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A

CONCISE ACCOUNT

OF THE

ORIGIN OF THE TWO HOUSES OF PARLIAMENT:

WITH

AN IMPARTIAL STATEMENT

OF THE

PRIVILEGES OF THE HOUSE OF COMMONS,

AND OF THE

LIBERTY OF THE SUBJECT.

By EDWARD CHRISTIAN, of Gray's Inn, Esq.

BARRISTER AT LAW, CHIEF JUSTICE OF THE ISLE OF ELY, AND DOWNING PROFESSOR OF THE LAWS OF ENGLAND.

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PREFACE.

IT is a lamentable thing, that one life should have been lost, or one drop of blood should have been spilt, in a contest, where it is impossible that two men of sense and education, who bestow due attention upon the subject, can be of different opinions; and where all protest that they are influenced only by a love of their country, and a sacred regard for truth, justice, and liberty.

The minds of the ignorant, and of those who have no wish to be undeceived, for a while may be agitated or inflamed; but the mist of error and delusion will soon be dispelled, and our excellent Constitution will

shine again, like the sun, with unimpaired purity and splendour.

Various ineffectual attempts have been made to shake the two main pillars of our Government, viz. religion and sound morals; but this is a new enterprize of the adversary, and if not planned with more art and design, evinces a disposition quite as daring, when it strikes at the very basis of the noblest fabric ever reared by human wisdom.

It is now attempted to be proved to us, that those important rights and privileges, which we have boasted of for many centuries, are directly contrary to the letter and spirit of Magna Charta.

The misconceptions, or the misrepresentations, lately propagated in a popular paper, have been exposed with great ability in a pamphlet published by Henry Maddock, of Lincoln's-inn, Esq.; in another published by Charles Watkin Williams Wynn, Esq. M.P.; and by a speech spoken in the House of Commons by the Right Hon. George Ponsonby, late Chancellor of Ireland.

The leading authorities in these publications and in this treatise, are in a great degree the same; and the greatest part of them are collected in the late Report of the Committee of the House of Commons to search for precedents.

The coincidence proves, that those who exert fair and proper diligence in the pursuit of information upon legal subjects, must necessarily draw their intelligence from the same authentic sources.

It has been said, that "a popular judge is an odious thing;" and every judge is deservedly so, who sacrifices any part of the law and justice of his country to acquire Popularity: a barrister also would be

equally detestable, if in pledging himself to communicate legal and constitutional information to the public, he should assert what is false, or suppress what is true.

The task would be endless and painful to point out the errors and omissions of those who have assumed the style of professional writers, that they might gain a greater degree of credit for accuracy, and thereby more effectually delude the public. The writer of the following observations has therefore thought it the most eligible mode, and that which is the most agreeable to his own feelings, to avoid the appearance of a controversy, and to endeavour to arrange his own reasons and authorities in such a manner, that every reader may judge of the fairness of them, and the justness of his conclusions; and may institute the comparison himself with the arguments of those who have advanced

different doctrines. He is convinced, that the more the Law and the Constitution of this Country are studied and known, the more they will be found to deserve and command the reverence and support of the people of England.

The good sense of the nation is beginning to manifest itself in every part of the kingdom; and he has therefore the most perfect confidence, that the present volcano will soon discharge its combustible ingredients, and permit us to approach and contemplate its crater without the slightest apprehension of a fresh eruption.

Grays Inn,
June 12, 1810.

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CHAP. I.

IT has been a great controversy amongst antiquarians whether there was any representation of counties, cities and boroughs, before the 49th year of Henry III.; those who contend that this representation did not commence at that time, maintain that it must necessarily have existed before the Conquest, as from the evidence and arguments which they produce it does not appear to have been a novelty or an innovation at any time subsequent to the Conquest. Others assert, and apparently with much more truth and reason, that this representation and our House of Com-

mons, though they did not exist in their present state, in the reign of William the Conqueror, yet were strictly feudal in their origin; and were an easy variation or gradation produced by time upon the feudal assemblies constituted by the Conqueror.

It is remarkable that the different sides of this question have been strenuously maintained by different parties in politics. The friends of the prerogative, in order to treat the House of Commons with less respect, and to diminish its dignity, contend that it owes its origin to the rebellion of the Earl of Leicester, in the 49th year of Henry III., and consequently that it was an innovation in our government; and when the attendance of the Commons was ordered in the next reign by Edward I., that the authority and existence of the Lower House emanated from the prerogative of the Crown. Because this has been advanced by one party, those who act upon opposite principles think it necessary wholly to deny it, and to endeavour to prove that representation did not commence in the reign of Henry III., but that it must have existed before the Conquest, and from the remotest antiquity; on whichever side is the truth, the decision of this question ought by no means to diminish our veneration for our present liberty and constitution.

For, as Lord Lyttelton, in his Persian Letters, justly observes—"If liberty were but a year old, "the English would have just as good a right to "claim and to preserve it as if it had been handed "down to them from many ages."

It is a great misfortune that such important questions should not be decided to the satisfaction of men of science, one way or the other; as the reader, who has not the opportunity or the resolution to examine a great many books, will form his opinion from the last author of credit which he may chance to read. This question seemed to be at rest, or at least, decided by a great majority that representation was posterior to the Conquest, if Lord Lyttelton in his History of Henry the Second had not revived the controversy, and contended with more warmth and zeal than force of argument, that representation must have been transmitted to us from the Saxons.

This controversy first began about the revolution by William Petyt, a celebrated antiquarian, and who was keeper of the records in the Tower, who in 1682 published his *Ancient Right of the Commons asserted*, to prove that representation existed before the time of Henry III. His principal arguments are, that *populus* is mentioned in the Saxon Wittenagemotes; that the Norman

Kings were crowned *assensu tam cleri quam populi*; and a record in which the borough of St. Albans, in 8 Edw. II. claims to send burgesses to parliament, as they had done in the time of Ed. I. and his progenitors; and the progenitors of Edw. I. must at least mean his grandfather King John. And that there are records prior to the reign of Henry III. in which the *communitas regni*, or commons of the realm, are mentioned, which must signify knights, citizens, and burgesses.

But Dr. Brady, in a book called *An Introduction to the old English History*, seems to have fully refuted those arguments. He says, that *populus* is only contradistinguished to *clerus*, and meant the lay barons in opposition to the bishops and clergy; that *communitas regni* signified at that time the nobility or the barons, or the members of the feudal parliament; and that the borough of St. Albans claims to send burgesses because they held lands immediately of the Crown, or were tenants *in capite*, by which right he admits they might attend.

Lord Lyttelton repeats Mr. Petyt's arguments, and adds one of his own, which is, that the creation of this representation, or the House of Commons, must have been so extraordinary an innovation, that it was impossible that co-

temporary writers could have been silent upon it, as they all are: but this seems to admit an easy answer. It is true, if in the reigns of Henry III. or Edward I. the House of Commons had sprung up with authority and power, as distinct from the House of Peers from which it separated as it is at present, history could scarce furnish us with so memorable a fact. Even the changes in the Roman government from regal to consular, and from consular to imperial, would not have been more extraordinary. But the deviation of the House of Commons from the House of Peers, or the great Council, appears to have been so easy and gentle, and so consistent with former principles, that it occasioned at the time no surprise or wonder at all.

Slight aberrations from original principles are like the divergency of two lines drawn at a small angle from the same point. The consequences are not at the first adverted to, but they become more perceivable in proportion to the distance from the point of deviation.

Many of the best parts of our law and constitution have been moulded into their present excellent form by a gentle pressure during the rotation of time, rather than from any original forecast or contrivance.

The most learned antiquary searches in vain to

discover why we are now tried for crimes by two juries, and why the second, and that only, should be unanimous.

But we enjoy the blessings of their operations, and no one but a madman would destroy what he cannot explain.

In tracing the history of our government or of the two Houses of Parliament, we frequently find great difficulty and obscurity, but it is good philosophy to adopt those principles which will account for the greatest number of the appearances and facts, that we are now certainly acquainted with.

After the introduction or the full establishment of the feudal system by the Conqueror, every seat in parliament was territorial, or the owner of lands who held them immediately of the King had both a right, and was under an obligation, to attend the King's Court, the great Court Baron, or the great Counsel of the nation.

These were called chief tenants, or tenants *in capite*. At the time of the dissolution of monasteries by Henry VIII. there were 29 abbots and priors, who were members of the House of Lords in consequence of the lands which they held immediately of the King.

And in times prior to that a much greater number were frequently summoned. Selden in

his Titles of Honour, enumerates several instances of abbots and priors, who were summoned to parliament, but who excused themselves because they did not hold lands *in capite*, or were not *liberè tenentes*, or freeholders of the King.

Every tenant of the King, however small was his estate, had the same right to a seat in this parliament as the most powerful baron.

In the Magna Charta of King John, we find a distinction had been made between the greater barons and the smaller freeholders.

That very vague and indefinite distinction most unquestionably, in the event, produced the division of the Lords and Commons.

The King declares—" Ad habendum commune consilium regni sommoneri faciemus Archiepiscopos, Episcopos, Abbates, Comites, et majores barones *sigillatim per literas nostras*, et præterea faciemus sommoneri, *in generali*, per vicecomites et balivos nostros omnes illos que de nobis tenent in capite.* Bl. Mag. Char. 14.

* To hold the common Council of the realm, we shall cause the Archbishops, Bishops, Abbots, Earls, and the greater barons, to be summoned individually by our letter, and besides, we shall cause all those who hold of us in chief, (in capite) to be summoned, in general, by our Sheriffs and Bailiffs.

It is very extraordinary that this most important clause, which is in the Magna Charta of King John, is omitted in that of the 9 Hen. III. which stands the first in our Statute book.—See Black. Magna Charta.

Here we see the outline of our present parliament. The separate summons by letter or writ to each peer is continued to this day ; the general summons of all the freeholders of the Crown produced, in the course of the two next reigns, a writ to the Sheriff, to which our present elections owe their origin.

We are informed, also, who were the constituent members of the High Court of Parliament 150 years after the Conquest. It continued in this state for fifty years longer, until the Earl of Leicester having usurped the sovereign power in the 49th of Henry III., instead of ordering the Sheriff to give this general summons to all the tenants of the Crown or lesser barons, directed the Sheriff to summon and send two knights out of each county. These tenants were either knights or compellable to become knights. The qualification for knighthood was afterwards, in the time of Edw. II. fixed at twenty pounds a year ; or rather, all who had an estate under that value were exempted from taking upon them that expensive honour. This act of the Earl of Leicester was perfectly consistent with former principles.

These freeholders of the Crown, though each had a right to attend, had probably not insisted upon it, but on the contrary were petitioners to be discharged from so burthensome a duty.

But he who had the power to compel the attendance of each individual, seemed to have fixed a reasonable limit to the exercise of that power, when he was contented that the Sheriff should send him two only from each county. The rest were not prohibited from attendance, but their attendance was dispensed with.

This was a most important act of state, which required no confirmation by the legislature ; it was consistent with former principles, it was consistent with the great Charter ; no one was torn from his home and family but *per legem terræ*, by the law of the land. The policy of the measure was undoubtedly to compel a greater attendance than had before appeared, that the power and consequence of the greater barons might be diminished by the increase of the votes in parliament, and by those over whom the Crown was more likely to have an influence. But when this writ was communicated by the Sheriff to the King's tenants at his county court, as they considered their attendance in parliament rather a burden to be avoided than an honour to be solicited, they would be glad to agree amongst themselves, upon condition that the rest should pay their costs and expences, which two should attend instead of the whole number.

