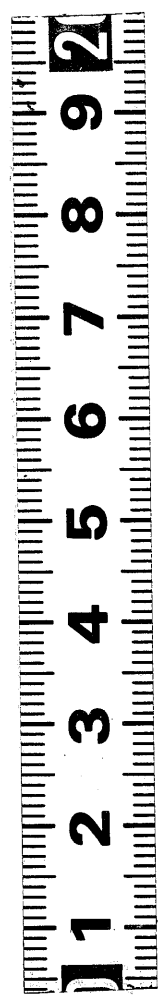


45-4



0206

Ashby and White :

O R,

The Great Question,
*Whether an Action lies at
Common Law for an Elec-
tor, who is deny'd his Vote
for Members of Parlia-
ment ?*

Debated and Resolv'd.

Together with the Case of *Jay*
and *Topham* : And the Defence
made by *Sir Francis Pemberton*
and *Sir Thomas Jones* for their
Judgment given therein.

With other Cases.

Printed in the Year 1705.

Luna 17^o die Januarii, 1703.

THE House being inform'd,
That there had been an Extra-
ordinary Judgment given in
the House of Lords upon a
Writ of Error from the Court of Queen's-
Bench, in a Cause between *Matthew Asb-*
by and *William White*, wherein the Pri-
vileges of the House were concern'd,
appointed some of their Members to
search the Journals of the House of Lords
as to their Proceedings upon the said
Writ of Error, and to report the same
to the House.

THEY also order'd the same Mem-
bers to inspect the Journals of the House
of Lords, as to what they had done for-
merly in the Case of *Soam* and *Barnardis-*
ton; and likewise to report that matter to
the House.

Martis 18^o die Januarii 1703.

THE House ordered, that the Mem-
bers who were appointed to search the
B Jour-

(2)

Journals of the House of Lords as to their Proceedings upon a Writ of Error from the Court of Queen's Bench, in the Cause between *Asbby* and *White*, should likewise search the several Offices of the Court of Queen's Bench, for the Record of the Judgment, and all other Proceedings there in that Cause, and report the same to the House.

Jovis 20^o die Januarii, 1703.

A PETITION of *Charles Baturst* Esq; was presented to the House and read, touching an Order made by the House of Lords the twelfth day of *February 1702.* with relation to an Order made by the Court of Exchequer the *15th of July, 23^o Willielmi Tertii,* concerning an Inquisition and Survey of the Boundaries of the Honour of *Richmond,* and Lordship of *Middleham,* and of many other Honours, Mannors and Lordships bounding thereupon: And praying the consideration of the House thereof, and such Relief on the subject matter of the said Petition, as should be thought meet. And thereupon the House appointed several Members to search the Journals of the House of Lords as to their Proceedings, touching the

(3)

the matter aforesaid; and also the Offices of the Court of Exchequer, touching the Proceedings there, in relation to the said Inquisition; and to report the same to the House.

AND they the same Day order'd, That the Report, with relation to the Proceedings of the House of Lords and Court of Queen's-Bench, in the case of *White* and *Asbby,* should be made on the morrow Morning.

Veneris 21^o die Januarii, 1703.

Mr. FREEMAN reported, That the Members appointed to search the Lords Journals, touching their Proceedings upon a Writ of Error from the Court of Queen's-Bench, in a Case between *White* and *Asbby;* and what the Lords had done in the Case of *Soame* and *Barnardiston,* had search'd the same accordingly; and he read in his Place what they found therein, and he deliver'd the same at the Table, where the same was read. And,

Mr. BREWER also reported, That the Members appointed had also search'd the Offices of the Court of Queen's-Bench, for the Judgment and Proceedings

(4)

ings there in the Case of *Ashby* and *White*, and had obtain'd a Copy of the Record of the Judgment, which he deliver'd in at the Table.

Mr. SPEAKER after the Reports were over, told the House, That he thought it to be his Duty to put them in mind of the great Consequence and Importance of this Matter, and that it behov'd them to take very great Caution in their Proceedings, not only that the Grounds and Foundation be good, but also that the Method and Manner of treating it be according to antient Usage and Custom of Parliament: And to that end he desires the House would give him leave to state this matter, as it appear'd to him, and according to what occur'd upon the sudden to his Memory, that the House might take proper methods upon this occasion.

Mr. SPEAKER then proceeded to give the House an account of the state of Elections by Custom or Common Law, and that the great alteration in point of Elections was in the beginning of *H. 4.* time, since whose Reign the Returns for Parliament have been made by Indenture. That by the Statute of *7 H. 4.* there is a Method prescrib'd of Election

(5)

Election and Return, and the Occasion he took to be this: *H. 4.* came to the Succession of the Crown by the deposition of *R. 2.* when the Parliament was sitting. That Parliament was continu'd to *H. 4.*'s time: for tho in the Rolls it was call'd a new Parliament, and Returns were made as by the Sheriffs of the Countys, and also by the Burroughs, as if it was a new Parliament; yet it was the same Parliament, for they were the same Men, and there were too few days between one Parliament and the other to have a new Election. But *Henry 4.* having made such an extraordinary step, he would not leave it as a Precedent to be found out. Afterwards when times were a little more settled in his seventh year, and that Practice was necessary to be condemn'd, It was provided, at the great Complaint of the Commons, that it should be done by Indenture, that the same or like deceit should never be put upon the Kingdom afterwards, and one part was to be kept below. This continu'd for about four years, when there was another Complaint of the proceeding of Sheriffs (he said he need not mention the Regulation of forty Shillings a year and some other things which are not directly to this Case) and upon that the

B 3

W

(6)

was a penalty put upon the Sheriffs of a hundred pounds, which he took to be in the eleventh year; and it was put under the Inquiry of Judges of Assize, and so it stood all that King's Reign till *H. 5.* And then there was another Law made for Electors and Elected, that they should be all resident. Some of the Law-Books give a pretty Construction of it, that tho' there was such a Law, yet the Custom of Parliament was to be the Rule. But he said he thought it to be a better Construction, That it being then reckon'd a Service, and a hard Service, none but Residents in the Burrough were compellable. Thus it continued till about *H. 6's* time, and then if the Sheriffs had made a wrong Return, if indicted or prosecuted at the Assizes, there was to be immediate execution for this hundred pound, without any Traverse. Upon this there was a Statute to allow the Sheriff a Traverse for this hundred pound, and that he should not be liable to it till he was legally convicted; so it stood till about a year afterwards, that the Parliament thought it necessary to make another Act about *8 H. 6.* and then there was great Complaint again of the ill Proceedings of Sheriffs: And the Law was inforc'd again, and it was declar'd who should

(7)

should be the Electors; and the Sheriff was made liable to the penalty of a hundred pound, and imprisonment without Bail or Mainprize, and it was inquirable by the Judges of Assize. Another Statute was made the *10 H. 6.* which inforceth the manner of Elections, so it stood. Then *23 H. 6.* there are two Statutes, one relating to the Wages of Knights, Citizens and Burgeses, and how they should be levied; another reciting the Statute of *H. 5.* and *H. 6.* and it says, that there were not sufficient Penalties on Sheriffs, who besides that sometimes they sent no Writs to Burroughs, made insufficient Returns, &c. And the Mayors and Bayliffs were guilty of the same; and therefore over and above the first penalty of a hundred pounds, they laid another penalty of a hundred pounds more, which was to the Plaintiff, with Costs of Suit: and this was to be try'd before the Judges of Assize, and the Courts at *Westminster*, and at the Sessions; and the Action is to lie either for a Knight, or Burges, or any other Person that would bring the same, but within a time limited, three months from the Commencement of the Parliament. Thus Elections stood in point of Law till the modern Alteration, within
B 4 every

(8)

every bodies memory. And he hop'd whatever time Gentlemen took this matter into consideration in, they would do it as became the House of Commons, and examine all Particulars, as well as the Judgments of Law, and they would do what became a House of Commons, and that no body would see the Dignity of the House of Commons impair'd. And however differences were between them in other things, they would be unanimous in preserving the Rights of the Commons, and of doing it in a right and justifiable manner: And offer'd to their Consideration, whether it would not be best to proceed in the old method, by going into a grand Committee for the Courts of Justice to consider this matter, and that by taking this course they would walk in the steps of their Predecessors, and avoid many Inconveniences, which were easily to be foreseen would happen, by taking another Course.

BUT it being mov'd and seconded to consider of the said Reports in a Committee of the whole House, the Question was put, and carry'd, That the House on Tuesday then next following, would resolve it self into a Committee

(9)

mittee of the whole House to consider of the said Reports.

Mr. WARD the same day reported, That the Members appointed to search the Lords Journals and Offices of the Court of Exchequer, as to their Proceedings touching the matters mention'd in the Petition of *Charles Bathurst* Esq; had search'd the Journals and Offices accordingly; and he read in his Place what they found therein, and afterwards deliver'd in the same at the Table, where the same was read, and the House refer'd the Consideration of the said Report to the Committee of the whole House, to whom the Consideration of the Report made yesterday relating to the Case of *Ashby* and *White* was refer'd.

AND the House order'd, That the same Members should search the Offices of the Court of Chancery for the Bills and Answers and Order on Hearing, made in the said Court, between the Lord *Wharton*, and the said *Mr. Bathurst* and others, and that they should report the same to the House.

Luna

(10)

Luna 24^o Januarii 1703.

Mr. BREWER reported, That the Members appointed to search the Offices of the Court of Queen's Bench, as to what Proceedings were there in the Case of *Barnardiston* and *Soame*, and for a Copy of the Judgment in that Case, had searched the same accordingly; and he presented to the House a Copy of the said Judgment, the Consideration whereof was refer'd to the Committee of the whole House, who were appointed to consider of the Report relating to the Case of *Ashby* and *White*.

Martis 25 Januarii 1703.

THIS day the House resolv'd into a Committee of the whole House to take into Consideration the Report of the Lords Journals touching their Lordships Proceedings on a Writ of Error in the Case between *Ashby* and *White*, & *al.* and also touching their Lordships Proceedings in the matter mention'd in the Petition of Mr. *Bathurst*; in which last Case of Mr. *Bathurst*, as it was alledg'd, their Lordships had taken upon them an original Jurisdiction in controuling an
Order

(11)

Order made by the Court of Exchequer for the filing of a Record that had been several years lodg'd in Mr. *Granges's* Chamber of the Temple. But the Committee in the first place agreed to go on with the business of *Ashby* and *White*; and the Debate of that matter was carry'd on with great Order and Temper, and was to the effect following.

Mr. FREEMAN in the Chair.

Mr. BREWER. Sir, we are now in a Committee of the whole House upon the Consideration of the Case of *Ashby* and *White*, which I take to be a matter of the last Consequence to the Privileges of the House of Commons, which I think are dangerously invaded by the Lords pretence of Judicature upon them. But as I don't doubt every Gentleman here thinks it his Duty to support and maintain the just Rights and Privileges of this House, as intrusted by those who sent us hither; so we shall do it in such a manner as will consist with and maintain a due Correspondence with the Lords. I shall open the true State of the Case, with the Judgment given upon it in *Westminster-Hall*, and some of the Reasons which in my opinion support that Judgment; and then speak to the Reversal of it by the
Lords

(12)

Lords (which with Submission I take to be a new Attempt of their Lordships to bring this and all our Privileges before them in Judgment) which I believe neither this nor any other House of Commons will endure, nor want Will or Power to relieve themselves against such an Usurpation.

THE Plaintiff declares against the Defendants, That whereas on the 26th day of *December* in the 12th Year of *K. W. 3.* a Writ issu'd to the Sheriff of *Bucks*, commanding him to cause to be elected two Burgesses for *Aylesbury*; the Sheriff directed his Precept accordingly to the Constables, to whom it belonged to execute that Precept; and the Burgesses being assembled, and the Plaintiff duly qualify'd to give his Vote, he offer'd to give it for *Sir Tho. Lee* and *Mr. Mayne*: but the Defendants falsly and maliciously intending to defeat him of that Privilege, did refuse to receive it, which he lays to his Damage, and Issue being joyn'd, that Cause was try'd at the Assizes, and a Verdict for the Plaintiff, and 5 *l.* damages.

THE Fact being thus try'd, the matter in hand (that is to say, Whether this Action is maintainable by the Rules of Law, or not) was often argu'd by
Counsel

(13)

Counsel learned at the Bar, and afterwards consider'd by the Judges in the Queen's-Bench, and upon their mature Consideration Judgment was given for the Defendants, that is, that the Plaintiff had no good Cause of Action.

NOW I understand the chief reason was, for that the Right of Voting in such cases hath ever been, and ought to be cognizable and determinable by the House of Commons, and not elsewhere: For by the Law and Usage of Parliament, the House of Commons have heard and determin'd the Right of their own Elections, and consequently and necessarily the Right of the Electors to vote; and for this purpose at the opening of all Parliaments a Committee of Elections is nominated of Members of our own to hear and determine of such Right of Elections, to whom Petitions (after presented to the House) are refer'd; and if any Elector had been refus'd his Vote in the Country, he is notwithstanding allow'd his Vote here in case he had right, and it shall avail the Candidate as much as if the Vote had been receiv'd below; and the Committee after Judgment upon the Case report to the House all the special Matter, and their Resolutions; where the whole matter may be afresh debated,
and

(14)

and the House agree or disagree with the Committee, as shall appear reasonable; so that this Determination and Method of Trial hath two Digestions, and more likely to be well founded than that of a common Jury, who we know are made by under Sheriffs, and often of Persons so corrupted or ignorant, that new Trials are often granted by the Judges. But it may be objected that no single Petitioner will be receiv'd by the House: In answer to this I say he may; and I have known Petitions touching Elections prefer'd by a very few Persons, and by the same reason may by one: I am sure we have no Order of the House against it; and if Gentlemen object that no single Petition of this nature was ever receiv'd, if they'll shew me when it were offer'd, I will shew them when 'twas receiv'd; I believe they can't shew me 'twas ever refus'd. But I would ask if they can shew me that such an Action as this was ever brought against the Officer as in this case. I'm sure they can't, and which in our Law is allow'd a good Argument that no Action lies; especially it being a Case which can't be presum'd, but may happen very often, almost in every Election: And I believe there never was a new Parliament called but frequent

(15)

frequent occasions might have been taken for such an Action, and better founded than this of the Plaintiff's, who was a poor Hostler, and remov'd from that Parish by the Order of two Justices, as being likely to become chargeable. But it seems our Ancestors repos'd a Confidence in their Representatives to have right done them in such cases: They sought not relief from common Jurys. And what is now done by this attempt? Why the Judges upon their Oaths say that they have no Cognizance of the Cause; but notwithstanding the Lords say they have Cognizance, and reverse that Judgment; and the Consequence of that is, the Lords will judg of this our undoubted Privilege, never till now drawn into question; and by the same Reason and Law the Lords may sit in Judgment upon all other our Privileges, and thereby we become depending upon them; which some without doors I find are willing to submit to, for that they say where one is depriv'd of his right he ought to have Damages, which the House of Commons can't give. I allow where one is injur'd he shall have relief by our Law in one place or other, but we have not one Shop to cure all Distempers. The Queen's-Bench relieves chiefly in matters

matters criminal, the Common-Pleas in civil Pleas between Party and Party, the Exchequer in matters of Revenue, Chancery in cases of Fraud; and in the Case in question relief may be had (as said before) in the House of Commons by Law and Usage of Parliament, which all Lawyers know is a very considerable known and approv'd part of the Laws of *England*. And tho no Damages are usually given here, yet the Officer for misbehaviour and arbitrarily refusing Votes who had right, may be and has been punished by the Power and Authority of the House, and even at Common Law, as when an Alderman is refus'd by the Mayor, or other Person who ought to admit him, the Remedy is by *Mandamus*, which tho it is chargeable to the Person injur'd, yet I don't know any Damages are given him, otherwise than that the Party injur'd is admitted, which is a relief, the Alderman having what he complain'd for: And so the Elector his Vote is allow'd as good as if the Constable had took it. And by the way, give me leave to observe how small a relief the new devis'd Remedy by Damages is: I dare affirm and demonstrate that the Plaintiff in the Case in question is above 100 *l.* out of Pocket more than the
Costs

Costs and Damages recover'd, which I take to be *infelix victoria*. But if Gentlemen say the poor Hostler could not expend so much, I believe so too; but if at the expence of any great Man I think it less justifiable, to make a Tool of that poor Fellow, perhaps in order to enlarge a Jurisdiction.

I MUST confess I take the Case of the Elected to be much stronger than the Case of the Electors; and yet in such cases Relief at common Law was always deny'd, as in the Case of Sir *Sam. Barnardiston* and *Soame*, there the Sheriff made a double Return, and in the Case of Mr. *Onslow* a false Return; and the Persons injur'd by those Returns were put to very great Charges, and kept long from their Seats in the House, and yet at common Law could never obtain a Relief. The Judges were of opinion (as they now are in the Case of the Elector) that it was a matter of Parliamentary Cognizance, of which they were not competent Judges. And should we now admit this matter to be determin'd by the Courts below, what great Confusion and Inconvenience would follow? I presume nobody will pretend to exclude the Jurisdiction of the House of Commons in this case; and yet if they judg one way,
C and

(18)

and the Courts below another, and neither have Power to supersede or reverse the Determination of the other, under what uncertainty will the Officers and all Partys concern'd lie? Whereas in other cases, where one Court errs a superior Court reverses; but here both Adjudications shall stand together, tho inconsistent the one with the other.

BUT 'tis said in this case, the Action lies, because the Defendant refus'd the Plaintiff's Vote *maliciose & falso*: I take those to become words of course, and no Evidence of that is given to the Jury.

Sir, TO conclude, the House lately pass'd a Resolution, That no Lords should intermeddle at any of our Elections: But if this is allow'd as Law, they may at the last judg and make (for ought I know) all our Elections. But for my part, I am for continuing the Possession of this and all other just Privileges, as deriv'd down to us from our Predecessors, who ever enjoy'd and exercis'd them as now we should; and I hope before we rise we shall think of some Remedys, and not lie wholly under the power or mercy of the Lords.

Sir THO. POWYS. Mr. Freeman, I believe I should hardly have rose up in
this

(19)

this matter, but that I think it more particularly my Duty to speak to this thing if it were possible than any other; for in truth I have had a more particular opportunity of knowing the nature of this Case, and the Proceedings in it, and what the Consequences of it will be, than many others have had.

I MUST acquaint you I was of Counsel in this Cause in the House of Peers upon the Writ of Error with *White*, and the other Constables that were prosecuted in this Action, and did to my power defend what I took to be the Rights and Privileges of this House.

I WOULD stand right in the opinion of every body: for what I did there for my Client in the course of my Profession, I don't think my self oblig'd to maintain here; for then it was my Duty to do my best for him as his Counsel, but now he hath done with me, and I have done with him in this place.

IT hath been to the great Honor of some Judges in *Westminster-Hall*, who have argu'd in Cases below at the Bar, and have been brought on the Bench before the Cause hath been determin'd: That they have argu'd at the Bar one way, and when upon the Bench have given Judgment another way against
their

their very Clients, and thereby done their Duty in both places.

NOW when I have said this, I hope I do stand fair and clear, that I now speak as a Member of the House of Commons.

YOU are upon a Point which I wish had never happen'd, for there is nothing I enter upon with greater reluctance, than what looks like a Dispute with the other House; for no Man pays a greater Honor to the House of Peers, and to every Peer there than I do, however as I am intrusted I shall endeavour to maintain the Rights of this House. And I do say, if the Peers of *England* can determine all our Propertys at Law upon Writs of Error, and all our Rights in Equity upon Appeals; and if they can determine all our Elections in consequence of this Action (as I am of opinion they may if this Action prevails) they have a greater Power than ever that House had in the days of their noble Ancestors when they were in their greatest Grandure.

I WILL show you what will be the ill Consequences, and I think it very fit for you to take this Matter into Consideration, if there be any way to come at it. First, I can't deny but, generally speaking, a Man has right to bring his
Action

Action at Law: but then I hope, tho a Man hath a right to bring an Action, yet he can't bring it in detriment to any other Man's Privilege; for if a Member of this House be su'd in time of Privilege, tho a Person have a right to such Action, yet he can't prosecute it in breach of the Privilege of such Person, much less can a Man prosecute an Action in breach of the Privilege of this House. And suppose this should come before the Lords in Question by Writ of Error, and they should be in possession of the Cause; sure every Determination of the Lords upon a Writ of Error is not without more ado to be conclusive to the Commons in their Rights and Privileges, so as that they may not take an alarm and be concern'd if all their Privileges are about to be taken from them. Suppose any Member of this House (as I think by the Privileges of this House he may) should in this House have just occasion to take notice of some great Misdemeanour in any great Officer of the Crown, and should assert Matters highly intrenching on the Honour of a Peer of *England*; and suppose when the Parliament was up the Peer should bring his Action of *Scandalum Magnatum* against the Member at Law for words that he had spoken
C 3 here,

here, and lay them as spoken elsewhere (for so in a transitory Action he may) and he should justify that they were spoken in the House of Commons, where by the Privileges of the House freedom of Speech is allow'd; and suppose Judgment in that Case (as in this it was) should be given against the Plaintiff, and afterwards this by a Writ of Error should be brought before the Peers, and they should reverse this Judgment, and give Judgment for the Plaintiff; can any thing be more destructive to the Constitution of Parliament, if such a Case as this should happen? And must the Commons in such Case sit down by it?

SUPPOSE any Man should presume to arrest any Member as he was going into the House of Commons, nay the Speaker himself, and afterwards he is committed by order of the House, and the Person committed should bring his Action for taking him into Custody, and the Serjeant who took him into custody should plead this matter, and the Judges give Judgment for him as they did for the Defendants in this Case, and by Writ of Error, it being brought into the House of Peers, they should reverse this Judgment, and give the Plaintiff his Damages; will any
one

one say we could not take notice of this? Would it not destroy all our Rights and Privileges?

SO no doubt in this Case, tho they have gone by way of Action at Law, and Judgment in *Westminster-Hall*, and Writ of Error in the House of Peers, it cannot be said, but if it concerns our Rights, we may take notice of it. In the Case of *Sir John Elliot, &c.* at the end of Justice *Crooke's* Reports of King *Charles's* Reign, the Commons declar'd the Judgment 5 *Car. 1.* illegal, and against the Privileges of Parliament.

IT is my poor Opinion 'tis our Right (and I think no body can doubt it) for we are in possession of it, to determine our own Elections; and I would be glad to be acquainted when first we began to hear and determine our own Elections; I believe no body will say with certainty when we did not.

I KNOW we have a turbulent Author, who generally affected to be in the wrong, and tho a Member of this House made it his business to write against their Privileges, and was always hunting among the Records of the *Tower*, from whence he brought away a great deal of Dirt with him, and yet could never pretend or produce more than two Instances,
C 4 ces,

ces, where the Commons resorted to any other place for the settling the Right of their Elections: The man I mean is Mr. Prynne, he takes occasion to do it from what is said by my Lord Chief Justice Coke (who, with your favour, I must take notice of so far, as to say he was not only a very great Man in our Profession, but had been Speaker of the House of Commons in his time) and he in his 1st *Instit.* fol. 116. and 4th *Instit.* 1 cap. fol. 14, 15. and 23. asserts, That the Law of Parliament is as much part of the Law of the Kingdom as any other, and indeed the highest: he calls it *Lex & Consuetudo Parliamenti*, and says, This is a Law that each House hath possession of, and judgeth by, and each House is a House of Judicature; and he puts upon this a great many Instances, and some of them may seem strange to those who have run upon the Commons of late. He tells you of a Case, 8 *Eliz.* at that time *Onslow* was Speaker (and it is in 19 fol. of the Book of the House of Commons of that year) one *Long* was return'd a Member for *Westbury*; and it being complain'd of that he came into the House by undue Practices, it was enquir'd into by the House of Commons, and found that he had given four pounds

pounds to the Mayor of *Westbury*; and they having examin'd and try'd this matter, they did not only expel *Long*, but they fin'd and imprison'd the Mayor of *Westbury*, *secundum Legem & Consuetudinem Parliamenti*. Mr. Prynne, the Author I mention'd, supposeth there was a time when the Commons us'd to apply to the King, in case wrong was done in the matter of their Elections; and in his Comment on the 4 *Instit.* 31. goes back to 12 *E.* 2. There the King was pleas'd by Commission to appoint several Persons to hear the matter of an Election. He pretends to another Instance, and that is in *H.* 6th's time, in the case of *Huntington*; and there was a Petition to and a Commission from the King in like manner. The latest of these Instances is above 200 years ago, and neither of them make any thing for a Power in the Lords to determine the Elections of the Commons; but on the contrary, rather for a Power to be delegated by the King; and the Instances are but two.

NOW, I say, Sir, we are, and have been in possession of this Right for a very great length of time, and have it confirm'd to us by Act of Parliament; for the late Act of 7 and 8 of King *William* hath in effect declar'd, that the Determination

nation of the Right of the Electors is in the House of Commons; for it says, that the Sheriffs and Officers of all sorts shall follow the last Determination of the House of Commons, as their Rule and Guide in such Cases. And surely nothing is more absurd than to say that this House shall examine, try and determine who are Elected; and yet *Westminster-Hall*, and the Lords shall examine and determine the Right of the Electors: How can any one examine the Election, but the first step he takes must be to consider and determine who are the Electors? And the determining the one is determining the other.

I WOULD trouble you a little with the Reasons they give why this Action should lie. It hath been said, and I think 'tis true for the Honour of *England*, and I believe it hardly can be found to fail, That where a Man hath a Right, and a Wrong done him, he's somewhere to have a remedy; but now let us see the application of this Rule. Are they not by the same Law that settles the Right, and declares the Wrong, to enquire where the Remedy is to be had? For tho you have a Remedy, you mistake that which is the proper Remedy; and the same Law that settles the
Right,

Right, and declares the Wrong, gives the Remedy; you must therefore go to the Place where the Law directs your Remedy, not where your self would desire the Remedy. Therefore says my Lord *Coke*, in his Preface to his *4th Instit.* and likewise *fol. 14, and 15.* We have several Jurisdictions, some Ecclesiastical, some Temporal, &c. some govern'd by one Law, and some by another; and all must have their Rules and Bounds, which must be observ'd: If your Right be Ecclesiastical, as for instance, before the Statute of Tithes, could you in *Westminster Hall* have brought your Action? Or if Issue had been join'd in such an Action, and the Parties had gone to Trial, will any body say but the Judges must have arrested Judgment, and said that 'twas out of their Jurisdiction? If a Lord of a Manor should refuse to admit a Man, to whom a Surrender is made of a Copyhold Estate, the Lord has done him wrong and damage too, but yet he can't bring his Action at Law for it, for it is an equitable Right, and he must go to a Court of Equity for his Remedy; and so I could put 1000 Instances, but I will not spend your time. So that, I say, 'tis not enough to say you have a Right, and
must

must have a Remedy, and therefore you may bring your Action at the Common Law; but you must seek it in a proper place, tho perhaps Costs, and Damages, and a Trial by a Jury may be more desirable by the Party.

NOW in this Case I would know, whether this is not a matter of Parliamentary Jurisdiction, and also a Parliamentary Right? Is any thing more plain? He that hath a Right to vote, hath a Right to send a Person to represent him and sit in Parliament; therefore 'tis a Parliamentary Right: Where then must be your Remedy? In the House of Commons, where you have a Right to send a Person to sit and represent you, there you may complain I was deny'd my Vote, or misus'd upon the Election. This by the Law of Parliament shall be examin'd here, and for this purpose you constantly appoint a Standing Committee of Elections.

INDEED I can't but wonder at the bringing of this new invented Action; for if there be any thing certain in the Common Law, 'tis this, That where you claim a Right to any thing, it must be founded upon common Usage in that Case, or in some Case that carries the same reason, and is just like it; for the
Com-

Common Law, generally speaking, is nothing else but common Usage. Now let us see for the Usage in this Case, and whether there has been any thing like this Action before. Say they, how do you know but such Actions have been brought before? I do not see that there can be a stronger negative Proof in any other Case than in this; for we have had Parliaments, as appears by our Statutes in print, for 500 years, and we have had Parliaments in every Reign since, and in several Reigns a great many Parliaments: and let us consider, whether this Case would not have happen'd frequently in 500 years, in so many Elections in Counties, Burroughs and Cities, where there are such infinite number of Electors: and therefore this Case must frequently have happen'd if such an Action lay at Law. If it be ask'd, how do I know that such an Action hath not been brought before? I answer, 'Tis wonderfully plain there never was such an Action brought before; for as we have our Acts of Parliament in print, so we have faithful Reports of all our Law-Cases, which we call the Year-Books, and which are Memorials of all Cases so long back as from E. 2's time, that is, 400 Years, follow'd by a Series
of

of Reports till this time, and are now grown so numerous, that they become a Burden. And I will desire any Gentleman of the Law here, or in *England*, to shew me the footsteps of any such Action as this, or of this kind till now, ever brought before. We have always said our Forefathers were wiser Men and greater Lawyers than we are, and so they were; but such an Action as this never enter'd their Thoughts.

