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A SHORT

ACCOUNT

OF THE

Authorities in LAW,

UPON WHICH

JUDGEMENT

Was given in

Sir *EDW. HALES*

HIS

CASE.

WRITTEN BY

Sir *EDW. HERBERT*,

Chief Justice of the Common Pleas,

In Vindication of HIMSELF.

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HAVING been call'd to a place of Judicature in difficult times, after my most sincere Resolutions and uttermost Endeavours of discharging the Duty of that place with a good Conscience, having yet had the hard Fortune to fall under the greatest Infamy and Reproach that is possible for any man to lie under, of Perjury and Breach of Trust, in giving a Judgment in *Sir Edward Hales*

his Case contrary to Law, and contrary to my Knowledge and Opinion (for that only can make it Criminal;) and which, they say, tends to the Subversion of all our Laws; contrary to the Oath that every Judge takes, and to that high Trust repos'd in him to judge, to the best of his understanding, according to Law: Although I cannot hope to wipe off that universal ill Impression that the Malice of some People who understand the nature of this Case very well, has made upon most men who do not understand it; yet in order to clear my self to all just and dis-interested Persons who are only my Enemies by mistake, I think my self obliged to give some short Account of that Judgment, and the Grounds upon which it was given; and this I will do, not by making an elaborate and legal Argument, to make out by Reasons of my own, that the Judgment then given is consonant to Law, which whether it be or no, is like to be considered in Parliament, and to whose determination I shall as intirely and as chearfully submit as any other Person in the Nation: But I shall set down, not all the variety of Cases that we meet with in our Books touching the Kings Power of Dispensing with Acts of Parliament, for that would swell this Paper to an unreasonable length, and discourage many from reading any part of it; but only some few of the chiefest and plainest Authorities in Law,

upon.

upon which the Resolution in the Case of Sir *Edw. Hales* was grounded. I shall not only cite the Books and Pages where those Cases are to be found, but transcribe the very Words, that every body may be convinced, that if we were in a Mistake, it was no Wilful Mistake, but that we had the Authority of former Judgments given by great Men that went before us (and for which they were never question'd) to lead us into it.

The Case (for I must state it upon my Memory, not having any Copy of the Record by me) was shortly this.

An Action Popular was brought against Sir *Edw. Hales*, upon the Statute 25. *Car. 2. c. 2.* for the Penalty of 500*l.* wherein the *Plaintiff* declares, That whereas it was provided by the Statute, &c. setting forth the Statute: Notwithstanding which, the *Defendant* having a Commission to serve the King as a Colonel of Foot, and not having received the Sacrament, nor taken the Oaths and Tests, &c. within the times prescribed by the Act, and after the times expired wherein he ought to have received the Sacrament and taken the Oaths and Tests as aforesaid; he did execute the said Office, and continued to act by colour of the said Commission, of which he was Indicted and Convicted at the Assizes in *Kent*, &c. whereby the Action accrues to the *Plaintiff* for the Penalty of 500*l.* The *De-*
fendant.

Defendant pleads that before the times expired, &c. he had a Dispensation under the Broad Seal to act *Non obstante* that Statute.

To which the *Plaintiff* demurres.

And Judgment was given for the *Defendant* that his Plea was good.

And first it will be necessary to shew what the Nature of this Dispensing Power is, which is warranted by our Judgment; and that will best appear by the Definition of it which is given in the 11. Report of my Lord Coke, p. 88. in the Case of Monopolies. *Dispensatio mali prohibiti est de jure Domino Regi concessa propter impossibilitatem prævidendi de omnibus particularibus; & dispensatio est mali prohibiti provida relaxatio, utilitate ceu necessitate pensatâ.*

“ For true it is (says the Book) that inasmuch as
 “ an Act of Parliament, which generally prohi-
 “ bits any thing upon a Penalty that is Popular, or
 “ only given to the King, may be inconvenient to
 “ divers particular Persons, in respect of person,
 “ time, or place; for this purpose the Law gives
 “ a power to the King to Dispense with particular
 “ Persons. And in the Seventh Report, pag. 63.
 in the Case of Penal Statutes, which was the opi-
 nion of all the Judges of *England*, 2. *Jacobi*, It is re-
 solved, That the King may Dispense with any par-
 ticular Person, that he shall not incur the Penalty
 of the Statute, tho it be an Act made *Pro bono pub-
 li*.

lico, and that this is a Trust and Confidence inseparably annex'd to the Royal Person of the King. I cite these two first Cases chiefly to shew that a Dispensation in its nature is particular, and given to particular Persons by Name; which is all the Power that is attributed to the King by our Judgment. And this I mention because of an unreasonable mistake of most People that talk of the Dispensing Power, as tho the Kings Declaration of *Liberty of Conscience*, whereby all the Laws that concern Religion are at once totally suspended and laid asleep, were warranted by it: Let that Declaration stand or fall upon its own bottom, I am sure the Case I am now speaking of has nothing to do with it. And having by these Cases cleared the nature of all Dispensations, which are always granted to particular Persons (as Sir *Edw. Hales* his was in our Case, who was the first, and I think the only Person who then had such a Dispensation,) I shall now cite some of the chief Authorities upon which our Judgment was given in that Case; and the first and great Case that I cite, wherein the Kings Dispensing Power is described and limited, is in the Year-Book of *Hen. 7. fol. 11. & H. 7. f. 12.* in these words, “ There is a diversity (says the Book) “ between *malum prohibitum* and *malum in se*, as “ a Statute forbids any man to Coin Mony, and “ if he does, he shall be hanged; this is *malum pro-*
“ *hibitum*,

