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St. John's.

The Fall Term of the SUPREME COURT was closed at a late hour on Saturday night last, after the extension for a week of 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 KIELLEY *vs.* CARSON and others of the House 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 LILLY'S JUDGMENT.

This case is one of the greatest importance that has ever been brought under the consideration of this Court; and as intimately concerns the liberty of the subject, and directly involves a quettion as to the extent of the Royal Prerogative, and the powers of the House of Assembly, I am happy to have had an opportunity of hearing the arguments of counsel on both sides, in which much learning and research has been displayed, and every point which could make in favour of either party has been urged with very great ability. The question is, in a great measure, the same with one upon which I have already given my opinion, and with an earnest desire to arrive at a just conclusion, I have well weighed the arguments which have been used, and have given the matter the best consideration of which I am capable,

This was an action of trespass for assault and battery, and false imprisonment. The first count is for breaking and entering plaintiff's dwelling house on the 6th day of August, and seizing and imprisoning him for the space of four days. The third count is for assaulting and imprisoning him generally; and the second and fourth counts for the battery. The defendants have pleaded, first, the general issue; and secondly, a special justification. That of the first defend at is to the effect —That long before and at the time when &c. a Colonial Legislature of our Sovereign Lady the Queen was holden in St. John's, in the Island of Newfoundland, and was then and there is sitting. and that the defendant at the time when, &c., was and yet is, a member of the House of Assembly of the Island aforesaid, and the Speaker thereof. That at the time when, &c., to wit, on the 6th day of August, the said House of Assembly being sitting, one John Kent, being then a member of the said House of Assembly, complained to the said House that the plaintiff on the day and year aforesaid, had made use of insulting and threatening language and gestures towards the said John Kent, so being a member of the said House of Assembly, in reference to him in his office as member of the said House. The plea then recites the proceedings of the House upon this complaint, and the resolution of the House that the Speaker should issue his warrant, &c. That the defendant, as Speaker, in pursuance of the said resolution and order, and according to the *laws, customs and usages* of the House of Assembly, did issue his certain warrant, in manner and form as set forth in the plea, and then states the arrest of the plaintiff under the warrant—has being brought before the Houss—the proceedings of the House thereon—a subsequent resolution and order, that the plaintiff, by his conduct before the House, having committed a gross iteration and aggravation of the previous contempt, be handed over by the Serjeant-at-Arms to the Sheriff of Newfoundland, and the Gaoler of Her Majesty's Gaol for this district; and that the said defendant, as Speaker, should issue his order to these officers as a warrant for this proceeding;—that defendant, Speaker as aforesaid, in pursuance of the order and resolution, and according to the *laws customs and usages* of the said House of Assembly, did, on the ninth day of August, in the year aforesaid, issue his certain warrant under his hand and name, as such Speaker, in the form set forth in the plea under which the plaintiff was lodged in the gaol of the district. The justification of the other defendants is the same, with the excep of their being members of the Assembly only, and exception also the defendant Walsh, who justifies as the messenger and servant of the House, and as acting under the orders of the Sergeant-at-Arms. To this justification the plaintiff has demurred generally, and the defendants have joined in demurret.

The first and main question then which is to be considered is, whether the House of Assembly do by *law* possess the power of punising summarily *by* a commitment for contempt, as in the nature of a breach of their privileges,—and secondly, if they do lawfully possess such a power, whether they have rightly exercised it in the present instance.

In support of the first point, and in proof of the existence in the Assembly of the power in question, it is argued that they possess it, in the first place, from analogy to the Imperial House of Commons; that because the House of Commons lawfully exercises such a power, the House of Assembly here is necessarily invested with it. A very brief consideration, however, of the nature and constitution of the the Imperial, its origin and history, its powers as well of supreme judicature as of supreme legislature. not only within the United Kingdom, but as fully and extensively in and over the remotest portion of the British dominions, will convince any one of the sort of analogy which the General Assembly of this Island bears to it. Parliament is governed by its own laws and customs, the *Lex et consuetudo Parliamenti*, which is coeval with the common law, and is part of the law of the land, and as such the Judges are bound to take judicial notice of it; but this law is peculiar to Parliament alone and is not applicable to any other body on earth. The powers & privileges which both Houses of Parliament possess and enjoy, have been exercised by them from time immemorial; they have been confirmed and recognized by statutes and judicial precedents for centuries. The power of the two Houses of Parliament to commit for contempts, was shewn in the celebrated case of *Burdett vs. versus Abbott*, to which so much reference has been made, to be founded on immemorial usage, —to be part of the powers and privileges of Parliament statutably assigned to both Houses upon their separation—to be incident to Parliament as being the *highest Court of Record in the Realm*, and to be established and recognized by numerous precedents in all ages of our history; and altho' Lord Ellenborough says that such a power was essentially inherent in Parliament as the *supreme legislature of the Kingdom* still the exercise of it in that case was held to be authorised and justified by *the law of the land*, and consequently that such a power was not (as was argued) in contravention of Magna Carta and the 28th of Edward the third, which declare, that no man shall be imprisoned but by the *lawful* judgment of his peers, or by *law of the land*.

