LEADING CASES IN CONSTITUTIONAL LAW

THOMAS

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BRIEFLY STATED.

WITH INTRODUCTION AND NOTES.

BY

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FOURTH EDITION.

BY

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PREFACE

TO THE THIRD EDITION

An explanation of the design of this work will be found in the following paragraphs, which are here repeated from the Author's Preface to the First Edition.

"Some knowledge of the chief cases in Constitutional Law is now required in many examinations, and is obviously necessary to the thorough student of our constitutional history. Yet there has existed no book briefly setting out the main principles decided in these cases, which are scattered through many volumes, and buried in prolix reports. Even Dr. Broom's book, although, in spite of its thousand pages, it is the nearest approach to anything of the kind, lacks the brevity and conciseness which are so necessary for the student.

"What I have endeavoured to do is to extract the essence of the cases with which the student is expected to be familiar, preserving always something of the concrete circumstance that is so helpful to the memory; to add, where necessary, a short note to the individual case; and to

subjoin to each important group of cases some general remarks in the shape of a Note. The cases are so arranged as to be convenient for ready reference, and while the treatment is very concise, I hope that it is sufficiently accurate."

In the present Edition I have eliminated a few of the cases which scarcely appeared to me entitled to be called "leading." I have, however, largely added to the Notes and indeed almost re-written some of them, adding references to the principal recent cases bearing upon the various subjects dealt with; the work has consequently grown somewhat in length.

C. L. A.

2, Pump Court, Temple,
March, 1901.

PREFACE
TO THE FOURTH EDITION

Since the Third Edition of this work was published no case of special importance in Constitutional Law has been before the Courts. One case of interest, however, *R.* v. *Lynch*, arose out of the South African War and has been noted, and the book has generally been brought up to date.

C. L. A.

2, Pump Court, Temple,
June, 1908.

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LEADING CASES

IN

CONSTITUTIONAL LAW

INTRODUCTION

Constitutional Law—where to be found.

WHERE there exists a body of laws regulating the distribution and exercise of the supreme power in a community, and a Court entrusted with the interpretation of that body of laws, the term Constitutional Law has a very definite application. That is the case, for example, in the United States. In England, on the other hand, where there is no written constitution, this law exists in a much looser shape, and can only be collected from legal decisions, parliamentary precedents, and actual practice.

Importance of judicial decisions.

We are here concerned with constitutional usage only in so far as it has been established or illustrated by the decisions of the law-courts. Although these are far from covering the whole extent of constitutional practice, we shall see that many of the most important principles of the Constitution have come under the discussion and determination of the Courts. That part of our constitutional law should have been made or at least declared by the judges, will not surprise any one who knows how enormous has been their influence in the whole field of English law.[1]

[1] 'The whole of the rules of Equity and nine-tenths of the rules of Common Law have in fact been made by the judges.'—*Mellish*, L. J. in *Allen* v. *Jackson*, 1 Ch. Div. 405.

Constitutional Law—its extent.

For practical purposes we must take the term 'Constitutional Law' to include not only what Austin calls 'constitutional law proper,' but also what he calls 'administrative law,' the two branches making up together 'the law of political conditions, or public law.'[1] Constitutional law proper, in his view, only 'fixes the constitution or structure of the given supreme government.' Administrative law determines the mode in which the sovereign power is to be exercised, either by the sovereign power itself, or by the subordinate political officers to whom portions of the sovereign power may be delegated.

Its object—the prevention and remedy of misgovernment.

Or we may put it in another way perhaps, and say that Constitutional Law has for its object security against misrule, and remedy in the event of misrule. And we shall for the present be chiefly concerned with this latter aspect of constitutional law. We shall consider a particular class of injuries and delinquencies arising from the misuse of the power bestowed upon rulers and administrators, and the remedies provided for them by the tribunals of the country.

Its relation to Common Law misrepresented.

An attempt has been made in one of the few works upon this subject to elaborate a contrast between Constitutional Law and Common Law, and to illustrate the relation between them.[2] Constitutional law is there said to mean 'the aggregate of doctrines and sanctions directly tending to the maintenance of our social union;' and common law, 'the aggregate of rules and maxims, written or customary, directly tending to the maintenance of private rights.' The antithesis here suggested does not really exist; there is no such line of demarcation between constitutional law and common law. They are not disparate and independent branches of law. Constitutional law is simply a portion of the common law, and is included in

[1] 1 Austin, Jur. 4th ed. pp. 73, 274.
[2] Broom, Const. L. pp. viii., ix.

it as the part is included in the whole. The distinction is not only useless and untrue—it may even be dangerous. It is precisely this notion that the constitutional law was above and beside the common law, that has caused some of the chief difficulties of our constitutional history. It explains not only the exaggerated claim of the Stuart monarchy to a divine authority not subject to the laws, but also the comparatively recent attempt on the part of the House of Commons to assert what has been called 'a supremacy not short of the divine right of Charles or of James.'[1] What may be said is, that constitutional law is that part of the common law which deals directly with the exercise of the functions of government, sometimes securing the subject against unfair abuses of original or delegated power; sometimes protecting the ministers of government in the proper execution of their duties.

The true relation.

The supreme power in this country exists in a parliament consisting of king, lords, and representatives of the commons. The main functions of government are twofold—the Legislative and the Executive.

The Constitutional Powers.

Of these, the former is carried out in the main by parliament itself, although certain minor powers of legislation are delegated to the crown in council, to subordinate officers, and even to certain private corporations. The Executive function, on the other hand, is exercised entirely by delegates, under the direction of the crown. It may be divided into an Administrative and a Judicial department, the duty of the latter being mainly to interpret and to declare the existing law. The judges are called in either to enforce obedience to the laws (more strictly, perhaps, to determine for

i. Legislative.

ii. Executive.

a. Administrative.

b. Judicative.

[1] Hearn, Government of England, p. 2.—Lord Camden reminds us, in his judgment in *Entick* v. *Carrington*, that 'Sergeant Ashley was committed to the Tower in the 3rd of Charles I. by the House of Lords for only asserting in argument that there was a law of State different from the Common Law': 19 S. T. 1073.

the guidance of the Executive, whether the laws have been disobeyed); or to decide between contending parties as to their proper interpretation.

Summary.

Briefly, then, we may say that the Legislative function is the supreme power of making laws; the Administrative function is the supreme power of executing them: and the Judicative (or Judicial) function is the supreme power of interpreting them when called upon.

We may now proceed to look in cases and judicial decisions for illustrations and proofs of the constitutional limitations of these several branches of the supreme power, taking them in the order here laid down.

'Leading cases.'

One caution must be borne in mind as to the use of the term 'Leading Cases.' The ordinary use of the expression indicates a case that settles the law upon some important question. But it will be observed, with regard to these constitutional cases, that in some instances the decisions of the judges were wrong, whether through error of judgment or from servility. In some instances the legislature has interfered and has settled the law by statute; or in others the better opinion has tacitly reasserted itself. Yet these cases may be fairly called 'leading,' as being of the greatest importance in the history of the constitution. Although they cannot themselves be directly cited for the purpose, yet the whole proceedings connected with them do, in the result, establish the law on the principle involved. And the peculiar importance of constitutional law, and its intimate connexion with our national life and political development, lend a special interest and value to the record of each step in those proceedings.

I. The Legislative Function.

i. *The Crown.*

The legislative function properly belongs to the crown in parliament, and no single branch may legislate without the concurrence of the other two. The Executive has a limited power of legislation by orders in council, &c., but only when such power has been expressly delegated by parliament. The Crown in Parliament.

Speaking generally, and leaving out of view such special emergencies as the Civil War or the Revolution, the only conscious attempt at independent legislation has been made by the highest branch of the legislature—the crown.

The crown has attempted to exercise a power of independent legislation in virtue of an asserted prerogative by licence and dispensation, or by proclamation and ordinance : *Case of Monopolies* (p. 12) ; *Case of Proclamations* (p. 14). It has also claimed the right of suspending and dispensing with laws passed by parliament. *Thomas* v. *Sorrell* (p. 16), and *Godden* v. *Hales* (p. 17), were cases of particular dispensations ; while the *Case of the Seven Bishops* (p. 18) illustrates the attempt to suspend certain penal statutes by royal proclamation. The power of taxation is constitutionally a department of the legislative power. Attempts on the part of the crown to exercise it were seen in *Bate's case* (*the Case of Impositions*) (p. 26) ; where the king imposed a customs duty without consent of parliament ; and *Rex* v. *Hampden* (*the Case of Ship Money*) (p. 30), where writs were issued for the collection of money without parliamentary authority. Attempts to legislate without Parliament.

In some of these cases the decision of the law courts was for the crown ; and the principle that the crown may not legislate nor impose, save with the

consent of parliament, was not established without violent struggles.

ii. *Parliament.*

Usurpation by Commons.

Some of the cases noticed under this heading illustrate unconstitutional attempts by the House of Commons to usurp a legislative power in establishing rules of privilege which have led to collisions with the courts of law and with the House of Lords.

It was admitted that the House of Commons had a right to determine all matters touching the election of its own members. But the attempt to enlarge this privilege and to determine the rights of electors led, in more than one case, to a conflict between the House of Commons on the one side and the law courts, together with the House of Lords, on the other. The legal question in dispute was ultimately settled by statute.

Ashby v. *White.*

In the case of *Ashby* v. *White* (p. 34), the House of Commons renewed its pretensions and maintained its claims so obstinately that it committed the persons who had brought actions, together with their legal advisers, as for contempt, and even summoned the judges before the House to explain their conduct. These steps led to a further collision with the House of Lords, which was only put an end to by the prorogation of parliament. After which, however, the law courts had their way.

Again, in the case of *Stockdale* v. *Hansard* (p. 44), a limit was set to the privilege of parliament, and it was decided that it may not authorise libellous matter to be published. Another statute was passed to meet this difficulty. But the case is decisive of the right of the law courts to inquire into matters of parliamentary privilege.

The undoubted privileges of the two Houses, however, are very great. A member of either House is not to be called to account elsewhere for anything said or done by him in parliament; *Lord Shaftesbury's case* (p. 38); *Rex* v. *Eliot, Hollis and Valentine* (p. 41); though the privilege has been held not to protect a member for what he does out of doors. Privileges.

Either House may commit for breach of its privileges: *Burdett* v. *Abbot* (p. 39). Nor will a court of law inquire into the ground of such commitment: *Sheriff of Middlesex's case* (p. 47). Nor will a court of law interfere with the entire control of the House over its own proceedings: *Bradlaugh* v. *Gossett* (p. 49).

II. The Executive Function.

The Crown.

The crown is the head of the executive power, and as such is entitled to allegiance, the nature and limitations of which are considered in *Calvin's case* (p. 53). The crown is also invested with certain high prerogatives, though they are of course subject to the law of the land. Crown, the head of Executive.

With regard, indeed, to Colonies and Dependencies obtained by conquest, as opposed to those acquired by occupancy or settlement, the crown (subject to the paramount authority of parliament) possesses the whole authority of legislation. It is limited, however, by this restriction, that when it has once granted a legislature to such a colony it cannot afterwards exercise there any legislative power: *Campbell* v. *Hall* (p. 57). Colonies and Dependencies.

That the king can do no wrong is a maxim of the Constitution often employed but often misunderstood. Though an action will not lie against the crown as it

will against a private person, yet the subject is not without a remedy, if his contractual rights are illegally invaded by the crown. His proper course is to proceed by petition of right, which he may now by statute (23 & 24 Vict. c. 34) bring in any of the superior courts in which an action might have been brought if it had been a question between subject and subject. This mode of procedure is illustrated by *The Bankers' case* (p. 58); while *Viscount Canterbury* v. *The Attorney-General* (p. 59) shows that it cannot be adopted to recover compensation from the crown for damage due to the negligence of the servants of the crown. Nor can it be maintained against the crown to recover damages for any tort: *Tobin* v. *The Queen* (p. 60).

i. *Administrative.*

The officers of State are, as a consequence of their official position, protected by certain immunities; while, on the other hand, the subject is protected against their misuse of the powers entrusted to them for public purposes.

Habeas Corpus.

To begin with the latter case, there is first and most important, as a guarantee of the liberty of the subject, the Habeas Corpus Act, the operation of which is here illustrated by *Darnel's case* (p. 64). In connexion with this subject there are also given the cases of *Shanley* v. *Harvey* (p. 68); *Sommersett's case* (p. 69); *The Slave Grace* (p. 71); and *Forbes* v. *Cochrane* (p. 70), to exhibit the attitude of the English law towards slavery; and *Pigg* v. *Caley* (p. 66) as the last case in which villeinage was alleged in a court of law. Finally, *Rex* v. *Broadfoot* (p. 73) illustrates an exception to the respect paid by our law to the personal right and freedom of the subject in the right of Impressment.

Illegality of General Warrants.

Another valuable guarantee of the rights of the subject against the executive consists in the doctrine

of the illegality of general warrants, here illustrated by *Leach* v. *Money* (p. 75); *Wilkes* v. *Wood* (p. 76); and *Entick* v. *Carrington* (p. 77). In each of these latter cases the plaintiff recovered damages against the agent of the executive. While the Constitution thus protects the subject against the officers of the executive, it affords certain immunities to public officers. They are not answerable for the negligence or default of their subordinates: *Lane* v. *Cotton* (p. 80). They are not held personally liable for contracts made by them on behalf of the public in the performance of their duties: *Macbeath* v. *Haldimand* (p. 81); nor are they liable to be sued in respect of acts done in the performance of their public duties: *Gidley* v. *Lord Palmerston* (p. 82).

Liability of Governor.

Governors of colonies are not viceroys, and their powers are limited by the express terms of their commissions. They may be sued therefore either in their own courts or in the English courts: *Mostyn* v. *Fabrigas* (p. 84); *Hill* v. *Bigge* (p. 85); *Phillips* v. *Eyre* (p. 86). They will not be held responsible, however, for an act of State within their authority, though the Court will decide what is an act of State: *Musgrave* v. *Pulido* (p. 87).

Viceroy.

A viceroy, having a fuller delegation of royal authority, cannot be sued at all in his own courts for an act of State: *Luby* v. *Lord Wodehouse* (p. 88).

Members of military and naval services.

It is an important constitutional principle that only soldiers are subject to military law: *Grant* v. *Gould* (p. 92). As to the relations between officers in the military and naval services, and their liability to their subordinates, they are governed by the principle that those who have voluntarily entered these services are bound by their regulations. The Courts will, generally speaking, decline to discuss essentially military or naval matters. No remedy is obtainable in a civil court for damage, even maliciously caused to his subordinates by a superior officer acting within the scope of his

duties: *Sutton* v. *Johnstone* (p. 95); *Dawkins* v. *Lord Rokeby* (p. 96). Nor are officers liable to outsiders for any injury done by them while properly acting in discharge of their duties: *Buron* v. *Denman* (p. 100). But they are liable for tortious acts done without authority: *Madrazo* v. *Willes* (p. 99).

ii. *Judicative.*

Immunity of judges and jurors;

The integrity and independence of our judicial system is secured in various ways. The sovereign, although he is the fountain of justice, and the judges are regarded as his delegates, cannot personally determine causes: *The Case of Prohibitions* (p. 103). No jury is liable to be fined or otherwise punished for its finding: *Floyd* v. *Barker* (p. 104); *Bushell's case* (p. 105). The judges are made independent of the crown by being removable only on an address of both houses of parliament. They are made independent of the people by not being civilly liable for any judicial act: *Hamond* v. *Howell* (p. 108); *Houlden* v. *Smith* (p. 110); *Anderson* v. *Gorrie* (p. 108). This extends even to a judge acting without jurisdiction, unless he knew, or ought to have known, that he had no jurisdiction: *Calder* v. *Halket* (p. 111).

of witnesses and parties.

The same immunity is afforded to the parties, and their advocates, and to the witnesses in all legal proceedings: *Astley* v. *Younge* (p. 115); *Munster* v. *Lamb* (p. 117); *Seaman* v. *Netherclift* (p. 116).

Liberty of the press.

Finally, a group of cases is presented illustrating that liberty of the press which is one of the strongest guarantees of constitutional rights. *Wason* v. *Walter* (p. 119) shows that parliamentary proceedings may be fully reported: and *Usill* v. *Hales* (p. 121) shows that

this freedom covers also the reports of proceedings in courts of justice. It has been held, however, not to extend to the proceedings of public meetings: *Davison* v. *Duncan* (p. 123); though now, by statute, protection has been secured to newspapers in this respect also.[1]

[1] Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64).

LEADING CASES

GRANT OF MONOPOLIES

The Case of Monopolies. 44 *Eliz.* 1602.

11 *Rep.* 85.

This was an action by Darcy, a groom of the privy chamber to Queen Elizabeth, against Allein, a haberdasher, for making playing-cards, for the exclusive importing and making of which Darcy held a patent from the queen.

Two questions were argued at the bar: (1) Was the grant of sole making good? (2) Was the dispensation from the stat. 3 Edw. 4, c. 4, which imposed a penalty on importing cards, good?

It was argued for the defendant, and

Held by *Popham*, C. J., and the Court, that: (1) The grant was a monopoly, and therefore void as against both common law and statutes, and also as against public policy; (2) The dispensation was also against law. The king may dispense with particular persons, but may not dispense for a private gain with an Act passed *pro bono publico.*

Judgment for the defendant.

Note.—Coke adds that 'our lord the king that now is,' in his 'Declaration,' printed in 1610, has published that 'monopolies are things against the laws of this realm.' In 1623 a statute was passed declaratory of the law, which, however, reserved the rights of corporations and of 'any companies or

societies of merchants' (21 Ja. 1, c. 3, s. 9), and continued for many years the subject of controversy.

In 1683–5 the question was fully discussed in the 'Great Case of Monopolies,' or the *East India Co.* v. *Sandys*, when the grant of sole trading to the company was held good by the judges.[1] The very elaborate judgment of *Jeffreys*, C. J., was separately printed in 1689, and is spoken of by Macaulay as 'able, if not conclusive.' In 1694 the company obtained a further charter, upon which a resolution was carried by the House of Commons 'that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament,'[2] and this has ever since been considered to be the sound doctrine.

The statute of James I. expressly provides that no declaration therein contained shall extend to any letters-patent and grants of privilege to inventors for the term of fourteen years or under. This term may now be extended by the High Court of Justice for a further period of seven, or even, in exceptional cases, fourteen years.[3]

It was decided in the case of *Feather* v. *The Queen*, in 1865,[4] that letters patent do not preclude the crown from the use of the invention protected by the patent, even without the assent of or compensation made to the patentee; it has, however, since been enacted[5] that a patent shall have to all intents the like effect as against His Majesty as it has against a subject; provided that any government department or its agents or contractors may at any time use the invention for the services of the crown on such terms as may be agreed upon between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all the parties interested.

[1] 10 S. T. 371; Skinner, 132, 223.
[2] 5 Parl. Hist. 828.
[3] 7 Ed. 7, c. 29, s. 18.
[4] 6 B. & S. 257; 35 L. J. Q. B. 200.
[5] 7 Ed. 7, c. 29, s. 29.

ROYAL PROCLAMATIONS

The Case of Proclamations. 8 *Ja. I.*, 1610.

12 *Rep.* 74 (vi. 297); 2 *S. T.* 723.

History. This arose out of the Petition of Grievances. On the 20th Sept. 1610, *Coke*, as C. J., was called before the Privy Council; and it was referred to him whether the king, by proclamation, might prohibit new buildings in London, or the making of starch of wheat, these having been preferred to the king by the House of Commons as grievances and against law. *Coke* asked leave to consider with his colleagues, since the questions were of great importance, and they concerned the answer of the king to the Commons. It was afterwards:—

Answer. *Resolved* by the two Chief Justices, Chief Baron, and Baron Altham, upon conference betwixt the Privy Council and them, that the king cannot by his proclamation create any offence which was not an offence before, for then he might alter the law of the land in a high point; also that the law of England is divided into three parts, common law, statute law, and custom, but the king's proclamation is none of them. Also it was resolved that the king hath no prerogative but that which the law of the land allows him. But the king, for prevention of offences, may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law.

Note.—In the 16th century it was by no means unusual for the crown by proclamation to, in effect, create new laws and

new offences, which laws were enforced in the Star Chamber. Indeed, Parliament itself acquiesced in this course, for by 31 Hen. 8, c. 8 it was enacted (contrary to the opinion of the judges) that proclamations made by the king with the advice of his council should be observed and kept as though they were made by an Act of Parliament, and the king was empowered to enforce such proclamations by such penalties as he and his council might see fit. It is true that this Act was repealed by 1 Edw. 6, c. 12, s. 4, but proclamations continued to be issued and enforced, although it was agreed by the judges in the reign of Mary that no proclamation could make a new law but only confirm and ratify an ancient one, and that the king could not by proclamation impose any forfeiture or imprisonment (*Dalison*, p. 20, ca. 10). Notwithstanding this declaration and the opinion expressed by Coke and his fellow judges in the above Case of Proclamations, mandates of this kind continued to be issued by the king and council, and enforced by the Star Chamber until that court was abolished in 1641.

