for public safety on the enforcement of the state law as against the employees of all railroads, state or interstate. The application of the state statute was not by way of enlargement or contraction of the Federal Employers' Liability Act. See *Salabrin* v. *Ann Arbor R. R.,* 194 Mich. 458; *Pennsylvania R. R.* v. *Stalker,* 67 Ind. App. 329.

We think that the statute of Kentucky limiting the age of employees and punishing its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce and that application of it in this case was error.

Reversed.

BARRY, SERGEANT-AT-ARMS OF THE UNITED STATES SENATE, ET AL. *v.* UNITED STATES EX REL. CUNNINGHAM.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 647. Argued April 23, 1929.—Decided May 27, 1929.

1. A resolution of the Senate which recites the refusal of a witness to answer questions asked of him by a committee pursuing an investigation under authority from the Senate, and which directs that he be attached and brought before the bar of the Senate "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound," expresses the purpose of the Senate to elicit testimony in response to questions to be propounded at its bar; and in deciding whether the witness must attend, it is not material to consider whether the information sought to be elicited from him by the committee was pertinent to the inquiry which it had been directed to make. P. 612.
2. Exercise by the Senate of its judicial power to judge of the elections, returns and qualifications of its members, Const., Art. I, § 5, cl. 1, necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel answers to pertinent questions, to determine

the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. P. 613.

3. In the exercise of this power, the Senate may dispense with the services of a committee and itself take the testimony, or, after conferring authority on its committee, it may at any stage resume charge of the inquiry, and deal with the subject without regard to the limitations that were put upon the committee and subject only to the restraints of the Constitution. P. 613.
4. It is not to be assumed, in advance of a witness' interrogation at the bar of the Senate, that constitutional restraints will not be faithfully observed. P. 614.
5. When one who, upon the face of the returns, has been elected to the Senate and who has a certificate from the Governor of his State to that effect, presents himself to the Senate claiming the right of membership, the jurisdiction of the Senate to determine the rightfulness of the claim is invoked and its power to adjudicate such right immediately attaches by virtue of § 5 of Article I of the Constitution, empowering it to judge of the elections, returns and qualifications of its "members." P. 614.
6. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, is a matter within the discretion of the Senate. P. 614.
7. Refusal by the Senate to seat the claimant pending the investigation does not deprive the State of its "equal suffrage in the Senate" within the meaning of Article V of the Constitution. P. 615.
8. The power of the Senate to require the attendance of witnesses, when judging of the elections, returns and qualifications of its members, is a necessary incident of the power to adjudicate in nowise inferior under like circumstances to that exercised by a court of justice, and includes in some cases the power to issue a warrant of arrest to compel such attendance. P. 616.
9. The warrant may issue without previous subpoena, where there is good reason to believe that otherwise the witness will not be forthcoming. P. 616.
10. The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. P. 618.
11. The act of the Senate in issuing its warrant for the arrest of a witness is attended by the presumption of regularity which applies to the proceedings of courts. P. 619.

12. It is to be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. P. 619.
13. If judicial interference can be successfully invoked by the person so arrested, it can only be upon a clear showing of arbitrary and improvident use of the power constituting a denial of due process of law. P. 620.

29 F. (2d) 817, reversed.

CERTIORARI, *post,* p. 827, to review a judgment of the Circuit Court of Appeals reversing a decision of the District Court, 25 F. (2d) 733, which discharged a writ of *habeas corpus* sued out by Cunningham and remanded him to the custody of the Sergeant-at-Arms of the Senate, who had arrested him under a warrant issued pursuant to a resolution of the Senate.

Mr. George W. Wickersham, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* was on the brief, for petitioners.

The Circuit Court of Appeals erred in holding the warrant under authority of which respondent was arrested to be a process in a proceeding to punish for contempt, and in not holding it to be a warrant of attachment to compel respondent's presence and testimony. The purpose of the Senate is obvious from the face of the warrant and resolution.

