

POWER OF LEGISLATIVE BODIES TO PUNISH FOR CONTEMPT

In 1924, the proceedings of the committee of the Senate of the United States appointed for the purpose of investigating the management of the Department of Justice by Attorney General Harry M. Daugherty were brought to a standstill by the refusal of his brother, Mally S. Daugherty, to appear before the committee and produce the books of a certain bank in Ohio of which he was president, which were believed to contain certain important information on the subject under investigation. When he was arrested by the sergeant-at-arms of the Senate for the purpose of compelling his attendance before the committee, the United States District Court for the Southern District of Ohio discharged him on *habeas corpus*,¹ and the desired information was never obtained. The case was appealed and is still pending before the Supreme Court of the United States. This incident raised a question of great interest and importance to the country as to how far legislative bodies can go in compelling the giving of testimony and the production of books and papers by unwilling witnesses. The question is not new. It has been before the Supreme Court in four outstanding cases² and has been passed on many times by state courts. But while the courts are in agreement on many phases of the subject, other very important phases of it remain to be determined. Upon the proper determination of these matters will to an extent depend the future effectiveness of our legislatures as law-making bodies and as agencies for keeping the public informed of the operations of their governments, state and national. It seems appropriate, therefore, that the whole subject

¹ *Ex parte Daugherty*, 299 Fed. 620 (D. C. 1924). When, in January, 1926, relator in this case was called before a federal grand jury in New York investigating alleged misconduct of the alien property custodian, he stated that he had given the same records involved in the Senate's inquiry to his brother, former Attorney-General Harry M. Daugherty, who "wanted to look over certain matters—mostly politics—and see where he stood," and that they had been burned.—*Boston Herald*, Jan. 23, 1926, p. 14, c. 2. See also editorial in the same paper, Jan. 29, 1926, p. 14, c. 3. See also *The New Republic*, March 31, 1926, pp. 164-167.

² *Anderson v. Dunn*, 6 Wheat. 204 (U. S. 1827); *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 661 (1897); *Marshall v. Gordon*, 243 U. S. 521 (1917).

should be examined with some degree of care in an effort to discover if possible the principles upon which legislatures and courts may safely proceed in such cases.

It will be found as the discussion proceeds that the power of legislatures to punish for contempt is closely bound up with the ancient privileges of such bodies and of their members, as it furnishes the means by which they are able to give effect to the privileges claimed. It will also be seen that the privileges of legislative bodies in this country and the means of making them effective are derived, not so much from any express delegation in our constitutions, state and national, as from the laws and customs of the English House of Commons transmitted through the colonial assemblies as a well-established legal tradition and adopted into our constitutions, mainly by implication, as an integral and inherent part of the "legislative power" which the fathers conferred upon our representative assemblies. Only by arriving at a clear understanding of what those words meant to them can we determine the extent of the powers conferred.

I. ARE ENGLISH PRECEDENTS OF VALUE IN THIS COUNTRY?

At the very outset it seems necessary to answer a question that at first blush seems too obvious to call for consideration, that is, whether the precedents of the House of Commons have any persuasive value for us in this country. As our common law was inherited from England and our legislative machinery and procedure were largely modeled on the British pattern, an affirmative answer would seem to follow as a matter of course. But serious doubt was raised as to the value of such precedents by the opinion of the United States Supreme Court in the celebrated case of *Kilbourn v. Thompson*.³ In that case, the court, speaking through Mr. Justice Miller, admitted that the power of the House of Commons to imprison for contempt of its authority had been fully sustained by the courts of Westminster Hall, but contended that such precedents were of no value to us for the reason that the House of Commons was a court as well as a legislative body, and

³ See note 2, *supra*.

that in punishing for contempt, it was exercising a judicial power that had come down from the days when the two houses sat as one body, the High Court of Parliament.⁴ In support of his thesis, Justice Miller gives extracts from the opinions in several English cases, stating that the House of Commons is a court, most of which seem to be based on a statement to that effect in Coke's Institutes,⁵ and then he draws the following conclusion:

"We are of the opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices."⁶

Thus, by taking the affirmative side of the much-controverted question as to whether or not the House of Commons is a court, Mr. Justice Miller disposed in summary fashion of the great mass

* Justice Miller states his position as follows:

"While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament. . . . Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England. It is upon this idea that the Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for contempt of these privileges and authority that the power rests."
—103 U. S. 184.

* Thus from the case of *Burdett v. Abbott*, 14 East 1 (1811), is taken the following quotation from the opinion by Mr. Justice Bailey:

"In an early authority upon the subject, in Lord Coke, 4 Inst. 23, it is expressly laid down that the House of Commons has not only a legislative character and authority, but it is also a court of judicature; and there are instances put there in which the power of committing to prison for contempts has been exercised by the House of Commons, and this, too, in cases of libel."—103 U. S. 184.

* 103 U. S. 189.

of English parliamentary precedents and court decisions, which for the most part were unfavorable to the views expressed by him. But he is not consistent in this particular, for a little further on in his opinion he makes liberal use of English court decisions when they suit his purpose, and, in the following quotation which he reproduces from the opinion of Mr. Justice Coleridge in *Stockdale v. Hansard*,⁷ he completely answers his own dictum that the House of Commons is a court:

"The House is not a court of law at all in the sense in which that term can alone be properly applied here. Neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; powers of inquiry and accusation it has, but it decides nothing judicially, except where it itself is a party in the case of contempts."⁸

As to whether the House of Commons is in law a court, is perhaps very difficult to say. The House itself has taken both sides of the proposition. Thus the English constitutional historian, Henry Hallam, calls attention to an entry on the rolls of Parliament in the time of Henry IV to the effect that the judicial powers of Parliament did not belong to the House of Commons,⁹ and Sir Thomas Erskine May, the great authority on parliamentary procedure, quotes a resolution of the Commons of 1592, to the effect that that body was a court of record.¹⁰ It seems probable that in earlier times the House of Commons did not seriously claim to be a court, but as the Commons grew stronger and especially as the conflict with the Crown came on, the House and its partisans, such as Lord Coke, put forward every claim calculated to enhance the power and prestige of that body.¹¹ This

⁷ 9 Ad. & E. 1 (1838).

⁸ 103 U. S. 198.

⁹ HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND, 5th ed. 207.

¹⁰ MAY, LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, 13th ed. (1924), 101.

¹¹ It must be remembered that Coke's Institutes were written in the midst of the fiercest internal struggle that England ever experienced. Soon after the work came from the hands of the printer, the remnant of the revolutionary House of Commons resolved itself into a high court of justice and sent Charles I to the block. Statements made by Coke pertaining to matters involved in the struggle must be accepted with great caution. Thus Prof. E. C. Corwin, in

mental attitude continued for some time after the final triumph of Parliament in 1688, but, after the occasion for asserting the claims had passed, we find Lord Mansfield saying that the House of Commons was not a court,¹² and May says that "this claim, once firmly maintained, has latterly been virtually abandoned, although never distinctly renounced."¹³

commenting on Coke's attempt to find warrant in *Magna Carta* for the right which he was seeking to establish that the subject could only be proceeded against by the king upon presentment by a grand jury, has this to say:

"It must not be thought that in writing thus Coke is recording the facts of history. Rather, to quote a recent authority on *Magna Carta*, he was but 'following his vicious method of assuming the existence in *Magna Carta* of a warrant for every legal principle established in his own day,' a method which has enabled him to mislead utterly 'several generations of commentators.' Among those thus misled are the three great commentators on American constitutional law, Kent, Story, and Cooley—willing dupes no doubt, yet dupes none the less."—"*The Doctrine of Due Process Before the Civil War*," 24 HARV. L. REV. 366, 368 (1910), citing, for the sub-quotations, McKechnie, *MAGNA CARTA*, 447.

Dean Roscoe Pound, in commenting on this phase of Coke's work, says:

"Coke's purpose was to prove his case in the contests between courts and crown in which he was a chief actor. Recent historians who have re-examined the material in writing histories of the King's Council, the Star Chamber and the High Commission, assert that he grossly perverted the texts. Very likely he did for he was a partisan and an advocate. . . . Coke's problem was what they [the provisions of *Magna Carta*] must be made to mean if justice was to be done in accordance with them and by means of them in seventeenth-century England. The fiction of interpretation enabled him and his contemporaries to believe that the two things were the same."—INTERPRETATIONS OF LEGAL HISTORY, 132.

To the same effect is the following from Prof. Redlich:

"Anyone who closely follows the party strife of the sixteenth and seventeenth Centuries under the leadership of the learned jurists of those times will have little difficulty in seeing that their constitutional arguments, at times bordering on the fantastic, were mere cloaks for the political claims to power made by the majority of the House of Commons, and by sections of the nation which it represented."—JOSEPH REDLICH, *PROCEDURE OF THE HOUSE OF COMMONS* (Transl. by A. Ernest Steinhal), Vol. I, p. 25, note, quoted and commented on by Prof. McIlwain in his *HIGH COURT OF PARLIAMENT*, pp. 230-1, note.

