f·om myself, that the proceedings now pending excite a deep interest in the public mind—that your Lordship's decision is looked for with an anxiety seldom equalled in this community; and well may such excitement and anxiety prevail, for upon your judgment, in a great measure, hangs the question,—Is there, or is there not a body of men in this colony who are above all law—who can, by their simple vote, make any thing they please an offence—who can condemn without trial, and consign to the dungeon, by their own fiat, whomsoever they will?

"In discussing this grave and important subject, and one which is of a novel character, I feel the responsibility of my situation, and my inability to do justice to my client's cause—his cause is the cause of the public. It is a sense of what is due to that public, and the high feeling of honour and independence which actuates my client, that has placed him in a situation to require your Lordship's aid. He might, by apologizing for an offence of which he says he is not guilty, have released himself; and established a precedent dangerous to the liberties of all of us. He now stands upon his right as a British subject under which, praised be God! we live—he demands the judgment of your Lordship on the legality of his imprisonment.

"I wish time had permitted me to have gone more deeply into this interesting subject, than it has;—circumstances had allowed me but a few hours of last night to prepare for this argument. I possess, however, the advantage of bringing to the consideration of the question, a mind free from personal interest—my reasonings and observations are applied to the constitution of the Assembly, not to its members, and the objections which I shall urge, I should do so equally were that body composed of my most respected friends.

"The House of Assembly claim all the Privileges and powers of the House of Commons—have exercised them—and in their exercise have imprisoned Dr. KIELLEY.

"In considering whether the Prisoner is entitled now to be discharged, the argument resolves itself in two heads.—1st. Have the House of Assembly any authority to commit for contempt, and punish by their own authority, what they may consider breaches of their privilege? 2nd. If the Assembly possess such a power, are not their proceedings in this cause irregular, and insufficient to warrant the confinement of Mr. KIELLEY?

"Until within the last five or six years, Newfoundland was governed by those Laws and rules which apply to a Colony of Great Britain. belonging to her by right of *occupancy*. The Laws still continue in force, and are the safeguard of the subject. In 1832, His late Majesty authorized the Governor, by his Commission, to convene from amongst the inhabitants of the Colonies a House of Assembly, for the purpose—in conjunction with the Governor and Council—of 'making Laws' for the internal management of the Colony;—and for no other purpose.

"By the authority, then, under which it was called into existence, the buisness of the Assembly was to 'make laws' in conjunction with the other two branches of the Legislature: nor was even this power unlimited, they could only make such laws as are not repugnant, but as nearly as may be, agreeable to the laws and statutes of Great Britain.

"There are but three lawful modes, by virtue of which any man, or body of men can acquire civil powers or jurisdiction superior to his follow-men. 1st—By the common Law, and the powers conferred thereby.—2ndly.—By Statute which can speak for itself.—3dly—By Prescription.

"I apprehend it is an unquestioned and unquestionable principle of Law, that every Act of Parliament and public document is to be construed most strictly in favour of liberty—1 Co. Litt. 18—and according to the reason and rule of the common Law; 5 Co. Di. 250. In construing therefore the Governor's Commission, by which the Assembly was created, no power against the liberty of the subject will pass by it, and no infringment of the common law allowed under it, further than the *expressed words*, and the legal and necessary consequence of these words, will clearly authorize. Now it does not appear to me that the words of that commision, enabling the Assembly to assist in making some Laws for this Island, give in any manner or way, to that body, the unbounded power they assume. No Act of Parliament has given it—Prescription has not given it. How then is it claimed an exercised?—Under what colour do they assume the right of being Party, Judge, Jury, and Gaoler in the same cause?—by analogy, say they, to the House of Commons of Great Britain! That *Supreme* Council possess it—so (it is said) must the House of Assembly of Newfoundland!! That august body deem it due to their dignity to protect themselves, and assert and vindicate their own privileges by their own mere motion and power; so the House of Assembly of Newfoundland deem it due to their dignity to act in like manner!!

"Now what is the nature, the extent of the power, the House of Assembly claim? That full power of adopting the like proceedings, in cases of contempt, as both Houses of British parliament exercise. Hear the opinion of the celebrated Mr. Hargrave on that point; a man whom the Judges of England were not ashamed to consult, and whose learning and research have seldom been surpassed.