It is of course still legal for the crown to issue proclamations, either when authorised by statute or for the enforcement of the existing law, but there appear to have been few instances of illegal proclamations since the abolition of the Court of Star Chamber in which their observance was usually enforced. An instance, however, occurred in the year 1766, when, in a case of apparent urgent necessity and at a time when Parliament was not sitting, the king, on the advice of his ministers, laid an embargo by proclamation upon all ships laden with wheat or flour with a view to prevent exportation and to relieve the great scarcity caused by a bad harvest. With some difficulty Parliament was afterwards induced to pass an Act indemnifying the ministers and those who had taken part in enforcing this proclamation.

For a modern authority that the object of a Royal Proclamation is to make known the existing law, and that it can neither make nor unmake law, *see Ex parte Chavasse, In re Grazebrook*, 4 De G. J. & S., at p. 662.

CROWN—DISPENSING POWER

Thomas *v.* Sorrell. 25 *Car. II.*, 1674.

Vaughan, 330—359.

The plaintiff claimed a large sum of money from the defendant for selling wine on various occasions without a licence, contrary to stat. 12. Car. 2. The jury returned a special verdict, alleging that they found a patent of 9 Ja. 1 incorporating the Vintners' Company, with leave to sell wine *non obstante* the stat. 7 Edw. 6, which Act forbad the sale of wine without certain licences.

The chief question to be argued was the validity of these letters patent; and to 'this dark learning of dispensations' *Vaughan*, C. J., applies himself at great length.

Judgment. His judgment may be summarized as follows:—

He refers to an old rule laid down in a case of 11 Hen. 7, that with *malum prohibitum* by statute the king may dispense, but not with *malum in se*, but he points out that this rule had more confounded men's judgments on the subject than rectified them, inasmuch as every *malum* is in truth a *malum prohibitum* by some law. By a process of reasoning, by no means clear or easy to follow, he arrives at the conclusion that the king cannot dispense with any general penal law made for the general good or the good of a third party, but that he may dispense in the case of an offence against a law the breach of which would only affect the king himself and would not be to the particular damage of a third party. Adopting the words of Sir Wm.

Anson,[1] 'his conclusion seems to amount to this, that the king might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for his exclusive benefit.'

Judgment was given for the defendant, *i.e.* in favour of the validity of the patent.[2]

Godden *v.* Hales. 2 *Ja. II.*, 1686.

2 *Shower*, 475; 11 *S. T.* 1165.

History. This was a collusive action, brought to establish the dispensing power claimed by the crown. The plaintiff sued Sir Edward Hales, who had been appointed to the colonelcy of a foot regiment, for neglecting to take the oaths of supremacy and allegiance and to receive the Sacrament, which he was bound to do as a military officer by the Test Act (25 Car. 2). He had been indicted and convicted at the Rochester assizes, and the present action was to recover the penalty of 500*l.* provided by that statute.

Plea. The defendant pleaded a dispensation from the king by his letters patent under the great seal discharging him from taking the oaths and receiving the Sacrament. The question was whether this dispensation constituted a good bar to the action.

Eleven judges out of twelve concurred in holding that it was.

[1] Anson on the Constitution, vol. 1, p. 314.

[2] The law as here laid down agrees nearly with the view of Coke: 1 Co. Litt. 120*a*; 3 Inst. 154, 186. Blackstone observes that 'The doctrine of *non obstantes*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall when King James abdicated the kingdom' (1 Comm. 342).

Judgment.

It is a question of little difficulty. There is no law whatever but may be dispensed with by the supreme lawgiver; as the laws of God may be dispensed with by God Himself. The laws of England are the king's laws; it is his inseparable prerogative to dispense with penal laws, in particular cases and upon particular necessary reasons; and of those reasons and necessities the king himself is sole judge.

Judgment for the defendant.[1]

Seven Bishops' Case. 4 *Ja. II.*, 1688.

12 *S. T.* 183; 3 *Mod.* 212; 2 *Phillips*, *S. T.* 259—355; *Broom*, *Const. L.* 408—523.

History.

James II. had ordered by proclamation that a Declaration of Indulgence in matters of religion should be read by the bishops and clergy in their churches, and that the bishops should distribute the Declaration through their dioceses to be so read.

(? Seven) Six of the bishops met at the archbishop's palace at Lambeth and drew a petition that the king would not insist upon their distributing and reading the Declaration, 'especially because that Declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign;' and stating that they could not in prudence, honour, or conscience make themselves parties to it. This petition six of them presented to the king in person, who received

[1] The judgment of *Herbert*, C. J., proceeded upon the highest ideas of prerogative. Nevertheless, it is by no means evident, in the words of Hallam (3 Const. Hist. Eng., 8th ed. 62), that this decision was against law. The dissentient judge in this case was *Street*, and *Powell* is said to have doubted for a time, but to have afterwards concurred.

it angrily. The same evening the petition was printed and published in every part of London by sympathisers of the bishops. Shortly afterwards they were summoned to appear before the council to answer 'matters of misdemeanour,' and were told that a criminal information for libel would be exhibited against them in the King's Bench, and were called upon to enter into their recognizances to appear. This they refused to do, insisting upon their privileges as peers; and were accordingly committed to the Tower.

Case for the crown.

On the 29th June the case came on, when they were charged upon an information by the Attorney-General with a conspiracy to diminish the royal authority, and in prosecution of this conspiracy with the writing and publishing of a certain 'false, feigned, malicious, pernicious and seditious libel.' The defendants pleaded not guilty.

After much time had been wasted in attempts to prove the handwritings of the bishops, this was at last done by calling Blathwayt, a clerk of the Privy Council, who had heard the bishops own their signatures to the king.

But the libel was charged to have been written in Middlesex, and this could not be proved—as it had in fact been written at Lambeth, in Surrey. Accordingly Lord Sunderland was brought to prove a publication in Middlesex by the presentation to the king.

The document was asserted by the prosecution to be a libel, because it urged that the Declaration was based upon an illegal power.

Defence.

The counsel for the defence argued:—

1. That the petition was a perfectly innocent petition, presented by proper persons in a proper manner. The bishops are intrusted with the general care of the church, and also by stat. 1 Eliz. c. 2 with the carrying out of that Act—the Act of Uniformity; and had a right to petition in this case. There is always a right to petition

or appeal to the crown when the king or his ministers have done or are about to do anything contrary to law.

2. As to their questioning of the dispensing power, no such power exists. The declarations of parliament sufficiently show this. In 1662, when King Charles wished to extend an indulgence to the Dissenters, it was asserted by parliament that laws of uniformity 'could not be dispensed with but by act of parliament.' In 1672, when the king had actually issued such a Declaration, upon the remonstrance of parliament he caused the said Declaration to be cancelled, and promised that it should not become a precedent. In 1685, when the king announced that he had certain officers in his army 'not qualified according to the late tests of their employments,' parliament passed an Act of Indemnity that 'the continuance of them in their employments may not be taken to be dispensing with that law without act of parliament.' Until the last king's time, the power of dispensing 'never was pretended,' on which point Somers, as junior counsel for the defence, quoted 'the great case of *Thomas* v. *Sorrell*' to show that it was there agreed by all that there could be no *suspension* of an act of parliament but by the legislative power.

The points urged by counsel for the crown, which appear to have most substance in them, were that even if all the matters alleged in the petition were true that afforded no defence if, as they contended, the statements in the petition were libellous; as *e.g.*, it would be libellous to allege in a petition to a judge that his decision was illegal and that the petitioner could not in honour, prudence, or conscience obey it, even though such decision was unjust.

That, in fact, the king's declaration was perfectly legal, the king having an especial power to issue proclamations and to make orders and constitutions in matters ecclesiastical, of which this was one.[1]

[1] Noy 100; 2 Cro. Jac. 37.

The solicitor-general and the recorder even went so far as to deny the right of the bishops to petition the king at all, except in parliament, but this contention does not appear to have been accepted by any of the judges, the lord chief justice declaring that it was the birthright of the subject to petition.

Charge. The judges pointed out to the jury that the two questions for their consideration were:—1. Was the publication proved?—a mere question of fact upon which there could be no doubt. 2. Was the petition libellous? *Wright*, L. C. J., and *Allybone*, J., expressed their opinions that it was; *Holloway* and *Powell*, JJ., thought that it was not.

The jury having retired and been locked up all night, the next morning delivered a verdict of *Not Guilty*.

Note.—This trial illustrates several questions of great constitutional importance. 1. The document presented to the king might be argued to be privileged on the ground of its being a *petition*, and this raises the question of the limitation to the right of petition.[1] 2. The crown charged the petitioners with sedition, and thence starts an inquiry into the nature of a seditious libel.[2] 3. This alleged seditious character again arises out of the denial of the dispensing power, and the principal argument both of the bar and the bench turned upon the great question of this prerogative. The last point will be found discussed in a Note; to enter upon the others would carry us too far.

Points of law on the trial. But upon the trial there were several minor points of law raised by the bishops' counsel which it may be useful to summarize:[3]

1. It was argued that they should not be compelled to plead, because the return made by the Lieutenant of the Tower to the

[1] On the history of the right to petition, see 1 May, Const. Hist. Eng. 444–451; Cox, Inst. Engl. Gov. 260–265.

[2] On the controversies as to a seditious libel, Cox, Inst. Engl. Gov. 278–293; 2 May, C. H. E. 107–117, and *passim*.

[3] They will be found stated at greater length and discussed in 2 Phill. S. T. 333–355.

writ of Habeas Corpus, upon which the bishops had been brought up for trial, did not state that they had been committed by the Privy Council as such, but by certain 'lords of the Privy Council.'

The objection was bad, since the warrant, the really important document, was sufficient in point of form.

2. Nor as lords of parliament had they been legally committed, since 'seditious libel' was not a breach of the peace, for which sureties may be demanded. But privilege of parliament holds except in the cases of 'treason, felony, and the peace'[1] (*i.e.* breach of the peace), and this privilege secures those entitled to it against commitment.

Both these points were overruled by three judges: *Powell*, J., in each case would like to wait to consider precedents, and would give no opinion.

3. Strong objections were taken as to the nature of the proof of handwriting offered—but these only show how unsettled was the law upon the subject of proof of handwriting. As to some, though not as to all of the bishops, evidence was offered which would now be considered quite satisfactory in *kind*—of witnesses who had seen them write, or received letters from them, and so could testify as to the identity of handwriting, and so on. The judges being divided as to the sufficiency of the proof, other evidence was required, and therefore Blathwayt was produced.

4. The last objection was that there was no evidence of publication in Middlesex. To this the Court agreed, and were about to direct the jury to acquit on this ground, but at the last moment Lord Sunderland was produced to prove the actual delivery of the document into the king's hands.

The two judges (*Holloway* and *Powell*) who expressed opinions in favour of the defendants were deprived of their offices shortly afterwards. At the Revolution, which soon followed, five out of the seven bishops refused to take the oath of allegiance to William III., and were deprived of their sees.

[1] Coke, 4th Inst. 25.

Note I.—On the Dispensing Power.

The existence of a suspending and dispensing power as a prerogative of the crown is one of the questions which have most engaged the partisanship of historical and constitutional writers, and its true history has been consequently much debated. Writers like Lord Campbell and Lord Macaulay deny that it ever existed; but Hallam cautiously observes that 'it was by no means evident that the decision in *Sir Edward Hales' case* was against law.'[1] An argument for its existence will be found to have been urged in a law court so recently as 1815.[2]

It is certain that the power in our earlier history was often employed; and not unfrequently with the approval of the people. It seemed indeed almost a corollary from the king's power of pardon: if he might dispense with the penal consequences of an offence when it had been committed, it seemed natural that he should be able to supersede the necessity of pardon by a previous licence to commit the action.

It is said to have been first used by Henry III. in imitation of the power of dispensation claimed by the Pope, to all of whose rights the crown claimed to succeed. It is true that even then protest appears to have been made against the introduction into the civil courts of the old ecclesiastical '*non obstante*' clause.[3] Nevertheless instances of dispensation became numerous, and parliaments of Richard II. permit the king to exercise the power, while reserving a right to disagree thereto; and this power is amply recognized by the Commons in the reign of Henry IV.

In the reign of Henry VII. it was determined by all the judges in the Exchequer Chamber that although an act of

[1] 3 Const. Hist. 62.

[2] By Dr. Lushington in the *Case of Eton College*, 1815; see Anson on the Constitution, vol. 1, p. 317.

[3] *I.e.* 'notwithstanding any law to the contrary.'

parliament forbad any person to hold the office of sheriff for more than a year, and expressly barred the operation of a *non obstante* clause, nevertheless a grant of a shrievality for life, if it contains such a clause, would be valid. And this case was not only approved by Fitzherbert, by Plowden, by Coke, and by all the judges in *Calvin's case*, but it was followed in *Thomas* v. *Sorrell.*

On the other hand the protests frequently made against its exercise were made rather against particular occasions of its use. When Charles II., wishing to employ the suspending power, issued his Declarations of Indulgence, parliament protested, and he was obliged to take them back. Of this much is made in the argument of the Seven Bishops, and Macaulay considers it a complete abandonment of the right. But no protest was made on his suspending other statutes, as for example the Navigation Act.

We may fairly sum up perhaps by saying that the power had been frequently exercised, though always subject to protest when its particular exercise was disapproved. But its legality, at any rate so far as it was exercised in respect of acts which were only *mala prohibita* and not *mala in se*, was fully admitted by the law courts, and there was nothing in the concessions made, for example, by Charles II., to amount to an express renunciation or statutory abolition of the claim. It was the determination of James II. to employ the power as a means of giving relief to Roman Catholics that led to a new settlement of the kingdom, and the formal abolition of a prerogative of which the people had become impatient; for questions as to the dispensing and suspending power and the right to petition were finally set at rest by the Bill of Rights (1 Wm. and Mary, sess. 2, cap. 2) by which it was amongst other things declared: '(1) That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament is illegal; (2) that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late is illegal . . .; (5) that it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.' It was also enacted by sec. 12 'That no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be

held void and of no effect, except a dispensation be allowed of in such statute.'

The words in this statute 'as it hath been assumed and exercised of late' should be noticed, as by them the ancient prerogative of the king to dispense with the punishment of an offender *after conviction*, or in other words to pardon, was saved.

THE RIGHT TO IMPOSE

Bate's Case (The Case of Impositions)

4 Ja. I., 1606

Lane, 22; *2 S. T.* 371; *Broom, Const. L.*, 247—305

History. An information was exhibited in the Exchequer against John Bate,[1] a Levant merchant, for refusing to pay an impost or customs duty of 5*s.* per cwt. on currants, ordered by letters patent from the king over and above the statutory poundage of 2*s.* 6*d.* per cwt. Upon this statute defendant relied, and opposed payment of the 5*s.* as illegally imposed. The king's attorney demurred to these pleas.

Judgment of the four barons was unanimous *for the crown*, on grounds of which the following is an abstract :—

Judgment. 1. The king's power is twofold—ordinary and absolute. The ordinary power, or common law, which exists for the execution of civil justice, cannot be changed without parliament. But the king's absolute power affecting matters of state and the general benefits of the people is *salus populi*, and is not directed by the rules of common law, but varies according to the wisdom of the king. Customs are a material matter of state. Judgment in matters of prerogative must be not according to common law, but according to exchequer precedents. They referred to cases in which the crown had levied customs over and above subsidies granted by parliament; *e.g.*, to an increased custom on foreign merchandise levied by Edw. I., to a custom levied

[1] I follow Mr. Gardiner in thus writing the name.

by Hen. VIII., and to a similar impost in the reign of Mary.

2. All customs are the effect of foreign commerce: but all commerce and foreign affairs are in the absolute power of the king. The sea-ports are the king's gates, which he may open or shut to whom he pleases, and he has therein absolute power. He provides fortresses for their safety.

3. If he may restrain the person by a *ne exeat* he may *a fortiori* restrain the importation of goods, and if he may restrain these absolutely he may do so *sub modo*.

4. If he may impose, he may impose what he pleases.

Petition of Grievances.

While the case was pending the matter had already been taken up by the Commons, who upon presenting a petition were informed by the king of the decision of the law courts in his favour. In July, 1608, a Book of Rates was published under the authority of the great seal, imposing heavy duties upon almost all mercantile commodities, to be paid to the king, his heirs and successors. When parliament again met in 1610 they debated the whole question, and were not deterred by the king's message that they were not to do so. The debate lasted four days, the principal speakers being Sir Francis Bacon and Yelverton[1] for the right of imposition, and Hakewill and Whitelocke on the other side.

Argument against the right.

The main points in the argument against the king's right to impose were:

I. Customs are *consuetudines*, and the very name shows that this 'duty is a child of the common law.'[2]

[1] In the State Trials (ii. 477), Yelverton is said to have spoken against the right, and Whitelocke's speech is erroneously attributed to him. *Notes and Queries*, 3 Ser. ix., 382, x. 39, 111.

[2] There were of course certain dues and customs payable to the king at common law or by a very ancient prescription; as *e.g.*, the feudal reliefs and aids, 'prisage.' which was a duty payable to the king upon every ship-load of wine imported by English merchants, and a customs duty on wool.

II. But by the common law the duty is a thing certain not to be enhanced by the king without consent of parliament. Where the common law has made provision, the king may not impose arbitrarily.

All our kings, from Hen. III., have sought increase of customs by way of subsidy from parliament; sometimes by way of prayer and entreaty, and for a short time; sometimes even by way of loan, undertaking to repay. All which is an argument that they had no such absolute power. Even Edw. III., than whom 'there was not a stouter, a wiser, a more noble and courageous prince,' prayed his subjects for a relief for the maintenance of a war (14 Edw. III., stat. 1, c. 21). Where merchants alone granted a subsidy on wool, the Commons complained, 27 [*it should be* 17] Edw. III., and in stat. 36 Edw. III., c. 11, it is expressly forbidden.

From the Conquest till the reign of Mary—480 years,—there were only *six* impositions by *twenty-two* kings: and yet all these, even when borne for a short time, were complained of, and upon complaint removed. Other so-called impositions were 'dispensations or licences for money, to pass with merchandise prohibited by act of parliament to be exported.'

III. Even if the king had such power at common law, it is utterly abrogated by statutes, the chief being:—

1. Magna Carta, c. 30. 2. 25 Edw. I., c. 7. 3. De Tallagio non concedendo[1] (cited as 34 Edw. I., st. 4). 4. 14 Edw. III., st. 1, c. 21.

These debates resulted in a *Petition of Grievances*[2] to the king, 1610; which not only complained of impositions in general, but also sought relief in respect

[1] The De Tallagio non concedendo, though recited as a statute even in the Petition of Right, and held to be so by the judges in 1637, seems to have been, as suggested by Dr. Stubbs, a mere abstract of Edward's confirmation of the Charters (Select Charters, 487).

[2] Printed more fully than in the S. T. in Petyt, *Jus Parliamentarium*, 318.

of certain imposts on alehouses and sea coal: and begged 'that all impositions got without consent of parliament may be quite abolished and taken away.' A bill was introduced with this object, but dropped in the House of Lords. The impositions on sea coal and alehouses were remitted, but no further concession was made. A bill was again introduced in the parliament of 1614, but the Lords declined a conference upon the subject, and the parliament was dissolved without anything having been done.

Note.—The decision in this case was considered by Coke and Popham to have been right (see 12 Rep. 33); and it was treated by the judges in 1628 as conclusively established. For a full discussion of the whole controversy, see 2 Gardiner, Hist. Engl., 1–12, 70, 75–87, 236–48. It is impossible here to give anything like a full account of the prior history of the imposition on currants, which formed the subject-matter of this case. It may, however, be stated that the duty had in one form or another existed from about the year 1580. It had originally been imposed at the request of the merchants themselves, and mainly for protective reasons. Similar duties had been imposed during the two preceding reigns, and no question as to their legality had been raised for nearly half a century.

The judgment of the Court of Exchequer has no doubt been condemned by most modern historians. Mr. Hubert Hall, of the Public Record Office, however, after a careful examination of the original records, many of which he finds to have been mis-stated and mis-quoted by those members of the House of Commons who spoke against the imposition, alleges in his 'History of the Customs Revenue in England' (Elliot Stock, 1892), that there is far more to be said in support of the judgment of the Court than has commonly been supposed; that it was in fact wholly warranted by the then existing state of the Constitution. It is unfortunate that the judgment of Chief Baron Fleming, an admittedly able and upright judge, has only come down to us in a mutilated form in the State Trials. Sir Wm. Anson (on the Constitution, vol. i., p. 326) expresses an opinion that the decision in Bate's

case violated the spirit of the Constitution rather than the letter of the law.

The question was in the end settled by legislation, at first by the Statute 16 Car. I., c. 8, and still more definitely by the Bill of Rights (1 Wm. and Mary, sess. 2, cap. 2), by which it was declared 'that levying money for or to the use of the crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted is illegal.'