“ *hibitum*, for before the Statute, Coining Mony
 “ was Lawful ; but now it is not so, and there-
 “ fore the King can Dispense with it. So if a
 “ Man Ship Wooll in any place but *Calice*, it is
 “ *malum prohibitum*, because it is prohibited by Act
 “ of Parliament, and the King can Dispense with
 “ it, and so in like cases : but that which is *malum*
 “ *in se*, the King nor no other person can dispense
 “ with, as if the King would give a Man power
 “ to kill another, or License one to make a Nu-
 “ sance in a High-way, this were void ; and yet
 “ the King can pardon these things when they are
 “ done. These are the very words of that Book :
 and my Lord *Vaughan* discoursing of, and explain-
 ing this case in the Case of *Thomas and Sorrell* in
 his Reports, p. 333. First, shews how a Dispen-
 sation differs from a Pardon. For a Dispensati-
 on does *jus dare*, and makes the thing prohibited
 (to all others) lawful to be done by him that has
 it: And therefore the King cannot dispense with
mala in se, because they never were, and can never
 be made lawful ; but even these, says the Year-
 book, may be pardoned after they are done.

From these Cases, results this plain Syllogism.
 Whatever is not prohibited by the Law of God,
 but was lawful before any Act of Parliament
 made to forbid it, the King, by his Dispensation
 granted to a particular person, may make lawful
 again ;

again; to that person who has such Dispensation, though it continues unlawful to every body else.

But to execute any Office without taking the Oaths and the Tests antecedent to any Acts of Parliament made to forbid it, was lawful.

Therefore the Dispensation granted to Sir *Edward Hales* did make it lawful for him to do so, though it continued unlawful for any body else.

In this Argument the premises are none of our own, we have them out of our Law-books; and the Authority of those books have never yet been questioned. I appeal then to any indifferent person, whether it can be Criminal in Judges, to draw a necessary Conclusion from Premises and Book-Cases that have been taken for Law for so many Ages together.

The next great Case is the Resolution of all the Judges of *England*, in the 2. of *Henr. 7.* in the Exchequer Chamber, upon the Kings Power of Dispensing with the Statute of 23 *Henr. 6.* cap. 8. *That no Man should be Sheriff for above one Year.* The recital in the preamble, and the whole purview, if compared with our Statute of 25 *Car. 2.* cap. 2. equals it in every particular, and in some goes beyond it: for the mischiefs recited in this latter Statute are only in these words, *for preventing dangers which may happen from Popish Recusants, and quieting the minds of his Majesties good Subjects.*

The Cause of making the Statute of 23 *Hen. 6.* is for preventing the Importable damage of the King and his People, Perjury, Manslaughter and great Oppression. The Purview Enacts,

1. *That no Man shall be Sheriff for above a Year.*
2. *That all Letters Patents made for Years or Lives, shall be void.*
3. *That no Non obstante shall make them good, (which shews that the Parliament thought the King could otherwise have dispens'd with this Act by a Non obstante.)*
4. *Whoever acts by colour of such Letters Patents, shall forfeit 200l.*
5. *He shall be utterly disabled to bear the Office of Sheriff in any County of England.*
6. *That every Pardon for such offence shall be void.*

Notwithstanding all this, it was adjudged in that Case before-cited by all the Judges of *England* (who were at that time as learned as ever sat upon the Bench,) I say it was adjudged by all the Judges in the Exchequer-Chamber, that the Kings Dispensation with that Statute was good.

Having then this Case before us, if we should have judged the Dispensation not good in *Sir Edward Hales's Case*, it must have been upon one of these two grounds: that is, either,

1. In the first place, we must have found some difference between the Kings power in that Case, and in this, which I confess, after the nicest inquiry, does not appear to me, and I wish any man would shew me any such difference if he can: or else,

2. We must have adjudged that Solemn Resolution given in the Exchequer-Chamber by all the Judges of *England* so long ago, and which has been taken for good Law for ever since, we must adjudge no Law: whereas the known Rule is, that after any point of Law has been solemnly settled in the Exchequer Chamber by all the Judges, we never suffer it to be disputed or drawn in question again.

But our Enemies seeing the force of this Argument have had the Confidence to say, that that point is not resolved in that Case, they might with as much modesty affirm, *Thou shalt not bear false witness against thy Neighbour*, to be none of the Ten Commandments; we can only reply in this case as in that, that if we have eyes to read, and common sense to judge, it is there resolved. Indeed there is another point about the Sheriffs passing his Accounts, which the Judges were divided in: but in the point of the Dispensation they all agreed, or else that other point could never have come in question.

But to put this beyond all Controversie, we have two things to offer.

1. First, That it has been cited as adjudg'd in several books of great Authority.

2. Secondly, It has been the constant practice to have such Dispensations in all Kings Reigns ever since that Resolution.

