LETTERS, &c.

SIX LETTERS

OF

Publicola,

ON THE

LIBERTY OF THE SUBJECT,

AND,

THE PRIVILEGES

OF

THE HOUSE OF COMMONS.

ORIGINALLY PUBLISHED IN THE TIMES;

AND NOW COLLECTED,

And illustrated with Notes and additional Proofs,

BY THE AUTHOR.

"*Respice quid moneant Leges.*" Juv. 8, 91.

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DEDICATION

TO

THE PUBLIC.

THE following Letters were originally published in The Times. I have now collected them, with the addition of such Notes as I think will tend to illustrate the subject, and beg to dedicate them to you for whose benefit they were written.

The Power which the House of Commons have lately exercised, and to which they pretend to be entitled, is of a most alarming nature. It threatens no less than the annihilation of that personal liberty which has awakened the most noble emotions in our hearts, and excited the envy of all other nations. Hitherto we have enjoyed the blessings of freedom: whether we are now to be deprived of that inestimable jewel, is a question which cannot fail to agitate the minds of all good men; for, as the poet very truly observes,

> " Jove fix'd it certain, that whatever day
> " Makes man a slave, takes half his worth away."
>
> POPE's HOM. OD. 17. 392.

In a state of liberty, both virtue and genius are kept alive; in slavery, nothing exists but a spirit of adulation and degeneracy of manners. Cicero, the illustrious patriot and orator of Rome, speaking to Catiline, was very different from the same Cicero pleading before Cæsar for Marcellus. It is easy then to see the consequences that would arise if the House of Commons had power to determine in cases of *libel,* and to imprison the libeller *during their pleasure.* Public spirit would be lost; genius discouraged; the Freedom of the Press destroyed; and liberty at last totally extinguished. For who would be bold enough to censure the conduct of public men, and expose the folly and wickedness of public measures, if he could be dragged before a Tribunal where some corrupt minister commanded a majority, and that majority had power to imprison at pleasure? We know very well in what manner the Commons have sometimes decided upon questions which concerned themselves. So notoriously partial and unjust was their conduct with respect to Elections, that in the year 1770, Mr. Grenville was obliged to bring in a Bill which directs that in future they shall proceed in those cases *upon Oath.* With what integrity then can it be supposed that they would act in matters of libel, where they are *not* bound to decide upon their oaths? Would Ministers have no influence with some Members? Would the love of Power have no charms with others? May the freedom of Englishmen never be trusted to such hazards! Those who would vote away the public

money without any concern for the burthens of the people; those who would approve of the very worst of measures, in order to gratify a Patron Minister; those, who would be vain of the exercise of power, would feel but little reluctance in voting away MAGNA CHARTA, and leaving the people in a state of uncertainty and slavery.

But as it is the object of the following pages to shew, that the Commons neither have, nor ought to have, the power of imprisoning the people at their pleasure, it would be superfluous for me to enlarge upon the subject in this place. I shall, therefore, take my leave of you with beseeching you most earnestly to maintain your rights and liberties; and that you may always deserve to enjoy them is the fervent prayer of

PUBLICOLA.

LETTER I.

TO THE MOST REV. FATHER IN GOD,

CHARLES MANNERS SUTTON,

BY DIVINE PROVIDENCE

ARCHBISHOP OF CANTERBURY.

Magna fuit quondam Magnæ reverentia Chartæ.——Lord COKE.

MAY IT PLEASE YOUR GRACE,

ON the 15th day of June, in the year of our Lord 1215, JOHN, then King of England, granted unto his subjects a Charter, called "THE CHARTER OF LIBERTIES, OR THE GREAT CHARTER." By a chapter in this Charter which alone, (says Mr. Justice BLACKSTONE,) would have merited the title that it bears, of the *Great* Charter, every individual of the nation is protected in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the legal judgment of his Peers, or the law of the land: "NULLUS LIBER HOMO CAPIATUR, VEL IMPRISONETUR, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ;" words which deserve to be written in letters of gold, and to be inscribed in capitals on some conspicuous place in all our Courts of judicature.

HENRY the son and successor of JOHN, renewed the Great Charter in the 9th year of his reign.* He did not, however, govern himself by its restrictions with that fidelity which he had professed, and therefore, when, in the year 1253, he demanded an aid to go to the Holy Land, the Barons refused to grant it to him, unless he would promise to observe his father's Charter. HENRY assured them it should be punctually kept. Upon this assurance the aid was granted; and soon after (May 3), *without any solicitation*, he convened in the Great Hall of the Palace of Westminster, an Assembly, at which

* It is extremely worthy of observation, that Matthew Paris says, the Statute was renewed by Henry *in the same words* with the Charter of King John. Sir William Blackstone did not attend to this, or he would not have mistaken a *spurious* copy, called a Confirmation of the Great Charter by King Henry the IIId. for the authentic copy; but this was no more than Sir Edward Coke had done before him. Sir William, in his edition of the Great Charter, has not only omitted the whole Article in which the word *Terminum* is inserted by King John, but he has also in Henry the Third's Confirmation of it copied the barbarous, unintelligible word *Turnum*, not as an abbreviated, but as an entire, radical word of itself. The fact is, that the Confirmation before mentioned, from which Sir William took his copy, is a spurious one, and spurious in every Article which either makes an addition to, or diminution of, King John's Great Charter. For Matthew Paris, who was contemporary with John during his whole reign, and who also lived to see 42 years of the reign of Henry the IIId. expressly insists, that the Charter of King John, and the Confirmation of it (eleven years afterwards) by his son Henry III. were *in* NULLO *dissimiles*. And the authority of that English Historian, who, from his local situation as a monastic resident all his life-time so near the seat of action as the monastery of St. Albans was, must necessarily have seen both the one and the other; and who, as the most accurate as well as the most celebrated Historian of his own time hath carefully transmitted to posterity, a faithful copy of the Great Charter itself, and yet hath not handed down to us one single article of Henry the Third's Confirmation of it, adding, for a very good reason of such his silence and total omission, that "*Chartæ utrorumque Regum in nullo invemiuntur dissi-*" *miles.*"—Vide Lord Chief Baron Gilbert's Hist. of Com. Pleas, 3rd. ed. introd. p. 3, note: and the learned Selden, in his Argument for Sir Edmund Hampden, Opp. III. 1938.

were present all the Lords Spiritual and Temporal, with lighted tapers in their hands. The King would not hold one, saying, he would lay his hand upon his heart during the whole ceremony, to shew he consented to what was going to be pronounced. Then the Archbishop of CANTERBURY standing up before all the people, denounced a terrible curse against all that for the future should oppose, directly or indirectly, the observance of the Great Charter; and likewise, against those that should any way violate, diminish, or alter the Laws and Constitutions of the kingdom. This anathema being denounced, the Charter was read aloud and confirmed by the King, who kept his hand all the while on his breast, and said, after all was performed, *So may God help me, I inviolably observe all these things, as I am a man, as I am a Christian, as I am a Knight, as I am a crowned and anointed King.* This done, every one threw down his taper upon the ground, and wished that those who violated the Charter might thus smoke in Hell. (See M. Paris, p. 866.)

The Sentence or Curse given against the breakers of the Great Charter is in these words:—

" In the year of our Lord 1253, the third day of May, in
" the Great Hall of the King at Westminster, in the presence,
" and by the assent, of the Lord Henry, by the grace of God,
" King of England, and the Lord Richard Earl of Cornwall,
" his brother, Roger Bigot, Earl of Norfolk and Suffolk,
" Mareschal of England, Humfrey Earl of Hereford, Henry
" Earl of Oxford, John Earl Warren, and other estates of
" the Realm of England; William Boniface, by the mercy of
" God, Archbishop of Canterbury, Primate of England, E.
" of London, H. of Ely, S. of Worcester, E. of Lincoln,
" W. of Norwich, G. of Hereford, W. of Salisbury, W. of
" Durham, R. of Exeter, M. of Carlisle, W. of Bath, E. of
" Rochester, T. of St. David's, Bishops apparelled in pon-
" tificals, with tapers burning, against the breakers of the

" Church's liberties, and of the liberties or other customs of " the Realm of England, and namely, of these which are con- " tained in the Charter of the Common Liberties of England, " have denounced the sentence of excommunication in this " form. By the authority of Almighty God, the Father, the " Son, and the Holy Ghost, and of the glorious Mother of " God, and perpetual Virgin Mary, of the blessed Apostles " Peter and Paul, and of all Apostles, and of all Martyrs, of " blessed Edward King of England, and of all the Saints of " Heaven, we excommunicate, accurse, and from the benefits " of our holy mother, the church, we sequester all those that " hereafter willingly and maliciously deprive and spoil the " church of her right; and all those that by any craft or " wileness do violate, break, diminish, or change the Church's " liberties, and free customs *contained in the Charter of the* " *common liberties*, granted by our Lord the King, to Arch- " bishops, Bishops, and other Prelates of England; and " likewise to the Earls, Barons, Knights, and other Free- " holders of the realm; and *all that secretly or openly, by* " *deed, word, or council, do make Statutes, or observe them* " *being made, and that bring in customs, or keep them when* " *they be brought in, against the said liberties, or any of them,* " the Writers, the Law-makers, Councellors, and the Execu- " tioners of them, *and all those that shall presume to judge* " *against them:* all and every which persons before-mentioned, " that willingly shall commit any of the premises, let them " well know that they incur the foresaid sentence, *ipso facto*, " (i. e. upon the deed done). And those that commit ought " ignorantly, and be admonished, except they reform them- " selves within fifteen days after the time of their admonition, " and make full satisfaction for that they have done, at the " will of the ordinary, shall be from that time wrapped in the " said sentence. To the perpetual memory of which thing, " we, the aforesaid Prelates, have put our seals to these " presents."

HENRY the Third was succeeded by EDWARD the First; and in the 25th year of his reign, (being the year of our Lord 1297), your Grace is aware, that the Great Charter was again confirmed. " *And we will* (says the Statute) *that our Justices, Sheriffs, Mayors, and other Ministers, which under us have the laws of our land to guide, shall allow the same Charter, pleaded before them in all its points, as the common law.*"

CHAP. 2. " *And we will, that if any judgment be given from henceforth, contrary to the points of the Charter aforesaid, by the Justices, or by any other Ministers that hold plea before them, against the points of the Charter, it shall be undone, and holden for nought.*"

CHAP. 3. " *And we will, that the same Charter shall be sent, under our seal, to Cathedral Churches throughout our Realm, there to remain, and shall be read before the people two times by the year.*" Here (says my Lord Coke) it is to be observed what care was taken for the preservation of this Charter, for (adds he) it is good chance to obtain, but great wisdom to keep. (2 Inst. 527.)

CHAP. 4. " *And that all Archbishops and Bishops shall pronounce the sentence of excommunication against all those, that by word, deed, or council, do contrary to the foresaid Charter, or that in any point break or undo it. And that the said curses be twice a year denounced and published by the Prelates aforesaid. And if the same Prelates, Bishops, or any of them be remiss in the denunciation of the said sentence, the Archbishops of* CANTERBURY *and* YORK, *for the time being, shall compel and distrain them to the execution of their duties in form aforesaid.*"*

* This excommunication the Prelates could not pronounce without warrant by authority of Parliament, because it concerned temporal affairs.—2. Inst. 527.

Now I, as a Freeman of England, naturally jealous of the liberties secured to me by the Great Charter, do approach your Grace with the utmost reverence, to request that you will direct the said Charter to be read before the people *twice this year*, and every succeeding year, in the Cathedral Churches within your province; and also that you will desire the Bishops

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In an old edition of "The Case of the Bankers," &c. there is the following passage:—

"The time would fail me, should I enlarge upon that inviolable bulwark of our Liberties and Property, the MAGNA CHARTA, or GREAT CHARTER of England; a Charter, purchased with the Treasure and sealed with the Blood of our Ancestors; a Law promulged and established to the English, with a terror and solemnity inferior only to that of the *Holy Commandments* by God himself to the Jews. There was here no Thunder or Lightning, it is true; but there was so dreadful a fulmination of Curses upon the *Violators* thereof, that no man ever yet considered them without Horror and Astonishment; a Law, revered by *former Parliaments* to that degree, that they enacted transcripts thereof to be carefully preserved in all the Cathedrals of the Realm; that it should be carefully read before the people; that twice a year the Prelacy should thunder out the greater excommunication against the *Infringers* thereof, though but in *Word* or *Council* (says the Statute;) that the *Lord Chancellor* and all the great *Ministers of State*, upon Entry into their Offices, should constantly be sworn to the Observation thereof; that it should be allowed as the *Common Law*, by all Officers of Justice; that all *Judgments*, in opposition thereto, should be *null* and *void*; nay, that the very *Priests* should frame the Consciences of the People, to the observance thereof; and lastly, a Law, confirmed by no less than *Thirty-two several Acts of Parliament*.—And what was the reason of all this Veneration and Diligence? Was this Charter of that Sanctity and Importance?—Yes, surely; the Presence thereof was then thought as necessary to the *English*, as that of the *Palladium* to the *Trojans*; the *Holy Ark* to the *Hebrews*; the *Sea-Banks* to the States of *Holland*. In company of this Tutelar, there was no possible danger. In the absence thereof, no possible safety. Such then was the care of our Ancestors (*wise men*, perhaps, though not so *great Clerks*) in the munition and fencing about of their Rights and Properties; and so invincible was their zeal to transmit those *Jewels* to their Posterities, with the same lustre and beauty, that they

to pronounce the sentence of excommunication against all those, that by word, deed, or council, do contrary to the same Charter, or that in any point break or undo it. Your Grace is aware, that the Bishops have, for many years, neglected to read the Great Charter in the Cathedral Churches, and to pronounce excommunication against the breakers of it; but the Statute of EDWARD I. is still in full force, and by Chapter 4 of that Statute, you, as Archbishop of Canterbury, are required to *compel* and *distrain* the Bishops to the execution of their duties in form aforesaid. Your Grace will not, I am sure, be unwilling to admit, that the Great Charter ought to be kept sacaed; and, indeed, you will perceive that the Act of Confirmation by EDWARD I. declares, that "*all "Justices, Sheriffs, Mayors, and other Ministers, which, "under us, have the laws of our land to guide, shall allow "the same Charter pleaded before them in all its points;*" "and (Chapter 2) "*if any judgment be given from hence-"forth, contrary to the points of the Charter aforesaid, by "the Justices, or by any other Ministers that hold plea before "them, against the points of the Charter, it shall be undone, "and holden for nought.*" By this Chapter your Grace observes, that as long as Magna Charta is unrepealed, *all judgments given against any of the points of it shall be annulled and holden for nought;* and, therefore, it is very material for the welfare of the subject, that the said Charter should be "read before the people in the Cathedral Churches, two times "by the year." If this be done (and by the Act of EDWARD I. your Grace is bound to see it done) every one will understand what liberty he has, and how far he may act. For in-

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"themselves had received them from their Predecessors; those old English "heroes seeming to me to bear always in mind that saying of our *Country-"man*, and great Captain, GALGACUS, when his Army was in the instant "of joining Battle here with the Roman invaders; *et majores vestros "et Posteros cogitate:—Fellow Soldiers*, says he, *remember your Ances-"tors and your Posterities;* a short speech, but containing more of Ar-"gument and Persuasion, than can be expressed in ten Reams of Paper."

stance, just to put a case to illustrate what I mean: suppose any person should set up a *custom* against any of the points of Magna Charta: now, if any one were injured by the exercise of such custom, he would plead the Great Charter, and the Act of EDWARD declares, "that all Justices, &c. &c. "*shall allow the same Charter pleaded before them in all its* "*points; and if they give any judgment contrary to the* "*points of the Charter, it shall be undone and holden for* "*nought.*" Can any thing be more clear? And, therefore, your Grace perceives, that *custom* will not do, if it be against the Great Charter; and also my Lord COKE declares, that "NO CUSTOM CAN PREVAIL AGAINST AN EXPRESS ACT OF PARLIAMENT." (Co. Litt. 113.)

Now, your Grace knows, that Magna Charta was confirmed no less than *thirty* times from the first EDWARD to HENRY IV. It is still in full force and unrepealed, and repealed it can never be, but by the Parliament. By this word Parliament, I do not mean, nor will your Grace understand it to mean, one branch of the Legislature only, but the three estates of King, Lords, and Commons. For, as King CHARLES I. in his answer to the declaration and votes of the two Houses concerning Hull (Clarendon, 1. part 400; and Rushworth's collections) declared, "he very well knew the great and unlimited power of a "Parliament, but he knew as well it was only in that sense, "as he was a part of that Parliament; without him, and "against his consent, the votes of either, or both Houses to-"gether, must not, could not, should not (if he could help "it, for his subject's sake as well as his own) forbid any thing "that was enjoined by the law, or enjoin any thing that was "forbidden by the law."

I will say no more. But I repeat that I now call upon your Grace, pursuant to the 3d and 4th chapters of the Act of 25th Edward the First, to direct the Bishops to read the Great Charter twice this year before the people, in the Cathe-

dral Church of St. Paul in London, and in all other the Cathedral Churches within your province; and I do also hereby require your Grace to instruct the Bishops at the same time to "pronounce the sentence of Excommunication against all "those, that, by word, deed, or council, do contrary to the "said Charter, or that in any point break or undo it;" and if the Bishops, or any of them, be remiss in the denunciation of the said sentences, then I charge your Grace, as Archbishop of Canterbury, for the time being, "to *compel* and *distrain* "them to the execution of their duties, in form aforesaid." I shall shortly make a similar application to the Archbishop of York; and I humbly hope, that both your Grace and he will thank me for reminding you of this very important branch of your duty. Your Grace will recollect, that Magna Charta secured the Liberties of the Church, as well as the Liberties of the People; and therefore you ought, in that respect, to see the Great Charter most strictly kept.—With the utmost reverence to your Grace, I have the honour to be,

Your very humble servant,

PUBLICOLA.

LETTER II.

TO THE MOST REV. FATHER IN GOD,

CHARLES MANNERS SUTTON,

BY DIVINE PROVIDENCE

ARCHBISHOP OF CANTERBURY.

