

The Arugment of the Commons Concerning the Liberties of the Person and Every Free Man, with the Objections of the King's Council (No date)

Transcript

Norfolk Record Office, AYL/192, ff. [1r]–[8r]

[1r]

The Argum[en]t made by the Comaundem[en]t of the house of Commons out of Acts of p[ar]liam[en]t and Authorities of lawe expoundinge the same at [th]e first conference w[i]th the lords concernge the lib[e]rties {of}[th]e p[er]son and eu[e]ry Free man

[Left margin: My Lordes] Vpon the occasions {as} red deliu[e]red by the gentleman yo[u]r lo[rdshi]pps haue heard {the} Comons haue taken into their serious Considerac[i]on the matt[e]r of p[er]sonall lib[e]rtie, and after longe debate there of diuers dayes as well by solemne Argum[en]ts of single p[ro]positions of doubts & answeres, to the end {} scruple might remayne in any mans brest vnsatisfied they haue vppon a full search and clere vnderstandinge of all things p[er]tinent to [th]e question vnanimously declared [tha]t noe Freeman ought to be Comitted or detained in prison or otherwise restrained by the Comand of [th]e Kinge or the privie Councell or any other vnlesse some cause of the Comittm[en]t deteyno[u]r or restr[ain]t be expressed for w[hi]ch {by} law he ought to be Comitted detained or restreyned, And they haue sent me w[i]th other of yo[ur] members to {rep[re]}sent vnto yo[u]r lo[rdshi]pps the true grounds of such their resoluc[i]on, And haue Charged me p[ar]ticularly (leavinge [th]e resons of law & p[re]sidents for oth[er]s to giue yo[u]r lo[rdshi]ps satisfac[i]on that this libtie is established and confirmed by the whole state, the Kinge the lor[d]s Spirituall and temporall and Comons by seu[er]all acts of Parliam[en]t, The Authoritie whereof is soe greate that [i]t can receive noe answer, saue by interp[re]tation or repeale by future statuts, And those that I shall mynde yo[u]r lo[rdshi]ps of are {} direct to [th]e poynt that they can beare noe other explanation at all and suer I ame they are still in force, The first of them is [th]e grande Chart[e]r of the lib[e]rties of England first granted in the seauententh yere of Kinge John. and renewed in the 9th yere of Kinge Henry [th]e third, & since confirmed by Parliam[en]t aboue thirty tymes, The words are thus Cha: 29 Nullus liber homo Capia{} vel ymprisonetur aut diseisetur de libero {} suo vel libertatibus vel liberis Consuet{}bus suis aut vtlagetur aut exvletur aut alquo mo{} destruat nec super eum ibimus nec super eum {de}mittimus nisi p[er] legale Iudicium

parium

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pariu[m] suoru[m] vel per legate Iudicium legem terre Their words nullus liber homo etc are exp[re]sse enough, yet it is remarkable that Matheue Paris an author of speciall credit doth obserue fo: 432. That [th]e Chart[e]r of 9^o H. 3. was [th]e very same as that of the 17th of Kinge Iohn. in nullo dissimiles are his words & that of Kinge Iohn he setteth downe verbatim fo: 342. and there the words are directly *Nec eum in carcerem mittimus*, and such a corrupc[i]on as is now in the print might easilie happen twixt 9. H. 3. & 28 when this Charter was first exemplified but certainly there is sufficient left in that w[hi]ch is extant to decide this question for the words are that no freeman shalbe taken or ymprisoned but by the

lawfull Iudgem[en]t of his peeres (w[hi]ch is his Iury Peeres) for peeres ordinary Iuro[u]rs for others whoe are their Peeres) or by the law of the land w[hi]ch words lawe of the land must of necessitie be in vnderstood in this notion to be by due p[ro]ces of the lawe and not the lawe of the land gen[er]ally other wise it would comp[re]hend bondmen (whome wee call villaines) who are excluded by the word liber for [th]e gen[er]all lawe of the land doth allowe their Lords to ymprison them at their plesuer w[i]thout cause wherin only they differ from the Freemen in respect of their [per]sons who cannot be ymprisoned w[i]thout a cause, And [tha]t this is the true vnderstandinge of these word[es]p[er] legem terre will more plainly apere by div[er]s other statuts that I shall vse w[hi]ch doe expound [th]e same accordingly, And though these words of this grand Ch[a]r[t]e[r] be spoken in the third p[er]son yet they are not to be vnderstood of suyts betwene p[ar]tie and p[ar]tie at least not of them alone, but even of the Kings suyts against his subiects, as will appere by [th]e occasion of the gettinge of that Charter w[hi]ch was by reson of [th]e differences betwixt those Kings & their people and therefore p[ro]p[er]ly to be applyed to their power over them, and not to ordinary question betwixt subiect and subiect 2ly the word[es] *per legale Iudiciu[m] parum suorum*, ymediately p[ro]ceedinge the other of *per legem terre* are ment of the tryall at [th]e Kings suyte and not of [th]e p[ro]secuc[i]on of a subiect And therefore [i]f a peere of [th]e Realme be arraigned at [th]e suyte of [th]e Kinge vppon an Indictment of Murder he shalbe tryed by his peeres [tha]t is Nobles but if he be appealed of Murther by a subiect his tryall shalbe by an ordinary Iury of 12 freehold[er]s as appereth in -10 -. E. 4. 6. .33. H. {-}.8. Brooks tytls Triall .142- Stamford pleas of [th]e Crowne lib: 3 Cap. 1-fol 152 and {-} .10. E.4. It is sayd such is the meaninge of

