

Court File No.: CV-21-00656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, as amended**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
LAURENTIAN UNIVERSITY OF SUDBURY**

**BOOK OF AUTHORITIES OF THE
ATTORNEY GENERAL OF ONTARIO**
(Motion Returnable January 18, 2022)

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TAB 1

the other words in the same warrant, and shews that his accounting in conformity to his duty is the means of such discharge. But the warrant before us has no conclusion whatever : and, even if it justified the arrest (which is questioned on other grounds), cannot justify any of the ulterior proceedings against the plaintiff.

I apprehend that the goodness of a warrant in respect of its contents is wholly independent of the authority from which it proceeds. However dignified and powerful the body which sends forth process, that process [410] must be consistent with itself and with the law, in order to defend the officer who acts upon it. There is no disrespect to the high assembly with which this matter originated in applying the same rules of construction to the instruments by which it acts as to those that may be issued by an ordinary justice of the peace. It is impossible to make this distinction. The magistrate is as absolute, while exercising his jurisdiction, as an Act of Parliament can make him. A recent Act (a)¹ has, in certain cases, permitted him to avail himself of a good conviction where a commitment would otherwise have been imperfect : but that Act proves what the common law was, and has no application to the present case.

There is a general averment, in the plea, that the acts complained of were done in accordance with the ancient usages and principles of the House, and the law and custom of Parliament. And the plaintiff is said to have admitted this as a fact by demurring. But I am of opinion that this would give too extensive an effect to admissions by demurrer, which ought to be rigidly confined to what the rules of construction require, especially when the averment is ambiguous and the fact is not peculiarly within the knowledge of the party. The averment here will be satisfied by being interpreted with reference to the mere issuing of the warrant. We cannot suppose, either that the defendant claims for the House of Commons the privilege of issuing a bad warrant, or that the party questioning the conduct of its officer admits such privilege, still less that the officer should exceed the limits of the authority which the warrant purports to vest in him.

The point lastly stated for argument, on behalf of the [411] defendant, is that the Speaker's warrant issued in a case where the House of Commons had jurisdiction, and the Courts of Common Law have no right or power to inquire into the formal mode in which they have proceeded. But the answer is, that we are inquiring, not how the House proceeded, but how the officer acted. The view that I take steers clear of all collision with any privilege of the House, except that large and general one to which I first adverted, and renders it unnecessary to consider the other objections to the plea. And, though the objections to this warrant may at first sight appear of a technical nature, they will be found, on consideration, to involve principles of vital importance to the liberty of the subject.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER. (ERROR FROM THE QUEEN'S BENCH.)

SIR WILLIAM GOSSET *against* HOWARD. 1845. For note, see p. 359, ante.

Damages having been assessed (May 27th, 1845) at 200l. over and above costs, &c., and judgment signed, in the above case, the defendant below brought a writ of error in the Exchequer Chamber, assigning error in the common form. Joinder. The writ of error was argued in Trinity vacation (a)² and Michaelmas vacation (b) 1846.

[412] Sir F. Thesiger, Attorney General, for the plaintiff in error (defendant below), after comparing and observing upon the several judgments delivered in the Queen's Bench, argued, as to the case itself, as follows.

First : the Act in question appearing to have been done by order of the House of Commons, that order is a complete justification to the officer, and a perfect answer to

(a)¹ Stat. 7 & 8 G. 4, c. 30, s. 39.

(a)² June 13th and 15th. Before Tindal C.J., Coltman, Maule, and Cresswell Js., and Parke, Alderson, and Rolfe Bs.

(b) November 30th and December 1st. Before Coltman, Maule, and Cresswell Js., and Parke, Alderson, and Rolfe Bs.

the action. This point, though it could not be urged in the Queen's Bench, may be argued before this Court, which has not yet had it under consideration. (The argument on this subject is omitted, the Court of Error not having given any decision on the point. The authorities cited were for the most part the same as those collected in *Stockdale v. Hansard* (9 A. & E. 1); the only additional ones being stat. 3 & 4 Vict. c. 9, s. 1 (recital); Co. Litt. 127 b., and note (1) to *Foxvist v. Tremaine* (2 Wms. Saund. 209), as to the form of pleading in *Jay v. Topham*(c); *Verdon v. Deale* (2 Show. 300), and the pleadings in the same case as set out in Brownl. Ent. 129 (e).) [Maule J. [413] You contend that the order, even if there had been no warrant, would have been a justification.] It would. In former times no warrant would have been issued (a); and here none would have been necessary, if the House had not directed the Speaker to issue one. Then,

Secondly: the warrant, at all events, was a justification, having issued by order of the House; for the officer is bound to execute all orders and warrants of the House where no defect of jurisdiction appears on the face of them; and here no such defect appears, and the warrant is alleged in the pleas to have been issued according to the usages and privileges of the House and the law and custom of Parliament, which fact is admitted by the demurrer. And the Court cannot go into any further inquiry. This position rests upon the same authorities as those cited under the first head of the argument.

Thirdly: assuming that the authority is to be enquired into, the proceedings of the House in this case were in pursuance of its ancient usages and privileges, and agreeable to the law and custom of Parliament. On the judgments delivered in the Court below it is perhaps left doubtful whether this is admitted by the demurrer, at least to the extent of acknowledging that the warrant itself was framed according to those privileges, and to that law and custom. But it is clear upon authority that the powers claimed by the several pleas are inherent in the House, and essential to the proper discharge of its functions: and, up to the is-[414]-suing of a warrant, this is admitted in the judgments of Lord Denman C.J. and Coleridge J. (ante, pp. 379, 380, 404), in the Court below. The authority of the Commons, as "the general inquisitors of the realm," to set on foot examinations, is asserted in 4 Inst. 11, 24. In *Burdett v. Abbot* (14 East, 1, 138), Lord Ellenborough, speaking of the House of Commons, says that, "independently" "of any precedents or recognized 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." In *Stockdale v. Hansard* (9 A. & E. 115), Lord Denman C.J. said: "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt." Littledale J. added (9 A. & E. 168); "There is no doubt about the right as exercised by the two Houses of Parliament with regard to contempts or insults offered to the House, either within or without their walls; there is no doubt either as to the freedom of their members

(c) 14 East, 102, note (a) to *Burdett v. Abbot*.

(e) Alderson B. asked, with reference to this head of the argument, whether the order of the House would be conclusive if they directed that a person should be put to death. The Attorney General answered, that he should decline arguing upon any extreme and extravagant case. [Alderson B. It may not be necessary for you, because the course of precedent which you rely upon may have extended as far as the case of contempt, though not farther; not, for instance, to the turning a man out of his freehold.] The supposition of an extreme abuse might be urged against the jurisdiction, however undeniable, of any Court. [Alderson B. There is a difference between abusing known powers and assuming unknown ones.] If a House of Parliament assumed such powers, the question raised would be a constitutional, not a legal one. There is no legal redress against the House, more than against the Sovereign herself, if she inflicted a personal injury. [Alderson B. But it does not follow that, if an officer were employed, the officer of the Sovereign or of the House would be protected. Your best answer is, that the authorities do extend to the case for which you require them, and you do not want more. Tindal C.J. That is your best answer.]

(a) See p. 370, note (a), ante.

from arrest, or of their right to summon witnesses to require the production of papers and records, and the right of printing documents for the use of the members of the constituent body; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge." Patteson J. (9 A. & E. pp. 209, 210, 213), recognized the right of the [415] House to protect itself by summary proceedings against obstruction, and said also (in answer to an argument for the defendant): "The House is armed with ample powers to send for all persons who can give them information either before a committee, or at the Bar of the House."

Fourthly: if the House of Commons was acting in the regular course and exercise of its constitutional functions, the question remains, whether the proceeding by which the House carried out its object was regular and formal or not. But, on the assumption now made as to jurisdiction, the Court of Queen's Bench could not enquire whether the warrant was in such a form as this Court might deem valid. Some observations of the learned Judges on this point in *Howard v. Gosset* (ante, p. 359), are at variance with many authorities, from the case of *The Earl of Shaftesbury* (6 How. St. Tr. 1269), downwards. Coleridge J. (ante, pp. 380, 381), after noticing the argument "that, with regard to the transcendent powers of the House, and its identity with the people at large, and out of respect to its great dignity, the warrants which it issues are not to be dealt with as those which proceed from tribunals co-ordinate with ourselves, or inferior," said: "I cannot admit that the degree of strictness in which formal accuracy is to be required in warrants has been measured, or ought to be, by the dignity of the Courts from which they issue. Experience has shewn that the liberty of the subject, with which we are entrusted, is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required: and in that view of it it is no paradox to say that form be-[416]-comes substance. The more powerful, therefore, the source, and the higher in point of rank, the more strictness ought we to shew, the more accuracy may reasonably be required. From the wide extent of jurisdiction, indeed, in the one case, and its narrowness in the other, a different rule of intendment exists: but, with this qualification, the rule is as I have stated." "It is trifling with language to speak of the present warrant as defective in form only. If the House cannot arrest of its own mere pleasure and without cause, to omit to state any cause, and to rely on its mere pleasure, is to proceed with one essential of the jurisdiction absent." And Lord Denman C.J. said (ante, p. 409): "I apprehend that the goodness of a warrant in respect of its contents is wholly independent of the authority from which it proceeds. However dignified and powerful the body which sends forth process, that process must be consistent with itself and with the law, in order to defend the officer who acts upon it. There is no disrespect to the high assembly with which this matter originated in applying the same rules of construction to the instruments by which it acts as to those that may be issued by an ordinary justice of the peace." His Lordship also (ante, p. 408), cited the dictum that "the cause of commitment ought to be certainly stated, to the end that the party may know for what he suffers, and how he may regain his liberty." But the Court of Queen's Bench itself, very lately, in the case of *The Sheriff of Middlesex* (11 A. & E. 273), held a warrant of commitment by the House of Commons for a contempt to be valid, though it did not shew what the contempt was, and the term of imprisonment stated was only "during the [417] pleasure of this House;" on which grounds the warrant of a justice of peace or of an Inferior Court would have been deemed void; *Rex v. James* (5 B. & Ald. 894), *Ex parte Besset* (6 Q. B. 481). Williams J., in the present case, viewed this point correctly, and relied upon the case of *The Sheriff of Middlesex* (11 A. & E. 273). (The Attorney General here read the judgment of Williams J. in *Howard v. Gosset* (ante, pp. 396-398), from "And before I proceed," to "*Burdett v. Abbot*.") That the Speaker's warrant can be treated like that of a justice of the peace or an Inferior Court is a position unsupported by any authority. An opposite doctrine is stated in 3 Hawk. P. C. 219, b. 2, c. 15, s. 73 (7th ed.): "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses" (of Parliament), "and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice." Whereas the books abound with authorities shewing that, in the case of inferior jurisdictions, an opposite presumption

takes place if the legality be not made apparent. That the House of Commons is a distinct Court of Judicature is laid down in 4 Inst. 23, 28; and, in the judgments of Lord Ellenborough and Bayley J. in *Burdett v. Abbot* (14 East, 138, 152, 153, 159, 160), (assented to by Lord Denman C.J. in *Stockdale v. Hansard* (9 A. & E. 130)), it is placed at least on the level of the Superior Courts. So, in *Burdett v. Abbot* (5 Dow, 199), in the House of Lords (referred to in the present case by Williams J.), Lord Eldon [418] plainly compared the House of Commons to a Superior Court of Westminster Hall, when he enquired of the Judges: "Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of habeas corpus, the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances, out of which the contempt arose were not set forth in the warrant?" to which the Judges unanimously answered that the Court of King's Bench would not liberate. Of the credit given by the Courts to warrants of the Houses of Parliament a strong instance appears in the case of *The Earl of Shaftesbury* (6 How. St. Tr. 1296), where the question turned on a commitment by the House of Lords, during His Majesty's pleasure and the pleasure of the House; and Sir T. Jones J. said "such a commitment by an ordinary Court of Justice, would have been ill and uncertain"; but the earl was remanded. In *Regina v. Paty* (2 Ld. Ray. 1105), where a commitment by the Speaker's warrant was objected to, but the prisoner was remanded, Gould J. said (2 Ld. Ray. 1106): "If this had been a return of a commitment by an Inferior Court, it had been naught, because it did not set out a sufficient cause of commitment: but this return being of a commitment by the House of Commons, which is superior to this Court, it is not rever-[419]-sible for form." Powys J. (2 Ld. Ray. 1107), observed: "The second objection was, that the warrant was not under seal." But to this I answer, that the House of Commons is a Court;" "and commitments by a Court need not be under hand and seal. And besides, the consuetudo Parliamenti will justify this commitment." "Fifthly, it is objected, that the commitment is, during the pleasure of the House of Commons, whereas it ought to be, till they shall be discharged by due course of law. To this I answer, that this commitment is more favourable for the prisoner." "Besides, this is agreeable to the constant forms of commitments by the House of Commons; and it is agreeable to our commitments here, which are implied to be during the pleasure of the Court. And though the House of Commons express that in their commitments, yet that is only expressing what we imply." "If all commitments for contempts, even those by this Court, should come to be scanned, they would not hold water. Our warrants here in such cases are short, as for a contempt, or for a contempt in such a cause. So in Chancery the commitments for contempts are for a contempt in not fully answering, &c. and would not this commitment be sufficient?" "The House of Commons is a great Court, and all things done by them are to be intended to have been *ritè acta*, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of Court of two lines, and such commitments are held good, because it is to be intended, that we understand what we do." And Powell J. (2 Ld. Ray. 1111), as to the objection that the warrant was to detain during pleasure, an-[420]-swered that that "was the constant form of warrants by the House." De Grey C.J., in *Brass Crosby's case* (3 Wils. 188, 199), when arguing that the Court of Common Pleas cannot take cognizance of a commitment by the House of Commons, said: "The rule is, that the Court of Remedy must judge by the same as the Court which commits: now this Court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us. If the Court of Common Pleas should commit a person for a contempt, the Court of King's Bench would not enquire into the legality or particular cause of commitment, if a contempt was returned; yet in some cases the Court of King's Bench is a Court of Inquiry, but in this case is only co-ordinate with this Court." And Blackstone J. observed: "Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law." So in *Rex v. Hobhouse* (2 Chitt. Rep. 207, 210), this

Court said: "The House of Commons have adjudged (as appears by the warrant), that the gentleman on the floor has been guilty of a contempt, in having published a seditious libel." "We cannot enquire into the form of the commitment, even supposing it is open to objection on the ground of informality." Therefore it is incorrect to say that a warrant of the House of Commons is examinable with the same strictness as a commitment by an Inferior Court: the true rule is, that it must be dealt with as [421] the Court would treat the proceeding of a Superior Court having co-ordinate jurisdiction. Then the well known distinction applies, that, when parties claim or justify under a Court of inferior rank or limited power, the circumstances giving the jurisdiction must be shewn, but not where the authority is derived from a Superior Court: note (1) to *Peacock v. Bell* (1 Wms. Saund. 74 a.); *Taylor v. Clemson* (2 Q. B. 978, 1031), judgment of the Court; *Harrison v. Wright* (13 M. & W. 816, 818); Com. Dig. Pleader (3, M, 24).

The Courts at Westminster have always claimed to arrest without using such formality as is required in warrants issued by justices of the peace. In *Throgmorton v. Allen* (2 Roll. Abr. 558, tit. Trespass (C), pl. 2), cited in *Mayhew v. Locke* (7 Taunt. 63, 66), it was held that the marshal of the King's Bench might justify under the order of the Chief Justice, given by word of mouth, to arrest and have the plaintiff before him, to answer, &c. [Alderson, B. In the case of an order by a Judge for executing sentence of death, there is no warrant (g). Parke, B. That is because there is a record. The reason appears from 2 Hale's P. C. 409, c. 57.] In *Watson v. Bodell* (14 M. & W. 57, 70), which was an action of trespass against the messenger of a Court of Bankruptcy for detaining the plaintiff in custody till he paid costs in pursuance of an order given by the commissioner but not under seal, Parke B., delivering the judgment of the Court, said that, if, in the particular case, a warrant was required, it ought to have been under the commissioner's hand and seal: but he added: "It is clear that a Court of Record may commit by order to the custody of its [422] officer in open Court, as the Queen's Bench or Quarter Sessions, for there is, or ought to be, a record of such commitment: and the order given *sedente Curiâ* by the Court in this case would probably be a protection to the officer." Hawkins (vol. 3, p. 199, b. 2, c. 15, s. 37), in explaining the words "taken" "by commandment of the King, or of his justices," in stat. 3 Ed. 1, c. 15 (Westm. 1), observes that "by commandment" "of his justices" cannot be understood as relating to persons imprisoned only for safe custody, "and therefore it seems, that they must be taken in a more restrained sense of those only who are imprisoned by the absolute command of such justices by way of punishment, as for a misdemeanor done in their presence, or for other contempts, or such like matters, which lie rather in their discretion than in their ordinary power; and it seems, that a commitment by the Chief Justice, without shewing any cause whatsoever, shall be intended to be for some such matter." It appears, indeed, to have been the practice of this Court, in some cases, to issue attachments for contempt without a rule to shew cause; *Rex v. Jones* (1 Stra. 185), *Anonymous case* in *Salkeld* (1 Salk. 84). And, in *Saunders v. Melhuish* (6 Mod. 73), a party charged on affidavit with committing a fraud under colour of proceedings in ejectment was at once committed to answer interrogatories; Holt, C.J. saying: "When one is put to answer interrogatories for a fact fully proved against him, he ought to answer in custody; but where it is anything doubtful, the course is to put him to answer, that is, to bind him by recognizance to answer." In 3 Hawk. P. C. 221, b. 2, c. 15, s. 76, reference is made to the contro-[423]-versy between the Court of King's Bench, in the time of Lord Coke, and the Court of Chancery, when several persons committed by the Court of Chancery were bailed by this Court, "Upon exceptions to the generality of the form of the commitments, as not shewing the time of the commitment, or setting forth only the command of the Lord Chancellor as the ground of the imprisonment, without mentioning any crime at all, or mentioning the crime in general terms, as for a contempt to the Court of Chancery without shewing what the contempt was, or at what time committed;" and Hawkins, after noticing particularly the case of one Glanvil, says that he has not met with any late precedent of this kind, expresses a doubt whether the authority of the former cases is not now lessened, and then adds: "However it cannot but be expected, that the Superior Courts will pay the highest regard to one another's proceedings, and be ready to presume, that they are agreeable to law, unless the contrary appear, or the case be

(g) See *Rex v. Antrobus*, 2 A. & E. 788, 808.

very particular and extraordinary:" and he observes, as to the particular case of relief given by Chancery against the unequitable use of a judgment: "Whenever it stands indifferent whether the matter examined by Chancery, after a judgment at law, be of such a nature as is proper for relief in Chancery, or not, it is not probable that any other Court of Westminster Hall will easily presume that it is not, when the Chancellor, who is the proper Judge, hath determined that it is: and agreeably hereto it hath been adjudged, that a commitment from Chancery for disobedience to a decree, is good, without shewing what the decree was." In *Dicas v. Lord Brougham* (6 Car. & P. 249), the [424] warrant under which the plaintiff had been committed by the Lord Chancellor, sitting in bankruptcy, was clearly insufficient according to the tests which have been applied to other warrants of commitment; for it stated no cause, and ordered the plaintiff to be detained "until my further order:" yet Lord Lyndhurst C.B. held that the judgment of the Lord Chancellor could not be questioned in an action against him for the commitment under such warrant; and also that there was no necessity for a special plea, but that the general issue was sufficient, as no action would lie; which latter proposition appears to be supported by *Bushell's case* (1 Mod. 119), and *Hamond v. Howell* (1 Mod. 184). But against the Judge of an Ecclesiastical Court an action has been held maintainable for excommunicating without jurisdiction; *Beaurain v. Sir W. Scott* (3 Camp. 388). The known forms of attachment in the Queen's Bench, Exchequer and Common Pleas contain nothing to shew that the proceeding relates to a matter cognizable by the particular Court: but it is presumed in favour of those Courts. The form in the Common Pleas, as given in Tidd's Practical Forms, p. 348 (8th ed.), is: "Attach C. D. so that you may have his body before," &c., "to answer us, of and concerning such things as on our behalf shall be then and there objected against him." There is, indeed, on these attachments, an indorsement of the name of the cause in which the process issues; but that shews nothing as to jurisdiction. The form of attachment in the Court of Chancery (given in 2 Smith's Chancery Practice, 653, 3d ed.) is also quite inconclusive as to the matters giving jurisdiction. [Rolfe, B. What form was used [425] in *Mr. Lechmere Charlton's case* (2 Mylne & C. 316, 343)?] The warrant there was more full, and recited a very special order; such an order was made also in *Mr. Long Wellesley's case* (2 Rus. & M. 639), with a formal adjudication; but a less complete one (merely ordering that the party "do stand committed," &c. "for his contempt of this Court in writing," &c. a paper recited in the order) was held sufficient in *Ex parte Van Sandau* (1 Phillips, 445, 446, 605), on comparison of the forms in Mr. Charlton's and Mr. Wellesley's cases with earlier precedents. [Alderson B. No doubt a Court may judge of its own orders or warrants. The House of Commons, if they thought a warrant of the Speaker insufficient, might liberate on that ground.] In *Ex parte Van Sandau* (1 Phillips, 445, 446, 605), a question turned on the necessity of an adjudication that contempt had been committed. But that has lately been held unnecessary, in *Cobbett's case* (7 Q. B. 187). [Alderson, B. That case came before all the Courts. Parke, B. There can be no occasion to adjudge a contempt committed when the process of the Court itself has been destroyed.] It appears to have been the opinion of a learned Judge in the Court below that the warrant should be circumstantial enough to acquaint the party arrested with the ground of proceeding, so that he may judge whether he will obey it or not. [Tindal, C.J. That would not apply to the attachment from the Common Pleas.] Nor to an arrest by merely sending the mace, as formerly practised by the House of Commons. [Alderson, B. It is the practice of the House of Lords now.] And it cannot be assumed, as was suggested in the Court below, that the officer would orally communicate the cause of arrest. That the latitude allowed to Superior Courts as to the form of their process is not [426] granted to inferior ones, and that these are strictly required to shew their jurisdiction, appears from many authorities, among which are *Rex v. Fowler* (1 Salk. 293), *Rex v. Eyre* (2 Stra. 1066), *Rex v. Dugger* (5 B. & Ald. 791), (recognized as an authority in *Regina v. Thorogood* (12 A. & E. 183, 198)): the point is also explained by the case *In the Matter of Clarke* (2 Q. B. 619). Therefore it was incorrectly assumed in the Court below that no difference existed in this respect between superior and inferior jurisdictions. Then, if this Court recognizes the procedure of the House of Commons as one Superior Court recognizes that of another (*g*), the case comes,

(*g*) Parke B. referred to *Lake v. King*, 1 Saund. 131, as shewing that the Court of King's Bench will notice the order and course of proceedings in Parliament.

