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For

Thomas Drummond Esq

with Mr Howley Compts

A LETTER,

on

&c. &c.

The Marquis of Normanby's Government in Ireland

1839.

A LETTER

TO

THE MARQUIS OF LANSDOWN,

STATING

SOME LEGAL OBJECTIONS

TO THE

LATE PROCEEDINGS IN THE HOUSE OF LORDS,

WITH REFERENCE TO

THE MARQUIS OF NORMANBY'S GOVERNMENT

IN IRELAND.

BY

A MEMBER OF THE IRISH BAR.

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A LETTER,

&c. &c.

My Lord,

The proceedings lately had in the House of Lords and the Committee of Inquiry now sitting, with reference to Lord Normanby's government in Ireland, appear to me to demand notice on grounds different from those on which they have been already eonsidered. In the debates that have taken place in both Houses of Parliament, their general merits have been most fully and ably discussed. They have been thoroughly examined as a political question, and the state of facts upon which it was sought to prove their necessity has been well shown to justify that policy "which has guided the executive of Ireland of late years." With this view of the subject it is not my present intention to deal, but there are some grounds of legal objection which do not appear to me to have been sufficiently put forward; to them alone I shall confine this letter to your Lordship. The pro-

position which I would endeavour to maintain, and which, in my judgment, if I have read the law rightly, is fully borne out by the authorities to which I mean to refer, is, that the late proceedings in the House of Lords, with reference to Lord Normanby's government in Ireland, are not only a violation of the privileges of the House of Commons, but contrary to the usage of Parliament and of positive enactments. And in the first place, it will be necessary to consider the nature of the proceedings in the Lords, their avowed object and character, to be inferred impliedly from the terms of the resolution which was come to, but more directly from the speeches, not alone of the noble Lord with whom they originated, but from those of his noble supporters, and from the course of inquiry entered on since the Committee has commenced its sittings. It cannot be considered other than a criminatory proceeding against a great public minister for a mal-administration of the duties committed to his care. It professes to inquire whether there are any grounds for censure or for blame in the conduct of the high nobleman who has been summoned before its tribunal, and it is more than implied, that in case the evidence may justify any ulterior proceeding, this inquisitorial Committee will either assume judicial functions, and proceed to censure and condemn, or call upon the Lords to pronounce judgment upon its suggestion and accusation.

Now, in the first place, it is contrary to the usage of Parliament that the House of Lords should be the initiative in such proceedings. In the earlier periods of the English government, the National Council, the common ancestor of our two houses of Legislature, was accustomed to inquire into the conduct of the different executive officers, and punish them for their offences. The king himself was not exempt from such inquiry. On such important occasions the prosecution, instead of being committed, as in the case of ordinary offences, to the management of an individual, was conducted by the Assembly, who acted both in the capacity of accusers and judges,—a practice ill calculated for securing a fair trial to the delinquent. Upon the establishment, however, of the two Houses of Parliament, it became a natural and obvious improvement, that as the power of trying offences was restricted to the House of Peers, the privilege of conducting the prosecution should belong to the House of Commons, that branch of the Legislative Assembly which had no share in the judicial department, but which was no less deeply concerned than the other to prevent the abuses of administration. "In this manner," says an eminent writer on the English Government, "the two characters of a judge and a prosecutor, which in the ordinary courts had been placed in different hands, by the custom of appointing deputies to officiate in the name of the Crown, came likewise to be separated

in the trial of those extraordinary crimes, where from the danger of arbitrary measures, an amendment of the ancient practice was especially required; and the supreme judiciary power being limited to the House of Peers, the right of impeachment was of course devolved upon the House of Commons."*

Since the time of Henry IV. it has been the proper duty and privilege of the House of Commons to accuse or to impeach, while the House of Lords has merely acted in its judicial capacity as the most high and supreme court of criminal jurisdiction. By the Statute of the 1 Hen. IV. c. 14, all appeals of misdemeanor in Parliament, at the prosecution of any private person, are wholly taken away; for the words are general, that no appeals be from henceforth made or in anywise pursued in Parliament in time to come.† And when the Earl of Bristol, in the time of Charles II., delivered in articles of high treason and other misdemeanors against the Earl of Clarendon, upon a solemn reference of the House of Lords to all the judges, it was unanimously resolved, and so reported, that both as to matters of misdemeanor, as well as those of high treason, the impeachment was against law and against the Statute of 1 Hen. IV. c. 14. "Appeals in the Statute and accusations by single

* Millar's Historical View of the English Government, vol. ii. p. 237.