As to the first, Though I might cite many books, yet I will only cite three or four of the clearest and greatest Authorities: and the first shall be *Fitzherbert*, in his Abridgement of this very Case, *Tit. Grant. 33.* who lived near this time, and could not easily be mistaken in the sense of the Year-book; *The Patent*, says he, was adjudged good by all the Justices; *but the Statute says expressly it shall be void*, therefore it is only made good by the Kings Dispensing.

2. Next to him shall be *Plowden*, who, as all Lawyers will confess is as little like to be mistaken in the sense of the Year-books as any Reporter we have; and he in his *Commentaries*, p. 502. in the Case between *Greendon* and the Bishop of *Lincoln*; after citing the Case both out of the Year-book, and out of *Fitzherbert's* Abridgement, has these words where the Statute was, *That the Kings Grant to any Man to be Sheriff of any County for longer time than a Year shall be void, notwithstanding any Clause of Non obstante to be put in-*

to the Patent, there it is held, that the Kings Grant to the Earl of Northumberland, to be Sheriff during life must have a Clause of Non obstante, because of the precise words of the Statute before mentioned; and with such a Clause of Non obstante, the Patent to the Earl was good.

3. Next is my Lord Coke, who asserts the Kings Prerogative touching this matter in much higher terms than we would presume to do, in giving judgment in Sir Edward Hales his Case, for in his Twelfth Report, pag. 18. he has these words. No Act can bind the King from any Prerogative which is sole and inseparable to his person, but that he may dispense with it by a Non obstante, as a Sovereign Power to command any of his Subjects to serve him for the publick weal; and this solely and inseparably is annexed to his Person: and this Royal power cannot be restrained by any Act of Parliament, neither in Thesi nor in Hypothesi, but that the King by his Royal Prerogative may dispense with it: For upon the Commandment of the King, and Obedience of the Subject does his Government consist: as it is provided by the Statue of 23 Hen. 6. cap. 8. That all Patents made or to be made of any Office of a Sheriff, &c. for term of Years for life in Fee-simple or intail, are void and of none effect, any Clause or Paroll de non obstante, put or to be put into such Patents to be made notwithstanding: And further whosoever shall take

upon

upon him or them, to accept or occupy such Office of Sheriff, by Vertue of such Grants or Patents shall stand perpetually disabled to be, or bear the Office of Sheriff within any County of England; by the same Authority, and notwithstanding that by this Act, First, The Patent is first made void. Secondly, The King is restrained to grant Non obstante. Thirdly, The Grantee disabled to take the Office, yet the King by his Royal Sovereign Power of Commanding, may Command any man by his Patent (for such causes as, he in his wisdom doth think meet and profitable for himself and the Common-Wealth, of which he himself is solely Judge) to serve him and the weal publick as Sheriff of such a County for years, or for life, &c. And so it was resolved by all the Justices of England in the Exchequer Chamber, 2 H. 7. And after some other cases to this point of the Kings Prerogative, he has this farther (says he) see 4 Hen. 4. cap. 31. In which it is Ordained that no Welshman be Justice, Chamberlain, Treasurer, Sheriff, Steward, Constable of a Castle, Escheator, Coroner or chief Forester, nor other Officer whatsoever, nor Keeper of Records, &c. in any part of Wales, notwithstanding any Patent made to the contrary, with Clause of Non obstante licet sit Wallicus natus: and yet without question the King may grant with a Non obstante. Thus far that Book, and I have transcribed the Book at large; that every body may see that the Kings Power of Dispensing

pensing with such Acts of Parliament as restrain his granting Offices, stands upon a peculiar reason besides the general one; upon which his power of Dispensing with other Penal Laws is founded. And that if this be a pernicious Opinion, we are not to suffer as the first Authors of it. But lest it should be Objected, that this is my Lord *Cokes* single Opinion; or that the twelfth Report is not of so great Authority as the rest of his Reports are: The same is Resolved by all the Judges of *England*, (if my Lord *Coke* be a faithful Reporter) in *Calvin's Case* in the seventh Report, p. 14. in these words: *Every Subject is by his Natural Allegiance bound to serve and obey his Sovereign, &c. It is Enacted by the Parliament of 23 H. 6. That no Man should serve the King as Sheriff of any County above one Year, and that notwithstanding any Clause of Non obstante to the contrary; that is to say, Notwithstanding that the King should expressly Dispense with the said Act; howbeit it is agreed 2 H. 7. that against the Express Purview of that Act, the King may by a special Non obstante Dispense with that Act, For that the Act could not bar the King of the service of his Subject, which the Law of Nature did give unto him.* This is Reported (unless my Lord *Coke* had a mind to deceive the succeeding Judges, and draw them in, to give pernicious Opinions). as the sense of all the Judges of *England* in King *James* his time, in the Exchequer Chamber. And

And now I would ask, these Cases thus solemnly resolved, are they Law? Or are they not? If it shall be said that they are not Law? What Foundation have the Judges to stand upon? Or what certain Measures can they take in giving Judgment, either between the King and his Subjects, or between Party and Party: If so many solemn Resolutions by all the Judges of *England* in the *Exchequer* Chamber, are not to be relied upon? If they are Law; then I appeal to all mankind whether our Case does not come up in every tittle to the reason of those Resolutions: Whether the Act. of 25. *Car. 2.* do not bar the King of the service of some of his Subjects; and whether therefore for great Reasons, and in particular Cases he may not dispense with it.

