

Now I pray you observe.

In the Writ of Summons to the Peers of the Kingdom, the Words are, *Super dictis negotiis tractaturi verumq; Concil' impensuri*; but in the Writ for choice of Knights and Burgesses to serve for the Commons, the Words are, *Ita quod milites pro se & Communitate Comitatus predicti, ac dicti Cives & Burgenses pro se & Communitate Civitatum & Burgorum plenam potestatem habeant* (what to do?) *ad faciendum & consentiendum his quæ tunc ibidem de Communi Concilio regni nostri contigerint ordinari super negotiis antedictis.*

So the Words are, *facere & consentire*, to Matters agreed on concerning the Defence of the Kingdom; there are no other Matters mentioned in the Writ for Summons of their representative Body: no such Words as are in the Peers Writs are in theirs; yet I cannot say, and so I desire to be conceived, but that according to the Record of 9 Hen. IV. the Commons may also humbly offer their Advice to the King; they may shew their Grievances, and the State of the Commons: but it is plain, that the principal Duty belonging to the Commons is, *facere & consentire*, otherwise there would have been in their Writ, as well as in the Peers, *super dictis negotiis tractaturi, verumque Consilium impensuri.*

Upon this I put the Case, and argue thus: the Kingdom wants present Provision, necessary for present Defence, to be in readiness; this Provision (the Case so falling out) must be so speedily made, as that it would be dangerous, in regard of what may happen, to stay for an Assent in Parliament. Well, in this Case there is a Duty from the Subject, and a Necessity that the Thing must be done, but the necessary Form for the Subjects Assent in Parliament cannot be pursued; I demand what must be done, or what may be done in this Case, without Breach of Law?

Is the Duty lost for want of Time to observe the Form?

For my part, I understand not any Reason that the Duty, in such Case, should be lost; but I should agree, that were not this a Duty, *vi termini*, which is to come from the Subject, in such a Case, but only a mere Benevolence, then that such Benevolence could not by Law be exacted without the essential Part of it, *viz.* the Subjects Assent in Parliament.

4. I confess, that by the fundamental Law of England, the Parliament is *Commune Concilium Regis & Regni*, that it is the greatest, the most honourable and supreme Court in the Kingdom; that no Man ought to think any dishonourable thing of it: yet give me leave to say, That it is but a *Concilium*; to say so is no Dishonour to it: The King may call it, prorogue it, dissolve it, at his Pleasure; and whatsoever the King doth therein, is always to be taken for just and necessary.

We must consider, that it is a great Body, moves slowly; sudden Dispatches cannot be expected in it.

Besides, tho' the Parliament cannot err, Parliament-Men may *de facto*: every particular Member of the House hath his free Voice, some of them may chance to make Scruples, where there is no Cause; it is possible that some of them may have sinister Ends; these things breed Delays, so they may Disturbances. (I would to God, the late woful Experience of this Kingdom, had not verified these Speculations.)

Yea, there have been, in former Times, Censures of Parliaments themselves; the good Parliament, *Temp. Ed. III. Parliamentum indoctorum*, *Temp. Hen. IV.* and in the same King's Time, if we believe my Lord Coke, 11. f. 113. *Brangwit*, *id est*, the White-Crow Act. These Matters are considerable in such Cases as ours is.

Wherein apparently *Mora trahit periculum*, and to follow the Rule, *Festina lente*, is most dangerous.

5. The Point of *retentio Domini maris* (which is in the Case) is not of an ordinary Consideration; for, besides the antient Inheritance and Right which the Crown of England hath in it, it is obvious to every Judgment, that in the Continuance or not Continuance of it to the Crown, not only the *bene esse*, but even the *esse* itself of the Commonwealth doth consist; and therefore it behoveth the Subjects *accelerare* to the Tuition of it: slowness is an Argument of Stupidity, or want of that Sensibleness of the Diminution of that Right which every Subject ought of Right, and hath a concerning Reason, to propose to himself.

Notable are the Words in the *Scotch Rolls*, 10 Ed. III. *numb. 3.* In a Writ by the King to a great Part of all the Kingdom; *Considerato, quod progenitores nostri Reges Angliæ domini maris & transmarini passagii, totis præteritis temporibus extiterunt, & plurimum nos tæderet, si honor noster regius nostris temporibus in aliquo læderetur. Quodque omnes homines de regno pro d. s. v. s. me iisdem, contra bestium invasiones, tenentur exponere se & sua.*

The Writ wherein these Words are, was a Command or Charge laid upon the Subject, without any Warrant of Parliament for it.

It was a Writ directed to all Earls, Barons, Knights, and others, *ab ore aque Thamefis versus partes occidentales*, which included divers Inland Counties.

It issued upon Occasion of *David de Brus* having a great Navy afloat, and therewith having enter'd *Jersey* and *Guernsey*.

The Writ is a Command to those to whom it is directed, *Tan'is & tam gravibus periculis imminetibus debite ponderatis*, to treat with the Archbishop of *Canterbury*, and other Great Men assigned by the King, *super defensione regni & populi.*

The Writ concludes thus, *Scire vos volumus, quod si rebelles aut difficiles fueritis in præmissis, in tanto & tam grandi necessitatis articulo*, the King will repute those *Rebelles, aut difficiles, tanquam suos & regni inimicos.*

6. Not to speak of Necessity in general, which is of itself a Relaxation of Laws, and serves for a Dispensation, even by the Equity of the Law itself: in our Case there is a Necessity in point of Government.

I shall put you a Case, where an express Clause in an Act of Parliament hath been doomed void, because it was against a Matter of Necessity in point of Government.

2 H. VI. 6. *Tb. Earl of Northumberland's Case. Nota*, 28 Ed. III. & 42 Ed. III. Penal Acts were made, That none should exercise the Office of Sheriff above a Year, altho' that he have a *non obstante*; that Clause of (*altho'*) is void, and a *non obstante* may be of that *non obstante*: no Reason can be for this, but because it takes a necessary part of Government out of the King's Hands.

7. *Salus Reipublicæ*, by all Laws, is *suprema lex, & summè necessaria*. It is, where it interposeth,

poseth, *Lex legis*. It takes away particular Interests, before itself give place for that Cause.

8 *Ed. IV.* 36 *Hen. VIII.* *Dyer*. A Bulwark for Defence may be built upon another Man's Ground, *invito domino*.

No Dower or Thirthing to a Woman, of a Castle of Defence; it may indanger *Salus Reipublicæ*, by dividing such a Piece.

An Alien Merchant takes a Lease for Years, of a House for his Trade: this is a good Lease, so long as he tradeth, and there is no Enmity between his King and ours; but when he ceaseth trading, or if War happen, the King shall have the Interest of the Lease. The Reason, It is possible, that *Salus Reipublicæ* may be concerned, if the Alien's Interest in it should continue.

8. If there were not *Salus Reipublicæ* in our Case, yet there is in it at least *Bonum publicum* intended.

I will put a Case, where Subjects are bound without their Assent, for the *Bonum publicum* sake. 44 *Ed. III.* 19. Chamberlain of London's Case, *Coke* 5. f. 63. Inhabitants of a Town, without any Custom, may make Ordinances or By-Laws of any thing, *pro bono publico*; and in such Case, those who are absent, and so unconsenting, are bound, the *Bonum publicum* is the Cause.

9. Prevention of further general Mischief, which may ensue, trencheth, even by Construction of Law itself, upon other Mens Rights. For that Cause, pulling down a House which is on fire, to save other Mens Houses, is lawful. *Higbly's Case*, *Co.* 10. 139. One is bound by Prescription, to make or repair Walls, Damms, or such like against Waters: This Man is not able to do it, a small Breach happens, which either must speedily be made up, or a general Mischief will happen. In this Case by Exposition of the Statute of Sewers, and by an Equity out of the Letter of the Laws, grounded upon *Salus pop.* all those who are within the Level are to be taxed, and to contribute for present; the Ability of him, whose the Right of the Burden is, *non expectata*.

10. I find a Writ in the Register *de reparatione faciendâ*, which is cited in *Bowles's Case*, *Coke* 11. f. 82. b. whereby, if two Joint-tenants be of a House, the one shall have a Writ of *de reparatione faciendâ*, against the other; and the Words of the Writ are, *Ad reparationem & sustentationem ejusdem domus tenetur*; where the Word (*tenetur*) is observable. Every Man hath an Interest in the Commonwealth, but the King's Interest is incomparably beyond other Mens; therefore the King may, by a like Reason of Law, call upon his Subjects to join in Contribution with him, towards the Reparation and Sustentation of the Fabrick of the Commonwealth.

11. In the gret and common Vouchee's Case, 13 *H. IV.* 14. in the Debate of this Cause of the new-erected Office of the measuring of Cloths in London, which was brought to Parliament; it is a memorable Saying of *Gascoigne* the Chief Justice, "The King may charge the People of his Realm without special Assent of the Commons, to a Thing which may be Profit to the common People."

This Saying is cited and allowed in the Case of Monopolies, *Coke* 11 f. 86. b. and so it is very commonly, upon Arguments concerning such Questions.

12. I observe, that tho' the Precedents of Writs and Execution of them, for assessing the Subject

by the King's Command, without Warrant of Parliament, are very many in several Kings Reigns; yet there is not any Precedent of any civil Action brought for any thing done in former Ages, upon such Commands of the King as is in our Case, but only that one of the Abbot of *Robertsbridge's* Case, which hath been often cited; and in the pleading thereof it is acknowledged, that the agifting of Mens Lands and Tenements to contribute, *ad custodiam maris* by the King's Commands, without Tax by Consent in Parliament, was good in Law.

And I note, that that Case happened and was in Agitation, and gave fair Cause of Demurrer, in an opportune Time in demurring, if the Law had been otherwise; for it happened at that very time, when the Statute *de Tallagio non concedendo* was made, or in hammering.

If only one Action brought heretofore, *una birundo*, it were not to be regarded, tho' it had been against the King's Power; but when that one is assertive of the regal Power, it is to be respected more than as a single, I mean, as a *singularis probatio* of it.

Lastly, I observe, that upon Grievances, or Complaints in Parliaments which have been almost infinite, and upon all Occasions in former Times, no one Record hath been, or I think can be cited, that in case when Charges have been imposed without common Assent, for the necessary Defence of the Kingdom in an instant Article of Necessity, any King hath ever answered, or assented, That such Charge hath been against the Laws or Liberties of the Subject.

Neither the Reclamation of the Subject alone on his side, nor the single commanding Rescripts of the Sovereign alone on his side, are of Authority to preserve the Law; but if there be a Concurrence of King and Subject, that is it whereby a Judge may ground his Resolution.

As for that one of 2 *R. II.* which cometh nearest in that Kind, but hath not the King's Acknowledgment; I note, that it was upon a Deliberation, before the Charge imposed: And truly I think that if the Charge in that Case had been first imposed and collected, upon Complaint against it afterwards, it would never have been adjudged for unjust.

Many things are questioned, and sometimes denied to be lawful, before they are done, which *facta valent*, which being done, are good and valid in Law. If a Question be made of that which of itself is lawful, the very making the Question, makes it questionable, and may draw on an Opinion that it is not lawful.

Rot. Parl. 4 *H. IV.* num. 28. & *Rot. Parl.* 6. *H. IV.* num. 9. you shall find, that the Commons having considered of the Wars of *Scotland*, the Rebellion of *Wales*, the Safeguard of the Sea, & especialment the Defence of the Realm, they granted a Subsidy, but with Protestation that it should not be an Example to charge the Commons hereafter with any manner of Subsidies, for the Wars of *Scotland*, or *Wales*, or the Safeguard of the Sea, or the Marines of *Calcis* or *Ireland*, without Consent in Parliament. I observe, that there is not a Word in this Protestation, that the Subjects should not be charged without Consent in Parliament for the Defence of the Realm, tho' there were a little before an exprefs mention of it, and that with an especialment. On the other side, there is a Cloud of Precedents of imbarcking of private

Mens Ships, in case of Necessity of Defence of the Realm, and Safeguard of the Seas, Command of making Gallies and Ballingers *sumptibus propriis*.

Arraying and Apparelling of Soldiers, and victualling and conducting them in this Case of necessary Defence, *propriis sumptibus*, of several Towns and Counties, as well Inland as Maritime; the express Words of the King's Commands in such Cases, by his Writs directed to the respective Sheriffs and Head Officers, are, That they should *levare facere expensas de comitatibus*, sometimes *comitatuum*, sometimes *villarum*, as the Case was: wherein note the Words, *levare facere*; and in what manner the Sheriffs Levies are, *viz.* Assessment by himself, and Collection by himself and Ministers, I think few are ignorant.

Amongst which kinds of Writs, some of 48 H. 3. are remarkable for these Words in them, *Cumque adhuc necesse sit propter casus fortuitos ad securitatem & defensionem regni, defensionem habere promptam, contra Alienigenarum adventum, &c. Inter alia sic Rot. Claus. 48. H. III. mem. 2.* A Writ to the Town of Bedford. So still the Pressure is according to the Occasion, instant Provision raised, whereby a Promptitude may be not staying a Provision by Parliament, which Cunctation might be opposite to Promptitude.

Also the French Roll, 21 E. III. Pars 2. mem. 9. Co. 11. shews, that whereas a Subsidy out of the Wools had been granted to endure for a certain time only, yet the King, *necessitate compulsus, de consilio Prælatorum, Magnatum, & aliorum de concilio suo*, (not *per commune concilium*) did ordain *quod subsidium prædictum levetur usque* a further Time.

Close Roll, 1 R. 2. m. 18. many Writs were directed to the Bailiffs of the several Towns of Cambridge, Huntingdon, Nottingham, Derby, Lincoln, Gloucester, Worcester, St. Edmonds-bury, and Thetford, reciting a former Command of the King to these several Towns, to provide several Ballingers, *ad custas validiorum et magis divitum hominum*, of those Towns. Now by those Writs the King declared to them, that *videbatur* to the King and his Council, that they who had 10 l. and upwards in Goods, should contribute, and not others; and commands those Bailiffs to compel Men of that Ability to contribute, *per distinctionem si necesse foret, & aliis viis & modis, quibus melius viderint expedire*.

I spare Iterations, I conclude my Second General Head with my Subscription again proved by my Judgment, by what I have said before:

That when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, the King may, by Writ under the Great Seal, command all the Subjects of the Kingdom at their Charges to provide and furnish Ships for the Defence and Safeguard of the Kingdom, and may by Law compel the doing thereof.

And that in such Case the King is the sole Judge of the Danger, and when and how the same is to be prevented.

And how many more have subscribed to this Tenet it is not unknown; the Records of the General Courts of Justice of the Kingdom, manifest to such as will look into them.

The Third General Head.

I Have done with my Second General Head, and come now to my Third; which is, To consider the Acts of Parliament, Answers to Petitions in

Parliament, *Magna Charta* Laws, which concern the King's Proceedings in this Case.

1. St. Edward's Laws have *Danegelt* mentioned in them; see *cap. 12.* but not another Syllable pertinent to this Case, saving that the Church and People are free, have Liberties and Customs belonging to them of Right, which is not by any denied.

2. I find that there was a *Magna Charta Libertatum Regni* made by K. Henry the First, the *Beau-Clerke*, in which is this Clause, That *Milites possiderent terras dominicarum suarum quietas ob annibus Geldis* (*Guilt* signifieth a Sum of Money.) And yet amongst the Laws of his Time, as appeareth by *Leges Hen. I. c. 16.* this is one which I cited before, *Danegeldum i. e. 12d. de unaquaque bida per annum, si ad terminum non reddatur vita emendetur* (which signifieth an Amerciament.)

3. The *Magna Charta* of K. John, made at *Running-mead*, hath been cited by Mr. Hampden's Counsel, and urged to be an Act of Parliament; the Words inferred out of it are, *Nullum scutagium vel auxilium capiatur in regno nostro, nisi ad corpus nostrum redimendum, & primogenitum filium militem faciendum, & ad primogenitam filiam nostram semel maritandam; & ad hoc non fiat nisi rationabile auxilium, &c.*

The Words pitched upon are (*Nullum auxilium*) a general Negative; I have touched before the Signification of the Words (*Aid, auxilium*) I will answer the Words farther anon, together with other Statutes, which have as general and further negative Words.

Observe, But there is no question but *Running-mead Mag. Ch.* was no Statute, nor ever was taken for one, saving in those Parts wherein it and *Mag. Ch.* of 9 Hen. III. do concur: to give but one Reason, tell me when, after K. John's Time, were 25 Barons appointed, according to that which is contained in *Running-mead Magna Charta*. If there were any great matter in *Nullum auxilium*, it is observable that those Words are not in *Magna Charta* of 9 H. III. and that is the *Magna Charta* which hath the frequent Confirmations.

In *Confirmatio Chartarum* 25 Ed. I. there is mention of that *Magna Charta* of K. Henry III. by Name, and none of that K. John's *Magna Charta*.

Certainly there were some *Iniqua* in the *Magna Charta* of King John; the Barons did in that King's Time *iniquum petere ut æquum ferrent*, otherwise that *Magna Charta* would have been also confirmed, as well as his Successor Henry the Third's.

And I pray you note, That after the *Nullum auxilium* there follows on, *Nisi ad corpus nostrum redimendum*: If for that, then certainly much more for the redeeming of the whole Body of the Commonwealth, which is our Case.

4. The *Magna Charta* of 9 H. III. which is the often confirmed *Magna Charta*, tho' it allow all the Liberties of the Subjects then claimed, hath no special Words pertinent to our Question, which is a Matter observable; for Charges for the Defence of the Kingdom commanded by the King out of Parliament, were frequent both at and before that time.

In it there are only general Words of *Habeant libertates suas*; out of which Word (*suas*) I do observe, First, A Right of the Subject in his Liberties; they are (*suæ*). Secondly, Those Liberties which the Subjects must *habere*, must be (*suæ*) that is, such Liberties as are fit for a Subject, as are compatible with the Relation between a King

and a Subject. The Words are not *omnes libertates*, all manner of Liberties, but (*suas*), that is, Liberties proper for them, or such Liberties as they are, in good construction, capable of.

And indeed *Quicquid recipitur, ad modum recipientis recipitur*.

14 H. VII. f. 11. The Abbot of St. *Bartholomew's* had a Charter from King *Henry II.* that he should be as free in his Lands, as the King was in his Crown; yet these general Words pass for no more than a Subject is capable of; he must notwithstanding those swelling Words, pay Fines for Alienation without Licence, admit the King's Valect to a Corody, and such like.

But in that *Magna Charta* of 9 *Hen. III. cap. 20.* there is this Clause, (*Et si nos adduxerimus vel miserimus eum in exercitum, &c.*) which proves the King's Right, even by that Statute, to dispose of the Bodies of his Subjects for his Army.

Also *Cap. 30.* there is a Clause, that *omnes Mercatores* shall have safe Conduct, and Liberty *ad emendum vel vendendum, sine omnibus malis tollentis, per antiquas & rectas consuetudines, præterquam tempore belli*; which shews, that in *Tempore guerra mala tollente* might be set up, they were not then *mala tollenta*. *Dominus opus habet*, made them *tolerabilia & toleranda*; in our Case, we have *tempora guerrina*.

5. *Confirmatio Chartarum*, which was 25 *Ed. I.* is the next Statute whereof there is any Colour for *Mr. Hampden*, the Words thereof are,

Que pur nul besoigne tielx maners de aydes, mises, ne prises, ne prenderomer forsque de com' assent de tout le realme, saves les anc' aydes & prises dues & accustomes. But this Statute hath not been stood upon, because of the *Saves les anc' aydes, &c.* That which is saved or excepted is clearly out of the Body of the Law.

6. But then comes the Statute *de Tallagio non concedendo*; which of what Time it was, *non constat*. It was between 25 & 34 *Ed. I.* I do agree that to be a Statute or an Act of Parliament: The Recital in the Petition of Right, 3 *Car.* binds up my Judgment to affirm otherwise.

The Words of that Statute are general, without any saving or Exception, *Nullum Tallagium vel auxilium, per nos vel heredes nostros in regno nostro ponatur seu levetur sine voluntate & assensu Archiepiscoporum, Episcoporum, Comitum, Baronum, Militum, Burgensium & aliorum liberorum communitate de regno nostro*.

These Words indeed are general; but for a true and just Exposition of them, the Occasion of the hard pressing to have that general Statute is to be considered.

K. Ed. I. had Right to Dukedoms and Earldoms in *France*, and great Wars he had with the *French King* about them.

Great Troubles also he had out of *Wales* and *Scotland*.

He was in *Flanders* about auxiliary Wars against the *French King*, both at the making of *Confirmatio Chartarum*, and of *Tallagio non concedendo*.

He had a little before, in the 22d of his Reign, caused Scrutinies to be made throughout the Kingdom, to raise Moneys for Supply of his great and pressing Occasions for these Wars, which in truth did not immediately concern the Defence of his Kingdom; for if he would have let those Wars alone, he might have had Quiet enough for his Kingdom of *England*.

Upon the said Scrutiny search was made, where and in whose Treasuries or Hands Moneys were, whereby the King might be furnished; and indeed, the King's Ministers took the Moneys they found upon the Scrutiny as borrowed for the King, tho' it were against the Owners Wills to lend them: And amongst others, for the most part, they lighted upon the Treasurers of Religious Houses, many of which had Coffers well stored. The Religious Men being thereupon oppressed themselves, incensed the Great Men against the King; and by that means, and the Palpableness of the Injury, the great Lords, especially the then Constable and Marshal of *England*, *Bobun* and *Bigott*, stood out against the King with a great deal of stiffness; and at last the King being in a Streight, and to pacify one Extremity with yielding to another, passed the Act *De Tallagio non concedendo*, without the exception or the saving of the antient Aids which was in *Confirmatio Chartarum*.

But it is plain, that these general Words were never meant, either on the King's, or on the Great Lords and other Subjects sides, to be absolutely general for all Cases: for notwithstanding those Words, the Aids *pur faire fitz Chevalier & pur file marier*, continued, and so did the King's Power to array and send Soldiers, *sumptibus villarum & comitatuum*, into remote Parts of the Kingdom, out of their proper Counties, for the Defence of the Realm, as appeareth in the continual Practice in that King's and his Successors Times; as, if I had time, I could make good by a long Succession of Precedents, appearing upon Records.

See a notable Apology or Remonstrance publicly made by King *Edw. I. m. 25.* enrolled, concerning his Proceedings at that time in this Business, whereby that is made good, which I have before alledged.

But besides this Answer, I shall give a further Answer to this and the other Statutes, when I shall have perused all of them.

7. The next Statute urged is 14 *Ed. III.* in the second Parliament of that Year; in which Statute there is a Recital of a Grant in the same Parliament, of the ninth Part of the Goods of the Commons for two Years: the King willing to provide for the Indemnity of the Commons, willeth and granteth to the same Prelates, &c. (wherein note the word, the *same*) that the said Grant which is so chargeable, shall not be another time had in Example, nor that *they* (which must be construed the same Prelates, &c.) be from henceforth charged, nor grieved, to make up any Aid, or to sustain any Charge, if it be not by common Assent, and that in Parliament: And that all the Profits rising of the said Aid, and of all Wards, Marriages, Customs and other Profits rising out of the Realm of *England*, shall be spent upon the Maintenance of the Realm, and of the Wars in *Scotland* and *France*, and in no Place elsewhere, during the said Wars.

Note, that the general Clause which is urged to be in this Statute, cometh in the middle part of the Statute, and is coupled with other Matter, which was but temporary; and therefore in my Judgment that general Clause was meant to be but temporary, *viz.* during the Continuance of the Wars which were then on foot; and was never meant to be a perpetual Discharge for ever of all manner of Charges and Aids, as appeareth, for that, notwithstanding that Clause, *K. Ed. III.* did shortly

shortly afterwards, and during all his Reign, as frequently charge the Subjects for Defence of the Kingdom, as ever he had done before: He had also his Aids *pur fair fitz Chevalier & pur file marier*, after that; which if the Words were to be expounded generally and perpetually, neither he nor his Successors could have had.

And it is worth the Observation, that this Statute is never mentioned in the Petition of Right, as *Tallagio non concedendo*, and 25 *Ed. III.* by Names are; and yet if this had been a perpetual Statute, there was as great Reason to have mentioned it as any other Statute.

8. The next Statute urged is the Petition of Right, 3d of the King's Reign.

This Petition reciteth the Statute *de Tallagio non concedendo*, and the Statute of 25 *Ed. III.* against Loans and other things: Then cometh the Petition itself, which is an humble Prayer to his Majesty, by his Subjects, That no Man hereafter be compelled to make or yield any Gift, Loan, Benevolence, Tax, or such like Charge, without common Consent by Act of Parliament: And his Majesty's gracious Answer in Parliament is, *Soit droit fait comme est desire.*

After this, his Majesty, that knows his own Heart and sincere Meaning best, in his second Speeches to both Houses, amongst other things, saith, and that most justly and truly, "That it must needs be conceived that he had granted no new, but only confirmed the antient Liberties."

I observe, there is no express Clause in any of those Statutes which I have before cited, that no Charge shall be imposed without common Consent, no not for necessary Defence of the Kingdom: And if such a Clause had been offered to have been express, besides that I doubt of what Validity it had been, I certainly believe, that neither King *Ed. I.* nor King *Ed. III.* nor our Sovereign, would ever have yielded to so dishonourable and unjust an Expression.

But all these several Statutes being general, and having no particular Expressions, I conceive that according to all Rules of Law for Exposition of Statutes, those three Statutes, *de Tallagio non concedendo*, 25 *Ed. III.* and the Petition of Right, must have a reasonable Intendment, and that by a common and just Equity, for Exposition of those three Statutes, Aids and Charges, for so necessary a Purpose as the Defence of the Kingdom; and *Salus Reipublicæ* will be clean out of the Law, as fully as if they had been precisely excepted: and if other Exposition be made according to the Letter only, it might truly be said of such a literal Exposition, That *Litera occidit*, that Laws made for the Good of the Commonwealth, will prove the Bane and Ruin of it.

I will give you a Taste of some Expositions of Statutes, with Restrictions of the Generality of the Words of them, tho' they be general Negatives. The Cases I could put are very many, but I will cite only a few, and those such as are applicable to the Reason of our Case.

Dyer 361. The Statute of *Glocester* saith, That Tenants for Lives or Years, *nullum facient vestum*; yet a Waste, whereby the Land leased *melioratur*, is no Waste within that Statute.

The Statute of *Westminster* the second saith, That Tenant in Tail shall not *per factum, vel feoffamentum*, do any Act to the Prejudice of his Issue: Yet 43 *Ed. III.* *Octavian Lamberti's* Case is, Tenant

in Tail of Lands whereto a Stranger hath Title of Entry; to gain a Release of this Title, and for Defence of his Estate, by his Deed granteth a Rent Charge out of the Lands intailed; this Grant bindeth his Issue, so that he shall hold the Land charged, notwithstanding the general Words of the Statute.

There was a Statute made 14 *Ed. III.* That for every Sack of Wool carried out of the Realm, the Merchant shall find Surety to bring into the Kingdom Bullion, that is, Silver, to the Value of 2 Marks, and to take for it 2 Marks in Coin. 36 *Ed. III.* an Act was made, That whereas the Commons had granted a great Subsidy out of their Wools to the King for three Years; the King granted, that after those three Years, nothing shall be taken of the Commons, but the antient Custom of 1 Mark, for a Sack of Wool. And 45 *Ed. III.* another Act was made, That no Imposition or Charge shall be put upon Wools, others than the Subsidy and Custom granted to the King, *sans Parliament.*

Upon long Debate adjudged, That notwithstanding these two latter general Statutes, yet the finding of Sureties for bringing in of Bullion, enjoined by 14 *Ed. III.* was not taken away by either of those two latter Statutes. And in that Case, besides the former Rule of Equity put by me for Exposition of general Statutes, another Reason is given, applicable also to our Case, namely, That every Statute shall be taken the most beneficially for the King.

Pasch. 13 *Jac.* In the Star-Chamber, whereas the Statute of 1 *Rich. III. c. 2.* saith, That the Subjects shall not be charged, by any Charge, Executions or Impositions, called a Benevolence, nor by such like Charge; yet one Mr. *Oliver St. John*, a *Wiltshire* Gentleman, being brought to the Bar, *protenus* for writing a Letter to the Mayor of *Marlborough*, against a Course then holden, for trying what Money rich and able Men would give unto King *James*, of their voluntary free Will, it was resolved by the whole Court of Star-Chamber, with the then Chief-Justice's Advice, that a Commission to treat what Men would give voluntarily to the King, was not within the Statute of 1 *R. III.* tho' the Words were general; and Mr. *St. John* was grievously censured for his inveighing by his Letter against the awarding of the Commission.

I conclude this Matter, with an Answer by Mr. *Sollicitor*, aptly given to Mr. *St. John*, who urged this Clause out of the Laws of King *W. I. c. 55.* *Volumus ut omnes liberi homines regni nostri habeant terras suas, bene & in pace, liberi ab omni exactione injusta & ab omni tallagio, ita quod nihil ab eis capiatur vel exigatur nisi servitium suum liberum, quod de jure nobis facere debent, & prout statutum est & a nobis eis datum & concessum jure hereditario per communi concilium totius regni.*

You see here are general Words referring to a general Act of Parliament; yet afterwards, *c. 59.* are these Words, *Statuimus ut omnes liberi homines totius regni sint fratres conjurati ad monarchiam nostram & ad regnum nostrum, pro viribus suis & facultatibus, contra inimicos pro posse suo defendendum & viriliter servandum.* This latter Clause shews the Intention of the Act of Parliament formerly set down, that notwithstanding the general Words of the Act, it extendeth not to Cases of common Defence of the Kingdom, or where *Salus Monarchiæ Regis* or *Reipublicæ periclitatur.*

I have now done with the general negative Statutes, strongly urged; and I think I have exempted the Question of our Case from the Purview or Intention of those Statutes.

But besides those Statutes, Mr. *Hampden's* Counsel hath urged some Statutes that no Soldiers, or Men at Arms, should be enforced to go out of their proper Counties, without Wages from the King.

I will not let those, because urged, tho' pertinent in the Generality only of the Peoples Liberties, pass unexamined.

The Statute of *Winchester* 13 *Edw.* I. c. 6. was cited for that Purpose. The Words are, 'Every Man shall have in his House Harness to keep the Peace, after the antient Assize.' And sheweth what the antient Assize was. And then there is a Clause for fresh Suits after Felons, from Country to Country; and indeed, in case of fresh Suit after a Felon, none is bound to go out of his County. But as to the point of going without Wages out of the Counties for Defence of the Kingdom, not a word in my Book in that Statute.

Then cometh 1 *Ed.* III. c. 5. the second Parliament; the Words are, 'The King wills that no Man be charged to arm himself, otherwise than he was wont, in the Time of former Kings of *England*; and that no Man be compelled to go out of his County, but where Necessity requireth, and sudden coming of strong Enemies into the Realm; and then it shall be done as hath been used in Times past, for the Defence of the Realm.'

Nota. That before this Statute, the use was for Men to go in such Cases, *propriis sumptibus*, as appeareth by many Precedents.

In the same Year, 1 *Ed.* III. c. 7. the Commons complained of Commissions to prepare Men at Arms, and to convey them to the King into *Scotland*, *Gascoigne*, or elsewhere, at the Charge of the Shires; and that the King hath not before this time given any Wages to the Preparers and Conveyers, nor Soldiers, whereby the Commons have been at great Charge. To this the King's Answer is, The King wills that shall be so done no more.

Nota. But note by the very Complaint, that neither the Complaint nor Answer are applicable to Case of Necessity, for Safeguard of the Kingdom.

Then 18 *Ed.* III. c. 7. That Men of Arms chosen to go in the King's Service out of *England*, shall be at the King's Wages, from that Day that they depart out of the Counties where they were chosen, till they return.

This Statute extendeth not to Case of necessary Defence. Besides, the Provision is against going out of *England*, which is not in our Case.

Then 25 *Ed.* III. 8. No Man shall be constrained to find Men of Arms, other than those that hold by such Services if it be not by common Assent and Grant in Parliament.

This extendeth not to Defence of the Kingdom. Besides, it is a Provision for particular Men, specially required. Likewise it is only against finding the Bodies of Men of Arms. But pressing of Soldiers or Men of Arms, to serve in all manner of Wars, hath been always so frequent, both in old, late and modern Times, that it were a needless Labour to prove that which every Man knoweth.

All these Statutes of 1, 18, and 25 *Ed.* III. are confirmed by Parliament, 4 *H.* IV. c. 13. and yet

Rot. Parl. 5 *H.* IV. numb. 24. (which is observable for the Time, being presently after 4 *Hen.* IV.) it appeareth, that there had been Commissions directed to Gentlemen of the Country, for arraying, arming, and conducting of Soldiers to the Coasts of the Sea, and elsewhere, in divers Counties; and that there were many Forfeitures and Clauses comprised in those Commissions: The Observation of which was perilous to the Commissioners.

The Commissions were brought into the Commons House, and by them entertained as Grievances. The Commons upon Deliberation, did obliterate certain Clauses in those Commissions, and prayed the King, that from thenceforth no Commissions of Arrayage should issue, otherwise than was contained in an amended Copy, which they humbly offered ready drawn.

And that Copy was agreed to by the King in Parliament, after Conference with the Judges, and Advice with the Lords thereupon; and the Tenor of the said Copy was enrolled.

And in the Precedent thereof, appearing in the Parliament-Roll, and being as for the County of *Bucks*, fifteen Gentlemen of the Country are made Commissioners, amongst them I find the Name of *Hampden*, I believe an Ancestor of Mr. *Hampden*, the Party in our great Cause.

But to return: In that Commission there is a Recital of Invasion and Burnings, which had been by Enemies: And that to resist them if they should again invade, *ac pro subventionē & defensione regni & ligeorum*, the King assigneth Commissioners *ad eraiandum & triandum omnes homines ad arma, & ad armari faciendum omnes illos qui de corpore sunt potentes, qui de suo proprio non habent, unde seipfos armare possint, viz. quilibet eorum juxta statum & facultates suas, & ad distringendum omnes illos qui in terris & bonis sunt potentes, & pro debilitate corporis impotentes, ad invenendum armatos pro illis qui non sunt habiles*, (where, by the way I note, that in case of common Defence, the People, not the King are to be at the Costs.) And the Commission directs further, That the Commissioners shall train and divide the Soldiers, and shall *conducere eos tam ad costeram maris, quam alia loca, ubi & quoties necesse fuerit*, (here is sending out of the County of *Bucks*, I am sure) and shall muster them; and that the armed Men shall be armed with their own proper Arms, and not with the Arms of others, upon Pain of Forfeiture of them, (note the Clause of Forfeiture) *& ad arrestandum & capiendum omnes qui fuerint rebelles seu contrarii, & prisonæ committendum, ibidem moraturi quousq; pro eorum punitione aliter duxerimus ordinandum*, (here is Power of Imprisonment.) That Commission commands likewise the Commissioners to array themselves, *& insuper* to make Beacons, whereby *gentes patriæ de adventu inimicorum poterint congruis temporibus præmuniri*; and a further Clause, that the Commissioners shall *ducere* the Soldiers *cum periculum advenerit, ad costeram maris & alia loca, in defensionem regni & patriæ; ita quod pro defectu armationis & ductionis damna patriæ non adveniat ullo modo*.

The Commission I have taken, and now repeat at large, because offered by the Commons themselves in Parliament, instantly after the Confirmation of *Edw.* the Third's Laws, 1, 18, and 25 of his Reign beforementioned, and all by the Judges Advice.

All Powers of Command imply the Duty of Obedience. I say no more, but as Arms and Travelling by Land are necessary for the Defence of Land, so Ships and Sailing, Ordnance and Tackling, and the Necessaries mentioned in the Shipping-Writ, are most requisite for Defence at Sea.

And thus I have passed all the Acts of Parliament cited or pertinent to our Case; I confess they are *leges ligantes*, and I think that in my Answers to them, I have not broken the Bonds of them, with the which I acknowledge both my Conscience as a Judge, and my Estate as a Subject, obliged.

The Fourth General Head.

I Come now, in the *Last* place, to my *Fourth* General Head, which is, To answer the Objections made by the Counsel on Mr. *Hampden's* Side.

The Objections were of three sorts: some grounded upon Reasons of Law; some upon Authorities and Inferences upon Records; some upon Mischiefs and Inconveniencies pretended.

