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Constitutional Privileges of Legislators

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THE CONSTITUTIONAL PRIVILEGES OF LEGISLATORS

EXEMPTION FROM ARREST AND ACTION FOR DEFAMATION

By Oliver P. Field*

American constitutions usually guarantee to members of legislative bodies in the national and state governments certain privileges which are deemed essential to the unhampered functioning of the lawmaking branch of the government. Freedom of debate and exemption from arrest are the privileges most often safeguarded. To analyze the nature and extent of these privileges is the purpose of these paragraphs.

1. Freedom of Debate

The constitution of the United States provides that for any speech or debate in either house members of Congress shall not be questioned in any other place.[1] State constitutions contain similar provisions.[2] This privilege is of English origin, and was a hard-won protection from royal interference with the freedom of debate in parliament.[3] The privilege has also been a protection

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[1]Art. 1, sec. 6. cl. 1. Freedom of debate is safeguarded to most modern legislatures in foreign states also. See Veeder, Absolute Immunity in Defamation, 10 Col. L. Rev. 131, note 1.

[2]See constitutions of Alabama art. 4, sec. 56; Arizona, art. 4 (2), sec. 6; Arkansas, art. 5, sec. 15; Colorado, art. 5, sec. 16; Connecticut, art. 3, sec. 10; Delaware, art. 2, sec. 13; Idaho, art. 3, sec. 7; Illinois, art. 4, sec. 14; Indiana, art. 4, sec. 8; Georgia, art. 3, sec. 7; par. 3; Kansas, art. 2, sec. 22; Kentucky, sec. 43; Louisiana, art. 28; Maine, art. 4, pt. 3, sec. 8; Maryland, art. 3, sec. 18; Massachusetts, chap. 1, sec. 3, p. 10; Michigan, art. 4, sec. 8; Minnesota, art. 3, sec. 8; New Jersey, sec. 4, cl. 8; New Mexico, art. 4, sec. 13; New York, art. 3, sec. 2; North Dakota, art. 2, sec. 42; Ohio, art. 2, sec. 12; Oklahoma, art. 5, sec. 22; Oregon, art. 4, sec. 9; Pennsylvania, art. 2, sec. 15; Rhode Island, art. 4, sec. 5; South Carolina, art. 3, sec. 14; South Dakota, art. 3, sec. 11; Tennessee, art. 2, sec. 13; Utah, art. 6, sec. 8; Virginia, art. 4, sec. 48; Washington, art. 2, sec. 17; West Virginia, art. 6, sec. 17; Wisconsin, art. 4, sec. 16; Wyoming, art. 3, sec. 16. It has also been asserted thtat this privilege exists even in the absence of constitutional provision, "as a necessary principle in free government." See Cooley, Torts (Student ed.) p. 229.

[3]For English origin of privilege see Vedder, op. cit., 10 Col. L. Rev. 132-4. Story says that the privilege existed in the American colonies. Story, Commentaries on the Constitution sec. 866.

against the fellow-subjects of the legislator,[4] and as adopted in the constitutions of the states, this was the protection designed to be attained.[5]

The nature and purpose of the privilege have been well stated by Cushing, in his work on the Law and Practice of Legislative Assemblies[6]:

"The privilege, secured by this constitutional provision, though of a personal nature, is not so much intended to protect the members against prosecutions, for their own individual advantage, as to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear either of civil or criminal prosecutions; and therefore it ought not to be construed strictly, and confined strictly within the literal meaning of the words in which it is expressed, but to receive a liberal and broad construction, commensurate with the design for which it is established."

The terms of most of the constitutional provisions on this point do not often extend beyond speeches or words spoken in debate, but legislators have interpreted the privilege as including more than the spoken word. The following statement made in the case of *Kilbourn v. Thompson*[7] would seem to support this interpretation:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which though in writing must be reproduced in speech, and the act of voting, whether it is done vocally or by passing between the tellers. In short, the things generally done in a session of the House by one of its members in relation to the business before it."

It was said by the Massachusetts court in *Coffin v. Coffin*[8] that the member is not necessarily confined to his place in the house; that

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[4]Cushing, Law and Practice of Legislative Assemblies, secs. 601-3.

[5]Beard, American Government and Politics 233. It was said by James Sullivan (Cassius) in the Massachusetts Gazette for November 27, 1787, that this provision was a guarantee of free government, and those who were opposed to this provision were severely criticized by Sullivan. This letter is reprinted in Scott, Federalist 484. The following statement is found in Commonwealth v. Blanding, (1825) 3 Pick. (Mass.) 304, 15 Am. Dec. at 248: "All proceedings in legislative assemblies . . . are protected from scrutiny elsewhere than in those bodies themselves, because it is essential to the maintenance of public liberty that in such assemblies the tongue and the press should be wholly unshackled." This was dictum.

[6]Section 603.

[7](1880) 103 U. S. 168, 26 L. Ed. 377.

[8](1808) 4 Mass. 1, 3 Am. Dec. 189.

there might be cases in which the legislator is entitled to the privilege when not within the walls of the representatives' chamber.

