THE GOVERNOR'S COMMITTEE ON PREPARATORY RESEARCH

for the

NEW JERSEY CONSTITUTIONAL CONVENTION

THE LEGISLATURE - INVESTIGATIONS

by
Sidney Goldmann
Head, Archives and History Bureau
Division of the State Library, Archives and History
and
C. Thomas Schettino
Member of the Bar of New Jersey

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The Constitution of New Jersey contains no provision giving the Legislature power to investigate state or local governments, the fidelity of any public officer or employee, or the performance of any public office, employment or trust. Whatever power the Legislature possesses is that inherent in it under the common law. The constitutional deficiency has become increasingly serious with the whittling down of the original legislative investigatory power by the courts.

The law relating to this power has been well summarized in 59 Corpus Juris, pages 95-102:[1]

> "Investigations.[2] The legislature has power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law,[3] and the legislature may proceed, with that end in view, by a duly authorized committee of one or both branches of such body.[4] *** It is the general rule that the legislature has no power through itself or any committee or other agency to make inquiry into the private affairs

1. See also, 49 American Jurisprudence, pp. 256-61.
2. 59 C. J. 96-98
3. Ex parte McCarthy, 29 Cal. 395; Greenfield v. Russell, 292 Ill. 392; Atty. Genl. v. Brissenden, 271 Mass. 172; People v. Keeler, 99 N. Y. 463; State v. Frear, 138 Wis. 173
4. "Power to secure needed information by such means has long been treated as an attribute of the power of the legislature. It existed in the British Parliament and in the colonial legislatures, and has been carried into effect in most if not all of the state legislatures." 49 Am. Jur. 257, s39. McGrain v. Daugherty, 273 U. S. 135. In order for the legislature to enact wise and timely laws, necessity of investigation must exist as an indispensable incident and auxiliary to the proper exercise of legislative power. Re Battelle, 207 Cal. 227 The power is as broad as the subject to which the inquiry properly entered upon has relation. Re Battelle, supra. Where there is a proper use that the legislature can make of the information sought, an ulterior purpose cannot be imputed, nor can an improper use of the information, when secured, be presumed. Robertson v. Peeples, 120 S. C. 176.

of a citizen, except to accomplish some authorized end[5] ***. Neither the legislature nor a committee appointed by it can constitute itself into a court of general jurisdiction or a grand inquest for the purpose of inquiring into the conduct of a citizen not a member of its body,[6] and the legislature has no power to conduct an investigation for the detection of crime,[7] except in connection with impeachment proceedings, although it is not a valid objection to an investigation that it may disclose crime or wrongdoing on the part of individuals, provided its object is the framing and enactment of proper laws or regulations.[8] A legislature, a joint session, or a committee cannot violate the constitutional rights of a person by conducting a public investigation of charges against him under the pretense or cloak of its power to investigate for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in finding indictments, for the purpose of intentionally injuring or vindicating any institution or individual, or for any other ulterior purpose.[9] A general, roving, inquisitorial, compulsory, investigation, conducted upon allegations, with no fixed principles, and governed by no rules of law or evidence, is illegal.[10]

"It has been held that, whatsoever means the two houses of the legislature use for the purpose of investigating, the right to investigate is separate and distinct in each house."[11]

"Authority to obtain information necessary for its determination concerning the exercise of the power to enact laws may be conferred upon non-legislative bodies.[12]

"In the exercise of its power to make investigations, the legislature may incur reasonably necessary expenses, payable out of public funds.[13] ***

"*** While the powers allowed to a legislative committee are necessarily exceedingly broad and include a search into the subject matter of the investigation far beyond the scope

5. Ex parte Hague, 105 N.J.Eq. 134, which held that the New Jersey Legislature had no authority to require petitioner to answer questions relating to his private affairs and property. Greenfield v. Russell, supra; In re Barnes, 204 N. Y. 108; Atty. Genl. v Brissenden, supra
6. Ex parte Hague, supra
7. Ex parte Caldwell, 138 Fed. 487; Atty. Genl. v Brissenden, supra
8. People v. Milliken, 185 N. Y. 35
9. Greenfield v. Russell and Ex parte Hague, supra
10. Ex parte Hague, supra
11. Ex parte Hague, 103 N. J. Eq. 31
12. Atty. Genl. v Brissenden, supra
13. State v Frear, supra

of a judicial trial, not being confined to evidence such as would be required upon a trial at law, its powers are not unlimited and its inquiring must be confined to facts relevant to the inquiry,[14] and the answer of a witness cannot be compelled either by the legislature or one of its committees on an inquiry or investigation, except for legislative purposes or in acquiring information upon which to predicate remedial action.[15]

"While in some aspects legislative investigations may partake of judicial attributes and require the exercise of quasi-judicial faculties, it is not a judicial function belonging exclusively to the courts.[16] *** But where an inquiry involves the investigation of criminal charges, the general rule is to the effect that it would be an invasion of the province of the judiciary for the legislature to undertake it.[17]

"Compelling Attendance of Witnesses and Production of Evidence.[18] By the weight of authority, if the subject of investigation is within the range of legitimate legislative inquiry and the questions are pertinent thereto and do not call for privileged matter, either house, if so authorized, or a committee thereof, *** may summon witnesses and compel obedience thereto,[19] it being held that the inherent and auxiliary power reposed in legislative bodies to conduct investigations carries with it such power.[20] ***

"*** The right to compel a witness to produce books and papers before a legislative committee turns upon whether their production is necessary to the inquiry which it is conducting,[21] and the production of papers material to an inquiry may not be refused merely because they are private.[22] When, however, it appears that the legislative committee in issuing a subpoena is attempting to embark upon a 'fishing expedition,' it will be declared void.[23]

