

**THE PARLIAMENTARY PRIVILEGE
OF
FREEDOM FROM ARREST,
1603–1629**

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DECLARATION

I, Keith Anthony Thomas Stapylton, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed 

ABSTRACT

This thesis considers the English parliamentary privilege of freedom from arrest (and other legal processes), 1603-1629. Although it is under-represented in the historiography, the early Stuart Commons cherished this particular privilege as much as they valued freedom of speech. Previously one of the privileges *requested* from the monarch at the start of a parliament, by the seventeenth century freedom from arrest was increasingly *claimed* as an ‘ancient’, ‘undoubted’ right that secured the attendance of members, and safeguarded their honour, dignity, property, and ‘necessary’ servants. Uncertainty over the status and operation of the privilege was a major contemporary issue, and this prompted key questions for research. First, did ill definition of the constitutional relationship between the crown and its prerogatives, and parliament and its privileges, lead to tensions, increasingly polemical attitudes, and a questioning of the royal prerogative? Where did sovereignty now lie? Second, was it important to maximise the scope of the privilege, if parliament was to carry out its business properly? Did *ad hoc* management of individual privilege cases nevertheless have the cumulative effect of enhancing the authority and confidence of the Commons? Third, to what extent was the exploitation or abuse of privilege an unintended consequence of the strengthening of the Commons’ authority in matters of privilege? Such matters are not treated discretely, but are embedded within chapters that follow a thematic, broadly chronological approach. These include an outline of how the inter-relationship between privilege and the royal prerogative developed from the medieval period onwards, as well as analyses of significant cases. Drawing on key sources that include parliamentary and constitutional records, contemporary diaries, and edited collections from a wider period, the research supports a view that privilege matters imparted a striking distinctiveness, sophistication, and authority to the parliaments of the early Stuart period, especially the Commons.

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EDITORIAL NOTES

The following conventions apply:

1. Where available, original spelling has largely been retained, but the long s (ſ) and thorn/th (Ț) have been given modern form. Where confusion about spelling or syntax might arise, a gloss has been inserted in square brackets, or modern spelling substituted. Unusual abbreviations in quotations have been silently expanded.
2. The names of parliamentarians, other than in direct quotations, are spelt in the form adopted by the *History of Parliament (HoP)* volumes.
3. The parliamentary seats of members of the Commons of 1604-29 are given, when first referred to, e.g. Thomas Morgan (Wilton). Subsequent references are given if the MP sat for a different constituency at the time.
4. English dates before 1752 are shown with the new year beginning on 1 January, rather than 24 March.
5. Unless a particularly Scottish context applies, only the English form of the monarch's title is shown, for example, James I rather than James VI & I. Non-specific references to sovereigns are in the masculine form, as a matter of simplicity.
6. Lengthy titles of early books and articles are indicated in footnotes by an ellipsis after the main element of the title, and are given in full in the bibliography.
7. The bibliography details the edition of works that have been directly cited, as well as any different edition cited by a third party author. Places of publication for works cited are in the United Kingdom, unless otherwise distinguished. When more than one city is listed for the same publisher, only the first city has been listed. The full titles of publishers are given for works that appeared before 1900; thereafter forenames, initials and descriptive phrases, such as '& Co.' are usually omitted.

ABBREVIATIONS

Abbreviations that are commonly used in printed works are not listed.

<i>Add.</i>	Additional Manuscripts, British Library
<i>bap.</i>	baptised
<i>BHOL</i>	British History Online, the online database of the Institute of Historical Research
<i>BL</i>	London: British Library
<i>Cam. Soc.</i>	Camden Society
<i>CD</i>	Commons Debates
<i>CJ</i>	Journal of the House of Commons
<i>col.</i>	column
<i>CP</i>	Commons Proceedings
<i>Cotton</i>	Cotton Manuscripts, British Library
<i>CSPD</i>	Calendar of State Papers Domestic
<i>d.</i>	died
<i>fol(s).</i>	folio(s)
<i>ECCO</i>	Eighteenth Century Collections Online
<i>EEBO</i>	Early English Books Online
<i>Harl.</i>	Harley (Harleian) Manuscripts, British Library
<i>HLRO</i>	House of Lords Records Office
<i>HMC</i>	Historical Manuscripts Commission
<i>HoC</i>	House of Commons
<i>HoL</i>	House of Lords
<i>HoP</i>	History of Parliament
<i>IHR</i>	Institute of Historical Research
<i>LJ</i>	Journal of the House of Lords
<i>MS</i>	manuscript(s)
<i>n.</i>	footnote or endnote

<i>NS</i>	New style (date)
<i>ODNB</i>	Oxford Dictionary of National Biography. The references are to the OUP online edition (2004 unless otherwise stated).
<i>OED</i>	Oxford English Dictionary
<i>OS</i>	Old style (date)
<i>OUP</i>	Oxford University Press
<i>PRO</i>	Public Record Office (now TNA)
<i>r</i>	<i>recto</i> (front side of a folio)
<i>repr.</i>	reprint(ed)
<i>RP</i>	<i>Rotuli Parliamentorum</i> (Parliament Rolls of Medieval England): ed. Chris Given-Wilson et al. (Woodbridge, 2005). The citations in this thesis come from <i>BHOL</i> .
<i>s.a.</i>	<i>sine anno</i> (unknown date of publication)
<i>s.l.</i>	<i>sine loco</i> (unknown place of publication)
<i>s.n.</i>	<i>sine nomine</i> (unknown publisher)
<i>stat.</i>	statute
<i>TNA</i>	Kew, Surrey: The National Archives
<i>UP</i>	University Press
<i>v</i>	<i>verso</i> (back side of a folio)

States in the USA are abbreviated using the US Postal Service abbreviations, available from <<http://goo.gl/u4Osau>>.

JOURNAL ABBREVIATIONS

<i>AHR</i>	<i>American Historical Review</i>
<i>Bull IHR</i>	<i>Bulletin of the Institute of Historical Research (now 'Historical Research')</i>
<i>EHR</i>	<i>English Historical Review</i>
<i>HistJ</i>	<i>Historical Journal</i>
<i>JBS</i>	<i>Journal of British Studies</i>
<i>JIH</i>	<i>Journal of Interdisciplinary History</i>
<i>JModH</i>	<i>Journal of Modern History</i>
<i>P & P</i>	<i>Past and Present</i>
<i>PH</i>	<i>Parliamentary History</i>
<i>TAPS</i>	<i>Transactions of the American Philosophical Society</i>
<i>TRHS</i>	<i>Transactions of the Royal Historical Society</i>

I : INTRODUCTION

Properly understood, the privileges of Parliament are the privileges of the nation, and the bedrock of our constitutional democracy [... but ...] it can confidently be stated that parliamentary privilege or immunity from criminal prosecution has never ever attached to ordinary criminal activities by members of Parliament. [...] The stark reality is that the defendants [... committed ...] crimes of dishonesty to which parliamentary immunity or privilege does not, has never, and, we believe, never would attach.¹

The court of appeal made these observations on the operation of the parliamentary privilege of immunity from legal processes and freedom from arrest,² when hearing a case that arose out of the parliamentary expenses scandal of the late twentieth century.³ Their judgment shows that even today there are controversial aspects to this parliamentary privilege, which were also identified in a report by a parliamentary joint committee, a few years earlier:

The principle that both Houses impose upon their members an absolute priority of attendance is the origin of [the privilege of] ‘freedom from arrest’. [...] Such

¹ England and Wales Court of Appeal (Criminal Division), *Between: R and David Chaytor (1) Elliot Morley (2) James Devine (3) Lord Hanningfield (4)*, [2010] 2 Cr App R 34, [2010] EWCA Crim 1910, in England and Wales Court of Appeal (Criminal Division) Decisions (British and Irish Legal Information Institute, 2010), at <<http://goo.gl/i4piH>>.

² The term ‘freedom from arrest’, also sometimes termed ‘privilege of parliament’, is used in this thesis to encompass a range of parliamentary immunities from legal processes and ‘molestations’ that could be claimed by peers, members of the Commons, and their respective servants. As summarised by Sir Edward Coke, privilege was to apply ‘in case of any arrest, or any distress of goods, serving any process, summoning the land of a member, citation or summoning his person, arresting his person, suing him in any court’: in John Hatsell, *A Collection of Cases of Privilege of Parliament : From the Earliest Records to the Year 1628* (London: H. Hughes, 1776), p. 160.

³ The appeal court case concerned the trials of three former MPs and a peer, who had all been charged with false accounting in relation to parliamentary expenses. During their trials in the crown court, the men had argued unsuccessfully that there was no case to answer, because expenses claims were covered by the doctrine of parliamentary privilege, and could not be the basis of criminal charges. The appeal court rejected appeals against the crown court decision, and the men were eventually convicted.

justification as exists for its continuance resides in the principle that Parliament should have first claim on the service of its members, even to the detriment of the civil rights of others. The 1967 committee took the view it was wrong for the claims of individuals to be obstructed by use of members' immunity from arrest, and considered the privilege anomalous and of little value.⁴

There have been several reports from joint committees of both Houses and green papers on the matter during the last fifty years, the most recent of which states: 'There is no obvious continuing justification for Members of Parliament enjoying different treatment from any other citizen in civil proceedings'.⁵ Nevertheless, no change has actually occurred. Speaker John Bercow, therefore, still referred to 'freedom from arrest' in his speech at the start of the 2015 parliament, delivered on behalf of the Commons:

It is now my duty, in the name of and on behalf of the Commons of the United Kingdom, to lay claim, by humble petition to Her Majesty, to all their ancient and undoubted rights and privileges, especially to freedom of speech in debate, to freedom from arrest, and to free access to Her Majesty whenever occasion shall arise, and that the most favourable construction shall be put upon all their proceedings.

Nor did the lord privy seal, baroness Stowell, depart from custom and practice in her response: that Elizabeth II did 'most readily confirm all the rights and privileges which have ever been granted to or conferred upon the Commons by Her Majesty or any of her Royal predecessors'.⁶ Lady Stowell's words might have equally well been spoken on behalf of Elizabeth I or her Stuart successors. Speaker Bercow's formula begins with the generally best-known parliamentary privilege today: *freedom of speech in debate*. *Freedom from arrest* is the next privilege referred to by Speakers,

⁴ House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Parliamentary Privilege - First Report*, in www.parliament.uk (UK Parliament, 1999), at <<http://tinyurl.com/n2yocm6>>, Chapter 7, §326-27.

⁵ Leader of the House of Commons, *Parliamentary Privilege, Cm 8318*, in *Official Documents* (HM Government, 2012), at <<http://tinyurl.com/lc6na3f>>, p. 77.

⁶ Hansard, *House of Lords Debates, November 1995*— in www.parliament.uk (UK Parliament), at <<http://tinyurl.com/nvwrnuc>>, vol. 762, no. 2, col. 3: 19 May 2015.

and its developing status within the political scene in the early Stuart years is the subject of this thesis.

Claims for freedom from arrest and other legal processes predate petitions from incoming Speakers for liberty of speech. Freedom from molestation and legal processes developed to insulate members from anything that might divert them from the business of parliament, or prevent the personal attendance of those servants that were ‘necessary’, at least in theory, for a parliamentarian to fulfil his role.⁷ Members of both Houses, and their servants, could claim privilege, although this research is largely confined to the Commons.⁸ The period chosen for research was one when freedom from arrest took on a particular importance, as changes in the definition, assertion, operation, and extension of privilege contributed to the growth of institutional and political power, and altered the way that parliament defined itself. These years have been termed ‘a critical period in the political history of not just England, but of the English-speaking world. [...] From 1604 to 1629 the House of Commons was at the centre of English politics as never before’.⁹ During this period, 1,782 men became MPs; this research has found 191 cases relating to freedom from arrest or other legal processes that were raised in the Commons, although Paul Hunneyball gives a slightly lower figure of 183.¹⁰ John Hatsell, writing much earlier, highlighted 74 cases in the same period.¹¹ The figures found by Hunneyball and in this research can be contrasted to just 44 cases that were identified by Bindoff for the

⁷ The first case of granting personal immunity to a member may well have occurred in 1340: see Appendix 1, case 2.

⁸ The privilege extended to the royal household, officers of both Houses, and their servants in turn, as all were deemed necessary to the proper working of parliament. Three cases exemplify this: William Hogan, servant of Queen Elizabeth: see Appendix 1, case 23; one of the queen’s heralds: *LJ*, 2, p. 240: 3 December 1601; and Sayres, servant to the Commons’ Clerk: *CJ*, 1, p. 295: 10 April 1606.

⁹ Paul Langford FBA, ‘Foreword’, in Andrew Thrush, *The House of Commons 1604-1629 : Introductory Survey and Appendices* (Cambridge: UP, 2010), I, ix.

¹⁰ The overall figure is given on the *HoP* website, at <<http://goo.gl/Bs6uKS>>. Hunneyball’s figure can be found in: Paul M. Hunneyball, ‘The Development of Parliamentary Privilege, 1604-29’, *PH*, 34 (1) (February 2015), 111-28, p. 116. The small variation in the number of cases between Hunneyball and this research perhaps reflects differing judgements on the categories to which cases should be assigned.

¹¹ Hatsell, *Cases of Privilege*, pp. 130-89. Hatsell would have known of further cases, which he did not apparently consider worthy of description.

sixteen parliaments of 1509-58, the majority relating to the arrests of servants, rather than privilege for MPs themselves.¹²

It is important to note that parliamentarians in the early seventeenth century strove to protect and preserve *all* their privileges, with importance attached to both freedom from arrest, and freedom of speech in debate. Privilege claims for freedom from arrest – however much they seemed individual or trivial – were accordingly considered with as much gravity as questions of freedom of speech, or the sequestering of members who had offended the crown in some way. Such was the significance of all their privileges to the Commons that, whereas these had previously been *requested* from the monarch at the start of a parliament, by the seventeenth century they were in effect being claimed as ‘ancient’, ‘undoubted’ rights and privileges, or at least being ‘petitioned’ for in what had become almost a ceremonial sense of that word.¹³ Indeed, the *Form of Apology and Satisfaction*, which was drafted, but not submitted, in the summer of 1604, asserted that ‘Our making of request in the entrance of Parliament to enjoy our privilege is an act only of manners’.¹⁴ The dilemma for the Commons was that if it was understood that their ‘petition’ for privileges were capable of rejection, then they conceded that their privileges could be limited, or even denied, by the king. The dilemma for the king was that if he allowed his prerogative to be bypassed, questioned, or constrained in one particular area, then potentially all his prerogative powers could be limited or even denied.

A further difficulty appeared in the early modern period. On the one hand, parliamentary privilege operated properly and legitimately to safeguard the attendance of members of both Houses. On the other hand, there could be a distortion of privilege, so that it insulated the personal and financial affairs of parliamentarians and their servants from equally proper legal processes, for all the time that a parliament was in being, and for a time before and afterwards. Even though privilege of

¹² S. T. Bindoff (ed.), *The House of Commons : 1509-1558*, 3 vols. (London: Secker & Warburg, 1982), I, pp. 26-27.

¹³ The words, *ancient* and *undoubted*, were still included in Speaker Bercow’s request in 2015.

¹⁴ J. R. Tanner (ed.), *Constitutional Documents of the Reign of James I, A.D. 1603-1625 : With an Historical Commentary* (Cambridge: UP, 1930), p. 222.

parliament did not confer perpetual immunity on any member, action could not be taken to recover debts through legal processes if a parliament lasted for any length of time. This was especially true of the first parliament of James I, which ran from March 1604 to November 1610. There was also a view that if a process to recover debts had been broken, for example by the release of an MP through privilege, then the process could not be resumed later, when the member's privilege no longer applied. However, until perhaps the late twentieth century, the pursuit of profit by those in parliament was a perfectly acceptable activity, even if, at times, ventures failed, and debts were consequently left unpaid. Those who defaulted in these circumstances were not considered fraudulent, merely unfortunate, as were their creditors. Nevertheless, as a result of these tensions, the early-seventeenth century Commons took assiduous care to seek out precedents, particularly those recorded in the parliament rolls, or the journals of the House, and to work within a law, which was, for the most part, 'customary' common law, based on such precedents, rather than derived from statutes, or parliamentary resolutions and orders.¹⁵ Privilege cases, often trivial and *ad hoc* on the surface, seemed to be largely about protecting the honour, dignity, and property of individual members of the Lords and Commons, yet their cumulative effect was to help both Houses to define themselves and strengthen their institutional character. Cases were managed seriously, typically through the committee for privileges (first established in the reign of Elizabeth I), and then on the floor of the House. In this way the Commons maintained, defended, and sometimes clarified, stretched, or redefined parliamentary dignity and authority: such change was, however, *evolutionary* rather than *revolutionary*. As Sommerville observes, 'Privilege did not expand steadily at the expense of royal power. The idea that privileges grew in accordance with a master plan by which the House of Commons aimed to seize the reins of government from the monarch has little to recommend it.'

¹⁵ The Lords also took steps to identify precedents that would maintain the rights and privileges of their House, for example in relation to the sequestering of lord Arundel: *LJ* 3, pp. 558-62: 18 April 1626.

Very often privileges were asserted in a piecemeal fashion, as responses particular to circumstances had little to do with royal policy'.¹⁶

Key research questions

This thesis looks to reframe the privilege of freedom from arrest within the study of early-seventeenth century parliaments. It begins by tracing the origins and development of the privilege of freedom from arrest, from its medieval origins as a way of ensuring that those summoned to parliament were free from extraneous cares, through to the early seventeenth century, when privilege as an entity took on an importance of its own. The key contemporary issue was whether understandings about the privilege of freedom from arrest were certain, consideration of which prompted research questions that are at the heart of this thesis. The research has analysed and grouped all the individual cases that were raised in the Commons during this period. The first research question asks whether the ill definition of the constitutional relationship between the crown and its prerogatives, and parliament and its privileges, led to tensions, increasingly polemical attitudes in the Commons, and a questioning of the royal prerogative. Or, putting the question from a different angle, to what extent were there effective, common, working understandings about the origins, scope and operation of both the royal prerogative and parliamentary privileges? Second, was it important to maximise, even to modernise, the scope of the privilege of freedom from arrest and other legal processes, if parliament was to carry out its business properly? Linked to this, there is a question whether the management of privilege cases, despite being largely *ad hoc* and individual, nevertheless had the cumulative effect of adding to the authority and confidence of the Commons – was the whole greater than the sum of its parts? Third, to what extent was the exploitation or abuse of privilege an unintended consequence of the strengthening of the Commons' authority in matters of privilege? These research questions are not treated discretely, but are embedded within chapters that follow a thematic, and broadly

¹⁶ Johann P. Sommerville, 'Parliament, Privilege, and the Liberties of the Subject', in Jack H. Hexter (ed.), *Parliament and Liberty from the Reign of Elizabeth to the English Civil War* (Stanford (CA): UP, 1992), 56-84, p. 57.

chronological approach, including an outline of how the privilege originated in the medieval period and developed thereafter, together with a presentation of significant cases. Consideration of these research strands helps to determine the extent to which privilege matters contributed to the parliaments of the early Stuart period, presenting a striking new ‘distinctiveness and sophistication as an institution’.¹⁷ In summary, these wide-ranging issues might be condensed into a single key question: *where was sovereignty now to be found?*

Historiography

The numerous contributions to the historiography of the early Stuart period inevitably reflect the changing roles of crown and parliament, and have often attempted to ‘explain’ why the civil war(s) of the seventeenth century took place. Bibliographies help to identify the body of work on the early seventeenth century, but they do not of themselves provide an analytical frame of reference.¹⁸ Some historiographical surveys cover this period, for example, those by Richardson, Hexter, and Tomlinson.¹⁹ Consideration of the historiography in this section is not intended, however, to detail the to and fro of the general historical debate around the early Stuart years, involving writers within various traditions, approaches, or ‘schools’, who often focused on the civil wars and their origins. Rather, the following paragraphs concentrate on locating material that has greater relevance for the methodology and arguments of the thesis and its study of parliamentary privilege, particularly the part that privilege did, or did not, play in the possible development of ‘oppositional’ or ‘consensual’ elements in the early Stuart parliaments. In this, it must be noted that freedom from arrest has

¹⁷ David L. Smith, *The Stuart Parliaments 1603-1689* (London: Arnold, 1999), p. 9.

¹⁸ The *Bibliography of British and Irish History* (BBIH) is the most comprehensive work. A summary of the historiography and a very full bibliography are included in: Barry Coward (ed.), *A Companion to Stuart Britain* (Oxford: Blackwell, 2003), pp. xiv-xxiv, and pp. 492-529; and Barry Coward, *The Stuart Age : England, 1603-1714*, 3rd edn., (Harlow: Longman, 2003), pp. 498-504.

¹⁹ R. C. Richardson, *The Debate on the English Revolution* (London: Methuen, 1977); J. H. Hexter, ‘Historiographical Perspectives: The Early Stuarts and Parliament : Old Hat and The Nouvelle Vague’, *PH*, 1 (1) (December 1982), 181-215; Howard Tomlinson, ‘The Causes of War - a Historiographical Survey’, in Howard Tomlinson (ed.), *Before the English Civil War : Essays on Early Stuart Politics and Government* (London: Macmillan, 1983), 7-26.

generally received limited attention by historians, despite its significance to those at the time. This is possibly because this particular privilege came to be associated with attempts to avoid meeting debts – even if a final day of reckoning might come – and other abuses, so that it did not resonate with whiggish writers in particular, who were happier describing parliamentarians nobly promoting ‘liberty’, by asserting freedom of speech, or resisting any extension of the powers of the crown. The exploitation of privilege, which is considered in this thesis, has received limited attention, although Blackstone recognises that the privilege does ‘derogate from the common law, being only indulged to prevent the members being diverted from the public business’.²⁰

A. S. Turberville, whose works covered the sixteenth and seventeenth centuries, did describe some of the specific issues that arose from protecting the servants of members of parliament from both Houses, in an article from 1927.²¹

Chapter three below provides an extended study of the case of Sir Thomas Shirley, which attracted considerable contemporary attention. In the historiography, however, it generally receives brief mention, as a case where the Commons, through their own actions, finally secured the autonomous right to free members – even though Shirley’s release had depended in no small measure on the co-operation and support of James I. Prothero’s article from 1893 is an exception, in describing the case in some detail.²² The other case that is considered at greater length in this thesis concerned the MP, John Rolle, whose goods were seized after he failed to pay what he saw as unlawful customs duties.²³ This does attract more historiographical attention, usually figuring within a discussion of resistance to Charles I for raising funds without parliamentary authority. Hatsell, writing in the mid-eighteenth century, includes issues that arose from Rolle’s claim for privilege.²⁴ Whig writers generally

²⁰ Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon, 1765-9), I, pp. 159-61.

²¹ A. S. Turberville, ‘The “Protection” of the Servants of Members of Parliament’, *EHR*, 42 (168) (1927), 590-600.

²² G. W. Prothero, ‘The Parliamentary Privilege of Freedom from Arrest, and Sir Thomas Shirley’s Case, 1604’, *EHR*, 8 (32) (October 1893), 733-40.

²³ See chapter six below.

²⁴ Hatsell, *Cases of Privilege*, pp. 184-85. Hatsell briefly records the Commons’ confirmation of privilege in respect of a *subpoena* served on Rolle, which was a significant

[footnote continues ...]

identified the Rolle case as a point on the development of a rule of law that preserved property rights and individual liberties. Samuel Rawson Gardiner was, however, particularly critical of the way in which Rolle's contemporaries focused on his individual circumstances, rather than larger issues, thereby converting a 'mighty struggle against unparliamentary taxation into a mere dispute about privilege'.²⁵ Popofsky, in rejecting revisionist suggestions that the Commons were largely impotent in the early Caroline parliaments, has identified the Rolle case as lying on a 'continuum of constitutional concern in the Commons over arbitrary royal taxation extending back into the reign of James I and culminating in a crisis over tonnage and poundage in the [1629] session'.²⁶

Writers from the seventeenth and eighteenth centuries mostly provided some account of privilege cases, with little comment, positive, or negative. Blackstone is more expansive, and cautions members of the Commons of his own period to remember the high trust placed in them as guardians of the English constitution, 'bound by every tie of nature, of honour, and of religion'.²⁷ By the nineteenth century, writers in what came to be seen as the 'whig' tradition outnumbered 'tory' interpreters, who were uneasy with the proposition that resistance to a sovereign was sometimes justified, or any ideas that power lay with 'the people', rather than the sovereign in parliament.²⁸ Of significance for this thesis, however, was the whig line that there was tension and conflict between the first two Stuart kings and their parliaments. In that analysis, the crown was supposedly increasingly bent on strengthening its powers, even to make it absolute along continental lines. Parliament, especially the lower House, was consequently setting itself up to protect the liberties that they and the people had won over time, by asserting their rights and privileges, and establishing a say in matters of state and government. Pejoratively pigeon-holed

.....
 contributor to the Commons' anger over Rolle's treatment: *ibid.* pp. 170-71. See also p. 226 below.

²⁵ Gardiner's observations are quoted more fully on p. 201 below.

²⁶ Linda S. Popofsky, 'The Crisis over Tonnage and Poundage in Parliament in 1629', *P & P* (126) (February 1990), 44-75, especially p. 45.

²⁷ Blackstone, *Commentaries*, I, p. 9.

²⁸ Mark Knights, 'Politics after the Glorious Revolution', in Barry Coward (ed.), *A Companion to Stuart Britain* (Chichester: Blackwell, 2009), 455-73, p. 456.

as a ‘whig writer’ for a time, historians have, however, revisited Gardiner with some admiration: ‘*the* authority and *the* indispensable narrative [...] returning to it after some years I was amazed by the moderation and carefulness with which Gardiner unfolds the coming of the Puritan Revolution’;²⁹ or: ‘It is a rash historian who disagrees with Gardiner’;³⁰ and: ‘Gardiner was one of those inexhaustible nineteenth-century masters whose range and command leave us awestruck’.³¹ He began his research in the 1850s, and started to question current explanations of the conflicts of Charles I’s reign. In the preface to the first edition of his history, he noted that:

Certainly the politics of the seventeenth century, when studied for the mere sake of understanding them, assume a very different appearance from that which they had in the eyes of men, who, like Macaulay and Forster, regarded them through the medium of their own political struggles.³²

As Ronald Hutton identifies, from the mid-1920s onwards, Wallace Notestein followed Gardiner’s line that the House of Commons was increasingly powerful, pitting itself against royal attempts to retrench what the people had wrested from their monarchs.³³ There was, however, increasing criticism through the mid- to late-twentieth century that earlier writers had located concepts such as *liberty* and *freedom* backwards from their own age into the seventeenth century. Although Herbert Butterfield challenged what he described as ‘The Whig Interpretation of History’ as early as 1931, his interest was, however, more in establishing sound historical methods, than in providing an extended ‘revision’ of whig commentaries on developments in the early seventeenth century.³⁴ Butterfield was, of course, not the first writer to advocate rigorous historical methods. In particular, the German school

²⁹ J. S. Morrill, *Seventeenth Century Britain, 1603-1714* (Folkestone: Dawson, 1980), p. 33.

³⁰ Christopher Hill, ‘Parliament and People in Seventeenth-Century England’, *P & P* (92) (August 1981), 100-124, p. 105.

³¹ Theodore K. Rabb, ‘Revisionism Revised : Two Perspectives on Early Stuart Parliamentary History : The Role of the Commons’, *P & P* (92) (August 1981), 55-78, p. 56.

³² Samuel Rawson Gardiner, *History of England from the Accession of James I. To the Disgrace of Chief-Justice Coke, 1603-1616*, 1st edn., 2 vols. (London: Hurst & Blackett, 1863). The quotation is from the 1883 edition, I, vi.

³³ Ronald Hutton, *Debates in Stuart History* (Basingstoke: Palgrave Macmillan, 2004), p. 7.

³⁴ Herbert Butterfield, *The Whig Interpretation of History* (London: Bell, 1931).

of *Historismus* [‘historism’, rather than ‘historicism’] tried to introduce objectivity and ‘scientific method’, by questioning the material, and seeking to avoid teleological pronouncements. Leopold von Ranke, who can be seen as its founder, wrote: ‘Importance has been attached to history’s duty to judge the past, in order to instruct the contemporary for the benefit of future ages. This work does not aspire to such high duties: it simply tries to show how it was in essence’ [my translation].³⁵ Prothero advocated that the ‘distinct, objective, methodological techniques developed by historians had a unique educational value and should therefore be taught as an intrinsic component of every university history course’.³⁶

An important ‘school’ to move on from whig interpretations comprised Marxist writers, notably Christopher Hill, particularly in the period beginning after the second world war. They differed from the whig analysis, by arguing that the growing ambition of parliament was the source of conflict in the seventeenth century, reflecting changing economic dynamics, which included an economically strong, but politically weak, gentry. Their analysis seemed, however, to offer little comment on matters of parliamentary privilege.

Nearly all historical interpretations will be questioned over time, and new analyses and explanations offered.³⁷ However, a particular ‘revisionism’ developed from the 1970s onwards in relation to Stuart studies, characterised by a rejection of whig interpretations that had anachronistically or teleologically presented the defence by parliaments of individual liberty and the rule of law as a kind of English constitutional exceptionalism.³⁸ There was a similar rejection of the Marxist analysis.

³⁵ Leopold von Ranke, *Geschichte der romanischen und germanischen Völker von 1494 bis 1514* (s.n., 1824), vii. This was von Ranke’s first significant work.

³⁶ Algernon Cecil, ‘Prothero, Sir George Walter (1848-1922)’, *ODNB*.

³⁷ Revision of the historiography of the early seventeenth century is not unique: consider, for example, views on life and culture in the ‘The Dark Ages’, the appeasement approach of Neville Chamberlain, or Russia under Stalin, all of which have been subject to heavy revision.

³⁸ Burgess discusses the differences between anachronism and teleology, and accuses Butterfield of carelessly conflating the two terms – this can be found within his broader historiographical analysis of revisionism: Glenn Burgess, ‘On Revisionism: An Analysis of Early Stuart Historiography in the 1970s’, *HistJ*, 33 (3) (September 1990), 609-27, especially pp. 614, 614n., 615.

Although revisionism is particularly associated with careful studies of how parliament worked and went about its business in the first decades of the seventeenth century, it reflected and drew on a more disciplined and rigorous examination of the relationships between Elizabeth I and the Commons. For example, Michael Graves used the documents to consider varying interpretations of Elizabethan parliaments, suggesting that such interpretations have inevitably reflected the assumptions and questions that have been put forward by major historians.³⁹ Geoffrey Elton set out that: ‘It has been my purpose – and, I know, that of my critics as well – to consider only the ascertainable facts of history and the possible interpretations to be put upon them’.⁴⁰ Elton’s particular contribution was his empirical examination of the Elizabethan parliaments themselves, rather than the issues surrounding their development. He identified that the main preoccupation of these parliaments was legislation, not conflict, which led him to ask: ‘why Tudor government remained pretty stable through a difficult century, while instability and collapse attended upon the government of the early Stuarts’. He answered his own question in the following way:

Parliament, the premier point of contact between rulers and ruled, between the Crown and the political nation, in the sixteenth century fulfilled its function as a stabilizing mechanism because it was usable and used to satisfy legitimate and potentially powerful aspirations. It mediated in the touchy area of taxation; by producing the required general and particular laws; it kept necessary change in decent order; it assisted the rich in the arranging of their affairs; and it helped the ambitious to scale the heights of public power. What more could we ask of the image of the body politic? Only that it should satisfy liberal preconceptions by regularly undoing governments. But that was not a function which sixteenth-century theory ascribed to Parliament, and I can see no reason why it should have done so.⁴¹

³⁹ Michael A. R. Graves, *Elizabethan Parliaments, 1559-1601* (London: Longman, 1987).

⁴⁰ G. R. Elton, ‘A Revolution in Tudor History?’, *P & P* (32) (1965), 103-09, p. 109.

⁴¹ G. R. Elton, ‘Tudor Government: The Points of Contact: I. Parliament’, *TRHS*, 24 (1974), 183-200, particularly pp. 184 and 200.

This thesis follows a similar line, in suggesting that the stability provided by a broadly consensual Elizabethan settlement was attractive to many members of the early Stuart parliaments, whose nature was essentially robustly conservative, rather than oppositional or revolutionary, at least until the late 1620s, and that this, in turn, influenced the way that privilege cases were approached and managed.⁴²

Revisionism has been characterised as more a reasoned point of view, than an organised ‘school’.⁴³ As John Morrill notes: ‘the interesting thing about revisionism was how a whole series of people came to the same conclusions simultaneously without really knowing one another [and] reacted to some extent against a previous generation of Oxford-trained historians’.⁴⁴ A particular revisionist contribution was to frame the debate on first principles, advocating a careful study of the parliaments of the 1620s, in order to build up a ‘narrative’, rather than selecting evidence to support pre-formed theories of opposition and defences of liberty. A similar empirical approach, using the records of all privilege cases that were raised in the early Stuart Commons, has been adopted in this thesis. Revisionist ideas found particular impetus in works in the mid-1970s, including those by Mark Kishlansky,⁴⁵ Morrill,⁴⁶ Kevin Sharpe,⁴⁷ and, not least, Conrad Russell, whose name is particularly associated with this approach. Zaller saw Russell as suggesting: ‘that the Stuart period may most fruitfully be regarded not as a high road to civil war but a sad and scuttling retreat down the back alleys of compromise’, and that the ‘Civil War was the breakdown of an existing consensus [...] the failure of men of goodwill rather than the creation of a

⁴² Two of the members who were arrested for their misbehaviour at the end of the 1629 parliament, William Coryton and Denzil Holles, later went on to be strong supporters of the crown: see Appendix 4. Sir John Eliot regularly expressed his loyalty to the crown in his speeches.

⁴³ ‘With no organized school, no single founding moment, no deliberately coordinated method, there were and still are almost as many revisionisms as there are scholars identified with the label’: Cynthia Herrup, ‘Revisionism: What’s in a Name?’, *JBS*, 35 (2) (April 1996), 135-38, p. 136.

⁴⁴ Interview with John Morrill, 26 March 2008, at <<http://goo.gl/Etjvwv>>.

⁴⁵ Mark Kishlansky, ‘The Emergence of Adversary Politics in the Long Parliament’, *JModH*, 49 (4) (December 1977), 617-40.

⁴⁶ J. S. Morrill, *The Revolt of the Provinces: Conservatives and Radicals in the English Civil War, 1630-1650* (London: Allen and Unwin, 1976).

⁴⁷ See the collection of essays in: Kevin Sharpe (ed.), *Faction and Parliament: Essays on Early Stuart History* (Oxford: Clarendon Press, 1978).

wilful opposition or overweening tyranny'.⁴⁸ Morrill has noted that: 'Whole issues of several leading journals were devoted to [Russell's] demolition of the notion that there was a "high road" to civil war in the early seventeenth century. There was misgovernment and there was incompetent kingship. There was no constitutional opposition, no "winning of the initiative by the house of commons", no use of the power of the purse to clip royal prerogative wings; and the struggles for power at court were amplified within the houses of parliament'.⁴⁹

Sharpe emphasised the ineffectiveness of parliament before 1629, both in terms of its own organisation and its capacity to finalise legislation, as well as its chronic inability during the 1620s to provide good advice. He suggests that, lacking effective leadership, the Commons – incoherent in their views, conservatively loyal – far from coming to dominate the political centre-stage, were dysfunctional and irrelevant to the major problems that had to be faced.⁵⁰ Russell himself set out his position that historians had overrated both the powers and the ambitions of early seventeenth-century parliaments, although he concedes that there was a 'rapid change of political mood', particularly over the course of the 1620s, and that the closing events of the 1629 parliament were 'a genuine act of opposition'.⁵¹ His finding, that criticisms of the crown needed to be set in a context of monetary pressures, not least resistance to fiscal demands in the localities, was in clear contrast to 'the classic Whig explanation of a House of Commons aggressively defending English liberties, or the neo-Marxist depiction of a class struggle inexorably leading to victory for the rising "middling

⁴⁸ Robert Zaller, 'Reviewed Work: Faction and Parliament: Essays on Early Stuart History by Kevin Sharpe', *Albion*, 11 (2) (1979), 174-75, p. 174. The phrase 'high road to civil war' is associated with Elton, who used it in 1965, and further included it in: G. R. Elton, *Studies in Tudor and Stuart Politics and Government*, Volume II : Parliament (Cambridge: UP, 1982), 164-82; cf. Thomas Cogswell, 'A Low Road to Extinction? Supply and Redress of Grievances in the Parliaments of the 1620s', *HistJ*, 33 (2) (June 1990), 283-303.

⁴⁹ John Morrill, 'Russell, Conrad Sebastian Robert, fifth Earl Russell (1937-2004)', *ODNB*.

⁵⁰ Kevin Sharpe, 'Introduction', in Kevin Sharpe (ed.), *Faction and Parliament : Essays on Early Stuart History* (Oxford: Clarendon, 1978),

⁵¹ Conrad Russell, *Parliaments and English Politics, 1621-1629* (Oxford: Clarendon, 1979), pp. 417-33, p. 416.

sort”⁵². Monarchs were now no longer able to ‘live of their own’, as Edward IV had undertaken to do.⁵³ James and Charles needed parliaments to supplement income from the traditional feudal or quasi-feudal dues, and those taxes and duties that were granted for the whole life of the monarch. It is a mistake, however, as Russell has pointed out, ‘to suppose that granting too little supply was part of the same process as the withholding of supply [... so that] grants remained excessively small even at times when members were leaning over backwards to demonstrate their eagerness to vote supply’.⁵⁴ The Commons did not appear to appreciate the true costs of the military activity that they often advocated: grants in the 1620s did not come near to properly funding military actions for which they had clamoured. At other times, the financial straits in which either king found himself allowed the Commons to press for their privileges to be confirmed and for their grievances to be addressed before granting supply. Was this ‘oppositional’? Russell presented a perhaps over-restrictive notion of opposition, in his argument that ‘an alternative government’ under a monarchy was only possible if there was a pretender or other credible challenger for the throne, or if an army was available, and, in Russell’s view, neither element was available before August 1640.⁵⁵ This seems an oversimplification. Opposition to the monarch could surely take more subtle forms, alongside delaying or refusing supply: criticism of perceived toleration of papism and Arminianism; a clamour for privilege, for example, for John Rolle and his goods; and moves to impeach counsellors, such as Bacon, Cranfield and Buckingham.

Russell also seems wrong in arguing that the English parliaments of the early Stuart period were weak, because they had failed to seek redress before supply.⁵⁶ James and Charles found it almost impossible to obtain parliamentary supply on any

⁵² Pauline Croft, ‘Review of Conrad Russell’, *IHR : review no. 709* (2009) (Institute of Historical Research), at <<http://tinyurl.com/p7vfkkr>>.

⁵³ G. L. Harriss, ‘Reviewed Work: The Crown Lands, 1461-1536: In the Series of Historical Problems, Studies and Documents by B. P. Wolffe’, *EHR*, 88 (346) (January 1973), 172.

⁵⁴ Conrad Russell (ed.), *Unrevolutionary England, 1603-1642* (London: Hambledon, 1990), p. 43.

⁵⁵ *Ibid.*, xiii.

⁵⁶ Conrad Russell, ‘Parliamentary History in Perspective, 1604-1629’, *History*, 61 (February 1976), 1-27 (*passim*).

regular, predictable basis, because the Commons *were* determined to raise grievances, even if such grievances were rarely satisfactorily addressed, and this contributed to personal and institutional animosity. Only in 1621 and 1625 were grants made without conditions. This thesis shows a clear linkage between issues over the royal finances, including the non-parliamentary collection of tonnage and poundage, on the one hand; and the robust promotion of issues of privilege that followed the sequestration of the goods of a member of parliament who had refused to pay such unauthorised duties, on the other hand. The fear that parliament might be permanently bypassed in relation to supply gave a harder edge to protests in the late 1620s.

New stances on what had almost become a consensus around revisionism began to gather pace in the 1980s.⁵⁷ Whereas the revisionist view was that division and conflict were abhorrent to members of both Houses, fluid arguments were now put forward that there were multiple competing discourses, and that constitutional and religious conflict *was* ubiquitous in the early Stuart parliaments, as presented, for example, in the ‘post-revisionist’ work of Richard Cust and Ann Hughes,⁵⁸ Cust alone,⁵⁹ Clive Holmes,⁶⁰ Johann Sommerville,⁶¹ Thomas Cogswell,⁶² and others. As Chris Kyle notes: ‘in the wave of later 1970s and 1980s revisionism, the whig orthodoxy most clearly articulated in Wallace Notestein’s *The Winning of the Initiative by the House of Commons*’ was pressured and broken.⁶³ A few years later, the management of

⁵⁷ For example, Rabb, ‘Revisionism Revised’; Hill, ‘Parliament and People’, pp. 100-24.

⁵⁸ Richard Cust and Ann Hughes, ‘Introduction: After Revisionism’, in Richard Cust and Ann Hughes (eds.), *Conflict in Early Stuart England : Studies in Religion and Politics 1603-1642* (Harlow: Longman, 1989), 1-46.

⁵⁹ Richard Cust, ‘Charles I, the Privy Council, and the Forced Loan’, *JBS*, 24 (2) (April 1985), 208-35; Richard Cust, *The Forced Loan and English Politics : 1626-1628* (Oxford: Clarendon, 1987).

⁶⁰ Clive Holmes, ‘Parliament, Liberty, Taxation, and Property’, in Jack H. Hexter (ed.), *Parliament and Liberty from the Reign of Elizabeth to the English Civil War* (Stanford (CA): UP, 1992), 122-54.

⁶¹ J. P. Sommerville, *Royalists and Patriots : Politics and Ideology in England, 1603-1640*, 2nd edn., (Harlow: Longman, 1999).

⁶² Thomas Cogswell, *The Blessed Revolution : English Politics and the Coming of War, 1621-1624* (Cambridge: UP, 1989); Cogswell, ‘A Low Road to Extinction?’; Thomas Cogswell, ‘War and the Liberties of the Subject’, in Jack H. Hexter (ed.), *Parliament and Liberty from the Reign of Elizabeth to the English Civil War* (Stanford (CA): UP, 1992), 225-51.

⁶³ Wallace Notestein, *The Winning of the Initiative by the House of Commons*, Raleigh

[footnote continues ...]

parliament had come to take centre stage, such that ‘parliament became an increasingly important site of discourse and a reaffirmation that successful parliamentary management could be the key to either stifling royal policy or bending it in another direction’.⁶⁴

More recently, Hunneyball has made two important contributions. First, in 2009, he identified that ‘in the early 17th century the House of Commons finally began to emerge from the shadow of the Lords, securing greater control over its own affairs [with] members presenting themselves as the true champions of constitutional freedom’.⁶⁵ He describes the developments in the assertion, consolidation, and extension of privilege during the period (which are treated at more length in this thesis), and identifies greater confidence in the dealings of the Commons with the crown. He further argues that some of these advances were made in collaboration with the Lords, although ‘peers rarely hesitated to assert their superior status and clout’ during the early part of the period. Pressure by both Houses forced Charles I to accept the *Petition of Right*, in 1628, but at the same time this was when the Commons came to present themselves ‘as the true voice of the English people’.⁶⁶ Second, in 2015, Hunneyball concentrates more directly on the management of parliament, and the ‘dramatic expansion in the exercise and scope of parliamentary privilege’ in the early Stuart period. He notes that privilege had developed as a mechanism to facilitate the business of parliament, but argues that, by the time of the Jacobean and early Caroline parliaments, it ‘came to be seen as a personal benefit for members, or even a political weapon for use against the crown’. Such arguments agree with much of what is presented in this thesis. However, he also argues that,

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Lecture on History (London: OUP for British Academy, 1924; repr. 1949). He was commenting more on the winning of the initiative in respect of legislation, rather than in a wider, constitutional sense. However, during the early Stuart period very little significant legislation was enacted, and little legislative intent was controversial, beyond the attempt to bring England and Scotland into full union.

⁶⁴ Chris R. Kyle, ‘Managing Tudor and Stuart Parliaments : Introduction’, *PH*, 34 (1) (February 2015), 8-13, pp. 8-9.

⁶⁵ Paul M. Hunneyball, ‘The House of Commons, 1603-29’, in Clyve Jones (ed.), *A Short History of Parliament* (Woodbridge: Boydell, 2009), 100-09, p. 100.

⁶⁶ *Ibid.*, pp. 101-05, *passim*.

whereas developments occurred in both Houses, it ‘was the Lords which normally led the way, continually pushing the boundaries of privilege as part of a general reassertion of its rights and status’.⁶⁷ This thesis argues that the Commons should not be characterised as weak followers of the Lords, rather that there was a growing confidence in the Commons around the consolidation and extension of their rights, liberties and privileges – even if their views did not always prevail. They were willing to challenge the Lords directly, as when they refused the Lords’ request for a conference in 1610, because the Lords were apparently acting as intermediaries for the king.⁶⁸ Somewhat later, in 1628, the Commons refused to send their *Journal* to the Lords to check an apparently hostile entry.⁶⁹ This research suggests that developments in the lower house matched or exceeded those in the upper, within a climate of innovation that is acknowledged by Hunneyball.

Elements of earlier approaches have been adopted. So, the weight given in German *Historismus* to marshalling data, the empirical approach of Neale, and the revisionist emphasis on building up a narrative through a careful study of parliaments, rather than selecting ‘helpful’ evidence, have been followed. Although there was a clear conservative, broadly loyal stance to be found among most members, who wished to preserve what might be termed the Elizabethan settlement, there is, nevertheless, evidence of conflict. This thesis therefore offers a nuanced view: it finds evidence for compromise and consensus in the management of privilege cases by an essentially conservative House of Commons, for example in the Shirley case, and in the attempts to rein in Eliot’s inflammatory speeches.⁷⁰ On the other hand, it identifies conflict in debates leading up to the preparation of various formal statements from the Commons, such as the *Apology* of 1604, the *Petitions* of 1610, the *Protestation* of 1621, the *Petition of Right* of 1628, and the *Three Resolutions* of 1629, all of which, to a greater or lesser degree, included elements that related to privilege issues. The Rolle case is shown to have played an important part in the defiant, if chaotic, last

⁶⁷ Hunneyball, ‘Development of Privilege’, p. 111.

⁶⁸ See pp. 125f. below.

⁶⁹ See p. 33 below.

⁷⁰ For example, see pp. 140 and 223 below.

days of the 1629 parliament. Conflict is, of course, two-dimensional, and evidence is presented of the generally robust but sometimes unhelpful responses of James I and Charles I to the Commons' polemical stances.⁷¹ The historiography of the period has therefore inevitably shaped the approaches taken in this thesis.

Methods and sources

The research approach that has been adopted for this thesis is, first, to identify the origins of the privilege of freedom from arrest, to provide a context for other elements of the research. Second, the Commons' journals and contemporary diaries have been consulted at length, in order to identify and analyse nearly two hundred individual privilege cases that were raised in the Commons between 1604 and 1629: in particular, the cases of Sir Thomas Shirley (1604) and John Rolle (1628-29), which each took up significant parliamentary time, and changed the ways in which privilege was viewed and treated.⁷² Other cases with a wider significance are also identified. Particular attention is paid to how participants viewed developments, by using contemporary materials, identified below, rather than overemphasising the significance of 'great men'. The third element of the research approach is to provide a narrative of the key difficulties in the consolidation, management, and promotion of privilege. Arguments and counter-arguments arose between crown and Commons over the nature and status of prerogative and privilege. These exposed several issues: first, how to balance changing pressures over privileges and prerogatives within a supposedly immutable framework; second, how to ensure that both the authority of the Commons and the sovereignty of the monarch were respected; and, third, how to safeguard the interests of creditors while defending the privileges of members. At the same time, consideration has to be given to three broad possibilities. First, did clashes over privilege arise because an essentially *conservative* House of Commons wanted simply to keep both privilege and the royal prerogative as they were in 1603?

⁷¹ The two-way traffic in protests and rejoinders is recorded in G. W. Prothero (ed.), *Select Statutes and Other Constitutional Documents : Illustrative of the Reigns of Elizabeth and James I*, 4th edn. (Oxford: Clarendon, 1913), pp. 250-424, *passim*.

⁷² Consideration is given to a smaller number of cases from the Lords, particularly those that related to abuses of the 'protections' for servants of peers.

Alternatively, were a couple of dozen hothead zealots using privilege issues to push for a wider set of grievances to be addressed? Or were those hotheads possibly articulating views that were actually held by a largely silent majority?

Reflecting the tensions around privilege in the early Stuart period, the time frame for this thesis has been set so as to cover changes between 1603, which saw the accession in England of James VI and I, and 1629, which marks the end of the first run of Stuart parliaments.⁷³ By the start of this period, the Commons were well on the way to evolving into the more important of the two Houses, and conscious of their privileges. The Commons were nevertheless generally welcoming of the protestant James, with his Tudor ancestry, albeit he had been brought up within a different legal and constitutional framework.⁷⁴ His principal tutor, the historian and humanist scholar, George Buchanan, had tried to turn James into a god-fearing, protestant king who accepted the limitations of monarchy, as proposed in his treatise, *De Jure Regni apud Scotos*.⁷⁵ That book, however, was heavily suppressed, and a limitation on his powers was certainly *not* acceptable to the young king. James also had to come to terms with a common law system, rather than one based on Roman law, and to understand the relative powers and privileges of the sovereign and a bicameral, heterogeneous parliament in his new kingdom. In England, he would not be able to manage parliament through the Lords of the Articles, who deliberated legislation before it reached the full Scottish parliament. He would face reminders that *Magna Carta* included what Carpenter terms a ‘sensational and revolutionary’ security clause ‘for the observation of the peace and the liberties between king and kingdom’, i.e. subordinating the king to the law.⁷⁶ It set out that the barons could choose twenty-five of their number to hold to account the king, his justiciar, bailiffs, and ministers. If the king did not redress any offence that was drawn to his attention, the barons and

⁷³ Although James I acceded on 24 March 1603, there was an outbreak of plague, so that his first parliament only opened on 19 March 1604.

⁷⁴ The (undelivered) *Apology* of 1604 set out that ‘our care is and must be to confirm the love and to tie the hearts of your subjects the commons most firmly to your Majesty’: Tanner (ed.), *Constitutional Documents : James I*, p. 230.

⁷⁵ George Buchanan, *De Jure Regni Apud Scotos...* (London: Richard Baldwin, 1689). The original Latin version appeared in the 1570s.

⁷⁶ David Carpenter, *Magna Carta* (London: Penguin, 2015), p. 325, p. 31.

‘commune of all the land’ could take any of the king’s ‘castles, lands, possessions [...] until it is redressed [...] saving our person, and those of our queen and our children. And when it is redressed they shall obey us as they did before’.⁷⁷

The importance of respecting ‘custom’, and an emphasis on the consensual, contractual nature of law making, is evident in the tripartite coronation oath taken from at least the time of William I onwards: to preserve peace, and protect the church; to maintain good laws, and root out bad; and to dispense justice to all. In 1308, Edward II swore an additional fourth clause: to protect and strengthen ‘the just laws and customs that the community of the realm shall have chosen’.⁷⁸ Use of the word ‘customs’ – *custumes* in the French version, *consuetudines* in the Latin – strongly implies that the solemn oath was, at the very least, safeguarding concessions won from the king’s predecessors: an oath from which he could not resile. Despite the wishes of the new king for the formation of a single nation of ‘Great Britain’, the reality was that his accession simply marked a personal and regal union, not one that was corporative. The end of the period for this research is significant, being the point when the Commons had the confidence boldly to incite people not to pay duties and impositions that had not been given parliamentary authority, resolving, without expressed dissent, to make it a capital offence, no less, to propose the levying of non-parliamentary duties, or to pay such duties willingly. Russell is prepared to concede that the closing events of the 1629 parliament were ‘a genuine act of opposition’.⁷⁹ It was certainly the start of a period of personal rule that was to last for more than a decade.

There are three main types of primary sources for this period: general collections of political and constitutional documents; formal records of debates and privilege cases; and personal works, diaries and notes for the period. The first group includes editions

⁷⁷ Ibid., pp. 62-65; it is perhaps unsurprising that such a significant clause was omitted in the 1216 version of the Charter: *ibid.*, p. 409.

⁷⁸ Maurice Hugh Keen, *England in the Later Middle Ages : A Political History*, 2nd edn., (London and New York: Routledge, 2003), p. 39.

⁷⁹ Russell, *Parliaments and English Politics*, p. 416.

by Gardiner;⁸⁰ Prothero;⁸¹ Tanner;⁸² Adams and Stephens;⁸³ Kenyon;⁸⁴ Larkin and Hughes (relating to proclamations);⁸⁵ and Coward and Gaunt.⁸⁶

Second, the records of debates in the Commons and Lords are primarily represented in the journals of both Houses, which were prepared and written up from each clerk's notes at the end of the day. They were published in print form by HMSO in 1802, and are now available digitally, through *British History Online* (IHR). The records are complete for the whole period, 1604-29, with the exception of sittings from 16 October to 6 November 1610. The Commons' journals were intended to provide a record of the business of the House, so that extraneous matters were either not recorded at all, or at best were given brief mention. For example, the gunpowder plot of 1605 was initially recorded in a bare two sentences, and the deaths of Elizabeth and James I were not included at all. At the start of the Jacobean period, the journals give some flavour of what was said, but, as the century progressed, they began to provide less detail. This reflected the concern, which arose during the first parliament of James I, that matters of privilege, conferences between the two Houses, and what was being said in debate, as distinct from the Commons' decisions, were being relayed to the king, particularly by the then clerk, Ralph Ewens.⁸⁷ As a result, oversight of the journals increased: for example, an order was made, in the first session of the 1610 parliament, for a committee to oversee the clerk's books.⁸⁸ There

⁸⁰ Samuel Rawson Gardiner (ed.), *Constitutional Documents of the Puritan Revolution, 1625-1660*, 2nd edn. (Oxford: Clarendon, 1899).

⁸¹ Prothero (ed.), *Statutes and Constitutional Documents (1913 edn.)*.

⁸² Tanner (ed.), *Constitutional Documents : James I*.

⁸³ George Burton Adams and H. Morse Stephens, *Select Documents of English Constitutional History*, 2nd edn., (London: Cape, 1935).

⁸⁴ J. P. Kenyon (ed.), *The Stuart Constitution, 1603-1688 : Documents and Commentary* (Cambridge: UP, 1966).

⁸⁵ James F. Larkin and Paul L. Hughes (eds.), *Stuart Royal Proclamations : I: Royal Proclamations of King James I, 1603-1625* (Oxford: Clarendon, 1973); James F. Larkin (ed.), *Stuart Royal Proclamations : II: Royal Proclamations of King Charles I, 1625-1646* (Oxford: Clarendon, 1983).

⁸⁶ Barry Coward and Peter Gaunt (eds.), *English Historical Documents, 1603-1660* (London: Routledge, 2010).

⁸⁷ Chris R. Kyle, *Theater of State : Parliament and Political Culture in Early Stuart England* (Stanford (CA): UP, 2012), p. 63.

⁸⁸ *Ibid.*, p. 66.

were similar orders in 1614 and 1621.⁸⁹ Within this tight control, any alteration was a matter of record. So, in 1626, ‘some slip and error in the clerk’s book’ was drawn to the attention of the Commons, and an order was made that the oversight committee could amend the records.⁹⁰ The best-known example of outside interference occurred in December 1621, when James I tore pages out of the *Commons’ Journal*, which had recorded that the Commons had agreed to submit a *Protestation*, ‘concerning sundry Liberties, Franchises, and Priviledges of Parliament’. The king later gave a qualified apology for his actions.⁹¹ In 1628, there was a dispute between Commons and Lords, over whether the earl of Suffolk had said publicly that John Selden (Ludgershall) deserved to be hanged, for erasing an unfavourable record, and for stirring up sedition. Despite Suffolk’s denial, the Commons pursued their version of events, whereas the Lords asked for the Commons’ journal to be sent up to them. Sir Edward Coke (Buckinghamshire) was ‘sent up to the Lords with this Message: That there was no Resolution of the House in the Case mentioned; and that the Entry of the Clerk, of particular Men’s Speeches, was without Warrant at all Times, and in that Parliament, by Order of the House, rejected, and left; and therefore not thought fit to be sent up to their Lordships.’⁹² At the same time, it appeared that the Commons wished to satisfy themselves, in respect of the *Journal*: ‘Upon Question, a Committee of Eight to survey the Clerk’s Book’.⁹³

Compensating for these more abbreviated journal entries, several private diaries began to include more extensive records of speeches in parliament, which form the third group of sources. The writers perhaps wanted to ensure they, or their patrons, would still have comprehensive accounts that they could consult. As Kyle has noted, parliamentary diaries before the 1620s were ‘few in number and largely uncontroversial jottings [which] resembled and closely followed the official *Commons’ Journal*. From the 1620s onwards, the importance of events led to MPs seeing themselves as central figures, and the public was hungry for more information,

⁸⁹ *CJ*, 1, p. 501: 30 May 1614; *CJ*, 1, p. 517: 10 February 1621.

⁹⁰ *CJ*, 1, p. 830: 4 March 1626.

⁹¹ See pp. 138f. below.

⁹² *CJ*, 1, p. 884: 17 April 1628.

⁹³ *Ibid.*

so that diaries were more often political in style, and records of speeches'. There was also an implicit relaxation of the ban on any unofficial reporting of proceedings. By the 1620s, 'Parliament played host to a myriad of MPs and peers who wrote as "journalists", recorders, and compilers of potentially dangerous information'.⁹⁴ As David L. Smith notes, 'the diaries (for both Lords and Commons) do not contain accurate transcripts of what members said on a given day'. Accounts sometimes differ dramatically, reflecting, at least in part, the difficulties of making a contemporaneous record, and, in part, the 'biases, motives and concerns' of the compiler, as well as their attitudes and working methods.⁹⁵ Care must always be taken that 'objectivity' is not wrongly ascribed to a source, simply because it is first-hand.⁹⁶ That said, the diaries, some fifty in number for the period, usually provide broadly consistent accounts for a particular speech, debate, or resolution for the day in question. At least one volume of diaries and records for each of the parliaments from 1604 to 1629 has been published at various times from the eighteenth century onwards, with some providing the work of a single diarist, others giving transcriptions of several diaries, as well as the entries from the official *Journal* for a particular parliament.⁹⁷ There

⁹⁴ Kyle, *Theater of State*, p. 60-61.

⁹⁵ David L. Smith, 'The House of Lords, 1529-1629', in Clyve Jones (ed.), *A Short History of Parliament* (Woodbridge: Boydell, 2009), 29-41, p. 37.

⁹⁶ As with Winston Churchill and the second world war: see David Reynolds, *In Command of History: Churchill Fighting and Writing the Second World War* (London: Allen Lane, 2004), especially p. 229.

⁹⁷ Simon Healy, 'Debates in the House of Commons, 1604-1607', in Chris R. Kyle (ed.), *Parliament, Politics and Elections, 1604-1648*, Cam. Soc. Fifth Series (Cambridge: UP for the Royal Historical Society, 2001), 13-147; David Harris Willson (ed.), *The Parliamentary Diary of Robert Bowyer, 1606-1607* (Minneapolis (MN): University of Minnesota Press, 1931); Samuel Rawson Gardiner (ed.), *Parliamentary Debates in 1610* (London: Cam. Soc., 1862); Elizabeth Read Foster (ed.), *Proceedings in Parliament 1610*, 2 vols. (New Haven (CT): Yale UP for the Yale Center for Parliamentary History, 1966); Maija Jansson (ed.), *Proceedings in Parliament 1614: House of Commons* (Philadelphia (PA): American Philosophical Society, 1988); Wallace Notestein, Frances Helen Relf, and Hartley Simpson (eds.), *Commons Debates 1621*, 7 vols. (New Haven (CT): Yale UP, 1935); T. Tyrwhitt (ed.), *Proceedings and Debates of the House of Commons in 1620 and 1621, by Sir Edward Nicholas*, 2 vols. (Oxford: Clarendon, 1766); Christopher Thompson (ed.), *Sir Nathaniel Rich's Diary of Proceedings in the House of Commons in 1624* (Wivenhoe: Orchard, 1985); Philip Baker (ed.), *Proceedings in Parliament 1624: The House of Commons* (London: History of Parliament Trust, 2015) in *BHOL*; Maija Jansson and

[footnote continues ...]

was, until recently, a gap in the run of published material, which related to the 1624 parliament, although the records and diaries began to be published online in 2015.⁹⁸ At the time of writing this thesis, it is understood that further material for 1624 will be published online and in print form.

There are, of course, other records of debates and privilege cases, beyond the contemporary diaries and official journals, for example, the autobiography and correspondence of Sir Simonds D'Ewes, and an edition of some of Sir John Eliot's writings and speeches.⁹⁹ Our understanding of privilege, as it developed historically through to the seventeenth century, is assisted by such sources, and is reflected in this research. A much quoted and re-edited work, *The Manner of Holding Parliaments in England*, or *Modus Tenendi Parliamentum Apud Anglos*, was not a forgery, as previously thought, but probably written about 1321, by William Ayermin, who was himself almost certainly a clerk to the parliament.¹⁰⁰ It was not, however, an authority on how to run a parliament, 'more a manifesto for opponents of Edward II'.¹⁰¹ The medieval parliament rolls, available in transcribed, translated, digital form in *British History Online (BHOL)*, detail a number of petitions and cases that shaped privilege

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William B. Bidwell (eds.), *Proceedings in Parliament 1625* (New Haven (CT): Yale UP for the Yale Center for Parliamentary History, 1987); Samuel Rawson Gardiner (ed.), *Debates in the House of Commons in 1625* (London: Cam. Soc., 1873); William B. Bidwell and Maija Jansson (eds.), *Proceedings in Parliament 1626*, 4 vols. (New Haven (CT): Yale UP for the Yale Center for Parliamentary History, 1991-96); John Parkhurst (ed.), *The Proceedings and Debates of the House of Commons, in the Sessions of Parliament, Begun the Twentieth of January 1628 [OS] ... Taken and Collected by Sir T. Crew* (London: R. Chiswell, 1707); Robert C. Johnson, Mary Frear Keeler, Maija Jansson Cole, and William. B. Bidwell (eds.), *Commons Debates 1628*, 6 vols. (New Haven (CT): Yale UP for the Yale Center for Parliamentary History, 1977); Wallace Notestein and Frances Helen Relf (eds.), *Commons Debates for 1629*, Research Publications of the University of Minnesota (Minneapolis (MN): Minnesota UP, 1921).

⁹⁸ Baker (ed.), *Proceedings 1624*.

⁹⁹ James Orchard Halliwell (ed.), *Autobiography and Correspondence*, by Sir Simonds D'Ewes, 2 vols. (London: Richard Bentley, 1845; repr. s.l.: Elibron, 2005); Alexander B. Grosart (ed.), *An Apology for Socrates, and Negotium Posterorum*, by Sir John Eliot, 2 vols. (London: Chiswick Press, 1881).

¹⁰⁰ Numerous manuscript copies of the work exist: see John Taylor, 'The Manuscripts of the 'Modus Tenendi Parliamentum'', *EHR*, 83 (329) (October 1968), 673-88.

¹⁰¹ Paul Cavill, seminar paper, presented at *Making Constitutions, Building Parliaments*, conference, London, 3 July 2015.

and were cited as precedents.¹⁰² Kleineke provides the records of many cases that arose in the long fifteenth century.¹⁰³ The accounts by Sir Simonds D'Ewes of the Elizabethan parliaments provide valuable information on Tudor thinking and precedents.¹⁰⁴ In 1625, he came upon 'an elaborate journal of the parliament held in the thirty-fifth year of Queen Elizabeth', from which he developed his parliamentary history of that reign, published in 1682.¹⁰⁵ Robert Bowyer, clerk from 1610-1621, gave himself the task of bringing 'order to the parliamentary records, after what he called the "negligence" of his predecessors'.¹⁰⁶ His successor, Henry Elsynge, was clerk from 1621 until 1635, although parliament did not sit after 1629.¹⁰⁷ Elsynge drew on the *Modus* for an unfinished treatise on parliamentary procedure, some of which may have been prepared by Bowyer, as described in an annotation on the 1768 copy held in the London Library. Apparently in contemporary handwriting, this sets out that:

Sir Simonds D'Ewes says in the preface to his journal 'this treatise was compiled especially as I conceive by Rob^t. Bowyer esq clerk of parl^t from the 6th to the 18th Jac.1 and afterwards enlarged by H. Elsing esq' and adds in his journal p. 10 'first confusedly gathered and now lately digested into a methodical treatise'.

The *Preface* to this edition sets out that:

The following treatise was first printed in 1660, several years after the death of the author [Elsynge], and evidently from a very incorrect copy. However, such as it was, the Public received it so favourably, that it has since been reprinted more than once.¹⁰⁸

¹⁰² Through subscription.

¹⁰³ Hannes Kleineke, *Parliamentarians at Law : Select Legal Proceedings of the Long Fifteenth Century Relating to Parliament* (Oxford: Wiley-Blackwell, 2008).

¹⁰⁴ Sir Simonds D'Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth* (London: Paul Bowes, 1682; repr. Shannon, Ireland: Irish UP, 1973).

¹⁰⁵ J. M. Blatchly, 'D'Ewes, Sir Simonds, First Baronet (1602-1650)', *ODNB*.

¹⁰⁶ Alan Davidson, 'Bowyer, Robert (c. 1560-1621)', *ODNB*.

¹⁰⁷ J. C. Sainty, 'Elsynge, Henry (bap. 1577, d. 1635)', *ODNB*.

¹⁰⁸ Thomas Tyrwhitt (ed.), *The Manner of Holding Parliaments in England, by Henry Elsynge* (London: Tho. Payne, 1768).

William Hakewill was a member of parliament for three Cornish constituencies in the parliaments of 1601, 1614 and 1621, and then Amersham, in those of 1624 and 1628. He is important for having published, in 1641, a collection of materials on parliamentary procedure, which included his own translation of the *Modus Tenendi Parliamentum*.¹⁰⁹ During the 1630s, John Rushworth began to document significant events, and in 1640, he was appointed clerk-assistant to the House of Commons. During the 1650s, he worked on the eight volumes of his *Historical Collections*,¹¹⁰ a documentary history of the civil wars, beginning in 1618, and running through to 1641, written, he claimed in his preface, without commentary or opinions, ‘a bare Narrative of matter of Fact, digested in order of time’.¹¹¹ An anonymous work, *The Priviledges and Practice of Parliaments*, published in 1628, was a polemical tract that traced back the origins of parliament to Saxon times. It defended the *Petition of Right*, as well as setting out that the king could not change the law without the consent of parliament, and that the judges were there solely to expound the law.¹¹² This work was in turn countered by the much copied *A True Presentation of Forepast Parliaments to the View of Present Tymes and Posterity*, attributed by some to Sir John Doddridge, but which was almost certainly written, in about 1628, or 1629, by Sir Francis Kynaston (1586/7-c. 1642).¹¹³ As Smuts identifies, in this Kynaston showed his concern about a growing reverence for the House of Commons, and associated disrespect for kingship by many MPs at the time. Kynaston felt that

¹⁰⁹ W. Hakewel, *Modus Tenendi Parliamentum : Or, The Old Manner of Holding Parliaments in England* (London: Abel Roper, 1671); Sheila Doyle, ‘Hakewill, William (bap. 1574, d. 1655)’, *ODNB*.

¹¹⁰ John Rushworth, *Historical Collections of Private Passages of State ...* (London: George Thomason, 1659).

¹¹¹ Cited in: Joad Raymond, ‘Rushworth, John (c. 1612-1690)’, *ODNB*.

¹¹² Anon., *The Priviledges and Practice of Parliaments in England...* Lansdowne Tracts : 18/28 (s.n., 1628), chapter 18.

¹¹³ Sir Francis Kynaston (?), *A True Presentation of Forepast Parliaments to the View of Present Tymes and Posterity*, (Manuscript, 1629, BL, London), Lansdowne 213, fol. 149-179. Another copy, in the Parliamentary Archives (HC/LB/1/4) attributes authorship to ‘The Learned Antiquarie, Judge [John] Doddridge’. Professor Peacey, UCL, explains that ‘the tract is anonymous, and sometimes attributed to Doddridge, but this seems unlikely, since he was (or was almost) dead when the pamphlet appeared, to which this work was a response. Sir Francis Windebanke attributed it to Sir Francis Kynaston’: personal email 3 July 2011. Kynaston sat for Shropshire in the 1621 parliament.

parliament's proper function was to offer the king advice and assistance on issues that the latter put before them. The needs of the king, especially supply, were at the heart of parliamentary business – attempts by the lower House to bargain with the king were abominable and unjustified, as were the Commons' pretences (i.e. claims) to privileges. Kynaston 'strenuously objected to the idea that MPs were mainly responsible to their "countries" rather than the king, which he thought had spread dangerously in recent years'.¹¹⁴

Some later works are also of value. William Petyt (1641-1707) favoured the radical ancient constitutionalist cause during the exclusion crisis, and at the revolution of 1688, so that his *Jus Parliamentarium*, written in 1739, provided a whiggish view of the development of parliamentary practice, rights, and liberties.¹¹⁵ Francis Maseres (1731-1824) gave a summary of the operation of parliamentary privilege that was published in 1764, in the climate of controversy surrounding John Wilkes.¹¹⁶ Sir William Blackstone (1723-1780) provided an extended description of the origin and nature of 'privileges, of person, servants, lands and goods; which are immunities as antient as Edward the confessor'.¹¹⁷ Hatsell (1733-1820), clerk of the Commons from 1768 to 1797, commented on individual privilege cases, some of which are considered further in chapter four below.¹¹⁸ Thomas Erskine May (1815-1886), later lord Farnborough, but usually referred to as 'Erskine May', wrote a work on parliamentary practices, including privileges, that has been revised many times, and is still used as the prime authority within parliament today.¹¹⁹

¹¹⁴ R. Malcolm Smuts, 'Kynaston, Sir Francis (1586/7-1642)', *ODNB*.

¹¹⁵ William Petyt, *Jus Parliamentarium...* (London: John Nourse, 1739).

¹¹⁶ Francis Maseres, *A Collection of Cases and Records Concerning Privilege of Parliament; with a Few Occasional Remarks Upon Them* (London: J. Whiston and B. White, 1764).

¹¹⁷ Blackstone, *Commentaries*, II, p. 321.

¹¹⁸ Hatsell, *Cases of Privilege*.

¹¹⁹ The first edition was published in 1844, and the most recent in 2011: Thomas Erskine May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 24th edn., (London: LexisNexis, 2011). In 2015, the prospective Speaker, John Bercow, was commended as meeting the requirement that 'A Speaker has to have a good knowledge of "Erskine May"': Hansard, *House of Commons Debates, November 1988*— in www.parliament.uk (UK Parliament), at <<http://goo.gl/OzDNGP>>: 18 May 2015, col. 3.

The introductions to the diaries and records of debates provide the editors' views on the parliaments in question.¹²⁰ Journal articles on individual cases include Bryant on what is arguably the earliest recorded case of immunity from arrest,¹²¹ Graves on the case of lord Cromwell (or Crumwell),¹²² and Prothero on the case of Sir Thomas Shirley.¹²³ As noted earlier, Turberville provided a detailed account of some of the specific issues that arose from protecting the servants of members of parliament.¹²⁴ In addition, a few years earlier, Wittke had provided an extended piece on privileges, whose main theme was the relation of the law of parliament and privilege, *lex et consuetudo parliamenti*, to the law of the land.¹²⁵ Chafetz considers privilege cases from the early Stuart period within an article that focuses on the Bush administration's politically motivated dismissal of nine United States Attorneys in 2006.¹²⁶ He traces the tensions between *executive privilege*, analogous to *prerogative* in British terminology, and the privileges of the legislature back to a number of English cases from the early modern period, including some that are described in this thesis, such as those of Ferrers,¹²⁷ Arundel,¹²⁸ and Rolle.¹²⁹

Available in print, and digitally on subscription, The *Oxford Dictionary of National Biography (ODNB)* gives the background to the lives of many leading figures in the early Stuart parliaments. The *History of Parliament (HoP)* has provided more extensive biographies of all the individual members of parliament, together with accompanying surveys, details of constituency representation, and the like. The most

¹²⁰ These are listed on p. 34n. above. Notestein also wrote on the 1604-10 parliament: Wallace Notestein, *The House of Commons 1604-1610* (New Haven (CT): Yale UP, 1971).

¹²¹ W. N. Bryant, 'Commons' Immunity from Arrest: The Earliest Known Case (1340)', *Bull IHR*, 43 (November 1970), 214-15.

¹²² M. A. R. Graves, 'Freedom of Peers from Arrest: The Case of Henry Second Lord Cromwell, 1571-1572', *The American Journal of Legal History*, 21 (1) (January 1977), 1-14.

¹²³ Prothero, 'Privilege and Shirley's Case'.

¹²⁴ Turberville, 'Protection of Servants of Members'.

¹²⁵ Carl Wittke, 'The History of English Parliamentary Privilege', *The Ohio State University Bulletin*, 26 (2) (1921), 9-212.

¹²⁶ Josh Chafetz, 'Executive Branch Contempt of Congress', *The University of Chicago Law Review*, 76 (3) (Summer 2009), 1083-1156.

¹²⁷ *Ibid.*, pp. 1095-98.

¹²⁸ *Ibid.*, pp. 1104-06.

¹²⁹ *Ibid.*, pp. 1108-11.

significant volumes for this thesis relate to the period 1604-29; these were published in 2110, later made available digitally through *BHOL*, on subscription.¹³⁰ Other *HoP* volumes cover earlier parliaments, and provide details of cases that were used as precedents.¹³¹

The research is presented in seven chapters, the first of which provides the introduction, including a description of the historiography, the research approach, and the more important sources for the period. The next chapter sets the privilege of freedom from arrest and the royal prerogative within a historical and constitutional context, in order to illustrate how people viewed these two elements at the start of the seventeenth century. The development of parliamentary privileges and liberties in the English system from the medieval period onwards is traced, to show how these elements were initially the means of protecting parliamentarians from outside interference or distraction, but then took on a significance of their own. As James I and Charles I both asserted that privileges were given form and legitimacy through exercise of the royal prerogative, a further section describes the difficulty of defining the scope and limitation of that prerogative, and the implications for matters of privilege. The third chapter identifies issues from the case of Sir Thomas Shirley, who was arrested and detained in 1604 in connection with debt, and whose gaoler resisted at some length the orders of the Commons to release Shirley, thereby exposing uncertainties across a number of differing strands about the ways privilege operated. The fourth chapter looks at a range of privilege cases across the early Stuart parliaments, and suggests that these were presented and managed so as to maintain a nuanced range of rights, that related not just to the interests of individual members, but also reflected wider issues within a changing political and constitutional landscape

¹³⁰ Andrew Thrush and John P. Ferris (eds.), *The House of Commons : 1604--29*, 6 vols. (Cambridge: UP, 2010). Thrush is identified as the sole author of the introductory volume.

¹³¹ John S. Roskell, Linda Clark, and Carole Rawcliffe (eds.), *The House of Commons : 1386-1421*, 4 vols. (Stroud: Alan Sutton, 1992); Bindoff (ed.), *Commons 1509-1558*; P. W. Hasler (ed.), *The House of Commons : 1558-1603*, 3 vols. (London: HMSO, 1981).

that the chapter also describes. This provides a framework for consideration, in the fifth chapter, of the ways in which debt, outlawry, and bankruptcy were tackled within the seventeenth-century legal, financial, and commercial system. The chapter also shows how privilege came to be exploited, with abuses sometimes perpetrated by a number of members of both Houses, and their ‘servants’. The penultimate chapter considers issues from a case at the end of the period – that of John Rolle, whose goods had been seized by customs officers, although the Commons saw them as being protected through the privilege that Rolle enjoyed as the member for Callington. The seventh, concluding chapter draws on the research to propose that the management of issues of privilege in the early Stuart period reflected and engendered a greater feeling of institutional confidence and importance. Appendices give the details of significant privilege cases that occurred before 1603, many of which were cited as precedents in the early Stuart parliaments; set out the dates for the early Stuart parliaments; provide a chronology for the Shirley case; and summarise the later lives of the members who had been arrested after the acrimonious last sitting of the 1629 parliament.