Fourthly, to a mere question on the form of warrant adopted by the House; but that is, in other words, a question on the practice of the House: and no Court will interfere with the practice of another. Each Court has the power of settling its own practice. "The course of the Court is the law of the Court," Com. Dig. Courts (Q). In *Burdett v. Abbot* (14 East, 63), Mr. Holroyd said, in argument: "Suppose a party was arrested upon a void writ out of C. B. as if a writ tested in one term were not returnable till the second term, which has been held to be a void writ; if he sued his writ of habeas corpus returnable in this Court instead of in C. B., this Court would not discharge him, but would refer him to the Court out of which the writ issued." Lord Ellenborough answered: "Without touching the question of contempt, I should rather think, that if a person arrested [427] on a process absolutely void upon the face of it, claimed his discharge of us, we should discharge him, whether it were on Exchequer or Common Pleas process. As suppose the defect in the process were in a matter required by positive statute, of which all the Courts must take cognizance. If indeed it were a doubtful matter, which might involve any question as to the practice of another Court, we should send him to that Court." *Ex parte Smyth*, in the Court of King's Bench (3 A. & E. 719, 724) and Court of Exchequer (2 Cro. M. & R. 748; Tyr. & G. 222), is a direct authority on this point.

Fifthly, the question, as raised by Coleridge J. on the validity, or by Wightman J. on the sufficiency, of the particular warrant, as appearing from the contents of warrant itself, is disposed of by the preceding argument. The demurrer admits that it was issued duly by the proper person. Powys J. in *Regina v. Paty* (2 Ld. Ray. 1108), already referred to, says that things done by the House of Commons will be presumed *ritè acta*, without special recital, "By the same reason as we commit people by a rule of Court of two lines, and such commitments are held good, because it is to be intended, that we understand what we do." A like intendment must be made in favour of a warrant drawn up by the Speaker of the House of Commons; he must be taken to understand the practice, and will not be presumed to have issued a warrant in an unusual form. But, even construing this document as if it had issued from an Inferior Court, it is sufficient, for it recites that the House "had that day ordered that the plaintiff should be sent for in the custody of the serjeant at arms attending the said House;" [428] and, connecting that recital with the subsequent part, which "did require and authorize the serjeant at arms then attending the said House of Commons to take into custody the body of the plaintiff," it is obvious that the words "take into custody" must be understood in the sense which would make it a fulfilment of the recited order that he should "be sent for;" and must therefore imply that he was to be brought before the House. *Coster v. Wilson* (3 M. & W. 411), shews that the recital may be so coupled with the mandatory part. *Ex parte Goff* (3 M. & S. 203), is to the same effect, and is recognized in *Daniell v. Philipps* (1 Cro. M. & R. 662, 673; 5 Tyr. 293, 306). [Alderson B. mentioned *Ex parte Foulkes* (15 M. & W. 612).]

Petersdorff, *contrà*. No question of privilege legitimately arises in this case. The House of Commons is not directly a party, but becomes so incidentally; and the real question is, whether a warrant at variance with the practice of Courts generally, and with established principle, can be sustained merely because issued from the House of Commons. It is unnecessary to deny that they, like other Superior Courts, may commit for contempt, though the power of either House in this respect has been to some extent called in question by Mr. Hargrave in his *Juridical Arguments* (e). But the power is at any rate of a peculiar nature, subject to limitations, dependent on circumstances, and founded on the necessity of self-protection common to all Courts. This is discussed in the judgment drawn up by Wil[429]-mot J. in *Rex v. Almon* (a); and the power, as exercised by the House of Commons, is vindicated on the ground of necessary self-protection by Lord Ellenborough in *Burdett v. Abbot* (14 East, 151, 152). For that necessary purpose, the House, or Court, exercising the authority, must themselves judge what is a contempt; great latitude has been allowed in the form of their commitments; but, if they commit, an adjudication must appear on their proceeding (c). In the case of *The Earl of Shaftesbury* (6 How. St. Tr. 1269;

(e) Case of Mr. Perry's Commitment, 2 Harg. Jur. Arg. 183.

(a) Wilmot's Notes of Opinions, &c. p. 254, et seq.

(c) Kelly, in the argument below, cited *Green v. Elgie*, 5 Q. B. 99, as to the necessity of an adjudication in form.

1 Mod. 144), *Murray's case* (1 Wils. 299), *Rex v. Flower* (8 T. R. 314), *Regina v. Paty* (2 Ld. Ray. 1105), *Brass Crosby's case* (3 Wils. 188), and the case of *The Sheriff of Middlesex* (11 A. & E. 273), in which the commitments were upheld, adjudications of contempt appeared. It may further be admitted that the House of Commons has a general inquisitorial power; but the question arising here is, what means they are authorized in using to obtain evidence.

The first head of argument for the plaintiff in error is, that, the act of trespass appearing to have been done by order of the House of Commons, no further defence is necessary. But the issuing of this warrant is a judicial act; for it is not done in the exercise of legislative or inquisitorial powers; and, if so, the proceeding is clearly cognizable here or by the Court of Queen's Bench; for it is well established that a Superior Court may enquire into the legality of process issuing from another Court, whether of limited or of general jurisdiction: case of [430] *The Marshalsea* (10 Rep. 68 b.), *Prigg v. Adams* (2 Salk. 674), *Bryant v. Clutton* (1 M. & W. 408; Tyr. & G. 843), *Barker v. Braham* (3 Wils. 368). [Tindal C.J. There the ca. sa. from the Queen's Bench had been set aside before the action was brought in the Common Pleas.] If the general rule be that process of a Superior Court may be questioned in a Court of co-ordinate jurisdiction, the House of Commons has no privilege exempting it from such enquiry. (He then proceeded to discuss this point. The argument is omitted for the reason before given; p. 412. He cited Hargrave's Preface to Hale on the Jurisdiction of the Lord's House, p. cxxxv., et seq.; note to *Ashby v. White*, in Mr. Gale's ed. of Ld. Raymond, p. 527, et seq.; *Coundell v. John* (2 Salk. 504); and other authorities all of which are cited in *Stockdale v. Hansard* (9 A. & E. 1), or before mentioned in this report.) At least, if the warrant of the House were illegal on the face of it, a Court of Law might notice the invalidity: as, if they had ordered a man to be transported for a contempt. [Alderson B. It does not appear by any authority that the House of Commons ever has transported. They have been accustomed to commit; and there may be a great difference between questioning their exercise of a new power and examining the grounds on which they have exercised an old one.] Lord Kenyon observed, in *Rex v. Wright* (8 T. R. 293, 296): "I do not say that cases may not be put in which we would not (sic) enquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their serjeant at arms to arrest a counsel here who was arguing [431] a case between two individuals, or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it." In all applications to discharge from custody under warrants of the House of Commons, the Courts have looked into the document; and, if it professed to state any ground of proceeding, they have not scrupled to examine it.

The objection, therefore, is open, that this warrant, on the face of it, does not authorise the arrest. The defendant has placed the warrant on the record as containing in itself the ground of his justification, according to the rule, that, "in trespass, when the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his plea. For it is not sufficient to allege generally that he committed the act complained of by virtue of a certain writ or other warrant directed to him; but he must set it forth specially: note (1) to *Greene v. Jones* (1 Wms. Saund. 298). Now the warrant here stated is contrary to the provision of Magna Charta (stat. 9 H. 3, c. 29), that "no freeman shall be taken, or imprisoned," "but by lawful judgment of his peers, or by the law of the land," which implies, according to Lord Coke, 2 Inst. 52, that a commitment must be "by due process" "of law, and according to the law of the land;" to fulfil which condition, according to the same authority, "the cause must be contained in the warrant," p. 52: and the same doctrine is laid down in p. 591. The necessity of stating the cause is enforced also in Bla. Com. vol. i. p. 137, and in vol. iii. p. 133, where the author says that "the glory of the English law con-[432]-sists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made: that the Court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner." To the same effect are, 2 Hale's P. C. 111, 122; Lamb. Eirenarch. 87, b. 2, c. 2, and *Dr. Groenvelt's case* (1 Ld. Ray. 213); and the doctrine is supported by the opinion of Holt C.J. in *Kendal's*

case (5 Mod. 78, 85). The objection of uncertainty, which prevailed in *Money v. Leach* (1 W. Bla. 555), is of the same nature as that now taken; and there, usage, though long continued, was held to be no answer. The necessity of describing the offence, not as particularly as in an indictment, but so far as to shew an authority to imprison (*d*), is insisted upon by Best C.J. in *Wickes v. Clutterbuck* (2 Bing. 491, 2): and the judgments of this Court in *Caudle v. Seymour* (1 Q. B. 889), are strong on the same point. Imprisonment and detainer without any cause shewn are a subject of complaint in sect. 5 of the Petition of Right, 3 C. 1: and an Act of the Scottish Parliament, A.D. 1701, expressly provides that no person shall be imprisoned for custody in order to trial without a written warrant "expressing the particular cause for which he is imprisoned" (*h*). If there be any distinction between a warrant to commit and a warrant [433] to apprehend, the latter ought to be the more carefully guarded, because such a warrant is more likely to meet with resistance. [Parke B. What specification of cause is there in a *capias ad respondendum*?] That is merely civil process. [Parke B. You say that any process for the purpose of arresting must state a cause. The *capias* does not even recite the writ on which it is founded.] It shews that the party is arrested at the suit of A. B. in an action of debt, or on promises. [Alderson B. It shews that the motive of the Court for taking, but not the cause of the taking.] The party taken knows from the process what he has to answer. [Alderson B. Does the *capias* under stat. 1 & 2 Vict. c. 110, s. 3, state that there is cause for believing that the defendant is about to quit England?] No case in which a form is given by statute can affect the general rule. And in the statutory form the *capias* recites an action pending. Parke B. It is not recited, though the fact is to be inferred from the practice of the Court. If you scan the *capias* as accurately as you would a justice's warrant, you do not find that there is a pending plea. Alderson B. And, if you infer that fact from the process of the Court, must not you give the same credit to the process of one Court of superior jurisdiction as to that of another? It may be admitted, consistently with the argument, that a distinction may exist between the process of a Superior and that of an Inferior Court. [Alderson B. Then are we to construe the warrant of the House of Commons as process of a Superior or of an Inferior Court? According to the language of the Court of Common Pleas in *Brass Crosby's case* (3 Wils. 199, 204), it must be [434] treated as process of a Superior Court.] That may be admitted: but still, according to the authorities, it ought to shew, first, a lawful cause of arrest; secondly, a jurisdiction, not only over the subject matter but over the person; and, thirdly, a time when, or an event on which, the imprisonment shall determine: and, fourthly, like every other warrant, it ought to have a proper conclusion. The instrument in question has none of these requisites. Such a document, if returned to a habeas corpus, would not enable the Court to judge whether the imprisonment was lawful or not. If there have been one or two instances in which the House has issued warrants as vague, they are clearly irregular, and can only have the effect of weakening any argument that might be drawn from uniformity of practice. As to the forms of attachment; those against the sheriff, in the Queen's Bench and Exchequer (*a*) do state a cause; and, in the case of attachment against a party for not paying costs, there is a special indorsement, "for nonpayment of costs, taxed," &c. at so much, "pursuant to a rule of Court." Attachments for contempt of the Court of Chancery recite a contempt, and state that the party is to answer that charge, and to abide the order of the Court; 1 Daniell's Chanc. Pract. 428, 2d ed. The form in the Common Pleas, which has been relied upon, is more general; but it does inform the party what he is called upon to do; and an indorsement is always added, which renders the information complete. And, further, the particular form cited is one known and used in the Court for a long series of years, and is addressed to the sheriff, as an officer of the Court. Possibly, too, even this form, ac-[435]-cording to the doctrine of *Money v. Leach* (1 W. Bla. 555), might not be held good on the ground of long usage, if it were now called in question. [Alderson B. The usage there was that of a particular person, the Secretary of State for the time being. The practice of a Court is the usage of the country, the common

(*d*) Kelly, in the Court below, admitted that it might not be necessary to shew an offence, but contended that a cause at least must appear.

(*h*) Acts of the Parliaments of Scotland, vol. 10, p. 272.

(*a*) See Tidd's Pract. Forms, 115, 116, 8th ed.

law. The usage of the lord mayor would be quite a different thing. *Money v. Leach* (1 W. Bla. 555), does not meet the question whether general warrants issued by a Court according to its immemorial usage would or would not be good. Supposing it could be shewn that the House of Commons had, from time immemorial, issued warrants like this, do you say they would still be invalid? At least this warrant is without parallel in the practice of other Courts. As to the Lord Chancellor's warrant in *Dicas v. Lord Brougham* (6 Car. & P. 249), its validity may be doubted; on the trial, no question was raised upon its form.

It cannot be maintained that this proceeding is analogous to process for obtaining the attendance of witnesses. That is not compulsory in the first instance. There must be disobedience before an attachment issues. The Superior Courts do not begin by sending for a witness in custody. But on this warrant it appears that the House of Commons does so. No usage has been shewn which authorizes them so to proceed. Nor, indeed, does it appear by the warrant that the party named is required to come and give evidence. [Alderson B. That objection arises if you construe the warrant like that of a magistrate.] At any rate, a power is exercised which the Superior Courts do not assume. [Alderson B. It is the daily practice to commit persons [436] in order that they may give evidence, in criminal cases.] That is under stats. 1 & 2 P. & M. c. 13, s. 5, and 2 & 3 P. & M. c. 10, s. 2 (a), in case of felony; but the power is a limited one; the party committed is in the presence of the justice, and is, in a manner, in contempt, by not finding recognizances. [Alderson B. How would that be in the case of a married woman?] A married woman refusing to find surety for her appearance at Quarter Sessions to give evidence in a case of felony may be committed; *Bennet v. Watson* (3 M. & S. 1). In *Evans v. Rees* (12 A. & E. 55, 57, 59, 60), where the plaintiff had been summoned to give evidence before a justice on a charge of assault, and, on his non-appearance, the justice issued his warrant for bringing the plaintiff before him to find bail to appear and give evidence at the assizes, this Court held the proceeding invalid. Lord Denman C.J. intimated an opinion that the only ground on which a commitment could be maintainable would have been contempt; and Littledale J. said "This warrant is clearly illegal, even if the magistrate had the power of compelling the attendance of the witness by warrant." Stat. 2 & 3 Vict. c. 71, s. 22, empowers a police magistrate to issue his warrant for bringing a witness before him who has been served with summons and disobeys (d). These Acts, and stat. 6 G. 4, c. 16, s. 33, authorising commissioners of bankrupt to bring before them by warrant persons deemed capable of giving information as to the bankrupt or his estate, and not attending on summons, afford the only instances in which, even by statute, such a power can be exercised.

[437] A test which has been often applied to the validity of warrants is, what the consequence would be if resistance were made and the officer killed. In *The Countess of Rutland's case* (6 Rep. 52 b., 54 a.), "it was resolved, that the sheriff, or any other by his authority, who makes an arrest of the person of another, ought on the arrest to shew at whose suit it is; out of what Court, for what cause he makes it," &c. "If the officer be demanded he must shew his warrant;" 1 Hale's P. C. 583; and, if the warrant be not lawful, as if the name of the bailiff, &c., be interlined after sealing, "if such bailiff be killed, it is but manslaughter, and not murder;" 1 Hale's P. C. 457. To the same effect are the case on the Circuit of Northampton cited in the case *High Commission* (12 Rep. 49), in 12 Rep. (12 Rep. 49), and the dicta in *Burslem v. Fern* (2 Wils. 47, 48), and *Housin v. Barrow* (6 T. R. 122); and the doctrine of these is supported by *Hood's case* (1 Moo. Cro. C. 281). And on an indictment for murder it could not be contended that the warrant, because issued by the Speaker of the House of Commons, was not examinable.

Then, if the warrant pleaded be bad, the other matters stated in the pleas cannot aid; they are only explanatory, and matter of inducement. It is not even stated that the acts complained of were done in obedience to the orders and resolution of the House. And in general, where a party justifies under a specific authority in law, if that authority fails, he cannot avail himself of proceedings anterior to the defective one. The justification here is, and must be, rested on the warrant itself. A sheriff, if

(a) And see stat. 11 & 12 Vict. c. 42, s. 20.

(d) And see, now, as to justices generally, stat. 11 & 12 Vict. c. 42, s. 16, and Sched. (L, 2), (L, 3), (L, 4).

he had executed an invalid [438] warrant, could not allege that it was founded upon a valid judgment. (The Attorney General said he admitted that the order of the House alone could not be a defence to the individual officer, but that he must rely upon the warrant.) [Parke B. Then, if the warrant is bad, the defence fails.] The pleas allege that the proceedings of the House were according to their usages and privileges and the law and custom of Parliament; but they do not state that the warrant itself was so.

Lastly, it is questionable whether the warrant, as set out, justifies the several acts complained of in the declaration. It recites an order that the plaintiff should be sent for in the custody of the serjeant at arms, and then requires the serjeant at arms "to take into custody the body of the plaintiff." That authorises a single act of arrest, not carrying him from one room to another, imprisoning him, then compelling him to return, and imprisoning him again, which are several substantive trespasses, and not one trespass with aggravations. [Cresswell J. You say that the warrant is an authority to take him, and not to fetch him. Maule J. Might not the officer move him an inch? For, in strictness, all the allegations might be satisfied by his having been moved an inch and then detained for another moment. Each moving would be a separate trespass.] The warrant should have directed the officer, not only to take, but to detain the plaintiff in custody, and to bring him, &c. On these pleadings it may as well be supposed that the plaintiff was twice detained for several hours as for several moments. [Maule J. That might have been matter for a replication. The plea itself states, in effect, that the defendant did no more than was necessary [439]-sary to bring him before the House. Rolfe B. Is not the warrant, in effect, an order to fetch? Parke B. You say it is only an order to take him, not to detain him one minute.]

Sir F. Thesiger, Attorney-General, in reply. As to the power of the Houses, generally, to commit for contempt, which has been questioned in some degree on the authority of Mr. Hargrave, that writer says, in vol. i. p. 3 of his *Juridical Arguments* (a): "I understand it to be clearly part of the law and custom of Parliament in England, that each House of Parliament may enquire into and imprison for breaches of privilege:" and he goes on to cite instances. The argument and authorities for the plaintiff in error on the subject of privilege have not been answered. (The reply on this head is omitted. In addition to the authorities before mentioned, the Attorney General cited, as to the irresponsibility with which certain bodies and individuals, and among these the Judges, are invested, in the discharge of public functions, *Floyd v. Barker* (12 Rep. 23); judgments of De Grey C.J. and Blackstone J. in *Miller v. Seare* (2 W. Bl. 1141, 1145, 1147); *Garnett v. Ferrand* (6 B. & C. 611, 625); judgment of Holt C.J. in *Groenvelt v. Burwell* (1 Ld. Ray. 454, 468); judgment of Lord Mansfield in *Mostyn v. Fabrigas* (1 Cowp. 161, 172)).

The plaintiff in error relies upon the warrant, as that which alone can justify him individually in executing the order of the House. [Maule J. It might have been another question, if the House had merely [440] issued their order, whether the officer might not have justified under that at once, without stating a warrant.] That was the course taken in *Jay v. Topham* (14 East, 102, note (a)). Then as to the generality of this warrant. The words "per legem terræ," in Magna Charta, do not advance the argument for the defendant in error, because it is a question in each case what is the *lex terræ* applicable to the subject matter. The passages cited from Blackstone apply to warrants of commitment; and that in 3 Comm. 133, is too general in its assertion; it is contradicted, for instance, by the practice on attachments. The passages from Hale and Lambard, and the cases of *Wickes v. Clutterbuck* (2 Bing. 483), and *Caudle v. Seymour* (1 Q. B. 889), related to warrants of justices of the peace; and all these authorities, except the last, and 2 Hale's P. C. 111, relate to warrants of commitment. *Kendal's case* (5 Mod. 78), was that of a commitment by a Secretary of State. It was argued that warrants to apprehend should be more strictly guarded than warrants of commitment: but Hale (2 P. C. 111), says that a warrant for apprehension, not containing the cause specially, is not therefore void, if de facto, the matter be within the jurisdiction of the justice, and it be so averred. Such warrants are often issued on suspicion merely: and in case of felony the apprehension may be without any warrant. *Money v. Leach* (1 W. Bl. 555), does not shew that every

(a) Opinion on the commitment of the Hon. Simon Butler and Mr. Oliver Bond.

warrant which may be termed general is void. And in *Rex v. Tubbs* (g) a warrant "to impress sea-[441]-men, sea-faring men, and persons whose occupations and callings were to work in vessels and boats upon rivers," was fully recognized as valid, on the grounds of usage and necessity. [Alderson B. That was not properly a general warrant: it was a warrant against a particular class of persons, over whom the Crown had always had that power.] Still the recognition of it is inconsistent with the universal rule contended for on the other side. And the decision in *Money v. Leach* (1 W. Bl. 555), may be grounded on the distinction taken by Alderson B., in the present case, between acts of an individual and acts of a Court. Committal for the purpose of giving evidence is a stronger application of the *lex terræ* than appears reconcileable with the argument on the other side. But all the authorities relating to warrants of magistrates become unimportant, when it is admitted that warrants of the House of Commons stand on the same footing as process of the Superior Courts. (Petersdorff denied that he had meant to make any absolute admission to this effect.) The authorities before cited establish the point, and refute the doctrine, laid down in the Court of Queen's Bench, that warrants of the House of Commons are to be tried by the same rule of construction as those of a justice of peace, or rather that, in proportion as the Court is higher in rank, the construction ought to be more strict. [Alderson B. The rule as to construction depends on the extent of jurisdiction rather than on the dignity of the Court. The jurisdiction of a justice of peace is limited, and contrary to the common law; and therefore it is necessary to see, on the face of his pro-[442]-ceeding, that he has not gone beyond his jurisdiction.] *Primâ facie* an Inferior Court has not jurisdiction; a superior has; though there may be a Superior Court which has not jurisdiction over the whole kingdom. [Parke B. referred to *Peacock v. Bell* (1 Saund. 73).] The distinction between a Superior Court and a Court of limited and statutory jurisdiction was discussed and recognized in *Harrison v. Wright* (13 M. & W. 816, 818). And the opinion of Coleridge J. in the present case, as to the necessity of setting forth a cause in the warrant of the House of Commons, is at variance with the language of the same learned Judge in *Stockdale v. Hansard* (c).

