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JUDGMENT, By the Hon. Mr. Justice LILLY, In the matter of the Imprisonment of EDWARD KIELLEY.

In Chambers, August 13, 1838.

Having upon a previous day, upon hearing counsel at great length, and after the fullest research into this question which the brevity of the time between the issuing and return of the Habeas Corpus permitted me, been clearly of opinion upon several grounds that the imprisonment of the party was illegal, I did, as was my duty in such case, immediately restore him to his liberty—intending, however, at as early a day as possible, to give at more length the reasons upon which I had arrived at the judgment I then pronounced. Having in the meantime had sufficient opportunity to consult the best authorities upon the subject, in addition to the extensive information which I derived from the learned and very able arguments of the counsel for the prisoner, I shall now enter more fully upon the consideration of the grounds of my decision, in order that the community at large, and especially the parties more nearly interested in this question, may understand that I have not acted in this matter rashly or unadvisedly, but upon reasons satisfactory to my own mind, and, I trust also, to all who will take the trouble of enquiring into them.

This was an application by the prisoner to be discharged, under a Habeas Corpus, from the goal of this town, to which he had been committed by virtue of a warrant to the Sheriff from the Speaker of the House of Assembly of the Island, for an alleged breach of the privileges of the House. The questions, therefore, which present themselves to my mind are,—First: What are the privileges of the House of Assembly? Secondly: Have they the power of punishing summarily for a breach of their privileges by imprisonment? And thirdly: If it cannot be clearly shewn that they have such power, whether the warrant in the present case is a legal and valid document for the detention of the prisoner?

As to the first question, I am given to understand that the House of Assembly here assume to themselves the privileges of the Imperial House of Commons, and claim to exercise the like powers of punishment for a breach of those privileges, and that upon this plea they have exercised the power of punishing the prisoner on the present occasion. This, therefore, leads me, in the first instance, to examine briefly into the nature and origin of the privileges and powers of Imperial Parliament, and more especially those of the House of Commons, before enquiring for the authority upon which those privileges and powers are claimed for the House of Assembly.

Every one who has sufficiently read the history of our mother country well knows that anciently the two Houses of Parliament sat together, and formed what then and after their separation was and still is called the High Court of Parliament—a Court of the remotest antiquity, of the highest dignity, and of the most unlimited power and authority within the Realm. Its laws, customs and usages, which Sir Edward Coke and all the old writers style the *lex et consuetudo parliamenti*, were from the earliest times held and considered to be part of the law of the land, and in that respect a part of the Common Law; and at the time of the separation of the two Houses, which was an early as the 4th Hen. 3. the privileges enjoyed and the functions uniformly exercised by each branch of the Legislature were, in the opinion of Lord Ellenborough, by a formal act at the time of their separation, statutorily assigned to each.

If not whole, the greater part therefore, of these laws, customs, and usages are coeval with the Common Law. They have, from time to time, been expressly altered and varied by Acts of the Legislature for that purpose, and are to be found in the "rolls of Parliament"—in precedents and records, and "continual experience of the customs of Parliament." It therefore appears that the Law of Parliament was not originally one uniform code, but has been added to, altered, and amended from time to time; that many of the powers and privileges of the two branches of the Legislature have, at various times, been doubted, resisted, and debated, and have been exercised only upon their being clearly ascertained to be a part of the ancient and undoubted usage and custom of Parliament. But the House of Commons have never claimed, nor has any one been hardy enough on their behalf to claim the power, by their own resolution, of making that a privilege which before was no privilege. Neither are their privileges arbitrary and undefined, vague and uncertain, but where doubt arise are discoverable by "examining the records of Parliament," and enquiring "what was claimed and allowed in similar instances in former times," precisely in the same manner as the Common Law is construed by the Judges of the several Courts of Law. It does not precisely appear at what time the House of Commons first convicted for contempt as in the nature of a breach of privilege, and Mr. Hatsell mentions that up to the time of Hen. 7. the Commons had never proceeded as for a breach of privilege upon their own authority.† It is now,

however, and indeed always has been clear law, that the House of Commons does lawfully possess the power of commitment for contempt, as in the nature of a breach of privilege—a power recognized by Statute as having been anciently exercised by them—equally applicable to the House of Lords, for they are one and the same in this respect—the Grand Council of the Realm divided into two different parts, and carrying with them those powers which they collectively exercised before their separation. Upon a Habeas Corpus, therefore, to discharge one committed by the House of Commons for contempt, it has been adjudged and decided in satisfaction of that part of Magna Carta which directs that no man shall be imprisoned but by the lawful judgment of his peers, or by the Law of the land, and of the 28 Edw. 3. that no man shall be taken or imprisoned without being brought into answer by due process of the Law, that the *lex et consuetudo parliamenti*—the Law of Parliament—is part of the Law of the land equally with the Common and Statute Law.