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II : PRIVILEGES AND PREROGATIVES

Introduction

And although we cannot allow of the style, calling it, Your ancient and undoubted Right and Inheritance; but could rather have wished, that ye had said, That your Priviledges were derived from the grace and permission of our Ancestors and Us; (for most of them grow from Precedents, which shews rather a Toleration than Inheritance:) Yet we are pleased to give you our Royal assurance, that as long as you contain your selves within the limits of your duty, we will be as careful to maintain and preserve your lawful Liberties and Priviledges, as ever any of our Predecessors were, nay, as to preserve our own Royal Prerogative. So as your House shall only have need to beware to trench upon the Prerogative of the Crown; which would enforce us, or any just King, to retrench them of their Priviledges, that would pare his Prerogative, and Flowers of the Crown: But of this, we hope, there shall never be cause given.¹

This extract from a speech of James I shows how the relative limits of the rights and privileges of the Commons, on the one hand, and the powers and prerogatives of the crown, on the other hand, could be unclear and sometimes contentious. Uncertainty led to threats, fears, claims and counter-claims that grew in intensity throughout the early Stuart years.

Those parliamentary rights and privileges had developed in the English system from the medieval period onwards, initially as a means of protecting parliamentarians from outside interference or distraction, but had later come to take on a significance of their own. The difficulty was that privileges were based on long-standing common law, rather than statutes, so that theoretically no change or expansion was possible: ‘From the fact that the privileges of the two Houses are part of the law of the land, it follows [...] that neither House can add to, or alter, its privileges by its own

¹ Rushworth, *Historical Collections*, I, p. 52: 11 December 1621.

resolution. [...] However, each House *is* the sole judge of its privileges'.² A key issue for the Commons was what gave privilege its legitimacy. By the seventeenth century, they had come to claim that their privileges were *undoubted*, and were only the subject of a petition to the sovereign at the start of a parliament as a 'matter of manners'. If, however, they were to accept that their privileges might be less than undoubted and theirs by right, then they conceded that those privileges could be limited, or denied by the king. Yet, James I and Charles I both asserted that privileges were indeed only *granted* through an exercise of the royal prerogative. That royal prerogative, like privilege, was also based on common law, and accordingly apparently immutable: the crown could not invent new areas of prerogative, although they might be adapted to changing circumstances or emergencies. In particular, the unwillingness of the Commons to grant supply before grievances were addressed led to the privy council endorsing the use of alternative means of raising funds under the royal prerogative, some of which were revivals of older, feudal rights, some of which relied on a creative interpretation of what the king could do in an 'emergency'. There was a risk for James I and Charles I, which paralleled that of the Commons: if their prerogatives, or any novel interpretation of their prerogatives, were successfully challenged, then potentially all prerogative powers could be disputed. Further, once a prerogative power had been conceded, or allowed to decay, it could not readily be revived.³

Issues of privilege and prerogative, and the tensions between them, are explored in this chapter, which is structured, first, to consider the origin, development and status of parliamentary privilege, as it was commonly understood – or disputed – at the time of James I's accession. The second main section looks at the origins of royal prerogative powers, and the degree to which these powers were accepted or challenged at the time, particularly in relation to the assertion and exercise of

² L. A. Abraham and S. C. Hawtrey, *A Parliamentary Dictionary* (London: Butterworth, 1956), pp. 146-47.

³ Some elements of the royal prerogative are exercised occasionally, to maintain their validity. For example, since 1965 all but three new non-royal peers have been appointed as life peers. The exceptions are William Whitelaw, former deputy prime minister; the former Speaker, George Thomas; and the former prime minister, Harold Macmillan – thereby maintaining the prerogative right to create new hereditary peerages.

parliamentary privilege by the Commons. These descriptions provide a context for consideration in later chapters of how issues over prerogative, privilege, supply and grievances were inter-connected in the early Stuart period and the implications for the authority of the Commons and the crown respectively.

Parliamentary privileges

This section looks at the development of the parliamentary privilege of freedom from molestations (including arrests and detention), from the medieval period onwards, through to its position within the general constitutional settlement, as understood by people at the start of the seventeenth century. It begins with an exploration of what is meant by ‘privilege’ and associated terms, as well as consideration of the purposes of parliamentary privilege. This is followed by a description of how privilege was established and confirmed, and the three qualifications that affected its application. The section ends with an analysis of where people believed privilege to be positioned within the constitution at the accession of James I.

Changes in the meanings of words over time have blurred the respective meanings of ‘privilege’, ‘liberties’, or ‘liberty’ in the context of a parliament. One usage is that privilege is ‘the set of rights and immunities enjoyed by a legislative body, its members, and officers’.⁴ In that sense, *privilege* should strictly be limited to the freedom from arrest and lawsuits that was afforded to the Commons and their servants.⁵ There are several meanings for *liberty* or *liberties*, but care must be taken to avoid an anachronistic understanding of an ancient meaning. Today, *liberty* would most often be taken in one of three senses: first, ‘the state or condition of being free’; second, ‘freedom from arbitrary, despotic, or autocratic control’; or, third, ‘each of those social and political freedoms which are considered to be the entitlement of all

⁴ ‘Privilege’: *OED Online*.

⁵ Peers were free from arrest, but not suits, when parliament was sitting, on the basis that commoners might be embarrassed by a lack of funds when resisting a suit, whereas it was assumed that ‘1st, peers have sufficient lands whereby they may be distrained and brought thereby into court to answer to the plaintiff’s demands; and 2dly, the dignity of their persons, which the law will not permit to be degraded by subjecting them to common arrests’: Maseres, *Cases and Records*, p. 4. This indicates that an arrest was part of a process to secure settlement of the debt, rather than a punishment.

members of a community – a civil liberty’.⁶ However, the ‘liberties’ claimed by Speakers of the House of Commons were meant less in any of those senses, more: ‘a privilege, immunity, or right enjoyed by prescription or grant’.⁷ The medieval parliament rolls include both *liberties* and *privileges* within set phrases. For example, entries for 1459 include in separate places both the Latin, ‘*libertates, jura regalia, consuetudines, franchises, immunitates et privilegia* [liberties, royal rights, customs, franchises, immunities and privileges]’, and the original English, ‘privileges, libertees, immuntees and franchises’.⁸ This indicates some nuanced distinctions between these terms, although they have often been used interchangeably. Elton suggests just such a distinction:

Privilege, in the legal sense, meant a special protection granted to a person in a court of law, and parliamentary privilege meant more particularly the right of every peer, knight and burgess (and their servants) to avoid arrest by the order of any court inferior to the Parliament, during the time that Parliament was sitting. Liberties, on the other hand, a term in later years loaded with principled meaning, at this time [the Tudor period] signified protection of the practices which enabled both Houses to discharge the functions for which they had been summoned – counselling the Crown and conducting legislative business. These were the liberties of the Lords and Commons, not the liberties of the subject against whom they might well be asserted. Parliamentary privilege had a pre-Tudor history; parliamentary liberties would appear to have had virtually none.⁹

Certainly, over time, the two terms, *liberties* and *privileges*, were conflated into one: *parliamentary privilege*. A parliamentary joint committee report, from 1999, shows that the ancient privilege of freedom from arrest, although still claimed by the Speaker at the start of a parliament, should not be abused:

Parliamentary privilege is not a licence for members of Parliament to behave in ways

⁶ ‘Liberty’: *OED Online*.

⁷ *Ibid*.

⁸ *RP*, v, 345-70: November-December 1459.

⁹ G. R. Elton, *The Tudor Constitution : Documents and Commentary* (Cambridge: UP, 1982), p. 260.

which are unacceptable to society at large. It has its roots deep in history, and as it has developed over the centuries it has in some respects become obscure and uncertain. It is full of technicalities.¹⁰

However, in the past at least, if privilege was ‘obscure and uncertain’, this could pose a potential risk, for example, if the crown were to dispute, or even withhold, a privilege. There were, however, potential counter-difficulties in defining the terms of parliamentary privileges too tightly:

If [...] all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.¹¹

Privilege of parliament and freedom from arrest and other legal processes has a long history, but probably not as far back as has been implied by writers such as Erskine May, who refers to the laws of Ethelbert at the end of the sixth century: ‘If the king call his people to him (i.e. in the *witena-gemót*), and any one does an injury to one of them, let him pay fine’.¹² Blackstone found that the laws of Edward the Confessor included the precept: ‘*ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint, sit summa pax* [let there be complete peace for those coming to the assemblies, whether summoned, or coming on their own business]’.¹³ The essential premise was that a summons to a medieval parliament had the force of a royal command. Attendance at a parliament was therefore the origin of the protection of members of the Commons and the Lords, so that they were not molested personally, or in the matter of their goods or servants; nor diverted or distracted, on

¹⁰ House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *1999 Select Committee Report*, vol. 3, Written Evidence : Call for Evidence, at <<http://goo.gl/p2ZCVR>>.

¹¹ Blackstone, *Commentaries*, I, p. 159.

¹² Thomas Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 2nd edn. (London: Butterworths, 1851), p. 105.

¹³ Blackstone, *Commentaries*, II, p. 321.

their way to or from parliament, or while attending sittings, which at that time included the king. Moreover, if any members were impleaded before the courts in civil actions, it was equally important to protect them from arrest or imprisonment, which would, of course, hinder their attendance at a parliament.¹⁴ In addition, servants, such as cooks, horse keepers, and the like were needed to meet the personal needs of members of both Houses, when travelling to and from parliament, or when living in Westminster or wherever else parliament was sitting, so that they in turn were not to be arrested or subject to other legal processes. Legal immunity therefore ensured that a member or servant: first, was not diverted by being compelled to attend other, lower courts as a witness or juror, or as a principal in a case; second, would be free from arrest and other legal processes in civil law, including having to answer to *subpoenas*; and, third, could retain his goods and property.¹⁵ These protections collectively ensured that he was not prevented by parochial distractions from attending the Commons.

Resistance to *subpoenas* had a long history, as seen in a complaint, in 1293, that one had been served on someone coming to seek redress from Edward I, but that this could not apply, as it would be a breach of the privilege of the *crown*, because the man was within the royal palace, as explained by the then lord chancellor, in 1959:

¹⁴ *Implead* has two main meanings in a legal context: ‘to sue in a court of law’; and ‘to bring (a new party) into an action because he or she is or may be liable to the impleading party for all or part of the claim against that party’: *Dictionary.com*, at <<http://goo.gl/6Yd0Rh>>. Typically, the term arises where a third party is vicariously liable for all, or part of, the damages that an original plaintiff may win from the original defendant. In 1959, the then lord chancellor pointed out that, by the end of the Plantagenet period, the Commons, in addition to establishing that ‘neither they nor members of their household can be arrested on civil process during the sitting of Parliament, began to assert a claim that they cannot even be impleaded’: Viscount Kilmuir, (David Patrick Maxwell Fyfe), *The Law of Parliamentary Privilege* (London: Athlone, 1959), p. 9.

¹⁵ The case of lord Crumwell (or Cromwell) from 1572 showed that the issue of a *subpoena* was not the only ‘legal process’ that might prevent a member of the Commons or Lords from undertaking parliamentary duties. Crumwell was accused of not obeying a chancery injunction, and was ‘attached, by virtue of a Writ of Attachment, proceeding out of the said Court of Chancery, contrary to the ancient Privilege and Immunity, Time out of Memory, unto the Lords of Parliament, and Peers of this Realm’: Graves, ‘Cromwell’, p. 11. See also Appendix 1, case 17.

At one time it was the Crown, not Parliament itself, that required and protected the independence of members. But the principle is unchanged – members are there to give their counsel for the benefit of the country, originally in the person of the King, now including the people and Parliament itself. At no time has privilege been accorded as an end in itself.¹⁶

Erskine May notes that the right of MPs to resist *subpoenas* does not have an unbroken history, and cites two cases. The first involved the MP, John Beaumont, who had ‘a subpoena served on the Earl of Huntingdon during the Parliament of April 1554; the Lords sent the writ down to the Commons, who apologized for the offence but also argued that it was *not* a breach of privilege [my emphasis]’. The second case, from January 1558, was one where two members were sent to the lord chancellor to ask for revocation of a *subpoena* – showing that at that time a release from a *subpoena* had to be requested through chancery.¹⁷ A further case concerned William Ward, who seemed to have obtained privilege for himself, ‘without first securing a warrant for it from the House of Commons and on 22 Feb. 1552 his misdemeanour was referred by the House [...] although with what result is not known’.¹⁸ In 1621, Sir Edward Coke (sitting then for Liskeard) drew on a precedent from 1336-7, when observing that, even where the member was represented by an attorney: ‘a subpaena, though it restraine not the person, yet because it hinders the service is not to be served upon a member of this howse’.¹⁹

Deploying privilege, as a means of securing the attendance of all members, was important, not just because the king had summoned the Commons, but also because each member was a proxy for everyone in his ‘country’ or town, and expected on

¹⁶ Kilmuir, *Law of Parliamentary Privilege*. p. 21. The person who had served the *subpoena*, in a plea that was familiar in other cases, said that he did not ‘understand that he was doing anything which might be in any way in breach of the privilege and dignity of the crown, and he is prepared to acquit himself in any way it pleases the lord king’: *RP*, Roll 6 (SC 9/6), after Easter 1293.

¹⁷ Thomas Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 1st edn., (London: Charles Knight, 1844), I, pp. 101-10; Bindoff (ed.), *Commons 1509-1558*, I, p. 406

¹⁸ Bindoff (ed.), *Commons 1509-1558*, III, p. 547.

¹⁹ *Belasyse*, fol. 96, in Notestein et al. (eds.), *CD 1621*, v, p. 162: 13 May 1621; *CJ*, 1, p. 620: 14 May 1621.

their behalf to raise grievances, and take decisions.²⁰ Electors might, *in extremis*, take a view that any controversial decision did not apply to them, if, through his absence, their member had not spoken, or voted on a matter. Bowyer's diary notes the opinion of the committee for privileges: 'The Lords doe [re]present but themselves, viz. every man his owne Person, How great and honorable soever he be, but of the Commons, every man is a body Representative, either of a whole County, or a Burrough at least'.²¹ This absolute requirement to attend meant that deaths of sitting members led to by-elections. In addition, requests had to be made for leave of absence for the Commons, and to arrange proxies for the Lords.²² Despite such strictures, there was a longstanding problem with low attendances in James I's reign, leading to a number of messages from the king, and debate in the House as to the most appropriate form of action. Beyond a difficulty maintaining the credibility of decisions if few had participated in the process, there were two other issues, in relation to absences from the Commons. First, the lawyer-members, who were the most frequent absentees, tended to be the more learned and experienced members of the House, so that the capacity to defuse tensions, and to reach decisions on a considered basis and in line with precedents, was affected. This issue was clearly recognised, when in 1614, Sir Edward Hoby (Rochester) moved that 'the Serjeant may go to all the Courts, to move them, from the House, to hear those Members of the House, before any other; that so they may attend their Service in this House, and yet not lose their Practice'.²³ Second, the 'absolute requirement' for members to attend, unaffected by legal processes and other 'molestation' of person or goods, through the invocation of parliamentary

²⁰ This was argued in the case of William Strickland, who had been sequestered from the Commons in 1571. Members then called for his return, because he was not a private individual, but specially chosen to represent his area. See Appendix 1, case 16.

²¹ Willson (ed.), *Bowyer Diary*, p. 234, fol. 241: 14 March 1607.

²² An Act of 1514-15, only repealed in 1993, provided that any of the: 'Knights, Citizens, burgesses & barons [...] do nott depart from the same parliament nor absent hym selff from the same tyll the same parliament shall be fully fynysshid endyd or prorogued, except [...] lycens of the Speaker and Commons in the same parliament'. Infringement would lead to forfeiture of wages 'for evermore': *An Act concerning burgesses of the parliament 1514-15* (6 Hen. VIII c. 16), in John Raithby (ed.), *Statutes of the Realm ...* 6 vols. (London: s.n., 1810-1819), III, p. 134, repealed by the *Statute Law (Repeals) Act 1993* (Eliz. II c. 50).

²³ *CJ*, 1, p. 479: 11 May 1614.

privilege, would seem less justifiable, if other members were freely absenting themselves. It was also felt that allowing a legal process to continue, even through the use of attorneys, was still a breach of privilege: ‘No Processe is to be served on any of this House, for though his Person be not drawn from his Corporall Attendance: yet his minde is withdrawne, whereby the House hath no use of his Presence’.²⁴

The handling of privilege issues reflected the fact that, from the thirteenth century, parliaments were run by and for the monarch, acting directly, or through leading figures, such as the lord keeper or the chancellor. The protection of those attending parliament was first established through individual cases that then often served as precedents. The medieval parliamentary records show that there were a number of petitions to the king to correct directly any matter that hindered the attendance of an individual at a parliament, for example, because he was ‘molested’ when travelling there. There were also more generic petitions that the king should act to eliminate infringements of privilege. Both can be seen in petitions in the 1403-04 parliament for the privilege of freedom from arrest and imprisonment, and freedom from molestation and assaults.²⁵ The first petition noted that ‘according to the custom of the realm’ those coming to a parliament, and their servants, ‘ought not to be arrested or in any way imprisoned in the meantime for any debt, account, trespass or other contract of any kind’ when going to or from a parliament. The petition asked that any who did carry out an arrest ‘should pay a fine and redemption to you and give the injured party his damages threefold’.²⁶ The king’s response was that ‘there is a sufficient remedy for this case’, which, Roskell et al. suggest, ‘while not overtly repudiating the Commons’ claim, can hardly be said to have reinforced the privilege’.²⁷ The second, more specific petition, followed an attack on Sir Thomas Brooke’s menial servant,

²⁴ Willson (ed.), *Bowyer Diary*, p. 175, fol. 200: 19 May 1606.

²⁵ There is a distinction: ‘To be *arrested*, is to be taken by the officers, by process, or otherwise; to be *detained in prison*, is either to be detained after an arrest, or after a commitment from the bar of some court, which is never called an arrest, although in truth it be one’. Identical definitions are found in Hatsell, *Cases of Privilege*, p. 21; and Tyrwhitt (ed.), *Manner of Holding Parliaments (Elsynge)*, p. 217.

²⁶ *RP*, III, 541, 71: January-March 1404.

²⁷ Roskell et al. (eds.), *Commons 1386-1421*, I, p. 151. This case was cited in the Lords, in 1626, in a debate on the privilege of freedom from arrest for peers: *LJ*, 3, p. 559: 18 April 1626.

Richard Cheddar, who had been ‘horribly beaten, wounded, blemished and maimed by one John Salage otherwise called John Savage’.²⁸ The Commons petitioned for the drastic punishment of anyone who assaulted those who were entitled to privilege, and asked that they should not be pardoned subsequently. Henry IV broadly accepted the petition, and a statute was passed shortly afterwards, whose provisions were to apply ‘in Time to come in like Case’.²⁹ There were further entries in the *Parliament Rolls*, in 1432,³⁰ 1433,³¹ and 1446.³² There must have been regular petitions and statutes, to support Hatsell’s observation that:

Notwithstanding these repeated Acts of Parliament to secure the Members of both Houses from any insults on their persons, such was the licentiousness of the times, or rather, so slow and ineffectual were the remedies given by these laws, that in a very few years the Commons again apply to the King for farther provisions to suppress this very dangerous practice.³³

According to Roskell et al., the privilege of freedom from arrest and imprisonment seems to have been invoked infrequently between 1429 and 1478:

We may reasonably assume, therefore, that in occasionally asking for this particular privilege to be allowed the Commons were only promoting some ‘special petition’ made to them in the first place by the Member concerned [...] Certainly, enough MPs were involved as defendants in the courts at Westminster [...] to have benefited from the privilege. But however valuable it may have been for individuals, freedom from arrest or imprisonment was especially important in expediting the general business of Parliament, by ensuring the constant attendance of Members.³⁴

Kleineke records twenty-nine cases from 1411 to 1489, with writs and petitions requesting the release of members or servants, with the same formula more or less

²⁸ See Appendix 1, case 3.

²⁹ *Assaulting servants of knights of parliament* 1403/4 (5 Hen. IV c. 6), in Raithby (ed.), *Statutes of the Realm*, II, p. 144.

³⁰ Roskell et al. (eds.), *Commons 1386-1421*, I, pp. 148-51; *RP*, IV, 404: May to July 1432.

³¹ *RP*, IV, 453 November-December 1433.

³² *RP*, V, 111: March 1446; Appendix 1, case 5.

³³ Hatsell, *Cases of Privilege*, p. 27.

³⁴ Roskell et al. (eds.), *Commons 1386-1421*, I, p. 155.

repeated in each. Over time, the king became less involved in individual cases, responsibility being devolved to chancery, and, still later, to the Commons themselves. Similarly, requests at a more general level were refined down to formulaic ‘petitions’ by the Speaker at the start of a parliament, for confirmation of privileges that were increasingly characterised as ‘ancient’ and ‘undoubted, and an equally formulaic expression of royal consent, which was often signified by the lord keeper or lord chancellor, rather than the sovereign in person.’³⁵

By the time of the Shirley case in the early seventeenth century, the Commons looked to six particular precedents to guide their decisions: three medieval precedents were those of William Larke (1430), Walter Clerk (1460) and William Hyde (1474); three Tudor cases related to Edward Smalleye, or Smalley (1575/6), William Hogan (1601) and Anthony Curwen (1601).³⁶ William Larke was an MP’s servant who had been unjustly accused by one Margery Janyns, but, on advice, the king consented to Larke’s release. The consent made it clear that Janyns should have execution of the judgment she had obtained against Larke after the end of the parliament’.³⁷ Walter Clerk had been imprisoned in the Fleet for multiple debts and transgressions, including ‘a riot’ and ‘trespass’, and outlawed at the suit of John Payne. The issue for the Commons was the delay to its business; as they were to do in the later case of Hyde, they successfully petitioned the king to have Clerk freed: ‘so that the said Walter may attend this your parliament daily, *as it is his duty to do*’ [my emphasis]. The Commons conceded that Clerk’s liabilities remained, and that he could be rearrested when his privilege ended, ‘as if the same Walter had never been arrested at any time for any of the things stated or committed to ward’.³⁸ The third case affected William Hyde, who successfully applied for an action for debt to be stayed until the end of the parliament. This was again based on the assumption that *all* those summoned to a parliament had to be present if it were to transact its business.³⁹ All

³⁵ As in the exchanges at the opening of parliament in 2015: see pp. 12f. above.

³⁶ *CJ* 1, p. 173: 16 April 1604; *CJ*, 1, p. 195: 2 May 1604. See pp. 91f. and p. 103 below. The cases are described more fully in Appendix 1, cases 4, 7, 9, and 18, 23, 24.

³⁷ Editorial notes in relation to *RP*, IV, 357-8: January-February 1430.

³⁸ *RP*, v-373, col. b, 9: October 1460.

³⁹ *RP*, VI, 156, 55: after June 1474: Third Roll.

three medieval precedents saw privilege being granted, but allowed the legal processes to be taken up again by creditors after the parliament was over. They also indemnified the sheriff and officers against actions for vicarious liability to the creditor. In Smalley's case, the 'the principle was established that the House might discipline, as well as protect, the servants of its Members'.⁴⁰ Hogan was arrested for a debt, but claimed privilege as a servant of the queen. He was released, but the Lords ordered that 'the Warden of the Fleete should be free from any Trouble, Damage, or Molestation, for Discharge of the said William Hogan'. Curwen was a servant, actually a solicitor, to William Huddleston, who was arrested for non-payment of a long-standing surgeon's bill. He protested to the arresting serjeant that he was privileged by virtue of his master's membership of the Commons; however, the creditor and arresting serjeant rejected this claim, in the kind of dismissive terms that occurred in other cases.⁴¹ There was a possibility that if the serjeant freed Curwen, he could find himself vicariously liable for the debt, so that he understandably kept Curwen in custody. Although the Commons were sympathetic to his difficulty and discharged him, they ordered the creditor to pay a fine for his contempt of the privilege of the House. There was then a debate whether Curwen should indeed be privileged, as he had been arrested on an execution, not mesne process, but in the end, it was felt that the precedents supported him being granted privilege.⁴²

⁴⁰ Hasler (ed.), *Commons 1558-1603*, II, p. 241.

⁴¹ For example, in the Shirley case: see p. 90 below; or when a common informer said that 'he cared not a fart for the Parliament': see p. 135 below.

⁴² *Mesne process* is 'any process issued between original and final process; that is, between the original writ and the execution': *Legal Dictionary: The Free Dictionary at Farlex*, at <<http://goo.gl/z3x51Q>>. *Execution* is 'the act of carrying into effect the final judgment of a court. The writ which authorizes the officer so to carry into effect such judgment is also called an execution': *ibid.*, at <<http://goo.gl/HY191J>>. In the medieval period, if the prisoner was held in execution, not on mesne process, 'it was necessary to have an Act of Parliament to save to the parties a right of a new Execution after the time of Privilege': Hatsell, *Cases of Privilege*, p. 46. The distinction between arrests on mesne process and those on an execution was regularly considered in Commons proceedings over privilege in the early Stuart period. In 1604, the *Privilege of Parliament Act* established that MPs held in prison on an execution could benefit from parliamentary privilege. In 1625, the Commons declared that anyone who was 'in execution' for debt could not serve in parliament: Sommerville, *The Liberties of the Subject*, p. 61.

For most medieval cases, the records show that the Commons petitioned the king for a writ of parliamentary privilege to be issued for a member, or his servant, and this was generally processed without dispute. However, four applications were denied, and four applicants were not released from arrest, at least initially, despite writs for such release having been issued.⁴³ A key change took place in the Tudor period, when jurisdiction over privilege cases was transferred from the king in parliament (effectively chancery), to the Commons themselves. The case of Ferrers, who was freed in 1542 through the mace alone, marked a significant point in this development.⁴⁴ By the seventeenth century, a number of procedures had been developed to cover various kinds of privilege situations. The process used to pre-empt freedom from arrest or detention was that a member, or someone considered to be a member's servant, could obtain a warrant from the Speaker, which safeguarded the person until parliament was dissolved. However, in the early part of the seventeenth century, perhaps as early as 1611, a crucial change occurred, whereby a servant of a member of either House could be issued with a written protection certificate, signed by the master.⁴⁵ Where a member was summoned to a court as witness or juror in a case, the Speaker would write to the justices of the particular assize, to excuse the MP from attendance there. In cases where a member had actually been arrested or imprisoned, another MP would raise the matter in the Commons, and privilege was usually granted immediately, often accompanied by an order that the 'delinquents' who had procured and made the arrest were to appear before the Commons, or the matter was referred to the committee for privileges. The privilege was not, however, always endorsed; in 1552, Hugh Lloyd was ordered to meet his obligations:

It is considered that Hugh Lloyd [...] should be put from the Priviledge, and [...] that when he had satisfied his Creditors, he should be delivered from the Counter to the

⁴³ Kleineke, *Parliamentarians at Law*, especially pp. 40-41, and pp. 70-91.

⁴⁴ See Appendix 1, case 13.

⁴⁵ Turberville, 'Protection of Servants of Members'; see also pp. 179ff. below.

Serjeant of the House and discharged of imprisonment there, notwithstanding an action laid upon him in London, after his first imprisonment.⁴⁶

That privilege extended not just to the servants of members of both Houses, but also the servants of parliamentary officers. For example, in 1532, the cook of the Inner Temple was able to avoid arrest for debt, because he served the Speaker of that year's parliament.⁴⁷

There were three qualifications to freedom from arrest. First, privilege did not apply if the arrest was for treason, felony, or breach of the peace, which were offences directly affecting the crown, and therefore had precedence over parliamentary privileges, which were themselves 'granted' through the royal prerogative. This qualification was generally understood and accepted. So, in 1593, John Brograve noted that 'in cases of felony a man could not have priviledge though *sedente Parlamento*'.⁴⁸

The second qualification was that freedom from arrest, and enjoyment of goods were limited, to 'all the time that they were on their way to the place of parliament, all the time of the session, and all the time that they were home again' – *eundo, sedendo, redeundo*.⁴⁹ Before the seventeenth century, there was uncertainty about the length of time to be allowed for privilege before and after a parliament. According to Anson, the convention grew up that the privilege extended for forty days either side of a parliament. This would protect the member for the likely maximum period of any journey to or from parliament on medieval roads or waterways. It was also the period

⁴⁶ Anon., *The Orders, Proceedings, Punishments and Priviledges of the Commons House of Parliament in England* (London: s.n., 1641), ch. XV.

⁴⁷ Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford (CA): UP, 2003), p. 31.

⁴⁸ T. E. Hartley, *Proceedings in the Parliaments of Elizabeth I* (Leicester: UP, 1995), p. 164. The distinction between felonies and misdemeanours finally came to an end in 1967 in England and Wales, when legislation abolished felonies, and stated that all former felonies would be tried according to the rules of procedure and evidence that applied in trials and pre-trial hearings for misdemeanours: *Criminal Law Act 1967* (Eliz. II c. 58).

⁴⁹ William John Thoms, *The Book of the Court ...* 2nd. edn., (London: Henry G. Bohn, 1844), p. 188.

included in the old notice of summons required in *Magna Carta*, article 14.⁵⁰ There was a gradual shift downwards from the supposed limit of forty days, so that sixteen days later became the settled norm, as seen in the case of Sir Vincent Skinner (Preston), who was arrested by the sheriff of Middlesex on the sixteenth day after the end of the fourth session of James I's first parliament. When parliament resumed, in October 1610, Skinner's case soon led to a debate about the extent of privilege before and after sittings:

And so after the question asked generally, whether the privilege of parliament did extend the 16 days and no more, and then whether all executions subsequent ought to be discharged by the privilege. Twas particularly demanded whether Sir Vincent Skinner should have his privilege allowed and 'twas granted. And so by habeas corpus the next day he was brought and delivered and the sheriff discharged because, although he ought to take notice of the privilege of the House, yet it being doubtful to ourselves and we having no precedent where the privilege had been allowed for 16 days though for 14 days there was a precedent shown in Brereton's case, and the general conceived opinion was of 16 days.⁵¹

These findings were cited in 1625: 'the priviledge of Parliament is 16 dayes before the sittinge, and 16 dayes after the end of itt'.⁵² This was again confirmed in 1640: 'that every Member of this House had Privilege for Sixteen Days, exclusive, and Fifteen Days, inclusive, before the Beginning and Ending of every Parliament'.⁵³

The third qualification related to servants: whether travelling to or from parliament or attending sittings, members of both Houses were entitled to have a full complement of servants, who could also claim privilege. The qualification was that they had to be 'necessary' or 'menial' servants, whom his master specially 'caused to

⁵⁰ Sir William Reynell Anson, *The Law and Custom of the Constitution*, ed. Sir Arthur Berriedale Keith, 4th edn., 3 vols. (Oxford: Clarendon, 1935), I (Parliament), p. 165; Carpenter, *Magna Carta*, p. 45.

⁵¹ *BL, Add. 48119*, in Foster (ed.), *Proceedings 1610*, II, pp. 307-08: 30 October 1610. Roger Brereton (Flint) had been arrested a few days after the adjournment of November 1605: Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 299.

⁵² *BL Add. 48091* (Yelverton 100), fol. 6r: *Record of Parliament: 23 June 1625*.

⁵³ *CJ*, 2, p. 10: 24 April 1640.

use and employ' during the sessions of parliament.⁵⁴ The term 'servant' is generally used in all the contemporary documents, but is perhaps misleading. We might today use the terms, 'member of staff', or 'colleague', as servants were not only cooks, horse keepers, and the like, but came to include gentlemen who were part of the client network of medieval and early modern men, as well as people who did not attend the MP directly, such as farm bailiffs. For example, John Arundell of Trerys was described in a writ of parliamentary privilege of 1431 as a 'knight, servant and familiar' of Humphrey, duke of Gloucester, although we know that Arundell was of higher status than a 'menial' servant, having been sheriff of Cornwall from 1420-22, and that he would become a member for Cornwall in 1427 and 1432.⁵⁵ Arundell's status illustrates a continuing difficulty in deciding who was protected as a 'servant' of a magnate-peer, who might have hundreds of servants, most of whom could not remotely be deemed 'necessary' for the peer's parliamentary functions and journeys. Although the peer might not even personally know such 'servants', they could, so it was felt, still claim privilege. As noted above, there was a procedural change in the early part of James I's reign to the way in which protections for servants were established; this development, and its potential for abuse, is explored more fully in chapter five below. Even with these three qualifications, the key effect of the privilege during the early modern period was to provide protection from legal entanglements, including processes to recover debts.

The following paragraphs locate privilege within the overall constitutional settlement, as it developed into the beginning of the seventeenth century. An important element was a refinement and formalisation of Speakers' requests of the sovereign at the start of a parliament. Although commentaries cannot be relied on to give authoritative first dates for requests or claims for privileges, it is clear that Speakers came to include petitions in their first speeches on taking office that were, at first, personal to the Speaker, and later included requests on behalf of the Commons

⁵⁴ *Menial* derives from 'post-classical Latin *menialis*, domestic, relating to the household': *OED Online*.

⁵⁵ TNA KB145/4/6/9, *Writ of parliamentary privilege*: 28 January 1431, in Kleineke, *Parliamentarians at Law*, pp. 34-35, and p. 389. Arundell's privilege related to his service to Gloucester, rather than his own status as an MP.

as a body. So, in 1378, Sir James Pickering made his ‘protestation’ to Richard II that he should be forgiven for any personal transgressions. In respect of the Commons as a whole, however, he did not make any general requests for privileges, such as freedom from arrest or freedom of speech.⁵⁶ Indeed, it was quite possible for a Speaker himself to be imprisoned for speaking his mind too freely in parliament, as had happened to Pickering’s predecessor, Sir Peter de la Mare.⁵⁷ In the next reign, Thomas Chaucer made a similar request, which received a guarded response from Henry IV:

The speaker asked that he might speak under protestation. To which the king granted that he might speak under such protestation as other speakers had done before him in the time of his noble progenitors and ancestors, and in his own time, but not otherwise, because he did not under any circumstances wish to have any kind of novelty in this parliament, but he wished to be and to remain entirely in his liberties and franchises and also at liberty to the same extent as his other said progenitors or ancestors had been at any time in the past.⁵⁸

Moving through to the Tudor period, Thomas More, as Speaker of the Commons in April 1523, petitioned Henry VIII, represented by Cardinal Wolsey, in two areas: the first was to excuse himself if he misrepresented the Commons to the king.⁵⁹ More then rehearsed that members of the Commons differed in character and ability, and were not all equally careful in their speech, sometimes being more concerned with its content than its formulation. Fearful of any consequent royal displeasure against the bold or rash, it might be that men would not speak up, so that More petitioned the king for liberty of speech. Neale points out that More ‘is not asking, not dreaming of asking, that members shall be allowed "to frame a form of Relligion, or a state of gouvernement as tho their idel braynes shall seeme meetest" ’.⁶⁰ A request by Sir

⁵⁶ *RP*, III, 34: October 1378.

⁵⁷ James Alexander Manning, *The Lives of the Speakers of the House of Commons ...* (London: Willis, 1851), p. 3.

⁵⁸ *RP*, IV, 648: November 1411.

⁵⁹ Manning, *Lives of the Speakers*, p. 156.

⁶⁰ J. E. Neale, ‘The Commons’ Privilege of Free Speech in Parliament’, in E. B. Fryde and Edward Miller (eds.), *Historical Studies of the English Parliament* (Cambridge: UP,

[footnote continues ...]

Thomas Moyle appears in the records for 1542: '*Postremo, supplicavit Regie Majestati, "Ut in dicendis Sententiis quivis libere et impune eloqui posset quid Animi habereti"*' [‘Lastly, he petitioned his royal majesty "that in debate, anyone might freely express his opinion and judgement" ’]. In the same occasion, freedom of debate was granted conditionally: '*Postremo, honestam dicendi Libertatem non negare Regiam Majestatem* [Lastly, his royal majesty does not deny *honestly expressed* freedom of speech]’ [my emphasis].⁶¹ As the century proceeded, the Speaker moved from a request simply for immunity for himself, to making a wider request for the liberties of the House. D’Ewes records the request of Sir Thomas Gargrave in 1559, which provides evidence that requests were now made ‘in the usual form’, and also that a request for freedom from arrest ‘in former times hath always been accustomed’:

And lastly, he came, according to the usual Form, first to desire Liberty of access for the House of Commons to the Queen’s Majesties presence, upon all Urgent and Necessary Occasions. Secondly, that if in any thing [he] himself should mistake, or misreport, or over-slip that which should be committed unto him to declare, that it might, without prejudice to the House, be better declared, and that his unwilling Miscarriage therein might be pardoned. Thirdly, that they might have Liberty and freedom of Speech in whatsoever they Treated of, or had occasion to propound and debate in the House. The fourth, and last, that all the Members of the House, with their Servants and necessary Attendants, might be exempted from all manner of Arrests and Suits, during the continuance of the Parliament, and the usual space, both before the beginning, and after the ending thereof, as in former times hath always been accustomed.

The ‘royal answer’ was to grant the requests, with conditions, including the admonition in respect of the last that: ‘great heed would be taken, that no evil disposed person seek of purpose that priviledge for the only defrauding of his

1970), 147-76, p. 158. The internal quotation is from the lord keeper’s speech in 1593.

⁶¹ *LJ*, 1, p. 167: 20 January 1542.

Creditors, and for the maintenance of injuries and wrongs'.⁶² By this time, the liberties and privileges of the Commons were shaped by custom and procedures, and it was during the long reign of Elizabeth that privilege was carefully positioned within constitutional arrangements that were understood by queen and Commons alike. The Elizabethan settlement was one where the sovereign enjoyed prerogative rights, and the right to determine policy. Although not *required* to put selected matters before parliament, the polity worked more smoothly when she did. Elizabeth's main concern was to avoid according rights to parliament that might be turned against her: freedom of speech in debate was restricted to matters that had been properly put before parliament by the crown, rather than a free-for-all, in which the policies and decisions of the monarch might be debated, or criticised.⁶³ By 1593, the question of freedom of speech was as much a matter of assertion as before, when the lord keeper returned to a well-trodden path in his response:

The Queen answereth, Liberty of Speech is granted you; but how far this is to be thought on: [...] Priviledge of Speech is granted; but you must know what Priviledge you have, not to speak every one what he listeth, or what cometh in his brain to utter, but your Priviledge is to say Yea or No.

He went on to caution the Speaker not to receive any bills 'which will meddle with reforming of the Church, and transforming of the Commonwealth'.⁶⁴ To agree to privileges that enhanced the status and efficiency of the parliament was a wise policy, and the privilege of freedom from arrest was not a challenge *per se* to the royal authority. For their part, since privilege theoretically admitted no novelty, as it drew its very legitimacy from the past, the Commons assiduously searched for precedents

⁶² Sir Simonds D'Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth : Journal of the House of Lords* (London: Paul Bowes, 1682; repr. Shannon, Ireland: Irish UP, 1973), pp. 16-17: 28 January 1559.

⁶³ This qualification on freedom of speech was a recurring theme, as seen in messages from Elizabeth I in 1559, 1571 and 1585: *ibid.*, p. 17; *ibid.*, *Speech of Sir Nicholas Bacon*, p. 151: 29 May 1571; William Fitzwilliam: Northants Record Soc, Fitzwilliam of Milton Papers, 2, in J. E. Neale, *Elizabeth I and Her Parliaments, 1584-1601* (London: Cape, 1957), p. 435.

⁶⁴ Heywood Townshend, *Historical Collections...* (London: T. Basset, 1680), pp. 37-38: 19 February 1593.

that might be relevant in particular privilege cases, in order to maintain, and sometimes to stretch, parliamentary dignity and authority.

As Speakers' petitions were routinely granted, albeit sometimes accompanied by warnings, by the seventeenth century the Commons came to think that *customary* privileges and liberties had become theirs by *right*. So, Elsynge notes: 'The Commons ever enjoyed those priviledges which the Speaker now petitions for, though never desired by any of the antient speakers, until after the sixth year of King Hen. 8 [Sir Thomas Neville, 1515]'.⁶⁵ He goes on to identify that a claim for freedom from arrest 'was never made until of late years, yet this priviledge did ever belong to the Lords and Commons, and to their servants also, coming to the Parliament, staying there, and returning home'.⁶⁶ We can see these traditional requests by Speakers throughout the period. An example from 1624 is typical: Sir Thomas Crew's (Aylesbury) long encomium on James I ended with the customary request for privileges, alongside equally traditional assertions of obedience, humility, and loyalty to the majesty of the sovereign. The lord chancellor, having conferred with the king, responded with what became a familiar set response: 'And now, Mr. Speaker, what Liberties, Privileges, and Access, was ever yielded to any of your Predecessors, His Majesty now granteth it fully and freely, without the least Jealousy or Diminution'.⁶⁷ This speech reflects the position of both James I and Charles I: that they confirmed and granted *existing* privileges, through the royal prerogative. The following section, therefore, looks at the origins and deployment of royal prerogative powers, and the degree to which these were accepted or challenged by contemporaries, particularly in relation to the exercise of parliamentary privilege.

Prerogative powers

This section considers the royal prerogative, from which parliamentary privileges and liberties were supposedly derived. It begins by looking at some definitions, and goes on to outline the main areas in which the prerogative operated, inasmuch as these

⁶⁵ Tyrwhitt (ed.), *Manner of Holding Parliaments (Elsynge)*, p. 175.

⁶⁶ *Ibid.*, p. 184.

⁶⁷ *LJ*, 3, pp. 212, 213: 21 February 1624.

impinged on privilege. The difficulty of delimiting the royal prerogative led to many questions being posed in the early Stuart period: what powers *did* exist definitively, by custom, or through the common law? What might be done legitimately, without the authority of an Act of Parliament? Was the royal prerogative increasingly encroaching on the ‘liberty’ of the subject? There was also a longstanding fear of tyranny and absolutism: might confirmation of parliamentary privileges be withheld through a negative exercise of the royal discretion? Alternatively, had privileges now taken on a life of their own, as it were, so that they were characterised as ‘ancient’ and ‘undoubted’, and hence no longer dependent on the yea or nay of a king?⁶⁸ Two concerns emerged that are relevant for this thesis: first did the Commons’ privileges *only* exist by virtue of a grant through the royal grace; and, second, was the royal prerogative being redefined and expanded, at the possible expense of parliamentary privileges and liberties, for example in the raising of finance through extra-parliamentary means?

A recent parliamentary select committee report reflects the difficulty of describing and defining the royal prerogative:

The exact limits of the prerogative cannot be categorically defined [...] There is no single accepted definition of the prerogative. It is sometimes defined to mean all the common law, ie non-statutory powers, of the Crown. An alternative definition is that the prerogative consists of those common law powers and immunities which are peculiar to the Crown and go beyond the powers of a private individual e.g. the power to declare war as opposed to the normal common law power to enter a contract. Whichever definition is used there is no exhaustive list of prerogative

⁶⁸ Certainly, developments in the United Kingdom have led *parliament*, rather than the monarch, to possess a legislative authority today which is unlimited by law, ‘and remains a fundamental part of the contemporary UK constitution’, even if ‘many scholars [are] increasingly convinced that the rule of law and basic human rights are too valuable to remain subject to the will of an elected legislature’: Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart, 2015), p. 2. In 2015, the government controversially signalled its intention to repeal the *Human Rights Act 1998* (Elizabeth II c. 42), on the grounds that it compromises the supremacy and sovereignty of the UK Parliament.

powers. Some have fallen out of use altogether, probably forever – such as the power to press men into the Navy.⁶⁹

That difficulty is not new, and different suggestions have been made over the years, including that of Cowell in the early seventeenth century:

Prerogative of the king (prærogative regis) is that especial power, pre-eminence, or privilege that the king hath in any kind, over and above other persons, and above the ordinary course of the common law, in the right of his crown ... there is not one [regality] that belonged to the most absolute prince in the world which doth not belong also to our king [...] only by the custom of this kingdom he maketh no laws without the consent of the three estates, though he may quash any law concluded of by them'.⁷⁰

Dicey saw the royal prerogative as ‘the discretionary authority of the executive’, which is everything that the king or his servants can do without the authority of an Act of Parliament.⁷¹ In 1610, however, the *Case of Proclamations* established that ‘the King hath no prerogative, but that which the law of the land allows him’.⁷² Another formulation has it that, in essence, the royal prerogative is ‘the legal exercise of royal authority’, in three forms.⁷³ First, there are the special privileges accorded to the king in the law courts, which include creating judges, pardoning criminals through the royal grace, making charters, and awarding honours.⁷⁴ Charles I used one feature

⁶⁹ House of Commons Select Committee on Public Administration, *Memorandum from the Treasury Solicitor’s Department: The Royal Prerogative*, in www.parliament.uk (UK Parliament, 2004), at <<http://goo.gl/6OgHjB>>, §1-3.

⁷⁰ James Cowell, *The Interpreter*, (Cambridge: 1607), in Coward and Gaunt (eds.), *English Historical Documents*, p. 407.

⁷¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 9th edn., (London: Macmillan, 1945), p. 420. ‘Dicey’, whose first edition was published in 1885, remains a standard work (presenting the whiggish tradition) in courses on the constitutions of countries whose legal system is grounded in English law.

⁷² England and Wales High Court (King’s Bench Division) Decisions, *Case of Proclamations: [1610] EWHC KB J22 77 ER 1352, (1611) 12 Co Rep 74*, in England and Wales High Court (King’s Bench Division) Decisions (British and Irish Legal Information Institute), at <<http://goo.gl/HDSWU>>.

⁷³ Margaret Atwood Judson, *The Crisis of the Constitution : An Essay in Constitutional and Political Thought in England, 1603-1645* (New Brunswick (NJ): Rutgers UP, 1949), p. 23.

⁷⁴ General pardons were routinely granted at the end of a parliament (but not to recusants):

[footnote continues ...]

of this element of the royal prerogative, in an attempt to neutralise opposition to Buckingham and himself. The prerogative allowed him to ‘prick off’ (name) someone as sheriff, who was required to remain within the physical limits of his shrievalty, unless he had royal permission to depart. This reflected the fact that, from 1403, the writ of summons had included a *nolumus* clause that disbarred sheriffs from election to parliament for the county of their shrievalty.⁷⁵ The Commons had further decided, in 1614, that a sheriff might not sit, even if he was elected for a different bailiwick to the one where he was sheriff.⁷⁶ In 1625, Charles decided to use these provisions to sideline ‘sticklers in the last Parliament’, who were opponents of the duke of Buckingham, not by arresting them, but by pricking them off as sheriffs, which he was perfectly entitled to do. Those who were chosen in this way included Sir Francis Seymour, Sir Edward Coke,⁷⁷ Sir Thomas Wentworth, Walter Long,⁷⁸ and Sir Robert Phelips.⁷⁹ This desire to dampen opposition down had the opposite effect, the Commons being enraged by the crude manoeuvre that had been intended to prevent key members playing a part in the 1626 parliament.⁸⁰

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see Cynthia Herrup, ‘Negotiating Grace’, in Thomas Cogswell, Richard Cust, and Peter Lake (eds.), *Politics, Religion and Popularity in Early Stuart Britain: Essays in Honour of Conrad Russell* (Cambridge: UP, 2002), 124-40.

⁷⁵ *Nolumus* means ‘we do not want’. The advancement of personal cases led to lawyers being specifically debarred from membership of the Commons in 1372, under a *nolumus* clause: Alpheus Todd, *The Practice and Privileges of the Two Houses of Parliament* (Toronto (ONT): Rogers & Thompson, 1840), xvi. Sheriffs were similarly disqualified from 1403. The St. Albans chronicler sarcastically commented that the 1404 parliament was accordingly called ‘under a new style of writ, namely that no knights or citizens who knew anything about the law of the realm should be elected, but that they should be entirely unlearned (*omnino illiterati*); as a result of which this parliament was subsequently, and deservedly, given the name of the Unlearned Parliament (*Parliamenti Illiterati*): Annales, 391, in *RP*, Henry IV, October 1404, n. 6.

⁷⁶ Thrush, *Commons 1604-29*, I, pp. 55-56.

⁷⁷ Coke, who had been pricked as sheriff for Buckinghamshire, tried to circumvent the matter by contriving his election for Norfolk, despite the Commons’ decision of 1614: *ibid.*, I, p. 71. This served no purpose, as it was clear a sheriff was not entitled to sit for any constituency.

⁷⁸ Similarly, Long procured his election for Bath, despite having been pricked as sheriff for Wiltshire: Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 159.

⁷⁹ *Ibid.*, VI, p. 288; III, p. 587; VI, p. 710; V, p. 159; V, p. 696.

⁸⁰ Thrush, *Commons 1604-29*, I, 1.

Second, there are prerogatives that remain in respect of the king as chief feudal lord, even though many of the crown's feudal rights had died out by the early fourteenth century. The capacity to raise money through the feudal system, particularly fees paid by an heir when inheriting property or land, was in effect superseded by votes from parliament of *subsidies*,⁸¹ or a grant of a *fifteenth* or *tenth*⁸² of each secular subject's income, granted singly, in multiples, or as fractions. Although medieval monarchs had been expected to 'live off their own', i.e. the income from the royal estates and feudal dues, as well as traditional 'great customs', from at least the fourteenth century, parliament had had to grant additional sums on an increasing scale, as such traditional royal incomes did not keep pace with inflation.⁸³ The costs of any war naturally added to the requirement for such parliamentary grants, possibly up to as much as £1 million a year.⁸⁴ Up to the time of Charles I, the Commons usually granted the sovereign multiples of subsidies, fifteenths and tenths, and the right to collect *tonnage and poundage*.⁸⁵ In 1610, Salisbury tried, albeit unsuccessfully, to secure the 'Great Contract', whereby the king would be granted a regular supply of £200,000 per year, from land tax and excise, in return for his surrender of prerogative rights, including impositions. In the end, however, there was a serious financial gap between what the crown could raise from its lands and grants, and what the sovereign wished to have to spend. Moreover, leading voices in the country were very happy to advocate the waging of expensive wars, but far less happy to vote supply to the crown actually to do so, particularly if they felt that public money was being squandered. Cotton articulated concerns that could have been raised

⁸¹ A tax, particularly on wool exports that was regularly granted from the 1340s. It gradually became a fixed sum, granted by parliament for a defined period, rather than being hypothecated on the value of exported goods. Confusingly, the term 'lay subsidies' is also sometimes used to describe tenths and fifteenths: see following footnote.

⁸² A tax on 'moveable' property, regularised in the 1330s, as fifteenths on county property, tenths on town property, which came to yield a fixed sum of about £39,000.

⁸³ As noted earlier, Edward IV undertook to live of his own, although this anticipated continuing grants of tonnage and poundage: see p. 25 above.

⁸⁴ Smith, *Stuart Parliaments*, p. 54. Kishlansky gives a figure of £800,000: Mark Kishlansky, *Charles I, An Abbreviated Life* (London: Penguin, 2014), p. 20.

⁸⁵ Tunnage, or tonnage (the spelling generally used today), and poundage were duties raised on every tun of imported wine, and on every pound of imported or exported merchandise.

at any point in the 1620s: the ‘waste of public treasure in fruitless expeditions’; subsidies misused to balance the books of a profligate king, rather than being applied for the public good; the need to enact resumptio⁸⁶; royal abuse of forced loans and purveyances without parliamentary assent; the creation of ‘an Inland armie in winter season [...] with a glorious pretence of Religion & publique safetie’; and overall, the ‘rapine of the rich (and ruine of all)’.⁸⁷ Such concerns led to serious difficulties with supply at the start of the reign of Charles I. The problem was that, although the Commons regularly granted subsidies, and tonnage and poundage to successive monarchs, Charles had wrongly assumed that he could collect tonnage and poundage from his accession under the royal prerogative, pending any such parliamentary grant. This then led to protests about the alienation of individuals’ property through the exercise of the prerogative, contrary to the supremacy of parliament in matters of supply. There was frequent referral to *Magna Carta*, where the original article 12 provides that:

No scutage or aid is to be levied in our kingdom, save by the common counsel of the kingdom, save for the ransoming of our body, and the making of our first-born son a knight, and for the marrying a single time of our first-born daughter; and for these things there is only to be reasonable aid. In a similar way it is to be for aids from the city of London.⁸⁸

However, this article was omitted in reissues of the Charter.⁸⁹ People firmly believed that every subject had the right to enjoy his property absolutely, and that it could only be affected, for example, by taxation, if the people, through the Commons, had given approval, or the courts had made a judgment ‘in matters of *meum et tuum*’. These beliefs were of central importance in any consideration of the Rolle case, as set out in chapter six below.

⁸⁶ A return to the crown of lands granted earlier to others.

⁸⁷ Sir Robert Bruce Cotton, *The Danger Wherein the Kingdom Now Standeth & the Remedie*, Lansdowne Tracts : 10/7 (s.n., 1628), pp. 16-19.

⁸⁸ Carpenter, *Magna Carta*, p. 43.

⁸⁹ *Ibid.*, p. 410.

Last, there are prerogatives for the king as head of government of the commonwealth, which are generally lumped together as ‘acts of state’, or ‘matters of state’.⁹⁰ In the early modern period, these included sole control of foreign policy and war, regulation of overseas trade, regulation of the Church of England, and coining money. In relation to parliament, the crown has the prerogative right to summon, prorogue, and dissolve parliaments. This was acknowledged in 1614: ‘The Commons in all humility did acknowledge that the summoning and dissolving of a parliament belong only to his [the king’s] supreme power, that they would be contented with anything his Majesty should order, either for continuing or ending the parliament’.⁹¹ Each House can, however, adjourn sittings at its convenience from day to day and over the main holidays. Dissolution ends a parliament, whereas a prorogation simply concludes a session, and an adjournment is a break within a session. As members of both Houses were expected to attend all sittings, there had to be opportunities for vacations of varying lengths, when unfinished legislation would be suspended rather than terminated. Once supply had been voted, and the legislative programme fulfilled, parliament could be dissolved, but dissolution liquidated all unfinished legislation. Parliaments had a natural rhythm, being summoned when supply was needed, or legislation was required, with breaks at suitable intervals, and ending with the royal assent to bills.⁹² The sovereign might act to preserve the state and the general wellbeing of the commonwealth, although the tacit assumption is that such action should reflect an emergency.⁹³ It is, of course, difficult to define the nature and temporal extent of an ‘emergency’ – relevant when Charles I collected tonnage and

⁹⁰ In 1621, James I rejected an expression of opinion by the Commons on the marriage of his son, as ‘committing of high treason’, in direct breach of his command on such a matter of state (see pp. 137f. below).

⁹¹ *Anonymous Diary*, Add. 48,101, BL, in Jansson (ed.), *Proceedings (Commons) 1614*, p. 425: 4 June 1614. However, this prerogative power has in effect been removed from the sovereign, through the *Fixed-term Parliaments Act 2011* (Eliz. II c. 14), which provides that parliaments are to run for five years, except in particular, prescribed circumstances.

⁹² In the Shirley case, a question arose whether a parliament inevitably and unavoidably ended when the royal assent was given to a bill: see pp. 106ff. below.

⁹³ Tanner (ed.), *Constitutional Documents : James I*, p. 5; Derek Hirst, *Authority and Conflict : England, 1603-1658* (London: Arnold, 1986), pp. 26-27.

poundage without parliamentary authority, but under a claim of ‘necessity’ in the face of foreign threats.

At the beginning of the seventeenth century, despite emerging tensions, most people did not inherently oppose or reject the generality of the wide powers held by the sovereign, reflecting a common fear that unbridled liberty could soon turn into anarchic disorder, mob rule and even assassinations or lynchings. It was felt that the head of state had to be able to act independently at times, and that it would, for example, be nonsensical to ‘consult’ parliament on matters such as going to war. As Hughes describes, it was felt that: ‘It was up to kings to decide to rule justly, with God’s aid; subjects had no redress if they did not’. However, there was an emerging counter view: ‘that royal power was derived from the community who had given it up on conditions and could resist if these conditions were broken; the statutes of the realm and the coronation oaths of monarchs were surviving evidence of these conditions’.⁹⁴ In other words, the king was not expected to do anything injurious to the subject, or, by extension, his property; this expectation was part of the ‘ancient constitution’ that many MPs wished to conserve by active means. However, change was perhaps inevitable after Elizabeth’s long reign, not least because the rather unmajestic alien, James VI and I, could not benefit from the easy, chivalrous loyalty that had previously been paid to a ‘glorious’ English monarch, who was also a woman: ‘Such an Emulation was of Love between that Senat & this Q[ueen], as it is questionable whether had more affection, the parl. in observance unto hir, or she in indulgence of the parl’.⁹⁵ James, like Elizabeth, had survived potentially perilous early years, having being born into his mother’s ‘bloody nest’, and had reigned as king of Scotland since 1567, when he was one year old – a ‘cradle king’ – and was to die peacefully at a good age, unlike many of his predecessors. James gained full control of the Scottish government in the early 1580s, and had therefore been attending parliaments for over twenty years before he succeeded Elizabeth. Like

⁹⁴ Ann Hughes, *The Causes of the English Civil War*, 2nd edn., British History in Perspective (London: Macmillan, 1998), p. 77.

⁹⁵ Grosart (ed.), *Apology & Negotium Posterorum (Eliot)*, I, p. 35. The views are those of Sir John Eliot.

Elizabeth, he was well read, and his personality and intellect meant that he favoured robust, even combative, statements on matters of principle. In 1603, he must have felt that he knew all there was to know about personal survival, as well as how to rule his government and manage relationships between crown and parliament. James rarely avoided an opportunity to promote his own view of his regality and powers, both in the two books on kingship that he wrote before he came to England, and through his publicly-stated unwillingness to accept the view of parliamentary privilege that had emerged in his new kingdom.⁹⁶ English parliamentary privilege was largely based on a common law interpretation, whereas James was familiar with civil or Roman law, which was more concerned about the rights of the ruler than the liberties of the subject. The mainstream whig view, now generally rejected, is that James I found his refractory parliaments incomprehensible, set out to do without them, and thereby *deliberately* set out to destroy the innate, and already well-developed parliamentary liberties of England. That characterisation is wrong: James told the Spanish ambassador, in 1614, that ‘I am a stranger here, and found it [the House of Commons] here when I arrived, so that I am obliged to put up with what I cannot get rid of’.⁹⁷ Some of the difficulties ascribed to James reflected his philosophical stance that all laws derived from the royal grant, and that kings had existed before any law-making assemblies, whereas the reality was that he fully intended to follow the rule of law. Alan Smith has questioned whether the king was responsible for the discord and ‘opposition’ that grew during his reign, suggesting that these were by-products, possibly inevitable by-products, of unpopular policies, such as the proposed constitutional union of ‘Great Britain’.⁹⁸ It is indeed possible to suggest that James’s manner and approach were unhelpful. For example, he issued a proclamation that

⁹⁶ King James VI of Scotland, ‘The True Lawe of Free Monarchies ...’, in James Craigie (ed.), *Minor Prose Works of King James VI and I* (Edinburgh: Scottish Text Society, 1982), 57-82; King James VI of Scotland, *Basilikon Doron ...* (Edinburgh: s.n., 1599). Originally written for his first-born son, Henry, James presented a copy of *Basilikon Doron* to his second son, Charles, after Henry’s early death.

⁹⁷ Samuel Rawson Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War, 1603-1642*, 10 vols. (London: Longmans, 1883), II, p. 251.

⁹⁸ Alan G. R. Smith (ed.), *The Reign of James VI and I* (London: Macmillan, 1973).

seemed to interfere in the election process, warning sheriffs and electors that they should ‘avoid the choice of any persons either noted for their superstitious blindness or for their turbulent humours other ways [...] and that an expresse care bee had, that there be not chosen any persons Banquerupts or Outlawed, but men of knowen good behaviour and sufficient livelyhood’.⁹⁹ Further, in the ‘Buckinghamshire election dispute’, James, initially at least, supported chancery over the Commons.¹⁰⁰ Nevertheless, he told the Commons that ‘he had no Purpose to impeach their Privilege: But since they derived all Matters of Privilege from him, and by his Grant, he expected they should not be turned against him’.¹⁰¹ Nor, for their part, were some parliamentarians content to avoid controversy, particularly in the aftermath of the Buckinghamshire and Shirley cases, so that *The Form of Apology and Satisfaction* was prepared by a committee appointed on 1 June 1604. It was read in the House on 20 June, and recommitted by order of the House, but was not reported out again before adjournment on 7 July. No full copy was inserted in the *Journal* of the House of Commons, but there are copies in manuscript, and a printed version in Petyt’s *Jus Parliamentarium*.¹⁰² The *Apology* rebutted the king’s view that privileges were granted through his grace, rather than held by right, and warned that ‘the prerogatives

⁹⁹ ‘A Proclamation concerning the choice of Knights and Burgesses for the Parliament, 11 January 1604’, in Larkin and Hughes (eds.), *Proclamations (James I)*, I, p. 68.

¹⁰⁰ The case turned on whether Sir Francis Goodwin or Sir John Fortescue should sit for Buckinghamshire. The principal issues were whether the return of Goodwin, who had outstanding outlawries for debt, should be rejected in favour of Fortescue, and the consequent competing claims of chancery and the Commons to regulate such disputed election returns. See Gardiner, *History of England (1883 edn.)*, I, pp. 167-70; Conrad Russell, *The Crisis of Parliaments : English History, 1509-1660*, Short Oxford History of the Modern World (London: OUP, 1971), p. 271; Derek Hirst, ‘Elections and the Privileges of the House of Commons in the Early Seventeenth Century : Confrontation or Compromise?’, *HistJ*, 18 (4) (December 1975), 851-62; Derek Hirst, *The Representative of the People? : Voters and Voting in England under the Early Stuarts* (Cambridge: UP, 1975), p. 10; R. C. Munden, ‘The Defeat of Sir John Fortescue : Court Versus Country at the Hustings’, *EHR*, 93 (369) (October 1978), 811-16; Linda Levy Peck, ‘Goodwin v. Fortescue : The Local Context of Parliamentary Controversy’, *PH*, 3 (December 1984), 33-56; Eric N. Lindquist, ‘The Case of Sir Francis Goodwin’, *EHR*, 104 (412) (July 1989), 670-77; Andrew Thrush, ‘Commons v. Chancery : The 1604 Buckinghamshire Election Dispute Revisited’, *PH*, 26 (3) (2007), 301-09.

¹⁰¹ *CJ*, 1, p. 158: 29 March 1604.

¹⁰² Petyt, *Jus Parliamentarium*, pp. 227-43.

of princes may easily and do daily grow; the privileges of the subject are for the most part at an everlasting stand. They may be by good providence and care preserved, but being once lost are not recovered but with much disquiet'.¹⁰³ Although the *Apology* was never adopted or delivered to James, it was not forgotten, and often referred to in later parliaments, which used some of its language in their own protestations.

Conclusions

This chapter has traced the origins and purposes of the rights, privileges and liberties of parliament, and how these had been given form and substance through the royal prerogative. The English constitution of the seventeenth century was viewed as one where 'the fundamental laws of the English polity [...] gave the king his prerogatives, and gave the subjects security in their liberties and property'.¹⁰⁴ There was an apparently broad acceptance of the wide powers held by the sovereign, but a major difficulty lay in the ill definition of this apparently settled constitutional relationship between the crown and parliament, which in turn exposed two key areas of tension.

The first area of tension related to the status of privileges, which had historically been *petitioned* of monarchs. However, by the early seventeenth century these were increasingly seen, not just as 'ancient', but also 'undoubted', with a legitimacy gained through custom – to the point where the link to grants under the royal prerogative was becoming almost a matter of form alone. Throughout the early Stuart period, there was a growing difficulty in agreeing where the relative boundaries of privileges and prerogative powers lay. The breakdown of apparently settled understandings can be seen in polemical speeches, 'petitions', 'protestations', and the like, which set out the differing views of the Commons and the crown on a range of privilege issues, albeit often with claims of mutual respect. So, in 1604, the draft *Form of Apology and Satisfaction* had complained of the growth of princely prerogatives and perceived assaults on privileges. This, and other declarations and protestations, might not have immediately led to change, yet their words and themes were often referred to in

¹⁰³ Tanner (ed.), *Constitutional Documents : James I*, pp. 217-30, esp. p. 222.

¹⁰⁴ Glenn Burgess, *The Politics of the Ancient Constitution : An Introduction to English Political Thought, 1600-1642* (University Park (PA): Pennsylvania State UP, 1992), p. 5.

speeches and documents that followed. Later chapters will show that such pronouncements from the Commons were invariably countered by words or actions from the king, the latter including the dissolution of offending parliaments; devices to prevent 'awkward' members of the Commons from sitting; the action of James I in tearing offending pages out of the *Commons' Journal* in 1621; the circumvention of the terms of the *Petition of Right* by Charles I; and the publication of justifications for his actions by Charles I.¹⁰⁵

The second area of difficulty related to supply: since the fourteenth century, the Commons' consent to taxation had become so essential that they could attach conditions to their grants. As will be further shown in later chapters, strain grew because of the chronic financial difficulties under which James I, and, particularly, Charles I, laboured, so that they could no longer live off traditional incomes. This allowed the self-declared 'loyal' Commons to exert a powerful leverage on both kings. For example, in 1606, the Commons promised James two subsidies and four fifteenths, but this would yield just £260,000, whereas the king was indebted to the tune of £734,000.¹⁰⁶ The Commons could demand that grievances, particularly in relation to privileges and liberties, religion and the conduct of royal advisers, were addressed *before* any grant of supply, in the knowledge that the king was highly dependent on such awards. The crown countered this by ending the life of any parliament that was not willing to authorise supply, or which overplayed its hand over grievances, as the power to summon, prorogue, and dissolve parliaments remained unequivocally within the royal prerogative. By 1629, the Commons were so concerned about the collection of tonnage and poundage under the royal prerogative, and the associated assault on the privileges of John Rolle (described in chapter six below), that they used the not unfamiliar device of condemning counsellors, as surrogates for the king himself. This can be seen in the extraordinary declaration, in the second of the *Three Resolutions*, that 'Whosoever shall counsel or advise the

¹⁰⁵ For example, 'His Majesty's Declaration to all his loving Subjects, of the Causes which moved him to dissolve the last Parliament', in Rushworth, *Historical Collections*, I, pp. 1-11: 10 March 1629.

¹⁰⁶ Thrush, *Commons 1604-29*, I, p. 12.

taking and levying of the subsidies of tonnage and poundage, not being granted by parliament, or shall be an actor or instrument therein, shall be likewise reputed an innovator in the Government, and a capital enemy to the Kingdom and Commonwealth'.¹⁰⁷ The following chapters will show how privilege matters shaped, and were shaped by, the interrelationship between such issues of supply, the rights and authority of the Commons, and the royal prerogative, and how these led up to the chaotic final sitting of the Commons in 1629.

¹⁰⁷ The second of *The Three Resolutions*, in Kenyon (ed.), *Stuart Constitution*, p. 85.

III : SIR THOMAS SHIRLEY'S CASE (1604)

Introduction

This chapter considers some key issues that arose from a grant of parliamentary privilege in 1604 to Sir Thomas Shirley. Shirley was arrested and imprisoned for debt before he could take up his seat for Steyning in James I's first parliament, and only released almost two months later.¹ Descriptions of Shirley's case have sometimes focused on how his gaoler, the warden of the Fleet prison, made the Commons look impotent, at times almost comically so.² That is too restricted a view, however, as the case is significant for a number of interconnected issues that went beyond the release of a single member. In this chapter, these issues are first identified, followed by an analysis of how each of them was treated as the case unfolded. The final section summarises conclusions about the extent to which they were, or were not, resolved in 1604; the significance and impact of legislation passed in connection with the case; and the growth of the Commons' institutional confidence.

In the historiography of the early Jacobean period, 'Shirley's Case' has often attracted little more than a short paragraph or a footnote in many histories, explaining that it confirmed the Commons' autonomous right to free members who had been arrested for debts, or other civil processes; and that associated legislation gave some protection to those who might be affected by the privilege, including gaolers and creditors. By contrast, there has been a tendency to focus on the privilege issues within the contemporary Buckinghamshire election dispute, also known as 'Goodwin

¹ There were three members in the 1604 parliament named, variously, Shirley, Sherley, or Shurley. In subsequent instances, where no first name is given, the reference is to the principal person in the case, Sir Thomas Shirley (1542-1612).

² The Fleet prison was used to receive people who had been committed by Star Chamber, and for debtors. Such prisons were treated as a business: the warden was appointed by letters patent, and it became a frequent practice of the holder of the patent to farm out the prison to the highest bidder. In 1624, the warden of the Fleet told the Commons that he charged prisoners for their food and other necessities, as well as five marks when a prisoner was first admitted. He also allowed prisoners committed by the chancery courts to leave the prison upon payment of a daily fee: *CJ*: 26 May 1624.

versus Fortescue', through which the Commons gained the right to control election returns. The Buckinghamshire case points up the differences in interpretation between whiggish writers, on the one hand, for whom it appeared to be a triumphal forerunner of a series of crown-parliament clashes that culminated in the civil wars, and revisionists, on the other hand, who found that it typified the compromises of the period.³

Perhaps the lack of attention to Shirley's case in the historiography has arisen because it did *not* lead to a struggle with the crown: indeed, James I and the House of Lords were amenable to most of the Commons' suggestions for ways to secure Shirley's release and to meet the concerns of the other principals. This was, after all, a time when James was trying to cooperate with parliament, so as to gain approval for the political, rather than simply personal, union of England and Scotland. Moreover, the case seemed 'conclusively' to have resolved the essentially procedural issues that arose, so that it sat uneasily within a teleological analysis that looked for evidence of a prolonged constitutional conflict. Furthermore, the rather squalid context, of a member trying to avoid his debts, hardly sat well with the whiggish ideal of noble parliamentarians asserting ancient rights and liberties – Shirley's difficulties were not going to generate a 'revolution of the saints'. Adams exemplifies the dismissive comments made by many writers: 'Of far less importance [than freedom of speech] except in the earliest times and of scarcely any importance today [1935], is the privilege of members of parliament to freedom from arrest during a session and going to and returning from one'.⁴ More recently, revisionist writers have largely ignored Shirley's case, perhaps taking a broad view that any issues that it raised were insignificant, and had been solved by the summer of 1604. The literature that *did* consider the case in detail has appeared sporadically. A curious example is a narrative from 1768 in *The Gentleman's Magazine*, whose editor was particularly interested in running biographical and antiquarian articles.⁵ A journal article by Prothero, from

³ For sources discussing this dispute, see p. 71n. above.

⁴ Adams and Stephens, *Select Documents*, pp. 191-93.

⁵ John Nichols, 'Narrative of the Proceedings of the House of Commons in the Reign of King James the First', *The Gentleman's Magazine*, xxxviii (March 1768), 99-104.

1893, seemed to provide a definitive judgement that: ‘not only had the commons successfully asserted their privilege, but they had to all appearance established their right to release imprisoned members by means of their own officers, without any interference on the part of the crown or the law-courts’.⁶ Prothero included the relevant records and documents in a book that was first published in the following year.⁷ His descriptions and interpretations perhaps overplayed the extent and clarity of the developments that arose from Shirley’s case, but had an authority that led several later writers to adhere to his lines of argument, or at least to cite his works, thereby preserving the case in a kind of constitutionalist historiographical aspic.⁸

Over time, collections of constitutional documents, the *HoP* volumes, contemporary diaries, and the parliamentary records have generally provided the facts of privilege cases, including Shirley’s, rather than offering extended interpretations.⁹ In 1980, however, Lambert used the case to exemplify what she saw as the restricted authority of the Commons at that time.¹⁰ This thesis differs, arguing that the Shirley case helped to develop the institutional authority of the Commons. More recently, Chafetz has looked at the legal basis for several aspects of legislative privilege, in both the British parliament, and the USA. He has covered freedom from arrest and civil processes, including Shirley’s case, which, following Wittke’s earlier work, he has characterised as one of the strongest cases of the supremacy of *lex parliamenti* over *lex terrae*.¹¹ Although one might argue with aspects of Chafetz’s conceptual

⁶ Prothero, ‘Privilege and Shirley’s Case’, p. 734.

⁷ G. W. Prothero (ed.), *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, 1st edn. (Oxford: Clarendon, 1894).

⁸ See, for example: Wittke, ‘History of Privilege’, which uncritically accepted the views on privilege of earlier writers, such as Elyng and Erskine May.

⁹ See, for example: Tanner (ed.), *Constitutional Documents : James I*; Kenyon (ed.), *Stuart Constitution*; Healy, *CD 1604-1607*; Thrush and Ferris (eds.), *Commons 1604-29*, especially the introductory survey by Thrush, and the entries for Steyning (constituency) and Sir Thomas Shirley (biography).

¹⁰ Sheila Lambert, ‘Procedure in the House of Commons in the Early Stuart Period’, *EHR*, 95 (377) (October 1980), 753-81, pp. 770-71.

¹¹ Joshua A. Chafetz, *Democracy’s Privileged Few : Legislative Privilege and Democratic Norms in the British and American Constitutions* (New Haven (CT): Yale UP, 2007), especially pp. 29-30, 115, 119, and 195-96.

framework, he has nevertheless returned freedom from arrest to the more central kind of position that it enjoyed in the early Stuart period.

Such works show that Shirley's case has a complexity that has been under-recognised, even though it had as much contemporary importance as the Buckinghamshire election dispute. This can be seen in the seniority and experience of the members of the committee for privileges that considered Shirley's case; the assiduous attention given to possible precedents; the number of times when the matter came before the Commons; the entries that were made in various contemporary diaries; the drafting of a petition to the king; and the preparation of three parliamentary bills. Furthermore, both the Buckinghamshire dispute and the Shirley case were referred to in the *Form of Apology and Satisfaction*, which was drafted in the summer of 1604, although it has to be recognised that the *Apology* did not receive sufficient support in the Commons for it to be presented to James I.¹²

By the start of the seventeenth century, there was a general expectation that privileges would be maintained from parliament to parliament, and for some of the period between parliaments. So it was that Sir Edward Phelips, Speaker of James I's first parliament, within a lengthy speech on 22 March 1604, included five successful requests to the king, the first two on behalf of the Commons, and the other three in relation to his own position: 'Freedom of Speech: Protection of Bodies, Servants, and Goods: Free Access, for such Occasions, as the House shall have: To admit no Information, without calling him to answer: To pardon his Wants and Imperfections'. The lord chancellor responded: 'The Petitions made before by Mr. Speaker were answered, and granted of Course'.¹³ The *Apology*, referred to above, includes an interesting assertion by at least some members of the Commons, that requesting *rightful* privileges was now merely a matter of form: 'Our making of request in the entrance of Parliament to enjoy our privilege is an act only of manners, and doth weaken our right no more than our suing to the King for our lands by petition'.¹⁴ Sommerville notes, however, that the combative Kynaston 'not only accepted but also

¹² Tanner (ed.), *Constitutional Documents : James I*, pp. 217-30, especially pp. 224-25.

¹³ *CJ*: 22 March 1604 (second scribe); *CJ*, 1, pp. 146-47: 22 March 1604.

¹⁴ Tanner (ed.), *Constitutional Documents : James I*, p. 221.

applauded the *Apology's* assertion that prerogative grew while liberty stood still [...] He had little time for the privileges of Parliament or the liberties of the subject'.¹⁵ Nevertheless, by the time of James I's first parliament, there was a general understanding that where the Commons had decided a member, or his servant, was entitled to privilege of parliament, then any arrest or legal processes would cease, and the person in question would be released with little further discussion or difficulty. That must have appeared to be the likely outcome when Sir Thomas Shirley was arrested in 1604.

