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(Constitutional Law.)

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To an action of trespass against the Sergeant at Arms of the House of Representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead, that a Congress was held and sitting, during the period of the trespasses complained of, and that the House of Representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same, and had ordered that the Speaker should issue his warrant to the Sergeant at Arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said House, to answer to the said charge; and that the Speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the Sergeant at Arms to take the plaintiff into custody, &c. and delivered the said warrant to the defendant. By virtue of which warrant the defendant arrested the plaintiff, and conveyed him to the bar of the House, where he was heard in his defence, touching the matter of the said charge, and the examination being adjourned from day to day, and the House having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant, until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the Speaker, and then discharged from custody; and after being thus reprimanded, was actually discharged from the arrest and custody aforesaid.

Error to the Circuit Court of the District of Columbia.

This was an action of trespass, brought in the Court below, by the plaintiff in error, against the defendant in error, for an assault and battery, and false imprisonment: to which the defendant pleaded the general issue, and a special plea of justification. The

plaintiff demurred generally to the special plea, which was adjudged good, and the demurrer overruled: and judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff. The question arising upon the demurrer will be best explained by giving the defendant's plea at large, as pleaded and adjudged good upon general demurrer, in the Circuit Court, viz.:

And the said Thomas, by the leave of the Court here first had, further defends the force and injury, when, &c. And as to the coming with force and arms, or whatsoever is against the peace, and also as to the assaulting, beating, bruising, battering, and ill-treating of the said John, in manner and form as the said John, in his said declaration, hath above supposed to be done, the said Thomas saith that he is not guilty thereof, and of this he, as before, puts himself upon the country. And as to the imprisonment of the said John, and the keeping and detaining him in confinement, at the time in the said declaration mentioned, to wit, on the said eighth day of January, in the year one thousand eight hundred and eighteen, and for the space of two months in the said declaration mentioned, the said Thomas saith, that the said John ought not to have or maintain his action aforesaid against him, because he saith that long before and at the said time when, &c. in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, a Congress of the United States was holden at the city of Washington, in the county of Washington, and District of Columbia aforesaid, and was then and there,

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and during all the time aforesaid, assembled and sitting, and that long before and at the time when, &c. in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, he the said Thomas was, and yet is, Sergeant at Arms of the House of Representatives, (then and there being one of the Houses whereof the said Congress of the United States consisted) and by virtue of his said office, and by the tenor and effect of the standing rules and orders ordained and established by the said House for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said House, and of the said Congress, was then and there, and during all the time aforesaid, and yet is duly authorized and required, amongst other things, to execute the commands of the said House, from time to time, together with all such process issued by authority thereof, as shall be directed to him by the Speaker of the said House. and that long before, and at the time when, &c. in the introduction of this plea mentioned, and during all the time in the declaration mentioned, one Henry Clay was, and yet is, the Speaker of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was and yet is, amongst other things, duly authorized and required to subscribe with his proper hand, and to seal with his seal, all writs, warrants, and subpœnas issued by order of the said House. and that long before and

at the time when, &c. in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, one Thomas Dougherty was, and yet is, the Clerk of the said House of Representatives; and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was and yet is, amongst other things, duly authorized and required to attest and subscribe with his proper hand, all such writs, warrants, and subpœnas issued by order of the said house and that long before, and at the time when, &c. in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, and ever since, it was and yet is, amongst other things, ordained, established, and practised, by and under such standing rules and orders as aforesaid, and such laws and customs as aforesaid, that all writs, warrants, subpœnas, and other process issued by order of the said House, shall be under the hand and seal of the said Speaker of the said House, and attested by the said Clerk of the said House, and so being under the hand and seal of the said Speaker, and attested by the said Clerk as aforesaid, shall be executed, pursuant to the tenor and effect of the same, by the said Sergeant at Arms. And the said Thomas, the defendant, further saith, that the said Henry Clay, so being such Speaker of the said House of Representatives as aforesaid, and the said Thomas Dougherty, so being such Clerk of the same House as aforesaid, and he the said defendant,