But besides the Authority of this Case, we have the constant practice, that this Statute of Sheriffs has been constantly dispensed with ever since it was made; and if those Dispensations were not good, then all persons Convicted upon Indictments found by *Grand Juries*, returned by such Sheriffs, are illegally Attainted; then all Pannels of Juries returned, and other Procces executed in Civil Causes, by such Sheriffs, was altogether erroueous, and it is strange that nobody in so long a time should hit that blot.

Obj. The only Objection, that I hear, is made to this, by eminent men of our Profession, (who freely acknowledge the Authority of these Cases, and the Resolution in them, that no Act of Parliament can debar the King of the service of his Subjects, which the Law of Nature gives him, to be good Law;) is this, that say they, It is not the Act of Parliament that debars the King of the service of his Subjects in this Case, but it is the default of those Subjects, who will not qualify themselves for his service, by doing those things that the Statute requires. But for a full and plain Answer to this, I say,

1. First, We are not now considering these Grants of Offices, as they are beneficial to the Subjects, on whom they are conferred, but as the King has an interest in the service of those Subjects; and it is a known Rule in Law, that among common persons, no man shall suffer by the default of another; much less shall the King be prejudic'd by the default of any of his people.

2. But Secondly, Pray where is the difference between an Act of Parliaments barring the King directly of the service of his Subject, and doing of it by necessary and inevitable Consequence? As, if an Act of Parliament were made that no Man that is Lame or Deaf should serve

the King in any Office, though they were otherwise well qualified for it; the King were as effectually debarred of the service of such Subjects, as though they had been expressed by Name. I know it will be said, that these are Natural defects which the Subjects cannot help, but the others are Wilful Impediments, that may be removed, if they please.

But to prove that this is not so: I ask, Whether when the Act requires Declarations and Subscriptions to be made, it should be done *contrary* to a Mans Opinion, or *according* to it? Certainly no Man will say, *contrary* to a Mans Opinion, for that would be high Dissimulation, and more elude the ends of the Act, than not doing it at all. If then it must be done *according* to a Mans opinion, it is no more in any Mans power to change his Opinion, than to cure himself of Deafness or Lameness. Every Man believes, not because he will, but because he must believe. Error is a Disease of the Mind, as much as those beforementioned are of the Body. It is true, a Man may seek for Instruction, and use all means to be better informed; and so may a Man, in the other Case, try all proper Remedies to Cure his Distempers; but proper Remedies do not always effect the Cure, and often when they do, there is much time taken up in
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the Operation: and the King, who is in no default at all, loses the service of his Subject in the mean time: And if this Prerogative be, as my Lord *Coke* says, *Proprium quarto modo*, and that it belongs to our Kings, as he says, *Omni, soli & semper*: The King can be no more debarred of the service of his Subject for a month, or a year, than he can be debarred of it for ever; especially since in that month, or year, may happen such occasions, which afterwards during the joint Lives, of the King that is to command, and of the Subject to be commanded, may probably never happen again.

Many other Cases of Acts of Parliament might be cited, as 8. R. 2. 2. That no Man should go Judge of Assize into his own Country. And 10. E. 3. 3. That whoever has a Pardon of Felony, shall find Sureties of the Good Behaviour, or his Pardon shall be void; which Statutes have been constantly Dispensed with ever since they were made: but I resolve not to heap up all the Cases of Dispensations, but to confine my self to those that were, as they are before cited, the principal ground of our giving Judgment in Sir *E. Hales* his Case. Only after I have answered some Objections, I have two Authorities more to offer, which I take to be of greatest weight in this Case, and that is two Concessions of the Com-

mons of *England* in Parliament, acknowledging this power of Dispensing to be in the King.

But first, To answer an Objection or two that I hear is made :

1. *Obj.* This Act was made *pro bono publico*, and in the Case before-cited, of 11. *H.* 7. The King cannot Dispense with a common Nufance; and this Case Dispensed with, would be as bad as Dispensing with a common Nufance.

Anfw. Tho this will receive an easie Answer, yet I shall avoid giving it in words or reasons of my own (as I do all along, because I know they would be suspected and misconstrued) but in the words of my Lord *Vaughan*; whom I cite the oftener, because every body remembers him, and it is very well known, he was never guilty of straining the King's Prerogative too high. In *Thomas and Sorrel's Case*: The chief Reason why the King can't dispense with a publick Nufance, is said by him to be, because every particular person that has received damage by it, may have his Action, which the King cannot bar. Nor see I any reason, says he, page 335. *Why the King may not Dispense with those Nufances by which no Man has right to a particular Action, as well as he may with any other offence against a Penal Law, by which no third person has cause of Action: from whence it follows, that if an Act of Parliament call*

an Offence a Nufance, from whence no particular damage can arise to a particular person to have his Action, the King may Dispense with such a nominal Nufance.