"Proceedings in either house of Parliament for contempt and breach of privilege, more especially where as in the present case the charge is for a libel, are in their nature very contrariant to the ordinary rules and course of administering justice in England,—The offended parties act as judges, The court is not an open one,—The witnesses against the accused party are generally examined in his absence.—The accused party is called upon to defend himself, without the opportunity of cross examining the witnesses against him,—He is not in general allowed to have the benefit of counsel.—He is in some degree interrogated against himself. He loses the benefit of trial by jury; and if the imputation is for a contempt against the House of Lords, and the accused is a commoner, he is tried, not by persons of his own order, but by those of a distinct and a higher one. The judgment is said to be, not only unappealable, but wholly unexaminable, except by those who pronounce it.—All this variety of hardship upon the party accused, I understand to be at least incident to the ordinary proceeding for contempt against either House of Parliament.—But if the contempt be publishing a libel, which is now the case before me, there is a still further hardship: for in the first instance, and before hearing of the accused party, it is sometimes adjudged. as it appears to have been in the present case, that the offence has been committed; and so it is only left to the accused to controvert his having committed it. This seems a very severe deviation from the common course of criminal justice. Surely it is essential to the defence of the party accused, that he should have the opportunity of shewing, not only that the fact charged was not done by him, but such fact is not an offence; and denying the latter to him appears like adjudging one half of the case without a hearing; and though the paragraph which constituted the charge in question, was too grossly libellous on the house of Lords to admit of any satisfactory explanation, yet cases of a very different kind, such as might give large scope for argument, may be easily supposed,"—1 Har. Ju. Ex. 278.

"See my Lord, what is the *vastness* of the power claimed by the Assembly. The same learned authority says—'I am struck with the vastness of this power; as I understand the precedent, it entitles the Lords [the Assembly claim equal power], for breach of their privileges to impose pecuniary fine any extent—to award perpetual imprisonment,—to award perpetual hard labor, and to stigmatize by the pillory.'!!

"Are these my Lord, powers lightly to be admitted in a new country, without statute, without law?

"The great objection to the Star Chamber was, the exercise of an arbitrary power of fining, imprisoning, and stigmatizing, without trial by jury; and that Court was exterminated as an unbearable grievance. Is it to be conceived that similar powers are extended to every Colonial Assembly by implication or analogy? The same author from whom I have already copiously extracted, says—'As the power thus claimed to be exercised by the Lords over the fortunes and persons of the King's subjects, seems to clash with some of their most favourite and fundamental rights and liberties—namely, *trial by Jury*—right to an open Court—right to have justice administered to them by the King's Judges, and according to the forms and principles by which those Judges are bound to act—and their right to the benefit of appeal—SO THE LEGAL EXISTENCE OF SUCH POWER SHOULD BE MADE TO APPEAR BY PROOFS AND SANCTIONS OF THE MOST IRREFRAGABLE KIND.' And so say I, my Lord, with respect to the House of Assembly.—We know that Magna Charta says, 'No man shall be imprisoned but by the judgment of his Peers, or the Law of the land;' that law must come by one of the three ways I have mentioned, and it is for your Lordship to say whether it has.

"It is a maxim in Law, that upon those who would take a case out of the general rule of law, does the *ones* rest of shewing the exception;—where is the IRREFRAGABLE PROOF of the legality of the power now claimed? Not even is the current of common repute in favor of it; (not, my Lord, that I would confine the liberty of the subject to common repute or to any thing else beside the strong arm of the law), for it is only within the last few years that when one of the Superior Courts of this Island in vindicating its dignity, and exercising a power which no lawyer or well-informed person could deny to it, deemed it necessary to commit a Printer to Gaol for contempt, the legality of those proceedings was arraigned by the very Body who now arrogate to themselves a similar power, though upon *somewhat* (!) more questionable authority.

"But, my Lord, the Assembly claims this power by analogy with the British House of Commons, consisting of between five and six hundred of the *elite* of the wealth, rank, wisdom, and learning of the Commoners of Great Britain, and the Assembly of Newfoundland, consitting of fifteen inhabitants who *need* not be able to read or write, who *need* not possess one farthing, and whose only qualification need be the occupancy of a hovel for two years!! Can any analogy exist between the Parliament of Great Britain, the *Supreme* Council of the Empire, existing from time immemorial, and having omnipotent controul over every corner of the dominions of Her Majesty,—and the Assembly of Newfoundland, which has not supreme power even within its own narrow limits—whose being grows out of a parchment Charter, and was dated only six years back, and whose very existence could be extinguished in an instant by that body to which it compares itself? I leave that for your lordship to decide. So much for analogy.