BUT it may be said, How does it appear that there was occasion for these kind of Actions formerly, for Men heretofore were unwilling to serve in Parliament, they were hir'd, and almost pressed to it, and it was hard to get Men to come up? I answer, It was so far otherwise for many years past, that so early as *H.4's* time, there were great Contentts about Elections, and the Sheriffs in those days were apt to do wrong, as appears by *7 H.4. cap. 15.* And therefore *11 H.4. cap. 1.* there was impos'd one hundred pounds penalty to the King on the Sheriff that did not do his Duty, according as the Statute does direct: so that it does appear there was occasion for these Actions if they had lain by Law; and yet you will find that never till *23 H. 6.* did it enter into the Thoughts of any Man,

Man, that an Action at Common Law could be brought for an Injury in an Election; and therefore that Act recites, that there was not before that time a sufficient Remedy for the Party griev'd, and therefore gives a hundred pounds to the Party, and Costs if a Knight, and forty pounds if a Citizen or Burgess, and that by a Law made on purpose to help the Party to an Action where there was no such Remedy before. Thus it rested till the famous Case between *Nevill* and *Strode*, in *2d Siderfin, fol. 168. fol. 1658.* (in that time they sent five Knights of the Shire out of *Berkshire*) *Mr. Nevill* brought his Action against *Strode* the Sheriff; and he alledg'd, that he being one of the five chosen for that County, *Strode* had maliciously and falsely refus'd to return him, &c. and the Jury gave him fifteen hundred pounds Damages. This Action made a great noise, and the Judges look'd upon it as a great Novelty, and thought fit to consult the Parliament in it (in former days in matters relating to the Parliament, they us'd to consult the Parliament) and the Judges heretofore when they were ask'd their Opinion in difficult matters relating to the Parliament, or Law of Parliament, would say this was above us, and therefore

fore to be decided by Parliament. And this Case being refer'd to the Parliament, they look'd upon it as so extraordinary an attempt, that tho Mr. *Nevill* had a Verdict for fifteen hundred pound Damages, yet he never got a farthing of the Mony, or any benefit by the Verdict : *Sed ibi dormivit.*

AFTER this came the great Cause that hath been mention'd of *Soames* and *Barnardiston* : and methinks this deserves very much our consideration, and how far the Determination of the House of Peers ought to be a Rule in this very Case. That Cause set forth with great Prospect of Success : Sir *Samuel Barnardiston* in that Case did not slight the Determination of the House of Commons, but first petition'd this House as the proper place to determine his Right, and had it decided for him, That he was the Person duly elected, and the other Return was taken off the File ; and then he brought his Action at Common Law, and set forth this whole matter, and that the Sheriff falsly and maliciously return'd another with him, whereby he was kept out of his Right, &c. a long time, and put to very great Expence and Costs. This came to be try'd at the Bar of the King's Bench, and there was a Verdict given

given for Sir *Samuel Barnardiston* for eight hundred pounds. This was look'd upon as a great Case, and my Lord Chief Justice *Hale* bid all Persons about him take notice, that they did not determine the Right of the Election, for the Judgment in that Case belong'd to the Parliament ; but said, since the House of Commons had determin'd the Right, he thought they might follow their Judgment to repair him in Damages, and so gave Judgment for the Damages the Jury had given the Plaintiff.

THIS Case was look'd upon so improper for the Common Law, that upon a Writ of Error brought in the Exchequer Chamber, that Judgment was revers'd, because the Common Law could not any way intermeddle with Elections to Parliament, further than was directed by Acts of Parliament. It might have been said, and I know 'twas said, that the Reversal of this Judgment was by an extraordinary high hand : And therefore, upon the Revolution, in the very beginning of King *William's* Reign, Sir *Samuel Barnardiston* brought a Writ of Error in Parliament, complaining that in the Exchequer Chamber they had revers'd this Judgment unjustly, and went upon these Reasons, as may be observ'd

D from

from the Journal of the House of Lords, which were the Reasons of some very few protesting Lords.

First, Because it was a denying Sir *Samuel Barnardiston* the benefit of the Law, which gives relief as to all Wrongs and Injuries; and here is a very great damage to the Plaintiff, and therefore he ought to be repair'd.

Secondly, Say they, if it should be allow'd that Sheriffs and Bayliffs may make false Returns, and no remedy but a hundred pounds Forfeiture, it would be of dangerous consequence, and might tend to the packing of a House of Commons, which may overturn the whole Constitution. But the Peers then did not think these Reasons sufficient for this new Action at Common Law, and accordingly the House of Peers affirm'd the Judgment of Reversal in the Exchequer Chamber, and said, the Judgment was well revers'd, for that no such Action did lie at the Common Law, tho' the Injury done did tend to the Plaintiff's Damage; and all the other Mischiefs which are now suggested were insisted on: and thus it stands to this day. And yet now 'tis said upon the same Reasons, the Action does lie for this Person, tho' he be only an Elector, and must receive much

much less Damage than the Person elected; and there is no one reason for the Elector but holds more strongly for the Elected. The Elected can't maintain an Action, and yet now 'tis clear that one of the Electors may, tho' he can have no substantial Damage; for if a Man comes and gives his Vote (as here in this Case) 'tis not in the power of the Officer to hinder him of the benefit of it; for his Vote will be as well given as if the Officer had put it down, and this with respect both to the Person who gave the Vote, and him for whom he voted: and so really 'tis no substantial damage to any Man.

THE next thing I shall mention to you is another Case of Mr. *Onslow*: He brought his Action against the Sheriff of *Surry* for making such a Return upon him (I believe I have the Gentleman in my Eye who brought that Action) he declar'd in the same manner that it was done falsely and maliciously, and had a Trial and a Verdict; and yet notwithstanding, the Court of Common Pleas (being govern'd by Sir *Samuel Barnardiston's* Case) did unanimously, 33 *Car. 2.* say, We must not presume to determine the Merits of Elections or Returns, there is a proper Jurisdiction for it, and they

gave Judgment against the Action, and I think he hath acquiesc'd in it ever since. I am sure I have heard no more of it; the Reasons given by the Court appear in the Report of the Case in 3 Levins, fol. 29 and 30. and are worth the reading.

THERE was a Case a year ago between *Prideaux* and *Morris* in the County of *Cornwal*. Mr. *Stratford* was return'd, and Mr. *Prideaux* brought an Action in the Common Pleas, in the time of King *William*, against the *Viander*, for making a false Return against him to his great Damage, and laid it with all aggravation. This went to a Trial in *Cornwal*, and there was a special Verdict found; and the Question was, whether this Action would lie before the Commons had determin'd the Right of Election? And the whole Court unanimously gave Judgment, that the Action could not be brought till the matter had been first brought before the House of Commons, and they had determin'd the Right.

NOW here is a total Silence in all Books of the Law, that any such Action as this is doth lie: Here are the Acts of *H. 6.* and King *William*, which provide Remedies at Law, because there was no other

other provision before. Here are not only these solemn Judgments in *Westminster Hall*, but the Judgment of the House of Peers, in the Case most like to this of any that can be thought of, that no such Action doth lie: And yet I can't tell how, there are abroad Persons that endeavor to run upon the House of Commons, and use them ill on all occasions, and are zealous for this Cause, which seems to be set on foot to undermine all our Elections, and bring them to another Judicature.

NOW see the Consequence: No Man ought to have a foot against him, two Judgments at once in two several Courts, whereby one may punish him at the same time for doing a thing, and the other for not doing it. I believe such Proceedings would be look'd upon as barbarous even in *Turky*, and yet that will be just our Case: A Gentleman petitions the House of Commons, and says, The Right is in such a set or sort of Men; as for example, in all the Freemen or free Burgesses; and that according to that way of Election he was chosen, and not the Person that is return'd: and this is determin'd by the Committee of Elections, and afterwards by this House against him that petition'd. This Man goes immediately and brings an
D 3 Action

Action in *Westminster-Hall* against the Officer that return'd the other ; nay every one of these Persons that he affirm'd the Right of Election to be in, bring their Actions, and it comes into *Westminster-Hall* to be try'd, and the Jury find the Right to be in these Men, as he has alledg'd, contrary to the Determination of the House of Commons, and Judgment is against the Officer in every one of these Actions, for the Men you have determin'd the Right not to be in. You can't set one of these Judgments against the other ; I can't defend my self in *Westminster-Hall*, by saying, The House of Commons have determin'd that these Men who sue me have no Right to vote. There is nothing like this in the World, two independent Courts that can't controul one another, but both may go on together in the same Cause, and both having a Right to judg, one judges one way, and the other t'other, and the Officer is crucify'd between 'em.

LET it be consider'd again, that at this rate none but Knaves or Beggars will be Mayors or Bayliffs in an Election-year : for suppose as at *Westminster*, where I think there are ten thousand Electors ; or suppose it be as in some Towns near *Wales*, for one of which I have

have the Honour to serve, where the Descendants of every Burges claim Right to vote, and by consequence they will bring it in time almost to all the Sons of *Adam* ; for all the Sons, and all the Daughters Husbands, and all their Descendants claim a Right to vote. Now what a miserable Case must that Officer be in, when Persons shall come from East, West, North and South, and say their Pedigree is so and so (tho they are good at Pedigrees in those Countries, yet) what a Condition is he in ? he's bound to determine whether they have a Vote or not ; and tho he's no Lawyer or Herald, yet however he's bound to give Judgment one way or another at the peril of an Action : And suppose but a hundred Men should bring their Actions against the Officer, what Man can stand a hundred Actions, tho he be in the Right ?

THERE are not only these Difficulties in the Case, but there is Revenge ; and in popular Elections there are those Heats, and the Voters ingage with that animosity, that the losing side next day will be ready, perhaps only for Revenge, to send for a multitude of Writs, and have the pleasure of ruining the Officer who was against them, tho he was in the right ; for every one has a Right to

bring his Action whose Vote was disallow'd, tho it should be found at last that he had no Right.

AS to the words *falso & malitiose* laid in this Declaration, which seem to be a great Ingredient in this Action; I agree, in some Cases where there is a Jurisdiction, these words may make a great aggravation of the Offence; but they can't make a thing unlawful that is lawful, nor give a Jurisdiction where there was none before: for no Man will say if a Person should bring an Action at Common Law for a Legacy, and alledg, That the Executor, tho he had sufficient Assets, yet he *falso & malitiose* refus'd to pay it; that would give a Jurisdiction to the Courts of Common Law. These words are *verba Clericorum*, words of Course for the most part. Besides, how dangerous and hazardous it would be for an Officer, tho ever so innocent, to depend upon these words, when every Body knows that Falstity and Malice rest in the Mind, they are in the Imagination, and the Jury that are to try this Action are at liberty to judg with what Mind the Officer acted; that would be the hardest thing in the World for an Officer to undergo in every Action. It would be enough for the Jury to presume it was

was done maliciously (seeing few Mayors or Bayliffs but have their Inclinations, and give their Votes themselves for their Friends) because the Officer made an Interest for the other side; and the consequence of this new invented Action, if countenanc'd, will be, that every Triennial Parliament will bring a Triennial Harvest to *Westminster-Hall*. I speak against my own private Interest, if that was to be consider'd. Elections without Actions keep up Animosities too long, so that they are hardly heal'd in three years time; but these Actions will help to vex and worry Corporations from three years to three years, and Mayors and Bayliffs will be the most miserable Men in the Kingdom, and ought to run their Country rather than stand a popular Election: whereas the Officer is accountable to you for his Behaviour at the Election. This is not a matter that stands in need of the Aid and Assistance of *Westminster-Hall*, that they should invent a new Action and Remedy, as if there was a failure of Justice. Has any one come with a Complaint against any Officer to this House, and they have not been willing to hear it? Have not the Committee a Right to hear and report Matters with respect to the Electors as well

well as the Elected? And have we not known that the Electors, tho but a small number of them (as in a late Case of this sorry Town of *Ailsbury*) about five I think of the Electors came and complain'd, and their Complaints were fully heard. And if any single Elector should come with a Petition, and represent that he was abus'd by any Officer, or ill-treated by any Mayor or Bayliff at the Election, I don't think but the House would be ready to do him Justice: And they have a Right so to do, for the Officer is accountable to them for his Behaviour. 'Tis not now only so practis'd, but always was so; for in the same Treatise of my Lord *Coke's 4th Inst. fol. 49.* he says, that they will make him change his very Return; they will make him raze out the Name of one, and put in the Name of the other. So they have a Jurisdiction adequate in this Case; and surely if they can hear the Complaint of several Electors, they can hear the Complaint of any one Elector. I would not trouble you with Arguments that may be proper in *Westminster Hall*, because we are here upon a matter of our Constitution; but I know no Action more obnoxious to the true reason of the Common Law, which abhors multiplicity

city of Actions; and a Man shall never have a particular Action for that which naturally draws on multiplicity of Actions, and may be reform'd in a more compendious manner. Upon this reason that famous Case in *5 Rep.* call'd *Bolton's Case*, is founded: If a Man builds a Dove-house near a Common-field, where Men make all their Profit by Plowing and Tillage, and therein keeps a great number of Pigeons that live upon his Neighbours Corn, is not this a great Wrong and Injury to them? and yet no Action lies; for if one Man that is wrong'd thus may bring his Action, a great many more may do the like, and so there will be infinite Actions; therefore it shall be presented in the Court-Leet, as that Book says. So there is that Case of *Williams* in the same Book, where the Lord of a Mannor had a Chappel for himself and Tenants to repair to, and to hear Divine Service, within the Parish of *Aldbury*: He brought his Action against the Vicar, who was oblig'd to officiate, for that he had neglected, &c. tho he had us'd time out of mind to officiate, and had an allowance for it: Says the Case, If this Action should be allow'd, all the Tenants and Servants of the Lord might have the like Action, and so there would be

(44)

be multiplicity of Actions, and therefore he shall not have this Action; but if it had been to have been perform'd in his own private House or Chappel, he alone might have had an Action. But since it would draw on a great many Actions which may ruin any Man, therefore the Remedy must be taken in such manner as it is given where there is a publick Offence. In the Case before us every Person is chosen *pro bono publico*; for tho he be chosen for a particular place, he serves for the whole Kingdom; and for that reason you shall not proceed by way of Action, but in such manner as it hath been always us'd, where the whole thing shall be examin'd at once, and all determin'd upon one Petition, wherein all the Partys injur'd may join instead of a multitude of Actions.

I SHALL not propose to you any thing, but hope you will at least come to some Determination that may assert our Right in this Point, that this Door may not be open to bring in a new Jurisdiction to examine and determine whether any of us sit here rightfully or not.

'TIS a standing Order of the House, that no Peer hath a Vote in the Election of a Commoner; but in the next Elections,

(45)

ons, if this be allow'd, every Peer may vote, for they are Freeholders, and many of them Burgeses and Members of Corporations, and they may all come and demand your Votes, and if refus'd, bring their Actions.

THESE and many more Inconveniences are obvious if this Action should be allow'd, and I believe it may have a great effect upon our Constitution. Very much more might yet be said, but I have taken up too much time already.

Sir JOHN HAWLES. Mr. Freeman, we are jealous of our Privileges, and I think we have just reason so to be; but we must take care that that does not carry us too far out of the way: I would not have it taken for granted, that whatsoever is said against the Lords here tends to assert the Privileges of this House, or that what is said for the Lords here is against this House. I am as much for the Privileges of the Commons of *England* as any Man, and I own they have lost a great deal of Power: I think the Commons had a great Power, when the greatest part of the Judicature of this Government was their sole right; I mean that of trying the Fact of Causes, which heretofore was in the Commons alone: Nay, if a Peer had

had had a matter of Contest with another Peer, or with a Commoner, and Issue was join'd, that Issue was to be try'd by Commoners, and not by Peers. 'Tis true, if the Prosecution of a Peer was in a capital Matter at the King's Suit, it was to be try'd part by Commoners, and part by their Peers; the Bill of Indictment was to be found by Commoners, but the Issue was to be try'd by Peers: but if a Peer was prosecuted in a capital matter by a Commoner, or a Peer, as by an Appeal, the Issue was to be try'd by Commoners. I must confess, as to the Lords Jurisdiction in matters of Equity, the Commons have great reason to be jealous, because there all Facts as well as Law and Equity come to be try'd and judg'd by the Lords alone.

S I R, I say when all Facts were try'd, and most of the Officers of Government were chosen by the Freeholders of the County, the Commons were somewhat greater than now they are; when they had the Election of the Sheriffs of the Countys; when they had the Election of what they call'd the Conservators of the Peace, Officers that were the same with our now Justices of the Peace, with this difference only, those the Commons made, these

these the Crown makes. The Commons had a great Power when they were to elect their Captains that led them out to War, which heretofore they did, and had a right to do, till it was taken away from them by the Act that settles the Militia, tho I own it was disus'd many years before. The making of Sheriffs is now plac'd in the Crown, we have nothing left now but Matters of Trials in particular Cases, and even that is so far cramp't that the Jury is return'd by an Officer that the Crown puts upon the County.

B U T yet I am not for carrying things further than we have a right to do; I am for keeping what we have, and for that reason I am not for encroaching upon the allow'd Jurisdiction of the House of Lords; we have always allow'd them a right to hold Plea of Writs of Error. The Parliament in *H. 4th's* time did declare the right of Judicature to be in the House of Peers; and I never found any Inconvenience in it, if the Peers kept only to matters of Law, and left the Facts to be try'd by the Commons; nor did I ever know that Right of the Lords question'd till now.

A

A GREAT deal hath been said for and against the Right of bringing this Action; I do not think that that is now the Question: The Question is, Whether a Judgment being given in the King's-Bench, a Writ of Error does not lie in the House of Lords? But whether the Lords did right in giving that Judgment they have now given in the Case before you, that is another thing. I speak to the right of holding Plea of this particular Writ of Error; nobody hath deny'd but that they have a Right to hold Plea of a Writ of Error in general upon a Judgment given in *Westminster-Hall*; but say they, the Lords ought not to have done it in this particular Case, and several Reasons have been given for it.

FIRST, here is the Privilege of the House of Commons in question in the Case: That hath been argu'd and insisted on, but I confess that Argument does not influence me. The Lords have held Plea of a Writ of Error, in which the Privilege of the Commons hath been in question; and the Lords have done right to the Commons in it, particularly in that matter of the Parliament of 1640. when some were suppos'd to have done irregular things in the House of Commons,

mons, and were prosecuted for it by Information in the King's-Bench, and were fin'd in K. Ch. 1st's time, whereupon a Writ of Error was brought in the House of Lords, and that Judgment revers'd in the time of K. Ch. 2^d: There the Lords did right to the Commons in the matter of Privileges of the Commons, for it was for laying hands upon the Speaker in this House; and I think every body commended what was done in that matter by the House of Lords, and nobody ever said but that they had a right so to do. Some things are not to be come at otherwise than by a Writ of Error in the House of Lords; and I believe if you look a little back, there have been Judgments given in *Westminster-Hall* not only in matters of but against the Privilege of the Commons; and these Judgments stand unrevers'd, tho I think they are fit to be revers'd, and I know no other method to do it but by Writ of Error in the House of Lords. I think there is one Judgment upon an Information against the Speaker for licensing Papers to be printed, which he did by Order of the House.

THERE is another Instance of a Person taken into Custody by Order of this House, it was the Case of Mr. *Top-ham*,

ham, Serjeant of this House: The Party brought his Action, the Serjeant pleaded his Warrant, that it was done by Order of the House of Commons, and Judgment was given against him, and this Judgment stands unrevers'd.

NOW what method have you to reverse these Judgments but by Writ of Error? If you think to do it by a Bill in this House, that must likewise pass the House of Lords, and so will be the same thing as a Writ of Error.

ANOTHER thing is said, that this Person was not damnify'd; or if he was, there are such a number of Persons who were then likewise damnify'd that may bring their Actions, that nobody will execute such an Office. I think that Argument ought not to prevail, for at that rate you will allow the Officer not only to be a Judg, but the supreme Judg, and the Partys damnify'd shall be without Relief; he may do what he pleases, and he shall never be question'd afterwards save in this House, which I will consider by and by. 'Tis agreed you may punish an Officer that misbehaves himself in matters of Elections, and that is practis'd now very much; but at the same time you punish the Officer, the Person damnify'd hath no Satisf-

Satisfaction, tho our Law allows Satisfaction in Cases where he that did the Wrong shall not be punished, and allows Satisfaction in all Cases where a Person is punishable if another hath receiv'd a particular Damage.

A MAN is liable to be fin'd to the King or Queen, that is a Punishment; but if he pays so much to the Party damnify'd, that is Satisfaction. If a Man's Horse breaks into another's Ground, he shall not be punish'd, but the Person damnify'd shall have Satisfaction: But in this Case you allow the Officer shall be punish'd, but you will not allow the Man injur'd any Satisfaction for the Damage he has receiv'd, which cannot be supported by Reason, or by the Authority of any particular Case.

IN all Cases I take it to be true, where a Man is punish'd for doing another Damage, the Person damnify'd shall have Satisfaction. But that Rule does not hold true in the contrary.

IT is said there are a great many Persons concern'd, and if you give every one an Action there will be no end of these Actions, and therefore none shall have an Action. This is a strange Argument: If a Man injures one or two Persons, each shall have an Action for their respective

(52)

Damages, but if he injures an hundred none of them shall have an Action; as if when a Man is moderately injurious he shall make Satisfaction, but if he is extravagantly injurious he shall be scot-free, and make Satisfaction to none. This rests to be made good either by Reason or Authority, which hitherto hath not been done. The Case cited I own is true, but you must take it with this difference; if any thing is done which might have been of damage to a hundred People, but was of damage to none, none shall bring their Action, tho the Criminal shall be punish'd; but where there is particular Damage done to any Person, an Action will lie for the Damnification of that Person. If a Man digs a Pit, any Man may fall into it, and no Person shall bring an Action for that; but if any Person doth fall into it, and hath particular damage by it, he shall bring an Action and have Satisfaction. And with Submission, that Argument will not hold, that because a Person may be ruin'd if he be oblig'd to make Satisfaction for the Wrong he hath done, therefore he shall not make Satisfaction to any particular Person he hath damnified.

I T hath been said, admitting it to be so that the Party ought to have Satisfaction,

(53)

faction, yet he ought to take his Remedy in a proper Court; as if a Legacy was given, an Action would not lie in the Queen's-Bench for it, which is true. But it would have been well if that Gentleman had told us which was the proper Court to give Satisfaction for the Wrong suppos'd to be done in this Case. If the Queen's-Bench be not the proper Court, what Court is? 'Tis said the House of Commons is a Court, I was always of opinion it was so: 'Tis a Court of Judicature, my Lord Coke says, and a Court of Record. I wonder, when all this is allow'd, it should be said this Court hath not a Power to administer an Oath to a Witness, I think that was never deny'd to any other Court whatsoever. Every Court of Record has power to administer an Oath; but tho this be a Court of Record this can't, hath not that power. It would have been very well if those who are against this Action could shew us that this is a Court that can give Satisfaction; some Courts can punish but can't give Satisfaction, whereof I think this one; Satisfaction was never given here that I know of, Was it ever? or pretended to be had here? In the first Instance 'tis true, this House hath punish'd, and by such Punishment com-

E 3

pell'd

(54)

pell'd the Delinquent to make Satisfaction to a Person by increasing or remitting such Punishment; but that is not the Case before us.

I T hath been said, there has been no Instance of this kind of Action brought, and that the Court of Queen's-Bench have declar'd they have nothing to do with the business of Elections, for that the Right of Elections ought to be determin'd here; and for that purpose the Declaration of the Lord Chief Justice *Hale* in the Case of *Barnardiston* and *Soames* has been cited. I must confess I can't but wonder at that Case: We did lately think that the Judgment given in the King's-Bench in that Case was rightly given, and afterwards when it was revers'd People were astonish'd at the reason of it, and more when that Judgment of Reversal came to be affirm'd in the House of Lords. Nobody hath ever said why that Judgment was revers'd; I do not see but on the same reason several Judgments within these few years, nay even in this Reign, may be revers'd likewise. For the Court of King's-Bench in that Case did not pretend to a Judicature of determining the Right of Elections, the matter in that Case had been determin'd before in this House; but they only gave

Damages

(55)

Damages for the Wrong sustain'd, that was all the Court did in that Case, and yet that Judgment was revers'd. I believe there hath been some Judgment given by this House within these twelve Months, that where the House hath determin'd the Right of Election, the Party griev'd shall be allow'd to maintain an Action at Law for his Damnification.

BUT I take it that there is a difference between the Case of *Barnardiston* and *Soame* and this present Case. Time was when it was doubted, where a Man that was elected and the Officer refus'd to return him, whether the Person elected was damnify'd or not. 'Tis very certain heretofore Persons were not so ambitious of sitting in this House as now they are; and some Persons purchas'd Charters of Exemption, to be excus'd sitting in this House: And so it had been practis'd in the House of Lords. The Act that hath been mention'd before expressly commands, that the Person chosen shall come and be present in Parliament. And afterwards there was a Penalty put upon such as were chosen if they did not appear here; to which another Punishment was added, which was, The Person elected, if he did not come

E 4

hither,

(56)

hither, he should lose his Wages. It was not reckon'd a Damage that any Person was not return'd a Burgefs to fit here, but a Kindness; but that did not hold so in the Case of an Elector. Every body agrees, as the Electors had a Right to choose, so there was no Statute to compel them so to do; but they look'd upon it not only as their Right but their Interest to be present at the Elections: and none can say but 'tis a Man's Interest to make choice of such a Person to serve in Parliament, who hath the power over his Estate, and Life too for ought I know, as he could trust. No body ever doubted that a Person who had a Right to vote had an Interest, and might be damnified if his Vote was refus'd. So that none of the Cases that have been put of the Right of the Person elected to serve in Parliament as Knight of the Shire or as Burgefs, come up to the Case in question.

I WOULD say one thing as to the Damnification of the Persons elected; there is a late Act that gives double Damages where the Return is contrary to the last Determination. Now I do take it, that Act supposes that a Man might have been damnify'd before; and if he was damnify'd before, he was so by the Common Law, for no Statute Law gives
him

(57)

him any Damages: 'Tis true, that Statute gives double Damages, but still that Statute supposes there was a Damage before, and builds upon that Foundation; so that with Submission that very Statute runs against all the Cases that have been put as to the Persons elected.

'TIS said, At this rate the Lords may come to vote in Elections. I am of opinion the Lords have no Right to vote in Elections for a Knight of a Shire or a Burgefs; and the reason I go upon is this, Every Person who had a Right to vote ought to have contributed to the Expences of him that was elected. If he was a Freeholder he was an Elector for the County, if a Burgefs for the Borough; and the Expences of the Knight of the Shire were to be levy'd of all the Freeholders, and the Expences of the Burgefses upon all that were resident in the Borough. But the Lords were excused of that Charge, they were not to be Contributors to the Expences of a Knight of the Shire or Burgefs, because they were of another House. There was a Law made which says, that for Lands purchased by any Lords, such Lands should continue chargeable to the Expences of Knights of the Shire, as they were before such Purchase; so that it's plain before that
Act,

(58)

Act, the Lands the Lords were seiz'd of or purchas'd, were excus'd of that Charge.

BUT, Sir, I think this matter is not to the Case in question: This is nothing but a collateral Action for a Damnification, whereof the Consequence is not much, not above five pounds, tho I acknowledg the smallness of the Sum does not influence this Case. Nor is the Question, Whether the Lords have done Right or not in reversing the Judgment given in the Queen's Bench. *Humanum est errare.* If they have a Jurisdiction, we can't justly complain; tho I am of Opinion they have done Right, I think the Plaintiff in this Case was damnify'd, and I think the Court of Queen's Bench ought to have given Judgment against those who did him the Injury for the Damage he sustain'd; and I think the Lords have done Right in reversing that Judgment, and in giving such Judgment as the Court of Queen's Bench ought to have given.

Sir EDWARD SEYMOUR. 'Tis enough for me that we have the Law on our side, and we are very much oblig'd to the Pains and Understanding of those learned Gentlemen that open'd this Debate,

(59)

bate, in presenting us with a true state of our Disease; it only remains now for your Prudence to apply a Remedy. And I cannot but take notice, that this is an Action without any Precedent to warrant this Proceeding; and I believe it might have remain'd so still (for I don't think there was Virtue enough in the Cobler of *Ailesbury*, nor had he Purse enough) if a Lord had not acted that part.

FOR my part, Sir, I do not think this to be the single Instance of the House of Lords we have reason to complain of. I think in a great measure, by their Proceedings they seem to hold forth, That the Ax is laid to the Root, and that they have a Dislike of this House of Commons, and endeavour to get rid of them. I shall not instance in Particulars, but I hope there is one you will not let go without applying some Remedy to, and that is, that noble Representation in which they have vilify'd you to the highest degree, and lay all the Mischiefs of the last Reign and this at your Door. I could shew you there is nothing in it but stuff, *populum fallere*; and we see the Consequence of it, and what Pains and Endeavours they have taken to disperse it all over the World, to make Impressions upon the People. But that which I would have

(60)

have some resort to, is this, That these worthy Persons that have spoke before, tho they have truly represented the state of our Condition, yet they have been very tender of applying a Remedy.

IT does, I think, consist of two Parts; one is what relates to the inferior Courts, the other to the Judgment of the House of Lords upon this Writ of Error. Now that there is a Right to bring a Writ of Error, the Learned admit; but I would take away the Foundation, and make this Declaration:

THAT no inferior Court below should presume to intermeddle with the Elections of the House of Commons; and I am sure then there will be no foundation for a Writ of Error. In the next step, with relation to the Judgment given in the House of Lords; 'tis true, the Lords make a great Complaint, That in matters of Parliament we have address'd, without advising and consulting with them. I will not say how far 'tis justify'd by their Proceedings; I need not remind you of the Address they made without you, when you address'd against my Lord of *Worcester*; before you had presented your Address, they presented a Counter-Address to yours. But I take the distinction to be here, 'tis one thing
in

(61)

in matters of State, and another thing when the matter depends between the two Houses: Where 'tis a matter of State, with relation to the Queen's Prerogative being violated and invaded, as you are her great Council, you are to advise the Queen in that matter, and not let any thing of that kind pass upon her.

BUT howsoever I would go the regular way, by condemning this Judgment, in relation to the House of Lords; and after you have made that Condemnation, I would apply to the House of Lords, to see if they would recede from this Judgment of theirs. But I am afraid Arguments or Debates will help your Case but little, you must have recourse to Remedies that are in your own Power. We see what they did upon the last Occasion when they thought their Privileges were concern'd; they adjourn'd, and all to prepare the way to make the World believe they were injur'd, and prepare them for their Proceedings afterwards.