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so being such Sergeant at Arms of the same House as aforesaid, and the said Congress, so being assembled and sitting as aforesaid, heretofore and before the said time when, &c. in the introduction of this plea mentioned, to wit, on the seventh day of January, in the year aforesaid, at Washington aforesaid, in the county and district aforesaid, it was, in and by the said House, for good and sufficient cause to the same appearing, resolved and ordered, pursuant to the tenor and effect of such standing rules and orders so ordained and established as aforesaid, and according to the force and effect of such laws and customs as aforesaid, that the said John had been guilty of a breach of the privileges of the said House, and of a high contempt of the dignity and authority of the same wherefore, it was then and there, in and by the said house, further resolved and ordered, in the like pursuance of such standing rules and orders as aforesaid, and of such laws and customs as aforesaid, that the said Speaker should forthwith issue his warrant, directed to the Sergeant at Arms, commanding him to take into custody the body of the said John, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge, &c. as by the journal, record, and proceedings of the said resolutions and order in the said House remaining, reference being thereto had, will more fully appear. Whereupon, the said Henry Clay, so being such Speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and according to such laws and customs as aforesaid, did, for

the execution of the resolutions and order aforesaid, afterwards, and before the time when, &c. in the introduction of this plea mentioned, to wit, on the said seventh day of January, in the year aforesaid, at Washington aforesaid, in the county aforesaid, as such Speaker as aforesaid, duly make and issue his certain warrant, under his hand and seal, duly directed to the said Thomas, the defendant, as such Sergeant at Arms as aforesaid, (to whom, so being such Sergeant at Arms as aforesaid, the execution of such warrant then and there belonged,) and by the said Thomas Dougherty, so being such Clerk as aforesaid; in and by said warrant, reciting that the said House of Representatives had, that day, resolved and adjudged, that the said John Anderson had been guilty of a breach of the privileges of the said House, and of a high contempt of its dignity and authority; and that the said House had thereupon ordered the said Speaker to issue his warrant, directed to the said Sergeant at Arms, commanding him, the said Sergeant, to take into custody the body of the said John Anderson, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge, therefore, it was required that the said Thomas, the defendant, as such Sergeant as aforesaid, should take into his custody the body of the said John Anderson, and then forthwith to bring him before the said House, at the bar thereof, then and there to answer to the charge aforesaid, and to be dealt with by the said House, according to the constitution and laws of the United States and said

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Henry Clay, so being such Speaker as aforesaid, then and there, and before the said time when, &c. in the introduction of this plea mentioned, delivered the said warrant to the said Thomas, so being such Sergeant as aforesaid, to be executed in due form of law. By virtue, and in execution of which said warrant, the said Thomas, as such Sergeant as aforesaid, afterwards, to wit, at the said time when, &c. in the introduction of this plea mentioned, at Washington aforesaid, in order to arrest the said John, and convey him in custody to the bar of the said House, to answer to the charge aforesaid, and to be dealt with by the said House, according to the constitution and laws of the United States, in obedience to the resolutions and order aforesaid, and to the tenor and effect of the said warrant, so issued as aforesaid, went to the said John, and then and there gently laid his hands on the said John to arrest him, and did then and there arrest him by his body, and take him into custody, and did then forthwith convey him to the bar of the said House, as it was lawful for the said Thomas to do for the cause aforesaid: and thereupon such proceedings were had, in and by the said House, that the said John was then and there forthwith duly examined, and heard in his defence, before the said House, at the bar thereof, touching the matter of the said charge; and that such examination was, in and by the said House, and by the resolutions and orders of the same, duly adjourned and continued from day to day, from the said time when, &c. in the introduction of this plea mentioned, until the sixteenth day of January, in the

year aforesaid, which said examinations were then so adjourned and continued, as aforesaid, from necessity, in order to go through and conclude the examination and defence of the said John, touching the matter of the said charge, before the said House; neither the said examination, nor the said defence, having been finished or concluded before the day last aforesaid. during all which time, to wit, from the said time when, &c. in the introduction of this plea mentioned, until the day last aforesaid, it was, in and by the said House, duly resolved and ordered, from day to day, as the said examination was adjourned and continued as aforesaid, that the said John should be remanded, kept, and detained in the custody of the said Thomas, as such Sergeant as aforesaid, by virtue and in execution of the said warrant, in order to have such his examinations and defence finished and concluded, in due form; and the said Thomas, as such Sergeant as aforesaid, afterwards, to wit, at and from the said time when, &c. in the introduction of this plea mentioned, until the said sixteenth day of January, in the year aforesaid, did, in pursuance of the last mentioned resolutions and orders of said House, and by virtue, and in execution of the said warrant, keep and detain the said John in custody as aforesaid, and him did bring and have, from day to day, during the said time, before the said House, at the bar thereof, in order to undergo such examinations as aforesaid, and to be heard in his defence aforesaid, touching the matter of the said charge, to wit, at Washington aforesaid, in the county aforesaid, as it was also lawful for him, the