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Magna Carta, by the same reson therefore as *per iudicium periu[m] suoru[m]* extends to the Kinges suits soe shall these word[es] *per legem terre* and in 8 . E.2 . rot Parliaments membrano 7. there is a petic[i]on that a writ vnder the privie seale went to the Gardians of the greate seale to cause lands to be seised into the Kings hands, by force of w[hi]ch their went a writ sent of the Chancery to the Escheato[u]r to seise against the forme of the grand Chart[e]r that the Kinge nor his minist[er]s shall out noe man of his Freehold w[i]thout resonable Iudgem[en]t and [th]e p[ar]tie was restored to his land, w[hi]ch sheweth {the} statute did extend to [th]e Kinge, there was no invation vppon this p[er]sonall libtie vntill the tyme of Kinge Edw: . 3 . w[hi]ch was oft sooner resented by [th]e subiect for in 5 . . E. 3- Cap: 9 It is ordeined in their words, It is enacted that no man from thence forth shalbe attached by any accusation nor foreiudged of lyfe or lymbe, nor, his lands tenem[en]ts goods or chattels seised into the Kings hands against the forme of the greate Charter and the law of the land 25 . E . 3 . Cap . 4 is more full and doth expound the words of the grand Charter, And it is thus wheras it is conteyned in the greate Chart[e]r of [th]e Franchises of England, that none shalbe ymprisoned or put out of his Freehold nor of his Franchise nor freecustome, vnlesse [i]t be by the lawe of the land, It is accorded assented and established that from henceforth none shalbe taken by petic[i]on or suggestion made to o[u]r lord [th]e Kinge or to his Councell vnlesse it be by Indictm[en]t or presentm[en]t of his good and lawfull people of the same neigbourhoode where such dedes be done in due manner or by p[ro]ces made by writ originall at the Comon lawe, nor that none be out of their Franchises nor his Freeholds vnlesse he be duly brought in answeere and foreiudged of [th]e same by the Course of the lawe and if any thinge be done against the same it shalbe redressed & holden for none /

But of this statute I obserue that what in Magna Carta and the p[re]amble of this statute is termed by the lawe of the land is in [th]e body of this act expounded to be by p[ro]ces made by writt originall at the Comon lawe w[hi]ch is a playne Interpretation of [th]e word (lawe of [th]e land) in [th]e grand Charter And I note this lawe was made vpon the Comittm[en]t of diu[er]s to the tower noe man yet

knoweth

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for what , 28 . E . 3 . Cap . 3 is yet more direct this lib[er]tie beinge followed w[ith] freshe suite by [th]e subiects, where [th]e words are not many but very full & significant [tha]t noe man of what estate or Condi[i]on that he be shall be put out of his lands nor tenem[en]ts nor taken nor imprisoned, nor disinherited nor put to death he w[ith]out he be put to answere by due p[ro]ces of [th]e lawe here yo[u]r lo[rds]hipps see [th]e vsuall words of [th]e lawe of [th]e land are rendred by due p[ro]ces of [th]e lawe

. 39 . E.3 . Rot Parliam[en]t numb[er] 9^o amongst the petic[i]ons of [th]e Comons one of them beinge into Englishe out of frenche, it is thus, first That [th]e greate Ch[ar]t[er] & [th]e Ch[ar]t[er] of [th]e Forrest & [th]e other statuts made in his tyme, and [th]e tyme of his p[ro]genitors, for [th]e p[ro]fitt of hym & his Cominalltie be well & firmly kept & put in due execuc[i]on w[ith]out puttinge disturbance or makinge arrest contrary to them by speciall Comand or other manner /

The answere to [th]e petic[i]on w[hi]ch makes it an act of Parliam[en]t, is, o[u]r lord [th]e Kinge, by [th]e assent of [th]e prelates dukes Earles Barrons & [th]e Cominalltie hath ordeyned and established that [th]e said Ch[ar]t[er]s & statuts be held & put in execuc[i]on accordinge to [th]e said petic[i]on w[hi]ch is that no arrest should be made contrary to [th]e statuts by sepciall Comand

This Concludes [th]e question & is of as great force as [i]f it were printed, for [th]e p[ar]liam[en]t Roll is [th]e true warrant of an act, and many are omitted out of [th]e booke that are extant

36 . E . 3 . Rot Parl[iamen]t No the 20 explaneth it further for their [th]e petic[i]on is {It[e]m} as it is Contained in [th]e Grand Charter & other statuts [tha]t noe man be taken or ymprisoned by speciall Comand w[ith]out indictm[en]t or other due p[ro]cesse to be made by [th]e lawe, and often tymes it hath bin, and is yet, that many are hindred taken & ymprisoned w[ith]out Indictm[en]t or other p[ro]ces made by [th]e lawe vpon them, as well of thinges] done out of [th]e forrest of [th]e Kinge as for other things, That it would please o[u]r said lord to Comand those to be deliu[er]ed w[hi]ch are soe taken by sepciall Comand against [th]e forme of [th]e greate Charters & statuts aforesaid The answere is

The Kinge is plesed that if any man fynde hymselfe greued [tha]t he come & make his Compl[ain]t & right shalbe done vnto hym 37 .E - 3 - Cap. 18 agreeth in substance when it saith though [tha]t it be conteyned in [th]e greate Ch[ar]t[er] [tha]t no man be taken or ymprisoned or put out of his freehold w[ith]out p[ro]ces of [th]e lawe Neu[er]thelesse divers people make suggestions to [th]e Kinge hymselfe as well for mallice as other wise, whereof [th]e Kinge is often greived, and divers of [th]e Realme put in damage against [th]e forme of [th]e said Charter, Wherefore it is ordeyned that all they

w[hi]ch

[2v]