Object. 1. 2 R. III. f. 10 & 11, was objected; where, upon the Distinctions of *potestas in Curia*, & *potestas in Camera*, concerning the assessing of Fines, it is said, that *Justiciarii Regis per eorum discretionem assideb' finem, & non dominus Rex per se in Camera sua, nec aliter coram se, nisi per Justiciarios suos; & haec est voluntas Regis, viz. per Justiciarios suos & Legem suam unum est dicere.* And it was said, that in the present Case, the King hath not proceeded *per Justiciarios*, but *per se* or in *Camera*.

Ans. I answer, That in our Case there is not any thing done *in Camera*, the Shipping-Writ issueth out of the Court of *Chancery*; besides, we are not now in the Case of assessing a Fine.

It is true, that if a Presentment, Indictment, or Information, be depending in the King's Court, and so far proceeded in, as that Judgment of a Fine is to be given, this is not to be assessed by the King *in Camera*, but by the King's Justices *in Curia*.

Howsoever, if we go to Distinctions, there is *potentia absoluta*, and *potesta ordinaria*: I hope none will deny, but that the King hath *potestatem absolutam*, in many Cases.

Stat. Westm. 1. It appears a Man may be committed *per speciale praeceptum domini Regis*, and is not in that Case Bailable.

20 Hen. VII. The King is *Capitalis Justiciarius Angliae*.

I put you the Case of *Hil. 2. E. III. p. 6.* One having Money of the King's wherewith to pay Soldiers, misused it, and committed many Outrages in *Lancashire*; a Writ issued to the Sheriff of *Lancaster* to attach him; being by virtue thereof attached, and brought to the *King's-Bench*, he was there discharged; the Reason given by *Scroope* the Chief-Justice was, Because the Attachment being grounded upon a Suggestion, was against the Law: no such Writ ought to have issued, unless there had been some Indictment, Presentment, or Information depending. But I doubt not, if the King had by his absolute Power made a special Precept in his Chamber for Commitment of this Man, he could not have been discharged.

The Truth is, The Objection upon the Distinction of *Curia & Camera*, is not rightly applied to this Case: it might as well have been urged against

a Commission of Sewers issued at common Law, out of the Chancery. The Matter is, what the Law is concerning the King's Power, for Provision towards necessary Defence.

Object. 2. It hath been said, that divers Payments and Promises of Payments have been made by the King in all Ages, upon Occasions of his Wars and Provisions for the Defence of the Realm and Sea: and many Records have been vouched to that Purpose.

Ans. I answer, *First*, It is true; but more Payments have been made by the Subjects also in the same Cases; as will appear, if we go to vie by Records: Multitudes have, to that purpose, been cited on the King's Side.

Secondly, In some Cases, as of Borrowing, Purveyance, or the like, Payment by the King was of Right; but in the Cases merely for necessary Defence, his Payment, or Promise of Payment, was of Courtesy and Grace, and is not binding in Precedent, no more than in the Case of Mines Royal. It appears by many Precedents, cited in the Case of Mines common, That many Subjects, Owners of Land, wherein were Mines of Silver, shared with the King; some had a twentieth, some a greater, some a lesser Part: and this was objected against the King's sole Interest, which notwithstanding was adjudged, and the Answer made to those Records was, That it was of the King's Courtesy and Grace, not of Right: one may do with his own what he pleaseth.

But I will put you at large one of the Records which hath been cited, and let it be considered for whom it maketh.

23 Ed. I. Rot. 77. *Ex parte rememorator' Regis.* There Writs issued to divers Mayors and Bailiffs to make Gallies, ordained by the King, and *Concilium suum*: It doth not say, *commune concilium*, to be made *pro defensione regni & securitate maris*; and in the Record there is a Clause, *Custum quod ad hoc posueritis, cum illud sciverimus, vobis in exitibus ballivae vestrae allocari faciemus.* But note, that here is a Command they shall first lay out the Money: and note, that there is this further Clause in the same Writs, *Volumus autem quod bordas & mercimum, quae ad hoc competunt, ubicunque ea inveniri contigerint, & cujuscunque fuerint in villa praedieta vel extra pro galeis illis faciendis capiatis.* I pray you note that Clause, for the express Words of *Magna Charta* are, *Nos non capiemus boscum alicujus ad castra, vel ad alia agenda nostra, sine voluntate ejus cujus boscus fuerit*: and yet it is commanded, that they should take *boscum alienum* in this Case, and I think warrantably; for the Words in *Magna Charta* are, *ad agenda nostra*, but the making the Gallies commanded, was not *agendum regis* within, but *agendum regni*, without the Meaning of *Magna Charta*.

Obj. 3. Disusage, or no Precedent for many Years of this Course now attempted, hath been objected.

Ans. I answer, as it is said 11 H. IV. 7, & 38. upon that Objection against the Force of the Statute of 14 Ed. III. about the King's Presentations to lapsed Churches, that an Act of Parliament disused may be put in use, and so that Law disused may be put in use, especially in the King's Case, for *Nullum tempus*, &c.

Also, the Thing hath been done, tho' not this particular Way, Supplies have been made otherways; sometimes by Collection of Moneys, and Means without Warrant of Parliament; sometimes by liberal Provisions and Grants in Parliament, in late Kings Reigns by Benevolences, before

fore *Richard III's* Time, in the Manner commanded, and after treated.

Object. 4. The several Means and Incomes, which the Crown hath, have been distributed; as that it hath Tenures and Escuage for Wars, Customs and Tenures for Defence at Sea, Fines in the Hanaper for the Charge of his Justice: and thereupon it hath been said, there is no Cause, if these Incomes were well imployed, to raise Moneys thro' new Ways.

Answer. *Utinam* those great Means and Incomes could serve the turn.

My Brother *Weston* made a Computation what the five Ports Service cometh to, and thereby it falleth short to be to any Purpose.

As for Escuage, it is Attendance out of the Realm, but for forty Days, and that in case of mean Tenures, if the Tenants proper Lords attend the King, for therein every one is to defend his own Seigneur for that Time. Alas! What is that for a Kingdom? Besides, are we sure the Occasion of Defence will press but for forty Days? Again, what if the mean Lords themselves go not in Person?

But since I have Occasion of Speech of Escuage, I must put you in mind of two sorts of Escuage, by the Law.

The first is that before touched, and is commonly called *forinfecum servitium*: And it is only for *Wales*, *Scotland*, and other the King's foreign Territories.

The second is of another kind, and is appliable to this Case, in regard of charging the Subjects, without their Parliament-consent. It hath not been called for these many Ages; but in the black Book of *Tilburienfis*, l. 1. c. 26. you shall find concerning it in these Words: *Fit interdum, ut in imminente vel insurgente in regnum hostium machinatione, decernat Rex de singulis feodis militum summam aliquam solvi, marcham scilicet vel libram unam, unde militibus stipendia, vel donativa succedant: mavult enim princeps stipendiarios quam domesticos, bellicis apponere casibus. Hec itaque summa, quæ nomine scutorum solvitur scutagium nuncupatur; ab hac autem quieti sunt ad scaccarium residentes.*

Object. 5. This is a general Charge; it appears by the *Mittimus*, that every County in the Realm hath the like Writs, amongst which many, as this of *Bucks*, are merely Inland Counties, they have no Places to make Ships in, no Means to convey their Ships (if they could make any) to the Sea: they have no Mariners, nor Tacklings, &c. and so an Impossibility, or, at least, an improper Charge is put upon them; the Cinque-Ports, the Maritime Towns and Counties are furnish'd, and are aptest to be put to this Service.

Answer. I answer several ways.

The Inland Counties may provide all those Things which they have not of their own, with their Money; *Pecuniæ omnia obediunt, nummus is mensura rerum.*

Also there is great Reason they should join, by the Rule of *Qui sentit commodum, &c.* I am sure if Defence be not made, they may *sentire incommodum.* So by the Rule, *Quod omnes tangit, &c.*

11 H. 7. *Sir Will. Herbert's Case.*

The Reason in Law of charging Heirs in Gavel-kind, and of Contribution to Charges upon Land, equally liable, cometh to this Case.

Also the whole Realm is but one Body; the Division of it into Counties, was by King *Alfred.*

The King may make a County *de novo*; by taking out of another; may make two Counties of one, or one of two, if he please.

Then take the whole as one Body, the several Members center in it; if one Member suffer, every Member of the same Body suffereth with it.

But methinks there is more Reason to excuse, than to charge the Ports and Maritime Parts; in this Case they stand between the Enemy and the Inland Parts, they are the next Door to Danger; and it is fit they should not be let Blood, but should keep it all, to serve themselves and the Inlands, and not have Means taken from them, whereby they may be disabled.

Besides, I refer myself to the several Precedents, single and at large, cited by my Brother *Weston*; by which it appears, that the Inland Places have heretofore been charged with Provisions of Gallies, Ballingers, &c. for the Seas.

By the Commission of Sewers, it appears, that this Course agrees with Proceedings in like Case, by the Common Law.

F. Nat. Register. All who are within the Level of an Inundation, rich or poor, without respect of Persons, are to be proportionably assess'd, upon that Commission.

P. 15 E. II. Rot. 70. in bk. w. The Case of *Rippon* in *Yorkshire*, is notable upon this Reason; by it, it appears, that the Law was, that all that had Salvation by the Plaintiffs being Hostages to the *Scots*, were by Law compellable to bear their ratable Shares, to raise Moneys for the Plaintiffs Ransom.

23 Ed. I. cl. Rot. 1. memb. 4. dorf. In a Writ to the Archbishop of *Canterbury*, the Words and Matter are notable also to this Point: *Sicut lex justissima, providâ circumspectione sacrorum principum stabilita, hortatur, & statuit ut quod omnes tangit ab omnibus approbetur; sic & innuit evidenter, ut in communibus periculis per remedia provisa communiter obvietur.* As to the Objection out of the Records, (*per remedia provisa communiter*) that should be by Parliament; I think the contrary is apparent out of the Writ: for the Writ requires the Archbishop, with the Clergy of his Diocess (not Province) by their Proctors, inasmuch as the King of *France*, *Classe maxima & bellatorum copiosâ multitudine congregatis, proponens linguam Anglicanam omnino de terra Anglicana delere*, to come, by a short Day ensuing, to *Westminster*, *tunc ibidem ad tractanda, ordinanda & facienda nobiscum, & cum cæteris prælatis & aliis incolis regni qualiter sit periculis hujusmodi obviandum.* Note, here is no mention of *Proceres*; and besides, Clergymen have no Capacity of Knights or Burgeses Places in Parliament, therefore this was not a Treaty appointed or intended in Parliament; which is further enforced upon the Words (*ad tractand', &c. nobiscum & cæteris prælatis & aliis incolis regni.*) If a Treaty in Parliament should have been, it had been readier to have expressed in Parliament, or in *Communi Concilio*, and not to have used the other improper Expression.

Besides, I do not find that any Parliament was holden at that Time, nor at any Time between *21 E. I.* and *24 E. I.* whatsoever was said by Mr. *St. John* to the contrary.

But if this Treaty had been, or were intended to have been in Parliament, it is not concluding; for it could not be but in Parliament, as hath been urged.

Object. 6. This Way draweth a many ill Consequences; for it stirs Murmuring; and Grudging of the People, by reason of the Burdens upon them.

Answer. The Consequence would be worse, if the Kingdom should be lost, (which I cannot mention without a *quod absit*) and *de malis minimum*.

Besides, popular Grudgings are many, if not most times causeless; they are not to hinder doing of Right.

Object. 7. This is to become an annual Charge upon the People; there is Cause of thinking so, because since 11 Car. we have had every Year new Shipping-Writs.

Answer. If the Necessity continues, the Charge must continue. The same Reason serves for the Continuance as was for the Beginning of it. Yet I deny that of itself it may be annual.

Cessante Causa, cessare debet effectus; but *continuante causa, continuandus effectus*.

This must be left to his Majesty's Justice, which God forbid that any should think he will abuse.

Object. 8. It hath been agreed, that if there were *flagrans bellum*, if we had (*quod absit*) a *Hannibal ad portas*, then this Course without Provision in Parliament, were not against the Law. But it hath been said, that we have neither *flagrans bellum*, nor a *Hannibal*, in our Case.

Answer. Let us consider what the Reason is, why it is not against the Law in case of *flagrans bellum*, or *Hannibal ad portas*. It can be no other but to avoid a further Mischiefe. The same Reason holdeth in our Case, wherein there is apparently an *initium malorum*; and in such Times as we now live in, or *rebus sic stantibus*, no Man of Understanding, but must acknowledge that Security is dangerous.

Object. 9. Tonnage and Poundage, which was used in former Kings Times to be granted by Parliament, for a Provision of a Stock, for those Purposes for which the Shipping-Writ now issueth, is taken *de facto* by the King's Majesty, tho' it be not yet granted him.

Answer. Read the Words of the Statute 1 Jac. & ult. at large. In them observe, 1st. a Confession by the Commons, That Tonnage and Poundage hath been paid to the Kings of England Time out of Mind: I say, it is so confess'd; I do not say, that in Truth it was so.

2dly. Observe the Word (*Towards*.)

3dly. A Confession that the Tonnage and Poundage are not sufficient for those Purposes, for which it was commonly granted. The Occasions are now for vaster Expences than were requisite at that Time; and what Tonnage and Poundage will not now suffice to perform, must be raised some other Way.

Also it is to be known, for an Answer to the Objection against the taking of it, as if it were not taken *de jure*, that Tonnage and Poundage hath been always taken, with a *continuando* upon the Change of a King, before such time as a Grant came of it by Parliament; upon the Demise of the King, the payment or taking it never ceased, or was discontinued, until it came to be due by Grant of Parliament.

Object. 10. It appears that a Parliament might have been holden; there are about six Months between the *Teste* of the Shipping-Writ, and the 1st of *March* ensuing.

Answer. This receiveth an Answer in itself; for if the King had been pleased to have called a Parliament; to have had Provisions granted, and by or before the 1st of *March* 11 Car. Provision had been granted, yet the thing commanded by the Shipping-Writ in *August*, to be ready in *March*, could have but begun in *March* to have been then prepared, and so a whole Year apparently lost; in which time, God knows what might have become of this State.

Object. 11. But what if the King surmise only, that there is such Danger as must be prevented, when in truth there is no such Matter?

Answer. Hath not the King a Conscience?

The Law believeth his Affirmation, and for that Cause they are not traversable, as appeared by my Lord *Dyer* upon the *Ne exeat regno*.

Rex est recordum superexcellens. Teste meipso, is his Language; it is against the Duty of a Subject to contest with him.

Again, it is a Rule of Law, *Cuilibet in arte sua credendum est*; it is the King's proper Art, to have Intelligence of foreign Intentions, to foresee publick Dangers, to conclude and put in Execution what is necessary for the Preservation of his Estate and People.

Tu regere imperio populos, Rex summe, memento: Hæ tibi erunt artes, &c.

Also Mr. *Hampden*, by his Demurrer in this Case, hath confess'd all the Matters in Fact, which moved the King to issue this Writ, and are mentioned in the Writ.

Object. 12. 26 E. 1. Pat. Roll. mem. 21. hath been urged: there it appeareth that the King, desirous to amend *gravamina populo nomine suo facta*, sent Commissioners to hear and determine what Takings had been from the Subjects made in the King's Name, but without his Warrant; and to punish it presently, and to do right to the Parties: but as for that which should be found to have been taken by the King's Warrant; *Le Roi voit que soit certifie, et il eut ferra tant que ils se tiendr' apais per reason*.

Answer. Note the Distinction in this Case between the Repayment and Satisfaction by the Parties for that which was taken without Warrant, and the Repayment, if it were taken by Warrant of the King. For in case that which was taken by colour of the King's Warrant was against the Law, it was as tortious to the Subject, as that which was taken without the King's Warrant; and in all Justice, the Subject ought to have been restored to his Right, with as much Expedition in one Case as the other.

Also, as hath been already answered, the Words are not (*they shall be paid*) but *le Roi ferra tant que ils se tiendrent apais per reason*; that is, as I conceive it, The King will give them a reasonable Answer.

Object. 13. Upon the Words *Requirimus & Rogamus*, in Writs to the Bailiffs of diverse Towns, when they were sent unto to array and send Men at the Expences of the Towns, it hath been urged, *Ergo* the Thing required is a Matter of good-will, and not of Right; in which Case it would rather have been a *Mandamus*, or a *Præcipimus*, than a *Rogamus*.

Answer. Note the *Requirimus* precedes.

Also the Word *Rogamus* signifies as properly a Commandment, as a Prayer. *Linwood*.

Also the Words are, *effectuose requirimus & rogamus.*

Also *Cum princeps orat, precibus præcepta colorat.*

But since those Writs are urged, let them be read; and it will appear, that in the Matter of them, pertinent to this Question, they make directly for the King. *Vid.* for that Purpose, *Rot. Sco.* 12 E. II. m. 7. *dorso*, but chiefly *Rot. Sco.* of the same Year, m. 13. *dors.* In the Writ to *London* there, the King reciting that the *Scots fines regni Angliæ cum ingenti armorum multitudine ingressi*, had taken the Castles of the King, and of his Subjects, and did still hold them; and had besieged more Castles; and that the King, by the Council of the Prelates, Earls, Barons, and the Peers of the Realm, had ordained (not a Word of the Commons) to be at *York* such a Day, with an Army; and they had promised to be there with him *sumptibus suis cum toto posse suo: nos considerantes quod pro tanta necessitate, fideles & subditos nostros, ut in præmissis manus apponant adiutrices decet requirere & rogare, ac de vobis specialiter confidentes, vos effectuose requirimus & rogamus quatenus ad præmissa considerationem debitam habentes*, they should instantly array 500 Footmen, and send them to the King, *sumptibus suis.*

Nota, All this done without Warrant of Parliament; and more Court-like Words, certainly, were of Purpose used in such a Time as that was, of instant Necessity, *ad faciendum populum*, than either needed, or might have been used, if it had been so thought convenient.

Object. 14. Out of *P. f.* 26 *Ed. I.* *Rot.* 35. *Commun' ex parte Rememoratoris Regis.* *Reginald Gray* being commanded by the King to levy and conduct to the King 1000 Men out of *Bromfield* and *Yale*; he, by his Letter to the King, answered, That he durst not chuse 1000 Men there, without Warrant; and that he would not *mewer* (that is, move) in those Parts without Pay.

Answer. His writing that he durst not, is not to the Right, but in his Judgment it was not safe, or might be dangerous.

Also, he durst not without Warrant, it may be, he thought the King's Letter, without his Great or Privy-Seals, no sufficient Warrant.

Also, it appears in the Record, that the King had sent him Word before, that the Treasurer should ordain Payment; but it seems Pay came not; and then it is likely Soldiers would not stir without Money: They commonly cry *Guelt*, and if they have it not, are apt to disband.

Object. 15. Repayments commanded by the King (*ut conscientia Regis exoneretur*) *Ergo*, the King could not take of Right in these Cases.

Answer. The Record is 29 *E. I.* *Commun' ex parte Rememorator' Regis*; there is a Command for Repayment, *Quia pro urgentissimis negotiis & pro utilitate & defensione totius Regni*; the King had received of the Abbess and Convent of *Canonlieghe* 612 *l.* and had promised Repayment; note those Words: And also, for that the Abbess had petitioned the King in Parliament for Repayment. So here was a Promise originally for Repayment also in this Case; a very great Sum of Money it was which was taken from one single Corporation, more than was proportionable for them; and therefore just and conscionable, that Repayment should be: this great Sum was taken upon a Scrutiny, 22 *Ed. I.* in Places where it was thought that Money might be had. And upon that the foresaid Sum was borrowed (unwillingly, God

knows, as to the Lender) of this Abbess, and of divers other Religious.

The like Scrutiny was made, *temp. E. II.* and the like Course for Repayment, as appears, *Rot. Parl.* 8 *E. II.*

And indeed, it had been before those Times, and so continued, a usual thing, for our Kings to look into the Treasure of the Religious, when they had Occasion of Money; and sometimes to take their Silver Plate, and rich Offerings, for Supply of instant Wants. And the Religious would not fail to press upon the King's Conscience, until they had Restitution.

Object. 16. 12 *E. III.* *Ro. Alman.* m. 22. *dors.* A Letter to the Archbishop to move all the People to pray and give Alms for the King.

Answer. I say no more, but will read what the Record is, itself *loquitur.*

Pater, &c. Cum populis regni, variis oneribus, tallagiis & impositionibus hætenus gravetur, quod dolentes rescriimus, sed (note this but) inevitabili necessitate compulsi, de eisdem oneribus ipsum relevare non valemus; (so no Wrong confess'd; Necessity excused it, and Continuance of a Wrong cannot be justified.) The King desires the Archbishop to move the People, *ut tantam necessitatem humiliter, benigne, patienter & charitative sustineant:* note those Adverbs, especially *humiliter.* And they would have a good Opinion of the King, and would pray and give Indulgences, to the end he might prosper in his Wars for Recovery of his Right in *France.* (Note, *To the end, &c.*) *Oneribus prædictis (que non ex malitia vel presumptione voluntaria, ipsos gravant) non obstantibus.*

Object. 17. Out of the *Parl. Roll* 13 *E. III.* m. 9. & 11. The Remembrances of the Parliament.

One of the Points to be considered and proposed by the King, was for Course to be taken for a Navy at Sea, and for Recovery of *Jersey*, which the *French* then had conquered.

Answer. In this Proposition the Words of the King are, *Et per tant ferr' les Comons dischargedes del guard del mere;* by which Words it is evident, the King conceived, that the Commons were by Law charged with the Guard of the Sea.

It is true, the Commons answer, They pray *in drt. del guard del mere*, that they be not charged to give Counsel, it being a thing whereof they have no Cognizance; but they give their Advice, that they think the Barons of the Ports should do it, and therein they confess, that the guarding of the Land belongs to the Commons, *sans gages de-maunder ou prender.* They could not deny but that the Sea must be guarded. They put not the Charge of that Guard upon the King, but would place it upon the Ports. Of what Strength or Power the Ports were in those Times, I know not; but in our present Age, it is apparent, they are not by many Degrees, near able to defend the Seas, which must notwithstanding be defended, and that Defence can fall upon none but the whole Realm.

Object. 18. Upon the *Parl.* 15 *Pas.* 2 *R. II.* *pars* 1. where the Speech of *Scroope*, then Chancellor, is set down; he therein declared the Cause of the Summons of that Parliament, whereby it appeareth, that a little before there had been a Parliament at *Glocester*, and no Provision for common Defence was there agreed on; that after the Departure of that Parliament the King had assigned some Prelates and Lords to be of his continual Council, for the Year following; the said Council treating and having before their Eyes, the great

Mischiefs and Perils, with which the Realm was on all Parts invironed, and the Summer approaching, and no Ordinance made in Parliament for Salvation of the Realm, and Resistance of the Enemies. And the said Council durst not take upon themselves alone the Ordinances of so perilous and high an Act; but it was advised by them, after *Christmas* to assemble a great Council, of all the great Lords of the Realm, Prelates and others: and upon a second Warning there came well near all the Prelates, as well Abbots as others, the

Sages here
are said
Men, not
Judges, as
was objected.

Earls, Barons, Bannerets, and other Sages of the Realm; and then there the great Perils and Mischiefs to the Realm being disclosed, by reason of the great apparent Wars by Land and Sea, whereof no Ordinance was provided; and moreover, it being declared before them, by the Officers of the King, and Treasurers of the War, as to the State of the King, and of the Realm, that nothing remained in the Treasury for the War; it was said, in the same Council, *Pur conclusion final, que ils ne poient cet mischiese remedier, sans charger le Common del realme, que charge ne puit estre fait ne grant sans parliament; Et per tant per assent de eux le parliament ore este somon' Et in le meane temps que suffic' army ser' ordaine al mere in defence, Et salvation del realme et del navie, et del Coasts del mere a quel costages tous les Seignors appromptarent volontairement al roy, divers grand sommes del money. Et issint font bon gents de London, et d'autres vills, as quod le roy per assent fuit in dit grand Counsell, aurit envoy pur ce cause. Et ad done a eux son royall grt. pur repayment.* It hath been said, that the present Question is fully answered.

Ans. I confess that this Record hath a great Shew of Proof, that tho' there be an apparent and instant Time of Danger to the very *Salus Reipublice*, yet no Charge upon the Commons may be made, or granted, without Parliament. And indeed, this is the strongest Proof upon any Record, that hath been urged on Mr. *Hampden's* Side. But I think it will receive an Answer with indifferent Affections, if these Things be observed.

1. That this Consultation and drawing in Question of the using of Means, was before any Charge actually imposed: Which now I insist not upon, because I have formerly touch'd upon it.

2. The King was then in Minority, the Law was not then clear and settled concerning an Infant King's Power. You see it was debated, and not resolved, until the Time of K. *Ed. VI.* vide the Case of the Duchy of *Leicester*, *Plow. Com.*

3. The Example of *Latimer* was then fresh; and the Lords, it may be, were over-wary, upon his Precedent, tho' it could not parallel with theirs, if they had undertaken, upon so urgent Occasions, to have charged the Commons, without their Consent in Parliament.

4. Note the Words of the Record, That the Lords, appointed Counsellors, could not advise or find any Means; and it is certain, that no Counsellors, none but the King himself, could command so high a Matter. The King then was not there; he was at that Time scarce out of his Nurse's Care.

5. The People at that Time were wavering, and full of Discontents; they had withdrawn themselves from Parliament. *Alice Peers* had a little before plaid her Pranks, and the young King was not fortunate in his then governing Servants.

Lastly, The Thing necessary, *viz.* Security of the Kingdom, was done by another Way, *viz.* by lending of Money, as in the Record: But put the Case it had not been done one way or other, then of Necessity the People must have been charged, tho' without, yea, tho' against their Consent; for the Kingdom must not be lost, an *ultimum refugium* must be found out, rather than so fatal and final a Mischief and Misery must be endured.

Object. 19. *Rot. Parl. 2 H. IV. n. 22.* Concerning Barges and Ballingers, commanded to be made without Assent of Parliament. The Commons Petition saith, That this had not been done *avant ceux heurs*, and pray'd that the Commissions might be repealed. The King's Answer was, That the Commissions should be repealed.

Ans. It is plain that those Commissions, before that Time, ceased of themselves; for they were made in *Richard* the Second's Time, and died with him. All Commissions from the King are but Authorities which end with that King from whom they issue.

Also note, that the said K. *Henry* the Fourth's Answer in Parliament goeth further, *viz.* But for the great Necessity which the King hath of such Vessels for Defence of the Realm, in case the Wars should hold, the King would commune with the Lords of this Matter, and after shew to the Commons for their Advice. Which Words are notable to this Question. It cannot be denied, but this Answer to the Commons said Petition in Parliament is, in effect, a *Roy soi aviser*.

I note that *Rot. Parl. 1. R. II. m. 52.* there is a Gratification by the King, in confirming of Franchises to those Cities and Towns, *que sont ore* (that is, now in this Time of Parliament) charged with the making of Ballingers in Defence of the Realm. Here in this Parliament just Occasions were given to the Commons to have complained of this Charge, with the making of Ballingers, charged upon them before the Parliament, if it had been a Wrong: but they complained not of it, for ought appears; and the King's Gratification is no Proof that it was as by way of Recompence for a Wrong; but it is plainly an Argument of the King's Grace to them, by way of Encouragement of them in their Services for the Commonwealth. The like appears, *M. 3. 2. Cheqr. K. Rem. inter brevia directa Baronibus.*

Also it is to be known, that in all King's Times, some Matters have been preferred in Parliament, from the Commons to the King, as Grievances, which in themselves have not been Wrongs, or against the Law: We find in our Books, there may be *damnum absque injuria*.

Object. 20. *Parl. 7 Ed. IV. n. 7.* In the beginning of the Parliament, the King himself spake to the Commons, and, amongst other things, promised the Commons, He would live of his own.

Ans. The King's Speech stayeth not there, but goeth further, the Words are these: 'I purpose to live of mine own, and not to charge my Subjects but in great and urgent Causes, concerning more the Weal of themselves, and the Defence of them and the Realm, than mine own Pleasures; as heretofore by the Commons of this Land hath been done, and borne, to my Progenitors, in time of need.' Which Words are remarkable: not a Syllable in them of doing this only by common Assent in Parliament, but relatively, as heretofore, &c. which how it hath been

de facto, you have heard; namely, sometimes in Parliament, and sometimes out of Parliament.

The last material Objection to be answered by my Memory, is the Authority of *Fortescue* in his *de laudibus legum Angliæ*, where he saith, *Cap. 13.* 'That the King of England is *Rex politice regens*; and *regulariter*, to do what he please.' This needs no Answer, it is agreed. But he farther saith, *Cap. 9.* That the King may not *populi substantias proprias subtrahere, reclamantibus eis vel invitis*; that he may not *Tallagia & cætera onera eis imponere ipsis inconsultis*; That he may not *subjectum populum renitentem onerare impositionibus peregrinis*.

I answer, That 'tis most true *regulariter*, & *regula non facit jus*, & *nulla regula quin fallit*.

Cases of Necessity, Cases of *Bonum publicum*, Cases of *Salus Reipublicæ*, are not to be comprised within ordinary Rules. I have spoken so much hereof already, that now I will say no more, but conclude, That in Cases of Necessity, *pro salute Reip.* every Subject must (even by Rules of Law) bestir himself; must contribute his best Abilities; must set to both his helping Hands.

Rich Men must expose their Treasures.

Able Men of Body must put on Arms.

Great Counsellors must give their best Advice.

Women must not be idle.

Old Men and Clergymen (if they have no other Powers) must attend their Prayers.

And Judges must press and enforce the Laws upon the Subjects to compel them to contribute.

And so I have done at this time: And what I have said, I have spoken to the Best of my Understanding, and in Discharge of my Conscience in a Case of *Salus Reipublicæ*.

And it being high time now for me to give over, I conclude upon all my Reasons and Authorities cited, That as this Case is upon the Pleading of it, the Charge of 20 s. imposed on Mr. *Hampden*, towards the Provision of a Ship, commanded by the Writ of *Aug. 11. Car. Regis*, is consonant to Law, and consequently, That Judgment ought to be given against him, *Quod oneretur*.

The Opinion of Sir George Vernon Kt. one of the Justices of his Majesty's Court of Common-Pleas at Westminster, deliver'd in the Exchequer Chamber, in the great Case of Ship-Money.

THIS is a Cause of great Consequence, and is one of the greatest that ever came in question in this Kingdom, and the Records are infinite that have been cited on both sides; but by reason of want of Health, and Disability of Body, I have not been able to peruse the Records as I intended, and to have prepared myself, in which I am to argue; and therefore I would desire Time until this Day Sevensnight, to peruse the Records and compare my Notes, wherein, as you may see, I have taken great pains, [*Producing his Notes to the Court*] that I may be the better prepar'd to deliver my Opinion in this weighty Matter: And then, God willing, I will not fail.

But it was answered by the Court, That in regard certain Days have been peremptorily appointed at first for their Arguments, it could not be altered now, nor could they give him any further Time.

Whereupon he said, 'Seeing I may not have any further Time, I must therefore deliver my

Opinion in brief, according as I have conceived it in my Conscience to be, which is as followeth, viz.

'That the King, *pro bono publico*, may charge his Subjects, for the Safety and Defence of the Kingdom, notwithstanding any Act of Parliament; and that it is warrantable by *Gascoigne, 13 Ed. IV. 14.* and moreover, that a Statute derogatory from the Prerogative doth not bind the King; and the King may dispense with any Law in Cases of Necessity, *2 Hen. VII. 11.* And so concluded for the King.

A few Notes of the Argument of Sir Tho. Trevor, Kt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of Ship-Money.

AFTER he had opened the Record he said, The Question upon it was, Whether Mr. *Hampden* should be charged with the 20 s. imposed upon him, as this Case is?

This Case, by reason of the Weightiness of it, is adjourned from the Exchequer hither to be argued, and the Advice of all the Judges is required herein; many Days have been spent in the arguing of this Case, as it well deserves; six Days by the Defendant, and six Days on the King's side.

It is some Labour, in a Case of this Extent, to contract myself, according to my Conscience and best Knowledge: I shall seriously ponder the Weight of this Case, and digest it, as by the Law is warrantable, and so grounding my Judgment accordingly. And the Judgment which I shall give, in fine, is, That Mr. *Hampden* ought to be charged with this 20 s. and is to give Satisfaction for the same. My Lord *Coke* saith of a short Case in his *11 Report*, That tho' it be as short a Case as ever was argued, yet the weightiest in any Court for Consequence: So it may be affirmed of this Question, for the Sum is but 20 s. but the Weight thereof is of far greater Extent: it concerneth the whole Kingdom.

Mr. *Hampden* hath demurred, and thereby hath granted all Matters of Fact to be true. The Defendant's Council have taken much Pains for their Client; and, without Flattery, so have the King's Council.

I acknowledge, the laying of a Charge upon the People by Parliament is a safe way, if Time and Occasion will permit. *Anno 1588*, when the *Invincible Armada*, so termed, came into England, the Provident Care for the Prevention thereof was out of Parliament. Alas! It is not Parliaments can keep us safe. Was not that detestable Gunpowder-Treason, *3 Jac.* devised to have been executed in the Parliament-time? The Wisdom of the Parliament did not discover this utter Ruin and Destruction, that had like to have happened to the King and Kingdom, and to the Overthrow of Religion; but it was the great Mercy of God that did it.

This Kingdom hath been always Monarchical: A Democratical Government was never in this Kingdom. In the time of the *Britons*, 500 Years before the Birth of our Saviour, when *Brute* came from *Troy* into *Britain* (as one writes) it had a politick and regal Government: This is confirmed by the Letter from the Pope to King *Lucius*. And our King hath as much Power and Prerogative belonging to him, as any Prince in Christendom hath

hath. It is the King's Prerogative to appoint the Beginning and Ending of Parliaments. So great a Body can move but slowly. A great part of the seven Months would be spent, or the Parliament ended; and then we were but to begin to rig and trim our Ships, to provide Powder, Shot, Cables, &c. many of these, perhaps, to be had in foreign Parts; Masters and Gunners, &c. to be got; Ready Money must be had for the providing of all these; this will require convenient time before this can be done. What Hazard may the Kingdom run all this while? What Policy is there to make State-Affairs known to the People? They may thank themselves, they would not make a Ship for the Service, and then they might have had it for their own Use afterwards. When the Kingdom is in Danger, the King may command a Supply for Prevention thereof; and who can tell better than the King how to prevent the Danger? *Necessitas non habet Legem.* The King then must not forbear. The common Law doth regard the common Good above particular; as in Pontage, Murage and Paveage.

The Provision of Shipping hath prevented us from Danger hitherto, and I hope it will still. It hath Increased the Honour of the Kingdom. It's known not only to ourselves, but to other Princes, that our Ships are of far greater Burthen, Strength, and better furnished, than ever was before. All which redoundeth to the King and Kingdom's Honour. The Ship, called *The Sovereign of the Sea*, may be termed, *The Sovereign of all Ships.*

To conclude: The Sum assessed for this Business, I wish it may be paid by all cheerfully, for it is for a general Good, for the Safety of the whole Kingdom: The Subjects are not prejudiced by it, either in their Dignities, or Properties in their Goods: The King's Prerogatives protect the Peoples Liberties, and the Subjects Liberty the King's Prerogative: 'Tis proper for Kings to command, and Subjects to obey. We that are the Judges of the Kingdom have paid it, and therefore it is fit our Opinions concur with our Actions in this Case. And so my Advice is, That Judgment ought to be given that Mr. *Hampden* ought to be charged with the 20 s. assessed on him.

*The Argument of Sir George Crooke Kt.
One of the Justices of his Majesty's Court
of King's-Bench at Westminster, in the
Exchequer-Chamber, in the great Case
of Ship-Money.*

THIS Case of Mr. *Hampden's* stands upon Record, and what Judgment may be upon this Record is the Question. I find no Party in this Case but Mr. *Hampden.* A *Scir' Fac'* is brought against him, to shew Cause why he should not be charged with the 20 s. assessed upon him, towards the finding of a Ship.

