REPORTS of CASES ARGUED and DETERMINED in the COURT of QUEEN'S BENCH. By JOHN LEYCESTER ADOLPHUS, of the Inner Temple, and THOMAS FLOWER ELLIS, of the Middle Temple, Esqrs. Barristers at Law. Vol. IX. Containing the Case of STOCKDALE AGAINST HANSARD, and the Cases of Hilary Term and Vacation, 1839. In the Second Year of VICTORIA.

During some part of the period comprised in this volume the reporters have been favoured with the assistance of Edward Smirke, of the Middle Temple, Esquire, Barrister-at-Law. The cases reported by Mr. Smirke are pointed out as they occur.

[1] CASE OF STOCKDALE AGAINST HANSARD, DETERMINED IN THE COURT OF QUEEN'S BENCH, IN TRINITY TERM, IN THE SECOND YEAR OF THE REIGN OF VICTORIA.

JOHN JOSEPH STOCKDALE *against* JAMES HANSARD, LUKE GRAVES HANSARD, LUKE JAMES HANSARD, AND LUKE HENRY HANSARD (*a*). 1839. It is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by defendant; and that the House of Commons heretofore resolved, declared, and adjudged "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it." On demurrer to a plea suggesting such a defence, a Court of Law is competent to determine whether or not the House of Commons has such privilege as will support the plea.

[S. C. 2 P. & D. 1; 3 St. Tr. N. S. 723; 8 L. J. Q. B. 294; 3 Jur. 905. For subsequent proceedings, see 11 Ad. & E. 253, 297. Upheld, *Case of the Sheriff of Middlesex*, 1840, 11 Ad. & E. 285. Considered, *Howard* v. *Gossett*, 1845-47, 10 Q. B. 375, 411. Referred to, *Wason* v. *Walter*, 1868, L. R. 4 Q. B. 83; *Henwood* v. *Harrison*, 1872, L. R. 7 C. P. 613. Considered, *Bradlaugh* v. *Erskine*, 1883, 47 L. T. 618. Commented on and approved, *Bradlaugh* v. *Gossett*, 1884, 12 Q. B. D. 271. Discussed and applied, *Dillon* v. *Balfour*, 1887, 20 L. R. Ir. 611.]

Case. The declaration (May 30th, 1837) stated that, before and at the time of committing the grievance next hereinafter complained of, the said plaintiff was, and for a long time had been, a bookseller and publisher of books, and, as such bookseller and publisher of books, had published divers and very many scientific books, and

(*a*) This case, on account of its importance, has been placed out of its order, for the purpose of early publication.

particularly, in the year 1827, a certain physiological [2] and anatomical book written by a learned physician on the generative system, illustrated by anatomical plates; and, whereas the said defendants, on 1st May 1836, did publish and cause to be published in a certain book, purporting to be "Reports of the Inspectors of the Prisons of Great Britain," the passage following, that is to say: "This last is a book" (meaning the said physiological and anatomical book) "of a most disgusting nature; and the plates are indecent and obscene in the extreme;" whereas, in truth and in fact, the said book is purely of a scientific character: yet the said defendants, well knowing the premises, but contriving and maliciously intending to defame and injure the said plaintiff in his said trade of a bookseller and publisher, and cause it to be believed that he published indecent and obscene books, on 19th August, A.D. 1836, maliciously and falsely did publish, and cause to be published, of and concerning the said plaintiff, in his said trade and business, in a certain printed paper, purporting to be a copy of the Reply of the Inspectors of Prisons for the Home District, with regard to the Report of the Court of Aldermen, to whom it was referred to consider the first report of the inspectors of prisons as far as relates to the gaol of Newgate, which said copy of the reply purports to be a letter from William Crawford and Whitworth Russell, Esquires, inspectors of prisons for the home district, to the Right Honourable Lord John Russell, &c., the false, scandalous, and defamatory libel following, that is to say,— "But we deny that that book is a scientific work (using that term in its ordinary acceptation), or that the plates are purely anatomical, calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms [3] which we have already employed, as those only by which to characterise such a book" (meaning thereby that the said book was disgusting and obscene, as stated in the above-mentioned Report of the Inspectors of Prisons of Great Britain): and, in another part of the said libel, to the substance and effect following, that is to say: "We also applied to several medical booksellers, who all gave it the same character. They described it as one of Stockdale's obscene books" (meaning thereby that the plaintiff was a common publisher of obscene books); "That it never was considered as a scientific work; that it never was written for or bought by the members of the profession as such; that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work:" to the great injury of the said plaintiff in his said trade and business, and also of his fair fame and reputation, and to the damage of the said plaintiff of 5000l." &c.

Plea (of July 6th, 1837). That, heretofore and before the commencement of this suit, and after the making of a certain Act of Parliament, made and passed at the Parliament begun and holden at Westminster on 19th February 1835, entitled, "An Act for effecting greater Uniformity of Practice in the Government of the several Prisons in England and Wales; and for Appointing Inspectors of Prisons in Great Britain" (a), to wit on 1st January, A.D. 1836, the Right Honourable John Russell (commonly called the Right Honourable Lord John Russell), then being one of His late Majesty's principal Secretaries of State, in pursuance of the said Act, nominated and appointed William Crawford, Esquire, [4] and the Rev. Whitworth Russell to visit and inspect, either singly or together with any other inspector or inspectors appointed under the provisions of the said Act, every gaol, bridewell, house of correction, penitentiary, or other prison or place kept for the confinement of prisoners in any part of Great Britain: and that afterwards, viz. on 1st March in the year aforesaid, they, the said William Crawford and Whitworth Russell, as such inspectors as aforesaid, made their report in writing of the state of a certain gaol and prison in the City of London called Newgate, and transmitted the same to the said Right Honourable John Russell (commonly called, &c.), then being such Secretary of State as aforesaid, in pursuance of the said Act of Parliament. And that heretofore, and before the publication of the said supposed libel in the declaration mentioned, viz. on 13th August A.D. 1835, a Parliament of our Sovereign Lord His late Majesty King William IV. was holden at Westminster in the county aforesaid; and it was in and by the Commons' House of the said Parliament then, to wit on the day and year last aforesaid, resolved and ordered that the Parliamentary papers and reports printed for the use of the House should be rendered accessible to the public by purchase at the lowest price at which they could be furnished, and that a sufficient number of extra

(a) Stat. 5 & 6 W. 4, c. 38.

copies should be printed for that purpose: and that afterwards, at a Parliament of our late said lord the King, holden at Westminster in the year 1836, and before the publication of the said supposed libel in the said declaration mentioned, viz. on 9th February 1836, it was ordered by the said Commons' House of Parliament that a select committee should be appointed to assist Mr. Speaker in all mat-[5]-ters which related to the printing executed by order of the House: and that afterwards, and before the publication of the said supposed libel, viz. on the day and year last aforesaid, a select committee was duly appointed by the said House, in pursuance of the said last-mentioned order, for the purposes in the said order mentioned: and that afterwards, and before the publication of the said supposed libel, and whilst the said last-mentioned Parliament was so sitting as aforesaid, viz. on 18th March in the year last aforesaid, it was resolved by the said committee, appointed in pursuance of the said last-mentioned order of the said House (amongst other things) that the Parliamentary papers and reports printed by order of the House should be sold to the public at certain specified rates, and that Messrs. Hansard (meaning the said defendants), the printers of the House, be appointed to conduct the sale thereof: and that afterwards, and before the said publication of the said supposed libel, and whilst the said last-mentioned Parliament was sitting, viz. on 18th March in the year last aforesaid, a copy of the said report of the said William Crawford and Whitworth Russell, so being inspectors of prisons as aforesaid, was laid before the said Commons' House of Parliament, pursuant to the directions of the said Act of Parliament: and that afterwards, and before the publication of the said supposed libel, and whilst the said Parliament was so sitting as aforesaid, viz. on 22d March in the year last aforesaid, it was in and by the said Commons' House of Parliament ordered that the said report of the inspectors of prisons should be printed: whereupon the said defendants, then being printers employed for that purpose by the said House, did afterwards, to wit on the day [6] and year last aforesaid, in pursuance of the said orders and resolutions, print and publish the said report: and that afterwards, and during the sitting of the said last-mentioned Parliament, and before the publication of the said supposed libel, viz. on 5th July 1836, it was ordered, by the said Commons' House of Parliament, that there should be laid before that house a copy of a report made, on the 2d July 1836, by a committee of the court of aldermen to that Court, upon the said report of the said inspectors of prisons in relation to the gaol of Newgate: and that, in pursuance of the said last-mentioned order, the said report made on 2d July 1836 was laid before the said Commons' House of Parliament, and was thereupon then ordered by the said Commons' House of Parliament to be printed: and that afterwards, viz. on 22d July in the year aforesaid, they, the said W. Crawford and W. Russell, so being such inspectors as aforesaid, transmitted to the said Right Honourable John Russell (commonly called, &c.), then being one of His late Majesty's principal Secretaries of State as aforesaid, a certain reply in writing of them the said W. Crawford and W. Russell, as such inspectors as aforesaid, with regard to the said report of the said court of aldermen mentioned in the said last-mentioned order of the said Commons' House of Parliament; and afterwards, and before the publication of the said supposed libel, viz. on 25th July in the year aforesaid, a copy of the said Reply of the said Inspectors of Prisons for the Home District, with regard to the said report of the said committee of aldermen, was, in pursuance of an order of the said Commons' House of Parliament for that purpose made on the day and year last aforesaid, presented to and laid before the said [7] House; and thereupon the same then became and was part of the proceedings of the said Commons' House of Parliament: and it was afterwards, and before the publication of the said supposed libel, and during the sitting of the said last mentioned Parliament, viz. on 26th July in the year last aforesaid, ordered by the said Commons' House of Parliament that the said reply of the said inspectors should be printed: whereupon the said defendants, so being printers as aforesaid, and employed for that purpose, did, by the authority of the said Commons' House of Parliament, and in pursuance of the said orders and resolutions of the said Commons' House of Parliament, print the said reply of the said inspectors of prisons, as directed and required by the said orders and resolutions of the said House, and did publish the same by the authority of the said Commons' House of Parliament, and as directed and authorised by the said orders and resolutions, and not otherwise howsoever, as it was lawful for them to do for the cause aforesaid: and the said

defendants further say that the said report and the said reply, which the said defendants so printed and published as in this plea mentioned, are the same report and reply as are mentioned in the said declaration, and that the said matter in the said declaration charged as libellous is contained in the said report and reply in this plea mentioned, and that the publishing the same matter, as charged in the said declaration, is the same publishing as in this plea mentioned, and not other and different, and that the said defendants did not ever publish the said libellous matter in the said declaration mentioned otherwise or on any other occasion than as in this plea mentioned: and the said defendants further say, that the said Commons' House of Parliament heretofore, viz. on 31st May in **[8]** the year last aforesaid, resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it. Verification.

Demurrer (July 8th, 1837), assigning for causes: that the known and established laws of the land cannot be superseded, suspended, or altered by any resolution or order of the House of Commons; and that the House of Commons, in Parliament assembled, cannot, by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land; and that, if such power be assumed by them, there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm.

Joinder in demurrer.

The demurrer was argued in Easter term, April 23d, 24th, and 25th, and Trinity term, May 28th, 1839.

Tuesday, April 23d. Curwood for the plaintiff.

Upon these pleadings the questions are:—Has the party a right to sue for the injury complained of? Can that right be abridged by any authority but that of the Legislature? Has the House of Commons the right to assume that authority, and to be the sole judge of its existence and extent? The House rests its claim on what is termed the "Law of Parliament;" but there is a fallacy in asserting the privilege of either House to be alone the law of Parliament. *Thorp's case* (*a*)[1], has **[9]** been usually cited in support of this claim of exclusive cognizance; but the dictum attributed to the Judges in that case, as to the privileges of Parliament, is correct only when applied to the whole Parliament, and not to each separate branch of it. It must be referred to a period when the King, Lords and Commons constituted the Supreme Court of Judicature, and the distinction of Houses was imperfectly marked. At this day the functions of each branch of the Legislature are defined; and it is clear that neither the King alone, nor either House separately, can make or declare law. The inconvenience of a different state of things is evident. Each House might make contradictory declarations of law, and each declaration would equally be the "Law of Parliament." The resolutions of the House of Commons are relied upon in the plea; but, if such resolutions could make law, the legislative, judicial, and executive powers of the State would soon be absorbed by that House. The authorities are for the most part collected in Mr. Pemberton's pamphlet (*a*)[2], and in the argument of Holroyd J. in *Burdett* v. *Abbot* (14 East, 11, et seq.). A few will be sufficient to shew that the Courts of Law have, from a very early period, taken upon themselves to decide and to declare the law as to Parliamentary privilege. One of the earliest cases is that of *Donne* v. *Walsh* (*c*), 12 Ed. 4, in which the Court of Exchequer determined that the servant of an earl was entitled to be discharged from arrest during **[10]** the sitting of Parliament, but was not exempt from being sued, although the writ of privilege produced by the defendant

(*a*)[1] 5 Rotuli Parliamentorum, 239. Cited, 1 Hatsell's Precedents, 28, 3d ed. (see p. 20, note (*a*), post). See Coke's 4th Institute, 15; 14 East, 25.

(*a*)[2] "A Letter to Lord Langdale on the Recent Proceedings in the House of Commons on the Subject of Privilege, by Thomas Pemberton, M.P." 1837. See also "Remarks on a Report from a Select Committee of the late House of Commons on the Publication of Printed Papers;" by P. A. Pickering, M.A., 1838.

(*c*) 1 Hatsell's Precedents, 41, citing Prynne's Register of Parliamentary Writs, part 4, p. 752.

to the Barons of the Exchequer claimed immunity in both respects (*a*)[1]. The privileges of the House are as much a part of the law of the land as the statute, ecclesiastical, or Admiralty law, all of which must be noticed and determined by the Courts of Common Law, when brought before them in the ordinary course of justice. *Barnardiston* v. *Soame* (*b*), and *Benyon* v. *Evelyn* (*c*)[1], are also decisive authorities. In the former case, a Court of Law undertook to adjudicate on a double return at an election of members, although exclusive cognizance of such matters was claimed for the House of Commons (*d*). In the latter, Sir O. Bridgman decided that members of the House of Commons were liable to be sued during a sitting of Parliament, although it was said that a committee of the House had voted in favour of their exemption. *Rex* v. *Wright* (8 Term Rep. 293), will be relied upon, where Lord Kenyon is reported to have said that it was impossible to admit the proceeding of either House to be a libel, and that this Court would not enquire into it. That case was an application to the discretion of the Court for leave to file a criminal information against a person who had printed a correct copy of a **[11]** report of the House of Commons. The Court refused, in their discretion, to grant it, and properly; but it does not follow that every dictum attributed to the Court in giving judgment is to be accepted as sound law. The language there used is, in fact, at variance with the later authority of Lord Ellenborough, in *Burdett* v. *Abbot* (14 East, 128), who distinctly reserves the right of the Courts to enquire into the proceedings of the House in the supposed case of an extravagant and unwarrantable assumption of power. The case of *Sir W. Williams* (13 How Sta. Tri. 1369), might be quoted, in which the Speaker was convicted and fined for the publication of Dangerfield's narrative under the sanction of the House of Commons; but it cannot be denied that the precedent is too exceptionable to be relied on (*c*)[2].

As to the plaintiff's right to sue, the present case is stronger than that of *Ashby* v. *White* (14 How. Sta. Tri. 695. 2 Ld. Raymond, 938). In that case there was some pretence for a claim of exclusive cognizance by the House, for it was not disputed that the House has exclusive right to judge of the validity of elections to serve in Parliament: but the House of Lords decided, upon a writ of error, that the right of suffrage was a franchise, for the disturbance of which the voter was entitled to a common law remedy, and was not constrained to seek redress only by application to the House of Commons.

Then, supposing the Courts of Law to have cognizance of the privileges of Parliament, the question in this case **[12]** is, whether the House of Commons has the privilege of enabling individuals to publish for general sale and circulation whatever that House pleases with impunity? The first proof of the exercise of this privilege is found in 1641 (*a*)[2], a very suspicious period for its commencement. Popular ferment ran high, and parties in the State were preparing to appeal to force. From that period downwards, the journals of the House of Commons contain numerous entries, by which it appears that ridiculous, illegal, and tyrannical privileges have been asserted by that House. A mere enumeration of them, for the period of about a century after the Restoration, is enough to shew the degree of weight that should be attached to the orders of the House on such subjects, as entered on its journals, and the mischief of leaving it to be the sole judge of the existence and limits of its privilege. The most trifling civil injuries to members, even trespasses committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary

(*a*)[1] "Arrestari minimè debeant, imprisonari, aut implacitari." Prynne says, in a marginal note on the last two words, "This was a new clause and privilege."

(*b*) 6 Howell's State Trials, 1063; S. C. 2 Levinz, 114; Freeman (K. B. & C. P.) 380, 387, 390, 430.

(*c*)[1] Reports of Sir O. Bridgman's Judgments, 324.

(*d*) The judgment was reversed on error in the Exchequer Chamber, and the judgment of the Exchequer Chamber was affirmed in the House of Lords; 6 How. Sta. Tri. p. 1117. But see *Myddelton* v. *Wynn*, Willes, 605, 606.

(*c*)[2] Proceedings were taken in order to a reversal of the judgment upon the Revolution, but it does not appear to have been ever actually reversed. See the observations of Mr. Wynn, 13 How. Sta. Tri. 1438.

(*a*)[2] See the "Report from the Select Committee" (of the House of Commons) "on the publication of printed papers" (May 8th, 1837), p. 3, and Appendix, p. 19.

duty, have been repeatedly the subject of enquiry under the head of privilege (*b*). If the [13] declaration of the House is to establish the existence of such privileges,

(*b*) The following is the result of the cases, as it was stated in the argument.

Cases voted Breaches of Privilege, between the Restoration and 1697. (The number of cases, not the number of persons, was stated.)

Delivering ejectments to members of Parliament	15
Serving process on members of Parliament	5
Serving them with subpœnas (probably subpœnas out of Chancery)	16
Entering on their estates	24
Entering the mines of a member of Parliament	1
Pulling down a scaffold at Mr. Bertie's	1
Distraining the goods of members of Parliament	13
Impounding their cattle	3
Lopping Mr. Scawen's trees	1
Serving the tenants of members of Parliament with ejectments	16

During the same period persons were ordered into custody in the following cases.

For delivering ejectments to members of Parliament	7
Serving subpœnas on them	12
Entering on their estates	5
Entering the mines of a member of Parliament	1
Pulling down a scaffold (Mr. Bertie's)	1
Detaining the goods of members of Parliament	10
Stopping up their lanes	2
Driving their cattle	2
Cutting down trees of a member of Parliament	1
Entering on estates	3
Arresting the servants of members of Parliament	49
Serving ejectments on tenants of members of Parliament	4
Seizing the cattle of a tenant of a member of Parliament	1
Serving the tenant of a member of Parliament with process	1

From 1697 to 1714, the following cases of breach of privilege occur.

By delivery of declarations in ejectment to members of Parliament	2
Entering their lands, &c.	9
Serving ejectments on their tenants	3

Under the date of 1606, a person named Bigland is voted guilty of a breach of privilege, in taking the horse of Mr. James (the member for Bristol) from an inn stable, and riding it post (*a*)[1].

In 1700, Rogers, an attorney, was committed for breach of privilege, in sending an exorbitant bill of costs to the gunners at Portsmouth (*b*)[1].

From the year 1714 to 1761, the following instances occur.

Ejectments against members	4
Injuries to their property	51

Among the latter are the following.

In the year 1728. Digging Lord Gage's coal (*c*)[1].
1729. Ploughing Mr. Bowles's land (*d*)[1].
1733. Digging Sir Robert Grosvenor's lead (*a*)[2].
1739. Killing Lord Galway's rabbits (*b*)[2].
1742. Assaulting Sir Watkin Williams Wynn's porter, in Downing Street (*c*)[2].
1753. Fishing in Mr. Joliffe's pond (*d*)[2].
1759. Entering upon Admiral Griffin's fishery (*e*).
1759. Taking fish from Sir John Glynne's water (*g*).

(*a*)[1] Com. Journ. vol. i. p. 352.
(*b*)[1] Id. vol. xxi. p. 116.
(*c*)[1] Id. vol. xiii. p. 313.
(*d*)[1] Id. vol. xxi. p. 511.
(*a*)[2] Id. vol. xxii. p. 102.
(*b*)[2] Id. vol. xxiii. p. 505.
(*c*)[2] Id. vol. xxiv. p. 391.
(*d*)[2] Id. vol. xxvi. p. 698.
(*e*) Id. vol. xxviii. pp. 489, 545.
(*g*) Id. vol. xxviii. p. 598.

and the House itself is exclusively to adjudicate upon them, the authority of the law is superseded.

[14] In the case of Mr. Long Wellesley (2 Russell & Mylne, 639), the Lord Chancellor (Lord Brougham) committed a member of the House of Commons (then sitting) for a contempt of Court, and refused to allow his claim of privilege. In disregarding the claim, he must necessarily have taken upon himself to determine the nature and extent of the privileges of the House. If it be asked why the exercise of these privileges has been so frequently suffered without calling them in question in the ordinary Courts of Justice, it may be answered that the power of the body which sought to enforce them has been too formidable to **[15]** be discreetly or safely resisted; and that the long continuance of a bad usage is not decisive of its legality; for the use of secret torture is shewn (*a*) to have prevailed in this country during the very period when its practice was disclaimed by the Courts of Law, and denounced by the greatest lawyers (*a*). Irregular practices and undefined claims of privilege grow up in unsettled times: and they pass unresisted until some suitable occasion arises for submitting them to examination, when they are found to be unwarrantable, and are extinguished.

April 23d, 24th, 25th.—Sir J. Campbell, Attorney-General, contrà.

The House of Commons is called before an inferior tribunal for authorizing a publication which it thought beneficial to the community, and essential to the discharge of its legislative functions. The right to do so is an ancient privilege recognized by legislative declarations, and never questioned, since the Revolution, except by the plaintiff. The assertion of that right is a claim of free intercourse between members of the House and their constituents, advanced solely for the public benefit, and it is, in a peculiar manner, one of those "rights and privileges of Parliament" described in the remonstrance of both Houses to Charles I. (December 1641) (2 Parl. Hist. 978), as "the birthright and inheritance, not only of themselves, but of the whole kingdom."

The House of Commons has directed the defendant to appear and plead to this action; but it does not thereby submit its privileges to the decision of this Court, **[16]** or of any other tribunal than itself. The only object of the pleading is to inform the Court, in a regular way, that the act complained of was done in exercise of its authority and in the legitimate use of its privileges. The fact that it was so done is admitted by the demurrer; and nothing remains for this Court but to give judgment for the defendants. Another and a summary remedy might have been adopted; but the House, having confidence in the tribunals of the country, deems it expedient to refer the case to the consideration of the Court in the ordinary course of justice, thereby giving to the plaintiff an opportunity either of denying that the act was done under the alleged authority, or of shewing that the authority has been exceeded.

That the publication is criminatory cannot be denied; nor that the declaration shews a good ground of action: but this is not a libel; a libel is a criminatory writing

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In the year 1756. Erecting a building, posts, and rails, on Sir Cordel Firebrace's waste in Suffolk (*h*).

1760. Digging in Earl Verney's ground, and carrying away a tree (*i*).

During the same period are the following cases of privilege.

Ejectments served on the servants of members of Parliament . .	3
Serving legal process on the servants of members of Parliament .	9

Under the date of March 16th, 1760, is the following entry (*k*).

"Resolved that it is the opinion of this committee, that Sir Richard Perrot, having entered into possession of a cellar, in the occupation of a tenant of Charles Fitzroy Scudamore, Esquire, a member of this House, is thereby guilty of a breach of the privilege of this House.—Ordered, that the said Sir Richard Perrot be for his said breach of privilege taken into the custody of the serjeant-at-arms attending this House."

(*a*) He cited Jardine's Reading on the Use of Torture, 1837.

(*h*) Com. Journ. xxvii. p. 636. (*i*) Id. vol. xxviii. p. 915. (*k*) Id. vol. xxviii. p. 1107.

published without just occasion or authority. Where the occasion justifies the publication, as in the case of a publication for the use of members, or an answer to enquiries respecting the character of a servant, it is no libel, and any consequential loss to the party is damnum absque injuriâ. Then, as to the plea, it is in bar and not to the jurisdiction. The latter is applicable only where the subject of complaint is alieni fori, to which forum the plaintiff is referred for the proper remedy. Here, where the Court has jurisdiction over the subject matter of the action, as disclosed in the declaration, a plea in bar, and not to the jurisdiction, is proper; *Rex* v. *Johnson* (*a*)[1]. There is no other Court to which **[17]** the plaintiff can be referred for redress; the publication furnishes no ground of complaint any where or in any Court. Suppose in an action of trespass the defendant pleaded a commitment by the House for prevarication, or for non-attendance on due summons, or for an assault on a member in the House, or the Speaker in the chair; would it be competent to this Court, upon such a plea, to enquire whether any privilege to commit existed? Yet, if this demurrer is to prevail, there is no tribunal before which the nicest question of privilege may not be discussed.

The plea refers to stat. 5 & 6 W. 4, c. 38, s. 7, which requires an annual report to be made by the inspectors of prisons to the Secretary of State, and a copy of the report to be laid before both Houses. The object of this latter provision was to ensure publicity. The plea states the due appointment of inspectors; the resolutions and orders of the House with respect to the publication and sale of papers; the several reports of the inspectors and of the court of aldermen, and the order of the House to print the reports; and it concludes by setting out the resolution of the House, that the power of publishing its reports, &c., is an essential incident to its functions. All this is admitted by the demurrer, which assigns for special causes a series of truisms. It is objected that the House cannot alone supersede, suspend, or alter the law of the land. No such power is claimed. The House only claims a right to declare and explain the law of the land respecting its own privilege. In doing so, it no more alters or makes law than this Court does when it declares the common law in the ordinary course. The House does not claim the power to create a new privilege by its own authority.

[18] The points insisted upon by the defendants, are these:—

First. The alleged grievance arises from an act done by the House of Commons, in the exercise of a privilege claimed by them. The question of privilege, therefore, arises directly; and this Court cannot enquire into the existence of the privilege, but must give judgment for the defendants.

Secondly. Even if the question arose incidentally, still, on this record, the Court could not enquire into the existence of the privilege, but must give judgment for the defendants.

Thirdly. The privilege (assuming that the Court could enquire into its existence) does exist.

I. As to the first point. The question of privilege here arises directly. The record shews a general order for publication, made by the House of Commons, which would include the publication of this reply. The case, therefore, is the same as if a particular order had been made on the occasion. There are various general orders made by the House, as, for instance, the sessional orders for arresting those who obstruct the avenues to the House: and if a person were taken into custody under one of these orders it would be the act of the Commons, as much as if a special order were made for the purpose.

The privilege of the House applies to two distinct matters: first, personal immunity, as the exemption from arrest claimed by members for themselves, and (until it was abolished by statute (*a*)[2]) for their servants: secondly, the powers exercised by the House collectively, such as those of summoning witnesses, calling for **[19]** the production of papers, committing to custody, and that (which is not now disputed) of printing for the use of members. The privilege here in question is of the latter

(*a*)[1] 6 East, 583. As to the necessity of a confession and avoidance, see *Fairman* v. *Ives*, 5 Barn. & Ald. 642; *Cotton* v. *Browne*, 3 A. & E. 312; *Lillie* v. *Price*, 5 A. & E. 645.

(*a*)[2] See stat. 10 G. 3, c. 50. Compare sect. 2 with stat. 12 & 13 W. 3, c. 3, s. 2; and stat. 11 G. 2, c. 24, s. 2.

kind. The power is claimed for the public benefit, but ranges within the law of privilege. [Lord Denman C.J. The word "privilege" is not used in this plea.] Nor, perhaps, did it occur in the pleadings in *Burdett* v. *Abbot* (14 East, 1). And in the case of a commitment the return to a habeas corpus does not use the term "privilege," but sets out matter shewing that the act is done by the House in exercise of the powers belonging to it. The present case stands as if there had been a formal order for publishing the papers in question, with a preamble asserting the privilege, and the expediency of such publication.

The act, then, is an exercise of privilege; and it is within the general jurisdiction of the House, since they have a clear general right to print and publish their proceedings. The demurrer admits that this document was, published as a part of their proceedings: and it was in fact, a part of them. A report, if adopted by the House, is clearly so. Had the inspectors of prisons been examined at the Bar, their examination, if entered on the journals and in the votes, would have been a part of the proceedings. There might have been a debate in which this report and reply were read, and an order then made that they should be entered on the journals. Then they would clearly have been a part of the proceedings. And they are so here, the report having been laid before the House in pursuance of an Act of Parliament, and the reply by a vote, and the House having ordered both to be printed.

The question then is, whether an action lies against **[20]** the defendants for publishing this reply under the authority of the House? The act is, in reality, a thing done in Parliament; as when the House vote that a person shall be committed, and the Speaker issues his warrant, and the vote is carried into execution. Setting aside privilege, who would be legally responsible for the act, it being done in Parliament? The defendants are the servants of the House, obeying its order; if they are liable, where is a line to be drawn? The Speaker, the members of the committee which superintended the publication, perhaps even the members of the House who voted for the publishing, would be likewise answerable.

But, where a question of privilege arises directly on the record, this Court cannot enquire whether the privilege exists or not. Wherever the enquiry would be—whether the House of Commons, as a House of Parliament, had power to do a particular act, the question is one of privilege; considering privilege, not merely as matter of personal immunity, but as comprehending the powers belonging to a House of Parliament collectively. Here the question of privilege is directly raised, and cannot, thereof, be enquired into by a Court of Common Law. As to the cases of *Donne* v. *Walsh* (*a*), *Benyon* v. *Evelyn* (*b*), and *Barnardiston* v. *Soame* (*c*), cited for the plaintiff; in the first two the question of privilege did not arise directly, but incidentally; in the last no **[21]** question of privilege arose, and the House was no party to the proceedings. No case can be cited in which a Court of Common Law has acted where the point of privilege arose directly, except *Rex* v. *Williams* (13 How. St. Tr. 1370), which is admitted not to be an authority. The most frequent cases in which the privilege of the Houses of Parliament has come in question directly have been cases of habeas corpus on commitments by them; and there the Courts of Common Law have disclaimed jurisdiction. So the question would arise directly if an action of trespass or false imprisonment were brought for such a commitment; and wherever it might be sought to overrule an act done by either House, and justified by its authority. The present is a case of that description. In *Burdett* v. *Abbot* (14 East, 1), if the plaintiff had complained of the Speaker's warrant as a libel, the case would have been precisely similar. If the complaint appears on the record to be made against an act of one of the Houses, so that the Court is called upon to say

(*a*) Prynne's Register of Parliamentary Writs, part 4, p. 752, cited 1 Hats. Prec. 41. The Attorney-General made his references to the third edition of Hatsell's Precedents (1796), and that edition is cited throughout this report. There is, however, a fourth edition (1818), which does not always correspond in paging with the third. Vol. 1 contains, in addition to the former appendix, reports by committees of the House of Commons on the arrest of Lord Cochrane by the marshal of K. B. (see p. 237, note (*b*), post), and on the case of *Sir F. Burdett* in 1810, and the authorities bearing upon it.

(*b*) Reports of Sir O. Bridgman's Judgements, 324.

(*c*) 6 How St. Tr. 1063. And see the references, p. 10, note (*b*), ante.

whether the privilege alleged in justification belongs to the House or is usurped, the point of privilege arises directly, whether raised by the declaration or by any subsequent pleading. It would arise so, for example, if the sheriff were sued for an escape, and pleaded that the defendant was elected a member of the House of Commons and was discharged by their order. With a question of privilege raised incidentally, the Court must deal as it best can; as if, in an action of debt, the defendant pleads that he is a member, and privileged while the House sits; there no act or adjudication of the House is vouched, but there is merely a claim by an individual to be exempt from answering in the action. In such a **[22]** case necessity may require that the existence of the privilege should be examined into; but the necessity which makes the rule points out its limit. Where an act of either House is complained of, no such necessity can exist. There an adjudication has been made on the very point, and by a Court of exclusive jurisdiction; and such an adjudication is binding.

The privilege of Parliament appears to be looked at on the other side in the same light as the exemption of a witness from arrest, or the privilege of an attorney to be sued in his own Court; rights upon which, no doubt, the Courts of Common Law have power to adjudicate. But the power of adjudicating upon Parliamentary privilege stands on a very different footing. The object of allowing such privilege to the House of Commons was, that it might be independent of the Crown and of the House of Lords. For that purpose it is necessary that the House should be exclusively the Judge of its own privilege.

The law of Parliament differs from the common law, as do the laws administered in the Equity, Ecclesiastical and Admiralty Courts, with which laws the other Courts do not profess to be conversant. It is not necessarily even a part of the law of England; for the Parliament is not of England only, but likewise of Scotland and Ireland. This Court, therefore, cannot take cognisance of it. If the Court here could do so, a Scotch, or even a Colonial Court might adjudicate upon the law of Parliament. In the latter case an appeal would lie to the Privy Council; so that the privileges of the House of Commons might come to be decided upon by the King and certain of his Privy Councillors. And not only might the Courts of Scotland or the colonies pronounce upon the law of Parliament, but Hundred Courts and Borough Courts, **[23]** and all others throughout the country, of however low authority, might do so likewise.

The Courts of Law are subordinate to the Houses of Parliament; and that shews their incompetency to decide upon a question of Parliamentary privilege directly arising. Originally, the Houses of Lords and Commons sat together. The Courts of Law, which at that time were established and had the same powers which they now enjoy, were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance. But, according to the argument now urged, an act of the whole Parliament might at that very time have been reviewed by a Court of Law. The Houses of Parliament were subsequently divided. If the Courts of Law could not, before that time, have enquired into the legality of a commitment, or the publication of a paper, by Parliament, neither could they do so afterwards. When the Houses were divided, which Lord Ellenborough (*a*)[1] supposes to have been done by statute, whatever was done by either in the exercise of its privileges was the act of the whole Parliament. All such acts of either House are still supposed to be the act of the whole. Thus a writ of error to Parliament is, properly, an appeal to the whole body, not to one House; and the Commons are supposed, in point of law, to form part of the Court of Appeal, and concur with the Lords in their decision. This subject is treated of in Lord Hale's "Jurisdiction of the Lords' House, or Parliament" (*b*), and Mr. Hargrave's preface to that work.

[24] The inconsistency which results from supposing that a Court of Common Law can review the acts of either House of Parliament may be thus illustrated. The House of Lords exercises an appellate jurisdiction in cases depending in this and the other Courts of Westminster Hall. Suppose this Court to decide that the House of Lords had acted illegally in voting a commitment: as, for example, if Anthony Earl of Shaftesbury (*a*)[2], in 1677, instead of suing out a habeas corpus, had brought an

(*a*)[1] In *Burdett* v. *Abbot*, 14 East, 137.

(*b*) Chap. iii. and chap. xxii. See 4 Inst. 23. 5 Com. Dig. Parliament (L, 1).

(*a*)[2] See 6 How. St. Tr. 1269.

action for the imprisonment, and a justification under the authority of the House of Lords had been pleaded and demurred to: upon writ of error, the decision of the Court would have come under the review of the House of Lords itself. The incongruity is avoided by holding that this Court, a subordinate tribunal, cannot take cognisance of a question which directly brings into dispute the authority of Parliament. The House of Lords frequently direct the publication of proceedings on an impeachment; and Judges have intimated an opinion that the publication of proceedings on a trial is not always justifiable. But would this Court take upon it to determine, in such a case, whether or not the House had authority to make the proceedings public?

There is no distinction, for the purpose of this argument, between the House of Lords and the House of Commons. They have co-ordinate authority. Sir Robert Filmer, indeed (whose opinions, and some similar ones, are combated by Sir Robert Atkyns in his argument in *Rex* v. *Williams* (*b*)[1]), held the House of Commons to be a mere excresence, and to have had, originally, no independent authority. And, at the present day, ob-**[25]**-servations tending strongly to excite prejudice against the proceedings of that House have been published in the introduction, by Lord Brougham, to the report of his judgment in *Wellesley* v. *The Duke of Beauford;* where it is even said that there is not "a single argument ever urged in favour of privilege which would not serve as a pretence for allowing all the members of both Houses to rob and murder with impunity on the highway" (*a*)[1]. But the House of Commons virtually comprehend the whole commonalty of the realm; their Acts are those of all the Commons of the United Kingdom. Lord Holt says, in *Ashby* v. *White* (*b*)[2], "It is not to be doubted but that the Commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers, this right is **[26]** not exerciseable by them in their proper persons; and therefore, by the Constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them." And in stat. 15 E. 2 (Revocatio novarum ordinationum (*a*)[2]) it is enacted, that, "the matters which

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(*b*)[1] 13 How. St. Tr. 1369. See p. 1400, et seq.

(*a*)[1] "Speeches of Henry Lord Brougham," 1838, vol. iv. p. 344. The Attorney-General also referred to the following passages:—

"The pretensions at different times set up by the Houses of Parliament to certain privileges placing them above the law of the land, are the more familiarly known in consequence of their having of late been brought into discussion by a new and extravagant claim, asserted on behalf of the House of Commons, to publish libels through irresponsible agents." Vol. iv. p. 341. "The House of Commons did not perhaps deem the circumstance of the offender" (Mr. Lechmere Charlton) "being a member of the Court against which he had committed a contempt, any mitigation of his offence. At all events they left the Bar to protect its own privileges; and indeed there seems no conceivable reason why that body should not also have made common cause with the guilty party, so far at least as to inquire whether or not one of their members was rightfully imprisoned, and thus suspended from the exercise of his functions." Ib. p. 345. "All rights are now utterly disregarded by the advocates of privilege, excepting that of exposing their own short-sighted impolicy and thoughtless inconsistency. Nor would there be any safety for the people under their guidance, if unhappily their powers of doing mischief bore any proportion to their disregard of what is politic and just." Ib. p. 352.

(*b*)[2] 2 Ld. Ray. 950. See the late edition of Lord Holt's judgment, referred to, p. 55, note (*b*), post.

(*a*)[2] The statute recites the commission granted, in 3 Ed. 2, by the King to the prelates, earls, and barons, to choose certain persons of the prelates, earls, and barons, and of other lawful men whom they should deem sufficient to be called unto them, for "ordaining and establishing the estate of the household of our said lord the King, and of his realm;" under which commission ordinances were made, (5 Ed. 2), by the Archbishop of Canterbury and the bishops, earls, and barons thereunto chosen: and that, upon examination in Parliament (15 Ed. 2), by the prelates, earls, and barons, and by the commonalty of his realm, the said ordinances were found prejudicial: the same are therefore annulled; and it is enacted, "That for ever hereafter, all manner of ordinances or provisions, made by the subjects of our lord the

are to be established for the estate of our lord the King, and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in Parliaments, by our lord the King, and by the assent of the prelates, earls, and barons, and the commonalty of the realm; according as it hath been heretofore accustomed." The Commons are the grand inquest of the nation. The House of Lords institute enquiries, but only in default of that duty being performed by the Commons. If there is corruption or oppression, the Commons are to accuse, the Lords to judge. The power of publishing is essential to the Commons, in the discharge of their inquisitorial functions.