It is well settled that the Senate has the power to punish for contempt a witness in an inquiry which the Senate had the power to make, who refuses to answer questions pertinent to the inquiry. *Anderson* v. *Dunn,* 6 Wheat. 204; *In re Chapman,* 166 U. S. 661; *Marshall* v. *Gordon,* 243 U. S. 521; *McGrain* v. *Daugherty,* 273 U. S. 135.

It is also now equally well settled that the Senate has the power to compel the presence and testimony of a recalcitrant witness by a body attachment in the form of an arrest, in a proper case. *McGrain* v. *Daugherty,* 273

U. S. 135; *Matter of Stewart,* Sup. Ct., Dist. of Columbia, Feb. 25, 1928.

The compelling of the presence and testimony of respondent before the bar of the Senate after a refusal to answer questions put to him by a member of a committee, is in full accord with congressional precedent. *Woolley's Case,* Hinds' Pre., Vol. 3, §§ 1685 *et seq.; Stewart's Case, Id.,* § 1689; *Irwin's Case, Id.,* § 1690; *Barnes' Case, Id.,* § 1695; Jefferson's Manual, § 13.

The inquiry was within the constitutional powers of the Senate, to judge of the elections, returns and qualifications of its members, and to make or alter regulations as to the times and manner of holding elections for Senators. Art. I, § 3; *McGrain* v. *Daugherty,* 273 U. S. 135.

The respondent's second examination before the committee was preceded by Resolution 324, expressly reciting the election contest, and the subsequent resolutions adopted December 9, 1927, December 12, 1927, December 17, 1927, referring the claims to the committee, emphasize this as the primary purpose of the inquiry. The same resolution under which the proceedings against respondent were initiated, was before this Court in *Reed* v. *County Comm'rs,* 277 U. S. 376.

The Senate, in judging of the elections, returns and qualifications of its members, is not limited to the enforcement of prohibitions contained in Article I, § 3, cl. 3. Sen. Doc. No. 4, 70th Cong., 1st Sess.

The provisions of Article I, § 5, do not require that one must be seated and sworn as a member before an investigation is possible. The practical construction placed upon the word "member" by legislation is entirely at variance with respondent's contention. For example, see R. S. § 105.

The language in Article V of the Constitution "that no State without its consent, shall be deprived of its

equal Suffrage in the Senate," has no reference to such a condition as we are considering. Story, 1 Const., § 627.

Provision is made in the Seventeenth Amendment for temporarily filling any vacancy which may occur in the representation of a State in the Senate.

The Senate had power and jurisdiction to order the arrest of respondent to bring him to its bar to testify, under its judicial power as the sole constitutional judge of the elections, returns and qualifications of its members. *Kilbourn* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135.

The Circuit Court of Appeals erred in holding that a subpoena served on a witness followed by his neglect to appear constituted necessary preliminaries to the issue of the attachment. It is conceded that the Senate has the powers of a court in a proceeding such as this. It is of course admitted that a court (at least in a civil case) will not ordinarily order the arrest of a witness without a previous disobedience of a subpoena, or a showing that the witness is about to leave the jurisdiction, or something of the sort. But it must be borne in mind that this general practice is the result of the usual way of exercising discretion, and has nothing to do with the power or the jurisdiction of the courts to issue such process. Chamberlayne's Modern Law of Evidence, Vol. 5, § 3612.

The power to issue such summary warrants of attachment is amply demonstrated by the common practice, well known to this Court, of issuing bench warrants for material witnesses in criminal cases. See U. S. Code, Tit. 28, § 659; *Blair* v. *United States,* 250 U. S. 273; *In re Aliens,* 231 Fed. 335; G. L. Mass., 1921, c. 277, § 70; § 618–b, N. Y. Code Crim. Pro.; *People* v. *Sharp,* 78 Misc. 528; *People ex rel. Maloney* v. *Sheriff,* 117 Misc. 421; *People ex rel. Farina* v. *Wallis,* 208 App. Div. 720; *People ex rel. Bruno* v. *Maudlin,* 206 N. Y. Supp. 523.

These cases and statutes also show to be unfounded the contention that the warrant was violative of the Fourth Amendment because issued without probable cause. It is clear that the fact that the person arrested is a material witness in a case involving the interests of the people or of the Government, is sufficient cause. But even were more needed, the contumacy of the witness at his hearings before the committee, and the difficulty found in serving a subpoena on him for the first examination should be more than sufficient cause.

