Erskine May, Vol. II, Chapter VII, pp. 73-85

Privilege and Law

Servants' Privileges Discontinued

Such being the multiplied relations of Parliament to the people, let us inquire how, since its early excesses in the reign of George III., it has deferred to the law, and respected other jurisdictions besides its own. The period signalised by the ill-advised attempts of the House of Commons to enlarge its powers, and assert too tenaciously its own privileges,—was yet marked by the abandonment of some of its ancient customs and immunities. From the earliest times, the members of both Houses had enjoyed the privilege of freedom from arrest in all civil suits; and this immunity,—useful and necessary as regarded themselves,—had also extended to their servants. The abuses of this privilege had long been notorious; and repeated attempts had already been made to discontinue it. For that purpose bills were several times passed by the Lords, but miscarried in the Commons. At length, in 1770, a bill was agreed to by the [74] Commons,(1) and sent up to the House of Lords. There it encountered unexpected opposition from several peers: but was carried by the powerful advocacy of Lord Mansfield.(2) Nor was this the only privilege restrained by this useful act. Members and their servants had formerly enjoyed immunity from the distress of their goods, and from all civil suits, during the periods of privilege. Such monstrous privileges had been flagitiously abused; and few passages in parliamentary history are more discreditable than the frivolous pretexts under which protections were claimed by members of both Houses, and their servants. These abuses had already been partially restrained by several statutes: but it was reserved for this act, to leave the course of justice entirely free, and to afford no protection to members, but that of their persons from arrest.

Kneeling at the Bar

This same period witnessed the renunciation of an offensive custom, by which prisoners appeared before either House to receive judgment, kneeling at the bar. Submission so abject, while it degraded the prisoner, exhibited privilege as odious, rather than awful, in the eyes of a free people. In the late reign, the proud spirit of Mr. Murray had revolted against this indignity; and his contumacy had been punished by close confinement [75] in Newgate.(3) But in 1772, when privilege was most unpopular, the Commons formally renounced this opprobrious usage, by standing order. The Lords, less candid in their proceedings, silently discontinued the practice, in cases of privilege: but, by continuing the accustomed entries in their journal, still affected to maintain it.(4)

Privilege and the Courts

Parliament, having relinquished every invidious privilege, has not been without embarrassments in exercising the powers necessary for maintaining its own authority and independence, and which,—if rightly used,—are no restraint upon public liberty. Each House has exercised a large jurisdiction, in declaring and enforcing its own privileges. It administers the law of Parliament: the courts administer the law of the land; and where subjects have considered themselves aggrieved by one jurisdiction, they have appealed to the other.(5) In such cases the appeal has been to inferior courts, [76] to courts whose judgments may again

be reviewed by the High Court of Parliament. The courts, without assuming the right to limit the privileges of Parliament,—have yet firmly maintained their own unfettered jurisdiction to try all causes legally brought before them; and to adjudge them according to the law, whether their judgment may conflict with privilege, as declared elsewhere, or not. A court of equity or common law can stay actions, by injunction or prohibition: but neither House is able to interdict a suit, by any legal process. Hence embarrassing contests have arisen between Parliament and the courts.

The right of both Houses to imprison for contempt, had been so often recognised by the courts, on writs of *habeas corpus*, that it appeared scarcely open to further question. Yet, in 1810, Sir Francis Burdett denied the authority of the Commons, in his place in Parliament. He enforced his denial in a letter to his constituents; and having himself been adjudged guilty of contempt, he determined to defy and resist their power. By direction of the House, the Speaker issued his warrant for the commitment of Sir Francis to the Tower. He disputed its legality, and resisted and turned out the Sergeant, who came to execute it: he barred up his house; and appealed for protection to the Sheriffs of Middlesex. The mob took his part, and being riotous, were dispersed in the streets, by the military. For three days he defended himself in his house, while the authorities were consulting as to the legality of breaking into it, by force. It was [77] held that the Sergeant, in executing the Speaker's warrant, would be armed with all the powers of the law; and accordingly, on the third day, that officer having obtained the aid of a sufficient number of constables, and a military force, broke into the beleaguered house, and conveyed his prisoner to the Tower. The commitment of a popular opponent of privilege was followed by its usual consequences. The martyred prisoner was an object of sympathy and adulation,—the Commons were denounced as tyrants and oppressors.