† Hale on Jurisdiction of House of Lords.

persons, are one and the same thing, and this Statute reaches to all appeals, charges, accusations, or impeachment delivered in Parliament, where the person accused was to be put to his answer."* It is true that in the 15 Edw. III. c. 31, there was a judicature set up by Act of Parliament in the House of Lords for miscarriage of public ministers, "que soient oustes et punises par le judgement des peres et autres covenables y mises: et sur ce le roy ferra prononcier et faire execution sans delay selonc le judgement des peres de Parliament." But this jurisdiction was not of long continuance, for by the Parliament of 17 Edw. III. n. 23, that whole Parliament is at once repealed, "et perdu le nosme de statute come cel qu'il prejudicial et contraire as leges et usages de realme et as droits et prerogative du nostre seigneur le roy," and was never enacted again. But as to criminal proceedings upon an impeachment sent up to the Lords by the House of Commons, that was never esteemed within the Statute of Hen. IV. c. 14, and accordingly it was so declared by the judges in the case already referred to between the Earls of Bristol and Clarendon; the reason assigned by Hale being, because the accusation or impeachment of the House of Commons is in nature of the highest presentment or indictment by the grand inquest of the whole kingdom. But it is not alone by

* Sir Michael Foster in Lord Clarendon's case.—St. Tri. vol. vi. p. 318.

the Statute of 1 Hen. IV. that the Lords are restricted from exercising their criminal jurisdiction on the suggestion of any but the House of Commons, for the words of the Statutes 25, 28, and 42 Edw. III. are against putting men to answer upon suggestion without presentment. In the 16th chapter of Hale's Treatise on the Jurisdiction of the Lords, he says, " After the time of Henry IV. I find very little footsteps of proceedings in the Lords' House in cases criminal, but the people took the ordinary course of law, or if they resorted to Parliament they began in the House of Commons, and thus it was transmitted to the House of Lords, and it ended in a bill or an Act of Parliament."

In the Report from the Committee of the House of Commons appointed to inspect the Lords' journals in relation to the proceedings on the trial of Warren Hastings, a document drawn up with great ability, and showing much research, (by Edmund Burke,) it is stated, " As criminal proceedings, according to the forms of the civil and canon law, are neither many nor important in any court of this part of the kingdom, your Committee think it right to state the undisputed principle of the imperial law from the great writer Carpzovivus. He says, 'that a doubt has arisen whether evidence being once given in a trial or public prosecution, (*in processu inquisitorio,*) and the witnesses examined, it may be allowed to form other and new

articles, and to produce new witnesses, &c.' Your Committee must here observe, that the *processus inquisitorius* is that proceeding which is carried on in the name of the judge acting *ex officio*, from the duty of his office, which is called the *nobile officium judicis*. For the judge under the imperial law possessed both these powers, the inquisitorial and the judicial, *which in the high Court of Parliament are more aptly divided and exercised by the different Houses.*"

Having thus shortly stated the law as applicable to the criminal jurisdiction of the Lords, let us see whether in the late proceedings, in appointing a Committee to inquire into Lord Normanby's administration, they have not alone departed from the usages of Parliament, but from that practice and those principles which belong to the administration of the criminal law, while they have acted in contravention of positive enactments. An accusation is preferred by a single peer against a high public officer, arraigning him with a mal-administration of the duties committed to his care, charging him not only with an injudicious conduct of the government, but with a direct infringement of the law. Upon this suggestion the House of Lords appoints a Committee to try and inquire into the truth of the charges, and to collect such further evidence as may substantiate acts of misgovernment or delinquency. This Committee being appointed with the further view, as expressed upon the part of those