¹² *Jones v. Randall*, 1 Cowp. 17 (1774); *MAY*, *op. cit.* 101.

¹³ *MAY*, *op. cit.* 101. For an elaborate discussion of the question as to whether the House of Commons is a court, see McILWAIN, *HIGH COURT OF PARLIAMENT*, c. III, pp. 109-246.

It is of interest to note that our legislative bodies in this country have sometimes been referred to as courts. Thus in *Coffin v. Coffin*, 4 Mass. 1, 34 (1808) we find this language: "I consider the House of Representatives not only as an integral branch of the legislature, and as an essential part of the two houses in convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction." The contempt power is also fully recognized in this case. The legislature of Massachusetts is still officially known as the "General Court."

Whether the House of Commons be called a court or not, is for purposes of this discussion, a matter of small moment. It is fundamentally and essentially a legislative, and not a judicial, body. The few remnants of judicial or quasi-judicial power that it may still exercise are not materially different from the judicial powers exercised formerly and to a lesser degree at the present time by American legislative bodies. Coke, in the passage referred to in the decisions quoted by Justice Miller, enumerates three such powers—(1) the power of impeachment, (2) the power to punish for contempt, and (3) the power to bring to the attention of the House of Lords delinquencies committed by members of that body.¹⁴ To this list Justice Miller, in the passages quoted above, adds a fourth, the power, jointly with the House of Lords, to pass bills of attainder. Now, it will be seen that the first and third of these powers, that is the power, as the “generall inquisitors of the realm,”¹⁵ to prefer impeachment charges to be tried by the House of Lords, and the power to direct the attention of that body to cases of “oppression, bribery, extortion, or the like” on the part of members of the upper house, are not strictly speaking judicial in their nature, and the first is possessed and exercised by the lower house of all our legislatures, state and national. If possession of this power by the House of Commons makes it a court, then our lower chambers are also courts, and the precedents of the House of Commons would be very persuasive. If the possession of the second power enumerated by Coke, that of punishing for contempt—the very power whose exercise we are now considering—be held to make the House of Commons a court, then Mr. Justice Miller’s argument comes to this: “The possession of the power to punish for contempt makes the House of Commons a court, and the House of Commons can punish for contempt because it is a court.” It hardly need be said that such an argument carries little weight. But Justice Miller’s contention goes a step further. He says that this power “goes back to the period when the bishops, lords, knights and burgesses met in one body.” Historically this claim cannot be maintained. It now

¹⁴ 4 COKE, INST., 23-24.

seems definitely established that the first instance in which the House of Commons vindicated any power or privilege by imprisoning for contempt occurred in 1543, nearly three hundred years after the Commons had become a separate body.¹⁵ We will see that our colonial assemblies to whose powers in this respect our state legislatures succeeded, exercised the power to punish for contempt practically from the time they came into existence, and the houses of Congress had several times exercised the power within the first decade of their existence. From these facts it would seem that we can make out about as good a claim to a prescriptive right to the exercise of contempt powers as can be made out for the House of Commons.

The fourth judicial function, that added to Coke's list by Justice Miller, is the right formerly exercised by the Commons, conjointly with the Lords, of enacting bills of attainder. Lord Coke did not mention this, presumably because he did not regard it as a judicial power. It is rather the exercise of the legislative power to pass special acts, a perverted form of legislation probably almost as common in this country in colonial and early post-Revolutionary days as it ever was in England. Our state legislatures did not hesitate to pass bills of attainder¹⁶ directed at those

¹⁵ In discussing this first use of the contempt power, Hallam says:

"The Commons sent their serjeant with his mace to demand the release of Ferrers, a burgess, who had been arrested on his way to the House; the jailers and sheriffs of London having not only refused compliance, but ill treated the serjeant, they compelled them . . . and even the plaintiff who had sued the writ against Ferrers, to appear at the bar of the House, and committed them to prison. The king in the presence of the judges confirmed in the strongest manner this assertion of privilege by the Commons. It was, however, so far, at least, as our knowledge extends, a very important novelty in constitutional practice; not a trace occurring in any former instance on record, either of a party being delivered from arrest at the demand of the serjeant, or of anyone being committed to prison by the sole authority of the House of Commons."—HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND*, pp. 157-8.

See also MAY, *THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT*, 13th ed., pp. 112-113. May adds the interesting detail that before ordering the arrest of the sheriffs, the House of Commons laid the case before the House of Lords, "who, judging the contempt to be very great, referred the punishment thereof to the order of the Commons' house."

¹⁶ Thompson, "*Anti-Loyalist Legislation During the American Revolution*," 3 *ILL. L. REV.* 81, 147; Pound, "*Justice According to Law*," 14 *COL. L. REV.* 1, 2, 8 (1914). In this article Dean Pound calls attention to numerous instances of the exercise of judicial power by American legislatures, such as granting divorces, or creating special rules for particular cases or for particular indi-

who sided with England in the Revolution, and at least one of these measures was sustained by the United States Supreme Court as a valid exercise of the legislative power. In the case of *Cooper v. Telfair*,¹⁷ involving such a statute passed by the state of Georgia, in 1782, before the United States Constitution forbade the enactment of such laws, Mr. Justice Paterson used this significant language:

“The power of confiscation and banishment does not belong to the judicial authority; and yet, it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution.”¹⁸

From this it will be seen that the fathers were not legislating against an imaginary danger when they provided in the Constitution that no bill of attainder could ever be passed either by the national Congress or by any state legislature.¹⁹

If this opinion is correct and the power to pass bills of attainder is essentially legislative in character, then Mr. Justice Miller's argument that the possession of this power makes the House of Commons a court whose precedents are valueless to us completely fails. Besides, the power to pass bills of attainder and bills of pains and penalties has been obsolete in England for a hundred years.^{19a} The truth is that a careful study of the legislative history of England and America will show that the privileges of representative bodies and the power to punish directly the invasion of those privileges are a part of the common inheritance of

viduals, or affording special relief in individual cases, or granting new trials after final judgment, or exercising jurisdiction in insolvency. The legislature of Rhode Island exercised appellate jurisdiction until 1857, and the New York Senate continued to act as a court of appeals until the adoption of the constitution of 1846.

¹⁷ 4 Dall. 14 (U. S. 1800).

¹⁸ 4 Dall. 19. Almost identical language was used by Mr. Justice Cushing in his brief concurring opinion.

¹⁹ Constitution, Article I, Secs. 9 and 10.

^{19a} Dean Pound says that “the abortive bill of pains and penalties brought against Queen Caroline is probably the last of its kind.” 14 CAL. L. REV. 3 (1914). That was in the year 1820. IX DICTIONARY OF NATIONAL BIOGRAPHY, 152.

the Anglo-American peoples. At first the House of Commons was a weak and timid body, asserting few privileges for itself and its members and depending on the king and the lord chancellor to protect them in the enjoyment of them. With the break-down of the nobility at the end of the War of the Roses, and with the growth of the cities and the commercial classes during the Tudor period, the Commons grew stronger and bolder and began to claim more privileges and to assert the right to protect them by their own direct means. Every privilege they succeeded, as the people's representatives, in wresting from the king and nobility became a part of the cherished rights of Englishmen, and were as highly prized in the colonies as in the mother country. So we find the colonial assemblies setting up precisely the same privileges and vindicating them in precisely the same way, as was being done contemporaneously by the House of Commons. Just as there were excesses and brutal punishments there, so there were excesses and brutal punishments here. And so, too, with the coming of a more enlightened and humane spirit, excesses and barbarities progressively disappear on both sides of the Atlantic, until today the privileges asserted by the House of Commons and the means by which they are vindicated are not appreciably different from those asserted and vindicated by our state and national legislative bodies. The contempt power is everywhere, in the English-speaking world, regarded as an inherent power, an essential auxiliary of "legislative power," and, as we will see, the nature and extent of the power was scarcely affected at all by the advent of written constitutions and the doctrine of the separation of the powers of government. It follows that no one who would understand the subject can shut his eyes to the experience and practice of the great assembly after which all our legislative bodies have been modeled.²⁰

²⁰ The extent to which the colonial assemblies modeled themselves on the pattern of the House of Commons is strikingly illustrated in the faithfulness with which they copied the ancient ceremony observed at the opening of a session of Parliament. From a very early day, it is believed, and certainly from the time of Henry VIII, when regular journals began to be kept, it has been customary, upon the assembling of Parliament, for the House in a body to wait upon the King sitting in the House of Lords, and present their newly-elected speaker for the King's approval. The choice having been approved, the speaker,

II. ENGLISH AND AMERICAN COLONIAL PRECEDENTS ²¹A. *Freedom from Arrest*

While the privilege of freedom from arrest only included freedom from arrest on civil process, and not for criminal offenses,²² it was extended to the servants and estates, as well as to the person, of the member, as will be seen by reference to the speaker's petition quoted above. This led to grave abuses during the century following the Restoration and hundreds of persons were haled before one house or the other and imprisoned for such crimes as arresting the servants of members, or trespassing upon their property, or bringing actions of ejectment against members or their servants or even against their tenants—that is, for any act that would necessitate the presence of the member in court

"In the name, and on behalf of the Commons, lays claim by humble petition to their ancient and undoubted rights and privileges; particularly that their persons, their estates, and their servants may be free from arrest and all molestation; that they may enjoy liberty of speech in all their debates; may have access to his Majesty's royal person whenever occasion shall require; and that all their proceedings may receive from his Majesty the most favorable construction."

