45TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 100.

ARREST AND IMPRISONMENT OF HON. ROBERT SMALLS.

JANUARY 25, 1878.—Recommitted to the Committee on the Judiciary and ordered to be printed.

Mr. Knott, from the Committee on the Judiciary, submitted the following

REPORT:

The Committee on the Judiciary, having had under consideration the resolution requesting them to examine into the parliamentary precedents, and report whether there has been any invasion of the rights and privileges of the House of Representatives in the alleged arrest and imprisonment of Robert Smalls, a member of said House, by the authorities of the State of South Carolina, whether the detention of said Smalls is legal and justifiable, and what, if any, action in relation thereto ought to be taken by said House, would respectfully submit the following report:

The statutes of South Carolina provide that "every executive, legislative, or judicial officer, who corruptly accepts a gift or gratuity, or a promise to make a gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion, or judgment shall be given in any particular manner, or on a particular side of any question, cause, or proceeding which is or may be by law brought before him in his official capacity, or that in such capacity he shall make any particular nomination or appointment, shall forfeit his office, be forever disqualified to hold any public office, trust, or appointment under the laws of this State, and be punished by imprisonment in the State penitentiary, at hard labor, not exceeding ten years, or by fine not exceeding five thousand dollars and imprisonment in jail not exceeding two years." (Rev. Stat. S. C., chap. 131, § 10, p. 725.)

It appears that after his credentials as a member elect to the Forty-fifth Congress of the United States had been formally issued and forwarded to the Clerk of the House of Representatives, Mr. Smalls was arrested under a regular warrant issued by a duly-authorized magistrate on a charge of having accepted a bribe in violation of the statute just recited, and on the 9th day of October, 1877, entered into a recognizance to appear at the next ensuing term of the court of general sessions in and for the county of Richland, in said State, and answer such bill of indictment as might be preferred against him therefor.

Whether he was actually on his way to attend the session of Congress called to meet on the 15th of October when arrested your committee are not advised, but on that day he appeared at the bar of the House with his credentials as a member thereof, was admitted to his seat as such, and took the oath prescribed by law. On the 25th day of the same month he was granted a leave of absence at his own request, and returned to Columbia, S. C., where, in discharge of his recognizance, he appeared in the court of general sessions, the tribunal having jurisdiction of the offense charged against him, to answer an indictment preferred against him on the 22d of October, for having accepted from

one Josephus Woodruff a bribe of five thousand dollars, on the 18th day of December, 1872, under an agreement and understanding between them that Smalls, who was at the time a member of the senate of South Carolina from the county of Beaufort, should cast his vote as such in favor of the passage of a certain joint resolution making an appropriation for the expenses of printing ordered by the general assembly of that State during its last two preceding sessions.

On the 8th of November Mr. Smalls presented his petition to the court in which the indictment was pending for a removal of the cause to the Circuit court of the United States for the district of South Carolina, which having been overruled, he moved the court to discharge him from custody, on the ground that his arrest and detention were in violation of his privilege as a member of Congress, which motion was overruled and a trial had by jury, which resulted in his conviction and sentence to imprisonment in the penitentiary for five years. The accused having before sentence filed his motions for a new trial and in arrest of judgment, which were respectively overruled, appealed from the judgment of the court, and was admitted to bail in the sum of ten thousand dollars and discharged from custody pending the appeal, since which time he has been in attendance upon the sessions of the House.

Such is a brief statement of the facts shown by the record herewith submitted, and in view of which the inquiries propounded in the resolution under consideration must be determined. And although numerous questions of parliamentary privilege have arisen in the courrse of our Congressional history, some of which have not only been elaborately discussed by the ablest intellects that have illustrated the legislative annals of our country, but have been solemnly reviewed by the highest judicial tribunal known to our Constitution, it is, perhaps, worthy of note that the question to what extent, if any, a member of Congress enjoys an immunity from arrest under criminal process, State or Federal, is now presented for the first time since the organization of our present form of government, and from that fact alone it is probably entitled to a somewhat more careful examination than it might otherwise seem to demand. Yet, however entertaining or instructive it might be under other circumstances to enter upon a critical review of the great variety of cases in which the two houses of the British Parliament as well as the various legislative assemblies of our own country have asserted other peculiar personal privileges in behalf of their own members, a proper solution of this question renders such an extended inquiry in this connection neither necessary nor profitable.