But the two knights who were sent from each

county, independently of this election, had a personal right to sit in parliament, and for some time afterwards sat with the barons, and were in fact their peers.

Thus we see this election of the knights and this representation of the counties were so slight a change, and so agreeable to former principles, that they could scarce be regarded as an innovation.

We cannot give so satisfactory an account of cities and boroughs, because we have no authentic evidence that citizens and burgesses actually did sit with the peers anterior to the reign of Henry III.; but it is easy to show from original principles, that some of the burgesses from each borough, that held lands of the King, had a right, or were under an obligation, to attend.

If the King had created a city or borough a corporation, and had granted it lands to hold immediately of himself, it is clear that the corporation would collectively be a tenant of the King, and either all the corporators, or some of them, as representatives of the rest, would be entitled, and compellable, to attend the King's courts.

And hence we find in 8. Edw. II. that the borough of St. Albans, which had been passed over, demanded, as a matter of right, a summons to send

burgesses, because they assert they were tenants of the King *in capite*.

It is very probable that the citizens and burgesses, who must have been poor tradesmen, would not in general be ambitious of claiming their legal and constitutional right to sit in the same assembly with the haughty barons.

And when Edw. I. in the next reign, was induced to adopt the same measure as the Earl of Leicester, conscious perhaps of their own meanness, they separated from the barons and knights, and consulted among themselves only upon the public business. The knights at that time sometimes joined the barons, and sometimes the citizens and burgesses.

But at last they found it perhaps more convenient, or agreeable to their feelings, to take precedence of the citizens and burgesses, than to be obliged to give it to the barons. In Scotland, the Commissioners of shires always formed one estate with the barons.—See 1 Bl. Com. 95. n. 4.

If this concise history be correct, it will prove that the union of the knights and burgesses, and the separation from the barons, with whom they originally had a personal right to sit, has established our High Court of Parliament, and the division of the two Houses.

It is certain that there was not an actual sepa-

tion of the two Houses, till the end of the reign of Edw. III., or the beginning of Richard II.

Mr. Hume is mistaken, who says, that Peter de la Mare was the first prolocutor or speaker of the Commons in the first year of Rich. II. For I find, that in the 51st Edw. III., the year preceding, Monsieur Thomas de Hungerford Chevaler, *qui avoit les paroles par les communes* d'Engleterre en cest parlement, requested the King to pardon all, who had been impeached in the former year. Rot. Parl. 51 Edw. III. p. 87.

Sir John Dalrymple thinks, that the separation of the two Houses of Parliament in England was owing merely to the accidental circumstance, that one room could not be found large enough to contain the members thus returned to parliament.

But in Scotland where they were not so numerous, and where the members of the great Council sat exactly upon the same original principles, they still continued in the same house.—See an account of the Scotch parliament, 1 Bl. Com. p. 95. n. 4. Ed. by Chr.

From the principles here laid down, it follows, that this representation was nothing more than the attendance of a part for the whole, and no one was represented, but those who had a right, personally vested in themselves, to sit in parliament.

Chief Baron Gilbert, agreeably to what is here

advanced, says, " At the first, the Commune " Concilium Regni, or the Parliament, consisted " of the tenants in capite, and to this court after- " wards the representatives of boroughs that hold " in capite were called."—For. Rom. 3.

In the commencement of this representation, as might be expected, the numbers of the representatives varied, being sometimes four, sometimes three, two, or one for each county.

In one instance, the King ordered the same members to be returned again. And this at that time could scarce be regarded as a stretch of prerogative, for he who had a right to compel the attendance of the whole, might surely determine both upon the number and the persons who should attend.

In the 18th Ed. I. the words of the writ to the Sheriff are, " Tibi præcipimus, quod *duos vel tres* de discretioribus et ad laborandum potentioribus militibus eligi, et eos ad nos usque Westmonasterium venire facias.* Brady, 49.

In the 28th Edw. I. Anno 1300., the writs to the Sheriff direct, that he shall cause to appear before the king, at his parliament at Lincoln, two

* We command you, that you cause *two or three* of the most discrete knights to be elected, and who are most able to labour. Strength to undergo labour was a material qualification in antient times.

knights of his county : viz. those who came for the community of the county by his precept to the last parliament, and also the same citizens and the same burgesses, for all the cities and boroughs within his bailiwick ; and if any of them were dead or infirm, then to cause others to be chosen and come in their stead.—See 1 vol. of Parliament. Hist. 115—and Brady 152.

Even late in the reign of Edw. III. the present number was not established ; for in the 26th Ed. III. only one representative was summoned from each city and borough ; and in the next year, one knight was summoned from each county, but two members from each city and borough.—Brady, 158 and 160.

This appears to be the progress of parliaments in this country, and the subsequent changes arose, some from usage and gentle unresisted deviations, and some from the express provisions of the legislature.

We may conclude, from these premises, that it was always a solecism, and repugnant to principles, for a peer to vote for a member of the lower house, for he attends parliament in person ; and the right of election was given to those only, who had a personal exemption. Some peers have claimed this as a right, but it is not only contrary

to various resolutions of the Commons, but to first principles.

Mr. Prynne says, the payment of the wages, four shillings a day to the knights each, and two shillings a day to the citizens and burgesses, had no other origin but the equitable maxim, qui sentit commodum debet sentire et onus.—See 1 Black. Comm. p. 174. n. 34. Ed. by Chr. where a full account is given of the origin and history of the writ de expensis militum, civium et burgensium.

The barons were not benefitted by this representation, they were therefore not compellable to contribute to the wages of the knights. But by a statute, 12 R. II. c. 12. it was enacted, " that lords and spiritual persons, who purchased lands, which were contributary to the expences of the knights of parliament, should contribute in respect of those lands.

These great changes have been made gradually in the English Government, without any act of the legislature ; but in Scotland they were introduced by an act of parliament in the year 1427, and the alterations are there distinctly described and delineated.

They follow the English Government after a period of 130 years, and they have always appeared to me irrefragable proofs of what we partly

know, and partly conjecture, respecting the English Government.

The title of the seventh parliament in the reign of James I. of Scotland will prove, that the members of the Scotch parliament were precisely those, who were the original members of the English parliament.

" In Parliamento Septimo, vel Concilio Generali Illustrissimi Principis Domini Jacobi, Dei Gratia, Regis Scotiæ, tento apud Perth, primo die Mensis Martii, Anno Domini Millesimo Quadringentesimo vicesimo septimo: Et Regni Domini Regis vicesimo tertio, cum continuatione dierum & temporum, summonitis & vocatis more debito & solito, Episcopis, Abbatibus, Prioribus, Comitibus, Baronibus, & *Libere-tenentibus, qui de Domino nostro rege tenent in capite*, & de quolibet Burgo *certis Burgensibus*, comparentibus omnibus illis qui debuerunt, voluerunt, & potuerunt commode interesse, quibusdam vero absentibus, quorum aliqui legitime excusati fuerunt, aliis se contumaciter absentantibus, quorum nomina patent in Rotulis sectarum, quorum quilibet adjudicatus fuit in amerciamento decem librarum, ob suam contumaciam." The members who were summoned and called in the due and accustomed manner were, the bishops, abbots, priors, earls, barons, and free-holders who hold

of our Lord the King in chief, and of each borough *certain burgesses*, from that expression it would appear, that the number of burgesses from each borough was not then reduced to a fixed number.

And the following statute passed in that parliament introduced the representation of counties in Scotland, in the year 1427.

102. " That small Barronnes and free-halders needis not to come to Parliamentes.

Item, The King with consent of the haill Councel, Generallie hes statute and ordained, that the small Baronnes and free-tennentes neid not to cum to Parliaments nor General Councels, swa that of ilk Schirefdome their be send, chosen at the head Court of the Schirefdome, twa or maa wise men, after the largenes of the Schirefdome, out-tane the Schirefdomes of *Clakmannan* and *Kinrosse*, of the quhilkis ane be sende of ilk ane of them, the quilk sall be called Commissares of the Schire, and be thir Commissares of all the Schires sall be chosen ane wise man and expert, called the commoun Speaker of the Parliament, the quhilk sall propone all and sindrie needis and causes, perteining to the commounes in the Parliament or General Councel, the quhilkis Commissares sall have full and haill power of all the laif of the Schireffedome, under the witnessing of the Schi-

reiffis seale, with the seales of diverse Barronnes of the Schire, to heare, treate, and finallie to determine all causes to be proponed in Councel or Parliament: The quhilkis Commissares and Speakers, sall have costage of them of ilk Schire, that awe compeirance in Parliament or Councel, and of their rents, ilk pound sall be utheris fallow to the contribution of the said costes. All Bishoppes, Abbottes, Priors, Dukes, Erles, Lordes of Parliament, and Ban-rentes, the quhilkis the King will be received and Summound to Councel and Parliament, be his special precept." Murray's Scotch Statutes, fo. 17.

Mr. Erskine in his Institutes of Scotch Law upon this statute, makes the following observations:—p. 17.

"By 1427. c. 102. the lesser barons were exempted from the burden of attending the service of parliament, provided that commissioners were sent from the barons of each county, to represent them.

"This exemption, which was renewed under certain restrictions, by 1457. c. 75. and 1503. c. 78. was changed, insensibly, in the course of some generations, into an utter disability in all the lesser barons from sitting in parliament without election by the county, though no statute is found expressly to exclude them—1587. c. 13."

So far I have thought it proper to give here a history of our antient constitution.

The English Government was, beyond a doubt, in its origin, feudal.

The feudal system has been sometimes described as a system of slavery, sometimes as a system of liberty; in fact, it contained much of both, but by preserving the one and abolishing the other, we have raised the noble fabric of the English constitution.

It has been improved and perpetuated by the united wisdom of Englishmen for ages, and we need not fear that it will ever be destroyed by their folly and their fury. We have never yet lost, in our laws and government, what was worth preserving.

Ours is the constitution which Tacitus, the profoundest politician of antiquity, thought too perfect ever to exist among mankind, which it was more easy to commend than to realize; and if such a government should ever chance to be constituted, it would be destitute of permanence and stability. His words are—Cunctas nationes et urbes populus aut priores aut singuli regunt. Delecta ex his et constituta reipublicæ forma, laudari facilius quam evenire, vel si evenit, haud diuturna esse potest. Tac. 4 Ann. c. 33.

CHAP. II.

The House of Commons is a Court of Record.

UPON this subject I shall extract what has been said by Lord Coke, and what has been observed and collected by Mr. Hatsell.

Lord Coke says, "Now order doth require "to treat of other matters of judicature in the "Lords House, and of matters of judicature in "the House of Commons. And it is to be "known that the Lords in their House have "power of judicature, and the Commons in their "House have power of judicature, and both "Houses together have power of judicature; "but the handling hereof, according to the "worth and weight of the matter, would re-"quire a whole treatise of itself; and to say the "truth, it is best understood by reading the "Judgements and Records of Parliament at "large, and the Journals of the House of the "Lords, and the book of the Clerk of the House of

"Commons, which is a record, as it is affirmed "by act of Parliament in Parliament, in Anno "6 Hen. VIII. c. 16." 4 Inst. 23.

