

PART XII.

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*The Case of the King's Prerogative in  
Salt-peter.*

In the Session of Parliament held in *December*  
*An. 4 Jac. Regis.*

ALL the Justices, viz. *Popham*, Chief Justice of *Eng-land*, *Coke* Chief Justice of the Common Pleas, *Fleming* Chief Baron, *Fenner*, *Searl*, *Yelverton*, *Williams*, and *Tansfield*, Justices, were assembled at Serjeants Inn, to consult what Prerogative the King had in digging and taking of Salt-peter to make Gunpowder by the Law of the Realm; and upon Conference between them, these Points were resolved by them all, *una voce*.

That although the Invention of Gunpowder was devised within Time of Memory, viz. in the Time of *R. 2.* yet inasmuch as this concerns the necessary Defence of the Realm, he shall not be driven to buy it in foreign Parts; and foreign Princes may restrain it at their Pleasure, in their own Dominions: And so the Realm shall not have sufficient for the Defence of it, to the Peril and Hazard of it: And therefore inasmuch as Salt-peter is within the Realm, the King may take it according to the Limitations following for the necessary Defence of the Kingdom.

Although the King cannot take the Trees of the Subject growing upon his Freehold and Inheritance, as it was now lately resolved by us the Justices of *England*: And although he cannot take Gravel in the Inheritance of the Subject, for Reparation of his Houses, as the Book is in *11 H. 4. 28.* Yet it was resolved, that he may dig for Salt-peter, for this that the Ministers of the King who dig for Salt-peter, are bound to leave the Inheritance of the Subject in so good Plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the Disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any Wrong.

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And as to the Case of Gravel, for Reparation of the Houses of the King, it is not to be compared to this Case; for the Case of Salt-peter extends to the Defence of the whole Realm, in which every Subject hath Benefit; but so it is not in the Case of the Reparation of the King's Houses: And therefore it is agreed in 13 H. 4. and other Books, that the King may charge the Subject for Murage of a Town, to which the Subjects were charged in the Time of Insurrection or War, for Safety: And so for Pontage, for this that he which is charged hath Benefit by it, but the King cannot charge the Subject for the making of a Wall about his own House, or for to make a Bridge to come to his House; for that doth not extend to publick Benefit: But when Enemies come against the Realm to the Sea-Coast, it is lawful to come upon my Land adjoining to the same Coast, to make Trenches or Bulwarks for the Defence of the Realm, for every Subject hath Benefit by it. And therefore by the Common Law, every Man may come upon\* my Land for the Defence of the Realm, as appears 8 Ed. 4. 23. And in such Case on such Extremity they may dig for Gravel, for the making of Bulwarks; for this is for the Publick, and every one hath Benefit by it; but after the Danger is over, the Trenches and Bulwarks ought to be removed, so that the Owner shall not have Prejudice in his Inheritance: And for the Commonwealth, a Man shall suffer Damage; as, for saving of a City or Town, a House shall be plucked down if the next be on Fire: And the Suburbs of a City in Time of War for the common Safety shall be plucked down; and a Thing for the Commonwealth every Man may do without being liable to an Action, as it is said in 3 H. 8. fol. 15. And in this Case the Rule is true, *Princeps & Respublica ex justa causa possunt rem meam auferre.*

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3 Point

It was resolved, that this Taking of Salt-peter is a Purveyance of it for the making of Gunpowder for the Necessary Defence and Safety of the Realm. And for this Cause, as in other Purveyances, it is an Incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other Purveyances ought, and cannot be converted to any other Use than for the Defence of the Realm, for which Purpose only the Law gave to the King this Prerogative. And it is not like to the Mines of Gold and Silver, for there the King hath Interest in the Metal; and therefore there he

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he may dig for it, *Quia quando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest.* <sup>Plow. 314, 325.</sup>  
*Vide Plow. in le Case de Mines.* So the King may dig in <sup>326.</sup>  
the Land of the Subject for Treasure-trove, for he hath Property: And if the Powder which is so made by the Ministers of the King, begin to decay (as it will in two Years) then it ought to be changed for other, or the Money coming of it ought to be employed for Powder for the Defence of the Realm; or the Ministers of the King ought to make Provision of Salt-peter which will endure a long Time, and when need is, to make it into Gunpowder, which may be made before the Navy can be put in Readiness.

The Ministers of the King cannot undermine, weaken, <sup>4 Point,</sup> or impair any of the Walls or Foundation of any Houses, be they Mansion-houses, or Out-houses, or Barns, Stables, Dove-houses, Mills, or any other Buildings: And they cannot dig in the Floor of my Mansion-house which serves for the Habitation of Man; for this, that my House is the safest Place for my Refuge, Safety, and Comfort, and of all my Family; as well in Sicknes as in Health, and it is my Defence in the Night and in the Day, against Felons, Misdoers, and harmful Animals; and it is very necessary for the Weal publick, that the Habitation of Subjects be preserved and maintained.