W[hi]ch make suggestions shalbe sent w[i]th [th]e said suggestions before [th]e Chauncellor Treasurer and his graund Councell, And that they their fynde suertie to pursue their Suggestions, and incurr [th]e same payne [tha]t [th]e other should haue had if he were attainted, in case that his suggestions be found evill, And [i]f then p[ro]cesse of the lawe be made ag[ains]t hym w[i]thout beinge taken and ymprisoned against [th]e forme of [th]e said Charter and other statuts here [th]e law of [th]e land in [th]e grande Ch[a]r[t]e[r] is explained to be w[it]hout p[ro]ces of [th]e lawe 42 . E . 3 Cap.3. At [th]e request of the Comons by their petic[i]ons put forth in this p[ar]liam[en]t to eschew mischeefe and damage done to diuers of his Comons by falce accusers W[hi]ch often tymes haue made their accusations more for Revenge and singuler benefitt then for the p[ro]ffitt of [th]e Kinge or of his people w[hi]ch accuseth p[er]sons some haue bene taken & sometymes caused to come before the Kings Councell by writt & otherwise vpon greivous payne against [th]e law It is assented & accordid for [th]e good gou[er]m[en]t of [th]e Comons [tha]t no man be put to answere w[it]hout p[re]sentm[en]t before iustics in matt[e]r of Record or by due p[ro]ces & writ originall accordinge to [th]e ould lawe of [th]e land and if any thinge from henceforth be done to [th]e Contrary, it shalbe voyde in law and held for error But this is bett[e]r in [th]e p[ar]liam[en]t Roll where [th]e petic[i]on and answere w[hi]ch makes [th]e act are sett downe at Large 42 . E . 3. Rot Parliam[en]t No. .12 .

The petic[i]on

It[e]m becaus many of yo[u]r Comons be hurt & distroyed by falce accusors, who make their accusations more for Revenge & p[ar]ticuler gaine, then for [th]e p[ro]ffitt of [th]e Kinge and^{of} his people And those that are accused by them some haue byn taken and others haue bin made to come before [th]e Kings Councell by Writt or other Comandem[en]t of [th]e Kinge vpon greivous paynes contrary to [th]e lawe, That it would please o[u]r lord [th]e Kinge and his good Councell for [th]e uise gou[er]ment of his people to ordeyne that if hereafter any accuser propose any matter for [th]e p[ro]ffitt of [th]e Kinge, that the same matt[e]r be sent to the iustices of [th]e one benche or of [th]e other, or the Assizes to be enquired & determined accordinge to [th]e lawe And if it conc[er]ne [th]e accuser or [th]e p[ar]tie that he take his suyte at [th]e Comon lawe And [tha]t noe man be put to answere w[it]hout p[re]sentm[en]t before iustices or of matt[e]r of Record or by due p[ro]ces & originall writt Accordinge to [th]e Auncient law of [th]e land, And if any henceforward be done to [th]e Contrary that it is voyd in law & held for error their by due p[ro]cesse & originall writt accordinge to [th]e Auncient lawe of [th]e land is ment [th]e same thinge as *p[er] legem terre* in

magna

[3r]

Carta And [th]e abuse was that they were put to answere by [th]e Comandem[en]t of [th]e Kinge

The King[es] answere

Because this Article is an article of the graund Charter the Kinge will that this be done as [th]e petic[i]on doth demand

By this apperth that *per legem terre* in magna Charta is ment by due p[ro]ces of [th]e lawe

Thus yo[u]r lo[rdshi]pps haue heard acts of p[ar]liam[en]t in [th]e poynt } But the statute of Westm[inste]r 1 Chap: 15 is vrged to disprove this p[er]nt opinion where it is expressly said that a man is not replevisable who is Comitted by [th]e Comandm[en]t of [th]e Kinge therefore [th]e Comandm[en]t of [th]e Kinge is w[i]thout any cause shewed it sufficient to Comitt a man to prison, And because [th]e strength of [th]e Argum[en]t may appere & [th]e answe be [th]e bett[er] vnderstood I shall reade [th]e Words of [th]e statuts w[hi]ch are thus, And forasmuch as Sheriffs and others w[hi]ch haue taken & kept in prison persons detected of felony and often tymes haue let out by replevie, such as were not replevisable and haue kept in prison such as were replevisable, because they would gayne of [th]e one p[ar]tie and greive [th]e other

And forasmuch as before this tyme [i]t was not certenly determined what p[er]sons were replevisable & what not, but only those that were taken for [th]e death of a man or by Comandm[en]t of [th]e Kinge or of his Iustices or for [th]e forrest It is p[ro]vided & by [th]e Kinge Comanded [tha]t such prison[er]s as before were out lawed, And they w[hi]ch haue abiured [th]e Realme provers, and such as be taken w[i]th [th]e manner & those w[hi]ch haue broken [th]e King[es] prison, Theeues openly defamed & Knowne & such as be appeled by provers, soe as [th]e provers be livinge if they be not of good name, and such as be taken for burninge of houses feloniously done, of or for money, or for Counterfeitinge [th]e Kings seale or persons excommunicate taken at [th]e request of [th]e Bishopp or for manifest offences or for treason, touchinge [th]e Kinge hymselfe shalbe in noe wise replevisable by [th]e Comon writt or w[ith]out writt, But such as be indicted of larceny by inquest taken before sheriffe or Bayliffs by their office or of light suspicion or for pettye larceny [tha]t amounteth not to aboue [th]e value of xij d If they were not guyltie of some other larceny aforetyme or guyltie of [th]e receipt of felons or of Comandm[en]t ^{or} of force or aide in felony done or guyltie of some other trespas for w[hi]ch one ought not to lose life or member, and a man appealed by a prover {-} after [th]e death of [th]e prover if he be no Comon theefe or defamed shall from henceforth be let out by sufficient suerty whereof [th]e sheriffe wilbe answerable, and that w[i]thout givinge ought of their good[es] And if [th]e sheriffe or any other lett any goe at large

