

Erskine May, Vol. II, Chapter VII, pp. 1-13

Wilkes and Liberty

[1] WE have traced, in the last chapter, the changes which were successively introduced into the constitution of the House of Commons,—the efforts made to reduce the influence of the crown, the ministers, and the aristocracy over its members,—to restrain corruption, and encourage an honest and independent discharge of its duties to the public. We have now to regard Parliament,—and mainly the House of Commons, under another aspect: to observe how it has wielded the great powers entrusted to it,—in what manner it has respected the prerogatives of the crown, the authority of the law, and other jurisdictions,—and how far it has acknowledged its own responsibilities to the people.

Throughout its history, the House of Commons has had struggles with the crown, the House of Lords, the courts of law, the press, and the people. At one time straining [2] its own powers, at another resisting encroachments upon its just authority: successful in asserting its rights, but failing in its usurpations; it has gradually assumed its proper position in the state, controlling all other powers, but itself controlled and responsible. The worst period of its dependence and corruption, was also marked by the most flagrant abuses of its power. And the more it has been brought under the control of public opinion,—the greater have been its moderation and forbearance.

The reign of George III. witnessed many remarkable changes in the relations of Parliament to the people, which all contributed to increase its responsibility. Moral causes also extended the control of the people over their rulers, even more than amendments of the law, by which constitutional abuses were corrected. Events occurred early in this reign, which brought to a decisive issue, important questions affecting the privileges of Parliament, and the rights of the subject.

The liberty of the subject had already been outraged by the imprisonment of Wilkes, under a general warrant, for the publication of the celebrated No. 45 of the 'North Briton;'(1) when Parliament thrust itself forward, as if to prove how privilege could still be abused, as well as prerogative. Being a member of the House of Commons, Wilkes had been released from his imprisonment, by the Court of Common Pleas, on a writ of *habeas corpus*, on the ground of his privilege.

Wilkes Denied His Privilege

[3] The only exceptions to the privilege of freedom from arrest, which had ever been recognised by Parliament, were 'treason, felony, and breach of the peace,' 'or refusing to give surety of the peace.' The court properly acknowledged the privilege, as defined by Parliament itself; and discharged Wilkes from his imprisonment. He was afterwards served with a subpoena, on an information against him in the Court of Kings Bench, to which, on the ground of privilege, he had not entered an appearance. On the meeting of Parliament, however, in November, 1763, he lost no time in stating that if his privilege should be affirmed, he was ready to waive it, 'and to put himself upon a jury of his countrymen.' Parliament,—which had ordinarily been too prone to enlarge its privileges,—was now the first to abridge and surrender them. Eager to second the vengeance of the king, the Commons commenced by voting that the 'North Briton,' No. 45, was 'a false, scandalous, and malicious libel,' and ordering it to be burned by the hands of the common hangman. Then, in defiance of

their own previous resolutions, they resolved 'that privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of law, in the speedy and effectual prosecution of so heinous and dangerous an offence.'

To the principle of the latter part of this resolution there can be little exception; but here it was [4] applied *ex post facto* to a particular case, and used to justify a judicial decision, contrary to law and usage. Mr. Pitt, while he denounced the libel and the libeller, remonstrated against the abandonment of the privilege. These resolutions being communicated to the Lords, were agreed to; but not without a most able protest, signed by seventeen peers, against the surrender of the privilege of Parliament 'to serve a particular purpose, *ex post facto, et pendente lite*, in the courts below.'⁽²⁾

Such a libel as that of Wilkes, a few years later, would have attracted little notice: but at that time it is not surprising that it provoked a legal prosecution. It was, however, a libel upon the king's ministers, rather than upon the king himself. Upon Parliament it contained nothing but an obscure innuendo,⁽³⁾ which alone brought the matter legitimately within the limits of privilege. There were, doubtless, many precedents,—to be avoided, rather than followed,—for pronouncing writings to be seditious: but sedition is properly an offence cognisable by law. So far as the libel affected the character of either House, it was within the scope of privilege: but its seditious character could only be determined by the courts, where a prosecution had already been commenced. To condemn the libel as seditious was, therefore, to anticipate the decision of the proper [5] tribunal: and to order it to be burned by the hands of the common hangman,—if no great punishment to the libeller,—yet branded him as a criminal before his trial. The mob took part with Wilkes,—assailed the Sheriffs who were executing the orders of Parliament; and having rescued part of the obnoxious 'North Briton' from the flames, bore it in triumph to Temple Bar, beyond the limits of the city jurisdiction. Here they made another bonfire, and burned a jack-boot and a petticoat, the favourite emblems of the late unpopular minister Lord Bute, and the Princess. This outrage was resented by both Houses; an address being voted for a prosecution of all persons concerned in it.