Sir Thomas Shirley

Some brief account needs to be given of the earlier life of Sir Thomas Shirley, showing he had ambitions to enhance his personal status, accompanied by a degree of prevarication, false accounting, and recklessness. He was not only a landowner, but also had interests in the important Sussex iron industry. Shirley was MP for Sussex in 1572, 1584, and 1593, and was knighted in 1573. He held various government appointments, partly through his connections with the earl of Leicester, including becoming deputy lieutenant for Sussex, being removed in 1601; commissioner for recusancy (1580); commissioner for disarming recusants (1585); and joint treasurer-at-war to Elizabeth (1586).¹⁶ These posts seemingly led to him making between £4,120 and £20,000 annually, but attracted the suspicions of Burghley, and his salary was reduced.¹⁷ At the same time, Shirley's rising social position had led to a need for a larger residence, and a number of questionable deals. Not helped by very poor – even false – account keeping, he became greatly indebted to the crown; it may even have been that he owed more to the queen than he was worth. In 1588, the sheriff seized many of his goods, and he was made bankrupt in December 1596.¹⁸ Around

¹⁵ Sommerville, *The Liberties of the Subject*, p. 82. As already noted (p. 37n. above), Kynaston may well have been the author of *A True Presentation of Forepast Parliaments to the View of Present Tymes and Posterity*, (Manuscript, 1629, BL, London), Lansdowne 213, fol. 149-179.

¹⁶ Janet Pennington, 'Sherley, Sir Thomas (c. 1542–1612)', *ODNB*.

¹⁷ Pennington gives the higher figure; David William Davies, *Elizabethans Errant* (Ithaca (NY): Cornell UP, 1967), p. 19, provides the lower figure.

¹⁸ *Ibid.*, pp. 43- 44.

this time, Shirley was not happy, complaining to Sir Robert Cecil: ‘a strange and most extraordinary course of handling [...] which is that before my accounts be determined, or any certain debt known upon me, I should make over all my lands [...] to be returned to me when the Queen’s Majesty is satisfied; and in the meantime no provision of livelihood for me, my wife and children’. He was found to owe £19,000 to the queen: Shirley insisted it was no more than £8,000, although his indebtedness led to a first spell of incarceration in the Fleet prison. Shirley would not have been entitled to privilege after April 1593, when Elizabeth’s eighth parliament ended. The next parliament began in October 1597, but Shirley was not elected for any seat, and was therefore obviously no longer entitled to privilege. By now disgraced, he was probably released in January 1598, ‘poor but not yet broken’.¹⁹ A deed of 1602 shows the complicated nature of indebtedness, and recites that:

The said Sir Thos. Sherley after he became accountable conveyed to John Baker of London, esq., the said 1/4th part of the manor of Heyghley and all other his said lands, messuages &c. and the said John Baker conveyed to the said Sir John Caryll and the other parties named; all which premises were seized for or towards the satisfaction of the debt to the Crown. And [...] Sir Thos. Sherley had paid towards the satisfaction of the said debt £4086. 11. 10½ and the Queen had agreed to accept a conveyance of the said 1/4th part of the manor and the messuages, lands &c. before mentioned at and for £1200 towards satisfaction of the said debt and to regrant the same to John Myddleton and Anthony Foule at the like price of £1200. It was witnessed that the said Sir Thos. Sherley, Sir John Caryll and the other parties granted to the Queen the said 1/4th part of the said manor and premises.²⁰

Further records show that Shirley conveyed properties to Sir Edward Coke, the attorney general, and Sir Thomas Flemynge, solicitor general, ‘to the use of the queen’. On 2 October 1604, he conveyed several properties to James I.²¹ Shirley’s

¹⁹ Ibid., p. 44-46; Hasler (ed.), *Commons 1558-1603*, III, pp. 375-76.

²⁰ West Sussex Records Office: SAS-F/323 [Close Roll, 44 Eliz. Pt. 28]: Archive of Frere and Co of London, solicitors: *Abstract of attested copy of deed*: 28 January 1602.

²¹ West Sussex Records Office: Wiston/3637: *Copy of conveyance, from Sir Edward Coke, kt., attorney general, Sir Thomas Flemynge, kt., solicitor general, Sir Thomas Sherley, snr., of Wiston, kt., Sir John Sherley of Isfield, kt., Sir Edward Onslowe of*

[footnote continues ...]

difficulties meant that, by the start of the seventeenth century, he no longer commanded the local gentry's confidence to sit in the Commons as one of the knights of the shire for Sussex. The borough of Steyning, however, was more directly under his influence and control; he was elected for that place in 1601, and re-elected in 1604.²² Shirley may possibly have still been an undischarged bankrupt at that point – it was only in July 1604 that his relatives stood surety for him.²³

The chronological summary of events in Appendix 3 shows that writs for the 1604 parliament were issued on 31 January 1604; Shirley was re-elected for Steyning on 17 February; and the first session began on 19 March. He had, however, been arrested by the sheriff of London, on 15 March, for a number of debts and sureties, apparently amounting to at least £8,000, with the principal suitor being Giles Simpson (or Sympson), a goldsmith.²⁴ Goldsmiths were often bankers and moneylenders, gold being a principal form of money. Shirley's debt to Simpson might have related to those kinds of services, rather than the supply of golden artefacts, even though Simpson was 'his Majesty's goldsmith', for whom he supplied 'fine gold and fine silver for the making of spangles for the rich coats for the guard'.²⁵ The arrest was nevertheless made, despite Shirley telling those who detained him that he was privileged. On 22 March, the Commons were informed that Shirley had been arrested and imprisoned for debt, and a motion for privilege was put forward.²⁶ Whereas it might have been expected, in line with any number of privilege cases in the past, that he would be released almost immediately, Shirley was only finally freed on 15 May, because a number of issues had arisen, which are presented next, in broadly the same order as they arose at the time.

.....
Granleigh, co. Surrey, kt., and Anthony Sherley of Preston to King James I: 27 July 1604.

²² Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 320.

²³ Pennington, 'Thomas Sherley'.

²⁴ Thrush, *Commons 1604-29*, I, xxxv; Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 320.

²⁵ Frederick Devon, *Issues of the Exchequer, Being Payments Made out of his Majesty's Revenue During the Reign of King James I* (London: John Rodwell, 1836), p. 11.

²⁶ *CJ*, I, p. 149: 22 March 1604.

Issues in the Shirley case

A number of issues arose in Shirley's case, the first of which was whether outlaws and bankrupts could lawfully be elected to parliament, and benefit from the associated privileges. This was relevant, as Shirley was a bankrupt, also possibly an outlaw, and perhaps unentitled to protection. The next issue was whether privilege existed for a member who had not yet sworn the oath at the start of a parliament: was Shirley even entitled to be treated as a member before parliament sat, or did privilege operate from the time that a person was declared elected? The third issue concerned the means to effect the release of a privileged member, and the authority of the Commons to enforce their own orders in such matters. The next issue concerned the interrelationship of liabilities and indemnification, in cases where a member of parliament was released despite owing money to others. Shirley's case dragged on, because of considerable doubt about who precisely was responsible for meeting a debt where a debtor-member 'escaped' by claiming privilege: whether it was the member, the arresting parties, or might it be that the creditor's claims simply failed?²⁷ The fifth and final issue arose if Shirley's release could only be effected through legislation: did the royal assent to bills automatically end a parliament, or might the assent be given as soon as a bill passed all its parliamentary stages? These five issues will now be considered in turn, in the particular context of Shirley's case.

The first issue was concerned with whether bankrupts or outlaws might sit as members, and benefit from the associated privileges.²⁸ By virtue of earlier statutes, proclamations and legal judgments, an outlawed member was supposedly barred from being an MP, although the Commons were prepared at times to ignore such outlawries.²⁹ The situation was clearly confusing, and potentially damaging to

²⁷ The notion of an 'escape', whether physically from gaol, or through a legal process, has a clear meaning: 'where one that is arrested cometh to his liberty before that he be delivered by award of any Justice, or by order of Law': *Terms de la Ley*, 1621, in the *OED Online* definition of 'escape'.

²⁸ Wider consideration of this issue is provided in chapter five below, especially pp. 164ff.

²⁹ For example, see p. 71n and Appendix 1, case 22.

parliament's reputation and credibility. It attracted a royal proclamation from James I urging the omission of 'any persons Banquerupts or Outlawed'.³⁰ Attempts to prevent outlaws from sitting in parliament had a particular significance for the cases of Sir Francis Goodwin and Sir Thomas Shirley in 1604. In respect of the former, the *Commons' Journal* recorded the issue:

The first Motion was made by Sir William Fleetwood, One of the Knights returned for the County of Buckinghamshire on the Behalf of Sir Francis Goodwyne Knight, who, upon the first Writ of Summons, directed to the Sheriff of Buckinghamshire was elected the first Knight for that Shire; but, the Return of his Election being made, it was refused by the Clerk of the Crown, *quia utlagatus* [because he was outlawed].³¹

The Commons were clearly uncomfortable with the idea that outlaws could act as legislators, so that, a week later, they decided to 'tender our humble Petition to his Majesty, for Leave to make a Law for the Banishing of all Outlaws hereafter from the Parliament: And pray, that we may hold all our Privileges intire'.³² A bill to exclude outlaws from parliament was twice read and committed, on 31 March 1604,³³ and reached the report stage, on 13 April 1604, when it was ordered to be engrossed.³⁴ It is unclear what happened next with this bill, but it was perhaps consolidated into a further bill 'for Disabling of Recusants, Persons attainted of Forgery and Penury, Outlaws, and Contemners of the Law, to be of the Parliament', which received a first reading, on 24 April 1604.³⁵ This bill then received a second reading, on 26 April, when it was sent to committee.³⁶ However the bill was not included in the House of Lords' lists of bills sent up by the lower House: it appears that it cannot have been enacted by the time parliament was prorogued, on 7 July 1604.³⁷ On the other hand,

³⁰ 'A Proclamation concerning the choice of Knights and Burgesses for the Parliament, 11 January 1604', in Larkin and Hughes (eds.), *Proclamations (James I)*, p. 68.

³¹ *CJ*, 1, p. 149: 22 March 1604.

³² *CJ*, 1, p. 158: 29 March 1604 (dated as 30 March by the second scribe).

³³ *CJ*, 1, p. 160: 31 March 1604.

³⁴ *CJ*, 1, p. 170: 13 April 1604.

³⁵ *CJ*, 1, p. 183: 24 April 1604.

³⁶ *CJ*, 1, p. 185: 26 April 1604.

³⁷ Lists of bills from the lower house are given in *LJ*, 2, p. 295: 10 May 1604, through to *LJ*, 2, p. 341: 5 July 1604, *passim*.

as discussed further below, bankrupts were treated differently from ‘ordinary’ debtors, the former having a criminal character, whereas the latter were subject to civil processes.³⁸ James I’s proclamation was intended to secure the election of fit and proper people to parliament, with a subsidiary benefit for the lord chancellor, who helped draft it, of strengthening chancery *vis-à-vis* the Commons. It included a command: ‘that an expresse care bee had, that there be not chosen any persons Banquerupts or Outlawed, but men of knowen good behaviour and sufficient livelyhood’. The proclamation explained that those who passed laws on taxation ought to have paid their own dues, something that a bankrupt would not have done.³⁹

Shirley was almost certainly a bankrupt when he was returned, and seemingly outlawed, although he claimed that: ‘as soone as he found he was outlawed did reverse the utlayre by a *supersedias*,⁴⁰ the Coppy whereof he had in his hande to shewe under the offyceres hande’.⁴¹ Shirley’s situation reflected the more general confusion surrounding bankruptcy, as pointed out by Blackstone. On the one hand, ‘none of the statutes allowed for appeal from the associated and personal jurisdiction exercised by the lord chancellor’; yet in practice there was the possibility that ‘the decision of commissioners [of bankruptcy] that a man was in fact a bankrupt [...] could be challenged in law’.⁴² It should be noted that right into the nineteenth century, bankruptcy was no barrier to someone sitting as an MP. However, it was only from the mid-seventeenth century onwards that a debtor who denied bankruptcy could have this tested in court, so that Shirley would have needed to petition for reversal. If it was true that Shirley’s outlawry had been stayed, this should have been persuasive,

³⁸ See pp. 164ff. below.

³⁹ ‘A Proclamation concerning the choice of Knights and Burgesses for the Parliament, 11 January 1604’, in Larkin and Hughes (eds.), *Proclamations (James I)*, I, p. 68.

⁴⁰ ‘A writ that suspends the authority of a trial court to issue an execution on a judgment that has been appealed. It is a process designed to stop enforcement of a trial court judgment brought up for review. The term is often used interchangeably with a stay of proceeding’: *Legal Dictionary: The Free Dictionary at Farlex*, at <<http://goo.gl/ynKFh>>.

⁴¹ *Sir Robert Cotton’s Diary of the 1604 Session*, BL Cotton MS, Titus F.IV, in Healy, *CD 1604-1607*, p. 46: 27 March 1604.

⁴² Blackstone, *Commentaries on the Laws of England*, III, p. 427, in W. J. Jones, ‘The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period’, *TAPS*, 69 (3) (1979), 5-63, p. 10.

although he did not seem to have denied directly that he owed money, or even that he was a bankrupt: he merely contested the outlawry, perhaps recognising that the latter was more likely to debar him from the Commons. It was only in July 1604 that Shirley's relatives stood surety for him, so that, for the period in which the case was active (March to May 1604), bankruptcy stood over him.⁴³ It is nevertheless clear that the Commons did not consider that such a bankruptcy debarred Shirley from sitting in 1604, nor, indeed, from claiming privilege, which would protect him from arrest and imprisonment for debt. Lord chancellor Ellesmere was unimpressed, as can be read in his later critical observations on James I's first parliament:

Persons outlawed were received, allowed and justified to be lawful members of the parliament, and thereby were privileged and protected from the ordinary course of law and justice. Whereas [...] they have neither lands or goods of their own, nor liberty of their persons, and are therefore unfit to be of so grave a senate and council and cannot be deemed to be meet to be law makers.⁴⁴

The question whether bankrupts and outlaws could serve in parliament was not resolved by the cases of Shirley, or Goodwin. Indeed, the issue appeared to be one where the Commons were prepared at the time, and subsequently, to ignore the legislation and royal commandments, and to take pragmatic, inconsistent decisions, case-by-case.

The second issue was whether privilege existed for a member who had not yet sworn the oath at the start of a parliament. In this case, was Shirley even entitled to be treated as a member, if he had not yet sworn the oath, i.e. before parliament sat? The matter is briefly recorded, in the debates of 27 March: 'Yelverton junior [Northampton] sayd that [...] yt was yett questyenable whether Sir Thomas was a

⁴³ Pennington, 'Thomas Sherley'.

⁴⁴ *Ellesmere Observations*, in Foster (ed.), *Proceedings 1610*, I, p. 277. Foster feels that Ellesmere's strictures refer to Sir Francis Goodwin, but it can be argued that they might have also referred to Sir Thomas Shirley. Thomas Egerton, lord chancellor from 1603 to 1617, was created baron Ellesmere in 1603, and viscount Brackley in 1616.

member of the house, or not'.⁴⁵ However, the Commons did not entertain the idea that the member had to be sworn in order to have privilege: 'Eundo, sedendo, redeundo, morando [while going, sitting, returning, remaining] the Privilege to be allowed'.⁴⁶ This makes sense, as it obeyed the principle that nothing should prevent the attendance of those who had been summoned by the king. The logic was impeccable: whether Shirley had taken the oath was irrelevant – he was meeting a royal summons. So: the issue was one that was raised, but quickly dismissed.

The third issue concerned the means by which the Commons could effect the release of a privileged member – what force did their orders and writs truly have.⁴⁷ Lambert notes:

Even in matters of privilege the Commons' 'rights' had no real basis in law. For most purposes [...] of privilege cases the Commons had to rely on the clerk of the crown to issue all writs required: his acceptance of the speaker's warrant for the purpose is little more than a legal fiction. [...] The 'orders' made by the Commons were of little effect unless the party concerned consented. The Commons were unable to compel obedience from the warden of the Fleet in Shirley's case.⁴⁸

By the time of the Shirley case, however, there was a fairly well established procedure, whereby another member would draw the attention of the House to the arrest of anyone subject to privilege, and the Commons then routinely granted the privilege. In cases where the arrest was in execution, rather than on mesne process, a warrant would be made out for a writ of *habeas corpus* directed to the warden of the prison where the member was held – in some cases, the matter was first considered by

⁴⁵ *Diary of Sir George Manners, March – April 1604*, Belvoir Castle, Rutland MS, in Healy, *CD 1604-1607*, p. 29: 27 March 1604.

⁴⁶ *CJ*: 27 March 1604 (second scribe).

⁴⁷ The process for peers was somewhat different: 'a peer of the realm [...] may sue a Certiorari in the Chancery [...] testifying that he is a peer of the realm, comanding them to award such process against him as they ought to do against a peer of the realm': Maseres, *Cases and Records*, p. 5.

⁴⁸ Lambert, 'Procedure', pp. 770-71.

the privileges committee. There were alternatives to writs of *habeas corpus*, which included petitioning the king to act through the royal grace; direct action by the serjeant-at-arms of the Commons acting on the authority of the mace; or specific private legislation. Direct action was more usual where a member was held on mesne process. Presenting a writ of *habeas corpus* in cases of execution had usually proved enough in the past, but Shirley's gaoler refused to release him until he was assured that he would not be held personally liable for the debt in question, as a result of what was technically an 'escape' – as seen in the fourth issue, considered below.⁴⁹

Hatsell notes that, from 1575 onwards (Smalley's case),⁵⁰ and certainly by the latter part of Elizabeth's reign, a 'constant practice' had developed for 'the sending for persons intituled to Privilege, (when under arrest), by the Serjeant-at-Arms, and the committing [of] the bailiffs, and persons procuring the arrest, for their contempt to the House'.⁵¹ Miscreants were usually held in the Tower, which was the prison for the House; subsequently required to make a personal appearance, they would have to confess their fault, humiliatingly bareheaded and kneeling at the Bar, and then be pardoned, 'paying their fees'. Over time, there were instances when the House took a more draconian view; more usually, it was inclined to a low-key leniency.⁵²

Looking more specifically at Sir Thomas Shirley: his arrest was raised in the Commons, on 22 March:

This being a Motion tending to Matter of Privilege, was seconded with another by Mr. Serjeant Shirley, touching an Arrest made the 15th of March last, the Day of his Majesty's solemn Entrance through London, and Four Days before the Sitting of the Parliament, upon the Body of Sir Thomas Shirley, elected One of the Burgesses for the Borough of Steyning in the County of Sussex, at the Suit of one Gyles Sympson, a Goldsmith, dwelling in Lumbard-street, London, by one William Watkyns, a Serjeant

⁴⁹ The definition of what constituted an 'escape' is given on p. 82n. above.

⁵⁰ See Appendix 1, case 18.

⁵¹ Hatsell, *Cases of Privilege*, p. 121.

⁵² Variations in the Commons' sentences are described more fully on pp. 116ff. below.

at Mace, and Thomas Aram, his Yeoman; and prayed, that the Body of the said Sir Thomas might be freed, according to the known Privilege of the House.⁵³

In line with what had become customary practice when a member had been arrested in execution, the Speaker was ordered to seek a warrant for *habeas corpus*, directed, as was usual, to the clerk of crown in chancery:

IT is this Day Ordered and required by the Commons House of Parliament, that a Writ of Habeas Corpus be awarded, for the Bringing of the Body of Sir Thomas Shirley Knight, one of the Members of this House, and now Prisoner in the Fleet, into the said House, upon Tuesday next, at Eight a Clock in the Morning, according to the ancient Privilege and Custom in that Behalf used. And this shall be your Warrant.⁵⁴

At first, things went as the Commons might have expected: Simpson, Watkins, and Aram appeared on 27 March in the Commons as ‘delinquents’, together with Shirley, who was delivered by John Trench, the warden of the Fleet prison. Crucially, however, Shirley was *not released* from Trench’s custody: this shows that the Commons were operating within the law, and were possibly concerned about the rights of the creditors to secure satisfaction if a debtor somehow ‘escaped’ at their behest. The opposing parties now presented their views:

The said Offenders [...] averred, that the Writ of Execution was taken forth the Thirtieth of January; was delivered to the Serjeant the Eleventh of February, before Sir Tho. was elected Burgess; [...] that the Serjeant knew nothing at all of Sir Thomas his Election; but understood, by his Majesty’s Proclamation, that no Person outlawed for Treason, Felony, Debt, or any other Trespass, ought to be admitted a Member of the Parliament; and was thereupon induced to think, that Sir Thomas Shirlye, standing outlawed, should not be elected or admitted a Burgess; which if he

⁵³ *CJ*, 1, p. 149: 22 March 1604. John Shirley, or Shurley, (c.1546-1616) sat for Lewes in this parliament, and was connected to Thomas Shirley by marriage. A *serjeant-at-law* was ‘a member of a superior order of barristers (abolished in 1880), from which, until 1873, the Common Law judges were always chosen’, *OED Online*.

⁵⁴ *CJ*, 1, p. 149: 22 March 1604.

had known or suspected, he would have been very careful, not to have given Offence to this honourable House, by any such Arrest.

To this Sir Thomas was admitted to answer, who affirmed, that the Arrest was made the Fifteenth Day of March, the Day of his Majesty's first and solemn Entrance through London, at what Time he was going by Commandment to wait upon his Majesty; whereof, upon the first Offer to touch him, he wished the Serjeant to take Knowledge; as also, that he was elected a Burgess for the Borough of Steyning in the County of Sussex, to serve at this present Parliament; that, notwithstanding, they persisted in the Arrest, and carried his Body to the Prison of the Compter.⁵⁵

Sir Robert Bruce Cotton (Huntingdonshire) adds the gloss that Shirley claimed to have stayed proceedings for the outlawry consequent on his bankruptcy, and gave some colour to the scene of the arrest:

That as soone as he found he was outlawed did reverse the utlarye [outlawry] by a *supersedias*, [...] and touching their knowlyge of him to be a Burgese, he said he tould them that they might kise the Towere [themselves be incarcerated] for arrestynge him a Burges and that the Bishop of durhame coming by the same Instante to the officeres said also so much, but they regarded Not this havinge once laide the Executyone upon him.⁵⁶

Those who had arrested Shirley were on weak ground in their persistence in detaining him, even when he protested that he was commanded to attend the king, and that he was an elected member of the Commons, both of which meant, *prima facie*, that he was privileged. It appeared, however, that Watkins feared that he was already liable for his 'prisoner', and the associated debts if Shirley were to be freed – a matter that is the substance of the fourth issue, considered below.

Members who spoke in the debate on 27 March considered the legitimacy of Shirley's case. Anthony Dyott (Lichfield) argued that Shirley's initial detention did

⁵⁵ *CJ*, 1, p. 155: 27 March 1604. The Commons would come to declare, in 1625, that anyone who was 'in execution' for debt could not be elected: Sommerville, *The Liberties of the Subject*, p. 61. A compter, or counter, was a small prison controlled by a sheriff.

⁵⁶ *Cotton*, in Healy, *CD 1604-1607*, p. 46: 27 March 1604.

not initially constitute a contempt, as his warning to those arresting him had been purely verbal; however his continued detention *was* a contempt, as a written record of his election was later available.⁵⁷ Sir Henry Montagu, Recorder and a member for London, with connections to the lord chancellor, was active throughout the debates on the Shirley case, including that of 27 March. He consistently maintained that Shirley should have his privilege, and that those who had arrested him, and those who refused to release him, were guilty of contempt. It was decided to refer the issue to the committee of privileges, which comprised seventeen experienced parliamentarians, many with a legal background, seven representing county seats, and ten boroughs, ‘with Authority to examine all the Doubts and Questions of that Case, and to hear the Counsel and Witnesses on both Parts’.⁵⁸ They gave an interim report on 5 April:

They found, that Simson was guilty of the Contempt wittingly; that Lightbone [sic], the Serjeant at Mace, made the Arrest wittingly, willingly, and wilfully: Which both were made appear by these Circumstances: It was found, that [...] Sir Thomas, being first arrested upon a *Latitat*,⁵⁹ said, he was a Burgess of Parliament, and therefore willed the Serjeant to beware. The Serjeant answered, That Mr. Simson knew that, and he himself knew it well enough. Sir Thomas, being in the Compter, and the Execution laid upon him, sent again to Simpson, and told him, as before. Simpson answered, he could but lie by it.⁶⁰

The second scribe’s version dates the report to 11 April.⁶¹ Both versions record that the Commons immediately resolved that Simpson and his yeoman should be committed to the Tower, ‘the proper prison of the House’.⁶² However, they learned that the lord chancellor, Ellesmere, ‘before the sitting of the House, had committed them’: this might well have been a flexing of the muscles of the chancellor, *vis-à-vis*

⁵⁷ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 138.

⁵⁸ *CJ*, 1, p. 155: 27 March 1604.

⁵⁹ *Latitat*: a writ allowing a sheriff to arrest a fugitive or supposed fugitive in a county different to the county where the court with jurisdiction sits: paraphrase of entry in *Legal Dictionary : The Free Dictionary at Farlex*, at <<http://tinyurl.com/o3v87v9>>.

⁶⁰ *CJ*, 1, pp. 167-68: 5 April 1604.

⁶¹ *CJ*: 11 April 1604 (second scribe).

⁶² The yeoman, Aram, was later released, presumably as he was not a principal, nor had he acted knowingly in contempt of parliament.

the Commons. Sir Edward Hoby and Francis Moore (Reading) ‘were appointed to acquaint his Lordship with the Judgment of the House, for their Remove to the Prison of the Tower’.⁶³ The Commons were later told that Ellesmere had acted on his own initiative, supposedly to prevent the solemnity of the king’s entrance into London being disturbed by disputes over the arrest of a member.⁶⁴

On 13 April, counsel for the warden of the Fleet and for Shirley each produced precedents that differed over whether a writ of execution, taken out before parliament sat, invalidated a claim for privilege. Reference was made to Ferrers’ case, when the Commons dispatched their serjeant-at-arms, claiming that the Commons’ mace was sufficient authority to secure Ferrers’ release.⁶⁵ The Commons were subsequently told of the contrary legal opinion, presented in 1576: ‘[That there is] no Precedent for setting at large by the Mace any Person in Arrest, but only by Writ’.⁶⁶ The House decided that further arguments, including those from Simpson’s counsel, should be heard on 16 April.⁶⁷ The House considered two matters on that date: ‘Justice of Privilege, and Justice to the [creditor] Party’. Three precedents were presented: those of William Larke (1430), Walter Clerk (1460), and William Hyde (1474).⁶⁸ All three precedents had seen privilege being granted, but with the legal processes permitted to be taken up again after the parliament was over; they also indemnified the sheriff and officers against actions by the creditor. On that basis, the House decided that Shirley should have privilege immediately, and considered: ‘Whether we shall be Petitioners to his Majesty, for the Securing of the Debt to the Party, and saving harmless of the Warden of the Fleet, according to the Precedents’.⁶⁹ There were concerns: for Simpson, that he might never see his money if Shirley were released; and for the warden, that he might be held liable for an ‘escape’ if the House had no legal right to

⁶³ *CJ*, 1, pp. 167-68: 5 April 1604.

⁶⁴ *CJ*, 1, p. 171: 13 April 1604.

⁶⁵ See Appendix 1, case 13.

⁶⁶ *CJ*, 1, p. 195: 2 May 1604.

⁶⁷ *CJ*, 1, p. 171: 13 April 1604.

⁶⁸ *CJ* 1, p. 173: 16 April 1604. The cases are described more fully on pp. 53f. above, and in Appendix 1, cases 4, 7, 9. These precedents were further referred to a month later: *CJ* 1, p. 195: 2 May 1604; see p. 103 below.

⁶⁹ *CJ*: 16 April 1604 (second scribe).

free Shirley, and, further, that he might be vicariously liable to Simpson, for the debt due from an ‘escaped’ prisoner. Indeed, it is clear throughout that the warden was concerned that he would not be ‘safe’ from such liability, if he simply yielded to the writ(s) of *habeas corpus*, or any direct activity by the Commons’ serjeant-at-arms to secure Shirley’s release.

The Commons now decided on a specific bill to free Shirley, which was introduced on 17 April, ‘for securing Simpson’s debt and the safety of the Warden of the Fleet in Sir Thomas Shirley’s case’, and immediately passed to the committee that had been established on 27 March.⁷⁰ In an attempt to avoid confusion, this is termed ‘the first bill’ in this chapter. The bill set out the background, and asserted that Shirley’s arrest was ‘contrarie to the liberties, priviledges, and freedoms accustomed and dewe to the commons of your highness Parliament, who have ever used to enjoy their freedome in coming to and returning from the Parliament, and sitting there without restraint or molestacion’.⁷¹ Crucially, the bill asked that the king should order the chancellor to issue a royal writ to the warden of the Fleet, which would in effect free Shirley, so that the latter could attend parliament. The bill also provided that Simpson could seek recovery of the debt, and indemnified the sheriff, warden of the Fleet, and others in similar positions of authority, against vicarious liabilities. The issue of indemnification is considered below, as the fourth issue in this section. However, within a month, as Prothero identifies, the Commons ‘began to see that if the [first] bill became law they would seriously imperil their privilege, or, at all events, practically surrender their right to enforce it. The [first] bill invoked the aid of the king and the lord chancellor, and the prisoner would have owed his liberty, not to the direct action of the house, but to the potent intervention of the chancery’. Prothero notes the difficulty of invoking the aid of chancery so soon after the Commons’ triumph over that court in the Buckinghamshire election dispute.⁷² On 8 May, the House considered a number of possibilities: whether to attempt enforcement under the mace; whether to issue a still further writ of *habeas corpus*; whether to press for

⁷⁰ *CJ*: 17 April 1604 (second scribe).

⁷¹ The full text is given in Prothero, ‘Privilege and Shirley’s Case’, pp. 738-39.

⁷² *Ibid.*, p. 735.

immediate royal assent to the bill; or whether to punish the warden for contempt, even if the royal assent were granted.⁷³ Some legislation was always likely to be necessary to indemnify those involved in the arrest, as the warden of the Fleet steadfastly refused to free Shirley until the king assented to a bill that would ‘save’ Simpson and the warden himself. Initially, the House had preferred to petition for Shirley’s release, rather than proceeding through the mace, i.e. using its own direct authority, in line with the counter-precedents of Ferrers (1542), and Smalley (1576), when they *had* used the authority of the mace.⁷⁴ But now, there was a crucial shift: ‘to protect its role, the House needed to secure Shirley’s release by itself [...] and that is what it did’.⁷⁵ So it was that eventually two orders were made: first, to commit the warden to the Tower, close prisoner, confinement to the ‘terrifying’ Little Ease dungeon being stayed for one day;⁷⁶ and, second, to send the serjeant to the Fleet to require the delivery of Shirley, i.e. under the authority of the mace.⁷⁷ On 9 May, the serjeant duly went to the Fleet with his mace, but the mission turned into a near-circus, because of the actions of the feisty wife of the warden:

The Serjeant returneth from the Fleet: Said, he demanded the Body of Sir Tho. Shirley three times, and called upon him at his Chamber Window. That the Warden’s Wife had taken all the Keys, and discharged her Servants from Attendance on the Prisoners: Cried out. That if they would call her Husband, he would satisfy the

⁷³ *CJ*, 1, p. 203: 8 May 1604.

⁷⁴ See Appendix 1, cases 13 and 18.

⁷⁵ Chafetz, *Democracy’s Privileged Few*, p. 30.

⁷⁶ The Little Ease lies twenty feet below ground in the White Tower of the Tower of London. Just four feet cubed, any prisoner was compelled to serve his sentence in a cramped and crouching position – literally, conditions *of little ease*: William Benham, *The Tower of London* (London: Seeley, 1906). Camus also referred to it: ‘To be sure, you are not familiar with that dungeon cell that was called the little-ease in the Middle Ages. In general, one was forgotten there for life. That cell was distinguished from others by ingenious dimensions. It was not high enough to stand up in, nor wide enough to lie down in. One had to take on an awkward manner and live on the diagonal; sleep was a collapse, and waking a squatting. Mon cher, there was genius – and I am weighing my words – in that so simple invention. Every day through the unchanging restriction that stiffened his body, the condemned man learned that he was guilty and that innocence consists in stretching joyously’: Albert Camus, *The Fall (La Chute)*, translated at <<http://goo.gl/OIqleh>>, §109-10.

⁷⁷ *CJ*: 8 May 1604 (second scribe).

House. – He was loth to use Violence, neither had he any such Commandment [to use physical force], therefore returned without him.⁷⁸

Another account notes that the serjeant could ‘force no doors open at the prison, and the serjeant attended by a numerous crowd of merry spectators returned to Westminster and reported his reception’.⁷⁹ Some members wanted further discussion of the legal points: for example, William Hakewill (Mitchell) ‘preferred a short bill to induce the warden of the Fleet to release his prisoner’, which left Sir Henry Montagu unimpressed, claiming that: ‘it helpeth not’, and that: ‘this was not a time to treat about matters of law, but how to deliver Sir Thomas Shirley’.⁸⁰ Those requiring action prevailed at first. The House, on a vote of 176 to 153, decided to send six members, with the serjeant and mace, to the Fleet, to require Shirley’s delivery, ‘and if denied to press to his chamber, and, providing for the safety of the prison and prisoners, to free him by force’. However, the Speaker suggested that members proceeding in this way might be acting unlawfully, so that, in the end, none came forward to form the action party. Of greater satisfaction, Sir John Herbert (Monmouthshire), a privy councillor and second secretary of state, reported that: ‘his Majesty, upon the Reading of the Precedent of Ferrers [when the privilege *was* enforced through the mace], was graciously pleased to leave it to their Liberty, to proceed in the Case of Sir Tho. Shirley, as they thought fit; with Care and Caution for the other Prisoners’.⁸¹ This provides a good example of James I’s conciliatory attitude in this case, possibly linked to his wish to secure parliamentary approval of a formal union of England and Scotland. James might also have felt somewhat insecure in his grasp of English practice in relation to freedom from arrest. As Rait sets out, although ‘a safe conduct to [the Scottish] Parliament was given in 1389 [...] there is no instance of the assertion [of the claim of the members of the Scottish parliament to freedom from arrest] before the year 1639 [...] when the Lords of the Articles [...] forbade the arrest

⁷⁸ *CJ*, 1, p. 204: 9 May 1604.

⁷⁹ Nichols, ‘Proceedings of the House of Commons’, p. 101.

⁸⁰ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 371; Hatsell, *Cases of Privilege*, p. 154.

⁸¹ *CJ*, 1, p. 205: 9 May 1604.

of a member of Parliament "during the time of Parliament and forty-eight hours thereafter" .⁸²

On 10 May, there had been some thought, generated by Francis Moore, who sat on the privileges committee and was a close associate of the chancellor, that the latter might release Shirley, *de bene esse*.⁸³ However, a new bill, here termed ‘the second bill’ – for ‘securing the debt of Simpson and others and the safety of the Warden of the Fleet in Sir Thomas Shirley’s case’ – was brought in on that date.⁸⁴ This was generated by Sir Henry Montagu, and used much the same text as the first bill, in relation to Simpson and the others, but with one important omission. Crucially, it did not refer to any action by the king or chancellor to issue a writ to the warden of the Fleet, but again rehearsed the right of members to proceed to and from parliament unmolested.⁸⁵ The second bill rapidly cleared the Commons, and was sent up to the Lords.⁸⁶ Yet, as described below, in relation to the fifth issue of this section, the timing of the royal assent to this bill was problematic.

By 11 May, the Commons found their own authority in tatters, after a second abortive mission by the serjeant-at-arms. The warden was again brought to the Commons, reminded of his contempt, threatened with further punishment, and asked if he would yield. He nevertheless remained ‘perverse’, and was told by the Speaker that he had increased his contempt; he was now to be ‘terrified’, by being put into the Little Ease.⁸⁷ He was, however, additionally informed that legislation was in hand to indemnify him. There were two developments on the following day, 12 May. First, the Commons decided to send five members to ascertain whether the warden was indeed in the Little Ease. Second, in a positive turn of events, the lieutenant of the Tower wrote:

⁸² Sir Robert Sangster Rait, *The Parliaments of Scotland* (Glasgow: Maclehose, 1924), p. 526.

⁸³ A conditional ending, or stay, of proceedings; in Shirley’s case; this might have been like a release on bail.

⁸⁴ *CJ*: 10 May 1604 (second scribe).

⁸⁵ The full text is given in Prothero, ‘Privilege and Shirley’s Case’, pp. 739-40.

⁸⁶ The Lords gave the bill its first and second readings on 10 May, and a third reading on 12 May, after which it was returned with some amendments to the Commons, who sent a message in reply, thanking the Lords for the expeditious passage of the bill: *CJ* and *LJ*, May 1604, *passim*.

⁸⁷ *CJ*, 1, p. 207: 11 May 1604.

The Warder, of the Fleet [...] now hath some Feeling of his own Error and Obstinacy; and because, as he now apprehendeth, it pleased you Yesterday to open unto him the Grace, which he received from both the Houses of Parliament, in providing for his Security; his humble Desire is, that by some of the House (namely Sir Francys Hastings and Sir Nathaniel Bacon) he may be resolved therein; whereupon he will, as he saith, most humbly submit himself, upon Monday in the Morning, to deliver the Body of Sir Thomas Sherley unto the Serjeant, if it shall please you to send him.⁸⁸

Events began to turn more rapidly: on 14 May, Sir Herbert Croft (Herefordshire) reported on the members' visit to the Tower, noting 'the Warden's insolent Carriage', and 'Great Fault in the Lieutenant, that he did not make clean and ready the Place called Little Ease (being reported to be very loathsome, unclean, and not used a long Time, either for Prison, or other cleanly Purpose) as the Order of the House might have been performed in Time'. The House was in angry mood: many members spoke, and Sir Thomas Hoby (Scarborough) and others advocated issuing a writ of *habeas corpus* to the lessee of the Fleet, Sir George Reynolds. Reynolds was called in, but he told the House that he had had a lease of the Fleet 'for divers Years, and the now Warden had a Lease from him for Two Years yet enduring; and that he was thereby absolute Warden'.⁸⁹ In other words, Reynolds was not in an executive position directly to arrange Shirley's release.

The House considered motions for a fine of £1,000 to be imposed on the lieutenant for not doing his duty, and a fine of £100 a day on the warden: 'for every Day from henceforth, that Sir Tho. Shirley is detained', as well as debarring the warden from holding any office. Significantly, the Commons noted that there had already been two cases of privilege in this parliament – 'remora, a little fish stayeth great ships'.⁹⁰ In the end, the House did not pursue some of the extreme ideas, but

⁸⁸ *CJ*, 1, p. 208: 12 May 1604. The dating of this concession is curious, as it is placed chronologically in the *Commons' Journal* before further attempts to force the hand of the warden.

⁸⁹ *CJ*: 14 May 1604 (second scribe).

⁹⁰ The other case was that of the disputed Buckinghamshire election. *Remora* is the suckerfish, popularly believed to be able to prevent the forward motion of a ship

[footnote continues ...]

took four decisions. First, a warrant was to be directed [to the clerk of the crown] for a new writ of *habeas corpus cum causa*. Second, the serjeant should go to the Fleet with the writ. Third, that the warden was to be ‘brought to the Fleet door by Mr. Lieutenant himself, and there the Writ be delivered unto him, and the Commandment of the House, by the Serjeant, for the Executing of it’. Fourth, that the Warden should ‘be committed to the Dungeon in the Tower, called Little Ease’. It appears that the Commons decided on a discreet approach to the king, rather than presenting a formal petition: ‘It was observed, that Mr. Vice-chamberlain to the King, was privately instructed to go to the King, and humbly desire, that he would be pleased to command the Warden, on his Allegiance, to deliver Sir Tho. not as petitioned by the House, but as of himself found fit in his own gracious Judgment’.⁹¹ It is not entirely clear whether the warden was consequently instructed by the king to yield, or whether he was persuaded by the stick and carrot approach of the Commons; in any case, he had apparently already indicated his willingness to deliver up Shirley. Lambert conjectures that the former is more likely,⁹² although the warden would surely have still required some kind of guarantee, royal or otherwise, that he would not be liable for the debt. In any event, the Speaker reported on 15 May that he had received correspondence from the warden, ‘both expressing his Penitency for his former Obstinacy, and his Willingness to deliver the Prisoner; desiring withal, that he might be spared from the Dungeon until this Morning; that he might lie in the Fleet the last Night, for providing some Money, which he had to pay the next Day’. They included the poignant sentence: ‘I remain still in Little Ease: I have come in no Bed these Three Nights; my Wife is barred Access to me, and no Servant of mine to minister to my Wants’. The Speaker wrote back that ‘if the Warden would yield the Prisoner presently, he would take upon him, that he might be spared from the Dungeon till this Morning. Upon that Answer, he caused Sir Tho. to be delivered’. On his release, Shirley came to the House ‘and, after the Oath taken, he was instantly admitted to sit

.....
through its adherence.

⁹¹ *CJ*, 1, p. 210: 14 May 1604.

⁹² Lambert, ‘Procedure’, p. 771.

in the House'.⁹³ Shirley might now be sitting in the House, but the Commons were not immediately prepared to forgive. The warden of the Fleet was released from the Little Ease, but remained in the Tower until 19 May, when he, 'being called in, kneeling, confessed his Error unfeignedly, to have offended this honourable House: That he was sorry he had offended. And thereupon was pardoned, and discharged by the House, paying his Fees'.⁹⁴ On 9 June, Sir Edward Hoby proposed: 'that Simpson, a Prisoner in the Tower, for arresting Sir Tho. Shirley, might be brought into the House on Monday; and that the House would extend Mercy towards him, paying his Fees'.⁹⁵ On 11 June, Simpson, somewhat curiously, asked why he had been ordered to appear, and was told this was with a view to releasing him. Whereupon, he 'fell into a fit of an infirmity', and was ordered to reappear on the following day.⁹⁶ Perhaps because of this incapacity, he did not appear on 12 June, and had to remain in the Tower until 19 June. Finally, Simpson was released 'to his former Liberty without further Impediment or Restraint', after petitioning the House, and paying his fees. Simpson was also informed of the bill for his indemnity, touching Shirley's debt: in other words, his right to pursue the debt once Shirley was no longer an MP.⁹⁷ In June 1604, an arrangement was reached through the royal agency, whereby the manors and lands of the Shirleys would be restored to them, at an annual rent of about £2,000, payable to the king.⁹⁸

Prothero exemplifies the mainstream view of Shirley's case as one that is generally regarded as having finally settled the question of privilege of freedom from arrest in the Commons' favour.⁹⁹ However, that settlement followed considerable uncertainty by the Commons, in terms of the method by which it could exert its authority – *habeas corpus*, or direct action under the mace, or a petition to the king, or a specific piece of legislation. Obtaining Shirley's release was a messy business, which required one of the principals to be put into a dungeon in the Tower. Certainly,

⁹³ *CJ*, 1, pp. 210-11: 15 May 1604.

⁹⁴ *CJ*: 19 May 1604 (second scribe).

⁹⁵ *CJ*, 1, p. 234: 9 June 1604.

⁹⁶ *CJ*, 1, p. 236: 11 June 1604.

⁹⁷ *CJ*, 1, p. 242: 19 June 1604.

⁹⁸ Davies, *Elizabethans Errant*, p. 46.

⁹⁹ Prothero, 'Privilege and Shirley's Case', p. 734.

if the warden of the Fleet had been confident that, if he released Shirley, he would not be liable for the large sum of money involved, things might have been concluded much more quickly, and with far less challenge to the Commons' authority. The issue of where liability for the debt of a person released under privilege lay is therefore considered next.

The fourth issue reflected considerable doubt about who precisely was responsible for meeting a debt, if a debtor-member 'escaped', by claiming privilege: was it the member, or the relevant sheriff, or the gaoler; did the creditor have to stand a loss, or could he reactivate the processes to recover the debt, once the member was no longer entitled to privilege? The problem was that a gaoler was held liable for any escape, not just where a prisoner had absconded, but also situations where the gaoler had released someone before his case had been dealt with in the courts.¹⁰⁰ Although writing in the 1760s, Blackstone identifies key legal points that would have obtained at the time of Shirley's arrest:

THE writ of *capias satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; [...] When a defendant is once in custody upon this process, he is to be kept in *arcta et salva custodia* [in close and safe custody], and, if he be afterwards seen at large, it is an *escape*; and the plaintiff may have an action thereupon against the sheriff for his whole debt. [...] Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper, after which he never can retake his prisoner again, (though the plaintiff may retake him at any time) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent.¹⁰¹

¹⁰⁰ See the definition of an escaper in p. 82n. above.

¹⁰¹ William Curry (ed.), *The Commentaries of Sir William Blackstone, Knt. On the Laws and Constitution of England* (London: W. Clarke & Son, 1796), III, p. 413. '*Capias ad satisfaciendum* is 'a writ of execution issued upon a judgment in a personal action, for the recovery of money, directed to the sheriff, or coroner, commanding him to take the defendant, and him safely keep, so that he may have his body in court on the [footnote continues ...]

An early statute had placed the responsibility for the safe keeping of any prisoner on the gaoler, who became liable for the debt if the prisoner ‘escaped’.¹⁰² A further medieval statute attempted to address the ‘great Mischief and Undoing of many People’, by enacting that ‘a prisoner by judgement shall not be set at large’. The act set out that prisoners at the Fleet prison ‘be oftentimes suffered to go at large by the Warden of the Prison, sometime by Mainprise [surety] or by Bail, and sometimes without any Mainprise with a Baston¹⁰³ of the Fleet [...] and be long out of Prison Nights and Days, without the Assent at whose Suit they be judged’. The statute established that, unless the prisoner was freed by order of the king, ‘the Plaintiffs shall have their Recovery against the same Warden by Writ of Debt’.¹⁰⁴ Releasing a prisoner who claimed parliamentary privilege was therefore none the less an ‘escape’.

This issue had a long, continuing history, including the cases of Larke, Clerk, and Hyde, which were presented as precedents on 16 April 1604, and were to be referred to again on 2 May: all had involved a petition from the Commons to the king.¹⁰⁵ These precedents maintained the right of privilege for the member, but allowed the legal processes to be taken up again, after the parliament was over; they also indemnified the sheriff and officers against actions by the creditor. It is important to note that in each of the precedents, the prisoner was held in execution, not on mesne process, so that ‘it was necessary to have an Act of Parliament to save to the parties a right of a new Execution after the time of Privilege’.¹⁰⁶ Moreover, in the Fitzherbert case, Coke, at that time Speaker and solicitor general, had proposed that ‘it is no

.....
 return day, to satisfy (*ad satisfaciendum*) the plaintiff’: in *Legal Dictionary Online*, at <<http://goo.gl/Gd2iO>>.

¹⁰² *Statutum Mercatorum* [*Statute of Merchants*] 1285 (13 Edw. I).

¹⁰³ A tipstaff. ‘Prisoners were allowed to go at large by bail, or with a “baston” (tipstaff), for nights and days together [...] confirmed by a rule of court during the reign of James I’: in *BHOL*, at <<http://tinyurl.com/o88p3r3>>.

¹⁰⁴ *Prisoners for Debt* 1377 (1 Rich. II c. 12), in Raithby (ed.), *Statutes of the Realm*, II, p. 5. The statute also penalised those who feigned having debts to the king, thereby delaying the pursuit of suits for debt by private individuals.

¹⁰⁵ See pp. 53f. above; and Appendix 1, cases 4, 7, and 9.

¹⁰⁶ Hatsell, *Cases of Privilege*, p. 46. The nuances between arrests on mesne process and on an execution were partly clarified in 1625, when the Commons declared that anyone who was ‘in execution’ for debt could not be validly elected: Sommerville, *The Liberties of the Subject*, p. 61.

escape in the Sheriff, nor would the person lose his action of doubt, though Fitzherbert should be delivered'.¹⁰⁷ In the Shirley case, it was felt to be clear that the 'Remedy [for the debt was] against the Debtor, and not against the Sheriff', an apparent contrary precedent notwithstanding: '35 H. VIII. [1543–44] the Gaoler delivered a Prisoner; the Party sued the Gaoler'.¹⁰⁸

In an earlier debate, in March 1604, the Commons had heard from a number of leading members, including several serjeants-at-law. This debate is highly significant, in that it shows how uncertain the law was in relation to this issue, and the danger of members avoiding rightful financial obligations. There was a view 'that the House should so proceed as they gave not Way and Encouragement to others to practise to be arrested upon Execution with a Purpose, by Pretence of Privilege, to discharge the Debt' [nullify any process for recovery at some future point].¹⁰⁹ Two members, Anthony Dyott and Lawrence Tanfield (Oxfordshire), thought that, if Shirley were released, the creditor would be unable to execute the same arrest warrant again, no matter how much his grievance was justified, and would therefore lose his money.¹¹⁰ Many who spoke were dissatisfied with this potential legal difficulty. Sir John Doddridge (Horsham) suggested that 'Shirley's release from prison by order of the Commons would have the unwanted effect of discharging his debt, but "wished that conference might be had with the judges" to settle the matter'.¹¹¹ Robert Hitcham (King's Lynn) suggested that 'the creditor might obtain another writ of execution after the session, but that no penalty should be imposed on the sheriff'.¹¹² Humphrey Winch (Bedford) apparently argued that the writ for Shirley's release would simply put the arrest warrant for the debt on hold, with the creditor being able to reactivate

¹⁰⁷ Appendix 1, case 22; Hatsell, *Cases of Privilege*, p. 108.

¹⁰⁸ *CJ*: 27 March 1604 (second scribe). This was the case of William Trewynnard: Appendix 1, case 14.

¹⁰⁹ *CJ*, 1, p. 155: 27 March 1604.

¹¹⁰ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 138, and *ibid.*, VI, p. 492.

¹¹¹ *Manners*, in Healy, *CD 1604-1607*, pp. 25, 28: 24 March 1604.

¹¹² Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 707. This was in line with a more accommodating principle: that a sheriff is not necessarily acquainted with all nuances of the law, and is also obliged to comply with legal writs and processes, although he should not capriciously or 'boldly' set a prisoner at large, and could be amerced if he did so: Maseres, *Cases and Records*, pp. 60-61.

the recovery process after the end of the session.¹¹³ George Snygge (Bristol) was clearly aware of Shirley's character, suggesting that he might have had himself elected expressly to avoid his debts: 'yf Sir Thomas procured him selffe extraordinarylylie to be a burgesse he ought not to have his priviledge'.¹¹⁴ In a later debate, on 5 April, there was continuing concern that Shirley should not be released before the arguments on both sides were heard in respect of the debt.¹¹⁵ The issue was raised yet again, on 16 April, when it was decided: 'That he [Shirley] was to have privilege: but because the creditor might not loose his debte, nor the Warden of the Fleete be in danger for an escape, ordered that he should not be delivered till peticion made according to former presidents for the saveing of them'.¹¹⁶

Both the 'first bill' and the 'second bill' did not simply provide for Shirley's release, but also addressed the difficulties and anomalies that the lawyers had identified in the Commons' debates and their deliberations in committee. As already recorded, the first bill had made provision to petition the king for Shirley's release. However, it also established that 'the said Sheriffe of London, the nowe Warden of the fleete, and all others, that have had the said Thomas [Shirley] in Custodie, since the said first arrest, theire executrs or administratrors any of them maie not be in any wise hurt, endamaged or greeved, because of the said dismissing at large of the said Thomas'. It further set out that Shirley was not excused his debts, simply on the grounds that he had enjoyed privilege at some prior point. Simpson and other creditors could proceed to recover what they were owed, after the dissolution of the parliament, as the bill allowed for: 'theire and any of theire execucions and suits at all tyme, and tymes after the dissolving of this present Parliament, to be taken out and persecuted as if the said Thomas had never bene arrested or taken in execucion'.¹¹⁷

¹¹³ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 804.

¹¹⁴ *Manners*, in Healy, *CD 1604-1607*, pp. 28-29: 27 March 1604.

¹¹⁵ *CJ*, 1, p. 167: 5 April 1604.

¹¹⁶ *Sir Edward Montagu's Diary of the 1604 Session*, Northants RO, Montagu MS 30, in Healy, *CD 1604-1607*, p. 68: 16 April 1604.

¹¹⁷ Prothero, 'Privilege and Shirley's Case', p. 739. Two private Bills that related specifically to Simpson and the warden are shown in the list of private legislation as: *An Acte to secure Simpson's Debte, and save harmles the Warden of the Flete in Sir Thomas Sherleye's Case 1603* [1604] (1 Jas. I c. 9, private act); and *An Acte to secure the*

[footnote continues ...]

The Commons remained unclear on the issue of liability, and on 2 May, they were presented with some recent precedents: those of Smalley, Curwen and Hogan, together with ‘three precedents out of the Tower; Two of them in English and one in French’, which they had already considered, on 16 April.¹¹⁸ Smalley’s case implied that Shirley could be freed, but at the risk of punishment from the House, or an order for him to pay the debt. Curwen’s case had seen the arresting serjeant threatened with vicarious liability for the debt, whereas in Hogan’s case the warden of the Fleet was indemnified for any such vicarious responsibility. As Hogan’s case occurred at the very end of Elizabeth’s reign, it perhaps served as a model for what the warden of the Fleet expected for himself in Shirley’s case. The precedent of requiring the privileged person to enter into a surety for any sum in dispute might reasonably have been followed.

There was a significant difference between the two bills in other areas: the second bill again provided that Simpson could seek recovery of the debt, and indemnified the sheriff, warden of the Fleet, and others in similar positions of authority.¹¹⁹ On the date of the introduction of the second bill, the Speaker read out a letter from the wife of the warden of the Fleet, in which she made a suggestion for legal guarantees:

If it seem pleasing unto you to certify me, under the Hand of the Three Chief Justices, that it is no Escape; or to send for Simpson, and persuade him to release all Escapes; or Sir Thomas Sherleye, to put in good Security for his true Imprisonment; or to invent any Ways for my Safety, whereby I and mine perish not in the Street; I am, in all Willingness, ready to obey, and discharge him in an Hour’s Warning.¹²⁰

Debte of Simpson and others, and save harmles the Warden of the Flete in Sir Thomas Sherleye’s Case 1603 [1604] (1 Jas. I c. 10, private act): Raithby (ed.), *Statutes of the Realm*, IV part II, p. 1017.

¹¹⁸ *CJ*, 1, p. 195: 2 May 1604. The three new cases are described more fully on p. 53 above, and in Appendix 1, cases 18, 24, and 23. A footnote in *CJ* explains that the unnamed precedents related to William Hyde, William Larke, and Walter Clerk, referred to on 16 April: see p. 91 above.

¹¹⁹ Prothero, ‘Privilege and Shirley’s Case’, pp. 739-40.

¹²⁰ *CJ*, 1, p. 206: 10 May 1604.

The Commons were clearly not in a position to secure any such guarantees. The first bill and the second bill referred specifically to the circumstances of Shirley's arrest, so, in order to generalise the position, what was at first described as 'The Bill for the Relief of Plaintiffs in Writs of Execution, where the Defendants in such Writs have been arrested, and set at Liberty by the Parliament' was introduced on 20 April. This was not a purely private measure, and was enacted as the 'Privilege of Parliament Act' in the summer of 1604. It provided that:

If any person being arrested in Execution, and by priviledge of either of the Houses of Parliament set at libertie [...] that from henceforthe noe Shiriffe Bayliffe or other Officer from whose Arreste or Custodie any such person so arrested in Execution shalbe delivered by any such Priviledge, shall be charged or chargeable with or by any Action whatsoever for deliveringe out of Execution any such priviledged person so as is aforesaide, by suche Priviledge of Parliament set at Libertie.

Further, any creditor who had been thwarted from debt recovery, through the invoking of privilege, could arrange for a new writ 'after such tyme as the priviledge of that Session of Parliament in which such priviledge shall be so graunted shall cease'. Lastly, the Act provided that those arresting a member of either House could still be punished for their breach of privilege.¹²¹ In other words, privilege of parliament did not give any member a perpetual immunity from debt recovery. The 1604 Act was a major advance in clarifying that parliamentary immunity only provided a stay in proceedings involving members, although there were still some ambiguities. So, at the end of James I's first parliament, the issue of 'escapes' arose in a different form, in the case of Sir Vincent Skinner. The Commons had granted Skinner privilege, but held that:

¹²¹ *Privilege of Parliament Act 1603 : An Acte for New Executions to Be Sued Againste Any Which Shall Hereafter Be Delivered out of Execution by Priviledge of Parliament, and for Discharge of Them out of Whose Custody Such Persons Shall Be Delivered* 1604 (1 Jas. I c. 13), in Raithby (ed.), *Statutes of the Realm*, IV, part II, p. 1029. The Act is dated 1603, although passed in 1604. This is in accordance with the contemporary legal fiction that parliamentary legislation was dated to the first day of a parliamentary session, however long, and regardless of when the royal assent was given: C. R. Cheney (ed.), *A Handbook of Dates : For Students of British History*, 2nd edn. (Cambridge: UP, 2000), p. 108.

This was an escape in the sheriff to suffer the prisoner to go into Hertfordshire (the sheriff may make his prison where he will in the county but not in some other county). And such an escape that the sheriff is not only by this subject to an action by the creditors, but he cannot after justify the taking or detaining of the prisoner, but the prisoner may have an *audita querela* in such case to be discharged of execution, because the escape is voluntary.¹²²

On the other hand, the protection for creditors was recalled, when, in 1621, the sheriff of Middlesex was ordered to free a servant of the chancellor of the duchy of Lancaster, and was told: ‘And there is an act of parliament that dischargeth you and keepeth the party plaintiff from prejudice by giving him power to renew his execution’.¹²³ The protection for sheriffs can be seen in an eighteenth-century work on the law: ‘for if no default or laches¹²⁴ can be ascribed to the sheriff there can be no reason to charge him with the debt; and there seems to have been no default in him [...] and the law supposes him to be a lay person, and not to have knowledge of the law; and he is therefore unable to argue or dispute whether any writ that he receives comes to him with or without sufficient authority’.¹²⁵ However, when the plague was threatening London in 1625, prisoners in the Fleet Prison petitioned the House of Lords, ‘whereby they humbly desired to have the Benefit of His Majesty’s Writ of Habeas corpus, etc. (heretofore used but now denied), in this Time of Infection’.¹²⁶ This was referred to the Commons, whereby misgivings were expressed, particularly over freeing prisoners through *habeas corpus*, as this would be ‘directly an escape in law’. Although sympathetic to the prisoners’ case, the Commons decided ‘To deliver to the Lords, as the Opinion of this House, that an Habeas Corpus, as now used, is

¹²² Add MS 48119, in Foster (ed.), *Proceedings 1610*, II, p. 307: 30 October 1610. *Audita Querela* is ‘a writ applicable to the case of a defendant against whom a judgment has been recovered, (and who is therefore in danger of execution, or perhaps actually in execution) grounded on some matter of discharge which happened after the judgment, and not upon any matter which might have been pleaded as a defence to the action’, in *Legal Dictionary: The Free Dictionary by Farlex*, at <<http://goo.gl/mYFMV>>.

¹²³ *The Anonymous Journal*, fol. 320v, in Notestein et al. (eds.), *CD 1621*, II, p. 359: 11 May 1621.

¹²⁴ ‘Negligence in the performance of any legal duty’: *OED Online*.

¹²⁵ Maseres, *Cases and Records*, pp. 59-60.

¹²⁶ *LJ*, 3, p. 458: 6 July 1625.

against Law, and an Escape. 2ly, To deliver it to the Lords, as the Opinion of the House, that this being an Escape, a Creditor, consenting, shall never take him more in Execution; for, if he do, the Prisoner may have an Audita Querela'.¹²⁷

In summary, legislation arising from Shirley's case indemnified sheriffs and gaolers from any vicarious liabilities for the debts of members who had been released by claiming privilege.¹²⁸ However, later events showed that members, and their real or sham servants, still used privilege of parliament to hold off creditors, at least over the period during which parliament sat.¹²⁹

The fifth and final issue was whether the royal assent to all bills from the session automatically ended a parliament – or might exceptional assent be given to a single bill that had passed all its parliamentary stages? As Cheney sets out: 'In the sixteenth century [...] there was an opinion [...] that a session was automatically determined by the royal assent to a bill (which for centuries past had normally taken place on the last day of a parliament)'.¹³⁰ Cheney refers to the *Commons' Journal* of 1554, which records: 'Upon a Question asked in the House, if, upon the Royal Assent, the Parliament may proceed without any Prorogation; It is agreed by Voices, that it may'.¹³¹ That decision reflected a situation a situation that arose in 1553, when Mary I was so delighted by the speedy passage of a bill that embodied her religious policies that she came in person to give her immediate assent, with the loss of other pending legislation, not least the bill that would have granted her supply. Whether the royal assent could only be given at the end of a session was a question that, in different ways, nevertheless exercised the Commons and the warden of the Fleet in 1604. The Commons had failed to obtain Shirley's release through writs of *habeas corpus*, or

¹²⁷ *CJ*, 1, p. 808: 9 July 1625.

¹²⁸ A number of pieces of legislation followed through into the eighteenth century, which increasingly strengthened the right of a creditor to renew a suit for his debt after someone ceased to be an MP.

¹²⁹ Thrush, *Commons 1604-29*, 1, pp. 90-91, details some of the abuses. The issue of abuses is also considered more fully in chapter five below.

¹³⁰ Cheney (ed.), *Handbook of Dates*, p. 107.

¹³¹ *CJ*, 1, p. 38: 21 November 1554.

using the serjeant-at-arms directly. However, the alternative of specific legislation had the drawback that the royal assent was only given at the end of a parliament, so that Shirley would not sit before that time. Equally, the warden was not prepared to release Shirley, simply on the basis of a bill that might not, in the end, be passed in a form that protected him. Was there any way out of the impasse? In sending the first bill up to the Lords on 21 April, the Commons asked them ‘to move the King’s Majesty for His Royal Assent to be speedily granted unto the Bill concerning Sir Thomas Sherley; signifying that, if it should depend till the End of the Parliament, the Desire and Purpose of their House by this Bill would be frustrate’.¹³² On 28 April, the Lords considered issues over the manner and timing of the royal assent:

Which being to be done but by Two Ways, videlicet, either by His Majesty’s presence or by Commission, the Lords do hold the first unfit, that His Majesty should be moved to come in Person purposely, for the giving of His Royal Assent to any one private Bill; and for the second, concerning the Royal Assent by Commission, some Doubt is conceived, whether the King’s Royal Assent to one Bill apart, do not conclude a Session.¹³³

On the same day, Sir Edward Hoby told the Commons about the Lords’ uncertainties, and a possible solution:

For his Highness’ Royal Assent to the Bill; whether the King should come in Person, or be done by Commission, they doubted: Both too much in the Case of a private Person: but this a Matter of Privilege, concerning the whole House. It were fit a Petition were exhibited to his Majesty from the House, that he would be pleased to give his Royal Assent; leaving the Manner to himself.¹³⁴

Consequently, the Commons dispatched Sir John Herbert ‘with divers others’, to ask for a conference with the Lords on a number of matters, including ‘Furtherance and Expedition to the Bill for *Sir Thomas Sherley*’. Although the Lords went on to give the bill a third reading on 30 April, the problem remained: would the royal assent end

¹³² *LJ*, 2, p. 283: 21 April 1604.

¹³³ *LJ*, 2, p. 286: 28 April 1604.

¹³⁴ *CJ*, 1, p. 189: 28 April 1604.

the session, or, put another way, would it only be given at the end of a session, such that the warden would not feel able to release Shirley to take his seat before that point? Interestingly, however, Shirley had already, on 26 April, ‘suggested a way of overcoming this difficulty himself. In a letter to Cecil, he proposed that the king should merely promise to give his assent. That way the Commons need not worry that it would lose its legislation, and he might then be released’.¹³⁵ This suggestion was followed up, when, on 4 May, the House considered the draft of a petition to the king, asking him to pass the bill to secure Shirley’s release. Having rehearsed the background to the case, the draft petition went on to request: ‘for that the Service of the said Sir Thomas Shirley is needful in the Commons House, during this present Session of Parliament, that Your Majesty would vouchsafe, out of Your Grace and Clemency, to signify under Your Highness’ Hand, upon this Petition, that Your Majesty will give Your Royal Assent to the said Bill, in the End of the Parliament’. However, it appeared that the House feared that its rights to independent action might be compromised, so that the draft petition ‘was not approved, nor thought fit by the House to proceed in that Manner, being, as was conceived, some Impeachment to the Privilege of the House’.¹³⁶ Nevertheless, some more discreet approach must have been made, as, on 9 May, the Commons were told that the king was prepared ‘to leave it to their Liberty, to proceed in the Case of Sir Tho. Shirley, as they thought fit’.¹³⁷ A day later, the Commons received further news that James was prepared to be helpful: ‘Sir Roger Aston [Cheshire] delivereth from the King, that, in verbo Principis, he will give his Royal Assent at the End of the Session’.¹³⁸

The issue of whether the royal assent to a bill automatically ended a parliamentary session remained unresolved at the end of the case, as Shirley was eventually released after the warden ended his resistance. Nevertheless, the weight of opinion appeared to be that the royal assent terminated a session. In 1621, at a time when a distinction was being drawn between adjournments and prorogations, a bill was introduced that the

¹³⁵ *HMC Hatfield*, xvi. 71-2, in Thrush and Ferris (eds.), *Commons 1604-29*, vi, p. 321.

¹³⁶ *CJ*, 1, p. 198: 4 May 1604. The wording of the draft petition is given in the second scribe’s record for that date.

¹³⁷ *CJ*, 1, p. 205: 9 May 1604.

¹³⁸ *CJ*, 1, p. 205: 10 May 1604.

particular ‘session shall not determine by his Majesty’s Royal Assent to some Bills’.¹³⁹ There was, however, a clear exception, when in 1625, during a plague epidemic in London, parliament was likely to be adjourned. The issue of whether all bills would be lost was addressed by the passage of a bill, which rehearsed the background: that unfinished ‘weightie’ business might be aborted, because of the adjournment owing to the plague. It specified that: ‘His Majesties Royall assent unto one or more Acts of Parliament will not be a determination of this present Session’. Any bills receiving the royal assent were to take effect immediately.¹⁴⁰ As a result, before the adjournment and subsequent regathering at Oxford, ‘Mr. Speaker went up, attended by divers of the House; where, in his Presence, the Royal Assent was given unto some Bills; and then he, and the House, came down’.¹⁴¹ By the time of the Long Parliament, it seemed that the royal assent might be given in the middle of a session, when the king agreed to a bill that provided for triennial parliaments, as well as to the bill of attainder of the earl of Strafford.¹⁴²

Conclusions

In some areas, uncertainties that were exposed in Shirley’s case were largely resolved by the summer of 1604: for example, there was a brisk, unequivocal decision that privilege of freedom from legal processes and arrest applied to people who had been declared elected, but who had not yet taken the oath at the start of the parliament. There was an equally clear understanding that the royal assent to bills ended the parliament, so that it was not possible to give the assent to any individual measure during the course of a session. The case had exposed differences of opinion about whether arresting officers and gaolers were vicariously liable for the debt of any member who was released through privilege of parliament, and whether creditors lost their rights when a member was so freed. As a result, both specific and general

¹³⁹ *CJ.*, 1, p. 633: 31 May 1621. The bill was not enacted: there were only two statutes in 1621, and both concerned supply.

¹⁴⁰ *An Act, that this Session of Parliament shall not determyne by his Majesties Royall assent to this and some other Actes 1625* (1 Car. I c. 7), in Raithby (ed.), *Statutes of the Realm* v, pp. 21-22.

¹⁴¹ *CJ.*, 1, p. 809: 11 July 1625.

¹⁴² *CJ.*, 2, p. 87: 16 February 1641; *CJ.*, 2, p. 141: 10 May 1641.

legislation indemnified the former, and allowed the latter to pursue their claims once a member was no longer privileged. Importantly, the case, and the legislation passed in consequence, clearly established that the Commons could directly obtain the release of privileged members, with no need for any specific legislation, or exercise of the royal grace. This was reinforced in 1626, when the Commons declared: ‘the House hath power, when they see cause, to send the Serjeant immediately to deliver a prisoner’.¹⁴³ Such pronouncements, and the handling of later cases, show a certainty about the management of privilege that grew from the time of Shirley’s case onwards, as seen through the work of senior members, lawyers, and the committee for privileges. In relation to bankruptcy, however, there was far less clarity. Although James hoped to prevent outlaws and bankrupts from sitting, Shirley was *not* debarred; the issue remained, and the Commons continued to act quite inconsistently. It might reasonably be argued that such inconsistencies contributed to the abuses of the privilege of freedom from arrest seen in cases that arose at later points in this period, and which were to exercise the king and both Houses.

As the case ended, and after some bruising encounters, where the main difficulties lay with the warden of the Fleet, rather than a king who had been discreetly helpful, the Commons were more confident in their own strength as an institution. They were increasingly sure that their privileges were ‘ancient and undoubted’, and in accordance with precedents. They had been careful to work within the law. They had defended their right to free members who had been arrested and imprisoned for civil matters. The abandonment of the ‘first bill’, which would have relied on an intervention by crown and chancery to break the impasse of Shirley’s continuing detention, provides evidence, not of some teleological ‘turning point’, but of a recognition that the Commons could use their own strength to maintain their rights and privileges: this was evolutionary, rather than revolutionary. The *Form of Apology and Satisfaction*, dated 20 June 1604, includes a section on Shirley’s case that provides an appropriate endpoint for this chapter:

¹⁴³ Hatsell, *Cases of Privilege*, p. 163.

In the delivery of Sir Thomas Shirley our proceedings were long; our defence of them shall be brief. We had to do with a man, the Warden of the Fleet, so intractable and of so resolved obstinacy as that nothing we could do, no, not your Majesty's royal word for confirmation thereof, could satisfy him for his own security. This was the cause of the length of that business: our privileges were so shaken before, and so extremely vilified, as that we held it not fit in so unreasonable a time and against so mean a subject to seek our right by any other course of law or by any strength than by our own.¹⁴⁴

¹⁴⁴ Tanner (ed.), *Constitutional Documents : James I*, p. 225.

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IV : DEVELOPMENTS AND CASES 1603-1629

Introduction

This chapter looks at a range of privilege cases across the early Stuart parliaments, set within a context of varying parliamentary landscapes.¹ Change over this period had three aspects: first, privilege and grievances became increasingly interlinked; second, some individual cases moved privilege into new, sometimes contentious, areas; third, ‘privilege’ was treated as an entity, encompassing freedom from physical and verbal molestations; arrests and detentions, the safeguarding of servants and property, and immunity from most other legal processes. Each parliament not only saw privilege cases of a familiar type, such as when members or servants were arrested, or issued with *subpoenas*, but also witnessed stronger, extended, or novel interpretations of the scope of the privilege of freedom from arrest and legal processes, for example, in its extension to those having business with the Commons, such as petitioners; in the matter of punishing and pardoning transgressors; or the challenge to the court of high commission. The Commons took a particularly robust stance in the both the Shirley case, and the exchanges of 1629 that followed the seizure of a member’s goods by customs officials, which are considered separately, in chapter six below. Progress was not, however, even, and it will be seen that there were both advances and setbacks in the Commons’ moves to maintain their privileges, set against to the crown’s equally strong desire to maintain its prerogative rights. So, whereas it is clear that many members wanted the Commons’ privileges and the royal prerogative ‘to stand well together’, by the 1620s there was increasing, palpable concern that the ‘freedom of ancient parliaments’ was under threat.² Moreover, whenever periodic clashes over privileges occurred, both James I and Charles I tended to restate their commitment to the maintenance, but not the extension, of privileges that had been granted by their predecessors. The Commons were increasingly concerned across the period that grievances, including alleged assaults on their privileges,

¹ This research has identified 191 cases that were raised in the Commons during this period.

² The quoted phrases come from a speech by Sir John Eliot: *Diary of John Pym*, fol. 8v, in Baker (ed.), *Proceedings 1624*: 27 February 1624.

should be addressed before any grant of supply, fearing that if they did not achieve this, the king would dissolve the parliament as soon as supply had been secured. For their part, both kings were anxious to see the Commons deal with supply issues more expeditiously, and to spend less time preparing ‘protestations’, or talking about matters that they considered to be literally none of their business.

The chapter is structured along broadly chronological lines: the key developments in each of the early Stuart parliaments are presented, as these related to, or affected, privilege matters, with descriptions of significant privilege cases, particularly those which illustrate the interplay between privilege, prerogative, grievances, and supply.³ As has been set out earlier, privilege was meant to ensure that men could contribute to the work of a parliament, unaffected by ‘molestation’ – a term that covered physical assaults, physical detention and other legal entanglements that might affect themselves, their servants, or their property. The descriptions in this chapter make reference to Hatsell’s grouping of privilege cases that fall within this broad area:

1. The commitment [to prison] of members, or their servants by the Privy Council, or by any court of justice, or other magistrate.⁴
2. The arrest and imprisonment of members, or their servants in civil suits.⁵
3. The summoning of members, or their servants, to attend inferior courts, as witnesses, jurymen, & co.⁶
4. The prosecuting of suits at law, against members, or their servants, during the time of Privilege.⁷
5. Taking the goods or effects of a member in execution, or otherwise.⁸
6. Assaulting or insulting a member, or his servant, or traducing his character.⁹

³ Privilege issues in the 1628-9 parliament are mainly considered within chapter six below.

⁴ Hatsell, *Cases of Privilege*, pp. 131-53.

⁵ *Ibid.*, pp. 153-65.

⁶ *Ibid.*, pp. 165-71.

⁷ *Ibid.*, pp. 171-82.

⁸ *Ibid.*, pp. 182-85.

⁹ *Ibid.*, pp. 185-89.

The early Stuart parliaments

The 1604 parliament

As has been shown in chapter three above, the arrest and imprisonment of Sir Thomas Shirley, in breach of his presumed privilege, took up considerable parliamentary time in the first months of the initial Jacobean parliament, and raised many important issues. In his own extended description of the Shirley case, Hatsell, perhaps harshly, identifies an inconsistency in the views of Sir Edward Coke, concerning the appropriate procedure for freeing an arrested member. He referred to the Fitzherbert case of 1593.¹⁰ Coke, at that time both Speaker and solicitor general, had proposed: ‘That, before a Writ of Privilege should be granted, it would best suit the gravity of the House to grant a Habeas Corpus cum causa, returnable in Chancery, the Sheriff to appear, and the whole matter being transmitted out of the Chancery, the House then to judge upon the whole Record’.¹¹ In the Shirley case, Coke had shifted, or perhaps developed, his thinking, so that he now proposed that privilege was to apply ‘in case of any arrest, or any distress of goods, serving any process, summoning the land of a member, citation or summoning his person, arresting his person, suing him in any court’. The privilege was to be enforced through a letter from the Speaker, with the penalty of ‘censure at the next session’.¹² The Shirley case can be seen to have strengthened privilege in two key areas. First, the Commons were now more confident about deploying their own authority to free members, using either the authority of the mace, or a Speaker’s warrant, albeit one that had to be processed through the clerk of the crown. Second, members were to have privilege in civil suits. Shirley’s case had produced the *Privilege of Parliament Act 1603*, which had established that parliamentary immunity only provided a stay in proceedings involving members.¹³ This is reflected in the comparatively simple case, from 1607, of Sir Robert Johnson (Monmouth Boroughs), who was granted privilege in the matter of an exchequer suit over titles to certain lands, brought by Sir Robert Brett. Brett petitioned the Commons to lift the privilege, on the grounds that Johnson was delaying the hearing,

¹⁰ See Appendix 1, case 22.

¹¹ Hatsell, *Cases of Privilege*, p. 108.

¹² *Ibid.*, p. 160.