who supported the noble Lord who moved it, and as declared by the noble Lord himself, to found some ulterior measure against that high personage, in case the evidence adduced should justify the censure which had been by anticipation pronounced against him. Is not then this course in direct violation of the law as declared by the judges in the case of the Earl of Bristol and Lord Clarendon, founded on the Statute of 1 Hen., which takes away all appeals in Parliament in treason or misdemeanors at the prosecution of private persons, and to which rule, as so laid down, impeachment by the Commons is the only exception? Is it not in violation of the Statutes of 25, 28, and 42 Edw. III., the words of which, according to the authority of Hale, are against putting men to answer on suggestions without presentment; and is it not against the opinion of Parliament itself, declared in Rol. of Parl. 15 Edw. III. already referred to, where a judicature was set up in the Lords by Act of Parliament against the miscarriage of ministers; and the House of Lords thus requiring an Act of the Legislature to confer that jurisdiction, is it not to be implied that it had it not otherwise. That Act being repealed by the 17 Edw. III. the powers thus created are wholly at an end.

Independent of the authorities already stated, there is this further objection to the mode of proceeding adopted by the Lords, that it contradicts a leading principle of our criminal justice, which is,

that those who accuse shall not judge. The eloquent and intrepid advocate of the unfortunate Louis commenced his defence of that ill-fated monarch with these words: "Je cherche les juges mais je ne trouve que des accusateurs." Has the occasion for this language entirely passed away, or shall we not rather find a very fitting case for its application in a tribunal which first condemns, then inquires, contradicting in each branch of its proceeding both the law and the facts.

I will now shortly advert to what has been urged against the part taken by the House of Commons with reference to these proceedings in the House of Lords. In defence of their own privileges, setting aside altogether any political considerations, the Commons could not have remained silent. It is their proper privilege to impeach, to accuse, as it is that of the House of Lords to try and to judge. The House of Lords had sought to draw to itself that right which since the reign of Henry IV. was solely exercised by the Commons. The mode by which that usurpation was acted on, was muffled up, it is true, in a guarded and specious phraseology, but still beneath the thin covering was to be seen the rapacious hand that was ready to snatch authority. The House of Commons was wise enough not to be deceived, and asserted with effect its own proper privilege.

The House of Lords, it is true, did not take that final step which would have, strictly speaking, justified the House of Commons in entering into

conflict with it on the subject of privilege. Although it proceeded to censure, yet it did not venture to do so in direct terms; but its condemnation was rather of an inferential character, and was more pointing to a future exercise of jurisdiction than to a present usurpation of authority. The only course then left for the Commons, who have invariably evinced a quick sensibility and a jealous resistance to any assumed jurisdiction by the House of Lords, was to move in advance just so far as the House of Lords had approached to that disputed boundary which lay between them, and to disaffirm, in terms sufficiently significant, but still forbearing, the resolution of the Lords. Thus while they saved their own right of preferring charges, or accounting for their not doing so, they gave a monitory intimation that they would not forget the course which their predecessors had taken in emergencies that were analogous; but that, as in the cases of Carr and Fitton, and Skinner and the East India Company,* they would deny the original jurisdiction of the Lords, without an impeachment by the Commons or the verdict of a jury. Mr. Hargrave, in his abridged report of the case of Fitton, says:—"The two cases of Fitton and Carr, which are the earliest instances to be met with of direct petitions of complaint to the Commons against the Lords for the excessive assumption of judicature by the latter, did not of themselves bring

* St. Tr. vol. vi. pp. 726, 768.

the two Houses into actual quarrel with each other; yet there passed enough from the Commons to show that they were nearly ripe for serious contest on that head; and that as Fitton's case had already provoked them to appoint a committee to consider of the exercise of jurisdiction by the Lords in all cases of the kind, and such committee was still existing, so very little additional matter was required to excite the Commons into direct hostility." Hume says, with reference to Skinner's case :— "Public business met with obstructions this session from a quarrel between the two Houses. Skinner, a rich merchant in London, having suffered some injuries from the East India Company, laid the matter by petition before the House of Lords, by whom he was relieved in costs and damages to the amount of five thousand pounds. The Commons voted that the Lords, in taking cognizance of the offence, originated without any appeal from inferior courts, had acted in a manner not agreeable to the laws of the land, and tending to deprive the subject of the right, ease, and benefit due to him by those laws; and that Skinner, in prosecuting his suit after this manner, had infringed the privileges of the Commons, for which offence they ordered him to be taken into custody. Some conferences ensued between the two Houses, when the Lords were tenacious of the right of judicature, and maintained that the method in which they exercised it was quite regular. The Commons rose into great