14. Yoe v Hoffman, 61 Kan. 265; People v. Foster, 198 N. Y. S.7
15. Ex parte Hague, 105 N. J. Eq. 134; Ex parte Wolters, 64 Tex. Cr. 238
16. Ex parte Battelle, Atty. Genl. v Brissenden, People v Keeler, supra; Lowe v Summers, 69 Mo. App. 637; People v Sharp, 107 N. Y. 427
17. Greenfield v Russell, supra
18. 59 C.J. 99-102
19. Ex parte Hague, 104 N. J. Eq. 369; People v. Keeler, supra
20. Atty. Genl. v Brissenden, supra
21. In re Barnes, supra
22. Burnham v Morrisey, 14 Gray (Mass) 226
23. Ex parte Hague, 104 N. J. Eq. 31; In re Barnes, supra

> "When a witness, lawfully summoned, refuses to appear, a warrant or attachment may issue to compel his attendance,[24] the statutes in some instances so providing, and the procedure, when not fixed by statute, being controlled by the customary rules and practice of the legislative bodies.***
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> "Each house of the legislature may punish contempts of its authority by other persons where they are committed in its presence,[25] and equally may it be a contempt of the house for a witness to refuse to appear, or to testify, before its duly empowered committee, or to produce books or papers,[26] and a statute empowering either house to imprison a contumacious witness is not in excess of the legislative power.[27] *** No person can be punished *** unless his testimony is required in a matter into which the house has jurisdiction to inquire.[28] Furthermore, the evidence sought by the committee must be material and wilfully withheld,[29] and a witness may not be required to answer incriminating questions.[30]

The extent of the New Jersey Legislature's general investigatory power was first explored at length in the case of In re Hague,[31] cited as authority for many of the statements in the above quotation. The 1928 Legislature had by joint resolution set up a joint investigating committee. Mayor Hague refused to obey a subpoena issued by that committee. It thereupon adjudged him in contempt and reported to the Legislature, which then met in joint session and passed a concurrent resolution upon the authority of which a warrant was issued directing the arrest and detention of Mayor Hague and his arraignment before the bar of

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24. Ex parte Hague, 104 N. J. Eq. 369
25. In re Barnes, Lowe v Summers, supra. Ex parte Hague, 104 N. J. Eq. 31, held that the right to punish a recalcitrant witness must be vindicated by the Senate and the Assembly in their separate relations, since the right is separate and not joint. Action by the joint session of the houses was held unauthorized.
26. In re Gunn, 50 Kan. 155; Burnham v Morrisey, Lowe v Summers, and In re Barnes, supra
27. People v Keeler, supra
28. In re Barnes, supra
29. People v Foster, 204 App. Div. 295
30. Ex parte Hague, 9 N. J. Misc. Rep. 89; Emery's Case, 107 Mass. 172
31. 104 N. J. Eq. 31, affirmed Ibid, 369 (first case); 105 N. J. Eq. 134, affirmed 9 N. J. Mis. Rep. 89 (123 N.J. Eq. 475) (second case).

joint session. On habeas corpus proceedings brought to test the validity of the warrant, Chancery ordered him discharged from custody. It held that the joint resolution setting up the inquiry, the appointment of the joint investigating committee, the subpoena, the committee's action in adjudging petitioner quilty of contempt of the Legislature, the concurrent resolution and the warrant based thereon, were all unconstitutional and therefore void.[32] On appeal, the Court of Errors and Appeals held that:[33]

> 1. The joint resolution, taken as a whole, was a valid exercise of legislative power, even if one or more of the inquiries suggested therein might be unlawful.
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> 2. The subpoena was lawfully issued and lawfully required attendance before the investigating committee, notwithstanding the assumed inclusion therein of illegal requirements for the production of documents.
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> 3. It was lawful to order a warrant for arrest of the Mayor and to bring him before the Legislature; and the warrant was, if otherwise valid, not vitiated by lack of a seal.
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> 4. The warrant, ordering the arrest and arraignment before the bar of the Senate and General Assembly "to answer as and for a contempt in refusing to obey" the subpoena, by its language contemplated penal action.
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> 5. However, it was not within the power of the Senate and General Assembly to inflict such punishment.
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> 6. It was not competent for the Legislature to direct the arrest under conditions which might involve imprisonment until six days later before the Mayor could be brought before that body in session.

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32. 104 N. J. Eq. 31, at p. 77
33. 104 N. J. Eq. 369

The vote was unanimous on the first four points. The court split 6-6 on points (5) and (6), as well as on the ultimate question of reversing Chancery. The Chancery order therefore stood.

The 1929 Legislature adopted a supplemental resolution to the joint resolution of 1928, appointing a joint committee whose members were specifically named, requiring it to

> "make a survey of all questions of public interest; to investigate violations of law and the conduct of any state, county or municipal official, *** department,*** commission;***board, or ***body; to report whether the functions of such officials, departments, commissions, boards and bodies have been or are being lawfully and properly discharged for the purpose of obtaining information relative thereto as a basis for such legislative action as the senate and general assembly may deem necessary and proper."

In the course of the investigation made by the committee, there was evidence of alleged waste of public moneys in condemnations instituted by Hudson County and by Jersey City, of sums paid by motion picture theatres in Hoboken and Jersey City in order to stay open Sundays, and of illegal manipulation of bus franchise fees which defrauded Jersey City of substantial tax monies. The committee subpoenaed the Mayor of Jersey City and asked ten questions of him relating to his financial and property affairs. Upon his refusal to answer any of them, the joint committee reported that fact to the Legislature. The joint session then subpoenaed the witness to appear before it. He did, the questions were again submitted by the joint session, and again he refused to answer. Thereupon the joint session adjudged him in contempt and caused a warrant for his arrest to be issued, directing his confinement in jail until such time as he was willing

to answer. Upon being arrested, the Mayor instituted habeas corpus proceedings. The Vice-Chancellor concluded the arrest was without legal justification and ordered him discharged.[34] On appeal, the Court of Errors and Appeals held that in submitting the questions the Legislature invaded the judicial department of the government, thereby violating Article III, Paragraph 1 of the New Jersey Constitution relating to separation of powers.[35] The questions, said the court, were clearly meant to show that the witness was involved in the alleged criminal conspiracies resulting in the mulcting of the public treasuries of Hudson County and Jersey City:

> "The questions were within the scope of the resolution which directed an investigation of violations of law by county or municipal officers; but, as has already been stated, investigations of alleged violations of the criminal law are strictly judicial in their nature, and, under the constitution the legislature has no more power to conduct such investigations than has the governor, who constitutes the third branch of our governmental system, even if the latter desired the information sought for the purpose of advising the legislature with relation to changes in our criminal laws that would make violations thereof by county and municipal officers less likely to occur. In refusing, therefore, to answer these questions, relating as they did to matters, inquiry into which was outside of the jurisdiction of the legislature, Hague was exercising a legal right, and this being so the legislature was without power to punish him for such refusal, for, as was stated by Mr. Justice Miller in the case of Kilbourn v. Thompson, 103 U. S. 190: 'No person can be punished for contumacy as a witness before the legislature unless his testimony is required in a matter into which the legislature has jurisdiction to inquire.' "[36]

After indicating that the Legislature is not entirely without power to exercise any judicial functions -- it does so in impeachment proceedings as well as in cases, where it investigates the truth of a

34. 105 N. J. Eq. 134
35. 123 N. J. Eq. 475, at p. 478
36. Ibid, at p. 479

charge brought to its attention involving swindling the State out of property -- Chief Justice Gummere went on to hold that even if the Legislature were considered as authorized by the Constitution to investigate the alleged criminal charges which were the basis of questions asked, yet there was no power to compel the witness to answer. The Legislature had attempted to exercise such power in issuing the warrant, for it directed arrest and confinement in jail until the witness was ready to answer. The court declared that a witness is protected by law from being compelled to give evidence that tends to criminate him.[37]

The Chancery decision, thus affirmed, was broader and stronger in the language used, as indicated by these paragraphs from the headnotes to the opinion:[38]

> "It is a well-settled rule that the legislature cannot, nor can any committee appointed by it, constitute itself into a court of general jurisdiction or a grand inquest, for the purpose of inquiring into the conduct of a citizen not a member of its body, nor can it compel the answer of a witness on an inquiry or investigation before it except for legislative purposes or in acquiring information upon which to predicate remedial legislation."
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> "A legislature, and a fortiori a joint session or a committee, cannot violate the constitutional rights of a person by conducting a public investigation of charges made against such person, either directly or by inuendo -- under the pretense or cloak of its power to investigate for the purpose of acquiring information for legislation, whether the investigation be for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in finding indictments, for the purpose of intentionally injuring such person, or for any ulterior purpose."
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> "Joint session was without authority to require petitioner to answer questions propounded to him which he declined to answer -- all of which related to his personal private affairs and property. The legislature, as such, lacks such authority.

37. Ibid, at pp. 480-81
38. 105 N. J. Eq. 134-35

> Neither the senate nor the general assembly possesses, or can be invested with, such authority."
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> "It is axiomatic that citizens are subject to the duty to appear and testify and produce books and papers in a court of law when duly subpoenaed in a case pending therein, when such disclosure is relevant and material to a judicial determination of such case; but they are not subject to a duty before a legislative investigating committee."
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> "A general, roving, offensive, inquisitional, compulsory investigation, conducted by a committee or a joint session without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws. Such an inquisition would be destructive of the rights of the citizen."

In re Kelly,[39] decided eight years after In re Hague, closely followed the principles enunciated in the latter case. The 1938 Assembly had appointed an investigating committee pursuant to an Assembly resolution reciting claims made by the defeated gubernatorial candidate of malconduct, fraud and corruption in the General Election of 1937 in Hudson County. The resolution directed the committee to

> "make a survey of all questions of public interest, including a survey of the finances and expenditures of the State, counties, and municipalities, to investigate violations of law and the conduct of any State, county or municipal official; *** department; *** commission; *** board; or *** body; to investigate alleged fraudulent and illegal conduct of the general election on November second, one thousand nine hundred and thirty-seven;*** and to report its findings as a basis for such legislative action as the General Assembly may deem necessary and proper."

Kelly and two others were subpoenaed and asked certain questions by the committee relating to the election in Jersey City. Each one refused to answer on advice of counsel. They were then arrested and committed to jail on warrants issued by a magistrate on the complaint of the Assembly

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39. 123 N. J. Eq. 489

investigating committee chairman. On habeas corpus proceedings, Chancery held that the petitioners were justified in refusing to answer, and ordered their discharge from custody. The Vice-Chancellor pointed out how closely the Assembly resolution resembled the joint resolution in the Hague case, except that it directed investigation of the allegations of election fraud and criminality. The court quoted the Court of Errors and Appeals decision in the former case at length and held that the Assembly resolution under consideration attempted to usurp the functions of the judiciary and was, therefore, under the separation of powers provision (Art. III, Par. 1), unconstitutional and void. The fact that a joint committee had tried to hold the witness for contempt in the Hague case, whereas here the Assembly committee complained to a magistrate who thereupon issued the warrant of arrest, was held to make no difference, since the resolution itself was invalid.

In re Kelly was affirmed on appeal,[40] the per curiam opinion simply stating that the affirmance was "for the reasons stated in the opinion filed in the court below." Justice Case, dissenting, said:[41]

> "....the courts should not impinge upon, or withhold recognition of, legislative powers.... I perceive no effort at the usurpation of constitutional powers in the granting of so much authority as was necessary to support the incidents hereinafter mentioned, or in the inquiries addressed to the respondents or in the consequent arrests....
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> "...the assembly had the right to obtain information legitimately pertinent to the subject-matters upon which it was called to legislate.

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40. McRell v Kelly, 124 N.J.Eq. 350. The court divided, 12-3.

41. Ibid., at pp. 351, 352-53

> "The elections constitute an essential and exceedingly fertile subject of legislation. None more so or more appropriately so.... There is no doubt in my mind of the authority of the assembly to seek enlightenment on the matter in which the elections are actually conducted, and to seek it with compulsory process. Any other view would cut directly and seriously into the roots of our form of government....
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> "...The specific questions come squarely within my conception of what the assembly was entitled to ask and to have answered. They were clearly introductory and they in nowise constituted an inquiry into crime.... we have no justification for assuming that if these questions had been answered, subsequent ones would have concerned subjects beyond the pale of legislative inquiry..."