The test laid down by both the United States court and the Massachusetts court seems to be: Is the member engaged in legislative business at the time he makes the alleged defamatory statement? If he is engaged in his legislative capacity, he is within the privilege, but if he is not so engaged, even though he be within the walls of the House, he loses the protection offered by the privilege. In applying this test, the Massachusetts court did not favor the member of the Assembly claiming the protection of the privilege, with the benefit of any of the doubts which arose in the case. In the *Coffin Case,* it might easily have been held that the legislator who was the defendant was acting in his legislative capacity. But the court seemed to feel no hesitation in holding that he acted without the privilege. The words spoken were doubtless defamatory,[9] but were spoken in the Assembly hall, just following the close of a debate on a resolution which furnished the subject of the defamatory remark, and it might have been that the parties had in mind a motion to reconsider.

The case has been cited in support of a liberal interpretation of the privilege, and there are not wanting writers of repute who advocate the doctrine of liberal construction.[10] If by liberal construction is meant merely that the privilege shall not be confined to the spoken word, little quarrel could be picked with the doctrine. But, if it means that the legislator shall be given the benefit of the doubt, that the circumstances surrounding the making of the defamatory remarks shall be interpreted so as to bring him within the privilege, then it is submitted that the doctrine is not sound, nor is it supported by the decision in *Coffin v. Coffin.* The statement in the *Coffin Case* in support of a liberal interpretation is dictum, and was not applied in that case.

This privilege from action for defamation for anything said in

[9]The expressions which were the basis for the action were such as "that convict" and a statement concerning plaintiff's acquittal by a jury of an embezzlement charge, "That did not make him less guilty, thee knows." See also the following statement from McGaw v. Hamilton, (1898) 184 Pa. 108, 39 Atl. 4, 63 A. S. R. 78, a case dealing with the same question in connection with a municipal council proceeding: "From the tenor of the foregoing authorities it follows that, even in the recognized cases of absolute privilege, it is not enough that the slanderous words were uttered in a legislative hall . . . to establish a claim for absolute immunity. A further reference must be had to the circumstances, and to the occasion of the particular occurrence, before that question can be settled." p. 115.

[10]See, however, the comment by Story to the effect that the privilege should be strictly construed. Story, op. cit., sec. 866.

the course of legislative business has been denominated an absolute privilege by several writers.[11] There is language in the *Coffin Case* which would seem to support this view. The English law seems settled to the effect that the privilege is an absolute one, of the same class as that enjoyed by judges.[12] There is no case in the United States which has directly decided that the privilege is an absolute one, and on principle it is believed that the privilege should be deemed a conditional one. The grant of an absolute privilege should not be lightly implied, for it is in derogation of the rights of the body of citizens as a whole. If a conditional privilege will serve to attain the same end it should be preferred. In the case of an absolute privilege a showing of actual malice does not suffice to remove the protection afforded by the privilege, but in the case of a conditional privilege such a showing of actual malice is sufficient to remove the privilege as a defense to the action. It might well be asked whether there is any necessity for granting an absolute privilege in this matter to the legislator. It would seem that the constituent should be given that little protection which remains when he must show actual malice in the legislator. It is believed that perfect freedom of debate is only essential to effective representative government in so far as it brings forth searching and critical analysis plus such information as may be valuable in the handling of legislative business. It can hardly be argued that legislative business is aided in any way by the making of malicious statements. Malice can scarcely be deemed a guarantee of that free legislative action which the constitutional provisions on this point were designed to attain. The purpose of the privilege is such that there is no reason for granting an absolute immunity to the legislator. A conditional privilege allows the legislator all the freedom of debate which is of any benefit to representative government, and the interest of the individual in preserving his reputation is of sufficient importance to warrant the doctrine of a conditional privilege, that he may retain some measure of protection

[11]Veeder, op. cit., 10 Col. L. Rev. 134; Newell, Slander & Libel, 3rd ed., sec. 506; dictum in McGaw v. Hamilton, (1898) 184 Pa. 108, 39 Atl. 4 63 A. S. R. 78; Cooley, Torts, 3rd ed., 425; 17 R. C. L. 330.

[12]Pollock, Torts, 8th ed., 264-5. See also Channel, J. in Bottomley v. Brougham, [1908] 1 K. B. 584, 77 L. J. K. B. 311, 99 L. T. 111, 24 T. L. R. 262, on the general nature of absolute privilege. A portion of this opinion is reprinted in Hepburn, Cases on Torts 659, note 1. It is perhaps somewhat easier to sustain an absolute privilege for judges than for legislators, but it might be a matter of doubt whether the law would be as uncompromising in favor of the judge were it to be fashioned anew.

from defamation by a legislator,[13] for it sometimes happens that legislators do abuse the privilege of exemption from action for defamation for speeches made in the legislature.[14]

2. Privilege From Arrest

Most of the state constitutions, as well as the constitution of the United States, extend the privilege from arrest to legislators.[15] It has been suggested by some writers and courts that the privilege exists in the absence of constitutional provision as an inherent privilege of parliamentary assemblies.[16] There is, however, some authority to the contrary.[17] By the very terms of the provisions in the majority of the constitutions the privilege is confined to legislators. It is therefore clear that a person elected to the legislature and admitted to his seat by that body is within the privilege. But by the constitutions of many states the legislature is constituted the final judge of the election and qualifications of its own members.[18] What is to be the rule with regard to the member-elect who journeys to the meeting place of that body and finds that he is denied a seat? Is he a legislator within the meaning of the privilege? It seems that the rule for determining whether a per-

[13]Ogg and Ray, Introduction to American Government 354. As to the publication of speeches of congressmen which are of a defamatory nature there has been some uncertainty. Such publication was without the privilege in England, but in the United States it seems as though practice has been to the contrary. See Story, op. cit., sec. 866 and Beard, American Government and Politics 233.

