THE STAR,

AND CONCEPTION BAY JOURNAL.

Vol. IV. WEDNESDAY, JANUARY, 23, 1839. *No.* 238.

HARBOUR GRACE, Conception Bay, Newfoundland:—Printed and Published by *JOHN THOMAS BURTON*, at his Office, opposite Mr. W DIXON 's.

St. John's.

The Fall Term of the SUPREME COURT was closed at a late hour on Saturday [illegible] last, after the extension for a week [illegible] the original time prescribed for its sittings.

The topic of all-engrossing interest in the public mind throughout the term, was the decision to which it was probable the Court would come on the deeply important matter involved in the case of KIELLY *vs.* CARSON and others of the [illegible] of Assembly, which was, it will be remembered, an action for false imprisonment under colour of the Privileges of the House.—*Public Ledger, January* 4.

MR. JUSTICE DESBARRES' JUDGMENT.

This is an action of Trespass False imprisonment. This case, therefore comes before the Court for Judgment in the like points as the case of Burdett and Abbott, reported in 14 East

First—Whether the House of Assembly of this Colony in General Assembly convened has any authority to commit in case of contempt as for a Breach of Privilege?

Secondly—Whether (supposing the House to have such authority in general) that authority has been well executed by the authority in question?—that is, whether the warrant stated in the plea of the defendants discloses a sufficient ground of commitment in this instance?

And thirdly—Whether the means which have been used for the execution of the Speaker's warrant are in law justifiable?

The remaining points raised on the record, as regards certain of the defendants being subordinate to and controlled by the same principle of law, will therefore be observed upon hereafter.

It appears to me quite unnecessary at present to enter largely into the luminous report of the case of Burdett vs. Abbott, and Brass Crosby's case, decided in Easter Term, 11. Geo. 3d, after the very able comments made by the Counsel at the Bar on the language of the learned Judges who presided on those occasions. The Judgment which followed in the case of Burdett vs. Abbott recognises the principle therein contended for—That the House of Commons in Parliament convened had power to commit for contempt as for Breach of Privilege, and that the Speaker's warrant in that form, unattended with certain common law ceremonies, was admitted to be a sufficient authority in a Court of Law. After carefully perusing that important case, I have to express my unqualified concurrence in the then Judgment of the Court.—The question to be determined at present is—Does the House of Assembly of this Colony possess the power to imprison for contempt as for a breach of privilege?

In the course of the argument used by Lord Ellenborough in the case of Burdett and Abbott, and Lord de Grey and the Judges in Brass Crosby's case, I find some very cogent reasoning concerning the privileges necessary to and inherent in such a body as the House of Commons, and that of imprisoning for contempt being one;—and Coke, 4 In. 23, mentions the power of committing by such a Body (as the House of Commons) to be legal Now, by investigating into the constitution and functions of the House of Assembly, we may discover whether there be any analogy between it and the House of Commons, and what attributes are essential to enable it to work that part which is assigned to it as a co-ordinate Branch of the Legislature.

The polity of this Colony is composed of a Governor, Council, and House of Assembly, a form of Government for many years in operation in other of Her Majesty's Colonies. The Legislature is convoked by Royal Authority. The power of enacting Laws for their own government is recognised by the Imperial Parliament by the Act of 2 & 3 Wm. the 4th, Cap. 78. The Act of the Colonial Legislature passed accordingly, altering and amending the last mentioned Act. In regard to the general exercise of the Legislature functions by the Assembly, so constituted, it is only necessary to look into the important volume of Colonial Enactments which are almost hourly cited in our Courts of Law. The House of Assembly claims the exclusive right to adjudicate in cases of disputed elections, &c. Blackstone, (Com. 168.) in describing the polity of H. M. Colonies observes, "The form of Government in most of them is borrowed from that of England;" and describes their House of Assembly as "their House of Commons."

I feel I cannot express my sentiments with more satisfaction to myself, in regard to such a Body as the House of Commons, by adopting the following passages from Lord Ellenborough's Judgment in the case of Burdett vs. Abbott:—"The privileges that being to them seem at all times to have been and necessarily must be, inherent in them; independent of any precedent it was necessary that they should have the most complete personal security to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection,—I do not mean merely against acts of individual wrong, for poor and impotent indeed would be the privilege of Parliament if they could not also protect themselves against injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exercise of their Parliamentary functions." And again,—"The right of self protection implies as a consequence a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedent or recognised practice on the subject, *such a body* must, *a priori*, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be and is authorized to remove any immediate obstruction to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and effectual protection; it must also have the power of protecting itself from insult and indignity, whenever offered, by punishing those who offer it." And again: "And is not the degradation and disparagement of the two Houses of Parliament in the estimation of the Public, by contemptuous libels, as much an impediment to their efficient acting with regard to the Public as the actual obstruction of an individual Member by bodily force in his endeavour to resort to the place were Parliament is holden; and would it consist with the dignity of such bodies, or, what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparative tardy result of a prosecution in the ordinary course of Law for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seems to require that *such bodies* constituted for *such purposes* and exercising *such functions* as *they do*, should possess the powers which the history of the earliest times shews that they have in facts possessed and used."