In exercising its separate power to "judge of the elections, returns and qualifications of its members," the Senate cannot be made to depend upon the concurrence of the House of Representatives or upon any statute. *Reed* v. *County Comm'rs,* 277 U. S. 376.

Since the Senate has jurisdiction to bring the respondent before it by process of attachment, no inquiry should be made by this Court on *habeas corpus* into the reasons which induced it to do so, and he should be remanded to custody.

The recitals in Resolution 179 of the previous double recusance of respondent may strengthen the position of the Senate, as was held in the *Stewart* case, *supra,* regarding a legislative inquiry; but it is wholly unnecessary where, as in the case at bar, the Senate acts in its judicial capacity. If the Senate's questions to respondent are to be inquired into at all by a court, it can be only after they have been formulated and put to him at its bar, and he has refused to answer and has been committed to close custody until he shall answer.

Unless this Court were able to say that no question pertinent to the elections, returns or qualifications of members of the Senate elected in November, 1926, could or would be asked of respondent by the Senate on his production at its bar, there can be no basis on which to order his discharge upon *habeas corpus.*

The propriety of an inquiry into the method and amount of moneys expended to secure the nomination of a candidate, is demonstrated by the provisions of the Pennsylvania Corrupt Practices Act. If it should appear as the result of the investigation that the conduct of either the primary or the general election for Senator was such that a candidate would have been disqualified for the office had he been seeking a state office, can it be contended that the Senate under its powers to judge the qualifications of its own members, might not refuse to seat that candidate?

Newberry v. *United States,* 256 U. S. 232, is not decisive on the power of Congress to regulate primary elections within the States, since the adoption of the Seventeenth Amendment, especially as this Court has more recently recognized the direct relation between the primary and the general election in the case of *Nixon* v. *Herndon,* 273 U. S. 536. But even if it were decisive, it has no bearing on this case, which is concerned not with Congressional regulation of primaries, but with violations of state primary laws; which is concerned, not with a criminal prosecution, but with an inquiry to judge of the elections, returns and qualifications of a member-elect of the Senate.

If the warrant was an attachment to compel respondent to testify, the propriety or pertinency of the questions he refused to answer is immaterial.

Even if this were a contempt process, so that pertinency of the questions respondent refused to answer was involved, the questions were clearly pertinent and proper.

The arrest was not violative of the Fourth Amendment, because unsupported by oath or affirmation. *McGrain* v. *Daugherty,* 273 U. S. at p. 158.

The fact that a new Congress has convened since respondent's examinations, is wholly immaterial to this case, whether considered from the viewpoint of the Senate's legislative power or its judicial power in regard to its own members. *McGrain* v. *Daugherty, supra.*

Mr. Ruby R. Vale, with whom *Messrs. Otto Kraus, Jr.,* and *Benjamin M. Golder* were on the brief, for respondent.

Respondent has always admitted the Senate's power to compel his attendance as a witness by subpœna or other legal process. The broad inquiry as to the existence of that power, will not then be discussed, because not raised.

Respondent has always assumed, and the Circuit Court of Appeals has concluded, in effect, that the special committee recommended that he be adjudged in contempt because of contumacy committed by him on two occasions in the 69th Congress; that the Senate acted on this recommendation when, on the same day that the report was filed, it passed Resolution 179 of the 70th Congress, the recital of which charged him with this specific offense; that because of such contumacy, Resolution 179 was the first step taken by the Senate in the contempt proceedings to have him legally punished therefor, if finally so adjudged, when he appeared before the Senate "to answer such questions . . . as the Senate . . . may propound."

Uniformly it has been urged that the inclusion in Senate Resolution 179 of the order to appear before the bar of the Senate and there to answer "questions pertinent to the matter under inquiry," was to give the accused an opportunity to purge himself of the contempt charged.