[27] The Commons have, in particular, the power of enquiring into the conduct of the Courts of Justice; and at the commencement of every session a Grand Committee of Justice is appointed by that House (*a*)[1], to receive complaints from the various tribunals within the jurisdiction of the House. The House itself is, according to all authorities, a Court; whether a Court of Record or not, is immaterial, for the Court of Chancery is not so, yet it has, not the less, every necessary power for enforcing its judicial authority. In Com. Dig. Parliament (E, 14), it is said (in treating the House of Commons) that "a Committee for Justice may summon any Judges, and examine them in person, upon complaint of any misdemeanor in their office." And accordingly, in 19 Car. 2, Keeling, Chief Justice of the King's Bench, appeared in person before the House of Commons on complaint made against him of "misdemeanors, done in the said office, as fining of juries, &c." (*b*)[1]. The Acts there enquired into were not erroneous decisions, which might have been remedied by ordinary course of law, but irregular and oppressive proceedings, for which the only remedy was by the interference of the House. [Lord Denman C.J. In *Bushell's case* (*c*)[1] the jury who had been committed were discharged on habeas corpus by the Court of Common Pleas.] The Court of Common Pleas might discharge the parties in that case on habeas corpus, because they had been committed by an Inferior Court, the Court of Sessions of Oyer and Terminer at the Old Bailey. But an action, as Hale C.J. afterwards inti-**[28]**-mated, would not have lain for the imprisonment (*a*)[2]. Sir Robert Atkyns says, in *Rex* v. *Williams* (*b*)[2], "I myself have seen a Lord Chief Justice of this Court, while he was Lord Chief Justice, and a learned man, by leave from the House of Commons, pleading before that House for himself, and excusing what he had done in a trial that came before them in the west, whereof complaint was made to the House. And he did it with that great humility and reverence, and those of his own profession and others, were so far his advocates, as that the House desisted from any further prosecution" (*c*)[2]. In the year 1 W. & M. (1689), Sir Francis Pemberton and Sir Thomas Jones were questioned by the House of Commons (12 How. St. Tr. 822), for their judgment given, against the privileges of the House, in the case of *Jay* v. *Topham* (see 14 East, 102, note (*a*)), and were committed to custody. And it cannot be doubted that such

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King or of his heirs, by any power or authority whatsoever, concerning the Royal power of our lord the King or of his heirs, or against the estate of our said lord the King or of his heirs, or against the estate of the Crown, shall be void and of no avail or force whatever; but the manners," &c. Then follows the passage in the text. The Act is printed in the statutes of the realm, published by the Record Commission, 1810 (vol. 1, p. 189). See Brady's History of England, vol. iii. p. 146.

(*a*)[1] See 4 Inst. 11.

(*b*)[1] 1 Sid. 338. Reference is made in the margin to *Rex* v. *Wagstaffe*, 1 Sid. 272.

(*c*)[1] 22 Car. 2. Vaugh. 135. S. C. Freem. (K. B. & C. P.) 1. Sir T. Jones, 13.

(*a*)[2] *Bushell's case*, 26 Car. 2. 1 Mod. 119.

(*b*)[2] 13 How. St. Tr. 1413.

(*c*)[2] This apparently refers to the steps taken in the House of Commons in 1667, against Keeling C.J., who appeared before the House at his own request; 6 How. Sta. Tri. 992, citing 4 Hats. Pr. 113. See also the proceedings against several of the Judges, in the House of Commons, in 1680; 8 How. St. Tr. 163, 193, 194. It does not appear that, on this latter occasion, any of the Judges attended the House; for North, in his Examen, p. 567 (cited, 8 How. St. Tr. 168, note) says—

"It was much wondered, at the time, that, in all this noise about the Judges, none were sent for to the House; the cause was thought to be, that they were stout men, and would have justified all they had done, and that was not thought seasonable."

a power still exists. Even in our own times, the case of an Irish Judge (*g*), against whom a complaint had been made, was entertained, and his petition thereon received, in the House of Lords, whose authority in such **[29]** a case is, at any rate, not greater than that of the House of Commons.

But, according to the plaintiff, in a case like any of these, the Judges might again sit in inquisition upon the proceedings of the House of Commons: and not only the Judges of the Superior Courts, but those of the County Court and other inferior tribunals. Yet even the Court of Queen's Bench cannot issue a mandamus or a prohibition to the House of Lords or House of Commons. There might indeed be a Court superior to the Legislature, like the Supreme Court in the United States of America, which is authorised to decide on the legality of acts of Congress, and to determine questions between the whole Union and a particular State, or between one State and another. But here no such Court exists. And, as there is no appeal from the Supreme Court in America to Congress, the absurdity does not exist there which would arise in this country if the Courts of Law had the jurisdiction contended for, namely, that the legislative body is a Court of Appeal from that very tribunal which affects to control its decisions.

The administration of the law of Parliament is referred by the Constitution to the two Houses of Parliament exclusively, as other Courts exclusively administer the revenue law, the canon law, the maritime law, and equity. And this peculiar jurisdiction is necessary from the nature of Parliamentary privilege. That privilege was created in order that the Houses might perform their functions effectively and independently; it has existed always, and not by derivation from the Crown; it is as old as the prerogative, and as much part of the Constitution. It could not have existed beneficially, if cognisable by inferior tribunals. Privilege is given to the House of Commons to be exercised against the Crown and the House of **[30]** Lords: unless the Commons were themselves the tribunal by which their privilege is to be judged, it would have been abolished long ago. The necessity for preserving it from interference by the Courts of Law is not to be estimated from the present improved state of those Courts. The law of privilege was settled when Judges were the creatures of the Crown, and liable to be discarded if not obedient, and when the Kings themselves used to interfere in the administration of justice, which they did personally and as Judges, in ancient times, and afterwards by letters to the Judges, directing them how to act in particular cases, a practice several times checked by statute, as, in particular, by stat. 2 Ed. 3, c. 8, and 18 Ed. 3, stat. 4 (*a*). And, although the Judges are now independent of the Crown, there may still be a proper constitutional jealousy lest, at some time, a desire of popularity (*b*), or of extending the jurisdiction of the Courts, should lead them to decisions against wholesome and useful privilege, as mischievous as those formerly given in submission to the King's authority. But, during the struggles of the House of Commons against the Crown, as in the reigns of Elizabeth, James 1, and Charles 1, the privileges of the House would clearly not have survived if they had depended on the ruling of Judges. And, at any period, **[31]** in the case of a contest between the two Houses, if a question of privilege arose, and could be decided by a Court of Common Law, the ultimate appeal would be to the House of Lords, who would thus become Judges, in the last resort, of the privileges of the Commons. Thus, in the case of *Shirley* v. *Fagg* (6 How.

(*g*) The Attorney-General was understood to allude to the case of Mr. Justice Fox, a Judge of the Common Pleas in Ireland. See his petition, 45 Lords' Jour. 662; and the resolution for postponing the proceedings for two months, p. 716. Also 7 Parl. Deb. 752, 788, A.D. 1806.

(*a*) See, on the subject of interference by the Kings of England with judicial proceedings, a great number of authorities cited by Mr. Amos in a note to his edition of Fortescue, p. 23, note B. to chapter 8. Also Sir F. Palgrave's Rise and Progress of the English Commonwealth, vol. i. p. 278, part 1, c. 9.

(*b*) He cited here from vol. i. of Lord Erskine's Speeches, p. 379, 2d ed., the following passage of Lord Mansfield's judgment in the case of *The Dean of St. Asaph*. "The Judges are totally independent of the ministers that may happen to be, and of the King himself. Their temptation is rather to the popularity of the day. But I agree with the observation cited by Mr. Cowper from Mr. Justice Foster, 'that a popular Judge is an odious and a pernicious character.'"

St. Tr. 1121), and in that of *Regina* v. *Paty* (*b*), if the parties committed by the Commons had brought actions of trespass, and the Court of Common Law had determined the question in privilege, the House of Lords, on appeal, would have been, in a manner, judges in their own cause. And there is no remedy against the abuse of such an authority, since the House of Lords cannot be dissolved.

The lex Parliamenti is not known to the Judges of the Common Law Courts. They have no means of arriving judicially at any information on the subject of privilege. The Judges, even of the Superior Courts, are not, in general, and cannot be presumed to have been, members of either House of Parliament. The Parliamentary reports, and even the journals, furnish little information on the subject, many privileges resting wholly in usage. It is said that all subjects of the realm are bound to take notice of Parliamentary privilege; but that does not imply a judicial knowledge. All persons are bound to take notice of the general law of the land; but all are not competent to administer it. It was an observation of Speaker Onslow (cited, 2 Hats. Prec. 75, note), "That common lawyers, accustomed to the forms and practice of the Courts of Westminster Hall, know little of Parliamentary law, or of the forms of proceeding in Parliament." If the Judges of the Courts in Westminster Hall are little **[32]** acquainted with Parliamentary privilege, still less can the Judges of Inferior Courts be supposed to understand it.

Either the Courts of Common Law must take the law of privilege as laid down by the Houses of Parliament, or the Houses must accept it from them. In the latter case, the decision of a pie poudre court may bind the Lord Chancellor and the Speaker. And the judgments of the Commom Law Courts may not be uniform. There may be twenty actions against the Speaker for libel or false imprisonment, or as many indictments (for if privilege is no bar to a civil action it is clearly no answer to an indictment), and as many County Courts, or Courts of Quarter Session, may be of different opinions as to the law. By what rule, then, is Parliament to be guided in its exercise of privilege?

The existence of privilege, therefore, necessarily requires that that privilege should be declared by the House to which it belongs. If it does not exist, of course no question arises as to the proper tribunal. If it does, it cannot be usefully exercised unless judged of by the Houses themselves. And, even in the introduction (*a*), already cited, to Lord Brougham's judgment in *Wellesley* v. *The Duke of Beaufort*, it is allowed that, "in order to be consistent," the champions of privilege "must maintain that the Houses of Parliament alone are the judges of their privileges. This right is worth nothing if it is confined to judging of the general and abstract question. They accordingly also maintain that they alone are the Judges to decide whether, in any particular instance, those privileges have been broken."

It is objected that the carrying privilege to this **[33]** extent gives each House of Parliament a legislative power, independently of the Crown and of the other House. But the proposition contended for goes no further than to say that each House is a Court of exclusive jurisdiction, as the Ecclesiastical Courts, the Admiralty Court, and the Court of Exchequer, are with respect to particular branches of the law. They have not power to make the law, but only an exclusive authority to declare it on particular subjects. It does not follow that they can extend their jurisdiction. It has been said that much of the law established in the Common Law Courts is "Judge-made;" and it may be so described: but the Judges exercise no legislative power: the law which they deliver is supposed to have always existed, and to be merely declared by them.

Arguments are likewise drawn from the liability of this privilege to abuse: but such a liability does not shew that the privilege has no existence. In every balanced Government there must be powers so constituted as to check each other, powers which have their respective limits, but for the abuse of which there can be no remedy. In this country the Crown has, by its prerogative, the powers of declaring peace and war, of pardoning, and of summoning and dissolving Parliament; and if these are abused the law furnishes no remedy. So the House of Lords have the power of judicature in the last resort; and for any decision they might give in abuse of that power there is no redress. The House of Commons has the absolute power of voting

(*b*) 2 Ld. Ray. 1105; S. C. 2 Salk. 503. Reports temp. Holt. 526.
(*a*) Lord Brougham's Speeches (cited, p. 25, ante), vol. iv. p. 347.

the public money, and might stop the supplies improperly. An Attorney-General may enter a nolle prosequi on any prosecution, and might, if he chose to abuse that power, obstruct the course of justice. He may refuse his fiat for a writ of error; or **[34]** he may make an injurious use of the discretion vested in him as to filing criminal informations. But these powers do not the less exist. The three branches of the Legislature have an unlimited power. They might make a statute for abolishing the House of Commons. The Septennial Act was a strong instance of their exercise of authority. They might pass an Act for changing the religion of the country against the wish of the people. For such cases no redress is provided by the law; if they occur, revolution has begun, and the only remedy is resistance.

It may, however, be observed that the same argument from the possibility of abuse, which is urged against privilege as insisted upon by the House of Commons, applies equally to the power claimed for the Common Law Courts, of determining how far privilege extends.

It is true that the power claimed by the Commons of declaring their own privilege has, in past times, been frequently abused. But, first, the Constitution supposes that the House consists of independent and intelligent men, who will discharge their duty: and, secondly, there are many instances of conduct pursued by the Judges in past times, which shew what consequences would have ensued if the law of privilege had always rested in their hands. On points not involving privilege, it is sufficient to cite the cases (mentioned by Mr. St. John in his speech at a conference between the Houses in 1640 (*a*)[1]) of Wayland, Chief Justice of the Common Pleas, who was banished for taking bribes, temp. Ed. 1., and Thorpe, Chief Justice of the King's Bench, who was adjudged to be hanged for the same offence, temp. **[35]** Ed. 3: the decision of a great majority of the Judges in favour of the claim of ship-money (*a*)[2]; and the case of *Sir Thomas Darnel and Others* (3 How. St. Tr. 1), where the Judges of this Court held that a person committed by order of the King in Council was not to be discharged on habeas corpus

Then, as to decisions of the Judges on questions of privilege. In 11 Ric. 2 (1387), Tresilian, Chief Justice of the King's Bench, and Belknap, Chief Justice of the Common Pleas, with other Judges, Belknap's associates, were required by the King to answer certain questions; and, among other answers (*c*), they stated that the parties who procured the passing of a statute then lately enacted (which they held derogatory to the King's royalty) "were to be punished with death, except the King would pardon them;" and they gave the same opinion as to those who moved the King to consent to that statute. Also, on being asked whether, if, on Parliament being assembled, the King shall have limited certain articles upon which the Lords and Commons ought to proceed, and they will not proceed thereon until he shall have answered them on certain articles proposed by them, the King in such case ought not to have the governance of the Parliament, &c.; they replied, "That the King in that behalf has the governance, and may appoint what shall be first handled, and so gradually what next in all matters to be treated of in Parliament even to the end of the Parliament: and if any act contrary to the King's pleasure made known therein, they are to be punished as traitors." And, being asked whether the Lords and Commons can, **[36]** without the King's will, impeach in Parliament any of the King's Judges or officers for any of their offences, they answered, "That they cannot, and if any one should do so, he is to be punished as a traitor." In the case of Stroud, Long, Selden, and other members of the House of Commons, in 1629, 5 Car. 1, the King caused questions to be propounded to the Judges as to the liability of members for offences against the King or Council "not in a Parliament way;" and they answered that a member so offending might be punished for it after the Parliament ended, if not punished in Parliament; "for the Parliament shall not give privilege to any 'contra morem Parliamentarium,' to exceed the bounds and limits of his place and duty. And all agreed, that regularly he cannot be compelled out of Parliament to answer things done in Parliament in a Parliamentary course; but it is otherwise where things are done exorbitantly, for those are not the acts of a

(*a*)[1] On the case of *Ship Money*, 3 How. St. Tr. 1273.

(*a*)[2] *Rex* v. *Hampden*, 3 How. St. Tr. 825.

(*c*) The Attorney General read the questions and answers more at length, from 1 Parl. Hist. 194, 195.

Court." And, in answer to the next question, they decided that a particular course of conduct, therein pointed out, would be "punishable out of Parliament, as an offence exorbitant committed in Parliament, beyond the office, and besides the duty of a Parliament man" (*a*)[1]. Stroud and the other members were afterwards committed to custody for acts done by them in Parliament, and on return to writs of habeas corpus, it appeared that the commitments were by warrants of the Privy Council. When the Court of King's Bench was ready to deliver judgment on the returns, the King removed the pri-**[37]**-soners from the several prisons in which they were confined to the Tower, and wrote letters to the Judges stating his pleasure that none of the parties should come before the Court "until we have cause given us to believe they will make a better demonstration of their modesty and civility, both towards us and your Lordships, than at their last appearance they did." Accordingly no judgment was given; and the prisoners remained in custody during the long vacation. In that vacation the King summoned two of the Judges to Hampton, and conferred with them upon the case. In Michaelmas term the parties were brought up, and the Court consented that they should be bailed, but required sureties also for their good behaviour. To the latter proposition they objected, stating, among other reasons, that "we cannot assent to it without great offence to the Parliament, where these matters which are surmised by return were acted." The Court answered that they had no knowledge, from the return to the habeas corpus, of the matters having been transacted in Parliament. But Hyde C.J. said: "If now you refuse to find sureties for the good behaviour, and be for that cause remanded, perhaps we afterwards will not grant a habeas corpus for you, inasmuch as we are made acquainted with the cause of your imprisonment." And the prisoners, not finding sureties for good behaviour, were remanded. In 1621, the House of Commons having entered upon their journals a protestation "that the liberties, franchises, privileges and jurisdictions of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England," James 1 sent for the journals, and, in Council, erased the protestation (*a*)[2]. This is stated **[38]** by the minutes of Council to have taken place in the presence of the Judges, and was, no doubt, done at their suggestion. Another instance of the manner in which the Judges have treated constitutional rights is the resolution of eleven out of the twelve in favour of the dispensing power in *Sir Edward Hale's case*, 1686, 2 Ja. 2 (11 How. St. Tr. 1198, 1199). Lord Clarendon, speaking of the transactions in the case of ship-money, and other abuses which took place about the same period, complains that the people saw, in the Courts, "reason of State urged as elements of law, Judges as sharp-sighted as Secretaries of State, and in the mysteries of State; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof;" and he adds, "The damage and mischief cannot be expressed, that the Crown and State sustained by the deserved reproach and infamy that attended the Judges, by being made use of in this and like acts of power." Clar. Hist. Rep. vol. 1, pp. 123-4 (ed. 1826, 8vo).

These examples may be set off against the instances which have been cited of abuses of privilege by the House of Commons, and shew that questions of privilege could not have been left in the hands of the Judges with safety to the Constitution.

But the true remedy for abuses of this kind is in the Constitution itself. If an individual is aggrieved by the exercise of privilege, he may be heard, and his grievance redressed, on petition to the House. There may be a revision of what has been done by either House. There may be a conference between the two. The House of Commons, if it persist in an excess of authority, may be dissolved. Thus the difficulty occa-**[39]**-sioned in Mr. Wilkes's case, by the resolution that a member expelled could not be re-elected, was cured by a dissolution, and the election of a new House of Commons which rescinded the vote. The interference of Courts of Law to correct abuses of privilege is unnecessary, and, except *Sir W. Williams's case* (13 How. St. Tr. 1369), there is no instance in which the authority of the Courts has been enforced against an

(*a*)[1] 3 How. St. Tr. 237, 238. The Attorney-General also referred to the account of this conference in Nalson's Collections, vol. ii. p. 374, 375, cited, 3 How. St. Tr. 238, note. The proceedings referred to were those taken in Parliament on March 2d, 1629, when the Speaker was detained in the chair while certain votes were passed, after the King had ordered an adjournment.

(*a*)[2] See 1 Parl. Hist. pp. 1361-3.

alleged abuse of this kind. Excesses which may have occurred in the assertion of privilege have, from time to time, been corrected by, or with the concurrence of, the Houses themselves. The instances of abuse relied upon on the other side come down to no later a period than 1760-1. The disposition of the Houses to abate any grievance arising from privilege is shewn by the statutes passed to facilitate actions against members. Before stat. 2 Ja. 1, c. 13, it had been considered that, if a person arrested in execution were discharged by reason of Parliamentary privilege, the plaintiff was for ever barred from suing out a new writ of execution in the same case. By that statute, sect. 2, power was given to sue out a new execution when the privilege of the session should cease. But it may be observed that sect. 3 recognises the authority of the Houses to enforce their own privileges; for it enacts that nothing in that statute contained shall extend "to the diminishing of any punishment to be hereafter by censure in Parliament inflicted upon any person which hereafter shall make or procure to be made any such arrest as is aforesaid." Again, the remedies of suitors against members and their servants were still further facilitated by stats. 12 & 13 W. 3, c. 3, 11 G. 2, c. 24, and 10 G. 3, **[40]** c. 50. The enactments of stat. 4 G. 3, c. 33, and subsequent Acts, for bringing members of Parliament within the provisions of the bankrupt laws, are another instance in which the Houses have divested themselves of privilege for the general advantage. In the two recent cases of Mr. Long Wellesley (*a*)[1], and Mr. Lechmere Charlton (*b*), the House of Commons has rejected the claim of its own members, imprisoned for contempt of the Court of Chancery, to be discharged by reason of privilege.

It is asked why the Courts of Common Law may not judge of Parliamentary privilege, as well as of prerogative. But what is done by an officer of the Crown under the prerogative is done at Common Law. There is no peculiar tribunal to decide what belongs to the prerogative. But privilege of Parliament depends upon a law sui generis, and administered by a Court having peculiar jurisdiction.

It is also asked what would be the remedy if either House of Parliament were to do something very outrageous, as to issue an injunction against proceeding in an ejectment; or to order the Speaker to execute a person as a criminal. The answer is, that it is not decent to put such cases. It might as well be asked what remedy could be taken if the Sovereign were personally to commit a crime. In the case of *Monopolies* (10 How. St. Tr. 407), Finch, Solicitor-General, (afterwards Lord Nottingham) says, in reply to a similar argument: "I take it, the possibility of the abuse of power, is no objection against that power. For by this argument, though the King has a power and prerogative by law to restrain subjects **[41]** from going beyond the sea, by a ne exeat regnum, no, say they, he cannot; for then he may restrain all his subjects from going out of the kingdom, and so imprison and hinder every one from going out of the nation."—"So that this way of arguing does strike at all power, and I need give no other reason for it, for there can be no power at all, which is not accompanied with some trust; and there is no trust, but it possibly (morally speaking) may be broken." The answer to such objections is also well stated in a passage of Consideration on the Law of Forfeiture for High Treason (by Charles Yorke) (*a*)[2]; where it is

(*a*)[1] *Wellesley* v. *The Duke of Beaufort*, 2 Russ. & Mylne, 639.

(*b*) *In the Matter of the Ludlow Charities*, 2 Mylne & Craig, 316.

(*a*)[2] Page 116, 3d ed. London, 1748.

The whole passage, which the Attorney-General read, is as follows:—After noticing the supposition that the King might summon the Lords to pass laws without the Commons, the author says, "Though the law will not suppose the possibility of the wrong, since it cannot mark out or assist the remedy; yet every member of that representative body might exclaim in the words of Crassus the Roman orator, when he opposed the encroachments of a tyrannical consul on the authority of the Senate: "Ille non consul est, cui ipse senator non sum:" he is no King, to whom we are not a House of Parliament. On the other hand, should the representative of the Commons, like that of Denmark, surrender the rights and liberties of the people into the hands of the King, and the King, instead of dissolving the Parliament, should accept the surrender, and attempt to maintain it, contrary to the laws, and to the oath of the Crown; or should the two Houses take the power of the Militia, the nomination of Privy Councillors, and the negative in passing laws out of the Crown; these would be cases tending to dissolution: that is, they are cases which the law will not put,

observed that [42] the law will not put such cases, and that they are out of the reach of laws and stated remedies. Where they occur, they tend to a dissolution of society, and to a condition of things for which the only cure is resistance. Wherever there is a paramount power, there is the same possibility of abuse: and paramount power must be lodged somewhere. In a limited monarchy it is distributed through various departments of the State; and the law supposes that power, so created for the public good, will be constitutionally and beneficially exercised. As to the order which it is said the House of Commons might make to put a man to death, such an order would not be within their general jurisdiction. The order now in question is so.

It appearing, therefore, on this record, that the action is brought for a thing authorised by order of the House of Commons, and to reverse that order, the question of privilege arises directly, and this Court has no jurisdiction. It has only to see that the act was ordered by the House in exercise of the privilege which they claim, and to give judgment for the defendants.

II. The House of Commons has passed a resolution (which is pleaded, and admitted by the demurrer), "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the con-[43]-stitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it." Then, supposing that the question of privilege arose here not directly but incidentally, this Court would be bound by the resolution set out on the record. And, if the law be as declared, this action cannot be maintained, the order being made in exercise of a legitimate authority. The law is here laid down by a Court of original jurisdiction: the allegation of its having been so declared is neither traversed nor qualified; it is not suggested that either House of Parliament has ever decided otherwise. The Court cannot say à priori that no such privilege can be enjoyed; and, if not, how can they find out, on the argument of a demurrer, whether the House of Commons has enjoyed this privilege or not? Can the Court, on demurrer, look into the journals, the debates, and the votes, to ascertain whether, in point of fact, the power has been exercised? If judicial determinations are sought for, they cannot inform the Court what the privileges of Parliament are, because many of the most essential have never been the subject of judicial determination.

The Court has here a declaration of the House of Commons, not upon a matter of general law, of which the Court itself is a proper judge, but upon Parliamentary privilege. That declaration is evidence of the law, which the Court is bound to receive as authority. So the resolutions of the Judges (such as occur frequently in Lord Coke's Reports) are evidence of the general law of England; and judicial notice is taken of a custom of trade which has been found by a special jury, or a custom of London certified by the recorder. The adjudication of the House of Commons on a point of Parliamentary [44] law ought not to have less weight than the adjudica-

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being incapable of distrusting those whom it has invested with the supreme power, or its own perpetual duration; and they are out of the reach of laws and stated remedies, because they render the exercise of them precarious and impracticable. This observation may be applied to every similar case, which can be formed in imagination, relative to the several estates; with this difference, that it holds strongest as to the King, in whom both the common and statute laws have reposed the whole executive power: nor could the least branch of it be lodged in the two Houses, for the purpose of providing a judicial remedy against him, unless the Constitution had erected imperium in imperio, and were inconsistent and destructive of itself. Should it then be asked, What! has the law provided no remedy in respect of the King? and is the political capacity thus to furnish an exemption to him in his natural, from being called to account? the law will make no answer, but history will give one. When the King invaded the fundamental Constitution of the realm, the convention of estates declared an abdication, and the throne vacant. Indeed the political character, or the King considered as an estate, still subsisted in notion and judgment of law; the right of the people to be governed by a limited monarch, according to the ancient exercise and distribution of powers between the three estates, remained as much as ever: but the exercise of the Government was suspended, which made it a case tending to dissolution."

tion of an Ecclesiastical or Admiralty Court on a question of canon or maritime law. The question of privilege comes before this Court like a question of foreign law; and, where it becomes necessary to decide incidentally a point of foreign law, or law belonging to another tribunal, the rule always is, to follow the law of the Court of original jurisdiction.

The argument for the defendants is therefore greatly strengthened by the resolution of May 31st. But, independently of that resolution, it would be sufficient to shew that the Act complained of was done by the authority and order of the House of Commons in the exercise of their privileges.

That the law of Parliament is peculiar, and distinct from the common law of England, appears from many authorities.

On the impeachment brought in 1388 (11 Ric. 2) against the Archbishop of York, Tresilian and others, "the justices, serjeants, and other sages of the law, both of the realm and of the civil law, were charged by the King to give their faithful advice to the Lords of Parliament how they ought to proceed in the said appeal. Who answered, 'That they well understood the tenor of the said appeal; and affirmed, that it was not made nor brought according as the one law or other required.' Upon which, the said Lords of Parliament having taken deliberation and advice, it was by the assent of the King, with their common accord declared, 'That in so high a crime as is laid in this appeal, and which touches the person of the King, and the estates of this realm, and is perpetrated by persons who are peers thereof, together with others, the cause cannot be tried else-**[45]**-where, but in Parliament, nor by any other law, or Court, except that of Parliament; and that it belongs to the Lords of Parliament and to their free choice and liberty, by ancient custom of Parliament, to be Judges in such cases, and to judge of them by the assent of the King'" (*a*).

There is a statutable allowance of privilege in 11 Ric. 2, not printed in the Statute-Book, but appearing on the Parliament rolls, and evidently an Act of Parliament (*b*)[1], in these terms:—"In this Parliament, all the lords, as well spiritual as temporal then present claimed, as their liberty and franchise, that the great matters moved in this Parliament, or to be moved in other Parliaments in time to come, touching peers of the land, should be agitated (demesnez), judged and discussed by the course of Parliament, and not by the civil nor by the common law of the land used in other lower Courts (plus bas courtes) of the kingdom: which claim, liberty, and franchise the King readily (benignement) allowed and granted (ottroia) to them in full Parliament." This is confined in terms to the House of Lords; but has always been considered as extending to matters transacted in or by authority of either House.

The Judges have, in several instances, objected to deciding questions of privilege. Lord Coke (13 Rep. 63) says:—"Note, the privilege, order, or custom of Parliament, either of the Upper House, or of the House of Commons, belongs to the determination or decision only of the Court of Parliament." And he then states the case of *The Earls of Arundel and Devonshire* (13 Rep. 63), (27 H. 6), which was a controversy between them in the House of **[46]** Lords "for their seats, places, and pre-eminences of the same." The King referred it to the Judges to examine the title; and they reported "That this matter, (viz. of honour and precedency between the two earls, Lords of Parliament,) was a matter of Parliament, and belongs to the King's Highness, and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined." Upon which Sir Robert Atkyns observes, in his argument for Sir W. Williams (13 How. St. Tr. 1427); "One would think this were a strange answer of the Judges, to deny their advice; were they not assistants to the Lords in matters of law? The true reason of their declining to give their advice is, it was a case above them, and not to be determined by the ordinary rules of law, and therefore out of their element. 'Quæ supra nos, nihil ad nos.' Therefore their answer was, that it was a matter of Parliament, and belonged to the King and Lords, but not to the Judges."

Another instance is found in *Thorp's case* (*b*)[2]. The House of Commons (in 31 & 32 Hen. 6, 1454), represented to the King and Lords in Parliament, that Thomas Thorp,

(*a*) 1 Parl. Hist. 207, 208.
(*b*)[1] 3 Rot. Parl. 244. Cited in *Burdett* v. *Abbot*, 14 East, 22.
(*b*)[2] 13 Rep. 63. More fully in 1 Hats. Prec. 28, from 5 Rot. Parl. 239.

their Speaker, was imprisoned, and they prayed his discharge according to the privileges of the House. Richard Duke of York informed the House that Thorp was taken in execution at his suit, in an action of trespass, and prayed that he might not be discharged. The Lords "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 no." The Judges, after deliberation, answered and said: "That they **[47]** ought not to answer to that question, for it hath not been used aforetime, that the justices should in anywise determine the privilege of this High Court of Parliament; for it 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 Parliament, and not to the justices." It may be contended that the Judges merely refused to adjudicate; but they were not asked to decide; they were merely requested to give an opinion, and declined doing so, as the Judges have in later times on questions of equity. This was the interpretation given to their conduct by Lord Ellenborough in *Burdett* v. *Abbot* (14 East, 29). His Lordship says that the question was not put to them as to persons who should adjudge, "but as advisers to 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."

In the case of *George Ferrers* (*b*) the King (Henry VIII.) in the presence of the Lord Chancellor and Judges, the Speaker, "and other the gravest persons of the Nether House," thus recognised the superiority of the law of Parliament over that of the other Courts. "We be informed by our Judges, that we at no time stand so highly in our estate Royal, as in the time of Parliament; wherein we as head, and you as members, are conjoined and knit together into one body politic, so as whatsoever offence or injury (during that time), is offered to the meanest member of the House, is to be judged as done against our person and the whole Court of Parliament; which **[48]** prerogative of the Court is so great (as our learned counsel informeth us) as all acts and processes coming out of any other Inferior Courts, must for the time cease and give place to the highest." And "Sir Edward Montagu, then Lord Chief Justice, very gravely declared his opinion, confirming by divers reasons all that the King had said, which was assented unto by all the residue, none speaking to the contrary."

In Coke's Fourth Institute, 15, it is said: "And as (*a*) every Court of Justice hath laws and customs for its directions, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c. So the High Court of Parliament suis propriis legibus et consuetudinibus subsistit. It is lex et consuetudo Parliamenti, 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 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 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 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 this is the reason that Judges ought not to give any opinion of a **[49]** 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. And some hold, that every offence committed in any Court punishable by that Court, must be punished (proceeding criminally) in the same Court, or in some higher, and not in any Inferior Court, and the Court of Parliament hath no higher."

In 3 Hawk. P. C. p. 219, book 2, c. 15, s. 73 (Leach's ed. 1795), it is said, "There can be no doubt but that the highest regard is to be paid to all the proceedings of

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(*b*) 1 Hats. 56, 57, citing Holinshed's Chronicle.

(*a*) Opposite these words in the margin is "Lex et consuetudo Parliamenti. Ista lex ab omnibus est quærenda, a multis ignorata, a paucis cognita." The same words are in Co. Litt. 11 b.

either of those Houses" (of Parliament), "and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice."

Sir William Blackstone, in 1 Comm. 164, after stating the objection made by the Judges when called upon to answer in *Thorp's case* (1 Hats. Prec. 28. 13 Rep. 63), says: "Privilege of Parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the Crown. If, therefore, all the privileges of Parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of Parliament. The dignity and independence of the two Houses are therefore in great measure preserved by keeping their privileges indefinite."

[50] The dicta of Judges on this subject concur with the opinions of text writers. De Grey C.J. says, in *Brass Crosby's case* (3 Wils. 199): "This Court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us." "The counsel at the Bar have not cited one case where any Court of this Hall ever determined a matter of privilege which did not come incidentally before them" (p. 202). "Courts of Justice have no cognizance of the Acts of the Houses of Parliament, because they belong ad aliud examen" (p. 203). Acts of either House cannot, according to this opinion, be adjudged upon by the Common Law Courts, even incidentally. And Blackstone J. there, referring to *Regina* v. *Paty* (2 Ld. Ray. 1105), where Holt C.J. differed from the rest of the Judges, says, "We must be governed by the eleven, and not by the single one."

In *Regina* v. *Paty* (2 Ld. Ray. 1108, 1109), Powys J. said, "The House of Commons is a great Court, and all things done by them are to be intended to have been rite acta." The House of Commons are a great branch of the Constitution, and are chosen by ourselves, and are our trustees; and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do anything amiss." And, he said, "The reason why there were no precedents of that kind" (of enquiry by this Court into the proceedings of the House) was, "That it would be unreasonable to put the Judges upon determining the privileges of the House of Commons, of which privileges they have no account, nor any footsteps in their books: **[51]** that the House of Commons have the records of them, and, as occasion requires, search them to find them: that the Judges cannot resort to those records, and, therefore, it is indeed impossible for them to judge matters of privilege." And Powell J. said (2 Ld. Ray. 1110), "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." "He said, this Court might judge of privilege, but not contrary to the judgment of the House of Commons." "The Court of Parliament," he said (p. 1111), "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."

Lord Camden, in *Entick* v. *Carrington* (19 How. St. Tr. 1047), after stating that the only instance of a power to commit without a power to examine upon oath is in the practice of the House of Commons, says, "But this instance is no precedent for other cases. The rights of that assembly are original and self created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error."

In Com. Dig. Parliament (G, 1), it is laid down, that "the Parliament suis propriis legibus et consuetudinibus subsistit." And that "all matters moved, concerning the Peers or Commons in Parliament, ought to be determined according to the usage and customs of Parliament, and not by the law of any Inferior Court." And the same doctrine is laid down in other abridgments.

[52] The principles thus recognized by Judges and writers on the law have been acted upon in many cases. And, first, those instances may be mentioned in which writs of habeas corpus have been sued out upon commitments by the Houses of Parliament. In connection with this class of cases, that of *Sir Thomas Darnel and Others*

(3 How. St. Tr. 1), 3 Car. 1 (1627), should be noticed. To writs of habeas corpus sued out by them, returns were made, stating that they were committed by warrant of Privy Council; and the Court of King's Bench held that, "If a man be committed by the commandment of the King, he is not to be delivered by a habeas corpus in this Court, for we know not the cause of the commitment." And Hyde C.J. said: "Mr. Attorney hath told you that the King hath done it, and we trust him in great matters, and he is bound by law, and he bids us proceed by law, as we are sworn to do, and so is the King; and we make no doubt but the King, if you seek to him, he knowing the cause why you are imprisoned, he will have mercy; but we leave that. If in justice we ought to deliver you, we would do it; but upon these grounds, and these records, and the precedents and resolutions, we cannot deliver you, but you must be remanded." This decision was strongly censured in the House of Commons in the ensuing Parliament; and an article was inserted in the Petition of Right (1628), to prevent such imprisonment and detention in future. But, although this exercise of power by the Crown was so called in question and restrained, the rule has remained unaltered that the Houses of Parliament may by their own authority commit, and that such commitments are not questionable by the Courts of Law.

[53] Two cases of habeas corpus on commitments by the House of Commons occurred in the time of the Commonwealth. Captain Streater (*a*)[1] was committed by the Speaker's warrant, until he should be delivered by order of Parliament. On return to a habeas corpus, and argument thereon, the Court of King's Bench ordered him to be remanded; and it was said (*b*)[1] (apparently by Rolle C.J.), "Mr. Streater, one must be above another, and the inferior must submit to the superior; and in all justice, an Inferior Court cannot controul what the Parliament does. If the Parliament should do one thing, and we do the contrary here, things would run round. We must submit to the legislative power: for if we should free you, and they commit you again; why here would be no end: and there must be an end in all things." And, as to the objection that no cause was expressed by the return, the same Judge said: "It is true, here there is not. We are Judges of the law, and we may call Inferior Courts to an account why they do imprison this or that man against the known laws of the land; and they must shew cause to any man. In this case, if the cause should come before us, we cannot examine it, whether it be true or unjust: they have the legislative power" (*c*). **[54]** After the dissolution of the Parliament, another habeas corpus was sued out, and the prisoner admitted to bail (*a*)[2].

In *Sir Robert Pye's case*, cited in 5 How. St. Tr.(*b*)[2], from Ludlow's Memoirs, it is mentioned, as a proof of the low state to which the Parliament had fallen before the Restoration, that when Sir R. Pye, who had been committed by their order, was brought before the Court of King's Bench on habeas corpus, and Judge Newdigate asked the counsel for the Commonwealth why it should not be granted, they answered that they had nothing to say against it; whereupon the Judge, "ashamed to see them so unfaithful to their trust," replied, that "Sir Robert Pye being committed by an order of the Parliament, an Inferior Court could not discharge him."

In more settled times, after the Restoration, Lord Shaftesbury (6 How. St. Tr. 1269. 1 Mod. 144. 3 Keb. 792), was committed to the Tower by the House of Lords, on a warrant specifying no cause but "high contempts committed against this House." On argument upon return to a habeas corpus, he was remanded, and Sir T.

(*a*)[1] Case of *Captain Streater*, 5 How. St. Tr. 366.

(*b*)[1] Page 386.

(*c*) The legislative power appears to have been mainly relied upon by the Court in this argument. Nicholls J. said, "You did distinguish between an order and an Act of Parliament. Why their power is a law, and we cannot dispute any such thing:" p. 387. And the Judge cited in the text said: "The second thing that hath been objected against the return was by Mr. Freeman: he says, the Parliament hath not power to alter the laws. Why, they have the legislative power, and may alter and order in such sort as they please:" p. 386. And, on the prisoner's citing the case of *Darnel and Others* (3 How. Sta. Tri. 1), the same Judge said, "The King was plaintiff against them, and he was but a feoffee in trust: the Parliament is plaintiff against you, and they are a legislative power:" p. 388.

(*a*)[2] *The Protector and Captain Streeter*, Style, 415. Cited, 5 How. St. Tr. 405.

(*b*)[2] 5 How. St. Tr. 948. Ludlow, vol. 2, p. 842, ed. 1698.

Jones J., after allowing that such a commitment by an ordinary Court of Justice would have been bad, said (6 How. St. Tr. 1296), "The cause is different when it comes before this High Court." "The course of all Courts ought to be considered," "and it has not been affirmed, that the usage of the House of Lords has used to express **[55]** the matter more particularly on commitment for contempts, and therefore I shall take it to be according to the course of Parliament. 4 Inst. 50. It is said that the Judges are assistants to the Lords, to inform them of common law; but they ought not to Judge of any law, custom, or usage of Parliament." And Rainsford J. said, "This Court has no jurisdiction of the cause, and therefore the form of the return is not considerable."