The Occasion of that was the Writ of *4 Aug.* which is the Foundation of all; and that is directed to the Sheriff of *Bucks*, as to other Sheriffs, to prepare a Ship of such a Burden, for the Reasons mentioned in the Writ, *Quia Prædones, &c.* because the Kingdom is infested with Pirates, &c. *Quod datum est nobis intelligi, &c.* for that they do seek to draw Men into Captivity; and also lest we should lose the Dominion of the Sea; and for these Reasons these Writs are sent forth. For the Time that they were to continue abroad, it

is twenty-six Weeks, so long the Payment of the Men to be at their Charge: *Et quos Rebelles, &c.* and if any do rebel, that they should be imprisoned. And so the Record setteth forth further, that upon this Writ a *Certiorari* went forth, and Mr. *Hampden* was certified not to have paid it.

Now upon all, Mr. *Hampden* hath demanded *Oyer* of all the Writs, and hath demurred.

I must confess, this Cause is a very great Cause, and the greatest Cause that ever came in question before any Judges. And for my own Part I am sorry it should come in question in this Place; more requisite it was to have it debated in a publick Assembly of the whole State: for on the one side, it concerns the King in his Prerogative and Power Royal; and on the other side, the Subject, in his Lands, Goods, and Liberty, in all that he hath, besides his Life.

For my own part, I am sorry that I am enforced to dissent from my Brothers that have argued before me; a fitter Course it were for me to have argued with them privately, who have argued so learnedly and well. I have studied all that I could to have concurred with them; but speaking, according to my own Heart, (for we are to give Judgment upon our Oaths) in Respect of my Reason and Conscience, I cannot concur with them; it makes me at a stand with myself, because of the Arguments of so many learned Men before me, and to suspect my Judgment, whether it be erroneous or no. Yet I must set down my own Reasons, and upon them leave them to my Lords that come after me to judge on.

Judgment is of the Lord, the Hearts of Men, and also their Judgments, are in the Hands of God; and when Judgment is once past, we have done. For my own part, I know in this Case we cannot do so well as we should, but to satisfy ourselves in our Consciences and our Understandings; and in this Case we are to give Counsel to the King according to our Oaths, whether this Charge be legal or not. If legal, the Subject ought not to complain: If not legal, then not in the King's Power thus to charge the Subject.

The King's Counsel have maintain'd this Writ to be good; and the Judges that have argued, in their Judgments have maintained it. Then the King is advised by his Judges, Whether this be legal or no? If legal, it is well; if not, then the Burden lies upon us. For the King doth nothing but what he is advised.

The Case hath been excellently, learnedly, and well argued on both sides; for that which was pressed by Counsel on either side, did not much move, for they argue as Counsel; and we are to give Judgment upon our Oaths, on what they have said.

But the Judges Opinions already deliver'd do much trouble me. When I have been of Counsel, I have argued one way, and have thought myself very clear; when I have come as a Judge, and argued, I have thought clear otherwise of the Case. I desire to give Judgment in this Case according to God's Direction, and my own Conscience, and that is the best. And so I do not doubt but all my Brothers have gone according to their Conscience, which makes me suspect myself. But every Man standeth or falleth to his own Master. I desire God to guide me to a true Judgment; and tho', for the Reasons aforesaid, I doubt myself, yet I am not of the same Opinion with my Brothers; but according to my Conscience, I think
that

that Judgment ought to be given for the Defendant; For which my Argument shall stand upon these Points.

1. I hold that this Writ is not allowable by the Common Law, but is a Writ absolutely against the Common Law.

2. Admit it was good at Common Law, yet it is against divers Statutes.

3. I hold, that no Necessity, nor no Pretence of Danger, can give this Cause for the Writ: For if the Writ be against the Common Law, no Pretence of Danger can Warrant it.

4. There is no Warranty by Prerogative of the Crown, nor Power Royal, for this Writ.

5. That this Writ is the first Writ that ever was devised in this Kind, and first put in Practice, either in Inland Counties or Maritime Parts.

6. That there is not any one Precedent, nor any one Record judicial, or Judgment in Point of Law for the Writ; if not, then I hold it not fit to be maintained.

I come now to the Writ itself. 1. I hold the Motives of this Writ to be insufficient to warrant the same.

2. The Commands of the Writ are merely against the Law; because the Commands of the Writ are, to charge the Subject to find a Ship, with Men, Munition, &c. against the Words of the Common and Statute-Law.

3. If they were, yet the Assessments of the Writ are not warrantable by the Law, and so no Assessment: And if no good Writ, then the *Scir' Fac'* will not lie.

4. I come to the *Certiorari*: And, whether it be well-grounded, or no, is the Question. And I hold, it doth not well issue, as this Case is.

1. For the Point of Law. We that are Judges are bound, according to the Law, not according to our own Imaginations, both to judge according to the Law, and the Law of this Land, either of the Common Law or of the Statute-Law: and I see no Book, nor know of any Authority that doth maintain this Writ; but contrariwise, there are Books and Authorities in Law, that say, This Writ ought not to be maintained. It is a Rule in *Littleton*, that *That which was never done before, cannot now be done*.

I say, there cannot be produced an Example of the like Writ, I mean the Writ 4 *Aug.* 11 *Car.* that ever went unto the whole Kingdom, to make Ships, &c. nor unto all the Maritime Counties, at one time; but it is the first Precedent, either for Inland Counties, or Maritime Parts; and if no Precedent before, then not by the Law to be maintained.

2. It is against the Common Law of the Land, which gives a Man a Freedom and Property in his Goods and Estate, that it cannot be taken from him, but by his Consent in Specie, as in Parliament, or by his particular Assent: for the Law puts a difference between a Freeman and Bondman. A Bondman's Goods may be taken without his Consent; but not so of a Freeman.

Then thus stands the Case, and the Question ariseth, Whether this Writ to command the Subjects in any Inland County, to prepare a Ship, and provide Men, Munition, &c. went out by their Consent? And whether allowable or no, if without their Consent, for this is a Charge upon the Subject. And I say, no common Charge upon the Subject ought to be but by a common Consent, or in a Parliamentary Course. Mr. *Lambert* saith,

that in the Conqueror's Time the King could charge the Subject with no unjust Taxation, nor Taillage, *sed per commune concilium*. And that was a Law not given by the Conqueror, but allowed by him, as to be the Law of the Kingdom.

In the *Charta* in King *Jahn's* Time, it is plain, the Liberty of the Subject is there confirmed, *Nul-lum scutagium, nullum auxilium nisi per commune concilium*. It appeareth plainly by the Books, that this cannot be done but by Consent in Parliament. *Fortescue* Chief Justice setteth down what the Law of *England* is in that kind, as Instructions for the young Prince. Saith he, 'The King governeth his People by Power, not only Royal but also Politick.' If this Power over them were Royal only, then he might change the Laws of his Realm, and charge his Subjects with Taillage, and other Burdens, without their Consent. Thus the King can change no Laws, nor yet charge them with strange Impositions against their Wills. He setteth down, as the Head is the chief of the Body, so the King is the Head of his People: He cannot take any thing from them, without their ordinary Consent; the common Consent it is in Parliament.

Cap. 3. an express Clause there, *hoc individuo*. Shew me any Book of Law against this, That the King shall take no Man's Goods, but he shall pay for it, tho' it be for his own Provision; or lay any Burden upon his Subjects, but he must do it by their Consent in Parliament. If this be the Privilege of the Subject, then it is express, the Subjects ought not to have this Charge imposed upon them, but by their common Consent. Tho' it be said, A Statute is the Act of the King, the Lords and the Commons only give their Consents; I say, it is the Act and Grant of the Commons, as well as of the Lords; for what Consent is given there, is given by every Man of the Kingdom, by the Power of the Voice which they gave in chusing the Knights of the Shires and Burgeses. There is a Book Case, 13 *Hen. IV. fol. 14.* expressly, That no Man shall be charged without his Consent in Parliament. *Gascoigne*, Chief Justice, gave it as a Rule. *Coke's Reports*, *Clark's Case*, No Man to be charged in *St. Albans*, but with their Consent.

In the Chamberlain of *London's* Case, to put a small Sum upon a Merchandize, &c. when it is for the Good and Benefit of the People, is a thing to be allowed thro' a common Ordinance to be Good, so they have no Loss by it; as in case of Murage, Pontage, Paveage, and Tolls of Markets: Taxes upon the People for these are allowed, because they are Matters for Use of the People, and are not as a Matter of Charge imposed upon the People.

Fitz-Herb. Na. Br. The King hath the Government of the whole Kingdom, both in time of War and Peace. None will deny but that he may command, that no Man can doubt of; and therefore in that kind, in Point of Inundation, the King, by his Writ, commandeth, That that shall be stopped, and be done by those that have Benefit or Loss by the Inundation; and those only are to be charged, as come unto *Kent*: If an Inundation be in *Kent* Marshes, shall the County of *Middlesex* be charged therewith? no; but those that have Profit by it, or have Loss by it. *Vid.* the 10th Report.

Then here standeth the Case; if that be so, the Question is not now, Whether a common Charge may be levied upon the Subject, without Consent: No question but a common Charge may, if occasion, and every Man ought to obey it.

But the Question is, Whether, upon the Allegations in this Writ, there shall be a Charge to impose Money upon them in the mean time, without their Assent? I say not, but by a Parliamentary Course: in that kind the common Law doth not allow it. A notable Case in 14 E. II. *Banc. R. Rot. 60. Heb. and Lever's Case in Durham*; an Action of Trespass was brought against *Lever* for taking away the Chest of *Heb's*, with Goods and Money in it he pleaded not Guilty; the Jury gave a Special Verdict, That the Defendant took the Money; but it was upon this Occasion: The *Scots* had invaded *Durham*, and burnt divers Houses about *Durham*; upon which the Inhabitants of *Durham* assembled together to consult about their Defence; and took an Oath to obey the Ordinance to be made by Consent amongst them; whereof the Plaintiff was one that swore, and gave his Consent; Whereupon they made an Order to give the *Scots* a Sum of Money to depart, but they would not be gone without ready Money; whereupon they made a second Ordinance, That every Man's House should be searched, and where they found Money, to take it: Thereupon the Defendant took the Money out of the Plaintiff's House. The Judges asked the Jury, If this last Order was done with the Plaintiff's Consent. They said it was done by Reason of the Occasion. Thereupon ment was given for the Plaintiff: That because it was not with his Consent, that therefore they ought not to be charged. It came into the King's Bench, and they seeing of this Special Verdict, the Judges of the King's Bench reversed the Judgment; for why? what was done, was done by his own Consent and proper Act, because of his Consent upon his Oath; and therefore (said the Judges) he had means to help himself against the Commonality of *Durham*, and they to pay him again to his proportionable Part. This proveth, That no Man ought to part with his Goods, but with his Consent.

That of *Rich. II.* which is not a Statute, yet doth shew, that the Law was at that time, as it is the same at this Day. Advice was taken in a great Assembly how to charge the Commons: And it was answered, That they could not be charged, but by common Consent in Parliament, And it was the Declaration of *Scroope* in the Parliament-House, That without Consent in Parliament, the Commons ought not to be charged; because the Commons have a Consent in Parting with their Goods. It is said in *Doctor and Student*, That the Subject hath such a Property in his Goods, that no Man shall meddle with them, but by his Consent; which is the Reason they recover Damages when they meddle with their Goods, not by their Consent.

Another Reason why the common Law looketh into it is, because of the Inconveniencies that might insue, if this should be allowed; To charge one Ship, by the same Reason there might be ten Ships charged. We have a pious King, and tho' he will now do it, yet the Law looketh into this Inconvenience. That of *Danegelt* began in the Year 991. The first Composition was 10000 *l.* The second 16000 *l.* The next 24000 *l.* The next 36000 *l.* And in 10 or 11 Years, by five several Rifings, it came to 48000 *l.* And so, for ought that I do know, this may come to forty hundred thousand Pounds. Therefore the Law looketh to make certain the Charges. The first double Subsidy that ever was, was 31 *Eliz.* and the Chancel-

lor of the Exchequer said, It did make his Heart to quake to move for a double Subsidy, one Subsidy being granted so lately. The Reason of it was, because the *Spanish* Invasion was foreseen.

After the *Spanish* Invasion was past, then came the Second Grant of a double Subsidy; and he said, he hoped not to live to see a Subsidy granted again. 33 and 39 *Eliz.* It came to three Subsidies, and four Subsidies, but if there had been ten Subsidies, what was done, was done by Parliament; and the Law alloweth it because of the greater Inconvenience. Then it is in the Judgment of the Parliament for the appointing of those Subsidies, as the Occasion requires.

The Statutes of Tonnage and Poundage, as appears by all the Statutes made in *Rich. II.* and continued till *Hen. IV. V. VI. VII.* and so downwards to King *James's* Time, are to the end the King might have Money in his Coffers for the Defence of the Realm, and for the Safe-guard of the Sea, that he might not, upon a sudden Occasion, be unprovided; because it is Reason and fitting that Kings should ever have Money ready against any Occasion. But now it is not granted, yet it is taken, the same Profit is made still: And I do not doubt but the King doth employ it for the Defence of the Kingdom, and Safeguard of the Sea. The difference between a Charge and Defence is much; for the first there is no Law to compel the Subject unto it, but by Parliament: For the Second, which is the Defence, every Man's Person is bound in Defence, *Exponere se & vitam ipsam*, upon Peril thereof; but he is not bound to any Charge without his Consent. So in this kind I hold, as the Law standeth, that no Charge ought to be imposed, but by their common Consent; for you will make it all one to take away the Property of the Goods, which you do *quodam modo*, tho' not *in specie*. Power is given to distrain the Goods, and to sell them; and every Man is liable to the Discretion of the Sheriff.

But admit this Charge might be imposed by the common Law, yet I do conceive it is prohibited by the Statute; for I hold, as now my Brothers the Judges, have held, that the Statute *de Tallagio non concedendo*, is a Statute, notwithstanding what hath been argued at the Bar to the contrary. It is apparent in our printed Books; and in one of our Books, the express Time is mentioned when it should be made, *viz.* 25 *Ed. I.* then it is said to begin. *Taillage* is an antient Aid, and so is *Purfile marier*, and *pur faire fitz chevalier*; but no *Taillage* without a common Consent in Parliament; so I agree with my Brothers, that it is a Statute.

Next this Statute of 25 *Ed. I.* which is said to be no Statute, the Kingdom of *England* hath ever held it for a Buckler for them, That no Charge (without common Consent) should be laid upon them. And the Reason wherefore this Statute was made, was in respect of the great Taxes imposed on the Subject without Consent, in time of War.

The next Statute is 14 *Ed. III. cap. 1.* A great Subsidy was then granted. What was then done? The King doth grant for him and his Heirs not to put them to any Charge hereafter, unless it be by common Consent in Parliament.

Oh! but this is but for that King himself alone!

I answer, it is perpetual. If the King doth grant for him and his Heirs, it doth go to all his Posterity,

Posterity, and is a good Act of Parliament; so that is the second Act of Parliament in the Negative, That no Charge shall be laid on the Subject, but by common Consent in Parliament.

That which is stood upon by my Brothers, is 21 Ed. III. That Statute was made to grant a Subsidy upon every Sack of Wool; and also Taxes upon Merchants Goods Transported, 6 d. in the Pound. This Statute thus made, the King afterwards, because few of the Sacks of Wool were carried over before *Michaelmas*, sent forth a Proclamation, that 6 d. in the Pound should continue till *Easter*, and no longer: but half a Year after this was complained of to the King, and the King (by Proclamation out of Parliament) did take away the 6 d. in the Pound. 22 Ed. III. in the *February* then next following, an express Act of Parliament (this Subsidy so granted) to continue till *Michaelmas* and by Proclamation to continue till *Easter*. They confirm all till *Easter*, and no further continuance of it to be.

By this appeareth, that for so small a thing as 6 d. in the Pound for such a Time, as from *Michaelmas* to *Easter*, that it was a Charge not to be borne but by Consent in Parliament.

4 Hen. IV. m. 28. A Subsidy granted, That this should not be drawn into Example to charge the People, but by common Consent, and that in Parliament.

13 Hen. IV. m. 10. There it is said, Where a Subsidy is granted, it shall not be granted henceforward for Defence of the Kingdom, or Safeguard of the Sea, but in Parliament.

Then came a Parliament. What did they complain of? The Patent of the Office of Alnerage, tho' it was but a small Charge, yet they set down that this was contrary to the Law, That no Taxes, nor no Aid should be imposed on the People, without Consent in Parliament: The Commons were then very zealous in small Matters.

2 Hen. IV. m. 22. *Hoc individuo*. At that Time a Commission went forth to divers Towns in the Kingdom, to provide, &c. When there came a Parliament, 2 Hen. IV. they complain of those Commissions that enforced them to do that which by the Law they ought not to do; and pray'd those Commissions might be repealed: The Answer is absolute, *Let it be done. Soit fait*.

The next is 1 Rich. III. True, the King was an Usurper. Benevolences were granted; but that was no Charge, as ours is, and therein the Commons claimed their Liberties.

Lastly, The concluding Law is that of 3 Car. the Petition of Right, That no Person shall be taxed without Consent of Parliament: And when the King was informed of the former Statutes how they were; Thereupon this Statute 3 Car. was made, which reciteth the Statute *de Tallagio*, and divers other Statutes; and it was referred to my Lords the Judges (most whereof are here) whether this Law doth give more than formerly from the King. And we were all of Opinion, that this Law did give no more than what was formerly, and was only but a reviving of the antient Privileges of the Subject; it added no more, but only revived what was formerly granted.

I do conclude, that no Charge can be imposed upon the Commons, without their Consent in Parliament. We that are Judges, must go according to the Intention and Meaning of those Laws. The Meaning of the Laws in this kind was, that no

manner of Charge, Aid, or Tax should be laid upon the Subject, but by Consent in Parliament. The Judges are to expound them according to their Intention.

But they say, the Practice hath been otherwise.

We say not now what *de facto*, but what *de jure* was done; and we, as Judges, must not allow *de facto*, *sed quid de jure factum fuerit*.

To answer the great Objection, It is for the Defence of the Kingdom: Here is such a Necessity and Danger, as will not admit the Delay of a Parliament.

I hold, for my part, that no Necessity nor Danger can allow a Charge, which is a Breach of the Laws. I hold it absolutely, that for a general Charge of Money upon the People, it cannot be upon any Pretence of Danger or Necessity. Mens Persons may be used in the case of Necessity or Danger; for every Man is bound to defend the Kingdom, but no Necessity can procure this Charge without a Parliament. The Law provideth a Remedy, in Case of Necessity and Danger; for then the King may command his Subjects, without Parliament, to defend the Kingdom. How? By all Men of Arms whatsoever, for the Land; and by all Ships whatsoever, for the Sea, which he may take from all Parts of the Kingdom and join them with his own Navy; which hath been the Practice of all former Kings: In their Necessity they have taken Ships from all Parts of the Kingdom. 10 Ed. III. M. 2. Scot. 10 Ed. III. M. 16. when there was a great Navy of Scots and French appeared, and intended to come and invade the Kingdom, the King appointed two Admirals, one towards the *North*, the other towards the *West*, and to meet together at what Place he pleased; and, m. 16. sent into *North-Wales* and *South-Wales* to maintain one Ship, either of them upon their own Coasts of the Sea, for the Defence of the Kingdom. And in *Rot. Alm.* 12 Ed. III. Writs went for the arresting of Ships in all Parts of the Kingdom. *Rot. Viag.* 1 H. IV. m. 12. Writs issued to all Archbishops and Bishops, shewing imminent Danger, that they should be ready in Arms, to come and assist *ad custodiendum mare*, whithersoever he should appoint them. But in that Time, when the Danger, was such, yet no Ships appointed to be prepared thro'out the Land. And 5 Hen. IV. that all the Men of all Parts should come together in such a Place: This was only an arraying of Men to be in readiness. 3 H. V. to the same purpose. And 1 Hen. VII. which was much stood upon, of a Rumour of Wars between the King of the *Romans* and the *French* King, which might, perhaps, in the End, tend to an Invasion of this Kingdom, there was an arraying of Men, from 16 to 60, and gathering of Ships, and taking Order for Watch and Ward upon the Sea-Coasts, but no Command to make Ships. 4 Hen. VIII. *pars* 2. there the King by Proclamation saith, That *the Enemy is ready to enter, Ships are furnished with Men of War to invade the Kingdom*. What then? What was done then? It is no more, but that every County in *England* have Men in readiness to assist, from 16 to 60, to defend the Kingdom, and to have good Watches and Wards upon the Sea-Coasts.

But, I pray you, in all these Times of Hen. VIII. Hen. VII. Hen. V. Hen. IV. were there ever any Writs went forth for Ships into any County? it doth not appear that any County was to prepare or make any Ships; but only Men in

Arms: So the Law makes Provision, in Time of Danger, by help of their Persons, and with Ships, not with a pecuniary Charge; for that cannot hold for any, nor can be done without Parliament. And if new Ships must be made, it must be made by Parliament. If so be the Writs be to make Ships, then let the Sheriffs make them, and shew for their Discharge upon Record, that they are made and prepared. But to appoint by Writs Ships to be made, and by their Directions appoint the Sheriffs to levy Money to pay off some of the Ships, was never yet done, this being a Precedent of the first Impression. The Law did always account the Parliament able to provide and to give sufficient Aid, and most fit to consult *de arduis Regni*; and there is a Consent of and Grant of the Commons to what is done, they are Actors in it.

By the old Law of *Alfred*, Parliaments were to be held twice a Year; and by express Statute made 4 *Edw.* III. 14. an express Law was made, That every Year a Parliament should be held, especially if Need required. And by another Statute, for avoiding of Grievances that daily happened, a Parliament should be held once a Year. Then it is to be conceived, a Parliament may be called, and Things may be charged that way.

And for the Objection, That a Parliament is not the speediest way to prevent the Danger; the Imagination of Man cannot invent a Danger, but Course may be taken for Defence, till a Parliament be had. So, for my part, I hold this Point of Necessity, or Danger, cannot be held a sufficient Ground for this Writ.

The next Thing is this; Yea, but this is maintained by Prerogative and Royal Power. I say for that, by my Oath I am bound to maintain all the true Prerogatives of the King; and we that are Servants to the King must maintain his Prerogatives, and, to the best of our Skill, not suffer them to be diminished. But I hold there is no such Prerogative in this Kind.

The Prerogative is, that which the Law presumeth, *That the King can do no Wrong*: And so it is in *Bracton*, *Rex potest facere quod de jure potest facere*. 11 *Rep. Magdalen-College Case*, 246. *Plowden's Comment*, The King can do no Wrong, nor any Act to wrong the Subject. *Bracton*, *hoc non potest agere quod non potest agere juste*. Therefore if this Charge be against the Law, so much to the Prejudice of the Subjects, as I conceive it to be, the King will never do it; for it is done by Misinformation that it hath been usually done, and may be justly done. 21 *Edw.* III. a Patent is made, which is a Wrong to the Subject, the King, *de jure Regis*, ought to revoke the Patent; for the Law hath that honourable Conceit of the King, *That he can do no Wrong*. A King, therefore, to have a Royal Power or Prerogative, to do that by his Writs, to command any thing to be done that is against the express Laws of the Kingdom, to the infringing of the Liberties of his Subjects, is not admitted by the Law: The Royal Power is to be taken away; for as it is before said by *Fort seu*, he can change no Law, nor charge his People, but by common Consent in Parliament. So, for my part, I hold that this same Charge upon the Subjects, by his Royal Authority, it is not allowable.

The King, we know, is a most just and pious King, that he will do nothing against his Laws; if he did know it to be against Law, he would

never desire it. When a Judge of the Land was called in question, in Queen *Elizabeth's* Time, about denying some Loan, delivering his Opinion against the same, he said, It was against his Oath, and against the Law, to advise her Majesty to it. With which she rested satisfied. If the Judges say, by Law the King may do this; he may do it: If they say no, but by Act of Parliament, he will never do it.

But it is said, The King taketh the Course, *More majorum*. There is not any Precedent especially maintained, by any judicial Record, that warranteth this Course: and if there were any Precedents, we are to judge according to the Law, and not according to Precedents; not to judge what hath been done, but what of Right hath been done. 11 *Rep. Magdalen-College Case*, tho' there be many Precedents, that maintaineth not a Right; the Question is still, Whether a Right or not?

But admit that Precedents could make it to be lawful, yet I hold there is not any one Precedent to maintain this Case.

For, *First*, I say there is no one Precedent goeth to Inland Counties all over *England*, before now. I say, to Maritime Counties to prepare, as my Brother *Berkley* confessed, that he knew none for any Inland Counties, but 1 *Rich.* II. 11, 52, there Writs went out to divers Inland Towns, but not to Counties, to make Ships; and besides, these were not any to Inland Counties.

To this I say, Those Writs that went out at that Time were done by Conveyance in Parliament: for an Order was made in Parliament, That all that had any Charters, the ancient Cities, Boroughs and Towns, that had any Charters of Liberties, should there be examined; and appoints how, and by whom; and have their Liberties confirmed without Fine, if they would produce Ships for the Defence of the Kingdom. But yet in this Record not one Inland County or Maritime County is charged, nor no Inland Town, but those that would have their Liberties confirmed.

Now to look upon the Precedents of K. *J. In's* Time, 6 *Johan.* 9 *Johan.* 14 *Johan.* &c. here be the six Precedents in Court; and I have looked into every Precedent on the King's side, to satisfy myself; and all those Precedents are only for arresting of Ships, that they should not go forth of the Realm; and 15 *Johan.* all Ships to be ready as the King shall have Occasion.

Then we come to *Hen.* III's Time: 13 *Hen.* III. m. 5, 13, &c. there are six of these Records, I have read them all; they are no more, but only to Port-Towns, to arrest Ships, and the rest to have Men at Arms, in readiness upon the Sea-Coasts, and that but for forty Days.

Then for the Precedents of *Edw.* I's Time, all of them being examined, not any one of them go to the Counties. 13 *Ed.* I. 77. divers Ships are appointed to be made, but it is *ad sumptum Regis*, and only unto Sea-Towns; the Record shews, that by the Barons of the Exchequer they have an Allowance for it. 23 *Ed.* I. m. 5. same Roll, a Writ to the Sheriff of *Norfolk*, to compel them to maintain their Sea-Coasts. 14 *Ed.* I. a Writ *ad congregandas centum naves paratas*, and armed Men to be put in them. So to command in that kind the King may, and we must obey; he commands Ships ready made, not to make them. Afterwards, 14 *Ed.* I. *Rot.* 17. several Writs to the Archbishops and Bishops, to attend

attend with their Arms in readines, to maintain the Coasts. 14 *Ed. I. Rot. 78.* a Writ to the County of *Berks*, a Thing much stood on; it is only for Matter of Array, if it be well looked into, and no Matter of making or finding of Ships; and divers other Writs in this King's Reign, for maintaining of Armies in their proper Counties: and no Man can deny but that every Man in his proper County is to go to defend the Kingdom. And also for having of all Ships of above 40 Tons in readines: But to make new ones, in any Inland County, is not warranted by any Precedent, that I can see; tho' I have looked over all the Records that have been brought unto me; no, not in Maritime Counties, to make Ships.

For the Precedents of *Ed. II. Time, 9 Ed. II. &c.* to put them all together, they are only to congregate Ships to be in Readines, but not to make new Ships.

To come to *Ed. III. Time. 7 Ed. III. m. 9.* Command is to assist the Admiral with their Ships, as Occasion shall require. 10 *Ed. III. 11.* a Precept to Port-Towns only, to bring their Ships to *Portsmouth*, for 13 Weeks, furnished with Victuals, &c. 2 *Ed. III. 16.* not to depart without Licence. 10 *Ed. III. 12 Ed. III. Rot. Alm.* Writs only to Port Towns, *ad custodiend' Mare.* 12 *Ed. III. m. 12.* a Command to *Henry Hufsey, &c. ad congregand' homines*, and to attend on the Sea-Coasts. But these were the Causes of making the Law, 14 *Ed. III.* that there should be no further Charge laid on the Subject: so that all before that Statute do not prove our Case. 15 *Ed. III.* A Custody of the Ports commanded, and Warrants to arrest Ships. 16 *Ed. III.* Command to the Earl of *Dover, &c.* to prepare Ships against an Enemy that intends to come to subvert the Kingdom, and to set up Beacons; which is the first Original of Beacons that I observe. All these Precedents in *Ed. III. Time*, were but to keep Men and Ships in readines, and to bring them to the Sea-Coasts. 46 *Ed. III. m. 3.* that the *French* made great Preparation, whereupon they are commanded all to array, both Clergy and Laity, to guard the Sea-Coasts. And in those Times, when there was more likelihood of Danger than now, no Writs came out then, but only to array Men, and keep them in readines. 50 *Ed. III.* to array Men in *Norfolk* to defend the Coasts. 29 *Ed. III.* Command to the Bishop of *Durham*, and into *Cumberland* and *Northumberland*, to have their Men in readines. A Number of these Precedents in that King's Reign.

For *Rich. II. Time*, it doth not appear by any one Record there is any thing for Ships, but only for the Custody of the Sea.

And for *Icn. IV. Hen. V. Hen. VI. Time* until 2 *Eliz.* they are all concerning Matters of Arms, not to make Ships. And when the Rebellion in the *North* was in the Queen's Time, then by Writs Men were commanded to be in readines, for Defence of the Kingdom.

The next Thing we come to is the Writ it self. For my part, I hold it to be illegal; mark the Recital of the Writ, it is no more but *Quod datum est nobis intelligi, &c.* not a plain Affirmation, as Apparency of it. Then the Motives are, Because the Pirates do infest the Seas: Such Motives as never were in any Writ before. All former Writs were not to provide great Navies in respect of Pirates; there is no such great Danger of them. 15 *Ed. I.* it is there set down, when Pirates infested the Seas, they took Order that there

should be only 10 Ships to scour the Coasts. 16 *Ed. III. &c.* Command that Men should be arrayed, lest the Enemy should invade the Kingdom; but no mention made of Pirates, for they will be removed with a few Ships. Mark the Times when great Pirates were upon the Sea, they would be glad to sculk away when the King's Navy came towards them. Now that this should bring the King's Navy to Sea, is against the Law of the Land, and are not Motives sufficient to induce a Charge of this Kind.

Secondly, The very Commands of the Writ it self are unlawful, in respect of the Inconveniences to an Inland County; whereas there was never any Inland County charged in that kind before, as Coast-Towns that have been heretofore charged with Soldiers, and had none, were discharged. When *Bodmin* in *Cornwall* was charged with finding of a Ship, they shewed they never had Ship nor Mariners there, and that divers of them were imprisoned for not finding such a Ship; whereupon Commission issued to the Admiral to examine the Truth thereof: And because it was found they had no Mariners, they were discharged.

But Mr. Solicitor answered, This was done by the Admiral, beyond his Commission; but 13 *Ed. III.* the same Year, there was a Writ awarded to *Chichester* in the County of *Suffex*, to find a Ship, and they complained they had not any Ships used to arrive there, nor Mariners therein inhabiting; and thereupon they were discharged, upon a Writ out of the Chancery: So I say, Inland Counties that are not wont to have Ships, the Law doth not appoint them to do that which they cannot do, nor will not expect from them that which is impossible.

The Pursuance of this Writ is against Law; it appoints them to provide a Ship, hire Men, and provide Victuals and Wages for them, 26 Weeks, &c. I say, this is against Law plainly, and against divers Statutes, and no Law doth warrant it; for Soldiers, which are the King's Servants, ought to have their Pay from the King, at the general Rendezvous. 15 *Johan. m. 3.* Ships commanded to be at the Ports upon the King's Pay. Tenants by Knight's Service, after forty Days, were to be at the King's Charge. 17 *Ed. I.* 16 *Ed. III.* it appeareth there, the King, upon the Invasion of the *Scots*, many Men being lost, appointed Soldiers, and their Wages paid, and what to *Durham*, and what to *Newcastle, &c.* 31 *Ed. I.* in the Exchequer, Writs went out to levy Men to resist the *Scots*, and they would not stir without their Wages. 16 *Edw. III.* to pay Soldiers Wages. 2 *Edw. III. Rot. 16.* there it is set down in Parliament what Soldiers have received for their Wages. 26 *Stat. 18 Ed. III. cap. 7.* Soldiers are not to go out of their Counties without Pay. 10 *Ed. III.* the Men of *Bucks* stood upon it, and would not go out of their County to the Coasts of *Southampton* without Wages. *Rot. Alm. 12 Ed. III. m. 12.* A Writ to compel all Men to make Munition for Ships, for the Town; and thereupon *H.* and *B.* they were commanded to maintain the Men of the same Town. *Claus. 13 Ed. III. m. 14.* Men of Arms for the Defence of the Sea-Coasts complained their Wages were not paid them: Ordered, The Town from whence they came should pay them. The Statute of 11 *Hen. VII. cap. 1.* provides, that Soldiers that go out of their own Counties to attend the King in his War, shall have their Wages from the Time they go from their Houses, to be paid by the King's own Officers.

I hold that this Assessment is not lawful and allowable: then if the Assessment thus made falls to the ground, the Power to the Sheriff to assess doth; and he may do it as he lists, put more upon one than another, therefore an Assessment in that kind is not legal.

Then the Clause, *Si rebelles fuerint, &c.* to imprison them, then to give Power of Imprisonment to the Sheriff: Clauses have been in former Writs, in Cases of Arrays, to distrain, if they refuse to pay; never in Case of levying Money, to imprison for it: it is clearly against *Magna Carta* to be imprisoned, unless he be indicted, or by due Process of Law.

The next Thing is the last Clause of the Writ, 'If more be gathered than shall be needful, to be returned amongst those that have paid it.' That sheweth the Ship must be done; we are now upon the Record, and by this Record it doth not appear that a Ship is made. It appears Mr. Hampden was assessed 20*l.* towards the making of a Ship. It is said, If the Money be paid, others can provide Ships. This is not according to Law, to command a Ship of War of 250 Tons, and to turn it into Money; for if a Ship were made by a County, the County should have it again, but in this Case it is otherwise: this *Ser' Fac'* is brought to have the Money.

For the *Comitatus*, it is directed to a Sheriff out of Office *quod dicitur de se* and ought not so to be, for all Writs are directed to the present Sheriff; so for the old Sheriffs to shew Cause what they have done, and the new Sheriffs to make their Return, he is the immediate Officer of the Court.

Admit the *Ser' Fac'* should go forth, it would do something, *onerare, &c.* to whom, or how, nothing here: but *Ser' Fac' quare onerari non debet*; but to whom *onerari*, it doth not appear.

Besides, it is directed to levy Money in that kind, and to sell it on a Ship, it is well. If not so bestowed, then those that received the Money are accountable to those of whom they had it. In *Ed. III.* Time, Soldiers received Money to go to Service in War, yet paid at home, but were compelled to repay it to the County where they received their Wages. Also two High Constables having received Money for Soldiers, were indicted for not employing it accordingly, and adjudged to restore it to the County where they received it, and to find Sureties. So it doth not appear that this Ship was builded, there is no Preparation for a Ship; the Sum assessed is not legal; then the Writ is not legal, because it varieth from all the Precedents formerly; it varieth in the Time of 26 Weeks, before that but for 13 Weeks; in the Manner for Soldiers Wages to Inland Counties, which was never before. I say, it varieth from all the Precedents, in that Kind. And so I hold this particular Writ is not sufficient, nor warranted by the Law, and that Judgment in this Case ought to be given for Mr. Hampden.

The Argument of Sir George Crooke Knight, one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the great Case of Ship-Money, as it was presented to the King's Majesty.

The Case is this upon the Record.

THE King by Writ under the Great Seal, dated 4 Aug. anno 11. of his Reign, di-

rected to the Sheriff of the County of Bucks, and to all the Men in that County, commandeth them in these Words.

1. *Quia datum est nobis intelligi, quod Prædones quidam Pirati ac Maris Grassatores tam nominis Christiani hostes Mahumitani quam alii congregati Navæ & bona & Mercimonia non solum Subditorum nostrorum, verum etiam subditorum amicorum nostrorum in mari quod per gentem Anglicanam ab olim & seculi consuevit nefarie diripientes & spoliantes & ad libertatem suam deporta vere hominesque in eisdem in Captivitate miseram mancipantes.*

Motives of this Writ which are five.