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said Thomas, to do for the cause aforesaid and thereupon afterwards, to wit, on the said last mentioned sixteenth day of January, in the year aforesaid, such further proceedings were had in and by th said House, that it was then and there finally resolved and adjudged, in and by the said House, that the said John was guilty, and convict of the charge aforesaid, in the form aforesaid, and that he be forthwith brought to the bar of the said House, and there reprimanded by the said Speaker, for the outrage by the said John committed, and then that he be forthwith discharged from the custody of the said Sergeant at Arms. and thereupon the said John was then and there, in pursuance of the last mentioned resolutions, order, and judgment, forthwith reprimanded by the said Speaker, and then forthwith discharged from the arrest and custody aforesaid; as by the journals, record, and proceedings of the said resolutions, orders, and judgment in the said House remaining, reference being thereto had, will more fully appear which are the same several supposed trespasses in the introduction of this plea mentioned, and whereof the said John hath, above in his said declaration, complained against the said Thomas, and not other or different. With this, that the said Thomas doth aver that the said John, the now plaintiff, and the said John Anderson, in the said resolutions, orders, warrant, and judgment respectively mentioned, was, and is, one and the same person. and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was

assembled and sitting, to wit, at Washington aforesaid, in the county aforesaid · and this the said Thomas is ready to verify: Wherefore he prays judgment, if the said John ought to have or maintain his aforesaid action thereof against him, &c.

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Mr. *Hall*, for the plaintiff in error, made three points. *February 20th.*

1. That the House of Representatives had no authority to issue the warrant.

2. That the warrant is illegal on the face of it.

3. That in either case, it is no justification to the officer who executed it.

1. If the house had authority, it must be either in virtue of the Constitution of the United States, of usage and precedent, or as inherent in, and incidental to, legislative bodies. In the Constitution there are but two clauses which can be made to serve the purpose. The first article, section eight, enables Congress to make all laws which may be necessary and proper to effectuate the powers expressly given. But it is obvious, that this merely authorizes the Legislature collectively, not one House separately, to pass certain *laws*, not mere occasional sentences. And the powers delegated to the United States, being in derogation of the rights of sovereign States, must be construed strictly.[a] For the same reasons, the authority to determine the rules of its proceedings, (art. 1. sec. 5.) cannot be construed to operate beyond the walls of the House, except on its own

[a] 2 *Mass. Rep.* 146.

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members, and its officers. It is observable, also, that this authority is coupled with an authority to punish its members for misbehaviour, and to expel a member. It is a rule of construction, that the text should be considered in connection with the context, but the context, viz. the power to punish and to expel, relates solely to the internal polity and economy of the House. The authority is to determine the *rules* of its proceedings, not the *proceedings* themselves, for these are determined by the Constitution itself in the first article. The fifth section of the first article, authorizes the House to punish *its members*, *et enumeratio unius est exclusio alterius.* The power of issuing warrants is manifestly *judicial.* This may be assumed as an axiom. The Constitution ordains, that the judicial power (which is equivalent to all the judicial power) shall be vested in one Supreme Court, and other inferior Courts, (art. 3. sec. 1.) Thus, the right of the *Courts* to exercise such a power, is *exclusive*, and an assumption of it by any other department, is an usurpation. Nor can the authority be inferred from usage and precedent. These must be, either of the two Houses of Congress, the State Legislatures, or the British Parliament. On the journals of the House of Representatives, are found the cases of Randal and Whitney, and two others. On those of the Senate, is the case of the editor of the Aurora, &c. Shall we be told, that these proceedings were acquiesced in? The want of spirit in the individual to resist oppression, cannot fairly be construed into acquiescence on the part of the public; since that resistance

could be made only by the person immediately affected. As to the usage of the State Legislatures, it is either under colour of their unlimited powers, of express provisions in their Constitution, or of the common law and the usage of Parliament. In this case, unlimited powers and express provision are not pretended; the penal code of the common law is no part of the federal system. Is, then, the authority incident to legislative bodies? An incident is defined, "a thing *necessarily* depending upon, or appertaining to, another that is more worthy, or principal." So the Constitution of the United States, (art. 1. sec. 8.) when regulating the incidental powers of Congress, authorizes it to make such law only as may be "*necessary*" to effectuate the express powers. *Necessity*, then, is the criterion of incident. But is a power to punish the offer of a bribe beyond the verge of the House necessary to enable Congress to perform its duties? The impunity of the offence being the only possible reason of the necessity, if the offender may be adequately punished by the Courts of justice in the ordinary mode of proceeding, the supposed necessity ceases. Bribery of a member of Congress is punishable in the State Courts, and in the Circuit Court of the District of Columbia, according to the course of the common law. Redress may also be had before the same tribunals, in case of the battery or libel of a member, and if the existing remedies be insufficient, an act of Congress may be made to supply the deficiency. And though the ordinary remedies should not reach every possible case, it is a rule, that "if the