¹³ See pp. 104f. above.

hoping to gain a half-year's rents for the disputed lands. Brett's petition set out that he hoped that: 'the Absence of One Man will be no great Hindrance to the Business of this House'. However, 'This Petition being read, and understood; the former Order of the House, in Point of Privilege for *Stay of the Trial*, was notwithstanding affirmed'.¹⁴ Less than a month later, Johnson informed the House that Brett had 'entered upon his House in Question, and his Goods, and keepeth Possession by Force and Violence'. However, 'no Order ensued upon this'.¹⁵ Three days later, the exchequer ordered Brett to leave the property, in return for Johnson's assurance that he would allow the cause to be heard next term. If he continued to invoke parliamentary privilege, the hearing would proceed anyway. The case dragged on until October 1608, when the earl of Worcester and other arbitrators declared that possession should be given to Brett, in return for an annuity for Johnson and his wife.¹⁶

The circumstances of Shirley's case were far from unique, and further privilege cases arose in relation to the arrest and imprisonment of members or their servants in civil suits. The case, from 1607, of Richard James (Newport, Isle of Wight), who was arrested by Hutchins, a serjeant, on a writ of execution 'on the Procurement of one Bateman, an Attorney', includes elements that were common in most privilege cases. An arrest is made, or sometimes merely attempted, during which the member advises the arresting parties that he is privileged; but the arresting parties ignore the claim. The case is then brought to the attention of the Commons, who next order those who had infringed privilege to appear before them, usually degraded by having to kneel, bareheaded, at the Bar of the House. Sentence is then passed that the arresting parties should be held, usually in the Tower, ending some days later with a fulsome apology and release of the delinquents, 'paying their fees'. So, in this case, James told Hutchins that he was a burgess, but the serjeant told James that he must answer the writ. The Commons followed usual practice, and ordered that the arresting serjeant and the attorney that had procured the writ should be brought before them. They were committed to the custody of the serjeant for a month – 'which judgment was pronounced against them, kneeling at the

¹⁴ *CJ*, 1, p. 382: 13 June 1607.

¹⁵ *CJ*, 1, p. 390: 4 July 1607.

¹⁶ Thrush and Ferris (eds.), *Commons 1604-29*

Bar, by Mr Speaker'. Bateman was brought to the Bar, when he confessed that he had 'rashly and unadvisedly procured a Write of Execution [...] and 'acknowledgeth himself faulty, and therefore the Censure of this honourable House to be justly and favourably inflicted upon him: yet, [...] he humbly prayeth, that this honourable House would vouchsafe to release him of his Imprisonment; for the which he shall be bound, for ever hereafter [...] to be more respective and dutiful towards so honourable a State, and the Members thereof'. Bateman was duly released, and Hutchins shortly afterwards, well short of the month originally imposed as a sentence. There were, however, a couple of unusual features to the case. First, the men were committed to the custody of the serjeant-at-arms, rather than being lodged in the Tower, which was the prison for the House. Second, Bateman was given leave for a few days during his detention to carry out his business as an attorney, as the Commons did not wish to punish Bateman's clients for their attorney's faults.¹⁷

There was, however, a later case which significantly deviated from the generally forgiving attitude of the Commons towards transgressors: in 1621, Thomas Johnson, a servant of Sir James Whitelocke (New Woodstock) was arrested upon an execution, but successfully sought privilege. It was ordered that the serjeant who had arrested him was to be sent for.¹⁸ However, it was revealed that the two bailiffs had been told that Johnson was a privileged servant, but they had nevertheless arrested him. The question of punishment arose. Sir Nathaniel Rich opined: 'that because they are poore men and base that they maye be committed not to the Towre (because t'is to good a prison) but to Newgate for a weeke'. Sir Samuel Sandys (Worcestershire) felt that the Commons should be merciful and 'leave no bitter remembrance behind us', as it was the last day of the parliamentary session. In the end it was ordered that: 'they shall aske forgiveness at the barr upon ther knees of the howse and [of] Sir James Whitlock, and to ryde as before [back to back bareback on one horse], with papers with this inscription *for arrestinge of a servant to a member of the Commons howse of parliament*, from Westminster to the Exchange, and presentlie to be delivered to be executed by the sheriffe of Middlesex, presentlie and a warrant to be made to him, which was so made and openlie reade in the

¹⁷ *CJ*, 1, pp. 332-38: 10 February to 20 February 1607, *passim*.

¹⁸ *CJ*, 1, p. 629: 28 May 1621.

howse.¹⁹ These men might have been unlucky in the timing of their offence, as both Houses were becoming sensitive about privileges during the course of 1621, as described in chapter five below.

There were, nevertheless, some occasions when direct action to free a member or servant was unnecessary, as in 1607, when the Speaker informed the House that Nicholas Hawkins had been apprenticed to William Towerson, a merchant; they had fallen out, and Hawkins had been taken in as a servant by Sir Warwick Hele (Plympton Earle). Towerson then had Hawkins arrested ‘upon an Action of 8000 *l*’. The Commons decided that a warrant for a writ of *habeas corpus* should be prepared; but later the same day, the matter was ‘reported to be stayed and appeased by Mediation’.²⁰

In general, during most of James I’s first parliament, once Shirley had been released, and the Buckinghamshire election dispute had been resolved, privilege matters were not at the forefront of Commons business. Cases mainly related to individual members, and were generally resolved without difficulty, including those where someone had been arrested for debt, or had been ordered to attend inferior courts, as principal or witness (often on a *subpoena*), juror, and so on. The matter of excusing a member from attending court as a juror appeared uncommon, although it might be that the courts excused any privileged person in advance of any possible referral to the Commons. The records do show that, in May 1607, Sir Thomas Bigg (Evesham), and Sir Thomas Lowe (London) were named by the sheriff of London to serve as jurors in the court of king’s bench. They were granted privilege, and the serjeant-at-arms ‘commanded to go with his Mace, and deliver the Pleasure of the House to the Secondary [deputy] of the King’s Bench, the Court then sitting’.²¹ Some years later, Sir William Alford (Beverley) was summoned as a juror; this time a letter was sent from the Speaker to the judges, confirming Alford’s privilege, and expressing the expectation that he would not be amerced for his non-

¹⁹ *Belasyse*, fols. 117-18; in Notestein et al. (eds.), *CD 1621*, v, pp. 196-97: 4 June 1621.

²⁰ *CJ*, 1, pp. 338-39: 20 February 1607.

²¹ *CJ*, 1, p. 369: 6 May 1607. Sir John Tracy was granted privilege in 1597, because he had been put on a jury at the court of common pleas during a session of the House. In this case, the serjeant-at-arms was sent with the mace to obtain Tracy’s release from the court: Sir Simonds D’Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth : Journal of the House of Commons* (London: Paul Bowes, 1682; repr. Shannon, Ireland: Irish UP, 1973), p. 560: 22 November 1597.

appearance.²² Much more common were cases where a *subpoena* was issued, as this was classed a contempt, inasmuch as the member would be diverted from attending the ‘high court’ of parliament, as is neatly encapsulated in the *Commons’ Journal* of 1604, ‘a [court] Appearance must necessarily withdraw [the Member’s] Presence and Attendance upon the Service of the said House’.²³ Hunneyball has found that: ‘as late as 1585, the Commons was denied the right to freedom from subpoenas, but this privilege, too, was secured by the end of Elizabeth I’s reign’.²⁴ There was a steady stream of routine cases of privilege against *subpoenas* across all the early Stuart parliaments, as recorded in the Commons’ journals. Two particular clusters occurred, in 1604 and 1606. In May 1604, seven members were granted privilege against *subpoenas*.²⁵ One of these was Sir Edward Montagu(e), who informed the House that he was ‘warned to appear upon a Trial at Guildhall tomorrow’ and asked what was the pleasure of the House in the matter. After debate, it was ordered that Montague was to have his privilege. The associated Order from the Speaker shows the formula that was employed in such matters, giving the justification for the privilege, and what should happen to the person who served the *subpoena* on the member:

WHEREAS the Commons House of Parliament was this Day informed by Sir Edw. Mountague Knight, One of the Members of the said House, that he had Warning to appear at the Guildhall Tomorrow, upon a Trial between one Hollowell Plaintiff, and himself Defendant; because his said Appearance must necessarily withdraw his Presence and Attendance upon the Service of the said House; it is thought fit, and so ordered, That he be excused in that Behalf, according to ancient Custom of Privilege; and that the said Hollowell, as also the Party that brought the Warning, be commanded by the Serjeant, in the Name of the House, to appear at the Bar Tomorrow Morning, that they may understand the Pleasure of the House accordingly.²⁶

²² *CJ*, 1, p. 898: 15 May 1628.

²³ *CJ*, 1, p. 208: 14 May 1604.

²⁴ Hunneyball, ‘Development of Privilege’, p. 114. The reference is to the case of Richard Cooke: see Appendix 1, case 21.

²⁵ The cases are recorded in: *CJ*, 1, p. 203: 8 May 1604; *CJ*: 10 May 1604 (second scribe), four cases; *CJ*, 1, p. 208: 14 May 1604; *CJ*, 1, p. 210: 15 May 1604.

²⁶ *CJ*, 1, p. 208: 14 May 1604.

In February 1606, six further members successfully applied for privilege in respect of *subpoena* processes.²⁷ Alban Stepneth (Pembrokeshire) informed the Commons that he had received a *subpoena* to appear in the Star Chamber, delivered seven days before the forthcoming session of parliament, at the instigation of a William Warren; the two had, apparently, been pursuing legal actions against each other. At the Bar of the House, Warren admitted that he knew that Stepneth was a member, but believed that the latter was not entitled to privilege, as he was then sheriff for Pembrokeshire, and therefore not allowed to leave the county without royal permission.²⁸ Warren's argument was presumably that if Stepneth could not travel to Westminster, protecting him from actions that would prevent or delay such travel was otiose. Stepneth had indeed not attended the short parliamentary sitting of November 1605, curtailed by the gunpowder plot, but his period as sheriff had ended in February 1606, and he subsequently returned to Westminster. Warren also asserted that there was another, older suit that he had brought against Stepneth in the Star Chamber, which remained to be determined. Presumably, Warren was (correctly) of the view that a suit that had begun before Stepneth was elected might take its course, but not while parliament was sitting. The House concluded that Warren's defence was truthful, but inadequate. The difficulties encountered in the cases of Cooke,²⁹ and Stepneth meant that 'the Commons found themselves obliged to take the punishment of this [claimed] breach of their Privileges into their own hands, whereas, till that time, the mode of redress had been different'.³⁰ However, as he had merely sought to have Stepneth respond to points to be put to him in the Star Chamber, possibly through an attorney, rather than a direct appearance, Warren was not confined to the Tower, but placed in the custody of the serjeant-at-arms for three days.³¹ This exemplifies the relatively lenient treatment of many delinquents by the House.

A gloss on the matter of *subpoena* processes is recorded by Bowyer, in relation to the case of Sir Richard Bulkeley (Anglesey), who was served a *subpoena* out of chancery, in

²⁷ The cases are recorded in: *CJ*, 1, p. 266: 11 February 1606, four cases; *CJ*, 1, p. 268: 13 February 1606, two cases.

²⁸ See p. 65 above for the origin of this prohibition.

²⁹ See Appendix 1, case 21.

³⁰ Hatsell, *Cases of Privilege*, p. 165.

³¹ *CJ*, 1, p. 268: 14 February 1606; *CJ*, 1, p. 269: 15 February 1606; Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 433; Willson (ed.), *Bowyer Diary*, p. 37: 14 February 1606.

May 1606.³² There was some question over whether Bulkeley had to appear personally. The Speaker pointed to a possible difference between a ‘Sub Poena to answer, and a Sub Poena to reioyne, for in the former, the Defendant is to appeare personally, and putt in his Answer, whereby he is drawn from attendance in this House: But he may reioyne by directions to his Attorney without his owne Personall Presence’. However, the House was reminded of the earlier opinion: ‘that no Processe is to be served on any of this House, for though his Person be not drawn from his Corporall Attendance; yet his minde is withdrawne, whereby the House hath no use of his Presence’.³³ The party who served the *subpoena* was brought to the House on 20 May, and committed to the serjeants.³⁴ The session then ended without any further action being recorded.

There was a difficulty in granting a request for privilege, if a *subpoena* related to a serious offence. Therefore, in May 1607, the case of Sir Edmund Ludlow (Hindon) was referred to the Committee for Privileges and Returns, as the writ ‘appeared to be at the Suit of Mr. Attorney-general [and thereby for the king]; which made the Question [of granting privilege] disputable’.³⁵ The case might well have related to the ‘savage assault on a servant named Joel King, who had secretly married his [Ludlow’s] daughter. [...] Ludlow had also had King arrested after the latter identified his assailants, an action described as "barbaric" by Star Chamber’. Ludlow escaped censure, although the jury was unhappy that the servants, rather than the principal, were sentenced.³⁶

The approach in cases where a *subpoena* had been issued is exemplified in a letter written by the Speaker to the lord chief baron, later in the same parliament. This shows that the Commons were by now using their own authority to free any member who had been served a *subpoena*:

W H E R E A S it hath been informed in the Commons House of Parliament, that a *Subpoena ad comparendum*, hath been lately, during this Session, served upon the Person of Sir Rich. Pawlett Knight, One of the Members of the said House, contrary to ancient and known Privilege; because the personal Attendance of the said Sir Rich, is here necessarily

³² *CJ*, 1, p. 305: 6 May 1606; *CJ*, 1, p. 308: 12 May 1606.

³³ Willson (ed.), *Bowyer Diary*, p. 175: 19 May 1606.

³⁴ *Ibid.*, p. 177: 20 May 1606.

³⁵ *CJ*, 1, p. 371: 8 May 1607.

³⁶ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 187.

required, during the Time of Parliament, and that he feareth, his Cause may receive Damage, or himself incur Contempt, by his Want of Liberty to attend it: I thought good (out of the Duty of my Place) as well to make known the Privilege and Pleasure of the House unto you, as to pray your Lordship, in his behalf, that there may be Order given, that no further Process issue against him, until he may have Time and Leisure to follow his own Cause.³⁷

Another kind of case arose when a member was assaulted, or insulted, or his character was traduced: in other words, he was ‘molested’ somewhat more literally, either inside or outside the House. The first case of this type arose on the first day of the initial parliament of James I: Sir Herbert Croft, who had sat in three previous parliaments, and now represented Herefordshire, pressed into the crowded House of Lords to hear the speech from the throne.³⁸ However, one of the yeomen of the guard, Bryan Tash, ‘gave uncivil Terms to Sir Herbert Crofts, and another Gentleman of the House, in saying, "Goodman Burgess, you come not here"’. This was assumed to be a ‘great contempt’.³⁹ Tash was placed in the custody of the Commons’ serjeant, and, immediately after hearing the king’s speech, moderation was urged, as Tash was one of the king’s guard, and thereby possibly himself accorded privilege.⁴⁰ On the following day, Tash appeared before the Commons, confessed his fault, and was then pardoned, although the Speaker ‘gave him Advice and Warning, for his better Care and Carriage hereafter, upon any the like Occasion, in the Course of his Service and Attendance’.⁴¹ The case illustrates the care taken publicly to tackle any action that affected the dignity of members: it would have been possible, after all, for Croft simply to have raised the matter privately with Tash’s commanding officer. The importance of maintaining personal dignity can be seen in the fact that, in addition to entries in the Commons’ journals, no fewer than three contemporary diaries record the incident and aftermath, *viz* those of Sir George Manners,

³⁷ *CJ*, 1, p. 369: 5 May 1607.

³⁸ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 26.

³⁹ *CJ*, 1, p. 142: 19 March 1604.

⁴⁰ *CJ*, 1, p. 150: 22 March 1604. Cotton’s diary notes that Tash ‘was pardoned in Marcy not in Justyce, the kyng being partly meanes for his favore’: *Cotton*, in Healy, *CD 1604-1607*, p. 44: 23 March 1604.

⁴¹ *CJ*, 1, p. 152: 23 March 1604.

Sir Robert Cotton, and Sir Edward Mountagu.⁴²

Further cases potentially affected the dignity of the House or its individual members. For example, in 1604, Sir John Savile (Yorkshire) complained that a furrier had abused him in ‘slanderous and unseemly Terms, upon his Proceeding as a Committee, in the Bill touching Tanners, Curriers, &c’.⁴³ In 1607, Sir Robert Johnson complained to the House ‘of a turbulent Clamour and Outcry of certain Women against him, and upon him, as he walked the Streets, for speaking against the Bill touching Wherrymenn and Watermen, &c. handled in the Committee’. The outcome was that the Speaker was to write to the justices of Middlesex ‘to prevent Disorder or Violence in the Matter’.⁴⁴ Disorder with violence was a particular adjunct to the employment by many members of pages, who tended to gather on the steps of the House, or at other times took themselves off to taverns, as well as engaging in activities that infringed the dignity of the House and its members. A difficulty was that these pages were, of course, subject to privilege by virtue of their service to members. This dilemma was apparent in 1604, when the innocent parties were punished, rather than any of six pages, who, it seemed, had taken a cloak from a boy-servant of one of the members, in order to meet a tavern reckoning for wine and cakes. The cloak was torn; the vintner’s man then refused to return the cloak to its rightful owner, but the Commons ordered him to do so. The vintner and his man were held in custody, but subsequently released, paying their fees to the clerk and serjeant-at-arms.⁴⁵ The Commons’ pages were clearly a difficult bunch, and, in 1606, information was given that: ‘the Pages upon the Stairs had much abused the Passengers, and had beat down Two Clerks of the King’s Bench; so as the Judges there had taken Knowledge, and committed them’. This posed a dilemma: the pages clearly could not behave in this way, but action had been taken by the judges that affected the Commons’ authority, so that ‘this House sent the Serjeant to clear the Stairs, and to demand the Prisoners to be taken

⁴² Healy, *CD 1604-1607*, pp. 22, 24, 42, 44, 54, 55.

⁴³ *CJ*, 1, pp. 240-41: 26 June 1604.

⁴⁴ *CJ*, 1, p. 348: 5 March 1607. Johnson was involved in a further privilege issue in 1607: see pp. 115f. above.

⁴⁵ *Manners*, in Healy, *CD 1604-1607*, p. 25: 24 March 1604; *CJ*, 1, p. 152: 24 March 1604; *CJ*, 1, p. 167: 5 April 1604.

into his Custody, and to bring them into the House Tomorrow in the Morning'.⁴⁶ On the following day, the two pages in question were brought to the Bar: one was ordered to be whipped 'in the Townhouse by the Beadle of Westminster', and the other's case was dismissed, as it seemed that he had tried to calm matters down.⁴⁷ In 1621, the same difficulty over who was to punish miscreants arose, when the judges of the king's bench were made aware that some servants to members had abused 'poor men and clients' of the courts on the stairs. Edward Alford (Colchester) moved that they should be punished by the House, which the judges agreed to, pointing out that they 'would have indicted them for Stroke in Face of the Court: And many, for less Offences, have lost their Hands'. In the end, the offender denied the accusation, and, as no witness was forthcoming, 'was at liberty upon his master's word that he should be forthcoming if any proof come against him'. At the same time, the House was reminded that there was a longstanding arrangement that the warden of the Fleet should station two of his men on the stairs, to ensure that no such misdemeanours arose.⁴⁸ Further, in 1610, there was a complaint that certain pages on the stairs had dragged the servants of some members down the stairs and taken their cloaks. It appeared that the master of the *Prince's Arms* tavern had then received the stolen goods. On the same day that this complaint was made, Sir Henry Poole (Cricklade), reporting on his examination of Thomas Reely, servant to one Davyes, exposed a racket, in which members' cloaks were pawned by a number of pages of members of both Houses, in order to pay tavern reckonings. There was the usual difficulty: it was possible to order the pages of members of the Commons to appear, but would the Commons be infringing peers' privileges if they called for the servants of the latter to appear before them?⁴⁹ It appears that matters were not taken further, as no subsequent entry can be traced in the journal of either House.

Matters involving pages were insignificant, in comparison to an insult, in July 1610, offered to Speaker Phelips by Sir Edward Herbert (Merioneth). Herbert apparently challenged the Speaker on the stairs, regarding the passage of a bill. Phelips complained

⁴⁶ *CJ*, 1, p. 258: 24 January 1606.

⁴⁷ *CJ*, 1, p. 260: 25 January 1606.

⁴⁸ *CJ*, 1, p. 513: 8 February 1621; *X The Anonymous Journal*, fol. 37, in Notestein et al. (eds.), *CD 1621*, II, pp. 40-41: 8 February 1621.

⁴⁹ *CJ*, 1, pp. 403-04: 2 March 1610.

on the next day, that Herbert: ‘put not off his hat, put out his tongue’ and ‘popped his mouth with his finger in scorn’. Herbert’s friend, Sir Robert Harley (New Radnor Boroughs) offered to go and persuade Herbert to come before the House voluntarily, to save him from the indignity of being summoned by the serjeant. When he appeared, Herbert rather disingenuously said that ‘he had no intent of scorn’, and Sir Julius Caesar (Westminster) suggested that ‘Mr Speaker would hold himself satisfied’ by this apparent apology. However, Phelips was ‘worse satisfied than before’, perhaps because of the limited, even insincere, nature of the apology, and threatened to take the matter to the king, for which he was attacked by John Tey (Arundel), who was then himself called to account. Herbert unsurprisingly left the country shortly afterwards.⁵⁰

The Commons were careful to observe due forms in matters of privilege: a significant case that illustrates this concerned Roger Brereton, arising from his commitment by the judges of the king’s bench for contempt, in November 1605, when parliament was prorogued. The matter was referred to a committee, which later recommended that he ought to have privilege, but ‘it was ordered that he should not be sett at libertie by a Serjeant at Mace, because he was imprisoned by order of judiciall court viz. the Kings bench: but that therefore he should be discharged by a writt’.⁵¹ Accordingly, a writ of *habeas corpus* was ordered, which led Francis Moore to declare in the House that provision of *habeas corpus* for Brereton ‘witnesseth that my lord chancellor will not infringe the privilege of the House’.⁵² Brereton did not, however, help matters, by then absenting himself from the House, which ran contrary to the argument for his release – that his service in the Commons was necessary. In 1610, Robert Berry (Ludlow) unsuccessfully asked for privilege for his son, who had been imprisoned for an altercation with the night watch. This son was supposedly also the servant of Berry senior – a somewhat curious state of affairs, and one, if it had been widely adopted, would surely have been seen as an abuse of privilege.⁵³ Also in 1610, the Commons took exception to a

⁵⁰ *CJ*, 1, p. 451: 18 July 1610; Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 638; *ibid.*, IV, p. 548.

⁵¹ Willson (ed.), *Bowyer Diary*, p. 35: 13 February 1606.

⁵² Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 299; *CJ*, 1, p. 269: 15 February 1606.

⁵³ *CJ*, 1, p. 408: 10 March 1610. Petyt gives a lively account of the affair that led to the claim: ‘This young man [...] struck the fire of his link amongst the watch, whereupon some of
[footnote continues ...]

message from the Lords, requesting a conference, whereby they could ‘impart unto us some things which they had received from His Majestie’. Members asserted: ‘that it was unusuall and derogatory from the ancient liberties of the Howse to receave a message from His Majesty by the higher Howse (as thoe they were interposed betweene the King and his subjects)’. The Commons declared their agreement to a conference if ‘theyre Lordships did desyre this meeting upon intent onely to communicate unto theyme theyre owne conceipts on anythinge which they had received from his Majesty, they were come hither with all willing readines to receve it’. On the other hand, ‘if theyre Lordships were employed herein as messengers onely to the Howse of Comons from his Majesty, [...] then this course was contrary to the ancient orders, liberties, priviledges, and graces of the Howse’.⁵⁴

One of the common types of privilege case in this period concerned the prosecuting of suits at law, against members of the Commons, or their servants, during the time of privilege. It should be noted that the situation for peers in relation to legal processes was somewhat different. ‘The person of a peer was "for ever sacred and inviolable" from arrest for debt or any claim arising out of property, it being an assumption in law that there would always be sufficient goods in the barony available for distraint in satisfaction of any debt’.⁵⁵ Hatsell notes that claims for privilege in the Commons to avoid

.....

them telling him that he might use better manners, he gave evil words, whereupon, being brought before the constable, he was examined whither he went. He said to his lodging, and being asked whom his lord was, he said his master, and whom his master, his lord. Well, quoth the constable, if you use no other answer, you are like to kiss the Counter. I would see, said he, the proudest constable in London send me to the Counter, and the constable did send him to the Counter. Both parties being heard, the House concluded that the constable had but done his duty and that the young man should pay the aforesaid 20s. and the constable’s charges during his custody within the serjeant’s house’: *Petyt*, 537/14, in Foster (ed.), *Proceedings 1610*, II, pp. 57-58.

⁵⁴ Gardiner (ed.), *Debates, 1610*, Old Series, lxxxi, p. 51: 11 June 1610.

⁵⁵ J. R. Tanner (ed.), *Tudor Constitutional Documents, A.D.1485-1603*, 2nd edn. (Cambridge: UP, 1948), p. 578; Maseres, *Cases and Records*, p. 4. Privilege for peers today is expressed in Standing Order 79: ‘The privilege of the House is that, when Parliament is sitting, or within the usual times of privilege of Parliament, no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House, unless upon a criminal charge or for refusing to give surety for the peace’: Leader of the House of Commons, *Green Paper on Privilege, 2012*, p. 77. This disparity may reflect the fact that, at the start of a parliament, the Speaker seeks the privilege for all members of the Commons

[footnote continues ...]

prosecutions of suits were not pursued strongly in the Tudor period: only one arose in the period of 125 years between Atwyll's case of 1478,⁵⁶ and the end of Elizabeth's reign. He observed that this must have been either because no such cases arose, or 'that if such prosecution had existed, the House of Commons should acquiesce in it'.⁵⁷ Hatsell goes on to suggest that:

The principal object of the House of Commons, in the preservation of their Privileges at this time [the Tudor period], was, the securing of the persons of the Members, and of their menial servants from arrests, and not the permitting of the attendance of the Members to be interrupted by the Summons of any inferior Court; but as to the inconvenience which might arise to Members, from suits being carried on against them during the time of Privilege, they do not seem to have adopted the idea in so large an extent, as was maintained after the accession of James I.⁵⁸

The usual practice was that if a member, or his servant, was involved in a trial of some sort, the Speaker would write a letter to the justices at the assizes, asking for the trial to be stayed, but not struck out. The 1607 case of Sir John Bennet (Ripon) gives a typical example:

My very good Lords, IT hath been informed in the Commons House of Parliament, that one John Denham hath taken down Two several Writs [... against ...] Sir John Bennett Knight[...] And because it is conceived, that it may be a Means to withdraw him, the said Sir John Bennet, from his Service here, or otherwise endanger the Success of the Cause; therefore the House hath thought fit, that he should have Privilege, for Stay of the Trial, as in other the like Cases hath been usual; and have commanded me to make known their Order and Resolution unto you; praying you will be pleased to stay the Proceeding accordingly, until the said Sir John may be freed of this Service, and be at Liberty to follow and attend his own Cause.⁵⁹

.....
 throughout that parliament, whereas there is no similar request from the lord speaker (formerly the lord chancellor) for the Lords.

⁵⁶ See Appendix 1, case 11.

⁵⁷ Hatsell, *Cases of Privilege*, pp. 122-23.

⁵⁸ *Ibid.*, p. 123.

⁵⁹ *CJ*, 1, pp. 342-43: 26 February 1607.

There was continuing ambivalence throughout the early Stuart period on the question of whether the *institutional* dignity of the House required privilege to be applied so as to prevent a member attending court, even if it might be in his *personal* interest to be given leave to pursue legal matters, in effect by waiving his privilege. In 1606, John Baxter (Derby) was given leave of absence ‘for some special Occasions urging him to attend at the next Assizes’, but ordered to return before the end of the session.⁶⁰ In 1607, Sir Thomas Holcroft (Cheshire) asked the House’s permission ‘to answer and to sue’. It was unclear ‘whether it were fit to dispense with Breach of Privilege’, but this, notwithstanding, leave was given for him to attend to his legal affairs.⁶¹ The case of Herbert Pelham (Reigate) illustrates the kinds of confusion that could arise when staying a legal action that might, or might not, be to the advantage of the member concerned. Pelham had become ‘embroiled in legal troubles’, possibly arising from an unsuccessful attempt to pay off his debts and ‘advance his grandchildren’ through legislation in the 1607 session. On 26 April, Pelham moved for parliamentary privilege, concerning a suit that was being heard in the exchequer, whereupon the serjeant-at-arms was sent to stay proceedings. On his return, however, the serjeant reported that the lawyers for the prosecution were determined to proceed if called upon by the court. There was a view that, because Pelham had recently given his consent to the hearing of the suit, and his opponents had retained counsel, the case should be allowed to proceed. The Commons remained unwilling to waive Pelham’s privilege, but informally asked Pelham’s opponents to halt proceedings, which they agreed to do. A little later, however, Pelham had evidently withdrawn his objections to the suit, as permission ‘for Mr. Pelham to proceed in the Exchequer notwithstanding a former stay’, was requested by Anthony Irby (Boston).⁶²

The Commons never did establish unequivocally whether a member might waive his privilege: for example, in 1610, Sir Francis Goodwin (Buckinghamshire) and Sir Jerome Horsey (Bossiney) were granted stays of trial, whereas, for Sir Timothy Whittingham (Thirsk), and Robert Askwith (York), it was ordered that they ‘may proceed to Trial,

⁶⁰ *CJ*, 1, p. 289: 25 March 1606.

⁶¹ *CJ*, 1, p. 378: 3 June 1607.

⁶² Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 630.

without Stay – they both assent’.⁶³ In 1621, the Commons decided that: ‘If a subpoena be delivered to any of the House sitting in parliament, he may challenge his privilege if he will, otherwise he may waive it if he please’.⁶⁴ Despite a reluctance to see a member waive his privilege, this was allowed to Sir William Cope (Banbury), in 1621. Cope was a colourful character, who had seemingly not paid the widow of Sir George Coppyn for land he had bought from her late husband. The Commons ordered that she might proceed to sue Cope, who had waived his privilege.⁶⁵ The issue of waiving privilege also arose in 1628, when Sir Simeon Steward (Aldeburgh), asked the House for five days’ leave, ‘as he has a subpoena *ad audiendum judicium* in the Star Chamber by Mr Attorney and he bound in a recognizance of 500 *l.* not to take benefit of his privilege by being a member of the House’. He explained that preparing for the case was lengthy and arduous, ‘then, so it might be deferred, I agreed not to claim any privilege of the House, and I was to enter bond not to claim any privilege. I refused it. The Attorney pressed me in it, and still I refused. He said he would move the Lords in it, so I yielded’. Sir Edward Coke was unimpressed: ‘There was a fault on all sides. The recognizance is upon record. He is now bound not to make any use of his privilege. A man elected cannot refuse; he must serve his trust. He can make no proxy; he sits for many a thousand. It was ill done to do this. Let us send for the recognizance’. As Johnson identifies: ‘in considering Steward’s request that he be permitted to stand trial through waiving his privileges, the Commons had to choose between defending its traditions and seeing a deputy lieutenant brought to book for misconduct’.⁶⁶ The House ordered that ‘that Sir Simeon Steward, notwithstanding his recognizance, ought to have the privilege of the House’.⁶⁷ There were further thoughts, and, on 30 April, three decisions were reached: (1) ‘he, that served the Subpoena upon Sir S. Steward, for the Hearing in the Star-chamber, to be sent for, to answer his Contempt in it’; (2) ‘Referred to the Committee for Privileges, to consider, what Course fit to be taken about Sir S. Steward’s Recognizance; and to report to the

⁶³ *CJ*. 1, p. 421: 26 April 1610.

⁶⁴ *The Anonymous Journal*, fol. 207r, in Notestein et al. (eds.), *CD 1621*, II, p. 235: 16 March 1621.

⁶⁵ *Book of Orders*, fol. 85, in *ibid.*, VI, p. 468.

⁶⁶ Johnson et al. (eds.), *CD 1628*, III, p. 123n.

⁶⁷ The composite narrative formed by collating BL Add. MS 50, Trumbull, Downshire Library and twelve similar MSS, in *ibid.*, pp. 124-25: 28 April 1628.

House, what fit to be done therein’, and (3) ‘Sir S. Steward enjoined by the House to attend the Service of the House, and not to attend the Hearing of his Cause in the Star-chamber’.⁶⁸

Cases that involved taking the goods or effects of a member in execution, or otherwise, did not solely arise in the 1628-9 parliament, although that was when they took on a wider significance. One case of this type arose in 1607, when Sir William Kingswell (Petersfield) was granted privilege in respect of goods seized by the sheriff of Hampshire, probably on behalf of his neighbour Sir Richard White.⁶⁹ Shortly afterwards, Thomas James (Bristol) was granted privilege after his horse had been requisitioned from an inn by the postal authorities. When told by the ostler that the horse belonged to an MP, the post servant said, ‘It makes no Matter [...] my Master will justify what I have done’.⁷⁰

The 1604 parliament ground to a halt, not because of any specific difficulty, but largely because James I lost patience over the issue of supply. Salisbury had suggested the *Great Contract*, as a way of putting the royal finances on an appropriate footing for the time. However, negotiations with the Commons over the detail proved unsuccessful, and on 6 December 1610, James, having finally run out of patience, brought the session to an end, with a dissolution on 9 February 1611.

The 1614 parliament

Following the dissolution of 1611, James avoided another parliament, until financial pressures gave the king little choice.⁷¹ It is possible to identify a change of attitude in the Commons during this period, whereby parliamentarians saw privilege as an entity that could not, and should not, be violated. As Jansson notes, the 1614 parliament ‘emphasized procedure in all their maneuvers as a protection of the privilege they claimed by custom and right due to the Lower House [...] self-consciously confirming the institutional identity of parliament, irrespective of whether institutions were in real

⁶⁸ *CJ*, 1, p. 890: 30 April 1628.

⁶⁹ *CJ*, 1, p. 343: 26 February 1607.

⁷⁰ *CJ*, 1, p. 352: 12 March 1607.

⁷¹ The marriage of princess Elizabeth in 1613 had associated costs, and the death of the prince of Wales in 1612 had meant that no marriage could be arranged, accompanied by a suitable dowry

jeopardy'. Perhaps less happily, she makes the apparently anachronistic suggestion: that 'the English parliament of 1614 [...] anticipated the concern with procedure and privilege that is evident throughout the sessions of the 1620s'.⁷² We can, however, agree with her general thrust: 'that the manner of proceeding in almost every kind of business in the House was questioned and defined; the reiteration of procedures peculiar to the Commons provided the collective membership with a conscious sense of identity as well as practical knowledge of its inner workings'.⁷³ A difficulty, as identified in *HoP*, was the failure of the inexperienced Speaker, Ranulph Crewe (Saltash), to control the House. Having only previously sat in the 1597-98 parliament, he was particularly susceptible to challenges by members who were more familiar with current procedure. In addition, he was frequently not treated with due deference or courtesy; for example, he was at times jostled in the rush to leave the chamber at the end of a day's business.⁷⁴

Privilege cases did arise during the short course of this parliament. An internal assault on the dignity of the House and one of its members occurred when Sir John Semmes (Maldon) and Sir Henry Widdrington (Northumberland) were members of a committee on undertakers, chaired by Sir Roger Owen (Shropshire). They drew attention in the House to violent abuse that Owen had suffered, although Owen was himself loath 'to name any man till he was compelled by the House'. Sir William Herbert (Montgomeryshire) then confessed that he was the perpetrator of the abuse. Despite some concerns that such disorder had become more common, and that the Speaker might even be in danger of being 'plucked' from his chair, the House was inclined to view Herbert's confession as a mitigating element in any punishment that might be imposed. In the end, he was allowed to apologise from his place in the House, rather than at the Bar. It then emerged that Sir Robert Killigrew (Helston) had also laid his hand upon Owen and the chair, and 'said that he would see him out of it, and told him he should put no more tricks upon them, with other hot words'. This was thought worthy 'of the deepest censure of the House', but Killigrew's acknowledgement of his fault counted in his favour, and Owen

⁷² Jansson (ed.), *Proceedings (Commons) 1614*, Introduction, xiii.

⁷³ *Ibid.*, xx-xxi.

⁷⁴ Thrush and Ferris (eds.), *Commons 1604-29*, III, pp. 734-35.

thereupon pardoned Killigrew, who, like Herbert, was not required to apologise further at the Bar of the House.⁷⁵

The care taken by the Commons to observe due forms in matters of privilege has already been noted in claims that arose in the 1604 parliament. In a later case, Sir William Bampfield (Bridport) was elected to parliament in 1614 while simultaneously pursuing a chancery suit, for which lord chancellor Ellesmere committed him to the Fleet for contempt of court. The Commons ordered a writ of *habeas corpus* ‘forthwith [...] according to the ancient privilege and custom in that behalf used’, and the warden of the Fleet delivered Bampfield up.⁷⁶ The assertion that this was ‘by ancient privilege and custom’ is interesting, in that the Commons only began independently to order the release of its members in the mid-Tudor period. Nevertheless, the subsequent case of Sir Henry Stanhope (East Retford) would show that the Commons were careful to respect the qualifications on privilege. In 1628, Sir John Stanhope (Leicester), Sir Henry’s uncle, moved for the latter’s privilege, as he had been: ‘imprisoned by the lords [of the council], neither for treason, felony, or refusing the surety of the peace’. Debate then arose ‘whether a *habeas corpus* should be granted him to come to a hearing in the House, or whether he should be fetched by the serjeant with the mace. The latter was resolved upon: to come himself and his keeper’. It was noted he had been committed by a warrant from the council, for having issued a challenge to a duel.⁷⁷ When the warden of the Marshalseas was brought to the Bar of the House, he said that he acted on the authority of ‘a warrant, dated 4 May, where the cause was expressed: breach of the peace and contempt of the king’s command [forbidding a duel]’.⁷⁸ John Pym (sitting then for Tavistock) argued for a neat solution: ‘That he thinks the warrant from the lords for commitment of Sir H. Stanhope, being for the peace, is no breach of parliament[ary privilege]. Doubts whether this House can take security for the peace or no. We must commit him [...] to some prison, as the Tower. He is of the opinion we must remand him’. In other words, the Commons could not unconditionally free someone held for

⁷⁵ *Anonymous Diary*, MS E237, Kenneth Spencer Research Library, in Jansson (ed.), *Proceedings (Commons) 1614*, pp. 231-32: 13 May 1614.

⁷⁶ *CJ*, 1, p. 464: 14 April 1614; *CJ*, 1, p. 466: 16 April 1614.

⁷⁷ Johnson et al. (eds.), *CD 1628*, IV, pp. 233, 236: 3 May 1628.

⁷⁸ Harleian MS. 5324, fol. 36v, in *ibid.*, pp. 243-44: 3 May 1628.

breach, or potential breach, of the peace, but could take him into their own custody, thereby preserving the veneer of privilege. The warden was then ordered to take Stanhope back to the prison, but to return with him the following day. This gave the Commons time to consider the precedents, and to decide whether to take action against Richard Herbert, who had sent the challenge to Stanhope, which may have been seen as an attempt to molest him.⁷⁹ Stanhope was freed when he gave security that he would not breach the peace.⁸⁰ It is not clear whether he returned to the Commons.⁸¹

The 1614 parliament was blighted by difficulties over the levying of impositions by the king, and perceived slights on the Commons' privileges, in particular the claim by the bishop of Lincoln that impositions were a matter for the royal prerogative alone. James rejected a suggestion that he give up impositions in return for a grant of supply, which would have left him worse off financially.⁸² On 4 June, the Commons went so far as inform James that until 'it shall please God to ease us of these impositions wherewith the whole kingdom doth groan, we cannot without wrong to our country give Your Majesty that relief which we desire'.⁸³ In the end, James I lost his patience at the concentration on prerogatives and privileges. He therefore dissolved the Commons, who had sat for barely two months, and had passed no legislation; four of the most outspoken members were sent to the Tower.⁸⁴ Given the political obstacles facing parliament in 1614, the loss of control by the Speaker, and the ineffectual leadership of the official government spokesmen in the Commons, it is difficult to see how even a more experienced Speaker than Crewe could have prevented the early dissolution of what came to be characterised as the 'addled parliament'.⁸⁵ James expressed his frustration to the Spanish ambassador:

The House of Commons is a body without a head. The members give their opinion in a disorderly manner; at their meetings nothing is heard but cries, shouts and confusion. I

⁷⁹ *Diary of Edward Nicholas, Esq.*, S.P. 16/97, fols. 59-60, in *ibid.*, p. 265.

⁸⁰ *CJ*, 1, p. 894: 8 May 1628.

⁸¹ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 415.

⁸² The day before the dissolution, Sir Edwyn Sandys had warned that the Commons were 'not to have the liberties of the House run through our fingers': *Anonymous Diary*, in Jansson (ed.), *Proceedings (Commons) 1614*, pp. 433-34: 6 June 1614.

⁸³ *Ibid.*, p. 425: 4 June 1614.

⁸⁴ Thrush, *Commons 1604-29*, I, xlii.

⁸⁵ Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 735.

am surprised that my ancestors should ever have permitted such an institution to come into existence.⁸⁶

The 1621 parliament

James I reluctantly had to call a parliament in 1621, because of fresh calls on the royal finances, despite some rationalisation in the period since the 1614 parliament had been brought to an end. These new requirements arose chiefly in relation to a moral, financially significant requirement for James to support his daughter and son-in-law, in their attempts to regain the Palatinate, and possibly the throne of Bohemia. The parliament started well enough, with the Commons freely voting two subsidies. A number of privilege cases were processed, although not always without controversy. One arose out of a quarrel between members, which occurred at a meeting of the grievances committee. During an argument with Clement Coke (Dunwich), Sir Charles Morrison (Hertfordshire) ‘fell into an old rhyme [...] and he repeated the Two last Verses, of "Asses and Glasses"’. As *HoP* records, Coke ‘took it ill, the Mentioning of Judges riding upon Asses’, which was an apparent aspersion on his father, Sir Edward Coke, chairman of the committee. Outside the committee, Clement Coke hit Morrison, who in turn obtained a sword from his servant, and drew on Coke in Westminster Hall. Both were suspended from sitting, although there was a general wish to play down the affair. Coke was initially lodged in the Tower, but out of respect to his father, permitted to remain in the charge of the latter. In the end it was ordered that: ‘Clement Coke, for the offence committed to the house in strykyng of Sir Charles Morryson with his hand on Munday sennight on the parliament steeres, was to remayne at the pleasure of the house. But for the repayre of the particular party that was stroke, that resteth for hereafter. And called into the house, did on his knees at the barre receyve his Judgment accordyngly’. Morrison subsequently declared that ‘nothing was ever so great an honour to me as to be chosen by my country to serve here’, and pleaded that he had ‘never intended the least provocation to Mr.

⁸⁶ Gardiner, *History of England (1883 edn.)*, II, p. 251.

Coke'. Both were restored to their places, and Morrison waived his right to an apology from Coke.⁸⁷

The Commons continued to be assiduous in acting against those who traduced or threatened members outside parliament. In 1621, Sir Henry Lovell (Bletchingley) had spoken against one Henry Dorrell in a debate; when Dorrell heard this, he threatened Lovell with imprisonment 'if not during the Parliament yet presently after'. Summoned to appear at the Bar of the House, Dorrell at first denied having made the threat, but when Lovell produced witnesses, Dorrell was committed to the serjeant's custody, and ordered to acknowledge his fault before the House, or else be sent to the Tower.⁸⁸ Lovell himself incurred the censure of the House, when, in 1624, he was accused of a variety of misdemeanours in procuring his own election, as well as not having taken communion. The Commons committed him to the Tower, but after apologising two days later, he was released.⁸⁹ Also, in 1621, Sir Francis Seymour (Wiltshire) complained that a common informer had threatened that 'he would have out a supersedias against Sir Edward Francis [Steyning], notwithstanding he is a member of this House, and that he cared not a fart for the Parliament'. The informer was ordered to appear, but did not submit lightly, at first 'denieth with damnable oaths that he ever said such words', but eventually confessed to the offence.⁹⁰

Hatsell describes a group of cases where the main concern was to ensure that privilege of parliament protected members or their servants, if they had been committed to prison by the privy council, or 'by any court of justice, or other magistrate' in the absence of just cause, or due process of law. However, as noted earlier, it was not possible to escape legal processes for serious crimes, such as treason or felonies. In 1621, the Commons were reminded by serjeant Ashley that 'the King's prerogative is that he may sue for whom he will, specially in parliament', even though at least one member, John Carvile (Aldborough), somewhat stretched matters in thinking that: 'At the King's

⁸⁷ *CJ*, 1, p. 616: 9 May 1621; *CJ*, 1, p. 619: 11 May 1621; *John Smyth*, fol. 102, in Notestein et al. (eds.), *CD 1621*, v, p. 372: 9 May 1621; Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 433.

⁸⁸ Tyrwhitt (ed.), *CP 1620 and 1621 (Nicholas)*, I, pp. 31-32; *CJ*, 1, p. 520: 13 February 1621.

⁸⁹ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 167.

⁹⁰ *Nicholas Diary*, in Notestein et al. (eds.), *CD 1621*, I, pp. 348-50: 28 April 1621.

suit a parliament man cannot be sued for capital crimes. [...] But capital crimes must be punished here, for this is the highest court'.⁹¹ Carvile was wrong, although he was perhaps a forerunner of those who, in 1649, decided that the Commons had the right to put even the king on trial for 'capital crimes'.

The warden of the Fleet had figured predominantly in the Shirley case. Difficulties with the warden arose again in March 1621, during a spat between chancery and the court of wards. The latter had ordered that a Mr Fuller and Sir John Hall, who were involved in litigation, should be held in the Fleet prison. Both men were given leave by the lord chancellor to attend the Commons, 'to open their grievances'. However, although the warden of the Fleet gave liberty to Hall, he refused either to allow Fuller to instruct counsel in person, or to release him to attend the Commons, which was a breach of privilege. As Sir John Finch (Canterbury) observed, the lord chancellor (his own patron) was 'as much discontented with [this] as any'. The warden of the Fleet countered, by complaining that Sir John Hall had made two 'escapes' from him, 'and the Recovery cost Blood', but he was nevertheless ordered to give liberty to both men 'to go abroad to solicit [i.e. plead their affairs]'.⁹² When the Commons returned to the Hall case some two weeks later, they ordered: 'That this House conceiveth it fit, that both Sir John, and Tho. Fuller, Clerk, should be absolutely freed from their Imprisonment; and the Causes be dismissed out of both the said Courts; and either of the said Parties to take his Remedy at the Common Law'.⁹³

The records for 1621 include some general statements, in relation to court attendance and stays of legal processes. The Commons had first ordered that: 'Where any Member of the House hath Cause of Privilege, to stay any Trial, a Letter shall issue, under Mr. Speaker's Hand, for Stay thereof, without further Motion in the House'.⁹⁴ The issue was revisited a little later, when the committee for privileges reported 'that they have found, in the King's Time, 2d, 3d, and 4th Sessions, several Precedents, upon Motions and Orders in the House, and Letters thereupon written to the Justices of Assise, for Stay of

⁹¹ *The Anonymous Journal*, fols. 483-84, in *ibid.*, II, pp. 510, 512: 10 December 1621; *Z Diary*, fol. 46r, in *ibid.*, III, p. 231: 11 December 1621.

⁹² *CJ*, 1, pp. 534-35: 2 March 1621.

⁹³ *CJ*, 1, pp. 558-59: 16 March 1621.

⁹⁴ *CJ*, 1, p. 525: 17 February 1621.

Trials for Members of the House. These recorded in the Journal Book. That it belongeth to the Clerk to make them'.⁹⁵ This led to an Order:

Diverse Members of the house of Commons having tryalls at the next Assizes, 'twas Agreed that the Course is and hath been allwayes to defer the Tryall but not by way of restraint and inhibicion to the Judges, for that were against Law, since the Stat. of 2 E. III, Ca. 8 provydes, quod neque propter Sigillum Magnum neque partum differatur Ius [loosely translated: justice under the great seal is not to be deferred]. But the Speaker directs a Letter to the Justices of Assize in the Name of the house, to request them to defer the tryall for that present. But a warrant by way of Inhibicion may be directed to the party in the suite to restrain him from proceeding, if the other party which is a member of the Parliament will require it.⁹⁶

Before an adjournment from 4 June until 14 November 1621, there was a debate over whether privileges held during such longer adjournments. As a result, 'It was ordered that if any member of this House or his servants be distrained, arrested, served with a citation or sued any way during the time of this recess, Mr Speaker shall have authority to send for the gaoler, bailiff, sheriff, prosecutor or party and require them to free and discharge them'.⁹⁷ In other words, the outgoing Speaker could now take steps to free a member on his own initiative, using the authority of this enabling Order, rather than needing to have a direct resolution of the House in respect of an individual member.

The 1621 parliament was also affected by the exposure of exploitation and abuses of parliamentary privilege, as described in chapter five below, although these do not seem to have led to significant involvement of the crown. However, in terms of relationships between the king and the Commons, after the second session of parliament began, matters began to turn very awkward: in early December, worried about a possible Spanish match, the Commons petitioned James I for prince Charles to be 'timely and happily married to one of our own religion'.⁹⁸ The king rejected any expression of opinion on the marriage

⁹⁵ *CJ*, 1, p. 536: 3 March 1621.

⁹⁶ *Minnesota Notes*, in Notestein et al. (eds.), *CD 1621*, VI, p. 432: 3 March 1621

⁹⁷ *The Anonymous Journal* fol. 381r & v, in *ibid.*, II, pp. 417-19; 1 June 1621. This issue arose again, in 1625: *CJ*, 1, p. 804: 6 July 1625.

⁹⁸ Conrad Russell, 'The Foreign Policy Debate in the House of Commons in 1621', *HistJ*, 20 (03) (June 1977), 289-399, p. 289.

of his son as ‘committing of high treason’, by ‘foul-mouthed orators of the House of Commons’, in direct breach of his command on the matter. He concluded: ‘And although we cannot allow of the style, calling it, Your ancient and undoubted Right and Inheritance; but could rather have wished, that ye had said, That your Priviledges were derived from the grace and permission of our Ancestors and Us; (for most of them grow from Precedents, which shews rather a Toleration than Inheritance)’.⁹⁹ Subsequent discussion then led the Commons to agree a *Protestation*, which was entered in their *Journal* on 18 December, claiming that:

The Liberties, Franchises, Priviledges, and Jurisdictions of Parliament, are the ancient and undoubted Birth-right and Inheritance of the Subjects of England, and that [...] every Member of the house of Parliament hath, and, of right, ought to have freedom of speech, to propound, treat, reason, and bring to conclusion the same.¹⁰⁰

James’s reaction was dramatic: he summoned the privy council, six judges, and the clerk of the Commons, who was ordered to bring his journal. The king then said that he *did* confirm and preserve the Commons’ privileges, whether derived from statute or custom, but that the *Protestation*, ‘so contrived and carried as it was, his Majesty thought fit to be rased out of all memorials’. When the clerk appeared, ‘His Majesty did [...] in full assembly of his Council, and in the presence of the judges, declare the said Protestation to be invalid, annulled, void, and of no effect. And did further, *manu sua propria* [with his own hand], take the said Protestation out of the Journal Book of the Clerk of the Commons house of Parliament’.¹⁰¹ As in 1614, punishments followed.¹⁰² A little later, James, in a ‘most gracious manner’, justified his removal of the offending pages. Not untypically, he expressed the view ‘that he never meant to deny the house of commons

⁹⁹ Rushworth, *Historical Collections*, I, p. 52: 11 December 1621; Manning, *Lives of the Speakers*, p. 291.

¹⁰⁰ Rushworth, *Historical Collections*, I, p. 53: 19 December 1621.

¹⁰¹ *Ibid.*, I, p. 54: 30 December 1621.

¹⁰² Coke (sitting then for Liskeard) was sent to the Tower, with William Hakewill (sitting then for Tregony), and Sir Robert Phelps (Bath). John Pym (Calne), who had criticised James I for his leniency towards catholics, was placed under house arrest. Thomas Crewe (Northampton), Sir James Perrot (Haverfordwest), Sir Nathaniel Rich (East Retford), and Sir Dudley Digges (Tewkesbury) were sent to Ireland: Russell (ed.), *Unrevolutionary England*, p. 81.

any lawful privileges that ever they had enjoyed; but whatsoever privileges or liberties they had by any law or statute, the same should be inviolably preserved unto them; and whatsoever privileges they enjoyed by custom, or uncontrolled and lawful precedent, his maj. would be careful to preserve'.¹⁰³ Although a number of cases during this period had spawned a more consistent and coherent approach to privilege matters, this last episode represented a significant blow to the Commons, and on 6 January 1622, the king dissolved a parliament whose disastrous sitting had lasted less than a year.

The 1624 parliament

By 1624, James had become more conciliatory, mainly out of yet further necessity to secure supply, so that his speech at the opening of parliament in February included the following typical mix of concessions and qualifications:

For Matters of Privileges, Liberties, and Customs, be not over-curious;¹⁰⁴ I am your own kindly King, ye never shall find Me curious in these Things; therefore do what you ought, and no more than your lawful Liberties and Privileges will permit, and ye shall never see Me curious to the contrary: I had rather maintain your Liberties than alter them in any Thing; shew a Trust in Me, and go on honestly, as you ought to do, like good and faithful Subjects; and what you shall have Warrant for, go on; and I will not be curious, unless you give Me too much Cause.¹⁰⁵

On the larger stage, there were attempts in meetings with potential leaders of the Commons to stir up bellicosity against the Spanish, who had humiliated Prince Charles in the matter of the 'Spanish match'. Three subsidies were voted for military operations, with three more promised for the autumn. Moreover, privilege for an individual member was rarely removed from an intent to safeguard privilege for the institution. This can be seen very clearly, when Sir Edward Giles (Totnes) successfully requested privilege for Sir

¹⁰³ William Cobbett, *The Parliamentary History of England, from the Earliest Period to the Year 1803* ... 36 vols. (London: Longmans, 1806-1820), I, p. 1362.

¹⁰⁴ *Curious* is used in the sense of 'anxious, concerned, solicitous': *OED Online*.

¹⁰⁵ *LJ*, 3, pp. 209-10: 19 February, 1624.

John Eliot (sitting then for Newport, Cornwall), to stay a trial at the Exeter assizes.¹⁰⁶ Some argued that suits for debt should not be amenable to privilege.¹⁰⁷ However, Eliot, present in the Commons at the time, then started a ‘lengthy and unexpected’ debate, characterised as his first great *coup de théâtre*.¹⁰⁸

That we had lost the freedom of ancient Parliaments. The jealousy between us and the King the cause, and our want of secrecy the cause of that jealousy. Some, perchance, that were instruments in that discovery did but serve the turn of others that had worse ends than themselves. If there were not false glasses between us and the King, our privileges and his prerogative would stand well together. To consult and deliberate, do not include only restraint of his supreme power. [...] We are the representative body of the kingdom, the King of us, and all that we do is both under him and for him. So it concluded with a 3-fold motion: (1) that some general obligation might be invented of trust and secrecy; (2) that his Majesty would not respect such whisperers and thinks the enemies to parliaments could not be any good servants to him; (3) to frame a petition for the privileges.¹⁰⁹

Sir Edward Nicholas (Winchelsea) records in his diary: ‘He [Eliot] would have us to seek to the King for our particular sureties, the promise we have had from the King being but in general’.¹¹⁰ Eliot might have thought his words would resonate with those favouring a restatement of privilege, and certainly Sir Francis Seymour was in favour of revisiting the contentious *Protestation* of the previous parliament. John Pym (sitting then for Chippenham), however, realised that a successful parliament depended on avoiding such a debate, and noted in his diary that ‘Divers were afraid this motion would have put the House into some such heat as to disturb the great business’. The ever-eloquent Phelips warned against stirring up a hornets’ nest over past matters, and successfully recommended remission to a committee, after which the matter was quietly dropped.¹¹¹

¹⁰⁶ *CJ*: 27 February, 1624 (second scribe). Giles returned to the matter on 2 March, when the House decided that a letter should go from the Speaker, staying any suit or trial against Eliot: *Diary of Edward Nicholas*, fol. 39v, in Baker (ed.), *Proceedings 1624*: 2 March 1624.

¹⁰⁷ *Diary of John Holles*, fol. 83v in *ibid.*: 27 February 1624.

¹⁰⁸ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 184.

¹⁰⁹ *Diary of John Pym*, fol. 8v, in Baker (ed.), *Proceedings 1624*: 27 February 1624.

¹¹⁰ *Diary of Edward Nicholas*, fol. 28v, in *ibid.*: 27 February 1624.

¹¹¹ *Pym*, fol. 8v in *ibid.*: 27 February 1624.

Another privilege case showed that freedom from molestation, of person and goods, applied not just to members of both Houses and their servants, but supposedly extended to those having business with parliament. So, in 1624, the matter was raised that the Master of the Feltmakers, who came to ‘prefer’ a bill in the Commons, had been taken by a serjeant, and committed to the Fleet prison. Despite offering a huge bond of £2,000, the Master was detained.¹¹² On 12 May 1624, a petition was presented to the Commons, asking that those who had been imprisoned should be ‘enlarged’ [released from confinement], in order to allow them to present their bill to the House. The issue, of whether privilege had been breached, was referred to the committee for privileges.¹¹³ However, a couple of weeks later, the committee reported that ‘they had no time to examine it [the petition]’, and it was resolved ‘to let it rest in statu quo, till next Session’.¹¹⁴ During the course of the Rolle case, the Commons clearly asserted that any people having business with the Commons, for example, the merchant-petitioners, were entitled to privilege, because parliament might need them to appear in person, and they should not be diverted from such a summons by extraneous concerns.¹¹⁵ This initiative was, nevertheless, challenged by Charles I, in his speech at the dissolution of 1629, so that the issue remained open.

Before proroguing parliament on 29 May 1624, James remained concerned about his own position, when he ‘vowed, that all the Subsidy (for which He heartily thanked them), though it had not been so tied and limited, shall be bestowed that Way [to wage war on Spain]. His Majesty remembered them, that nothing was given to relieve His own Wants: which He expects at the next Session, in the Beginning of Winter’. However this parliament never resumed, being automatically dissolved when James I died on 27 March 1625.

The 1625 parliament

Charles I was some ten years younger on accession to the English throne than his father had been, and self-evidently without the benefit of any prior experience as a ruler, such as

¹¹² *CJ*: 14 April 1624 (second scribe).

¹¹³ *CJ*: 12 May 1624 (second scribe).

¹¹⁴ *CJ*: 28 May 1624 (second scribe).

¹¹⁵ See pp. 229f. and pp. 239f. below.

James VI and I had uniquely enjoyed, even though, as prince of Wales, Charles had attended the House of Lords from 1621 onwards. Kishlansky relates varying views of Charles as a monarch:

In the mildest version, Charles was ineffectual and incompetent. [...] He was ‘the shy man afraid of seeming shy’ who receded in the presence of powerful personalities like Buckingham, Laud, and Strafford and was putty in the hands of his strongwilled wife with whom he was sentimentally in love’.[1] He understood little of the art of government at which he remained an aesthete rather than a connoisseur despite a quarter century of rule. In the strongest version, Charles was a man of blood, a tyrant bent on subverting the constitution of his kingdom, destroying the liberties of his subjects and establishing a continental style absolutism. In this guise he was ‘perfidious, not only from constitution and from habit, but also on principle’.[2] He was vindictive toward his opponents and ruthless toward his enemies, ‘a stubborn, imperious and dangerous man’ who ‘inspired fear’.[3]¹¹⁶

Eliot, perhaps surprisingly, identified several positive qualities in Charles: ‘his pietie, his religious practise & devotion, [...] the innate sweetnes of his nature, the calme habit & composition of his minde: [...] the order of his house, the rule of his affaires’.¹¹⁷ Even then, Charles’s qualities of loyalty and bravery had unintended, unwelcome consequences, for example in his protection of Buckingham, and his later unwillingness to disown the actions of the customs collectors in the Rolle case. However, this was an age of personal monarchy, and the new king expected to be obeyed: ‘Charles thought purely in terms of descending authority, never ascending authority’.¹¹⁸ Sommerville suggests that Charles believed that he was accountable only to God, and not his subjects, although he might, as with his justifications of the dissolutions of 1625 and 1626, choose

¹¹⁶ Mark Kishlansky, ‘Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights’ Case’, *HistJ*, 42 (1) (March 1999), 53-83, pp. 53-54. The cited passages are from: [1] J. P. Kenyon, *The Stuarts. A Study in English Kingship* (London: Batsford, 1958), p. 64; [2] Thomas Babington Macaulay, *Critical, Historical, and Miscellaneous Essays and Poems* (London: s.n., 1885), III, p. 375; [3] Michael B. Young, *Charles I* (Basingstoke: Macmillan, 1997), pp. 49-50.

¹¹⁷ Grosart (ed.), *Apology & Negotium Posterorum (Eliot)*, I, pp. 39-40.

¹¹⁸ Young, *Charles I*, p. 81.

to provide explanations.¹¹⁹ Another view suggests that Charles was neither naïve nor a tyrant; rather that he was principled and astute, although dogged by bad luck and his own commitment to maintain moral principles come what may.¹²⁰ Any negative aspects to Charles's character would seem likely to have exacerbated difficulties over key issues, such as religion, supply, the place of privilege in the constitution, and the nature of government: weakness would be exploited by the Commons, whereas perceived tyrannical or absolutist tendencies would inevitably lead to a contrary reaction. Moreover, it would appear that Charles did not have his father's carefully tuned antennae and supple skills of statecraft when matters became problematic. Difficulties would become apparent when his first parliament assembled in May 1625, with the royal finances under particular pressure. There was the expenditure on Charles's marriage to Henrietta Maria; costs for James I's funeral; the expenses associated with commitments, or near commitments, to military activity on the continent, and subsidies to England's allies; as well as inefficiency and leaching of funds through corruption, or incompetence. Despite a desperate need for supply, the parliament only lasted until August, having transacted no significant business, some giving it the title of the 'useless parliament'.¹²¹

Even so, privilege referrals do seem to have been quite numerous, as Sir George More observed that he had 'above twenty petitions about privileges'; he was ordered to 'bring them sealed up, and delivered to the Clerk; with a Note of the Order, wherein they were received'.¹²² One particular privilege case concerned Sir William Cope, who had been arrested for debt a month after the prorogation of James I's last parliament, and placed in Oxford castle, on a suit from Lady Coppyn to recover £3,000 – not the first litigation involving these two parties.¹²³ There were petitions and counter-petitions at the start of the parliament, but on 22 June 1625, Cope's petition for privilege was 'by a general voice

¹¹⁹ J. P. Sommerville, *Politics and Ideology in England, 1603-1640* (London: Longman, 1986), p. 34.

¹²⁰ A line taken in Kevin Sharpe, *The Personal Rule of Charles I* (New Haven (CT): Yale UP, 1992).

¹²¹ *The Useless Parliament*. Susie Dent (ed.), *Brewer's Dictionary of Phrase & Fable*, 19th edn. (London: Chambers Harrap, 2013).

¹²² *CJ*, 1, p. 807: 8 July 1625.

¹²³ The 1621 case involving Cope is described on p. 129 above.

rejected'.¹²⁴ On the next day, Robert Hitcham (sitting then for Orford) reported that the privileges committee found that Cope was taken in execution 33 days after the end of the last parliament, outside the now-conventional time limit for privilege to apply, of 16 days before and 16 days after a session.¹²⁵ However, as a prisoner, he had not been eligible for election anyway:

A man in exequution is not eligible, for though he come out by Habeas Corpus, the law intendes him to bee a prisoner, and not able to serve, and therefore, although he should have payd the debt and bene discharged before the appearance, yet must ther bee a new election; for that which was voyde att first, cannot be made good by any post fact right. Soe priviledge and elegibility are convertible; whatsoever may be chosen ought to have priviledge; the law gives no priviledge where the creditor is deprived of all further remedye, as in this case, which is not provided for by the Stat. 1 Jacob.¹²⁶

Cope was 'discharged the House, and a warrant issued for a new election'; Cope did not sit again in parliament.¹²⁷ A further case involved Arthur Bassett, who had been elected for Fowey, despite being in prison on mesne process, as he could not raise the necessary sum for bail in respect of a huge debt. Sir John Eliot presented a petition from Bassett, which was referred to the committee for privileges; his case was further raised by John Delbridge (Barnstaple).¹²⁸ A few days later, the committee reported back, and the House decided that Bassett should have privilege, as he had been arrested on mesne process, not 'true debt'. As such, he was: 'well elected. No Common Law, nor Statute Law against it'.¹²⁹ Nevertheless, there were voices against granting Bassett privilege: 'If this be allowed, wee shall empty the prisons and fill the Parliament with such members as will take more care of how to shift off their owne debts then to provide good lawes for the

¹²⁴ *CJ*, 1, p. 800: 22 June 1625.

¹²⁵ The period of privilege from arrest for a member going to, or returning from, parliament had been established in Sir Vincent Skinner's case (see p. 57 above) at sixteen days before and after each session: BL Add MS 48119, in Foster (ed.), *Proceedings 1610*, II, pp. 306-8: 30 October 1610.

¹²⁶ *Fawsley Manuscript*, in Gardiner (ed.), *CD 1625*, p. 15.

¹²⁷ *Draft Journal*, HLRO MS 3409, fols. 132-33, in Jansson and Bidwell (eds.), *Proceedings, 1625*, pp. 227-28: 23 June 1625.

¹²⁸ *Draft Journal*, HLRO MS 3409, fol. 141, in *ibid.* p. 257; *CJ*, 1, p. 401: 4 July 1625.

¹²⁹ *CJ*, 1, p. 806: 8 July 1625.

Commonwealth'.¹³⁰ At the same time, as Sommerville records, it was argued that if all who were committed for debt were rendered ineligible to serve as MPs, political opponents might initiate a process involving a spurious debt to render the other party ineligible. Granted, privilege could be abused, but was 'nevertheless a vital safeguard of Parliament's proper functioning and consequently of the subject's freedoms'.¹³¹

A failure to grant supply arose largely because the Commons were more concerned with high politics and grievances. The upshot was that they voted an inadequate two subsidies, and drew up a bill that would have given the king tonnage and poundage for only one year to 25 March 1626, despite reassurances by the solicitor general, Robert Heath (East Grinstead) that the king would address their grievances.¹³² The Commons' attitude had been hardened by the knowledge that tonnage and poundage had continued to be collected since the death of James, without parliamentary authority, albeit Charles's shortage of funds had left him little choice in the matter, and, further, he might have expected the usual retrospective authority to collect those duties to be backdated to his accession. The tonnage and poundage bill moved from the Commons to the Lords, where it received a first reading, on 9 July, but was then allowed to 'sleep', probably because the more loyal Lords were unhappy at the time-limited nature of the grant. In the Lords' list of bills from the session, it is shown as having received only a first reading.¹³³ Contrary to certain histories, it is therefore clear that Charles I was *not* authorised to collect tonnage and poundage in 1625, even for just one year. The collection of the duties without parliamentary authority would in fact lead, in 1628, to a refusal by some merchants to pay up, the consequent impounding of their goods, and, in particular, a claim for privilege for his goods by the MP, John Rolle. The Commons resolved: 'to draw a Petition to his Majesty, comprehending the Heads of all those Things, whereof the House shall think fit

¹³⁰ Gardiner (ed.), *CD 1625*, p. 61.

¹³¹ Sommerville, *The Liberties of the Subject*, p. 62.

¹³² *CJ*, 1, p. 800: 22 June 1625. Russell has it that John Rolle, Sir Edward Coke (elected for Norfolk in 1625 and 1626, and Buckinghamshire in 1628), and Sir Robert Phelps (Somerset) were behind this limitation, leading to disfavour with the king and the seizure of Rolle's goods in 1628: Russell, *Crisis of Parliaments*, p. 300. *HoP* cautions that 'it cannot automatically be assumed that Rolle was already becoming involved in issues which were to dominate his career three years later, such as Tunnage and Poundage': Thrush and Ferris (eds.), *Commons 1604-29*: VI, p. 87.

¹³³ *LJ*, 3, p. 490: 12 August 1625.

to inform his Majesty'; the committee charged with the task presented the outcome on 8 August.¹³⁴ Charles tried to expedite matters with a message, delivered by the chancellor on 10 August, which acknowledged the Commons' good intentions, but 'desired them to consider his Affairs require a speedy Dispatch [and] desireth a present Answer about his Supply. If not, will [...] make as good Shift for his present Occasions, as he can'.¹³⁵ Sir Robert Phelips (sitting then for Somerset) clearly recognised the subtext in the message: if adequate supply was not granted, the king would use the royal prerogative of action in an emergency, which Phelips recognised as a 'dangerous precedent'.¹³⁶ A further committee was set up, to consider the response to the royal message.¹³⁷ What resulted was outwardly loyal and dutiful in tone, but with a meatier core, as seen in this extract:

We are all resolved, & doe heerby diclare, that we will ever continue most loyall & obedient subjects to our most gracious Sovereigne, K[ing] Charles, & that we wilbe readie in convenient time, & in a parliamentarie waie, freelie and dutifullie to doe our utmost indeavor to discover & reforme the abuses, & greivances of the realme & state, & in the like sort to afford all necessarie supplie to his most excellent majesty upon his present, & all other his just occasions and designes.¹³⁸

Having somewhat threateningly been made aware that supply would only be granted in a 'convenient time', and 'a parliamentary way', and concerned about the nature of the Commons' grievances, not least the opposition to the duke of Buckingham, Charles had had enough. The parliament, which had begun business sessions in the Commons on 21 June 'in a mood of grudging goodwill', was now abruptly dissolved on 12 August, 'in a mood of resentful bewilderment'.¹³⁹

¹³⁴ *CJ*, 1, p. 810-12: 5, 6, 8 August 1625.

¹³⁵ *CJ*, 1, p. 813: 10 August 1625.

¹³⁶ Phelips was a man whose gifts as an elegant orator earned him both respect and enmity. In earlier parliaments he had opposed the Spanish match, becoming 'pre-eminently the leader of the opposition, in full cry against Buckingham, insisting on withholding supply until grievances were addressed, attacking impositions, and railing against court toleration of Catholics', and someone who brought 'a convincing, principled, albeit pragmatic, realism' to issues: Thomas G. Barnes, 'Phelips, Sir Robert (1586?- 1638)', *ODNB*.

¹³⁷ *CJ*, 1, p. 813: 10 August 1625.

¹³⁸ Gardiner (ed.), *CD 1625*, pp. 125-26.

¹³⁹ Kenyon (ed.), *Stuart Constitution*, p. 59.

The 1626 parliament

Desperate for money grants, Charles I was soon obliged to call a fresh parliament, which began on 6 February 1626, and, as was often the case, some routine privilege cases were brought up early in the Commons' first session. Privilege also surfaced as a serious issue in the Lords, but in their case, matters were far from routine. They had been outraged by Charles's attempts to neutralise Buckingham's fiercest critics, when he denied John Williams (bishop of Lincoln) his proxies, and imprisoned the earls of Bristol and Arundel.¹⁴⁰ These actions were to have significant consequences for the debates over parliamentary privilege and royal prerogative, in the period from around March 1626 through to early June of that year. Despite employing a variety of delaying tactics and obfuscations, Charles was faced with the implacable resolve of the Lords to reinforce their privilege of freedom from arrest, particularly in respect of Arundel. In the end, the king had to capitulate, sending a message: 'to take away all Dispute, and that their Privileges may be in the same Estate as they were when this Parliament began, His Majesty had taken off His Restraint of the said Earl [of Arundel], whereby he hath Liberty to come to the House'.¹⁴¹

Having previously impeached Bacon and Cranfield, the Commons' main efforts were to pursue Buckingham, potentially also through impeachment, as he was suspect in religion, and because of his incompetence as a military leader, and, rather less overtly, because of his supposed malign influence on the king.¹⁴² For them it was essential to have their grievances satisfied before any grant of supply, as Christopher Wandesford (Richmond) remarked: 'Parliaments have of late met, saluted, given money, and so departed with promise to do something the next parliament'.¹⁴³ For his part, the king was hardly in a position to dissolve this fresh parliament, even to protect his favourite, because of his urgent need for supply to mount a second expedition against Spain.

¹⁴⁰ Vernon F. Snow, 'The Arundel Case, 1626', *The Historian*, 26 (3) (May 1964), 323-49, p. 330.

¹⁴¹ *LJ*, 3, p. 655: 8 June 1626.

¹⁴² Clayton Roberts contended that an increasingly confident House of Commons were using impeachments to such effect that Charles I had to resort to personal government to avoid further impeachments: Clayton Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge: UP, 1966), pp. 42-76.

¹⁴³ *Diary of Bulstrode Whitelocke*, DD. 12.21, Cambridge University Library, in Bidwell and Jansson (eds.), *Proceedings 1626*, II, p. 351: 23 March 1626.

Charles found a need to speak directly: ‘And you, Gentlemen of the House of Commons [...] I must tell you that I am come here to show you your errors, and, as I may term them, unparliamentary proceedings in this Parliament. [...] Remember that Parliaments are altogether in my power for their calling, sitting and dissolution’.¹⁴⁴ Not for the first time, he warned the Commons that it must turn its attention to supply, or else he would be forced ‘to take other resolutions’.¹⁴⁵ A standoff resulted between a king who was determined to have supply and to protect Buckingham; and the Commons, who were equally determined to see grievances addressed. The charged atmosphere in both Houses meant that supply was never discussed during May and June 1626, and a dissolution seemed increasingly likely.¹⁴⁶ Despite conciliar advice to the contrary, the king remained adamant, seeing the Commons’ refusal to grant supply as a concerted attempt to undermine the monarchy, and he dissolved the parliament on 16 June. However, the Commons ensured that every member had a copy of a lengthy intended remonstrance that they had prepared. This set out that they were not responsible for delays in providing supply to the king, to which they were committed; that tonnage and poundage always required ‘a special Act of Parliament, and ought not to be levied without such an Act’; and that they would provide supply once their grievances had been redressed.¹⁴⁷ The lord keeper’s speech, on behalf of Charles, tellingly claimed: ‘As never king was more loving to his people [...] so there was never king more jealous of his honour’.¹⁴⁸ The king offered his own explanation of events, when he assured the Lords that the termination had not come ‘for any cause gyven by your [ordships] but proceeding from the Commons’.¹⁴⁹ In a case of shutting the stable door, a royal proclamation was issued, on 16 June, ‘prohibiting the publishing, dispersing and reading of a Declaration or Remonstrance’ from the Commons to ‘his Majestie’.¹⁵⁰

¹⁴⁴ Gardiner (ed.), *Constitutional Documents*, pp. 4-6.

¹⁴⁵ *Whitelocke*, in Bidwell and Jansson (eds.), *Proceedings 1626*, III, p. 406: 9 June 1626.

¹⁴⁶ The Lords were also dissatisfied, presenting a petition against the imminent dissolution: Rushworth, *Historical Collections*, I, p. 404: June 1626.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Whitelocke*, in Bidwell and Jansson (eds.), *Proceedings 1626*, II, p. 391: 29 March 1626.

¹⁴⁹ Jess Stoddart Flemion, ‘Dissolution of Parliament in 1626 : A Revaluation’, *EHR*, 87 (345) (October 1972), 784-90, p. 784.

¹⁵⁰ Larkin (ed.), *Proclamations (Charles I)*, II, p. 93.