Mr. Hastell has expressed a doubt, whether the House of Commons is so far a court of record, that the public or the Lords could claim a right of inspecting their Journals.

But the right of inspecting the Journals of the House of Commons is of less importance, as Mr. Hatsell informs us, "that on the 23d of Novem-"ber, 1703, it was carried on a division of 177 to "147, 'That the votes should be printed;' and "so, I believe, it has continued every Session "since that time." He adds, "Whether, if the "House of Commons should refuse to continue "this order for printing their votes, the Lords "could claim a right of inspecting their Journals, "'on the principle of their being public records,' "is a question it does not become me to decide "upon.—Many very great and respectable opi-"nions have differed on this subject. On the "4th of March, 1606, in a message to the Lords, "the messenger having used the expression of "'Knights, &c. and Barons of the Commons "Court of Parliament,' the Lords take offence "at this, and send a message to complain of "these words. The Commons appoint a com-"mittee to consider of this message, who report

" on the next day, the 5th of March ; and, after " referring to the statute of the 6th of Hen. VIII. " chap. 16th, wherein it is enacted, ' That the " licence for members departing from their ser- " vice shall be *entered of record* in the book of " the Clerk of the Parliament, appointed or to " be appointed for the Commons House ;' they " add, ' That they doubt not but that the Com- " mons House is a Court, and a *Court of Re- " cord ;* and that their Lordships did not take any " exception to that point.' To which the Lords " answer, ' That they were not, with respect to " that part of the message, willing to enter into " further debate at that time, though in all points " they were not satisfied.'

" From the speeches of several members " throughout the Parliaments of James I. short " heads of which are preserved in the Journals, " the great Lawyers of those times appear to have " entertained different opinions upon this ques- " tion. In the famous dispute about the punish- " ment of Floydd, Sir Edward Coke, on the 2d " of May, 1621, says, ' He wisheth that his " tongue may cleave to the roof of his mouth, " that saith, that this House is no Court of Re- " cord ; and he, that saith this House hath no " power of Judicature, understands not himself : " for though we have not such power in all

" things, yet we have power of Judicature in " some things ; and therefore it is a *Court of Re- " cord.*'—And afterwards, ' That he knoweth " this is a Court of Record, or else all the power " and liberty of this House were overthrown*.' " There is the following entry in the Journals of " the 4th of May, 1621 : ' Sir Edward Sack- " vylle—That all our proceedings may be en- " tered here, and kept as records.' This entry " is explained in the second volume of the " printed Debates, p. 22, where, in a further de- " bate on the question about Floydd's punish- " ment, Sir Edward Sackvylle saith, ' The " Journals in the Lords House of Parliament are " recorded every day, in rolls of parchment, and " therefore he would have ours so done too.' " And then the book says, ' It is ordered, That " the Journals of this House shall be reviewed, " and recorded on rolls of parchment.' But I " do not know that this order was ever carried in- " to execution." 3 Hats. Prec. 28.

But even if the House of Commons were not a court of record, it would afford no argument that they had not the power to commit for a contempt, because the Court of King's Bench have decided, that " the Admiralty Court may punish

* See printed Debates, Session 1620-1, vol. ii. p. 7.

" one that resists the process of their court, and " may fine and imprison for a contempt to their " court, acted in the face of it, though they are " no Court of Record." Sparks *v.* Martyn, 1 Vent. 1.

CHAP. III.

Magna Charta. Judicium Parium. Lex Terræ. Lex et Consuetudo Parliamenti. The Great Charter. The Trial by Jury. The Law of the Land. The Law and Usage of Parliament.

THE twenty-ninth chapter of Magna Charta, the firm basis of our government, was framed to protect us from every species of violence or injustice, committed either by the power or the influence of the Crown.

" Nullus liber homo capiatur vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam.

The following is the translation given in the Statutes at Large :—

" No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or

free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him,* but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right." 9 Hen. III.

This important charter is, in fact, a statute or act of Parliament. It was signed and sealed by those who constituted the legislative body at that time. But under an obligation of the most solemn form, it assures us that the liberty, property, and life of a free-born Englishman, shall never be affected but by the judgment of his peers, or by the law of the land.

The judgment of our peers, or as applied to commoners, the trial by jury, is one branch only of the law of the land, though mentioned here as the most pre-eminent.

* Lord Coke says, that the words nec super eum ibimus, nec super eum mittemus, signify that no man shall be condemned at the King's suit, either before the King in his bench, nor before any other commissioner or judge whatever. 2 Inst. 46. I am inclined to think this erroneous, because in a record, in which the other terms are similar, referred to by Sir William Blackstone, p. xiii. Introduction to Mag. Char. the words are, nec super eos *per vim vel per arma* ibimus. So these words, like all the rest, meant that the people should be subject to no violence of any kind, except what was permitted per legale judicium parium suorum, vel per legem terræ.

But there are an infinite number of legal proceedings, by which a subject may be arrested, imprisoned, and outlawed by the law of the land, without the intervention of a jury.

And whenever the judgment of peers or a trial by jury is resorted to, it can exist only in those cases, which the law of the land defines and describes. The trial by jury is specified as the highest example of the law of the land.

If the law of the land is not preserved, the trial by jury will soon be lost.

It was well said by the judges, as appears from the year book 19 Hen. VI. 63.; "La ley est le plus haute inheritance que le Roi ad; car par la ley il même et touts ses sujets sont rules, et si le ley ne fuit, nul Roi, et nul inheritance sera."

"The *law* is the highest inheritance which the King has; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither King nor inheritance."

It is equally true that the law is the highest inheritance of the subject, and if there were no law, there would be neither inheritance nor the trial by jury.

For all misdemeanours a peer of parliament must be tried, not by his peers in parliament, but exactly in the same manner as a commoner by a jury—In this case he is tried, not by judicium pa-

rium, but he is tried according to the lex terræ, the law of the land.

In an impeachment a commoner is tried by the Lords, who are not his peers; here the lex terræ prevails over the judicium parium.

When a man is committed for trial, when he is arrested for debt upon mesne process, he is legally deprived of his liberty without the judgment of a jury. If he pleads guilty to a capital charge, or stands obstinately mute, he may be deprived of life by the law of the land, but without the intervention of a petty jury. Lord Coke, in his commentary upon Magna Charta, says, "A watchman may arrest a night-walker by a warrant in law." 3 Inst. 52.

The judicium parium itself is qualified in Magna Charta by legale; it can therefore be introduced only in those cases, which the law of the land prescribes and directs; and every circumstance attending it must be fenced in and fortified by the law of the land. All the process of the court of Chancery, by which the subjects of this country, in many instances, may be deprived of their personal liberty, or of the property they were in possession of, is agreeable to the lex terræ, though the court may have never requested the assistance of a judicium parium.

Ten thousand instances might be specified

where the law of the land can have no cooperation with the trial by jury, yet in all these cases it is strictly conformable both to the letter and spirit of Magna Charta.

No one will dispute the declaration of Lord Holt, that "a man ought to be concerned for Magna Charta and the laws. And if any one against law imprison a man, he is an offender against Magna Charta."—Lord Raym. 1302. Fost. 313.

This animated, though self-evident sentiment, produced the following observations from one, who was in fact as sincere and as rational, though not in his expressions so ardent and so ostentatious, an asserter of the liberty and rights of the subject, viz. Mr. Justice Foster.

"There is undoubtedly a justice due to the community, founded in the interest every individual hath in the public tranquillity; which once destroyed, all private rights will sink and be absorbed in the general wreck. And if the common rights of the subject are supposed to be the object in view, (it is an object which deserveth the attention of all wise and good men at proper seasons, and under those limitations which wisdom and a just concern for the public will suggest), let it be remembered, that liberty is never more in danger than when it vergeth into licen-

tiousness. Cæsar cherished a spirit of licentious popularity against the Senate, Cromwell cherished the same spirit against Crown and Senate; both set up a tyranny of their own subversive of true liberty, which ever must be founded in *law*, and protected by it."—Fost. 317.

The lex et consuetudo parliamenti, or the law and custom of parliament, describes one great division of the common law.

It depends upon the same principle of antient usage, as the laws respecting juries, the laws of inheritance, and that infinite collection of laws, which secure our lives, liberty, and property, but which has received confirmation and alteration from time to time by the legislature. Lord Chief Justice Wilmot has well said, that "the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by *usage* or *writing* is the same thing." 2 Wils. 348.

Consuetudo parliamenti is added to the word lex; it is conceived, because it may, in some instances, differ from the general law of the land, or in the words of Lord Coke, "the high court of parliament suis propriis legibus et consuetudinibus subsistit." So we say by the law and custom of merchants, bills of exchange were always

negotiable or assignable; we there add the word custom to the law because it is an exception to the general rule, which is, that a debt or a *chose* in action cannot be assigned. But the exception is as antient as the general law, for in the common law there is neither priority nor posteriority.

We say in like manner, that by the custom of the realm a carrier is liable to make good all losses, except those which are occasioned by the act of God, or the King's enemies.

This is part of the common law of England, and it is probable that the custom of the realm has been applied to it, because it is peculiar to carriers, and is different from the law, which is applicable to all other bailees or depositaries.

Or it may be a law peculiar to this realm.* See Bl. Com. 453. n. 11. Ed. by Chr.

In Rich *v.* Kneeland, Hob. 17. the law respecting the liability of carriers, is said to be by the *custom of the realm*, or by the *custom of England*, and upon a writ of error before the judges

* It is very remarkable that in the system of the Hindû Laws, the liability of a carrier is precisely the same as by the English Law, except he is not answerable for losses produced by the act of God, or by the King; we say the King's enemies. The words 'act of God' are there explained in the same manner. See Colebrook's Hindû Law.

As this is probably not to be found in the laws of any other country, it is a very extraordinary coincidence.

in the Exchequer Chamber, " it was resolved, that though it was laid as a *custom of the realm*, yet, indeed, it is *common law*."

The lex et consuetudo parliamenti, is well explained by Lord Coke in the following extract:—

" And as every Court of Justice hath laws and " customes for its direction, some by the common " law, some by the civil and canon law, some by " peculiar lawes and customes, &c. So the High " Court of Parliament suis propriis legibus & " consuetudinibus subsistit." It is lex & consue- " tudo Parliamenti, that all weighty matters in " any parliament moved concerning the peers of " the Realm, or commons in parliament assem- " bled, ought to be determined, adjudged, and " discussed by the course of the parliament, and " not by the civil law, nor yet by the common " laws of this Realm used in more inferiour " courts; which was so declared to be secundum " legem & consuetudinem Parliamenti, concern- " ing the peers of the Realm, by the King and all " the Lords spirituall and temporall; and the " like pari ratione is for the commons for any " thing moved or done in the House of Com- " mons: and the rather, for that by another " law and custome of parliament, the King can- " not take notice of any thing said or done in the " House of Commons, but by the report of the

" House of Commons: and every member of the " parliament hath a judiciall place, and can be " no witnesse. And this is the reason that " Judges ought not to give any opinion of a mat- " ter of parliament, because it is not to be de- " cided by the common laws, but secundum le- " gem et consuetudinem Parliamenti; and so the " Judges in divers parliaments have confessed. " And some hold, that every offence committed " in any Court punishable by that Court, must " be punished (proceeding criminally) in the " same Court, or in some higher, and not in any " inferiour Court, and the Court of Parliament " hath no higher."

