REPORTS of CASES ARGUED and DETERMINED in the COURT of KING'S BENCH. By EDWARD HYDE EAST, Esq. of the Inner Temple, Barrister at Law. Vol. XIV. Containing the Cases of Easter, Trinity, and Michaelmas Terms, in the 51st and 52d Years of GEORGE III. 1811.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF KING'S BENCH, IN EASTER TERM, IN THE FIFTY-FIRST YEAR OF THE REIGN OF GEORGE III. 1811.

SIR FRANCIS BURDETT, BART. *against* THE RIGHT HON. CHARLES ABBOT, Speaker of the House of Commons. 1811. To an action of trespass against the Speaker of the House of Commons for forcibly, and, with the assistance of armed soldiers, breaking into the messuage of the plaintiff (the outer door being shut and fastened,) and arresting him there, and taking him to the Tower of London, and imprisoning him there; it is a legal justification and bar to plead that a Parliament was held, which was sitting during the period of the trespasses complained of; that the plaintiff was a member of the House of Commons; and that the House having resolved "that a certain letter, &c. in *Cobbett's Weekly Register*, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House, and that the plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered that for his said offence he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the defendant, as Speaker, in execution of the said order, issued his warrant to the serjeant at arms, to whom the execution of such warrant belonged, to arrest the plaintiff and commit him to the custody of the lieutenant of the Tower; and issued another warrant to the lieutenant of the Tower to receive and detain the plaintiff in custody during the pleasure of the House; by virtue of which first warrant the serjeant at arms went to the messuage of the plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose, and demand made of admission, he, by the assistance of the said soldiers, broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody under the other warrant, by the lieutenant of the Tower.

[Affirmed, 4 Taunt. 401; 5 Dow. 165; 3 E. R. 1289 (with note), to which add, *Fielding* v. *Thomas*, [1896] A. C. 609.]

Sir Francis Burdett, Baronet, complains of the Right Hon. Charles Abbot, having privilege of Parliament, of a plea of trespass, for that the said Charles heretofore, [2] to wit, on the 6th of April 1810, and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered a certain messuage of the said Sir Francis, situate in the parish of St. George Hanover-Square, in the county of Middlesex, and on one of those days, to wit, on the 9th of April, in the year aforesaid, (the outer door of the said messuage being then and there shut and fastened,) with divers soldiers and men armed with offensive weapons, forcibly and with strong hands broke open a certain window and two window shutters

of and belonging to the said messuage of the said Sir Francis, and through the same broke into and entered the said messuage, and made a great noise, disturbance and affray in the said messuage; and with force and arms made an assault on the said Sir Francis, and laid hands upon him, and forced and compelled him to go from and out of his said messuage into a certain public street there, and also then and there forced and obliged him to go into a certain coach in, through and along divers other public streets and highways to a certain prison called the Tower of London, and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, from thence hitherto; contrary to the laws of this realm, and against the will of the said Sir Francis; whereby he the said Sir Francis during all the time aforesaid was and still is hindered from transacting his lawful affairs, &c. to wit, at the parish aforesaid in the county aforesaid. And also for that the said Charles heretofore, to wit, on the day and year last aforesaid, with force and arms, &c. made another assault upon the said Sir Francis, to wit, at the parish, &c. and then and there seized and laid hold of the said **[3]** Sir Francis with violence, and forced and compelled him to go in, through and along divers public streets and highways to a certain prison called the Tower of London, and then and there imprisoned the said Sir Francis and kept and detained him in prison there without any reasonable or probable cause whatsoever for a long space of time, to wit, from thence hitherto; contrary to the laws of this realm and against the will of the said Sir Francis, whereby, &c. And also for that the said Charles heretofore, to wit, on the day and year last aforesaid, with force and arms, &c. made another assault upon the said Sir Francis, to wit, at the parish aforesaid, &c. and then and there imprisoned the said Sir Francis, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit, from thence hitherto; contrary to the laws of this realm and against the will of the said Sir Francis. There was a fourth count for a common assault.

The defendant pleaded, first, not guilty, to the whole of the trespasses charged. And secondly, as to the breaking and entering the said messuage of the said Sir Francis on one of the said days in the first count of the said declaration mentioned, to wit, on the 9th of April in the year aforesaid, (the outer door of the said messuage being then and there shut and fastened,) and with the said soldiers and men breaking open the said window and window shutters, and through the same breaking into and entering the said messuage, and making a noise and disturbance in the said messuage, and making the said assault on the said Sir Francis, and laying hands upon him, and forcing and compelling him to go from and out of his said messuage into the said public street there, and also forcing and obliging him to go in the said coach in through and along the said streets and highways in the **[4]** said first count mentioned, to the said prison called the Tower of London, and there imprisoning him the said Sir Francis, and keeping and detaining him in prison there for the said space of time in the said first count mentioned: the said Charles says, that the said Sir Francis ought not to have or maintain his aforesaid action thereof against him the said Charles, because he says that long before and at the said time when, &c. in the introduction of this plea mentioned, and during all the time in the said first count mentioned, a Parliament of our Sovereign Lord the now King was holden at Westminster in the county of Middlesex, and was and yet is sitting; and that long before and at the said time when, &c. in the introduction of this plea mentioned, and during all the time in the said first count mentioned, he the said Charles was and yet is a member of the Commons House of the said Parliament, and the Speaker of the said Commons House of Parliament; and the said Sir Francis also was and yet is a member of the said Commons House of Parliament, to wit, at Westminster, &c. And the said Charles further saith, that they the said Charles and the said Sir Francis, so being members of the said Commons House of Parliament as aforesaid, and the said Charles, so being Speaker of the said Commons House of Parliament as aforesaid, heretofore and before the said time when, &c. in the introduction to this plea mentioned, to wit, on the 6th of April 1810, at Westminster aforesaid, the said Parliament then and there sitting, it was in and by the said Commons House of Parliament resolved, that a letter signed "Francis Burdett," and a further part of a paper intituled "Argument," in *Cobbett's Weekly Register* of March 24th, 1810, was a libellous and scandalous paper, reflecting on the just rights and privileges of that **[5]** House; and that Sir Francis Burdett, Bart. who had admitted the above letter and "Argument" to be printed by his authority, had been thereby

guilty of a breach of the privileges of that House: and it was thereupon then and there in and by the said Commons House of Parliament ordered, that Sir Francis Burdett, Bart. be for his said offence committed to the Tower of London, and that Mr. Speaker do issue his warrants accordingly: as by the record and proceedings of the said resolutions and order remaining in the said Commons House of Parliament, reference being thereto had, will more fully appear. Whereupon the said Charles, so being such Speaker as aforesaid, in pursuance of the resolutions and order aforesaid, and according to the laws and customs of Parliament, did, for the execution of the said order, afterwards, and before the said time when, &c. in the introduction to this plea mentioned, to wit, on the 6th of April, in the year aforesaid, at Westminster aforesaid, in the county aforesaid, as such Speaker as aforesaid, make and issue his certain warrant under his hand and name, as such Speaker as aforesaid, directed to the serjeant at arms attending the House of Commons, or his deputy, to whom the execution of such warrant then and there belonged; in and by which said warrant, reciting that the House of Commons had that day adjudged that Sir Francis Burdett, Bart., who had admitted that a letter signed "Francis Burdett," and a further part of a paper entitled "Argument," in *Cobbett's Weekly Register* of March 24, 1810, was printed by his authority, (which letter and argument the said House had resolved to be a libellous and scandalous paper reflecting upon the just rights and privileges of the said House,) had been thereby guilty of a breach of the privileges of the said House; and that the House of Commons had thereupon ordered that the said Sir [6] Francis Burdett be for his said offence committed to His Majesty's Tower of London: therefore it was required that the said serjeant at arms, or his deputy, should take into his custody the body of the said Sir Francis Burdett, and then forthwith deliver him over into the custody of the lieutenant of His Majesty's Tower of London. And all mayors, bailiffs, sheriffs, under-sheriffs, constables, and headboroughs, and every other person or persons were thereby required to be aiding and assisting to the said serjeant or his deputy in the execution thereof. And the said Charles, so being such Speaker as aforesaid, then and there, and before the said time when, &c. in the introduction of this plea mentioned, delivered the said warrant to Francis John Colman, Esq., then and there being the serjeant at arms attending the said House of Commons, (to whom the said warrant was directed,) to be executed in due form of law. And the said Charles further says that he the said Charles, so being such Speaker as aforesaid, after the making of the said resolutions and order, and for the execution thereof, and according to the laws and customs of Parliament, did, in pursuance of the said resolutions and order, and for the further execution of the said order before the said time when, &c. in the introduction of this plea mentioned, to wit, on the day and year last aforesaid, at Westminster, &c. make his certain other warrant under his hand and name, as such Speaker as aforesaid, directed to the lieutenant of his Majesty's Tower of London or his deputy; in and by which said last-mentioned warrant, reciting that the House of Commons had that day adjudged that Sir Francis Burdett, Bart. who had admitted that a letter signed "Francis Burdett" and a further part of a paper intituled "Argument," in *Cobbett's Weekly Register* of March [7] 24th, 1810, was printed by his authority, (which letter and argument the said House had resolved to be a libellous and scandalous paper reflecting on the just rights and privileges of the said House,) had been thereby guilty of a breach of the privileges of the said House; and that the House of Commons had thereupon ordered that the said Sir Francis Burdett be for his said offence committed to His Majesty's Tower of London: therefore it was required that the said lieutenant of His Majesty's said Tower, or his deputy, should receive into his custody the body of the said Sir Francis Burdett, and him safely keep during the pleasure of the said House. And the said Charles, so being such Speaker as aforesaid, then and there, before the said time when, &c. in the introduction to this plea mentioned, delivered and caused the said last-mentioned warrant to be delivered to the lieutenant of His Majesty's Tower of London aforesaid, to be executed in due form of law. By virtue and in execution of which said first-mentioned warrant the said Francis John, as such serjeant as aforesaid, afterwards, to wit, at the said time when, &c. in the introductory part of this plea mentioned, in order to arrest the said Sir Francis, and to convey and deliver him into the custody of the lieutenant of His Majesty's said Tower of London, to be kept and detained in prison in the said Tower, in obedience to the resolutions and order aforesaid,

went to the said messuage of the said Sir Francis; and because the outer door of the said messuage of the said Sir Francis was then and there shut and fastened, so that the said Francis John could not thereby enter the said messuage, and the said Sir Francis was then and there in the said messuage, he the said Francis John, then and there with a loud and audible voice, gave and caused to be given notice of the said first-mentioned warrant, [8] and that the said Francis John was then and there come to the said messuage to arrest the said Sir Francis by his body, by virtue thereof; and the said Francis John then and there required the outer door of the said messuage to be opened to him the said Francis John, and then and there required that the said Francis John might be admitted into the said messuage for the execution of the first-mentioned warrant; and because the outer door of the said messuage was not opened to him the said Francis John, but was and continued to be kept shut and fastened against him the said Francis John, and the said Sir Francis then and there upon such request made to open the outer door of his said messuage, then and there wholly refused and omitted so to do; he the said Francis John, at the said time when, &c. in the introduction to this plea mentioned, with and by the aid and assistance of the said soldiers and men broke open the said window and window shutters, and through the same broke into and entered the said messuage; the same then and there being a convenient mode of entering the said messuage for the purpose aforesaid; and then and there gently laid his hands on the said Sir Francis to arrest him, and did then and there arrest him by his body, by virtue and in execution of the said first-mentioned warrant; and then and there in order to convey the said Sir Francis to His Majesty's said Tower of London in execution of the first-mentioned warrant, and in obedience to the resolutions and order aforesaid, forced and compelled the said Sir Francis to go from and out of his said messuage into the said public street, and also forced and obliged him to go in the said coach, in, through, and along the said streets and highways, in the introduction to this plea mentioned, in the way to the said Tower of London [9] from his said messuage; and then and there delivered him the said Sir Francis into the custody of the lieutenant of the said Tower of London, to be kept and detained in prison there, in obedience to the resolutions and order aforesaid: and the said lieutenant then and there received the said Sir Francis, and detained and imprisoned him in the said Tower, according to the said warrant herein secondly before mentioned: and in so doing the said Francis John did necessarily and unavoidably make a little noise and disturbance in the said messuage, he the said Francis John making as little noise and disturbance and doing as little injury as he could on that occasion: which are the same several supposed trespasses in the introductory part of this plea mentioned, and whereof the said Sir Francis hath above in the first count complained against him the said Charles: with this that the said Charles, doth aver, that the said Sir Francis, the now plaintiff, and the said Sir Francis Burdett in the said resolutions, order, and warrants respectively mentioned was and is one and the same person; and that at the said several times in this plea mentioned, and during all the time therein mentioned the said Parliament was and is sitting, to wit, at Westminster in the county of Middlesex: and this the said Charles is ready to verify; wherefore he prays judgment if the said Sir Francis ought to have or maintain his aforesaid action thereof against him, &c.

The second justificatory plea was the same as the first, only that it confined the justification to the arrest of Sir Francis, as mentioned in the first count, and to the forcing and compelling him to go from his house into the public street, and forcing him to go in a coach through the streets to the Tower, and there im-[10]-prisoning him, and keeping and detaining him there during the time mentioned in the first counts; omitting to justify the breaking and entering of his house whilst the outer door was shut and fastened, with the assistance of the soldiers, &c. in the same count also mentioned. And at the conclusion of this plea was the following traverse:—Without this, that the said Charles is guilty of the said supposed trespasses or any of them in the introduction of this plea mentioned otherwise, or in any other manner, than by the making, signing, issuing, and delivering of the said warrants as such Speaker as aforesaid, in pursuance of the resolutions and order aforesaid, in manner and form as in this plea is before alleged; and this the said Charles is ready to verify: wherefore he prays judgment if the said Sir Francis ought to have or maintain his aforesaid action thereof against him, &c.

The plaintiff joined issue to the country on the first plea of not guilty. And as to the second plea to the several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the plaintiff saith that he by reason of any thing by the defendant in that plea alleged ought not to be barred from having and maintaining his action thereof against the defendant, because the same plea of the defendant in form aforesaid pleaded, and the matter therein contained are not sufficient in law to bar the plaintiff's action, nor is he bound by law to answer it; and this he is ready to verify: wherefore for want of a sufficient plea in this behalf the plaintiff prays judgment, and that his damages on occasion of committing those trespasses may be adjudged to him. And there was the like general demurrer to the third plea. The defendant joined in the demurrers.

[11] The case was argued by Holroyd for the plaintiff, in support of the demurrers, on Friday the 8th of February in last Hilary term; but owing to the press of business towards the conclusion of the term, and the necessary time required for the further argument of the case, it was adjourned to Easter term; and on Friday the 17th of May in that term Sir Vicary Gibbs, Attorney-General, was heard on the part of the Speaker; and on the same day Holroyd replied for the plaintiff; immediately after which the Court gave judgment.

Holroyd argued thus for the plaintiff. The first and most important question is, whether this Court can take cognizance of the question concerning privilege of Parliament which is brought in judgment before it in this cause. Lord Coke says in his 4th Inst. 15, (which will be mainly relied on for the defendant,) that "the High Court of Parliament suis propriss legibus et consuetudinibus subsistit: that it is lex et consuetudo Parliamenti (*a*)[1] that all weighty matters in any Parliament moved concerning the peers of the realm, or commons, in Parliament assembled, 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 (*b*)[1] used in more Inferior Courts, which was so declared to be secundum legem et consuetudinem Parliamenti, concerning the peers of the realm, by the King and all the Lords Spiritual and Temporal: and the like, pari ratione, is for the Commons (*a*)[2], for any thing moved or done in the House of Commons: and the rather, for that by another law and custom of Parliament the King cannot take notice of any thing said or done in the **[12]** House of Commons but by the report of the House of Commons: and every member of the Parliament hath a judicial place, and can be no witness." And then Lord Coke proceeds to state, "And this is the reason that Judges ought not to give an opinion of a matter of Parliament, because it is not to be decided by the common laws, but secundum legem et consuetudinem Parliamenti: and so the Judges in divers Parliaments have confessed (*b*)[2], &c." The only authority cited by Lord Coke for this position is *Thorpe's case;* which, whether it bear him out or not, will be seen in its turn. But he having so stated it; and it having been further said by a very learned commentator (*c*) on the law, that the privileges of Parliament are indefinite for the safeguard of its members: it is necessary first to ascertain whether that doctrine be correct, whether this Court have not the power to inquire of and decide upon the legem et consuetudinem Parliamenti when it comes incidentally before them, in order to determine whether the particular case in judgment be or be not governed by that law and custom; for it would be in vain to argue what the judgment of the Court ought to be in this case, if it have no jurisdiction to meddle with the question of privilege at all; if when the House of Commons have declared that any act whatever is a breach of their privilege, it were incompetent to the Courts of Law to take further cognizance of the subject-matter.

To consider the question first upon principle and analogy; it would be strange if the privileges of Parliament were indefinite, if by that word were meant undefinable and unlimited, when even the prerogatives of the King are definable and limited; when the **[13]** rights and liberties of the people are also defined and limited by the same law which confers them: neither are they less secure on that account, but their

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(*a*)[1] Lord Coke refers in the margin to Rot. Parl. 11 R. 2, No. 7.

(*b*)[1] Refers to 1 Inst. s. 3, verb. en la Ley.

(*a*)[2] Refers to Rot. Parl. 2 H. 4, No. 11. Rot. Parl. 3 H. 6 In *Le Countee de Marshall's case*, Rot. Parl. 27 H. 6, No. 18. *The Earl of Arundel's case.*

(*b*)[2] Refers to Rot. Parl. 31 H. 6, No. 26, 27, 28, *Baron Thorpe's case.*

(*c*) 1 Blac. Com. 164.

certainty is the very cause of their security. The same must be the case with respect to the lex et consuetudo Parliamenti. Every law must in its nature be definable and defined, however persons may differ as to its application. As every subject is bound and presumed to know the extent of the King's prerogative, because he is punishable if he infringe it; so he must take cognizance of the privileges of Parliament, that he may not offend against or oppose them when justly exercised. But how can he secure himself against offence, if the law which he is to obey be not known, nor capable of being known? With what reason therefore can it be said that the privileges of Parliament are a matter of which the Judges cannot take cognizance, when every subject in the kingdom is bound to know them at his peril? Lord Coke himself however in another place (*a*)[1], after stating that the Judges are assistants to the Lords, to inform them of the common law, but that "it doth not belong to them (as hath been said) to judge of any law, custom, or privilege of Parliament," proceeds to point out the sources from whence the law of Parliament is to be derived: "And to say the truth, the laws, customs, liberties, and privileges of Parliament are better to be learned out of the rolls of Parliament and other records, and by precedents of continual experience, than can be expressed by any one man's pen." And he also tells us (*b*)[1] from Fleta, "Ista lex ab omnibus est quærenda, à multis ignorata, à paucis cognita." Applying then to the sources of knowledge to **[14]** which Lord Coke himself has referred, it will appear from the current of cases, when duly considered, that the Judges are bound to take cognizance of the law of Parliament, as of every other part of the law of the land; and of those cases which may appear to clash, some are distinguishable from the present, and others have been over-ruled by high authority. It will appear too from Lord Hale's History of the Common Law (*c*)[1] that the lex et consuetudo Parliamenti is not to be considered as opposed to the common law, but a part of it: for in treating of the lex non scripta, he says that under that term he includes not only general customs, or the common law properly so called, but even those more particular laws and customs applicable to certain courts and persons. Therefore though the law of Parliament be sometimes contrasted with the common law, that is only where the term common law is used in a narrow sense, as applying only to a particular branch of it; in the same manner as it may be contrasted with the lex prerogativæ, or the lex forestæ, or the lex mercatoria, all which Lord Hale states to be branches of the common law, used in its large and general signification. In like manner the lex Parliamenti is part of the common law, applied to the rights and privileges of Parliament; not superseding the common law, as differing from it like the Civil or Admiralty Law, or as the lex militaris, which formerly prevailed in the Court before the constable and marshal of the realm; but as a branch of the same common law, part of the lex terræ, and therefore as such must be equally capable of being known, and must be taken to be known to the Judges of **[15]** the land, and they are equally bound to take cognizance of it when brought incidentally in judgment before them in the Courts of Law, the same as of any other branch of the lex non scripta or common law. It was so considered by Lord Holt in the case of the *Aylesbury Men* (*a*)[2], where he said, "We are bound to take notice of the customs of Parliament, for they are part of the law of the land, and there are the same methods of knowing them as the laws in Westminster-Hall." And as the same very learned Judge said in *Knollys's case* (*b*)[2], (who pleaded his peerage of Earl of Banbury to an indictment for murder pending in this Court,) "The lex Parliamenti must be looked on as the law of the kingdom: but admitting it were a particular law, yet if a question arise determinable in the King's Bench, the King's Bench must determine it." Again, if this were not part of the common law, a commitment under the law and custom of Parliament would be against Magna Charta, which provides that nullus liber homo capiatur vel imprisonetur, &c. nisi per legale judicium parium suorum, vel per legem terræ; and against subsequent statutes, particularly the 28 Ed. 3, c. 3, which is an exposition and declaration of the other; providing that "no man shall be imprisoned, &c. without being brought in to answer by due process of the law." Lord Hale in his History of the Common Law (*c*)[2] says, "Touching the styles and appellations of the

(*a*)[1] 4 Inst. 50.
(*b*)[1] 4 Inst. 15, in the margin, quotes Fleta, lib. 2, cap. 2.
(*c*)[1] P. 22 and 25.
(*a*)[2] 8 St. Tr. 162.
(*b*)[2] Salk. 512.
(*c*)[2] P. 53.

common law, and the reasons of it, it is called sometimes by way of eminence lex terræ, as in the Statute of Magna Charta, c. 29, where certainly the common law is at least principally intended by those words, aut per legem terræ, &c." But supposing the law of Parliament were a distinct law, superseding the common law, like the civil or admiralty law, **[16]** still it would be necessary for this Court, upon the question arising incidentally or collaterally before them, to judge of the law and custom of Parliament, in the same manner as it does of the civil or admiralty law when brought in question judicially before it, in order to ascertain to what extent the one supersedes the other, and the bounds of each of them respectively. And though the law of Parliament heretofore received may be expounded and applied from time to time as particular occasions arise; yet it cannot be extended or altered in derogation of the common law, without the authority of the whole Legislature: in like manner as Lord Hale says (*a*)[1] of the common law, that "though the usage, practice, and decisions of the King's Courts of Justice may expound and evidence it, and be of great use to illustrate and explain it, yet it cannot be authoritatively altered or changed but by Act of Parliament." A judgment therefore of the King's Courts in a particular case does not make a new law, but only expounds and evidences, as Lord Hale says, the common law which existed before; so that if fresh lights should afterwards discover such judgment to have been wrong, the evidence is not of such a binding nature, but that it may be revised, and a better exposition of the law adopted in future. In like manner no resolution of either House of Parliament, taking it to have decided judicially upon the matter before it, can make that a legal privilege of Parliament which was not so before by law: it may be of great use and weight, as evidence to expound the law; but if it were afterwards shewn to be erroneous, it would not be binding; for a new privilege can only be created by Act of Parliament. In this **[17]** view the matter has always been considered, not only by the Courts of Law, when such questions have come incidentally in review before them, but also by the Houses of Parliament, whenever there has been any question in either, whether it were entitled to such a privilege or not. Whether therefore the customs and privileges of Parliament be taken to be a branch of the common law, or a distinct and independent law, it is not true that the Common Law Judges have no means of knowing what those customs and privileges are, nor have any right to decide upon their extent; for Lord Hale has shewn that the subject is cognizable by them; and Lord Coke himself has pointed out the sources from whence the knowledge of it is to be derived.

It appears from the authorities that the Courts of Law have always disregarded the resolution of either House, that such an act was a breach of privilege, when the same did not appear to them to be so by law. Thus in *Fitzharris's case* (*a*)[2], in 1681, who was impeached of high treason by the Commons; when the Lords had refused to proceed upon the impeachment, and had resolved that he should be proceeded with according to the course of common law, the Commons resolved that such refusal was illegal; and that for any Inferior Court (by which were meant the Courts of Westminster-Hall, or other than the High Court of Parliament) to proceed against Fitzharris or any other person lying under an impeachment in Parliament for the same crimes of which he stood impeached, was a high breach of the privilege of Parliament. But notwithstanding this, Fitzharris was tried (*b*) for high treason at the Bar of this Court, and con-**[18]**-victed and executed; a plea which he put in to the jurisdiction of the Court, that an impeachment was pending against him, having been first overruled after long argument, and the defendant ordered to answer over. The opinion of Lord Coke, when Speaker of the House of Commons, (which is to be found in D'Ewes's Journal, 482 (*c*),) in the case of *Mr. Fitzherbert*, in the 35th of Eliz., is material with reference to the writ of privilege. The questions declared by the committee were these two, whether Mr. Fitzharris were a member of the House;

(*a*)[1] Hist. of Com. L. 26.

(*a*)[2] 3 St. Tr. 224, 263. 4 St. Tr. 165. 8 Cobbett's St. Tr. 238.

(*b*) This was on the 9th of June 1681, after the dissolution of the Parliament, which was on the 28th of March in the same year.

(*c*) This was quoted from a note of Mr. Hargrave, upon the judgment delivered by Lord C. J. Bridgeman, in *Benyon* v. *Evelyn*, Tr. 14 Car. 2, C. B. Roll, 2558, which was taken from a MS. in the progress of printing, but not then published, p. 14 of the print.

and if he were, whether he were to have the privilege. "It hath been my manner ever since my first practice to observe strange learning, especially such as appertaineth to the law; as in this of the privilege of this House; therefore I will inform what we have learned. First, this writ of privilege must go from the body of this House, made by me, and I to send it into the Chancery, and the Lord Keeper is to direct it. Now before we make such a writ, let us know whether by law we may make it, or whether it will be good for the cause or no. For my own part, my hand shall not sign it, unless my heart may assent unto it. And though we make such a writ, if it be not warrantable by law and the proceeding of this House, the Lord Keeper will and must refuse it. No man shall stand more for the privilege of this House than I will; and what is the privilege of this House is meet should be observed." This shews the opinion of Lord Coke, that it was not the mere resolution of the House, that the writ should issue, which made it legal and binding; but the Lord Keeper, (paying indeed all due deference and respect to **[19]** that resolution,) was still to consider whether the party were legally entitled to the writ in the particular instance; and was bound to refuse it, if in his judgment he were not so entitled. From whence it follows, that in no case can this Court be bound by a mere resolution of either House of Parliament, if it appear that such resolution is not sanctioned by law. This doctrine is also agreeable to an earlier decision of the Lord Chancellor in 1584 (*a*)[1]. A motion was made in the House of Commons, touching the opinion of the House for privileges in case of a subpœna out of Chancery served upon Richard Cook, a member; and it was ordered that certain other members, attended by the serjeant of the House, should in the name of the House repair presently to the Court of Chancery, and there signify to the Lord Chancellor and the Master of the Rolls, that by the ancient liberties of the House the members were privileged from being served with subpœnas; and not only to require the discharge of Mr. Cook's appearance before the Court on the said subpœna, but also to desire that in future the Lord Chancellor and the Master of the Rolls would allow the like privilege for other members to be signified under the Speaker's hand. But the answer returned to the House by the deputed members from the Lord Chancellor was, "That he thought the House had no such liberty of privilege by subpœnas as they pretended: neither would he allow of any precedents of the House committed unto them, formerly used in that behalf, unless the House would also prove the same to have been likewise thereupon allowed, and ratified also by the precedents in Chancery." It appears therefore that the Lord Chancellor acted in that case **[20]** in the same way which Lord Coke afterwards said that the Lord Keeper must do in case the writ of privilege was sent to him to pass the Great Seal, in a case where he thought by law that the party was not entitled to it. The mistake which Lord Coke fell into in supposing (*a*)[2] that the Judges could not give any opinion respecting matters in Parliament, arose from his view of *Thorpe's case;* precedents of cases of privilege in Parliament being in his time difficult to be gotten at, and very little known: but since then the laborious Mr. Prynne has much enlarged the collection, and it will appear from thence that the Judges have declared their opinions on such privileges not only in their own Courts, but even in Parliament itself. Some of these are previous to *Thorpe's case.* The first is the case of *The Prior of Malton,* 10 Ed. 2 (*b*), which was an original writ of attachment returnable in this Court, reciting the privilege both of the prelates, earls, barons, et alios, tam clericos quam laicos, in coming to, continuing at, and returning from Parliament, to be protected from all grievances, &c. Such was the privilege of Parliament considered to be at that time. It appears to have been an action brought in this case for a trespass and breach of privilege also, in which the plaintiff complained of the defendants for distraining him by his horses and harness at York when returning from the Parliament at Lincoln. The process was executed, and the defendants were attached, but no judgment upon it has been found; so that it does not appear what was the final result of the case; but at least it establishes the fact, that so early as at that period an action was brought in this Court for that which was complained of as a breach of privilege of Parliament, **[21]** as well as a trespass; and the defendants, who might have had a good cause for distraining, except

(*a*)[1] Cited from 1 Hatsell, 96.
(*a*)[2] In 4 Inst. 15.
(*b*) Prynne's Animadversions on 4 Institute, p. 20, and 1 Hatsell's Prec. 12.

so far as respected the breach of privilege, were put to answer both. It is also to be observed, that the privilege was claimed as a joint privilege appertaining to the whole Parliament, Peers as well as Commons. This view of the nature of Parliamentary privilege will furnish an answer to an objection sometimes urged against the trial in an action of any matter of privilege claimed by the House of Commons, that their privileges may be endangered by being submitted in the dernier resort to the judgment of the House of Lords, or rather to the King in Parliament, upon a writ of error. For it appears from this and subsequent cases that it is not the privilege of the one or the other House merely, as opposed to or contradistinguished from each other; but if the privilege in question exist at all, it is the joint privilege of the whole Parliament: and the Commons cannot be prejudiced by the legality of it being first questioned in this Court, and afterwards before the King in Parliament upon a writ of error, though the Lords would have to give the judgment upon it, inasmuch as these have a joint interest with the Commons in supporting every such claim, if it be founded in law; and they cannot negative the claim of the Commons, without deciding at the same time against their own privilege. Lord Hale (*a*), however, in the last chapter of his Treatise on the Jurisdiction of the Lords' House of Parliament, does not consider even their judgment as irremediable, though no person can appeal further as a matter of right; for there are many instances in which the whole Parliament have interfered by passing an Act to correct or reverse a judgment of the House of Lords; and in **[22]** that way the Commons themselves might, by the weight and influence of the means they possess, ultimately assert their own right, if upon a full investigation of the matter by the whole Parliament, it should be found that any error had crept into such a judgment, or that the privilege claimed was such as ought in future to exist. An instance occurs of a statutable allowance of privilege in the 11 Ric. 2, which is not printed in the Statute-Book, but in the Rolls of Parliament (*b*). "The Lords Spiritual and Temporal claim as their liberty and franchise, that the great matters moved in Parliament touching Peers shall be adjudged by the course of Parliament, and not by the civil law, nor by the common law of the land used in more low Courts. The King allows it in full Parliament." Now considering this as extended pari ratione to the Commons, though the Peers only are mentioned; yet it is limited to matters done in Parliament, and extends not to matters done out of it. It includes freedom of debate, and that members shall not be questioned for their conduct in Parliament. Yet even in such matters the Peers did not proceed as upon a resolution of their own, that they had such a privilege, but they claimed it as belonging to them to be exercised in Parliament: and in full Parliament it was allowed to them.

