; shall not the King pay for his Charge? 4 Ed. 2. Rot. 12. Roger de Salvage, a Scottish Prisoner, the King bore his Charges; so because the King payeth the Charges of a Prisoner for which he hath Benefit by his Ransom, therefore he is to defend the Kingdom.

Dyer 162. A Man in Execution cannot be forced to go to War.

Our Writ doth not desire to send Men in Execution to go to War, for there are enough besides them.

Then they object the borrowing of Money, and the King paid again for it, *pro negotiis urgentissimis*.

The King may have occasion to borrow Money, and reason he should pay it; nothing to the Question.

But the Case is, whether all the People, for their Wives, and for their Families Safety, and for the Safety of the whole Kingdom, may not be compelled to contribute to it? The Abbot of Gloucester gave Money to maintain a Damsel, the King took this Money for the present, and paid it back again. This was *ad exonerand' conscientiam*: that for things taken away without Warrant, the Minister should answer for it, not pay and repay, but shall hold themselves satisfied with Reason.

But they object, that 26 Ed. 1. a Commission went out to inquire, *de Rebus captis, sive pro custodia Maris, &c.* and the King saith, that *il fera taunt que se tenderont a payse pur Reason*.

True, *se tenderont a payse, &c.* which is not to be understood, that the King will pay or repay; but that they should hold themselves satisfied *pur Reason*, that is, he would give them Reason why they should be satisfied.

\* *Baronibus legendis pro hominibus Scot.*



*The Third Day's Argument of Sir Edward Littleton, Knt. his Majesty's Solicitor-General, in the Exchequer Chamber, before all the Judges, in the Behalf of his Majesty.*

*May it please your Lordship,*

I shall go on where I left; only inform you of one Record, 1 Hen. 4. The Writ that went for the Array of the Bishop of *Canterbury*, which doth recite, that whereas there was Danger upon the Sea, he and all his Clergy should *Manus apponere adjutrices*. I speak of this, because it was at so low a Time as Hen. 4. and it was *pro salut' Populi*.

*Coia' Pl' 14 Jac.* Between *Weaver* and *Ward*, Command came from the King and Council, that the Train-Bands in *London* should be muster'd for the training and making of them ready to defend the Kingdom. One in the training hurt his Companion, and he thereupon brought his Action against him: And this was pleaded in Bar, that he was muster'd by special Command; and this was adjudged a good Justification, because it was for the Preservation of the Land. 28 Hen. 8. which recited that the King did pay them in *Lincolnsbire*; but for the other, he saith, that he shall remember their Pains.

I shall now go on. It was objected, that by the Statute of *William 1.* the People should enjoy their Lands freely, *sine omni injusta exactione sive tallagio*.

This was for Money to be received for a general thing; but that it was not for this thing appeareth in one Chapter, that Knights-Service Tenures should do what belonged to it. The rest *sunt Fratres Conjurati ad Monarchiam Angliæ defendend'*. 14 Ed. 3 Chap. 1. 25 Ed. 3. 1 Ed. 1. *Walsingham* 184. All these are set aside by the Statute, and concern not our Question. Ours is rateable and proportionable, according to old Practice. And it is one thing to compel a particular Man, and another thing to set an equal Rate upon the whole Kingdom.

*Ult. Febr. 3 Car.* A Commission of Loans for the Defence of the Kingdom.

They mean the Commission, which was a Consideration to levy Monies, by reason of the Necessity of the Times.

It appeareth in the Journal Book to be for Impositions, or otherwise to raise Monies not concerning this Question. It appears by that, that the King gave a gracious Answer unto it; and that it was done for the present time only, a Warrant for Advice only. It was done to raise Money in general; but no Determination of Right, and said, at your Desires it shall be cancelled.

Then there was a Commission for Loans, 5 Feb. 2 Car. and this they say was for the Defence of the Kingdom.

It appears it was for the Defence of the *Palatinate* and *Denmark*, and for that a Bishop was sentenced for his mistaking; Mr. *Pym* brought up the Articles against him.

I shall now come to an Objection, worthy the making by Mr. *St. John*; and because it is a thing not truly understood, but taken at random, I shall crave your Lordship's Patience: and that is the Statute *de tallagio non concedendo*, 25 Ed. 1. made after

the King went into *Flanders*, and agreed upon here by the Prince as Viceroy, and afterwards sent into *Flanders* to be sealed by the King, as it is put in some Books. The Words are general: No Talliage to be taken without the Consent of the Lords in Parliaments,

For this I desire the Liberty to inform you of the Story of the Times, to make a better Answer. This is not all, in some Statute-Books it is not mentioned; in others, no King's Reign mentioned. And in *Ed. 1.* no Year of it, and now they would apply it to the 25 *Ed. 1.* and this they would ground upon the compelling of Aid, 23 and 24 *Ed. 1.* And the Commission in 24 *Ed. 1.* did issue upon that, and consequently that this Aid was the Aid complained of, and then redressed.

*Walsingham*, a Monk of *St. Albans*, they rely upon for this, that wrote some seven-score Years after the thing was done. Sir *Edward Coke* saith, Chronicle Law is not much to be regarded. True he saith, Chronicle Histories may shew us the Times, but if it tell us what the Law is, we are not to believe them. No Historian, that I ever knew yet, ever read the Records, and therefore no true History; for the most part they are taken up in *Paul's*, or the Street.

To take something in Consideration, by way of stating the Case, upon the Statute *Confirm. Char.* and the other *de Tallagio non concedendo*, that is, that no Aid shall be levied but by Consent in Parliament.

The first Statute is, that no such Aid shall be levied, the Nature of it, and the Acts themselves rightly compared, there remains no Scruple against the Case.

Three things for the true understanding thereof must be consider'd. First, what kind of Aids had been in use before 25 *Ed. 1.* and for what they are taken.

Secondly, how and what Remedy was given by that Statute.

And Thirdly, how far that Statute *de Tallagio non concedendo* is in Force and Authority in this Case.

For the First, it appeareth in the common Story, that in 21 *Ed. 1.* the King of *France* had seized all the Dutchy of *Gascoigne*, upon Pretence that he did not appear at his Parliament at *Paris* upon a Summons. Thereupon the first took a Course for the regaining of his Dutchy, and the War continued with various Success, till 25 *Ed. 1.* And he had also War with *Scotland* and *Wales*. For tho' *Wales* was taken 12 *Ed. 1.* yet there was one *Madox* who pretended himself to be of the Blood of the Prince, till 23 *Ed. 1.* and till that Year they were not quieted. And he having all these Wars against *Flanders*, *Gascoigne*, *Scotland*, and *Wales*, some at one time, some at another, and most altogether, divers Aids and Supplies were taken upon these Occasions of several Natures; some were by voluntary Grants of the People, some were by Impositions and Levies by the Names of Talliages or Taxes to be paid to the King, some by Assesment of Lands, as the Abbot of *Robertsbridge*, 25 *Ed. 1.* All this appeareth by the Commission to enquire of Extortion.

And besides all these, some by Prizes of Goods and Money taken from the Possessors without any Payment, Rates, or Taxes. Nay, there was then ransacking of the Monasteries, and taking of the Monies found there; Mr. *St. John's* Case for Money taken out of their Treasury: and besides all these

these, there were some by way of Ransom, as Mr. *St. John* rightly observ'd, and shewed his Learning and Industry, that the Clergy upon their Denial were put out of the King's Protection: And they did ransom themselves by giving a fifth Part of their Goods. *Pat. 25. Ed. 1. M. 11. pars 2.* The People being thus grieved with such Aid and Prizes so extraordinarily taken for the Maintenance of Foreign War, obtained that it might be enacted, that such Aid in a relative Term may not be granted nor taken without their Consent, by the Statute of *25 Ed. 1. and Confirma' Char.* Observe this one thing, the Markets of *England* three Years before had granted the King *Subsidium pro guerra*, upon every Sack of Wool five Marks; three Marks upon Woolfells; upon every Pack of Skins five Marks: And this was granted of their own Free-Will, and this was to continue for two or three Years. *22 Ed. 1. M. 2. Sine Roll.* where it is there related. Next Year, before *Confirma' Charta*, all the Laity, except Cities, Boroughs, and ancient Demesne, had granted to the King in *Subsidium pro guerra*, the 11th Part of their Goods, *24 Ed. 1. M. 2. pat. Pars 2.* And the Summer before *Confirma' Chart'* an 8th granted by all the Laity, except the Cities and Boroughs; and they granted a Fifth, and this was still for the War, *25 Ed. 1. M. 11. Pat.* The Application is this: Those many Aids of these several kinds having been granted for the War, divers Men of that Time did doubt and fear, that however they meant it but for a certain Time, yet being not so clearly expressed, it might bind them for the future; and that they so doubted, appeareth by *Confirma' Char'*. And forasmuch as divers of our Realm are in fear, that the Aid and Taxes which they have given us before time towards our War and other Business, of their own Gifts and Good-Wills, might turn to a Bondage to them and their Heirs; and likewise for the Prizes taken, we do grant for us and our Heirs, that we shall draw no such Aid, Taxes, nor Prizes, into a Custom, for any thing done heretofore, be it by Rule or any other Precedent that may be found.

Then, my Lords, for no occasion such manner of Aids, Taxes, or Prizes shall be taken, but by common Consent; but it endeth not so, saving the ancient Aids and Prizes due and accustomed. This being the State of the Case, he pleased to observe the Complaint of the People; this kind of Aid, it is plain, was never meant there, when *salus Populi periclitabatur*, and may be levied notwithstanding the Statute: For the Act is only against such kind of Aids as had been voluntarily granted by the People, some by Merchants, and some by others, that they should not be taken against their Wills hereafter, but by Consent in Parliament. *Such* is a Relative, it is not general no Aids, but no *such* Aids.

*Secondly*, It refers to those that were voluntarily granted to the King for *Scotland* and *Wales*, and his other Wars.

And another Reason why these Aids that had been for the Custody of the Sea, could not be said to have come of their Good-wills: For observe the Abbot of *Robertsbridge's* Case, it appears plainly it was done against their Wills, for the Custody of the Sea, by virtue of the King's Writ.

*August* before *Confirma' Char'* those that had given an 8th Part, they did obtain expressly Letters Patents, that such their free Gifts hereafter might not be *in servitutum*, *25 Ed. 1.* that is the very

thing doubted in *Confirma' Char'* Now those that had granted an 8th, had no Reason to do it, for they had a Charter to free them, but the other had not: And therefore the Statute might well say; some did fear. So upon the whole Matter, there are no other Aids but these voluntarily granted at that time, none in the Body of the Act but those granted with a Good-Will, for those Foreign Wars; and the Forty Shillings receiv'd by the King upon every Sack of Wool, with three Marks granted *22 Ed. 1.* was by the Merchants only for the War in *Gascoigne*; and thereupon it was enacted; that the King should not take such things but by Consent.

There is also in the Statute *Confirma' Char'* an Exception, that all ancient Aids due and accustomed were excepted; and therefore what kind was meant in the body of the Act, the Exception makes clear, ancient Aids excepted; this was an ancient Aid; and therefore never meant there to introduce a new Law, that no Aid should be taken; but no such Aid. No Imposition should be taken; but the Practice of all Ages shews this hath been levied ever since, from time to time, which is an Interpretation of the Words of the Law. This I do open, to make way to the Statute *de Tallagio non concedendo*. Thrice in the Statute is this Word (*such*) but that they should make use of that Statute *de Tallagio non concedendo*, of it self, without relation to that, whereas it will appear it is a mere Extract out of this, and no Statute it self: For Debate of that; this *de Tallagio* is the same with that *Confirma' Char'*, it is a plain Extract of it, or some other thing at some other time. Sometime in some printed Book, *nullum Tallagium*, no Aids shall be taken by the King; sometimes without Notes of Time when made, and at the best it is no more, but it is said it was made in the Time of *Ed. I.*

If we shall compare *Confirma' Char'*. and the Articles that were in this, we shall find it to be nothing but an Extract out of that Statute, and that it was no Act of Parliament. And to make it appear it was an Extract taken out of it, observe the general Heads *de Tallagio non concedendo*.

First, The Charter against Prizes. Secondly, Another against Wool. Thirdly, A general Confirmation of the Laws and Liberties. Fourthly, A Pardon to divers Lords there.

These are the things in which they would make it a Statute of it self, all expressed in *Confirma' Char'*. they do not differ in Substance. A sixth Head is the very Year of the *25 Ed. 1.* for the Pardon of those Lords was made *5 Nov. 25 Ed. 1.* this same was sealed by the King Word by Word, proved by the Statute-Roll, the very same Roll that hath *Confirma' Char.* the next *Fol.* The Monk did mistake this Statute. No Man will believe a Monk, that wrote seven score Years after, against a Record.