"MAGNA CHARTA being only an Abridgement of our ancient Laws and "Customs, the King that swears to it, swears to them all, and is not "admitted to be the interpreter of it, or to determine what is good or "evil, fit to be observed or annulled in it, and he can have no more "power over the rest. This having been confirmed by more Parlia-"ments than we have had Kings since that time, the same obligation "must still lie upon them all, as upon JOHN and HENRY, in whose "time that Claim of Right was compiled. We know the value our "ancestors set upon their Liberties, and the courage with which they "defended them; and we can have no better example to encourage "us, never to suffer them to be violated or diminished."

Lord SOMERS.—*Judgment of Kingdoms and Nations*, ¶ 6.

MAY IT PLEASE YOUR GRACE,

IN a former address, I took the liberty to recal to your recollection the solemnity with which the "CHARTER OF LI-"BERTIES, OR THE GREAT CHARTER," was confirmed by King HENRY III. in the presence of all the Lords Spiritual and Temporal, and also the sentence, or curse, denounced by the

Archbishop of CANTERBURY against all those, who by *word*, *deed*, or *council*, should in any point break or undo it. I re-minded you of the statute of the 25th EDWARD I. whereby the Great Charter was again confirmed, and appointed to be read before the people, by the Bishops, twice a year, in all Cathe-dral Churches throughout the realm; and I pointed out to you, that, by Chapter IV. of that Act, you, as Archbishop of Canterbury, are required to compel and distrain them to the execution of their duties, in form aforesaid.

I shall now beg permission, to submit to your Grace some farther observations, in order to shew the necessity of your causing sentence of Excommunication to be denounced against the breakers of the Great Charter.

Your Grace knows, that it is the very essence of our Kings, to govern according to Law; for where the will governs, and not the Law, there he is no longer King. The Law is to be the only rule and measure of his government. He can do nothing as a King but what he can legally do. "The Law," saith BRACTON, who wrote under HENRY III. "maketh the "King. Let the King, therefore, render to the Law, what "the Law has invested in him with regard to others—dominion "and power; for he is not truly King, where will and plea-"sure rule, and not the Law." It is, therefore, one of the first axioms of our Regal Government, that "the Law makes "the King," and he subjects himself to the Law by his Coro-nation Oath. For, when a King of England is crowned, the Archbishop or Bishop says to him, "*Will you solemnly pro-"mise and swear to govern the people of this kingdom of "England according to the laws and customs of the same?*" The King answers, "*I solemnly promise so to do.*"—"*Will "you preserve unto the Bishops and Clergy of this realm, and "unto the Churches committed to their charge, all such rights "and privileges as by law do or shall appertain unto them,*

" *or any of them?*" The King answers, " *All this I pro-*
" *mise to do*.*"

Now, when the present King succeeded to the throne, the above questions were put to him, and he gave the above answers; and, therefore, your Grace will rejoice, with every individual of this realm, that the King is bound to observe and keep the *Great Charter*. I say, your Grace will rejoice, because the very first article of that Charter is, " *That the Church* " *of England shall be free, and enjoy her whole rights and* " *liberties inviolable.*" And I am sure every individual will

* These are the terms of the contract between the King and the People; and, by the Stat. 1 Will. and Mar. st. 1, c. 6, this oath is to be administered to every King and Queen who shall succeed to the imperial crown of these realms, by one of the Archbishops or Bishops of the realm, in the presence of all the people; who, on their parts, do reciprocally take the Oath of Allegiance to the Crown. 1 Comm. 235.

That excellent patriot, and good man, my Lord Somers, says, " that the " doctrine of absolute *passive-obedience* is inconsistent with the goodness " of God, and the love he hath for man; and is destructive of the end, " intent, and design of God's laws, which is man's happiness. For God, " who is infinitely happy in himself, had no other motive than the hap- " piness of man in those rules he has given him to walk by; and, for that " reason, has made it a duty in him to help the poor and miserable, " relieve the oppressed and distressed, and do all manner of kindness and " good offices to one another. Can it then be presumed, that he requires " obedience to tyrannical power, which brings poverty, misery, and " desolation on a nation? If it be a duty to relieve the poor, it must be " a duty to hinder people from falling into that miserable condition, " which they cannot prevent, except they have a right to oppose arbi- " trary power. And, if it be a duty to promote the public good, which " they cannot do if they are obliged to submit to tyrannical government, " it must be their duty to oppose it. There is no duty that a man owes " to his neighbour, or himself, but does oblige him to oppose tyrannical " government; in doing thereof, he gives that honour, and performs the " duty which he owes to his maker; which cannot more be shewn than " in imitating him, by promoting the good and happiness of his fellow- " creatures." *Ubi. sup.* T. 115.

rejoice, because another chapter in the Charter says, " *No* " *man shall be taken, or imprisoned, or disseized of his free-* " *hold, or outlawed, or banished, or any ways destroyed;* " *nor will we pass upon him, or commit him to prison, unless* " *by the legal judgment of his Peers, or by the law of the* " *land.*" But I have no fear, that the King will at any time attempt, or encourage, or countenance others, to break any of the points of the Great Charter; for, I remember, that a little while ago, when some alterations in the laws with regard to religion were suggested to him, he replied, that " *it was against* " *his Coronation Oath, and he could not do it.*" And, therefore, I am sure the King will not suffer any of his subjects to be imprisoned, *unless by the* " *judgment of his Peers, or by the law of the land;*" for that would be equally against his Coronation Oath, being against the *Great Charter*, which is the foundation of the liberties both of the Church and of the people.

From the King I will pass to the Judges. The Judges are sworn to execute justice (as my Lord Coke says) *according to law and custom of England.* This proves how justly the laws are called the great inheritances of every subject, and the inheritance of inheritances, without which we have no inheritance. For (as Lord SOMERS observes) " as the subjects of the King are born to lands, and other things, so are they born to inherit and enjoy the laws of this realm, that so every man have an equal benefit by law."

Now, if the Judges are sworn to execute justice according to law, are they not bound to execute justice according to MAGNA CHARTA? Then what says the Great Charter? It says, " *No* " *freeman shall be imprisoned, unless by the legal judgment* " *of his Peers, or by the law of the land.*" Again, what says the Act of Confirmation of the Great Charter by Edward the " First? It says, " *Our Justices, Sheriffs, Mayors, and other* " *Ministers, which, under us, have the laws of our land to guide,* " *shall allow the same Charter, pleaded before them in judgment,*

"*in all its points, as the common law.*" This (says my Lord Coke) is a clause worthy to be written in letters of gold: and here (he adds) it is to be observed, that the laws are the Judges' guides, or leaders, according to that old rule, "*Lex est exer-*" *citus judicum tutissimus ductor,*" or "*Lex est optimus* "*judicis zenagogus,*" and "*Lex est tutissima cassis.*" (2 Inst. 526.)

The Judges of the land are, therefore, bound to do justice to every man according to the law of the land. QUEEN ELIZABETH and her Counsellors urged the Judges very strongly to obey the Patent under her Great Seal, in the case of CAVENDISH; but they answered, *that both she and they had taken an oath to keep the law, and if they should obey her commands, the law would not warrant them, &c.* (Anderson's Rep. p. 155.) And besides the offence against God, their country, and the commonwealth, they alledged the example of EMPSON and DUDLEY, who were executed as traitors, as were GAVESTON, the two SPENCERS, TRESILIAN, STRAFFORD, and others, for subverting the laws of the land, in obedience to the King's command, whereby they said, *They were deterred from obeying her illegal commands.* They who had sworn to keep the Law, notwithstanding the King's writs, knew that the law depended not upon his will; and the same oath that obliged them not to regard any command they should receive from him, shewed, that they were not to expect indemnity by it; and not only, that the King had neither the power of making, altering, mitigating, or interpreting the Law; but that he was not at all to be heard, in general or particular matters, otherwise than as he speaks, in the common course of justice, by the Courts legally established*. Hence it appears, that the Judges are bound to decide according to the GREAT CHARTER; for that is a part (and the most valuable part) of our Laws, and they are sworn to execute justice "*ac-*" *cording to the Laws.*" Upon this principle it was, that

* See Lord Somers, ubi. sup. ¶ 81.

"*when a letter was written by the Speaker to the Judges, to* "*stay proceedings against a privileged person, they rejected it* "*as contrary to their oath of office.*"—(See Noy. 83, 757.)

But I will not occupy your Grace too much. I will just introduce to your notice a passage from the "History of the Reign "of King Charles the Second," by Bishop Burnet;

"*The House,*" (he is speaking of the House of Commons in the year 1680) "*did likewise send their Serjeant to many parts* "*of England, to bring up abhorrers as delinquents: upon* "*which the right that they had to imprison any besides their* "*own members came to be much questioned, since they could* "*not receive an information upon oath, nor proceed against* "*such as refused to appear before them. In many places, those* "*for whom they sent their Serjeant refused to come up. It was* "*found that such practices were grounded on* NO *law, and were* "*no elder than* QUEEN ELIZABETH'S *time. While the House of* "*Commons used that power gently, it was submitted to in re-*" *spect to it; but now it grew to be so much extended, that many* "*resolved not to submit to it.*" (See Vol. ii. p. 121.)

Now, I will offer to your Grace a little comment on this passage. First, the Bishop says—"*It was found that such prac-*" *tices were grounded on* NO *Law.*" To be sure it was, for MAGNA CHARTA says, "*No freeman shall be imprisoned, but by the legal judgment of his peers, or by the law of the land.*—Then he says, "*Such practices were no elder than Queen Elizabeth's time.*" This is very important; for it should seem, that the House wanted to set up an *immemorial custom*, but they could go no farther back than QUEEN ELIZABETH'S time. Now, it is clear and established law, that in order to make a *custom* good, it must have been used so long, "*that the memory of man runneth not to the contrary.*" If any one can shew the beginning of it within *legal* memory, (that is, within any time since the first year of the reign of RICHARD I.) it is not a

good custom *. But, supposing they could have found precedents before the time of ELIZABETH, could they have acted upon them? Certainly not: for, as Lord COKE says, "*No "custom can prevail against an express Act of Parliament;*" and Magna Charta is an express act, which declares, that "*No "freeman shall be imprisoned but by the legal judgment of "his peers, or by the law of the land.*" However, the Bishop adds, that "*While the House of Commons used that power "gently, it was submitted to in respect to it; but now it grew "to be so much extended* (a dangerous and alarming circumstance indeed!) *that* "*many resolved not to submit to it.*"

What, then will the Judges of the land say at this day? *Does Magna Charta exist? Can it be repealed but by the Parliament? Does not the Parliament consist of three estates, the King, Lords, and Commons? Are not they* (the Judges) *sworn to execute justice according to the laws of the land? Is not Magna Charta part of the laws of the land? Does not that Charter contain a clause, that "No man shall be impri-"soned but by the judgment of his peers, or by the law of "the land?" Does not the Act of* 25 EDWARD I. *direct, that "all Justices, &c. &c. shall allow the same Charter pleaded "before them in all its points, as the common law?" And, finally, does not the second chapter of that Act declare, that, if any judgment be given, contrary to the points of the said Charter, by the Justices, &c. &c. it shall be undone, and holden for nought?*

Trusting, therefore, that your Grace will at all times defend the GREAT CHARTER, which, I repeat, secured the rights and liberties of the Church, as well as of the People,

I subscribe myself, with the utmost respect,

Your very humble Servant,

PUBLICOLA.

* Richard the 1st. began his reign the 6th of July 1189, and was crowned the 3rd of September following. So that whatsoever was done before that time, is before time of memory. What is since that time, is, IN a LEGAL SENSE, said to be WITHIN, or since the time of memory.—Hale's Com. L. v. 1. p. 4.

LETTER III.

TO

Sir SAMUEL ROMILLY, Knt. M. P.

"*Impius et crudelis judicandus est, qui libertati non favet. Angliæ jura "in omni casu libertati dant favorem.*"—FORTESCUE, cap. 42.

"No man, of what estate or condition that he be, shall be put out of "land or tenement, nor taken nor IMPRISONED, nor disinherited, nor "put to death, *without being brought in to answer* by DUE PROCESS OF "LAW."

Statute 28 Edward III. ENFORCED by 16 Car. I. cap. 10, which regulates the Privy Council, and takes away the Star-Chamber.

SIR,

INDEPENDENT of every party, and influenced by no other motive than that honest ardour which should warm the bosom of every Englishman in the cause of Liberty, I presume to submit to your consideration a few observations on the subject of the Privilege which is claimed by the House of Commons, to imprison the people of England. I will confess Sir, that I consider this claim as subversive of the fundamental

laws of the kingdom, and particularly of that strongest bulwark of our liberty, "*the trial by jury.*" I know it has been said, "it is highly improbable, that the House of Commons should *abuse* the privilege which they now claim;" but to this I will answer, we have laws which *deny* them this privilege; and "laws," as JUNIUS says extremely well, "are intended, not to trust to what men *will* do, but to guard against what they *may* do." I find in the page of history, which is the key of knowledge, that the Roman Senators were once inspired with the noblest sentiments of virtue, probity, and public spirit; but CICERO, who lived to see days of *ambition* and *corruption* at Rome, says in a letter to a friend, "aut assentiendum est nulla cum gravitate paucis, aut frustra dissentiendum;" that is, "*you must either basely vote with* CRASSUS *and* CÆSAR, *and one or two men more in power, or vote against them to no purpose.*" And so, at some future, and perhaps not very distant period, it may happen with our Senate; we may have Ministers who may employ such efficacious means of corruption as will render them absolute masters of the Government, and then the voices of one or two honest individuals will be of no avail. I contend, then, that the House of Commons ought *not* to have the power which they have exercised of imprisoning the subject without a trial by Jury; and I ground myself upon this maxim of TACITUS—"nec unquam satis fida potentia ubi nimis est."—"*Power without controul is never to be trusted.*" For, let us consider how easy it would be for a *corrupt* Minister, having the House of Commons at his command, to determine almost any writing which reflected upon public measures, to be infamous and libellous;* and then for the House, being *accusers* and

* What measures are there which some men will not support for the sake of money, or in expectation of preferment? In 1780, the celebrated Mr. Dunning affirmed in the House, and upon his Honor, "that he knew "*fifty* Members in that House, and most of them within his hearing, "who totally condemned, and reprobated out of the House, the measures they supported, and voted for in it." General Conway, in 1782, said in the House, "that he had dined a few days ago with an "honest plain soldier, who observed that he had never been more "astonished than at hearing many Members of Parliament most heartily "condemn in coffee-houses, the very same measures, for which he had "seen them the most strenuous advocates in Parliament."

Tiberius used to laugh at the base compliances of the Senate in his time, and frequently cried out, *O Homines ad Servitutem paratos!* Well then may it be said to the people whom such Members as these profess to represent—

"*Pone seram; cohibe—Sed quis custodiet ipsos*
"*Custodes?*" *Juv.* 6, 346.

"To legal forms in vain your rights you trust,
"For who shall keep the very keepers just?"

WAKEFIELD.

Judges in their own cause, to imprison the writer, not for a certain and limited time, prescribed by the laws of the land, but during their own pleasure or caprice. Indeed, Sir, this would be striking at once at the Liberty of the Press, which is the great jewel of all our liberties; for if the time should ever arrive, when the people of this country are prevented from discussing, with temper and moderation, the conduct of public men and public measures, I consider that all our liberty is lost*.

But, Sir, I will not argue any longer upon the *propriety* of the power which the House now claim, to imprison the people without the intervention of a Jury: the grand question for

* It was an excellent saying of Socrates, that "the Sun might as easily "be spared from the Universe, as FREE SPEECH from the liberal institutions of Society." (Apud Stob. eth, ecl. 13.). Timoleon, the deliverer of Syracuse from the tyranny of Dionysius, told his friends, who were urging him to punish a slanderer of his virtuous achievements, that "his primary motive to all his painful enterprises, had been the security of *free speech* to the meanest citizen." (Corn. Nep. 20, 5.)

consideration is, Whether they really *have* the power so to imprison? In order to prosecute this inquiry, we must refer to our Statute Book. In the course of a late discussion, the argument seems to have turned upon the words of Magna Charta, viz. that "no man shall be imprisoned, but by the "judgment of his Peers, *or the law of the land.*" It was said that these words, "*or the law of the land*," let in the privilege claimed by the House of Commons; because their privileges were part of the law of the land. Let us, for a moment, concede this point, and leaving the House of Commons to put what construction they please upon these words of Magna Charta, allow me, Sir, to ask you, what you understand by the words of the Statute of EDWARD the Third, which I have prefixed to this Address, viz. "*No man, of what estate or* "*condition that he be, shall be put out of land or tenement,* "*nor taken, nor* IMPRISONED, *nor disinherited, nor put to* "*death, without being brought in to answer* BY DUE PROCESS "OF LAW." Now, Sir, will the House of Commons, looking at this Statute, say that *they* have the power to imprison a man who is not brought in to answer "*by due process of* "*law?*" If they say they have this power, why then they have power to do all the other things prohibited by the Statute; they can *put a man out of his land or tenement;* they can *disinherit him;* they can *put him to death*; for the words "*due process of law*" have a reference to every thing that precedes. What, then, is meant by *due* process of law? Is it such process as the House of Commons can issue? No: for that House can issue no legal process whatever. "Due "process of law," says my Lord COKE*, "is a warrant, or "mittimus, under *hand* and *seal*;" and the SPEAKER of the House of Commons has *no* power *to seal*. He does not even pretend to it; for his warrant concludes in these words, "Given under my *hand*," not under "my hand and *seal*;" and, therefore, I contend that the warrant of the SPEAKER of the House of Commons is not that *due process* of law which

* 2 Inst. 52.

the Statute of 28 EDWARD III. requires, in order to justify the *imprisonment*, or *putting to death*, of the subject.