The next is *Larke's case* (*c*), 8 H. 6, who, being a servant of Wm. Mildred, a member of the House, was taken in execution during the Parliament, on a judgment in trespass given in C. B. before the day of summoning the Parliament, as well for the King's fine for the trespass vi et armis, as for the damages recovered. Upon which a bill was brought into the House in the form of a petition from the Commons for Parliamentary remedy, in which they assert their claims, and declare their opinion, that **[23]** they were privileged from all arrests during the Parliament, except for treason, felony, or surety of the peace; and conclude by praying that in future it may be enacted into a law, that neither lords, nor knights, nor others, (considering it as a common privilege of the whole Parliament and not merely of their own body,) or their servants, might be arrested or detained in prison during the time of Parliament, except for treason, &c. There was an enactment in that case, by the consent of the plaintiff's counsel, for the discharge of Larke out of custody; he having been taken during the Parliament, though upon a judgment given before: but there was a saving to the plaintiff of his execution after the end of the Parliament, and for the King's fine. But the rest of the petition for a like general law in future was denied. That therefore is an instance in which the Commons' House claimed, besides the special redress in the particular instance, a general privilege for their members, jointly indeed with the rest of the Parliament; but they did not act upon this claim themselves, but submitted it to the rest of the Parliament, as a matter of general concern. And though their petition was partly complied with, so far as affected the present discharge of the member arrested; yet even that was only done by consent of the plaintiff's counsel, and upon the terms, as it seems, of saving to the plaintiff in the

(*a*) P. 207, 8. (*b*) 3 vol. 244. (*c*) 1 Hatsell, 18.

suit his further execution after the Parliament was up: for otherwise the defendant having been once taken in execution, the plaintiff's right would have been gone: and the general recognition by a law of the privilege claimed in the like cases in future was refused. It was a perilous act in a sheriff to discharge a person arrested, upon his bare assertion that he was a member of Parliament, or even **[24]** upon the sheriff's own knowledge of it, unless he also knew the extent of the privilege, and whether it covered the particular case; for the sheriff was liable for the debt if he wrongfully liberated his prisoner: and therefore the sheriff, who was sworn to obey the King's writ, was not bound to take notice that his prisoner was a member of Parliament, if he had not his writ of privilege, which was to be the sheriff's protection for his discharge as against the plaintiff in the suit: and without such writ, it appears in one case, as if it would have been considered a breach of the sheriff's duty to discharge the prisoner upon his bare assertion: and during the sitting of Parliament, it might be considered as the party's own fault if he did not obtain his writ of privilege. With this accords what was said by Sir Orlando Bridgeman in the judgment of *Benyon* v. *Evelyn* (*a*). "But in case of a judgment against a privileged person, and he taken in execution thereon sedente Parliamento, the law seems in former times to have been more doubtful. 8 H. 6, Rot. Parl. No. 57." (Then, after citing *Larke's case*, he proceeds—) "Upon the petition of the Commons, the King, by advice of the Lords, but with consent of the plaintiff's counsel, enacts that the judgment shall stand in force; and that after the Parliament ended the Judges shall make out process of capias ad satisfaciendum et pro fine, as if he had never been imprisoned; and commissioners to be appointed by the Lord Chancellor to take him and deliver him to the warden of the Fleet. But where it was further prayed that none of the members a vos parlements desore aveniere, leur servants ou familiers, de ne soient ascunement arrestes ne en prison deteynes durant le temps de vos parlements, s'il ne soit pour treason, felony, ou surety **[25]** de peace; the answer is, roy se avisera. There was a special Act of Parliament for a new execution and by a new way against Larke; but the King refused to make a general law in it."

Then came *Thorpe's case* (*b*), 31 and 32 H. 6, Rot. Parl. No. 25, 26, 27, 28 and 29. It would seem from the 4th Register, 683, mentioned by Mr. Hatsell, that Parliament was only under an adjournment when Thorpe was prosecuted to judgment and taken in execution; but it appears by the rolls of Parliament (*c*), that it was then prorogued (*d*). It was an action of trespass for taking goods, brought in the Court of Exchequer at the suit of the Duke of York against the Speaker of the House of Commons, in which, during the prorogation, judgment was recovered by the duke for 1000l. and 10l. costs; and Thorpe was taken in execution for the amount and committed to the Fleet, as well for the fine due to the King, as for the damages adjudged to the plaintiff. Afterwards, upon the meeting of Parliament on the 15th of February, the Commons petitioned the King and the Lords, that they might enjoy all such liberties and privileges as they had been accustomed and of ancient times used for coming to the Parliament and going, and returning; and then they require that Thomas Thorpe their Speaker, and W. Royle, mem-**[26]**-bers of the said Parliament, then being in prison, may have their liberty; this being declared to be a privilege of Parliament. The cause of the judgment and commitment was thereupon declared to the Lords by the counsel for the Duke of York; and thereupon it was prayed on behalf of the duke, that the Lords, considering that the trespass was committed by Thorpe after the beginning of the then Parliament, and that the action was commenced, "and by process of law judgment thereupon given against the said Thomas Thorpe in time of vacation of the Parliament, and not in Parliament time;" and that if he should be released by privilege of Parliament before the duke was satisfied of his damages and costs, the duke would be without

(*a*) Cited from the MS. before referred to, p. 18, n. a.

(*b*) 1 Hatsell, 29, and 5 vol. of Rolls of Parliament, 227 to 239, 4 Inst. 15.

(*c*) Mr. Hatsell also refers to the 2d vol. of Parliamentary History, 270, as the more probable account, to shew that Parliament was under prorogation at the time.

(*d*) On the 6th of March, 31 H. 6, the Parliament at Reading; on the 28th of March it was prorogued to the 25th of April, and then held at Westminster till the 2d of July, when it was again prorogued. It was afterwards held at Reading on the 7th of November, and then prorogued till the 11th of February, at Westminster, and then adjourned to the 14th of the same month.

remedy in that behalf; therefore that Thorpe should according to law be kept in ward till the damages and costs were satisfied. But the Lords; "not intending (as it is stated) to impeach or hurt the liberties and privileges of them that were come for the commune of this land to this present Parliament, but equally after the course of law to minister justice, and to have knowledge what the law will wey in that behalf; opened and declared to the justices the premises, and asked of them, whether the said Thomas ought to be delivered from prison by force and virtue of the privilege of Parliament, or not? To which question the Chief Justices, in the name of all the justices, after deliberation had among them, said that they ought not to answer that question, for it hath not been used aforetime that the justices should in anywise determine the privilege of the High Court of Parliament." Now to pause on this first part of their answer; the Lords, who must be taken to have known what the privileges and course of Parliament were, conceived that they had a right to apply to the Judges for their advice upon the matter of law. The Judges however say that they **[27]** were not to determine the privilege of the High Court of Parliament. The question it is to be observed was put to them in Parliament: and in Parliament the Judges were not to determine any thing, having no voices there: they were only, when called upon, to advise the Lords in matters of law; and the Lords who were sitting in that case as the Magnum Concilium Regis, were to determine the point. Lord Hale (*a*)[1], speaking of the different councils of the King, mentions the concilium privatum, the concilium ordinarium, and the concilium magnum, both in and out of Parliament. That of the concilium ordinarium, the Privy Council and great officers of State, whether peers or not, and the Judges were members. That the concilium magnum was a council both in and out of Parliament; that is, whether Parliament were sitting or not; and the consilium ordinarium was a part of that council when they were sitting in or out of Parliament. In early times much business was done in the House of Lords, sitting as the magnum concilium: in that case the Judges had voices, and might assist in the determination as well as any of the Lords of the council. At the time when the question was put to the Judges in *Thorpe's case*, concerning the privilege of Parliament, the Lords were sitting as part of the Parliament, where the Judges had no deliberative voice; and that furnishes the true solution of the answer given by them on that occasion. For they said, "It was not for them to determine what might be done by Parliament, which is so high and mighty in its nature that it may make law, and that that is law it may make no law: and the determination and knowledge of that privilege belongeth to the Lords of the **[28]** Parliament, and not to the justices." Undoubtedly the determination of it did belong to Parliament, by which must be understood the whole Parliament, and not any one branch of it. But the Judges proceeded to declare how they should proceed in their own Courts; "In such case as writs of supersedeas of privilege of Parliament be brought and delivered; the said Chief Justice said that there be many and divers supersedeas of privilege of Parliament brought into the Courts; but there is no general supersedeas brought to surcess of all processes, &c." It appears from thence, and from the 4th part of Prynne's Reg. 811, that Thorpe had only a general supersedeas; and so likewise in *Hodges* v. *Moor* (*a*)[2], where a claim of privilege was, upon a letter brought by the defendant from the Speaker to the Court of K. B., disallowed by the whole Court; the Judges say that the defendant ought to have brought a writ of privilege; and that when Thorpe was Speaker, he having only a general supersedeas for all actions, it was held ill. So that the Judges, stating in *Thorpe's case* what they do in their own Courts upon writs of supersedeas, distinguish between those that are lawful or otherwise, and declare that a general writ of supersedeas, such as Thorpe appears to have had, would not avail, but that he ought to have had a particular writ of supersedeas for each action; the privilege of Parliament being for the person and not for the proceeding. These considerations will serve to explain the proceeding in that case, and the judgment eventually given on it by the Parliament. "For (say the Judges) if there should be a general supersedeas brought to surcease all processes, it should seem that this High Court of Parliament, that ministreth all justice and equity, should **[29]** lett the process of the common law, and so it should put the party complaining without remedy, for so much as actions at common law be not determined in this High Court of Parliament. And if any person

(*a*)[1] Jurisdiction of the Lords' House of Parliament, ch. 2, p. 5, &c.
(*a*)[2] Noy, 83.

that is a member of this High Court of Parliament be arrested in such cases as be not for treason, or felony, or surety of the peace, or for a condemnation had before the Parliament, (that is before the time of holding the Parliament, not in Parliament,) it is used that all such persons be released of such arrests, and make an attorney (*b*); so that they have their freedom and liberty freely to attend upon the Parliament." All this serves to shew what the Judges meant by saying they were not to determine the privilege of the High Court of Parliament before which they were then called to advise. [Lord Ellenborough, C.J. Surely the word determine was not there meant to be used by them in the sense of adjudge; but they meant to say no more than this; you, the Lords' House, ask our opinion upon a question concerning privilege of Parliament before you; but we are not to determine that question; that is, we are not to give you any determinate purpose upon that subject. The question was not addressed to them as to persons who were to determine or adjudge upon it, but as advisers to **[30]** the Lords on the law. They say in effect, it is not a proper subject for us to enter into; it properly belongs to yourselves; and therefore it is not for us to advise you upon it.] Sir O. Bridgeman (*a*) seems to have drawn the same conclusion from the answer of the Judges in that case as is now submitted to the Court; and the Lords themselves decided in the case before them according to the opinion of the Judges; so that they could not have considered the answer of the Judges as a declaration that they knew nothing about the matter, and therefore could offer no advice to their Lordships. And in the conclusion of the record it is said; "after which answer and declaration it was thoroughly agreed, assented, and concluded, by the Lords Spiritual and Temporal, that the said Thomas (Thorpe) according to the law should remain still in prison for the causes abovesaid; the privilege of the Parliament, or that the said Thomas was Speaker of the Parliament, notwithstanding." [Lord Ellenborough, C.J. I do not mean to touch upon the observations arising out of *Thorpe's case*, which are many and important ones; but it appears to me that the fair import of the Judges' answer to the question put to them is this: We cannot determine that which is a question for your own consideration respecting your own privileges, but we will tell you what is the rule upon which we act in our Courts. And then the Lords adopt the rule of law as it prevailed in the Courts of Westminster.] The Lords proceeded further in that case to declare, "That the premises should be opened and declared to them that were comen for the commune of this land, and that they should be charged and commanded in the King's name, that they with all goodly haste and speed proceed to the election of another Speaker." And then the record concludes, **[31]** "The which premises, forasmuch as they were matters in law, by the commandment of the Lords, were opened and declared to the Commons by the mouth of Walter Moyle, one of the King's Serjeants at Law." Now it would indeed be extraordinary, if the Judges could know nothing of the privileges of Parliament, and could not even give an answer of advice respecting them, that the Lords should order one of the King's Serjeants to go and expound their resolution to the Commons because it contained matters in law. The matter was accordingly opened and declared to the Commons by the King's Serjeant at Law, in the presence of the Bishop of Ely, accompanied by other Lords; and the bishop then commanded them in the King's name to elect another Speaker; which they did. The sum of the whole case is this: the Commons conceiving their privilege to be invaded by the proceedings had against their Speaker, and his commitment in execution of the judgment recovered against him, do not act of themselves upon their

(*b*) I.e. "Make an attorney to answer the action; which says Sir O. Bridgeman, in *Benyon* v. *Evelyn* (from Mr. Hargraves's MS. before cited) shews that the foundation, the bringing of the action, was still good, though the superstructure, the proceeding by arrest, was void. 31 H 6, Rot. Parl. No. 26, 27. In *Thorpe's case*, the Chief Justice, in the name of all the Judges, declares to the Lords the course of proceeding in the Courts of Westminster upon supersedeas of privilege; that if a member of Parliament be arrested in such cases as be not for treason, felony, or breach of the peace, or for a condemnation had before a Parliament, it is used that all such persons should be released of all such arrests, and make an attorney; so that they may have the freedom and liberty freely to attend the Parliament. This is so pregnant a proof of the course of practice of those times, being the declaration of all the Judges, that I shall not need to make further proof before that time."

(*a*) Ut supra.

own declaration that they had such a privilege, but state it as a matter of general concern to the Parliament at its opening, by way of claim indeed and as a matter of right, together with other privileges, in order that it may be acknowledged and ratified, and that no person may be ignorant of it. The Lords call upon the Judges for their opinion upon the question, considering it as a matter of law. The Judges, waving the determination of the case as a matter touching the privilege of the High Court of Parliament, in which they had no deliberate voice, advise the Lords now they (the Judges) would act upon it in their own Courts: and the Lords, adopting the rule of the Courts of Law, disallow the **[32]** privilege claimed, because Thorpe, the imprisoned member, defendant in the suit, had only a general supersedeas, and not a particular supersedeas in that suit; and because the condemnation was before the Parliament began; being during a prorogation. The Commons acquiesce in this decision, and chuse another Speaker. Sir O. Bridgeman thus comments upon *Thorpe's case* in giving his judgment in *Benyon* v. *Evelyn* (*a*)[1]. The principal question there being whether it were a breach of privilege to sue out and continue an original against a member of the Commons' House of Parliament during the sitting of Parliament; which was decided in the negative: he says, "I should have been glad not to have had occasion to have delivered my opinion on this point for two reasons; first, because it is a tender thing for an Inferior Court to judge of the privileges of a Superior Court: and 4 Inst. 50 saith, that the Judges are assistants to the Lords to inform them of the common law; but it doth not belong to them (*a*)[2] to judge of any law, custom, or privilege of Parliament; and cites for it *Thorpe's case*, 31 H. 6, Rot. Parl. No. 26, and some other cases; which cases only extend where the privilege of Parliament comes in debate in the House of Peers. The Judges are not to determine there what the privilege of Parliament is in such cases; for the conusance thereof belongs to the Lords of the Parliament, and not to the Judges: and yet even there, the Judges deliver their opinions to the Lords, as assistants, what the course of Common Law was in such cases; according to which opinions the Lords gave their judg-**[33]**-ment against privilege in that case; that Thorpe, being condemned in trespass in the interval of Parliament, and in the Fleet pro fine Regis, should remain in execution there. But out of Parliament, where, upon an action at common law, a question concerning privileges of Parliament arises, nothing hath been more frequent than for the Judges of the Common Law to deliver their opinions concerning it, and consequently to give their judgments (*b*)." [Bayley, J. They must know the extent of their own jurisdiction, and in what cases it is taken away. But it does not follow that the Common Law Courts are bound to take conusance of the particular way in which the privileges of Parliament are to be exercised in all instances. The cases alluded to are those where an action being depending in this or some other Court, it has been attempted to stop the proceedings upon the ground of an alleged breach of privilege: it therefore became necessary for the Court to take notice of the extent of their own jurisdiction, and to see whether a sufficient foundation were laid for staying the action.] It will appear upon the consideration of all the cases to what extent the **[34]** Courts of Law have

(*a*)[1] From Mr. Hargrave's MS. p. 6, &c.

(*a*)[2] The learned editor of that judgment remarks in a note the omission of a qualification added here by Lord Coke, viz. "as hath been said," &c.

(*b*) Sir O. Bridgeman continues, and concludes this part of his judgment with saying, "The King himself daily permits his privileges and prerogatives to be determined between him and his subjects in the Courts of Westminster by the common law. And when in a common action the privilege of Parliament doth come to be part of the plea or justification, it is of necessity that the privilege, whether there be such, and what the extent of it is, come also into consideration. For as in the Register (Regist. Brev. 58) it is said of the Ecclesiastical Court, which is inferior to the common law, if a common law point come in question there, non est consonum rationi quod cognitio accessarii in causâ christianitatis impediat, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere; so I may say here, the privilege of Parliament coming in incidentally as part of the case, as a consequent must in this particular case be also debated here. And so it was in *Trewyniard's case*, 36 H. 8, Dy. 60, in an action of debt against a sheriff upon an escape of a member of Parliament taken in execution, and delivered by privilege of Parliament. And in *River's case*, 12 Ed. 4, and in other cases, some of which I shall have occasion to cite anon at large."

gone in taking conusance of particular claims of privileges. It was the more necessary to enter at large into the examination of *Thorpe's case*, because that has been made the foundation of the notion that the Judges in the Courts of Common Law could not take conusance of the privileges of Parliament, which will appear to be an erroneous conclusion.

Clerke's case in the 39 H. 6 (*a*)[1] is the next upon the subject. That was a petition to the King in Parliament by the Commons, stating that Clerke, who was burgess for Chippenham, after coming to and during the sitting of Parliament was arrested and imprisoned for certain fines due to the King, which had accrued in an action of trespass brought by Robert Basset against Clerke, in which he was condemned, and also in another action against him by John Payne for maintenance, in which also he was convicted. He was outlawed at the suit of one of the parties, and was taken upon a capias utlagatum, and finally committed to the Fleet, where he was retained by the other party; and was in custody at the time of the petition to answer the condemnation money to the respective parties, and the fines due to the King. The prayer to the King and Lords was to order that the Chancellor have power to direct writs to the warden to discharge Clerke, in order that he might attend the Parliament; and that neither the Chancellor, nor the warden of the Fleet, nor any other be endangered by the dismissal; saving however the execution of the King, and of the respective plaintiffs in the suits, after the dissolution of the Parlia-**[35]**-ment, notwithstanding the arrest and discharge, as if he had not been arrested; and saving to the Commons their whole privilege in tam amplo modo as if an Act had not been made. That petition was granted by the King and the Lords, and so became an Act of Parliament. There again the Commons had come to a resolution that the arrest of Clerke was a breach of their privilege; yet they did not act upon that of themselves, but prayed an Act of Parliament, which was acceded to by the rest of the Legislature, to discharge him during the Parliament; indemnifying the Chancellor, and saving the rights of the King and of the creditors after the Parliament. From whence it should seem that the arrest was not considered to be wholly illegal; the condemnation being prior to the Parliament; but the taking of him being in the time of Parliament; he not having his writ of privilege; because they save the rights of the King and the creditors after the end of the Parliament, and subject him then to be taken in like manner as if he had never been so before, from which otherwise he would have been freed.

The next is the case of *Donne* v. *Walsh*, which was in the Exchequer of Pleas, in 12 Ed. 4 (*a*)[2]. It was a bill of debt on bond, to which the defendant, a servant of the Earl of Essex, pleaded his right of privilege: and there, though the question arose concerning a breach of privilege of the Lords' House only, yet the writ recites it as an entire and joint privilege of the Lords and Commons, that none of them ought to be imprisoned or impleaded during the time of Parliament: and then the defendant pleads, that he on such a day and ever since (covering the time of the writ) was the menial servant to the Earl of Essex, and came with him to Parliament, &c. The **[36]** plaintiff replied that there was no such custom of Parliament as pleaded by the defendant; which was in fact a demurrer, and is so treated by Mr. Atkyns in his Treatise of the Power of Parliament (*b*); and judgment was thereupon given by the Barons of the Exchequer, with the advice of all the other Judges; allowing that there was a custom of Parliament that the members of either House ought not to be taken or arrested during the time of Parliament; but denying the custom to be that they ought not to be impleaded (*c*). That is a direct authority in point: it is a decision of all the Judges on a question of privilege brought in judgment before them; and so far as they thought the privilege founded in law, they allowed it; but beyond that, they disallowed it.

There is also a similar decision of the Court of Exchequer in *Rivers* v. *Cosins* (*a*)[3], in the same year; in commenting on which Sir Orlando Bridgeman (in *Benyon* v.

(*a*)[1] 5 vol. of Rolls of Parliament, 374; and 1 Hatsell, 34.

(*a*)[2] 4 Prynne's Parl. Writs, 743 (752). (*b*) P. 42.

(*c*) In the recital of this case in the judgment of *Benyon* v. *Evelyn*, it is added that "judgment was thereupon given against the privilege."

(*a*)[3] 4 Prynne, 757 to 763, and the same record is recited at length in Sir O. Bridgeman's judgment, before cited, in *Benyon* v. *Evelyn*, p. 29.

Evelyn) says, "This precedent, being by the advice of all the Judges of England, ought to have its due respect; and it contains several things worthy of observation; amongst others, that there is no such custom or privilege, that a member of Parliament cannot be impleaded during the Parliament: and the person who claimed the privilege was put to answer during the Parliament, and judgment was given against him." He adds further, "The resolution of all the Judges, I cannot say was satisfactory to all the members of the Commons' House, who claimed greater privileges both as to the discharge of members and their servants taken in execution, than was allowed either by the **[37]** King and Lords in Parliament, or in Westminster-Hall by the Judges; as appears by the saving in the clause of *Wm. Hyde's case*, 14 Ed. 4, No. 55, and also by their claims in the case of *John Atwell, Burgess of Exeter*, 17 Ed. 4, Rot. Parl. No. 35, both being after this resolution of the Judges in *Rivers's case.*"

All these authorities shew that Lord Coke was mistaken in the conclusion which he drew in 4 Inst. 15, from *Thorpe's case.* "The truth," says Sir O. Bridgeman (*b*)[1], "is, that Lord Coke's treatise of the jurisdiction of Parliament is a posthumous work; and though I shall attribute as much to his learning in the law as to any sages in the law whatsoever, yet there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them he is guided by abstracts, which occasions miserable mistakes, and by the modus tenendi Parliamentum, which, as to the time of making it, was most certainly a counterfeit piece. So that there are a multitude of errors in his chapter concerning Parliaments, and in particular both those records (*a*)[1] are grossly mistaken."

Hyde's case referred to by Sir O. Bridgeman is in effect the same as *Clerke's case* before mentioned (*b*)[2]. The other case mentioned by him, of *Atwell*, 17 Ed. 4 (*c*), was that of a petition from the Commons, reciting as before, "From time out of mind the knights, citizens and burgesses of Parliament, amongst other liberties and franchises, have had and used the privilege that any of them should not be impleaded in any action per-**[38]**-sonal, nor be attached by their person or goods in their coming to any such Parliament, there abiding, nor from thence to their proper home resorting; which liberties and franchises the King at the commencement of this Parliament graciously hath ratified and confirmed." Then he sets forth that John Atwell, citizen for Exeter, coming to the Parliament, and continually attending upon the same since its commencement and during its continuance, was condemned by default of answering to eight feigned informations in the Exchequer preferred against him by John Taylor, in 160l.; the said John Atwell daily attending the Parliament, and not having knowledge of the same condemnations. That writ of fieri facias and capias ad satisfaciendum had issued against him, on which he was apprehensive of being taken; so that he could not freely depart from this present Parliament to his own home for doubt of his body and goods being put in execution, contrary to the privilege due to the members of Parliament. Upon this prayer of the Commons, the King by advice of the Lords, orders (and thereby it is enacted) that the said writs of execution should not be executory or hurtful to him, his body or goods, returning from the Parliament; and that the Chief Baron of the Exchequer (the judgments being in that Court) shall have power to grant without denyer writs of supersedeas to surcease all manner of executions in that behalf to be made. "Saving always to the aforesaid John Taylor his aforesaid judgments and executions, and every of them, to be had and sued at his pleasure against the said John Atwell at every time after the end of this present Parliament, this present ordinance notwithstanding." There again the Commons still claimed the custom not to be impleaded sedente Parliamento, notwithstanding the decision in *Donne* v. *Walsh;* and this claim, it is observed by Sir **[39]** O. Bridgeman (*a*)[2], is negatived in effect by the saving clause in the Act, reserving to Taylor

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(*b*)[1] P. 34, of the judgment in *Benyon* v. *Evelyn.*

(*a*)[1] The cases referred to by Lord Coke in 4 Inst. 24 are *Bogo de Clare's case*, 18 Ed. 1, and *John de Thoresby's case*, 10 Ed. 3.

(*b*)[2] Ante, p. 34. (*c*) 5 vol. Rolls of Parl. 131; and Hatsell, 48.

(*a*)[2] His words immediately following the statement of the saving clause are, "Whereby it appears that the judgment of the King and Lords in Parliament agreed with the Judge's resolutions, that the impleading a member of Parliament during the Parliament, without taking out execution, was not against the privilege; for there is a saving of the judgment. From all which the inference is strong: the Act of

his execution after the end of the Parliament. He must therefore have considered that it was not a resolution of the Commons' House only, which makes a privilege, unless it be either acknowledged by the law before, or ratified by the rest of the Parliament, which would make it a law in future. In consequence of this it appears, that in the next claim of privilege of this description made by the Commons, the claim of exemption from being impleaded during the Parliament is omitted.

That was in the case of *Roo* v. *Sadcliffe* (*b*)[1], 1 H. 7, where the privilege, which was claimed entire both for Lords and Commons, was confined to freedom from arrest or imprisonment. Up to that period the House of Commons had never proceeded as for a breach of privilege upon their own authority: when it was a common case of privilege known to the law, a writ of privilege had issued as a matter of course, by which it was inforced: when there was any doubt or difficulty in the matter, it was referred to the consideration of the whole Parliament, and acted upon by them as a matter of common concern to both Houses: but it never was acted upon by the Commons alone on their single resolution: they had never proceeded to **[40]** deliver any person arrested upon process out of custody by their own authority: on the contrary, they had at last abandoned their repeated claim of privilege to be exempt from being impleaded during the Parliament, after it had been as often disallowed by the Lords and the Judges.