The framers of our Constitution, fully aware that the members of every legislative body ought to enjoy such a reasonable protection from personal restraint not inconsistent with the general welfare as would enable them to discharge their duties in a proper manner, yet, equally sensible of the impropriety of permitting the extent of that privilege as well as the methods for its enforcement to rest entirely in the discretion of those for whose benefit it might be claimed, took care to limit it in the organic law of our government, by declaring that Senators and Representatives "shall in all cases, *except treason, felony, and breach of the peace*, be privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same." (Const. U. S., Art. I, § 6.) It is manifest, therefore, that the question whether an arrest of one of its members under criminal process is an invasion of the privileges of the House of Representatives depends primarily upon whether the offense for which the arrest was made falls

within the exception embraced by the terms "treason, felony, and breach of the peace," as employed in the provision of the Constitution just quoted.

Hence it becomes necessary, in the very outset of this investigation, to ascertain the sense in which those terms are to be understood: that is, whether the exception was intended to be strictly confined to cases coming within the technical definitions of "treason, felony, or breach of the peace," or whether those terms were employed by the framers of the Constitution as a compendious expression, comprehending all criminal offenses of every description whatever. And while it is true that in a few instances the former of these hypotheses has been urged with singular earnestness in the construction of the familiar and long-established rule of English parliamentary law from which this provision in our Constitution was evidently copied, it is difficult, if not quite impossible, to believe that the framers of that instrument intended that the exception should be understood in the restricted and technical sense of the terms employed, instead of the more enlarged and comprehensive one in which the same terms have been applied for centuries by both houses of the British Parliament, and in which they have been invariably explained by all the standard authors upon the law and practice of that body. To do so, indeed, would be to accuse them not only of the absurdity of prescribing a rule for which no adequate reason can be assigned, but one which cannot by any possibility be made to operate uniformly upon all the States, besides attributing the most ridiculous incongruities to that marvelous masterpiece of their genius and wisdom which has challenged the admiration of civilized man for nearly a century.

If there is any reason why a member of Congress should be privileged from arrest under legal process in any case whatever, it is simply because it might be more detrimental to the public interest to detain him from the discharge of his duties in Congress, especially under circumstances involving no such moral turpitude on his part as would render him unfit for their performance, than it would be to temporarily interrupt or suspend the ordinary course of legal justice in that particular instance; while on the other hand the only reason that can be assigned for withholding that privilege from members who may be charged with felony, treason, or breach of the peace, is that the very life of civil society depends upon the prompt and impartial enforcement of its criminal laws, and that it would be far more conducive to the public good that a Senator or Representative guilty of any such offenses should not only be arrested, but tried without delay, and sent to expiate his crime in the jail or the penitentiary, than it would be to drag him, perhaps reeking in infamy, from the bar of justice and thrust him into an important position of public trust for which his own conduct had shown his total unworthiness, and where his presence would constantly tend to render the entire body of which he might be a member a conspicuous object of obloquy and contempt.

Precisely the same reason, however, applies with equal force to many of the most detestable crimes known to the calendar, which, at the time the Constitution was framed, did not come within the technical definition of either treason, felony, or breach of the peace, either at common law, by any statute then in force in all, if in any, of the States of the Union; among them notably bribery, perjury, and forgery, the very crimes which have since been specifically declared in many of our State constitutions to be so infamous as to render a person not only unfit for any

public position whatever, but totally unworthy of credit on oath, or the privilege of voting at any election.

Are we to suppose, then, that the sages who framed our organic law intended to assert that the same overpowering public interest which requires that a member of Congress shall be arrested and detained from the discharge of his official duties to answer for a row at the polls, or a brawl in the bar-room of a tavern, demands that he should be in his seat protected by an inviolable immunity from molestation, notwithstanding bench-warrants against him for having procured his election by bribery may be in the hands of every constable in his district? Did they regard a simple assault and battery as such an enormous crime that the Senator or Representative who might be charged with such an offense should be arrested, no matter under what provocation it might have been committed, and kept from his seat in order that he might be tried and fined a few shillings and costs, however detrimental his detention might be to the interests of his constituents or the country, while one guilty of robbing his neighbor of his life, his liberty, or his fortune by the infamous and detestable crime of perjury should be shielded from personal restraint under criminal process by the sacred panoply of privilege? Or did they deem it more dangerous to the dignity of the American Congress to compel its members to associate with the petty pilferers charged with the larceny of twenty shillings than with the aristocratic thief who had pocketed a half a million by forgery? If not, how can we conclude that the terms "treason, felony, and breach of the peace," as employed in the provision under consideration, were intended to be understood according to their strict technical signification? For, as already remarked, neither bribery, perjury, nor forgery was a felony at common law, while some of those offenses remain to this day mere misdemeanors under the statutes of some of the States.