By the time of this parliament, the Commons were also prepared to challenge the workings of the prerogative courts, seen in a case involving Sir Robert Howard, which culminated in an assertion of the authority of the Commons over the high commission, and an associated determination to abolish *ex officio* oaths.¹⁵¹ Howard was a generally undistinguished MP who was elected for Bishop's Castle in all the parliaments of the 1620s. He became involved in a number of legal proceedings that began on 1 March 1625, when he was summoned to the high commission to answer an accusation of adultery, which was an offence against the sacrament of marriage. He was ordered to take the oath *ex officio* before giving evidence, but claimed parliamentary privilege allowed him to refuse.¹⁵² Howard was then committed to the Fleet prison, but freed on a writ of *habeas corpus cum causa*, and after he had shown a copy of his return to parliament. The commission then reconvened to hear Howard's evidence, declaring somewhat surprisingly that the chancery certificate of his return to parliament was 'of no worth, being no record'. However, the commission could only punish Howard by using 'the rusty sword of excommunication', which sentence was pronounced, and then publicly announced at St Paul's Cross.¹⁵³ The excommunication continued beyond the dissolution of 12 August 1625 that had followed James I's death. Although Howard was again elected to sit in the first parliament of Charles I, the Commons do not appear to have considered the apparent breach of privilege. Howard was re-elected for Bishop's Castle for Charles I's second parliament, which first sat on 6 February 1626, and on 16 February, the excommunication was lifted. On the following day, it was agreed by the Commons that a breach of privilege could be punished in one parliament, in respect of an offence that had taken place during the time that an earlier parliament was sitting. Excommunication may have been an archaic procedure to force someone to give

¹⁵¹ The high commission was a prerogative court that had been established in the sixteenth century to hear ecclesiastical cases. The *ex-officio* oath took the form of a religious oath to answer truthfully all questions that might be asked by a tribunal, such as Star Chamber, or the high commission. It gave rise to what became known as the 'cruel trilemma' where the accused would find himself trapped between breaching a religious oath (taken extremely seriously in that era as a mortal sin), contempt of court for silence, or self-incrimination. The name derives from the questioner putting the accused on oath *ex officio*, meaning by virtue of his office or position: at <<http://goo.gl/W0GzxX>>.

¹⁵² His refusal may have been linked to his apparent catholic sympathies.

¹⁵³ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 814.

evidence, but at a time when religion was of paramount importance, there was a wider threat that, Howard being ‘under excommunication major’,¹⁵⁴ the entire House could be liable under canon law to the penalties of ‘excommunication minor’¹⁵⁵ for keeping his company. The matter was therefore referred to the committee for privileges.¹⁵⁶ That committee reported a month later, when the Commons unanimously agreed that Howard had claimed privilege before the commission in ‘due manner’, and that he should have his privilege. MPs who had sat on the high commission when it passed sentence against Howard were ordered to attend hearings to explain themselves, with a threat expressed by some that those who had rejected Howard’s privilege claim should themselves be made to declare their errors at St Paul’s Cross, where Howard had been publicly degraded.¹⁵⁷ Several commissioners claimed that they were unaware that Howard was claiming privilege at the time, or that they had not actively voted for Howard’s punishment. The House decided, first, that Howard should have privilege for all legal proceedings from 1 February 1625 onwards, and these should be ‘declared to be void, and ought to be vacated and annihilated’. Second, ‘a Letter to be written by Mr. Speaker to the Lord of Canterbury, and the rest of the Lords, and others of the High Commissioners, for annulling of the said Proceedings’. Third, the commissioners’ registrar should be instructed to raze the proceedings against Howard from his records – an order that was carried out before the dissolution.¹⁵⁸ The Howard case was important in three respects. First, it led to confirmation that a breach of privilege in one parliament could be punished in another. Second, it exposed the inappropriateness of *ex officio* oaths, particularly in a climate where some religious groups refused to take any kind of oath.¹⁵⁹ Third, it showed that the associated penalty of excommunication, which potentially affected any or all of

¹⁵⁴ ‘Absolute exclusion of a person from the church and in extreme cases even from social intercourse with church members’: *Merriam Webster Dictionary*, at <<http://goo.gl/3TdZjx>>.

¹⁵⁵ ‘Separation or suspension from the sacraments but not absolute exclusion from the [...] Church’: *Merriam Webster Dictionary*, at <<http://goo.gl/b6LTcL>>.

¹⁵⁶ *CJ*, 1, p. 821: 17 February 1626.

¹⁵⁷ *CJ*, 1, p. 839: 21 March 1626, gives an overall summary of the facts; *Whitelocke*, in Bidwell and Jansson (eds.), *Proceedings 1626*, II, pp. 330-34: 21 March 1626.

¹⁵⁸ *CJ*, 1, p. 854: 3 May 1626; Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 814; *CJ*, 1, p. 869: 10 June 1626.

¹⁵⁹ The Fifth Amendment to the US Constitution gives protection against self-incrimination: ‘No person shall be compelled in any criminal case to be a witness against himself’.

the Commons, through their association with Howard, had threatened the authority of the House of Commons, and the right of its members to privilege in legal suits. The outcome had been a clear counter-assertion of the authority of the Commons and their privileges over a prerogative court. The Commons also declared their intention to legislate against the use of *ex officio* oaths, but this had not been accomplished before the period of personal rule began.¹⁶⁰

Another significant case in this parliament concerned the servant of Sir Thomas Bagehott (Stockbridge), arrested on a mesne process ‘at his master’s heels’ after the start of the parliament. The issue was whether someone taken on a mesne process could be freed by the dispatch of the serjeant-at-arms to the prison in question, or whether a writ of *habeas corpus* was required.¹⁶¹ The committee for privileges were asked to look at the case, and reported their opinion that the servant ‘should be delivered by Habeas Corpus, by Warrant from the House’. The old precedents of Ferrers,¹⁶² Shirley,¹⁶³ and Skinner¹⁶⁴ were referred to. Accordingly, the House ordered the Speaker to prepare a warrant to the Clerk of the Crown for the purpose.¹⁶⁵ A rider was added: ‘notwithstanding the said opinion of the Committee, the House hath power, when they see cause, to send the Serjeant immediately to deliver the prisoner’.¹⁶⁶ The man was brought to the Bar of the House; but the keeper of the Gatehouse had made an error in making out his return, which he was ordered to correct, and the servant was then freed.¹⁶⁷

Also in 1626, it emerged that Sir Emmanuel Giffard (Bury St Edmunds) had been arrested for debt on 23 January, and imprisoned in the Gatehouse: an apparently clear breach of privilege. When parliament assembled, Sir Benjamin Rudyard (sitting then for Old Sarum) applied for privilege for Giffard. The keeper of the Gatehouse explained that

¹⁶⁰ During the period of personal rule, controversy around cases in Star Chamber and the high commission, including the requirement for *ex officio* oaths, led to two pieces of legislation in the long parliament that abolished these. These acts are commonly known as the *Habeas Corpus Act* 1640 (16 Car. I c. 10), and *An Act for the Abolition of High Commission Court* 1640 (16 Car. I c. 11). Their long titles are given in the bibliography.

¹⁶¹ *CJ*, 1, p. 816: 9 February 1626.

¹⁶² See Appendix 1, case 13.

¹⁶³ See chapter three above.

¹⁶⁴ See p. 57 above.

¹⁶⁵ Hatsell, *Cases of Privilege*, pp. 162-63.

¹⁶⁶ *CJ*, 1, p. 820: 15 February 1626.

¹⁶⁷ *CJ*, 1, p. 821: 17 February 1626.

Giffard had been arrested on two executions. The House then ordered the Clerk of the Crown to attend the next day ‘with the return of Mr Gifford’.¹⁶⁸ It emerged that the indenture of the election return for Giffard had erroneously been dated 30 January, which would have meant that he was *not* entitled to privilege on the (earlier) date of his arrest. It was agreed that the committee for privileges should examine the matter of fact, i.e. the date from which Giffard could be said to have been elected.¹⁶⁹ A few days later, the committee reported that Giffard had apparently been elected on 11 January, but that the town clerk had dated the indenture 30 January, ‘as conceiving it was to bear Date the Day of the next County: So as he was arrested after his Election, but before the Return: his Arrest being 23 January’.¹⁷⁰ A number of differing views now emerged, among which, the neat point was made that: ‘The Time of the Election to be respected, not the Date of the Indentures of the Return; for then may be in the Power of a Sheriff, or other Officer, to defeat our Privilege’. Despite some contrary voices about the legitimacy of such a move, the House finally resolved that the indenture should be amended to show a date of 11 January for the return, rather than 30 January. It was further ordered that Giffard should have privilege and be delivered out of execution; and a warrant was issued to the Clerk of the Crown, for a *habeas corpus* to bring Giffard up the next day.¹⁷¹ In due course, Giffard was brought in, the writ and return were handed to the Clerk of the Commons, who read them; the Speaker then discharged Giffard, wished him to take the oath, and his seat in the House.¹⁷²

As well as determinedly protecting members’ privileges, the Commons were equally assiduous in punishing those who acted in an unparliamentary fashion. So, in 1626, the Commons became concerned about the actions of Richard Dyott, who was a regular defender of Buckingham, and provoker of puritan members. Dyott had attended a joint conference with the Lords to hear charges laid against the duke of Buckingham. Many had been angered by Buckingham’s cocksure demeanour, but Dyott suggested that the Lords would have censured Buckingham if his behaviour had been unacceptable – unless

¹⁶⁸ *CJ*, 1, p. 817: 9 February 1626.

¹⁶⁹ *CJ*, 1, p. 817: 10 February 1626.

¹⁷⁰ *CJ*, 1, p. 819: 15 February 1626.

¹⁷¹ *CJ*, 1, p. 820: 17 February 1626.

¹⁷² *CJ*, 1, p. 821: 18 February 1626.

they had been too cowed to do so, going on to remark that: ‘it is an indignity to the Lords to think them thus poor and pusillanimous’. This was too much for many of the Commons, who censured Dyott and, on 9 May, ordered him to be sequestered from the House.¹⁷³ The ban was only lifted on 23 May, after a ‘very submissive petition’ from Dyott, who ‘said he was infinitely obliged to the favor of this House. He could offer no more for himself but to make this error of mine an instruction to me of more temperate and inoffensive carriage hereafter’.¹⁷⁴

In 1626, the matter of the arrest of Sir John Eliot (sitting then for St Germans) arose. Eliot had summed up the case for the impeachment of Buckingham, making remarks that were ‘a *tour de force* of colourful invective’, but on the next day the king counter-attacked, ordering the arrest of both Sir Dudley Digges, and Eliot, who had handled the summing-up in a way that Charles felt was insulting to his honour. There was a clear tension between claims of privilege for the two men, and a degree of acceptance that the king had powers to arrest people for lese-majesty. The Commons nevertheless threatened to refuse to transact any ordinary business, and on 19 May, Eliot was released; Digges had been freed some three days earlier. On 20 May, a Commons motion was made, ‘concerning Sir Jo. Ellyott; whether he be to come and sit here, having been accused of high Crimes, extrajudicial to this House’. Eliot was sent for, ‘to give him Occasion to discharge himself of whatsoever might be objected against him, for any thing passed from him at the Conference’. After he had made a speech defending himself, a motion was passed: ‘Sir Jo. Ellyott hath not exceeded the Commission given him by the House, in anything passed from him in the late Conference with the Lords. The like for Sir D. Digges. - Both, without One Negative’.¹⁷⁵

A contrasting case was that of John More (Lymington), which was raised at the same time as Eliot’s case. John Pym moved for privilege for More, who had been arrested in February 1625, when he was entitled to privilege of parliament, because he had refused to answer a summons to attend the assizes, and had not arranged for representation by an

¹⁷³ *CJ* 1, p. 858: 9 May 1626.

¹⁷⁴ *Diary of Sir Richard Grosvenor*, MS611, Trinity College Dublin, in Bidwell and Jansson (eds.), *Proceedings 1626*, III, p. 313: 23 May 1626.

¹⁷⁵ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 192; *CJ*, 1, pp. 861-62: 20 May 1626.

attorney. The Commons agreed that a letter should be written to the judges of the king's bench, desiring a stay of judgment there, until the Commons, through the privileges committee, determined whether More was indeed entitled to privilege.¹⁷⁶ The committee apparently did not make a report on the case. However, events now took a new turn, when, on 3 June, at a grand committee, which had been arranged to prepare a conference on the impeachment of the duke of Buckingham, 'More caused a scandal by declaring impulsively that it would be "impossible for a tyrant to bring this land to subjection, like that of France"'. These words could be interpreted as treasonous and were reported to the House. It was accepted that More's tongue had run away with him, and after some debate he was committed to the Tower by the Commons.¹⁷⁷

There was thus a contrast between Eliot, who was seen as having spoken in line with what was expected of him, at the impeachment hearing concerning Buckingham, and then been *improperly* imprisoned on the king's command, and More, whose words had been found to be offensive by the Commons, so that they, not the king, *properly* ordered his imprisonment. A few days later, More petitioned for his release, whereupon the chancellor of the exchequer notified the House that: 'His Majesty is well pleased to remit Mr More if the House shall think fit', and he was then released from the Tower, and restored to the House.¹⁷⁸

The dissolution of 1626 had done nothing to help the king's circumstances, in which finance was urgently needed to pay for the continuing war with Spain; to secure the rights and safety of his sister; and to meet other commitments, such as his assurance of assistance to Denmark.¹⁷⁹ Charles did receive some income after the 1626 dissolution: crucially, in July, a privy council commission set out that tonnage and poundage were traditional duties, and 'specially ordered' that they should continue to be collected, until such time as parliamentary authority was obtained. There is a neat symmetry in the

¹⁷⁶ *CJ*, 1, p. 861: 20 May 1626.

¹⁷⁷ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 414.

¹⁷⁸ *CJ*, 1, p. 867: 7 June 1626.

¹⁷⁹ The Danish king, Christian IV, was Charles's uncle. Charles's failure to pay contributed to the Danish defeat by Imperial forces at the battle of Lutter.

Commons' view that their privileges were now theirs by custom, and no longer dependent on a grant by the king; although for his part the king might argue that tonnage and poundage were now the sovereign's by custom, and no longer dependent on a grant by the Commons. The council also ordered that anyone refusing to pay the duties should be committed to prison until they did so.¹⁸⁰ The council further proposed that a free benevolence, or a loan from the king's subjects, should be requested, 'tyme not admitting the way of a Parliament'.¹⁸¹ As Cust explains, 'it was well established that in an emergency the king was entitled to request a general aid from his subjects. If this was refused, then necessity compelled him to resort to the prerogative, and he could legitimately request a loan or a benevolence'.¹⁸² Letters accordingly went out in July 1626, setting out that the Commons had unanimously agreed to grant the king four subsidies and three fifteenths, although the measures had not gone through all the parliamentary stages before the dissolution of June 1626. On that basis, the king felt that it was appropriate to 'desire all our loving subjects [...] lovingly, freely and voluntarily [...] to give unto us a full supply answerable to the necessity of our present occasions', in other words, a benevolence or free loan.¹⁸³ However, those letters did not have the desired result, so in the autumn instructions went out to local commissioners to collect a forced loan, which it was felt would be 'readily and cheerfully be lent unto us by our loving subjects, when they shall be truly informed from us of what importance and of what necessity that is which we now require of them'.¹⁸⁴ Charles published a document that accounted for his actions, by describing how a small, but powerful group of MPs had corrupted the House, forcing the king to dissolve the parliament prematurely.¹⁸⁵ A further proclamation reassured people that 'we are fully prepared to call a Parliament soe soone as conveniently wee maie and as often as the Commonwealth's and state occasions shall

¹⁸⁰ Gardiner (ed.), *Constitutional Documents*, pp. 49-51.

¹⁸¹ The term *benevolence* was variously used to cover both loans and gifts to a king. James I had called for a benevolence in 1622.

¹⁸² Cust, 'Forced Loan (JBS)', p. 210.

¹⁸³ Gardiner (ed.), *Constitutional Documents*, pp. 47-48.

¹⁸⁴ *Ibid.*, p. 52.

¹⁸⁵ *A Declaration of the true cause which moved His Majestie to assemble and after inforced him to dissolve the two last meetings in Parliament*: Cust, 'Forced Loan (JBS)', p. 212.

require it'.¹⁸⁶ The use of the term 'loan' meant that the Commons could not claim that a tax was being levied without parliamentary approval, even if few may have supposed that this loan would ever be repaid. However, there was a significant counter-cost, in terms of the resentment of those forced to pay what they saw as an imposition of dubious legality, and a number of those who were supposed to be collecting the loans induced people not to pay. The degree to which there was an 'emergency' that justified the forced loan was also questioned. Soldiers began to be forcibly billeted on less wealthy refusers, and the more prominent were imprisoned.¹⁸⁷ In particular, *five knights* were summoned before the council, and imprisoned for refusing to pay the forced loan.¹⁸⁸ When they sought *habeas corpus*, the judges ruled that a man jailed by special command of the king had no relief in common law, despite judicial disquiet about arbitrary imprisonment as an instrument of government.¹⁸⁹ By treating the king's right permanently to imprison as exceptional, as well as somewhat doubtful in law, the judgment had the effect of shaking Charles's authority in the matter considerably. In February 1628, there was an attempt to raise extra-parliamentary supply through a levy of ship money, which was technically not a tax, but a cash payment of feudal origin, in lieu of physical provision of a ship.¹⁹⁰ The proclamation levying ship money made it clear that a parliament was not ruled out, but that it would have to meet on the king's terms. The courts narrowly endorsed the view that the king could take an executive decision to levy ship money, and could take action against those refusing to pay.¹⁹¹ However, several inland counties refused to pay for what

¹⁸⁶ *A Declaration of his Majesty's clear intention, in requiring the aid of his loving subjects, in that way of loane which is now intended by his Highness*: *ibid.*, p. 219.

¹⁸⁷ Russell, *Parliaments and English Politics*, pp. 331 and 334; David L. Smith, *A History of the Modern British Isles, 1603 - 1707 : The Double Crown* (Oxford: Blackwell, 1998), pp. 70-71.

¹⁸⁸ Sir John Corbet, Sir Thomas Darnel(l), Sir Walter E(a)rle, Sir John Heveningham, and Sir Edmund Hampden.

¹⁸⁹ T. B. Howell (ed.), *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors ...*, by William Cobbett, 21 vols. (London: Longman, 1816), III, pp. 51-59, especially p. 59.

¹⁹⁰ Alan Cromartie, *The Constitutionalist Revolution : An Essay on the History of England, 1450-1642* (Cambridge: UP, 2006), p. 236.

¹⁹¹ Bulstrode Whitelocke, 'Ship Money', in Henry Craik (ed.), *English Prose : Selections* (s.l.: Macmillan, 1916), .

was supposedly a coastal protection measure, and the demand for ship money was withdrawn.

The 1628 parliament

The need for supply in the face of the difficulties outlined above made it increasingly likely that Charles I would have to call a parliament, which happened on 31 January 1628. Before it met, he made some conciliatory moves: all loan refusers were released that month, and a proclamation was issued, putting on hold the raising of monies from the people directly, despite what was seen as the urgent necessity for funds for defence. Instead, the king was prepared ‘wholly to rely upon the love of Our people in Parliament, and not to deferre their assembling’.¹⁹² The first session began on 17 March, and, as was usual, some privilege cases were soon raised. However, as in each of Charles’s earlier parliaments, the pressing issues were the securing of supply and redress of grievances, with many of the Commons concerned about the potential for an arbitrary, even absolutist, exercise of royal powers and prerogatives, and the perceived growth of Arminianism and catholicism. A particular grievance concerned the continuing collection of tonnage and poundage without parliamentary authority, and this had led to some London merchants refusing to pay the duties, whereupon their goods were seized, pending payment. One of the difficulties for Charles I was the rise of more critical members at the same as the loss of some moderate voices. William Coryton (Cornwall), Sir John Eliot (Cornwall), Sir Peter Heyman (Hythe), Sir Miles Hobart (Great Marlow), Denzil Holles (Dorchester), Walter Long (Bath), John Selden, William Strode (Bere Alston), and Benjamin Valentine (St Germans) all became more strident in their advocacy over a range of grievances, including the perceived attitude of Charles I towards the House of Commons and its privileges and rights. Privy councillors were few in number, and, in December 1629, the now loyalist Wentworth had moved to the Lords, and been appointed president of the Council of the North. Even so, it is wrong to suggest that the Commons were united in refusing supply. For example, Sir Benjamin Rudyard (Downton), while fearing for the future of parliament, was prepared to support the king,

¹⁹² Larkin (ed.), *Proclamations (Charles I)*, II, pp. 187-88.

by pointing out the illogicality of withholding supply for the king to carry out actions that the Commons had advocated:

This is the crisis of parliaments, by this we shall know whether parliaments will live or die [...] His Majesty has [... proclaimed ...] that he relies wholly upon our Loves; which if we do not answer in our Actions, we are worse than unworthy of his. The Cause why we are called hither is, to save ourselves. [...] Mr. Speaker, we are not now upon the *bene esse* of the kingdom, we are upon the very *esse* of it, whether we shall be a kingdom or no [...] Seems it a small Thing unto you that we have beaten ourselves more than our enemies could have done? And shall we continue so by our divisions and by our distractions? [...] ¹⁹³ Let us, Mr. Speaker, give the king a way that he may come off like himself [...] by giving the king a large and ample supply proportionable to the greatness and importance of the work in hand, for counsel without money is but a speculation. ¹⁹⁴

Cases that involved taking the goods or effects of a member in execution, or otherwise, did not solely arise in 1628-29, although that was when they took on a wider significance. John Rolle applied for privilege for the goods of John Delbridge in 1626,¹⁹⁵ and in 1628, Thomas Bray, servant to Sir John Coke (Cambridge University), was given privilege for his goods ‘seized and distrained in the country while he is here in the service of his master’.¹⁹⁶

However, by far the most important claim in this category was that of John Rolle, one of the merchants whose goods had been seized for non-payment of tonnage and poundage. However, as member for Callington, he would have expected to enjoy privilege for his goods and himself. Having failed in legal moves to regain his property in late 1628, his case was raised in the Commons in early 1629 as a matter of privilege, at a time when difficulties over ‘the king’s business’, matters of religion, the authority of the Speaker of the Commons, and the character of Charles I were so intertwined as to affect the general tone of the parliament, through to its dramatic and chaotic conclusion in

¹⁹³ Anon., *The Parliamentary or Constitutional History of England from the Earliest Times to the Restoration of King Charles II*, 2nd edn., 24 vols. (London: Tonson & Miller, 1763) VII, pp. 336-37.

¹⁹⁴ Johnson et al. (eds.), *CD 1628*, II, pp. 58-59: 22 March 1628.

¹⁹⁵ *CJ*, 1, p. 850: 27 April 1626.

¹⁹⁶ Stowe MS 366, fol. 165, in Johnson et al. (eds.), *CD 1628*, IV p. 407.

March 1629. The Rolle case and other events in the 1629 session have such significance for consideration of privilege of person and property that these are considered in separate detail in chapter six below.

Conclusions

Parliamentary privilege clearly mattered in the early Stuart period, with a growing recognition that coherent procedures contributed to the development of privilege as an entity, and provided a conscious sense of identity for the House. Individual claims were managed with increasing care and consistency, with the result that, over time, the Commons were able to consolidate, and sometimes extend, the ambit of the privilege of freedom from arrest and other legal processes into new, sometimes contentious, areas. One example of such extension was to exempt members from any kind of involvement in suits, whether or not these required the personal attendance of the member in court, because there should be no extra-parliamentary distractions. A greater institutional confidence can be seen, for example, in the disfavour shown to members who wished to waive their privilege; the extension of privilege to those having business with the Commons; and the challenge to the prerogative court of high commission and its use of *ex officio* oaths.

At the start of James I's first parliament, the Shirley case centred on an individual member, but had a wider significance, in that it established that the Commons had clear, independent authority to free members who had been arrested or detained, indemnified gaolers who freed privileged members, and also gave some rights to creditors. Yet, over time a clear distinction was maintained between effecting the release of members imprisoned in civil suits, as against those imprisoned by the order of a court, where it was felt the Commons should proceed by commissioning a writ of *habeas corpus*. Succeeding cases where a member or his servant had been imprisoned in civil suits were generally resolved satisfactorily, as the inevitability of severe punishment for those who had offended against privilege was a powerful deterrent. However, in most cases the sentence that had been pronounced against the 'delinquent' was quietly reduced, reflecting an emphasis in privilege matters on outward forms and outcomes, and a confidence that allowed justice to be tempered with mercy.

This period saw regular claims for privilege when a *subpoena* had been issued, which, if granted, avoided a need to attend court. Similarly, the Commons established the right to avoid jury service. It was also decided that privilege applied, even if a member had instructed an attorney, and was therefore not required in court to answer a *subpoena* personally, on the grounds that the suit could nevertheless distract him from due attention to matters in parliament. There was, however, continuing ambivalence whether the institutional dignity of the House, and the need for every part of the kingdom to have a voice in parliament, required privilege to be applied to prevent a member attending court, even if he wished to waive his privilege – an issue which remained unresolved during this period. The time limits during which privilege applied before and after a session were confirmed as sixteen days. The Commons enhanced the procedure to be followed if privilege was claimed during an adjournment. As the matter could not be raised in the chamber, the outgoing Speaker was empowered to use his own authority to have a privileged member freed. In addition, it was decided that breaches of privilege that occurred during one parliament could be addressed in a later parliament. The danger of physical attacks on members or their servants persisted to some degree into the seventeenth century. Political discourse could be robust, yet the Commons took care to punish any assaults, physical or verbal, on members and servants. This was seen as an important element in maintaining the dignity of the House, not least if one member attacked another. The emphasis on outward forms retains its importance today, as seen in the ban on ‘unparliamentary language’.¹⁹⁷ The Commons increasingly took into their own hands the punishment of those who had breached privilege in some way or other, or who had offended the Lords or the king, thereby pre-empting imprisonment by another agency, which might have raised some awkward questions about whether privilege could

¹⁹⁷ ‘Words to which objection has been taken by the Speaker over the years include blackguard, coward, [snivelling little] git, guttersnipe, hooligan, rat, swine, stoolpigeon and traitor’: House of Commons, *Unparliamentary Language*, in www.parliament.uk (House of Commons Information Office, 2009), at <<http://tinyurl.com/n666hhn>>. The Speaker’s requests for withdrawal can sometimes emphasise the insult, as when asked: ‘Which word do you want me to withdraw, Mr. Speaker—little, arrogant or shit?’, Speaker Weatherill replied, ‘the last word’: Libraries of House of Commons and House of Lords, *Hansard : Parliamentary Debates, 1803-2005*, in Millbank Systems (History of Parliament Trust), at <<http://goo.gl/6aZVRK>>, House of Commons: 20 June 1990, vol. 174, col. 921.

be invoked. The Commons were also prepared to punish those who used intemperate language about the monarch or peers, thereby strengthening their role in dealing with cases of lese-majesty, or contempt of the Lords. One group did however cause some difficulty: pages attending upon members might be able to claim to privilege by virtue of their service, yet their behaviour was sometimes unacceptable, even criminal.

Moreover, although time was still spent on individual cases, there was a greater emphasis in the Commons on the wider constitutional impact of the privilege of freedom from arrest in all its forms, such that matters of privilege and grievances were becoming increasingly interlinked. The failure to grant the crown adequate supply was a major factor in Charles I turning to extra-parliamentary means to raise revenue, which inevitably infringed the 'ancient freedom of parliaments', particularly the Commons' rights, liberties and privileges, which included the control of supply to the king. This engendered a change of attitude in the Commons, whereby parliamentarians saw the different elements of privilege as an entity that could not, and should not, be violated, and led to the preparation of polemical statements. The Commons' view was that their privileges were now theirs by custom, and no longer dependent on a grant by the king; whereas the king might reasonably think that tonnage and poundage were the sovereign's by custom, and no longer questionable by the Commons. However the Commons robustly asserted their rights, in particular stressing that the crown could only raise money through traditional feudal levies, or on the back of parliamentary approval, rather than by the use of novel powers that supposedly lay within the royal prerogative. Linked to this restatement of their power to control supply, the Commons were prepared to support the claims of John Rolle for parliamentary privilege in respect of his goods. The Commons' assiduous preservation of customary privileges came to benefit not just individual members, but also the institution as a whole, thereby giving the Commons greater corporate confidence to defend ancient freedoms, not least through a succession of 'protestations', petitions, and 'apologies'. These generally provoked James or Charles to remind the Commons that privileges were a 'donature' through the royal grace, accompanied by a restatement of the willingness of the monarch to grant such privileges 'as were ever enjoyed'. There was a continuing tension between the Commons' wish to begin parliamentary sessions by setting out their grievances, and awaiting their resolution before making any grant of supply, and the monarch's wish to secure supply speedily,

after which grievances might – perhaps – be considered. Later chapters will show how privilege matters contributed collectively to the changing dynamics of the period in two key areas. First, the privilege of freedom from arrest made it easy to exploit the system, and is the subject of the next chapter. Second, the assertion of privilege to protect the goods or effects of a member was at the centre of the Rolle case, which is considered in chapter six below.

V : EXPLOITATION OF PRIVILEGES

Introduction

Privilege can be, and has been, abused. [...] It has never been, and is not now, designed to benefit M.P.s personally.¹

Parliamentary privilege is not a licence for members of Parliament to behave in ways which are unacceptable to society at large.²

The exploitation of privilege was not new in the early Stuart period, nor did it end then, as can be seen in these two statements from the second half of the twentieth century. The ‘parliamentary expenses scandal’ of the early twenty-first century has seen spurious and unsuccessful claims for parliamentary privilege, lodged by MPs and peers who were found to have improperly manipulated claims for expenses and fees, and who were, in some cases, prosecuted in the courts.³ If unacceptable behaviour by MPs has a long history, the exploitation of privilege was a particular feature of parliamentary life in the early seventeenth century, linked to changes in the presentation, management, and operation of privilege. These changes somewhat perversely generated greater institutional confidence and strength, especially in the Commons, but at the cost of reducing the former certainties about what was, and was not, acceptable behaviour in relation to privilege. Over the period, privilege came to be seen less and less as a tool to preserve the rights of an individual MP, and rather more as a means to increase the institutional integrity and strength of the Commons. So, the Shirley case was mainly about one man – the extension of privilege and

¹ Kilmuir, *Law of Parliamentary Privilege*, p. 21.

² House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *1999 Select Committee Report*, vol. 3, Written Evidence : Call for Evidence, at <<http://goo.gl/p2ZCVR>>.

³ England and Wales Court of Appeal (Criminal Division), *R and David Chaytor and Others (2010)*. The ‘others’ were Elliot Morley MP, James Devine MP, and the peer, lord Hanningfield.

greater autonomy for the Commons were incidental to the main issue of securing Shirley's release – while associated legislation gave some satisfaction for creditors who were affected by the privilege. However, without making an overly whiggish claim of 'burgeoning constitutional conflict', by the time of the Rolle case, privilege had become increasingly politicised and polemical, and bound up with broader questions of liberty that went beyond the rights of a single MP.

Issues around debt recur frequently in this thesis, and have a particular relevance when considering how privilege was exploited, so that this chapter is structured, first, to provide the context in which debts were viewed, with the possibility of outlawry or bankruptcy for defaulters. It then goes on to look at the changing composition of parliament, associated with a variety of motives for seeking election, and an increasing exploitation of privilege across both Houses. Such exploitation will be seen to have been facilitated, in part, by changes to the way in which protections were arranged for members, peers, and particularly their servants, real and supposed – an exploitation that could be benign in some cases, blatantly abusive and self-serving in others.

Debt, outlawry and bankruptcy

As issues around debt recur in this thesis, some appreciation is required of the ways in which commercial and financial affairs were safeguarded in the early seventeenth century, and of the limits on personal financial conduct. This section describes how the law included provisions for possible outlawry, bankruptcy, or arrest and imprisonment, if someone failed to meet their obligations. This helps us understand two particular developments. First, how and why privilege was used by a significant number of members of parliament, and their real, or supposed servants, to avoid the penalties for financial default. Second, how, as a consequence, *institutional* protection – intended to ensure that parliament could function with a full complement of members – was distorted to provide an excessive and unwarranted degree of *individual* protection.

The extreme sanctions might appear to be outlawry, which, in the medieval period mostly comprised *criminal* outlawries, consequent on indictments for serious crimes, such as treason, rebellion, homicide, or other felonies. By the early modern period,

the process had developed from being the ‘last resort of criminal law’, towards *civil* outlawries. If a defendant to an action for debt failed to appear in court, it was the sheriff’s duty to apprehend him. If the man could not be found, did not appear in court, or had no goods in the county that could be seized, the sheriff was directed to make a proclamation on five occasions. If the man still failed to appear by the fifth proclamation, he was declared an outlaw. If a debtor who continued to owe monies did surrender, he would be committed to prison, pending court action, or satisfaction of the debt. There were other consequences: medieval statutes, and a specific judgment from 1456/7, debarred anyone who was outlawed from sitting as a burgess in parliament, as outlaws could *ipso facto* not be freemen of their borough.⁴ As Thrush records, ‘shortly before the 1597 parliament met [...] the sheriffs of each county were ordered [by the privy council, strongly influenced by lord keeper Egerton] to ensure that no "unmeet" men were returned as borough members’.⁵ There was continuing confusion over the rights of outlaws to be elected, or to take up seats, so that in 1604 a royal proclamation ordered: ‘that an expresse care bee had, that there be not chosen any persons Banquerupts or Outlawed, but men of knowen good behaviour and sufficient livelyhood’.⁶ The question whether bankrupts or outlaws might sit as members arose in relation to the Shirley case, when the issue was left unresolved.⁷ James issued a further proclamation, in November 1620, which set out that a ban on bankrupts was required; else the Commons would be filled with ‘necessitous persons that may desire long parliaments for their private protection’.⁸

Bankruptcy, in contrast to outlawry, has a shorter history. This is perhaps because until at least Tudor times the structure of trade and finance, with any associated law, had been erected by the landed classes, for whom the system of contracts, and settlement for land, animals, or crops that had been traded was reasonably clear, equitable, and effective. However, as England became more mercantile, and less tied

⁴ Thrush, *Commons 1604-29*, I, p. 67. Although referred to in *CJ*, I, p. 158: 29 March 1604, the judgment has not been identified further.

⁵ Thrush, ‘Commons v. Chancery’, p. 302.

⁶ ‘A Proclamation concerning the choice of Knights and Burgesses for the Parliament, 11 January 1604’, in Larkin and Hughes (eds.), *Proclamations (James I)*, p. 68.

⁷ See pp. 82 ff. above.

⁸ Larkin and Hughes (eds.), *Proclamations (James I)*, I, p. 494.

to land as the creator and repository of wealth, there was a tension between reasonable, even commendable, risk-taking in the search of profit, and reckless, or imprudent ventures, in which the merchant or trader might find it difficult or impossible to meet his obligations. A necessary constraint on recklessness would be supplied through the threat of bankruptcy. Bankrupts were quite narrowly defined as insolvent subjects of the sovereign, engaged in trade or business, both wholesale and retail. Concerns included the risk that a bankrupt person might flee the realm, leaving his debts behind; or barricade himself in his dwelling house, which by law could not be forcibly entered; or transfer his assets, either to a third party before the law took its course, or sometimes to just one of the creditors.⁹ The first specific legislation, enacted in 1542, had two prongs. The first was that all of a debtor's assets could be taken by the authorities, and sold to pay creditors, 'a portion, rate and rate alike, according to the quantity of their debts'. It became an act of bankruptcy to have oneself arrested, or to procure one's goods to be attached prior to an act of bankruptcy, so that there was nothing left for the creditors.¹⁰ The second element covered situations where the debtor no longer had sufficient goods, property or lands to be sold by the sheriff to meet the debt. The man would be arrested and remain confined, until he or his friends paid the debt, although the creditor had to provide food and water if the debtor was destitute. However, statutes did not identify the debtor as a criminal, nor interpret debt itself as a crime at common law.¹¹ Bankruptcy was apparently becoming widespread in the seventeenth century, as seen in an Act of 1623, which set out that:

Daily Experience showeth, that the number and multitude of Bankrupts do increase more and more [...] to the great Incouragement of evill minded persons, the hinderance of Traffique and Commerce [... and that ...] if such Trader shall by himself, or others by his Procurement, obtain any Protection or Protections, other

⁹ A writ of trespass would lie against a sheriff who broke into a house to make execution on a writ of *feri facias*: Francis J. J. Cadwallader, *In Pursuit of the Merchant Debtor and Bankrupt*, (1965, UCL, London) PhD Thesis: Faculty of Laws, p. 407.

¹⁰ *Ibid.*, p. 20.

¹¹ Margot C. Finn, *The Character of Credit : Personal Debt in English Culture, 1740-1914* (Cambridge: UP, 2003), p. 110.

than such protection or protections as shall be lawfully protected by the Privilege of Parliament [he] shall be adjudg'd a Bankrupt.¹²

This is highly significant, as noted by Goodinge: ‘This is plain, All Protections are within this Statute, except Parliament Protections duly obtain’d’.¹³ Imprisonment for insolvency ended in 1828, with an erroneous but common belief that imprisonment for personal debt ended completely in 1869: in reality, small debtors could continue to be imprisoned for up to six weeks, and there were still 3,594 imprisoned debtors in 1929.¹⁴ Only in the nineteenth century were bankrupts disqualified from sitting as an MP.¹⁵ Today, it is felt that ‘the main purpose of disqualification is to ensure that Members are fit and proper people to sit in the House, and are able to carry out their duties and responsibilities free from undue pressures from other sources’.¹⁶ Bankrupts are therefore disqualified from being returned as a member of parliament, sitting in the Lords, or, if already an MP, from sitting and voting, ‘*irrespective of any Parliamentary privilege* [my emphasis]’.¹⁷

Increasing exploitation of privilege

As noted earlier, the privilege of freedom from arrest had a clear purpose from the medieval period onwards: to ensure that men would not be hindered from attending the king at his ‘high court of parliament’.¹⁸ It was not intended to protect members

¹² *An Acte for the Discription of a Bankrupt and Reliefe of Credytors* 1623 (21 Jas. I c. 19), §1-2: Raithby (ed.), *Statutes of the Realm*, IV, part II, p. 1227.

¹³ Tho. Goodinge, *The Law against Bankrupts : Or a Treatise Wherein the Statutes against Bankrupts Are Explained*, 3rd edn., (London: John Nutt, 1713), p. 28.

¹⁴ Erik Berglöf, Howard Rosenthal, and Ernst-Ludwig von Thadden, *The Formation of Legal Institutions for Bankruptcy : A Comparative Study of the Legislative History*, (unpublished research, 2001, Mannheim, Germany), at <<http://goo.gl/9zV3ZN>>, p. 22. Imprisonment for debt today is restricted to defaults on fines or orders imposed by courts.

¹⁵ May, *Parliamentary Practice*, p. 12.

¹⁶ Oonagh Gay, *SN/PC/3221: Disqualification for Membership of the House of Commons* (House of Commons Library, 2004), at <<http://tinyurl.com/npkavmb>>.

¹⁷ *Insolvency Act 1986* (Eliz. II c. 45), §426-27, in *legislation.gov.uk* (TNA), at <<http://goo.gl/gosdnW>>. These provisions were confirmed in the *Enterprise Act 2002* (Eliz. II c. 40), §266: in *legislation.gov.uk* (TNA), at <<http://goo.gl/cAu4r>>.

¹⁸ ‘It was during the 14th century that the notion of a "High Court of Parliament", distinguished from other royal courts by its omnicompetence, began to take root’:

[footnote continues ...]

and their servants from having to meet their financial obligations, nor did it appear to do so to any significant extent before the later Tudor period. To some degree, there was greater motivation and opportunity to become an MP in the early Stuart period, with the Commons coming to represent a wider cross-section of the population than simply members of leading families and prominent merchants or lawyers.

Membership was not always beneficial: there were costs in elections and maintaining a presence in London, and members were supposed to be ever-present in parliament, even if not everyone complied with this stringent requirement to attend.¹⁹

Nevertheless, it is clear that many still sought election out of a sense of duty, perhaps associated with an expectation that those from leading local families, or holding certain offices, such as town clerk or recorder, should serve. The shire members had always had a high status, but seats in the larger boroughs became more prestigious and sought after. There were, for example, eight candidates for two seats in Reading (1628), nine in Sandwich (1620), and ten in Nottingham (1624).²⁰ Such contests marked a ‘great suing, standing and striving’ for seats.²¹ Gardiner notes that, for 1625: ‘never within living memory had there been such competition for seats in the House of Commons’.²² Kishlansky nevertheless takes the view that, until the civil war, choices of MPs were honour-laden *selections* that reflected virtually unanimous choices by neighbours, rather than *elections* that might offer a genuine political choice; indeed, there was a prejudice against contests.²³ Others might seek to become

Chris Given-Wilson, ‘The House of Lords, 1307-1529’, in Clyve Jones (ed.), *A Short History of Parliament* (Woodbridge: Boydell, 2009), 16-28, p. 23.

¹⁹ See pp. 50f. above.

²⁰ Thrush and Hirst differ on the numbers of contests. Thrush found that there were 7 known contests in 1604, around 33 in 1624, and at least 35 in 1628: Thrush, *Commons 1604-29*, I, p. 73. Hirst found 13 contested elections in 1604, maybe 42 in 1624, and perhaps 34 in 1628: Hirst, *The Representative of the People?*, pp. 217-22.

²¹ J. Spedding (ed.), *The Letters and the Life of Francis Bacon*, 7 vols. (London: Longmans, Green, Reader and Dyer, 1874), v, p. 181, in Thrush, *Commons 1604-29*, I, p. 73.

²² Gardiner, *History of England (1883 edn.)*, v, p. 337.

²³ Mark Kishlansky, *Parliamentary Selection: Social and Political Choice in Early Modern England* (Cambridge: UP, 1986). Peacey describes the contrasting views of Hirst and Kishlansky, in relation to the controversy around the Kent election of spring 1640: Jason Peacey, ‘Tactical Organisation in a Contested Election’, in Chris R. Kyle (ed.),

[footnote continues ...]

an MP in order to advance the interests of the client group of a patron or relative, sometimes by keeping a seat warm for someone unable to serve at the time. Many members, particularly burgesses, found that membership of the Commons benefited them in their occupations – in the law, or commerce, or trade of some sort – some of which might be performed on behalf of constituents. Parliament offered special opportunities for members to network with those who had legal, political, and financial power, and perhaps to gain influence for themselves.²⁴ Some might have wanted to fulfil an ambition to gain personal prestige, a ‘badge of rank’. Status and outward show were important: for example, Sir Thomas Shirley’s difficulties arose because of large debts to a leading goldsmith, at a time when lavish displays of gold and silver were a feature of entertaining in the home, and mere pewter was scorned. There were also those who were less concerned about the dignity of parliament, or their own honour, and more about personal advantage. For some, at least, there was a clear benefit in using parliamentary privilege as a way of forestalling creditors.²⁵ Even in the sixteenth century, there were occasions when the Commons apparently valued their protections and privileges more highly than any rights for creditors, and this produced more than one royal admonition. So, in 1559, as noted earlier, the Commons were told that ‘great heed would be taken, that no evil disposed person seek of purpose that priviledge for the only defrauding of his Creditors, and for the maintenance of injuries and wrongs’.²⁶ There may well have been further cases of attempts to defraud creditors under a cloak of privilege, because, in 1593, the lord keeper, Sir John Puckering, ‘having received instructions from the Queen’, answered the incoming Speaker’s ‘three demands’ for privilege by saying: ‘To your Persons all Priviledge is granted, with this Caveat, That under colour of this Priviledge, no man’s

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Parliament, Politics and Elections, 1604-1648 (London: Cam. Soc., 2001), 5th series, volume 17, 237-72, pp. 237-38.

²⁴ The medieval bar on lawyers becoming members of the Commons no longer applied, whereas a *nolumus* clause still applied to sheriffs, who were not permitted to leave their shrievalty, as exploited by Charles in 1625: see p. 65 above. This restriction was also a feature of the Stepneth case: see p. 120 above.

²⁵ Thrush, *Commons 1604-29*, I, pp. 73-93.

²⁶ D’Ewes, *Lords*, p. 17: 28 January 1559.

ill doings, or not performing of duties, be cover'd and protected'.²⁷ Neale found a different version of the same speech: 'the proteccion of your house be not worne by any man as a cloake to defraude others of their debtes and duties'.²⁸ Further, in 1601, the Commons were told that debtors should not avoid their obligations: 'Her Majesties Pleasure is, you should not maintain and keep with you notorious persons either for life or behaviour, and desperate Debtors who never come abroad, fearing Laws, but at these times [i.e. when parliament was sitting]'.²⁹ These admonitions show that the abuses were becoming a matter of continuing royal concern – a concern that was to be shared by James I, and his lord chancellor, Ellesmere.³⁰ Indeed, at the start of the seventeenth century, it had become clear that the limits of privilege were ill defined, with a consequent uncertainty about what was acceptable practice. The possibility that MPs and their servants could use privilege to shield themselves from their creditors was attractive to unscrupulous members and potential members of the Commons. The Shirley case showed how the selection of precedents and the management of privilege favoured the MP, rather than his creditors. However, Shirley was clearly not alone in his exploitation of privilege, and the 1614 parliament saw several people getting themselves elected, in order to avoid their obligations, including Shirley's own son, also named Thomas.³¹ Thrush comments: 'Just how many men were driven to seek election primarily to escape their creditors is never likely to be known, but in 1614 around eleven members may have done so'.³² Of

²⁷ Townshend, *Historical Collections*, p. 38: 22 February 1593. The account is also given in D'Ewes, *Lords*, p. 460: 22 February 1593.

²⁸ J. E. Neale, 'The Lord Keeper's Speech to the Parliament of 1592/3', *EHR*, 31 (121) (January 1916), 128-37, p. 137. Neale found the text of the speech in Harl. 6265, fols. 111-14.

²⁹ D'Ewes, *Lords*, p. 602: 30 October 1601.

³⁰ See pp. 84f. above.

³¹ Although the death of his father left the younger Thomas Shirley heir to a ruined estate, it also assured him of election at Steyning in 1614, which provided him with protection against his creditors. He was again imprisoned for debt in 1616 – the privilege he enjoyed during the short, addled parliament of 1614 having come to an end: Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 323. Shirley was re-elected for Steyning in 1621.

³² Thrush, *Commons 1604-29*, I, pp. 90-91.

these, six were more or less insolvent before seeking election.³³ Of the others, Sir Thomas Gerrard (Lancashire) was tainted with recusancy, so that he purchased a baronetcy in order to demonstrate his loyalty, but without sufficient funds for the purpose.³⁴ Sir William Sandys (Winchester) was also tainted with recusancy, and acted as surety for one of the gunpowder plotters. Because of the need to show his loyalty, and after making some unwise investments, he fell disastrously into debt. He may nevertheless have sought election to parliament to secure a piece of private legislation, rather than to benefit from parliamentary privilege.³⁵ Finally, three of those identified by Thrush got into financial difficulties chiefly through involvement in lengthy and costly litigation.³⁶ A twelfth individual, Sir Henry Goodyer (West Looe), was driven by debt to seek re-election in 1614, but failed in the attempt.³⁷

An increase in the number of cases may have been associated with the possibility of a parliament lasting a long time, as with the first parliament of James I.³⁸ Later, although each of the parliaments of the 1620s did not last long, the overall time that those parliaments were in being filled much of that decade. A long period of parliamentary activity might see some members chafing to get back to their estates and businesses. By contrast, a lengthy parliament could be most convenient for someone trying to avoid meeting his debts or being summoned to a court, as privilege was deemed to apply during adjournments, which must have led creditors to question whether a debtor would ever not be *eundo*, *sedendo*, or *redeundo*. This was recognised in a debate in June 1621, when it was known that parliament was about to

³³ Sir William Cavendish (Derbyshire), Sir Cuthbert Halsall (Lancashire), Sir Theophilus Finch (Great Yarmouth), Robert Wolverston (Cardigan Boroughs), Sir William Lovelace (Canterbury), and Sir Thomas Shirley the younger (Stevington): Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 464; *ibid.* IV, p. 521; *ibid.*, IV, p. 279; *ibid.*, VI, pp. 837-38; *ibid.*, V, pp. 164-65; *ibid.*, VI, p. 323.

³⁴ *Ibid.*, IV, pp. 356-57. As a mark of loyalty, many with strong recusant leanings purchased baronetcies, which were open to both protestants and catholics.

³⁵ *Ibid.*, VI, p. 209.

³⁶ Edward Savage (Petersfield), Sir John Bourchier (Kingston-upon-Hull), and Rowland Meyrick (New Radnor Boroughs): *ibid.*, VI, p. 217; *ibid.*, III, pp. 262-63; *ibid.*, V, pp. 322-23.

³⁷ Thrush, *Commons 1604-29*, I, pp. 90-91.

³⁸ The parliament of 1604-10 sat for about thirty months, representing around one third of the total extent of those years.

be adjourned for some time.³⁹ Even then, Sir Robert Phelps was not sympathetic to those who were confronted with *bona fide* protections for members or servants during vacations:

For priveledg, we must consider protections in generall and protections in particuler. For the particular, they are ipso facto nullified that are not given to members of our howse. But for members of the house, their Goods and estates are protected in the vacation as well as their persons, and so their servants; and so lett them be if this cessation [adjournment] continew 7 years. Lett all undew protections be called in, but let us maynetayne all just one[s] to us and our posterity.⁴⁰

Sir Dudley Digges suggested that:

Provision might be made for upholding the priviledges in the Recess, for the Limittacion thereof; That it might not be extended to any other than the members of the howse and their necessarye servants; And that it might be declared howe farr aswell the goods and Lands as the persons were under this Parliamentary Course of Protection.⁴¹

The resolution that the Commons finally decided upon neatly encapsulates the scope of the privilege and the way in which it was operated and managed: privilege of parliament was to apply for their persons, lands, goods and servants during the forthcoming recess, as this was by adjournment not prorogation. Moreover, the Speaker was empowered to issue a letter, without the need for any additional authority, requiring the release of any member, or servant who had been arrested, or detained, ‘as if the parliament were sitting’. Any delinquent would be dealt with when parliament next resumed.⁴²

³⁹ The adjournment ran from 4 June 1621 to 14 November 1621.

⁴⁰ *Barrington Notes*, fols. 75-76, in Notestein et al. (eds.), *CD 1621*, III, p. 380: 1 June 1621. Only a few months later, Phelps had come to the view that the use of protections was leading to abuses: *Barrington Notes*, fols. 5-11: 20 November 1621, in *ibid.*, III, p. 409.

⁴¹ *Pym*, fol. 156, in *ibid.*, IV, pp. 400-401.

⁴² *Book of Orders*, fols. 86-87, in *ibid.*, VI, pp 477.

Moving on to 1624, Thomas Charnock and Edmund Breres arranged their election for the Lancashire borough of Newton to avoid their creditors. Charnock was from an ancient Lancashire family that contained a number of recusants, including his own father-in-law. He became involved in numerous debt cases, having stood surety for his brother and Breres.⁴³ Breres himself was from a minor gentry family, who was bound in numerous debts that involved his father-in-law. The failure of the latter to repay what he owed ‘resulted in an escalation of further debts and bitter litigation’ for Breres. Despite various attempts to clear what he personally owed, Breres was faced with impending bankruptcy when elected in 1624, but died the following year.⁴⁴ The number of cases, as a proportion of the total number of MPs, was fairly small, so that cynical, self-serving exploitation of privilege to avoid the financial obligations of oneself, or one’s supposed ‘servants’ did not appear to be prevalent. However, the records show that the censure of the House over time was more likely to be directed at individual members who had behaved badly *in the House*, for example by ‘hissing’ during a speech,⁴⁵ or showing disrespect to the Speaker,⁴⁶ rather than those whose actions *outside the House* might reflect badly on the Commons’ good name, not least those who were avoiding their financial obligations.

Although privilege was rigorously maintained in the early Stuart parliaments, those creditors, arresting serjeants or sheriffs who had failed to respect privilege rarely served the full term of any sentence imposed by the Commons, as, after a few days’ imprisonment, ‘delinquents’ were usually recalled to the Commons, or themselves asked to be heard, when they would offer a fulsome apology. Their status as supplicants was reinforced by a degrading requirement that they kneel, bareheaded, at the Bar of the House. They would then usually be ordered to pay any requisite fines and gaolers’ fees, before being freed. Three exceptions can be found, however. First,

⁴³ Thrush and Ferris (eds.), *Commons 1604-29*, III, pp. 493-94.

⁴⁴ *Ibid.*, III, pp. 296-97.

⁴⁵ For example, ‘Mr. Hext moveth against Hissing in the House; as not beseeming the Gravity of the Assembly, derogating from the Dignity of it, and from the Privileges, more than any other Abuse whatsoever’: *CJ*, 1: 26 March 1604 (second scribe).

⁴⁶ For example, ‘Sir Edw. Herbert challenged [the Speaker] on the Stairs: That he popped his Mouth with his Finger in Scorn : Did again this Morning do it in the Street on Horseback’: *CJ*, 1, p. 451: 18 July 1610

an exasperated House of Commons ordered the refractory warden of the Fleet in the Shirley case to be incarcerated in the four-foot cube that was the Little Ease cell within the Tower, without early relief.⁴⁷ Second, in 1621, it was ordered that two men should ride bare back on one horse, from Westminster to the Exchange, with papers on their breasts, identifying that they were being punished for having improperly arrested a member's servant.⁴⁸ In the third example, a man who had counterfeited a protection had to stand on two separate days in the pillory, and was then to be kept perpetually in the Bridewell and put to work.⁴⁹ In some cases, a whipping was specified.⁵⁰ It was really only when the issue of the misuse and forgery of 'protections' mushroomed in the 1620s that severe punishment was more certain, and the limits of privilege more tightly defined, with both Houses increasingly intent on projecting their authority and status.

Before concluding this section, it has to be recognised that resisting legal processes was not always unfair, or prejudicial to the good name of parliament. It would appear that there were times when political opponents would deliberately engineer legal actions, often across different locations, sometimes clandestinely, so that the potential MP might be outlawed or arrested, *before* he was covered by parliamentary privilege, and without being able to resist a process of which he might not even have been aware. The wearing down of a man through multiple suits can be seen from two cases from as early as the fifteenth century. The first involved Richard Dygon, servant of the MP, John Wyke, who was subject to 'six actions of debt and various other actions of trespass'.⁵¹ The second concerned Edmund Chymbeham, who was granted privilege, but this was followed by an allegation of a felony, which kept him in prison.⁵² Another case, from 1601, concerned William Vaughan, servant to the earl of Shrewsbury, who was held in Newgate prison on an execution. It appeared that one William Crayford had 'fraudulently and maliciously taken out and laid upon the

⁴⁷ See p. 93n. above.

⁴⁸ *CJ*, 1, pp. 637-38: 4 June 1621.

⁴⁹ *LJ*, 3, p. 172: 27 November 1621.

⁵⁰ *CJ*, 1, p. 260: 25 January 1606.

⁵¹ See Appendix 1, case 8.

⁵² See Appendix 1, case 10.

said Vaughan divers Writs of Execution and Outlawry of many years past, and utterly without the privity and knowledge of most of the parties to whom the said Suits appertained, of which parties some were avowed to have been a good while since Deceased'. The Lords ordered his release by virtue of his privilege, and specified that: 'the said Sheriff shall be free from any trouble, damage or molestation for his said discharge [of Vaughan]'.⁵³ As Thrush suggests, there was sympathy in the seventeenth century for men who may have been outlawed behind their backs, and a reluctance to see creditors, rather than electors, determining who would sit in parliament. So the Commons decided, in 1628, that: 'Ferdinando Huddleston, Knight for Cumberland [...] may serve, notwithstanding he be outlawed'; in fact, there were twenty-four outlawries against him. The debate on the matter paid particular attention to the possibility that Huddleston might have been outlawed behind his back, as might happen to 'the best man in a county', and that 'it was no little prejudice to the commonwealth so to be deprived of the possibility to be served by the worthiest persons'.⁵⁴

This section has shown that in the early Stuart period, the privilege of freedom from legal processes operated in ways that did not reflect the original purpose. Concerns arose about the exploitation of privilege, and the way that it benefited three kinds of men who ran up debts: first, recusants, or those with catholic connections, who wanted to provide a costly show of loyalty; second, those who had stood surety for family or friends; and, third, those who had acted more unscrupulously, and with a blatant disregard for their obligations. The changes in the composition of the Commons may have meant that some members were more concerned about personal gain and advancement than the dignity and honour of themselves and the institution. The Commons were always at pains to maintain, or even to extend, their privileges, even during lengthy parliaments, so that there was growing tension between maintaining the privilege in a form that met its original purpose, and making some

⁵³ D'Ewes, *Lords*, pp. 607-09, December 1601.

⁵⁴ *CJ*, 1, p. 714: 28 May 1628; Thrush, *Commons 1604-29*, I, p. 68. The question of 'secret outlawries' (not only in relation to MPs) had previously led to the passage of legislation, including *The Avoidance of Secret Outlawries Act 1588* (31 Eliz. I c. 3).

adjustments to safeguard the rights of creditors and others who had reason to use the law against MPs, or their servants.

Privilege for servants

This section looks at the operation of privilege for servants of members of both Houses of Parliament, who were covered by the privilege of freedom from arrest, imprisonment, or legal processes, in the same way as their masters.⁵⁵ This privilege became increasingly exploited or abused during the early seventeenth century, although it had its origins in the medieval period, when it developed to protect those servants that were necessary for a member when travelling to and from parliament, and carrying out his functions there. However, the definition of whether a servant or class of servants was ‘necessary’ was open to different interpretations. Abuses were seen in the protection of servants who had engaged in unseemly behaviour, even though a breach of the peace was not amenable to a privilege claim. As described below, there was growing abuse after the way in which a ‘servant’ could be protected from legal processes and arrests was simplified in the early part of the seventeenth century. He could now carry a document – a ‘protection’ – signed by his master, not validated by any third party, which confirmed his status.⁵⁶ Several attempts, with varying degrees of success, were made to reduce, or eliminate malpractice, by restricting the use of such protections to servants who were truly both ‘menial’ and ‘necessary’.

The operation of privilege of parliament, to include members’ servants, was long-standing. In 1404, the Commons asked the king for privilege for themselves, and that ‘their men and servants with them at the said parliament, who are under your special protection and safekeeping, ought not to be arrested or in any way imprisoned in the meantime for any debt, account, trespass or other contract of any kind’.⁵⁷ This request shows how privilege grew out of the protection given by kings to those involved in parliaments. Over time, the definition of a ‘necessary servant’ came to include a wider

⁵⁵ The exemption did not cover treason, felonies, or breaches of the peace.

⁵⁶ See pp. 179ff. below.

⁵⁷ *RP*, III, 541, 71: January-March 1404.

group, such as estate bailiffs, on the grounds that a member or peer needed to be spared the diversion of resolving legal matters that might involve *any* kind of servant. This extension can be seen as exploitative, rather than abusive. More direct abuse of the system of protection for servants occurred whereby an unscrupulous or corrupt member of either House would name someone as a servant, who was in reality simply a friend, client, or associate. So, in 1454, a certain Derykson purported to be the servant of John Toke, ‘whereas God and all the world knows that the opposite is true and thus the [petitioner] is delayed and barred from his said action’.⁵⁸ Some other petitions for privilege were unsuccessful, so that Sir Laurence Reynford, servant of Henry, earl of Essex, was not granted privilege of parliament for sums owed to an otter huntsman, arising out of long-standing contracts running, presumably, over more than a single parliament.⁵⁹ John Walshe, another servant of the earl of Essex, was not granted privilege, as he had been ‘impleaded’ (brought into a suit as a third party); the judges decided that such cases had never been amenable to privilege of parliament:

There is not nor ever was such a custom that [... those ...] coming to parliaments by royal summons and the members of their households should not be impleaded by reason of any trespass, debt, account, convention or other contract whatsoever while they so abide in royal parliaments, as is specified and recited in that writ.⁶⁰

By the early seventeenth century there was a rising number of cases involving servants: seven cases were brought to parliament’s attention between 1549 and 1603, fourteen arose in James I’s reign, and thirty-two across Charles I’s whole reign.⁶¹ Some of the privilege cases from James I’s reign that involved servants did not always show the principals in a good light. In 1604, Sir Edward Hoby (Scarborough) asked ‘That a Man of his, for fighting, being committed by my Lord Chief Justice,

⁵⁸ TNA C1/22/101, *Petition to the chancellor*: March 1454, in Kleineke, *Parliamentarians at Law*, pp. 40-41.

⁵⁹ TNA E13/158, roll 26, *Writ of parliamentary privilege*: June 1472 to November 1473, in *ibid.*, pp. 70-81.

⁶⁰ *Ibid.*, pp. 82-85. This case took place towards the end of the Plantagenet period, by which time, the Commons ‘began to assert a claim that they cannot even be impleaded’: Kilmuir, *Law of Parliamentary Privilege*, p. 9.

⁶¹ Turberville, ‘Protection of Servants of Members’, pp. 591, 593.

might be [sic], for other Actions, have the Privilege of this House'. This was 'yielded unto'.⁶² Two years later, a writ of *habeas corpus* was issued for some of Sir Edwyn Sandys' (Stockbridge) servants, who had been committed to Newgate by Sir Robert Leigh, a justice of the peace, for rioting and wounding while drunk. Leigh's fault chiefly lay in his refusal to grant bail to the men, and the Commons found him 'guiltie of endeavoring to enfreng and breake the priviledges of the howse'. However, they were inclined to mercy, judging that Leigh had acted more out of ignorance than malice, and had been in custody for some time before the Commons heard the facts. Leigh then prayed 'the Favour of the House, if he had offended'. This was taken as only a qualified acknowledgement, and led to 'Great Trouble and Confusion' over whether Leigh had submitted himself appropriately. He was then 'Called in again; and to expound his conditional Submission, and to speak it absolutely'. Having apologised absolutely and unconditionally, he was then discharged.⁶³ This account perhaps confirms the view that the Commons were often more concerned about outward appearances, rather than substance, and the maintenance of privilege to protect their servants, rather than the exercise of justice, and that they were prepared to protect even those who had committed a breach of the peace. A fourth case, from 1610, involved a servant of Nicholas Steward (Cambridge University), who had got a woman with child, at a time when 'the justices are empowered to punish the reputed father, and to make provision for the care of the child and to charge such father with a weekly payment of a sum of money, which, if he refuses to pay, then to commit him to the common gaol'.⁶⁴ The situation was muddied because the warrant was issued before the parliament began, but only executed after the start of the session, so that the matter was referred to the privileges committee.⁶⁵ The House subsequently

⁶² *CJ*: 24 May 1604 (second scribe). Presumably, he feared some kind of action for compensation from the aggrieved party.

⁶³ Willson (ed.), *Bowyer Diary*, p. 50: 23 February 1606; *CJ*, 1, pp. 272-73: 22 February 1606; Hatsell, *Cases of Privilege*, pp. 131-32.

⁶⁴ Hatsell, *Cases of Privilege*, p. 132.

⁶⁵ *CJ*, 1, p. 438: 14 June 1610.

ordered that the servant should have privilege, but that he, rather than the constable, should bear the charges.⁶⁶

The number of *recorded* cases where privilege was invoked was surely smaller than the overall total, as there must have been many occasions where a member's servant avoided arrest or imprisonment, simply by proving that he was under protection of privilege through his master, perhaps by showing a protection document. Where a case did come before parliament, importance was attached to an outward show of maintaining the privilege, even though penalties for infringement of privilege were usually not severe: as noted previously, the 'delinquent' who had arrested the servant was usually brought to the Bar of the House, reprimanded, apologised, and made to pay any necessary fees.

A change in the procedure for invoking privilege may have contributed to the rise in the number of cases. In the Tudor period, a servant wishing to benefit from parliamentary privilege could obtain a warrant from the Speaker, which safeguarded his person until parliament was dissolved. This was a development of the approach taken in the Smalley case of 1574, to secure the release of a servant 'by warrant of the Mace, and not by [chancery] writ'.⁶⁷ If someone had actually been arrested, the matter would be raised in parliament, which usually led to the issue of a writ to free the servant, with the arresting parties being summoned to appear before the House. If there were any difficulty, the Commons' serjeant with the mace would be used to enforce the authority of the House. However, in the early part of the seventeenth century, perhaps as early as 1611, a crucial change occurred, whereby a servant of a member of either House could be issued with a written protection certificate, signed by his master, rather than the Speaker.⁶⁸ As Turberville identifies: 'If the servant was to be secure in the effective enjoyment of his privilege, the issue of a written certificate was a great advantage, perhaps almost a necessity. He needed at least a card of identity. So he was given a protection certificate, in which any persons whom it might concern were strictly charged "under the ancient privileges, laws, and

⁶⁶ *Titus*, fol. 124, in Foster (ed.), *Proceedings 1610*, II, p. 379; *CJ*, 1, p. 440: 16 June 1610.

⁶⁷ See Appendix 1, case 18.

⁶⁸ Turberville, 'Protection of Servants of Members', p. 592.

customs of the realm", not to "arrest, attack, impress, stop, hinder, or molest" XXX during the time of parliament'.⁶⁹ An alternative version can also be found:

Whereas John Rogers, gent., is my servant, for whom I have special employment, these are to require you and every of you to forbear to molest, arrest, or imprison my said servant, during this present parliament and 15 days after, as you will answer to the contrary at your utmost peril. Given under my hand and signet at [blank] the [blank] day of December 1610. To all mayors, bailiffs, and other his Majesty's officers, to whom it shall appertain.⁷⁰

This pre-emptive certification saved time and helped avoid confusion about who was and was not a 'servant', but only if the supposed masters exercised restraint in their issuing of protections. Written protections might also have been intended to reduce confusion about the status of servants, and consequent challenges to parliamentary authority, such as occurred in the Curwen case of 1601, when a creditor and arresting sergeant gave contemptuous replies to a servant's claim that he was privileged.⁷¹ In the event that a protection failed in its purpose, *The Privileges* gives 'The forme of a Letter to bee directed to the Sheriffe of L. for discharge of a Servant that is Arrested upon Execution, and during the time of the Parliament notwithstanding his Protection'. A peer, or county or borough member of the Commons could use the following formula, and there is also a version to be used by a peer alone:

Wherepon by the ancient Priviledges, Lawes and Customes of this Realme heretofore used and approved, The Lords Spirituall and Temporall, the Knights, Citizens and Burgesses of the Parliament, have alwayes had their servants and followers priviledged and free from any molestation, trouble, arrest or imprisonment, for some certain dayes, both before the beginning and after the ending of the same. [...] I understand notwithstanding, that you or some of you, have now in your hands some Processe, Writ or Warrant, to molest, arrest, imprison I.B. my household Servant in ordinary⁷²

⁶⁹ Ibid.

⁷⁰ *A Commonplace Book*, V.a.321, Folger Shakespearean Library fol. 66v, in Foster (ed.), *Proceedings 1610*, II, p. 6n.

⁷¹ See Appendix 1, case 24. A similar contempt for privilege was evident in the Shirley case.

⁷² *Ordinary* had the sense of staff in regular attendance or service: *OED Online*.

whose attendance I have special cause to use and employ in matters which doe much concerne and import my estate, and other occasions to bee followed and solicited by him during this Sessions of Parliament. These are therefore to Charge and Command you, and every one of you, both to withdraw the same Processe, Writ or Warrant, if any such bee; As also, if thereby you or any of you, have molested, arrested, or imprisoned him, the said I.B. within the compasse of the foresaid dayes of priviledge; That then upon sight hereof, you presently set him at Libertie, as you or any of you will answeere to the contrary. Given under my hand and Seale the XX. day of XXX.⁷³

These documents have a number of points of interest. First, there is an assertion that the claim for freedom from arrest for a servant is based on ancient privileges, laws, and customs. It can be seen that statutes were indeed enacted in 1403⁷⁴ and 1433,⁷⁵ to protect ‘any that come to Parliament’ and their servants from assault or affray; transgressors could be fined.⁷⁶ Second, there is confirmation that the privilege obtains for some certain, but undefined, days, before the beginning, and 15 days after the ending, of a parliament, although the position that obtained between prorogued sessions is not explicitly stated. The 1512 case of Richard Strode provided a precedent, as the stannary courts had imprisoned him during a time that parliament was prorogued, for words he had used within parliament. A writ was issued that he should be delivered ‘safe and sound’ to parliament, which was followed by the enactment of *Strode’s Act: The Privilege of Parliament Act 1512* (4 Hen. VIII c.8).⁷⁷ Third, the certificate should be sufficient to secure the release of the servant.

One key issue merits more extended treatment: who actually was a ‘servant’, or indeed a ‘follower’, a term used in one of the documents? The material cited above give at least some expectation that the servant had to be ‘a household servant in ordinary’, or someone whom his master specially ‘caused to use and employ’ during

⁷³ Anon., *Privileges and Practice ... (1628)*, pp. 20-21. The version for use by a peer alone can be found on p. 22.

⁷⁴ 5 Hen. IV c. 6.

⁷⁵ 11 Hen. VI c. 11.

⁷⁶ Hatsell, *Cases of Privilege*, pp. 16-17.

⁷⁷ See Appendix 1, case 12.

the sessions of parliament. Holinshed records that Henry VIII had expressly referred to ‘their servants, even their cooks and house-keepers [an alternative reading is horse-keepers]’.⁷⁸ Even so, two of the above documents refer respectively to a ‘gent.’, and ‘gentlemen’. The servant might also be used and employed ‘in matters which doe much concerne and import my estate’, both of which descriptions suggest men above the level of ‘menial’ servants, or those in personal attendance on the master. The issue of how to define a ‘servant’ recurred across the period. In 1584, the Lords decided that viscount Bindon’s servant was not ‘a menial Servant, nor yet ordinarily attendant upon the said Viscount’.⁷⁹ In 1607, the Commons heard of the arrest for debt of Thomas Finch, ‘servant’ to Sir Michael Sondes (Queenborough). As was usual, the arrest was ‘conceived to be a great contempt to the privilege of the House’: a writ of *habeas corpus* was ordered. The arresting serjeant affirmed that the creditor had assured him that Finch was not a servant to a member, and that he, the serjeant, knew that Finch was working as an attorney.⁸⁰ However things were not as simple as they seemed: ‘the Party arrested had bene Servant to Sir Michael Sandys [Sondes] long time, and now of late was become a sworne Attorney of the Common Pleas, and yet Sir Michael Sandys affirmed to the House, that the Party notwithstanding his being such an Attorney, doth still continue his household meniall Servent, and receives Wages of him’.⁸¹ Finch was delivered up under the writ of *habeas corpus*, but the House asked itself whether privilege applied to all servants, or only to ‘menial and necessary servants’. Sondes declared that Finch ‘lay in his House, solicited his Causes, received Wages’, and the House was told of the precedents by which privilege had been granted on earlier occasions: first, to the solicitor of William Huddleston,⁸² and, second, to the solicitor of the baron of Walton.⁸³ The House maintained the privilege for Finch, and ordered that the serjeant should be held for a

⁷⁸ Raphael Holinshed, *Chronicles of England Scotland, and Ireland* (London: s.n., 1808), III, p. 824, in Turberville, ‘Protection of Servants of Members’, p. 592.

⁷⁹ *LJ*, 2, p. 69: 7 December 1584.

⁸⁰ *CJ*, 1, p. 332: 10 February 1607.

⁸¹ Willson (ed.), *Bowyer Diary*, pp. 209-10: 13 February 1607.

⁸² Appendix 1, case 24.

⁸³ No case involving the solicitor of baron Walton (or de Wilton? or de Walden?) has been identified.

month, but excused any fine, because of the muddled circumstances of the case. This was clearly unsatisfactory, so that ‘afterwards Mr Speaker said openly, "That he would move the Lord Chief Iustice of the Common Plase, That Provision might be, that no Attorney sworne of that Court, should serve any man": So it was agreed that every man at his Perill must take Notice of Persons priviledged’.⁸⁴ On at least one occasion, privilege was claimed for the son of an MP.⁸⁵ However, privilege was not always maintained, as in a case that involved the wealthy, ruthless, and violent Sir Edmund Ludlow, whose huge belief in his own powers may have alienated fellow-members.⁸⁶ In 1610, it emerged that he had attempted to protect one of his former servants, by claiming that he was still in his employ. Exposure of this flagrant abuse meant that the servant was not granted privilege, and a referral to the committee for privileges was made. No further record can be traced in the *Commons’ Journal*, so it might be that the matter was allowed to drop quietly.⁸⁷

It was possible, of course, for someone to assert falsely that he possessed a protection: ‘one George Crippes, Mariner, giveth out speches that he hath a protection from one of the Members of this Howse, and that therfore he will not appeare nor answeare to any Accion or Suite in law, and yet refuseth to disclose what the name of the party by whome he is soe protected’. The House believed the claim to be false, ‘to the wrong and scandell of the House’, and ordered the serjeant-at-arms to bring Crippes before them.⁸⁸ 1621 was a year when a number of malpractices were exposed that brought the reputation and authority of both Houses into question, and illustrated the abuses to which a system that used written protections was prone. In March, the Commons became concerned about the issue of protections for servants, or supposed servants, and their abuse, surrounding a case involving a fraudulent bankrupt: James Lasher (Hastings) drew attention to the activities of a London grocer, Francis Lovell, who not only failed to satisfy his ancient creditors, but also falsely

⁸⁴ *CJ*: 13 February 1607 (second scribe); Willson (ed.), *Bowyer Diary*, pp. 209-10, fols. 226-27: 13 February 1607.

⁸⁵ See pp. 125f. and p. 125n. above.

⁸⁶ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 188.

⁸⁷ *Titus*, fol. 125, in Foster (ed.), *Proceedings 1610*, II, p. 380: 20 June 1610; *CJ*, 1, p. 441: 20 June 1610.

⁸⁸ *Book of Orders*, fol. 70, in Notestein et al. (eds.), *CD 1621*, VI, pp. 457-58: 15 March 1621.

held goods on a promise – unrealised – to make future payment. Threatened with arrest, he had shown protections from Sir Thomas Jermyn (Bury St Edmunds), and Sir Richard Grosvenor (Cheshire), who protested that they had been misled by Lovell’s friends into believing he was a gentleman, who only needed protections for a week or so, in order to allow him to acquire funds to meet his obligations. Both Jermyn and Grosvenor then withdrew their protections.⁸⁹ The House ordered ‘that noe man should protect any but his ordinarie servants, And that the service itselfe was a Protection, And That noe member of the Howse could make any Protection in writing, but onely a Declaracion of his service’.⁹⁰ A few days later, John Whitson (Bristol), a merchant, complained that Sir Thomas Shirley junior (Steyning) had protected someone ‘being none of his servants or attendants’. Others were indignant: Sir Warwick Hele wished ‘to have this examined and punished’. William Hakewill (sitting then for Tregony) stated that the king had specially recommended that protections should apply only to servants in attendance in Westminster, not ‘the country’. He reminded the House that ‘noe member of this howse can protect any but his servant and ought not to declare it in writeinge, and that so ruled last Parliament and such servants only as attend upon our persons’. However, Sir Edward Coke took an expansive view: ‘Ther ought to be no writeinge, but all those whose service [is] necessary are priviledged whether they waite uppon our persons or serve us in the countrye. A Bailiffe of more use that is trusted with the orderinge of a man’s estate in the country than a page or footman attendinge on our persons’.⁹¹ The House endorsed this view, when it resolved:

That the Members of this house are to have priviledge as well for their Bayliffes, Cookes, Butlers, husbandmen and other their necessary and meniall servants and attendants which in their absence in the service of this house live and continue in the Country as for their attendance and servants upon their persons here in and about the City because without such priviledge for them these members of this house cannot performe there service herein with that freedome for distraction and other prejudice as is fittinge. But it is also further resolved and declared [...] that none of the

⁸⁹ Tyrwhitt (ed.), *CP 1620 and 1621 (Nicholas)*, I, pp. 166-67, 170: 15 March 1621.

⁹⁰ *Pym*, fols. 64-65, in Notestein et al. (eds.), *CD 1621*, IV, p. 159: 15 March 1621.

⁹¹ *Belasyse*, 37v, in *ibid.*, V, p. 64: 22 March 1621.