The next in order is *Ferrers's case*, 34 H. 8; the account of which is taken from Holinshed (*a*), who says that it having been a case of privilege, he had gotten as correct an account of it as he could from those whom he considered to be well acquainted with it: but it is quoted at length from thence by Sir O. Bridgeman in his judgment in *Benyon* v. *Evelyn* (*b*)[2], and is in substance as follows. "During the sitting of Parliament one George Ferrers, a servant of the King, being elected a burgess of Plymouth, in going to Parliament was arrested in London by process out of K. B. at the suit of one White, for 200 marks, wherein he was late afore-condemned as a surety for the debt of one Wheldon: which arrest being signified to the Commons' House, order was taken that the serjeant at arms should forthwith repair to the Compter in Bread-Street, whither Ferrers was carried, and there demand his delivery. [This was the first instance where any such delivery had been demanded or made except by writ of supersedeas.] The serjeant went accordingly to the Compter, and declared to the clerks there what he had in command; but they and other officers of the city were so far from obeying the said command, that after many stout words they forcibly resisted the serjeant, and an affray ensued within the Compter gates between Ferrers and the officers; so that the serjeant was driven to **[41]** defend himself with his mace, the crown of which was thereby broken, and his mace was stricken down. During this brawl the Sheriffs of London came thither, to whom the serjeant complained of this injury, and required of them the delivery of the said burgess, as before. But they, taking part with their officers, made little account either of his complaint or of his message, rejecting the same contemptuously with much proud language: so that the serjeant was forced to return without the prisoner; and finding the Speaker and all the knights and burgesses set in their places, declared to them the whole cause as it fell out; who took the same in so ill part, that they altogether (of whom there were not a few, as well of the King's Privy Council as also of his Privy Chamber,) would sit no longer without their burgess, but rose up wholly and repaired to the Upper House, where the whole case was declared by the mouth of the Speaker before Sir Thomas Audley Knt. 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." The account then proceeds, that "the Commons returned from the House of Lords to their places, and upon new debate of the case took order that their serjeant should soon repair to the Sheriffs of London and require delivery of the said burgess, without any writ or warrant had for the same, but only as before; albeit the Lord Chancellor offered then to grant a writ, which

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Parliament did allow the foundation and proceeding and judgment against Atwell, a member of Parliament, during the Parliament, though it discharged the execution."

(*b*)[1] Roll of Parl. 104, and 1 Hatsell, 51.

(*a*) 1 vol. 955.

(*b*)[2] P. 19. Mr. Hargrave refers to the margin to Crompt. Jurisdiction of Courts, 8, to 36 H. 8, fo. 61, and to Dy. 275.

they of the Commons House refused; being of a clear opinion that all commandments and other acts proceeding from the nether House were to be done and executed by their serjeant without writ, only by shew of his mace, which was his warrant." **[42]** Before that time the writ of privilege had always issued, which vouched the authority from whence the protection proceeded; but upon that occasion as the officer of the Commons had been sent immediately from their own House with the insignia of his office, they deemed that to be a sufficient authority to the sheriff to deliver up the imprisoned member. "But before the serjeant's return into London, the sheriffs, having intelligence how heinously the matter was taken, became somewhat more mild; so as upon the said second demand they delivered the prisoner without any denial. But the serjeant having then further in command from those of the nether House, charged the said sheriffs to appear personally on the morrow by 8 of the clock before the Speaker in the nether House, and to bring thither the clerks of the Compter and such other of their officers as were parties to the said affray; and in like manner to take into his custody the said White, which wittingly procured the said arrest in contempt of the privilege of the Parliament. Which commandment being done by the serjeant accordingly, on the morrow the two sheriffs with one of the clerks of the Compter who was the chief occasion of the said affray, together with the said White, appeared in the Commons' House; where the Speaker charging them with their contempt and misdemeanor aforesaid, they were compelled to make an immediate answer without being admitted to any counsel; albeit Sir Robert Cholmley, then Recorder of London, and other the counsel of the city then present, offered to speak in the cause, who were all put to silence, and none suffered to speak but the parties themselves. Whereupon in conclusion the same sheriffs and White were committed to the Tower of London; and the said clerk, who was the occasion of the fray, and the officer of London who did the **[43]** arrest, called Taylor, with four other officers, to Newgate, where they remained from the 28th to the 30th of March; and then they were delivered, not without humble suit made by the Mayor of London and other their friends. And forasmuch as the said Ferrers, being in execution upon a condemnation of debt, and set at large by privilege of Parliament, was not by law to be brought again into execution, and so the party without remedy for his debt, as well against him as his principal debtor; after long debate of the same for nine or ten days together, they at last resolved on an Act of Parliament to be made, and to renew the execution of the said debt against Wheldon the principal debtor, and to discharge the said Ferrers." It is to be recollected that the condemnation in this case had been before the Parliament, and that Ferrers was taken as he was coming to the Parliament; and it was before that time a contested point, whether a member coming to the Parliament could be arrested upon a condemnation had before. But there were other ingredients in the case, which probably entered materially into the decision in the result, namely the indignity and violence offered by the sheriffs and their officers to the serjeant at mace bearing the ensign of his official authority, and also the situation of Ferrers himself as an immediate servant of the King. The Lord Chancellor, it is said, and all the Lords and Judges there assembled, judged the contempt to be very great upon the declaration to them of the whole case; yet in Moore's Rep. 57, it is reported to have been said by Dyer "que si home soit condemne, en debt ou trespass, et est essien un des burgesses ou chivalers de parliament, and puis soit prise en execution, il ne poit avoir le priviledge del parliament: et issent fuit tenus per le sages del ley en **[44]** le case d'un Ferrers en temps le roy H. 8, et comment que le priviledge a ceo temps fuit a luy allow, ceo fuit minus juste." And this case is thus mentioned by Sir Robert Atkins one of the Judges of C. B., in his argument in *Barnardiston* v. *Soame* (*a*). "10 Eliz. Dy. 275, there is an action brought against the keeper for letting a burgess of Parliament go at large by writ de privilegio parliamenti, who was in execution. The Lord Dyer says nothing there what became of it; but Moore, 57, reports that it was held by Dyer, that if one condemned in debt or trespass be chosen to the Parliament, and after taken in execution, he shall not have his privilege of Parliament: and, as he says, it was so held by the sages of the law in the case of *Ferrers;* and that though his privilege was indeed allowed, yet, (as they held) it was minus juste. Which case of *Ferrers* was the same here mentioned before to be in Dyer, 275, as appears by Mr. Crompton in his Jurisdiction of Courts, 8 b. So that

(*a*) 7 St. Tr. 437.

some things relating to the Parliament the Courts of Westminster must determine, and the Judges cannot avoid it if they will do justice." It seems on the whole, that the complaint of the Commons was not so much of the original arrest being a breach of privilege as of the violent and contemptuous manner in which the sheriffs and their officers treated the serjeant at arms when sent by the House to demand their member; for they saved the plaintiff's execution against Wheldon the principal debtor, who, upon the supposition that the taking of Ferrers the surety in execution was lawful, would otherwise have been discharged; although White the plaintiff had willingly procured the caption of Ferrers as he was coming to the Parliament. Even with respect to Ferrers him-**[45]**-self, though he was ultimately discharged by the Act, there appears to have been some previous doubt; for it is said (*a*)[1] that "before this came to pass the Commons' House were divided upon the question, but in conclusion the Act passed for Ferrers, who won by 14 voices." It would certainly have been dangerous for the sheriffs to have discharged their prisoner upon their own responsibility, on the mere verbal order of the serjeant bearing his mace; for if that had not been deemed a good authority at law for the discharge, the sheriffs would have made themselves liable for the debt. There was another ingredient too in the case, that Ferrers was a servant of the King; who, being advised of this proceeding, called before him the Lord Chancellor and the Judges, together with the Speaker of the Parliament, and others, the greatest persons of the nether House, before whom he claimed the privilege for all his servants attending there upon him; so that, said His Majesty, if Ferrers had been no burgess, but only his servant, yet in respect thereof he was to have the privilege as well as any other: being, as he said, informed that the members claimed the privilege for their servants during the Parliament. But after reproving the conduct of the plaintiff in the action, His Majesty commended the equity of the Commons in restoring to the plaintiff his remedy against the principal which he had lost by law. And afterwards Sir Edward Montague, the Chief Justice, confirmed all that the King had said respecting the privilege; which was assented to by the rest. So that it appears that the allowance of the privilege in that case was as well in respect of the claim of the King for his servants, as of the claim of the House for its members. In the sequel however the Act did not pass the upper House, as the Parliament was dissolved before the **[46]** Lords had time to consider it. Sir O. Bridgeman (*a*)[2], in speaking of that case, having before stated that it had been considered a doubtful matter whether the party there were entitled to privilege or not, says, that "this case doth not only determine the law for the privilege against the execution, but also that the party ought to be discharged without writ when the serjeant at arms came for him." But Pasch. 6 Eliz. in Moore's Rep. 57; (and I have seen the same in other good reports,) Dyer said, that Ferrers ought not to have the privilege of Parliament, and that it was allowed minus justè. And he cites *Trewynard's case* in the same Parliament, 35 H. 8, after the resolution in the last case; who being a burgess of Parliament, and taken in execution, was freed not by the mace or serjeant at arms, but by a writ of supersedeas of privilege; which writ was a security to the sheriffs against an action for an escape, whether the privilege were allowable or not. And he also observes upon *Ferrers' case*, that the sheriffs were not sent to the Tower for arresting him, but for the subsequent contempt in refusing to liberate him when demanded by the serjeant at arms. With respect however to *Ferrers' case*, as he was coming to attend the Parliament at the time he was taken in execution, though upon a condemnation before the sitting of the Parliament, the liberating of him seems to be no more than what this Court would do in the case of a person, who being liable to be taken in execution of a judgment for a debt, was coming to attend the Court, in obedience to a subpœna or other lawful summons: if arrested in his progress hither, the Court would discharge him; although it might be no contempt in the sheriff **[47]** making the arrest, if he did not know that the party was coming to attend for that purpose. The case of *Trewynard* (*b*) was an action of debt by executors against the Sheriff of Cornwall for the escape of Trewynard on an award of exigent and outlawry after judgment and a capias ad satisfaciendum. He rendered himself to the sheriff on the quinto exactus. The sheriff pleaded that he let his prisoner go upon a writ

(*a*)[1] Vide the judgment in the case of *Benyon* v. *Evelyn*.
(*a*)[2] In the judgment of *Benyon* v. *Evelyn*.
(*b*) Dy. 59, states it as of E. 36 & 37 H. 8.

of privilege. No judgment appears; but at least the case shews that it was at the peril of the sheriff to let the party go without a sufficient defence in law: and that it was no contempt or offence in the plaintiff, who thought himself injured by the escape, to question the sufficiency of the privilege in an action against the sheriff, although the writ of privilege was issued by the order of the House of Commons, which probably appeared upon the face of the writ.

The next is *Pledall's case* (*a*)[1], of which Prynne states that in the Parliament of 2 & 3 Ph. & M. it was ordered that Mr. Comptroller, with others of the House, should declare to the Lords their opinion that their privilege was broken; for that Gabriel Pledall, a member of the House, was bound in recognizance in the Star-Chamber to appear before the council in twelve days after the end of the Parliament. On this there was a conference between the two Houses; (as upon a matter of common concern to both:) and Mr. Comptroller, Mr. Speaker, and four others who attended it, reported to the House, that the Chief Justices, Master of the Rolls, and serjeants, did clearly affirm that the recognizance was no breach of the privilege; in which the Commons acquiesced. [In which case it is observable that the Judges **[48]** in Parliament gave their opinion upon the subject of Parliamentary privilege; although it was for the Parliament to adopt it or not as they thought fit.] In which report, says Mr. Prynne, four things are considerable: 1st, that the Commons complained of the binding their member in his recognizance in the Star-Chamber, sitting the Parliament, and stated it as a breach of privilege. 2dly, that upon consideration and conference the Lords clearly resolved the contrary: which contradicts their votes in *Sir Simon Steward's case*, as illegal and erroneous. 3dly, that they advised with the Chief Justices, Master of the Rolls, King's Serjeants, and Counsel, and pursued their resolutions in this case against the opinion of the Commons' House. 4thly, that the Commons have not 12, much less 40 or 20 days' privilege after Parliament ended.

Another case of privilege mentioned in the same book (*a*)[2] arose out of a cause before the Delegates, between the Duchess of Somerset, appellant, and the Earl of Manchester, defendant, 16 Car. 2, touching the validity of the late Earl of Essex's will. The defendant, as a peer of the realm, by his letter directed to the Delegates, demanded 40 days' privilege before the session of Parliament to put off their sentence; whereupon the Delegates, consisting of the two Lords Chief Justices, five other Judges, and other commissioners, after debate among themselves, were of opinion, 1st, that they ought not to take notice of any peer's or member's demand of privilege upon any letter or information, but only when claimed by writ of privilege under the Great Seal, directed to them, according to law and the ancient custom of Parliament. 2dly, that when any question arises concerning **[49]** privilege of Parliament, and comes legally and judicially before the King's justices upon any case or trial in His Majesty's Courts, they are the proper Judges to allow or disallow it according to law, as in the cases of *Walsh*, *Cosins*, and others forecited: for being Judges of the principal case, they must by consequence be Judges of all consequences that attend it. 3dly, that privilege of Parliament was not to be allowed in point of law to any peer or other member sued only in another's right, as an executor, &c.; the privilege being merely personal for him and his necessary servants, &c. 4thly, that the earl had not privilege for 40 days before the session of Parliament. [Therein determining upon the very point of that privilege.] 5thly, that Judges were not bound to proceed in Courts of Justice according to the votes of either House, (which votes were alterable or repealable by either House,) in cases of privilege, but according to the known laws and custom of the realm, their oaths, and trusts. 6thly, that they being only met to give judgment in that case formerly heard, wherein the earl's personal attendance was not necessary or required, they might proceed to pass sentence therein without breach of privilege: which they thereupon then did accordingly; reversing the earl's will, and granting administration to the duchess his sister.

Then came the case of *Benyon* v. *Sir John Evelyn* (*b*), so often referred to, in which Sir Orlando Bridgeman entered most largely into the cases on this subject, and expressly decided in the affirmative the question of privilege, which was raised by the

(*a*)[1] 4th part, Prynne's Reg. 1213.

(*a*)[2] Ibid. 1214.

(*b*) This was cited from the MS. of the learned Judge in the possession of Mr. Hargrave before mentioned, ante, 18. Vide also Carth. 137, and 1 Show. P. C. 99.

pleadings in that case, whether an original might be sued out or prosecuted against a member during the sitting of Parliament. It **[50]** was an action upon an assumpsit for goods sold and delivered to a member of Parliament; to which the Statute of Limitations was pleaded, that the cause of action, if any, did not arise within six years: and one of the questions raised by the pleadings was, whether an original might have been sued out against the defendant and kept up by continuances while he remained a member of Parliament, without a breach of privilege; that being the excuse relied on by the plaintiff for neglecting to sue during part of the time that had occurred from the cause of action till the action commenced, namely, from the 21st till the 24th Car. 1, when the King died. That learned Judge considered himself bound to decide the question of privilege thus brought in judgment before him, although, as he says, "he should have been glad not to have had an occasion to have delivered his opinion upon the point for two reasons: first, because it is a tender thing for an Inferior Court to Judge of the privileges of a Superior Court:" and then he refers to what has been noticed in 4 Inst. 50; but he observes, that *Thorpe's case* and other cases there cited "only extend where the privilege of Parliament comes in debate in the House of Lords. The Judges are not to determine there what the privilege of Parliament is in such case; for the conusance thereof belongs to the Lords of Parliament and not to the Judges. And yet even there the Judges deliver their opinions to the Lords as assistants, what the course of the common law was in such cases, &c. But out of Parliament, where upon an action at common law a question concerning privilege of Parliament arises, nothing hath been more frequent than for the Judges of the Common Law to deliver their opinions concerning it, and consequently to give their judgments. The King himself daily **[51]** permits his privileges and prerogatives to be determined between him and his subjects in the Courts at Westminster, by the common law. And when in a common action the privilege of Parliament doth come to be a part of the plea or justification, it is of necessity that the privilege, whether there be such, and what the extent of it is, come also into consideration." The next cause, he says, why he wished to avoid the question as to the privilege of Parliament was, that it had been said at the Bar to have been declared by the committee of privileges of the House of Commons in the then last sessions, "that it was a breach of privilege to sue out and file an original against a member of Parliament; which was the point in question." But this, he says, was denied by some Parliament men of great note and learning, of whom he had inquired. "But, (he adds) if it be so alleged, I shall give all reverence as becomes me to all opinions and votes, as proceeding from so honourable a body; but I am under the obligation of an oath to do equal law, according to the best of my own judgment, whatsoever the authority of other opinions or resolutions may be." He then cites (*a*) two cases in the time of Ed. 3, one of the 29 Ed. 3, 14, where the Judges of Assize proceeded according to law, notwithstanding such a resolution and command to surcease. The other of the 13 Ed. 3 (Fitzh.) Voucher, pl. 119, where, notwithstanding there had been two resolutions of Parliament upon the matter, it was again brought in judgment before the Judges in C. B. "The use (he says) which he makes of it is, that resolutions or votes in either House of Parliament in the absence of the parties concerned are not so conclusive in Courts of Law, but we may with due respect, notwithstanding these reso-**[52]**-lutions, nay, we must give our judgment according as we upon our oaths conceive the law to be, though our opinion shall fall out to be contrary to those resolutions or votes of either House."

The only remaining case necessary to advert to on this part of the subject is that of *The King* v. *Knollys* (*b*), which was an indictment found at Hicks's-Hall against Charles Knollys for murder. A plea in abatement was put in, that William Knollys was created Earl of Banbury, from whom, through mesne descents, the honor came to the defendant. Replication; that the defendant petitioned the Lords in Parliament to be tried by his Peers, and they disallowed his peerage, and dismissed the petition. The defendant demurred; and the replication was adjudged to be bad; Lord Holt and the rest of the Court being of opinion, that "this order of the House was not a judgment of Parliament. The Parliament (said he) consists of the King, the Lords Spiritual and Temporal, and Commons: the judicial power is in the Lords only, yet legally and virtually it is the judgment of the King, if not of the Commons."

(*a*) P. 8 of the MS. (*b*) 2 Salk. 509. S. C. Carth. 297. 1 Ld. Raym. 10.

And indeed there are ancient precedents of writs of error made returnable before the Commons as well as the Lords; and there are instances mentioned by Lord Hale of the Commons having been parties in giving the judgment: and it was not an uncommon thing to proceed in full Parliament even upon decrees of the Court of Chancery, and to reverse them by the act of the whole Parliament. "This dignity (Lord Holt adds) is a title by common law; and if a patentee be disturbed of his dignity, the regular course is to petition the King, who indorses it and sends it into the Chancery. No plea was depending in the Lords, for he did not petition to enjoy, but supposed himself in possession. Here was no judgment; a Court can give no judg-**[53]**-ment in a thing not depending, or that does not come in a judicial way before the Court: here the title to the earldom was not before them. It is said that this judgment was given secundum legem Parliamenti; but lex Parliamenti must be looked on as the law of the land. But admitting that it were a particular law, yet if a question arise determinable in the K. B., the K. B. must determine it." For this he cites *Benyon's case.* And the defendant in that case was not tried at all (*a*)[1]. In 1 Ld. Raym. 18, it is stated that Ld. C. J. Holt was summoned to give his reasons for this judgment by the peers, but he refused to do it in this extrajudicial manner; for which some of the peers would have committed him to the Tower.

From all these authorities these conclusions may be drawn: first, that for the purpose of ascertaining and confirming the privileges of Parliament, recourse was always had, anciently at least, to the law, by suing out the writ of privilege, which issued out of Chancery under the Great Seal of England. Secondly, that the privilege was claimed as a privilege of the whole Parliament, and not of one House only: so that it was the common concern of the whole; and therefore no danger resulted from the Courts of Common Law taking cognizance of it, from whose decision a writ of error lay to one branch of the Parliament, the Lords; because they had an equal interest in protecting the privilege, if by law it existed, for themselves, as well as for the House of Commons. Thirdly, that the usage and custom have been, where there was any doubt what the law was, not to act upon it by the resolution of one House only, but for the one House making the claim to lay the matter before the other; so that if the privilege claimed were confirmed, it became then the act of the whole Parliament, which could not be **[54]** disputed by any, and which the Judges were bound to take notice of and consider as law in future, whether or not it was allowed before. [Lord Ellenborough, C.J. How could the concurrence of the two Houses without the King make it a more perfect law than if it stood upon the resolution of the one House only?] In almost all the cases it was done by an Act of Parliament with the King's assent. In most of them previous to *Ferrers' case,* it went in the form of a petition to the King in Parliament. It is not meant, however, to say that in any case the two Houses could make a law respecting privilege, without the King, supposing the privilege did not exist before; but in early times the proceedings in ordinary cases, where the privilege was known and acknowledged, was by the writ of privilege; and in new and extraordinary cases the means taken for having it acknowledged was by bringing the question before the whole Parliament. Fourthly, that the Judges have a right, and indeed are bound to determine all cases of privilege, brought judicially before them, except when they arise in the Lords' House of Parliament, where they are no parties to the determination: but where the question comes before them in a legal way in their own Courts, they are bound to take cognizance of the existence and extent of the privilege, and to decide upon it; and the usage also appears to have been for them to advise upon it even in Parliament when their advice is required.

There is another class of cases of actions upon the false and double returns, and likewise for improperly taking or refusing votes of electors, where doubts have arisen whether the Courts of Common Law could take cognizance of them on account of their relating to matters concerning Parliament. The final result of those cases has established the right of the Common Law **[55]** Courts to take cognizance of such questions arising in the way of actions brought by the parties grieved; and the principle of those decisions extends to the present case. Those cases are so well known that it is sufficient to allude to them generally, and to the Acts of Parliament which have passed respecting them. The first of these cases was *Nevill* v. *Stroud* (*a*)[2],

(*a*)[1] Vide Hargrave's Preface to Lord Hale's Jurisdiction of the Lords' House, 227.
(*a*)[2] 2 Sid. 168.

which was an action for a false return, and is stated to have been oftentimes argued in the Common Bench, and by them delivered into Parliament, where the record continued some time and was argued; and afterwards, when the Long Parliament was re-assembled, of which the plaintiff was a member, the same record was again brought to the Parliament by Mr. Justice Atkyns, and by the order of Parliament it was adjourned into the Exchequer-Chamber, there to be argued before all the Judges, and after their opinions given, the record was to be remanded into C. B., which Court by the rule of the Parliament was to give the judgment accordingly. So that the Parliament, instead of wishing to confine the question of false returns entirely to their own cognizance, where an action had been brought in one of the Courts of Westminster, and the Judges, as was frequently the case in ancient times on matters of difficulty, had referred the record to the Parliament, the latter returned it again into the Exchequer-Chamber, to have the question decided by the Judges. The report states that the Judges being all assembled in the Exchequer-Chamber, the order of Parliament was read, signed by the clerk of Parliament, by which they were entitled to oyer of the record: after which the record was read by their own **[56]** officer. The result does not appear (*a*)[1]. Then came *Bernardiston* v. *Soame* (*b*)[1]. That was an action upon the case for a double return, which was tried at Bar; and it was moved in arrest of judgment by North, Attorney-General, and Scroggs, King's Serjeant, that the action would not lie: and they said that the case of *Nevill* v. *Stroud* was never determined; but in respect of the difficulty was sent into Parliament, where it never received a determination. They then objected that the falsity of the return was only examinable and punishable by the House of Commons, who in that instance had punished the returning officer by committing him, and that this Court had no cognizance of it. The case was adjourned to the next term, when the return being stated and found to be false and malicious, and with intent to put the plaintiff to charge, Hale, Twysden, and Wylde held the action lay, and gave judgment for the plaintiff; Rainsford doubting: it appears however from the report of the same case in Freeman (*c*), that Rainsford thought the action not maintainable. The case however afterwards went to the Exchequer-Chamber, where by the opinion of North, C.J. (who had been counsel for the defendant) and five other Judges against two, the judgment of K. B. was reversed, which reversal was affirmed upon writ of error to the House of Lords (*a*)[2]: yet that House first heard the opinions of all the Judges upon the subject, who were seven to five in favour of the affirmance: though that was a question respecting the privilege of the House of Commons, whether that House was not the only forum where the matter could be heard. But after the Revolution that judgment of the House of Lords was in effect reversed **[57]** by the whole Parliament, which passed the Declaratory Act of 7 & 8 W. 3, c. 7, s. 1, declaring all false returns wilfully made of any member to serve in Parliament to be against law, and thereby prohibited; and that the return of any member contrary to the last determination of the House of Commons as to the right of election in the particular place, shall be deemed to be a false return; and giving an action on the case in the Courts of Law to the party grieved, with double damages and full costs. And such was the opinion of Lord C. J. Willes in *Myddleton* v. *Wynne* (*b*)[2], where, after noticing the prior opinions on the subject, he says, "Upon this point I give no opinion of the rest of the Judges, but speak this as my own opinion only; though it has never yet been determined, I should have no doubt but this action [for a false return] would lie at common law; and it would be a reflection on the law to say it would not; because here is certainly damnum cum injuriâ, which by the policy of the common law ought to have some remedy." And so the Statute of William considers it; for it gives an action to the party grieved. [Bayley, J. The clause which gives the action is an enacting, and not a declaratory one.] That was necessary, because it not only gives the action, but gives it with double damages. But the argument would be the same upon the first or declaratory clause of the statute, if the enacting clause had been left out; and so it appears

(*a*)[1] It is said that no judgment was given. 2 Lev. 115. 3 Lev. 30, and 1 Lutw. 89.

(*b*)[1] 2 Lev. 114. (*c*) Freem. 390, and 430.

(*a*)[2] Vide 7 St. Tr. 451-3, and Pollexf. 470.

(*b*)[2] Willes, 597-606. S. C. 1 Wils. 125.

to have been considered by Lord C. J. Willes in the last-mentioned case. The objection there taken was, that the action could not be heard till the question as to the right of election had been decided in Parliament: to which he answers, that "the construction contended for by the plaintiff in error would overturn the whole Act of Parliament, **[58]** as it would deprive the party even of having an action on this statute; for the action must be brought within two years after such false or double return made: and therefore if this action be not to be brought until the matter is determined in Parliament, they might keep the petition so long depending, that the time for bringing the action would be expired, and then the party would be without remedy." His Lordship then says, "With regard to the case of *Prideaux and Morice* (*a*)[1], which was much relied upon; I cannot, (speaking for myself only,) hear it mentioned, without entering my protest against that part of the determination which says that the determinations of the House of Commons shall be final and conclusive on the Courts of Westminster-Hall; first, because the method of trial there is different from that of Westminster-Hall; had they the same authority to inquire into those things that we have, I should be content. Next, they did not make their determination upon oath: whereas we are sworn to determine according to right: they cannot try by juries: nor can they examine the witnesses upon oath." In *Onslow's case* (*b*), the Court (North, being C. J.) again held, upon the authority of *Soame* v. *Barnardiston*, that an action for a double return to Parliament did not lie against the returning officer, upon the ground that they had no jurisdiction of the matter; the principal part thereof being a return in Parliament. But that case was also before the Declaratory Statute of King William, and is contradicted by the opinion of Ld. C. J. Willes in *Myddleton* v. *Wynne*. But the matter was afterwards put out of doubt by the ultimate decision in the great case of *Ashby* v. *White and* **[59]** *Others* (*c*), which was an action on the case against the returning officers of the borough of Aylesbury for refusing the plaintiff's vote at the election of members to serve in Parliament for that borough. Ld. C. J. Holt there held the action maintainable, against the opinions of the other three Judges of this Court, who gave judgment for the defendant; but that judgment was afterwards reversed by the House of Lords, on a writ of error, and judgment given for the plaintiff by 50 Lords against 16; Trevor C. J. of C. B. and Price B. being of opinion with the three Judges of K. B.; and Ward C. B. and Bury and Smith, Barons, being of opinion with Ld. C. J. Holt: Tracy, J. doubted, and Nevill and Blencowe, Js. were absent. But Ld. Raymond says, he had it from good hands that Tracy agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration. The decision of the House of Lords in favour of the right of action in that case has been considered **[60]** and acted upon as law ever since. It was so in *Milward* v. *Serjeant* (*a*)[2], upon the like action in this Court: Lord Mansfield refused to

(*a*)[1] 1 Lutw. 82-9. Salk. 502, and 7 Mod. 13.

(*b*) 2 Ventr. 37, and 3 Lev. 29.

(*c*) 2 Ld. Ray. 938. Salk. 19. 6 Mod. 45, and other books.