In the debates upon the great case of Ashby *v.* White, Mr. Harley (the then Speaker) explains the law of parliament in the following luminous manner:—

" The common law is the common usage of the realm; I take the law of parliament to be the common law of the land, and the usage 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 informed, 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." 8 St. Tr. 113.

He was followed with equal ability by Mr. Cowper (afterwards Lord Chancellor Cowper), who said, " I perfectly agree with the honourable and learned gentleman, in what he laid down as an undoubted maxim, or ground-work, for the opinion he delivered, 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." 8 St. Tr. 114.

And further—" It is a 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 contrived for the common safety. But how can this constitution be preserved, 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." Ib. 118.

" 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 used, 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." Ibid 119.

CHAP. IV.

The Power of Courts of Justice to punish Contempts by their own Authority.

THIS subject is explained in a full and satisfactory manner by Chief Justice Wilmot, in an argument, which he had prepared to deliver, if the application for an attachment against Mr. Almon, the bookseller, had been persisted in. It requires no apology to give the following copious extract from that learned argument :—

IN THE KING'S BENCH.

THE KING AGAINST ALMON.

" Mr. Justice Wilmot.*

" This is an application made to the Court

* This opinion was not delivered in Court, the prosecution having been dropped, in consequence, it is supposed, of the resignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved. The occasion of it was a motion in the Court of King's Bench, by the Attorney General, for an Attachment against Mr. Almon, for

by the Attorney General, for an attachment against Mr. Almon, for publishing a pamphlet, containing many libellous passages upon this Court, and upon the Chief Justice for his conduct both in Court and out of it: and it charges the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus Act; and though the Chief Justice is

publishing a Pamphlet, intituled, " A Letter concerning Libels, " Warrants, Seizure of Papers, &c. Printed for J. Almon, Piccadilly, 1765."

In consequence of this motion, grounded on affidavits of the above pamphlet having been bought at the shop of Mr. Almon, in Piccadilly, a rule was made for Mr. Almon, to " shew cause," why a Writ of Attachment should not issue against him for his contempt. In answer to these affidavits Mr. Almon made an affidavit, in which he expressed his " concern and surprize at this charge, being no ways conscious of having in any " act of his life been guilty of the least intentional disrespect towards that Court, nor does he now, nor did he ever apprehend " or understand that the passage or extract of the pamphlet, intituled, " A Letter," &c. " was so meant or intended, or could " be so construed."

" As these proceedings were afterwards dropped, they are not mentioned in the reports of this period; but it appears that this opinion was prepared after the argument on the rule to " shew cause," as it takes notice of the arguments of counsel, and of the objection made to the granting of the attachment. But as the matter never came to a final decision, it must be considered only as the opinion of the Judge who gives it."

named and marked out in that passage, yet the whole Court is most manifestly, and in express words involved in it.

" It has been argued, that the mode of proceeding by attachment is an invasion upon the ancient simplicity of the law; that it took its rise from the Statute of Westminster, ch. 2. and Gilbert's History of the Practice of the Court of Common Pleas, p. 20, in the first Edition, is cited to prove that position. And it is said, that Act only applies to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt to the authority of the Court; yet that papers reflecting merely upon the qualities of Judges themselves, are not the proper objects of an attachment; that Judges have proper remedies to recover a satisfaction for such reflections by actions of " Scandalum Magnatum;" and that in the case of a peer, the House of Lords may be applied to for a breach of privilege; that such libellers may be brought to punishment by indictment or information; that there are but few instances of this sort upon libels on Courts or Judges; that the Common Pleas lately refused to do it; that libels of this kind have been prosecuted by actions and indictments; and that attachments ought not to be extended to libels of this nature; because Judges would be determining in their own cause; and that it is more proper for a Jury to determine " quo animo" such libels were published.

" As to the origin of attachments, I think they did not take their rise from the Statute of Westminster, ch. 2; the passage out of Gilbert does not prove it; but he only says, " the original of commitments for contempt " seems" to be derived from this Statute;" but read the paragraph through, and the end contradicts the " seeming" mentioned in the beginning of it, and shews that it was a part of the law of the land to commit for contempt, confirmed by this Statute; and indeed, when that Act of Parliament is read, it is impossible to draw the commencement of such a proceeding out of it: it impowers the Sheriff to imprison persons resisting process; but has no more to do with giving Courts of Justice a power to vindicate their own dignity, than any other chapter in that Act of Parliament.

" The power which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of Record or not, to fine and imprison for a contempt to the Court, acted in the

face of it, 1 Vent. 1. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the "Lex Terræ," and within the exception of Magna Charta, as the issuing any other legal process whatsoever.

"I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law, there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by Jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by Jury do,—immemorial usage and practice: it is a constitutional remedy in particular cases, and the Judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance

of process, or a contumelious treatment of it, or any violence or abuse of the Ministers, or others, employed to execute it. But it is said that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon Courts or Judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling Judges for what they do in their judicial capacities, either in Court or out of Court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever.

"By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. 12 Co. 25. The King is "de jure" to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King "concerning his justice."

"The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial de-

terminations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

" In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words "authority" and " contempt of the Court," to speak with precision upon the question.

" By the word " Court," I mean the Judges

who constitute it, and who are intrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Acts of Parliament. " Contempt of the Court" involves two ideas: contempt of their power, and contempt of their authority. The word " authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power: but by the word " authority," I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

" Livy uses it according to my idea of the word, in his character of Evander :—" Authoritate magis quam Imperio pollebat:" it is not " Imperium;" it is not the coercive power of the Court; but it is homage and obedience rendered to the Court, from the opinion of the qualities of the Judges who compose it: It is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was doposited in their hands; that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it; and therefore every instance

of an attachment for contumelious words, spoken of a rule of the Court (of which there are great many) is a case in point to warrant an attachment in the present case, where a rule of Court is the object of the defamation ; and it would be a very strange thing that Judges, acting in the King's Supreme Court of Justice in Westminster Hall, should not be under the same protection as a Bailiff's follower, executing the process which those Judges issue : it is not their own cause, but the cause of the public, which they are vindicating, at the instance of the public ; for I do not think that Courts of Justice are to take their complaints up of themselves : it must be left to his Majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings, they are only putting the complaint into a mode of trial, where the party's own oath will acquit him; and in that respect it is certainly a more favourable trial than any other: for he cannot be convicted if he is innocent, which, by false evidence, he may be by a Jury ; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an indictment or an information ; for the Court must set the punishment in one case as well as the other : they do not try him in either case;

he tries himself in one case, and the Jury try him in the other.

" An action of " Scandalum Magnatum" is only to redress the private injury ; compensation, and not punishment, is the object of it; and though some Judges may have sought pecuniary satisfaction, yet others have thought more liberally, and disregarded all private emolument or gratification for the personal injury, and resented the indignity as the cause of the public ; and the conduct of the Court of Common Pleas, in respect of the libel published by the Court Martial, is an authority in point upon this part of the case.

" As to proceeding in the House of Lords for a Breach of Privilege, the scandal upon the noble Lord does not affect him in the character of a Peer, but as the Chief Justice of this Court; and if it did, I cannot think it a more favourable mode of prosecution than an attachment, where his own oath will acquit him. As to leaving such libels to be prosecuted by indictment or information, that Juries may judge " quo animo," they were written or published ; I am as great a friend to trials or facts by a Jury, and would step as far to support them as any Judge who ever did, or now does, sit in Westminster Hall ; but if to deter men from offering any indignities to Courts of

Justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the Court should call upon the delinquents to answer for such indignities, in a summary manner, by attachment, we are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all laws, the safety and security of the people.

"The trial by Jury is one part of that system; the punishing contempts of the Court by attachment is another; we must not confound the modes of proceeding, and try contempts by Juries, and murders by attachment. We must give that energy to each, which the constitution prescribes. In many cases, we may not see the correspondence and dependance which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it; and I am sure it wants no great intuition to see, that trials by Juries will be buried in the same grave with the authority of the Courts who are to preside over them.

"The constitution has provided very apt and proper remedies for correcting and rectifying the

involuntary mistakes of Judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power, given to the Judges for their protection, is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it: is it possible to stab that authority more fatally than by charging the Court, and more particularly the Chief Justice, with having introduced a rule to subvert the constitutional liberty of the people? a greater scandal could not be published." Wilmot's Opin. 243.

Here Chief Justice Wilmot has fully and ably explained, that "a commitment for a contempt is as much the Lex Terræ, and within the exception of Magna Charta, as the issuing any other legal process whatever."—See also 4 Bl. Com. 283. 2 Atk. 469. 13 Ves. 237.

A printed libel reflecting upon the proceedings of the House in contumelious expressions may be more aggravated from the permanence of its effect, but it is an insult or contempt of the same class and nature, and precisely the same in principle, as menaces or contemptuous expressions spoken

of the Judges either in Court or out of Court; and whatever is a contempt of the Courts of Westminster Hall must necessarily be a contempt of the highest of all Courts, the House of Lords; and Lord Camden has declared in the case of Mr. Wilkes, " There is no difference between the " two Houses of Parliament in respect to privi- " lege. The Statutes of 12 & 13 Wil. III. c. " 3, and 2 & 3 Ann, c. 18, speak of the privi- " lege of Parliament, in reference not to one " House in particular, but to both Houses." 11 St. Tr. 305.

CHAP. IV.

The Constitutional Power of the House of Commons to commit for Contempts.

SIR William Blackstone has said, that " Privi- " lege of Parliament was principally established, " in order to protect its members not only from " being molested by their fellow subjects, but " also more especially from being oppressed by " the power of the Crown. If therefore all the " Privileges of Parliament were once to be set " down and ascertained, and no privilege to be " allowed but what was so defined and deter- " mined, it were easy for the executive power to " devise some new case, not within the line of " privilege, and under pretence thereof to harass " any refractory member, and violate the freedom " of parliament. The dignity and independence " of the two Houses are therefore in great mea- " sure preserved by keeping their privileges inde- " finite." 1 Bl. Com. 164.

The author of this treatise, as the annotator upon the Commentaries, has presumed to differ

from the learned Judge, and to state, that " he " cannot but think that clearness and certainty " are essentially necessary to the liberty of Eng- " lishmen; mystery and ignorance are the natural " parents of superstition and slavery. How can " rights and privileges be claimed and asserted, " unless they are ascertained and defined? The " privileges of Parliament, like the prerogatives of " the Crown, are the rights and privileges of the " people. They ought all to be limited by those " boundaries which afford the greatest share of se- " curity to the subject and constituent, who may " be equally injured by their extension as their di- " minution. The privileges of the two Houses " ought certainly to be such as will best preserve " the dignity and independence of their debates " and councils, without endangering the general " liberty; but if they are left uncertain and in- " definite, may it not be replied with equal force, " that under pretence thereof the refractory mem- " bers may harass the executive power, and vio- " late the freedom of the people?" Ibid. n. 19.