Members thereof cann order or grant any priviledge or proteccion to any by any writeinge under his hand or seale but the same proteccion is meereley voyd if the party to whome the said proteccion is granted bee not truly and really his Meniall servant or attendant in which Case noe proteccion by writeing is necessary.⁹²

The Commons clearly showed continuing concerns, during a further debate in November 1621. Mr Brooke felt that the extent of privilege for servants, as decided in the previous March, might be too wide: ‘the Burgesses of Parliament have priveledges for ther servants familiars, [...] and the Country complains of our protections and of the upper house more. Somm of this house have protected Knights who are no servants to them nor fitt to be so. Lett all disavow such undew protections and be censured if they revoke them not’.⁹³ Sir Edward Coke put forward a balanced view: ‘A citation or subpaena not to be served on servants. All servants as well lookeinge to our estates at home in the country as attendinge on our persons are priviledged. [...] but [...] Lett us not abuse our priveledges to the grievance of our countrye. Protections are royall priveledges and but good in some cases’.⁹⁴ The reference to protections being a royal privilege should be noted. Coke went on to say that: ‘he hath disavowed a Servant of his, that hath served him 22 Years’. Sir Robert Phelips suggested that the committee for privileges should consider which protections were ‘fit’ and which were ‘unfit’, and cautioned: ‘We ought to be carefull of nothing more than the honor of this howse, and the priveledges of it are the matters of moment. It is the universall crye of the kingdom that we have graunted that which is abusive, vzt. protections’.⁹⁵

⁹² *Book of Orders* (Petyt 537:18, Inner Temple Library), fol. 90v, in *ibid.*, VI, p. 461: 22 March 1621. This resolution must have been remembered, when, in 1628, ‘Sir Guy Palmes [Rutland] had one Boswell to keep his courts and receive his rents, and now brought them up to him, and he was arrested for a debt here at London. It was resolved that he ought to have privilege, and that the serjeant that arrested him should be sent for’: Johnson et al. (eds.), *CD 1628*, IV, p. 6: 28 May 1628.

⁹³ *Barrington Notes*, in Notestein et al. (eds.), *CD 1621*, III, pp 409-10: 20 November 1621. The MP was probably Christopher Brooke (York).

⁹⁴ *Belasyse* in *ibid.*, V, pp. 205-6: 20 November 1621.

⁹⁵ *Barrington Notes*, in *ibid.*, III, p. 409: 20 November 1621. Phelips had modified his position from earlier in the year, when he defended the operation of protections, even during long vacations: *Barrington Notes*, in *ibid.*, III, p. 380: 1 June 1621.

Moreover, it was reported that blank protections were sold for five shillings a piece.⁹⁶ The Commons resolved: ‘that all Protections, granted by any Member of this House to any, not his menial Servant or Attendant, are void. And Ordered, That, if any shall hereafter avow any such Protection, unlawfully given, or shall, after this Time, give any, he shall incur the Censure thereof’.⁹⁷

There was a matching debate in the Lords, in December 1621.⁹⁸ Although the Commons’ resolutions might have put down a marker, they still did not closely define who was to be considered a ‘menial servant or attendant’. In contrast to cases involving higher-born supposed servants, in 1628 it was servants of low status whose privilege was questioned, when James Elcocke, servant of Sir Edward Dennys (Yarmouth, Isle of Wight), was arrested at the behest of one, Skynner, an attorney. Skynner admitted that he knew that Dennys was a member of the Commons, but asserted that only ‘attendants upon his person’ should be privileged, rather than any ‘scullion-boy and kitchen-boy’ into which category he clearly placed Elcocke.⁹⁹ Elcocke’s rights were maintained, Sir James Perrott going so far as to say he ‘thought it fit to use him [Skynner] as a man was, for arresting a servant of Sir James Whitelocke, caused to ride with the face to the horse[’s] tail, backwards’.¹⁰⁰

Difficulties over the protection of servants persisted through the seventeenth and will into the eighteenth century. In 1641, a report from the Lords’ privileges committee recommended that only those who were menial servants, or ‘necessarily employed in their affairs’, should qualify for a peer’s protection. However, the ambiguity in the definition of *necessarily employed* led to a referral back to the committee.¹⁰¹ The Commons restated the ban on the issue of protections for any but menial servants on more than one occasion, until they decided, in 1661, that *no*

⁹⁶ *Pym*, in *ibid.*, IV, p. 420: 20 November 1621

⁹⁷ *CJ*, 1, p. 640: 20 November 1621. The online version gives an incorrect date of 14 November. The Lords adopted a similar motion in 1624: *LJ*, 3, pp. 417-18: 28 May 1624.

⁹⁸ The abuse of peers’ protections is explored more fully on pp. 188ff. below.

⁹⁹ *CJ*, 1, pp. 904-05: 26 May 1628.

¹⁰⁰ *Diary of Sir Richard Grosvenor*, E.5.35, Trinity College Dublin, in Johnson et al. (eds.), *CD 1628*, IV, p. 133: 30 May 1628.

¹⁰¹ *LJ*, 4, pp. 270-71: 10 June 1641.

written protections were to be provided to servants, and that their release from arrest should, in a return to earlier procedures, be secured through an Order from the Speaker.¹⁰² The Lords did not go so far, again limiting the ban to those ‘that are not now their Lordships’ menial Servants, or Persons necessarily employed about their Estates’.¹⁰³ Even so, the Commons seemingly still needed to restate the ban on protections through their standing orders, in a number of sittings between 1670 and 1695, while the Lords passed resolutions on the matter between 1690 and 1718.¹⁰⁴ It was clear that abuses were not going to be avoided simply through a resolution or Order of either House, despite public and parliamentary concern, both when protections were forged, and when servants were in reality neither ‘menial’, nor ‘necessary’. As a consequence, statutes were introduced in the eighteenth century that progressively reduced the scope of the privilege afforded to servants, culminating with an act of 1770, which ended the exemption for servants from court actions, arrest, or imprisonment during times of privilege, in connection with suits for debt.¹⁰⁵ Servants were no longer free to escape their obligations, although until 1892 the Speaker continued to include an otiose claim at the start of a parliament for exemption for servants from arrests or molestations.¹⁰⁶

This section has shown how the privilege of parliament was being increasingly abused in the early Stuart period, in respect of ‘servants’ of members of both Houses. There was a continuing difficulty in defining what kind of servant was intended to be covered by the privilege, and there was a wider acceptance that people like estate bailiffs were entitled to privilege as much as body servants. There was also a change in procedure, so that a ‘servant’ could produce a written protection to forestall any

¹⁰² *CJ*, 8, p. 184: 15 November 1660; *CJ*, 8, p. 319: 25 November 1661; *CJ*, 8, p. 321: 28 November 1661.

¹⁰³ *LJ*, 11, p. 341: 3 December 1661.

¹⁰⁴ *CJ*, 9, p. 157: 9 April 1670; *LJ*, 14, p. 521: 13 October 1690; *LJ*, 16, p. 83: 27 January 1697; *LJ*, 19, p. 431: 15 April 1712; *LJ*, 19, p. 442: 7 May 1712. For a further listing, see Turberville, ‘Protection of Servants of Members’, pp. 598-99.

¹⁰⁵ *Parliamentary Privilege Act 1770* (10 Geo. III c. 50).

¹⁰⁶ Turberville, ‘Protection of Servants of Members’, p. 600. The last claim ‘to freedom from arrest of their persons *and servants* [my emphasis]’ was made by the Speaker Elect, Arthur Wellesley Peel, on 6 August 1886: Libraries of House of Commons and House of Lords, *Hansard, Parliamentary Debates*, at <<http://tinyurl.com/or82h3w>>, House of Lords, 3rd series, vol. 308, cols. 12-13: 6 August 1886.

arrest or legal process. In general, the immunity was recognised as problematic by contemporaries. Nevertheless, it is hard to differ from an analysis that: ‘The privilege of freedom from arrest and molestation was no doubt essential to the authority and dignity of the House of Commons, but the extension of the privilege to members’ servants and estates became a source of grave injustice’.¹⁰⁷

Protections and the Lords

This section looks at some specific abuses that were brought to the Lords’ attention in the 1620s, particularly in relation to the protection of servants. Although this thesis is primarily about the Commons’ privileges, both Houses were increasingly concerned about the misuse of written protections, so that debates in one House might reflect difficulties identified in the other, with a concern that public confidence in the probity of parliament as a whole was being compromised. It is important, therefore, to look at the cases of abuse or malpractice that were raised in the Lords, in order fully to understand how the privileges of both Houses were viewed by contemporaries. The extension of privilege to a wider group of servants had particular significance for magnate peers, who tended to have a larger group of clients, or followers, and more than one estate outside London with its own establishment, so that they would be hard pressed to determine who exactly was a necessary servant, and thereby properly entitled to privilege. So, it may be that the emergence of cases surrounding peers heightened concern in the lower House that parliament as a whole was being brought into disrepute by the misuse of protections. The most serious concerns were, first, that blank protections were being signed by peers, i.e. without the inclusion of the servant’s name; and, second, that the seals or signatures of peers were being forged onto counterfeit protections. Both types of protection might then be sold on, with the name of someone who was not a servant of an MP or peer inserted at some point. This section describes such issues in more detail, and also shows that the Lords recognised that they needed to act, not just on a case-by-case basis, but also to tackle the issue more comprehensively and effectively, in order to maintain their honour.

¹⁰⁷ R. L. Schuyler, ‘Review: [Untitled] : Reviewed Work : The History of English Parliamentary Privilege, by Carl Wittke’, *AHR*, 27 (2) (January 1922), 290-2, p. 291.

Around 1621, the Lords began to concern themselves over the counterfeiting of protections for servants. Counterfeiting obviously carried the risks of detection, and of severe punishment. Even so, peers, especially the magnates, were more susceptible to this crime than members of the Commons, as they would be more likely to sign a set of several blank protections, with the details being added separately, perhaps by a secretary or steward. In November 1621, the Lords learned of a number of alleged forgeries, with lord Stafford¹⁰⁸ and lord North separately complaining that their protections had been counterfeited. Eight alleged perpetrators were summoned to appear before the House.¹⁰⁹ Three, Peare, Blunt, and Warynges, were brought to the Bar of the Lords, where Peare denied the counterfeiting of a protection, affirming that ‘he received the same from one Denton, the which Protection was for himself; and that the said Denton received of him Three Shillings for the same’. Perhaps surprisingly, Peare was then ‘acquitted and set at Liberty’. Blunt ‘confessed that he counterfeited the Lord Stafford’s Seal, to One Protection only’. His sentence was severe, as it appeared that he was a hardened criminal. A paper was to be placed on his head in the pillory, reading: ‘John Blunt, for having counterfeited the Seal of a Peer of this Realm to a Protection, being before-time convicted for notorious Offences of like Nature in other Courts, is, by the Lords of the Upper House assembled, besides this his publick Punishment, To be perpetually imprisoned in Bridewell, and There to be employed in Work for his Living’. Warynges denied counterfeiting, and affirmed that: ‘he received Six Protections from the Lord Stafford, with Blanks, of[f] one Mathew Watson’. He was remanded to appear a fortnight later, and to bring in Watson at the same time, which he failed to do.¹¹⁰ Warynges then confessed that he wrote the protections, claiming that he did not counterfeit lord Stafford’s hand and seal, but later admitted the counterfeiting as well, for which he was ordered to stand in

¹⁰⁸ Edward Stafford, fourth baron Stafford (fourth creation), should not be confused with Thomas Wentworth, created first earl of Strafford in 1640.

¹⁰⁹ In the case of lord Stafford: Thomas Waringes, Mathew Smyth, Timothy Castleton, John Blunt, Stephen Bucked, Matthew Peare, and William Gravenor; in the case of lord North: Bryan Griffith: *LJ*, 3, p. 170: 26 November 1621.

¹¹⁰ *LJ*, 3, p. 172: 27 November 1621; *LJ*, 3, p. 186: 8 December 1621.

the pillory for one day, with papers on his head, showing his offence.¹¹¹ Another alleged counterfeiter of Stafford's protections was John Stephen Buck, who was brought to the Lords on an occasion when Stafford was not present. An order was then made for Buck to be brought back later, but it is uncertain whether this actually happened.¹¹² It was not just Stafford's and North's protections that were being forged: the Lords were informed that one, Con Connor, had 'counterfeited the Hand and Seal of the Lord Viscount Rochford'; he was ordered to be brought before their lordships.¹¹³ Connor told the Lords that he had received the protection from a Lyonell Johnson, following which Connor was released on recognisances of £140, in order to 'search for and produce the said Lionell Johnson'.¹¹⁴ It seems that this did not happen before the end of the session.

A further case had a number of twists: William Cowse, servant to lord Stafford, submitted a petition that he should be freed from Ludgate prison, as a matter of privilege. He had been arrested and his goods seized, on the suite of 'one Mr Goade and William Jennynge', and detained in prison, so that he could not pay his rent, and the lease of his house, worth £300, had been sold. Cowse's petition noted that Goade had shown contempt to the Lords, saying that: 'He neither regarded the Protection, nor your Lordships Orders, nor any Thing else your Lordships could do, no more than he regarded a Rush'. When Cowse and the others appeared before the Lords, the evidence of the sheriff's officer introduced a new element, affirming: 'that he had not arrested the said William Cowse, but that he first had Leave from the Lord Stafford (whose Servant he is) so to do; and produced a Writing, under the Lord Stafford's Hand and Seal, of disclaiming the said William Cowse to be his Servant, if the Information given his Lordship be true, that the said William Cowse intends to defraud William Jennings and William Goade of their due Debt'. Goade's use of contemptuous language was corroborated through the evidence of two others, and he was 'committed to the Prison of The Fleet, there to remain during the Lords Pleasure'.

¹¹¹ *LJ*, 3, p. 199: 18 December 1621.

¹¹² *LJ*, 3, p. 185: 7 December 1621.

¹¹³ *LJ*, 3, p. 176: 30 November 1621.

¹¹⁴ *LJ*, 3, p. 179: 3 December 1621.

Although present, Stafford did not speak on the matter, which was remitted to the committee for privileges, with Cowse remaining in Ludgate prison for the time being. The Lords finally ordered that the privileges committee might determine whether Cowse should be released, although it is unclear whether this happened.¹¹⁵

The Lords clearly recognised that they had to adopt a more comprehensive approach that addressed the issue of protections for servants in general. In addition, they may have recognised that they needed to align their approach with that of the Commons.¹¹⁶ So, in December 1621, the lord privy seal, the earl of Worcester, presented the views of the committee for privileges on: ‘How far it is conceived the Privilege of the Nobility doth clearly extend, concerning the Freedom of their Servants and Followers from Arrests’. The committee recommended that servants and family members who were ‘employed necessarily and properly about their Estates as well as their Persons’ should have privilege twenty days before and after every Session. Peers were put on their honour to limit their protections to those properly within the defined limits of privilege. Moreover, they were to submit to the judgment of the House on individual cases, and accept both any personal reproof, as well as any withdrawal of privilege for anyone not found to be a true servant, ‘[for] the Justice of the Kingdom must be preferred before any other personal Respect, and none to be spared that shall offend after so fair Warning’. These trenchant words were interesting in their reference to justice, but must nevertheless have been too much for some, as ‘this was read the Second Time, and directed to be entered as delivered to the House, as the Opinion of some of the Lords of the Committee for Privileges, &c. but suspended by the House to be entered as an Order of the House till they had taken further Consideration thereof’.¹¹⁷ Although the matter was in effect put on hold in 1621, the words alone, or possibly the punishments meted out to offenders, may have had the desired effect for the immediate future, as the next case is not recorded until

¹¹⁵ *LJ*, 3, p. 169: 24 November 1621; *LJ*, 3, p. 170: 26 November 1621; *LJ*, 3, p. 173: 28 November 1621.

¹¹⁶ The Commons had carried their definitive resolution on the matter in March 1621, and had debated abuses in June and November 1621: see pp. 184ff. above.

¹¹⁷ *LJ*, 3, pp. 194-95: 14 December 1621.

1624.¹¹⁸ This latter claim occasioned a further report from the committee for privileges, when they referred to the findings of the 1621 committee. The committee now recommended adoption of exactly the same form of words, with the minor change, that the scope of privilege was to ‘begin with the Date of the Writ of Summons; and to continue Twenty Days after every Session of Parliament’.¹¹⁹

However, the abuse still did not go away entirely, and, in March 1626, the Lords ordered George Gardner and George Buttrice to appear at the Bar of the House, ‘to answer their Contempt, for counterfeiting Protections, under the Hand and Seal of the Earl of Huntingdon’.¹²⁰ When they appeared, Gardner denied the forgery, ‘affirming that he had many such Protections from one Tymothy Chastleton [sometimes Castleton] and that he sold them unto divers [people]’; Chastleton was ordered to appear before the Lords. Buttrice denied forgery, but confessed that he ‘bought one of the said Protections of the said Gardyner, not knowing that it was forged; and denied that he knew of any more’; he was committed to the Fleet prison.¹²¹ Chastleton did not appear, despite a warrant for his arrest having been provided to Gardner.¹²² Gardner subsequently ‘confessed that he had bought and sold Ten of these Protections [supposedly those authorised by the earl of Huntingdon]; for which he humbly craved Pardon, and expressed his hearty Sorrow and Repentance for the same; but he absolutely denied that he did insert any Name in any one of the said Blank Protections’. The Lords decided that he was to be put in the pillory in both Westminster and Norwich for two hours, ‘with a Paper on his Head, declaring his Offence: videlicet, For Buying and selling of counterfeited Protections, Under the Hand and Seal of a Peer in Parliament’.¹²³ The sentence against Gardner was put on hold until after Easter, and an order was made that five others, named by Gardner as counterfeiters, were to be arrested.¹²⁴ Four of them were brought to the Lords to

¹¹⁸ *LJ*, 3, p. 238: 1 March 1624.

¹¹⁹ *LJ*, 3, pp. 417-18: 28 May 1624.

¹²⁰ *LJ*, 3, p. 524: 11 March 1626.

¹²¹ *LJ*, 3, p. 525: 13 March 1626.

¹²² *LJ*, 3, p. 539: 23 March 1626.

¹²³ *LJ*, 3, p. 550: 4 April 1626.

¹²⁴ *LJ*, 3, p. 552: 5 April 1626. Those named were William Pettus, Mathew Deboyse, William Sumpter, Captain Broome, and Sadleton.

answer Gardner's allegations of 'buying and selling divers Protections, counterfeited under the Hands and Seals of Lords of Parliament'. However, the Lords decided that the accusation was false; confirmed their earlier sentence that Gardner should stand in the pillory; and, further, 'that he should not be discharged until he had re-paid unto the aforesaid [guiltless men] their Charges'.¹²⁵

Further offences were identified, two years later, in 1628: the first of these concerned a servant of lord De La Warr, Thomas Willoughby, who had been arrested after the dissolution of June 1626. A writ of *habeas corpus* led to his appearance before the Lords, who 'did not think fit to punish' his principal creditor for the breach of privilege. However, it appeared that there were 'other debts and executions' laid upon Willoughby, which were possible breaches of privilege. The Lords remitted the case to a committee to consider whether he should be privileged in respect of these, as there was some doubt whether the actions had been more than the customary twenty days or so after the dissolution, when privilege no longer obtained.¹²⁶ The Lords later learned that Willoughby had satisfied his creditors, and no further action was taken.¹²⁷ In the second case, John Mayne was alleged to have counterfeited a protection from lord Mountague.¹²⁸ However, there was a twist to the story, when a petition from Mayne was read, in which he claimed privilege as a servant of Henry Parker, fourteenth baron Morley and Mouteagle. The serjeant-at-arms told the Lords that when his man tried to arrest Mayne, the latter had:

Contemned [scorned] the Order of this House, and offered him Violence; yet his Man at last apprehended him, and brought him to Town; and Mayne making an Excuse to see one George Pridee, an Acquaintance of his, the said Pridee and one John Waller do detain him out of his Custody. All which was justified by, the Serjeant's Man, upon his Oath, in the open House.

¹²⁵ *LJ*, 3, p. 558: 18 April 1626.

¹²⁶ *LJ*, 3, p. 705: 31 March 1628.

¹²⁷ *LJ*, 3, p. 782: 6 May 1628.

¹²⁸ *LJ*, 3, p. 709: 3 April 1628.

The Lords concluded matters for the day by ordering that Mayne, Predee, and Waller were to be brought before them.¹²⁹ They were duly brought in, but other business being pressing, the matter was referred to the committee for privileges, with Mayne detained, and Predee and Waller set at liberty.¹³⁰ At a later point, a letter from lord Morley was read to the Lords, confirming that Mayne was his servant, upon which he was freed. The *Journal* nevertheless records that Mayne had been apprehended for allegedly forging lord Montague's protections, and had resisted the serjeant's man.¹³¹ Lord Morley was involved in a second case that arose at this time, when the Lords were told that he had issued a protection for someone who was not employed in his household business, but in the survey of his woods in Essex.¹³²

This section has considered abuses that were drawn to the Lords' attention, including those involving the counterfeiting of written protections supposedly issued by peers. It has shown that the Lords recognised that they needed to act forcefully, not just on a case-by-case basis, but also to tackle the issue more comprehensively and effectively, in order to put the 'justice of the kingdom' above any considerations of personal honour or the privileges of peers.

Conclusions

The privilege of freedom from legal processes for members of both Houses, and their servants, was increasingly exploited in the early Stuart period, to the point of abuse in some situations. A rise in the number of cases may have reflected the fact that the Commons now contained a number of 'new men', some of whom were less concerned with upholding the spirit of parliamentary privilege, or even their own honour, and rather more with using privilege to avoid their financial obligations, or to hamper litigation against them.¹³³ They were helped by the fact that parliaments were now sitting for longer periods, and that their privilege obtained over the whole extent

¹²⁹ *LJ*, 3, p. 717: 9 April 1628.

¹³⁰ *LJ*, 3, p. 735: 12 April 1628.

¹³¹ *LJ*, 3, p. 773: 28 April 1628.

¹³² BL Add. 40091 (Elsynge), *Minute Book of the House of Lords 1628*, fol. 109v: 28 April 1628.

¹³³ Between 1500 and 1629, the membership of the Commons rose from 296 to 493: Thrush, *Commons 1604-29*, I, pp. 43-44.

of a parliament, in contrast to the medieval period, when parliaments usually ran for a single session of no more than a few weeks. There was also a growth in the abuse of protection provided to servants, exacerbated by the effects of a simplification in the early years of the seventeenth century of the way in which protections were provided. Further, there was a continuing difficulty in defining what kind of servant was covered, with acceptance over time that MPs and peers should not be diverted from parliamentary business by becoming involved in supporting a much wider group of people 'in the country', rather than simply those who were needed to attend directly to the master when he was at Westminster, or travelling. Some protections were certainly provided to men who were faced with legal processes, but who could not on any reasonable basis be said to be close, or 'necessary' servants, such as farm bailiffs, friends, people such as lawyers to whom the MP or peer had paid fees, or even family members. The value of a protection thereby became high enough to tempt people either to obtain and to sell on blank, but genuinely signed, protections, or to counterfeit seals or signatures on bogus protections.

Some conclusions can be drawn following consideration of the growing exploitation of privilege in the early Stuart period. First, the extension of privilege to a much more fluidly defined group of 'servants' shows the same kind of elasticity to the limits of privilege that were identified in the Shirley case, and were to become a feature of the Rolle case. Second, a system of privilege that was essentially self-regulated by each House was open to abuse: *Quis custodiet ipsos custodes?* It is clear that debts and unwelcome litigation might be avoided if a man secured election to the Commons, or obtained a certificate of protection, or even a forgery of one, as a supposedly 'necessary' servant. Censure was more likely to be directed at individual members who had behaved badly *in the House*, rather than those whose actions *outside the House* might reflect ill on the Commons' good name, not least those who were avoiding their financial obligations. Last, reform of the system was slow, despite obvious abuses, as there was a tension between preserving privileges, against allowing creditors and others access to justice. Irrespective of whether the rise in the number of cases was abusive, it cannot be suggested that the authority of parliament in relation to the conduct of its members was weakening. In reality, both Houses were becoming more strident and protective in relation to their privileges, as can be seen in

the various ‘protestations’ generated by the Commons, leading to a generally more combative stance in the 1620s. Holdsworth noted that ‘the Houses of Parliament were prepared to assert, in the name of privilege, a power to override the law [... which was ...] most dangerous from the point of view of constitutional principle [...] both Houses in the exercise of their undoubted privileges, inflicted considerable injustice on the private citizen’.¹³⁴

Criticism of the exploitation and abuse of privilege was likely to originate from three directions. First, it might come from those who were directly affected as creditors, or litigants. Although it is difficult to identify directly what the views of such people were, it is clear that some of those seeking to make arrests were inclined to disparage the privilege, more so in respect of servants, especially if they had been engaged in rowdiness of some sort. Second, criticism might, to a degree, come from the crown: Elizabeth and James I had from time to time expressed their concerns about the exploitation of privilege.¹³⁵ However, unlike his two predecessors, Charles I does not seem to have offered direct criticisms, perhaps because he was trying to find ways to work with his parliaments. His concern was more about the way that the Commons were claiming that privilege was an inherent right, and no longer dependent on the royal prerogative and grace. Issues of privilege were undoubtedly becoming bound up with wider political issues, so that challenges to the ‘liberties’ of parliament were increasingly seen as challenges to the ‘liberties’ of citizens in general. Third, both Houses became increasingly aware of the negative impact of privilege, albeit slowly. During the early part of this period, internal criticism was sporadic, and action against people who secured election to avoid personal obligations, or their servants, was always more likely to be on a case-by-case basis. Leading figures in both Houses only really started to take the matter seriously in the 1620s, when the Lords were warned that ‘the Justice of the Kingdom must be preferred before any other personal Respect’, and the Commons were told that ‘it is

¹³⁴ Sir William Holdsworth, *A History of English Law*, 2nd (1937) edn., 12 vols. (London: Methuen, 1903), x, p. 544.

¹³⁵ D’Ewes, *Lords*, p. 17: 28 January 1559; Townshend, *Historical Collections*, p. 38: 22 February 1593; *Ellesmere Observations*, in Foster (ed.), *Proceedings 1610*, I, p. 277; Larkin and Hughes (eds.), *Proclamations (James I)*, I, p. 494.

the universal cry of the kingdom that we have granted that which is abusive, viz. protections'. Nevertheless, there were still peers who did not wish to see their rights and privileges constrained, so that the Lords took some three years to order limits on the issue of protections. Despite repeated resolutions of both Houses to limit the use of protections for servants, the issue did not go away until well into the eighteenth century. It seems that Taswell-Langmead was right, when he said that 'the extension of the privilege of peers and members from arrest, so as to protect, not only their own persons, but their property, their servants, and their servants' property, [...] gave rise to very grave abuses, and the commons even took up the position that they and their servants were immune from civil proceedings of every kind'.¹³⁶

¹³⁶ Theodore F. T. Plucknett (ed.), *English Constitutional History ... by Thomas Pitt Taswell-Langmead*, 10th edn. (London: Sweet and Maxwell, 1946), p. 648.

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VI : JOHN ROLLE'S CASE (1628-29)

Introduction

This chapter considers a case, which began in 1628, and is significant within a series of events that changed and extended the nature of the Commons' views of their powers. It concerns a request for parliamentary privilege that concerned John Rolle, who was a London merchant, as well as member for Callington.¹ The case arose at a time when difficulties over royal finances, matters of religion, the authority of the Speaker of the Commons, and the character of Charles I were so intertwined as to affect the general conduct of the 1628-9 parliament through to its dramatic and chaotic conclusion. The particular circumstances were that, in 1628 customs officials had taken the trading goods of Rolle and about thirty other principal merchants, mainly involved in the Levant trade. This followed the merchants' refusal to pay duties of tonnage and poundage, because the Commons had not authorised their collection for the king. It appears that Richard Chambers, rather than Rolle, was probably the leading figure in that group of merchants, but there was one significant difference between the case of Rolle, and that of Chambers and the wider group of traders.² Whereas they had all asserted that there was no obligation to pay unauthorised duties, Rolle's position meant that he could additionally pursue a claim that parliamentary privilege protected him and his property, and that goods that had

¹ Callington was in Cornwall, and a number of awkward members held seats in that county at one time or another, including William Coryton, Denzil Holles, Sir John Eliot, and Benjamin Valentine: Thrush and Ferris (eds.), *Commons 1604-29*, II, pp. 45-81.

² Chambers, who was not a member of parliament, was a prominent opponent of the exercise of royal powers to raise supply without parliamentary authority. He resisted the collection of tonnage and poundage in 1628, and ship money in 1637. In June 1629, it was ordered that neither he nor his goods should be released until he had paid both the tonnage and poundage and a Star Chamber fine. His imprisonment continued for six years, and it has been observed that: 'His fidelity to constitutional principle may be contrasted with the resolutions of the majority of merchants, whose response to the common call to desist from trading if this involved payment of illegal duties was predictably short-lived': Robert Ashton, 'Chambers, Richard (c. 1588-1658)', *ODNB*; Rushworth, *Historical Collections*, I, pp. 639ff.

been seized should be returned to him. These claims gave rise to four key questions. First, did privilege extend to *all* of a member's goods, as well as to his person? Second, did the privilege still hold during times when parliament was adjourned or prorogued? A third ancillary issue was whether privilege of parliament applied for petitioners to the Commons, not just MPs and their servants. The fourth issue had two strands: were those collecting tonnage and poundage – or seizing goods in lieu – acting directly on royal authority; and, if so, could parliamentary privilege still be invoked to recover the goods? Did privilege apply against the king? There was then a further, tactical, issue: whether the assertion of 'ancient and undoubted' rights of privilege for Rolle alone might divert attention from wider issues of principle that warranted the Commons' attention in the 1629 session, namely concerns that 'true religion' was being assailed by the growth or toleration of Arminianism and popery. Moreover, any unlawful collection of duties, without parliamentary sanction, was something that affected Englishmen in general, and not only MPs. As if these issues were not enough, Charles I's manipulation of the printing and distribution of the *Petition of Right* had soured the atmosphere in 1628-9. All these matters were so interwoven that it would be wrong to view Rolle's case as somehow separate from, or subservient to, issues in the late-1620s concerning wider constitutional rights and privileges. That centrality can be seen in the fact that Rolle's case was raised on the second sitting day of the 1629 session, 22 January, and was then considered at length on several subsequent occasions – on the floor of the House, and in committee – through to the penultimate sitting day, 23 February. This case can be viewed alongside the earlier one of Sir Thomas Shirley: the 'plasticity of the idea of privilege and the extent to which it could be exploited for political purposes' in 1629 echoes a similar plasticity in the Commons' assertions of 1604.³

Although an increasing number of members of the Commons, and, at times, the Lords, brought the treatment of Rolle and the other merchants, as well as the actions of the customs officers, into arguments about the style and scope of the exercise of royal powers, the historiography has not always assigned that kind of importance to

³ The phrase is from Smith, *Stuart Parliaments*, p. 118.

the Rolle case.⁴ Rushworth, writing just before the Restoration, gives an extended account of the case of the merchants, including Rolle, but with little comment: ‘I pretend only in this Work to a bare Narrative of matter of Fact, digested in order of time; not interposing my own Opinion, or interpretation of Actions’.⁵ The author of the work published in 1707 as *The Proceedings and Debates of the House of Commons in the Sessions of Parliament begun the Twentieth January 1628* (Old Style) is named as Sir Thomas Crew[e], supposedly a member of the Commons in that parliament: Sir Thomas was Speaker in the parliaments of 1624 and 1625, but did not sit in 1628-29, whereas his son, John did.⁶ Whoever the author was, he must have drawn on some of the contemporary diaries: the preface claims that the account is preferable to Rushworth’s version. Hatsell picks out the issues that arose from Rolle’s complaint to the Commons about the seizure of his goods, and the Commons’ resolutions.⁷ Gardiner sets the Rolle case within the wider context, by arguing that, in the parliament of 1628-9, ‘it was most unlikely that, until the ecclesiastical difficulties had been settled, any arrangement satisfactory to both parties could be made on the question of tonnage and poundage’.⁸ He condemned contemporaries who had missed the opportunity to make the Rolle case a milestone on what was later characterised as the ‘high road to civil war’:

It was hardly possible to dwarf a great question more completely than to convert the mighty struggle against unparliamentary taxation into a mere dispute about privilege. Yet this was what the House seemed disposed to do. ‘Let the parties,’ said Lyttelton, ‘be sent for that violated the liberties’. The Commons did not notice that in so doing they were leaving a strong position for a weak one. In resisting the King’s claim to

⁴ For a treatment of the wider historiography, see chapter 1 above.

⁵ Rushworth, *Historical Collections*, I, *Preface*.

⁶ Parkhurst (ed.), *Crew : 1629 Proceedings*; Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 731, p. 736.

⁷ Hatsell, *Cases of Privilege*, pp. 184-5. Hatsell also briefly records the Commons’ confirmation of privilege in respect of a *subpoena* served on Rolle, which was nevertheless a significant contributor to the Commons’ anger over Rolle’s treatment: *ibid.*, pp. 170-1. See pp. 226f. below.

⁸ Samuel Rawson Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War, 1603-1642*, new edn., 10 vols. (London: Longmans, Green, 1899), VII, p. 59.

levy duties without consent of Parliament, they were guarding the purse of the subject from encroachments to which no limit could be placed. In resisting his claim to seize the goods of a member of Parliament, they gave a direct advantage to a merchant who happened to be a member of the House over one who was less fortunate. In point of fact, the claim of privilege for goods in the case of legal proceedings is one which has long ago been abandoned by a triumphant Parliament.⁹

Russell's position was given in the title of an edited collection of articles that appeared in 1990: *Unrevolutionary England, 1603-42*, although in 1979 he had recognised the importance of the controversy over tonnage and poundage: 'Parliament again attempted to use the right to withhold supply as a political weapon', and he accepted that the 1629 privilege dispute was the result of 'spontaneous combustion at Westminster', and a 'genuine act of opposition'.¹⁰ This chapter offers a nuanced gloss on Russell's views, and shows that events at the end of the 1629 parliament extended parliamentary privilege in the light of the Rolle affair, and gave the Commons the confidence to acclaim resolutions, 'with a loud yea', which characterised those who paid, or induced others to pay, extra-parliamentary duties as guilty of *capital* offences.¹¹

There are also matters of contingency, relating to the leadership of the Commons, and the personality of the king. A later section of this chapter considers whether the Speaker, Sir John Finch, was equipped to manage an increasingly fractious House. More significant was the effect of the combative nature of some leading members of the Commons on the conduct of the 1629 session. Lockyer suggests that the Commons were 'in no mood to be conciliatory [over tonnage and poundage]. One reason for this was the absence of moderate and constructive leaders'. The absence of Sir Edward Coke¹² and the then Sir Thomas Wentworth¹³ 'left the Commons under

⁹ Ibid., VII, p. 32.

¹⁰ Russell (ed.), *Unrevolutionary England*, title and p. 40; Russell, *Parliaments and English Politics*, pp. 416-17.

¹¹ Rushworth, *Historical Collections*, I, p. 670: 2 March 1629.

¹² Coke sat in seven parliaments through to 1628. He did not attend in 1629, perhaps partly because of old age, partly because he had decided to concentrate on writing his treatises on the laws.

the influence of hotheads such as Sir John Eliot, Denzil Holles and Benjamin Valentine'.¹⁴ Moreover, there were just four privy councillors in the 1628-29 parliament to support and promote the king's position.¹⁵ The complex nature of Charles I's character has been considered above (pp. 142f.). One of his qualities was loyalty: in the Rolle case, his principled, honourable refusal to disown those who had seized the merchants' property scotched the deal that would have allowed the Commons to legitimise the king's collection of tonnage and poundage. If the king and the courts condoned and authorised the seizure of Rolle's goods, the route of parliamentary privilege would have to be pursued.

Popofsky, in an extended review of the 1629 crisis, rejects the revisionist view that the Commons' refusal to vote tonnage and poundage was both futile and irrational, and that the chaos of the final events of that parliament was a disgraceful demonstration of impotent anger. She places the Rolle case as lying on a 'continuum of constitutional concern in the Commons over arbitrary royal taxation extending back into the reign of James I and culminating in a crisis over tonnage and poundage in the [1629] session'.¹⁶ The introduction to the *HoP* volumes for 1604-29 argues that there was a determined view in 1629 that two key areas of serious discontent had to be addressed before any grant of supply: the king's continuing extra-parliamentary levy of tonnage and poundage, and 'the continued favour shown by Charles towards Arminian clergy'.¹⁷ To this might be added the fear of tolerance of popery: Charles I had married the catholic Henrietta Maria of France, in 1625, with a marriage treaty

.....
¹³ Wentworth sat in the Commons between 1614 and 1628. His early years saw him as one of the critics of the politics of the court. Later, he became a leading loyalist, but having been created baron Wentworth in July 1628, and viscount Wentworth in December 1628, he did not sit in the Commons in the 1629 session. He was granted the earldom of Strafford in January 1640.

¹⁴ Roger Lockyer, *Tudor and Stuart Britain, 1485-1714*, 3rd edn., (Harlow: Pearson Longman, 2005), p. 307. Further detail is provided in Appendix 4 below on the members arrested following the dissolution of 1629.

¹⁵ Sir John Coke (secretary of state), Sir Humphrey May (chancellor of the duchy of Lancaster), Sir Thomas Edmondes (clerk of the crown), and Sir Francis Cottington (who was only admitted to the privy council in November 1628): Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 598; V, p. 292; IV, p. 169; III, p. 689.

¹⁶ Popofsky, 'Tonnage and Poundage Crisis', especially p. 45.

¹⁷ Thrush, *Commons 1604-29*, I, lv.

that included commitments about the religious rights of the queen, her children, and her household; while, in a separate, secret document, Charles promised to suspend operation of the penal laws against catholics. To the horror of many, Charles sat alone at his coronation: Henrietta Maria would not agree to kneel in front of a protestant bishop. The queen also abused her rights to hear catholic masses, by opening up her chapel to large numbers of English catholics, and her suite of catholic Frenchmen was very much on public view.¹⁸ However, a lack of agreement between different leaders of the Commons over the line to be taken on matters of religion led to a refocusing of attention on tonnage and poundage, including the question of privilege for Rolle. The Commons' grievances came to a head in the rowdy, ill-tempered, confrontational sitting of 2 March 1629, and the acclamation of *three resolutions*, after which the ringleaders were arrested, and parliament was dissolved, not sitting again until February 1640.¹⁹

This chapter will show how Rolle's case arose in a context where relationships between sovereign and parliament had deteriorated. Difficulties over supply, the direction of the government over religion, foreign and military affairs, and assaults, or perceived assaults, on liberties, rights, and privilege, led to eleven years of personal rule by Charles I. It will inform our understanding of the 1628-29 parliament, by showing that the Rolle case was far from being a kind of secondary sideshow, and by highlighting ways in which the Commons were extending the scope of privilege of parliament. The first of the following four sections places the parliament of 1628-29 within a context of tensions, arguments, and counter-arguments over religion, royal policy, supply, and privilege that had grown during the early Stuart period. The second describes the ways in which the case of John Rolle and his fellow-merchants unfolded through 1628, and particularly during the 1629 session, ending with a dissolution that was to last until 1640. The third section considers some of the key issues and themes relating to privilege. The last provides conclusions that can be drawn from consideration of Rolle's case.

¹⁸ Caroline M. Hibbard, 'Henrietta Maria (1609-1669)', *ODNB*.

¹⁹ The text of the three resolutions is given on pp. 236f. below.

The parliament of 1628-29 in context

The events of 1629 have to be seen in the context of earlier developments: across the course of the early Stuart period, tensions, arguments, and counter-arguments over religion, royal policy, supply, and privilege were interrelated, and had become more frequent. In considering supply, the key point of conflict between the Commons and the new monarch, Charles I, concerned tonnage and poundage, which had been a significant source of regular crown income since the medieval period.²⁰ Many recent histories uncritically follow seventeenth-century references, in stating that they were granted for life only from the time of Henry VII onwards. In fact, as early as 1415, Henry V received tonnage and poundage for life, having previously had fixed term grants.²¹ There was then a reversion to provision for fixed terms in the reign of Henry VI. However, Edward IV was ‘to have and receive the said subsidy of poundage yearly’.²² In January 1484, Richard III received a grant ‘from the said first day of this present parliament during your natural life’.²³ The backdating of the grant to Richard III to the start of his reign is significant, as this provided a precedent for backdating and legitimising continuous collection of duties from a monarch’s accession, but before parliament had made any grant to the new ruler. Henry VII was then indeed granted tonnage and poundage for life, again backdated to the start of the reign, but with the proviso: ‘these grants are not to be taken as a precedent by the kings of England in time to come’.²⁴ The other Tudor monarchs were treated similarly, but there was some flexing of muscle when James VI and I came to the English throne, with a warning that a grant of tonnage and poundage was a ‘gratuity’, not a ‘necessity’, and that it would be wrong to ‘pre-judicate our Assent or Dissent [to

²⁰ These duties were first levied in the fourteenth century, and were in effect made perpetual by the *Lotteries Act* 1710 (9 Anne c. 6), the *National Debt Act* 1714 (1 Geo. I c. 12), and the *National Debt Act* 1716 (3 Geo. I c. 7). They were consolidated into a single set of customs and excise duties by the *Customs and Excise (Consolidation) Act* 1787 (27 Geo. III c. 13).

²¹ *RP*, IV, 63-4: 6 November 1415.

²² *RP*, V, 508: April 1463.

²³ *RP*, VI, 238: January 1484.

²⁴ *RP*, V, 268-9: 10 November 1485.

such a grant]'.²⁵ At Charles I's accession, there would nevertheless still have been a reasonable expectation of a backdated grant for life, not only on the general basis of the precedents, but also because of a promise by the Commons to the late king that there would be financial support for open war with Spain. However, not for the first time in parliamentary history, the Commons wanted to withhold supply until they had satisfaction for their grievances, which included persistent criticism of the role and actions of the duke of Buckingham, and fears over a perceived tolerance of Arminianism and catholicism. The difficulty, from the Commons' standpoint, was that any grant of supply might well be swiftly followed by a dissolution; from the king's point of view, discussion of grievances might both affect his authority, and delay or even prevent the grants of supply he needed. These difficulties had been apparent in the parliaments of 1625 and 1626, together with the devices used to raise finance by non-parliamentary means that are described in chapter four. However, once it became clear that the sums raised by such means would be insufficient for the king's needs, a parliament was of necessity called, to begin on 17 March 1628. There were three distinct phases to this parliament: March to June 1628, June 1628 to January 1629, and January to March 1629. The first session took place from 17 March to 26 June 1628; there was then an adjournment before a second session began on 20 January 1629;²⁶ the last day that the Commons sat was 2 March, and parliament was dissolved on 10 March 1629. It is necessary to look at all three periods in order to understand the Rolle case.

In the first phase, the initial moves from the king were conciliatory: before the start of the parliament, a proclamation was issued, putting on hold the raising of monies from the people directly, despite what was seen as the urgent necessity for funds for defence. Instead, the king was prepared 'wholly to rely upon the love of Our people in Parliament, and not to deferre their assembling'.²⁷ This made sense: that tonnage and poundage were traditionally available to each monarch on a continuing

²⁵ *CJ*: 14 June 1604 (second scribe); *CJ*, 1, pp. 244-45: 22 June 1604.

²⁶ The original intention had been for the second session to start on 20 October 1628, but this was put back to January 1629, for reasons that are set out below.

²⁷ Larkin (ed.), *Proclamations (Charles I)*, II, pp. 187-88.

basis might have been true *factually*, but it was nevertheless *politically* unwise to levy the duties without parliamentary authority. However, when parliament assembled in March 1628, the session started badly: the Commons were minded not to attend the king in the House of Lords, because Black Rod had not come in person to summon them, but in the end they did so, out of respect to the sovereign.²⁸ Charles may possibly have wanted his opening speech to be regal, forceful, and brave, but its tone is ill judged, patronising, and peremptory to the point of rudeness, as these extracts show:

These Times are for Action; [...] for tedious Consultations, at this Conjunction of Time, is [sic] as hurtful as ill Resolutions. [...] I, therefore, judging a Parliament to be the ancient, speediest, and best Way, in this Time of common Danger, to give such Supply as to secure ourselves, and to save our Friends from imminent Ruin, have called you together. [...] If you (which God forbid) should not do your Duties in contributing what this State at this Time needs, I must, in Discharge of My Conscience, use those other Means which God hath put into My Hands. [...] Take not this as a Threatening (for I scorn to threaten any but My Equals) ...²⁹

Next, on 19 March 1628, Sir John Finch was chosen as Speaker. As he was to play a key role in events less than a year later, it is perhaps helpful to consider his character at this point. He was a lawyer, from a family active in Kent politics, and had benefited from the patronage, from 1614 onwards, of Sir Francis Bacon, whose impeachment Finch vigorously contested in 1621, the year when, as recorder for Canterbury, he first entered parliament.³⁰ After Bacon's fall, Finch tied himself closely to the king, and to Buckingham, for whom he was one of the chief defenders and counsel, in the Commons generally, and during the impeachment proceedings more particularly. For the 1628 parliament, in accordance with contemporary custom, Finch would have been identified to the Commons as the king's choice. On being put forward, he gave a

²⁸ *CJ*, 1, p. 872: 19 March 1628.

²⁹ *LJ*, 3, p. 687: 17 March 1628.

³⁰ Louis A. Knafla, 'Finch, John, Baron Finch of Fordwich (1584-1660)', *ODNB*, which incorrectly states that he was elected for Canterbury in 1614; Thrush and Ferris (eds.), *Commons 1604-29*, II, p. 192.

flowery, extravagantly flattering speech of acceptance, in which he expressed his personal conviction that the Commons would willingly grant supply to the king, from affection to his person and the honour of their country. The following extract indicates a tone that may well have irritated those who had anxiously identified arbitrary, or absolutist tendencies in the current regime:

[...] I bow my knees unto you most excellent Majesty [...] having been by your gracious beams drawn up from earth and obscurity. [...] in parliament [...] I find a lively representation of that true happiness, which, under your Majesty's gracious government, we all at this time enjoy. [...] Here, in the fulness and height of your glory, like the sun in the exaltation of his orb, sits your most excellent Majesty.³¹

The role of the Speaker was changing: traditionally, he had managed the Commons' business, for example choosing the bills, motions, and other matters to be put to the House, and deciding whom he would call upon to speak. The Speaker did not, by custom, vote when in the chair: 'He was foreclosed of his Voice [by becoming Speaker] and was to be indifferent to both parties'.³² However, by the 1620s, his authority was being diluted: for example, the House was more frequently forming itself into a grand committee of the whole House; a senior member, such as John Pym, rather than the Speaker, would then take the chair, and members could contribute to a debate as often as they liked.³³ The Speaker would sit there as an ordinary member, unable to manage the House, although able to contribute to debates as if a private member. Nevertheless, he was still expected to act as a conduit between Commons and ministers, keeping the latter in touch with proceedings. He might also

³¹ Manning, *Lives of the Speakers*, pp. 306-7.

³² Townshend, *Historical Collections*, p. 321: 12 December 1601.

³³ For example, on 20 April 1626, Christopher Wandesford took the chair: *Whitelocke*, in Bidwell and Jansson (eds.), *Proceedings 1626*, p. 34. This kind of arrangement was formalised in 1690, when the Commons decided that supply would be considered by a committee of the whole House, chaired by its 'own man', rather than the Speaker, who was seen as the King's spy. Richard Hampden was appointed the first chairman Of Ways And Means, a role that was combined with that of deputy Speaker in the mid-nineteenth century. The terms have come to be used interchangeably, although the committee of Ways and Means was abolished in 1967: UK Parliament, *The Chairman of Ways and Means/Deputy Speakers*, in www.parliament.uk (UK Parliament), at <<http://goo.gl/rOqaqb>>.

be summoned by the king, either to discuss Commons' business, or to receive a message for the House. Another difficulty was discontinuity in the Speakership: it had become customary from 1559 onwards, with rare exceptions, for each Speaker not to seek re-election to the Commons after a parliament had been dissolved.³⁴ Finch as a lawyer 'had a high standard of forensic evidence, argued cases on the facts, and was seen by many contemporaries as a pillar of justice and mercy'.³⁵ However, was he up to the task of being Speaker? After all, three predecessors had had problems that reduced the authority of the office that Finch would assume, and only the experienced Thomas Crewe had fulfilled the role reasonably well during this period.³⁶ First, Ranulph Crewe's inexperience in the Commons was exposed when there were procedural wrangles during the short-lived 'addled' parliament of 1614, where he also found himself jostled by members when leaving the chamber: Ranulph Crewe only sat in the parliaments of 1597 and 1614. Second, Sir Thomas Richardson (St Albans) all but lost control of the parliament of 1621-22, perhaps unsurprisingly, as he only sat in that single parliament. The difficulty for Speakers of being placed between king and Commons was seen in the command from the king to Richardson that the Commons were not to present their *Protestation*, despite which it was entered into the *Journal*, and sent to the king through a deputation of twelve members.³⁷ Third, Sir Heneage Finch, Speaker in 1626, found himself in a near-impossible position: whereas the king expected to receive an early grant of subsidies to pay for the war with Spain, many members of the Commons were determined to impeach Buckingham before making any such grant. Sir Heneage did at least have the advantage of having sat in the three preceding parliaments. In the 1628-29 parliament, Sir John Finch (cousin to Sir Heneage) was given to tears, which might be seen as reflecting an underlying weakness, or possibly a device to win the sympathy of the House. For example, in 1628, he was required to inform the House, on behalf of the

³⁴ Thrush, *Commons 1604-29*, I, pp. 221-23, *passim*.

³⁵ Knafla, 'John Finch'.

³⁶ Sir Thomas Crewe was, exceptionally, Speaker in both the last parliament of James I and the first of Charles I (1624 and 1625, respectively).

³⁷ See pp. 138f. above. When the members appeared, James called for twelve chairs, as there were 'twelve kings a-coming': Manning, *Lives of the Speakers*, p. 291.

king, that they must stop attacking Buckingham: 'there is a command laid upon me to interrupt any that should go about to lay aspersion on the ministers of state'.³⁸ Aware of the anger this provoked, he declared: 'I protest before God I mean all well. If you knew what I have done you would not blame me, for I am sure I have used all my best faculties to do you service'. Soon afterwards he tearfully declared that he was no longer able to behold 'so woeful a spectacle in so grave a senate', and left to take a steer from the king.³⁹ It is therefore important to bear Finch's character traits and loyalties in mind, when considering the degree to which members were able to question and oppose the king's wishes and directives during the course of the 1629 parliament, and confront the authority of the Speaker, particularly during the final day's sitting. Notably, during the course of the debate on 2 March 1629, Sir Peter Heyman 'bitterly inveighed' against Finch, saying that he was 'a disgrace to his country [Kent] and a blot to a noble family' for seeking 'to pluck up our liberties by the roots'. Unless Finch was called to the Bar and another Speaker chosen in his stead, Heyman warned, 'we shall annihilate the liberties and dignity of Parliament'.⁴⁰

The 1628 parliament was able to give some early comfort to the king, voting five subsidies on 4 April, in recognition of the foreign threat. The king was reported to be particularly pleased to hear that there were no dissenting voices to the proposal.⁴¹ There was a risk, however, that the grant would stall when going through the requisite parliamentary stages, as the more general mood of the Commons in the parliament of 1628 was to assert privileges, and question the prerogative and actions of the king, leading to repeated messages from Charles that a grant of supply should be expedited. There were also attempts to reassure the Commons about the king's intentions. For example, on 26 April, Sir Thomas Wentworth, in one of his last contributions in the Commons, hoped that 'it shall never be stirred here whether the King be above the law or the law be above the King'.⁴² Two days later, there was 'A Conference Desired

³⁸ In Knafla, 'John Finch'.

³⁹ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 276.

⁴⁰ *Ibid.*, IV, p. 683.

⁴¹ Rushworth, *Historical Collections*, I, p. 525: 7 April 1628.

⁴² Johnson et al. (eds.), *CD 1628*, p. 98, cited in Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) p. 18.

by the Lords and Had by a Committee of both Houses, Concerning the Rights and Privileges of the Subjects', which heard contributions from Sir Dudley Digges (sitting then for Ludgershall), Sir Edward Littleton (Caernarvon Boroughs), John Selden and Sir Edward Coke. Digges spoke on property rights and the rights of redress open to anyone who felt they had been wrongly treated: 'It is an undoubted and fundamentall point of this so antient common law of *England*, that the subject hath a true property in his goods and possessions, which doth preserve as sacred that *meum & tuum* is the proper object'.⁴³ Coke argued further that: 'The Common Law hath so admeasured the Kings Prerogative, as he cannot prejudice any man in his inheritance and the greatest inheritance a man hath, is the liberty of his person, for all others are accessory to it. [...] All judgements against Magna Charta are void'.⁴⁴ Sir Robert Heath, the attorney general, provided detailed and technical rebuttals of the precedents provided by the Commons, and Sir Thomas Coventry, the lord keeper, reported that:

His Majesty out of his great and princely care, hath thought of this expedient to shorten the business, by declaring the clearness of his own heart and intention: and therefore hath commanded me to let you know, That he holdeth the statute of Magna Charta, and the other six statutes insisted upon for the subjects' liberty, to be all in force; and assures you, that he will maintain all his subjects in the just freedom of their persons, and the safety of their estates; and that he will govern according to the laws and statutes of this realm; and that you will find as much security in his Majesty's Royal Word and Promise, as in the strength of any law ye can make; so that hereafter ye shall never have cause to complain.⁴⁵

May and June 1628 saw a positive rash of privilege cases in Lords and Commons, in respect of arrests or *subpoenas*, shortly before parliament was prorogued on 26 June. Those identified were: Allen Figes, servant to the Bishop of Worcester;⁴⁶ Sir John

⁴³ Anon., *A Conference Desired by the Lords and Had by a Committee of Both Houses, Concerning the Rights and Privileges of the Subjects* (London: Matthew Walbancke and Richard Best, 1642), p. 3.

⁴⁴ Ibid., p. 69.

⁴⁵ Cobbett, *Parliamentary History*, II, p. 332.

⁴⁶ *LJ*, 3, p. 860: 17 June 1628.

Danvers (Oxford University), apparently for a chancery case;⁴⁷ Thomas Mannes, servant to Mr Wylde (probably John Wylde, member for Droitwich);⁴⁸ Sir George Gresley (Newcastle-under-Lyme), in respect of a *subpoena*;⁴⁹ and Bolto and Talbot Benbrigge, servants to Sir Edward Osborne (East Retford).⁵⁰ Such cases typify an ever-present concern to preserve privileges.

At various times in the first few months of the parliament, there were speeches or debates in the Commons condemning new directions in religion; the mismanagement of affairs by Buckingham and other ‘evil counsellors’; the use of forced loans and the sanctions meted out to those who refused to pay these; and the attempt to collect tonnage and poundage without parliamentary authority. In the face of unresolved grievances, a *Petition of Right* was presented on 28 May 1628, and passed on 7 June, with, crucially, the backing of both Houses of parliament – the Lords had been affronted by the incarceration of the earls of Bristol and Arundel in 1626, and the king’s subsequent evasiveness in providing explanations.⁵¹ The *Petition* cited the requirement, given statutory force in the reign of Edward I, that no ‘tallage or aid’ should be levied without parliamentary approval.⁵² It also set out objections to forced loans or benevolences and associated penalties without the consent of parliament; imprisonment without cause shown or by special royal command; disinheritance or execution without lawful judgement by peers or the law; forced billeting; and the use of martial law to oppress subjects and to exempt the military from ordinary law. Although only a petition, the measure was, after some manoeuvring by the Commons, treated as a statute and printed for public distribution.⁵³ David L. Smith rightly points

⁴⁷ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 19.

⁴⁸ *CJ*, 1, p. 915: 20 June 1628.

⁴⁹ *CJ*, 1, p. 917: 21 June 1628.

⁵⁰ *CJ*, 1, p. 919: 25 June 1628.

⁵¹ *The Petition Exhibited to His Majestie by the Lords Spirituall and Temporall and Commons in this present Parliament concerning divers Rights and Liberties of the Subjecte: with the Kings Majesties Royall Answere thereunto in full Parliament 1627 1628* (3 Car. I c. 1): Raithby (ed.), *Statutes of the Realm*, v, pp. 23-24.

⁵² A similar provision is given in *Magna Carta*, §12.

⁵³ There is continuing uncertainty about whether the *Petition* was merely a petition, or had a larger statutory force. It has been considered a declaratory act, a private bill, or simply a petition. Reeve proposes that ‘the *Petition* was a legislative act of statutory character and effect, rather than a judicial measure which did not bind the king at law.

[footnote continues ...]

out that the *Petition*, as well as other parliamentary protestations and remonstrances, needs to be set in the context of the time, rather than being characterised as a constitutional signpost on a whiggish ‘high road to civil war’. He suggests that the *Petition* ‘was a very practical document, born of mistrust of one particular monarch and prompted specifically by the royal policies of 1626-27’.⁵⁴ After the submission of a remonstrance from both Houses seeking a favourable response, Charles agreed to the *Petition*, at which ‘the Commons gave a great and a joyful Applause’.⁵⁵ The subsidy bill then passed through all its Commons’ stages.⁵⁶ A second remonstrance was nevertheless prepared, which acknowledged that grants of tonnage and poundage for life had been the norm since the time of Henry VII, and that Charles I might have expected the same, were it not for his likely curtailment of the parliament.⁵⁷ There was a clear warning, however, that any collection of tonnage and poundage, unless granted by parliament:

Is a breach of the fundamental liberties of this kingdom, and contrary to your Majesty’s royal answer to the said Petition of Right. And therefore [the Commons] do most humbly beseech your Majesty to forbear any further receiving of the same, and not to take it in ill part from those of your Majesty’s loving subjects, who shall refuse to make payment of any such charges, without warrant of law demanded.⁵⁸

This was a key moment: the Commons were both calling on the sovereign to honour his undertakings, and inciting English merchants not to pay tonnage and poundage, or

.....

If [...] the Petition was legislative, [...] it achieved its purpose and anchored the political and ideological concerns of the commons in contemporary legal reality’: L. J. Reeve, ‘The Legal Status of the Petition of Right’, *HistJ*, 29 (2) (1986), 257-77, p. 258. Although it is included as a statute (3 Car. I c. 1) in both the TNA database of legislation and *The Statutes of the Realm*, the king’s response is given as ‘*soit droit fait come est desiré*’, in this instance this reflecting the notion that Charles regarded the *Petition* as a private bill, i.e. one that did not require printing, which was one of the points of dispute.

⁵⁴ Smith, *Stuart Parliaments*, pp. 116-17.

⁵⁵ *LJ*, 3, p. 842: 7 June 1628.

⁵⁶ *CJ*: 12 June 1628 (second scribe).

⁵⁷ The duties had in fact been awarded for life to every sovereign from Edward IV onwards, as described on p. 205 above.

⁵⁸ Rushworth, *Historical Collections*, I, p. 630: 16 June 1628.

similar impositions – a call that would be answered by a significant number of such merchants, crucially including John Rolle. It is easy to see how Charles saw an inducement not to pay a royal levy as an assault upon his dignity and powers, and that he was mightily frustrated by the Commons' intransigent failure actually to pass legislation that would legitimise the collection of tonnage and poundage. On the final day of the 1628 session, Charles kept the Speaker at Whitehall for two hours, to prevent the Commons from passing the remonstrance.⁵⁹ Instead, he summoned the Commons to attend him in the Lords, where, in a forthright speech, he said that he would end the session earlier than intended. He gave his reasons, although asserting that he was only obliged to account for his actions to God, being particularly concerned about the constructions being put on the *Petition of Right*, as well as the tenor of decisions by the Lords and the Commons:

It is known to every one, that a while ago the House of Commons gave me a Remonstrance; how acceptable, every Man may judge; and, for the Merit of it, I will not call that in Question, for I am sure no wise Man can justify it. Now since I am certainly informed, that a second Remonstrance is preparing for me, to take away my Profit of Tonage and Poundage (One of the Chief Maintenances of the Crown) by alleging, that I have given away my Right thereof, by my Answer to your Petition; this is so prejudicial unto me, that I am forced to end this Session some few Hours before I meant it, being not willing, to receive any more Remonstrances, to which I must give a harsh Answer.⁶⁰

As the Commons had not granted sufficient supply, the king had little alternative but to collect tonnage and poundage without parliamentary authority. The council directed that those who resisted the customs officers in the execution of their duty should be imprisoned 'until this Board give other order, or they be delivered by order of law'.⁶¹ However, as Burgess suggests, it is wrong to suggest that the king was hell-bent on claiming that tonnage and poundage were part of the royal prerogative.

⁵⁹ Nevertheless, the remonstrance was certainly circulated; for example, a copy exists in the Hampshire Records Office: Hampshire Records Office, 44 M69/L39/19, Jervoise.

⁶⁰ *CJ*, 1, p. 920: 26 June 1628.

⁶¹ *Council Register*, 31 August 1628, in Gardiner, *History of England (1899 edn.)*, VII, p. 4.

Rather, he was arguing that by custom and practice the duties were now granted for life, and collected with implicit parliamentary authority – as Charles’s predecessors had gathered it from their accession, before any relevant parliamentary vote.⁶² There may even have been an unspoken nod in the direction of the Commons’ assertions that their privileges were similarly legitimised by custom and practice. Even so, resistance to the collection of the duties continued, so that Richard Chambers was one of a group brought to the Star Chamber, on 28 September 1628, for refusing to pay ‘moderate duties [...] and the raising and publishing of undutiful and false speeches, which may tend to the dishonour of the King or the State, or to the discouragement or discontentment of the Subject, or to set discord or variance between his Majesty and his good People’. Chambers was found to have: ‘utter[ed] these undutiful, seditious, and false words, *That the Merchants are in no part of the world so screwed and wrung as in England; That in Turkey they have more encouragement*’, fined £2,000, and committed to the Fleet for his seditious words and actions. The twenty-two councillors present had differed as to the sentence, some arguing for a fine of £500 to be accompanied by an apology to the king, others that the fine should be as high as £3,000, and with commitment to prison.⁶³ With no parliamentary grants of supply, and faced with the refusal of about thirty principal London merchants, including Chambers and Rolle, to pay duties, the privy council authorised the seizure of untaxed goods.⁶⁴ This was despite the merchants’ offer to give security for any sum that they might ultimately be obliged by law to pay. As will be described more fully below, the merchants tried unsuccessfully to regain their property, after which resistance to paying tonnage and poundage weakened somewhat, although there were certainly those who persisted in their refusal, not least Rolle. Difficulties over the legality of the collection of tonnage and poundage were part of an overall volatility at the time, linked to a range of other problems and disasters, such as the growth of Arminianism and its apparent tolerance by some senior clergy and councillors; tolerance of catholicism, particularly following the royal marriage; punitive, forcible billeting on

⁶² Burgess, *Politics of the Ancient Constitution*, p. 190.

⁶³ Rushworth, *Historical Collections*, I, p. 672.

⁶⁴ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 88.

civilians, with the costs being borne by the civilian concerned; Buckingham's position; and the fall of La Rochelle. Taken together, these were seen by many in the Commons as the result of a weakening of true religion, and pointed to the need for retrenchment and reform.⁶⁵

Only one of these issues had resolved itself before the 1629 session: a disgruntled army officer had assassinated Buckingham on 23 August 1628. This had the potential to reduce tensions between crown and Commons: with no need to manoeuvre to prevent the Commons attacking his friend, Charles could now summon a parliament. At the same time, however, there was now no obvious 'evil counsellor' to attack as a surrogate for the king himself. However, Buckingham's absence did not resolve other fundamental grievances, for example the king's treatment of the *Petition of Right*, which had been seen as a success for the 1628 parliament, 'yet the Petition itself rested most insecurely on the interpretation Charles chose to give it'.⁶⁶ Some members were clearly going to feel affronted by these developments, and seek to reassert the Commons' authority when parliament reassembled on 20 October, the date previously announced for the resumption. Despite all these difficulties, or perhaps because of them, Charles and his councillors determined to achieve a settled government, by avoiding a too hasty recall, so that on 1 October parliament was further prorogued by proclamation, from 20 October 1628, until 20 January 1629.⁶⁷ Without Buckingham, or any replacement, Charles was now taking a more proactive approach, in the hope of securing greater parliamentary cooperation, particularly for a grant of tonnage and poundage. According to Cust, the postponement of the new session would allow 'Charles I's "patriot" privy councillors, apparently with the blessing of the king, to put together a "new deal" for cooperation between crown and people. This was based on settling grievances over Arminianism and tonnage and poundage, relaunching the war against Spain, and re-establishing a harmonious relationship with parliament [...] Had it succeeded it could have provided the basis

⁶⁵ D. Clark, 'Thomas Scott and the Growth of Urban Opposition to the Early Stuart Regime', *HistJ*, 21 (1) (March 1978), 1-26, *passim*.

⁶⁶ Russell, *Parliaments and English Politics*, p. 399.

⁶⁷ Rushworth, *Historical Collections*, I, p. 638.

for an alternative to Charles I's Personal Rule'.⁶⁸ A January 1629 start for this next session would conveniently still give enough time for new subsidies to be voted, and, hopefully, for the Commons to give backdated authority for the collection of tonnage and poundage, along with a grant of the duties for life, reflecting the king's 'strong attachment to the proper, traditional, and legal way of doing things'.⁶⁹ During December 1628 and early January 1629, there were reports of almost daily meetings of leading councillors, with the king hoping 'for a fair and loving meeting with his people'. Councillors agreed on measures to intensify the campaign against papists, and to tackle Arminianism, the latter being more problematic in the light of the king's anti-Calvinist position. Even so, a running sore was the continuing refusal by some merchants to pay tonnage and poundage, despite assurances that parliament would be able to determine the matter.⁷⁰

Yet, after all the generally high hopes and seemingly careful preparation, things were nevertheless to go badly wrong in 1629. Russell summarises the lines that would be taken by different groups within the Commons:

The basic struggle of 1629 was between two rival groups in the Commons, each working for a different bargain. That led by Pym and Rich wanted to vote tonnage and poundage in return for Charles's abandonment of Arminianism. In accord with Eliot's longstanding ideas on ministerial responsibility, the group led by Eliot and John Selden would vote tonnage and poundage once the king had agreed to the punishment of those who had collected it without legal authority. Their hand was greatly strengthened when the customs officers seized the goods of John Rolle, who was an MP, and so turned a general issue of liberties into a specific dispute about parliamentary privilege.⁷¹

⁶⁸ Richard Cust, 'Was There an Alternative to the Personal Rule? Charles I, the Privy Council and the Parliament of 1629', *History*, 90 (299) (July 2005), 330-52, p. 330.

⁶⁹ Russell, *Parliaments and English Politics*, p. 395.

⁷⁰ Cust, 'Was There an Alternative to the Personal Rule?', p. 341.

⁷¹ Conrad Russell, 'Eliot, Sir John (1592-1632)', *ODNB*. Russell's positive views on the focus on Rolle are in contrast to Gardiner's criticisms of such a narrow approach: see pp. 201f. above.

This section has shown that in the 1628 parliament, issues of religion, and the conduct of the government, alongside matters of finance and parliamentary authority, were factors in a growing parliamentary disaffection. A backdated grant of tonnage and poundage for life had been a reasonable expectation for the new king, yet some leading figures in the Commons were not prepared to authorise this until their various grievances had been properly addressed. The king's need to tap into what was a major source of royal income at the time had led to a continuing collection of the duties without parliamentary authority. The consequent discontent of the Commons was evident in the presentation of the *Petition of Right*, on 28 May 1628. The 'spin' that Charles I subsequently put on his eventual acceptance of the *Petition* exacerbated tensions in the interval between the parliamentary sessions of 1628 and 1629. There were moves, after the death of Buckingham, to reduce those tensions: the planned return of the Commons in autumn 1628 was postponed to the following January, in the hope that a deal could be brokered in the meantime, which would secure supply through parliamentary means. Nevertheless, there was a continuing requirement for funds when parliament was not sitting, and this, tautologically, could only be met through non-parliamentary means, such as the collection of ship money, voluntary and forced loans and benevolences, and the continuing collection of tonnage and poundage. Testing the legitimacy of the collection of tonnage and poundage, a group of London merchants, including Chambers and Rolle, refused to pay up, and customs officials seized their goods. This was to precipitate claims of parliamentary privilege, for Rolle and his goods, and, more obliquely, for those of the other merchants who decided to present petitions to the Commons – developments which would play a large part in shaping the 1629 session.

John Rolle and the 1629 parliament

This section sketches Rolle's own background, and then gives an account of the ways in which his case, and that of his fellow merchants, assumed increasing importance up to the end of the 1629 session of parliament. Robert Rolle had two sons who sat for Callington, a Cornish borough where he controlled one of the nominations: his second son, Henry, was elected there in the 1621 and 1624 parliaments, and his less illustrious fourth son, John, became member there in 1626 and 1628. It is sometimes

difficult to identify which ‘Mr Rolle’ is the subject of contemporary records, when brothers were sitting in the same parliament; many entries without a forename probably refer not to John, but to Henry, who was a ‘notable lawyer and [...] a respected figure in the House, experienced in procedural matters and the handling of weighty legislation’. John Rolle was more narrowly concerned with matters of trade, and became a member of the Levant Company in 1624.⁷² One of the brothers started to become involved in matters relating to tonnage and poundage as early as the 1626 parliament, when ‘Mr Rolles’ (probably John) successfully moved for privilege for John Delbridge.⁷³ John Rolle was active in a number of trade-related matters in the 1628 parliament, and both he and Henry were named on 7 June to help draft the subsidy bill’s preamble.⁷⁴ It was certainly John Rolle who was the eponymous subject of the privilege case, which turned on the refusal, in October 1628, by a group of London merchants, including Rolle, to pay tonnage and poundage, because collection of those duties had not yet been voted by parliament.⁷⁵ Customs officials then seized merchandise from this group; the silks and other goods taken from Rolle were worth £1,517. He claimed that this was above the value of what was demanded, and undertook to settle what was owed, as and when the duties received parliamentary sanction.⁷⁶ However, as will be described more fully, the offer was rejected, with the customs officers asserting that they were acting through a commission given under the Great Seal. Rolle tried to claim privilege for his goods, as well as his person, a

⁷² John also sat for Truro in 1640, and Henry for Truro in 1625, 1626, and 1628. Robert’s first son, Sir Samuel Rolle, sat for Grampound in the 1625 parliament, and Callington in 1640, but did not have a seat in the 1628-9 parliament, when John Rolle’s case arose. Unless otherwise stated, references in this chapter are to John Rolle: Thrush and Ferris (eds.), *Commons 1604-29*, VI, pp. 79-90, *passim*.

⁷³ *CJ*, 1, p. 850: 27 April 1626.

⁷⁴ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 87.

⁷⁵ Rolle was not the only member of the Commons who refused to pay tonnage and poundage. John Delbridge had successfully sought privilege in 1626, to stay a suit in London involving his goods. In March 1629, he was brought before the privy council ‘upon complaint made of some undutiful carriage of his towards His Majesty, not only in refusing himself but in persuading others to refuse to pay any duties to the king for goods exported and imported’. However, under examination, he convinced the councillors of his innocence, and discouraged them from sending for his accusers: *ibid.*, IV, p. 43.

⁷⁶ W. A. Shaw and Robert Ashton, ‘Rolle, John (1598-1648)’, *ODNB*.

claim that was denied, as the customs officers believed that privilege did *not* apply to the goods of a member of the Commons, despite precedents to the contrary. As parliament was not in session, this matter of privilege could not be raised immediately in the Commons. A further route that was, however, open to Rolle and the other merchants, was to use writs of *replevin*,⁷⁷ the first of which was issued on 12 November 1628 in the chancery court. One of the London sheriffs (Acton) delayed the process of implementing the writ, and the customs collectors then persuaded the attorney general to obtain a stay of proceedings. The barons initially ruled that Rolle's goods should remain impounded until parliament settled the whole issue, and on 27 November, they concluded that *replevins* were not a proper way of removing goods from the king's possession. A further writ of *replevin* was nevertheless put forward on 5 January 1629, but this was equally unsuccessful. Yet more of Rolle's stock was seized on 20 January, which was the first day of the new parliamentary session.⁷⁸ John Selden raised the failure of the *replevin* in the Commons on the following day, when he proposed that a committee should examine whether 'the liberties have been infringed'.⁷⁹ More specific reference to Rolle's circumstances was made on the day after that: 'Mr Rowles reports how his goods were taken for not payment of custom as was usual, though he offered security to pay what was due by law or adjudged by parliament, but his proffere was refused, and [blank] said if Mr Rowles had all the House of Commons in him he would [do] what he did'.⁸⁰ As a longstanding parliamentarian, Phelips described how, in the first year of James I's reign (when he was representing East Looe), parliament was prorogued because of the plague, yet tonnage and poundage duties were collected, and the Commons consequently told the collectors that they had had no right to do so.⁸¹ Edward Littleton was, along with men such as John Selden, and the now absent Sir Edward Coke, a leading lawyer; he had supported the parliamentary campaign for the *Petition of*

⁷⁷ 'The restoration to or recovery by a person of goods or chattels distrained or confiscated, upon giving a surety to have the matter tried in a court of justice and to return the goods if the case is lost': *OED Online*.

⁷⁸ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 88.

⁷⁹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 5: 21 January 1629.

⁸⁰ *Lowther's Account of January 22*, in *ibid.*, p. 9n.: 22 January 1629.

⁸¹ Parkhurst (ed.), *Crew : 1629 Proceedings*, p. 6: 22 January 1629.

Right, and was to play a prominent part in the Rolle case.⁸² He identified the issues: whether tonnage and poundage were payable without parliamentary authority; and whether a member of parliament was to have privilege for his goods as well as his person.

There were long-standing precedents whereby privilege was extended to a member's 'goods and estate', and these are set out more fully in Appendix 1. The first was as long ago as 1289-90, when the Master of the Temple, sitting in parliament as *primus baro* (a first baron of the realm), had successfully petitioned for his 'distrainable goods', in the face of an attempt by the bishop of St David's to seize these.⁸³ This privilege was reaffirmed in 1315/16, in the case of the prior of Malton: 'that of not being attach'd in their horses and necessary goods and cattales'.⁸⁴ In 1478, John Atwyll seemingly owed money to one John Tailor, who took steps to proceed against him.⁸⁵ Atwyll, however, did not appear in court, because he was in Westminster, and unaware of the actions against him. Tailor then arranged for writs to be directed to a number of sheriffs, which would probably have led to Atwyll or his goods being taken in execution. As a consequence, 'the said John Atwyll cannot freely depart from this present parliament to his home for fear that his body, his horses and his other goods and chattels which he needs to have with him might be duly arrested in that matter, contrary to the privilege customarily due to all the

⁸² *HoP* records that 'While he had been a nuisance to the Crown during the session, Littleton was not a wrecker, and he was not arrested for his part in the disorders of 2 March. However, he "won eternal fame" in some quarters by arguing for the imprisoned Members in June, and in October he moved a habeas corpus for Selden, who had been detained on other charges': *HoP* at <<http://goo.gl/xNqLLS>>. (This paragraph is not included in the entry for Littleton in the print version of *HoP*.) Like several other leading lawyers of the 1620s who were critical of royal policy, Littleton advanced as a servant of the crown in the course of the 1630s, becoming recorder of London in 1631, solicitor-general in 1634, chief justice of the common pleas in 1640 and lord keeper a year later: Roger Lockyer, *The Early Stuarts : A Political History of England, 1603-1642* (London: Longman, 1989), p. 234. He was created baron Littleton in February 1641: Christopher W. Brooks, 'Littleton, Edward, Baron Littleton (1589-1645)', *ODNB*.

⁸³ See Appendix 1, case 1.

⁸⁴ Hatsell, *Cases of Privilege*, p. 50.

