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CAN THE HOUSE OF COMMONS COMMIT A JUDGE FOR CONTEMPT ?

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CAN THE HOUSE OF COMMONS COMMIT A JUDGE FOR CONTEMPT?

Presented to
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in token of deepest esteem,
by the Author,
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15.9.66

by

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CAN THE COMMONS COMMIT A JUDGE FOR CONTEMPT?

In Reference No. 1 of 1964, the majority of the Judges of the Supreme Court have held that as the power of committal for contempt by a conclusive general warrant is possesed by the House of Commons not as a legislative chamber, but as a part of the High Court of Parliament, the Indian legislative houses, not being Superior Courts of Records, cannot possess this power by virtue of Art. 105 3) or 194(3) of the Constitution. Reading Articles 121 and 211 together, their Lordships have further held that the conduct of a Judge in relation to the discharge of his duties cannot be the subject-matter of action in exercise of the powers and privileges of the legislative houses in India, even if it is assumed that such conduct can become the subjet-matter of contempt proceedings under the powers and privileges of the English House of Commons. Justice Sarkar in his minority opinion, however, has stated that the House of Commons has the power to commit for contempt by a conclusive general warrant as one of its privileges as a legislative chamber and that Articles 105(3) and 194(3) have vested this privilege in the Indian legislative houses (para 175 of the Opinion of the Supreme Court). He has also expressed the view that if in such a case of committal the Judge makes an order releasing the prisoner on an interim bail and fixing a day for enquiring into the legality of the commitment, he "would be committing contempt of the House, for by it he would be interfer-

ing with the order of the House illegally and wholly without jurisdiction" (para 205). As regards the collateral question whether the Judge has under our Constitution immunity against action by the House for contempt committed by him, Justice Sarkar has not pronounced any opinion. But he has noted the reference made on behalf of the U. P. Assembly to Jay V. Topham (para 209).

May in his Parliamentary Practice (16th Ed.) undoubtedly writes that the power of commitment has been exercised by the House not only against private individuals but also against Sheriffs, magistrates and "even judges of the Superior Courts", and that "over a thousand instances of its exercise up to the middle of the ninteenth century are to be collected from the Journals" (pp. 91-92). But he refers only to Jay V. Topham as the case where two judges of the King's Bench were committed for having over-ruled the plea of the Serjeant at Arms to the jurisdiction of the Court on the basis of an order of the House—a decision which the House condemned as "illegal, a violation of the privileges of Parliament and pernicious to the rights of Parliament" (p. 155). It seems that this single case cannot be regarded as a dependable precedent for the power of the House of Commons to commit a Judge of a Superior Court for contempt. This conduct of the House cannot be supported by law. As Lord Ellenborough said in Burdett V. Abbot, the plea of Topham had a "double vice". It began as a plea in bar, concluded in abatement and did not at all answer the whole matter of the plaint, particularly the question why Topham had detained

Jay till he had paid a sum of money for his deliverance [14 East. pp. 104, 109]. Lord Ellenborough stated with emphasis that "it is surprising upon looking at the record in that case how a Judge should have been questioned and committed to prison by the House of Commons, for having given a judgement which no Judge whoever sat in this place could differ from". The learned Chief Justice noted the Attorney-General's remark that the matter was not so well understood at that time, and himself suggested that the earlier association of Pemberton C. J. with the trial of Lord Russel, the judgment and attainder in whose case had been recently reversed by Parliament, was the cause of his unpopularity. Referring to this committal, Lord Denman C. J. said in Stockdale V. Hansard [9A & E. p. 134] : "Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown." His Lordship fully agreed with Lord Ellenborough that the plea was bad in law and the two Judges had overruled it with the utmost propriety.