R. *v.* Hampden (The Case of Ship Money).

13 *Car. I.*, 1637.

3 *S. T.* 825; 2 *Rushworth*, 257; *Broom, Const. L.* 303–367.

History. King Charles issued writs for the collection of ship money to the City of London, and other maritime towns, in 1634. In 1635 he took the opinion of the judges, and was advised by ten out of the twelve that when the good and safety of the kingdom in general was concerned, and the whole kingdom was in danger—of which he was to be considered the sole judge—he might by writ under the great seal command all the subjects at their charge to provide such number of ships with men and munitions as the king might think fit for the defence of the kingdom, and might compel obedience to such writs. The king thereupon proceeded to issue writs to the various sheriffs commanding them to provide the ships and men mentioned in the writs, and to assess the expenses upon the inhabitants of their counties, and to imprison any who might be refractory. Similar writs were issued in 1636. On Hampden's refusing to pay 1*l.*, the amount at which he was assessed, proceedings were taken against him in the Exchequer.

He demurred, and the demurrer was heard in the Court of Exchequer Chamber.

Mr. *St. John* and Mr. *Holborne* argued for Hampden.

It is conceded (1) that the law of England provides for foreign defence; and (2) lays the burthen upon all; (3) that it has made the king sole judge of dangers from abroad, and when and how the same are to be prevented; and (4) that it has given him power by writ to command the inhabitants of each county to provide shipping for the defence of the kingdom. Argument for defendant.

The question is only *de modo*. This must be by the forms and rules of law. As without the assistance of his judges the king applies not his laws, so without the assistance of parliament he cannot impose.

The law has provided for the defence of the realm both at land and sea by undoubted means: (1) by tenure of land giving service in kind and supply; (2) by prerogatives of the crown; (3) by supplies of money for the defence of the sea in times of danger. These are the ordinary settled and known ways appointed by the law. But the king may not run to extraordinary, when ordinary means will serve. The king may call parliaments when he chooses.

That parliament is the means of supply appointed for extraordinary occasions is shown both by reason and authority.

A series of statutes were quoted showing the same thing. 1. Charter of Will. I.; 2. Magna Carta; 3. 25 Edw. I., c. 5; 4. *De Tallagio non concedendo*[1]; 5. 14 Edw. III., st. 2, c. 1; 6. 25 Edw. III.; 7. 3. Car. I., c. 1, s. 10.

So much as to defence in general. That of the sea has nothing special. Most or all of the precedents are the charging sea-towns which are discharged of defence at land. The charge is therefore double in the one case and single in the other. Any towns not maritime ought not to be charged, which is the very case of the defendant.

[1] See Note, p. 28.

Holborne, who argued also for Hampden, would not admit that the king was the proper judge of danger, except when the danger was so imminent that parliament could not be consulted.

Lyttelton, S.-G., and *Bankes*, A.-G., argued for the crown.

Judgment. The judges gave judgments: *Weston*, *Crawley*, *Berkley*, *Vernon* and *Trevor* for the king; *Croke*, *Hutton* and *Denham* for the defendant; *Bramston*, C. J., and *Davenport* also for the defendant, but mainly on technical grounds; *Jones* and *Finch*, C. J., for the king.

Croke reiterated, and added somewhat to *St. John's* arguments.

The judgment of *Finch*, C. J.,[1] may be thus summarized:

The defence of the kingdom must be at the charge of the whole kingdom. The sole interest and property of the sea, by our laws and policy, is in the king, and sea and land make but one kingdom, and therefore the subject is bound to the defence of both. Parliament is not the only means of defending the kingdom. The king is not bound to call it but when he pleases, and there was a king before a parliament. The law which has given the interest and sovereignty of defending and governing the kingdom to the king, also gives him power to charge his subjects for its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties only, when the danger is general they go to inland counties also. Acts of parliament to take away the royal power in the defence of his kingdom are void. 'They are void acts of parliament to bind the king not to command the subjects, their persons and their goods, and I say

[1] Lord Clarendon observes, 'Undoubtedly my lord Finch's speech in the Exchequer Chamber made ship money much more abhorred and formidable than all the commitments by the Council table, and all the distresses taken by the sheriffs in England.'

their money too, for no acts of parliament make any difference.'

Seven of the judges deciding against the defendant, *judgment* was for the crown.

Note.—This case brought to a head the claim of the crown to enforce direct taxation just as in *Bate's* case (p. 26) the question of the right to impose indirect taxation was raised. Whatever may be thought of the judgment in *Bate's* case, and we have already indicated that much could be said in its favour, it seems quite impossible to justify the judgment of the majority of the Court in the case of ship money. Apart from questions as to earlier statutes and precedents the claim of the crown was absolutely barred by the then recent statute, 3 Car. I., c. 1 (the Petition of Right), which provided 'that no man hereafter be compelled to make or yield any gift, loan, benevolence, *tax*, or such like charge, without common consent by Act of Parliament.'

This decision gave much offence to the nation, and three years afterwards, in the Long Parliament, a statute (16 Car. I., c. 14) was passed declaring all the proceedings contrary to 'the laws and statutes of the realm, the rights of property, the liberty of the subjects, and the Petition of Right,' and 'vacating and cancelling' the judgment.

PARLIAMENT—PRIVILEGE

Ashby *v.* White and others. 2 *Anne*, 1704.

2 *Lord Raymond*, 938; 3 *Ib.* 320; 14 *S. T.* 695–888; 1 *Smith*, *L. C.* 240.

History. The plaintiff in this case, being duly qualified, had tendered his vote in an election of burgesses for parliament, and this had been refused by the defendants as returning officers. Although the candidates for whom he would have voted were duly elected, the plaintiff brought an action, and laid the damages at 200*l.* He obtained a verdict, with 5*l.* damages and costs.

On motion in the Queen's Bench in arrest of judgment, on the ground that the action did not lie, judgment was given for the defendants, *Holt*, C. J., dissenting. Upon writ of error in the House of Lords, this was reversed on the grounds set forth by *Holt* in the court below.

Judgment. The franchise is a right of a high nature, and there must be a legal remedy to vindicate it; if a man were to have no remedy it would be equivalent to the loss of his right. An injury (*i.e.* an invasion of a man's legal right) imports a damage, even if no pecuniary damage is shown. The right to vote is founded upon the elector's freehold, and matters of freehold are determinable in the king's courts. This is a proper tribunal to try the question; 'who hath a right to be in the parliament is properly cognizable there, but who hath a right to chuse is a matter settled before there is a parliament.' And again the House of Commons cannot take cognizance of particular men's complaints, nor

can it give satisfaction in damages, nor was such a petition ever heard of in parliament as that a man was hindered of giving his vote and praying for a remedy. Parliament would undoubtedly say 'take your remedy at law.' It is not like the case of determining the right of election between the candidates.

Decided.—That an action will lie against a returning officer for refusing the vote of a duly qualified person: and that the refusal is an injury, though it be without any special damage.

The House of Lords gave judgment in Ashby's favour on the 14th January, 1704. The Commons immediately took the matter up, and after debates lasting from the 17th to the 25th January, on this latter day they passed resolutions that neither the qualification of any elector, nor the right of any person elected is cognizable or determinable elsewhere than before the Commons of England in parliament assembled, except in such cases as are specially provided for by act of parliament; and that an action in any other court was therefore a breach of privilege. The Lords also discussed the question, and passed counter-resolutions.

Meanwhile five other 'Aylesbury men' had brought similar actions against the constables of their borough. They were thereupon committed to prison (Dec. 5) by the House of Commons for a breach of their privileges, together with their council and solicitors who had attempted unsuccessfully to obtain their discharge on *habeas corpus*, the majority of the judges holding, against *Holt*, C. J., that the House of Commons were the sole judges of their own privileges. The burgesses then applied for a writ of error to take the question to the House of Lords. Nevertheless the House of Commons resolved that no writ of error lay in this case, and petitioned the queen not to grant it. The Lords now also appealed to the queen by an address,

in which they showed that writs of error from inferior tribunals were *ex debito justitiæ*, writs of right, and upon the queen's referring the question to the judges, ten out of twelve certified to that effect. They further complained that the resolutions of the House of Commons amounted to a direct repeal of the laws protecting the liberty of the subject by means of *habeas corpus*, and prayed that she would order the writs to issue. The reply of the queen was, that she would have granted the writs of error prayed for, but that it was necessary at once to put an end to the session, and she knew, therefore, that no further proceedings could be taken.

The prorogation of parliament set the Aylesbury men and their legal advisers at liberty and left them free to pursue their legal remedies, without the intervention of privilege, and they obtained verdicts and execution against the returning officer.

Note.—Apart from the discussion of the privileges of parliament which arose out of this case, it is probably of greater importance as illustrating the maxim '*ubi jus ibi remedium*,' and the principle that the mere novelty of a complaint in an action on the case was in itself no answer to the action, if it were based upon an invasion of a right recognized as such by the law. In these respects *Ashby* v. *White* will be found fully commented on in Smith's Leading Cases. The case is also of interest in connexion with the duties and liabilities of a returning officer. It is observed in *Tozer* v. *Child*, 1857,[1] that the report of this case in Raymond is defective in failing to show that Lord *Holt* based his judgment on the fraud and malice of the defendant. A fuller form of the judgment was published from a manuscript in 1837, and here, indeed, this point is directly dealt with, as Lord *Holt* there states that malice was charged by the plaintiff in his declaration and found by the jury. It has indeed since been held that if a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuses to receive the vote of a person

[1] 26 L. J. Q. B. 151 ; 7 E. & B. 377.

entitled to vote at an election no action will lie against him as, acting in a quasi-judicial capacity, he is protected if he acts honestly (*Tozer* v. *Child*, *supra*). It would appear that in such a case the right of the voter as against the returning officer is not an absolute right to have his vote recorded, but, as was suggested by Bramwell, B., in *Tozer* v. *Child*, a right to have the goodness of his vote fairly considered by the officer.

It will be observed that Lord *Holt* expressly repudiated any claim on behalf of the Court to determine the question of disputed elections, as, when *Ashby* v. *White* was tried, it was recognized that the House of Commons alone had jurisdiction to decide such disputes, and that the sheriff in making his return as to an election was responsible only to the House; *Barnardiston* v. *Soame*, 6 S. T. 1063. From about 1600 to 1868 the House, sometimes as a whole, but latterly by a committee, disposed of all questions as to disputed elections, but by 31 & 32 Vict. c. 125, amended by 42 & 43 Vict. c. 75, the trial of election petitions and questions arising out of controverted elections was referred to two judges of the King's Bench Division of the High Court of Justice, who certify their finding to the Speaker.

PARLIAMENT—POWER TO COMMIT

Case of Lord Shaftesbury. 29 *Car. II.*, 1677.

1 *Mod.* 144; 6 *S. T.* 1269.

History. Lord Shaftesbury, with two other Peers, had been committed to the Tower by an order of the Lords 'during the pleasure of this House for high contempts committed upon this House.'

Some months afterwards Lord Shaftesbury was brought up in the King's Bench on a writ of *habeas corpus*, and the question of the sufficiency of the return was argued.

It was admitted that there had been many instances of commitment by each House, but the question had never been determined in a court of law.

Judgment. The judges held that the return would have been held ill and uncertain in the case of an ordinary court of justice. But the Court was bound to respect the most High Court of Peers, and the return was not examinable in the King's Bench. It would be otherwise if the session was over.

Held:—That the prisoner must be remanded.

Later History. In the next session this application to an inferior court was voted a breach of privilege, and Lord Shaftesbury was called upon to beg their Lordships' pardon for bringing his *habeas corpus*. This he did, and was discharged.

Burdett *v.* Abbot. 51 *Geo. III.*, 1811.

14 *East*, 1–163; 4 *Taunt.*, 401; 5 *Dow*, 165.

This was an action of trespass against the Speaker of the House of Commons for breaking into the plaintiff's house, and carrying him to the Tower. History.

The defendant pleaded that the plaintiff and himself were members of a parliament then sitting; that it had been resolved by the House of Commons that a letter from the plaintiff in a newspaper was a breach of its privileges, and that the Speaker should issue his warrant for the plaintiff's commitment to the Tower in pursuance of which warrant the plaintiff had been arrested. Pleas.

The case was first argued on demurrer before Lord *Ellenborough*, C. J., and the Court of King's Bench; whose judgment was affirmed on a writ of error before Sir *Jas. Mansfield*, C. J., in the Exchequer Chamber; and again affirmed in the House of Lords by Lord *Eldon*, C., and Lord *Erskine*. Judgment.

Held:—That the power of either House to commit for contempt is reasonable and necessary, and well established by precedents. 2. That the execution of a process for *contempt* justified the breaking into the plaintiff's house.

Note.—The preceding case of Lord *Shaftesbury* shows the right of the House of Lords to commit for contempt. In *Burdett* v. *Abbot* it was placed beyond question that the House of Commons had a similar jurisdiction. There is said, however, to be this difference in the powers of the two Houses; the Lords may commit for a definite period which may extend beyond their own session, whereas a commitment by the House of Commons ceases, *ipso facto*, at the prorogation of parliament.[1]

It is clear that if it appears by the warrant that the

[1] Anson on the Constitution, vol. 1, p. 229. *R.* v. *Flower*, 8 T. R. 314.

commitment was for contempt, the court will not enquire further; if, however, as Lord Ellenborough said in *Burdett* v. *Abbot*,[1] it did not profess to commit for contempt but for some matter appearing on the return which could by no reasonable intendment be considered as a contempt, but a ground of commitment evidently arbitrary and unjust and contrary to every principle of law or justice, then the court would probably look into the return and act as justice might require.

It may be observed that it has been held in the Privy Council that the *lex et consuetudo parliamenti* do not belong to the supreme legislative assembly of a colony, and that colonial parliaments have no right to punish by imprisonment for contempts committed within their walls. *Doyle* v. *Falconer*, 1866; L. R. 1 P. C. 328; 4 Moo. P. B., N.S., 203; or beyond them, *Kielley* v. *Carson*, 1842; 4 Moo. P. C. 63; and *Fenton* v. *Hampton*, 1858; 11 Moo. P. C. 347. Any such authority, therefore, must rest upon statute, and has in some cases been conferred; see *Speaker of Legislative Assembly of Victoria* v. *Glass*, 1871; L. R. 3 P. C. 560. The power of expelling disorderly persons they possess of course, but this is not peculiar to them; as Lord Abinger, C.B., has said, 'every person who administers a public duty has a right to preserve order in the place where it is administered, and to turn out any person who is found there for improper purposes.'[2]

Compare the case of the *Sheriff of Middlesex*, *post* (p. 47) and note.

[1] 14 East at p. 150.
[2] *Jewison* v. *Dyson*, 1842, 9 M. & W. 540, at p. 586.

PARLIAMENT—FREEDOM OF SPEECH

R. *v.* Eliot, Hollis and Valentine.

5 *Car. I.*, 1629.

Cro. Car., 181; 3 *S. T.* 294.

History. This was an information by the Attorney-General against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, for seditious words spoken in the House of Commons, of which they were members, and for a tumult in the same place.

The defendants, by their plea, denied the jurisdiction of the court, on the ground that offences done in parliament could only be punished in parliament, and they refused to plead any other plea.

Judgment. After arguments in which the whole question of the privilege of free speech in parliament was discussed, the defendants relying, among other things, upon the Act passed 4 Hen. VIII. in *Strode's* case, the judges, *Hyde*, C. J., *Jones*, *Whitlocke*, and *Croke*, held that an offence committed in parliament against the king or his government may be punished out of parliament, and that the Court of King's Bench had jurisdiction.

The defendants' plea was overruled, and they were thereupon sentenced to pay heavy fines, and to imprisonment during the king's pleasure.

Later History. In 1641 the Long Parliament passed a resolution that the exhibiting of this information was a breach of the privilege of parliament.

In 1667 the Commons and the Lords passed resolutions that the judgment was illegal, and also that the act of parliament, commonly called Strode's Act, is a general law declaratory of the ancient and necessary rights and privileges of parliament.

The Lords further ordered that the proceedings in the King's Bench should be brought before them by a writ of error, and on the 15th of April, 1668, it was ordered 'that the said judgment shall be reversed.'

Note.—In 1512 Strode and others had been fined in the Stannary Court, and imprisoned in default, for having, 'with other of this House,' introduced into parliament certain bills which the tinners did not like. It was enacted,[1] on his petition, that the judgment and execution should be void, and further, that all suits, &c., against him 'and every other of the person or persons afore specified, that now be of this present parliament or that of any parliament hereafter shall be, for any bill, speaking, reasoning, or declaring, of any matter or matters, concerning the parliament to be communed and treated of, be utterly void and of none effect.'

It seems to have been doubted, however, whether this act was intended to be of general application or only to meet *Strode's* case, and it was some time before the absolute right of free speech unhindered by the crown was generally admitted. Shortly after *Strode's* case it became customary, at the meeting of each parliament, for the Commons to formally petition for freedom of speech as one of their privileges, but the claim, to its fullest extent, does not appear to have been admitted by the crown, at any rate in practice. In answer to the usual petition of the Commons in 1593, the Lord Keeper, Sir Edward Coke, replied, 'liberty of speech is granted you, but you must know what privilege you have; not to speak every one what he listeth, or what cometh into his brain to utter; but your privilege is "aye" or "no."'

The above case of *Eliot, Hollis & Valentine* was the last instance in which the privilege of freedom of speech in parliament was questioned. By the Bill of Rights[2] it was declared

[1] 4 Hen. VIII., c. 8.
[2] 1 W. & M., Sess. 2, c. 2.

'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of parliament.' In an action of slander brought against Mr. A. Balfour, then Chief Secretary for Ireland, the court, being satisfied that the only words spoken by the defendant about the plaintiff were spoken by him in parliament, ordered all proceedings in the action to be stayed.[1] Words spoken in parliament itself are *absolutely* privileged, that is, the privilege is not lost, however malicious or false the words may have been. But this only applies to words there spoken, and if a member of parliament chooses to repeat or publish a slanderous speech which he has made in parliament, he is not absolutely protected, and damages may be recovered against him if it can be shown that he is acting maliciously or from an improper motive, or that the report of the speech published by him was not fair or accurate.[2]

As to the general right of publication of parliamentary proceedings, see pp. 44, 119 *post*.

If an ordinary offence against the law, as *e.g.*, an aggravated assault, were committed by a member of parliament within the walls of parliament, there is no authority for saying that such an offence would not be cognizable by the ordinary Courts.[3]

[1] *Dillon* v. *Balfour*, 20 L. R. Ir. 600.

[2] *R.* v. *Lord Abingdon*, 1 Esp. 226; *R.* v. *Creevey*, 1 M. & S. 273. See also *Wason* v. *Walter*, p. 119 *post*.

[3] See *Bradlaugh* v. *Gossett*, 12 Q. B. D. at p. 283; 53 L. J. Q. B. 209; 53 L. T. 620; 32 W. R. 552; 2 Hallam Const. Hist. (8th Ed.), p. 6.

PARLIAMENT—PUBLICATION OF PROCEEDINGS

Stockdale *v.* Hansard. 2 *Vict.*, 1839.

9 *Ad. & E.* 1; *Broom Const. L.* 875–983.

History. A book published by the plaintiff had been described by two inspectors of prisons in a report to the government as 'disgusting and obscene.' This report was printed and sold by the defendants by order of the House of Commons. The plaintiff brought an action for libel, claiming 5000*l.* damages.

Plea. The defendants pleaded that they had printed and sold the report only in pursuance of the order of the House of Commons, that the report having been presented to and laid before the House it became part of the proceedings of the House, and that the House had resolved '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.'

Demurrer. To which the plaintiff demurred, that the known and established laws of the land cannot be superseded or altered by any resolution of the House of Commons, nor can that House by any resolution create any new privilege inconsistent with the law.

Argument. It was argued by the defendants, who had been directed by the House to plead to the action merely to inform the court, that the act complained of was done in exercise of its authority, and in the legitimate use of

its privileges: that the courts of law are subordinate to the Houses of Parliament, and are therefore incompetent to decide questions of parliamentary privilege. But if the court were competent to inquire into the existence of the privilege, it could be shown to have long existed.

Judgment for the plaintiff, per Lord *Denman*, C. J.:— Judgment.

Parliament is supreme: but neither branch of it is supreme by itself; the House of Commons is only a component part of parliament. The resolution of any one of the three legislative estates cannot alter the law or place any one beyond its control. The claim for an arbitrary power to authorize the commission of any act whatever is abhorrent to the first principles of the constitution. The privilege of each House may be the privilege of the whole parliament, but it does not follow that the opinion of its privileges held by either House is correct or binding. There are many cases where the law courts have discussed questions of parliamentary privilege.

2. Nor has it been shown that the privilege of publication exists. Here the publication of the opinions referred to was not in relation to any matter before the House, and more copies were ordered to be printed than were necessary for the use of its members.

The other members of the Court, *Littledale*, *Patteson* and *Coleridge*, JJ., concurred.

Decided:—That the House of Commons, by ordering a report to be printed, could not legalize the publication of libellous matter.