Lord Denman C.J. admits, in the present case, that the House may order a person to be brought before them for examination compulsorily, and without apprising him of the reason; because delay might, in some cases, wholly defeat the privilege of inquiry. But, according to the argument on the other side, if the House were inquiring into a treasonable conspiracy, and wished to secure the attendance of a witness who, on being informed of the object, would abscond, they might indeed issue a warrant to bring him before them, not stating the cause; but, on *habeas corpus*, the cause must be returned, and so the purposes of the investigation be defeated. [Petersdorff. It should at least appear by the warrant that the party was to attend for the purpose of being examined. Parke B. Do you say that a warrant so stating would be sufficient? Petersdorff. It would be free from one objection. But it [443] ought to shew that the party will not come voluntarily, and therefore is to be brought before the House in custody. Parke B. Would it, then, be enough to say "Whereas it appears to the House that the witness will not come voluntarily, and therefore must be brought in custody?" Petersdorff. It would not, because they cannot send for him in custody in the first instance. It must appear by the warrant that he has already been sent for, and absconded or refused to attend, and so is in contempt.] That would be a circuitous mode of effecting the purpose, and very likely to defeat it. And in the judgment of Coleridge J. it seems admitted that such a course was not necessary.

Supposing that the warrant here were process of the more usual kind issuing from one of the Superior Courts of Record, it is clear that, whether it were merely irregular, but not set aside, or were an excess of jurisdiction, no action would lie against the officer for executing it; unless indeed the proceeding had been taken under a mere statutory power, which had been exceeded. If a writ of right were brought by a subject in the Queen's Bench, the officer would not be liable for executing the process. That is the distinction between Superior and Inferior Courts: in the one the officer is bound to execute the process without enquiry, and, in doing so, has the same

(g) 2 Cowp. 512. See *Rex v. Watts*, 1 B. & Ad. 166, as to the writs of assistance.

(c) The Attorney-General read 9 A. & E. pp. 228, 229, from "Although in the case," to "competent jurisdiction."

immunity as a Judge of the Court: in the other, if he puts in force that which the Court has no authority to order, it is at his peril. *Riddell v. Pakeman* (2 Cro. M. & R. 30; 5 Tyr. 721), is an instance of the exemption where irregular proceedings had been taken in a Superior Court, and never set aside: the law as to cases before Inferior Courts, or justices of the peace, is laid down by Tin-[444]-dal C.J. in *Morrell v. Martin* (3 M. & G. 581, 582-597). In the former case the action was brought in the Court from which the irregular process had issued: but it cannot be supposed that the rule would have been different if the plaintiff had gone to another Court. [Maule J. On the contrary, another Court would probably have said that they did not know what was irregular in the Exchequer.] In an Ecclesiastical Court, no action lies against the Judge for excommunicating improperly, if he has acted within his jurisdiction; *Ackerley v. Parkinson* (3 M. & S. 411): otherwise if he has exceeded the jurisdiction; *Beaurain v. Scott* (3 Campb. 388); and the same law would apply in each case to the officer. This point, as to the responsibility of officers required to execute process, is made clear by *The Countess of Rutland's case* (6 Rep. 52 b., 54 a.). *Andrews v. Marris* (1 Q. B. 3), and the authorities there cited, *Carratt v. Morley* (1 Q. B. 18), *Draper v. Blaney* (2 Saund. 193), *Parsons v. Lloyd* (2 W. Bl. 845; 3 Wils. 341), and *Grant v. Bagge* (3 East, 128, 140). In all such cases, where the exemption of the officer has been recognised, it would be idle if the action, not lying in the Court from which the process issued, might be brought in another. Where, indeed, the Superior Courts are exercising a power created by Act of Parliament, stricter rules prevail; as in the case of orders by the Lord Chancellor or Court of Review under stat. 6 G. 4, c. 16; *Muskett v. Drummond* (10 B. & C. 153), which case was acted upon in *Christie v. Unwin* (11 A. & E. 373); *Brancker v. Molyneux* (4 Man. & G. 226). [Parke B. There is a mis-[445]-take in the report of *Christie v. Unwin* (a), in 11 Adolphus and Ellis; the order was not made by the Lord Chancellor, but by the Court of Review. But perhaps it is not important whether such an order was issued by the Lord Chancellor exercising a special statutory power given to himself, or by a Court made a Court by statute for specified purposes (b). In *Harrison v. Wright* (13 M. & W. 816), the objection, that a Judge of the Court of Exchequer had exceeded a statutory jurisdiction, was got over by the consent which parties had given to his order.] The distinction between statutory and common law jurisdiction seems contemplated by Lord Ellenborough in *Burdett v. Abbot* (14 East, 64), when he puts the case of an application to the Court to discharge on process void on the face of it: "As suppose the defect in the process were in a matter required by positive statute, of which all the Courts must take cognizance."

As to the cases cited to shew that a Superior Court will judge of the process issuing from another Court: in the case of *The Marshalsea* (10 Rep. 68 b.), the process came from an Inferior Court. *Prigg v. Adams* (2 Salk. 674), decided only, on the construction of a statute establishing a local Court, that the judgment of a Superior Court contrary to the statute was not void, but voidable by plea of error. In an Inferior Court this would have [446] been otherwise; the case, therefore, if relevant at all, is an authority for the plaintiff in error. In *Barker v. Braham* (3 Wils. 368), the ca. sa. from the Queen's Bench had been set aside by that Court before the action of trespass was brought in the Common Pleas. In *Bryant v. Clutton* (1 M. & W. 408; Tyr. & G. 843), the process of the King's Bench had not been brought into question when the cause was stopped; the only decision was that that had been done prematurely on a supposition that the individual defendant could not be liable in trespass. The attachment there appears to have been at an end before the action was brought. These authorities, therefore, do not shake the proposition that, where process of a Superior Court is still subsisting, whether such process be irregular or void, the officer executing it is protected. And, if the analogy between warrants from the House of Commons and process from the other Superior Courts is undeniable, the warrant here protects the plaintiff in error.

(a) 11 A. & E. 373. The reporters have referred to their note of the argument and judgments, and find that the inaccuracy pointed out in the text occurred as it appears in their work: they regret that it should have been retained, both in their report of the discussion and in their statement of the case.

(b) Stat. 1 & 2 W. 4, c. 56. See, as to the order in *Christie v. Unwin*, *Ex parte Hall*, 1 Mont. Deac. & De Gex, 217, and Mr. Deacon's note, p. 219 (b).

If the warrant of a House of Parliament is not to be tried by the same rules as the process of an Inferior Court or the warrant of a justice, no ground is shewn for requiring a direct adjudication of contempt. In the case of *The Earl of Shaftesbury* (6 How. St. Tr. 1271; 1 Mod. 144), the words "for high contempts committed against this House" did not amount to an adjudication; and the warrant there is admitted on the other side to have been sufficient. It appears from *Green v. Elgie* (5 Q. B. 99), that a warrant in the like form from an Inferior Court would have been held defective. If the Houses do adjudge a specified act to be a contempt, this Court will not, on their own view of the Act stated, question its being so; *Regina v. Paty* (2 Ld. Ray. 1105); [447] and this seems to be in effect admitted in the judgments of Patteson J. and Coleridge J. in *Stockdale v. Hansard* (9 A. & E. 195, 228). The warrant in *Rex v. Hobhouse* (2 Chitt. Rep. 207), recited a contempt, but did not (if construed with the strictness required on the other side) profess to commit for a contempt. All the authorities shew that warrants of the Houses of Parliament, if not tried by more lax rules than are applicable to process of the other Superior Courts, are at least not subject to the tests which have been proposed. It may, indeed, be contended, here, that an adjudication does appear on the face of the warrant: for it was admitted by the Court of Queen's Bench in the present case, and not denied in *Stockdale v. Hansard* (9 A. & E. 1), that the House of Commons, as a Court of Inquiry, may compel the attendance of parties whom they wish to examine, and the warrant, as pleaded here, recites their order "that the plaintiff should be sent for."

As to the question whether or not the warrant justifies all the trespasses: it is true that the Speaker does not expressly order the plaintiff to be brought before the House; but the object with which the warrant issues is clear, from the context; and, in common sense, there can be no doubt that "sent for," in the recital, means that the party is to be brought before the House, and the necessary acts done for that purpose. [Parke B. There was not a majority of the Court with my brother Wightman on this point.]

Cur. adv. vult.

Parke B., in this vacation (February 2d), delivered the judgment of the Court.

[448] This case was argued very ably and elaborately at the sittings of this Court of Error after Trinity and Michaelmas term last. During the interval between the two sittings we have lost our deeply lamented chief, the Lord Chief Justice Tindal; and, if the surviving members of this Court had had any difference of opinion upon the judgment which they ought to pronounce, they would certainly have desired the attendance of the other Judges who now compose the Court, upon a second argument of this important case. But, my brothers Alderson, Coltman, Maule, Rolfe, Cresswell and myself, who heard the whole argument, agreeing entirely in opinion, we have thought it unnecessary to require that assistance.

Upon the argument, every case bearing upon the question under consideration, or relating to the powers and privileges of Parliament, was brought before us and commented upon. We deem it right to abstain from giving an opinion upon some of the questions as to the privileges of the House which were discussed by the learned counsel, because our judgment in no way depends upon them. We need not, therefore, decide whether the House of Commons is the sole judge of its own privileges not merely when it is adjudicating on their alleged violation but in all cases, so that whatever it commands must be deemed to be in conformity to them, and the mere order of the House under all circumstances is a sufficient justification precluding all inquiry into its legality by any ordinary Court: because we find that the privileges involved in this case are not in the least doubtful, and the warrant of the Speaker is, in our opinion, valid, so as to be a protection to the officer of the House, upon a principle which, as it applies to the [449] process and officers of every Superior Court, must surely be applicable to those of the High Court of Parliament and each branch of it.

The question arises upon a writ of error after a judgment on demurrer to pleas in an action of trespass: and all we have to determine is whether those pleas, or any, and which, of them, are a good answer to the declaration of the plaintiff below, complaining of a trespass. In order to do so, we must decide whether the defendant was justified or not in doing the act complained of by the authority relied on in the pleas, and consequently whether that authority was sufficient in point of law.

The trespass alleged is an assault on the plaintiff, the carrying him along a passage to a room, and then along another passage to another room, and detaining him there.

The first and second pleas do not differ from each other in any respect necessary to be noticed. They both state that certain matters came on to be discussed and debated in the House of Commons; that it was considered by that House to be necessary that the plaintiff should be questioned and examined at the Bar of the House touching these matters; that an order of the House was made that he should attend the House forthwith, of which order he had notice; that he wilfully and contemptuously refused to obey the order, and concealed himself for the purpose of avoiding attendance on the House; and thereupon, in order to compel the attendance of the plaintiff at the Bar of the House to be questioned on those matters, it was ordered and resolved by the House that the plaintiff should be sent for and brought before the House in the custody of the serjeants at arms, and that the Speaker should issue his warrant [450] accordingly: that the Speaker did issue his warrant accordingly: by which warrant, after reciting therein that the House of Commons had that day ordered that the plaintiff should be sent for in the custody of the serjeant at arms, he required and authorised the serjeant at arms to take into custody the body of the plaintiff: and the defendant then proceeds to justify, as serjeant at arms, all the trespasses complained of, including the detaining of the plaintiff until he could bring him before the house.

The third plea states that it was ordered by the House that the plaintiff should attend the House to answer a charge against him of a breach and contempt of privilege; of which order he had notice; that he did not attend, but wilfully and contemptuously and without reasonable cause disregarded the order, and concealed and secreted himself; and thereupon an order and warrant, similar to those in the first and second pleas, were made, under which there is a similar justification.

The fourth plea states an order to attend (without assigning the cause of the order), and a wilful disobedience of the order and warrant as before.

Upon the argument of the demurrer to these pleas, the Court of Queen's Bench were divided: but judgment was given by the majority for the plaintiff; and that on the ground of a defect in the warrant: and the question which we have to decide is the same, whether the warrant was defective or not.

For it cannot be disputed that the House of Commons has by law the particular powers to take into custody which in the three first pleas it is expressly averred to have exercised; and we have nothing to do with any other. First, that House, which forms the [451] Great Inquest of the Nation (4 Inst. p. 11), has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not inquire), bring them in custody to the Bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the Bar to answer the charge: and, further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised. These are the only questions of privilege involved in this inquiry independently of the form of the warrant.

The first of these two propositions was rightly admitted in the judgments, in this case, of Lord Denman and my brother Coleridge, as well as in that of my brother Williams in this case, and was not disputed by my brother Wightman, nor at the Bar on the argument of this case (see also *Stockdale v. Hansard* (9 A. & E. 115)): and the second is equally clear; for it belongs at least to every Superior Court.

The question therefore turns upon the form of the warrant alone. If it be good, and if it authorised all that is alleged to have been done by virtue of it, the defendant was justified: if it were bad, or if it did not authorise all that the defendant did, he was not justified; for it was admitted, and properly so, on the part of the defendant, that he could not justify under the order of [452] the House independently of the warrant, because the order authorised no particular person to take the plaintiff. To connect the defendant with the order, a warrant to him was necessary.

The answer to the question as to the validity of the warrant depends mainly upon a preliminary point: on what principle is the instrument to be construed? Is it to be examined with the strictness with which we look at the warrants of magistrates

or others acting by special statutory authority and out of the course of the common law, or is it to be regarded as the mandate or writ of a Superior Court acting according to the course of the common law?

The Judges who composed the majority of the Court of Queen's Bench seem all to have thought that the Speaker's warrant was to be strictly construed; and Lord Denman and my brother Coleridge appear to have assimilated it to the warrant or commitment of a justice of the peace, and applied the same rules of construction to which such an instrument is always subjected. All these three Judges held it to be void, because it did not shew a sufficient authority on the face of it to justify the defendant in all he admitted to have done, though they did not agree in the nature of the defect. If this had been the case of a magistrate acting under some statute which gave him a special authority to take a man into custody under the same circumstances as are stated in the three first pleas, we should no doubt have agreed with those learned Judges that a warrant in a similar form would have been void, those circumstances not appearing upon the face of it; for, in the case of special authorities given by statute to justices or others acting out of the ordinary course of [453] the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to shew their authority on the face of them by direct averment or reasonable intendment. Not so the process of Superior Courts acting by the authority of the common law. In the argument of the case of *Peacock v. Bell* (1 Saund. 74), the rule as to pleading is well expressed thus: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so;" "nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged:" and therefore the majority of the Court held that, the Courts of Counties Palatine being Superior Courts, the record in those Courts need not state the cause of action to have arisen within the jurisdiction. In like manner it is presumed, with respect to such writs as are actually issued by Superior Courts, that they are duly issued, and in a case in which they have jurisdiction, unless the contrary appears on the face of them; as it would, for instance, if a writ of *capias* for a criminal matter issued from the Common Pleas, or a writ in a real action (before the abolition of such remedies) from the King's Bench, or a real action, not in the Crown's case, in the Exchequer: in all which cases the want of jurisdiction would appear. But writs issued by a Superior Court, not appearing to be out of the scope of their jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid [454] acting under them; and that although they be on the face of them irregular, as a *capias* against a peeress (*Countess of Rutland's case* (6 Rep. 54 a.); or void in form, as a *capias ad respondendum* not returnable the next term, *Parsons v. Loyd* (3 Wils. 341); for the officers ought not to examine the judicial act of the Court whose servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it; *Turner v. Felgate* (1 Lev. 95), *Cotes v. Michill* (3 Lev. 20). Many of the writs issued by Superior Courts do upon the face of them recite the cause of their issuing and shew their legality: writs of execution for instance: others however do not, and, though unquestionably valid, are framed in a form which, if they had proceeded from magistrates or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient and rendered them altogether void. A *capias ad respondendum*, for example, issued before the recent statute 1 & 2 Vict. c. 110, states no original writ, no affidavit of debt, nor any plea commenced before the *capias* issued; and it is still unquestionably valid: yet, if, instead of being issued by a Superior Court, it had proceeded from an individual who had a special limited power by a statute, after an original writ from Chancery directed to him, or after a suit instituted and affidavit of debt, to command another to be arrested, a warrant in this form would have been as clearly bad. So the forms of writs of attachment from the Superior Courts do not state the previous steps, of a charge of contempt, the rule of Court that it should issue, or the nature of the con-[455]-tempt. That issued from the Common Pleas (not against officers of the Court merely, but against individuals) is simply to order the sheriff to bring the party into Court on a certain day to answer to Her Majesty of and concerning those things which on her behalf shall then and there be objected against him. There is no recital of any previous proceeding, no statement of the nature of the charge, none of the adjudi-

cation of the Court that it ought to be answered; yet this writ is as unquestionably good as it would have been unquestionably bad had it been issued by a magistrate or other individual who had a special jurisdiction to punish for such offences as would constitute a contempt of Court or any other particular offence. It appears, indeed, that, if a writ of a Superior Court expressed no cause at all, it would be legal, and the defendant not bailable, according to what Lord Coke says in *The Brewers' case* (1 Rol. Rep. 134). It was a mistake to assert, as was done at the Bar, that an adjudication of a contempt was a necessary part of every committal for a contempt, and that an attachment would be invalid without it. It is not so in the Superior Courts of Common Law, as has been before stated, nor in the Court of Chancery, as Lord Lyndhurst has lately decided; *Ex parte Van Sandau* (1 Phillips, 445, 605).

The proceedings of the House of Commons in the two cases stated in the pleadings, in each of which it is acting for itself and enforcing its own lawful authority, bear a close analogy to cases of contempt in which the Superior Courts in Westminster Hall are acting for themselves and are enforcing theirs. If, in these Courts, the [456] writ of attachment need not state any special grounds in order to shew that the Court is acting duly, formally and regularly, what good reason can be assigned for requiring the House of Commons to do so? If the writ of attachment in the general form used is a protection to the sheriff, the officer of the Court executing it (as it undoubtedly is), and he need state nothing in his plea but the issuing of the attachment (*Levinz's Entries*, p. 191 (*Osborne v. Brookhouse*), *Britton v. Cole* (1 Salk. 408), *Com. Dig. Pleader* (3 M, 24)), why should not the warrant of the Speaker in a general form be equally a protection to the serjeant at arms, the proper officer of the House? We are clearly of opinion that at least as much respect is to be shewn, and as much authority to be attributed, to these mandates of the House as to those of the highest Courts in the country; and, if the officers of the ordinary Courts are bound to obey the process delivered to them, and are therefore protected by it, the officer of the House of Commons is as much bound and equally protected. The House of Commons is a part of the High Court of Parliament, which is without question not merely a Superior but the Supreme Court in this country, and higher than the ordinary Courts of Law; Lord Camden in *Entick v. Carrington* (19 How. St. Tr. 1047). And, if we give credit to the Courts of Common Law that they will not issue writs of attachment except in due course and in accordance with the powers which the law gives them, and that notwithstanding the possible abuse of the liberty of the subject to which this principle may give rise by enabling a Court to imprison for any cause, why should we not equally give credit to both branches [457] of the High Court of Parliament that they also will duly execute their powers in obedience to the law from which they derive them, and to which, in common with all other Courts, they are subject, though this course may also possibly lead to the same consequence, the abuse of the liberty of the subject by their imprisoning any one at their mere will and pleasure? The possibility of abuse, which is urged as an objection to the power of either House to issue its mandate in such a form, is no valid argument against its existence. If it were, it would apply equally to all the Superior Courts, which without doubt have such power; and it would apply also to the other admitted legal powers of these Courts, which may be abused without adequate remedy. In case of an improper exercise of the power of attachment by a Court of Law or Equity, or by either branch of the High Court of Parliament, there can be no appeal: the only remedy is by application to the sense of justice of each Court: and it would be improper to suppose that any one of them would be more likely to abuse the power, or less likely to grant redress, than another.

That the rule which we have stated does prevail with respect to the proceedings of the High Court of Parliament is proved by numerous authorities. Mr. Justice Powys, in *Regina v. Paty* (2 Ld. Ray. 1108), says that "the House of Commons is a great Court, and all things done by them are intended to have been *ritè acta*, and the matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of Court of two lines, and such commitments are held [458] good, because it is to be intended, that we understand what we do." Mr. Justice Blackstone says, in *Brass Crosby's case* (3 Wils. 205): "Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law." And Hawkins sums up the

authority thus: "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those Houses, and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice:" 3 Hawk. P. C. 219, b. 2, c. 15, s. 73. Citations may be multiplied to the same effect. Sir T. Jones in *Lord Shaftesbury's case* (6 How. St. Tr. 1296): "The course of all Courts ought to be considered, for that is the law of the Court," "and it has not been affirmed, that the usage of the House of Lords has used to express the matter more particularly on commitments for contempts, and therefore I shall take it to be according to the course of Parliament." Gould J. in *Regina v. Paty* (2 Ld. Ray. 1106): "A commitment of the House of Commons, which is superior to this Court," "is not reversible for form." Lord Tenterden, in *Rex v. Hobhouse* (2 Chit. Rep. 210), says: "We cannot enquire into the form of the commitment, even supposing it is open to objection on the ground of informality."

If, then, we construe the warrant of the Speaker with only the same respect that we should shew to a writ out of any of the Courts of Westminster, we clearly [459] think we ought to hold it to be valid. From the three first pleas we know that in fact it issued in a matter in which the House had clearly jurisdiction, and that it properly issued; and in its form there is nothing to shew the contrary. The matter in the fourth plea, though it does not shew affirmatively that it did issue in a matter within their jurisdiction, does not shew the contrary: and, as the order is within the scope of their general jurisdiction, we cannot say that it was unduly made. The House had an undoubted right to order the plaintiff into custody, and to have him brought to the Bar, and had also as much right over its own forms as any other Court has. It must be presumed that this is the right form, being that which it has chosen to adopt: and, if we inform ourselves by consulting precedents, we know that it is in a form not improper; for there are many in a form as general with respect to the recital, and some equally so as to the mandatory part; printed Report of the Committee of Privilege in *Howard v. Gosset*, 99, 101, 103, 104, 105, 115 (a).

For these reasons we think that the warrant was valid. And the difference between the opinion of this Court and that of the majority of the Queen's Bench is only this: that they construe the warrant as they would that of a magistrate, we construe it as a writ from a Superior Court. The authorities relied upon by them relate to the warrants and commitments of magistrates; they do not apply to the writs and mandates of Superior [460] Courts, still less to those of either branch of the High Court of Parliament.

One question only remains: Was the warrant such as to authorise all the trespasses complained of? It appears to us that we ought to read the mandatory part in connexion with the recital: and, so reading it, it seems to us clear that it authorises the defendant to do that which the recited order commanded: viz., not merely to take the plaintiff, but to bring him to the Bar. In this respect both my late brother Williams and my brother Coleridge, and we think rightly, differed from Lord Denman and my brother Wightman.

We agree therefore with my late brother Williams, and consider this warrant as valid; and are of opinion also that the defendant was justified by it in all which he did.

And for these reasons we think that the judgment of the Court of Queen's Bench on all the pleas ought to be reversed.

Judgment reversed.

End of Hilary vacation.

(a) Second report from "the Select Committee appointed to enquire into the proceedings of the action of *Howard v. Gosset*, and to report their observations and opinions thereon to the House." Dated 20th June 1845. Appendix, Nos. 4, 5.

[461] CASES ARGUED AND DETERMINED IN THE QUEEN'S BENCH, IN EASTER TERM AND VACATION, X. VICTORIA.