In corroboration of these sentiments my attention has been drawn to the recent and not unfrequent exercise of the power of committal, as for a Breach of Privilege, by the House of Assembly of New Brunswick, Canada and Prince Edward Island. These Colonies have the same form of Government as Newfoundland, and their Representative Branches are of course correspondingly constituted, yet their power of committing under such circumstances has never been declared illegal nor even questioned in a Court of Law, and which would not likely be the case, particularly at New Brunswick, were may be found as numerous, respectable, and talented a Bar as in any of Her Majesty's Colonies. I am therefore of opinion that *such Bodies*—which I understand to mean Bodies constitutionally exercising Supreme Legislative functions of the nature of the British House of Commons, and convoked by Royal Authority—must have the power of committing as for a Breach of Privilege necessarily inherent in them independent of any precedent. General convenience must always outweigh partial inconvenience. If it be warranted by Common Law it cannot be shewn to be illegal by any consequences drawn from Magna Charta, and I will now examine into the Law on the subject.

It has been argued at the Bar, that the House of Assembly cannot claim by prescription or immomial custom any power of Commitment, and that no act of Parliament has expressly given it to them, and that therefore it cannot legally belong to them. It is quite unnecessary for me to follow the argument of Counsel as to the discovery and settlement of this Colony by English subjects, and to decide, according to his view, what laws shall be admitted and what rejected—at what time and under what circumstances. The fact that the general Common Law of England does operate throughout this Colony, is clearly manifested by reference to the proceedings of our Supreme Court, where may be learned that the Laws of the Land are liable to frequent and most sudden changes in their course from analogous points adjudicated differently in the superior Tribunals of England, and to which our Colonial Tribunals are required to comform. In the present case, for example, where the Counsel at the Bar argued for ten hours at least upon adjudicated cases in England, it would have been unnecessary trouble, had not the principle or Common Law of England extended to the Colony. Notwithstanding so much care and attention has been bestowed upon this important case, the strongest and most advantageous position, in my humble opinion, yet remains unnoticed. By an Act of the Imperial Parliament, now it force, this Court is made to determine according to *the Laws of England*, so far as the same can be applied. I must now occupy a few minutes in offering some observations on the applicability of the Statute Law of England to the subject under consideration.

By the 32d Geo. 3d, cap. 46, His Majesty, under the Great Seal, may institute a court of criminal and civil Jurisdiction at Newfoundland. This Act describes the Jurisdiction and manner of proceeding of the Court in Criminal cases to be "in the same manner as plea is holden of crimes and misdemeanors in that part of Great Britain called England." And also with "full power and authority to hold *plea*, as hereinafter mentioned, of all suits and complaints of a civil nature arising within the Island of Newfoundland, and in the Islands and Seas aforesaid, and on the Banks of Newfoundland; which Court shall determine such suits and complaints of a civil nature according to the Law of England, as far as the same can be applied to suit and complaints arising in the Island and places aforesaid." The 2d Section empowers the Governor, with the advice of the Chief Justice, to institute Surrogate Courts, with full power, &c, which Courts shall respectively be Courts of Record and shall determine according to *the Law of England*, as far as the same can be applied to suits and complaints arising in the Islands and places aforesaid. The 3rd, Section describes the mode of proceeding in the Supreme and Surrogate Courts. The next Act is the 49 Geo. 3rd, cap 27, entitled "An Act for establishing Courts of Judicature in the Island of Newfoundland," &c., has reference to the Act passed 32d Geo. 3rd, cap. 46, which by subsequent acts was continued until the 25th March, 1809; states it is expedient that the provisions of the said act should be amended, and like Courts of Judicature made *perpetual*;—enacts that His Majesty by Commission under the Great Seal, may institute a Court of Criminal and Civil Jurisdiction to be called the Supreme Court of Judicature of the Island of Newfoundland. Pleas of all crimes and misdemeanors committed, &c., in the same manner as plea is holden of such crimes and misdemeanors in that part of Great Britain called England; and also with full power and authority to hold plea in a summary way of all suits and complaints of a civil nature arising within the Island of Newfoundland, &c.; which Court shall determine such suits and complaints of a *civil nature according to the Law of England*, as far as the same can be applied to suits and complaints arising in the Islands and places aforesaid.