He Is Expelled

The severities of Parliament were still pursuing Wilkes. He had been ordered by the Commons to attend in his place, with a view to further proceedings; but having been wounded in a duel,—provoked and forced upon him by Mr. Martin, one of their own members,—his attendance was necessarily deferred. Meanwhile, expecting no mercy either from the crown or from Parliament,—tracked by spies, and beset with petty persecutions,—he prudently withdrew to Paris. Being absent, in contempt of the orders of the House, the proceedings were no longer stayed; and evidence having been taken at the bar, of his being the author and publisher of the 'North Briton,' No. 45, he was expelled the House. In expelling a [6] member, whom they had adjudged to have committed the offence of writing and publishing a seditious libel, the Commons acted within their powers: but the vote was precipitate and vindictive. He was about to be tried for his offence; and they might at least have waited for his conviction, instead of prejudging his cause, and anticipating his legal punishment.

But the Lords far outstripped the other House, in this race of persecution. On the first day of the session, while the Commons were dealing with the 'North Briton,' Lord Sandwich complained to the Lords of an 'Essay on Woman,' with notes, to which the name of Bishop Warburton was affixed; and of another printed paper called 'The *Veni Creator* paraphrased.' Of the 'Essay on Woman,' thirteen copies only had been printed, in Wilkes' private printing-press: there was no evidence of publication; and a proof-copy of the work had been obtained through the treachery of one of his printers. If these writings were obscene and blasphemous, their author had exposed himself to the law: but the only pretence for noticing them in

Parliament, was the absurd use of the name of a bishop, a member of their Lordships' House. Hence it became a breach of privilege! This ingenious device was suggested by the chancellor, Lord Henley; and Mr. Grenville obtained the bishop's consent to complain of the outrage, in his name. But it was beneath the dignity of the House to notice such writings, obtained in such a manner; and it was notorious that the politics of [7] the author were the true ground of offence, and not his blasphemy, or his irreverence to the bishop. The proceeding was the more ridiculous, from the complaint of obscenity having been made by the most profligate of peers,—'Satan rebuking sin.'⁽⁴⁾ Nevertheless the Lords were not ashamed to examine the printers, from whom the proof-sheets had been obtained, in order to prove that Wilkes was the author. They at once addressed the king to order a prosecution of Wilkes: but as he was, at this time, laid up with his wounds, proceedings against him for the breach of privilege were postponed. On the 24th January, when he had escaped from their jurisdiction, they ordered him into custody. They were at least spared the opprobrium of further oppression: but their proceedings had not escaped the indignation and ridicule which they deserved.

Leaving Wilkes, for a time, as a popular martyr,—and passing over his further contests with the government in the courts of law,—we shall find him, a few years later, again coming into collision with Parliament, and becoming the successful champion of popular rights.

The discussions on his case were scarcely concluded, when a complaint was made to the Lords, by Lord Lyttelton, of a book with the title of '*Droit Le Roi*.' It was the [8] very opposite of Wilkes' writings,—being a high prerogative treatise, founded upon statutes, precedents, and the dicta of lawyers before the Revolution. It was too monstrous to be defended by any one; and, like the 'North Briton,' it was ordered by both Houses to be burned by the hands of the common hangman. There was no pretence for dealing with this case as a breach of privilege: but as the popular cause had suffered from the straining of privilege, in the person of Wilkes, no one attempted to save this ultra-loyal treatise from the flames.

At the dissolution of Parliament in 1768, Wilkes, who had, in the meantime, resided abroad,—an exile and an outlaw,—offered himself as a candidate for the city of London. He was defeated: but the memory of his wrongs was revived; and with no other claim to popular favour, he found himself the idol of the people. He now became a candidate for Middlesex, and was returned by a large majority. His triumph was celebrated by his partisans, who forced the inhabitants of London to illuminate, and join in their cry of 'Wilkes and liberty,'—marking every door, as they passed along, with the popular number '45.'

But he was soon to suffer the penalties of his past offences. On the first day of the ensuing session, having appeared before the Court of Kings Bench on his outlawry, he was committed on a *capias utlagatum*. Rescued by the mob, he again surrendered himself; [9] and his imprisonment was the unhappy occasion of riots, and of a collision between the military and the people. His outlawry was soon afterwards reversed: but he was sentenced to two years' imprisonment for his libels.

During the first session of this Parliament, therefore, Wilkes was unable to take his seat; and as yet no proceedings were commenced against him in the House of Commons. At the opening of the second session, in November, he brought himself into notice by accusing Lord Mansfield,—in a petition to the House,—of having altered the record on his trial; and Mr. Webb, the Solicitor of the Treasury, of having bribed Curry, the printer, with public money, to appear as a witness against him. His charges were voted to be groundless: but they served the purpose of exciting popular sympathy. He was brought down to Westminster to prove them, attended by a large concourse of people; and for a moment he perplexed the House by submitting whether, being a member, he could stand at the bar, without having taken the oath and delivered in his qualification. But he soon received the obvious answer that being in custody at the bar, the acts affecting members sitting in the House, did not apply to his case.