I shall shew what was sent over into *Flanders*, and that was *Confirma' Char.* and did bear Date the 10th of *October*, the King being then in *Flanders*, and was there sealed by the King himself. That it may appear, there is no manner of question of it, here is the very Copy of the Statute-Roll; and the whole *Confirma' Char.* is recited *verbatim*, in Witness, 10 *October 25.* of our Reign: Whereas *Walsingham* saith, that this very Charter, Word for Word, was sealed in *Flanders*, under the Great Seal of *England*, *5 Nov. 25.* of our Reign, and sent back into *England*. For this Statute-Roll against that time, doth expressly say, that this was the Charter that was sent over into *Flanders*; and hath the same Teste, Word for Word; and this

was sent back into *England* to confirm it further. The next thing that followeth upon the same Date and Roll, is the Pardon of the Earls; this was dated 5 Nov. after this *Confirm' Char.* was sealed.

They have not yet shewed that this Statute *De Tallagio non concedendo* was ever entered upon the Roll; nay, it could not be enter'd: Who would think that an Extract of an Act of Parliament should be enter'd upon the Roll? If they can quit Mr. *Walsingham*, they are wise Men; they must carry the Practice of all Times. Where did any Man see that this Act of Parliament was ever shewed to discharge Men of the Defence of the Kingdom since 25 *Ed. 1*? Did no body know this Mystery to plead, not to defend the Sea and their Land? Did no Man hear of this till now? Shall this, against all the Practice of the Times ever since, take away such a Flower of the Crown, as to compel People to grant Aid for the Defence of themselves? A harsh Construction!

If this should be true, it would destroy even Acts of Parliament: To what Purpose is that Statute made of the 25 *Ed. 3.* if that were totally taken away before? And if no Aid, those Aids *Pur Filie Marrier, &c.* are taken away also

Nay, if this be an Act of Parliament, when was it made, before the 25 *Ed. 1.* or since? It appears not when: It is *individuum Vagum*, I know not what, but in Truth an Extract. Nay, if this be an Act of Parliament under these Words, no Taillage is equivocal as well as Aid; that is proper Taillage that is laid upon Villages. 25 *Ed. 3.* 100 *Acowry. Entries 406. b. 8. Ed. 2. Execution 15 Ed. 3. 106 Acowry.* A Rent may be released by the Name of Taillage: No Mention of this in all Ages.

Then it was objected, that 25 *Ed. 1. M. 7. pars 2.* expressed in the King's Proclamation 12 *Aug.* before ever he was going into *Flanders*, that he was sorry for the Aid demanded of his People.

Let him remember for what Reason he did demand those Aids which he was sorry for; they were Aids granted not for the Defence of the Kingdom alone, but for the Defence of the Kingdom mixed with foreign Defence, by reason of Wars with *Gascoigne, Wales, Scotland*, and elsewhere; for that it was for foreign Wars. Upon this followed the Commission, 26 *Ed. 1. Pat.* that went to all the Kingdom, which makes for us.

There are three Parts in that Commission: *First*, To observe if the Officer did any thing without Warrant, they should return it. *Secondly*, If done wrong, the King would answer it. And, *Thirdly*, They should be satisfied with Reason if the King did warrant it. The Answer thereunto given was upon another Construction made of the Words of the Record in the Parliament 2 *Ric. 2.* The Cause was this: the Chancellor declaring the Cause of Calling the Parliament, he doth shew, that the King, in the End of the last Parliament, had assigned some Lords to be of his continual Council for the Year following; the Number was seven that were assigned, and they were sworn to give good Counsel for the Aid of the Kingdom. These Counsellors treating of the Peril of Enemies from all Parts, and the Matter requiring Dispatch, they durst not undertake the ordering of so perilous a Thing, therefore ordered a Grand Council to be assembled. The Grand Council was assembled, to whom was shewn the great Peril and Mischief of the Kingdom apart, by War,

by Land and Sea; and that nothing was remaining in the Treasury for the Maintenance of War: For a final Conclusion, that they might remedy this Mischief, they say, that it cannot be done without Parliament; this was the *English* of it, and in the mean time an Army might be landed: And for the present Supply of the Charge of such an Army, they lent the King great Sums, which by great Security and other Things, he did engage himself to pay: Upon this the Lords did advise how it might be done with the least Charge to them all, and how the King's Right of his Crown, and other Inheritance beyond the Seas might be safe, and the King, Kingdom, and themselves defended, to the Confusion of all their Enemies: To this Purpose the Treasurer was directed to be ready to shew what was expended the next Parliament, to be bestowed for the Marches of *Scotland, Wales and Ireland*; and said in that great Council, they could not remedy that Mischief without charging of the Commons, which cannot be done, say they, without Parliament.

It is plain, by the Story of that Time, and the Words of the Chancellor, that it was for the Maintenance of the War in *France, Scotland and Ireland.* And tho' the Defence of the Kingdom be mentioned with these Wars, yet the main Supply was for these foreign Wars.

In the next Place, a little before in the Parliament, the like Aid for the like Occasion was desired by the King, 2 *Ric. 2. M. 24, 25. Parl. Roll.* What did the Commons say now? They ought not to bear such foreign Charges. The King gave them a fair Answer, admonished them, for *Gascoigne* concerned the Kingdom of *England*; for that is as a Bulwark to the Kingdom of *England*: *Burbacon* is an old *Fort de Hors*; for the Aid demanded in that Parliament was with this Relation as consonant; both together concerned the Defence of the Kingdom, that they might be Bulwarks for the Kingdom of *England.*

In the next Place, who spake these Words? The Lords, said they, could not remedy the Mischief without a Parliament. The Lords assigned by the Parliament, they must not do it; it is dependent upon the other Part, the Lords could not do it that Way.

But shall we come home, and speak plain *English*? We know this was 2 *Rich. 2.* a young Prince. It doth appear expressly, that these things were brought into the Parliament for Advice, which were fit for Royal Authority, for Expence for Wars, and for Counsel, and for governing of his Realm. It appears further, by the very Chancellor's Speech, that the Council had been heretofore ordained for the guarding of the Kingdom, 2 *Rich. 2. Rot. Parl.* This Parliament taking notice of the King's tender Age, they took much Power unto themselves. There was to be a Council for the governing of the Kingdom in general; but the Counsellors should be chosen to govern the State for two Years, and these Counsellors not to be removed from the King without the Parliament: and more than that, his Treasurer was to be governed by the Parliament, and his Counsellors chosen in Parliament.

At the End of the Petition of Right, neither Lords nor Commons, jointly nor severally, can make a new Law without his Consent; and that your Lordships, and none but you, are the Interpreters of the Law, wise King *James* did declare.

The next Thing considerable is, *Tempus Belli* to defend it. It is when the Condition of the Time is such, that the Current of Justice and Law is by such Violence stopp'd, as Judges do not sit, nor Sheriffs dare execute their Office, nor any Court is open, especially the *Chancery*, which is *Officina Justitiæ*.

It was said there was a Time when the King might command this Levy, to which they did agree: They did agree the King might command this Levy when he hath proclaimed a War, tho' no Stroke stricken, no Danger, nor Armies, nor Opinion of any Force coming; this doth put it into the King's Power by their own Consent. And by all Reason, 19 *Ed. IV. 6. Brian's* Opinion. How many Wars have been proclaimed in this latter Age? No War denounced in 88, tho' consulted of in *Spain*; and they did not think fit to denounce a War, saith Sir *Walter Raleigh*; those Days are past. Now they begin by the Sword, not by the Trumpet or Herald.

In the next place, they say, if the King be in the Field with his Banners display'd; this they say was *Tempus Belli*. Cannot the Course of Justice sit then, but there must be a Peace? 39 *Ed. III. Rot. 10.* Did not the Court of Justice sit then? Our ordinary printed Books shew what Causes of Law then were. And in *Henry the Sixth's* Time; in all our Civil Wars, and in *Henry the Seventh's* Time, they sat then. But the true Time, to make it *Tempus Belli*, is to make a War against the King.

In the *North*, towards *Scotland*, when the Enemy approaches, is it necessary that it must be a Time of Peace, because the Court of Justice sits at *Westminster-Hall*? There may be then a strong War in the *North* and *West*, as ever was in *England*, when the Court of Justice sits here. That *Tempus Belli* may be in some Places of the Kingdom, and in some Places not, appeareth 33 *Ed. III.* and who shall discern if there be any Danger?

They agreed in general, the King may do it, and that the Power of Discerning is in his Majesty: I shall leave it in the King, till Mr. *St. John* finds a Third Person to do it.

13 *Hen. IV.* for the Murage; they say that this doth only charge those Things that are *venalia*, for Men are not compelled to go to Market.

How shall they then live? True, it is not compulsory to go thither; but it is compulsory to pay the Money.

1 *Ric. II. M. 176. pars 2.* A Petition from the City of *London*, to have all Owners of Lands to be rated with them in the Danger of Wars, not having Lands in Tenure to do it.

This doth make for us; that not only Merchants, but every Man in the lieu of Tenure to do it. The Lord *St. Albans* saith of *Hen. the Seventh*, that Kings may fall from their absolute Power when they see Cause, but not be compelled to do it.

They say Supplies are called those things, *sine qua non* the Kingdom may not be defended: And because there is a Way by Parliament, therefore no other Way.

They say it will not be affirmed, that the King hath the same Power for an Offensive; as Defensive War: I affirm, nor defend nothing; the Parliament is a great Body, and the Kingdom may be lost in the Interim.

Then they alledge there is forty Days for Escoiage, and the like for Parliament. Many times Things are impossible, and inconvenient to be done by Parliament.

First, Impossible; the Necessity may be such that it will not brook the Delay of a Parliament. 48 *Hen. III.* Summons to the *Cinqüe Ports*. They come Day and Night to the King when any Danger is.

It hath been said, that there are seven Months between the Test of the Writ and the Ships being at *Portsmouth*; in that Time a Parliament might have been summoned.

The great one, and the true Answer is; that this resteth still in the King's Judgment. If the King hath Intelligence that foreign States will set out the next Spring a Fleet, and for Conveniency of his People, sendeth seven Months before-hand to raise this Aid; hath the People any Cause to complain of this? Mr. *Hampden* hath not paid the Money yet, being two Years after.

If they should have gone by Parliament, see what Rubs in this Case might be. Forty Days are spent before the Parliament sits: Then when they meet in Parliament, there is a Ceremony in chusing of a Speaker; Solemnities in these take up Time: Then the Lords take Things into Consideration, then they must have Conferences and Disputes with both Houses; before they agree, the Kingdom may be lost: In the mean time, suppose this comes in some reasonable time, to make Assessments first in the Cities, then in the Burroughs, then particular Assemblies, then Divisions; and after all this; there must be Collectors appointed to levy the Money; what a great deal of Time is spent in all this; every Man may see.

Our County, say they, is an Inland County; and they cannot find a Ship suddenly; and therefore the greater the King's Mercy and Favour to lend them his Ships instead thereof. When all this is done; and Ships provided; reasonable Time must be allowed to sail from the *North* to *Portsmouth*; but this doth solely rest in the Judgment of the King.

31 *Hen. VIII. cap. 8.* An Act of Parliament not to take away any of their Inheritance or Lands.

Here is no Lands or Goods taken away; only let them contribute to the Defence of themselves, and all is done. Mr. *Hampden* hath had none of his Goods touched.

They say, for Shipping it was done in King *John's* Time at the Subjects Charge; but they do not meddle with Land-Service at that time. 15 *John. 13. dorf. Rot. Claus.* King *John* had Business beyond the Sea. That this was rather for beyond Sea, than the Kingdom, appeareth thus. The Writ saith, to have such Ships as would carry eight or six Horses, and that must needs be for some foreign Service; and not for Land-Service at Home. And it appeareth, *Rot. Claus. M. 1. dorf.* the King was well landed at *Rochel*.

For the Terms of the Law, which concerns Hideage and other Things, *Bract. 37.* and some Services introduced by common Consent, I will not trouble you with it.

To come to the Case of the Abbot of *Robertbridge*, that Arms was laid on by the Statute of *Winchester*. That will not serve, Arms was long before that Time. They say the Assess was in time of War; the *French* had burnt *Dover*; 23 *Ed. I.* and that the Assessment was not made by the King's Authority: but it appears it was by the King's Authority, by Virtue of his Writ: 25 *Ed. I. Lo. Treas. Rememb. Leybourne* was Admiral of all the Kingdom; and was *Custos Maris &*

*Maritim*' for some Parts: but that it was for Land-Service, and not for Sea-Service.

*Custos Maris & Maritim*' are Terms convertible; he that doth one, defends the other.

They have left no Stone unturn'd to take away the Force of this Case. They tell us now, the Clergy was put out of the King's Protection this Year, and so it appears in the *Exchequer*; but they have not shewed any such Writ delivered into the *Common-Pleas*, only *Spencer's* Word of Mouth, that they should have no Privilege there. Suppose it were so in other Courts: 25 *Ed. I.* it appears plainly, that the Clergy came all to be in the King's Protection, and gave Ransoms; and this Cause was not till *Michaelmas* after. And whereas it is said, this Abbot's Case did only concern the Land-Service, it proveth both the one and the other; Money for the Sea-Service, Horse and Man for the Land-Service.

Oh! they say, 29 *Ed. I. Mag. Char.* was not observed; and instanc'd *John de Gray*, and *Philip's* Case.

Whatsoever was the Practice of that Time, is not material. And for that of the Charter of the Forest, they say, tho' it be there said, *Nullus amittat vitam vel membrum pro venatione nostra*, yet one was beheaded.