Justice Case discussed the Hague cases at length to show that they were not authority for the non-admissibility of the questions in the Kelly case.

The Kelly case has been criticized,[42] as has the Hague decision.[43] Just how seriously these cases have cut down the legislative power of investigation can only be understood from a further consideration of the nature of that power and the history of its development.

Legislative power is not a self-defining concept. And yet it is a very ancient power, exercised at an early date by the British Parliament

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42. See, for example, 48 Yale Law Journal 1434, at pp. 1438-39 (June 1939): "The New Jersey court seems to go rather far in restricting (the legislature's) powers of investigation.... It is to be hoped that other jurisdictions will not follow..."

    See, also, 4 Univ. of Newark Law Review 189, at pp. 199-200, holding that neither of the Hague cases supports the Kelly decision: "What could be more appropriate or competent for the legislature to investigate than the conduct of elections?"

43. See, for example, 30 Columbia Law Review 1059, at p. 1060 (November 1930): "The ... case is unusually extreme in its language in denying the legislature's power of investigation... the question remains whether the information sought might not have been useful as a basis for legislation."

over persons guilty of disturbing conduct in its presence. Such conduct might consist of insults and libels on the legislature as a whole or on its individual members, or of attempts to bribe a member. The legislative practice of punishing such conduct by commitment for contempt is long established and supported by judicial decision. The source of the power lies "in the necessity for self-help and self-defense - the employment of an efficient instrument to protect the institutions of government from unwarranted interferences with their work."[44] It is like the summary power exercised by courts to cope with offenses to decorum committed in their presence, as well as the power to commit contumacious witnesses for contempt. Landis states the matter thus:[45]

> "With both courts and legislatures the exercise of such a power is not the primary purpose of their creation.... It secures to them the power to function as courts and legislatures... It is accurate... to regard the power as subsidiary to the exercise of a greater and more comprehensive power for which the institution, whether court or legislature, is created. Both institutions... have adopted the same device -- summary commitment -- to effectuate the main purposes of their existence... The existence (of the legislative power to commit for contempt)... in a certain class of cases proves that the device of summary commitment has been deemed necessary in those instances to maintain the legislative process. Proof of a similar necessity is required in order to establish the legislature's power over a contumacious witness before a committee of inquiry..."

The legislative committee of inquiry with power to summon witnesses and compel the production of records and papers is found in British parliamentary history as early as 1604, when there were legislative inquiries into disputed elections. Investigating committees for other purposes, armed with powers to compel the production of persons and papers, to administer oaths

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44. Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 Harvard Law Rev. 153 (December 1926), at pp. 156-57

45. Ibid., at pp. 158-59

and to report recalcitrant and untruthful witnesses to Parliament, are also found in this early period. Such committees might be for the purpose of discovering data for proposed legislative ends, or of determining whether public funds had been spent for authorized purposes.[46] The investigating committee, extensively used in the years following 1688, when Parliament won its long struggle for supremacy, had by 1728 become the common instrument of the legislative process.[47]

When, finally, the power of Commons was challenged in the courts, Lord Coleridge was able to say:[48]

> "That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: it is unnecessary to attempt to do so now: I would be content to state that they may inquire into every thing which it concerns the public weal for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest when disobedience makes that necessary..." (Underscoring supplied)

On appeal, Baron Parke, approved Lord Coleridge's statement, and said:[49]

> "....(The House of Commons), which forms the Grand Inquest of the Nation, ... has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience ... bring them into custody to the bar for the purpose of examination."

The colonial legislatures here in America followed the parliamentary precedents and practice. They, too, used committees of inquiry and exercised

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46. Ibid., at p. 161

47. Ibid., at pp. 162-64, where various legislative investigations are detailed.

48. Howard v. Gosset, 10 Q. B. 359, at pp. 379-80 (1845). See, also, Hallam, Principles of British Constitutional Law, pp. 307-8 (1925)

49. 10 Q.B. 411, at pp. 450-51 (1847)

the power of punishing for contempt as a necessary incident of the legislative power. And when the colonies declared themselves free and independent states, the new legislatures freely resorted to investigating committees and punishment for contempt. The tradition of the British Parliament and the institutions developed by it in aid of the legislative process "were neither alien to the newer soil of America nor inimical to Revolutionary ideals of independence."[50] The power so asserted, says Landis, was upheld by the state courts when challenged; prior to 1880 no court denied or curtailed its exercise.[51] Judge Daly, of New York, reflected the existing view when he said in Briggs v. MacKellar:[52]

> "...It is a well-established principle... that either house (of the legislature) may institute any investigation having reference to its organization, the conduct and qualifications of its members, its proceedings, rights, or privileges, or any matter affecting the public interest, upon which it may be important that it should have exact information, and in respect to which it would be competent for it to legislate. The right to pass laws, necessarily implies the right to obtain information upon any matter which may become the subject of law... In American legislatures the investigation of public matters before committees, preliminary to legislation, or with the view of advising the house appointing the committee, is, as to parliamentary usage, as well established as it is in England, and the right of either house to compel witnesses to appear and testify before its committees, and to punish for disobedience, has been frequently enforced.... The right of inquiry, I think, extends to other matters, in respect to which it may be necessary, or may be deemed advisable, to apply for legislative aid..."

The reason assigned by some courts, as in the Hague cases, for drastically cutting down the legislative power is that the investigation tres-

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50. Ibid., at p. 166. And see pp. 165-67. See also, Potts, "Power of Legislative Bodies to Punish for Contempt," 74 Univ. of Pa. Law Rev. 691 (1926), for colonial and early state precedents.