The next case is *Regina* v. *Paty*, reported in Lord Raymond (2 Ld. Ray. 1105. 14 How. St. Tr. 849). The original judgment of Holt C.J. in that case has lately been published from a manuscript copy (*b*); but, though a valuable document, it does not materially vary from the reports before published. That case, no doubt, is an extreme one, and tries the principle upon which such decisions have gone. Paty had been committed by the Speaker's warrant, for having (contrary to the declaration, and in contempt, of the House of Commons) brought an action against the late constables of Aylesbury for disallowing his vote in the election of members to Parliament. If there was any case in which a Court of Law might justifiably have enquired into a commitment by the House of Commons, it would have been this, since an action brought under the same circumstances had been held maintainable by the House of Lords in *Ashby* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 695). But eleven of the twelve Judges agreed that the Court of Queen's Bench had no jurisdiction in the case of a Parliamentary commitment, and could not discharge the prisoners. Gould J. said (page 1106), "If this had been a return of a **[56]** commitment by an Inferior Court, it had been naught, because it did not set out a sufficient cause of commitment: but this return being of a commitment by the House of Commons, which is superior to this Court, it is not reversible for form. And that answers the objections to the form of the commitment. We cannot judge of the privileges of the House of Commons, but they are to debate them among themselves. He said, it was objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned but by the law of the land: but that the answer to this was, that there were several laws in this kingdom, among which was the lex Parliamenti; which law, as it is said in the 4 Inst. 15, "Ab omnibus est quærenda, a multis ignorata, a paucis cognita;" and that it was uncertain that those words in the Statute of Mag. Chart. were to be restrained to the common law. He said, the Parliament had laws and customs peculiar to itself, and that this was declared to be secundum legem Parliamenti; and that the Judges ought not to give any answers to questions proposed to them about matters of privilege, because the privileges of Parliament are not to be determined by the common law." He then commented on the cases of *Lord Shaftesbury* (6 How. St. Tr. 1269. 1 Mod. 144), and *Sir John Elliot* (3 How. St. Tr. 293), and concluded "that no habeas corpus would lie." Powys J. (whose judgment has been partly cited already (page 50, ante)), said (2 Ld. Ray. 1108): "Shall the Commons hinder a man from proceeding at law? Now in general speaking, that is the only use of privilege; and the meaning of privilege is, that it is a privilege against the course of law: such is the privilege of members against suits of law to be brought **[57]** against them." And Powell J. (whose judgment also has been before cited (page 51, ante), said (2 Ld. Ray. 1110, 1111), that "this Court might judge of privilege, but not contrary to the judgment of the House of Commons." "If they" (the Court of Queen's Bench) "should discharge those persons, that are committed by the House of Commons for a breach of privilege, this would be to take upon themselves directly to judge of the privileges of Parliament. This want of jurisdiction in the Court cures all the faults in the commitment." The greatest respect is due to Holt C.J., who differed, in this case, from the rest of the Judges; but his was a single opinion against that of eleven, and it has been constantly over-ruled. Nor does his argument support the decision which he gives; for he said, "If the votes of both Houses could not make a law, by parity of

(*b*) "The Judgments delivered by the Lord Chief Justice Holt in the Case of Ashby *v.* White and Others, and in the Case of John Paty and Others. Printed from Original MSS. With an Introduction." London, 1837.

reason they could not declare law" (*c*). But this is an incorrect conclusion; for every Court which administers law may declare, though it cannot make, the law. A record of this case was made up on mature deliberation had by the Judges; and the reason there stated for the decision is "quod cognitio causæ captionis et detentionis prædicti Johannis Paty non pertinet ad Curiam dictæ dominæ reginæ coram ipsâ reginâ."

In *Alexander Murray's case* (1 Wils. 299), on return to a habeas corpus, it appeared that Mr. Murray had been committed **[58]** by the House of Commons for a contempt; and, on motion that he might be admitted to bail, this Court declined to interfere. The Habeas Corpus Act, 31 Car. 2, c. 2, having been cited, Wright J. said, "It has been determined by all the Judges" "that it could never be the intent of that statute to give a Judge at his chamber, or this Court, power to judge of the privileges of the House of Commons. The House of Commons is undoubtedly an 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." Denison J. added, "This Court has no jurisdiction in the present case; we granted the habeas corpus, not knowing what the commitment was, but now it appears to be for a contempt of the privileges of the House of Commons; what those 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." And Foster J. said, "The law of Parliament is part of the law of the land" (*a*).

In the case of *Brass Crosby, Lord Mayor of London* (3 Wils. 188. 2 W. Bl. 754), who was committed by the House of Commons for a contempt in holding their messenger to bail for having executed their warrant, a habeas corpus was sued out and return made; and the Court of Common **[59]** Pleas, after argument, remanded the lord mayor. De Grey C.J. said there (3 Wils. pp. 199, 200, 203), "I do not find any case where the Courts have taken cognisance of such execution, or of commitments of this kind; there is no precedent of Westminster Hall interfering in such a case. In *Sir J. Paston's case*, there is a case cited from the Year-Book (*b*), where it is held that every Court shall determine of the privilege of that Court; besides, the rule is, that the Court of remedy must judge by the same [law] as the Court which commits: now this Court cannot take cognisance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us." "How then can we do any thing in the present case, when the law by which the lord mayor is committed, is different from the law by which he seeks to be relieved? He is committed by the law of Parliament, and yet he would have redress from the common law; the law of Parliament is only known to Parliament-men, by experience in the House." "The House of Commons only know how to act within their own limits; we are not a Court of Appeal; we do not know certainly the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges; we cannot judge of the contempts thereof, we cannot judge of the punishment therefore." "Courts of Justice have no cognisance of the acts of the Houses of Parliament, because they belong ad aliud examen." Gould, Blackstone, and Nares Js. expressed similar opinions.

[60] In the case of *Alderman Oliver* (2 W. Bl. 758), which was the same in its circumstances with that of the Lord Mayor Crosby, a habeas corpus was sued out in

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(*c*) 2 Ld. Ray. 1115. The corresponding passage in the judgment, as lately published from Holt's MS. (see p. 55, note (*b*), ante), is, "If before this declaration there was never any privilege or right to appropriate to the House of Commons a jurisdiction to determine the point for which Paty brought his action, there can be none now; if there were, it ought to be shewed. I know of none, nor did any man ever hear of it: the claim is no older than the declaration, which was made the last session of this Parliament." P. 57.

(*a*) He added, "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."

(*b*) In 13 Rep. 64, Coke cites a case as Sir John Paston's. The reference is to 12 Ed. 4, 2: perhaps Yearb. Hil. 4 Ed. 4, 43, A, pl. 4, is meant.

the Court of Exchequer, and a like judgment given by the unanimous opinion of the Barons.

In *Rex* v. *Flower* (8 T. R. 314), which came before this Court on habeas corpus, Benjamin Flower had been committed and fined by the House of Lords for a breach of their privileges, in publishing a libel on the Bishop of Llandaff. Lord Kenyon there recognised the power of the House of Lords to imprison and fine for contempt, and said, "We were bound to grant this habeas corpus: but having seen the return to it, we are bound to remand the defendant to prison, because the subject belongs ad aliud examen." And Grose J. adopted the language of De Grey C.J. with respect to the House of Commons in *Crosby's case* (3 Wils. 199, 201, 202), that the adjudication of the House on a contempt was a conviction, and the commitment in consequence execution; that every Court must be sole judge of its own contempts; and that no case appeared in which any Court of this Hall ever determined a matter of privilege which did not come incidentally before them.

In *Rex* v. *Hobhouse* (*d*)[1] the commitment was by the House of Commons for contempt in publishing a libel. Mr. Hobhouse was brought before this Court on habeas corpus, and remanded. The Court said, "We are not authorised to enter into the discussion of any of the objections taken by the gentleman on the floor to this commitment." "The cases of *Lord Shaftesbury* (6 How. St. Tr. 1269. 1 Mod. 144. 3 Keb. 792), **[61]** and *Rex* v. *Paty* (2 Ld. Ray. 1105. 14 How. St. Tr. 849), are decisive authorities, to shew that the Courts of Westminster Hall cannot judge of any law, custom, or usage of Parliament, and consequently they cannot discharge a person committed for a contempt of Parliament. The power of commitment for contempt is incident to every Court of Justice, and more especially it belongs to the High Court of Parliament; and therefore it is incompetent for this Court either to question the privileges of the House of Commons, or a commitment for an offence which they have adjudged to be a contempt of those privileges."

In addition to these authorities, which shew that, on habeas corpus, the Courts of Common Law will not interfere with a commitment by the House of Commons, it appears from *Bushell's case* (1 Mod. 119), and *Hamond* v. *Howell* (1 Mod. 184), that, even if a party were discharged on habeas corpus in such a case, no action would lie for the commitment. Bushell, one of the jurymen committed by the Court of Oyer and Terminer at the Old Bailey for acquitting Penn and Mead, and discharged subsequently by the Court of Common Pleas (*d*)[2], brought an action against the lord mayor and recorder for false imprisonment; and, on motion in K. B. by the defendants for time to plead, Hale C.J. said (1 Mod. 119), that the habeas corpus was in the nature of a writ of error, and that, in the case of an erroneous judgment reversed, an action of false imprisonment would not lie against the Judge or against the officer. "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 **[62]** that purpose; and the matter was done in a course of justice: they will have but a cold business of it."

Several instances may be put in which the Courts would not adjudicate upon privilege in an action for a thing done by either House, where the act itself directly raised, or might have raised, the question of privilege. In *Tash's case* (1 Hats. Pr. 190), complaint was made to the House of Commons that Tash had stopped a member of the House going into the House of Lords, and had shut the door upon him. He was committed by the Commons to the custody of the serjeant, and afterwards brought to the Bar and discharged upon his submission, and payment of fees. If Tash had brought an action for the imprisonment, and the defendant had justified, it is clear that a Court of Law would not have enquired into the legality of the act of the House. So, if a party be taken into custody, under the sessional order, for an obstruction in the Lobby. In *Williams's case* (1 Hats. Pr. 92), a person was committed for assaulting a member of the House of Commons; in the case of *Mr. Coke's Servant* (1 Hats. Pr. 112), a party who had arrested a servant of a member of that House was brought in custody to the Bar, and discharged, paying his fees: in each case without previous adjudication, warrant, or order. Had an action been brought in either case,

(*d*)[1] *Rex* v. *Hobhouse*, 2 Chitt. Rep. 207. S. C. (but the observations of the Court on this point not reported) 3 B. & Ald. 420.

(*d*)[2] *Bushell's case*, 22 Car. 2, Vaughan, 135. S. C. Freem. (K. B. & C. P.) 1. T. Jones, 13.

and a justification pleaded, the question of privilege would have arisen directly, though there had been no specific order or adjudication in the particular case: but the authorities already cited shew that the Court could not have enquired whether the privilege existed. The present case is within the same principle.

It is a general rule that the judgments of Courts of exclusive jurisdiction are conclusive against all the world; and their decisions bind Courts in which the **[63]** questions decided arise incidentally. In many instances a Court of peculiar jurisdiction has prevented causes which were properly to be decided there from coming before any other tribunal. In *Mitchell* v. *Rodney* (2 Br. Parl. C. 423), the defendant, under a plea of not guilty in trover, proved that the goods converted had been taken upon the surrender of St. Eustatius, and that a suit for condemning them was pending in the Court of Admiralty: and, the question being one of prize or no prize, which the Court of Common Law could not determine, the House of Lords decided, affirming the judgment of the Court of King's Bench, that the defendant was entitled to judgment. In *Home* v. *Earl Camden* (1 H. Bl. 476), the Court of Common Pleas prohibited the Commissioners of Appeal from the Court of Admiralty, who had issued a monition to bring in the proceeds of property claimed as prize; but the Court of King's Bench reversed this decision; *Lord Camden* v. *Home* (4 T. R. 382): and the House of Lords affirmed the judgment of the King's Bench; *Home* v. *Earl Camden* (2 H. Bl. 533. 6 Br. Parl. C. 203). The principle was the same as in the preceding case; but this case was the stronger, because the question arose between two British subjects, and the property had been sold pending the suit. *Le Caux* v. *Eden* (2 Doug. 594), goes further still. That was an action for false imprisonment: and it appeared that the imprisonment took place by the capture of a ship which was released by the Court of Admiralty: but the Court of King's Bench held that the question of personal injury was incidental to that of prize or no prize, which could not be decided by a Court of Common Law. *Lindo* v. *Lord Rodney* (*g*) supports the same principle. Even **[64]** the decisions of foreign prize courts are binding as to the facts found by them; *Geyer* v. *Aguilar* (7 T. R. 681). Similar decisions have been given in the instance of the Ecclesiastical Courts; *Bouchier* v. *Taylor* (4 Br. Parl. C. 708), *Prudham* v. *Phillips* (Amb. 763): of judgments of forfeiture and condemnation in the Exchequer; *Martin* v. *Wilsford* (Carth. 323), *Hart* v. *Macnamara* (*e*), *Scott* v. *Shearman* (2 W. Bl. 977): of acquittal in the same Court; *Cooke* v. *Sholl* (5 T. R. 255): (though in the last two cases the action was trespass, and the previous judgment was in rem): of a judgment by Commissioners of Excise; *Fuller* v. *Fotch* (Carth. 346. Holt, 287). It is true that a stranger may shew (though a party to the judgment may not) that the judgment was obtained by fraud, as was said in *Prudham* v. *Phillips* (Amb. 763), and in *The Duchess of Kingston's case* (20 How. St. Tr. 537-45, note). So the sentence of an Ecclesiastical Court in a suit for the fulfilment of a contract of marriage per verba de futuro was held binding when given in evidence upon non assumpsit in an action for a breach of promise of marriage; *Da Costa* v. *Villa Real* (2 Str. 961). In *Brittain* v. *Kinnaird* (1 Br. & B. 432), a conviction by a magistrate, under stat. 2 G. 3, c. 28, was held conclusive proof that the vessel was a boat within the statute, in an action of trespass for taking the boat. And there Dallas C.J., referring to a suggestion that a magistrate might seize a seventy-four gun ship, and call it a boat, said, "Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it."

The following authorities shew that, when a question **[65]** comes incidentally before a Court not having original jurisdiction in the subject-matter, such Court must decide according to the law of the Court which has the original jurisdiction. In *Juxon* v. *Lord Byron* (2 Lev. 64), it was decided that the Spiritual Court, if a temporal matter arise incidentally before it, must decide it according to common law. So, if the temporal question be a matter of fact, it must be tried by the same evidence as at common law; *Shotter* v. *Friend* (2 Salk. 547). In *Barnes's case* (2 Rol. R. 157), the return to a habeas corpus shewed a judgment by the Warden of the Cinque Ports, under which the party was imprisoned for refusing, upon summons, to restore an anchor which he had taken when thrown up between high and low water mark. This judgment no Court of Common Law could have pronounced; yet the Court of King's Bench held it a good return, it being alleged on it that the proceeding "fuit

(*g*) Note [1] to *Le Caux* v. *Eden*, 2 Doug. 613.
(*e*) 4 Price, 154 (note to *Rex* v. *Horton*).

juxta leges maritimas." The same principle appears from *Gare* v. *Gapper* (3 East, 472), followed by *Gould* v. *Gapper* (5 East, 345). In the latter case Lord Ellenborough cited the language of Blackstone, 3 Com. 112, where it is said that a prohibition "may be directed to the Courts Christain, the University Courts, the Court of Chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment **[66]** of a legacy, a release of tithes, or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those Courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the Court in which the suit is depending: an impropriety, which no wise Government can or ought to endure, and which is therefore a ground of prohibition." *Carter* v. *Crawley* (T. Raym. 496), a judgment of North C.J., shews the same principle. It follows that this Court must adopt the law of Parliament, alleged, as a fact, in the plea, and admitted by the demurrer.

In *Rex* v. *Wilkes* (2 Wils. 151), a member of the House of Commons, arrested under a Secretary of State's warrant, for publishing a seditious paper, brought habeas corpus in the Common Pleas, and was discharged as being privileged. Afterwards the two Houses resolved that privilege did not extend to cases of libel (*c*). The Courts of Law would now act upon those resolutions, and disallow the privilege. In 1769 Wilkes was expelled from the House of Commons for a libel (*d*); and the House of Commons resolved that he was incapable of being re-elected for the then Parliament (*e*). Afterwards the resolution was rescinded (*g*). The point **[67]** might have arisen, or might now arise, incidentally before the Common Law Courts upon an action for a false return, or a double return, under stat. 7 & 8 W. 3, c. 7, ss. 2, 3: and in such case the Courts would clearly be bound by the resolution of the House, if properly placed on the record.

Courts of exclusive jurisdiction interfere to prevent other Courts from acting in matters within such jurisdiction. The House of Commons might therefore have prevented this Court from proceeding in the present case, had that been considered an expedient course. In an *Anonymous case* (Lane, 55), the Court of Exchequer restrained a party from proceeding in trespass in any other Court, against a bailiff who had levied an amercement under Exchequer process. In *Cawthorne* v. *Campbell* (1 Anstr. 205, (note)), the same practice was elaborately maintained by Eyre C.B., where a similar action was removed from the Common Pleas into the Exchequer. And, in an *Anonymous case* in Anstruther (1 Anstr. 205), the case last mentioned was acted upon by Macdonald C.B. In these cases the Courts have judged of their own privileges, and have asserted them by preventing other Courts from interfering. So the Court of Chancery will not allow a suit (unless by its own permission) against a receiver appointed by itself; as ejectment; *Angel* v. *Smith* (9 Ves. 335). *Ex parte Clarke* (1 Rus. & Myl. 563), is to the same effect. In *Scroggs's case* (6 Bac. Abr. 530 (7th ed.), Privilege (B), 2), 26 C. 2, a serjeant at law was arrested on a latitat at the door of Westminster Hall: and the Court of Common Pleas dis-**[68]**-charged him, and said that they would commit the plaintiff if he sued the sheriff for the escape.

In *Biggs's case*, A.D. 1768 (32 Lords' Journ. 185, 187), the Lords ordered a person into the custody of the Black Rod, for bringing an action against a justice of the peace who had apprehended him by command of the House for a riot at the door of the House. The attorney was also committed to Newgate; and the plaintiff in the action was not discharged from custody until he had released the defendant. In *Hyde's case*, A.D. 1788 (38 Lords' Journ. 250), Mr. Hyde was committed by the Lords for indicting a constable who had assaulted him; the assault having been committed in pursuance

(*c*) Nov. 1763. 15 Parl. Hist. 1362, 1371.
(*d*) Feb. 3d, 1769. 16 Parl. Hist. 546.
(*e*) Feb. 17th, 1769. 16 Parl. Hist. 580.
(*g*) May 1782. 22 Parl. Hist. 1411.

of a general order of the House to refuse admission into Westminster Hall during the trial of Warren Hastings. In 1827 the House of Lords acted upon the same principle in *Bell's case* (59 Lords' Journ. 199, 206), where the messenger of the House had received an umbrella from the owner at the door of the House, and had not returned it, and the owner sued for the value in the Court of Conscience, and recovered. The House summoned both the owner and the clerks of the Court before them: and the plaintiff was discharged on his submission, and the officers upon their declaring their ignorance of the nature of the summons. The proceeding might have been the same, if the suit had been in a Superior Court. [Lord Denman C.J. Had the messenger there done more than take the umbrella?] All that appears is, that it was deposited in the usual place, and not returned to the owner. But the question **[69]** clearly turned, not on the merits of the particular case, but on the contempt.

There is a class of cases in which it has been held that actions of this kind are not maintainable, though the House of Parliament has not interposed; and this to avoid collision on questions of privilege. Before stat. 7 & 8 W. 3, c. 7, in *Nevill* v. *Stroud* (2 Sid. 168), the question arose, but was not decided. *Bernardiston* v. *Some* (2 Lev. 114), which has been relied upon for the plaintiff, was a decision of this Court that an action lay for deceitfully making a double return: but that judgment was reversed in the Exchequer Chamber by six Judges against two; *Barnardiston* v. *Soame* (6 How. St. Tr. 1070); where North C.J. delivered a judgment fully bearing out the principle now contended for. The judgment of the Exchequer Chamber was affirmed in the House of Lords after the Revolution; *Barnardiston* v. *Soame* (6 How. St. Tr. 1117); upon consultation with the Judges. The doctrine of the last case was acted upon in *Onslow's case* (2 Vent. 37), and recognized in *Prideaux* v. *Morris* (2 Salk. 502), with the concurrence of Holt C.J. It is true that in *Wynne* v. *Middleton* (1 Wils. 125), Willes C.J. dissented from the opinion delivered in *Prideaux* v. *Morris* (2 Salk. 502), but his opinion is contrary to repeated decisions.

Actions for things done in Parliament, or by the authority of Parliament, have uniformly been held not to lie, and judgments in them, if obtained by the parties suing, reversed. In *The Bishop of Winchester's case* (*i*) the bishop was proceeded against in the King's Bench **[70]** for absenting himself from Parliament: and he pleaded to the jurisdiction, that such offence ought to be corrected in Parliament, and not elsewhere: and the plea was allowed. In *Plowden's case* (4 Inst. 17. 1 Parl. Hist. 625), the Attorney-General filed an information in this Court against Plowden, the eminent lawyer, and others, for departing from Parliament without license: Plowden traversed; and the proceedings, which commenced in the reign of Mary, dropped upon the demise of the Crown. It cannot be inferred that Plowden meant to admit the jurisdiction, though he shewed by his plea that, in point of fact, he had not committed the offence. In *Strode's case* (1 Hats. 85), a member of the House of Commons was prosecuted in the Stannary Court for bringing a bill into Parliament; and the prosecution succeeded: but, upon this, stat. 4 H. 8, c. 8, was passed, avoiding the proceedings, and all suits, &c., for the future, "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament;" and it was afterwards resolved by both Houses (*c*) that this extended to all members in all Parliaments. In *Sir John Elliot's case* (3 How. St. Tr. 293), the Attorney-General filed an information against Sir John Elliot for language and acts which, as appeared by the information, had been spoken and done in the House. The defendant pleaded to the jurisdiction. The Judges stated, at the opening of the case, that they had already considered and resolved upon the point, and that they should hold offences committed criminally and contemptuously in Parliament punishable in another Court, the Parliament being ended; and so they ultimately decided, and the defendant was found guilty. But no Judge, **[71]** even there, went so far as to hold that they had jurisdiction over acts done by the whole House: it was admitted that there was no such jurisdiction. The Long Parliament, in 1641, complained of this judgment, as against the law and privileges of Parliament; and it was reversed in the House of Lords (*a*) after the Restoration, both Houses having passed resolutions against it. The authority of *Rex* v. *Williams* (2 Show. 471. 13 How. St. Tr. 1369), is abandoned on the other side. There the defendant was

(*i*) 4 Inst. 15. Yearb. Pasch. 3 Ed. 3, fo. 18, B, pl. 32.
(*c*) 1667. 9 Com. Journ. 19; 12 Lords' Journ. 166.
(*a*) See 3 How. St. Tr. 319, 333.

indicted for having (when Speaker) published Dangerfield's Narrative by order of the House of Commons. He pleaded to the jurisdiction; the Attorney-General demurred; and the Court gave judgment immediately, interrupting Pollexfen upon his using the words "The Court of Parliament." The defendant's counsel declined to go on; judgment was given for the Crown, and the defendant was fined 10,000l. The House of Commons, after the Revolution, resolved that the judgment was illegal, and against the freedom of Parliament (*c*)[1]. That was, indeed, the act of only one branch of the Legislature; but the Bill of Rights, stat. 1 W. & M. sess. 2, c. 2, recites, as one of the grievances committed under James II., prosecutions in the Court of King's Bench for matters and causes cognisable only in Parliament; and declares that debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament. The decision was not, indeed, actually reversed; nor, in strictness, was it erroneous, for the plea was to the jurisdiction, and not in bar, as it ought to have been: so that the defence was not formally on **[72]** the record (*a*)[1]. But it is admitted here that, in principle, that decision cannot be supported; and such an admission is conclusive against the plaintiff. The act complained of here is as much done by the whole House of Commons as the publication by the Speaker in *Rex* v. *Williams* (2 Show. 471. 13 How. St. Tr. 1369). No just distinction can be suggested between criminal and civil proceedings: if there be no criminal liability, there can be no civil liability.

In *Jay* v. *Topham* (*c*)[2] the defendant was sued for false imprisonment; he pleaded to the jurisdiction, that he was serjeant-at-arms to the House of Commons, and had taken the plaintiff by order of the House. The plaintiff demurred to the plea as being pleaded after full defence, and yet not answering all the declaration: and there was judgment of respondeat ouster. After the Revolution, this case was brought before the House of Commons on the defendant's petition, and referred to a Committee of Privileges. The House resolved that the judgment was illegal (*d*). The two surviving Judges, Pemberton and Jones, being brought before the House, defended themselves on the ground that the plea should not have been to the jurisdiction: but they admitted fully that the defence was, if properly pleaded, **[73]** a valid one. In fact, however, it seems that there was a plea in bar, which was over-ruled, as appears from Nelson (*a*)[2], and from Topham's Petition (10 Com. Journ. 164). The two Judges, therefore, had knowingly violated the law, to gratify the Court party, and were not treated with undeserved severity by the Commons. The record is not in the Treasury; it was taken up to the House of Commons on the occasion of the petition, and probably not returned. *Verdon* v. *Topham* (2 T. Jones, 208), was an action of the same kind against the same party: there was a plea to the jurisdiction, and judgment of respondeat ouster; but little else appears. *Lord Peterborough* v. *Williams* (2 Show. 505. 13 How. St. Tr. 1437), was an action of scandalum magnatum against the Speaker, for reflections on the plaintiff contained in Dangerfield's Narrative. The same matter was pleaded as in *Rex* v. *Williams* (13 How. St. Tr. 1369. 2 Show. 471); but it does not appear that judgment was given, and the suit seems to have been compromised. Dangerfield himself was prosecuted, 1 Ja. 2, for publishing the Narrative (*g*), and convicted; but whether the circumstances of the publication afforded any defence under privilege does not appear. The severity of the punishment, however, shews the feeling which existed

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(*c*)[1] 1689. 10 Com. Journ. 215.

(*a*)[1] The Attorney-General here stated that it had been suggested that the proceeding was collusively instituted, but, he said, it appeared, from documents then in the possession of a descendant of Sir W. Williams, that at least the form of payment of 8000l. (which is said in Shower to have been accepted for the 10,000l.) was gone through. He observed, however, that Sir W. Williams afterwards became a favourite of the Duke of York, and was employed in the prosecution of the Seven Bishops; 12 How. St. Tr. 183, see 225, note. As an instance of the ostensible exaction of a fine, he referred to Sir S. Bernardiston's case in the proceedings between *Skinner and The East India Company*, 3 Hats. Pr. 345.

(*c*)[2] Note (*a*) to *Burdett* v. *Abbot*, 14 East, 102.

(*d*) 12 How. St. Tr. 821.

(*a*)[2] 2 Nels. Abr. 1248 was referred to; but *Verdon* v. *Topham*, T. Jones, 208, is the case there named.

(*g*) *Rex* v. *Dangerfield*, 3 Mod. 68.

as to the publication, at the time of the trial, and the spirit in which, probably, the proceedings were conducted.

The ultimate result of the cases of this period is, that no criminal or civil liability is incurred for acts done by the authority of either House of Parliament. It is true that the bill for reversing the judgment against Williams **[74]** was not carried. It passed the House of Commons, but not the Upper House. The reason is supposed to have been, that it was meant to indemnify Williams, but that there was no fund. It was thought hard that Sawyer, the Attorney-General, should be made to furnish the indemnity; and he had friends in the House of Lords. The proposed Act was, in its nature, private: but the principle of the decision had been disaffirmed by the Bill of Rights.

Since the Revolution, there has been only one instance in which actions have been brought for any thing done by the authority of the House, namely, the case of Sir Francis Burdett. *Burdett* v. *Abbot* (*a*)[1] was an action of trespass against the Speaker for false imprisonment; and, in principle, it cannot be distinguished from an action on the case for libel. Holroyd, who was counsel for the plaintiff, argued that the Common Law Courts could judge of the law of Parliament upon the question arising incidentally: but he failed to shew that the question there did arise incidentally. The Attorney-General, Sir V. Gibbs, shewed that the case could not be distinguished from those which had arisen upon habeas corpus. And that proposition was adopted by the Judges, who held that the question arose as directly in the case before them as it would have done on a proceeding upon habeas corpus. So, here, the case is as if the House of Commons had committed the plaintiff for suing, and he had brought himself up by habeas corpus. In *Burdett* v. *Colman* (*b*)[1] the action was against an officer of the House: the same defence was pleaded as in the former case; but the plaintiff new **[75]** assigned for excess, and the defendant had a verdict. That case also was taken up to the House of Lords, for judgment non obstante verdicto: and in that also it was held that the complaint was answered, and that the warrant of commitment would have sufficed on return to a habeas corpus. Now the decisions must have been the same, if the actions had been in case for publishing the warrant, which was primâ facie a libel, and the defendants had justified under the order of the House. It is observable, too, that *Burdett* v. *Colman* (*a*)[2] shews that there is no distinction between the case of the Speaker and that of a servant of the House.

Many instances have occurred in which such actions would have been brought if they had lain. In *Shirley* v. *Fagg* (6 How. St. Tr. 1121) the defendant, a member of the House of Commons, being served with an order of the House of Lords to answer a petition of appeal by the plaintiff, referred to the House of Commons as to his privilege. The plaintiff was arrested under the Speaker's warrant, but escaped. A fresh warrant issued against him; and his four counsel, Pemberton, Churchill, Peck, and Porter, were taken into custody by the serjeant at arms, and sent to the Tower. Four writs of habeas corpus before the House of Lords were taken out; but the Lieutenant of the Tower refused to obey. The main question between the two Houses was settled at a later period. No doubt the conduct of the House of Commons was wrong. Had there been any remedy by action, the parties arrested would have availed themselves of it, as they cannot be supposed to have been ignorant of their rights. But no such proceeding took place. The cases mentioned on the other side, of abuses of privilege, **[76]** confirm this argument; the greater the abuses, the stronger is the argument from the absence of any proceeding for a remedy by action. Littleton, speaking of the Statute of Merton, says (*a*)[3] that the not bringing an action where it might be brought if maintainable, is strong proof that no such action lies. The omission, in the present instance, cannot be accounted for by any dread entertained of the House, because no such feeling has prevented the suing out writs of habeas corpus.

Then, as to the cases which may be relied upon as supporting the jurisdiction of the Common Law Courts. In *Atwyll's case* (*b*)[2], 17 Ed. 4, Atwyll, a member of the

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(*a*)[1] In K. B. 14 East, 1. In Exch. Ch. 4 Taunt. 401. In Dom. Proc. 5 Dow. 165.
(*b*)[1] In K. B. 14 East, 163. In Dom. Proc. 5 Dow. 170.
(*a*)[2] Ibid.
(*a*)[3] Sect. 108. Co. Litt. 80 b.
(*b*)[2] 1 Hats. Pr. 48. This and the three following cases are from the Parliament rolls.

House of Commons, complained to the House that writs of fi. fa. and ca. sa. had been sued out against him in the Exchequer. What took place was a conference between the two Houses, the result of which was an order by Parliament, in the form of an Act, with the Royal assent, that the writs should be superseded till the end of that Parliament, saving to the judgment creditor his execution after that. One object of this Act was, that the judgment creditor might have justice; for, till stat. 1 Ja. 1, c. 13, a discharge by privilege put an end to the debt; though now, by that Act, the debt is revived after the end of the Parliament (*c*)[1]. Therefore, in particular cases, it was customary to pass Acts for preserving the creditors' remedy, when members were discharged by privilege. But no inference arises from this in favour **[77]** of the power claimed for the Common Law Courts. *Larke's case* (1 Hats. Pr. 17, 8 H. 6), *Clerke's case* (1 Hats. Pr. 34, 39 H. 6), and *Hyde's case* (1 Hats. Pr. 44, 14 E. 4), are to be explained on the same ground. In *The Prior of Malton's case* (*d*) an action was commenced against the defendants for arresting the prior, by his horses and harness, on his return from Parliament; the writ reciting that members ought to be free eundo et redeundo. What the result was, does not appear: the case therefore proves nothing. In *Trewynnard's case* (1 Hats. Pr. 59, 36 & 37 H. 8), the sheriff was sued for an escape from final process; and the defendant pleaded that, while Trewynnard the prisoner was in his custody, he was discharged by the King's writ of privilege, as a member of the House of Commons, arrested while coming to Parliament. The plea was demurred to; but there was no judgment: so that the case proves nothing. But an argument for the sheriff is extant in Dyer (1 Dyer, 61 b.), containing this passage: "Although Parliament should err in granting this writ, yet it is not reversible in another Court, nor any default in the sheriff." In *Donne* v. *Walsh* (*h*) the defendant was sued in debt in the Exchequer. He pleaded a writ of privilege, which set out a custom, that neither members nor their servants, coming to Parliament, ought to be arrested or impleaded; and averring that he was a servant of the Earl of Essex, so coming, &c., prayed judgment. The plaintiff, in his replication, prayed that the writ might be disallowed, for that there was no such custom. The Barons consulted the Judges of both the other **[78]** Courts, found that there was no such custom as to not being impleaded, disallowed the writ, and put the defendant to answer. Here the question arose incidentally: the action was not brought for an act done by the order of the House; but it merely involved incidentally a question of personal privilege. The same explanation applies to *Eyver* v. *Cosins* (1 Hats. Pr. 42, 12 E. 4). In *Pledall's case* (*b*) the Houses, on conference, agreed that it was no breach of privilege to bind a member by recognizance to appear in the Star Chamber after the end of the Parliament, for matters not connected with his character as a member. That proves nothing as to the present question. In *Cook's case* (*c*)[2] a dispute arose between the Lord Chancellor and the House of Commons, whether members were privileged from being served with subpœna; and a search for precedents was directed, but no report was made during the Parliament. And, besides, that also was a mere question of personal immunity.

In *Benyon* v. *Evelyn* (O. Bridgm. Judgments) 324, the Statute of Limitations was pleaded in bar to assumpsit for goods sold and delivered. The plaintiff replied that defendant was a member of the House of Commons from the time of the promise to the death of King Charles I., when Parliament was dissolved by such death; that, from thence to the Restoration, there was no Court of Chancery from which an original could issue, and no Court of Record of the King open; and that the action was brought within six years of 29th May 1660. Rejoinder, that the cause of action, if any, accrued on 10th **[79]** July, 21 Car. 1, and that, from thence to the death of Charles I., and thence hitherto, the Court of Chancery and the Superior Courts at

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(*c*)[1] It is remarkable that, in this statute, s. 2, it was thought necessary to make an express provision that no sheriff, &c., from whose custody any person taken in execution should be delivered by privilege of Parliament, should be chargeable with "any action whatsoever, for delivering out of execution any such privileged person."

(*d*) 1 Hats. Pr. 12, 9 E. 2, citing p. 20 of Prynne's Animadversions on 4 Inst.

(*h*) 1 Hats. Pr. 41, 12 E. 4. From Prynne's Register, part 4, 752.

(*b*) Cited 14 East, 47, from Prynne's Reg., part 4, p. 1213.

(*c*)[2] 1 Hats. Pr. 96, 26 Eliz. Cited from Dewes's Journal. See also O. Bridgm. Judgments, 351.

Westminster were open, &c. Sur-rejoinder, that the defendant was a member till 30th January 1649, so that the plaintiff could not sue an original or bill against him, and that, from thence till 29th May 1660, there were no Courts, &c.: to which the defendant demurred. Here it was agreed that, even if the member had been privileged, the defence was not answered, stat. 21 Jac. 1, c. 16, containing no exception in such case. The dicta of Bridgman C.J., as to the privilege, were therefore extra-judicial and a parade of authorities on the subject was unnecessary. Further, if privilege would have constituted a defence, the question would only have arisen incidentally: so that the dicta at most shew merely that the Courts may determine the question of privilege if it arise incidentally. Bayley J. so understood the observations; *Burdett* v. *Abbot* (14 East, 33). Further, it appears that Bridgman did not believe that the House had passed a resolution declaring it breach of privilege to file an original against a member. Bridgman relies upon *Trewynnard's case* (1 Hats. Pr. 59), and others which have been already explained. He relies also on a case in the reign of Ed. 3 (*c*)[1], saying that there the Judges proceeded, notwithstanding a resolution and command to surcease. That case was assize of novel disseisin, in which the question was, whether the tenant was a bastard or not. The point was referred to the bishop, who certified (*d*) to the Judges of Assize that he was [80] stating the facts. The tenant caused it to be suggested in Parliament that the bishop had certified against the common law, and prayed remedy. There was then a writ to the Justices of Assize to surcease; but they took the assize nevertheless, in right of the damages, and adjourned the parties to the Common Pleas. Then a writ came to them to cause the record to be brought to the council before the Bishop of L. and two other bishops, to try if the cause assigned by the bishop for bastardy were good. They adjudged the certificate good. Afterwards, because the Justices of Assize had taken the assize contrary to the writ, the Chancellor reversed their judgment before the council, where it was adjudged as the bishop had certified, and ordered the record back into the Common Pleas. There it was adjudged that the plaintiff should recover, because the bishop had certified that the tenant was bastard. But it is said that the justices took no regard of the reversal before the Council, because that was not a place where the judgment could be reversed. Now it does not appear that the writ to surcease, in this case, was issued by Parliament. In Fitzherbert's (*a*)[1], Brooke's (*b*), and Rolle's (*c*)[2] Abridgments, this case is cited merely to shew that the Judges consider themselves bound by the bishop's certificate, without regard to the grounds on which it proceeds. Even if the writ issued from Parliament, the case does not support Bridgman's doctrine that the Courts will not obey a writ to surcease from proceedings against a member: for it does not appear that the tenant was a member. Bridgman relies also on *Staunton* v. *Staun*-[81]-*ton* (*a*)[2]. That was formedon in the Common Pleas, where, a question arising upon an averment in the demandant's counterplea, he "sued to Council in Parliament" (which seems to mean that he took the opinion of the House of Lords), whether the averment could be so made; and the Lords held that it could. A writ was then issued to the Common Pleas, reciting the opinion, and commanding them to go on. The Judges differing, the case was again brought before Parliament, which again directed the Common Pleas to proceed, and it was accorded in Parliament that judgment should be given for the demandant. This was done; but a writ of error was brought, so that the matter again came before the Judges, notwithstanding the two resolutions. The case occurred in the reign of Edward III., at which time it was not unusual for the Courts of Law to consult Parliament in cases of difficulty. All that the instance shews is that, at that time, the Courts of Common Law would, in a case between party and party, hold themselves at liberty to give judgment contrary to the opinion of the Lords delivered in a quasi-judicial capacity. It has no connection with the point discussed by Bridgman, or with the present question. There was no point of privilege involved.

In 1681 (33 C. 2), Fitzharris (8 How. St. Tr. 223), had been impeached for high

(*c*)[1] Yearb. Pasch. 39 Ed. 3, f. 14, A. See Lib. Ass. 38 Ed. 3, f. 224, B, pl. 14.
(*d*) See Vin. Abr., Bastard (K), (L).
(*a*)[1] See Fitz. Gr. Abr., Bastardy, pl. 8.
(*b*) See Bro. Abr., Bastardy, pl. 21.
(*c*)[2] See 2 Roll. Abr. 592, l. 35, Triall (E), pl. 1.
(*a*)[2] Fitz. Gr. Abr. Voucher, pl. 119, and 2 Rot. Parl. 122 (14 Ed. 3).

treason; and the Lords resolved (a question having arisen whether such impeachment should be in the case of a commoner) that the case should be proceeded with in the ordinary course of law. The House of Commons passed a resolution against the **[82]** resolution of the House of Lords; and, two days after, Parliament was dissolved. Then Fitzharris, being indicted in this Court, pleaded in abatement that an impeachment was depending: and the plea was overruled, and judgment of respondeat ouster given. The only point there determined was, that an impeachment in a Parliament which was dissolved, did not abate an indictment in the Common Law Courts (*a*)[1]. That has nothing to do with any question of privilege. In *Knowles's case* (or *Lord Banbury's case* (12 How. St. Tr. 1167. 2 Salk. 509. 1 Ld. Ray. 10)), the defendant was indicted for murder, as Charles Knowles, and pleaded in abatement that he was Earl of Banbury, which was no doubt a good plea. A replication, that he had petitioned the House of Lords to be tried by his peers as Earl of Banbury, and that the petition had been dismissed, was held bad on demurrer; and properly; for the proceeding of the Lords was coram non judice, they having no jurisdiction in such cases unless on reference to them by the Crown; in fact, the Crown sometimes decides such cases upon the advice of its own law officers, as in the case of *The Huntingdon Peerage*. This is therefore no authority on privilege. The attempt was to plead an adjudication, but no regular adjudication was shewn. Neither House, as such, had any interest in the question.