To this address the Lord Chancellor as the presiding officer replies that

"His Majesty most readily confirms all the rights and privileges which have ever been granted to or conferred upon the Commons, by his Majesty or any of his royal predecessors."—MAY, 70.

In the same way the colonial assemblies demanded a renewal of their ancient privileges. For example, in 1734, the Assembly of Pennsylvania in a body waited on the Governor, sitting with his council, and after he had approved the speaker chosen, that official "in the name and behalf of the House" petitioned

"That the members of this House, during the Time of their Sitting in Assembly, may enjoy Freedom of Speech in all their Propositions and Debates; and that their Persons and Estates may be free from Arrest and Molestation: That himself (as Speaker), as often as the Business of the House shall require, may have free Access to the Governor: That if in reporting any Thing to the Governor as the Sense of the House, he happen to be mistaken, such Mistake may not be imputed to the House, but that he have free Liberty to resort to them for their true Meaning, and the Mistake be pardoned: That it would please the Governor to give Credit to no Information he may receive without Doors, of Matters moved and debated in the House, until the same shall have passed in Resolves."

To this petition, it is stated, the Governor was "pleased to assure the House, that he would always protect them in the full Enjoyment and Exercise of the same."—Votes of Assembly, Vol. III, 219. For repetitions of this ceremony in the same words in other years, see Votes of Assembly, Vol. III, 444, 497, 536; Vol. IV, 757; Vol. VI, 2, 113, 193, 262, 284, 546.

²¹ American colonial precedents have not heretofore been collected and made available.

²² MAY, 120.

as either plaintiff or defendant.²³ Finally Parliament itself saw that it had grossly perverted a very useful and valuable privilege, and, partly by statute and partly by custom, the excesses have been eliminated until now the protection is confined, as in this country, to freedom from arrest of the member only, on civil process, during the sessions of Parliament and for a reasonable period before and after the session.²⁴

In America the colonial assemblies, following the example of the mother country, claimed the same freedom for themselves, their servants, and their estates.²⁵ This claim they made good by imprisoning those who disregarded it. Thus in 1691, the New York Assembly incarcerated a sheriff who arrested and detained a member-elect on his way to attend the session,²⁶ and in 1740 it imprisoned one C. Den for nearly a month for seizing a boat used by a member for attending its sessions.²⁷ In the same year, the House of Burgesses of Virginia punished as for contempt a person who assaulted a member's servant and spoke disrespectfully of the master.²⁸

B. *Freedom of Members from Assaults, Affronts, Insults, Libels*

Probably no privilege claimed for the members has more frequently called for the exercise of the contempt powers of the houses than that which guarantees that the members shall be free from molestation during the sessions of the Parliament. Thus, in 1623, Thomas Morley was fined 1000 pounds, sent to the pil-

²³ An extended list of cases is to be found in the "Report from the Select Committee" (of the House of Commons) on the publication of printed Papers (May 8, 1837), p. 3 and (Appendix) p. 19, reproduced in 9 Ad. & El. 12. It is said that more than a thousand cases of punishment for contempt by the two houses of Parliament have occurred, though now they are of rare occurrence.

²⁴ MAY, *op. cit.* 114-116. For a full discussion of this privilege, see MAY, chap. V, pp. 110-135.

²⁵ See the speaker's petition quoted above from the Assembly of Pennsylvania. See also New York Ass. Jour. Vol. I, 413-414 (1718). In 1660 the House of Burgesses of Virginia passed a resolution waiving their right of freedom from arrest in part but adding "that they will be ten days after the expiration of this session subject to arrest, judgment, and execution against their estates but the persons to be still free."—Jour. H. of B. 1659/60.

²⁶ Ass. Jour., Vol. I, 4.

²⁷ Ass. Jour., Vol. I, 233, 234, 236, 238.

²⁸ Jour. of H. of B., 1740, (Reprint) pp. XXXII, 421.

lory, and imprisoned by the House of Lords, for a libel on a member of that body. In 1781, the House of Commons committed a person who sent a challenge to a member to fight a duel, and in 1809, it sent one Daniel Butler, a sheriff's officer, to Newgate prison for arresting and insulting a member.²⁹

The journals of the colonial assemblies are filled with cases of imprisonment for molesting members. For example, in 1693, the House of Burgesses of Virginia adopted the following:

*"Resolved and accordingly ordered that Mr. Thomas Rooke, for his several abuses to the members of the house in general on his bended knees acknowledge his offense, and beg the pardon of the house in such words as shall be appointed and that for the personal abuse given Mr. Kemp, a member of the house, he ask his forgiveness in particular, and that he remain in the Messenger's custody till further orders."*³⁰

In 1727, the same body called before it one Edward West, charged with "affronting" a member, and he, "kneeling at the Bar, was by order of the House, reprimanded by Mr. Speaker, and upon his knees asked pardon of Mr. Andrews, and of the House." He was then discharged upon payment of costs.

In 1723, the Virginia house arrested William Hopkins for uttering "several rude and Contemptious and undecent expressions" concerning a member. Upon being ordered to apologize on bended knee, he refused. Thereupon it was ordered:

"That said Wm. Hopkins be led thro' the Town in Custody of the Messenger by the Door Keepers of this House Attended by the Constables of the Town, from the Capital Gate to the College Gate and back again with an Inscription in great Letters pind upon his Breast in the following words ("For Insolent Behavior at the Bar of the House of Burgesses when he was there as an offender and with obstinacy and Contempt disobeying their Order.") And in case he shall refuse to walk that he be Tied to a Cart and Drawn thro' the Town, And that he be afterwards

²⁹ For these and other illustrations see *MAY*, 87-88.

³⁰ The form of the apology provided by the speaker is set out in full. *Jour. H. of B. 1659/60-1693* (Reprint), pp. 473, 4, 5, 6, 7.

committed to the public gaol in Williamsburg The Keeper whereof is hereby required to receive and there safely to keep him during the pleasure of this House."

This resolution brought him to terms and he was allowed to apologize, to thank the house for the "favorable Mitigation of my Just punishment," and to promise that, "I will from this time carefully shew a decent Respect to every member of this House and do earnestly entreat their good will."³¹

In 1717, the New York Assembly arrested one George Webb, a boatman, for offering an affront to Mr. Speaker and another member. He apologized for the "great Indignity and Affront offered by him," and two days later was discharged, "paying his fees."³² The next year the Assembly sent its door-keeper to arrest one Edward Penant for accusing a member of having accepted a bribe, but he reported that Penant had left the province.³³ In 1729, Mr. Gilbert Livingston, member from the Manor of Livingston, reported that Capt. Jacobus Bruyn had said that Livingston had betrayed his country by voting supplies to the colonial government for a period of five years. For this insult, Bruyn was taken into custody on June 9th. As no further record is made of his case, it is presumed that he remained in custody until July 12th when the house adjourned.³⁴ In 1759, the Pennsylvania Assembly imprisoned Thomas Christie for instigating a "false, scandalous, and groundless" election contest against a member."³⁵

C. Freedom of House as a Whole from Insults and Libels

English and colonial legislatures were always very sensitive of their honor and dignity and quick to resent any conduct that tended to bring them into contempt. As early as 1559, we find the House of Commons committing William Thrower to the

³¹ Jour. H. of B. 380 *et seq.*

³² Ass. Journ., Vol. I, 406-7.

³³ *Ibid.*, 419.

³⁴ *Ibid.*, 592, 594. For Samuel Townsend's case, see Ass. Journ., Vol. II (1758) 551-4 (writing insolent letter to speaker).

³⁵ Votes of Ass., Vol. V, 57.

custody of the sergeant for a contempt in words against the dignity of the House. In 1580, Arthur Hall, a member, was expelled, fined, and imprisoned by the House for printing "matter of infamy of sundry good particular members of the house, and of the whole state of the house in general, and also of the power and authority of the house."³⁶

The colonial assemblies, following the example of the English Parliament, struck out vigorously and often against persons insulting them or reflecting upon their dignity and power. For example, the House of Representatives of Massachusetts in 1722 expelled a member for presenting to the house a petition containing "false and reflecting expressions upon the House."³⁷ In North Carolina, the house in an address to the Governor accused the Chief Justice, William Little, and his assistants of exacting illegal fees of office. The Chief Justice took exception to this and sent to the Governor a petition asking for a hearing on the charges. In the opinion of the house this document contained "Scandalous expressions reflecting on the Dignity of this House." It was therefore

"Ordered, That the sergeant attending this House do immediately take Mr. William Little into his custody and him safely keep until to morrow morning and that he then bring him before the House to Answer for his Affronting the House by sundry Reflections exprest in his petition now before the House."³⁸

In 1717, the New York Assembly arrested the seventeen members of the grand jury for presenting an "humble Representation" to the Governor in regard to a bill just passed by the Assembly. When brought to the bar of the house and examined, they said that "they were humbly of Opinion, they might petition one Part of the Legislature, without any intention of reflecting on the other Two," whereupon they were discharged, "paying their Fees."³⁹ The details of the case of Judge William Moore

³⁶ 1 HATSELL, 93; MAY, 86. For many other English cases see MAY, 85-87.