by suertye

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Suertie that is not replevisable [i]f he be Sheriffe Constable or other Bayliffe of Fee w[hi]ch hath keepinge of prisons & thereof be attainted he shall lose his fee & office foreu[er] & if [th]e vndershirife Constable or bayliffe of such as haue fee for keepinge of prisons doe it contrary to [th]e will of his lord or any other bayliffe beinge not of fee, They shall haue three Yeeres ymprisonm[en]t and make a fyne at [th]e King[es] lesuer And if any w[ith]ould prisoners replevisable after that they haue offered sufficient suerties, he shall pay a greivous americiament to [th]e Kinge, and if he take any reward for [th]e deliu[er]ance of such he shall pay double to [th]e prisoner And alsoe shalbe in [th]e great m[er]cy of [th]e Kinge

The answeare

It must be acknowledged [tha]t a man taken by [th]e Comand[men]t of [th]e Kinge is not replevisable soe are the expresse words of this statute, But this maketh nothinge against [th]e declarac[i]on of [th]e Comons, for they say not [tha]t [th]e sheriffe may replevie such a man by suerties {scilt} manucaptor, But that he is baylable by [th]e Kings Courts of iustice, for

[th]e bett[er] app[re]hendinge whereof it is to be Knowne [tha]t their is a difference betwene replevisa^{ble} w[hi]ch is alwayes by [th]e sheriffe vpon pledges or suerties giuen & baylable w[hi]ch is by Courte of Record where [th]e prisoner is deliu[e]red to his bayle, and they are his gaolers and may ymprison hym and shall suffer for hym body for body as appereth 33^o et 36 E.3. in [th]e tytle of Maineprise pl: 12 . 13. where [th]e difference betwene bayle and maynprise is expressly taken And if [th]e words of [th]e statute themselues be observed it will appere playnely [tha]t it extends to [th]e Sheriffe & other inferior officers & doth not bynde [th]e hand[es] of [th]e Iudges The preamble w[hi]ch is [th]e Key [tha]t opens [th]e entrance into [th]e meaninge of [th]e makers of [th]e lawe, is forasmuch as Sheriffs & others w[hi]ch haue taken & kept in prisons p[er]sons detected of felony, out of these words I obserue, [tha]t it nominates [th]e Sheriff{e} and then if [th]e iustics should be included they may be Comprehended vnder the gen[er]all word other w[hi]ch doth not vse to extend to those of an higher Ranke but to inferiours, for [th]e best (by all Course) is first to be named, And therefore if a man bringe a writt of Customes and services, and names rents & other things the gen[er]all shall not include homage w[hi]ch is a p[er]sonall service and of an higher nature, but it shall extend to ordinary Annuall services .31. E .1. droit 67 . see [th]e statute of 13 Eliz: Cap. 10. w[hi]ch beginneth w[i]th Colleges deanes & Chapters Persons vickers & Conculds w[i]th these word & others hauinge spirituall p[ro]motions shall not Comprehend Bishoppes [tha]t are of an higher degree as

apperes

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In [th]e Arch b[isho]pp of Canterburies Case Reported by S[ir] Edw: Cooke lib: 2 fo: 46. 6. And thus much is explaind in this very statute towards the end when it doth enumerate those Word{s} meant by [th]e word (other) namely vndersheriffe Constables & Bayliffs againe [th]e words are Sheriffs & others, w[hi]ch haue taken & kept in prison, Nowe eu[e]ry man knoweth, Iudges doe neither arrest nor keepe men in prison That is office of Sheriffs and other inferior minist[er]s, Therefore this statute meant such only and not iudges, the words are further that they let out by replevin such as were not replevisable this is [th]e p[ro]p[er] language for a Sheriffe, naye more expresse afterwards in the body of the statute, that such as are there menc[i]oned shalbe in no wise replevisable by [th]e Comon writt w[hi]ch is de *homine replegiando*. and is directed to [th]e Sheriffs nor w[i]thout writt w[hi]ch is by [th]e Sheriffs ex officio, but [tha]t w[hi]ch receives noe answere is this that the Comand of the iustices (whoe derive their authoritie from [th]e Crowne) is there equalled as to this purpose w[i]th the Comand of the Kinge and therefore by all resonable Construction it must needes relate to officers that are subordinate to both, as Sheriff[es] vndershiriff[es] baylifs Constables & the like And it were a harshe exposition to say that the iustices might not discharge there owne Comand and yet that reson would conclude as much, and that this was ment of [th]e Sheriffs & other minist[er]s of Iustice appereth by [th]e recytall of 27 . E . 1 . Cap. 3. and like wise by fleta a manuscrip{t} called soe because the author laye in the Fleete when he made the booke, for the lib: 2 Cap: 52 in his Chapter of retornes and the veices of [th]e hundred Courts in [th]e Cuntry setteth downe the Articles of the Charges, that are there to be enquired of amongst w[hi]ch one of them is de replegiabilibus iniuste vetentis et irreplegiabilibus dimissis, w[hi]ch cannot be ment of not baylinge by [th]e iustices for what haue these inferiour Courts in [th]e Cuntry to doe w[ith] [th]e acts of [th]e iustices, And to make it more playne he setteth downe in this Chappill that concernes Sheriffs onely [th]e