Since a contumacious witness should not be punished without proper proceedings being instituted against him after the commission of the offense, Resolution 179 was in effect, and in analogy to the practice which obtains in the courts, a rule to show cause why he should not be adjudged in contempt for the past offense charged in the recital of the resolution. The final adjudication of the fact of contempt with the imposition of punishment then

depends upon the answer and attitude of the accused witness when he appears at the bar of the Senate.

Courts have jurisdiction in habeas corpus proceedings to pass on the power of the Senate to institute proceedings in contempt against an alleged contumacious witness, or to imprison a witness not contumacious for future examination. *Anderson* v. *Dunn,* 6 Wheat. 204; *Marshall* v. *Gordon,* 243 U. S. 521; *McGrain* v. *Daugherty,* 273 U. S. 135; *Matter of Stewart,* Supreme Court, District of Columbia, Feb. 25, 1928; *Kilbourn* v. *Thompson,* 103 U. S. 168; *In re Chapman,* 166 U. S. 135.

The American cases, federal and state, are uniform in holding that a legislative body is not the final judge of its power and privileges in cases involving the rights and liberties of individuals; but the courts may discharge on habeas corpus a relator arrested and detained in excess of legislative authority. *Anderson* v. *Dunn, supra; McGrain* v. *Daugherty,* 273 U. S. 135; *Sinclair* v. *United States,* 279 U. S. 263; *Kilbourn* v. *Thompson,* 103 U. S. 168; *Kielley* v. *Carson,* 4 Moo. P. C. 63; *Burnham* v. *Morrissey,* 14 Gray 226; *Marshall* v. *Gordon,* 243 U. S. 521; *In re Chapman,* 166 U. S. 661; *McDonald v. Keeler,* 99 N. Y. 463; *Interstate Commerce Comm'n* v. *Brinson,* 154 U. S. 478.

The transforming of the warrant of arrest into a process to appear, is without precedent. Distinguishing *McGrain* v. *Daugherty,* 273 U. S. 135; *Matter of Stewart,* Supreme Court, District of Columbia.

The treating of the warrant as a process to compel attendance of a witness and to take and hold his body without outstanding process or "without probable cause," violates the Fourth and Fifth Amendments. *Ex parte Field,* 5 Blatch. C. C. Rep. 63.

Text-book writers and the courts generally regard the power to compel the attendance of a witness by attachment as analogous to a proceeding for contempt; and

they all emphasize the necessity of showing the service of a subpœna as a condition precedent. *Commonwealth* v. *Shecter,* 250 Pa. 282; *Douglass Co.* v. *Simpson,* 233 Pa. 517; *Respublica* v. *Duane,* 4 Yeates 347; *Commonwealth* v. *Carter,* 11 Pick. 277; *Andrews* v. *Andrews,* 2 Johns. 109; *Sanderson* v. *The State,* 168 Ala. 109; *Brand* v. *The State,* 13 Ala. App. 390; *Ex parte Humphrey,* 2 Blatchf. 228; *Ex parte Beebees,* 2 Wall. Jr., 127; *Burnham* v. *Morrissey,* 14 Gray 226; Jones, Evidence, (Civil Cases) § 799; Wigmore, Evidence, 2d ed., Vol. 4; § 2199, p. 663.

In § 881, Rev. Stats., Congress was careful to safeguard the rights of individuals against an arbitrary use of this extraordinary remedy by permitting its issuance only after formal application in open court had been made by the District Attorney; and when the court was "satisfied by proof that the testimony of any person is competent and will be necessary on the trial." This Act and also that of March 3, 1887, c. 397, § 2, 24 Stat. 635, and § 660, U. S. C., emphasize and make clear, not only that an attachment will not issue without a previous subpœna or to prevent the absconding of a material witness, but also that statutory authority has been deemed necessary, even in such instances.

Neither the Senate nor the House of Representatives has ever assumed the power here asserted by the Senate to arrest and bring to its bar a witness without first summoning him by subpœna. Hinds Preced., Vol. 3, pp. 1–67. In every other case where warrant of arrest issued, the witness refused to answer certain specific questions after he had disobeyed the subpœna.

The warrant is issued without probable cause because the record does not disclose respondent to be guilty of defiant and contumacious conduct as a witness before the special committee: (a) since he answered truthfully all

relevant questions, and (b) refused to answer only improper inquiries concerning his personal affairs.