The term felony, indeed, at the common law was confined to offenses which occasioned a total forfeiture of either lands or goods, or both, and seems to have imported rather an act by which an estate was forfeited, or escheated to the lord of the fee, than the degree of moral turpitude involved in the offense, or the punishment prescribed therefor. Thus we find that suicide was always considered a felony, because it subjected the estate of the person committing it to forfeiture, though the party being dead could not be the object of any punishment whatever; and that homicide by misadventure, or *se defendendo*, being followed by forfeiture, was, strictly speaking, a felony also, though perhaps never punished with death; while heresy, which was a capital offense, was never considered a felony, because it worked no such forfeiture. Finally, however, the term became so generally connected with the idea of capital punishment that whenever a statute made any new offense a felony the law was construed to imply that it should be punished with death by hanging, as well as forfeiture, unless the person convicted prayed the benefit of the clergy. (See Gabbett's Criminal Law, 15, 16; Co. Lit., 391, 4; Bl. Com., 94, 95.)

To render more certain, however, what offenses shall be deemed felonies, if for no other reason, the legislatures of several of our States have provided by statute that all offenses punishable by death or imprisonment in the penitentiary shall be so classed, while others have prescribed no general rule upon the subject, leaving the question in each particular case to be determined by the rules of the common law or the provisions of the statute defining the offense. Hence it results that what may be a felony under the laws of one State may be a mere misdemeanor under those of another. And it will be found, moreover, that

even in the same State the grade of the offense is frequently made to depend upon some slight circumstance in no way affecting the degree of moral turpitude involved, or the offender's fitness for the position of Senator or Representative. For instance, in the State of South Carolina the crime for which Mr. Smalls was arrested is only a misdemeanor, while under the laws of perhaps a majority of the other States it is clearly a felony. And again, in some of the States the larceny of goods of the value of ten dollars or over is made a felony, while the theft of less than that amount is a mere misdemeanor.

It is evident, therefore, as has already been said, that if we are to understand the term "felony" as here employed, according to its strict technical definition, the rule can never be made to operate uniformly upon all the States, and that its application even to members from the same State might result in the most ridiculous absurdities. A member from one State could plead his privilege from arrest for an offense as heinous even as bribery itself, and his plea must be allowed, and his arrest held to be a fearful strain, if not an atrocious outrage upon the dignity and independence of the House, simply because such an offense is technically a mere misdemeanor under the laws of the State where it was committed, while another charged with a precisely similar crime would be compelled to submit in silence to an arrest and take his chances between a cell in the penitentiary and a seat in the American Congress, because the law in *his* State defines the offense to be a felony.

Moreover, if such a construction is correct, the arrest of a member of Congress on a charge of having stolen $9.99—if such a supposition could possibly be indulged—in a State where the larceny of $10 and upward is declared to be a felony and the theft of anything of less value a mere misdemeanor, would be a daring if not a dangerous invasion of the Constitutional immunities of the House; whereas if he had stolen just one cent more he would have been stripped of the hallowed ægis of privilege and allowed to take up his abode in the State's prison "unwept, unhonored, and unsung."

But, again, it is worthy of remark that while at common law bribery—except, perhaps, the single instance of the bribery of a judge in relation to a cause pending before him—was merely a misdemeanor, few, if any, offenses in the entire catalogue of crimes seem to have been held in more utter detestation by the framers of our Constitution. So flagitious, indeed, does it appear to have been in their estimation that in providing for the impeachment and removal of the President and officers of the United States from their respective positions for high crimes and misdemeanors they made it peculiarly conspicuous by specifying it by name, and that, too, in connection with and second only to treason. But can it be possible that while deliberating upon that section they could have contemplated the spectacle of the Sergeant at-Arms of the Senate with the mace, the awful emblem of his office, upon his shoulder, stalking into a court of justice, where a Senator is held to answer an indictment for having bought his high position with money, and defiantly bearing off the privileged person of the thrifty statesman to act as judge in a high court of impeachment where the President or some other exalted functionary of the United States is on trial for the same dangerous and detestable crime?