But a graver matter in which Wilkes had involved himself, was now to be considered. He had

published a letter from Lord Weymouth [10] to the magistrates of Surrey, advising them to call in the military for the suppression of riots, with a prefatory letter of his own, in which he had applied the strongest language to the secretary of state; and had designated the late collision between the troops and the populace in St. George's Fields, as a bloody massacre. Here again, a strange and irregular proceeding was resorted to. The letter was a libel upon a secretary of state, as an officer of the crown; who, being also a peer, complained of it as a breach of privilege. But instead of proceeding against the author in the House of Lords, the paper was voted an insolent, scandalous, and seditious libel; and a conference was held with the Commons on the conduct of Wilkes, as a member of their House. They immediately took the matter up; and rushing headlong into a quarrel which did not concern them, called upon Wilkes for his defence. He boldly confessed himself the author of the prefatory letter; and gloried in having brought 'to light that bloody scroll' of Lord Weymouth. The letter was voted to be an insolent, scandalous, and seditious libel. A motion was then made for the expulsion of Wilkes, founded upon several distinct grounds: first, this last seditious libel, which, if a breach of privilege, was cognisable by the Lords, and not by the Commons, and, if a seditious libel, was punishable by law: secondly, the publication of the 'North Briton,' five years before, for which Wilkes was already under sentence, [11] and had suffered expulsion from a former Parliament: thirdly, his impious and obscene libels, for which he was already suffering punishment, by the judgment of a criminal court; and, fourthly, that he was under sentence of the court to suffer twenty-two months' imprisonment.

And Again Expelled

Such were the cumulative charges, upon which it was now proposed to expel him. Nothing can be more undoubted than the right of the House of Commons to expel one of its own members, for any offence which, in its judgment, deserves such punishment,—whether it be a breach of privilege or not. But here the exercise of this right was unjust and oppressive. It was forcibly argued, that for all the offences enumerated, but one, Wilkes had already suffered, and was still suffering. For his remaining offence,—the libel on a secretary of state,—it was not the province of the House to condemn and punish him by this summary process. It should be left to the courts to try him,—and, if found guilty, to inflict the punishment prescribed by law. For his old offences he could scarcely be expelled. During a whole session he had been a member; and yet they had not been held to justify his expulsion. Then why should they now call for such severity? Clearly on the ground of his libel on Lord Weymouth. The very enumeration of so many grounds of expulsion, implied their separate weakness and insufficiency; while it was designed to attract the support of members, influenced by different reasons for their votes. These arguments were urged by Mr. Burke, Mr. Pitt. Mr. Dowdeswell, Mr. Beckford, [12] Mr. Cornwall, and, above all, by Mr. George Grenville. The masterly speech of the latter does great credit to his judgment and foresight. When a minister, he had been the first to bring the House of Commons into collision with Wilkes: but he now recoiled from the struggle which was impending. Having shown the injustice of the proposed punishment, he proceeded to show its impolicy and danger. He predicted that Wilkes would be re-elected, and that the House would have but two alternatives, both objectionable; either to expel him again, and suspend the issue of the writ for the entire Parliament; or to declare another candidate,—with a minority of votes,—to be elected, on the ground of Wilkes' legal disqualification. In both cases the law would be violated, and the rights of the electors invaded. And in warning them of the dangerous contest they were about to commence, he predicted that the power and popularity of the demagogue would suddenly be reduced, if he were relieved from his martyrdom, and admitted to the legislature, where his true character would be discovered.

But all these arguments and cautions were proffered in vain. The House,—making common cause with the court,—had resolved to scourge the insolent libeller who had intruded himself

into their councils; and, regardless of future consequences, they voted his expulsion by a large majority. According to Burke, 'the point to be gained by the cabal was this: that a precedent should be established, tending to show that the favour of the [13] people was not so sure a road as the favour of the court, even to popular honours and popular trusts.' 'Popularity was to be rendered, if not directly penal, at least highly dangerous.' This view, however, is too deep and philosophical, to have been the true one. The court party, having been defied and insulted by a political opponent, were determined to crush him; and scarcely stopped to consider whether the laws were outraged or not.

Footnotes.

1. See [Chap. XI](#).
2. Horace Walpole says it was drawn up by Chief Justice Pratt.
3. The passage reflecting upon Parliament was as follows: 'As to the entire approbation of Parliament [of the peace] which is so vainly boasted of, the world knows how that was obtained. The large debt on the civil list, already above half a year in arrear, shows pretty clearly the transactions of the winter.'
4. "'The Beggar's Opera' being performed at Covent-Garden Theatre soon after this event, the whole audience, when Macheath says, "That Jemmy Twitcher should peach me, I own surprises me," burst out into an applause of application; and the nick-name of Jemmy Twitcher stuck by the earl so as almost to occasion the disuse of his title.'—Walpole's Mem., i. 314.

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