ferment, and went so far as to vote 'that whoever should be aiding or assisting in putting in execution the order or sentence of the House of Lords, in the case of Skinner against the East India Company, should be deemed a betrayer of the rights and liberties of the people of England, and an infringement of the privileges of the House of Commons.' They rightly judged that it would not be easy after this vote to find any one who would venture to incur their indignation. The proceedings of the Lords seem in this case to have been unusual, and without precedent."* From these cases and others, upon which, the limits I have laid down for myself do not permit me now to enter; I think it is pretty clear that the House of Commons on the late occasion, in noticing the proceedings in the Lords, did not altogether act without precedent, or from any gratuitous desire to enter into collision with the other branch of Parliament. I must, however, guard myself against any inference being drawn from the observations I have made larger than what I desire to maintain; the proposition for which I would contend being, that the House of Lords is not, either in criminal or in civil matters, a court of original jurisdiction, and that it must be moved in the former case either by indictment removed by *certiorari* into the House, or by an impeachment of the Com-

* Hume, Hist. Eng. ch. 65.

mons. It is perfectly true that the House of Lords in its legislative and political capacity has a right to enter upon any inquiry concerning public matters, with a view to legislative remedies in case such should appear necessary, or to address the Crown for the aid of the prerogative. It possesses also, a species of original jurisdiction on matters of privilege, and upon which ground alone may be explained those instances of an exercise of original authority which have in former times been relied on to justify a more enlarged jurisdiction than the law would entitle it to assume. Within this boundary I have stated its jurisdiction is confined, but when it erects itself into an original criminal tribunal, and enters upon an inquiry for the purpose of censuring or condemning either commoner or peer for matters not of privilege, it appears to me that in such case it appropriates to itself ground to which it can lay no just claim, and which has been at all times hotly contested with it by the Commons. I may here observe, that the fact of the person proceeded against being a member of the House of Peers does not appear to help out the jurisdiction. Sir Heneage Finch, the Solicitor-General, in the debate on Lord Clarendon's case, said that in case of misdemeanor the trial of Peers must proceed from the Commons. And Lord Shaftesbury in his speech on the proceedings in his own case in the King's Bench on an habeas corpus.*

* St. Trials, vol. vi. p. 124.

his Lordship having been committed by the House of Lords for a contempt, said "Mr. Attorney-General is pleased to say, I am a member of the House of Lords, and to lay weight on a member. It is very true I am one of them, and no man hath a greater reverence or esteem for the Lords than myself, but, my Lords, I hope my being a peer or a member of either house shall not lose my being an Englishman, or make me to have a less title to Magna Charta and the other laws of English liberty." In this case of Lord Shaftesbury it appeared indeed to be considered, that if it was not a question of privilege, and founded on a contempt committed in the face of the house, for so it was assumed, the commitment by the Lords could not be maintainable; the entire ground of the judgment in the King's Bench being that it was a commitment for contempt during the sitting of the house for a breach of privilege, and thus seeming to imply that if there was a prorogation the sentence of the Lords must be at an end. "The authority of Parliament is from the law, and as it is, it is circumscribed by law, so it may be extended, and if they do extend those legal bounds of authority, their acts are wrongful, and cannot be justified any more than the acts of private men."* I have thus, my Lord, endeavoured shortly to submit some authorities to show, that if the Committee of

* Lord Holt in 1 Salk. 505, and 2 Lord Raym. 1114.

Inquiry now sitting on the subject of Lord Normanby's Irish administration can be taken to be a criminal tribunal, receiving evidence to substantiate charges against a public minister, and that if, after the reception of that evidence, either the Committee itself, or the House of Lords upon its suggestion, shall proceed to censure or condemn, that it will be exercising a jurisdiction which neither the law nor the usages of Parliament will concede to it. While no profit can arise from such assumed authority, it may lead out the Commons to a conflict, from which, the history of the past will show that the House of Lords has nothing to expect, in which it cannot have a victory, and may perhaps sustain a defeat. For although, upon former occasions, such contests have ended in a kind of compromise,* or rather indeed in a retreat upon the part of the Lords, still it is neither wise nor safe to raise such strife, or to tempt a civil warfare in which even a victory cannot be a triumph.