In *Ashby* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 675), the question was one in which the Houses of Parliament had no interest: it turned, according to Holt C.J., on common and statute law. Three Judges against Holt C.J. decided, in the King's Bench, **[83]** that such action did not lie. On error, in the House of Lords, of the ten Judges present, one doubted, five held that the action did not lie, and four that it did. It was decided by fifty Lords against sixteen that it did lie (2 Lord Ray. 958). Lord Mansfield, in *Milward* v. *Serjeant* (note (*b*) to 14 East, 59), disapproved of the decision. But, at any rate, it has no bearing upon a case where an express resolution of the House of Commons is judicially before the Court. This remark applies to later cases, in which it has been held that such action lies; but in none of which was there any conflict as to privilege between the House and a Court of Law; *Milward* v. *Serjeant* (note (*b*) to 14 East, 59), *Drewe* v. *Coulton* (1 East, 563, note (*b*)), *Fox* v. *Corbett* (1784. Cited 14 East, 62).

The Duchess of Somerset v. *The Earl of Manchester* (Prynne's Reg. part 4, 1214, A.D. 1663), is sometimes referred to for the dicta contained in it. There, in a case before the Delegates, in which the validity of a will was in question, the defendant, being a peer, wrote a letter to the Delegates demanding forty days' privilege, to put off the sentence, before the session of Parliament. This letter the Delegates might have disregarded entirely. They came, however, to five resolutions, importing, first, that they would not notice a demand of privilege made by letter, but only one signified by writ of privilege under the Great Seal: secondly, that, when questions of privilege of Parliament come legally before the Courts, they are the proper Judges to allow or disallow the privilege: thirdly, that privilege was not to be allowed to a party sued alieno jure: fourthly, that the earl had not privilege for forty days before the session: **[84]** fifthly, that the Judges were not bound to proceed, in Courts of Justice, according to the votes of either House in cases of privilege, but according to the known laws of the realm, their oaths and trusts: sixthly, that they might pass sentence without breach of privilege, the earl's personal attendance not being necessary. They passed sentence accordingly. But, of these resolutions, the first is clearly wrong, if meant to affirm that privilege can never be noticed except when there is a writ of privilege. The second, from the cases cited (*a*)[2], appears to refer only to those instances where the question arises incidentally. The third is unimportant here. The fourth would alone have been sufficient to decide the case. The fifth is purely gratuitous, there being no resolution of the House before the Delegates.

The decision in *The Duchess of Kingston's case* (20 How. St. Tr. 355), against the

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(*a*)[1] In *Warren Hastings's case*, it was resolved by both Houses, in 1791, that the dissolution of Parliament does not abate a pending impeachment. See Parl. Hist. vol. 28, p. 1018, vol. 29, p. 514. As to publications on this subject, see 2 How. St. Tr. 1446, note.

(*a*)[2] *Donne* v. *Walsh*, 1 Hats. Pr. 41. See ante, p. 77. *Ryver* v. *Cosins*, 1 Hats. Pr. 42. See ante, p. 78.

conclusiveness of a former sentence, when disputed by a person not party to the suit in which it was given, cannot militate against the principle here argued for by the defendant.

In *Mr. Long Wellesley's case* (2 Russ. & M. 639), a member of the House of Commons was committed by Lord Chancellor Brougham for contempt in detaining a ward of Chancery: a committee of the House disallowed the claim; and the Chancellor disallowed it also. The decision of the Court was in accordance with the resolution of the House. In *Mr. Lechmere Charlton's case* (2 Mylne & Cr. 316), Lord Chancellor Cottenham committed a member of the House of Commons for a contempt. The member petitioned **[85]** the House: but the Committee of Privileges decided against his claim of privilege. The Lord Chancellor appears to consider the House the proper tribunal to decide the question, and does not say how he should have acted if their decision had been different (*a*).

III. Assuming that this Court were competent to enquire into the existence of the privilege, it may be shewn that the power of printing and publishing reports and papers, though of a criminatory nature, for public information and benefit, has long existed. If the House has power to order the publication, it must follow as a necessary consequence that no action will lie; for criminatory matter published by lawful authority cannot be a libel. The fact of sale for money can be no material ingredient in the offence; nor does it appear by the plea that the paper in question was sold (*b*).

It is conceded that a publication confined to the use of members is lawful; yet the evil now complained of must result to the party inculpated, in an equal or greater degree, from this limited circulation. It is presumed that every member of the Upper as well as the Lower House may read it. If the language is not actionable per se as verbal slander, he may repeat it to others. The slander may thus obtain general publicity; yet not a copy can be sold, or shewn to the party injured; and **[86]** he is thus deprived of all means of vindicating his character.

That the law may not, in the case either of limited or of general circulation, afford a remedy by action, is no argument against the authority of the House; for there are many instances of injury without remedy by suit or indictment: the most opprobrious terms, within certain limits, may be used, in speech, to assail the character of man or woman, and yet the law afford no redress. The policy of the law excludes such a remedy; and the private injury is more than balanced by the public benefit. The difficulty of drawing the line between a limited and a general circulation is itself a proof that no distinction exists. How many copies are to be printed? Are the wants of a future House as well as the present to be provided for? What is to be done with the copies on a dissolution? Are the Peers to have them? And, if they are, may copies be supplied to the Judges, Attorney and Solicitor-General, and others summoned to attend the Lords by writ? If the members of the House of Commons are alone to have copies, what use is to be made of them? May a member read his copy from the hustings in his own vindication. On the death, what are his executors to do with it? Are they to burn the copy or will it be a devastavit to do so? Similar questions may be asked in the case of a member resigning his seat. On a dissolution, are all copies to be burnt? Is it indictable to deliver copies to public libraries, or to give them in exchange for other public papers to a foreign State, agreeably to a recent arrangement? Can a rule which it is impossible to obey, at least without preposterous results, be sanctioned by the law of the land?

[87] There are three modes of proving the existence of privilege. 1. By the necessity of it. 2. By long usage. 3. By long acquiescence in it.

1. As to the necessity here. There may not be a physical necessity, as there is for permission to a member to enter the House and take his seat; but there is a like

(*a*) The Attorney-General here cited, in addition to the authorities before adduced by him from text writers, "Lex Parliamentaria, or a Treatise of the Law and Custom of the Parliaments of England" (1690), in which it is stated that the Houses, though now sitting separately, continue one Court; that the Parliament gives law to other Courts, and therefore ought not to receive it from them (p. 36, 37); and that "it doth not belong to the Judges to judge of any law, custom, or privilege of Parliament" (p. 9).

(*b*) It does not appear on the record that the selling is either complained of or confessed.

necessity to that which is recognized as the foundation of the more limited right of circulation among members. There is, in fact, no absolute necessity even for such limited privilege, since every member may be present, and may hear every paper and proceeding read over. But in practice this would be impossible, or so inconvenient that the House could not efficiently discharge its functions if this right to print for its own use were not allowed. Now it is the same kind of necessity which exists for the same mode of communicating information to the whole constituency. The theory of the constitution supposes a constant intercourse between the representative and the constituent. The constituent petitions the House, and the House informs the constituent. This intercourse does not involve the publication of all proceedings, but only of those which concern the constituents: some are necessarily secret. But even as early as the reign of Henry VIII., the Chancellor, on a prorogation of the Parliament, desired the members to report to their electors what had been done.

The Parliament has been called omnipotent (*a*). It has powers of so extensive a nature that many measures, which it is competent for the Legislature to introduce, would not be submitted to, if there were no means of explaining their object to the people, or pointing out their necessity. Thus the dissolution of monas-**[88]**-teries was preceded by a publication of the abuses which were reported to prevail in them. The Exclusion Bill in the reign of Charles II.; the Regency Bills, George III.; the bills repeatedly passed for suspending the Habeas Corpus Act; the Acts for the abolition of slavery, the reform of corporations, the amendment of the poor-laws, are also instances of great legislative changes, to which the people were to be reconciled by circulating among them information, or by the previous publication of reports which were in their nature criminatory. The report which gives rise to the plaintiff's action is another instance in which it was useful to explain, and justify to the public, the introduction of new regulations and additional restraints: one of these, viz. the exclusion of certain books from prisons, occasioned the reference to the plaintiff's book of which he now complains. The inquisitorial powers of the House cannot be exercised with effect, or with justice to accused parties, unless the right of publishing charges be allowed to it. In the case, a few years ago, of a magistrate, Mr. Kenrick, against whom certain charges were adduced in the House, the publicity of the investigation was as beneficial to the party himself as to others. The two Houses may enquire into the competency or conduct of a Judge, and address the Crown to remove him: yet the public would doubtless be dissatisfied at the removal, unless the grounds of it were made known. Can it be maintained that the Judge in such a case might sue the Speaker for directing the publication of the evidence?

As to part of the proceedings, viz. the votes and many of the orders of the House, and the journals of both Houses, there is an absolute necessity for publishing them. All persons are supposed to be cognizant, **[89]** and are bound to take notice of them. Each House will notice the votes of the other. The orders in reference to private bills, election petitions, &c., have the force of law, and must be published in order that the people may know what they are bound to obey. The journals are publici juris. They are evidence in the Courts. Any one may inspect and copy them. Those of the Lords are records, and are so treated in all Courts, though it may be doubtful as to the Commons' Journals. Will an action lie for criminatory matter entered in these journals? Against whom will it lie, the printer, the Speaker, or the Lord Chancellor? If no action lies for matters contained in such votes, or in the journals, what distinction is there between them, and papers, like the reports, which have become part of the proceedings, and been published separately? Formerly the votes contained every thing, even the speeches of members. Petitions may be, and sometimes are, printed in a supplement to the votes. This very report might have been printed in the supplement, or entered on the journals in consequence of a debate arising on it; and, ex concesso, the journals may be printed for public use.

2. Then as to usage. In *Lake* v. *King* (1 Saund. 133), the Court said they would take judicial notice of the usage of Parliament, after they had informed themselves of it by enquiry. There is abundant evidence of such usage in the present case. Numerous instances are collected in the Report of the Committee of the House of

(*a*) 1 Bla. Comm. 161.

Commons on this subject (*b*)[1]; and there are many others to the same **[90]** effect. The result is this:—Before the invention of printing, other modes must have been resorted to for publishing the proceedings of Parliament. Statutes were formerly proclaimed in the County Courts. There is no express proof of the usage to publish proceedings before July 30th, 1641; even the practice of printing for the use of members is not traced to an earlier period. From 1641 till 1680 the Speaker from time to time appointed a person exclusively to print and sell specific papers; the form of appointment is seen in *Thompson's case* (8 How. St. Tr. 1). In 1680 a general order was made, and this order has been renewed every session with the exception of 1702, when it was suspended for a short time. This applies only to general votes and proceedings: reports and miscellaneous papers have been printed under distinct orders; nor does it appear that the circulation has been confined to members. The numbers printed have usually far exceeded the number of members; and the sale, though not expressly authorized, has, in fact, always prevailed. If it be objected that the precedent originated with the Long Parliament, it may be answered, that it occurred before Charles I. left London for the north, during a period when a regular Government was subsisting, and statutes were passed which are the law of the land. In 1680 a debate occurred on the subject of printing the votes, when it was unanimously agreed to persist in the practice; Mr. Secretary Jenkins alone objecting, not on the ground of illegality, but because it was "a sort of appeal to the people," and was "against the gravity of this assembly" (*b*)[2]. The orders for printing have been in two forms; one directs the printing generally, **[91]** the other for the use of members. A debate has often arisen on the form to be adopted. Sometimes a limited circulation has been enlarged by a subsequent unlimited order. The expense of printing was formerly defrayed by the sale; since the expense has exceeded the receipt, the Treasury has paid the deficiency. In one way or another the practice of sale has, in fact, prevailed for two centuries; there has never been any difficulty in obtaining copies; and reports, like those on the South Sea Bubble, the slave-trade and municipal corporations, wounding the feelings of private persons, and which would have been deemed libels under other circumstances, have circulated without restriction during all that period.

3. Acquiescence is a third proof of the existence of the privilege. Except *Rex* v. *Williams* (13 How. St. Tr. 1369), no instance of an action or indictment has been shewn until the present plaintiff brought his action. There has been (as Buller J. said in *Le Caux* v. *Eden* (2 Doug. 602)), a "universal silence in Westminster Hall." The action, not the publishing, is an innovation. It is primæ impressionis, and supported by no analogy. What will be the consequences if the Speaker is to be held liable for such publications? Suppose a resolution of either House were to pass criminating the ministers of the Crown, and were to be published in the minutes, the Lord Chancellor, Speaker, and all others concerned, are liable to action or indictment. If the Speaker refuses to authorise the publication of papers, the House may send him to the Tower: if he obeys, the party aggrieved may sue or indict him. The Postage Act, 42 G. 3 (*c*), by giving **[92]** the power of sending votes and proceedings free from postage, recognised their general circulation; for it was not limited to the case of papers sent to members.

Among the objections which have been urged to this claim of privilege are,

1. That it alters the law of the land, by legitimating the sale of libels. This is a petitio principii; it assumes that the privilege is not the law of the land.

2. That the exercise of the right inflicts a wrong, and that there is no wrong without a remedy. This again is begging the question. It is not a wrong if lawfully done; and, as to the loss or inconvenience to the party, the law, in pursuit of a greater benefit, does not regard it. For the same reason, there is no redress for an innocent party unjustly indicted, unless malice and want of probable cause be shewn; no action against a witness for evidence he has given; nor against counsel for what he says in the discharge of his duty. No action lies for commitment by either House,

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(*b*)[1] "Report from the Select Committee on Publication of Printed Papers; with the Minutes of Evidence, and Appendix. Ordered, by the House of Commons, to be printed, 8 May 1837." See p. 102, post.

(*b*)[2] 4 Parl. Hist. 1306.

(*c*) Stat. 42 G. 3, c. 63, s. 10. See stats. 7 W. 4 & 1 Vict. c. 32 and c. 34.

however arbitrary. The suspension of an officer by his commander is another instance of injury done with impunity. The Post-Master-General is not liable for the loss of letters. Confidential communications; literary criticism; exhibiting articles of the peace containing matter of defamation, though false; impressment of seamen; are all examples of loss, pain, or injury, for which the policy of the law provides no remedy by action.

3. It is objected, that this privilege is not among those claimed by the House from the King at the beginning of every Parliament. The answer is that the privileges are inherent in the House, and as ancient as the prerogative of the Crown. The demand is a mere form, like **[93]** the consent of the people asked for the Sovereign at the Coronation. They were never prayed for by the Speaker until the reign of Henry IV.; and, when James I. asserted that they were enjoyed of mere grace and favour, the Commons entered a protest on their journals, which was torn out by the King (*a*)[1].

4. Again, it is objected that the immunity claimed is unnecessary, and that the proceedings would be sufficiently circulated through the same medium as the debates. But there is a distinction between papers and debates. The former are published at discretion, and by the order of the House. The debates are published without authority, the House retaining its power of conducting them in secrecy for the purpose of protecting itself from the interposition of the Crown.

5. It is said that all useful matter may be published without any libel. But the publication of some reports would be impossible if every thing offensive to the feelings were to be expunged. To leave blanks for names would only aggravate the mischief. It has been suggested that injured parties should be recompensed out of the public purse; but that would be an undue encouragement to the bringing of actions; and the suggestion is not applicable where parties have been indicted. The Speaker, for instance, in such a case, could not be indemnified by money for an imprisonment.

6. It is objected that this privilege cannot exist by prescription, being one that must have arisen within time of memory. This argument would deprive the **[94]** House of all privileges; for its separate existence, as a branch of the Legislature, can hardly be traced beyond legal memory; indeed, the jurisdiction of this Court, and the equitable jurisdiction of the Lord Chancellor and of the House of Lords on appeal, either have arisen in times comparatively recent, or rest upon fictions to which a modern origin can be assigned. The power of a Court of Oyer and Terminer to prohibit the publication of its proceedings during a trial, was not established before 1821 (*a*)[2]. The right of a member to be discharged from arrest without a writ of privilege is of recent origin; *Holiday* v. *Pitt* (*b*). Even a commitment by the House of Commons for contempt cannot be traced farther back than the reign of Elizabeth. Although the lateness of the invention of printing may preclude the defendant from asserting an immemorial right to print, yet the right to publish in some mode or other has substantially existed from the earliest times; and this is enough to support the claim. Printing has superseded the old mode of proclamation of statutes by the sheriff (*c*), and may itself be superseded by some other invention.

7. As to the argument from abuse, all power is capable of being abused. The unquestioned right of commitment for contempt may be so. The privilege of freedom **[95]** from arrest may be made a shelter for fraudulent debtors. Freedom of speech may be used as a licence to calumniate. But the Constitution presumes that the Houses of Parliament, as well as the Courts of Justice, will usurp no undue authority. That the power has been exercised with moderation may be inferred from the fact that no action has been attempted since the Revolution, until that lately brought by

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(*a*)[1] 1 Com. Journ. 668, 18th Dec. 1621. 1 Hats. 78, 79. And see the authorities referred to in *Holiday* v. *Pitt*, 2 Stra. 986.

(*a*)[2] *Rex* v. *Clement*, 4 B. & Ald. 218. In the argument in *Rex* v. *Clement*, referred to, p. 96, note (*d*), post, it was stated that orders in restraint of publication during the proceedings were made on the trial of Watson in K. B., in 1818, and on that of Brandreth under the special commission at Derby in the same year. See 32 How. St. Tr. 81, 109, 766, 779.

(*b*) 2 Stra. 985. But stat. 12 & 13 W. 3, c. 3, was there relied upon.

(*c*) Com. Dig. Parliament (G, 23).

the plaintiff himself (*a*); at least this inference cannot be denied by those who assert that such publication has always been actionable.

Of the reported cases and authorities on this branch of the subject, the first is *Lake* v. *King* (1 Saund. 131 a.). There an alleged libel was contained in a petition to a committee of grievances, copies of which had been printed and delivered to members of the committee. Though there had been no order of the House, Hale C.J., and the rest of the Court, took judicial notice of the order of proceeding and practice of the House, and on that ground held the action not maintainable. On the same principle the order and practice of unlimited distribution entitles the defendant to judgment in the present case. The next case is *Rex* v. *Williams* (13 How. St. Tr. 1369). Taken in connection with the 9th declaratory clause of the Bill of Rights, 1 W. & M. sess. 2, c. 2, which in effect reversed the decision in that case, it is an authority for the defendants (*d*)[1]. *Rex* v. *Wright* (8 T. R. 293), was an application for **[96]** a criminal information in the case of a libel contained in the report of a secret committee. The same grounds were urged as now, in support of the rule; yet the Court held that the proceedings of neither House could be treated as a libel, and strongly reprobated the decision in *Rex* v. *Williams* (13 How. St. Tr. 1369). *Rex* v. *Wright* (8 T. R. 293), was a stronger case than the present; for the defendant there had published the report without any authority from the House. In *Rex* v. *Clement* (4 B. & Ald. 218), a Court of Oyer and Terminer made an order forbidding the publication of an unfinished trial, and imposed a fine for the violation of it. On motion for a certiorari to remove the order for the purpose of its being quashed, this Court upheld it. The fine was thereupon estreated into the Exchequer: thence the estreat roll was transmitted into the Duchy Court (the fine belonging to His Majesty in right of the Duchy of Lancaster), and a levy made. The defendant was then permitted, by consent of the Crown, to file a plea to the estreat, alleging the illegality of the original order, and praying to be discharged from the fine: to this the Attorney-General of the duchy demurred, and the demurrer was argued (17th April 1828) before the Chancellor of the duchy, assisted by Bayley J. and Hullock B., who adjudged the order and fine to be legal (*d*)[2]. This was an order for the suppression of proceedings; but the publication of them is justifiable pari ratione. The principle is, that Courts have a right to make such orders (whether to direct or **[97]** to prohibit publication) as are felt to be necessary for the due performance of their functions. Nor are precedents wanting of orders for the publication of trials. In *Layer's case* (16 How. Sta. Tri. 93), A.D. 1722, it appears from the debates in the House of Lords (8 Parl. Hist. 54), that the Judges of this Court directed, and in part revised, a report of the tral. The trial of Lord Melville (29 How. St. Tr. 549), was also published by order of the Lords; and the person appointed for that purpose by the Lord Chancellor obtained an injunction against a bookseller for publishing another report of the same case; *Gurney* v. *Longman* (13 Vesey, 493), where earlier instances are cited in support of the usage. *Manley* v. *Owen*, cited in *Millar* v. *Taylor* (4 Burr. 2329), recognizes the exclusive right of the Lord Mayor of London to appoint a person to print the sessions papers of the Old Bailey, the lord mayor being at the head of the commission. The imprimatur prefixed to some of the old law reports appears to indicate the same power in the Courts to order publication of their proceedings. The sentences of courts martial are published by being read at the head of every regiment, and entered in the orderly books; such publication being necessary for the due administration of justice by those courts.

Publications for the good of the community have been held privileged in many instances; as the declaration of a court-martial censuring the prosecutor, and delivered by the President to the Judge-Advocate, *Jekyll* v. *Sir John Moore* (2 New Rep. 341); the report of a military court of enquiry (though not a regular Court of Justice) transmitted to the **[98]** Commander-in-Chief, *Home* v. *Bentinck* (2 Brod. & B. 130); a story told in a sermon by way of example, from Fox's Book of Martyrs, though

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(*a*) *Stockdale* v. *Hansard*, 2 M. & Rob. 9. See p. 101, note (*b*), post.

(*d*)[1] The Attorney-General here read a MS. in the handwriting of Sir W. Williams, containing the article referred to, and indorsed, "the part of the Bill of Rights relating to my judgment in Banco Regis, and fine in Trinity, 1 James 2."

(*d*)[2] The Attorney-General read a MS. note of these proceedings, and of the judgment of the Duchy Court.

defamatory of a living person, and untrue, *Greenwood* v. *Prist* (*b*). On the like principle, an action has been held not maintainable for matter of crimination inserted in articles of the peace, "not only concerning the petitioners themselves, but many others," *Cutler* v. *Dixon* (4 Rep. 14 b.). Privilege has in like manner been extended to defamatory matter in an affidavit exhibited in Court, *Astley* v. *Younge* (2 Burr. 807); and to a complaint against an officer in the Army, addressed by his creditor to the Secretary-at-War, *Fairman* v. *Ives* (5 B. & Ald 642), where *Cleaver* v. *Sarraude* (1 Camp. 268), was recognized. In *Rex* v. *Baillie* (21 How. St. Tr. 1), a criminal information was refused for a statement, submitted to the Governors of Greenwich Hospital, accusing persons connected with its management. A writ of forger of false deeds sued out against a peer was held not actionable, the suit being actually in a course of prosecution, *Lord Beauchamps* v. *Croft* (Dyer, 285 a.), where *Buckley* v. *Wood* (4 Rep. 14 b.), a case similar in principle, is referred to in note (37). No action lies for an advertisement injurious to character, but published bonâ fide to obtain information; *Delany* v. *Jones* (4 Esp. N. P. C. 191). In *Blackburn* v. *Blackburn* (4 Bing. 395), a letter addressed to the pastor and deacons of an independent congregation, impeaching the moral character of one of their ministers, was held to be a libel; but it is clear that, if the statement had been made bonâ **[99]** fide and without malice, it would have been held privileged. And, if communications of this nature, addressed to persons interested in them, are privileged, can it be said that a representation on so important a subject as that of prisons, delivered by the members of the House of Commons to the commons, their constituents, is actionable as a libel? A party may indeed be injured by the result of such a publication; but (as was before observed) there may be a loss without any right to compensation at law. Thus in *Stockdale* v. *Onwhyn* (5 B. & C. 173), it was decided that the publisher of a scandalous work could not recover damages against a person who pirated it; and in *Poplett* v. *Stockdale* (2 Car. & P. 198), it was held that the printer of the same work could not recover against the publisher on a contract for printing it, the defence being its corrupt character.

The plaintiff in this case cannot demand that the privilege claimed by the House should be established by proofs of its exercise. It is asserted on the same principle upon which Wilmot J., in *Rex* v. *Almon* (*c*), maintained the right of the Common Law Courts to attach for contempt, as necessarily incident to their constitution, and coeval with their first foundation. On that principle, also, the Judicial Committee of the Privy Council, in *Beaumont* v. *Barrett* (1 Moore's Rep. Priv. Counc. 59, 76), upheld the power of the House of Assembly of Jamaica to commit for publishing a libel in breach of their privileges; and doubtless it would in like manner have recognized their authority to order a publication which they deemed to be for the general advantage, on the ground that whatever is re-**[100]**-quisite or beneficial for a legislative body in the exercise of its functions inherently belongs to it, and the right need not be supported by proof of user, or by prescription.

No instance can be found in which a publication by authority of either House of Parliament has been considered a subject of prosecution or civil action. *Rex* v. *Lord Abingdon* (*a*), is not such an instance. The paper there published by the defendant (a speech which had been read by him in the House of Lords) was issued without the sanction of the House; no privilege claimed by them was involved in the prosecution. So in *Rex* v. *Creevey* (1 M. & S. 273), the publication (of a member's speech) was not authorized by the House, but, on the contrary, was against its Standing Order. Lord Ellenborough there, referring to *Rex* v. *Wright* (8 T. R. 293), said "I will not here wait to consider whether that could be strictly called a proceeding in Parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in Parliament in the terms given to some

(*b*) Cro. Jac. 91 (cited in *Brooke* v. *Montague*); S. C. cited in *Rex* v. *Williams*, 13 How. St. Tr. 1387.

(*c*) Wilmot's Opinions and Judgments, 254. And see the judgment of Lord Ellenborough in *Burdett* v. *Abbot*, 14 East, 137, 151.

(*a*) 1 Esp. N. P. C. 226: S. C. cited in *Rex* v. *Creevey*, 1 M. & S. 274.

of the Judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons' House of Parliament? A member of that House has spoken what he thought **[101]** material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there; but, unauthorized by the House, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual."

The only remaining authority is the dictum of Lord Denman C.J. in the former case of *Stockdale* v. *Hansard* (*a*)[1]. In that action of libel, it was urged for the defendants at Nisi Prius that the matter complained of was privileged, being contained in a report published by order of the House of Commons. His Lordship held that the order was no protection; but the question was not fully discussed; and, as the defendants had a verdict on the plea of justification, there was no further occasion to contest the point. But, as it now appears, the great body of authorities is adverse to his Lordship's ruling (*b*).

[102] Since the trial of that cause, the question of privilege, as applied to the point now before the Court, has been referred to a committee of the House of Commons, appointed without reference to party; they have reported, with only one dissentient voice, in favour of the protection claimed by these defendants (*a*)[2]; and their report has been adopted by the House of Commons. An opinion so delivered and adopted

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(*a*)[1] 2 M. & Rob. 9. S. C. in the Report of the Select Committee on Publication of Printed Papers, 8th May 1837. Appendix to Minutes of Evidence, No. 1, p. 65.

(*b*) The pleas in the above case of *Stockdale* v. *Hansard and Others* were, 1. Not guilty. 2. A justification, alleging that the facts stated in the libel were part of a report made by the inspectors of prisons, and asserting the truth of that statement. Sir J. Campbell, Attorney-General, for the defendants, insisted on the latter defence; but he also gave proof that the alleged libel was published and sold in pursuance of resolutions of the House of Commons, and contended, therefore, in the first instance, that the publication was privileged by their authority.—Lord Denman C.J. said, in summing up: "On the third ground, namely, that this is a privileged publication, I am bound to say, as it comes before me as a question of law for my direction, that I entirely disagree from the law laid down by the learned counsel for the defendant. I am not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whatever arrangements may be made between the House of Commons and any publisher in their employ, I am of opinion, that the publisher who publishes that in his public shop, and especially for money, which may be injurious, and possibly ruinous to any one of the King's subjects, must answer in a Court of Justice to that subject if he challenge him for a libel, and I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a Court of Justice for questioning that point, it were left unsatisfactorily explained, the Judge who sat there might become an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it to a tyranny that no man ought to submit to." His Lordship then said, referring to *Rex* v. *Wright*, 8 T. R. 293, that that case was not applicable, and was no authority to prevent his stating the law as he now laid it down. He added: "Therefore my direction to you, subject to a question hereafter, is, that the fact of the House of Commons having directed Messrs. Hansard to publish all their Parliamentary reports, is no justification for them or for any bookseller who publishes a Parliamentary report containing a libel against any man." Report from the Select Committee, &c. (see p. 89, note (*b*), ante). Appendix to Minutes of Evidence, No. 1, p. 68. Verdict for the plaintiff on the first issue; for the defendants on the second.

(*a*)[2] The Attorney-General stated that the committee appointed was as follows:—Lord Viscount Howick, Sir Robert Peel, Mr. Attorney-General, Mr. C. W. Williams Wynn, Mr. Tancred, Sir William Follett, Mr. Charles Villiers, Sir Frederick Pollock, Mr. Roebuck, Lord Stanley, Sir George Strickland, Sir Robert Harry Inglis, Mr. Serjeant Wilde, Sir George Clerk, Mr. O'Connell. And that the resolution in favour of the privilege was agreed to by Sir G. Strickland, Sir F. Pollock, Mr. C. W. Williams Wynn, Sir W. W. Follett, Lord Stanley, Sir G. Clerk, Mr. Serjeant Wilde, Mr. Attorney-General, Mr. O'Connell, and Sir R. Peel: dissentiente Sir R. H. Inglis.

is entitled to weight in a Court of Law. And the Court will remember the **[103]** advice of Lord Bacon, to a Judge of the Court of Common Pleas, on his appointment: "That you contain the jurisdiction of the Court within the ancient mere-stones, without removing the mark" (*a*)[1]; and the dictum of Abbott C.J. in *Ex parte Cowan* (3 B. & Ald. 130): "We wish not to be understood as giving any sanction to the supposed authority of this Court to direct a prohibition to the Lord Chancellor sitting in Bankruptcy." "If ever the question shall arise, the Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own."

May 28th.—Curwood, in reply.

The authorities cited for the defendants establish the jurisdiction of this Court to deal with questions of privilege. In the earliest cases, the House of Commons did not even venture to decide on their undoubted privileges, but appealed to the Crown or to the House of Lords, who themselves took advice of the Judges. *Thorp's case* (1 Hats. Pr. 28. 13 Rep. 64), and others are instances of this. In early periods of history, the legislative and judicial characters of Parliament are faintly distinguished, and the "law of Parliament" is often the act of the united Legislature. With the power and popularity of the Commons, the privilege assumed by them has been extended and strengthened; but they have never set themselves in opposition to the law with success or credit. *Wilkes's case* (see p. 66, ante), was an example of such a conflict: there, to use the words of Lord Chatham, "Under pretence of declaring **[104]** law, the Commons made it, and united in the same persons the offices of Legislature, party, and Judge" (*a*)[2]. So here, the Commons, while they profess to declare the law of Parliament, are in fact depriving the subject of his right of action, as was attempted in *Ashby* v. *White* (2 Lord Ray. 938. 14 How. St. Tr. 695). It is impossible to avoid taking cognizance of privilege; for until enquiry and examination it cannot appear whether the case involves privilege or not. There is no power to procure a certificate to be made by the Speaker, as the recorder certifies the customs of London. If privilege be part of the law, this Court not only may notice, but is bound to know it. The doctrine, that the power inherent in the whole Parliament belongs also to each component estate, is absurd, for it would give to each a distinct power of legislation. The conclusiveness of the judgment of Courts of exclusive jurisdiction is not denied; but the House of Commons has little, if any, jurisdiction, in the strict sense. It has none of the indicia or attributes of a Court of Justice. It cannot even examine witnesses on oath. It cannot adjudicate between A. and B. Even Lord Kenyon, in *Rex* v. *Wright* (8 T. R. 293), relied upon by the defendant, admits the existence of cases in which this Court would dispute the assumption of privilege. In *Burdett* v. *Abbot* (see 14 East, 128), Lord Ellenborough makes a similar concession. Whether the doctrine, established in that case, that a commitment for contempt is not examinable by any other Court, be well founded, may be doubted and hereafter controverted; but on this occasion there is no need to dispute it. The distinction between inci-**[105]**-dental and direct cognizance is obscure; the more intelligible rule is, that the Court must notice privileges whenever they come judicially before it. It is objected that the privileges of the House will be submitted to the decision of Courts of Quarter Sessions, County Courts, and other inferior jurisdictions. But, if privilege be part of the law, why should such Courts be deemed disqualified from forming an opinion upon that as well as upon any other matter of law? Why is the same person to be presumed ignorant of Parliamentary privileges when he presides at sessions, and cognizant of them as soon as he enters the House of Commons? It is urged that members must have free intercourse with their constituents, and every facility for inviting and communicating information. But to circulate calumny, and prohibit actions for it, cannot be a fit expedient for the discovery of truth or the diffusion of correct intelligence. With regard to past usage, it is worthy of observation, that one of the earliest instances of this appeal by the House to the people was on the occasion of raising troops to be employed against the King. The practice of unlimited publication for sale, openly and avowedly, only began as late as 1836; and already two actions have been the result. There is no pretence for putting this case

(*a*)[1] Speech of Lord Bacon to Hutton J., Lord Bacon's Works, vol. iv. p. 508, ed. 1803.

(*a*)[2] Debate on the Address, 1770. 16 Parl. Hist. 659.

on the footing of a confidential communication. What foundation of necessity, or what confidential character, can be discerned in the publication to all mankind of a report on the state of Newgate prison? It is argued that Courts are not to presume that powers of this kind will be abused. But this assertion of the legal impossibility of abuse is disproved by authentic records, which shew that abuses have been great and frequent. Instances have been already enumerated, and **[106]** the number might be easily increased (*a*). And what security has the subject against the recurrence of scenes like those which occurred in the case of *Shirley* v. *Fagg* (6 How. St. Tr. 1121), where the two Houses, seised per mi and per tout of the whole inherent powers of Parliament (according to the doctrine of Sir Robert Atkyns), made contradictory declarations of law, leaving the subject at a loss to know whose law of Parliament was to be held authentic and conclusive? These absurdities and mischiefs are to be remedied only by declaring the law of Parliament subject to the general law of the land, and holding the privileges of the House to be (as the prerogative of the Crown ever has been) within the cognizance of the ordinary Courts.

Cur. adv. vult.

The learned Judges, in Trinity term (May 31st), 1839, delivered judgment seriatim.

[107] Lord Denman C.J. This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel.

The plea was, that the inspectors of prisons made a report to the Secretary of State, in which improper books were said to be permitted in the prison of Newgate; that the Court of Aldermen wrote an answer to that part of the report, and the inspectors replied repeating the statements, and adding that the improper books were published by the plaintiff. That all these documents were printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of the members, and who also resolved, declared, and adjudged, that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, is an essential incident to the due performance of the functions of Parliament, more especially, &c.

The plea, it is contended, establishes a good defence to the action on various grounds.

1. The grievance complained of appears to be an act done by order of the House of Commons, a Court superior to any Court of Law, and none of whose proceedings are to be questioned in any way.

This principle the learned counsel for the defendant repeatedly avowed in his long and laboured argument; but it does not appear to be put forward in its simple terms in the report that was published by a former House of Commons.

It is a claim for an arbitrary power to authorise the commission of any act whatever, on behalf of a body **[108]** which in the same argument is admitted not to be the supreme power in the State.

The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three

(*a*) The following case in the 1st vol. of the Commons' Journals, pp. 438, 440, 441 (also shortly stated in 1 Hats. Pr. 132), was here cited:—

"Die Jovis 14 Junii 1610. Sir George Moore.—That D. Steward's man, privileged, was, for begetting a woman with child.—The warrant, signed by justices before the Parliament, executed now,—Whether privilege or no? Committed to the Committee for Privileges.

"Die Saturni 16 Junii 1610. Sir Jo. Hollis,—Touching Mr. D. Styward.—Constable had a warrant under four justices of peace.—

"That he should have privilege; the parties to be discharged; and consideration after to be had, who shall pay it."

"Die Mercurii 20 Junii 1610.—Mr. D. Steward,—touching the arrest of his servant:—Moveth for the charges. Whether the reputed father, being taken by a justice's warrant, shall pay; or the constable that executed the warrant.—The constable could not discharge him.—Q. for the constable:—Resolved, not to pay it; but, the reputed father."

legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. The proposition is therefore wholly untenable, and abhorrent to the first principles of the Constitution of England.

2. The next defence involved in this plea is, that the defendant committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges. This last proposition requires to be first considered. For, if the Attorney-General was right in contending, as he did more than once in express terms, that the House of Commons, by claiming any thing as its privilege, thereby makes it a matter of privilege, and also that its own decision upon its own claim is binding and conclusive, then plainly this Court cannot proceed in any enquiry into the matter, and has nothing else to do but declare the claim well founded because it has been made.

This is the form in which I understand the committee of a late House of Commons to have asserted the privileges of both Houses of Parliament: and we are informed that a large majority of that House adopted the assertion. It is not without the utmost respect and **[109]** deference that I proceed to examine what has been promulgated by such high authority: most willingly would I decline to enter upon an enquiry which may lead to my differing from that great and powerful assembly. But, when one of my fellow subjects presents himself before me in this Court, demanding justice for an injury, it is not at my option to grant or withhold redress; I am bound to afford it if the law declares him entitled to it. I must then ascertain how the law stands: and, whatever defence may be made for the wrongdoer, I must examine its validity. The learned counsel for the defendant contends for his legal right to be protected against all consequence of acting under an order issued by the House of Commons, in conformity with what that House asserts to be its privilege: nor can I avoid then the question whether the defendant possesses that legal right or not.

Parliament is said to be supreme; I most fully acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each House is the privilege of the whole Parliament. In one sense I agree to this; because whatever impedes the proper action of either impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order before it can work at all. But it by no means follows that the opinion that either House may entertain of the extent of its own privileges is correct, or its declaration of them binding. In the course of the argument, the privileges of the Commons were said to belong to them for their protection against encroachment by the Lords. **[110]** The fact of an attempt at encroachment may, then, be imagined; and we must also suppose that the Commons would resist it. In such a case, the claims set up by the two Houses being inconsistent, both could not be well founded, and an instance would occur of adverse opinions and declarations, while the real privilege, whenever it is ascertained, would certainly be the inherent right of Parliament itself.

The argument here became historical; and we were told that, at the early period when privilege was settled, the three estates, assembled, and embracing all the power of the State, never would have left their privileges at the mercy of a very inferior tribunal, especially when the King's Judges were dependent on the Crown, and removeable at its pleasure. I cannot accede to the inference. If in those early times the Lords and Commons had felt the enlightened jealousy of dependent Judges which is here supposed, they would not have left them in that state of dependence, equally dangerous to the character of the Judges and to the just rights of themselves and of all their constituents. But we have no proof whatever of the Constitution of this country being framed on abstract principles: there cannot be a doubt that it adapted itself to the exigencies of the several occasions that arose, and gradually grew into that form which the ends of good government require. But, while I dispute the fact of privileges being settled in the aulâ regiâ, or any other supposed constituent assembly, on any given principle, or indeed at all, I am far from believing that the Judges ever had, or ought to have, by law, the smallest power over Parliament or either House of Parliament. The independence of Parliament is the corner stone of our free **[111]** Constitution. The Judges who invaded it in the reign of James the First and his son have justly shared with those who betrayed the rights of the people in the case of ship money the abhorrence of all enlightened men. But a mean submissiveness to power has not been always confined to the Judges; the same dispositions belonged

to Parliament itself, and to both Houses. When we remember the sentence pronounced against an unfortunate gentlemen of the name of Floyde (*a*)[1], for a slight offence, if it were one, against King James the First, in speaking of his daughter and son in law, we shall allow that the two Houses had as little sense of independence as of justice. The Commons resolved, declared, and adjudged that his fortune should be confiscated, and his body tortured, his name degraded, and himself imprisoned for life. The Lords rebuked the invasion of their privileges of punishing, for which the Commons humbly apologised; but the sentence was carried into full effect: and can any one believe that these two Houses, thus vying in obsequiousness and cruelty, could entertain good views on the constitutional independence of Parliament (*b*)?