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words of a statute do not extend to a mischief which rarely occurs, they shall not, by an equitable construction, be extended to that mischief, but it is *a casus omissus*, and the objects of statutes, are mischiefs, *quæ fræquentius accidunt.*"[a] It is evident, that the framers of the Constitution deemed it more prudent to leave such mere possible mischiefs unprovided for, than to incur a certain evil by vesting an extraordinary and dangerous prerogative for their suppression.

2. The warrant is illegal on the face of it. By the fourth article of the amendments to the Constitution, it is provided, that "*no* warrant shall issue but on probable cause, supported by oath or affirmation." Thus, are prohibited, *all* warrants which do not rest on oath, and on probable cause. But it is no less necessary, that the warrant should recite the cause in special and the oath. The Constitution is not satisfied with "a cause" so vague and indefinite, as "high contempt and breach of privilege." When it adopts a term from the common law, it adopts, also, the law regulating its incidents and properties, unless repugnant to that instrument. Now, what are the incidents and properties of a warrant at common law? It is said by *Dalton*, that "the warrant ought to contain the *special cause and matter* whereupon it is granted."[b]

3. If there be either a defect of authority in the House, or illegality in the warrant, it is no justification. That it is none in the former case, has long

a Vaugh. 373. *b Dalton's Sheriff*, 169.

since been settled in this Court.[a] As to the latter alternative of the proposition, the constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory.[b] Thus, the warrant is a nullity. The rights of Congress on the subject of contempts, have been considered similar, and equal to those of the federal Courts. But here we must recur again to the maxim, that when the constitution adopts a term from the common law, it adopts, also, its incidents. At common law, the power to punish contempt is incident to Courts. But "Congress," and the "House of Representatives," being terms unknown to the common law, can derive no claims through it. Courts enforce the laws; they must, therefore, be clothed with authority to compel obedience to them: whereas, the Legislature is merely deliberative. But, it is asked, are the members to be insulted with impunity, in a manner which will not authorize the interference of a Court? If the insolence be merely by words or gestures, not amounting to slander or assault, the genius of our institutions does not admit of its punishment. Privilege of Congress is reduced by the sixth section, art. 1. of the constitution, to exemption from arrest, and freedom of speech. From the nature of the enumerated privileges, it is evident, that the sole object of giving them was to prevent interruption of the business of the Houses, not to render the person and feelings of members more sacred than those of other citizens. An attempt to

a Little v Barreme, 2 *Cranch*, 179.
b 4 *Bl. Comm.* 491.

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bribe a member may be made in Maine or Missouri. The Speaker's warrant may be issued on a mere allegation without oath, commanding the Sergeant at Arms to arrest the accused "*wherever found*," and bring him to the bar of the House. So that he may be dragged from the extreme of the Union, to be tried by a legislative body. Yet the constitution (art. 3. sec. 2.) provides, that "the trial of all crimes shall be by jury; and that such trial shall be held in the State and District where the offence was committed;" and, also, (art. 5. amendments,) that "no person shall be held to answer for an infamous crime, except on the presentment or indictment of a grand jury; nor shall be deprived of liberty without due process of law" And further, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District." It is only necessary to compare the conduct of the House of Representatives, in the case at bar, with these provisions, in order to perceive its gross injustice and illegality.

The *Attorney-General* and Mr. *Jones*, contra, stated, that the only question before the Court was, whether the House of Representatives could exercise the power in question, either as incidental to its legislative, or its judicial capacity.

1. The House being one branch of the Legislature, no legislative act can be performed without its concurrence, and therefore an attack upon it, is an attack upon the whole Congress. The necessity of self-defence is as incidental to legislative, as to judi-

cial authority. This power is not a substantive provision of the common law adopted by us, it is rather a principle of universal law growing out of the natural right of self-defence belonging to all persons. It is unnecessary to resort to the doctrine of constructive contempts, in order to vindicate the conduct of the defendant as a ministerial officer. He merely executed the judgment of the House, pronouncing the plaintiff guilty of a breach of privilege, and a high contempt. It was confessedly within the competency of the House to render such a judgment in some cases such as that of a direct interruption of its proceedings by open violence within the walls. But from the plea, *non constat*, what was the nature of the offence committed by the plaintiff. Nor was it necessary that the plea should set out the facts constituting the contempt. It is sufficient for the protection of the officer, that the House has jurisdiction to punish contempts, and that it had adjudged the plaintiff guilty of a contempt. The power of punishing contempts is incidental to all Courts of justice, and even to the most inferior magistrates, when in the exercise of their public functions, and arises out of the absolute necessity of the case, which renders it indispensable that they should have such a power.