The Senate can not commit for a contempt by an individual in an investigation involving either the election or qualifications of an individual certified as elected, but who in fact, by its own resolution, is not a member of the Senate.

The Senate can perform its judicial function only if and when the election of a *member* is in question; or the age, residence, or citizenship of a *member,* or his conduct, or character, raise the issue of his qualification. Membership in the Senate is essential to its passing on the fact of "either his election or qualification." The nomination of a Senator at a primary or convention is distinct from his final election. The formality of the oath is necessary to membership in the Senate.

Legislative bodies, on many occasions, have refused to administer the oath of office to a member-elect, pending an examination into the legality of his credentials, but the Senate will search in vain for a precedent where a Senator-elect has presented credentials in legal form, evidencing his election, and possesses the constitutional qualifications, who has been denied membership.

When the Senate declared that Vare was not a member of that body, it, by that formal act, deprived itself of power to pass on his constitutional qualifications, or to investigate either his election or inquire into his nomination; and when it forfeited its power so to function in a judicial capacity, it was without authority or jurisdiction to commit respondent for contempt.

The qualifications as to age, citizenship, residence and inhabitancy, as set forth in § 3 of Article I of the Constitution, are the only qualifications which can determine his right to be qualified as a Senator under the legal certificate of the Governor of the State whose accredited repre-

sentative he is; and this because the words of the Constitution confer power to judge of the qualifications of members only.

If the Senate has power to pass upon the non- or extra-constitutional qualifications of a Senator-elect, and before he becomes a member, then any qualification pleasing to the Senate, as then constituted, is added to the qualifications named in the Constitution; and the latter, by arbitrary act of the Senate, is in fact amended.

If the Senate has the power to ignore the legal certificate of election of the Governor of a State and deny membership to one who possesses the qualifications as defined in the Constitution, the safeguards for continuous and perpetual representation in the Senate will have been stricken down; the Senate by its act will have written into the Constitution qualifications not defined therein; and the State thereby will have been deprived of its equal suffrage in the Senate for the length of time, at least, intervening between the vote denying him membership and the determination of the issue of the election or his qualifications.

The scope of the special committee functioning under Resolution 195 embraces a subject-matter as to which there can be no valid legislation, because it relates to nominations of Senators at primaries. *Newberry* v. *United States,* 256 U. S. 232.

The Senate having taken no action in the 69th Congress upon the recommendation of the committee, is without power in the 70th Congress to punish for a contempt committed in the preceding Congress.

The revival of the special committee by Resolution 10 of the 70th Congress, confers no authority to commit for a contempt committed in the 69th Congress, because there can be no imprisonment for a contempt beyond the Congress in which it was committed.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the validity of the election of a United States Senator from Pennsylvania in November, 1926. The inquiry began before the election, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries, Cunningham was subpoenaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had learned the trick from a former senator of " saving money and putting it away and keeping it under cover "; that this senator " was a past master in not letting his right hand know what his left hand done,

and he dealt absolutely in cash. The 'long green' was the issue."

Mr. Vare was nominated and elected at the succeeding November election. The special committee thereafter submitted a partial report in respect of Cunningham's refusal to testify. In January, 1927, Vare's election having been contested by William B. Wilson upon the ground of fraud and unlawful practices in connection with the nomination and election, the Senate adopted a resolution further authorizing the special committee to take possession of ballot boxes, tally sheets, etc., and to preserve evidence in respect of the charges made by Wilson. In February, 1927, Cunningham was recalled and, questions previously put to him having been repeated, he again refused to give the information called for, as he had done at the first hearing.

At the opening of Congress in December, 1927, the Senate adopted an additional resolution, reciting, among other things, that there were numerous instances of fraud and corruption in behalf of Vare's candidacy and that there had been expended in his behalf at the primary election a sum exceeding $785,000. Expenditure of such a large sum of money was declared to be contrary to sound public policy; and the special committee was directed to inquire into the claim of Vare to a seat in the Senate, to take evidence in respect thereto, and report to the Senate—in the meantime, it was resolved, Vare should be denied a seat in the Senate. By a subsequent resolution, the Committee on Privileges and Elections was directed to hear and determine the contest between Vare and Wilson.