Another reason for denying to the Courts of Law all power in matters of privilege was said to flow from their same supposed ancient jealousy of the Lords. "The Commons never would have tolerated such an enquiry, because the decision might then have come to be reviewed on appeal by the co-ordinate and rival assembly;" yet the Attorney-General informed us, almost in the same breath, that the appellate jurisdiction of the Lords was of recent date, that it originally belonged to the whole Par-**[112]**-liament, and that it was long warmly contested with adverse declarations of privilege by the House of Commons. The case of *Burdett* v. *Abbot* (14 East, 1), in 1810 was an action brought against the Speaker himself, for an act done by him in Parliament by order of the House of Commons. The plaintiff questioned his right, and, by seeking redress in this Court, eventually submitted their privilege to the decision of the House of Lords. At this very moment the defendant, as acting by order of the House of Commons, prays our judgment in this question of privilege, and the House of Commons instructs the Attorney-General to appear as his counsel before us. He tells us, indeed, that we can only decide in his favour; but, if we do, the House of Lords may reverse that judgment next week. Such is the practice of the nineteenth century: yet we are gravely told that in the dark ages of our history the Commons were too enlightened to allow any discussion of their privileges in any Court whose judgment may be questioned in the Lords.

But it is said that the Courts of Law must be excluded from all interference with transactions in which the name of privilege has been mentioned, because they have no means of informing themselves what these privileges are. They are well known, it seems, to the two Houses, and to every member of them, as long as he continues a member; but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumption to ask how this knowledge may be obtained, had not the Attorney-General read to us all he had to urge on the subject from works accessible to all, and familiar to every man of education. The argument here seems to **[113]** run in a circle. The Courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual, because the law has taken such matters out of their cognisance. The old text writers, indeed, affirm the law and custom of Parliament, although a part of the lex terræ to be, "ab omnibus quæsita, à multis ignorata." This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense. Lord Holt (*a*)[2] in terms denied this presumption of ignorance, and asserted the right and duty of the Courts to know the law of Parliament, because the law of the land on which they are bound to decide. Other Judges, without directly asserting the proposition, have constantly acted upon it; and it was distinctly admitted by the Attorney-General in the course of his argument. I do not know to whom he alluded as disputing the existence of any Parliamentary privilege; no such opinion has come under my notice. That Parliament enjoys privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both Houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in aulâ regiâ, they rest on the stronger ground of a necessity which became apparent at least as soon as the two Houses took their present position in the State.

(*a*)[1] 2 How. St. Tr. 1153.

(*b*) See the debates, 8 How. St. Tr. 92, et seq. And the note at p. 92.

(*a*)[2] See *Reg.* v. *Paty*, 2 Ld. Ray. 1114, 1115. And the judgment of Lord Holt in that case, ed. 1837, p. 54. Also *Ashby* v. *White*, 2 Ld. Ray. 956.

Thus the privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, **[114]** and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the Speaker by order of the House, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the Speaker cannot be arraigned in a Court of Justice. But, if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.

The privilege of committing for contempt is inherent in every deliberative body invested with authority by the Constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall and every Judge of all the Courts would be bound to discharge him by habeas corpus.

Nothing is more undoubted than the exclusive privilege of the people's representatives in respect to grants of **[115]** money, and the imposition of taxes. But, if their care of a branch of it should induce a vote that their messenger should forcibly enter and inspect the cellars of all residents in London possessing more than a certain income, and if some citizen should bring an action of trespass, has any lawyer yet said that the Speaker's warrant would justify the breaking and entering.

The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt. We freely admit them in all their extent and variety; but, if, on a resolution of guilt voted by themselves, this grand inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder?

I will speak but of one other privilege, the privilege from personal arrest, which is both undoubted and indispensable. A distinction has been sometimes taken, but, in my opinion, does not exist in law, between one class of privileges as necessary for performing the functions of Parliament, and another as a personal boon; both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of Parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members. In early times their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance; but, when this privilege was strained to the intolerable length of preventing the **[116]** service of legal process, or the progress of a cause once commenced against any member during the sitting of Parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of Parliament, these monstrous abuses might have called for the interference of the law, and compelled the Courts of Justice to take a part. Suppose, then, in the celebrated case of *Admiral Griffin* (*a*), that one who claimed a right of fishing in his ponds had brought an action here against the officer who seized him, who justified the imprisonment under the Speaker's warrant, alleging his high contempt in daring to fish in a member's pond near Plymouth; would not the Court of Queen's Bench have been bound to enquire as to the privilege, and to declare that it did not and could not extend to such a case? I desire to put the further question, whether the

(*a*) P. 14, ante: in which case four persons were committed.

decision of such cases could be at all varied by the House declaring, with whatever of solemnity or menace, that it was the ancient and undoubted privilege of Parliament to do each and every one of the abusive acts enumerated.

Examples might be multiplied without limit; but the examples are said to be abuses, and to prove nothing against the use. It is also urged that abuse is not to be presumed; that the only appeal lies to public opinion, and that outrages like these would authorise resistance and amount to a dissolution of the Government. I answer, that cases of abuse must be supposed, to test the truth of the principle now under discussion. I say, farther, that it is only in cases of abuse that the principle is required; that, though the maxim be true, ab abusu ad usum non valet consequentia, it cannot apply where an abuse is directly charged and offered to be proved: **[117]** that no presumption can be made against a fact established or admitted. Need I go on to add, that the appeal to public opinion, however successful, comes too late after the injury has been effected, and that to talk to an innocent sufferer of his right to consider the social compact as broken towards him, to throw off his allegiance, and resist the outrage perpetrated in the name of Parliament, is language at least novel in a Court of Law?

We were, however, pressed with numerous authorities, which were supposed to establish that questions of privilege are in no case examinable at law. *Thorp's case* (*a*) was, as usual, first cited. The facts were, that the Lords, in Edward the Fourth's time, consulted the Judges respecting the privilege then claimed by a member of the Commons' House, and the Judges at first declined to answer,—facts totally inconsistent with an anterior settlement of Parliamentary privilege, especially on the footing of the jealousy felt by the Commons towards the Lords and the judicial authorities. The Judges did ultimately waive their objection to declaring an opinion on a question of privilege; they declared it in Parliament, and by Parliament it was adopted (*b*). Yet their reluctance to assume, in the first instance, the delicate office of interfering with the privilege of Parliament, even at the request of the House of Lords, and the respectful and submissive language in which they, the interpreters of the law, avowed their deference to those **[118]** who make it, have been construed into a judicial decision that in their own Courts they would decline to enforce that very law when made, if either House of Parliament should obstruct and overbear it by setting up the most preposterous claim under the name of privilege. Often, undoubtedly, similar expressions have fallen from the Judges; but they must be modified by the cases in which they occurred. A sentence from C.J. North's judgment in *Barnardiston* v. *Soame* (6 How. St. Tr. 1109), was read at the Bar. The question being, whether an action on the case lay against the sheriff at common law for a double return of members to Parliament, which he strongly denied, he said, in the course of his elaborate argument, "If we shall allow general remedies (as an action upon the case is) to be applied to cases relating to the Parliament, we shall at last invade privilege of Parliament, and that great privilege of judging of their own privileges." These words appear, at first sight, of extensive import indeed; but when we refer them to the subject then in hand, which was an action against a sheriff for his conduct in a Parliamentary election, we shall perceive that they are far from making the large concession supposed. The right of determining the election of their own members is one of the peculiar privileges of the assembled Commons, like all other proceedings for their own internal regulation. With respect to them, I freely admit that the Courts have no right to interfere, nor, perhaps, any regular means of obtaining information. How they must deal with such points when actually brought before them, is another consideration. But the possible inconvenience that might arise from permitting the action against the sheriff, if the Courts should come into conflict with Parliament in those points **[119]** of unquestionable privilege in which Parliament must have the sole power of declaring what its privilege is, furnishes no shadow of an argument for the proposition, that

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(*a*) 1 Hats. Pr. 28, from 5 Rot. Parl. 239. S. C. 13 Rep. 63. See 4 Inst. 15; 14 East, 25.

(*b*) The proceeding in Parliament seems (as to the detention of Thorp) to have been contrary to the suggestion of the Judges. See the statement of the case at p. 31 of Hats. Pr. vol. i. And Mr. Hatsell's comments at pp. 33, 34. See *Ferrers's case*, 1 Hats. Pr. 53. *Anon.* Moore, 57. 1 Hats. Pr. 58.

whatever subject either House declares matter of privilege instantly becomes such to the exclusion of all enquiry by the Courts.

We were also reminded of the disparaging terms applied by the Judges to their own authority, when Alexander Murray, in 1751, was brought before this Court by habeas corpus (1 Wils. 299). I have obtained a copy of the return, setting out a commitment by the House of Commons for a contempt in general terms: but it is not unworthy of remark, that Foster J. founds his judgment on what was said by Lord Holt, and treats it as a commitment for a contempt in the face of the House. The fact was so, but the return did not state it: and Lord Ellenborough observed, in *Burdett* v. *Abbot* (14 East, 111, 148), that Holt did not so limit the power of commitment for contempts. Twenty years later, Brass Crosby, Lord Mayor of London, brought himself before the Court of Common Pleas by habeas corpus (3 Wils. 188. 2 W. Bl. 754). The Lieutenant of the Tower returned, for the cause of his imprisonment, an adjudication by the House of Commons, that the lord mayor, being a member of the House, having signed a warrant for the commitment of a messenger of the House for having executed a warrant of the Speaker, issued by order of the House, was guilty of a breach of privilege of the House. The lord mayor had manifestly committed a breach of privilege; the grounds of it are fully set out in the Speaker's warrant; nothing could, therefore, be less needful or less judicial than the wide assertion of privilege that was volunteered by the Chief Justice. Yet, **[120]** after all that he said respecting the indefinite powers of Parliament, his decision rests on the simple ground that all Courts have power to commit for contempt, Sir W. Blackstone clearly shewed, on the same occasion, that the return was good on acknowledged principles of law, and declared the power then exercised to be one which the House of Commons only possesses in common with the Courts of Westminster Hall. But it must be confessed that his remarks on the state of public feeling rather evince the spirit of a political partisan than the calmness and independence which become the judicial seat. We know now, as a matter of history, that the House of Commons was at that time engaged, in unison with the Crown, in assailing the just rights of the people. Yet that learned Judge proclaimed his unqualified resolution to uphold the House of Commons, even though it should have abused its power; rebuked the murmur and complaint which its proceedings had justly excited; deprecated as the last of misfortunes, and in terms which might lead to a supposition that he was at liberty to withdraw from it, a contest between the Courts of Justice and either House of Parliament, and, with reference to objections pressed against the mode of executing the warrant, worked himself up at length to the untenable position: "It is our duty to presume the orders of that House, and their execution, are according to law."

The two cases last alluded to were disposed of by the Courts, without taking time to consider, and even without hearing counsel on one side. In the former, the Chief Justice Lee took no part, having been absent when Alexander Murray was brought here. I do not mean to insinuate that a longer consideration would have been likely to produce a different result, being **[121]** satisfied that the decision itself was right. But I do believe that, if the Court had deliberated and paused, they would have employed more cautious language, and abstained from laying down premises so much wider than their conclusion required. Lord Ellenborough (*a*), when pressed with their authority, distinctly refused to bow to it, corrected some phrases ascribed to several Judges in the reports of both cases, and placed a limitation on the doctrine laid down by Chief Justice de Grey, without which it would have yielded to either House of Parliament the same arbitrary power over men's liberty that the doctrine of ship-money would have lodged in the Crown over their property.

Lord Kenyon was cited as holding language of the same self-denying import in *Rex* v. *Wright* (8 T. R. 293), where Mr. Horne Tooke had applied for a criminal information against a bookseller, for publishing a copy of the report made by a committee of the House of Commons, which was supposed to convey a charge of high treason against Mr. Tooke, after he had been tried for that crime and acquitted. This application for leave to set the extraordinary power of the Court in motion for the punishment of misdemeanors is at all times received with the utmost caution: the Court, in exercising its discretion, often refuses the indulgence prayed. Lawrence J. thought that the party was not libelled. "It is said, that this report charges him

(*a*) See 14 East, 111, 113.

with being guilty of high treason, notwithstanding the verdict of a jury had ascertained his innocence; but that is not the fair import of the paragraph." This opinion, for which the learned Judge gives his reasons, was alone sufficient to discharge the rule. But he proceeded to make other observations. He likened the publi-**[122]**-cation of this report to that of a proceeding in a Court of Justice, and said he was not aware of that having been deemed a libel. To what degree such publications are justifiable, is still a question open to some doubt; there can be none, that, without direct personal malice, it could not properly expose the publisher to a criminal information. Lawrence J. remarked accordingly, "The proceedings of Courts of Justice are daily published, some of which highly reflect upon individuals; but I do not know that an information was ever granted against the publishers of them." He then remarks, with much good sense and liberality, that it is also greatly for the public benefit that the proceedings in Parliament should be generally circulated; and though he adds, "They would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller," still he speaks with reference to the case before him, giving his reasons for concurring in the discharge of the rule for a criminal information, but not affecting to decide a legal question which did not arise.

Grose J. laid down no legal proposition in the judgment delivered by him. Lord Kenyon certainly did: as certainly it was extrajudicial, and is open to investigation. The proposition asserted by him was, that no proceeding of either House of Parliament could be a libel. But, with the highest reverence for that most learned Judge, I must be allowed to observe that he here confounds the nature of the composition with the occasion of publishing it. Matter defamatory and calumnious, which would therefore found legal proceedings for a libel, may be innocently published by one who has legal authority to do so. His Lordship says, "This is a proceeding by one branch of the Legislature, and, **[123]** therefore, we cannot enquire into it." If this be true, one branch of the Legislature has power to overrule the law. Lord Kenyon felt this, and denied the existence of such a power, adding, "I do not say that cases may not be put, in which we would enquire whether or not the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other. The latter puts an end to the claim to authorise any act without the agents being subjected to any enquiry. It equally overthrows that doctrine of the subordination of Courts, which would condemn the first criminal tribunal of England to silence and submission if either House should unhappily be induced to give their warrant to a crime.

Lord Kenyon supposes a case, in which the Court would "undoubtedly" pay no attention "to an injunction from the House of Commons;" and he seems to think the case too enormous to have been ever possible. "If, for instance, they were to send their serjeant at arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action." Yet these enormities, too gross to be thought possible, were the daily proceedings of the House of Commons in former times; nay, they fall short of the truth. Not only did that great assembly in Charles the Second's time placard Westminster Hall with injunctions to barristers (some of Lord Kenyon's most illustrious predecessors) against daring to appear in the discharge of their duty to their clients, but they sent their serjeant at arms to arrest and imprison counsel, solicitors, and parties who had violated their privileges by presuming to appear at the Bar of the highest Court of Appeal in the country. They may not have granted their formal injunction to stay proceedings **[124]** in a common action; but they constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body. If Lord Kenyon had been Chief Justice in the days of Sir John Fagg and Dr. Shirley (6 How. St. Tr. 1121), and either of them had sued out his writ of habeas corpus before him, and had appeared to be in Newgate for the offence of submitting his case to be argued in the House of Lords, it is plain that he would have enquired whether the House was justified in that particular measure, and would have restored the prisoners to freedom. Yet the resolution was "a proceeding by one branch of the Legislature," "a proceeding of those who, by the Constitution," were "the guardians of the liberties of the subject." This inconsistency in a person of Lord Kenyon's wonderful acuteness, as well as other inaccuracies hereafter to be noticed, make one regret that the judgment in this case, like those before whom Murray and Crosby had been brought, was not

more deliberately prepared. It was given on the instant, not in a full Court, not after hearing both sides. It bears marks of haste, and, we cannot deny, of the excitement and inflammation which belonged to the extraordinary times in which it occurred.

I do not pretend to discuss at length the particulars of every case in which the doctrine of privilege is asserted; but two, of paramount magnitude and importance, cannot be passed over. Sir W. Williams was prosecuted (13 How. St. Tr. 1369. 2 Show. 417), by ex officio information for an order signed by him as Speaker, authorising the publication and sale of Dangerfield's Narrative, being a slanderous libel on James, Duke of York, four years after that order had been given. His trial did not come on till the duke had **[125]** ascended the throne; he pleaded to the jurisdiction of the Court, and that plea is admitted to have been properly overruled; he then pleaded as a justification the order of the House of Commons, and that plea was set aside without argument. He was fined 10,000l., and afterwards the fine was reduced to 8000l. He never questioned this sentence, nor has it been reversed by any Court or by Act of Parliament; on the contrary, Lord Kenyon, in the case last under discussion, appears to me to have considered it as good law; but, at the moment, his memory, in general so faithful, misled him as to the facts. He said, "The publication was the paper of a private individual, and under pretence of the sanction of the House of Commons an individual published" (*a*)[1]. Now, though the Narrative was indeed the paper of a private individual, it was adopted by the House, who ordered its publication; the Speaker did not publish as an individual, nor under pretence of their sanction, but as Speaker, and by their direct command. It was, therefore, an Act done in Parliament. The proceeding was by consequence a breach of the fundamental privilege which exempts all that is there done from question. The affair was taken up by the Convention Parliament; the Bill of Rights refers to it; the judgment would probably have been reversed by Parliament, like the attainders of Russel and Sidney, if the bill introduced for that purpose had not contained a most iniquitous provision for reimbursing the sufferer out of the estates of the Attorney-General, which caused its rejection by the Lords.

Even if this case were not bad law, it would be worthy of the severest censure; a prosecution by the Crown of a single member of Parliament for the mis-**[126]**-deed of all, commenced years after, the defence indecently scouted from the Court without a hearing, and the conviction followed by an excessive penalty. But in what respect can it be said to bear the least analogy to the present case? The Speaker is not here sued: the sale of the present libel is not by the Speaker, nor took place within the walls of Parliament. If any officer of the House had been held innocent in disseminating that mass of atrocious falsehood, if any bookseller had been held justified in selling it, because the Speaker ordered that it should be sold for the benefit of the libeller, that would have been indeed a case in point. But I find, in 3 Mod. 68 (*a*)[2], that Dangerfield himself had been convicted and punished for this same publication; and of that sentence I do not find that the legality any more than the justice has ever been challenged; yet it is plain that the Speaker's order under the authority of the House would have been as good a justification to him for publishing, as the resolution of the House can now be to the present defendant. These two cases afford the true distinction; *Rex* v. *Williams* (13 How. St. Tr. 1369), was ill decided, because he was questioned for what he did by order of the House, within the walls of Parliament. *Rex* v. *Dangerfield* (*a*), is undoubted law, because he sold and published, beyond the walls of Parliament, under an order to do what was unlawful.

Lord Shaftesbury, in 29 Car. 2 (6 How. St. Tr. 1269. 1 Mod. 144. 3 Keb. 792), sought his discharge from imprisonment in the Tower on an order of the Lords Spiritual and Temporal to keep him and two other Lords in safe custody, "during His Majesty's pleasure, and the pleasure of this House, for high contempts committed against this House." The return **[127]** was open to serious objection, as may be seen in the long arguments reported at p. 144 of 1 Mod. Of the three Judges who remanded the earl, one said that the return, made by an ordinary Court of Justice, would have been ill and uncertain, but would not say what would be the consequence as to that imprisonment if the session were determined. The second said, "The return, no doubt, is illegal, but the question is on a point of jurisdiction, whether it may be

(*a*)[1] 8 T. R. 296.

(*a*)[2] *Rex* v. *Dangerfield*, 3 Mod. 68.

examined here? This Court cannot intermeddle with the transactions of the High Court of Peers in Parliament, during the session," "therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the session had been determined, I should be of opinion that he ought to be discharged." And the third, the Chief Justice, thought the Court had no jurisdiction, for reasons unconnected with the continuance of the session. It is strange that the duration of the session, on which the judgments turn so much, is now held to be immaterial where the Lords commit. This decision, which undeniably, and à fortiori, would give a sanction to many later ones, and many dicta touching privilege which arose on habeas corpus, is cited by Lord Ellenborough, in *Burdett* v. *Abbot* (14 East, 147), without a comment. In *Rex* v. *Flower* (8 T. R. 314), allusion is made to it by Lord Kenyon, without considering its authority in point of law. Mr. Justice Holroyd, when arguing *Sir F. Burdett's case* at the Bar (14 East, 62-70), distinguished between that action, in which the nature of the contempt appeared in the plea, and the return to the habeas corpus stating the contempt in general terms; he distinguished also between an action and the proceedings by habeas corpus.

[128] One feature of *Shaftesbury's case* (6 How. St. Tr. 1269), is curious, though not perfectly singular: the very proceedings of the House of Lords, to which the Court of King's Bench yielded entire acquiescence, were condemned by the same House, 19th November 1680, as "contrary to the freedom of Parliament," "derogatory to the authority of Parliament, and of evil example and precedent to posterity (*b*). The order and proceedings were thereupon adjudged "unparliamentary from the beginning, and in the whole progress thereof, and therefore were all ordered to be vacated, that the same or any of them may never be drawn into precedent for the future." In the same manner, after Lord Camden and the Court of Common Pleas had held Mr. Wilkes entitled to his release from custody before his trial on an indictment for libel, by reason of his privilege as a member of Parliament (*c*), the House of Commons came to a vote that themselves possessed no such privilege (*d*). By which authority in such cases should we be bound? By that of our own law books, our daily guides, which however would appear to refer us to the journals, or by that of the journals of the House, in which the Lex et Consuetudo Parliamenti are treasured, but which are supposed to be hidden from our view. I think the Attorney-General referred us to the latter, of which he had before assured us that we were ignorant. Yet in *Shaftesbury's case* (6 How. St. Tr. 1269), these journals would overturn the authority of the Court. So, in the Middlesex election contests between Wilkes and Luttrell, it is notorious that the law of Parliament was laid down in the most opposite sense on different occasions by the House of Commons.

But, as to these proceedings by habeas corpus, it may **[129]** be enough to say that the present is not of that class, and that, when any such may come before us, we will deal with it as in our judgment the law may appear to require.

The Attorney-General told us of another case in point in his favour, *Burdett* v. *Abbot* (14 East, 1). We must then examine that case fully. The plaintiff committed a breach of privilege by the publication of a libel; the defendant, the Speaker, stating that fact on the face of his warrant, committed him by order of the House to prison; an action was brought for this assault and false imprisonment. Did the House of Commons threaten the plaintiff or his attorney or counsel for a contempt of their privileges? On the contrary, by an express vote they directed their highest officer to plead and submit himself to the jurisdiction of this Court. When the suit was pending, did they entertain questions on the course of the proceedings, or resolve that they alone could define their own privileges, or declare that Judges who should presume to form an opinion at variance with their's should be amenable to their displeasure? They suffered the cause to make the usual progress through its stages, and placed their arguments before the Court. Their arguments were just; their conduct had been lawful in every respect. The Court gave judgment in the Speaker's favour. The grounds of the decision were, not that all acts done by their authority were beyond the reach of enquiry, or that all which they called privilege was privilege, and sacred from the intrusion of law, but that they had acted in exercise of a known and needful privilege, in strict conformity with the law.

(*b*) 6 How. St. Tr. 1310. (*c*) 19 How. St. Tr. 989.
(*d*) 15 Parl. Hist. 1362.

Let us now see what was acknowledged by the Court **[130]** to be the privilege of the House of Commons. Lord Ellenborough, almost on opening his luminous commentary on all the learning so profusely poured out in the discussion, claims for the High Court of Parliament, and each of the Houses of which it consists, "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" (*a*). This is the position established by him. The nucleus of Mr. Justice Bayley's careful argument is in these few words: "The House of Commons has not only a legislative character and authority, but is also a Court of Judicature." "If then the House be a Court of Judicature, it must" "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" (*b*). Sir V. Gibbs, the Attorney-General, who argued for the defendant, took the same ground of justification (p. 85). It were "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." "If then the right exist 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?" (P. 86.) Such was the principle on which the Exchequer Chamber affirmed the judgment (*c*); and the question proposed by Lord Eldon in the House of Lords to the Judges, before that tribunal of the last resort pronounced in favour of the House of Commons, confines it in the same manner (*d*). The decision manifestly rests on the **[131]** privilege to punish for contempt, inherent no doubt in Parliament and in each House, whether regarded in the legislative or in the judicial capacity, but which it only possesses in common with the Courts of Justice, and which was there exercised within the strictest bounds of common law.

This great case, solemnly argued at the Bar, and on both sides with extraordinary learning and power, and in which the Court evidently pursued their own enquiries in the interval between the arguments, presents a striking contrast to the rash and unmeasured language employed by former Judges in ex parte proceedings, as writs of habeas corpus, and motions for criminal information. Lord Ellenborough and Bayley J. carefully guard themselves against adopting such expressions, the former dissenting directly from Chief Justice de Grey, the latter quoting without dissent the doctrine laid down by Holt in *Regina* v. *Paty* (2 Ld. Ray. 1115). With the same freedom Lord Ellenborough commented, in *Rex* v. *Creevey* (1 M. & S. 273), on Lord Kenyon's dicta in *Rex* v. *Wright* (8 T. R. 293).

To the assertion, that the Courts have always acquiesced in the unlimited claim of privilege, I have already stated enough to authorise me in opposing the contrary assertion. I proceed to prove its truth in other instances.

The phrases which I have selected for remark out of the cases cited are the exception, not the rule. From early times the spirit of English judicature has been more free and independent. Numerous cases were cited in the argument for the plaintiff, in *Burdett* v. *Abbot* (14 East, 1), not required for the decision, except as they removed **[132]** the preliminary obstacle to all discussion. They have been repeated in able tracts; most of them were criticised by the Attorney-General. He sought, and successfully in some, to shew that the question of privilege, under the circumstances, did not arise. But they are not cited for their circumstances; their use is to shew that the Courts exercised the right of examining matters supposed to be protected from their enquiry by privilege of Parliament. For this purpose it is enough to enumerate, in the words of Prynne (Regist. part 4, p. 815), "the cases of *Larke* (1 Hats. 17), *Thorp* (ib. 28), *Clerke* (ib. 34), *Hyde* (ib. 44), *Attwyll* (ib. 48), *Walsh* (ib. 41), *Cosin* (ib. 42), *Ferrers* (ib. 53), and *Trewynnard* (ib. 59), which (he says), "the Lord Chief Justice vouched, and insisted on in his learned argument of this case, to the great satisfaction of those of the long robe, and most auditors then present, as well members of the Commons House as others;" *Cook's* (ib. 96), *Pledall's* (*n*), and others might be added. *The Duchess of Somerset's case* (Prynne's Reg. part 4, 1214), *Fitzharris's* (8 How. St. Tr. 223), and others not necessary to be named, were of later

(*a*) 14 East, 138. (*b*) P. 159.
(*c*) *Burdett* v. *Abbot*, 4 Taunt. 101. (*d*) 5 Dow. 199.
(*n*) Cited 14 East, 47, from Prynne's Reg. part 4, 1213.

date. The Chief Justice thus eulogised by Prynne was Sir O. Bridgman, delivering the judgment of the Court in *Benyon* v. *Evelyn* (O. Bridgman's Judgments, 324), who brings this result out of his examination of ancient authorities. "That resolutions or resolves of either House of Parliament, singly, in the absence of the parties concerned, are not so concludent in Courts of Law, but that we may (with due respect nevertheless had to those resolves and resolutions), nay, **[133]** we must give our judgment according as we, upon oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either House." That Chief Justice Bridgman took upon himself to decide on privilege is so clear from his own plain words, that the opinion of Holt in *Ashby* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 695), and of Holroyd in arguing *Burdett* v. *Abbot* (14 East, 49), cannot make us more certain of the fact. The Attorney-General does not deny the proposition, but would parry its effect, by shewing that the circumstances appearing there raised no question of privilege, and that what he was pleased to style the parade of learning on the subject was misapplied. But the Judge avowed his right and duty: if he invaded privilege of Parliament, by laying down doctrines inconsistent with it, the invasion could not be less culpable because uncalled for by the cause in hand.

The next case to which I advert in truth embraced no question of privilege whatever; but, as one of the highest authorities in the State has thought otherwise, I shall offer some comments upon it; I mean *Jay* v. *Topham* (12 How. St. Tr. 821). The House of Commons ordered the defendant, their serjeant-at-arms, to arrest and imprison the plaintiff for having dared to exercise the common right of all Englishmen, of presenting a petition to the King on the state of public affairs, at a time when no Parliament existed. For this imprisonment an action was brought. The declaration complained, not only of the personal trespass, but also of extortion of the plaintiff's money practised by defendant under colour of the Speaker's warrant. The plea of justification under that warrant, which could not possibly authorise the extortion, even if it could the arrest, was over-ruled by this Court, no doubt with the utmost **[134]** propriety, for the law was clear; Lord Ellenborough points this out in the most forcible manner, in 14 East, 109. Yet for this righteous judgment C. J. Pemberton and one of his brethren were summoned before the Convention Parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session. Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown. It gave me real pain to hear the Attorney-General contend that the two Judges merited the foul indignity they underwent, as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea, as set out in Nelson's Abridgement (*a*)[1], appears to have been in bar, and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge: the record produced there, on which the Judges were said to have violated the law, exhibits a bad plea for the reasons assigned by Lord Ellenborough; and the judgment punished by the Commons could not have been different without a desertion of duty by the Judges.

We have arrived at the Revolution, in which Holt took a conspicuous part. He owed to it the seat which he filled with such unrivalled reputation. On three several occasions he found himself compelled to deal with questions of privilege, and on all he gave his judgment against the claim. I shall not dwell minutely on **[135]** *Knollys's case* (*a*)[2], where he, with the whole Court, came to a different conclusion from the House of Lords, as to the supposed Earl of Banbury's right to that title. The Attorney-General asserted that that was no question of privilege, but merely whether an individual was a peer or not. One might have supposed that the issue, whether one claiming to be a member of either House of Parliament was such or not, had some relation to Parliamentary privilege, especially when the restraint of his person on a criminal charge was involved in that question. The Lords considered it matter of privilege, and questioned the Judges. But the matter, it seems, had not been

(*a*)[1] 2 Nels. Abr. 1248. The plea there is that pleaded, not in *Jay* v. *Topham*, but in *Verdon* v. *Topham*. See 14 East, 102, note (*a*).

(*a*)[2] Or *Knowles's case*, 12 How. St. Tr. 1167. S. C. 2 Salk. 509. 1 Ld. Ray. 10.

formally referred to the House of Lords, and was not duly brought before them. They had, however, formally given judgment, and of that the Court was informed. How could the Court know that the Lords had proceeded extrajudicially, if utterly ignorant of Parliamentary matters, or be permitted to enquire into their methods of proceeding, if their own subordinate station estopped them from questioning any act done by the paramount authority of a House of Parliament?

Without further pressing *Knollys's case* (*a*)[1], I confess it was not without difficulty that I could trust the evidence of my own senses, when the Attorney-General set aside the authority of *Ashby* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 695), by declaring that it was not a question of Parliamentary privilege. If not, the three justices who differed from the Chief Justice were strangely deceived: the Chief Justice himself misapprehended both their reasoning and his own. The House of Lords was mistaken in their view of the subject, when they adopted the Chief Justice's opinion against that of **[136]** his three brethren. And the House of Commons was most of all ignorant of the truth, when (January 17th 1704 (*a*)[2], three days after the Lords had reversed the judgment of the Queen's Bench) being "informed, that there had been an extraordinary judgment given in the House of Lords upon a writ of error from the Court of Queen's Bench, in a cause between Matthew Ashby and William White, wherein the privileges of the House were concerned," they brought the proceedings before them, and after great debate resolved (*b*)[1] that Ashby having, in contempt of the jurisdiction of the House, commenced such action, was guilty of a breach of their privileges, and that whoever should presume to do the like, and all attornies, solicitors, counsellors, serjeants at law, soliciting, prosecuting, or pleading in any such case, "are guilty of a high breach of the privilege of this House." The Lords (*c*)[1], after full enquiry by a committee, resolved, on the other hand, "That the declaring Matthew Ashby guilty of a breach of the privilege of the House of Commons, for prosecuting an action against the constables of Aylesbury, for not receiving his vote at an election, after he had, in the known and proper methods of law, obtained a judgment in Parliament for recovery of his damages, is an unprecedented attempt upon the judicature of Parliament, and is in effect to subject the law of England to the votes of the House of Commons."

And now we are gravely informed that this case concerned not the privileges of Parliament. If, however, the opinion of all the Judges and of both Houses, and of all historians and all lawyers till that assertion was made, be correct, then that case decided that the Courts of Law were not bound by the opinion of the Commons' House on matters of election, whereupon they claimed **[137]** the sole right of judging, and had actually given judgment; but that the law must take its course, as if no such judgment had been given by the House of Commons, and no such privilege claimed. On this point the decision has never to my knowledge been impugned in any of our Courts. Lord Mansfield is supposed to have dissented from it, but his doubt applies to the form of declaration (*a*)[3] merely; and his own practice at the Bar (*b*)[2], of asking leave of the House of Commons to commence such actions, proves only his cautious desire to avoid and avert from his clients the doom denounced against Ashby, Paty, and their brother burgesses and others in pari delicto, their counsel and attornies.

In the case commonly designated as the case of *The Men of Aylesbury* (*c*)[2], a question of the utmost difficulty and importance was brought before the same Chief Justice, and the Court of Queen's Bench. The House of Commons, acting on the resolution just cited, pronounced those persons guilty of the breach of privilege there prohibited, and sent them to Newgate for a contempt in bringing their action. They sued out their habeas corpus. Holt, in a judgment of the highest excellence (*d*), gave such reasons for restoring them to liberty as it is easier to outvote than answer: the other three Judges thought the adjudication of the House of Commons on a contempt brought before them could not be gainsayed in that proceeding. The Judges of the

(*a*)[1] Or *Knowles's case*, 12 How. St. Tr. 1167. S. C. 2 Salk. 509. 1 Ld. Ray. 10.
(*a*)[2] 14 How. St. Tr. 696. (*b*)[1] P. 776. (*c*)[1] P. 799.
(*a*)[3] See also, as to the opinion of Tracy J., 2 Ld. Ray. 958.
(*b*)[2] 14 East, 59, note (*b*).
(*c*)[2] *Regina* v. *Paty*, 2 Ld. Ray. 1105. S. C. 14 How. St. Tr. 849.
(*d*) See "The Judgments delivered by the Lord Chief Justice Holt," &c., from the original MSS., ed. 1837. Ante, p. 55, note (*b*).

other Courts are understood to have concurred with the majority in the Queen's Bench; and the opinion just cited must be taken as that of eleven Judges against one. But the other **[138]** eight could only have stated their first impression, without publicity, and without hearing the argument. There is no satisfaction in dwelling on the angry contests between the two Houses which ensued. The peculiarity of the circumstances leaves a doubt whether the law can be considered as settled by what then occurred (*a*)[1]. But, even supposing that this Court would be bound to remand a prisoner committed by the House for a contempt, however insufficient the cause set out in the return, that could only be in consequence of the House having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the House of Commons is of power to protect a wrong doer against making reparation to the injured man.

When the Judges were supposed to have unanimously agreed to surrender their right of examining whatever may have been done by authority of Parliament, some very important declarations by some of the most eminent among them must have been forgotten. Lord Chief Justice Willes avowed the contrary resolution: "I declare for myself that I will never be bound by any determination of the House of Commons against bringing an action at common law for a false, or a double return, and a party injured may proceed in Westminster Hall notwithstanding any order of the House;" *Wynne* v. *Middleton* (1 Wils. 128).

What was said by Lord Mansfield in the House of Lords, respecting the privileges of the other House in the Middlesex election, is the more weighty, because he was then upholding the privilege of the latter in election matters (*c*): "Declarations of the law," said he, "made **[139]** by either House of Parliament, were always attended with bad effects: he had constantly opposed them whenever he had an opportunity, and in his judicial capacity thought himself bound never to pay the least regard to them." He exemplified this remark by reference to general warrants: although thoroughly convinced of their illegality, "which indeed naming no persons were no warrants at all, he was sorry to see the House of Commons by their vote declare them to be illegal. That it looked like a legislative Act which yet had no force nor effect as a law: for supposing the House had declared them to be legal, the Courts in Westminster would nevertheless have been bound to declare the contrary; and consequently to throw a disrespect on the vote of the House." "He made a wide distinction between general declarations of law, and the particular decision which might be made by either House, in their judicial capacity, on a case coming regularly before them, and properly the subject of their jurisdiction." "Here" (that is in a case of election) "they did not act as legislators, pronouncing abstractedly and generally what the law was, and for the direction of others; but as Judges, drawing the law from the several sources from which it ought to be drawn, for their own guidance in deciding the particular question before them, and applying it strictly to the decision of that question."

The dispute between the two Houses in 1784 (*a*)[2], when the Commons issued a kind of mandate to the Treasury to suspend the payment of certain bills till the House should further direct, was in fact a struggle between the two great parties in the country. The Lords by a large majority condemned that proceeding, and resolved (as the same House had almost in corresponding terms **[140]** resolved at the close, in 1704, of *The Aylesbury case*)—"That an attempt, in any one branch of the Legislature, to suspend the execution of the law, by separately assuming to itself the direction of a discretionary power, which, by an Act of Parliament, is vested in any body of men to be exercised as they shall deem expedient, is unconstitutional" (*a*)[3]. The doctrine was enlarged upon by Lord Thurlow, who spoke of the resolutions of the House of Commons in terms preserved by tradition, which there might be impropriety in repeating. The Commons defended their resolution by asserting that, in fact, it did not fairly bear the import ascribed to it. Lords Mansfield and Loughborough took the same line in answering Lord Thurlow, both fully admitting with him, that the Commons have no power to suspend the law by their resolutions. The former said (*b*),

(*a*)[1] See 14 East, 92, note (*b*).
(*a*)[2] See 24 Parl. Hist. 494, et seq.
(*b*) Ib. 517.
(*c*) 16 Parl. Hist. 653.
(*a*)[3] 24 Parl. Hist. 497.

that "for either branch of the Legislature to attempt to suspend the execution of the law, was undoubtedly unconstitutional." "It had been stated as a ground for voting it (*c*)[1], that the House of Commons had come to a resolution militating against a clause of the 21st of the present King. What then? A resolution of the House of Commons would not suspend the law of the land. A resolution of the House of Commons, ordering a judgment to be given in any particular manner, would not be binding in the Courts of Westminster Hall."

Nor can I refrain from quoting the characteristic burst of sentiment with which Lord Erskine remarked in 1810 on some censure cast on Sir Francis Burdett, for appealing to the law against the legality of the Speaker's warrant. "No man would more zealously defend the privileges of Parliament, or of either House of Parliament, **[141]** than he should; and he admitted, that what either branch of the Legislature had been for the course of ages exercising with the acquiescence of the whole Legislature, would, in the absence of statutes," "be evidence of the common law of Parliament, and, as such, of the common law of the land. The jurisdiction of Courts rested in a great measure upon the same foundation: but besides that, these precedents, as applicable alike to all of them, were matters of grave and deliberate consideration; they were, and must be, determined in the end by the law." "The contrary was insisted upon by the Commons, when they committed Lord Chief Justice Pemberton for holding plea of them in his Court; but so far was he from considering such a claim as matter of argument under this government of law, that I say advisedly, said his Lordship, that if, upon the present occasion, a smilar attack was made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones and blood." "Why was any danger" "to be anticipated by a sober appeal to the judgment of the laws? If" "the Judges had no jurisdiction over the privileges of the House of Commons, they would say they had no jurisdiction. If they thought they had, they would give a just decision according to the facts and circumstances of the case, whatever they might be" (*a*)[1].

After these decisions in our Courts, and these strong and vehement declarations of opinion, by some of the greatest luminaries of the law, it is too much to seek to tie our hands by the authority of all our predecessors.

On Lord Brougham's judgment in the case of *Mr.* **[142]** *Long Wellesley*, lately published by himself (*a*)[2], and reported also in 2 Russell and Mylne, 639, for obvious reasons I shall observe but shortly. He adopted in its fullest terms the resolution expressed by C.J. Willes (*b*), and carried it no farther, though his form of expression is perhaps more striking and forcible. "If instead of justly, temperately, and wisely abandoning this monstrous claim, I had found an unanimous resolution of the House in its favour, I should still, (and it is this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery), I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law" (*c*)[2]. A declaration the more remarkable, as proceeding from a Judge long known as the champion of all popular rights, the jealous asserter of all the real privileges of that assembly, where his station and his services may be thought to place his name on a level, at least, with the greatest of all those, either lawyers or statesmen, who have come after him upon the same stage.