And I say this is not a thing that falls out by chance, but carry'd on by all their Power, to represent you as inconsiderable, and to make you useful for nothing but giving Mony, and then to send you home into the Country: But if you
do

(02)

do not keep the Power in your own hands, you will be without Remedy. I conclude with what I mention'd in relation to the Courts below, to declare that they have no Power to intermeddle in matters of our Elections.

MARQ. OF HARTINGTON.
I shall not pretend to follow that honourable Gentleman near the Bar in all the steps he hath made, tho' I think I may be as regular as he. I think he hath only shew'd, That there is not so much reason in this Case to find fault with the Lords, but it is necessary to find fault with them one way or another.

I THINK this is a matter of great Consequence, and as long as I sit here, and as long as I live, I shall be as tender of the Privileges of this House as any body. I think 'tis upon the due ballance of both Houses that the Safety of the Whole does consist; and I must confess, I think the Liberty of a Cobler ought to be as much regarded as of any body else; that is the Happiness of our Constitution.

I THINK it was very well observ'd by an experienc'd Member, That this Writ came very regularly before the Lords: If so, then I think the Question
is

(63)

is between us and the Persons that elected us; and I think, tho' Gentlemen would not formerly allow of any distinction between the Privileges of the House, and those of the People of *England*; yet they must allow it now, or they can't complain that this Action is any prejudice to this House. For when a Person offers his Vote at an Election, and is not admitted to give it, and upon such refusal brings his Action in the Courts in *Westminster-Hall* (which I take to be the present Case) if giving Judgment upon it be contrary to the Privileges of this House, then 'tis pretty plain, that our Privileges do interfere with the Rights of the People that elected us.

I SHALL plainly give you my Opinion in this Case: I can't think this Action to be a breach of the Privilege of this House; for, Sir, the Party griev'd can be no way reliev'd, but by applying to the Law, and I think the learned Gentleman below is out in all his Instances; for he hath given an account of People injur'd applying to you, but they were Candidates, and certainly that was their proper Remedy; but in the Case of an Elector, I don't see he can have satisfaction by applying to you.

GEN-

(64)

GENTLEMEN talk of the Law of Parliament, I can't see how that can give any interruption to the Law of the Land, that it shall not do Right to the Party griev'd: How shall a Man injur'd in the manner I have mention'd, receive Satisfaction by applying to the Parliament? 'Tis true, the Officer offending may be punish'd, but the Party injur'd can't receive that Satisfaction he would in the Courts below, by giving him his Damages.

I THINK this is a matter of great Consideration, and it is necessary to consider well of it, and not to determine rashly. I think it may be of use to us, since there are Judges who have been of Opinion, That the Subject ought not to have his Remedy in this Case. A Judg that will out of fear or any regard to one House, do contrary to his Oath, I believe at another time will be influenc'd by the other: I think 'tis the Duty of a Judg to act according to Law, and not be afraid of either.

Mr. LOWNDES, Sir, There is no doubt but all the Judges (as hath been said) and every body else are oblig'd to be-

(65)

behave themselves according to the Laws of the Land: But the Question is, What is the Law of *England* in this Case? If the House of Commons has an original Right to determine all matters concerning Elections of their own Members (as it hath been always understood to have) and if we have a power to punish Officers for making false Returns, or any other Misfeazances committed by the returning Officers; then it will not be necessary that the Judges in *Westminster Hall* should have any Jurisdiction at all in the matter now in question; and if they have none, then by consequence the Lords will have as little by Writ of Error.

I DO confess, Sir, when I first heard of this Case, it gave me some apprehension that it might be of fatal Consequence (by reason of the Novelty of it) to your Privileges, which are indeed the Privileges of the Commonalty of *England* which we represent: But since I have thought of it from time to time, and it hath been better open'd by the learned Gentlemen that have spoke in this Debate, I conceive our coming to some Resolutions declaratory of our Right in this Affair, may preserve the Liberties of

F this

(66)

this House, and of all the Commons of *England*, who have entrusted us with the preservation of their Rights.

I THINK the learned Gentleman over-the-way took his ground too narrow; I might add him this point, That where there is a Writ of Error brought from a Judgment in *Westminster-Hall* in Cases where a Writ of Error lies, and where that Court and the House of Lords have a Jurisdiction, there the House of Lords are at liberty to give what Judgment they please: But I have read, the House of Lords is not an unlimited Jurisdiction, but is bounded as well as the Courts of *Westminster-Hall* by the Law of *England*. I speak it with the greatest Reverence, that the Regal Power (which is the most Supreme in *England*) is oblig'd to the observance of the Laws; and it would be absurd at the same time to say, That any part of the Parliamentary Constitution is not limited by the known Laws of the Land, or the Laws and Customs of Parliament; and I doubt not but it will appear, a Writ of Error doth not lie, and never did lie before the Lords in such a Case: And so it comes at last to this point, What is the Law of *England*

(67)

England in this Case? And I will tell you my thoughts of it.

I HAVE read, and learn'd, and believe 'tis true, That matters of Parliament are to be determin'd by the Laws and Customs of Parliament; and I believe there is as good Authority for it, as there is for Writs of Error, or any thing else; and that this Law and Custom of Parliament is a principal part of the Law of *England*, and to be learn'd by Experience and Precedents, and I reckon that we must come to them at last. Now, Sir, let us see what Experience or Precedents we have to found this Jurisdiction of the House of Commons upon, for examining and determining matters concerning their own Elections. 'Tis true, we have no Journals extant before *E. 6's* time: And there is a Book they call *Seymour*, I think 'tis a Book of no great Authority; and if it be, there is but a small matter in it. I have read it over carefully myself more than once, and find only Titles of Bills depending, and when they were read; and all I learn'd from it, was, that sometimes Bills in those days were read four times. And, Sir, there is as little concerning Elections in Queen *Mary's* Reign; but in the beginning of Queen *Eli-*

(68)

Elizabeth, you have the matters of Elections plainly set down, and so they have been ever since. And from that time to this it hath been a standing Rule in the House of Commons in the beginning of every Parliament, and (as I take it) of every Session, to appoint a Committee to examine all matters concerning Elections. Now if the Right of Electors is not a matter concerning the Election, then I own my self under a mistake: But if that be a material part, and comprehended within the general Words; and if those Committees have from time to time proceeded to examine the Right of Electors, and this House hath proceeded from time to time to give Judgment in such Cases, sometimes according to general Qualifications settled and adjusted in the House, and very frequently upon examining and considering the Rights of particular Voters, then I think we have as good Authority for the Jurisdiction of this House in the matter of these Elections, as can be had for any thing whatsoever.

I DO say in this Case, we ought to take our Ground and Foundation upon the Right which the Commons of *England* have, and ever had, by the Law and

(69)

and Customs of Parliament, to be exercis'd by the Representatives of their own chusing; which Right is grounded upon manifold Precedents and constant Usage. For if we have a Power to hear and determine the Right of the Electors, and to punish Officers for abridging them of their Right, and give Satisfaction to the Party, all which most evidently appears not only in your Journals, but by a continu'd and uninterrupted Practice, time out of mind; then I think we need look no further.

I DO say, that from time to time there has been never a Session of Parliament but this Power has been exercis'd; and in your Committees they have often come to Resolutions to determine the Right of all Electors, and frequently of particular Electors; and for that purpose only they have examin'd, whether Persons had Burgage, Tenures, or have paid Scot and Lot, or have been Freemen, and other Circumstances necessary for the Information of the Committees; and as matters have appear'd, they have judg'd them qualify'd or unqualify'd: And where the Votes of Persons having Right have been offer'd, tho' refus'd at the Election, the Committees have usually allow'd

F 3

low'd

low'd those Votes as if they had been given, and upon their Determination the House have agreed with the Committee very frequently, and sometimes have disagreed with the Committee, as the merits of the Cause have appear'd to the House. So that nothing is plainer, than that the House of Commons have from time to time exercis'd this Jurisdiction in all the parts of it; and sometimes Elections have been try'd at the Bar, and determin'd by the House upon such Trial.

THEN how comes this ACTION to be brought in *Westminster Hall*? I have consider'd that point, and take nothing to be plainer than this, That *Westminster Hall* never had a power to meddle with Elections, but where by some special ACT of Parliament you have given them Power. I know that there are some Opinions, that Elections have been try'd in Chancery, and in the House of Lords: But I can't find any thing of that Nature ever settled, tho some Attempts have formerly been made that way. I know that Witnesses have been carry'd up sometimes to the House of Lords Bar to be sworn, but the Trial of Elections, and of the Right of the Electors, hath always been in the House of Commons; so
that

that here would be no defect of Power or Justice, if no body else meddled in this matter.

THEN consider what ACTs have alter'd this Original Right: I think there are two that are most material to be consider'd; one is that of 23 of *H. 6. cap. 15*. What is the Importance of that? It takes notice that convenient remedy for the Party griev'd was not ordain'd in the former Statutes against Sheriffs, Mayors and Bailiffs offending; whereby one would infer, that the Parliament in those days did not think or know any thing of the Remedy now endeavour'd to be set up in *Westminster Hall* and the House of Lords. And this Statute provides, that if any Sheriffs do contrary to the Statutes about Elections, he shall incur the penalty of the former Statutes, *viz.* one hundred pounds to the King and a year's Imprisonment, and shall forfeit a hundred pounds more: To whom? To the Party that ought to have been return'd, and if he do not sue, there is an ACTION given for the same to any body else: And a Mayor or Bailiff for a false or undue Return, is to forfeit to the King forty pounds, and forty pounds to the Party that should be return'd; and if he do not
F 4 sue,

(72)

sue, then a popular Action is given for the last penalty : So it is plain by this Statute, no Action is given to the Voter who had his Remedy in the House of Commons. Your Ancestors were so careful of your Liberties, that they never trusted their Elections to all Persons; such as held in Villenage, all customary Tenants who held at the Will of their Lords, and might be influenc'd by them, and (as I take it) Tenants by Escuage, till Escuage was reduc'd to certainty, were excluded, and afterwards all Freeholders under forty Shillings a year: and when the Officers were by Law to admit some Votes, and reject others, they were to use the best of their Judgments, without being liable to multiplicity of Actions (unless in the Cases I have mention'd) but for their Defaults were always responsible to the House of Commons.

LET us consider then the Statute in King *William's* time, I think 'tis in the seventh year of his Reign: there the Statute takes notice of the Injury done to Gentlemen by double and false Returns, and thereby a double Return is made a false Return; and by that Statute 'tis provided, That if any returning Officer
return

(73)

return contrary to the last Determination of the House of Commons of the Right of Election, such Return is thereby adjudg'd to be a false Return and void.

THIS Statute of the seventh of King *William* admits the very Determination of the Right of Election to be in the House of Commons; it does not say the Determination of the Election, but of the Right of Election. I will endeavour to avoid repetition.

BUT how does this matter stand by the Law and Custom of Parliament, which is a most material part of the Law of *England*? The House of Commons have the Jurisdiction in these matters of their Elections, but by one or two Statutes the House of Commons have given power in one or two Cases to proceed in the manner therein prescrib'd; but none of the Cases allow'd by those Statutes, are like the Case of this Man at *Ailesbury*, for he is not a Person who has suffer'd because he was not duly return'd, nor the Person mention'd in 7^o *Willielmi*, nor is his Action founded upon any Statute; so that this Case is left out of the Statutes, and it must be determin'd according to the Law and Custom of Parliament.

AS

(74)

AS to the Case of Mr. *Nevill*, it never came to be determin'd in Parliament: We read it was put off to the Parliament because of the great weight of it; and the Judges were of Opinion, That it was a Matter too high for them. And in the Case of Mr. *Onslow*, where the Case of Mr. *Nevill* was cited, they positively said, It was a Matter of too great presumption for the Judges to meddle with it.

THEN how comes it to pass, If this Action might have been brought at Common Law; I say, how comes it to pass that this Action was never brought before? Certainly that is an Argument it never lay, for there must have been occasion for such an Action, if the Common Law would have maintain'd it. But the Judges, who knew best the Grounds and Reasons for this pretended Action, have refus'd meddling in this Matter, because it concern'd the Parliament, and the Parliament had not entrusted them with it.

AS to the Case of *Barnardiston* and *Soame* first adjudg'd in the King's Bench, the Reason was because it had been adjudg'd in Parliament; for Sir *Samuel Barnardiston* had a majority by near a hundred,

(75)

dred, and the House of Commons had try'd the Cause, and gave him his Right of Session in this House; so that one would have thought that he had liberty to have gone into *Westminster Hall*. But afterwards this Judgment was revers'd in the Exchequer; and Judg *Ellis* in his Argument, which is set down in *Polluxfen's Reports*, says plainly, That the Right of determining Elections belongs to the House of Commons, and the House of Commons have determin'd it for Sir *Samuel Barnardiston*, and for that reason you ought to affirm this Judgment.

THIS Matter was brought presently after the Revolution into the House of Lords; and when it came there, all but five or six Lords were for affirming the Reversal. Now, Sir, by reading the Reasons of these five or six Lords that dissented, we may easily infer what were the Reasons that induc'd the whole House to affirm the Reversal. Two Reasons were given: First, said they, because otherwise there will be a Defect of Justice. One may infer, if these five or six Lords were of Opinion that there would be a Defect of Justice, all the other

(76)

ther Lords were of Opinion there would be no Defect of Justice. The five or six Lords that dissented, said, That the Plaintiff ought to have this Action by the Common Law. Certainly if the other Lords had been of this Opinion, they would have maintain'd the Action; but they concluded no such Action did lie, because no such Action was given by the Common Law.

I TAKE this matter to be of infinite moment, and I think there is no Degree or State in this Realm, but what is bound by the known Laws of the Land; and if the Lords in Parliament and the Judges are limited by the Laws of the Land, so that they have no Jurisdiction in this Case, then I do not see how a Writ of Error can give them Jurisdiction.

SIR, I appeal to you, and all the Gentlemen here, Whether what hath been said on one side hath been at all answer'd by the other: If an Action of *Scandalum Magnatum* should be brought against a Member for what he has said in this House, no doubt but that Member would plead the Privilege of this House, and 'tis to be hop'd the Judges would allow it, and put the Plaintiff *sine die*. But not-

(77)

notwithstanding, a Writ of Error according to this Doctrine might be brought, and the Lords might give Judgment that this Action does lie, and then what would become of your liberty of Debate? This is an Instance worthy your Regard.

IT hath been told you, how the Lords have taken notice of the Privileges of this House in the Case of *Hollis* and *Elliot*, in the latter end of a Book put out by Sir *Harbottle Grimston*, call'd *Croke Car*. Let that be set in its true colours, and see whether any thing can be drawn from that Case to fortify the Judgment lately given in the House of Lords. There was a disorder in the House of Commons, and the Speaker was violently forc'd back into the Chair, and scandalous words against the King's Privy Council and Judges were utter'd by *Elliot*, *Hollis*, and others, and upon that a Prosecution was brought 5 *Car. primi* against those particular Gentlemen in *Westminster-Hall*, as well for the Words spoke in the House of Commons as for the Force, and Fines were set upon them. This matter after the Restoration of *Ch. 2.* was brought before the Lords at a Conference, and they took notice of the Privileges of this House, not to set them aside,

(78)

side, but to confirm them; and their Lordships declar'd the Judgment to be illegal, and against the Freedom and Privilege of Parliament, and desir'd the Lord *Hollis* to bring the Roll before them by Writ of Error; and so by Agreement the Judgment was revers'd, as being against the freedom of Speech in Parliament, allow'd by *Stromds* Act, which their Lordships acknowledg'd to be declaratory of the antient and necessary Rights and Privileges of Parliament. Their Lordships then would not let any matter appear upon Record to destroy the Commons Privileges, and I wonder how this Precedent comes to be cited to justify a Proceeding which tends directly to take away your Privileges.

I WISH with all my heart the House would have appointed some Persons to have searched Precedents, and I am sure they would have found an infinite number to be produc'd to have justify'd the Power of the House in this Case, how it hath been in their power time out of mind, how they have a power to punish Officers, and in some Instances they have given Damages.

I R E M E M B E R one in my time; Mr. *Tankred* caus'd a Person to be brought

(79)

brought hither, and he clear'd himself; and the House (as I remember) made an Order, That as he was the occasion of the Man's coming up, and had done him an Injury, he should make him Reparation, and he was forc'd to do it by paying him a Sum of Mony.

N O T that I would go so far as to say, That this House is a proper Court for imposing Fines: But if they are not a proper Jurisdiction for the business of their own Elections, I think they have no Jurisdiction at all. I will not say this House has a power to fine: I know we read something of that in your Journals, but I think those Fines came to nothing, because there was no Means to estreat them, or cause them to be levy'd; and so that matter has slept ever since, and I hope will for ever.

B U T not only your Freedom of Debate, but Right of Session in this House is concern'd in this Case: And if you have not a Power to determine matters of Elections to this House, I wonder how any Author comes to say this House has any Judicature at all; for if they have not a Jurisdiction to this, they have no Jurisdiction to any purpose whatsoever.

I F

(80)

IF this Point be settled, That this Power belongs to the House of Commons, the next Consideration will be how to attain it; and in this I hope Gentlemen will take such steps as are proper for them, and for those they represent; for we are sent here *ad tractandum*, &c. in the name of those we represent: and we have but a delegated Power, and can't without breach of Trust give up the Rights of the Commonalty. For my own part, I have taken an Oath to preserve the Privileges of the People that chose me, but without such an Oath should be of opinion that I cannot give up this Privilege which I am to execute on their behalfs; but I will use all the lawful and just methods I can to come at it, and I think you may do this without interfering with the House of Lords or the Judges. There is no doubt but the Judges in *Westminster-Hall* are bound to take notice judicially of your legal Proceedings here; and if you come to make a Declaration, "That the Power of hearing and determining all matters concerning Elections does belong to the House of Commons in Parliament, I doubt not but they will take notice of it as becomes them. And give me leave to say,

(81)

say, no body can help bringing this Action as this was done; for a Person may take out a Writ, and declare upon it, and carry it down to Trial without the privity or knowledg of any Court; and then when the Cause is try'd, the other side comes and moves in Arrest of Judgment, and the Court gives Sentence. But I wish the Defendant had demur'd, and then that would have put it as a Point of Law to the Judges; and if they had determin'd it judicially for you, I believe it would have gone no further. For it is one thing to determine it upon Demurrer, and another thing, when the Cause has been try'd and Damages given, to have the Court's Opinion *ex post facto*.

THE Judges determin'd the Action does not lie; but as matters stand now, perhaps in the like Cases there will be brought a Writ of Error before the Lords, and they will give such a Judgment as they have given now for ought I know. I should not think it proper to come to any Question now, by which you shall determine your Right, if you are not fully satisfied about it; but it ought to be consider'd farther. The Law and Custom of Parliament is to be found out by Experience and Precedents: But if you are satisfy'd,

G then

(82)

then I think the proper Question is,
 “ That by the Law and Custom of Par-
 “ liament, the hearing, examining and
 “ determining all matters concerning E-
 “ lection of Members to serve in the
 “ House of Commons, is to be by the
 “ same House. I think that is to be your
 Question, or to that effect.

THE Consequence will be, If this
 be part of the Law of *England*, as it
 plainly is, you may as well stand upon
 that Declaration as upon any new Law to
 be made by Parliament, if you could get
 it: But I believe you have no great rea-
 son to expect a new Law in this Case to
 pass in the House of Lords, Then what
 would you do? If you should try to get
 a new Law and fail, it will be constru’d
 that you had not this Power before, but
 endeavour’d to get it, and the House of
 Lords deny’d it you.

BUT ’tis plain and clear you have
 this Power already, and a sufficient ground
 to stand upon, and I doubt not but *West-*
minster-Hall will take notice of it, and
 the House of Lords too: If they do not
(here Mr. Lownds was interrupted by a
noise made by some few of the Members,
who said, What then? But he proceeded)
 I say, if they do not, it will be time
 enough

(83)

enough to confer with them afterwards.
 And give me leave, I am not afraid to
 say, if a private Man, much more the
 House of Commons have the Law of
England on their sides, let them be under-
 min’d ever so much, one way or other
 they will obtain their Right sooner or
 later. The Rights of the People of *Eng-*
land are safer in the Hands of their Re-
 presentatives than any other: if they do
 not like them, they can turn them out
 and chuse new ones; but they can’t do
 so in the case of the Lords.

I BEG pardon for my great pro-
 ximity; I take it to be of importance to
 avoid all Contests with the House of
 Lords, and with *Westminster-Hall*, and I
 think you may do it by proposing and
 adjusting a plain Declaration of your
 Right by the Law and Custom of Par-
 liament.

Mr. SOL. GENERAL. After what
 hath been said at large concerning the
 Law in this Case, especially since it hath
 receiv’d no Contradiction in any Instance
 whatsoever; I will avoid the Repetition
 of what has been already offer’d, and en-
 deavour to shorten your Debate, by bring-
 ing it something towards a Point.

G 2

IT

(84)

IT hath been said, That the Question now before you is, Whether Judgment being given in the Court of Queen's Bench, a Writ of Error does not lie in the House of Lords to reverse that Judgment? I cannot by any means agree that to be the Question.

BUT that which I take to be the proper Question before you is, Whether or no it be the sole Right of the Commons of *England* to determine their own Elections? If you are of that opinion, never let your Disease grow to such a head as to put you upon the necessity of complaining of a Judgment of the Lords, but rather check it in its Infancy.

IT may perhaps sound harsh, That a Man shall not be admitted to make use and have the benefit of the Law; and yet when that Thought is thoroughly digested, I believe no Gentleman in this House but will agree, That there may be many such Instances where you will not endure any Suit at Law. I can't give you any better Instances, than what have been mention'd to you by a learned Gentleman on the other side, who approves of this proceeding by Writ of Error; the Prosecution against Sir *William Williams* for publishing a Libel (as it was

(85)

was call'd) by Direction of this House, and an Action against the Serjeant for obeying your Commands. If such an Action should be brought against the Speaker or Serjeant, should we sit still here to see what they would do in the Courts below, and afterwards wait for the Event in the House of Lords by Writ of Error?

'TIS very true, these Judgments that are mention'd by that Gentleman continue still unrevers'd. As to that given against the Speaker, he mention'd it as a Precedent not fit to be follow'd; indeed 'tis a reproach to the House to mention it, since no Parliament hath revers'd it. As to the other Action against the Serjeant, he says Judgment was given against him, and that stands in full force; as I remember that Case, it went off upon the form of pleading.

BUT nothing of that kind being the Question now, I beg leave to state what this Action is that is now before us: For Gentlemen in the Country who have frequently met with Actions, prosecuted without Censure for matters relating to Elections, may perhaps be surpriz'd till they come to consider what the Point is. This is not an Action grounded upon any

G 3

Statute

Statute whatsoever. 'Tis agreed an Action may be maintain'd where a Statute gives a particular Remedy, but this is an Action founded upon the common Law. Whatever your Privileges are, if you will consent to an Act of Parliament to make other Persons Judges of those Privileges, so far as you consent, if they pursue the Power given them by Act of Parliament, there is no Wrong done you: But an Action brought at common Law is that which I think interferes with the inherent Right of this House.

WE have I think attain'd to one piece of Knowledg upon this Debate, That this was the first Action that was ever brought of this kind; and Gentlemen will not much wonder why this is brought now, when they consider what Endeavours have been us'd to make this House contemptible. I believe this may be thought the most probable method to attain that end.

I WOULD not repeat the Precedents that have been quoted, yet I can't but take notice of that of *Barnardiston* and *Soame*: Those Arguments that were made use of for this Judgment in that Case were rejected, and the Judgment of the Lords was then directly contrary. I should

should be very glad to hear how the Lords Judgment of Reversal in that Case and in this are reconcilable. The Commons at that time would scarce have suffer'd such an Attempt upon their Privileges, and I hope we shall be as careful and as zealous to preserve ours: We have as much Power as our Predecessors, we shall never suffer for want of Power, if we do not suffer for want of Will to exert it.

I EXPECT to hear of the great Authority of one learned Judg that differ'd from the rest; I have the utmost esteem for his Judgment, but am sorry to hear any Insinuation that those Judges who have given their Opinion otherwise are guilty of a breach of their Oaths. It hath been touch'd upon, That whenever any Question has been ask'd the Judges concerning the Privileges of the Lords, or the Privileges of the Commons, their Answer is recorded for the Instruction of all their Successors, and to the Honor of both Houses of Parliament, That it was a Matter above their Knowledg: The Law of Parliament is above the Judges of the Common Law, and is not to be subject to their Judgment; 'tis *alieni fori*.

AND, Sir, as I have been inform'd, this was the Answer given in the House of Lords by one of the present Judges, and by what I have heard it was well he escap'd their Censure; shewing too much Respect to this House-gave very great Offence.

I BEG Gentlemen to consider (I shall not enter into Particulars that have been mention'd) Whether any thing of this kind would not make you despicable to the lowest degree in the World, and expose Electors to such Mischiefs that none could endure? Upon every Election that comes before you, 'tis impossible to judg the Right of Election, but by the Right of the Electors. If you will endure any Person, after you have said he has no Right, to go into *Westminster Hall*, and bring an Action in the Courts there, a Jury may find a Verdict, That the House of Commons are mistaken, and that this Person hath a Right, and Judgment shall be given accordingly. Will not this Proceeding, that very moment, submit your Resolutions to the Examination and Censure of the inferiour Courts? May not they say, They vote for one another, we have detected them all? That they are a parcel of People
pack'd

pack'd together, and not one of them elected as they should be?

WHAT Condition the Magistrate will be in, hath been mention'd already; when a multitude hath a Right, and every body may bring his Action, Can any Magistrate (a Constable as in this Case) bear the Expences of a hundred or a thousand Actions at Law? There will not be wanting some to prosecute a Magistrate with all the Violence possible.

THO I can by no means agree, That this Matter is to be determin'd according to the common Rules and Methods of Law, but according to the Course of Parliament; yet I shall compare it with some other Cases in the Law.

THAT which makes these Persons Hardships the greater, is, These Magistrates are not People that officiously interpose to take a Poll at Elections, and make a Return; but these are Men, who, by the duty of their Office, are oblig'd to do it; and if they do not execute their Office, you punish them; and if they do execute their Office, and give you Satisfaction, yet if you let this be examin'd in another place, after you have said they have done well, they may be punish'd for doing so.

(90)

I WILL compare this with one or two common Cases that have not been mention'd: Suppose a Person should exhibite an Indictment against another maliciously, he does this wilfully, and an Action does lie against him; but if a Grand Juryman find a Bill against a Man, the Law will not admit an Averment that it was done maliciously, because he was oblig'd by his Office to do it: So it is in the Case of a Witness, because he is brought in by the Process of the Court: So it is in the Case of Judges. And is it not equally the Duty of a Magistrate to determine upon the Poll, and afterwards to make a Return? And is not that examinable before you?

A GREAT deal might be said further upon this, but I hope 'tis pretty unnecessary: And that no body can have any doubt but that our Privileges are very much concern'd in this Question, and what the Consequences would be; therefore I would humbly propose for the Question what another Gentleman hath hinted at, which may reduce this Debate to a particular Point.

WE certainly have such a thing as the Law and Custom of Parliament, and that is very well known, and upon that
foot

(91)

foot I desire you would put a Question to this effect.

“ THAT the sole Right of examining and determining all Matters relating to the Election of Members to serve in Parliament, except in such Cases as are otherwise provided for by Act of Parliament; is in the House of Commons; and that neither the Qualification of the Electors, or the Right of the Persons elected, is elsewhere cognizable or determinable.

MEMBERS. The Question, the Question.

Mr. SMITH. Sir, I speak only to your Order, That Gentlemen would not interrupt one another by calling for the Question, but give diligent attention to the Debate, for this is a Matter of great Consequence.

THEN Mr. FREEMAN (in the Chair) stated a Question on his Paper to the Effect propos'd by Mr. SOLLICITOR, and read the same to the Committee.

Sir CHRIS. MUSGRAVE. I am very willing to hear any Gentleman
that

(92)

that will stand up and speak, and you have had a very good hint given you by an honourable Person, that this is a business of great moment; and I hope we shall continue to do as we have done, that is, to hear Gentlemen patiently; and that we may not be guilty of any Disorder, I move you for Candles to be brought in.

THEN the Question was put, and carry'd for Candles.

AND they were brought in accordingly.

Mr. DORMER. Mr. *Freeman*, you have now a Question upon your Paper, but that which I take to be the Question, is, "Whether a Freeholder or a Freeman, who hath a Right to give his Vote for his Representatives in Parliament, may arbitrarily and maliciously be depriv'd of that Privilege, without any Redress in any Court whatsoever."

THIS I take to be the Case before you; 'tis said to be of great Consequence, and I do take it to be of as great Consequence as any thing that ever came before either House; and I don't look upon it

(93)

it only to concern the Jurisdiction of the Lords and Commons, but to affect every part of the Constitution, and the Queen the Head thereof in the highest Degree: for it comes to this, If the Lords have not a Right to determine in this Matter, which by Writ of Error is regularly brought before them, we shall be turn'd into a state of Villenage, and the People will be depriv'd of chusing their own Representatives without Relief, and shall not have Relief by her Majesty in the Court of Queen's Bench, nor before her in the Court of Parliament, where, in consideration of Law, she is always present, and where by our Law is the last Appeal; and there will be a Failure and an Interruption of Justice, and our Constitution, in relation to our selves, will be so far chang'd, that 'twill be impossible there should be any right Representatives of the People: For 'twill not be the People then that will chuse, but the Officer may arbitrarily refuse and return whom he thinks fit, and the particular Person will be without Remedy. For whatever Gentlemen apprehend, if the Right of Return be not controverted, which way can any particular Man bring his Case before you? And what Remedy

(94)

dy shall he have if not by Action? I will not say there has not (but I will turn the Argument, and put it upon them to shew there has) but I believe there never was any particular application to the Committee of Privileges, where the Injury has been done to a particular Man, which is the present Case: and this Matter is found by a Jury that was struck, and not one Man of the Jury but of Quality, and approv'd on both sides: And I think, tho it never came before the Parliament, nor the Committee of Privileges, they might consider of a particular Injury.