(*a*)[2] Hil. 26 G. 3, B. R. This case was cited from 1 East, 567, where it was referred to by Lawrence, J. in *Harman* v. *Tappenden and Others;* and also in the note of *Drewe* v. *Coulton*, there cited. The following note of it has since come to my hands from Mr. Durnford's collection, which is entered as of E. 26 G. 3.—"*Milward* v. *Serjeant, in Error.* Action against returning officer, similar to *Ashby* v. *White*, on which account the Court would not hear it argued. It came by writ of error from the Common Pleas. Lord Mansfield said—There is a decision of the House of Lords in point. As we said in *Coulson* v. *Coulson*, whatever our private opinions may be, we shall not go counter to a decision by the House of Lords. If it were res integra, he intimated a pretty strong opinion that the action would not lie, unless there were express malice. Garrow said on this, that in *Ashby* v. *White* there was malice, but none in this: there, it was quod malitiosè intendentes, &c.; and here it is only 'wrongfully and injuriously intending,' &c. Curia. It is not said in *Ashby* v. *White* that he maliciously obstructed, &c.; the malitiosè intendens is nothing: it is no averment: and Holt expressly says, I do not go on the malice; he laid it out of the question. And Lord Mansfield said —In the House of Commons they proceed as for a breach of privilege. In the great Denbighshire election I advised three different petitions to the House of Commons; one of 400 freeholders struck off the poll; that they might be at liberty to bring actions at common law. You did not argue this in C. B. Judgment affirmed." Vide

hear any argument unless the case could be distinguished from *Ashby* v. *White*; saying, that the question had been already determined in the House of Lords. In that case there was a verdict for the plaintiff. In a subsequent case, of *Drewe* v. *Coulton* (*b*), which was an action against the returning officer of Saltash for refusing the plaintiff's vote as a burgage tenant, at the election of members to Parliament, Mr. Justice Wilson nonsuited the plaintiff at the trial upon the opening; the refusal of the vote not appearing to have been wilful and malicious; which he held to be necessary to sustain the action at common law: but no doubt was entertained of the action's being maintainable if the refusal were malicious. [Lord Ellenborough, C.J. asked, whether in *Milward* v. *Serjeant* it was laid to be wilfully and maliciously done.] In all the cases subsequent to *Ashby* v. *White*, it appears to have been laid in the same form as in that case, which was considered to have been decided on the ground, that the declaration (which in that case alleged that the defendants, knowing the premises, but contriving, and fraudulently and maliciously intending to injure the plaintiff in that behalf, and to hinder and deprive him of his privilege in the premises, did hinder him to give his vote in that behalf, and did absolutely refuse to permit him to give his vote in that behalf, &c. for **[61]** that election, &c.) sufficiently stated the act to be wrongfully done. Mr. Justice Tracy, indeed, appears to have doubted, whether it was sufficiently stated to be wrongfully and maliciously done; but the House of Lords held the gravamen of the action to be sufficiently laid in the declaration. Besides, in none of the prior cases did this Court decide against the action, because the declaration did not lay the injurious act to be wilfully and maliciously done, but because the Courts of Law could not take cognizance of the privilege of Parliament. [Lord Ellenborough, C.J. There was no question agitated, as far as I recollect, in any of the cases before the case of *Drewe* v. *Coulton*, as to the allegation of malice; unless it were in a case which Mr. Justice Wilson probably had in his mind, of an action, in which I believe he was counsel, which had been tried some time before against the returning officer of Preston (*a*)[1], who under an error, in which he had only followed the example of his predecessors in the office for many years before, had made the same return upon the accustomed right of voting as they had done: though upon petition to the House of Commons, the class of voters rejected by him had been received. But as it appeared that he had acted, not with any malicious purpose, but conformably to the old usage, and by legal advice, that was considered to be a sufficient justification for him, and he obtained a verdict.] The wrongfulness of the act complained of is the very gist of an action on the case: but the House of Lords must have considered in *Ashby* v. *White*, that the wilfully doing of an act injurious to the plaintiff was sufficient to found the action. All these cases are material to shew, that **[62]** the subject-matter concerning the Parliament, and being examinable there, as the right of voting is, diverso intuitu, does not take away the power of this Court to determine upon it when brought in judgment before them by action. The last case of this description, was an action on the case brought in the Court of C. B. in 1784, by the late *Mr. Fox* against *Corbett, High Bailiff of Westminster*, for not making the return of the plaintiff's election to Parliament in due time, but proceeding with a scrutiny after the period when he should have returned the writ. A verdict was obtained for 2000l. damages, and a motion was afterwards made in arrest of judgment, which was ultimately abandoned by the defendant.

Another class of cases has occurred upon the writ of habeas corpus, which cases, though they may seem at first sight to bear against the principle deduced from the other authorities, that this Court will take cognizance of the privilege of Parliament, yet are either distinguishable from or wholly irreconcilable with those authorities. The first of these is *Lord Shaftesbury's case* (*a*)[2], who being committed with other peers by the House of Lords, for high contempts against the House, during the pleasure of His Majesty and of the House, sued out the writ of habeas corpus returnable in K. B.; and on the return, it was objected by the earl's counsel, inter alia, 1st. That the

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2 Luders, 248, who says that the defendant's malice made part of the plaintiff's case at the trial.

(*b*) Cited in 1 East, 563, note.

(*a*)[1] This is mentioned in 2 Lud. 246, as the case of *General Burgoyne* v. *Moss*, which was tried after the election at Preston in 1768.

(*a*)[2] 1 Mod. 144, and 2 St. Tr. 615.

general allegation of high contempts was too uncertain; for the Court could not judge of the contempt if it did not appear in what act it consisted. 2dly. That it was not shewn where the contempt was committed; and in favour of liberty it should be intended to have been committed out of the House. It was argued, that the return of such a **[63]** commitment by any other Court would clearly be too general and uncertain; for which *Bushell's case* (*b*) was cited; and that a commitment by the House of Peers made no difference: and they cited *Benyon's case*. It was admitted there by the counsel (*c*) for the House of Lords, that "if an action be brought, where privilege is pleaded, the Court ought to judge of it as an incident to the suit whereof the Court was possessed;" but not, they said, directly, as on a habeas corpus upon a commitment for a contempt in the same session: and on that principle, the decision there passed against the earl, who was remanded. There the question of privilege came directly and not incidentally before this Court. The application there was to discharge a person who had been committed by another Court, the House of Lords, for an alleged contempt against them. The answer would have been the same in the case of a commitment by the Court of C. P. for a contempt, and an application to this Court to discharge the party committed; this Court would certainly refuse the application, and refer him back to C. B. For otherwise if he were discharged, the Court of C. B. would commit him again, and there would be a conflict of jurisdiction between the two Courts upon a point on which there could be no appeal to a superior jurisdiction. This is the principle which governs all the cases on the writs of habeas corpus, and on which alone they can be supported; where the Courts have refused to interfere, to discharge persons committed for contempts generally by either House of Parliament during their session. Suppose a **[64]** party was arrested upon a void writ out of C. B. as if a writ tested in one term were not returnable till the second term, which has been held to be a void writ (*a*); if he sued his writ of habeas corpus returnable in this Court instead of C. B., this Court would not discharge him, but would refer him to the Court out of which the writ issued [Lord Ellenborough, C.J. Without touching the question of contempt, I should rather think, that if a person arrested on a process absolutely void upon the face of it, claimed his discharge of us, we should discharge him, whether it were on Exchequer or Common Pleas process. As suppose the defect in the process were in a matter required by positive statute, of which all the Courts must take cognizance. If indeed it were a doubtful matter, which might involve any question as to the practice of another Court, we should send him to that Court.] All the cases now under consideration arise upon the common law writ of habeas corpus, which is like any other common law process, and therefore the case may be argued as if the Habeas Corpus Act did not exist. Adverting then again to the case of the defective writ before put, it should rather seem that, except by writ of error, one Court cannot act on or interfere with the proceedings of another Court of co-ordinate jurisdiction; and that therefore this Court would not discharge a person from custody even under such defective writ issued by another Court of Westminster-Hall. For if this Court should relieve in such a case, and the other Court should differ; as there could be no writ of error, it would bring on an immediate struggle between the two Courts: whereas if the party be referred to the Court from whence the writ issues, that Court has power to **[65]** relieve and would relieve him if he were entitled to it: but even if it did not, the party grieved would not be without remedy; because he might bring an action in this Court for the arrest against the party who sued out such void writ, in which action this Court would take cognizance of the process of the other Court, and a writ of error would lie from their judgment to a Court superior to both. So in respect to these applications to the Common Law Courts to discharge from commitments for breaches of privilege, when they refuse to inquire as to the particular cause of commitment, they decide no question of jurisdiction against their own cognizance of the privileges of Parliament; nor is the party complaining left without remedy, if the commitment should turn out to be illegal;

(*b*) Vaugh. 135.

(*c*) By Jones, Attorney-General, 1 Mod. 154. See the same thing said by Lord C. J. Holt in the case of *The Aylesbury Men*, St. Tr. 162, by Lord C. J. de Grey, in *Brass Crosby's case*, 3 Wils. 202; which latter was referred to by Grose, J. in *Rex* v. *Flower*, 8 Term Rep. 325.

(*a*) Qu. *Davy* v. *Hollingsworth*, T. 24 G. 3, K. B.; or *Adams* v. *Spang*, 1 Wils. 155.

because though this Court will not discharge him by summary proceeding upon the habeas corpus writ, yet he has his remedy by action, in which the legality of the commitment may be put in issue. In that shape, this Court assumes no discretionary control over the proceedings of any other; because a writ of error would lie upon it to the House of Lords, if the action were not maintainable: but as no writ of error lies upon the proceeding by habeas corpus, the party would be shut out of his remedy, if the determination of the Court were wrong, and he had no remedy by action. [Bayley, J. If the Court of C. B. were to commit for a contempt, would an action lie against the officer; and would this Court try in such an action, whether or not the party had been guilty of the contempt? I put that case, as an answer to it one way or the other may apply strongly to the present.] That case will be distinguished from the present in another part of the **[66]** argument (*a*)[1]: at present it is sufficient to shew, that the cases of refusal to discharge on writs of habeas corpus do not bear against this action. One of the most important of these cases, was that of *The King* against *Sir Thomas Darnel and Four Others* (*a*)[2], which was prior to that of Lord Shaftesbury: and though it was not upon a commitment by either House of Parliament, but by the Privy Council, yet it is important to be considered, as well because it led to the Petition of Right, as because it shews the distinction between the habeas corpus cases and the present. The defendant Darnel, with others, was committed by the Privy Council for refusing to lend money to the King on the commissions for loans, and brought his habeas corpus cum causâ. The warden of the Fleet returned, that he had the party in his custody by virtue of a warrant of two of the Privy Council directed to him in his verbis: "Whereas heretofore the body of Sir Thomas Darnel hath been committed to your custody; these are therefore to require you still to continue him, and to let you know, that he was and is committed by the special command of His Majesty, &c. and this is the cause of the detention of the said Sir Thomas Darnel." It was objected, that the return was insufficient, the warrant not specifying the cause of commitment: the Court however determined that it was good, and that they had no jurisdiction on commitment by the King or the Lords of the Council; and this on the authority of precedents (*b*); but persons so committed could be delivered only by the direction of the King or Lords of the Council, where no cause of commitment is alleged. And they cited the resolution of all the Judges in **[67]** Anderson's time, that if one be committed by command of the King, he is not to be delivered by habeas corpus in this Court; for we know not the cause of the commitment. This judgment produced the Petition of Right (*c*), which declares the decision illegal. It would in fact have vested an arbitrary power in the King. But while that opinion prevailed, the consequence would indeed have been fatal, if an action of this description would not have lain. For then a person might have been committed by the Privy Council, by the command of the King, for a cause confessedly illegal; such as not submitting to a forced loan; and he could have had no relief by habeas corpus in this Court, if he were committed generally by the King's command: and the Privy Council might have held him committed as long as they pleased; which would have established nothing short of arbitrary power. But if he could bring his action for the false imprisonment, then, though the Courts had refused to examine into the contempt or breach of privilege upon the writ of habeas corpus; still he would have had his legal remedy in damages for the injury. The decisions, therefore, of the Courts on those writs, and the declarations of different Judges, that they could not judge of the privileges of Parliament, delivered on such occasions, where the parties committed by either House of Parliament for breach of privilege sought that summary relief, conclude nothing against the right of action, which it was still open to the parties grieved to pursue, in order to try the legality of the privilege thus asserted: and there was nothing inconsistent with that right, in the Court's refusing to discharge the parties committed on habeas corpus. [Lord Ellenborough, C.J. Do you **[68]** find in any of the cases where the Court have refused to liberate the party on the habeas corpus, that they have referred him to another remedy by action?] No

(*a*)[1] Post, 77.

(*a*)[2] 7 St. Tr. 113.

(*b*) But see several cases stated in Moor. 839, where persons so committed had been delivered on habeas corpus in the time of Queen Elizabeth.

(*c*) Stat. 3 Car. 1, c. 1.

intimation of that sort is observable: but it is only upon the ground of such an ulterior remedy that the decisions in those cases appear to be maintainable: for certainly it appears by all the other authorities referred to, that the Judges not only may but must take cognizance of the privileges of Parliament when brought incidentally in judgment before them upon action brought, though not when the privilege comes directly into question, as in the cases of habeas corpus; for that would produce an immediate clashing of jurisdiction between the Court committing for the contempt, and the other Court assuming to discharge the party as committed without legal authority. The person committed is, as it were, in the custody of the committing Court, and the object of the application upon the writ of habeas corpus is to take him out of their custody; the question of privilege and contempt therefore comes directly in judgment: it would be the immediate subject of contest between the two jurisdictions; and the one Court could not discharge the party out of the other's custody, without assuming to exercise a jurisdiction over its proceedings. This Court, therefore, may properly and consistently with the party's ulterior remedy by action, if he have been illegally committed by either House of Parliament, refuse to take cognizance in that mode of the question of privilege. But it is quite otherwise in the case of an action brought by the party grieved, disputing the privilege claimed or its due exercise: for the action operates no change of custody, and induces no clashing of jurisdictions: the question of privilege arises only incidentally, and by way of **[69]** justification for the act of imprisonment, which is the immediate foundation of the action. No superiority or control is in this shape assumed over the proceedings of the committing Court; nor can any public detriment ensue, if the Court in which such an action is brought should pronounce an erroneous judgment upon the question; as it would be capable of being corrected by the House of Lords, the Court of Dernier Resort, upon writ of error; which has the same interest with the other House of Parliament in upholding the just privileges of Parliament. The cases of *Murray* (*a*),[1] *Crosby* (*b*),[1] *Oliver* (*c*), and *Flower* (*d*), which were all cases upon habeas corpus, are all distinguishable upon the same ground. [Lord Ellenborough, C.J. You do not then rely upon *Bushell's case* (*e*); for if you say that one Court cannot interfere upon habeas corpus with the commitments of another Court, there is an end of *Bushell's case*, which was a direct interference of that description, and a discharge of the party committed on the ground of an insufficient return.] That was a case of a discharge by the Court of C. B. of a person committed by a Court of Oyer and Terminer, and not the case of a commitment by a Court of co-ordinate jurisdiction, such as the K. B. or Exchequer. It was upon that distinction that the party was discharged from that commitment, on account of the cause of the commitment not being particularly stated, so that the Court above might judge whether it was sufficient cause for detaining the party. *Bushell's case* is therefore an authority to shew, that where the cause of commitment can be judged of, **[70]** as by a Superior Court, it ought to be stated; and that if a sufficient cause be not shewn, the Court which has power to judge of it will discharge the party. There are cases in Moor. 839, 840, of commitments by the Court of Chancery, not stating for what cause; and on the prisoners, being brought up by habeas corpus, this Court, it is said in *Bushell's case* (140), would not inquire, whether the commitments were on the equity or law side, but discharged the prisoners in either case alike. It is not however clear, whether such commitments might not have been considered at that period as made by a Court not of co-ordinate jurisdiction, which might be a reason for discharging the prisoners where no sufficient cause appeared: for where it was shewn that the cause of commitment was for disobeying a decree, the discharge was refused (*a*)[2]. [Lord Ellenborough, C.J. Before you quit *Bushell's case*, I wish you to advert to what Lord C. J. Vaughan there says (*b*)[2], that the cause of commitment ought to appear to the Court before whom the commitment is returned as clearly as it appeared to the Court who made the commitment. Is not that laid down generally, or is it confined to commitments by Inferior Courts?] He appears

(*a*)[1] 1 Wils. 299. (*b*)[1] 2 Blac. Rep. 754.
(*c*) In the Exchequer, in Easter term, 1771.
(*d*) 8 Term Rep. 314. (*e*) Vaugh. 135.
(*a*)[2] This was in the case of *Wm. Allen*, Tr. 13 Jac. 1, cited in *Apsley's case* Moor. 840.
(*b*)[2] Vaugh. 137.

to lay it down generally: and that is material in the consideration of the manner in which the cause of commitment is stated in the Speaker's warrant in this case.

This is the case of a commitment by the House of Commons, which is no Court of Record; and though it be directed in an old statute, that the persons attending the House of Commons shall not leave the Parliament to the end of Parliament, until it **[71]** be noted in the clerk's book of Parliament; making thereby no distinction between the two Houses; yet if that made the book a book of record, it would not make the House of Commons a Court of Record for any other purpose: and if its proceedings in general be not of record, an allegation to that effect will make no difference; but this Court will recognize the whole Court of Parliament, and will distinguish between the jurisdiction of that whole Court, and the jurisdiction of the House of Commons singly. The House of Lords indeed, is a Court of Record, and the difference between the usages of the two Houses, in respect to persons guilty of contempts before them, seems to be founded upon the essential difference, that the one is a Court of Record, and the other is not. For commitments for contempts by the House of Lords are for a time certain; and they frequently impose fines, which operate by way of punishment of the offender, as well as for the immediate removal of the obstruction to their proceedings; and no Court, which is not of record, can fine. And though there be one or two instances, in very ancient times of the House of Commons having exercised a power of fining, yet being satisfied that it was not warranted, they have long ceased to exercise it: and the only way of accounting for their having discontinued to fine, and for their not sentencing to imprisonment for a limited time, when the Lords have done both, is that the House of Commons is not a Court of Record. Then, though the party committed for a contempt by a Court of Record may be estopped from disputing what is stated on the record, yet there is no such estoppel in a Court not of record; and therefore there must not only appear a good cause of commitment upon the face of the warrant itself, but it may even be argued further, **[72]** that the fact should have been averred, which it is not, that the plaintiff had been guilty of a contempt and breach of privilege, and what that contempt and breach of privilege was, in addition to the resolution of the House to that effect stated.

But at any rate, whether such an averment was necessary or not, nothing can be implied in favour of a warrant of commitment, not issuing especially from a Court of Record, which is not stated in the warrant itself. The opinion of Lord C. J. Vaughan in *Bushell's case* (*a*) before referred to, is most precise to this point: "The writ of habeas corpus (he says) is now the most usual remedy by which a man is restored again to his liberty, if he have, against law, been deprived of it. Wherefore the writ commands the day, and the cause of the caption and detaining of the prisoner, to be certified upon the return: which, if not done, the Court cannot possibly judge, whether the cause of commitment and detainer is according to law or against it. Therefore the cause of commitment ought by the return to appear as specifically and certainly to the Judges of the return, as it did appear to the Court or person authorized to commit: else the return is insufficient," &c. [Lord Ellenborough, C.J. Every person must have great respect for the Lord C. J. Vaughan, on account of his public virtues; but how can that doctrine of his, in its full latitude, stand with the cases which have been decided upon the habeas corpus writ?] It may, when taken with the exceptions which he afterwards (*b*) notices, of general commitments for treason or felony, which are admitted to be good: but these, he observes, are not like the cases then under his consideration, namely, cases of commitments for contempts: "for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press **[73]** for his trial; which ought not to be denied or delayed; and upon his indictment and trial, the particular cause of his imprisonment must appear; which proving no treason or felony, the prisoner shall have the benefit of it. But in this case, (i.e. of a commitment of a juryman for a contempt in acquitting persons indicted against evidence and the direction of the Court,) though the evidence given were not full nor manifest against the persons indicted, but such as the jury, upon it, ought to have acquitted those indicted; the prisoner shall never have any benefit of it, but must continue in prison when remanded, until he hath paid that fine unjustly imposed upon him, which was the whole end of his imprisonment." Besides, in the

(*a*) Vaugh. 136, 7. (*b*) Ib. 142, 3.

case of treason or felony, the prisoner is charged with a known offence, and if the charge be made maliciously and without probable cause, he has his remedy by action against the prosecutor who procured his commitment. [Lord Ellenborough, C.J. Such a remedy is but a poor exchange for the loss of liberty in the mean time, if the party were by law entitled to be discharged upon a commitment in that general form. But the position of Lord C. J. Vaughan, before adverted to, is laid down broadly, without any qualification or restriction as to commitments by Inferior Courts; and however able that judgment of his is in general, I very much doubt, whether that part of it can be sustained in its full extent.] If, in the case of treason or felony, there were a probable cause for the party's commitment, however hard the case may be, if he be ultimately found to be innocent, he suffers no legal wrong by being committed for trial on such probable cause, which is a commitment for safe custody, and not for punishment: but that is very different from the case of a commitment by the House of Commons for a contempt or breach of privilege, where if it be **[74]** sufficient to state the cause generally, the party grieved may be continued in prison, without any means of procuring his discharge, or a trial for the offence; as he may in the cases of treason or felony, which must take place within a reasonable time, otherwise the prisoner will be discharged: he must therefore be without remedy, unless an action lie for the false imprisonment, in which the sufficiency of the justification can be brought in issue. This action then is maintainable if it do not appear upon the warrant that there was a good cause of commitment: and still more, if that which is there stated to be the cause of commitment be insufficient in law. The Court has a general jurisdiction over the subject-matter of this action, which is for a trespass against and imprisonment of the plaintiff's person; and every subject of the realm, when imprisoned, has a right to appeal to the law against any other who procured or aided in that trespass and imprisonment, in order to ascertain whether he was rightly arrested and imprisoned or not. The action of trespass lies for the act of force against the person or property of another, whatever be the intention of the person committing it, unless he can justify it for a legal cause.

What then is the justification alleged in this case? It is in substance, that Sir Francis Burdett, a member of the House of Commons, had admitted in his place, that a certain paper was printed by his authority; which paper the House resolved to be libellous and scandalous, and reflecting upon the just rights and privileges of the House, and that Sir F. B. had been thereby guilty of a breach of the privileges of the House. Now if the doctrine of Lord C. J. Vaughan be well founded, enough is not stated to shew this to be a breach of privilege. A mere libel, quà libel, is in itself no breach of privilege. But it is not neces-**[75]**-sary to contend, that a libel upon the House or its proceedings may not be a breach of privilege; because it does not sufficiently appear upon this warrant, that this was a libel upon the House of Commons or its proceedings. But whatever the libel was, it could be no breach of privilege, nor an offence of any kind, unless it were published. It might be printed, and yet not published; for different compositors might have taken different parts, as is commonly the case; so that no one of them might have known the contents of the entire paper. And though it had even been stated to be published, yet if it were not stated to be published by the plaintiff's authority, it would have been no breach of privilege in him: and if no breach of privilege, then there was no good cause of commitment. It is not stated positively, that the House had adjudged the plaintiff to be guilty of a breach of privilege, and that therefore they ordered him to be committed; but only that the House had resolved that a certain printed paper was libellous, &c.; and that Sir F. B., who had admitted the paper to be printed by his authority, had been thereby guilty of a breach of privilege; which is with reference only to the act before imputed to him. It is stated that the House resolved, that the paper, so admitted by the said Sir F. B. to have been printed by his authority, was "a libellous and scandalous paper, reflecting on the just rights and privileges of the said House;" but that does not necessarily shew that it was a libel against the House of Commons; and the words are not to be construed beyond their due and proper sense in a matter affecting the liberty of the party. It might be a libel against the House of Lords, and the paper might contain reflections (not injurious or wrongful reflections, for it is not so stated, but fair and lawful reflections) on and **[76]** in vindication of the just rights and privileges of the Commons: but if it were not a libel upon the House of Commons, there could be no ground for imputing it as a breach of their privileges.

It would not be sufficient to allege in an indictment, that the defendant obtained money from another by pretending such and such things, without charging, that he falsely pretended, &c.(a)[1]. So the words reflecting on, do not in themselves import injuriously reflecting on, though they may be sometimes used in that sense in familiar discourse. The word reflect is stated in Dr. Johnson's Dictionary as meaning, "4, to consider attentively;" and reflection is stated from Locke to be, "the perception of the operations of our own minds within us, as they are employed about the ideas they have got." [Lord Ellenborough, C.J. Though the meaning might have been more precisely expressed, yet can there be any doubt of the true meaning, when it is stated to be a "libellous and scandalous paper, reflecting upon the just rights and privileges of the House?" The injurious meaning is expressed to a reasonable and common intent; which is sufficient.] Supposing, then, that the publication of a paper of that description might have been deemed a breach of privilege, yet the warrant of commitment states no such breach; but it only states that the House had adjudged that Sir F. B., who had admitted that the paper was printed by his authority, which the House had resolved to be libellous, &c. had been thereby guilty of a breach of privilege, &c.: thus making the plaintiff's admission of such a fact to be the breach of privilege; without alleging that he had committed the act complained of.

This action, it must be observed, is not brought against the Speaker for an act done by him in Parliament: the resolution of **[77]** the House was an act done in Parliament, for which no action would lie against any person for being a party to it: no member can be questioned for any thing said or done by him as such in the House: but this is for an act done out of the House, for which the Speaker is answerable, if the House had no authority to order him to issue a warrant of commitment in the particular case. But further, though the resolution of the House were sufficient to authorize him to issue a warrant for the commitment of the plaintiff; yet if the warrant actually issued were not legal and sufficient in the frame of it to warrant the arrest and imprisonment of the plaintiff, the Speaker would be answerable for the trespass complained of, in like manner as any magistrate would be, who, being authorized and directed by Act of Parliament to issue a warrant of apprehension against offenders in a certain case, issued it in an illegal form. In this respect this case differs from that of a mere ministerial officer executing a warrant legal in its frame, and issued by a Court of competent jurisdiction: and this is the answer to a question put by one of the learned Judges in a former part of the argument (a)[2].

Upon the whole therefore of this part of the argument, the plaintiff contends for the right and duty of the Judges to take conusance of the privileges of Parliament, when questions concerning those privileges are brought incidentally in judgment before the Court in an action brought by a party complaining of the trespass and imprisonment which have ensued upon the alleged breach of them. That if no action of trespass for the imprisonment under a commitment would lie in a case of this sort, in order to put the persons who issued the warrant upon shewing **[78]** a legal cause for such commitment, and a legal warrant to authorize it; it would enable any body of persons, having power to commit for contempts, to punish as for a contempt whatever they might please to call such, and the party grieved by the undue exercise of such a power would be without remedy. That the right of maintaining such action, for the purpose of trying the legality of the commitment, is not disproved by the practice, which has prevailed in the Courts, of refusing to examine into the question of privilege upon the return to the writ of habeas corpus, stating a breach of privilege as the cause of commitment; where the question of privilege arises directly, and where the exercising a power of discharge by the Courts of Law would lead to a clashing of jurisdiction. But that no detriment can ensue to the House of Commons from the Courts of Law taking incidental conusance of the privileges of Parliament, in the way of action; because any erroneous judgment they might pronounce would be liable to be corrected upon writ of error to the House of Lords, who have the same interest as the Commons in upholding all their legal privileges. That by laying the basis of Parliamentary privileges in the law of the land, and subjecting them to the examination and control of the Courts of Law, no arbitrary and despotic power can

(a)[1] Vide *Rex* v. *Airey*, 2 East's Rep. 30. It is sufficient if it be stated in substance, that the pretences were false.

(a)[2] Ante, 65.

be exercised, and no person can be deprived of his liberty, without ultimate redress, except by a law made or recognized by the whole body of Parliament; whereby the one House may operate as a check upon the other, agreeably to the general principle of the Constitution, which is composed of checks and balancing powers. In such a Constitution it is of essential consequence that the legality of every act affecting the liberty of the subject should be open to the examination and trial of the Courts [79] of Justice. Further, that no sufficient cause of commitment appears to have existed in fact; or if so, that it is not distinctly and certainly stated in the warrant to justify the commitment under it. That even if there were a justifiable cause for the resolution of the House, the Speaker issuing his warrant founded on such resolution is answerable for any illegality or defect in the frame of the warrant, and that this warrant is defective in the statement of the imputed breach of privilege.