[14]It should be noted that the wording of some constitutions will hardly permit of a construction of conditional privilege. Such for example is the provision of the Washington constitution, art. 2, sec. 17, "No member of the legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate." See also constitutions of Maryland, art. 3, sec. 18; Wisconsin, art. 4, sec. 16. The absolute privilege is accomplished here by barring any action whatever.

[15]See note 2. Also constitutions of California, art. 4, sec. 11; New Hampshire, art. 20, Part II; Iowa, art. 3, sec. 111; Washington, art. 4, sec. 15. No provision was found in the constitutions of Missouri, Vermont, or Maryland.

[16]Cooley, Constitutional Limitations, 5th ed., 169; Flanders v. Kimball, (1869) 3 Am. L. Rev. 377. Story says: "It seems absolutely indispensable for the just exercise of the legislative power in every nation, purporting to possess a free constitution of government; and it cannot be surrendered without endangering the public liberties, as well as the private independence of the members." Story, op. cit., sec. 859.

[17]See Berlet v. Weary, (1903) 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 108 A. S. R. 610.

[18]In re Gunn, (1893) 50 Kan. 155, 32 Pac. 470, 19 L. R. A. 519; McCrary, Elections, 3rd ed., sec. 621; Allen v. Lelande, (1912) 164 Cal. 56, 127 Pac. 643; Mills v. Newell, (1902) 30 Col. 377, 70 Pac. 405; Price v. Ashburn, (1914) 122 Md. 514, 89 Atl. 410.

son is entitled to a seat in a legislative body is the possession of a certificate of election. If he holds such a certificate he is said to be entitled to the seat upon the organization of the body, and he can be ousted only by action of the body itself.[19] The certificate is prima facie evidence of good title to the seat. It would thus seem to follow that those members-elect who hold certificates of election are within the privilege.[20] Whether a member-elect not holding a certificate of election would be accorded the privilege is not certain, as the cases do not specify whether the members-elect who had been denied a seat held a certificate of election or not.[21]

A member of the legislature would of course lose the privilege upon resigning his seat. The power of expelling members is quite usually granted to legislative bodies in this country, and the privilege of a member from arrest ceases upon his expulsion from the legislature, and the court will not inquire into the motives which prompted the expulsion, nor the mode in which it was accomplished.[22] The privilege from arrest has been extended by judicial decision to a member of a state ratifying convention, convened to discuss the adoption of the constitution of the United States.[23] For the purpose of being accorded the protection of this privilege, the term "senators and representatives" as used in the constitution of the United States has been interpreted to include territorial delegates to congress.[24] In support of this decision it was said that the territorial delegate was a representative of the people in every sense except that he did not have the right to vote, and that the presence of such a delegate was necessary to the intelligent and efficient performance of the work of Congress in so far as it related to the government of territories. One court refused to extend the privilege to territorial delegates on the basis of the constitutional privilege, but the privilege was accorded them on the basis of parliamentary law.[25] It was stated by this court that the constitutional provision could not have contemplated such dele-

[19]Cushing, op. cit., sec. 228.

[20]Ibid., sec. 551. Watson says the privilege is effective from the time of election. Watson, Constitution of the United States 307. To the same effect is Story, op. cit., sec. 864.

[21]See, for example, Dunton v. Halstead, (1840) 2 Pa. L. J. R. 45, 4 Pa. L. J. 237, and comment thereon in Watson, op. cit., 311.

[22]See Hiss v. Bartlett, (1855) 3 Gray (Mass.) 468, 63 Am. Dec. 768. Also Cushing, op. cit., secs. 550-58.

[23]Bolton v. Martin, (1788) 1 Dall. (U. S.) 216, 1 L. Ed. 144.

[24]Doty v. Strong, (1840) 1 Pinney (Wis.) 84.