2. Each branch of the Legislature has certain powers of judicature under the constitution, and the House of Representatives has the exclusive power of impeachment, which necessarily involves the authority of compelling the attendance of witnesses, and punishing them for contempt. Even Lord HOLT, who was an enemy of the extravagant privi-

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leges of Parliament, admits that the power of impeachment residing in the House of Commons, necessarily involved the authority of committing the accused, and of punishing contempts.[a] The powers of judging of elections, and of punishing members for disorderly conduct, necessarily involves all the incidents of judicature. Nothing appears upon the face of the record, to show that it was not in the exercise of these very powers, or in defence of the admitted privileges of the House, that the warrant issued. It need not appear on the face of the warrant that the cause out of which the contempt grew, was within the judicial powers of the house. The mere question between the ministerial officer and the offender, is, whether the warrant was issued by a Court of competent jurisdiction, and whether he has pursued the precept in the manner of executing it. In other words, the only question is, whether the House has, in any case, the power of punishing contempts. If it has jurisdiction, it is a peculiar exclusive jurisdiction, and its exercise cannot be questioned or re-examined elsewhere. The doctrine is settled and established in this Court, that the grant of the powers expressly given to Congress in the constitution, involves all the incidental powers necessary and proper to carry them into effect.[b] And the general grant of judicial powers to the Courts of the United States. does not exclude the other branches of the government from the exercise of certain por-

a Regina v. Paty, 2 *Lord Raym.* 1105.

b M'Culloch v. Maryland, 4 *Wheat. Rep.* 316.

tions of judicial authority. The different departments of the government could not be divided in this exact, artificial manner. They all run into each other. Even the President, though his functions are principally executive, has a portion of legislative power; and the Congress is invested with certain portions of judicial power. The whole of this subject has been thoroughly investigated, in two recent cases in England, and the authorities cited on the argument of those cases, renders it unnecessary to repeat a reference to them on the present occasion.[a]

a Burdett v. Abbott, 14 *East's Rep.* 1. Burdett v. Colman, *ib.* 163.

In these cases, the pleas by the Speaker and Sergeant at Arms of the House of Commons justified the supposed trespasses under a warrant *reciting* a resolution of the House that "a letter signed 'Sir Francis Burdett,' and a further part of a paper entitled, 'Argument,' in Cobbet's Weekly Register, of March 24, 1814, was a libellous and scandalous paper, reflecting on the just rights and privileges of that House, and that Sir Francis Burdett, who had admitted the letter and argument to have been printed by his authority, has been thereby guilty of a breach of the privileges of that House," and that it was thereupon ordered by the House, that the plaintiff, for his said offence, should be committed to the Tower, and that the Speaker should issue his warrants accordingly. The cases were carried from the Court of King's Bench, to the Exchequer Chamber, where the judgments in favour of the defendants were affirmed upon the same grounds stated by the judges of the K. B. in East's Rep. The plaintiff, Sir Francis Burdett, having brought a writ of error to the House of Lords, the cause was argued for him by Mr. *Brougham* and Mr. *Courtnay*, in the Session of 1816—1817. After the counsel for the plaintiff in error had been heard, Lord ELDON, (Ch) proposed to their Lordships that the counsel for the defendants should not be heard,

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It is sufficient to say, that they fully establish the doctrine that a legislative body has, from the necessity of the case, a right to commit persons for con-

until the House should have received the opinion of the Judges on the following question, viz. "Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally, without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt generally, whether, in that case, the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose, were not set forth in the warrant."

The question being handed to the Judges, and they having consulted among themselves for a few minutes, Lord Chief Baron RICHARDS delivered their unanimous opinion that in such a case the Court of King's Bench would not liberate.

Lord ELDON, (Ch.) That this is a case of very great importance none will dispute but, at the same time, I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the defendants, before proceeding to judgment. But in my view of the case, considering it as clear in law, that the House of Commons have the power of committing for contempt, that this was a commitment for contempt, that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant, and being of opinion that the objections, in point of form, have not been sustained, unless any other noble Lord should express a wish to hear the counsel for the defendants, I shall now move that the judgments in the Court below be affirmed.