Sir, I must declare, with all the respect I feel for the House of Commons, as *one* branch of the Legislature, it appears to me, that in committing to prison persons whom they, in their discretion, deem *libellers*, they assume to themselves the *like* jurisdiction as was formerly exercised by the Court of STAR CHAMBER. It may be very material to examine this point. The Judges of the Court of Star Chamber were composed chiefly of *Privy Counsellors;* so that the very *same persons* acted in the double capacity of *Legislators* and *Judges* in their own cause, and punished men for pretended crimes against themselves as *Ministers;* for they first issued *arbitrary Proclamations* from the *Council Board*, which had all the *force of laws* in those days, and afterwards enforced them with cruel penalties in the Star Chamber. But at length, the oppressions of that Court, more particularly the sanguinary penalties which it had been accustomed to inflict upon *writers*, grew so intolerable, that the people resolved to bear it no longer, and accordingly it was suppressed by an Act of Parliament in the 16th year of the reign of King CHARLES the First.

Now, Sir, it is necessary to observe, that the *Preamble* of this Act recites many old Statutes concerning the liberty of the subject, and, among the rest, the before-mentioned Statute of the 28th EDWARD III. c. 3. It then states that the Judges of the Court of Star Chamber "have undertaken to punish "*where no law doth warrant*, and to make decrees for things, "having *no such authority*, and to inflict heavier punishments "than *by any law is warranted.*"

SECTION 2. "And for as much as all matters examinable "or determinable before the said Judges, or in the Court "commonly called the STAR CHAMBER, may have their *proper* "*remedy and redress*, and their due punishment and correc- "tion by *the common law of the land, and in the ordinary* "*course of justise elsewhere:* and forasmuch as the proceed-

" ings, censures, and decrees of that Court, have by experience
" been found to be *an intolerable burthen to the subject*, and
" the means to introduce *an arbitrary Power and Govern-*
" *ment*:

SECT. 3 and 4. " BE IT ENACTED, for preventing the like
" in time to come, that the said Court of STAR CHAMBER, and
" all jurisdiction, power, and authority, belonging unto, or
" exercised in the same Court, or by any of the Judges,
" Officers, or Ministers thereof, be clearly and absolutely dis-
" solved, taken away, and determined; *and that from hence-*
" *forth no Court, Council, or* PLACE OF JUDICATURE, shall be
" erected, ordained, constituted, or appointed within this realm
" of England or dominion of Wales, which shall have, use, or
" exercise the *same*, or the *like jurisdiction* as is, or hath been
" used, practised, or exercised in the said Court of *Star-*
" *Chamber*."

SECT. 6. " And be it further provided and enacted, that if
" any Lord Chancellor, or Keeper of the Great Seal of Eng-
" land, Lord Treasurer, Keeper of the King's Privy Seal,
" President of the Council, Bishop, Temporal Lord, Privy
" Counsellor, JUDGE OR JUSTICE WHATSOEVER, shall offend,
" or do any thing contrary to the purport, true intent, and
" meaning of this law, then he or they shall, for such offence,
" forfeit the sum of 500l. of lawful money of England, unto
" any party grieved, who shall prosecute for the same, and
" first obtain judgment thereupon, to be recovered in any
" Court of Record at Westminster, by action of debt, bill,
" plaint, or information, wherein no essoign, protection, wa-
" ger of law, aid, prayer, PRIVILEGE, injunction, or order
" of restraint, shall be in anywise prayed, granted, or allow-
" ed; nor any more than one imparlance."

SECT. 7. " And every person so offending shall likewise for-
" feit and lose to the party grieved, by any thing done, con-
" trary to the true intent and meaning of this law, his *treble*
" *damages*, which he shall sustain and be put unto, by means

" or occasion of any such act; or thing done, the same to be
" recovered in any of his Majesty's Courts of Record at West-
" minster, by action of debt, bill, plaint, or information,
" wherein no essoign, protection, wager of law, aid, prayer,
" PRIVILEGE, injunction, or order of restraint, shall be in
" anywise prayed, granted, or allowed, nor any more than
" one imparlance."

Now, Sir, it must be left for the Judges of the land to deter-
mine whether the House of Commons, by imprisoning a person
for a *libel*, do not assume the *like* jurisdiction as was formerly
practised by the Court of Star-Chamber. It appears to me that
they do; for they act in express contradiction to the Statute of
28 EDWARD III. which declares, that " no man shall be im-
" prisoned, *without being brought in to answer* BY DUE PRO-
" CESS OF LAW;" and that Statute is enforced by the Act which
abolishes the Star-Chamber. The SPEAKER of the House of
Commons either is, or is not, a Judge or Justice. If he be a
Judge or Justice, then he comes within the Act of the 16th
Car. I. c. 10., and is liable to all the penalties thereof; and it
is worthy of observation, that the Act declares no " PRIVILEGE"
shall be *prayed* or allowed. If he be no Judge or Justice, then
he can issue no process whatever, and consequently, any im-
prisonment by him must be completely unlawful. But the
SPEAKER of the House of Commons is not a Judge or Justice*;
he cannot administer an oath; he cannot admit to bail; and I
think I have before shewn, that he cannot issue any *legal* pro-
cess; he can *sign*, but he cannot *seal*; and that process which
is signed, but not sealed, is not " *due process of law*," within
the words and meaning of the Act of 28 Edward III. c. 3.

* There is no mention in the Rolls of Parliament of any Speaker of the House of Commons before the 51 Edward III. when Sir Thomas Hungerford filled that office. He is called, " *Monsieur Thomas de Hun-*
" *gerford, Chivaler, q'i avoit les Paroles pur les Communes d'Engleterre.*"
In the House of Commons the Speaker never votes but when there is

Sir, it is extremely clear to my mind that the House of Commons cannot imprison for a libel, without the libeller is "*brought in to answer by due process of law.*" No judge or justice whatever can commit for a libel; for it must first be ascertained *by a jury* that the matter complained of *is* a libel. That very able and distinguished writer, M. DE LOLME, tells us in his admirable work on "The Constitution of England*," p. 295, that "the liberty of the press, as established in England, consists therefore, (to define it more precisely) in this; "that *neither the Courts of Justice*, nor *any other Judges* "*whatever*, are authorized to take notice of writings intended "for the press, but are confined to those which are actually "printed; and must, *in these cases*, proceed *by the trial by* "*Jury*." You are aware, Sir, it was formerly determined by the Court of King's Bench, that the Judge or Court alone were competent to determine whether the subject of the publication was or was not a libel; (see the case of the Dean of St. Asaph, 3 T. R. 428.): but the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60. was passed, intituled "*An Act to remove doubts respecting the functions of* "*Juries in cases of libels.*" And it declares and enacts, that on every trial of an indictment or information for a libel, the Jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be required or directed by the Judge to find the defendant guilty merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it in the record. Hence it is the business of a Jury, and not of any Judge whatever, to decide both

an equality without his casting vote, which in that case creates a majority; but the Speaker of the House of Lords has no casting vote, but his vote is counted with the rest of the House; and in the case of an equality, the non-contents or negative voices have the same effect and operation as if they were in fact a majority. (Lords Journ. 25 June, 1661.)

* This book is recommended to the Public by Junius, as "a perform-"ance, deep, solid, and ingenious." Pref. 31.

upon thefact and the criminality of a libel: and I contend, that the House of Commons are not a Jury. They are not sworn "*to give a verdict according to the evidence;*" they cannot examine a witness upon oath; nor can they act the part of a jury to give damages. If, therefore, the House of Commons assume to themselves the right of deciding upon a libel, and, in consequence of such decision, commit the libeller to prison, I incline to think, that they bring themselves within the description of a court, exercising the *like* jurisdiction as was used by the Court of Star-Chamber; for they are *accusers* and *judges* in their own cause; and they violate the act of 28 Edw. III. c. 3. which declares "*that no man shall be imprisoned with-*"*out being brought in to answer by* DUE PROCESS OF LAW."

Sir, I am exceedingly glad to find that this matter is to come before the Judges of the land; and it is a great satisfaction to the public to know, that our present Judges are upright and learned men. In former times, the Judges talked a great deal about *privilege;* and some of them have said, that they must not examine into any thing done by either House of Parliament. But I think our present Judges will not agree with this doctrine; for if they find *one* branch of the Legislature acting in direct opposition to a law made by *all* the branches, they must declare *that one* branch to be wrong; and upon this principle, that an Act of Parliament can only be declared void by the *same* Legislative Power by which it was made. They have nothing to do with *privilege* or *custom;* for they know very well, that no usage whatever can counteract the effect of the clear and express words of an Act of Parliament, which declares, that "*no man,* "*of what estate or condition that he be, shall be put out of land* "*or tenement, nor taken nor* IMPRISONED, *nor disinherited,* "*nor put to death, without being brought in to answer by* DUE "PROCESS OF LAW." The twelve Judges must determine ac-

cording to law; they are bound by *an oath* so to do. It is very clear, that they cannot *make* a law; they are not to assume the characters of legislators. It is their province *jus dicere*, and not *jus dare*. If, therefore, they shall determine, that, *notwithstanding* the Act of EDWARD III. the House of Commons may imprison the people at their pleasure, in the same breath they will pronounce,* that the House of Commons can (as I said before) do all the other things which are prohibited by that statute, viz. they can *put a man out of his land or tenement;* they can *disinherit* him; and, finally, they can put *him to death;* and if the Judges shall so determine, then there will no longer be occasion to *seal writs*, and to *swear in Juries;* it will no longer be necessary for them, as Judges, to sit in Westminster-hall, and to go the circuit; the liberty of the subject will be destroyed; and this country will become one of the most wretched on the face of the habitable world!!!

Sir, before I close this address, I must beg to say a few words with regard to the legality of breaking open houses in order to arrest a person under a warrant from the Speaker of the House of Commons. I will confine myself to an examination of those cases where houses may be broken open, without

* Formerly the Judges held their places *durante bene placito*, and while that was the case, it is easy to conceive, and indeed, history informs us, that the administration of justice was not so impartial as it ought to be. This, no doubt, gave occasion to the remark which Mr. Selden has made in his TABLE TALK, where he says, that "the King's Oath is "not security enough for our property, for he swears to govern accord-"ing to law; now the judges are the interpreters of the law; *and what* "*judges can be made to do*, we know." But, by the Stat. 13 W. III. c. 2. it was enacted, that the Judges should retain their places *quamdiu bene se gesserint;* and by the 1. Geo. III. c. 23. they are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, (which was formerly held immediately to vacate their seats,) and their full salaries are absolutely secured to them during the continuance of their commissions.

repeating what I have before said concerning a warrant under the *hand* only. I need not tell you, Sir, that the house of every man is to him as his castle, as well for defence against injury and violence as for his repose, according to the maxim, *Domus sua cuique est tutissimum refugium.* This, I say, is the general maxim of law; but still I know there are some cases where the privilege will be of no avail. In a collection of the Penal Statutes, made by that very able Magistrate, Mr. ADDINGTON, I find it laid down, that *houses may be broken open in the following cases;* the person signifying first the occasion of his coming, and requiring the opening of the doors, and being refused; viz. *First*, in treason, felony, or suspicion thereof: 2dly, to apprehend any person who hath dangerously wounded another, being freshly pursued: 3dly, an affray being in a house, the constable may break it open to keep the peace: 4thly, upon a forcible entry or detainer found by an inquisition: to apprehend any person upon a capias utlagatum, or by fine; or upon process of excommunication, or upon a warrant of the peace, or good behaviour: 6thly, upon a recovery in a *real* action, the Sheriff may break them open to deliver possession: 7thly, and generally, in any case, *where the King is party*, or hath any interest; for no man's house shall protect him against the King. (See last ed. title "Houses" in the note.)

Now, Sir, I cannot find, that the case of Sir FRANCIS BURDETT comes within the description of any of those here mentioned. Supposing even that the warrant had been issued by a Judge, or Justice, still the officer executing it would not have been justified in breaking open the house of Sir FRANCIS. For, suffer me to ask, what offence has he committed? Has he been guilty of treason or felony? No. Has he committed a breach of the peace? No. He has, it is said, *published a libel;* and a libel is *no breach of the peace.* This has been most so-

lemnly determined; and I will here quote the words of Lord Chief Justice PRATT, in delivering the judgment of the Court in the case of "the King versus Wilkes, Esq. Member of Par-"liament for Aylesbury:" 2 Wils. 151: "We are *all* of "opinion that a *libel* is *not* a breach of the peace; it tends to "a breach of the peace, and that is the utmost; but that "which only tends to the breach of the peace *cannot* be a "breach of it. I cannot find that a libeller is bound to find "surety of the peace in any book whatever, nor ever was "in any case, except one, viz. the case of the seven Bishops, "where three Judges said, that *surety of the peace* was re-"quired in the case *of a libel*. Judge POWELL, the only "honest man of the four Judges, dissented, and I am bold to "be of *his* opinion, and to say, *that case is not law;* but it "shews THE MISERABLE CONDITION OF THE STATE AT THAT "TIME. Upon the whole, it is absurd to require surety of "the peace, or bail, in the case of a libeller."*

I shall now beg leave to conclude.—I am sure, Sir, there is no man that can have a greater respect than yourself for the laws of your country; no man who can have a more anxious concern for the liberty of the subject. Indeed it is astonishing how very tender the law is in this particular. I remember a case where Sir HENRY FERRERS having been arrested by virtue of a warrant, in which he was termed a *Knight*, though he was a Baronet, Nightingale, his servant, took his part, and killed the officer; but it was decided, that, as the "warrant was an *ill* warrant, the killing of an officer in "executing that warrant could not be murder, because no

* The same noble Judge in delivering the judgment of the Court in the case of the General Warrants, declared, "that our law is wise and "merciful, and supposes every man accused to be innocent, *before he is* "*tried by his Peers.*" 2 Wils. 292,

"good warrant; wherefore he was found not guilty of the "murder and manslaughter." (See Croke's Rep. P. 111. p. 371.) Let, then, the people dread any encroachment on their liberties. Let them not be deterred from discussing, with temper and decency, any question which respects their rights and immunities. For my part, I shall not be alarmed at any epithet of reproach which may be cast upon me. I know that I am a loyal and faithful subject; but I also feel, that there is a duty which every man owes to the *people* as well as to the State. "*When the liberty of the* "*subject is invaded,*" says that noble patriot, Chief Justice HOLT, "*it is a provocation to all the subjects of England.*" In a word, it is the business of every individual to contribute as much as he can towards the preservation of the liberties of the whole people; and it behoves every man to remember, with an excellent writer, that "*as it is more* "*easy to pull down than to build up, so experience con-*"*vinces us, that of all labours the restoration of liberty* "*has ever been found the most difficult.*"

With sentiments of the highest respect,

I have the honour to be, Sir,

Your very obedient servant,

PUBLICOLA.

LETTER IV.

TO

Sir SAMUEL ROMILLY, Knt. M. P.

" IT SEEMS TO ME TO BE A NOBLE THING, BOTH TO BE FREE MYSELF, AND TO
" LEAVE FREEDOM TO MY CHILDREN."

CYRUS apud Xenoph.

SIR,

IT is with infinite satisfaction I perceive you have stated to the House of Commons, that " the opinions which " you had expressed on the legality of the warrant under " which Mr. JONES now suffers, is still perfectly *unaltered* by " any thing which you have heard." I observe with pleasure, that " you wished to have had an opportunity of re-stating " some of those opinions which you had formed only after " *serious thought*, had delivered with much and *anxious sin-* " *cerity*, and which you still retain as fixedly and firmly as " ever." Upon looking back to see more precisely what those opinions are, I find it reported, that " you entertain a " great doubt whether the House of Commons has a right to " commit for a breach of privilege in the case of a *libel* on the " conduct of one of their Members." You think, that " the " House has a right to commit in a great many cases; such as " where their proceedings are interrupted; where the people, " by hissing or otherwise, insult Members coming to the

" House; where they threaten Members if they vote on a par- " ticular side; and many others of the same nature: but as to " *libels* published on the past conduct of Members, and not " on any proceedings at the moment going on before the " House, you have great doubts as to the right of committing, " because you conceive it to be *against the first principles of* " *justice;* because the House act as their own *Counsel, Jury,* " and *Judge;* because they are the *accusers* and the *punishers;* " the House are the judges of the law, and of the fact; and " the party is committed *during their pleasure.**"

* As a great deal has been urged in favour of the privilege of the Commons to imprison for a libel, by way of analogy to the practice of Courts of Justice, which, it is said, may commit for contempts, I shall beg to add a few words on that part of the subject. Lord Chief Baron Gilbert has stated, that " it is one part of the law of the land to commit " for contempts, and confirmed by the Stat. Westm. 2, c. 39." (Hist. of Com. Pleas, p. 25). Now, I must declare, that, after looking into that Statute, I cannot find any thing to warrant his assertion. All that the Statute says, is, that many great men (who in those days had castles, fortresses, and liberties, wherein they used to secure themselves) had resisted the Sheriff in executing the King's writs; which, creating great inconvenience, the Sheriff is ordered to remove all obstructions to the execution of the process. The Act, therefore only applies to persons resisting the King's writs, and does not say a word about any other contempt. I must confess, that I cannot understand how Courts of Justice can imprison for a *libel*, without infringing upon Magna Charta. All that they can do, in a *constitutional* manner, is, in my opinion, to imprison such persons as commit contempts *in facie curiæ;* or, in other words, who occasion an immediate obstruction to the administration of justice, and, as such, are disturbers of the peace. But, even in those cases, I conceive that the Courts cannot *constitutionally* imprison *during their pleasure*, but that the offender must afterwards be brought in, to answer by due process of law, and receive sentence of punishment from a *jury*. For, though the Stat. Westm. 2, c. 39, declares, that such persons as shall be convicted of resisting the Sheriff, shall be punished *at the King's pleasure*, yet my Lord Coke, in his exposition of these words, says, " That " is, according to that which shall be, upon *due* proceeding, adjudged " *coram rege* in the King's Court of Justice; for no man can be punished " by *absolute* power, but *secundum legem, et consuetudinem Angliæ*, as

Sir, I think it hardly necessary to repeat, that I am totally unacquainted with Mr. JONES, and that I am induced to trouble you with my remarks from no other motive than that which must animate the whole body of the people—"*a people*" (as you very justly observe) "*who love their liberties.*"

In my former address, I expressed much satisfaction, that this question was to come before the Judges of the land. Since that time, I find that pamphlets have been published, and opinions are spread abroad, that the Judges have no power to

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"hath been said before, in the exposition of Magna Charta, and else-"where hath been often said." (2. Inst. 454.) If a Judge could imprison for a *libel*, he must necessarily become what our law never warrants, that is, a Judge *in his own cause;* and if he could imprison *during his pleasure*, he would be possessed of an *absolute* power, which our Constitution does not allow. The fact is, that great and good men have, at all times, been very tender of the liberty of the subject. Chief Baron Gilbert says, that "when the Common Pleas proceeded on *Clausum* "*fregit*, the defendant was under the same disadvantages as when he was "arrested on a *Latitat*." Upon which the annotator (who was well acquainted with the laws and constitution of his country,) observes—"Here the Chief Baron candidly allows, that the arrest by *Clausum fre-*"*git* in the Commons Pleas, and by the *Latitat* in the King's Bench, "did lay the defendant under *disadvantages*. If the Chief Baron had "said, 'under unwarrantable oppressions in open violation of King "John's Great Charter, not only by subverting and perverting the an-"cient process of the law in trespass, but also by an arbitrary and bar-"barous abuse of special bail:' If the Chief Baron had stigmatized this "process by *Latitat* with the *seemingly* harsh, but richly merited terms "above mentioned, as SIR ORLANDO BRIDGEMAN, Chief Justice of the "Common Pleas did, when the *Latitat* was first introduced into the "*King's Bench*, he would perhaps have done no more than an honest "indignation, at the innovation, would warrant." (Hist. of Com. Pleas, 3d. ed. p. 183.) As for *discretion*, I am for investing the Judges with as little as possible. We know, that some men view matters in a very different light from what they are seen by others. "The discretion of the "Judge," (says Mr. Gibbon very truly) "is the *first engine of tyranny;* "the laws of a free people should foresee and determine every question "that may probably arise in the exercise of power and the transactions "of industry." (Decline and Fall, &c. v. 8. p. 111.)

interfere in the matter. Passages are cited from my Lord COKE, in his fourth Institute, to shew, that "the Judges ought *not* to "give their opinion of a matter of Parliament, because it is "not to be decided by the common law," &c.; and the case of BRASS CROSBY, which has been so often mentioned, is insisted upon as a case in support of this doctrine.