The writer of that note feels a particular satisfaction in finding that his opinion upon this subject is conformable to that of Lord Chancellor Clarendon, who greatly laments that many good men have been imposed upon by the mere mention of the privilege of Parliament. He says, " It is

not to be believed how many sober, well-minded men, who were real lovers of the peace of the kingdom, and had a full submission and reverence to the known laws, were imposed upon, and had their understandings confounded, and so their wills perverted by the mere mention of privilege of Parliament," &c. and he then gives his own opinion in the following words:—

" They are the only judges of their own privileges, that is, when the breach of those privileges, which the *law* hath declared to be their own, and what punishment is to be inflicted upon such breach. But there can be no privilege, of which the *law* doth not take notice, and which is not pleadable by and at *law*.

" The truth and clearness of this will best appear by instance: If I am arrested by process out of any court, I am to plead in the court that I am a member of parliament, and that, by the privilege of parliament, my person ought to be free from arrests. Upon this plea the Judge is bound to discharge me; and if he does not, he is a criminal as for any other trespass against the law: but the punishing the person who hath made this infringement is not within his power, but proper to that jurisdiction against which the contempt is; therefore *that House* of which I am a member, upon complaint made of such an arrest,

usually sends for the persons culpable, the party at whose suit the arrest is made, and the officers which executed it, and *commits them to prison till they make acknowledgment of their offence*, the Judge having no more power to commit the man, that sued or arrested me, than he hath to imprison a man for bringing an action at law, when he hath no good title; *neither is he judge of the contempt.*

" Again, if a man brings an information or an action of the case for words spoken by me, and I plead that the words were spoken by me in parliament, when I was a member there, and that it is against the privilege of parliament, that I should be impleaded in any other place for the words I spoke there; I ought to be discharged from this action or information because this privilege is known and pleadable at law; but that Judge can neither punish nor examine the breach of privilege nor censure the contempt. And this is the true and proper meaning of the old received Axiom, that they are judges only of their own privileges." 1 Clar. Hist. fo. 310.

In this extract Lord Clarendon has expressly declared, that either House of Parliament may commit all persons to prison, till they make acknowldgement of their offence, who have been

guilty of a violation of the legal privileges of the House.

The question then is, whether contemptuous and insulting language respecting any individual member, for his conduct in parliament either by words or by writing; and whether reflecting upon the proceedings of the House in general by contumelious language, are a breach of the privileges of the House?

No one will contend, that an argument, however erroneous, drawn up against any resolution of either House of Parliament, or against any decision of a court of law, is a contempt, if it is expressed in terms which are respectful, or free from insult. It only becomes a contempt or a violation of the law, when contumelious and insulting language applied to the members and judges is mixed with, or added to, the reasons and authorities which the writer produces.

The progress from insult to hatred, and from hatred to resistance, is generally rapid and accelerated. It is therefore wise to oppose and stop the commencement of its career.

Mr. Hatsell's first volume of Precedents of the Proceedings of the House of Commons, is confined entirely to the consideration of the Privileges of the House, and in page 186, he enumerates the cases which fall under the head of " assaulting

" or insulting a member, or traducing his cha-
" racter;" and in page 196, he says, " I have thus given at large the several cases, relative to the privileges of the members of the House of Commons, and their servants, from the earliest times to the end of the parliament, 1628.

The principal view, which the House of Commons seem always to have had in the several declarations of their privileges, was this, of securing to themselves (1) their right of attendance in parliament unmolested *by threats or insults of private persons*; (2) their thoughts and attention undisturbed by any concern for their goods or estate; (3) their personal presence in the House not to be withdrawn, either by the summons of inferior Courts, by the arrest of their bodies in civil causes, or, what was of more importance, by commitment by orders from the Crown, for any supposed offences." 1 Hats. 196.

Mr. Hargrave in his learned Preface to Lord Hale's Jurisdiction of the House of Lords, has given a very particular history of the controversies between the two Houses, respecting their claims of privilege and jurisdiction at different periods; and he observes, " the Commons have even forborn to revive considering the right of the Lords, *to fine* the Commons of England for breach of *privilege*, and to *imprison them on that account be-*

yond the sitting of parliament; notwithstanding the objections heretofore so strongly urged against both of those practices; and notwithstanding the laudable abstinence of the Commons themselves, from attempting to vindicate the breach of their own privileges, otherwise than by an imprisonment, which, if not sooner determined by their own act, of course ceases when parliament is either dissolved or prorogued." Harg. Pref. 217.

These authorities from Sir William Blackstone, Lord Clarendon, Mr. Hatsell and Mr. Hargrave, prove that the best writers upon the subject have never entertained a doubt, that the House of Commons had the constitutional right to commit those who were guilty of a violation of their legal privileges.

I shall now consider what has been said and decided by the Judges in the courts of law, in the cases of commitments by the House of Commons.

And upon this point I consider Lord Chief Justice Holt as the highest of all judicial authorities, because what he has advanced is the result of the maturest deliberation, and because he resisted the House of Commons with the utmost zeal and vigour when he thought them in an error; we may therefore rest assured, that he would make no concessions to them but when he thought them in the right.

He has declared "he made no question of the power of the House to commit; they *might commit any man for offering an affront to a member*, or for a breach of privilege, nay, they might commit for a crime because they might impeach." Queen v. Paty, Lord Raym. 1115.

This declaration he has made in a case in which he informs us "he was so unfortunate, as to go contrary to the act of the House of Commons, and the opinion of all the rest of the Judges in England, whose assistance they had desired, and there had been a meeting for that purpose.

Lord Holt in that case was of opinion, if the House of Commons had committed for an act, which could not in a court of law be considered a breach of privilege, the Judges might discharge the party by a Habeas Corpus; the other Judges thought they were precluded from pronouncing any judgment upon the legality of a commitment by the House during the same session.

But with respect to the case of *an affront offered to a member of the House*, Lord Holt himself admits, they have the power to *commit any man*; upon this point therefore all the twelve Judges were agreed, and the patriotism of the Chief Justice could not lead him to hesitate for a moment.

When Chief Justice Pemberton, and Sir Thomas Jones were summoned before the House of Commons, in the year after the Revolution, and were examined for what they had decided in the Court of King's Bench several years before, in an action, in which the Serjeant at Arms was a party.

Sir Francis Pemberton said, "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. Now here it is allowed by all people "living, I think no Judge ever denied, that the "order of this House was sufficient to take any "one into custody." 8 St. Tr. 3.

Sir Thomas Jones said, "If the Serjeant had "produced a copy at most of your Journal, that "had been sufficient, and no Judge would "have been so silly or imprudent, at least, to "have said that had not been a good and sufficient authority." 6th July, 1 W. & M. Ib. 5.

But these two learned Judges differed from the House of Commons, with respect to the form of the plea, which the Serjeant at Arms ought to have put upon the record in the action brought against him, and for that reason they were ordered to be committed to the custody of the Serjeant at Arms, and were detained there till after the prorogation.

This seems to have been a harsh proceeding

against the Chief Justice of the King's Bench, and one of his colleagues, both of whom avowed the power of the House to commit for contempts.

See 8 St. Tr. 6. and Comm. Jour. 19 July, 1689.

The Earl of Shaftesbury was committed by the House of Lords in the year 1677; he was brought up before the Court of King's Bench by a Habeas Corpus, when Chief Justice Rainsford expressed himself in the following terms, equally applicable to a member of the House of Commons as to a peer.

"This Court hath no jurisdiction of the cause. We ought not to extend our jurisdiction beyond its due limits, and the actions of our predecessors will not warrant us in such attempts. The consequence would be very mischievous, if this court should deliver *the members of the Houses of Peers and Commons*, who are committed, for thereby the business of parliament may be retarded, for perhaps the commitment was for evil behaviour, or *undecent reflections on the members*, to the disturbance of the affairs of parliament. 1 Mod. 158.

The next case of the kind is that of Alexander Murray in 1751. He was committed by the House of Commons for a contempt, and was brought by a Habeas Corpus before the Court of

King's Bench; when Mr. Justice Foster used the following remarkable words—"The law of parliament is part of the law of the land, and there would be an end of all law, if the House of Commons could not commit for a contempt."

He was remanded; the other two Judges, Dennison and Wright, were of the same opinion; the Chief Justice Lee was absent. 1 Wils. 299.

Brass Crosby Esq. Lord Mayor of London, was committed to the Tower for a contempt by the Speaker of the House of Commons, 25 March, 1771; in the following term he was brought before the Court of Common Pleas by a Habeas Corpus, but was remanded by the unanimous judgment of the Court.

The Lord Chief Justice De Grey observed, "That this power of commitment must be inherent in the House of Commons, from the very nature of its institution; and *therefore is part of the law of the land.* They certainly always could commit in many cases; in matter of Elections, they can commit Sheriffs, Mayors, Officers, Witnesses, &c. and it is now agreed, that they can commit generally for all contempts. All contempts are either punishable in the Court contemned, or in some higher Court. Now the Parliament has no superior Court; therefore the contempt against either House can only be punished by themselves."

And Sir William Blackstone, one of the Judges, went very fully into the consideration of the principles of the law upon the subject, as appears from the following judgment.

" I concur in opinion, that we cannot discharge the Lord Mayor. The present case is of great importance, because the liberty of the subject is materially concerned. The House of Commons is a Supreme Court, and they are judges of their own privileges and contempts, more especially with respect to their own members. Here is a member committed in execution by the judgment of his own House. All Courts, by which I mean to include the two Houses of Parliament and the Courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective Court. Infinite confusion and disorder would follow, if Courts could by writ of Habeas Corpus examine and determine the contempts of others. This power to commit results from the first principles of justice; for if they have power to decide, they ought to have power to punish. No other Court shall scan the judgment of a superior Court, or the principal seat of justice. As I said before, it would occasion the utmost confusion, if every

Court of this Hall should have power to examine the commitments of the other Courts of the Hall for contempts; so that the judgment and commitment of each respective Court as to contempts must be final and without control. It is a confidence that may, with perfect safety and security, be reposed in the Judges and the Houses of Parliament. The legislature since the Revolution (see 9 & 10 W. III. c. 15.) have created many new contempts. The objections which are brought, of abusive consequences, prove too much, because they are applicable to all Courts of dernier resort: et ab abusu ad usum non valent consequentia, is a maxim of law as well as of logic. General convenience must always outweigh partial inconvenience; even supposing (which in my conscience, I am far from supposing) that in the present case the House has abused its power. I know, and am sure that the House of Commons are both able and well inclined to do justice. How preposterous is the present murmur and complaint! The House of Commons have this power only in common with all the Courts of Westminster Hall: and if any persons may be safely trusted with this power, they must surely be the Commons, who are chosen by the people: for their privileges and powers are the privileges and powers of the people. There is a great

fallacy in my brother Glynn's whole argument, when he makes the question to be, Whether the House have acted according to their right or not? Can any good man think of involving the Judges in a contest with either House of Parliament, or with one another? And yet this manner of putting the question would produce such a contest. The House of Commons is the only Judge of its own proceedings; Holt differed from the other Judges in this point, but we must be governed by the eleven, and not by the single one. It is a right inherent in all supreme Courts; the House of Commons *have always exercised it.* Little nice objections of particular words, and forms and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the Orders of that House, and their execution, are according to law. The Habeas Corpus in Murray's case was at Common Law. I concur intirely with my Lord Chief Justice." Crosby's Case 3 Wils. 188.