[25]Flanders v. Kimball, (1869) 3 Am. L. Rev. 377.

gates, because there were no such persons at the time the constitution was framed. The fact that one of the obligors on a joint and several bond is a legislator and therefore privileged from action at the time an action is brought on the bond, does not privilege the other obligors.[26]

The modern English rule as to the duration of the privilege from arrest is that it extends over a period of forty days before the session opens and forty days after the session has closed.[27] There is some conflict of opinion as to what was the rule of the common law at the time of the framing of the early state constitutions and the constitution of the United States. The English case cited above is authority for the opinion that the rule of the common law was that of forty days, and had been such for a long time.[28] In the case of *Hoppin v. Jenckes,*[29] the Rhode Island court examined the authorities with some care and concluded that the rule of the common law was that of a convenient time in which to reach the session of parliament, and a similar period in which to reach home following the close of the session. The court was of the opinion that no such definite time as forty days could be said to be the common law rule.[30]

Constitutional provisions in the United States differ in their treatment of the duration of the privilege from arrest. Some of the constitutions merely use such phrases as "going to" and "returning from" the session of the legislature.[31] Other constitutions provide that the privilege be in operation for a period of fifteen days before the opening of the session,[32] while some provisions specify a given number of days both before and after the session during which the privilege shall be in effect.[33] Where the constitution provides that the privilege exists for a specific number of days in addition to the time of the session of the legislature there is little difficulty. Such a specific enumeration of days would seem

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[26](1802) 2 Bay (S. C.) 406.

[27](1847) Goudy v. Duncombe, 1 Ex. 430, 5 D. & L. 209.

[28]See, also, Cushing, op. cit., sec. 580.

[29](1867) 8 R. I. 453, 5 Am. Rep. 597.

[30]Cushing also doubts that there was any such fixed period. See Cushing, op. cit., sec. 580. See, however, Story, op. cit., sec. 861.

[31]See, for example, the constitutional provisions of Illinois, Kentucky, and Minnesota referred to in notes 2 and 14 as typical of this.

[32]The following states have provisions for a certain period before and after the session; California, Connecticut, Michigan, Mississippi, Nebraska, Rhode Island, South Carolina, West Virginia, Wisconsin.

[33]These states provide for a number of days either before or after, but not both: Idaho, Kansas, Nevada, Utah, Virginia, Washington, Indiana.

to deny the application of a rule of convenience such as perhaps obtained at common law.[34] It might be noted that if the legislator reaches his destination before the specified period following the close of the session has expired the privilege ceases to exist.[35] Members of Congress are not allowed a period to be computed by the twenty-miles per day travel rule which is applicable in some other instances.[36]

Just what is a convenient and reasonable time in "going to" and "returning from" a session is a little doubtful. It has been held that members of Congress need not take the most direct route in going to a meeting of Congress, nor are they precluded from stopping on the way, to rest, and even to visit with friends.[37] If illness befalls members of the family during the course of the journey that fact may be pleaded in extenuation of what would otherwise be deemed an unreasonably long time. If a legislator finds himself unable to leave the city promptly following the close of the session because of financial embarrassment the court will take that fact into account in determining a reasonable time as applicable to his case.[38] There is some authority however, which holds that the duration of the privilege should be strictly construed.[39] But twenty-four hours has been held to be too short

[34]See Watson, op. cit., 310 for comment on Hoppin v. Jenckes, (1867) 8 R. I. 453, 5 Am. Rep. 597; Cushing, op. cit., 582.

[35]Colvin v. Morgan, (1800) 1 John. Cas. (N. Y.) 415. Also Corey v. Russell, (1830) 4 Wend. (N. Y.) 204. In the latter case it was said, "The protection from arrest is secured to enable members of the legislature to return to their homes, and having in fact returned, they cannot claim an exemption from arrest, although the fourteen days are not expired." p. 205.

[36]Lewis v. Elmendorf, (1801) 2 John. Cas. (N. Y.) 222.

[37]Miner v. Markham, (1886) 28 Fed. 387. The test here laid down was that of the intent to go to Washington on this particular trip, notwithstanding the stopover in question. It was said that minor stops were not fatal, if made in good faith. See the criticism of this case, (which allowed the privilege to a member claiming to be on his way to a session of congress which was to open December 7, served with a summons October 28) in Watson, op. cit., 316-17; "It would seem that this decision carries the doctrine too far. The language of the constitution is plain, simple and clear. To establish quarters and settle his family and household affairs, are, at least in this connection, unusual expressions, and to attend to these matters might require much greater time for some members than for others, so that no general rule could be established on the subject even should it be held that the words of the constitution are susceptible of such a construction." But see this comment from Story, op. cit., sec. 864; "Nor does it nicely scan his road, nor is his protection forfeited by a little deviation from that which is most direct, for it is supposed convenience or necessity directed it."

See also Miner v. Markham, (1886) 28 Fed. 387; Cushing, op. cit., sec. 582.

[38]Dunton v. Halstead, (1840) 2 Pa. L. J. R. 45; 4 Pa. L. J. 237.