The conclusion to be drawn from the history of these transactions is, that it should be the endeavour of both Houses, and of every member of each House of Parliament, to take care in their proceedings not to transgress those boundaries which the law and constitution have wisely allotted to them, or to interfere in those matters which, by

* Skinner's case, St. Trials, vol. vi. Sir John Barnurdiston's case, ibid.

the rules and practice in former ages are not within their jurisdiction.

"In the few attempts which were made by the House of Lords in the reign of Charles II. to extend the jurisdiction to causes not brought from the inferior courts, but originating with them, they were opposed by the House of Commons with such a weight of argument, so forcibly supported upon the principle of the constitution, that no further endeavours have, or I trust ever will be made. We see that whenever either House has from resentment or any other cause transgressed those bounds, and endeavoured to extend their own rights, or to usurp those which belong to another, confusion and disorder have immediately followed; and in every instance the Crown has been obliged to prorogue the Parliament in order to put an end to that disgraceful scene, which altercations between two branches of the legislature exhibit to the subjects of the empire."*

In the preceding observations I have confined myself altogether to a legal view of the proceedings in the Lords, and as I declared at the outset of this letter, I shall not pass beyond that limit; not indeed from any indifference to the great interests that are at issue, or to the distinguished nobleman whose administration has been so strongly assailed. Abler and more fitting hands have built up his

* Hatsell's Prec. vol. iii. p. 58.

praise, and have borne ample and convincing testimony to the value of his administration. If it had no other merit, and it is but a part of its good effects, it was a great step to have drawn the popular heart of Ireland towards the Government, and to have established a sympathy and confidence between the ruler and the people, a relation hitherto unknown in the public affections of that country. Nor is it from any want of materials that I have not entered on the office of vindication. They lie about me in abundance, and those who know me will not deny, that I had good opportunities for collecting them. Had I felt such an examination of the subject necessary, I could have justly said, "Atque illud in primis mihi lætandum jure esse video, quod in hac insolita mihi ex hoc loco ratione dicendi, causa talis oblata est, in quâ oratio nemini deesse potest. Dicendum est enim de Cn. Pompeii singulari eximiaque virtute; hujus autem orationis difficilius est exitum, quam principium invenire. Itaque non mihi tam copia, quam modus in dicendo querendus est."

Having thus circumscribed myself within certain limits, I have not opened topics which are far from being unimportant, and which occur to me to furnish additional constitutional objections to the proceedings which have been had. "The Commons are the general inquisitors of the sores and grievances of the kingdom,"* and if the Lords are

* Serjeant Crewe's speech on trial of the Lord Treasurer, Middlesex, 2 St. Tr. 1222.

permitted to combine that office with those original judicial functions which they appear disposed to assume, joining to both an executive character, an occasion may arise when the late precedent may be put forward to oust the Commons of their right of impeaching public delinquents. It may be, that at some future time, the House of Lords, differing from the Commons on great questions of policy, thinking that popular liberty had grown too strong, and desirous to wear down its strength by denying it that proper nutriment which it may from time to time stand in need of, some chief governor of a great section of the empire, one of their own body, instead of resting his power, as we have lately seen it, on the broad base of popular feeling, may place it again on the narrow pedestal of a small and anti-national party,—abusing his authority to oppress and degrade the many, to pamper and exalt the few,—if such an administration, although agreeable to the House of Lords, should be viewed with deep dissatisfaction by the Commons, the short process for the Lords to adopt in order to shelter the delinquent, would be, to enter the charges themselves, to express them feebly, inquire as to them loosely, and to judge favourably. They might thus stop the Commons in their advance to the bar, to demand severe but necessary justice. It may, indeed, be said that this is an extreme and improbable case; but public rights should not be committed to the chances of what may or may not

be. The perfection of our constitutional territory is, that there are no lines of uncertain or capricious division, nothing left for contest or dispute, each portion well fenced and guarded within its own proper distribution. Whatever tends to disturb that wise arrangement, the result of great wisdom, long experience, and well attested utility, should be looked to with a jealous care, and met, as in the olden time, with a strong and determined resistance.

I have the honour to be,

My Lord,

Your Lordship's very obedient Servant,

A Member of the Irish Bar.