But what is all this to the safe Custody of the Sea? Nay, they have not shewed your Lordships, that there was any thing in that great Charter for the Custody of the Sea. 51 *Hen. III. fol. 84. Britt. 117. Flet. & Fitz Her.* Lord *Coke* on *Littleton*. Perhaps question might be about this in the *Exchequer* at this time; the Case of *Shoreham* discharg'd of Land-Service, because they found Shipping.

They that were nearest Danger, most fit for that Defence; as the King, in the tenth Year of his Reign, sent only to Maritime Towns.

2 *Ric. II. M. 42.* They say *Beverly* was discharg'd, because it was an Inland Town, therefore no Inland Town ought to pay. A Writ directed to *William Ruffel*, Admiral, commandeth only the Sea-Coasts.

13 *Ed. III. M. 35. Rot. Claus. Part 1.* afterwards discharg'd, because of other Service. And for that of *Beverly*, a Complaint that they were to contribute to such a Town to find a Ship; they say they have Privileges, but the special Reason why it was freed, was for Reverence the King did bear to *St. John de Beverly*.

Mr. *St. John* knows it; 120 Ships granted to the two Admirals, *North* and *West*, for Service beyond the Sea. 31 *Ed. I. de inveniendo* Horses, because of great Business in his Wars abroad, he bound them to make Galleys for foreign Service. True, the King at this time was in *Scotland*, and kept his *Christmas* there. Then come to 31 *Ed. I.* as tho' he should do it by Service of the *Cinque-Ports*: *Newcastle upon Tyne* at their own Charges; but when into *Scotland* at the King's Pay, then they came to this. 10 *Ed. III. M. 6. Rot. Claus.* sent for Ships into *North-Wales*, and *South-Wales*; the Writ did say, that Wages used not to be paid for such Service; and did express in his Writ, Satisfaction should be given unto them, not of Right, but *de Gratia*; and reciteth that Clause, that the People were bound unto it. 2 *Ed. III. 16 dorf.* That there should be three hundred Pounds to relieve the Fishermen, the King should not have it of the People of that Town. They say all these Records being Matter of Fact, did occasion the

making of many Statutes of Redress. 14 *Ed. III. cap. 1.* great Aid for *Scotland, France, and Gasconne*; 15 *Ed. III. M. 9.* contrary to *Mag. Char.* 22 *Ed. III. M. 4.* 36 *Ed. III. M. 9.* no Goods to be taken without Consent: These are Things comprehended within the Petition of Right. 37 *Ed. III. M. 2.* speaketh only of the great Aids. 23 *Ed. III.* Galleys made: they say the King paid for them; that is, upon the King's own Promise; but they say that is *nudum pactum*. Then they say, is the King's Word nothing? 13 *Ed. III. M. 9.* called a Parliament, propounded as on the King's Part; they are not liable to the Defence of the Sea. If the Commons have nothing to do with the Guard of the Sea, why is it propounded unto them.

20 *Ed. III. M.*— That the Guard of the Sea henceforward be made at the Charge of the King, as hath been promised, and there the People discharged. They do not affirm in their own Case there was any Right. 21 *Ed. I. Rot. Franc. M. 9.* 25. on Merchants Wools, and 6 *d.* Poundage for a certain Time, and to cease *tamquam*, &c. 22 *Ed. III. 2 s.* upon a Sack of Wool may cease.

All these Things were granted for foreign Wars; and if the Cause should cease, then the Thing should cease. 2 *Hen. IV.* Commission for Building of Galleys, the King would confer with the Lords about it: Then 19 *Hen. IV. 17. 21.* touching the Guard of the Sea, not bound unto it.

4 *Hen. IV. 28 M.* Tonnage and Poundage not to be taken without common Consent. A Protestation of the Commons doth not bind the King; and concluded with *nullum tempus occurrit Regi.*

*The First Day's Argument of Mr. Holborne, on the Behalf of Mr. Hampden, before the Judges in the Exchequer-Chamber, in the great Case of Ship-Money.*

May it please your Lordships,

I N Obedience to your Lordships Commands, I am ready, tho' not not as I desire, nor as the Cause deserveth, to argue it; it being impossible for one in so short a Time to be fitted to make a Reply to the Life of the Cause of an Argument, so long, so learned, and so full of Records, wherein neither Labour nor Learning was wanting. I may say of him, as one said once, *Etiam hæc defensa fuisset.*

I shall now rather shew your Lordships what I should do, than what I shall for the present. I shall proceed well, hoping the Subject will excuse, and your Lordships greater Care supply my Defects, which have been without any Default.

My Lords, the Case upon the Records stands thus: In *May* last there issued out of the *Exchequer* a Writ of *Scir' Fac'* to the Sheriff of *Bucks*, to warn my Client to shew Cause, why he should not pay *xxs.* assessed upon him by the late Sheriff of that County, for the finding of a Ship of War mention'd in the Writ, 4 *Aug. 11 Car.* sent into that Inland Country, and the *xxs.* certified into the *Chancery* to be unpaid, and sent over into the *Exchequer* by *Mittimus*, to be levied there. Mr. *Hampden* hath appeared, and demanded Oyer of the Writ 4 *Aug.* of the *Mittimus*, &c. and upon the Reading of them all, hath demurred in Law generally; and the King's Counsel have joined in

Demurrer:

Demurrer: and I humbly conceive Judgment ought to be given for my Client.

My Lords, I shall proceed to the stating of the Questions, which are three: the first, which is a chief one, is this; whether, upon the whole Record, the Case do appear for the King; that 4 Aug. 11 Car. being the Day of the Date of the Writ, the King could charge the County of Bucks to find a Ship at their Costs and Charges? By way of Admittance, if he could, yet whether the King can give Power to the Sheriff to assess the County as in this Case? By a further Admittance, admit that the King have Power to charge and assess, whether he can levy the Money unpaid by this Course of *Certiorari* and *Mittimus*, as he might do if it were his own proper Debt? Of these three Questions, whereof the two last remain untouched, and not argued by us, I chiefly intend to insist.

For the first Question, tho' argued fully, yet I doubt, as yet, whether it standeth rightly stated; not but that I conceive Mr. Solicitor had good Colour to state it, as he made it, partly by the Record, yet somewhat out of our Admittance; yet by Admittance only, and so expressed.

Again, another Reason which I conceive, there was a Necessity on the King's Part, so to make it as Mr. Solicitor stated it, or else to wave the Debate.

The first Question is, whether or no, upon the whole Record, the Case so appeareth for the King, that 4 Aug. 11 Car. being the Date of the Writ, the King could by his Writ charge the County of Bucks for the finding of a Ship of War?

This, on his Majesty's Part, hath been stated in these Records, whether the King finding in his Judgment the Safety and Preservation of the Kingdom and People, necessarily and unavoidably to require this Aid commanded by this Writ, might not command such an Aid by the Writ, for saving and preserving of the Kingdom and People; wherein, I confess, there is not one Word but hath its Weight.

As to this Question, thus made, I shall take three Exceptions, which are things taken in to be granted, which I shall not argue if I can avoid them.

That at least, in the King's Judgment, the Safety and Preservation of the Kingdom was in danger'd 4 Aug. that is, that the Kingdom was in danger to be lost. If it be so that the Kingdom was in such Danger, and that the Danger was so instant and unavoidable, that it necessarily required this Aid by this Writ; that is, it required a present Charge of Shipping presently, 4 Aug. 11 Car. to be forthwith commanded, and that Occasion could not expect a Parliamentary Consideration and Supply; these be Things wherein we differ. And, lastly, for the Truth of it, the Certificate was sufficient in a legal Way.

My Lords, to find out whether the Record doth warrant these three Things of great Importance. First, I shall seek for them in the Writ 4 Aug. and next in the *Mittimus*; there is no Colour elsewhere to look for them.

To open the Writ rightly will clear these Differences, as I humbly conceive, without any great Argument. And first, for the Writ dated 4 Aug. 11 Car. I shall read the Words, wherein the Danger of the Kingdom is expressed, and then explain what Words give that Sense that is taken out of them.

*Quia datum est nobis intelligi quod prædones quidam Pirati & Maris Grassatores tam Nominis Christiani hostes Mahumetani quam alij congregati, naves & bona & mercimonia, non solum subditorum nostrorum verum etiam subditorum Amicorum nostrorum in Mari quod per Gentem Anglicanam ab olim defendi consuevit nefarie diripientes, & spoliantes: ac ad libitum suum deportare hominesque in eis in captivitatem miserrimam mancipantes. Cumque ipsos conspiciamus Navigiis indies præparantes ad Mercatores nostrorum ulterius molestandi & ad Regni gravandam nisi citius remedium apponatur, eorumque conatui viriliter obviamur. Et consideratis etiam periculis que undique his guerrinis temporibus imminet, ita quod nobis & subditis nostris defensionem Maris & Regni omni festinatione quam poterimus accelerare convenit, nos volentes defensione Regni tuitione Maris securitate subditorum nostrorum salva Conductione Navium, &c.* Here are the Causes and Occasions; all that comes after is not material to the stating of the Question.

My Lords, in the opening of this Writ, it is true, there was mention of loss by Merchants of some particular Members of the Kingdom. And this loss by *prædones Pirati quam Mahumetani & alij*; and tho' *alii*, yet Pirate still and no more; then it saith *ipsi*, still those Pirates daily prepared Ships, but not armed with Men. What to do? To molest the Merchants, and, *ad gravandum Regni* as Pirates still hitherto. I conceive there is not a Word of Danger from any Empire, but from Pirates; not a Word of Danger to the Kingdom, but to Merchants: however, all this is *quod intelleximus*. The Record goes on thus, *Consideratis etiam periculis &c. imminet*. This Part, as I conceive, is not so positive, the Dangers are but *Consideratis*, nor the Danger to the Body of the Kingdom. No Word of that; or if to the Kingdom, yet nothing in point of Safety, only but in point of Molestation: none of all these appears. And besides, the Clause is too general, not expressing any particular Danger, from whom or how. However, be the Danger to the one or to the other, be it to the Kingdom or to the Merchants, be it for Trouble or for Safety, hitherto I may say there is no mention of any such instant Danger, as necessarily did require this instant Command in the Writ, not so much as in the King's Judgment. For ought that appears, a Parliament, even in the King's Judgment, might have been called, and Consideration taken for a Defence. Here be all the Premises upon which the Conclusion must arise; and hitherto nothing material to make a Danger to the Safety of the Kingdom, and so instant, that a Supply *nunc aut nunquam* must come in.

Altho' the Premises, I conceive, are only considerable, yet the Conclusion will be but this, *convenit accelerare*; but it is fitting to hasten: but no such Necessity, tho' it be *convenit accelerare pro defensione Regni*. If that were material, it cannot be construed, but with relation to the Premises on which it is built. And whether in fear of Trouble, or Danger, or Loss, *non constat*: and tho' it be *cum omni festinatione*, yet it is *qua poterimus*; and that is *possimus quod jure poterimus*; that is, with all the Hasten that by Law you can make: which way this is, your Lordships have heard.

Now, my Lords, it appears on the Record, that there was no such instant Necessity, but that a Parliament might have been time enough; for that it was observed between the Test of the Writ and the

the Rendezvous, there were two hundred and odd Days, whereas a Parliament requireth but forty; in the Remainder of these two hundred Days, the Parliament might have considered of the Means of Defence. But I leave it to your Lordships to judge, notwithstanding those Expences of Time cunningly reckoned up to your Lordships by Mr. Solicitor; and tho' it be true, that Things are oftentimes long in Deliberation, yet Nature tells us they can be sooner. If there be a Necessity, we know that will force.

I have but opened this Writ 4 Aug. I am now come to the *Mittimus*: The only Doubt which I conceive in the *Mittimus* is, that where the Case stands but thus, in this Writ is recited the Tenor of the Writ 4 Aug. and then the Writ goes on, and saith, *Quia salus Reg' periclitabatur*, and that is all the Clause in the Record that gives Colour to the Case so to be made. And to the whole Record we have demurred.

Here it hath been said, we have confessed all by the Demurrer; and if that hold not, the King, who is the Judge of the Danger, hath said so, he hath certified so under the Great Seal: and on these depends the Weight of both these Processes.

To this I have many Answers, but I shall select a few from many others, on which I shall rely. My first Answer is this; here the Words are, that *Salus Reg' periclitabatur*. These Words in shew seem to be positive, but in substance but relative; and are rather but a Comment on the Writ, or an Abstract in point of those Dangers mentioned in the Writ, for the Clause was brought in on the Return of the Writ; and if we have the Writ it self, the Comment thereupon, or further Explanation thereof, is not material.

My second Answer is; I doubt, I say no more, if the King put particular Reasons into the Writ 4 Aug. whether the Law (I speak of legal Course) doth permit any after Writ to put in further Clauses of the same Nature with the former, to the same End.

If the Case be thus, then our Demurrer will be no Confession of any such Danger.