The Judges who usually sat in Banc in this term and vacation were, Lord Denman C.J., Patteson J., Wightman J., Erle J.

PEMBERTON, Clerk, *against* COLLS, Clerk. Thursday, April 15th, 1847. Case for slander of a clergyman. 1st count, stating words spoken of plaintiff in his profession as follows (with innuendoes, and an inducement stating only that plaintiff was vicar of a church, and defendant a clergyman, and that plaintiff had always conducted himself well in his profession): "The very day I came into residence, Dr. P." (plaintiff) "sent for me: I went and dined with him; and the wine must have been drugged; for I took but two glasses, and was quite stupified. While in this condition, Dr. P. put a bill into my hands, and requested me to sign it, saying, 'I wish to have it as a security for the payment of 130l. per annum for reading for you at the new church.' I answered, 'Well, give me a pen and I will sign it.' Immediately I had signed it, Dr. P. snatched it up, and, laughing, said, 'This will be quite safe.' The bill, I think, was drawn for 2500l. or 2600l.: but, having been stupified with the wine, I do not rightly remember." "You cannot suppose that I can visit a man who so cheated me at my first coming." Innuendo, that plaintiff fraudulently obtained the bill from defendant while he was stupified with drugged wine. 2d count, stating words spoken of plaintiff in his profession (with innuendoes, but no further material inducement) as follows: "Dr. P. placed before me a bill. I signed: I do not know for what amount it was, whether for 2000l. or 3000l.; for I was completely pigeoned by Dr. P.:" innuendo, that plaintiff had obtained the bill from defendant by fraud. Special damage, that plaintiff's curate believed him guilty of the misconduct, and, by reason thereof, was prevented from cordially and effectually assisting plaintiff in the clerical duties and spiritual concerns of the parish. On motion in arrest of judgment, after verdict for plaintiff, Held: that the 1st count was good, because the words there set forth reflected upon the plaintiff in his profession. That the 2d count was bad, because the words there did not so reflect. *Venire de novo* awarded.

[S. C. 16 L. J. Q. B. 403; 11 Jur. 1011.]

Case. The first count of the declaration stated that, before and at the time of the committing, &c., plaintiff had been and was a clergyman of the United [462] Church of England and Ireland as by law established, in holy orders, and then was the vicar of the vicarage of Wandsworth in the diocese of Winchester in England: that plaintiff has always conducted himself in his said function and character of a clergyman with piety, honesty and morality: that defendant was also a clergyman of the United Church, &c.: yet defendant, well knowing the premises, but contriving, &c., to injure plaintiff and also the character of the plaintiff, and to degrade him in his said character of a clergyman, heretofore, and after the passing of a certain statute made, &c. (3 & 4 Vict. c. 86), intituled "An Act for better Enforcing Church Discipline," to wit on, &c., in a certain discourse which defendant then had with one George William Cockerell and divers other good and worthy subjects, &c. of and concerning plaintiff and of and concerning him in his said profession of a clergyman, and relating to himself the defendant, in the presence and hearing of the said G. W. C., falsely and maliciously spoke and published of and concerning plaintiff the several false, scandalous, malicious and defamatory words following of and concerning plaintiff, and of and concerning him in his said profession of a clergyman of the said United Church, and relating to himself, the said defendant: viz. "The very day I" (meaning defendant) "came into residence, Dr. Pemberton" (meaning plaintiff) "sent for me" (meaning defendant): "I" (meaning defendant) "went and [463] dined with him" (meaning plaintiff); "and the wine must have been drugged; for I" (meaning defendant) "took but two glasses, and was quite stupified. While in this condition, Dr. Pemberton" (meaning plaintiff) "put a bill into my hands, and requested me" (meaning defendant) "to sign it, saying, 'Colls'" (meaning defendant), "'just put your name to this; I wish to have it as a security for the payment of 130l. per annum for reading for you at the new

TAB 2

McNab v. Bidwell and Baldwin

Ontario Judgments

Upper Canada Court of King's Bench

Robinson C.J., Sherwood and Macaulay JJ.

1830.

[1830] O.J. No. 23 | Dra. 144

(15 paras.)

Case Summary

The House of Assembly in this province have a constitutional right to call persons before them for the purpose of obtaining information, and if the House adjudge the conduct of such persons, in answering or refusing to answer before a select committee to be a contempt, they have the right of imprisoning them.

1 TRESPASS and false imprisonment against the Speaker and another member of the House of Assembly. The Speaker pleaded that he was a member of the House of Assembly in this province, and Speaker of that House at the time when, &c. That the Assembly being then in session it was by them resolved that the present plaintiff, "having refused to answer questions put to him by the select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by force, with power to send for persons and papers, and otherwise misdemeaning himself before the said committee, had been guilty of a high contempt and breach of the privileges of the House of Assembly;" and that it was therefore further resolved and ordered by the said Assembly "that the Speaker should issue his warrant, directed to the Sergeant at Arms or his deputy, to apprehend the present plaintiff forthwith, and bring him to the bar of the said House on Monday then next to answer for such contempt and breach of privilege." That the defendant as Speaker did issue his warrant in pursuance of these resolutions, particularly reciting the proceedings of the Assembly on which it was grounded, and requiring the Sergeant at Arms to apprehend the plaintiff forthwith and bring him to the bar of the House of Assembly on a day therein named to answer for such contempt and breach of privilege. That upon this warrant the plaintiff was [Dra Page145] apprehended and brought to the bar of the House of Assembly; that the resolutions of the Assembly were there read to him, and he having been heard in his defence before the said House of Assembly respecting his said contempt and breach of privilege, it was by the Assembly resolved and ordered that for his said contempt and breach of privilege he should be committed to the common gaol of the Home District during the pleasure of the House, and that the Speaker should issue his warrant to the Sergeant at Arms or his deputy, and to the sheriff or gaoler of the Home District, requiring the Sergeant at Arms to take the plaintiff to the said gaol, and the sheriff or gaoler to receive him and keep him in custody during the pleasure of the House. That the defendant as Speaker

McNab v. Bidwell and Baldwin

did, while the House was still in session, make his warrant in pursuance of this resolution, which warrant, before being signed by him, was read to and approved by the House - the warrant is then set out, containing a precise recital of the proceedings on which it is founded, and being exactly in accordance with the resolutions of the House. The defendant further states that upon that warrant the plaintiff was apprehended by the Sergeant at Arms and delivered into the custody of the sheriff of the Home District, who received him and detained him during the pleasure of the House of Assembly, from the 16th February to the 3rd March in the same year, in obedience to the resolution, order, and warrant last mentioned, and that during all the time mentioned the parliament was still sitting. The other defendant (Mr. Baldwin) pleaded specially relying on the same facts and privileges, and setting forth that he was a member [Dra Page146] of the Assembly, and sitting and acting as such, and in that capacity assented to the resolutions ordering the warrants for the plaintiff's apprehension and commitment for contempt after plaintiff had been heard in his defence at the bar of the House and adjudged guilty of the contempt.

2 To these pleas the plaintiffs demurred generally.

3 This case was argued last term at great length, and very ably by the Attorney-General for the plaintiff, and Rolph for the defendants. The judgment of the court, however, embraces every matter of importance which was raised and discussed, and was this day given.

ROBINSON C.J.

4 As a mere legal question, the point in this case seems to me to be so free from difficulty that it is unnecessary to labour it, and I shall not consider it in its several branches with that minuteness which would be proper if I entertained doubts on the subject. Whether in any particular case that may be under discussion in the House of Assembly it may be expedient or just to dispose of it there, and those opinions may proceed upon considerations which the members of that body and they only can entertain. But whether the Assembly, as a branch of the legislature of this province, have power to commit for a contempt in a case like the present is altogether a different question, and when it comes for decision here it must be decided on strict legal principles, and wholly apart from all other considerations. The justification in this case would have been more strictly formal [Dra Page147] if it had given to the legislature of this province, and to that branch of it whose powers are in question, the precise designations assigned by the British statutes which create them. The term "parliament," regarding merely the import of the word, may perhaps be correctly applied in reference to the nature and functions of our legislature, as it is certainly applied to councils of far inferior importance, and it is certain that the term has grown into use in this province, and has the direct sanction of many of the acts of our legislature, but it would have been more technically proper I think on such an occasion as the present to have preserved the precise names assigned to our legislature and its several branches in our written constitution - and in calling the resolutions of the Assembly, which is but one branch of the legislature, the resolutions of parliament, as is done in one of the special pleas, there is certainly an inaccuracy which would have been better avoided. The substantial defence, however, is before the court on this general demurrer, and it is upon general principles of the law and constitution that the question has been argued. If in consequence of a similar commitment by the House of Commons an action of trespass against the Speaker and a member of that House were depending in the Court of King's Bench in England, it cannot now be doubted for a

moment that it would not and could not be sustained. Many authorities have settled that point conclusively, and whether the right to commit for such a contempt should be questioned upon the return of a habeas corpus, or as in the present case in an action of trespass, it is certain that the Court of King's Bench would disclaim the power either to [Dra Page148] discharge the prisoner or to examine into the particulars of the alleged contempt with the view of affording the party a remedy by action for his imprisonment. They would decidedly hold that for a contempt offered to the House in session the offending party might be committed by order of the House. I cannot imagine that any distinction would be drawn between a contempt alleged to have been offered to a committee of the House or a contempt offered to the House in a body, and I am convinced that when the House had resolved that refusing to answer questions proposed by a committee was a contempt of the House and a breach of their privileges, the Court of King's Bench would not question the propriety of that decision. It is equally clear that no exception would be considered to lie to the warrant of the commitment on account of the general nature of the charge, "that the party had otherwise misdemeaned himself before the committee." On the contrary, the court would disclaim, as they have always disclaimed, the power of enquiry into the particulars of the contempt - *Ld. Raym. 1105, 1 Mod. 158*. They would therefore hold it needless to specify a matter into which they could not examine, and as the charge that the party had "otherwise misdemeaned himself before the committee of the House" might include contempt of a very flagrant description, they would rather think it reasonable to infer that some such contempt had been committed than to presume that the House of Commons had gravely imputed an offence where none existed. The cases in *3 Wile. 190*, and *14 Ea. 1*, are most explicit and conclusive upon these points, and the judgment of Mr. J. Bailey in the last case shews in [Dra Page149] very clear and strong terms how contrary it would be thought in England to reason and to law that under such circumstances as are stated in this record the Speaker, who simply carried into effect the resolution of the House, and much more an individual member who merely voted upon it, should be held responsible as trespassers. It is unnecessary here to reason upon the decisions adverted to or the cases which are cited in them; they establish nothing new with respect to the doctrines of contempt, either as applied to the House of Commons or the courts of justice, but the elaborate judgments of the court, and particularly of Lord Ellenborough, in *14 Ea.*, are so full, and to my mind so satisfactory, that, notwithstanding the apparent danger of entrusting to any tribunal the power which is the subject of discussion in these cases, the arguments proving its necessity seem to me unanswerable in every point of view.

5 We are then driven to the question, whether there is in the jurisdiction and constitution of this court, or in the nature and powers of the House of Assembly in this province, a sufficient reason for concluding that in a case like the present a control which in England the Court of King's Bench cannot exercise over the acts of the House of Commons, ought to be exercised by this court over the House of Assembly. Perhaps in favour of personal liberty, and considering the right to its enjoyment as a natural right only to be abridged when the authority is manifest, the question ought rather to be reversed, and we should be held first to satisfy ourselves that the power exists to control this natural right. The terms of the question, however, are immaterial, [Dra Page150] since the investigation must be the same. In a case then of contempt so clearly and directly alleged on the pleadings and resolved by the House, I cannot see upon what sound principle the power of the Assembly can be denied. If it were admitted that in England the authority of the House of Commons to commit has, when questioned, been sustained by the courts upon the ground of precedent and usage only, still it is material to consider that this usage must have had a beginning, and

that in the first instance we must suppose the power to have been assumed and acquiesced in from a conviction that upon principle it might and ought to be exercised. Although the precise era at which the House of Commons began to exist as a separate branch of the great council of the nation is still a disputed point among historians and antiquaries, still a period is assigned by very general consent, which was long subsequent to the regular organization of the great Common Law Court of the Kingdom, and they must therefore have begun to exercise this power at a time when there was a tribunal to control them, if such control could in the nature of things come within the jurisdiction of that tribunal. But the power of the House of Commons to commit for a contempt has not been taken to rest wholly or even mainly on the ground of precedent and immemorial usage, and upon the imagination, or fiction built upon it, that an act conferring such a power must be presumed to have been passed, though the record can no longer be found. If it did in England rest on this ground exclusively, then it seems to me that in order to vindicate the assumption of such an authority by the Assembly here it would be necessary [Dra Page151] to rest the argument upon an adoption "of the laws of England as the rule of decision in all matters of controversy relative to property and civil rights," and to reason thus - By the law of England the House of Commons, as one branch of parliament, may commit for contempt; therefore, as we have adopted the law of England, the House of Assembly of Upper Canada, as part of the legislature of Upper Canada, may legally exercise the same powers without reference to the principles upon which such powers are assumed. I am not prepared to say that upon that footing the argument can be maintained, and most of the objections that in this case were very forcibly urged against the existence of the authority have appeared to me to be applicable only upon the supposition that it is endeavoured to be maintained simply upon the fact that we have adopted the laws of England. But the question is to be taken up on broader grounds, and I think upon the most convincing authority. In 14 Ea. Ld. Ellenborough expressly declares his opinion, "That independently of any precedents or recognised practice on the subject, such a body as the House of Commons 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 authorised to remove any immediate obstructions of its own proceedings." Then if, a priori and independently of precedents, such a body as the House of Commons must be armed with an authority to commit for contempts, and thereby to remove any immediate [Dra Page152] obstructions to its proceedings, I think the same power for the same reasons must be admitted to reside in the House of Assembly here; for that Assembly represents all the people in this province; it has, in conjunction with the other branches of the legislature, power to bind the lives, liberties, and estates of all the inhabitants of this country.

6 Although the legislature of this colony is subordinate to the imperial parliament, it is the supreme power acting in this province; its legislative authority extends to the most important objects, and the instances in which it is restrained are, perhaps, not those of the greatest and most immediate consequence to the welfare of society. If a legislative body with such powers, and established for such purposes, had not also the power of giving effect to their consultations by protecting themselves from insults, and removing obstructions from their proceedings, I am not certain that more injury than good might not be found to result from the constitution conferred upon us, and I cannot satisfy myself upon any reasoning that it is not as important for us as the people of England that our legislature should not be compelled to make laws in the dark, and that they should have power to enquire before they come to decide. When it is considered that this particular branch of the legislature is elective, and that the

nature of its functions is such as occasionally and inevitably to raise up against its proceedings much excitement and opposition, and often much prejudice from various causes, it is obvious that it would soon become utterly helpless and contemptible if it had not the power of deterring persons from menace, [Dra Page153] defiance, and insult, by the exertion of such authority as is confided in all countries under our constitution to the common courts. if once, then, it be established that they may in such cases commit for contempt, then the law relating to all commitments for contempts necessarily applies, and according to a series of authorities necessarily restrains us from interfering in the present instance.

7 It has been contended that the contempt which is particularly specified, namely, the refusing to answer certain questions put by a select committee appointed to enquire into the Hamilton outrage, and the alleged threatened release of Francis Collins by force, could have been no contempt, inasmuch as the Assembly not having criminal jurisdiction or power to try or to enquire, were exercising functions that did not belong to them. Neither the premises nor the inference can, I think, be admitted. How can we possibly know that the outrage spoken of may not be conceived to have implicated the character of one of their own members so deeply that for the honour of the House it was necessary to relieve him from suspicion or to expel him as unworthy. Again, the outrage and the threatened violence spoken of may have been of a nature so serious as to demand strong legislative measures, and surely it would be a very imperfect constitution that should furnish those who have to act in such emergencies with no authority to acquire the necessary information. There is no occasion for examining here into the means of conducting an impeachment in this province; but suppose for a moment that no such means exist, if the united representatives cannot therefore bring a great public offender [Dra Page154] to justice in this province, there would seem to be very urgent occasion for their representing to the King or to the imperial parliament the necessity of a remedy from another quarter. In making such representations the assembly could not be said to be arrogating a criminal jurisdiction; and if it be admitted that such representations are within the scope of their functions, which all usage would shew them to be, then there is certainly a rational object for enquiry, and a necessity for a power to punish such contempts as would obstruct its exercise. We cannot divine, and we ought not to presume to conjecture, the specific object of such enquiry, much less can we entertain and act upon the presumption that because such a power might be abused it was therefore in this case intended to abuse it. It is said that courts newly created cannot prescribe, and can therefore have no other power than is expressed in their charter. The courts of Oyer and Terminer and General Quarter Sessions in this province have their power defined by no act of our legislature, and yet I doubt not that upon the principle of reason and necessity they must be allowed powers to preserve and enforce their authority.

8 Without discussing further the objections that have been or may be raised, I am on the whole of opinion that this action cannot be supported. I do not say that because the British House of Commons has the power, therefore under our adoption of the law of England the same power is vested in the House of Assembly as a body perfectly similar; but I consider the question in this way:- the fact that the House of Commons assumes and exercises the right shews that [Dra Page155] it is felt to be necessary in order to enable them to discharge their duties. I think the same necessity exists here, and from principle the same consequence in my opinion must follow such a necessity. It is plain that if upon this record this action could be sustained against one of these defendants no one could

venture hereafter to fill the situation of Speaker, and if it could be sustained against the other certainly there would be an end of independent exercise of the will and judgment upon constitutional questions by the members of that body.

9 Arguments were very ingeniously raised upon the possible abuses that might follow the recognition of the power exercised in this case by the Assembly, and some of them certainly were formidable in appearance at least; but every objection of this nature would equally be against the House of Commons. It is scarcely possible for such objections to be pushed to a greater length than they were by Sergeant Jephson in 3 Wils. 190; and they cannot receive a more satisfactory answer than is given to them in the judgments of Ld. C.J. De Grey and Blackstone J. The true point of view in which to regard the question is that these powers are required by the House in order to enable them to promote the welfare of their constituents; we are bound to suppose that they will use them with discretion and for good ends; and if we had the power we should have no right to withhold them on the assumption that they desire to pervert the objects of their constitution.

SHERWOOD J.

10 (After stating the case.) Upon these pleadings it becomes necessary to determine the following questions:- [Dra Page156] 1st. Had the House of Assembly a constitutional right to make the enquiry stated in the defendants' special pleas?

11 2nd. Had the House of Assembly a lawful right to imprison the plaintiff for refusing to answer the questions put to him by the special committee?

12 1st. The House of Assembly is a co-ordinate branch of the legislature established in this province by 31st Geo. III., c. 31. The legislature so established are authorised and empowered by that statute "to make laws for the peace, welfare, and good government of this province." It is my opinion that the right of enquiry for the purpose of enabling the legislature to exercise their constitutional functions is necessarily incident to both branches; for I do not see how they could join in making laws for the good government of the King's subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature. And the right of examination implies a right to compel the answering of all such questions as the law of the land will sanction. It does not appear by the pleadings what questions the plaintiff in this case refused to answer; but I think it must be presumed they were lawful. Proper respect should be shewn to the proceedings of both Houses, and they should always be considered as acting correctly and agreeably to the rules of law and natural justice, unless the contrary appear beyond a doubt.

13 2nd. I am of opinion that the enquiry alluded to [Dra Page157] was correctly made by the committee, because their acts when received and adopted by the House become the acts of the House itself. This I believe to be conformable to the ordinary course of parliamentary proceedings. As the right of enquiry implies the right of compelling answers, so, it seems to me, it implies the further right of punishing for contumacy or wilful prevarication. If it should at any time evidently appear, in the manner required by law, that the Legislative Council or House of

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Assembly had committed one of the King's subjects for some matter which could not with the least semblance of truth be considered a breach of privilege according to the established principles of our constitution and the laws of the land, courts of justice would do their duty and grant such relief as the law prescribes. I am of opinion that the House of Assembly had a right to punish the plaintiff for refusing to answer the questions put by the committee, and the only point, therefore, which remains to be discussed is whether they have exercised that right in a lawful manner.

14 It appears to me that a breach of privilege can in no instance be considered to amount to a higher offence than a misdemeanour, and consequently that it ought to be punished in the same way. There can be no good ground for asserting the existence of right in either House to impose or levy a fine; and the only mode therefore of punishing an individual, not a member of the House, which can lawfully be exercised, is that of imprisonment. Every court, from the highest to the lowest, possesses the power to imprison for contempts offered in the face of the [Dra Page158] court. Upon as full a consideration as I have been able to give this case, I am led to the conclusion that judgment should be entered for the defendants. [See Beaumont v. Barrett, 1 E.F. Moore 59; Keilly v. Carson, 4 Moo. P.C. 63; Fenton v. Hampton, 11 Moo. P.C. 347]

15 Per Curiam. - Judgment for defendants.

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TAB 3

QUEBEC COURT OF QUEEN'S BENCH—
APPEAL SIDE.

1875*

Feb. 17.

EX PARTE CLEMENT ARTHUR DANSEREAU.

[Reported 19 L. C. Jurist, 210.]

*Legislative Assembly of Quebec—Powers and Privileges of—
33 Vict. c. 5, Q.*

Provincial Legislatures have as incident to their express powers under the B. N. A. Act the right to summon witnesses and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation and the control assigned to them in respect of the administration of public affairs.

The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right, are valid.

Ramsay, J., dissenting.

The petitioner (Feb. 13) prayed for the issuing of a writ of *habeas corpus* addressed to Charles Garneau, Serjeant-at-Arms of the Provincial Legislature of Quebec, commanding him to bring the body of the petitioner, and for the setting aside of the warrant of arrest under which the petitioner was arrested, as being illegal.

The writ was ordered to issue, and counsel were heard thereon.

The reasons assigned on behalf of the petitioner were substantially the same as those urged in the case of *Cotte and Duvernay*,† which came before Mr. Justice Ramsay, a Judge of the Court of Queen's Bench, in Chambers, a few days previously.

*Present:—DOSSON, C. J., MONK, TASCHÉREAU, RAMSAY and SANBORN, JJ.

†In the above case, *Carter, Q.C.*, for the petitioners, submitted the following propositions:

1st. That the House of Assembly of Quebec does not possess the

power of arrest with a view to adjudication on a complaint of contempt committed out of doors.

2nd. That the power of the House of Commons in England was part

1875

EX PARTE
DANSEREAU.

STATEMENT.

The witness *Dansereau* was in the same position as *Cotte* and *Duvernay*, but as the Court was about to sit, the writ in his case was made returnable in term. The Court (Feb. 17) rendered judgment, sustaining the warrant and quashing the writ of *habeas corpus*.