"I would now ask is it *convenient* that such enormous powers should be vested in the Assembly or the Council of Newfoundland, as that claimed for both by the Assembly, I do not my Lord insult your understanding by waiting for an answer, but reply, *it is* NOT. And what says Lord Lyttleton on this point—"Argumentum ab *inconvenienti* plurimum valet in lege—non solom quod licet sed quid est *conveniens* est considerandum. Nihil quod est inconveniens, *est licitum*. (Co. Lit. 18.) And Lord Coke in his commentary upon this text, says—'An argument drawn from inconvenience is forcible in law; and the law, which is the perfection of reason, *cannot suffer that which is inconvenient*,'(that is, *generally* inconvenient); thus the very inconvenience and unsuitableness of such a power furnishes a powerful argument against its existence here.

Is such a power *necessary*? I submit that it is not."

By the Judge.—Do you admit that the Assembly have any privilege?

"Yes, my Lord; I admit that they have the same privilege that I have, or any body of men who are engaged in any lawful business have,—the privilege of expelling from their presence any one who molests them, and handing the offending party over to the law to be punished; and, my Lord, I say, and my humble judgment, they have no 'vindictive' privileges. If any corporation (and the Legislature more closely resembles a corporation than anything else) were sitting in their chamber or hall, and a libel were published against them, or a member of the Society was abused, either in the face of the Society or out of doors, was it ever heard that the offending party was committed *by the Corporation for a contempt*? No, my Lord: neither House of Legislature can be interrupted without a violation of the general law of the country, and under that law the offending parties are resistible not only by the power of the Magistracy but are punishable in the Queen's Courts according to the degree of their offence; such is the proper and constitutional protection, I think, they are entitled to, and to no other; and since those Courts are ample for their protection, where is the *necessity* for the House of Assembly assuming a power repugnant to the law of the land?

"But when we examine into the sources whence the imperial Parliament derive their power of commitment, we shall discover stronger reasons for denying the analogy sought for. 'Parliament is the highest and most honourable COURT of justice in the Kingdom,' saith Lord Coke, 1 Co., Lit. 55 'and every *Court of Record* has by law the power of punishing contempt summarily,' 1 Wils. 299. In the celebrated case of Mr. Crosby, Lord Mayor of London, 3 Wils, 188, Lord Chief Justice De Grey said, 'The House of Commons can commit for any crime *because* they can impeach for any crime. When the House of Commons adjudge any thing to be a Breach of Privilege, their adjudication is a conviction, and their commitment in consequence is in execution, and no Court can discharge, on bail, a person that is in execution by the judgment of *another Court*.' But the House of Assembly is not a Court—it has not pretended to be one. So much to shew that the House of Commons have their power of commitment, as incident to their being a *Court*, I shall endeavour to shew that, in addition, they have the sanction of *immemorial* usage, supposed to be founded on *Act of Parliament*, for the support of their Privileges, and that its being the *Supreme* Council of the nation, renders such Privileges inherent in it.

"In the case of Sir Francis Burdett *vs* Mr. Abbott,(now Lord Canterbury,) 14 East, 137, Lord Ellenborough says, 'When the two Houses of Parliament, which originally sat together, first ceased to do so, and began to have a separate existence, is a matter more of antiquarian curiosity than of legal research. The Privileges which have since been enjoyed, and the functions which have been since uniformly exercised by each branch of the Legislature, with the knowledge and acquiescence of the other House, and of the King, must be presumed to be the privileges and functions which then—that is, at the very period of their original separation—were *statutably* assigned to each. The privileges which belong to them seem at *all* times to have been, and necessarily must be inherent in them this is an essential power necessarily inherent in the *Supreme* Legislature of the Kingdom. On *this* ground it is admitted that the House of Commons must be, and is authorized to remove any immediate obstructions to the due course of its own proceedings.' Lord Ellenborough goes on to answer the argument that the separation of the two Houses of Parliament happened since the return of Richard the First from the the Holy Land, and consequently within legal memory; 'the answer to this objection is, that some *Statute* or Act of *Supreme National Authority*, whichever it was, by which the Houses began to exist and act, and have since continued to act separately, invested the House of Commons with the antecedent essential privilege which belonged to the aggregate body of Parliament.' Does any statute, does any usage extend this power to Newfoundland? or is the Legislature of Newfoundland the supreme authority of the nation?

