Lauderdale

THE

LAW AND USAGE OF PARLIAMENT,

IN CASES OF

Privilege and Contempt:

BEING AN ATTEMPT TO REDUCE THEM WITHIN

A THEORY AND SYSTEM.

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Res olim insociabiles miscuerunt, imperium et libertatem.

TACITUS.

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After so much has been said and written on the subject of this treatise, it might seem superfluous to discuss it any farther.—The title page however will shew, that this pamphlet has somewhat of a larger scope, and as others have collected precedents, it has been the effort of the writer of these pages to endeavour to reduce them within some system; to form them, on legal grounds, into a kind of theory, which might comprehend their general reason, and, by analogy with more known principles, explain and determine their rules, exceptions, and consequences.

N. B. Some verbal and literal inaccuracies will be found in these pages, for which the writer has to request a more than common share of indulgence from the reader.

THE

LAW OF PRIVILEGE, &c.

EVERY scheme of Government becomes more complicate in proportion as it proposes more numerous ends. In an infinite number of these ends, and of the different means which are necessary to produce them—some of them being natural results of direct powers, others being attainable only through a long and complex intermixture of forces, sometimes collateral,—sometimes oblique, and sometimes even, in part, contradictory;—in such a system of machinery, the complexity of the motion can only be effected by the number of the movements; and whatever simplicity there may be in the result, there can be none in the operation.

A byestander, observing such an engine at work, must not consider it an objection either to his own understanding, or to the excellence of

the machine, that, whilst he sees the results, he cannot follow them directly to their efficient movements; and that in politics, as in other sciences,

Rationem artis intelligunt docti; indocti sentiunt voluptatem.

It is this complexity of constitution, and even of the particular laws under it, which in fact distinguishes a free form of Government from a scheme of despotism. In despotism the ends are simple, and the machinery direct. The will of the Sovereign is at once the end and the means. If there be any difficulty—if the knot do not yield to the first attempt to untie it, the sword is at hand to sever it. Despotism takes a short cut to all its minor as well as to all its main objects. The character of the Prince, descending to every subordinate magistrate, renders every magistrate alike a despot; and if the law, or the case, confound him, he terminates his perplexity by reducing it within his will.

In a popular Government things are necessarily different. The first scheme of such a Government being perhaps accommodated to an early state of society, when property is simple,

and civil relations are few, is necessarily naked and narrow—mostly sufficient to restrain from habits which had been contracted in the community of savage nature; to keep the robber from the undefended house, and the trespasser from the exposed field, to sanctify the limit, and to fortify the dwelling.—But with a people accurate in their knowledge, and mature in their enjoyment of freedom, with whom a love of liberty is but a consciousness of their own strength and value; and who, in submitting to government, submit only to their own manifest reason; with such a people, the spirit which first framed the Government follows it up in its progress through the road of time, and keeps it within the track and the course which they first assigned it: with such a people, therefore, the Government takes the form of successive times and manners, improves with the progress of reason, and the march of civilization; and by adapting itself to the wants, the habits, and the expediency of the people, ultimately identifies itself with the human mind, and becomes exactly what our nature requires.—In such a Government complexity is natural and necessary.—Perhaps there is not one rule, not one principle, which has not been twisted and

bent into all possible shapes, in order to fall in with some other rule or principle.—Public force, the necessary power of the state, the civil liberty of the individual, the permanency of rule, and the shifting forms and circumstances of things,—the inflexibility of law, and the discretion of the judge,—the necessary latitude of equity, and the more necessary constancy of law; all these things are not to be obtained and conciliated without innumerable mutual sacrifices, without something pared from one to avoid the friction by the concurrent line of motion of the other,—without much apparent confusion, and some real counteraction.

Nothing, therefore, can in fact be more complex than our own popular system of Government, because nothing has so great a variety of ends, and so many necessary limits to its means; because the passions of men have been consulted as well as their wants, and their humours as well as their passions.

They have a very narrow conception of our constitutional liberty, who, taking the logical notion of the term, should define it to consist in

this or that general exercise of the powers of the body or the faculties of the mind,—in the secure enjoyment of the rights of our persons, and of the fruits of our labour.

The liberty of an Englishman is not the character, the quality—but the element, the principle,—at once the constituent matter, and the animating and informing spirit of the Constitution,—it mixes itself with every thing, it forms the life and soul of every thing, and every thing is hateful to him, and his nature averts from it, which wants its salt and relish.—It is the air which he breathes; he cannot live in its void.

A foreigner, unaccustomed to our feelings, is frequently heard to express his astonishment at those murmurs of impaired liberty, those discontents and alledged oppressions, which liberty, and which oppressions, are totally invisible and unintelligible to him: he sees neither liberty nor the natural capacity of it in the thing and circumstances before him; but the Englishman is right and the foreigner is wrong. There is scarcely any thing about an Englishman into which liberty should not in some degree enter; it is as necessary,

and possible, in adjunct as in quality, in act as in essence.

The first declaratory act of the body and form of the English Constitution, some of the principles being expressly stated, and others necessarily implied in their declared violations, was *Magna Charta*. Of this statute it is barely necessary to observe, that it contains all those eternal limits, and well marked outlines and boundaries,—that compass of right in the subject, and that limit of power in the Magistrate, which filled up by the wisdom of after ages, availing themselves of the circumstances of the times, —sometimes amended in its mode, sometimes enlarged in its positive or remedial provisions, but never diminished in its quantum of substantial liberty, composes at present what may be termed the major part of the Constitution of England; an inheritance from our ancestors, but which every age has kept together, and added something of its own.

It would be the basest treason to ourselves to admit that the reason and authority of this fundamental law could be become obsolete, or lost in the high antiquity in which it originated;—with a difference in form, and a change in mode it remains in substance, and therefore in reason and authority,

the same now as in the age of John.—Like the system of nature, or the system of reason, the Constitution is as young now as in the years which first succeeded it: it has the authority of age without the decay—giving up to every age the *exuviæ* which belonged to itself, and borrowing from every successive age what was necessary to render it analogous to *that* age, it has marched, like the sun in the heavens, hand in hand with time, and is as new, as reasonable, as much and as peculiarly a thing, a creature of this century, as it was new, reasonable,—a suitable being and creature of the century which preceded it, or of five hundred centuries ago.

Magna Charta therefore still exists, and in every question of constitutional right or privilege, must still be the rule and measure of our judgment. When we say *Magna Charta*, we take it not as the single charter of John, but as the body, composed as well of that charter, as of all the statutes which were enacted to explain and enforce it, and which are all so analogous to it, as reasonably to be considered only ONE THING—a law, and its authoritative comments and explanations, its collateral and direct enforcements. This body forms the constitutional statute law of the realm, in the same man-

ner as the body of usages, customs and maxims form the common law, interpreted, and made uniform, by the decisions of courts of justice.

Here the natural course of our argument might seem to render it necessary to introduce the general learning upon this statute, as likewise to enter on the reading of those other statutes, which relate to the imprisonment of the subject without due process of law, and more particularly such as respect the learning of the old and modern writ of *Habeas Corpus*, the Petition of Right, the Bill of Rights, and concerning the trial of life, liberty, and property, otherwise than according to the known law of the land. These and many others of the same kind are commonly discussed in an inquiry into those liberties and rights which the people of England claim under the magistrate; but the deductions from hence are so simple, the arguments so obvious, and the truth, as well as the universal efficacy of these laws, so generally acknowledged, that it is useless to launch into waters, every part of which has been so admirably sounded and fathomed. It will be more to the purpose to come at once to the point of the subject.

Suffice it to observe, that, with respect to the general tenor of these statutes, their immediate end was to bring the rights of persons and of property within the pale of positive law; to ascertain and fix the rule of civil and criminal justice, and thereby to rescue life, liberty, and property, from the discretion of the judge, or power wherever lodged, and to deposit it under the protection of a law, which, as constant, could not follow the humours of men, and being defined in its jurisdiction, in its form of trial, and limit of punishment—standing on high, and being legible to all, could not be a snare to the weak, nor an instrument of tyranny to the strong; could not give a legal licence to despotism, and, under the names and forms of liberty, exercise the most intolerable, because the most unjust and irremediable oppression.

It was known, because it was experienced, even in that age, that no despotism was so galling, so easy, and so frequent, as that which was exercised under the cover and pretext of a law, which, being conceived in general terms, and having no precise boundary, could be extended by ingenious analogies into every thing, and which, in fact, was

merely the reason of those who were appointed to administer it. The actual violence of tyrants, their dispensation with all law, and putting aside every thing at their own wills, were very rare occurrences; and where they did happen, they extended only to those immediately under their own eye, or within their influence. Naboth might lose his vineyard, but the rest of Israel kept their lives and properties. Such irregularities, moreover, continued only during the life of the tyrant; when the law existing, though suspended, every thing returned to its proper state:—but it was otherwise when the law became corrupted on principle and system. It was then made to betray itself; and the principle of corruption, like an original sin and taint, descended with it from generation to generation, till it either wholly destroyed the law, or, from the effect of habit, corrupted the taste and judgment of the people to itself, leading them to consider that the evil was as necessary as the law, and that the one could not be had without the other.

A power, alledged by certain writers to resemble this in its kind, is now claimed by the House of Commons under the name of Privilege.—The object therefore of the

present argument is to consider what is the legal and constitutional compass of privilege, and whether it can include within it the wide discretionary power now claimed.

Nothing is more generally and deservedly unpopular than any thing which can derogate from the respect which the people owe to the House of Commons.—The House of Commons, in their origin, in their trust, and in their end, belong immediately to the people. The Crown can support itself. Power amongst a free people requires such an independent strength in the Crown. —It has nothing to look to from sympathy.—The House of Lords is likewise sufficient for itself—it can stand upon its own legs, and is propped by the strong buttress of the throne behind it.—It is not so with the Commons: that strength which is necessary to support the two other branches against the people would be too much for the third branch.—Our Constitution, therefore, which understands, and follows in the line of our nature, whilst it refuses the Commons any positive power, looks to supply it from the strength derived from opinion, from popular sympathy, and congenial nature. This congeniality of

nature,—this mutually felt and understood community of interest and affection, constitute the best strength of the popular branch of the legislature, and enable it to keep that commanding station which the Constitution has given it.—They are neither friends to the people or the House of Commons who would break or even relax this bond of fellowship.—There will be a speedy end to the Constitution, either when the people, becoming traitors themselves, shall withdraw from the support of that phalanx which they have pushed forward to meet the first onset of power—or when the Commons, trusting to their single strength, shall leave the people behind them, and attempt to fight the battle alone.—In the one case they are a point without a body, in the other a body without a point.

But this very strength of the Commons renders it necessary to regard them with greater vigilance.—Bodies, as well as individuals, are apt to abuse power, and no power is so naturally abused, or becomes so dangerous in its abuse, as that which approaches to the character of a democracy. Absolute tyranny is rare, and in its violence, by appealing forcibly to the passions of

men, carries its own remedy with it.—The most dangerous tyranny is that excess of legal power which is termed usurpation: this is a corruption in principle—the principle of action; the judgment, and the conscience, are corrupted both in those who act, and those who suffer under this imagined extent of right;—the one, deeming himself justified in the right, acts without controul; and the other suffers as if under a legal necessity or moral obligation, with patience, or, at best, with an inactive discontent.—Such was the state of things to which Clarendon alludes in the following passage:

"It is not to be believed how many sober well minded men, who were real lovers of the peace of the kingdom, and had a full submission and reverence to the known laws, were imposed upon, and had their understandings confounded, and so their wills perverted by the mere mention of PRIVILEGE of Parliament, which instead of the plain and intelligible notion of it, was by the dexterity of those *Boutefeus*, and their under agents of the law, added to the supreme sottishness of the people, rendered such a mystery as could only be explained by themselves, and extended as far as they found necessary

for their occasions, and was to be acknowledged a good reason for every thing, for which no other reason could be given."

This question carries us farther than to the point for which we applied it.—It proves that there has been a period in our history, in which the Commons, under a forced interpretation of their constitutional power, have wilfully or erroneonsly assumed it in an extent which overturned all the institutions in the country, and swallowed up in itself the other co-equal and co-ordinate powers.

Now the origin of this usurpation being in wrong conceptions as to their legal power, the best security, it would seem, against the recurrence of the evil, would be to define the bounds of this legal power,—to set and mark those limits which the Constitution and the law have assigned it.—It is certainly difficult to define a matter which, like the air we breathe, or the space we breathe in, is without any palpable limit, is left in the waste of generation without line or fence—Astronomers, however, have seen lines where nature never made them—have struck their parallels across the ocean and the sky.—Morallists, accustomed to look for

the essential differences of things, have been equally bold and successful; and it may seem, from what has been done in the different branches of our law, that there are few subjects, however unpromising, which may not be reduced within some method and limits; what is unknown and uncertain in its absolute nature, may be brought to some kind of analogy with a more known and defined substance; with the incidents of which, from its similitude of essence, it may keep a parallel march.

In the first setting out, therefore, it is necessary to make a distinction between what the House of Commons holds as privilege and what it holds of essence.—The House of Commons is a supreme branch of the legislature: whatever therefore is a branch of its legislature functions it holds of essence and not of privilege:—it is not the privilege of the the House to debate, to discuss, to examine, or to vote;—it is not by privilege that they reject or pass a bill;—privilege must not be confounded with power on the one hand, or with the natural functions of the body on the other.—Privilege is a special pre-eminence, an honorary preference, a necessary exemption from certain ordinary rules,—not of law, but of legal process or proceeding, which

is granted in consideration of the peculiar constitution of the House:—it is not a part of essence, but an adjunct.

The foundation of privilege, therefore, is in this peculiar constitution of the Commons. The question is, what are those distinctive qualities in the legal constitution of the House of Commons? What are those parts of its essence and its functions to which the law has appended these privileges?—The consideration of the source may best lead us to the general line and direction of the channel.

The House of Commons bears a threefold relation to the constitution and to the other constituted powers.—It is one of the branches of the legislature; it is a council; and in the execution of its duties is almost daily a court of inquiry and investigation—with a necessity of being able to summon witnesses, and to compel them to give information, or what, as applied to this matter, is loosely called evidence.—From these three characters, the law of parliaments and the rights of the House must be deduced.

As a branch of the legislature, and a council, the House must necessarily be independent in its discussions and conclusions.—It must have therefore whatever is necessary to ensure this independence; must be enabled to protect itself equally from the people and the Crown; must not be *questioned*, as far as respects its discussions and proceedings by a court of justice, nor impeded, insulted, and harrassed by a mob.

Such is the general constitutional ground of parliamentary rights; that is to say, whatever is essentially and directly necessary to the due and efficient exercises of its duties as a council and as a court.