Note.—In consequence of these proceedings, an Act, 3 & 4 Vict. c. 9, was passed, in virtue of which any person called upon to defend an action in respect of the publication of any reports, papers, votes, or proceedings of either House of Parliament ordered by either House, may bring before any court of law in which such proceeding has been commenced, a certificate

from the Lord Chancellor, or the Clerk of the Parliaments, or the Speaker of the House of Commons, or the clerk of the same House, that the publication was under the authority of the House of Lords or the House of Commons, and such court or judge shall thereupon stay all such proceedings. And this is to apply also to all extracts from any paper thus printed, published *bonâ fide* and without malice. This Act of course settled the question, not in itself of the greatest importance, which had given rise to this memorable case. But far greater issues were involved, and upon those issues *Stockdale* v. *Hansard* remains, and it is to be hoped ever will remain, a binding authority. It was of this case that *Cockburn*, C. J., in his judgment in *Wason* v. *Walter* (L. R. 4 Q. B. at p. 86) spoke as follows :—' From the doctrines involved in this defence, namely that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the legislature—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold. To the decision of this court in that memorable case we give our unhesitating and unqualified adhesion.'

PARLIAMENT—CONTROL OVER ITS OWN PROCEEDINGS

Sheriff of Middlesex's Case. 3 *Vict.*, 1840.

11 *Ad. & E.* 273; *Broom, Const. L.* 961–967.

History. This case arose out of *Stockdale* v. *Hansard*. The Sheriff of Middlesex, in pursuance of a writ from the Queen's Bench, had levied execution upon property of the Messrs. Hansard. The House of Commons thereupon committed him for contempt. A writ of *habeas corpus* having been obtained the Sergeant-at-Arms of the House of Commons made a return that he had detained the Sheriff under a warrant of commitment directed to him by the Speaker, and he set forth the warrant. That document stated that the House had resolved that the Sheriff, 'having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms; but it did not set forth what the contempt was. Upon motion to discharge the Sheriff on *habeas corpus*, Lord *Denman*, C. J., delivered judgment.

Judgment. The judgment in *Stockdale* v. *Hansard* was correct. The technical objections taken to this warrant from the Speaker are insufficient. On a motion for a *habeas corpus* the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. With regard to the objection that the warrant did not set forth the facts which constituted the alleged contempt, no doubt words containing this kind of

statement have appeared in most of the former cases but not in all. The House has power to commit for contempt, and we must suppose that it adjudicated with sufficient reason. The Sheriff must therefore remain in custody.

Held:—That a court of law cannot inquire into the grounds of a commitment for contempt by the House of Commons, because the warrant of commitment does not specify the grounds upon which the person committed had been adjudged guilty of contempt.

Note.—Compare the earlier cases of *Burdett* v. *Abbot*, 1811 (*supra* p. 39), and *R.* v. *John Cam Hobhouse*, 1820; 2 Chitty, 207. In the latter case the court said, 'The House of Commons have adjudged (as appears by the warrant) that the gentleman on the floor has been guilty of a contempt in having published a seditious libel, of which he has acknowledged himself to be the author. We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality.'

Howard v. *Gossett*, 10 Q. B. 359; 16 L. J. Q. B. 345, which shortly followed, was a somewhat similar case. The Court of Exchequer Chamber there held that the House of Commons has power to institute inquiries and to order the attendance of witnesses, and in case of disobedience to bring such witnesses in custody to the bar; that if there be a charge of contempt and breach of privilege and an order to the person charged to attend to answer it, and a wilful disobedience to that order, the House has power to take him into custody, and that the House alone is the proper judge when these powers are to be exercised; also that the House of Commons being a part of the High Court of Parliament, the supreme court of this country, no mere objections of form can be taken to its warrants, as can be done in the case of warrants of justices, but that wherever the contrary does not plainly and expressly appear by the warrant itself it is to be presumed that the House has acted within its jurisdiction.

Bradlaugh *v.* **Gossett.** 48 *Vict.*, 1884.

12 *Q. B. D.* 271; 53 *L. J. Q. B.* 209; 53 *L. T.* 620; 32 *W. R.* 552.

History. This was an action against the Sergeant-at-Arms, who had been directed by the House of Commons to remove the plaintiff from the House until he should engage not further to disturb the proceedings. The plaintiff asked to have that order declared to be void as beyond the power and jurisdiction of the House to make, and an order restraining the defendant from preventing the plaintiff from entering the House and taking the oath as a member.

The defendant demurred, on the ground that the statement of claim disclosed no cause upon which an action could be maintained, and the demurrer was argued before *Coleridge*, C. J., *Mathew* and *Stephen*, JJ., who allowed the demurrer.

Judgment. *Held*:—That the House of Commons is not subject to the control of the law courts in matters relating to its own internal procedure only. What is said or done within its walls cannot be inquired into elsewhere. The House of Commons cannot, by resolution, change the law of the land, but courts of law have no power to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House an act which he may have a right by law to do.

NOTE II.—ON PRIVILEGE OF PARLIAMENT AND THE LAW COURTS

The whole subject of the Privilege of Parliament is much too large to be treated in a short note.[1] But we must not omit to consider what is for our purpose the most interesting aspect of the subject, and one of the most difficult questions in Constitutional law, viz. the extent to which courts of law will adjudicate upon matters of privilege. The violent controversies produced by this question between the House of Commons and the courts of law are already indicated in the cases reported; nor is it at all impossible that similar contests may again occur.

Each House of Parliament, and therefore the House of Commons, claims to be the sole judge of its own privileges and of what constitutes a breach of them. The courts have always admitted that the House of Commons possesses that authority to commit summarily for contempts, which exists in every superior court of law;[2] and the judges always give a liberal construction to the warrants of such commitments, which are therefore not reversible upon mere matters of form. But this has not contented the House of Commons. They have not thought it sufficient to enforce their undoubted privileges, but have at various times claimed in effect a power of legislation by asserting an exclusive right to entertain all questions connected with privilege; and that the courts of law should act ministerially only in matters of privilege, accepting or enforcing any declaration of either House. They have even denied that the judges could ascertain what is the law of privilege, as though it were a matter of inspiration vouchsafed only to themselves.[3]

The opinions of the judges in the matter have varied very much. During the 18th century the tendency was strong in favour of declining to decide questions of privilege in any way,

[1] Cox, Inst. Eng. Gov. p. 204 *et seq.* Sir Erskine May, Parl. Prac. (11th Ed.), 59–146.

[2] Per *Ellenborough*, C. J., in *Burdett* v. *Abbot*, 14 East at p. 138, and cp. Lord *Erskine* in the House of Lords on the same case, 5 Dow, at p. 202.

[3] Argument of Attorney-General, in *Stockdale* v. *Hansard*, 9 A. & E. at p. 31.

and the natural result followed, that privilege was pushed to an extravagant extent. The House of Commons 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.[1] Even in the case of *Ashby* v. *White*, however, *Holt*, C. J., expressely asserts the right and duty of the courts to know the law of parliament as part of the common law of the land. And the later decisions have been much more favourable to the right of the courts to entertain questions of privilege. For this *Stockdale* v. *Hansard* is the leading authority. There Lord *Denman*, C. J., lays down that although the House of Commons has a right to declare what are and have been its privileges—it may not under cover of a declaration create any new privilege. That would be to give to the resolution of a single branch of the legislature the force of a legislative enactment. It is true that the House of Commons disclaim the power to make new privileges. But the claim the House does assert will amount to the same thing, if its members alone are competent to declare the extent of their privileges, and if a court of law is concluded from going behind their declaration.[2]

Lord *Denman* also points out that 'it must be remembered that during the session 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.'

The present condition of the question is, according to Sir Erskine May, unsatisfactory. 'Assertions of privilege are made in Parliament, and denied in the courts; the officers who execute the orders of Parliament are liable to vexatious actions;

[1] *Denman*, C. J., in *Stockdale* v. *Hansard;* and for some flagrant instances, see 9 A. & E., p. 12. Amongst them were the following, which were all treated as breaches of privilege, with the result that the offenders either had to make satisfaction or were taken into custody:—Impounding a member's cattle, lopping his trees, detaining his goods, serving his tenant with process, taking his horse from a stable and riding it, digging his coal, ploughing his land, killing his rabbits, assaulting his porter, fishing in his pond, erecting a fence on his waste. On one occasion an attorney was committed for delivering an exorbitant bill of costs for the preparation of a petition to the House and for threatening to sue for the amount.

[2] The true distinction is made by Lord *Clarendon*, who construes the doctrine that the House of Commons are the only judges of their own privileges, to mean that they are the only judges in cases where their privileges are offended against, and not that they only can decide what are and what are not their privileges. 1 Hist. Rebellion, pp. 562-564.

and if verdicts are obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions, instead of being prevented from proceeding with them by some legal process acknowledged by the courts, can only be coerced by an unpopular exercise of privilege which does not stay the actions.'[1]

[1] Parliamentary Practice (11th Ed.), p. 145.

ALLEGIANCE

Calvin's Case. 6 *Ja. I.*, 1608.

4 *Rep.* 1; 2 *S. T.* 559; *Broom Const. L.* 4–26.

History. King James was anxious that the union of the two crowns should confer mutual naturalization upon his English and Scotch subjects; and when the English House of Commons was unwilling that this should be so, the question was raised by two collusive actions in the name of Robert Calvin, a *postnatus* of Scotland, *i.e.*, one born after the union of the crowns. One of these actions was brought in the King's Bench claiming that Calvin was entitled to certain freehold land in England (which he could not then be if he were an alien), and the other in Chancery for the title deeds of the estate. The defendants pleaded in abatement that Calvin was an alien. On a demurrer to this plea the case was argued in the Exchequer Chamber before the *Lord Chancellor* and twelve judges.

Argument for plaintiff. Allegiance is the obedience due to the sovereign; and persons born in the allegiance of the king are his natural subjects, and no aliens. This natural allegiance is not limited to any spot—*nullis finibus premitur*—and is due to the king in his natural capacity, rather than his politic, of which he has two, one for England, and one for Scotland. One allegiance is due by both kingdoms to one sovereign.

The point is, whether internaturalization follows that which is one and joint, or that which is several; for if the two realms were united under one law and parliament,

the *postnatus* would be naturalized. As it is, the king is one ; but the laws and parliament are several.

Judgment. *Held* :—That the plea was bad ; it following that the *postnati* were not aliens, and might therefore inherit land in England.

NOTE III.—ON ALLEGIANCE AND ALIENS

Note.—The reasons given for the decision in *Calvin's case* were to some extent based upon the somewhat exaggerated notions of 'divine right' characteristic of the Stuarts, and of many lawyers of that time. By the Act of Union, however, which has united the two kingdoms into one, much of the learning involved has been rendered unnecessary and obsolete. Allegiance is defined by Coke to be 'a true and faithful obedience of the subject due to his sovereign.' It is correlative with protection, and so ceases when the sovereign can no longer *de jure* protect his subjects;[1] thus allegiance is changed by conquest, or by cession of territory under a treaty.[2] It is not governed by locality, but clings to the subject wherever he is: *nemo potest exuere patriam.* And it is indefeasible—its obligation is for life. This was the earlier common law doctrine as to allegiance, but it has been much modified by modern legislation. Allegiance may now be renounced or acquired; and is regulated by the Naturalization Acts of 1870 and 1872 (33 & 34 Vict. c. 14; 35 & 36 Vict. c. 39). As to aliens, stat. 7 & 8 Vict. c. 66 first relaxed the law, and the Naturalization Act, 1870, now provides that real and personal property of every description (except a British ship) may be acquired and held by an alien in the same manner as by a natural-born British subject, and a title to real and personal property may be derived through an alien, precisely as through a natural-born British subject. It also provides for the naturalization of aliens, and enables British subjects to become naturalized in a foreign state, and to be re-admitted to British nationality. The Act contains (sec. 10) declarations as to the national status of women and children, which are substantially as follows:—A married woman is to be deemed a subject of the State of which her husband is for the time being a subject; if a father, being a British subject, or the mother being a British subject and a

Aliens.

[1] 'Allegiance is the tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject.' 1 Bl. Comm. 366.

[2] Forsyth, 'Cases and Opinions on Constitutional Law,' p. 334.

widow, becomes an alien under the Act, every child who during infancy has become resident in the country where the father or mother is naturalized, and has according to the laws of such country become naturalized therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject; but if such father or mother becomes re-admitted to British nationality, the children who have during infancy become resident in the British dominions with their parents are to be taken to be British subjects. There is also a provision that if an alien is naturalized, his children, who during infancy have been resident with their parents in any part of the United Kingdom, shall be deemed to be naturalized British subjects.

A British subject cannot, notwithstanding the Naturalization Act, become naturalized in a State with which this country is at the time at war.[1]

[1] *R.* v. *Lynch*, [1903] 1 K. B. 444; see also *De Jager* v. *Att. Gen. of Natal*, [1907] A. C. 326.

REMEDY AGAINST CROWN

Campbell *v.* Hall. 15 *Geo. III.*, 1774.

Lofft, 655; 1 *Cowp.* 204; 20 *S. T.* 239–354, *and* 1387.

History. This was an action against the collector of customs in the island of Grenada to recover money paid as duty upon exports, on the ground that the duty had been illegally imposed.

It appeared that Grenada had been conquered from the French in February, 1762. By a proclamation in October, 1763, the crown had delegated to the governor power to legislate with the advice and consent of a council and an assembly of representatives. In July, 1764, letters patent were issued under the great seal, imposing a duty upon exports from Grenada.

The question was, whether the crown, after the proclamation of 1763, could still impose a new duty, and this was argued three times upon a special verdict before Lord *Mansfield*, C. J., who gave judgment for the plaintiff.

Judgment. *Held*:—That the crown, having once delegated the power of legislation (including taxation) to a local assembly, cannot afterwards exercise the power of levying taxes there.

In the course of his judgment Lord *Mansfield* affirmed the following amongst other propositions:—That a country conquered by the British arms becomes a dominion of the sovereign in right of his crown, and therefore necessarily subject to the legislative power of the British parliament; that the conquered inhabitants when once received into the conqueror's protection

become British subjects and are no longer enemies or aliens; that the laws of a conquered country continue until they are altered by the conqueror; that, conceding that the sovereign has power without the concurrence of parliament to make new laws for a conquered country, although this is a power subordinate to his power of legislation in parliament, he can make no laws which are contrary to fundamental principles, as *e.g.* giving exemptions from the authority of parliament, or privileges exclusive of his other subjects.

Note.—A recent case in which an unsuccessful attempt was made by proclamation to alter, or at least to depart from, laws which had been duly enacted for the government of an annexed territory is *Sprigg* v. *Sigeau* [1897] App. Cas. 238; 66 L. J. P. C. 44; 76 L. T. 127.

Bankers' Case. 2 *W. & M.*, 1690.

1 *Freeman*, 331; *Skinn.* 601; 14 *S. T.* 1; *Broom Const. L.* 225–231.

History. Charles II. had been accommodated with loans by bankers on the security of the public revenue, and a stat., 19 Car. II. c. 12, made the 'orders and tallies' transferable. In 1671 payment was postponed nominally for a year, but the postponement was continued indefinitely, and many of the bankers and their customers were in consequence reduced to great distress. In 1677 the king gave them partial relief by granting them annuities out of the hereditary excise granted to the crown in 1660, which annuities were paid till 1683. They then fell into arrear and so continued, until, at the Revolution, suits were begun to enforce payment. The procedure was by petition to the Barons of the

Exchequer, asking for payment of the arrears, and the matter was then argued upon a writ of error in the Exchequer Chamber.

The question was (1) whether the grant of the king bound his successors, *i.e.* could the king alienate the revenue fixed in him and his successors; (2) whether the petitioner had adopted a proper remedy. Questions in issue.

Held:—By a majority of the judges (1) that the king could alienate the revenues of the crown; (2) that the petitioners had adopted a proper mode of seeking remedy. Judgment.

The judgment, though reversed by Lord Keeper *Somers*, was reaffirmed by the House of Lords.

Note.—No benefit was derived from the petition of right in this case,[1] until by 12 & 13 Will. III., c. 12, s. 15, the hereditary excise, after 26 December, 1705, was ordered to be charged with an annual sum equal to interest at 3 per cent., until redeemed by repayment of one-half of the principal sum. The total amount of the bankers' debt, as it was called, was 1,328,526*l.*

Viscount Canterbury *v.* The Attorney-General.

5 & 6 *Vict.*, 1842.

1 *Phillips*, 306; 12 *L. J.* (*Ch.*) 381; 7 *Jur.* 224.

This was a petition of right, in which the petitioner claimed compensation from the crown for damage done to his property while Speaker of the House of Commons by the fire which in 1834 destroyed the House of Parliament. The fire had been caused, the petitioner alleged, by the negligence of the servants of the crown, in burning a large quantity of the old tallies from the History.

[1] Per Lord *Mansfield*, C. J., in *Macbeath* v. *Haldimand*, 1 T. R. 172.

Exchequer, in so careless a manner as to overheat certain stoves. To the petition the Attorney-General put in a general demurrer. The argument turned on the meaning of the maxim, 'The king can do no wrong,' which, it was maintained, covered civil torts as well as criminal acts.

Argument.

The other side argued that no construction could be right which should enable the king to wrong the subject without making compensation, for the prerogatives exist for the advantage of the people. It was admitted, indeed, that for the personal negligence of the sovereign, no proceedings could have been maintained.

Lord *Lyndhurst*, C., allowed the demurrer.

Judgment.

Decided:—That a petition of right does not lie to recover compensation from the crown for damage due to the negligence of the servants of the crown.

Tobin *v.* The Queen. 27 & 28 *Vict.*, 1864.

33 *L. J.* (*C. P.*) 199; 16 *C. B. N. S.* 310; 10 *L. T.* 762.

History.

The captain of one of her late Majesty's ships had taken and destroyed an innocent vessel, as being a vessel engaged in the slave-trade. The owners brought a petition of right against the crown to recover damages. The Attorney-General demurred on the ground that the petition of right did not show that the crown was in law responsible for any of the alleged unlawful acts of Captain Douglas.

The demurrer was argued before *Erle*, C. J., and the Court of Common Pleas.

Judgment.

Held: 1. That in seizing the ship Captain Douglas was not acting in obedience to a command of Her

Majesty, but in the supposed performance of a duty imposed upon him by an Act of Parliament, *viz.* the Act for the Suppression of the Slave Trade. 2. That even assuming that he was an agent employed by the queen to seize vessels engaged in the slave trade, he was not acting within the scope of his authority in seizing a ship not so engaged, and therefore could not make his principal liable. 3. That a petition of right cannot be maintained against the crown to recover damages for a trespass.

Note.—The words of the judgment show that an action might lie against Captain Douglas, as having exceeded his authority. Comp. *Madrazo* v. *Willes ; Buron* v. *Denman*, *post*, and the note on the 'Liability of Officers' (p. 101). The judgment in this case was approved by the Court of Queen's Bench, in *Feather* v. *The Queen*,[1] 1865, where it was held that a petition of right does not lie to recover damages for an infringement of patent rights by the crown. In *Thomas* v. *The Queen*,[2] 1874, it was decided that a petition of right lies to recover unliquidated damages for the breach of a *contract* made on behalf of the crown by a duly authorized agent.

[1] 35 L. J. Q. B. 200 ; 12 L. T. 114 ; 6 B. &. S. 257.
[2] L. R. 10 Q. B. 31 ; 44 L. J. Q. B. 9.

NOTE IV.—ON REMEDIES AGAINST THE CROWN

The ordinary modes of action are not available against the king; this is a practical corollary from the maxim that the king can do no wrong. It has, however, been doubted whether this has always been the case, although no example of an ordinary action against the reigning sovereign can be found in our legal history. The subject is, however, not entirely without a remedy, for except in cases of pure tort, he may usually proceed by petition of right. The origin of the procedure by petition of right is probably to be found in the immemorial practice of approaching the sovereign by petition when a redress of grievances is sought for or an act of grace and favour solicited.[1] Where the crown was in possession of any hereditament or chattel, and the petitioner controverted the title of the crown, he set forth his claim in a petition usually addressed in early times to the king in Parliament, and the answer *soit droit fait al partie* (let right be done to the party) being endorsed thereon by the king, the petition was referred either to one of the ordinary courts or to a commission appointed to try the question as between party and party.[2] This procedure remained practically unchanged until 1860.

The proceedings upon petitions of right have been simplified by the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), and they may now be intituled in any division of the High Court. They are left at the Home Office for His Majesty's fiat, and upon that being obtained[3] the subsequent proceedings follow the practice in ordinary actions as far as possible.

If the subject were injured by a *grant* by the crown made to other parties, the remedy was formerly by a writ of *scire facias*, but it would appear from sec. 5 of the Petitions of Right Act, 1860, that any injustice so done may now be remedied under a petition of right, a copy of which is to be served on the grantees.

[1] See Clode 'On Petition of Right,' ch. 1. [2] Clode, ch. 2.