The truth is, as stated by a standard writer upon Parliamentary law and practice, "The word 'felony' has derived so many meanings from so many parts of the common law and so many statutes, and has got to be used in such vast number of different senses, that it is now impossible to know precisely in what sense we are to understand it; and unless it

is allowed to have such a signification as, with the other words of the exception, will cover the whole extent of criminal matters, it must be rejected altogether for uncertainty, or restricted to a very few cases." (Cush. Par. Law and Pract., p. 230.)

There are, however, other and perhaps equally cogent reasons for the conclusion that the terms "treason, felony, and breach of the peace," as employed in the clause of the Constitution under consideration, were intended to embrace the entire range of indictable crimes, and not to be restricted to offenses coming strictly within their mere technical signification. They were copied literally from the familiar rule of English Parliamentary law, and were evidently intended to be taken in the same sense in which they were there understood. Certainly it will not be supposed that it was ever contemplated that Congress should give a wider range to the personal privileges of its members than was ever claimed by either house of the British Parliament, where immunity from arrest has always been confined to civil causes, and has never been allowed to interfere with the ordinary course of criminal justice.

As far back as the year 1429, when the House of Commons asserted the privilege of freedom from arrest in behalf of William Larke, a servant of one of its members, the claim was coupled with the exception adopted in our own Constitution, to which case Sir Edward Coke refers as authority for the rule stated by him in the Fourth Institute (p. 25), that "generally the privilege of Parliament does hold, unless it be in three cases, viz, treason, felony, and the peace." Again, in the year 1456, in the famous case of Thomas Thorpe, who, notwithstanding he was Speaker of the House of Commons, was taken in execution on a judgment in an action of trespass at the suit of the Bishop of Durham and committed to the Fleet. The House of Lords submitted the question to the justices of the court of King's Bench whether he ought to be delivered from prison by force and virtue of the privilege of Parliament or not, to which the chief justice, in the name of all the justices, "after sadde communicacion and mature deliberation hadde amonge theim," answered among other things that "if any persone that is a membre of this high court of Parlement be arested in suche cases as be not for *treasen, or felonie, or suerte of the peas, or for a condempnation hadde before Parlement*, it is used that all such persones shuld be relessed of such arrestes and make an attouney, so that they may have their fredom and libertee frely to entende upon the Parlement." "After which answer and declaration," the record proceeds, "it was thorowly assentied, agreed, and concluded by the Lords, spirituel and temporal, that the seid Thomas, accordinge to the lawe, shuld remayne stille in prison for the causes above said, the privilegge of the Parlement, or that the same Thomas was Speker of the Parlement notwithstondynge, and that the premisses should be opened and declared to theym that were comen for the Commune of this land, and that they shuld be commaunded in the Kinge's name that they, with all goodly hast and spede, procede to the election of another Speker." (See the case cited in full, 1 Hatsell's Precedents, p. 29.)

In the celebrated case of the Earl of Arundel the exception is stated in somewhat different language. On the 14th of March, 1626, by order of Charles I, the Earl of Arundel was committed to the Tower without the cause of his imprisonment being made known, but it was supposed to be on account of the marriage of his son with the sister of the Duke of Lennox. The House of Lords, highly incensed at his commitment, immediately took the matter under consideration, and after several mes-

sages between themselves and the King it was resolved on the 18th of April, *nemine contradicente*:

That the privilege of this house is, that no Lord of Parliament, sitting the Parliament, is to be imprisoned or restrained without sentence or order of the house, unless it be for treason or felony, or for refusing to give surety for the peace. (3 Lords, p. 562.)

In neither of these cases, which are cited here to show the different forms in which the exceptions to the general rule as to freedom from arrest have been from time to time expressed by the English Parliament, was there any proceeding explaining the precise sense in which the terms "breach of the peace," "surety of the peace," and "refusing to give surety for the peace" were employed, or to show how far they were intended to limit the privilege of members and others in criminal prosecutions.