In the next place, admit the Words in the Writ had been positive, and materially expressed; yet, according to our Rules of Law, it cannot make use of that Sense they are now applied unto: For the best, the Word *Salus* being only proper to a physical and natural Body, is applied here to a Body Politick. It is but a Metaphor which the Law will not indure in Writs, for it would bring in great Mischiefs. In Writs and in Pleadings, Metaphors are dangerous: We know not how to take Issue upon it, and therefore is not regularly allowed; but I leave it to your Lordships Judgments.

There are no Words of the Danger of the loss of the Kingdom, that is, such instant Danger: for apply the Words to a natural Body, as *Salus J. S.* is in Danger, it doth not presently imply, that he is in such instant Danger of Death. A Doctor will say a Patient hath not his Health, yet no Danger of Death, it is the common Speech; the same Sense it must have in a Body Politick. If the Words were good, and did imply a Danger, yet not such a Danger as may hazard the loss of the Kingdom; for the Words are only *Salus Reg' periclitabatur*, and the thing may be never in Action, which twenty Years hence may lose the Kingdom. A Man may say, that the Safety of

the Kingdom is in Danger. At the best, the Words will not make the Case as it is put.

Mr. Solicitor, out of his great Care, searching into every Hole where he thought we might peep out, doubting our Demurrer would not be a Confession sufficient, he take in another Help, which is this, that if this be so declared by the King's Opinion, and under the Great Seal, that this alone had been sufficient. For this there hath been urged, the legal Weight of the King's Affirmation, and of a Certificate under the Great Seal; and both be concluded in this Case.

My Lords, before I answer to this Matter, I profess, for my Client and my self, that we make no doubt of the King's Word, and believe there was Danger, tho' not so apparent to us; but only loth to allow it as sufficient in a legal Proceeding, lest what his Majesty, in his own Worth deserves, by after Princes might turn to a Disadvantage.

That which we urge is, how far in form of Law this may be allowed, we shall argue, and that briefly, for the Case needeth no help.

For this Point I take it for Leave, under your Lordships Favour, that in legal Proceedings, and regularly, his Majesty's Opinion, and Certificate in Things of Fact, is not binding.

Yea, but they say, it is Matters of State and Government.

For that, to ask the Question, whether or no raising Forces thus is left to his Majesty, that stands and falls on the main Cause.

My Lords, I do agree, in divers Cases the King's Affirmative shall be conclusive in Matters of Fact, that is, when it is not so triable elsewhere; as in a Writ *de Rege inconsulto*, to stay Proceedings, when the King certifies Matter of Fact, the Writ must be obeyed, but then, withal, the Matter is triable elsewhere. But these Cases will not match ours. As for that great Case 20 Ed. I. concerning the Lords Marchers, that the King was *Recordum superlativum*, to say no more, it is but an Allegation of the King's Counsel.

My Lords, the Reasons whereon I shall most rely, to avoid the Sense of the Writ, *Salus Reg' periclitabatur*, is thus, That tho' it doth now appear by the *Mittimus*, that 4 Aug. the Kingdom was in Danger of being lost, yet it is not sufficient in Law, nor can our Demurrer hurt us; because it must have so appeared in the Writ, 4 Aug. it self; for the Writ and Declaration in Law must ever contain precisely so much of Matter as is necessarily true to warrant the Demand.

In this to see the Mischief, if a Danger now declared makes the Case, how shall the Subject know by the Writ 4 Aug. whether to obey or no? The Law binds not a Man to divine: And if this subsequent Declaration shall mend the Case, then the Subject shall be a wrong Doer, *ex parte facti*, which is against the Reason of our Books. I shall remember the Cases put by Mr. *St. John* to another Purpose. A Commission sent forth without Cause expressed, that Commission is not good; and it is not denied by Mr. Solicitor, that a Cause must be set to make it good in Law. And if your Lordships be pleased to look on the Precedents, as I know you will, which the King's Side shall bring unto you, your Lordships will find the Danger turned from the first Writ to the last. Nay, in the Writ of this Year I am told it is so, out of their

their Opinion, fearing the Writ 4 Aug. was not so good as they would have it. They put it into the *Mittimus*, which they knew could not do good; but they did it only to cavil.

But lastly, admit the King had said the Kingdom was in such instant danger of Loss, and that there was an instant necessity of the Command this way, and that this could not have expected Consideration in Parliament; yet if the contrary appears in the Record, then neither was the Demurrer a Confession, nor the Certificate conclusive.

I could stand on many other Things, as that the Danger should be more particular, for so are all the old Precedents. To say, *Salus Regni* is in Danger, is too general; as in a Protection, they must alledge, in what place the Party protected is imploy'd.

Secondly, In the *Mittimus* it should not be that *Salus Regi periclitabatur*, but how *Salus Regi periclitabatur*, I believe it is meant so; but we must now look to Rules of Law. True it might have been in Danger before, but not *tunc*; as in the Case of Indictment upon the Statute of 8 Hen. VI. for an Entry upon *Whiteaker, existens tenement*. J. S. the Laws will not take notice of the Time, without saying, *tunc existens*, at the time of the Entry.

My Lords, in the Conclusion upon this Discourse, it appears, I have so pared the Case, that in the Writ dated 4 Aug. there appears no Danger of the Kingdom being then lost; and that in the *Mittimus* there are no express Words of Danger to the Kingdom instant or unavoidable. If it were so, it cometh not time enough; for it should have been in the Writ dated 4 Aug. And if there had been such expressing of such instant Danger in the Writ 4 Aug. and in the *Mittimus*, yet not material, if otherwise on Record. And lastly, this Certificate doth not conclude us.

Thus then to shew what the Case is, and what it is not, I have put out of the Consideration of the Case, all Considerations of such Danger to the Safety of the Kingdom, as are unavoidable.

I have left nothing in the Case but Consideration of protecting Merchants against Pirates, but for ordinary Defence of the Sea. If the Case doth fall thus, I humbly conceive, that in this place, I might, without further Argument, with some Confidence, venture my Client's Case upon your Lordships Judgments, notwithstanding any thing objected on the King's Part.

Then, by your Lordships Command I shall proceed: having laid aside the *Mittimus* and *Salus Regni periclitabatur*, and taking the Case only on the Writ 4 Aug. which, as I take it, is nothing of Danger to the Kingdom, but for protecting Merchants, and for common Defence. The Case stands thus.

That tho' there be no actual Invasion, no known or declared Enemy; yet the King out of his Judgment, 4 Aug. 11 Car. apprehendeth and foreseeeth Danger to the Kingdom in point to be lost; and that the Danger is so instant and unavoidable, that it requireth this Aid. Whether the King out of Parliament by his Royal Power can command this Supply?

I have endeavoured not to mistake Mr. Solicitor; it were an Injury to requite him so ill. In my Argument I shall desire leave to hold his Course, because the two main Questions are both of one Nature, tho' different in Degree.

Our Question is, in case of common Good against Pirates. Upon the whole, my End is to shew, that by the fundamental Policy of *England*, the King cannot out of Parliament charge the Subject, no not for common Good, unless in special Cases, and of a different Nature, or upon different Reason; nor for a necessary Defence, tho' in the King's Judgment the Danger be instant and unavoidable.

My Lords, in the debate of these two Questions, I have learned of Mr. Solicitor not to say all that I could, but so much as is necessary, and as he hath chalked out the Way.

I shall inquire of this Power by Arguments upon Practice constant and allowed in time of good Government, when the Liberty of the Subject was not trampled upon; and shew it by Acts of Parliament, Reason, and Authorities in both.

My Lords, I am now come close to the Arguments on the main: Before I begin, give me leave to profess that I am in a Dilemma. The Question will be, what the King can do in these Cases, by his Royal Power? it much concerns him. And I have learned out of a Speech of his late Majesty, what it is to debate such Questions. Not to argue it were to disobey the Assignment of the Court, and to desert my Client and his Cause. For my part, as your Lordships see I have laboured to decline the main Question, I should be glad it might so sleep.

I shall not offer it, if happily the Case falls off in the penning of the Writ, and not of the King's Power. I doubt whether the way of Argument shall do the Crown a disservice.

Out of my Duty to his Majesty, and Service to your Lordships, I humbly offer, whether your Lordships may not think it fitting to determine the Question upon the framing of the Case, before it be further argued; and here I shall rest, or upon your Command am ready to go on.

*Here the Lord Chief Justice Finch said, we do not use to judge of Cases by Fractions.*

My Lords, since it is your Command I shall obey, and go on, notwithstanding the *bicorne Argumentum*, which on each side threatneth.

I hope his Majesty will excuse us, for arguing of that which cannot else be determined. And as he hath given way to an Argument, I hope his Goodness will excuse us, while we do our Duty for our Client. And if I err in my Materials, or in the way of my Arguing, it is from the defect of my Wisdom, I cannot be wiser than God hath made me, and not out of any disaffection to the Service.

My Lords, I hope neither his Majesty nor your Lordships will think it a Point of a higher Nature: yet thus far I assure your Lordships, that if any Matter or Consideration of State come in my way, I shall tread as lightly as I can; yet I must crave Liberty to pick out some to refer to your Lordships Consideration, and shall forbear those things that are unfit.

*Here the Lord Chief Justice Finch said, Keep you within the bounds of Duty, as befits one of your Profession at the Bar at Westminster, and you shall have no Interruption.*



My Lords, I shall be very wary and tender. I shall now open the Division and Parts of my Argument.

My Negative Part is this, That the King cannot out of Parliament charge the Subject, not only for the Guard of the Sea against Pirates; but also not for the ordinary Defence of the Kingdom, tho' the King judge the Kingdom unavoidably in Danger to be lost. And in this I must take in the Defence; as well the Defence at Land as Sea.

My positive part is this, The King regularly is to be at the Charge for guarding the Sea against Pirates; and for the Defence of Land and Sea against Enemies, so far as he is able: And that the King hath Provision for both, especially for the Sea-Service.

In the Prosecution of these two general Parts, I shall not only propose my own Considerations, but join them with Mr. *St. John's*, as I can further infer them, or justify them against Mr. Solicitor's Denial or Evasion.

And this Course will necessarily bring in many of his Arguments, which I would be glad to spare, if the Cause would bear it, because your Lordships should not think that I do nothing but repeat. In this way I shall humbly endeavour to clear each Part, by giving a Reply before I descend to other Particulars. And where I conceive a new Objection, which will not fall within any former Answer, I will raise it, and endeavour to lay it. Into these general Questions will fall many others of great Consequence.

First, Such as not being the main, I will not draw upon particular Debates. Where there is any thing concerning State or Reverence, I hope to admit such, and save my Client's Cause.

Having thus unfolded my form of Argument, I descend to my Negative, That the King in none of these Cases without Parliament, can charge the Subject.

I will prove it from Reason, which is the Master of all Authorities, as Mr. Solicitor said. And from Reason drawn from the Fundamental Policy of the frame of this *English* Government, in the necessary Attendance of the Publick Advice in Parliament upon the Royal Power.

And Secondly, from the absolute Property the Subject hath in his Lands and Goods. From these two things I shall draw my Reasons.

For the Political Advice in Parliament, I shall humbly decline all School-Disputes. The Spider may make Poison out of that which the Bee makes Honey. I shall omit the Consideration of some Points.

I shall take my Rise from the Judgment of King *James* 1619. in his Speech in Parliament; wherein his Majesty agrees, that the King *in concerto*, can do no more than the Fundamental Laws of the Kingdom alloweth: and I assure my self his Majesty desireth not more.

Before I enter into the Argument further, Whether the Law hath intrusted the King out of Parliament in either of the Cases put: I here profess for my Client and my self, that while we speak of Political Advice, and how far a Governor subject to Error and Will may use a Regal Power, we do always with thankfulness to God acknowledge our present Happiness, to be blessed with so just a Prince; and we fetch it from our Hearts. And were his Majesty so immortal as he deserves, and

sure that his Successors may be Heirs to his Virtues as well as to his Crowns, we should wish the Royal Power might be free from Political Advice, and Unlimited.

*Here the Lord Chief-Justice Finch said, This belongs not to the Bar to talk of future Government; it is not agreeable to Duty, to have you bandy what is the Hopes of succeeding Princes, when the King hath Children of his own that are like to succeed him in his Crowns and Virtues.*

My Lords, for that whereof I spake; I speak as looking far off many Ages, five hundred Years hence.

My Lords, because I might run into further Error, if I should not take your Advice, I shall slip over much; and the Sum of all is,

*First*, An Argument from the Policy of *England*, in the necessary Attendance in the particular Advice in Parliament.

*Secondly*, It will be from the absolute Property that the Subject hath in his Goods, taking that for granted, against the Book of *Cowel* written in the Time of King *James*, who under the Word Parliament, speaking of the King's Power out of Parliament, saith, the Power in Parliament is but a pious Policy. But this was complained of, and by Proclamation the Book was denied. Your Lordships also know of another Book that was sentenc'd upon the same Occasion.

The use that I make of it, is this. If the Frame of *English* Government stands in the Royal Power, and the Subject hath Property in his Goods; then the adequate Reason of both from these is, that therefore the King can without Parliament charge the Subject in his Estate, tho' in pretence for common Good, no more than a Prince five hundred Years hence, if subject to Error or Will, may if he will, upon any Occasion or no Occasion, at what rate he will, charge the Subject to the height.