It is indeed true that that avowal of opinion was no more necessary for the decision than perhaps the discussion of Chief Justice Bridgman and the declared resolution of Chief Justice Willes. But would that circumstance render the sentiment less offensive, if it really assailed the independence and dignity of the House of Commons? Quite the contrary. Yet there was no committee, no resolution, no menace.

Two admissions were made by the Attorney-General **[143]** in the course of his argument here, either of which appears to me fatal to his case. He very distinctly

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(*c*)[1] The proposed resolution of the House of Lords
(*a*)[1] 16 Cobb. Par. Deb. 851.
(*a*)[2] Speeches of Lord Brougham, vol. iv. p. 357.
(*b*) 1 Wils. 128. Ante, p. 138.
(*c*)[2] *Mr. Long Wellesley's case*, 2 Russ. & M. 660.

recognised the words of Lord Mansfield, that, if either House of Parliament should think fit to declare the general law, that declaration is undoubtedly to be disregarded, adding that it should be treated with contempt. Now such declaration would be a proceeding of the House, and so above all enquiry.

Again, if the due subordination of Courts is the guiding principle, the declaration, even if against law, by a Superior Court, demands respect and deference, if not acquiescence. But the declaration of general law may arise in the course of an enquiry respecting privilege: the claim advanced by the report of the committee (*a*)[1] is that the House is the sole and exclusive judge of the extent of its own privileges, and the Attorney-General, in the same spirit, informed us, on the part of the House of Commons, of his and their "confidence that, when we should be informed that the act had been done in the exercise of a privilege, we should hold that we could no longer enquire into the matter." He warned us that, this being a question of privilege, we have no power to decide it; and told us that whenever either House claims to act in exercise of a power which it claims, the question of privilege arises. But, if the claim were to declare a general law, the Attorney-General agrees that no weight would belong to it. Clearly then the Court must enquire whether it be a matter of privilege, or a declaration of general law: as indisputably, if it be a matter of general law, it cannot cease to be so by being invested with the imposing title of privilege.

The other concession to which I alluded is, that, when **[144]** matter of privilege comes before the Courts not directly but incidentally, they may, because they must, decide it. Otherwise, said the Attorney-General, there would be a failure of justice. And such has been the opinion even of those Judges who have spoken with the most profound veneration of privilege. The rule is difficult of application. Lord Ellenborough and the Court, as well as the defendant's learned counsel, felt it to be so, in *Burdett* v. *Abbot* (14 East, 1). The learned report of the Select Committee states (*b*)[1], in direct terms, that they "have not been able to discover any satisfactory rule or test by which to ascertain in all cases whether the question of privilege would be deemed to arise directly or incidentally; there are many cases which might be decisively placed in the one class or the other, but there may be also very many which cannot be so assigned."—"Your committee are of opinion, that the Courts have no jurisdiction to decide upon privilege, either directly or incidentally, in any sense inconsistent with the independence and exclusive jurisdiction of Parliament. If such a jurisdiction did exist of deciding incidentally upon privilege, uncontrolled by Parliament, it would lead to proceedings as incongruous, and as effectually destructive of the independence of Parliament as if the direct jurisdiction existed; a consequence which, together with the extreme uncertainty of the extent of the rule, makes it indispensably necessary that it should be investigated."

The report (*c*) seems to consider that the question of privilege arose incidentally in the former trial between these parties (*d*), and points out very serious inconveni-**[145]**-ences that may flow from according to Courts of Justice this power of deciding incidentally. The opinion that the Courts have no jurisdiction to decide upon privilege, either directly or incidentally, undergoes some apparent qualification by a reference to the sense in which the words are used. It appears that the Courts have no such jurisdiction "in any sense inconsistent with the" "exclusive jurisdiction of Parliament" (*a*)[2]. I would not venture to speak with absolute certainty of the meaning of this passage; but I imagine that a body which has no jurisdiction to act in any sense inconsistent with the exclusive jurisdiction of another body can possess no jurisdiction at all. I think, then, it must be assumed, that the committee of the late House of Commons declared that the Courts have no jurisdiction whatever to decide even incidentally on any matter of privilege; their resolutions having reference to this preceding part of their report.

Now this power is denied to the Courts by this report for the first and only time. Even the appendix (*b*)[2] to it, which by being published by the same authority I know not well how to disjoin from it, returns to that same distinction between the direct and incidental occurrence of questions of privilege which the report and resolutions appear

(*a*)[1] "Report," &c. (cited, ante, p. 89, note (*b*)); page 17, sect. 78.
(*b*)[1] Ib.; page 13, sects. 59, 60.
(*c*) Pp. 13-15, sects. 61-65.
(*d*) See p. 101, note (*b*), ante.
(*a*)[2] Report, &c. p. 13, s. 60.
(*b*)[2] See Appendix, No. 3, p. 25 to 29.

to repeal. It were to be wished that the late House of Commons had laid down their rule for the guidance of the Courts in language less open to dispute as to its meaning; but we in this case must feel relieved from all embarrassment, by the frank acknowledgment of the Attorney-General. If, then, we may be under the obligation of deciding on privilege, even though incidentally, it follows that we have some **[146]** knowledge on the subject, or at least the means of obtaining knowledge. The report takes for granted that, if either House has actually come to a decision on the point thus raised, we should be bound to adhere to it: and the Attorney-General insisted that, even if in the present case the question did but arise incidentally, we should be bound by the declaration of the law set forth by the House in any formal statement of its opinion.

Our duty would then be to interpret the law laid down by one House by discovering its meaning. But after ascertaining it as best we might from those stores of Parliamentary learning from which we are pronounced to be excluded, we might possibly find that the other House (or the same House at another time) had come to an opposite declaration. What course must we then take? How reconcile the discrepancy? Perhaps it may be said that the fact is not to be presumed. I agree that it is not; but it exists at this moment with reference to the legal rights of parties in the matter that arose in *Ashby* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 695). This Court could not decide the matter either way, without overruling what has been laid down either by Lords or Commons, and thus violating the privileges of Parliament, and rendering ourselves amenable to just displeasure.

But suppose an entirely new point to arise, and some party litigating here to set up a claim of privilege never heard of before, as to which, therefore, neither House had ever framed a resolution.

Since, then, the Court may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the House of Parliament, as Holt **[147]** and the Court of Queen's Bench differed from the Lords in the *Banbury case* (12 How. St. Tr. 1167), as he did in *Paty's case* (2 Ld. Ray. 1105. 14 How. St. Tr. 849), and as the same and many other of the Judges as well as the Lords did from the Commons in the case of *Ashly* v. *White* (2 Ld. Ray. 938. 14 How. St. Tr. 695), and as I trust every Court in Westminster Hall would have done, if an order of either House, purporting to be made by virtue of the privilege of Parliament, had been brought before them as a justification for the imprisonment of a subject of this free State, for killing Lord Galway's rabbits, or fishing in Admiral Griffin's pool.

In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second proposition differs from the first in words only. In both cases the law would be superseded by one assembly; and, however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible, in itself the most monstrous and intolerable of all abuses.

Before I finally take leave of this head of the argument, I will dispose of the notion that the House of Commons is a separate Court, having exclusive jurisdiction over the subject matter, on which, for that reason, its adjudication must be final. The argument placed the House herein on a level with the Spiritual Court and the Court of Admiralty. Adopting this analogy, it appears to me to destroy the defence attempted to the present action. Where the subject **[148]** matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it.

3. I come at length to consider whether this privilege of publication exists. The plea states the resolution of the House that all Parliamentary reports printed for the use of the House should be sold to the public, and that these several papers were ordered to be printed, not however stating that they were printed for the use of the House. It then sets forth the resolution and adjudication before set out. We know, by looking at the documents referred to at the Bar, that this resolution and adjudica-

tion could not justify the libel complained of, because it was not in fact passed till after action brought. But, passing over all minor objections, I assume that the defendant has properly pleaded a claim, on the part of the House, to authorise the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.

The Attorney-General would preclude us from commencing this enquiry. He protests against our taking any other step than that of recording the judgment already given in the Superior Court, and registering the edict which Mr. Hansard brings to our knowledge. But, having convinced myself that the mere order of the House will not justify an act otherwise illegal, and that the simple declaration that that order is made in exer-**[149]**-cise of a privilege does not prove the privilege, it is no longer optional with me to decline or accept the office of deciding whether this privilege exist in law. If it does, the defendant's prayer must be granted and judgment awarded in his favour; or, if it does not, the plaintiff, under whatever disadvantage he may appear before us, has a right to obtain at our hands, as an English subject, the establishment of his lawful rights and the means of enforcing them.

In the first place, I would observe that the act of selling does not give the plaintiff any additional ground of action, or right to redress at law, beyond the act of publishing. The injury is precisely the same in its nature, whether the publication be for money or not, though it may be much more extensively injurious when scattered over the land for profit. But the direction to sell is highly important in this respect, that public sale necessarily imports indiscriminate publication beyond recal or control, and holds out the same authority as a protection to every subordinate vender, who, by purchase from their printer and bookseller, is, like him, doing no more than giving effect to an order of the House.

How far it is strictly constitutional for either House of Parliament to raise money by sale or otherwise, and apply it to objects not specified by Act of Parliament, might require consideration on general grounds, but does not belong to the present season or place, in which we have only to deal with the manner in which the mutual rights of the parties before us in this action are affected.

It is likewise fit to remark that the defamatory matter has no bearing on any question in Parliament, or that could arise there. Whether the book found in the **[150]** possession of a prisoner in Newgate were obscene or decent could have no influence in determining how prisons can best be regulated; still less could the irrelevant issue whether it was published by the plaintiff. The most advisable course of legislation on the subject is wholly unconnected with those facts: the inquisitorial functions would be exercised with equal freedom and intelligence, however they were found to be. And, if the ascertainment of them by the House was a thing indifferent, still less could the publication of them to the world answer any one Parliamentary purpose.

The proof of this privilege was grounded on three principles,—necessity,—practice,—universal acquiescence. If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires. But the promise to produce that proof ended in complete disappointment. It consisted altogether in first adopting the doctrine of *Lake* v. *King* (1 Saund. 131), that printing for the use of the members is lawful, and then rejecting the limitation which restricts it to their use. The reasoning is, "If you permit the number of copies to be as large as the number of members, the secret will not be confined to them." A strong appeal to justice and expediency against printing, even for the use of the members, what may escape from their hands to the injury of others, but surely none, in point of law, for throwing down the only barrier that guards the rest of the world against calumny and falsehood founded on ex parte statements, made for the most part by persons interested in running down the character assailed.

The case just alluded to drew a line, in the nineteenth year of Charles the Second, which has always been **[151]** thought correct in law. The defendant justified the libel he had printed, by pleading that it was only printed for the use of the members. Much doubt at first existed whether the justification were good in law; the right of delivering copies for the use of the members of a committee being undisputed, but some of the Judges questioning whether printing could be so justified. After an advisement of many terms and even of some years, Lord Hale and the Court sustained the defence, because, being necessary to their functions, it was the known course in

Parliament to print for the use of members. But wherefore all this delay and doubt, if the House then claimed the privilege of authorising the publication of all papers before them? or how can we believe that the defendant would not have pleaded at first that privilege, when we find that he was admitted to have acted according to the course and proceedings of Parliament, if it was then their understood right? This case occurred within a very few years of *Benyon* v. *Evelyn* (O. Bridgman's Judgments, 324, Trin. t. 14 Car. 2), which must have excited the attention of the House, and made them vigilant in maintaining their privileges against improper interference from Courts of Law.

The supposed necessity soon dwindled, in the hands of the learned counsel, down to a very dubious kind of expediency; for is it not much better, said he, that a man defamed, and thence avoided by mankind, should know he has been the victim of a privileged publication, than remain ignorant by what means he has lost his place in society? A question over which many a man might wish to pause before he answered it. It is far from certain that he would become acquainted with the fact; he might be absent on business, or abroad in the [152] service of his country; but the discovery when made would bring him small comfort, as it would shew him that his enemy was too strong to grapple with, and that the door of legal redress must be barred against him for ever.

Another ground for the necessity of publishing for sale all the papers printed by order of the House was, that members might be able to justify themselves to their constituents, when their conduct in Parliament is arraigned, appealing to documents printed by authority of the House. This is precisely the principle denied and condemned by Lord Ellenborough and the Court in *Rex* v. *Creevey* (1 M. & S. 273), a decision which it may now perhaps be convenient to censure as inconsistent with privilege, but which, founded on Lord Kenyon's authority in *Rex* v. *Lord Abingdon* (1 Esp. N. P. C. 226), has been uniformly regarded till this time as a just exposition of the law. But indeed it is scarcely possible for ingenuity to fancy a case in which a member, accused of any misconduct in his trust, should be able to vindicate himself by resorting to such documents. Then, on general grounds, the necessity of making the Parliamentary conduct of members known to their constituents is urged, and the duty of the House of Commons to convey instruction to the people. The latter argument may be answered by asserting that the duty of general instruction resides in the whole Legislature, and not in any single branch of it. The former argument proves too much; for the conduct of the representative is best disclosed by the share taken by him in the debates, which from all time up to the present moment have been, not only neither sold nor published by the House, but cannot be published by the most accurate reporter [153] without his incurring the danger of Newgate for breach of privilege, and being exposed without justification to legal consequences.

It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is no doubt susceptible of improvement; but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty; and if, on such considerations, either House should claim, as matter of privilege, what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the Courts, though never, I hope, treated with contempt. It would also be the declaration of a new law; and the word "adjudge" can make no difference in the nature of the thing.

The practice, or usage, is the second ground, on which the Attorney-General seeks to rest this privilege; and he has a warrant for his claim, which, if well founded, is even stronger than any opinion of necessity: he refers to an Act of Parliament.

The Postage Act (*a*), it seems, conveys all Parliamentary proceedings to all parts of the Empire free of expense. And, forasmuch as, when that Act passed, it was notorious that the votes and other proceedings contained matter criminating individuals, therefore, it was argued, the Legislature must have intended to circulate

(*a*) Stat. 42 G. 3, c. 63. See stats. 7 W. 4 & 1 Vict. c. 32, and c. 34.

such criminating matter. But the same Act requires newspapers to **[154]** be circulated free of postage: it was equally notorious that newspapers often contained libels; yet it was never contended that the Postage Act intended to give impunity to their circulation. In both cases it is clear that the Act merely gave untaxed circulation to such proceedings and such papers as it was before lawful to circulate, leaving all questions of what is lawful in their former plight.

But "the practice has prevailed from all time." If so, it is strange that no vestiges of it are tracked to an earlier period than 1640, when the House of Commons, acting neither in a legislative nor an inquisitorial capacity, began to set up an authority independent of the Crown, and hostile to it, which led to its gradually absorbing all the powers of the State. For near twenty years the House was taking this executive part, which they could not carry on but by publishing their votes and proceedings. At the Restoration they made some amends to the exiled King, by evincing their loyalty in the same manner; and their vows of allegiance and submission were also sold and published, as their manifestoes and levies of men and money against his father had been before. Thus does the practice appear to have originated in the Long Parliament, and to have been continued at the Restoration. The origin disproves the antiquity of the privilege, or its necessity for the functions of one of the three estates; no such necessity was thought of till one began to struggle against the other two for an ascendency which reduced them to nothing. True it is, the practice of so printing and publishing has proceeded with little interruption till this hour. But the question is not on the lawfulness or expediency of printing and publishing in general; it is whether any **[155]** proof can be found of a practice to authorize the printing and publication of papers injurious to the character of a fellow subject. Such a privilege has never been either actually or virtually claimed by either House of Parliament; the notice of neither has been called to the fact of their giving publicity to writings of that character. What course they might have taken we cannot know, if a party thus injured had laid his grievance before them. Had their answer been, we claim the right to promulgate our judgment on cases within our jurisdiction, on which we have made inquisition, heard evidence and defence, and formed our judgment,—they would have referred to a state of things wholly different from that which is now before us. If they had said, we claim the privilege of ordering the printing of what we please, and of publishing all we print, however partial the statement, and however ruinous to individuals, the question of their right to justify the publisher would have been much the same as that which we have now under discussion.

The practice of a ruling power in the State is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden; general warrants had been issued and enforced for centuries before they were questioned in actions by Wilkes and his associates, who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without **[156]** incurring the displeasure of the offended House, instantly enforced, if it happened to be sitting, and visiting all who had been concerned. During the session, it must be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes. And the order to "take him," addressed to the serjeant at arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?

Besides, the acquiescence could only be that of individuals in particular hardships, brought upon themselves by the proceedings published. We have a right to suppose that a considerate discretion was fairly applied to the particular circumstance of each case; that few things of a disparaging nature were printed at all; that, where criminating votes were allowed to meet the public eye, they were justified as an exercise of jurisdiction upon matters properly brought before Parliament, after patient hearing, and candid enquiry; that the imputations were generally true, and actions for libel would only have made them more public; and that, even where ex

parte proceedings were printed to the annoyance of private persons, that minute suffering would be lost sight of in the general sense of an overwhelming necessity. All kinds of prudential considerations, therefore, conspired to deter from legal proceedings, and will fully account for the acquiescence; and the difference between the extent of publication formerly practised and the uncontrolled sale of all that the House may choose **[157]** to print in order to raise a fund for paying its officers cannot fail to strike every unbiassed understanding.

I must add, that the evidence on this subject set forth in the report convinces me that publication has never been by way of exercising any of its privileges, nor the fruit of deliberation to what extent it ought to be carried and within what bounds restrained. With very different objects the practice was originally introduced; it grew imperceptibly into a perquisite; and I venture to believe that it was raised into a traffic, and a means of levying money, without much consideration.

The authority to which the Attorney-General last appealed is one to which particular attention is due? I mean the report of the committee appointed by the late House of Commons to examine the subject. He spoke of it as a document of extraordinary weight, demanding the utmost respect, as uniting the suffrages of the most distinguished statesmen and the most eminent lawyers. I feel just and high deference towards them all; towards none more than the learned person who pressed us with their authority, and whose argument at the Bar so fully laid before us all that could possibly be urged in defence of their resolutions. That learned person gave us to understand that he had sacrificed many weeks of his valuable time in studying this great subject, and that in preparing his argument he had become perfectly convinced that his side was the side of truth. He must forgive me the remark, that this conclusion would have affected me more if it had preceded, instead of following, the report of that committee and the trial at Nisi Prius, and indeed the resolution of 1835 (*a*).

He also felt it right to remind us that members of that committee, though not now occupying judicial sta-**[158]**-tion, are sure to do so hereafter; that their fame may eclipse all their predecessors upon the Bench, and their opinion, embodied in the committee's report, ought to be as much venerated as if it had appeared some ages earlier,—in the reign, he added by way of example, of Queen Anne. I fully accede to the suggestion; but, in acting upon it, I could not refrain from considering the claims to confidence which the individual members might possess. My enquiry would not be confined to their learning and ability: I should ask of their habitual candour and love of truth; perhaps, too, of their political and personal connections. I might be driven to the invidious necessity of comparison: finding that some lawyers in the House had dissented from the committee, if I had found also in the minority such names as adorn the list of those who opposed the claim of privilege in the case of *Ashby* v. *White* (2 Ld. Ray. 938), in the reign referred to, it might be difficult, notwithstanding any disparity of numbers, to be quite certain which way the balance of authority inclined.

One thing would aid me in this estimate; whether the first impression of those most conversant with constitutional law coincided with the resolutions in which they afterwards concurred. For in many cases the first thoughts of understanding men are the best, and the surest to bear the stamp of truth; subsequent consideration sometimes brings expediency into competition with rectitude, and expediency of all kinds, general and particular, public and personal. But, on the other hand, it would not be unimportant to know whether great lawyers, whose minds had not been particularly exercised in these matters, who might have been at first induced to concur in the resolutions, had seen reason to **[159]** abide by them on maturer reflection. Some may have yielded to the extensive claims of privilege admitted by Judges, and asserted by great living authority, who might afterwards renounce them as inconsistent with clear principles of law in daily operation. But I have been led too far in observing on the authority of the report, against which the plaintiff is, in truth, appealing to our judgment, and on which nothing but the learned counsel's claim of deference to it could have tempted me to make a single remark. Let me only add that, if its authority and force of reasoning had appeared to its composers so conclusive, there might have been more propriety and more grace in leaving them to

(*a*) Ante, p. 4.

their natural influence over our minds, than in resorting to language which would have exposed our motives to a darker suspicion than any pointed at by the Attorney-General, if our opinion had happened to coincide with that of the House of Commons.

I cannot conclude without some reference to the particular circumstances which have attended this cause in its progress, and have been observed upon by the Attorney General at the close of his long discourse. I then mentioned the suddenness with which this great subject came upon me, when the newspapers informed me that the issue which I was about to try had been made the topic of discussion in the House of Commons the night before. I must now add that when, on the trial (*a*)[1], it was proposed to make out a defence from the resolution so often cited, that resolution was unknown to me. The project of the honourable House to authorize the unrestricted sale of all their printed proceedings at so much a sheet, throwing off such a discount to whole-**[160]**-sale purchasers, and appropriate the money to be raised to specific purposes, was what I never had anticipated, and (I own) could hardly believe. I thought it clear that such a course of proceeding could only be defended by asserting for one House of Parliament that sovereign power which is lodged in the three estates; an opinion confirmed by the report of the committee, by the Attorney General's argument, and by the concurrence of my learned brethren.

Some degree of censure was insinuated on my immediate declaration of an opinion not absolutely necessary for disposing of the cause, and which was said to have encouraged the plaintiff to commence this second action. I may be allowed to doubt this supposed consequence; for the second action was brought three months later, and immediately after the report of the committee had appeared. Perhaps, by some dexterous dealing with the points that arose at Nisi Prius, it might have been possible to avoid this painful collision, but not without shrinking from my duty to those parties who, whether necessarily or not, brought this question before me, and had a right to my opinion upon it; not without a poor compromise of the sacred principles of constitutional freedom. Besides, the delay would have implied a doubt where none was entertained, and would have been but a short postponement of the evil day; for similar questions must have sprung up in other quarters, and must have brought under examination the large rights now claimed.

I had indulged a hope that the resolution might have undergone revision, and have been found such as the House of Commons would not wish to continue on its journals. I had even some ground for believing that distinguished members of the committee itself entered **[161]** upon the enquiry with opinions corresponding with my own; and I, for my own part, am at a loss to discover, in their printed report, or in the argument I have heard, any good reason for their conversion.

I cannot lament that I gave utterance at the proper season to sentiments of which I deeply felt the importance as well as the truth; nor can I doubt that a full consideration of the whole subject will lead to beneficial results. One thing alone I regret, a warmth of expression in asserting what law and justice appeared to me to require, which may have rendered it more difficult for the late House of Commons to recede from any claim which it had advanced.

I am of opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on this demurrer.

Littledale J. The first question for our consideration is, whether the resolution of the House of Commons, that they have the power to do an act, precludes the Court from enquiring into the existence of the power; and whether we are in the situation of enquiring into this question at all; and whether we are not estopped by this resolution of the House of Commons, who have resolved, declared, and adjudged, that the power of publishing such of its papers, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it, operates (*a*)[2], so as to estop this Court from **[162]** proceeding to investigate the subject presented to the Court upon this demurrer.

It is said the House of Commons is the sole judge of its own privileges: and so

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(*a*)[1] Ante, p. 101, note (*b*).

(*a*)[2] Some verbal inaccuracies, which will be found in the report of this judgment, occur in the copy from which it was delivered. The few corrections requisite (which the reporters have not thought it proper to make) will be obvious.

I admit as far as the proceedings in the House and some other things are concerned; but I do not think it follows that they have a power to declare what their privileges are, so as to preclude enquiry whether what they declare are part of their privileges.

The Attorney-General admits that they are not entitled to create new privileges; but they declare this to be their privilege. But how are we to know that this is part of their privileges, without enquiring into it, when no such privilege was ever declared before?

We must therefore be enabled to determine whether it be part of their privileges or not.

Suppose the House of Commons had resolved that they had a right to punish persons for an infringement on the property of members, as was declared in the case of Admiral Griffin, and also in other cases where claims of privilege have been set up which are now abandoned by the Attorney-General, could it be contended that, if the House were now to resolve that those privileges belonged to them, this Court were estopped from enquiring into whether they were to be taken as part of the privileges? Or suppose that the House were to go much beyond what was formerly considered as privilege, and were to assert as privileges what, at the same time, I must admit, this House of Commons is never likely to assert, is this Court to be shut out from enquiry into whether they have the privilege or not?

It is said that the proceedings in Courts which have a peculiar jurisdiction of their own, and where the mode **[163]** of proceeding is different from ours, cannot be enquired into in the Common Law Courts; as in the case of judgments, and matters only cognisable in the Ecclesiastical Courts, and in the Admiralty Courts, and that therefore, as the House of Commons is exclusively the judge of its own privileges, we cannot enquire into it. But the cases are not similar; the Ecclesiastical Courts and the Courts of Admiralty give judgment or decide matters upon adverse claims of parties litigated in the Courts. But this proceeding in the House of Commons does not arise on adverse claims; there are no proceedings in the Court; there is no Judge to decide between the litigant parties; but it is the House of Commons who are the only parties making a declaration of what they say belongs to them.

If the House of Commons were to make an adjudication upon the discussion of a claim of litigant parties on a subject within their jurisdiction, this Court would be bound by it. If the House of Commons have the right to resolve what their privileges are, so as to estop the Courts of Common Law from enquiring further into the subject, and in a case like the present to give judgment without more for the defendants, the House of Lords have the same power; and I will suppose that, the House of Lords having the same enquiry to make as to the state of prisons, under an Act of Parliament, and the very same reports and proceedings had been made to their House as have been made to the House of Commons, and that the House of Lords had resolved that copies of the papers should be printed for the use of the members of the House of Lords, and had declared that no other copies should be printed; and supposing that, upon the judgment now proposed by the Attorney-General to be given for the defendants on the ground **[164]** before mentioned, and that the record came by writ of error before the House of Lords, would that House consider themselves estopped from enquiring into the matter by the resolution of the House of Commons? I will not pretend to say what they would do; but I cannot bring my mind to any other conclusion, as to this part of the case, than that this Court is not necessarily bound, by the mere assertion of the resolution of the privilege having been declared by the House of Commons, to give judgment for the defendants without further inquiry.

I would here make some remarks as to the mode in which the plea states the resolution of the House of Commons as to the privilege: "And the defendants further say, that the said Commons House of Parliament heretofore, to wit on the 31st day of May, in the year last aforesaid, resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it." This plea states the fact of a resolution having been made by the House of Commons on the 31st day of May 1837, which is after the day of the commencement of the action as stated in the demurrer book, and also after the day of the declaration. Now, if this was the averment of a new fact which had arisen after the commencement of the action, and it was a material fact to be introduced into the plea,

it ought to be pleaded in bar of the further maintenance of the action, and not in bar of the action generally: but, as this statement of the resolution is only a statement of **[165]** what is the privilege of the House, and which privilege, it is contended, is coeval with the House of Commons, I do not think it is such an allegation of a new fact as to say that the plea should be confined to be a bar of the further maintenance of the action.

Another remark on the plea is, that the resolution of the 13th of August 1835, that the Parliamentary papers printed by order of the House should be made accessible to the public by purchase, which includes all the papers printed. Whereas the resolution of the 31st of May 1837 is only as to such papers as should be deemed necessary and conducive to the public interest, which is more limited than the former resolution, and implies a selection, and might seem to require that the selection should be made after the resolution. But, as the plea states that the paper which is the subject of this action had been ordered to be printed, that implies that the House thought it necessary and conducive to the public interest that it should be published.

I have made these remarks as to the technicality of the plea. I will now consider whether the order of the House is a sufficient justification for the doing an act otherwise illegal? And whether the power does exist in this particular case.

I think that the mere statement, that the act complained of was done by the authority of the House of Commons, is not of itself, without more, sufficient to call at once for the judgment of the Court for the defendants. The defendants have not pleaded to the jurisdiction of the Court, but have pleaded in bar generally, and so as to raise a question of law or of fact according as the plaintiff chooses. And I think that this Court is not estopped from investigating the question of law **[166]** raised by the demurrer to the plea in this action. And I think we are to enquire whether the act of publication has any thing to do with the privilege of the House; and, if it has, then whether those privileges, connected with the authority given to the defendants, amount to a justification. In the case of *Burdett* v. *Abbot* (14 East, 1), no question was made as to the Court being precluded from investigating the law of the case; they heard very long and laborious arguments, and gave judgment for the defendant. And so also we are at liberty here, and we are not shut out from hearing the arguments, and giving such judgment as we consider to be according to law. But it is said that the question of the privilege of the House of Commons comes directly before the Court upon the pleadings, and that, therefore, upon all the authorities, it is quite clear it is not competent to this Court to enquire into the question of privilege; and it is said that it is, in effect, the same case in principle as *Burdett* v. *Abbot* (14 East, 1); and that it was there held that the defence, being founded upon the order of the House to do the thing complained of, raised the question of privilege directly, and that the Court could not investigate the legality of that order. But this differs very materially from *Burdett* v. *Abbot* (14 East, 1). That was an action against the Speaker himself for an act done by him in the House. The act done by him was to commit an individual whom the House adjudged to be guilty of a contempt to the House, and who had been for that ordered to be taken into custody; and there was a specific order of the House as to the particular thing to be done; but this case is altogether different; these defendants are not members of the House, but agents em-**[167]**-ployed by them; the plaintiff is a perfect stranger to the House; he has been guilty of no insult or contempt of the House, and there is no order of the House applicable to him. He stands, therefore, in the situation of a stranger to the House, complaining of persons who are no members of the House, but merely employed to distribute their papers.

Lord Ellenborough in the course of his judgment says (*a*) that, independently of any precedents or recognised practice on the subject, such a body as the House of Commons must à priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. But yet, when he comes to the summing up the points for the consideration of the Court, and gives the first part of his judgment, he says, first, that "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

(*a*) 14 East, 138.

and recognition, and by the judgments of the Courts of Law, in a long course of well-established precedents and authorities" (*b*).

Lord Ellenborough, therefore, takes into his consideration the reason and necessity of the order, as well as the evidence of usage and practice, and the legislative sanction and recognition by Courts of Law in a long course of well established precedents and authorities. I admit that it is very difficult to draw the line between the question of privilege coming directly before the Court, and where it comes incidentally: the shades of difference run into one another.

[168] The decisions and dicta of the Judges, who have said that the House of Commons are the only judges of their own privileges, and that the Courts of Common Law cannot be judges of the privileges of the House of Commons, are chiefly where the question has arisen on commitments for contempt, upon which no doubt could ever be entertained but that the House are the only judges of what is a contempt to their House generally, or to some individual member of it: but no cause has occurred where the Courts or Judges have used any expressions to shew that they are concluded by the resolution of the House of Commons in a case like the present. I think, therefore, that the Courts of Westminster Hall are not precluded from going into the enquiry from the decisions and dicta of Judges. And I think that, when Lord Ellenborough summed up the reasons for his judgments in the way already pointed out, in a case where it is alleged that the question of privilege came directly before the Court, we may follow his example, and endeavour to ascertain whether these resolutions of the House, on which the plea is founded, be founded on the reason and necessity of the order, as well as on evidence of the usage and practice, of the legislative sanction, and recognition of law in a long course of well established precedents and authorities.

After the very full and elaborate judgment of my Lord Denman, I do not think it necessary to go into the whole subject of privilege. There is no doubt about the right as exercised by the two Houses of Parliament with regard to contempts or insults offered to the House, either within or without their walls; there is no doubt either as to the freedom of their members from arrest, or of their right to summon witnesses, to require the **[169]** production of papers and records, and the right of printing documents for the use of the members of the constituent body; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge.

In the case of commitments for contempts, there is no doubt but the House is the sole judge whether it is a contempt or not; and the Courts of Common Law will not enquire into it. The greater part of these decisions and dicta, where the Judges have said that the Houses of Parliament are the sole judges of their own privileges, have been where the question has arisen upon commitments for contempt, and as to which, as I have before remarked, no doubt can be entertained. But not only the two Houses of Parliament, but every Court in Westminster Hall, are themselves the sole judges whether it be a contempt or not: although, in cases where the Court did not profess to commit for a contempt, but for some matter which by no reasonable intendment could be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently unjust and contrary to law and natural justice, Lord Ellenborough says that, in the case of such a commitment, if it should ever occur (but which he says he could not possibly anticipate as ever likely to occur), the Court must look at it, and act upon it, as justice may require, from whatever Court it may profess to have proceeded.

I will confine my observations to what is the more immediate subject of this record, viz. the printing and publishing Parliamentary papers.

There is no trace of printing Parliamentary papers of any description prior to 1641, when there was a general **[170]** resolution for printing the votes of the House; and at subsequent times reports and miscellaneous papers were printed under special resolutions, and measures taken for their distribution through the country. And it appears that these various papers have from time to time been allowed to be sold. Then it appears, by the plea, that there was a general resolution of the House in August 1835, that the papers which should be ordered to be printed should be sold, and the price was directed to be as low as possible. The publication on which the

(*b*) 14 East, 158.

action is founded was ordered to be printed, and was published by the defendants, who were the printers appointed by the House of Commons to print their papers; and it is upon these orders, and upon the resolution, that the defence is founded. Though the fact of any resolution for printing and distributing papers is not shewn to have taken place at an earlier period than 1641, yet, from the difficulty there may be in now finding records and documents of an earlier date, I cannot say but that they were printed before that time: the votes were the first things ordered to be printed; but, though the reports and miscellaneous Parliamentary papers do not appear to have been printed till a later period, yet, for the purposes of this argument, I think they may be all classed together: and I think, also, that the resolution that they might be sold makes no difference in principle; for, though the sale would cause a greater circulation, it is the distributing them to the country at large, whether by sale or gift, that raises the question. The fact of the printing and distributing Parliamentary papers, even had it existed long before the Conquest (when I say "printing," of course it is not appropriate language to the times before the introduction of print-**[171]**-ing), would, of itself, prove nothing as to privilege. Parliament does not require any privilege to publish its own papers; any man may publish his own papers; but the only thing that can be called privilege is a right to publish defamatory papers, amongst the general mass which are to be distributed. As a pure abstract universal statement of privilege, I think it cannot be supported; it can only be so under some qualifications. These qualifications must necessarily be enquired into.

The first case that occurs, as to the publishing Parliamentary papers of a defamatory nature, was that of *Lake* v. *King* (1 Saund. 120, 131 a.), where certain Parliamentary papers had been printed which aspersed the character of Sir Edward Lake, who was vicar-general and principal official of the Bishop of Lincoln. The defendant pleaded that he printed the papers in question for the use of the members of the House of Commons; and, on a demurrer to the plea, the Court held the plea good, because it was the order and course of proceeding in Parliament to print and deliver copies, &c., whereof they ought to take judicial notice. This decision was quite correct, as it was a privileged publication.

The next case that occurs as a case of litigation, is *Rex* v. *Williams*, which is reported in 2 Shower, 471, and much more fully in the thirteenth volume of the octavo edition of the State Trials, page 1369. It was an information against Sir William Williams, who was Speaker of the House of Commons, for printing and publishing a paper called Dangerfield's Narrative. He pleaded to the jurisdiction of the Court, that, this paper being signed by him as Speaker by the **[172]** order of the House of Commons, the Court of King's Bench had no jurisdiction over the matter. On a demurrer to this plea, it was over-ruled; and he afterwards pleaded nearly the same facts as a plea in bar. This plea in bar appears afterwards to have been withdrawn, and he was fined a very considerable sum of money. It was afterwards considered, when a change took place in the Government, a very harsh proceeding against the Speaker, and as being very much influenced by the politics of the times; and a bill was brought into Parliament to reverse the judgment obtained: but for some reason the bill was never finally passed, and the judgment remained as it was.

There is no doubt but the proceedings against Sir William Williams were very harsh and improper; but I am by no means prepared to say that, as the original plea was pleaded to the jurisdiction of the Court of King's Bench, and was not pleaded in bar, the judgment of the Court was wrong. But, as to what one may consider the merits of the case with regard to Sir William Williams, if he had either pleaded not guilty, or a special plea in bar, which he had prosecuted to trial, I am not prepared to say but that he ought to have been acquitted, because the act of signing the order for printing the paper was done in the House of Commons by the order and authority of the House, and was therefore a proceeding in the House, and, as such, was a case of privilege which exempted him from both a criminal prosecution and an action.

I will now advert to the case of *Rex* v. *Lord Abingdon* (1 Esp. N. P. C. 226). That was an information against Lord **[173]** Abingdon for a libel contained in a paragraph in the public newspapers, stated to be part of a speech delivered in the House of Lords. Lord Abingdon urged that, as the law and custom of Parliament allowed a member to state in the House any facts or matters, however they might reflect on an individual, or charge him with any crimes or offences whatsoever, and such was dispunishable by the law of Parliament, he from thence contended that he had a right

to print what he had a right to deliver, without punishment or animadversion. Lord Kenyon said, "As to the words in question, had they been spoken in the House of Lords, and confined to its walls, that Court would have no jurisdiction to call his Lordship before them, to answer for them as an offence; but that in the present case, the offence was the publication under his authority and sanction, and at his expense."

I will next mention the case of *Rex* v. *Wright* (8 T. R. 293), which is considered as an authority for the defendants. It was an application by Mr. Horne Tooke for leave to file a criminal information against the defendant for publishing a paragraph in the report of a committee of the House of Commons, imputing treasonable conduct to Mr. Tooke. The rule was refused, and Lord Kenyon, says "It is impossible for us to admit that the proceeding of either of the Houses is a libel; and yet that is to be taken as the foundation of this application." He afterwards adds, that "this is a proceeding by one branch of the Legislature, and therefore we cannot enquire into it." But Lord Kenyon does not admit the orders of the House of Commons to be conclusive on all occasions; for he says, "I do not say that cases may not **[174]** be put in which we would not enquire whether or not the House of Commons were justified in any particular measure." Mr. Justice Lawrence assimilated the case to a publication of what took place in a Court of Justice. He says, "This case has been chiefly argued on two grounds: first, it is said that the report of the House of Commons is itself unjustifiable, inasmuch as it imputes a crime to the prosecutor, and deprives him of his privileges. It is said that this report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence; but that is not the fair import of the paragraph. It is impossible that a man may have views hostile to the Government and Constitution of the kingdom, without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not therefore follow that this report charges those persons with the same crime of which they had been before acquitted: but the chief ground taken by the prosecutor's counsel is, that though the report of the Commons cannot itself be considered as a libel, the defendant, not acting under the authority of the House, may be indicted for publishing it, with a view to general circulation. It has been said, that the publication of the proceedings of Courts of Justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield* v. *The Bishop of Chichester* (2 Mod. 118), has been cited," upon which he makes some observations. Then he goes on to state, "The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these **[175]** proceedings contain no point of law, and are not published under the authority or the sanction of the Courts; but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Currie against Walter (*a*), proprietor of the *Times*, for publishing a libel in the paper of the *Times;* which supposed libel consisted in merely stating a speech made by a counsel in this Court, on a motion for leave to file a criminal information against Mr. Currie. Lord Chief Justice Eyre, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this Court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the Judges doubted whether or not the defendant could avail himself of that defence on the general issue. He then adds, "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice shall be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in Parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller." Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question, **[176]** yet, as he only published a true copy of it, Mr. Justice Lawrence stated that he was of opinion the rule ought to be

(*a*) *Curry* v. *Walter*, 1 Bos. & Pul. 525.

discharged. It is to be observed that the strict expression of Lord Kenyon cannot be doubted for a moment: for he only says that it is impossible to admit that the proceeding of either House of Parliament is a libel; of which there is no doubt; for the proceeding itself certainly is not a libel? And, with regard to Mr. Justice Lawrence's opinion as to the publication of the proceedings in a Court of Justice, the generality of his expressions is commented on by other Judges in subsequent cases, and does appear to admit of some qualification.

Then it is contended upon this case that, if the Judges thought the publication was privileged, though unauthorized by the House of Commons, á fortiori it would be so if it was so authorized. The case as far as it goes is certainly in favour of the defendants.