I come now to the most important consideration—namely, does the House of Assembly of this Island possess the powers and privileges acknowledged as belonging to the House of Commons, and more particularly the power of punishing summarily by imprisonment for a breach of privilege as in the present instance? Upon this point let us look at the origin of our Local Legislature. It is, as is well known to all of us, but some five or six years since it first commenced to exist by virtue of a Commission from His late Majesty to the Governor of the Colony, empowering him to convoke General Assembly from among the inhabitants of the Island, who, in conjunction with the Governor and Council, were to make laws and ordinances for the good government of the Colony, not repugnant to the Acts of the Imperial Parliament. But in this Charter contained anything which erects the House of Assembly of the Island into a body of the same power and authority, and possessing the same rights and privileges as the Imperial House of Commons? There is not. Is there any Statute or Act of Imperial Parliament which defines their rights, powers, and privileges, and declares them to be, within their jurisdiction, coequal in power with the House of Commons? There is none. Whence, then—by what authority, and from what source, do they derive the power which they have exercised on the present occasion? I am given to understand that it is by analogy to the House of Commons and the Assemblies of other British Colonies—that is, because the House of Assembly is the representative branch of the Local Legislature, it is therefore necessarily invested with all the privileges and powers acknowledged to belong to the House of Commons, as well as the customs usages of the House of Assembly of other colonies. I myself have heard not only this doctrine, but that even of the power of inflicting corporal punishment broadly asserted by members of the House of Assembly. Let us examine into it. This colony is one of those provincial establishments, the constitution of which, according to Blackstone, "depend on the respective commissions issued by the crown to the Governors, and the instruction which usually accompany those commissions, under the authority of which Provincial Assemblies are constituted with the power of making local ordinances not repugnant to the Laws of England." So far that our Assembly is not equal in power, even within this colony, to the Imperial Parliament, to which it, as well as all other Legislatures in the Queen's dominions, is subordinate—whose constitution is as yet liable to alteration by the Sovereign Power which granted it, and whose existence may, by an Act of Parliament, at any time be terminated. Again, our House of Assembly does neither by itself nor in conjunction with the Council form a Court of Record; neither do the Council and Assembly together, nor does either separately, form a Court of Judicature; nor does it possess the power of impeachment—one of the highest powers of the House of Commons, which may consequently commit even for a crime in order to an impeachment. The House of Lords, as is well known, is the highest Court of Record, and possesses supreme appellate jurisdiction within the realm; but does the Council of this Island—the Upper Branch of the Legislature—in the least respect whatever exercise analogous powers?—and yet the powers and privileges claimed to be exercised by the House of Assembly on the present occasion should, for the like reason, apply equally

to the Council, from its analogy to the House of Lords. It is true there are here three branches of the Legislature, in imitation of the British Parliament, and somewhat similar forms of procedure in the passing of Bills are observed, but beyond this it is absurd to talk of analogy where there is no resemblance of origin, constitution, or powers. Indeed it is not long since the executive government, upon view of the style of Parliament which the Legislature had arrogated to itself, disallowed the title as wholly inapplicable; and if under the name Parliament our Assembly might have claimed to exercise the powers of the Imperial Parliament, this act of the Government has prevented them doing so.

And here I will refer as conclusive upon this subject to the opinion of Lord Camden—a lawyer of the highest learning and ability, who was successively Attorney-General, Chief Justice of the Common Pleas, and Lord Chancellor of England—one who it is well known favoured popular claims, and during the war of the revolted American colonies sided with colonial pretensions. Speaking of the exercise of rights by the Colonial Assemblies, as supported by arguments drawn from the exercise of the like rights in the House of Commons, he says—"The constitution of the two Assemblies (that is of the House of Assembly and the House of Commons) differ fundamentally in many respects; our House of Commons stands upon its own laws, the *lex parliamenti* whereas Assemblies in the Colonies are regulated by their respective charters, usages, and the Common Law of England, and will never be allowed to assume those privileges which the house of Commons are entitled to justly here, upon principles that neither can nor must be applied to the Assemblies of the Colonies." And again he says—"In this disposition of the Lower House to assume to themselves any privilege which the English House of Commons enjoy here. His Lordship (Lord Baltimore) should resist all such attempts where they are unreasonable, with firmness, and should never allow any encroachments to be established on the weight of that argument singly for I am satisfied that neither the Crown nor the Parliament will ever suffer those Assemblies to erect themselves into the power and authority of the British House of Commons."*

Let us now enquire into the legality of exercising the power of punishing summarily by imprisonment for contempt, as in the nature of breach of privilege, upon the ground that a similar power is exercised by the Legislatures to other Colonies. The constitutions of these colonies, as has been shewn, are not all alike, but depend upon the terms of the respective Commissions under which they were granted, and, indeed, those of the old American colonies were greatly dissimilar to each other. In some of them the Councils at least were Courts of Record possessing various powers of judicature; but if in any of them (Nova-Scotia for instance) the power of punishing by imprisonment for breach of privilege is exercised by the House of Assembly, it is not necessarily because the House of Commons exercise the same power, nor of any inherent right in the Assembly to exercise such power. It may be that in such colony they originally enacted and declared by a Law what the rights and privileges of the several branches of the Legislature were, and conferred upon them the power of punishing summarily for a breach of those privileges. The most probable foundation for the exercise of such a power is long practice, not questioned in the first instance, and after lapse of time and repeated exercise grown into an usage, and recognised perhaps by the Courts of