The Assembly of this Island was called into existance by the King's Commission to the Governor, under which it waw established only six years ago. Its authority is limited to the enacting in conjunction with the Governor and Council, of laws and ordinances not repugnant to, but as near as may be agreeable to the laws of England. It is therefore, by no means the Supreme Legislature of this Island, for then it would exclude the authority of Parliament, which is absurd. Its jurisdiction, moreover, is circumscribed, and does not extend even over the whole Island, for a late enactment, was disallowed by his Majesty's because it assumed to exercise a controul over part of the Island, not within its jurisdiction. The number of members composing the House of Assemblp consists of but 15, and of these. 6 form a quorum. The qualification as well of the electors, as of the members, does not require the possession of any amount of property, real or personal, whatever. All persons who occupy for twelve months any description of dwelling, are hereby qualified to be electors; and the only qualification prescribed for members is the occupancy for two years of the same description of tenement. I do not remark upon these circumstances invidiously but merely to shew the inapplieapility, in every respect, of the argument drawn from analogy.

The analogy here argued to exist between our House of Assembly and the British House of Commons, has also been invariably denied in the most express terms by every authority upon the subject which I have met with. Mr. Chitty, in his able treatise upon the Prerogative of the Crown, and the relative duties and rights of the subject, says, "With respect to the Colonial Assemblies, it is "most important that any idea that they stand "on the same footing as the English House of "Commons, should be excluded from consideration. "The principles upon which the English Parlia- "ment rests its rights, powers and privileges, "cannot be extended to a provincial Assembly. "Parliament stands on its own laws, the *lex et* "*consuetudo Parliamenti*, which are founded on "precedents and immemorial usage. The planta- "tion Assemblies derive their energies from the "Crown and are regulated by their *respective* "*charters and usages, and by the commons law of* "*England.*"

It is therefore quite out of the question to appeal to the law and custom of Parliament as the rule by which we are governed in this case, and there is therefore no weight in the argument that upon the establishment of a General Assembly here, under the King's Commission the *lex et consuetudo Parliamenti*, which is peculiar to Parliament alone, thereby necessarily comes into force here. So far was this from being allowed or admitted by the source from which our charter emanated, that His late Majesty was advised to withhold his assent from certain Acts of the Assembly, for the reason that they contained the words "*In Colonial Parliament assembled.*" In Canada, it is true, the Legislature is styled a Parliament, but it is by the words of an express Act of the Imperial Parliament, under which the Legislature was erected, and all Acts there run in the name of the Queen, by and with the advice and consent of the Legislative Council and Assembly.

The power of the commitment for contempt is contended for, in the second place, upon the ground that a like power exercised by the Assemblies of other colonies. To prove this, references have been made in the Journals of those Assemblies to instances of commitment for contempt. It would, however, have been more satisfactory to my mind if some legal adjudication upon the subject of the exercise of such a power had been cited; we should then have seen the origin and nature of it, and wether founded as it is not unlikely, on some local enactment, or supported upon usage recognized by the Courts of Law,—for wether this practice previling in those Colonies be conformable to the law or not, cannot clearly appear, unless it be shewn to be recognized by judical precedant. The instances which have been referred to are also all of very recent occurrence, in colonies where Legislaturs have existed for half a century and upwards. In some of the colonies, I am aware that an Act for a trial of disputed elections, in imitation of the Grenville Act, is in force and the power of compelling the attendance of parties and witnesses, is given by such Act.—But whether the usages of such Assemblies be legal or not in the colonies where they prevail, they are clearly not binding here, and have no legal force whatever in this country. As well might the House of Assembly here claim to exercise the power of elections the members of the Council because other Assemblys have had power by their Charters to do so, or prescribe to appear certain officers who, in other colonies, are by usage appointed by the Assembly.—No local Act in colonies can have any validity in this country, neither can the peculier usage and practice and their legislatures beuset up as having any bearing upon this case.

The third argument in support of the power of the Assembly to punish summarily for contempt by imprisonment, is drawn from the King's Commission, and Royal Instruction accompining it, under which the Local Legislature was erected.