⁸⁵ See Appendix 1, case 11.

members usually summoned to the aforesaid parliaments'.⁸⁶ The Commons then successfully petitioned for privilege for Atwyll.⁸⁷ Hatsell adds two comments on the Atwyll case. First, that this was the only one from the medieval period relating to the property of a member of the Commons. Second, that the privilege was 'expressly confined to such goods and chattels, as it was necessary the member should have with him during his attendance in Parliament, or in returning to his home'.⁸⁸ That narrow distinction was *not* being applied in the Rolle case, rather it was argued that those who were engaged in public life should not be distracted from their duties by the need to defend *any* of their own property.⁸⁹ A little earlier, 'seizure of goods' had been the subject of a letter from the Speaker to the sheriff of Hampshire, in 1607:

Whereas I am informed, that you, or One of you, have, during this Session of Parliament, caused a Seizure to be made of certain Goods belonging to Sir William Kingswell Knight, One of the Members of the Commons House of Parliament; for that the Privilege of Parliament, during the Time of Service there (haply not so well known to yourself) reacheth as well to *the Goods, as Person, of every Member* attendant for the Time; I am, by the Duty of my Place, to advertise you thereof, and to advise and require you, that you forthwith procure the Restitution of the said Goods unto him, according to the said Privilege [my emphasis].⁹⁰

Rolle's case was not simply about asserting privilege for his property; there was also the problem of how to *restore* his property. The Lords had already made a general pronouncement about the restoration of goods, in 1628, when the earl marshal reported; 'That the Committee for Privileges met [...] to consider of the Four Things referred to their Consideration. [...] 3. Whether the Goods of a Privileged Person, taken in Execution (during the Privilege of Parliament) ought not to be delivered to the said Party by Privilege of Parliament?' Their answer was that: 'they all Agreed,

⁸⁶ *RP*, VI, 191-2: January 1478.

⁸⁷ Hatsell, *Cases of Privilege*, p. 50.

⁸⁸ *Ibid.*, p. 67.

⁸⁹ Coke notes: 'It appeareth that a Member of the Parliament shall have Privilege of Parliament, not only for his servant, as is aforesaid, but for his horses, & c. or other goods distrainable': Coke, *Fourth Institute*, p. 24, in *ibid.*, p. 3.

⁹⁰ *CJ*, 1, p. 343: 26 February 1607.

That the Goods of a Privileged Person taken in Execution, ought to be redelivered and freed as well as the Person'.⁹¹ Sir John Coke, the secretary of state, saw a need to balance the maintenance of parliamentary privilege within a spirit of moderation, but Littleton gave a rejoinder: 'we have moderation preached unto us in Parliament, and we have followed it; I would others did the like out of Parliament. Let the parties be sent for that violated the liberties of Parliament, to have their doom'. Sir John Eliot saw three key issues: '1. the right of the particular gentleman; 2. the right of the subject; 3. the right and privilege of this House'. Whereas Eliot had wanted the House to discuss the business directly, a select committee of no more than twenty members was instead established: 'to take into Consideration the Particulars of the Relation, made by Mr. Rolles, wherein the Subject's Liberty, in general, hath been invaded, and to examine the same'.⁹² At a later point, petitions from key merchants were referred to this committee.⁹³ Further, the customers were 'to be sent for to the House to answer their Contempt to the House'.⁹⁴

Charles I was, of course, fully aware of the Commons' concern that their privileges had been compromised, and that Rolle was claiming specific privilege, so that he needed to act in a conciliatory manner, if he were ever to be granted tonnage and poundage. He accordingly set out that if the Commons granted tonnage and poundage 'as my ancestors have had it, my past actions will be concluded, and my future proceedings authorized'. He then made clear that he did *not* take tonnage and poundage 'as appertaining unto my hereditary prerogative [...] for it ever was, and still is my meaning, *by the gift of my people* to enjoy it' [my emphases]. Somewhat disingenuously, he then said that he had taken tonnage and poundage pending a Commons grant, as an act of necessity, and on the understanding that the Commons always intended to vote them to him, prevented only by the constraints of time. He

⁹¹ *LJ*, 3, p. 782: 6 May 1628.

⁹² *True Relation*, in Notestein and Relf (eds.), *CD 1629*, pp. 8-9: 22 January 1629. (2) *CJ*, 1, p. 921: 22 January 1629.

⁹³ *CJ*, 1, p. 923: 28 January 1629.

⁹⁴ *CJ*, 1, p. 924: 30 January 1629. Popofsky points out that 'the huge profits made by the customs farmers and periodic revelations of their fraudulent practices had made them increasingly suspect to many in the 1620s': Popofsky, 'Tonnage and Poundage Crisis', p. 53.

concluded by expressing a wish that the Commons should ‘not be jealous of one another’s Actions [and] deaf to all ill Reports or Rumors concerning me, until my Words and Actions speak for themselves’.⁹⁵ The speech seems to have given great satisfaction, so that an attempt was made to introduce a new bill for tonnage and poundage.⁹⁶ However, Eliot and Phelps sabotaged this, by proposing that civil grievances should be resolved first. There was also a procedural wrangle over whether a subsidy bill should come in on the king’s recommendation. However, things then moved in a different direction, when Francis Rous (Tregony) argued that the destruction of the true religion by Arminianism and popery should be given the foremost attention of the House:

I desire that we may look into the belly and bowels of this Trojan horse, to see if there be not men in it ready to open the gates to Romish tyranny and Spanish monarchy. For an Arminian is the spawn of a papist; and if there come the warmth of favour upon him, you shall see him turn into one of those frogs that rise out of the bottomless pit.⁹⁷

Similar heat was produced by Sir Walter Earle (Dorset): ‘As for passing of Bills, settling Revenues, and the like, without settling Religion, I must confess I have no Heart to it: Take away my Religion, you take away my Life; and not only mine, but the Life of the whole State and Kingdom’.⁹⁸ However, the king sent a message ‘that he expects Precedency of Tunnage and Poundage’, rather than the Commons working up a Remonstrance.⁹⁹ Even though a few members urged respect for the king’s wishes, further discussion of taxation had to wait, as set out in ‘*The Commons Apology for not passing their Bill of Tunnage and Poundage, and their Desire to proceed with Religion*’, which was prepared on 29 January.¹⁰⁰ It was clear that there was a double difficulty in securing a tonnage and poundage bill – the priority

⁹⁵ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 9-12 *passim*: 24 January 1629.

⁹⁶ *CJ*, 1, p. 924: 29 January 1629.

⁹⁷ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 101.

⁹⁸ Parkhurst (ed.), *Crew : 1629 Proceedings*, p. 31: 27 January 1629.

⁹⁹ *Ibid.*, p. 41: 27 January 1629.

¹⁰⁰ *Ibid.*, p. 45: 29 January 1629.

accorded to Rolle's privilege and the restoration of his goods, and the determination by some to tackle issues of religion before any other business. Charles replied to the Commons' declaration, asserting his right to have his business placed before the House, and urging the Commons to conclude matters relating to tonnage and poundage 'with Diligence', so as to 'put an End to those Questions that do daily arise between me and some of my Subjects'.¹⁰¹

However, further developments in the Rolle case now overtook any discussion of finance. The committee on the case of the merchants who refused to pay tonnage and poundage reported that William Acton, sheriff of London, had prevaricated and contradicted himself in his appearances before the committee. The House resolved to send for him as a 'delinquent', despite his protestations of cooperative intent.¹⁰² Crew records that Acton, 'in regard his Abuse appear'd to be so gross, and that he had so many times Liberty given to him to recollect his Memory, and he being so great an officer of so great a city, he had all the favour that might be, and yet rejected the same, and carried himself in a very scornful manner'.¹⁰³ There was one nice touch: although the sheriff was to kneel at the Bar, in reflection of the gravity of his offence, 'soe soone as he did kneele, to be wished to stand up agayne'.¹⁰⁴ The sentence was nevertheless severe: although protesting 'his Desire to avoid any Offence to any Member of the House', he was called in again, and ordered to the Tower.¹⁰⁵ The real issue was almost certainly his obstructive delay in processing the *replevin* for Rolle. As was usual when the Commons imprisoned people for contempt, Acton soon petitioned for his release. He was told that this would be arranged, following an apology by him, and his attendance at the relevant committee, 'where the House expecteth such a clear Satisfaction, both to the Committee, and the House, as he incur not any further Censure thereof'.¹⁰⁶

¹⁰¹ Ibid., pp. 49-51 *passim*: 29 January 1629.

¹⁰² *Diary of Sir Richard Grosvenor*, Trinity College Dublin, in Notestein and Relf (eds.), *CD 1629*, p. 182: 9 February 1629.

¹⁰³ Parkhurst (ed.), *Crew : 1629 Proceedings*, p. 63: 9 February 1629.

¹⁰⁴ *Grosvenor*, in Notestein and Relf (eds.), *CD 1629*, p. 182: 9 February 1629.

¹⁰⁵ *CJ*, 1, p. 928: 10 February 1629.

¹⁰⁶ He was eventually freed on 12 February: *CJ*, 1, p. 929: 11 and 12 February 1629.

As bad as anything Acton had done, two further developments were reported by Rolle himself: on 9 February, ‘his warehouse hath been locked by one Massey, a pursuivant’;¹⁰⁷ and Nicholas Shrimpton, a messenger from the attorney general, had issued him with a *subpoena* to attend a Star Chamber hearing into his refusal to pay tonnage and poundage. Rolle told Shrimpton that he was a member of parliament, and the latter asked if that meant that Rolle refused to accept the writ, to which Rolle replied: ‘No, if you will serve it on me’. This was such a clear breach of privilege that the attorney general sent Rolle a letter ‘excusing this, by the Mistake of his Messenger, and promising the withdrawing of the Information’. This ‘gave occasion of smart Debates in the House’ – some saw it as a tactic to divert the Commons from debating grievances about religion.¹⁰⁸ Eliot spoke against the judges who were preventing the merchants retrieving their goods: ‘I conceive, if the judges of that court had their understanding enlightened of their error by this House, they would reform the same, and the merchants thereby suddenly come by their goods’.¹⁰⁹ Sir Robert Phelips deployed his rhetorical skills:

By this information you see the misfortunes of these times, and how full time it was for this assembly to meet to serve his maj. and preserve ourselves, and I am confident we came here to do both [...] Great and weighty things wound deep; cast your eyes which way you please, you may see violations upon all sides: look on the liberty of the subject; look on the privilege of this house [...] if we suffer the liberty of the house to wither, out of fear or compliment, we shall give a wound to the happiness of this kingdom.¹¹⁰ [...] You see we are made the subjects of scorn and contempt.¹¹¹

Sir Humphrey May (Lancaster), chancellor of the Duchy, tried to reassure the House: ‘that this neither proceeded from King nor Council’.¹¹² The Commons were clearly angry: they ordered that Rolle had further privilege regarding the *subpoena*; that Shrimpton should be sent for to answer his contempt; that a select committee should

¹⁰⁷ ‘A royal or state messenger, esp. one with the power to execute warrants’, *OED Online*.

¹⁰⁸ Rushworth, *Historical Collections*, I, p. 653: 10 February 1629.

¹⁰⁹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, pp. 60-61: 12 February 1629.

¹¹⁰ Cobbett, *Parliamentary History*, II, p. 441.

¹¹¹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 55: 10 February 1629.

¹¹² *Ibid.*

examine the matter; and that the clerk in the Star Chamber should be summoned to explain by what warrant he had made out the *subpoena*.¹¹³ The committee reported, just a day later, that the facts were as submitted by Rolle: the *subpoena* had been issued, but had then been swiftly withdrawn by the attorney general.¹¹⁴ A separate committee for tonnage and poundage reported that they had learned that ‘in the Bill preferred in the Exchequer, it was expressed, the Merchants did plot, practise, and combine against the Peace of the Kingdom’.¹¹⁵

The legal calendar now gave the Commons a problem. As described above in relation to 1606-7, in spring there was often a clash for lawyers in the Commons between the parliamentary and the legal calendars, so that they tended to absent themselves from the Commons to attend any legal business they had. Over the years, many ignored the standing requirement to request leave of absence from the Commons. Nevertheless, in 1629 it was decided that no one was to leave town without permission.¹¹⁶ One of those thus pressed to remain was William Noye (Helston) – a senior, experienced lawyer.¹¹⁷ He had, until then, mostly aimed at breaking the deadlock over tonnage and poundage, and avoiding confrontation, ‘by proposing fundamentally conservative, declaratory legislation which simultaneously recognized the legitimate claims and needs of the crown while protecting the long-term legal interests of the subject’.¹¹⁸ However, Noye now took an ‘unexpectedly hard line, [launching] a vigorous attack on the dubious legal arguments which had been deployed to justify collection of the subsidy during the previous three and a half years, claiming that these tactics, and the accompanying seizures of merchants’ goods, were the principal obstacle to a resolution of the crisis. In his view the correct balance of the law had yet again been disturbed, and needed to be restored before

¹¹³ *Ibid.*, pp. 55-57: 10 February 1629; *CJ*, 1, p. 928: 10 February 1629.

¹¹⁴ *CJ*, 1, p. 929: 11 February 1629. Rushworth dates this as 10 February.

¹¹⁵ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 57: 11 February 1629.

¹¹⁶ Parkhurst (ed.), *Crew : 1629 Proceedings*, p. 69: 11 February 1629.

¹¹⁷ He was to be made attorney general in 1631.

¹¹⁸ James S. Hart, Jr., ‘Noy, William (1577-1634)’, *ODNB*.

normal business could resume'.¹¹⁹ His speech clearly expounded the interlocking issues that were exercising many of the Commons:

We cannot safely give unless we be in possession, and the proceedings in the Exchequer nullified, and the information in the Star Chamber, and the annexation to the Petition of Right ... I will not give my voice to this until these things be made void; for it will not be a gift but a forced confirmation; neither will I give it ... [without] a declaration in the bill, that the king hath no right but by our free gift. If it will not be accepted, as it is fit for us to give it, we cannot help it. If it be the king's already, as by these new records it seemeth to be, we need not give it.¹²⁰

Noye could see the difficulty arising from the rulings of November 1628 that Rolle could not use a *replevin* to recover his goods. Nevertheless, he took the 'wildly optimistic' view that the barons of exchequer might be persuaded to withdraw their judgment, if the cloth that had been seized was in lieu of payment of tonnage and poundage, and not some other duty.¹²¹ Although May told the Commons that: 'All the proceedings of the King and his Ministers was [sic] to keep the question safe, until this House should meet, and you shall find the proceedings of the Exchequer were legal', there were far more speeches condemning the arbitrary nature of the seizure of the merchants' goods. For example, William Coryton said: 'I conceive it is fit the merchants should have their goods before we can think of the bill [for tonnage and poundage]'. It was agreed that a message should be sent to the barons of the exchequer, asking for a halt in proceedings, as the customers' affidavits made clear that goods were stayed only for duties contained in the book of rates.¹²² The four senior members who were deputed to carry the message represented a spectrum of views. Sir Humphrey May was a privy councillor, chancellor of the Duchy, a loyalist, and defender of the king's interests.¹²³ Sir Francis Cottington (Saltash) was a newly appointed privy councillor, and would be made chancellor of the exchequer a month

¹¹⁹ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 540.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *True Relation*, in Notestein and Relf (eds.), *CD 1629*, pp. 61-63: 12 February 1629.

¹²³ Andrew J. Hopper, 'May, Sir Humphrey (1572/3-1630)', *ODNB*.

later.¹²⁴ By contrast, Sir Nathaniel Rich (Harwich) was ‘a stickler for procedure and legal forms’. He was an opponent of Buckingham, and someone who became increasingly alarmed by the threat of militant Arminianism, and the spread of Jesuit and papal influence.¹²⁵ The last was Sir Robert Phelips, a leading orator against Buckingham, and opponent of unauthorised means of raising supply. The substantive reply, from the ‘Lord Treasurer, Chancellor, and Barons of the Exchequer’, made it clear that the goods that had been seized were ‘only for the Duty of Tunnage and Poundage, and other Sums compris’d in the Books of Rates’, but that the barons’ orders ‘did not determine, nor any ways trench upon the Right of Tunnage and Poundage’. Whereas the owners had sought to use writs of *replevin*, in effect, to pre-empt the case being properly argued, the court of exchequer had stayed any such *replevin*, ‘which was no lawful Action or Course in the King’s Cause, nor agreeable to his Royal Prerogative’. They did leave it open to the owners of the goods ‘if they conceiv’d themselves wrong’d, might take such Remedy as the Law alloweth’.¹²⁶ Rushworth records the Commons’ reaction: ‘instead of satisfaction expected by the House, [it] was looked upon as a justification of their actions’. The matter was referred to a select committee ‘to consider [...] whether ever the Court of Exchequer held this course before, for staying of Replevins; and whether this hath been done by Prerogative of the King in his Court of Exchequer’. Further, the customers and the pursuivant (Shrimpton) were to attend the House on 16 February.¹²⁷

There now occurred a significant attempt to establish an extension to privilege, so that it applied to petitioners to the Commons. The grounds were that parliament retained a curial function, and might need petitioners to appear in person, so that they should not be diverted from such a summons by extraneous concerns. Although Charles I was to characterise this as a new area of privilege, it had in fact been raised in 1624, when the Felt-makers were pursuing a bill in the Commons to secure relief against a chancery decree. However, the Master of the Felt-makers was ‘taken by a

¹²⁴ Fiona Pogson, ‘Cottington, First Baron Cottington (1579?-1652)’, *ODNB*.

¹²⁵ Robin J. W. Swales, ‘Rich, Sir Nathaniel (c. 1585-1636)’, *ODNB*.

¹²⁶ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 96-98: 14 February 1629.

¹²⁷ Rushworth, *Historical Collections*, I, p. 655: 12 February [the date is incorrect]; *CJ*, I, p. 930: 14 February 1629.

Serjeant, and committed to the Fleet, 2,000 *l.* Bond offered, but not accepted'.¹²⁸ A petition was then presented, and the Commons ordered that those who had been held were to be freed by the warden of the Fleet, 'for Prosecution of their Bill, till the same be determined by both Houses'. The committee for privileges was asked to consider 'whether any of the former Proceedings, in arresting the Felt-makers, during their Attendance upon this Court, have impeached their Privilege of this House, and to make Report thereof to the House'.¹²⁹ No further action seems to have been taken at that time. However, the question of privilege for petitioners to the Commons received fresh attention in 1629, because the customers were still pursuing the merchants, buoyed by the barons' endorsement of the legality of their actions, which in turn gave rise to petitions from the merchants to the Commons. As a result, Sir John Eliot tried to protect such petitioners, by moving an Order, which specified that 'a Man having a Plaint depending here, shall be privileg'd in his Person, not freed from Suits'.¹³⁰ Such a radical proposal was perhaps too much, so that it was not agreed in that form, but sent to a committee to consider the level of privilege available to anyone with a cause in parliament. In the meantime, 'intimation shall be given to the Lord Keeper, that no Attachment shall go forth against the Merchants'.¹³¹ A few days later, Chambers submitted a further petition, additional to that of 28 January, 'in complaint of a warrant newly proceeding from the Council-board for stay of the merchants goods, unless they pay the duties that were due in King James his time'. Eliot was exasperated: 'You see, as by the last answer from the Exchequer touching the merchants, that the merchants were bound within that Court to sue for their own, and now they are debarred from all means of coming by their own goods'.¹³² Chambers'

¹²⁸ *CJ*: 14 April 1624 (second scribe).

¹²⁹ *CJ*, 1, pp. 702-03: 12 May 1624.

¹³⁰ This development led Charles, at the forthcoming dissolution, to complain that people were granted privilege by the Commons, 'for no other Cause, but because they had Petitions depending in that House': Rushworth, *Historical Collections*, Appendix, p. 9: *His Majesty's Declaration to all his loving Subjects, of the Causes which moved him to dissolve the last Parliament: March 10, 1628* [OS].

¹³¹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 63: 13 February 1629. The merchants were named as Mr. Chambers, Mr. Fowkes, Mr. Gilman, and Mr. Phillippes: *CJ*, 1, p. 929: 13 February 1629.

¹³² *True Relation*, in *ibid.*, p. 81: 17 February 1629.

latest petition was referred to the committee for the merchants, ‘to take into Consideration, what Course is fit to be taken, to put the Merchants in Possession of their Goods’.¹³³

A key question for the committee was whether the customers had seized the cloth in their own interest, or on behalf of the king. It was clear that neither Charles nor his agents were conceding that the privilege of parliament that members enjoyed for their goods applied in cases where a royal commission authorised their seizure. This was put forward by two of the customers, Abraham Dawes and Richard Carmarthen, who were called in and separately interrogated by the Speaker. Dawes said:

He took Mr *Rolls*’s Goods by virtue of a Commission under the Great Seal, and other Warrants remaining in the hands of *Sir John Elliot*: That he knew Mr *Rolls* to be a Parliament-man, and that Mr *Rolls* demanded his Privilege; but he did understand that this Privilege only extended to his Person, and not to his Goods. [...] He took those Goods for such Dutys as were due in King *James* his time; and that the King sent for him on Sunday last, and commanded him to make no further Answer.

Carmarthen in turn said that:

He knew Mr *Rolls* to be a Parliament-man, and that he told Mr *Rolls* he did not find any Parliament-man exempted in their said Commission; and if all the Body of this House were in him, he would not deliver [up] the Goods; if he said he would not, it was because he could not.¹³⁴

The debate that followed considered the options that were open to the Commons, with varying levels of anger: Christopher Wandesford advised against making the customers delinquents, preferring to submit a remonstrance to the king. Sir Nathaniel Rich (sitting then for Harwich) also urged caution, moving not to proceed at present, until a select committee had determined whether the king himself gave the order to stay the goods, even though they were the goods of a ‘parliament-man’. Selden was far more fiery: ‘If there be any near the King that misinterpret our Actions, let the

¹³³ *CJ*, 1, p. 931: 17 February 1629.

¹³⁴ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 112-13: 19 February 1629.

Curse light on them, not on us, and believe it is high time to right our selves; and until we vindicate our selves in this, it will be in vain for us to sit here'.¹³⁵ Eliot was equally strong: 'We see it is not only for the interest of the goods of a member of this House, but also for the interest of this House, if we let this go, we shall not be able to sit here. [...] The first [step] is whether we conceive these parties to be delinquents or no, and to have violated our privileges [...] and if they be delinquents, what punishment they shall merit'. The House resolved to move into a grand committee, suspended ordinary business, and ordered that no member was to leave London.¹³⁶

Clarity was now about to be offered on the important question of whether the customers were acting on royal authority, specifically in relation to tonnage and poundage, or in pursuit of duties that they might take as part of their general collection of customs. The answer seemed to come when one of the customers, Sir John Wostenholme, complying with an Order from the Commons, 'delivered a Lease of the Customs, under the Great Seal', which was read out to the committee for the customs. This commission set out the royal claim to collect tonnage and poundage lawfully, and to imprison refusers on behalf of the crown:

Whereas the Lords of our Council, taking into consideration our Revenue, and finding that Tunnage and Poundage is a principal Revenue of our Crown, and hath been continued for these many years; have therefore order'd all those duties of Subsidies, Customs and Imposts as they were in the one and twentieth year of King James [...] and as they shall be appointed by us under our Seal, be levy'd: [...] and if any Person refuse to pay, then our Will is, that [they shall be committed] to prison such [as are] so refusing, until they conform themselves: And we give full Power to all our Officers [...] from time to time, to give assistance to the Farmers of the same, as fully as when they were collected by Authority of Parliament.¹³⁷

Wostenholme's case was forwarded to the committee, with Selden identifying that Wostenholme had 'often confessed that the goods were taken for Tonnage and

¹³⁵ Ibid., pp. 113-14: 19 February 1629.

¹³⁶ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 85: 20 February 1629.

¹³⁷ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 116-17: 20 February 1629. Rushworth records the commission as having been produced on 22 February.

Poundage', and that he had given conflicting evidence. Selden's view was that Dawes' case was similar; whereas Carmarthen had directly shown contempt: '*if all the parliament were in him, he would not deliver the goods*'.¹³⁸ The committee was increased by six, including 'Mr Rolles', surely the lawyer Henry Rolle, John Rolle's brother. When the committee met, Edward Littleton put forward three strong arguments. First, a member should have privilege for his goods, because, if he were impleaded, he could not sit in the House: 'the ground of all privilege is for public service for the general good of the Commonwealth, therefore all private interest must yield and give place, and *the privilege of parliament exceeds and is above all other privileges and courts, and Parliament only can decide Parliament privileges, not any other judges or courts*' [my emphasis]. This was placing privilege of parliament back above any royal commission – the mirror image of the arguments that Dawes and Carmarthen had presented earlier. Second, privilege applied during a prorogation, sixteen days coming and going: the problem of the dates involved in the Rolle case is discussed below. Third, did privilege of goods hold, even against the king? Littleton argued that it did, except in cases involving high treason, felony, or breach of the peace. Although Sir Robert Phelips and Sir Francis Seymour supported Littleton, the chancellor of the Duchy, Sir Humphrey May, argued that 'no Privilege lieth against the King in point of his Duty [...] God forbid that the King's commands should be put for delinquency. When that is done his crown is at stake'. Sir John Coke, the secretary of state, sought to limit the discussion to the case of Rolle alone, as it was only he that was subject to privilege, despite Eliot's attempt to extend privilege to any who had suits in hand in parliament. Noye claimed that 'these Customers had neither Commission nor Command to seize; [...] therefore the Privilege is broken by the Customers, without relation to any Commission from the King'.¹³⁹ This is an important point: if the goods had been seized only in relation to tonnage and poundage, then the king's earlier statement that he disclaimed any prerogative right to tonnage and poundage¹⁴⁰ would have the effect of allowing Rolle's goods to be

¹³⁸ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 87: 20 February 1629.

¹³⁹ *Ibid.*, pp. 88-90: 21 February 1629.

¹⁴⁰ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 9-12: 24 January 1629.

subject to parliamentary privilege. It was clear that the customers were acting on a commission from the king to collect tonnage and poundage, but crucially, there seemed to be no direct authority to seize the goods of a member of parliament who would not pay the duties. This omission appeared to assist both the friends and opponents of the crown: the Commons could punish the customers without dishonouring the king. However, was the omission simply a drafting error? Events took a fresh turn when Sir John Coke brought an unequivocal message from the king: the customers *were* under his direct orders:

That it concerns his Majesty, in a high degree of Justice and Honour, that truth be not concealed; which is, that what the Customers did, was by his own direct Order and Command, at the Council-board, himself being present: And tho' his Majesty takes it well, that the House have severed his interest from the interest of the Customers, yet this will not clear his Majesty's Honour, if the said Customers should suffer for his sake.¹⁴¹

This did indeed display Charles's sense of 'justice and honour', but by refusing to state falsely that the customs officers had acted independently, which would have absolved him from blame for the seizure of the goods, he threw away the chance of a statutory grant of tonnage and poundage, and retrospective permission for what had already been collected. The loyalist May encapsulated the issue, once the king had admitted that the seizure had been executed on his command: 'We take this as a high point of privilege, and His Majesty takes it as a high point of sovereignty, and therefore would not have us think so much of the privilege of this House as to neglect that of the sovereignty'.¹⁴² The presentation of this argument must be seen as a move towards asserting that sovereignty lies with the people, which would underlie the future trial and execution of Charles I. The grand committee reported 'that Mr. Rolls, a Member of the House, ought to have privilege of Person and Goods; but the

¹⁴¹ Rushworth, *Historical Collections*, I, p. 659: 22 February 1629.

¹⁴² *HoP* dates this to 25 February: Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 304, but the remark was in fact made on 23 February: *Nicholas*, in Notestein and Relf (eds.), *CD 1629*, p. 169: 23 February 1629. The confusion perhaps arises from the way in which the publisher dates the pages in *CD 1629*.

Command of the King is so great, that they leave it to the House'.¹⁴³ The Commons then swiftly resolved:

1. that every Member of this House is, during the Time of Privilege of Parliament, to have Privilege for his Goods and Estate. 2ly, That the 30th of October last, the 5th of January last, and sithence, were within Privilege of Parliament. 3ly, That Mr. Rolle ought to have Privilege for his Goods, seized the 30th of October last, the 5th of January last, or at any Time sithence the said 5th of January last.¹⁴⁴

The matter of dates when privilege applied is important in the Rolle case: the contemporary view was that privilege applied for as little as sixteen days, and certainly no more than forty days, before and after a parliamentary session. So, Rolle had privilege from 26 June 1628, when parliament was prorogued, for at most forty days, i.e. ending on 5 August. Although his goods were seized on 30 October, the argument was advanced that 'because the current session had originally been scheduled to open on 20 Oct., Rolle had been entitled to privilege for those of his goods which had been confiscated at the end of that month'.¹⁴⁵ That line may have been redundant – as parliament was *prorogued*, rather than *dissolved*, there was arguably a case that Rolle had privilege anyway for the whole period between the end of one session and the start of the next. If the original argument was accepted – that a member had privilege for his goods – the further seizure on 20 January was a clear breach of privilege, as parliament had been about to resume on that very day.

The final part of the story of the 1629 parliament now unfolded, when the Commons adjourned 'in some heat', on 23 February, for what was intended to be a *single* non-sitting day, i.e. to return on 25 February.¹⁴⁶ However, Charles I sent a message on the latter date, which adjourned the House for a further *five* days, with all committees and other proceedings being put on hold.¹⁴⁷ It might seem that the king was imposing an additional adjournment as a tit-for-tat response to the Commons'

¹⁴³ Rushworth, *Historical Collections*, I, p. 659: 22 February 1629.

¹⁴⁴ *CJ*, I, p. 932: 23 February 1629.

¹⁴⁵ Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 88.

¹⁴⁶ *CJ*, I, p. 932: 23 February 1629.

¹⁴⁷ *CJ*, I, p. 932: 25 February 1629.

self-adjournment; on the other hand, he might have been looking for a cooling-off period to find a basis for agreement with the Commons.¹⁴⁸ An order by the king for an adjournment was likely to be provocative, as there was a view, from 1604, that ‘the Commons House alone, might, of itself, and by itself, be adjourned’.¹⁴⁹ However, any lull in proceedings that was intended to help those working on behalf of the crown to resolve matters might also have given the opportunity for the ‘parliamentary rights’ group to determine their own tactics. On 2 March, when the Commons returned, events took a particularly dramatic turn, although the precise sequence of proceedings during that day’s sitting does not agree across all contemporary accounts. It is not necessary to describe in full detail all the events that occurred, as these are included in the diaries and many histories of the period. In summary, when the sitting began, Speaker Finch delivered a message that it was the king’s pleasure to adjourn the House for seven days, i.e. to 10 March, and that in the meantime the House was not to proceed to any business; in other words, not to put forward any protestations, petitions, or remonstrances. Normally, that would have been that: the Speaker would formally put the motion to adjourn, and would then rise from his chair, with the House thereby adjourned. The pretence would thereby be maintained that the House had adjourned itself, rather than that the king had adjourned the House. On this day, however, the move to adjourn was resisted, the Speaker was held in his chair, and Sir John Eliot tried to have a document protesting against a number of alleged abuses read out, asserting that ‘In this great question of Tonnage and Poundage, the instruments moved at his [the king’s] command and pleasure; he dismays our merchants, and invites strangers to come in to drive out our trade, and to serve their own ends’.¹⁵⁰ After further attempts by Finch to leave, matched by attempts by Denzil Holles to have Eliot’s paper read, what became known as *The Three Resolutions* were agreed:

¹⁴⁸ Ian H. C. Fraser, ‘The Agitation in the Commons, 2 March 1629, and the Interrogation of the Leaders of the Anti-Court Group’, *Bull IHR*, 30 (81) (May 1957), 86-95, p. 86.

¹⁴⁹ *CJ*, 1, p. 150: 22 March 1604.

¹⁵⁰ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, pp. 102-03: 2 March 1629.

1. Whosoever shall bring in innovation of religion, or by favour or countenance seem to extend or introduce Popery or Arminianism, or other opinions disagreeing from the truth and orthodox Church, shall be reputed a capital enemy to this Kingdom and Commonwealth. 2. Whosoever shall counsel or advise the taking and levying of the subsidies of tonnage and poundage, not being granted by Parliament, or shall be an actor or instrument therein, shall be likewise reputed an innovator in the Government, and a capital enemy to the Kingdom and Commonwealth. 3. If any merchant or person whatsoever, shall voluntarily yield, or pay the said subsidies of tonnage and poundage, not being granted by Parliament, he shall likewise be reported a betrayer of the liberties of England, and an enemy to the same.¹⁵¹

This was heady stuff: there were to be offences of a *capital* nature, no less, as well as ‘an invitation to the public at large to make up for the powerlessness of their representatives at Westminster by instituting a taxpayers’ strike’.¹⁵² The king then tried to send ‘Maxwell (the screech-owl) with the Black Rod for the dissolution of parliament, but being informed that neither he nor his message would be received by the House, the King grew into much rage and passion, and sent for the Captain of the Pensioners and Guard to force the door, but the rising of the House prevented the bloodshed that might have been spilt’.¹⁵³ In fact, Sir Miles Hobart (Great Marlow) had taken the key from the serjeant-at-arms, put him out of the House without his mace, as he was a very old man, and locked the door while the articles of the threefold protestation had been read out, each being ‘allowed with a loud *Yea* by the House’. The House then rose after a two hour sitting. Finch was permitted to leave, and to inform the king of ‘the scope of our loyal intention’. So, ‘in much confusion’, the House was – from its point of view – *adjourned* to 10 March.¹⁵⁴ The dilemma that Finch faced can be set against the greater certainty that Speaker William Lenthall

¹⁵¹ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 757; Kenyon (ed.), *Stuart Constitution*, p. 85.

¹⁵² Russell, *Parliaments and English Politics*, p. 416.

¹⁵³ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 106: 2 March 1629. A screech owl was an usher.

¹⁵⁴ Thrush and Ferris (eds.), *Commons 1604-29*, IV, pp. 276-77; Rushworth, *Historical Collections*, I, p. 660: 2 March 1629.

showed, on 4 January 1642, when he defended his office against Charles I in these or similar words:

May it please your majesty, I have neither eyes to see nor tongue to speak in this place but as this house is pleased to direct me whose servant I am here; and humbly beg your majesty's pardon that I cannot give any other answer than this is to what your majesty is pleased to demand of me.¹⁵⁵

However, in 1629, faced with a clear challenge to his own authority and that of the Speaker, Charles issued a proclamation confirming the *dissolution* of parliament on 2 March. This represented the king as wanting to foster better understanding, 'unity and peace' between himself and the Commons, but that he had been thwarted by 'the malevolent dispositions of some ill affected persons of the House of Commons'. It described how the king had intended there to be a time for reflection, by adjourning parliament from 25 February to 2 March. However, the proclamation went on to say, 'by the disobedient and seditious carriage of those said ill affected Persons of the House of Commons, [...] We and Our Regal Authority and Commandment have been so highly contemned, as Our Kingly Office cannot bear. [...] And therefore it is Our full and absolute resolution to dissolve the said Parliament'. The proclamation ended by distinguishing between those who had acted loyally, and those that 'have given themselves over to Faction, and to worke disturbance to the Peace and good Order of Our Kingdome'.¹⁵⁶ On 10 March, Charles appeared, to effect the dissolution of parliament in person. He praised the 'dutiful demeanours' of the Lords, and declared to them, 'and all the World, that it was merely the undutiful and seditious Carriage in the Lower House that hath caus'd the Dissolution of this Parliament'. He acknowledged that a 'good Number' of the Commons were 'as dutiful Subjects as any in the World', whereas 'some few Vipers amongst them [...] did cast this Mist of Undutifulness over most of their Eyes'.¹⁵⁷ The verdict of the

¹⁵⁵ Rushworth, *Historical Collections*, IV, p. 478: 4 January 1642.

¹⁵⁶ Larkin (ed.), *Proclamations (Charles I)*, II, pp. 223-24.

¹⁵⁷ *LJ*, 4, p. 43: 10 March 1629.

attorney general, Robert Heath, was that ‘the untoward disposition of a few ill Members of the Commons House of Parliament hath given such a just and such an unhappy occasion’ for the dissolution. Heath then ‘entered with zest on the prosecution of those responsible’.¹⁵⁸ Charles himself went into print, to justify the dissolution of 10 March, making it clear that he did not accept that privilege obtained for petitioners to the Commons, nor that privilege for a member’s goods could be invoked where these had been taken to meet obligations to the king:

We are not ignorant, how much that House hath of late Years endeavoured to extend their Priviledges, by setting up general Committees for Religion, for Courts of Justice, for Trade, and the like; a Course never heard of until of late: So as, where in former Times the Knights and Burgesses were wont to communicate to the House, such Business as they brought from their Countries; now there are so many Chairs erected, to make Enquiry upon all Sorts of Men, where Complaints of all Sorts are entertained, to the insufferable Disturbance and Scandal of Justice and Government, which having been tolerated a While by our Father, and our Self, hath daily grown to more and more Height; insomuch, that young Lawyers sitting there, take upon them to decry the Opinions of the Judges; and some have not doubted to maintain, That the Resolutions of that House must bind the Judges, a Thing never heard of in Ages past.

[...]

And whereas Suits were commenced in our Court of Star-chamber, against Richard Chambers, John Foukes, Bartholomew Gilman, and Richard Phillips, by our Attorney General, for great Misdemeanours; they resolved, that they were to have Priviledge of Parliament against us for their Persons, for no other Cause, but because they had Petitions depending in that House; and (which is more strange) they resolved, That a Signification should be made from that House, by a Letter, to issue under the Hand of their Speaker, unto the Lord Keeper of our Great Seal, that no Attachments should be granted out against the said Chambers, Foukes, Gilman, or Phillips, during their said Priviledge of Parliament.

¹⁵⁸ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 618.

[...]

[And] they went about to create a new Priviledge (which we will never admit) That a Parliament-man hath Priviledge for his Goods against the King; the Consequence whereof would be, That he may not be constrained to pay any Duties to the King, during the Time of Priviledge of Parliament.¹⁵⁹

There was now no realistic prospect of a grant of tonnage and poundage, so that Charles I decided to rule without parliaments; more than a decade of personal rule only ended on 13 April 1640, with the commencement of the Short Parliament.

Key issues and themes

Several key issues and themes that have particular meaning and significance can be identified from the preceding narrative of the 1629 session. The overarching concern was about liberty, privilege and governance, as noted in Sir Robert Phelips' speech at the start of the session: 'You shall see violations upon all sides: look on the Liberty of the Subject, look on the Privilege of this House [...] If we suffer the Liberty of the House to wither out of fear of Complaint, we shall give a Wound to the Happiness of this Kingdom'.¹⁶⁰ As well as anger about the way in which Charles I had treated the *Petition of Right*, and worries about religion, concerns were expressed by many throughout the 1629 session about perceived assaults on liberty in general, and parliamentary privilege in particular, occasioned by the unauthorised collection of tonnage and poundage, and the associated seizure of goods belonging to Rolle and the other merchants. Counter-arguments were limited, because there were so few privy councillors or other loyalists to defend the crown's position: Sir John Coke, Sir Humphrey May, Sir Thomas Edmondes, and Sir Francis Cottington had secured seats in the Commons in 1628; Sir Richard Weston, Sir John Savile, Sir Robert Naunton, and Sir Julius Caesar did not.¹⁶¹ Nor did it help that Charles I was willing to use confrontational language towards the Commons, or at least towards those whom he

¹⁵⁹ Rushworth, *Historical Collections*, Appendix.

¹⁶⁰ Cobbett, *Parliamentary History*, II, p. 441.

¹⁶¹ David Harris Willson, *The Privy Councillors in the House of Commons, 1604-1629* (New York (NY): Octagon, 1971), p. 62.

saw as troublemakers. The overall effect was to give the Commons a cohesive institutional confidence that saw them refusing to process any grant of tonnage and poundage, while at the same time making repeated protests, and attempts significantly to extend privilege – even if such attempts were not always successful.

Four specific issues in relation to the Rolle case were identified at the start of this chapter. The first of these was whether a member of parliament had privilege for *all* his goods. Medieval cases had established the principal of privilege for a member's 'goods and estate', with a rider that the horses, goods and chattels should be 'necessary' for a member during his attendance in parliament, or in returning to his home. That narrow qualification had been extended by the time of the Rolle case, on the wider argument that those who were engaged in public life should not be distracted from their duties by the need to defend *any* of their own property. Charles I nevertheless made it clear, in his speech at the dissolution, that there could be no extension of privilege to cover a member's goods against the king, as this would inevitably mean that such a member could not have his goods sequestrated for failing to pay any duties to the king, during the time of privilege of parliament.¹⁶² In the absence of any effective sanctions for non-payment, he would have a tax holiday while he remained an MP.

The second issue was whether privilege still held during times when parliament was adjourned or prorogued. It was uncertain whether Rolle only had privilege sixteen days after prorogation on 26 June, or, alternatively, that he had privilege before and after the *planned* resumption on 20 October, which would have meant that seizure of his goods at the end of October would have been in contempt of parliamentary privilege. If it is assumed that the goods were susceptible to privilege, a further seizure of goods, on 20 January 1629, was a clear breach of privilege, as parliament had been about to resume on that very day. The Commons were not prepared to yield any ground on this issue, resolving that Rolle had had privilege for his goods when these were seized on 30 October 1628.¹⁶³

¹⁶² Rushworth, *Historical Collections* I, Appendix, pp. 8-9.

¹⁶³ *CJ*, 1, p. 932: 23 February 1629.

The third issue was whether privilege of parliament applied for petitioners to the Commons, as well as to members and their servants. In what represented an attempt significantly to widen parliamentary privilege, Eliot had moved an Order that would have granted privilege to those who were petitioning the Commons. Although it was remitted to a committee for consideration of the level of privilege that should be available to those with a cause in parliament, the lord keeper was sent a message that no attachment was to proceed against four, named merchants.¹⁶⁴ This was an important statement of a new principle: that those petitioning parliament had privilege, on the grounds that parliament might need them to appear in person, and they should not be diverted from such a summons by extraneous concerns. Charles I, in his speech at the dissolution, nevertheless challenged this initiative, so that the issue remained open.

The fourth issue had two strands: were those collecting tonnage and poundage, or seizing goods in lieu, acting directly on royal authority; and, if so, could parliamentary privilege still be invoked to recover the goods? The problem for Rolle had not been how to establish his privilege, but how to obtain the restoration of his property. In February 1629, the barons of the exchequer ruled that the goods had been legitimately seized, in lieu of payment of tonnage and poundage, but this was without prejudice as to the question of the legality of the duties. They also ruled that the owners of the goods could ‘take such remedy as the law alloweth’.¹⁶⁵ It was not clear what that remedy might be, other than through the route of parliamentary privilege, with it being argued that ‘the privilege of parliament exceeds and is above all other privileges and courts, and Parliament only can decide Parliament privileges, not any other judges or courts’.¹⁶⁶ The counter-argument was that privilege could not obtain against the king. However, did their commission authorise the customers to seize an MP’s goods? An unequivocal response to this question came from the king: the customers *were* under his direct orders and command.¹⁶⁷ This honourable statement

¹⁶⁴ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 63: 13 February 1629.

¹⁶⁵ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 96-98: 14 February 1629.

¹⁶⁶ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 88: 21 February 1629.

¹⁶⁷ Rushworth, *Historical Collections*, I, p. 659: 22 February 1629.

scuppered any chance of a statutory grant of tonnage and poundage, and retrospective permission for what had already been collected. As Russell observed, the Commons' refusal to grant tonnage and poundage in 1628-9 made the case for continuing parliaments increasingly difficult to argue, as they were no longer financially useful to the government.¹⁶⁸ On the other hand, if Charles had not stated that the customers were following his orders, the Commons could have confirmed Rolle's privilege, treated the officials as delinquents, and opened the way for Rolle and the other merchants to regain their goods. They would probably have also given the king authority to collect tonnage and poundage, most likely with retrospective effect. Charles would have secured supply, and a major item in the Commons' list of grievances would have been crossed through. It is also likely that Charles would not have decided to dispense with parliaments, as he was to do for the next eleven years.

The Commons, in nearly the last decision of the 1629 parliament, resolutely confirmed that a member was entitled to privilege for his goods and estate, and that Rolle accordingly had privilege for goods that had been seized.¹⁶⁹ An increasing strength of feeling, at least among some leading members, against the alleged assault on privileges, rights and liberties, reached its peak in the chaotic, confrontational furore of the sitting on 2 March. The Commons now had the confidence boldly to incite people not to pay duties and impositions that had not been given parliamentary authority, resolving to make it a *capital* offence, no less, to propose the levying of non-parliamentary duties, or willingly to pay such duties. That day's sitting helped change the way in which the Speaker was viewed: not everyone present may have supported the extreme, personal attacks on Finch, but there was a noticeable shift, which would see each successive Speaker increasingly become the servant of the House, rather than simply an intermediary or messenger between king and Commons. The work of the Commons might have been about to end for what would be more than a decade, leaving some uncertainty about the extended scope of privilege, but an air of robust confidence was evident in the demeanour of those who played leading roles in that day's sitting, and were then arrested for having done so. Writing some

¹⁶⁸ Russell, *Parliaments and English Politics*, p. 388.

¹⁶⁹ *CJ*, 1, p. 932: 23 February 1629.

time later, however, Sir Simonds D'Ewes thought that 'March the 3rd was the most gloomy, sad, and dismal day for England that happened in five hundred years last past', as it led directly to the period of personal rule, with 'sad effects [...] in Church and Commonwealth'. D'Ewes broadly supported the king's approach to securing parliamentary approval for the collection of tonnage and poundage, and felt that the 'cause of the breach and dissolution was so immaterial and frivolous [since] divers fiery spirits in the House of Commons were faulty and cannot be excused'.¹⁷⁰

A fitting summary of the issues that arose from the Rolle case is provided in the words of Sir John Eliot: 'We see it is not only for the interest of the goods of a member of this House, but also for the interest of this House; if we let this go, we shall not be able to sit here. / The King can not command a thing soe unjust as the violacion of our priviledges'.¹⁷¹

Conclusions

This chapter has suggested that the Rolle case was far from being a 'mere dispute about privilege'. No secondary sideshow, privilege was now closely bound up with grievances, and challenges to the royal authority and prerogative. It was because grievances had led to a breakdown in supply for Charles I that Rolle and his fellow merchants refused to pay duties that had not been authorised by parliament – even though precedents suggested that retrospective authority would have eventually been forthcoming. The number of times that Rolle's case was considered during the 1629 session provides clear evidence of its contemporary importance. During this period, the privileges of both Houses of parliament, together with the safeguarding of the royal prerogative, were becoming a matter of public debate and propaganda. The Rolle case, even at the time, was seen as having a wider importance than the matter of a single member's property: Eliot asserted that it concerned the rights of Rolle, subjects in general, and the rights and privilege of the Commons.¹⁷² The primacy of parliamentary privilege was asserted, even against the king, albeit that such a claim

¹⁷⁰ Halliwell (ed.), *D'Ewes: Autobiography and Correspondence*, I, pp. 402-03.

¹⁷¹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 85: 19 February 1629; *Grosvenor*, in *ibid.*, p. 224: 19 February 1629.

¹⁷² *True Relation*, in *ibid.*, p. 8: 22 January 1629.

was resisted. Nor did the Commons submit to reprimands from the king: 'If we suffer the Liberty of the House to wither out of fear of Complaint, we shall give a Wound to the Happiness of this Kingdom'.¹⁷³ Although it has been suggested that the absence of old hands such as Sir Edward Coke and Sir Thomas Wentworth left the Commons under the influence of 'hotheads', with only four privy councillors being members of the Commons, care nevertheless needs to be taken to avoid suggesting that most members were spoiling for some kind of fight.

The development of a more expansive, 'plastic' privilege shows a certain symmetry with the Shirley case of 1604, where the Commons were beginning to develop a greater institutional confidence, with a robust certainty, even then, that their privileges were 'ancient and undoubted', and in accordance with precedents. The Commons in James I's first parliament had shown that they could use their own strength to maintain their rights and privileges. The strong line taken in the decisions of the Commons on the Rolle case showed a further expansion of institutional confidence, whereby privilege of parliament for all of a member's goods was asserted, even against the king, and was said additionally to apply to petitioners to the Commons, not just members and their servants. Further, the Commons were prepared to incite people not to pay duties, if these had not been authorised by parliament, and to condemn those who advised the king that duties could be collected without parliamentary approval.

The 1629 dissolution did, however, leave some issues from the Rolle case unresolved. It also led to action being taken against a number of members who had been prominent in the events of 2 March. William Coryton, Sir John Eliot, Sir Peter Heyman, Sir Miles Hobart, Denzil Holles, Walter Long, John Selden, William Strode, and Benjamin Valentine were all arrested within a short period, followed by a struggle for bail, and with writs of *habeas corpus* flying around. The king's lawyers, hamstrung by the *Petition of Right*, knew that they had to show cause for the imprisonment, but were reluctant to allege that it was for words uttered and acts committed in parliament, as these might be protected by parliamentary privilege. The

¹⁷³ Parkhurst (ed.), *Crew : 1629 Proceedings*, pp. 5-6: 22 January 1629.

response was to offer bail, but on condition that the person concerned was prepared to be bound over. However, most of those who had been arrested refused this offer, on the grounds that they would be admitting their guilt, and would in effect be prevented from any future criticism of the government, as they would be liable to be rearrested if they did not meet the bail condition. Those who had been arrested were, in fact, treated in different ways, depending on their age and health, and the gravity of their misdemeanours, with Valentine remaining in prison until 1640, although he was not closely confined.¹⁷⁴

When parliament again met after eleven years of personal rule, a committee, including ‘Mr Rolles’, was established, to consider the breaches of the privilege of parliament in respect of the proceedings against the members arrested after the last session of the 1621 parliament, and what reparations might be due to them.¹⁷⁵ At the same time, there was some attempt to reduce the tensions over tonnage and poundage, so that the lord keeper, at the start of the short parliament, observed that: ‘Tonnage and Poundage his Majesty had taken [since] the Death of his Father, according [to the] Example of his Predecessors. – Desired to have it as a Grant from his People; and to that End had a Bill prepared, only with one Alteration. In complying with these Particulars, his Majesty would graciously accept it’.¹⁷⁶ However, as the parliament was so short, it appears that no bill making such a grant was actually enacted. It was only in November 1640, that some of the old issues were revisited, when a committee on the *property of the subject* was tasked with considering most of the issues that have been identified in this chapter:

The [Commissions, Judgments and Decrees] concerning either illegal Taxes, or the Property of the Goods of the Subjects, and the Proceedings thereon; and also, the Judgments, Resolutions, and Proceedings in Parliament upon them; and to present the State of them to this House, that they may proceed upon them in such a Way, as shall be fit to present them to the Lords: And they are likewise to consider the Proceedings in Parliament upon the Petition of Right, and the Additions unto it: And

¹⁷⁴ The subsequent histories of the arrested members are described in Appendix 4 below.

¹⁷⁵ *CJ*, 2, pp. 53-54: 18 December 1640.

¹⁷⁶ *CJ*, 2, p. 5: 17 April 1640.

they are to consider those Proceedings that were in the Exchequer, since the Death of King James, upon the Statute of Tonnage and Poundage, granted unto him for Life; and the Proceedings upon Replevyings, brought by those that had their Goods detained by Colour of that Statute.¹⁷⁷

Those who had collected tonnage and poundage without parliamentary authority proposed to the Commons in 1641 that they should pay a fee of £100,000, in order to obtain ‘An Act of Oblivion, for what is past’. The Commons’ response was twofold: first, they confirmed that all unauthorised collections of taxes, etc. were against the law, and that those who made such collections were delinquents.¹⁷⁸ Second, they agreed on such an Act of Oblivion for those who had collected the duties and now voluntary acknowledged their error, against a collective payment of £150,000.¹⁷⁹ As for tonnage and poundage, a committee was set up in March 1641, to prepare a bill to grant the subsidy for three years, with the intention of supporting the navy and the defence of the kingdom.¹⁸⁰ The bill received a first and second reading on 27 May 1641, specifying that the duties ‘shall be taken for so long time as the House shall think fit, in the same manner as now they are’.¹⁸¹ It then passed all its stages in the Commons, and then the Lords in June.¹⁸²

Rolle remained a troublesome figure, receiving a second Star Chamber *subpoena* in January 1630, when he was questioned about his speeches in the Commons. He did not appear to have been further punished at that time, although his goods remained confiscated, so that he did not continue his business after 1629. He was returned for Truro in both elections in 1640, and used the Commons platform to pursue his claims. In May 1641, the Long Parliament instructed the committee of trade to consider his case, and possible reparations. Two years later, the Commons ordered that payments should be made to him of £1,517 for the goods arrested, £4,844 as interest on his

¹⁷⁷ *CJ*, 2, p. 38: 27 November 1640. There was a supplementary order to the committee: *CJ*, 2, p. 47: 8 December 1640.

¹⁷⁸ *CJ*, 2, p. 156: 25 May 1641.

¹⁷⁹ *CJ*, 2, p. 157: 26 May 1641; *CJ*, 2, p. 161: 29 May 1641.

¹⁸⁰ *CJ*, 2, p. 107: 18 March 1641.

¹⁸¹ *CJ*, 2, p. 159: 27 May 1641.

¹⁸² *CJ*, 2, p. 178: 18 June 1641; *LJ*, 4, p. 281: 21 June 1641.

remaining capital in 1628, from which date he had refused to trade, and of £500 for his four years' expenses in lawsuits. Further, a fine of £8,641 was levied on the executors of the customers, and on Sir William Acton, the sheriff of London who had been sent to the Tower for his part in refusing a *replevin* for Rolle, although it is unclear whether Rolle received any of these payments.¹⁸³ These can be said to be the final acts in the Rolle case.

¹⁸³ Shaw and Ashton, 'Rolle'; Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 89.

VII : CONCLUSIONS

Context

This thesis has considered the parliamentary privilege of freedom from arrest in England, from the accession of James VI and I, and the summoning of his first parliament in 1604, through to the dissolution of the parliament of 1628-29. Freedom from arrest and other ‘molestations’ developed in the English system from the medieval period onwards, alongside freedom of speech in debate and the right of access to the sovereign. Initially, it was a means of securing the attendance of all those summoned by the king to his ‘high court of parliament’, by protecting members of the Commons and Lords in three main areas: outside interference or distractions, including physical molestations; processes in civil law, including arrest or detention of their person, or the seizure of property; and any requirement to attend a lower court, often through a *subpoena*, as a principal in a case, or as a witness or juror. Privilege extended to any servants that were necessary for MPs or peers to discharge their responsibilities when parliament was sitting, or when they were on their way to or from parliament. It was important to ensure that each member of the Commons attended every session of a parliament, so that the views of his ‘country’ or borough were represented to the king, and reflected in debates on intended legislation; to legitimise any grants of taxation or other types of supply for the king; and so that the expectations of the king were in turn fed back to his people.¹ There were three main qualifications to the privilege. First, privilege did not apply if any arrest was for treason, felony, or breach of the peace. Second, privilege only applied when parliament was sitting, or when the member was on the way to or from parliament. Third, privilege extended, at least in principle, only to those servants whom his master specially ‘caused to use and employ’ in relation to his attendance at parliament.

¹ Unlike the Lords temporal and spiritual, no proxies could be appointed for members of the Commons.

Key research findings

The key issue in the early Stuart period was whether understandings about the privilege were certain, which in turn suggested a number of questions that have been pursued across this research.

The first of these concerned the status, scope and operation of parliamentary privilege and the royal prerogative, and whether a lack of clarity over their respective boundaries led to tensions between crown and parliament. Located within a framework of loyalty to the sovereign, the constitutional relationship in the later sixteenth century operated in ways that seemed largely settled and mutually understood, with little desire firmly to delineate, let alone widen, the scope of either privilege, or the royal prerogative. Indeed, as recently as 1999, the risks of defining privilege too sharply were identified by a joint committee of both Houses:

People outside Parliament who are concerned with privilege matters want the law to be clear and certain, so that they can forecast with some assurance whether or not a given contemplated action is or is not likely to be regarded as a breach of privilege. Parliamentary opinion, on the other hand, may want the law to be vague and indefinite, so that privilege can be deployed to cover circumstances that have not previously arisen.²

The historic status of privilege was recognised at the start of each parliament, as in 1604, when there were ‘Five Petitions by the Speaker: Freedom of Speech: Protection of Bodies, Servants, and Goods: Free Access, for such Occasions, as the House shall have: To admit no Information, without calling him to answer: To pardon his Wants and Imperfections’, with the lord chancellor responding: ‘The Petitions made before by Mr. Speaker were answered, and granted of Course’.³ Although the petition used ‘freedom from arrest’ as a blanket term, the essential nature of the privilege was wider, in that it covered cases of physical assaults or threats, verbal insults, or actions

² House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *1999 Select Committee Report*, vol. 3, *Memorandum by Mr. Geoffrey Lock*, at <<http://goo.gl/6XXi0>>. This statement follows the line taken by Blackstone (see p. 47 above).

³ *CJ*: 22 March 1604 (second scribe); *CJ*, 1, pp. 146-47: 22 March 1604.

that demeaned the dignity of individual members or the House as a whole. It gave members and their servants a wide measure of immunity from legal processes, and it was later proposed that freedom from molestation of person extended to those having business with parliament, for example as petitioners. In a number of the cases described in this thesis, the Commons consolidated and extended the ambit of privilege, often without direct challenge.

The wording used by newly appointed Speakers may have been one of apparent supplication, but the underlying feeling was that the Commons' privileges were in reality 'ancient and undoubted', with a legitimacy and permanence that had been gained through custom and practice. The Speaker's words were seen as an archaic formula that had lost much of its literal meaning: the Commons could not concede that they were in reality still petitioning for a continuation of their privileges, as this would have opened up a possibility that the crown truly had the power to refuse. James I and Charles I, for their part, consistently rebutted the Commons' understanding that the liberties, rights and privileges of parliament were 'ancient and undoubted', rather seeing them more as a recent, subtle, creeping enhancement, and asserting that they existed through royal licence, or 'grace' alone. Accordingly, a few months after the opening of the 1604 parliament, James I told the Commons that their privileges were held, not by right, but by way of 'donature upon petition'.⁴ Their response was to prepare the (unsubmitted) *Form of Apology and Satisfaction*. This boldly stated that 'Our privileges and liberties are our right and due inheritance, no less than our lands and goods. [...] OUR making of request in the entrance of Parliament to enjoy our privilege is an act only of manners', and cautioned that 'the prerogatives of princes may easily and do daily grow; the privileges of the subject are for the most part at an everlasting stand. They may be by good providence and care preserved, but being once lost are not recovered but with much disquiet'.⁵ Ill-definition of the status and scope of parliamentary privilege, including freedom from arrest, led to increasingly polemical speeches and declarations from the Commons that 'sundry Liberties, Franchises, and Priviledges of Parliament' were being

⁴ Tanner (ed.), *Constitutional Documents : James I*, pp. 220.

⁵ *Ibid.*, pp. 217-30, esp. p. 222.

threatened. Declarations, petitions, ‘apologies’, and ‘protestations’ might not have immediately led to positive responses from the crown, yet their words and themes were often referred to in later speeches and documents. On the other hand, despite their avowals of reserved rights, both James I and Charles I *were* prepared ‘graciously’ to recognise and respect the Commons’ privileges. It might perhaps seem that much of the tension between king and Commons could have been avoided, if James I had been prepared at some point to concede without qualification that the Commons’ privileges were indeed no longer dependent on the royal prerogative. However, such a concession would not have been in keeping with James’s views on kingship, and, more importantly, would have opened up for question all other areas of the royal prerogative. Even if privilege was becoming a particular point of friction between a growing number of members of the Commons and the sovereign, this nevertheless continued to be on an almost accidental basis, rather than a coherent, choreographed attempt to ‘win the initiative’. However, the Commons’ determination, often unrealised, to see their grievances – largely relating to privilege, religion, and the conduct and influence of royal advisors – addressed before granting supply frustrated both monarchs, and led to early dissolutions by both James I and Charles I. Charles was particularly exasperated by the Commons’ failure to authorise the collection of tonnage and poundage, and to legitimise its collection retrospectively from his accession. As a consequence, the privy council advised the crown that it could raise funds in an emergency through extra-parliamentary means, accompanied if necessary by a degree of coercion. Although the crown seemed to have little alternative if the Commons would not grant supply, this was a clear challenge to the principle that the crown had to obtain the Commons’ authority for the collection of taxes and duties. In response, the *Petition of Right* of 1628 sought an end to non-parliamentary taxation, forced billeting of soldiers, imprisonment without cause, and the use of martial law. It also set out that the Commons exercised their rights and liberties according to the laws and statutes of the realm. It is wrong to suggest that the House of Commons was united in its challenge to the king, with moderation still favoured, for example, by those members who had been dismayed by Sir John Eliot’s combative promotion of the *Petition*. Although Charles eventually agreed to the

Petition, he soon acted in ways that subverted its terms, which further inflamed both Houses.

A major element of uncertainty surrounded the failure, in early 1629, to secure parliamentary privilege for the ‘body and goods’ of John Rolle, which, if it had been successful, would have had the effect of confirming that the crown had acted unlawfully in collecting tonnage and poundage. The continued detention of the goods of Rolle and his fellow merchants led to concerted action, a conspiracy even, to assert parliamentary authority. In March 1629, in chaotic scenes in the Commons, Sir John Eliot and a small group of other MPs insisted on proposing *Three Resolutions*, which condemned as capital offences, no less: innovation in religion, or the countenance of Arminianism or popery; any advice to the king to levy tonnage and poundage without parliamentary authority; and any payment of tonnage and poundage without such parliamentary authority. The Speaker was held in his chair, so that the proposals could be put to the House, and they were then reportedly adopted as if with one voice. However, the fact that such inflammatory declarations had been thus acclaimed, that the king’s commands for an adjournment had been flouted, and that the Speaker and royal servants had been subject to aggressive treatment by some, led Charles I to dissolve parliament, and then to have the ringleaders who had promoted these actions arrested. Nevertheless, these events showed that uncertainty over privilege, particularly the assumed right of members to have their persons and goods protected, actually engendered the confidence with which the Commons had moved to advance their own authority. The implied question was: ‘Where does sovereignty now lie?’ Eliot with others might have replied ‘with the people through parliament’. Charles I gave his response by entering into a period of personal rule without parliaments, which would last for more than a decade.

The second research question asked whether it was important to maximise the scope of the privilege of freedom from arrest, if parliament was to carry out its business properly. Did the *ad hoc* management of individual cases nevertheless have the cumulative effect of adding to the authority and confidence of the Commons? Privileges, by their very nature, were supposedly immutable, thereby giving them an

innate authority, yet there was a clear emerging desire to strengthen, or even to expand, their scope, as a response to perceived changes in royal powers and prerogatives. Early in James I's first parliament, the resolution of the Shirley case had extended the scope of parliamentary privilege. First, there was a clear decision that privilege applied to those who had been elected, but who had not yet taken the oath at the start of the parliament. Second, specific and general pieces of legislation reaffirmed that arresting officers and gaolers were indemnified against any possible vicarious liability to creditors, if an MP was released ('escaped'), by virtue of privilege. Third, and most importantly, the case clearly established that the Commons could directly obtain the release of privileged persons. After the hard-won success of the Shirley case, there was a developing sense of the importance of privilege cases, which were managed with growing certainty. 'Privilege' was increasingly treated as an entity, encompassing freedom from arrest, as well as a more general rejection of arbitrary or absolutist royal powers. As a result, the Commons were able to consolidate, and sometimes extend, the ambit of privilege. For example, they enhanced the procedure to be followed if privilege was claimed during an adjournment, by authorising the outgoing Speaker to use his residual powers to have a privileged member freed. In addition, it was decided that breaches of privilege that occurred during one parliament could be addressed in a later parliament. The Commons were resolute in acting against those who had breached privilege in some way or other. However, the punishment of those who had disregarded a member's privilege showed an interesting contrast. On the one hand, any 'delinquent' was forced to come to the House, made to kneel, hatless, at the Bar of the Commons, an experience that was intended to degrade the man and reinforce the standing of the House, and he would then often be sentenced to a period of imprisonment. On the other hand, the House usually tempered such public exercises of parliamentary authority, by allowing the offender to return after a few days, and to make a fulsome apology, after which he would be set free, paying fines and costs that were due. The Commons' assiduous preservation of customary privileges came to benefit not just individual members, but also the institution as a whole. This period saw regular, successful claims for privilege when a *subpoena* had been issued. Privilege was held to apply, even if a member had instructed an attorney, and was therefore not required

in court to answer a *subpoena* personally, on the grounds that he might nevertheless be distracted from due attention to matters in parliament. There was, however, continuing ambivalence whether the institutional dignity of the House required privilege to be applied to prevent a member attending court, if the member wished to waive his privilege, and thereby pursue matters to his advantage. This last issue was never conclusively determined one way or the other during this period. The Howard case placed the authority of the Commons above that of the prerogative courts, and exposed the oppressive nature of *ex officio* oaths.

At the same time, the Commons were aware of the limitations of privilege and the need to work carefully within the law. For example, it was quite clear that the Commons could not unconditionally free someone who might have breached the peace, as this was not susceptible to a claim for privilege. However, they could remand such a person into their own custody, thereby preserving the veneer of privilege. The Commons were prepared to act juridically, either to pre-empt crown action against a member, or to defend and extend privilege. They also recognised the danger of intemperate language, as when the subject of Eliot's diatribe in 1624 was referred to a committee, where it was quietly lost from sight. Consideration of the cases that arose in this period shows that privilege clearly mattered, and there was a growing recognition that procedures gave form to privilege, and provided a conscious sense of identity for the House.

The third key research area was a consideration of the extent to which the exploitation and abuses of the privilege were an unintended consequence of the strengthening of the Commons' authority in matters of privilege. There were three key elements to the exploitation of privilege. First, there was a strong sense that safeguarding privilege in all its manifestations was more important than safeguarding the interests of a few creditors, contrary as this might be to natural justice. The very strength of the Commons in asserting their privileges, and the punishments meted out to 'delinquents' that had instituted actions for debt, arrested MPs or had held them in prison, clearly limited creditors' rights.

Second, debt in matters of speculative commerce and trade ventures was not necessarily seen as abhorrent as it would have been previously, when contracts and agreements mainly involved cloth, crops, land, and livestock. In addition, the Commons now contained some – by no means a majority – who were less concerned with upholding the spirit of parliamentary privilege, or even their own honour, and rather more with using privilege to avoid their financial obligations, or to hamper legal processes that threatened them. MPs who did run up debts were helped by the fact that parliaments were now in being for longer periods, so that their privilege obtained over the whole extent of a parliament and for some time before and afterwards, which was especially significant in the 1600s and the 1620s. Although outlawry or bankruptcy might befall a person with serious financial difficulties, this was not necessarily a bar to election and membership of the Commons. There was even some feeling that those who were involved in trade, or who made loans had to accept the risk of uncertain repayment. Moreover, usury had long been banned by Christian and Muslim doctrine, and was associated with non-believers, notably Jews: if a creditor did not receive his ‘pound of flesh’, so be it.⁶

Third, the definition of which ‘servants’ might avail themselves of parliamentary privilege was stretched to a point that came to be recognised as abusive. Earlier, privilege for servants had been limited to those who were in ‘necessary’ and ‘menial’ attendance on their master, while on the way to or from parliament, or while the House was in session. Later, it was accepted that MPs and peers should not be diverted from parliamentary business by the possibility of becoming involved in supporting a much wider group of people. These could not on any reasonable basis be said simply to comprise close, ‘menial’, or ‘necessary’ servants, but now included, for example, farm bailiffs, friends, professionals to whom the MP or peer had paid fees, or even family members. Such expansion reflected a growing feeling that, even if the member or peer was not involved directly in litigation, his mind would be diverted

⁶ ‘In the seventeenth century it began to be argued that interest-taking did not constitute usury, as long as it represented the real difference between the value of present and future sums of money, and was not mere extortion’: ‘Notes and Queries’, *The Guardian*, undated, at <<http://goo.gl/63PY8b>>.

from parliamentary duties, if he had to devote some time to the affairs of this extended group of ‘servants’. This exploitation of privilege was exacerbated by the simplification, in the early years of the seventeenth century, of the way in which protections were provided to servants. Servants could now be provided with a pre-emptive certificate of protection signed by their master, which could be produced if they were threatened with arrest or detention, in contrast to the earlier requirement to involve the Speaker. The value of a protection thereby became sufficiently high as to tempt people either to obtain, and to sell on, blank, but genuinely signed or sealed, protections, or to counterfeit such protections in their entirety. Nevertheless, despite action by the Lords against the sale and counterfeiting of protections for servants, and repeated resolutions of both Houses to limit their exploitation, the abuse of protections for servants was not fully eliminated until well into the eighteenth century.

In the early part of this period, there was limited recognition that abuses were affecting the reputation of parliament, even though the crown and the lord chancellor expressed their concerns. Later, however, both Houses became increasingly aware of the negative impact of privilege. This was especially so in the 1620s, when the Lords were warned that ‘the Justice of the Kingdom must be preferred before any other personal Respect’, and the Commons were told that ‘it is the universal cry of the kingdom that we have granted that which is abusive, viz. protections’. The way in which the privilege of freedom from arrest was defined and managed for MPs themselves facilitated exploitation and abuse for purely personal purposes. Over time, one of the most significant effects of these protections was to prevent actions by creditors to recover debts from MPs while parliament was sitting, and for a short period before and after every parliament.

Final observations

This thesis has not isolated itself within a single historiographical position. It has followed the empirical approaches across the Tudor and early Stuart periods adopted by Elton, for example, and many of the revisionists of early Stuart history, and built up the narrative by interrogating the considerable body of evidence in the parliamentary records and diaries. It also follows a line that the stability provided by a broadly consensual Elizabethan settlement was attractive to many members of the

early Stuart parliaments, whose nature was essentially conservative, rather than oppositional or revolutionary, at least until the late 1620s, and that this, in turn, influenced the way that privilege cases were approached and managed. Russell's views are interesting, with his suggestion, on the one hand, that a conservative, loyal House of Commons was dysfunctional and irrelevant to the major problems that had to be faced, while, on the other hand, he concedes that the political mood changed, particularly through the 1620s, and that the closing events of the 1629 parliament were 'a genuine act of opposition'. This thesis agrees with his finding that monetary pressures, rather than any whiggish grand defence of liberties, or Marxist class struggles, were at the root of criticisms of the crown. A clear linkage existed between issues over the royal finances, including the unlawful collection of tonnage and poundage, on the one hand; and the robust promotion of issues of privilege, in the light of the seizure of the goods of merchants who had refused to pay tonnage and poundage, and the associated privilege claims on behalf of Rolle. It has been well argued by 'post-revisionists' that there were multiple competing discourses, and that constitutional and religious conflict *was* ubiquitous in the early Stuart parliaments. Particular issues around privilege have been picked out as contributing to those constitutional clashes – apparent in debates leading up to the preparation of various formal statements from the Commons, such as the *Apology* of 1604, the *Petitions* of 1610,⁷ the *Protestation* of 1621, the *Petition of Right* of 1628, and the *Three Resolutions* of 1629, all of which, to a greater or lesser degree, included elements that related to privilege issues. A nuanced addition to the historiography has been suggested in the shape of the central argument of this thesis, that there was a growing confidence in the Commons around an unplanned consolidation and extension of their rights, liberties and privileges – even if their views did not always prevail.

Throughout the early Stuart period, a certain 'elasticity' in the definition and

⁷ These petitions set out grievances over freedom of speech, impositions, ecclesiastical reform, and the high commission: Prothero (ed.), *Statutes and Constitutional Documents (1913 edn.)*, pp. 296-307.

operation of privilege can be discerned, which allowed existing privileges to be applied in new circumstances from time to time. The Shirley case of 1604 had, at first, exposed the fragility of the Commons in privilege matters. However, after two months' struggle to free Shirley, a greater institutional confidence could be detected, with an emerging certainty that the Commons' privileges were 'ancient and undoubted', and based on precedents. The Commons had shown that they could use their own strength to maintain their rights and privileges, by reference to custom and common law, including the unwritten *lex et consuetudo parliamenti*. The difficulties that such unwritten and imprecise practices created were clearly shown during the row over the Commons' *Protestation* of 1621. Even so, such spats did not mean parliament and king were invariably mutually antagonistic: parliament was there to assist the sovereign, and to keep him or her in contact with opinion. Indeed, petitions and grievances had been part of parliamentary and crown business from the earliest times, as seen in repeated entries in the medieval parliament rolls. By the late 1620s, however, privilege had become closely bound up with grievances, and increasingly strong challenges to the royal authority and prerogative, which were now a matter of public debate and propaganda from both crown and Commons.

The strong line taken in the reactions of the Commons to the Rolle case showed that they were prepared to strive for the primacy of parliamentary privilege, albeit that the grounds for such a claim were resisted. Privilege of parliament for all of a member's goods was asserted, even against the king, and was also said to apply to petitioners to the Commons, not just members and their servants. Further, the Commons were prepared to incite 'a taxpayers' strike', if the collection of duties had not been authorised by parliament, with the threat of capital punishment for those who did pay, or who collected such duties. Such challenges to the royal authority led to the dissolution of 1629, the arrest of those MPs who had been at the centre of the challenges to royal authority, and a period of personal rule that was to last from 1629 to 1640. By this time, however privilege matters had clearly contributed to parliament acquiring a striking new distinctiveness, authority, and sophistication as an institution in the early Stuart period: privilege mattered then and still matters now.

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APPENDIX 1 : SOME EARLIER PRIVILEGE CASES

This appendix describes those cases of privilege that occurred up to 1603, and which are referred to in the body of the thesis – set out in chronological order.

1. The Master of the Temple (1289-90)
2. John de Godessfeld (1340)
3. Richard Cheddar, servant of Sir Thomas Brooke (1404)
4. William Larke (1430)
5. Sir Thomas Parr (1446)
6. Thomas Thorpe (1453)
7. Walter Clerk (1460)
8. Richard Dygon, servant of John Wyke (1467, or 1471)
9. William Hyde (1474)
10. Edmund Chymbeham, servant of the duke of Clarence (1468, or 1473)
11. John Atwyll (1478)
12. Richard Strode (1512)
13. George Ferrers (1542)
14. William Trewynnard (1542)
15. John Smith (1559)
16. William Strickland (1571)
17. Lord Crumwell (1572)
18. Edward Smalley, servant of Arthur Hall (1576)
19. Walter Vaughan (1581)
20. Arthur Hall (1581)
21. Richard Cooke (1584)
22. Thomas Fitzherbert (1593)
23. William Hogan, servant of Queen Elizabeth (1601)
24. Anthony Curwen, servant of William Huddleston (1601)

1. *The Master of the Temple*, a member of parliament *ex officio*, successfully petitioned for his ‘distrainable goods’ in the face of an attempt by the bishop of St

David's to seize these, in 1289-90. This established privilege for a member's goods, so that Sir Edward Coke later commented: 'it appeareth that a Member of the Parliament shall have Privilege of Parliament, not only for his servant, as is aforesaid, but for his horses, & c. or other goods distrainable'.¹

2. *John de Godessfeld* was committed to the Fleet prison in 1340 for allowing a farm that he held from the king to fall into disrepair. He was released by order of the king, because the privilege of Commons' immunity from arrest had been flouted. Bryant identifies this as the earliest known example of the Commons' immunity from arrest.²

3. *Richard Cheddar*, a menial servant of Sir Thomas Brooke, was, in 1404, 'horribly beaten, wounded, blemished, and maimed by one John Salage otherwise called John Savage'.³ The Commons petitioned in respect of the 'Lords, knights, etc. of parliament' and cited:

[...] In this present parliament the horrible assault and wounding which has been committed against Richard Cheddar, esquire (who had come to this present parliament with Sir Thomas Brooke, knight, one of the knights for the county of Somerset), and a servant who was with him, by John Salage, otherwise called Savage, through which the aforesaid Richard Cheddar has been injured and wounded and is in danger of his life. May it please you to ordain a remedy for this matter, and a sufficient remedy also for other similar cases, so that his punishment will be an example and source of terror to others, to prevent them from committing such crimes in the future: namely, that if anyone kills or murders anyone who has come in this way under your protection to parliament, it should be adjudged to be treason, and if anyone seriously injures or disfigures any such person who has come in this way under protection, he should lose his hand. And if anyone wounds or assaults any of those people who have come in this way, he should be put in prison for a year and pay a fine and redemption to the king. And may it please you of your special grace to

¹ Hatsell, *Cases of Privilege*, p. 3, which also cites Coke, *Fourth Institute*, p. 24.