³⁷ JOUR. H. of R., Vol. IV (Reprint), 43.

³⁸ SAUNDERS, COLONIAL RECORDS OF N. C., Vol. III, 603-4.

³⁹ Ass. Jour., Vol. I, 410-411.

and William Smith, Provost of the Academy of Philadelphia, who were repeatedly arrested for presenting a document to the Governor "containing many injurious Charges, and slanderous Aspersions against the late Assembly, and highly derogatory of, and destructive to, the Rights of this House, and the privileges of Assembly," will be given in another place.⁴⁰ A very striking case of imprisonment for libelling the house occurred in New York just on the eve of the American Revolution, the case of Captain Alexander McDougal, who was imprisoned a total of eighty-one days for publishing a "scandalous Reflection on the Conduct, Honor and Dignity of this House." The details are given in the footnote.⁴¹

Libels and reflections upon former assemblies were resented and punished,⁴² as were also assaults on officers of the house,⁴³ and the publication of the proceedings or parts thereof without

⁴⁰ Votes of Ass., Vol. IV, 747-8, 763-4, 768, 769, 776, 777, 781-5, 820, 837, 846. Vol. V, 22.

⁴¹ In December, 1769, a paper was published calling a mass meeting of citizens "in order effectually to avert the Destructive Consequence of the late *base inglorious* Conduct of our General Assembly," in voting supplies to the British troops then stationed in New York. The house thereupon adopted resolutions denouncing the publication as a "scandalous Reflection on the Conduct, Honor and Dignity of this House," and declaring the author of it "Guilty of a high Misdemeanor." They therefore called upon the Governor to offer a reward of 50 pounds for his arrest. The offer was made and Captain Alexander McDougal was arrested on February 7, 1770. He refused to give bond and was held in jail until he was indicted by the Supreme Court in the following April. He then gave bond in the sum of one thousand pounds, and was discharged. However, as the case before the court was never brought to trial, he was again arrested, and on December 20, 1770, he was arraigned at the bar of the House as "the supposed author or publisher" of the article. He pleaded, in reply, that he was already under indictment in the Supreme Court, for the same offense, "and he conceived it would be an infraction of the laws of Justice to punish a British subject twice for the same offense." His reply was voted "a high contempt" and he was sent to jail, only five members voting in the negative. He applied for *habeas corpus*, but upon the sergeant's showing in his return that he was "committed by a warrant of the Speaker for a contempt of the authority of this House," the court refused to interfere. He was finally discharged when the house was prorogued on March 4, 1771, after an imprisonment of eighty-one days. O'CALLAGHAN, DOCUMENTARY HIST. OF N. Y., Vol. III, 534-537.

It is of interest to note that McDougal rose to the rank of major general during the Revolutionary war and was a prominent member of the state senate of New York from 1784 until his death in 1786.

⁴² Note the last two cases mentioned above. Also the case of Hezekiah Watkins, New York Journal, Vol. II, 520-21.

⁴³ In 1742, the Virginia House of Burgesses arrested and reprimanded William Nugent for beating the doorkeeper.—Jour. Pp. XX, 131, 132.

permission.⁴⁴ Other illustrations of punishment for libel and slander of the house, found in our colonial history, are given in the margin.⁴⁵

D. Control of Elections of Members

The right to determine election contests, formerly claimed by the House of Commons and by the colonial assemblies, was a frequent occasion for the exercise of the contempt powers of these bodies. Prior to the time of Elizabeth election contests had for the most part been settled by the Chancellor. From that time until the Revolution of 1688 the House of Commons contested the field with the courts, and in 1689 in the case of *Bar-*

⁴⁴ See the case of Hugh Gaine.—O'CALLAGHAN, DOCUMENTARY HIST. OF N. Y., Vol. IV, 385.

⁴⁵ New York, 1720, Captain Mulford forced to apologize for rash expressions concerning the Assembly—*Jour.*, Vol. I.

New York, 1756, Rev. Hezekiah Watkins imprisoned for printing a libel on house.—*Id.*, Vol. II, 520-21.

New York, 1758, Samuel Townsend arrested, held for a day, reprimanded and discharged.—*Id.*, Vol. II, 551-55.

New York, 1765, anonymous insulting letter written to house. Governor asked to offer a reward of 50 pounds for discovery of perpetrator.—*Id.*, Vol. II, 787.

Pennsylvania, 1743, party firing a gun loaded with shot at door of chamber.—*Votes of Ass.*, Vol. III, pp. 539-540.

Pennsylvania, 1757, William McIlwaine ordered arrested for uttering "false and scandalous Reflections on the House."—*Absconded.—Id.*, Vol. IV, 734.

Pennsylvania, 1769, woman ordered imprisoned for behaving in a "very disorderly Manner, as well to the Members as to the House itself."—*Id.*, Vol. VI, 152.

Pennsylvania, 1776, Capt. Josiah Hart ordered brought before the house for refusing to pay an account allowed by the house. Having appeared before the audit committee of the house and "paid all expenses incurred by his late Misconduct," he was discharged without appearing at the bar of the house.—*Id.*, Vol. VI, 705, 724.

Virginia, 1730, John Mercer and Peter Hedgman arrested, reprimanded and discharged, "paying fees," for writing a remonstrance, "a scandalous and Seditious Libel containing false and scandalous Reflections upon the Legislature."—*Jour. H. of B. (1727-34)*, 66, 71.

Virginia, 1742, John Austin made his humble "Submission" to the house for words spoken.—*Id.*, XX, 107, 113. On same day a committee was appointed to investigate a sermon preached by Rev. Mr. Fife, reflecting on members.—*Id.*, Pp. XX, 108.

Virginia, 1742, address sent to Governor's council complaining that at a conference between committees of that body and of the house, one councilor sat with his hat on. The Council explained that no disrespect was intended but that it was only an inadvertence.—*Id.*, Pp. XX-XXII, 141.

*nardiston v. Soame*⁴⁶ the House of Lords held that the exclusive right of passing on the legality of election returns and of the conduct of the returning officers was in the House of Commons. After this triumph, the Commons extended the right to include all questions respecting the right of electors to vote. Then they argued that if electors were permitted to sue election judges for refusing to receive their votes, there might arise a diversity of judgments between the Commons and the courts to the confusion of the subject and the discredit of the House. Therefore, in 1704, in the celebrated case of "the Aylesbury men," where five voters began actions in the courts against the election officers for refusing their votes, the House held the plaintiffs guilty of contempt and sent them to Newgate prison. This was later recognized as an excess of authority, and the precedent has not been followed for a hundred and fifty years.⁴⁷

In America, the colonial assemblies from the beginning assumed control of questions arising in connection with the election of their members. They summoned the sheriffs before them and reprimanded and otherwise disciplined them for failure to perform their duties as returning officers.⁴⁸ In Virginia, persons guilty of riotous conduct at elections,⁴⁹ and persons charged with fraudulently securing signatures to a petition complaining of the

⁴⁶ 6 State Tr. 1119 (1689).

⁴⁷ MAY, 64-66. Since 1868 election contests in England have been settled by two judges selected from the King's Bench Division of the High Court of Justice.—*Id.*, 641-643.

⁴⁸ In *New York*: In 1747, the High Sheriff of Richmond was called on to explain his failure to send in the returns. "He humbly hoped that as what he had done was through inadvertency, the House would not proceed to greater Severities." He was let off with a reprimand by the speaker, "paying fees."—*Jour.*, Vol. II, 227, 8, 9. Another similar case occurred in 1761. *Id.*, 658.

In *Pennsylvania*: In 1707, the sheriff was brought to the bar and "made his humble submission to the House, and promised to bring the said returns Tomorrow."—*Votes of Ass.*, Vol. II, 2, 3.

In 1740, the former sheriff of Bucks, when brought before the bar, showed that his failure was not "through willful Neglect or Contempt of the House." Reprimanded. *Id.*, Vol. III, 425-6.

In 1756, William Parsons was charged with having detained the writ of election intended for the sheriff. He was allowed counsel and time to prepare for trial. Later the sergeant was told at his lodgings that "he had been gone out of town, some days, to Amboy, for the Recovery of his Health, and was not expected to return again to Philadelphia."—*Id.*, Vol. IV, 743.