Viewed in this light, the committal of Pemberton and Jones, JJ. can never be regarded as a legally binding precedent or an example of proper exercise of the penal jurisdiction of the House of Commons. In Comyn's Digest of Parliament, the House of Commons, in its capacity as the Grand Inquest of the Nation, is regarded as having the power to enquire into the conduct of Courts of Justice

and to summon any Judge for examining him in person upon complaints of any misdemeanour in his office. In 1667 Chief Justice Keeling appeared before the House on such a complaint for having fined juries, but this was entirely on his own request [See Sir Robert Atkyn's statement in Rex V. Williams, 13 How. St. Tr. 1413]. In 1680 proceedings were started in the House of Commons against several Judges, but none of them attended the House and none was sent for. The reason has been well-stated by North in his Examen. p. 567 (cited, 8 How. St. Tr. 168 note) thus : "The cause was thought to be that they were stout men, and would have justified all they had done, and that was not thought seasonable". In 1806 there was a complaint against Justice Fox of the Court of Common Pleas in Ireland, but this complaint was entertained not by the Commons but by the Lords [7 Parlm. Debates, pp. 752, 768]. These are perhaps all the cases of complaints against the Judges of the Superior Courts dealt with by either of the two Houses, aud of these, the case of Pemberton and Jones JJ. is the only one in which Judges have been committed for contempt of the House of Commons.

But we have already seen that the legality of this committal has been questioned by eminent Judges and jurists of England. Moreover, between 1690 and 1965, the Commons have not committed a single Judge of the Superior Courts, although there were ample provocations from them which could have led the House to resort to this weapon,

had not its use been completely prohibited by the growth of new constitutional ideas.

There are cases on record which show that the Commons had no such power during the two centuries that preceded Jay V. Topham. In Donne V. Walsh and Ryver V. Cosins, both decided in 1472, the Court refused to recognise the privilege claimed by the House that its members could not be impleaded for debt during Parliament. But, for this the Judges concerned were not charged with contempt. In 1477 the Commons took the help of a Bill to give protection to a member whose claim for a similar privilege was rejected by the Exchequer Court. In Benyon V. Evelyn (1664), Chief Justice Bridgman stated that the resolution of the House regarding its privileges was not conclusive in law. In the case of Sir William Williams (1684) the Court fined the Speaker of the House for having printed and published by its order and within the walls of Parliament, a paper containing reflections upon the Duke of York. Had the power to commit a Judge for contempt been in existence, it would certainly have been exercised on this occasion. For, the House declared the judgement of the Court as "illegal and subversive of the freedom of Parliament" and made three futile attempts to reverse it by Bills, and yet, it did not propose any committal of the Judges concerned.

Fifteen years after Jay V. Topham, the Commons passed a resolution that Ashby by bringing an action before the Queen's Bench on an election matter, was guilty of a breach of privilege.

But Holt C.J. stated in his minority opinion that the court had jurisdiction in the case. The House, however, did not consider this opinion as constituting any contempt. In R.V. Paty (1704) Chief Justice Holt again said that the power of the House to commit for its contempt by a speaking warrant was examinable in the Courts, and as the right involved in the case was a franchise, the prisoners could not be regarded as having committed any breach of privilege or contempt and should be discharged. In retaliation the House ordered the committal of the Counsel and others concerned in prosecuting the writs, but—and this is important—the Chief Justice was not touched, although he had expressed an opinion diametrically opposite to that of the House.

When we come to the modern leading cases, we see that the power of the House to commit a Judge recedes still further. Thus, in 1811 the House, instead of committing Counsel and others who had assisted Burdett in bringing an action of trespass against the Speaker for having acted in obedience to its orders, voluntarily submitted its very right of committal to the jurisdiction of the Courts. In Stockdale V. Hansard (1836-37) the Court of Queen's Bench rejected the claim of the House that its declaration regarding the existence and extent of its privileges was conclusive, and held that the order of the House to print a Parliamentary report containing matter libellous to Stockdale was no defence to the action brought by the latter. The House, instead of committing the Judges concerned, ordered that the damages and costs be paid. When