51. Landis, op. cit., at p. 167

52. 2 Abb. Pr. 30, at pp. 41, 55-57, 61 (N.Y., 1855). See, Landis, op. cit., p. 168, note 62, for state courts that have adhered to the principles enunciated by Judge Daly, and note 63 for those which have reflected the contrary view of the U. S. Supreme Court in Kilbourn v. Thompson, 103 U.S. 168 (1880).

passed upon the doctrine of separation of powers. The legislature was invading the area reserved to the judicial branch of the government. This reasoning has been criticized as based on a misconception of just what separation of powers in general, and the legislative power in particular, means.

The fact is that the framers were not dealing with something new when they wrote the principle of separation of powers into the Federal Constitution. As has been shown above, those powers already had a fairly certain and clear definition. To the founders the legislative power certainly possessed a genuine content, which was[53]

> "the residu m of the past and the possibility of adaptation to the exigencies of the future... Its meaning was for them disclosed by the legislative histories of England and the colonies, but that meaning also embraced within it the conception of the process of its development....
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> "Legislative power in 1789 already possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and papers. This may be admitted, and yet the question as to the limits of inquiry by the legislature remains.... Legislative power does not operate in vacuo; the guide to its content is to be found in its history, not in generalization from inadequate data nor deduction from a preconceived premise relegating legislatures to a role certainly unhistorical and in all probability politically undesirable."

Legislative precedents, contemporaneous with the framing of the Constitution, are the background against which the founders worked. They are, therefore, entitled to great weight.[54] Legislative investigating committees, as has been pointed out, existed before 1789, checking into the expenditures of public moneys and into various areas of governmental administration. Such committees became increasingly more important and necessary, and their range of investigation of the broadest scope, as the nation expanded. A great

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53. Landis, op. cit., p. 169; and see, also, p. 156

54. Cf., Chief Justice Taft in Myers v. United States, 272 U.S. 52, at pp. 174-75 (1926); United States v. Midwest Oil Co., 236 U.S. 450, at p. 473 (1915)

number of these committees were (obviously) concerned with the investigation of the executive branch of the government, and yet the separation of powers doctrine was never seriously considered as a bar to such procedure.

Congressional committees invariably had the power to send for persons and papers, as did many on the state level.[55] When one of the witnesses summoned before an 1860 U. S. Senate committee which investigated the seizure of the federal armory and arsenal at Harpers Ferry, Va., refused to testify and a resolution was proposed to imprison him for contempt, Sumner went to his defense, claiming the Senate was attempting to exercise judicial power. The resolution was overwhelmingly passed, 44 to 10; the Senate's reply was that what it did was the accepted practice of legislative assemblies, arose out of the practical necessities for the exercise of legislative power, and found its justification in the legislative process.[56]

It has been said that "no single notion has contributed so much to judicial confusion" in considering the legislative powers of investigation as the separation of powers doctrine.[57] A court's denial of the power because it is deemed "judicial"

> "....loses sight of the fact that the underlying theory was never meant to apply to powers ancillary to an ultimate governmental function. The need for identical incidental powers may be felt in each department; and necessity justifies implication. The power to investigate is justified, if at all, as one of these incidental or implied powers. An altered nomenclature may be useful: the 'separation of ultimate functions.' "[58]

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55. Landis, op. cit., at pp. 171-209 contains a detailed account of the Congressional committees, their fields of investigation and powers.

56. Cong. Globe, 36th Cong. 1st Sess. (1860) pp. 1100-1102

57. Herwetz and Mulligan, "The Legislative Investigating Committee," 33 Columbia Law Rev. 1, at p. 6 (January 1933). Cf., Bondy, "The Separation of Governmental Powers," 5 Columbia University Studies in History, Economics and Public Law 114 (1896)

58. Herwetz and Mulligan, op. cit., at pp. 6-7

The case of Kilbourn v. Thompson, 103 U. S. 168 (1880), so strongly relied upon in the Hague and Kelly cases, and in similar cases denying the legislature the right to commit a contumacious witness for contempt on the ground that this was a judicial function, has been strongly criticized as completely ignoring parliamentary, colonial and state legislature precedents, as misconceiving entirely the nature and extent of the legislative process and as even misunderstanding the real nature of the inquiry launched by the House of Representatives.[59]

The court in the Kilbourn case also demanded definiteness of legislative purpose in launching the inquiry. It has been argued that this is no ground for cutting down an investigation; the results that may be achieved can rarely be foretold, they depend on the exhaustiveness of the examination. Landis cites Congressional precedents to illustrate the gap one finds between purpose and accomplishment.[60]

It cannot be assumed, as did the Supreme Court in the Kilbourn matter, that the legislature has no legislative purpose in mind in ordering the inquiry. For a court to do so is to indulge in dangerous conjecture;[61] moreover, "such assumptions are contrary to the traditional attitude of courts in reviewing the constitutionality of legislative action."[62] The answer to the narrow

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59. See, for example, Landis, op. cit., at pp. 215-17, and Herwitz and Mulligan, op. cit., at pp. 9-11.

60. Op. cit., at pp. 217-18

61. Herwitz and Mulligan, op. cit., at p. 10: "A court should withhold interference with fact-finding unless there is no scintilla of possibility that the facts when obtained will be useful.... One cannot afford to deal with this problem on a priori grounds; the situations are so alive that their content may alter while judges deliberate."

Cf., Case, J. (dissenting), McRell v. Kelly, 124 N. J. Eq. 350, at p. 353

62. Landis, op. cit., at p. 218

rule of the Kilbourn case is found in a decision of the Supreme Court 16 years later:[63]

> "What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such features may be defensible...."

That court in a still later case likewise avoided the pitfall of assuming that an unconstitutional exercise was contemplated by the legislative inquiry:[64]

> "The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We cannot assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling."