And there are two notable Precedents, by which it appears, that the King by his Prerogative had Power to prohibit Depopulation, and provide for Habitation.

The one in the 43 *Ed. 3. Rot. claus. in turri, numero 23. pro villa de Southampton.*

The other, *An. 21 R. 2. in dorso clause, par. 1. N. 15.* by which the King prohibits that *Incol' villarum prædictarum non prosternant domus suas in villis prædictis in alias migraturi regiones, &c.*

Also the Ministers of the King cannot dig the Floor of any Barn employed for the safe Custody of any Corn, Hay, &c. of the Owner, for that the Floor of a Barn cannot be made dry and serviceable again in a long Time: But they may dig in the Floors of Stables and Ox-houses, so that there \* be sufficient Room left for the <sup>Page [14]</sup> Horses and other Cattle of the Owner: And so that they repair it in convenient Time, in so good Plight as <sup>Q</sup> it was before; also they may dig in the Floors of Cellars and Vaults, so that there be sufficient Room for the Necessaries of the Owner; and so that the Wine, Beer, and other necessary Provision of the Owner be

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not removed, or in any Sort impaired. And they may dig any Mud-walls which are not the Walls of any Mansion-house, so that Order be taken that the Mansion-house be well defended, as it was before; and so they may dig in the Ruins and Decays of any House or Buildings, which are not preserved for the necessary Habitation of Men.

5 Point. They ought to make the Places, in which they dig, so well and commodious to the Owner as they were before.

6 Point. They ought to work in the Possession of the Subject, but betwixt Sun-rising and setting; so that the Owner may make fast the Doors of his House, and put it in Defence against Misdoers.

7 Point. They ought not to place or fix any Furnace, Vessels, or other Necessaries in any House or Building of the Subject without his Consent, or so near any Mansion-house, as by it it may receive Prejudice or Disquiet.

8 Point. They ought not to continue in one Place over a convenient Time, nor to return again into the same Place before convenient Time (which is long Time) be passed.

9 Point. It was resolved, that the Owner of the Land cannot be restrained from digging and making Salt-peter, for the King hath not Interest in it as he hath in Gold and Silver in the Land of the Subject, for the King in the Case of Salt-peter hath but Purveyance; so that the Property of it is in the Owner, and for that he cannot be excluded of the Commodity in his own Land.

And it is to be observed, that before 31 *Eliz.* which was the next Year after the *Spanish* Invasion, there was not any Licence or Commission of any King or Queen of this Realm, for the taking of Salt-peter: But in the said 31st Year there were two Licences granted.

The one particular to *George Constable* Esquire, and the other general to *George Evelin*, *Richard Hills*, and *John Evelin*: The first gives *Constable* Power and Authority for eleven Years to dig, open, and work for Salt-peter within the Counties of *York*, *Nottingham*, *Lancaster*, *Northumberland*, *Cumberland*, and the Bishoprick

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rick of *Duresme*, as well within our Lands, Grounds and Possessions, as also within the Lands, Grounds and Possessions of any of our loving Subjects within the Counties aforesaid: And the Consideration of the Patent was for a great Quantity of Salt-peter yearly, by the said *George Constable*, to be made and provided for the Store of the Queen, at a lower Rate than before was paid.

And further, Our Will and Pleasure is, That the said *George Constable*, &c. shall at his own proper Costs and Charges, erect, make up, and raise all Mud-walls, Stables, and Grounds whatsoever so digged up, &c. In which Licence it was observed, that no Power is given to dig in any Mansion-house, Barns, Dove-houses, &c. but, as appears in the last Clause, in Mud-walls, Stables, and Grounds; for the Clause of Reparation ought without Question to extend to all the Places to which the Power to dig extends, &c.

The other Commission to *Evelin*, &c. extends to all the Realm of *England* \* and *Ireland*, and all other Dominions of the King, as well within our own Lands, Grounds and Possessions, as also within the Lands, Grounds and Possessions of any of our Subjects.

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*Note*; The Licence begins with Lands, &c. so that Houses or Builings are not named in it. For the learned Counsel of the Queen, as it should seem, who drew the Licence, thought not that the Licence ought to extend to the Mansion-house, or other necessary Houses; for otherwise it would have been expressed in the Licence. And after, *scilicet* 18 October 2 *Jacobi*, Commission was granted to *Evelin* and others, to take Salt-peter in the Lands, Possessions, and other convenient Places, and in convenient Times, so that there were but three Licences or Commissions ever made. And in none of them any Power by express Words is given to dig in any Mansion-house, &c. And in none of them is any Prohibition to the Subject to dig in his own Land: And it is observed, that in the said last Commission is a Clause, that for Carriage none ought to go above nine Miles from his own House, and that he shall have 4 *d.* for every Mile laden and empty, *viz. Eundo & Redeundo*. And the Reason was, That the Owner may return again to his own House in the same Day: And note Reader, here is a good Resolution of the Justices for the true Prerogative of the King in taking Purveyance of Salt-peter.