As to the Advice Political, if the King can do this alone, what is become of the Policy for which the Political Advice was made attendant to the Regal Power? *Ne Respublica*, &c.

Secondly, If the Subject hath a Property in his Goods, how is it in the Power of any one alone to charge that? This Reason I must not leave, for on this the Case stands or falls; tho' there be many Books and Cases, yet all are from Reason, but especially when these stand together.

The Reason seems so strong, that it ever holds in ordinary Power. It holds *pro bono Publico* & *pro Defensione*, he cannot make a Charge in ordinary things; and Mr. Solicitor did not deny the force of this Objection. The Answer stands thus.

Admit it be agreed, that by the Policy of the Kingdom the King cannot charge the Subject, yet the King may, without Advice in Parliament, in Cases extraordinary; where, in his Judgment, the Safety of the Kingdom is in instant Danger, and that the Business will not admit of the calling of a Parliament. He fortified this part of his Distinction with strong Reason; for in such Cases Property must yeild, for *Salus Populi suprema lex*; & *neccitas, lex temporis*; & *quod cogit defendit*, all are true; and to this some home Cases were put: As for building of Bulwarks upon another Man's Land, and burning of Corn in

88. And then foreseeing the Incounter of a Reply, he saith, the Subject must not say; that altho' the Power be in the King, he will enlarge his Power, for the King can do no wrong.

This *prima facie* hath a fair shew, and may go far; yet I hope to give it a full Reply. By this Distinction the whole Frame of Political Advice is, under favour, destroyed. I shall shew the contrary by Reason and Experience.

For the Distinction between Danger, ordinary and extraordinary, where the King doth think a Danger and a Parliament cannot be called: That Distinction, I say, must needs destroy the Policy in the whole; for as I conceive, the End of that Policy was but this; for else, what could it be? As it will ever be in the Will and Desire of a good Prince to do all Good for the Subject, to whom this Advice by Parliament can do no Hurt; so what Case soever should happen many Ages after, for that Posterity will look upon it, it should never be in the Power of any Governor to become subject to Will or Error, if he would so do to hurt the Kingdom. That Policy was not made so much for a good King, but looking what might happen many Ages after.

If you allow such a Prince Power extraordinary, and make him Judge of the Occasion; then in Substance, tho' Provision be made, yet after his Declaration we must make further Provision.

Yet may some say, here is a *Possè* and *Effè*; because he may, so he will.

True, it is unmannerly to say so of any ordinary Man; but under favour, it is allowable to say he may, if he will: Then if we leave him that Liberty, in such Cases he hath no Restraint, but his Will.

But it is said, the Law will not presume any such thing.

The Law doth not presume a Will, but the Law looks on Things that may be, as well as on Things that will be. True, the Law-Books say, the King can do no Wrong; which proves, that it is possible for a Governor in his Inclination to incline to Wrong, and therefore the Law hath taken a Care that he should do none; for he cannot make a Disseisin nor Discontinuance. There may be an Inclination to Entry; but the Law, because he should do no Wrong, hath made this Act void: which is not a Disability in the King, but a Prerogative, to make him come the nearer to the Divinity in the Attribute.

I shall offer the Judgments of several Ages in England; they ever thought it a dangerous thing, when they thought any Restraint fitting, to allow any Exception whatsoever, tho' Cause for it, left the Party, that was meant to be restrained, should be judge, and then go out when he would. *Thomas of Beckett*, he would not swear to the Laws of King *Hen. the Second*, unless he might put in this Expression, *Salvo honore Dei*. The King never meant to violate any of these; but if that had been allowed, the Clergy had been Judges of that, therefore they would not be satisfied: at this Day we have an Experience of the opinion of Kings themselves in this Case.

I shall proceed to the Practice of our Kings. In all Acts of Parliament, where they had ever a Desire to declare the King limited or restrained, if they did admit of any Exception, they would have it in Words so punctual, that they would not

admit of any Matter of Evasion, for fear hereby his Proceeding might be at large. In the grand Charter of King *John*, *Nullum Scutagium imponatur*, there was a Clause of Exception; true, there was a Reason to except how all (not as *Ed. I.* would have done) saving the Aid due and accustomed; but the *faire Fitz Chevalier*, &c. and so was *Mag. Char.* tho' not in the Roll, so careful they were to have no Words that give any such Light.

I come to the Statute of 25 *Ed. I.* against Aid, saving the antient Aid due and accustomed: no doubt but in these Words there was no more saved than Law must allow the King, and the Parliament did so mean; yet when that same Act came out, the Subject was not satisfied, and therefore the Statute *De Tallagio non concedendo* was made to take away the Exception in that Act. The Statute 28 *Ed. I.* after the Confirmation of two Charters, and divers Additions, there comes at last a *Salvo Jure Coronæ*. Your Lordships will find in History how all this was satisfied. And 29 *Ed. I.* at a Parliament held at *Lincoln*, the King made a Confirmation without a *Salvo*, and yet none will deny the Right of the Crown; the Lords did intend to preserve that. Thus your Lordships see the Opinion of this Kingdom, from Time to Time, how careful they ever were in all their Acts, to leave any Way whereby that which they did intend for their Good might be avoided: Now whether in this Case there might not be an Avoidance; I humbly leave it to your Lordships Judgments.

But before I go further, it may be demanded; how came in those Savings into those Acts, if the Parliament did not like them, and if they were put in here was a Trust?

I shall give a double Answer in the Case; tho' a *Salvo*, yet it will differ from our Case: the King was not Judge there, but your Lordships are Judges between the King and his People: but in this Case the King is to be Judge of the Necessity.

But to give you the true Answer, the Exception never came in originally from both Houses, but from the Lords themselves; this may seem strange. It was the Difference of those Times and ours in making Acts of Parliament; those were not Times of granting all, or denying all, but to answer some as to some part, and sometimes an Exception. And this being read, the Act drawn up upon the whole by the King's Council; and this Mischief was found out 5 *Hen. IV.* and from that time all Petitions were wholly granted or denied. So your Lordships see how these Savings came in, not by the Subjects, but by the penning of the Acts by the King's Council. The last Example is in late Times in the late Parliament, in the Petition of Right now printed; which was long in Debate in Parliament against Loans and Billeting of Soldiers. After the Petition had passed the Lower House, that those things were against the Law, there was a Proposition in the Upper House concerning the Addition of a Clause of Saving. Upon the Journals it appears, that there were several Conferences between both Houses, where the Reasons are mentioned, and do appear. And in the several Conferences the Commons did not yield; but the Petition passed absolutely; and the Reason was, because to put in that Saving was to undo the Petition.

To conclude this, to shew the Experience of such an Exception, *sine assensu*, what it hath wrought in former Ages, as that of *Normandy*, tho' foreign; yet to shew what such a thing did work there. It had the same Privileges we claim, and much of their Law came in here with *William* the Conqueror. *Lewis* the XIth taxed them high; they made Complaint, he, on the Complaint acknowledged it, and would tax them no more but on great Occasions: What followed, those Histories plainly declare.

Having, as I hope, taken off the Bulk of that Distinction, I shall further shew how it doth not stand with the Practice of the Common Law. It is a fundamental Rule in our Law, rather a Mischief than an Inconveniency: For when nothing can be so absolute in Government, but that there may be one Case or other wherein there is no Provision made, all the Care Men take is to chuse the least. Now his Rule is rather a Mischief than an Inconvenience. Now Mischief is that which perhaps may fall out never; or if it doth fall out, yet seldom; for if it were a thing that might commonly fall out, it were an Inconvenience. On this fundamental Rule, the Law concerning Lands and Liberties is thus grounded. True, there might be a Mischief for want of this Power in a Case extraordinary; but the Mischief perhaps never, or seldom falleth out. But to allow the other, would be an Inconvenience daily. I desire your Lordships to cast your Eye upon a learned Writer, *Comines*, Fol. 107, 131, 180, 181. where in the whole, putting them all together, speaking of the Danger that might come to a State for want of Power to raise Supplies for Resistance, giveth a Commendation of the Government of *England*: True, he doth go so far, saith he, it is hard in a defensive War, that any Preparation, which must be great and long about, can be so acted, but that Princes may take a timely Notice, to call together, and advise by Parliament. In the *Low-Countries*, where they have Wars, tho' they have an Excise for ordinary, yet they do it not for extraordinary, without Consent in Parliament.

My Lords, I go on: admit an Enemy ready to land, no Possibility for a Parliament; see how the Case will now stand. I shall leave it to your Lordships Consideration, whether there be an absolute Necessity, *infra & extra*, to command, and then to shew there is a Command, and by what Law; and by that Law that is more strong than the positive Law of the Kingdom; and doth work more in Point of Fear. I do put this by way of Admittance.

In that Case there goeth out a Writ, a *Mandamus Rogantes*; but it is in *Articulis necessitatis & quatenus a Mandamus Rogantes, not sub pena forisfacti*, of all you can, but for your own Preservation, and Safety of the Kingdom. These Writs have gone forth in such Times, when there hath been a near Danger, and that hath served the Turn; for that Instinct of Nature, that did make some Part of the Kingdom desire Government for Preservation, the same Instinct of Nature, doth infer to Contribution for Defence: Nay, that is a stronger Law than ours; for that Law which ariseth from one's own Breast, as it doth command, so it doth compel: There need no Law without, when there is a Judge within. Now in Times of Necessity, there is a Law that doth compel; nay, there is a stronger Penalty than our Laws can imagine; for our Laws can make but a

Penalty of all that you have; but how? To the King. But when there is a Danger from an Enemy there is not only a Danger of losing all that one hath, but of losing Lives and Lands, and all that we have; and all into the Hands of the Enemy.

Put the Case an Enemy was landed; to shew what the Powers are by our Laws in that Case for Defence; when there is particular Appearance of instant and apparent Danger, in that Case, particular Property must yield much to Necessity. These Cases our Books warrant, as building of Bulwarks on another Man's Ground, and burning Corn. In §§. there was an actual Danger, and then it was just to take Corn or Grass, or any thing to raise Supplies. But where do any of our Books say, that upon Fear of Danger, tho' in the King's Case, a Man can, without leave, make a Bulwark in another Man's Land? I do not read. As your Lordships may observe in this Case, of apparent Danger, the Power of the King; observe withal the Power of the Subject, and out of what Principle this doth grow; whether out of a Form of Law, or out of Necessity. In these Cases of Instant Danger, and actual Invasion, it is not only in the Power of the King, but a Subject may do as much in divers Cases. For if there be an actual War, the Subject may, without any Direction, do any Act upon any Man's Land, and invade any Property towards Defence: It is the Law of Necessity that doth it. Nay, in that Case, the Subject may prejudice the King himself in point of Property. If an Enemy be landed, and a Subject take away the Horses of the King, he may justify it in any Action; as in case of a Castle or City, if they can justify there was a Necessity, they may pull down the Walls, or blow up the City. In this Case there is no manner of Mischief if Subjects Goods be taken by the King, or any Man; and in that instant Necessity be employ'd to the publick Good. *Levis timor* will not serve; for then a Man cannot enter for fear of Force, but for such a Fear as ariseth from an actual and apparent Danger; then there can be no Loss to the Subject in that Case. *Secondly*, On the other side I shall shew, what Goods were taken for publick Use, were taken by way of Loan, and Satisfaction was made for them.

*The Second Day's Argument of Mr. Holborne, on the Behalf of Mr. Hampden, before the Judges in the Exchequer-Chamber.*

*May it please your Lordships,*

**T**O remember the Question whereupon I left off my Argument the other Day, whether the King of *England* can charge the Subjects for finding of Ships at their own Costs, only upon the King's Judgment of an instant Danger.

*First*, Whether for Defence of Merchants against Pirates. *Secondly*, For ordinary Defence of the Sea: And, *Thirdly*, For Defence extraordinary against an Enemy, only out of the King's Apprehension of an instant Danger, which cannot, in his Judgment, expect a Supply elsewhere.

Not to repeat, yet in a word or two, I shall open my Proceeding on this Question; and the rather, for that I find some Misapprehension, as if I had granted more than I meant, which is fit to clear.

The Sum of all was but this, That the King could not charge the Subject in any of these Cases. The Reasons I urged were but shortly thus: That the Subjects of *England* having an absolute Property in their Goods and Estates, and the Policy of Parliamentary Advice being to prevent Charge only, then on no Occasion one might err by Weakness, by Evasion or Will: That therefore the King could not charge in any of these Cases, without Parliament; for that so he might charge, if he would, as on Occasion so on no Occasion, as to 7*l.* so to 17*l.* That if this held in ordinary Charges, you may not exert extraordinary Occasions, tho' instant in the King's Opinion; for so a King intending to do nothing by his Policy without Parliamentary Assistance, he may, if he would so declare, charge at Pleasure, on no necessary Occasion, or beyond all Proportion. This Distinction I endeavour'd to take off, shewing it did destroy the End of the Policy.