the Sheriffs went to execute the judgment of the Court in a third action brought by Stockdale against Hansard, the House committed them and Stockdale for contempt for acting in defiance of its earlier resolution. In the fourth action brought by Stockdale from behind the prison, his solicitor, Mr. Howard, was sent to Newgate, having assisted him in the prosecution. But the Judges were, again, left untouched, although they exercised jurisdiction and gave their judgment against Hansard. The most conclusive proof for the proposition that the power of the House to commit a Judge for contempt does not exist any longer, is to be found in the following facts : In 1845 the Court of Queen's Bench said in Howard V. Gosset that no question of privilege was involved in the suit and that the warrant of the House by which Howard was imprisoned was technically defective. The House protested against this judgement and in a resolution said that a privilege was involved in the case and that it would not admit the right of any Court to decide on the propriety of the forms of its warrants. At the same time, the House ordered that a writ of error be brought upon the judgment of the Queen's Bench. The Court of the Exchequer Chamber reversed the judgment of the Court below and upheld the views of the House. But the House did not think for a moment that the Judges of the Queen's Bench should be committed for contempt for having refused to recognise one of its authentic privileges. I believe that even if the Exchequer Chamber had confirmed the judgment of the Queen's Bench, the House would have done no

more to save its privilege than to get a Bill passed in the manner of the Parliamentary Papers Act, 1840.

It may, therefore, be legitimately asked why the House has since 1690 scrupulously refrained from committing a Judge. The reasons are many. Since the Restoration, the House has more and more realised that legislative and judicial functions should be separated and that it is not properly constituted to discharge the latter. Formely it claimed to be not only a Superior Court of Record but also a Court superior to the Courts at Westminister Hall, and for some years the Judges capitulated before this claim of the House. The House based its power to commit for contempt on the medieval conception of Parliament as primarily a Court of Justice and defended it by arguments which, as May says, "confounded legislative with judicial jurisdiction" (p. 91). But, with the Restoration, the nation accepted new principles of government including those of limited monarchy, legal supremacy of Parliament, constitutional liberties of the people, and an independent judiciary. Neither Cromwell in the "Constitution of the Protectorate", nor Locke in his "Two Treatises of Government", had shown any awareness of the supreme importance of an independent judiciary for protecting the rights of the people against any encroachment by the Crown or by the political parties. In 1701 the Parliament laid down by an Act that the Judges would hold office, not, as before, during the pleasure of the Crown, but during good behaviour, and that they would be removed only

on an address by both Houses of Parliament [13 Will. III, c. 2]. The Parilament recognised that the independence of the Judiciary was the *sine qua non* of the rule of law, the very bed-rock of constitutionalism. A Judiciary no longer subservient to the executive, should also be independent of either House of Parliament for the same reasons. Deeper knowledge of the nature of the judicial function gradually convinced both the Houses that it was not proper for them to interfere with the function of the Courts ; that it was for the Judiciary to determine the existence of common law, to interpret a statute, to examine the validity of a custom or privilege of the Parliament or an order of the executive, and to fill up the *casus omissus*—and the Court was to do all this not ministerially but by applying its own view of the law. The Courts, in their turn, began to rise to the height of the occasion by asserting their lawful jurisdiction [R. v. Paty, (1704), and other cases that followed it]. In 1728 Montesquieu visited England and in 1748 wrote in his "Spirit of the Laws" that if the judicial power were joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control. Blackstone in his "Commentaries on the Laws of England" expressed identical views. Burke in his "Reflections on the French Revolution" warned that "whatever is supreme in a State, it ought to have, as much as possible, its judicial authority so constituted as not to depend upon it, but in some sort to balance it ; it ought to give security to its justice against its power ; it ought to make its

judicature as it were, something exterior to the State." In 1811 Lord Ellenborough observed in Burdett V. Abbot that even in a committal for contempt of the House, if the warrant was a speaking one and appeared to be on the face of it unjustified, illegal or extravagant and contrary to every principle of positive law or natural justice, "the Court must look at it and act upon it as justice may require, from whatever court it may profess to have proceeded." We have seen that Lord Ellenborough, and twenty-six years later, Lord Denman, did not hesitate to censure the committal of Pemberton and Jones JJ. by the House of Commons as unjust, tyrannical, and subversive of the liberties of the people, and that the Commons did not think that they had any power to commit for contempt any of these two Chief Justices for their reflections upon the House. In Stockdale V. Hansard Lord Denman C.J., and Patteson, Littledale, and Coleridge JJ., observed that although the Court of Queen's Bench was vastly inferior to the House of Commons considered as a body in the State, yet the House was not a Court of Judicature at all. For, it could not decide a matter in litigation between two parties either originally or by appeal. Only in cases of its contempt, election of its members, and with respect to its internal proceedings, could it decide judicially. For this reason, said Justice Coleridge, "we know no superior but those Courts which may revise our judgments for error."