[3] If the fiat is refused the proceedings cannot go on, 23 & 24 Vict. c. 34, ss. 2, 3; and an action will not lie against a minister for advising the sovereign to refuse his fiat, *Irwin* v. *Grey*, 3 F. & F. 635.

In cases where it has been alleged that executive officers of the crown have failed to perform their duties and have thus occasioned damage to members of the public, attempts have not unfrequently been made to induce the High Court of Justice to enforce the performance of those duties by the issue of a writ of *mandamus*. Occasionally, no doubt, such writs have been issued, but it appears now to be well settled that, although in cases where servants of the crown have been constituted by statute agents to do particular acts a mandamus will lie against them as individuals designated to do those acts, yet where they are acting merely as servants of the crown, and owe no legal duty to the applicant, he cannot ask for a mandamus to compel them to do their duty to the sovereign their employer. So in *The Queen* v. *The Lords Commissioners of the Treasury*[1] the court refused a mandamus to compel the defendants to pay the costs of certain prosecutions out of moneys granted and appropriated by parliament and applicable to that purpose; *Cockburn*, C. J., in his judgment observing: 'Independently of authority, I think there is no doubt whatever that we must look upon them (*i.e.* the Lords of the Treasury) as servants of the crown. The money is voted by parliament as a supply to the crown. . . . It is true that the money is appropriated to a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true that . . . it is a supply to be got at by a certain specified process, and it is true that the crown must issue warrants or orders under the sign manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But, nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the crown.' In such cases the remedy, if there be one at all, is by petition of right. It is not, however, unusual where a legal question arises, for the advisers of the crown to waive the objection to the jurisdiction to grant a mandamus in order that the opinion of the court may speedily be obtained.[2]

[1] L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 26 L. T. 64; 20 W. R. 336; see also *R.* v. *Secretary of State for War* [1891] 2 Q. B. at p. 334; 60 L. J. Q. B. 457; 64 L. T. 764; 40 W. R. 5.

[2] As *e.g.* in *R.* v. *Commissioners of Inland Revenue* [1891] 1 Q. B. at p. 488; 60 L. J. Q. B. 376; 64 L. T. 57; 39 W. R. 317.

HABEAS CORPUS

Darnel's Case (Five Knights' Case). 3 *Car. I.*, 1627.

3 *S. T.* 1; *Broom, Const. L.* 158–204.

History. Sir Thomas Darnel was one of the five knights who had been imprisoned for refusing to obey privy seals for forced loans to the king. An application was made to the Court of King's Bench for a writ of *habeas corpus* directed to the warden of the Fleet to show the cause of the imprisonment, that thereupon the court might determine whether the imprisonment was legal or illegal. The writ was granted, and the warden made a return alleging that the prisoner was in his custody by virtue of a warrant of the Attorney-General which stated that the prisoner 'was and is committed by the special command of His Majesty.' Similar writs were issued and returns made in the case of the other four prisoners.

Various objections were taken by counsel for the prisoners to the form of the return, especially that no cause for the commitment was specified other than the command of the king, and that at any rate the prisoners ought to be brought up to answer any complaint made against them, and not remanded to prison for an indefinite period.

Judgment. The court, however, decided that the rule had been, where an *insufficient* cause of commitment was expressed, to deliver the party if the case so required. But where *no* cause had been expressed, the prisoner had ever been remanded.

Held:—That the return was sufficient.

The five knights accordingly remained in prison until they were discharged by the king in council, January 29, 1628, the *habeas corpus* having been moved on November 3 previously. Further history.

When parliament met in March there was much discussion, and a conference took place between the two Houses, when Sir Dudley Digges, Littleton, Selden, and Sir E. Coke argued for the Commons.

The conference resulted in the *Petition of Right*, which insists that: 1. By Magna Carta no freeman is to be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land. 2. By 28 Edw. III., no man is to be imprisoned without being brought to answer by due process of law. To this petition the king at length assented.

Note.—The doctrines here set forth were finally vindicated by their incorporation in 1679 into the Habeas Corpus Act, 31 Car. II. c. 2, 'An Act for the better securing the Liberty of the Subject.'

SLAVERY

Pigg *v.* Caley. 15 *Ja. I.*, 1617.

Noy, Reports, 27.

History. The plaintiff brought an action of trespass against Caley for taking his horse.

Plea. The defendant pleaded that he was seised of a manor to which the plaintiff was a villein regardant, and that defendant and all those seised of the manor had been seised of the plaintiff and his ancestors.

Verdict and judgment. The plaintiff replied that he was free, and the issue was found for him.

Note.—This case of *Pigg* v. *Caley* is interesting as the last instance in which an assertion of villeinage was made in an English court of law.

Crouch's case in 9 & 10 Eliz.[1] is usually said to be the last, but, as is pointed out in Mr. *Hargrave's* argument in the case of *Sommersett*, there are four later instances to be found in print, in 18 Eliz., 1 Ja. I., 8 Ja. I., which was never determined, and finally that here reported in 15 Ja. I.

In the case of Crouch, Butler entered into certain lands of W. Crouch as into lands purchased by his villein, and made a lease of them to his servant Fleyer, who entered, and was ejected by Crouch. Upon an action for this ejectment Crouch pleaded not guilty, and the verdict upon the issue passed for him against the plaintiff.

In another action of *Fleyer* v. *Crouch* it was alleged 'that Butler and his ancestor, and all those whose estate he hath, have been seised of Crouch and his ancestors as of villeins regardant from time whereof memory, &c.' After a trial of the issue and a special verdict it was found 'that the ancestors

[1] Dyer, 266, pl. 11 (*Butler* v. *Crouch*); 283, pl. 32 (*Fleyer* v. *Crouch*).

of Butler were seised during all that time of the ancestors of Crouch, as of villeins regardant, &c., until the first year of Henry VII., and that Crouch was a villein regardant to the said manor, and that no other seisin of Crouch or his ancestors was had since, but whether the said seisin of the manor aforesaid be in law a seisin of the aforesaid Crouch and his ancestors from the aforesaid first year of Henry VII., they pray the advice and discretion of the court, &c. . . . and afterwards it was resolved by all the Justices of the Bench that the plaintiff shall not recover upon this verdict, and that the prescription had failed since the 1st Henry VII.'

Many causes tended to the gradual decay and extinction of villeinage in England, such as the development of the towns, repeated manumissions encouraged as they were by the Church, the wars carried on against France, the growing expensiveness of serf labour, and the discontent of the peasants themselves, as testified in various risings. But the cause with which we are here most specially concerned, was the discouragement of villeinage by the courts of justice. They always presumed *in favorem libertatis*, and threw the whole burden of proof upon the lord, not only in the writ *De nativo habendo*, where he was plaintiff, but also in the writ *De homine replegiando*, where the villein was plaintiff. And nonsuit of the lord in a *De nativo habendo* was a bar to another such writ, and a perpetual enfranchisement; but a nonsuit of the villein in a *De libertate probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind.

Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord which legal refinement could strain into an acknowledgment of the villein's liberty.[1]

In Scotland in the year 1775, as appears from the preamble of 15 Geo. III. c. 28, there were many colliers, coal-bearers, and salters, who were then in a state of slavery or bondage, bound to the collieries and salt-works where they worked for life and transferable with such works when their masters had no further use for them. This form of bondage was finally put an end to in 1799 by 39 Geo. III. c. 56.

A contract of service for the term of the servants' life is not illegal (*Wallis* v. *Day*, 2 M. & W. 273) though it has been said

[1] 20 S. T. 35–47.

(*ibid.*) that such a contract should be under seal. But specific performance of a covenant for personal service will not be ordered.

Shanley *v.* Harvey. 2 *Geo. III.*, 1762.

2 *Eden*, 126.

History. A lady, the owner of a negro servant called Harvey, had made a *donatio mortis causâ* to him. Her administrator filed a bill against the negro and his trustees, claiming the gift as part of the deceased's estate.

Judgment. The bill was dismissed with costs by *Northington*, C. *Held*:—As soon as a man sets foot on English ground he is free. A negro may maintain an action against his master for ill-usage, and may have a *habeas corpus* if restrained of his liberty.

Note.—The subject of *Slavery* is perhaps strictly not a question of Constitutional Law; since personal liberty in this sense is one of those primary general rights, maintainable not against the government as such, but against all the world. Yet in deference to ordinary usage the chief cases connected with the doctrine of slavery in England are here included.

The case above is given as an earlier assertion of the English doctrine than Lord *Mansfield's* famous judgment in *Sommersett* v. *Stewart*, although the question is here less directly before the Court. The latter decision, while affirming the doctrine expressed by Lord *Northington*, was only extorted from Lord *Mansfield* after he had delayed judgment for three terms, and had vainly struggled to induce the parties to a compromise.

It is noticeable that only in 1729 Mr., afterwards Lord, *Talbot*, A.-G., and Mr. *Yorke*, afterwards Lord *Hardwicke*, S.-G., had given an opinion 'that a slave coming from the West Indies to Great Britain doth not become free,' and

pledged themselves to the London Merchants to save them harmless in such matters.[1] And in *Smith* v. *Brown* and *Smith* v. *Gould* (1706), 2 Salk. 666, the judges apparently considered that if the claim were properly formulated in the pleadings a right of property in a negro would be recognized by the Court. The question was doubtless one of difficulty inasmuch as the former legal status of villeinage was indisputable and had never been abolished, and by several English statutes the legal existence of slavery in the Colonies had been fully recognized.

Sommersett's Case. 12 *Geo. III.*, 1771–2.

Lofft, 1–19; 20 *S. T.* 1–82; *Broom, Const. L.* 59–114.

History. Sommersett, a Virginian slave, having been brought to England by his master, left his service and refused to return. His master seized him and committed him to the custody of a ship captain for the purpose of sending him to Jamaica to be sold as a slave. The captain was ordered by writ of *habeas corpus* to return the body of James Sommersett with cause of detainer into the King's Bench. The captain's return to the writ set forth the above facts.

Sommersett's cause was argued by Mr. Hargrave:

Argument. 1. The only kind of slavery recognized by English law is Villeinage, and the last instance of that in the courts was 15 James I. (*Pigg* v. *Caley*, p. 66 *ante*). Even here the judges had always presumed in favour of liberty, and the law recognized no villein save by prescription or the villein's confession. 2. The fact that no new form of slavery has since arisen affords a presumption that the law will admit none.

[1] Per Lord *Stowell* in *The Slave Grace's Case*, 2 Hagg., at p. 104.

Judgment.

Lord *Mansfield*, C. J., delivered judgment that the return was insufficient. 'The state of slavery . . . is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England and therefore the black must be discharged.'

Decided:—That slaves coming into England cannot be sent out of the country by any process to be there executed, but if forcibly detained here are entitled to be discharged by writ of *habeas corpus*.

Note.—All this case expressly decided was, that a slave coming here cannot be sent out of the country against his will. In *Knight* v. *Wedderburn*, 1778, a Scotch case decided a few years later, Sommersett's Case was relied on, and its principle extended, to declare that the slave was not bound to serve his master here (v. 20 St. Tr. 1 n.). The 'inconvenience' mentioned in Lord *Mansfield's* judgment was that (as was alleged in the argument) there were then about 15,000 negro slaves in the kingdom who would all be affected by the judgment.

Forbes *v.* Cochrane (and Cockburn). 55 *Geo. III.*, 1815.

2 *B.* & *C.* 448.

History.

The plaintiff was a British merchant domiciled in Spanish Florida, and held there, as it was lawful to do, a number of slaves. Thirty-eight of these deserted one night, and were found next day upon a British ship of war lying within a mile of the shore. The commander declined to compel them to return, and an action was therefore brought by the plaintiff against him and against his commander-in-chief, who had endorsed his conduct.

A jury found for the plaintiff subject to a special case which was argued before *Bayley*, *Holroyd*, and *Best*, JJ., and decided for the defendants.

In an English ship, which may for this purpose be considered as a 'floating island,' these slaves were subject only to English law—and by that they were not slaves. The defendants did all they were legally bound to do to assist the plaintiff, perhaps more ; they permitted him to endeavour to *persuade* the slaves to return. They were not bound to *force* them to return. Judgment.

Decided, therefore, that no action will lie against an officer who receives slaves into a British vessel and refuses to give them up.

Note.—Mr. Justice *Stephen* says (2 Hist. Crim. Law, 55) that the judgment in this case proceeded on the ground that the ship was not in Spanish waters at the time, and that would appear from the judgment of *Best*, J., at p. 467 of the report. But Mr. Justice *Stephen* expresses an opinion that commanding officers of British ships of war *in foreign territorial waters* are under an obligation imposed by international law to deliver up fugitive slaves when required to do so by the local authorities in accordance with the local law, and that it is doubtful whether by refusing to discharge that obligation they might not incur a personal responsibility to the owners of the slaves.

Case of the Slave Grace (The King *v.* Allan).

8 *Geo. IV.*, 1827.

2 *Hagg. Adm. R.* 94–134.

Mrs. Allan, of Antigua, had brought a female slave to England in 1822, and the next year returned, taking the slave with her to Antigua. In 1825 the slave was seized by the Custom House at Antigua as forfeited to History.

the king, on suggestion of having been illegally imported in 1823. The case was decided in favour of Mrs. Allan in Antigua, and an appeal was brought by the crown to the Admiralty Court in England.

Judgment. Per Lord *Stowell.* This question turns really upon the count that the slave Grace, 'being a free subject of his Majesty, was unlawfully imported as a slave from Great Britain into Antigua.'

Held:—That the slave having accompanied her mistress into England, and there taken no step to establish her freedom, upon returning voluntarily to a country where slavery was legal, reverted to the condition of a slave; and her stay in England had only put her liberty, as it were, into a sort of parenthesis.

RIGHT OF IMPRESSMENT

Rex *v.* Broadfoot. 15 *Geo. II.*, 1743.

Foster, 154; 18 *S. T.* 1323.

History. At the gaol delivery held at Bristol, Broadfoot was indicted for the murder of Calahan, a sailor belonging to one of his Majesty's ships. The deceased had been shot by Broadfoot, while the latter was endeavouring to avoid being pressed. The men engaged in pressing were not accompanied by a commissioned officer as required by the terms of the press-warrant.

Direction to Jury. Mr. Serjeant, afterwards J., *Foster*, as Recorder, directed the jury that as no commissioned officer was present everything the press-gang did must be regarded as an illegal attempt upon the liberty of the person concerned, and he told them to find the prisoner guilty of manslaughter. But 'this being a case of great expectation,' he thought it proper to deliver his opinion that—

Pressing for the sea-service is legal, provided the persons impressed are proper objects of the law, and those employed in the service are armed with a proper warrant.

Note.—The practice of impressment, though now it may perhaps be considered of merely historic interest, is important in connexion with constitutional doctrines, and especially the English doctrine of personal liberty. Nor is it, perhaps, altogether impossible to imagine a revival of the practice if the public necessity should so require.

Impressment of soldiers was always less used than that of sailors. The statute 16 Car. I. c. 28, after reciting that by law

no subject ought to be impressed or compelled to go out of his county to serve as a soldier 'except in case of necessitie of the sudden coming in of strange enemies into the kingdom,' or unless bound by the tenure of his lands, authorized an impressment during the following year. Since then impressment for the army has never been exercised except by statute, as was the case, for example, in 1706 (4 Anne, c. 10), in 1757 (30 Geo. II. c. 8), and in 1779 (19 Geo. III. c. 10, during the American war). Hallam[1] has overlooked this last statute, when he speaks of 1757 as the last occasion; the impressment was, however, confined to such able-bodied idle and disorderly persons who did not exercise a lawful trade or employment or have some substance sufficient for their support, and to convicted smugglers.

The crown has, however, by immemorial right the power to compel its male subjects between, as now fixed by statute, the ages of 18 and 30 to serve in the Militia for home defence only, the selection of the men bound to serve being by ballot. This is regulated by various statutes, chiefly by 42 Geo. III. c. 90, 23 & 24 Vict. c. 120, and 45 & 46 Vict. c. 49. But by annual Acts of Parliament the proceedings for raising the Militia by ballot have been for many years annually suspended unless an Order in Council should be made to the contrary, and this suspension is still continued by an Expiring Laws Continuance Act.[2]

The impressment of sailors was generally regarded as a prerogative of the crown, though its legality was questioned by some, as, *e.g.* by Emlyn, who, writing in 1730,[3] observes that he does not know that 'the practice ever had the sanction of one judicial determination.' Foster, also, could find no decision directly in favour of the practice, though he had no doubt as to its legality. His view was afterwards affirmed by Lord *Mansfield* in *R.* v. *Tubbs*, 1776,[4] 'the power of pressing is founded upon immemorial usage;' and Lord *Kenyon* in *Ex parte Fox*, 1793,[5] 'the right of pressing is founded on the common law, and extends to all sea-faring men.'

[1] 3 Const. Hist. 212.
[2] See Manual of Military Law, 164 *et seq.*
[3] See Preface to State Trials, p. xxviii.
[4] Cowp. 512.
[5] 5 T. R. 276.

GENERAL WARRANTS

Leach *v.* Money. 6 *Geo. III.*, 1765.

3 *Burr.* 1692, 1742; 19 *S. T.* 1001; *Broom, Const. L.* 522–543.

History. This was an action of trespass by Mr. Wilkes's printer against three king's messengers for trespass and false imprisonment. The defendants justified their conduct under a warrant of Lord Halifax, a principal Secretary of State, which required the defendants to search for the authors, printers, and publishers of an alleged seditious libel entitled *The North Briton*, and to apprehend them together with their papers. The plaintiff was apprehended and released after four days, as he turned out not to be the printer. The jury found for the plaintiff—400*l.* damages.

Argument. Upon a bill of exceptions being tendered and a writ of error brought, it was argued that such warrants had been sanctioned by long custom; and that a secretary of state, as a sentinel of the public peace, must have the power to issue them. As a conservator of the peace, he was protected by statute 7 Ja. I. c. 5; 24 Geo. II. c. 44.

Judgment. Per Lord *Mansfield*, C. J.:—There is no case for these uncertain warrants; it is not fit that the judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and give definite directions to the officer as to the person to be arrested. Nor is it enough that the usage has been so. A usage, to grow into law, ought to be a general usage; this is but the usage of a particular office, contrary to the usage of all other justices. No degree of antiquity can give sanction to a usage bad in itself.

The warrant had not been pursued, for the person taken up was neither author, printer, nor publisher, and this alone was a sufficient justification for the judgment, which was accordingly affirmed. As the justice would not be liable, the officer has no protection.

Wilkes *v.* Wood. 3 *Geo. III.*, 1763.

19 *S. T.* 1153; *Broom, Const. L.* 544–554.

Wood was secretary to a secretary of state, and, with a constable and several king's messengers, entered into Mr. Wilkes's house, broke open his locks, and seized his papers. The warrant upon which this was done merely directed the messenger 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled *The North Briton*, No. 45, and these or any of them having found, to apprehend and seize, together with their papers.' Wilkes brought an action of trespass. The action was tried before *Pratt*, C. J. [Lord Camden], and a special jury.

Judgment. The Chief Justice in his charge to the jury pointed out that the defendant claimed a right to force persons' houses, break open escritoires and to seize papers, &c., upon a general warrant where no inventory was made of the things taken away and no offenders' names were specified in the warrant, and therefore a discretionary power was given to messengers to search wherever their suspicions might chance to fall. If such a power was vested in a secretary of state and he could delegate this power, it certainly might affect the person and property of every man, and was totally subversive of the liberty of the subject.

Verdict for the plaintiff—damages, 1000*l.*

Entick *v.* Carrington. 6 *Geo. III.*, 1765.

19 *S. T.* 1030; *Broom, Const. L.* 555–609.

The defendant, with three other persons, king's messengers, acting under a warrant from a secretary of state, had forcibly entered the plaintiff's house, he being alleged to be the author of a seditious libel, and carried away his books and papers: upon which he brought an action of trespass. The jury returned a special verdict, stating that the defendant had acted upon a warrant from a secretary of state, authorizing the arrest of the plaintiff by name and the seizure of his papers, and that it had been the custom for secretaries of state since the Revolution to issue such warrants; they assessed the damages at 300*l.* if the defendants were liable. History.

This special verdict was twice argued, and judgment was delivered by Lord *Camden*, C. J., for the plaintiff.

A secretary of state is the king's private secretary, but has not in consequence the authority of a magistrate. Nor has any magistrate such a power of commitment without a power to examine upon oath. No individual privy councillor, as such, has a right to commit. As to the power of seizing papers, that is not supported by one single citation from any law book extant, and is claimed by no other magistrate in this kingdom, not even by the Lord Chief Justice of the King's Bench. Judgment.

Decision, therefore:—'We are all of opinion that the warrant to seize and carry away the party's papers, in the case of a seditious libel, is illegal and void.'

NOTE V. ON GENERAL WARRANTS

The practice of issuing general warrants to arrest, in which no particular person was specified, is said to have originated with the Star Chamber. It was afterwards revived by the Licensing Act of Charles II., and authorized to be used by the Secretary of State, and the practice is supposed to have continued after the expiration of that Act in 1694. At all events, it had been frequently exercised even after the Revolution.