How they were understood, however, by the members of the British House of Commons at a time when they were especially vigilant and earnest in defending their privileges from regal encroachment may be seen by reference to the report of Mr. Pym, from a committee appointed to prepare heads for a conference with the House of Lords concerning the proceedings against recusants, made to the House of Commons, August 18, 1641. The second point to be insisted on in the contemplated conference was stated as follows:

To let the Lords understand that the conviction of divers recusants has been hindered under pretence of privilege of Parliament from their Lordships, that the opinion of this House is that no privilege of Parliament ought to be allowed in this case for these reasons: (1) Privilege of Parliament is not to be allowed in case of peace, if peace be required. (2) *It is not to be allowed against any indictment for anything done out of Parliament.* (3) It is not to be allowed in case of public service for the commonwealth, for that it must not be used for the danger of the commonwealth. (4) It is in the power of the Parliament, and doth not bind the Parliament itself. (2 Com., p. 261.)

The points insisted upon by the Commons are stated in still clearer language in the report of the conference, made to the House of Lords on the following day, August 19, 1641:

(1) That no privilege is allowable in case of the peace betwixt private men, much more in the case of the peace of the kingdom. (2) That privilege cannot be pleaded against an indictment for anything done out of Parliament, because all indictments are *contra pacem domini regis*. (3) Privilege of Parliament is granted in regard to the service of the commonwealth, and is not to be used to the danger of the commonwealth. (4 Lords' Journal, p. 369.)

But the opinion of the House of Commons, at that time, with regard to the extent of its privileges in cases of criminal prosecutions is perhaps still more emphatically expressed in the following extract from the report of Mr. Glynn upon the sealing of the chambers, trunks, &c., of Mr. Pym, Mr. Hampden, Mr. Strode, and Mr. Hazelrigg, which was adopted as the declaration of the House, January 6, 1641 (2):

That we are so far from any endeavor to protect any of our members that shall be in due manner prosecuted according to the laws of the kingdom and the rights and privileges of Parliament for treason *or any other misdemeanor*, that none shall be more ready and willing than ourselves to bring them to speedy and due trial, sensible that it equally imports us as well to see justice done against them that are criminous as to defend the just rights and liberties of the subjects and Parliament of England. (2 Com. Jour., 374.)

Hatsell, after having revieved all the various precedents of Parliamentary privilege from the earliest records down to the year 1628, says in his conclusion:

There is not a single instance of a member's claiming the privilege of Parliament, to withdraw himself from the criminal law of the land; offenses against the public peace, they always thought themselves amenable for to the laws of their country; they were contented with being substantially secured from any violence from the

Crown or its ministers, but readily submitted themselves to the judicature of the King's Bench, the legal court of criminal jurisdiction, well knowing that privilege which is allowed in case of public service for the commonwealth must not be used for the danger of the commonwealth. (1 Hat. Prec., p. —.)

It is true that in the famous case of "The Seven Bishops," tried at the King's Bench in 1688 for publishing a libel, it was contended for the defendants that, being members of Parliament, they could not be arrested for any offense other than treason, felony, or *actual* breach of the peace, but the point was overruled. Powell declined to give an opinion until he could consult all the books that could give light on the case. Allybone contended that libel was "agreed on all hands to be a breach of the peace," because upon its commission sureties of the peace might be required, in which Holloway and the lord chief justice concurred. (12 Howell St. Trials, p. 228.)

The decision of this point, however, as well as the character of the court, was severely animadverted upon by Lord Camden in the case of John Wilkes, who, while a member of the House of Commons, was arrested, on the 30th of April, 1763, for the publication of a seditious libel in the forty-fifth number of the North Briton, but brought before the court of Common Pleas on a writ of *habeas corpus* on the 6th of May following, when the lord chief justice, having disposed of the other points urged in behalf of the prisoner, said:

The third matter insisted on by Mr. Wilkes is that he is a member of Parliament, and entitled to privilege to be free from arrest in all cases, except treason, felony, and actual breach of the peace, and ought, therefore, to be discharged from imprisonment without bail, and we are all of opinion that he is entitled to that privilege, and must be discharged without bail. In the case of the Seven Bishops the court took notice of the privilege of Parliament, and thought the bishops would have been entitled to it if they had not judged them to have been guilty of a breach of the peace, for three of them, Wright, Holloway, and Allybone, deemed a seditious libel to be an actual breach of the peace, and, therefore, they were ousted of their privilege most unjustly. If Mr. Wilkes had been described as a member of Parliament in the return, we must have taken notice of the law of privilege of Parliament, otherwise the members would be without remedy where they are wrongfully arrested against the law of Parliament. We are bound to take notice of their privileges as being part of the law of the land. 4th Inpt. 25 says: "The privilege of Parliament holds, unless it be in three cases, viz, treason, felony, and the peace." These are the words of Coke. In the trial of the Seven Bishops the word "peace" in this case of privilege is explained to mean where surety of the peace is required. Privilege of Parliament holds in information for the King, unless in the cases before excepted. The case of an information against Lord Tankerville for bribery (4 Anne), was within the privilege of Parliament. (See the resolution of the lords and commons, anno 1675.) We are all of opinion that a libel is not a breach of the peace; it tends to the breach of the peace, and that is the utmost. (1 Lev., 139). But that which only tends to the breach of the peace cannot be a breach of it. Suppose a libel to be a breach of the peace, yet, I think, it cannot exclude privilege; because I cannot find that a libeler is bound to find surety of the peace in any book whatever, nor ever was in any case except one, viz, the case of the seven bishops, where three judges said that surety of the peace was required in the case of a libel. Judge Powell, the only honest man of the four judges, dissented, and I am bold to be of his opinion, and to say that case is not law. But it shows the miserable condition of the state at that time. Upon the whole, it is absurd to require surety of the peace or bail in the case of a libeler, and therefore Mr. Wilkes must be discharged from his imprisonment. (2 Wils. Rep., 150.)

How far this judgment may have been influenced by the peculiar state of politics at the time it is perhaps unnecessary to inquire, but the matter was taken into consideration by both houses of Parliament at their next meeting, and after a spirited discussion, which terminated in a joint vote, it was resolved by each—

That the privilege of Parliament doth not extend to the case of writing and publishing of seditious libels nor ought to be allowed to obstruct the ordinary course of law in the speedy and effectual prosecution of so heinous and dangerous an offense.

(Com. Jour., November 24, and Lords Jour., November 29, 1763. New Pal. Hist., vol. 15, 1362.)

And notwithstanding the nervous protest entered by seventeen members of the House of Lords, in which is to be found perhaps the most masterly argument that could be framed in support of the opinion of Lord Camden, the contrary doctrine seems to have prevailed with the courts as well as the Parliaments of that country from that day to this.

In the first book of Blackstone's Commentaries, published two years thereafter, and which was doubtless quite familiar to the framers of our Constitution, direct reference is made to the case of Wilkes, and the principle asserted in the resolution just cited affirmed to be correct, in the following language:

It is to be observed that there is no precedent for any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I, c. 13, and that of King William (which remedy some inconveniences arising from privilege of Parliaments) speak only of civil actions. And, therefore, the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes, or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants in any *crime* whatsoever; for all crimes are treated by the law as being "*contra pacem domini regis.*" And instances have not been wanting wherein privileged persons have been convicted of misdemeanors and committed or prosecuted to outlawry even in the middle of a session; which proceeding has afterward received the sanction and approbation of Parliament. To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege, and that the reasons upon which that case proceeded extended equally to every indictable offense. (1 Bl. Com., 166.)

Alluding to the resolution in the case of Wilkes, the committee of privileges, in 1831, said:

Since that time it has been considered as generally established that privilege is not claimable for any indictable offense. (Sess. paper, 1831, 114.)

And May, in his Treatise on the Law, Privileges, Proceedings, and Usages of Parliament, published in 1844, says: "The privilege of freedom from arrest has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice" (p.). While Lord Brougham, in the case of Mr. Long Wellesley (2 Russell & Mylne Rep., 673), and in Westmeath *v.* Westmeath (9 Law Journal, ch. 179), lays it down as the "plain, broad, obvious, and intelligible rule" that with respect to everything which is in its nature criminal privilege of Parliament affords no protection, though it is perhaps proper to state that in neither of those cases was the decision of the point necessary.

Story, in his Commentaries on the Constitution of the United States, (sec. 865) says:

The exception to the privilege is that it shall not extend to treason, felony, or breach of the peace. These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase "breach of the peace" would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes), against the opinion of Lord Camden and other judges of the court of common pleas, and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace.