RAMSAY, J.:—

Immediately after the judgment in the cases of *Cotte* and *Duvernay*, rendered by me in Chambers yesterday week, a petition was presented to me for a writ of *habeas corpus* in the present case. It was taken as a matter of course that I would issue the writ and decide it at once; but as the Court was to sit within three days, I availed myself of the power granted by sub-s. 2, s. 22, c. 95, Con. Stat. L. C., and made the writ returnable in term. By this means an opportunity is afforded of obtaining, if not a final decision on a question involving important inter-

of the "*Lex et consuetudo Parliamenti*," and the existence of that power does not warrant the ascribing it to every Legislative Council or Assembly in the colonies, although its legislative powers might be general, and not restricted as are those of the Local Legislature.

3rd. That the power of the House of Commons in England to compel the attendance of witnesses is based upon the fact that it is a Court of Record, which the Legislative Assembly is not.

4th. That the House of Commons in England, although possessing the power of a Court of Record to enforce the attendance of witnesses, did not possess the power of administering an oath to witnesses until in 1871, by Imperial Act 34 and 35 Vict. c. 83, that power was granted, and therefore the Quebec Legislature could not validly pass an Act to confer on committees the power of

examining witnesses under oath—a right which was not granted until 1871 by the Imperial Parliament to the Commons of England.

5th. That the authority of the Local Legislatures is expressly limited by the Union Act to the subjects specially assigned to them, and that they possess no authority or jurisdiction beyond such special designation.

6th. That the legislative authority in matters concerning *the peace, order and good government of Canada*, in relation to all subjects not specially assigned to the Local Legislatures, is conferred upon the House of Commons by the 91st section of the Union Act; and if the power to pass a law giving committees the authority of administering an oath to witnesses was not within the jurisdiction of the House of Commons of Canada, under the Union Act, as established by the disallowance of the Bill passed

ests, at least the opinion of the full Court of Queen's Bench.

I have so recently expressed my opinion on this matter (1)—an opinion which remains substantially unchanged—that I shall confine my remarks to what appears to be new in the arguments of the learned counsel for the Speaker.

And, first, I must express astonishment that one of the learned counsel should have reproduced with deliberation the unsustainable proposition that I had no authority to issue the writ now before the Court. It will strike criminalists as a doctrine somewhat novel that a man detained under a warrant of arrest cannot obtain a writ of *habeas corpus* on production of the warrant, without affidavit. Section 1 of our Habeas Corpus Act (cap. 95, Con. Stat. L. C.) reads as follows :—

1. "All persons committed or detained in any prison

to administer oaths to witnesses on the Pacific Scandal Enquiry, 36 Vict. c. 1, it necessarily follows that the Act of the Quebec Legislature, 33 Vict. c. 5, passed in 1870, transcends even the power vested in the Senate and House of Commons of Canada, and is *ultra vires*.

7th. That the Legislature of Quebec is to be regarded as a body of limited jurisdiction only, having no legislative powers derivable from the common law, but simply those created by statute; and it possesses no inherent powers or judicial functions such as could be assigned to or be exercised by a Court of Record.

8th. That the enquiry instituted by the Legislature of Quebec in the present instance was not incident to the exercise of the legislative authority specially assigned to it by the Union Act, and by reason thereof the appointment of a select com-

mittee to enquire into what is popularly known as the "Land Swap" was beyond its powers as a Legislature, and under the Union Act, sec. 65, could only be validly exercised by the Lieutenant-Governor in Council, under Royal Commission.

9th. That the Legislature of Quebec having only a limited jurisdiction, deriving its efficacy solely from statute, and out of the course of the common law, the warrant of the Speaker, in order to render it valid, ought on its face to disclose by direct averments the facts and circumstances relied upon for the exercise of the jurisdiction claimed; whereas the warrant of the Speaker wholly failed to disclose any authority personal to himself as such Speaker, or in the Legislative Assembly of Quebec, to order the arrest of the petitioner, and is therefore absolutely null and void.

(1) See note *post*, p. 220, *Cotté's Case*.

1875

EX PARTE
DANSEBÉAU

Ramsay, J.

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EX PARTE
DANSEKKAU.

Ramsay, J.

within Lower Canada, for any criminal or supposed criminal offence, shall of right be entitled to demand and obtain from the Court of Queen's Bench, or from the Superior Court, or any one of the judges of either of the said courts, the writ of *habeas corpus*, with all the benefit and relief resulting therefrom, at all such times, and in as full, ample, perfect, and beneficial a manner, and to all intents, uses, ends and purposes, as Her Majesty's subjects within the realm of England, committed or detained in any prison within that realm, are there entitled to that writ, and to the benefit arising therefrom, by the common and statute laws thereof."

Section 4 runs thus:—

"And if any person is committed or detained, as aforesaid, for any crime (unless for felony or treason, plainly expressed in the warrant of commitment) in the vacation time, and out of term or sessions, such person (not being convicted or in execution by legal process), or any one on his behalf, may complain to one of the judges of the Court of Queen's Bench, or Superior Court, who upon view of the copy of the warrant or warrants of commitment and detainer, or otherwise, upon oath made that such copy was denied to be given by the person in whose custody the prisoner is detained, *shall*, upon request made in writing by such person, or any one on his behalf, attested and subscribed by two witnesses present at the delivery of the same, award and grant a writ of *habeas corpus*, under the seal of the court of which such judge is a member, directed to the officer or person in whose custody the party so committed or detained is, returnable *immediatè* before the said judge.

Section 20 is for persons confined by civil process, or restrained of their liberty otherwise. This is to be gathered, not from the rubric, as was presumed at the argument, but from the dispositions of the section which

the rubric, sufficiently for the purpose, enunciates. To have dealt, then, with the application in this case under section 20, I must have supposed that the arrest was on a civil process. As the warrant did not pretend to be of this nature, the supposition would have been most gratuitous, and to have arrived at it I must have had the ingenuity to discover that a warrant of arrest of the Speaker could be a summons.

A summons differs essentially from a warrant in this, that it is not an attachment. The persistence in calling this attachment a summons can have no effect but to lengthen the discussion. A summons may be for a criminal matter, under statute, but an attachment is presumably for criminal matter, and the only exception I know is the attachment on *capias* for debt. If Mr. Dansereau had been committed on a *capias*, I should certainly not have issued the warrant without an affidavit. If, however, the theory of the Speaker's counsel were to prevail, then the more meagre the warrant, the more difficult it would be for a person incarcerated to get out of prison, and the judges would have to presume a civil process behind an attachment almost in blank, unless there was an affidavit of circumstances on the part of the prisoner.

In support of this curious pretension, *Hobhouse's Case* was cited. It is certainly very edifying to have in a case like this, where it is sought to reconcile the public mind to the exercise of arbitrary privileges, the extraordinary and unjustifiable proceedings against Mr. Hobhouse unnecessarily forced on our attention. That *sedition* person became a minister of the Crown, was created a peer of the realm by Her Majesty, and died covered with honours only a few years ago. It will not, however, be necessary to overthrow the decision in that case in order to meet the argument of the Speaker's counsel, for the case is no way in point.

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In the first place, I may observe that I never said that the Court was obliged to issue the writ. In effect I said what I conceive the statute says: that in process not civil, when the warrant is defective in not setting out a felony or treason plainly, and where it does not appear that the prisoner is in execution of a sentence of a legal court, a judge in vacation and out of term (not the court) must issue the writ on view of a copy of the warrant, or on affidavit that a copy has been refused, under a penalty of £500 sterling. In order to have a *dictum* overruled, it is necessary to set it out in technical and precise language, and not in the loose phrases of conversation. I may further add, that it never was supposed that *Hobhouse's Case* decided the question of the duty of a judge in chambers and out of term. See the *quære* in Hammond's Term Index.

In the second place, the warrant in *Hobhouse's Case* was a commitment in execution by the House of Commons, who, in virtue of their enormous privileges (privileges to which the learned counsel for the Speaker of the Legislative Assembly avows he has no claim), can commit by general warrant. Now, it will be remembered that where there is a commitment in execution, the writ does not issue, of course.

In the third place, our Habeas Corpus Act goes further than the statute of Charles. It applies to bail, as we see by the preamble; our Act, which is more extensive, has no such restriction. Section 4 of our Act refers to common law commitments, as well as to applications in bailable offences; and section 18, which enacts the penalty, applies to all that precedes. I therefore hold that I was right in issuing the writ on view of the warrant, as the statute directs; and I may further intimate that it is a practice to which I intend to adhere so long as the law remains unchanged.

The tone of a remark of one of the learned counsel for the Speaker was sufficient to show the immense importance in a constitutional point of view of the enterprise which we are called upon to sanction. While on the one hand we are told that claim is not laid generally to *all* the powers and privileges possessed by the House of Commons,—that all that is desired is simply to be able to send for persons and papers in order to make enquiries for the purposes of legislation, and that the warrant is simply a summons; on the other hand, we are told, as a matter of congratulation, that since the attachment of Mr. *Dansereau*, the Legislative Assembly has asserted its dignity by an attachment for a libel. We should be deceiving ourselves if we entertained the idea that the real point here is, whether or not the power to compel the attendance of witnesses for the purpose of the proceedings and deliberations of the House, alone exists as a privilege necessary to its being. The form of the warrant before us, and the boast of the Speaker's counsel, are more significant than the formal renunciation of the claim to all the powers, privileges, and immunities of the Commons. If the House can arrogate to itself the right to compel the attendance of witnesses, and can attach for libel on the most general of general warrants, I should be glad to know which of the privileges of the House of Commons it cannot claim as necessary to its existence? Nay more, the subject of the public felicitations of the learned counsel for the Speaker happens to be the exercise of an authority not only not given to the Local Legislature, but exclusively given to the Dominion Parliament; for it is a trial for libel, a clearly defined crime, and it is in excess of the powers exercised by either of the Houses in England. Sir Erskine May says, Vol. 2, p. 276:

“While Parliament continued to wield its power of commitment capriciously and vindictively—not in vin-

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dication of its own just authority, but for the punishment of libels, and other offences cognisable by the law—it was scarcely less dangerous than those arbitrary acts of prerogative which the law had already condemned as repugnant to liberty. Its abuses, however, survived but for a few years after the accession of George III.”

But to take the more plausible pretension put forward for the House of Assembly. They say, “We must have incidentally the powers necessary to our existence; it is necessary to our existence that we should be able to make enquiries, and we cannot make enquiries unless we can compel the attendance of witnesses.” No one contests the first and second of these propositions; but what is said is this, that the right to compel the attendance of witnesses is not essential to making enquiries. People in every-day life make enquiries constantly, yet they have no power to compel their neighbours to come in and give them their advice. The Crown too requires to make enquiries much more urgently than either House of Parliament; but it has no power to this day, in England to compel the attendance of witnesses before its commissioners. Two cases were suggested by counsel, to shew that the power to examine witnesses was essential to the House. One was to prove the preamble of a private bill; and the other, corruption on the part of a member.

If it were necessary to have the power to compel the presence of witnesses in *certain cases*, it does not follow that the House should have the power inherently in *all*; so that, unless it can be shewn that this is one of those cases, the argument would not help the pretension ostensibly put forward. But the preamble to a private bill has never been *proved*, in the strict sense of the word. It is substantiated to the satisfaction of the committee, and that is all. It is only by the Act 21 and 22 Vict. c. 78, that committees in England have the

power to examine witnesses on oath; consequently a committee is not at common law restricted in any way as to the extent of information it should have before it declares the preamble proved. In practice it is hardly possible to conceive the necessity of compelling witnesses to appear, to prove or disprove the preamble of a private bill. The parties interested in a private bill are under a compulsion much more stringent than the most enthusiastic advocate of privilege could devise, to come in and say their say to the committee. I have seen warm debates as to the right to produce evidence on private bills. I remember of no case where it was necessary to compel the attendance of persons. But in any case, if we are to build up the right for the House of Assembly, on any grounds of necessity such as that insisted on, we must say, by parity of reasoning, that the Corporation of Montreal has a similar right on an application to put up a steam engine in a back street.

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The other instance, that of a member guilty of corruption, is still less conclusive. It is hardly possible to conceive a case more plainly beyond the jurisdiction of the local Governments than the trial of a member for a crime, such as that of taking a bribe. I have always understood that the House would not take notice, even of a charge of felony, until after conviction, and the seat is vacated by operation of law, because the convict is *mortuus civiliter*. A seat is not vacated for a misdemeanor, except perhaps perjury, no matter how heinous, and the instances we find of the arbitrary expulsion of members (of which there are some) are not of a character to impress one with the opinion that a power to expel is essential to the very existence of each Legislative Chamber.

To take another test: let us suppose that a judge were accused of taking a bribe—would it be thought

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to be a power necessarily inherent in the court to which he belongs to make an enquiry, out of the ordinary course of law, for the purpose of suspending or of expelling him? It is plain that if such a power is essential to a Legislative Chamber, it is also essential to a court; yet no one pretends that courts, with all their privileges, real or pretended, have ever claimed such a right. One, and the most famous case of the expulsion of a member of the House, is that of Wilkes. It ended in all the declarations, orders and resolutions, respecting the Middlesex election, being expunged from the journals as subversive of the rights of the whole body of the electors of the kingdom. (1) This result is a perpetual commentary on the great necessity argument.

Again, it is not sufficient to say that it is necessary because committees in England have the right to send for persons and papers. For, for the hundredth time it must be repeated, it appears that the English right depends not on necessity, but on usage. It is perfectly evident that if the House may compel the attendance of witnesses, it may compel the production of "papers and things." Now let us see how far this leads us. Not only may a man be interrogated by the members of a body not logically trained to decide nice questions of evidence, and consequently totally unfit to limit an enquiry to its just proportions, but it may compel him to produce his private papers, and every moveable in his possession for their inspection. I know one of the learned counsel for the Speaker recoils from the test of his pretensions by extreme cases. The *reductio ad absurdum* is, however, a perfectly legitimate process of reasoning, and applied to the particular point before us it exhibits in relief the monstrous nature of the pretensions put forth by the House of Assembly. If they succeed in maintaining their

(1) May's Const. History, vol. 1, p. 407.

claims, I will not say they have established "an organized chaos," for I am not sure I fully understand the value of these words in the relation in which they have been placed; but this I will say, that a body of limited and local authority has, in violation of the most clearly expressed intention of its charter, organized for itself an arbitrary system of government totally subversive of individual liberty. It is needless to cite the case of *Anderson v. Dunn*, for it was examined in the case of *Doyle v. Falconer*; and whether *Anderson's Case* was decided rightly or the reverse, it cannot weigh with us, for its authority was rejected by the Privy Council.

I was particularly anxious to avoid any allusion to the well-known circumstances which gave rise to the present proceedings; for although I am aware that the convenience of the object to be attained will to a great measure absorb public attention to the exclusion of the weightier considerations, and although I by no means undervalue the importance of making the decisions of courts intelligible to those who have not made a special study of law, it struck me that an argument based on a question on which the public mind seems to be disturbed, perhaps more than the occasion requires, might lead to greater misapprehension than a mere technical discussion of the points involved. But the power to abstain from the consideration of the Tanneries enquiry, as an illustration, has slipped from my hands by the frequent allusions that have been made to it. I enter on it, then, but merely as an illustration, and without expressing any opinion, or really having any settled opinion as to the full merits of the question by itself.

It seems, then, that the opinion is prevalent that either by want of due diligence on the part of the Government last summer, or by bad faith on the part of one or more of the Ministers, and want of due

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care and diligence by the others, a bargain excessively injurious to the pecuniary interests of the Province was entered into. Now, it is desired to examine into how far those opinions are true; and it is contended that such an enquiry is absolutely necessary, in order that the House of Assembly may perform its functions. It may fairly be asked of those who advance this argument, wherein this necessity consists? It is evidently, not a political necessity, for the country exercised its jurisdiction, and gave its decision, in no equivocal manner, months before the Legislature met. It cannot be with a view to legislation, for it may be presumed the House does not purpose to enact a law to annul the bargain complained of. The only conceivable question that remains is an executive one, namely, whether the validity of the deeds should be contested, or whether criminal proceedings should be taken against any of the parties accused? Now, for either of these purposes, it would be manifestly unfair and improper to subject witnesses compulsorily to the interrogations of the complaining party.

The impropriety will appear more manifest when it is remembered that it was formally announced, at the opening of the proceedings here, that the committee would not be bound by the legal rules of evidence; in other words, that the committee would disregard in this quasi-criminal investigation those rules which experience has established as the best mode of discovering truth.

It must not be concluded from what I have said, that the House can make no enquiry; all I say is this, that the House requires no arbitrary powers to enquire, and to arrive at a result sufficiently satisfactory for all practical purposes. If men refuse to answer questions under suspicious circumstances, so much the worse for them. Take, for instance, one of the

questions to which, I believe, an answer was refused :
 "How have you \$17,000 at your credit?" I understand
 the witness said it had nothing whatever to do with the
 Tanneries exchange, but he declined to say what trans-
 action it represented. He gave a categorical answer,
 which does not, perhaps, give all the assurance desirable;
 and without the exercise of any arbitrary powers, the Com-
 mittee may be guided in its conclusions by this unexplained
 reticence. I do not know, of course, nor do I wish to ex-
 press any opinion as to what conclusion should be arrived
 at, for I have not read more than the most minute
 fraction of the evidence, but those whose business it is to
 know all about the matter will probably not be much
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Another species of reasoning was brought into play.
 It was asserted that the Local Legislatures were not
 of a subordinate character. If it be necessary to the
 Speaker's argument to maintain this proposition gener-
 ally, his case would be in great jeopardy. I readily
 admit that within the scope of its own functions it is not
 subordinate, except in so far as its new legislation may
 be disallowed by the Executive branch of the Dominion
 Parliament. I do not desire to say unnecessarily what
 may be offensive to a body of very great position and
 authority, but since the comparison (proverbially odious)
 is thrust upon us as an argument, I shall not avoid
 saying what is evidently true. Its inferior dignity and
 rank to those of Parliament are marked in every way—
 by the appointment of its highest branch by the Executive
 of the Dominion, by its powers being special and not
 general, by its territorial jurisdiction being less extensive,
 and, above all, by its legislation being subject to disallow-
 ance by the Governor-General.

Again, in referring to the case of the *Speaker of the
 Legislative Assembly of Victoria v. Glass*, we were told

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that the dignity of the Legislative Assembly of Victoria was not greater than ours. Without having the charter before us we could not decide that question, which, however, is of no importance. Whatever its dignity may be in the abstract, the power to legislate on matters of this sort was specially allowed by its charter, and that is the avowed reason of the judgment of the Privy Council. That case is therefore an authority against the Speaker in the present case.

Mr. *Loranger* seemed by his argument to abandon the extreme pretension that the House could commit for a contempt. But to abandon this is to abandon everything. The warrant in the present case either presumes a contempt, or the pretensions of the Legislative Assembly of Quebec are more enormous than those of the House of Commons; for then, to justify the proceedings we should have to say that they claimed the right to attach without a cause at all.

This pretension is original. Citing the case of *Burdett v. Abbott* (another case almost as suggestive as the *Hobhouse Case*, of the dangers of allowing individual liberty to be spirited away under the specious guise of convenience), Mr. Justice Badgley said in the *Laroie Case*: "Yet, if the commitment should not profess to be for a contempt, and the matter appearing in the return as the ground of the commitment could by no reasonable intendment be considered a contempt, and the commitment, therefore, evidently arbitrary, unjust, and contrary to every principle of positive law or natural justice (which, however, may not be anticipated to occur), the court would, it seems, not only be competent, but bound to discharge the party" (1). If this is not an attachment for a contempt, then it is evidently arbitrary, unjust, and contrary to every principle of natural justice. Besides,

if it were conceded that this attachment were not, of itself, a commitment, of what use would it be if the House could not commit in the end?

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If, again, we examine the plea of necessity by the light of the three authoritative cases decided in the Privy Council, we find that very serious interruption of the business of the House did not justify a commitment on the ground of necessity.

Once more, if we examine it historically, we find it not only the pretext of oppression all over the globe, but very specially that most successfully combated by our race. Thenoble tale of English history—the beacon—the guide to all those who possess or strive to obtain individual liberty within the law, constantly appealed to even by those who like it least in the abstract—teaches us a lesson, not of resistance to prerogative, but to all arbitrary and undefined powers whatever, no matter how artistically they may be dressed up. I know of no claim of prerogative or privilege which has not come backed by the plea of necessity. It was the defence of Secretary of State warrants general, though hardly so general as the one before us—it was the defence, I dare say, of *lettres de cachet*; it was the origin of the right claimed by members of the English House of Commons to commit as for a contempt any one who should encroach on the fishery of a member of the House. I doubt not the Irish courts thought it was sufficient excuse for the pretension they once put forth, that as every crime was a contempt, they could try and punish criminals on attachment without the intervention of a jury.

To-day we are cajoled with the plea of necessity on one point which perhaps it might not seem very disastrous to concede, save for the evil precedent, and on the eve of this argument a legislator, personally offended, informs us that this argument is a subter-

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fuge. It is not public convenience they seek to further, but to protect their own dignity. So the individual liberties of the people are to be sacrificed to gratify the vanity of the people's representatives, and those accused of crimes affecting a member of the House may be tried, not by their peers, but by those whose feelings of personal dignity are involved in the issue. I have heard it said that the case I refer to, that of a person supposed to be the writer of an article reflecting on a member, has been inopportunately brought up. I think the very reverse. The public should be obliged to the member who has furnished a more extreme case as an example, in order to show the danger lurking under that now before us.

I have entered at some length on this branch of the case, because it covers the only debatable ground. If this warrant cannot be defended on the plea of necessity, it cannot be defended by any text of law. And it appears to me, with increasing force, the more I look at the question, that the assumption of power constructively on the ground of necessity must be restrained to its narrowest limits; and so restraining it, I cannot hold that it is necessary to the existence of every legislative body to have the right to compel the attendance of witnesses generally. And therefore, to borrow from a speech of my learned brother Sanborn on a famous occasion, I would call all such necessities as these entirely "artificial."