AND as for the Notion that hath been taken up, That where the House of Commons have a Jurisdiction, there the Party is in all Cases without Remedy in any other Court: Sure that is not according to Truth; for in the Case of a false Return there is a publick Injury, that does not hinder the Party from obtaining Satisfaction as to his particular Injury; and if no Action lies, there can be no Satisfaction; for this House hath not awarded Damages in any Case, notwithstanding the Case cited: for that was only Costs for the Man's Trouble in coming up to be examin'd before this House. And if they should award Damages,
there

(95)

there is no way of levying those Damages; What Writ can we issue out? And if this Person be without Remedy at Law, he must sit down without any Redress whatsoever.

THERE may be a multitude of Cases where this House hath a Jurisdiction as far as concerns the Publick and themselves, and the Party shall have his Action also.

IF I receive a Blow in this House, 'tis a Violation of the Privilege of this House, and this House can take Jurisdiction of it, and censure the Person that hath done the Injury; but will any Man say, That an Action of Battery will not lie at the Common Law in that Case?

THERE was the Case of Sir *Thomas Clarges*: At the time of his Election there was one *Roe* spoke words to his Prejudice; he might certainly have complain'd to this House of it (you had an Instance, I think, last Session of one that complain'd for some such Injury against the Lord Bishop of *Worcester*, and the House took it into consideration, which Sir *Thomas Clarges* might have done) but he brought his Action, and recover'd considerable Damages; and afterwards a Writ of Error was brought
in

in the King's Bench, and Judgment was affirm'd.

T H E R E is a Case not within any provision of your Law, and that is, where a Sheriff made a Return; and he deliver'd this to a private Messenger to bring up to the Crown Office. The Messenger by the way thought fit to vitiate the Return, and make another Return than what he receiv'd from the Sheriff: For this an Action was brought, and he recover'd at Law against this Messenger for the private Damage he had done him. Certainly otherwise the Law would be defective.

I N another Case, the Sheriff adjourn'd, in prejudice to a Candidate, to a Corn Field; an Action was brought against this Sheriff at Law for the Damages he had done this Gentleman, and it was maintain'd; and I dare say more Cases may be put: which shews that you having a Jurisdiction as to what concerns the Publick, does not exclude the Party, but he may have an Action for his private Injury.

A G R E A T many Positions I have heard, which I take not to be true, particularly this, " That there is no Remedy at Law, but in Cases provided for " by

" by the Statutes: That is not so, these Statutes imply the contrary. The first says, Whereas there was not a sufficient Remedy, therefore that gives a more compleat Remedy, and so the Judges declar'd in the Case of *Barnardiston* and *Soame*.

S I R, They have told us of the Cases of *Barnardiston* and *Soame*, and of *Nevill* and *Strode*; with humble submission to you, those Cases go so far as to prove the Jurisdiction of the Lords and the inferior Courts: That of *Barnardiston* and *Soame* was an Action try'd before the Court of King's Bench, and a Set of as learned Judges as ever were before or since, and three of them were of Opinion for the Action, and my Lord Chief Justice *Hale* was one of them; who the Term before he surrendred his Character, did thus express himself: " He gave Thanks to " God that he had spar'd him to that " time, that he was able to keep his " Cushion, and declare his Conscience " in that Place. But afterwards it had its fate, a Writ of Error was brought in the Exchequer Chamber; Mr. Justice *Levins* that reports it, says it appears, That those who argu'd against the Judgment in the King's Bench were made
H Judges,

(98)

Judges, and they themselves afterwards determin'd the Case. And every body knows how valuable it was at that time, to know the price of an House of Commons and an *English* Parliament. Three Judges were then made in the Exchequer, and I think two in the Common Pleas. Afterwards it came into the House of Lords, and there the Reversal in the Exchequer was affirm'd, for Reasons different to what are urg'd now, and I believe for several good Reasons. The Sheriff in that Case had made a double Return, and the Sheriff might do it for his own indemnity, for it was no more than finding a special Verdict: and therefore the Saying *falso & malitiose* being put to a thing that was in it self right, it would not alter the nature of the thing. Another Reason they went upon was, they said this double Return was a void Return, and for that Reason the Action did not lie; and upon these Reasons depended that Judgment. That Gentleman who said that only four or five Lords dissented, is under a great mistake; four or five Lords only I believe entred their Dissent, but there was a great number, and near an equality against that Judgment; and divers Lords, now in that House, were against

(99)

gainst that Judgment, that did not enter their Dissent.

THEN, Sir, there is the Case of *Nevill* and *Strode*; and that was first a Judgment in the Common Pleas, and when it had taken its Progress in *Westminster Hall*, it came before the House of Lords; and the Lords return'd it back again to *Westminster Hall*, and order'd all the Judges of *England* to deliver their Opinion in it. That was founded upon an Ordinance of those times, *Berkshire* was to send five Knights, and *Nevill* was one of them that were elected, but not return'd: there they said, in that Case that Ordinance was intirely new, and that Case did not recommend it self by the known Laws of the Land, and for that reason they would not give Judgment, for Wages could not be levied for five such Knights. And when afterwards they were to give Judgment, the right Constitution had recover'd it self.

NOW as to the Lords Right to receive a Writ of Error in this Case: You have address'd to them that they would receive a Writ of Error at a time when your Privileges were invaded. That was the Case of my Lord *Hollis*, who with others was inform'd against,

H 2

5 Car.

(100)

5 *Car.* for having spoke words in this House that did affect the Government: And he pleaded to the Jurisdiction of the Court (Is there any such thing here? No, they have submitted to it) and the Court over-rul'd their Plea to the Jurisdiction, and that Judgment continu'd in force (as some others which have been since do now, which it were well if they were revers'd) till this House took notice of it; and in 1667. they desir'd a Conference with the House of Lords. The Chairman was my Lord Chief Justice *Vaughan*, and this House there complain'd how they were griev'd by that Judgment: and after repeated Conferences, both Houses did consent to this Expedient, That my Lord *Hollis* being the only Survivor, should be desir'd to bring a Writ of Error in the House of Lords, and he did so, and the Lords in that Case did you Justice, and revers'd the Judgment.

AS to your passing this Vote, what it will signify I can't tell. What signify'd a Vote you pass'd before about the year eighty, That the putting the Laws in execution against Protestant Dissenters, was an Injury to the Publick, and a Subversion to the Government; and that

(101)

that those that put them in execution, should be looked upon as Enemies to the King and Kingdom? The Consequence was, That all the Laws against Popery were put in execution against Protestants more than they were before. The Judges in Westminster-Hall said, this Vote had not passed into a Law, and they could not take notice of it. I hope we shall do nothing that will lessen our selves, nor any thing but what will be effectual for the Ends for which 'tis proposed.

Sir JOS. JEKYLL. Mr. *Freeman*, I consider you have been a long time in this Debate, and a great deal of it has been spent, either in Suggestions contrary to what appears before you, or else in Questions altogether improper for the Consideration of the Committee; and therefore it is necessary to look back to that which gave occasion to the present Dispute.

THE Committee hath a Copy of the Proceedings of this Action referred to them, but it hath not been read; and I am confident if it had, and had been attended to by Gentlemen, they would scarce have said that the Lords in the

H 3

Judg-

(102)

Judgment they gave, did any thing in opposition to your Judgment, or in derogation of your Privileges.

BEFORE the Action was brought, there was a Resolution of the House of Commons, That the Right of Election for the Borough of *Ailesbury* was in the Inhabitants not receiving Alms. 'Tis from that Resolution the Plaintiff hath taken his Rise, and has brought his Action; for by this Declaration he makes his Case to be, that he was an Inhabitant of that Borough not receiving Alms; and that the Constables falsly and maliciously obstructed and hindred him from giving his Vote at the Election there. The Constables plead not Guilty, and the Matter goes to a Jury, and they find for the Plaintiff, and give him 5 *l.* Damages: Which is in effect a finding that the Plaintiff was an Inhabitant not receiving Alms, and that he was obstructed and hindred from voting by those Constables, and that was done *falso & malitiosè*, and to his damage. And this may serve to demonstrate, that the Proceeding at Law has not been in opposition but in conformity to your Judgment.

NOW let us consider, whether the bringing of this Action is a Violation of
your

(103)

your Privileges: A great many things have been said not proper for you to deliberate upon; one, that this will encourage a multitude of Suits; another, that this Action was never brought before, and several other Matters which go to the Question, whether the Action will lie. Now that is not the Question here; but the true and only Question before you is, Whether this Action was brought in Violation of your Privileges; for if there be no breach of Privilege in it, I know of no Authority we have to stop the Course of legal Proceedings.

AND as to that, but one thing (as I conceive) has been said materially, which is this, That this is a Parliamentary Case, and appertains to your Jurisdiction; and the Judges of the Common Law are not Judges of the Law of Parliament, and therefore they ought not to have given the Plaintiff his Judgment (and it must be admitted the Lords ought not to have given any Judgment, but what the Judges ought to have given.) To maintain this it hath been said, and undoubtedly it is true, that this House hath a Right to judg of Elections; and it is as true, that in order to come to that Determination, it is incidently

H 4

(104)

dently necessary that the House do judge of the Right of the Electors; and it has been said (but that I deny) that the Right of the Electors is by the Law of Parliament.

I TAKE the Right of every Elector in *England* to accrue to him by the Common Law, for he is under one or other of these Qualifications: Either he is a Freeholder, and then he has a Right to vote for Knights of the Shire; or he has a Right by Charter, or a Right by Prescription; which two last Rights take in the Right of Voting in all Cities and Boroughs. Now I would be glad to know whether the Right of a Freeholder is not by the Common Law? Is it not an Estate, with all its Privileges and Services, created by that Law? Whether a Right by Charter is not by the Common Law? Is it not that Law that enables the Crown to grant Charters, and qualifies that Power? Whether a Right by Prescription is not by the Common Law? Is not Prescription Common Usage? and is the Common Law any thing but Common Usage? So that the Right of every Elector being by the Common Law, the Judgment of that Right is primarily and originally in the Courts

(105)

Courts of Law. The Freeholders Right of Voting, is of the Essence of his Freehold; and you may as well take away his Freehold, as take away his Right to vote, which he has by virtue of that Freehold, and then tell him he must come to the House of Commons to recover it. And the same may be said of those several Interests which give a Right of voting in Cities and Boroughs. And thus I hope I have made it out, that a Right of Voting is not a Parliamentary Right, but an ordinary legal one, and the Common Law. Judges have the Judgment of it originally; and it is incidently only that the House has a Power of judging of it, and that too according to the Rules of the Common Law: which is a further demonstration that it is a Common-Law Right; for it would be absurd to say, a Man has a Right by one Law, which is to be judged by the Rules of another.

THEN what Course has the Plaintiff taken? He has a Right by the Common Law to chuse Burgesses for *Ailesbury*: That Right has been invaded, and he has gone to the Common Law for redress, and from no other Power could he have it; for this House or the Committee

(106)

mittee of Elections can't give a Remedy in this Case, that is, cannot make the Person injured reparation for the Damage done him, by obstructing him in the exercise of his Privilege: and that is the thing the learned Gentlemen who have spoke in this Debate have passed by; and these are the material Points, that this is a Right at Common Law, and this House cannot apply a Remedy.

BUT it has been said that the House will examine, not only on behalf of the elected Person, but of the Electors. 'Tis true, but in order to what? To see whether you have a right Member here, and for no other end; for I challenge any Gentleman to shew me one Instance of a single Man who came hither and complained that he had a Right to vote, and was hindred from voting, and made that solely to be the Offence of the Officer. Did the House, or would the House ever receive such a Complaint? And yet he may go with that Complaint to the Law; for whether the Person he would vote for be return'd or not, the Injury is the hindring him from enjoying his Privilege: And it cannot be made an Injury, or not an Injury by Matter *ex post facto*, that is, by the Officer's returning or not return-

(107)

returning the Candidates. And tho the Officer should repent him, and not carry his Injustice so far as to make a false Return, yet it is of use that the Law will redress the Wrong done to the Voter, and thereby perhaps stop the first Steps or Approaches towards a false Return.

BUT if I should admit the House would receive the single Petition of a Voter who was refused, and when the Person he would have voted for was returned, yet the House cannot make him Reparation; all we can do is to censure the Officer, but we can't make the Person complaining whole in point of Damages. Indeed it has been said the House can give Damages, and there was an Instance given of Mr. *Tankred*, who complained against a Clergyman, and the House ordered Mr. *Tankred* to pay him Costs: So was Sir *Geo. Meggot* ordered to pay Costs to the Member he causelessly petitioned against, and the like is provided for at the beginning of every Session. But are these Instances of any Petitioner repaired in Damages by this House? No, these are Instances against Petitioners, not in favour of them; nor are Damages given in those Cases, but Costs;

(108)

Costs: all that is provided for is, that Persons frivolously complained against shall not be out of Pocket. And by a Mean you have a Jurisdiction in point of Expences, but not in point of Damages, for you may order the Wrong-doer into Custody, and make his payment of Costs to the injured Person the price of his Liberty; but there is no direct Remedy even for Costs.

BUT it is apprehended here may be a clashing of Jurisdictions, and if the Party should be allowed to go to Law, the Courts of Law may be of one Opinion, and this House of another. This is a Supposition the Law does not allow of, for this is to suppose Courts of Justice will not do Right. It will be allowed to me your Determination will always be Just, and other Courts the Law supposes will do Right too, and then they will determine as you do; and your Determination and that of the Law, as I said before, has been the same in this Case. But then as the Supposition of Law is that all Courts will do Right, so human Frailty supposes there may be an Error in Judgment: And yet Courts must have Jurisdiction, or else there can be no Administration of Justice among Men, since there

(109)

there is no Judicature short of another World that can pretend to an unerring Judgment.

AND now I will show you where several Courts have different Jurisdictions of the same Fact, and the Law allows them, notwithstanding there may be diversity of Judgments. The Court of Common Pleas may punish a Person for assaulting an Officer in the execution of their Process, as a contempt to that Court; but at the same time for the same Matter the Offender may be punished in the King's Bench as it is a Breach of the Publick Peace; and the Officer may if he pleases bring his Action in the Court of Exchequer for the Damage done him.

I WOULD observe a little upon the Cases cited, and that as short as possible. The first is that of *Nevill and Strode*; I have looked into the Journal of 1659. and the only Book of our Law where that Case is reported, and that is *Siderfin's* second Reports; and that was upon Writs issued out by *Cromwell*, whereby he appointed Counties to choose differently, some three, some four, some five Members: Mr. *Nevil*, who was a Member of the Long Parliament, stood for one of the five Knights for the County of *Berks*;

(110)

Berks; they chose him, but he was not return'd, and therefore he brought his Action in the Common Pleas: that Action depended there some time, and thereupon the Justices brought the Record into this House for difficulty, and desir'd the House would come to a Determination in it (and by the way there was no House of Lords in being at that time; for it was in the time of the Long Parliament, who had usurped the whole Legislative as well as the Executive Power) and no wonder the Judges complimented them with the Determination of that Question, since they were their Creatures, and had their Commissions from them. Well, but the Record being brought in, the House appointed a day to consider of the matter, and when they saw the Plaintiff had proceeded according to the known methods of Law, they gave no Judgment in it, but sent it back to *Westminster-Hall*, and there it was again argued, but never adjudg'd. And that there was no Judgment given is easy to account for, if the Judges thought such an Action would lie; for at that time the Long Parliament was upon the point of bringing in the King, and restoring the Laws: And if they had given Judgment for

(111)

for the Plaintiff, they had given a Sanction to the highest Usurpation of the Protector, and all his wild Fancies of changing the Constitution at his Will and Pleasure. And indeed the Plaintiff had disaffirm'd the Authority of the Long Parliament, which he had with great Zeal asserted, and of which he was himself a Member. But if the Judges had thought such an Action would not lie, they might without any scruple have given Judgment for the Defendant. And this seems to me a strong Authority that *Westminster-Hall* thought such an Action would lie: and it is very remarkable, that when that House of Commons (as they call'd themselves) had usurp'd the exorbitant Power I mention'd before, they did not proceed to assume the Jurisdiction of the Common Law.

THE next Case is that of *Soame* and *Barnardiston*, in which *Westminster-Hall* was divided: my Lord *Hale* was of one opinion, and my Lord *North* of another, and there were six and six of a side, and the matter came by Writ of Error into the House of Lords, and a Gentleman said 800*l.* was worth contending for. But I am apt to think *Sir Samuel Barnardiston* did not hope to recover

(112)

recover one farthing of the Mony, for *Soame* was dead, and I believe without Assets: for in all the Proceedings in the House of Lords none appear'd on the behalf of his Widow, she had no Counsel there; but it was argued against Sir *Samuel Barnardiston* by Mr. *Mountague*, the late Lord Chief Baron, to vindicate the Proceedings of the Exchequer Chamber, and Judgment was given as hath been said in the House of Lords.

BUT what happen'd next? The Commons were so uneasy under that Judgment, and the Injury which might be done to the People from whom they deriv'd their Authority, by double or false Returns, that the next thing was the Interposition of the Legislature to apply a Remedy, and the Lords came in to it, tho it was a great discredit to the Reversal of that Judgment; for the Act of the 7th of the late King declares false Returns to be against Law, and provides an Action shall lie where an Officer makes a Return falsely and maliciously; they never thought it an insnaring thing, but knew Malice might be try'd in that as well as in many other Cases: And I wonder to hear *falso & malitiose* should be so much words of course. Men are
try'd

(113)

try'd for their Lives every day, where Malice is the main Point in Issue. If a Man does without any Provocation kill another, the Law intends Malice, and that is Murder: So here, if an Officer refuseth the Vote of one, who hath a clear and indisputable Right, the Law presumes it done maliciously; but if the Officer refuses a Man's Vote, and there is any probable cause or colour to do it, or his Right of voting is doubtful, the Judge will tell the Jury they ought to find for the Defendant; and therefore it's only in a plain and glaring Case that a Man can prevail in such an Action. And this by the way is an Answer to that Objection, that such Actions as these will bring all your Elections to be determin'd by the Lords: Since an Officer can never be found guilty by a Jury upon this Action where there is a Controversy or Dispute, much less can the Lords try or determine any thing of the Right.

T H E R E is another Case, and that is the Case of Mr. *Onslow* against the Bayliff of *Hastemere*; that Judgment was against the Action, and was given by my Lord Chief Justice *North*, and the rest of the Judges of the Common Pleas, upon the Authority of the Judgment in the
I Case

Cafe of *Soame* and *Barnardiston* in the Exchequer Chamber ; and no wonder they would not give a Judgment contrary to what some of themselves had given in another place.

SIR, this Question hath been before this House not long since, Whether a Candidate should be hindred from proceeding upon an ACTION at Law before he had come to this House for their Determination whether he was chosen or no? And this House upon a solemn Debate adjudg'd that he might go to Law before he had come hither ; and I desire your Clerk may read a word or two in your Journal, 'Tis Monday 13^o March 98.

Clerk reads. " The House being acquainted, that *John Buller* Esq; who was Candidate at the Election for choice of Members to serve in this present Parliament for the Borough of *Lescard* in the County of *Cornwal*, hath brought an Action upon the Statute made in the 7th year of his Majesty's Reign, against *Mr. Richard Roberts* Mayor of the said Borough for the Sum of 500*l.* for making a false Return of *William Bridges* Esq; altho the said *Mr. Buller* never petition'd against, or question'd
" the

" the said Return in this House, and a Debate arising thereupon, resolved that the Debate be adjourn'd till Wednesday Morning next.

Sir JOS. JEKYLL. Now I desire you to look upon Wednesday the 15th day of *March*, when that Debate was resumed.

Clerk reads. This was the 15th of *March*. " The House resumed the adjourn'd Debate relating to *Mr. Buller* ; and after a long Debate the same fell without any thing done thereupon.

MEMBERS. Well, what then?

Sir JOS. JEKYLL. I take this to be a plain Authority that will govern the Cafe before you ; for if it was not reasonable to restrain a Man from proceeding at Law upon the Statute before he had come hither for a Determination, when it was to controvert the very Election, which was undoubtedly proper for the Judicature of the House, much less will it be reasonable to restrain a Proceeding at Law, which is not to controvert the Election, and upon a Cafe not proper for the Judicature of the House ; and the House doing nothing upon that

(116)

Complaint, is a Declaration that the House could not justly do any thing upon it: For if a Man makes a Motion in any other Court, and the Court declares they will do nothing upon it, I desire to know whether that be not a Declaration of that Court, That the Motion is unreasonable, and it is all the Judgment the Court gives in such a Case. And I had the honour to sit in Parliament when that Motion was made, and very much pressed; and some that have spoke in this Debate were then of an Opinion contrary to what they are now, and were not for stopping the course of Law.

S I R, I apprehend the Action is well founded in this Case; this Man had a Right to vote, he had an Injury done him in respect to that Right, he hath sought to be repair'd in a proper way, and he could not be repair'd in any other: I am for doing nothing to his Prejudice, and therefore am against your Question.

Mr. HARLEY (Speaker.) Sir, I shall trouble you but with a few words after this long Debate: And rather to understand the Terms you are debating on, than to think any thing I can offer to

(117)

to be of any great weight. But I take the Question not to be as some have represented it, but to be singly this in general, Whether an Action does lie at Common Law in the Case before you.

T H E R E is no need to mention the particular Circumstances of *Ailesbury* Election, for if that was the single Case you might have taken another method. I will not insist that in this very Election a great number of those Inhabitants petition'd this House upon this Point, That their Votes were deny'd: And after this Petition had lain in the House some time, it was withdrawn by their own Consent; I do not trouble myself whether this particular Man was amongst them, nor will I trouble you with what may reasonably be urg'd from this, but leave that to other Gentlemen.

B U T I desire we may understand the Terms upon which we are debating; we have had Maxims of the Common Law, and the Rights of Parliament mention'd. The Common Law is the common Usage of the Realm; I take the Laws of Parliament to be the common Law of the Land, and the Usage of

(118)

Parliament to be the Law of Parliament; and the Law of Parliament is to be known by Usage, as the Common Law is.

THEN how shall we know whether this belongs to the Common Law? If there be any other way, I should be glad to be inform'd; but I think there is no other way of knowing, whether an Action will lie at Common Law, but by Reason or Usage, and Precedents. Now if by Reason, it is to be made out by what necessarily attends this Case, or some other Cases like it. And pray what do they offer that this lies at Common Law? Do they give you any Precedent? What Reason do they offer? I suppose that which was read last is no Precedent in this Case, for that was an Action upon the Statute; or that the Courts below take upon them a Legislature instead of a Judicature, which must be if there be no Rule for them to go by. I take the Question you have read to consist of two parts; one asserting your own Right, the other is negative, That no other Courts have any Right but in Cases particularly directed by the Statute.

I

(119)

I CAN'T think this of Electors and Elected a Privilege, I take it to be a Service both in the Electors and Elected; and formerly it was reckon'd an hard Service, I know not how they find it now. 'Tis a Service, I take it, because all who are Electors are liable to pay the Wages, and I take that to be a Burden: and not only from that, but the very Towns that were Boroughs, and elected, when one paid Fifteenths, the other paid Tenths; so that I take it to be a Service: and if a Franchise, see the Consequence, it will be in the power of the Crown to create as many Boroughs as they please.

THEN consider, this House is in possession of this Power, as of Right; and I do not find the Common Law in possession of any such Right. Then what do they offer to bring it in, but that there would be some failure of Justice? Now I took it, That the Judges are *Jus dicere*, and not *Jus dare*: If any thing want a Provision to be made for it, it must be done by the Legislative Power; and if the Electors want it, Provision must be made for them that they shall have an Action. And those Gentlemen, who think that necessary, may
bring

I 4

bring in a Bill to that purpose, and take the sense of the Legislature upon it in a regular way.

THE Question before you now is, Whether the Examination, Hearing and Determination of all Matters relating to Elections, where some Statutes have not particularly directed otherwise, does not belong to this House? There was a famous Case of *Goodwin*, that was a Case contested by the Crown, and the Crown pretended to send out another Writ. And there they say, That as to Members of Parliament, their Attendance, &c. they are the sole Judg. And this they lay before King *James* in the first year of his Reign, and claim it as their sole Right, and the King's second Writ was determin'd to be void.

BUT a Gentleman makes an Argument, If one should strike another in the House, what Remedy? Why there is an Act made for that Case in *Henry 6th's* time.

I THINK now the Matter will turn upon this: Say they, 'tis true you can try Elections, and who are the Electors; but here is one thing remains, that is, to give Satisfaction. Have they any Precedents for this? I believe the Precedents

cedents are without; they have a Power for what is necessary, nothing less than a Law can give the other.

GENTLEMEN say, there may be a difference in Judgment in Courts below, but they are subordinate, and there lies an Appeal: But in this Case all Courts will be co-ordinate with you; and therefore if that be a Grievance, nay a Solacism in Government, prevent it now.

'TIS said, What will your Vote do? That is pretty odd: if they would have an Act of Parliament, your Vote must be the Ground of it.

YOU are Judges of the whole; but say some, you can't give the pecuniary Satisfaction. Well, suppose so, but you can restore all to their Right. But let me say this, If you would not set up a co-ordinate Power with you in matters of Elections, and which will be too hard for you at last, I hope it will be a warning to you to take more care in the judging of your Elections for the time to come.

IF the Judgment belongs to you, and you are possess'd of it for so long a tract of time that no body can offer any thing against it since *H. 4th's* time; till Gentlemen shew me some reason why the com-

(122)

mon Law should lay hold of it, I must be of Opinion that it does belong to you, and no Court can take Cognizance of it but you, except where'tis otherwise provided for by Statute.

Sir THOMAS MERES. Sir, I shall not enter into a Discourse, and repeat what I remember of former times. I will say but this, let others answer it better if they can: As to the words *falso & malitiose*, it seems one Chief Justice said, they were words of Importance, and must be prov'd; another Chief Justice said, they were only words of Course, that is, like Pepper and Vinegar to a slice of roast Beef; so there is one Chief Justice, that spoke last but one, against another.

AS to making Satisfaction, I confess I like very well what that Gentleman said on the right hand, If there was any Precedent for it, I agree it would do very well that this House could give Damages, and we will make the best of it; but most of these things have Spite in them, and these Actions are brought with Spite. Now this we can do, we can punish the Officer, and there is Revenge in that, and that is a sweet bit and some Satisf-

(123)

Satisfaction: What further occurs to me, hath been spoken by other Gentlemen better than I can do it; and I shall not repeat, it being so late in the night.

Mr. COWPER. I perfectly agree with that honourable and learned Gentleman that spoke last but one in this Debate, in what he laid down as an undoubted Maxim or Groundwork for the Opinion he deliver'd, That the Law and Custom of Parliament is part of the Law of the Land, and as such ought to be taken notice of by all Persons. And I think 'tis the exact Standard by which we ought to walk; and the Deduction my poor Judgment is apt to make from that Principle is this, That we ought not out of Zeal to our own Jurisdiction, to go one step farther than that known Law and Custom of Parliament will warrant us to do.

NOW I take it upon this Debate, That this Law and Custom of Parliament doth not give the Subject, who is injur'd by his Vote being deny'd him, any Satisfaction or Recompence for that Damage: And am the rather confirm'd in that Opinion, because that very learned and

(124)

and honourable Gentleman, who is particularly knowing in the Laws and Precedents of Parliament, has not pleas'd to represent to you any one Precedent, where the Subject so injur'd hath complain'd to the Parliament, and had Redress in that Particular; but all Petitions have been either from the Candidates or Electors, complaining of an undue Return. So that it cannot be shew'd, That it hath been the Law and Custom of Parliament to give that Remedy or Relief in Parliament, which is the subject Matter, or end of Action now in question.

I GO likewise along with him, and every Gentleman that hath spoke it in this Debate, That by the Law and Custom of Parliament, none but your selves can determine who are rightly elected, in order to displace or place them here; and incident to that end, you have the sole Right of considering the Right of the Electors, I say so far forth, as it is necessarily incident to determine who shall, and who shall not sit here; and no other Court can consider the Right of the Electors, in order to determine the Right of any to sit in this Place, further than you by some Act of Parliament have given them leave. But this Matter having

(125)

ing now been disputed a great while, you have had it fully represented to you, how they came to hold the Scales in this Action in *Westminster Hall*, not as in a Case where the Right of Election, or the Privileges of this House was the subject Matter of the Question, the Action was brought there only to intitle the injur'd Subject to Damages. And this Matter ought to be consider'd, as it relates to different Ends and Purposes, and upon that it turn'd in the Case of *Soame and Barnardiston*. They who thought that Action lay, thought the Courts below might try the Merits of an Election to repair in Damages, not to determine who should be admitted to sit in Parliament.

AND I will venture to say, That the Judgment of the House of Lords that confirm'd that Reversal, was in no wise at that time satisfactory to the Commons of *England*.

BUT the Act of Parliament that hath been mention'd was built upon this, that the Reversal of the Judgment between *Barnardiston* and *Soame* was not right, and so that Act was procur'd to set up the Right of the Commons of *England* that was thought to be invaded by that

(126)

that Reversal or Judgment, that the Action upon the Case did not lie.

I WILL go a step farther, That as you have the sole Power to try the Right of Election, and consider the Right of the Electors, to the end I mention'd, to determine who shall be admitted here; so I grant it hath been the Law and Custom of Parliaments (how antient I will not inquire) to punish the Offenders, particularly the Officers and Magistrates presiding at the Election, for doing any Wrong or Injury in his Office on that occasion, in order to make him an Example, or as an Offender against the Publick, and the Constitution of Parliament: so far I grant you have a just Right to go, and no body ought to interfere with you.