In the year 1779 Benjamin Flower, the editor of a Newspaper, was committed by the House of Lords for a libel on the Bishop of Llandaff. He was brought before the Court of King's Bench upon a Habeas Corpus, when Lord Kenyon made the following observations:—

"If we entertained any doubts upon this subject, it would be unbecoming in us to rush to a speedy decision without looking through all the cases cited by the defendant's counsel; but not having any doubts, I think it best to dispose of the case at once. The cases that have been referred to are all collected in Lord Hale's Treatise on the Jurisdiction of the Lords' House of Parliament, and that valuable Preface to it published by Mr. Hargrave; but in the whole of that publication the defendant's counsel has not found one case applicable to the present. This is one of the plainest questions that ever was discussed in a court of law. Some things, however, have dropped from the learned counsel, that require an answer:—First, it is said that the House of Lords is not a Court of Record. That the House of Lords when exercising a legislative capacity is not a Court of Record, is undoubtedly true; but when sitting in a judicial capacity, as in the present case, it is a Court of Record. Then it was objected, that the defendant was condemned without being heard in his defence; but the warrant of commitment furnishes an answer to that; by that it appears, that 'he was informed of the complaint made against him,' &c. and having been heard as to what he had to say in answer to the said complaint, &c. he was adjudged 'guilty of a high breach of the privileges of the House,'

&c. so that it clearly appears that he was heard in his defence, and had the same opportunity of calling witnesses, that every other defendant has in a court of justice. Then insinuations are thrown out against the encroachments by the House of Lords on the liberties of the subject: but the good subjects of this country feel themselves protected in their liberties by both Houses of Parliament. Government rests in a great degree on public opinion; and if ever the time shall come, when factious men will overturn the Government of the country, they will begin their work by calumniating the Courts of Justice and both Houses of Parliament."

"When Lord Shaftesbury's case came on, there were some persons who wished to abridge the privileges of the House of Lords: but Mr. Serjeant Maynard was one of those who argued in support of their privileges; and he surely was not capable of concurring in any attempt to infringe the liberties of the people. It has been said, however, that though many instances are to be found in which the House of Lords has in point of fact exercised this power, whenever that power has been resisted, it has been resisted with effect; from whence it is inferred, that the House of Lords has not the authority which it assumes: but in this case I may avail myself of the same

argument in favour of its jurisdiction, for no case has been found where it has been holden to be illegal in the House of Lords to fine and imprison a person guilty of a breach of privilege. We were bound to grant this Habeas Corpus; but having seen the return to it, we are bound to remand the defendant to prison, because the subject belongs to 'aliud examen.' There is nothing unconstitutional in the House of Lords proceeding in this mode for a breach of privilege; and unless we wish to assist in the attempt that is made to overset the law of parliament and the constitution, we must remand the defendant." 8 Durnford's and East's Reports, 314.

Having stated the opinions of several of our best writers upon law, and the decisions of the most learned and upright Judges, that have filled and adorned, at different periods, the highest seats of judicature in this country; all of whom have concurred, in declaring that the House of Commons have a right to commit every person who is guilty of a contempt; I shall now proceed to consider how far this right has been recognized by the House of Lords.

In the conference between the Lords and the Commons in the case of the Aylesbury men, the Lords have admitted it in the clearest terms; they say, "The Lords never disputed the Commons'

" power of committing for breach of privilege, as " well persons who are not of the House of Com- " mons, as those who are." 8 St. Tr. 173. 17 Lords Jour. 714.

A decision of the Lords upon this question is of still higher authority than that of the Judges, because if any action should ever be brought before the Courts of Westminster Hall, whatever judgment or judgments may be there pronounced in it, the House of Lords must be the ultimate Court of appeal.

The Lords have once given judgment against the unanimous opinion of all the Judges. See 2 Bl. Comm. 169. n. 1. Ed. by Chr.; and against the opinion of all the Judges except one, in the case of resignation bonds. Ibid 280.

The opinions of the Judges are therefore not conclusive upon them; but it is said they have a greater respect for their own decisions; for from a regard to their dignity and to preserve a consistency in their judgments, they will never permit a question which they have once decided to be debated again in their own House. 1 Brown Ch. Ca. 286.

Mr. Hatsell in the first volume of his precedents relates from Hollingshead, that Ferrers, a member of the House, had been arrested for a debt in London, and that the House sent the Ser-

jeant at Arms to demand their member, but the officers of the city resisted the Serjeant, and an affray ensued; then it is said, " During this brawle, the Sheriffs of London, called Rowland Hill and H. Suckley, came thither; to whom the Serjeant complained of this injury, and required of them the delivery of the said burgess, as afore; but they bearing with their officers, made little account either of his complaint or of his message, rejecting the same contemptuously with much proud language, so as the Serjeant was forced to return without the prisoner; and finding the Speaker and all the knights and burgesses set in their places, he declared to them the whole case, as it fell out; who took the same in so ill part, that they all together (of whom there were not a few, as well of the King's Privy Counsel, as also of his Privy Chamber) would sit no longer without their burgess, but rose up wholly, and retired to the upper House; where the whole case was declared by the mouth of the Speaker, before Sir Thomas Audley, Knight, then Lord Chancellor of England, and all the Lords and Judges there assembled; who judging the contempt to be very great, referred the punishment thereof to the order of the Commons House." P. 54.

Here we have an express judgment of the

Lords, and conformable to the opinion of the Lord Chancellor and the Judges assembled, that the punishment of a contempt committed by persons, who were not members of their House, "belonged to the order of the Commons House."

Though these resolutions might not preclude the House from hearing the subject debated, if it were brought before them by a writ of error from the Courts of Westminster Hall, yet they afford the most cogent reasons to conclude what would be their judgment whenever the question is duly proposed for their consideration.

I shall now proceed to the consideration of the precedents of the House of Commons itself.

These precedents or authorities consist either of commitments from the remotest times to the present day, or of general resolutions of their legal power to commit.

It is very remarkable, that, of the first eleven persons who were committed to the Tower by the House of Commons, one only was a member of that House; and it is rather extraordinary that this should have escaped the attention of the Committee of the House, who have bestowed so much diligence lately in the collection of precedents.

In Mr. Hatsell's first volume of precedents it is stated, "Whereupon in conclusion the said Sheriffs (of London, see *ante*, 67.) and the same White (the Plaintiff) were committed unto the

Tower of London, and the said Clerk (which was the occasion of the fray) to a place then called Little Ease, where they continued from the 28th until the 30th of March, and then they were delivered, not without humble suit made by the Mayor of London and other their friends." P. 55.

April 1, 1552. "It is ordered that Crykettoste (not a member) shall be sent prisoner to the Tower by the Serjeant of this House: on the 5th of April he is ordered to be discharged of the imprisonment, paying his fees." Ibid. 72.

23 April, 1554. "William Johnson, one of the burgesses, complained upon Monyngton, who had beaten him, whereupon Monyngton came to this House, and not knowing Johnson to be a burgess, confessed he had stricken him: whereupon it was ordered, that Monyngton was sent prisoner to the Tower. On the next day (having given sureties to keep the peace) Monyngton was discharged." Ibid. 74.

7 & 10 March, 1575. "The House finding that Smalley (a servant of a member) had fraudulently procured his arrest in order to be discharged of the debt and execution, commit him to the Tower for a month, and until he should pay to William Hewet the sum of one hundred pounds," which was probably the amount of the debt for which he had been arrested. Ibid. 90.

4 February, 1580. Mr. Norton complains of a book, " not only as reproaching some particular good members of the House, but also very much slanderous and derogatory to the general authority, power and state of this House, and prejudicial to the validity of its proceedings, in making and establishing of laws." And it appearing to the House that Mr. Hall, a member, was the procurer that the said book was printed and published, and Mr. Hall being brought to the bar, he submitted himself to the House and asked pardon, and being withdrawn sundry motions and arguments were had; but at last it was resolved, without one negative voice, " that he should be committed to prison", and upon another question, " that he should be committed to the prison of the Tower, *as the prison proper to the House.*"

And it was further resolved, that he should remain in the said prison for six months, and until he should make retractation of the book to the satisfaction of the House: that he should pay a fine to the Queen of five hundred marks; and that he should be presently severed and cut off from being a member of this House any more during the continuance of this present Parliament. Ibid. 93.

5 April, 1593. Mr. Neale, Burgess for Gran-

tham, complains, " that he had been arrested " upon an execution, that he had paid the money, " but that out of regard to the liberties and privi- " leges of the House he thought it his duty to ac- " quaint them with it."

The next day Weblen, the person at whose suit the execution was had, and the officer who executed it, were for their contempt committed to the Tower, there to remain during pleasure, and on the 9th of April, they were reprimanded, and discharged. Ibid 110.

22d March, 1603. Sir Thomas Shirley, member for Steyning, had been committed prisoner to the Fleet, on an execution. On this the Warden of the Fleet was sent for to the House, where he, persisting in refusing to release the prisoner, was committed to the Tower for the contempt.— After several days the Warden was again called in, when he still persisting in his obstinacy, was told by the Speaker, " that as he did increase his " contempt, so the House thought fit to increase " his punishment, and that their judgment was " now, that he should be committed to the prison " called Little Ease in the Tower." Sir Thomas was delivered up by a petition sent to the House from the Warden in his durance, and praying to be released from it. The House however thought fit to continue him in the same dismal hole, some

time longer, when at last, being ordered to be brought to the bar, on his knees he confessed his error and presumption, and professed that he was unfeignedly sorry that he had so offended that honourable House.

On which, the Speaker by direction of the House pronounced his pardon and discharged him, paying the ordinary fees. Ibid 154.

These instances I have abridged from Mr. Hatsell, and have used his words *verbatim.*

He has displayed great industry in the collection of these cases not only from the Journals, but in those years, where the Journals are wanting, from other documents.

They prove that eleven persons were commited to the Tower by the House prior to the year 1628, and that one only was a member of the House.

In Hall's case the Tower is called " the proper prison of the House."

The cases of commitments to *the Tower* collected by Mr. Hatsell are for arresting, assaulting, libelling the members, and resisting the orders of the House; but every page contains instances of commitments to the custody of the Serjeant, and to other prisons besides the Tower.

Mr. Hatsell, p. 186, vol. I. classes together as one head of breach of privilege, " assaulting and insulting a member, and traducing his character."

In Chief Justice Wilmot's excellent explanation of the contempts of Courts, it is fully shewn that they are all of the same nature, and regulated by the same principle.

When the insulting language is committed to writing, it may be more deliberate and permanent, but still it is an offence of the same species as contemptuous words spoken to the Judge in Court, or an assault offered to his person.

Every reign since the Journals were regularly preserved abounds with instances of commitments for contumelious and contemptuous expressions and publications. See the late Report of the Committee. Mr. Hatsell's Prec. and the Jour. Comm. passim.

I shall therefore give only one specimen subsequent to the Revolution.

11 Jan. 1696. " Resolved that John Rye, of London, Merchant, having caused a libel reflecting on a member of this House, to be printed and published, and to be delivered at the door of this House, is guilty of a breach of privilege of this House.

" Ordered, that the said John Rye be taken into the custody of the Serjeant at Arms attending this House for the said breach of privilege."

The following resolutions I find in the reign,

to which we ascribe the great confirmation of our law and liberty.