The illegality of such warrants was finally settled, as well as the illegality of warrants to seize papers, by the judgments in the above cases. Each of the cases given decides a different point: *Leach* v. *Money* that a general warrant to seize some *person* not named is illegal; *Wilkes* v. *Wood* decides the illegality of a warrant to seize the *papers* of a person not named; while *Entick* v. *Carrington* carries the latter point further, and establishes the illegality of a warrant to seize the papers of a person named—manifestly a sort of general warrant as regards the papers. These decisions are supported by two able judgments—of Lord *Mansfield*, in *Leach* v. *Money* in error, and of Lord *Camden* in *Entick* v. *Carrington*.

In a subsequent action, tried in 1769 before *Wilmot*, C. J., and a special jury, against Lord Halifax, the Secretary of State who had issued the warrants in question, Wilkes recovered 4000*l*. damages,[1] and we are told that 'the verdict was much less then the friends of the plaintiff expected, and so little to the satisfaction of the populace, that the jurymen were obliged to withdraw privately, for fear of being insulted.'

The House of Commons, while the law courts were thus engaged, was also debating the subject: and in 1766 passed resolutions declaring such warrants not only to be illegal, but, if executed on the person or papers of a Member of the House, to be a breach of privilege. As to this declaration, it is to be observed that Lord *Mansfield*, in a speech in the House of Lords, objected to it on the ground that declarations of the

[1] 19 S. T. 1406–1415.

law by either House of Parliament have no binding force, and are not necessarily to be adopted by the courts of law.

At the same time he affirms that 'general warrants are no warrants at all, because they name no one'; with which may be compared Wilkes's refusal to obey the warrant, as 'a ridiculous warrant against the whole English nation.'[1]

The only warrant recognized by the law which can in any way be called a 'general' warrant is a search warrant for goods stolen, or fraudulently obtained, or unlawfully pawned, or in respect of which forgery has been committed. The origin of this kind of warrant is unknown, and Lord *Camden* in his judgment in *Entick* v. *Carrington* says that it crept into the law by imperceptible practice. The practice in issuing these search warrants is now, however, in most cases regulated by 24 & 25 Vict. c. 96, s. 150 (the Larceny Act), which provides that a justice of the peace may, upon proof by a credible witness of a reasonable cause to suspect that any person has in his possession or on his premises any property with respect to which any offence punishable under that Act shall have been committed, grant a warrant to search for such property. It is not, however, necessary (although it is usual) to specify the exact goods for which a search is to be made.[2] The place to be searched must be specified in the warrant, as a general warrant to search all suspected places would be bad.[3]

[1] 2 May, Const. Hist. Eng. 255-262.

[2] *Jones* v. *German*, [1896] 2 Q. B. 418; [1897] 1 Q. B. 374; 66 L. J. Q. B. 281; 75 L. T. 161; 60 J. P. 616.

[3] 5 Burn's Justice of the Peace (30th Ed.), p. 1182.

LIABILITY OF PUBLIC OFFICERS

Lane *v.* Cotton (and Another). 12 *Will. III.*, 1701.

1 *Salkeld*, 17; 1 *Ld. Raymond*, 646.

History. Sir Robert Cotton and another were appointed postmasters-general by letters patent, with power to appoint deputies and servants. The plaintiff sued them for the loss of some exchequer bills which, by the alleged negligence of the defendants, were stolen from a letter in the post-office.

Judgment. The case came before *Holt*, C. J., and three other judges. *Holt* held that the defendants were liable, but the three other judges held that it was impossible for the Postmaster-General, who had to execute this office in such distant places at home and abroad, and at all times, by so many several hands, to be able to secure everything.

Decided:—That a public officer is not liable for the negligence or defaults of his subordinates.

Note.—Lord *Raymond* says (at p. 658), that the plaintiff intended to bring a writ of error, upon which the defendants paid the money, but this appears to be very doubtful.[1] This decision was followed in the case of *Whitfield* v. *Lord Le Despencer*, 1778; Cowp. 754, decided by Lord *Mansfield*, C. J., and the Court of King's Bench. And in *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. at p. 124, Lord *Wensleydale* states the well settled principle of law to be that when a person is acting as a public officer on behalf of Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct

[1] See Cowp. at p. 759.

of servants, though appointed by himself; the subordinates are the servants of the public, not of the head of the department.

If a public officer himself abuses his trust either by an act of omission or commission amounting to a positive breach of his duty, and thus causes an injury to an individual, an action may be maintained against him (*Henley* v. *Mayor, &c. of Lyme*, 5 Bing. at p. 107; *Robinson* v. *Gell*, 12 C. B. 191). See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which, however, only applies where the officer has acted in supposed pursuance and with a *bonâ fide* intention of discharging his duty, although in fact he may have acted illegally (see *Theobald* v. *Crichmore*, 1 B. & Ald. 227).

In a case of trespass by an inferior official acting directly under the orders of his superior, who has substantially directed the act complained of to be done, both officials may be sued. If it cannot, however, be shown that the superior directed the trespass, then the person actually committing it is alone liable (*Raleigh* v. *Goschen*, [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90).

Macbeath *v.* Haldimand. *26 Geo. III.*, 1786.

1 *T. R.* 172.

History. The defendant, as Governor of Quebec, had entered into certain contracts with the plaintiff to be supplied with goods for the public service. Upon the ground of their being unreasonable, only a part of the plaintiff's charges had been paid by the Treasury, and he was left to his remedy for the rest.

He then brought this action for his further claim against the defendant, and the jury, under direction, found for the latter.

Judgment. Upon motion for a new trial the rule was discharged by Lord *Mansfield*, C. J., *Willes*, *Ashurst*, and *Buller*, JJ.

Held:—That the defendant was not personally liable. The goods were for the use of the crown, as the plaintiff well knew. Great inconveniences would result from considering a governor or commander as personally responsible in such cases. For no man would accept of any office of trust under government upon such conditions.

Note.—See also *Palmer* v. *Hutchinson*, 6 App. Cas. 619; 50 L. J. P. C. 62; 45 L. T. 180, where the above case was followed. Of course it is possible in cases of this kind for the public officer, like any other agent, to make himself liable personally by an express contract that he will be so liable (as in *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677); but there must be distinct evidence of such a contract. Moreover the common law doctrine that an agent, who makes a contract on behalf of his principal, is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, has no application in the case of a contract made by a public officer acting as such on behalf of the Crown, *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420; 76 L. T. 444; 45 W. R. 355.

Gidley *v.* Lord Palmerston. 3 *Geo. IV.*, 1822.

3 *Brodr. & B.* 275.

History. This was an action against the defendant, as Secretary of State for War, by the executor of a war-office clerk for arrears of retired allowance, which the defendant was authorized to pay out of moneys provided by parliament. At the trial a verdict was found for the plaintiff subject to the opinion of the Court.

The special case was argued before *Dallas*, C. J., and the Court of Common Pleas.

Held:—'That an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment.' Judgment.

Note.—With this and the previous case may be compared *O'Grady* v. *Cardwell*, 1872 ; 21 W. R. 340 (cp. 20 W. R. 342).

LIABILITY OF GOVERNORS AND VICEROYS

Mostyn *v.* **Fabrigas.** 15 *Geo. III.*, 1774.

Cowp. 161 ; 1 *Smith, L. C.* 591.

History. This was an action in the Common Pleas against the governor of the island of Minorca for illegally imprisoning and banishing the plaintiff without trial, on the ground that the plaintiff was concerned in an alleged riot. The acts complained of were committed in Minorca, but the declaration formally alleged that they were committed in London where the venue was laid. The defendant pleaded 'not guilty,' and a special plea alleging that he was Governor of the island, that the plaintiff was raising a sedition and mutiny, and that in consequence thereof he caused him to be imprisoned there, which as Governor he had a right to do. The plaintiff took issue upon these pleas, and the jury found in his favour with 3000*l.* damages.

Argument. The case was argued on error in the King's Bench, principally on the ground for the defendant, that no action would lie in England for an act committed in Minorca upon a native of that island.

Judgment. Judgment per Lord *Mansfield*, C. J. : It is impossible there could ever exist a doubt but that a subject born in Minorca has as good a right to appeal to the king's courts of justice as one who is born within the sound of Bow bell. To repel the jurisdiction of the king's court you must show another jurisdiction ; but here no other is even suggested. The effect or extent of the king's

letters patent which gave the Governor his authority can only be tried in the king's courts, so that a governor must be tried in England, to see whether he has exercised the authority delegated to him legally and properly.

An action lies against a governor in the courts of this country for injuries committed by him in the possession of which he is governor.

Note.—It was also argued for the defendant that no action would lie against him as governor acting in a judicial capacity. To this Lord *Mansfield* assented, but pointed out that it had not been pleaded, nor was it even in evidence, that the defendant sat as judge of a court of justice. It may be noted that Minorca was a British possession from 1763 to 1782.

Hill *v.* Bigge. 5 *Vict.*, 1841.

3 *Moo. P. C. C.* 465; *Broom, Const. L.* 622–655.

History

An action had been brought against the Governor of the island of Trinidad, Sir George Hill, in the court of civil jurisdiction there, for a debt incurred in England to English creditors, and before his appointment as governor. He appeared under protest, and pleaded that he could not be sued in the court of a colony of which he was the governor. The plea was overruled, and the case decided against him.

Argument.

He now appealed to the Privy Council, and it was argued that he, being by the terms of his commission vested with legislative as well as executive power, was not within the jurisdiction of the courts in the colony he governed.

Judgment.

In the judgment (delivered by Lord *Brougham*) the

judgment of the colonial court was affirmed, and it was pointed out that (1) the authority of a governor is only delegated from the sovereign, and is strictly limited by the terms of his commission; (2) the crown itself may be sued, though in a particular manner; (3) the judges of the courts in this country are liable to be sued in their own courts.

Decided: — That an action will lie against the governor in the court of his colony.

Phillips *v.* Eyre. 30 & 31 *Vict.*, 1867.

L. R. 4 *Q. B.* 225, 6 *Q. B.* 1; 40 *L. J. Q. B.* 28; 22 *L. T.* 869; 10 *B. & S.* 1004.

History. This was an action of assault and imprisonment against the defendant, who was Governor of Jamaica, and upon the outbreak of a rebellion there had proclaimed martial law, and taken various measures for the suppression of the rebellion, in the course of which the acts were committed for which the action was now brought.

Plea. The defendant in one of his pleas alleged that the grievances complained of were covered by an Act of Indemnity which had been passed in 1866 by the Jamaica legislature, and that the action therefore could not be maintained.

Replication. To this the plaintiff replied that the defendant was still governor at the passing of the Act of Indemnity, which could, therefore, only have become law by his consent. It was also urged in argument that an Act of the Jamaica legislature could not bar the plaintiff's right to maintain an action in England.

The defendant demurred, and the demurrer was

heard in the Queen's Bench, and then upon error in the Exchequer Chamber, where judgment was delivered for the defendant by *Willes*, J.

Held:—(1) That the governor of a colony can legally give his consent to a bill in which he is personally interested; (2) that the Act of a colonial legislature must be treated in accordance with the principles of the comity of nations, that consequently where by the colonial law an act complained of is lawful, such act, though it would have been wrongful if committed here, cannot be made the ground of an action in an English court, and that the same reasoning applies where an act is afterwards legalized by a colonial statute (see on this last point the judgment of *Cockburn*, C. J., in the Queen's Bench). Judgment.

Musgrave *v.* Pulido. 43 *Vict.*, 1880.

5 *App. Cas.* 102; 49 *L. J. P. C.* 20; 41 *L. T.* 629; 28 *W. R.* 373.

This was an appeal to the Privy Council from the Supreme Court at Jamaica. The plaintiff in the action had there sued the defendant for a trespass, in seizing and detaining a schooner of which the plaintiff was charterer. History.

The defendant pleaded that he was governor of the island, and entitled to the privileges of that office, and that the acts complained of were done by him as governor, and as acts of state. The Supreme Court overruled the plea, and ordered the defendant to answer further, and the defendant appealed.

It was contended for the appellant that the plea was

good as a plea of privilege, and that it also disclosed a good defence to the action.

Judgment. Judgment was delivered by Sir *Montague Smith* affirming the decision of the court below.

Held:—(1) That a governor is not privileged from being sued in the courts of his colony; (2) that it is within the province of municipal courts to determine whether any act of power done by a governor is within the limits of his authority, and therefore an act of state.

Luby *v.* Lord Wodehouse. 28 *Vict.*, 1865.

17 *Ir. C. L. R.* 618–640.

Action against a Viceroy. The plaintiff was the proprietor of the *Irish People* newspaper, and had been himself arrested, and his office had been broken into, and his working plant, books, and papers had been carried away and detained by the police. He brought an action against the Lord Lieutenant in the Irish Court of Common Pleas in trespass, trover, and detinue. The Lord Lieutenant did not appear and defend the action, but the Attorney-General applied for an order to stay all proceedings, upon the ground (*inter alia*) that the acts complained of were done by the defendant in his capacity as Lord Lieutenant of Ireland.

Judgment. *Held*:—That no action is maintainable against the Lord Lieutenant of Ireland during his continuance in office for any act done by him in his capacity of Lord Lieutenant.

Where such an action has been brought, the court will on motion direct the writ of summons and plaint to

be taken off the file without putting the Lord Lieutenant to plead to the jurisdiction.

That the question as to whether or not the act was done by the defendant in his capacity of Lord Lieutenant is not a proper one to be submitted to a jury.

NOTE VI.—ON THE LIABILITY OF GOVERNORS AND VICEROYS

It is now well settled that a colonial governor may be sued not only in this country but in the courts of his colony during his governorship. Some degree of doubt as to his liability was caused by an erroneous theory expressed by Lord *Mansfield* in *Mostyn* v. *Fabrigas*, 'that the governor is in the nature of a viceroy, and that therefore locally, during his government, no civil or criminal action will lie against him.' This doubt was disposed of, however, by the cases of *Hill* v. *Bigge*, and *Musgrave* v. *Pulido*, and it is now well established that a governor's authority is expressly limited to the terms of his commission, and that he does not possess general sovereign power. There is one important qualification of his liability. He cannot be held responsible in any action for any act done by him as an *Act of State* and within his legal authority. And *Musgrave* v. *Pulido* shows that it is within the province of the courts to determine whether acts alleged to be Acts of State are really so.

The Lord Lieutenant of Ireland and probably the Governor-General of India, neither of which countries is a colony, stand indeed upon a different footing, and are considered to be viceroys. It has been held that no proceedings in respect of an *Act of State* can be even commenced against the Lord Lieutenant of Ireland, as is shown by *Luby* v. *Wodehouse*, and also by *Tandy* v. *Earl of Westmoreland*, 27 St. Tr. 1246, and *Sullivan* v. *Earl Spencer*, Ir. Rep. 6 C. L. 173. It was indeed admitted in *Luby* v. *Lord Wodehouse* (at pp. 627, 631) that actions had been brought against a Lord Lieutenant for debt in the High Courts, and that he would be liable for every personal injury or debt.

A governor, like other public officers, is not personally liable on contracts made by him in his official capacity (*ante*, p. 81), and, in all cases where his actions are of a judicial nature, he shares of course in the immunity of all judges.

The *criminal* liability of a governor is expressly provided for,

at any rate in respect of misdemeanours, by 11 & 12 Will. III. c. 12, and 42 Geo. III. c. 85, which enact that all crimes committed by governors of colonies and others in the public service in places beyond seas shall be tried in the Court of King's Bench. In *R.* v. *Eyre*,[1] it was decided that under these statutes and 11 & 12 Vict. c. 42, s. 2, in the case of a misdemeanour alleged to have been committed by an ex-governor in his colony, a magistrate within whose jurisdiction the accused had come had jurisdiction to hear the case; and if he should commit on the charge, he must return the depositions into the King's Bench, and it has since been held that the above-mentioned statutes apply only to misdemeanours and not to felonies.[2]

Ex-Governor Wall[3] was tried in 1802 for murder, on the ground of his having inflicted excessive corporal punishment in the island of Goree in 1782. He was convicted and hanged, Lord Campbell thinks, 'through vengeful enthusiasm.'[4]

In 1804 General Picton[5] was tried in the King's Bench for a misdemeanour in causing torture to be inflicted upon Luisa Calderon to compel a confession while he was governor of Trinidad. A question arose as to whether the Spanish law permitted torture in Trinidad at the time of its cession by Spain. A rule for a new trial having been obtained, upon the second trial the jury returned a special verdict setting forth the facts, and the court ordered the defendant's recognizances to be respited till further orders. No judgment had been pronounced when General Picton fell at Waterloo.

For an earlier discussion of the various questions as to a governor's liability, *Dutton*, app. v. *Howell*, resp. 1690, in the House of Lords may be consulted.[6]

[1] L. R. 3 Q. B. 487.
[2] *R.* v. *Shawe*, 5 M. & S. 403.
[3] *R.* v. *Wall*, 28 S. T. 51.
[4] Campb., Lives of the Chief Justices, vol. 3, p. 149; Forsyth Cas. & Opin. 86.
[5] *R.* v. *Picton*, 30 S. T. 225.
[6] Shower, Cases in Parliament, 24. Other cases on the powers, duties, and liabilities of governors will be found collected by Mr. Forsyth, in 'Cases and Opinions on Constitutional Law,' pp. 80–89.

MILITARY AND MARTIAL LAW

Grant *v.* Sir Charles Gould. 32 *Geo. III.*, 1792.

2 *H. Bl.* 69.

History. This was a motion for a prohibition to prevent the execution of a sentence of a thousand lashes passed on the plaintiff by a general court-martial. The plaintiff had been charged before the court-martial with persuading two soldiers to desert in order to join the East India Company's service. He denied that he was a soldier, or liable to martial (meaning *military*) law, though he admitted, that for purposes of a recruiting agent he assumed the character of a sergeant in the 74th regiment, to enable him to carry on the business of a recruiting agent, and received pay and allowances as such; or that he had been guilty of a military offence. The plaintiff having been convicted and sentenced, applied to the King's Bench for a prohibition.

Judgment. Judgment was delivered by Lord *Loughborough*, C. J., who pointed out that 'martial law does not exist in England at all.' When martial law is established it is very different from what is inaccurately called martial law merely because it is the decision by a court-martial. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons; every species of offence committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. The Mutiny Act has created a court to try those who are a part of the army for breaches

of military duty. The only ground of prohibition by the ordinary courts is to prevent them from exceeding their jurisdiction.

The motion was therefore refused.

Note.—Much confusion has often arisen between the terms 'military law' and 'martial law,' and it cannot be said that Lord *Loughborough's* judgment in the above case is altogether calculated to lessen the confusion.

Military law is the law which at all times, whether in peace or war, at home or abroad, governs the soldier. Civilians are in no case subject to it, unless as members of the reserve or territorial forces they are called out for actual military service or training, and, even if they are riotous or insurgent, civilians cannot be dealt with under military law, but must be left to the ordinary civil courts. Although military courts have jurisdiction over soldiers in respect of many ordinary criminal offences as well as for breaches of discipline, the civil courts also have jurisdiction over them as regards offences against the law of England; and by sec. 41 of the Army Act a soldier is not to be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in the United Kingdom. Military law is to be found in the Army Act (44 & 45 Vict. c. 58), supplemented by Rules of Procedure made by Her Majesty under that Act, by the Queen's Regulations, and by Army Orders.[1]

Martial law, using that term in its strict sense as distinguished from military law, is unknown to the law of England, at any rate as the law has stood for many years past. It may best be described by reference to what is known in France and most other continental countries as that which follows upon a 'Declaration of a State of Siege,' as a result of which civil law is either wholly suspended for the time being or is made subordinate to the authority of the army or military power. It may also be described in words used by the Duke of Wellington in the House of Lords in 1851: 'Martial law is neither more nor less than the will of the general who commands the army; in fact martial law is no law at all.' The Petition of Right

[1] Full information on this subject will be found in the Manual of Military Law, an official publication of the War Office.

(3 Car. I., c. 1), declared the illegality of 'divers commissions under your Majesty's great seal by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land according to the justice of martial law against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law,' instead of the accused persons being proceeded against in the ordinary courts. It must be borne in mind, however, that at the date of the Petition of Right peace undoubtedly prevailed within the Kingdom. Where there is a state of war different considerations prevail, and it is well settled that where war is actually raging the ordinary courts have no jurisdiction over the action of the military authorities; and the fact that for some purposes civil tribunals are still permitted to pursue their ordinary course is not conclusive that war is not raging.[1] The question, however, whether a state of war in fact existed at the time of the act complained of is one for the decision of a civil court when peace is restored.