2. *Cumque istis conspiciamus Navigium in dies preparantes ad Mercatores nostros ulterius molestare & ad Regnum gravare nisi citius remedium apponatur eorumque conatui viriliter obvietur.*

3. *Consideratis etiam periculis que undique his guerrinis temporibus imminet, ita quod nobis & subditis nostris defensionem Regni omni Festinatione qua poterimus accelerare convenit.*

4. *Nos volentes defensione Regni, tuitione maris, securitate Subditorum nostrorum Salva Conductione Navium & Merchandiarum ad Regnum nostrum Angliæ valent' Et de eisdem Regno ad partes externas trahent' (Auxiliante Deo. maxime providere; cum nos & Progenitores nostri Reges Angliæ Domini Maris prædicti semper hactenus extiterunt, & plurimum nos tederet si honor iste Regius nostris temporibus depereat aut in aliquo minuatur.*

5. *Cumque omnis istud defensionis quod omnes tangit per omnes debet supportari prout per legem & consuetudinem Regni Angliæ fieri consuevit.*

Locis Præfat' Vicecom' Balliv' Burgenibus Majoribusque probis hominibus & omnibus aliis, quibuscumque supra mentionat' in Burgis, Villis, villatis, hamlettis & locis prædictis eorumque Membris. 1.

Charges of this Writ, which are 3.

In fide & legiantia vestra quibus nobis tenemini. 2. Et sicut nos & honorem nostrum diligitis. 3. Nec non sub forisfactur' omnium que nobis forisfacere poteritis firmiter injungend' Mandamus.

1. *Quod unam navem de Guerra, Portugii 450 doliorem. 2. Cum hominibus tam Magistris peritis quam Marinariis valentioribus & expertis, centum & octoginta ad minus. 3. De tormentis tam majoribus quam minoribus pulvere tormentario ac hastis & telis aliisque armaturis pro bello sufficientibus. 4. Et cum duplici Eskippamento, nec non victualibus usque ad primum diem Martii jam proxim' sequen' ad est homines competent' 5. Et abinde in viginti & sex Septimanas ad Custagia vestra, tam in victualibus quam hominum Salaris & aliis ad Guerram necessariis per tempus illud super defensionem maris in obsequio nostro, in Comitatu Custedis maris, cui custodiam maris ante prædict' primum diem Martii committimus & prout ipse ex parte nostra declaraverit moratur' parari, & ad Portum de Portsmouth circa decimum primum diem Martii duci facias. Ita quod sint ibi in eisdem die ad ultimum ad proficiend' ex*

End for which the Ship is to be.

inde cum navibus nostris & navibus aliorum subditorum nostrorum. 1. Pro tuitione maris. 2. Et defensione vestrum & vestror'. 3. Repulsioneque & debellatione quorumcumque mercatores nostros & alios subditos & fideles prædict' in Dominia nostra ex causa mercaturæ se divertentes vel ab inde ad proprium declinantes super mare gravare seu molestare satagentium.

Clauses of the
Assess.

1. *Assignavimus autem te præfat' vicecom' Bucks ad assidend' omn' hom' in villis de Agmondesham, Wendover & Marlow Magna & in omnibus aliis villis villat' Burgis Hamlettis & aliis locis in Com' Bucks præd' & terræ tentes in iisd' navem vel partem navis præd' non habentes vel in ead' non deservientes ad contribuend' expensis circa provisionem præmissorum necessar'.*
2. *Et saper' præd' vill' Burg' Hamlett' & locor' membris eorumq' sic ut præfertur ad assidend' & ponend' viz. quemlib' eorum juxta statum suum & facultates suas.* 3. *Et portiones super ipsos assessat' per distinctiones aliosve modos debitos levand'.* 4. *Et collectores in hac parte nominand' & constituend'.* 5. *Ac omnes eos quos rebelles & contrarios inveneris in præmissis in carcere mancipand' in eod' moratur' quousque pro eor' deliberatione ulterius duxerimus ordinand'.*

Precluse of the
Writ for the
Ease of the
Subject.

Et ulterius mandamus quod circa præmissa diligenter intendatis & faciatis & exequemini cum effectu sub periculo incumbente. Volumus autem quod non colore præd' mandati nostri.

1. *Plus de iisd' hominibus leverari fac': quam ad præmiss' sufficien' ad expensas necessar'.* 2. *Aut quod quisquam qui pecuniam de contribuentibus ad præd' custag' faciend' levaverit ead' vel partem inde penes se detineat.* 3. *Vel ad alios usus quocvis questito colore appropriare præsumat.* 4. *Volentes quod si plusquam sufficiat collectam fuerit hoc inter solventes pro ratu portionis ijsis contingen' exsolvatur.*

By virtue of this Writ, Mr. Hampden is assessed to 20 s. for his Lands in *Stoake Mandevile* in that County, which, not being paid, is certified amongst others into the *Chancery*, upon a Writ of *Certiorari*, dated 9 Mar. 12 Car. by a Schedule thereunto annexed. And by a Writ of *Mittimus*, teste 5 Mar. 13 Car. this Writ of 4 Aug. 11 Car. and the Writ of *Certiorari*, and the Schedule annexed, is sent into the *Exchequer*, with a Command there to do, for the levying of Sums so assessed and unpaid, *prout de jure & secundum legem regni nostri Angliæ fuerit faciend'*; whereupon a *Sci' Fa'* issued out of the *Exchequer*, reciting the said Writ, to warn Mr. Hampden amongst others, to shew Cause why he should not be charged with this Money. Upon this he being summoned, appeared, and demandeth the hearing of those Writs and Schedule, which being read unto him, thereupon he demurreth in Law. And whether Judgment upon this whole Record be to be given against *John Hampden*, that he is to be charged or no, that is the Question; for he is the only Party in this Case. And there is no Cause why any Man should say that the Question is, Whether Judgment should be given for the King, or the Defendant; for as this Case is, the King is no Party to the Record, but only it is a judicial Process out of the *Exchequer*, grounded upon the former Record, for the Defendant to shew Cause why he should not be charged: which hath been very elaborately argued by the Defendant's Counsel, who demurred, that he should not be charged; and by the King's Council, very learnedly and elaborately argued, that he should be charged.

This Case is a Case of great Weight, and the greatest Case of Weight that ever we read, argued by Judges in this Place; and therefore, adjourned into this Place for Advice of all the Judges: For of their side it is alledged, That it concerneth the King in his Prerogative and Power Royal; and on the other side, That it concerneth

all the King's Subjects in their Liberties, their Persons, and their Estates; for which it hath made some of us to wish and move amongst ourselves, that it might have been by his Majesty's Favour, heard and determined in another Place by his Majesty, and his great Council of his Realm, where all Convenience and Inconvenience might have been considered of, provided for, and prevented for present and future Times, and not to be argued only by us, who are accounted his Majesty's Counsel at Law; wherein if any thing be done amiss, the Fault must light upon us, as misadvising the King therein. But seeing it hath pleased his Majesty, that the same should be argued and determined in this Place, whose Pleasure we must obey, I must give my best Advice upon my Oath to the best of my Skill; wherein I hope not to trench upon his Majesty's Prerogatives, which we are all bound by our Oaths, to the best of our Skills, to maintain, and not to suffer them to be diminished; nor upon his Royal Power; but truly to deliver what I conceive the Law to be, concerning the Case in question.

Wherein I must confess I have been much distracted, having heard so learned Arguments on both sides at the Bar, and so many Records and Precedents cited on either side; but they did not so much move me, for the Council have on either side proposed such Reasons, as they thought convenient for the maintaining of their Opinions, and perhaps with a prejudicate Opinion; as I myself by my own Experience when I was at the Bar, have argued confidently, and as I then thought the Laws to be on that side for whom I argued. But after being on the Bench, and indifferently weighing all Reasons and Authorities, have been of a contrary Opinion; and so the Law hath been adjudged contrary to that Opinion which I first confidently conceived.

But that which hath moved me most, and maketh me distrust my own Judgment in this Case is, that my Brothers that have argued before me, who have argued upon their Oaths, and I presume have seen the Records and Precedents cited on either side, have all argued one way; with whose Opinions I should willingly have concurred, if I could have satisfied my own Judgment with their Reasons; but not being satisfied, I have learned that I must not come with a Multitude against mine own Conscience, for I must stand or fall with my own Master. And therefore I shall shew Reasons, and leave myself to the Judgment of my Lords and others my Brethren. And whatsoever shall be adjudged, I must submit unto, and so do with all others, and do now declare my Opinion to be, that as this Case is, Judgment ought to be given for the Defendant. My Reasons and Grounds that I shall insist upon are these:

1. That the Command by this Writ of 4 Aug. 11 Car. for to make Ships at the Charge of the Inhabitants of the County, being the Ground of this Suit, and Cause of this Charge, is illegal and contrary to the Common Laws, not being by Authority of Parliament.

2. That if at the Common Laws it had been lawful, yet now this Writ is illegal, being expressly contrary to divers Statutes prohibiting a general Charge to be laid upon the Commons in general, without Consent in Parliament.

3. That it is not to be maintained by any Prerogative or Power Royal, nor Allegation of Necessity or Danger.

4. Ad-

4. Admitting it were legal to lay such a Charge upon Maritime Ports, yet to charge any Inland County, as the County of *Bucks* is, with making Ships, and furnishing them with Masters, Mariners and Soldiers at their Charge, which are far remote from the Seas, is illegal, and not warranted by any former Precedent.

5. I shall examine the Precedents and Records cited to warrant this Writ, which have been all the principal Grounds of the Arguments to maintain the same. And I conceive there is the chief ground-work being in my Notes, but I forgot it.

But before I proceed to the Argument, I desire to remove two Difficulties: *First*, That by the Demurrer the Danger of the Kingdom is confessed, and so it is to be allowed for a Case of Necessity.

To this I answer, That the Demurrer confesseth not Matters in Fact, but where the Matter is legally set down; but if it be not a legal Proceeding, then the Demurrer is no confessing of the Matter of Fact. This appeareth in the Book-Case, *5 Hen. VII. fol. 1.* and *Coke lib. 5. fol. 96.* in *Burton's Case*, That a Demurrer is no confessing of Matters of Fact, but where the Matter precedent is sufficiently pleaded or laid down; and so it is held in all our Books.

The *Second* Difficulty is, That this Case is so resolved by all our Opinions under our Hands, that this Writ was legal; which was much pressed by Mr. Solicitor.

To this I answer, That it is true that I have set down my Opinion under my Hand unto Two Cases, to the first voluntarily in *Dec. 1635*, which was thus:

‘ I am of Opinion that where the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger, of which his Majesty is the only Judge, there the Charge of Defence ought to be borne by all in general.’

This I hold to be agreeable to Law and Reason; this Opinion I do still and shall always maintain; for where the Kingdom is in Danger, the King may command every Person of his Kingdom with all his Force to come and defend it at all Times and in all Places of his Kingdom where he pleaseth; and the King is the sole Judge of the Danger, and of War and Peace; and if any do not perform his Commands therein, he is fineable and punishable in a deep manner.

The second was in *Feb. 1636*. which is thus, ‘ That when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, his Majesty may by Writ under the Great Seal of *England* command all his Subjects of this Kingdom at their Charges to provide and furnish such Number of Ships with Men, Victuals and Ammunition, and for such Time as his Majesty shall think fit, for the Defence and Safeguard of the Kingdom from such Danger. And that his Majesty may compel the doing thereof, in case of refusal and refractoriness. And that in this Case his Majesty is sole Judge of the Danger, and when and how the same is to be prevented and avoided.’

To this Opinion, I confess, I then with the rest of the Judges subscribed my Hand; but I then dissented to that Opinion, and then signified my Opinion to be, that such a Charge could not be laid by any such Writ, but by Parliament: and so absolutely in that Point one other did agree

with me, and dissented from that Opinion; and four others, in some other Particulars, from that which was subscribed. But the greater part seeming absolutely to be resolved upon that Opinion, some of them affirming that they had seen divers Records and Precedents of such Writs, satisfying them to be of that Judgment; I was pressed to subscribe with them, for that the major part must involve the rest, as it was said to be usual in Cases of Difference, and for that the lesser Number must submit to the major, altho’ they varied in Opinion; as it is in our Court, if three Judges agree in Opinion against one, or two where there are five Judges, Judgment is to be entered *per Curiam*, if the major part agree, and the other are to submit to it: and in Cases of Conference, and Certificate of their Opinions, if the greater part did agree and subscribe, the rest were to submit their Opinions. And this by more antient Judges than myself was affirmed to be the continual Practice: And that it was not fit, especially in a Case of this Nature so much concerning the Service of the King, for some to subscribe, and some to forbear their Subscriptions: And that altho’ we did subscribe, it did not bind us, but that in point of Judgment, if the Case came in question judicially before us, we should give our Judgments as we should see Cause after the Arguments on both Sides, and we were not bound by this sudden Resolution.

Hereupon I consented to subscribe; but I then said, that in the mean time the King might be misinformed, by our Certificate under our Hands, conceiving us all to agree together, and to give him this Advice under our Hands, and not know there was any dis-assented or was doubtful: but it was then said, the King should be truly informed thereof; and thereupon we that dis-assent, did subscribe our Hands with such Protestations as aforesaid, only for Conformity, altho’ contrary to the Opinion I then conceived.

But this being before Arguments heard on either Side, or any Precedents seen, I hold that none is bound by that Opinion. And if I had been of that Opinion absolutely, now having heard all the Arguments on both Sides, and the Reasons of the King’s Counsel to maintain this Writ, and why the Defendant is to be charged; and the Arguments of the Defendant’s Counsel against the Writ, and their Reasons why the Defendant should not be charged to pay the Money assessed him; and having duly considered of Records and Precedents cited and shewed unto me, especially those of the King’s Side, I am now of an absolute Opinion that this Writ is illegal, and declare my Opinion to be contrary to that which is subscribed by us all. And if I had been of the same Opinion that was subscribed, yet upon better Advise being absolutely settled in my Judgment and Conscience in a contrary Opinion, I think it no shame to declare that I do retract that Opinion, for *humanum est errare*, rather than to argue against my own Conscience. And therefore none having, as I conceive, removed those Difficulties, I shall proceed to my Argument, and shew the Reasons of my Opinion, and leave the same to my Lords and Brothers. Not one Precedent nor Record in any precedent Time, that hath been produced or shewed unto me, that doth maintain any Writ, to lay such a Charge upon any County Inland or Maritime.

I have examined this particular Writ, and the several Parts thereof; and do conceive it is illegal, and not sufficient to ground this Charge upon the Defendant.

1. The Motives of this Writ are not sufficient to cause such a Writ to be sent forth.

2. The Command of the Writ to prepare a Ship at the Charge of the Inhabitants, which mentions Victuals and Men, is against the Common Laws and Statutes of this Kingdom.

3. That to lay a Charge of finding Victuals, and Wages of Soldiers and Mariners, is illegal, and contrary to the Common Laws and divers Statutes.

4. The Power of Assessment given to the Sheriff alone, and to distrain for this, is illegal, and not warranted by any Precedent.

5. The Power of Imprisoning is illegal, and contrary to divers Statutes, and not warranted by the Precedents.

6. That the Preclose of the Writ, and the Practice of it, is contrary to itself, and *oppositum in obiecto*.

7. If this Writ were legal, yet the manner of the Assessment by the Sheriff as it is certified, is not warranted by this Writ; consequently this Sum cannot be demanded of the Defendant by virtue of this Writ.

8. That the *Certiorari* and *Sci' Fac'* issued not legally, and consequently no Judgment can be given against the Defendant thereupon.

For the first Point, that this Writ, 4 Aug. 11 Car. is against the Common Law, my Reasons are these:

1. Because this is the first Writ since the Conquest that went out to any Inland County to prepare a Ship with Men and Ammunition, for ought appeareth by any Record that hath been shewn. And where there was never any Precedent, by the Rules of Mr. Littleton, fol. 23. the Law is conceived not to allow any such Writ. And Sir Edward Coke in his Comment upon Littleton, fol. 81. saith, That where there is no Example, it is a great Intendment the Laws will not bear it.

So I conceive here, there never having been a Precedent before of any such Writ to the Sheriffs and Inhabitants of a County, to prepare a Ship with Men and Ammunition upon any Occasion whatsoever, that it is against the Common Law to award such a Writ.

2. For that the Common Law of England setteth a Freedom in the Subjects in respect of their Persons, and giveth them a true Property in their Goods and Estates; so that without their Consent, or implicitly by an Ordinance which they consented unto by a common Assent in Parliament, it cannot be taken from them, nor their Estates charged: and for this purpose the Law distinguisheth between Bond-men, whose Estates are at their Lords Will and Disposition, and Free-men, whose Property none may invade, charge, or unjustly take away but by their own free Consent, and therefore not warranted by Law; which is proved by these Authorities.

Coke in his Reports, lib. 8. fol. 92. in Francis Case, sets down this Rule, *Quod nostrum est, sine factu seu defectu nostro amitti, seu in alien' transferri non potest.*

Mr. Lambert, fol. 24. setteth down the Laws of England which were confirmed by William the Conqueror, hath these Words: *Inter alia volumu:*

Et concedimus, quod omnes Monarchæ Regn' sui præci' habeant & teneant terras suas & possessiones suas bene & in pace, liberas ab omni exactione injusta & ab omni tallagio (not mentioning there injusta) ita quod nihil ab eis exigatur præter servitium suum justè debitum. Hereby it appears there is an absolute Freedom from all Tallage.

17 of King John, in Mat. Paris, fol. 246. the King doth grant and confirm unto his Barons and Commons, inter al' these Liberties following: *Nullum scutagium vel auxilium ponamus in Regno nostro nisi per commune Concilium Regni nostri, nisi ad redimend' corpus nostrum, filium nostrum primogenitum Militem faciend' vel ad Primogenitam filiam maritand'.* By this it appears what was then conceived to be amongst others their Liberties, and then confirmed; which was, that no Aid should be laid upon them but by Parliament, for the Parliament was then called *Commune Concilium*.

That the Law is so, appeareth by the Treatise written by Fortescue, who had been Chief-Justice of England in King Henry IV's Time, and after Chancellor of England, when he wrote the Book, intituled, *De laudibus legum Angliæ*, fol. 25. cap. 9. he saith thus; That the King of England cannot alter nor change the Laws of England at his Pleasure, for *Principatu regali sed & politico ipse populo suo dominatur.* If his Power were Royal only, then he might change the Laws, *Tallagio quoq; & cætera onera eis imponere ipsis inconsultis*; but adds, that the King of England *sine subditor' assensu leges mutare non potest, nec subiectum populum renitentem onerari impositionibus peregrinis.* And cap. 13. fol. 31. he compares the King and Subjects of England to the Head and Body Natural: *Ut non potest corpus physicum nervos suos commutare neq; membris suis proprias vires & propria sanguinis alimenta ducere sua, nec Rex qui caput corporis politici mutare potest leges corporis illius, nec ejusd' populi substantias proprie subtrahere, reclamantibus eis aut invitis.* Thus he in this Place; but in fol. 84. cap. 36. he seemeth to say, *In hoc individuo, Rex Angliæ neq; per se nec ministros suos, Tallagia, Subsidia, aut quævis onera alia imponit, leges suas, aut leges eor' mutat, aut nova condidit sine concessione vel assensu totius Regni sui in Parlamento suo expresso.* Which Words seem so general, that in no Case he can do it.

So it appeareth by the Book-Case, 13 Hen. IV. fol. 14. That the Grant of the King, which tendeth to the Charge and Prejudice of his People in general, is not good, unless it be by Parliament. But it is agreed there, That Grants of Tolls, of Fairs, of Pontage, Pickage, Murage, Ferrying, or such like, which are for the Profit, Good, and Ease of the People, and Profit of them that will take Benefit thereof, and not compulsory to any to pay, but to them that will take the Benefit; and being very small and reasonable Sums, the Law doth give Allowance to them: but if they were great Sums, that tend to the Charge of the People, the Law will judge them void.

This appeareth in Sir Ed. Coke's Reports, lib. 5. fol. 63. in the Case of the Chamberlain of London, That an Ordinance made by the Common-Council of London, where they have a Custom by their Common-Council to make reasonable Ordinances to bind all within the City, concerning Clothes to be brought to Blackwell-hall, there to be viewed, measured and searched, before they were sold, and a Penny upon a Broad-Cloth appointed for the Officer that did that Service; that such a Charge was reasonable; for that it was for the publick

Benefit of the City, and the Commonwealth; and a pecuniary Penalty laid for not performance of that Ordinance was allow'd.

Ibid. fol. 64. in *Clark's Case* it is resolved, That an Ordinance made by the Assent of the Plaintiff himself, and other Burgeses of the Town of *St. Albans*, for a small Tax upon the Inhabitants of the Town, towards the Erection of the Courts, and other Necessaries, for the Term to be kept there, was allow'd to be good, and did bind the Plaintiff, being by the Plaintiff's own Consent, and for the publick Good of the Town.

Also *Coke*, lib. 11. fol. 86. in *Darcie's Case* citeth this out of *Fitz-Her. Na. B.* fol. 122. That every Grant of the King hath this Consideration in it, tacit or exprefs, *Quod Patria per Donationes illius, magis solito non oneretur.* And as by Grant the King cannot charge his People, so neither can he by Writ lay any Charge upon his People, but by their Consent, or where they have apparent Benefit thereby; And that is the Reason of the Writ in the *Reg.* 127, and *Fitz-Her. Na. B.* 113. Where by Breach of the Sea-Walls any Inundation is of the County, the King, who is *Pater Patrie*, and taketh care for the Good and Safety of his People, sendeth out his Commission to inquire by whose Default any such Breach happened, and to cause all that had Lands or Commons to be contributory to the making up of the Sea-Walls; and this is done by a Jury: but this Charge cannot be laid upon a County or Town in general, but upon particular Men that have Loss or Benefit, or may have Loss or Benefit thereby: And this is done by Inquiry of a Jury, before the Sheriffs, or Commissioners appointed. So it is at this Day, upon Commissions of Sewers, as appeareth by *Coke*, lib. 10. fol. 142. in the Case of the Isle of *Ely*. The Taxation by the Commissioners of Sewers, must be upon every particular Man that hath or may have Loss or Benefit by such Inundations, and making up of the Walls; and cannot be laid upon any remote Parts, which are out of the Level of such Loss or Benefit; and it must be certain and particular upon Persons: certain, by reason of Loss or Profit, and cannot be laid in general upon a Town; but in those Cases there is a particular Loss or Benefit, and in particular Places, and but in petty Charge. And then where the Law alloweth that which in Reason is to be done, that may be done without a special Statute: for, *De minimis non curat lex.* But in this Case there is a general Charge thro' the whole Kingdom, which the Law doth not permit, without common Consent in Parliament.

But it hath been alledged, That this Charge hath been imposed for the publick Safety, and Defence of the Kingdom: and may not this be done when every one hath Advantage by it?

To this I say, When imminent Danger and Cause of Defence is, there must be Defence made by every Man (when the King shall command) with his Person: In such a Case every Man, as it is said in the Precedents, is bound *per se & sua* to defend the Kingdom. And I think no Man will be unwise, but that he will *exponere se & sua* for the Defence of the Kingdom, when there is Danger; for otherwise, he is in danger to look to *se & sua*: but to lay a Charge in general upon the Kingdom, either for making or preparing of Ships, or Money in lieu thereof, is not to be done but by Parliament, where the Charge is to be borne in general by all the Subjects.

To prove further, That no Man may have his Goods taken from him but by his Consent, appeareth by a Record, *Mich. 14 Ed. II. Rot. 60.* in the King's-Bench, in a Writ of Error brought upon a Judgment given at *Durham*; where in an Action of Trespais, by *William Heyborne*, against *William Keylowe*, for entering his House, and breaking his Chest, and taking away 70 *l.* in Money, the Defendant pleaded not Guilty; the Jury found a special Verdict, That the Scots having entered the Bishoprick of *Durham* with an Army, and making great Burning and Spoils, the Commonalty of *Durham* met together at *Durham*, whereof the Plaintiff was one, and agreed to send some to compound with the Scots for Money to depart, and were all sworn to perform what Composition should be made, and to perform what Ordinance they should make in that behalf: and thereupon they compounded with the Scots for 1600 Marks; but because that was to be paid immediately, they all consented that *William Keylowe* the Defendant, and others, should go into every Man's House, to search what ready Moneys were there, and to take it for the making up of that Sum; and that it should be repaid by the Commonalty of *Durham*; and thereupon the Defendant did enter into the Plaintiff's House, and did break open the Chest, and took the 70 *l.* which was paid accordingly towards the Fine. The Jury was demanded, Whether the Plaintiff was present, and did consent to the taking of the Money? they said No: whereupon the Plaintiff had Judgment to recover the said 70 *l.* and Damages, for that otherwise he had no Remedy for his Money; and the Defendant was committed in Execution for that Sum. And thereupon the Defendant, *Keylowe*, brought a Writ of Error in the King's-Bench, and assigned his Error in point of Judgment; and there the Judgment was reversed, and the Reasons set down in the Record were, *First*, Because the Plaintiff, *Heyborne*, had his sufficient Remedy against the Commonalty of *Durham* for his Money: *Secondly*, Because he himself had agreed to this Ordinance, and was sworn to perform it; and that the Defendant did nothing but what the Plaintiff had assented to by his Oath, and therefore is accounted to do nothing but by his Consent, and as Servant unto him, therefore he was therein no Trespasser: and therefore the Judgment given in *Durham* was reversed, because he had assented to that Ordinance, tho' afterwards he was unwilling; yet having once consented, his Goods were lawfully taken. By which it appeareth, that if he had not particularly consented, such an Ordinance would not have been good to bind him; altho' this was in a Case of great Danger, and for Defence.

2 *Ric. II. pars 1.* The Parliament-Roll proveth this directly; altho' it be no Act of Parliament, yet the Record is much to be regarded, for it sheweth what the Law was then conceived to be: for *Scroope*, the Lord Chancellor, then shewed to all the Lords and Commons assembled in Parliament, That all the Lords and Sages had met together since the last Parliament, and having conferred of the great Danger the Kingdom was in, and how Money might be raised in case of imminent Danger, which could not stay the Delay of a Parliament, and the King's Coffers had not sufficient therein; the Record is, they all agreed, Moneys sufficient could not be had without laying a Charge upon the Commonalty, which say they, cannot be done without a Parliament; and the Lords themselves,

elves, for the time, did supply the said Necessity with Money they lent: which Record proveth directly, That this Charge without an Act of Parliament is illegal.

So upon these Reasons I conclude, That this Writ, compulsorily to charge the Subjects against their Wills, is not warranted by any Book, and therefore illegal.

If this Writ should be allow'd, great Inconveniences would ensue, which the Law will always avoid, and not permit any Inconveniences.

1. If any such Charge may be laid upon the Counties by Writ, without Assent in Parliament, then no Man knoweth what his Charge may be; for they may be charged as often as the King pleaseth, and with making of as many Ships, and of what Burdens, and with what Charge of Ammunition, Men and Victuals, as shall be set down. Wherein I doubt not, but if the Law were so, the King being a very pious and a just King, would use his Power very moderately; but Judges in their Judgments are not to look to present Times only, but also to all future Times, what may follow upon their Judgments.

That this Inconveniency may be, appeareth by the *Danegelt*, first appointed in Times of Necessity, to receive them from the Cruelty of the *Danes*, which often changed, and still increased: for *A. D.* 991, when it began, it was but 10000*l.* In 994, it was increased to 16000*l.* And in 1002, it was increased to 24000*l.* And in 1007, it was increased to 36000*l.* And in 1012, to 48000*l.* So if this Writ be well awarded, it may be at pleasure what Bounds it shall have. Also there was never but one single Subsidy and two Fifteenths used to be granted in Parliament, until 31 *Eliz.* and then a double Subsidy, and four Fifteenths were granted: Sir *Walter Mildmay*, then Chancellor of the *Exchequer*, moving for it, and saying, *his Heart did quake to move it, not knowing the Inconvenience that should grow upon it*; he shewed great Reasons for his moving it, it being about the Time of the *Spanish* Invasion, and so it was granted. Afterwards, 35 *Eliz.* treble Subsidies and Fifteenths were granted. And 43 *Eliz.* four Subsidies and eight Fifteenths were granted; and yet these were not accounted grievous, neither would it have been, if it had been ten Subsidies because in Parliament, and convenient Times and Means appointed for the levying of them. Tonnage and Poundage were granted to this End in 13 *Rich. II.* and have continued ever since by several Grants until this King's Time, wherein it was unhappily question'd in Parliament: but the End thereof was, that the Kings might have Money in their Purfes against Times of Need, for extraordinary Occasions, especially for the Defence of the Realm, and guarding of the Sea, as it is especially declared by the Statute 1 *Jac.* and former Statutes, and for other necessary Uses, as the King pleased.

Object. But it is said, That Tonnage and Poundage is not now granted to the King, and therefore the King is enforced to these extraordinary Courses.

Tho' it be not granted, yet I think it is taken; and I doubt not but to the same Intent, and for the same Purposes employ'd for which it was first granted; which was, for the Defence of the Kingdom, and Guard of the Sea. Therefore in case of Danger and Necessity, every Subject, for the Defence of the Kingdom, is bound for *Legianciae debito*, as some Records say, and *Legianciae suae vin-*

culo, astricti, as others speak; *se & sua totis viribus & potestate exponere, &c.* And in such a Case, the King may demand the Persons of his Subjects, and arrest their Ships, to wait on his to defend the Seas; yet with this also, When they go out of their Counties, to be at the King's Charges: But to command the Subject by Writ, to build new Ships, or to prepare Ships at their Charges, or to lay a common Charge on the Subjects in general, for matter of Defence, or avoidance of Danger; is not warrantable by the Common Law.

2. Another Inconvenience is, That it is left in the Power of the Sheriff to charge any Man's Estate at his Pleasure, taxing some, and sparing others, as his Affections lead him; and sometimes, by colour thereof, levying more than he need, and enriching himself; which Power the Law never alloweth him, altho' it were in lesser Matters; as to make an Assessment for Breach of Sea Walls; but to do it by a Jury, and not by himself alone. So for these Reasons, I conclude, This Writ is against the Common Law, and so illegal.

I conceive, if the Common Law were doubtful in this, whether such a Charge might be imposed by Writ; yet now it is made clear by divers express Statutes, That the King is not to lay any Charge upon his Subjects, but by their Consent in Parliament; and that is, by many Acts of Parliament in force, and not repealed: and there is no doubt but that the King by Parliament may bind them and their Successors, every King by Oath being bound to perform the Statutes of his Realm.

The Statute of 25 *Ed. I. cap. 5.* which is in these Words, 'Forasmuch as divers People of our Realms are in fear, that the Aids and Taxes which they have given us before-time towards our Wars, and other Busineses, of their own Grant and Good-will, however they were made, might turn to a Bondage of them and their Heirs; because they might be at other time found on the Roll; and likewise for the Prizes taken throughout our Realm by our Ministers; We have granted for us and our Heirs, That we shall not draw any such Aids, Taxes or Prizes into a Custom, for any thing that hath been done heretofore, by any Roll, or any other Precedent that may be found.'

Ibid. cap. 6. 'Moreover, we have granted for us and our Heirs, as well to Archbishops, Bishops, Priors, and other Folk of the holy Church; as also to Earls, Barons, and all the Commonalty of the Land; that for no Business from henceforth we shall take any Aids, Taxes, nor Prizes, but by the common Assent of the Realm, and for the common Profit thereof, (saving the antient Aids and Prizes due and accustomed)' which are the express Words of that Statute. Now, what those antient Aids were, is well known, that they were *ad redimendum corpus, ad filium primogenitum militem faciend' & ad filiam primogenitam maritand'*: Which Aid concerns not the Subject in general, but particular Men were liable thereunto by their Tenures. So this Saving need not to have been; for the Body of the Act extended not to them, but to the general Aid of the Kingdom.

However, if this *Salvo*, as it hath been objected, would preserve this Aid now in question, yet the Statute made afterwards, *de Tallagio non concedendo*, being without any *Salvo*, takes it away:

Which Statute, *Rastal* in his Abridgment, fol. 441. in his Title of *Taxes*, abridgeth in this manner: ‘*Anno 25 Ed. I.* it is ordained, that the Taxes taken, shall not be taken in Custom, nor but by the Assent of this Realm, except the antient Aids and Taxes: and there the Tax of 40s. upon the Sack of Wool is released.

Ibid. ‘That no Taillage, by us or our Heirs in our Realm, be put or levied, without the Assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgeses, and other free Commons of our Realm; that nothing be taken from henceforth, in the name, or by reason of *Male tout*’ of a Sack of Wool. Statute *de Tallagio non concedendo*.’

Object. Mr. Solicitor laboured much to prove, that there was no such Statute, *de Tallagio non concedendo*: 1. For that it was not to be found on the Rolls of Parliament. 2. For that it was not set down when it was made. 3. That it was but an Abstract out of *Confirmatio Chartarum Libertatum*. Mr. Attorney said, he would not deny it to be a Statute, neither would he affirm it; but that yet it did not extend to take away the Aid demanded, by Prerogative or Power Royal for the Defence of the Kingdom.

Respons. To this I answer, This was never doubted to be a Statute until this Argument; and that it is a Statute, appeareth, 1. For that it is printed in the *Book of Statutes*, for a Statute. 2. It is recited in the *Petition of Right*, to be a Statute. To that it is not found on the Rolls, I answer, That many Statutes that are known Statutes, are not found on the Rolls, as *Mag’ Cbar*’ is not.

And as touching the Time, I conceive it to be made 24 *Ed. I. cap. 1.* for so it is set down in the *great Book of Statutes*, printed 1618, to be the first Statute therein made, *viz.* in these Words: *No Taillage nor Aid shall be taken or levied by us or our Heirs, in our Realm, without the Good-will and Assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgeses, and other Freemen of the Land.*

And that it is a Statute, all my Brothers have agreed.

The only Doubt then is, whether this Statute extendeth to Aid for the Defence of the Kingdom; which I think it doth: for it is the precise Words of it, That no Taillage or Aid shall be imposed but by Grant in Parliament, which extends to all manner of Aids: and by this Law the Subjects of *England* have defended themselves ever since, as with a Buckler, as saith *Bodinus*, fol. 97. whereby it appeareth, that notice was taken of this Law in foreign Parts, and so held still to be a Statute in force.

The next Statute is 14 *Ed. III. cap. 1.* which recites the Grant of the great Subsidy of the ninth Fleece, the ninth Lamb, &c. formerly granted; whereupon these Words follow: ‘We willing to provide for the Indempnity of the said Prelates, Earls, Barons, and others the Commonalty of the Realm, and also of the Citizens, Burgeses, and Merchants aforesaid, will and grant for us and our Heirs, to the same Prelates, Earls, Barons, and Commons, Citizens, Burgeses, and Merchants, that the same Grant shall not be had forth in Example, nor fall to their Prejudice in time to come, nor that they be from henceforth charged or granted to make any Aid, or sustain any Charge, if it be not by the

‘common Assent of the said Prelates, Earls, Barons, and other great Men and Commons of the said Realm of *England*, and that in the Parliament: and that all the Profit arising of the said Aid, and of Wards, Marriages, Customs, and Escheats, and other Profits, arising of our said Realm of *England*, shall be set and dispended upon the Maintenance of the Safe-guard of this Realm of *England*, and of our War in *Scotland*, *France*, and *Gascogne*, and in no Place else where during our War.’

By this Statute it appeareth that it is expressly provided, that the Subjects should not be from thenceforth charged nor grieved to make any Aid, nor sustain any Charge but by common Assent, and that in Parliament; which is as express as may be, and exclusive to any Charge otherwise; which I conceive was made against the Appointment of making, or preparing and sending out of Ships at the Charge of the Towns wherein they were, or sending Men out of their own Counties at the Charge of the County.

Object. Now whereas it is alledged by my Brother *Waton*, and my Brother *Berkley*, That this was but a temporary Statute, and ended when the War ended, which appeareth by the last Clause for Employment of those Profits towards those Wars; I conceive it appeareth to be an absolute and perpetual Statute, for it is granted for him and his Heirs in Perpetuity. And also it appeareth by *Plowden* in his *Comment. fol. 457.* in Sir *Thomas Worib*’s Case, where a Grant is by the Name of the King, which is in his Politick Capacity; this extendeth against him, his Heirs, and Successors, altho’ they be not named. Also the Intendment of this Law appeareth to be for the Security of the Subjects, from thenceforth for all future Ages. And then the Office of Judges, as appears by Sir *Edward Coke* his *Reports lib. 5. fol. 7.* and *Plowden*’s *Comment.* in *Aston* and *Stud*’s Case, is to construe Statutes according to the true Intent of the Makers thereof, which was in this Statute, that it should be a perpetual Security for the Subjects. And to little purpose it had been, to make a Statute to continue but during the Time of the War, or during the King’s Life.