Now to apply this to our Case, for exercising an Office without taking the Test, no particular person can have an Action, because no particular person can have any Damage by it, (for an Action, as an Informer, is not meant, that being the Case of all popular Statutes) and therefore the King may Dispense with it, before the Action brought: and in page 341. he explains this very well. *No Offence, says he, against a Penal Law could be Dispensed with, if the reason of not Dispensing, were because the Offence, is contra bonum Publicum, for all Offences against Penal Laws are such, p. 342. though such Laws are pro bono publico, they are not Laws pro bono singulorum Populi (which are the Laws which the King cannot Dispense with, as will appear at large in the Concession of the Commons, 3 Caroli, which I will cite by and by) but pro bono Populi complicati, as the King in his Discretion shall think fit to order them for the good of the whole. In this Notion the Estate of every Pater-familias may be said to be pro bono communi of his Family, which yet is but at his discretion, and management of it; and they have no Interest in it, but have Benefit by it.*

Obj.

Obj. 2. But it is again Objected, that in Statutes that are *pro bono Publico*, in a less degree, the King may Dispense. But this Statute was so highly necessary for the Publick, that it could not be Dispensed with.

Ans. To which my Lord Vaughan Answers in the Case before-cited. p. 344.

1. *All Penal Laws, when made, and in force, are equally necessary, and in things necessary, there is no gradation of more or less necessary.*

2. *If any Penal Laws were possibly less Dispensible than others, those capitally Penal were less Dispensible than those less Penal. But it is not so: for Coining Money of right Alloy in imitation of the Kings Coin, is capitally Penal without licence, but it may be licensed, &c. It is capital to multiply Gold or Silver, by the Statute 5 Hen. 4. c. 4. but may be licensed, as was done to John Faceby, tempore H. 6. The Dispensation with a Non obstante to that Statute may be seen, Coke, Placita Coronæ fol. 74. cap. 20.*

Obj. 3. But if the King have a Power to dispense with one, he may dispense with twenty, with an hundred, and so the Statute may become of little force.

Ans. From the Abuse of a thing to draw an Argument against the thing it self, is no Consequence at all; it is, as is resolved in the Cases above cited, a high Trust reposed in the King, and if the

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the King will violate his Trust, there is never a one of his Prerogatives but may be abused, to the ruin of his People. To instance in one or two.

1. Every body will grant, that the King can pardon Murther and Robbery, yet if he should pardon every Murther and every Robbery that is committed, it were better to live with the Cannibals in *America*, than in our Native Country; and the Human Laws that are made to punish those Crimes, would be rendered of as small force and effect, as it is objected the Law in our Case would be by frequent Dispensations.

2. There is no doubt, but the King may create any Man a Peer of *England*, and thereby give him a Vote in Parliament; yet if the King should abuse this Power so far as to create ten thousand Peers, or confer this Honor upon every body that asks it, no doubt it were a total Destruction of the Legislative Power of the Nation. And yet in either of these Cases, (or in any other branch of the Kings Prerogative) if the Judges should judge the King had such a Prerogative, it were an unreasonable Objection, to say, These Prerogatives may be abused; *Ergo* the Judges have given a pernicious Judgment.

When we were to give Judgment in Sir *Edward Hales* his Case, we could neither know, nor hinder if we did, any ill use the King might make of this Power, we were only to say upon our Oaths, whether.

whether the King had such a Power or no, and for that we had the great Authorities above-cited, and two much greater than those; I mean two several clear Concessions of all the Commons of *England* in Parliament assembled, of this Dispensing Power to be in the King; and that not in a submiss complying temper, but when they were in a high Debate with the Crown (especially in the latter Case) about the Violation of other Laws.

And the first of these is *Rot. Parl. 1. Hen. 5. n. 15.* and it is printed in *Rolls Second Abridgment, Tit. Prerogative 180.* the Record is in these words, *The Commons pray that the Statutes for Voiding of Aliens out of the Kingdom, may be kept and executed: To which the King agrees, saving his Prerogative, that he may Dispense with whom he pleases; and upon this the Commons answered, that their intent was no other, nor never shall be by the Grace of God.* There were as great apprehensions of Dangers and Inconveniences from Aliens then, as there is from Roman Catholics now.

And afterwards, in the same Parliament, [*Rot. Parl. 1. Hen. 5. n. 22.*] when the Commons pray that the Statutes of Provisors, Statutes of the same Nature with this in our Case; (for they were made against the Court of *Rome's* encroaching Jurisdiction in *England*;) I say when they make the like Prayer, that these may be put in execution, being admo-

admonished by the Kings Answer in the former Case, they themselves insert in their very Prayer, a Saving for this Prerogative of the Kings, and then the King agrees to it.