We here use the words parliamentary rights, because a step farther in the deduction is necessary to constitute them privileges.—In any other corporation, having similar duties, they would be mere rights,—the reason of the law would grant them as means necessary to the end, but it would still leave them as cognizable and demandable by the ordinary course of law; but the House of Commons, by virtue of its political supremacy, by its consequent and necessary in-

dependence, must hold all its rights as privileges: that is to say, as rights granted by an original and fundamental law—*lex singula*, or *privata*, which themselves only are competent to adminster and to explain, and which is rendered privilege by these two qualities—an acknowledgment and concession of the principle of original right, and the adminstration of it by the subjects themselves.—

Such therefore is the first source and limit of privilege of parliament: that is—*whatever is essentially and directly necessary to the due and efficient exercise of its parliamentary duties.*

The privileges under this head may be termed privileges of ESSENCE, as flowing directly from the constitution or political capacity of parliament.

Under this head are to be ranked all those privileges of parliament in general, and of each House in particular, which are manifestly deducible from the principle above mentioned; which are necessary to the peculiar functions of parliament, or the peculiar character of each house as considered by itself.

With respect to parliament, as a body consisting of Lords and Commons, these primary privileges are,—freedom of speech, freedom of person from civil process, whether mesne or final; and that which has been termed the hinge of all their privileges, "that whatever matter arises concerning either House of Parliament ought to to be examined, discussed, and adjudged in that House to which it relates, and no where else".—To which may be added, the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained in the case of any criminal proceeding.

With respect to the House of Lords as a branch of the Legislature (for as a court of judicature our argument has nothing to do with them,) their main privileges are,

1st, That every Peer, as acting for himself, and not by delegation from another, may make another

Lord of Parliament his proxy to vote for him in his absence.

2d, That every Peer may enter his protest on the Journals of his House, a privilege which seems founded on the same general reason, that of his being more immediately a party affected, and therefore having a claim to record his remonstrance and dissent, and to appeal to further consideration.

3d, That all bills in their enactments and consequences, affecting the rights of peerage, should begin in the House of Peers, and suffer no changes or amendments in the House of Commons.

4th, That all matters relative to the election of Scotch or Irish Peers, and every thing connected therewith:—together with every thing relating to rank, and precedency; or to claims upon titles of honor, which affect the dignity of their own order, should belong exclusively to the House of Lords.

5th, That the House of Lords should have the assistance and attendance of the Judges.

As we are not examining the judicial functions of the House of Lords, we shall say nothing in respect to their jurisdiction as a court of appeal from the judgments of the ordinary tribunals.

The primary privileges of the House of Commons, including those which we have above enumerated as belonging to Parliament in common, seem to be contained in freedom of speech,—freedom of person from civil process,—the origination of money bills, (which in its strict sense is rather a right of essence than a privilege,) and an exclusive jurisdiction in all matters of the election of their members.

All these rights and privileges are most indisputably included in the constitutional competence of the House of Commons, and they hold them by the same tenure by which they hold their political existence; they hold them by that social compact, which whether actual or implied, at the same time that it created certain institutions, must be presumed to have given them whatever was necessary to their maintenance and the free exercice and security of their duties.—The Commons hold them as rights under that first principle of all law, that the right to the end must include the right to the necessary

means: they hold them as privileges, because they are part of their nature, or what the law calls things of common right; and because the Commons, as a supreme power, must vindicate and assert itself—as well might we deny the Prerogative of the Crown to the coinage, to the granting of patents, and the distributing of honors and offices, and put it to the law to prove its right, as to dispute and call into court any of these primary privileges.—The *lex et consuetudo Parliamenti,* in this sense, are co-ordinate with the law of the realm, and, like the House itself, one of the supreme powers,

Let us now proceed a step farther.

The House of Commons, as we have said above, stands in a threefold relation to the other branches of the legislature, and in these three capacities has to discuss, to examine, and to conclude; that is to say, has all the peculiar functions of a court—The house therefore, in common with every other court, must have so much preliminary power as is necessary to enable it to exercise these functions; and this power must be of that kind which is alone efficient to the end; that is, the power of summarily, and *in limine*, vindicating its own dignity and functions by removing

and punishing, *instanter*, all contempts and obstructions.

Here, therefore, we arrive at another general head and trunk of parliamentary privilege—the privilege of punishing for contempts; and under these heads—that of privileges of essence and privilege of punishing contempts, and a third branch of privilege founded in their character of a Grand Jury, and more particularly, from their peculiar right and duty of impeachment, may be classed all the privileges of the House, and the limits of this essence or contempt, and right and duty of impeachment, will be the natural limits of the privileges rooted in them.

With respect to the first head, as it is not the subject immediately before us, and as, in fact, it is of little difficulty, lying chiefly within intelligible and direct deductions from general rules, we shall say nothing more of it than what has been cursorily stated above.—The main power of the Commons, as far as it is summary, arbitrary, and, in claim at least, final, and as far as it affects the personal liberty of the subject

as an individual is founded and asserted under contempt.

The natural and legal limits therefore of that power are to be found in the natural and legal limits of contempt.—Our present point is to ascertain and mark out these limits.

Now the doctrine of contempts, as it lies open to natural reason, and as it has been explained by all our soundest Lawyers may be laid in one principle:—it his the self-defence of the Court,—of its moral person and functions.—The origin and necessity of it are intelligible in the mere statement.—A Court cannot begin to act, cannot even enter upon its functions,—unless, by enforcing obedience to its process, it can bring its subject before it.—A Court may likewise be insulted or obstructed *in ipso banco*.—It is necessary therefore that a Court should have a power of asserting and vindicating its dignity and its jurisdiction, by removing obstructions,—compelling obedience to its process, and punishing contempts.—It is likewise evident from the mere statement that this privilege of punishing contempts answers to self deencef amongs tindivi-

duals, being the defence of the dignity, body, and functions of the court.

The consideration, therefore, of the nature and objects of self-defence will conduct us to the nature and objects of contempts.

Self-defence in an individual embraces three points,—character, personal security, and personal liberty.—Now a moral person has the same properties, and therefore the same subjects of self-defence.—The character of a moral body is its dignity, and the liberty and security of a moral body are the free exercise of its political functions, and the free enjoyment of its political rights.

The first contempts, therefore, and the privileges which are founded upon them, are those which respect the character of the House of Commons, and hence it may laid down as a generalprinciple.

That whatever grossly reflects on the character of the House of Commons,—whatever imputes to them what ti would be a libel to impute to an individual, is contempt, and thereby breach of privilege: it is a

direct assault upon their character, and, through the odium presumed to be excited thereby, a consequential obstruction of their proceedings.

To render this subject more intelligible, we will now break this general principle into particulars.

The character of a moral person may be assailed in three ways:

1st. In the moral reputation of any of its individual members—The House of Commons cannot be supposed indifferent to the moral characters and the integrity and purity of its members; their purity, at least from all atrocious vices or crimes, is necessary to the due discharge of their peculiar corporate duties, and therefore a part of their moral or corporate person—It is incumbent therefore upon the House to defend itself from all such imputations which are direct attacks upon its person, and upon its functions—Such imputations therefore are gross contempts, and a direct breach of privilege: whence it may be laid down as a particular rule.

That it is an undoubted breach of privilege grossly

to vilify the character of any member of parliament,—not only as being a member, but as being a man.

The reason of this rule, however, being founded in the general principle of all obstructions, that is, in the tendency of the act to impede, impair, or render nugatory the proceedings of the court, so it must be understood with reference to this reason.—The vice or crime imputed must be such, as, by distroying the REPUTATION, may be construed, without force, into impairing the efficiency of his political functions.

Thus if A. B. being a member of parliament, I. S. says that A. B. is a villain—a scoundrel—or any other word of common colloquial abuse, it is not on the principle above stated a breach of privilege or contempt, because from the common acceptance of those terms, they carry no such distinct meaning as can be brought to bear upon the honour of the House—So if I. S. say of A. B. he is a *murderer*, it is likewise no contempt—but if I.S. say of A. B. that he is a thief, a swindler, he is guilty of some shameful or infamous crime, at the same time designating him as a *Member of*

Parliament, it is clearly a breach of privilege and contempt, as well as a libel at common law, and may be punished, at the election of the House or the Subject, in one or both ways.

With this limitation, there cannot be a doubt that whatever renders the character of a member of parliament infamous, is breach of Privilege, as well as libel at law, and is cognizable both by parliament, and the courts of law.

It is necessary however to consider an objection and distinction which have been sometimes taken, and which more particularly fall in with this part of our subject.

It is demanded why privilege of parliament should interpose where the act is cognizable by common law.—The common law has given a remedy, and more particularly in the case of libels and assaults, —where is the equity, therefore, or where the necessity, that the same offence should be doubly punished, or that of two possible courses of proceeding that should be chosen, which takes from the accused the forms of trial, and the security of a known law, and a settled jurisdiction.

To this it may be answered, that is not contrary to any known rule of law, and certainly not to any maxim of natural justice, that these should be two remedies for the same evil,—and that where the Commons and the law have a concurrent jurisdiction, either, or both, should take its right.—It is not two punishments, and each of them equal to the act, for the same offence,—but two punishments for different parts of the offence,—two satisfactions for two wounded interests.—The Commons are injured in their privilege,—the law in the public or private wrong.—The Commons heal their privilege,—and the law takes compensations for its own wrong.—Is it not thus in libels at common law?—The party has an action for the special damage to himself, and the king an indictment for the injury to the public peace.

In all cases, however, in which these concurrent jurisdictions meet, it is certainly an argument to the prudence and discretion of the House,—and accordingly the Commons would always do well to consider, whether in such cases the penal hand of the law be not sufficient, and whether that necessity, in which the anomolous power of privilege is founded,

does not cease to exist, were the law is at hand with its sword and its shield.

Self-defence has no place where the matter will wait the coming up of the law: no reason, nor justice, will suffer a man to be his own judge, and his own assertor, where a better judge, and a better assertor are at hand in the presence of the law.—Accordingly, in the cases which follow this attempted devolopement of principle, it will be seen, that in the best times of our constitution, in those seasons in which no extravagant apprehension of plots and dangers has rendered it blind and desperate,—when, all storms of prerogative and civil contest being hushed in their caves, it has fallen quietly down the stream in obedience to its healm, it will be seen that privilege in these times has likewise slept, and in any casual wrong has left its watch and duty to law.

This, however, being a most important head of consideration, we shall cursorily observe, that wherever in this concurrent jurisdiction, or rather right of cognisance of the law and privilege, the Commons have acted in preference upon their privilege; they have so acted upon, and as it were

established by an almost uniform course, the following distinctions:

1st, Where the matter has been a gross outrage.—A direct assault, and such as evidently upon the mere face of it required a summary vindication and punishment; in this case they have acted upon privilege

2d, Where the privilege, function, or right offended against, have been matter of general knowledge,—undeniable, and self evident,—in these cases they have likewise acted upon privilege.

3d, But where the privilege supposed to be offended against has been matter of argument, and not of evidence,— of dispute, and not acknowledgement,—and the offensive quality of the act itself is in the mere violation of this doubtful privilege,—without any thing superinduced in its manner and circumstances which may bring it within the reach of a more known privilege;—in these cases, the Commons have generally carried their complaints to the courts of law.

4th, In all cases which have required the Com-

mons to act in a double capacity,—that of legislators to declare a doubtful law,—and that of Judges to punish upon it,—in consideration of natural equity, the Commons have very rarely acted upon their privilege—they have usually contented themselves with declaring it,—and dismissing the party with a reprimand, thereby avoiding the injustice of an *ex post facto law*, but laying down the rule for the future—on the other hand, where the privilege has been matter of general notoriety and evidence, and therefore the Commons had only one part, that of adjudication or assigning the punishment; in all these cases the Commons have acted, *ex manifesta re et lege*, on their privilege.

5th, Summarily, therefore, where the act or the rule have been doubtful, so as to require trial or declaration, the Commons have had recourse to law—where both act and rule have been matter of notoriety and confession, they have *even in good times* acted upon their privilege.

The second way in which the character of a corporate person may be assailed is in its peculiar character as a court, or in the character of any individual member, *as being a member*, of that court or corporation.

Under this head it may be laid down a sa rule, *That it is an undoubted contempt and breach of privilege to impute to any Member of Parliament as such, that he takes bribes, preferments, place, or office, with a view to his particular vote or general conduct.*

Thus it would be contempt and breach of privilege to assert, that the Commons had decided unjustly or unfairly, in any enquiry, or election.

It would be contempt likewise and breach of privilege to tax the House with any gross act, whether of omission, or commission, with respect to its duties,—such as having smuggled a bill,—having, miscounted an alledged majority,—having no regard to their constituents,—being a mere ministerial assembly,—that their seats were bought and sold like so many stands in Mark Lane, &c.

It would be a contempt likewise to burn a member in effigy, for any vote, speech or conduct in parliament.

A distinction must likewise here be taken between error, and corruption,—between the imputation of erroneous policy, and corrupt judgement;—it is no contempt, because no injury, to impute error, and to discuss the imputation, to any human tribunal, or any individual, whatever.—The natural liberty of the people, which is but another name for the liberty of the press, includes within its just compass this right of opinion, of inquiry, and of discussion.

Any one therefore may discuss the proceedings of the Commons or of Parliament even after they have become final; any one may doubt their wisdom and policy. The mouth of history must not be shut.—There is no legal fiction by which the Commons are exempted from the frailty of nature, and therefore from the just presumption of error—The only limits are, the discussion must not be of a nature so as to obstruct their proceedings, or factiously to call in question their just jurisdiction. To do the latter can clearly answer no good purpose, and being an attack on their vital essence is a high contempt, and requires a summary assertion and vindication.

The third way in which the character of a moral person may be assailed is, in its dignity—This may in fact be considered either as a peculiar quality in itself, or as something superinduced upon character, which aggravates the crime of any offence against it by aggravating the consequences.

With respect to parliamentary privilege, to guard against any error from a too comprehensive rule, it may be necessary to observe in the first instance, that the common law attributes no peculiar dignity to a Member of Parliament as an individual, and that the dignity, therefore, which is the subject of privilege, and the subject of defence, is that of the House, and not of the individual person.

There is a well known statute on the books for the defence of the dignity of individual persons: the words of the statute are, Lords of Parliament and prelates, making no mention of Commoners.

When we speak of the dignity, therefore, of Parliament, we can intend nothing but the dignity of the House; and all privileges founded on

this dignity must be understood to be limited to this sense.

The general rule, therefore, will be—that whatever violates the dignity of the House is breach of privilege, and contempt.

Thus, it is doubtless a contempt to use language of insult or contumely towards either House of Parliament.

It is doubtless a breach of privilege to use such language towards the Speaker—it is doubtless a contempt to caricature or expose to ridicule either the House in a body,—or any individual member caricatured and ridiculed *as such*.

Every court or council has necessarily its own proceedings within itself:—It has the discretion to open or shut its doors:—this is very different from being secret tribunals.—All courts and all councils are virtually open to the country.—In the courts of law the country is present by its jury.—In the council of Parliament the country is present by its representatives.—The House of Commons, there-

fore, has an undoubted right to withhold its proceedings and speeches from publication.