Now, Sir, I admit, that my Lord COKE tells us, "the Judges "ought not to give their opinion of a matter of Parliament;" but, suffer me to ask, are we to be bound by this mere *dictum* of my Lord COKE, great and learned as he was? The intelligent and very laborious Mr. PRYNNE, who detected and exposed many errors and absurdities of that Judge, in respect to matters of Parliament, has left us an observation on this dictum; he says, "though the Judges cannot give an opinion in the "Parliament or Lords' House, sitting the Parliament; yet, "when matters or *Privilege* of Parliament come *judicially* be-"fore them in the Courts *where they sit as Judges*, there they "MAY, DO, and OUGHT to judge them; as in the cases of "Bartholomew Done against John Walsh, Mich. 12. E. 4. "rot. 20. in the Court of Exchequer; and of John Ryver "against Robert Cosyn, Hil. 14. E. 4. rot. 7. and sundry "other cases." (See "Animadversions on, and Amendments "of, the Fourth Part of the Institutes," p. 16.) In the case of BRASS CROSBY, the Counsel, though men of considerable learning and ability, do not, however, appear to have looked into PRYNNE on that occasion*; for I find the Chief Justice

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* Sir Francis Bacon in his book of the Advancement of Learning, speaking of cases omitted in law, fol. 38, very justly says, that "The "narrow compass of man's wisdom cannot comprehend all cases which "time hath found out, and therefore cases omitted and new, do often "present themselves."

(Dr. Grey) observes, that "the Counsel at the Bar have not "cited *one* case where any Court of this Hall ever determined "a matter of privilege which did not come *incidentally* before "them:" and then he adds, "the present case differs much "from those which the Courts will determine; because it does "not come *incidentally* before us, but is brought before us "*directly*, and is the whole point in question; and to deter- "mine it, we must supersede the judgment and determination "of the House of Commons, and a commitment in execution "of that judgment." With very considerable surprize, inter- mixed with no small portion of regret, I observe, that Mr. Justice Blackstone acquiesced in this doctrine, notwithstand- ing he tells us in his valuable Commentaries, (vol. 1. p. 166,) that "when a letter was written by a Speaker to the Judges, "to stay proceedings against a privileged person, they rejected "it, as *contrary to their oath of office**." What this oath of

* It is impossible not to perceive the fallacy of some of the arguments used by the Judges in the case of Brass Crosby. Gould, Justice, said, that "the Resolution of the House of Commons is an adjudication." But surely the learned Judge must have known, that no resolution of the Commons can supersede the written law of the land. An order made by that House, or by the House of Lords, does not bind the liber- ty of the subject, as appears in 2 Inst. 47. Blackstone, Justice, said, "How preposterous is the present murmur and complaint! Are not the "Commons chosen by the People?" To this I will answer, in the words of the Earl of Chatham, in the case of Mr. Wilkes: "*When the People* "*choose their Representatives, they never mean to convey to them a power* "*of invading their rights, or trampling upon the liberties of those whom* "*they represent*. What security would they have for their rights, if "once they admitted, that a Court of Judicature might determine every "question that came before it, not by any known positive law, but by "the vague, indeterminate, arbitrary rule of what some are pleased to "call *the wisdom of the Court?*" (Debates, 1770.) But Mr. Justice Blackstone said, 'It is our duty to *presume* the orders of that House, and their execution, are according to law." Indeed! and this from a Judge, who is sworn to *interpret* the Law?—A Judge is not to *presume*,

office is, almost every man must know; it is "to administer "*justice according to law*, without having regard to any per- "son—without letting to do right for any *letters* or *command- "ments* which may come to them from the King, or from any "other, or by any other cause;" and it was, no doubt, from a high respect and reverence for this oath, that Lord Holt (one of the most upright Judges and noble Patriots that ever sat upon the bench,) told the Speaker, and a select number of the House who went in person to the Court of King's Bench, in order to deter him from proceeding in the Aylesbury case—"I sit here to administer justice; "if you had the whole House of Commons in your belly, "I should disregard you; and if you do not immedi- "ately retire, I will commit you, Mr. Speaker, and "those with you."—I contend, then, that it would be ab- surd, and, I think, no less than a prevarication with consci-

but to *investigate*; not to delay, but to execute the law. To *presume* that an order made by the Commons is a good order, is to presume that they can order nothing that is wrong; and to presume that, without any in- quiry or relief, is a strange doctrine for a Judge who presides in a Court, where he is bound by an oath to determine according to the laws of the land. If an order of the House of Commons, as one branch of the legis- lature, could operate as a law, then an order of the House of Lords, as another branch of the legislature, would pass for a law also; but the House of Lords cannot, as I have just shewn, make any order to bind the liberty of the subject. In the case of the King and Queen, v. Knowles, (cited more at large post, pag. 85,) it is very truly said by Samuel Eyre, Justice, that the Judges can "judge of an act of Parlia- "ment, what is one; that an act by King and Lords is not a good one; "and so they may judge of an order of the House of Lords, whether "the concurrence of the other estates of Parliament, or one of them, be "requisite." And, that the courts of law can take judicial cognizance of the proceedings in Parliament will be shewn more fully in the course of the succeeding pages.

ence, for the Judges to say, that they are not to give relief to a British subject, merely because the injury is done by the House of Commons; which House is only *one* branch of the Legislature, and consequently *cannot, ought not, must not* break through any act which has been solemnly done by *all the three* branches thereof. Besides, the Judges must remember, that by their conduct the honor of the *King* is affected. The King is bound by his Coronation Oath to preserve and keep all the laws of the land, and one of those laws is, in the words of Magna Charta, "*We will sell to no man, we will deny to no* "*man, nor delay right or justice;*" which words, the King, in judgment of law, is ever repeating through his representatives in all his Courts. It was, therefore, an excellent saying of that glorious Prince, EDWARD III. when he caused THORPE, Chief Justice of the King's Bench, to be hanged for taking a bribe; "*That he being intrusted, as the King's Deputy, to adminis-* "*ter justice in that Court, he had, as much as in him lay,* "*broken that solemn oath, which his Majesty made to his* "*people at his Coronation.*" Yes, Sir, I maintain, that Mr. Prynne is right, and that the Judges *can* and *ought* to determine on matters or *privilege* of Parliament when they come before them *judicially* in the Courts *where they sit as Judges;* and if they could not do so, how wretched would this country be if ever it should fall under the government of a *wicked* Minister, and a *corrupt* House of Commons? What security, I ask, would the people have for their liberties, their property, their lives? What inducement would there be for them to remain in this country? Is it the *soil*, or the *atmosphere* alone, that renders England dear to us? No; it is the confidence which every man feels, that England is "*the land of liberty.*" This is the charm which stimulates his industry, and sweetens his repose; this is the pride, the glory of his heart. In what, then, does liberty consist? Not, indeed, in the power of doing every thing which a man's passions urge him to attempt, or his

strength enables him to execute; but, as I conceive, in the power of doing every thing that is not forbidden by some *known* and *certain* law. "Where there is *no law*, there is "*no freedom*," says Mr. LOCKE; and therefore the grand difference between Governments that are *arbitrary*, and such as are *free*, is, that in the former the *will*, in the latter the *law*, governs. You, Sir, who are not merely a lawyer, a casuist, but also a polite and learned scholar—you will remember, that this just distinction between *tyranny* and *freedom* is admirably drawn by THESEUS, in his answer to the Theban Herald, in "The Supplicants" of Euripides:—

"Of all the evils that infest a state,
"A *Tyrant* is the greatest: there the laws
"Hold not one common tenor; his sole *will*
"Commands the laws, and *lords it over them*;
"This pow'r thou hast not. WHERE THE LAWS ARE WRITTEN,
"The *weak*, the *rich*, have all one equal course
"Of justice; and the lower ranks, when wrong'd,
"Know their redress against injurious greatness;
"And *penury*, with *justice* on its side,
"Triumphs o'er riches: THIS IS TO BE FREE."——POTTER, 1. 485.

And such, Sir, is the freedom of England. We have the *same* laws for the *rich* and the *poor*; and it is not in the power even of the *King* himself to punish the meanest of his subjects, but by *the ordinary forms of law*. In our happy Constitution there are no *hidden reserves* of authority, to be let out on occasion, and to overflow the rights and liberties of the people: the law is the proper and only rule of conduct both for the King and the People. Our Kings can neither make nor change laws; they are under the law, and the law is not under them. The King of England cannot *dispense* with the laws of the land; for the very first article of the glorious Bill of Rights declares, that "the pre-"tending power of *suspending* or *dispensing* with laws, or "the execution of laws, by legal authority, without consent

"of Parliament, is *illegal*." If, therefore, a man commit *high treason*, what is to be done? Can the King give orders for his execution before he is brought in to answer (as the Statute 28 EDWARD III. c. 3. requires) "*by due process of* "*law?*" No, he cannot do so; for that would be to *dispense* with the law; it would be to *suspend* that most noble privilege of Englishmen—"*the trial by Jury.*" Mr. Justice BLACKSTONE says (and here I cannot help repeating my wish that he had always been equally consistent), that "not "only the substantial part, or judicial decisions of the law, "but also the formal part, or *method of proceeding*, cannot "be altered but by Parliament; for if once those outworks "were demolished, there would be an inlet to all manner of "innovation in the body of the law itself." (Com. vol. 1. p. 142.) By what authority, then, permit me to enquire, can the House of Commons pass that *barrier* which the King himself is not suffered to do? Is *his* prerogative to be restrained within certain limits, clearly known, and fully ascertained; and are *they* to assume the exercise of privileges which, by their own confession, are *uncertain* and *undefined?* Is the King, in the highest offence that can be done to Majesty, namely, in the case of treason, bound to proceed by *the trial by Jury?* and shall the House of Commons, when they are offended, proceed *according to their pleasure** ? Sir, if the House of Commons can do this, then I deny that we live in a land of freedom; we have been all along deceived; we do not possess *that* Constitution we imagined. If, I say,

* If the King were to exercise the arbitrary power of committing *at* his pleasure, and *during* his pleasure, what would not the Commons themselves exclaim? In the time of James II. they expressed themselves as follows: "here is tyranny, here is despotism, here is an absolute mo- "narch governing not only without law, but against law;" and such expression caused that sovereign to abdicate the throne, and produced the glorious Revolution.

the House of Commons can imprison the people, not according to *the ordinary forms of law*, but at their own *discretion*, who knows but they may, at some future period, treat the subject very little better than was practised in the arbitrary proceedings of the *Ostracism* by the ancient Athenians, or by the still more oppressive *lettres-de-cachet* of modern France? Any man that shall publish writings offensive to the Ministry may be brought before the House; and they (as you observe) "are to act as their own *Counsel, Jury*, and "*Judge*; they are to be the *accusers* and the *punishers*; "they are to be the Judges of the *law* and of the *fact*; and "the party is committed *during their pleasure!!!*"

May the firmness of our laws, and the integrity of our Judges, forbid them this power! May the liberties of the People, and the spirit of the Constitution, remain unshaken! No man respects the House of Commons more than I do; but I dread any encroachment (from whatever quarter it may be made) on the liberty of the subject. The question is now to be determined by the Judges; they have *power by law*, and are bound by *an oath* to administer justice, "*freely without sale—fully without any de-* "*nial.*" Every man is concerned; the liberty, the property, the life of every individual is involved in their decision. The country are looking on, but with calmness and fidelity: the people respect the law, for they know that "THE LAW IS GREAT, AND WILL PREVAIL."

I have the honour to be, Sir,

Your very obedient Servant,

PUBLICOLA.

LETTER V.

TO

THE FREEHOLDERS

OF THE

COUNTY OF MIDDLESEX.

" Remember, O my Friends, the Laws, the Rights,
" The gen'rous plan of pow'r, deliver'd down
" From age to age, by your renown'd forefathers,
" So dearly bought, the price of so much blood!
" O! let them never perish in your hands,
" But piously transmit them to your children.".

CATO, Act III. Scene 5.

GENTLEMEN,

As I have always considered, that whatever is of a public nature the public have a right to enquire into, I trust you will excuse the liberty I take of addressing myself to you at this alarming crisis, when our ancient Rights and Privileges are in the utmost danger of being destroyed. So much, indeed, has already been said upon this subject, that little remains for me to say; but if it were ever so little, I should not think myself justified in withholding it from my fellow-subjects.

Gentlemen, the House of Commons, in defiance of the written law of the land, have assumed the power of imprisoning a subject without the intervention of a Jury. They say, that they have exercised this power for many ages, and that the length of the practice is sufficient to establish the justice of it. They present us with precedents drawn from the very worst of times, when the original liberties of this nation were eclipsed by the usurpations of *Prerogative;* and then they contend, that because these arbitrary proceedings have never been resisted before, they ought not to be resisted at this moment*. These, to be sure, are most persuasive arguments; but, in my poor judgment, they will never convince the people of this country, as long as they possess the " *Great Charter of Li-* " *berties;*"—the *Statute of* 28 *Edward* 3. *c.* 3."—the " *Statute of Marlbridge;*"—and " *the Bill of Rights.*" But, notwithstanding these old and explicit laws,—notwithstanding the toils and dangers which our generous an-

* As to the *Resolutions* of the House of Commons, they amount to nothing; for if a resolution made by them were to bind the subject, then we must admit that a resolution by the Lords, and also a resolution by the King, would have equal effect; and if that were the case, we should perhaps have three *separate* resolutions to distract and enslave the people. But no resolution of any of the three estates can operate as a law to bind the subject, for to this purpose they must all join. As for the *Precedents* which the Commons have adduced, where they exercised the power of imprisoning, I do not see what they can avail.—" Precedents (says Mr. Selden) are good proofs of illustration or con-" firmation, where they agree with the express law, but they can never " be proof enough to overthrow any one law, which the whole legis-" lature have enacted."

When the words of Magna Charta are expounded, according to their true meaning, the Stat. of 25 Edward I. c. 2. will set aside all the Precedents which the Commons have brought forward to support their Privilege to imprison at pleasure. " And we will, (says that Stat.) that if any judgment be given from henceforth, contrary to the points of the said Charter, by the Justices, it shall be *undone and holden for nought.*"

cestors overcame in order to procure, and the noble struggles which the people are now making to preserve them,—we are gravely told by some Members of the Honourable House, that "*they know of no privilege claimed by that "House which it does not possess: they know of no power "exercised by it which it has not the right to employ.*" This was the language of Mr. PONSONBY with regard to your Petition, though he voted that it should be received: and he added, that "*he regretted the ignorance which seemed "to influence the people upon this subject.*" In the debate upon "Sir FRANCIS BURDETT's notice to the Speaker," Sir ARTHUR PIGOTT is reported to have said, that "*notwith-"standing all the daily trash which was published, there was "no doubt that the House had a right to punish those who "libelled them in their legislative capacity;*" and he honours those persons who maintain a different opinion, with the title of "*instigators of anarchy,*"—"adherents of the new "school,"—and "*contemptible pretenders.*" Epithets of this nature are certainly enough to alarm the most courageous; but as I have freely and frequently delivered my sentiments upon this subject, I cannot be persuaded to part with my reason, even by the grandiloquence of men, who have long been accustomed *virûm volitare per ora.* Mr. PONSONBY regrets the ignorance which influences the people upon this occasion. But, Gentlemen, are we really so ignorant as he supposes? Have we never read *Magna Charta*, which is our *political Bible?* Have we never read what that noble patriot, the Earl of CHATHAM, said in the House of Peers, in the case of Mr. WILKES? "My Lords, the Constitution is "not a vague or loose expression; *we all know what it is;* "that the first principle of it is, that the subject shall not be "governed by the *arbitrium* of one man, or body of men "*(less than the whole Legislature)*, but by certain laws, to "which he has virtually given his consent, which are open "to him to examine, and *not beyond his ability to under-"stand.*" And again, "The Noble Lord (MANSFIELD)

"assures us, that he knows not in what code the law of "Parliament is to be found; that the House of Commons, "when they act as Judges, have no law to direct them "but their own wisdom; that their decision is law; and if "they determine wrong, the subject has no appeal but to "Heaven.