Lord ERSKINE. When this matter was first agitated, I understood that the House of Commons intended to pursue a very

tempt, in breach of their privileges; that they are the exclusive judges whether those privileges have been violated in the particular instance, and that

different course. I was therefore alarmed. I expressed myself, because I felt, with warmth. I have changed none of the opinions I then entertained, I then said that the House of Commons ought to be jealous of such privileges as were necessary for its protection. My opinion is, that these privileges are part of the law of the land, and upon this record there is nothing more than the ordinary proceeding, the Speaker of the House of Commons, like any other subject, putting himself on the country as to the fact, and pleading a justification in law, for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeding gave rise to the most heartfelt satisfaction; for if the judgment had been adverse to the defendants, the House would no doubt have submitted. It would be a libel on the House of Commons to suppose that it would not. Therefore, by this judgment, it appears that it is the law which protects the just privileges of the House of Commons, as well as the rights of the subject.

The case has been argued with great propriety, but it was contended that it was not alleged in the warrant that the libel was *published* by the plaintiff. But it is alleged that the paper was printed by his authority. And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word *reflecting*, standing by itself, would not be sufficiently distinct. But the warrant recites that the letter had been adjudged to be a libellous and scandalous paper, reflecting on the just rights and privileges of the House of Commons, and the meaning there must be, arraigning the just rights and privileges of the House.

I, myself, while I presided in the Court of Chancery, committed for contempt, in a case in which a pamphlet was sent to me, the object of which was, by partial representation, and by

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their decisions upon the subject cannot be questioned in any other Court or place.

3. As to the form of the warrant, it is unnecessary to describe the offence particularly in the warrant, except for the purpose of letting the party see whether it is bailable or not.[a] But this was only a warrant to arrest the plaintiff, and bring him before the House; a preliminary proceeding absolutely necessary to exercise any sort of jurisdiction over the matter.

March 2d. Mr. Justice JOHNSON delivered the opinion of the Court. Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry, whether the House of Representatives can take cognisance of contempts com-

flattering the Judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a Court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law, and have only to add, that I fully concur in the opinion delivered by the judges.

The counsel were called in, and informed that the House did not think it necessary to hear counsel for the defendants. And then, without further proceeding, the judgments of the Court below were affirmed. 5 *Dow's Parl. Rep* 165. 199.

a *Chitty's Crim. Law*, and the authorities there cited.

mitted against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon the power to punish. If the House of Representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

It is certainly true, that there is no power given by the constitution to either House to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to

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their exercise, not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposite it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end, is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with

the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain, that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbour's rights.

That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend, on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power

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of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended, that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which

unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress within this District, enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favour, for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right in the House of Representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the House be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no farther than to exclusion, and it requires no exuberance of imagina-

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tion to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within the District. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but they are purposes of a more grave and general character than the offences which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet *contempt* might be reasonably applied.

But although the *offence* be held undefinable, it is justly contended, that the *punishment* need not be indefinite. Nor is it so.

We are not now considering the extent to which the punishing power of Congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution.

The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

Analogy, and the nature of the case, furnish the

answer—"*the least possible power adequate to the end proposed*;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the *duration* of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

But the American legislative bodies have never possessed, or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

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If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the House of Representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? the reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the House of Representatives, that the express grant of power to punish their

members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members.

This argument proves too much, for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state which sent him.

In reply to the suggestion that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent would support the asser-

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tion of such powers in any other than a legislative or judicial body. Even corruption any where else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious: there is no difficulty in observing

that respectful deportment which will render all apprehension chimerical. 1821.

The Concep-tion.

Judgment affirmed.

(PRIZE.)

LA CONCEPTION. *The Spanish Consul*, Claimant.

Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.

Where a transfer of the capturing vessel in the ports of the belligerent State, under whose flag and commission she sails on a cruize, is set up in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner.

APPEAL from the Circuit Court of South Carolina.

This was an allegation filed in the District Court of South Carolina by the Vice Consul of his Catholic Majesty, claiming restitution of the ship La Conception and cargo, as the property of Spanish subjects to him unknown, which had been illegally captured by the armed ship La Union, sailing under the flag of Buenos Ayres, and pretending to have a commission or letter of marque from that government, but actually built, equipped, armed, and manned in the United States. A claim was interposed