To publish such proceedings, therefore, without permission is a clear contempt of privilege.

To publish them, against command, is a contempt of dignity.

To publish them partially, and injuriously, is both an injury in itself, and a breach of that implied contract which the parties, permitted by the House to take them, have entered into with the House.—In both cases, it is an injury which has originated *in facie curiæ*, and is therefore a contempt;—and where it is against command, is a contempt of authority, and therefore of dignity.

Contumacy of all kinds, whether in act or words, is a contempt against dignity;—but as it falls more immediately under the notion of an assault on the functions of the House, or on that small portion of jurisdiction which the law has given the Commons, so we shall consider it chiefly under that head.

This leads us therefore to the second main divi-

sion of injuries to a moral person,—and of obstructions or assaults to the being or duties of Parliament.—These are such as affect its PERSONAL SECURITY.

Under this head, the House of Commons may be attacked chiefly on three points.

1. In the safety of its persons,—whether of individual persons going to or from the House—or for having exercised any duty or privilege in the House,—or with respect to the whole House,—in menacing, overawing, &c.

It is unnecessary to use any words to prove that this is an offence both against law and privilege, and is punishable by both or either according to the election of the party injured.

2d, In its process—it is equally plain that all contumacious disobedience to any orders which the House has a right to give,— and more particularly, all forcible resistence to its process,—all refusal to attend its committees when summoned,—all withholding or falsification of evidence,—all these are direct attacks on the House in the exercise of its rights, and, by the uniform construction of law

are all violent assaults which necessarily put a court upon acting summarily in its self-defence.

3d, In its jurisdiction.

If contumacy or resistence to process be an assault upon the House in the exercise of its duties, still more so must be the total denial of its jurisdiction. This has a tendency to cut off its rights and privileges altogether.—It will not admit a doubt, therefore, but that all such denial, whether by word or writing, is a direct breach of privilege, and an high contempt,—inasmuch as tending to subvert all authority of the House, and to arrest it, *in initio*, in the issue of any process or the discharge of any duty.

Under this denial of jurisdiction, may be comprehended,—the appealing to any inferior court in a matter of undoubted privilege;—the putting the Commons to their law,—to the manifest derogation of their dignity, and interruption of their proceedings.

Under the same head may be comprehended any violation of the privilege asserted in the Bill of

Rights,—of not being *questioned*, or impeached in a court of law.

As this doctrine however, if asserted merely in general terms, would be so entirely discretionary, as to become almost arbitrary, it is necessary to subjoin some limitations; the principal of which are.

1. The above rules are not to be understood as restricting the liberty of the press, and opinion from all enquiries and discussions, whether any alledged privilege or any alledged act be within the jurisdiction, or within the privilege of Parliament.—This would be a violence upon natural liberty which our constitution does not admit.—This liberty, however, must not so far pass its bounds as to deny or dispute self-evident and acknowledged constitutional truths, fundamental maxims, and known and established law.—Such a liberty would tend to destroy all liberty,—and dissolve all society.—It would be a pure evil,—without any good whatever —a liberty for mischief, and licence for ruin.—No establishment could stand against it,—and the House of Commons having a right to defend itself against it, has purely a right of self-defence.

Where it is attended with violence and outrage, the House usually acts summarily in this self-defence.—Where the matter is merely libellous without any subsequent act, it usually presents it to a court of law.

2. The second limitation is, that the integrity of the jurisdiction and the privileges of the Commons, their right of not being questioned and impeached, must not so wholly, in matters of penal infliction, preclude all jurisdiction of the King's courts, as to leave the subject totally at the mercy of the House, and of an uncertain law.—The judges are bound by their oaths to administer justice according to the law of the land, and it is impossible that they should acknowledge privilege to be law unless they can take a virtual cognizance of it; unless they can compare any alledged act of it with some rule or notion of it existing in their minds.

The distinction seems to be, that wherever any matter of undoubted privilege comes before the court, the court, taking a virtual cognizance of the privilege—that is, acknowledging it as self-evident, but not unnecessarily professing to sit in judgment on it,—dismisses it *instanter*. But in cases where

the House have exceeded their privilege, or acted upon a very doubtful privilege, there cannot be a doubt but that the Court of King's Bench has a power to receive the appeal, and might, cursorily as it were, declare an opinion of court, though they should not deem it discreet to act upon it. The Commons certainly may abuse their power and privileges, and such an abuse, when existing in an extraordinary degree, being the abuse of a supreme and unaccountable power, must be without remedy; or at least without other remedy than in the whole legislature.—But such extraordinary abuse is rare. The ordinary, and more frequent kind of abuse, is in the transgression of the line of right, and not in a violent departure from, and abrogation of all duty.—Our constitution in the other branches of the legislature does not leave this ordinary abuse without remedy. Is it not a fair inference, therefore, that the constitution has made the same provision here. In the first place, by the discreet interposition and declaration of the King's Courts, and ultimately, by the dissolution of Parliament.

The third main division under which the House of Commons may receive injuries, and be put upon its defence, is its liberty;—this includes any attacks

that may be made on its freedom of person and of speech.—Under all these, however, the rule of privilege is so clear, and the misapplication of any act which may arise so impossible, that it seems unnecessary to enter more at large upon this head. The privileges under this head in modern times have as seldom been abused as disputed.

Such therefore, considered as the self-defence of a council or court, (the only analogy in which it can be considered) seems to be the reasonable and legal compass of privilege and contempt. We shall subjoin a few select and leading precedents, to prove that the House of Commons have in good times invariably proceeded within these lines, and that even in bad times when they have trespassed over them, they have acknowledged the principle whilst they have exceeded its extent. Sometimes, for example, stretching the compass of dignity too far, and applying it to an individual, instead of to the House, they have endeavoured to render every libel a breach of privilege, and to derogate from the jurisdiction of the common law, by bringing a case strictly private, immediately and originally before Parliament. At other times, not duly regarding the proper line of self-defence, as a summary re-

pulse of violence by violence, as a thing granted from necessity, and to be bounded by that necessity, they have acted indiscreetly, if not altogether illegally, in regarding every remote, indirect, petty insult or wrong an object of this self-vindication: thus forming what no law or reason can ever admit —a doctrine of constructive self-defence, and fictitious contempts.

Contempts, when punished as crimes, must not be grounded on fictions: fictions being allowable to advance equity, but never to work wrong, or originally to create crimes. Where any alledged case, therefore, of breach of privilege is not of direct violence or obstruction,—such as in most cases of libel, and in all those of argumentative denial of any claimed power or privilege, such cases are clearly not within the neccessity of so summarily superseding the ordinary course of the law, and therefore, it may be presumed, not within the constitutional reason of privilege.—Accordingly, in all such cases, the practice of the best times has been to resort to the law.

With respect to the privileges of the Commons, as founded upon their occasional character of a grand

jury, as in all cases of impeachment, the House have always assumed a right of commitment, preparatory to impeachment. This right is founded on the same constitutional necessity as that of impeachment itself. It would be in vain that they should have the right of accusing and bringing to trial, unless they had the means of securing the body. The delay of any appeal to the ordinary course of law might defeat the very end of impeachment. The party might withdraw, and public justice be eluded.

In several cases, however, which happened before the Revolution, the House assumed this right of committal preparatory to impeachment in a latitude very dangerous to the liberty of the subject. The preparation for impeachment became a fiction, and seemed assumed only to form a reasonable ground for an arbitrary privilege. It was seldom followed up with any actual impeachment, and was often exerted in cases where there could be no such intention; where the offence was within the cognizance of the common law; and the offender was not too powerful for the ordinary tribunals. The absurdity, and the necessary consequences of this privilege, claimed in so indefinite a manner,

were at length acknowledged, and though the principle has never been formerly revoked, the practice is abolished. This privilege is now never exerted, except where the House have come to a previous declared resolution to impeach. The question of impeachment is put first, and after that has been carried, another resolution is proposed for putting the accused unde rsuitable bail, and in most cases the Commons have applied to the House of Lords, the great court to try impeachments, to secure the person of the offender.

Before the Revolution, moreover, another practice equal dangerous began to prevail in the Commons. It was adopted as a principle, that in all cases in which the House of Commons were concerned as a party, or in any way could imagine themselves concerned, the Commons in all such cases had the same rights of summary punishment, or summary self-vindication. Under this principle, construed in some extent, they proceeded to commit almost every kind of libellous, and particularly their eligious and polemic writers, "whose writings and assertions, say, they endanger the common weal, and the Protestant religion." They applied the

same principle to every kind of writing or even of preaching and speaking, which created even their fears or jealousy. They affected to consider all such writings and speeches as state crimes, and giving their right of impeachment a latitudinarian construction, they claimed upon it a general and original cognizance of every thing which endangered the state, or questioned any part of the old establishment. Had this doctrine continued, it is very easy to see that the House of Commons would have ultimately drawn every thing to itself, and, in despite of its constitution, established an original jurisdiction.—We might have seen perhaps that happen in the Commons which we have seen happen in the courts of law,—that is, by virtue of fictions they might have drawn to themselves what in their first institution they were positively denied.

The Exchequer feigning every man to be a king's debtor, and therefore that the king had an interest in all his private engagements, brought every civil action even within the letter of its jurisdiction, and from a court of revenue and accompt became a court of general pleas. In the same manner, perhaps, the House of Commons, feigning

every thing to be a state crime, and that every state crime belonged primarily to themselves, might on this basis, and in fact in one period of our history they did, imagine themselves in the first instance to have a general right of committal, and afterwards a discretion, whether they should follow up such committal by impeachment.—These claims, however, are now obsolete, and are no longer ranked amongst their privileges.

To say all in a few words, privilege, in good times, like the sword of the Black Prince in Westminster Abbey, has been more honourable in its rust than in its edge—more glorious in its disuse, than in its service; the House and the people concurring to think it their best praise, that, having so much power, they have used it so moderately. It is necessary perhaps that the House should have this power, because the time may time when prerogative may call upon it to gird it on its loins. But till that time *shall* come, let it lie quietly upon the surface of the tomb, beneath which, with the Edwards and Henries of ancient times, prerogative as yet sleeps, and if the Constitution watch and do its duty, shall still sleep never to rise again.

PRECEDENTS.

The journals of the House of Commons are preserved no farther back than the first year of Edward VI. and are very imperfect till the reign of James I.—We must have recourse, therefore, for precedents to the parliamentary rolls. These have been carefully examined, and the leading cases in the early reigns abridged by Mr. Hatsell, a man, who voluntarily comprehending within the line of his duty whatever might illustrate and adorn the office to which he is attached, is entitled to the praise which belongs to those who have become benefactors, when they were required only to be servants.

The design of the present treatise will not permit us to extract the cases themselves; but with regard to privilege, from the earliest records to the end of the reign of Henry VIII. we shall quote the words of Mr. Hatsell, vol. i. page 38.

"It will immediately occur to any one who reads the foregoing cases, as entered at length in the records, that the privileges claimed by the House during this period were only for the;

knights, citizens, and burgesses, and their menial servants and familiares present with them in their attendance on Parliament:—that the duration of these privileges is in no instance carried farther than in their coming, staying, and returning to their houses, and that the extent of the privilege claimed was, to be free from any assault, or from arrests or imprisonment, except for treason, felony, or surety of the peace."

At this time, moreover, the claim of privilege was made either by petition to the King, or in case of the arrest of a member, or his servant, by suing out a writ of privilege, which was sometimes allowed and sometimes refused by the Courts. The House of Commons had not yet ventured to redress themselves by treating these arrests as contempts, and abating them as constructive nuisances by the immediate hand of their own officers.

Another peculiarity, besides this of the claim being made by writ, characterised the prayer, or rather the allowance of privilege, as to its extent, in all this period. The privilege against arrest was not construed to extend to

execution. When the body of a member was taken in execution, the Parliament sitting, a special act was made for his release: this being necessary to preserve the debt to the creditor after the discharge of the person taken in execution.

In the 31st of Henry VI. Thorpe, the Speaker, being taken in execution, the House referred the matter to the Judges:—the Judges refused to take cognisance of the law of Parliament, and the Commons accordingly chose a new Speaker.

The public inconvenience of this practice being great and frequent, a general act was at length past in the reign of James I. reserving the debt to the creditor in all cases of discharge under the claim of privilege of Parliament. Thereafter no distinction was made between mesne process and execution, but in both cases the person of the member was discharged.

But the old practice was as we have stated it to be, up to the 34th of Henry VIII. The Member, whether arrested by mesne process or taken in

execut on, either sued out his writ of privilege, or applied to the House, in which case a special act of parliament was passed for his release, and for preserving the debt to the creditor.

Two inferences may be deduced from this practice:

1st, That the expediency of the personal liberty of Members of Parliament has been acknowledged in all times, but that the common law in suffering a manifest injustice to follow from thence, and giving no remedy, had certainly not provided for this liberty in the case of executions, and that therefore this improvement, and an improvement it certainly is, belongs to modern times. It is not to be found in the common law, though certainly within the reason, and therefore the spirit of the constitution.

2dly, That up to this period it was not thought derogatory to the honor of Parliament, nor to their rights and privileges even where most undoubted, to receive these rights and privileges from the hand of the law; to plead privilege under the law, but not to supercede law.

Through all this period, the only privileges claimed were those which we have termed privileges, without which the commons could not have exercised their constitutional duties.—And they vindicated these privileges, when infringed, by appeal to the ordinary tribunals.

The first case in which the House came forwards to punish an obstruction of its members, by its own power, is that of George Ferrers': he was arrested going to the House, and upon the Commons sending their Serjeant to release him, he was forcibly resisted and beaten. The Serjeant applied to the Sheriffs, who rejected his complaint, and treated him with contumely.—The Commons petitioned the King and the House of Lords to punish the parties, who, adjudging the contempt to be very great, referred the punishment to them;—who thereupon imprisoned the Sheriffs, and did not release them till after very humble petitions.

Here therefore we see the first instance, in which, by sufferance of the King and Lords, the Commons assumed two new powers,—in the first place that of punishing contempts,—and in the second place that of *summarily* punishing them,—*i. e.* by their own officers, and without appeal to the courts.

"There are in this case so many new and extraordinary circumstances, says Mr. Hatsell, that I am apt to suspect that the measures which were adopted, and the doctrine which was now first laid down with respect to the extent of the privileges of the House of Commons, were more owing to Ferrers' being a servant to the King, than that he was a Member of the House."

The next case is that of Trewinnard, reported by Dyer, 59 Rep.—in which privilege was first extended to the release of a Member of Parliament in execution for debt;—but, a careful examination of the cases will warrant a conclusion, that from the earliest period to the end of the reign of Henry the VIII. the only case in which the House interposed to release a member by their own authority, without the assistance of a writ of privilege or act of Parliament, was that of Ferrers.