very statute of westm[inste]r 1 . Cap . 15 . w[hi]ch he translates verbatim, out of Frenche into lattine, saue that the Recordes taken by [th]e Comand of [th]e Iustices thus, *per Iudicum Iusticiarioru[m]* and his p[re]face to [th]e statute playnely sheweth that he vnderstood it of Replevine by [th]e Sheriffs for he saith qui de beat p[er] plegios dimitti qui non declarat hoc statutu[m] et per plegios is before the Sheriffe, but for direct authoritie it is [th]e opinion of Newton the Cheife Iustice in 22 H. 6. 46. where his words are these It cannot be intended that the Sheriffe did suffer hym to goe at large by manuprise for where one is taken by [th]e writt of [th]e Kinge or by [th]e Comandem[en]t of [th]e Kinge he is irreplevisable, But in such cases his freinds may come to [th]e iustices for hym [i]f he be arrested and purchase

a sup[er]sediās

[5r]

Sup[er]sediās : This Iudge Concludes [tha]t [th]e Sheriffe Cannot deliu[er] hym that is taken by [th]e Comandem[en]t of [th]e Kinge for that he is irreplevisable w[hi]ch is the very word of the statute, but saith he his freinds may come to [th]e iustices and purchase a sup[er]sediās soe he declares the very question that the Sheriffe had noe power but that the iustices had power to deliu[e]r hym that is Comitted by [th]e Kings Comand And both [th]e Auncient & modern practice manifests as much for he that is taken for the death of a man or for the forrest is not replevisable by [th]e Sheriffe & yet they are ordinarily bayled by [th]^e iustices And where by the Kings writt directed to [th]e Sheriffs in [th]e tyme of Edw: 1 & E . 2 . A As apperes in [th]e close rowles w[hi]ch could not be done if they were not baylable And it is eu[e]ry daies experience [tha]t [th]e iustices of the Kings benche doe bayle for murder and for offences done in the forrest w[hi]ch they could not doe if [th]e word irreplevisable in NO. 1. were ment of [th]e iustices as well as [th]e Sheriffs for the authorities that haue bene offered doe prove [th]e Contrary they are in number three

The first is 21 E . 1 . rot 2. in {suor} w[hi]ch alsoe is in [th]e booke Pleas in Parliam[en]t at [th]e tower fol. 44. it is not an act of p[ar]liam[en]t but a resoluc[i]on in p[ar]liam[en]t vppon an acc[i]on there brought w[hi]ch was usuall t̄ in those tymes, And [th]e case is that Stephen Rabaz [th]e Sheriffe of [th]e Countie of Lei[ce]st[er] and Warwick was questioned for that he had let at large by suerty as amongst others one Will[ia]m the sonne of Walter le Persone against [th]e will and Comand of [th]e Kinge when as the Kinge had Comanded hym by lett[er]s vnder his privie seale that he should doe no favor to any man that was Comitted by [th]e Comand of [th]e Earle of Warwick as [tha]t man was whervnto the Sheriffe answered [tha]t he did it at [th]e request of some of [th]e King[es] houshold vppon their lett[er]s and because the Sheriffe did acknowledge [th]e receipt of [th]e King[es] l[ett]re whervppon he was Comitted to prison accordinge to [th]e forme of [th]e statute

To this I answere that the Sheriffe was iustly punished for [tha]t he is expressly {-} bounde by [th]e statute of . W . 1 . w[hi]ch was agreed from [th]e beginninge but this is noe p[ro]ofe That [th]e Iudges had not power to bayle this man

The next Authoritie is 33 . H . 6 . in [th]e Courte of Comon pleas fol 28 . 6 . 29 . where Robt Poygnes Esq[uir]e was brought to [th]e barr vppon a capias & it was returned [tha]t he was Comitted p[er] duos de Concillio I beleue it is misprinted for duos id est duos de Concilio w[hi]ch is strongest against What I mayneteyne *pro diuersis Causis regem {tangenti[us]}* And he made an att[e]rny there in an acc[i]on whence is inferred [tha]t [th]e returne was good & [th]e p[ar]tie Could not be deliu[e]red

[5v]

[*Left margin:*To] This [th]e answe[r]e is playne first noe opinion is deliu[er]ed in that booke one way or other vppon [th]e returne, neither is their any testimony whether he was deliu[er]ed or bayled or not 2ly it apperes expressly [tha]t he was brought thither to be Charged in an acc[i]on of debt, at an other mans suyte and no desye of his owne to be deliu[er]ed or bayled, And then if he were remanded it is noe way materiall to [th]e question in hand,