That there was no Necessity of such a Distinction here, I shewed. There was one thing which I forgot, for destroying of the Distinction from Necessity, and leaving the King Judge of the Necessity; that in Judgment, so to do it, is all one as to leave it to him arbitrarily, if he will, which is that only which was intended to be prevented; if he will, was part of the Charge, if not the principal, in the Lower House of Parliament, against the Divine for his Sermon. I have seen the Charge, for holding the King had a Power in case of Necessity, and leaving the King Judge, and so at Liberty and Pleasure, if he will. This I do but touch here, for I must make use of it in the main; and under favour, shall make the Case somewhat like.

For the other two Matters, that when Danger is apparent, there was no need of positive Laws, I urged it thus; not admitting any thing, wherein I desire not to be mistaken. Admit no Writ of positive Command, yet the Subject will be then under a stronger Law, which as it doth command, so it doth compel, that is, the Law of Necessity, which is the strongest of all Laws; with which the Judgment carrieth an Execution, and that this Law commandeth under a greater Penalty: for tho' not under pain of Forfeiture to the King, which as to the Cause of Forfeiture, is but *ad terrorem*; yet under the true Pain of Forfeiture of all to the Enemy, from whom we must look for no Mercy.

*Lastly*, That of an actual Invasion, and Necessity withal, that not by any positive Law of the Kingdom, but of the general Law of Necessity, which is above all Laws, for the publick Good private Good doth yield on all Parts. Of these two last I have but touched here, to shew what I mean; I shall speak further of them both towards my Conclusion, in my Answers to Mr. Solicitor's Objections.

I shall now proceed to make good out of our Books of Law, that the Law doth not leave it in the Power of the King (in respect of such a King as possibly may be) to lay any Charge upon the Subject, but only in such Cases where the Law hath made such Provision, that if he would he cannot miscarry.

In this place, because it is taken for a Maxim, that the King can do no Wrong; and therefore the Law doth repose this Trust in him, of charging without any Danger at all: I shall shew, that the same Law doth take notice how, and in what Cases the King can, as much as in him lieth, do amiss;

and where the Law is sparing to leave the King any Power to lay a Charge on the Subject, even in small things; when the *Quantum* rests in his Judgment. It is true, the Law doth allow the King to command Payment of Monies in some Cases; yet where the *Quantum* or Occasion is subject to a Trial; the Ground of all this is, that the Law sees the King may incline to mistake, tho' as a King he can do no Wrong.

This may seem a Nicety, but under favour it is clear. This resteth in the Distinction of a double Capacity of a King, as a natural Man; and to say in this respect he cannot err, is strange! Human Nature is not capable of that Prerogative at the best; and they are subject to natural Infirmities of the Body, and must die: even so of the Understanding and Will. And so you see the Law must take notice of possible Mistake in Government; and this Possibility in another is no Injury to a good Prince, but sets off his Merits with a greater Lustre. This is not only true for smaller things, but even in the greatest. How many Acts of Parliament have we in Print (of which your Lordships are Judges) declaring the King's Mistakes in the Acts themselves by way of Complaint, and providing Remedy for the future, yea, in their own Times? To instance in one long since, cast your Eyes upon the beginning of the Acts of Parliaments of *Edward* the Third's Time, where we find a Statute for the Government of the Realm.

As the Law saith, he may incline to mistake in his natural, so it hath taken care, that in his politick Capacity he shall not. And therefore, lest possible Errors of the Natural Body should reflect on the Body Politick, the Law hath provided antient Means to prevent it, which was a Writ of *ad quod damnum*. *Na. Br.* saith, that if any Damage be to the King's Subjects, the Patent is in Law naught: As if the King grants a Fair, and there is an *ad quod damnum* brought, to inquire what Fairs were kept by it; if found a Damage, the Patent is void: The Books are full of such Cases. It is true, that in some Cases, the Books do allow the King to lay a Charge upon the Subject, yet not in every Case for publick Good; but only in some few, which indeed have been antient, and indeed of the very Essence of necessary Traffick and Intercourse, between one Part and another of the Kingdom; as Murage, to keep the Commodities sold the safer: Toll, for a Fair or Market towards the maintaining of it: Pontage and Paveage, for the bettering of Passages. And in all these Cases the King may grant a Sum of Money to be paid; yet as it is in this common Good, somebody must have the Power to grant, and that can be none but the King. So if the King should grant on no Occasion, or howsoever, which is enough for me, a Sum too great, greater than the Benefit the Subject shall receive, it is void in Law. If the Subject hath not a *quid pro quo*, then no Charge; 5 Report: and in this Case there is a Judge of the Justness of the Proportion, besides the King: And this is when a Patent cometh to be questioned, if the Toll be laid too high, then the same Patent is nought. Thus then you see how far it is that the Law doth agree, that the King shall lay Charges upon the Subject, only out of common and ordinary Necessity, there must be somebody to have Power. But then there is a further Remedy of a Mistake.

Here, before I leave this, I will make a double Use thereof. First to shew, that if the Law doth

not permit the King any absolute Power in this Trifle, shall the King do it in so great a Matter, where you shall have no Judge but himself of the Occasion and Proportion?

I next observe, where the Law permits the King to charge in any Case arbitrarily, it is but where this Power doth arise by original Contract, and precedent Consideration and Agreement for Land; and then not *quatenus* as a Subject, but *quatenus* as a Tenant, only as *Ratione Tenuræ*, in respect of the particular Signory and Dependence, not in respect of the general Signory of the Kingdom.

My Lords, it is true, at the Common Law the King had a Power and Liberty to charge, till he was restrained by Statute, which was *Aids pur Faire Fitz Chevalier, pur file Marrier, pur Ransome*, and taxing of antient Burroughs: And these Aids too, were in respect of particular Signory, *quatenus Tenentes*.

The next thing that I observe is, that the Policy of the Kingdom so little delights in these Incertainties, tho' it ariseth out of Contract and Consideration, that in Case of these Aids, the Law would not allow that Inconvenience of leaving them to an arbitrary Charge, but in some Case settled a Proportion. It's true in Case of Ransom, because no Man can tell the Certainty of that, it is left at large.

This I further observe, by the Common Law, where the Charge is in respect of the Tenency; yet if the Charge comes often, as the King pleaseth, there the Law did not leave it to the King's Judgment; as in Escuage, which is a Profit arising to the King in respect of the Signory. Tho' the Law allowed the said Aids, *pur Faire Fitz Chevalier*, and *pur File Marrier*, because they could happen but once; but Escuage that might happen often, the Law would not allow that to be uncertain; it must be assessed in Parliament, as in the Charter of King *John*, which was always held to be no more than the Common Law.

My Lords, upon the whole, I desire your Lordships to consider how unwilling the Law is to leave the King a Liberty to charge, even in the King's Case, at Common Law; and how restrained by Act of Parliament, where the Common Law before did give Liberty.

Next observe, that the Law, in none of the said Cases, nor I believe in any other, doth permit a Power to lay an immediate Charge upon the Subject, but only in laying a Charge to be paid in respect of the Benefit which he hath received, which is fit to pay, and none are compelled to receive it or pay it; for if he will not have the Benefit, he may refuse to pay it even in Cases between King and Subject. In the Case of Toll, Pontage and Paveage, it is not laid so on the Subject, that he shall pay it whether he will or no; but as there is a Benefit by the Pontage, &c. which cannot be maintained without Charge, 'tis therefore just, that those that have the Benefit should bear the Charge.

Lastly, I shall offer, that even in Cases where the King doth lay a Charge *quatenus Rex*, it is not so left unto him, either for the Occasion or Proportion, as that if he will lay never so much, he may; for if it be unreasonable, the Law doth make it void, as in case of Toll, if unreasonable.

My Inference is this: If the Law be thus careful in small things, as Penny Matters, whether or no the Law will make no Provision in the Main, but leave the Subject to the absolute Liberty of the King, to charge the Subject when he will say the Kingdom is in Danger, and where there is no Judge at all? I will conclude with Book-Cases, in the Point, that the Law doth not leave a Power in the King to charge, tho' it be in the King's Judgment? *pro bono publico*; as in the Case of granting an Office. The King cannot at this Day regularly create an Office in itself with a Fee, but in Law it is void; tho' the Office in itself hath a Shew, nay, it may be *pro bono publico*. P. 11 *Hen. IV.* 15, 16. and in 14. a Grant of an Office of Measurage with a Fee void; and that very thing, 13 *Hen. IV.* was complained of in Parliament, that it was against the Law, because it was in Charge of the People; to which the King answers, Let the Laws and Statutes be performed. In the Roll, amongst the Adjudicates, the Reason is expressed, *quia sonat in prejudicium Populi*. 16 *Ric. II.* the King grants to one a Rate upon every Barge that passed the Bridge, in Consideration that the Patentee had taken upon him the scouring of the River, in that Case the Patent was repealed. So in the Case of Rights to be kept for the Benefit of Seafaring-Men, this was in Charge of the People. This Patent was complained of, and your Lordships know the Order upon it. I omit many Cases, and conclude with that of *Fortescue de Legibus Angliæ, cap. 25.* speaking of and commending the Policy of the Government of *England*, he prefers it before that of *France*; and shews the good Fruits and Efforts of it; and lays down this for one, That the King cannot charge without Consent in Parliament. And he was a Man allowed for extraordinary Judgment, who sheweth Instructions for a Prince for future Government, being trusted more with the Government of the Prince than any other. I conclude these Cases with this Observation.

This denying of Power of laying Charge on the Subject, is not only in the Case where the King would raise Benefit to himself, which a Man may call *tallagium vel auxilium*; but in Cases of Charge which lies on the Subject, tho' not for the King's own Benefit, tho' also it be in Cases *pro bono publico*, as in the Cases put before.

I shall now come from the Books, by which I have shewed what is the Common Law, that by these Grounds the King cannot charge the Subject. I shall now offer the Consideration of some things, which are Acts of Parliament, or have the Force of Acts of Parliament.

I shall begin with that of *William I.* for a Conqueror I shall not call him, for that Name came in about *Ed. III.* his Time; for there being an *Edward* before, because they could not tell how to give him a Distinction from the Confessor, they called him *Edward III.* after the Conquest, by Direction of Sir *Roger Owen*, the great Antiquary. That which I shall urge is, that which he granted *Anno 1.* of his Reign, That all Freemen should hold their Lands *ab omni injusta Exactione seu Tallagio*, nothing to be demanded but that which was by Tenure, as in *Eadmerus* by *Selden*. Now whether or no this be an Act of Parliament, I shall not dispute; yet in those Times when a thing was granted between the King and the Subject, tho' it had not all the Formalities that now it hath,

yet

yet it was binding: however, this is called the Conqueror's Laws, and I take it for a Law.

Then it resteth to examine the Words, whether the Words will serve the Purpose, to clear the Subject in point of Sefs. It is said, they should be free *ab omni injusta Exactione seu Tallagio, ita quod, &c.* By this all Charges, but such as were by Tenure, are called Exactions. The Rule is, *ubi lex non distinguit nec nos debemus.* This is a Grant, if not of Right, yet of Grace, and must be taken largely, *favores amplificandi.* The Subject could not have demanded of him, especially that of forty Shillings, if it had not been the Law of the Land before.

I shall humbly leave it, whether this be not the Law by which *Edward* the Confessor laid down the *Danegelt*; for the *Danegelt* was not only against Pirates and Sea-Robbers, (they were indeed Pirates and strong at Sea) but also against all other Enemies. These called the King of *Man*, *Archipirata*, that is, a powerful King at Sea; and that these Pirates were only strange Enemies; and it was to raise Men, not *obviare eruptioni*, but *irruptioni*, not so much to keep them within their own Kingdom, as to keep them from falling on the Land. And by the History of those Times when this was raised, it was by reason of the *Danes* landing in *Northumberland* and *Essex*; and so upon that Irruption of the *Danes*, *Danegelt* was raised. It is called by *Camden*, in his *Brit' irruptione hostium*; and *Lambert*, in his *Saxon Laws*: but let it be *irruptione*, or *eruptione*, or be it *Danegelt*, to keep them from coming out, or landing here, both of them were for the Publick Service. When this had been so much complained of in *Edward* the Confessor's Time, it is clear he damned it. And *Ingulphus* is an Author without Exception, and *Tilburienfis* not to be compared to him. *Ingulphus* was a great Courtier and Favourite of *William* the Conqueror's; and to think that he had not a better Knowledge of what the Confessor did than *Tilburienfis*, who wrote many Score Years after, is much. And it is strange that *Ingulphus*, who was so much bound to the Confessor, should carry a Law down to *Edward*, so much to the Prejudice of the Confessor, if he had not been sure of it. *Tilburienfis* was urged, as if he spake, that it had been paid to the Conqueror; he wrote in *Henry II.*'s Time. And, my Lords, observe that he was an Officer in the *Exchequer*, and for the Rules of the *Exchequer* he teacheth them well; but for History against *Ingulphus* I leave him.

If this were laid down by *Edward* the Confessor, then I conceive, this Law of *William I.* was but the Law of *Edward* the Confessor; and there was no Ground for him to require a Law to lay any Charge but what was before. *Tilburienfis* makes this good, for he himself saith, that the Conqueror laid it down, and took it up again. If it were laid down, I would know by what Law or particular Direction it was laid down, if not by this; for nothing in all the Laws of the Confessor can cause to lay it down but this: and thus far he standeth with *Ingulphus*.