"Thus, my Lord, I trust I have shewn you that the privileges of the House of Commons, great as they are were given to that House by statute applying to *themselves*, and they have exercised it time out of mind; that it is the Lex *Parliamenti*, and not applicable by mere assumption to any other body on earth, except the House of Lords? And will your Lordship as a British Judge, admit, without 'irrefragable proof, of its legal existence, the power of the House of Assembly to assume and exercise these enormous and dangerous privileges and to pass their judgment against whomsoever they will, under whatsoever pretence they please, and then assert that that judgment is *unappealable*, *unexaminable*, and *unredressable*? But how monstrous is it, my lord, to pretend that such powers, such infringement on the law of the land, pass by inference, by analogy!! Every lawyer knows that nothing but a clear, negative statute can toll the right of the subject, or take away the Common Law, Plonder 112—13; an affirmative statute could not do it; could then inference or analogy, supposing in this case and inference could be drawn, or any analogy existed? It must be no trifling, shallow, or arbitrary pretence, which should deprive a subject of his liberty; and wo would be to this, or to any other country, where the upright, fearless administration of the law were wanting to protect the innocent and redress the injured. The term 'liberty,' is seldom heard on my tongue, because I venerate it too deeply to desecrate it by brawling it. I am thankful that until this time, I never found occasion to be alarmed for public liberty and freedom. Now attempts are made, and deeds are perpetrated under the most dangerous of all pretences the pretence of *right*, which it behoves the community to resist stedfastly and steadily. '*Nemo fuit repente turpissimus*,' applies as well to the body politic, as to individuals, and now on this the first occasion of its exercise is the time to ascertain whether such a power as the Assembly claim, does legally exist, in order that if it *does*, instant and constitutional measures may be taken to get rid of it, as a burden too grievous to be borne—and if it *does not*, that the most energeric measures may be adopted to obtain ample compensation for an unprecedented outrage.

"It may be asked, how have other Colonial Legislatures been suffered to exercise the powers of commitment for contempt, if it were not legal? I cannot well say how such a practice *was* suffered; but because it was *suffered* and for a series of years was quietly and genarally acquiesced in, that which was at first a *wrong*, may have become, by usage, a *right*;—"communis error facit jus," in the same way as if A wrongfully entered upon the land of B. and for a long series of years exercised uninterrupted and adverse acts of ownership over it, A would at last acquire a right and title which could not be questioned. We however draw no precedents from our neighbours—not because they are bad, but because we have better. We have our own country, our mother land to guide us. We draw our protection and rights from the law of England, and by that law my client will stand or fall.

"There are many more authorities than those which I have cited that might be adduced by me, had time permitted me to extend my search; but sufficient, I trust, has been shewn to your Lordship. I have endeavoured to ground my arguments mainly on great fundamental principles of law, which are generally more satisfactory, and safer to proceed upon, than the mere dicta of adjudicated cases, in the application of which doubts might arise.

"Upon all these grounds, considerations, and authorities I submit that, as the power which the House of Assembly claim is clearly an infringement of the Common Law as no authority under which they have obtained the right of so departing from the Law of the Land, appears—as it would be exceedingly dangerous to the liberty of the subject, and contrary to *Magna Charta*, to admit of such a departure—as the exercise of such authority is not incident to, necessary, or convenient for the performance of those duties assigned them by the Constitution of the House—that the commitment of Mr. KIELLEY was illegal, and that he is entitled to his discharge.

"As to the second point, the informality of the warrant, it is too apparent to require any argument. Without stopping to inquire whether this document would or would not be sufficent if emanating from the House of Commons, I would merely state that it does not issue for that or any such Body, and therefore stands upon the footing of any warrant, commitment or execution—and as such it is voide for want of a seal; for that it states no adjudiction—no conviction—for that it does not state that the Speaker was ordered to issue any such warrant—and because the period of imprisonment is indifinite." (The learned Council here cited several authorities, which supported his position, and continued) "But although this warrant is worthless, and on that ground Dr. Kielley is entitled to be immediately discharged, the informality of the proceeding it is not what I am most desirous of proving; that indeed, would be merely a salve