⁴⁹ *Jour. H. of B.*, 1727-1740, pp. XXVIII, 278.

election of certain members,⁵⁰ were sent for in the custody of the serjeant-at-arms and forced to confess their wrongs, to apologize to the house, and to pay their fees. In the same colony in 1740, a member was deprived of his seat upon a showing that he had promised to pay the fines that might be assessed against voters who were unfavorable to him and who would remain away from the polls, in violation of law; and a non-member who was guilty of the same offense was forced to acknowledge his fault and apologize.⁵¹ In Pennsylvania, the assembly as the "grand inquest of the province", investigated riots at the polls and requested the Governor to direct the judges of the courts to make a thorough probe of the violations of the law.⁵²

E. General Inquisitorial Powers—Unwilling Witnesses

The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention. These investigations were sometimes conducted by the House itself and sometimes by committees clothed with authority to send for "persons, papers, and records." For example, during the Indian war of 1722, the Massachusetts House of Representatives engaged in a long-drawn-out controversy with the Governor over their asserted right to call before them for examination Colonel Walton and Major Moody, the heads of the colonial forces in Maine, to determine the responsibility for the failure to carry out certain offensive operations ordered by the house at a previous session. They had no power to remove military officers, but they asserted it to be "not only their Privilege but Duty to demand of any Officer in the pay and service of this Government an account of his Management while in the Public Employ." ⁵³

⁵⁰ *Id.*, 31, 32, 33, 34.

⁵¹ *Id.*, pp. XXXIII, 426-7.

⁵² *Votes of Ass.*, Vol. III, 498-503.

⁵³ *Jour.*, Vol. IV, 165. [The Journals from 1715-1724 have been reprinted in five volumes by Mass. Hist. Society.] The upshot of the controversy was that the House finally secured the testimony desired, along with that of many other witnesses, and ultimately brought about the retirement of Walton and

In Pennsylvania, in 1742, as has already been noted, the assembly summoned a great many witnesses for the purpose of investigating riots at an election, at the conclusion of which they requested the Governor to direct the courts to go into the matter fully and punish the wrong-doers. There is nothing to indicate that the house at any time contemplated taking any other action.⁵⁴ In this colony—and the same was true of most of the colonies—the Assembly had a standing committee to audit and settle the accounts of the treasurer and of the collectors of public revenues. This committee could sit during recesses of the house and was clothed with “full Power and Authority to send for Persons, Papers and Records by the Sergeant at Arms of this House, in order that all the said public Accounts be fully settled and made ready to be laid before the House on the first Day of their Meeting in September next.”⁵⁵ In 1770, the house ordered the assessors and collectors of Lancaster County to appear before the audit committee and to bring with them their books and records for the preceding ten years.⁵⁶ In North Carolina, the Assembly ordered the arrest and detention of the receiver of “powder money” at “Roan-oak,” for his refusal, in compliance with the Governor’s orders, to submit his accounts to the house.⁵⁷

The foregoing are only a few of the many investigations of all manner of subjects carried on by the colonial assemblies. In all these cases, they assumed as a matter of course that they had authority to punish as for contempt any person who refused to appear and give the information called for. Thus, in 1691, the New York Assembly having been informed that Mr. Dally,

Moody from the service. Later when the house learned that Walton was still exercising his functions “and is bound Eastward, having given out such Speeches as (if possible to be accomplished by him) may prove very pernicious to this Government,” they

“Resolved, That the Sheriff of the County of Suffolk, be directed forthwith to follow the said Colonel Walton, and order his return to Boston, to attend the Order of this court.”—*Jour.*, Vol. IV, 199. See also pp. 94, 95-6, 126, 128, 130, 132-3, 146, 155, 156, 163-5, 167, 170, 177, 179, 182, 183, 186, 188, 191-2, 194-5. See also HUTCHINSON, *HIST. OF MASS. BAY*, Vol. II, 276-294.

⁵⁴ *Votes of Ass.*, Vol. III, 498-503, 564, *et seq.*

⁵⁵ *Votes of Ass.*, Vol. VI, 2, III, 193, 66-102.

⁵⁶ *Id.*, 199, 224.

⁵⁷ 3 SAUNDERS, *COLONIAL RECORDS OF N. C.*, 585-6, 604.

"the French Minister," had received a petition signed by several inhabitants of Harlem and Westchester, he was called before the house, and, having refused to answer the questions put to him, was declared guilty of contempt and committed "to the custody of the Serjeant at Arms, and there to remain until he shall make Answer, or be discharged by the House."⁵⁸ The refusal of Samuel Townsend to appear when summoned before the house to answer for writing an insulting letter to the speaker met with like treatment in 1758.⁵⁹

In this connection, the case of William Moore and William Smith, which arose in Pennsylvania in 1757, is so instructive and illustrates so many of the powers under discussion that it seems worth while to state it in some detail. Complaints having been made to the house that William Moore, Judge of the court of common pleas and justice of the peace, had for a long time been guilty of "fraudulent, corrupt and wicked practices," the house examined many witnesses and sent an address to the Governor asking him to remove Moore.⁶⁰ It seems to have been conceded that the Governor alone had the power of removal and there is nothing in the record to indicate that any legislation on the subject was in contemplation. When a newly elected assembly met in January, 1758, Judge Moore was arrested and charged with having presented to the Governor and printed in the newspapers a document "containing many injurious charges, and slanderous Aspersions against the Conduct of the late Assembly."⁶¹ At the same time William Smith, "Provost of the Academy of this City," was arrested, charged with having assisted in the preparation of the paper. Among the witnesses examined touching Smith's part in the affair, was Dr. Phineas Bond, who, feeling honor-bound not to tell what he knew, was promptly committed to the custody of the serjeant to be held until he should answer the questions put to him, no one being permitted to speak to him except in the presence of the serjeant.

⁵⁸ Ass. Jour., Vol. I, 9-10. The subject matter of the petition is not given.

⁵⁹ *Id.*, Vol. II, 552, 553, 554.

⁶⁰ Votes of Assembly, Vol. IV, 747-8.

⁶¹ Votes of Assembly, Vol. IV, 763-4.

Another witness was committed for "prevaricating in his Testimony, and refusing to answer."⁶² As a result of the hearing the Assembly declared Judge Moore guilty of contempt and ordered that he be confined in the "common Gaol of the County of Philadelphia, there to remain until he shall willingly make such a Retraction of the Aspersions and Falsehoods contained in the said Libel, as this House shall approve of." At the same time the sheriff was instructed not to "obey any writ of Habeas Corpus, or other Writ whatsoever, that may come to his hand for the Bailing or Discharging the said William Moore, or otherwise discharge him from his Custody, on any Pretence whatsoever, and that this House will support him in his Obedience to this Order."⁶³ Smith was also held guilty and sent to jail. Through his counsel he gave notice of his intention to appeal the case to the King in Council, but the house held that no appeal would lie in a contempt proceeding. From the jail he wrote a letter to the speaker insisting on his right to appeal, but the house, considering this a "further Insult upon them, returned no Answer thereto."⁶⁴ In April, 1758, the Assembly took a short recess and Moore and Smith were discharged on *habeas corpus*, in accordance with the rule that imprisonment by the House of Commons terminates with the session, but when the house met again they were rearrested and held to the end of the session in September. The matter was taken up again in the session beginning in October, 1758, and an order for their rearrest was made on February 28, 1759, but the sergeant-at-arms reported that Moore had absconded and Smith had sailed for England.⁶⁵

One more incident in connection with the Moore and Smith case is worthy of notice. At one stage in the hearings the house was disturbed by hand-clapping, stamping and other noises on

⁶² In this case the sergeant was ordered "not to permit any Person whatsoever, either directly or indirectly, to converse with or speak to the said Armbruster, till further Orders from this House."—Votes of Assembly, Vol. VI, 776.

⁶³ *Id.*, 769.

⁶⁴ Votes of Assembly, Vol. VI, 777, 781, 784.

⁶⁵ *Id.*, Vol. V, 5, 22. It seems that the house failed to get rid of Moore, for in 1775 we find him still oppressing the people as a justice of the peace.—Votes of Ass., Vol. VI, 665.

the part of the spectators. This was voted an insult and many of those present were haled before the bar of the house, where, after apologizing, they were reprimanded by the speaker and ordered to pay the fees for their arrest. Those who refused to appear when summoned were arrested and also those who failed or refused to pay their fees.⁶⁶

This case, it will be observed, epitomizes to a large extent the contempt powers exercised by the colonial assemblies. Here the Pennsylvania body asserted its right to investigate a public official, although it did not claim the right to impeach or otherwise to remove him, and did not indicate any intention of legislating on the subject under investigation. It also asserted its right to punish libellous reflections upon itself and to vindicate the good name of a preceding assembly. It declared and exercised the right to punish contumacious witnesses and witnesses giving false testimony. It held that there was no right of appeal from a judgment of contempt and that *habeas corpus* did not lie until after the recess or adjournment of the house. Finally it asserted its right to protect itself against disturbances from onlookers. In view of this great precedent it is not at all surprising to find the national House of Representatives in the very same city, forty years later, punishing Randall and Whitney for offering bribes to members, and the Senate proceeding against William Duane for publishing a libel upon it.⁶⁷

III. EARLY STATE AND NATIONAL PRECEDENTS

The foregoing survey of English and American colonial practice shows clearly that it was the generally accepted view that legislative bodies had the inherent right to protect their privileges, their dignity, and their honor by use of the power to punish for contempt. The precedents were plentiful and had continued down to the outbreak of the struggle for independence. The statesmen of the period were thoroughly familiar with these precedents and regarded the power to punish for contempt as an integral

⁶⁶ *Id.*, Vol. IV, 781-5, 786, 837, 843.