After that comes the case of *The King* v. *Creevey* (1 M. & S. 273). There the defendant published a speech which he had made in Parliament, reflecting on the character of an individual. Lord Ellenborough says, "How can this be considered as a proceeding of the Commons House of Parliament? A member of that House has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there; but unauthorized by the House, has chosen to publish an account of that speech, in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual." The defendant was convicted, and, upon an application, to the Court for a new trial, Lord Ellenborough says, "If any doubt belonged to this question, I should **[177]** be most anxious to grant the rule to shew cause, in order to have the grounds of doubt more fully discussed and settled. But as I cannot find any thing on which to found even a color for argument, except what arises from an extravagant construction put on a particular expression of Lord Kenyon in the case of *The King* v. *Wright* (8 T. R. 293), it would be to excite doubts, and not to settle them, if we were to grant the rule. What Lord Kenyon there said was this,—"That it was impossible to admit that the proceeding of either of the Houses of Parliament was a libel; and yet that was to be taken as the foundation of the application made in that case." I will not here wait to consider whether that could be strictly called a proceeding in Parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in Parliament in the terms given to some of the Judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons House of Parliament? A member of that House has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privileged: but he has not stopped there, but unauthorized by the House, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the **[178]** character of an individual. The only question is, whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an oratio ad populum in order to explain his conduct to his constituents? There is no case in practice, nor I believe any proposition laid down by the best text writers on the subject, that tends to such a conclusion. The case of *Rex* v. *Wright* (8 T. R. 293), indeed determined that a proceeding in Parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as was held in *Rex* v. *Lord Abingdon* (1 Esp. N. P. C. 226). As to *Curry* v. *Walter* (1 Bos. & Pul. 525), it is not necessary for the present purpose to discuss that case: whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to Eyre C.J." "In *Lake* v. *King* (1 Saund. 120, 131 a.), the judgment of Lord Hale and of the other Judges was founded upon this point, viz. that it was the order and course of proceedings in Parliament to print and deliver copies, of which the Court ought to take judicial notice. In order therefore to bring this case within the rule in *Lake* v. *King* (1 Saund. 120, 131 a.) we ought to find

that it is the order and course of proceedings in Parliament that members should print their own speeches; and that this Court will take judicial notice of such a course of proceeding. The very statement of the proposition shews it to be untenable. It is therefore neither within *Lake* v. *King* (1 Saund. 120, 131 a.), nor *Rex* v. *Wright* (8 T. R. 293), giving to that case its full effect; and even if it were, perhaps the **[179]** Court would lay down the doctrine with somewhat more limitation than is to be found in that case." Mr. Justice Bayley says, "If the case admitted of any doubt I should be desirous of granting a rule. But the case is without difficulty. A member of Parliament has undoubtedly the privilege for the purpose of producing Parliamentary effect to speak in Parliament boldly and clearly what he thinks conducive to that end. He may even for that purpose, if he think it right, cast imputations in Parliament against the character of any individual; and still he will be protected. But if he is to be at liberty to circulate those imputations elsewhere, the evil would be very extensive. No member, therefore, is at liberty to do so. In *Lake* v. *King* (1 Saund. 120, 131 a.) such was the impression of the lawyers of that day. There the defendant did not justify the printing and delivering the petition to divers subjects, &c. generally, but to divers subjects being members of the committee appointed by the Commons; and such publication was held justifiable, because it was according to the order of proceedings of Parliament and their committees. But it is not contended to-day that it is according to the course and order of Parliament for members to communicate their speeches to the printers of newspapers, in order to give them to the world in a more corrected form. If any misrepresentation respecting them should go forth, there is a course perfectly familiar to all members, by which such misrepresentations may be set right, viz. by complaining to the House of the misrepresentation, and having the author of it at the Bar to answer such complaint: therefore it is not necessary for the purpose of correcting the misrepresentation that a member should be the publisher of his own speech. It has been argued that the **[180]** proceedings of Courts of Justice are open to publication. Against that as an unqualified proposition I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which, for the purposes of justice, the Court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings in a Court of Justice may be published." Mr. Justice le Blanc says: "As to the right of a member of Parliament to speak in Parliament what is defamatory to the character of another, that sitting in a Court of Justice we were not at liberty to inquire into that; because every member had liberty of speech in Parliament: but when he published his speech to the world, it then became the subject of common law jurisdiction; and the circumstance of its being accurate, or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication."

Now these remarks in *Rex* v. *Creevey* (1 M. & S. 273), very materially neutralize the opinions of Lord Kenyon and Mr. Justice Lawrence in *Rex* v. *Wright* (8 T. R. 293); but after all none of the cases, *Rex* v. *Lord Abingdon* (1 Esp. N. P. C. 226), *Rex* v. *Wright* (8 T. R. 293), and *Rex* v. *Creevey* (1 M. & S. 273), were publications under the orders of the House, and do not affect the question of privilege, and therefore I only consider them as declaring the opinion of Judges on publications to the public at large of what has occurred in Parliament.

I would also take this opportunity of referring to the argument raised as to the publication of trials in Courts of Law, and which, it has often been stated, is justifiable **[181]** though they may contain matter defamatory to the character of individuals. I am by no means prepared to say that, as a general proposition, they may be justified. Besides the opinions of Lord Ellenborough, Mr. Justice Bayley, and Mr. Justice le Blanc, as before expressed, I may refer to the case of *Stile* v. *Nokes* (7 East, 493), and *Rex* v. *Mary Carlisle* (3 B. & Ald. 167), *Lewis* v. *Walter* (4 B. & Ald. 605), and *Flint* v. *Pike* (4 B. & C. 473), that it must not be understood that on all occasions the publication of trials which contain matter defamatory of the character of individuals can be justified.

It is said that it is proper that the members of the House should have the right to send copies of all the Parliamentary papers to their constituents, to justify themselves in case their constituents should find any fault with their conduct in Parliament. If the member whose conduct is blamed by his constituents wishes to vindicate his

conduct, he may send what Parliamentary papers he pleases, provided they do not contain any criminatory matter of individuals; but I think it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in Parliament.

As to the general information to be given to the public of all that is going on in Parliament, I cannot conceive upon what ground that can be necessary. I do not consider as a matter of right that the public should know all that is going on in Parliament. But, as to the right of communicating the proceedings in Parliament to the public, if it be meant to communicate any papers which contain matters defamatory as they think proper, **[182]** that is a matter which, in my judgment, can only be done by an Act of the Legislature. And I do not think that the communicating defamatory papers to the public can be justified as a matter of necessity, or as reasonable to be done.

An argument has been adduced in favour of the right to publish the proceedings in Parliament from the Act of 42 G. 3, c. 63, allowing the votes and proceedings in Parliament to be sent free of postage. It may be thought very right to allow those papers to be sent free of postage on general principles: but no argument can be adduced from that, that the Act meant to sanction the publication of such papers as are defamatory.

Then it is said, the plaintiff is defamed by these papers being delivered to the members, and therefore it is of little consequence whether the number of defamatory papers are extended. But thousands of copies may be distributed under the order of the House; and upon no principle of law can it be contended that, because a man may be lawfully criminated amongst one class of Her Majesty's subjects, that he may be so amongst all.

Then it is said that, though the defaming a man's character be an evil, yet it is an evil of small magnitude compared with the advantages that may result from the publication of defamatory papers. But it does not appear to me that, as a general proposition, benefit is to be expected to result from the publication of defamatory papers. The advantages are altogether undefined and uncertain, and cannot, as a matter of law, be set off against the positive injury arising to a man from his character being defamed. But, if such a principle of law could be admitted, it would be necessary to shew **[183]** what was the advantage to be derived from such a publication.

It is said that there is no instance of any action having ever been brought against any person for publishing Parliamentary papers, the publication of which was sanctioned by the resolution of either House of Parliament, and that is a very strong reason why the action is not maintainable. That is sometimes given as a reason why an action cannot be maintained; but all such cases depend upon their own particular circumstances: when such cases arise; the principles of law are examined, and, if they apply, the Courts decide an action to be maintainable, though none such has ever been brought before; but here, the action taken by itself is confessedly maintainable, and the question is about the justification. Now the same identical justification was never pleaded before that I know of: and the question therefore is, not whether the action itself is maintainable, but whether there can be any objection to it, because the defence has never been set up. If the defence has never been pleaded before, and never brought into discussion on any other occasion except as far as I have before mentioned, there is no more reason to say that it is good, or that it is bad, till it has been investigated.

But it is said, that the practice of publishing Parliamentary papers never has been disputed, and that there has been a complete acquiescence in it amongst all classes of persons, and that there have been a great many occasions where discussions have arisen in which circumstances relating to individuals have been laid before Parliament, and that copies of those proceedings have been distributed through the country; as, for instance, in the investigation of the South Sea scheme, **[184]** the slave trade, the Municipal Corporation Act, and many others; and yet nobody has ever come forward to institute any proceedings upon them. Against those who furnished any criminatory matter to be laid before the House, or against any one who published them for the use of the members, no proceeding can be instituted. But, as to those who distributed them to the public, it may be remarked that persons whose conduct and character might be impugned where abuses existed might feel that they deserved the imputation, and that the charges against them were true, and therefore their taking any proceed-

ings would only be to make the matter worse: and, as to those who were unconscious of deserving the charges, they might think that it would not be advisable to enter into a contest with the House of Commons.

It is said to allow this to be decided contrary to the Bill of Rights. The Bill of Rights (*a*) declares that the freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament. This does not, in my opinion, in the smallest degree infringe upon the Bill of Rights. I think this is not such a proceeding in Parliament as the Bill of Rights refers to; it is something out of Parliament. The privileges of Parliament appear to me to be confined to the walls of Parliament, for what is necessary for the transaction of the business there, to protect individual members so as that they may always be able to attend their duties, and to punish persons who are guilty of contempts to the House, or against the orders and proceedings or other matters relating to the House, or to individual members in discharge of their duties to the [185] House, and to such other matters and things as are necessary to carry on their Parliamentary functions; and to print documents for the use of the members. But a publication sent out to the world, though founded on and in pursuance of an order of the House, in my opinion, becomes separated from the House; it is no longer any matter of the House, but of the agents they employ to distribute the papers; those agents are not the House, but, in my opinion, they are individuals acting on their own responsibility as other publishers of papers.

I admit that, if my opinion be correct, the same question may be agitated in the Inferior Courts, such as the Quarter Sessions and County and Borough Courts; that, however, results from the law: if the law be so, they have the right to enquire into it.

I therefore, upon the whole of this case, again point out what Lord Ellenborough very much relied upon in his judgment in *Burdett* v. *Abbot* (14 East, 158), when he said that "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." But, in the case now before the Court, I think that the power of the House of Commons to order the publication of papers containing defamatory matter does not stand upon the ground of reason and necessity, independent of any positive authorities on the subject. And I also think that it is not made out by the evidence of usage and practice, by legislative sanction and [186] recognition in the Courts of Law in a long course of well-established precedents and authorities.

Upon the whole of the case, I think there should be judgment for the plaintiff.

Patteson J. This is an action for a libel contained in a reply of certain inspectors of prisons, appointed under the Act 5 & 6 W. 4, c. 38, to a report of the court of aldermen in London, and published by the defendants. The plea states that an original report of the inspectors was laid before the House of Commons under the provisions of that Act, that their reply to the court of aldermen was laid before the House, pursuant to an order of the House, and became part of the proceedings of the House, which, as a matter of fact, is admitted by the demurrer. The plea also sets out a resolution of the House of Commons of the 13th August 1835, that the Parliamentary papers and reports printed for the use of the House should be rendered accessible to the public by purchase at the lowest price at which they could be furnished; and that a sufficient number of extra copies should be printed for that purpose.

It also sets out the appointment of a committee on the subject, their resolution, and a further resolution and order of the House that the Parliamentary papers and reports printed by order of the House should be sold to the public at certain specified rates; and that Messrs. Hansard (the defendants), the printers of the House, be appointed to conduct the sale thereof. It also states orders of the House for printing the original report of the inspectors and their reply. The plea then alleges that the defendants printed and published the report and reply by authority of the House; and, in con-[187]-clusion, it sets out a resolution of the House of the 31st May 1837, by which it was resolved, declared, and adjudged, that the power of publishing such

(*a*) 1 W. & M. sess. 2, c. 2.

of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of the Commons' House of Parliament as the representative portion of it. The declaration in this case is entitled on the 30th May 1837, the day before the last-mentioned resolution. This resolution must be treated as declaratory only of a supposed ancient power of the House of Commons to publish, and that for two reasons. First, because, if it be treated as creating a new power or privilege, it would plainly be an alteration of the existing law, and an enactment of a new law by one branch of the Legislature only, which, it is admitted on all hands, cannot lawfully be done. Neither is the language of the resolution consistent with such a supposition; for, if the power or privilege be essential now, it must always have been so, since the constitutional functions of Parliament have always been the same. Secondly, if it be treated as a new power or privilege, it is not applicable to the libel for the publication of which this action is brought, nor to the action itself, both of which are prior to the passing of the resolution. The resolution in its terms seems to imply the exercise of some discrimination in the House, in selecting portions of its proceedings for publication; for it is limited to such of its proceedings as it shall deem necessary or conducive to the public interests; one would, therefore, have expected to see some averment in the plea that the publication in question had been so deemed by the House of Commons; yet nothing of the kind is to be found. However, as the plea sets out a prior **[188]** resolution of the House, that the Parliamentary papers and reports printed by order of the House should be sold to the public, I suppose it must be taken, upon this record, that the House of Commons deems it necessary, or conducive to the public interests, to publish all the Parliamentary papers and reports which it orders to be printed, without exercising any other discrimination, as to particular papers, than may be supposed to have been exercised when they were ordered to be printed. And the more so as there is an averment in the plea that the publication in question was by authority of the House, which is admitted by the demurrer.

Three questions appear to arise on this record.

First, whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

Secondly, whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from enquiring into the legality of that act.

Thirdly, if such resolution does not preclude this Court from enquiring, then whether the act complained of be legal or not.

With respect to the first question, it has not been contended in argument that either House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to those high assemblies to suppose that such extravagant cases should arise. But less extravagant cases have arisen in which both Houses of Parliament have con-**[189]**-fessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters wholly without their jurisdiction, but which they have treated as questions of privilege. And, though no instance has been cited of any action having been brought, but, on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, viz. that there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury? If it be once conceded that either House of Parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect: and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done in the House, and out of the House under orders given in the House, and in determining against whom such action would lie. It is clear that no action can be maintained for anything said or done by a member of either House in the House: and the individual members composing the House of Commons, whether it be a Court of Record or not, may, like other members of a Court of Record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those

who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master. Nor could an officer under the illegal orders of a magistrate, until the Legislature interposed and enabled him to do so. The mere circumstance, [190] therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse that act, if it be in its nature illegal: and it is necessary, in answer to an action for the commission of such illegal act, to shew, not only the authority under which it was done, but the power and right of the House of Commons to give such authority. This point indeed was not pressed upon the argument of this case; but I have mentioned it because it seems to me that it will be very difficult to maintain the affirmative of the second question, if this first point be given up.

The second question is, as I conceive, raised upon this record, by the declaratory resolution of the 31st of May 1837, set out at the conclusion of the plea. The other resolutions and orders set out in the plea are not declaratory of the power or privilege of the House, but directory only: and, as it has been shewn that it is possible that the House, however unintentionally, may make illegal orders, and that, if it should do so, those who carry them into effect may be proceeded against by action at law, it follows that the Court in which such action is brought must, upon demurrer, enquire into the legality of those directory orders, and cannot be precluded from doing so by the mere fact of those orders having been made.

If this Court, then, be not precluded from entertaining the question as to the legality of the directory orders by the orders themselves, it is precluded, if at all, by the resolution of the 31st of May 1837, and by nothing else. No other resolution of the House of Commons to a similar effect is set out in the plea, and we cannot look out of the record. It is certainly somewhat strange to [191] urge that this Court, in which the present action was already pending, and which had already on its proceeding the declaration of the plaintiff, should be precluded from entering into the question by a resolution of the House of Commons passed between the declaration and the plea; but I pass on to consider the effect of the resolution as if it had been passed long before any action had been brought in which a question could arise as to the existence of the power to which it relates.

The proposition is certainly very startling, that any man, or body of men, however exalted, except the three branches of the Legislature concurring, should, by passing a resolution that they have the power to do an act illegal in itself, be able to bind all persons whatsoever, and preclude them from enquiring into the existence of that power and the legality of that act. Yet this resolution goes to that extent; for, unless it is taken to mean that the House of Commons has power to order the publication of that which it knows to be defamatory of the character of an individual, and to protect those who carry that order into effect from all consequences, it will not avail the defendants in this action. I take the resolution, therefore, to have that meaning, though the language of it does not necessarily so import. And I take it also, in combination with the resolutions in 1835, to mean that the House of Commons deems it necessary or conducive to the public interests that all the Parliamentary papers which it orders to be printed should be sold, though the resolution of 1837 by itself would seem to imply directly the contrary, and that some discrimination as to publishing should be exercised on the subject. Now, if the House of Commons, [192] by declaring that it has power to publish all the defamatory matter which it may have ordered to be printed in the course of its proceedings with impunity to its publisher, can prevent all enquiry into the existence of that power, I see not why it may not, by declaring itself to have any other power in any other matter, equally preclude all enquiry in Courts of Law or elsewhere, as to the existence of such power. And what is this but absolute arbitrary dominion over all persons, liable to on question or control? It is useless to say that the House cannot by any declaratory resolution give itself new powers and privileges; it certainly can, if it can preclude all persons from enquiring whether the powers and privileges, which it declares it possesses, exist or not: for then how is it to be ascertained whether those powers and privileges be new or not? If the doctrine be true that the House, or rather the members constituting the House, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare. I am far from supposing that they will knowingly do so; but I see nothing to prevent it. Some mode of

ascertaining whether the powers and privileges so declared be new or not must surely be found; and, if it be conceded that the Courts of Law, when that question of necessity arises before them, may make the enquiry, then the doctrine that the resolution of the 31st of May 1837 precludes enquiry by this Court must fall to the ground. But it is argued that the point must be ascertained by reference to public opinion. I cannot find in the common law, or statute law, or in any books of authority whatever, any allusion to such reference: and indeed what tribunal can **[193]** be conceived more uncertain, fluctuating, and unsatisfactory, than public opinion? It is even difficult to define what is meant by the words "public opinion."

It is further argued that the Courts of Law are Inferior Courts to the Court of Parliament and to the Court of the House of Commons, and cannot form any judgment as to the Acts and resolutions of their superiors. I admit fully that the Court of Parliament is superior to the Courts of Law; and in that sense they are Inferior Courts: but the House of Commons by itself is not the Court of Parliament. Further, I admit that the House of Commons, being one branch of the Legislature, to which Legislature belongs the making of laws, is superior in dignity to the Courts of Law, to whom it belongs to carry those laws into effect, and, in so doing, of necessity, to interpret and ascertain the meaning of those laws. It is superior also in this, that it is the grand inquest of the nation, and may enquire into all alleged abuses and misconduct in any quarter, of course in the Courts of Law, or any of the members of them; but it cannot, by itself, correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents in some Court of Law, or conjointly with the other branches of the Legislature may remedy the mischief by a new law. With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a Superior Court to the Courts of Law. And those Courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity; but I deny that a mere resolution of the House of Lords, or even a decision of that House in a suit originally brought there (if any such thing **[194]** should occur, which it never will, though formerly attempted), would be binding upon the Courts of Law, even if it were accompanied by a resolution that they had power to entertain original suits: much less can a resolution of the House of Commons, which is not a Court of Judicature for the decision of any question either of law or fact between litigant parties, except in regard to the election of its members, be binding upon the Courts of Law. And it should be observed that, in making this resolution, the House of Commons was not acting as a Court either legislative, judicial, or inquisitorial, or of any other description. It seems to me, therefore, that the superiority of the House of Commons has really nothing to do with the question.

But it is further said that the Courts of Law have no knowledge or means of knowledge as to the lex et consuetudo Parliamenti, and cannot therefore determine any question respecting it. And yet, at the same time, it is said that the lex et consuetudo Parliamenti are part of the law of the land. And this Court is, in this very case, actually called upon by the defendants to pronounce judgment in their favour, upon the very ground that their act is justified by that very lex et consuetudo Parliamenti, of which the Court is said to be invincibly ignorant, and to be bound to take the law from a resolution of one branch of the Parliament alone. In other words, we are told that the judgment we are to pronounce is not to be the result of our own deliberate opinion on the matter before us, but that which is dictated to us by a resolution of the House of Commons, into the grounds and validity of which resolution we have no means of enquiring, and are indeed forbidden by Parliamentary law to enquire at all. I cannot agree **[195]** to that position. If I am to pronounce a judgment at all, in this or in any other case, it must and shall be the judgment of my own mind, applying the law of the land as I understand it according to the best of my abilities, and with regard to the oath which I have taken to administer justice truly and impartially.

But, after all, there is nothing so mysterious in the law and custom of Parliament, so far at least as the rest of the community not within its walls is concerned, that this Court may not acquire a knowledge of it in the same manner as of any other branch of the law. In the margin of the well known passage in Lord Coke's Fourth Institute (*a*), it is said to be lex ab omnibus quærenda à multis ignorata, à paucis

(*a*) 4 Inst. 15, in marg. Also in Co. Litt. 11 b.

cognita. The same might with the same truth be said of any other part of the law. Lord Coke says, in the same place, that the High Court of Parliament suis propriis legibus et consuetudinibus subsistit. This is perfectly correct also when applied to the internal regulations and proceedings of Parliament, or of either House; but it does not follow that it is so when applied to any power it may claim to exercise over the rest of the community.

It is, indeed, quite true that the members of each House of Parliament are the sole Judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must necessarily adjudicate on the extent of their privileges. All the cases respecting commitments by the House, mostly raised upon writs of habeas corpus, and collected in the arguments and judgments in *Burdett* v. *Abbot* (14 East, 1), establish, at the most, **[196]** only these points, that the House of Commons has power to commit for contempt; and that, when it has so committed any person, the Court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the House; in the same manner as this Court cannot entertain any such questions, if the commitment be by any other Court having power to commit for contempt. In such instances, there is an adjudication of a Court of competent authority in the particular case; and the Court, which is desired to interfere, not being a Court of Error or of Appeal, cannot entertain the question whether the authority has been properly exercised. In order to make cases of commitment bear upon the present, some such case should be shewn in which the power of the House of Commons to commit for contempt under any circumstances was denied, and in which this Court had refused to enter into the question of the existence of that power. But no such case can be found, because it has always been held that the House had such power, and the point attempted to be raised in the cases of commitment has been as to the due exercise of such power. The other cases which have been cited in argument relate generally to the privileges of individual members, not to the power of the House itself acting as a body; and hence, as I conceive, has arisen the distinction between a question of privilege coming directly or incidentally before a Court of Law. It may be difficult to apply the distinction. Yet it is obvious that, upon an application for a writ of habeas corpus by a person committed by the House, the question of the power of the House to commit, or of the due exercise of that power, is the original and primary matter pro-**[197]**-pounded to the Court, and arises directly. Now, as soon as it appears that the House has committed the person for a cause within their jurisdiction, as for instance, for a contempt so adjudged to be by them, the matter has passed in rem judicatam, and the Court, before which the party is brought by writ of habeas corpus, must remand him. But if an action be brought in this Court for a matter over which the Court has general jurisdiction, as, for instance, for a libel, or for an assault and imprisonment, and the plea first declares that the authority of the House of Commons or its powers are in any way connected with the case, the question may be said to arise incidentally; the Court must give some judgment, must somehow dispose of the question. I do not, however, lay any great stress on this distinction. It seems to me that, if the question arises in the progress of a cause, the Court must of necessity adjudicate upon it, whether it can be said in strict propriety of language to arise directly or incidentally.

I do not purpose to go through all the authorities upon this part of the subject which have been already examined by my Lord, but to confine myself to a few of the leading cases; before, however, I do so, I would observe that privilege and power appear to me to be very different things, as I shall have occasion to observe hereafter, and that the present question appears to me to relate to the powers of the House of Commons and not to its privileges properly so called.

The principal case is *Thorp's case* (*a*). I cannot pretend, after all the observations which have been **[198]** made upon that case by counsel and Judges, and by the report of the committee of the House of Commons on which the resolution of May 31st, 1837, was founded, and to which we have been referred by the Attorney-General, to throw any new light upon the real grounds of the answer there first delivered by the Judges. With all deference for ancient authority, it appears to me to have been an evasive answer, probably arising from the circumstances of the times: but if that be

(*a*) 31 & 32 H. 6, 1 Hats. Pr. 28, from 5 Rot. Parl. 239. S. C. 13 Rep. 63.

not so, the answer, being given in the House of Lords, has respect to the situation both of those who proposed the question and those who gave the answer, and amounts only to this, that they the Judges ought not to be called upon by the Lords in Parliament to inform them as to the privileges of Parliament, which they must themselves know; but it is nothing like a disclaimer of being able to decide any such question if it should arise in their own Courts. And, as to that part of their answer in which they speak of Parliament being able to make that law which was not law, it is plainly beside the question proposed; for it must relate to the power of the three branches of the Legislature concurring, and not to any resolutions of any one of them separately, or even of any two of them; added to which, they do actually give their opinion as to what they would hold in their own courts, and the Lords adopt and act upon it (*a*).

The passages in Lord Coke's Fourth Institute (*b*) rest upon *Thorp's case* (1 Hats. Pr. 28), and if the foundation fails, the superstructure cannot stand, however celebrated the architect may be.

Expressions are certainly to be found in *Rex* v. *Wright* (8 T. R. 293), **[199]** which appear to withdraw from the Courts of Law all power of noticing the publication of Parliamentary papers; but the expressions used by Lord Kenyon appear to me, I say it with hesitation, and pace tanti viri, to be quite inconsistent; and I am at a loss to know on what ground he really proceeded: whilst Mr. Justice Lawrence appears to have considered that the matter was not libellous, let it be published by whom it would; and it is to be observed that it did not appear that it was published by order of the House of Commons. Again, the authority of that case is greatly shaken by *Rex* v. *Creevey* (1 M. & S. 273); and, even if that was not so, it is to be recollected that the motion there was for a criminal information, which is a matter of discretion and not of right, and moreover that the doctrine as to the legality of publishing proceedings of Courts of Justice was then recently held without those qualifications and restrictions which, as I think, common sense, and the obvious good of the community at large, have compelled the Judges since that time to engraft upon it.

On the other hand, the cases of *Donne* v. *Walsh* (1 Hats. Prec. 41), *Ryver* v. *Cosyn* (1 Hats. Pr. 42), and *Benyon* v. *Evelyn* (O. Bridgman's Judgments, 324), shew that the Courts of Law have taken cognisance of such questions, and have decided contrary to the known claims of the House for its members: and whether it be true or not that Sir Orlando Bridgman made a gratuitous and unnecessary display in the latter case, this is certain, that his learned and laboured judgment must have excited, and did excite, great attention, and yet the decision was acquiesced in. It is true that we have no evidence of the direct interference of the House in that **[200]** case; neither could they constitutionally interfere as a body, inasmuch as no act of theirs, as a body, was brought into question; but no one doubts that the claim of the member was in reality the claim of the House. To that case may be added *Fitzharris's case* (8 How. St. Tr. 223), and that of *The Duchess of Somerset* v. *The Earl of Manchester* (Prynne's Reg. part 4, 1214), and the memorable cases of *Ashby* v. *White* (2 Ld. Ray. 938), and *Regina* v. *Paty* (2 Ld. Ray. 1105), and *Knollys's case* (12 How. St. Tr. 1167). I do not mention these last cases as showing that the jurisdiction of the Courts of Law, in matters said to concern the privileges of Parliament, has been conceded by the House of Commons, but as showing that it has not been decided that such jurisdiction in no case exists: and in *Ashby* v. *White* (2 Ld. Ray. 938), there was strong ground for maintaining that the House of Commons had exclusive jurisdiction over the subject as a Court of Judicature, though I think not sufficient ground; whereas, on the present question there is no possible ground for so saying. I agree that the case of *Rex* v. *Williams* (13 How. St. Tr. 1369), is not to be relied on. The political character of it, the violence of the times, and the just dread of arbitrary power in the Crown, which occasioned the allusion to it in the Bill of Rights, deprive it of authority as a solemn judgment of the Court. Yet it is plain that the Speaker of the House of Commons could not be justified, even under the law of privilege as declared by the resolution of the 31st of May 1837, in publishing Dangerfield's Narrative, which was no part of the proceedings of the House: and the bare authority of the

(*a*) See p. 117, ante, note (*b*).
(*b*) 4 Inst. 15. See also 4 Inst. 49, 50.

House could alone be set up as his justification, which I have already shewn to be insufficient for that purpose. **[201]** Another ground may be taken to shew that *Rex* v. *Williams* (13 How. St. Tr. 1369), was not a right decision, that the thing done by him, viz. the order to publish, may be said to have been done in the House, and so not to be cognizable by the Courts of Law. Yet the man himself, for whose benefit the publication took place, Dangerfield, was committed and punished for publishing the very same thing out of the House. That which was reprobated in *Williams's case* (13 How. St. Tr. 1369) was the prosecution, by the officer of the Crown, of the Speaker of the House for an act done by him as such Speaker. The legality of such an act, as regarded private individuals, was in no way brought under review. And the Bill of Rights (*b*) plainly points at prosecutions for proceedings in Parliament only.

I do not particularly advert to the other cases cited from Hatsell and other books; for they really do not appear to me to bear materially upon this part of the case, or indeed upon any of the questions raised upon this record. The supposed mischief of an appeal to the House of Lords cannot surely prevent this Court from adjudicating on the question. Indeed the Attorney-General asks us to pronounce judgment for the defendants, because the House of Commons have resolved that we are bound to do so: yet upon that judgment a writ of error will lie just as much as if we give judgment for the plaintiff. To avoid such inconvenience, if it be important to do so, some legal mode should have been found of making it unnecessary for us to give any judgment at all: but no such mode can be found. The analogy attempted to be established, upon the argument, from decisions of Courts of exclusive **[202]** jurisdiction, appears to me not to hold good. The instances adduced are in respect of matters admitted to be within the exclusive jurisdiction of such Courts, whether ecclesiastical, or Courts of Admiralty, or foreign Courts, and in which they have in the particular case come to a decision, and so the matter has passed in rem judicatam; but none have been or can be cited where a decision of any of those Courts, that a particular matter is within its exclusive jurisdiction, has been allowed to be binding upon other Courts as to that position, and to oust them of their right of jurisdiction: it may be that in some cases there is concurrent jurisdiction: and, as I have before observed, the resolution of May 1837 cannot be considered to have been passed by the House of Commons as a Court either legislative, judicial, or inquisitorial, or of any other description. Cases were cited by the Attorney-General, where the Court of Exchequer had taken from the other Courts of Law proceedings pending before them; but they were cases of revenue belonging by the King's prerogative peculiarly to that Court, and in which that Court had confessedly exclusive jurisdiction.

Some cases were also cited where the House of Lords had compelled parties to relinquish proceedings in the Courts of Law in respect of matters occurring in that House, as to which it is conceded that the Courts of Law cannot have cognizance.

It is further argued that, if this Court can entertain this question, so can the most Inferior Court of Record in the kingdom, where the matter arises within its jurisdiction. I admit it to be so; but I can see no reason why the mere resolution of the House should preclude an Inferior Court from the enquiry, any more **[203]** than this Court: nor can I see anything derogatory to the dignity of the House in such inquiry.

Upon the whole the true doctrine appears to me to be this: that every Court in which an action is brought upon a subject-matter generally and primâ facie within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction: that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities, and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May 1837 from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority

(*b*) Stat. 1 W. & M. sess. 2, c. 2, s. 1.

of decided cases, and the judgments of our predecessors, if any be found which bear upon the question.

I come then to the third question: whether the act complained of be legal or not. I do not conceal from myself that, in considering this point, the resolution of the House of Commons of 31st May 1837 is directly called in question; but, for the reasons I have already given, I am of opinion that this Court is, not **[204]** only competent, but bound, to consider the validity of that resolution, paying all possible respect, and giving all due weight, to the authority from which it emanates.

The privilege, or rather power (for that is the word used), which that resolution declares to be an essential incident to the constitutional functions of Parliament, is attempted to be supported, first, by shewing that it has been long exercised and acquiesced in; secondly, that it is absolutely necessary to the legislative and inquisitorial functions of the House.

First, as to exercise and acquiescence. I am far from saying that, in order to support any privilege or practice of Parliament, or of either House, it is necessary to shew that such privilege or practice has existed from time of legal memory. That point was disposed of by Lord Ellenborough, in the course of the argument in *Burdett* v. *Abbot* (*a*). Long usage, commencing since the two Houses sat separately (if indeed they ever sat together, as to which I do not stop to inquire, nor when they separated, as being wholly immaterial to this question), may be abundantly sufficient to establish the legality of such privilege or practice.

Now, with respect to the exercise of the power in question, I conceive that such exercise is matter of history, and therefore that the observation of Mr. Attorney-General, that he ought not to be called upon in arguing a demurrer to prove matter of fact, is not well founded. If, indeed, the plea had stated that the Commons' House of Parliament had been used to exercise this power, the demurrer would have admitted the exercise, but no such averment appears upon the face of the plea; and the historical fact of the exercise **[205]** of the power is introduced by the defendants' counsel himself, in order to argue thence that the power must be legal. The onus of shewing that it is so lies upon the defendants; for it is certainly primâ facie contrary to the common law. It is very remarkable that no mention is made of this alleged power of the House of Commons in any book of authority, or by any text writer. It is no where enumerated among the privileges or powers of the House. After the utmost research by the learned counsel who so ably argued this case, he has not furnished us with a single passage from any author, nor have I found any, in which even a hint is thrown out that the House of Commons has power to order defamatory matter appearing upon its proceedings to be published, and to protect the publisher from the consequences which generally attach upon the publication of such matter. Surely if such a power had really existed, some notice of it would have been taken by Hatsell or Blackstone, or some other writer, in commenting upon Parliamentary privilege: and the absence of all such notice, is to me a strong circumstance to shew that it really never existed. The first instance of the House printing anything appears to have been in the year 1641. It is indeed argued by Mr. Attorney-General that, although the votes and proceedings of the House do not appear to have printed and published before that time, yet that doubtless some other mode of publication, either at the Sheriffs' Courts or some other occasions of public meeting, must have been adopted. As to which argument, I must say that it appears to me to be a purely gratuitous assertion without the semblance of probability. Acts of Parliament, that is, new laws, appear to have been so promulgated; but there is **[206]** not a trace to be found, that I am aware of, of the votes and proceedings of either House separately having been so dealt with.

The exercise of this power cannot therefore be said to have commenced earlier than 1641, a most suspicious time in the history of this country for the acquisition of a new power by the House of Commons. From 1641 to 1680 it appears that specific votes and proceedings only were printed from time to time by special resolutions. The papers first printed appear to relate entirely to the contest between the King and the House, and were, no doubt, intended for general circulation; but surely it is impossible to contend that a practice arising out of the unfortunate and violent state of the times can be supported, unless other reasons applicable to quiet and

(*a*) 14 East, 1. See the judgment of Lord Ellenborough, p. 139.

ordinary times can be assigned for its continuance. In 1680 the first general order for printing the votes and proceedings of the House is made, and, with the exception of a short time during the year 1702 (*a*), has been continued to the present time. The votes and proceedings so printed appear also to have been sold during that time, whether as a perquisite of the officers or not is perhaps not very material; and no question has arisen respecting the legality of the practice. The votes and proceedings so printed appear to have been recognized by the House of Lords as authentic documents; upon which however I do not see that much stress can be laid, inasmuch as the fact of their being printed under the order of the House of Commons must of necessity authenticate them, whether it were legal so to print them or not. These votes and proceedings are quite distinct **[207]** from reports and miscellaneous papers printed for the House, and do not seem to have contained at any time matters defamatory to private individuals: and therefore the absence of any attempt to question their legality can hardly be treated as any acquiescence. No one was aggrieved.

With respect to reports and miscellaneous papers printed for the use of the House, it appears that no general order for their publication and sale was made until the resolution of 1835, set out in the plea in this action. Many resolutions were passed from time to time as to the printing and publishing specific papers; and many of those papers were of such a nature that private individuals may have felt themselves aggrieved, and may have found in them matters defamatory to themselves, for which actions at law might plainly have been maintained, if published under ordinary circumstances unconnected with the House; and it is, as I apprehend, upon the absence of any trace of such actions with respect to such papers that the argument with regard to acquiescence mainly rests. The argument is undoubtedly entitled to consideration: it has been frequently used in other cases, and much weight has been given to it by great authorities, particularly by Mr. Justice Buller in the case of *Le Caux* v. *Eden* (2 Doug. 594. See p. 602): but it is obvious that the weight of it much depends upon the nature of the injury sustained, the relative power of the person inflicting it, and the person sustaining it, and the greater or less difficulties with which the remedy is surrounded. If these points be attended to, it is hardly possible to imagine a case less likely to be brought forward than that of a man who found that he **[208]** was defamed in a paper published by the order of the House of Commons as part of their proceedings: not to mention that in very many instances, especially if due discrimination was exercised, as I cannot help thinking was formerly the case, the defamatory matter was strictly true, and therefore an action would be useless, and criminal proceedings equally so, as regarded any remuneration to the party complaining. The fear of contending with so powerful a body must operate very strongly in deterring persons from bringing actions, and may well account for the attempt never having been made. In the case of *Lake* v. *King* (1 Saund. 131), indeed, the attempt was made to render a petitioner to the House of Commons liable in damages to a person who was defamed in his petition which he had printed for circulation amongst the members of the House. The action was held not to lie, the distribution of the publication having been confined to the members of the House. The exercise of the power by the House, until 1835, appears to have been by special order, directing sometimes that papers be printed for the use of the House, sometimes that they be printed (generally), sometimes that they be also published; and they appear to have been sold by officers of the House as a perquisite, until in 1835 the resolution set out in the plea was come to, that they should be sold by the defendants to the public in general, the object being, so far as it can be collected from the resolution, to defray the expences of printing that which was requisite for the use of the members, not to give any important or necessary information to the constituents of the different members of the House.

[209] It is said that the House of Lords has constantly ordered the printing and publishing of papers and proceedings, and that no instance occurs of any action having been brought against the publisher. The same observations apply to such practice in that House as have already been urged with respect to the House of Commons, except as relating to trials in the House of Lords. They are proceedings in an open Court of Justice, and may properly be considered under the second ground on which this power is supposed to exist, namely, the necessity for it.

(*a*) See Report from the Select Committee, &c., p. 2, s. 12.

Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere; therefore no order of either House can itself be treated as a libel, as the Attorney-General supposed it might if this action would lie. No such consequence will follow.

The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege properly so called, i.e., an exemption from some duty, burden, attendance, or liability to which others are subject, or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority. Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and import-**[210]**-ant duties, and that, if the House be so obstructed, either collectively, or in the persons of the individual members, the remedy should be in its own hands, and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace), which, although the privileges, properly so styled, of the individual members, are yet the privileges of the House. Hence the power of committing for contempt those who obstruct their proceedings, either directly, by attacks upon the body or any of its members, or indirectly, by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen in which the extent and exercise of these privileges and powers have come in question: and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. But this is, I believe, the first time in which a question has arisen as the power of the House to authorize an act prejudicial to an individual who has neither directly or indirectly obstructed the proceedings of the House, and is in no way amenable to its authority. The decision of *Lake* v. *King* (1 Saund. 131), which I mentioned before, proceeded on similar grounds of necessity.

Every facility ought undoubtedly to be given to all persons applying to either House of Parliament or to any Court of Justice for the redress of any alleged grievance; and it would be most inconvenient to hold such persons liable to actions for anything contained in such **[211]** applications, as libel; but, when those who are applied to circulate generally by sale such defamatory matters, the case assumes a very different character. In the case of *Fairman* v. *Ives* (5 B. & Ald. 642), a petition addressed by the creditor of an officer in the Army to Lord Palmerston the Secretary at War was held not to be actionable, although containing defamatory matter; but can it be doubted that if Lord Palmerston had ordered it to be published, the publisher would have been liable to an action; or can it be contended that the Secretary of State, to whom the report and reply on which this action is brought were, by Act of Parliament, directed to be sent, to be by him laid before the Parliament, would have been justified in publishing them? and, if not, why should the House of Commons be at liberty to do so? In the same manner the protection of all confidential communications extends no further than the necessity of each particular case requires.