Object. Also where it is alledged that the Statute of 14 *Ed. III.* is not mentioned in the *Petition of Right*, which is some Argument that it was not conceived to be a continuing Statute.

Respons. To that I answer, That in the *Petition of Right* it is said, That by the Statute there recited, and other the good Statutes of this Realm, the Subjects shall not be compelled to pay any Taxes, Taillage, Aid, nor other like Charge not set by Parliament; in which this Statute is as well intended as other Statutes, and as far as if it had been expressly recited. Also it appeareth by all the Books of Statutes, that this Statute is granted as a Statute continuing, whereas others expired, are set down as expired.

21 *Ed. III. pars 2. m. 11.* A Subsidy being granted by Parliament, *viz.* 40s. on every Sack of Wool transported before *Michaelmas* following, and 6d. on every 20s. of Merchandize, for the Safe-guarding of the Merchants and Defence of the Coast, &c. After *Michaelmas*, *viz.* 31 *Octob.* 21 *Ed. III.* by Writ the Collectors were commanded to continue the Collection of those Subsidies until *Easter*. But, 26 *Nov.* 21 *Ed. III.* the King by Writ commanded

manded the stay of the 6*d.* in the 20*s.* and to continue the Collection of the Subsidies upon the Sacks of Wool until *Easter*.

22 *Ed. III. Rot. Parl. m. 16.* The Parliament being holden in *Lent*, the Commons complain of the Continuance of this Collection of the Subsidies upon the Sacks of Wool longer than the Parliament had granted it, and provided that it should not be continued longer than *Easter*, at the Procurement of any Person. By this it appeareth, that the Parliament being careful that the Time for levying of a Subsidy granted, should not be enlarged by any Power, much less would they admit of a Writ to lay a Charge without Grant by Parliament.

25 *Ed. III. m. 8.* It was enacted that no Man should be compell'd to find Men at Arms, other than such as hold by such Service, except it be by common Assent in Parliament. By this it appeareth, that if Men be not compellable to find a Man at Arms, unless it be by common Assent in Parliament; much less is any bound to be contributory to the preparing of a Ship with 180 Men at Arms, and Victuals, and Wages of Soldiery for 26 Weeks, unless it be by common Assent in Parliament.

Rot. Parl. 21 Hen. IV. Num. 22. An Act of Parliament, as I count it, in the very Point, is in these Words: 'For that of late, divers Commissions were made to divers Cities and Burroughs within the Realm, to make Barges and Barringers, without Assent of Parliament, and otherwise than hath been done before these; how ever the Commons do pray the King that these Commissions may be repealed, and that they may not be of any Force or Effect.' To which it is answer'd, 'That the King willeth that the said Commissions be repealed;' which is an absolute and perfect Statute.

But then there are added these Words: 'But for the great Necessity he hath of such Vessels for the Defence of the Realm in case that the War shall happen, he will treat with his Lords of this Matter, and afterwards will shew it to the Commons to have their Counsel and Advice in this Point.' So by the Record it appeareth that the Commons did conceive, that no Cities, Burroughs, nor Towns, without Consent in Parliament, were to be charged with the making of such Vessels; to which the King agreeth. And from that Day to this, until the making of these Writs, in no Age, altho' the Kingdom hath been many times in danger of Invasion, and hath been invaded, there do not appear any Records that ever I have seen of Writs directed to any Towns or Cities at their Charges, to make or prepare any Ships or Vessels whatsoever.

Object. And whereas it hath been objected, and especially insisted upon by my Brother *Berkley*, that this latter Part, that the King will treat with his Lords concerning them, and after confer with the Commons, is a gentle Denial of that Act; as the Experience is at this Day. *Le Roy se avifera* is a Denial of an Act.

Respons. Hereupon I answer, It is an absolute Act, for it is an absolute Assent to the Petition. And that which came after was but a plausible Excuse, for that such Commissions had gone out; and this farther Consultation never appeared to be made, nor ever any such Writ or Commission for such Vessels to be made went out since until this Writ.

13 *Hen. IV. m. 10.* A Grant is of a Subsidy of Wools, Woolfels, Hides, and other things there mentioned, and of Tonnage and Poundage for one Year, for the Defence of the Marches of *Calais*, &c. and for the Defence of the Realm, and the Safeguard of the Sea. And therein is this express *Proviso*, 'Provided that this Grant of a Subsidy of Wools, &c. and Tonnage and Poundage, in time to come, shall not be taken in Example to charge the Lords and Commons of this Realm with any manner of Subsidy for the Safeguard of *Calais*, &c. nor for the Defence of the Realm, nor the Safeguard of the Seas; unless it be by the Will of the Lords and Commons of the Realm, and that by a new Grant to be made, and that in full Parliament to come.' By this appeareth that it was then provided, that no Charge should be laid on the Lords or Commons, no not for the Defence of the Realm, but by Grant in full Parliament.

13 *Hen. IV. m. 43.* A Petition was in Parliament reciting, That there was an Office granted of Alnager within *London* and the Suburbs of the same, with Fees to that appertaining, where any such Office never was, nor any such Fees appertaining thereunto; and that by colour thereof, they levy one Half-penny of the Buyer and a Half-penny of the Seller, and upon Sale of every hundred Ells of *Canvas* a Penny of the Seller and a Penny of the Buyer, wrongfully against the Statutes in the Times of your Highness's Progenitors made to the contrary, by which it is ordained that no Taillage nor Aid shall be granted nor levied without Assent and Consent of the Lords and Commons of your Realm, as by the said Statutes is fully declared; wherefore they prayed that such Letters Patents made thereof shall be void and holden for none. And this was granted; whereby it appeareth that it is declared then in Parliament, that those Statutes were and did continue; that no Taillage or Aid shall be levied without Grant in Parliament.

1 *Ric. II. c. 1.* It is enacted in these Words: 'Our Sovereign Lord the King remembering how the Commons of this Realm, by new and unlawful Inventions, and inordinate Covetize, have, against the Laws of this Realm, been put to great Servitude and importunate Charges and Exactions, and especially by a new Impost, called a Benevolence, whereby divers Subjects of this Land, against their Wills and Liberties, have paid great Sums of Money, &c. It is enacted and ordained, that the Subjects and Commons of this Realm from henceforth shall in no wise be charged by such Charges or Impositions called a Benevolence, or such like Charge: And that such Exactions called a Benevolence, before that time taken, shall be taken for no Example to make any such, or any like Charge, from any of his Subjects of this Realm hereafter, but shall be damned and nulled for ever.' By this it appeareth that it is expressly provided that the Subjects shall not be charged by way of Benevolence, which is in nature of a Free Gift, nor such like Charge; that is, no Charge of Money shall be laid upon the Subjects upon any Pretence whatsoever, be it for Defence in time of Danger, or Guarding of the Sea.

The last and concluding Statute is the *Petition of Right*, made in the third Year of his Majesty's Reign, reciting, That it was enacted by a Statute made in the Time of *Edward I.* commonly called

Statutum de Tallagio non concedendo, that no Taillage or Aid shall be laid or levied by the King or his Heirs in this Realm, without the Good-will and Assent of the Archbishops, Bishops, Earls, Barons, Knights, and others the Free-men of the Commonalty of this Realm. And by a Statute of 25 *Ed.* III. That none shall be compelled to make any Loans to the King, because such Loans were against Reason, and Franchise of the Land. And by another Statute, That none shall be charged by any Impositions called a Benevolence. By which Statutes, and other the good Statutes of this Realm, your Subjects have inherited the Freedom that they shall not be compelled to contribute to any Taxes, Taillage, Aid, or other like Charge not set by Parliament.

And then they pray, that none hereafter be compelled to make or yield any Gift, Loan, Benevolence, Tax, or such like Charge, without common Consent by Act of Parliament. And after five other Things there mentioned, the Conclusion is: 'All which they pray as their Rights and Liberties.' Unto which the King answers, 'Let Right be done as is desired.' Which is a full and perfect Statute, shewing in this Point the Liberty of the Kingdom prayed, and allowed; which was not done without the Advice of the Judges, whereof I was one, whose Opinions were then demanded, and resolved that the same did not give any new Liberty, but declared what the Liberty of the Subject was in this amongst others, that they should not be compelled to be contributory to any Tax, Taillage or Aid, nor any like Charge not set by Parliament. All which Statutes, those of 25 *Edw.* I. 34 *Edw.* I. and 14 *Edw.* III. being in the negative and in force, I conclude that these Writs to lay such a Charge is against the Law, and so the Assessment by colour thereof unlawful.

Object. Now whereas the precedent Arguments have been that the Kingdom being in Danger, therefore these Writs went forth for the making of Ships, because there could not be so suddenly any Parliament called, and the Parliament is a slow Body, and the Kingdom may be lost whilst there is a Consultation, and the Danger is conceived to be very great, because that the Writ 4 *Aug.* so mentions, that the Pirates provided a great Navy to infest the Kingdom, and it is fit with Speed to provide a Remedy: And that the Writ of *Mittimus* mentioneth, That *Salus Reipublicæ periclitabatur*: And we must believe these Suggestions to be true, for the King's Certificate by this Writ is *Recordum Superlativum*, as Mr. Solicitor and my Brother *Berkley* termed it, and must leave it upon the King's Conscience if it be not true, to lay such a Charge upon an untrue Suggestion. And the Defendant also by his Demurrer hath confessed all the Suggestions in the Writ to be true; therefore it must be concluded the Kingdom was in great Danger, and present Remedy must be had by making of these Ships, and must be commanded by these Writs, and not to stay for a Parliament: and my Brother *Crawley* said, It may be if a Parliament were called, they will not yield to the going forth of such Writs, altho' the Kingdom was never so much in Danger. And this Charge in respect of the making of the Defence is not within the Intention of these Statutes; and if it had been expressly mention'd within a Statute, that such a Charge should not be imposed, it had been a void Statute, and contrary to the Laws, that the Kingdom should not be defended.

Respons. 1. To all these I answer, That the Matter now in question is upon the Writ 4 *Aug.* Whether that be legal or not; and the Suggestions therein be sufficient or not for the Writ of *Mittimus*, mentioning that *Salus Reipublicæ periclitabatur* at the Day of the issuing of the Writ 4 *Aug.* which is a Year and an half after the first Writ, doth not help it; and this not notified to the Sheriff and Inhabitants of the County to make them the more careful, and in a greater Contempt if a Ship were not provided, but it is only a Notification to the Barons of the *Exchequer*, that the same was the Reason that the same issued forth.

Respons. 2. The Suggestions are not absolute, that any such Danger was, or such Navy was prepared by Pirates; but only mentioneth, *Quia datum nobis intelligi* that the Pirates had done such Mischief.

Respons. 3. If such Suggestions had been absolutely set down, yet we are not always bound absolutely to believe them; because many times untrue Suggestions are put into Writs and Patents; and yet it doth not lie upon the King's Conscience, neither doth the Law impute any Fact to the King, that any such be: for the Law doth always conceive honourably of the King, That he cannot, nor will not, signify any Untruth under the Great Seal; but he is abused therein, and the Law imputeth it to them that so misinformed the King, and thrust in such Suggestions into the Writ or Patent. And therefore all Patents grounded upon untrue Suggestions, are accounted void.

Respons. 4. That the Demurrer confesseth nothing but that which is legally and well set down; but if it be illegal the Demurrer confesseth it not, but is well offer'd for that Cause.

Respons. 5. If the Kingdom were in Danger, yet a Charge must not be laid in general upon the Subjects, without their Consent in Parliament: for either the Danger is near, and then the present Provision must be made by Mens Persons, and the present Ships of the Kingdom, which the King may command from all Parts of the Kingdom, as Need shall require; but cannot command Money out of Mens Purses, by distraining of their Goods, or imprisoning of their Persons. But if the Danger be further off, by reason of any foreign Combinations, (as it is conceived it may be here) that Provision must be made of Ships by all the Kingdom for Defence; then, as *Philip Commines*, fol. 179. saith, That Cloud is seen afar off, before that the Tempest falls, especially by a foreign War; and such Invasions cannot happen so soon, but that the King may call his Sages together, and by Consent make Provision for such Defence.

So I say here, If there be Time to make Ships, or prepare Ships at the Charge of the Counties; then is there Time enough for his Majesty, if he pleases to call his Parliament, to charge his Commons, by Consent in Parliament, and to have a Subsidiary Aid, as always hath been done in such Cases. And they are not so long coming or meeting, but they will make Provision for Defence, it being for all their Safeties: For it appeareth by *Coke*, lib. 9. fol. 1. in his Epistle, that King *Alfred* made a Law, That a Parliament should be held twice every Year, and oftner, if need requir'd, in Times of Peace: So that it was then conceived, that it was necessary to have Parliaments to redress Inconveniences.

Also by a Statute made 4 *Ed. III. cap. 14.* it is enacted, A Parliament shall be held once every Year, and oftner, if need be. And also by a Statute made 36 *Ed. III. cap. 10.* it is enacted, for the Redress of Mischiefs and Grievances that daily happen, a Parliament shall be holden every Year, as another Time was ordained by a Statute, which, I think, referreth to 4 *Ed. III.* Also it appeareth by the Speed that was in the Parliament held in the third Year of his Majesty's Reign, when five Subsidies were granted, two of them to be paid within few Days after the Session of Parliament ended; and therefore might, as this Case is, been order'd and provided for by Parliament within 7 Months, as the Time was between the Teste of the Writ, and the Time prefix'd for Ships to be prepar'd and sent.

Objeēt. And whereas it is objected, That perhaps the Parliament would not have consented, and so the Kingdom might have been lost.

Respons. It is answer'd, That it is not to be presum'd, that the Parliament would deny to do that which is fit for the Safety and Defence of the Kingdom, their own Estates and Lives being in Danger, if the Kingdom were not sufficiently defended: For it is a Rule, *Nil iniquum est presumend' in lege.* So of the High Court of Parliament, That they would not deny that which is fitting. But I confess, I think that if it had been moved in Parliament, they would never have consented to these Writs, such never having been awarded before since the Conquest. And if they had consented, they would have taken a Course how the same should have been made with the most Conveniency, and not to leave it to Sheriff to tax them how he would.

Objeēt. To that which hath been said, That this Charge is not within the Statute, and that a Statute to inhibit such a Charge, for Defence were void.

Respons. I answer, that it is true, That if a Statute were, that the King should not defend the Kingdom, it were void, being against Law and Reason. But a Statute that Money shall not be charg'd or levy'd, nor that Men shall be charg'd to make or prepare Ships at their own Charges, without common Consent in Parliament, I conceive were a good Law, and agreeable to Law and Reason. And the King may by Parliament, restrain himself from laying such a Charge, but by Consent in Parliament. And then the King being a just and pious King, as ever govern'd the Kingdom, which we that serve in his Courts of Justice have daily Experience of, would not assent unto, or suffer any such Charge, if he were truly inform'd the imposing of this Charge were against any one Law of his Kingdom, as this is against so many; but would say, as it is said of the Statute made 35 *Ed. I.* That the Pope should not be permitted to present to Benefices; That he was bound by his Oath to see that, and other Laws in force, and not repealed, to be performed: That he would not suffer such Charges to be laid, contrary to the Laws and Statutes of his Realm: And would do as the late famous Queen *Elizabeth* did, when having required a Charge upon divers of her Subjects, by particular Letters from the Lords of her Council, of several Sums of Money for present Help towards her Wards in *Ireland*, hearing that one of her Judges, being convented before her Lords for the Payment of it, thereby discouraging others to pay it, answered it was against the Laws, that

the same should be imposed, there being an express Statute against it, which he being a Judge, was bound by his Oath to signify; he being, as much as in him was, to be a Conservator of the Queen's Oath in that behalf. The Queen, I say, was very angry that such an Imposition had been laid against Law, and commanded it should be stop'd from farther gathering; and to some that had paid their Moneys, the same was restor'd. And therefore the Principal and only Fault in the charging of his Subjects by these Writs, if they be unlawful, as I conceive they are, is in those that devised them, and informed him that they were lawful, and such as his Progenitors had from time to time used to send forth; and in his Judges who have affirmed it to be lawful: Therefore upon this Point I conclude, That this Charge, by this Writ, is illegal; and is no sufficient Cause to charge the Defendant.

Objeēt. Whereas it hath been much urged and argued by Mr. Solicitor, and Mr. Attorney, That this Writ is warranted by the King's Prerogative and Power-Royal, to send forth such Writs for Defence and Safety of the Kingdom in Time of Danger.

To this I answer, That I do not conceive there is any such Prerogative; for if it were a Prerogative, I should not offer to speak against it: for it is part of our Oaths, that are Judges, to maintain the King's Prerogative to the best of our Skill, and not to suffer the same to be diminish'd. But if it be as I have argued, That is against the Common Law, and against so many Statutes, that the Subjects should be enforced to sustain, or to contribute to any Charge, without the special Consent, or common Assent in Parliament, then there is no such Prerogative; for whatsoever is done to the Hurt or Wrong of the Subjects, and against the Laws of the Land, the Law imputeth that Honour and Justice to the King (whose Throne is establish'd by Justice) that it is accounted not done by the King, but by some untrue and unjust Informations. This appeareth by the Authorities of our Books; for *Bracton, lib. 3. fol. 107.* who is an ancient Writer in our Law, said, *Nil aliud potest Rex in terris, cum sit Dei Minister & vicarius, quem de jure potest;* and there a little after, *Itaq; potestas Juris sua est, & non injuriæ, cum sit auctor Juris, non debet inde Injuriæ nasci occasio, unde Jura nascuntur.* Sir *Edw. Coke*, in the 11th Book of his Reports, in the Case of *Magdalen College*, where the Question was, Whether Queen *Elizabeth* having taken a long Lease of a College, being conceived to be against the Statute 13 *Eliz.* it was sought to be maintain'd by her Prerogative, but resolv'd it could not, it being against a Statute, by which she was bound, tho' not nam'd, and there *fol. 72.* it is said, *Hoc solum Rex non potest facere, quod non potest injuste agere.* *Plowden's Comment.* *fol. 246, 247.* in the Lord *Berkley's* Case it is said, That the Prerogative of the King cannot do Wrong, and his Prerogative cannot be any Warrant to do any Wrong to any. *Plowden's Comment.* *fol. 487.* in *Michell's* Case, it is said by Justice *Harper*, Altho' the Common Law doth allow many Prerogatives to the King, yet it doth not allow any, that he shall hurt or wrong any by his Prerogative. 21 *Ed. III. fol. 47.* the Earl of *Kent's* Case, it is said, That if the King, under his Great Seal, do make any Grant to the Hurt of any other, he shall repeal and avoid it, *Jure Regis;* for the King is accounted to be abus'd by untrue Sug-

Suggestions, when he is drawn to do any Wrong to the Hurt of any other; much more I say, when he is drawn to do any thing to the Hurt of his Subjects in general. Sir *Ed. Coke*, lib. 11. fol. 86. in *Darcie's Case*, it is said, That every Grant of the King hath this Condition annexed unto it, *Tacite aut expresse, ita quod Patria per Donationem illam magis solito non oneretur, seu gravetur.* The Book called *Doct̄or and Student*, fol. 8. setting down, That the Law doth vest the absolute Property of every Man's Goods in him, and that they cannot be taken from him but by his Consent, saith, That is the Reason that if they be taken from him, the Party shall answer the full Value thereof in Damages. And sure I conceive, that the Party that doth this Wrong to another, shall, besides the Damages to the Party, be imprison'd, and pay a Fine to the King; which in the *King's-Bench*, is the tenth Part of as much as he payeth to the Party. So then, if the King will punish the Wrong of taking of Goods, without Consent, between Party and Party; much more will he not by any Prerogative take away any Man's Goods, without his Consent, particular or general.

So I conclude, that I conceive, there is not any such Prerogative to award such Writs to command *M. A.* to sustain such Charge, as to be contributory to it; and to be detain'd and imprison'd for not Payment thereof.

Also I conceive, That this is not an Act of Royal Power; for if it be illegal to impose such a Charge, then it is not accounted as a Matter of Royal Power, but as a Matter done upon an untrue Suggestion, and a Matter of Wrong done: and Wrong is not imputed to the King, for he can do no Wrong; but it is imputed to them that advised him to this Course.

Royal Power, I account, is to be used in Cases of Necessity, and imminent Danger, when ordinary Courses will not avail; for it is a Rule, *Non occurrendum est ad extraordinaria, quando fieri potest per ordinaria*; as in Cases of Rebellion, sudden Invasion, and some other Cases, where Martial Law may be used, and may not stay for legal Proceedings. But in a Time of Peace, and no extreme Necessity, legal Courses must be used, and not Royal Power.

Therefore, whereas in the Statute of 31 Hen. VIII. cap. 8. which was made upon the Suppression of Abbeyes, when Rebellions were begun to be stir'd, it is recited, That sudden Occasions happening, which do require speedy Remedies, and for lack of a Statute, the King was enforced to use Royal Power; it was enacted for the Reasons therein mention'd, That the King, by the Advice of his Council therein nam'd, two Bishops, two Chief Justices, and divers others, or the major Part of them, by his Proclamation, may make Ordinance for Punishing of Offences, and lay Penalties, which should have the Force of a Law, (with a Promise that thereby no Man's Life, Lands or Goods, should be touch'd or impeach'd) so that therein Royal Power was fortify'd by a Statute: yet that Statute took care that no Man's Life, Lands or Goods, should be taken or prejudic'd; and that Statute was thought inconvenient, and therefore the same by a Statute of 1 Ed. VI. was repealed.

So *Braet̄on*, lib. 2. cap. 24. fol. 55. And the same is cited in *Coke*, lib. 7. fol. 11. in *Calvin's*

Case, *Regis Corona est facere Justitiam & Judicium, & tenere Pacem, sine quibus Corona consistere non potest, nec tenere.*

Coke, lib. 7. fol. 5. in *Calvin's Case*, cited out of *Fortescue*, *Rex ad tutelam corporum & bonorum erectus est*; which being so, he cannot take away Mens Goods, or charge them without their Consent, by any Prerogative or Royal Power.

Also there can be no such Necessity, or Danger conceiv'd, that may cause these Writs to be awarded to all Counties of *England*, to prepare Ships at such a Charge, and with such Men and Ammunition, without Consent in Parliament; for the Laws have provided Means for Defence in Times of Danger, without taking this Course: for that the King hath Power to command all, or any Persons of his Kingdom, to attend with Arms at the Sea-Coasts, to defend the Coasts, or any other Parts of the Kingdom; and also by his Officers, to make stay or arrest, all or any the Ships of Merchants, and others having Ships; or as many as he pleaseth to go with his Navy, to any Parts of his Kingdom, for Defence thereof; and to attend those to whom he appointed the Guard of the Seas, or the Sea-Coasts, at such Times and Places as they should appoint. And this hath been always taken and conceived to be sufficient for Defence, against any Prince whatsoever; and yet the same was in Times, when the Navy of *England* was not so strong, as now by the Blessing of God and the good Providence of his Majesty it is.

That this Course was then so taken, appeareth by divers Records, viz. 23 Ed. I. m. 4. the Record reciteth, That the *French King* had prepared a great Navy upon the Sea, and purposed to invade the Kingdom, *& linguam Anglicanam de terra delere*; and thereupon the King commanded all the Ships, and Men with Arms, to be in readiness to defend the Kingdom.

Rot. Scot. 10 Ed. III. m. 16. reciteth, That certain Gallies in Parts beyond the Seas, were prepared with Provisions of Men, and Arms, and other Necessaries of War, and ready to invade the Land: Command was, that divers Ships should be in readiness to defend the same; and the Ships of the Ports of *Ireland* to be sent into *England* to help to defend the Kingdom.

Scot. 10 Ed. III. m. 22. A Writ was to the Bailiff of *South Wales*, (reciting, That the *Scots* and divers others confederating together, prepare themselves to Arms and Ships in a great Number, and intend to invade the Kingdom) to command them to have one Ship ready upon the Sea to defend their Coasts. The like Writ was then to *North-Wales*.

Alm' 12 Ed. III. m. 10. A Writ to the Mayor of *London*: *Quia hostes nostri in Galleis cum multitudine non modica congregati in diversis partibus regni hostiliter ingressi sunt, & civitatem predictam celeriter si possunt invadere proponunt.* The King commandeth them to shut up the City towards the Water, and to put all their Men in Arms ready to defend, &c.

Alm' 13 Ed. III. m. 13. A Writ to the Bailiff of *Great Yarmouth*: *Quia pro certe didicimus quod hostes nostri Franc' & adherentes eisd' Galleas & naves guerrinas in copiosa multitudine in partibus exteris congregarunt, & iis homines ad arma parari faciunt, & proponunt se movere versus regnum nostrum & navig' regni nostri & Portus prope mare situat'*

situat' pro viribus destruere, & id' regnum invadere &c. command the same Town to prepare four Ships with 140 Men, &c.

At the same time Writs went forth to twenty other Towns upon the Sea-Coasts. *Franc. 26 Ed. III. m. 5.* Writ to the Earl of *Huntingdon* and others, *Quia adversarii nostri Franciæ nos & regnum nostrum invadere machinantes, magnum navigium preparari fecer' & armari, ne dum ad regnum nostrum Angliæ subito attrahend' sed ad nos & dominium nostrum & totam nationem Anglicanam pro viribus subvertend' &c.* commanding them to guard all the Sea-Coasts of *Kent*, and to array all Men to be ready with Arms to defend the Sea-Coasts.

5 Hen. IV. m. 28. A Commission is to *Thomas Morley* and others: *Quod cum inimici nostri Franciæ Britan' Scot' & al' sibi adherentes inter se obligati magna potentia armat' super mare in æstat. prox' futur' ordinaverunt regnum nostr' Angliæ invadere, &c.* commanding them to array Men with Arms to defend, &c.

4 Hen. VIII. Par. 2. The King by Proclamation to the County of *Kent*, sheweth, that it is come to his Knowledge of certain, that his ancient Enemy, the *French* King, hath prepared and put in readiness a great and strong Navy, furnish'd with Men of War, to invade the Kingdom of *England*; the King appoints the Lord of *Abergavenny* and others, to put Men in Array, and to be ready to defend that County.

Anno 1588, when the great Invasion was by the Navy, termed *the invincible Navy*, which was foreseen long before, this Course of preparing Ships by every County of the Kingdom was not appointed; yet in all these Times, when there appeared so great Danger or Invasion, there never went any such Writ into any of the Counties of *England*, to provide Ships: But the Navy of *England*, and Army of *England* was always accounted sufficient for the Defence of the Kingdom.

So I conclude this Point, that I conceive this Course cannot be taken by any Prerogative or Royal Power, nor any Allegation of Necessity or Danger.

For the fourth Point, I conceive, that if it were legal to lay such Charge upon maritime Parts; yet to charge any Inland County with making of Ships, and furnishing them with more Mariners and Soldiers at their Charges, which are far remote from the Sea, is not legal, nor warranted by any former Precedent; for it commandeth an unreasonable and impossible thing by them to be done: and then a Writ, commanding such a thing as is unreasonable and impossible for the Parties of themselves to perform, without Help of other Counties, is always illegal; for it is a Rule, That *Lex non cogit ad impossibilia*: If one by Covenant bind himself to do a Thing impossible, the Covenant is void.

This appeareth by the Book-Case *40 Ed. III. fol. 6.* where the Case is expressly, that if a Man do Covenant to do a Thing impossible, the Covenant is void, and the Deed is void in that respect: also the Book, *m. 2 Ed. IV. fol. 2.* If a Feoffment be made upon Condition to be void, if the Feoffee did not a Thing which is impossible, the Feoffment is good, and the Condition void: for it was the Fault of the Feoffor to annex such a Condition. And this appeareth by the Case of on Arbitriment. If the Arbitrator award, that one shall enter into Bond, with such a one as his Surety, to pay a Sum of Money, or to do any

other Act, it is void, as to the finding of a Surety at the least; for it is not in his Power to compel him to be his Surety: therefore the Law accounteth it unreasonable, and so void. And this appeareth by the Book-Case *17 Ed. IV. fol. 5.* where it is so resolved.

So this Writ commanding the Sheriff and Inhabitants of an Inland County to find a Ship with Masters and Mariners; whereas there are not any Ship-Wrights that have Skill to make Ships, nor any Masters or Mariners ever there to guide a Ship, for they are still conversant about Matters of the Plough, and feeding Cattel, and Husbandry, and are trained up by Musters to Skill of Arms to defend the County, but not with Sea-Affairs; for most of the County never saw a Ship, nor know what belongs to Musters or Mariners; and the County is not bound to seek out of the County for such Men; and perhaps if they should, they cannot tell where to have them: Therefore, when such Writs to Inland Towns have been awarded to find Ships with Masters and Mariners, it being conceived by Information that they were Maritime Towns, and had Ships, and Mariners dwelling with them; the Truth thereof being made appear to the contrary, they have been discharged, as appears by a Record, *13 Ed. III. part 2. m. 14.* where a Writ went to the Admiral of the Fleet: Upon Complaint to the King by the Men of *Bodmin* in the County of *Cornwall*, that they were unjustly charged to find a Ship with Masters and Mariners, whereas that Town was no Port-Town, nor adjoining to the Sea, but far within the Land, nor ever had Ships lying there, nor Mariners nor Seamen, nor ever used to find any such for Sea-service, and that their Major and Officers were imprison'd for not finding a Ship; thereupon the King appointed to have it inquired whether their Allegations were true, and if it were true, signified that he would not have them be unjustly charged, but that they should be discharged thereof. Which sheweth, that it was then accounted unjust to lay such a Charge upon a Town that was an Inland Town, and had no Mariner inhabiting in it; much more when such a Charge is laid upon an Inland County, which is much farther remote from the Sea, and cannot perform by themselves that which the Writ commanded.

Object. But this Record being objected by the Defendant's Counsel, Mr. Solicitor gave Answer, that the same was, because the Admiral of his own Authority had charged them, which was not according to his Commission; for he was only to charge the Port-Towns and Sea-Towns: but that the same may not be done by the King's Writ, the Record doth not prove.

Respons. But to this I answer, that I conceive it is all one when such a Charge is laid upon a Town by Writ, which is an Inland Town, for so it appeareth by another Record of the same Year, *viz. 13 Ed. III. part 1. m. 14.* where a Writ was directed to the Admiral of the Fleet, *Ab ore Thamesis versus partes occidentales*; reciting, that where the King by his Writ to the Town of *Chichester*, commanded the Mayor and Commonalty there, that they should make *unam Navem & duos Esularios de Guerra parari*, with Mariners and Men at Arms, to be at *Portsmouth* such a Day, to go with the King's Ships; and that they had complained that they had not, nor ever had any Ships arriving in that Town, nor had any Seamen or Mariners dwelling

dwelling there; and that it appeared to the King, by Inquisition of a Jury returned into his *Chancery*, this their Allegation to be true: therefore, because the King would not have them *indebitè gravari*, (for so be the Words of the Record!) the King commandeth the Admiral that they shall not be troubled nor distrained for not Performance of such Service. Whereby it appeareth, that if they being within a few Miles of the Sea, should not be charged to find such a Ship, much less more Inland Counties that are farther remote from the Seas, are justly to be charged with finding Ships and Mariners. Therefore I conclude this Point, that I conceive, this Writ in that respect is not legal, nor warranted by any former Precedent.

The fifth and great Point hath been, and indeed the chief Argument hath been, a multitude of Records and Precedents, which have been cited, that should warrant these Writs; and that the King hath done nothing but what his former Progenitors have done, and have lawfully done; and that he doth now but *More Majorum*, and that which always in ancient Times hath been done and allowed, and therefore ought to be done.

I confess this Allegation much troubled me, when I heard, these Records cited, and so learnedly and earnestly pressed by Mr. Solicitor, and after by Mr. Attorney, to be so clear, that they might not be gainsaid: but that they proved a clear Prerogative, or at least a Royal Power, that the King might do so, especially when my Brother *Weston*, and my Brother *Berkley* (who have seen the Records) pressed some of them, and relied upon them for the Reasons of their Judgments: I say, I was much doubtful thereupon, until I had perused all these Records sent me by the King's Counsel, and satisfied my Judgment therein.

But now I answer, That if there were any such Precedent (as I shall shew there was not one shewed to me) to prove this Writ to be usual, yet it were not material: for now we are not to argue what hath been done *de facto*, for many Things have been done, which were never allowed; but our Question is, what hath been done, and may be *de jure*. And then, as it is said in *Coke, lib. 4. fol. 13.* in *Witton's Case*, it is said, *Multitudo errantium non parit errori patrocinium*: and *lib. 4. fol. 94.* in *Slade's Case*; Multitude of Precedents, unless they be confirmed by judicial Proceedings, in Courts of Record, are not to be regarded; and none of these were ever confirmed by judicial Record, but complained of.

But to give a more clear Answer unto them, I say, that in my Opinion, upon View and serious reading of all the Records that have been sent me on the King's Part; for I have read them all over *Verbatim*, and I presume they sent all they conceived to be material, and I have taken Notes of every one of them, and diligently considered of them, I conceive that there is not any Precedent or Record of any such Writ sent to any Sheriff of any Inland County to command the making of Ships at the Charge of the County; but this is the first Precedent that ever was since the Conquest that is produced in this kind.

But it is true, that before 25 *Ed. I.* there have been some Writs to maritime Towns and Ports, and other Towns, as *London, &c.* where they have had Ships and Mariners, to provide and prepare Ships, and to send them to such Places as the King pleased to appoint, upon any just Cause

of Fear of any Danger, for the Defence of the Sea and Kingdom; and great Reason, that they having Ships and Masters of Ships and Mariners, should be at the King's Command, to bring all or as many as he pleaseth for the Defence of the Sea and Kingdom, being those that had the most Benefit of the Seas, and likely to have the greatest Loss if the Sea and Coast were not daily guarded; and those were appointed most commonly to be at the King's Charge, but sometimes upon Necessity they were appointed to be at the Charges of the Towns and Ports adjoining: which I think was the true Cause of the Complaint in Parliament in 25 *Ed. I.* and of the making that Statute for the staying of that Course; for there is no Record of any such Writs afterwards in *Edward the First's* time, after that Statute to maritime Towns, to prepare or send Ships at the Charge of the Towns.

But in the time of *Ed. III.* then the War being between him and the *French King* in *Annis 10, 11, 12, & 13* of that King, where the most Writs awarded to maritime Towns, to send Ships at their Charges sufficiently furnished; and those I think were the Principal Cause of the making of the Statute of 14 *Ed. III. cap. 1.* And after that Statute no such Writs, nor any Commissions for that Purpose were awarded to any maritime Towns, or Inland Towns, for the making of Ships, but one; which Record was much pressed by Mr. Attorney, and afterwards by my Brother *Weston*, and my Brother *Berkley*, to prove, that this Course was, and might be practised after the Statute of 14 *Ed. III.* for sending forth such Writs, and allowed: But that Record is fully satisfied, for it was grounded upon an Ordinance of Parliament in 1 *Rich. II. m. 52.* that all antient Cities, Burroughs, and Towns, that would then, should have their Charters confirm'd without any Charge of Fine, save only to make a Ship of War for Defence of the Realm: so this was not compulsory to any, but voluntary to those that would have their Liberties confirm'd. And afterwards, in 1 *Hen. IV.* Commissions were awarded for making such Vessels of War; but those issuing forth without any Ordinance of Parliament, were complained of in Parliament 2 *Hen. IV.* and so such Writs issued forth in any Age, to any maritime Towns, to make Ships, or prepare Ships at their own Charge for the King's Service, until these late Writs.

This general Answer I give to all the Records; and now I shall take a short View of all the Records that have been cited and sent to me, and leave them to the Judgment of my Lords and others, if any of them prove these Writs usual and legal.

The Records of King JOHN's Time.

6 *Job. m. 1.* 3 *Job. m. 3.* 14 *Job. m. 2.* 17 *Job. m. 7.* Three of these are to arrest and make stay of Ships, that they should not go out of the Kingdom, but to be ready for the King's Service; and the other was to bring Ships of particular Towns to the Mouth of the *Thames*, for the King's Service.