[39]Lewis v. Elmendorf, (1802) 2 John. Cas. 222. This case holds that

a time in which to force the legislator to leave the capitol on pain of losing the protection of the privilege.[40] It may well be that what is a reasonable time in "going to" the session might be different from a reasonable time in "returning from" the same session, as some time should be allowed the member to straighten his affairs in the capitol before leaving for his home. A member on leave of absence is within the privilege,[41] and it has been held that if only a short time intervenes between the adjournment of one session and the opening of the next session of congress, the member is within the privilege if he visits about between sessions, it being inconvenient for him to go to his home because of the great distance of the same from the capital city.[42]

There is no reason for believing that any distinction is to be drawn between regular and special sessions, and it has been decided that any constitutional meeting of the legislature is included within the meaning of the privilege clause. The privilege is in existence while the senate of a state legislature sits as a court of impeachment by virtue of its authority in such cases under the constitution.[43] It is not always easy to tell when the session of a legislative body is legally at an end but the test would seem to be whether the legislature has actually terminated the session.[44] This would mean that one house could not end the session by an adjournment, but both houses would have to adjourn in order to terminate the session, and it might be necessary that the adjournment be to the date of the next constitutional meeting.[45] Several state constitutions limit the period of the legislative session, and in those states the question would be easily settled.[46]

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a member of congress is privileged during the session, or while he is actually on his journey to or from the seat of government. Watson approves this, Watson, op. cit., 310. See Respublica v. Duane, (1807) 4 Yeates (Pa.) 347.

[40]Ross v. Brown, (1889) 7 Pa. Co. Ct. Rep. 142.

[41]Gray v. Sill, (1883) 13 W. N. C. (Pa.) 59; 2 Ann. Cas. 615, note. It was said in Respublica v. Duane, (1807) 4 Yeates (Pa.) 347, that "If a member should neglect his duty by not attending the session of congress, or should desert it without leave, he is no more entitled to privilege in such instances from arrest, than a mere private citizen. The court however will not presume a dereliction of duty, unless it is established by satisfactory proof; they will construe the privilege liberally, and by no means weigh the absence of a member in scales too nice."

[42]Flanders v. Kimball, (1869) 3 Am. L. Rev. 377. In this case congress had taken a recess, and the delegate lived in Washington territory.

[43]Cook v. Senior, (1896) 3 Kans. App. 278, 45 Pac. 126.

[44]Cushing, op. cit., sec. 584.

[45]Ibid., sec. 584.

[46]Mathews, American State Government 170 ff.

Treason, felony and breaches of the peace are usually excepted from the privilege from arrest.[47] It is therefore sometimes asserted that the privilege is restricted to civil arrest.[48] The exception contained in the United States constitution has been construed to include "all criminal offenses,"[49] and a state court has held that there need not be an actual breach of the peace, if the party be subject to indictment.[50] At common law there were some crimes, as perjury, which did not fall within either of the three exceptions.[51] It was the opinion of Lord Chancellor Brougham that the privilege did not apply to anything criminal, but applied to everything in the nature of a civil process.[52] The Wisconsin court has ruled that bribery, not being a felony at common law nor in the territory at the time the constitution of the state was framed, was not included within the exception.[53] It is interesting to notice that the court found a waiver of the privilege in this case. There was some conflict in the English law on the question of the inclusion of misdemeanors in the exception to the privilege from arrest, but the American rule would seem to include them.[54] No cases on contempt of court as related to this privilege have been found in the United States, but the English rule is that the privilege extends to an indirect contempt, but not to a direct contempt, and this distinction would doubtless be followed in this country.[55]

[47]Sometimes in addition to this exception "breach or surety of the peace" are also excepted. For additions to the exceptions, see provisions referred to in note 2 and 14, for Arkansas, Colorado (adding also violation of oath of office), Montana (same), Pennsylvania (same).

[48]1 Willoughby, Constitution of the United States, sec. 233.

[49]Williamson v. United States, (1908) 207 U. S. 425, 28 S. C. R. 163, 52 L. Ed. 278. The court said in the course of its opinion: "Since from the foregoing it follows that the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit." p. 446. See 5 C. J. 388; United States v. Wise, 1 Hayw. & H. (D. C.) 82, Fed. Cas. 16746a.

[50]Commonwealth v. Keeper of Jail, (1877) 4 Wkly. Notes (Pa.) 540, 13 Phila. 573.

[51]Cushing, op. cit., sec. 560.

[52]See on the English law, Cushing, op. cit., secs. 559-65; Watson, op. cit., 308-9.

[53]State v. Pollacheck, (1898) 101 Wis. 427, 77 N. W. 708. Story makes this statement: "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." Story, op. cit., sec. 865.

[54]Cushing, op. cit., sec. 563, particularly on the Wilkes seditious libel case.

[55]Cushing, op. cit., sec. 564. So, too, in a contempt for refusal to obey

This privilege from arrest is not only a privilege of the legislature, but is also a privilege of the individual legislator, granted to him on behalf of the public.[56] Accordingly it is generally held that the legislator may waive the benefit of the privilege. Waiver may be voluntary, or may be implied from a failure to assert the privilege in the proper manner or at the proper time.[57] The privilege must be set up affirmatively as a defense, for the court will not take ex officio notice of it.[58] Proceedings in a court which could be stayed by a plea of privilege are not void ab initio, because the privilege is not an incapacity like infancy or coverture.[59] It can hardly be said to be a burden on the legislator to have to show that he is a member of the legislature, for the facts which would show this are usually quite easily ascertainable. The privilege is not against suit, but is against arrest or a service with process, so it follows that the privilege may not be pleaded in abatement of a writ.[60]

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a writ of habeas corpus. Ibid., sec. 565. In Respublica v. Duane, (1807) 4 Yeates (Pa.) 347, an indictment was brought against a person, and one of the witnesses who was a legislator failed to attend court. He had been subpoenaed, and a motion was made for attaching the legislator and the court though in this case refusing on the showing made to grant the motion, said, "On the most mature reflection, I am of opinion, that the court may either grant or refuse such compulsory process, according to the existing circumstances." See to the same effect United States v. Cooper, (1800) 4 Dall. (U. S.) 341, Fed. Cas. 14861. But see United States v. Thomas, (1847) 1 Hayw. & H. (D. C.) 243. Fed. Cas. 16476.