The only remaining point is as to the breaking of the plaintiff's house, the outer door being shut; which arises upon the first justification. The law, considering every man's house as his castle for his protection and defence, privileges it from being broken into for the purpose of executing any process, or making any arrest, except where the King is a party. That appears by the Year-Book 13 Ed. 4, 9 a.(a). So Lord Coke, in 5 Rep. 91 b. 92 a. says, that where the King is a party, the writ of itself is a non omittas propter aliquam libertatem, though it be not so worded; and cites the same Year-Book, "That for felony, or suspicion of felony, the King's officer may break the house to apprehend the felon; and that for two reasons: 1st, for the commonwealth; for it is for the commonwealth to apprehend felons. 2d, in every felony the King has interest; and where the King has interest, the writ is non omittas, &c.: and so the liberty or privilege of a house doth not hold against the King." And there [80] is much more to the like purpose, to shew that outer-doors cannot be broken open even upon the King's writ, except it be for a crime; and not where it is in debt or trespass at the suit of a party. Lord Coke also appears (4 Inst. 176,) in his time to have considered that a justice of peace could not make a warrant upon a bare surmise even of a crime, to break any man's house; as to search for a felon or for stolen goods, without an indictment found. There is no case where it has been held lawful to break open the door, except for some crime, and upon process at the suit of the King for that crime: for the law gives the privilege of defence to every man's castle, except against the King's process for crimes against the King's peace. But the same reason does not extend to a case like the present: for though the publication of a libel be indictable at the suit of the King, as tending, it is said, to a breach of the peace; yet the warrant issued in this case was not as for a breach of the peace; nor could the House have proceeded in this course for the publication of the paper merely quâ libel, and as an offence at common law; but only as for a breach of their privilege, in publishing a paper injuriously reflecting on their rights and privileges; which is no crime against the King's peace, nor through him against the whole realm. Neither is there any necessity for resorting in this case to so violent a remedy as that of breaking into a man's castle, in order to seize his person there; for so long as he shuts himself up in it, no mischief or obstruction can be committed by him against the House of Commons. It is a matter of general concern to the whole kingdom, that offenders against the King's peace should be brought to trial with all reasonable speed, and punished if found guilty; and it is the common practice to break doors in execution of the King's process against such offenders. But it [81] will be extraordinary, if the subject be not entitled to the privilege and protection of his castle against a warrant of commitment for contempt, issued by the Speaker of the House of Commons, that no case should ever before have occurred, in which it has been attempted to execute such a warrant by breaking into the party's house in order to arrest him.

The further argument of the case was adjourned to Easter term; and on Friday, May 17th,

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(a) The passage runs thus; "Et fuit tenus que pour felonie, ou pour suspection de felonie, home poit debruser meason pour prendre le felon, car il est pour le common weale de prendre eux. Et auxi Choke dit, que le roy ad interest, le brief est non omittas propter aliquam libertatem, &c.: issint le libertie de son meason ne lui tiendra lieu, &c. Mes auter est pour det au trespass; le Vicont, ni auter, ne poit debruser le meason pour lui prendre; car ceo n'est forsque particuler interest del partie, &c." Vide 18 Ed. 4, 4.

The Attorney-General was heard on the part of the defendant.—The plaintiff has had the benefit of every thing which learning and ingenuity, brought forward by the help of the greatest diligence, could produce in his aid, and it is not the fault of his counsel that the authorities he has cited do not bear more effectually upon the true point of the case, nor break in upon any of the propositions necessary to be maintained on the part of the defendant. The very statement of this case, without going at all into the argument derived from the long train of authorities cited, puts the plaintiff out of Court. It is an action of trespass brought against the Speaker of the House of Commons for having, as he was ordered to do by the House, issued his warrants to the serjeants at arms, and to the keeper of the Tower; the one to arrest and convey to the Tower, and the other to take and keep in custody the plaintiff, who had been voted by the House to be guilty of a contempt and breach of privilege, for which they had condemned him to imprisonment in the Tower: it is therefore an action of trespass against the officer of a Court of competent jurisdiction, for having issued the process of that Court by its direction. No lawyer ever heard of such an action maintained, or **[82]** treated of as a serious matter of doubt. *Bushell's case* is decisive against it: not that part which is to be found in Lord C. J. Vaughan's report, but the sequel of it in 1 Mod. 119, 184. Bushell, after he had been delivered out of custody by habeas corpus, and another person in the same situation, brought actions of trespass and false imprisonment against some of the commissioners of gaol delivery, and the recorder, by whom they were committed, and against the officers of the Court who executed its process; and while these actions were depending, some of the defendants applied to this Court for time to plead. Lord Hale said at once, without doubt or hesitation: "I speak my mind plainly, that an action will not lie: for a certiorari and a habeas corpus, whereby the body and proceedings are removed, are in the nature of a writ of error; and in the case of an erroneous judgment given by a Judge, which is reversed by a writ of error, shall the party have an action of false imprisonment against the Judge? No, nor against the officer neither. The habeas corpus and writ of error, though it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice. They will have but a cold business of it. A habeas corpus and certiorari is a writ of right, the highest writ the party can bring. So a day was given to shew cause." The application for a discharge upon a writ of habeas corpus, is that upon which the party has a right to have a correct judgment given, as much as in any other case. It was not therefore correctly argued for the plaintiff, that though the Court refused to discharge a party upon habeas corpus, it did not follow that an action of trespass would not lie; and that though the **[83]** prisoner were not entitled to his discharge upon the habeas corpus, yet that upon the same facts he might support an action of trespass. The converse of that proposition is true: in no case would trespass lie where the party would not be entitled to his discharge upon a habeas corpus; though it does not follow, that in every case where the party was entitled to his discharge upon the habeas corpus, an action of trespass would lie. A party may have been committed upon an erroneous judgment pronounced by a competent jurisdiction, and be entitled to be discharged on the writ of habeas corpus; but though the judgment might be erroneous, the process awarded thereon would not be void, nor would the officer who issued it by the direction of the Court be deprived of the protection which that process gave him. This is a clear answer to the present action, and would be sufficient in any other than the present case to rest it upon; but as this answer, decisive as it is, would hardly satisfy the expectation of the Court upon such an occasion as the present, it is proper to examine shortly the arguments and authorities adduced on the part of the plaintiff, rather for the purpose of shewing how far the doctrines maintained on this occasion go, and how far they can be supported by the authorities, than for any interest which the defendant has in disputing any of them upon this occasion: for in truth they have little or no bearing upon the case in judgment. It would have been sufficient otherwise to have stated a few short propositions, which, being established in the mind of every lawyer, need no authorities to support them. As that the House of Commons have a right to commit persons for contempts in breach of **[84]** their privileges: that they are the Judges of those privileges, and whether or not they have been violated in the particular instance, that their decisions upon that subject, upon cases brought directly before them, cannot be questioned in any other Court: that it is neither proper nor

decent to object to this kind of jurisdiction in the house, by saying that they may abuse the power by committing persons on false or frivolous pretences: it is not to be presumed that those to whom the constitution has entrusted such a privilege will so abuse it: it is most unwise to state it with a view to the general administration of justice; because it is an objection that may be equally raised against any jurisdiction of the same sort that may exist in any man or body of men in this country; against the Courts of Justice as well as against the Houses of Parliament. If an estate be given to a man for his life and no longer, and an ejectment be brought for that estate, in which the question is, whether that be an estate for life, or in fee; it is possible that the Court in which that action is brought may decide that it is an estate in fee; and it cannot be prevented, if the Court were determined so to do; and if the party aggrieved brought a writ of error, the Court of Exchequer Chamber may, if they please, decide the same, and so may the House of Lords, also, in the last resort: but each of those Courts would, notwithstanding, be justified in committing any person who stated that they were ignorant or profligate enough to come to such a decision. In a matter of such general notoriety, it is sufficient to state that this right exists in the House of Commons. But if the House were not the sole and ultimate judge of its own privileges, the Speaker would still stand defended in this case: for did any man who has the slightest pretence to information ever doubt **[85]** that the House of Commons has a right to commit any one who insults their proceedings while pending before them, and who causes a libel to be printed and published, reflecting upon and impeaching the integrity and justice of those proceedings. The mere denial by certain persons of these privileges of the House of Commons cannot throw any doubt upon them: nor can it be necessary to carry the Court through a train of reasoning that is common and trite, and known to every man before he ventures to call himself even a student at law. If it were necessary, it would be easy to shew that every Court in Westminster-Hall has the same power of commitment for contempts, and that they could not exist long without such a power. It would have been easy to borrow from Lord C. J. Wilmot, the reasons so forcibly urged by him to that purpose in the admirable argument he had prepared for judgment in the case of *The King* v. *Almon* (*a*)[1]. It would have been shewn, that though the exercise of that power may be withheld, or but seldom exerted, yet if it were once established that the power itself did not exist in the Courts, all the mischief that can arise from scandalizing them would be produced, and felt immediately and constantly. If it were certainly known that a man might invent and publish libels upon Courts of Justice for any matters done by them which displeased him, and that he would be free from punishment till the tardy process of the law, (for so it may be called on such an occasion,) in its ordinary course of proceeding by indictment, could reach him, men would be found daring enough to hazard the event of that **[86]** distant day, and to offer to Courts of Justice those insults, which in the present day there is difficulty enough to restrain, notwithstanding all the guards by which they are surrounded. If then the right exists in the Courts of Westminster-Hall, upon what principle, it might then have been asked, could it be contended that the same right did not exist, and in the same degree, in the House of Commons? Is there less danger to the constitution in suffering persons to scandalize and defame the members of the House of Commons for their proceedings in Parliament, than to scandalize and defame the Judges for the exercise of their duties in Courts? Is that assembly less open to insults? Does the history of our own times inform us that, though it may be necessary to surround the Courts of Justice with these guards, it is not necessary to protect the House of Commons in the same manner? and can it be collected from the recorded wisdom of our ancestors, that they have left the House of Commons alone thus defenceless? On the contrary it will be found, that there is not a text writer upon the subject, there is not an historian, who does not inform us, that this power has been constantly stated and admitted to reside in the House of Commons (*b*). **[87]** Lord Coke (*a*)[2] considers the House of Commons

(*a*)[1] Wilmot's Rep. 243-254, &c. (*a*)[2] 4 Inst. 23.

(*b*) It is curious to observe what Mr. Prynne, whose partiality to the popular side will not be disputed, says upon this subject, in his treatise of the sovereign power of Parliaments and kingdoms; which was printed in 1643 by order of the committee of the House of Commons concerning printing, after the commencement of the Civil War: as such, therefore, I quote it, more for its curiosity than its authority. Part 4,

as a Court of Judicature, having power to commit. The House has in fact always claimed and exercised the right to commit members and others for a breach of their privileges. This appears by the journals of the House; and from the earliest period at which they are printed, down to the time of the Commonwealth, from thence to the Revolution, and again from the Revolution to the present time, numberless instances have been found, in which the House of Commons have committed offenders of this description. It is useless to detail the bead-roll of instances which are generally known, and are to be found in the appendix to the report of the committee of the House of Commons (*b*); so that it is impossible to controvert the practice.

This right, then, being established upon authority, upon principles, and upon practice, there is nothing left to do, but to follow the very learned and ingenious argument for the plaintiff, and consider how it bears [88] upon the present case. Authorities were cited to shew that the Courts of Law have a right to decide in certain cases upon the privileges of Parliament; which is true, and has never been questioned in any of the instances cited. But it does not follow, that because they have a right in some cases, they have a right in all: and accordingly the plaintiff's counsel, in the result, stated the right of the Courts of Law to decide upon the privileges of Parliament with this qualification, where the question of privilege arises incidentally; and with that qualification the proposition may be admitted. No doubt, that in many cases, if the point have not been directly decided in Parliament, and it be not ascertained what the privileges of Parliament are, the Courts of Law, from the necessity of the case, must decide the question when brought judicially before them: for how else can such cases be disposed of. Take, for instance, the case of *Benyon* v. *Evelyn*, so much referred to. An action was brought for goods sold and delivered: the defendant pleaded the Statute of Limitations: the plaintiff replied, that he could not sue the defendant sooner, because he was a member of Parliament, and privileged from suits: the defendant denied that position, and said that, though members of Parliament cannot be arrested, they may be sued. Then the question between them was, whether members of Parliament could be sued or not during the sitting of Parliament; because if they could, the action might have been maintained. The Court there were obliged to determine the question; and they did determine it; lamenting, however, that necessity. Lord C. J. Bridgman upon that occasion says: "When in a common action the privilege of Parliament doth come to be part of the plea or justification, it is of necessity [89] that the privilege, whether there be such, and what the extent of it is, come also into consideration. For, as in the register it is said of the Ecclesiastical Court, which is inferior to the common law, if a common law point come in question there, non est consonum rationi quod cognitio accessarii in causâ christianitatis

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page 26, "Secondly, for the Parliament's imprisoning of men pretended to be against Magna Charta, I answer, first, that the Parliament is not within that or any other law against imprisonments, as I have formerly cleared; therefore is not obliged by it, nor can offend against it. Secondly, that it hath power to imprison and restrain the greatest members of their own Houses, though privileged men exempt from all other arrests, and public persons representing those that sent them thither; therefore much more may they imprison or restrain any other private persons notwithstanding Magna Charta. And the Parliament being the supremest judicature paramount of all other Courts, their commitments cannot be legally questioned, determined, nor their prisoners released by habeas corpus in or by any other Inferior Court or judicature whatsoever." I will only refer further to one modern book, 7 T. Rep. 741, for what was said by one of the greatest lawyers and Judges of late times in the case of *The King* v. *Despard*. "I remember (said Lord Kenyon) when a doubt was made whether or not the House of Commons had the power of committing to prison. On that occasion a gentleman of great character and fortune, Sir John Phillips, who had retired from the Bar, appeared in this Court for the purpose of moving that the person who had been committed by the House might be discharged. The Court heard him patiently, and the public, perhaps, were gratified with hearing the question discussed: and though the motion was unsuccessful, I believe the public were satisfied that justice was properly administered. Many other cases of this kind have been agitated in this Court, where they have met the same fate." The case alluded to was probably *Murray's case*, which is stated in 2 Wils. 299, to have been moved by Sir John Phillips.

(*b*) See also a collection of precedents published by Mr. Wynne in 1810.

impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere: so I may say here, the privilege of Parliament coming in incidentally as part of the case, as a consequent, must in this particular case be also debated here." Unquestionably it must, because otherwise it would be impossible for the case to be decided. But after citing cases to shew that where the question of privilege comes before the Court incidentally, they must decide it, the plaintiff's argument stopped short, and omitted to shew how the question of privilege arises incidentally in this case. On the contrary, if a case were to be invented to shew where the question of privilege arises directly, it would be this very case. For here was a direct judgment of the House of Commons that the plaintiff had been guilty of a breach of their privileges, and that he should be imprisoned in the Tower for that breach: there is an order thereupon given to the Speaker to issue his warrant for the plaintiff to be committed to the Tower; and a warrant issued in consequence; which is executed: then follows this action of trespass brought against the Speaker who issued the warrant in obedience to the orders of the House. Can any case be imagined in which the question of privilege can come more directly before the Court than in this? Has not the direct point now brought in question before this Court been already decided by the House of Commons; and is not the Court, by the shape of the argument, called upon to determine that, in this particular instance **[90]** of the exercise of their privileges, the House have decided wrong? The Court must say so, if the action be held to lie. But, with great deference to the Court, they have no jurisdiction so to decide: it was for the House of Commons to determine whether their own privileges had or had not been violated: they have determined it directly, and have punished the plaintiff for such violation accordingly: and it is against one of those who have carried that judgment of a competent jurisdiction into execution that this action is brought: and unless this Court decides that it has a right to inquire in such a case whether the House has properly or improperly imprisoned the offender, and to reverse its judgment in effect, by declaring that the Speaker has himself transgressed in obeying the order of the House, and that it was his duty to refuse to issue his warrant upon such order, judgment cannot be given for the plaintiff. The plainness of a case sometimes renders it the more difficult to argue it, because the adversary's objections are answered in the mere statement of them.

It was said, that the class of cases, in which the Courts had refused to liberate on habeas corpus persons committed for breaches of privilege, furnished no authority for saying that an action of trespass could not be maintained against the officer who had executed the parliamentary process, if the commitment should be shewn to be without authority. But surely the remanding of the party committed, brought before the Court upon habeas corpus; though it do not conclude him from further applications for his liberation to every Court in Westminster-Hall, upon habeas corpus; or even from calling for their judgment upon the same question in an action of trespass; is decisive to shew that, in the judgment of the remanding Court at least, an action of trespass could **[91]** not be supported in the particular case: for if upon the return it appeared that he was not in custody by a lawful authority, it would be the duty of the Court to deliver him. Though if they did liberate him, it would not necessarily follow that an action of trespass could be maintained against the officer. It is impossible that the language of Lord C. J. Vaughan in *Bushell's case* (*a*) should be understood in the large sense attributed to it; that in every return to a habeas corpus, the Court to whom the return is made should see the cause of commitment as plainly as the committing Court saw it: the contradiction of it may be found in *Bushell's case* itself, and in the authorities there cited. One of those is *Apsley's case* (*b*), who is stated to have been committed to the Fleet by the Court of Chancery for a contempt, and liberated upon habeas corpus brought. What the circumstances of that case were do not appear, but reference is there made to the case of one *Allen;* where the return to the habeas corpus was that the Lord Chancellor, Heselmere, had committed Allen for a contempt in disobeying a decree of the Court of Chancery: which was held to be sufficient; and the Court refused to deliver him: yet it cannot be said that, upon such a return, the Court to which the appeal was made saw the cause of commitment in all its circumstances as plainly as the Court which committed him; for the latter alone knew the decree which was disobeyed, and whether the case was within their

(*a*) Vaugh. 137. (*b*) Moore, 840.

jurisdiction, and being so, whether the facts justified it. *Bushell's case* was not a commitment for a contempt; it was a commitment of a jury, because they did not find a verdict according to the evidence of the fact and the direction of the Court: and Lord C. J. Vaughan is mis-[92]-taken in supposing that it was the first instance of the commitment of a jury for returning a verdict against the evidence: an instance of the same kind occurred in *Sir Nicholas Throckmorton's case* (*a*). *The Aylesbury case* (*b*) created great interest at the time, and some degree of heat passed

(*a*) 1 St. Tr. 77, 8.

(*b*) The report of Lord Raymond, 2 vol. 1105, is of what passed on the return to the habeas corpus before the Court of Queen's Bench, in Hil. 3 Anne. But it appears from a MS. of Mr. Baron Price, that on the 18th and 19th of January 1704, Lord Keeper Wright summoned all the Judges to attend him for their opinions; having been served with two petitions for writs of habeas corpus by J. Paty and another, two of the five Aylesbury men, who were committed on the 5th of December 1704, by warrant of Mr. Speaker Harley, by virtue of an order of the House of Commons of the same date for bringing actions against the late constables of Aylesbury, for refusing their votes in the election there for members of Parliament. Application had also been made to several of the Judges for writs of habeas corpus upon the same occasion. The MS. also contains the minutes of another conference of the Judges, held on the same occasion, on the 8th of February, at Serjeants' Inn, by the desire of Lord C. J. Holt and the other Judges of the Queen's Bench. The habeas corpus applied for on this occasion was not upon the statute, but at common law. The prisoners were all remanded. By the same MS. it appears that after the decision of the Court of Queen's Bench upon the writ of habeas corpus sued by Paty, (reported in 2 Ld. Ray. 1105,) by which he was remanded, of which a special entry was made of record, quod cognitio causæ captionis et detentionis prædicti Johannis Paty non pertinet ad curiam dictæ dominæ reginæ coram ipsâ reginâ, ideo idem Johannes remittitur, &c.; Paty petitioned the Queen to grant him a writ of error returnable in Parliament. The Queen referred it to the attorney and Solicitor-General, and afterwards to all the Judges, who met on the 21st of Feb. 1704, at Serjeants' Inn, whether the Queen ought to grant the writ of error of right, or ex debito vel merito justitiæ, or ex gratiâ. After debate of the question, it appears that of the twelve Judges who met at that time, Holt, C.J. Trevor, C.J. Ward, C.B., and Blencowe, Powis and Tracy, Justices, were of opinion, that the writ of error was a writ of right in this case, and that the Queen ex debito justitiæ ought to grant it; and that Nevill, Powell, and Gold, Justices, and Bury, Price and Smith, Barons, held that the writ of error was of grace and favour, and not of right: but Nevill, Powell, Gold, and Bury, afterwards changed their opinions, and agreed with the first six: and on the 24th of February, 1704, these certificates were returned.

"May it please your Majesty,

"In obedience to your Majesty's command we have considered of the petition hereunto annexed; and we are humbly of opinion that a writ of error in this case ought to be granted of right, and not of grace. But we give no opinion whether a writ of error does lie in this case, because it is proper to be determined in Parliament, where the writ of error and record are returned and certified.

"HOLT.	POWIS.
"TREVOR.	BLENCOWE.
"WARD.	GOLD.
"NEVILL.	TRACY.
"POWELL.	BURY."

"May it please your Majesty,

"In obedience to your Majesty's command we have considered of the petition hereunto annexed; and we are humbly of opinion that your Majesty is not of right and justice obliged to grant a writ of error in this case. "PRICE. SMITH."

The Judges all attended the Queen at the Cabinet on the 25th of February, and delivered these their several resolutions to Her Majesty in the presence of the prince, and many of the principal members of the Council. But finally, in consequence of a disagreement growing between the two Houses of Parliament upon this subject, the

into the discussion of it: **[93]** there was probably as great a division in opinion, whether in fact what was done was a breach of the privilege of the House of Commons, as upon any other occasion that has occurred. It is important, therefore, to observe the course which the leading statesmen and great lawyers of that time took for the purpose of bringing it to the decision of a Court of Law: they brought writ after writ of habeas corpus, and had the judgment of all the Judges upon it: but no where is it hinted that, although the party might not be entitled to his discharge upon the habeas corpus, he was still entitled to maintain an action of trespass. Yet that cause was not in the hands of persons who were likely to overlook that material consideration for their clients; nor was **[94]** it likely, even in a public view of the case, that they should have overlooked any thing that might have embarrassed their adversaries so much: and it is difficult to believe, after looking through every judgment that has been pronounced, every argument urged, and every debate that has been brought forward in both Houses of Parliament upon that subject, that if there were any colour for the proposition, that notwithstanding a refusal to liberate upon habeas corpus, an action of trespass might still be maintained, some intimation of such an opinion should not be found in the reports, parliamentary or legal, of those and subsequent times; more especially when it is recollected, that that controversy lasted for some time, and that a sufficient period for consideration intervened between that case and the case of *Murray*, and between the subsequent cases of *Crosby* and *Flower*.

In the cases of *Crosby* and *Oliver*, the question was tried by habeas corpus, brought by one of the persons committed in the Court of Common Pleas, and by another in the Court of Exchequer. Mr. Serjeant Glynn was the adviser and conductor of those proceedings: and recollecting the history of those times, it was not likely, that if any ingenuity could have prevailed over those who imprisoned Crosby and Oliver, it would have been wanting: but in none of the arguments used upon that occasion, nor in any of the judgments pronounced in each of the Courts, is there the smallest intimation that, though the parties were remanded, still they could maintain trespass. But what is most satisfactory upon this point is that the prayer of the habeas corpus being refused in different Courts of Westminster-Hall, no action of trespass was ever brought, upon which, if the judgment of the Court of Common Law were erroneous, the record might **[95]** have been carried to the House of Lords: and therefore there can be no doubt but that, in the opinions of the very able and zealous men of that day, the judgments of the Courts upon the writs of habeas corpus were considered as having decided that actions of trespass would not lie: in other words, that the Courts, refusing to deliver the parties upon the habeas corpus writs, must have been of opinion, that those who imprisoned them had not been guilty of trespass. The cases in which these questions have come directly before the Court occurred mostly in times of violence, when such Acts were exercised as gave rise to *Bushell's case*, and were repressed by that judgment; and which never have been mentioned since but with reprobation. The distinction between the province of the Court and jury is now too well established, and the principles of liberty are too well understood, to subject juries acting in the conscientious discharge of their duties to any such danger. *Lord Shaftesbury's case* (*a*) was the first experiment made in the Courts of Law upon the legality of these commitments for breach of privilege. He was brought up by habeas corpus before this Court, having been committed by a warrant as for a contempt of the House of Lords. Sir Thomas Jones, J. said: "The course of all Courts ought to be considered; for that is the law of the Court; *Lane's case*, 2 Rep. 16, and it hath not been affirmed that the usage of the House of Lords hath been to express the matter more punctually on commitments for contempts, and therefore I shall take it to be according to the course of Parliament." Wilde, J. said; "The return no doubt is illegal: [he must have meant in a common case:] but the question is on a point of jurisdiction, whether **[96]** it may be examined here. This Court cannot intermeddle

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Queen, in answer to an address from the House of Lords for granting a writ of error, said that she should have granted the writ of error desired in the address, but finding an absolute necessity of putting an immediate end to the session, she was sensible that there could have been no further proceeding upon the matter: and the Parliament was prorogued to the 1st of May 1705.

(*a*) 2 St. Tr. 615, 622. 1 Mod. 144.

with the transactions of the High Court of Peers in Parliament during the session which is not determined; and therefore the certainty or uncertainty of the return is not material; [by which he must have meant the certainty or uncertainty of the contempt for which the party was committed:] for it is not examinable here." Rainsford, C.J. said: "This Court have no jurisdiction of the cause, and therefore the form of the return is not considerable." Twisden, J. was absent, but desired Jones, J. to declare his opinion, that the party ought to be remanded. Sir Thomas Jones, J. further said, "that where the Courts of Westminster have taken cognizance of privilege, it has been only an incident to the cause before them; but in that case the direct point of the matter was the judgment of the Lords." To apply that doctrine to the present case: it was admitted there, as it is here, that privilege may be inquired into where it is an incident in the cause; and it was not inquired into in the case of *Lord Shaftesbury*, because it was not an incident, but was the direct point in the case before the Court. [Lord Ellenborough, C.J. What distinction do you take between a direct and an incidental question of privilege. I take the question of privilege to come directly in judgment before the Court, upon an application for the party's discharge upon habeas corpus.] If upon the trial of an ejectment to recover an estate, a question arose upon the validity of a marriage; and the legitimacy and right of the claimant depended upon the legality of that marriage; the Court must decide that question, (though properly a question of ecclesiastical conusance,) because it arises before them collaterally. The direct point in that case is, whether the party claiming be entitled to the estate; which depends on the colla-[97]-teral point, whether the marriage between A. and B., from whom he claims title by descent, be a legal one. The Court must of necessity decide that question which arises thus collaterally: and perhaps collaterally would be a more correct term than incidentally. But suppose A. and B. had been cited into the Ecclesiastical Court for cohabiting together, without being legally married; and the Ecclesiastical Court pronounced the marriage void, and directed the writ de excommunicato capiendo to be issued thereupon; and suppose the party to be taken, and an action brought by him against the officer for the execution of that writ: there the question of the legality of the marriage having been directly decided by the Court to which the decision of it belonged, and not merely collaterally; the judgment of the Ecclesiastical Court would be conclusive in favour of the defendant in such action, who had only acted in execution of the judgment of a Court of competent jurisdiction. The justification runs back in a direct line from the Act complained of to the judgment of the Ecclesiastical Court; the one springs out of the other, and the two are connected together. But in the case of the ejectment, where the same question might arise, there is no judgment in the Ecclesiastical Court connected with the immediate cause of action in the Court of Common Law: the question of marriage may be said therefore to arise incidentally or collaterally, and the Court of Common Law are obliged to decide upon it with such lights as they can get, lest the principal cause, the title to the estate, should stop for want of such previous decision. In like manner the Christian Courts must sometimes decide questions of common law: not that they pretend to be competent to decide [98] them; but because, without such decision, the principal cause, which is within their proper jurisdiction, would stand still. So the Common Law Courts are often under the necessity of expounding the law of foreign countries, where that may become necessary in the progress of a cause of which they have jurisdiction. [Lord Ellenborough, C.J. The question may be said to arise directly, where it is the direct and immediate fruit of the judgment of the other Court, which has exclusively the power to pronounce upon it.] The only reason for using the word "incidentally" is because it is to be found in former cases upon this subject.