It is said that, if papers, however defamatory, must needs be printed for the use of the members, as it is plain they must, and the point is not disputed, their further circulation cannot be avoided, for what is to be done with the copies upon a dissolution of Parliament, or upon the death or retirement of a member? The answer is obvious,—the copy of such defamatory matter ought to be destroyed, as it can no longer be used for the purpose for which it was intended:—at all events it must not be communicated to others. But it is said that the constituents have a right to watch over the conduct of their representatives, and therefore to know what passes in the House. The House itself is of a different opinion; for it is only by sufferance that any **[212]** one is allowed to be present at its debates; it is only by sufferance that the debates are allowed to be published; and it is only by the special permission of the House that its votes, and proceedings, and papers are communicated to the public, and that in the manner in which they think fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open Court, then

indeed there might be some colour for saying that it was necessary to publish all its proceedings. It is upon the ground that Courts of Justice are open to the public, that what passes there is public at the time, and that it is important that all persons should be able to scrutinize what is there done, that the publication of every thing which there passes has been thought to be lawful. I for one do not go that length, but think, with some Judges of great name who have gone before me, that the doctrine is to be taken with much limitation; but I feel sure that it cannot apply to a Court which is not open, whose proceedings in contemplation of law are secret at the time they take place, and to whom ex parte statements, often grossly defamatory, are made without the defamed person having any opportunity of being heard, and indeed often without the possibility of any inquiry being instituted; and it is not impossible, if such indiscriminate publication and sale be continued by the House of Commons, that petitions containing the grossest libels against the most innocent individuals may be purposely and maliciously presented to that honourable House, by persons who seek to publish and sell them with impunity, and to make the House most unconsciously the instrument of circulating their slander. It is the nature of the proceedings themselves which justifies, if [213] at all, the publication of what passes in a Court of Justice; and any person may therefore publish them: but the proceedings of the House of Commons cannot be published without the authority of the House; the right to punish does not result from the nature of the thing published, but from the leave obtained from the House; and this alone shews that it cannot be matter of necessity for the information of the constituents. I do not say that it may not be conducive to the public interests to inform the world at large of much that passes in the House; but I do say that it cannot be conducive to the public interests to circulate private slander; and that, in the exercise of a due discrimination as to what part of its proceedings shall be published, the House of Commons is bound to take care that such private slander be not circulated by its authority.

But it is said to be necessary in order to obtain the requisite information for the members in any legislative or inquisitorial measure. This ground is still less tenable: the House is armed with ample powers to send for all persons who can give them information either before a committee, or at the Bar of the House. It can never be necessary to sell indiscriminately to every body, in order to take the chance of some person volunteering information to the House. Will it be said that any one ever did volunteer information in consequence of such publications by the House, or that the House ever waited and paused in its deliberations or its votes, in order to see whether any one would so volunteer? It is not pretended that such has been the fact. Whether any individual member might or might not be justified in communicating to some persons out of the House defamatory matter printed for the use of the [214] House, I cannot pretend to say. Probably, upon any such question arising, the decision will lie with a jury; but I would by no means bind myself to any opinion on that subject: this is the case of an open sale to all who choose to buy, not justified by any peculiar circumstances attending this case above others.

Where then is the necessity for this power? Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of shewing the existence and legality of the power now claimed lies upon the defendants: it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the Attorney-General in his learned argument, and after much reflection upon the subject, that they have entirely failed to do so: and I am therefore of opinion that the plaintiff is entitled to our judgment in his favour.

Coleridge J. I concur with the rest of the Court in thinking that this plea discloses no sufficient answer [215] to the declaration; and, if my brother Patteson, after the full and satisfactory discussion which the question had then received, felt reluctant to

state his reasons at length, it may well be seen how much more ground there is now for me to desire that I might be allowed simply to express my concurrence. But the unusual importance of the principles involved in the decision, and the profound respect due to those whose privileges are said to be at stake in the cause, seem to require that I also should state the reasoning by which I have arrived at this conclusion; and I have the consolation at least to feel certain that I cannot weaken the just effect upon this audience of what has already been stated. I shall not, however, think it necessary to notice all the points which have been made, or to comment on more than a few of the authorities cited in the argument. It would, indeed, be impossible to do this within any now reasonable bounds; and, in my opinion, the question on which the cause must turn are so elementary, whatever difficulty there may be in them, that they must after all be decided chiefly upon principle.

Two great questions have been discussed upon the argument; and I shall consider the plea as sufficiently raising them in substance, although I cannot say that they are raised so simply and unambiguously as I should have expected, as well from the great learning and ability and industry employed in framing it, as from the dignity of that high body on behalf of which we are informed that it has been pleaded. The first, and immeasurably the more important, of these is, whether it be competent to the Court, after the disclosure by the plea that the House of Commons has declared itself to have the power of publishing any report, vote, **[216]** or proceeding, the publication whereof it deems necessary or conducive to the public interests, to inquire whether by law the House has such power. Although not in form a plea to the jurisdiction, and wanting one essential incident to such a plea, if we answer this question in the affirmative it would in effect lead to much the same consequences. We should not indeed dismiss the plaintiff from our Court to another tribunal competent to give him relief, for none such is alleged to exist; but we should give judgment against him ministerially rather than judicially, on the ground that the act complained of was done in the exercise of a power, as to which the whole jurisdiction, both to declare its existence and to decide on the propriety of its exercise in the individual case, was beyond our competence, and exclusively in the body by whom the very act was done. According to this argument, the plea in form leaves a matter for our decision, but in substance prescribes conclusively the judgment to be pronounced. It must be admitted that this is a very startling conclusion: and certainly it must not be confounded with cases to which it has been likened, where, the question in a cause turning upon foreign law or any of those branches of our own law administered in Courts of peculiar jurisdiction, we decide it, not according to the common law, but according to what we suppose would have been the decision in the foreign or the peculiar Court. We are undoubtedly bound so to do; in one sense we have no discretion to do otherwise; that is, we cannot be influenced by any consideration, whether that decision would be satisfactory to our own minds as English or common lawyers; but still we exercise a judicial discretion, the same in kind, as in **[217]** deciding on a question of the common or statute law; for we inquire, by such lights as we can procure, what that law, foreign or peculiar, may be; and, when we have ascertained it, we apply the facts to it, and decide accordingly. Neither, again, is this to be confounded with cases in which, after an adjudication by a foreign or peculiar Court upon the same facts between the same parties, one shall bring the other before us in the way of original suit; there indeed, and upon a distinct principle, if the fact of such adjudication be properly pleaded and proved, or admitted, the further agitation of the question will not be permitted: we do not profess to decide upon the merits of the case: the existence of the former judgment in full force is, by our own law itself, a legal bar to the second recovery or a new agitation of the matter. We are now, however, called upon to abstain from all inquiry, in a case in which the existence of the law is not substantively alleged in the plea (for as the House, it is admitted, cannot make the law, the resolution declaring it is only evidence of its existence, and not an allegation of it), where it does not appear that the particular facts have ever been adjudicated on, and where the particular order, under which the act complained of was done, is not distinctly brought within the law as said to have been declared.

All this, however, has been maintained upon the footing of privilege. It is said the Commons have declared that they have this privilege, and the act has been done in the exercise of the privilege, but a Court of Law can neither inquire whether they have the privilege, nor whether the case falls within it, because the House of

Commons alone is to judge of its own privileges: the Court, therefore, to use the words of the [218] Attorney-General, has "nothing to do but to give judgment for the defendants."

Now it will be observed that one and the same reason in terms is here assigned for two widely differing conclusions; and it may therefore well be that the proposition may have two different senses, and be true in one though false in the other. No one in the least degree acquainted with the Constitution of the country will doubt that in one sense the House is alone to judge of its own privileges, that in the case of a recognised privilege the House alone can judge whether it has been infringed, and how the breach is to be punished. This concession, however, will not satisfy the advocates of privilege, nor the exigencies of the defendant's case. The Attorney-General contends that the House is alone and exclusively judge of its own privileges, in the sense that it alone is competent to declare their number and extent, and that whatever the House shall resolve to be a privilege is by such resolution conclusively demonstrated to have been so immemorially.

This proposition must be tried by the tests of principle and authority. And, first, it is not immaterial to observe that privileges, though various in their kinds and effects, are all understood to be comprehended within the proposition; and I at once admit that no distinction can be made; for all privileges must be ultimately referred to the same source, the effective discharge of those duties which by the Constitution are cast upon the House of Commons. At the same time it is obvious that, in effect and in feeling, those privileges which become personal immunities to individual members, and those which are public and can be exer-[219]-cised only by the whole body in discharge of some public duty, are very different; and, when we are considering on principle the reasonableness of the proposition contended for, it must not be laid out of sight that the same rule is to be extended to that which the pride, the passions, and the self-interest of members may naturally be tempted to extend, and to that which the whole body, for the efficient discharge of its great public duties, may have thought it requisite to demand of the Constitution. That this is not an idle apprehension the cases cited from the journals by the plaintiff's counsel abundantly demonstrate.

I next observe that the power to make any new privilege has been, as was necessary, distinctly disclaimed; the House, it is said, only acts judicially in declaring the law of Parliament. We must however look to the substance of things: and, as that cannot be done indirectly which it is unlawful to do directly, if it shall appear that the power claimed is in effect equivalent to that which is disclaimed, a strong presumption at least is raised against the validity of the claim. Now what, in effect, is the right to declare the extent of privilege conclusively but irresponsible and uncontroulable power to make it? At present we know, or we fancy we know, the limits of privilege, in certain cases at least; for example, we have been taught that the House of Commons cannot administer an oath to a witness: let me suppose the House to resolve to-morrow that it has the power to do so, and that it is a breach of privilege to deny it; if the Attorney-General's argument be correct, that power not merely is thenceforth, but from time immemorial has been, inherent in the House; and every Judge and lawyer must forget all that he has been learned [220] before, and is forbidden to enquire even into the previous Acts or declarations of the same branch of the Legislature upon the same subject? although the journals of the House might teem with conclusive proof that no such power existed, it would not be lawful for this Court to borrow light from them; it must acquiesce in the new declaration, and deny its relief to any one suffering under it. Yet what would be in effect the result, but that the House would have thus acquired for itself a power which no lawyer could doubt it did not possess before? I have put a case drawn from within the range of those which fall under the admitted province of privilege: but the same reasoning will apply to cases entirely unconnected with it, cases which have really nothing to do with the duties or proceedings of the House. It would be easy to put striking instances of this kind; but they may be summoned up at once, and without the least exaggeration, in the remark, that there is nothing dear to us, our property, liberty, lives or characters, which, if this proposition be true, is not, by the Constitution of the country, placed at the mercy of the resolutions of a single branch of the Legislature.

Three answers, however, are made to such a supposition; first, it is said that paramount and irresponsible power must be lodged somewhere, and that it can

nowhere be so safely lodged as with the representatives of the people; secondly, that it is not seemly to presume nor sound to argue from presumed abuse of power by so august a body; thirdly, that in truth what has been urged by way of objection with regard to the House of Commons might equally be said in the matter of contempts of this or any other Court of Judicature.

As to the first, I would observe that, by the theory of **[221]** the advocates for privilege, they cannot argue this as a question of power; they limit themselves in terms to jurisdiction; they claim only an absolute jurisdiction; I answer that is in effect uncontrollable power: if they reply by an admission and a justification of that which I object, they must at least abandon their disclaimer of it, and acknowledge that they do in effect contend for the right not merely to declare, but to make privileges. But, if they justify the claim by asserting that absolute and irresponsible power must be lodged somewhere, and that it can no where be so safely lodged as with the representatives of the people, I take leave respectfully to dissent from both branches of the proposition.

As to the first, I will not waste time by examining those extreme cases with regard even to the entire Legislature, in which, according to the theory of the Constitution, even its so called omnipotence is limited; cases wisely not specified, nor in terms provided for, because they are beyond the Constitution, and, when they unhappily arise, resolve society in its original elements. But, if the assertion be applied to any body in the State, or any Court for the administration of justice, civil or criminal, there is neither the one nor the other which by the Constitution claims absolute power in the sense in which it is now claimed for the Commons. Every question which comes before a Court of Justice must be one of law or fact; and, as to either, the decision may be wrong through error or corruption; but our Constitution has been careful, almost to an extreme, in providing the means of correcting it in both cases, and for punishing it in Judge or jury, when it can be traced to corruption. It is true that, as to errors in law, there must be some limit to the series of Courts of Revision; **[222]** and it is supposable that the Court of last resort may persist in the error of the original decision. But even in that extreme case the Constitution fails not, for the Parliament may then interfere (and has done so in some cases) to reverse and annul the erroneous dicision.

Denying as I do the first branch of the proposition, it is not necessary for me, and would not comport with the profound respect which I feel for the House of Commons, to give my reasons for doubting the second.

But it is said, secondly, that the argument is founded on presumed abuse of power by the House of Commons; that such an argument is not sound in reasoning, nor seemly as applied to so august a body. I agree that it is not seemly, and I disclaim the intention of using it; yet, when I am considering merely the antecedent reasonableness of the defendant's argument, I cannot pretend to forget what the journals of the House have been shewn to contain, nor to be ignorant that it is of the very nature of irresponsible power, especially in the hands of a large body, to run to excess. I believe, however, that among those who now claim this power are the men who would be the very last to abuse it. But the truth is, that the answer is beside the question; for the cases are put merely to try the truth of a universal proposition; and by the strictest rules of reasoning you may apply even extreme cases to test the truth of such propositions. My opponent in argument asserts that in all cases the House may declare conclusively that it possesses this or that privilege; I deny the truth of that, because, if true, the House would be able to commit by law this or that monstrous act of tyranny or injustice: he may in return either deny my assertion, or admit it; if he deny it, he will soon find that he must abandon his first claim also; **[223]** if he admit it, then my argument is, that, whether in fact the consequence will happen seldom or often, or it may be never, that cannot be law from which such a consequence may in natural course follow.

To the third answer, I have already given the necessary reply in considering the first. I will only, in addition, point out how wide the distinction is between the declaration of the House of Commons in a matter of privilege, where itself is judge and party, and where the law provides no means of revision in any individual case, and the decision, even erroneous, even corrupt, of a Court of Justice between contending parties. I do not forget, but reserve for another place, the case of committals

for contempts, which will be found, both as regards the House and Courts of Justice, to fall more properly under a different consideration.

But it is said that this and all other Courts of Law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decisions. This argument appears to me founded on a misunderstanding of several particulars; first, in what sense it is that this Court is inferior to the House of Commons; next, in what sense the House is a Court at all; and, lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this Court is to the House of Commons, considered as a body in the State, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords, yet, as a Court of Law, we know no superior but those Courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. **[224]** In truth, the House is not a Court of Law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties: it has no means of doing so; it claims no such power; powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between Courts; and, in the only sense therefore in which this argument would be of weight, it does not apply. In any other sense the argument is of no force. Considered merely as resolutions or Acts, I have yet to learn that this Court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons, in litigation before us, depend upon their validity. But I deny that this inquiry tends to the reversal of any decision of the House; the general resolution and the res judicanda are not identical; the House of Commons has never decided upon the fact on which the plaintiff tendered an issue: that argument will be found by and by to apply to the cases of committal for contempt, but it has no place in the consideration immediately before me.

Again, it is said that the jurisdiction of the House must be exclusive, because it proceeds, not by the common law, of which alone we are cognisant, but by a different law, the Parliamentary law, of which we are wholly ignorant. I cannot think that this argument is entitled to much weight. It is every day's practice with us to decide cases which turn upon the laws of foreign countries, or the laws administered in Courts of peculiar jurisdiction in this country. Of these we have no judicial know-**[225]**-ledge; but we acquire the necessary knowledge by evidence: and it is not denied that, where in a cause the question of privilege arises incidentally, this Court must take notice of it and inquire into its existence and extent. What therefore it must do in some cases where the same difficulty exists, there can be no moral impossibility on that account of its doing in all.

This objection, however, leads me to observe that cases of privilege so called will often arise, where the question will be, not merely whether the privilege does exist, but whether the claim made can be reduced at all under any true definition of privilege. Privilege, if it be any thing but the mere declaration of the present will of the body claiming it, must be capable of some general fixed definition, however it may vary in degrees in different bodies. No lawyer, I suppose, now supports the doctrine of Blackstone (*a*), that the dignity of the Houses, and their independence, are in great measure preserved by keeping their privileges indefinite. But of privilege in the general we must be competent to form some opinion, because we have from time to time to deal with our own privileges. Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. The Attorney-General has said that it is always a question of privilege, when it is a question whether the House has power to order the act complained of to be done; and that this question arises directly, whenever it appears by the record that the **[226]** action is for that which the House has ordered to be done. In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and

(*a*) 1 Bla. Comm. 164.

no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.

I proceed now to examine a few and but a few of the very numerous authorities cited on this question. It does not appear to me at all necessary to go through many; for whatever may be the weight of instances of acquiescence by individuals in the acts of the House of Commons, and, generally speaking, I consider it to be little or none, it is not so as between the House of Commons and the Courts of Judicature. The House has for centuries been feelingly alive upon questions of privilege; and for centuries it has been the most powerful body in the State: if therefore I find, in several well considered cases, the Courts disclaiming to be bound by the resolutions of the House as to their privileges, and actually adjudicating upon them, without any or only with ineffectual remonstrance, I cannot but think such instances entitled to the greatest respect, and to be of quite sufficient force to establish a proposition which in itself is so consonant to reason.

I know it will be said that, in many of the cases alluded to, the question of privilege has arisen incidentally only, and that in such, ex necessitate, the Courts have interfered. In what sense "incidentally" is here used, has been often asked, and never as yet quite satisfactorily answered; in what sense a greater necessity exists in the one case than the other, has not been made out. The cases of habeas corpus are generally **[227]** put as instances where the question arises directly. Let me suppose the return to state a commitment by the Speaker under a resolution of the House ordering the party to capital punishment for a larceny committed; it will hardly be said that a stronger case of necessity to interfere could be supposed; and yet it must be admitted, on the other hand, that the question of privilege or power, between which the argument for the defendants makes no difference, would arise directly. A case therefore may be supposed in which it would be necessary to interfere, even where the so doing would be a direct adjudication upon the act of the House. It should seem, then, that some other test must be applied to ascertain in what sense it is true that the House can alone declare, and adjudicate upon, its own privileges.

I venture, with great diffidence, to submit the view which I have taken on these embarrassing questions, not as claiming the suspicious merit of novelty, but as one which will at least remove all difficulties in theory, and be found, I believe, not inconsistent with the general course of authorities. I say general course; for, during so long a series, carried through times so differing in political bias, and between such parties as either House of Parliament on the one side, and the Courts of Law, individual Judges, or litigant suitors, on the other, it would be quite idle to expect that any one uniform principle should be found to have invariably prevailed. In the first place, I apprehend that the question of privilege arises directly wherever the House has adjudicated upon the very fact between the parties, and there only; wherever this appears, and the case may be one of privilege, no Court ought to enquire whether the House has adjudicated properly or not; but whether **[228]** directly arising, or not, a Court of Law I conceive must take notice of the distinction between privilege and power; and, where the act has not been done within the House (for of no act there done can any tribunal, in my opinion, take cognisance but the House itself), and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of the law.

To apply these principles to the cases in which, on the return to a habeas corpus, it appears that the House has committed for a contempt in the breach of its privileges, I subscribe entirely to the decisions, and I agree also with the dicta which in some of them the Court has thrown out on supposed extreme cases. In every one of these cases the House has actually adjudicated on the very point raised in the return, and the committal is in execution of its judgment. In all of them the warrant, or order, has set out that which on the face of it either clearly is, or may be, a breach of privilege, or it has contented itself with stating the party to have been guilty of a contempt without specifying the nature of it or the acts constituting it. *Brass Crosby's case* (3 Wilson, 188), is an instance of the former; *Lord Shaftesbury's* (1 Mod. 144), of the latter. The difference between the two is immaterial on the present question, which is one of jurisdiction only. Although in the case of an Inferior Court, over which this Court exercises a power of revision and controul even in matters directly within

their cognisance, it will require to see the cause of committal in the warrant, yet, with regard to Courts of so high a dignity as the Houses of Parliament, if an adjudication be stated, gene-**[229]**-rally for a contempt, as contempts are clearly within their cognisance, a respectful and a reasonable intendment will be made that the particular facts, on which the committal in question has proceeded, warranted it in point of jurisdiction; for the propriety of the adjudication, that being assumed, would of course not be to be enquired into. But in both cases the principle of the decision is, that there has been an adjudication by a Court of competent jurisdiction. Thus in the former, De Grey C.J. says (3 Wils. 199),

"When the House of Commons adjudge anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in consequence, is execution; and no Court can discharge or bail a person that is in execution by the judgment of any other Court. The House of Commons therefore having an authority to commit, and that commitment being an 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."

And in the latter, in which the main contest was on the generality of the order of the Lords, Rainsford C.J. says (1 Mod. 158), "The commitment, in this case, is not for safe custody, but he is in execution on the judgment given by the Lords for the contempt, and therefore if he be bailed, he will be delivered out of execution; because for a contempt in facie Curiæ there is no other judgment or execution."

The same principle will explain and justify the observations which have been made by different Judges from time to time with regard to supposed cases, even of direct adjudication; and, if it should appear that the **[230]** vice objected to the proceeding is not of improper decision or excess of punishment, but a total want of jurisdiction, in other words, where it is contended that either House has not acted in the exercise of a privilege, but in the usurpation of a power, it cannot be doubted that the same Judges, who were most cautious in refraining from interfering with privilege properly so called, would have asserted the right of the Court to restrain the undue exercise of power. The fact of adjudication then has no weight, because the Court adjudging had no jurisdiction. Many such instances have been referred to in the argument. I pass over the luminous, and, as I think, still unanswered judgment of Lord Holt, in *Regina* v. *Paty* (*a*), which is bottomed on this principle; but I will cite, by way of illustration, the dicta of Lord Kenyon and Lord Ellenborough, whom I select, not only for their pre-eminent individual authority, but also because I can cite from their judgments in cases in which they were with a firm and favourable hand upholding the just privileges of the Commons. And it is satisfactory to see that the distinction was even then present to their minds.

Lord Kenyon, in *Rex* v. *Wright* (8 T. R. 296), after saying, "This is a proceeding by one branch of the Legislature, and therefore we cannot enquire into it," immediately qualifies the generality of that remark, by adding, "I do not say that cases may not be put in which we would enquire, whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their serjeant-at-arms to arrest a counsel here, who was arguing a case between two individuals, **[231]** or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it." In each case here supposed, there would have been a direct adjudication upon the very matter, and in each there would have been a claim of privilege; but the facts would have raised the preliminary question, whether privilege or not: into that enquiry Lord Kenyon would have felt himself bound to enter; and, when he had satisfied himself that there was no such privilege, the fact of adjudication would have become immaterial.

So in the most learned and able argument of Holroyd in *Burdett* v. *Abbot* (14 East, 128), when he had put a case of the Speaker issuing his warrant by the direction of the House to put a man to death, Lord Ellenborough interposed thus: "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

(*a*) 2 Ld. Ray. 1012. And "The judgments," &c. cited, p. 55, note (*b*), ante.

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." This case again supposes an adjudication; but can language be more clear to shew the undoubting opinion of that great Judge, that it would have been still open to this Court to enquire into the jurisdiction of the House; and can any one seriously believe that the fact of a previous declaration by the House, that they had such jurisdiction, would have been considered by him as shutting up that enquiry?

[232] Again, the same principle relieves me from all difficulty as to cases where, at first sight, the question appears to arise less directly, but where still the Court of Law would have to determine the case before it upon facts already directly adjudicated upon by the House. Such was the celebrated case of *Burdett* v. *Abbot* (14 East, 1), in the decision of which I most heartily concur. There the action was trespass quare clausum fregit, and assault and false imprisonment; but the defence was a procedure in execution of a sentence of the House of Commons. If that sentence were pronounced by a competent Court, it warranted all that was done; the only question that could be made upon any principle of law was the competency of the adjudicating Court: and, the competency of the House to commit for a contempt being not seriously doubted, there was a direct adjudication, into the propriety of which this Court would not enquire. It could not enquire into it without trying over again what had already been decided in the House, i.e. whether Sir Francis Burdett had been guilty of a contempt; but this would have been contrary to the plainest principles of law. That this was the true principle of decision may be seen most simply from the narrow question put to the Judges by the Lords, and the short judgment of Lord Eldon, when the case came before the House on writ of error (*b*).

Neither have I any difficulty with any of the cases in which the question arises upon any thing said or done in the House. In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in **[233]** Parliament, from impeachment or question in any place out of Parliament; and that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity. The argument, therefore, with which we were pressed, that if the defendants were liable to this action, the Speaker who signed the order for printing, and the members who concurred in the resolutions, must be equally liable to be tried, on the ordinary principle of master and servant, has no foundation. It cannot be necessary to dwell on a distinction so well established; on the other hand, no conclusion in favour of the defendants can be drawn from the immunity of the Speaker or the members in respect of anything, done by them in the House, which occasioned the publication of the libel complained of, without. The order may be illegal, and therefore no justification to him who acts on it without; and yet the Courts of Law may be unable to penetrate the walls of the House, and give redress for anything done within; just as the individual who executed an illegal order of the monarch would be responsible, although the Constitution would allow of no proceeding against the monarch himself.

And now, having made these limitations clear, I would ask whether, subject to them, there is any reasonable doubt that it has been the practice of the Courts to enquire into questions of privilege, a practice, considering all the circumstances, prevailing with remarkable uniformity, and traced from very early periods? It would be impossible for me within any reasonable limits to go through the series of recorded cases; and, after the **[234]** judgments already pronounced, must be quite unnecessary; although to specify only a few may seem as if they alone were relied on. The case of *Donne* v. *Walsh*, 12 E. 4 (1 Hats. Pr. 41), and of *Ryver* v. *Cosyn* in the same year and same book (1 Hats. Pr. 42), are important, is shewing that at that early period, when the supersedeas of a cause was to depend on the extent of the Parliamentary privilege, the enquiry was left to the Judges of the Court in which the cause itself was pending. In both instances, the Barons of the Exchequer take to counsel the Judges of either Bench, and, finding quod non habetur nec unquam habebatur talis consuetudo as that relied on for the supersedeas, disallow it, and order the defendant to answer to the declaration.

(*b*) 5 Dow, 199, 200.

Ferrers's case (1 Hats. Pr. 53), in the reign of Henry VIII. is noticed by Mr. Hatsell, p. 53, as being the first instance in which the House of Commons took upon themselves to vindicate their privilege of freedom from arrest (*d*); and, when that case is read at length, one cannot but observe indications of their proceeding, as if in the exercise of an untried power, with uncertain and somewhat inconsistent steps. The House is inflamed by the imprisonment and detention of their member, and the violent resistance to the serjeant; but what is their first step? They all retire to the Upper House; the Speaker states their grievance, the Chancellor and the Judges consider the matter, and, "judging the contempt to be very great," refer "the punishment thereof to the order of the Commons' House." Then, the member being relieved, and the offenders against privilege having submitted and been punished, an Act of Parliament passes, after long **[235]** debate, touching the member's debt (*a*); the King comes to the Parliament, and descants in large terms upon their privileges, founding himself on the information of his learned counsel; and the whole is concluded by the Lord Chief Justice "very gravely" declaring "his opinion, confirming by divers reasons all that the King had said." Dyer, who, in an *Anonymous case* (*b*), in Moore, p. 67, states the law as to one of the privileges of Parliament, refers to this case, saying, "And so it was held by the sages of the law in the case of one Ferrers in the time of Henry VIII."

Cases and language such as the preceding seem to me to furnish the key to the true meaning of the expressions to be found in *Thorp's case* (1 Hats. Pr. 28), and the 4 Inst. (4 Inst. 15), on which so much reliance has been placed by the defendants. When the Judges in that case speak of "a High Court of Parliament," "so high and mighty in his nature, that it may make law, and that that is law, it may make no lawe," they cannot truly be speaking of either or both Houses; and when they say, "That the determination and knowledge of that privilege belongeth to the Lords of the Parliament and not to the justices," it would be inconsistent with the general course of authorities to suppose they meant to represent themselves as really ignorant of the law of Parliamentary privilege, and also with their going on immediately to inform the Lords as to the course adopted with regard to Parliamentary privilege in the Courts below. **[236]** The question indeed was one of privilege between the two Houses, and the person of the Duke of York on the one hand, and the Speaker on the other; and the Judges, advisers of the Peers as to all matters of common law, decline to advise the Lords how to decide that question there, and this, considering the times, and the power of one of the litigants, with no very blameable reserve; at the same time they inform them of their own course of decision in such cases arising in their own Courts below.

Benyon v. *Evelyn* (O. Bridgman's Judgments, 324), has been so much discussed during the agitation of this question that I shall only refer to it. But I was indeed surprised to find it treated in the argument as bearing very lightly on the question, and the judgment of the Lord Chief Justice therein characterised as a mere idle display of learning, unnecessary to the decision of the cause. That indeed was not a case in which the House took any part, and the privilege was sought to be used against the member; but how these circumstances detract from the effect of that decision as shewing the constant interference of the Courts of Law in questions of privilege, I do not understand. If indeed it can be shewn that the cases there relied on are unfairly selected, or unfaithfully reported, or if any sound distinction can be shewn between the free discussion of one branch of the privilege of the House and that of another, the judgment there may not press upon the defendants: if these cannot be shewn, and it was not attempted in the argument, it is all but decisive of the question.

The great case of *Ashby* v. *White* (2 Ld. Ray. 938), decided by the **[237]** Court of last resort, and the modern but well considered cases in Chancery of *Mr. Long*

(*d*) And see Prynne's Reg. Part 4, 858.

(*a*) To prevent the creditor from ultimately losing his demand.

(*b*) Moore, 57. Dyer's observation, and the opinion of the sages of the law, according to him is against the enforcement of the privilege in this case, which he says was "minus just." And see Prynne, Reg. Part 4, 861. See also Hats. Pr. 58.

Wellesley (2 Russ. & Mylne, 639), and *Mr. Lechmere Charlton* (*b*), are all that I will further mention; and I will only mention them by name. Indeed, with the opinion which I have upon the state of the authorities on this question, I seem to myself to have dwelt longer than I ought to have done on this part of the case. Limiting the interference of Courts of Law with the privileges of the House of Commons as I have done in the earlier part of my remarks, it appears to me to be quite unquestionable.

The less important question raised by the plea, but still a cardinal one to the decision of the case, remains to be considered as shortly as I can. Has the House of Commons the privilege of publishing and selling indiscriminately to the public whatever it orders to be printed for the use of the members? Or, conceding the resolution and order just stated to be identical in effect with the resolution of uncertain date stated at the end of the plea (which yet, considering their language, is a wide concession to make), is the power of publishing such of its votes, reports, and proceedings, as it shall deem **[238]** necessary or conducive to the public interests, an essential incident to the constitutional functions of the Commons' House of Parliament?

The burthen of proof is on those who assert it; and, for the purposes of this cause, the proof must go to the whole of the proposition: its truth as to the votes, or even as to some of its proceedings, will not suffice. Now we have been referred to the report of the committee on the publication of printed papers, and with some emphasis we have been informed of the names of the individual members. The industry displayed in the former, and the well known learning and ability of the latter, are such, that we may safely say, if the proposition has not been demonstrated, it cannot be.

Si Pergama dextrâ
Defendi possent, etiam hâc defensa fuissent.

One thing is remarkable in this controversy. The privileges of Parliament at different periods have engaged largely the attention of political writers, and Parliament has never wanted zealous assertors to enumerate them; and no one can doubt of the extreme importance of this branch of them, if it had ever existed. I look to the report for authorities of this class, and I find it a perfect blank. If any thing could be added to that report, the argument for the defendants, it may be safely asserted, would have supplied it; that is equally a blank on this head. Nor am I able, and my brother Patteson, with far wider research, tells us that he is not able, to supply any authority to this effect. It is difficult to explain this in any manner consistently with its being a recognized privilege. General acquiescence might explain why there was no case to be found in support of it; but for the very same reason one should have expected to have **[239]** found it enumerated in some or all of the text writers who have had to deal with the subject of privilege.

But, if not to be found in such works, nor evidenced by any resolution of the House prior to that of 1837, does it stand more securely on the testimony of the journals and proceedings of the House? It cannot be denied that the journals present evidence of the exercise of the right of publication; the question is, whether, all things considered, and specially the nature of the right on the one hand, and the imperfect state of the early journals on the other, it is sufficient in reason to establish its existence. For about the first century of the journals, from 1547 to 1641, nothing appears on the subject; but the time and occasion of the commencement of the

(*b*) 2 Mylne & Cr., 316.

In March 1815, Lord Cochrane, being in the King's Bench prison, under sentence for conspiracy, escaped, and went into the House of Commons, during the session of Parliament, but not while the House was assembled. He was there retaken by the marshal. Lord Cochrane was at that time, and before the escape, a member of the House. The marshal stated the facts in a letter to the Speaker, and the matter was referred to a committee of privileges, who reported that they found nothing in the journals to guide them; but "That, under the particular circumstances given in evidence, it does not appear to your committee that the privilges of Parliament have been violated, so as to call for the interposition of the House by any proceedings against the marshal of the King's Bench." March 23d, 1815. 1 Hats. Prec. 278. Appendix, No. 5, 5th ed. 1818.

precedents relied on, and the early precedents themselves, are far more unfavourable to the right than the previous want of any. The time is 1641; the occasion the unhappy difference between the Sovereign and the House: the precedents themselves direct Acts moving in and towards the Great Rebellion. Mr. Hatsell, closing his first part (*a*)[1], says, "If I shall ever have leisure or inclination to continue this work, I shall think myself obliged to pass over every thing that occurred" "after this unhappy day" (the entrance of the King into the House), "and shall collect only such precedents as are to be met with" in the two Parliaments of 1640, till the "4th of January, 1641, and then proceed directly to the Restoration." And I cannot but think that this part of the defendants' case would have stood better if the same discretion had guided the industry of those who collected their precedents, and if no reliance had been placed on these violent and irregular proceedings.

[240] Passing from this inauspicious opening to the year 1660, and thence to the year 1835, I do not doubt that in a great many instances the House of Commons is shewn to have printed and published votes, reports, and proceedings; the votes indeed with considerable regularity; but, as to the first of these, the right to publish is undisputed, and stands on a ground which leaves this question untouched. The term "proceedings" is so vague that I am unwilling to pronounce any opinion upon the right as to them generally; but no doubt there are many things, fairly reducible under that term, which the House would have the right to publish: and, as to their reports, a large proportion of them would contain nothing criminatory of individuals, so as to raise no question upon the right. Now, when the necessary deductions are made in respect of all these considerations, and when, besides, we allow for the reluctance which individuals would have to litigation with so formidable an adversary as the House, even where the criminating matter in a report was false, and that it would be doubled where the matter was true, which in many instances it must in reason be taken to have been, the residuum of the evidence which may be fairly considered to support the right claimed is so small as entirely to fail in making it out. We have been obliged in this case to refer to what looks like evidence in fact, in order to ascertain the law: and evidence naturally bears with a different weight on different minds. I speak of my own impression; and, considering it merely as a question of evidence, I frankly avow that what has here been collected gives the claim to my mind the character much more of usurpation than lawful privilege.

But it may be said that necessity, or at least a strong **[241]** expediency, prove the existence of the privilege, for they are the foundation of all privilege.

These may be essential to privilege; but I must take leave to deny that alone they can constitute it. The House of Commons is sometimes called the grand inquest of the nation; and to the discharge of its duty as such, who can doubt that the power to examine witnesses upon oath would be most conducive? To the perfect discharge of that duty who can doubt that in early times it was thought essential? Yet there is nothing clearer than that the House has not that power, and cannot by its own resolutions acquire it. The author of Junius's Letters, I think, lays down a safer rule: "To establish a claim of privilege in either House, and to distinguish original right from usurpation, it must appear that it is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed." Letter xliv (*a*)[2].

Were I therefore to concede the necessity, or the strong expedience, one half only of the defendants' case would be made out; the objector would still appeal to the defective evidence of allowance, and the rule would hold "Bonum ex causâ integrâ, malum ex aliquâ parte." But I do not feel that I can make that concession. I will not put this upon the ground of inconsistency in the urging this argument for a body whose most undoubted and exercised privilege it is to exclude the public at pleasure from their debates; but, recollecting the great inconvenience of all injustice, the great advantage of maintaining the principle that even public benefits are not to be purchased by a violation of the sacred rights of individuals, recollecting how nearly all, if not all, the benefit **[242]** of publicity may be secured, even when it is confined to matter not criminatory, I assert with the greatest confidence that the balance even of public expediency is in favour of a right of publication restricted by the limits of the

(*a*)[1] 1 Hats. Pr. 218, 223, ed. 1818.
(*a*)[2] Vol. ii. p. 213, 2d ed. (Woodfall), 1814.

common law. What advantage derived from publicity can be equal to the maintenance of the principle, that even to the representatives of the people, the most powerful body in the nation, the calumny of individuals is forbidden? What benefit can countervail the evil of a general understanding that any man's character is at the mercy of that body, and that by the law, not merely by the force of overbearing power, but by the rule of English law, for the sake of public expediency, he may be slandered without redress? I desire to avoid language that may have the semblance of offence: but I soberly ask the warmest advocate for this extended privilege, whether any benefit in a land, all the institutions of which seek the genial sunshine of public opinion and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth, the House of Commons has become a trader in books, and claims, as privilege, a legal monopoly in slander?

If then I try this claim by the authority of text writers, by the evidence of precedents, by the test of expedience, or necessity, it seems to me in each and all of these to be signally wanting. I am therefore of opinion that the plaintiff is entitled to our judgment. I could wish that I had leisure to express my reasons more concisely, and more clearly. I have examined the question, however, with an anxiety proportionate to its importance, and with a deep sense of the responsibility attaching to the decision; but I cannot say that I entertain the least doubt of its correctness.

[243] We have been warned of the danger of a pursuit after popularity; advice no doubt tendered in a respectful and friendly spirit; advice most useful where needed. I trust that nothing we have said or done can fairly lay us open to the imputation of needing it. For myself I am afraid to quote a passage from the eloquent appeal of a great predecessor of my Lord (*a*)[1], lest any one should suppose me weak enough to be thinking of a comparison with Lord Mansfield; but I feel the distinction between the popular favour that follows an honest course, and that which is followed after.

To speak of a contempt of the House, if "we assume to decide this question inconsistently with its determination," argues what I should call, if the language had not been used by those whom I am bound to revere, a strange obliquity of understanding. The cause is before us; we are sworn to decide it according to our notions of the law; we do not bring it here; and, being here, a necessity is laid upon us to deliver judgment; that judgment we can receive at the dictation of no power: we may decide the cause erroneously; but we cannot be guilty of any contempt in deciding it according to our consciences.

The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people.

Judgment for the plaintiff.

[244] CASES ARGUED AND DETERMINED IN THE COURT OF QUEEN'S BENCH, AND UPON WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER, IN MICHAELMAS VACATION, IN THE SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges who sat in Banc in this vacation were Lord Denman C.J., Patteson J., Williams J., Coleridge J.

The following cases, until the date of December 1st inclusive, were determined by the Court of Queen's Bench sitting in Banc in pursuance of a rule of Court made last Michaelmas term, under stat. 1 & 2 Vict. c. 32 (*a*)[2], and read in Court, November 12th, 1838.

[245] FERGUSON *against* MAHON. Tuesday, November 27th, 1838. Declaration in debt for two years' rent, at 90l. per annum, due 1st November 1836; the particulars of demand giving credit for the first of the two years' rent, less 16l. 16s. 6d.

(*a*)[1] Lord Mansfield in *Rex* v. *Wilkes*, 4 Burr. 2562.

(*a*)[2] "An Act to enable Her Majesty's Courts at Westminster to hold sittings in Banc in time of vacation."

Sect. 1 enacts "That from and after the passing of this Act it shall be lawful for