But the plainest Concession of the Commons of *England* assembled in Parliament, was that 3 *Caroli*, upon a Debate between the Two Houses, upon the Petition of Right; it is in *Rushworth's* Collections, First Part, as it was deliver'd by Mr. *Glanvill*, in a full Committee of both Houses of Parliament, 23. *May* 1628. in the Painted Chamber: and that what he says as to this matter, may not pass for the single Opinion of Mr. *Glanvill*, (tho he was a Learned Man) he in the presence of the Commons, addresses himself to the Lords in these words, p. 571. *Having thus reduced to your Lordships Memory the effects of your own Reasons; I will now with your Lordships favour, come to the points of our Reply, wherein I most humbly beseech your Lordships, to weigh the Reasons which I shall present, not as the sense of my self, the weakest Member of our House, but as the genuine and true sense of the whole House of Commons, conceived in a business debated there with the greatest Gravity and Solemnity, with the greatest concurrence of Opinions, and Unanimity that ever was in any business maturely agitated in that House. And then coming to speak of the Point in question, he delivers the sense of the Commons in these*

Words: There is a Trust inseparably reposed in the persons of the Kings of England, but that Trust is regulated by Law; for example, when Statutes are made to prohibit things not mala in se, but only mala quia prohibita, under certain forfeitures and penalties to accrue to the King, and to the Informers that shall sue for the breach of them: the Commons must, and ever will acknowledge a Regal and Sovereign Privilege in the King, touching such Statutes, that it is in his Majesties absolute and undoubted Power, to grant Dispensations to particular persons, with the Clauses of non obstante, to do as they might have done before those Statutes, wherein his Majesty conferring Grace and Favour upon some, doth not do wrong to others; but there is a difference between those Statutes and the Laws and Statutes whereon the Petition is grounded: By those Statutes the Subject has no Interest in the Penalties, which are all the Fruit such Statutes can produce (that is, to such Informer) until by Suit or Information commenc'd, he become intitled to the particular Forfeitures; whereas the Laws and Statutes mentioned in our Petition, are of another Nature; there shall your Lordships find us to rely upon the good old Statute called Magna Charta, which declareth and confirmeth the ancient Common Laws of the Liberties of England. There shall your Lordships also find us to insist upon divers other most material Statutes, made in the time of King Edward III. and King Edward IV. and other

other famous Kings, for explanation and ratification of the Lawful Rights and Privileges belonging to the Subjects of this Realm: Laws not inflicting Penalties upon Offenders in malis prohibitis, but Laws declarative or positive, conferring or confirming ipso facto, an inherent Right and Interest of Liberty and Freedom in the Subjects of this Realm, as their Birthrights and Inheritances descendible to their Heirs and Posterity: Statutes incorporate into the Body of the Common Law, over which (with reverence be it spoken) there is no trust in the Kings Sovereign Power or Prerogative Royal to enable him to Dispense with them, or to take from his Subjects that Birthright or Inheritance which they have in their Liberties, by virtue of the Common Law and of these Statutes.

I have the rather cited this at large, because it is a clear acknowledgment of the Kings Dispensing Power in as large a manner as we have adjudged it, and does at the same time vindicate it from one of the most clamorous, the most malicious, but withal, the weakest Objections that ever was made against it. By this Judgment say they, you have cancell'd all our Laws, and given up our Lives, Liberties, and Estates, to be disposed of at the Kings pleasure. It is plain, that this is no Consequence at all; for the Commons here in Parliament, at the same time that they expressly grant that the King has undoubted Power of Dispensing with

Laws prohibiting things that are not *mala in se*, but only *mala quia prohibita*, Laws that are made, as my Lord *Vaughan* expresses it, *pro bono populi complicati*; yet they utterly deny, as they had good reason to do, that the King can Dispense with one tittle of *Magna Charta*, or any of those other Laws whereby the Lives, the Liberties, the Interests of any of the Subjects are conferr'd upon, or confirm'd to them; for these are Laws *pro bono singulorum Populi*, which the King never can Dispense with. And as to this matter, I do not know whether it will be proper, but any man so sensibly touch'd in his Reputation, may be provok'd to commit some Indecencies. I must appeal to all men that have observed my Actions and Behaviour since I have had the Honor to sit upon the Bench, whether I use to be guilty, in Laws of this kind, to strain the Construction of them for the Kings Interest. First, in such Laws wherein the Lives of men have been concerned, I confess, I have been scrupulous even to a Fault; for in some Cases upon Statutes that had been adjudged Felony by wiser and better Judges than my self, and it was highly for the Kings service they should be so, yet I could never give Judgment of Death, because I could not satisfy my own Conscience that those Statutes were now in force. And in other Cases wherein the Rights of the Subjects have been brought in question,

question, how strictly I have kept to that substantial difference taken by the *House of Commons*, that though the King in Laws of Government, in Penal Laws of a publick nature, has a power to Dispense in particular Cases; yet he cannot Dispense with Laws which vest any the least right or property in any of his Subjects; will appear by the Opinion I gave in the Case of *Magdalen Colledge*, (for the truth of which, I appeal to all that know any thing of the Transactions in that Case) wherein, when the Kings Right against the Colledge, was endeavour'd to be asserted by a Dispensation granted by himself, I utterly denied that Dispensation to be of any force at all, because there was a particular Right and Interest vested in the Members of that Colledge, as there is in the Members of many other Corporations, of Choosing their own Head. So far have I been from giving up all Mens Lives, Liberties and Properties to the *Kings pleasure*.

I had forgot to take notice of two or three Objections more that are usually made.

Obj. First, here is a Disability, and the King cannot dispense with a Disability. As the Statute against buying Offices, the King, say they, cannot Dispense with, for that reason.