21 Sec.—The Governor may appoint Courts of Civil Jurisdiction called Surrogate Courts, to be Courts of Record, and "*shall determine according to the Law of England*, as far as the same can be applied to suits and complaints arising in the Islands and places aforesaid."—The next, 5 Geo. 4, cap. 67, entitled "An act for the better administration of Justice in Newfoundland and for other purposes." By virtue of this Act, the Royal Charter constituting the present Supreme Court issued the 19th Sept., 1825. The Act sets out,—"Whereas it is expedient to make *further provision* &c"

Sec. 21st—Repeals so much of the Act passed in the 49 Geo. 3, as relates to the Courts thereby instituted, &c., and directs all the records, &c. [That part of the act 49, Geo. 3, which directs all suits and complaints of a civil nature shall be determined according to the Law of England, is left in operation.]

The act of the 5 Geo. 4, cap. 67, is continued by 10 Geo. 4, cap. 17.

Continued by 5 Geo. 4, cap. 67—5 Geo. 4, cap 68—10 Geo. 4, cap 17—which are continued in force by the 2d and 3d Wm. 4, cap. 78, containing the following enactment:—"Whereas it is expedient the said Acts be further continued in force until the same shall be repealed, altered or amended by any act or acts that may for that purpose be made by His Majesty, with the advice and consent of any House or Houses of General Assembly which His Majesty may at any time see fit to convoke within the said Colony of Newfoundland."

21 Sec.—And whereas by virtue of divers acts of Parliament divers duties are now payable to His Majesty within the said Island of Newfoundland.

Be it therefore enacted that when or so soon as any House or Houses of General Assembly shall have been convoked by His Majesty from among the Inhabitants of the said Colony, and shall have actually met for the despatch of the Public business thereof, &c.

I will now conclude with a few observations on our present Judicature Act.—By the 5th Geo. 4th, Cap. 67, his Majesty may institute a Supreme Court of Judicature, which shall be a Court of Record, and shall have all Criminal and Civil Jurisdiction whatever in Newfoundland, "as fully and amply to all intents and purposes as his Majesty's Court of Kings's Bench, Common Pleas, Exchequer, and high Court of Chancery in England have, or any of them hath."—In this manner the Jurisdiction of the Supreme Court is given to it by analogy. Now as the Court of Kings's Bench can take no cognizance of a commitment by the House of Commons for a breach of its privileges, it appears to me the Supreme Court of Newfoundland can take no cognizance of a commitment by the House of Assembly for a breach of its privileges. There is no Writ suitable to such a contingency, there *is* no Writ in the King's Bench, for it has no Jurisdiction to enter into the merit of a commitment by the House of Commons for Contempt, as for breach of its Privilege.

I am of opinion that the warrant in this case discloses sufficient ground of commitment, and an order to these officers to execute it, the justification for the persons acting under it, is made out.

I am also of opinion that an action would not be against the members of the House of Assembly for any thing done as such,—and that the Speaker in issuing the warrant which he has done by order of the House, did so act in the character of a member of the House—judgment must be entered accordingly for the defendants

MR CHIEF JUSTICE BOURNE'S JUDGMENT.

In the able and elaborate arguments on this Demurrer not only the great leading case of *Burdett vs. Abbott* and all the numerous authorities on Parliamentary Privileges therein cited and comprehended, with numerous others to be found in Hargrave, Hatsell, and the Reports, were passed in review before us, but the Journals of other Colonial Assemblies were resorted to, to exemplify their practice, and First Principles were discussed to elucidate the nature of Legislative Bodies in general. Speculative opinions may vary as to the comparative advantage or danger of endowing Legislators with the power to imprison without having recourse to the medium of the ordinary Legal Tribunals; whilst some may consider this necessary, (especially to the Representatives of the People,) for their self-protection, their freedom of Debate, their full ability to inquire and collect facts and materials previous to discussion; others may feel alarm that any body of men, (even though elected and trusted by a majority of their constituents,) should be the arbiters in their own case, and may fear lest so vast a power should not on all occasions be exercised in a manner sufficiently discreet and temperate.—Leaving topics like these to be weighed by those who make and can alter Laws, Judges, (who can do neither) have only to consider and interpret what the Law is.

The Arguments addressed to us, and the Pleadings, as they appear on the Demurrer-book, present in substance three propositions for our consideration.

1st.—Has the House of Assembly of Newfoundland the power to arrest and to commit for contempt or for any insult and obstruction offered to any of its members?

2d.—How far can this Court inquire into the circumstances attending the exercise of such power?

3d.—Do the Pleas of Justification sufficiently show that this power was regularly exercised?

The first is the main and essential question: for, unless the House is entitled to such a privilege, no caution in the mode of applying it nor care in pleading it could avail.

The privilege of the House of commons of Great Britain to commit for contempt must be acknowledged to be completely established by the case of *Burdett v. Abbott*, 14, East. and indeed this was conceded by the Plaintiff's Counsel in his argument; but he contended that the House of Commons possessed this power by reason of its high antiquity, its supreme authority, and its right founded on