The argument of Kilbourn v. Thompson that the non-official conduct of a citizen is immune from legislative scrutiny has also been a target of criticism. In discussing this phase of the case, one authority says:[65]

> "Established privileges of immunity, of course, exist before such (legislative) committees as well as before courts of law. But the mere fact that by a subpoena duces tecum a court is subjecting to the public gaze the private affairs or private business of a citizen has never been suggested as a bar to the court's process. The efficient exercise of judicial power imposes upon private citizens a duty to submit their conduct to its scrutiny; the interests of privacy are there over-balanced by the interest in efficient government. That efficiency should be accorded judicial power and withheld from legislative power, is contrary to the dictates of public policy as well as inimical to a theory of separate but equal governmental powers. The use of such evidence for a legitimate purpose within the scope of the power adducing it, can as well be presumed for legislatures as for the courts.

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63. In re Chapman, 166 U.S. 661, at p. 669 (1897)

64. Smith v. Interstate Commerce Comm., 245 U.S. 33, at p. 46 (1917). And see People v. Keeler, 99 N.Y. 463, at p. 487 (1885); Robertson v. Peeples, 120 S.C. 176 (1919), and Atty. Genl. v. Brissenden, 271 Mass. 172 (1930) that it will be presumed that the legislative action was taken in good faith, and an effort will be made to justify the inquiry.

65. Landis, op. cit., at pp. 219-20. Cf., Lord Coleridge in Howard v. Gosset, note 48 supra, and Herwitz and Mulligan, op. cit., p. 6 and note 9.

> "The bar of privacy does not prevent requiring a public utility to submit its accounts to investigation, not because they have ceased to be private and are public records, but because such accounting is a prerequisite of the efficient exercise of legislative control.
>
> "Their relevancy to the legislative inquiry constitutes the authority for their production. Tariff powers similarly are the basis for authorizing an inquiry into costs of production, even though such costs concern private manufactures and their accounts. The control over the safe-keeping of the public funds authorizes an inquiry into their expenditure and tracing such expenditure into the accounts of private citizens. The power to create and abolish departmental offices, the necessity for acquaintance with administration as a prerequisite for legislation, permits an inquiry into the conduct of such private citizens and their affairs when the evidence leads to an inference that their conduct has made, encouraged, or shielded official malfeasance. The bar of privacy, otherwise, would make only the most superficial of examinations possible."

The observation made concerning Kilbourn v. Thompson ("Its result contradicts an unbroken Congressional practice continuing even after the decision, with the increasing realization that committees of inquiry are necessary in order to make government effectively responsible to the electorate") and Ex parte Daugherty[66] ("in its practical effect (it) elevates executive power beyond the reach of responsibility")[67] might well be directed to decisions which follow their reasoning.

The Commission on Revision of the New Jersey Constitution of 1942 (the "Hendrickson Commission") undoubtedly had these decisions and their

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66. 299 Fed. 620 (1924). The U. S. District Court for the Southern District of Ohio released Daugherty, who had been arrested under a Senate resolution investigating the Attorney-General of the United States' failure to prosecute certain malefactors, for refusing to obey a subpoena issued by a Senate subcommittee commanding him to appear and testify as to what he might know relative to the matters being considered by the subcommittee. The subcommittee had power to send for persons, books and papers.

67. Landis, op. cit., at p. 220

significance in mind when it proposed the following provision in its draft of a revised Constitution:[68]

> "The Legislature or either house thereof may by resolution constitute and empower a committee thereof or any public officer or agency to investigate any and all phases of State and local government, or any part thereof, the fidelity of any public officer or employee, or the performance of any public office, employment or trust. No person shall be privileged from testifying in relation to any such matters and upon so testifying he shall be immune from criminal prosecution with respect to any matter to which such testimony may relate. Any public officer or employee who shall refuse or willfully fail to obey any subpoena lawfully issued by such investigating committee, officer or agency, or who shall refuse to testify or to answer any questions relating to any matter properly under investigation, or who shall refuse to waive immunity from prosecution with respect to any matter upon which he may testify, shall thereby become disqualified to continue in his office, position or employment, which shall forthwith be deemed vacant. Any such person shall not thereafter be eligible for any public office, position or employment."

The Committee thus sought to reconstitute and revitalize the legislative power in the field of investigation. In the "Summary and Explanation" accompanying the draft Constitution, the Committee said:[69]

> "Strengthening of the legislative power of investigation, on the other hand, will directly result in improved accountability of public officers and employees for the faithful performance of their trust. The new provision on this subject requires any public officer who may be called upon to testify with respect to his official duties to answer all legitimate questions and either to waive his privilege against self-incrimination or lose his privilege of continuing in the public service."

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68. Art VI, Sec. I, Par. 3, Report of the Commission on Revision of the New Jersey Constitution, 1942, p. 50

69. Report, op. cit., at p. 26

In the hearings on the Hendrickson Commission report held before a Joint Legislative Committee in the summer of 1942, this proposal was supported as a provision designed to confirm and strengthen the investigatory power of the Legislature;[70]

> "The whittling of this, one of the original powers of all English-speaking Legislatures, which has taken place in recent years has held great potential danger for the State. To give the Legislature the essentially executive power to appoint to public office, and then deny it adequate power to investigate the conduct of public officers has been a great mistake. A Legislature is by nature incapable of acting as a responsible chief administrator, but it can and should act for the people year in and year out as the critic of the conduct of administration."

Another witness, who had acted as counsel for the Legislature in the Hague cases, had this to say:[71]

> "The power of the New Jersey Legislature to investigate State and local governments and officials for the purpose of obtaining information as a basis of legislative action has been narrowly limited by decisions of the Court of Errors and Appeals, as you all know. The rule which obtains in New Jersey under these judicial decisions is very much narrower than that which obtains in the federal jurisdiction and in the jurisdiction of every State in which the question has arisen. *** Our Court of Errors and Appeals has held, in effect, that the investigatory power of the Legislature is limited to impeachment cases and to cases in which

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70. Record of Proceedings before the Joint Committee of the New Jersey Legislature..., 1942, p. 116

71. Ibid., pp. 375-76. For a view questioning the advisability and legality of the Hendrickson Commission provision, see pp. 382-85; for modification of the provision, p. 392 and 393-94; against the provision, pp. 815-16

> the State is swindled out of its property, and the reasoning is if the conduct or matter being investigated happens to be criminal in nature, it is solely the function of the judicial branch of the Government, and that the investigating power of the Legislature is confined to cases in which the State is directly affected, the kind to which I have just referred. The rule of other jurisdictions is that the Legislature has power to investigate the conduct of public officers and public agencies for the purpose of obtaining information as a basis for legislative action, and that if such conduct be criminal in nature, it is the function of the judicial branch to try the guilty ones criminally, and if convicted, punish them. The two functions are complementary. The Legislature has the power to procure information and ascertain facts as a basis for the exercise of its legislative function. The judiciary has the power to prosecute criminally and to convict and punish if a criminal offense is disclosed.
>
> It is high time that this salutary legislative power be recaptured by the New Jersey State Legislature."