⁶⁷ 2 HINDS, PRECEDENTS, 1047-52, 1052-56.

part, or auxiliary, of legislative power. As a necessary result, when they drafted their constitutions, state and national, and conferred the legislative power upon the bodies provided to receive it, they conferred the contempt power along with the rest. This doubtless explains the fact that most of the states, in drafting their new fundamental laws, made no mention whatever of the power to punish for contempt. Of the eleven states adopting constitutions, during the Revolution, nine made no reference to the power to punish for contempt. Massachusetts and Maryland alone dealt directly with this subject.

The provisions incorporated in the Massachusetts constitution adopted in 1780 and continued down to the present time are especially interesting, and were subsequently adopted almost without change in New Hampshire⁶⁸ and South Carolina,⁶⁹ and possibly in other states. After declaring, in Article VI, "that the house of representatives is the grand inquest of this commonwealth, and all impeachments made by them shall be heard and tried by the Senate," the Constitution, in Article X, proceeds as follows:

"The House of representatives . . . shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest, any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house."⁷⁰

⁶⁸ Constitution of 1784, 4 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 2462. The provisions were retained in the constitutions of New Hampshire adopted in 1792, and 1902; 4 THORPE, 2477-8, 2501.

⁶⁹ Constitution of 1790, Sec. 13 of Art. I, 6 THORPE, 3260. The same provision reappears as Art. I, sec. 19 of the constitution adopted in 1865, as Art. II, sec. 16 of the constitution of 1868, and as Art. III, sec. 13, of the constitution of 1895. 6 THORPE, 3272, 3287, 3314.

⁷⁰ Constitution of 1780, Chap. I, Sec. III, Art. X. 3 THORPE, 1899. In the case of *Burnham v. Morrissey*, 14 Gray 226 (Mass. 1859), the Supreme Court held that these provisions were not grants of power to the houses, nor

The next article extended the same powers to the Senate and to the Governor and Council, and then occurs this proviso:

“provided, that no imprisonment on the order or warrant of the Governor, council, senate, or house of representatives, for either of the above described offences, be for a term exceeding thirty days.”⁷¹

In Maryland the constitution went much further conferring upon each of the houses unlimited power to investigate all grievances, and “affairs concerning the public interest,” to “commit any person, for any crime, to the public jail, there to remain till he be discharged by due course of law,” and to punish for contempt in a great variety of cases. The provisions are so interesting, as indicating the temper of the times, that they are reproduced in full in the footnote.⁷²

did they by implication deny to the houses power to punish for contempt in other cases not here enumerated. Their purpose, said the court, was to define and make explicit powers inherent in all legislative bodies. In one respect they extended the inherent power of the houses, by enabling them to commit for a period extending beyond the time of adjournment. See also *Coffin v. Coffin*, 4 Mass. 1, 34-5 (1808).

⁷¹ This proviso was not adopted by South Carolina. New Hampshire adopted it, but with the term of imprisonment limited to a period not exceeding ten days.

⁷² Constitution of 1776, Arts. X and XII. 3 THORPE, 1692.

Art. X: “They (members of the House of Delegates) may inquire on the oath of witnesses, into all complaints, grievances, and offenses, as the grand inquest of this state; and may commit any person, for any crime, to the public jail, there to remain till he be discharged by due course of law. They may expel any member, for a great misdemeanor, but not a second time for the same cause. They may examine and pass all accounts of the State, relating either to the collection or expenditure of the revenue, or appoint auditors, to state and adjust the same. They may call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of inquiries concerning affairs relating to the public interest; and may direct all official bonds (which shall be made payable to the State) to be sued upon for any breach of duty.”

Art. XII: “That the House of Delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behavior, or by threat to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the House, or by rescuing any person committed by the House. And the Senate may exercise the same power, in similar cases.”

Like the nine state constitutions, the Constitution of the United States is silent on the subject of contempt. Each house is given power to judge of the election and qualification of its members, to make its own rules of procedure, punish its members for disorderly conduct, and, with the concurrence of two-thirds, expel a member, but nothing is said of any power to deal with outsiders who may disturb the house or obstruct its proceedings.⁷³

Such was the state of the first written constitutions on this subject.⁷⁴ Their silence on the subject is suggestive. Equally so is the fact that for three-quarters of a century no case involving the contempt power of a legislative body except *Anderson v. Dunn*,⁷⁵ reached the higher courts, state or federal. This absence of adjudicated cases strongly suggests that there was a general acquiescence in the exercise of this power, for there was no dearth of cases in the legislatures that might have found their way into the courts if the persons concerned and their counsel had thought that relief could be obtained from that source. Since the constitutions and the court reports are silent we must turn to the Assemblies themselves. What, then, was the practice of the new legislatures? The answer is to be found scattered through a multitude of legislative journals, usually poorly printed and unindexed, that have not yet been fully explored. However, ample evidence has been assembled to warrant the statement that the

⁷³ Constitution, Art. I, Sec. 5.

⁷⁴ As to the contempt power in the state constitutions at the end of the Nineteenth Century, see an article by Frederick W. Whitridge "*Legislative Inquests*," 1 POL. SCI. QUART. 84 (1886).

⁷⁵ 6 Wheat. 204 (U. S. 1821).

Two early state cases, while not directly concerned with the contempt power, show clearly that the courts regarded it as inherent in legislative bodies. In the first, *Bolton v. Martin*, 1 Dall. 296 (1789), the Supreme Court of Pennsylvania held that the delegates to the convention called in that state to ratify the federal constitution enjoyed the same freedom from arrest on civil process as the members of the state legislature. While the latter had no privileges conferred upon them by express grant, the court said that "its members are legally and inherently possessed of all such privileges as are necessary to enable them, with freedom and safety, to execute the great trusts reposed in them by the body of the people who elected them."

The second case, *Coffin v. Coffin*, 4 Mass. 1 (1808), held that the legislative bodies in Massachusetts are for some purposes courts and may punish for contempt of their authority, though the point was not directly involved in the case. See pp. 34-35.

legislative bodies assumed that the contempt power so freely exercised by the colonial assemblies had been passed on to them without diminution. For example, in March, 1776, it was reported to the Continental Congress that one Isaac Melchior had treated the president of the Congress with "great rudeness" and had made "use of several disrespectful and contemptuous expressions towards him and this Congress." It was, therefore,

"Ordered, That the said Isaac Melchior attend Congress tomorrow morning at eleven o'clock, to answer for his conduct."

When he appeared, he denied any recollection of what he had done, "owing to the particular circumstances he happened to be under," and apologizing to Congress and its president, he was dismissed without further punishment, "in consideration of Mr. Melchior former services."⁷⁶ A year later, Mr. Gunning Bedford was declared "guilty of a high breach of the privileges of this House, in sending a challenge to one of its members for words spoken by him in this House, in the course of debate," and he was required to "ask pardon of the House, and of the member challenged."⁷⁷

In Virginia, whose constitution made no provision for punishing for contempt, the House of Delegates in 1781 appointed standing committees on religion, on privileges and elections, on courts of justice, and on trade, and clothed each of them with the power to "send for persons, papers, and records for their information." At the same session the same power was specially conferred on the committee on privileges and elections, which was ordered to investigate the opposition "in arms," on the part of some of the people of Augusta, to a law passed by the preceding legislature.⁷⁸ There is nothing in the record to show that any legislation or other affirmative action was contemplated as a result of this inquiry. During the same session, the house ordered the immediate arrest of one John Hopkins, a clerk in the treasury

⁷⁶ Jour. of Cong., Mar. 7, 1776, p. 84.

⁷⁷ *Id.*, June 12 and 14, 1777, pp. 232, 236.