Since the Petition of Right there has been no proclamation of martial law in England, but it has been proclaimed in Ireland (in May, 1798) and in the Colonies.[2]

What is known as martial law must be carefully distinguished from that right which at common law the Government possesses to put down by force riots and violent resistance to the execution of the law. For the purpose of protecting persons or property against violent crime any soldier or police officer, and indeed any private person, is entitled to use force, and even, in a case of necessity, to take the life of the person offending.[3]

[1] *Ex parte* Marais, [1902] A. C. 109; 71 L. J. P. C. 42. The Irish Parliament in two Acts (37 Geo. III. c. 11, and 43 Geo. III. c. 117), and the Parliament of the United Kingdom in 3 & 4 Wm. IV. c. 4, sec. 40, speak of the undoubted prerogative of the crown to resort to the exercise of martial law.

[2] See Forsyth, Cases and Opinions on Constitutional Law, pp. 207–214; Halleck, On International Law, p. 499; Dicey, On the Constitution, p. 502.

[3] See further on this subject, and as to the duty of soldiers in repressing riots, the Report of the Committee on the disturbances at Featherstone on September 7, 1893, cited in Dicey, On the Constitution, p. 460.

LIABILITY OF OFFICERS INTER SE

Sutton *v.* **Johnstone.** 22 *Geo. III.*, 1786.

1 *T. R.* 493; *Broom, Const. L.* 656–735.

In this case the plaintiff, a naval captain, brought an action against the commanding officer of his squadron for having put him under arrest and imprisonment, and so kept him nearly three years, until the plaintiff was tried by court-martial for disobedience of orders. He was acquitted, and afterwards brought this action, alleging that in imprisoning him and causing him to be brought before a court-martial the defendant had acted maliciously and without reasonable or probable cause. The action was twice tried, and on each occasion the jury gave a verdict for the plaintiff with heavy damages. History.

A motion was made in arrest of judgment in the Court of Exchequer, but the court decided in favour of the plaintiff. The defendant then brought a writ of error in the Exchequer Chamber when that court reversed the judgment, and this reversal was affirmed on the case being carried to the House of Lords.

Held:—That this is not like an action of trespass, which supposes that something manifestly illegal has been done. Here it is for the ordering of a prosecution which upon the stating of it is manifestly legal. Judgment.

The important question is whether such an action (*viz.* against a commander for exercising his discretion in ordering his subordinate to be tried by court-martial) can lie. Many men, when put upon their trial before a court-martial, have thought the charge to be without

a probable cause, malicious and oppressive, yet there is no usage, precedent or authority in support of the action. There is a provision in the Articles of War against such an abuse as an oppressive prosecution. A court-martial can alone judge of the original charge, and the same jurisdiction which tries the original charge must try the probable cause, which is in effect a new trial. And in this case, even if the action were maintainable in itself, judgment ought, we think, to be given for the defendant.

Note.—It will be seen that although Lord *Mansfield* expressed a strong opinion on the subject, he did not expressly decide that the action was not maintainable, as he held that there was probable cause for the imprisonment and prosecution of the plaintiff; and the reversal of the judgment of the Court of Exchequer must be taken to have proceeded on that ground.[1]

Lush, J., said, in *Dawkins* v. *Paulet*,[2] that he regarded the judgment in this case as of high authority, although the ultimate decision was based upon independent grounds; that every year since Acts have passed for the government of army and navy without any intimation of a contrary view on the part of the legislature; the judgment stands unassailed, one which has received the tacit assent of the legislature and the profession.

Col. Dawkins *v.* Lord Rokeby. 30 *Vict.*, 1866.

History. There were *two* actions arising out of the same matter by a military officer against a superior officer.

4 F. & F. 806. The first was an action for false imprisonment and malicious prosecution before a court of inquiry, and conspiring with others to cause the plaintiff's removal from the army—tried in 1866.

[1] See *Warden* v. *Bailey*, 4 Taunt. 89.

[2] L. R. 5 Q. B. at p. 122; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336; *v.* also L. R. 8 Q. B. at p. 271.

Willes, J., non-suited the plaintiff on the ground that no cause of action in a civil court had been shown. The matter had been discussed and disposed of by the military authorities. Persons who enter into the military state become subject to military rule and discipline, and must abide by them. Judgment.

The *second* was an action for libel and slander on the ground of Lord Rokeby's evidence before the court of inquiry held as to Col. Dawkins' conduct, and was tried before *Blackburn*, J., who directed the jury that the action did not lie, on the ground that the statements complained of were made by a military officer in the course of an inquiry into military matters, even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice, and without any reasonable and probable cause. L. R. 8 Q. B. 255. 45 L. J. Q. B. 8; 33 L. T. 196. Judgment.

Upon a writ of error this direction was approved by a court of ten judges—judgment being delivered by *Kelly*, C.B.

A court of inquiry is a court duly and legally constituted, and recognized in the Articles of War and in many Acts of Parliament. And the principle is clear that no action of libel or slander lies against judges, council, witnesses, or parties for words spoken in the ordinary course of any proceeding before any court recognized by law. Judgment of Exchequer Chamber.

Upon appeal to the House of Lords (May 5, 1874) the opinion of the judges was taken, and the judgment *affirmed*. L. R. 7 H. L. 744.

Note.—In 1869 Col. Dawkins brought an action against Lord Paulet[1] for the report made in the course of his duty to the Adjutant-General, declaring the plaintiff to be unfit for command, &c. The plaintiff by replication alleged actual malice and *mala fides*. *Mellor* and *Lush*, JJ., held the replication bad; no action will lie against a military officer for an act done in the ordinary course of his duty, even if done

[1] L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 584; 18 W. R. 336.

maliciously or without reasonable cause. *Cockburn*, C. J., dissented, and held the replication good; *Sutton* v. *Johnstone* had proceeded on the ground that there was reasonable and probable cause of arrest; and in that case Lord *Mansfield* expressly said, 'there is no authority either way.' *Dawkins* v. *Rokeby* (this being of course only the earlier action of 1866) was the other way, but was a single nisi prius judgment.

Then in the *second* action against Lord Rokeby in 1873, the Court of Exchequer Chamber, after referring to the L. C. J.'s opinion, observes[1] that 'it is satisfactory to us to feel that the general question of privilege as applied to communications between military authorities upon military subjects . . . is yet open to final consideration before a court of the last resort.'

When the question did eventually come before the House of Lords it was settled against the view taken by *Cockburn*, C. J.

The principle that the civil courts cannot be involved to redress grievances arising out of military duties between persons both subject to military law was clearly affirmed by *Lush*, J., in *Dawkins* v. *Lord Paulet*, and approved by the Court of Appeal in *Marks* v. *Frogley*.[2]

Cases such as *Sutton* v. *Johnstone* and *Dawkins* v. *Lord Rokeby*, where the acts complained of arose out of military duty, must be distinguished from cases where there is no colour for alleging that the grievance arose in the course of such duty. The mere fact that both the plaintiff and the defendant were in the military service of the crown will not affect the power of a civil court to adjudicate upon the matter in dispute.[3]

[1] L. R. 8 Q. B. at p. 272.
[2] [1898] 1 Q. B. at p. 899; 67 L. J. Q. B. 605; 78 L. T. 607; 46 W. R. 548.
[3] *Warden* v. *Bailey*, Taunt. 67.

LIABILITY OF OFFICERS TO THE PUBLIC

Madrazo *v.* Willes. 1 *Geo. IV.*, 1820.

3 *B. & A.* 353

This was an action brought against the captain of a British man-of-war by a Spanish subject for the wrongful seizure on the high seas of a ship employed by him in carrying on the African slave-trade, together with her cargo of 300 slaves. The plaintiff was not forbidden to carry on this trade by the laws of his own country.

At the direction of *Abbott*, C. J. [Lord *Tenterden*], the jury assessed the damages for ship and slaves separately, as the judge at first doubted whether damages could be recovered in an English court for loss in the prosecution of a trade here declared unlawful.

Upon the argument of a rule to reduce the damages accordingly, the court, *Abbott*, C. J., *Bayley*, *Holroyd*, and *Best*, JJ., decided in favour of the plaintiff.

Held:—That the plaintiff was entitled to recover damages for seizure of the slaves, of which he was legally possessed by the laws of his own country. It would have been otherwise if the slave-trade had been forbidden by his own country, or the general law of nations.

Buron *v.* Denman. 11 *Vict.*, 1848.

2 *Ex.* 167.

In this case the plaintiff, who was a Spaniard, and not a subject of the queen, was by the law of his own country legally possessed of slaves on the west coast of Africa. The defendant was captain of a man-of-war, who had proceeded to the Gallinas to release two British subjects there detained as slaves. He then concluded a treaty with the native king for the abolition of the slave-trade in his country, and in execution of the treaty fired the plaintiff's premises and carried away and released his slaves.

The defendant's proceedings were afterwards approved by the English government.

The case was tried at Bar before *Parke*, *Alderson*, *Rolfe*, and *Platt*, BB.

Held:—That the ratification of the defendant's act by his government made it an act of state for which no action could be maintained.

NOTE VII.—ON THE LIABILITY OF OFFICERS —MILITARY AND NAVAL

Some degree of protection to the persons responsible for the performance of duties imposed upon them by the executive is necessary, to induce them to undertake the performance of those duties, and to secure their regular and uninterrupted working.

This protection must be two-fold—first against their own subordinates, and secondly against the general public.

1. No officer is responsible to strangers for any injury done to them in the regular and proper discharge of his duties, or arising out of his pursuing the instructions of his proper superiors, or where his superiors have ratified his acts. This is illustrated by *Buron* v. *Denman* (*supra* p. 100). In *Nicholson* v. *Mouncey*,[1] a sloop of war had run down the plaintiff's vessel, while the sloop was under the defendant's command, although at the time of the collision the ship was under the navigation of the lieutenant. The captain was held not liable, since he was not in the ordinary position of the master of a vessel, and the lieutenant was in no sense his agent or servant. An officer, however, who is actually negligent in such a case is personally responsible in damages. See, *e.g.*, *The Volcano*, 2 W. Rob. 337.

The officer's immunity will not extend so as to cover any tortious act which does not take place in pursuance of the proper discharge of the officer's general or special duty. This is shown in *Madrazo* v. *Willes*.[2] So it was suggested in *Tobin* v. *The Queen*,[3] that an action might lie against Captain Douglas, who had also destroyed a supposed slaver. And in *Nireaha Tamaki* v. *Baker* ([1901] A. C. 561, 576; 70 L. J. P. C. 66; 84 L. T. 633) it was held that an aggrieved person may sue an officer of the Crown for an injunction to restrain a threatened act purporting to be done in pursuance of an Act of Parliament, but really outside the statutory authority.

[1] 15 East, 384. [2] *supra*, p. 99. [3] *supra*, p. 60.

2. Prompt obedience is essential to the discipline and efficiency of the services; and superior officers must often decide hastily. They must be guarded against excessive responsibility to their inferiors. It is settled, therefore, that an officer cannot be held liable in a civil court for any act done in the discharge of his duty, even though it be alleged to be done maliciously and without reasonable cause. For this *Sutton* v. *Johnstone* is the great authority. Though that case did not decide expressly that no action would lie for a malicious prosecution without reasonable cause, Lord *Mansfield* and Lord *Loughborough* expressed a strong opinion to that effect; and their view has been confirmed in the later cases of *Dawkins* v. *Lord Rokeby* and *Dawkins* v. *Lord Paulet*.

It is to be observed that the services are governed by articles and regulations of their own, and the courts will, as a general rule, refuse to inquire into purely military or naval matters. This was definitely established in *Dawkins* v. *Lord Rokeby*, by a decision of the House of Lords. The Articles of War prescribe rules for the 'Redress of Wrongs,' and officers must be considered to be bound by those rules.

In *Barwis* v. *Keppel*[1] the Courts refused to entertain an action in the case of a sergeant who alleged that he had been maliciously reduced to the ranks by the defendant, an officer in the Guards. The act had been done in Germany during war time, and the Court held that it had no jurisdiction—the king acting there by virtue of his prerogative.

[1] 2 Wils. 314.

PROHIBITIONS

Prohibitions del Roy (Case of Prohibitions).

5 *Ja. I.*, 1607.

12 *Rep.* 63 (vi. 280).

History. The king was informed (apparently by Archbishop Bancroft), upon complaint made to him by the archbishop concerning prohibitions, that he had a right to take what causes he pleased from the determination of the judges and to determine them himself.

Answer. To which *Coke*, C. J., answered, in the presence and with the consent of all the judges of England:

That the king in his own person cannot adjudge any case, either criminal or betwixt party and party, and judgments are always given by the court:

The king may sit in the King's Bench, but the judgments are always given *per curiam;* no king after the Conquest assumed to himself to give any judgment:

The king cannot arrest any man, for the party cannot have remedy against the king.

Note.—Coke's statement that no king after the Conquest gave judgment is probably not correct, and we must remember that the 12th Part of his Reports was not published by himself. Speaking of the Curia Regis, the well-known *Dialogus de Scaccario*[1] says, '*in qua ipse* (*Rex*) *in propria persona jura decernit*'; see also Pollock and Maitland, Hist. Eng. Law, vol. i., p. 134 *et seq.* What James wanted was to assert a right on the part of the crown to decide questions in which two courts were brought into collision, and thus to decide that the King's Bench could not prohibit the Ecclesiastical Courts.[2]

[1] I. iv.; Stubbs, Select Charters, 176.

[2] See Gardiner, 2 H. E. 35, 122.

IMMUNITY OF JURORS

Floyd *v.* **Barker.** 5 *Ja. I.*, 1607.

12 *Rep.* 23 (vi. 223).

History. A grand jury of Anglesey had indicted William Price for murder, and he had been convicted and executed. One Floyd then proceeded by 'bill' in the Star Chamber against Barker, the judge of assize on the trial, and the grand and petty jurors.

The case was heard before *Popham*, C. J., *Coke*, C. J., the Chief Baron, the Lord Chancellor, and all the Court of Star Chamber, and it was—

Judgment. *Resolved*:—That when a grand inquest (*i.e.* grand jury) indicts one of murder or felony, conspiracy doth not lie against the indictors, even where the party is acquitted; and that *à fortiori* it does not lie where he has been convicted.

What a judge doth as judge of record ought not to be drawn into question in this court or before any other judge.

Note.—The reason of this is said *in loco* to be that the king himself is *de jure* to deliver justice to all his subjects, and because he cannot himself do it to all persons, he delegates his power to his judges. Any cause of complaint therefore, ought to be laid before the king himself (at p. 25). Compare the *Earl of Macclesfield* v. *Starkey*, 1684;[1] an action of scandalum magnatum against one of a grand jury for a conspiracy to make a malicious and libellous presentment.

In *The King* v. *Skinner*, 1772,[2] a justice of the peace was indicted for scandalous words to a grand jury, which was

[1] 10 S. T. 1330. [2] Lofft, 55.

supported on the ground that the grand jury had no remedy by action, but Lord *Mansfield*, C. J., quashed the indictment, observing that though the words were extremely improper, neither party, witness, counsel, judge, or jury, can be put to answer civilly or criminally for words spoken in office, although if such words amounted to a contempt of court they might be punished as such.

Bushell's Case. 22 *Car. II.*, 1670.

Vaughan, 135; 6 *S. T.* 999; *Broom*, *Const. L.* 115–139.

History. A jury had acquitted William Penn and William Mead at the Old Bailey Sessions, on a charge of preaching in a London street, and had been fined by the Recorder forty marks each for contempt in doing so, and in default committed. A *habeas corpus* was moved, and the return was that the prisoners had been committed for finding a verdict 'contra plenam et manifestam evidentiam, et contra directionem curiæ in materia legis.'

Judgment. Per *Vaughan*, C. J.:—The return is insufficient, for it gives the court no opportunity of forming their own judgment as to the sufficiency of the evidence. Nor is the court bound to accept the opinion of the sessions court, for judges' decisions are constantly reversed. Then (1) the jury may have evidence before them that the judge has not, as they are entitled to make use of their own personal knowledge by which they may be assured that what is deposed in court is absolutely false, but to this the judge is a stranger; (2) in any case they do not find the law, and therefore cannot return a verdict 'contra directionem curiæ in materia legis.' Without a previous finding as to the facts the judge cannot direct, in matter of law, and he only knows the

facts from the determination of the jury. In such a case as this a writ of attaint would either lie against the jury for a false verdict or it would not. If it did that was clearly the proper and only way for punishing them, as a fine would not bar the attaint and they could not be punished twice for the same offence. If, on the other hand, an attaint did not lie (and he was of opinion it did not), it was clearly because a jury could not be punished in a criminal case for not finding according to the evidence and the judge's direction.

Decided:—That finding against the evidence, or direction of the court, is no sufficient cause to fine a jury.

Note.—A writ of attaint was a process by which the verdict of a jury in a civil cause might be reversed by a subsequent trial before twenty-four jurors. If the first verdict were set aside the jury who found it were punished by imprisonment and the forfeiture of all their property, or at a later date by a pecuniary fine. This proceeding had its origin in times when jurymen were considered as giving their verdict from their own pre-existing knowledge of the matter in dispute, rather than from the evidence of others given in their presence. If, therefore, they returned a perverse verdict, contrary to what was notorious in their neighbourhood, they were looked upon as having committed wilful perjury and as deserving severe punishment. The writ of attaint having long become obsolete was abolished by 6 Geo. IV. c. 50, s. 60.

It has been stated that the writ of attaint applied only to civil actions, and this seems the better opinion, although *Hale* (2 Hale, P. C. 310) speaks of the matter as being in some doubt, and 6 Geo. IV. c. 50, s. 60, appears to countenance the view that the king might have an attaint. But in criminal cases a practice undoubtedly arose in the sixteenth century of fining jurors who found verdicts of acquittal against manifest evidence and the directions of the judge. It was often protested that the practice was illegal, but it must be admitted that in *Bushell's Case* the Recorder had only followed the course frequently taken by judges of the superior courts, more especially it would appear by *Kelyng*, C. J., who only five

years previously had fined a jury at the Old Bailey 100 marks each for what he considered a perverse verdict of acquittal (see *Kelyng's Crown Cases*, ed. 1873, p. 69 *et seq.*).

In 1667 the House of Commons took the Chief Justice's conduct in fining juries into consideration, and resolved 'that the precedents and practice of fining or imprisoning jurors for verdicts is illegal.' *Bushell's Case* followed in 1670, and the practice of punishing jurors for their verdicts was finally put an end to.

IMMUNITY OF JUDGES

Hamond *v.* Howell. 29 *Car. II.*, 1678.

2 *Mod.* 218 (*cp.* 1 *Mod.* 119, 184).

History. The plaintiff had been one of the jury on the trial of Penn and Mead,[1] and had been committed. He now brought an action of false imprisonment against the Recorder of London, the Mayor, and the whole court at the Old Bailey.

The case was argued before *Vaughan*, C. J., and the Court of Common Pleas. But the whole Court were of opinion that the bringing of this action was a greater offence than the fining of the plaintiff and committing him for non-payment; the court had jurisdiction of the cause . . . they thought it to be a misdemeanour in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error in their judgments, for which no action will lie.

Judgment. *Held*:—That an action will not lie against a judge for what he doth judicially though erroneously.

Anderson *v.* Gorrie and Others. 1894.

[1895] 1 *Q. B.* 668; 71 *L. T.* 382.

History. This action was brought against three judges of the Supreme Court of Trinidad and Tobago for damages for acts done by them in the course of certain judicial

[1] Cp. *Bushell's Case*, p. 105 *ante*.

proceedings, the plaintiff alleging that these acts were done maliciously, without jurisdiction, and with knowledge of the absence of jurisdiction. The principal act complained of was that the plaintiff, having been summoned before the defendant Cook to be examined as to his means of satisfying certain judgments, and the summons having been adjourned, that defendant, under certain rules of Court made in pursuance of a colonial statute, ordered him to find bail in 500*l.* and in default of so doing the plaintiff was committed to prison.

Verdict.

The action was tried before Lord *Coleridge*, C. J. Before the trial one of the defendants had died. At the trial the jury found in favour of the second defendant, but as regards the defendant Cook they found that he 'had overstrained his judicial powers and had acted in the administration of justice oppressively and maliciously to the prejudice of the plaintiff and to the perversion of justice,' and they assessed the damages at 500*l.* Lord *Coleridge*, C. J., directed judgment to be entered for the defendant Cook as, notwithstanding the verdict, he was of opinion that he was not liable. The plaintiff appealed.

Judgment of Court of Appeal.

The Court of Appeal (Lord *Esher*, M. R., and *Kay* and *A. L. Smith*, L.JJ.) affirmed the judgment of the Lord Chief Justice. The judicial proceedings and the order complained of were clearly matters within the jurisdiction of the court of which the defendant was a judge. Taking the findings of the jury to be true to the fullest extent the action will not lie against the defendant. For an act done by a judge in his capacity of judge, and in the course of his office, he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen. If a judge goes beyond his jurisdiction a different set of considerations arise.[1]

Held:—That no action lies for acts done or words

[1] Questions of this kind are dealt with in the two following cases.

spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.