22 April, 1699. " Resolved, that the publishing the names of the members of this House, and reflecting upon them, and misrepresenting their proceedings in parliament, is a breach of the privilege of this House, and destructive of the freedom of parliament."

26 Feb. 1701. " Resolved that it is the opinion of this Committee, that to assert the House of Commons have no power of commitment but of their own members, tends to the subversion of the constitution of the House of Commons."

26 Feb. 1701. " Resolved that it is the opinion of this Committee, that to print or publish any books or libels reflecting upon the proceedings of the House of Commons, or any member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House of Commons."

I have now fairly stated all that I have found and have thought material upon the subject, and if there are any authorities of a contrary tendency I confess my ignorance of them.

Contra negantem principia non est disputandum. One seems to be beating the air, or fighting with shadows. All the wise, great, and good,

who have spoken or written upon the subject, are unanimous. There is no drawback, no counterpoize, no set-off, no contrary testimony, no conflicting principle or authority. It will be hereafter matter of astonishment how ingenuity and invention could have created such a phantom to frighten the people of England, and to mislead and delude the ignorant and unlearned.

It may be said, that the House ought to temper judgment with mercy, and instead of commitment ought to adopt the gentler mode of censure or reprimand. But the judgment of reprimand must be equally a violation of Magna Charta and the liberty of the subject, if the House is not possessed of the power of commitment. Every compulsory detention to hear any admonition, however salutary, if not permitted by the dominion of the law, is a false imprisonment; and to be forced against one's will to hear a reprimand is something similar to a commitment to the Little Ease in the Tower.

A Judge at the Assizes, or the Justices at the Quarter Sessions, where the prisoner is convicted of petty larceny, may transport for seven years, or may imprison for any number of years without limit, may whip without limit, or may inflict the two last punishments together without limit. When I say without limit, there is no limit, but

what is prescribed by reason, sound discretion and the Bill of Rights, which directs that " fines shall not be excessive, nor punishments cruel and unusual."* But still, the best Judges and the best of men must differ in their judgment of the moral admeasurement of the legal punishment to legal crimes.

So where there is a question, whether the punishment for a breach of privilege shall be a reprimand or a commitment to a prison, though some may think in moral justice, the slighter punishment commensurate with the offence, yet they are as guilty of a violation of legal justice, of Magna Charta, and the law of the land, as those who vote for the severer punishment, unless they can prove, that the law of the land permits them to proceed to the extent of a reprimand, and no farther.

It is asserted that no court or no person ought to be accuser, judge, jury, and executioner in their own cause. ' Nothing is more mischievous

* It is very common for some courts of Quarter Sessions in Lancashire, where justice is administered with great ability and propriety, to sentence persons convicted of petty larceny to imprisonment for three years.

The common law punishment for petty larceny, has certainly fixed no limit to the term of imprisonment, but as persons convicted of grand larceny by 18th Eliz. c. 7, cannot be imprisoned

than the misapplication of legal terms. The law is a two-edged sword, and becomes dangerous and hurtful to those whom it was intended to protect, when it is either unskilfully or wickedly handled.

But every court which punishes for a contempt must exercise the functions of a judge and a jury, and if the contempt is committed within its view or presence, it must inevitably also be the accuser and the witness.

At Stone's trial a by-stander clapped his hands when the jury pronounced, not guilty; he was observed by Lord Kenyon, who immediately ordered him to pay a fine of 20l. and to be committed till the fine was paid. Here that great Judge was most properly at the same time accuser, witness, judge, jury, though not executioner, in his own cause; but his cause was the cause of justice, and the cause of his country.

Lord Hardwicke ordered the printer of a News-

in the county gaol more than one year, or by the 5th Ann, c. 6. more than two years in the house of correction, nor less than six months; in order to preserve a consistency in the law, I would not exceed those limits in the case of petty larceny, especially as transportation for seven years is common to both.

But those who commit for more than two years upon a conviction of petty larceny, are certainly guilty of no violation of the law of the land. The question is only, whether they do not transgress the bounds of sound moral propriety.

paper to be committed to the Fleet prison, and one, who was a prisoner there, to be confined a close prisoner, for reflections upon the court. 2 Atk. 469. The late Chancellor, Lord Erskine, in the year 1806, committed a man and his wife as the authors, and the printer, of a pamphlet, reflecting upon the proceedings of the court, without the assistance of a jury. 13 Ves. 237.

These are precedents, which all who are anxious for the preservation of the principles of law, and the purity of the administration of justice, must for ever applaud.

In all times it is to be hoped that men will preside in our courts, who will possess the firmness of a Gascoigne, and who would not hesitate for a moment to commit even the heir-apparent to the crown, if he should contemn the majesty of the laws and the majesty of his Sovereign, by insulting his Judges in the execution of their office*.

* Mr. Hume tells us that Henry V. when Prince of Wales, was not ashamed to appear at the bar of the Court of King's Bench with a criminal, who had been a riotous companion of his, in order to give him countenance and protection. Finding that his presence had not overawed the Chief Justice, he proceeded to insult that magistrate on his tribunal; but Gascoigne, mindful of the character which he then bore, and the majesty of the Sovereign and of the laws, which he sustained, ordered the Prince to be carried to prison for his rude behaviour. The spectators were agreeably disappointed, when they saw the heir of the crown submit peaceably to this sentence, make reparation for his error by acknowledging it, and check his impetuous nature in the midst of its extravagant career. 3 HUME, 86.

Every magistrate, when he commits a prisoner for trial, or commits for punishment in consequence of a conviction before himself, acts both as judge and jury. He is a judge of the law, and a jury with respect to the facts.

Every commissioner of bankrupt, who commits a bankrupt to prison for the benefit of his creditors, is bound by a solemn oath to discharge all these functions according to the best of his skill and knowledge.

When this power of commitment without the assistance of a jury is entrusted by the law of the land to all the courts of Westminster Hall, and to so many inferior authorities, surely the people of England may safely confide it to those, who have ever been considered as their immediate guardians and protectors.

In every conceivable form of government, over every species of authority, there must necessarily be a power without control.

If the House of Lords were not the sole judges of their legitimate privileges, and if the exercise of them could be examined by the inferior courts,

this incongruity would follow, that, after any question had been judged and re-judged in Westminster Hall, there would be again an appeal *ab eodem ad eundem*, and it would return to the same point in the circle, from which it originally set out.

It is still more reasonable that this power should be lodged in the House of Commons, because they are the peers of commoners; their judgment seems to be both within the spirit and letter of the Judicium parium suorum of Magna Charta. When a subject is deprived by them of his personal liberty, it must be by a judgment of a far greater number of commoners, men of as good education and respectability, as can be found either in a grand jury or a special jury, in any county of the united kingdom.

Every contempt of a court is an offence both against that court and against the King's peace, crown, and dignity; and the punishment by the court would be no bar whatever to the prosecution commenced in the name of the King. The court has a discretion whether it will take cognizance itself of the offence, or will recommend a prosecution to be carried on by the King's Attorney General.

The House of Commons cannot command the Attorney General; but it is the practice to present

an address to the King, requesting that he will direct his Attorney to prosecute the party for a public misdemeanour. If they themselves did not possess the power of punishing, they must either be petitioners to the King that he would order a prosecution in his name, or they must prefer an indictment, like all other private prosecutors, at the Assizes or the Quarter Sessions. If the offence was committed in one of the four northern counties, it might be two or three years before the offender could be brought to justice, and even by the most expeditious mode which can be devised, in every case many months must necessarily intervene between the punishment and the crime*.

* There are five modes of prosecution for a misdemeanour.

1. The prosecutor may prefer a bill of indictment before a grand jury, either at the Assizes or at the Sessions, and if the grand jury find a true bill a capias or Bench warrant will issue, by which the party may be carried before any magistrate of the county, who must commit him, if he does not enter into a recognizance with two sufficient sureties to appear and plead to the indictment at the next Assizes and Sessions. At the second Assizes and Sessions he pleads to the indictment, but he cannot be compelled to take his trial. At the third Assizes or Sessions the prosecutor may bring on the trial, and if the defendant is found guilty he will receive judgment there.

The second mode is, when a complaint is made to a magistrate, he may by his warrant, where the offence is a breach of the peace, compel the party to appear before him, and to enter into recogni-

During the long interval between the commission of the contempt and the trial the House of

zance with sufficient sureties to appear at the next Assizes or Sessions, to answer to an indictment that may be preferred against him.

This shortens the proceedings by one stage, and brings on the trial at the second Assizes or Sessions.

The 3d mode is this, viz. after an indictment is found by a grand jury, either at the Assizes or Sessions, the prosecutor may remove it into the King's Bench or the Crown Office; there the defendant can be called upon to plead, and it is then sent down into the county, where the indictment was preferred by writ of nisi prius, and it is tried by the Judge on the civil side, and if the defendant is convicted the verdict of guilty is entered upon the record, which is sent back to the Court of King's Bench, and the defendant may be brought up to receive judgment in the following term.

The 4th mode: For every misdemeanour, the King's Attorney General, by virtue of his office, can file an information, by which he supersedes the functions of a grand jury.

The 5th mode: The Court of King's Bench have the same power of granting an information to be filed upon an application made publicly in the Court.

In the two last modes, viz. by information, the proceedings and consequences are similar to those of the 3d mode, or of an indictment removed into the Court of King's Bench by a prosecutor.

It appears from this short statement, a long time must intervene before a defendant can be brought to punishment for any misdemeanour.

The proceedings in prosecutions for misdemeanours are so dilatory, that they are certainly capable of great improvement, and call loudly for correction by the Legislature.

Commons might continue to be insulted; and before the trial the offender and his sureties might abscond out of the kingdom, forfeit their recognizance, and leave behind them no property to discharge it with.

The Attorney General might neglect or betray the prosecction, he might even enter a noli prosequi; and the King might grant a pardon either before or after the trial.

But if the King and his officers were zealously disposed to cooperate with the House of Commons in the vindication of their dignity by bringing the offender to punishment, still the eloquence of an ingenious advocate might induce the jury to acquit; and even if the jury did their duty by finding a verdict of guilty, or a special verdict, and the Court of King's Bench afterwards discharged their's by an honest judgment, still the House of Lords would have the power finally to arrest the judgment, and to set the delinquent completely at liberty.

These are some of the inconveniences, which would result, if the House of Commons had not the jurisdiction to punish all persons whatever for insulting their dignity or interrupting the regularity of their proceedings.

The inconsistencies and incongruities of pleading to an action would still be more glaring and

monstrous. The representatives of all the Commons of the United Kingdom must be represented by a practising Attorney of one of the Courts of Westminster Hall. Where is the property or the estate from which the damages are to be levied?

The mind of every friend to his country must be struck with horror at the contemplation of such mischief and confusion.

The excellence of our constitution can only be preserved by the independence of the House of Commons; the King, Lords and Commons, are the constitutional checks to the encroachments of each other. If the popular part of our government did not possess the transcendant and uncontrouled power of commitment for a violation of its just privileges it would soon be trampled upon by a licentious rabble, and of necessity would be driven to seek for protection under the wings of the prerogative, or would be prostrated at the feet of the aristocrasy.