From the conclusion of the reign of Henry the VIII. to that of Elizabeth, we find the House of Commons making very rapid strides in extending as well their privileges, as in their mode of asserting them.—It was now become the constant practice immediately to send the Serjeant at Arms to release the persons of Members under civil arrest,

and to commit the officers or persons procuring such arrests, for contempt of the House.

The reason assigned for this summary vindication of their rights being, that the interruption of the public proceedings could not wait the tardy process of the writ of privilege.

Now, therefore, we see the House first acting on the doctrine of contempt,—and that of a summary vindication of their own rights.

In 1529, William Thranur was committed to the custody of the Serjeant, being charged with a contempt in speaking against the dignity of the House.

In 1575, W. Williams was committed to the same custody for a double imputation,—that of speaking disrespectfully of the Government, and for threatening and assaulting a Member.

In 1580, occurs the case of Mr. Arthur Hall, a Member of the House (vide Sir Simeon D'Ewes, Journal, 298). In this case the House first punished a Member for a libel on its dignity. The offence of Hall, as the Committee report it, and

upon which they proceeded to imprison and expel him, consisted—

1st, In publishing the conferences of the House abroad in print, with a counterfeit name of the author, and no printer's name,—therein slandering many Members of Parliament, and insulting the dignity of the House by imputing to it false and unjust proceedings.

2dly, In denying in print the authority of the House to appoint Committees without *his* consent.

These offences were aggravated by a virulent letter to the House, and a refusal to attend in his place when summoned.

Upon this case Mr. Hatsell observes, that, from the variety of offences charged upon Mr. Hall, it is difficult to deduce any precise idea of privilege as understood by that House of Commons.

If we proceed to examine the several cases of privilege from the accession of James the First to the end of the Parliament of 1628, we shall certainly find the Commons proceeding very rapidly in their claim of summary power, and compelled, by

the necessity of the times, both to make new privileges, and to employ new modes of maintaining and defending them. Their pretensions, however, in their several declarations went no farther, than—

1st, To secure to themselves their rights of attending in Parliament, unmolested by threats or insults.

2d, To obtain the freedom of debate.

They never claimed any positive privilege beyond these two; and in their utmost extension of the newly-introduced doctrine of contempt, or summary defence, they never applied it to other cases or circumstances, than such as directly menaced or attacked the freedom of their persons or that of debate.

In 1601, Henry Davis was taken in custody upon charge of a libellous publication, termed the "Assembly of Fools,"—discharged; the book not appearing afterwards to be libellous.

In 1603, Bryan Tooke was committed for a contempt in language.

In 1604, T. Rogers was committed for abusing a Member respecting a bill at that time reading in Parliament.

In 1604, William Jones, a printer, was committed for giving the Speaker a bill, entitled An Act for Treasons committed by A. B.—The House in this case, upon some intermeddling of the King, passed a resolution, that Jones could only be discharged by themselves, and could not be taken from them and committed by any other.

In 1625, A man of the name of Foreman was committed for certain words spoken in opposition to the bill against swearing.

In the same year, Mr. Montague was committed for a contempt and libel in traducing Yates and Ward who had petitioned the House.

In 1628, Aleyne was committed for a contempt and libel.

From 1628 a new scene opens.—In the Long Parliament, privilege being provoked and opposed by prerogative, followed the tyranny of the

latter with equal strides, and, being the stronger of the two, destroyed both the rights of the subject and of the crown.—Though, from the violence of the greater part of these exertions of privilege, the Commons never pretended to set them up as precedents,—yet the general principles being favourable to their power were remembered, when the particular cases were forgotten,—and they afterwards adopted their reason, whilst they condemned their excess.

One of the most extraordinary cases, immediately following the Restoration, was that of Maurice Thomson, who being ordered into custody for suing a Member, barred his house, and kept out the Serjeant at Arms—The House being informed of this proceeding *empowered* the Serjeant to break open Mr. Thomson's house, and to call in the assistance of the Sheriff of Middlesex and all other officers as occasion might require.

In 1670, another case of a similar kind occured:—The Under Sheriff of Gloucestershire having rescued a prisoner from the Serjeant at Arms, the House commanded the arrest of the said Under Sheriff, and required the High Sheriff and the offi-

cers under him to assist in the execution of the same warrant.

In 1679, Blyth, a constable, was committed for refusing to aid in the execution of the Speaker's warrant.—To this may be added a numerous train of cases which we shall briefly mention.

The case of Dr. Shirley is next in importance.—Being unsuccessful in a Chancery suit against Sir John Fagg, a Member of the House of Commons, he preferred a petition of appeal to the House of Peers,—the Lords received the petition, and summoned Sir John Fagg to appear before them.—He complained to the Lower House that he was questioned by the Peers;—they espoused his cause, and insisted not only that no Member of their House could be summoned before the Peers, but that the Peers could receive no appeals from any Court of Equity;—they instantly moreover sent Shirley to prison;—the Lords assert their powers, conferences are tried, but no accommodation is effected;—four lawyers are sent to the Tower by the Commons for transgressing their orders and pleading in this cause before the Peers. The Lords, on their part, denominating this arbitrary commitment a breach of the Great Charter, order the Lieutenant of the Tower to release them, but he declines obedience. They apply to the King, and desire him to punish the Lieutenant for a contempt.—The King summons both Houses,—exhorts them,—and finding that exhortation has no avail dissolves the Parliament.

In this memorable case, some of the answers made by the Lords to the privilege claimed by the Commons are in substance as follows:

"The House of Commons, say they, are no court, nor have they authority to adminster an oath, or give any judgment. It is a transcendent invasion of the right and liberty of the subject and against Magna Charta, the petition of right, and all the other statutes which have provided, that no freeman should be restrained of his liberty but by due process of law—the privilege claimed by the Commons tends to the subversion of the government of the kingdom, and to the introduction of arbitrariness and disorder. It is of the nature of an injunction from the Lower House who have no authority or power of judicature over inferior sub-

jects, much less over the King and Lords."—*Cobb. Par. Hist.* vol. iv. 734.

The Commons, in a very passionate reply, contend that the *lex et Consuetudo Parliamenti* were co-ordinate in dignity and in existence with the great charter,—and that the charter, and all other laws had left it unmaimed, and unrestrained, for the preservation of their dignity and independence:—they particularly resent the charge of not being a court of judicature, and employ no very decorous language to vindicate themselves.—Amongst other resolutions, moreover, they came to the following:

1st, That no person committed, by order or warrant of this House, for breach of privileges or contempt of the authority of the House, ought to be discharged during this Session of Parliament, without the order or warrant of this House.

2nd, That no Commoners of England committed by the order or warrant of the House of Commons, for breach of privilege or contempt of the authority of the said House, ought, without order of the said House, to be by any writ of

Habeas Corpus, or any other authority whatever, made to appear and answer, or receive any determination in the House of Peers during that Session of Parliament wherein such persons were so committed.

Throughout the whole of this business it must be confessed that the Commons proceeded on the doctrine of contempt to its full rigour and to its fullest possible extent.—We see them endeavouring, moreover, to work out a kind of constructive contempt, and on the ground of it to exempt themselves in their own private causes from the jurisdiction of the established courts.—Having before established their right, or rather their power, by acting upon contempts, they now sought to render every appeal against them a contempt, and to bar the courts from all cognizance, *in limine*, of any complaint against them,—an assumption, which would indeed render the *lex parliamenti* the *lex-terræ*,—for if the Commons could assume a law, and the courts must take it for granted, the law was virtually enacted by their assumption.

In the case of Shirley and Fagg the Commons

were clearly in the wrong, inasmuch as it was an attempt to arrest the course of justice by an injunction from one branch of the legislature.—But absolute rights are not forfeited by abuse; what is holden by grace and favour may be. The character of the Commons of that time suffers by the excess, but the corporation of Parliament, renewed by the succession of generations, has no share in the shame or the reproach.

The next case we shall notice, though not strictly in order, is the case of the Earl of Shaftbury, 1 M. Rep. 144: this was a commitment by the House of Lords for a contempt; but as the argument applies to Parliamentary rights in general, it concerns the House of Commons as well as the House of Lords, —The Earl was brought before the Court of King's Bench on the return of a writ of Habeas Corpus. —This seems to have been the first case in which a court of law was called upon to determine the legality of a commitment by either House of Parliament.—The King's Bench refused to bail him, though the warrant did not express the nature of the contempt nor the place where it was committed; nor whether it was a mere charge, or whether a conviction by the House.

In this case we find Serjeant Maynard arguing in support of Parliamentary privilege as exempt from the jurisdiction of the Courts of law, where they met it front to front.—"If this commitment had been by an inferior court," being so manifestly different on all the circumstances which even natural reason could require in any thing of the effect of a warrant, having no specification of the offence, and therefore putting the individual under no obligation to yield, it must have been set aside, " even contrary to the rule of law, that one court will not interfere with the privileges or contempts of others.—But the commitment is by a court not under the controul of this court, and that court is sitting at this time."

Another very able man of his time, Jones, Attorney General, urges in his argument upon the same case, that the judges have in no age taken upon themselves to determine in matters of privilege; and that here an attempt was made to compel them to deliver their opinion on a matter whereof they had refused to give it when required by the King and Parliament,—as in the cases of the Earl of Devonshire, and of Thorp the Speaker."—" It is objected, continues he, that

there would be a failure of justice if the court shall not discharge the Earl,—now the failure of justice will be, if the court should discharge him, for then a gross contempt must go unpunished, inasmuch as offences in Parliament can be punished no where but by Parliament.—Contempts need not be committed in the House."

"How great would be the mischief, said Winnington, Solicitor General, if the law were otherwise,—for the King's Courts might decide one way, and the house in question the other.—These attempts are *primæ Impressionis*, and though imprisonments for contempts have been frequent by the one or the other House, till now no person ever sought enlargement here."

Accordingly the judges were unanimously of opinion that the court had no jurisdiction in cases where the direct issue and the object of complaint were Parliamentary privilege.

"We ought not," said Rainsford, Chief Justice, "to extend our privilege beyond its due limits, and the practice of our forefathers will not warrant us in such attempts. The consequences

would be very mischievous if this court should deliver the Members of the Houses of Peers or Commons when committed by their respective Houses.—The business of Parliament may be thereby retarded, for perhaps the commitment was for evil behaviour, or indecent reflections on the Members, to the disturbance of the affairs of Parliament.—The commitment in this case is not for safe custody, but he is in execution on the judgment given by the Lords for the contempt —This court has no jurisdiction in the matter." The Earl was remanded.

In this case it was allowed on all sides that a Member or stranger, committed by either House of Parliament, was entitled to his Habeas Corpus in case of a prorogation.

The next case of importance is Sheridan's, in 1680—He was committed for a general contempt in being connected with the Popish Plot:—a Judge granted him his Habeas Corpus at common law, not that on the recent statute of Charles II. The House being informed of this took it into their immediate consideration, and came to several resolutions, denying the right of the sub-

ject to his Habeas Corpus upon any commitment for breach of privilege.—Parliament, however, was prorogued before this matter was settled.

Besides breaches of privilege, and contempt, the Commons seem at this time to have assumed another ground of summary commitment.—In the case of Howard [*See Cobb. Parl. Hist.* vol. iv.] there was no pretext of direct contempt or breach of privilege.—His offence, that of exciting the religious fears of the Commons, was a state crime, if any, or a misdemeanor at common law.—The Commons however, considering themselves as a party attacked, committed him. In this usurpation they seem to have proceeded on a kind of constructive contempt, and to have claimed the right of summary punishment, or summary self-vindication, in every case in which they were concerned as a party.—In the case of Dr. Carey, whom the Lords imprisoned for an atrocious libel calling in question the legality of Parliament as a representative of the people after a prorogation, the House of Commons took up his case, on the ground that his offence, if any, was a misdemeanor at common law, and that it was unconstitutional to punish crimes in Parliament where the law was open.

It does not appear what was the issue of the enquiry into the sentence passed by the Lords upon Dr. Carey.—It is a proof, however, that their ideas of contempt were not very clear, when they disputed that right in the Lords which they exercised themselves.

During the whole reign of Charles II. the House assumed various kinds of power over the subject, but they were generally preparatory to impeachment, and upon the accusation of state crimes, such as they imagined the popish plot to be, and cannot be considered as entrenching on the ordinary tribunals.—Even the case of Shirley and Fagg was a proceeding which had no tendency to assert a general claim over the person of the subject, but was merely a question of jurisdiction over their Members; and though they were mistaken in their notions of law, their sentiments were not hostile to public freedom.—The truth is, that the latitude which privilege seemed to assume from the Restoration to the Revolution is to be imputed to the jealousy of the Commons of plots upon their authority and independence.—They were always either in suspicion or on enquiry of state crimes;—they seemed to consider themselves as holding their existence from

day to day.—Every session almost had its impeachment, and if in this state of things they entrenched somewhat on the liberty of the subject and the ordinary course of the law,—no one acquainted with the agitation of the times will judge them harshly.—The privilege of the House was at this time little more than the exercise of those necessary rights which belonged to it in its functions of a grand jury.—Over their own Members they held a tight hand, but when the matter was between themselves and the subject at large, they rarely punished any acts but such as were undoubted contempts; such as obstructed the freedom of debate, or questioned their established rights and functions.

PRECEDENTS SINCE THE REVOLUTIONS.

The first case which occurs is that of Jay and Topham, 1 W. & M. 1689, State Trials, Vol. 8th.—This case is as follows:

An action of trespass was brought against Topham by Jay for arresting him and detaining him in prison till he paid him £. 30—To this the defendant, Topham, pleaded, that there was an order of

the House of Commons for taking Jay into custody, and bringing him to the bar of the House.—This he pleaded to the jurisdiction of the Court of King's Bench;—alledging, that the court had nothing to do with it, and ought not further to examine it;—upon this there was a demurrer, and it was adjudged by the court that he should answer over,—that is, that he should plead in bar to the action.—Hereupon Topham complained to the House of Commons, which was the first assembly after the Revolution—The judges were ordered to attend, and explain their conduct to the Commons, who accused them of a breach of privilege in not admitting Topham's plea to their jurisdiction.—The judges, Sir Francis Pemberton, and Sir Thomas Jones, defended themselves at the bar of the House in an argument which we shall endeavour to bring into some kind of order, the report of it being exceedingly vague and perplexed.

1st, They contend that they could find no judgment against the jurisdiction of the King's Bench in any similar case; nor any vote or order of the House against it.

2d, That the action coming before them in a

judicial way, they found it necessary either to throw out the cause, or overrule the plea to the jurisdiction.