But [tha]t w[hi]ch is most relied vppon is [th]e opinion of Stamford in his booke of [th]e p[le]es of [th]e Crowne lib: 2 . Cap . 18 . fo . 72 73 in his Chapter of Maniprise where he reciteth the statute of W . 1 . Cap. 15 And then saith thus by this statute it apperes that in 4 cases at [th]e Comon lawe a man was Nø not replevisable to witt those that were taken for the death of a man, by [th]e Comand[men]t of [th]e Kinge or of his Iustices or for the forrest, Thus farr he is most right then he goeth on & saith as to [th]e Comand of [th]e Kinge it is vnderstood of [th]e Comand by his owne mouthe or his Councell w[hi]ch is incorporated vnto hym & speake w[i]th his mouth, or otherwise eu[er]y writt of Capias to take a man w[hi]ch is [th]e Kings Comand would be as much And as to the C{-}omand of [th]e Iustices, that is ment their absolute Comand[men]t^t for if it be their ordinary Comand[men]t he is replevisable by [th]e Sherife if it be not in some of [th]e Cases p[ro]hibted by [th]e statute

The answe[r]e that I giue vnto this is That Stamford hath said nothinge whether a man may be Comitted w[ith]hout cause by [th]e Kings Comand or w[ith]hout whether the Iudges ought not to bayle hym in such a case but only [tha]t such an on is not replevisab{le} W[hi]ch is agreed for [i]t belongs to [th]e Sheriffe, And because no man should thinke he ment any such thinge he concludes his Whole sentence touchinge the Comand of [th]e Kinge and the Iustices That one Comitted by [th]e Iustices ordinary Comand is replevisable by [th]e Sheriffe soe either he ment all by [th]e Sheriffe or least it apperes not [tha]t he {-} ment [tha]t a man Comitted by [th]e Kinge or [th]e privie Councell w[hi]ch cause is not bayleable by [th]e Iustices, And then he hath given no opinion in this case, what he would haue said if he had bene asked the question cannot be knowne, neither doeth it appere by any thinge he hath said [tha]t he ment any such thinge as would be inferred out of hym And now my Lords I haue p[er]formed the Comand of [th]e Comons & as I conceive shall leaue there declarac[i]on of p[er]sonall libtie, an Aucnient & vndoubted truth fortified w[ith] {seau} acts of Parliam[en]t And not opposed by any statute or authoritie of Lawe whatsoeu[er]

[6r]

The obiecc[i]ons of [th]e King[es] Councell w[i]th [th]e answeres made therevnto at [th]e too other Conferrences touchinge the same matt[e]r

It was agreed by M[aste]r Att[or]ny Generall that [th]e seau[e] statut[es] vrged by [th]e Comons were in force and [tha]t Magna Charta did extend most properly to [th]e Kinge, but he said i that some of them are in gen[er]all word[es], and therefore Conclude nothinge but are to be expounded by [th]e p[re]sident[es] & others that be more p[ar]ticuler are applied to [th]e suggestion of [th]e subiect[es] and not to [th]e Kinges Comande simplie of it selfe

[*Left margin:* Answ[ere]] Herevnto was answer [tha]t [th]e Statut[es] were as direct as could be w[hi]ch appereth by [th]e Readinge of them, and that though some of them speake of suggestions of the subiect[es], yet others do not and they [tha]t doe are as effectuall for [tha]t they are in equall reson a Comittm[en]t by [th]e Comand of [th]e Kinge beinge of as greate force when it moveth by a suggestion from a subiect, as when [th]e Kinge taketh notice of [th]e cause hymselfe the rather for that Kinges seldome intermeddle w[i]th matt[er]s of this nature, but by informac[i]on from some of their people M[aste]r AHorny obiectes [tha]t *p[er] legem terre* in Magna Charta w[hi]ch is [th]e foundac[i]on of this question, Cannot be vnderstoode for p[ro]ces of the lawe & originall writt for that in all Criminall proceeding[es] noe originall writt is vsed at all but eu[er]y Constable may arrest either for felony or for breache of the peace or to p[re]vent a breach of the peace w[i]thout p[ro]ces or originall writt, and it were hard [th]e Kinge should not haue [th]e power of a Constable, And the Statute cited by [th]e Comons make p[ro]ces of [th]e lawe and writt originall to be all one

[*Left margin:* Answ[ere]] The answer of the Comons to this obiection was [tha]t they doe not intend originall writt[es] onely by [th]e lawe of [th]e Land but all other legall p[ro]ces w[hi]ch Compr[e]hend [th]e whole p[ro]ceeding[es] of Law vpon cause other then [th]e tryall by Iuris Iudiciu[m] pariu[m] vnto w[hi]ch is opposed, Thus much is imported ex vi termini out of the worde proces and by [th]e true ex acceptac[i]on thereof in the statut[es] haue beene vrged by [th]e Comons to maynteyne their declarac[i]on & most especially in [th]e statut[es] of 25. E. 3. cap 4 Where it appereth [tha]t a man ought to be brought in answer by the Course of the lawe havinge form[er] menc[i]on of p[ro]ces made by originall writ And in [th]e 28. E. 3. cap .3 by [th]e course of the lawe is rendred by due p[ro]cess of the lawe, And 36. E. 3. rot{ } p[ar]l[iamen]t{ } No 20 The petic[i]on of the Comons saith that no man ought to [*Left margin:* plowden 2 8 9. Cooke 5 111 2R. 3. 18 22 E. 31 .299 . 19] be ymprisoned by speciall Comand w[i]thout Indictm[en]t or other due p[ro]ces to be made by [th]e lawe 37 . E. 3. Cap. 18 Calleth [th]e same thinge p[ro]ces of the lawe, And 42.E. 3 Cap. 3 stileth it by due p[ro]ces & writt originall where [th]e { } must be taken for a

disiunctive

[6v]