[56]Chase v. Fish, (1839) 16 Me. 132. "Privileges of this character, although founded upon what the public interest is supposed to require, when set up at the instance of the party, are regarded as personal, and such as may be waived expressly, or by implication, when not asserted at the proper time and in the proper manner." p. 132. See Cooley, Constitutional Limitations, 5th ed., 169. It was said in Hiss v. Bartlett, (1855) 3 Gray (Mass.) 468, 63 Am. Dec. 768, that "it is a question of personal privilege, not the privilege of the house." See also dictum in Kallock v. Elward, (1919) 118 Me. 346, 108 Atl. 256. Also Story, op. cit., sec. 863.

[57]Gyer's Lessee v. Irwin, (1790) 4 Dall. (U. S.) 107, 1 L. Ed. 762; Johnson's Executors v. Johnson, (1785) 4 Call (Va.) 38; McPherson v. Nesmith & Wife, (1846) 3 Gratt. (Va.) 237; State v. Pollacheck, (1898) 101 Wis. 427, 77 N. W. 708.

[58]Prentis v. Commonwealth, (1827) 5 Rand. (Va.) 697, 16 Am. Dec. 782. See, also, note, 16 Am. Dec. 684; "The rule as stated in the principal case, that courts do not ex officio notice the existence of the privilege granted to members of the legislature is undoubtedly correct and well sustained by authority."

[59]Prentis v. Commonwealth, (1827) 5 Rand. (Va.) 697, 16 Am. Dec. 782.

[60]McPherson v. Nesmith & Wife, (1847) 3 Gratt. (Va.) 237. It seems to be the rule that a service on a person within the privilege is not a trespass. Chase v. Fish, (1839) 16 Me. 132. Nor is such an arrest void, State v. Pollacheck, (1898) 101 Wis. 427, 77 N. W. 708, unless made so expressly by constitutional provision such as is the case in Rhode Island, Const. art. 4, sec. 5. This is an uncommon provision in state constitutions. Story

The Kansas court has held that where the constitutional provision was that the legislator should not be "subject to" arrest it is not within the power of the member to waive his privilege.[61] The court felt that the people of the state had declared in unqualified terms in this provision that the members of the legislature were not to be arrested. The member therefore could not thwart this rule. The theory underlying this decision is of course that the state has a paramount claim upon the services of the legislator and he shall not be allowed to defeat this claim. This is the real reason for the insertion of these provisions into state constitutions, but although sessions of state legislatures are short enough to warrant the view that the legislator should devote all of his time to the legislative work in hand it is nevertheless doubted by many observers that the temporary distraction to the individual member in these comparatively rare cases works any real damage to the public, and it is perhaps a recognition of this which causes the courts to allow the privilege to be waived in most jurisdictions.

Some of the state constitutions provide in terms that the privilege from arrest shall include immunity from civil process.[62] The constitution of Rhode Island even goes so far as to provide that any process served during the privileged period shall be considered void.[63] More often the phrase "privileged from arrest" is used, and this leaves much to be determined by judicial interpretation. There is a division of authority in both the state and federal courts on the question of whether the term *arrest* as used in the constitutions includes immunity from civil process. The Supreme Court of the United States has not passed upon the question so there is a diversity of opinion with regard to the provision as found in the constitution of the United States.[64]

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is perhaps mistaken when he says, "The effect of this privilege is, that the arrest of the member is unlawful, and a trespass ab initio, for which he may maintain an action . . ." Story, op. cit., sec. 863.

[61]Cook v. Senior, (1896) 3 Kans. App. 278, 45 Pac. 126.

[62]See constitutions of Arizona, California, Connecticut, Idaho, Kansas, Michigan, Oregon, Rhode Island, Virginia, Washington, Wisconsin.

[63]Art. 4, sec. 5.