3d, That even when justifications were given by act of Parliament, it was not enough to exclude the King's Courts from their jurisdiction.—Some acts of Parliament gave power to plead summarily, others to plead the general issue, and to give the special matter in evidence; but they never heard, that there was any provision made for pleading to the jurisdiction, though it was done by the authority of the whole Parliament, therefore they could not admit that the House of Commons had authority to exempt the King's Bench, being a court of law, from examining whether what was alledged to be done, was done in pursuance of their authority or not.—That the defendant might have pleaded the order of the House by way of bar; but that it would be a monstrous mischief to the plaintiff, if such plea was allowed to the jurisdiction; for it is agreed on all hands, that if Mr. Topham had abused his authority, and done any outrageous thing, he ought to be punished and return damages to the party injured.

4th, That in case the King's Bench could not examine it, the plaintiff would be without any remedy in the world.—So that if one of the officers of the House should *abuse* its orders, the person so abused could have no help, if the courts of law could not help him.—The Commons may examine their officers so as to punish them, but they cannot give damages, because the fact of injury must first be proved by witnesses on oath; next the damages must be assessed by a jury.—Now the House of Commons had never taken upon themselves to examine upon oath, or assess damages: so that unless the courts of law had jurisdiction in all such actions as these, the plaintiff must be remediless if he suffered a wrong; on the other hand, he would have recovered no damages if he had sustained no injury.

Such was the argument of Sir Francis Pemberton, who concluded, that, for the above reasons, he was bound to over-rule the plea to the jurisdiction.

Sir Thomas Jones, in addition to Sir Francis Pemberton's argument, says,—"That where the entire matter is transacted in this House, then a plea to the jurisdiction of the court is proper; but in the

present case I did conceive that THAT jurisdiction was most proper, which could try and determine the whole merits of the cause between both the parties; especially where the privileges of this House would no way suffer nor be injured.—The authority of this court is very great, but the authority of an Act of Parliament is greater; but when a law is passed by all these authorities, and any one acting by virtue of such a law is questioned thereon, he is either to plead in bar especially, or, as is sometimes provided for the ease of pleading, he may plead it generally, and give in evidence the special matter.—But it was never known that any man should say, I was an officer by Act of Parliament, and therefore demand whether you will take cognisance of the matter, having done what I did by Act of Parliament,—and if it be so in cases of Acts of Parliament, then I thought it might be so when there was only a command of this House."

Notwithstanding these arguments, the judges, who knew themselves to be in the hands of persons not well affected towards them, Pemberton having been the successor of Scroggs, and both of them judges during the two last reigns, descended to a base supplication of the pardon of

the House, who immediately rose upon their condescension, and imprisoned them for a breach of privilege.

In this case we see a solemn decision of the Court of King's Bench, that they have jurisdiction in cases of alledged breach of privilege,—though they are bound to admit a plea in bar, justifying such act as being done by order of the House of Commons, and such act being within the privilege of the House.

The case of Sir William Williams, though previous to the Revolution, was taken into the consideration of the House at the same time with that of Topham.—In Trin. Term, 36 Car. II. an information had been filed by the Attorney General in the King's Bench, against this Sir William Williams, for having printed the narrative of Thomas Dangerfield, though in so doing he had only obeyed the orders of the House.—In the second year of the reign of James II. judgment passed against him on this information,—The House now took it up, declared, and most justly so, the whole proceedings to be illegal, and brought in a bill to rescind the judgment—The

bill passed the Commons, but being considered unnecessary in the Lords, the matter being notoriously illegal, but the effect past, it was not then read a second time.

The next case was that of Duncomb, a Member, for making false indorsements on exchequer bills: he was committed to the Tower, expelled the House, and a bill of pains and penalties brought in.—The Lords, however, deeming the Commons to have assumed herein somewhat of the nature of an original jurisdiction over crimes which had nothing to say to privilege and contempts, rejected the bill, and ordered Duncomb to be discharged—The Commons, indignant at this interference, immediately passed two resolutions—one "That no person committed by the Commons could, during the same Sessions, be discharged by any other authority whatever,"—the other, "That Duncomb be again taken into the custody of the Serjeant at Arms,"—This was accordingly done.

We cannot pass this precedent without cursorily observing, that the Commons appear to have here exceeded their authority, unless the bills

were in any way in the custody of the House, or had any relation to them.

The next case which occurs is that of Mr. Rowe, a Member of the House, charged with a libel on the King's government by Sir Edward Seymour. The House voted the paper a scandalous libel, but went no farther.

The next case is Welwood's for a libel on the House,—ordered into the custody of the Serjeant at Arms, and reprimanded.

The next case is that of Dyer, a News-letter writer, for noticing the proceedings of the House —reprimanded.

The next case is that of Mr. Hungerford and Mr. T. Cooke, who were sent to the Tower for a high crime and misdemeanor in refusing to answer certain questions put to them by the House relative to the receipt of money for serving on committees.

The next case is that of the printer of the Flying Post, for certain observations on the pro-

ceedings of the House—A bill was at this time brought into Parliament to restrain the press, but immediately rejected.

The next case is a complaint against certain letters written by Mr. Chivers, which misrepresented and reflected upon particular Members of the House:—Mr Chivers was ordered to attend in his place, which he refused to do,—a motion was then made to send for him by the Serjeant at Arms, which was negatived.

The next case which occures is that of the Kentish petition; the history of it is short.—The freeholders of Kent being dissatisfied at the slow proceedings of Parliament,—that the King was not assisted abroad, and the Protestant interest not sufficiently considered, petitioned the House of Commons to adopt new measures, and employed strong language of expostulation.—The Commons, on account of the language of the petition, voted it to be a libel and a breach of privilege, and ordered the five Kentish gentlemen who presented it to be taken into custody by the Serjeant at Arms,—This was done, and they were not released till the prorogation.

The House on this occasion came to the following resolutions:

1. That to assert that the House of Commons is not the only representative of the Commons in England tends to the subversion of the rights and privileges of the House of Commons, and the fundamental constitution of the government of this kingdom.

2. That to assert, that the House of Commons have no power of commitment but over their own Members, tends to the subversion of the constitution of the House of Commons.

3. That to print or publish any books or libels, reflecting on any of the proceedings of the House of Commons, or of any Member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House.

4. That it is the undoubted right of the people of England to petition or address the King for the calling, sitting, or dissolving of Parliament, or for the redressing of grievances.

5. That it is the undoubted right of every subject of England, under any accusation, whether by impeachment, or otherwise, to be brought to a speedy trial, in order to be acquitted or condemned.

The next case of importance, for on such only shall we touch, is that of Ashby and White, and the Aylesbury men.—This case is shortly as follows:—Ashby, a pauper, having a right to vote at the election of Members of Parliament for the Borough of Aylesbury, tendered his vote to the Returning Officer, who refused to receive it,—Ashby in consequence brings an action on the case and obtains a verdict damages 5*l*. A motion was made to arrest the judgment in the King's Bench—on the ground that the refusal to receive the vote was no injury at common or statute law,—that the action was *primæ impressionis:* and that the grievance, if any, was to be remedied in Parliament: that courts of law could take notice of none but substantial injuries, and that no complaint of the same kind having been ever made in a court of justice, it was a strong presumption that the law did not recognise it as an injury—these arguments prevailed, and the judges reversed the decree, with the exception of Lord Holt, who supported the verdict of the jury—Ashby

appealed by writ of error to the Lords,—The Lords reversed the judgment of the King's Bench by a great majority.

The Commons thinking their privileges invaded by these proceedings in the King's Bench and in the House of Lords, came to several angry resolutions; voted Ashby guilty of contempt, and declared that all similar actions were usurpations upon the privileges of the Commons—Encouraged, however, by the authority of Lord Holt, Paty and several others brought their actions upon the same ground, whereupon the House of Commons, immediately acting on their resolutions, committed Paty and the others for contempt.—The matter being brought before the King's Bench, by Habeas Corpus, was very ably argued by the council.

Their objections were—

1. That the warrant was not under seal—and therefore was not good in form.

2. That Paty and others were not Members of the House, servants of the House, nor had com-

mitted any contempt in *facie Curiæ* in presence of the House as a court—but that the matter was done out of the House.

3. That the commitment was during the pleasure of the House, instead of till duly discharged by law.

4. That the assigned cause of commitment was for bringing an action at law: and shall the Commons hinder a man from proceeding at law?

5. That the matter of commitment was not specially, accurately, and sufficiently expressed; —that the warrant, therefore, wanted that legal precision, and those determinate bounds and definition, which the law required, in order to know to what to affix the act.

6. That it was contrary to *Magna Charta*, by which no man could be imprisoned but by the law of the land, and judgment of his equals.

7. That if the Court of King's Bench could not judge of the commitments of the House of

Commons, and such a commitment as that of Paty and the others was good, the House may stop the whole course of law, and take upon them a despotic power.

To these arguments it was replied by the court—

1. That with respect to the warrant not being under seal, it was no defect in the warrants of the House for various reasons:—In the first place, because the House of Commons is a court, and according to Lord Coke, 4 Inst. 28. 23, commitments by a court need not be under hand and seal; the second reason is, because the form of the warrant was according to the usage of Parliament, and the usage of Parliament was the law of Parliament, and the law of Parliament the law of the land; there was still a third reason— The warrant was that of a superior court, and therefore was not cognisable in the King's Bench —The want of jurisdiction must necessarily supply all the defects in form.

2. That with respect to the allegation that Paty and the others were not Members of the

House; and that the matter charged was matter done out of the House;—that it would be to narrow the doctrine of contempts beyond all reason, if they were confined to the Members and servants of the court, and to matter happening only in their presence;—that contempts were most usually committed by strangers, and more frequently out of the courts than in them; that few had the confidence to insult the court in its presence, and that the Members and servants of the court generally knew their duty better than to be guilty of contempts.

3. That as to the commitment being during the pleasure of the House, instead of the ordinary form, till they shall be discharged by due course of law.—In the first place, this form of commitment was notoriously the usage of Parliament.—In the second place, it was more favourable for the prisoner.—The commitment necessarily determined with the sessions, and it left the House the power to discharge the prisoners upon their submission.—Thirdly, this form was agreeable to the usage even of the Court of King's Bench, the only difference being, that the warrant of the House expressed it, whereas in the warrant of the King's Bench it was implied.

4. That as to the objection, that the cause of commitment was for bringing an action at law, that such was in fact the legal acceptance and intention, as well as the use of privilege. That privilege in its very term was an exemption from the ordinary course of law, and that of course the privilege was violated by putting it to its law.

5. That as to the warrants not being special enough, contempts were a kind of equity which were never expressed with the accuracy and rigour of law.—That if all commitments for contempt were scanned according to the rigour of the rules of law, none of them would hold water. That in all such cases the warrants of all courts, even those of the King's Bench, were short: as for a contempt, or a contempt for such a cause—such general terms are sufficient in the commitments of the ordinary courts, because the law necessarily intended that they understood what they were about, and that, from their reputation, their wisdom, and their integrity, and having no individual passions, they would not abuse their power; *a fortiori*, the law would infer the same thing with respect to the House of Commons—that the House of Commons was a superior court, and that all things done by them must be intended to be *rite acta*.

6. That with respect to *Magna Charta*, the *lex terræ* is not confined to the common law, but takes in all the other laws which are in force in this realm, as the civil and canon law, and amongst the rest the *lex parliamenti*. By the 28 Ed. III. c. 3. the words *lex terræ* are explained by the words, due process of law, and the meaning of the statute is, that all commitments must be by a legal authority.

7. That as to the objection that the House might abuse its privilege and stop the whole course of the law, this was a supposition as absurd as it was indecent.—That the House of Commons, as a branch of the legislature, and a supreme power, must not be presumed capable of abusing their rights.—That the law can never momentarily admit such a probability, or any argument founded on it.—That even supposing the Commons to have exceeded their jurisdiction, that the Court of King's Bench could give no remedy, because the wrong, if any, was done by a superior court. But that this want of remedy was no argument for the interference of the King's courts, because it was a case of necessity; that a supreme power was beyond the cognisance or controul of those below it; and that it would be a greater public evil to suffer such controul over a

power, which for all other causes ought to be independent, than to suffer an injury which could so rarely happen; that the constitution, however, had provided three remedies:—

1. The conference of the Lords and Commons.—2. The authority and influence of the crown, and, if the House were contumacious, the prerogative of dissolving it.—3. In the just apprehension of the House of returning to their constituents, and in the power of their constituents to reject or re-elect them.

The court accordingly remanded Paty and the others, against the opinion of Lord Holt.

Now as to the arguments of the judges in this case, they seem undeniable, except where in contradiction to the opinion of their own Lord Chief Justice, they assert a principle which would narrow their jurisdiction, and exempt many civil injuries from the remedy of the court.—There cannot be a doubt but that in matters, the direct issue of which is civil, and the consideration of privilege only incidental, the courts have cognisance, and privilege cannot be pleaded in

abatement of their jurisdiction.—The very granting of the Habeas Corpus,—and having their bodies in court, after they have been charged in execution, is a legal argument that the court is not without jurisdiction, and may at least learn the cause of commitment.

The doctrine contained in Paty's case has been confirmed in several modern instances—In Easter Term, 24 Geo. II. the Hon. Alexander Murray was committed to Newgate by the House of Commons for a breach of privilege and contempt.—A Habeas Corpus issued at common law, and Wright, Denison, and Foster, justices, were clear that the Court of King's Bench had no jurisdiction in that case; for that both Houses of Parliament, in concurrence with every court of record, even the lowest, has an exclusive right to commit for a contempt,—1 Wilson, 299.

In Wilkes's case, 3 G. III.—C. B.—Pratt, Chief Justice, and the whole court declared, that they had no power to decide on the privileges of Parliament.

In Entick *v.* Carrington, 11 St. Tr. 317—Lord

Camden says, "the rights of that assembly (viz. the House of Commons) are original and self-created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error,"—See Hawk. P. Cr. 171.—Numerous cases might be cited, in which the party committed has acquiesced in his sentence, without bringing his case before a court of law.

The next case of importance was that of Brass Crosby, 1771, which was briefly as follows:—The messenger of the House of Commons being sent to arrest the Printer of the Middlesex Journal, the printer carried him before Crosby as Lord Mayor, and Crosby committed him upon the spot,—a most manifest insult and obstruction of their process, and therefore a most outrageous contempt.—The House of Commons committed the Lord Mayor for a breach of privilege, who was brought into court by Habeas Corpus, and moved to be discharged, as illegally committed.

The argument of the court, in giving its opinion, will throw some further light on the privileges of the House,—the heads of it are as follows:

1. It is necessary that the House of Commons

should have the right of commitment,—and the House has it therefore, because it is necessary—They can do nothing without it,—cannot sit, cannot enter on their functions—This power must be inherent in the House from its very constitution, as means to an end, and therefore must be the law of the land, because it is the law of reason and necessity.

2. It is now (1771) generally agreed, that the House of Commons, under the above-mentioned principle, have the right of committing for all contempts generally—all contempts must be necessarily punishable somewhere,—either in the court contemned, which is most natural, or in some higher court—But Parliament, or either branch of it, has no higher court, therefore the contempts against either House can only be punishable by themselves.