Overcome by force, Sir Francis brought actions against the Speaker and the Sergeant, in the Court of King's Bench, for redress. The House would have been justified by precedents and ancient usage, in resisting the prosecution of these actions, as a contempt of its authority: but instead of standing upon its privilege it directed its officers to plead, and the Attorney-General to defend them. The authority of the House was fully vindicated by the court; but Sir Francis prosecuted an appeal to the Exchequer Chamber, and to the House of Lords. The judgment of the court below being affirmed, all conflict between law and privilege was averted. The authority of the House had indeed been questioned: but the courts declared it to have been exercised in conformity with the law.

Where the courts uphold the authority of the House, all is well: but what if they deny and repudiate it? Since the memorable cases of Ashby and [78] White, and the electors of Aylesbury in 1704, no such case had arisen until 1837: when the cause of dispute was characteristic of the times. In the last century, we have seen the Commons contending for the inviolable secrecy of all their proceedings: now they are found declaring their inherent right of publishing all their own papers, for the information of the public.

Stockdale v. Hansard

The circumstances of this case may be briefly told. In 1836, Messrs. Hansard, the printers of the House of Commons, had printed, by order of that House, the reports of the Inspectors of Prisons,—in one of which a book published by Stockdale, and found among the prisoners in Newgate, was described as obscene and indecent. After the session, Stockdale brought an action against the printers, for libel. The character of the book being proved, a verdict was given against him, upon a plea of justification: but Lord Chief Justice Denman, who tried the cause, took occasion to say 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.' The assertion of such a doctrine was naturally startling to the House of Commons; and at the next

meeting of Parliament, after an inquiry by a committee, the House declared '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 [79] incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it.' It was further resolved, that for any person to institute a suit in order to call its privileges in question, or for any court to decide upon matters of privilege, inconsistent with the determination of either House, was a breach of privilege.

Stockdale, however, immediately brought another action, to which the House,—instead of acting upon its own recent resolutions,—directed Messrs. Hansard to plead. The case was tried upon this single issue,—whether the printers were justified by the privilege and order of the House; and the Court of Queen's Bench unanimously decided against them.

The position of the Commons was surrounded with difficulties. Believing the judgment of the court to be erroneous, they might have sought its reversal by a writ of error. But such a course was not compatible with their dignity. It was not the conduct of their officer that was impugned: but their own authority, which they had solemnly asserted. In pursuing a writ of error, they might be obliged, in the last resort, to seek justice from the House of Lords,—a tribunal of equal but not superior, authority in matters of privilege; and having already pronounced their own judgment, such an appeal would be derogatory to their proper position in the state. They were equally unwilling [80] to precipitate a conflict with the courts. Their resolutions had been set at defiance; yet the damages and costs were directed to be paid! Their forbearance was not without humiliation. It was resolved, however, that in case of any future action, Messrs. Hansard should not plead at all; and that the authority of the House should be vindicated by the exercise of its privileges.