BUT now we are carrying the matter yet further: The Question now is not, Whether we have the sole Right to punish the Officer as a publick Offender; this Action is not brought to that end, nor is there a word in the Declaration, who was, or was not duly elected, or that the Constitution or Privilege of Parliament was violated. But the Plaintiff only says he had a Right to Vote, and that he was injuriously deny'd it (whether

(127)

ther the right or wrong Member was return'd he meddles not with it) and he submits it to the Court and the Law, Whether he ought not to have Damages for that wrong? And the Question now is, Whether that Demand of Damages was not well founded? or, Whether there is any thing in this contrary to the Law and Constitution of Parliament? Law depending on Custom, certainly consists not in, and is not to be made out by one Act, but by often reiterated Acts: and that must be very far from being the Law and Custom of Parliament, which is so far from being a frequent repetition of Acts or Precedents, that in this Case there is not one Instance where an Elector hath brought his Petition, without regard to the Return made, and desir'd his particular Right to vote might be try'd and asserted, he having been obstructed and injur'd in giving his Vote; nor was ever such Elector repair'd in Damages here, nor ever had his particular Right to vote resolv'd or asserted by any Judgment or Declaration of this House.

THE learned and honourable Person, upon whose Reasoning I am humbly offering my Thoughts with great deference, was pleas'd to instance in the
Case

Case of five Persons in the Town of *Aylesbury*, who exhibited a Petition, and complain'd of an Injury done them at an Election for that Town, at which their Votes were refus'd. And if they complain'd of nothing further, and did not conclude to the Right of the Return, and complain that they were unduly represented, I admit it had been so far an Instance to his purpose. But if they had so complain'd only of the Injury done the Petitioners in denying their Votes; yet he is pleas'd to tell you this Petition was withdrawn, and by the Consent of the Persons who presented it, and so came to nothing. I suppose this is the single Precedent to prove the Law and Custom of Parliament, because there is no other Instance given. It does not appear upon what Ground or Reasons it was withdrawn; and I having no particular memory of that Passage, you will pardon me if I am mistaken in my Conjecture. I believe no Man that seeks a Remedy would desist, if he expected to succeed; so I take the most probable Reason (till another appear) to be, that they were hopeless of doing any good with it: And one Petition not prosecuted, will hardly shew that Parliaments use to give Redress
in

in such Cases. Now if that Precedent had been successful, if the Petition had been refer'd to a Committee, if Damages had been given upon the Complaint, and a declarative Vote had pass'd to assert the Petitioners Right (but I did not observe there were any such Proceedings) then indeed I must admit that it was one Precedent in point, and a very material one; and it would have prov'd, That we had once held Plea of this matter, and by consequence if we had often done so, that no body else had to do with it. But if that Precedent be defective, and none can shew that ever any Petition was exhibited by any Elector for a personal Injury done him in rejecting his Vote, tho the Person he would have voted for was return'd, this Action may lie for such an Injury done to an Elector, without interfering with any Law or Usage of Parliament that hath yet been made evident; and that brings me to another matter of that honourable Person's Discourse, and I acknowledg he enter'd into it with a great deal of Candour and Fairness.

HE was pleas'd to say, he thought it was admitted in this Debate, That the like Action is not to be found in all the

K

Re-

Reports or Books of Law. I would allow his Objection its due weight, and admit what I take his meaning to be, That this Action, in the particular Species of it, may be new, tho' it's old in its Genus or the principal Materials on which it is built; and I take it, if by the general Rule or Reason of Law for such an Action it be warranted, this Action (as a thousand other Actions on the Case may) will lie, tho' in all the parts 'tis not to be exactly parallel'd; for it is the very Nature of, and imply'd in the name of an Action upon the Case, that every Man may maintain it on his particular Case, provided it carry in it the general Reason or Ingredients requir'd by Law to support such an Action, tho' in many Circumstances it may be perfectly new. I see that honourable Person understands clearly the necessary Incidents of that Action; that is, there are to be *damnum & injuria*, which I take to mean a Damage to the Subject, not arising from a lawful, but which is the Consequence of an unlawful Act. Now, says he, first here is no Damage, because antiently the Attendance was thought a Service and a Burden, and the
Right

Right of Electing was a Service too, and in being depriv'd of a Service there can be no Damage; and therefore one of the main Ingredients of an Action of the Case is wanting. This is clear Reasoning, and either to be answer'd or submitted to.

IT is said the Right of Electing was a Service, how true I doubt upon the reason of the thing: A Service was often a part of the Tenure, by which a Man held his Land till it came up to the Crown; and the Service was originally created by Grant and Reservation. Now can any one imagine, that where one holds a small Freehold, any such Tenure was created between him and his immediate Lord originally by Reservation, as that he should vote to send Members to Parliament?

BUT if it might be consider'd as a Service so created, it will not do the business of the Argument, unless you consider it also as a Service of Burden, without Advantage or Privilege; for if it be a Privilege too (tho' in its Creation it might be a Service) then the depriving a Man of it is an Injury. Now no body can think but that the Right to elect a
K 2 Par-

Parliament-man, which is a distinguishing Character from the Vulgar, and hath its weight in the Legislature, is a Privilege; and therefore to be depriv'd of, it, is to be depriv'd, not only of a Service and Burden, but of a very valuable Privilege: and I believe any Englishman would think we dealt hardly by him to deprive him of it, tho we should tell him at the same time, We depriv'd him only of a Service or Burden, and not of a valuable Privilege.

THERE is another thing occurs on this Head: We have been so far from thinking the being elected, a Service or Burden only, that in the nature of a Repeal of those Judgments of *Soame* and *Barnardiston*, by a positive Law we have given the Elected double Damages if he be deprived of that Service. Therefore by our own Notion, and in our own Case, 'tis a Privilege that ought to be recompensed even with double Damages, that is to say, when it concerns our selves. And shall we declare it a mere Service in the Case of our Electors, not to be recompensed even by single Damages, and that after the undoubted Methods of the Common Law have adjudged it their due? For I do not find
any

any body doubts, whether this Man has proceeded in the legal Method throughout, even in the last Resort. The Lords have not judged the Fact, they are bound as to the Fact by the Verdict, and they are unquestionably the Judges of the Law on a Writ of Error. And therefore as to what hath been said, That any Fact of an Election might come to be determined before the Lords, it is a great mistake, for they judg purely of the Law on Writs of Error, as every one knows that knows any thing of our Constitution. Give me leave to say, We upon this occasion judg of this Matter only as a Matter of Law which may affect our Privileges; and tho we have Authority to consider what is Law, as it relates to or may intrench upon our Privileges, no body that sits here can think that there lies an Appeal in this Place, or a second Consideration of this Matter after the Lords Judgment, as 'tis a Point of Law only, and as it regards the Right of the Subject. So that an Objection in point of Law here to the Judgment of the Lords, will not hold otherwise than as it relates to our own Privileges; for no body will say, That we are the Dernier Resort in any other respect. And tho that is the
K 3 only

(134)

only Point that brings it properly under our Consideration; yet I fear we are taking from the Subject in effect what the Law hath adjudged his Right, and reversing a legal Judgment given in the Subjects favour. There are other Arguments flung in to make up the weight only, as that which compares the present to the Case of a Dove-house; in which Case in regard of the multitude of Actions that would follow, an Action will not lie for every one that is injured by the erecting of it. It is true, where a Multitude are injured by one and the same Fact, it shall not be punished by a multitude of Actions; but the Publick is to take care of it, because the Injury is of a publick nature. But by the same Standard and known Laws of *England*, if one Man is so rash as to commit a multitude of Injuries which severally affect several Persons, it was never said that he became unpunishable by the multitude of his Offences, but every one injur'd has his Action against him. I have heard it said, *defendit Numerus*, but that is spoken as to the Number of Offenders, not the Number of Offences committed by the same Man. And these Injuries which consist in denying the Subject to vote when of Right he ought,

will

(135)

will not be multiply'd (as is objected) by letting the Subject know, That as they may come into Parliament to punish the Officer as a publick Offender against the Constitution; so the particular Person injur'd by being deny'd his Vote, may also have an Action for the private and particular Injury done to him only.

I WOULD mention one thing more: They who have spoke for the other Opinion, seem to take it for granted (which I do not take to be a true way of reasoning) that because in determining who have a Right to sit here, we do incidently, and only can in order to that End, determine who have a Right to vote, therefore no other Judicature can try the same Matter or Right to vote, tho it be to different Ends and Purposes.

NOW if you will consider the different Jurisdictions in the Constitution of this Kingdom, there is nothing more common; and many Instances may be given of it. There are variety of Jurisdictions that try the same Fact, and yet each hath a sole and separate Jurisdiction in that matter to different Ends; and these Jurisdictions are not in that respect subordinate to one another:

K 4

Take

(136)

Take the Spiritual and Temporal; the Spiritual is not subordinate, but only restrainable by the Temporal, where they intrench upon the Temporal; as in the common Instance of Matrimony, which directly and abstracted from other purposes, is triable in the Spiritual Court and no where else: But yet if that comes to be a Question of Fact in relation to a Title at Law, or to make out a Descent, why the Temporal Courts every day try it, tho' *per se* and taken by it self, it belongs to the Jurisdiction of the Spiritual Court; and yet these Courts are not in that respect subordinate one to another.

SO in the Case touched upon of a Battery, 'tis not triable in the Common Pleas, as 'tis an Offence against the Publick Peace, by Indictment in order to a Fine, but triable in those Courts only that have a Criminal Jurisdiction; but as 'tis a private Injury, and in order to recompense the injur'd in Damages, that is triable in the Court of Common Pleas, and other Places which have cognizance of Civil Actions only: And this is not in respect that one Court is subordinate to the other, but one holds Plea of the same Fact in order to one End, and the other

(137)

other in order to another End; and there is no clashing of Jurisdictions in such Cases.

FOR what hath been objected, That this may create variety of Judgments concerning the same Right: This does not weigh it seems in our own Cases, for we may bring our Actions for double Damages for a false Return, and yet that may produce the same variety of Judgments. So was the Opinion of the House in the Case behind me cited; and the Law is plain, That tho' the last Determination of this House, where there hath been any, shall determine the Right of Election, and there the Judges and Jury shall be bound by the last Determination, and to act by the same Rule; yet in Towns where there has been no Dispute of the Right settled here one way or other, the Candidate may notwithstanding bring his Action, and he or the People of the Place may also petition the House of Commons. And then there is the same Objection, for there may be variety of Judgments touching the Right of Election, one in the House of Commons, and another in the Courts below. And upon the Trial, in order to obtain Damages, a Jury, in such Cases

(138)

Cases where the Right had never been settled in Parliament before the Election in question, are not directed by the Judgment of your House on the same disputed Election, nor is any Jury bound to follow such Judgment. And if you will go upon a Supposition, that a Judge and Jury may go contrary to Law and Right, or the Determinations of this House in the Case before you, 'tis an Objection which you have over-look'd in your own Cases; and therefore why should it be an Objection to hinder the Person whom you represent of his Remedy for the Injury done him?

UPON the whole, I am for so much of your Question as serves only to declare, That you have the sole Power of determining the Right of all Elections, and even the Electors Right to vote, to the end to try who is your Member, or to punish the Officer as an Offender against the Constitution: So far is agreeable to the constant Law and Practice of Parliament. But for that part of the Question which relates to the restraining the Electors from bringing their Actions for the personal or private Damage done to them, I think it is not

(139)

not agreeable to the Law or Constitution of Parliament.

Sir HUMPH. MACKWORTH.
Mr. *Freeman*, we are much oblig'd to the Gentlemen that have argu'd on both sides, who have brought the matter of this Debate into a narrow compass: The Question is this, "Whether an Elector
" be intitled to an Action at Common
" Law against the Officer for recovery
" of Damages, in case his Vote which
" he offer'd be not taken down in Writing, and enter'd on the Poll? or,
" Whether the House of Commons
" have the sole Privilege of examining
" and determining the Right or Qualification of every Elector to give his
" Vote, and to judg of the Behaviour of
" every Sheriff, and other Officer in
" taking the Poll on the Election of
" Members to serve in Parliament?"

I AM of opinion, with great submission to better Judgments, that the House of Commons have a sole Right of Judicature in these Cases, and that the Elector is not intitled to an Action at Common Law. I shall endeavour to support this Opinion, by answering the Arguments that have been made use of
to

to prove the contrary: And first, I crave leave to observe, that the Gentlemen who have argued on the other side have not taken notice of a Distinction which seems to be very material in this Case, and that is, Between an actual Force or Violence done by the Officer, and a bare Omission in point of Duty. It is agreed, that in case the Officer does by Force or Violence obstruct or hinder an Elector from offering or pronouncing his Vote at an Election for which of the Candidates he pleases, the Elector will be intitled to an Action at Common Law for recovery of Damages, for that is a Personal Wrong, and does not concern the Right or Qualification of an Elector to vote in Elections; but in case the Officer does permit the Elector quietly to offer or pronounce his Vote (as he did in the Case of *Alby*, who pronounc'd his Vote for *Sir Thomas Lee* and *Simon Mayne Esq;*) but does not think fit to enter his Vote upon the Poll, the Elector in this Case is not intitled to an Action at Common Law for recovery of Damages, because he has neither suffer'd any Force or Violence, nor is by such omission depriv'd of his Vote: for a Vote being once pronounc'd, the Law takes

takes it for the benefit of the Publick, tho the Officer be wanting in his Duty; and none have power to determine, whether the Elector had a legal Vote, and whether the Officer had sufficient reason to refuse to enter the said Vote on the Poll, but the House of Commons. If any others should have Authority in this Case, they will be able to destroy the Freedom of Elections and the Constitution of Parliaments.

IT is insisted by some Gentlemen, that the Electors have no proper Remedy in this Case in the House of Commons, and therefore they must have their Remedy at Common Law: but with great deference to their Judgments, the Electors have a very proper Remedy in this House in every respect; for here their Votes will be allow'd, the legal Representatives restor'd, and the Officer will be punish'd for any wilful default in the Execution of his Office. This is a Remedy that answers the end for which every Elector is intitled to give his Vote, which is not for a private advantage to himself, but for the general advantage of the whole Kingdom. But the Action at Law is no proper Remedy

(142)

dy in any respect: For since a Vote that is offer'd and refus'd is as good by the Law of Parliament as a Vote that is offer'd and receiv'd, and is so adjudg'd on the Trial of every Election in the House of Commons, or else they could not fill their House with legal Representatives; it is not proper or reasonable that an Officer should pay Damages to an Elector that has not suffer'd any, nor that a publick Offence should be punish'd by a private Satisfaction; which is not likely to prevent the Evil, preserve the Vote, and restore the Representative; nor is the same consistent with the Constitution, or the publick Safety.

THE Qualification of Electors, and the Behaviour of Officers in all Elections, are matters of Parliament, and such matters are not cognizable elsewhere, as hath been often declar'd by all the Judges of *England*: A Parliamentary Case requires a Parliamentary Remedy. And since Votes have been refus'd in all Elections; if Electors in this Case had been intituled to an Action at Law, it must be presum'd that some time or other such an Action would have been brought, which yet was never once attempted in any former Reign; and all those Acts of
Par-

(143)

Parliament that were made to give Damages in Cases relating to Elections, do demonstrate that no such Damages could be recover'd at Common Law; for if they could, there had been no occasion for making any of those Statutes.

IT is insisted, that every Right must have a Remedy; but then the Subject must be first deprived of that Right, which in this Case he was not; and even when he is, he must have his Remedy in a proper manner, and in a proper Court. There are several sorts of Rights, and several sorts of Laws in *England*, and there are several Courts of Justice for the Administration of those Laws: A Man that has a right to a Legacy can't bring an Action at Common Law, but he has a proper Remedy in the Spiritual Court. The like may be observ'd of Cases that belong to the Courts of Chancery, Admiralty, Stannerys, and of the Forest Laws. The Subject cannot bring Actions at Common Law in Cases that belong to the Jurisdiction of other Courts. And when my Lord Chief Justice *Coke* enumerates the several Laws in this Kingdom, he gives the precedence to the Law and Custom of Parliament, which he tells
us

(144)

us is superior to the Common Law in *Westminster-Hall*. And as every Court at Law has its Customs and Privileges peculiar to it self, and is sole Judg of them, so also the high Court of Parliament, *suis propriis legibus & consuetudinibus subsistit*, hath its own proper Laws and Customs, and is sole Judg thereof. And if an Action at Common Law will not lie for a Legacy, where the Spiritual Court has a Jurisdiction, tho the Temporal Courts have in many respects a superior Authority; such an Action will much less lie in a Case concerning the Parliament, which is the highest Court of the Kingdom, and who are sole Judges of all Cases relating to themselves. But some carry this further, and say, that every Right must have a Remedy with Damages. This may be true in most Cases, where a Man is depriv'd of Rights of Property and Possession; but there are many Instances to be given where a Right of Franchise or Privilege is not intituled to any Damage; as a Person elected Mayor of a Corporation, if the proper Officer refuses to swear him, has no Action at Law for Damages, but his Remedy is by a *Mandamus* out of the Queen's Bench: There

(145)

There is a Remedy by *Quare impedit*, but not to recover Damages. In a Writ of Right you shall recover the Land, but no Damages: So in this Case, the proper Remedy is to have the Vote allow'd, which can only be done by the House of Commons. Some Gentlemen have found out a new distinction, which I never heard before, that the House of Commons have the sole Privilege to judg of the Rights of Electors, and of the Behaviour of Officers, to one intent, but not to another; that is, in order to determine who are the legal Representatives, but not to give Damages to the Party injured. But with great submission, there is no weight at all in this Distinction: for as it is plain that the Elector is not in this Case depriv'd of his Vote, and therefore suffers no Damage; so it is also evident, that the Judgment of the House of Commons in Matters properly cognizable before them cannot be contradicted by any other Judicature; and therefore their Judgment of the Qualification of the Elector, and of the Behaviour of the Officer, must be conclusive to all intents and purposes whatsoever. It is contrary to the Reason of all Laws, that the Behaviour of an Officer should

L

be

be subject to the Determination of two independent Jurisdictions: Or that he should be innocent by the Judgment of a superior Court, and guilty by the Judgment of an inferior: Or that he should be twice punish'd for the same Offence. No Man can serve two Masters: The Officer at this rate will be every way ensnar'd, and made liable to Punishment, whether he does his Duty or not: If he accepts illegal Votes on the Poll, he will forfeit 500 *l.* by the Statute for a false Return; if he refuses them, he may be ruin'd by a multitude of Actions; for if one may bring an Action, there may five hundred, since every Man at this rate may offer a Vote, and bring an Action for not entring it upon the Poll. How is this consistent with the freedom of Elections, in which there ought to be no Terror, neither on the Electors nor on the Officers? but as the Electors should be free to offer their Votes, so the Officers should be free to judge whether they ought to be enter'd on the Poll or not; and they ought not to be accountable to any but the House of Commons, whose Servants they are in all matters relating to Elections, and who are entrusted with the Determination of all

all Matters and Cases relating thereto; and they may as well punish them for taking illegal Votes on the Poll, as for not taking those that are legal. In neither of which Cases have the Judges of the Common Law any Jurisdiction, tho there is the same reason in both, to take care that every the meanest Subject may have Relief for any Injury done him; but we are not to take more care of the meanest Subject than of the whole House of Commons. The greatest Subject in *England* ought to have no Relief but what is consistent with the Law of Parliament, and the Safety of the Constitution. If an Action lies, and upon a Judgment on that Action a Writ of Error lies in the House of Peers, the Lords will be the sole Judges at last who have Votes to chuse a House of Commons; which is directly contrary to the fundamental Maxim of the Law and Custom of Parliament, that the two Houses are mutual Checks to each other, and sole Judges of their own Privileges.

THIS is an excellent Constitution, and admirably well contriv'd for the common Safety: but how can this Constitution be preserv'd if the Lords can punish our Officers, and govern our

Elections? This will be the way to destroy all Checks, and to make the House of Commons dependent on the Lords; and then I cannot see upon what Foundation you can be said to sit here to do any Service for your Country.

OTHERS insist that this is a Right that is incident to the Freehold and Freedom of Electors; therefore as their Freeholds are cognizable at common Law, so is every Incident belonging to it. This Argument is plausible at first sight, but in reality there is nothing in it: for tho the Commons of *England* have submitted their private Differences to Arbitrators or Judges, indifferently chosen and appointed by the Prince, the common Parent of the People; yet they have never submitted their fundamental Rights and Privileges, which they hold in their publick and politic Capacity as a free Branch of the high Court of Parliament, to any other but their own Representatives, who are chosen and appointed by themselves. This is not a Case properly speaking between Party and Party, but between the Lords and Commons, because the Determination of this Case brings the whole Right in question, Who have a Privilege to judge of

of the Qualification of Electors to give their Votes in Election of Members to serve in Parliament, Whether the Lords or the Commons? It is not now the Question, Who hath the best Right to a Freehold or Freedom, or to any thing that is incident to it? but, Whether the Commons of *England* shall have any Freeholds or Freedoms at all? Or, which is the same thing in effect, Whether they shall have any Security for those Rights or not? for if the Lords are Judges of your Privileges, you can hold no Right but during their Pleasure.

THE Lords seem to contend for the Right of the Subject, but I wish it is not for a Power to inable themselves to judge and determine as they think fit of all our Rights and Liberties; for this is the necessary Consequence of allowing an Elector to have a Remedy in any other place but within these Walls.

THIS is my humble Opinion; and if I am mistaken, other Gentlemen will set me right. This is certainly a matter of the highest importance to the Welfare of the Subject, and I doubt not but they will very well consider it before they give way to the establishing a Precedent

cedent that tends to destroy the Privileges of this House, or the Liberties of their Country.

A GREAT Tenderneſs is expreſs'd for this poor Man, whoſe Vote has been refus'd; but whether he had a Right to give his Vote is very much queſtion'd, and never yet determin'd by this Houſe, who has the proper Judicature thereof. But admitting he had a Vote, Whether ought to be prefer'd, a private Intereſt, or the publick Safety? Whether will be moſt for the Honour of this Houſe, and the Intereſt of our Electors, The Care of a private Perſon by a new invented Action, neither warrant'd by Reason, Precedent, or any eſtabliſh'd Law; or the Care of the Parliament, and the Conſtitution, on which depend the Rights and Liberties of all the Commons of *England*?

SIR, I beg pardon for taking up ſo much of your time, but I muſt confeſs, it ſeems to me, that our All depends upon a right Determination of this matter; for I cannot ſee any other reaſon why this new Device is ſupported by the Lords, but only to render you precarious and uſeleſs.

Sir

Sir GILBERT DOLBEN. Mr. Freeman, I ſhall not trouble you very long at this time of day: I think the Point in Debate has been truly ſtated by the Gentlemen who have inſiſted on this Queſtion, Whether an Action will lie for an Elector, for having been refus'd his Vote at the Election of a Member to ſerve in Parliament? A learned Gentleman would have the Queſtion to be, not Whether an Action will lie; but, Whether this Houſe has the ſole Right of determining that Matter, and of giving Remedy in it. I confeſs I think it is more properly ſtated the other way: But the thing is ſcarce worth a Diſpute, ſince which way ſoever you turn the Tables, it comes to the ſame point, and one of the Queſtions will in conſequence be reſolv'd by the Reſolution of the other: For if that Queſtion be put which is propos'd by the Gentleman, and carry'd in the Affirmative, That this Houſe has the ſole Right of determining this and all other matters whatſoever that concern the Right of Election; then it muſt follow, that whoever is wrong'd in any ſuch reſpect, cannot be redreſs'd by Action, ſince the Right of determining in Caſes

L 4

of

of this nature, is not in the Courts below, but solely in this House.

I SHALL not offer you any Arguments to prove this sole Right, many having been urg'd by others; but I will consider some things (without taking up much of your time) that have been offer'd as Objections to it.

SOME Gentlemen have made a distinction in this Case, between the Right of the Electors, and of the Elected; and they will have it, That the Courts below may decide the first, but not the last: Whereas, in my poor Opinion, the decision of the Electors Right must necessarily in many Cases decide who has Right to be elected. For suppose a common Case, That one of the Candidates insists upon an Election by a select number, and the other upon a popular Election: if in this Case one of the Populace be refus'd his Vote, upon a pretence that he is not of the select number, whereupon he brings his Action against the Officer; will not the event of that Trial determine (in consequence) the Right of the Candidates? Surely it must; since if it go for the Plaintiff, he for whom the Plaintiff offer'd to vote, and who had the popular Interest, will appear to have had

had the Right of Election; and so will the other Candidate, if it go for the Defendant. Several other Cases to the same purpose might be put: So that if an Action of this Nature should lie, it must (as I apprehend) unavoidably follow, That *Westminster Hall* by original Action, and by Writ of Error the House of Lords, will have Power to determine (at least consequentially) who has Right to sit in this House, and who not. And how consistent such a Determination will be with your undeniable Right (acknowledg'd on all sides) of determining the Elections of your Members, exclusive of all other Jurisdictions, I leave to Gentlemen to consider.

A LEARNED Person was pleas'd to object, That Right is founded upon Usage; and if this House had the sole Right of judging in a Case of this Nature, where a single Elector is wrong'd, doubtless there would be some Precedent of Relief given to such an injur'd Person. But (says the Gentleman) there is no such Precedent, and therefore it must follow, That this House has not the sole Right of relieving in that Case. I think I may safely deny his first Proposition, as he applies it to the Rights of this House, which

(154)

which (generally speaking) are not founded upon Usage. Sir, the Rights of Parliament are chiefly founded upon the Nature and Constitution of Parliaments. Usage is indeed a Corroboration, and an Evidence of those Rights; but the foundation of them, is our being a part of the Legislature, whereby we necessarily become invested with such Rights and Privileges, as enable us to act and to discharge our Duty in that great Capacity: So that it is not so much what has been us'd, as what is necessary to the Support of our Constitution, that must be the Rule and Measure in determining the Rights of the House of Commons.

BUT neither has Usage been wanting in this Case: For whereas the Gentleman asserts, That there is no Precedent where this House has given Relief to a wrong'd Elector, (with submission) several such Precedents appear upon your Books, particularly in the Case of *Banbury*, where four or five of the Inhabitants complain'd, and the House gave a Remedy. And I cannot see why, if it has been given to four, it may not be given to one; nay I should think if more than one have been reliev'd, *a fortiori* one should be relievable.

BUT

(155)

BUT it seems to me, that the Argument drawn from Usage goes much further than the learned Gentleman intended it should: for if all Right be founded upon Usage, all Right of Action must be so founded; and then what becomes of this Action which the Gentleman has labor'd to support? If Usage be nothing else but the repetition of the like Acts, then this Action (according to the Gentleman's Rule, that Usage is the Foundation of Right) cannot be rightful, unless there hath been a repetition of the like Action.

NOR can it be said, that this is the first time any such Cause of Action has arisen, and that therefore it could not have been brought before; for there has scarce been a Parliament call'd in any Reign, but some or other has without doubt been wrongfully refus'd his Vote: So that the Cause having been frequent, it must have had the like effect e'er now, in case such a Wrong could have been redress'd by bringing such an Action.

BUT no Gentleman has pretended to say, That any Action of this Nature was ever brought before; and therefore we may infer from the learned Gentleman's own Position, as likewise from the

(156)

the Authority of *Littleton's* Text, That since none has been brought, none can be brought. And this has been the constant Opinion of the Courts in *Westminster Hall*, the Judges having upon every occasion, where the Rights of Parliament have fallen under their consideration, in all times declar'd, That nothing of that kind is within their Jurisdiction: Nor can they judg of any such matter farther than as they are impower'd by particular Statutes.

AND this was the reason why the Judgment in *Barnardiston's* Case given in the King's Bench, was revers'd in the Exchequer Chamber, because it was a thing purely of Parliamentary Cognizance, the House of Commons having the sole Power of determining all Matters relating to Elections and Returns, except in Statute-Cases. Nay the Court of King's Bench had declar'd, They would not have proceeded in that Action of *Barnardiston*, had it not been grounded upon a precedent Judgment given in the House of Commons. But the Judges in the Exchequer Chamber thought, that even the Determination of the House was not a sufficient Authority to the Courts below to hold Plea in an Action relating to the Rights

(157)

Rights of Parliament, tho the Action was grounded upon that Determination; and therefore they revers'd the Judgment given in that Action: And (which is a mighty strong Circumstance in the Case) that Reversal was afterwards affirm'd in the House of Lords. So that it is plain, even the Lords themselves were at that time of the same Opinion with the Judges, That nothing which concern'd Elections was cognizable in *Westminster Hall*: for otherwise they could not have affirm'd the Judgment given in the Exchequer Chamber, which was grounded intirely upon that Maxim.

THIS appears farther by what their Lordships did in the Case of *Hollis* and *Elliot*, against whom Judgment had been given in the King's Bench, for what they had said and done in this House. In the year 1667. the House of Commons voted, That the Judgment given in the King's Bench against those Persons was illegal, as being against the Privilege of Parliament. And this Vote was (as I remember) deliver'd to the Lords at a Conference, with a desire of their Concurrence to it: Accordingly the Lords sent a Message, That they did concur. Nay they were so zealous, as to desire the
Lord

(158)

Lord *Hollis* to bring a Writ of Error upon that Judgment, which was done, and the Judgment was revers'd. From whence it must be infer'd, that their Lordships were then of Opinion, that whatever Judgment is against the Privilege of Parliament (that is, of either House of Parliament) is an illegal Judgment.