3. The House of Commons have likewise the sole right of judging upon their own privileges, and what are or are not contempts against them—Their adjudication is a conviction, and their commitment in consequence is an execution—And no court can discharge or bail a person in execution by the judgment of any other court.

4. It is a rule of law, that every court shall determine its own privilege and its own contempt.—If the Court of Common Pleas should commit a person for contempt, the Court of King's Bench would not and could not relieve him; they could not enquire into the legality or particular cause of the commitment. It is sufficient if the return to the habeas is, that the prisoner was committed for contempt. The word is enough; the Court is stopped by it from going further.

5. The King's Courts do not know the jurisdiction of the House of Commons;—they know nothing of the law of Parliament;—they have not its records, and having no knowledge thereof, they cannot judge whether they have exceeded its law, or fallen short of it. The Court can judge only as far as they know. They can give no opinion on the acts of the House of Commons upon their parliamentary law.

6. There is a great difference between matters of privilege coming incidentally before the Court, and being the point itself directly before the Court. In the first case, the Court will take notice of them, because it is necessary to pre-

vent a failure of justice. In matters of direct privilege they will not interfere, and it would be the extreme of mischief if they should.

That as to the objection, that a power from which there is no appeal may be abused to the most dreadful consequences, and that such abuses must be without remedy, this possibility of abuse, and this absence of remedy for the wrongs of a supreme power, are unavoidable. The Court of Common Pleas and the Court of King's Bench have both the same summary power, and may both abuse it,—and in both there is no appeal. The subject and the law have no security but in the discretion, the integrity, and the reputation of the Court,—and this, perhaps, is sufficient. If the inferior Courts abuse their authority, it is a public grievance, and the only remedy is in the Legislature. If the Commons abuse theirs, there is an appeal to the People, to whom the King may send them by dissolution.

The report of Crosby's case is chiefly valuable, as containing the opinion of Blackstone, which is thus given in his own words:—

"The present case is of great importance, be-

cause the liberty of the subject is materially concerned. The House of Commons is a supreme court, and every such Court must be judge of its own contempts, and of its own privileges. No Courts, in which I include the two Houses of Parliament and the Courts of Westminster, can have any controul in the contempts or privileges of each other. The reason of this rule is founded as well in the uniform practice of all Courts, as in the mischief which would follow the breach of it. The sole adjudication of contempts, therefore, and the punishment thereof, belong, exclusively, to each respective Court. What infinite confusion and disorder would follow, if one Court could determine the contempts of others!—It would lead to a daily combat of jurisdiction. Therefore, the judgment and commitment of each Court, as to contempts, must be final, and without controul.—And as to the abuse of this summary power—the rule is, that *ab abusu ad usum non valet consequentia.*"

Such are the leading precedents from the earliest times almost to the present day, in which the acts of the House, upon contempts and privilege, have been brought before the Courts of Law, and,

more particularly since the Revolution, have been sifted, examined, and in some degree settled.—There are certainly two or three other cases, but their matter and points are so anticipated and included in those we have given, that it would be but repetition to cite them. The case of Flower had nothing in it distinct and peculiar. It was decided upon the exact line of Crosby's case, and the judgment of De Grey almost verbally repeated by Lord Kenyon and the other Judges.—See 8 *Term. Rep.* 314.

So much, therefore, may be seen by these precedents.

1st, That the House of Commons are recognised as a Court in the Courts of Law.

2dly, That, as a Court, and a supreme Court, they have what essentially belongs to a Court—the right of adjudging contempts, and of punishing them without controul.

3dly, That, as a supreme Court, they are exclusive judges of their own privileges;—their privileges exist in their records and in their journals,

and may be declared by themselves, and when so declared, must be definitively adopted by others.

4thly, That the Courts have no *direct* cognisance of matters of privilege, but where the direct issue is a civil right, and the question of privilege is only incidental, that then the Courts have a right, and have frequently exercised it, to determine on the privilege.

5thly, That the remedy for the abuse of this summary power is threefold—1st, By conferences with the Lords—2dly, By the advice of the King, acting himself under that of his Privy Council—3dly, By a dissolution of Parliament.

JURISDICTION OF THE HOUSE.

Having now taken a cursory view of the precedents of Parliament, with the purpose of marking that compass of privilege which both Houses have immemorially claimed, and which the Courts of Law, when brought before them, have recognised, it now remains to be considered, how far the jurisdiction of the Houses of Parliament is independent and *per se*; how far it belongs solely to the

House, and thereby excludes the controul and cognisance of the King's Courts.

This independent jurisdiction, as far as relates to the question before us, is claimed and exercised on parliamentary commitments for contempt and breach of privilege; the Parliament claiming the right of commitment as grounded in necessity, and an exemption from controul and supervision, or, in other words, an independency of jurisdiction, as grounded in its supremacy.

The independency of the King's Courts, with respect to each other, in commitments for contempt, is grounded upon the inconveniency of the jarring and opposition of Courts of equal rank.—The independency of the jurisdiction of Parliament is grounded, *a fortiori*, on a similar reason, and upon the inconvenience and indecency that the acts of a supreme tribunal should be canvassed and controuled by an inferior one.

Let us look to the objections to this doctrine, which have been summed up in a syllogism.

The right claimed by the House of Commons

imprison for breach of privilege and contempt, exclusive of any controul, or interference of the Courts, can be claimed only by virtue of some positive law or custom.

Now there is no such positive law or custom.—*Ergo*—there is no legal ground of their claim.

To this it may be briefly answered,—1st, That the House of Commons have this jurisdiction from positive law,—2dly, That they have it by custom,—and 3dly, What is stronger than either, and what supercedes and supplies them both, the House have it from necessity; from the very nature and elements of their constitution as a supreme Court.

1st, The Parliament have this exclusive jurisdiction by positive law—*i. e.* by statute declaring and recognising their privileges, and by the judgment of the Courts interpreting common law, and thereby rendering it express.

By the statute 4 H. VIII. cap. 8. it was enacted and declared, that all accusements, condemnations, executions, fines, amerciaments, pu-

nishments, corrections, charges, and impositions, at any time from henceforth to be put or had upon any Member, either of that present Parliament, or at any Parliament after that act, to be holden for any bill, speaking, reasoning, declaring of any matter or matters concerning the Parliament to be commenced or treated of, be utterly void and of none effect.

Lord Hale's observation upon this clause is:—The act of 4 H. VIII. is declaratory of the antient law and custom of Parliament—The last clause is general,—that is, enacts and declares the general independence of Parliament, and of either House, of all other Courts whatever.

Again to the same point, the following is a passage from Lord Hale's Jurisdiction of Parliament, and which, having been repeatedly quoted by the King's Courts in delivering judgment, is now received as declared law, and an admitted rule of judgment,—in other words, as express common law.

"Every court of justice has laws and customs for its direction; some by the common law, some

by the civil or canon law, some by particular customs. So, the high Court of Parliament, suis propriis legibus et consuetudinibus subsistit.—Now it is *Lex et consuetudo Parliamenti*, that all weighty matters arising in Parliament, concerning the Peers or Commons in Parliament, should be discussed, determined, and adjudged by the Court of Parliament, and not by any other law used in any inferior court—which was so declared to be concerning the peers of the realm by the King and the Lords; *pari ratione* for the Commons, for any thing done or moved in the House of Commons; and the rather, for that by another law and custom of Parliament the King cannot take notice of any thing said or done in the House of Commons, but by report of the House of Commons, and *every Member in Parliament has a judicial place and can be no witness.* And this is the reason that judges ought not to give an opinion of matter of Parliament, because it is not to be decided by the common law, but *secundum legem* et consuetudinem Parliamenti—And every offence committed in any court, punishable by that court, must be punished in the same court, or in some higher, and the court of Parliament has no higher." Vide Hale's Jur. of Parliament.

Again, "The Lords in their House have power of judicature, and the Commons in their House have likewise power of judicature." Vide Plac. Par. 33 Edward, 1 Rot. 33.

Again, "The House of Commons is a distinct COURT."

And again, "Though the Parliament err in granting any process, which it ought not, yet this is not reversible in any other court, nor any fault of the Sheriff in executing it."

2. These examples and opinions we have produced to prove that the Parliament, and either House, (for wherever the common name is used, both or either are intended) have this independent jurisdiction by law; the same examples might suffice to prove that they possess it by custom.—For we see the *lex et consuetudo Parliamenti* invariably joined together in all our law books—and by this name the independency of their jurisdiction is therein asserted to be both in law and in custom.—It is in law for the reason and from the precedents above assigned; and it is in custom, because the common law, which is custom itself, invariably recognises it.—It recognises it moreover in all the ways by which it can legally recognise any thing: it recognises it positively by certain express judgments of courts and by the express language of the law books received and quoted as law;—and it recognises it negatively, in as much as it never acts against it.—What would any man require to constitute a custom, but a positive and unbroken recognition of it as a custom by the source of all custom, the common law; a recognition—coeval with the first knowledge, acquaintance and society, which the courts and the chambers of Parliament had with each other.

Care must be taken not to confound two kinds of custom,—legal custom, and Parliamentary custom.—Legal custom has been defined by statutes, and is limited within a certain compass of time,—Parliamentary custom is to be sought and to be found only in the records and journals of Parliament, and nothing can be averred against it, if it be found there. The record is necessarily the evidence of itself—The thing itself is of necessity a stronger evidence of its own existence than any presumption from prescription—and that surely may be reasonably considered as the custom of any court or body,

(or in other words, as a necessary part or element of it) the reason of which may not appear, but is inferred from its long co-existence with the thing to which it is annexed, andwhich is coeval with the thing itself—Moreover, as the lex et consuetudo Parliamenti are only to be judged of by themselves, they are necessarily exempt from what the law requires as the legal constituents of its own customs.

There is much controversy as to the antiquity of the House of Commons.—Prynne and Selden are of opinion that the House of Commons is not visible in our history as a portion of the Parliament till about the conclusion of the reign of Henry the Third, and after the battle of Evesham. Petyt, on the contrary, in his celebrated argument on the antient rights of the Commons, seems to prove, that they began long before this time; and Sir R. Atkins, in his tracts on Parliament, strengthens the arguments of Petyt by charters and records, carrying up the existence of the Commons, as a part of Parliament, to a date much anterior to the Norman Conquest. It is of little consequence to the question before us which of these opinions we may prefer. If the House did not exist in its

present perfect form, a co-ordinate part of Parliament, and an associate of the House of Lords, a distinct but equal branch of the Legislature, before the battle of Evesham, it is still certain that the People existed, and that the legislative power, claimed and exercised by the Freeholders in some shape or other, was at the least as extensive as at present.—At all events, the House of Lords, the *Magnum Concilium Domini Regis*, existed; and this is enough for our purpose, inasmuch as whatever right is claimed by the House of Lords in virtue of its parliamentary character, in cases of privilege and contempt, must of necessity belong to the House of Commons by the same right and title.

Parliament is to be considered as one body, consisting of Lords and Commons; granting, therefore, that before the formal junction of the Lords and Commons in the Great Council of the kingdom, the Commons had no corporate parliamentary existence, it must still be admitted, that upon the event of this conjunction, this confluence of the two streams, they became one and indivisible in their rights and functions. The Lords communicated to the Commons all

the rights and qualities of their parliamentary nature, and they gained them by adoption, if not by birth.

By a kind of *lex post liminia* they succeeded to a stock and fund as if they had enjoyed and possessed it by an original right—When the House of Commons became an adopted, received, and acknowledged Member of the *Magnum Concilium*, or Parliament, they necessarily became invested with all the rights and privileges of the body to which they were appended as a Member—They were not tenants in severalty; they were joint tenants. Each house or chamber had not merely its own peculiar share, but an entire and undivided right in the whole. To say all in a word, they became the mere balloted Members, as it were, into a corporation which existed long before them; the character, rights, and privileges of this corporation existed time out of mind; they were inherent in, and appended to its nature, and descended upon all its parts as soon as they came into existence. The chamber of the Parliament, called the Commons, might not exist till Henry III. or Richard; but the grand corporation of the Parliament commenced with the

monarchy, and necessarily communicated its own nature and rights to whatever it admitted as parts of itself—It seems needless to insist on this head;—but if Parliament were to appoint a commission of its own Members for a certain purpose during the sessions, there cannot be a doubt but that such committee, *quatenus ad rem commissi*, would have all the character and powers of Parliament; the right of punishing for contumacy, and committing for contempt.

The privilege of the House of Commons is not claimed as a custom from so recent a date as that of the visible body of the House appearing at Winchester or Westminster, but it is claimed as a custom necessarily as ancient as Parliament itself; as ancient as the *Magnum Concilium* of William the First, and the Wittenagemote of Alfred; as a right of reason, and a privilege of necessity.

Legal custom is one thing—parliamentary custom is another,—and they are to be sought in different places: one in the statute rolls, the other in the rolls of Parliament. It is not pleadable against a parliamentary custom that

it has existed since Richard I.—If the custom exist in the records, and is there acknowledged as a custom, there is an end of it. Whatever is parliamentary must be tried by itself.—Journal must be opposed to journal, and resolutions, votes, and orders, to each other. The question is not how you choose to interpret them, but what they intended themselves.

Let us now consider cursorily some of the objections—

This jurisdiction, it is said, is contrary to that clause of *Magna Charta* that no one shall be otherwise imprisoned than *per legem terræ et judicium parium.* Why so? Why is not the right of punishing for contempts a part of the lex terræ?—The other Courts have always assumed it as such, and exercise it as such;—and why should the High Court of Parliament, or any Chamber of the High Court of Parliament, when acting as a Court, whether in council, enquiry, or judgment, be excluded from what is granted to the lowest?—Parliament, moreover, as a corporation, was surely coeval with *Magna Charta*, and therefore whatever naturally belonged to it must

be, impliedly at least, conceived in the term *lex terræ*. By the lex terræ nothing more could be intended than the whole body of the common law, and of the process of the common law. If contempts, therefore, belonged to the common law, and they must have belonged to it, they were necessarily included within this general term.

In commenting upon these words, *legem terræ et judicium parium*, many law-writers have considered them as alternatives of each other, and in this sense have included contempts in the legem terræ, and assigned trials by jury to the other.—This seems an unnecessary nicety;—the conjunction is a copulative; and such a distinction of meaning did certainly not suit the knowledge and character of the æra of *Magna Charta*. It is sufficient to translate *legem terræ* by the words common law,—and then to understand by that common law whatever the common law necessarily and notoriously comprehends, whether by jury, or summary process. This summary process is the self-defence of Courts, and therefore, not to argue a point which in the very proposition is clearer than any argument can make it, every Court must have it, and have it by a stronger

authority than that of any positive enactment whatever: by the right of reason, and the supremacy, whether to make or dissolve, of necessity.