I shall further shew these Aids and Taillages were meant here. It is a clear Ground, that, *exceptio format Regulam in non exceptis*, an Exception often doth enlarge the Meaning of the Word beyond the ordinary Sense. As if I do grant to *J. S.* all my Trees, here my Apple-Trees pass not; but if I grant all my Trees except my Pear-Trees, there my Apple-Trees do pass, because this shew-

eth that meant all my Fruit-Trees. In the Word Trees I apply it, that here is a Discharge of all Taxes, except by Tenure. Now I shall shew that Tenures were for Defence and Service of the Kingdom in the proper Place, when I shall shew what Provision and Means the Law hath allowed the King for Defence.

My last Observation is this. This was not a Charter between the King and his Tenants, but betwixt the King and Kingdom; and so something must be laid down that was due to the King.

There are two kinds of Aids, one from Tenants, the other from the Commons; one was by Command from the King without any more, the other by Act of Parliament.

But here Mr. Solicitor hath taken that grounded Argument, of which I have found a contrary Sense, that is, *Sumus fratres conjurati ad Reg' defendend'*, wherefore these Aids not possibly meant here; but this is contradictory. By Inference to overthrow a thing express is against the Law. The Words are express, that there shall be no Taillage; then by an Inference to say, that the Defence of the Kingdom is not meant, is hard. True, all by their Allegiance are bound to defend the Kingdom, all are to fight for it. Acts of Parliament tells us, where and how we do it, and when; but that we must give Aid, is another thing.

It is one thing to supply with the Body, another thing to give or pay Money; and if there be any Invasion, *pro posse suo*, every Man is bound to Defence; but whether for every Defence of the Kingdom we must give an Aid, is another thing. Acts of Parliament will be the best Expositors of things so long since; for as Custom and Use will make a common Law, so likewise it will declare an antient Act of Parliament.

Now I shall come to that of King *John*, *quod nullum Scutagium vel Auxilium ponatur.* The Credit of this Statute I shall first clear. It is not only in *Matth. Paris verbatim*, who wrote in *Hen. III.*'s Time; but the Original was shewed under Seal the last Parliament by Mr. *Selden*, and these very Words were read, *Nullum Scutagium, &c.* And, my Lords, tho' this be no where on the Roll, yet that no ways lessens the Authority of it. It is no part of the Essence of a Statute to be found on Record; if all should be burn'd by Mischance, what would become of the Laws? Tho' the Rolls are all burnt, yet the Judges know what are Acts, and what not, tho' they have nothing to make it good by, but their own Manuscripts or printed Books, or Traditions. A Man cannot plead against an Act of Parliament, *nul' tiel Record*; and that is the Judgment in the Case, in 8th Report, *Prince's Case*. The Duchy of *Cornwal* stands supported by an Act of Parliament, not upon Record. That which I shall shew to make this an Act of Parliament, appears out of the Words: there are two things, *Scutagium* and *Auxilium*; and *Scutagium* riseth from the Tenants, and *Auxilium* from the Subject. To shew that *Auxilium* is laid down by this, it appears, that he could not assess Scutage without Parliament. I hope to shew that Scutage was for the Defence of the Kingdom, and is such a Provision, that no King hath a better, and such an one as will raise in *England* above 40000 Men.

Ay, but saith Mr. Solicitor, not assessed but by Parliament, that is, not meant to bind the King, but the Subject; the King can do no wrong.

Doth any Man think that the Commons did come to the King to bind themselves, and leave the King at Liberty?

I come now to argue from the Exceptions, *Exceptio format Regulam in non exceptis*. This Exception shews the Latitude of the Words to be a Discharge of all Aids, that there had not been Care had of the particular Aid, *quatenus a Tenentibus*; they were afraid, even those were swallowed up. True, I do not conceive that was a thing of necessity; but as the King may have it in if he would, so the Subject had no reason to deny it him, for it was but just, and was never meant to be taken from him. Nay, the Lords themselves had reason to take care themselves, that this was not discharged; for in all these Cases the King hath no more than a common Person, for he hath his Aid *pur file marrier*, and *pur faire ransom*, and that appeareth, 21 *Ed. I.* A Release from a Lord unto his Tenant: so that there was Reason that the King and Lords should have Care of this; yet they were afraid those Words would be so strong against publick Aids, that they would take away private Aids.

Last Reason that this *Auxilium* must be said publick; look in all the King's Desires, when they did desire Aids, still their Introduction is for the Defence of the Kingdom; which is a Cause of calling the Parliament; which appeareth by Speeches there on Record. Nothing can be intended of these private Aids for himself. I have done with the Charter of King *John*.

I next come unto *Mag. Char. 9. Hen. III.* For *Magna Charta*, I humbly conceive that this Charter, at the first, when it was granted, was no more than *verbatim* the Charter of King *John*, and originally had in it this very Clause of *Nullum Scutagium*: my Reason for it is this.

First, upon all Histories, that after King *John* had granted a Charter, the Pope would have discharged him of it, as far as in him lay, but that still the Lords and Commons made Claim. He died, *Hen. III.* cometh in. A Difference ariseth between the King and the *French*. Then it was proposed, that this Charter should be confirmed; Histories say, that at his Coronation he gave his Oath to confirm the Charter of King *John*. Then in the 9th Year of his Reign, the Lords demanded it; he was unwilling, because it was gotten *per duresse*: But the King said, we are sworn to do it, and therefore must confirm it. And in *Matt. Paris* it is said exprelly, that the Lords did call for the Charter of King *John*, and there it was read and confirmed *verbatim*. And *Matt. Paris* lived in the King's Court, and was *adeo familiaris*, that it is said, he eat with him at his Table; and at that time he wrote this Book, and sure he durst not have written it, had it not been true; but we find it not now upon Record: how this might possibly slip, I shall tell you.

First, We have no original Inrollment of *Mag' Char'*, no *Mag' Char'* but that of King *John's*. If it be true, which Histories say, that *Hen. III.* did revoke his Charter, it is possible these Rolls might perish in that time: the Authority of the King at *Oxford* did inforce them to bring in their Records; doubtless they would not leave the Inrollments.

The next Step to look for it is 28 *Ed. I.* confirmed there, and is exemplified; the Original may be lost in so long a time: what became of all Parliament Rolls, till 4 *Ed. III.*? All perished by Fire or some other Mischance; things were

afterwards put together, and upon the Roll. This was not the original Inrollment of 8 *Hen. I.* and written in the Roll where Acts of later time are written, and with the same Hand. If it were once in King *John's* Time, it must be left out somewhere.

Observe this one thing more, that is, as this of *Scutagium* and *Auxilium* doth concern the Subjects in their Lands, there is a Clause also that concerneth the Subjects in their Persons, *Nullus liber homo imprisonetur*, that might be taken for ordinary Imprisonment; then there cometh a Provision for the King that he should not do it, which is *non super eum Mittimus*, such Words as that a Man knoweth not what to make of them: but in the Charter of King *John*, it is *non enim in Carcerem Mittimus*. In this great Thing we see the Mistake, and how the other happened, I cannot tell.

I now come to *Ed. I.'s* Time, wherein I hope to make good those Acts of Parliament that we have vouched; and here lieth a main Endeavour. The First was of 25 *Ed. I.* which is not denied to be an Act, nor cannot. The other is *de Tallagio non concedendo*, which is so full, that it cannot be evaded, and therefore is denied to be an Act. First, for the Act of 25 *Ed. I.* which is against Aids and Tailages not to be taken without Consent of the Kingdom, I humbly conceive, that by these Words Aids and Tailages used in former Acts, that these were meant of things for a publick Defence of the Kingdom, complained of, and not denied. I shall bring home the Roll of the 25 *Ed. I.* that the King doth not promise to pay them *pur Reason*, to have Words for their Money; but that they must have a reasonable Satisfaction: I will shew that was the Sense given upon the Record.

First, for the Practice of the Times, that there were Ship-Writs went out, these Writs went forth in a more terrible Term than any I ever saw, *sub pena forisfacture vite & membrorum*. 24 *Ed. I.* was the Writ. I am sure that such a Writ, by the Common Law, would not have been mentioned, that if they did it not, the King should hang them. This Writ was the Grievance upon the Subject, and this Act refers to that. True, there were other Grievances, 4<sup>to</sup>. and 5<sup>to</sup>. but this was one; and that these Aids, which were then for the Defence of the Kingdom, were included within the rest, appears. The King, in reading the Articles, speaketh, that what was done was for Defence; tho' true he had Wars in *Poitou*, and in other Places beyond the Seas, yet as true that it was a War to be kept from hence by Defence. That part was for Defence cannot be denied; and yet no Distinction to be made between a Foreign War and Defence, and both equally a Grievance to the Commons.

After this Act of 25 *Ed. I.* there cometh out a Commission, and this was in Pursuance of the Promise that the King did make at his going into *Flanders*, and that was to inquire of those Grievances in the Articles, and among the rest; there was *de lanis & coriis* taken away *pro defensione Maris*; and to that the King saith there, *pay pour Reason*. There hath an Answer been given unto this, and much stood upon, that the King should say upon this Commission to inquire of Grievance *pro Custod' Maris*, if it were so *il fera tant ils tengeront appayer pur Reason*. That this should be no more, than that

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the King would give a Reason why he did it, I question. As if he should send forth Commissions, and afterwards dispute it, or if he did do it, whether lawful or not, that is not the way of sending out Commissions. Suppose that the King should say he would give them a Reason for it, this Commission did go forth to enquire of those Grievances. And if the King had not said he would have given any Satisfaction, yet it is enough that it is inquired of as a Grievance. It is a wrong upon the Subject, Princes may lay Taxes, yet the Subject doth not call for Satisfaction. A Princely Word that it should be done.

But when the King doth say *pais pur Reason*, to think, that that is no more than that he would give some Reason for it, is a very strange inference. In a Bargain they use to say, you shall hold your self content with Reason, you shall not have your own Demand, but he is satisfied one way or other; so here.

To begin with a Record. 21 *Ed. I.* Parliament Book. A Petition of the Commons, and they did desire Restoration of all their Monies. 25 *Ed. I.* there were Two *de lanis & victualibus* within that Commission; so the Monies and the Things taken were inquired upon by that Commission, 26 *Ed. I.* were for Defence, and here *Ordinatum est per Concilium quod Rex satisfaciet eis quam citius poterit.* Upon this Petition they desired Satisfaction. For Goods taken upon the aforesaid Commission, 26 ordered by Parliament, that the King should satisfy them so soon as he can, so that they should hold themselves content, *Ita quod se contentos haberent.* So that you see, not Satisfaction by Reason, to justify them, but the King should satisfy them one way or other. It is that they should have something for it, and not that they should have Reason shewn them why they should have nothing.

But I rest not here, there is one Parliament-Roll remaining before 4 *Ed. III.* and that was 8 *Ed. II. Pro Priore & Fratibus Sti Johannis Jerusalem.* It is there set forth, that *Ed. I.* did command his Treasurer and Barons of his Exchequer, to make Satisfaction for Wages taken in *Scrutinio* to the Clergy and Laity, *veluti pro lanis & coriis*; and that Satisfaction should be part by Money and part by releasing of Debts; so as thus the King had no meaning, 26 *Ed. I.* to pay back Money presently, but would give them Satisfaction one way or other, by Payment of Debts, or releasing of Debts, as was explained by that of *Ed. II.* Another Record *P. 27. Ed. II. Rot. 36.* Satisfaction was there given for an Eighth and a Fifth.

Those things which were taken before 25 *Ed. I.* complained of, and that confessed by Mr. *Solicitor*; so as I conceive, tho' it had been enough that there had been an Inquiry of these things as upon a Complaint, tho' there had been no more Answer. If any Answer make it better, it is no Answer to say, that they should have Satisfaction by Words, but either in Money or releasing Debts; if none at all, Confession had been enough.

I shall now come to talk of Mr. *Solicitor's* Exceptions to the 25 *Ed. I.* where he endeavour'd to shew that this Money for Shipping could not be intended within the Body of the Act; and if it was, yet it was excepted in the Saving of the Act.

The Objection stands thus. No Aids were charged but such as were granted, and we do not shew that these were granted; and there is

a Word beyond that, (*Prizes*) and how far that extends, I leave to your Lordships Judgments.

But if in the Body of the Act, yet excepted in the Saving all antient Aids due and accustomed; for the saving such an Aid due and accustomed surely was meant there.

In this Answer lieth this Question, whether these were the antient Aids due, or not, by the Common Law? this will stand or fall on the Body of the Argument. I shall tell you what these Aids were, and they cannot be these; there were other Aids mentioned in the Charter of King *John*, as *pur faire Fitz Chevalier, &c.*

That which takes off all, is, If these Aids were part of the Grievance, tho' for the Defence, they cannot be meant in the Saving, for that destroys the purpose of the Act. And for that Saving, it never came in by the Commons, nor the Lords; but the Form being so, to grant in part, and as the King would grant it so they must take it: Histories do say they did not like it, and so they desired an absolute Act.