The case of *The Queen* v. *Paty and Others* (*a*) gave rise to much heated discussion, upon the question, whether or not the House of Commons had acted correctly in determining, that an action brought against a returning officer for having rejected votes at an election was a breach of privilege. The House having committed those who were concerned in bringing the action, they sued out writs of habeas corpus; to which the warrant of commitment issued by the Speaker was returned; stating, "that by virtue of an order of the House of Commons, &c. these are to require you forthwith, upon sight thereof, to receive into your custody the body of John Paty, who,

(*a*) 2 Ld. Ray. 1105.

as it appears to the House of Commons, is guilty of commencing and prosecuting an action at common law against the late constables of Aylesbury, for not allowing his vote in the election of members to serve in Parliament; contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House," &c. The question in effect was whether this warrant upon the face of it [99] stated a legal cause of commitment. Lord Holt certainly was of opinion that it did not; for that the prosecuting of the action being in itself a legal act, and the right of the subject, could not be a breach of privilege; and consequently that the party ought to be discharged. But the eleven other Judges were of a different opinion; and, as Mr. Justice Blackstone said in *Crosby's case* (*a*), "We must be guided by the eleven, and not by the single one." The eleven Judges were of opinion, that the Court had nothing to do with the consideration, whether or not it was a contempt of the House of Commons; the House having determined it to be so, they were bound to give credence to that determination: and the party was accordingly remanded. Without going through the whole of the judgment in *Paty's case*, it is sufficient to refer to what was there said by one of the Judges, a very eminent man, Mr. Justice John Powell. He observed, that it was the first cause of the kind that had been before that Court, and differed from *Lord Shaftesbury's case*, because he was a member of the House of Peers, and they might have other powers over their own members than they had over their fellow subjects without doors. He said, "The Court cannot judge of the return; first, because they were committed by another law, and consequently we cannot discharge them by that law by which they were not committed." Now that is perfectly correct; they had been committed by another law, that is by the law of Parliament; and those who were the primary Judges of the law of Parliament had determined that they had been guilty of a breach of privilege. He says, "There is a lex Parliamenti; for the common law is not the only [100] law in this kingdom; and the House of Commons do not commit men by the common law, but by the law of Parliament. The House of Lords have a power of judicature by the common law upon writs of error, but they cannot proceed originally in any cause. But they proceed too in another manner in the case of their own privileges; and therein the Judges do not assist, as they do upon writs of error; and their proceeding in that case is by the lex Parliamenti. So the Commons have also a power of judicature, and so is 4 Inst. 23; but that is not by the common law, but by the law of Parliament, to determine their own privileges: and it is by this law that these persons are committed. This Court may judge of privilege, but not contrary to the judgment of the House of Commons; which yet we must do in this case if we discharge these persons from their imprisonment; which is the only judgment the House of Commons can give upon their determination that these persons have been guilty of a breach of their privileges." Pursuing, then, the reason of Mr. Justice John Powell; how can this Court determine that this action of trespass is maintainable against the officer who executed the process of the House of Commons; without determining, that the House acted wrong in coming to that resolution, and issuing that process? "This (he says) is drawing the plea ad aliud examen; and yet the House of Commons are the supreme Judges of their own privileges. This Court judges of privilege only incidentally; and so it did in *Benyon's case*, and in the case of *Ashby* v. *White:* for when an action is brought in this Court, judgment must be given one way or other." That is the reason why the Court must decide upon questions of [101] privilege. Then he proceeds to exemplify it by saying: "So they do in ecclesiastical matters, when a question of that nature arises in an action brought before them; as in the case of the Quaker's marriage depending in the Court of Common Pleas: but their judgment will not bind the Ecclesiastical Court: and therefore if such a marriage should be adjudged at law to be a good marriage, and yet afterwards the parties should be cited into the Ecclesiastical Court for living in fornication, and excommunicated, and taken upon the capias excommunicatum, this Court could not discharge them upon a habeas corpus. So here the Court of Parliament, he said, was a superior Court to this Court; and though the King's Bench have a power to prevent excesses of jurisdiction in Courts, yet they cannot prevent such excesses in Parliament; because that is a superior Court to them, and a prohibition was never moved for to the Parliament," &c. That is an express authority, that where a party is committed by the House of Commons for a contempt

(*a*) 3 Wils. 205.

in a breach of their privileges, and is brought before this Court upon a habeas corpus, this Court will not inquire whether he has been guilty of a breach of privilege or not; but the Court will say, that the decision of that question does not belong to them; the necessity of deciding it does not exist; and that having been already decided in the very case by more competent Judges of the subject, this Court cannot reconsider their judgment; but presuming it to be right, and that they have proceeded in the legal course; this Court cannot undertake to say that that which was done in the execution of a judgment pronounced by a competent authority was illegal, because they might be of opinion that the original judgment was wrong; inasmuch as the matter of that judg-**[102]**-ment belonged to the House, and not to this Court, and they were bound conclusively by that judgment upon the very point. The Court recollects the manner in which the House of Commons proceeded against Lord Chief Justice Pemberton, and the other Judges of this Court (*a*). But without entering

(*a*) This alludes to proceedings in the House of Commons in 1689, 1 Wil. & Mary, against the Judges of K. B. upon occasion of a judgment given by them so long before as in Easter term 34 Car. 2, in an action of trespass brought by one Jay against Topham, the serjeant at arms of the House, for arresting and imprisoning the plaintiff. To which the defendant pleaded an order of the House for arresting Jay and bringing him to the Bar, by virtue of which the defendant took and detained him for that purpose; and this was pleaded to the jurisdiction of the Court, instead of being pleaded in bar to the action. On which there was a demurrer; and the Court adjudged that the defendant should answer over on account of the informality of the plea. This in substance is the account given of the prceeeding by Lord C. J. Pemberton, when summoned with the other Judges of the Court before the House of Commons to answer for their conduct on that occasion; as it may be collected from the journals, and 8 St. Tr. 2. But as there is no account of the pleadings in that case in print, I have subjoined so much of them as is material from a copy of the record, with which I have been furnished. The record is intitled of Hil. 33 & 34 Car. 2, in B. R. Rot. 1165. The declaration is in the common form by John Jay against John Topham, for a trespass, assault, and false imprisonment, and detaining him in custody for 10 days, until the plaintiff paid 30l. for his liberation.

Plea.—Et prædictus Johannes Topham per R. G. attornatum suum venit, et defendit vim et injuriam, et dicit quod curia dicti domini regis nunc hic cognitionem placiti prædicti habere non debet; quia dicit, quod ad parliamentum domini regis inchoatum et tentum apud Westm. &c. ipse idem Johannes Topham fuit Serviens ad arma legitime constitutus, et attendens milites, cives, et burgenses parliamenti prædicti in parliamento illo tunc assemblatos, scilicet apud Westm. &c. quodque ipso prædicto Johanne sic Serviente ad arma existente, per milites, cives, et burgenses prædictos in parliamento prædicto in Domo Communium ejusdem parliamenti sic assemblatos ordinatum et præceptum fuit ipso prædicto Johanni Topham, secundum legem et consuetudinem parliamenti, quod ipse prædictus Johannes Topham prædictum Johannem Jay adduceret ad barram domûs illius in custodiâ ipsius Johannis Topham; virtute cujus quidem ordinis et præcepti, durante sessione parliamenti prædicti, ipse idem Johannes Topham prædictum Johannem Jay cepit et detinuit ad adducendum ipsum Johannem Jay ad barram prædicti Domûs Communium prædictorum; quæ quidem captio et detentio ex causâ prædictâ est eadem insultus, captio, et imprisonamentum prædicti Johannis Jay in narratione prædictâ superius fieri supposità: ideoque materia illa per milites, cives, et burgenses parliamenti in parliamento assemblatos, et non alibi, examinari et determinari debet. Et hoc paratus est verificare. Unde non intendit quod curia dicti domini regis nunc hoc placitum prædictum ulterius cognoscere velit aut debeat, &c.

To this plea the plaintiff demurred.—Et prædictus Johannes Jay dicit, quod pro aliquâ per prædictum Johannem Topham præallegatâ, curia dicti domini regis nunc hic cognitionem placiti prædicti habendi precludi non debet; quia dicit quod placitum prædictum per ipsum J. Topham modo et formâ prædictis placitatum, materiaque in eodem contenta minus sufficientia in lege existunt ad curiam dicti domini regis nunc hic a cognitionem placiti prædicti habendo precludendum: ad quod quidem placitum modo et formâ prædictis placitatum necesse non habet, nec per legem terræ tenetur aliquo modo respondere. Et hoc paratus est verificare. Unde pro defectu sufficientis responsi in hac parte, ipse idem Johannes Jay petit judicium, et quod curia dicti

into the [103] discussion, whether the plea in that case was to the jurisdiction, or in bar; (for whatever it was called, it must have operated, if at all, as a plea in bar;) that case shews [104] what the opinion of the Judges of this Court then was upon that subject; though they sturdily refused to recede from the judgment they had pronounced, and chose rather to suffer imprisonment than to apologise for doing that which they thought right. But Lord C. J. Pemberton said upon that occasion: "It is allowed by all people living, I think no Judge ever denied it, that the order of this House was sufficient to take any one into custody: no Judge, I presume, ever thought otherwise. But if this be pleaded to the jurisdiction here, the hands of the Court are closed; so that whether he had such an order or not is not to be inquired of by the Court. But if it be pleaded in bar, so it is a good bar; and he will have as much advantage as any; and all people must allow it is a good bar. Therefore I would pray you (the House), that you would consider that in this case, here is nothing of your privileges, nothing of the jurisdiction of this Court, is called in question, but only the manner of making use of it."

[Lord Ellenborough, C.J. It is surprising upon looking at the record in that case, how a Judge should have been questioned, and committed to prison by the House of Commons, for having given a judgment, which no Judge who ever sat in this place could differ from. The plea there began as a plea in bar, and concluded in abatement. There was a special demurrer, too, alleging for cause, that the plea did not answer the whole matter of the declaration. I do not see how any Judge, sitting in judgment upon a record so framed, could possibly have [105] given any other judgment than the Court gave in that case. But you are not interested in defending that commitment. The Attorney-General observed, that probably the matter was not so well understood at that time. Lord Ellenborough, C.J. It was after the Revolution, which makes such a commitment for such a cause a little alarming. It must be recollected, that Lord C. J. Pemberton stood under the disadvantage, at that period, of having been one of the Judges who had sat on the trial of Lord Russel (*a*), and therefore did not stand high in popularity after the Revolution, when the judgment and attainder in his case had been recently reversed by Parliament (*b*). I would not, however, have it for a moment supposed, that I cast the least reflection upon Lord C. J. Pemberton for his conduct in Court upon that trial. He was a man of eminent learning; and being no favourite of either party at that time, for he was shortly after that trial

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domini regis nunc hic placitum prædictum ulterius cognoscere vellet, et quod idem Johannes Topham ad billam prædictam ulterius respondeat, &c. Et pro causis morationis in lege super placito illo, idem Johannes Jay, juxta formam statuti, &c. ostendit, et curiæ hic demonstrat, has causas subsequentes, vid., eo quod placitum prædictum superius placitatum ad jurisdictionem curiæ domini regis nunc hic non est placitabile post plenam defensionem factum: ac quod placitum illud et totaliter insufficiens et minime respondet ad totas materias in narratione prædictâ superius specificatas; et caret substantiâ et formâ, &c.

The joinder in demurrer is in the common form, insisting upon the sufficiency of the plea.

Sed quia curia dicti domini regis nunc hic de judicio suo de et super premissis reddendo nondum advisatur, &c. a future day is given to the parties: and there the roll in this cause ends.

In the next term, viz. Easter, 35 Car. 2, Rol. 101, there is an entry of a declaration of Jay against Topham, for 30l. money had and received: to which Topham pleaded the general issue; but no further proceedings in this cause are stated. It is observable that Topham's plea to the first declaration takes no notice of the charge of continuing the plaintiff in custody till payment of the 30l.; to which the latter part of the demurrer evidently applies. This is alluded to by Lord C. J. Pemberton in assigning the reasons of his judgment to the House of Commons. "If (says he) Mr. Topham had abused his authority, and done any outrageous thing; if, when he had an order to bring a member to the Bar of this House, he had kept him extravagantly, and not brought him thither, but exacted money of him: if the case in fact were so; it it certain he ought to have been punished, and to return damages to the person injured." Sir Thomas Jones spoke more precisely to this point in the passage afterwards cited by the Attorney-General.

(*a*) 3 St. Tr. 705. (*b*) 1 W. & M.

removed from his situation (*c*), [106] was probably an honest man. Nor can I find fault with his direction in matters of law upon that trial. The Attorney-General having also described Lord C. J. Pemberton, with reference to his examination before the House of Commons, as one of the boldest Judges who ever spoke: his Lordship observed, that Lord C. J. Holt was a still bolder Judge; for when he was summoned before a committee of the House of Lords appointed to hear and report his reasons to the House for his judgment in *The Banbury case* (*a*)[1], he said, that if the record were removed before the peers by error, so that it came judicially before them, he would give his reasons very willingly; but he would not be questioned for the reasons of his judgment in that manner. This happened within a few years after the proceeding against Lord C. J. Pemberton, which no doubt Lord Holt had then in his contemplation. The Attorney-General then observed, with reference to *The Banbury case*, that the ground on which the judgment by the House of Lords against the claim of peerage (which judgment was replied by the then Attorney-General to the plea of peerage and misnomer pleaded to the [107] indictment for murder in that case,) was held not to conclude the question, was because the proper course had not been pursued to bring the question of peerage in judgment before the Lords; and therefore it was coram non judice; for the resolutions of the Lords in that case were taken upon a petition from the defendant to the House itself to be tried by his peers; whereas the proper course for the trial of the right of peerage is by petition from the claimant to the King; who thereupon, if he have any doubt upon the matter, refers it to the Lords to examine into it, and make their report of it to him; and upon their report the King determines it. This statement was assented to by Lord Ellenborough, C.J., who observed, that the record was set out in Tremaine (*b*), and the point very fully and clearly stated in Skinner (*a*)[2]: and added, that though the Lords appeared to have had full jurisdiction

(*c*) Sir Francis Pemberton was Chief Justice of the Court of C. B. at the time of Lord Russel's trial at the Old Bailey on the 13th of July 1683, and was succeeded by Sir Thomas Jones in the September following. A memorandum in p. 10 (of the second series of paging) of the great quo warranto case against the City of London, says that when the demurrer was joined, viz. Mich. term, 34 Car. 2, (A.D. 1682,) Mr. Serjt. Pemberton was Chief Justice of the K. B.: but before Hilary term, that it came to be argued, he was removed and made Chief Justice of the C. B., and Sir Edmund Saunders was made Chief Justice of the K. B. And it appears from p. 119, (the last series of paging) of the same book, that judgment was given in Trinity term, 35 Car. 2, and that Lord C. J. Saunders died either the day on which judgment was given, or the next day.

Amongst the rolls in the Crown-Office of K. B. I found writs tested Edmd. Saunders in Hilary term 34 & 35 Car. 2. Amongst others there is one so tested on 29th of January, 34 Car. 2, and another on 12th Feb. 35 Car. 2, the commencement of the reign being on the 30th of January. The writs continue tested by Saunders into Trinity term, 35 Car. 2; one so tested was of the 8th of June, 35 Car. 2. But on the 27th of June, 35 Car. 2, they are tested Thomas Jones, who was then the senior Puisne Judge of the Court, in whose name writs are tested on the vacancy of the Chief Justiceship. From the number of writs tested on the 27th of June, it seems as if it was the last day of Trinity term in that year. The first writ I found upon the roll tested George Jefferyes as C. J. was of the date of the 23d October (1), 35 Car. 2; the next is of the 3d of November: though Rapin, 2 vol. 733, says that Sir Geo. Jefferies was appointed C. J. of K. B. in December 1683.

The Chronica Judicialia states that Sir Francis Pemberton was appointed Chief Justice of the C. B. on the 22d of January 1682; which, as the civil year then began in March, answers to the day before Hilary term, 34 & 35 Car. 2; and in Trinity term following, i.e. Tr. 35 Car. 2, which was just before the trial of Lord Russel, it appears by the Book of Fines in C. B., that Sir Francis Pemberton, as Chief Justice, took acknowledgments of fines in that term. The Chronica Judicialia mentions the appointment of Sir Thomas Jones as Lord Chief Justice of that Court on the 29th of September 1683.

(*a*)[1] 1 Ld. Raym. 18. (*b*) Trem. 11.

(*a*)[2] Skin. 517, 522, 5; and vide 8 St. Tr. 49, which contains the account of the whole proceedings, including those in the House of Lords.

(1) This was before the last contraction of Mich. term by st. 24 G. 2, c. 48.

upon the question, whether or not they would grant a certiorari for removing the record; yet, (without meaning to commit himself upon the question,) perhaps it might be considered that they had out-stepped the bounds of their province in adjudicating upon the petitioner's right to the peerage, without a direct reference to them from the Crown upon the subject.]

The Attorney-General, in continuation, referred to a subsequent part of Lord C. J. Pemberton's defence before the House of Commons. "In this case, if Mr. Topham comes and pleads this by way of bar, no Court will deny but it is a good justification: he has answered to the thing, and justified what he has done: your authority will be allowed; but the question is, **[108]** whether this shall stop the Court that they shall not examine it; for any man living may plead such a plea. Now the putting him to plead this by way of bar is only to see whether what he hath pleaded is true. As to all other cases, when you allow that where they do any thing in prosecution of an Act of Parliament, they shall give it in evidence under the general issue; this is by way of bar, and you do in no way oust the Court of its jurisdiction." Being called upon again at a subsequent time to state further reasons for his judgment, he gave his opinion more at large; in the course of which he says then: "I did consider with myself that if this plea should be over-ruled, the defendant was at no prejudice; for the same matter might be pleaded by way of bar; and it would have been admitted a good bar, if true; and he could have no manner of prejudice, that I know of, by pleading as the Court directs. We did not question the legality of your orders, nor the power of them; but the great business was, whether he had pursued this order of the House of Commons; and that was the thing properly examinable." Again, he says, "No man would have said that the House should not have made such an order; or that he should not have executed it in the way you intended it." So that the jurisdiction of the House to commit in that case was completely recognized by Lord C. J. Pemberton. Sir Thomas Jones says, "I think Mr. Topham was advised and told, that he ought to plead this matter in bar; wherein there would be full consideration and perfect regard given to the commands and authority of this House, and all imaginable reverence. If he had but produced a copy at most of your **[109]** 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. But Mr. Topham thinks it not fit at all to answer in this plea to the taking the 30*l.*; to which, if it were extortion upon the subject, I am sure that whosoever has a care of the rights of the subject, as you have, would not have suffered the subject to have gone without remedy and satisfaction."

[Lord Ellenborough, C.J. Lord C. J. Pemberton had no occasion to make any excuse for his conduct: the plea was bad in the whole of it. Part of the cause of action alleged in the declaration was for detaining the plaintiff till he had paid a sum of money for his deliverance: the defendant pleaded the warrant of the Speaker to the serjeant at arms, to bring the plaintiff to the Bar of the House, but said nothing about detaining him till the payment of the money. It had a double vice: it was bad in that respect, and also as being pleaded both as a plea in bar and in abatement to the jurisdiction: there could not be a more clearly defective plea; and the Court could not have decided otherwise than they did, unless they had been grossly ignorant or inattentive to their duty. But the Judges were at the same time perfectly agreed upon that which is the question here, viz. the right of the House to commit for contempt.]

The Attorney-General.—Then there is the opinion of those two learned Judges, that this would be a good justification, if pleaded in bar. The next material authority is *The King* v. *Murray* (*a*), in 1751, where upon a habeas corpus issued, it was returned, "that the prisoner was, by an order of the House of Commons, committed to Newgate for a high contempt of that House;" and it **[110]** was moved to bail him upon the Habeas Corpus Act, (3 Car. 2, c. 2,) which it was said was of higher authority than an order of the House of Commons. Wright, J. says: "It appears, upon the return of this habeas corpus, that Mr. Murray is committed to Newgate by the House of Commons, 'for a high and dangerous contempt of the privileges of that House:' and it is now insisted upon at the Bar, that this is a bailable case within the meaning of the Habeas Corpus Act. To this I answer, that it has been determined by all the Judges to the contrary; that it could never be the intent of that statute to give a Judge at his

(*a*) 1 Wils. 299.

chambers, or this Court, power to judge of the privileges of the House of Commons. The House of Commons is undoubtedly a high Court; and it is agreed on all hands, that they have power to judge of their own privileges: it need not appear to us what the contempt was, for if it did appear, we could not judge thereof. Lord Shaftesbury was committed for a contempt of the House; and being brought here by a habeas corpus, the Court remanded him. And no case has been cited where ever this Court interposed. The House of Commons is superior to this Court in this particular," &c. Dennison, J. says, "In this case we granted the habeas corpus, not knowing what the commitment was for: but now it appears to be for a contempt of the privileges of the House of Commons. What these privileges (of either House) are, we do not know: nor need they tell us what the contempt was; because we cannot judge of it; for I must call this Court inferior to the House of Commons, with respect to judging of their privileges and contempts against them," &c. Then Mr. Justice Foster, who will not be suspected of truck-**[111]**-ling to the authority of the House, or of deserting the rights of the subject, for the purpose of recommending himself to persons in power, says: "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. All Courts of Record, even the lowest, may commit for a contempt. And Lord Holt, though he differed with the other Judges, yet agreed that the House might commit for a contempt in the face of the House." [Lord Ellenborough, C.J. There Mr. Justice Foster states Lord Holt's opinion much more narrowly than it is laid down in the report of Lord Raymond. He did not confine it to contempts in the face of the House. And Lord Holt, is the stronger witness in favour of their general power to commit for breach of privilege, because he was arguing against the power exercised by the House on that occasion. He there says: "He made no question of the power of the House of Commons to commit: they might commit any man for offering any affront to a member, or for a breach of privilege: nay, they might commit for a crime, because they might impeach." He must be understood, however, with some limitation, when speaking of their power to commit for a crime, because they may impeach: it must be understood of a commitment for the purpose of impeachment.]

The case of *The King* v. *Crosby* (*a*), which follows next, was as much litigated as any case ever was. No attempt was left untried in order to beat down the authority of the House of Commons in that commitment; but no Court (*b*), or Judge (*c*) in either **[112]** of the Courts, was to be found, who expressed the slightest shadow of doubt upon the legality of the commitment; and no attempt was made to carry the case further. If it had entered into the mind of any man to conceive that the party, though not entitled to his discharge under a habeas corpus, might still have brought his action against the officer who arrested, or the gaoler who detained him, there can be no doubt but that experiment also would have been made. Upon that occasion the same doctrine was laid down by the Court of Common Pleas, as had been before maintained by Mr. Justice John Powell, in the case of *The Queen* v. *Paty* (*d*). Speaking of that case, Lord C. J. de Grey says, "In the case of the Aylesbury men, the counsel admitted, Lord C. J. Holt owned, and the House of Lords acknowledged, that the House of Commons had power to commit for contempt and breach of privilege. Indeed, it seems they must have power to commit for any crime, because they have power to impeach for any crime. When the House of Commons adjudge any thing to be a contempt or a breach of privilege, their adjudication is a conviction, and their commitment in consequence is in execution; and no Court can discharge or bail a person that is in execution by the judgment of another Court. The House of Commons, therefore, having authority to commit, and that commitment being in execution, the question is, what can this Court do? It can do nothing when a person is in execution by the judgment of a Court having a competent jurisdiction; in such case this Court is not a Court of Appeal." After much more to the same purpose, Lord C. J. de Grey proceeds: "There is a **[113]** great difference between matters of privilege coming incidentally before the Court, and being the point itself before the Court: in the first

(*a*) 3 Wils. 188. 2 Blac. Rep. 754. 11 St. Tr. 335.

(*b*) The application to the Court of Exchequer was made by Mr. Alderman Oliver, who stood in the same situation, 2 Blac. Rep. 758.

(*c*) An application was made to L. Mansfield, C.J. of B. R. in the vacation.

(*d*) 3 Wils. 199.

case the Court will take notice of them, because it is necessary in order to prevent a failure of justice. As in *Lord Banbury's case*, where the Court of K. B. determined against the determination of the House of Lords: but in that case they considered the legality and validity of the letters patent, without regarding the other right of a seat in the House of Lords, with which the Court did not concern themselves." [Lord Ellenborough, C.J. In that respect Lord C. J. de Grey was incorrect: that is not a true statement of the decision in that case. The Court of K. B. held, amongst other things, that the Lords had no authority, upon a mere petition for a certiorari to make a binding decision upon a right of peerage (*a*)[1].] Lord C. J. de Grey afterwards adds, that that case differs much from those which the Court would determine, "because it does not come incidentally before us, but is brought before us directly, and is the whole point in question; and to determine it, we must supersede the judgment and determination of the House of Commons, and a commitment in execution of that judgment." He then proceeds to answer the argument that had been raised, of the possible abuse of such a power by the House of Commons; which he shews would hold also against every other jurisdiction: and concludes with referring to the decisions in the cases of *Lord Shaftesbury* and *Mr. Murray;* in the latter of which he says, that "all the Judges agreed that he must be remanded, because he was committed by a Court having competent jurisdiction. **[114]** Courts of Justice have no cognizance of the acts of the Houses of Parliament, because they belong ad aliud examen." All the Court agreed that the Lord Mayor should be remanded. A habeas corpus was also moved for by Alderman Oliver (*b*), in the Court of Exchequer, and the Barons were unanimously of opinion with the Court of Common Pleas. No writ of habeas corpus was sued out returnable in this Court. But it was still open to them to have brought actions of trespass, if so advised; for the order of remand upon the several writs of habeas corpus could not have been pleaded in bar to such actions; and the not bringing any actions shews the opinions of those who advised the parties, that no such actions could have been maintained; for if the Judges had so thought, they would have delivered the parties out of custody instead of remanding them to imprisonment. It is sufficient to advert to *The King* v. *Flower* (*a*)[2], not as containing any new doctrine, but merely as being the more recent case, and because it was brought before this Court; and for the purpose of observing, that no action of trespass was brought against the officers who had the custody of that person.

Here, then, is a concurrent stream of authorities, including all the text writers of the law and of the history of the times, and all the adjudged cases, all concurring in support of the right of the House of Commons to commit for contempts in breach of their privileges, and that they are the judges of what those privileges are, and whether those who are accused before them have been guilty of a breach of them; and that when they have decided that a party has committed a breach of privilege, and have directed that he should be imprisoned for such breach, and have ordered their officer to issue warrants for his apprehension and detention, which warrants have **[115]** been executed; their judgment is final, and cannot be questioned in any other Court whatever. That is the present case. The House of Commons have determined that Sir F. Burdett has been guilty of a contempt and a breach of their privileges; they have for that contempt adjudged him to imprisonment in the Tower; they have in execution of that judgment ordered their officer, the Speaker, to issue his warrant for the purpose of executing that judgment; the Speaker has issued his warrant in obedience to their order; the officer to whom it was directed has executed it; and for that cause the present action of trespass is brought against the officer of the House. The cause, then, has been directly decided by the House of Commons, inasmuch as this authority ascends in a direct and unbroken line from the act complained of to the power which directed it: the complaint is of the arrest and imprisonment; those acts were done in the execution of the warrant; the warrant was issued by the Speaker of the House of Commons; the Speaker was ordered to issue it by the House of Commons; and the House, having jurisdiction over their own privileges, and over those who break

(*a*)[1] Vide the 4th reason in *Rex et Regina* v. *Knollys*, Salk. 511. "Here was no judgment: a Court can give no judgment in a thing not depending, or that does not come in a judicial way before that Court," &c.

(*b*) 2 Blac. Rep. 758.

(*a*)[2] 8 Term Rep. 314.

them, had previously resolved that Sir F. Burdett had been guilty of a breach of the privileges of the House, had sentenced him to imprisonment, and directed this warrant to issue in execution of that judgment.

With respect to the critical objections taken to the form of the resolutions of the House, and of the warrant referring to them; it is not necessary to trouble the Court. The House of Commons is not bound by nor tied down to technical forms: it is enough that the Court see in substance what the plain meaning of the resolution is, of which there can be no doubt. There appears to have been a gross libel upon the House of Commons published in a periodical paper: which libel is ad-[116]-mitted by Sir F. Burdett to have been printed by his authority; and the House upon that resolved that he was guilty of a breach of their privileges; and the Speaker, in obedience to their order, issued his warrant, under which the plaintiff was arrested and committed to the Tower.