A second objection is, that the House of Commons is no Court of Record, and therefore has no right to fine or imprison. To this we might briefly answer, that this is a maxim of Law and not of Parliament. It is necessary that courts should have a certain dignity, character, and presumed knowledge, to be intrusted with this power over the person of the subject, and the judges have assumed this circumstance of their being a Court of Record as the qualification to which they give that power; such qualification justifying a reasonable presumption that such courts have the required dignity and knowledge. Now, who will say that a Court of Parliament is not within the reason of the rule, even if not within the letter? And as common law is a thing of reason, and, not like penal statutes, a thing of letters and syllables, that therefore the Parliament, even by common law, would be admitted to have the power in question?

In questions of this kind, however, there

usually a threefold argument;—one from reason, one from fact, and one from authority. None of these is here wanting. We have shewn the reason;—the following is the fact:—

It is not necessary to the summary power of commitment that the Courts should be Courts of Record.—All Courts require the right and power of self-defence, and therefore all legal Courts have it.

The Admiralty Courts have it—

The Ecclesiastical Courts have it—

A Police-office has it—

A single Magistrate has it.

So much for the argument of fact.

Now as to authority.—The House of Commons is a Court of Judicature, and a Court of Record.—*See* 4 *Inst.* 23 *and* 47.

In the statement of the privileges of the House of Commons, drawn up by a Select Committee,

viz. Sir Francis Bacon, Sir Edward Sandys, and others, and presented as an Address to King James the First, is the following claim and assertion.—It has been very injuriously (injuriously to the sacred memory of great and virtuous men) demanded, what kind of judges were Lords Mansfield, De Grey, and Kenyon?—Surely no one will ask what kind of men were Sir Francis Bacon and Sir Edward Sandys?—The passage is as follows:

"Concerning the ancient rights of the subjects of this realm, chiefly consisting in the privileges of this House of Parliament, the misinformation openly delivered to your Majesty has been in three things:

1. That we hold not our privileges of right but of grace, only renewed every Parliament by way of donative upon petition, and so to be limited.

2. That we are no court of record, but that our proceedings here are only acts and memorials, and that attendance on us with the records is courtesy not duty.

3. That the examination of the return of writs

for Knights and Burgesses is without our compass, and due to the chancery.

Against which assertions tending directly and apparently to the utter overthrow of the very fundamental privileges of our House and therein of the rights and liberties of the whole Commons of your realm of England, which they and their ancestors from time immemorial have undoubtedly enjoyed under your Majesty's most noble progenitors,—

We the Knights, Citizens, and Burgesses of the House of Commons assembled in Parliament, and in the name of the whole Commons of the realm of England, with uniform consent for ourselves and our posterities, do expressly protest, as being derogatory in the highest degree to the true dignity, liberty, and authority of your Majesty's High Court of Parliament, and consequently to the right of all your Majesty's said subjects, and the whole body of this your kingdom; and we desire that this our protestation may be recorded to all posterity.

And contrariwise, with all humble and due

respect to your Majesty, against those misinformations, we most truly avouch, that our privileges and liberties are our right and due inheritance, no less than our very lands and goods; and that they cannot be with-held from us, denied, or impaired, but with apparent wrong to the whole state of the realm.

And that our making request on the entrance of Parliament to enjoy our privileges, is an act only of manners, and doth weaken our rights no more than our serving the King for our lands by petition, which form, though new and more decent than the old one by *precipe*, yet the subject's right is no less now than of old.

We avouch also, that our House is a COURT OF RECORD, and so ever esteemed, and that there is not the highest standing court in the land that ought to enter into competition, either for dignity or authority, with the High Court of Parliament, which may give laws to other courts, but from other courts receive neither laws nor orders.—*Vide Hale's Jurisdiction of Parl.*

It is another objection against the process of the House, that it neglects those formalities which are observed in common law;—for example, that it does not proceed on the oath of witnesses, and on the legal rules of trial, but upon summary information, and the confession of the party. The weight which is erroneously given to these objections is founded on the same wrong conception and confusion of two distinct things. The jurisdiction of Parliament, like all rights and jurisdictions founded on necessity, and therefore left open by law, is a kind of equity or general reason, which is absolved from the rules of law by the condition of its nature,—which, not being born of law, does not proceed by law,—but, being born of reason, proceeds by reason. Of the rules of law some are merely positive, which are only obligatory because they are commanded by law.—Others are the rules of natural equity, as adopted and confirmed by the practice of the Courts. The rules of trial, the oaths of witnesses, and all the ordinary forms and ceremonial of Courts of Justice, are merely positive and arbitrary;—their obligation does not extend beyond their own court and tribunal;—one court may have

one form of process,—another court may have another. It is a principle of natural law that these forms should be such as should secure the end of natural justice; but it leaves to every court, and to every country, to give to these forms what shape they please, and amongst many of a similar nature and equivalent efficacy, to make a discretionary selection. Hence one court proceeds by oath of witnesses—another by wager of law;—one, *ex manifestâ-re*, by the evidence of the overt act itself;—another by legal proofs and presumptions,—by the proof of the fact, and by the legal designation of the guilty party.

The forms of courts, the rules of evidence and trial, are the securities which the law takes against the discretion of any individual Judge, but are these forms equally necessary when the law acts by its own arm, and as it were in its own person? Can the legislature, or any integral member of the legislature, at once a part and a whole, like the arm of the body, be jealous of itself, and admit that distrust of its own justice, as to put itself under those fetters with which it has invested and restrained all in-

ferior courts?—All such supreme jurisdictions sit by their own authority, and act upon their own reason;—their patent is in themselves;—their rule of court is in their own judgment;—they are not a legal, but a natural tribunal;—they are not bound by rules of law, which may or may not require certain oaths and process;—but they are bound by natural equity, which varies its process and its forms according to the reason of the case.

The House of Commons, it is said, cannot examine on oath.—Why so?—The House of Commons can examine on oath, and almost daily does examine on oath;—it examines on oath in election cases;—it examines on oath on committees of various kinds. Where the House does not examine on oath, it is not from defect of right and power, but because it has not used itself so to do. The matters which come before it are seldom of a nature in which oaths are required;—they have seldom any matters of trial properly so called. In all cases of privilege, they have only to decide *ex manifestâ-re*. The contempt stares them in the face;—the author of it is designated in the act itself; the

House have to adjudicate, and not to try; to give judgment, and not to hear evidence; what is said is not a defence, but a supplication to the mercy of the court. The prisoner is called upon—not to contradict the evidence, for that is past—but to answer the question, what have you got to say why sentence should not be passed?—Hence the manner in which the House receives these appeals; that is, without answer on its part, inasmuch as they are appeals to clemency, and rarely defences against the evidence.

The objection against the warrant, as being unsealed, is of the same nature as that against the process, and might be passed over with the same general answer, that the Parliament, and every branch of it, is a supreme and not a subordinate tribunal;—that they are bound by the rules of natural equity, and not by those of law, and that natural equity has no positive rules or determinate process; that she is fixed and invariable only in her ends, but that the whole armoury of reason is amongst her means; the staff, the sword, the rod, and the mace—the oath, the affirmation, the honour, and the mere

word, without the solemnity of formally affirming. The rules of the courts are what the courts have imposed upon themselves. Surely these inferior courts had no right to impose the same rules on the High Court of Parliament, or any one of the chambers of this High Court. Is it not almost as absurd to argue this objection as to urge it?—The process of the inferior courts belongs to themselves, and extends no further; it is their law, because it is their usage, and their self-imposition. It is neither the usage of the Parliament, nor have they self-imposed it; they have another usage, and another self-imposed rule;—they have a warrant of their own, trial of their own, and execution of their own.

The parliamentary warrants, moreover, are not within the reason according to which the legal warrants are required to be sealed. The magistrate is required to seal his warrant for two reasons—in the first place, to authenticate his act to another officer who is required to act upon it—and in the next place, that in the event of any illegality or oppression he may be called to answer for it, and instantly convicted on his record; or, in legal language, be estop-

ped from denying it, or requiring further proof of what he is alleged to have done. The law, hating litigation or delay of justice, whenever it acts by itself, always acts to the purpose, and takes a deed or record, a stamp or ingrossment, that nothing may be averred against it. The magistrate or court is thus rendered immediately amenable for its act. But the House of Commons being in its nature amenable to no one, and all its acts being acts of notoriety, *in facie patriæ populique*, the sealing of the warrants is necessary for neither of the above purposes. In the case of the abuse of the House, the subject has no legal remedy, because the abuse is deemed to be impossible, and the end not being required, the means (the sealing of the warrant) are not given;—and with respect to the officer, he is officially in attendance, and receives the warrant *ex manu in manum*.

We have considered, in another place, the objection, that a party, punished by Parliament for contempt, may be likewise punished at common law, and thus receive double measure for the same offence. Parliament may punish the contempt; the common law punishes

the breach of the peace. The offence has two distinct parts or points; it wounds two distinct interests; the Parliament cures one—the common law the other. Every offence consists of so many parts as its injury has objects; and every distinct injury requires its distinct satisfaction. The punishment is not double, but several;—the same stone breaks John Doe's arm and Richard Roe's head;—John Doe has his satisfaction in damages, and Richard Roe, if so inclined, in indictment.

The offences, moreover, punished by Parliament as parliamentary, are not generally *quatenus* their parliamentary nature, punishable elsewhere. The contempts against any court are only punishable either in that court, or in some higher court; and many of the contempts are only punishable in the court itself which is the object of them. This is peculiarly the case in parliamentary contempts—The ordinary courts take no cognisance of these contempts, because they know not what they are;—they depend upon the orders, the resolutions, &c. of the House, of which the courts have no legal knowledge and certainty. There are certainly some

offences against Parliament which are at the same time offences against common law, and here both Law and Parliament, as above said, will have their distinct satisfactions, or either may refer its vengeance to the other. But where the contempt is merely parliamentary—such as the non-attendance of a member—contumacy of a parole witness at the bar of the House—there is no concurrence of jurisdiction, because no concurrence of injury.

With respect to the peculiar nature of parliamentary commitments, it may be observed that arrests by command, *ore tenus*, without writing, are not unknown to the common law, and in contempts are very frequent. The Chief Justice, or other Justice of the King's Bench, may command, *ore tenus*, the marshal or any of his deputies to arrest any person, and such command is a good justification in false imprisonment, although there be neither seal nor writing, and although no cause be expressed in the commitment. The legal reason with respect to the Chief Justice or Judge is, that the law will not presume any ignorance of his duty or abuse of it in so high an officer; and with respect to the

marshal or his deputy, the command is a matter of notoriety, and impossible to be assumed or pretended, so as to serve as a cover for violence. The two reasons of writing and sealing failing, the person of the Judge being certified in the very act, so as to designate him as the author of it, and the officer receiving the command *ore tenus*, the law does not extend its demands, where they are so evidently unnecessary.

It is another question with respect to parliamentary process, whether it will justify breach of outer doors; a forcible entrance into the dwelling-house. Let us see the practice of the courts. With respect to the executing attachments for contempt, it will depend much upon the nature of the act which brings the party into contempt, whether the doors may be broken open or not. Our lawyers have always distributed contempts under the head of misdemeanors, and process of contempt always runs in the King's name.—Contempts grounded on some disobedience to the rules of court, in aid of the rights of litigating parties, and in the course of civil proceedings, as in refusing to perform an award become a rule of court, are to be consi-

dered merely in a civil light; and if a party be in execution upon an attachment for this species of contempt, it is a civil execution only, and he may be discharged under an Insolvent Act.—*See Rex v. Stoke—Cowp.* 137.

But in all cases of contempts of court, properly so called, and not merely fictitious contempts in aid of civil rights, as contempts of the King's writ, contempts in the face of the court, or contemptuous words or writings concerning the court; all these contempts are criminal, and of course subject to criminal process. They are misdemeanors at common law, and if the party, when called upon, do not purge his contempt to the court, or if the contempt be of an heinous nature, which induces the court to punish it in the first instance, an attachment issuing thereon will doubtless justify a breach of doors, because the breach of the peace is actual and primary, and not fictitious and consequential; because it is a violent contumacy, and therefore, *quatenus*, an act of rebellion, being a defensive standing up against the authority of the law.—Now, such being the power and rights of the King's courts, *a fortiori in re simili*, the court of

Parliament must have the same.—The reason is the same in its nature, only stronger in its degree. If the House of Commons have the right and power to adjudge contempts, and to commit upon them, they must be necessarily armed with an equivalent process with that of the inferior courts;—they cannot have a mancated and imperfect right;—if they have a right to the thing, they have a right to the execution and the process. The same reason which gives them contempts, must extend to give them whatever the reason of law attaches to contempts—the power of forcibly following up criminal contempts.

Much has been said of the privilege of the outer door, and of what has been called the sanctity of the dwelling, and the law has herein had a compliment to its clemency at the expence of its reason. There is certainly, however, such a thing as this privilege; but it extends against civil process only.—Forster, who has been called the Magna Charta of the liberty of the subject, lays down the privilege with this limitation.—Lord Coke, in Semayne's case, expressly excludes it in process wherein the King is a party. What, therefore, is the privilege?

It amounts in fact barely to this that in every case between party and party the law respects the outer door of the dwelling-house, because a private injury can wait a leisurely redress, and because it will not, by breaking open the door of the fold, expose the family to thieves and rapine, on the mere complaint of a subject for a civil wrong. But where the public is concerned, the reason failing, the privilege fails.

It must be remembered that this privilege is strictly that of the house, and not of the person: the protection of the person is merely incidental.

In *Lee v. Gansell—Cowp.* 5.—Lord Mansfield thus limits and explains the privilege:—"The books talk of the privilege of the mansion-house, and of the privilege of the door of it, which cannot be broken open. The whole question, therefore, will turn upon the extent of that which is called privilege. Now this rule of privilege, arising from a sound maxim of policy, is no privilege of a *debtor*, properly speaking, who absconds from justice in avoidance of legal process; but is annexed to the house and door for the protection

of a man and his family. It is therefore by consequence only that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is this: *that a greater evil should be avoided for a less, and a less good should give way to a greater.* The outer door therefore, or window of a man's house, shall not be broken open by process. This has been long and well understood;—the ground of it is this, that otherwise the consequences would be fatal; for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence which may probably be attended with such dangerous consequences. But this is a maxim of law, in respect of political justice, and makes no part of the privilege of the debtor himself. It is to be taken *strictly*, and not to be extended by any equitable analogous interpretation."