Disiunctive, which Change is ordinary in exposic[i]on of Statut[es] and deed[es] to avoyde inconveniences to make it stand w[i]th [th]e rest & w[i]th reson, And it may be Collected that by [th]e lawe of [th]e land in Magna Charta by [th]e course of [th]e lawe in 25 . E. 3. by due proces of [th]e lawe in 28 . E. 3 other due p[ro]ces to be made by [th]e lawe in 36 { } E. 3. processe of [th]e lawe in 37. E. 3. and by due p[ro]ces & writt originall in 4 { }. E. 3, are one and [th]e same thinge the latt[e]r of these statut[es] referringe alwaies to the foundac[i]on and that all of them ymport any die & reguler p[ro]ceeding[es] of Lawe vppon a cause other then the tryall by Iury, And this appereth (Cooke 10 74 in the Case of [th]e Marshalsey and Cooke 11 9 9 , James Bagg[es] case where it is vnderstoode of givinge Iurisdiction by Charter of { }, w[hi]ch is [th]e grounde of a p[ro]ceedinge by course of Lawe And in Seldon[es] noates on Fortescue fo. 29 where it is expounded for lawe { } w[hi]ch is likewise a triall at law by [th]e oth[er] of [th]e p[ar]tie differinge from [tha]t by the Iury And it doth truly comp[re]hend those and all other Regular p[ro]ceeding[es] in lawe vppon cause, w[hi]ch giues authoritie to [th]e Constable to arrest vppon cause, And if this should not be the true expression of the word[es] *p[er] legem terre* The King[es] Councell were desired to declare there meaninge w[hi]ch they neu[er] offered to doe and yet certainly these word[es]

wer{e} not put into [th]e Statute w[i]thout some menc[i]on of Consequence And therevppon M[aste]r { } Ashley offered an interpretac[i]on of them thus namely, That there were diu[er]s lawes of this Realme As [th]e Comon law [th]e lawe of [th]e Chancery [th]e Ecclesiasticall law [th]e law of [th]e admiraltie or Marine law [th]e law of m[er]chant[es][th]e Marshall law & [th]e law of State And that these word[es] *p[er] legem terre* doe extend to all those lawes.

{ } This it was answered [tha]t wee reade of noe lawe of state and [tha]t none of these lawes can be ment there haue [th]e Comon lawe w[hi]ch is [th]e principall & gen[er]all lawe and is alwayes vnderstood by way of excellency when menc[i]on is of [th]e lawe of [th]e land gen[er]ally And that though eu[er]y of theis other lawes w[hi]ch are admitted into this Kingdome by Custome or act of p[ar]liam[en]t may iustly be called a law of [th]e land yet none of them can haue [tha]t p[re]seminence to be styled [th]e lawe of [th]e land, And no statute law booke or other authoritive printed or vnprinted could be shewed to proove That [th]e lawe of [th]e land beinge gen[er]ally menc[i]oned was eu[er] intended of any other lawe And yet even by those other lawes a man may not be Comitted w[i]thout a cause expressed But it standeth w[i]th [th]e Rule of other legall p[ro]positions that *p[er] legem terre* must be ment [th]e Comon lawe w[hi]ch is [th]e gen[er]all & vniu[er]sall lawe by w[hi]ch men hould their Inheritances & therefore if a man speake of Escuage, generally it is vnderstood as littleton observeth P 99 of [th]e uncerten Escuage, w[hi]ch is a knight[es] service tenure for [th]e defence of [th]e Relme by [th]e

bodye

[7r]

Bodye of the { } in tyme of warr, and not of the certen Escuage w[hi]ch giveth only a Contribuc[i]on in money & noe p[er]sonall service, And if a statute speake of [th]e King[es] Court[es] of Record it is ment only of [th]e fower at westm[inste]r by way of excellency Cooke. 6. 20. Gregories Case Soe [th]e Canonists by [th]e excomunica^{c[i]on} simplie spoken doe intend the greater excomunicac[i]on, And [th]e Emperour in his Institutions saith that [th]e Civell lawe beinge spoken gen[er]ally is ment of [th]e Civell lawe of Rome though [th]e lawe of eu[er]y Cittie is a Civell Lawe, As when a man names the poet the Grecians vnderstand homer the lattinist[es] Virgi^{ll} 2dly admitt that *p[er] legem terre* extend to all [th]e lawes of [th]e land yet a man must not be Comitted by any of them but by the due proceeding[es] that are exercised by those lawes & vppon a cause declared Againe it was vrged [tha]t [th]e Kinge is not bounde to expresse a cause of ymprisonm[en]t because there may be in it matt[er]s of state not fit to be releaved for a tyme least [th]e Confederat[es] thervppon make meanes to escape the hand[es] of Iustice, And therefore [th]e Statut[es] cannot be intended to restreine all Comittm[en]t[es] vnlesse a cause be expressed for [tha]t it would be very inconvenient & dangerous to [th]e state to publishe [th]e cause at [th]e very first

Therevnto it was replied by [th]e Comons [tha]t all danger & inconvenience may be avoyded by declaringe a gen[er]al cause, as for treson suspicion of treson misprision of treson or felony w[i]thout specifying [th]e p[ar]ticuler w[hi]ch can giue no greater light to a Confederate then wilbe coniectured by [th]e very app[re]hention vppon the ymprisonm[en]t [i]f nothinge at all were expressed It was further alledged that there was a kinde of contradiction in [th]e position of [th]e Comons when they say [th]e partie Comitted w[i]thout

cause shewed ought to be deliu[er]ed or bayled Baylinge beinge a kinde of ymprisonm[en]t deliu[er]y a total freeinge