In the proposed revised Constitution submitted to and rejected by the people in 1944, the opposite provision read:[72]

> "The Legislature may by concurrent resolution and either house thereof may by resolution constitute and empower a committee thereof or any public officer or agency to investigate any and all phases of State and local government, or any part thereof, the fidelity of any public officer or employee, or the performance of any public office, employment or trust. No person shall be privileged from testifying in relation to any such matters, and upon so testifying he shall be immune from criminal prosecution with respect to any matter to which such testimony may relate unless he has waived such immunity. Any person holding public office, position or employment who shall refuse or willfully fail to obey any subpoena lawfully issued by such investigating committee, officer or agency, or who shall refuse to testify or to answer any questions relating to any matter under investigation, or who shall refuse to waive immunity from prosecution with respect to any matter upon which he may testify, shall thereby become disqualified to continue in his office, position or employment, which shall forthwith be deemed vacant and he shall be ineligible to hold any public office, position or employment."

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72. Art. VI, Sec. III

One of the charges made in the revision campaign which preceded the November 1944 referendum was that Art. VI, Sec. III, would wipe out the privilege which attaches to a confidential communication, such as between attorney and client, doctor and patient, priest (minister) and communicant, newspaper man and news source, and spouses. The charge, taken at face value, was not a merited criticism and was undoubtedly intended in some quarters to confuse and mislead the voters.

Privileges are of two distinct kinds. The first is that against self-incrimination - rendering the witness infamous or subjecting him to penalty or forfeiture. Insofar as this privilege is embodied in the Fifth Amendment to the Federal Constitution, it is settled that, like all the other first ten amendments it is not operative upon the states. The United States Supreme Court has rejected the contention that the privilege is one of the fundamental rights of citizenship and protected by the Fourteenth Amendment. The basic reason is that this privilege is not an inherent attribute of freedom; it is not derived from any of the great instruments declaratory of fundamental rights and has never ranked in English or American law as among the inalienable rights of mankind. It is not inherent in due process of law.[73]

The privilege against self-incrimination is a <u>personal</u> privilege of the witness and one which he may ordinarily waive. The 1944 revision would give no person this privilege in the course of a legislative investigation, whether he were the one being investigated or not.

The second type of privilege, relating to confidential communications of the kind indicated, is of an entirely different nature. It is not the personal privilege of the witness at all, but attaches to the confidential

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73. <u>Twining</u> v. <u>New Jersey</u>, 211 U. S. 78 (1908)

communication itself. It is for the protection of the person who confided to the witness and cannot be waived by him, for, in contrast to the first type of privilege discussed above, it does not belong to him. The revision provision would not affect this type of privilege in any way.[74]

Provisions in other state constitutions relating to the legislature's investigatory power are set out in the Appendix. Those of Florida, Kentucky, Louisiana, Maryland, Mississippi, Ohio, Oklahoma and South Dakota -- eight states -- contain express powers. Those of three states -- Arkansas, Colorado and Pennsylvania -- have provisions from which one can imply the power to investigate. It will be noted that the brief Florida provision directs that the manner of exercising the legislative investigatory power shall be exercised through legislation, and the South Dakota provision deals with self-incrimination in bribery cases.

The Model State Constitution, issued by the National Municipal League, provides simply:[75]

> "The legislature... shall have the power to compel the attendance and testimony of witnesses and the production of papers either before the legislature as a whole or before any committee thereof."

The only New Jersey statutory provisions relating to legislative investigations are those found in Title 52, Chapter 13 of the Revised Statutes. Sections 52:13-1 to 3, set out in Appendix B, date back to 1877; sections 52:13-5 to 13 (not reproduced) relate to contempts of joint legislative committees and were -- significantly in the light of the court decisions mentioned -- the first legislation passed by the 1929 legislative session.

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74. In New Jersey the confidential communications between attorney and client have the protection of the common law. Those made to a newspaper reporter are protected by R.S. 2:97-11.("the source of any information... published in the newspaper."), and confessions made to a clergyman by P.L. 1947, C. 324 (Senate Bill 213) signed by the Governor on June 20, 1947. Communications between spouses also have most of the protection accorded them under the common law.

75. Section 308, Partial Revision, 1946

A

APPENDIX

CONSTITUTION OF ARKANSAS

ARTICLE V - Sec. 12 - Powers of each house - Each house shall have the power to determine the rules of its proceedings; and punish its members or other persons for contempt or disorderly behavior in its presence; enforce obedience to its process; to protect its members against violence or offers of bribes or private solicitations; and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause. A member expelled for corruption shall not thereafter be eligible to either house; and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense. ***

CONSTITUTION OF COLORADO

ARTICLE V - Sec. 12 - Parliamentary rules - Each house shall have power to *** punish its members or other persons for contempt for disorderly behavior in its presence; to enforce obedience to its process; *** punishment for contempt or disorderly behavior shall not bar an indictment for the same offense.

CONSTITUTION OF FLORIDA

ARTICLE III - Sec. 10 - Attendance of witnesses - Either house shall have power to compel the attendance of witnesses upon any investigations held by itself, or by any of its committees; the manner of the exercise of such power shall be provided by law.