The special committee, in March, 1928, reported its proceedings, including testimony given by Cunningham, recited his refusal to give information in response to questions, as hereinbefore set forth, and recommended that he be adjudged in contempt of the committee and of the Senate. The Senate, however, did not adopt the recom-

mendation of the committee, but, instead, passed a resolution reciting Cunningham's contumacy and instructing the President to issue his warrant commanding the Sergeant-at-Arms or his deputy to take the body of Cunningham into custody, and to bring him before the bar of the Senate, "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate." The warrant was issued and executed; and thereupon Cunningham brought a habeas corpus proceeding in the federal district court for the eastern district of Pennsylvania.

In his petition for the writ of habeas corpus, Cunningham averred that he was arrested under the warrant by reason of an alleged contempt; and that, by reason of his refusal to disclose his private and individual affairs to the special committee, the Senate had illegally and without authority adjudged him to be in contempt and had issued its warrant accordingly. A return was made to the writ, denying that the Senate had adjudged Cunningham in contempt and, in substance, averring that the warrant by which he was held simply required that he be brought to the bar of the Senate to answer questions pertaining to the matter under inquiry, etc.

The district court, to which the return was made, after a hearing and consideration of written briefs and oral arguments, entered an order discharging the writ and remanding Cunningham to the custody of the Sergeant-at-Arms. A written opinion was handed down by Judge Dickinson, sustaining the power of the Senate to compel the attendance of witnesses under the circumstances above set forth, and holding that the Senate had not proceeded against Cunningham for a contempt; but by its resolution had required his arrest and production at the bar of the

Senate, simply to answer questions pertinent to the matter under inquiry. 25 F. (2d) 733.

Upon appeal, the court of appeals reversed the district court, holding that the arrest was in reality one for contempt, but, if it should be regarded as an arrest to procure Cunningham's attendance as a witness, it was void because a subpoena to attend at the bar of the Senate had not previously been served upon him, and that this was a necessary prerequisite to the issue of an attachment. Treating the proceeding as one for contempt, that court held that the information sought to be elicited and which Cunningham refused to give was not pertinent to the inquiry authorized to be made by the committee, and that Cunningham was justified in declining to answer the questions in respect thereof. Circuit Judge Woolley dissented, substantially adopting the view of the district court. 29 F. (2d) 817.

The correct interpretation of the Senate's action is that given by the district judge and by Judge Woolley. It is true the special committee in its report to the Senate recited Cunningham's contumacy and recommended that he be adjudged in contempt, but the resolution passed by the Senate makes it entirely plain that this recommendation of the committee was not followed. The Senate resolution, after a recital of Cunningham's refusal to answer certain questions, directs that he be attached and brought before the bar of the Senate, not to show cause why he should not be punished for contempt, but "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound . . ." We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited

from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed.

First. Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1. "That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." *Reed* v. *County Commissioners,* 277 U. S. 376, 388. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so de-

termine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We cannot assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. It sufficiently appears from the foregoing that the inquiry in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

It is said, however, that the power conferred upon the Senate is to judge of the elections, returns and qualifications of its "members," and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the

power by both Houses of Congress;* and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either House, he of course is elected a member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership, who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the state of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, "provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate." This constitutes a limitation upon the power

* Among the typical cases in the House, where that body refused to seat members in advance of investigation although presenting credentials unimpeachable in form, was that of Roberts, in the 56th Congress, where it was so decided after full debate by a vote of 268 to 50. Cong. Record, Vol. 33, pt. 2, p. 1217.

It was stated at the bar in this case that the Senate in 29 cases had, in advance of investigation, seated persons exhibiting *prima facie* credentials, and in 16 cases had taken the opposite course of refusing to seat such persons, before investigation and determination of charges challenging the right to the seat.

of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

Second. In exercising the power to judge of the elections, returns and qualifications of its members, the Senate acts as a judicial tribunal, and the authority to require the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance, as was done here, does not admit of doubt. *McGrain* v. *Daugherty,* 273 U. S. 135, 160, 180. That case dealt with the power of the Senate thus to compel a witness to appear, to give testimony necessary to enable that body efficiently to exercise a legislative function; but the principle is equally, if not *a fortiori,* applicable where the Senate is exercising a judicial function.