The Sheriffs of Middlesex

During the recess of 1839, another action was brought; and judgment having gone against Messrs. Hansard by default, the damages were assessed in the Sheriff's Court at £600, and levied by the Sheriffs. On the meeting of Parliament in 1840, the Sheriffs had not yet paid over the money to the plaintiff. The House now proceeded with the rigour which it had previously threatened,—but had forborne to exercise. Stockdale was immediately committed to the custody of the Sergeant-at-Arms, while Mr. Howard, his solicitor, escaped with a reprimand. The Sheriffs were directed to restore the money, which they had levied upon Messrs. Hansard. Being bound by their duty to the Court of Queen's Bench, they refused to obey this order; and were also committed to the custody of the Sergeant. In the hope of some settlement of the difficulty, they retained possession of the money, until compelled by an attachment from the Court of Queen's Bench to pay it over to Stockdale. Much sympathy was justly excited by the imprisonment of these gentlemen, who, acting in strict obedience to the law and the judgment of the court, had nevertheless endeavoured to avoid a contempt of the [81] House of Commons, which, in the execution of their duty, they were constrained to commit. Punished with reluctance,—and without the least feeling of resentment,—they were the innocent victims of conflicting jurisdictions.

In an earlier age the Commons, relying upon their own paramount authority, might even have proceeded to commit the Judges of the Court of Queen's Bench,—for which a precedent was not wanting:(6) but happily, the wise moderation of this age revolted from so violent and unseemly an exercise of power. Confident in the justice and legality of their own proceedings, —defied by a low plaintiff in an unworthy cause,—and their deliberate judgment over ruled by an inferior court,—they yet acted with as much temper and forbearance, as the inextricable difficulties of their position would allow.

Stockdale, while in custody, repeated his offence by bringing another action. He and his attorney were committed to Newgate; and Messrs. Hansard were again ordered not to plead.

Judgment was once more entered up against them, and another writ of inquiry issued; when Mr. France, the Under-Sheriff, anxious to avoid offence to the House, obtained leave to show cause before the court, why the writ should not be executed. Meanwhile, the indefatigable Stockdale solaced his imprisonment, by bringing another action; for which his attorney's son, and his clerk, Mr. Pearce, were committed.

Actions Stayed by Statute

At length these vexatious proceedings were brought to a close, by the passing of an act, providing that all [82] such actions should be stayed on the production of a certificate or affidavit, that any paper, the subject of an action, was printed by order of either House of Parliament.(7) Such an intervention of the supreme authority of Parliament, two years before, would have averted differences between concurrent jurisdictions, which no other power was competent to reconcile. No course was open to the Commons,—befitting their high jurisdiction and dignity,—by which the obedience of courts and plaintiffs could be ensured: their power of commitment was at once impotent, and oppressive: yet they could not suffer their authority to be wholly defied and contemned. Hence their proceedings were inevitably marked by hesitation and inconsistency. In a case, for which the constitution has made no provision,—even the wisdom of Sir Robert Peel, and the solid learning of Mr. Sergeant Wilde, were unequal to devise expedients less open to objection.

Howard v. Gossett

Another occasion immediately arose for further forbearance. Howard commenced an action of trespass against the officers of the House, who had taken him into custody. As it was possible that, in executing the Speaker's warrant, they might have exceeded their authority, the action was suffered to take its course. On the trial, it appeared that they had remained some time in the plaintiff's house, after they had ascertained that he was from home; and on that ground, a verdict was obtained against them for £100. Howard brought a second action [83] against Sir W. Gosset, the Sergeant-at-Arms, in which he was also successful, on the ground of the informality of the Speaker's warrant. The Judges, however, took pains to show that their decision in no way impugned the authority of the House itself. The House, while it regarded this judgment as erroneous, could not but feel that its authority had been trifled with, in the spirit of narrow technicality, by an inferior court. Still moderation prevailed in its counsels; and, as the act of an officer, and not the authority of the House itself, was questioned, it was determined not to resist the execution of the judgment: but to test its legality by a writ of error. The judgment was reversed by the unanimous decision of the Court of Exchequer Chamber. As this last judgment was founded upon broader principles of law than those adopted by the court below, it is probable that, in Stockdale's case, a Court of Error would have shown greater respect to the privileges of the Commons, than the Court of Queen's Bench had thought fit to pay; and it is to be regretted that the circumstances were not such as to justify an appeal to a higher jurisdiction.