19 *Job. m. 4.* A Commission to guard the Seas to *Job. de Marshal*, and to the Sheriff of the County of *Lincoln*, and to all others to attend his Commands.

15 *Job.* Writ to the Barons of the Cinque-Ports, and divers other Towns, to have their Ships ready for the King's Service.

In the Time of Henry III.

14 *Hen. III. m. 14.* 14 *Hen. III. m. 5.* A Writ to the Bailiff of *Portsmouth*, to prepare one Galley. A Commission to the Sheriff of *Rochester*, and another to the Sheriff of *Kent*, to cause all Men to be in Arms in that County, and to assess them what Arms they should find.

48 *Hen. III. m. 4.* A Writ to the Sheriff of *Norfolk*, commanding him to cause them appointed to attend all the Coasts in that County, who having served 40 Days intended to depart, that they should stay eight Days longer by reason of the Danger, and longer, if Need required. The like were sent to the Sheriffs of *Suffolk* and *Essex*.

48 *Hen. III. m. 2.* A Writ to the Mayor of *Bedford*, commanding him to provide for the Expences of them that were sent from thence for the guarding of the Seas; yet it is but for eight Days more after the Date of the Writ.

48 *Hen. III. m. 3.* A Writ to the Men of *Essex*, *Norfolk*, and *Suffolk*, appointed to attend for the guarding of the Sea-Coasts, reciting, that the King had appointed *T. de M. Custod' maris & part' maritim'* within their Counties, commanding them to assist him, and to perform therein what he required.

48 *Hen. III. m. 7.* A Writ to the Sheriff of *Cambridge* and *Huntingdon*, to command all Men of those Counties, able to bear Arms, to come to the King to *London*.

In the Time of Edward I.

25 *Ed. I. m. 5.* A Writ to those of *Essex*, *Norfolk*, and *Suffolk*, reciting, That such Persons were appointed *ad custod' maritim'* in those Parts, commanding them to attend them. Another to the Sheriffs of *Norfolk* and *Suffolk*, reciting, That certain Constables were appointed to assess Men at Arms, sufficient for the guarding of the Sea-Coasts, commanding them to distrain and compel them assessed to go.

24 *Ed. I. m. 17.* Writs to the Sheriffs of *Lincoln*, *York*, and *Northumberland*, reciting, That he had commanded *A. de B. ad congregand' & capiend' centum naves*, between *Leigh* and *Berwick*, & *ad homines potentes in cisd' ponend'*, commanding them to assist him therein.

24 *Ed. I. Rot. 62.* A Writ out of the *Exchequer* to *Adam de Guerdo & aliis Gardianis* of the Sea-Coasts in the County of *Southampton*, to distrain the Abbot of *Reading*, to find Horses, which he was assessed at for that Service.

24 *Ed. I. m. 16.* Writs to all Archbishops, Bishops, Earls, &c. in the Counties of *Somerset*, *Devon*, and *Cornwall*, to attend with their Horsemen and Footmen, for Defence of the Sea-Coasts in those Parts, when they shall be required by the Guardian of those Coasts.

24 *Ed. I. m. 71.* A Writ out of the *Exchequer*, directed to all Archbishops, Bishops, Earls, &c. in the County of *Norfolk*, reciting, That *Peter de Ruilin* was appointed *ad custodiend' partium maritimer' illarum*, commanding them to assist him.

24 *Ed. I. Rot. 78.* A Writ out of the *Exchequer* to the Sheriff of *Berks*, reciting, That the King

was informed by *Adam de Griden* Guardian of the Sea-Coasts in the County of *Southampton*, that those Men in the County of *Berks*, who were assigned to come to the defending of the Sea-Coasts in those Parts, came not as they were warned, commanding to distrain them, and compel them to come and to do the Service.

The like Writs were then awarded to the Sheriffs of *Wilts* and *Southampton*, &c.

24 *Ed. I. Rot. 81.* A Writ to the Bailiffs of *Great Yarmouth*, reciting, That the King was informed, that certain in *Flanders* and *France*, in a great Multitude, apparel'd like Fishermen, intended to invade their Town, warning them to gather their Ships together, and all their Arms, to defend themselves against such an Attempt.

24 *Ed. I. inter Com'.* A Writ to all Sheriffs and Bailiffs, &c. reciting, That he had appointed some therein named, *ad congregand' numerum navium & galliarum majorum*, &c. commanding the Sheriffs in their several Counties to be assisting to them therein.

24 *Ed. I. m. 9.* A Writ of *Supersedeas* to the Guardian of the Seas in the County of *Southampton*, to discharge *Hugh de Plessis* to find Arms for his Lands in that County, for guarding of the Seas, because he was in service with the King.

Nota, *All these Records are for Arrays, and congregating Ships, but none to make or prepare Ships at the Charges of the Counties.*

24 *Ed. I. m. 26.* A Writ to the Sheriff of *Essex* to discharge for the Winter time those that stay at the Sea-Coast, with their Arms to defend the Coast; but commanding them to be in a readiness when they should be again commanded. The like Writs were then awarded to divers Sheriffs of maritime Counties to the same purpose.

25 *Ed. I. m. 12.* A Writ to the Sheriff of *Lancaster*, reciting, That whereas the King had formerly commanded him to go to all the Ports and Towns where Ships were, commanding the Bailiffs of the Ports to have all the Ships of Burden of 40 Tons at *Winchelsea*, by such a Day; now commandeth the Sheriff to see them made ready, and sent thither accordingly.

Ibid. m. 13. The like Writs directed to the Sheriffs of *Lincoln*, *York*, *Northumberland*, and *Cumberland*.

Ibid. m. 14. The like Writs directed to nineteen other Ports and Towns in other Counties.

21 *Ed. I. m. 20.* A Commission to send away Men at Arms in the County of *Westmoreland*.

21 *Ed. I. Rot. 77.* In the *Exchequer*, shewed by the Defendant's Counsel, Writs went to several Maritime Towns upon the Sea-Coasts, and other Towns where Ships were usually made, to make Ships and Gallies; and that the King will allow and pay for them, when he knoweth the Charge thereof.

In the Time of King Edward II.

Pat. 9 Ed. II. Part 2. A Writ to all Men in the Towns upon the Sea-Coasts, and Ports of the Sea, between *Southampton* and *Falmouth*, reciting, That the King had appointed *John de Ner'on* to make Provision for a Navy in those Towns and Ports, at their Charges, he commandeth them to perform what he in that behalf shall require.

Claus. 20 Ed. II. m. 8. A Writ to the Bailiff of *Yarmouth*, reciting, That whereas the King had commanded all the Ships of the Burden of fifty Tons, from the *Thames* Mouth towards the *West*

Parts, to be at *Portsmouth* such a Day, &c. and they had sent two Ships: That the Masters and Mariners complained, that they could not serve without Wages, and therefore appointed them to send them Wages.

20 *Ed. II. m. 10.* A Writ to the Bailiffs of *Yarmouth*, commanding them to send all their Ships of the Burden of thirty Tons and above, to *Orewell* in *Suffolk*, with double Tackling, Victuals, and other things necessary for one Month.

The like Writs at the same time to other Towns, to the Number of four and thirty.

20 *Ed. II. m. 10.* A Writ to the Mayor of *London*, to provide three Ships with Men and Ammunition to go with nine Ships of *Kent* to guard the Sea-Coasts.

15 *Ed. II. m. 15.* A Writ to the Sheriff of *Norfolk*, commanding him to warn all Barons, Bannerets, Knights, and others of that County, to attend the King at *Coventry*, at such a Day to go with the King.

15 *Ed. II. m. 15.* Writs to the Sheriffs of *Norfolk* and *Suffolk*, commanding them to arrest all Barons, Bannerets, Knights and Esquires, who were commanded to attend the King at *Coventry*, such a Day therein named, and came not, to be before the King and his Council to answer it.

The Record saith, like Writs were then awarded to divers Sheriffs of other Counties.

16 *Ed. II. m. 13.* A Commission to array all Persons between the Ages of Sixteen and Sixty, with Arms convenient, to come to the King, when they shall be required.

19 *Ed. II. m. 6.* A Writ to the Archbishop of *Canterbury*, commanding him to array all his Servants and Families, to be ready to defend the Kingdom, if any Invasion should be.

The like Writs at that time to all the Bishops.

In the Time of King Edward III.

2 *Ed. III. m. 92.* A Writ to the Mayor and Bailiff of *Southampton*, commanding them to cause all their Ships of the Burden of forty Tons, and above, to be furnished with Men of Arms, and Victuals, ready to defend the Land, if any Invasion shall happen.

Scot. 7 Ed. III. m. 19. A Commission to *Hugh Courtney*, to guard the Seas in the Counties of *Devon* and *Cornwall*, and commanding all others to assist him.

10 *Ed. III. m. 25.* The like Commission to *Hugh Courtney*, for guarding the Seas in the same Counties.

Ibid. A Writ to *Bartholomew de Insula*, for Custody of the Sea-Coast in the County of *Southampton*; and therein is a Command to *John Tichborne*, and others for the County of *Southampton*, and to *Will. de Parshire*, and others for the County of *Berks*; and to *Job. Mareditt*, and others for the County of *Wilts*, to array Men with Arms, and to have them in readiness to defend the Coasts of *Southampton*.

Scot. 10 Ed. III. m. 2. A Writ to *Will. Clinton*, Guardian of the Cinque-Ports and others, to survey all the Ships of the Cinque-Ports, and other Ports from the Mouth of the *Thames* to *Portsmouth*, and to cause them to be furnished with Arms and Victuals for 13 Weeks, from the time they shall go from *Portsmouth*.

Scot. 10 Ed. III. m. 2. A Writ to the Mayor of *Winchelsea*, to cause the Ships appointed for that

Town to be furnished with Men and Arms, and Victuals, and other Necessaries for thirteen Weeks.

Scot. 10 Ed. III. m. 16. A Writ to the Admiral of the Fleet from the Mouth of the *Thames* to the West Parts, to keep upon the Seas the Ships of the Cinque-Ports, and other Ships arrested to defend the Kingdom against attempt of any Invasion.

The like Writ was then to the Admiral of the Fleet, from the Mouth of the *Thames* to the North Parts, with the like Command to hold the Ships together upon the Sea.

Scot. 10 Edw. III. 16. A Writ commanding the Ships of the Ports of *Ireland* to be sent hither, to guard the Seas here.

10 *Ed. III. m. 12.* A Writ to the Bailiff of *Yarmouth*, to cause the Men of that Town to contribute to the Charges of the Ships and Men, and Victuals, sent from thence for the Defence of the Kingdom.

Scot. 10 Edw. III. m. 22. A Writ to all the Bailiffs of Liberties, and Men of *South-Wales*, to have one Ship riding upon the Seas for Defence of those Parts.

The like to the Men of *North-Wales*.

Scot. 10 Edw. III. m. 21. A Writ to the Arrayers of Men for the County of *Berks*, to compel them of that County, assigned and assessed for the keeping of the Sea-Coast in the County of *Southampton*, to go to *Portsmouth* by a Day therein appointed.

Alm' 12 Ed. III. m. 12. A Commission reciting, that the King had appointed all the Ships from the Mouth of the *Thames* Northwards, to be arrested, and to cause them to be furnish'd with Ammunition, Men and Victuals, and to be brought to *Yarmouth*; and that the Men of *Lynn* refused to contribute to the Expence of the Charge of the Men sent in the Ship from that Town, and the furnishing of that Ship; and therefore commands the Commissioners therein named, to assess them that refuse to contribute and distrain them.

Alm' 12 Edw. III. m. 13. The like to compel the Men of *Bardefey* to contribute for the Expences of the Men of that Town.

Claus. 12 Edw. III. m. 17. The like to compel the Men of the Counties of *Surrey* and *Suffex*, to contribute to the Expences of the Men of those Counties, that did attend for the guarding of the Sea-Coasts in those Parts.

Vasc. 12 Edw. III. m. 8. A Writ to all Archbishops, Bishops, &c. and to the Sheriff of *Kent*, and the Barons of the Cinque-Ports, and all others in that County, commanding them to be assisting to *J. de Cobham*, to whom the Custody of the Sea in those Parts is committed; and to defend those Coasts against any foreign Invasion that shall happen.

Alm' 12 Edw. III. m. 10. A Writ to the Mayor of *London*, reciting the Danger of Invasion, and commanding to shut up the Gates at the Water-side, if the Enemies approach.

Alm' 13 Edw. III. m. 12. A Writ to the Bailiff of *Yarmouth*, reciting, that he had by his Writ commanded four Ships of War of that Town to be made ready with Men, Ammunition, and Victuals for three Months, at the Charges of the Town, to be brought to *Orewell*, and that they failed to come at the Day, to the great Peril of the Land; therefore commandeth the Bailiff to compel them at another Day therein prefixed, to be at the same Place.

There it is set down, that the like Writs were awarded to the Bailiffs of seventeen other Towns, for sending their Ships, being charged some of them for one Ship, and some for two Ships.

Claus. 13 Edw. III. m. 38. A *Superfedeas* for the Abbot of *Ramsay*, for being charged with Arms for guarding the Coasts in *Norfolk*, for his Lands in *Norfolk*, because he was by Command attending with all his Forces in the County of *Huntingdon*, for the Safety of these Parts.

Claus. 13 Edw. III. m. 14. A Writ of *Superfedeas* to the Arrayers of Arms in the County of *Oxon*, to discharge *John Mauditt* to serve there, because he served in *Wilt*.

Claus. 13 Ed. III. m. 14. A Writ to the Arrayers of Arms in the County of *Wilt*, which is only concerning the Payment of Soldiers Wages, who then attended to guard the Sea-Coasts.

These being all the Records shewed me, it appeareth that there were no Writs issuing out in those Times to any Sheriffs of Inland Counties, or Maritime Counties, to make or prepare Ships upon any Occasion whatsoever, but only to Maritime Towns, to send their Ships, or prepare their Ships, at their own Charges.

The Records shewed me since 14 *Ed. III.* do not shew any Writs to be awarded to any Maritime Town, to prepare Ships at the Charge of the Towns, except the Records of 1 *Rich. II.* and 1 *Hen. IV.* which I have before answered; and they since that Time shewed unto me, except such as I have mentioned in my Argument, are these:

Scot. 10 Edw. III. m. 14. A Commission to *Nicholas de Carlepe*, to array Men to resist the *Scots*.

Ibid. A Writ to the Mayor of *York*, to array all their Men to be ready when they shall be required.

20 *Edw. III. m. 15.* A Commission concerning the Arrays of Men in the Counties of *Derby* and *Nottingham*, and to punish them that come not when they are warned.

Rot' Franc' 21 Ed. III. m. 31. A Writ to the Arrayers of Men in the County of *Southampton*, to discharge the Abbot of *Battel*, for finding Arms for Defence of the Sea-Coasts there.

Franc' 25 Ed. III. m. 20. A Commission to *John Bodingham*, for the Custody of the Port and Maritime Parts in *Cornwal*, and to array all Men to be in readiness. There is set down, that the like Commission is to others in several other Counties.

Franc' 26 Edw. III. m. 5. A Commission to the Earl of *Huntingdon* and others, to have the Custody of the Ports in *Kent*, and to array Men, and to set up Beacons; which is the first I observe of this Kind.

Franc' 46 Ed. III. m. 34. The like Commission then to several other Persons, to array Men in several Counties, as *Warwick*, *Oxon*, *Berks*, and *Bucks*.

A Writ to the Archbishop of *Centerbury*, reciting the Danger of Invasion by the *French*, to hurt the Church and Kingdom, commanding him to array all his Clergy in his Diocess, and to be ready to go with the King's Forces, &c.

The like Writs to all other Bishops in the Kingdom.

Franc' 50 Edw. III. m. 47. A Writ to the Arrayers of Men in the County of *Norfolk*, and to the Sheriff of *Norfolk*, commanding them to command all great Men and others that have Mansions upon

or near the Sea-Coasts, to resort to them with all their Families, for the Defence of the Coasts.

The like to the Arrayers and Sheriffs of ten other Maritime Counties.

Scot. 29 Ed. III. m. 13. A Commission to the Bishop of *Durham* and others, to array Men in *Durham*, *Cumberland*, and *Northumberland*, to resist the *Scots*.

Franc' 40 Edw. III. m. 31. A Writ to *William Zouch* and others, to remove with all their Families to their Houses upon the Sea-Coasts.

Nota, That all the Records are for arraying Men, and none for preparing Ships.

In the Time of King Richard II.

1 *Rich. II. m. 7.* A Writ to the Bailiffs of *Scarborough*, because their Town was upon the Coasts of the Sea, and in danger of Invasion, carefully to look to the Custody thereof.

Eod' Rot' m. 12. A Writ to the Mayor and Bailiffs of *Oxford*, to repair the Walls of the Town, and to compel those that had Lands there, to contribute to the Expences thereof.

This Record hath been much urged by Mr. Solicitor and Mr. Attorney, that if the King have such a Power to command the Walls of a Town to be repaired, much more to command Ships to be made, which are the Walls of the Sea, and consequently the Walls of the Kingdom.

But this is clearly answered; for that it is but a private Town, and that which hath been formerly so walled, and for Defence and Safety of the Town; and none were to be charged but those that had Benefit thereby; and so it proveth nothing to the Case in Question.

Eod' Rot. m. 42. One Writ to the Sheriff of *Kent*, and another to the Sheriff of *Essex*, commanding them to perform an Ordinance made by the King and his Council, for setting up of Beacons, and keeping Watch about them.

Scot. 7. Ric. II. m. 8. A Writ to the Archbishop of *Centerbury*, to command all his Clergy between sixteen and sixty, to be array'd and put in Arms, both Horse and Foot, according to their Qualities, to defend the Kingdom.

Franc. 11 Ric. II. m. 13. A Writ to Serjeants at Arms, to arrest all Ships of War in the Ports of *Plymouth*, or *Dartmouth*, and other Ports, in the County of *Cornwal*; and to bring them to *Hunksbooke*, to go with the King's Majesty's Ships.

In the same Roll, divers other Writs to divers other Sheriffs at Arms, to arrest the Ships in divers other Ports.

Scot. 21 Ric. II. m. 3. A Commission to the Duke of *Albermarle*, to array Men in the *West-Marches*, towards *Scotland*, to resist the *Scots*.

In the Time of King Henry IV.

Rot. Viagii, 1 Hen. IV. m. 11. A Writ to the Sheriffs of *Derby* and *Nottingham*, reciting, That the King certainly understood that the *Scots* intended with a great Power to invade the Kingdom; commanding them to proclaim in all Parts in their Counties, That all Men between sixteen and sixty, should put themselves into Arms, competent according to their Degrees and Qualities, to be ready upon two Days warning at any time, to defend the Kingdom.

The like Writs were then directed to the Sheriffs of *Lincoln, York and Lancaster.*

Claus. 1 Hen. IV. m. 12. A Writ to the Archbishop of *Canterbury: Satis informati estis qualiter inimici mei Francie & alii sibi adherentes, cum magna classe Navium, cum magna multitudine armatorum super mare congregatorum diversas villas per Costerum Regni mei invadere, & nos & Regnum meum destruere, & Ecclesiam Anglicanam subvertere intendunt & proponunt;* thereupon commands, That the Clergy in that Diocess be array'd and arm'd, and to be ready to go against the Enemy.

The like Writs to all other Bishops in *England.*
Nota, *Altho' this great Danger be mention'd, yet no Command to prepare Ships.*

Pat. 5. Hen. IV. Part 2. m. 28. A Commission to *Thomas de Morley*, and others, and to the Sheriffs of *Norfolk and Suffolk*, and to the Bailiffs of great *Yarmouth*, reciting, *Quod cum inimici Francie, Scotie, & alii sibi adherentes se obligat magna Potentia armat super Mare in astat proximo futurum ordinaverunt & intendunt Regem invadere, &c.* Command to survey the Town of *Yarmouth*, and fortify it.

Nota, *Here also, tho' such great Danger and Distance of Time, yet no Writs issued to any Counties to prepare Ships.*

In the Time of King Henry V.

Pat. 3. Hen. V. Part 2. m. 37. A Commission to array all Men at Arms in the West Riding in *Yorkshire*, to be ready to defend those Parts.

The like Commissions to others, in nineteen other several Counties.

In the Time of King Henry VI.

Pat. 13 Hen. VI. m. 10. Pat. 39 Hen. VI. m. 11. Pat. 39 Hen. VI. m. 12. Pat. 39 Hen. VI. m. 1. Commissions for arraying of Men for the Defence of the Kingdom, if Invasion shall be; and for repressing of Rebels.

In the Time of King Edward IV.

Pat. 10 Edw. IV. m. 12. Commissions to *George D. of Clarence, & al'* to array Men for Defence.

Pat. 10 Ed. IV. m. 13. A Commission to *John Lord Howard*, to be Captain of all the Forces.

Pat. 49 Hen. VI. m. 22. A Commission to *Marquess Montague*, to array and put in Arms all Men beyond *Trent.*

In the Time of King Henry VII.

Pat. 1. Hen. VII. Part 1. A Commission to *Richard Fitz-Hugh*, and others, and to the Sheriff of *Yorkshire*, to array and cause to be armed, all able Persons, Abbots and others, to be ready to defend the Kingdom.

1 Hen. VII. Part 1. A Writ to the Sheriffs of *Norfolk and Suffolk*, to proclaim in all Parts in those Counties, for that there was likely to be open War between *Charles King of France* and the King of the *Romans*, and great Navies are prepared on either side; commands, That Watch and Ward be kept, and Beacons kept to give warning; and that every Man be ready, if need be, to come and defend the Kingdom.

In the Time of King Henry VIII.

4 Hen. VIII. Part 2. A Writ to the Sheriff of *Kent*, commanding him to proclaim in that County, That the King being certainly informed, that the *French King* had prepared a great and strong Navy, furnished with Men of War, to invade the Kingdom; therefore commandeth all Men between the Age of sixteen and sixty, to put themselves in Arms, to be ready to defend the Kingdom at an hour's warning.

In the Time of Queen Elizabeth.

11 Eliz. Commissioners went to take a View of all the Horses in *England* fit for Service, and to survey all the Arms, to have them all put in readiness, as Necessity should require.

Now it appeareth upon View and Examination of all these Records, most of them being cited by Mr. Solicitor and Mr. Attorney, in their several Arguments, there are none of them to prove the sending of any such Writs to Inland or Maritime Counties to prepare Ships; altho' there have been many times great Danger; nor yet any Writs to Maritime Towns, after the Statute of *14 Ed. III* to charge them to find any Ships at their Charges.

So then I conclude this Point, That I conceive this Writ is not warranted by any former Precedent.

Now I come to examine the Point of this Writ, Whether the same be legal and warranted by any former Precedent: And I conceive it is not.

1. The Motives mentioned in the Writ are, *Quia datum est nobis intelligi*, which is no certain Information: *Quod quidam predones & maris grassatores*, did take the King's Subjects, Merchants, and others, and carry'd them into miserable Captivity: *Cumque ipsos conspiciuntis navigantibus indicis preparantes ad mercatores nostros molestandum & Regem nostrum gravandum.*

All these, and those following, I conceive are not sufficient Motives, and were never in any Precedent before to have a Royal Navy prepared. For the former Precedents are, that great Princes in open Time of Hostility had provided great Navies with Ammunition and Soldiery, with intent to invade the Kingdom, as appeareth by the former Precedents: and against such Provisions it was necessary to provide the Royal Navy; the King's Ships, and all the Ships of the Kingdom, to be gathered together to withstand them. But to make such Preparations against Pirates, it was never put in any Writ before; for when Pirates infested the Seas, they came as it were by stealth, to rob and to do mischief; and they never dared appear but when they may do mischief, and escape away by their swiftness. But against them, the usual Course hath been, that the Admiral or his Deputy with some few Ships have secured the Coast, and not to employ the whole Navy. And this appeareth by a Record, *25 Ed. I. m. 9. William Leighbourn* the Admiral was appointed upon such an Occasion with ten Ships to lie upon the Seas, for the Safeguard of the Merchants: and the usual Practice hath been, when they hover upon the Sea, by sending a few Ships of War to scatter them, and make them fly away. And there is no fear of the Loss of the Dominion of the Sea, by any Act Pirates can do; neither is it convenient that every County of the Kingdom should provide Ships against them.

2. The Command of this Writ is to provide a Ship of 450 Tons at the Charges of the County, furnished with Masters and Mariners; which is impossible for them to do for the Reasons before alledged, and therefore is illegal, and not warrantable by any former Precedent.

3. The Command of this Writ to find Wages for Soldiery for 26 Weeks after they came to *Portsmouth*, when they are out of their County, and in the King's Service, is illegal; being against the Course of Precedents in divers Times, and against divers exprefs Statutes, and this appeareth by divers Records.

15 *Johan.* In the Writs of Summons of the Tenants by Knights Service, it is exprefsly mentioned, that after forty Days Service (for so many Days they were to do Service by their Tenure) they should be satisfied *ad denarios Regis.*

Pasch. 26 *Edw.* I. Amongst the Writs of the Exchequer it is there set down, that the Footmen of *Cheeshire* being 1000, who were appointed to go for the Defence of the Borders of *Scotland*, would not stir out of their Counties without Wages; and there 'tis set down, that one therein named was sent down with Money to pay the said Footmen.

Mich. 26 *Ed.* I. *inter Bria' irrot'* in the Exchequer, by reason of the Invasion of the *Scots*, many thousands of Soldiers were taken from divers Parts of the Kingdom *ad vadia Regis.* And there 'tis mentioned, that Clerks were sent down with Money to pay the Soldiers of several Counties their Wages.

30 *Edw.* I. In the Exchequer, in Account, the Wages for Land Soldiers for several Counties, and the Wages for Mariners are set down, what the Wages that were paid came to by the Day, and by the Week, both by Sea and by Land.

Trin' 31 *Ed.* I. *inter Brevia* in the Exchequer, the Wardens of the Marches of *Scotland* signified to the Barons, that the Men of *Cumberland* and *Westmoreland*, appointed for the Defence of the Marches, would not stir out of their Counties without Wages; whereupon Order was given for Wages for them.

19 *Edw.* II. Commissions went out to pay Soldiers, who served out of the several Counties, for Defence against *Scotland.*

Hil' 2 *Edw.* III. *Rot.* 16. In the Exchequer; it was ordered in Parliament, That whereas some Soldiers had received of some of the King's Officers, Money for their Wages, they were fain to give Bonds for Re-payment, and that those Bonds should be all re-delivered.

1 *Edw.* III. *cap.* 5. That no Man shall be compelled to go out of his County, but where Necessity required by sudden coming of strange Enemies into the County; and then shall be done, as hath been done in times past: which, I conceive, is to be at the King's Wages, when any are out of their Counties.

But to clear all Doubts, the exprefs Statute of 18 *Edw.* III. *cap.* 7. is, That no Men of Arms, Hobbellers and Archers, chosen to go in the King's Service out of *England*, shall be in the King's Wages from the time they go out of the Counties where they were chosen, until they come again.

19 *Hen.* VII. *cap.* 1. Those that had any Grants of Lands from the King; and 11 *Hen.* VII. *cap.* 1. Those that had any Offices of the Grant of the King, are to serve the King in his Wars: But in both it is appointed, they shall have Wages from

the time they shall come from their Houses, until they return.

2 & 3 *Edw.* VI. *cap.* 2. It is narrated, That no Captain receiving Soldiers, serving by Sea or Land, shall receive any Wages for more Soldiers, or more Time than they shall serve; and shall enter the days of their entring into Wages, upon Pain, &c.

All which Records and Statutes do prove, that the Soldiers should be at the King's Wages; therefore the Command for Soldiers Wages for twenty-six Weeks, when they go from *Portsmouth*, is illegal, and exprefsly against these Statutes: and so the Assessment being entire, as well for the Wages, as the other Charges, I hold it to be clearly illegal, and not to be demanded.

4. That the Command of this Writ to the Sheriff, to assess Men at his own Discretion, is not legal, nor warranted by the Precedents: for Precedents are commonly, that Assessments for Contribution, for making or setting out of Ships, have been by Commissioners, which by Presumption had Knowledge of such Matters, as commonly Sheriffs have not. Also, this leaveth to the Sheriff too great a Power to value Mens Estates, as to inhanche whom he will, and to favour whom he will.

5. That the Power to the Sheriff and Mayors of Towns, &c. to imprison, especially as it is used, is illegal, and exprefsly against divers Statutes: for it is provided by *Mag' Char' cap.* 29. *Quod nullus capiatur vel imprisonetur, nec super eum mittimus, nisi per iudicium parium suorum, vel per legem terræ.*

Also, 5 *Edw.* III. *cap.* 9. That no Man shall be attached, or his Goods seized, contrary to the Form of *Mag' Chart'.*

Also, by the Statute made 37 *Edw.* III. *cap.* 18. it is recited, That by that great Charter, none should be taken or imprisoned, but by due Process of Law; yet by colour of this Writ, the Sheriff may imprison any Person, yea, any Peer of the Realm: for altho' Peers are not to be arrested upon ordinary Process between Party and Party, as it is resolved in the Countess of *Rutland's* Case, in *Coke lib.* 6. *fol.* 32. yet upon Contempt, and upon Process of Contempt, which is always for the King, any Peer may be imprisoned, as it is resolved by all the Lords, and all the Judges, in the *Star-Chamber*, in the Earl of *Lincoln's* Case: and so the Sheriff, by colour of this Writ, may arrest any Peer, as for a Contempt in not paying. But by the Book-Case, 2 *Edw.* III. *fol.* 2. it is resolved, That a Writ to imprison one upon Suggestion, before he be indicted, or without due Process of Law, was illegal. So for this Clause, I hold this Writ to be illegal.

6. The last Clause of this Writ is, That by colour of this Writ, no more should be gathered than will be sufficient for the necessary Expence of the Premises, and that none who shall levy any Money towards these Contributions, shall detain the same with them, or employ the same to other Uses; and if more than did suffice were collected, it should be repaid amongst those that paid, after a rateable Proportion. But as the Course is taken, it is not to be perform'd: for no Ship, nor Tackling, nor Ammunition, nor Men, nor Wages, nor Victuals being provided, it is not to be known, whether more be gathered, or less than would suffice: And there being Money gathered, it is of necessity either detained with the Collector, or the Sheriff, or employed to other Uses than are appointed

pointed by the Writ; so the Writ is not performed: And the Money assessed and collected, is not duly paid nor collected; and the Money assessed and unpaid, cannot be duly demanded.

7. Admitting the Writs were legal, and the Commands therein legal, yet the Assessment, as is certified, is not sufficient to charge the Defendant; for it is not certified, that any Ships with Ammunition, and Men were prepared: and this is a Year after the Time it should have been prepared, and sent to *Portsmouth*. And if it were not prepared, there is no cause to charge the Defendant; and that not appearing to be done, it shall be conceived not to be done.

For if one be charged, in consideration of a thing to be done, before a certain time to pay a Sum of Money, if the thing be not performed according to the time, none can be charged for not payment of the Money after the time is past: for it is in nature of a Condition precedent, to have a Duty or Sum of Money to be paid after the Condition performed; and there, he that will have the Duty, must shew that the Condition is performed.

This appeareth in the Case of 15 *Hen. VII.* and *Coke, lib. 7. fol. 9. Ughtred's Case*. And therefore, if the Ships be not prepared according to the Writ, nor Money employed for preparing a Ship for and in the Name of the County; then every one that paid any Money, either voluntarily as in obedience to the Writ, or compulsorily upon Distress, may demand their Money again of the Sheriff, or of them that received it: For as they paid their Money, so it must be disposed of, and cannot be disposed of otherwise by any Command whatsoever, altho' it be under the Great-Seal: For the Command being under the Great-Seal, to prepare and furnish a Ship to such a purpose as in the Writ is mentioned, and they paying it to that Purpose, it cannot be otherwise disposed, altho' it be more for their Advantage; for private Men having Interest therein, that cannot be taken from them, nor dispensed withal. Therefore, in *Coke, lib. 7. fol. 37. in the Case of Penal Laws*, it is resolved, That if the Penalty appointed to be forfeited upon a penal Statute, be given to the Poor of the Parish where the Offence is committed, the King cannot dispense with the Penalty for that Offence, because the Poor have an Interest therein: but if the Penalty be given Part to the King, and Part to the Poor, the King may dispense with his own Part, but not with the Part of the Poor.

Objeſt. And where it hath been said, That it is by way of Accommodation, because the Country cannot well know how to provide to content, and perhaps with more Charge.

Reſponſ. To this 'tis answered, They must do it at their Peril, if the Writ be legal; and then if it be done, they shall have the Benefit thereof. For as my Brothers *Weston* and *Berkley* have both agreed, if the Ship were made when the Service was done, the County for which it was made shall have the Benefit of the Ship, Ammunition, and Victuals, and of the Service of the Men, being made more expert against another Time; and the Ship may with some easy Charge serve again, and nothing lost, but the Expence of the Victuals; and the Kingdom shall be so much the more strengthened by having so many Ships made or prepared; and they may have Account of their Money how it was bestowed; and if any Surplusage be gathered, to have it restored. And

that the Law is so, that if the Money be received of the County, and not employed accordingly, the Party so receiving it, and detaining it, or misemploying it, is to pay a Fine to the King for the same, and is accountable for the Money, appears by two Records.

The one in *Hill. 16 Edw. III. Rot. 23. B. R.* where two Soldiers were indicted, for that they taking 3 *l.* a-piece towards their Arms, and the bringing of them to the Place where they were appointed to serve the King in *England* in his Wars, they went not, but tarry'd still in their Houses, and retained the Armour and the Money which they had received for that Purpose. They thereupon being convented, pleaded Not guilty; and the one was found to go in the Service according to the Appointment, so he was discharged: and the other was found, that he received the Money, and went not to do the Service, nor restored the Arms nor Money; thereupon he was committed to the Prison, and paid to the King a Fine, and found Sureties to pay the Money to the Hundred from whom he had received it.

The other was *Hill. 20 Edw. III. Rot. 37. B. R.* There two High-Conſtables were indicted, for that they, 5 *Edw. III.* had received six Marks of the Towns in their Hundreds, to set forth Soldiers, and had not set them forth, but detained the Money; which they denying, it was found that they had received the Money for that Purpose, and had disbursed 10 *s.* and 6 *d.* thereof towards the setting forth of Soldiers, but had retained 38 *s.* and 6 *d.* and not disbursed it: thereupon they were fined and imprisoned, and afterwards enlarged upon Sureties to pay the Money they had retained undischursed, at the next time the King commanded Soldiers from those Parts. By both which Records, being for Offences done so long before, it appeareth, that those that have received Money of the Country to prepare Ships, and not employed it accordingly, are answerable to the King and his Successors, to pay a Fine for Misemployment of it, and are chargeable to those of the County of whom they received it for Payment thereof.

8. For the last Point, I conceive, that this *Certiorari* directed to the two that were late Sheriffs at the Time of the Assessment, and not to the Sheriff that was at the Time of the *Certiorari* awarded, who is the only immediate Officer to return the Writs, is not legal; for it is the first that hath been seen of that kind: for all Writs are directed to some immediate Sheriff, requiring him to demand of the former Sheriffs, what they did upon the former Writ; and they are to return to him what hath been done, and he to return the same to the Court, whereunto he is an immediate Officer; and the former are not any Officers. So the *Sci' Fa'* thereupon grounded, I conceive, is not good: Also the *Sci' Fa'* to warn Mr. *Hampden ad ostendendum si quid pro se habeat, & quare de prædictis viginti solidis onerari non debet*, not shewing to whom, is uncertain, and is insufficient. Thereupon I conclude upon the whole Matter, that no Judgment can be given to charge the Defendant.

The Argument of Sir William Jones, Knight, one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

IN *Easter* Term there issued forth a *Sci' Fac'* and this doth rehearse divers sums of Money assessed upon divers Persons in the County of *Bucks*, for providing a Ship of 450 Tons, with Men, Ammunition, &c. to attend the King's Navy for defence of the Kingdom.

And afterwards upon a *Certiorari* out of Chancery, directed to the Sheriff, to certify those Assessments, and the Names of those that made default of payment, Mr. *Hampden* was returned to be assessed at 20 s. and hath made default.