⁷⁸ Jour. H. of B., 1781, p. 8.

department, upon a report of contemplated misconduct on his part. He was discharged the next day, and later vindicated by the committee appointed to look into the matter.⁷⁹ In 1784, one John Warden, a Scotchman resident in Virginia was sent for under the custody of the sergeant-at-arms for "uttering certain expressions derogatory to the honor and justice of the same." Warden presented a written apology to the committee expressing his sorrow at having given unintentional affront and the matter went no further.⁸⁰

In Pennsylvania, the Senate, in 1801, ordered the arrest of one Peter Getz for disturbing the proceedings of the body,⁸¹ and in 1835 several contumacious witnesses, including Joseph R. Chandler, were arrested and confined by one of the houses.⁸²

Under the first constitution of New York, which provided that the assembly should "proceed in doing business in like manner as the assemblies of the colony of New York of right formerly did,"⁸³ several cases of the exercise of the contempt power occurred. In 1796 the house punished one Kilittas for charging that a committee of the house had acted corruptly. In 1810, the senate punished a man named Clarke for having challenged Senator DeWitt Clinton to a duel for words spoken by him in debate. About the same time the house punished a printer for

⁷⁹ *Id.*, pp. 6, 7, 38, 58. It will be noted that this case is indefensible, as his alleged unlawful plan was not directed against the house in any way.

⁸⁰ The resolution adopted by the house on this occasion was as follows:

"Information being given to the House, by a member in his place, that John Warden, of the county of Hanover, hath been guilty of a high contempt and breach of privilege of this House, in uttering certain expressions derogatory to the honor and justice of the same.

Ordered, That the subject-matter be referred to the Committee on Privileges and Election; that they do examine the matter thereof, and report the same, with their opinion thereon, to the House.

Ordered, That the Sergeant-at-Arms attending this House take into his custody the body of the said John Warden, and Mr. Speaker is desired to issue his warrant accordingly."

The member calling the matter to the attention of the house is supposed to have been Patrick Henry. Other prominent members of this body were James Madison, Richard H. Lee, and John Marshall. Madison was a member of the committee to which this case was referred.—*Cong. Debates*, 1831-32, Vol. 8, Part 2, pp. 2880-81.

⁸¹ *Sen. Jour.*, Nov. 1800, 289, 320, 328, 334-35.

⁸² 2 HINDS, PRECEDENTS, 1105.

⁸³ Constitution of 1777, 5 THORPE, 2631.

breach of its privileges.⁸⁴ The new constitution adopted in 1821, omitted the provision above referred to and merely provided that each house should determine the rules of its own proceedings.⁸⁵ In discussing this change, the revisors of 1830 say:

"It is believed that the omission of these words, in the amended constitution, was not intended to deprive, and could not have the effect of depriving, the two Houses of the Legislature of the indispensable power of punishing for contempt."⁸⁶

Accordingly they submitted an act defining the contempt powers of the legislature and naming the privileges the breach of which might be punished by imprisonment.

In the meantime, the house of representatives of New York, operating under the new constitution, had asserted and exercised the power in the case of William J. Caldwell. In 1824, the house appointed a special committee to investigate and determine whether any corrupt means had been used in securing the charter of the Chemical Bank. What action, if any, was contemplated as a result of the investigation, does not appear. Caldwell refused to appear before the committee and testify, and wrote a letter to the chairman containing reflections upon the house. Being arrested and arraigned at the bar of the house, he admitted writing the letter and refusing to testify. Thereupon the house adopted this resolution:

"Resolved, That there was no sufficient ground for his refusal to appear before the committee, and testify; that he was guilty of a misdemeanor and contempt of the House; that the sergeant-at-arms deliver him to the keeper of the jail of the county of Albany; that he be imprisoned until further order of the House, and that the Speaker issue his warrant accordingly."

⁸⁴ These three cases are referred to in the debates in Congress on Samuel Houston's case in 1832.—Cong. Debates, Vol. 8, Part 2, p. 2843, and Part 3, pp. 3006-7.

⁸⁵ Art. I, Sec. 3. 5 THORPE, 2640.

⁸⁶ Wickelhausen v. Willett, 10 Abb. Prac. 164, 171 (1860). This statement of the revisors of 1830 is quoted with approval in the leading New York case, McDonald v. Keeler, 99 N. Y. 463, 475 (1885).

After a week's imprisonment he came before the committee and testified, and was then discharged.⁸⁷

Another notable case arose in New York in 1837, involving the refusal of Moses Jaques and Levi Slamm to appear and testify before a committee of the house of representatives appointed to inquire whether or not the banks of the state had been using their funds for other than legitimate banking purposes. Here again there is nothing in the record to indicate what the purpose of the investigation was or what action was contemplated by the house. The motion that these parties were guilty of contempt and that the speaker issue his warrant and bring them before the house, was carried by a vote of 75 to 18. Slamm submitted and was discharged, but Jaques at first refused and was ordered imprisoned until he should agree to testify.⁸⁸

While these instances were occurring in the state legislatures, the houses of the Congress of the United States had on several occasions asserted their right to punish for contempt. The first important case arose, when the new government was less than seven years old, out of an attempt to bribe members of the House of Representatives. In December, 1795, three members arose in their places and stated that they had been offered financial inducements by one Robert Randall to support a proposed grant to him and his associates of a large body of Western lands. Like information was given by one member against Randall's associate, Charles Whitney. They were arrested and brought before the house, and, after a hearing, the house adopted, by a vote of 78 to 17, the following resolutions offered by Mr. Edward Livingston of New York:

"Resolved, That it appears to this House that Robert Randall has been guilty of a contempt to, and a breach of the privileges of, this House by attempting to corrupt the integrity of its members in the manner laid to his charge.

"Resolved, That the said Robert Randall be brought

⁸⁷ Jour. Ass., Nov. 1824, pp. 1229, 1265-66, 1288, 1351. See also Wickelhausen v. Willett, *supra*, note 86.

⁸⁸ Jour. Ass., 1837, 133-136, 262, 371, 381, 423-424, 433-440, 466, 488-489. Also Ass. Doc. 198 and 237 (1837), and Wickelhausen v. Willett, *supra*, note 86.

to the bar, reprimanded by the Speaker, and committed to the custody of the Sergeant-at-Arms until further order of this House."

After eight days of confinement under this resolution, Randall was, upon his humble petition, discharged from custody.⁸⁹

A very significant feature of this case is that there seems to have been no division of opinion among the members present, several of whom had been members of the Constitutional Convention,⁹⁰ as to the power of the house to punish a non-member for such an offense. There was much discussion as to the proper method of procedure—whether the accused should have the assistance of counsel, whether all questions should be asked by the Speaker and whether the testimony of the accusing members of the house should be given under oath—but practically none at all on the constitutional aspects of the case. Madison, one of the drafters of the Constitution, counseled deliberation, but expressed no doubt of the authority of the house. On the whole, the conclusion seems warranted that this body of representative men gathered from all the states, thoroughly versed in the legislative practice of the time, were substantially agreed that the grant of the legislative power to Congress carried with it by implication the power to punish for contempt.⁹¹

In 1800, an interesting case arose in the Senate growing out

⁸⁹ Journal, 1st Sess. Fourth Cong., pp. 389, 391, 392, 393, 395, 397, 405, 407, 414. 5 Annals, pp. 166-170, 177, 179, 185-195, 212, 222-229. 2 HINDS, PRECEDENTS, pp. 1047-1052.

⁹⁰ The Speaker, John Dayton, of New Jersey, James Madison, of Virginia, Nicholas Gilman, of New Hampshire, and Abraham Baldwin, of Georgia, had all sat in the Constitutional Convention and signed the draft-constitution. In addition to these men, the house contained other well-known statesmen and able lawyers, among whom may be mentioned Albert Gallatin, of Pennsylvania, afterwards Secretary of the Treasury, Edward Livingston, of New York, afterwards Secretary of State under President Jackson, William B. Giles, of Virginia, and Jeremiah Smith, of New Hampshire.

⁹¹ Just before the vote was taken John Nicholas, of Virginia, raised the issue of the power of the house to punish for contempt. "At the first embarking of the House in this affair, he had felt doubts. His scruples had gradually augmented, and he was now of opinion that Randall should not have been meddled with at all, in the present way. . . . He did not think that any resolution had yet passed the House, upon due consideration, whether they had a right to proceed or not."—5 Annals, 219.