"What then, my Lords, are all the generous efforts of "our ancestors? Are all those glorious contentions, by "which they meant to secure to themselves, and to trans-"mit to their posterity, a known law, a certain rule of "living, reduced to this conclusion, that instead of the ar-"bitrary power of a King, we must submit to *the arbi-"trary power of a House of Commons?* If this be true, "what benefit do we derive from the exchange? Tyranny, "my Lords, is detestable in every shape; but in none so "formidable as where it is assumed and exercised by a "number of tyrants. But, my Lords, this is not the fact; "this is not the Constitution; we *have* a law of Parlia-"ment; we *have* a code in which every honest man may "find it—we have Magna Charta; we have the Statute-"book, and the Bill of Rights." (Debates, 1770.)

Gentlemen, it is astonishing, that any man can think the House of Commons alone has power to dispense with the written laws of the land. Here is the ignorance which is charged upon others; here is the want of a knowledge of the most important nature—a knowledge of the Constitution, without which no Senator can possibly be fit for his office.* The Members of the House of Commons are delegated by the people to watch, to check, and to avert every dangerous innovation on their liberties. Their power has no other end than *preserva-*

* Vide Cic. de Leg. 3, 18.

tion; and therefore they can never have a right to destroy, to enslave, or designedly to impoverish, the subject.* They are empowered to act *for* the people, not to act *against* them; they are *trustees;* and, as such, are accountable to the people, who are their principals, for the faithful discharge of their duty.† They are not to exceed the powers with which they

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* See Locke's Essay on Civil Government, c. 11, Of the Extent of the Legislative Power.

† However offensive the term may be, I must declare, that the Members of the House of Commons are only the *servants* of the people; and formerly they received *wages* for the services they performed. Mr. Prynne says, that those wages had no other origin than that principle of natural equity and justice: *they who receive the benefit ought also to support the burthen.* But a writ was framed to enforce the payment of these wages; and what Mr. Prynne informs us is remarkable: "That "the first writs of this kind extant on our records are coëval with our "Kings' first writs of summons, to elect and send Knights, Citizens, and "Burgesses to Parliament; both of them being first invented, issued, "and recorded together in 49 Hen. III. before which there are no me- "morials nor evidences of either of those writs in our Historians or "records." (See his 4th Reg. of Parl. Writs, p. 2.) The first writs directed the Sheriff to levy, from the electors of the county, and to pay the Knights *their reasonable expenses in coming to the Parliament, remaining there, and returning to their respective homes.* But in the 16th Edw. II. the expenses of the Representatives were reduced to a certain sum by the day, *viz.* four shillings a day for every Knight, and two shillings for every Citizen and Burgess. Two shillings a day was so considerable a sum in ancient times, that there are many instances, where boroughs petitioned to be excused sending Members to Parliament, representing, that they were engaged in building bridges or other public works, and therefore unable to bear such an extraordinary expense. And it is somewhat remarkable, that from 33 Edward III. and uniformly through the five succeeding reigns, the Sheriff of Lancaster returned, *that the Citizens and Burgesses within the County of Lancaster, ought not, and could not, on account of their poverty and inability, send any Citizens or Burgesses to Parliament.* (Pryn. Brev. Parl. Red. p. 235 to 238; and Christian's Note on Comm. 1. p. 174.)

have been entrusted; and, therefore, if they want to imprison the people, (contrary to the statute of Edward the Third, which declares that "*no man shall be condemned without being "brought in to answer by due process of law,*") let them produce their authority. Will they say, that the people have given them this power? Will they pretend that the people have surrendered to them their ancient privilege of *a trial by jury?* Surely the Members of the House of Commons will not advance, that the people have alienated their liberties. They will not, I hope, suppose that Englishmen are become so indifferent, that they can see an individual imprisoned, contrary to law, without trembling for the freedom of the whole nation. I trust that my countrymen will never betray themselves. I have read of many nations, and have in my own days seen some, who have lost their liberties by their own fault; but I never heard or read of more than one people (the Cappadocians) who refused the liberty which they might have enjoyed. (Vide Strabo, lib. 12.*) But the people of England are not yet inclined to part with their liberties; and, therefore, their Representatives have no more right to betray them, than their Kings have to infringe them. Why should the House of Commons have a power which the King himself does not possess? The law is to be the only rule and measure of his government; and upon this

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Andrew Marvell, who was Member for Hull, in the Parliament after the restoration, was the last person in this country that received wages from his Constituents. (Christian, ubi sup.)

In Scotland the Representation of the Shires was introduced by the authority of the Legislature, in the 7th Parliament of James the First of that kingdom, anno 1427, and there it is at the same time expressly provided, that "the Commissaries shall have costage of them of ilk "schire that awe compeirance in Parliament." (Christian ubi sup. and Scotch Acts, printed in 1682, p. 30.)

* Libertatem repudiaverunt, ut quam sibi dicerent intolerabilem.

account it is truly said, that a King of England can do no wrong; nor will his prerogative be any warrant to him to do an injury to any one. How, then, can the House of Commons assume the power of imprisoning at their own *discretion*, when the King cannot imprison without the subject is first brought in to answer by *due process of law*? Is *this* the Constitution? Is *this* the law of the land? We are indeed most grossly ignorant of such a Constitution; we are totally unacquainted with any such law. Yes, here we are completely ignorant; but we have some little capacity in other respects. We know, that we have certain written laws to protect the subject; and we know, that those laws cannot *legally* be suspended or dispensed with by any authority *less than the whole Legislature*. It is not in the power of the House of Commons to repeal any written law whatever; they can neither make nor annul laws without the assent of the other two estates of the realm. This is the true Constitution of the country; and this Constitution the people are bound to maintain, unless they choose to betray themselves, and to fall into a state of universal corruption; and when they are once fallen into such a state, they will be sure to lose what they deserve no longer to enjoy.

But, Gentlemen, it is asserted by Sir ARTHUR PIGOTT, that the House of Commons *have* power to imprison the subject for a *libel*; and he says that we, who hold a contrary doctrine, are "*instigators of anarchy*." Now, though I entertain the highest respect for this Learned Advocate, I must beg to differ from him in both these particulars. In the first place, I cannot but wonder at his legal opinion. I should have thought, that in the course of his long and laborious lucubrations he must have met with the Statute of 28 Edw. III. c, 3. which declares, "*no man shall be put* "*out of land or tenement, nor taken, nor* IMPRISONED, *nor* "*disinherited, nor put to death, without being brought in to* "*answer by* DUE PROCESS OF LAW." I should have imagined, that he had not altogether passed over the Statute of Marl-

bridge* (now called Marlborough, in Wiltshire) which was made in the 52d year of Henry III. The reason of the making of this act was, (says my Lord Coke) that many fearful and dangerous troubles and dissensions between the King and his people had grown out of this root, that the King sometimes allowed, and sometimes disallowed the Great Charter — that the great men, and others, refusing the course of the King's laws, took upon themselves to be Judges in their own cause, and to take such revenges as they thought fit, until they had amends at their own pleasure; for a remedy in general of all which mischiefs, "*It is* "*provided, agreed, and granted, that* ALL *persons, as well* "*of* HIGH *as of* LOW *estate, shall have and receive justice in* "*the King's Court.*" Now, what will Sir ARTHUR say to these two Statutes? Will he, after an attentive perusal of them, pretend that any man, however mean his condition, or however great his offence, can be imprisoned, disinherited, or put to death, without being brought in to answer by *due process of law?* Will he say, that any man, or body of men, can have or receive justice in any other place than in the King's Courts of Justice? Sir ARTHUR must know what my Lord COKE says upon the above-cited words of the Statute of Marlbridge. "These words (in the Court of our Lord the King) "are of great importance; for all causes ought to be heard, "ordered, and determined before the Judges of the King's "Courts, *openly* in the King's Courts, *whither all persons* "*may resort*, and in no chambers, or other private places; "for the Judges are not Judges of Chambers, but of Courts; "and therefore in *open court*, where the parties' Counsel and "Attornies attend, ought orders, rules, awards, and judge-"ments to be made and given, and not in chambers or other "*private places*, where a man may lose his cause, or receive "great prejudice or delay in his absence for want of defence. "Nay, that Judge that ordereth or ruleth a cause in his

* This town in our law books is called a city, and the freemen, citizens. 2 Inst. 101. 39. E. 3. fo. 15.

" chamber, though his order or rule be just, yet offendeth he " the law (as here it appeareth), because he doth it not in " Court." (Vide 2 Inst. 103). But the Statute of Marlbridge does not stop here; it does not say merely, that all causes shall be *heard* in the King's Courts; it declares, that " *no one hereafter shall have revenge of his own authority,* " *without the award of the Court of our Lord the King.*" Gentlemen, I heartily rejoice in being able to bring this Statute to light from the gloom of antiquity; and I am certain, that every one of you must admire the noble precautions which your ancestors took for the preservation of the liberties, both of themselves and their posterity. Here is an excellent written law, a noble course of proceeding for the equal and impartial administration of justice! No; it is not lawful for causes to be heard, ordered, or determined, in any other places than in the King's Courts; it is not lawful for any man, or body of men, to revenge themselves; they must have judgment in some of the Courts of our Lord the King. No *private places* are to be used, where the public are *excluded;* no *galleries* are to be cleared; no *doors* barricadoed*; no persons are to be *accusers*

* Some Members of the Honourable House think, that the public ought not to be admitted to hear and report their debates. But Mr. Justice Lawrence is of a different opinion. In giving judgment upon a rule to shew cause, why a criminal information should not be granted against J. Wright, for printing and publishing a libel on John Horne Tooke (which alleged libel was contained in a report of the House of Commons which Wright had printed) he made use of the following words. " Though the publication of the proceedings of Courts of Justice may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public, that such proceedings should be generally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons, whose conduct may be the subject of such proceedings. The same reasons also apply to the *proceedings in Parliament;* it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be *generally* circulated. (See Rex. v. Wright, 8. T. R. 293.)

and *punishers* in their own cause. All men, high and low, must have and receive justice in the King's Courts of Justice. I beseech you then to consider the glorious advantages of a *public trial.* The offender neither makes his appearance, nor pleads, but in places where every body may have *free entrance;* and the witnesses when they gave their evidence, the Judge when he delivers his opinion, the Jury when they give their verdict, are all *under the public eye* * These are the blessings of a free Government—of a limited Monarchy—of a country where the laws are written. What then would the House of Commons set up against these laws? They tell us of a *Privilege* which was *usurped* in former times; and this, forsooth, is to deprive us of our *written* laws. I am very sorry, that Sir ARTHUR PIGOTT should entertain this notion; but, that he should call the persons who deny the legal force of the privilege " *instigators of anarchy,*" " *adherents of the new* " *school,*" " *contemptible pretenders,*" is more than I could have expected from him †. For my part, I shall not think my-

* See De Lolme on the Constitution, p. 182.——The King's Courts of Justice are the proper places where every person that has suffered injury and damage may make his complaint, and have right done him. Sir Edward Coke, in his exposition upon the Stat. of Westm. 2. c. 14. says, " It is an ancient maxim of the common law, *Non recedant quæ-* " *rentes a curia regis sine remedio.*" In 4 Inst. fol. 71, about the middle, he says, " No wrong or injury, either public or private, can be done, " but it shall be reformed or punished in one court or other, by due " course of law." And in the lower end of that folio, " *A failure of* " *justice is abhorred in law.*"

† The learned Advocate may, if he please, say, that the supporters of Magna Charta are instigators of anarchy; but he seems to have forgotten, that Glanvil, who was a learned lawyer, and Chief Justice in Henry the Second's days, wrote a book of the Common Law, which is the most ancient of any extant, touching the liberty of the subject, wherein he informs us, (lib. 1. c. 2.) that there was in his time such a thing as High Treason against the *Kingdom* as well as against the *King.* If the learned Gentleman will take the trouble to look into the elaborate history of Henry the Second by Lord Lyttleton, he will find the following passage,

self either an *instigator of anarchy*, or a *contemptible pretender*, while I find, that such men as Lord ERSKINE and Sir

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which is very worthy of his attention. "That arbitrary imprisonments, "without process of law, were against the custom of England, even in "those days," and that in this respect Magna Charta did no more than confirm the ancient law, will appear from the following passage in Ethelred, abbot of Rivaux, a contemporary historian. "Conjunxerat "se ei (regi Scotiæ) ejusque interfuit aciei Eustacius filius Johannis, de "magnis proceribus Angliæ, regi quondam Henrico familiarissimus, vir "summæ prudentiæ, et in secularibus negotiis magni consilii, qui a rege "Anglorum ideo recesserat, quod ab eo in curiâ *contra patrium morem* "captus, castra, quæ ei rex Henricus commiserat, reddere compulsus "est; ob quam causam offensus, ut illatam sibi ulcisceretur injuriam, "ad hostes ejus sese contulerat." According to other writers instead of *castra quæ Rex Henricus commiserat*, it should have been *castrum, quod*, &c. namely, the Castle of Bamburg: but what I (says the noble historian) cite this passage for, is to prove, that his imprisonment was *contra patrium morem*, and therefore considered as an offence done to him, which even *dissolved his allegiance*." Vol. 1. p. 508.

The opinion of his Lordship with respect to the Privileges of the House of Commons, may be seen in the following Extract from his Speech on that subject, in the House of Lords, in 1770.

"My Lords,—All *Privileges* are subordinate to the great *laws* of society; to the good order, the peace, and the safety of the State.

"Privilege must not be exercised to the grievous inconvenience and "detriment of the public; it must not obstruct the *public justice*; it must "not endanger the *public safety*.

"The administration of justice, and the execution of laws, are, by the "Constitution of our Government, entrusted to the Crown and its officers; but entrusted under checks beneficial to liberty, beneficial to "justice. But if you change this system; if you take the Executive "power from the Crown, and place it in *either* House of Parliament, "what check, what controul will then remain? An arbitrary power will "be *there*, which is no where else in our Government—an arbitrary "power without appeal!

"In order to preserve the independence of Parliaments, it will be ne"cessary to preserve the reputation of Parliament in the *minds of the* "*people*, and the love of it in their hearts. How, my Lords, can this be "done, if they find *it* an *obstacle* to that equal justice which is their "birth-right and their safety?

"Upon the whole, I am confident, your Lordships will on no account

SAMUEL ROMILLY deny the power of the House of Commons to imprison for a libel. The opinions of Sir SAMUEL ROMILLY have long been before the public; and Lord ERSKINE, with the soundness of a lawyer, conversant in the Laws and Constitution of his country, has just declared, that "the force of "laws is acquired in some cases by a long and uninterrupted "usage; but he must say generally this, that *if there should* "*be but one written law, one statute existing, contrary to the* "*usage, no such usage can avail against it.* The laws of the "land, which are part of the inestimable Constitution of this "country, can admit of no usage, custom, or authority against "their express provisions." And then he adds, in the spirit of an ancient Roman, "*I declare literally that I would sooner* "*die, than consent to the confining or punishing of any man,* "*contrary to the force and meaning of the written law of* "*the land.*" And afterwards, speaking of an occasion where "he had been told of *precedent* and *opinion*, and had heard the great name of Judge HALE produced as an authority to which he ought to defer, he says, that "he then had declared, "that he cared nothing for the opinion of Judge HALE. He "had the *written law* in his hand, and would abide by that "alone *against all other authority.* He should care no more "for my Lord HALE than for a great fly on the window, if "Lord HALE's authority was against the existing law of the "land, *even though backed by all the rest of the Judges.*"—

"depart from that maxim which is the corner-stone of all government; "that justice should have its course without stop or impediment. *Jus,* "*fas, lex, potentissima sint.* This, my Lords, is the very soul and es"sence of freedom. Obstruct this, and you immediately open a door to "violence and confusion; to all the iniquity and all the cruelties of *pri*"*vate revenge*; to the destruction of private peace, the dissolution of "public order; and, in the end, to an unlimited and despotic authority, "which we must be forced to submit to, as a remedy against such into"lerable evils. The *dominion of law* is the *dominion of liberty. Privilege* "against *law*, in matters of high concernment to the public, is *oppression*, "is *tyranny*, wheresoever it exits." (Debates, 1770.)

Instigator of Anarchy! Contemptible Pretender!—or rather, most excellent Patriot, and enlightened Senator! I trust, however, that his Lordship does not stand alone. I have, indeed, read, with considerable sorrow and surprise, the opinions of some other Noble Lords; but I really believe, that we have many illustrious charaters in both Houses of Parliament, whose excellent merit and solid virtue will not suffer them to betray the rights and liberties of their countrymen. I think we are not yet come (corrupt as we are) to that state, in which the Historian describes Rome to have been in his degenerate days, when, like a woman, past child-bearing, she ceased to produce great men; and, though it still subsisted some time after, it was only in consequence, and by means of its ancient grandeur, which continued to support the Republic, notwithstanding the weakness and vices of its Governors. (Sallust. in Bello Catalin.)