NOW to lay these two Opinions of the Lords together: If the House of Commons has the sole Privilege of judging all Matters relating to Elections (upon which ground their Lordships affirm'd the Reversal of the Judgment in *Barnardiston's Case*) and if every Judgment given against the Privilege of Parliament be illegal (as their Lordships both resolv'd and judg'd in the Case of *Hollis* and *Elliot*) how comes it to pass, that the Lords have lately thought fit to reverse the Judgment given in this Case of *Asbby* and *White*, which was grounded upon that very Opinion, establish'd by their Lordships in the Case of *Barnardiston*, That all Matters concerning Elections are determinable only in the House of Commons? And consequently, how can we avoid saying (pursuant to the other Opinion, and to the Judgment they gave

(159)

gave in the Case of *Hollis*) That their Lordships Judgment of Reversal given upon the Writ of Error in *Asbby's Case*, being against what themselves have own'd to be the Privilege of the House of Commons, is an erroneous (not to say an illegal) Judgment?

I CONFESS I cannot much wonder at its being so, when I consider, that the Steps their Lordships made in proceeding to this Judgment of Reversal, were so very hasty, as not to afford them sufficient time to weigh and to deliberate upon a Matter of such Importance. This Cause had depended near a twelvemonth in the King's Bench, it had been argu'd several times at the Bar, and at length *seriatim* by the Justices, three of whom, upon the reason of former Resolutions, gave Judgment against the Plaintiff, that the Action does not lie: And yet no sooner was this Writ of Error brought, but the Errors are immediately argu'd; and upon the first Argument, the Opinions of the Judges are requir'd; and notwithstanding they desir'd time but till the next day to consider of the Case, the Lords (as I am very well assur'd) would not allow them an hour, but oblig'd them to deliver their present Thoughts, which

which tho several of them express'd very doubtfully, and several others were for affirming the Judgment; yet their Lordships were so very clear, and so determinate in the point, that without any farther consideration the Judgment was revers'd.

AND now I desire Gentlemen to judg, whether in this instance the Lords have shewn that regard either to the Privileges or to the Dignity of this House, which their Ancestors and themselves had formerly express'd upon the Occasions before-mention'd.

I WILL take notice but of one thing more which fell from a learned Gentleman, who insist'd, that the Election to Parliament is not a Service, but a Privilege, because double Damages are given by the late Act concerning Returns. I have cast my Eye upon that Act, and I think if the Preamble be read, it will appear that Gentleman was somewhat unfortunate in appealing to it; for the Preamble calls the Election to Parliament a Service in express terms, and certainly with good Reason. If the House will give me leave, I'll read it.

“ WHEREAS

“ WHEREAS false and double
 “ Returns of Members to serve in Par-
 “ liament are an Abuse of Trust in a
 “ matter of the greatest Consequence to
 “ the Kingdom, and not only an Injury
 “ to the Persons duly chosen, by keep-
 “ ing them from their Service in the
 “ House of Commons, and putting
 “ them to great Expence to make their
 “ Elections appear, but also to the Coun-
 “ ties, Cities, Boroughs, and Cinque-
 “ Ports by which they are chosen, and
 “ the Business of Parliament disturb'd
 “ and delay'd thereby; Be it therefore
 “ enacted.———

Sir, not to trouble you any longer, I am entirely for the Question as it is stated.

Mr. KING. That which calls me up, in the first place is what that honorable Gentleman just against me was pleas'd to intimate, as if the Right of Electing was only a Service, and not a Liberty or Privilege; and I find a worthy Member, that spoke last, is of the same Opinion, Truly I am loth to tell you my own
 M with

(162)

without desiring the Act 25 Car. 2. 9 cap.
may be read. — —

MEMBERS. No, no.

Mr. KING. 'Tis an Act to enable the County Palatine of *Durham* to send Members to Parliament, and it recites, That they had not before that time had the Liberty and Privilege of electing and sending any Members to Parliament: where you see the Legislature call it a Liberty and Privilege; and if the Legislature call it so, I think I may venture to call it so too. And if it be a Liberty and Privilege, then the Question will be, Whether it does not stand on the same bottom with our Liberties and Privileges. In case of any other Franchise or Liberty, an Action lies at Common Law for the breach thereof; and why an Action should not lie at Common Law for the breach of this Franchise, as well as for the breach of every other Franchise, is to me very strange. Gentlemen take it for granted, this is purely an Action at Common Law, and no Statute hath any influence on it. Now there is a Statute which hath not been mention'd (only I must first premise that which I think

(163)

think no body will deny, viz. That wherever an Act of Parliament does forbid any thing, if any body be injur'd by the doing of the thing so prohibited by that Act, in consequence of Law the Person injur'd hath an Action) I say there is a Statute that forbids Disturbances or Hinderances in matters of Elections; and by consequence of Law, that Statute gives an Action to the Party injur'd, against the Person disturbing or hindering him in his Election. The Statute I mean, is the 3 E. 1. 5 cap. that is a positive Law whereby all Disturbances in Elections are forbid: Every Man is forbid to hinder or disturb by Force or Arms, by Malice, or menacing any man, to make a free Election.

I SHALL only instance in one parallel Case, tho I could in many more: The Statute in Ric. 2. time, *de Scandalis Magnatum*, only forbids the speaking Evil of great Men; there is not one word of an Action, yet by operation of Law it was always held, that an Action would lie upon that Statute for a Scandal of a great Man, because it was prohibited by that Statute. So here, the Statute forbids the disturbing of any Man by Force or Malice to make free

M 2

Elec-

Election; the Jury have found that the Defendants did in this Cause maliciously disturb and hinder the Plaintiff from voting at the Election; and by a like Consequence and Operation of Law, this Action is maintainable.

GENTLEMEN say, this is a new Action never heard of before: It is true, this particular Action was never brought before, but Actions of the same kind and nature, and grounded on the same Principles and Reasons of Law, have been brought before. *Et ubi eadem est ratio idem jus.* I could give you many Instances of this kind. Was it ever heard till the 20th or 21 Car. 2. that an Action lay against an Officer for denying a Poll to one who stood Candidate for a Bridg-master? The Mayor deny'd the Poll, and said, he was Judg of the Election: And upon this the Person injur'd brought his Action and recover'd. At the same time it was said, there was no such Action ever heard of before; 'tis true, not that Species but the Genus was heard of. Another Action was brought 30 Car. 2. (which was never heard of before) against a Mayor, for refusing the Plaintiff's Vote for a succeeding Mayor.

I

I BELIEVE every body knows that all the Law Books for 400 Years say, That the Reversioner had liberty to go into an Estate of a Tenant for Life, to see if he commit Waste. And no Action was ever brought till 16 Ja. 1. by a Reversioner against a Tenant for Life, for refusing to let him in to see whether Wast was committed. No Action was ever brought against a Master of a Ship for the negligent keeping and loss of Goods on board his Ship, till about the 24 Car. 2. and yet the Action lay.

THERE was another Action in K. Car. 1st time, brought for a false and malicious prosecution of an Indictment of a Man for Treason. There was the same Objection; and it was said, That this would deter People from prosecuting. And no body ever dreamt of it before, 'tis true, but it stood upon the general Reason of the Law; if you do me a Wrong I must have a Remedy. And as to what a worthy Gentleman hath said, That there are Instances at Common Law, where a Man shall recover and yet have no Damages; 'tis true in real Actions, but let him give me an Instance of that in an Action of the Case.

M 3

He

He recovers nothing there ; if he does not recover Damages in real Actions, he recovers the Land it self.-----

MEMBERS. The Question, the Question.

Mr. KING. I find Gentlemen are very uneasy, I will trouble you no further.

MEMBERS. Go on, go on.

Mr. KING. I agree, the determining the Right of Election belongs to the House of Commons ; and they ought to apply to the House of Commons in that Case : And I shall not depart from that, I think I can't without ruining the Constitution ; but that which I say is, That this Action does not at all relate to the Right of Election. This Action is brought by a Man that hath an undoubted Right of voting, against an Officer for maliciously refusing his Vote. Put the case this had happen'd in a County (for the Law would have been the same) that a Freeholder who had a Right to vote, had tendred his Vote to the Sheriff ; and tho he knew he was a Free-

Freeholder, yet the Sheriff should maliciously refuse his Vote : Hath the Sheriff done this Man an Injury, or no ? This Man does not bring his Action, because the Person he would have voted for is not return'd, but 'tis because there is an Injury done to his Franchise. If I thought the Right of Election was concern'd in this Case, I would go as far as any, for I think that does belong to the House ; but I don't think this is concern'd in the present Case.

Sir THO. LITTLETON. I shall be shorter than some imagine. It has been discours'd, Whether this be a Privilege or a Burden, &c. Let them think it a Burden that call it so : If it be a Burden, 'tis such a Burden as some Men spend a great part of their Estate for, as if it was a Privilege. I think this Resolution which is propos'd, tends to the encouraging one Man to injure another Man's Franchise without any Reparation, which I believe is not very consistent with Law or Reason. You have no doubt a Power of punishing the Offenders, but you can't give Damages : I think this is a plain Case, Here was

(168)

a Man who had a Right to vote, and was not admitted. ———

MEMBERS. No, no.

Sir THO. LITTLETON. That is admitted upon the Judgment: For the Case is made upon the Right; and if he had not prov'd his Right, he could not have recover'd. Then if he was deny'd his Right, no body will say, We can give him Damages. What would you have a poor Man do, come with a Petition, and see Counsel, and attend the Parliament for a Month together? The Man it seems thought it better to go this way. I think if he had complain'd, we might have punish'd the Officer, but for Damages he could have them no way but this.

SUPPOSE the Judges in *Westminster-Hall* had been of Opinion, That this Action did lie, and the Constables had brought a Writ of Error; What would you have said in a Case where a Man had been deny'd his Privilege of voting, and the Law had given Damages, if the Lords had said No, there shall be no Action? I think the Lords have done what is right, I think they have

(169)

have reliev'd the Person injur'd according to Justice; and it does not interfere with your Rights, for he founds his Action upon your Determination.

MEMBERS. No, no.

Mr. WALPOLE. Mr. *Freeman*, I desire to have the Question read.

ACCORDINGLY Mr. *Freeman* in the Chair read the Question again.

Mr. SERJEANT HOOPER. A Gentleman that spoke last but one was pleas'd to say, That if he thought the Right of electing Members was any ways concern'd in this Question, he would come heartily into it: I know not what that Gentleman means by it, but believe all future Elections will depend much upon the Determination you make now. If you give the Lords this Jurisdiction to take cognizance of Matters relating to Elections, we must come to them to know whether we have a Right to sit here. One Gentleman said he could not tell whether the sitting here was a Burden or a Privilege: I believe it is a Privilege to some, who by sitting here obtain a good Place; but I think as to others

others it may be look'd upon as a great Burden, for to come up and spend a great deal of Mony for the Publick Service; and all the Privilege that I know they have is, to protect their Estates and serve their Country.

THERE is no extravagant thing but may be brought into the House of Lords, if you countenance them in the Jurisdiction they have now taken upon them. Any Action whatsoever, let it belong to any temporal Jurisdiction, may be there determin'd. I will still suppose, notwithstanding what is objected against the Judges, they will do their Duty; but *Westminster-Hall* is now no Barrier, for whatever is there determin'd, may be brought by Writ of Error into the House of Lords, and they will determine it as they think fit. In the Case of *Soame* and *Barnardiston*, the Law was taken to be, that *Westminster-Hall* had not a Right to intermeddle in these Matters. What then hath since alter'd the Law, unless the Lords have the Legislative Power in them? And that I dare say they will have if you allow them this.

THIS I must take notice of from the Report now before you, that here
is

is a Step made, which if it had been made in another Jurisdiction I should have given a hard Name to it.

I THINK in the first place the Party should be brought in by the Queen's Process. When Errors are to be assign'd, there uses to go out a *Scire facias*, which is the Queen's Writ; but here is only an Order made, and for what? That the Party shall join Issue upon the Writ of Error. Suppose there had been a Release of Errors, must he have join'd Issue upon the Errors? And yet it is here so order'd before the Party is heard. I say, if they have a Jurisdiction, the Party ought to be call'd in by *Scire facias*. And no Judg or Judicature can grant Execution or Process but it must be in the Queen's Name. As for your Question, I come heartily into it.

Sir WIL. STRICKLAND. Mr. Freeman, I think this Question depends upon two parts, and I believe it the best way to divide your Question. One part of it concerns the Rights and Liberties of this House, and I think every body will come up to it; And as I would not lessen the Privileges that belong to the House
of

(172)

of Commons, so I would not lessen any Privilege of the Commons of *England* whom we here represent. As one are the Privileges of this House, so the other concerns the Liberties of the People of *England*, who can't otherwise come to a Remedy when they are abus'd in this manner. The Gentleman that call'd it a hard Service, if he would tell his Country so, I believe he might be excus'd, and they would send another in his room.

Mr. WALPOLE. I will trouble you very little at this time: I think the Point of Learning and Law hath been so well spoken to by those learned Gentlemen that have been against the Question, that if I was able I should say nothing more to that. But I think the Question as 'tis going to be put is not right; for as the Question stands, tho I can't give my Negative to one part, I think 'tis impossible to give my Affirmative to the other. The Matter before you comes to this single Question, Whether you will encourage, and give a Power to an Officer, be he whom he will, to act arbitrarily, or rather chuse in such a case to do something in favour of the Electors. I am sure if I desire to be
elected

10

(173)

electd by those that had the Right, I would never give the Officer an Authority to the prejudice of the Electors. Where you come to say, that the sole judging of the Qualification of the Electors belongs to the House of Commons only, those I apprehend are words of too large extent and ill consequence. Suppose there was an Action brought upon the last Act of Parliament for a false or double Return——

Mr. FREEMAN. There is an Exception in the Question as to that.

Mr. WALPOLE. I know there is; But suppose an Action is brought upon that Statute, the Officer may have proceeded with the greatest Impartiality, may have taken the Poll with the greatest Exactness and Justice, and there may appear to be an equal number of Votes for each Candidate, whereupon he makes a double Return, and this brings it to be determin'd by the Committee of Elections, and they vote one of them duly elected. This Gentleman that had the favour of the Committee (tho afterwards possibly it might be made appear, that by Bribery or Corruption, and at

a

a great Expence he procur'd himself to be elected) after you have voted him duly elected, he hath nothing to do but to try his Action, and see if he can make his double Damages amount to his Expences. The first thing he is to do, is to produce the Vote of the House of Commons that declar'd him duly elected, contrary perhaps to the last Determination in Parliament, which in every place is to be the Guide to the returning Officer. But shall there then be given in Evidence no Qualification of the Electors? Nothing to prove that the Persons admitted to vote were qualified according to such last Determination? Or shall that Vote of the House of Commons, that was intended only to bring him into this House, recover him 5 or 600 *l.* Damages? I take it as the Law stands. Now it ought to be seen who hath the greater number of legal Votes, and whether duly qualified; and in that case you must suffer the Matter again to be try'd by the Court, and you do in some measure make them Judges of the Qualifications of the Electors; if it were otherwise, they could not inquire into the Majority of legal Votes.

W H A T

W H A T happens in the Case of a Mayor, may be in the Case of a Sheriff: If a Mayor or a Constable may deny a Man his Vote that hath an uncontroverted Right in a Corporation, a Sheriff may refuse a Freeholder, and strike off enough to make a Majority for whom he pleases. You had once the Case before you, Whether a Sheriff could refuse a Scrutiny, and one or two Gentlemen would have given that Power to a Sheriff; but a learned Gentleman thought it a dangerous Question, and he desir'd to come to the Merits of the Election; and that was determin'd, and you voted the worthy Member duly elected, and thought it a dangerous thing to determine, Whether the Officer had that Power one way or another. I think that part of the Question which concerns the Qualification of the Electors, ought to be left out.

Mr. FREEMAN. I will read the Question (*which he did.*)

MARQ. OF HARTINGTON. Sir, I think it is a constant Rule, where a Question is complicated, 'tis the Right of every Member, if he desire it, to have

have the Question divided, and I think it regular to do it by an Amendment; and therefore I second that worthy Gentleman, that you would leave out those words that relate to the Qualification of the Electors.

Mr. SOL. GENERAL. My Lord is undoubtedly right in what he desires; That if there be any words in the Question to which Gentlemen have a dislike, that Question is not to be put; but only, Whether those words shall stand part of the Question: Therefore if those words of the Qualification of the Electors do give offence, it must be put, Whether they shall stand part of the Question? But I hope at the same time Gentlemen will apprehend that leaving out those words, leaves out all that you have debated on.

Sir CHRIS. MUSGRAVE. No doubt if any Question is complicated, Gentlemen do not know how to give an Affirmative or a Negative, and you must divide it: but I hope Gentlemen will consider the latter part of the Question is the main thing whereon you have debated; for if you do not assert that you have

have the Power of determining the Qualifications of the Electors, you give up the Right of the Commons of England: I do agree that the Question may be divided.

Mr. FREEMAN. That which is debated now is, Whether these Words shall stand part of the Question. —

Sir THO. MERES. Sir, I think the Question ought to be divided.

Mr. FREEMAN. The Question, as I have it upon my Paper, is this:

THAT according to the known Law and Usage of Parliament, neither the Qualification of any Elector, or the Right of any Person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled, except in such Cases as are specially provided for by Act of Parliament.

N BUT

BUT some Gentlemen are for leaving out these words, [" Neither the Qualification of any Elector, or] So that I must put a Question, Whether these Words shall stand part of the Question.

MEMBERS. Ay, ay.

THEN Mr. FREEMAN put the Question, and the Committee divided.

Teller for the Ay's Mr. Galston—215
Teller for the No's Mr. Wylde— 97

SO it was carry'd that those Words should stand part of the Question.

AND the main Question being put,

Resolved,

2. That according to the known Law and Usage of Parliament, neither the Qualification of any Elector, or the Right of any Person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembl'd, except in such Cases as

as are specially provided for by Act of Parliament.

Resolved,

3. THAT the examining and determining the Qualification or Right of any Elector, or any Person Elected to serve in Parliament, in any Court of Law, or elsewhere than before the Commons of England in Parliament assembled, except in such Cases as are specially provided for by Act of Parliament, will expose all Mayors, Bayliffs, and other Officers, who are oblig'd to take the Poll, and make a Return thereupon, to multiplicity of Actions, vexatious Suits, and unsupportable Expences, and will subject them to different and independent Jurisdictions, and inconsistent Determinations in the same Case, without Relief.

Resolved,

4. *THAT* Matthew Ashby, having in contempt of the Jurisdiction of this House, commenced and prosecuted an Action at Common Law against William White, and others, the Constables of Ailesbury, for not receiving his Vote at an Election of Burgesses to serve in Parliament for the said Borough of Ailesbury, is guilty of a breach of the Privilege of this House.

Resolved,

5. *THAT* whoever shall presume to commence or prosecute any Action, Indictment, or Information at Common Law, which shall bring the Right of Electors, or Persons Elected to serve in Parliament, to the Determination of any other Jurisdiction than that of the House of Commons, except in Cases specially provided for by Act of Parliament, such Person and Persons,

sons, and all Attornies, Sollicitors, Counsellors, Serjeants at Law, solliciting, prosecuting or pleading in any such Case, are guilty of a high breach of the Privilege of this House.

THESE Resolutions with this (to wit,

Resolved,

1. *THAT* according to the known Laws and Usage of Parliament, it is the sole Right of the Commons of England in Parliament assembled, except in Cases otherwise provided for by Act of Parliament, to examine and determine all Matters relating to the Right of Elections of their own Members)

Before pass'd in the Committee, were reported to the House.

Mercurii 26^o Januarii, 1703.

MR. FREEMAN reported the five Resolutions agreed to by the Committee ;
N 3

(182)

mittee; the first Resolution was not oppos'd, but after the second Resolution (*viz.*

THAT according to the known Law and Usage of Parliament, neither the Qualification of any Elector, or the Right of any Person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembl'd, except in such Cases as are specially provided for by Act of Parliament)

Was read the second time by the Clerk, the Question (according to Order) being propos'd to agree with the Committee in that Resolution, the Marquis of *Hartington* stood up in his Place, and spoke to this Effect.

MARQ. OF HARTINGTON. I don't expect the House will be of a different Opinion from the Committee, but I think it is my Duty, when I apprehend what you are doing will be of ill Consequence to the Constitution, to give my Dissent in every step. I think it will be dan-

(183)

dangerous to the very Being of this House: If this Maxim had been allow'd formerly, I think there would have been no need of taking away of Charters, and of *Quo Warranto's*; by the influence of Officers they might have fill'd this House with what Members they had pleas'd, and then they could have voted themselves duly elected.

SIR WILLIAM STRICKLAND. Mr. Speaker, I can't agree to this Resolution, I think it deprives the People of *England* of their Birthright; for they who have Freeholds in any of your Counties, or Freedoms in any Corporation, have as much Right to vote in Elections to Parliament, as they have to their Estates. And if any Gentleman would subject them to such arbitrary Proceedings, that a Sheriff or any other Officer may deny them this Privilege, give me liberty to say, I must be always against any such thing; for tho you can punish the Officer, you can't give any Satisfaction to him that receives the Injury.

N 4

Mr.

Mr. St. JOHN. Sir, I do not rise up to trouble you long, but to speak to one point that was mention'd by a noble Lord over the way. I shall be as tender as any Man alive of doing any thing against the Liberty of the People, but I am for this, because I take it to be the greatest security for their Liberty. The noble Lord was pleas'd to take notice, that in the Consequence, the Crown would have a great influence on those that are to return the Members of the House of Commons; and when they were in, they might vote for one another. I can't think that the Liberties of the People of *England* are safer in any Hands below, or that the influence of the Crown will be stronger here than in other Courts.

MARQ. OF HARTINGTON. I think that Gentleman hath not answer'd what I said. I shall never have any Suspicion of any that sit in this House now; but when those that have no Right are return'd, and make a majority, I think it will not be safe.

Mr.

Mr. WARD. I do not apprehend that Consequence from this Resolution. I think if it was so, this should have been offer'd before the first Resolution was pass'd, which hath pass'd in the House and Committee, *nemine contradicente*; for you can't determine the Right of any Members sitting here, without determining the Right of the Electors.

Mr. LOWNDES. I can't but think it will be harder to influence this House to get an ill Vote, than it will be another place: However, if I am a Freeholder, and have a Right to vote in a County; or a Freeman, and have a Right to vote in a Borough; by admitting Persons to vote that have no Right, it may be as much prejudice to me, for that may make my Vote signify nothing: And there is as much Injury one way as the other. If all the People of *England*, who have a Vote, should go together by the ears in *Westminster Hall*, and dispute there who has a Right to vote, and who not, I believe the Judges of the Common Law, and noble Peers of the other House, would be glad, in a little time, to restore the Right where 'tis, it would breed

breed so much Confusion. If Gentlemen are not satisfy'd already, they may easily be so, That there is no defect of Power in this House, but they have a Power to do Justice in all Cases of Elections ; and I hope every body will take care, not only to maintain the Rights of the People that sent them hither, but the Trust lodg'd in them, which they cannot depart from by the Rules of Justice.

THEN the Second, with the other three Resolutions past in the Committee, were agreed to by the House without a division, with this Amendment only, of leaving out [at Common Law] in the fifth Resolution.

BUT the House, tho they voted *Asbby* guilty of a breach of Privilege, in commencing and prosecuting the said Action, yet there having been no Declaration of the House in that Case before, they made no Order for taking him into Custody, as usual in Cases of breach of Privilege: However, the Declaration and Lenity of the House to this Man had not that effect as might have been expected ; for before the then following Session, not

not only Execution was taken out upon the said Judgment, but Mr. *Mead* brought Actions of like nature for *John Paty*, *John Oviat*, *John Paton Junior*, *Henry Basse* and *Daniel Horne*, five other Inhabitants of *Ailesbury*, for being deny'd their Votes at the Election of Members to serve in Parliament for the said Borough of *Ailesbury*. Of which Complaint being made to the House the said next Session, both Mr. *Mead* and his Clients were order'd to be taken into custody for the said breach of Privilege, and accordingly the Clients were taken and lay'd by it all the Session ; but the Messengers could not meet with Mr. *Mead*. The more particular Proceedings of the House against these Men, &c. may be seen in the printed Account thereof, put out by Order of the House after last Session.

[Faint, illegible text, possibly bleed-through from the reverse side of the page.]

A COPY of the Record
inter ASHBY & WHITE,
& al.

*Placita coram Domino Rege
apud Westmonasterium de Termino
Sancti Hillarii, Anno Regni Do-
mini Willielmi Tertii, nunc Regis
Anglie, &c. decimo tertio, Rotu-
lo 460.*

Bucks *ss* **M**ATTHEUS ASHBY
ponit loco suo Rober-
tum Greenway juni-
orem Attornatum suum versus Williel-
mum White, Richardum Talboys, Wil-
lielmum Bell, & Richardum Heydon,
de placito transgressionis super Casum.

ss. Willielmus White, Richardus
Talboys, Willielmus Bell, & Richardus
Heydon ponunt loco suo Johannem
Burn-

Burnham Attornatum suum versus
Mattheum Ashby de placito predicto.

ss. Memorandum quòd alias scilicet
Termino sancti Michaelis ultimo pre-
terito coram Domino Rege apud West-
monasterium venit Mattheus Ashby
per Robertum Greenway juniorem At-
tornatum suum & protulit hic in Curia
dicti Domini Regis tunc ibidem quan-
dam Billam suam versus Willielmum
White, Richardum Talboys, Williel-
mum Bell & Richardum Heydon, in
custodia Mareschalli &c. de placito
transgressionis super Casum, & sunt
pleg. de prosequendo scilicet Johannes
Doe & Richardus Roe quæ quidem
Billa sequitur in hæc verba scilicet
Bucks ff. Mattheus Ashby queritur de
Willielmo White, Richardo Talboys,
Willielmo Bell & Richardo Heydon, in
custodia Mareschalli Mareschalfiæ Do-
mini Regis coram ipso Rege de existen-
tibus pro eo videlicet Quòd cum vi-
cesimo sexto die Decembris Anno Reg-
ni Domini Willielmi Tertii nunc Regis
Anglie &c. duodecimo è Curia Can-
cellarie ipsius Domini Regis nunc apud
Westmonasterium in Comitatu Middle-
sexie emanavit quoddam breve ipsius
Domini

(190)

Domini Regis nunc tunc Vicecomiti Comitatus Bucks predicti directum recitando quod dictus Dominus Rex de advisamento & assensu Concilii sui pro quibusdam arduis & urgentibus negotiis eundem Dominum Regem statum & Defensionem Regni sui Anglie & Ecclesie Anglicane concernentibus quoddam Parliamentum suum apud Civitatem suam Westmonasterii sexto die Februarii tunc proximo futuro teneri ordinaverit & ibidem cum Prelatis Magnatibus & Proceribus dicti Regni sui colloquium habere & tractatum; Idem Dominus Rex nunc eidem tunc Vicecomiti Comitatus Bucks per dictum breve preceptum firmiter injungens quod facta Proclamatione in proximo Comitatu suo post receptionem ejusdem brevis tenenda de die & loco predictis duos Milites gladiis cinctis magis idoneos & discretos Comitatus predicti & qualibet Civitate Comitatus illius duos Cives & de quolibet Burgo duos Burgenses de discretioribus & magis sufficientibus libere & indifferenter per illos qui hujusmodi Proclamationibus interforent juxta formam Statuti inde editi & provisi eligi & nomina eorundem Militum Civium & Burgensium sic eligendorum in quibusdam

(191)

dam Indenturis inter ipsum tunc Vicecomitem & illos qui hujusmodi electionibus interforent inde conficiendis licet hujusmodi eligendi presentes forent, vel absentes inferi eosque ad dictos diem & locum venire faceret; ita quod iidem Milites plenam & sufficientem potestatem pro se & Communitate Comitatus illius ac dicti Cives & Burgenses pro se & Communitatibus Civitatum & Burgorum predictorum divisim ab ipsis haberent ad faciendum & consentiendum hiis que tunc ibidem de communi Consilio dicti Regni ipsius Domini Regis nunc (favente Domino) contigerent ordinari super negotiis antedictis ita quod pro defectu potestatis hujusmodi seu propter improvidam electionem Militum Civium aut Burgensium predictorum dicta negotia infecta non remanerent quovismodo & Electionem illam in pleno Comitatu ipsius tunc Vicecomitis factam distincte & aperte sub sigillo suo & sigillis eorum qui Electionibus illis interforent eidem Domino Regi nunc in Cancellariam suam ad dictos diem & locum certificaret indilate remittens eidem Domino Regi alteram partem Indenturarum predictorum eidem brevi consutarum una cum brevi

(192)

brevi illo quod quidem breve postea & ante predictum sextum diem Februarii in brevi predicto mentionatum scilicet vicesimo nono die Decembris anno duodecimo supradicto apud Burgum de Aylesbury in dicto Comitatu Bucks cuidam Roberto Weeden Armigero ad tunc Vicecomiti ejusdem Comitatus Bucks deliberatum fuit in forma Juris exequendum Virtute cujus quidem brevis predictus Robertus Weeden Vicecomes Comitatus Bucks predicti ut prefertur tunc & ibidem existens postea & ante predictum sextum diem Februarii scilicet tricesimo die Decembris Anno duodecimo supradicto apud Burgum de Aylesbury predictum in dicto Comitatu Bucks fecit quoddam preceptum suum in scriptis sub sigillo ipsius Roberti Weeden Officii sui Vicecomitis Comitatus Bucks predicti Constabulario Burgi de Aylesbury predicti directum recitandum diem & locum Parliamenti predicti tenendi proinde eos requirens & eis in mandato dans quod facta Proclamatione infra Burgum predictum de die & loco in eodem precepto recitatis causarent libere & indifferenter eligi duos Burgenses Burgi illius de discretioribus & magis sufficientibus per

(193)

per ipsos qui hujusmodi Proclamationibus interforent juxta formam Statuti in talibus casibus editam & provisam & nomina dictorum Burgensium sic electorum licet presentes forent vel absentes inferi in quibusdam Indenturis inter dictum Vicecomitem & illos qui haberent interesse id hujusmodi Electionibus & quod eos venire faceret ad diem & locum in eodem precepto recitatos ita quod dicti Burgenses haberent plenam & sufficientem potestatem pro se & Communitate Burgi predicti ad faciendum & consentiendum hiis que tunc ibidem de communi consilio dicti Regni (favente Domino) contingerent ordinari super negotiis antedictis ita quod pro defectu hujusmodi potestatis aut propter improvidam electionem Burgensium predictorum dicta negotia infecta non remaneret & quod electionem indilate eidem tunc Vicecomiti certificarent mittentes eidem Vicecomiti alteram partem indenturarum predictarum dicto precepto annexarum ut idem Vicecomes eandem certificaret dicto Domino Regi in Cancellaria sua ad diem & locum predictos quod quidem preceptum postea & ante predictum sextum diem Februarii scilicet eodem tricesimo die Decembris anno supradicto

O

apud

0304
(194)

apud Burgum de Ailesbury predictum in dicto Comitatu Bucks eisdem Willielmo White Richardo Talboys Willielmo Bell & Richardo Heydon ad tunc & usque ad & post retornatum ejusdem brevis Constabulariis Burgi de Ailesbury predicti existentibus in forma Juris exequendum deliberatum fuit quibus quidem Willielmo White Richardo Talboys Willielmo Bell & Richardo Heydon ratione Officii sui predicti Constabulariorum Burgi predicti executio precepti illius de jure ad tunc & ibidem pertinuit virtute cujus quidem precepti ac vigore brevis predicti Burgenses Burgi predicti existentes in ea parte debite premoniti postea & ante predictum sextum diem Februarii scilicet sexto die Januarii anno duodecimo supradicto apud Burgum de Ailesbury predicti coram eisdem Willielmo White Richardo Talboys Willielmo Bell & Richardo Heydon Constabulariis Burgi predicti assemblati fuerunt ad duos Burgenses pro Burgo illo eligendos secundum exigentiam brevis & precepti predictorum ac durante assemblatione illa ad intentionem illam & antequam hujusmodi duo Burgenses virtute brevis & precepti predictorum electi fuerunt scilicet die & anno ultimis supradictis apud Burgum de

(195)

de Ailesbury predictum in comitatu predicto idem Mattheus Ashby ad tunc & ibidem existens Burgens & Inhabitans Burgi predicti & Eleemosinas ibidem aut alibi ad tunc aut antea non recipiens sed debite qualificatus & intitulatus existens ad suffragium suum ad eligendum duos Burgenses pro Burgo predicto secundum exigentiam brevis & precepti predictorum dandum coram eisdem Willielmo White Richardo Talboys Willielmo Bell & Richardo Heydon quatuor Constabulariis Burgi illius quibus tunc & ibidem debite pertinuit ad suffragium ipsius Matthei Ashby de & in premissis capiendum & allocandum parata fuit & obtulit suffragium suum dare pro eligendo Thomam Lee Baronettum & Simonem Mayne Armigerum duos Burgenses pro Parlamento illo virtute & secundum exigentiam brevis & precepti predictorum ac Suffragium ipsius Matthei Ashby ad tunc & ibidem de jure debuit admitti Et predicti Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon sic Constabularii Burgi predicti tunc & ibidem existentes ad tunc & ibidem requisiti fuerunt per ipsum Mattheum Ashby ad suffragium ipsius Matthei Ashby predictum in premissis recipiendum

O 2

(196)

endum & allocandum iidem tamen Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon ad tunc & ibidem ut prefertur Constabularii Burgi predicti existentes premissorum non ignari sed machinantes & fraudulentiter & malitiose intendentes eundem Mattheum Ashby in hac parte damnificare & de privilegio suo de & in premissis predictis impedire & totaliter frustrare eundem Mattheum Ashby suffragium suum in ea parte dare ad tunc & ibidem obstruxerunt & ad tunc & ibidem penitus recusaverunt ad eundem Mattheum Ashby suffragium suum eligendos duos Burgenses pro Burgo illo ad Parliamentum predictum dare permittendum ac suffragium ipsius Matthei pro electione illa non receperunt neque allocaverunt ac duo Burgenses de Burgo illo pro Parlamento predicto Mattheo Ashby sic ut prefertur excluso sine aliquo suffragio ipsius Matthei Ashby ad tunc & ibidem virtute brevis & precepti predicti electi fuerunt in enervation. predicti privilegii ipsius Matthei Ashby de & in premissis predictis. Unde idem Mattheus Ashby dicit quod ipse deterioratus est & damnum habet ad valentiam ducentarum Librarum & inde producit Sectam &c.