[64]In favor of extending the privilege, see Miner v. Markham, (1886) 28 Fed. 387; Doty v. Strong, (1840) 1 Pinney (Wis.) 84; Flanders v. Kimball, (1869) 3 Am. Law Rev. 377; Nones v. Edsall, (1848) 1 Wall. Jr. 189, Fed. Cas. 10290, wherein a state case, Gyer's Lessee v. Irwin, (1790) 4 Dall. (U. S.) 107, 1 L. Ed. 762, is severely criticized. Opposed to extending the privilege, see Kimberly v. Butler, (1869) 3 Am. Law Rev. 777, 2 Balt. Law Trans. 276, 16 Pittsb. Leg. J. 11, 1 Chi. Leg. News 245; Kimberly v. Butler, (1868) 3 Am. Law Rev. 376; Worth v. Norton, (1899) 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563, 76 A. S. R. 524; Bartlett

It is argued in favor of including within the term *arrest* an immunity from civil process that the legislator needs protection from one sort of process as much as another. The end sought in the privilege is that the legislator be not hindered in any way in the performance of his legislative work. It is said that if civil suits are instituted against him by an arrest of the body it is admitted by all that they should be included within the privilege. And it is argued that although modern codes of procedure have abolished this method of instituting a civil action the fact remains that the legislator will be harassed by civil suits and his efficiency as a lawmaker impaired to an appreciable degree, although of course not in such a direct way as in the case of an arrest of the body. The legislator is said to need all of his time for his legislative work and should not be bothered with the necessities of preparing a case, arranging for the production of witnesses, and perhaps even with having to leave the session to attend to a suit. Not only is the public to be guaranteed the undivided attention of the legislator but it is only a just protection to the member himself, that his estates may not be attached, or other action taken against him during his absence from home. It is pointed out that the legislature might see fit to compel the attendance of the member, and thus a conflict would arise between the legislative and judicial branches of the government.[65]

In answer to these arguments it is maintained that ample protection may be given members, and is in fact given to them, by the provisions of various codes which provide that suits pending against the legislator during the session of the legislature shall not be tried until the session has ended. It is asserted that where the codes do not grant that protection reliance might be placed in

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v. Blair, (1895) 68 N. H. 232, 38 Atl. 1004; Howard v. Citizens Bank, 12 App. D. C. 222. Also note, 76 A. S. R. 539.

State cases construing the privilege to include exemption from civil process are Anderson v. Rountree, (1841) 1 Pinney (Wis.) 115; Tillinghast v. Carr, (1827) 4 McCord's Law (S. C.) 152; Bolton v. Martin, (1788) 1 Dall. (U. S.) 296, 1 L. Ed. 144. The last case was decided on the basis of legislative privilege, though the case arose on the privilege of a member of a ratifying convention in Pennsylvania called to pass upon the proposed constitution of the United States.

[65]For examples of statutory provisions, Doyle-Kidd Dry Goods Co. v. Munn, (1922) 151 Ark. 679, 238 S. W. 40; Pittinger v. Marshall, (1901) 50 W. Va. 229, 40 S. E. 342. But see Phillips v. Brown, (1915) 270 Ill. 450, 110 N. E. 601, Ann. Cas. 1917B 637, wherein a statutory provision exempting a legislator from service of civil process during the session was declared unconstitutional as special legislation. The constitution did not expressly extend the privilege to civil process. See the criticism of this case in 16 Col. L. Rev. 249-50.

the judicial discretion in granting a continuance. It has been suggested that such a continuance might be demanded as of right, but there is some doubt as to the soundness of this contention.[66] It is furthermore declared that the distraction of legislators by suits of creditors and other aggrieved persons is much over emphasized; that it is of little practical force. It presumes that legislators will be persons of litigious natures, given to "deadbeating" and contract breaking so as to cause aggrieved persons habitually to resort to the courts to vindicate their rights against the member. It is pointed out that the work of preparing for a case, calling witnesses and the other work incidental to law suits is performed by an attorney, and does not usually demand the personal attention of the legislator. Finally, granting the legislator may occasionally be sued during the course of the session, it is denied that any very serious consequences to legislation will ensue.[67] Leaves of absence are granted without too close scrutiny into the excuse given for asking the leave and this would seem to indicate that temporary absences from the session are not regarded as particularly serious. It is doubtful that any appreciable damage to the public can be traced to this practice. There was doubtless a time when the danger from the crown, from creditors, and from harassing suits instigated from various quarters was a real one, but as a practical matter in modern times, it is argued that there can hardly be said to be any very real need for a protection from civil process or civil suit. It is admitted that when the body was arrested, the privilege furnished an important protection to the legislator, but it is stated that modern codes have changed this. In this connection it should be pointed out that the abolition of the arrest of the body in civil suits has not been quite so sweeping as many seem to think, for there are still instances where this method of instituting a civil suit is retained in several jurisdictions.[68] In so far as this is true the argument of those who

[66]There is a dictum in Gyer's Lessee v. Irwin, (1790) 4 Dall. (U. S.) 107, 1. L. Ed. 763, which seems to hold that continuance may be demanded as of right, though the statement is not perfectly clear. This was followed in Doty v. Strong, (1840) 1 Pinney (Wis.) 84. But in Nones v. Edsall, (1848) 1 Wall. Jr. 189, Fed. Cas. 10290, the court severely criticizes this view.

[67]Cases construing state constitutional provisions to exclude civil process from the privilege are, Berlet v. Weary, (1903) 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 108 A. S. R. 616; Catlett v. Morton, (1832) 4 Littell (Ky.) 122; Rhodes v. Walsh, (1893) 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632. See note, 2 Ann. Cas. 615. 1 Johnson v. Offutt, (1862) 4 Met. (Ky.) 20; Gentry v. Griffith, (1867) 27 Tex. 461.