Upon this Return the King by *Mittimus* out of the Chancery sent the Writ, the *Certiorari*, and the Return, to the Barons of the *Exchequer*, to do as the Court shall think fit.

Thereupon a *Sci' Fa'* went forth to the Sheriff to summon Mr. *Hampden* to shew Cause why he should not pay the 20 s. assessed upon him: He was returned warned, and appears and demands Oyer of the several Writs and their Returns, and of the *Sci' Fa'*: and upon all this he demurreth in Law, and Mr. Attorney hath joined in Demurrer with him. And my Lord Chief-Baron and the rest of the Barons have adjourned this hither, to desire the Advice of all their Brothers of the Law; and indeed it requires Advice, for it is as great a Case as ever came to be advised on before Judges.

I say it is a great Case; it concerns the King in his Royal Prerogative, and the Subject in his Interest, in his Land and Goods, and Liberty of his Person. They that have spoken already, and they that shall speak after me, shall hardly escape the Censure of the People, of some that have some Understanding, of some peradventure that have less, and of some that have none at all, but speak according to their Opinions, Affections, or Wills. *Felices essent Artifices, si per solos Artifices judicarentur*: we should be happy to be judged by them that are learned; but when it is by them that understand not, then it is turned into Calumny and Reproach.

Some have taxed them that have gone, or will go with the King, as tho' they were fearful, and went about to captivate the Liberty of the People and take away their Goods. Some are taxed on the other side, if on the contrary, that they are given to Popularity: so as I may say as the Psalmist, *Domine, ne posuisti in lubrico loco*; for it is impossible to escape their Tongues, and between those two Decks of Censure I am like to fall. And however I may fall with my Sentence, with God's Grace I shall make no Shipwreck of my Conscience.

I am trusted by the King to display his Justice equally to all, and sworn to dispense his just Prerogative, as well as the Subject's Liberty; and if we do otherwise than as Judges, we do as false Men. If any Man offend contrary to his Oath, he doth forfeit his Lands, Goods and Tenements. I shall not therefore for any respect do against my own Conscience; but descend to give Judgment, not regarding the watry Mouths of others.

The King's Counsel, and the Counsel at the Bar, have spoken so largely to this Business, and it is spoken to by my Brothers so fully, that I can hardly say any thing but what hath been said before; so I will select some few things, to satisfy my own Conscience, tho' I cannot satisfy any Man's else; which I will do as plainly as I can, and as I ought to do. And if there had not been a variety of Contestation, I should have spoken very little; but now Necessity requireth that I must enlarge myself a little more.

1. I will state the Question, and in it put many things objected out of doors. The Question is, whether the King of *England*, when he perceiveth Danger to be imminent to the Kingdom, and a necessity of Defence, may not by his Writ send to all Counties as well Inland as Maritime, to require them, at the charge of the County, for a convenient time to provide Shipping, with Men and Ammunition, &c. but no Money to come to his Purse, but the Ships to go to defend the Kingdom.

The Question stands not, whether the King may draw it to be a perpetual Charge upon the Subject, which under favour he cannot; for this goeth upon a Fear of Danger, which continueth but for a Time, and therefore this cannot be perpetual; for when the Occasion ceaseth, the Taxes must likewise cease. There is a Case to this purpose, 39 *Hen. VI. fol. 39. Protection. Brooke*. A Protection granted to one for three Years, and the Question was, whether a good Protection: The Rule is, the King may grant a Protection for one Year, and at the Year's end, renew it for another Year if the Occasion require it, and so for a third Year; yet he cannot at the beginning give a Protection for three Years together. So in this case, tho' the King may, upon an emergent Occasion, command Ships, yet by reason of that Occasion he cannot make it perpetual; for the Occasion may cease.

2. In this Case, I will not exempt the King's Majesty himself, to bear a part of the Burden; the Head and Body must go together, he must join with his Subjects in the Defence of the Kingdom.

3. The Question is not, whether for a foreign War he may command this Charge; it must be only in defence of the Kingdom in case of imminent Danger.

4. It is not whether the King may lay this to draw a Sum of Money into his own Purse, for the King sends to have no Money; but to provide a Ship; and if the Sheriff accordingly provides a Ship, there is an end of the Business; all this is out of the Case.

As *Catlyn* Chief-Justice compared a Fine to *Janus Bifrons* having two Faces, the one looking backwards, the other forwards; so may I of my Argument: I shall first look backwards, and tell you *Quid fecimus*, what we have done; and then forwards and tell you *Quid faciemus*, what we shall do.

The *Quid fecimus* rests in the Advice we have given to his Majesty in the Case, and the Opinion of the Judges subscribed with their Hands delivered over to his Majesty (*which was read at large by him*.) The Advice we gave consists of four Assertions.

1. That when the Kingdom is in danger, all the Kingdom is to join in the Charge of Defence.

2. What shall be adjudged a Danger, and what not, his Majesty is the sole Judge thereof

of, and of the Means how to prevent and avoid it.

3. That in Case of Danger he hath Power to send to Inland Counties, as well as to Maritime, to assist to defend against Invasion.

4. That the King hath a Power of Compulsion, to punish those who refuse to contribute to this Charge.

This Opinion being jointly and severally delivered by us, declared by my Lord Keeper in the *Star-Chamber*, in the Presence of us the Judges, before the Lords of the Council, with an Intimation as if it were the full Consent of all the Lords of the Council before-hand, and there commanded to be inrolled in all the Courts at *Westminster*; yet we so delivered our Opinions, that if better Reason was shown to alter them, we might recede from them; for we had better *recurrere*, than *male currere*.

Now to the second Point, *quid faciemus*, whether to stand to this Opinion or not, and then whether this Book or Record will warrant it, and how far it differeth from what we have done, I shall speak my Conscience.

I am an old Man and ready for my Grave, my Tongue and my Heart shall go together. I am of the same Opinion I was then; and conceive what we then delivered was according to Law; with all Modesty submitting to those that have been or shall be of a contrary Opinion, for the Grounds of Law and Nature support it.

1. *Salus Populi est Suprema Lex. Qui sentit commodum, sentire debet & onus. Quod omnes tangit, ab omnibus debet supportari.* What do these Rules intimate else, but that when a Danger is imminent the Charge must lie upon the whole Kingdom, and the Burden must be borne by all? And that is not denied by them that were of Counsel on the other Side. It must not be every kind of Fear and Rumour that must draw this kind of Burden upon the Subjects; but such a Danger as the King in his Understanding perceiveth doth require a speedy Defence.

2. That the King is sole Judge of this Danger, and how to prevent and avoid it, is not to be literally understood, for we are his Judges deputed, but our Judgment flows from him. Judgment is settled in the King, he is the Fountain of Justice, from whence all other proceeds. *Brañon* saith, *Rex Vicarius Dei est in terra sua.* We are Judges cumulative not primitive; so he is the supreme Judge. In the Parliament the King is the sole Judge, the rest are but Advisers. 22 *Ed. III. fol. 3.* Here it is that the old Fashion of penning of Statutes was *Rex Statuit.* 7 *Hen. VII.* Afterwards it came to be with the Advice of the Lords and Commons. *Trin. 6 Hen. VI. Rot. 41. Banc. Reg.* There was a Prior brought a Writ of Annuity against one in *Ireland*, there was Judgment in the *Common-Pleas*; then at length a Writ of Error in Parliament; the Judgment affirmed; afterwards a Writ of Error in the *King's-Bench* here, and both Judgments reversed. And in the Entry of the Judgment the Record saith, *Nos cum assensu & ad requisition' Communitat'* do reverse the Judgment. Where note, the King is the Man that is the sole Judge thereof. (By the way observe, out of this Record, the Power of the *King's-Bench* in *England*; for upon this Record it appears a Writ of Error was brought in the *King's-Bench* in *England* to reverse a Writ of Error in Parliament in *Ireland*.) This sheweth the King in Parliament is the sole Judge, the rest but Ad-

visers. So, as I said before, he is the only supreme Judge of the Danger himself, and of the way of Prevention, whether by his Council or by his Parliament.

The third Assertion is, That the King without Parliament, in case of imminent Danger, hath Power to send to Inland and Maritime Counties to provide Ships. And I think he may do so by the Fundamental Laws, Common Laws, and Statute Laws, and by the Precedents.

First of all, for the Common Laws, (here I leave the Divines to talk of the King's Power, who under favour take more Liberty than is fitting to say in a Pulpit; for he that will have the Statute *de Tallagio non concedendo*, if it be a Statute, to bind the King, such a Man is not *Cesar's* Friend, but speaks without his Book) *Brañon* saith, That by the general Law of Monarchy, the Subjects Goods are at the King's Pleasure: But a King ruling by politick Advice, is to rule according to his fundamental Laws, which yet in *England* take not away, but preserve those *Jura Supreme Majestatis*, as to pardon all Offences, to stamp Money, and infinite others more declared in Parliament, 1 *Jac.* which Court is that *tres hault Court*, of which none ought to think dishonourably. I leave Divines to talk their Pleasure: We are to judge according to the fundamental Laws and Customs of the Realm. There is a Book which Mr. Attorney remembered well, that the King of *England* hath more Power than any other King. If the King must by the Law defend the Kingdom, he must lay a Charge to provide for the same. The Common Law owns the King as Sovereign and Head of the Kingdom, that should defend and protect it. 1 *Sam. viii. 19, 20.* They would have a King to be adjudged by, as other Nations had, and to go in and out before them; that was the Fashion of Kings before, to judge their People by Laws, and to defend them with Arms. It is an incident Quality inherent in the King. It standeth with Nature and Reason, that the King should have the Charge of the Defence. If this inherent Quality should be taken away, how can he defend his People? If he be no more than a common Person, he cannot be a King, unless he take the Defence and Protection of his People upon him. Mr. Attorney shewed learnedly, the King is a Monarch and Sovereign, the People his Subjects: He is the Head of the Body, and therefore may command it. *Fitz-Herb. Na. Br. and Stamford Prerogative*, that the King protects the Bodies and Lands of his Subjects: He is *Vicarius Dei*, appointed to protect the Kingdom: so there is a Tie of Allegiance that binds every Man. *Stamford, cap. 2. of Prerogative*, the King by Law is the Protector of the Body, Lands, and Goods of his Subjects; so he hath a Liberty and Prerogative for this End, (not for his own Profit, in the Bodies, Lands, and Goods of his Subjects, in Time of Danger. 11 *Hen. VII.* Every Man in his own Person is bound to serve the King for the Defence of the Realm; and gives a Reason, and that is the Reason of Protections, because they are bound to it; therefore they should have no Harm done unto them. The King himself cannot free any Man from his Allegiance, without Act of Parliament; neither can the Subject free himself, as in *Dr. Storie's Case.* So you see the King's Majesty hath Interest *pro bono publico*, in the Person.

He hath also an Interest in our Estates, if it be *pro bono publico*; as in the Case of *L.* it was adjudged he has Power to come over Mens Lands. Now what Prerogative hath the King concerning that? and yet, according to *Popham*, the two Chief Justices and Chief Baron agreed, that where a Man hath an Inheritance in Lands and Woods, the King cannot cut his Woods for his private Use, unless it be *pro bono publico*; nor dig Gravel in another Man's Lands: but yet in Case where it is *pro bono publico*, he may do it, and make Bulwarks on their Grounds for Defence of the Kingdom.

So for Pontage and Murage, the King cannot compel the Subject to make the Walls of his own Houſe, or a Bridge for his own private Use; but where it is commanded to be done, where the Subject hath a Benefit, there it is good: so here is the Difference of the Case, where the King commands for his private Use, or *pro bono publico*.

My Brother *Crooke* saith, the King may press Ships for his Service, in the Defence of the Kingdom, but not command Inland Counties to furnish Ships: yet there is a Precedent in *Oxford* to the contrary.

By the fundamental Laws of the Kingdom, he is the Defender of his Subjects, of their Bodies, Lands and Goods; and where it is *pro bono publico*, they are to pay towards it. If there had not been Objections that dazzled me, I should have done before this.

The Case of the Abbot of *Robertſbridge* is an Allowance of this Charge, a double Charge of Lands there in two several Places. I remember in a Parliament, where I learned a great deal of Good, 1 *Jac.* the King, without Consent in Parliament, laid an Imposition on Merchandize, but was in case of Necessity, *pro bono publico*.

Now to answer Objections, and those were many, my Brother *Crooke* did double and redouble them. Brother, we sit one next another, antient Judges, tho' different in Opinion. I speak out of my Conscience, as you have spoke out of yours; so, tho' there be Variety of Opinions, yet Conscience is the same.

First, saith he, the fundamental Laws of the Kingdom have settled a Property in the Goods in the Subject, that, without their Consents, this cannot be taken from them.

This doth not trench upon the Property of the Subject, if you take the Case right: If this be a lawful Prerogative in the King to lay this Charge, then how can it be said, that the Subject's Property is invaded? For if the Property *ab initio* be in the King, then the Law annexed this to the Lands and Goods of the Subject in the Beginning, and made them liable to it by a secret tacit Condition. If a Man do enter for a Condition broken, this is no divesting of the Property out of the Subject. If Goods be given to one till such a thing happen, or upon such a Condition, there is a Property in the Donce, yet it is clogged with a Limitation and Condition; and when the one or the other happens, the Property may be reduc'd or transfer'd; as in all Assessments and Rates, Goods are liable to the Payment thereof: so for the Payment of those things necessary for the Defence of the Kingdom without their Consent; for if legal, what needs this Condition? I would wish no Man to clamour, that this is to divest the Subject of the Property in his Goods; for it is nothing but what is for the Defence of the Kingdom.

The next Authorities objected by my Brother *Crooke*, are the Laws of *William the Conqueror*, and Charter of King *John*, then the Statutes, then *Fortescue*; and therefrom he saith very much, that the King of *England* cannot lay Taxes upon his Subjects, without their Consent in Parliament.

And where he speaks of Taxes and Charges that cannot be imposed without Consent, some other Places of the Author do shew, that it is where the King imposeth it for his own private Use, and not in Case of publick Defence.

The next is 13 *Hen. IV.* the Charges of 1 *d.* upon a Cloth for measuring, adjudged void. I conceive it was not adjudged void upon that Point. True, in Parliament it was complained of as a Grievance to the Subject; but every Petition in Parliament doth not argue a Right: it may be it was *ad damnum*, yet *absque injuria*; that Case differs much from this, for there was a Charge to a private Benefit, and no Regard to the publick, which perhaps the Law will not allow, but where there is a *quid pro quo*; nor of the Case of Dice, Cards, Monopolies, those Cases nothing like this: so a Commission of Sewers may lay a Charge for the Repair of a Bank; when the Lands are overflown, and the Owners be not able, the Neighbourhood must be taxed; so in case of a Bridge.

Then the Statute of 2 *Rich. II.* was objected; nothing must come to the King's Purse, nor to the King's Coffer, but it must be for the Defence of the Kingdom.

This was no lawful Charge, because the Intention was to fill the King's Coffers, which were empty, and that could not be done but by Parliament; so it is not in our Case, no Money is to come to the King's private Use.

That of *Hen. IV.* for repealing of Commissions that were awarded to provide Barringers, the Record saith only that the King's Answer to the Complaint was, *Le Roy se aviserá avec ses Signores*.

Then he cometh to the Statute of Tonnage and Poundage only for ordinary Defence of the Kingdom.

Why there should be any Difference between an Inland County and a Maritime I know not, since to the Common Defence all are equally engaged as one intire Body; and the Inland Counties have the Benefit by sending their Wools by Sea, and yet they must not help to the Defence of the Sea. As in the natural Body one Member helps another, so when the Maritime Counties are not sufficient to make Defence (as in case of extraordinary Defence they cannot be) the Inland County must contribute. Besides, the King may unite an Inland County to a Maritime, and make them but one County; is not he Lord of the Land as well as of the Sea? What was the Law before the Division of Counties? Surely it was equal in charging the whole Kingdom; for I see no Reason but an Inland County should be chargeable by Law, as well as a Maritime. In antient Times, things done upon the Sea, were tried upon the Land in the *King's-Bench*, as by many Records appeareth. One is of a *Norman* Robber upon the Sea.

Object. But if this be so, the Law suffereth a greater Inconveniency, *viz.* that the King may by his Writ charge what and when he pleaseth.

Respons. This the Law trusteth the King's Goodness with, that he will not require it of his Subjects but when there is occasion; and he may do it,

so long as he continues it no longer than there is occasion.

Object. But were not Dr. *Cowel* and Dr. *Manwaring* sentenced in Parliament for such Tenets?

Respons. They were sentenced, and deservedly, but different from our Case: I was a Member in the Parliament, and was in the lower House when *Cowel* was sentenced. I will tell you what Dr. *Cowel* did: he wrote a Book, and under the Words *Prerogative, Subsidies, and Kings*, he inferred as if the King might make Laws without Consent in Parliament; and wrote against the Common Law, which the King is sworn to maintain: thereupon he was sentenced, and his Sentence was just, and I gave my Voice for it. The other was Dr. *Manwaring*, he preached two Sermons that the King was not bound to observe his Laws, that the Right and Liberty of the Subject are at the King's Will and Pleasure without Parliament, and that this doth bind the Conscience of the Subjects, and that they are bound to pay Loan-Money upon pain of eternal Damnation; and that they that did refuse to pay the Loan-Money, did offend against the Laws of God, and were guilty of Disloyalty and Disobedience; and that the Authority of Parliaments, was not necessary to the granting of any Subsidy. For this he was sentenced, and made his Submission. That was for raising of Money for his own Use, but this is to require his Subjects to provide Ships for the Defence of the Kingdom.

Object. The next Objection was *Coinage*, that by that Tenure great Profits arise to the King for Defence.

Respons. Shall the Defence of the Kingdom be laid only upon those who have their Maintenance out of the publick Revenue? What will the King have left to maintain himself, his Queen, his Children, Intelligences abroad? Will you strip him of all? It is true, I hold that the King, with the Subjects, must join together in the Defence of the Kingdom. If the King be rich, you should have pleaded that the King had sufficient in his Purse.

Object. Then it is objected, that there is no apparent Danger, and that this Charge is not allowable neither by the Common Law, Statute Law, or Custom.

I say, it is due by the Common Law; but will you have Danger so apparent, as *Hannibal ad portas*? Will you suffer an Enemy to come in before you prepare to resist? If once he gets in, you will hardly get him out. Is not that as much to be commended, that doth prevent a Danger before it cometh, as when it comes? Is not the Care to prevent Fire from a House before the Fire takes hold of it, as great as when it is on Fire to quench it? Therefore the King, like a good Physician, seeing a Disease growing, before it gets too much Strength prevents it.

Object. In six Weeks Time, a Parliament may be called.

Respons. Tho' it may be, yet after they meet, a long Time they spend in Consultation before they can do any thing; which would be too mischievous in a sudden Invasion: and therefore King *Ed. III.* in his 10th, 11th, and 12th Years, whilst the Parliament was sitting, sent forth his Writs for Aid,

Object. It was alledged by Mr. *Holborne*, that the Law of Nature teacheth every Man to defend himself,

Respons. What, I pray you, will you then have done, on a sudden Invasion, when Forces must be raised in *Cornwall*, some in other Parts of the Kingdom as remote, and all must meet together? If the King must expect such an actual Invasion, before such time as he sends forth his Writs to have them all in readiness, how poorly would the Kingdom be defended at that time? Our Forces would be scattered, and cannot be brought together, which thus divided cannot withstand a foreign Power.

Object. The last Objection was, that the King, at his Pleasure, may draw when he pleaseth this Charge upon the Subjects, if he say he is of Opinion that there is Danger.

Why may not the Law allow this, and trust the King's Judgment here as well as in the Case of a *Ne exeat Regno*, in which if the King commands his Subjects to stay at home, for such and such a Cause, the Cause is not traversable? *Fitz-Her. Na. B. 165. 85. 7 Hen. VII.* saith, if the King doth rectify an Act of Parliament, you cannot speak against the King's Certificate under the Great Seal; *Null tiel Record is no Plea.*

Again, God Almighty bless the King; it is against Presumption of Law, that the King, whose Heart is in the Hand of the Lord, should tell a Lye. God gives Wisdom to govern aright. Lying Lips do not become a Prince, Truth to God Almighty he owes. The Law says, the King may *nescire verum*, but not *dicere falsum*. The King may not know a Truth, but cannot speak falsely. Next *Juramento strictus*, he is bound to administer Justice, and not to grieve his Subjects. Is he so unwise to charge them and himself without Cause, with providing of Ships? What Benefit comes to him by it? Surely to tell a Lye will be no Advantage to him; he were a King of Wickedness to lay a Charge on the Subject to no Purpose; thus he shall charge himself and his Subjects about nothing. Does any Man think he will put a Burden upon his Subjects without Cause? We have a good King, and our Imaginations ought to be good of him.

The fourth Assertion is, that the King hath Power to compel them to the contributing to this Charge. This Power of the King is a special Prerogative, and if good at Common Law, it taketh away the Statute, when it is *pro bono publico*, to defend the Kingdom.

The general Words of a Statute shall never be construed to extend to it; the Charter of King *John* shall never take away the King's Prerogative, neither the Statute *de Tallagio non concedendo*, which I agree to be a Statute, and so my Lord *Coke* allows it to be. Now this Power of the King, of which I argue, is a special Prerogative in point of Government: it is a *proprium* to a Scepter *quarto modo*, therefore the general Words of a Statute shall never be construed to extend unto it: as if the King hath a special Interest in Land by the Prerogative, it doth not pass away without precise Words, as the Books are infinite in it. If the King grants away Land by his Letters Patents, parcel of a Forest, without special Words, this shall remain subject to the Forest-Laws still: so many Cases may be put, when general Words

of a Statute extend not to a particular Prerogative. If general Words of the Statute should take away these Aids, why do they not take away the Aids of *pur faire Fitz chevalier, & pur file marier*, since that general Words may include them as well as this? But you all grant that these Aids are not taken away, and by the same reason I conceive this remains.

My Brother *Crawley* held that special Words in an Act of Parliament could not take away his Prerogative, because it would have been an Act against Reason. I will tell you what I have heard adjudged in this Case. In the Parliament held 1 *Jac.* there were two Things expressly moved: One, That there might be no Wardship or Tenure of the King: The other, That the King might not allow Surveyors. To these Questions, after long Disputes, it was answered by the whole Parliament, that such an Act of Parliament to top the Prerogative of Tenures would be void, because it is inherent in the Crown, for every Man holds immediately or mediately of the King. And 2 *Hen. VII.* an Act of Parliament to restrain the King's *non obstante* to dispense with penal Laws, as not to pardon Murder, is void; his Person and Royal Prerogative cannot be restrained by Parliament. Thus I have done with the former and larger Part of my Argument.

Now I come to see if the Record will maintain that which we have here, and I think it will bear it both for Matter and Form. First, let us see whether there be Substance enough, to shew that there is Danger sufficient for this Prerogative to require Aid and Assistance; and I think there is sufficient, the *French King*, the *Spaniard*, the *Low Countries*, all up in Arms; who knows what Danger this Kingdom may be in? and if the King say it is in Danger, it is not traversable; if the King had said no more but this, *pro defensione Regni*, without any more saying, it had been sufficient. It also recites that there were *Prædones, Piratæ*, that took away both Men and Ships; and that foreign Provision was making to take away the Dominion of the Sea; and that all this was *ad gravandum regnum nostrum*: and therefore commands a Ship to be provided *ad defensionem regni*. Here the Danger is general, and therefore the Defence must be general.

An indifferent and equal Assessment is first to be made, and then the Overplus of the Provision to be restored according to the Writ; for until the Money be had, how can the Provision be made? Tho it has been said, let the Ships be first built, and then make the Assessment; that cannot be, for with what shall the Provision be made? The Money must do it.

For matter of Precedents, as *Danegelt, &c.* I do not much stand upon, because I had not Time to peruse them, but conclude on my former Reasons. (*My Lord Chief Justice asked him what his Advice was; he answered,*)

My Advice is upon the whole Matter, that the Barons finding the other Process of Court and *Sci' Fa'* to be according to the *Exchequer*, (for that I leave to them) Judgment shall be given that *Mr. Hampden* shall be charged with the 20*s.* with this Limitation and Condition, that none of it comes to the King's Purse, for if it do, my Opinion is against it.

The Argument of Sir Richard Hutton, Knt. one of the Justices of his Majesty's Court of Common-Pleas at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

THE King by his Writ 4 *Aug.* informs, that there were gathered *Piratæ ac Maris Grassatores*, and that they were gathered together in hostile manner to hinder our Merchants from bringing their Goods into our Ports; and reciteth, that there are Wars abroad, and that considering these Perils and Dangers, and that the Defence of the Kingdom consists in the Defence of the Sea, which at all times belonged to this Kingdom, and that the Charge of Defence is to be borne by all; and the King is loth that in his Time such an Honour as the Dominion of the Sea should fall away or be diminished, and not be defended, hath therefore sent a Writ to the Sheriff of *Bucks* (as to other Counties) to provide a Ship of such a Burden against the 1st of *March*, and to come to *Portsmouth*, and there to remain for 26 Weeks, and to do as shall be directed them for the Defence of this Kingdom. And the Writ directed, that all that are Inhabitants shall be assessed for the providing of this Ship with Men and Ammunition.

By force of this Writ, *Mr. Hampden* being assessed at 20*s.* there went forth a *Certiorari* a Year and a half after, directed to the Sheriff of the County of *Bucks*, to certify what Sums they had assessed by virtue of the said Writ 4 *Aug.* and there are two several Certificates returned into *Chancery*; one, That *Mr. Hampden* was assessed at 20*s.* the other, That he hath not paid it. 5 *Maii* 13 *Car.* the King, by *Mittimus* out of *Chancery*, recites, that when he awarded the Writ 4 *Aug.* *Salus regni periclitabatur*, and that it was for the Defence of the Kingdom and Security of his Subjects; and doth send this Writ 4 *Aug.* the *Certiorari*, and *Mittimus*, to the Barons of the *Exchequer*, and commands the Barons to do that which appertains to Justice to be done. Whereupon a *Sci' Fa'* is awarded; whereunto *Mr. Hampden* hath appeared, and demanded *Oyer* of the *Sci' Fa' Mittimus, Certiorari*, and the Writ 4 *Aug.* and hath demurred generally; and *Mr. Attorney* hath joined in Demurrer: and how this *Sci' Fa'* lieth, is the Question.

And I am of Opinion that this *Sci' Fa'* doth not lie, and that Judgment in this Case ought to be given against the King. For the better understanding of the Court, I shall observe in the Method of my Proceedings,

1. Whether a Charge of this nature may, by the King, be imposed, by original Writ only under the Great Seal, without a Parliament. Wherein I hold it cannot be proved by any Authority or Reason, unless in time of actual War and Invasion.

2. I will answer those Objections only made formerly by them that have argued, that these Statutes do not extend to this kind of Prerogative, and that this Prerogative is not taken away by any of these Statutes.

3. I will answer the Precedents, both by Precedents of equal Nature, and by some Reasons,

whereupon I will conclude, that this Prerogative and Power, which is Monarchical, is included and taken from the King, and that must be done by Parliament.

4. I will answer some Objections that now have been raised, and were before made by Mr. Solicitor.

5. I will just open the Writ, that it neither containeth Matter sufficient in the Writ itself, nor is there Matter to warrant any such Levy as is pretended; neither is the same lawful, nor can be commended by *Mittimus*, nor can be commanded by those Sheriffs that are no Sheriffs in this Case upon the Matter.

Now, as my Brother *Jones* hath taken a great deal of Pains and Time, I will not be drawn from my own Order by what he hath said; but answer him in his Argument.

1. I say, that this Power of assessing of Money, being a great Charge, cannot by the Law at this Day, unless in time of actual War, be imposed upon the People by Act of Parliament.

The Acts of Parliament that have been mentioned, the first was *Mag' Char'*, which is an antient and great Statute; it cometh unto us with an *Inspeximus* from *Ed. I.* confirmed thirty times; the Words are, *Dedimus & concedimus has libertates subscriptas in perpetuum. Nullus liber homo capiatur vel imprisonetur. aut dissestietur de libero Tenemento suo vel libertatibus, &c. aut aliquo modo distringatur, aut in carcerem mittatur, nisi per legale iudicium parium suorum, vel per legem terræ.* King *William the Conqueror* made these Laws, and swore Men to those Laws. And then King *Edward*, in the last Chapter, commands them to be kept, and he will keep them so long as concerned him and all his People for ever. And for this they granted him a fifteenth Part of all their Goods, and it is a Statute here to this Day, *Stamford fol. 172.* to be tried *per Pares*, as the Barons at this Day have for their Trial the Privilege of this Statute.

The next Statute is *25 Ed. III. chap. 5.* reciting, 'And forasmuch as divers Persons, &c. we have granted for us and our Heirs, that we shall not draw such Aid and Pride into Custom for any thing done heretofore, by any other Rule or Precedent that may be found.' So there is now not only for Taxes for War, but for any other Business whatsoever, *forisque de commune consent de tous la Realme*, saving the antient Aid and Prizes due and accustomed. And this saving is nothing, for this Statute extends to no Particular; for if any extend to Aid by Tenure, all *England* is not bound to this, but some few. The Statutes extend to such Aids as the whole Kingdom is subject unto; none will say that all the Kingdom holds of the King *pur filz marier, &c.*

The Statute of *34 Ed. I.* concerning certain Liberties granted by the King to his Commons, this is printed *Anno 1534. 25 Hen. VIII.* No Tailage to be taken or levied to us, our Heirs or Successors, without the Good-will and Assent of the Archbishops, Bishops, Barons, and other Burgeses and Freemen of the Realm. This Statute hath been quarrell'd withal, but the Words are very effectual.

The Statute of *14 Ed. II.* agreed to be perpetual by my Brother *Jones*, for my part, I can see no Reason why it should be so. The Statute reciteth, That whereas the Barons and Commons of the Realm have granted of their good Free-will the King an Aid towards his Wars as well on this side

the Sea as beyond, of the ninth Sheep, the ninth Sheaf, &c. and the ninth Part of all their Goods, we will and grant for us and our Heirs, that the same so charged shall not be brought into Example to make any Aids, he doth not say such Aids, but by Consent in Parliament. No Man can say against these Words, they are so full and absolute.

The Statute *25 Ed. III.* enacts, that none shall be compelled to find Hobbellers; *Si il ne soit per commune consent in Parliament.* The Reason given in the Parliament-Roll, is very observable; *Carceo est incounter le droyt del Royalme.* These Words are in the Roll, yet left out in the printed Statutes, but the Reason I know not. This Statute of *25 Ed. III.* is confirmed by the Statute *4 Hen. IV.*

The Statute *1 Ric. II.* a very good Statute, tho' in a young King's Time, enacted and done by the Lords and Commons: There have been many Inventions to charge the Subject. Now *Hen. IV.* invented many Benevolences, and that is recited, That whereas divers Inventions, &c. (all the World I think is full of Inventions) it is enacted from henceforth, that the Subject shall no ways be charged with any such like Charge. They gave it the Name of Benevolence, but indeed they were Impositions, and great Charges were collected with that Name.

I conclude with that Statute of this King, the *Petition of Right*, which reciteth the Statute *de Tallagio.* Very many particular Things are mentioned there, Men are not to be compelled to lend Money without common Assent in Parliament; which is a Confirmation of these Statutes. I have done with the Statutes.

For the Authority of the Year-Books; I will confirm those two Authorities cited by my Brother *Crooke*, tho' my Brother *Jones* slight the Authority, *13 Hen. IV.* the principal Case being then a Grant of an Office of measuring of Cloth and put in Practice, and being granted out of Parliament condemned to be void; for the King cannot grant any common Charge on his People but in Parliament. And tho' my Brother *Jones* said, that perhaps such a Charge was *Dammum*, yet not *Injuria*; surely had not there been more in it, it had not been damned as illegal.

The other Authority is that of *Fortescue*; tho' my Brother *Jones*, in that Book, doth omit that which is material; for that Man he was sworn Chief Justice of *England*, and afterwards made Chancellor, who saith expressly in his 9th Chapter, That the King of *England* cannot alter any Law; That he governeth his People, not only by Royal, but by Politick Power, and can lay no Charge upon them but by Parliament. The King can change no Law, nor make Land Gavel-kind which is not, nor make Land divisible which is not; which he might do if it were to be done by Power Royal. And *Fortescue* concludeth with this excellent Saying, *fol. 26. 6.* 'Rejoice therefore, Sovereign Prince, and be glad; for the Law of your Realm administreteth to you and to your People no small Comfort and Security, &c. Prerogative strengtheneth the Subjects Liberty, and their Liberty strengtheneth the King's prerogative.' *Cap. 38.* is full and strong against the King, which my Brother *Jones* was pleased to omit. The King may by his Officers take Necessaries for his House, nevertheless he is bound to pay for them; for by the Law he ought not to take

take away any of the Subjects Goods without making Satisfaction for the same; neither can he lay any Taillage, Subsidy or other Burthen, or make new Laws, or alter old, without express Agreement of his People in Parliament.

I have done with the positive Part of my Argument. I will not trouble you long; I will answer some Objections now made, and heretofore made against these Statutes.

First, For the Statute *de Tallagio non concedendo*. True, it is very probable that it was no Statute, but an Extract out of the Statutes of 25 Ed. I. which is upon Record, the other not being to be found upon the Roll. It was averred *una voce*, it was a Statute, tho' not without Probability it was no Statute, as it was learnedly observed by Mr. Solicitor, in respect of the King's Absence beyond the Seas. Only I collect this out of his Argument that he thought that that Statute did reach very far against the King, which he could answer no way, but to take it away; therefore he thought it a Statute of some Force.

Next, my Brother *Berkley* would have the Statute of 14 Ed. III. to be but a temporary Statute, and but during the Continuance of the Wars. The 1st Part of the Statute is absolute, but the latter part is but a temporary Statute, and but during the Continuance of those Wars. But it must (the former part thereof) needs be perpetual, for it is granted for the King and his Heirs.

The next Objection is by my Brother *Jones* and my Brother *Crawley*, That this Power Royal is part of the Prerogative appertaining to his Person, and inherent to the Crown, a *proprium quarto modo*, so inseparable, that an Act of Parliament cannot take it away.

I confess there are some inseparable Prerogatives belonging to the Crown, such as the Parliament cannot sever from it. And I will prove to you out of Books, Cases and Statutes, that the King cannot release his Tenure *in Capite*. It was endeavoured that a Law should be made that the Court of Wards should be shut up, it was resolved it had been a void Law; such is the Care for the Defence of the Kingdom, which belongeth inseparably to the Crown, as head and supreme Protector of the Kingdom: So that if an Act of Parliament should enact that he should not defend the Kingdom, or that the King should have no Aid from his Subjects to defend the Kingdom, these Acts would not bind, because they would be against natural Reason. But in our Case here, there is no such thing; for there is no Act that restrains the King to lay any Charge at all, but only ties him to one Means, by which he would come by it, to wit; by Parliament. If before the Statute a Man alien Land held of the King without Licence, the King shall seize the Land, and have it forfeited to him and his Heirs for ever. Now by that Statute the Prerogative is restored to a reasonable Fine only; this was inherent in his Person as any thing could be, and yet it is restrained by Parliament.

Before *Mag. Char.* the King might take any Man's Goods for his Provision, and cut any Man's Woods down, to build or repair his Castles: yet since that Statute it is enacted, *Nullus Vicecomes nec Ballivus noster capiet equos, &c. nisi reddat liberationem. Nec capiemus boscum alieni ad castra vel ad alia agenda nostra, nisi per voluntatem illius cujus bosus ille fuerit.* And to this Day this Sta-

tute is of force, that the King cannot take these things, nor use his Prerogative.

The Prerogative of *Nullum tempus occurrit Regi*, is a great one; yet in some Case of Lapse of Churches, this Prerogative is taken away by the Statute of 25 Ed. III. cap. 1. where the King granteth for him and his Heirs not to present but in his own time: and this being pleaded 11 Hen. IV. fol. 7. is adjudged against the King, notwithstanding the Rule of *Nullum tempus occurrit Regi*.