Third. The real question is not whether the Senate had power to issue the warrant of arrest, but whether it could do so under the circumstances disclosed by the record. The decision of the court of appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also, a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming. A statute of the United

States (U. S. Code, Title 28, § 659) provides that any federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question.

United States v. *Lloyd,* 4 Blatchf. 427, was a case arising under the federal statute. The validity of the statute was not doubted, although the witness was held under peculiar conditions of severity, because of which the court allowed him to be discharged upon his own recognizance in the sum of $1,000.

In *State of Minnesota ex rel.* v. *Grace,* 18 Minn. 398, a similar statute was upheld and applied in the case of a material witness where it was claimed that there was good reason to believe that he would leave the state before the trial and not return to be present at the time of such trial. The court, using the words of Lord Ellenborough in *Bennett* v. *Watson,* 3 Maule & Selwyn 1, said (p. 402): "The law intends that the witness shall be forthcoming at all events, and it is a lenient mode which it provides to permit him to go at large upon his own recognizance. However this is only one mode of accomplishing the end, which is his due appearance." The witness, however, was discharged because of an entire absence of proof of any intention on his part not to appear and testify.

The comment of the court in *Crosby* v. *Potts,* 8 Ga. App. 463, 468, is peculiarly apposite:

"It is a hardship upon one whose only connection with a case is that he happens to know some material fact in

relation thereto that he should be taken into control by the court and held in the custody of the jailer unless he gives bond (which, from poverty, he may be unable to give), conditioned that he will appear and testify; but the exigencies of particular instances do often require just such stringent methods in order to compel the performance of the duty of the witness's appearing and testifying. There are many cases in which an ordinary subpoena would prove inadequate to secure the presence of the witness at the trial. The danger of punishment for contempt on account of a refusal to appear is sometimes too slight to deter the witness from absenting himself; especially is this true where there are but few ties to hold the witness in the jurisdiction where the trial is to be held, and there are reasons why he desires not to testify; for when once he has crossed the state line, he is beyond the grasp of any of the court's processes to bring him to the trial or to punish him for his refusal to answer to a subpoena. We conclude, therefore, that since the law manifestly intends that the courts shall have adequate power to compel the performance of the respective duties falling on those connected in any wise with the case, it may, where the exigencies so require, cause a witness to be held in custody, and in jail if need be, unless he gives reasonable bail for his appearance at the trial."

See also *Ex parte Sheppard,* 43 Tex. Cr. Rep. 372; Chamberlayne, Modern Law of Evidence, § 3622.

The rule is stated by Wharton, 1 Law of Evidence, § 385, that where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, and when allowed by statute in civil cases, he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the federal or state constitutions.

The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established.

The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. Compare *Reed* v. *County Commissioners, supra,* p. 388. The following appears from the report of the committee to the Senate upon which the action here complained of was taken. "A subpoena was issued for his appearance early in June. A diligent search failed to locate him. Finally Representative Golder of the Fourth District of Pennsylvania communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served." Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

It is not necessary to determine whether the information sought was pertinent to the inquiry before the Committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority. It fairly may be assumed that the Senate will deal with the witness in accordance

with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.

Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case. *Judgment reversed.*

THE MACALLEN COMPANY *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 578. Argued April 25, 1929.—Decided May 27, 1929.

1. A state tax on federal securities, or on the interest therefrom, is invalid, regardless of the amount of the tax. P. 624.
2. In determining whether a tax is an excise on the privilege of doing business as a corporation, or is in reality a tax on income from tax-exempt securities, this Court must inquire independently and is not bound by the designation of the tax in the taxing act or the opinion of the state court as to its nature. P. 625.
3. In the decisions of this Court holding that a tax lawfully imposed on the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property, it is implicit that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the non-taxable subject by its use as a measure of value was fortuitous and incidental. P. 627.
4. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld. P. 628.