[68]The following statement is found in a note in Scott, Cases on Trusts, 41, "In many jurisdictions one who receives property as a fiduciary and

wish to exclude immunity from civil process would seem to be weakened at this point.

Another line of reasoning which might be noted as supporting the exclusion of civil process from *arrest* is that the privilege is a concession by the people, and should be strictly construed in the same manner as the privilege from action for defamation. The Minnesota court phrased this argument as follows:[69]

"The right already yielded up by the people in this respect seems sufficient, without having their rights in civil actions abated, and possibly lost or destroyed; and we have not the will nor authority, by any strained construction, to aid in placing a constitutional provision beyond a reasonable and safe foundation, upon which the people may stand and defend their rights as against any branch of the sovereign power."

There are a number of quite startling results which might occur from the application of the rule that the privilege includes exemption from civil process which should not be entirely overlooked in considering the rule on grounds of policy.[70]

A number of courts have refused to extend the privilege to include immunity from civil process because they maintain that the term *arrest* is a word of art, that it was introduced into the constitutions as a technical term, and that the term as thus introduced referred only to a process involving bodily restraint, and sometimes accompanied with a requirement for bail. This argument is sought to be supported by a reference to those constitutions which have accomplished an exemption from civil process by specifying in terms that the privilege shall extend to "summons" or "civil process." It is asked: Why did these constitutions use these words if the term *arrest* as commonly understood at common law meant the same thing? There is some confusion in the cases on the effect of certain statutes of parliament upon the common law rule on the meaning of the term *arrest* as the word is

appropriates it to his own use, is liable to an arrest in a civil action." See also the case of Kallock v. Elward, (1919) 118 Me. 346, 108 Atl. 256. See also Smith, Revised Statutes of Illinois, 1921 ch. 16 secs. 1, 2; Wyoming, Compiled Statutes, 1920, sec. 6088; Page and Adams Ann. Ohio General Code, sec. 11790. 33 A. L. R. 645, note 648.

[69]Rhodes v. Walsh, (1893) 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632.

[70]In the last cited case this aspect of the question was considered at some length; the court demonstrated by use of hypothetical cases what it believed to be some inequitable results of the construction contended for by counsel for the legislator. For example, the court said that if a legislator should maintain a nuisance, nothing could be done to abate it during the session, and if insolvent, the legislator could fraudulently dispose of his property during the session; or suppose a legislator imprison his wife, friend, or stranger no remedy would lie by habeas corpus, the "birthright of every American citizen."

used in this privilege. The point would appear to be unimportant in view of the fact that the statute of 6 George III[71] settled the doubts that may have existed, and this statute was enacted before the separation of the colonies from the mother country. The case of *Bolton v. Martin*[72] is the one which heads a line of decisions and dicta supporting the view that the privilege of parliament included exemption from civil process. This case has been severely criticized, and it has been demonstrated that the judge who wrote the opinion in that case relied upon authorities which did not correctly state the law as it stood at the time the case was decided.[73]

Viewed on principle and authority therefore, the privilege from arrest as it is provided for in our American constitutions should not be construed so as to include exemption from the service of civil process. There does not seem to be any sound public policy demanding it, for the legislator is protected without it, and such protection as is denied him by excluding exemption from civil process does not result in any appreciable injury to the public. On the other hand it may be that in some cases it would work an injustice to allow this exemption, while no case has come to hand in which any injustice was done to the legislator by the denial of the civil process exemption from the scope of the privilege. Wherever the civil suit is accompanied by an arrest of the body the original purpose of the privilege should be kept in mind, and the legislator given the full benefit of the privilege. This study serves to demonstrate once again the effect of the use of indefinite terms in constitutions and statutes.[74] It would seem as though constitution makers in the future would do well to phrase the privileges which they wish to grant to legislators in more exact terms. Even so-called technical terms often lack the definiteness which is commonly associated with them.

[71]See for discussions of the common law extent of the privilege, Anderson v. Rountree, (1841) 1 Pinney (Wis.) 115; Tillinghast v. Carr, (1827) 4 McCord's Law (S. C.) 152; Bolton v. Martin, (1788) 1 Dall. (U. S.) 296, 1 L. Ed. 144; Worth v. Norton, (1899) 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563, 76 A. S. R. 524; Berlet v. Weary, (1903) 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 108 A. S. R. 610.

[72]1 Dall. (U. S.) 296, 1 L. Ed. 144, (1788).

[73]Merrick v. Giddings, (1879) 11 MacArth. & M. (D. C.) 55. Justice Wylie, after reviewing the English law said, commenting on the statement in the earlier editions of Blackstone which had been changed in the later editions of the work : "It is but a reasonable exercise of charity, however, to presume that Ch. J. Shippen, . . . relied upon a copy from one of the earlier editions of the Commentaries."

[74]See for an extended treatment of the use of indefinite terms in statutes, Freund, The Use of Indefinite Terms in Statutes, 30 Yale L. J. 437. For an example of another indefinite phrase found in many constitutions, see Field, Presentation of Bills to the Governor, 51 Am. L. Rev. 898.