CONSTITUTION OF KENTUCKY

Sec. 39 - Parliamentary rules - Each house of the General Assembly may *** punish for contempt any person who refused to attend as a witness, or to bring any paper proper to be used as evidence before the General Assembly, or either house thereof, or a committee of either, or to testify concerning any matter which may be a proper subject of inquiry by the General Assembly, or offers or gives a bribe to a member of the General Assembly, or attempts by other corrupt means or device to control or influence a member to cast his vote or withhold the same. The punishment and mode of proceeding for contempt in such cases shall be prescribed by law but the term of imprisonment in any such case shall not extend beyond the session of the General Assembly.

Sec. 53 - Treasurer and auditor - The General Assembly shall provide by law for monthly investigations into the accounts of the Treasurer and Auditor of Public Accounts, and the result of these investigations shall be reported to the Governor, and these reports shall be semi-annually published in two newspapers of general circulation in the State. The reports received by the Governor shall, at the beginning of each session, be transmitted by him to the General Assembly for scrutiny and appropriate action.

CONSTITUTION OF LOUISIANA

ARTICLE V - Sec. 17 - Action of legislature not requiring Governor's signature - Orders, votes and resolutions of either or both houses of the Legislature, affecting the prerogatives and duties thereof, or relating to adjournment, to amendments to the Constitution of this State or of the United States, to the investigation of public officers, and the like, shall not require the signature of the Governor; and such resolutions, orders and votes may empower legislative committees to administer oaths, to send for persons and papers, and generally make legislative investigations effective.

CONSTITUTION OF MARYLAND

ARTICLE III - Sec. 24 - Power to investigate - The House of Delegates may inquire, on the oath of witness, into all complaints, grievances and offences, as the grand inquest of the State, and may commit any person for any crime to the public jail, there to remain until discharged by due course of law. They may examine and pass all accounts of the State, relating either to the collection or expenditure of the revenue, and appoint auditors to state and adjust the same. They may call for all public or official papers and records, and send for persons whom they may judge necessary, in the course of their inquiries, concerning affairs relating to the public interest, and may direct all office bonds which shall be made payable to the State to be sued for any breach thereof; and with the view to the more certain prevention or correction of the abuses in the expenditures of the money of the State, the General Assembly shall create, at every session thereof, a joint standing committee of the Senate and House of Delegates, who shall have power to send for persons and examine them on oath and call for public or official papers and records; and whose duty it shall be to examine and report upon all contracts made for printing, stationery, and purchases for the public offices and the library, and all expenditures therein, and upon all matters of alleged abuse in expenditures, to which their attention may be called by resolution of either House of the General Assembly.

CONSTITUTION OF MISSISSIPPI

ARTICLE IV - Sec. 60 - Amendment of bills - No bill shall be so amended in its passage through either house as to change its original purpose, and no law shall be passed except by bill; but orders, votes, and resolutions of both houses, affecting the prerogatives and duties thereof, or relating to adjournment, to amendments to the Constitution, to the investigation of public officers, and the like, shall not require the signature of the Governor; and such resolutions, orders, and votes, may empower legislative committees to administer oaths, to send for persons and papers, and generally make legislative investigations effective.

CONSTITUTION OF OHIO

ARTICLE II - Sec. 8 - Parliamentary rules - Each house *** shall have all powers, necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

CONSTITUTION OF OKLAHOMA

ARTICLE V - Sec. 42 - Contempt - In any legislative investigation, either House of the Legislature, or any committee thereof, duly authorized by the House creating the same, shall have power to punish as for contempt, disobedience of process, of contumacious or disorderly conduct, and this provision shall also apply to joint sessions of the Legislature, and also to joint committees thereof, when authorized by joint resolution of both Houses.

CONSTITUTION OF PENNSYLVANIA

ARTICLE II - Sec. 11 - Powers of each house - Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free State.

CONSTITUTION OF SOUTH DAKOTA

ARTICLE III - Sec. 28 - Self incrimination in bribery cases - Any

person may be compelled to testify in investigation or judicial proceedings against any person charged with having committed any offense of bribery or corrupt solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, but said testimony shall not afterwards be used against him in any judicial proceeding except for bribery in giving such testimony, and any person convicted of either of the offenses aforesaid shall be disqualified from holding any office or position or office of trust or profit in this State.

B

APPENDIX

R.S. 52:13-1.

Any joint committee of the legislature, any standing committee of either house, or any special committee directed by resolution to enter upon any investigation or inquiry, the pursuit of which shall necessitate the attendance of persons or the production of books or papers, shall have power to compel the attendance before it of such persons as witnesses and the production before it of such books and papers as it may deem necessary, proper and relevant to the matter under investigation. Any such committee shall also have the power to employ such legal and clerical assistance as it may deem necessary to the proper conduct of the investigation.

R.S. 52:13-2.

If any person upon being summoned in writing by order of any committee mentioned in section 52:13-1 of this title to appear before such committee and testify, fails to obey such summons, the speaker of the house of assembly or the president of the senate may, upon application to him, by warrant under his hand order the sergeant at arms of the house over which he presides to arrest such person and bring him before the committee, and the sergeant at arms shall thereupon execute the warrant to him so directed.

R.S. 52:13-3.

Witnesses summoned to appear before any committee authorized by this article or any other law to conduct an investigation or inquiry shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the state. All such witnesses may be sworn by any member of the committee conducting the investigation or inquiry; and all witnesses sworn before any such committee shall answer truly all questions put to them which the committee shall decide to be proper and pertinent to the investigation or inquiry; and any witness so sworn who shall swear falsely shall be guilty of perjury. No such witness shall be excused from answering any such questions on the ground that to answer the same might or would incriminate him; but no answers made by any witness to any such questions shall be used or admitted in evidence in any proceeding against such witness, except in a criminal prosecution against the witness for perjury in respect to his answers to such questions.

Any witness who refuses to answer any questions decided by the committee to be proper and pertinent shall be guilty of a misdemeanor; and any witness who, having been summoned to appear before any such committee, fails to appear in obedience to the summons or, appearing, refuses to be sworn shall be guilty of a misdemeanor.