Little, if any, attention was given to this suggestion, and a few minutes later the resolution by Mr. Livingston, quoted above, was adopted.

of the publication, by William Duane, editor of the *Aurora*, of an alleged libel of the Senate and of one of its committees. Duane was ordered to appear at the bar of the Senate and "make any proper defense for his conduct in publishing the aforesaid false, defamatory, scandalous, and malicious assertions and pretended information." He appeared and asked to be allowed counsel, which request was granted with certain restrictions as to the functions to be performed by counsel. Later he wrote to the Vice-President saying that on account of the restrictions placed on counsel, reputable lawyers to whom he had applied refused to appear in his behalf, and informing the Senate that he would not attend further, and stating that the Senate could take such further action as it should see fit. For this refusal to appear, not for printing the libel, the Senate, by a vote of 16 to 12, held him "guilty of a contempt of said order, and of this House, and that, for said contempt, he the said William Duane be taken into the custody of the Sergeant-at-Arms attending this House, to be kept subject to the further orders of the Senate." This occurred on March 26. There is no record that he was again arrested, but just before the Senate adjourned on May 14, a resolution was adopted requesting the President to direct that Duane be prosecuted and punished by the courts of law ⁹²

In this case the power of the Senate to punish Duane was vigorously contested in one of the ablest debates of this period. Unfortunately, as the *Aurora* was a strongly Anti-Federalist paper, partisan feeling was involved and we cannot be certain how far the views expressed and the votes cast were influenced by party considerations.⁹³ While the arguments of Jefferson's followers did not convince the majority of the Senate, as the vote on the resolution showed, they may have so influenced them that they decided to let the matter drop. Probably a more potent factor

⁹² Sen. Jour., 6th Cong., 1st Sess., pp. 45, 51-54, 55, 56, 58, 59-61; 10 Annals, 63, 68-93, 104-5, 112-115, 117, 118, 121-124, 184; 2 HINDS, PRECEDENTS, 1052-1056. It seems that Duane was prosecuted and sentenced to serve thirty days in jail.—2 HINDS, 1052-1056.

⁹³ Thomas Jefferson, who was Vice-President and presided over the Senate during this debate, afterwards summarized in his "Manual" prepared for the Senate, the arguments for and against the exercise of the contempt power. Pp. 18-19.

was the approaching presidential election and the state of public opinion at the time, aroused by the odious Alien and Sedition laws, passed two years before for punishing just such expressions of opinion as Duane was guilty of. The rumblings, of which the Kentucky and Virginia Resolutions were a part, might well have caused a determined majority to forego the full measure of redress to which they were legally entitled.

Passing over some less important cases we come to what was, perhaps, the greatest of the early cases involving the right of one branch of Congress to punish for contempt. This arose in the House, in 1818, when Lewis Williams, a member from North Carolina, laid before that body a letter that he had received from Captain John Anderson, containing a check for \$500, as "part pay for extra trouble" in furthering certain claims in which the writer was interested. Thereupon Mr. John Forsyth, of Georgia, moved the following resolution, which was adopted, "and ordered to be entered *unanimously*":

"Resolved, unanimously, That Mr. Speaker do issue his warrant directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of John Anderson, and the same in his custody to keep, subject to the further order and direction of this House."

Before the resolution was voted upon, the question was raised as to the power of the Speaker to issue a general warrant. Henry Clay, the Speaker, said that fortunately there were few occasions for the exercise of the power but that there could be no question of the authority of the House to protect its privileges and its dignity.⁹⁴

Anderson was brought before the bar of the House and a long and instructive debate took place, at the conclusion of which a resolution to discharge Anderson from custody was indefinitely postponed by the decisive vote of 117 to 42, and the House held him guilty of contempt and ordered him reprimanded by the

⁹⁴ Jour. 15th Cong., 1st Sess., pp. 117, 119, 129, 154; 31 Annals, 580-583; 2 HINDS, PRECEDENTS, 1058-9.

Speaker.⁹⁵ In this decisive fashion the House after exhaustive debate definitely settled the question, so far as it could do so, that it had by necessary implication, wholly independently of any constitutional provision, the power to protect itself and to carry on its functions without obstruction or interference from without. In this position it was fully sustained by the Supreme Court in the suit for damages for false imprisonment brought by Anderson against Dunn, the sergeant-at-arms,⁹⁶ which will be discussed in another connection.

The House of Representatives in the early days was several times called upon to vindicate the right of the members to be free from assault for words spoken in debate. In 1809, one I. A. Coles was held guilty of a breach of the privileges of the House for assaulting a member in the Capitol building, after the House had adjourned, although it appeared that the occasion of the attack was not in any way connected with the business of the House.⁹⁷ In 1828, Russel Jarvis was charged, in a message from the President, with having assaulted John Adams, the President's private secretary, while he was in the Capitol building, and in the act of retiring from the House, to which he had just delivered a message from the President. The House held Jarvis guilty of violating the privilege of the House and meriting the censure of that body.⁹⁸ But the great case involving the right of the House to punish an assault on a member came in 1832, when Samuel Houston, formerly governor of Tennessee, and later president of the Republic of Texas, was held guilty of contempt and was reprimanded for an assault on William Stanbury, a member of the House from Ohio, for words spoken by Stanbury in debate. Houston was a warm personal friend of President Jackson, and the discussion out of which the provocation grew was aimed at the conduct of the President's Secretary of War. As a result the affair from the beginning, like the Duane case, took on a partisan aspect, so that much that was said in the long and vehement debate, loses the force that it would otherwise be entitled to. The significant thing

⁹⁵ 31 Annals, 589-90.

⁹⁶ Anderson v. Dunn, 6 Wheat. 204 (U. S. 1821).

⁹⁷ Jour. H. of R., 11th Cong., 2d Sess., pp. 111, 123, 147, 148; Annals, pp. 685, 705, 987; 2 HINDS, PRECEDENTS, 1096.

⁹⁸ Jour. 20th Cong. 1st Sess., p. 587; Cong. Debates, p. 2715; 2 HINDS, PRECEDENTS, 1081-3.

about the case is that those who favored the vindication of the privileges of the House were able to carry through their purpose in the face of the opposition of the dominant party and of the indomitable Jackson.

The facts of the case are briefly as follows: On April 14, 1832, the Speaker laid before the House a communication from Stanbury, in which he stated that on the previous evening he had been waylaid on the street near his boarding house and "knocked down by a bludgeon, and severely bruised and wounded by Samuel Houston." Immediately upon the conclusion of the reading of the communication, Joseph Vance, of Ohio, offered a resolution directing the Speaker to issue his warrant for the arrest of Houston. This passed by a vote of 106 yeas to 65 nays. Houston was brought before the House, allowed counsel in the person of Francis S. Key, denied bail on the strength of the precedents of the House of Commons, and brought to trial before the whole House. The trial occupied the time of the House for almost a month. After the testimony was all in many days were devoted to debate, at the conclusion of which, the following resolutions were separately voted on and adopted, the first by a vote of 106 to 88, and the second by a vote of 96 to 84.

"Resolved, That Samuel Houston has been guilty of contempt and a violation of the privileges of this House.

*"Resolved, That Samuel Houston be brought to the bar of the House on Monday next, at 12 o'clock, and be there reprimanded by the Speaker for the contempt and violation of the privileges of the House of which he has been guilty, and that he then be discharged from the custody of the Sergeant-at-Arms."*⁹⁹

The power to compel testimony from unwilling witnesses, which as we have seen was frequently exercised in colonial days, and was exercised by the New York legislature in the cases of W. J. Caldwell and of Jaques and Slamm, in 1824 and in 1837, was also made use of by the national House of Representatives during the first half of the last century. The first case was in 1812, when Nathaniel Rounsavell was committed for refusing to

⁹⁹ Jour. 22d Cong., 1st Sess., pp. 590, 593, 595, 600, 604, 610, 713, 725, 730, 736; Debates, 2511-2619, 2810-3022; 2 HINDS, PRECEDENTS, 1083-1089.

give testimony before a committee of the House appointed to "inquire whether there has been any, and, if any, what violation of the secrecy imposed by this House," in regard to a proposed embargo that had been discussed in a secret session of the House. After remaining in custody a day he indicated his willingness to testify and was discharged.¹⁰⁰ The second case occurred in 1837, when Reuben M. Whitney was arrested and held for some days while preparing for trial, on a charge of refusing to testify before a special committee of the House appointed to investigate matters pertaining to the executive departments.¹⁰¹

From the foregoing review of the cases it is now quite apparent that the changes attendant upon the separation from England and the establishment of state and national governments under written constitutions resulted in no abandonment on the part of the legislatures of the right so freely, and sometimes, it must be said, so harshly used during the colonial period, of punishing directly and without the intervention of courts or the authority of statutes those who obstructed their proceedings or reflected upon their integrity. In this survey of early state and national precedents we have seen the power exercised (1) by the Continental Congress, a voluntary body which had assumed the powers of a national legislature but which as yet had no written constitution behind it; (2) by state legislative bodies, especially in Virginia and New York, where the constitutions did not confer the power but were wholly silent on the subject; and (3) by the Houses of Congress, although the power was not expressly conferred in the constitution, but was asserted as a necessary means of self-defense inherent in all legislative bodies.

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(To be Continued.)

¹⁰⁰ Jour. 12th Cong., 1st Sess., 1812, pp. 276, 277, 280; Annals, p. 1266; 3 HINDS, PRECEDENTS, 1.

¹⁰¹ Jour. 24th Cong., 1st Sess., pp. 232, 367-372, 378-382, 407-417, 489; Congressional Debates, 1685-1707, 1735-1754, 1760-1773, 1789; 3 HINDS, PRECEDENTS 2-8. He was never declared guilty of contempt, for in the course of the trial before the House it developed that there had been a serious difficulty between respondent and two members of the committee and that his refusal to appear a second time before the committee was probably due to fear. The House thereupon ordered that he be discharged from custody.