The next question, as to whether we can look into the constitutionality of a local law, seems to suffer no difficulty, if an almost unanimous expression of opinion of those best qualified to judge be considered as authoritative for the decision of a practical matter. But one point was made at the arguing, that it would be very inconvenient if every Justice of the Peace had the power

to judge of the constitutionality of a law. But judging the constitutionality of an Act is only giving a judgment on the extent of an Imperial Act, and I do not see that this is more difficult than giving judgment on a Dominion Act. It is as easy to decide whether an enactment is within the B. N. A. Act, as it is to decide whether a man has committed a commercial fraud within any of the recent statutes. A magistrate has to do the one, why should he not do the other? In the speech of my learned brother, to which I have already alluded, I find this statesmanlike exposition of the danger which now menaces the petitioners before us :—

“ Hon. Mr. SANBORN—If my honourable friend would take that platform, or something like it, I should be happy to give it my best consideration at once; and I should be very glad if they would only give us a small part of it, of which I think they must see the justice—namely, *written guarantees*, so as to assure us that our rights of property shall not be overturned by the Local Parliament; to prevent, for example, a Squatters' Bill being passed at the very first opportunity in the Local Parliament, demolishing all the rights of property. I see my honourable friend opposite (Hon. Mr. Crawford) look melancholy, because he foresees that, when the new Constitution is adopted, twelve months will not pass before that becomes law in Lower Canada, and all protection for proprietors, so far as that is concerned, brought to an end. But this is only one instance significant of what will take place. It is perfectly well known, and none can realize it better than those who have a much greater horror of the progress of popular sentiments than I have, that the tendency in the popular mind is to break down monopolies of every kind, and to go to extremes in dealing with vested rights, even those which are established and founded on substantial

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principles of justice. Now, these rights, at the very least, ought certainly to be confided to the highest legislative authority. I go further, and maintain that guarantees for those rights ought to be placed in the written Constitution, that they ought to be beyond the power of interference by the legislative authority, and that they should be guarded by the judicial decisions of the highest courts in the country. In that case there would be a protection for property, but in this Constitution there is no such protection for property either in Upper or Lower Canada. And here is the point to which I ask the attention of my honourable friends of all parties—a point which I think all of them have been too little concerned about, and which applies just as well to Upper as to Lower Canada. For I say that, if some security is not given to the people in one of those ways for maintaining vested rights and interests of this character, the most disastrous results will arise in every Local Parliament; because, when these Parliaments are constructed, they will necessarily consist of a different class of men from those who now compose the Legislatures of the various Provinces. There will be such inducements to men of the highest order to get elected to the Central Parliament, that the consequence will necessarily and naturally be the result to which I point.”

It is just this sort of danger, so prudently and eloquently foreshadowed the law has, in my view, provided against. But what would the provisions of a written constitution and precise guarantees avail in the face of the paraphernalia of constructive powers, and the construction of “artificial necessities?”

Having then the power, and it being our duty consequently to look into the constitutionality of an Act of the Legislature, we must ask on what is the privilege founded? Reliance is principally placed on sub-s. 1 of s. 92, B. N. A.

Act—the clause giving power to amend the Constitution of the Province, except as regards the office of Lieutenant-Governor. Without entering into any question of what in the abstract may be called a part of the Constitution, the form of the Act clearly shows that it refers to the clauses 58 to 90, which are all under the general rubric, “Provincial Constitutions.” Now, it is very true that a rubric is not an enactment, but it is not less true that a rubric existing in the original Parliament roll may be used in the interpretation of a vague clause, just as the preamble may be used. But what is the general power to alter the Constitution, if it applies to any other matters than those specially called constitutional in the Act? Taken in its widest sense, it would be the power to upset the whole B. N. A. Act; and under this interpretation the Local Legislature, having more extensive powers than the Dominion Parliament (this was gravely advanced at the bar), like the lean kine, may eat up the fat.

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These are propositions which best refute themselves even when advanced in support of an arbitrary power in the ascendant, and I might, perhaps, then leave this one to the decision of the impartial; but the statement that the Local Legislatures have in any respect greater powers than the Dominion Parliament, is not only paradoxical—it is fallacious. They have different powers, and among them that of altering their Constitution save as to the Lieutenant-Governor. This power was given to them because, except in the one particular reserved, it was not considered to be of any importance what form the local Governments assumed; but an analogous power could not be given to the general government of a dependency of the empire. It is another proof, if any were needed, not of the importance of the local Government, nor of the magnitude of the

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powers conferred on them; but it is a proof of their relative insignificance.

The last question, and the most important, is the warrant of attachment. I think I have heard this part of the question talked of lightly as a mere matter of form, and consequently of little importance; and so people are deluded by sound. There are forms which are of no importance; but there are forms which are of the most vital importance. It signifies little how your coat is shaped; but it is a matter of moment to the most callous whether he is thrown into prison according to the forms of law for a specified offence, or without any intimation of what he is accused of, on the mere whim of a superior. Therefore it is a deceit to call this a mere matter of form, for the form is substantial. Of such all-absorbing interest is the form here, that I would readily enough admit that I see no great objections in practice to the Legislative House holding powers strictly defined (not defined by a general reference to the exorbitant privileges theoretically claimed by the House of Commons in England, but defined as the powers of this Court are defined); but a general warrant, which is nothing more than an order to the Serjeant-at-Arms to arrest A. or B., without expressing any cause whatever, cannot be justified on necessity by the most obsequious defender of arbitrary power. It is neither more nor less than a *lettre de cachet*. The consequence of granting it is to give the Local Houses, respectively, unlimited authority over the persons and property of Her Majesty's subjects. It is possible that the tyrant may be merciful and good, but he is not less a tyrant, or what the Emperor of Russia called himself to Mme. De Stael, who was complimenting him on the beneficence of his rule—*un heureux accident*. Such an accident, however, is a disagreeable sword impending over our heads, and I

should prefer to diminish by positive law, as much as may be, the dangers attending it.

When the political organization under which we now live was under discussion, the learned Chief Justice who presides over this Court, so entirely to the satisfaction of all those who have business here, used these remarkable words, which I venture to recall to his memory as perfectly applicable to the present case: "I know," he said, "that majorities are naturally aggressive, and how the possession of power engenders despotism, and I can understand how a majority, animated this moment by the best feelings, might in six or nine months be willing to abuse its power and trample on the rights of the minority while acting in good faith, and on what it considered to be its right."

If my words do not carry sufficient weight, let minorities take warning from those I have just quoted; let us beware in time, lest we are organizing despotism. In this fatal session, in which general warrants in their most dangerous form have been resuscitated, we have had an instance of a Bill supported by the presence of a turbulent mob, which invaded the House of Assembly, and by its proceedings reminded one of the action of the Commune. Where then were the boasted powers of the House? These "artificial necessities" had disappeared with the occasion when they might have had something to recommend them, and we find the chairman censuring the gentlemen in the galleries in a tone rather of apology than of expostulation. *L'Arbitraire* has nothing to recommend it. It is pregnant with evil, and incapable of good. Let majorities take warning; they may become minorities.

For my part, I have no hesitation about the illegality of general warrants. On this question there can be no compromise. My duty to the State, as a subject and as a magistrate, is too clear to be misunder-

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stood. I must resist them morally with all the arguments I can command, materially with all the authority I may possess. I hold that they are unknown to the law, and that the precedents cannot legalize them. As Chief Justice Pratt and the other judges of the Common Pleas said, in giving the death-blow to general warrants issued by the Secretary of State, "no degree of antiquity can give sanction to an usage bad in itself." (1) The power to issue a general warrant is given by no statute to the Commons of England; by section 18, B. N. A. Act, it is refused to the Houses of Parliament of Canada; and it is denied to all persons by many statutes in express terms. (See the Petition of Rights and 16 Charles I. cap. 10.) With one quotation from the greatest of our political writers, I shall conclude. Burke says:

"But if the habit prevails of *going beyond the law*, and superseding this judicature, of carrying offences, real or supposed, into the legislative bodies, who shall establish themselves into *courts of criminal equity* (so the Star Chamber has been called by Lord Bacon,) all the evils of the Star Chamber are revived. A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea in *criminal equity*; which is, in truth a monster of jurisprudence. It signifies nothing whether a court for this purpose be a Committee of Council, or a House of Commons, or a House of Lords; the liberty of the subject will be equally subverted by it. The true end and purpose of that House of Parliament, which entertains such a jurisdiction, will be destroyed by it."

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The grounds on which the petitioner relies for demanding his release are—1st. That the warrant

(1) May's Const. Hist., vol. 2, p. 258.

on which he was arrested is general, and does not set out any special reasons for his arrest; 2nd. That the Speaker of the Legislative Assembly of Quebec had no right or power to issue such a warrant; 3rd. That the Act of the Legislature of the Province of Quebec, whereon it is pretended the warrant was issued, is unconstitutional, null and void, being *ultra vires* and beyond the powers of that Legislature to pass. The 4th and last ground is general, and merely states that the proceedings under which the petitioner was arrested are null and void.

On behalf of the Speaker of the Legislative Assembly, it has been contended that the right to arrest for contempt is a privilege which belongs to the Legislative Assembly, and that any action taken to commit for such contempt could not be questioned before courts of justice. We are not, fortunately, without precedents on this point, which has been repeatedly raised before the courts in England, as regards the privileges of the House of Lords and of the House of Commons, and settled by the latest decisions in a way which leaves no doubt that this court has the unquestionable right to examine into the causes of arrest of any party claiming to be illegally held under duress. The case of *Stockdale v. Hansard* (1), and that of the *Sheriff of Middlesex* (2), have, it may be said, definitively settled that point. In this last case Lord Denman, C.J., used most emphatic terms, and in rendering the judgment of the court, said: "I think it necessary to declare that the judgment delivered by this court last *Trinity* term in the case of *Stockdale v. Hansard* (1) appears to me in all respects correct. The court decided there that there was no power in this country above being questioned by law. The House of Commons there attempted to place its privi-

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(1) 9 A. & E. 1.

(2) 11 A. & E. 273, 285.

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lege on the footing of an unquestionable and unlimited power. It was argued against that claim that the *dicta* of learned judges by which it was supported had in many cases been hastily thrown out, and were encountered by others of a contrary tendency from judges not less eminent, and by precedents. I endeavoured to establish that the claim advanced in that case tended to a despotic power which could not be recognised or exist in this country, and that the privilege of publication as there asserted had no legal foundation. To all these positions I, on farther consideration, adhere; all of them I believe in my conscience to be true."

Having therefore the power to enquire into the causes of the detention of the petitioner, we have to consider whether his first objection, that the warrant is general, is a valid one. On this point I am disposed to agree to almost every word said by my learned brother on my right, who differs from the majority of the court as to the objectionable character of such warrants. I cannot better express my own views on this question than by repeating the language used by Lord Lyndhurst in the case of *Van Sandau* (1), when he said: "If this form of order had been used for the first time upon the present occasion, and there were no precedent to appeal to on the subject, I should have come to the conclusion that the order was insufficient." But this form of warrant having repeatedly been recognised as valid both by the courts in England (2), and by our own courts (3), I do not think that it would be right or proper to avoid deciding the important question of privilege which is

(1) 1 De Gex, p. 311.

(2) Case of the Sheriff of Middlesex, 11 A. & E. 273; Gosset v. Howard, 10 Q. B., 359 to 452; Parke, B., Obs.

(3) Ex parte Monk, 1817; Ex parte Tracy, Stuart's Rep. 478; Case of Brodeur, Journals, Leg. Assembly, Canada, 1854; Ex parte Lavoie, 5 L. C. Rep. 99.

raised in this case by adjudging upon a mere question of form and by deciding contrary to previous decisions, although I admit such a warrant to be liable to very grave objections.

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The next question raised is that the Speaker had no authority to sign the warrant; that there was no order from the Legislative Assembly, the terms used being merely that the House moved, without saying that it had adopted a resolution or gave any order. This is a most technical objection, and to which the court is not disposed to give much weight. If the House unanimously moved that a certain thing be done it has certainly resolved that it should be done, and we think there is nothing in this objection (1).

The third and most important question raised is whether the Legislative Assembly had a right to summon a witness at the bar of the House or before a committee, and to commit him for refusal to appear. On the part of the petitioner it has been contended that the Local Parliaments were mere corporations, having no other powers than those expressly conferred upon them, and that they have no power to commit for contempt, nor even that of compelling witnesses to appear before them. They further contend that the Act of the Provincial Parliament of Quebec, 33 Vict. c. 5, giving to each House of Parliament authority to summon witnesses and to punish disobedience, was beyond the power of that Legislature, and that the Legislative Assembly had no such power as that claimed under that Act, which is unconstitutional. On the other side it was contended that we had no right to enquire into the constitutionality of an Act regularly passed and sanctioned, and that by the exercise of the power of disallowance alone could that Act be set aside. We cannot adopt this last view,

(1) Case of the Sheriff of Middlesex.

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and we consider that if an Act be clearly beyond the scope of the authority of the Parliament which passed it, whether that Parliament be the Dominion or a Local Parliament, it is our duty to determine, when the question is properly raised, whether that Act emanates from a proper and competent authority, otherwise we might come to have two Acts upon the same subject and contrary to each other, the one emanating from the Dominion and the other from the Local Parliament, in which case it would be absolutely necessary to determine which of those two Acts was law and emanated from the proper authority.

In their respective sphere the authority of the Dominion and that of Local Parliaments are co-extensive—that is, the one is not inferior nor subordinate to the other. All the powers which were formerly exercised by the several branches of the Legislature of the late Province of Canada have by the Confederation Act been transferred to either the Dominion or the Local Parliaments. I do not see that the power of Colonial Legislatures to summon witnesses in order to conduct the enquiries required for a proper understanding of the several questions affecting legislation or the administration of public affairs was ever challenged. Responsible Government, which has been recognised in the Local as well as in the constitution of the General Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures, and of controlling the administration of public affairs, and as such I believe that the House of Assembly had a right to exercise it, as it was exercised under the Constitution of the late Province of Lower Canada in the case of Mr. Monk, who was imprisoned in 1817 for refusing to produce certain

registers and papers before the House or a Committee of the House of Assembly. I cannot find a case where this power of Colonial Legislatures to summon witnesses has been questioned. I do not mean to say that our Local Legislatures are vested with all the privileges appertaining at common law by immemorial usage to the House of Commons in England. It has long been settled that they had not (1), but I merely say that they have a right to exercise such rights and privileges as are mere incidents of the powers specifically vested in them, and without which they could not properly exercise the duties devolving upon them.

I find that in the United States, in the case of *Anderson v. Dunn* (2), the Supreme Court decided that the power to commit for contempt others than members of the Legislature, although not expressly given by statute, was a necessary incident of the powers of the Assembly. If as a necessary incident of the exercise of its functions, the Local Legislature had the right to summon witnesses and punish them for contempt in disobeying its orders, it had undoubtedly the authority to regulate a right it possessed without legislation; and therefore the Act of 1870, already mentioned, in so far as it provides for the summoning of witnesses, was within the scope of its authority, whatever may be said of some other portions of the same Act, and upon which it is not necessary to express any opinion in this case.

The majority of the Court is for quashing the writ of *habeas corpus* and for rejecting the petitioner's demand.

[*Translated.*]

TASCHEREAU, J.:—

I cannot conceal from myself the importance of this

(1) *Kielly v. Carson*, 4 Moore P. C. C. 88; *Cuvillier v. Munro*, 4 L. C. R. 146.

(2) 6 Wheaton, 204.

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case, and the necessity of a prompt decision on the part of this tribunal, on account of the public and private interests which are here in question.

Apart from a number of less important questions and objections which are raised against the petition, and the absence of affidavits on the part of the petitioner, which I do not think it my duty to notice, there are two chief questions, besides the one relating to the form of the warrant.

1. Has the Legislative Assembly of the Province of Quebec power to hold enquiries, to compel witnesses to appear before it and to give evidence on oath ?

2. If a witness fails to appear before the Legislative Assembly, has the Assembly the right to cause him to be committed to the custody of the Serjeant-at-Arms, to bring him to its bar, and, as a consequence, can it punish such refractory witness ?

A special enactment gives these powers to this Assembly ; and these powers are besides necessary for the performance of its part in the legislation of the country.

The Act 33 Vict. c. 5, ss. 2, 4, 5, 6, 7, 8 and 9, passed in 1870, confers on it these powers. This Act does not admit of any other construction. But the counsel for Mr. *Dansereau* asserts that this Act is unconstitutional, and that the Legislature has exceeded its powers in passing it. The strongest objection that might be made to the Act, at least from the point of view of the present case, is not that of unconstitutionality, but of inutility ; for the Confederation Act, in giving to the Legislature of Quebec the power to make laws for the good of the country, to preserve and protect the immovable property of the Province, to change any part of the Constitution except what relates to the Lieutenant-Governor, by enacting that all the laws in force in the former Province of Lower Canada should be preserved to it in the same

manner as if the Act of Confederation had not been passed—the Act of Confederation, I say, in conferring all these powers on the Legislature of Quebec, has equally and implicitly intended to give it the means of accomplishing all that this Confederation Act allowed it to do and perform. Now, in order to legislate, it is necessary, in the majority of cases, to have an enquiry under oath—it is necessary to prove the fulfilment of conditions and formalities precedent, before granting or taking away charters or privileges, and invading the rights of the people of the country. It must have been foreseen that in the Legislative Assembly serious differences would arise among the members; that the dignity of the Assembly might be outraged, not only by the conduct of its members, but by that of the people outside, which would necessitate prompt and energetic action on the part of the deliberative body which was in session; and yet, on the principle that that Legislative Assembly should have only a limited jurisdiction, it could not enquire into these differences or these libels, and it would to the great injury of the public welfare, be obliged to suffer with patience the injury and shame of a libel without the power of making an investigation in order to expel the guilty member or to punish the person guilty of libel. A charge of shameless and open corruption against one of its members would remain unpunished, if the guilty person could not be reached by an enquiry under oath.

The cases where prompt and energetic action by the Assembly would be required, might be multiplied indefinitely, and yet people would go on repeating that the Legislative Assembly has only a limited power or jurisdiction; but the Act of 1869, 32 Vict. c. 6, allows the examination of witnesses under oath. Independently of that Act and of the Act of 1870, which confer expressly these powers on the branches of the Quebec Legislature

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they possess these powers *ex necessitate rei*, as corollaries of the other powers which the Act of Confederation gives, and no new legislation was necessary to give them. In defining them, the Legislature has virtually done nothing more than confirm and declare what belonged to it already by the usage of at least eighty years, and consequently since its establishment and existence as a Legislature. In 1831, at the time of the debates in the House of Lords in England—on the 13th of April, 1831, in reference to the arrest of the proprietor of the *Times* as guilty of libel, when some of the Lords denied the right of their House to punish by imprisonment a person guilty of libel, Lord Tenterden asserted, on the contrary, that this power was absolutely necessary to the Houses of Parliament in order to discharge their functions with dignity to themselves and advantage to the country. These words from the lips of Lord Tenterden, of whom England has so much reason to be proud as one of her greatest jurists, shew that the power claimed by the Legislative Assembly of Quebec is a power indispensably necessary, and without which it could not really exist.

We find in Story's Commentaries on the Constitution of the United States of America, page 307, the expression of a similar opinion. This author states that this power ought to be allowed to legislative bodies, and he cites the fourth volume of Blackstone's Commentaries, page 286, and ends by saying: "This power has not been disputed in any country, and has its origin in the very nature of every legislative body."

But it will still be said that the Legislative Assembly of Quebec is only one of the branches of a Legislature, with a power or jurisdiction which are limited. I am ready to admit that its powers are not those of the Imperial Legislature, nor even of the Legislature of Canada; but I say that, in its domain and its functions,

it has a power and a superintendence which is exceptional and superior to every other, and that it has duties and obligations to fulfil of such importance that it could not fulfil them lawfully and properly without the powers which the counsel for the petitioner denies to it. It, as much as the House of Lords or the House of Commons, may find itself in circumstances where the exercise of these powers is indispensable, unless it is to renounce its dignity and cease to legislate on the important subjects which are within its province, and which may demand despatch.

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The Act of 1870 seems to me perfectly legal and constitutional. It, like all other Acts, has been enacted in the name of Her Majesty, and assented to, and no doubt it would have been disallowed at the out-set, by the competent authority, on the advice of the Minister of Justice, if it had had any semblance of unconstitutionality. So long as this statute is not repealed or declared unconstitutional, I consider it as expressing the law of the Province, and I owe it full and entire obedience.

I might cite the case of *Tracy* and *Duvernay*, who, in 1832, were accused of libelling one of the Legislative Houses in the old Province of Quebec. Their case was argued before the Court of King's Bench at Quebec, on a *habeas corpus*, and among the different reasons advanced by the honourable judges who expressed their opinions we find fully stated those of the necessity of the branches of the Legislature having power to imprison for libel, as a means of protecting their rights and privileges.

The last objection is that the warrant is general and does not define the causes of the arrest of the petitioner. But it will be observed that this warrant is not a final process (*n'est pas en execution*), but is only a summons, effective and rigorous it is true, to appear at the bar of

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the Legislative Assembly, which, in virtue of its power of sending for persons and papers (in virtue of the 33 Vict. c. 5, and at the same time of an inherent right and one indispensable to its existence) takes this accustomed mode of ensuring the presence of an important witness who is not willing to appear otherwise. It is not a final execution, it is a preparatory measure in order to summon him to the bar of the Assembly to answer an accusation.

Hereafter, if it becomes necessary to give an order for final imprisonment, it is probable that the prisoner will be able to plead the generality of the warrant of incarceration. At the present time his objection is premature.

The course followed by the Legislative Assembly is that followed with regard to the proprietor of the *London Times*, which I have already mentioned, and is that indicated in May's *Parliamentary Practice*, page 420. At first a simple command, in general terms, to bring this man before the House was proposed and seconded without objection, and when he had been placed at the bar he was convicted and condemned to imprisonment for contempt; and it was on the second motion that the debates took place, during which Lord Tenterden spoke and delivered a speech from which I have cited an extract above.

This summary procedure is virtually sanctioned by section 9 of 33 Vict. c. 5, which declares that "All breaches of the Act itself may be summarily investigated by the House against which they have been committed, in such manner and form as the House shall consider suitable."

The English precedents are to the same effect, that is to say, upholding a simple warrant without any statement of the reasons.

This is what has been done in the case of the petitioner.

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I am therefore of opinion that the writ of *habeas corpus* should be quashed, and that the petitioner should be remitted to the custody of the Serjeant-at-Arms of the Legislative Assembly of the Province of Quebec.

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The B. N. A. Act, 1867, was enacted in response to the petition of the late Provinces of Canada, Nova Scotia, and New Brunswick, as stated in the preamble of the Act, "to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." The powers of legislation and representative government upon the principle of the British Constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been conceded to Canada, and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late Province of Lower Canada was constituted a separate Province by the Act of 1791, with a Governor, a Legislative Council and a Legislative Assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters. No powers that had been conceded were intended to be taken away by the B. N. A. Act of 1867, and none, in fact, were taken away, as it is not the wont of the British Government to withdraw constitutional franchises once conceded.

This Act, according to my understanding of it, distributed powers already existing, to be exercised within their prescribed limits, to different Legislatures constituting one central Legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the Provinces, or breaking the continuity of the prescriptive

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rights and traditions of the respective Provinces. In a certain sense the powers of the Federal Parliament were derived from the Provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The Provinces of Quebec and Ontario are, by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada.

This recognises their previous existence prior to the Union Act of 1840. All through the Act these Provinces are recognised as having a previous existence and a constitutional history, upon which the new fabric is based. Their laws remain unchanged, and the Constitution is preserved. The officers are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same relation to the Province of Quebec that the Governor-General sustained to the late Province of Canada.