The House has fully recognised the force of this observation, and, as May says, its claim of being a

Court of Record "once firmly maintained, has lately been virtually abondoned, though never distinctly renounced" (P. 90). On the other hand, it has been held in Kielly V. Carson (1843), and confirmed in Howard V. Gosset (1845), that the power of the House to punish for contempt is inherent in the House not as a body with legislative functions, but as a descendant of the High Court of Parliameht and by virtue of the *lex parliamenti*. But this *lex parliamenti* is quite silent about the power of the House to commit a Judge for contempt for any act done in discharge of his duty. In view of the observations of Lord Ellenborough and Lord Denman, the committal of Pemberton and Jones JJ. cannot serve as a lawful precedent. When the case of Burdett V. Abbot went in appeal before the House of Lords, Lord Eldon asked the Judges the following question: "Whether, if the Court of Common Pleas, having adjudicated an act to to be a contempt of Court, had committed for 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 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 Judges answered the question in the negative. Upon that Lord Eldon held that the House of Commons had the powers to commit by a general warrant,

and other members of the court agreed with this judgment. Lord Eldon, therefore, put the House in parity with the Court of Common Pleas, and thought that the House should be treated in the same way as one Superior Court treated another. But the question is : Can a Superior Court commit for contempt the Judges of another Superior Court ? Could the Court of Common Pleas commit a Judge of the Queen's Bench ? Certainly not. And if this is correct, the House of Commons, not being a Court superior to the Court of King's Bench, as Justice Coleridge said, cannot commit a Judge of that Court for having acted in error of his jurisdiction or in any other way, in discharge of his duties. For the removal of a malicious, corrupt or inefficient Judge, the House can hold discussion on a substantive motion, and then take steps in accordance with the Act of 1701.

If the conclusion we have arrived at is correct, the answer to question No. 5 referred to the Supreme Court of India under Special Reference No. 1 of 1964, viz., "Whether a Judge of a High Court who entertains or deals with a petition challenging any order or decision of a Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt or for infringement of its privileges and immunities or who passes an order on such petition commits contempt of the said Legislature and whether the said Legislature is competent to take proceedings against such a Judge in the exercise and enforcement of it powers, privileges and immunities", must needs be in the negative. For, the

powers. privileges and immunities of our Houses of Parliament and Houses of State Legislatures, under Articles 105(3) and 194 3', respectively, are, until defined by Parliament or the Legislatures of States by law, are "those of the House of Commons of the Parliament of the United Kingdom.....at the commencement of" our Constitution, and no more. And, we have already seen that the House of Commons has no power or privilege to commit a Judge of a Superior Court for its contempt.

Moreover, like the British Act of Settlement of 1701 (13 Will. III. c. 2), Article 121 of our Constitution says :

"No discussion shall take place in Parliament with regard to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except under a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided". Similarly Article 211 says : "No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties".

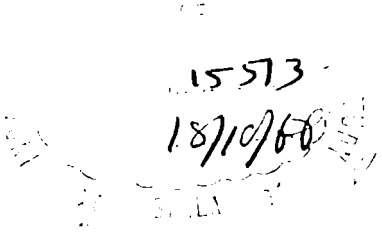
The procedure for the removal of a Judge has been laid down in Article 124(4) in the following words :

"A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-third of the members of that

House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity". As regard the removal of a Judge of a High Court, Proviso (b) to Art. 217(1) of the Constitution says :

"A Judge may be removed from his office by the President in the manner provided in cause (4) of article 124 for the removal of a Judge of the Supreme Court".

Reading Articles 105(3), 194(3), 121 and 211 together, we, have, therefore, to conclude that the conduct of a judge in relation to the discharge of his duties cannot be the subject-matter of action in exercise of the powers and privileges of the legislative houses in India.



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