Note.—In *Thomas Churton*,[1] in 1862, *Cockburn*, C. J., had stated that he was reluctant to decide, and would not do so until the question came before him, that if a judge abused his office by using slanderous words maliciously and without reasonable and probable cause he was not liable to an action. *Anderson* v. *Gorrie*, which, however, only followed several earlier cases, notably *Fray* v. *Blackburn*,[2] must now be taken as finally settling the law on this subject.

Houlden *v.* Smith. 13 *Vict.*, 1850.

14 *Q. B.* 841; 19 *L. J. Q. B.* 170; 14 *Jur.* 598.

History. This was an action of trespass for false imprisonment. The defendant, as county court judge, had ordered the plaintiff to be committed for contempt in not appearing before him upon a judgment summons. The plaintiff did not reside in the county court district of which the defendant was judge, but in a neighbouring district, and this was known to the defendant, who supposed, nevertheless, that he had authority. The statute under which the proceeding purported to be taken (9 and 10 Vict. c. 95, s. 98) only authorized the issue of such summonses by the county court within the limits of which the party should then dwell or carry on business.

Judgment. *Held*:—That the commitment being without jurisdiction, and made under a mistake in the law and not of the facts, the judge was liable in trespass.

[1] 2 B. & S. 475; 31 L. J. Q. B. 139; 6 L. T. 320.
[2] 3 B. & S. 576.

Note.—It may perhaps be contended that county court judges are, at any rate in most cases, now protected by 51 & 52 Vict. c. 43, s. 55 (the County Courts Act, 1888), which provides that, in any action against any person for anything done in pursuance of that Act, the warrant under the seal of the court shall be deemed sufficient proof of the authority of the court previous to the issuing of the warrant. See *Aspey* v. *Jones*, 54 L. J. Q. B. 98; 33 W. R. 217. In *Scott* v. *Stansfield*, 1868; L. R. 3 Exch. 220; 37 L. J. Ex. 155; 18 L. T. 572; 16 W. R. 911; the defendant was also a county court judge. The defendant in his capacity as judge, and while sitting in his court, had said of the plaintiff, an accountant, that he was 'a harpy preying on the vitals of the poor.' The plaintiff brought an action of slander, but upon demurrer it was—

Held:—That no such action would lie, even where the words used by the judge were alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him.

Calder *v.* Halket. 2 *Vict.*, 1839.

3 *Moo. P. C. C.* 28.

History. This was a case before the Privy Council, on appeal from the Supreme Court of Judicature, at Fort William, in Bengal. The plaintiff had been apprehended, by order of the defendant—who was a magistrate having jurisdiction over Asiatics only, and the plaintiff was a European—for supposed participation in a riot. He brought an action for assault and false imprisonment, and upon judgment being entered for the defendant by the Supreme Court, the plaintiff appealed. By statute (21 Geo. III. c. 70, s. 24), the provincial magistrates in India have the same immunity from actions extended to them in respect of their judicial functions as judges have in this country.

Argument. It was argued for the appellant that as the act in question was in excess of his jurisdiction, which extended only to natives, an action would lie.

Judgment. Judgment was given by *Parke*, B., and it was held that the plaintiff was bound to show that the judge knew, or ought to have known, the defect of jurisdiction, but of this there was no evidence, as it was not shown that the defendant was at any time informed, or knew before, that the plaintiff was a European, or had such information as to make it incumbent upon him to ascertain that fact, and the appeal must on this ground be dismissed.

Decided:—That a judge is not liable in trespass for a judicial act, without jurisdiction, unless he had the knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction; and that it lies on the plaintiff to prove such knowledge or means of knowledge.

Note.—See the observations upon this case in *Pease* v. *Chaytor*, 3 B. & S. 620; 32 L. J. M. C. 121; 8 L. T. 613; 11 W. R. 563.

NOTE VIII.—ON THE IMMUNITY OF JUDGES

The law as to the civil and criminal irresponsibility of judges is well settled. No judge is liable to an action before any ordinary tribunal for any judicial act or omission—with one exception, the refusal of a writ of *habeas corpus* in vacation, expressly provided for in the Habeas Corpus Act.[1] A series of decisions from the time of Coke (in *Floyd* v. *Barker*) to *Anderson* v. *Gorrie and Others*, establish that no action will lie against a judge for acts done or words spoken in his judicial capacity in a court of justice. And judicial acts are not only those done in open court, but all those emanating from the legal duties of a judge, as, for example, acts done in chambers.[2]

This doctrine has been applied not only to the superior courts, but to the court of a coroner, and to a court-martial, which are not courts of record. And it does not matter although malice and corruption be alleged, or want of reasonable and probable cause. Not even if the judge exceeds his jurisdiction will he be liable to an action, unless the plaintiff can prove that he knew, or ought to have known, the defect of jurisdiction.

This rule has been established to secure the independence of the judges and to maintain their authority. For this purpose they must be free from the liability to harassing and vexatious actions at the suit of discontented parties.

The decisions cover the cases not only of the judges of the superior courts, but also of the court of the Vice-Chancellor of a University, an ecclesiastical judge, a coroner, and a county court judge; nay, the principle has even been extended by analogy to the case of an arbitrator or referee,[3] with, however, the limitation that he must have acted honestly.[4]

Magistrates or justices of the peace are not protected to the

[1] 31 Car. II. c. 2, s. 10.

[2] *Taafe* v. *Downes*, 3 Moo. P. C. C. at p. 60.

[3] *Pappa* v. *Rose*, L. R. 7 C. P. 525 (Ex. Ch.); 41 L. J. C. P. 187; 20 W. R. 784; 27 L. T. 348.

[4] *Stevenson* v. *Watson*, 4 C. P. D. at p. 158; 48 L. J. C. P. 318; 40 L. T. 485; 27 W. R. 682; *Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624; 70 L. J. K. B. 482; 84 L. T. 444; 49 W. R. 401.

same extent. Their case is specially provided for by 11 & 12 Vict. cc. 42–44 (Jervis's Acts), and speaking generally an action will lie against them in either of two events:

1 For an act done without jurisdiction.

2. For an act done within their jurisdiction, but maliciously and without reasonable and probable cause.

Justices are, however, protected by many exemptions too numerous to mention here.[1]

What remedies then are provided in case of error or misconduct on the part of judges?

For errors in law a remedy exists in an elaborate system of appeals. For actual misconduct on the part of judges of the superior courts, the constitutional remedies are by impeachment, or by removal on the address of both Houses of Parliament. Since the Revolution there has been only one instance of such an impeachment—the case of Lord Chancellor *Macclesfield* in 1725; though there have been several cases in which parliamentary proceedings have been taken, in one of which a judge was removed from office.[2]

The judges of inferior courts, however, are subject to the control of the King's Bench, and are removable for misbehaviour either by common law or by special statutes. The Lord Chancellor may remove a coroner[3] or a county court judge[4] for inability or misconduct.

A justice of the peace is subject to a criminal information for misbehaviour; he may also be discharged from the commission at the pleasure of the crown.

[1] On this subject see 'Broom on Constitutional Law,' p. 787, and 'Stone's Justices' Manual' (39th Ed.), p. 914.

[2] Until the Act of Settlement (12 & 13 Will. III. c. 2, s. 3) the judges were removable at the pleasure of the crown. By that Act it was enacted that the commissions of judges should be made *quamdiu se bene gesserint*, but that upon the address of both Houses of Parliament it should be lawful to remove them. The first case in which such an address was proposed was that of Mr. Justice *Fox* (an Irish Judge) in 1805. In 1828 *Sir Jonah Barrington* was, on an address, removed from the office of Admiralty judge in Ireland. Abortive and unfounded proceedings were taken in the House of Commons in the cases of Lord *Abinger* (1843) and Sir *Fitzroy Kelly* (1867). The control exercised by Parliament over the judicial system will be found fully treated in 2 Todd, Parl. Gov. (Ed. 1869), 724-766 (c. vi.).

[3] 50 & 51 Vict. c. 71, s. 8; he may also be removed by any court before which he has been convicted of extortion, or corruption, or wilful neglect of, or misbehaviour in, the discharge of his duty.

[4] 51 & 52 Vict. c. 43, s. 15.

IMMUNITY OF PARTIES, WITNESSES AND ADVOCATES

Astley *v.* Younge. 32 *Geo. III.*, 1759.

2 *Burr.* 807.

Libellous statements in affidavits, &c.

This was an action of slander and libel. The defendant was a justice of the peace, and had refused to grant a licence to one Day for a public inn. An application was then made to the Court of King's Bench concerning the refusal, and on this application the plaintiff made an affidavit in reference thereto. The defendant answered this affidavit by another, in which he alleged the plaintiff's affidavit to have been 'falsely sworn.'

The plaintiff thereupon brought his action, and the defendant demurred. The demurrer was argued before Lord *Mansfield*, C. J., and the court, who 'unanimously and clearly'—

Judgment.

Held:—That no action would lie against the defendant for words 'only spoken in his own defence, and by way of justification in law, and in a legal and judicial way.'

Note—*Revis* v. *Smith* (18 C. B. 126; 29 L. J. C. P. 195) was a similar action brought against a person who had been a defendant in a Chancery suit, and had in the course of the proceedings made an affidavit accusing the plaintiff in *Revis* v. *Smith* of fraud. It was held that the action would not lie. See also *Henderson* v. *Broomhead* (4 H. & N. 569; 28 L. J. Ex. 360). Upon somewhat similar grounds it was held that a letter of complaint with an affidavit of alleged charges attached, which was forwarded to the Incorporated Law Society for

investigation by them, was so essentially a step in a judicial proceeding that no action could be founded upon any statement in either the letter or the affidavit—*Lilley* v. *Roney* (61 L. J. Q. B. 727). The same ruling was applied in the case of a written statement made by a medical man to a justice of the peace to whom an application had been made for a reception order under the Lunacy Act, 1890, as the justice was acting judicially in the matter (*Hodson* v. *Pare*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13). If, however, an affidavit containing scandalous matter, such as allegations of dishonesty, outrageous conduct, &c., not relevant to the issue, is filed in the High Court, the court may order the affidavit to be taken off the file and the costs of the application paid by the person at fault. R. S. C., Ord. 38, r. 11. The same applies to a scandalous pleading, if the scandalous matter is irrelevant to the issue. And if an affidavit is made extra-judicially, *i.e.* not in any pending action or legal proceeding, it is in no way privileged (*Maloney* v. *Bartley*, 3 Camp. 210).

Seaman *v.* Netherclift. 40 *Vict.*, 1876.

2 *C. P. D.* 53 (*cp.* 1 *C. P. D.* 540).

46 *L. J. C. P.* 128; 35 *L. T.* 784; 25 *W. R.* 159.

Slanderous statements by witness.

This was an action of slander. The defendant, an expert in handwriting, had given evidence in a suit to establish a will in which he pronounced the signature to the will, of which the plaintiff was an attesting witness, to be a forgery. The genuineness of the signature was established, and the judge made some disparaging observations on the defendant's evidence. Afterwards, in another proceeding on a charge of forgery, he was asked, in cross-examination, as to the observations of the judge above mentioned. He answered the question, and having done so, he

voluntarily added that he believed 'that will to be a rank forgery.' The plaintiff then brought the present action.

It was tried before *Coleridge*, C. J., and a verdict found for the plaintiff. On motion to enter judgment for the defendant, *Coleridge*, C. J., and *Brett*, J., decided in favour of the defendant.

The case went to the Court of Appeal (*Cockburn*, C. J., *Bramwell* and *Amphlett*, L. JJ.), which

Held:—That words spoken by a witness in the course of and having reference to a judicial inquiry are absolutely privileged, whether those words are relevant or irrelevant to the matters in issue. Judgment.

Munster *v.* Lamb. 46 *Vict.*, 1883.

11 *Q. B. D.* 588; 52 *L. J. Q. B.* 726; 49 *L. T.* 252; 32 *W. R.* 248.

This was an action by the plaintiff against a solicitor for words spoken of the plaintiff by the defendant, while he was defending a client at petty sessions. The defamatory suggestion made by the defendant was unsupported by any evidence in the case. Slanderous statements by an advocate.

At the trial the plaintiff was nonsuited by *Williams*, J. The divisional court refused to grant a new trial, and the plaintiff appealed.

The Court of Appeal, *Brett*, M. R., and *Fry*, L. J.,

Held:—That no action will lie against an advocate for words spoken in the course of a judicial proceeding, though they are spoken maliciously and without excuse, and are wholly irrelevant. Judgment.

Note.—In cases of this kind where the statements of persons occupying a judicial position, of witnesses and of

advocates are said to be absolutely privileged it is, as was pointed out by *Channell*, J., in *Bottomley* v. *Brougham*, [1908] 1 K. B. 584, incorrect to say that the law gives any one a privilege to be malicious. The true view is that in the public interest the law requires that the conduct of such persons, in the course of a legal proceeding, shall not be inquired into to see whether it is malicious or not, the object being that the independence of judges, advocates, and witnesses may be fully secured.

If, however, an advocate uses words of a grossly improper and irregular nature in a court of record, he may be punished by that court for contempt (see *Ex parte Pater*, 5 B. & S. 299; 33 L. J. M. C. 142; 10 L. T. 376; 12 W. R. 823); and even a defendant in a criminal proceeding has been heavily fined for conducting his defence in a grossly improper manner (*R.* v. *Davison*, 4 B. & Ald. 329). See also as to a witness misconducting himself in the same way, L. R. 2 C. P. D. at p. 61.

REPORTS OF PARLIAMENTARY PROCEEDINGS

Wason *v.* Walter. 32 *Vict.*, 1868.

L. R. 4 *Q. B.* 73; 38 *L. J. Q. B.* 34; 17 *W. R.* 169; 19 *L. T.* 409.

History. This was an action of libel against one of the proprietors of the *Times* newspaper, for a report of a debate in the House of Lords, in which statements had been made reflecting on the plaintiff.

There was another count in respect of a leading article on the debate.

The action was tried before *Cockburn*, C. J., who directed the jury, that if the matter charged as a libel in the first count was a faithful and correct report of the debate, the occasion was privileged, and that as to the second count a public writer is entitled to make fair and reasonable comments on matters of public interest.

The jury found for the defendant. A rule having been obtained for a new trial on the ground of misdirection, it was argued, and the judgment of the court was delivered by *Cockburn*, C. J.

Judgment. The Court discharged the rule for a new trial. In the course of his judgment the Chief Justice observed that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. It is of paramount public and national importance that parliamentary proceedings

shall be communicated to the public, who have the deepest interest in knowing what passes in parliament. But a garbled or partial report, or a report of detached parts of proceedings published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection. As to the count founded on the leading article the direction to the jury was perfectly correct. Such comments are privileged if made upon a matter of public interest, with an honest belief in their justice and with such a reasonable degree of judgment and moderation as in the opinion of the jury to amount to a fair and legitimate criticism on the conduct and motives of the person censured.

Held:—That a faithful report in a public newspaper of a debate in parliament is not actionable at the suit of a person whose character may have been called in question in the debate; nor is a fair and honest comment upon a speech made in the course of such a debate.

REPORTS OF JUDICIAL PROCEEDINGS, &c.

Usill *v.* Hales. 41 *Vict.*, 1878.

3 *C. P. D.* 319; 47 *L. J. C. P.* 323; 26 *W. R.* 371: 38 *L. T.* 65.

History. This was an action against the publisher for an alleged libel published in the *Daily News*, consisting of a report of an application made by three persons to a police magistrate for a summons against the plaintiff. The application was *ex parte*; the magistrate held that it only had relation to a matter of contract, and that he had no jurisdiction in the matter, and he referred the applicant to the county court.

The action was tried before *Cockburn*, C. J., who directed the jury that the publication, if a fair and impartial report, was privileged. The jury found for the defendant.

The case was argued on an application for a new trial, and it was by *Coleridge*, C. J., and *Lopes*, J.,

Judgment. *Decided*:—That a fair and impartial report of a proceeding in a police court, even though it was an *ex parte* and preliminary proceeding, is privileged.

Note.—Compare the case of *Lewis* v. *Levy*, 1858; (E. B. & E. 537) nearly to the same effect. In both these cases the court followed and approved a much earlier authority, *Curry* v. *Walter* (1 Bos. & Puller, 525), in which it was held that an action was not maintainable against a newspaper proprietor for publishing a true account of an application to the King's Bench for an information against two justices for refusing to license an inn.

So far as newspaper proprietors are concerned they are now protected by statute as well as by the common law. The Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64, s. 3), enacts that 'a fair and accurate report *in any newspaper* of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.' By sec. 8 no *criminal* prosecution shall be commenced against any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers.

It will be seen that the above provisions only apply to reports appearing in newspapers. In *Kimber* v. *The Press Association* ([1893] 1 Q. B. 65; 62 L. J. Q. B. 152; 41 W. R. 17; 67 L. T. 515) an attempt was made to make the defendants, who were not newspaper proprietors, responsible for a report supplied by them of an *ex parte* application to justices for a summons against the plaintiff for perjury; but the Court of Appeal followed *Usill* v. *Hales* and *Curry* v. *Walter*, and held that the action was not maintainable, as although the justices had power to hear such an application in private, they had not done so.

The privilege extends to fair and accurate reports of the proceedings of *all* courts while sitting in public; 'for this purpose no distinction can be made between a court of *pie-poudre* and the House of Lords sitting as a court of justice,' per Lord *Campbell*, C.J., in *Lewis* v. *Levy* (E. B. & E. at p. 554); and see *Hodson* v. *Pare* ([1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13).

It would appear somewhat doubtful whether the Law of Libel Amendment Act, 1888, sec. 3, gives an absolute privilege in the case of newspaper reports, or whether, as in all cases of qualified privilege, the privilege can be rebutted by proof of express malice; see, as to this, Odgers on 'The Law of Libel and Slander' (4th Ed., p. 306). Before the Act it was held that even a true report of proceedings in a court of justice was not privileged absolutely, and that if it were sent to a newspaper for publication from a malicious motive, an action would lie against the person so sending it: *Stevens* v. *Sampson* (5 Ex. D. 53; 49 L. J. Q. B. 120; 28 W. R. 87; 41 L. T. 782).

The right to comment stands upon a different footing to the right to report. Many statements in reports of legal proceedings are defamatory and libellous in the highest degree, but they are protected by the law, if they are fair and accurate, on the ground that the occasion is privileged. But fair comment and criticism on matters of public interest, although they may be in severe terms, are really not libellous at all. The distinction was pointed out by Lord *Esher*, M. R., in *Merivale* v. *Carson* (20 Q. B. D. at p. 280). Such comment only becomes libellous when it ceases to be what the law calls 'fair,' and whether it is fair criticism or not is a question for the jury. A man is entitled to entertain and express any opinion he pleases upon matters of public interest, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the limit of fair criticism (per *Bowen*, L. J., in *Merivale* v. *Carson*, *sup.*). Criticism of the conduct of a judge in a judicial proceeding is permissible, but it must not be such as to be calculated to obstruct or interfere with the due course of justice (*Skipworth's Case*, L. R. 9 Q. B. 230), or to amount to personal scurrilous abuse of the judge, as a judge (*R.* v. *Gray*, [1900] 3 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474), or the offender may be dealt with for contempt of court.

Davison *v.* Duncan. 20 *Vict.*, 1857.

7 *E.* & *B.* 229; 26 *L. J. Q. B.* 104; 5 *W. R.* 253.

History. This was an action for a libel contained in the report of the proceedings at a meeting of Improvement Commissioners to which the public were admitted. The defendant demurred, alleging that the report was a true account, published without malice.

The demurrer was heard before *Campbell*, C. J., *Coleridge*, *Wightman*, and *Crompton*, JJ., and allowed.

Judgment.

Decided:—That it has never yet been held that privilege extends to a report of what takes place at all public meetings.

Note.—The above case is retained as showing what was the law as to reports of public meetings before the statutory provisions set forth below, which have to a very great extent altered the law on the subject. But it must be remembered that *Davison* v. *Duncan*, followed and affirmed as it was by the Court of Appeal in the later case, *Purcell* v. *Sowler* (2 C. P. D. 215; 46 L. J. C. P. 308; 25 W. R. 362; 36 L. T. 416), still applies to all reports except those published by newspapers, and also to newspaper reports of meetings other than those specified in the Act of 1888, and to cases where the defendant had not inserted a reasonable contradiction as provided by the Act.

The Act referred to is the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), by sec. 4 of which a fair and accurate report published in any newspaper of the proceedings of a public meeting, *or* (except where neither the public nor a newspaper reporter is admitted) of any meeting of a local authority (the various authorities are specified in the section), or any committee thereof, or of Royal Commissioners, or select committees of either House of Parliament, or of justices at Quarter Sessions, and the publication at the request of any government department, or police authority, of any notice or report issued for the information of the public, shall be privileged, *unless* published or made maliciously; provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter; and provided also that the protection afforded by the section shall not be available as a defence if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same; provided further that nothing in the section shall be deemed to limit or abridge any privilege by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the

public benefit. For the purposes of this section the expression 'public meeting' means any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

GENERAL INDEX

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