The patriots of former times have held very different doctrines from those of the present day. Mr. Pym has eloquently said,—

"The great privileges belonging to this High Court of Parliament airi not airy and matters of pomp, but have in them reality and efficacy; whereby this Great Council of the Kingdom is enabled to perform all those noble functions which

belong to them, in respect to the Legislative power and Consiliary power; and as they are the great and highest Court of Resort and Judicature in the Kingdom, these privileges have been ever dear, and he hoped shall be, to both Houses."

"As there are general privileges belonging to the whole body, so there are others more peculiar belonging to either House; and of these the House of Commons shall be ever tender."

"For the Court of Parliament is not only a rule but a fountain of order; and if any confusion should be brought in here, there would be danger it might from hence be derived to other inferior jurisdictions of the kingdom." Spoken at a Conference 29 April 1640. Lords' Jour. 4 Vol. 72.

CHAP. V.

Whether an Officer has a right to break open outer doors to execute the Warrant of the Speaker of the House of Commons.

This is a question comparatively of a trifling consideration. For if an officer misconducts himself in the execution of any legal process, he individually must make retribution or satisfaction for the injury he commits from his own private purse, or by the imprisonment of his person.

It is agreed by all that no officer can break open outer doors in the execution of process in a civil suit.

Mr. Justice Foster in his excellent Discourses upon Criminal Law says,—

" The Rule that every man's house is his castle, when applied to the case of arrests upon legal process, hath been carried as far as the true principles of Political Justice will warrant, perhaps beyond what in the scale of sound reason and good policy they will warrant."

" The Rule already mentioned must likewise be confined to the case of arrests upon process in

civil suits, for where a felony hath been committed, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before mentioned having been previously made."

" In these cases the jealousy with which the Law watcheth over the public tranquillity (a laudable jealousy it is), the principles of Political Justice, I mean the justice which is due to the community *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience; and oblige us to regard the dwellings of malefactors when shut against the demands of public justice, as no better that the dens of thieves and murderers, and to treat them accordingly." P. 319.

Mr. Justice Foster says also, " that all the Judges were agreed that peace officers having a legal warrant to arrest for a breach of the peace, may break open doors, after having demanded admittance and given due notice of their warrant." P. 130.

We learn likewise from a case in Moor's Reports, that it was agreed by all the Judges of the King's Bench and the Judges at Serjeant's Inn, that the Sheriff who has a capias against any one to find

sureties of the peace may break the doors to arrest the party. Moor, 606.

Lord Hale says, " if a warrant of the peace issue from a justice of peace, the officer or minister of such warrant may break open a door in case of refusal to open, after demand and notice of his business." 2 Pl. of the Crown, 117.

Serjeant Hawkins says, " he may justify breaking open doors in the following instances; upon a capias grounded on an indictment for any crime whatsoever; or upon a capias from the King's Bench or Chancery to compel a man to find sureties for the peace or good behaviour, or even upon a warrant from a justice of peace for such purpose." 2 Hawk. 86.

Lord Coke says, " in all cases where the King is a party, the Sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter." Co. 91, Semaine's case.

But in the same case by Croke, it is reported that the Judges agreed " that the Sheriff might not " break any man's house to take execution, unless " in the Queen's case or for a *contempt*," &c.

Lord Coke has reported that doors can only be broken when the King is a party, and he must probably have thought that that included all contempts.

But in Croke's reports *contempts* are expressly mentioned.

It is quite clear that in every case where a party by a warrant from a justice of the peace, or by a capias or Bench warrant can be taken to answer, or to plead, to an indictment, the officer may break open his doors, though he afterwards must be bailed, if he can find sufficient sureties. It would then seem reasonable that the officer of the House of Lords, or of the House of Commons, should have the same power of breaking open doors when the offender is to be taken in execution of their sentence, and when no bail whatever can be accepted.

It is worthy too of consideration, that the privilege of a householder within his castle is precisely the same as the privilege of a member of either House of parliament; because these are privileged from arrest, as was declared by all the Judges in Thorpe's case, in every instance except for treason, felony, surety of the peace, or for a *condemnation* had before the parliament.

See Rot. Parl. 31 and 32 Hen. VI. No. 27. 1 Hats. Pre. 31.

The inviolability of the character of a legislator seems to stand upon a much higher principle of reason and policy than that of the character of a householder, and it would be an extraordinary

incongruity that every inferior magistrate should have the power to issue a warrant by which a constable could break into the palace of the Prince of Wales, or of any royal Duke, and could drag them out of it for the most trifling petty assault, if the House of Lords or House of Commons could not break the doors of the meanest of their servants, when they had been guilty of the grossest insult imaginable against either House, and when if they were apprehended, no power whatever could admit them to bail.—

But still if that should be the Law of the Land, its dominion can only be controlled by the united power of the King, Lords and Commons. We must always remember that *omnes idcirco legum servi sumus, ut liberi esse possimus.* Cic.

CHAP. VI.

Moral, Civil, and Political Liberty explained.

Whilst there are many persons in the present time, who think we can enjoy no liberty without a reform in parliament, or a reform in our laws, I have thought it not improper to subjoin here the following observations upon a subject which so much engages the attention of all descriptions of men, but which of all others is the least understood.

Though declamation and eloquence in all ages have exhausted their stores upon this favourite theme, yet reason has made so little progress in ascertaining the nature and boundaries of liberty, that there are very few authors indeed, either of this or of any other country, which can furnish the studious and serious reader with a clear and consistent account of this idol of mankind. Thousands worship it, and are even ready to offer their blood as a sacrifice to it, under the form of a tree, a cap, or a cockade. These foolish symbols, with various watchwords of sedition equally unmeaning, may enflame the passions of the vulgar

for a time, when practised upon by all the artifices of designing and wicked men, and may suppress the voice of reason and sobriety, but the consequences are too terrible to last long. Anarchy must reform itself, or where every crime is committed, and where neither life, person, nor property is secure, in such a war of all against all, each individual for his own sake will soon demand a truce, and offer articles of capitulation.

It would not be difficult to prove that Englishmen at present possess every species of liberty in a higher degree than ever was enjoyed in any other country, and even in a degree unknown to their ancestors. But I shall here briefly subjoin the different notions conveyed by the word *liberty*, which even by the most eminent writers and orators are generally confounded together.

The *libertas quidlibet faciendi*, or the liberty of doing every thing which a man's passions urge him to attempt, or his strength enables him to effect, is savage ferocity; it is the liberty of a tyger and not the liberty of a man.

" Moral or natural liberty (in the words of Burlamaqui, ch. 3. s. 15.) is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature,

and that they do not any way to abuse it to the prejudice of any other men."

This is frequently confounded, with savage liberty.

Civil liberty is well defined by Sir William Blackstone to be " that of a member of society, " and is no other than *natural liberty* so far re- " strained by human laws (and no farther) as is " necessary and expedient for the general advan- " tages of the public."

Mr. Paley begins his excellent chapter upon civil liberty with the following definition; " Civil " liberty is the not being restrained by any law, " but what conduces in a greater degree to the " public welfare." B. vi. c. 5.

The archbishop of York has defined " civil or " legal liberty to be that which consists in a free- " dom from all restraints except such as establish- " ed law imposes for the good of community, to " which the partial good of each individual is " obliged to give place."—(A Sermon preached Feb. 21, 1777, p. 19.)

All these three definitions of civil liberty are clear, distinct, and rational, and it is probable they were intended to convey exactly the same ideas; but I am inclined to think that the definition given by the learned Judge is the most perfect, as there are many restraints by natural law, which

though the established law does not enforce, yet it does not vacate and remove.

In the definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.

Political liberty may be defined to be the security with which, from the constitution, form, and nature of the established government, the subjects enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name.—Sir William Blackstone uses political and civil liberty indiscriminately;* but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas, which in their nature are so widely different.—The last species of liberty has probably more than the rest engaged the attention of mankind, and particularly the people of England. Civil liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed nearly to as great an extent as can be expected under any human establishment.

But some who are zealous to perpetuate these

* See 1 Bl. Com. 125.

inestimable blessings of civil liberty, fancy that our political liberty may be augmented by reforms, or what they deem improvements in the constitution of the government. Men of such opinions and dispositions there will be, and perhaps it is to be wished that there should be, in all times. But before any serious experiment is made, we ought to be convinced by little less than mathematical demonstration, that we shall not sacrifice substance to form, the end to the means, or exchange present possession for future prospects. It is true, that civil liberty may exist in perfection under an absolute monarch, according to the well-known verse:

Fallitur egregiè quisquis sub principe credit
Servitium. Nunquam libertas gratior extat
Quam sub rege pio. CLAUD.

But what security can the subjects have for the virtues of his successor? Civil liberty can only be secure where the King has no power to do wrong, yet all the prerogatives to do good. Under such a king, with two Houses of Parliament, the people of England have a firm reliance that they will retain and transmit the blessings of civil and political liberty to the latest posterity.

There is another notion of liberty, which is nothing more than freedom from confinement.

ment. This is a part of civil liberty but it being the most important part, as a man in a goal can have the exercise and enjoyment of few rights, it is preeminently called *liberty*.

But where imprisonment is necessary for the ends of public justice, or the safety of the community, it is perfectly consistent with civil liberty. For Mr. Paley has well observed that " it " is not the rigour, but the inexpediency of laws " and acts of authority, which makes them ty- " rannical." B. vi. c. 5.

This is agreeable to that notion of civil liberty entertained by Tacitus, one who was well acquainted with the principles of human nature and human governments, when he says, *Gothones regnantur paulò jam adductius, quam cæteræ Germanorum gentes, nondum tamen supra libertatem.* De Mor. Germ. c. 43.

It is very surprising that the learned Commentator should cite with approbation (p. 6. and 125.) and that Montesquieu should adopt (b. xi. c. 13.) that absurd definition of liberty given in Justinian's Institutes: *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* In every other country, and under all circumstances, the subjects possess the liberty described by this definition.

When an innocent negro is seized and chained,

or is driven to his daily toil by a merciless master, he still retains this species of liberty, or that little power of action, of which force and barbarous laws have not bereft him. But we must not have recourse to a system of laws, in which it is a fundamental principle, *quod principi placuit, legis habet vigorem,* for correct notions of liberty.

So far I have thought it proper to explain the different significations of the word *liberty;* a word which it is of the utmost importance to mankind that they should clearly comprehend; for though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falsò libertatis vocabulum obtendi ab iis, qui privatim degeneres, in publicum exitiosi, nihil spei, nisi per discordias habeant;* (Tac. 11 Ann. c. 17.)—The first sentence of Hooker's Ecclesiastical Polity contains no less truth and eloquence: " He that goeth about to " persuade a multitude, that they are not so well " governed as they ought to be, shall never want " attentive and favourable hearers."

This subject might be elucidated by various instances, particularly from the laws and constitution of this country; and the author cannot but cherish even a confident hope, that they who acquire the most intimate acquaintance with those laws

and that constitution, will always be the most convinced, that to be free, is to live in a country where the laws are just, expedient, and impartially administered, and where the subjects have perfect security that they will ever continue so; and, allowing for some slight and perhaps inevitable imperfections, that to be free, is to be born and to live under the English constitution. *Hanc retinete, quæso, Quirites, quam vobis tanquam hæreditatem, majores vestri reliquerunt.* Cic. 4 Phil.

FINIS.

E. Hemsted, Printer, Great New-street, Fetter-lane.