Answ. There is the same Disability in the case of Sheriffs, and yet resolved that the King can Dispense

spense in that Case, and the reason in the Statute of buying Offices, or sitting in Parliament without taking the Oaths, is because there is a Disability actually incurr'd, and when any person is actually disabled, he cannot have his disability taken off but by Act of Parliament. But in the Statute dispens'd with, in the Case of Sir *E. Hales*, there is no Disability actually laid upon any man; but certain things are required to be done, and as a penalty for disobeying the Act, and omitting the doing those things required by it, the Disability with the other Forfeitures are to be incurr'd after Conviction. Now the nature of Dispensations being, as was shewed before, to make the thing Lawful to him that has it, which is unlawful to every body else; it does plainly prevent the committing any offence by that person, and consequently the incurring any Penalty or Disability at all. But in the case of buying Offices the person is disabled before the Dispensation comes, for he is disabled *ipso facto* by contracting or dealing for the Office. So the true difference between the Case of Sheriffs, and the Case of buying Offices is this, *That the King in the one Case can prevent the incurring a Disability, but cannot purge it in the other after it is incurr'd.* To illustrate this by a Case of the like nature, *The King may prevent an Attainder, but he cannot purge an Attainder.* If a Man has committed Treason

or Felony, the King by granting his Pardon may infallibly prevent the Offenders ever being Attainted, but after he is once actually Attainted, the King can by no means take off that Attainder, or purge the Corruption of Blood, but by Act of Parliament; provided the Judgement by which he is Attainted be not Erroneous.

Obj. But it is Objected, that these Laws were made for the Interest of Religion, and all Offences against Religion are *mala in se*, and therefore not to be Dispensed with.

Ans. I Answer that true it is, all Offences that are directly against Religion, and as it is Constituted such by the Divine Law, are *mala in se*, and not to be Dispensed with; and in this Case the Parliament is bound as well as the King; for an Act of Parliament made against Religion in that sense is utterly void, as is instanced in *Doctor and Student*, of an Act, *That should forbid the giving of Alms upon any occasion, &c.* But Humane and Politick Constitutions, though made for the Interest of Religion, as they had a beginning, so they are alterable by the same power that made them; and therefore the breaches of them are in their nature *mala prohibita*, as was Resolved in the great Case of Dispensations, in 11 *H. 7.* above cited, and instances given; as the King may dispense with a *Priests holding of two Benefices*: though the Laws against Pluralities were made for the Interest of Religion,

ligion, and the better Edification of the people. So the King may dispense with a Bastards entring into Priests Orders, &c. These instances are taken for Law in that Year-Book.

But to all this I know it is said, that these high Trusts and Prerogatives might be always safe, and sometimes useful, in a Protestant Princes hands, who would faithfully discharge the duty of one that ought to be *Custos utriusque tabulae*; but when these Prerogatives are asserted to a Prince who is of a contrary Religion to that Establish'd by Law, there would be always danger of their being abused to the prejudice or destruction of the Establish'd Religion.

To which I answer, that it cannot be forgotten that the Promoters of the *Bill of Exclusion* used the same Argument: If you leave him King, say they, he will have all the Prerogatives of a King, and those Prerogatives may be made instrumental to the ruin of your Religion; which could not be denied by the Gentlemen on the other side, who oppos'd that Bill. Their only Reply was, *Fiat Justitia ruat Cælum*, it is his right, and we must not do evil that good may come; we must not do wrong, no not to promote the Interests of Religion its self. The same Argument that weigh'd with them to assert the right of Succession to the Crown of *England*, and consequently to all the
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Prerogatives together, was the Rule we had to guide us in giving Judgment in this Case concerning a particular branch of them. We must not break our Oath, nor give Judgment contrary to what seem'd to us to be Law, let the Consequence be what it will.

But it has been farther Objected to me, by some of my Friends, that, though I could not in Conscience have given Judgment against the King; being of the Opinion that I was, yet I should rather have parted with my Place, than to have given a Judgment even according to Law, which might be so prejudicial to that Excellent Religion that I profess; and of which when I cease to be, let me cease to be at all.

I Answer that neither in Prudence nor in Conscience I could have taken that course.

First, Not in Prudence; for I confess, that saying, *Omnia dat qui Justa negat*; had great weight with me in the Case, and that I was of opinion since an incroachment of Jurisdiction was fear'd, there could not be a greater, nor more dangerous provocation to it, than for Protestant Judges to refuse to give Judgment for a Prince of a different persuasion, in that which we could not deny to be his Right.

And next in Conscience, I could not decline giving Judgment in this Case; for by our Oaths we are as much obliged to give Judgment one way or other, as we are to give what we think a righteous Judgment in all Cases that come before us.

It hath been Objected that all this was a Contrivance, an Informer set up, and all but a feign'd Action.