There remains only the question upon the breaking of the house; the outer door being shut. It was stated, that this not being a proceeding at the suit of the Crown, the defendant cannot justify the breaking open of the plaintiff's house, although he was within at the time, and had had due notice of the cause of the officer's coming, and had refused, upon request, to admit the officer for the purpose of executing the warrant. And it is said, that there is no case in which the officers of justice are authorized to break open the outer door, except where the King is a party. But that is not a correct statement of the law. The King being a party is only put by way of illustration; the question is whether the process be issued at the instance of a private person, in assertion of a private right, or at the instance of a public authority in the assertion of a public right, where the public weal is interested in the execution of it. The distinction is between public and private rights, and public and private wrongs. Where an individual right only is concerned, the law, weighing the inconvenience of delay on the one side, and the consequence, on the other side, of protecting a man within his own house against a forcible entry, and of preserving the public peace, has judged, upon the whole that it is better that he to whom money is due should be put off for a time from enforcing payment of it, or in ascertaining any other private right, than that the public peace should be endangered by entering violently into a man's house in which he is residing. But where the process to be executed is matter of [117] general concern, in which the public at large have an interest; there the public interest is to be preferred to the privilege of the individual in the security of his house. That such is the principle of the cases will appear upon examination of them. One of the cases referred to was from the Year-Book, 13 Edw. 4, fo. 9: look then at the reasoning of that case. Brian says, it was held that for felony, or suspicion of felony, a man may break the house to take felons: the reason assigned for which is because it is for the common weal to take them: that is, in other words, because the public have an interest in it. And also, Choke says, that the King having an interest in it, the writ is with a non omittas propter aliquam libertatem, &c.: so that the liberty of his house shall not avail him: but otherwise it is for debt or trespass, where neither the sheriff nor any other can break the house to take him; for this is only the particular interest of the party. So that the reason assigned, and the distinction taken is, that where the interest of the public is concerned, there the door may be broken to make the arrest; but where the interest of the private individual only is concerned, it cannot be broken. The same doctrine is laid down in *Maleverer* v. *Spinke* (*a*), where, after putting several cases in which a man may justify the commission of a trespass, where it sounds for the public good, the Court say: "So also is it if the sheriff pursue a felon to a house, and, in order to take him, break open the doors of the house; that is justifiable, because it is for the public good that such felons should be taken. But it is otherwise in particular cases; as if the sheriff break open the house to arrest one within the house, by virtue of a capias in debt or trespass, he shall be punished; for this was a particular [118] case, and is not for the public good." So far is this principle carried, that even for a debt of the King the outer door may be broken; because the public are interested in the collection of the King's revenue; and that which is due to him, or withheld from him, though but for a time, is a wrong to the public, inasmuch as it is withdrawing from him the means of public supply for the support and protection of the State. Mr. Justice Foster (*b*) expresses himself to the

(*a*) Dy. 35 a. (*b*) Fost. Cr. L. 320, 1.

same effect, when, treating of the subject of homicide, he confines the privilege of not having the doors of a mansion-house forced to arrests upon process in civil suits: but the principles of political justice, he says, that is, the justice due to the community, ne maleficia remaneant impunita, all conspire to supersede every pretence of private inconvenience. This is the doctrine which is to be collected from all the cases; looking beyond the mere words used for illustration. *Semaine's case* (*a*)[1], however, is cited as an authority against the right to break the outer door, except where the King is party to the suit. But no such doctrine is there laid down; though it is said that the privilege of the House does not hold against the King's officer where he is a party: and that rests upon the earlier authorities, to which, therefore, recourse must be had in order to see the foundation of the doctrine. The same case is also reported in Cro. Eliz. 908, by the name of *Seaman* v. *Gresham:* and here it appears that the Court were at first divided; but at the conclusion there is this note: "Afterwards in Michaelmas term, 2 Jac. this cause was argued again; and Williams agreed with the opinion of Yelverton and Fenner in omnibus; and that the sheriff might not break any man's house to take execution, unless in the Queen's case, or **[119]** for a contempt, &c." This is a decisive authority, and is explanatory of every thing that hath been said. One other authority may be added to these, which is *Briggs's case* (*b*), thus shortly reported by Lord Rolle: "In *Mr. Briggs's case* upon an attachment against him, Coke said, that an attachment is a non omittas in itself, and for this the sheriff may break the party's house to take him; for the writ is for his person." It has been suggested that this may have been the case of an attachment for a breach of the peace, upon articles of the peace exhibited against the party: but the Attorney-General said he had caused inquiry to be made into the progress of it, and the office to be searched for what had preceded the attachment in that cause; and it appeared that the attachment issued, not upon articles of the peace, but for a contempt; (though it does not appear what the contempt was;) which coincides with what is stated in Coke's report of *Semaine's case*. Lord Rolle's report of *Briggs's case* states what passed in Hilary term 13 Jac. 1; and by a rule of Court made in the Michaelmas term preceding, it appears that this was an attachment for a contempt; for the rule directs, that unless the Sheriff of Shropshire returns the attachment of contempt against Richard Briggs, he shall be amerced 100l.; and in the Hilary term, to which the report refers, the Court made another rule, that unless the sheriff returned the attachment of contempt against Briggs, he should **[120]** be amerced 10l.(*a*)[2]. This is an express authority in point that, upon an attachment for contempt, the sheriff may break open the door of the house, if necessary to execute the process.

The public are mainly concerned in supporting that process which is issued for the public good; and this Court will not so degrade and vilify the House of Commons as to say that that which is a contempt of their privileges is not to be visited in the same way as contempts against the ordinary Courts of Justice. The public are as deeply interested in vindicating the privileges of the House of Commons from contempts committed against them as against any Court whatever. In cases of contempt, more than in most others, the permitting any resistance to process would, in such a crowded metropolis as this, daily add thousands to those who were disposed to resist, and would be subversive of the obvious policy of the law.

Having then shewn that the right of the House so to deal with the offence and the offender is indisputable; and that their judgment upon the matter cannot be questioned by this Court; and that if it could be questioned, it would be found legal in all its parts; and that the manner in which the process has been issued is strictly legal; nothing more remains to be answered.

Holroyd, in reply, said that, though the bearing of much of his former argument upon the present case had been questioned; yet he trusted that he had established

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(*a*)[1] 5 Rep. 91 b. 92. (*b*) Roll. Rep. 336.

(*a*)[2] The rules referred to by the Attorney-General run thus: "Saturday next after the morrow of All-Souls, 13 Jac. 1, Salop, Ss. Unless the sheriff shall return the writ of our lord the King of attachment of contempt against Richard Briggs on Monday next after the morrow of All-Souls, let him be amerced at 100l."

"Thursday next after the octave of St. Hilary 13 Jac. 1, Salop, Ss. Unless the sheriff of the said county shall return his writ of attachment of contempt against Briggs on Monday next after fifteen days of St. Hilary, let him be amerced 10l."

several very important points. It is important to have established, first, the authority of the cases before cited, asserting and recognizing the jurisdic-[121]-tion of this Court to take cognizance of the privileges of Parliament, and to decide upon them when any question concerning them arises incidentally before it, which is necessary for the case in judgment. And it was the more necessary to do this, on account of the dicta *thrown out upon the habeas corpus cases by different Judges, that they could not* take cognizance of those privileges. Secondly, that the House of Commons cannot, by their single resolution, without the rest of the Parliament, either make or declare the law: that they cannot of themselves make a privilege; for that would in effect be making a law: and that this has been declared both by the Courts of Law and by the conduct of the Parliament itself; because in several of the cases the Commons had claimed privileges, which were questioned in the Courts of Law, and disallowed by the Parliament. Thirdly, that the cases upon the habeas corpus, supposing them well founded to the extent they have gone, have been materially distinguished from the present case, by shewing that the question of privilege came in those instances before the Court directly, and not incidentally, as here. The Courts in those cases treat it as a matter of no consequence what the return was, so that it shewed a commitment by either House of Parliament for a contempt; because whatever the particular contempt was stated to be, they say they could not take cognizance of it. In *Lord Shaftesbury's case* (*a*), Sir Thomas Jones, J. says, that "such a return made by an ordinary Court would have been ill and uncertain; but the case is different when it comes from the High Court." There the commitment was by the House of Lords for a contempt. And he proceeds to distinguish that from "the cases where the [122] Courts of Westminster have taken cognizance of privilege; for in those it was only incident to a case before them, which was of their cognizance; but the direct point of the matter now is the judgment of the Lords." In that case he proceeds to consider that the Court had no jurisdiction to annul the act of the Lords. In like manner as in the case of a commitment for a contempt by this Court, the Court of Common Pleas could not discharge the party, because they have no direct authority or jurisdiction, either by writ of error or otherwise, over any thing done by this Court. And this would hold, whether the warrant of commitment was legal or not. In the same case Wilde, J. said: "The return, no doubt, is illegal, but the question is upon a point of jurisdiction, whether it can be examined here." And Rainsford, C.J. said: "This Court hath no jurisdiction of the cause, and therefore the form of the return is not considerable." If one Court took upon itself to discharge a prisoner committed by another Court of co-ordinate or superior authority for a contempt, whatever the particular contempt was stated to be, or whether it was stated particularly at all, provided it was stated generally to be for a contempt, it would necessarily lead to a conflict of jurisdiction between the two Courts: but no such conflict arises in the case of an action brought by the party grieved against the officer who arrests or imprisons, in order to try the legality of such commitment, and to recover damages if it were illegal. The cases upon the habeas corpus at common law are only to be supported upon this distinction, in opposition to the former cases cited, shewing that Courts of Law have cognizance of the [123] privileges of Parliament, and of the legality of acts done by either House of Parliament, when questioned incidentally in actions before them. [Bayley, J. You have not answered the question, whether an action could lie in the Court of Common Pleas against an officer of this Court executing its warrant of commitment for a contempt, to question the legality of such a commitment: and I may also ask, whether an action would lie against the Judges, or either of them, who signed the warrant?] Certainly no action would lie against Judges: they are accountable in another way: no common proceedings in the ordinary way can go against them. But with submission to the Court, if they issued a warrant of commitment in a matter of which they had no jurisdiction at all, and which appeared so upon the face of the warrant; though the Court of Common Pleas, having no dominion over the acts of this Court, could not discharge the party upon habeas corpus; yet an action would lie there against the officer who arrested or imprisoned the party upon such warrant: for whenever an act is done which is illegal to the damage of another, an action lies: and whatever was the decision of the Common Pleas upon that action, it might be rectified, if it were wrong, by writ of error to this Court, and from thence

(*a*) 1 Mod. 157.

to the House of Lords: so that no mischief could be done, either by letting the party go unrecompensed, if he were wronged; or by invading the jurisdiction of this Court, if it appeared that their officer was properly warranted. [Lord Ellenborough, C.J. Is there any case in which, when the discharge of a person committed for contempt has been refused on habeas corpus, that any Court has held out by way of consolation to him, that, though they could not discharge him for fear of breeding a conflict between different jurisdictions, yet that he had another **[124]** remedy by an action for damages?] The want of any such intimation, or of any instance of such action brought, though it may furnish an argument against the right of action, will not conclude the question: for if it can be shewn to be contrary to the general principles of the law and constitution, that the subject should be wrongfully arrested or imprisoned in any case, without a remedy by action, the Court will still hold that such an action is maintainable. The very case of *Lord Shaftesbury* illustrates the value of the distinction; for the Lords themselves in 1680 (*a*), four years after their commitment, resolved, that all the proceedings against him were contrary to law, and should not be drawn into precedent. [Lord Ellenborough, C.J. That was a declaration, that their own proceedings in committing him were contrary to law; which would be an authority to themselves: but their resolution could not be admitted as any authority, if it extended to the proceedings in the Courts of Law. Suppose yesterday there had been a vote of the House of Commons, determining, that the proceeding under this warrant was illegal; could we, sitting here in judgment upon a demurrer, consider what had so taken place upon that subject? It might put an end to the consequences of that commitment so far as depended upon the House itself; but how could it affect the law of the question in discussion before us?] The right of action, notwithstanding a refusal to discharge the party committed on habeas corpus, is more strongly evinced in the result of *Sir Thomas Darnel's case* (*b*), which was a commitment by the Privy Council, and by the special command of His Majesty; the **[125]** Court, upon application, refused to discharge him from that commitment; considering themselves concluded by the warrant from examining into the legality of the cause: but that case induced the Petition of Right, in which it was declared that such a warrant was illegal, in not stating the cause of commitment. Yet there had been a multitude of precedents prior to that time, in which the Judges considered that they had no authority to discharge the party, though the cause of commitment was not stated. [Bayley, J. asked, whether any actions had been brought upon those commitments, which were five in number; and was answered, that none such appeared. Lord Ellenborough, C.J. observed, that the commitments there professed to have been made by the special command of the King.] The defendants were imprisoned for refusing to lend money to the King on commissions for loans: five brought writs of habeas corpus cum causâ: the warden of the Fleet returned a warrant to him, signed by two of the Privy Council, requiring him to continue Darnel in his custody, and to let the warden know that "he was and is committed by the special command of His Majesty," &c.; which return was objected to, because the warrant did not specify the cause of commitment. The Court determined that the warrant was good, on the ground that they had no jurisdiction over commitments by the King, or the Lords of the Council. And several cases were stated from Moore, 139, in the time of Elizabeth, to shew, that they can only be delivered by the power that committed them; this Court not having a direct authority over the acts of the King in Council. And then they cite the resolution of all the Judges of England in Anderson's time, that a per-**[126]**-son so committed cannot be delivered by a habeas corpus out of this Court; for the Court knows not the cause of the commitment. If then an action would not lie against the persons issuing or executing the process, the consequence would be this; that, though the law declares that the King's prerogative is limited, and that those who do an illegal act, or execute for him any thing beyond his prerogative, are punishable for so doing; the party so unjustly and illegally restrained of his liberty would be without means of liberation for the future or remedy for the past; and there would be an unlimited power in the King and Privy Council, who would thus be enabled to make law in the particular instance. Whereas no mischief could arise in suffering an action to be brought; because if the

(*a*) Lords' Journals, vol. 13, p. 623. See also the resolutions of the Lords against the proceedings of the Commons in *The Aylesbury case*.

(*b*) 7 St. Tr. 113-137.

party under such a warrant had been wrongfully imprisoned; this Court, having cognizance of wrongful imprisonment, the cause of imprisonment alleged would only incidentally come in judgment before them; and this Court would not in that case assert any superiority over the Privy Council, whose acts they were thus necessarily obliged to review; and the ultimate adjudication of the question would go to the King in Parliament by writ of error from this Court. [Lord Ellenborough, C.J. Was the commitment in *Sir T. Darnel's case* considered as a commitment by the Privy Council, or by the King?] It was considered as a commitment by the Privy Council; but in the discussion the Court state that they have no jurisdiction over commitments by the King or by the Privy Council. [Lord Ellenborough, C.J. To be sure it could not be contended that the King himself could execute such powers: they must be executed by him through the medium of others, who are answerable if they be not legal: otherwise, all constitutional checks would be de-**[127]**-stroyed.] They sometimes used to be stated as commitments by the Council, and sometimes by the King himself, per regem in concilio; so that such commitments might be considered as the acts of such of the Council as concurred in them. But even considered as such, the acts of the Council in that case would not be controlable by law, if no action lay where they committed a person when they had no jurisdiction to do so: although the Courts of Law might have no jurisdiction to discharge the party out of custody from their commitments. Whatever body has the power of committing persons at its pleasure, as for a contempt, the right and lawful exercise of which power can neither be questioned directly upon a habeas corpus, nor incidentally in an action at law for the false imprisonment; that body, whether it be the King's Council, or either House of Parliament, has in effect an unlimited power, and is enabled to make law in the particular instance. In all Governments there must indeed be an unlimited power somewhere; but the great value of our Constitution is that it is composed of mutual checks, and that no one branch of it alone can make law in any case.

It may be admitted, that no action will lie against any member of Parliament for what he does or says, as such, in Parliament: nor will any action lie upon a mere resolution of the House of Commons, whether it be lawful or not lawful. [Bayley, J. What is Mr. Abbot but a member?] He is not questioned for what he did as a member in Parliament; but for what he afterwards did out of Parliament. [Bayley, J. The warrant is issued by the authority of the House of Commons, and as their act; but they order the Speaker, as their principal member, to sign it. Lord Ellenborough, C.J. You must make them all trespassers, or none. If the one who signs the warrant be **[128]** liable, all who commanded the act to be done must be equally liable.] Those who are directly instrumental in doing the illegal act out of Parliament may be trespassers, although the House itself would not be answerable for framing the resolution, however illegal, within their own doors. Suppose a case, however improbable, to happen, that the House were to direct the Speaker to issue his warrant to put a man to death: none of those who formed the resolution in Parliament would be responsible; but for the execution of such an order, for the act done out of Parliament, the person who issued the warrant, and those who executed it, would be responsible for murder. [Lord Ellenborough, C.J. The question in all cases would be, whether the House of Commons were a Court of Competent Jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges. When that case occurs, which it never will, the question would be whether they had general jurisdiction to issue such an order; and no doubt the Courts of Justice would do their duty.]

It is not necessary in this part of the argument to dispute whether they have a right to commit in some particular cases; but only for the right of this Court in all cases to look at the warrant and the resolution, and to see whether or not the House has kept itself within its jurisdiction: and it has only jurisdiction to commit for breaches of its privilege. Without saying at present whether a libel can in any case be a breach of privilege; at least it ought to have been averred in the plea, that the plaintiff had been guilty of a breach of privilege; and likewise it should have shewn what the libel was which they make a breach of privilege. [Lord Ellenborough, **[129]** C.J. They have come to a resolution, which is a judgment in this case; and are we to open the matter of that judgment, and say whether they came properly to that conclusion? We must look at the conclusion, and say whether that bears out the

act of their officer. Bayley, J. If we can unravel their conclusion, the County Court can do it also; for the plaintiff might have brought his action in the County Court as well as in this Court; omitting the vi et armis, and laying his damages under 40 shillings; and then the County Court would have had to decide on the fact, whether there had been a breach of privilege; whether the defendant were guilty.] The plaint would be removeable into the Superior Court. He then recapitulated his objections to the plea in bar, that it does not state that there was any libel on the House of Commons, or what the libel was, nor that that libel was a breach of privileges of the House. But whether it was so or not, that the warrant in this case was not sufficient. Notwithstanding any authority of the House to the Speaker to issue a warrant to commit the plaintiff, the Speaker is answerable if he do not issue a sufficient warrant for that purpose. If that which is stated in the warrant to be a breach of privilege be clearly not so by law, the Court is bound to decide against it according to law; and in the case of a warrant which is to take away from a man his liberty, nothing is to be inferred but what the words of themselves fairly and strictly import. It cannot be a breach of the privileges of the House to print a libel, without shewing at least that it was published; and no publication is stated: and this is an objection appearing on the warrant itself. The distinction between the question of privilege not being examinable by the Courts of Law when arising directly upon motion to dis-**[130]**-charge the party committed when brought before the Court by habeas corpus, and being examinable when arising incidentally before the same Court upon an action brought for the imprisonment, runs through and reconciles all the cases. Unless the action were maintainable in that case, the party wronged by an illegal imprisonment would be without remedy, contrary to every legal and constitutional principle: but no mischief can arise by leaving that remedy open; because there will be no conflict of jurisdiction, and the judgment of this Court is examinable in the Court of Parliament itself, by which any error in judgment may be corrected. With respect to the breaking the outer door, Lord Coke's authority in *Semaine's case* is express, that the outer door of every man's house is privileged from being broken, except only where the King is party: and Lord Coke so understands the case in the Year-Book 13 Ed. 4, fol. 9, to which he refers. And if the exception had also been extended to the case of contempts, as stated in the report of *Semaine's case* in Cro. Eliz., it is very extraordinary that so material a point should have escaped the observation of such a man as Lord Coke; and not less extraordinary that in the multitude of cases of contempt which must have occurred from that time to the present, no other than the single precedent of *Brigg's case* should be found in support of it; the circumstances of which it must be difficult at this day to ascertain, the case being so shortly and barely noticed in the report; and the leading case in the Year-Book only mentioning the breaking of doors in cases of felony or suspicion of felony. [Lord Ellenborough C.J. The law is indeed so laid down in that case; but it is an extra-judicial opinion; the point in judgment being, whether an Act avoiding all the corporations and **[131]** licences of Henry the 6th should be taken notice of as a public Act, or ought to have been pleaded as a private Act. There is no judicial determination of the point in question: therefore you do not lay the foundation for your doctrine so solidly as was to be expected. There is an earlier case in the 18 Edward 2 (*a*), which goes further, and which seems to import that upon all process in execution the outer door may be broken; but it is clear from other authorities that in civil process at the suit of any individual the outer door cannot be broken. That was expressly decided in *Cook's case* (*b*), where the very point came in judgment, whether the killing the officer in attempting to break the door to execute civil process against the party was murder or manslaughter; and it was held to be only manslaughter.]

Holroyd then expressed his anxious desire that the Court, if they had any doubt upon the question, would require another argument, on account of the great importance of the case, and of the topics which it embraced.

Lord Ellenborough, C.J. It does not appear to me with respect to the only points which are before us in judgment in this case, that any further argument is necessary:

(*a*) Vide Fitz. Abr. Execution, pl. 152, (misprinted 252,) corrected in Bro. Execution, pl. 100, from 18 Ed. 4, 4 pl. 19; and see also the report of the case of *Semayne* v. *Gresham*, in Yelv. 28.

(*b*) Cro. Car. 537.

the case has been already argued very fully and with great ability, and I do not think that further light can be thrown upon the subject by another argument. If the Court had any doubt upon the case they would certainly take further time for the consideration of it; but it **[132]** will be recollected that it has been depending for some time before us; and having been discussed at great extent, and the authorities diligently canvassed in the course of the last term, it has naturally led the Judges to look with attention into the authorities then cited, and to take a full consideration of the record before us; and upon the most mature consideration of that record, and of the law connected with the subject-matter, I own I have not a particle of doubt as to the judgment which it behoves the Court to pronounce upon this occasion.

This is an action of trespass commenced by Sir Francis Burdett, complaining of the defendant for breaking and entering his house, the outer door of it being shut, and doing this with force and a strong hand, assisted by soldiers, and taking him out of his house, putting him into a coach, and carrying him through the public streets under a military guard to the Tower of London, and there delivering him into the custody of the lieutenant of the Tower, and confining him in such custody. There are other counts in the declaration for similar trespasses against the plaintiff's person, unaccompanied by the circumstances of the breaking and entering the house, the outer door being shut: and there are also counts for false imprisonment generally, and for a common assault. The defendant, the Speaker of the House of Commons, justifies the several trespasses complained of; stating that at the time of committing these supposed trespasses a Parliament was holden and sitting at Westminster; that the defendant was a member, and also Speaker of the Commons House of Parliament, and that the plaintiff was also a member of that House. It then states a resolution of the House prior to the supposed trespasses, that a letter signed "Francis Burdett," and a further part of a paper entitled "Argument," accompanying the same, **[133]** and inserted in *Cobbett's Weekly Register*, was "a libellous and scandalous paper, reflecting on the just rights and privileges of that House:" and also "that Sir Francis Burdett, Bart., who had admitted that letter and argument to have been printed by his authority, had been thereby guilty of a breach of the privileges of that House: and that it was thereupon then and there ordered that Sir Francis Burdett should be for his said offence committed to the Tower of London, and that the Speaker should issue his warrant accordingly." It then states the issuing of such warrant to the serjeant at arms, reciting the resolutions and order of the House, which I have already stated, and commanding him or his deputy to take into his custody the body of Sir Francis Burdett, and then forthwith to deliver him into the custody of the lieutenant of the Tower. And then it states the delivery of the Speaker's warrant to the serjeant at arms. It further proceeds to state another warrant issued by the Speaker to the lieutenant of the Tower, reciting the same resolution and order of the House of Commons beforementioned; and states the delivery of this last-mentioned warrant to the lieutenant of the Tower. That, by virtue of the first-mentioned warrant, the serjeant at arms, in order to take the body of Sir Francis and deliver him to the lieutenant of the Tower, went to the messuage of Sir Francis; and because the outer door was shut and fastened, so that the serjeant at arms could not thereby enter the messuage, he, the serjeant at arms, then and there in a loud and audible voice gave notice to Sir Francis, who was then in his messuage, of the purpose for which he came, that is, to arrest him by virtue of the warrant. That the serjeant at arms required the outer door to be opened, **[134]** that he might be admitted into the house to execute the warrant; and because the outer door was not opened, but kept fast against him, and he was refused admittance, he with the aid of soldiers and armed men broke open the window and thereby entered into the house for the execution of the warrant, and made the arrest of the plaintiff; and, in obedience to the warrant, compelled him to go out of his messuage into the street, and from thence into a coach, and so conveyed him to the Tower, and delivered him into the custody of the lieutenant of the Tower.

This is the justification pleaded on the part of the Speaker; to which justification there is a demurrer: and the only points which are immediately presented by the record for our decisions are, first, whether the House of Commons has any authority by law to commit in cases of contempt as for a breach of privilege? Secondly, whether, supposing the House to have such an authority in general, that authority has been well executed by the warrant in question; that is, whether the warrant stated in the plea of the defendant discloses a sufficient ground of commitment in this instance?

And thirdly, whether the means which have been used for the execution of the Speaker's warrant are in law justifiable? The subject, as it seems to me, cannot properly be branched out and divided into more points. In argument it has indeed been dilated to a much wider extent here, and has been considered in much greater latitude as a question of controversy elsewhere, than is at all necessary for the decision of these which are the only points with which we have judicially any concern upon the present occasion. The citations made upon the first argument from the judgment of Sir Orlando Bridgeman rather tend to illustrate the character of that most eminent Judge, by **[135]** exhibiting the profundity of his learning, and the extent of his industry, than to throw any material light upon the present question. A very moderate portion of the learning there displayed by him is at all applicable to the present case. The main point decided, and properly decided, in that case was, that the privilege of Parliament, which exempted members from arrest, did not wholly suspend the right of suit against them during the entire continuance of the Parliament, at least so as to prevent the suing them by original. So a great part of the learning exhibited upon *Thorpe's case* there cited, though properly adverted to as the case itself was, bears very little on the question immediately before us. That case, which is to be found in the Rolls of Parliament, 31 H. 6, No. 26, 27, 28, decides that a suit commenced against a member might proceed to any extent in the time of the vacation of Parliament, though not in Parliament time, as it is called. *Thorpe's case* appears to be the earliest applicable to Parliamentary privilege; for the two other cases of an earlier date mentioned by Lord Coke in his 4th Institute (24), that of *John de Thoresby*, 10 Ed. 3, and of *Bogo de Clare*, 18 Ed. 1, are shewn by Sir Orlando Bridgeman in his judgment, in *Benyon* v. *Evelyn*, to have no proper reference to the privileges of the members of the House of Commons: and indeed, according to this case of *Thorpe*, as supposed by Lord Coke, it appears that the exemption from arrest was not claimed or considered as the peculiar privilege of a member of the one or of the other House of Parliament, properly as such; but as the privilege of a member of the High Court of Parliament generally: and the reason of such privilege, as given by the Judges, is one which applies equally to the members of both Houses, viz. "That they **[136]** may have their freedom and liberty freely to intende upon the Parliament." Other cases have been cited, in which the right of the subject to sue upon matters of Parliamentary cognizance has been in part recognized by the Courts. The first-mentioned of these cases however, that of *Thorpe*, respects merely the privileges of individual members, and the means of their individual protection, not the vindictive privileges of the House for offences done generally against the body of the House, in breach of the rights and privileges of the whole House collectively considered. The other cases next mentioned, of *Bogo de Clare*, and *John de Thoresby*, do not apply to this question; which is, what acts the House of Commons may justifiably do; not where, or how, such acts shall be alone brought into question.

As to the first point which arises in this case: has the House of Commons a right to commit for breach of privilege? It has been argued, that they are prohibited from imprisoning persons by the Statute of Magna Charta, and the 28 Ed. 3, c. 3: but the provision in Magna Charta directed against acts of unauthorized force, "That no man shall be imprisoned but by the lawful judgment of his peers, or by the law of the land;" and that of the stat. 28 Ed. 3, "That no man shall be put out of land or tenement, nor taken or imprisoned, nor disinherited, nor put to death, without being brought in to answer by due process of the law;" are satisfied as far as they relate to this subject, if the lex et consuetudo Parliamenti be, as Lord Coke and all the writers on the law have held that it is, part of the law of the land in its large and extended sense. At what time the two Houses of Parliament, as at present constituted and distinguished, that is, as Lords and Commons, first ceased to sit together, as originally they did, and began to have a separate existence, is a matter more of antiqua-**[137]**-rian curiosity than of legal importance. The separation of the two Houses seems to have taken place as early as the 49 H. 3, about the time of the battle of Evesham; for I think it is at that period that the first return of "knights, citizens, and burgesses" is to be found; and that separation was probably effected and previously sanctioned by a formal Act for that purpose by the King and Parliament as originally constituted. At any rate the very first subsequent Act of the Parliament, acting in the two Houses conjointly with the King, operated as a formal recognition of an antecedently authorized separation of Parliament into the two Houses in which they

then and have since sat. The privileges which have been since enjoyed, and the functions which have been since uniformly exercised, by each branch of the Legislature, with the knowledge and acquiescence of the other House and of the King, must be presumed to be the privileges and functions which then, that is, at the very period of their original separation, were statutably assigned to each. The privileges which belong to them seem at all times to have been, and necessarily must be, inherent in them, independent of any precedent: it was necessary that they should have the most complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection: I do not mean merely against acts of individual wrong; for poor and impotent indeed would be the privileges of Parliament, if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their Parliamentary functions. This is an essential right necessarily inherent in the supreme Legislature of the king-[138]-dom, and of course as necessarily inherent in the Parliament assembled in two Houses as in one. The right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must à priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument, that the House of Commons must be and is authorized to remove any immediate obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection: it must also have the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it. Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every Superior Court of Law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two Houses of Parliament in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavour to resort to the place where Parliament is holden? And would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of [139] a prosecution in the ordinary course of law, for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shews that they have in fact possessed and used. It is therefore idle to contend, as some have done, that, as the House of Commons is a body which has begun to exist separately and substantively since the time of legal memory, that is, since the return of Richard the First from the Holy Land; and that, as they cannot on that account claim by prescription or immemorial custom any power of commitment, and that no Act of Parliament since that time has expressly given it to them; therefore, that it cannot legally belong to them. I am glad that nothing of that kind has been advanced in argument upon this occasion; but it is impossible not to have heard of its having been urged elsewhere and on other occasions. And perhaps more weight has been given to the argument than seems to belong to it, from the pains that Sir Robert Atkyns (in his treatise in the form of an argument upon the information against William Williams, Esq.) has taken to answer it. For he seems to suppose it necessary, "to support the power and privilege of the House of Commons, as being an essential part of the Parliament, to make it out against these innovators, (as he calls them,) that the House of Commons has ever been a part of the Parliament, and that it was so long before the 49 H. 3;" which, as already mentioned, is the date of the first writ of summons for knights, citizens, and burgesses, now extant: admitting, "That, where the beginning of a thing is known, there can be nothing [140] belonging to it by prescription." But Selden, I observe, (Priv. of Parl. 713) acknowledges that there had been a great change in the constitution of the Parliament, but supposes it to have happened long before the 49 H. 3, namely, in the time of that King's father,

King John; (still placing it however within time of legal memory;) and he supposes that it was done by a law, though the law be lost; as many rolls of Parliament were wherein those laws were entered. But supposing the separate existence of the House of Commons to have begun only in the 49 Hen. 3, or at some other period within the time of legal memory; the answer to the objection is that some statute or Act of supreme national authority, whatever it was, by which the House then began to exist and act, and has since acted, separately, as a distinct branch of the Legislature from the Lords, and conjointly with the Lords and the King, as a Parliament, invested them, as such House, with the antecedent essential privileges which belonged to the aggregate body of Parliament, at least to the extent in which they have been ever since enjoyed by that House, and of which the subsequent enjoyment is evidence: and it would only vary the form of prescribing, if any prescription were in such case necessary, to such an one as the following; namely, that from time whereof the memory of man is not to the contrary until the 49 H. 3, all the members of Parliament, by their then name of proceres nobiles et magnates, and since the 49 H. 3 by their several names of Lords Spiritual and Temporal, and of knights citizens, and burgesses in Parliament assembled, have had and used, and now and still of right ought to have and use such and such privileges. So that if the Parliament itself, in any anterior form of its existence, be prescriptive antiquity, about which no reasonable doubt can be **[141]** entertained, the same privileges which were in such anterior form then enjoyed by it may still (if necessary so to consider it) be even technically prescribed for by Parliament in the very form into which it has since resolved itself and now subsists: unless, indeed, it can be contended with effect, that the Legislature itself is incompetent to vary the precise form in which, in time beyond memory, it appears to have existed and acted; a point which, I presume, few persons will be hardy enough to contend for. There is no pretence, therefore, for treating the privileges of the House of Commons, as some persons have treated them, as things of a novel origin and constitution, beginning within time of legal memory, and standing upon no authority of prescription or statute.