Law. If so, such power became to be, as regards such colony, in some respect part of the law of the land. But will any one say that such an usage can be pleaded as having any force in this colony, and that if it have even grown into Law in the colony where it obtains, it can be said to the law of this Island a whit more than their Statute of distributions, or for the release of dower or any other act of the Local Legislature of such colony can be held to be in force as the law of this Island?

It is laid down in the books of authority that the decisions of the two Houses of Parliament, in cases in which they are admitted to be the sole competent judges, are fully governed by usage and controlled by precedent. But how can the House of Assembly here, whose existence commenced scarcely six years ago, be said to be governed by usage and controlled by precedent in the present case, as to which manifestly neither usage nor precedent exists? If it is to the usages and precedents of the Imperial Parliament, or those of other Colonial Assemblies, they refer, certainly they do not understand the meaning of the terms.

But if the House of Assembly on the first occasion upon which they choose to exercise a power of imprisonment, consider themselves invested with it because the House of Commons exercise the same power, then are they equally entitled upon the same ground and for the like reason to all the powers and privileges of the House of Commons, for the rule by which they claim forbids them to choose some powers and privileges and reject others—they must take all or none—and if in addition to the *lex et consuetudo parliamenti* they are at liberty to call and choose from among the customs and usages of other Colonial Legislatures all such as in their judgment are desirable and convenient, they would be I fear a much more powerful body than the Imperial Parliament itself, or indeed any other known to the British Constitution.

That the House of Assembly here are invested with some privileges as incident to their condition, I do not mean to deny but of these I do not desire to constitute myself the arbiter—nor is it of importance on the present occasion that I should define what and how extensive they are, but it is my duty, and an imperative duty, to take care that they arrogate no privileges and exercise no powers, unless they be beyond question entitled to do so, which may interfere with the undoubted privilege—the dearest birthright of every British subject, recognized and confirmed by Magna Charta, "that no man shall be imprisoned but by the lawful judgment of his peers or by the law of the land,"—secured also by the statute of the 28 Edw. 3d, which enacts that "no man shall be put out of land or tenement, nor taken or imprisoned, nor disherited, nor put to death, without being brought in to answer by due process of the law." It has been shewn in argument, as it is laid down by the highest authorities, and is clear law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the Common Law—much less then shall a man's liberty, of which our laws are so tender, be restrained by implication or analogy.

The Courts of Record in England exercise and always have exercised the power of commitment for contempt which power is part of the law of the land, and the Superior Courts of this Colony also possess the like power, but it is by virtue of an express Act of the Imperial Parliament; and this power of the House of Commons, to commit for the like offence, originates, among other sources, in its being part of the highest Court of Record in the Realm, whose powers and privileges were originally assigned by Statute, and have been sanctioned by immemorial usage;—for as Lord Ellenborough says, "there is no pretence for treating the privileges of the House of Commons.

* Lord Coke, 4 Inst. 50. † 1 Hatsell, 51.

* Chalmer's Opinions.

of this town. highly approved or used it, that for us to say a Hampshire Tele- f Southampton ce may readily ated Stove.— rcuit Court, race, April Slade, Robertiddle, North- ts In- been made to ap- onorable Court, against them by ert Slade, senr., ajor, and Rol- gar, Merchants, able to pay to nty Shillings in h this day det- also appearing in value of the ent in England, entatives in this wise appearing, point Provisional of the Creditors for the purpose to the Estate of the this day ordered art, that Robert er, Robert Ma- and all Persons Debts amount re- Twenty Pounds in Person, or by assemble at the r Grace, on the erm, at Eleven on, in order to Creditors to be f the said Insol- grim this Honora- BERT PACK, Esq., Esq., and WILLI- merchants, residing nal Trustees, of the said Robert ger, Robert Ma- and the said Mills Martin, and hereby authorised and Receive the e said Insolvents, and directions, as shall from time to Court, JOHN STARK, rk and Registrar. p Trade hitherto nder the firm of N & Co. is this g consent. g claims on said o present the same Persons indebted o make payment o alone is authori- ets of said Co-part- BENNETT, ORGE MORGAN. Beck, ewfoundland, ebruary, 1838. future will be car- NNETT. hereby notified, that o the Advertisement ette of Tuesday las, ovision of Co-part- T, MORGAN & Co. ne under a miscon- ne of its duration, not sion at the time the ship between us:—l ace to a copy of the rship, which I have e the Co-partnership until the first day of ORGE MORGAN. PERSON to act as an e Harbour Grace e.—Application to be of this Paper.