And Cushing, in his Law and Practice of Legislative Assemblies, says:

The reason of the whole matter which clearly excludes all distinction of offenses in

reference to this subject, may be allowed to turn the scale in favor of the broad rule which withdraws the protection of parliamentary privilege from offenses and criminal prosecutions of every description.

It may be contended by some, however, that the exception in the provision of the Constitution under consideration relates only to treason, felonies, and breaches of the peace against the laws of the United States, and has no reference whatever to prosecutions in the courts of the several States. But if this is true, a member of Congress is not privileged from arrest at all, even in civil suits upon process issued under authority of the laws of a State, for the language used in the exception is as general as that employed in the rule, and if it is construed to refer only to offenses against the laws of the United States, precisely the same reasoning will limit the rule to arrests made under authority of those laws. While, on the other hand, if it was intended that Senators and Representatives should be privileged from arrest in any case arising under State laws, as it manifestly was, both the language and the reason of the exception as plainly imply that they shall not be in cases of treason, felony, or breach of the peace against those laws. This is certainly too plain to admit of dispute. If the framers of our Constitution intended to abridge the most important of all the sovereign powers of the several States, the one upon which the preservation of their very existence as organized communities depended, namely, the power to arrest and bring to prompt and impartial justice all persons, without regard to rank or position in life, who should violate their criminal laws, they would surely have expressed that intention in no vague, ambiguous phrase, but in plain and explicit language, especially when they might have done so by the use of half a dozen additional words. They would have said "except treason, felony, and breaches of the peace *against the laws of the United States*" if they had meant thus to limit the exception in question.

It should be remembered, indeed, that even a mail-carrier, or other person employed in the public service, is, upon principles of public policy, as much privileged from arrest under civil process while thus engaged as a member of Congress is under this provision of the Constitution, yet it is universally conceded that such privilege affords an officer or employé of the United States no immunity from arrest and trial upon a criminal charge in a State court. On the contrary, it was held in the case of the United States *v.* Hart (1 Peters's Cir. Ct. R., 390) that the act of Congress was not to be construed so as to prevent the arrest of a mail-carrier for driving the carriage in which the mail was carried through a crowded city at an improper rate of speed. And again, in the case of the United States *v.* Kirby (7 Wallace, 486), it was doubted whether Congress had the constitutional power to exempt employés of the United States from arrest on criminal process from the State courts, especially for crimes *mala in se*. Said Mr. Justice Field, who delivered the opinion of the court in that case:

All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can, therefore, furnish no justification for the arrest of a carrier of the mail. * * * The rule is different when the process is issued upon a charge of felony. No officer or employé of the United States is placed by his position, or by the services he is called upon to perform, above responsibility to the legal tribunals of the country, and to the ordinary process for his arrest and detention when accused of felony, in the forms prescribed by the Constitution and laws. * * * Indeed, it may be doubted whether it is competent for Congress to exempt the employés of the United States from arrest on criminal process from the State courts when the crimes charged against them are not *mala prohibita* but *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such an exemption should be attributed to Congress unless clearly manifested by its language.

And if this rule should be applied in the construction of an act of Congress, there is infinitely greater reason why it should prevail in the interpretation of a constitutional provision granting a power decidedly in derogation of the sovereign rights of the several States.

Upon principle, therefore, as well as in view of the precedents, your committee are clearly of the opinion that the arrest of Mr. Smalls, upon the charge and under the circumstances hereinbefore set forth, was in no sense an invasion of any of the rights or privileges of the House of Representatives; and that, so far as any supposed breach of privilege is concerned, his detention by the authorities of South Carolina for an alleged violation of the criminal law of that State was legal and justifiable; and having arrived at that conclusion, they have deemed it not only unnecessary but improper for them to make any suggestion here as to what course the House should have pursued had the arrest been a violation of its privileges.

Your committee, therefore, submit the following resolution and recommend its adoption:

Resolved, That the arrest of Robert Smalls, a member of this House, by the authorities of South Carolina, for an alleged crime against the laws of that State, was no violation of any right or privilege of this House; and that the detention of said Smalls for trial in the courts of said State, so far as any supposed breach of the privileges of this House is concerned, was legal and justifiable.

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