

Notes upon the dispensing power

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Source: Keynes Ms. 121, King's College, Cambridge, UK

Published online: February 2008

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Notes upon the dispensing power.

The King has a prerogative in many cases to dispence with Acts of Parliament but the prerogative is bounded by law & many Acts cannot in any sort be dispenced with

As 1st the Laws which are against mala in se

3. The Laws of publick concernment wherein the people are interested. The King cannot dispence with a law made for securing the liberty or property of the people &

2. The Laws concerning the Iurisdiction of the Admiralty

4. Statutes in which any particular subject or subjects are actually interested before dispensation.

5 Statutes which absolutely & directly prohibit or enjoyn a fact on pain of disability cannot be dispenced with after the disability attach't (as that of disability for Simony 31 Eliz. 6 & for buying of Offices 5 Edw. 6. for sitting in Parliament without taking the Tests) And this case the Lord Chief Iustice Herbert granted.

6 Nor before without possession previous to the disability: for the reason why the kings letters patents will not discharge a disability is not because it is attacht sooner or later, but because it is a disability arising from a {de}fect in the person which renders him unfit. And though the date of the Letters patents do precede the attachment yet the person holds not by dispensation before the disability & then the disability voyds the actually commencing dispensation as in the former case. So in the cases of Simony & offices a license previous to sell would be as void as a pardon subsequent. And the former case seems the stronger of the two. ffor the King can pardon that he cannot license.

7 Nor in case of possession previous to the disability. ffor possession qualifies not an unfit person. ‡ < insertion from lower down f 1r > ‡ And that authority which can disable an unfit person from admission into any Office can equally disable him from holding it after discovery of his unfitness. Should a man – < text from higher up f 1r resumes > Should a man give bond to resigne within a set time any Office or Living & thereby get into actual possession & then procure a dispensation to buy of his bond, tis an act of the same nature with bargaining before possession, & is therefore equally capable of being restrained by law against dispensation

The King has a prerogative in many cases to dispense with Acts of Parliament, as

1st A general law may be dispenced with in particular cases which are not mala per se nor lye not against the reason of the law. As when Queen Elizabeth dispenced with the common prayer in latin to the Colleges of Winchester & Eaton, the law it self allowing it to the Vniversities & private persons in any language they understood. Also in Chancery the King by his Chancellor doth continually dispence with {the rigour} even of the Common law in hard cases. ffor without such a dispensing power those laws might often prove

inconvenient with respect to persons time or place not foreseen by the Law makers. The King cannot take away the force of the law for any time but only dispense with it in particular cases.

2 Laws may be dispensed with & transgress in cases of necessity & this as well by the people in acting as by the king in commanding. But such cases are limited & circumscribed by divers conditions & particularly by the following two. ffirst a case cannot be necessary which happens by the will of the King, or subject. ffor that which happens to any man by his own will & contrivance does not happen to him out of necessity. So the dispensing with the Test to officers in the Army is not necessary because tis only the Kings will & pleasure first to have an Army & then to have those officers rather than others. Secondly the necessity cannot hold longer then till the King has time & opportunity to convene a Parliament. ffor the reason of dispensing in such cases is because the Law-maker could not foresee & provide for them & this reason holds no longer then till a Parliament can be convened. If therefore the King can call a Parliament & will not or if upon their convening the case be not propounded to them or they do not allow it the pretence of necessity ceases. Thirdly it must not be such a pretended case of <1v> necessity as the law-maker foresaw & provided against in the statute ffourthly if the people were interested in the law the dispensation ought to be for the common good & not for the interest of the King alone against the peoples & therefore is not valid against their consent. ffor this would be to do the people a double injury. ffirst to spoile them of their interest in the law & then to do it in order to a further injury. And from all this its plain that the King is not the sole judge of cases of necessity. His Prerogative is bounded by law & he is not the sole Iudge of those bounds. If any King shall say there's a necessity of raising money without consent of Parliament at a time when the nation sees not the necessity, or of condemning men without triall, or of altering the legal course of justice & setting up arbitrary Courts in civil matters, to the danger of property, or of setting up an High Commission Court against law whereby any man whatsoever may be excommunicated & so lose his property for not obeying all the King's commands: tis not the King's pretending necessity that will make these things legal & therefore the King is not the sole judge. All men may transgress the law as well as the king in cases of necessity & therefore are judges for their own actions in such cases as well as the King is for his, & yet have not a right to make every thing a case of n{e}cessity which they will call so. ffor on this principle any people may as well justify rebellio{n} as any King may oppression: which God forbid. The necessity therefore must be plain & {illeg} & extraordinary & such as may easily appeare to both parties to their common satisfaction. In

NB. In cases of necessity all men are equally legibus soluti, & return into a state of nature. And therefore in such cases it does not arise from the Kings Prerogative that he is solutus legibus for then no man would be free from the Law in cases of necessity but the King. Nor does it arise from the law of the Land because it is a freedom from that law by the necessity of transgressing it. Nor is it founded in any thing else then a necessity of transgressing the law & acting by reason alone as in a state of nature, according to the vulgar proverb, Necessity has no law.

Whence the dispensing power in such cases is no part of the law of the land nor of the Kings prerogative included in that law nor can have any other foundation than a necessity of being lawless. So then we may consider this power without meddling with the Prerogative.

Now such a necessity as absolves a man from the law & justifies his transgressing it is a dispensation from it & renders all other dispensations superfluous & null. ffor as a dead man cannot be killed so while the first dispensation is in force the law cannot be again dispensed with. Such a necessity therefore excludes the Kings dispensing power by an antecedent dispensation & if it be not such it does not justify that power & therefore the dispensing power in cases of necessity is a contradiction. And if a contradiction may invalidate an Act of Parliament much more does it invalidate the opinion of the Iudges, [or rather the opinion of those who sought out such men for Iudges who would subscribe to this opinion.] At least it makes it useless because (as we have shewn) there never can be a necessity of the Kings dispensing < insertion from f 2r > with law. The necessity it self dispenses & where it does not the King cannot by virtue of it.

If the King command to break the law & represent it necessary; the subject is not to break the law without necessity, it will not justify him that the King commanded unless the necessity be real

< text from f 1v resumes >

So when the English were Lords of France & French Parliaments could not convene for giving their king money, the French laws & convening of Parliaments were suspended of necessity & it would <2r> have been superfluous & impertinent for the French King to have put out an edict for dispensing with them. But an Edict to this purpose would have been very proper, That seeing the laws could not proceed nor Parliaments convene & yet money was absolutely necessary for the preservation of the nation: he therefore required them to contribute &c. And the obligation of such an edict would not have lain in the Kings prerogative or dispensing power but in the apparent necessity of the thing for common safety for if the people had not seen the necessity thereof they might have justly refused it.

3 In cases of necessity men are not always bound to observe the law of God. David being hungry eat the shew bread which was lawful for none but the Priests to do. Phinehas killd Zimri & Cosbi against the Commandment, the Maccabees upon compulsion fought on the Sabbath day, Yet cannot the King or Pope dispense with the laws of God in cases of necessity. The dispensation must arise from the necessity it self.