These privileges appear to have been claimed, exercised and recognized in numerous precedents almost as early as we can distinctly trace the House acting in its separate Parliamentary capacity. Without referring more at large to *Thorpe's case*, the personal privileges of Parliament are stated in it in these terms: "If any person that is a Member of this High Court of Parliament be arrested in such case as be not for treason or felony, or surety of the peace, or for a condemnation had before the Parliament, it is used that all such persons shall be released of such arrests, and make an attorney, so that they may have their freedom and liberty freely to intende upon the Parliament." I am aware that this authority in terms relates only to privileges of personal freedom from arrest, and not to the vindictive privilege of committing for contempts against the whole House. But on this latter point, not to incumber the case unnecessarily with a vast variety and quantity of matter, I would refer only generally to the case of **[142]** *Ferrers*, (very fully reported in Crompton's Jurisdiction of Courts;) *Trewynard's case*, in Dy. 59; *William Thranwis' case*, in 1529, who was committed to the custody of the serjeant at arms for a contempt in words against the dignity of the House; *John Wentworth's case*, of the same kind, in 1575, in D'Ewes' Journal, 244; and the case of *Hall*, a member of the House of Commons, in 1580, which is also in D'Ewes' Journal, from page 291 to 298 (*a*), and which is the first instance of a libel punished by the House. In that case Arthur Hall was punished for a libel on the dignity of the House, by being committed and expelled: and he was also fined; in respect to which latter species of punishment, that of fining, the House exercised in that instance a power which they have not since been in the habit of exercising: but certainly that precedent, as far as it goes to the expulsion and imprisonment of a member, is fully sustained by more modern usage. He was committed for six months, and to be further imprisoned till a revocation and retraction under his hand of the slander contained in his book. That perhaps might be considered as an excess of jurisdiction; as contrary to the general principles of English law: for the Courts of Law cannot commit a person till he retracts or makes personal submission for his offence: but as far as the mere infliction of imprisonment goes, it shews at least that the House were in the habit of committing for contempts. And the sort of libel for which he was

(*a*) And in 4 Inst. 23.

punished, as it appeared in D'Ewes' Journal, was not a libel upon individual members, but upon the whole Parliament.

[143] Without resting any longer, however, upon these precedents, I come with more satisfaction to an authority which cannot be gainsayed or questioned; to the legislative recognition of a power in either House of Parliament to punish by imprisonment; for that I think is virtually to be understood from the stat. 1 Jac. 1, c. 13. But before I observe upon that statute, I will shortly advert to a prior Act of the 4th H. 8, made in the case of a Mr. Strode, who was imprisoned for something he had done in Parliament; and by which it was enacted, that "all suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grants, charges, or impositions put or had, or hereafter to be put or had unto or upon the said R. Strode, and to every other person or persons afore specified in that Parliament, or that of any Parliament that shall be, for any bill, speaking, reasoning, or declaring of any matter concerning the Parliament to be commenced and treated, should be utterly void and of none effect." I own I agree with the cogent reasons given by Sir Robert Atkyns, (p. 56,) (*a*) that this is to be considered as a general Act, notwithstanding the opinion given to the contrary in the case of *Mr. Holles* (*b*), 3 Char. 1. This Act, however, only relates to the personal immunity and protection of the members themselves, for acts done in Parliament or concerning the same. Then comes the stat. 1 Jac. 1, c. 13, which after reciting, that "heretofore doubt had been made if any person, being arrested in execution, and by privilege of either of the Houses of Parliament set at liberty, whether the party at whose suit such execution was pursued, be for ever after barred and disabled to sue forth a new writ of execution in that case:" (which shews very clearly, that Parliament had been **[144]** in the habit of setting aside or superseding such executions;) for avoiding all further doubt and trouble which in like cases may hereafter ensue; enacts, "That the party at whose suit such writ of execution was pursued, his executors, &c. after such time as the privilege of that session of Parliament, in which such privilege shall be so granted, shall cease, may sue forth and execute a new writ or writs of execution," &c. Is not this an ample recognition of the prior exercise of an authority by the Houses of Parliament to liberate persons entitled to privilege, who were in execution: this statute enacting, however, at the same time, that it should not be an answer to the further charging him in execution by his creditor, that he had once been taken in execution. The statute then provides, "That from thenceforth no sheriff, bailiff, or other officer, from whose arrest or custody any such person so arrested in execution shall be delivered by any such privilege, shall be charged or chargeable with or by any action whatsoever, for delivering out of execution any such privileged person so as is aforesaid by such privilege of Parliament set at liberty; any law, custom, or privilege heretofore to the contrary notwithstanding." And then follows this proviso, which is very material to the present purpose: "Provided always, that this Act, or any thing therein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in Parliament inflicted upon any person which shall hereafter make or procure to be made any such arrest as aforesaid." Now by inflicting censure, the power of doing which was thus saved to the Houses of Parliament, as they had before been accustomed to exercise it, must be meant, not a mere crimination or reproof in words only, but the substantial infliction of positive punishment by **[145]** Parliament upon the offender. This Act, indeed, applies in terms only to the particular case of arrests; but no one can reason so weakly as to suppose, or argue so narrowly as to say, that the power of the Houses of Parliament to inflict punishment existed and had been exercised only in that particular case. I have mentioned this instance, not from the necessity of the thing in so plain a case, but because it has been thrown out very confidently, that the privilege of the House of Commons stood upon no Parliamentary recognition or authority whatsoever: here, however, is a direct Parliamentary recognition of their right to inflict punishment by censure in Parliament in the one case that is specifically mentioned, and it virtually ratifies what had been anteccdently done by the House in the way of punishment, of which the usual mode appears to have been by imprisonment.

Having stated thus much of the earlier precedents and authorities in respect to the Parliament itself, and their own practice of committing for contempts, I come

(*a*) See also 4 Inst. 9 to the same effect. (*b*) 7 St. Tr. 249.

now to a period nearer to our own times, and more within our own immediate contemplation and view, where the materials for our judgment are more abundant, and the sources from which they are drawn are in some respects more satisfactory. If any person more than another could be supposed to doubt the power of the House of Commons to commit for contempt; if any person who ever sat in this place was, more than any other, jealous of every supposed encroachment upon the rights of the people, either on the part of the Crown, or of either House of Parliament, or less favourable in general to claims of Parliamentary privilege, it was my Lord Holt. There is no person at all conversant with the disputes that have taken place in the Courts of Law on this subject, who **[146]** is not acquainted with the particulars of the case of *Ashby* v. *White;* and how he stood singly and manfully in an opinion, which was at last confirmed by the House of Lords, in maintaining the right of the subject to maintain an action in that case. The legality, however, of a power in the House of Commons to commit for breach of privilege, generally, is so far from being questioned by Lord Holt in *The Queen* v. *Paty* (*a*)[1], the case in which the bailing of the Aylesbury men, committed by the House of Commons for bringing actions against the constables of Aylesbury for refusing their votes at an election for members of Parliament, was agitated, that he expressly recognizes their power in the passage which has been referred to by the Attorney-General. His words are these: he said, "he made no question of the power of the House of Commons to commit: they might commit any man for offering an affront to a member;" (which must be understood of an affront to a member as such;) "nay, (he said) they might commit for a crime, because they might impeach." This, I presume, must be intended of a commitment for a crime in order to an impeachment: otherwise, he would admit them to have a general criminal jurisdiction, which certainly he could not mean to attribute to them. It is impossible for any thing to be more full, explicit, and unqualified, than this language of Lord Holt, in which he recognizes a power of commitment in the House of Commons for a breach of the privileges of their House: and what is said of the House of Commons may be understood as said also of the House of Lords; for they are one and the same in this respect: they are but the grand council of the realm divided **[147]** into two different parts, each carrying with it this essential power and privilege to protect itself, which each has exercised ever since (and therefore must be presumed collectively to have exercised before) their separation.

Prior to *Ashby* v. *White*, in point of time, was *The Earl of Shaftesbury's case* (*a*)[2], which was a commitment by the House of Lords "for a high contempt (stated to have been) committed against this House." Two of the Judges there thought that it was a material ingredient in that case, that the sessions during which the commitment was made was then continuing. The Chief Justice Rainsford thought, that the Court of K. B. had no jurisdiction of the cause; and Twisden J., who was absent, communicated by Jones J. his opinion, that Lord Shaftesbury should be remanded. No distinction was taken in that case between the authority of the Lords and that of the Commons to commit. And notwithstanding the generality of the commitment, which was for a high contempt, without saying when, where, or how committed, it was sustained by this Court, and Lord Shaftesbury was remanded. This case has been referred to by Judges in later times as an authority upon the point. And in *Alexander Murray's case* (*a*)[3] the commitment, which was by the House of Commons for an offence against them, was in the same terms, "for a high contempt of this House." Mr. Justice Wright says in that case, "that it was agreed on all hands that they (the House of Commons) have power to judge of their own privileges. It need not appear to us what the contempt was; for if it did appear, we could not judge thereof." And then he cites *Lord Shaftesbury's case.* Mr. Justice Dennison says, "They need not **[148]** tell us what the contempt was, because we cannot judge of it." Mr. Justice Foster says, "The law of Parliament is a 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: all Courts of Record, even the lowest, may commit for a contempt: and Lord Holt, though he differed with the other Judges, yet agreed that the House might commit for a contempt in the face of the House." That statement of Mr. Justice Foster certainly represents Lord Holt as having narrowed his admission far beyond what he appears to have done by Lord Raymond's report. The

(*a*)[1] 2 Ld. Ray. 1005. (*a*)[2] 1 Mod. 144. (*a*)[3] 1 Wils. 299.

power of committing for contempts is not there limited by Lord Holt to contempts committed in the face of the House. I do not know how those words got into Wilson's report; but the report of Lord Holt's own words, as made by Lord Raymond, who heard them, is more likely to be correct. Upon this case I would observe, that I agree with Wright and Dennison, Justices, in thinking, that it need not appear what the contempt was; but I am not prepared to say with them, that we could in no case judge of it, or that there might not appear such a cause of commitment as, coming collaterally before the Court in the way of a justification pleaded to an action of trespass, the Court might not be obliged to consider and to pronounce to be defective: but it might be a more doubtful question whether, coming directly before us, as on a return to a habeas corpus, we could relieve the subject from the commitment of the House in any case whatever.

The next case which came before the Courts on habeas corpus is, I think, *Brass Crosby's*, a case very fully considered by a **[149]** most learned Judge, Lord C. J. de Grey; and which was also decided by the opinion of all the Judges of the Court of Exchequer, as well as of the Common Pleas; for applications were made to both those Courts to liberate the persons who had been committed by the House for contempt: but I do not know of any application having been made to this Court on that occasion. Without going at large into the report, which is unnecessary after the full comment made at the Bar on the language of the Judges there stated; it is sufficient to say, that Lord C. J. de Grey and the other Judges were most clearly of opinion, that the Houses of Parliament were invested with the power of committing for contempts in breach of their privileges.

It has been said in answer to all these cases of refusal by the Courts to liberate on habeas corpus the parties who had been committed by either House of Parliament for contempt, that the Courts, knowing that the party committed had a remedy by action if he had been illegally committed, would not give him relief in that direct mode, but turned him over to the remedy by action if he were entitled to it, without inquiry whether or not he were entitled to relief in the particular instance. Now to what extent it may be warrantable to inquire into the cause of commitment, it is not necessary to pronounce: the commitment must always be by a Court of competent jurisdiction; and the competence of the House of Commons to commit for a contempt and breach of privilege cannot be questioned. A competence to commit for all matters and in all cases has never been asserted or pretended to on the part of either House of Parliament: the House of Commons does not pretend to a general criminal jurisdiction. But if the Judges before whom those applications were **[150]** made on writs of habeas corpus had felt that the Houses had no pretence of power to commit, or had seen upon the face of the returns that they had exercised it in those cases extravagantly, and beyond all bounds of reason and law, would they not have been wanting in their duty if they had not looked into the causes of commitment stated; and would it have been an excuse for a most imperfect discharge of their important duty upon the writ of habeas corpus to say, that though they remanded the prisoner, he had his remedy by action, if the case were that he ought never to have been committed at all? Is not the value of the intermediate liberty of the subject of such importance, that, where his case falls within the remedy of the writ of habeas corpus, the Judges were bound at common law to give the party the benefit of his immediate liberation, rather than to turn him over to a distant remedy by action against a party who may die before he can obtain his judgment; or, if he live, may become insolvent? That would be but a poor and forlorn remedy for the party aggrieved by the loss of his liberty; and it would be the greatest slander upon the administration of the law of England to say, that those who were called upon to administer it on those occasions would have so done. Upon this subject I will only say that if a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the Superior Courts, inquire further: but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say, that **[151]** in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have

proceeded. But is it found in any one instance, that upon a refusal by the Courts to discharge the party upon the writ of habeas corpus, in times even of popular inflammation, and where he might have had a chance of getting a large compensation in damages, if he were proved to have been injured, any such action has been afterwards brought? No such action has been ever brought, nor is it pretended that in any one of the various cases, in all of which the Judges have refused to liberate the party committed for contempt, any ulterior remedy by action was ever suggested as fit to be resorted to.

Thus the matter stands upon the authority of precedents in Parliament, upon the recognition by statute, upon the continued recognition of all the Judges, and particularly of Lord Holt, who was one of the greatest favourers of the liberties of the people, and as strict an advocate for the authority of the common law against the privileges of Parliament as ever existed. I should have thought that this was a quantity of authority enough to have put this question to rest, (which alone I am now considering,) that is, whether the House of Commons has the power of commitment for a contempt of their privileges? What is there against it? Is it inexpedient that they should have such a power? And I am now confining myself to the limits in which it is exercised in the case before us. I have already said that à priori, if there were no precedents upon the subject, no legislative recognition, no practice or opinions in the Courts of Law recognizing such an authority, it would **[152]** still be essentially necessary for the Houses of Parliament to have it; indeed that they would sink into utter contempt and inefficiency without it, could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to wait the comparatively slow proceedings of the ordinary course of law for their redress? That the Speaker with his mace should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the House? They certainly must have the power of self-vindication and self-protection in their own hands: and if there be any authenticity in the recorded precedents of Parliament, any force in the recognition of the Legislature, and in the decisions of the Courts of Law, they have such power.

Assuming then that the House has the power of commitment, the next point is whether it has been well exercised by the warrant in question. The warrant states a resolution of the House of Commons, that a certain paper (describing it) which the plaintiff, a member of the House, admitted to have been printed by his authority, was a libellous and scandalous paper reflecting on the just rights and privileges of the House; and that the plaintiff had thereby been guilty of a breach of the privileges of the House. It is said that there should have been an averment in the plea of all the several matters recited in the warrant as the foundation upon which it issued; and that it is not enough to allege an order of the House of Commons assuming the facts to be as stated in it. But if it be clear, as it is, that this was a matter which the House were competent to decide both as to the fact **[153]** and the effect of the publication; then by analogy to the judgment of a Court of Law, (and the judgments of either House of Parliament cannot with propriety be put upon a footing less authoritative than those of the ordinary Courts of Law,) the House must be considered as having decided both, as far as respects any question thereupon which may arise in other Courts. Again, it is said, that it is not stated that the plaintiff published the libel; only that it was printed by his authority: but to cause a libel, as this is declared to be, to be printed by others is a publication, supposing a publication to be strictly required in such a case. If the paper had been printed with his own hands, and had gone no further, it might not be a publication; but it being stated to have been done by his authority imports that it was not his own personal act, and therefore it must have been done by another under his authority; who thereby, by such his authority, became privy to the contents of the libel. It is further objected that it may be a libellous and scandalous paper in other respects than that which concerns the House of Commons; that it might reflect upon them in the most respectful manner, though it might be libellous and scandalous towards others. But are we to deprive words of their obvious and popular signification in order to arrive at this conclusion? When it is said in ordinary language, that a person has published a libellous and scandalous paper reflecting upon a body of persons, the word reflecting, coupled with the context, must be understood to mean injuriously and contumeliously reflecting, reflecting in a defamatory manner; it is stating the paper to be libellous and scandalous, insomuch

as it so reflects upon that body. The order might perhaps have been couched in more precise language; and if drawn by persons in the habit of settling convictions and com-**[154]**-mitments, it might have been done in what, with reference to such a subject, might be called a more workmanlike manner; but it is sufficiently plain and intelligible as it stands for all ordinary purposes. The conclusion of the order, that the plaintiff should be committed to the Tower for his said offence, and that the Speaker should issue his warrant accordingly, is the formal award of the execution of that power of imprisonment, which, upon grounds of law and precedent, already appears to belong to the House in cases of this sort. Indeed no stress has been laid in argument upon any supposed defect in the warrant in this particular.

Supposing then a power of commitment for breach of privilege to exist in the House, and that the warrant itself discloses a sufficient ground of commitment, and an order to their officer to execute it, the justification for the persons acting under it is made out, unless any unjustifiable means appear to have been afterwards used to carry the warrant into execution. And that brings me to the last point to be considered, whether the means which appear to have been used on this occasion for the execution of the Speaker's warrant were justifiable? And that depends upon the single question, whether, after notice given by the serjeant at arms of the purpose of his coming to the plaintiff's house, and the nature of the warrant he came to execute, and after a request, made by him, that the outer door might be opened to him, which was not complied with, he was authorized to break into the house for the purpose of arresting the plaintiff, and carrying the warrant into full execution? Nothing is more certain than that in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in **[155]** breaking open the outer door in order to execute such process: the law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor. But I have already observed that the distinction taken in argument stands upon an extra-judicial opinion in the Year-Book of the 13 Ed. 4, 9. It is there stated to have been held, "that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonweal to take them." And likewise Choke said, "Where the King has an interest, that the writ is a non omittas propter aliquam libertatem, &c." So the liberty of the party's house shall not hold where, &c. but otherwise it is for debt or trespass; the sheriff or other cannot break open the house to take him; for this is only the particular interest of the party. And this is cited in Fitz. Abr. Barre, pl. 110. Therefore, even in that case, the interest of the King in the execution of process seems only to be put in contradistinction to the interest of an individual in process sued out for his own particular benefit; inasmuch as the process of the Crown respects the public justice and public interest of the realm: but it is not put in contradistinction to process for contempt, in which the public at large have as much interest as in other criminal process. It is extremely important, where citations are made from the Year-Books in the abridgements, to look at the cases themselves from which the dicta are imported; for I have often found that a reference to the original case gives a very different meaning to the passage cited. Here it appears to have been a merely extra-judicial subject of discussion: the question being whether an Act of Parliament, that all the corporations and licences granted by King H. 6, **[156]** should be void, need be specially pleaded, or whether it should be judicially taken notice of as a public Act: in considering which the passage cited occurs as matter of observation between the Judges. If it rested upon that alone, I should not have thought it an authority; especially when I find an older case in H. 18 Ed. 2, which is in Fitz. Execution, pl. 152 (*a*); where it is said, "Note, that the minister of the King coming to levy execution of damages recovered may break open the house fastened if he cannot have the key: for it is not lawful for any to disturb the execution of the King's minister," &c. It is not however clear that this might not relate to a levy by the King's minister, as he is called, for the King's debt, and not to a levy by the King's officer for the debt of an individual subject. But in the latter sense the point was certainly ruled otherwise, (and according to the dictum in the Year-Book 13 Ed. 4, 9,) in the Year-Book 18 Ed. 4, 4, pl. 19, referred to in Bro. Abr. Execution, pl. 100; for there all the justices agreed that trespass lay against the sheriff for breaking the house to execute a fieri facias; "for by the fieri facias he

(*a*) By mistake printed 252.

may take the goods, but may not break the house" (*b*). What is said by the Judges in that case is confirmed by a still more important authority; a decision in a case of life and death. This was *Cooke's case* (*c*), who was indicted for murder in voluntarily killing a sheriff's officer while attempting to break into the house for the purpose of executing civil process against him; and this was held to be manslaughter, and not murder. Upon the authority therefore of that case I should say that **[157]** it stands perfectly clear, that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door: and therefore it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal? That it falls under the latter description cannot, I think, be doubted. And without going into the other books cited by the Attorney-General to shew that the privilege of keeping the outer door shut against process is confined to process in civil suits, it is sufficient to refer to *Semayne's case* as reported in Cro. Eliz. 909, where it is said, "That afterwards in Mich. term, 2 Jac. 1, this cause was argued again; and that Williams agreed with the opinion of Yelverton and Fenner in omnibus, and that the sheriff might not break any man's house to take execution, unless in the Queen's case, or for a contempt," &c. We understand by this a contempt of any of His Majesty's Courts of Justice: but it cannot be contended that the Houses of Legislature are less strongly armed in point of protection and remedy against contempts towards them, than the Courts of Justice are. There is also *Briggs's case*, cited by the Attorney-General, which came on before Lord C. J. Coke, and is to be found in 1 Roll. Rep. 336. It appears from the search which has been made in that case, that the sheriff was ruled for not returning an attachment against Briggs: and there it was held clearly that on process of contempt the outer door might be broken open. Therefore upon authorities the most unquestionable this point also has been settled, that where an injury to the public has been committed in the shape of an insult to any of the Courts of Justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors if necessary **[158]** in order to execute it. And therefore, upon these authorities, I conceive myself justified in saying, that all the points essential to be maintained in order to sustain the defendant's justification upon this record are made out. First, it is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities on the subject: but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the Courts of Law, in a long course of well-established precedents and authorities. 2dly, that the resolution of the House, that the plaintiff had been guilty of a breach of its privileges, and that the order made for his commitment for that offence, were in conformity to their power: that the warrant issued by the Speaker in this case, which warrant in itself embraces the resolution and order of the House, was made in due execution of their order: and that the mode of executing that warrant in this case, by breaking the house, after due notification and demand of admittance without effect, is justifiable, upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way for the public good. Under these circumstances, without the least particle of doubt upon my mind, I am clearly of opinion that there must be a judgment for the defendant.

Grose, J. The validity of the defendant's pleas in justification has been so fully argued, and the principles and the different authorities upon which we must determine the case, have been so elaborately stated by my Lord, that it is unnecessary for **[159]** me to do more than to say, that I perfectly agree that the defendant's justification is made out upon all points.

Bayley, J.(*a*). I am entirely of the same opinion in this case. My Lord has gone so very fully into it, that it would be improper for me to take up more time than by adding a few words. In an early authority upon this subject, in Lord Coke, 4 Inst. 23, it is expressly laid down, that the House of Commons has not only a legislative character and authority, but is also a Court of Judicature, having power of judicature:

(*b*) See also 27 Assize, 137, pl. 35, and 7 Ed. 3, 16, pl. 19.
(*c*) Cro. Car. 557.
(*a*) Le Blanc, J. was unable to attend from indisposition.

and there are instances put there, in which the power of committing to prison for contempts has been exercised by the House of Commons, and this too in the case of libel. If then the House be a Court of Judicature, it must, as is in a degree admitted by the plaintiff's counsel, have the power of supporting its own dignity as essential to itself; and without the power of commitment for contempts, it could not support its dignity. It is also admitted, that an action would not lie against the members of the House for any thing done as such; and if no such action will lie, I think that makes an end of this question: for it appears to me that the Speaker, in issuing the warrant which he has done by order of the House, did not act in the character of a subordinate officer, but in the character of a member of the House. When the House make an order that their Speaker shall issue his warrant, they do not direct him to do it as a subordinate minister to them, but only as being the individual member of greatest dignity in the House, by whom, on this and other occasions, the House speaks and acts; **[160]** and his act in this respect is not, I think, the act of an officer, but the act of a member of the House. But if it were the act of an officer of the House, acting under and by virtue of its judgment on the subject-matter, I cannot help thinking that, where a Court has competent jurisdiction to decide upon a point, and has decided and given judgment upon it, and they direct their officer to carry that judgment into execution, the officer is protected by that judgment. If the Court have ordered him to do that which was within their jurisdiction to order, he is bound to obey their order. But it is said, that the privilege of Parliament is examinable in this Court, and that it ought to have been averred, that this party was guilty of the contempt, stating it as a traversable fact, which might be tried again elsewhere against those who acted under the authority of the House of Commons. If that were so, the fact would be examinable not only in this Court, but in every Inferior Court throughout the kingdom, in which an action of trespass could be supported. Then, as the Courts of Justice must be considered as standing in the same situation, in respect to their judgments, as the House of Commons stands with respect to its own orders, it must also be contended, that if this Court were to adjudge a party to be guilty of contempt, and were to direct an attachment to issue against him, and to commit him for that contempt, any other Court, however inferior, might try the same question again in an action of trespass; because it would be said to arise incidentally, whether or not the party was guilty of that fact of which this Court had adjudged him to be guilty, and whether that fact was a contempt of this Court. I cannot see how to stop short of going that length, if this action can be supported.

[161] The plaintiff's counsel has cited a number of cases, which I will not go through, upon the Habeas Corpus Act, which he has endeavoured to distinguish from this: these are the decisions of Judges at distant periods of time, having full opportunity of reconsidering the question; all concurring in acknowledging the power of each House of Parliament to commit for contempt. And though in the case of *The Queen and Paty* (*a*), Lord Holt differed from the other Judges upon the particular question which arose there, yet he agreed on general principles, that the House had power to commit for contempt; but he thought, that in the particular warrant then in question the House had stated that to be a contempt, which he, in his judicial capacity, was bound to say was no contempt, and therefore that the warrant itself shewed an excess of their jurisdiction, and was felo de se. These cases upon the Habeas Corpus Act were attempted to be distinguished from this, by relying upon expressions made use of by some of the Judges, that although they could not question judgments of commitment by the House directly, yet that when those judgments came incidentally before them, they would have full power to examine into them. And then it is assumed that in this particular case the question arises incidentally. Now, as it appears to me, the very object of this action is to make a direct attack upon the judgment of the House of Commons, and to bring that matter, and that matter only, into question: and would it not be absurd to say, that though we cannot discharge the party committed from his imprisonment, because that would be directly arraigning the judgment of the House, yet that he shall have an opportunity of recovering by action full satisfaction for lying in prison: and that **[162]** in giving such satisfaction the judgment of the House is left where it was. But it seems to me that the giving the party full satisfaction for his imprisonment is, in legal contemplation,

(*a*) 2 Ld. Ray. 1805.

to do away all the punishment he has received: and if that be not bringing into question again the judgment of the House, I cannot understand how the point can be more directly brought into question. This is what occurs to me to say upon this part of the case.

As to the warrant, it seems to me that it has distinctly enough pointed out that which, using our common sense upon the subject, must be understood to be a contempt of the House. It states that a certain paper, printed by the authority of the plaintiff, was a libellous and scandalous paper, reflecting upon the just rights and privileges of the House: and every person reading that, must know that it means libellous and scandalous reflections cast upon the just rights and privileges of the House.

Then as to the breaking of the outer door to execute the warrant, I think that whoever reads *Semaine's case* will see that Lord Coke was making the distinction between those cases in which the King, standing forward as prosecutor on behalf of the subject on public grounds, was party, and other cases in which the subjects were parties only in respect of their private rights: but he was not meddling with cases of contempt. Process of contempt, however, has been held in other cases to warrant the breaking of the outer door for the purpose of executing it: it was so in *Semaine's case*, and in *Briggs's case;* and there is another case in Willes, 459, in which an attachment for a contempt was treated not as civil, but as criminal process; and therefore it was held that it might be executed on a Sunday: and the reason assigned is, that a contempt of the Court is a breach of the peace. Now in every breach of the peace the **[163]** public are considered as interested, and the execution of process against the offender is the assertion of a public right: and in all such cases, I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within. Upon these grounds I entirely agree with my Lord and my brother Grose.

Judgment for the defendant.