Et

(197)

Et modo ad hunc diem scilicet diem Veneris proxim. post Octabas sancti Hillarii isto eodem Termino usque quem diem predicti Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon habuerunt licentiam ad Billam predictam interloquendi & tunc ad respondendum &c. coram Domino Rege apud Westmonasterium veniunt tam predicti Mattheus Ashby per Attornatum suum predictum quam predicti Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon per Johannem Burnham Attornatum suum Et iidem Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon defendunt vim & injuriam quando &c. Et dicunt quod ipsi non sunt inde culpabiles & de hoc ponunt se super Patriam & predictus Mattheus Ashby similiter &c. Ideo veniunt inde Juratores coram Domino Rege apud Westmonasterium die Jovis proxime post octabas Purificationis beate Marie Virginis & qui nec &c. ad recognitionem &c. quia tam &c. idem dies datus est partibus predictis ibidem &c.

Postea continuato inde processu inter partes predictas de placito predicto per Juratam Patrie inde inter eos in

O 3

respectu

respectu coram Domino Rege apud Westm. usq; diem Mercurij proximò post Quindenam Pasche extunc proximam sequentem nisi Justiciarii Domini Regis ad Assisas in Comitatu predicto capiendas assignatos prius die Lune nono die Martii apud Aylesbury in Comitatu predicto per formam Statuti, &c. venerint pro defectu Juratorum &c. ante quem diem dictus Dominus Willielmus Tertius nuper Rex Anglie &c. diem suum clausit extremum ac etiam ante eundem diem loquela predicta adjournata fuit per breve Domine Anne nunc Regine Anglie &c. de communi adjournamento coram eadem Domina Regina apud Westmonasterium usq; a die Pasche in tres septimanas ad quas quidem tres septimanas Pasche coram eadem Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum & prefati Justiciarii coram quibus &c. miserunt hic Recordum suum coram eis hic in hec verba, scilicet, Postea die & loco infra contentis coram Edwardo Ward Milite Capitali Barone Scaccarij Domine Anne nunc Regine Anglie &c. & nuper Capitali Barone Scaccarij Domini Willielmi Tertij nuper Regis Anglie

glie & Thoma Knight Armigero hac vice associato eidem Edwardo Ward, & Thoma Bury Milite uno Barone Scaccarij dicte Domine Regine nunc & nuper uno Barone Scaccarij dicti nuper Regis Justiciariis ipsius Domine Regine ad Assisas in Comitatu Bucks capiendas assignatis per formam Statuti &c. presente prefato Thoma Bury non expectato virtute brevis de si non omnes &c. venerunt tam infra nominatus Mattheus Ashby quam infra scripti Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon per Attornatos suos infra contentos & Juratores Jure' unde infra fit mentio exacti similiter venerunt qui ad veritatem de infra contentis dicent' electi triati & jurati dicunt super Sacramentum suum quòd predicti Willielmus White Richardus Talboys Willielmus Bell & Richardus Heydon sunt culpabiles de premissis in narratione infrascriptis interius eis impositis modo & forma prout predictus Mattheus interius versus eos queritur Et assidunt dampna ipsius Matthei occasione infra contenta ultra Misas & custagia sua per ipsum circa Sectam suam in hac parte apposita ad quinque libras & pro Misas & Custagiis illis ad quadraginta

ginta solidos sed quia curia dicte Domine Regine nunc hic de Judicio suo de & super premissis reddendo nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domino Rege apud Westmonasterium usq; diem veneris prox' post crastinum Sancte Trinitatis de Judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum sed quia curia dicte Domine Regine nunc hic de Judicio suo de & super premissis reddendo nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem veneris proximum post tres septimanas Sancti Michaelis de judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum sed quia curia dicte Domine Regine nunc hic de Judicio suo de & super premissis reddendo nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmona-

monasterium usq; diem Sabbati proximo post Octabas Sancti Hillarii de Judicio suo inde audiendo eo quod curia dicte domine Regine nunc hic inde nondum &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum sed quia curia dicte Domine Regine nunc hic de Judicio suo de & super premissis reddendo nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem Mercurii proximum post quindenam Pasche de Judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum &c. Ad quem diem coram Domina Regina apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum sed quia curia dicte Domine Regine nunc hic de judicio suo de & super premissis reddendum nondum advisatur dies inde datus est prefato Mattheo Ashby coram Domina Regina apud Westmonasterium usq; diem veneris proximum post crastinum Sancte Trinitatis de judicio suo inde audiendo eo quod curia dicte Domine Regine nunc hic inde nondum &c. Ad quem diem coram Domina Regina apud

apud Westmonasterium venit predictus Mattheus Ashby per Attornatum suum predictum sed quia curia dicte Domine Regine nunc hic de iudicio suo de & super premissis reddendo nondum ad-
visatur dies inde datus est prefato Mat-
theo Ashby coram Domina Regina apud
Westmonasterium usq; diem Sabbati
proximè post tres septimanas sancti Mi-
chaelis de iudicio suo inde audiendo eo
quod curia dicte Domine Regine nunc
hic inde nondum &c. Ad quem diem
coram Domina Regina apud Westmo-
nasterium venit predictus Mattheus Ash-
by per Attornatum suum predictum su-
per quo visis & per curiam dicte Domine
Regine nunc hic plenius intellectis om-
nibus & singulis premissis maturaq; deli-
beratione inde habita consideratum est
quod predictus Mattheus Ashby nil ca-
piat per Billam suam predictam sed pro
falso clamore suo sit inde in misericor-
dia &c. Et predicti Willielmus White
Richardus Talboys Willielmus Bell
& Richardus Heydon eant inde sine
die, &c.

A

A COPY of the Record
inter SOAME & BAR-
NARDISTON.

*Placita coram Domino Rege
apud Westmonasterium de Termino
Sancte Trinitatis Anno Regni Do-
mini Caroli Secundi nunc Regis An-
glie &c. vicesimo sexto, Rotulo
1577.*

Middl. ss. **M**emorandum quod a-
lias scilicet Termino
Pasche ultimo prete-
rito coram Domino Rege apud West-
monast. venit Samuel Barnardiston Baro-
net. per Tho. Ditchfield Attornatum su-
um & protulit hic in curia dicti Domini
Regis tunc ibidem quandam Billam su-
am versus Willielmum Soame Militem
nuper Vicecomitem Comitatus Suffolcie
in custodia Marrescalli &c. de placito
trans-

transgressionis super casum & sunt pleg. de prof. scilicet Johannes Doe & Richardus Roe. Que quidem Billa sequitur in hec verba ff. Middl. Samuel Barnardiston Baronettus queritur de Willielmo Soame Milite nuper Vicecomite Comitatus Suffolcie in custodia Mar. Marrescal. Domini Regis coram ipso Rege existentem pro eo videlicet quod cum Dominus Rex nunc octavo die Februarii Anno Regni dicti Domini Regis nunc vicesimo quinto per breve suum gerend. dat. eisdem die & anno emanans extra Cancellariam suam apud Westmonasterium predict. in dicto Com. Middl. ad tunc existent. tunc Vicecomit. Com. Suffolcie predict. directum recitando per idem breve, Quod cum Henricus North Baronettus nuper elect. fuerat unus Mil. Com. predict. pro ad tunc present. Parlamento dicti Domini Regis inchoat. apud Civitatem suam Westmonasterii octavo die Maii Anno Regni dicti Domini Regis tertio decimo & ab inde per diversas Prorogationes usq; tricesimum diem Octobris Anno Regni ejusdem nunc Regis vicesimo quarto continuat. & ab eodem tricesimo die Octobris idem Parliamentum usq; quarum diem tunc instantis Februarii ulterius

rius prorogat. fuerat ibidem tunc tenend. & prosequend. Quodq; ipse sic elect. & debito modo retornat. juxta formam Statuti in hujusmodi casu edit. & provis. in domo inferiori communitate Regni dicti Domini Regis Anglie constitut. fuerat prout per Record. dicti Parliamenti sui in Cancellaria sua residend. plenius constabat ac idem Henricus North unus Militum pro Cond. predict. existend. diem suum clausit extremum ut dictus Dominus Rex acceperat cujus pretextu subditi dicti Domini Regis Com. Suffolcie pred. de uno Milite ad tractandum pro utilitate ejusdem Com. destituti fuerunt Idem Dominus Rex nolens tamen quod Communitas Regni sui in dicto Parlamento suo ad negotia dicti Domini Regis & statum Regni sui & Ecclesie Anglicane aggregat. ex causa predicta immoraretur seu extenuaretur quo minus negotia illa debitum forcierentur effectum eidem Vicecomit. dicti Com. Suff. per brev. ill. precepisset quod loco predicti Henrici in pleno Com. suo immediate post receptum brevis illius unum alium militem gladio cinctum idoneum & discretum Com. predict. (proclamatione prius de premissis ac de die & loco facta) libere

libere & indifferenter per illos qui hujusmodi proclamation. ill. interessent juxta formam Statuti inde editi & provisi eligi faceret & nomen ejusdem Militis in quibusdam indenturis inter predict. Vicecomitem & illos qui hujusmodi Electioni interessint inde conficiend. (licet hujusmodi eligend. presens esset vel absens) inseri eumq; ad dictum Parliamentum venire faceret Ita quod idem Miles sic eligend. plenam & sufficientem potestatem pro se & Communitate Com. predict. haberet ad faciend. & consentiend. hiis que in Parlamento de communi consilio dicti Regni sui (favente Deo) contingerent ordinari super negotiis ante dictis (noluit dictus Dominus Rex tamen quod predictus Vic. Suff. nec aliquis alius Vicecomes dicti Regni sui aequaliter esset electus) & Electionem illam sic factam distincte & aperte sub sigillo ejusdem Vic. & Sigillis eorum qui Electioni ill. interessent dicto Domino Regi in Cancellariam suam certificaret indilate remittend. dicto Domino Regi alteram partem Indenture predictae eidem brevi consutam una cum eodem brevi prout in eodem brevi plenius continetur. Quod quidem breve postea scilicet duodecimo die Februarii Anno Regni

Regni dicti Domini Regis nunc vicesimo quinto supradicto apud Gippovicum in dicto Com. Suff. prefato Willielmo Soame tunc Vic. dicti Com. Suff. existens deliberatum fuit in forma juris exequendum quodq; predictus Will. Vic. Com. predicti tunc existend. ad prox. Com. suum ejusdem Com. Suff. post receptionem dicti brevis scilicet vicesimo quarto die Februarii Anno Regni dicti Domini Regis nunc vicesimo quinto supradicto ac vigore brevis illius in pleno Com. suo tunc tent. apud Gippovicum predict. in dict. Com. Suff. coram eodem Williel. ad tunc Vic. ejusdem Com. breve illum legi fecisset nec non publicam Proclamationem de die & loco in brevi predicto in ea parte content. fecisset nec non de uno milite gladio cincto magis idoneo & discreto Com. predict. juxta formam & exigentiam brevis illius eligend. adveniend. ad Parliamentum predictum in pleno Com. ill. prout ill. per breve ill. precept. fuit & secundum formam ill. precept. fuit videlicet int. horam octavam & horam undecimam ante meridiem ejusdem vicesimi quarti die Februarii Anno vicesimo quinto supradicto super quo processum fuit tunc ibidem in pleno Com. ill. ad
Electio-

(208)

Electiorem unius alius Militis pro eodem Com. in loco predicto Henrici per Gentes in Com. illius residentes ac eidem Proclamationi interessentes ac licet idem Samuel in eodem pleno Com. tent. apud Gippovicum predict. (qui tunc & diu antea fuit Miles gladio cinctus in predicto Com. videlicet apud Brightwell commorans & conversans & in eodem Com. Suff. natus) secundum exigentiam brevis predicti debite electus & nominatus fuit eodem vicesimo quarto die Februarii inter horam octavam & horam undecimam fore Militem Com. illius in loco predicti Henrici North pro predicto Parlamento adveniend. pro eodem Com. ad idem Parliamentum per majorem numerum Gentium tunc residentium infra dictum Com. Suffolcie et predicto tempore Proclamationis predicti tunc & ibidem present. & eidem Proclamationi interessentium quorum tunc quilibet expendere potuit quadraginta solidos liberi tenementi & ultra per annum infra Com. illo ac licet predictus Willielmus ad tunc Vic. dicti Com. Suffolcie existens premissa satis sciens postea scilicet eodem vicesimo quarto die Februarii anno regni dicti Domini Regis nunc vicesimo quinto in Cancellariam dicti Domini Regis nunc

(209)

nunc apud Westmonasterium predictum in dicto Comitatu Middl. breve predict. retornavit simul cum quadam Indentura inter ipsum Vicecomitem & predict. Electores ipsius Samuelis de predict. Electione ipsius Samuelis fact. secundum exigentiam brevis predict. predictus tamen Willielmus ad tunc Vicecomes predicti Comitatus Suffolcie existens Officii sui debitum minime ponderans sed machinans & malitiose intendens ipsum Samuelem in hac parte minus rite pregravare ac eundem Samuelem de fiducia & officii unius Militis Comitatus predict. in dicto Parlamento exercend. omnia frustrare & deprivare & predictum Samuel. ad diversas magnas & grandes pecuniarum summas expendend. causare contra debitum Officii sui predicti falso malitiose & deceptively ad tunc in eandem Cancellariam apud Westmonasterium predictam retornavit una cum Indentura predicta quandam aliam Indenturam eidem brevi similiter annex. specifican. ill. fore fact. inter prefatum Willielmum ad tunc existen. Vicecomit. dicti Comitatus Suffolcie ex una parte & diversas alias personas dicti Comitatus in Indentura illa specificata & continens quod dicte alie persone ut major pars totius

P Comi-

Comitatus predicti in predicto pleno Comitatu Suffolcie apud Gippovicum predictam dicto vicesimo quarto die Februarii anno supradicto eligerunt quendam Lionel. Talamach Baronettum alias dictum Dominum Huntingtowre in Regno Scotie in loco predicti Henrici North un. Militem Comitatus Suffolcie predicti pro Parlamento predicto ad veniend. eidem Parlamento pro Comitatu illo ubi (re vera) predictus Lionel. non fuit elect. per majorem partem Comitatus illius fore Mil. in loco predicti Henrici pro Comitatu predicto prout per ultimam Indenturam predictam falso supponitur ratione cujus quidem falsi retorn. de predicta alia Indentura per predictum Willielmum Vicecomitem dicti Comitatus Suffolcie existen. in forma predicta fact. idem Samuel in domo inferiori pro Communitate hujus regni Anglie in dicto Parlamento ad predict. retorn. predicti brevis & diversa tempora postea assemblat. apud Westmonasterium predict. constitut. admitti non potuit quousque idem Samuel sup petitionem suam Communitati dicti Parlamenti pro remedio suo congruo in ea parte exhibit. & post diversas ingentes denar. summas in & circa manifesta-

festationem & verificationem dicte Electionis ipsius Samuelis coram dicta Communitate expend. & diversos labores in ea parte per ipsum Samuelem sustent. postea scilicet vicesimo die Februarii anno regni Domini Regis nunc vicesimo sexto per Communitat. dicti Parlamenti in domo Communitat. predict. admittus fuit & electio ipsius Samuelis predict. per Communitat. predict. declarat. fuit fore bona unde idem Samuel dicit quod ipse deterioratus est & dampnum habet ad valentiam trium mille librarum, & inde producit sectam &c. Et modo ad hunc diem scilicet diem veneris proximam post crastinum sancte Trinitatis isto eodem Termino usque quem diem predictus Willielmus habuit licentiam ad billam predictam interloquendi & tunc ad respondendum &c. coram Domino Rege apud Westmonasterium venit tam predictus Samuel per Attornatum suum predictum quam predictus Willielmus per Johannem Needham Attornatum suum & idem Willielmus defendit vim & injuriam quando &c. & dicit quod ipse non est inde culpabilis & de hoc ponit se super patriam & predictus Samuel similiter &c. Ideo ven' inde Juratores coram Domino Rege

ge apud Westmonasterium die veneris proximo post tres septimanas sancti Michaelis & qui nec &c. ad recogn. &c. quia tam &c. idem dies datus est partibus predictis ibidem &c. de quo die Jurata predict. inter partes predictas de placito predicto posita fuit inde inter eas in respectum coram Domino Rege apud Westmonasterium usque diem Jovis in crastino Sancti Martini extunc proximo sequente pro defectu Juratorum &c. Ad quem diem coram Domino Rege apud Westmonasterium venit tam predictus Samuel quam predict. Willielmus per Attornatos suos predictos & Juratores Jurate illius exact. similiter ven. qui ad veritatem de & super premissis dicend. elect. triat. & jurat. dicunt super Sacramentum suum quod predictus Willielmus est culpabilis de premissis predictis modo & forma prout predictus Samuel superius versus eum queritur & assidunt dampna ipsius Samuelis occasione premissorum predict. ultra misas & custagia sua per ipsum circa sectam suam in hac parte apposita ad octingentas libras & pro misis & custagiis illis ad quadraginta solidos. Sed quia curia dicti Domini Regis nunc hic de Judicio suo de & super premissis reddendum nondum advisatur
dies

dies inde ulterior datus est partibus predictis coram Domino Rege apud Westm. usque diem veneris proximum post Octabas Purificat. beate Marie de judicio suo inde audiend. eo quod curia dicti Domini Regis hic inde nondum &c. Ad quem diem coram Domino Rege apud Westm. venit tam predictus Samuel quam predictus Willielmus per Attornatos suos predictos super quo visis & per curiam dicti Domini Regis nunc hic plene intellectis omnibus & singulis premissis maturaque deliberatione inde habita consideratum est quod predictus Samuel Barnardiston recuperet versus prefatum Willielmum Soame dampna sua predicta per Juratores predictos in forma predicta assess. necnon nonaginta & octo libras pro misis & custagiis suis predictis eidem Samuel per curiam dicti Domini Regis nunc hic ex assensu suo de incremento adjudicat. Que quidem dampna in toto se attingunt ad noningentas libras Et predictus Willielmus in misericordia &c. Postea scilicet die Sabbati vicesimo quarto die Aprilis Anno Regni Domini Regis nunc &c. vicesimo septimo transcript. Record. & process. predict. inter partes predictas de placito predicto cum omnibus ea tangentibus

(214)

pretextu cujusdam brevis dicti Domini Regis de errore corrigend. per prefat. Willielmum Soame in premissis profecut. coram Justiciariis Domini Regis de Comuni Banco & Baronibus de Scaccario dicti Domini Regis de gradu de le Coife in Cameram Scaccarii juxta formam Statuti in Parlamento Domine Elizabethæ nuper Regine Angliæ apud Westmonasterium vicesimo tertio die Novembris Anno Regni sui vicesimo septimo tent' edit. a predicta curia dicti Domini Regis hic coram ipso Rege transmissa fuerunt predictusque Willielmus Soame in eadem curia Camere Scaccarii comparen' diversas causas & materias pro errore in Recordo & Processu predict. pro revocatione & adnullatione Judicii predicti assignavit Ad quas predict. Samuel Barnardiston in eadem curia Camere Scaccarii predict. similiter comparen. placitavit quod nec in Recordo nec in Processu predict. nec in redditione Judicii predicti in ullo fuit errat. Postmodumq; scilicet die Sabbati decimo die Junii Anno Regni dicti Domini Regis nunc vicesimo octavo visis premissis & per curiam Camere Scaccarii predict. diligent. examinat. & plenis intellectis tam Record. & Process. predict.

(215)

dict. quam Judicio predicto super eisdem reddit. videbatur curia Camere Scaccarii predict. quod judicium predict. vitiosum & defectivum in lege existit Ideo adtunc & ibidem per eandem curiam consideratum fuit quod judicium predictum in omnibus reversetur adnulletur & penitus pro nullo habeatur & quod predictus Willielmus ad omnia que occasione judicii predict. amisit restituatur super quo Record. predict. nec non process. predict. Justiciar. dicti Domini Regis de Comuni Banco & Baron. de Scaccarii dicti Domini Regis coram eis in premissis habit. coram Domino Rege ubicunq; &c. remittebantur secundum formam Statuti predicti Et in eadem curia dicti Domini Regis hic coram ipso Rege jam Resident. &c. Postea scilicet vicesimo quarto die Maii Anno Regni Domini Gulielmi & Mariæ nunc Regis & Regine Angliæ primo Record. & Process. predict. inter partes predictas cum omnibus ea tangentibus pretextu cujusdam brevis de errore corrigend. per prefat. Samuelem Barnardiston in premissis predictis profecut. dicto Domino Regi & Regine in presenti Parlamento a predicta curia dicti Domini Regis & Regine hic transmiss.

P 4 fuit

fuit predictusq; Samuel in eadem curia
 Parlamenti comparens diversas causas
 & materias pro erroribus in Recordo
 & processu predict. pro revocatione &
 adnullatione Judicii predicti assignavit
 Et postea scilicet vicesimo quinto die
 Junii Anno dictorum Domini & Domi-
 ne Regis & Regine suprascript. in pre-
 dicta curia Parlamenti visis & per cu-
 riam ibidem diligenter examinat. &
 plenius intellectis tam Record. & Pro-
 cess. predict. judicio super eisdem reddit
 quam predict. Errore superius assignat.
 pro eo quod videtur curie Parlamenti
 predicti quod Record. ill. in nullo vitio-
 sum aut defectivum existit Et quod
 Record. ill. in nullo fuit erratum Ideo
 adtunc & ibidem Consideratum est per
 eandem curiam Parlamenti predict. quod
 Judicium predict. in omnibus affirme-
 tur & in omni sui robore stet & effect.

The C A S E of
JAY and *TOPHAM,*

And the Defence made by

Sir F R A N C I S P E M B E R T O N

A N D

Sir T H O M A S J O N E S,

For their Judgment given
 therein.

With some other Cases.

(219)

The C A S E of
JAY and *TOPHAM*,
Sessio Parliament. I Will.
 & *Marix.*

MR. *TOPHAM* Serjeant attending the House, having by his Petition complain'd, That he had been a great Sufferer by several Prosecutions at Law for executing the Orders of the House; and that having pleaded those Orders to the Jurisdiction of the Court of Queen's Bench, his Pleas had not been allow'd, but Judgment was given against him: The House refer'd the Examination and Consideration of this Matter to the Committee of Privileges. Accordingly the Committee met and examin'd the Matter.

Sabbati

Sabbati 6^o Julii, 1 Will. & Mar.

Col. BYRCH reported the Fact as it appear'd to the Committee, with the Opinion of the Committee thereupon, with which the House agreed, in these words.

Resolv'd,

“ THAT the House doth agree
 “ with the Committee, That the Judgment given by the Court of King's Bench in *Easter Term, 34 Car. 2. Regis,* upon the Plea of *John Topham* (at the Suit of *John Jay*) to the Jurisdiction of that Court; and also the Judgments given against the said *Mr. Topham*, at the Suit of *Samuel Verdon, John Hilliard, Thomas Staples, Richard Blyth, John Nelson, Thomas Herbert, Nathaniel Reading* and *Richard Harneage*, are illegal, and a violation of the Privileges of Parliament, and pernicious to the Rights of Parliament.

THE House being inform'd, That *Sir Fra. Pemberton* and *Sir Thomas Jones* were Judges of the King's Bench at that time, order'd them to attend upon *Wednesday* next following. *Mer-*

Mercurii 10 Julii 1689.

THE House being inform'd, That *Sir Francis Pemberton* and *Sir Thomas Jones* attended, pursuant to the Order of the House; *Sir Francis Pemberton* was first brought in, and Mr. Speaker spoke to him to this effect.

Mr. SPEAKER. The House has been acquainted, There was an Action brought in the King's Bench in *Easter Term, 34 Car. 2.* by one *Jay* against *Serj. Topham*. To which Action he pleaded the Jurisdiction of this House; and that it proceeded to a Demurrer, and the Plea was over-rul'd by you as Chief Justice; so the House has sent for you to know upon what ground you did it.

Sir FRANCIS PEMBERTON. Sir, I know nothing of this Action, I have been out of the Court now six Years this Vacation. If I saw the Pleadings, it may be I might give you some account of it, but I can't remember so many thousand Actions as were brought at that time. But if you will let me know what the Charge is, I do not doubt but I can give you a good account of it. You say, Sir, he pleaded

pleaded the Jurisdiction of this House.

Mr. SPEAKER. That is, there was a Plea to the Jurisdiction of the Court of King's Bench, That it was done by Order of this House, so it concerns the Jurisdiction of this House.

Sir FRANCIS PEMBERTON. This is quite new to me, for I know not what I was sent for. You were pleas'd to summon me to attend, but I did not know for what, nor do I remember any such Action brought by *Jay*; I remember only an Action was brought by * *Verdon* against *Topham*. And I remember there was a Motion made to us for a new Trial in the Case, where there was 500 *l.* Damages given: And we did give them a new Trial, for we thought it monstrous and unreasonable Damages.

Mr. SPEAKER. There were several Actions brought, but that which the House would be inform'd of, is the Action that was between *John Jay* and *John Topham*.

* Vid. *Verdon's Case* in *Sir Tho. Jones's Reports*.

Sir

Sir FRANCIS PEMBERTON. Under favour, I can say nothing to this Action; but this I can say, if the Defendant should plead he did arrest him by the Command of this House, and should plead that to the Jurisdiction of the Court of King's Bench (I can say nothing to this particular Action, but) I think, with submission, I can satisfy you, that such a Plea ought to be over-rul'd, and I take it the Law is very clear as to this; but as to what is laid to my Charge with respect to this particular Action, if you please to give me some time to look into the Records of the Court.