Let me, then, implore you, my countrymen and fellow-subjects, to be careful to preserve a serious, sacred, and inviolable regard for the ancient principles of your Constitution; particularly for the *Trial by Jury*, which is the strongest bulwark of all our liberties. Do not be intimidated by a set of men, who make a laugh of liberty, and will, perhaps, call you *traitors* for your love of it. Remember (as my Lord SOMERS says *) that "*they neither are, nor can be traitors, "who endeavour to preserve and maintain the Constitution; "but they are the traitors who design and pursue the subversion of it.*" I perceive there has been a Meeting of some Citizens of London, who have drawn up an Address, in opposition to the proceedings which have lately taken place in that City, and in your County. By a strange contradiction, they profess to "*admire the principles of the Revolution;* and to "*revere the Constitution as then confirmed;*" and yet they call us, who do nothing more than stand up for the very same

* Judg. of Kingd. and Na. 44

Constitution, "*factious individuals,*" and complain of our "*insidious efforts.*" We ask for the *Trial by Jury;* we require that all men, high and low, may have and receive justice *in the King's Courts;* and, in a little time, we shall require to have *more frequent Parliaments*, and *a fuller Representation of the People.* Is there any thing *factious* in this? Are the noble efforts which are made to preserve our liberties to be called *insidious?* Those citizens may, if they please, speak of "the mischievous endeavours, which have failed in "traducing the character of the Sovereign;" but this is now a stale and idle trick, which the wise and honest part of the community will disregard. It might have done some time ago, but the people are now become more enlightened, and can judge a little for themselves. For, let me ask, who has traduced the character of the Sovereign? who has said a disloyal, a disrespectful word, concerning him? Those gentlemen have suggested things which never entered into the minds of the people: there is no question between the King and the People. The dispute is between the People and the House of Commons; the former complain, that the latter have invaded their rights, and trampled upon their liberties. Those Citizens say, that, "in reviewing the relative situation of this country with "others, they have much to rejoice at, and little to regret." Now, who can question, that they prefer this country to any other country whatever? But are they the only persons who admire this country? Or, let me ask, why do they admire it at all? The answer is, that they, and all other subjects, are proud of this country; because, by our *ancient Constitution,* we enjoy more liberty than any other country in the world. But, let every individual citizen stand forward and answer for himself. Would *he* like to be *imprisoned,* or to be *put to death,* without being brought in to answer by *due process of law?* Would *he* be contented to be tried by a tribunal, which should make itself Counsel, Jury, and Judge, accuser and punisher? all these characters united in one body, to determine in its own cause? Let every man put this question to his own heart. These are things which come home to

men's bosoms; they disturb every man at his fire-side, and in his bed. A man may call out while this is not his own case; but who, that is not blind by nature, or corrupt through art, will suffer that to be done to another, which may hereafter, upon the same grounds, and with the same facility, be done to himself? What! will men have *no* regard for those dear and glorious liberties which their generous ancestors delivered down to them? Will they barter them away for filthy lucre, or suffer them to be lost through mere indifference? Will they let their estates descend to their children, but not the laws which were made to protect those estates? Will they examine their ancient title deeds, but not look into the old and noble laws of their forefathers? Have they forgotten, that every man derives a greater inheritance from the laws than from his parents? Alas! some weak men seem not to know, that a *privilege* to set aside *one* Act of Parliament, is a privilege to set aside every other act of the Legislature; they do not appear to understand, that if a man can be *imprisoned* without being brought in to answer by due process of law, he can, by the same rule, be disseized of his freehold; he can be disinherited; he can be put to death; for the statute of EDWARD III. which prohibits imprisonment, without the regular process of the law, prohibits all the other measures which I have mentioned. Freeholders of Middlesex! do not be deceived. Be jealous of your liberties, and you will retain them; be indifferent, and you will lose them. Those Citizens of London before-mentioned may say, that you are inflamed by a *spirit of faction*, but I sincerely believe, that you are animated only by a *spirit of liberty*. Do not, therefore, relax this noble spirit; but remember, that as losing the *spirit of liberty* lost the *liberties of Rome*, even while the Laws and Constitutions made for the preservation of them remained entire (for there was still a Senate; there were still Censors and Tribunes); so if you suffer *this spirit* to expire, you may continue to call yourselves *Freemen*, but you will in reality be *Slaves*. You may submit, by little and little (for arbitrary power is generally acquired in this manner), till at last you have no inclination to resist. If the Romans had been told, in the days of AUGUSTUS, that an Emperor would succeed, in whose reign a *horse* should be made *Consul*, they would have been extremely surprised. But (as an excellent writer has observed), I believe they were not so much surprised, when the thing happened; when the *horse* was Consul, and CALIGULA Emperor. The Patriots at the Revolution, who remembered *long Parliaments*, who had felt the smart of them*, and who struggled hard for *annual*, and at last obtained *triennial* Parliaments, little thought, that in the course of a few years after, a Parliament which had been chosen for *three* years, would choose itself for *four* more, and entail *septennial* Parliaments on the nation. And yet all this was done; it has even been suffered to grow familiar to us; but because we are now tired of the oppression, and desire to have our ancient rights restored to us, we are to be called "*factious*," we are said to be using "*mischievous endeavours to overturn the Constitution.*" Let those citizens pause for a moment, and consider, whether they really *do* admire the principles of the Revolution. They say they do. Why, then, find fault with us because we want a *trial by Jury*; because we desire to have *triennial* Parliaments, and a *fairer representation* of the People? These were the articles which the Patriots of the Revolution procured for us. But we will watch those Citizens when the motion is made for a Reform; we shall then see in what manner they come forward to support the Constitution, "*as settled at the Revolution*," which they now profess so much to admire. They desire us "*to compare the blessings which we now enjoy with those of former periods.*" What! is it a blessing to be deprived of the Trial by Jury? Is it a blessing to be governed by a *septennial*, in-

* Tacitus says, "If an annual election to Power make men insolent, what must be their pitch of insolence, if they hold it five or seven years?" (Superbire homines etiam annua designatione; quid si honorem per quinquennium agitent?). This question may be answered without much difficulty.

stead of a *triennial* Parliament*? Let those "*admirers of* "*the principles* of the Revolution" answer us. They wish us "to *compare* the blessings we enjoy, with those which are "now possessed by the inhabitants of other countries." We are willing to do this; we are ready to admit, that we are much happier than the people on the Continent. *They* have lost their liberties; *they* have been sold to the tyrant of France; and we all know, that they were as ripe for slavery as the Cappadocians were fond of it. It becomes us then to be watchful of our *liberties*, which alone can keep us *free*. Let us not surrender our native rights, and we shall never be conquered by a foreign foe.

"Unless *corruption* first deject the pride
"And guardian vigour of the FREE-BORN soul,
"All crude attempts of violence are vain;
"For, *firm* within, and while at heart *untouch'd*,
"Ne'er yet by force was freedom overcome.
"But soon as Independence stoops the head,
"To vice enslav'd, and vice-created wants,
"Then to some foul corrupting hand, whose waste
"These heighten'd wants with fatal bounty feeds,
"From man to man the slack'ning ruin runs,
"Till the whole state, unnerv'd in slav'ry sinks."——THOMSON.

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* There are many persons who profess the greatest zeal for the Revolution, but who take every opportunity of opposing the very end for which it was undertaken. The *Claim of Right* declares, that *Elections ought to be free*, and, that *Parliaments ought to be held often*. As to *extending* the duration of Parliament, in the reign of George I. Dr. Johnson has expressed himself with great emphasis, by saying, that "The "sudden introduction of twelve new Peers at once by Queen Anne, was "an act of authority violent enough, yet certainly legal; and by no "means to be *compared* with that contempt of *national right*, with "which some time afterwards, by the instigation of *Whiggism*, the "*Commons*, chosen by the People for *three* years, chose themselves for "*seven*." Upon this Dr. Wharton very shrewdly remarks—"He should "have said at the instigation of some, who *called* themselves *Whigs*." Pope's Works, v. 9. p. 28.

Gentlemen, I shall now conclude with beseeching you once more to maintain your ancient Rights and Liberties. Do not lose sight of the Trial by Jury; do not suffer it to be destroyed, upon any pretence whatever. *Privilege* is a word of no determinate meaning; and however it may have been formerly exercised, no body of men have a right to any privilege which is contrary to law; or, in other words, have *no power to dispense with the laws of the land*. Do not, my friends, give your consent to the confining or punishing of any man, contrary to the force and meaning of the written law of the land. You have a constitution of which you are not ignorant; you have written laws which you can understand. You have Magna Charta; you have the Statute of Edward the Third; you have the Statute of Marlbridge, and the Bill of Rights. When you lose these, you will fall, and deserve to fall; you will no longer be worthy of freedom, and consequently ought not to enjoy it. Do not, therefore, degenerate; remember the glorious exertions of your ancestors; anticipate your danger, and resist it (but with temper and moderation) while it stares you in the face. Beware of deceitful men; do not resign yourselves to a treacherous conduct; do not betray yourselves. Let the whole body of the County be as jealous of their *liberties*, as a private man of his *honour*. In a word, I implore you not to abet the *enemies of the ancient Constitution*, under a notion of supporting *the friends of the Government*. Lay aside your petty differences; forget your private quarrels. The only cause which you should now espouse is that of *Liberty*; and, if you conduct yourselves with firmness and fidelity in this great cause, you shall see, that "*whoever set themselves above the law, will, in* "*the end, find themselves mistaken*."

I am, Gentlemen,

Your most affectionate humble Servant,

PUBLICOLA.

LETTER VI.

TO THE

RIGHT HON. LORD ERSKINE.

" Nought could his firmness shake, nothing seduce
His zeal, still active for the common weal;
Nor stormy tyrants, nor corruption's tools,
Foul Ministers, dark-working by the force
Of secret-sapping gold. All their vile arts,
Their shameful honours, their perfidious gifts,
He greatly scorned." THOMSON.

MY LORD,

AFTER the very able and animated speech, which your Lordship delivered in the House of Peers, on the subject of the Privileges of the House of Commons, I did not expect it would be asserted by any one, pretending to be conversant in the Laws and Constitution of his country, that the Commons have power to dispense with the *written law* of the land. This, however, has been done, and by a gentleman, whose name and reputation are by no means inconsiderable in the political world. The Right Hon. George Ponsonby has told the House of Commons, that they can *imprison* the subject at their own *discretion*, notwithstanding the Great Charter of King John; and he says, that *no Judge* whatever, *under any circumstances*, has a right to interfere

with the proceedings of that House. From the marked attention with which that gentleman's speech was received, and the frequent cheers which were given from *both sides* of the House, one would think that the Commons had made him their principal champion, and that they were willing to rest their cause, at least in the House, on his authority. They seem to have been of opinion, that if the power for which they contend could be defended at all, Mr. Ponsonby was the man to defend it. I agree with the Honourable House, that if their privilege to imprison a subject against the *written law* of the land could have been supported, the Right Hon. Gentleman would have supported it for them—

" Si Pergama dextra
Defendi possent; etiam hac defensa fuissent."

But the defence which the Right Hon. Gentleman has made is not supportable; and that it is not, I think I am prepared to shew, in a few remarks which I beg to submit to your Lordship's consideration, and which, without farther preface, I trust will meet with a courteous reception.

In the first place, then, I shall observe, that the Parliament of this country consists of three estates; the King, the Lords Spiritual and Temporal, and the Commons *. These

* I am aware it is contended by some, " that the Court of Parliament consists of the King's Majesty, as sitting there in his Royal capacity, *and* of the three estates of the realm," which (say they) are " the Nobility, Clergy, and Commonalty:" and (they add) " the King comes in upon a higher denomination and title; namely, the *head of these three estates*; and therefore, say they, those who have gone about to make the King one of the three estates are mistaken." But this doctrine is not, I conceive, maintainable at this day; for " the Lords Spiritual and Temporal are NOW in reality only *one* estate." (See Dyer 60.) And (as Mr. Christian observes) " there seems to be no " reason to doubt, but that any Act at this day would be valid, though " all the temporal Lords or all the spiritual Lords were absent." (Black-

three estates, united together, and considered as *one aggregate body*, are omnipotent; that is, they can make law; and that which is law, they can make no law; but *taken separately*, and independently one of another, they can neither make nor unmake laws; for the consent of *all three* is required to every act to bind the subject. This is the true constitution of England; and therefore no *written law* which is now in existence, can be repealed otherwise than with the concurrence of the King, the Lords, and the Commons. But, says the Right Hon. Gentleman, we (the House of Commons) have a privilege to imprison and punish at our own discretion; we do not care for an Act of Parliament, which declares, that "no man shall be imprisoned or put to death without the intervention of a Jury:" we can break down that barrier; nay, we will break it down, and when we have done so, there is no power upon earth that can call us to account: we are "the sole judges of our own privileges —the sole judges of what those privileges are—the sole judges of the extent (only observe, my Lord, the extent!) to which those privileges are to be carried; and the sole judges of the manner in which such privileges are to be exercised." And are we really come to this? Are the people

stone, vol. i. p. 155.) My Lord Holt very justly observes, that "neither "House of Parliament, nor both Houses jointly, can dispose of the "liberty of the subject, or property of the subject; for to this purpose "the King must join; and it is in the necessity of their several con- "currences to such acts, that the great security of the liberty of the "subject consists." (2 Raym. 1112.) In January, 1648, the Commons passed a vote, "that whatever is enacted or declared for law by "the Commons in Parliament assembled, hath the force of law; and "all the people of this nation are concluded thereby, although the "consent and concurrence of the King or House of Peers be not had "thereto;"—but, when the Constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1. that "if any "person shall maliciously or advisedly affirm, that both or either of "the Houses of Parliament have any legislative authority without the "King, such person shall incur all the penalties of a præmunire."

of England blind? Or are they so indifferent, that they can disregard the declaration made by the Right Hon. Gentleman, that the House of Commons alone (without the concurrence of the King and Lords) are omnipotent; that there is nothing but what they can do, if it be called by the name of privilege; and that the Judges of the land are estopped from declaring when they do wrong? Where does the Right Hon. Gentleman learn this law? Where did he find it said, that the House of Commons alone can repeal the written law of the land? He has referred to my Lord Coke: he has cited Sir Matthew Hale: he has favoured us with extracts from Sir William Blackstone; but does any one of those writers say, clearly and distinctly, that the House of Commons alone can do away the written law of the land; that they can confine and punish the subject at their own discretion; in short, that they can do any thing they please, and that no court of justice in this country has power to judge of their acts, and to declare when they exceed their powers? If any one, or even all, of those great legal writers should have declared these things, I would not pay the least regard to them; for I know, that they are decidedly repugnant to the spirit of our Constitution; and I can never forget what my Lord Holt (as great a lawyer as ever lived) declared upon the bench, viz. "that the authority of Parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." (1. Salk. 505.) The Right Hon. Gentleman must have been aware of this declaration of the learned Judge; but as it differs from his sentiments, he wishes to cast my Lord Holt in the back ground, by calling him *singular;* but that he was not quite so singular as that Right Hon. Gentleman wishes the people to believe, I shall shew, when I come to speak of the authority which the Judges have to interfere in matters of Privilege of Parliament.

The Right Honourable Gentleman asserts, that "Privilege of Parliament is as much *lex terræ*, and as much within the exception of Magna Charta, as any one part of the known law of the land that comes within its exceptions." To this I will answer, that the Right Hon. Gentleman is completely mistaken. The House of Commons had no jurisdiction whatever till several years after the existence of Magna Charta. My Lord Coke, indeed, has carried the antiquity of that House much higher; but he is quite wrong, for the first writ for the election of knights, citizens, and burgesses, was in the 49th year of the reign of King Henry the Third—(Vide Dug. Sum. Parl. 3. Cot. Abr. Pref. 13. b.) In the 35th year of Elizabeth, ann. 1592, Sir Edward Coke was Speaker of the House of Commons, and he then attempted to mislead it in a manner which deserves to be made known. He talked very highly of the antiquity of Parliaments, and of the mode of holding Parliaments, such as it is at this day; and said he had a book, which, if any member desired to see, he would shew it him; being a Precedent of a Parliament holden before the Conquest; intitled "*Modus tenendi Parliamentum;*" but no sooner had he extolled its antiquity and authority *in print*, than that most judicious industrious antiquary, Mr. John Selden, decried it to be a late imposture of a bold fancy, not exceeding the reign of King Edward the Third—(Titles of Honour, p. 708 to 721); and that very learned divine, Bishop Usher, in a letter to Mr. W. Hakewill, of Lincoln's Inn (who affirmed he had seen an exemplification thereof in the reign of King Henry the Fourth, said to be sent by King Henry the Second into Ireland), conceived it to be a *mistake;* and that this *modus* was not so ancient, many pregnant evidences of its novelty appearing throughout its whole contexture. To these I will add the observations of the learned and industrious Mr. Prynne, namely, that the word Parliament was not in use in the Conqueror's reign; for, says he, "that word, to express or denote a Parliamentary great council, as this

modus useth it, was never used in any of the ancient great councils, synods, laws, canons, constitutions, charters, patents, writs, or other records, nor yet in any of our old historians, living in the reigns of our British, Saxon, Danish Kings, before, or of our Norman or English Kings, after the Conquest, till the reign of King Henry the Third;—(vide Pryn. on 4th Inst. p. 2;) and, therefore, he is very much dissatisfied with Sir Edward Coke for his deception, or, at best, his mistake, and declares, that "had this been the mode of holding Parliaments in Edward the Confessor's reign *, and this *modus* shewn to, approved, and used, by William the Conqueror, and in the times of his successors Kings of England, as its title asserts, (which certainly was added long after the conquest, if the *modus* was before it,) or transcribed in a parchment roll, and sent into Ireland by King Henry II. to be there observed, and that, no doubt, by the advice of his Judges, it is very probable some of our historians, Parliamentary writs, rolls, records, statutes, or law-books, would have mentioned it; especially Statham, Fitsherbert, Brook, Fortescue, Sir Thomas Smith, Edward Vowell, Hollinshed, and Mr. Camden, in their Titles and Discourses of Parliaments. But (adds he) not one of all our ancient historians, Parliament writs, rolls, records, journals, statutes, law-books, or writers of Parliaments that I have perused, ever made the least mention of it, before Sir Edward Coke vouched it in the Parliament of 35 Elizabeth,

* I embrace this opportunity to observe, that, as to the Laws of Edward the Confessor, the authenticity of those in print is controverted by Dr. Hickes. (Hic. Thes. Ling. Septen. dissert. epist. 95.) In truth, (says Mr. Serjeant Runnington) what were in reality the Laws of Edward the Confessor is much disputed by antiquarians, and our ignorance of them seems to be one of the greatest defects in English history. The collection of Laws in Wilkins, which pass under the name of Edward, are plainly a posterior and an ignorant compilation. (Hale's Hist. of the Com. Law, v. i. p. 6. note B.)

when he was Speaker." (See Prynn. on the 4th Inst. p. 6, 7.) And in his "Additional Appendix of Records," (p. 1,) he tells us, that in perusing Mr. Agar's Abridgment of *Placita coram Rege* in the treasury of the receipts of the King's Exchequer, he found at the end of his Abridgment and table to the *Placita* of King Richard II. this *modus tenendi Parliamentum*, transcribed by him, out of a manuscript in Sir Robert Cotton's Library, as relating to the time of King Richard II. and containing some passages in it transcribed out of records in his reign. Therefore Mr. Agar thought that its highest antiquity did not exceed the latter end of King Richard II.'s reign; and so (says Mr. Prynne) the author's discourse of its antiquity and authority will prove but a mere Utopian fancy of his own invention *.