² Bryant, 'Commons' Immunity', p. 214.

³ The wording is within the statute associated with the case, *Assaulting servants of knights of parliament* 1403/4 (5 Hen. IV c. 6), in Raithby (ed.), *Statutes of the Realm*, II, p. 144.

refrain henceforth from issuing charters of pardon in such cases unless the parties are fully in agreement.⁴

In the face of a request for such drastic measures, Henry IV's response endorsed the general principle, but provided a more moderate punishment than that requested by the Commons:

Because the deed was done during the time of this parliament, let proclamation be made where the said deed was done that the John Salage mentioned in this petition should appear and give himself up to the King's Bench within a quarter of a year after the proclamation has been made. And if he does not do this, let the said John be convicted of the aforesaid deed, and let him pay the injured party his damages at double rate, to be assessed at the discretion of the judges of the said bench at the time, or through an inquest if it is necessary, and let him pay a fine and redemption at the king's pleasure. And let a similar thing be done in the future in any similar case.⁵

In addition to the grant of the petition, a statute was passed shortly afterwards, specific to the case, which set out, in the same terms as the king's response: 'That seeing the same horrible Deed was done within the Time of the said Parliament' and that a proclamation should be made that Savage should 'appear and yield him[self] in the King's Bench within a Quarter of a Year after the Proclamation made: and if he do not, the said John shall be attainted of the said Deed, and shall pay to the Party grieved his double Damages [...] and also he shall make Fine and Ransom at the King's Will. Moreover it is accorded that likewise it be done in Time to come in like Case'.⁶

4. *William Larke*, servant of William Milrede, was arrested for a debt in the substantial sum of £208.6s.8d., and imprisoned in the Fleet, in 1430. A modern commentary records that Larke 'had been unjustly accused by Margery Janyns. It is interesting to note that the consent to his release, made by the king on the advice of the Lords, and at the request of the Commons, needed the assent of Margery's

⁴ *RP*, III, 522-44: January-March 1404.

⁵ *Ibid.*

⁶ *Assaulting servants of knights of parliament 1403/4* (5 Hen. IV c. 6), in Raithby (ed.), *Statutes of the Realm*, II, p. 144.

counsel, although the Lords acted alone to decide on the outcome. The consent also made it clear that she should have execution of the judgment against Larke after the end of the parliament'.⁷ There are two views on the decision of the king to withhold his agreement (using the standard negative phrase, *le roi s'avisera*) to the Commons' request for a general privilege 'in future' of freedom from arrest, except for treason, felony, or breach of the peace. On the one hand, Elsynge confirms that the release of the individual was readily agreed, but a royal endorsement of the general principle of a wide immunity was unforthcoming, or, perhaps more accurately, otiose, as the privilege that already existed:

An. 8 Hen. 6. the commons petitioning for the discharge of *William Lark*, arrested in execution during the Parliament, and that the king would be pleased also to ordain, that no lord, knights, citizens, and burgesses, nor their servants, coming to the Parliament, may be arrested during the Parliament, unless it be for treason, felony, or breach of the peace, the king granted the first part of their petition, but *quant al remnant le roy s'avisera* [as for the rest, the king reserved his position]. [...] To this the answer is full, that the latter part of the bill doth comprehend more than it was fit the royal assent should be given unto, or more than was, or as this day is, the law of Parliament. For it is, that no member, of either house, be arrested or detained in prison during the Parliament, save in these three cases [treason, felony or breach of the peace].⁸

Coke, in his *Fourth Institute*, as quoted by Hatsell, sets out that the king refused the request for a law encapsulating the privilege, 'and therefore, the more natural conclusion to be drawn, as well from the petition itself as from the King's answer, appears to be that, at that time, the proposition was not acknowledged to be law in the extent in which they laid it down'. However, Hatsell suggests, more persuasively, that the king's formula answer perhaps simply reflected the fact that he had given specific redress to Larke, and that no further action was indicated.⁹

5. *Sir Thomas Parr*, having suffered an attack, on 14 March 1446, made petition to the Commons as follows:

⁷ *RP*, IV, 357-8: January-February 1430, editorial notes.

⁸ Tyrwhitt (ed.), *Manner of Holding Parliaments (Elsynge)*, pp. 216-17.

⁹ Hatsell, *Cases of Privilege*, p. 20, and p. 20n.

Petition of Sir Thomas Parr one of the knights of the shire in this present parliament for the shire of Cumberland that when he, on 14 March in the 24th year of the king [1446] was coming towards this said court of parliament, he was attacked by Robert Belingham and others, praying the commons of this parliament to pray the king by the advice of his lords spiritual and temporal being in this present parliament to ordain and enact in this parliament and by authority of the same that a writ of proclamation be made in the Chancery and sent to the sheriff of London that Belingham and his accomplices [be brought] before the kings Bench by Easter for the case to be determined.¹⁰

The Commons also directed a petition to the king, which was more broadly framed, but which only received the bland response: ‘*Soient l’estatutz faitz devaunt cez heures en cest partie, tenuz, gardez et observez, en toutz poyntes* [The statutes made before this time on this matter should be upheld, kept and observed in all points]’.¹¹ Parr’s more specific petition must have been approved, although the parties subsequently reached an agreement, for the record of the parliament of February 1449 includes the following petition from Belingham, which was itself granted:

Petition of Robert Belingham, of Burneside, Westmorland, gentleman [... and others ...] concerning a process ordered against them in the parliament in March 1446 at the petition of Sir Thomas Parr, one of the knights of the shire in this present parliament for Cumberland, because of their alleged attack on Sir Thomas. They were summoned to be arrested, and an act was made against them on 12 April 1446 in the case of their non-appearance. Although the parties had not made an appearance as required, they had now come to an agreement with Sir Thomas, and so request that the act should be repealed.¹²

6. *Thomas Thorpe* was Speaker in the parliament of 1453-54. The definition of the period for travelling for which the privilege applied became a matter of contention in the parliament of 1453-54, although wrapped up in some wider factional issues.

¹⁰ Petition by Thomas Parr, knight of the shire for Cumberland, TNA SC 8/27/1347: 1446.

¹¹ *RP*, XVI, 41: 1446; Hatsell, *Cases of Privilege*, p. 28.

¹² TNA SC 8/27/1348: counter-petition by Robert Belyngeham (Bellingham), 1449. The petition was endorsed ‘Let it be sent to the Lords’: *RP*, February 1449.

When the last session of the parliament opened, the Speaker, Thomas Thorpe, was accused by the duke of York of stealing property belonging to him. Thorpe had removed some of York's property from the palace of the Bishop of Durham, supposedly on the orders of Henry VI, to meet a fine that had been levied on York. However, Thorpe was in a weak position, as a staunch Lancastrian, and a known sympathiser of the duke of Somerset, a factional enemy of York. York, however, was in the ascendant, at a time when Henry VI was subject to one of his bouts of mental illness, and Somerset was in the Tower. Thorpe was arrested for the supposed offence, at a time when parliament was prorogued, and fined £1,000 plus £10 costs, being placed in the Fleet prison, pending payment of the fine. When parliament reassembled in February 1454, the Commons asked the Lords for Thorpe's release – a surprising move, as the duke of York opened the parliament himself. Nevertheless, the Commons' petition recalled the king's earlier agreement to the petition for privileges:

Be it remembered that on the said 14 February in the aforesaid year the commons made a request [...] that they might have and enjoy all such liberties and privileges as have been customary and used from of old for their coming to parliament; and it is in accordance with the same liberties and privileges that Thomas Thorpe, their common speaker, and Walter Rayle, members of the said parliament who were then in prison, should be able to go free and at their liberty for the full accomplishment of the said parliament.¹³

The duke of York made a counter-declaration: that Thorpe's removal of his property from the palace of the bishop of Durham, had led to York to 'take an action by bill in the court of exchequer'. York claimed that Thorpe was a member of the court and 'he ought to be have been impleaded in that court of the exchequer for such cases and in no other court'. York also pointed out that Thorpe had 'willingly appeared and had various days to speak at his request and desire, and answered the said bill and action and pleaded not guilty'.¹⁴ The duke's counsel put forward several further reasons why

¹³ *RP*, C 65/102, v-329, cols. a-b, 25: February 1453.

¹⁴ *RP*, C 65/102, v-329, col. b, 26: February 1453.

Thorpe should not be released: the offence had been committed since the parliament had been started; the process of law had taken place during the prorogation; he should not be released before York had been recompensed in the action; the law should be upheld, parliamentary privilege notwithstanding. The commentary on the *Parliament Rolls* notes that the chief justices declared that they could not decide on the point, as the privileges of the high court of parliament could only be determined by the lords of parliament. However, they added that although there was no general *supersedias* brought to parliaments to end all processes, since, if there were, a plaintiff could not get redress, because parliament could not determine actions in the common law. It was customary for all, save those accused of treason, or felony, or imprisoned for security of the peace, to be released so that they could attend parliament. The Lords heard this advice, but considered that Thorpe should remain in prison nevertheless, and that a new Speaker should be elected. This was fairly clearly a political decision made at York's behest, and might have been a *quid pro quo* for the treatment of his associate, Sir William Oldhall, Speaker of the 1450 parliament, who had been attainted in the second session of the parliament of 1453 at Somerset's behest.¹⁵ The Thorpe case had hinged on a view that, as there was no privilege in the time that parliament was not in session by way of prorogation, it had accordingly been lawful to imprison Thorpe, and, by extension, *keep him in prison*. In other words, a member could not claim release from existing imprisonment, simply because a new parliamentary sitting had begun. Further, the Lords could not have wished to cross the duke of York.¹⁶ Redlich suggests a response to that question: 'The imprisonment of Speaker Thorpe [...] may be looked upon as an exceptional outcome of the revolutionary feuds of that period'.¹⁷ Hatsell views the case as extending the three qualifications on the privilege of freedom from arrest, where treason, felony, or breach of the peace was involved, to a fourth: 'condemnation before the parliament'.¹⁸

¹⁵ *RP*, Henry VI: March 1453, *Introduction*.

¹⁶ Anon., *Privileges and Practice ... (1628)*, pp. 18-19; Roskell et al. (eds.), *Commons 1386-1421*, I, pp. 152-54.

¹⁷ Josef Redlich, *The Procedure of the House of Commons : A Study of its History and Present Form*, trans. A. Ernest Steinthal, 3 vols. (London: Constable, 1908), I, p. 22.

¹⁸ Hatsell, *Cases of Privilege*, p. 21.

7. *Walter Clerk* was imprisoned in the Fleet, in 1460, for multiple debts and transgressions, including ‘a riot’ and ‘trespass’, and outlawed at the suit of John Payne. As in earlier cases, the issue for the Commons was the delay to its business. They successfully petitioned the king: ‘to ordain and decree that your chancellor of England shall have the power to direct your writ or writs to the keeper of the said Fleet prison, ordering him by the same to have the said Walter brought before him without delay, and then to set him free, and to discharge the said keeper of him, with regard to every one of the things stated, so that the said Walter may attend this your parliament daily, *as it is his duty to do*’ [my emphasis].¹⁹ Coke, relating the case to the Commons in 1621, records that immunities were again requested for the principals in the case:

The parliament would do nothing. The king could not sue a parliament man [for debt], and they would do nothing, and the Clerke was outlawed. [...] 39 Hen. VI, c. 9,²⁰ the petition to the king praying the Commons that great delay is in Parliament by Walter Clark by your Majesty’s suit against the liberties of our House for a fine and imprisonment. Please it your Highness in discharging the delay to ordain and establish that the Chancellor send out your writ to free Walter Clark from the fine and imprisonment with a saving to the king and Robert Bassett and John Payne after the parliament and others’ debts, saving our privileges.²¹

The *Parliament Rolls* set out that the Commons conceded that Clerk’s liabilities remained, and that he could be rearrested when his privilege ended, ‘as if the same Walter had never been arrested at any time for any of the things stated or committed to ward’. The petition used language that would be echoed in the Hyde case (number 9), to seek indemnification of the sheriff and other officers: ‘your said

¹⁹ *RP*, v-373, col. b, 9: October 1460.

²⁰ No such statute is given in Charles Runnigton (ed.), *The Statutes at Large... by Owen Ruffhead*, 10 vols. (London: C. Eyre & A. Strahan, 1786), or Raithby (ed.), *Statutes of the Realm*, possibly reflecting the purge by Edward IV of much of the legislation of Henry VI.

²¹ *The Anonymous Journal*, fol. 514r, in Notestein et al. (eds.), *CD 1621*, II, p. 530: 17 December 1621.

chancellor, the keeper of the Fleet or any other person or persons shall not be harmed, injured or grieved in any way because of the said setting free of the said Walter'.²²

8. *Richard Dygon*, servant of John Wyke, was arrested for a debt to a shearman. A writ of 1467 or 1471 describes how the creditor 'has caused several actions to be taken in the names of various men [...] that is to say six actions of debt and various other actions of trespass, and thereby has had him arrested and keeps him in prison and so by great might and subtle imagination is likely there against all reason and conscience to abide, for he [Dygon] is of no power to answer all the premises'.²³ In other words, the creditor was trying to wear Dygon down through multiple suits.

9. *William Hyde* was arrested in 1474 for two debts, to the value of £69 and £4.6s.8d. respectively. The Commons noted that the arrest had occasioned 'great Delay and Retardation of Proceeding and good Expedition of such Matters and Besoignes [business], as for your Highness, and the Common Weal of this your Realm, in this your present Parliament were to be done and sped'. This was based on the assumption that everyone summoned to a parliament had to be present if it were to transact its business. The Commons successfully petitioned that the king should order the chancellor to issue a writ to free Hyde, addressed to the sheriffs of London. Their petition added the proviso that 'neither your said chancellor, sheriffs, or any of them, nor any other person or persons, shall be harmed, damaged, charged or troubled in any way because of the said setting at liberty of the said William Hyde. [...] and that the creditors] shall have a writ or writs of execution in, of and for the foregoing after the dissolution of this present parliament, as fully and effectually as if the said William Hyde had never been arrested at any time for any of the above reason'.²⁴

10. *Edmund Chymbeham*, a gentleman servant of the duke of Clarence, was arrested in either 1468, or 1473, at the suit of John Shukburgh, a London draper. Writs to free him through privilege of parliament were issued. It was then alleged that Shukburgh 'seeing that your said supplicant [Chymbeham] would be set free and be at

²² *RP*, v-373, col. b, 9: October 1460. *Premises*, in legal phraseology: 'The matters or things stated or mentioned previously': *OED Online*.

²³ TNA C1/31/16, *Petition to the chancellor*: 1465x67, 1470x71, in Kleineke, *Parliamentarians at Law*, pp. 66-67.

²⁴ *RP*, VI, 156, 55: after June 1474: Third Roll.

large [...] caused one John Plummer to lay suspicion of felony on your said supplicant and so they intend to have your said supplicant kept still in prison without bail or mainprise'. The petition was endorsed 'before the lord king in his chancery on Tuesday next coming, that is to say 16 February.'²⁵

11. In 1478, *John Atwyll* seemingly owed one John Tailor £160. Perhaps his attendance at Westminster meant that he was unaware of the processes against him, because Atwyll did not appear in court. Tailor arranged for writs to be directed to a number of sheriffs 'some of fieri facias and some of capias ad satisfaciendum'. The upshot was that 'the said John Atwyll cannot freely depart from this present parliament to his home for fear that his body, his horses and his other goods and chattels which he needs to have with him might be duly arrested in that matter, contrary to the privilege customarily due to all the members usually summoned to the aforesaid parliaments'. The Commons successfully petitioned the king for privilege for Atwyll, on the basis of 'such and as many writs of supersedeas upon this ordinance as shall seem necessary to the said John Atwyll, his heirs and executors, and each of them, directed to every sheriff or sheriffs of this realm to cease all execution to be made or had in that respect'. Tailor was given the right to sue for his monies 'after the end of this present parliament; notwithstanding this ordinance'.²⁶ This grant of privilege by the king had the effect of resuscitating a privilege that had been found in 1315/16: the right of members to their horses, necessary goods, and chattels, as a matter of privilege.²⁷ Hatsell adds a gloss that the privilege in respect of a member's goods was 'expressly confined to such goods and chattels, as it was necessary the Member should have with him during his attendance in Parliament, or in returning to his home'.²⁸

12. *Richard Strode* had put forward bills in the 1512 parliament 'against the damage being done by tinworks to ports and estuaries in Devon, as well as other bills "for the common weal" of that county'. This offended the four stannary courts of

²⁵ TNA C1/46/269, *Petition to the chancellor*: 1468, or 1473 before 16 February, in Kleineke, *Parliamentarians at Law*, pp. 64-65.

²⁶ *RP*, VI, 191-2: January 1478.

²⁷ Hatsell, *Cases of Privilege*, p. 50.

²⁸ *Ibid.*, p. 67.

Devon, and Strode was then fined a total of £160.²⁹ He was imprisoned before he could travel to Westminster, ‘in a dungeon and a deep pit underground in the castle of Lidford [...] and there and elsewhere remayned by the space of thre wekys [...] one of the most annoyous, contagious, and detestablest place within this realm’.³⁰ Three things followed. First, Thomas Denys, on whose authority Strode had been detained, referred the matter to the king’s council, ‘the supreme authority in stannary jurisdiction’, which responded by ordering an inquiry to determine whether Strode was guilty, and if so to award a *fieri facias* against him for the amount of the fine.³¹ Second, ‘he took advantage of his status as a subsidy collector to sue out a writ of privilege from the Exchequer [...] and it was that court which effected his release’.³² Third, on 4 November, when parliament opened, ‘two writs were issued to Sir Henry Marney, the lord warden of the stannaries, and to his deputy or deputies, “by petition in Parliament”: the first, a writ of *habeas corpus*, ordered Marney to deliver Strode “safe and sound” to Parliament [...] under a penalty of £1,000, while the second, a writ of *supersedeas*, removed the case to the jurisdiction of Parliament, thus eliminating all other jurisdictions, whether the stannary courts, the Exchequer or even the Council’.³³ ‘Strode’s Case’ formally recognised that the Commons and its business were privileged against inferior courts of the realm; could act as a court, as part of the ‘high court of parliament’; and control their own members.³⁴ Strode went on to introduce a bill, which is still in force, and includes the following:

And that all sutes, accusementes, condemnacions, execucions, fynes, amerciamentes [arbitrary fines], punysshmentes, correccions, grevances, charges and impositcions, putte or had, or here after to be put or hadde, unto [those] that nowe be of this

²⁹ Bindoff (ed.), *Commons 1509-1558*, III, p. 400.

³⁰ In the text of *The Privilege of Parliament Act 1512* (4 Hen. VIII c. 8), in Raithby (ed.), *Statutes of the Realm*, III, p. 53.

³¹ A writ of execution commanding the sheriff to make good the amount of a fine out of the goods of the person against whom judgment has been made.

³² Bindoff (ed.), *Commons 1509-1558*, III, p. 400.

³³ *Ibid.*

³⁴ House of Commons, *A Brief Chronology of the House of Commons : Factsheet G3*, in www.parliament.uk (House of Commons Information Office, 2009), at <<http://goo.gl/GHmrE>>; Mary Frear Keeler, ‘The Emergence of Standing Committees for Privileges and Returns’, *PH*, 1 (December 1982), 25-46, p. 26.

present parliament, or that of any Parliament hereafter, shalbe for any bill spekyng, reasonyng, or declaryng of any mater or maters concernyng the parliament to be condemned and treated of, be utterly voyd and of none effecte.³⁵

13. Ferrers' Case, of 1542, moved the Commons away from earlier procedure, whereby chancery had enforced the privilege of freedom from arrest on behalf of the Commons.³⁶ *George Ferrers* was an MP, and, significantly, a royal servant, who had been arrested for a debt incurred as a surety for a third party. The development was that the Commons tried to release him, not by petitioning the king for his freedom, but by dispatching their serjeant-at-arms, otherwise called the serjeant of the mace, to the Counter in Bread Street, to secure Ferrers' release. The case was cited as a precedent in later Commons sittings, and was described in a number of works, including Holinshed's *Chronicles*.³⁷ An eighteenth-century account sets out that:

They [the clerks] and other officers of the city were so far from obeying the said commandment [to release Ferrers], as after many stout words they forcibly resisted the said serjeant, whereof ensued a fray within the Counter-gates, between the said Ferrers and the said officers, not without hurt of either part, so that the said serjeant was driven to defend himself with his mace of arms and the crown thereof broken by bearing of a stroke, and his man struck down.³⁸

As the account continues, the sheriffs rejected the protest of the serjeant 'contemptuously, with much proud language, so as the serjeant was forced to return without the prisoner'. When they heard the serjeant's report, the Commons 'would sit no longer without their burgesse', and a delegation, headed by the Speaker, went to the Lords, and protested to the lord chancellor, so that he and the judges in the Lords 'referred the punishment thereof to the order of the commons house'. The Commons

³⁵ *Privilege of Parliament Act* 1512 (4 Hen. VIII c.8), commonly known as (*Richard*) *Strode's Act*, in Raithby (ed.), *Statutes of the Realm*, III, p. 53.

³⁶ The date of the case is sometimes given as 1543, but this is incorrect: see H. H. Leonard, 'Ferrers' Case: A Note', *Bull IHR*, 42 (106) (November 1969), 230-34; Bindoff (ed.), *Commons 1509-1558*, II, p. 130.

³⁷ Raphael Holinshed, *The Third Volume of Chronicles ... continued to the Yeare 1586* (s.l.: J. Harrison, 1587), pp. 955-56, in Neale, *Commons' Privilege of Free Speech*, p. 156.

³⁸ Maseres, *Cases and Records*, pp. 66-67.

then determined to send the serjeant to require Ferrers' release 'without any writ or warrant for the same [from the lord chancellor] but only as before'. This was on the basis that 'commandments and acts' of the Commons were 'to be done and executed by their serjeant, without writ, only by shew of his mace which was his warrant'. At this point, the sheriffs, having learned how seriously the matter was being taken, 'became somewhat more mild, so upon the said second demand, they delivered the prisoner without any denial'.³⁹ Clearly still angry, but without any relevant precedent, the House committed the sheriff to the Tower, the 'Clerk, which was the Occasion of the Fray' to a dungeon in the Tower, and the officers of the prison to Newgate.⁴⁰ As Bindoff sets out, 'the invoking of privilege was believed to involve the loss of the creditor's right and a bill to protect it passed the Commons but received only a single reading in the Lords before the prorogation on 1 April, when the matter was referred to the Council'.⁴¹ More significantly, Henry VIII now took a direct interest in the case, and confirmed the privilege of freedom from arrest, and the supremacy of parliament as a court. This would please the Commons, without diminishing his own authority, and would also reinforce the power of parliament over any putative papal authority. Holinshed records the speech:

The king [...] declared his opinion to this effect. First commending their wisdoms in maintaining the privileges of their House (which he would not have infringed in any point) [...] And further, we be informed by our Judges, that we at no time stand so highly in our estate royal, as in the time of Parliament; wherein we as head, and you as members, are conjoined and knit together into one body politic, so as whatsoever offence or injury (during that time) is offered to the meanest member of the House, is to be judged as done against our person and the whole Court of Parliament. Which prerogative of the Court is so great [...] as all acts and processes coming out of any other inferior courts, must for the time cease and give place to the highest.⁴²

³⁹ Ibid., pp. 67-68.

⁴⁰ Petyt, *Jus Parliamentarium*, p. 237.

⁴¹ Bindoff (ed.), *Commons 1509-1558*, II, p. 130.

⁴² Holinshed, *Chronicles*, in Tanner (ed.), *Tudor Constitutional Documents*, p. 582.

The king's words are usually quoted as endorsing the authority of the Commons, where a member had been arrested. However, this is not as clear cut as is sometimes maintained, since it is clear that Ferrers was also a royal servant, and would thereby be privileged, irrespective of whether he was a member of the Commons or not:

[The king] complained about the delay incurred and claimed privilege for himself 'attending upon the business' of Parliaments and for all his servants 'attending there upon him. So that if the said Ferrers had been no Burgess, but only his servant, yet in respect thereof he was to have the privilege as well as any other'.⁴³

It is easy to agree with Herbert's interpretation of Henry VIII's actions, quoted in Hatsell: 'He, whose master-piece it was to make use of his Parliaments, might not only let foreign Princes see the good intelligence between him and his subjects, but might also keep them all at his devotion'.⁴⁴

14. The case of *William Trewynnard* arose in 1544; this raised, but did not resolve, the issue of whether a sheriff was responsible for a debt if a debtor were released. Trewynnard was pressed over some land claims, and he had appeared to try to avoid these, by seeking election to the 1542 parliament. A writ of *exigent* concerning a particular debt was issued for Trewynnard to answer, *capias ad satisfaciendum*. However, he was granted privilege, and released by the sheriff for Cornwall. The original creditor died soon afterwards; after his executors had failed to obtain redress against the sheriff, the matter was referred to the lord chancellor. Trewynnard's release had raised the question 'whether he was [absolutely / finally] discharged by the order of the common law ... or no'.⁴⁵ An anonymous work, sometimes attributed to Francis Maseres, commented that

It seemeth that the party is not discharged from execution for ever, but only for a certain time. For it is not absurd or unreasonable that a judgement should be at one time executed, and at another executory [...] And there is a difference to be made where the body of a man that is in execution is set at large by the authority of the law,

⁴³ Bindoff (ed.), *Commons 1509-1558*, II, pp. 130-31.

⁴⁴ Hatsell, *Cases of Privilege*, p. 59.

⁴⁵ Bindoff (ed.), *Commons 1509-1558*, III, p. 485.

and where it is done without authority by the sheriff's own will and boldness: for the law will save all rights.⁴⁶

However, in Trewynnard's case, as 'the parties desired to have the matter determined without further trouble', and as Trewynnard 'ought not in conscience to be discharged [from the debt]', the chancellor ruled that he should pay the executors the relatively modest sum of £84.15s.⁴⁷

15. In 1559, the case of *John Smith* was raised: 'upon a Declaration by Mr. Marshe, that he had come to this House, being outlawed, and had also deceived divers Merchants in London, taking Wares of them to the Sum of Three hundred Pounds, minding to defraud them of the same, under the Colour of Privilege of this House'. Although there seemed to be a basis for the allegations, the Speaker nevertheless asked if Smith should have the privilege of the House; this was agreed by the narrow affirmative vote of 112 to 107.⁴⁸ Hatsell records Prynne's query: 'How honourable this vote was for the House, in the case of such a cheating member, carried only by five voices, is not fit for me to determine'.⁴⁹ Moreover, this decision seemed to ignore the royal warning to the Commons, given earlier that year, and with Smyth's case no doubt already emerging as a matter of concern, that 'great heed would be taken, that no evil disposed person seek of purpose that priviledge for the only defrauding of his Creditors, and for the maintenance of injuries and wrongs'.⁵⁰ The privilege in question was 'that all the Members of the House, with their Servants and necessary Attendants, might be exempted from all manner of Arrests and Suits, during the continuance of the Parliament, and the usual space, both before the beginning, and after the ending thereof, as in former times hath always been accustomed'.⁵¹

⁴⁶ Maseres, *Cases and Records*, pp. 57-58.

⁴⁷ Bindoff (ed.), *Commons 1509-1558*, III, p. 485.

⁴⁸ *CJ*, 1, p. 55: 24 February 1559.

⁴⁹ Hatsell, *Cases of Privilege*, p. 81.

⁵⁰ D'Ewes, *Lords*, p. 17: 28 January 1559.

⁵¹ *Ibid.*, p. 17.

16. *William Strickland* introduced a bill on 14 April 1571 for the ‘reformation of [religious] ceremonies’.⁵² The Treasurer of the Household warned that this touched on the royal prerogative, which reserved matters of religion to the crown, so that they should not proceed with a bill: ‘if the matters mentioned [...] are but matters of Ceremony, then it behoveth us to refer the same to her Majesty, who hath Authority, as Chief of the Church, to deal herein. And for us to meddle with matters of her Prerogative (quoth he) it were not expedient’. Just before the Easter adjournment, Strickland was ‘called before her Majesties Council [...] and was commanded by them to forbear coming to the said House, in the mean season, and to attend their further pleasure’.⁵³ Members asked by whose commandment, and for what cause, Strickland had been prevented from attending, noting that he was not a private individual, but a proxy, specially chosen to represent his area. George Carleton, ‘as part of what seems to have been a concerted defence of parliamentary liberties, [...] posited a novel constitutional principle: that whatever Strickland’s offence, the Commons, and not the Crown, had exclusive disciplinary jurisdiction over him’.⁵⁴ This led to some fiery debate. Some of those who spoke did not accept that freedom of speech in the Commons was subject to any qualification, some maintained that the royal prerogative did not extend beyond reasonable limits, whereas others argued for the absolute nature of the royal prerogative. Another view accepted that the current monarch had no malevolence towards the House, but feared that a less benign ruler might exploit any abrogation of its privileges.⁵⁵ As was often the case, precedents were sought; these included the case from Henry IV’s time, when a ‘Bishop of the Parliament’ was committed to prison by ‘commandment of the King’; and the case of the Speaker, Thomas Thorpe, committed to prison in 1454 (case 6 above). In the end, the House acknowledged that it had no powers to free a member who had been sequestered through the royal prerogative, and decided to petition the queen for

⁵² An action seen by Neale as characteristic of the ‘Puritan Choir’ in the Elizabethan parliaments.

⁵³ D’Ewes, *Commons*, p. 160: 14 April 1571.

⁵⁴ Hasler (ed.), *Commons 1558-1603*, I, p. 554.

⁵⁵ Petyt, *Jus Parliamentarium*, pp. 255-56.

Strickland's return.⁵⁶ The depth of discontent in the House, and associated attempts by the Speaker to calm matters, can be seen in a brief entry in the *Commons' Journal*: 'After sundry Motions and Speeches touching the Liberties of the House, and untrue Reports made of the House, Mr. Speaker declared, the Queen's Majesty to have as good Liking of the House now, as ever of any Parliament, since her Majesty's Reign'.⁵⁷ Strickland appeared in the House very soon afterwards.⁵⁸ A month later, Sir Nicholas Bacon clearly had these matters in hand when he reminded parliament that there were limitations on what could be discussed, and, perhaps rather chillingly, that those who transgressed would, in a chilling word, be 'remembered' by the queen:

Like as the greatest number of them of the Lower House have in the proceedings of this session shewed themselves modest, discreet, and dutiful, as becomes good and loving subjects, [...] so there be certain of them, although not many in number, who, in the proceedings of this session have shewed themselves audacious, arrogant and presumptive, calling her Majesty's grants and prerogatives also in question, contrary to their duty and place that they be called unto, and contrary to the express admonition given in Her Majesty's name at the beginning of this Parliament; which it might very well have become them to have more regard unto. But her Majesty saith, that seeing they will thus wilfully forget themselves they are otherwise to be remembered.⁵⁹

17. The case of *lord Crumwell* (or Cromwell) arose in 1572. This showed that an arrest, or the issue of a *subpoena*, was not the only 'legal process' that might prevent a member of the Commons or Lords from undertaking parliamentary duties. Crumwell was accused of not obeying a chancery injunction, and was 'attached, by virtue of a Writ of Attachment, proceeding out of the said Court of Chancery, contrary to the ancient Privilege and Immunity, Time out of Memory, unto the Lords of Parliament, and Peers of this Realm'.⁶⁰ The Lords decided that there was no justification for such action against Crumwell, by 'Common Law or Custom of the

⁵⁶ *Ibid.*, p. 256.

⁵⁷ *CJ*, 1, p. 85: 20 April 1571.

⁵⁸ Petyt, *Jus Parliamentarium*, p. 257.

⁵⁹ D'Ewes, *Lords*, Speech of Sir Nicholas Bacon, p. 151: 29 May 1571.

⁶⁰ *A writ of attachment* is a court order to *attach* or seize an asset, and is *executed* by a sheriff.

Realm, or by any Statute Law, or by any Precedent of the said Court of Chancery', and annulled the writ of attachment. The Lords' order was, however, conditional, as they ordered that their ruling might be overturned, if 'at any Time during this Parliament, or hereafter in any other Parliament, there shall be shewed sufficient Matter, that, by the Queen's Prerogative, or by the Common Law or Custom of this Realm, or by any Statute Law, or sufficient Precedents [...to permit such an attachment]'.⁶¹

18. *Edward Smalley* was a servant of Arthur Hall. Hall had himself quarrelled over dice with one Melchisedech Mallory, in December 1573. In November 1574, during an affray in St Paul's churchyard, Smalley wounded Mallory in the face; Mallory sought Smalley's arrest, and the latter was ordered to pay £100 in damages. Mallory died before the matters was settled, but his brother had Smalley re-arrested, when the latter claimed immunity from arrest, as the servant of an MP.⁶² On 16 February 1576, a committee was appointed to consider the matter,⁶³ and on 20 February, it was ordered that Smalley should have privilege.⁶⁴ On 22 February, the attorney general of the Duchy, George Bromley, reported that:

The Committees found no Precedent for setting at large by the Mace any Person in Arrest; but only by Writ; and that, by divers Precedents of Record, perused by the said Committees, it appeareth, that every Knight, Citizen, and Burgess of this House, which doth require Privilege, hath used in that Case to take a corporal Oath before the Lord Chancellor, or Lord Keeper of the Great Seal of England, for the Time being, that the Party for whom such Writ is prayed, came up with him, and was his Servant at the Time of the Arrest made. And thereupon Mr. Hall was moved by this House, that he should repair to the Lord Keeper, and make Oath in Form aforesaid; and then to proceed to the Taking of a Warrant for a Writ of Privilege for his said Servant; according to the said Report of the said former Precedents.⁶⁵

⁶¹ *LJ*, 1, p. 727: 30 June 1572.

⁶² Hasler (ed.), *Commons 1558-1603*, II, p. 241.

⁶³ *CJ*, 1, p. 106: 16 February 1576.

⁶⁴ *CJ*, 1, p. 107: 20 February 1576.

⁶⁵ *CJ*, p. 14: 22 February 1576.

If the Commons at that time were of that opinion, they seem to have ignored the precedent of Ferrers, from 1542 (case no. 13, above). Alternatively, it was suggested to Hatsell, that the mace could perhaps only be used to free a member, not his servant.⁶⁶ Yet, by 27 February something had changed, because: ‘After sundry Reasons, Arguments, and Disputations, it is Resolved, That Edward Smalleye, Servant unto Arthure Halle Esquire, shall be brought hither To-morrow, by the Serjeant; and so set at Liberty, by Warrant of the Mace; and not by Writ’.⁶⁷ The House then caused the serjeant-at-arms to rearrest Smalley, because he was fraudulently avoiding a debt. Hall was ordered by the House to pay the £100. When he refused, Smalley was put in the Tower; a bill was introduced to make Hall pay the damages, and to expel him; Smalley gave in; and Hall also submitted, but without apologising. Hasler concludes that ‘the principle was thus established that the House might discipline, as well as protect, the servants of its Members’.⁶⁸ That was not the end of the matter, as Hall was himself subsequently punished by the Commons for misconduct.⁶⁹

There are two significant features to this case. First, it appears to Hatsell that this is the first of what became many cases, where the parties who had procured the arrest of a member, or his servant, were themselves ordered to appear before the House, for their contempt to the Commons. Ferrers’ case had similar features, but was unusual in that he was a servant of the king, and that might have been more significant than his membership of the Commons.⁷⁰ The *Commons’ Journal* for 1604, in considering a number of precedents, cites two key passages in this case.⁷¹

19. *Walter Vaughan* had been outlawed for debt. In 1581, a ‘small but sympathetic’ committee, chaired by the Speaker, supported his membership of the Commons, when Vaughan claimed he had not incurred debts on his own behalf, but had stood as surety for a friend. He had apparently also repaid at least some of the

⁶⁶ Hatsell, *Cases of Privilege*, p. 90n.

⁶⁷ *CJ*, 1, p. 108: 27 February 1576.

⁶⁸ Hasler (ed.), *Commons 1558-1603*, II, p. 241.

⁶⁹ See case 20 below.

⁷⁰ Hatsell, *Cases of Privilege*, pp. 121-22.

⁷¹ *CJ*, 1, p. 195: 2 May 1604.

sums owed, so that 'it was then agreed by the whole House, that he should stand and continue, as in his former Estate of the good Opinion of this whole House, sufficiently purged and discharged of the said Suspicions before in Question'.⁷²

20. *Arthur Hall(e)*, Smalley's master, was later punished on the Commons' own authority, for having written a book which provided a 'colourful account' of the episode involving Smalley, described above (case 18). This account:

defaced the Authority of the Lower House [...] and these points touching him were resolved. Viz: That he be committed to the Tower, which is the prison for this house for a certaine time, and pay a fine to the Queene, and be severed from being a member of the house [...] that it be published by order of the house that his booke is false, and seditious, and that himselfe be brought into the house, to have this judgement pronounced against him by the Speaker, in the name of all the House, that the Sergeante bee commanded to convey him to the Tower, by warrant from the House, signed by the Speaker, and that all the proceedings be written, read, and entered, as other causes of the House are.⁷³

Hasler describes how, on 14 February 1581, 'he was committed to the Tower for six months, or until he retracted, excluded from Parliament and fined 500 marks. The first member to be expelled by the House (though the right had been claimed before), it was Hall's contempt for the Commons, described by him as "a new person in the Trinity", which most annoyed the House and accounted for the severity of his punishment'.⁷⁴

21. *Richard Cooke* was elected in 1584, but 'while Parliament was in session a subpoena was issued out of Chancery against him at the request of a certain Margery Dyke. His claim to privilege was supported by the House, and on 10 February 1585, a delegation was sent to the court of chancery to explain the position'. There they were 'very gently and courteously heard [...] and were answered by the Lord Chancellor, that he thought this House had no such liberty of Privilege for Subpœnas, as they pretended'. A search was made for precedents. Although Hatsell was unable to

⁷² *CJ*, 1, p. 124: 8 February 1581.

⁷³ Anon., *Orders, Proceedings, Punishments and Priviledges of the Commons*, chap. XIII.

⁷⁴ Hasler (ed.), *Commons 1558-1603*, II, p. 241.

discover whether such precedents were found, Hasler suggests that ‘the fact that Margery Dyke and her son later apologised to Cooke and to the House indicates that these were found’.⁷⁵

22. *Thomas Fitzherbert* was summoned to the privy council in November 1592 for offences in administering an estate. By 1593, he owed the queen £1,400, and others a total of £4,000. Hasler goes on to describe that Fitzherbert had been outlawed after 22 judgments against him for debt, so that ‘in this situation he was neither the first nor the last to think of the House of Commons as a refuge from his creditors’. He was returned for Newcastle-under-Lyme in 1593, but arrested by his cousin, and held in custody in Derbyshire, and then London. On 17 March 1593, Fitzherbert and the arresting sheriff were brought to the Bar of the House. Found to have been duly elected as member, the outlawry notwithstanding, the Commons would nevertheless not confirm privilege for him: first, because he was taken in execution before the return of the indenture of his election; second, because ‘he had been outlawed at the Queen’s suit; and, third, as he was ‘taken in execution neither *sedendo in Parlamento*, nor *eundo*, nor *redeundo*’. In fact, Fitzherbert was arrested two hours after his election.⁷⁶

23. *William Hogan*, ordinary servant to the queen, was arrested, in 1604, for a debt of £50; he claimed privilege, but agreed to pay the debt. The Lords then ordered his release, although he had to enter into a surety for the sum in question, and further ordered that ‘the Warden of the Fleete should be free from any Trouble, Damage, or Molestation, for Discharge of the said William Hogan’.⁷⁷

24. *Anthony Curwen* was a ‘servant and familiar’ of William Huddleston, member for Cumberland in the 1601 parliament. Curwen was actually a solicitor who was arrested for a small debt, at the suit of Andrew Matthews, a surgeon who had treated an injury to Curwen’s hand following a brawl. Curwen then protested that:

⁷⁵ *Ibid.*, I, p. 646; Hatsell, *Cases of Privilege*, pp. 96-97.

⁷⁶ Hasler (ed.), *Commons 1558-1603*, II, p. 125; Prothero (ed.), *Statutes and Constitutional Documents (1913 edn.)*, pp. 127-28; D’Ewes, *Commons*, p. 518: 5 April 1593.

⁷⁷ *CJ*, 1, p. 195: 2 May 1604.

His Master was a Member of this House, and a Knight of a Shire, and that he was thereby privileged from Arrest, and wished to be discharged. But Mathews [the surgeon], and the Serjeant said, they cared not for his Master, nor his Privilege; and said, that he was not privileged from an Execution. And so being carried to the Counter, he told the like to the Clerks, who affirmed likewise, that Priviledges would not stretch to Executions, and therefore would not discharge him.⁷⁸

Following a course that would be followed in Shirley's case, the creditor threatened the serjeant that 'if you let him go, I will be Answer'd by you; look you to it', so that the serjeant kept Curwen in custody, notwithstanding the latter's claim for privilege. The Commons were sympathetic to the serjeant, who apologised for any wrongdoing. They discharged him, but ordered the creditor to pay a fine for his contempt of the privilege of the House. There was then a debate whether Curwen should be privileged, or not, but it was felt that the precedents supported him being granted privilege.⁷⁹ Although there was some doubt about the validity of the warrant for his release, Curwen was freed: 'because the Matter was but small, he was delivered thereby, rather than so honourable a Court of the Parliament should be further troubled therein'.⁸⁰

⁷⁸ Townshend, *Historical Collections* p. 324: 14 December 1601.

⁷⁹ *Ibid.* pp. 325-26: 15 December 1601.

⁸⁰ As recorded when the case was cited as a precedent: *CJ*, 1, p. 195: 2 May 1604.

APPENDIX 2 : THE EARLY STUART PARLIAMENTS¹

PARLIAMENT OF 1604 – 1610 (James I)

Alternative title The Blessed Parliament

Summoned 31 January 1604

Assembled 19 March 1604

Dissolved 9 February 1611

Session Dates

1. 19 March 1604 – 7 July 1604
2. 5 November 1605 – 27 May 1606
3. 18 November 1606 – 4 July 1607
4. 9 February 1610 – 23 July 1610
5. 16 October 1610 – 6 December 1610

PARLIAMENT OF 1614 (James I)

Alternative title The Addled Parliament

Summoned 19 February 1614

Assembled 5 April 1614

Dissolved 7 June 1614

Session Dates

1. 5 April 1614 – 7 June 1614

PARLIAMENT OF 1621 (James I)

Summoned 13 November 1620

Assembled 30 January 1621

Dissolved Dissolved by Proclamation 6 January 1622
and by commission 8 February 1622

Session Dates

1. 30 January 1621 – 19 December 1621

¹ From Thrush, *Commons 1604-29*, I, xxxv – liii, *passim*.

PARLIAMENT OF 1624 (James I)

Alternative title	The Happy Parliament
Summoned	30 December 1623
Assembled	12 February 1624
Dissolved	27 March 1625, on the death of the king

Session Dates

1. 12 February 1624 – 29 May 1624

PARLIAMENT OF 1625 (Charles I)

Alternative title	The Useless Parliament
Summoned	2 April 1625
Assembled	17 May 1625
Dissolved	12 August 1625

Session Dates

1. 18 June 1625 – 12 August 1625

PARLIAMENT OF 1626 (Charles I)

Summoned	26 December 1625
Assembled	6 February 1626
Dissolved	16 June 1626

Session Dates

1. 6 February 1626 – 15 June 1626

PARLIAMENT OF 1628 – 1629 (Charles I)

Summoned	31 January 1628
Assembled	17 March 1628
Dissolved	Dissolved by Proclamation 2 March 1629 and by the king in person 10 March 1629

Session Dates

1. 17 March 1628 – 26 June 1628
2. 20 January 1629 – 2 March 1629

APPENDIX 3 : CHRONOLOGY OF THE SHIRLEY CASE

This table gives an outline description of key events in the case of Sir Thomas Shirley, dated as if the new year began on 1 January 1604. Source: House of Commons' *Journals*.

30 January	Writ for debt against Sir Thomas Shirley
31 January	Writs for new parliament
11 February	Warrant for Shirley's arrest
17 February	Shirley elected
15 March	Arrest of Shirley and imprisonment in Fleet prison
19 March	New parliament meets
22 March	John Shirley raises case; writ of <i>habeas corpus</i> issued but warden of the Fleet refuses to release Shirley
23 March	Case further raised by Thomas Wentworth
27 March	Appearance of principals in case; Commons debate; committee of privilege established
5 (or 11) April ¹	Report from privileges committee presented; Commons order Simpson and his yeoman to be committed to the Tower; warrant for a writ of <i>habeas corpus</i> reissued
13 April	Simpson and Watkins brought to Bar of House; case argued by counsel on both sides
16 April	Consideration of arguments and precedents; leave given to bring in first bill to ask sovereign to order Shirley's release
17 April	Introduction of first bill - 'Bill for Saving harmless the Warden of the Fleet, and for Securing Simpson's Debt, in Sir Tho. Shirley's Case'; committed to privileges committee
20 April	First bill considered at report stage and ordered to be engrossed; first reading of 'Bill for the Relief of Plaintiffs in Writs of Execution, where the Defendants in such Writs have

¹ Dated as 5 April in *CJ*, vol. 1, p. 167, and 11 April by the second scribe.

- been arrested, and set at Liberty by the Parliament', which became the Privilege of Parliament Act 1603
- 21 April Third reading of first bill; sent up to Lords; second reading of Privilege of Parliament bill
- 26 April Shirley writes to Cecil proposing a solution. Report stage of Privilege of Parliament bill – ordered to be engrossed
- 28 April Second reading of first bill in the Lords
Commons debate; conference with Lords requested
- 30 April Third reading of first bill in the Lords
- 2 May Further committee to consider precedents
- 4 May The House rejects proposal for a petition to king to expedite enactment of first bill; further writ of *habeas corpus*
- 7 May The warden of Fleet appears in House – refuses to release Shirley – committed to Tower; further writ of *habeas corpus*
- 8 May The warden again appears; the House agrees he should be committed to Tower; another writ of *habeas corpus*; serjeant-at-arms ordered to go to Fleet to release Shirley; committee established to consider precedents to fine those disobeying Commons' orders
- 9 May Report on abortive mission of serjeant-at-arms to Fleet prison; Commons receive message from king; further debate in Commons
- 10 May Further debate in Commons; second bill brought in, clears all stages and passed to Lords; letter from wife of the warden read by Speaker. Lords give second bill first and second readings
- 11 May Serjeant-at-arms describes failure of further mission to Fleet; warden brought to the House, remained obdurate, and was committed to Little Ease dungeon in the Tower
- 12 May Second bill amended by Lords and returned to Commons; five members of Commons sent on fact-finding mission to Tower

14 May	Report from five members on visit to Tower, further debate in Commons, further writ of <i>habeas corpus</i> ordered; serjeant-at-arms to take this to Fleet; 'private' request to king to intervene
15 May	Speaker reads two letters from warden agreeing to release Shirley, who then takes seat
16 May	Commons decide warden should petition for his own release
17 May	Speaker reads letter from warden explaining his actions
19 May	Warden apologises in person to the House
22 May	Serjeant who arrested Shirley freed
19 June	Simpson (main creditor) freed
20 June	Draft of <i>Form of Apology and Satisfaction</i> refers to case
Summer	Privilege of Parliament Act passed. Assent also given to private legislation 'securing the debt of Simpson and others and the safety of the Warden of the Fleet in Sir Thomas Shirley's Case'.

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APPENDIX 4 : THE ARRESTED MEMBERS

This appendix describes the circumstances of each of the members who were arrested after the dissolution of 1629. It provides a brief synopsis of their background leading up to the events of that spring, and their responses to their arrests, set out in the order in which they were released from confinement. The intention is to show that these men were not of a singularly oppositional nature, although all were strong advocates of parliamentary privileges and rights. Some of them had a history of challenging the royal authority; others had, at least for some time in the past, worked with or for the crown, or councillors; yet others became reconciled with royalist causes at a later point. The descriptions are largely based on those provided in *HoP* and *ODNB*.

Sir Peter Heyman had received land from Elizabeth I shortly before her death. He first sat in parliament in 1621, although he was required to be a member of the embassy to the Lower Palatinate in 1622 – this was not an honour, but a mark of royal disfavour for his refusal to contribute to the benevolence raised for the defence of the Palatinate. In the 1626 parliament, Heyman was one of the members who complained at the mismanagement of the war with Spain, and supported the attempt to impeach the duke of Buckingham. Following the dissolution, he was summoned before the council for refusing to contribute to the forced loan, but escaped imprisonment. His offence on 2 March 1629 was to make a direct, personal verbal attack on the Speaker, after which he was again arrested, but was released because of deteriorating health in late May 1629, at the age of 69.¹

William Coryton entered parliament in 1624. He was a bitter opponent of Buckingham, opposed Arminianism in the church, and favoured war with Spain. As Reeve describes, ‘believing in the conciliar and legislative authority of parliament, he espoused traditional concepts of purging evil counsellors but under Charles I came to put pressure upon the constitutional notion that the king could do no wrong’. He argued for redress before supply in both the 1624 and 1626 parliaments. Coryton was

¹ Andrew Thrush, ‘Heyman, Sir Peter (1580-1641)’, *ODNB*; Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 683.

a leading opponent of the forced loan; along with Eliot, for which he was imprisoned in the Gatehouse. His respect for the royal prerogative was qualified, in that he found its justification in statute and Magna Carta. He was possibly a ringleader in inciting men to refuse to pay the forced loan, so that he was detained in May 1627, and committed to the Fleet prison in July 1627. Released from prison in January 1628, he continued his confrontational stance towards the king. After the events of 2 March 1629, he was arrested, pleaded a lapse of memory about events in the Commons, but offered information about the Eliot group's meetings. Like the others, he entered a plea of parliamentary privilege when charged in the Star Chamber. Having already had a taste of imprisonment, which was explicitly intended to 'terrify' a miscreant, it may be harsh to say that 'his courage failed', but, by late April, Coryton was 'abjectly' petitioning for his freedom, which was granted in June 1629. For much of the civil war he was 'one of Cornwall's leading royalists'.²

Sir Miles Hobart, along with Valentine, had not sat in any previous parliaments. Although a 'modest landowner', Hobart had held no local offices. Once elected for Great Marlow, he made little impression, until 2 March 1629, when he volunteered to lock the door, thereby preventing anyone from leaving, but also barring the entry of the king's messenger. After his arrest, he refused to answer questions put outside parliament that related to his conduct within the Commons. In autumn 1629, he was told he might go free, if he put in a bond for good behaviour. Hobart refused this offer, but later alleged that he had been unaware of the Speaker's message for an adjournment, or of the arrival of messengers from the Lords and the king. Eventually, in March 1631, Hobart was released, dying in the following year, as a result of a head injury in a coach accident.³

Denzil Holles was the second surviving son of the earl of Clare, and apparently a scholar of Miltonesque precocity, matriculating at the age of thirteen, graduating at sixteen, and already attending Gray's Inn when fifteen. He sat in the 1624 parliament, where he made little mark, and only re-entered the Commons in 1628, for Dorchester,

² L. J. Reeve, 'Coryton, William (1580-1651)', *ODNB*; Thrush and Ferris (eds.), *Commons 1604-29*, III, p. 684.

³ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 722.

when he again attracted little attention in the first session. However, in the 1629 session, he spoke out against the customs farmers who had seized the merchants' goods. On 2 March, Holles along with Valentine had held the Speaker in his chair to prevent him from rising and thus adjourning the Lords, for which Holles was arrested immediately afterwards. When questioned, he disingenuously claimed that 'he came into the House that morning with as great zeal to do His Majesty service as anyone whatsoever', but 'finding His Majesty was displeased with him, he humbly desired that he might rather be the subject of his mercy than his power'.⁴ As Morrill describes, when offered bail on a bond of good behaviour, which would imply an admission of guilt, Holles was one of those who refused the offer. By 29 October 1629, there was a fudge – Holles' bail was paid by his father-in-law, and by his friend, William Noye, whether with, or without, Holles' understanding is not clear. In January 1630, the attorney general went further and accused Eliot, Holles, and Valentine of conspiracy.⁵ *HoP* sets out that Holles was 'one of the five members accused of treason by Charles I in January 1642. He took up arms for Parliament, but subsequently became a leading supporter of a compromise peace. He was again accused of treason by the New Model Army in 1647 and was subsequently secluded from Parliament. After living privately for most the 1650s he was raised to the peerage after the Restoration, becoming a prominent diplomat and privy councillor in the 1660s'.⁶

John Selden had a background as a precocious lawyer, and steward to Sir Henry Grey, earl of Kent. He also wrote widely on law and the history of the *ancient constitution*, so that: 'his subsequent pronouncements in Parliament on matters of law and precedent were treated with great respect'. He was first elected in 1624, when 'upholding the dignity and authority of the Commons was one of Selden's main preoccupations'.⁷ He was active against Buckingham, and in favour of the various remonstrances that were presented to Charles I. By 1629, he was a strong, informed

⁴ *Ibid.*, IV, p. 757.

⁵ John Morrill, 'Holles, Denzil, First Baron Holles (1598-1680)', *ODNB*.

⁶ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 758.

⁷ *Ibid.*, VI, p. 265-66.

proponent of parliamentary privileges and rights: for example, he was tasked with seeing whether the *Petition of Right* had been correctly entered in the parliament rolls.⁸ When Rolle's case was raised, Selden was keen to pursue parliamentary privilege for the member's goods, using his extensive knowledge of the law and parliamentary privilege. He saw the case as one that touched on the very purpose of parliament: 'If there be any near the King that misinterpret our Actions, let the Curse light on them, not on us, and believe it is high time to right our selves; and until we vindicate our selves in this, it will be in vain for us to sit here'.⁹ As Selden was also becoming exercised by the crown's protection of Arminianists and papists, it is perhaps unsurprising that he was prominent in supporting Eliot's remonstrance against misgovernment, and, as a consequence, joining the disruption of the 2 March sitting.

When examined on 18 March, Selden, perhaps 'terrified' by his imprisonment, denied any clear recollection of the tumultuous events on the day of the dissolution. He generally distanced himself from Eliot's statements, and denied prior complicity between them. He was unsuccessfully prosecuted in the Star Chamber, but, in the meantime, Selden had sued out a writ of *habeas corpus*. However, the government contrived to delay his release until October 1629, when he was finally offered, but refused, bail, on condition that he was bound over for good behaviour. Although he was not in fact prosecuted any further over the events in the Commons, he remained confined until May 1631, when his old ally Arundel intervened on his behalf to obtain his release.¹⁰

Sir John Eliot came from minor gentry, and was first elected to parliament in 1614 (St Germans), at the age of 21; he did not sit in the 1621 parliament, but was returned in 1624, 1625 (Newport in both years), 1626 (St Germans), and 1628 (Cornwall), becoming 'one of the most influential and controversial figures in the parliaments of the 1620s'.¹¹ Before the proceedings of March 1629, there had been earlier occasions

⁸ *CJ*, 1, p. 920: 21 January 1629.

⁹ Parkhurst (ed.), *Crew : 1629 Proceedings*, p. 114: 19 February 1629.

¹⁰ Morrill, 'Holles'.

¹¹ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 183.

when Eliot was involved in high profile events. Two privilege cases occurred at the same time in 1624; one particular to Eliot, the other a matter of principle, raised by Eliot. On 27 February 1624, Sir Edward Giles successfully requested privilege for Eliot, to stay a trial at the assizes.¹² Seemingly, a simple matter of granting privilege to a member threatened with legal processes, there is, however, an undercurrent that suggests some of the authorities wanted to silence Eliot, thereby affecting the wider privileges of freedom of speech and a free legislature. Eliot, present in the Commons on 27 February, started a ‘lengthy and unexpected’ debate on such wider privileges, characterised as Eliot’s first great *coup de théâtre*:¹³ ‘Again to petition his Majesty for the Continuance of those Favours our Ancestors have enjoyed’.¹⁴ Sir Edward Nicholas records in his diary: ‘He [Eliot] would have us to seek to the King for our particular sureties, the promise we have had from the King being but in general’.¹⁵ Eliot might have thought his words would resonate with those favouring a restatement of privilege, but John Pym realised that a successful parliament depended on avoiding such a debate, and commented in his diary that ‘divers were afraid this motion would have put the House into some such heate as to disturbe the greate busines’.¹⁶ The Commons seemed to favour restating the principles of their privileges, in an ‘act declaratory’, and, rather wearily perhaps, rehearsed that there had been confirmations of ‘Magna Charta thirty times’. They wanted to preserve the confidentiality of what was said in the House, by themselves punishing members who offended. Sir Edward Coke referred directly to ‘Freedom of Speech the Quintessence of the other Four Essences’.¹⁷ They decided to ask that the king should not dissolve parliament without showing them cause – Sir Robert Phelips noting ‘it is almost a miracle that we are now here again assembled’.¹⁸ The Commons concluded by establishing a committee ‘take into consideration the liberties and privileges of the House’.¹⁹ It is wrong to see

¹² *CJ*, 1, p. 719, in Baker (ed.), *Proceedings 1624*: 27 February 1624.

¹³ Thrush and Ferris (eds.), *Commons 1604-29*, IV, p. 184.

¹⁴ *CJ*, 1, p. 719, in Baker (ed.), *Proceedings 1624*: 27 February 1624.

¹⁵ *Nicholas*, fol. 27v, in *ibid.*: 27 February 1624.

¹⁶ Russell, ‘Eliot’.

¹⁷ *CJ*, 1, p. 719, in Baker (ed.), *Proceedings 1624*: 27 February 1624.

¹⁸ *Nicholas*, fol. 28r, in *ibid.*: 27 February 1624.

¹⁹ *CJ*, 1, p. 719, in *ibid.*: 27 February 1624.

the Commons as somehow united in presenting a polemical stance – Sir Walter Earle records the conciliatory mood of the Commons and its desire to avoid offending the king:

Sir Francis Seymour would have had better assurance given from the King than was last and would have had the parties that were restrained to declare whether it were for parliament business. But this was not approved of by the House.

Sir Roberts Phelips: he expected not any such proposition [...] Foreign parts are interested in this parliament, as well as we; good therefore to have respect to [avoid] disturbances and diversions. This our assembly is a miracle. Two things are to be expected, gratitude and obedience. Think fit to have a committee to consider of the best course how to proceed with least offence to his Majesty.²⁰

In the mid-1620s, Eliot distanced himself from Buckingham, whom he had previously supported, and allied himself more closely to William Herbert, third earl of Pembroke, who was a powerful enemy of Buckingham. Russell describes how Eliot repeatedly claimed that his attacks on Buckingham did not represent any attack on the king, and that he was speaking with the loyalty appropriate to a faithful counsellor.²¹ However, tasked, along with Digges, with summing up in the impeachment proceedings against Buckingham, Eliot went too far – in the king's view he impugned the memory of James I, and the honour of Charles I himself. Eliot and Digges were arrested at the door of the House, on 11 May 1626, and sent to the Tower – Digges was released after five days, but Eliot was only freed on 19 May. As noted earlier, the Commons, decided on the following day, 'without one negative', that 'Sir Jo. Ellyott hath not exceeded the Commission given him by the House, in anything passed from him in the late Conference with the Lords'.²² Eliot was firm in his protestations of loyalty to the king, and 'shared the complete commitment of his contemporaries to the

²⁰ *Diary of Sir Walter Earle*, fol. 31v, in *ibid.*: 27 February 1624.

²¹ Attacks on 'evil counsellors', as a surrogate for their royal master, were a common device, later placed within doctrines of 'ministerial responsibility', and 'the king can do no wrong'.

²² *CJ*, 1, p. 862: 20 May 1626.

doctrine of non-resistance', saying, in the following month, that: 'no act of the King can make him unworthy of his kingdom: it is against the tenet of our religion'.²³ He returned regularly to a single dogma: 'the treasure, laws, persons, actions of the kingdom, the kingdom itself, suffers under the too great power of one man [Buckingham]'.²⁴ Eliot was, with Coryton, a prominent refuser of the forced loan, in 1626, such that both were imprisoned in the Gatehouse, in 1627. The result was that Eliot issued a petition, which, as Russell describes, made a simple appeal to the rule of law:

Eliot ran through the statutes against arbitrary taxation which were later to form the basis of the petition of right—*Confirmatio cartarum*, *De tallagio non concedendo* [in Magna Carta], the statutes of 1340 and 1352, and the 1483 statute against benevolences – and appealed to the due process requirements for imprisonment laid down in Magna Carta. It was a powerful and emotive argument, which still retains its vitality, and the issue itself was raised to a new level of intensity that year in the *Five Knights'* case, when, in reply to the suing of a writ of habeas corpus, the king asserted that he did not need to show any cause for imprisoning people.²⁵

Eliot's action did not receive universal support: 'the deputy lieutenants thought that they could not attack the king when they were constantly having to appeal to him for ships, powder, and supplies, and when they themselves required power to billet soldiers before they rioted, or to impose martial law after they had done so'. Eliot had to wait until January 1628 to be released, through a general amnesty preceding the calling of a new parliament.²⁶

In the 1628 parliament, Eliot repeatedly spoke (Russell says 172 times): 'for the ancient glory of the ancient laws of England', for the 'propriety of goods', for the law of '*meum and tuum*', for the cause of any imprisonment to be shown, and for freedom of speech in the Commons. The most impressive speech was, perhaps, on 3 June

²³ Russell, 'Eliot'; *Grosvenor*, in Bidwell and Jansson (eds.), *Proceedings 1626*, III, p. 358: 3 June 1626.

²⁴ *Whitelocke*, in *ibid.*, III, p. 34: 20 April 1626.

²⁵ Russell, 'Eliot'.

²⁶ *Ibid.*

1628, when he raised five main grievances, relating to religion; military misadventures; ‘the insufficiency and unfaithfulness of our generals’; ‘the ignorance and corruption of our ministers’; and ‘the oppression of the subject’. He urged that a remonstrance should be drawn up, ‘all humbly expressed with a Prayer unto his Majesty, for the safety of himself, and for the safety of the Kingdom, and for the safety of Religion. He concluded with a profession of loyalty: ‘And thus, Sir, with a large affection and loyalty to his Majesty, and with a firm duty and service to my Country, I have suddenly, and, it may be, with some disorder, expressed the weak apprehension I have; wherein if I have erred, I humbly crave your pardon, and so submit to the Censure of the House’.²⁷

Eliot made numerous speeches in the 1629 parliament about the detention of Rolle’s goods, which urged the preservation of the liberties of the kingdom, as embodied in the Commons, and the avoidance of cautious approaches. For example, on 10 February, he said: ‘The happiness of the Kingdome consisteth in the preservation of their Liberties and those are contracted in this House. Our Lenity [mildness] causeth this violation: and our faire procedinge maketh our Liberties the Subject of scorne and contempt’.²⁸ Eliot also spoke against the judges who were preventing the merchants retrieving their goods: ‘I conceive, if the judges of that court had their understanding enlightened of their error by this House, they would reform the same, and the merchants thereby suddenly come by their goods’.²⁹ A week later, he repeated his warnings about the danger of failing to protect privileges: ‘We see it is not only for the interest of the goods of a member of this House, but also for the interest of this House; if we let this go, we shall not be able to sit here’.³⁰ He rejected the argument that the customers had been acting on the king’s orders: ‘the King can not command a thing soe unjust as the violacion of our priviledges’.³¹ Eliot was, however, often the member who reported from the committee examining the complaint of the merchants, and may thereby have been unfairly seen as the chief

²⁷ Rushworth, *Historical Collections*, I, pp. 591-92: 2 June 1628.

²⁸ *Grosvenor*, in Notestein and Relf (eds.), *CD 1629*, p. 186: 10 February 1629.

²⁹ *True Relation*, in *ibid.*, pp. 60-61: 12 February 1629.

³⁰ *True Relation*, in *ibid.*, p. 85: 19 February 1629.

³¹ *Grosvenor*, in *ibid.*, pp. 237-41.

critic of the crown and the courts in the continuing restraint of the merchants' goods, when he was merely speaking as his committee wished.³²

These unwelcome pronouncements were overshadowed by what happened on 2 March 1629, when Eliot played a big part, and was unsurprisingly arrested immediately after the dissolution. As described by Russell, and *HoP*, when questioned, Eliot refused to account for his actions on the grounds that he would himself be breaching parliamentary privilege, by communicating what had happened in the Commons without their authority; and that offences committed there were examinable only by the members themselves. Eliot presented himself as following the same line as Socrates, in refusing to respond to his refusers. The judges declined to dispute this argument, and the Star Chamber action was dropped in June 1629. Charles then moved Eliot and others from the custody of the marshal of king's bench, and thus out of the jurisdiction of the court, and had them confined in the Tower by his own warrant, in the custody of the lieutenant. Eliot sued for a writ of *habeas corpus* in late June, and in September the government decided to offer him bail, but only if he agreed to be bound over for good behaviour, a condition that Eliot rejected. He was then charged with sedition and conspiracy, along with Holles and Valentine. The defendants rejected the court's jurisdiction over acts committed in parliament, and refused to plead – ironically, Charles I was also to refuse to recognise the legitimacy of the tribunal at his own trial. Eliot's self-acknowledged dilemma was that if he did not submit he would incur the censure of the court, but if he did, his act would be considered 'a prejudice to posterity' and 'a danger to Parliament'. Therefore, he would be silent, just because his duty was to parliament. These ideas were summarised in his paper, *An Apology for Socrates*, written in the Tower.³³ However, on this occasion the judges concluded that the three men's silence constituted an admission of guilt. On 12 February 1630, Eliot was fined £2,000, and

³² *CJ*, 1, pp. 920-32: January-February 1629, *passim*.

³³ Grosart (ed.), *Apology & Negotium Posterorum (Eliot)*, editor's introduction, xii. In 2010, the court of appeal referred to Eliot's stance during a hearing into aspects of the parliamentary expenses scandal: England and Wales Court of Appeal (Criminal Division), *R and David Chaytor and Others (2010)*, §7.

sentenced to imprisonment until he acknowledged his fault.³⁴ By March 1632, he was displaying the symptoms of tuberculosis, and he died in the following November, aged forty. In an act of vindictiveness, Charles I refused to release the body for burial, writing on the petition of Eliot's son: 'Let Sir John Eliot be buried in the church of that parish where he died'.³⁵

Walter Long held several offices in Wiltshire, and was first elected to parliament in 1625. *HoP* suggests that he was perhaps one of those who sought election to evade creditors: he had borrowed heavily to meet the debts associated with his inheritance of an estate in the early 1620s. He made little impression as a member at that time. Nor did his financial worries end: 'my occasions do press me speedily to make money and nothing which I have is likely to yield me money so speedily as this [the sale of his Wiltshire manor]'.³⁶ In the 1626 parliament, Long increasingly aligned himself with the anti-Buckingham members, although he supported the grant of three subsidies and three fifteenths to the king in the debate of 27 March. His first big contribution came in defence of Eliot and Digges, when they were imprisoned after summing up in the Buckingham impeachment proceedings:

The imprisonment of these gentlemen grieved me as much as any. [...] I have heard of a precedent in 2 Henry IV when upon such an occasion the Commons showed the king that no Member should be committed but for felony or treason, and that spoken in his hearing. That Buckingham is cause of all this, for all our interruptions have happened when his business has been in handling. These gentlemen [Eliot and Digges] were employed in the examining of these offences of the duke. Their papers are taken and seized on, we know not whether all the proofs are gone. We ought to make such a Remonstrance there in this infringement of our liberty, that we have our Members and their papers; to preserve our honour, and maintain what we have done.³⁷

³⁴ Russell, 'Eliot'; Thrush and Ferris (eds.), *Commons 1604-29* IV, pp. 198-99.

³⁵ Russell, 'Eliot'.

³⁶ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 157.

³⁷ *Grosvenor*, in Bidwell and Jansson (eds.), *Proceedings 1626*, III, p. 244: 12 May 1626.

In the debate to decide whether to pursue a remonstrance against the detentions, Long argued that it should be ‘enlarged, and therein to desire His Majesty to punish those who have made him break his royal word, which was that we should have full liberty of speech’.³⁸ During the remainder of the 1626 parliament, Long continued his attacks on Buckingham, and criticised Charles I’s demand for a speedy grant of supply. Long was punished: he was removed from the Wiltshire bench; he was obliged to pay a punitive privy seal loan, although this was not pressed. As noted earlier, he was pricked as sheriff, along with Sir Edward Coke, Sir Thomas Wentworth, Sir Robert Phelips, and Sir Francis Seymour, in an attempt to neutralise particularly difficult opponents.³⁹

Long was returned to parliament in 1628, notwithstanding the ban on sheriffs being elected, and took a prominent position against mismanagement of foreign affairs and military campaigns, innovations in religion, and arbitrary government. There was also a particular matter of privilege: on 30 June 1628, shortly after parliament was prorogued, he was sued in the Star Chamber, essentially for neglecting his shrieval duties by coming to Westminster. In late October the attorney general outlined the charges and demanded that Long be *subpoenaed*, but Long had probably left London for the country by this time, for on 4 November, Sir Valentine Browne reported to Eliot that Long was away and ‘intends not to be found’.⁴⁰

In the 1629 session, Long complained that ‘a prosecution hath been against him in the Star Chamber for sitting in this House the last Session, he being High Sheriff of Wiltshire, and being chosen burgess of Bath in Somersetshire’.⁴¹ He opposed the pressure to grant tonnage and poundage speedily, and spoke against the tolerance given to catholics. However, it was his words during the sitting of 2 March that brought Long particular disfavour. He incited people to not pay tonnage and poundage, declaring that: ‘[any] man that shall give away my liberty and my inheritance (I speake of the merchants), if any of them shall pay Tonage and Pondage

³⁸ *Ibid.*, III, p. 305: 22 May 1626. In general, successive monarchs only granted a qualified freedom of speech.

³⁹ Thrush and Ferris (eds.), *Commons 1604-29*, v, pp. 158-59.

⁴⁰ *Ibid.*, v, p. 159.

⁴¹ *True Relation*, in Notestein and Relf (eds.), *CD 1629*, p. 41: 5 February 1629.

without gift by Parliament I shall vote him that does it to be a capitall enemeye to the Kingdome'.⁴² Long was selected for punishment after 2 March, but fled to Wiltshire; a proclamation called for his arrest for sedition and 'crimes of a high nature'. Long's uncle, William, 'abused [the king's messenger] with reviling speeches' before throwing a full chamber pot over his head, 'at which he [William] and his wife much rejoiced'. On 6 May, Long unsuccessfully applied for a writ of *habeas corpus*. On the following day, when examined by attorney general Heath, he argued that his parliamentary privilege meant that he should not be pressed to answer for what he had said or done in the House. He was kept in prison until February 1630, when he was fined 2,000 marks by the Star Chamber, and ordered to be remanded in the Tower for 'his presumption in quitting the personal service of sheriff whereunto he was obliged by oath, to play the busybody in Parliament'. He remained in prison until July 1633.⁴³

William Strode was a member of a Devon family; his father, Sir William Strode, controlled one seat at Bere Alston, the borough for which William the younger sat from 1624 onwards.⁴⁴ In the 1626 parliament, Strode became increasingly aligned with critics of Buckingham, and those who found fault with the regime. His critical stance hardened during the 1628 parliament, with at least 34 recorded speeches, often on religion – reflecting his puritan background, so that: 'Like Eliot, Strode supported Sir Thomas Wentworth's proposal, on 28 April for drafting a bill to enshrine the liberties of the subject, and on 1 May emphasized the importance of using this measure to curb arbitrary imprisonment. Later that day the king made clear his opposition to this strategy, by demanding to know whether the Commons would rely wholly upon his royal word to protect and uphold the subjects' liberties'. This led Strode to back calls, on 2 May, for a remonstrance justifying the Commons' actions, as well as, on 3 June, calling for a further remonstrance concerning the ills afflicting the nation.⁴⁵

⁴² *March 2nd Account*, in *ibid.*, p. 264.

⁴³ Thrush and Ferris (eds.), *Commons 1604-29*, v, p. 160.

⁴⁴ He was also elected for Plympton in 1626, but opted to sit for Bere Alston: *CJ*, 1, p. 822: 18 February 1626.

⁴⁵ Thrush and Ferris (eds.), *Commons 1604-29*, vi, p. 471.

Initially quiet at the start of the 1629 session, Strode backed Selden and Eliot in calling for the recovery of goods confiscated from merchants, not least John Rolle, although he questioned the value of directly punishing the customs farmers. At the same time, Strode was concerned about the tolerance of papists. It is unsurprising that Strode played a very vocal role during the events of 2 March, when he intervened as soon as the Speaker refused to countenance the reading of Eliot's paper that called for a remonstrance. Strode demanded that Eliot's paper be read, 'that we may not be turned off like scattered sheep, as we were at the end of the last session, and have a scorn put upon us in print'. He then called on other members to show their support by standing up, and when the Speaker still resisted, he rounded on him fiercely: 'You have protested yourself to be our servant, and if you do not what we command you that protestation of yours is but a compliment. If you be our servant you must obey us for the scripture saith: "His servant you are whom you obey"'. Summoned the next day to appear before the privy council, Strode initially evaded arrest. When apprehended, he refused to answer to any court, except parliament itself, and applied persistently for bail. However, when bail was finally offered, he was one of those who refused to be bound over, and he remained incarcerated until January 1640, when he was released in a conciliatory gesture prior to the meeting of the Short Parliament.⁴⁶

Benjamin Valentine came from an obscure background, and had little fortune. He did not serve as an official in local politics, but, in 1613, he became a servant of the royal favourite, Robert Carr, earl of Somerset. He became part of a west country nexus that was overseen by the Herberts, which included Sir John Eliot and William Coryton. Valentine only entered parliament in 1628, as one of the members for St Germans, succeeding Eliot. In the remonstrance debate of 1628, Valentine characterised Buckingham as a public enemy, and in 1629, he was one of the members calling for the punishment of the customs officers who had seized the merchants' goods. On 2 March, he joined Holles in holding the Speaker in his chair, for which he was brought before the privy council, on 4 March 1629, but refused to answer any questions on the grounds of parliamentary privilege. He then sued for a

⁴⁶ C. H. Firth and L. J. Reeve, 'Strode William (bap. 1594, d. 1645)', *ODNB*; Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 472.

writ of *habeas corpus* on 6 May, seeking bail. In October 1629, Valentine refused to be bound over to keep the peace and was remanded to prison. The men seen as ringleaders in the event of 2 March – Eliot, Holles, and Valentine – continued their protest, thereby forcing the crown to try them for seditious conduct and speeches in parliament. They then entered a plea against jurisdiction, maintaining that only parliament could judge them, but in vain. However, Valentine was found guilty, on 12 February 1630, along with Eliot and Holles, fined £500, and sentenced to imprisonment during the king's pleasure. Valentine refused to accept the competence of other courts to rule on events in parliament. An unrepentant Valentine remained in prison until 1640, although he was not closely confined, and was able to visit Eliot at the Tower until the latter's death in 1632.⁴⁷

⁴⁷ L. J. Reeve, 'Valentine, Benjamin (d. in or before 1653)', *ODNB*; Thrush and Ferris (eds.), *Commons 1604-29*, VI, p. 602.

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