Moderation of the House

The increased power of the House of Commons, under an improved representation, has been patent and indisputable. Responsible to the people, it has, at the same time, wielded the people's strength. No longer subservient to the crown, the ministers, and the peerage, it has become the predominant authority in the state. But it is characteristic of the British constitution, and a proof of its freedom from [84] the spirit of democracy, that the more dominant the power of the House of Commons,—the greater has been its respect for the law, and the more carefully have its acts been restrained within the proper limits of its own jurisdiction. While its authority was uncertain and ill-defined,—while it was struggling

against the crown,—jealous of the House of Lords,—distrustful of the press,—and irresponsible to the people,—it was tempted to exceed its constitutional powers: but since its political position has been established, it has been less provoked to strain its jurisdiction; and deference to public opinion, and the experience of past errors, have taught it wisdom and moderation.

The proceedings of the House in regard to Wilkes, present an instructive contrast to its recent conduct in forwarding the admission of Jews to Parliament. In the former case, its own privileges were strained or abandoned at pleasure, and the laws of the land outraged, in order to exclude and persecute an obnoxious member.(8) How did this same powerful body act in the case of Baron de Rothschild and Mr. Salomons? Here the House,—faithful to the principles of religious liberty, which it had long upheld,—was earnest in its desire to admit these members to their place in the legislature. They had been lawfully chosen: they laboured under no legal disability,—and they claimed the privileges of members. A few words in the oath of abjuration, alone prevented them from taking their seats. A large majority of the House was favourable to their claims: the law was doubtful; [85] and the precedent of Mr. Pease, a Quaker,—who had been allowed to omit these words,—was urged by considerable authorities, as a valid ground for their admission. Yet the House, dealing with the seats of its own members,—over which it has always had exclusive jurisdiction,—and with every inducement to accept a broad and liberal interpretation of the law,—nevertheless administered it strictly, and to the letter.(9) For several years, the House had endeavoured to solve the difficulty by legislation. Its failures, however, did not tempt it to usurp legislative power, under the semblance of judicial interpretation. But it persevered in passing bills, in various forms, until it ultimately forced upon the other House an amendment of the law.

Footnotes.

1. Walpole says: 'The bill passed easily through the Commons, many of the members who were inclined to oppose it, trusting it would be rejected in the other House.'—Mem., iv. 147. But this is scarcely to be reconciled with the fact that similar bills had previously been passed by the Lords.
2. 10 Geo. III. c. 50.
3. Parl. Hist., xiv. 894; Walpole's Mem. of Geo. II., i. 15. In 1647, David Jenkins, a Royalist Welsh judge, had refused to kneel before the Commons; and Sir John Maynard, Sir John Gayre, and others, before the Lords.—Com. Journ., v. 469; Parl. Hist., iii. 844, 880.
4. In 1787, Mr. Warren Hastings, on being admitted to bail, on his impeachment, was obliged to kneel at the bar; and again, at the opening of his trial, in the following year, he appeared kneeling until desired by the Chancellor to rise. Of this ceremony he thus wrote: 'I can with truth affirm that I have borne with indifference all the base treatment I have had dealt to me—all except the ignominious ceremonial of kneeling before the House.'—Trial of Hastings; Lord Stanhope's Life of Pitt, i. 356. The same humiliating ceremony was repeated eight years afterwards, when he was called to the bar to hear his acquittal announced by the Chancellor.—Ibid., ii. 319.
5. All the principles and authorities upon this matter are collected in Chap. VI. of the author's Treatise on the Law and Usage of Parliament.
6. Jay v. Topham, 1689; Com. Journ., x. 227.
7. Parliamentary Papers Act 1840, 3 and 4 Vict. c. 9. Papers reflecting upon private character are sometimes printed for the use of members only.
8. See supra, p. 3, etc.
9. See also Chap. XIII.