The oldest case to be found, which takes notice of this privilege, is a case in the year books, 18 Edw. IV. pl. 19.—An action was brought for breaking the outer door in execution of a *fieri facias*.—The court held that trespass would lie, for the

officer shall not break open an outer door to execute his process; but when the officer had so entered, he broke open a trunk, and took out the goods which were in it; in respect of which the court held, that trespass would not lie, for he had a right to break the trunk, and take the goods.—This is sufficient to shew how rigidly the privilege was taken. In Semayne's case (5 Coke, above quoted) the same *strict* doctrine was holden, and in the report in *Yelverton*, 44 Eliz. Mich. Term, Popham doubted whether even the OUTER door was privileged, because it would be an obstruction to justice. But afterwards the court resolved that the *outer* door ought not to be broken open, and grounded their opinion upon the single authority of 18 Edw. IV.

We thus see with what narrow jealousy the law first admitted this privilege, and how it restricted any equitable extension of it. Forster, speaking of the restriction of this privilege, expressly says, page 319, "It is always to be remembered that this rule is to be confined to the case of arrest upon process in CIVIL suits only."

In the precedents we have selected, we have

cited a case in which the House directed their officer to break open doors, and it is absurd to suppose that the House of Commons can be restricted to civil process, when civil injuries, properly so called, are, by constant practice, and the law of the land, almost in every case exempt from their jurisdiction. Their jurisdiction is emphatically confined to criminal enquiries and misdemeanors of a superior magnitude, and the process applicable to such offences is necessarily attendant upon the cognizance of them.—In a word, Parliament have this power because their jurisdiction would be imperfect without it.—They have it by the strongest of all laws—reason and necessity; and to allow them the cognizance of crimes, but to confine them to civil process, would be to introduce an absurdity in parliamentary law which the common law knows not.

In Dalton, 445, and Crompton, 149, it is laid down that a man may be indicted and fined for a contempt of court.

Contempts are in the nature of a breach of the peace, according to the opinion of Lord Chief Justice Holt, as cited and approved by Lord Hardwicke,

1 Atkins, 55;—and a man may be taken on a Sunday by process of contempt. It may be laid down generally, that in all cases in which process on the Sabbath-day is not prohibited by Stat. 29, ch. 11, there is no privilege of the outer door. A contempt for not performing an order of the Court of Chancery was hold-entantamount to a breach of the peace by Lord Chancellor Hardwicke, and therefore no privilege of the Sabbath-day. By analogy no privilege of the outer door.—See likewise 12 Mod. 348.

In Willes, 459, a contempt was holden by the Court of Common Pleas to be a breach of the peace, therefore process of contempt might be executed on a Sunday. It is true that the courts have relaxed the criminal rule with regard to contempts founded upon, and growing out of civil suits, and have recently considered attachments granted upon them in the light of merely civil executions; but in all cases wherein the offence is purely of a public character, and a disturbance of the order or œconomy of the realm, the process is deemed strictly criminal.

An attachment for not performing an award will

not be granted against a Peer or a Member of Parliament—because, according to the modern doctrine, they are in the nature of civil suits; but in 1 *Wilson*, 332, it is laid down that an attachment for a contempt may be issued against a Peer in all cases in which the offence is of a public kind.

In 1 Rol. 336, it is laid down, that an officer, upon an attachment against a man, may break the house to take him.—In *Comyn's Digest, Title, Execution*, c. 12, the same doctrine is admitted.

We would infer from these authorities that there is no privilege of the person or of the outer door in cases of criminal or public contempts.

The Statute 1 Jac. 1, cap. 13—sufficiently proves that the House of Commons have power to punish—If the offence therefore which they assume to punish, be by their adjudication a contempt, they have, of necessity, the same criminal process which belongs to other courts, to carry their sentence into execution.

Another objection has been made against the alledged looseness in the term of commitment:—The commitment of the Commons is during plea-

sure, because, being uncertain of their own existence, they do not pretend to punish beyond the being of the court—the crown may prorogue or dissolve them, which at once sets their prisoner free: this is a check upon any abuse of their power of commitment—The commitment "during pleasure," is attended with this advantage, that it leaves the prisoner the opportunity of being immediately released upon his submission, and is therefore a more merciful sentence than imprisonment for any fixed period; whilst the practice of constant prorogation affords a certain remedy in cases of conscientious contumacy; thus, at all events, the prisoner of the House of Commons, if he be obstinate, reaches the termination of his punishment in eight months; and, if he be submissive, may perhaps terminate it in as many days.

But it is said that the House of Commons have often proceeded against offenders by the usual course of law, and employed the Attorney General to prosecute; and why not in all cases? Of two modes of punishment they may surely make their choice; but they do not surrender one because they choose the other—Moreover it may not be expedient in all cases to proceed by the Attorney General—The Ministers and the Parliament may have

different objects and interests, and the Ministers, being perhaps themselves a party, may advise the King not to permit his officer to act against them.

In impeachments, moreover, there would certainly be a degree of indecency in immediately applying to the King against his own servants, and perhaps, his own acts—The Commons would be very ill employed in prosecuting every street libeller. It would be a sad concession from their dignity to wait in the room of a Grand Jury, for the purpose of presenting a contempt or misdemeanor—In one word, it is impossible to send them to the inferior tribunals for justice in cases of privilege, without at the same time giving a superiority to that court of appeal to which writs of error would lie from such inferior tribunal,—It is unnecessary, we should hope, to urge farther this political *reductio ad absurdum*.

There is another objection equally futile with those above noticed.—The House of Commons, it is said, in this right of summary commitment, have a power which the constitution does not allow to the King—But unhappily for this argument the King has this right and power—all contempts are punished in this summary way in the King's name—contempts of the court, contempts of the King's writs, con-

tempts of the person and authority of the King, in his courts, judges, and process, are all punished by this summary committal.

The objects of contempts and summary commitments are courts and judicial persons—The King, in his private individual person, is neither a court, nor a judge—when he becomes such in the person of his judges and court, he becomes a legal object of contempts; and contempts against him are then punishable as contempts,—*i. e.* summarily, by instantaneous repulse, and immediate defensive vindication.

Tear the King's smallest warrant and throw it in his officer's face, and you will find that you may be committed for contempt—The King indeed does not himself commit you, because the King does not act in his own person in the execution of justice—But you are committed by his court, and for the offence against his justice and authority.

Against what, for example, is the contempt considered as directed?—It is punished as against the law and justice of the realm, and this law and justice are constitutionally regarded as embodied and represented in the person of the King; all public justice being *his* right, as all public injury is *his* wrong—all contempts, therefore, of whatever kind, are against the King, and punishable only as against him—So absurd is it, that the King has not this right.

There are those who object to attachments as being contrary, in popular constitutions, to first principles—To this it may briefly be replied, that they are the first of all principles, being founded on that which founds government and constitutes law—They are the principles of self-defence; the vindication not only of the authority, but of the very power of acting in a court—It is in vain that the law has the right to act, if there be a power above the law which has a right to resist; the law would be then but the right of anarchy and the power of contention—Neither is it sufficient that the law should in this case remove the obstruction only—In no case whatever of a criminal nature is it sufficient to get rid of the mere act. Penal law, and every thing which by its reason is within penal law, is always made up of two things; satisfaction for the present act, and security for the future: in other words, a remedy and a penalty.

In the same manner, in all contempts, it is necessary to remove and to punish; and, by the very nature of the thing, both are united in the remedy of the one; the imprisonment of the person at once abates the contempt and punishes it.—There would indeed be something of a double punishment, independent of the circuitous course, if after the party were summarily committed for the obstruction, he was turned over to his trial to be punished for the contempt.

Having established therefore, as we trust we have, that the House of Commons, as a Court and Chamber of Parliament, have the right of punishment for contempts, it necessarily follows, that where there is a right in one party, there must be a corresponding obligation on the other.—If the Commons have a right to commit, they cannot be lawfully obstructed in the exercise of it:—such an obstruction would be a further contempt; it would be following up a first contempt by a greater—by an acknowledged and open resistance.

We have already seen that the courts have constantly refused all relief against the commitments of either House of Parliament upon writs of Habeas

Corpus; such commitments being by superior courts, and by a law of which they have no legal knowledge or record.—We have seen likewise in the case of Jay and Topham, that the judges of the King's Bench were committed by a resolution of the House for compelling their officer to plead in bar to an action brought against him for executing the process of the House of Commons, and that they acknowledged their error previous to their commitment.

Almost all the instances of actions brought against the Speaker or officers of the House are to be found in the reigns of Charles I. the latter end of Charles II. and James II. the very issue of whose reigns might be produced as an example how these usurpations were endured—The law however has always been steady to its point—The act of the 4th Henry VIII. was always referred to by the Parliament as the declaration of their rights and independence—The proceedings against Elliot, Hollis, and Valentine, in the reign of Charles I. were for a misdemeanor at common law, and not for acts merely Parliamentary; but even in this case the Parliament interfered, and declared that the cognizance of it, as being an act in the face of Parlia-

ment, belonged exclusively to themselves; the judgment of the King's Bench was accordingly rescinded by a concurrent vote of Lords and Commons.—The case of Sir William Williams was the next, the whole proceedings upon which were considered so illegal and oppressive, as to have given occasion to the emphatic declaration in the Bill of Rights—In the case of the Aylesbury men, the House equally resented such appeals to the courts against them, and committed the council and solicitors employed, as guilty of primary contempts.—It is unnecessary to enter at length into the arguments produced on these occasions, in as much as they are comprehended in what we have above said—It is totally a different thing where, under the peculiar circumstances of the case and the times, the Commons have waved their right and made a selection—Indulgence and concession are not necessarily a surrender of right; they go not beyond the single act to which they are applied: no conclusion therefore can be drawn from thence.

In all cases of actions brought against the Speaker or officers of the House there seem but these three methods of proceeding—The House has certainly not the right to injoin the courts of law from receiving such actions—Every subject has a right to his writ, and to sue in the King's courts, though even in so doing, as he may act injuriously, he proceeds at his peril, and under pledges.—The three ways of proceeding on the part of the House are as follows:—1st, They may commit all parties concerned, in so injuriously putting them to their law as to their undoubted rights, for a contempt.—2nd, They may plead in abatement to the jurisdiction of the court.—3rd, They may plead in bar, produce their justification, and put it upon the record; to the end of stopping by such plea all further proceeding.

The journals of Parliament are covered with examples of the two first methods; but we believe there is not an instance of the latter—It is always however ungracious to argue against grace.—The House of Commons, in most instances, may safely refer to the Judges, and as nothing can be lost on the score of right, so much perhaps may be gained on that of moderation. Nothing more nearly appeals to the affections of the people than the concessions of power.

It is not easy indeed to conceive how an action

against the Speaker or officers of the House can be reconciled to the first principles of law. If the courts uniformly refuse any relief from the commitments of the House, when the matter is heard before them under the returns to the Habeas Corpus writs, is it to be expected that they can entertain any action originally and immediately against the Speaker.

The Speaker is only the instrument of the House: its constitutional mouth and arm, when it is necessary for it to do any personal act—It is the authority, the will, and judgment of the House, that move his arm—The act therefore is imputable to the House only, and not to him.—To sue the Speaker therefore, is to sue the Commons, and to sue the Commons, in the exercise of its jurisdiction of contempt, is to sue one of the chambers of the high court of Parliament; in other words, the Parliament itself.

The Parliament is a corporation, or moral person, having three members, and one body, each of the members having the common judiciary character of the whole; each being a part as to constitutional efficacy, but a whole, as to legal person and defensive power—Thus in *Trewinnard's Case, Dyer* 60, it

is said, "That though the Parliament err, it is not reversible in any other court," and the term Parliament is here used, though the case was a judgment given by the House of Commons only in matter of privilege. In the same manner, in a case which occured before the Lord Chief Justice Vaughan, he thus speaks:—"As Parliament can correct the judgments, so are they to correct the judges that give dishonest and corrupt verdicts."—Rep. 139, Bushel's Case—So Sir Edward Coke, 12 Report, 1 folio, 64.

With respect to the alledged uncertainty of these privileges, we find the whole race of eminent lawyers from Sir Edward Coke to Blackstone, concurring in one opinion, that the law of Parliament, as a kind of general equity, is from its nature undefinable, and, like equity, would lose its effect and utility, if restricted within any letter whatever.—The natural use of it is to meet cases which are of themselves, necessarily, out of the possibility of definition; and the attempt to define which would be to reduce law itself to uncertainty.—A general law is as unnatural as a rigid equity.—Whatever, from its nature, must be administered by discretion is necessarily *extra regulam*; or to use a legal phrase, *equity cannot*

be ruled, and discretion is no longer such, than whilst under the ordinary obligations it is left arbitrary.—If any number of rules were laid down, how easy would it be, by the addition of extraneous circumstances, to take every future case out of the compass of such rules.—Privilege therefore may be allowed to shift, and to assume any shape, according as the accidents of the times, and the exertions of its natural enemies, prerogative and popular licentionsness, may require.—To refer privilege to its precedents and adjudicated cases is to confound things which are different in their nature; to throw equity into the chains of law, and to confine reason, when operating upon general principles and in the wide circle of human affairs, within those rules which have been assigned to it, with a wise jealously, in cases of property and merely civil concerns.

This arbitrariness and uncertainty are the defensive discretions and uncertainties of liberty.—It is a species of independence and loose power which the people through their representatives have reserved to themselves; which is left unassigned to any thing, that it may be fit for every thing; not

a waste, but a kind of common, which is always at hand for public use, without interfering with private appropriation or established boundaries.

Having now, as we hope, in some degree, executed the purpose with which we set out,—that is, endeavoured to establish a certain principle and system which might comprehend contempts,—and having produced examples of the several parts of this doctrine,—and in the next place, having cursorily noticed all the objections which fell in our way, and which recent circumstances have produced, we shall briefly take leave of the subject, by expressing our hopes, that nothing will sever the union of the Parliament and the People,—that union, without which Parliament must lose its power, and the People their protection;—without which Parliament, compelled to seek shelter from the throne, must become, in its own defence, an aristocracy, instead of the council of a free nation; and without which the people, on their parts, must shortly give that submission to the throne, which they refused to give to their own representatives.—The privileges of the Parliament are the privi-

leges of the People.—They are claimed and maintained by Parliament as the defence of popular rights, and our common liberty.—They arrest the course of prerogative, as well as that of popular licentiousness.—They assisted to banish James, and rendered the best part of the people passive whilst a faction was murdering Charles. Whence is it but by privilege that the Parliament can freely debate and fearlessly decide; that nothing can be introduced to bias or overawe them; that the King, as in the times of Henry VIII. and Elizabeth, can no longer tell them not to trouble themselves with affairs of state, and, as in the reign of Charles, cannot enter and demand the person of an obnoxious Member.—These are all indeed rights, but their defence is in privilege; in that summary power which repels and punishes in the instant.—No spectacle can be more monstrous than when in a popular government the people rise against themselves, and under the impulse of a blind fury, assist to demolish their best bulwarks—that matted and laboriously-composed sea-wall, which the patience of ages has been raising and repairing against the encroachments of an element as

much to be dreaded in its sap as in its assault.—Remove the controuls of Power, and a generation will not pass away before it will enlarge its bed.

FINIS.

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