* Although I do not think it necessary to add any thing to the respectable authorities I have cited on this head, I will just subjoin the following extract from Mr. Hume. In his Appendix to the reign of King John, he says,—"So far the nature of a general council is determined without any doubt or controversy. The only question seems to be with regard to the *Commons*, or the Representatives of Counties and Boroughs; whether they were also, in more early times, constituent parts of Parliament? This question was once disputed in England with great acrimony: but such is the force of time and evidence, that they can sometimes prevail even over faction; and the question seems, by general consent, and even by their own, to be at last determined against the ruling party. It is agreed, that *the Commons were no part of the great Council, till some ages after the Conquest*; and that the military tenants alone of the Crown composed that supreme and legislative Assembly." (Hist. of Eng. vol. ii. p. 116.)

It may, however, be satisfactory to add, that George Rose, Esq. (Keeper of the Records in the Treasury of the Court of the Receipt of Exchequer,) in his Report to the Select Committee, appointed by order of the House of Commons, to inquire into the state of the Public Records of the kingdom, says,—"I have certainly not been able to find in the Records the slightest foundation for an opinion that there was any election of Representatives of the Commons earlier than 49 Hen. III. except in the entry respecting the Borough of St. Albans, so often referred to by different writers; as the three instances mentioned by Whitelock in the reigns of John and Henry do not appear to apply to such election; but in order that a judgment may be formed of that, I have inserted the Records at the end of this Report, as they are too long to make a part of a note." (See the Report of the Select Committee, (folio) 4. July, 1800, p. 44.) Now, I shall beg leave to observe, that from an attentive perusal and consideration of the Petition of the Burgesses of St. Albans, and the answer given thereto, it is evident, that those Burgesses claimed not, nor prescribed to come to Parliament *merely* as from a Borough, but as from a town that was held *in chief* of the King; and this service was incident to their tenure, and was such as the King's progenitors had accepted in lieu of all services due by reason thereof. And of this opinion was Dr. Brady, in his Answer to Petit, p. 77, &c.———I have already observed (p. 53), that in Scotland the system of Representation was not adopted till the reign of James I. of that kingdom, ann. 1427.—A remarkable proof of the LITTLE intercourse between the English and the Scots, before the union of the Crowns, is to be found in two curious papers, one published by Haynes, the other by Strype. In the year 1567, Elizabeth commanded the Bishop of London to take a survey of all the strangers within the cities of London and Westminster. By his report, which is very minute, it appears that the whole number of Scots, at that time, was only FIFTY-EIGHT.—Haynes, 455. A survey of the same kind was made by Sir Thomas Row, Lord Mayor, A. D. 1568. The number of Scots had then increased to EIGHTY-EIGHT.—Strype, 4. On the accession of James, a considerable number of Scots, especially of the higher rank, resorted to England; but it was not until the Union that the intercourse between the two kingdoms became great. (Robert. Hist. Scot. v. ii. p. 304.")

The House of Commons cannot, therefore, find any exception in the Great Charter to warrant their violation of it. Mr. Ponsonby does not appear to me to have read enough upon this subject; he has just skimmed the surface, but has not descended to the bottom. Having, as I trust, shewn that the House of Commons had no jurisdiction till after the Great Charter, I will now explain in what manner they originally had redress for what they called a breach of privilege; and I will prove, that they proceeded by a Jury, and not according to their own pleasure. Mr. Prynne, whose

industry and research were most indefatigable, has left us a copy of a Record in the reign of Richard II. which he discovered *. It is "Pat. II. R. 2. pars 2. m. 3. dorso. De Inquirendo"—concerning an extraordinary forcible riot and trespass committed upon the goods, lands, servants, and tenants of one of the Knights of the Shire for Cumberland, while he was sitting in Parliament under the King's protection; and *this Writ of Inquiry* was issued out by the King upon his complaint thereof made unto him. The Writ is too long for me to transcribe, nor is it necessary: I shall, however, cite Mr. Prynne's observations upon it. "From this precedent," says he, "it is observable, first, that the House of Commons *in that age* assumed no jurisdiction to themselves, or their Committee of Privileges, to examine and punish this *transcendant riot and breach of privilege* of their Member, but only complained thereof to the King in Parliament, for redress thereof, as they did to the King and Lords in all other cases of like nature, till the end of the reign of King Henry VIII. as I have elsewhere (viz. in his Brief Register and Survey of Parliamentary Writs) evidenced at large. 2dly, That the King upon this complaint, did not presently send for the offenders in custody by a Serjeant at Arms, as the Commons of late times have done, but issued out a commission to inquire of the riot and abuses *by a Jury*: which (says he) I observe, not to diminish any of the just ancient privileges of the Commons House, or Members, or the exemplary punishment of the wilful contemptuous infringers of them, but to rectify the late irregularities in sending for persons in custody upon every motion and suggestion of a pretended breach of privilege, to their extraordinary vexa-

* In 1660, Mr. Prynne was chosen for Bath to sit in the healing Parliament; and after the Restoration, made Chief Keeper of his Majesty's Records in the Tower, with a salary of 500*l.* per annum. He published his Animadversions on Lord Coke in May, 1669, and died at his chambers in Lincoln's Inn the October following. Biog. Brit.

tion or expense, before any legal proof or conviction of their guilt, against the Great Charter and all ancient precedents and proceedings in Parliament." (See "Additional Appendix" to Animadversions on the 4th Inst. pp. 1, 2, 3).

Now, my Lord, what will Mr. Ponsonby—what will the House of Commons say to this? Where is now their jurisdiction? Where is their old and indisputable power to imprison the subject at their pleasure? Where is Mr. Ponsonby's privilege "as ancient as the common law*?" My Lord, the House of Commons talk to us about custom: let us just consider what is meant by custom. I have always understood, first, that no custom can prevail against an express Act of Parliament; and, secondly, that if any one can shew the beginning of a custom within legal memory, that is, within any time since the first year of the reign of Richard I. it is not a good custom. Now, in reference to the first point, we all know, that there is a written law against the power which is assumed by the House of Commons. This is clear and certain. With regard to the second point, I have just proved, that the House cannot shew the exercise of the power to commit and punish at their pleasure, before the first year of the reign of Richard I.; for I have cited the Writ of Inquiry in the reign of Richard II. at which time it appears, that they proceeded according to the old and sound mode

* It is important to observe, that both *before* and *after* the time of this precedent cited by Mr. Prynne, the Commons were extremely anxious for the strict observance of the Great Charter.

In the 36 Edw. III. they PETITIONED, (for, in that age, as Sir Robert Cotton informs us, they were only *Petitioners*, all *Judgments* appertaining to the King, and to the Lords, unless it were in Statutes, Grants, Subsidies, or such like,) "that such as are imprisoned *without due process of law* may be delivered:" the answer was,—"*the grieved upon complaint shall be heard.*"—(Cot. Abr. p. 93, and 392.)

In the 2 Henry IV. they PETITIONED, "that no person be arrested, or imprisoned, *contrary to the form of the Great Charter*;" the answer was,—"*The Statutes, and Common Laws shall be kept.*" (Idem, 410).

prescribed by the Great Charter; that is, by the Trial by Jury.—Where, then, I ask again, is the jurisdiction of the House of Commons to set aside the written law? How does Mr. Ponsonby intend to answer this? He occupied a very considerable time the other evening, in order to shew the *right*—the ancient, the undoubted right—of the House to imprison *at their pleasure*. He said, "now I have shewn the right." No, my Lord, he has not shewn the right; for I flatter myself, that I have shewn the House is *wrong*. Mr. Ponsonby is not so well read in the history and constitution of this country as he supposes. He is quite mistaken as to the origin of the House of Commons; and he is equally incorrect in saying, that "it is well known, the two Houses of Parliament formerly sat under the same roof, and transacted business together." He borrowed this observation from Lord Coke, who first affirmed it in the Parliament of 35 Eliz. when he was Speaker. I have already refuted my Lord Coke's account of the antiquity of Parliament; and I now maintain, that the House of Commons never sat and debated with the Lords in one House: for there was no House of Commons to sit with them, till the latter end of the reign of King Henry III.; and Mr. Prynne has cited various bills and writs of summons to shew, that they never sat together at that time. And all that is warranted by the rolls referred to by my Lord Coke is, that the Commons came to the Lords' House, when the causes of summoning the Parliament were declared by the *Chancellor*, and at the end thereof, and had sometimes conference with them, as now they have; but that they sat or debated together as one House, is in no ways proved. (Vide Pryn. on 4th Inst. pp. 8, 9, 10 *.)

* In order to remove all doubt upon this part of the subject, I shall here insert the declaration of the Select Committee above mentioned. In a note to their Report, p. 19. they express themselves as follows.—"Lord Cooke says, that the two Houses of Parliament sat together, till late in the reign of Edw. III. and till the Commons had a perpetual Speaker; but it appears by the Rolls of Parliament that they sat, or at least acted, separately long before that period," and for this they bring sufficient evidence from the Rolls. I must add, that Mr. Rose, in his Report, *(ubi sup.)* says,—"Lord Coke declares, that the Lords and "Commons sat together late in the reign of Edward III. and till the "Commons had a perpetual Speaker. The contrary of which, I think, "is now evident from the Rolls of Parliament:" and then he observes in a note on this passage—"Some reliance was placed by his Lord-"ship on the treatise '*de modo tenendi Parliamentum*,' the authority "of which, if not entirely destroyed by Prynne, will not at least in future "have much weight."———Much as I regret the necessity of extending this note, I cannot forbear adding what Mr. Rose says of Sir Robert Atkyns, as Mr. Ponsonby and some others seem to have relied very much upon his authority. "Sir Robert Atkyns, a man eminently dis-"tinguished for his integrity and his learning, as well as for his deep "researches into the ancient History of Parliament, in his learned and "elaborate argument in the year 1680 (in the case of an Information by the Attorney-general against Williams, Speaker of the House of Commons), in asserting the antiquity of that House fell into some "mistakes from not having resorted to the original records: he states, "and insists much on it, that the Speaker of the House of Commons, "51. Edward III. Sir Thomas Hungerford, was Speaker of the Parlia-"ment; whereas the words in the Record are—'*Monsieur Thomas de "Hungerford, Chivaler, q'i avoit les paroles pur les Communes d'Englc-"terre.*" Mr. Rose explains some other mistakes of Sir Robert, and they all appear to have arisen from this; namely, his calling the House of Commons, the Parliament; whereas it is only one branch of it, and cannot make or annul any law without the assent of the other two estates. Mr. Rose says, that in Scotland the Lords and Commons unquestionably sat in the same House till the Union of the Two Kingdoms, and the Commissioner who represented the Sovereign, debated with them from the Throne, although he had the Power (which he sometimes used), of adjourning the Assembly when he pleased." Report *(ubi sup.)*

My Lord, I shall now beg leave to proceed to that part of Mr. Ponsonby's speech where he endeavours to shew the propriety of the power assumed by the Commons; for as to the right, I conceive I have put that question at rest. He ridicules "the sagacious complaints of those who rant so loudly against what they call the absurdity of being Accu-

sers, Judges, and Executioners in their own cause." Now, my Lord, one would have thought, that however mistaken the Right Hon. Gentleman might be in his legal opinions as to the right of the power, he would not have asserted, that it is proper for men to be accusers and judges in their own cause. This is against the first principles of justice; it is contrary to the precepts of the divine law; and therefore it is an established maxim among us, *aliquis non debet esse judex in propria causa.* Indeed it is a manifest contradiction, that a man can be agent and patient in the same thing. Your Lordship knows, that if, during the time you presided in the High Court of Chancery, you had made a decree to strangers in a thing which concerned yourself in interest, and for yourself, it would have been void, because you could not be a Judge in your own cause. (H. 11. Ja. in Chancery, between Sir John Egerton and the Lord Darby and Kelly resolved by the Lord Chancellor, Coke, and Doderidge. 2 Roll. Abr. 93.) In Hil. 4. H. 4. a fine levied before the bailiffs of Salop was reversed, because one of the bailiffs was party to the fine, *quia non potest esse judex et pars.* In the case of the City of London *v.* Wood, it was determined, that an action cannot be brought by the Mayor and Commonalty in a Court held before the Mayor and Aldermen; for though the Mayor be not sole plaintiff, nor sole Judge, yet he is essentially plaintiff and judge. (12 Mod. 672.) In Jenk. 90. pl. 74. it is said, that judgment given by a Judge who is party in the suit with another, and so entered of record, is error, although several other Judges sit there, and give judgment for the Judge who is party. I could cite many more cases to this effect: but I will not trouble your Lordship with them; you know, that they are all grounded upon a sound and perfect principle of justice. Littleton, whose text has always been considered as the Bible of the law, declares, that "it is against reason, if wrong be done to a man, that he should be his own judge; for," says he, "by such way, if he had damages but to the value of an

halfpenny, he might assess, and have therefore a pound, which should be against reason. And so (he adds) such prescription, or any other prescription used, if it be against reason, this ought not, nor will not be allowed before Judges; *quia malus usus abolendus est.* (Vide Tenures, sec. 212.) Lord Coke observes upon this passage, that "every use is evil that is against reason; *quia in consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda:* and (he adds) by this rule, cited by our author, at the Parliament holden at Kilkenny in Ireland, An. 40. Ed. III.* Lionel Duke of Clarence being then Lieutenant of that realm, the Irish customs, called there the Brehon law (for that the Irish called their Judges Brehons) was wholly abolished, for it was no law, but a bad custom, "*et malus usus abolendus est.*" My Lord, it is astonishing, that Mr. Ponsonby should say, that the House of Commons can be accusers and judges in their own cause: and that they can do any thing they please, and go to what extent they think proper, without being subject to the controul of a court of law. If this were the case, what misery is there that might not be imposed on the subject? In the reign of Henry VI. Sir John Mortimer, being brought into the Parliament, *without arraignment or answer*, judgment in Parliament was given against him, that he should be carried to the Tower of London, and drawn through the city to Tyburn, and there hanged, drawn, and quartered; his head to be set on London Bridge, and his four quarters on the four gates of London †. Here is a lesson for the people of England! This case is mentioned

* The first Parliament holden in Ireland, after its subjection to the Crown of England, was that at Kilkenny, an. 3. Ed. II. the Acts whereof are all printed in the Statutes of Ireland, collected by Mr. Richard Bolton, printed at Dublin anno 1621. being the most ancient he could find in the Records thereof, under the custody of the Master of the Rolls there. (See Pryn. on 4th Inst. p. 259.)

† See 1 Cobbett's State Trials, p. 267. No. 21.

by Lord Coke, and he declares, that " the proceeding was evil: for (says he) by the Statutes of Magna Charta, c. 29. and 28 Edw. III. c. 5. no man ought to be condemned without answer." (4 Inst. 38.)

But, as Mr. Ponsonby is very fond of my Lord Coke, I will take the liberty to extract a passage from him, in order to shew, that none, not even Parliament, ought to introduce absolute and partial trials by discretion. Speaking, in his Comment on Magna Charta, of the trial by Jury, he says, " against this ancient and fundamental law, and in the face thereof, I find an act of Parliament *, 11 Hen. 7. chap. 3. made, that as well Justices of Assize, as Justices of Peace, (without any finding or presentment by the verdict of twelve men,) upon a bare information for the King before them made, should have full power and authority by their discretions to hear, and determine all offences, and contempts committed, or done by any person or persons against the form, ordinance, and effect, of any statute made, and not repealed. By colour of which act, shaking this fundamental law, it is not credible, what horrid oppressions and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Edm. Dudley, being Justices of Peace throughout England, and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the King's forfeitures."

* It demands the most serious consideration, that Lord Coke complains here of an Act of Parliament, that is, an Act of the *three* Estates. If, then he declares this to be subversive of the fundamental law of a trial by Jury, what shall be said of an Act of *one* Estate only? Let the House of Commons attend to this, and take the advice of the Roman Senator. " *Quod si* erratum est, *Patres conscripti*, Spe falsa *atque* fallaci; *redeamus in viam. Optimus est Portus Pœnitenti*, MUTATIO CONSILII." *Cic.*

" But at the Parliament, holden in the first year of Henry VIII. this act of 11 Hen. VII. is recited, and made void, and repealed; and the reason thereof yielded, for that by force of the said act, it was manifestly known, that many sinister and crafty, feigned and forged informations had been pursued against divers of the King's subjects, to their great damage and wrongful vexation: and the ill success thereof, and the fearful ends of these two oppressors, should deter others from committing the like, and should admonish parliaments,—(I beseech your Lordship to attend to this very important expression—not the expression of Lord Coke, but of the act itself, viz. *should admonish Parliaments!)* that instead of this ordinary and precious trial, *per legem terræ*, they bring not in absolute and partial trials by discretion." (Vide 2 Inst. 51.)

Now, my Lord, what will our adversaries offer in reply? Is it absurd for us to condemn all arbitrary proceedings? Does not the above extract shew the horrid evils arising from them? Yes, it shews those evils, and it " admonishes Parliaments" not to proceed in this manner. Thus much, then, for the propriety of the uncontroulable power which Mr. Ponsonby wishes the House to possess. And now to the consideration of that part of his speech, which denies the authority of the Judges to interfere with the privileges of the House of Commons.