The Statute of 7 Hen. VIII. c. 3. concerning Restraint of Informations, and that of 21 Jac. whereby the King excludeth himself to make a Title to any Land, whereof he had not been in possession within 60 Years before this time, he was tied to no time, but unlimited; yet this great Prerogative is thus bound. 30 Ed. III. cap. 10. Parliaments to be holden every Year one, or oftner if need be, because of divers Mischances that may happen. It is to be acknowledged as a gracious Favour from his Majesty to his Subjects, that he would admit of this Case to be argued in any ordinary Court of Justice, and not refer it to the Parliament, to which Place all such weighty Causes are most fit to be referred. I am satisfied in my Conscience he would do nothing in this Case, if he were justly informed, or may be informed he ought not to do it by Law.

The Laws of *England mutari non poterunt*, without consent of Counsel gathered together: *Si inusitatum emerferit*, saith *Fortescue* (as the Case of ours is) it is referred to the next Parliament; *Si aliquid inconsuetum*, then it is to be put to the Parliament.

2 Ed. III. fol. 7. There ariseth a new Question concerning the Statute of *Winchester*, about Recovery by Actions against the County where Robberies were committed; there the Case in respect of the Difficulty was refer'd to the Parliament, and there the Sheriff was warned to have his Money.

You shall see a notable Case in the Register fol. 224. among the Writs, of two that were at *York*, and served by a Clerk in the Chancery there to appear at *Rome*; and because of this Contempt they were committed to Prison, and a Writ came to bail them, returnable *coram nobis in Parlamento*: so Matters of Difficulty were adjourned into Parliament.

Westminster 2. cap. 28. In nova causa fiat novum remedium in Parlamento. To resolve Cases of difficulty, Statutes have enacted that there should be two Parliaments every Year, viz. 4 Ed. III. c. 4. which was a great Confirmation of the Liberties of this Realm. *Littleton* 110, 180. Parliaments ought to be frequent. I know not how it comes about, that this Kingdom which hath thus long flourished by Parliaments, should now forget her frequent kind of Government by Parliament, whether by Reason of some thing past, or some Disaster now fallen out, that this which is the antient way (I do not say that Parliaments is the Government, but Kings have governed by them) is so much out of use now-a-days.

I do not prescribe Power to the Parliament to govern the Realm, but the publick have been governed by the Parliament. There was seen too much of the ambitious Humour of some in the last Parliament, that stirred up nothing but Confusion and Discontentment as we now feel it to our great Prejudice.

Now I come to Precedents. *First*, that of *Danegelt* hath been objected; of which there were two Kinds, as Sir *Henry Spelman* in his *Glossary* observes; the one *ad pacandum*, the other *ad coercendum Danos*: great Sums of Money they had to go home again, from 12000*l.* to 48000*l. per Annum*; and it was raised in three Years: it was continued until King *Stephen's* Time; at which time 'tis said it was repealed. For my part, I see not but that it might now be put in use as formerly, had it not been for those Statutes of *Ed. I.* and *Ed. III.* before-mentioned: for it was not laid down when the Danger ceased, but was continued and taken up by Princes when they had a mind to it, as by *William the Conqueror*, and *William Rufus*; but since these Statutes it was never taken (*and here he read the Words of the Statutes.*) So if these Statutes took that away, why do they not bind in our Case? Which is a full Answer, in my Opinion, to that and all other Precedents before these Statutes: there have been shewed 200 on each side; but I say, it had been better they had never made use of them.

So to all the Precedents made before the Statute *de Tallagio non concedendo*, I give this general Answer, to be of no force.

For the Precedents in *Henry III.'s* time, which were many; yet in those Commissions for preparing of Gallies, after they were made they were at the King's Cost: This may be done at this time.

And with the Statute of 14 *Ed. III.* I answer those Precedents of the 10, 11, 12 *Ed. III.* and by the way observe the Times that were then, that Statutes were forced to be made to remedy those Evils; and surely those were the Burdens and unreasonable Taxes which the King, in the 13th Year of his Reign, confessed he had oppressed his Subjects with, and desired they might be forgotten, because he was urged to it by his Necessities, and not for any ill End of his own, (*and so he caused the Record itself to be read openly before all the Judges.*)

2 *Hen. IV.* 2 *Rich. II.* A general Assembly called and resolved, That Money could not be raised but by Parliament. Since this time, all the Precedents that have been vouched were for arraying Men, and putting them in readines.

28 *Hen. VIII.* There were some forced upon their own Charges to go to suppress some Rebels in *Lincolnsbire*, but afterwards were recompensed for their Charges; saith the Record, Our Pleasure is to send a Messenger, and on a Bill of Charges he shall satisfy them. I do agree, and there are many Statutes that Men should be arrayed, as the Statute of *Winchester*, which are only Preparations to make Men ready.

Now for that which hath been urged by Mr. Attorney excellently well, That the King, by the Law of the Land, hath a Prerogative in the Lands and Goods of his Subjects; so that in some Cases, the Sheriff may for him break open a Man's House, and the like, because otherwise he cannot execute Justice.

True, the King hath such a Prerogative, and fit it should be used; for otherwise Justice could not be administered, as it is in many Cases, the Sheriff, tho' a Verdict by Default, hath Power by Prerogative of the King to break into the House, and give Possession; for otherwise Justice could not be administered, if all Laws were contemned: for which Contempt the King may use his Power.

Again, the King of his own Charge maintains his Courts of Justice, and is bound so to do, 39 *Hen. VI.* 34 *Hen. VI.* And in lieu of these Charges the Law gives him those Fines and other Duties; so there is upon the Matter a *quid pro quo*: But where there is an Interest in a Subject, he cannot take it away without his Consent, as he may do it in Murage and Pontage, and the like; for there is a particular Benefit to the Subject. So I think I am almost at an End of answering the first and second Part of the Precedents; the antient Time was one Way, and the modern Time another Way.

In *Ed. IV.* *Ric. III.* *Hen. VII.'s* Times, they are all for Wages of the Mariners, certain Allowances they had; what a Week, what a Day is set down.

But you say, here in this Case appears no Money to be paid by the Subject, but only for a Ship to be provided by the Sheriff, and not any Money to come into the King's Purse.

I must conclude this Part with what is agreed by all, That if this Writ had been to levy Money, it had been void.

As I do take it, the Writ is to prepare a Ship of such a Burden; so the Ship is the Matter: Then give me leave to say this, and I say, as it appears plainly by the Record, there was no Ship prepared at all; then if no Ship, no Writ can be had against him for Disobedience. 'Tis known to all the World, 'tis not Ships, but Ship-Money: Ship-Money is in every Man's Mouth. It hath a Name of preparing Ships, but the End of it is to prepare Money, as in *Yorksbire* twelve thousand Pounds.

If the Provision of a Ship had been expressly alledged, it might have been traversed, and therefore Mr. *Hampden's* Counsel could do nothing but demur; and by demurring, they confess'd nothing but what is materially and sufficiently alledged, so that it might have been deny'd by a Traverse.

But you will object, That I did subscribe to a contrary Opinion, and set my Hand unto it.

To this, for my own part, I must say, and I can truly say it, 1. My private Opinion was ever against it. I did subscribe, but it was but for Conformity; for it is known to all, when a great Number meet together, the Judgment is that which the greater Number saith: Besides these Words to which we subscribed are no wise pursued.

2. Our Opinions were very suddenly required; for the King's Letter bears date *Feb. 2.* and our Opinions upon it bear date *Feb. 7.* following; and it was in a Case wherein we never heard any Argument: and we usually do, and God forbid but we may dissent from our private Opinions upon a better Reason heard. But I am of the same Opinion now that I was then.

But it will be said, we might have done it more advisedly. No Man of us but sometimes delivers his Opinion, and yet after we have heard an Argument, have changed our Opinions, and gone contrary to our former Judgment.

3. If after any Arguments heard I had been of the same Opinion that was delivered, yet this Writ doth not pursue the Direction thereof; for tho' we agreed, that the King might charge in case of a general Danger, yet this was, and is intended not a Danger of Pirates, but an imminent Necessity, and apparent Danger, which could not be avoided. For I do agree in the Time of War, when there is an Enemy in the Field, the King may

may take Goods from the Subject; such a Danger, and such a Necessity, ought to be in this Case, as in case of a Fire like to consume all without speedy Help, such a Danger as tends to the Overthrow of the Kingdom. Give me leave to say, that Kings of *England* have exercis'd great Power in taking this to themselves. 17 *Hen. VIII.* in the Cardinal's Time, it was counted lawful to send forth Commissions throughout *England*, to take a sixth Part of the Subjects Goods; whereupon many upon Refusal were sent to Prison; the Lord *Cobham* among the rest sent to Prison from *Huntington* to *London*: at length *Norfolk* and *Suffolk* grew to such a Heat for taking away their Goods in that undue manner, that the King was forced to call a great Council, who suppressed those kind of Writs; and the King laid the Fault upon the Cardinal; and the Cardinal said it was the Advice of the King's Council, and they deny'd it; so he bore the Shame.

So in the Time of Queen *Elizabeth*, who was a gracious and a glorious Queen, yet in the End of her Reign, whether through Covetousness, or by reason of the Wars that came upon her, I know not by what Counsel, she desired Benevolence; the Statute of 2 *Ric. II.* was pressed, yet it went so far, that by Commission and Direction Money was gathered in every Inn of Court; and I myself, for my part, paid 20 *s.* But when the Queen was informed by her Judges, that this kind of proceeding was against Law, she gave Directions to pay all such Sums, as were collected, back; and so I (as all the rest of our House, and as I think of other Houses too) had my 20 *s.* repaid me again: And Privy-Counsellors were sent down to all Parts, to tell them that it was for the Defence of the Realm, and it should be repaid them again.

Now for the Exceptions to the Writ itself, I must answer my Brother *Berkley*, That no Allegation afterwards (if the Writ be not good) will help it. The Writ is said to contain Matter sufficient, *Quia datum est nobis intelligi quod quidam piratae naves & bona subditor' nostror' &c.* and lead our Men into miserable Captivity, and provide Ships, Mariners, &c. *ad gravandum regnum nostrum.* Now here's nothing for the Defence of the Realm, no *cognoscimus hostium adventus*; as the Writs did antiently run.

Again, Pirates are to be withstood with ordinary Defence, which appertaineth to the King himself; but for extraordinary Defence against Invasion, when the Kingdom is like to be overthrown, there indeed the whole Kingdom is to contribute to the Defence. And our Resolution was, when such a Danger was apparent, the whole Kingdom in Danger, then the Defence to be extraordinary.

But you object, That tho' there be no Danger set forth in the Writ, yet in the *Mittimus* it is certify'd, *Quod salus regni periclitabatur.*

The Writ issued 4 *Aug. 11 Car.* the *Mittimus* came not out till near two Years after: Now the Counsel perceiving the first Writ was not sufficient, they politickly add to the *Mittimus* this Clause of *Salus regni periclitabatur*: so this coming so long after, cannot make that which was not legal *ab initio*, to become good by Matter *ex post factum*; this could not be helped by any subsequent Matter, as in Case of a Fine, &c.

This was much stood upon by my Brother *Berkley*; but I shall answer him with two Cases not to be deny'd: The First, *Vernon's* Case in

the 4th Report. A Man conveys Land to the Use of himself for Life, the Remainder to *J. S.* for Life, the Remainder to his Wife for her Jointure; tho' in this Case *J. S.* die before her Husband, so that now it falls out to be as advantageous to the Wife, as if it had been limited her immediately after the Death of the Husband: yet it is resolved, because it is not so limited in the Beginning, no good Jointure to bar her of her Claim to her Dower.

Also in *Chenie's* Case, 5 Report. A Will uncertain (and so not good) shall not be holpen by an After-Averment subsequent to alter the Estate: So it is in our Case, if the Writ were not legal when it first issued, no subsequent Matter shall make it good.

The Writ commands the Sheriff & *quos rebelles invenerit* to imprison, and to distrain all such as refuse to pay. This is directly against the Statute of *Mag' Char'* none ought to be distrained or imprisoned, but by the lawful Judgment of his Peers, and according to the Laws of the Land; 'twas never contained in any Writ before, nor can any such Writ be maintained.

Besides, the Words of the Writ are to rate every Man *secundum statum & facultates*; shall the Sheriff be a Judge and Party? If the Assessment be done according to the Writ, he must be Judge and Party: Never such a Writ before. All Sheriffs must assess himself, 8 *Hen. VI. Dyer* 320. So, for the Reasons aforesaid, I hold the Writ to be against Law.

Again, no Ship was prepared: If it had been prepared, it had been their own Goods; if not, it might have been pleaded, that there was never a Ship; and then the Sheriffs might have been punished for not obeying the King's Commands.

It hath been said, he hath confessed all Matters contained in the Writ; whereas in a Demurrer he confesseth no Matter of Fact, but what is sufficiently set down, 30 *Eliz. Coke* 23. resolves the same.

But to the Writ of *Sci' Fa'* I conceive it not legal; no such Writ can go forth to two Sheriffs of one County, they being neither of them Sheriff at this Time; for it went out after they were out of their Sheriffwick: therefore some Return should have been made by Inquisition. I never did see or hear of any Writ that went to two Sheriffs of one County, as it was to *Bucks*; and so two Sheriffs made two several Returns.

Again, this Money cannot be levied by *Sci' Fa'*, because the Writ directs other Means, either to distrain or to imprison; therefore not by *Sci' Fa'*, for it is contrary to the Words of the Writ. And seeing the Sheriff hath not followed that Direction, he must answer the Contempt.

But here to answer my Brother *Trevor*; I do agree in some Cases of a Certificate, or Presentment, that a Bridge was out of Repair, or a Highway stopt, there shall go a *Sci' Fa'* upon that; but that tells to whom the Money shall be paid. But here the Writ doth not demand the Money to be paid to the King for not preparing a Ship; that must be by Office or Inquisition on Record, if a legal Certificate, as it is. 2 *Ed. III. fol. 2.* The King commands the Sheriff of *Leicester* to summon *J. S. &c.* to come and meet him with Aid, to go into *Scotland*; he spent the Money to a great Value: There went a Writ out of the Exchequer to attach this Man: yet after long Debates it was held

held fit, the King must be informed by Matter of Record.

I agree, that the King, as he is Lord of the Sea, may lay Impositions; but then he ought to defend the Merchants Goods from Pirates. That famous Case of *Mitch' 4 Jac.* in which Case I was of Counsel, of an Imposition of 5 s. a Tun on Currants, one *Bates* stood out, and would not pay it; adjudged that that Imposition was lawful, for the King may lay an Imposition; for he hath the Rule of the Sea, and hath Power to hinder Merchants to traffick; and if they traffick, he secures their Goods.

To conclude with that which my Brother *Berkley* said, that the Subjects of *England* are free Men not Slaves, free Men not Villains. Here is no apparent Necessity of any Invasion; therefore by Law, they cannot be thus compelled to part with their Interest in their Goods. If there were any apparent Necessity, they were without Limit or Stint.

Thus have I, with as much Perspicuity as those Imperfections which attend my Age, would give me leave, set you forth my Reasons; and without any farther Protestation I conclude, both for Matter and Form, that you are not to give Judgment for the King.

The Opinion of Sir John Denham Kt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of Ship-Money, presented in Writing.

May it please your Lordships,

I Had provided myself to have made a short Argument, and to have deliver'd my Opinion, with my Reasons: But by reason of want of Rest the last Night, (my old Disease being upon me) my Sickness and Weakness are greatly increased, insomuch that I cannot attend the Business, as I desired. And if my Opinion be required, it is for the Plaintiff.

*Serjeant's-Inn, Fleet-Street,
26 May, 1638.*

Sir John Denham's second Certificate, directed to the Lord Chief Justice Brampton, 28 Maii 1638.

My Lords,

U Nderstanding that some Misconstruction was taken by some, of the Declaration of my Opinion, which I desired your Lordship upon the last *Saturday* to deliver in my Name; for further Satisfaction therein I have sent again, altho' I was most desirous to have passed my Vote in silence in this Work of weight, by reason I heard not the four last Arguments: yet I delivered my Opinion for the Plaintiff, which I took to be Mr. *Hampden*, by reason it appeareth by the Record that he coming in upon Process, *Queritur de colore premissorum graviter vexatum & hoc minus iuste*; which satisfied me that he was Plaintiff; and therefore I now declare my Opinion for Mr. *Hampden* who did demur.

I shall only deliver these two Reasons for the maintaining of my Opinion. The 1st is, that the

King's Majesty is *sola & suprema Justitia regni*, and the Rule of the Law is and hath always been, that his Majesty can do no Wrong; and thereupon ariseth another Rule of our Law, which I gave for my second Reason.

The King's Majesty being of a Corporate Capacity, can neither take any Lands or Goods from any of his Subjects, but by and upon a Judgment on Record, (according to our daily Experience in the Exchequer) there must precede some Judgment in that or some other Court of Record, whereby his Majesty may be intitled either to the Lands or Goods of a Subject, as namely where Seizure of Goods is made for his Majesty either upon Outlawries, Attainders, or Matters of the like Nature; as in Cases of Seizures in the Court of Exchequer, where Seizures are given by Statutes; yet without a Judgment in that Court upon a Trial for the King, the Goods are not to be recovered to the Use of the King as forfeited.

Upon Consideration whereof, and comparing the same with his Majesty's Royal Writ, I find no Judgment thereupon had nor given; which were the chiefest Reasons of my Opinion for Mr. *Hampden*.

The Argument of Sir Humphry Davenport Kt. Lord Chief Baron of the Exchequer, in the great Case of Ship-Money in the Exchequer-Chamber.

My Lords,

T H E R E have appeareth unto us upon this Record many several Arguments, and excellently made; it comes now to my Course, to express my own Opinion.

It appeareth upon this Record, that *Pasch. 13. Car.* a *Sci' Fa'* issued out of the *Exchequer* to the Sheriff of *Bucks*, reciting, Whereas several Sums of Money mentioned in a Schedule to that Writ annexed, by virtue of the Writ 4 *Aug.* assessed upon several Persons for providing of a Ship, were not paid, whereby he was commanded, *quod scire faceret*, to those several Persons in the Schedule annex'd nam'd, to appear in the *Exchequer, Octab' Trin' 13 Car.* to shew Cause why they should not pay those Sums of Money assessed upon them.

Thereupon a *Certiorari 9 Mar. 13 Car.* was directed to the Sheriffs of *Bucks*, to certify the Sums, and the several Persons upon whom they were assessed, and of the Warning given unto them to pay the same: The *Certiorari* being returned, and in Court in *April 13 Car.*

Then on 5 *May* there came a Writ of *Mittimus* out of the *Chancery*, by which the said former Writs were sent to the Barons of the *Exchequer*; which *Mittimus* recites the Writ 4 *Aug.* and not the Record itself: And the Barons are commanded, that they should thereupon proceed, as by the *Mittimus* is required.

Upon these Records, thus certify'd, there issued out of the Court of *Exchequer* a *Sci' Fa'* that is now in Debate, which was awarded against the Parties mentioned in the Schedule; and Mr. *Hampden* being returned, hath appeared, and demandeth Oyer of the Writ 4 *Aug. 11 Car.* of the *Certiorari 9 Mar. 13 Car.* and of the *Mittimus 5 Maii 13 Car.* Upon Oyer of these, and reading them unto him, as was demanded, Mr. *Hampden* hath

hath demurred in Law, alledging, That the Writs, and every of them, and the Returns of them, and the Matters therein contained, are not sufficient to charge him with the Sum of 20 s. on him charged: And thereupon demandeth Judgment, if the King will be pleased any further to proceed upon this Writ.

To this Demurrer, thus tendred by Mr. *Hampden*, Mr. Attorney hath joined, alledging, That the Writs mentioned, and all of them, and the Matters therein contained, are good and sufficient in Law to charge the Defendant with the Sum of 20 s. and demandeth Judgment thereupon for the King; and that the Defendant *Hampden* should be charged with the Sum of 20 s. and thereupon make Satisfaction; but to whom is not expressed upon the Record.

This Demurrer being thus warily joined on both Sides, there have been several Arguments thereupon at the Bar and Bench, excellently (no doubt) argued, and very fully. There hath been introduced and pressed to the Court (whereof there have been several Notes delivered) a Number of Records appertaining to the Question; so far forth, that in one of the Arguments at the Bar, there were excellently well remembred, at the least above 300 Records, and great Authorities.

Upon this Record, the Demurrer being thus joined, my Purpose is, after my Meanness, (not being able to give an Account of every Particular) to make a summary Collection of what I shall say, and with that Shortness and Brevity that appertains to be (the Weight of the Cause not deserted) upon the Duty of my Place, and upon my Oath, which I have learned and hold to be *ligamentum fidei inter Deum & animam*, to declare unto this Court what I do conceive to be just upon the Question arising upon the Records, wherein my Meaning is to retain myself unto the Parts of the Record.

Judgment is not here to be given, but a judicial Advice; and according to Number of Voices here, Judgment must be given in the Exchequer, without Respect to any of our particular Opinions who sit in this Court. I shall do my best Endeavour to open unto you such Questions, as do appear to me upon the Record to be aptly and fitly debated before us.

The State of the Question out of the Record will appear to be this, That 4 Aug. 11 Car. there issued out of Chancery a Writ, not returnable, unto the Sheriff of *Bucks*: This Writ was *inter Breva irretornabilia*, according to the Stile in that Court, and in the Court of Exchequer. By this Writ 4 Aug. which I do conceive to be the original main Ground of this Record, it appears what was the Occasion and Ground that Writ was awarded. It was touching and in respect of certain grievous Incurfions by the Pirates upon the Seas, who commit Depredations, and take the Goods and Merchandize, both of the King's Subjects and others that traffick here, and carry them into Captivity; and this is said to be to the great Damage of the Kingdom.

That the Times were dangerous, and hostile Times, *tempora bestilia*; and therefore, it was fit there should be a convenient Remedy provided by the Kingdom for Defence thereof: And thereupon, in that Writ, two several Mandates or Commands are imposed.

The *First* was a Command and Direction to the Sheriff of the County of *Bucks*, and to the

Mayor of *Buckingham*, and to the Bailiffs and Burgeses of *Chipping-Wiccombe*, and Parishes of the County of *Bucks*, & *pro omnib' hominib'* of those Towns, and all others dwelling in that County; these are the Persons who are charged. And by that Writ, 4 Aug. they were charged with this Particular, That they should before the first of *March* then following, at their own Costs, prepare and provide a Ship of War of 450 Tons, furnished and fitted with Men, Ammunition, and Victuals, to be brought to *Portsmouth* at their Charge, at or before the said first Day of *March*; and from thence, to be maintained at their own proper Costs and Charges, for the Space of 26 Weeks then next following, to attend such noble Persons, to whom the King should be pleased to commit the Custody of the Sea, and to pursue their Directions.

The *Second* sort of those two Mandates descends from the Persons to whom the Writ was directed unto some few, and that is upon the Matter to the Sheriff of *Bucks*, and to the Mayor of *Buckingham*, and the Bailiffs and Burgeses of *Chipping-Wiccombe*: To these is given and limited a Power by the Writ, distributively, as therein is appointed, respectively to tax and assess the whole County, *secundum statum & facultates*: And those that they should find to be Rebels, they should distrain them, or by any due Means commit them to Prison, there to remain until his Majesty sends forth an Order for their Deliverance. This I do conceive to be the End of those two Mandates mentioned and comprized in the Writ 4 Aug. 11 Car.

After this Writ 4 Aug. 11 Car. almost a Year and an half, then cometh the *Certiorari* out of Chancery, dated 9 Mar. 12 Car. directed to the Sheriff of *Bucks*, who, with the other Referees, should certify unto the King the Names of such Persons as were assessed, and what they were assessed, and who have performed the Assessment, and who not. That Writ was returnable 26 April then next following. And therein Mr. *Hampden* appears as a Defendant to the *Sci' Fa'*; therein was he certified to have been taxed to the Sum of 20 s. for his Lands in the Town of *Stoke Mandevile*, and that he did refuse to pay it, and did not pay it unto him, nor any of the Collectors that were appointed.

This being returned into Chancery, and no Order there made, or any Rule, that the Sum imposed on Mr. *Hampden* should be paid, 5 Maii then following, in the same Term cometh a *Mittimus*, reciting the Effect of those Writs, which is directed to the Lord Treasurer and Barons of the Exchequer; herein the Tenor of the Writ (and not the Writ itself) is certified into the Exchequer; and withal it certifieth the rest of the Record, together with the Schedules annexed to those Writs; and by that it is commended to the Court that they should proceed to do for the further Receipt and Collection of the Sums behind, as by the Law and Custom of the Kingdom of *England* should be required.

And upon this Certificate here cometh a Writ of *Sci' Fa'* directed to the Sheriff of *Bucks*, to give Notice to the Persons that were Defaulters, that they should appear and shew Cause, if they could say any thing, why they should not be charged therewith according to the Laws and Customs of the Realm; and the Writ is so returned: And upon that Return Mr. *Hampden* appears upon the Day in Person, and after Oyer of the Proceeding, hath demurred.

Upon this Record, this being the Case, and the Demurrer thereupon joined, we are to see what is the Law and Custom of *England* upon the Matter extant in the Record; for I intend not to expatiate beyond the Record, but to stick close to it, as it is in the Case now depending in Court, upon this Record: And therein I shall confine myself to some few general Heads, I shall not be long in any thing.

The first thing is, Whether these two Powers and Mandates mentioned in the Writ 4 *Aug.* 11 *Car.* the original Ground of this Suit, the one for Preparation of a Ship and Furnace, and of the Reliefe therein mentioned, as also another for Taxation at the Pleasure of the King, and of other Persons to whom it is returned, and that extended upon the Motives of the Writ 2 *Aug.* 11 *Car.* I say, that these two Mandates were not granted in Law, according to the Law and Custom of the Kingdom of *England*, upon the Motives as they are recorded: that is the first Question: If that be true, then the *Sub Po.* is at an end. If there be no legal Charge imposed upon the Country, then he ought to be discharged.

The second Question is upon the original Heade admitting that were legal in themselves, according to the Tenor of the Writ, to be then lawful, it is reduced by the Record. In this I shall offer to Consideration, what was the Cause of the Writ 9 *Aug.* 11 *Car.* out of Charge, after the Time so put for Execution of the first Writ which is returnable, that upon that it be so legal, and according to the Course of Law, as may be seen by the Record to be a sufficient Ground and Cause, that the *Sub Po.* is at an end, is the second Question.

The Third Question: This Writ being issued out, and the Defendant having appeared, and demurred in Law, whether there can be such Matter therein, that they may charge the Defendant with the Sum imposed upon him, so that the King may have a Judgment and Execution upon it, is the third Question.

This Case is a Case of very great Weight, and doth many concerns carry out of us to have an especial Eye unto it. It is an usual Question in our Books, whether we have much View.

However it be in the Records, to which we are now tied, it concerns the Prerogative of the King, and the Estate of the Subject. In my Confidence I think for the Act that was done was a gracious, honourable, and royal Act, and proceeding upon just Cause, that there should be a present Remedy for avoiding the Inconvenience that did appear, no doubt for our Good. Herein, tho' it be known to every one that knoweth me, but especially to myself, if I partake of the Rule that every Man is bound unto, *Nolle teipsum*, I know well, that no Man is more bound, nor oweth a more tender Care to preserve the King's Prerogative, and to do that which may advance the same, as we are all bound to do by the great Oath that we have taken upon our Promotion: And in that Particular, I profess none more bound than myself.

Upon this I have been told, and I have truly looked into the Records, so far forth as my Means will give leave; and according to what I understand of the Law, and the Custom of the Kingdom of *England*, to be upon this Record, I must needs say, tho' I do confess for my own particular unwillingly, that upon this Record Judgment ought to be given for the Defendant, *Quod*

Johannes Hampden sit quietus, &c. however with Submission to the greater Vote of my Brothers.

For first, I do conceive, that this Charge, thus commanded, and thus taxed, is not warranted by the Laws and Customs of the Kingdom of *England*: I shall therefore offer to the Consideration of the Court, the several Discussions upon the Writ.

First, For the Writ 4 *Aug.* 11 *Car.* directed to the Sheriff of *Bucks.*, to the Mayor and Burgesses of *Buckingham*, and Bailiffs and Burgesses of *Chipping-Wilcombe, & prælis hominibus Com' Bucks*; hereby are they charged upon their Allegiance, that they should, before the first of *March* following, prepare at their own Costs and Charges, for *prælis hominibus*, thro'out all the County, a Ship of War to be furnished, and that the same Ship of War they shall maintain at their own Costs and Charges, for the Space of 26 Weeks, to attend the King's Navy, for the Custody of the Sea, as the King shall direct and direct.

This first Part I take is not warrantable by the Law and Custom of *England*; in respect, being a Matter of so great a Charge, and by them, being an Island County, impossible to be performed to prepare a Ship before that Time, being no Maritime County, but an Island County: This I do take to hold, that this is not a Charge to be imposed upon a County, by the Name of *prælis hominibus*, or of the particular Men there named, except it were by their own Consent and Approbation. And with their Consent, I agree, a Charge upon *prælis hominibus*, for they receive nothing to their own UEs, if good enough; whereof I find one excellent Record, 24 *Ed.* 1. A Writ that issued out of the *Exchequer*, and when of there is the Record remaining to this Day inrolled and certified to be a true Copy: There it is directed in Case of Necessity, when the King is absent beyond the Sea, upon Information of the Discovery of a present and instant Invasion of the Enemies in *Land* and *France*, under Colour of coming as *Palatians* to surprize the Town of *Yarmouth*, and all the Parts of the Coasts thereabouts; the Lord Treasurer that then was, the King being beyond the Sea, the Under-Treasurer who had the Custody of the Sea, and the Barons of the *Exchequer*, carried a Writ to be directed to the Bailiffs *prælis hominibus* of that Town; and no doubt of it, in the Judgment of our Predecessor himself, was good Law, and the Writ legally executed upon the instant Necessity appearing. But *Lord* speaks not so much of the Necessity, as hath been observed: Therefore it is not good to conclude upon some general Words in him, That in no Case of Necessity the Charge can be laid; for the Scope of the whole Book, consider'd well, will not warrant it: The Intent of it is not against Cases of Extremity. You see not in the Case, but that therein the Regal Course must be observed, according to the Law and Custom of the Kingdom of *England*.

But when I do consider of the first Charge of preparing a Ship at their own Charges, and of the Consideration of the next Charge in the same Writ for Taxation, I do not see, nor I cannot perceive, how the same do agree, but that the one is repugnant unto the other; for that the former Part commands the Charge to be generally by all; and by this last Power it is limited to be done by a particular Person, and that to be done at his Will, and as he shall think fit; whereby

the Sheriff, Mayor, and Bailiff, thus employed, are excluded from the Charge; for they can do no Act upon themselves. It should have been done *per sacramentum proborum hominum*, considering these two different Powers. I hold the Law so to be clear in this Point. It appears not upon this Record that they were assenting unto it, or agreed upon any Ordinance herein.

Now the Power of the Preparation, upon the whole it is on the Sheriff himself, Mayor, Bailiffs, *probos homines* and all; but when you come to the latter *ipso facto*, by the Laws and Customs of the Realm, a great Part of the former Charge is removed directly from those that were chargeable: Power of Taxation is appointed, to whom? to the Sheriff, and how can he tax himself? He and all his Estate within the County of *Bucks* under the first Charge, and all discharged by the Power of Taxation limited in the second Clause: and therein I take it, that this same is not legal according to the Customs and Laws of *England*, the one doth not agree with the other. If you ask me the Reason of it, my Brother *Hutton* hath given it. The Charge is upon the Sheriff, and 'tis not possible for the Sheriff to tax himself, he cannot find himself *inter Rebelles*, he cannot commit himself to Prison, there to remain till such time as the King's Majesty shall deliver him; that he cannot do. So for the other *Manors* of *Buckingham* and *Chipping-Wiccombe*, exempted likewise; if they can do this, then clearly the former Charge, imposed by the first and said to be done by them all, is out out of doors.

Now it cannot be done, according to the Law of *England*, upon the Sheriff or upon his Land. The Point I think is very evident in our Books. 18 *Hen. VIII.* If a Defendant that is Sheriff be to be summoned, and he return that he cannot do it, Justice *H—* said that Return was not good, for that he might summon himself. 8 *Ed. III.* But if it come to a further Question, that if there be any Execution to be done where another may be prejudiced, he cannot do it, as to impanel a Jury upon a Writ, where he is a Party, which may prove a Prejudice to another; for if he do, it is not lawfully done, as it is in *Dyer, fol. 8, 9.* Of the Sheriff in a common Recovery. So upon these Authorities, for the first question, I hold it manifest, that this Act which the Sheriff is charged to do, is afterwards by this second Power discharged: these two Powers do not cohere, and therefore are not warranted by the Laws and Customs of the Realm of *England*.

Concerning the first Question my Opinion is clear, that there is a material and legal Exception appearing on the self-same Writ. My Reason is, the Sheriff is the great Officer of the County; but when he must do it, I take it legally, he ought to do it according to the Duty of his Place by the Law of *England*; that I do not take to be at his Will and Pleasure to lay one thing upon one, and another thing upon another: for my part, I conceive this must be done *per sacramentum*; he is not to be Judge in case of Uncertainties, when a division of Charge and Taxes is to be made; where things are put in Certainty in any of the King's Courts, there he may execute, as take a Man's Goods, imprison, &c. but in case of Uncertainty, the Law hath annexed to his Office a Way and Means how to reduce the thing to a Certainty, and that is, *per sacramentum proborum hominum*: as in the Case of Parceners, if they

have a mind to make Partition of their Inheritance, they may do it by Agreement between them if they will, or by making of Lots by a third Person, and the Elder shall chuse; but if she herself make the Partition, she shall not both divide and chuse; that alters the Case for Execution, when it is *in propria persona*. But admit they cannot agree, the Judgment of the Law is, that the Sheriff shall go in his proper Person into the Ground; shall he at his Discretion make the Partition as he pleaseth? No: The Judgment is, the Sheriff shall go in Person unto the Land, and that there *per Sacramentum, per Inquisitionem*, to be taken by chosen Jurors, they must consider of it; upon such a thing so done *per Sacramentum*, then indeed it is in the Sheriff's Power, he may now chuse whether he will prefer the Elder or the Younger. But for our Case, that this should be done by a Sheriff, by his Discretion, whilst the Interest of several Persons is concerned, is as it were to make a Rape. I do not find that in any Book of Law, I must confess. In that Act, which is done by the Law, there can be no Error or Partiality; so in *Writ. Ne' Br'* in his Writ *de onerando prorata portione*, see what there is to be done: it goeth to the Sheriff, he is trusted with the doing of this, but he is trusted by legal Means; what shall he there do? Where 20 Acres of Land held of the King in chief, they are sold to several Hands, there must be a Writ *de onerando pro rata* for discharging of the Rent; but this must be done *per Sacramentum*, not by the sole Power of the Sheriff. Hereof I find a notable Precedent; it is true, it is not in our Books of Law, but in an Historian; yet he doth set it down in that manner, that a Man may trust him so far; *Matth. Par.* he saith, and sheweth us that 17 *Hen. III.* eight Years after the making of *Mag' Char'* authorized by Parliament, that the King himself in his Parliament was pleased (according to the Institutions of Parliament) to require *Concilium & Auxilium*, for the King's Wars; where, by the way, let me observe, that *Auxilia* from the Subject granted to the King in Parliament are not merely voluntary, but Duties, to give Monies for Supply of Necessities of State; and in that I agree with the Opinion of my Predecessor, *Ho. Chief-Baron.* 19 *Hen. VI.* The King is bound to defend the Kingdom. The same Law that binds him to the Defence of the whole Realm, gives the King a Right of Inheritance to claim Subsidies for the Defence thereof. But to return to *Mat. Paris*: It appeareth there that the King in Parliament did demand Aid of his Subjects, *Concilium & Auxilium*, their Counsel as they were bound, their Help as they were able. It is said, that they made Choice of the Earl of *Chester* to give their Answer, who at first held it not fit to do it, alledging their Estates were but weak, that by the Laws of the Kingdom they that had been there in Person, they for their Escuage might not be troubled. The Prelates they were more courteous in their Answer, they desired Time to assemble themselves together, many being far distant: thereupon was a Time assigned, till *Mens' Pasch'*. In the mean time they all considered, the Lords on the one side, and the Lords Spiritual on the other side; and being demanded a Fifteenth of their Goods, they answered, So as they might have their ancient Laws established to them, for which they had been so much troubled, they would willingly assent unto it. The King consented unto it, and thereupon