To this it was answered that it hath alwayes ben the discrec[i]on of [th]e Iudges to giue soe much respect to a Comittm[en]^t by [th]e Comand of [th]e Kinge or [th]e privie Councell w[hi]ch are eu[er] intended to be done on iust & waightie causes, that they will not p[re]sently sett hym free, but bayle hym to answeere what shalbe obiected against hym on his Ma[jies]ties behalfe, But if any other inferior officer comitt a man w[i]thout a cause shewed they doe instantly deliu[er] hym as havinge no cause to expect their plesuer soe [th]e deliu[er]y is ymployed to an ymprisonm[en]t by [th]e Comand of some meane minister of Iustice, Baylinge when it is done by [th]e Comand of the Kinge or his Councell It was urged by M[aste]r { } that baylinge is a grace & favor of a Courte of Iustice and that they may refuse to doe it, This was agreed to be true in diu[er]s cases As when [th]e cause appereth to be for felony or other Cryme expressed for that there is an other way to discharge them in

Convenient

[7v]

Tyme (and by their tryall (and yet in these cases the Constant practize hath bene aunciently and modernely to to bayle men / But where noe cause of ymprisonm[en]t ymprisoned is returned, but [th]e Comand of the Kinge there is no waye to deliu{er} such p[er]sons by tryall or otherwise but [tha]t of [th]e h[ab]eas Corpus, And [i]f they should be then remanded, they may be p[er]petually ymprisoned w[i]thout any remedie at all & Consequently a man that had Comitted no iffence might be in worse case then a greate offendor for [th]e latt[e]r should haue an ordinary tryall to discharge hym the other should neu[er] be deliu[er]ed

It was further saide that thouhg [th]e statute of W.1. Cap: 15 . as a statute of way of provic[i]on did extend onely to [th]e Sheriffe, yet [th]e recitall in [tha]t statute touchinge these 4 causes, wherin a man was not replevisable at Comon la{w} namely those [tha]t were Comitted for the death of a man by [th]e Comand of [th]e Kinge or [th]e Iustices or for [th]e forrest, did declare [th]e iustic[es] could not bayle such an one, And [tha]t replevisable & baylable were sinomina & all one And [th]at Stamford a Iudge of greate authoritie doth expounde it accordingly And [tha]t neither [th]e Statute nor he saie replevisable by [th]e Sheriffe but gen[er]ally w[i]thout restraint, And [tha]t if [th]e Cheife Iustice Comitt[es] a man he is not to be enlarged by an other Courte as appereth in [th]e Regist[er]

{ } it was answered . 1 that [th]e recitall & body of [th]e Statute relate only to [th]e Sheriffe as appereth by [th]e very word[es] 2 that replevisable is not restrained to [th]e Sheriffe for [tha]t [th]e word[es] ymport[es] no { } that a man Comitted by [th]e Cheife iustice is baylable by [th]e Courte of King[es] benche 3 that Stamford meaneth all of [th]e Sheriff[es] or at least he hath not sufficiently expressed that he intended [th]e Iustices 4 it was deined [tha]t replevisable and baylable are [th]e same, for they differ in respect of [th]e place where they are vsed, bayle beinge in the King[es] Court[es] of Record Replevisable before [the]Sherriff[es], And they are of seu[er]all natures replevisable beinge a lettinge at large vppon suerties baylinge beinge when one { } in { } & [th]e bayle are his Gaolers & may ymprison hym & shall suffer boddy for body w[hi]ch is not true of replevinge by suerties And bayle differeth from mayneprise in this [tha]t mayneprise is an vndertakinge in a sum[m]e certain, baylinge to answeere the Condempnac[i]on in Civill Causes, & in

Criminall body for body And [th]e resons & authorities vsed in [th]e first conference were then renewed & noe exeptions taken to any haue [tha]t 22 H . 6 . it doth not appere [tha]t [th]e Comand of [th]e Kinge was by his mouth (w[hi]ch must be intended) or by his Councell w[hi]ch is all one as it is observed by Stamford for [th]e word[es]

are that

[8r]

that a man is not replevisable by [th]e Sheriffe whoe is Comitted by [th]e Kinge writt or Comandm[en]t of [th]e Kinge 21. E. 1 Rot{ } 2 { }, was cited by [th]e King[es] Councell But it was answered that it conc[er]ned [th]e Sherriffe of leicesterShire onely & not [th]e Iudges 33 H . 6. the King[es] attorny confessed was nothinge to [th]e purpose, And yet that booke hath bene vsually Cited by those that mayneteyne the Contrary to [th]e declarac[i]on of [th]e Comons, And therefore such sudden opinion that hath ben given ther vppon is not to be regarded, the foundac[i]on faylinge, And w[hi]ch can receaue noe answere, did not warrant what was inferred therin but that theis word[es] Sance disturbance mittre en arrest faire et lon com per speciale mandem[en]t ou en *auter maniere* must be vnderstood [tha]t [th]e Statut[es] should be put in execuc[i]on w[i]thout puttinge disturbance or Staye and not that they should be put in execuc[i]on w[i]thout puttinge disturbance or makinge arrest to [th]e Contrary by speciall Comandem[en]t or in other manner The Condie[i]on Comons did vtterly deny [th]e interp[re]tac[i]on given by [th]e King[es] Councell and to iustifie there owne did appeale to all men [tha]t vnderstood Frenche And vppon [th]e 7 Statut[es] did conclude that their declarac[i]on remayned an { } trueth, not controullled by any thinge said to [th]e Contrary

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