It was said, that Aids and Defences were meant of Foreign ones. If the King and Council were so wary as to put in such a Saving as before was not in the Act, it shews what Care they had to have that they could not have. If by the Laws they might have them for Foreign Defence and not at Home; they that put in the Saving would have put in a Distinction. I shall leave the Consideration of this Act to your Lordships, how far it shall extend to Aids for the Defence of the Kingdom in that Case.

I shall go on, and conclude with the Statute *de Tallagio non concedendo.* That Act of the 25 *Ed. I.* was indeed so well penned, that it gave Mr. *Solicitor* a very probable Colour to make those plausible Answers. The Lords did desire a better Act, not with these Words, no such Aids; for such is a relative Word, and those are dangerous Words.

Next, if no more be meant by the Saving than *pur faire Fitz Chevalier, &c.* and yet to have left these in the general, and not in the particular, had left a way open to question what they had been. And in *Walsingham* it appears the Lords were not contented with it, tho' it was signed and had passed the Great Seal. It is true, that at this time a Pardon did pass to those Lords; the Words are so strong, that this was denied to be an Act: and much said, and very colourable too, to that purpose.

It is true, that this Act is no where on Record, that we find; but for that an Answer hath been given before.

It is said, that is no Act, but only penned as a Charter; that Exception was once made by the King's Council on another Occasion.

Aims of Parliament were then penned so; *Mag. Charta*, and *Charta de Foresta* are but in form of Charters.

Yea, but we cannot tell when it was.

How many Acts of Parliament are there which we know not when they were? Historians best tell that. It is hard to find it when the Records are lost. But this will appear to be in the time of *Ed. I.* There is the Pardon to those Earls in 25 *Ed. I.* We know that the Rolls of those Times miscarried and were lost, and sure it must be after the Statute of 25 *Ed. I.*

But then there is an Exception from the diversity of the penning; sometimes *nullum Tallagium ponitur*, sometimes *ponatur*.



We know, upon the entering of the Rolls, there have been divers Mistakes in the entering of *ponatur*; if it be with a Dash, it may easily be mistaken, and so only *vitium scriptoris*, and nothing else.

Then let us inquire what it was if it be no Act. It is said it is no Act, but an Extract out of 25 *Ed. I.* and that he urged several ways upon several Occasions.

By the penning of it, it doth appear, that he that wrote it was a Scholar, and not mistaken, to make a thing absolute that was relative; for *nullum* to make it *tale*, and to make that without a Saving that had a Saving, is a strange kind of Saving.

Yea, this cannot be an Act; for at that time there was a Pardon granted to several great Lords.

If that be true, which History saith, when this Act was published, the Lords were not satisfied with it; and these were the Lords to whom the Pardon was granted that were not satisfied. And to make their Pardon the stronger, they did weave it into the very Body of the Act: and for *Walsingham*, he is of great Credit among the Historians.

They say further, that this is no Act, for this takes away those three Aids, *pur faire Fitz Chevalier, file marrier, and pur Corpus redimend*.

This is not so, Acts of Parliament speak of it, and Practice speaks of it, and therefore no Law; and Practice of Ship-Writs ever since, and for Defence of the Kingdom.

For the Aids, that is a good Act; yet those were not intended nor included within that Act, and therefore that Practice is not contrary, because it is not within the Words of the Act, nor in the Meaning of the Act.

For the Aids therein questioned, the Question was between the King and the Commons, and not between the King and Tenants; then that being the Question, there must be a Consideration according to the Occasion and the Doubt made. But to take thus *Nullum Auxilium ponamus*, these are not Aids put on the Tenants, but Fruits of a Signory, as the Duty riseth not from the King's Command, but from the Laws, and so not within these Words *Nullum Auxilium ponamus*. And so all the Practice ever since will well stand with this Act.

And to say Shipping is not meant, because of the Practice since, is nothing. Let me establish once the Laws, and no matter for the Practice. If the Laws be once settled, we must reduce Precedents to Laws, and not Laws to Precedents.

And for the Practice yet, still the Subject makes a continual Claim against them.

My Lords, to prove this is an Act, *Walsingham* entered it in his Time, who did not write very long after it. Tho' it hath been said that he was a Monk, and what he wrote he took up in the Street and Market-Place; yet I will not think so of *Walsingham*, who was ever held an Historian of very great Credit. And no Historian whatsoever durst set down any thing for an Act of Parliament, if he had not a sure Warrant for it. It had been little less than Forgery.

In the next place, it hath been said, Histories are no good Authorities in Law.

True, they shall not tell me what the Law is, yet they are good to tell us of *Res gestæ*, whether or no there hath been such things done. He tells us, not that this was for Shipping, or not for

Shipping, but tells us there was such a thing. I have searched after this Act, and I have found in an antient Manuscript in *Hen. IV.* Time where it is, and it goes there under the Name of *Statutum de Tallagio non concedendo*; and I find it mentioned no where, but still find it mentioned as a Statute. I have an Abridgment of *Hen. VIII.*'s Time, and there it is put in as a Statute. I will not urge positively, but probably, and that an Act in *Hen. IV.*'s Time, 13 *Hen. IV.* A Complaint of laying Taxes on the Subject; the Answer is, Let the Laws and Statutes be observed: this is that positive Act that doth reach it more than any other.

But the main Answer that I rely upon, is, that if they deny the Truth of an Historian for *Res gestæ* as this. If from time to time it hath been conceived an Act, what more strong? What makes our Common Law, but general Opinions and Allowances? And should we doubt of many things, whereof we find the Acts of Parliament themselves, I am afraid we should shake many things done by the Common Law. That which I rely upon is, the Judgment of the late Parliament, to which your Lordships will give all Reverence. This, my Lords, did not pass *sub silentio*, but was made a Question, and something proposed on the King's Part, whether an Act or not? in the Conclusion it came into the Petition of Right. The very Statute mention'd in that Petition was this, *de Tallagio non concedendo*, made in *Ed. I.*'s Time. How far this Question passed at the Committee, it is better known to your Lordships, and is the thing whereon it is built. If this had not been an Act, it had been dangerous to have put it into the Upper House; but it being there read, your Lordships know what was done upon it.

The Petition being thus debated in both Houses, I shall leave it to your Lordships Consideration, how far you will make this Question to go in this Case. And his Majesty did not deny the same, but both King and Council agreed it is a Law.

*Mr. Holborne's Third Day's Argument in the Exchequer-Chamber, before all the Judges, on the Behalf of Mr. Hampden.*

*My Lords,*

AS the other Day, so now again with your Lordships Favour, I shall be bold to sum up my last Day's Argument in a very few Words; and by the way clear my Meaning, wherein I was any whit obscure, as also add where I was defective, yet briefly in both.

My Lords, the general Question the other Day, being concerning the King's Power to lay a Charge of Money upon the Subject; and my general Ground against it being but this, that tho' the Laws did intrust the King in many great Powers in Government, and with the whole Government, according to the Laws; that yet by doing of Acts, which charge or prejudice the Subject in his Estate, the Law did see that it was possible that Kings, as Men, might err, and therefore did make Provision, that their Acts, if against Law, should be void, as in Case of a Disfeisin or Discontinuance, or where they were to pass Grants, that there should go before an *Ad quod damnum*; and also, that if they were passed,

fed, and were to the Prejudice of another, that regularly in that Case, the Law did make them naught, and that they were to be repealed.

And I shewed how this did hold, especially in laying Charges upon the Subject. I shewed that the Law was not willing to leave the King Power to charge in any Case, notwithstanding where the Occasion might be common, and did require, for the Maintenance of Traffick and Commerce between them, so to hold them still as within one Body. The Law must leave in some Body a Power to charge, which would be left in none but the King as supreme Governor. The Cases for this were the Monies to be paid for Murage, Pontage, Paveage, Ferriage, and the like. That in those Cases, tho' the King was trusted with a Power to lay a Charge; yet the Law did not leave the Charge arbitrarily in the King's Breast, so, but that if it were unreasonable, the Grant was naught, and the Proportion was to receive Trial by another, upon whose Judgment it must stand or fall, which were either the Judges or a Jury; like to that Case which I might have put, but did not, of a Fine uncertain upon a Copyhold. I also shewed, that in some Cases the Law did allow to demand arbitrarily upon some Subjects, Sums of Money, yet that was not upon the Subjects, *quatenus* Subjects; but upon some Subjects, *quatenus Tenentes*, which did rise upon the *Jus ventulare*, as to marry his Daughter, to make his Son a Knight, or for Ransom, or upon those who were little better than Villains, the King's Burgeses, whom the Law did not so much regard; yet the Policy of the Kingdom, in those Cases, did afterwards restrain the King to a Certainty, by Act of Parliament.

Afterwards I went to the Cases which were in Point, that the King could not lay a Charge upon the Subject, tho' for a publick Good; and instanced in the Case of the Grant of the Office of Measurage, with a Fee, adjudged void, *quia sonat in Oppressione Populi. 22 Ed. III. Pat. 31.* The King granted to one *Pawley*, an Office of Alneage of Worsted; and because in Charge and Burden of the People, and a new Grant, adjudged void, and was repealed.

I begin with that of 4 *Will. I.* which I now find more clearly to be an Act of Parliament, out of an antient Manuscript of the Church of *Litchfield*, mentioned to this Purpose in *Eadmerus*. Here I endeavour'd to answer to Mr. Solicitor, when he said, that there was another Law of the Conqueror's, which explained this; and shewed, that the Charges for the publick Defence were not meant, because it is said in another Place of the same Law, *quod omnes sunt fratres conjurati ad Regnum defendendum.* To this my Answer is, that they are so for their Bodies, *Fratres conjurati*, to serve, but not to be charged. Yet I must confess it is *pro viribus & facultatibus*, to defend the Realm; where *pro facultatibus* may seem to imply, that they were bound to be subject to Charges, *secundum facultates*. Under favour, *pro viribus & facultatibus*, are but Words of like nature; *viribus*, that is *facultates*, natural Powers, not Substance; for it is not only that they should be *Fratres conjurati ad Regnum defendendum.* but also *ad pacem dignitatem Coronæ, &c. & ad judicium Reg' & justitiam faciendum.*

I went next to the Charter of King *John*, which I observe to be but Common Law; it's inrolled, remaineth under Seal, and is recited *verbatim* in *Matth. Paris.*

I went next to the Acts of Parliament, 25 *Ed. I.* against Aids and Taillages; there I laboured to shew, that the Act was made against Aids and Taillages, tho' for the publick Defence; and that was out of the Articles, whereupon the Statute was made, and upon the King's Answer to the Articles: Next out of the Commons, which was after the Statute, to enquire of the Grievance mentioned in the Articles, to the end there might be Satisfaction, which was promised upon the Articles; where, in the Commons, the whole Inquiry was *de gravaminibus*.

It is enough for me that this Commission was grounded upon the former Articles, and that here this very thing, *pro defensione Reg'* was *inter gravamina*. It had been strange, when the King had confessed upon the Articles, that he would not legally justify them, and upon the Commission, in Pursuance of the Articles, had called them *Gravamina*, and so to be inquired of, that now when they were found he would justify them in any Point, and say, *a pais pur reason*, give them a Reason for what he did, as Mr. Solicitor saith.

Next I did conclude with the Statute *de Tallagio non concedendo*; and there my Labour was to prove this to be a Statute: and I am sorry I spent upon it so much Time, if that had not been denied by Mr. Solicitor to be a Statute. But now I understand, by the King's Side, that this was no Statute, but made and sealed at the same Time with that of the 25th, and meant to be no more than that of the 25th.

This seemeth strange: For why should they be both at one time? Next, how came they so much to differ, if made at the same time? Why are there some things in the Statute, *De Tallagio non concedendo*, which are not in the Statute of the 25th?

But the Teste will clear all. First for the Teste of that of the 25th, it was *Teste Ed' Principe*, and sealed by no more than the King: To this the Archbishops and Lords put their Hands and Seals. But, however, I am glad to hear it now confessed to be a Statute; for then we have no more to do, but to see whether the Charge of the Defence were within the Meaning of these Words, wherein sure the Words are general enough; and what Reasons have been given, why by the Expositions of these, Charges of Defence should be excepted, you have heard; and what my Answers have been unto them, I leave to your Lordships Judgments.

I come now to *Ed. the Third's Time, 17 Ed. III. Parl. Roll.* Whereas Commissions have been awarded to the People and Shires, to prepare Men at Arms for *Scotland* and *Gascoigne*, or elsewhere, at the Charges of the Shires, contrary to Law; the King hath not, before this time, given Wages, whereby the People have been at great Charge, and much impoverished. The King wills, that it be done so no more.

Ay, but it was said, this was to *Scotland*, and to *Gascoigne*; and that this was foreign War; and that was denied, tho' not admitted.

I answer, that in those Times, *Scotland* held in Fee of the Signory of *England*; and in those Times the King of *England* was *Dominus directus Scotiæ*: And so *Ed. I.* when he determined that Quarrel between *Bruce* and *Baliol*, and gave Judgment by Writ, settled *Baliol* King of *Scotland*, and did justify it; and it is remaining in the Rolls of *Scotland*, in Mr. *Squire's* Office. When there