I think it would be a great mistake to ignore the past governmental powers conferred upon, and exercised in, the Province now called Quebec, in determining the nature and privileges of the Legislative Assembly of this Province. The remark is as common as it is erroneous, that the Legislatures of the Provinces are mere large municipal corporations. It is true that every Government is a corporation, but every municipal corporation is not a Government. Consider the powers given exclusively to Provincial Legislatures. They have sole jurisdiction over education, property and civil rights, the administration of justice, and municipal institutions in the Province, subjects which affect vitally the welfare of society. The very court which enables us to determine the matter now under consideration, holds its existence by the will of the Provincial Legislature. No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to

the highest legislative power. Legislatures make laws ; municipal corporations make by-laws. If these legislative powers confided to Provincial Legislatures are not to be exercised in all their amplitude, with the incidents attaching to them, they can be exercised by no other sovereign power, while our present Constitution exists. They have been conceded by the Imperial Parliament, and it claims no further right, as a rule, to legislate upon our local affairs, and the powers given exclusively to the Local Legislature necessarily exclude the jurisdiction of the Federal Legislature. Blackstone says : " By sovereign power is meant the making of laws ; for wheresoever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the Government may put on. For it is at any time in the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases, by constituting one or a few or many executive magistrates, and all powers of the State must obey the legislative power in the discharge of their several functions, or the Constitution is at an end."

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When I find, after specifying several subjects over which the Local Legislatures have jurisdiction, there is added generally " all matters of a merely local and private nature in the Province," I find no other limit to these powers than the territorial boundary of the Province, and the class of subjects by which their powers are circumscribed. I find it equally difficult to assign any other limit to the power expressly given to amend the Constitution of the Province than that expressed in the Act. They are not permitted to amend the Constitution as respects the office of Lieutenant-Governor. I find in section 65 of the B. N. A. Act, the powers and functions of the Lieutenant-Governor are specially defined. This establishes that, in the view of

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the framers of that Act, the powers and functions of this branch of Parliament form part of the Constitution, and consequently the powers of the other branches are equally a part of the Constitution; and ability to amend the Constitution as respects the House of the Legislature includes power to determine their respective functions and immunities.

The right of disallowance by the Governor-General of local Acts within one year is a check which may be exercised to prevent impolitic laws coming into force. Where this right is not exercised, and there appears nothing *ultra vires* in the legislation, I see no reason why the Act 33 Vict. c. 5, of the Province of Quebec, should not be considered a law of the land. The counsel resisting this petition for enlargement has contended that upon a question of this nature the courts cannot declare a statute of the Provincial Parliament inoperative which has not yet been disallowed. So long as we have no general Court of Appeal, the ordinary courts must decide what is law when a conflict of jurisdiction is claimed to exist.

There is, no doubt, an incongruity in a court's deciding upon the powers of a Legislature to which it owes its existence. That power was contemplated being placed in a Supreme Court created by the Parliament of the Dominion; but so long as no such court has been created, it seems that the ordinary courts are under the necessity of declaring an Act *ultra vires* when they find it to be so. In this instance this is not a practical question, for there does not appear to be any want of jurisdiction in the Provincial Parliament to pass the Act complained of. By the second section of the Provincial Act mentioned, the Legislative Assembly of the Province of Quebec is permitted to command and compel the attendance or production before such House, or any committee thereof,

of such papers and things as it may deem necessary for any of its proceedings or deliberations. This is precisely the power exercised in the case before us. This arrest of Mr. *Dansereau*, by virtue of the power conferred by this Act, is, apart from the question of privilege, an inherent in, and incident to, every legislative body. Such privilege is exercised by one House upon an undefined law based upon the nature and usages of legislative bodies. This is by a statute conferring the right passed by the three branches. I hold that under this statute the Legislative Assembly of the Province of Quebec has a right to compel the attendance of Mr. *Dansereau* before the bar of their House.

Thus holding, it is unnecessary for the purpose of this case to discuss the question of privilege as a common law right. This, however, is not a matter which this Court can dismiss in justice to the subject, without some observations upon the general privileges and powers which the Provincial Legislative Assembly has a right to claim. From what has already been said, it is unnecessary to remark that I consider that the present Legislative Council and Legislative Assembly of Quebec have a right to invoke the usages and precedents of these Houses existing prior to the B. N. A. Act of 1867, from 1791 to the date of that Act. If anything further need be urged than what has been said, there is the notable precedent of the British Parliament, dating their privileges prior to the Commonwealth, and the fact that the Commons, subsequent to the Commonwealth, did not insist upon the right to examine witnesses on oath, as one of their privileges, which was insisted upon by that body during the Commonwealth. (May, p.427.) Whatever powers and immunities attached to the Legislative Assembly of the late Province of Lower Canada and the Legislative Assembly of the late Province of Canada, as neces-

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sarily incident to them in the proper exercise of their functions as legislative bodies, I consider attach to the Legislative Assembly of the present Province of Quebec. In considering the privileges necessarily incident to Colonial Legislatures, we can only apply the Constitution of the Parliament of the United Kingdom, where the analogy obtains. The Senate of the Dominion, or the Legislative Council of the Province, cannot claim the judicial powers of the House of Lords, and yet there are many judicial powers to be exercised in connection with legislation, the depository of which must be somewhere. For example, jurisdiction over divorce is given to the Federal Parliament. It has been thought necessary to assume power to examine witnesses upon oath, and determine the matter judicially, though neither House had greater powers than the Commons House of the United Kingdom. It became a necessary incident to the powers conferred. The Legislative Assembly of our Province has not the mere nude power of legislation. It has, by implication, by usage, and by a Constitution modelled upon the English House of Commons, also an inquisitorial power to make itself acquainted, by means of committees, [with] the needs of the Province, and the evils that exist in society over which it has control, in order to legislate intelligently and administer wisely. The appointment of committees of enquiry for purposes of this nature is incident to the existence and proper working of every legislative body. It is associated with all our ideas of legislation under the British system, and has been exercised without question in all our Parliamentary history as a Province. It has been urged at the bar that this inquisitorial power should be exercised by Royal Commissions, not by Committees of Parliament. Royal Commissions, strictly such, have been asserted by eminent jurists to be unconstitutional, as contrary to

Magna Charta. Lord Coke declares this most emphatically, inasmuch as the King cannot create a court to be administered upon any other rules than the common law. To constitute a court there must be *actor, reus, et judex*. Simple Royal Commissions, without the aid of statutory powers, are far more powerless than Parliamentary Committees. They have no power to compel the attendance of witnesses or the production of papers, or to examine witnesses under oath. Nor can they commit for contempt.

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Since, however, the responsibility of Ministers has been better defined, these Commissions, which are now generally statutory, have been found of great use, but not by any means to supplant parliamentary committees. Judicial functions are now assumed by the House of Commons only as incidentally necessary to carry out their powers, notably in case of private bills and matters of election. May says, "The two Houses, in the course of centuries, have appropriated to themselves different kinds of judicature." The Grenville Act, providing a court in the Commons for the trial of contested elections, is said by Mr. Christian to have conferred immortal honour upon its author. The power to compel the attendance of witnesses, and to compel them to give evidence, it must be remarked, is distinct from the power to administer oaths to such witnesses. Where it has been found necessary to get evidence under sanction of an oath, devices have been adopted to have the witnesses sworn before a judge, or at the bar of the Lords and the like. (May, 427 and 408). It has not been considered essential to the discovery of truth, that witnesses giving evidence before the Commons House or a Committee should be sworn. (May, 427.) Any person who refuses to attend, upon the summons of the Legislative Assembly, to give evidence, is obstructing that body in the legitimate execution of its functions.

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I think, without reference to the statute referred to, there must be an inherent right in the Legislative Assembly to compel persons to attend before them and give evidence. This principle, it appears to me, is conceded in the cases of *Kielly v. Carson* and *Doyle v. Falconer*. In the former, Baron Parke said, "We feel no doubt that such Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure free exercise of their legislative functions, they are justified in acting upon the principle of the common law."

This was said with reference to a Legislative Assembly acting under a Crown charter in a minor Province, and assuredly it should apply with much greater force to this Province, which, for many years, has been governed under a statutory Constitution and upon usages conformable to the British Constitution. The cases of *Tracy*, *Monk* and *Duvernay* in our early jurisprudence, and the recent case *ex parte Lavoie*, sanction these privileges as inherent in our Provincial Legislative Council and Legislative Assembly, and I find them recognised in the late cases in the Privy Council; and I see no reason, in this advanced stage of our parliamentary history and progress in all the material interests which give to a nation importance, why these powers should be denied to our Local Legislature. It must be borne in mind that the immemorial privileges of Parliament date back to a period in history when the British Parliament and British nation were very different from what they are now. The state of affairs then may be gathered from a curious contract, cited in Glanvill's Reports, in the time of Edward IV., 1463, in which John Strange, the member for Dunwich, covenants with his electors "that whether

the Parliament hold long time or short, or whether it fortune to be prorogued, he will take for his wages only a cade and half-barrel of herrings, to be delivered by Christmas."

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The men of England have been vigilant to prevent anything adverse to the common weal getting the sanction of immemorial usage, and the privileges of Parliament, claimed from this usage, have this usage because of their inherent necessity in the governing power. It was well remarked by one of the counsel for the Legislative Assembly, that if we cannot claim the privileges by immemorial usage, we can and ought to have such as are necessary to maintain the dignity and efficiency of our Legislature from the nature and importance of the powers conferred upon them. This warrant discloses no contempt. It is simply an exercise of the power of the Legislative Assembly to bring Mr. *DanserEAU* before that body. If this warrant were issued solely on the ground of privilege, it would be difficult to sanction it in its vague terms, without the purpose being shewn; but by the second and ninth sections of 33 Vict. c. 5, such warrant is permissible, for the House is permitted to bring any person before it, and to adopt such form as it may deem proper. I think the arbitrary form of the order is objectionable, but I cannot say that it is illegal.

With regard to the decision of Mr. Justice Ramsay in the case of *Cotte*, while it evinces great research and is an able opinion from the stand-point from which he views the subject, for the reasons given I am unable to agree with him in the views he has expressed as to the status and powers of our Colonial Legislatures. In his dissent from the majority of the court to-day he has given additional evidence of his research and his familiarity with this subject. He has done me the honour to refer to a speech made by me in

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the late Legislative Council of Canada, when the project of the Constitution to be adopted for the Confederated Provinces was under discussion. The sentiments there expressed, I understand, are cited as apparently inconsistent with the opinion I give now and here. This is not a place for discussion, but of opinion, but I think if my learned brother applies the logical mind which he is known to possess more carefully to the consideration of the sentiments there expressed, he will see no inconsistency between the views there expressed and the opinion now given. The argument then was that of a legislator, deprecating placing large powers in Local Legislatures without guarantees to secure the rights of property. As a fact, the powers were granted without guarantees, and it now only remains loyally to concede to these Legislatures the incidents which are corollary of the large powers conferred. I think the *habeas corpus* should be quashed, and the Serjeant-at-Arms be left to execute his warrant.

MONK, J.:—

I concur in the judgment of the Court, and on the main points in what has fallen from my learned colleagues. Before proceeding to examine the merits of this important case, it may be proper to remark that two technical points of some importance were raised by the opposing counsel at the argument:

1. It was contended by Mr. *Ritchie*, on the part of the Speaker, that the writ of *habeas corpus* had issued improvidently and should be quashed. It was argued that the 20th sec. of cap. 95 (Con. Stat.) would seem to require an affidavit; in fact, a *prima facie* case to be first made out, upon which, and upon which alone, the judge was called upon to exercise his discretion before the writ was allowed to issue. In the present case, this requirement

was not observed; and finally, it was urged that the writ had been erroneously issued on sec. 4 of the same statute.

2. It was, on the other hand, contended by Mr. *Kerr*, on behalf of the petitioner *Dansereau*, that the Speaker's warrant was a general warrant, and did not disclose any offence or delinquency whatever, nor any cause or apparent justification for Mr. *Dansereau's* arrest; and, consequently, that it was absolutely null and void, or, at all events, contrary to law.

These points have received from the Court the serious consideration which they undoubtedly deserve, and after what has been stated by my learned colleagues, I would merely remark on the first of these objections that, as a matter of fact and of regular procedure, the writ in this case did issue on the 20th sec. cap. 95, of the Con. Stat., and not sec. 4 of the same statute. (See *Hobhouse's Case*.) I apprehend that sec. 20 does not require a case to be shewn, by affidavit or otherwise, upon which the discretion of the judges is to be exercised. No such formality was exacted or observed in the present instance, and I doubt whether the mere exhibition of a general warrant, such as was produced in the case under consideration, was precisely what the law contemplated. In instances of this kind, not being of a criminal character, the affidavit of the petitioner, disclosing the chief circumstances of the case, if not of absolute necessity, would have met and answered in a manner more satisfactory, the requirements by the statute, and been more in conformity with the practice which has prevailed in this district—a practice which I regard as in the highest degree proper and judicious—such an affidavit of what was the cause of the arrest, or that there was no legal ground for it. It ought to have rebutted the presumption that the cause of arrest was legal.

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Although I consider it would have been desirable, and certainly more regular, if these formalities had been observed, yet I would not go the length of holding that the writ was improvidently issued, and that it should, therefore, be quashed. I would add, moreover, that notice of the application seems to have been given, that a copy of the warrant was produced before the learned judge, and that no objection appears to have been taken to the issue of the writ on that ground. I would, therefore, overrule this pretension of the counsel for the Speaker.

Upon the second objection, it was urged by Mr. *Kerr* that the warrant being a general warrant, and disclosing no ground or reason for arrest whatever, is irregular, and cannot be maintained by this court. No doubt, it may be said, and it has been ably and strenuously argued by Mr. *Dansereau's* counsel, that the Speaker's warrant should, at least specifically, or in general terms, shew some reason for the petitioner's arrest. Was Mr. *Dansereau* to be taken into custody by the Serjeant-at-Arms, and brought before the bar of the House, for breach of privilege, contempt, or refusing merely to obey the summons of a committee to appear and give evidence? The warrant does not say either in general or specific terms.

Without denying that there is considerable, indeed much, force in this argument, yet I am unable to accede to this view of the matter. I know of no precedent, law or usage which would justify this court in quashing a general warrant issued by the Speaker of the Legislative Assembly in a case like the present. This is, if I am not mistaken, the form of warrant issued by the Speaker of the House of Commons in England in cases similar or analogous to this. (See *Stockdale v. Hansard*; May on the Law, Privileges

and Usages of Parliament, p. 172; the case of the *Sheriff of Middlesex* (1), and the cases there cited; *Burdett v. Abbott* (2), *Howard v. Gosset* (3).) Warrants in this form have been issued by the Provincial Legislature for nearly 100 years, and finally, if the local Act of 33 Vict. c. 5, be part of the law of the land and binding on us, which I hold it is, the 9th section of that statute is decisive, and disposes of the question in terms the most peremptory and explicit

By that clause the house is constituted the exclusive judge of its own modes and forms of proceeding, and I am not disposed to interfere. In a case of doubt, it is a dangerous and delicate course for a court of law to set aside the preliminary proceedings of the Legislature in a matter such as this. I would merely remark that, technically speaking, a warrant of commitment is something different, on which, if a party be imprisoned for an illegal cause, he can have his remedy. For these reasons I would not set aside the warrant of the Speaker. I would not disregard it and liberate the petitioner on that ground.

These two technical objections (no doubt serious, but, as I apprehend, not fatal objections) having been thus overruled, I come now to consider what are the power, authority and privileges of the House of Assembly of Quebec, as I view them, in cases of the kind submitted for our consideration. We have to determine whether, from necessity as an inherent prerogative, an indispensable incident of their legislative authority, from long and recognised usage, or from positive law, they are or are not such as the house claims in the present case.

My learned colleagues have so fully and so ably expressed their opinion and explained the grounds of our judgment, that it is, perhaps, not necessary for me to

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(1) 11 A. & E. 273

(2) 14 East, 1.

(3) 10 Q. B. 359

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offer any very extended observations on this subject ; but since one of my learned colleagues, dissenting from our decision, has, with great learning and marked ability, extended his critical examination of the questions involved over a wide range of history, jurisprudence and constitutional law, it may be expedient that I should state briefly my reasons for coming to the conclusion that our Local House of Assembly does, beyond all doubt, possess the right to summon any of the Queen's subjects in this Province to appear before it or its committee to give evidence, and for other objects ; and that if these persons disobey, or disregard such summons, the House has the power to compel their appearance before the bar of the Assembly, to be dealt with according to law, and the rules and resolutions of that body.

I shall for the sake of convenience first offer a few remarks upon the powers, privileges and functions which, as it seems to me, at all times since the first granting of a Legislature to the colony, have been, and which now necessarily must be, inherent in that body, independent of any precedent or any usage. It was not contended by the counsel for the Speaker that the Legislative Assembly of Quebec possesses all the powers and privileges of the Imperial House of Commons. It is a legislative body, no doubt, but subordinate to that of the Parliament of Great Britain, and subject to its control, if it chose to exercise it. Therefore, such a pretension would perhaps be inadmissible. I do not consider myself bound, in the present instance, to decide that question ; it is not at all necessary that I should do so. Vague or cogent analogies may exist between the two bodies ; but I do not in any way or in the least degree, rest my opinion on these assumed or apparent analogies. They may be referred to, or even invoked, in order to illustrate matters of history and

parliamentary usage, but not as being of material importance in deciding this case.

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For example,—the peculiar powers, laws and usages of the British House of Commons are numerous and extensive, and are now, moreover, pretty well defined—they are, and always have been, I presume, deemed to be inherent, indispensable—in fact, absolutely necessary for the unmolested and efficient exercise of its authority and functions as a legislative body. Upon no other grounds and for no other reasons, could they have existed, or would they have been tolerated by the British people. Whether those powers, laws and privileges, peculiar to the House of Commons, have been the slow growth, the progressive accumulation during the lapse of many centuries arising out of critical emergencies in the development of the British Constitution, or whether they actually originated in the violence and political struggles of the 12th and 13th centuries, are, I presume, questions which I am not called upon to decide, and which it is not expedient to discuss on the present occasion. The precise time at which the memory of man is supposed to halt, or to lose its way, need not be determined by us. One thing is clear, and it is notoriously a matter of fact, that these powers and privileges of the Imperial House of Commons are implied in the very existence of that body, and that they result and have resulted from necessity, or as some would say from convenience (pretty much the same thing in matters of this kind); but time, with its varying and contradictory usages and precedents, is not an essential ingredient here, except in so far as it may have developed, and given strength and expansion to certain usages, and to that necessity and convenience or expediency, as my learned colleague on my right, dissenting from the judgment of the Court, has emphatically termed it.

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Among these usages, laws, rules or implied powers of the Imperial Parliament is to be found one which has existed and been exercised by the British House of Commons for ages, and through all the anarchy and violence of many revolutions, and that is the undoubted authority to compel parties, by general warrants, to appear before the bar of the House to answer for neglect or disobedience, or for certain objects not contrary to the laws of the land, but recognised and to be investigated and enforced, perhaps punished, by the laws and custom of Parliament, and which is indispensable for the efficient and responsible exercise of its functions. This has been an ancient and undisputed prerogative, and that is all, in this connection, which as an illustration arises for our consideration in the present instance.

Now, the same kind of necessity and implied authority, in this respect, though in a subordinate degree, appertains to and is vested in the Legislative Assembly of Quebec, as in the Imperial House of Commons. This I think, is beyond controversy, and I am not disposed to ignore or criticize those powers as they are claimed and enforced in England; and unless our law is clear, decisive and peremptory, I will not and cannot impede or overrule their exercise by our own Legislature.

I am unhesitatingly of opinion that this power, authority or prerogative, or whatever it may be termed, or whatever designation it may receive, is absolutely, indispensably necessary here, in order to carry on and accomplish the legislation of the country; and, at the same time, for the purpose of exerting a vigilant supervision over the Executive Government in the execution of the authority confided to it, and in the performance of its duties towards the people, represented by the House of Assembly. It has been found so in England, where the highest political wisdom has been na-

tured by long experience ; and in fact, in all representative bodies exercising the double functions of legislation, and at the same time called upon to exert a jealous, constitutional control over the executive power of the State, these powers are inherent and essential. And this is more particularly true in regard to legislative bodies framed on the model and vested with the authority of the British House of Commons. A considerable portion of our own legislation, in order to be judicious and well considered, must be preceded by enquiry, and for this purpose Parliament must have the power—the effective power—of making such investigation.

Besides, and further still, not to enumerate a great number and variety of cases, where the Legislature must possess power inherent and indispensable in its very constitution, not only for the purpose of exercising its ordinary functions, but also for the purpose of maintaining its own dignity and the respect of the country,—if it does not possess the power of compelling the attendance of witnesses, and the production of documents and other written testimony, what, under our system of ministerial responsibility to Parliament, is to become of that control and responsibility? Is all this a sham, and an abject delusion? What is to be done with Ministers, as we call them, who may, from culpable carelessness, or from design, have become guilty of some serious delinquency, but cognizable by Parliament only? How are we to deal with Ministries or individual Ministers? How is Parliament to enquire into the management or the mismanagement of the Departments of Government? What, in short, is to be done by Parliament in this respect, if it be declared incompetent to make enquiries, or to compel the attendance of witnesses; if it be helpless, and is forced to act blindfold in all these matters? If this be the case, let the Constitution be

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changed, and let it be declared that our Legislature and our Government constitute and are vested with the powers of a municipality, and no more. But if our Legislature is a British Legislature in the proper sense and meaning of the term, enacting laws for British subjects, though subordinate, and since, as a matter of fact it is so ; and if our Government is framed, in so far as circumstances will permit, upon the model of the British Constitution, and inasmuch as it is so, the British Parliament, in conferring on us such a Legislature and such a Constitution, did impliedly and necessarily bestow on them, and vest in them, the power and the adequate authority of accomplishing and completely fulfilling the objects for which they were intended. *Qui veut la fin, veut les moyens*, may be a small maxim, but it is a true and pregnant one, and it is a principle of the common law, that where political or other such bodies are organized and powers granted, all the means and authority necessary for the exercise of their functions are also impliedly conferred, though not expressly mentioned.

A single illustration will, I think, render all this pretty obvious. In 1870, the Local Legislature passed an Act, 33 Vict. c. 5, by which witnesses examined before Select Committees of the House must or could be sworn ; their evidence is now given under oath. This statute is a part of the law of the land—its binding force no one, I believe, seriously disputes ; but whether they do or no, for us sitting here in this case it is a part of the law of the land, or rather and more especially a law of Parliament. The right of summoning is here implied, and if persons refuse, the power of compelling their attendance is necessary, I presume. If so, they must, I apprehend, be first brought before the House. If the House does not possess this power, the

statute would be a dead letter, and to most practical interests and purposes inoperative.