Mr. Ponsonby says, that the Judges are *estopped* from deciding in cases of Privilege of Parliament; nay, he uses very strong language on this occasion, which I shall presently mention. Mr. Prynne, however, will completely refute the Right Hon. Gentleman's position, which is taken from my Lord Coke. Mr. Prynne declares, that " when matters or privilege of Parliament come judiciously before the Judges, in the Courts where they sit as Judges, there they may, do, and ought to judge them: as in the case of Bartholomew

Done ngainst John Walsh, Mich. 12. E. 4. rot. 20. in the Court of Exchequer; and of John Ryver against Robert Cosyn, Hil. 14. E. 4. rot. 7. Trewynnard's case Dyer, f. 59. and sundry other cases, published in the 4th part of my Brief Register of Parliamentary Writs." (Pryn. on 4th Inst. p. 16.) I wish Sir William Blackstone had looked more into Prynne and the earlier records than he did. He was too much accustomed to copy from my Lord Coke, without ever examining into his authorities. If Sir William had not been so fond of prerogative, as I fear he was, he would never have talked so highly of the undefined privileges of Parliament. He would have discovered the writ of inquiry, which shews, that the Commons originally proceeded by Jury and not at discretion; and he would have told us, that all arbitrary proceedings, however formerly exercised, are completely unjust and illegal; for that by the spirit of our Constitution we are to live by law, and not by opinion *.

* It is very justly observed by the learned John Fortescue Aland, in his preface to Sir John Fortescue's "Absolute and Limited Monarchy," that, "in other nations, every Lawyer's opinion goes for Law, but it is not so with us; nothing passes with us for Authority or Law, but the mature, weighty, and deliberate judgment of a whole Court, consisting of four learned and experienced Judges, after solemn argument, cautious debate, and serious consideration." Sir Wm. Blackstone seems to have grounded what he says upon the Privilege of Parliament, on the authority of Sir John Fortescue and the other judges of that day, but I think that Sir John and those Judges have been completely misunderstood. They could only mean to say, that they could not interfere with what the Parliament should do. By which word Parliament, they must have meant not one, but the whole three estates; and that they did mean so, is very evident from their expression; namely, that it (the Parliament), is so high and mighty, it can make law; and that which is law, it can make no law; whereas, they must have known very well that no *one* estate, independent of the others, could either make, or unmake laws. This, indeed, is very apparent from Sir John Fortescue himself, who in his excellent work *de laud. Leg. Ang.* c. 19. says, that "the Statute Law of England does not flow "from the mere will of one man, as the Laws do in those countries, "which are governed in a despotic manner; where sometimes the "nature of the Constitution so much regards the single convenience "of the Legislator, whereby there accrues a great disadvantage and "disparagement to the subject. But the Statutes of England are "produced in quite another manner; not enacted by the sole will of "the Prince, but with the *concurrent* consent of the whole kingdom: "and they must be amended and repealed, in the whole or in part, "with the same consent and in the same manner as they were at first "enacted into a Law." How, then, can it be supposed, that Sir John meant by the word "Parliament," one estate only, and not the three estates united together? For those only can make and repeal laws. But Sir W. Blackstone, when he wrote of the *undefined* Privileges of Parliament, seems to have forgotten what he had said a little before; viz. "Of great importance to the Public, is the preservation of the personal "liberty of individuals; for if once it were left in the power of any, "the *highest*, magistrate to imprison *arbitrarily*, whomever he or his "officers thought proper, there would soon be an end of all other rights "and immunities." (Comm. vol. 1. p. 135).

He would have reminded us of that important principle, *misera est servitus ubi jus est aut incognitum aut vagum*. But Sir William was too fond of prerogative; and though I do not wish to lessen the value of his memory, I must declare, that with regard to privilege of Parliament, either his head or his heart was very wrong. If he was not aware of the writ of inquiry in the reign of Richard the Second, his head is to blame; if he knew of that writ, and suppressed the knowledge of it, then his heart was worse than I wish to believe. The trial by Jury, (which, though not near so ancient as some writers have imagined, was certainly very general in the reign of Henry the Second *; for we find in that

* See what is said in note p. 57, as to the Trial by Jury in the time of Henry II.

With regard to the province of a Jury, I shall just state that they can determine as well upon the *law* as on the *fact*. In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the Jury gave a verdict against the

time many questions of fact relating to property were tried by twelve *liberos et legales homines juratos*, sworn to speak the truth, who were summoned by the Sheriff for that purpose), the trial by Jury, I say, is confirmed by the Great Charter, and the House of Commons used to proceed by this trial in the reign of King Richard the IId. and long after, till they usurped the arbitrary power to which they now pretend to be entitled.

But, as I undertook, near the beginning of this letter, to shew, that my Lord Holt was not quite singular in his decision, that the Judges could examine into matters of Parliament *, I will now cite a case where he was supported by the other three Judges of his Court, and judgment was given accordingly. This case is extremely important, as the conduct of those Judges will furnish an admirable pattern for the Judges of the present day, notwithstanding the intimidations which have been held out. Your Lordship, no

directions of the Court in point of *Law*, and for this were committed to prison. But the commitment was questioned; and on a Habeas Corpus brought in the Court of Common Pleas, it was declared illegal; Lord Chief Justice Vaughan distinguishing himself on the occasion by a most profound argument in favour of the right of a Jury. Bushell's case, 1 Freem. 1. and Vaugh. 135. In 1680, Sir John Hawles published his famous dialogue between a Barrister and a Juryman, to assert the claims of the latter against the then current doctrine denying their authority. This, and the learned "Argument in Support of the Rights "of Juries," by the Hon. T. Erskine (now Lord Erskine,) should be in the possession of every Englishman that loves his liberty.

* The *praises* which Mr. Ponsonby has lavished on such Judges as formerly acknowledged the omnipotence of the House of Commons, and the title of *singularity* with which he has honoured those who would not allow of such omnipotence, reminds me of an excellent observation of Mr. Selden; namely, "the Parliament-party, *if the law* "*be for them*, they call for the law; if it be *against* them, they will "*go to a parliamentary way;* if law be for them, then for law again: "like him that first called for sack to heat him, then small drink to "cool his sack, then sack again to heat his small drink, &c." (Vide Opp. III. 2052).

doubt, recollects the case, though Mr. Ponsonby may not. It is "The King and Queen against Knowles." (Trin. 6. Will. & Mary, 12. Mod. 56.)

Samuel Eyre, Justice, declared that "this Court (the King's Bench) shall judge of the validity of all judgments and records here pleaded, and whether they are legal or effectual, or no; as of an Act of Parliament, what is one; that an Act by King and Lords is not a good one: and so they may judge of an Order of the House of Lords, whether the concurrence of the other estates of Parliament, or one of them, be requisite; so the court may take judicial knowledge of the proceedings in Parliament, and of their committees.

"As to the objection, that the defendant hath, by his demurring, confessed this to be a judgment, *secundum legem et consuetudinem Parliamenti*, this is matter of law arising thereon; and demurrer confesses only matter of fact, as stated, and leaves the matter of law arising thereon to the judgment of the court."

"As to the order of the House of Lords, all the books are, that a Peer cannot be degraded but by attainder, or by Act of Parliament."

Giles Eyre, Justice, agreed with his brother, and said, "the order of the Lords does not bind the liberty of the subject; as 2 Inst. 47. about sending able lawyers into Ireland. Inferior courts are not tied up from judging their proceedings void; as if a writ of error be brought into Parliament of a judgment in the Common Pleas, whereas it should have been in the King's Bench, the Common Pleas may adjudge the writ of error void, and no *supersedeas*, and may award execution; or the King's Bench, notwithstanding this error, may examine the judgment upon writ

of error. As to the demurrer, that confesses only matter of fact and not of law, and *lex Parliamenti* is matter of law."

Gregory, Justice, agreed in every thing said by his brethren.

Holt, Chief Justice, in a most luminous speech, declared that "the Court of Parliament consists of King, Lords, and Commons." (Cromp. Jurisd. of Courts, 1. 4 Inst. 1. Dyer 60.) And after having spoken at some length of the legislative and judicial power of the Lords, he says, "*As to the secundum legem et consuetudinem Parliamenti*, that is added by the King's Council only in terrorem. Lex Parliamenti is lex terræ, and if a question concerning it doth arise in a cause of which the King's Bench has proper cognizance, the King's Bench may adjudge of it as the Spiritual Courts do of temporal judgments, as patents, deeds, &c. for the cognizance of the principal draws with it the cognizance of the accessaries and incidents. (Dyer 60.) And this holds in case of privilege of Parliament; as in Sir John Benyon's case, Trin. 14. Car. 2. in the Common Pleas, where filing an original against a sitting Member was adjudged no breach of privilege*. *It is no new thing for our Common Law Courts to examine matters of this nature, which concern proceedings in Parliament; we do but follow the examples of our predecessors.* In the 38th year of Edward the Third, the Bishop certified to this Court, that the father and mother were married, but that the party was born in

* Mr. Hargrave possesses a very full report in MS. of Lord Chief Justice Bridgeman's learned judgment in the case of Benyon and Evelyn, C. B. Trin. 14. Car. 2. in which after a very extensive investigation of the law upon the subject, the authority of the Judges to take cognizance of questions of Privilege of Parliament is asserted, and that authority was accordingly exercised in that case. See 6 Cobbett's St. Tr. p. 1126.

adultery; the Lords sent a writ to the Judges, and ordered them to judge on the special matter: but the Judges did not obey. In Stanton's case, the Lords commanded the Court of Common Pleas to give a judgment, the Chief Justice refused; afterwards, in his absence, the others complied, and gave judgment; the King's Bench afterwards examined the proceedings of the Lords, and adjudged them void: as appears 15 Edw. III. 1, 2, in the Oxford Library. *We are not to delay the Justice of the Land, and the law of it is our rule;* and for these reasons, let the indictment be quashed." And this was done accordingly.

My Lord, I am certain, that your Lordship must not only concur in opinion with these learned judges, but also admire their wisdom and integrity; and I have no doubt that my Lord Ellenborough and his brethren will act in the same upright and patriotic manner. The law of the land is their rule, and they are bound by an oath duly to administer the law*. The King's Attorney-General may tell my Lord Ellenborough, that he cannot interfere with any thing done by the Commons; but his Lordship can borrow the expression of Lord Holt, and say—"*It is only added in terrorem.*" He has the same cases, and the same arguments, to support

* Mr. Christian very truly observes, "that in no case whatever can a judge oppose his own opinion and authority, to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the State. And if an Act of Parliament, if we could suppose such a case, should, like the edict of Herod, command all the children under a certain age to be slain, the Judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the same legislative power by which it was ordained. Comm. 1. 41. n. 3. This learned annotator differs very much from his Author, with regard to the Privileges of Parliament; and says, that a discretionary power in the Two Houses of Parliament is repugnant to the spirit of our Constitution. Comm. i. 164. n. 18. 19.

him, as his great predecessor and the other three judges had; and those cases are enough to prove, that the Court of King's Bench holds jurisdiction in cases of Privilege of Parliament. He will not, nor will any of his brethren, be deterred or intimidated by the observation of Mr. Ponsonby, that "it would be a gross dereliction of duty—a gross transgression of the law of the land—for any judge, under any circumstances, to interfere with the Privileges of the Commons." This is a language which the Right Hon. Gentleman ought not to have used; it is (as my Lord Holt said) "*in terrorem:*" but the judges will not regard it, they will remember their oaths. The judges of the Court of King's Bench are much better read in the laws and constitution of this country, than Mr. Ponsonby appears to be: and they all know, that they are not to delay the justice of the land. They know, that the Great Charter contains a very plain and explicit declaration as to the protection which every man may expect from the laws of this country, and they know what is said in the confirmation of that Charter by the Act of 25 Edward I. "And we will (says that statute) that our justices, which under us have the laws of our land to guide, shall allow the same Charter, pleaded before them in all its points as the common law." Chap. 2.—And we will, that if any judgment be given from henceforth, contrary to the points of the Charter aforesaid by the justices, it shall be undone, and holden for nought*."

* The true meaning of the words of Magna Charta, "*per legem terræ*," is very clearly explained by the learned Mr. Selden, in his argument for Sir Edmund Hampden. He says—"If the Statute of Magna Charta were fully executed, as it ought to be, every man would enjoy his liberty better than he doth.

"The Law saith expressly, No freeman shall be imprisoned *without due process of law*. Out of the very body of this Act of Parliament, besides the explanation of other Statutes, it appears, *nullus liber homo capiatur vel imprisonetur nisi per legem terræ*. My Lord, I know these words *legem terræ*, do leave the question where it was, if the interpretation of the Statute were not. But I think, under your Lordship's favour, there it must be intended by due course of law to be, *either by presentment or by indictment*.

"My Lord, if the meaning of these words *per legem terræ*, were but as we use to say, according to the laws, which leaves the matter very uncertain; and *per speciale mandatum*, &c. be within the meaning of these words, according to the law, *then this act had done nothing*. The act *is*, no Freeman shall be imprisoned but by the law of the land; if you will understand these words, *per legem terræ*, in the first sense, this statute shall extend to villeins, as well as to freemen; for if I imprison another man, villein, the villein may have an action of false imprisonment. But the Lords and the King (for then they both had villeins) might imprison them, and the villein could have no remedy; but these words in the Statute *per legem terræ*, were to the freeman, which ought not to be imprisoned, but by due process of law; and unless the interpretation shall be this, the freeman shall have no privilege above the villein.

"So that I conceive, my Lord, these words *per legem terræ*, must be here so interpreted as in 42 Eliz. The bill is worth the observing; it reciteth, that divers persons without any writ, or presentment, were cast into prison, &c. That it might be enacted, that it should not be so done hereafter; the answer there is, that this is an article of the Great Charter, this should be granted. So that it seems the Statute is not taken to be an explanation of that of *Magna Charta*, but the very words of the Statute of *Magna Charta*." Vid. Opp. III. 1938.

My Lord, I shall now beg leave to conclude. I have followed Mr. Ponsonby step by step, and I shall be ready to

In order to explain to such readers as may not clearly understand what the word *villein* originally signified, I shall beg to observe, that at the time the Great Charter was made, and for many ages after, the nation consisted wholly of the Clergy, who were also the Lawyers; the Barons, or great Lords of the land; the Knights or soldiery, who were the subordinate landholders; and the Burghers, or inferior tradesmen, who from their insignificancy happily retained in their socage and burgage tenure, some points of their ancient freedom. All the rest were villiens or bondmen. (4. Comm. 419.) One cannot reflect upon the condition of the villein without the most lively emotion. His services were not only base, but uncertain both as to their time and quantity. He wa

follow him still farther whenever he is disposed to proceed. To you, my Lord, the people are now looking up with a peculiar degree of confidence. They remember, with gratitude and delight, the many noble stands which you have made for their liberties; and above all, for the Trial by Jury, which is the motto of your Lordship's arms. They have witnessed the candour—they have felt the generosity—they have admired the nobility of soul which is contained in your Lordship's speech in the House of Peers on the subject now before us. Your Lordship is truly noble; for virtue is the only true nobility; and greater virtue cannot be displayed than in important services done to your countrymen. Your Lordship has often served your country, but your zeal has never been more conspicuous than in the declaration, that "you would sooner die, than submit to any dominion but that of the law." You said, that if the House of Commons should dare to commit your learned friend Lord Ellenborough, as they formerly committed Lord Chief Justice Pemberton, "you would resist the usurpation with your strength, and bones, and blood." This, my lord, was excellently said; it confirms the character which you have al-

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not protected by the Great Charter; *no freeman shall be taken or imprisoned*, &c. was cautiously expressed to exclude the poor villein; for, as Sir Edward Coke tells us, the lord, though he may not kill or maim, may beat his villein, and if it be without cause, he cannot have any remedy. But (thank God!) the fetters of villeinage have long been shaken off: the last claim of it, which we find recorded in our Courts, was in the 15th of James I. and nothing can be more notorious, than that the race of persons who were once the objects of it, was about that time completely worn out by the continual and united operation of death and manumissions. (Vid. 11. Harg. St. Tr. 342). Every Englishman is now a freeman, and, as such, cannot be imprisoned but by *due process of law*, which, as Mr. Selden observes, is the true meaning of the words *per legem terræ*. Let us, then, be grateful to heaven for our liberties, and consider it as a point of conscience, not only to secure the enjoyment of them to ourselves, but also to transmit them to our posterity as the noblest inheritance of mankind.

ways maintained; and you very properly observe, that "what has been the character of your mind and understanding must continue to be its character." Your Lordship will not be governed by party, nor can you ever compromise the independence of your principles; you are a constant, resolute, and honest man. I am confident you must acknowledge, that the House of Commons have carried this matter too far; they have not attended to the statute of the 1st of Henry VIII. which *admonishes Parliaments*, that instead of the ordinary and precious trial by Jury, they bring not in absolute and partial trials by Discretion." Let us hope then, my Lord, that our laws will prevail; nay, they must prevail, for they stand upon too firm a basis to be shaken by Mr. Ponsonby, or the whole House of Commons put together. Their custom amounts to nothing; it has not existed from that period of time which the law requires in order to make it good: and besides, it is against, and in the very face of, the ancient and fundamental law of a trial by Jury. It is contrary even to the original proceeding of the Commons themselves, which was, I repeat, in the reign of Richard II. by the verdict of twelve men. Their present proceeding is a complete usurpation of the rights and liberties of the people—an unwarrantable oppression, in open violation of King John's Great Charter; and such, no doubt, the judges, who have power, will feel themselves obliged, by their oaths, to declare, in spite of the remarks and intimidations which some learned persons have thought proper to throw out. The judges know their duty, and the people are confident that they will perform it.

With the highest respect for your Lordship,

I have the honour to be, my Lord,

Your most obedient, humble servant,

PUBLICOLA.

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