Mr. SPEAKER. The House will consider of it, if you please to withdraw, and then give you their Resolution.

Sir FRAN. PEMBERTON withdraws.

Sir THOMAS JONES brought in.

Mr.

Mr. SPEAKER. Sir *Thomas Jones*, the occasion the House sent for you is this: They have been acquainted that in the time of King *Charles* the Second, in the thirty fourth year of his Reign, there was an Action brought by one *Jay* against Mr. *Topham*, that then was, and now is, Serjeant of the House of Commons. To which he pleaded, That what he did was by Order of the House, and this he pleaded to the Jurisdiction of the Court of King's Bench at that time; they desire to know if you gave the Judgment, and upon what reason.

Sir THOMAS JONES. 'Tis so long ago I do not remember it; 'tis above seven years ago, and I had not notice at all of the Cause I was commanded to attend you upon; whether I did give any such Judgment or no, it will appear by the Record it self.

Mr. SPEAKER. We have examin'd the Officers, and they give us an account, That Sir *Francis Pemberton* was Chief Justice, and you another Judge then.

Sir

Sir THOMAS JONES. I was a Judge of the Court at that time, but I cannot certainly say, we did give Judgment to over-rule the Plea; I hope if we did, it was according to Law.

Mr. SPEAKER. Well Sir, you may withdraw if you please.

Sir THOMAS JONES withdraws.

Sir FRAN. PEMBERTON brought in again.

Mr. SPEAKER. Sir *Francis Pemberton*, the House took notice when you were in before, you said, when an Order of this House was pleaded to the Jurisdiction of the King's Bench, you conceiv'd by the Law it ought to be over-rul'd; and that you could give those Reasons that would satisfy the House it was so; they expect you should give them now.

Sir FRAN. PEMBERTON. Mr. *Speaker*, As to this Question concerning this particular Case I know nothing, I know not what the Pleading was.

Q

Mr.

Mr. SPEAKER. The House does not expect any thing of your Answer as to this particular Case; but you seem'd to make your Assertion general, and therefore they desire to hear what you can say as to your general Assertion.

Sir FRAN. PEMBERTON. To satisfy the House of all together, I would desire to look into this particular Case; for I do not know whether I was Judg or not then: if they will give me some time, I will give them an account of the whole.

Mr. SPEAKER. The House expects to have some account now of what you said, that a Plea to the Jurisdiction of the Court of King's Bench ought to be over-rul'd.

Sir FRAN. PEMBERTON. If they please, since they charge me with this particular Case, I will answer to the whole together.

Mr. SPEAKER. Well, Sir, if you please to withdraw.

Sir

Sir FRAN. PEMBERTON withdraws.

HE is brought in again.

Mr. SPEAKER. Sir Francis Pemberton, the House did take notice that you did affirm here, that if an Order of this House was pleaded to the Jurisdiction of the Court of King's Bench, that it ought to be over-rul'd, and that you take the Law to be clearly so, and that you thought you could satisfy the House in that point. This is a general Assertion, and they require nothing as to the particular Case; but they do require you, that you would give them your Reasons why you maintain this Opinion.

Sir FRAN. PEMBERTON. The Question that was put to me by your self was a new Question to me: I heard nothing concerning it; nor did I know what it was that would be put to me. I did tell you my present Apprehensions of the Case you put; I did not speak of an Order of the House in general, but the Order that was in this Case of the Order of taking him into Custody: That was
Q^e the

the Question propos'd to me. I had no Reasons to speak of the Orders of the House in general, I can give no account of them; but 'tis *quoad hoc*, Whether the Order for taking him into Custody was pleadable to the Jurisdiction, I did apprehend by the Law it was not pleadable: If I was understood in any other sense, I beg your Pardon, for I spake it *quoad hoc*. The Case of *Jay* 'tis, I think, which was, It being the Order of the House to take him into Custody, that being pleaded to the Jurisdiction of the Court of King's Bench, whether that ought to be allow'd or no? Therefore if it be look'd upon as if I spake in general, I did not adapt my Words as I should, but that is my meaning.

Mr. SPEAKER. That comes much to the same purpose, under-favour; You say, an Order of this House being pleaded in this particular Case to the Jurisdiction of the King's Bench, that Order ought to be over-rul'd.

Sir

Sir FRAN. PEMBERTON. I beg your Pardon, the Plea.

Mr. SPEAKER. Ay the Plea.

Sir FRAN. PEMBERTON. It must be in Cases of like nature. I do not make such a general Assertion, (but speak as to this particular Case) I do not know how far that may go; and I hope the House won't desire my Opinion in that, I did not dream of it; we were upon this single Point. And I must tell you, I did not apprehend any such thing would be put unto me. As to the Justification of this, I can't, may be, upon the sudden be prepar'd with such Reasons as will satisfy the House; if they put it upon me to tell my present Apprehensions, that is another thing.

Mr. SPEAKER. I believe the House will be willing to hear your present Apprehensions.

Q3

Sir

Sir FRAN. PEMBERTON. That may be with some prejudice to the Law, I only tell you my present Apprehensions: If you will give me time to give you my Reasons, I will give you my Reasons as well as I can; but you cannot expect I should be furnish'd with such Reasons now, as I may upon further thought.

I MUST premise this to you, That the Jurisdiction of this House I do not take to be in question, nor the Validity of their Orders. I think there is no Judge that understands himself but will allow the Privileges of this House, they are the Privileges of the Nation, and we are all bound to maintain them as much as any Member of the House.

BUT the Question is here now *de modo*. 'Tis agreed on all hands the taking him into Custody is justifiable; but the Question is (*de modo*) whether pleadable by way of Jurisdiction, or in Bar; and therefore I do not look upon the Privileges of this House are at all in question, I only state what I apprehend the Case and Matter to be. If the House press me to declare my present Opinion of it, I must desire I may enlarge myself

self if there be occasion for it; it can't be expected I should be prepar'd to answer all things.

Mr. SPEAKER. There is no doubt the House will not tie you up.

Sir FRAN. PEMBERTON. The Question is of the manner of pleading this Order of the House; and the Question is, Whether it may be to the Jurisdiction of the Court or not?

AND, under favour, I have always taken it that such a Plea could not be pleaded to the Jurisdiction of the Court, but 'tis a good Plea by way of Bar. Any Man that understands the Law of *England*, makes a wide difference between the pleading to the Jurisdiction, and in Bar; And I must tell you, that I take it, that nothing which is pleadable in Bar is pleadable to the Jurisdiction, they are several manners of Pleading. The Justification here is a proper Matter of Bar, and 'tis a good Justification; but whether the Court shall be excluded their Jurisdiction, that they shall not know whether this be true or no, is the Question? For if this be pleaded to the Jurisdiction, there is an end of it. Whether

Mr. *Topham* had such an Order ~~or~~ not can't be a Question upon a Plea to the Jurisdiction, for the hands of the Court are ty'd up; and therefore whenever there is a Plea to the Jurisdiction, because the Court cannot examine the Fact, they swear to their Plea.

NOW here 'tis allow'd by all People living, I think no Judg ever deny'd it, that the Order of this House was sufficient to take any one into Custody. No Judg, I presume, ever thought otherwise; but if this be pleaded to the Jurisdiction here, the Hands of the Court are clos'd: So that whether he had such an Order or not, is not to be enquir'd of by the Court. But if it be pleaded in Bar, so 'tis a good Bar, and he will have as much advantage as any, and all People must allow 'tis a good Bar. Therefore I would pray you that you would consider, that in this Case here is nothing of your Privileges, nothing of the Jurisdiction of this Court is call'd in question, but only the manner of making use of it. There are Acts of Parliament; he that does any thing under an Act of Parliament, does it under as high an Authority, as he that acts under the Authority of this House, for that is the Authority of this Nation.

Yet

Yet in those cases, tho you are tender that none be prejudic'd acting by that Authority, yet you have never made any provision that it might be pleaded to the Jurisdiction. In the Case of the Commission of Sewers, where they justify by your Authority, and the whole Nation's, tho you have allow'd them as beneficial a way of pleading as can be, yet 'tis by way of Bar, not to the Jurisdiction of the Court. They say it is done by the Authority of the Commission of the Sewers, but they do not plead it to the Jurisdiction. This I did in pursuance of the late Act for Sewers, and therefore you are to examine it no further. This never was allow'd, nor the Parliament design'd no such thing.

IN this Case, if Mr. *Topham* comes and pleads this by way of Bar, no Court will deny but it is a good Justification, he has answer'd to the thing, and justified what he has done. Your Authority will be allow'd, but the Question is, Whether this shall stop the Court that they shall not examine it? For any Man living may plead such a Plea. Now the putting him to plead this by way of Bar, is only to see whether what he hath pleaded is true. As to all other Cases,

when

(234)

when you allow that where they do any thing in prosecution of an Act of Parliament, they shall give the general Issue in Evidence, this is by way of Bar, you do in no case oust the Court of its Jurisdiction. The King's Bench hath a general Jurisdiction to examine the things that are done whether fairly or not. This Plea is allowable, and ought to be allow'd to any Action of Trespass to be brought. But under favour I must submit it to you: I take the Law to be manifestly plain, That by way of Plea to the Jurisdiction it can't be, but it ought to be overrul'd to put him to plead it by way of Bar, where he will have as full Advantage. This is my present Apprehension.

THEN Sir *Franc. Pemberton* being withdrawn, a Question was put for adjourning the Debate, and it pass'd in the Negative; and the House

Resolv'd,
“ That the Orders and Proceedings
“ of the House being pleaded to the Ju-
“ risdiction of the Court of King's
“ Bench, ought not to be over-rul'd.

A N D

(235)

A N D Sir *Francis Pemberton*, and Sir *Tho. Jones* were order'd to attend again, to give what further Reasons they could for the maintenance of their Judgment.

Veneris 19 Julii 1689.

Sir *Francis Pemberton* and Sir *Thomas Jones* attending, Sir *Francis* was first brought in.

Mr. S P E A K E R. Sir *Fran. Pember-*
ton, The House appointed you to attend formerly (but they have been prevented by other business) to give the Reasons of your Judgment *int' Jay & Topham.*

Sir F R A N C I S P E M B E R T O N.
Mr. *Speaker*, This Case was an Action of Trespass, and it was brought by *Jay* against *Topham*, for arresting and detaining him in Prison by the space of ten days, and keeping him till he paid him 30*l.* to let him out of Prison, by which means many of his Affairs were lost, and left in that time undone, which is a common Action at Common Law.

T O

(236)

TO this the Defendant he comes and pleads, that there was an Order of this House made in *March 32 Car. 2.* (the Action is in the 34 in *May*) for taking of this *Jay* into Custody, and to bring him to the Bar of the House; and says that by virtue of that Order he took him and detain'd him, with an intention to bring him to the Bar of this House. And this he pleads to the Jurisdiction of the Court, that the Court had nothing to do with it, nor ought further to examine this matter. And upon that there was a Demurrer, and upon the Demurrer it was by the Court adjudg'd, that he should answer over; that is, that he should plead in Bar of the Action: And this is all that I can discern by the Case.

NOW Sir, as to the Reasons, since this House is pleas'd to command me, I will shortly tell you what my Apprehensions were, and upon what account we went in this Case. When this Action was pleaded to the Jurisdiction of this Court, I consider'd, and could find no Judgment at all against the Jurisdiction of this Court in any such Case, nor any Vote of this House, or any thing or Order against it at all. The Case that came nearest

(237)

est it, was the Case of Sir *John Elliott*, where there was an Information for some Misbehaviour in this House against Sir *John Elliott*, and others: They did there plead to the Jurisdiction of the Court, and there the Court over-rul'd it. It is true, afterwards upon the return of King *Charles the 2d.* there was a Writ of Error brought upon that Judgment, and Errors assign'd in the Lords House, and the Judgment was revers'd; but there was no Error assign'd in overruling the Plea to the Jurisdiction of the Court, but only this, that it was in the body of the Information said, That they did speak some words in Parliament which the Court of King's Bench could not try, because by the Judgment of the Lords House they were not cognizable at Law; for the Members of this House have always had a freedom of Speech here: and upon that account it was revers'd. But I must tell you, that in my Lord *Vaughan's* Report he did allow, that as to the Miscarriage that was alledg'd in laying hands upon the Speaker, the Court of King's Bench had a Jurisdiction.

AND finding no footsteps of Law, nor any thing of this Honourable House that

(238)

that could direct us, I did consider then what was reasonable and fitting to be done; I knew we had a Jurisdiction in the Case of such an Action as this is; and I found the Objection against it was only one: That this House was a superior Court, of a higher nature than the King's Bench, and of a greater Authority; and that the King's Bench had nothing to do to inspect the Actions of this House, or to examine what was done by virtue of any Order of this House. And then on the other side I consider'd, if the Courts of Law could not examine it, that there would be a Cause struck off by a bare Allegation without any more to do: For if we had no cognizance of it, if we could not examine the Matters that were done in pursuance of the Order of this House, how could we impanel a Jury, and to what purpose should we try it? for if it were found against him that he had exceeded his Authority, if we could not give Damages for it, what should we examine it for? I thought that the Consequence of this would be, That that which was alledg'd to be a disorderly Execution of the Vote, must be struck off by a bare Allegation.

SIR,

(239)

SIR, This coming before us in a judicial way, and we being to do something in it, either throw out the Cause, or overrule the Plea to the Jurisdiction; I thought it most reasonable that this thing should be examin'd in that Court.

THEN I consider'd, that where Justifications are made by virtue of Acts of Parliament, and every body must acknowledge that Court is of a higher nature than the King's Bench, yet that was not enough to exclude the King's Courts from their Jurisdiction.

I CONSIDER'D in Cases where Justification is made by Act of Parliament, there is a Justification by as high an Authority as this is, that will be allow'd on all hands; for there are not only the Orders of this House, but the Authority of the House of Lords. You have in those Cases fence'd the matter as well as can be imagin'd, and taken as much care to protect them; given some Power to plead summarily, others to plead Not guilty, and justify by giving the special matter in Evidence. But I never heard that there was any Provision made for the pleading to the Jurisdiction, tho it was done by a higher Authority: Therefore I thought that the high

high Authority and high Nature of this Court could not exempt the King's Bench, being a Court of Law, to examine, whether what was alledg'd to be done, was done in pursuance of your Authority, or not?

THEN I did consider with my self, that if this Plea should be over-rul'd, the Defendant was at no Prejudice, for the same Matter might be pleaded by way of Bar. And it would have been admitted a good Bar if true, and he could have no manner of Prejudice that I know of by pleading as the Court directs. We did not question the Legality of your Orders, nor the Power of them; but the great Business was, Whether he had pursu'd this Order of the House of Commons, and that was the thing properly examinable. But on the other side, it would be a monstrous Mischief to the Plaintiffs if such a Plea was allow'd to the Jurisdiction: for it would be agreed on all hands if Mr. *Topham* had abus'd his Authority, and done any outrageous thing; if when he had an Order to bring a Member to the Bar of this House, he had kept him extravagantly and not brought him thither, but exacted Mony of him; if the Case in Fact was so, it is certain he ought

ought to have been punish'd, and to return Damages to the Person injur'd.

THEN in this Case, you know, Mr. *Speaker*, That this House sometimes hath a Recess, and Parliaments have Intervals. When this Court hath a Recess, and the Parliament is dissolv'd (as there are many Years sometimes when there is no Parliament) then in the Recess of Parliament (supposing there was a good Order, and a Man had a Damage by the abuse of this Order in the mis-execution of it) 'tis reasonable this Man should be satisfy'd. But peradventure a Parliament may not come in three or four Years, perhaps six or seven Years, in that case he would lose his Action.

BUT that is not all, for in this Case if we could not examine it, the Man would be without any Remedy in the World. So that if one of your Officers should abuse your Orders, the Person that he hath abus'd could have no help if the Courts of Law could not help him. This was my Apprehension: This Court we know may examine their Officers so as to punish them for it; but I never heard nor understood that this

R

Court

Court could go in such a Method as to give Damages; for, first, in this Case the Method of the Law would be precluded: We know what are the Methods of a Man's obtaining Damages; first he must prove his Fact by Witnesses; I never heard this Honourable Court did condescend so far as to give an Oath; next, they must be assessed by a Jury: There is no other way as I know of at all; I never knew this Court take upon them to assess Damages at all.

IN the next place, if they could arrive at the matter of Damages, I never knew any Judgment given, or Execution awarded for Damages by this Honourable Court. So that my Apprehensions were, that unless the Courts at Law had jurisdiction of all such Actions as these were, this Man must be remediless if he had wrong: On the other side, he would have recover'd no Damages if he had none. No Man would have said, That the House should not have made such an Order, or he should not have executed it such a way as you intended it.

Mr.

Mr. *Speaker*, These were my Apprehensions in this Case; I consider'd it as well as I could, and did see a great Mischief on one side, if the ordinary Courts of Law had no Jurisdiction, and could apprehend none if they had, in seeing whether the Orders of this House were fairly executed or no, when I am confident that none of this House would allow there should be any abuse of their Order.

THESE being my Apprehensions as a Judge of the Court, I did think that I was bound to over-rule the Plea that was to the Jurisdiction of the Court. If I was mistaken in this Case, it was an Error of my Judgment, I had no mind or design to meddle with the Affairs of the House, nor to pry into what was done here, my design was to do Justice. What weight these things have with others, I must leave with this Honourable House: But this was that that induc'd me to give my Opinion for the over-ruling of the Plea.

Mr. *SPEAKER*. Did you deliver these Reasons in open Court when you gave Judgment?

R 2

Sir

Sir FRANCIS PEMBERTON. No, we very rarely give any Reasons in such Cases.

Mr. SPEAKER. Because if you had given these Reasons, it would have been some light to the *Serjeant* to have pleaded afterwards.

Sir FRANCIS PEMBERTON. I do not know truly what he did afterwards; but this I am sure he was told, that he might have pleaded this Matter in Bar, and this would have been a good Bar, and this I thought direction enough.

Mr. SPEAKER. Is it not usual in Cases of great Moment, as this was, to argue the Point in giving Judgment?

Sir FRANCIS PEMBERTON. It is so if they will argue it; but if the Counsel on both sides let it go, we examine no further.

Sir FRANCIS PEMBERTON withdrew.

Sir

Sir THOMAS JONES brought in.

Mr. SPEAKER. The occasion I suppose you know of your being sent for, 'tis to know upon what Reasons you over-rul'd the Plea to the Jurisdiction between *Jay* and *Topham*.

Sir THOMAS JONES. Mr. *Speaker*, in the first place, I seriously profess before God, and this Honourable House, That I never design'd to interfere with the Authority and Privileges of this House. I have had the Honour to be an unworthy Member of it in two several Parliaments; and truly I did always conceive, that for any thing transacted in this House, no other Court had any Jurisdiction to hear and determine it: And therefore I was always of opinion, That the Judgment given in the Case of Sir *John Elliot* and my Lord *Hollis*, was a very erroneous and unjustifiable Judgment; and the rather, because I knew that there was an Act of Parliament, that for any thing done in this House, by speaking, debating, or any reasoning whatsoever, there ought to be

R 3

no

(246)

no Suit in Accusation or Condemnation concerning it, 'tis utterly void.

BUT, Sir, when I did give this Judgment, I do confess I did think there was a difference to be taken in Matters that were merely transacted by this House, and may be complicated of the Authority and Commands of this House, and of the Execution of the Authority and Commands of this House abroad; and that was the Case that was before us in the King's Bench.

Mr. *Topham* was complain'd of, that he had not only imprison'd the Plaintiff *Jay*, but kept him in Prison till he had paid him 30 *l.* Now I did humbly conceive that this Declaration ought to be answer'd, and not to be put off with a Plea to the Jurisdiction of the Court.

'TIS true, as I did say, Where the intire Matter is transacted in this House, there a Plea to the Jurisdiction of the Court is proper; but in the present Case I did conceive, That Jurisdiction was most proper that 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

(247)

suffer nor be injur'd. Thereupon I think Mr. *Topham* was advis'd and told, that he ought to plead this Matter in Bar, wherein there would be full consideration and perfect regard given to the Commands and Authority of this House, and all imaginable Reverence: if he had but produc'd a Copy at most of your Journal, that had been sufficient, and no Judg would have been so silly or imprudent at least to have said, that had not been a good and sufficient Authority. But Mr. *Topham* thinks it not fit at all to answer in this Plea to the taking the 30 *l.* for which, if it was Extortion upon the Subject, I am sure that whosoever has a Care of the Rights of the Subject, as you have, would not have suffer'd the Subject to have gone without Remedy and Satisfaction.

SIR, as to what may be said in this Case, that upon complaint to you, you would have punish'd Mr. *Topham*; give me leave to say, that I think at that time when Mr. *Topham* had this Prisoner in Custody, you were risen. But besides, to let that go, I do conceive, and I never found it in my Experience, when I was an unworthy Member of this House, That you have ever given Damage to

R 4

a

a Party that was injur'd by your Officer. 'Tis true, you would punish your Officer for the Injury, but I never knew the Party injur'd have any Satisfaction.

S I R, another Reason is this, The Authority of this Court argues very great; but with all reverence be it spoken to the Authority of this House, The Authority of an Act of Parliament is greater than the Authority of this Court: For altho for the most part in Acts of Parliament you have the first Production and Formation of the Acts of Parliament, yet without the Consent of the Lords, without the Royal Assent of the King, 'tis no Law. But when 'tis a Law by all these Authorities, not only by yours, but by the Consent of the Lords; in case one Man does any thing by virtue of a Command of such an Act of Parliament, suppose it be under the Commissioners of Sewers, or in the executing of a Rate for the Poor, or raising your Poll Act; if any other Man shall be so hardy as to question his doing his Duty according to your Commands, the Party so question'd is either to plead in Bar especially, or, which indeed you have provided for the ease of pleading in many Cases, he may plead it generally, and
give

give in Evidence the special matter: but it never was known that any Man should offer to say, I was an Officer by Act of Parliament, and therefore demand, Whether you will take cognizance of the Matter, having done what I did by Act of Parliament.

A N D if it be so in Cases of Acts of Parliament, as no body will deny, then I thought it might be so when there was only a Command of the House to do such a thing (the Reverence to which would have been perceiv'd if there had been a Plea in Bar) and there was an Abuse of your Order, in the exacting thirty pounds complain'd of: and I thought the rather so, because of the Act of Parliament I mention'd, 4 H. 8. c. 8. which does provide, that there shall be no Prosecution or Suit for any Trouble or Grievance that is done in this House, and makes it void. But it goes further (it orders no Plea indeed one way or other, either in Bar, or to the Jurisdiction, but) in the Close of the Act it says, That if any the Persons thereafter should be vex'd, troubl'd, or otherways charg'd for any Cause as aforesaid; then he, or they, so troubl'd for the same, should have an Action of the Case against every
such

such Person or Persons so vexing and troubling them, and recover treble Damages and Cofts.

AND upon these Reasons, Sir, I did give my Opinion at that time, that the Plea to the Jurisdiction of the Court should be over-rul'd; which if not agreeable to your Judgment, I most humbly beg your Pardon for it.

Mr. SPEAKER. Did you deliver these Reasons in Court when you gave Judgment for over-ruling the Plea?

Sir THOMAS JONES. Truly, Sir, I can't say we did, nor can't say we were demanded our Reasons, nor can't say any thing was mov'd in arrest of Judgment, or shew'd to us why we should give our Reasons; but I believe Mr. *Topham* will not say but he was advis'd, that it was proper for him to plead it in Bar, and then all Right would have been done to the Authority of this Court, and to Mr. *Topham*, as well as to the Plaintiff.

Mr.

Mr. SPEAKER. It would have been a Satisfaction to Mr. *Topham* and the whole Kingdom, if you had given your Reasons; and we take it, that upon Demurrers of great Consequence, the Court uses to give the Reasons of their Judgments.

Sir THOMAS JONES. Truly 'tis so long ago I am not able to say whether we did or did not; but 'tis not usual for Judgment to be given *seriatim*, if all the Judges of the Court be agreed in the thing, as they were in this Case.

Mr. SPEAKER. Where the Judges agree, the Lord Chief Justice gives the Opinion of the Court; but then in matters of this moment, he usually gives the Reason.

Sir THOMAS JONES. As far as I told you before, we did give the Reason, that it was more proper to be a Plea in Bar than to the Jurisdiction of the Court.

THEN Sir *Thomas Jones* withdrew, and the House after a Debate

Re-

Resolved,
 " THAT Sir Francis Pemberton giving
 " Judgment to over-rule the Plea to
 " the Jurisdiction of the Court of King's
 " Bench, in the Case between Jay and
 " Topham, had broken the Privileges of
 " the House. And also

Resolved,
 " THAT Sir Thomas Jones giving
 " Judgment to over-rule the Plea to the
 " Jurisdiction of the Court of King's
 " Bench, in the Case between Jay and
 " Topham, had broken the Privileges of
 " the House.

AND by Order of the House, both
 Sir Francis Pemberton, and Sir Thomas
 Jones were taken into Custody for the
 said breach of Privilege, and lay by
 it till there came a Prorogation.

The

The CASE of
 Sir George Meggott.

23 Nov. 8 Willielmi R.

A COMPLAINT being made
 to the House, That Sir George
 Meggott had prosecuted at Law several
 Persons for what they had testify'd the
 last Session at the Committee of Privi-
 leges and Elections, upon hearing the
 Matter touching the Election for the
 Borough of Southwark; it was refer'd to
 the Committee of Privileges to examine
 the Matter of the said Complaint, and
 report their Opinion.

4 Decemb. 8 Willielmi.

A REPORT was made of the mat-
 ter of Fact, and that the Committee had
 come to this Resolution, " That Sir George
 " Meggott having prosecuted at Law Tho.
 " Malyn and Joh. Ladd, for what they testi-
 " fy'd at the Committee of Privileges and
 " Elec-

“ Elections the last Session, upon hearing
“ of the matter touching the Election
“ for the Borough of *Southwark*, was
“ guilty of a breach of Privilege.

THE House then agreed with the
Committee, and order'd Sir *George Meg-*
gott to be taken into Custody of the Ser-
jeant at Arms.

[Faint, illegible text, likely bleed-through from the reverse side of the page]

The

[Faint, illegible text, likely bleed-through from the reverse side of the page]

The CASE of Mr. Gee.

27 Nov. 8 *Willielmi R.*

A PETITION of *Thomas Kemp*
and others, on behalf of them-
selves and others the antient Hackny-
Coachmen, was presented to the House,
and read, setting forth, That the last Ses-
sion of Parliament the Petitioners apply'd
themselves by Petition to the House for
Relief of several Grievances they lay un-
der from the Commissioners for licensing
and regulating Hackny-Coaches, &c.
and particularly from Mr. *Gee* one of
those Commissioners; and that Mr. *Gee*
had brought his Action, and arrested the
Petitioners for their Proceedings in the
House, and by his Declaration had call'd
the Petition (by them before presented)
a Libel, thereby arrainging the Proceed-
ings of the House, and discouraging
Persons from seeking the Redress of their
Grievances; and they pray'd the Protec-
tion of the House in the Premises: And
the House refer'd the Petition to the Com-
mittee of Privileges and Elections, to
exa-

(256)

examine the Fact, and report the same with their Opinion.

9 Feb. 8 Willielmi R.

THE matter of Fact was reported, and that Mr. *Gee* had own'd the Arrest and Declaration, but confess'd that what he did was out of Ignorance, and said 'twas only to vindicate his own Reputation; and that the Committee had come to this Resolution, " That *Richard Gee* Esq; for prosecuting at Law the " Hackny-Coachmen for petitioning the " House, was guilty of a breach of Privilege.

THE House then agreed with the Committee, and order'd Mr. *Gee* to be taken into Custody of the Serjeant at Arms.

The

(257)

The CASE of
Mr. TANKRED.

20 Jan. 9 Willielmi R.

MR. TANKRED complain'd to the House of a breach of Privilege against Mr. *Edward Morris* Minister of *Aldborough* in the County of *York*; for that the said *Morris* had intercepted Letters of Mr. *Tankred's* which were sent by the Post.

14 Febr. 10 Willielmi R.

Mr. *MORRIS* attending, was brought in, and the House having heard him and his Witnesses, Resolved, " That there " was no ground of Complaint of breach " of Privilege, and order'd that Mr. *Morris* should be discharg'd from any further Attendance, and that he should " be paid the Charge of his Attendance " by Mr. *Tankred*.

F I N I S.
S

The TABLE.

A	SHBY & White, & al. <i>Copy of the Record.</i>	pag. 188
	B.	
Mr. Brewer.		3, 10, 11
	C.	
Mr. Cowper.		123
	D.	
Mr. Dormer.		92
Sir Gilbert Dolben.		151
	F.	
Mr. Freeman.		3, 91, 177
	G.	
Mr. Gee's Case.		255
	H.	
Mr. Harley, Speaker.		4, 116
Marq. of Hartington.		62, 175, 184
Sir Simon Harcourt, Sol. Gen.		83, 176
Mr. Serjeant Hooper.		169
Sir Jn ^r Haules		45 J.

	J.	
Jay and Topham's Case.		219
Sir Joseph Jekyll.		101
	K.	
Mr. King.		161
	L.	
Mr. Lowndes.		64, 185
Sir Thomas Littleton.		167
	M.	
Sir Thomas Meres.		122
Sir Humphry Mackworth.		139
Sir Christopher Musgrave.		176
Sir George Meggott's Case.		253
	P.	
Sir Thomas Powys.		18
	S.	
Sir Edward Seymour.		58
Mr. Smith.		91
Sir William Strickland.		171, 183
Mr. St. John.		134
Soame and Barnardiston, <i>Copy of the Record.</i>		203
	T.	
Mr. Tankred's Case.		257
	W.	
Mr. Ward for Newton.		9, 185
Mr. Walpole.		172