As to this matter, I can truly say that I don't remember that I ever heard of this Action, till after it was actually brought: but in this there seems to be no hurt or inconvenience at all. The Law is as well tryed, and settled in a Feigned Action, as in a True. There are Feigned Actions directed every day out of *Chancery*, to this very purpose, that great and difficult Points of Law may be settled by them; and why the King might not direct such an Action to be brought, to satisfy himself whether he had such a Power, and if he had, that the people might be satisfied, and acquiesce in it; I confess I see no difference at all. If there were indirect means used for procuring Opinions, or the like, I have nothing to say to it. I stand upon my Innocence, and challenge all the World to lay any thing of that kind, to my charge. My part was only to give my own Opinion, in which, if either by misunderstanding

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ing the Books that I have cited, or by drawing weak Conclusions from them, I have erred in the Judgement that I gave ; how can I for this be charged as a Criminal? The Law neither supposes, nor requires an Infallibility in any of his Majesties Courts of Justice; it were very uneasie Sitting in them, if it did. We can but judge according to the Books that lie before us, and according to the measure of our understanding of those Books: we have not always so much light to guide us, as we thought we had in this Case. We often meet with Cases new and rare, and very ill settled by former Judgments, where we are forced to dig Truth as it were out of the Mine; to compare and distinguish, to skreen and sift, and gather the sence of the Law out of the confusion of disagreeing, and very often contradictory Opinions, as well as we can; and if after all our Labour and our Pains, we happen to be mistaken; it was never yet imputed as a Crime. The Judgment is Reversed in a Writ of Error, not only without any Accusation, but without the least Reflection upon him that gave it. Nor can a mistake in Judgment be more Criminal in a matter of a greater Concernment, than it is in matters of the least Consequence. It would be very mischievous, and very dangerous if it should: for if in questions of Prerogative,

any mistake shall be made Capital on the one hand, when Judgment is given for the King; why succeeding Princes may not be as angry at any mistakes on the other hand, I cannot imagine. And when once affairs are come to that pass, there will be great encouragement for any Man, that can make the least shift to live without it, to undertake those very necessary, but very difficult, and very troublesom Imploiments; great freedom for Men to give Judgment according to their Opinion, and their Conscience, and great reliance upon the resolutions of those, who know they shall be sure to pay with their Lives and Fortunes, for any mistake of theirs, either to the King or the People, as either of them shall happen to get the upper Hand. For my own part I thank God I can say these two things: First, That for these ten years together, wherein (with very little intermission) I have Sate a Judge in several Courts, though I may be justly accused of many weaknesses and mistakes, yet I have never given Judgment in any one Case against the clear Dictates of my Reason and my Conscience. And the second thing is, That I never gave Judgment in any controverted Point, wherein I had so many, and so great Authorities to warrant it; as I have to warrant that Judgment which was given in Sir *Edw. Hales* his Case: And
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this I say, not to set up that Opinion again in a Pamphlet, which was so ill relished in a Court of Justice, nor to oppose my Sence to the Judgment of the Nation; for I think it is very fit that this dark Learning, as my Lord *Vaughan* calls it, of *Dispensations*, should receive some Light from a determination in Parliament, that Judges for the time to come, may Judge by more certain Rules, which Acts of Parliament the King may, and which he may not Dispense with; but I have cited those Authorities at this time in my own Defence, and for these particular purposes: in the first place, to shew,

1. That we are not the first Inventers of this Dispensing Power, but that it has been allowed without Controversie, to the Kings of *England* in all Ages, that they might Dispense with many Acts of Parliament.

2. That if our Judgment was erroneous, and that the King could not Dispense with that Act of Parliament, yet that Error was but an Error in that single Case, and had no such large and mischievous Consequences as is pretended. For that, because we Judged that the King could Dispense with that Statute, for others to conclude from thence, that therefore he had a Power to Dispense with all other Statutes, especially such as confer or vest in any of the Subjects any manner

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ner of Interest whatsoever, in their Lives, Liberties, or Estates; or that, because the King may Dispense with a Penal Law, wherein a disability is annexed to the breach of it as a Penalty, and that Penalty not to be incurred before a Legal Conviction, and where the Kings Dispensation makes the thing Dispensed with Lawful, and consequently prevents any Conviction or Penalty at all: for others to conclude from thence, that therefore the King may Dispense with such Statutes, where a precedent disability is actually laid upon any Man, as there is upon the Members of both Houses, till they have taken the Oaths and Tests prescribed, and therefore without question is not in the Kings power to Dispense: I say, these are Consequences which may flow from the heated imaginations of angry Men, but have no warrant or foundation at all, from the Judgment given by us.

I have one thing more to say in my Justification, which is, that if I have been guilty of so hainous Offences as I am accused of, where is the Temptation or the Reward? If it was to keep in my Judges Place, which otherwise I might have lost; I can only answer, that if that were the Case, I then became the worst Man in the World, only to keep that, which, it is pretty well known, I was with much difficulty, by the

persuasion of my Friends, prevailed with to accept: and for any other Reward, whoever is acquainted with the circumstances of my Fortune, will, I am confident, notwithstanding the false and idle reports, of I know not what great Reversions lately fallen to me, as easily acquit me of having been corrupted by the King, to give a pernicious Judgment in this Case, as of having enriched my self by taking Bribes in Cases between party and party.

All that I have to add more, is, that howsoever this that I have said in my Defence, may happen to be understood at present: yet I could not deny my self the satisfaction of having put in a Plea of Innocence at least; that whatsoever shall happen to me now, may perhaps meet with a more equal Judgment in after-times, since it ought to be much less uneasie to me to lose my Life, if any body be very fond of taking it, than to let the aspersions that are every day cast upon me, to pass in silence, or suffer my self to be transmitted to Posterity, under the Character of a Betrayer of my Religion, or a Subverter of the Laws and Liberties of my Country.

F I N I S.