This commission was issued in the year 1839, and empower the Govenor, by and with the concent of the Council and the House of Assembly, to make laws for the good government of the Colony, not repugnant to, but as near as may be agreeable, to the laws of England. But their are no terms in this Commission or the Royal Instructions which refer on the House of Assembly like powers and privleges with those enjoyed by the House of Commons, or such as are exercised by the Assemblyed of other Colonies; neither is they any great contoined theirin that they are to be governed by the law and custom of Parliment. No powers of judicrture are conferred upon the Council and Assembly conjointly or severdlly, and no appeal lies to either of them from this Court, or any other Court in this Island. But if the terms of the Charter were even more express in favour of the power chaimed by the Assembly, still the King cannot, cannot dispute with Magna Carta which is incorporated into the common law.—*2nd Rolles Reports*, 115. The King cannot charge by his grant alter the law in any respect, as he connot give power to any to oust another of his hand,—*2nd Rolles Reports*, 164.—The King cannot erect a new Court, with a new jnrisdiction without an Act of Parliament, and if it be erected, the jurisdection ought to be expressed, for nothing omitted will be within such judisdiction—*4th Instructe*, 200,—nor can he by Charter or Commission alter the common law.—*Com. Digest. Prerogative.*—If the King, as the fountain of Justice grant to a Court power to find and imprison, it shall be a Court of Record—1 *Salkeld*, 200;—but the King has not granted to the House of Assembly the power to fine and imprison, and it clearlp is not a Court of Record nor is any where called a *Court* at all.

As to the argument which was used, that the Assembly isa Court of Record, for that the Journal or Book of the Clerk is a Record, it is laid down *Hobbes* 110 as ta what shall be an Act of Parlirment that if the Jhurual of Parliament be variant faom to Record, it shall not prejudice, for that is *no record—Com Digest. Title Parliment*—which militates somewhat with the diclum of my Lord Coke, that, the book of the Celrk of the House of Commons is a Record, as it is affirmed by the Stature 6, Henry 8—but that Statute merely requires that a Member departing from the Parliament, shall have his lincese to depart recorded in the Clerk's Book. The House of Commons, however, is part of a Court of Record and of the highest Court of Record in the Kingdom, upon somewhat better authority than the Statute 6, Henry 8.

In the special plea of justification it is alledged, that the Defendant issued his Warrant in pursuance of the ordee of Assembly, and for the execution thereof and accorping to the *laws usagess* and *customs* of *the said House of Assembly*. This seams ta be essence of the justificaton. Now as to the *laws, usagen and customs* of the House of Assembly, if any such esist and have the force of law this Court would certainly be bound to recognze them,—bvt it has not been shewn to us in what "Rolles," "Records," and "Precedents," those *laws, usages and customs*, are to be found, and I have not been fortunate as to meet with auy treaties in which they are contained.

In is admitted, however, by the Counsel for the Defendants, that there is no Statute or Charter which in terms grants to the Houss of Assembly the power of imprisonment; and as to the *customs, and usages*, mentionad in the plea, no such things are pretended to be set up; for that the Assembly has been only 6 *years* in existence and that this is the very first instance, in which they have ever assumed to exercise the power of imprisonment. In the case of *Craw, v. Ramsey*—2 *Ventris* 7—the Court of Common Pleas in pronouncing judgment, unanimously agreed that "that which there is neither practical custom, judicial precedent, or Act of Parliament to warrant, may well be judged to be against law"—and can any thing be more apposite when applied to the present case.

The only remaining ground then upon which this power of commitment by the Assembly is contended for, as *lawful*, is that of *reason and necessity*. When we speak, however. of *necessity* as being a lawful justification of a proceeding which is not only at open varience with the known and established laws of the land and the ordinary course of Justice, but which deprives the subject of his freedom in diret contravention of the Magna Carta and the 28 Edward 3, those great bulwarks of the liberties of Englishmen, whereby, it is enacted that no man shall be imprisoned but by the *lawful judgment of his peers, or by the laws of the land*, and that no man shall be taking or imprisoned without being brought in to answer *by due process of the law*, it must be such a strick *legal necessity* as, in the absence of all other modes of aedress, and to prevent a failuse of justice, will warrant the dispensing with the established laws of the land. But if by the terms *necessity* be intended that such powers are fit and expedient and in the ordinary sense of the word *necessarg*, it may, perhaps, afford a good reason why they should be made the subject of a legislative enactment, but does not meet the necessity here set up. Our duty is to declare what the law is, not what it ought to be, *jusdicere non jus dare*, and I trust the day may never come when British Courts of Justice will sanction any infraction of the positive laws of the land, from motives or arguments o expediency.—We have indeed reason to rejoice that the rights and liberties of Englishmen are secured by laws fixed and certain, and defined by landmarks well known and established,—that they do not rest upon such an uncertainty as would justify any man or body of men in tampering with those rights and liberties whenever they might think fit and expedient for them so to do. The argument used by Lord Ellenborough in