From all this, therefore, it seems plain to my mind that the House does possess from necessity, and by implied and inherent prerogative, independent of usage or precedent, the powers claimed in the present instance. But if we hesitate in regard to this view of the subject, does there not exist a usage—a jurisprudence, so to speak—in matters relating to the powers of the Local Parliament of Quebec, which must go far to remove all doubt in reference to these powers, as claimed in the present instance? Is there no evidence of an authority, long exercised by our Parliament, and which may, at least, assist us in coming to a safe conclusion in a case like the present? I think we have precedents and decisions of considerable value and importance in this matter; and in invoking these precedents and these decisions, I do so to corroborate the view of the case which I have just presented. They do not, I apprehend, contradict, or in any way invalidate, but they confirm the soundness of the argument based on implied and necessary power; and furnish proof, if such were wanting, of the existence for nearly a century of the law, usage or authority here contended for.

And, first, I would remark that we need not, we cannot go back to the middle ages, exploring and searching for a *lex et consuetudo Parliamenti*. We are not called upon to revert to the times and events beyond which the memory of man runneth not, and knoweth nothing to the contrary. These are pleasing, perhaps instructive speculations, but, according to my view of this case, they lie outside and beyond the enquiries we are called upon to make. In the United States, they date the laws and usages of Congress from the formation of their Constitution, and we may safely, and must from

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necessity, trace ours from the organization of our Government under the British Crown to the present day. Our constitutional retrospect, if I may so express it, is not so extensive, our horizon not so distant; but, at the same time, they are not so hazy or historical as they are in England. We go back scarcely a century, but even within that short period we find the laws, usages and powers of our Parliament constantly and decisively asserted. We have the case of Mr. *Young* in 1793, that of Mr. *Monk* in 1817, those of Messrs. *Tracey* and *Duvernay* in 1832, of *Brodeur* and *Lavoie* in later times. These persons were brought before the bar of the House on general warrants—some for breach of privilege, some for refusing to give evidence and to produce documents, some for libels on the House, and others for delinquencies cognizable by Parliament. In the recent or pending case of the Tanneries Exchange, or Swap, as it is popularly called, witnesses have been summoned and sworn, and reluctantly gave evidence.

There are more and many other instances, not necessary to mention here, in which this inherent and necessary power of Parliament has been repeatedly exercised. Some of these cases were questioned—were brought before judicial authority—but the course and proceedings of Parliament were sustained, or at least have never been overruled. All this looks very much like a *lex et consuetudo Parliamenti*. If they do not establish that, they establish nothing; and in so far as usage is involved to justify these proceedings, we are driven to the conclusion that all the compulsory investigations and enquiries— all the instances of arrest and restraint conducted and enforced for nearly a century, were simply acts of tyranny, usurpation of authority, and, moreover, flagrant violations of law on the part of our Parliament. I should not like so to decide. I have no warrant, no authority for doing so.

It has been repeatedly said, and argued with great earnestness, that there have been three separate, fundamental and distinct breaches in the continuity, so to speak, of our Constitution—one in 1838, one in 1841, and the last in 1867. So likewise, though not in the same form, nor under the same circumstances, have there been disturbances, disruptions—I may say breaches in the British Constitution. Yet antiquarian industry, the legal researches of constitutional lawyers, in pursuit of precedents and parliamentary law, cheerfully travel back over this mutilated Constitution to the 13th century, and even to an earlier period.

Without, however, pursuing this analogy further, or into greater detail, as a matter of fact our Constitution has undergone suspensions, changes, modifications, and withal occasional restorations, and I think it may be safely held that if these parliamentary powers, usages and privileges ever did exist, and since they did exist, they never were, by these vicissitudes in our constitutional history, modified or abrogated; and, inasmuch as the Confederation Act, in this respect at least, has left us where we were—that is, independent, supreme, within our own sphere of legislation—it cannot be said to have interfered with these laws and usages of Parliament such as they existed in 1867.

Thus, then, as I view this part of the case before us, the authority and inherent privileges of the House of Assembly have virtually continued, though occasionally in abeyance, through all the changes of our Constitution, and they exist now in as full force as they did for a long time, and immediately previous to Confederation. I consider myself, therefore, bound by what I regard as an established usage, and I cannot in the face of all this decide that for nearly a century, and up to the present day, the Legislature of this country has, in the instances adverted to,

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and which in part illustrate its history, been acting as a mob, perpetrating illegal acts, and guilty of flagrant tyranny and violations of the law of the land. Such an assumption on my part, in view of the arguments from necessity and usage, above set forth, would not only be inadmissible, but, at the same time, it would be simply a preposterous judgment.

It is unnecessary to refer at length on the present occasion to the decisions of the highest tribunals of England, or to the opinions of eminent judges in their courts, in order to shew that the view here taken as to the inherent authority of Parliament, and the force of parliamentary precedent and usage, even in subordinate Legislatures such as ours, have been fully sustained. None of these cases, it is true, are exactly in point, but the principles there laid down clearly shew that our decision in this case, upholding the power and authority of the Local Legislature, is in entire conformity with what has been there laid down as law.

I have been induced to go more fully into the above considerations than I deem at all necessary in order to dispose of the questions submitted for our consideration, in consequence of the dissent of my honourable and learned colleague on my right, who rests that dissent upon grounds which this court regard as untenable. But it is not essential that these questions should be raised at all. We have a positive law, a statute of the Local Legislature, the 33 Vict. c. 5, which disposes at once of this case. The 2nd and 9th sections of that Act are decisive.

It is and has been, however, argued that that statute is unconstitutional. I do not think so. I am free to admit that, under the rulings of our courts, where a local statute is in palpable and flagrant contradiction to the Confederation Act, or in conflict with an Act of

the Dominion Legislature, the judicial authority of the local tribunals is bound to declare such a law unconstitutional and inoperative. If, however, there exist a doubt, that doubt must be given in favour of the constitutionality of the law, and the statute should be enforced. In this case, I apprehend, there is neither a manifest conflict, nor can a doubt arise. I am clearly of opinion that our Legislature had the power to pass that law. It has not been disallowed—it has been in force for five years, and we are bound by it; and being so bound, we need not appeal to any other authority or laws in order to decide this matter.

Thus, therefore, as it appears to me, upon the three grounds above adverted to—1st, the inherent and necessary powers of our Local Legislature; 2nd, the usage, precedents and decisions, in relation to the powers of our Legislature for nearly one hundred years; and partly under and in virtue of the clear and peremptory authority and requirements of positive laws, the 33 Vict. c. 5, and the statute of the same year which authorizes the administration of oaths to witnesses examined before committees of the House—we are bound to quash this writ of *Habeas corpus*, and to uphold, in so far as this case involves the prerogatives of our Parliament, the authority of the House. My learned colleagues, concurring in the judgment now rendered, have so fully and, I may add, so lucidly enunciated the views of the Court, that any further observations on my part would only weaken their elaborate exposition of the positive law which we regard as decisive of this case.

The judgment is recorded in these words :

"The Court having heard counsel on behalf of the petitioner and of the Speaker of the Legislative Assem-

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bly, and examined the petition, writ of *habeas corpus* and return thereto, doth quash the said writ of *habeas corpus*."(1)

Writ quashed.

[This note contains the judgment delivered by Mr. Justice Ramsay in Chambers in *Cotté's Case*, referred to at pp. 165, 167 *ante*, and is printed from the report in 20 L. C. Jurist, 210.]

RAMSAY, J. :—

On Friday a petition was presented to me in chambers on the part of Honoré Cotté, setting forth that he had been arrested and was then in custody of the Serjeant-at-Arms of the Legislative Assembly for the Province of Quebec, under authority of a warrant issued by the Speaker of that Assembly, and praying that a writ of *habeas corpus* might issue in order that the legality of his detention might be enquired into.

This petition was accompanied by a copy of the Speaker's warrant, authenticated by the Serjeant-at-Arms. The warrant was to the following effect :—

To the Serjeant-at-Arms attending the Legislative Assembly :—

Whereas the Legislative Assembly have this day ordered that Honoré Cotté, of the city of Montreal, cashier of La Banque Jacques Cartier, be sent for in custody of the Serjeant-at-Arms attending the House.

(1) [In *Landers v. Woodworth* (2 Can. S. C. R. 158), decided in January, 1878, it was held by the Supreme Court of Canada that the Legislative Assembly of the Province of Nova Scotia had, in the absence of express legislation on the subject, no power to remove one of its members for contempt, unless he was actually obstructing the business of the House; and that a member having been removed from his seat, not because he was obstructing the business of the House, but because he would not make an apology which the House had required him to make, his removal was beyond the legal authority of the Assembly.

In giving judgment, Richards, C.J., said, p. 192 :—"The Legislatures of Ontario and Quebec seem to have conferred on the House of Assembly in these Provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The Legislatures of the other Provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess."]

These are, therefore, to require you to take into your custody the body of the said Honoré Cotté, and bring him to the bar of the said Legislative Assembly.

Given under my hand and seal at the city of Quebec this third day of February, one thousand eight hundred and seventy five.

(Signed)

J. G. BLANCHET,

Speaker of the Legislative Assembly.

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As the warrant did not set up a felony, or shew that the petitioner was in custody in execution of a sentence of a court of justice, I ordered the writ to issue forthwith.

At the argument, the learned counsel who appeared for the Speaker considered himself authorized, from the fact of the writ issuing before any argument, to draw the inference that I considered the warrant bad.

The production of a warrant plainly bad on the face of it would, it seems to me, be a sufficient reason in any case to use all expedition in issuing the writ of *habeas corpus*, even if the law was silent on the subject. But the terms of the law are imperative, and the judge, in the vacation and out of term, has no discretion to exercise. The writ must issue on view of the copy of the warrant, unless the prisoner be detained for felony or treason plainly expressed in the warrant of commitment, or that, being convicted, he is in execution by legal process: Con. Stat. L. C., c. 95, s. 4. "And if any judge of the said Court of Queen's Bench or Superior Court, in the vacation time, and upon view of the copy or copies of the warrant of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, denies any *habeas corpus* by this Act required to be granted (being moved for as aforesaid), every such judge shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds sterling" *Ib.*, s. 1d. Section 20 of Habeas Corpus Act, to which reference was made, applies to the *habeas corpus ad subjiciendum* in civil matters, and not at all to the case before me.

This question has really never suffered any difficulty. In the case of *Larne* (1), which was a commitment on a warrant of the Speaker of the Legislative Assembly, the argument took place on the return to the writ. It is true that a practice has prevailed here of taking the argument on the presentation of the petition, and probably no great inconvenience arises in ordinary cases by following this short-hand process; but in cases of an important character it should be avoided.

As a practical question, those who oppose the present petition have no ground to complain, for, though not necessary, notice was given of the presentation of the petition in this case, and the argument was, by consent of all parties, deferred to Saturday.

The return to the writ which has now been produced, sets up the Speaker's warrant as a justification of the arrest, exactly in the terms of the copy accompanying the petition.

On view of this return, it appears to me that I am called upon to decide two questions: Has the Legislative Assembly of the Province of Quebec the power to order the arrest of any one for contempt? and if so, has it exercised that authority in a lawful manner in the present case?

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If the Legislature possesses the power claimed, it must be either under the operation of the common law, or in virtue of some statute.

At the argument, the general principle that all the privileges of the Houses of Parliament in England were inherently possessed by the Houses of the Colonial Legislature was not contended for. Indeed such a pretension could not now be maintained. It is true that this doctrine was laid down in 1833 in *Beaumont v. Barrett* (1), but this case was overruled in *Kielley v. Carson* (2), in *Fenton v. Hampton* (3), and in *Doyle v. Falconer* (4).

These decisions are not only of the highest authority, as proceeding from the Privy Council, but they are supported by the strongest considerations. Without setting aside *Magna Charta*, it would be impossible by analogy to extend the right to attach any subject of Her Majesty without the authority of Parliament.

No new writ and no new commission, Coke tells us, can be created without such authority (2nd Inst., p. 478). The right to deprive a man of his liberty can only be exercised by law; and by this is understood the positive law of the land, and not a constructive extension of jurisdiction. Besides, it is a mere fallacy to build an argument on analogy. As was correctly remarked by Mr. *Ritchie*, one of the reasons given for attributing the power to commit to the House of Commons in England, namely, that it is a Court of Record, is absurd. With the exception of the power to deal with questions relating to the return of its members—now almost abolished—the House of Commons has no judicial functions at all, and never had as a body separate from the House of Lords. The real ground of the right there, is immemorial usage; perhaps founded on the fact that in early times the House of Commons had judicial functions as part of the High Court of Parliament.

But it was said that there was a similar usage in Canada, maintained by a continuous jurisprudence. In support of this assertion, my attention has been directed to Mr. *Monk's Case*, in 1817 (S. R., p. 120), and the cases of *Tracy* and *Duvernay* in 1832 (S. R., p. 478). To which might have been added the case of *Lavoie* (5), in which the learned judge expressed views incompatible with the decision in the case of *Kielley v. Carson* (2) decided fourteen years before. In 1818, in reference to the commitment of Mr. *Monk*, a special committee was appointed to examine precedents of such commitments. The committee enquired not only into the practice in England, but also that of Canada and of the other dependencies of the Crown. They cited two cases of attachment, one of their own Assembly as far back as 1793, for the arrest of Mr. *Young*, a member of the House, and another of the Legislature of Jamaica. In this latter case the Legislative Assembly of that island attached the person of Major-General Carmichael, the officer in command of Her Majesty's forces there, and brought him to the bar of the House, to give evidence as to the proceedings before a court martial.

The memory of those familiar with the legislative proceedings of this country will readily supply other cases in which the Legislative Assembly has claimed and exercised the right of attachment.

(1) 1 Moore P. C. C. 59

(2) 4 Moore P. C. C. 63.

(3) 11 Moore P. C. C. 347.

(4) L. R., 1 P. C. 328.

(5) 5 L. C. R., 99.

But does this establish a usage in favour of the Legislative Assembly of the Province of Quebec?

In the first place, I would observe that the jurisprudence is not so conclusive as it might at first sight appear. The cases of *Monk*, *Tracy* and *Duvernay* were all decided prior to the case of *Kidley v. Carson*, which overruled the theory on which these Canadian cases were decided. There remains, then, only the case of *Lavoie*; and although the opinion of the learned judge who sat in that case evidently was that the Legislative Assembly of the late Province of Canada had privileges analogous to those enjoyed by the House of Commons in England, it was, perhaps, not necessary for him to decide that point. *Lavoie* was arrested under the provisions of two statutes of the Province of Canada, and the only question really before Mr. Justice Badgley was as to the form of the warrant. But against this case may be cited the case of *Curillier v. Munro*, (1) in which Chief Justice Rolland and Justices Day and Smith ruled that the privilege from arrest upon civil process does not attach to the members of the Canadian Legislature by virtue of any law or usage, and that it does not attach as a legal incident to the constitution of the Legislature, or by analogy between it and the Parliament of Great Britain.

Here then is a judicial decision which exactly meets the case of *Young*, the origin of this pretended usage in Canada. Again the case of *Beaumont v. Barrett* was mercilessly overruled, two of the judges who sat in it concurring, and no one ventured to hint that there was, or could be, any usage in the Island of Jamaica; yet the select committee of the Lower Canada House of Assembly, in 1818, justified the incarceration of Mr. *Monk* by the proceedings taken by the Legislative Assembly of Jamaica against Major-General Carmichael.

In *Curillier v. Munro*, Mr. Justice Day said, that to constitute a usage "in England the period of time is technically expressed as that beyond which the memory of man reaches not, and this legal memory is supposed to extend back to the time of one of the earliest kings of the Conquest," Richard I. Hale (1 Common Law p. 4) says: "Whatsoever was before that time is before time of memory; what is since that time is, in a legal sense, said to be *within*, or since the time of memory."

No colonial dependency of the Crown of England, therefore, can have any such usage established in favour of its Legislative Chambers, or of the members thereof. Their history is not sufficiently long, nor is it requisite in our day that privileges of this sort should be allowed to grow up under the plea of usage.

But even were the usage established, it could not be extended from one body to another. Thus *Young's Case* in 1793 might perhaps justify *Monk's Case* in 1817, and *Tracy's* and *Duvernay's Cases* in 1832, but they could be no foundation for the cases under the Constitution of the late Province of Quebec. In 1838, the Constitution under the Act of the 31 Geo. III. was suspended in consequence of an armed insurrection, a new Constitution was substituted which subsisted for three years, and the old Constitution of Lower Canada was never restored. Again, the Constitution of 1840 was abolished at the request of the Legislature of Canada, and a totally new Constitution was substituted therefor. In addition to this, there is no analogy

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between the Legislative Assembly of the Province of Quebec and any of the legislative bodies which have subsisted since 1791. They had all general power to legislate for the peace, welfare and good government of the Province (14 Geo. III. c. 83, s. 12; 31 Geo. III. c. 31, s. 2; 1 Vict. c. 91, s. 3; 3 and 4 Vict. c. 35, s. 3), whereas the powers of the Legislature of the Province of Quebec are strictly limited to specified objects. They are restricted exclusively to the subjects enumerated in sections 92 and 93, and concurrently with the Parliament of Canada as to agriculture and immigration under section 95 of the B. N. A. Act; and this is so much the case, that if there is any clashing between the enumeration of the classes of subjects attributed to the Parliament of Canada and of those attributed to the Legislatures of the Provinces, the subject shall not be deemed to be of a local or private nature. They are markedly called Legislatures in contradistinction to Parliament. The Queen forms no part of these Legislatures, although through her representative the Governor-General she appoints the Lieutenant-Governors; and I take it she could not in her own person sanction a Bill of a local Legislature, although she names the officer who shall perform this duty, a bit more than she could perform the duties now devolving on me, acting under her commission and by her authority.

We have only then to enquire whether the power to compel the attendance of witnesses is a power necessary to the existence of a legislative body; and if not, whether the warrant is helped by the statute of Quebec of 1870?

It was objected on the part of the Speaker that I must take the law as I find it, and that no court can decide as to whether an Act is constitutional or not unless there is a conflict of legislation. The exception appears to me to destroy the main proposition. The limitation of the powers of a dependent Legislature by an Imperial Act gives rise to a conflict of legislation the moment the Local Legislature exceeds its powers.

It would be strange indeed if the courts here could take cognizance of a conflict between a Dominion and a Local Act, and be precluded from deciding as to whether the authority of the Imperial Act itself were contravened by a Local Act.

The difficulty we have in realizing this distinction arises from the maxim known to every one in England, that the validity of an Act of Parliament cannot be called in question; but this maxim is only true of an omnipotent Legislature like the Parliament of England. There is no such maxim under the Constitution of the United States, and it does not hold good unrestrictedly under the present Constitution in Canada. I say unrestrictedly, because the maxim holds good in a sense. The courts cannot enquire as to the mode of exercising a power, but only as to its existence.

An illustration from our own history will explain my meaning and prevent misapprehension on a point of importance. The Act of 1774 appointed a Governor and Council, with power to make ordinances for the peace, welfare and good government of the Province of Quebec; but one power, that of levying duties and taxes, was reserved. Now, I take it to be incontrovertible that if the Governor and Council, acting under the provisions of the Act of 1774, had imposed a tax on the real estate of the people of Lower Canada, the courts would not have hesitated to declare the ordinance to be illegal, null and void.

The inconvenience of every magistrate deciding as to the constitutionality of an Act was insisted upon; but it appears to me that this inconvenience

is the inseparable result of dividing the legislative power. Could it be contended for an instant that a Justice of the Peace should give effect to a Local Act purporting to amend the law as to larceny? or that a Commissioners' Court should give heed to a Dominion Act restraining their jurisdiction to five pounds? It would be idle to contend that these are extreme cases. If the right exists in extreme it exists in delicate cases. It either exists or it does not, and if it exists it is the duty of the judge to exercise it to the best of his ability whenever called upon to do so.

As I had no doubt on this point, I did not think it necessary to hear petitioner's counsel upon it. It has already come up frequently before our courts since Confederation, and the decisions have been uniform in maintaining the right of the courts to decide on the constitutionality of an Act passed by a Legislature having a limited power to make laws. These cases were all examined by Mr. Justice Drummond in giving judgment in the case of the *Union St Joseph v. Belisle*; and although the judgment in that case was reversed by the Privy Council, the point in question was not overruled. On the contrary, the Privy Council confirmed the ruling by declaring the Act to be within the powers of the Local Legislature.

Besides, I am not aware that any constitutional writer of note has expressed any doubt on this subject. In the despatch of Sir John Macdonald relative to this Act, quoted at the argument, he expresses doubts as to its constitutionality, but he refrains from advising its disallowance, because the necessity arising, the courts can pass on the question. Apart from any consideration of a purely personal character, it must be borne in mind that Sir John Macdonald was one of the authors of the Bill, and from the high and responsible position he held at the time of Confederation, his opinion is entitled to great weight on a question of this sort.

The next point is as to the right of the House to compel the attendance of witnesses at their bar. I understood the learned counsel for the Speaker to maintain, 1st, without laying claim to all the privileges of the House of Commons in England, that the right of each House of the Legislature to compel the attendance of witnesses was a power necessary to the carrying out of the objects for which the Local Legislature was created, and that without the Act, 33 Vict. c. 5, this power existed; 2nd, that the Act 33 Vict. c. 5, was within the scope of the functions of the Legislature of Quebec.

I cannot agree with either of those propositions. Necessity, to be the ground-work of a power of this sort, must be an absolute necessity; such, for instance, as the power of an assembly to keep order within the hall where its deliberations are carried on, but not a mere matter of convenience. In the case of *Doyle v. Falconer*, an outrage in face of the House was held not to justify a commitment. Now, the object of a Legislature is to make laws and not to take inquests. There cannot then be any absolute necessity in their hearing witnesses. So much is this the case that there is no common law right to examine a witness under oath in committee or before either of the Houses of Parliament in England, except only in cases of impeachment, before the Lords. There is not, therefore, anything judicial in such a proceeding. The so-called witnesses are merely advisers; what they say has only argumentative authority, for *in judicio non creditur nisi juratis*.

Among the classes of subjects on which the Local Legislatures are permitted to legislate, I cannot find anything to authorise the passing of such

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a law as that now invoked. The learned counsel for the Speaker argued that sub-section 1 of section 92, B. N. A. Act, which gives the power to amend the Constitution, except as regards the office of Lieut.-Governor, implied it. But that only refers to the matters under heading "Provincial Constitutions." Again, reference was made to section 65, but that again only preserves so much of the organization of the executive authority as is required for carrying on the affairs of the country. It has nothing earthly to do with the privileges of the Houses of the Legislature. Again, it was said they could punish by way of fine, penalty or imprisonment. But that is only for enforcing a law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in section 92, and, I take it, according to the procedure established in all other criminal matters.

The Dominion Act supplies another class of argument destructive of the pretension of the House of Assembly at Quebec, and it is this, that the Houses of our Parliament of Canada—which is only a limited Legislature, in the sense that it is deprived of certain legislative powers exclusively confided to the Local Legislature—could not exercise any such right without statutory enactment; and further still, that the Parliament could not, by its own act, confer these privileges on the Houses. About the time the Ministers of Canada were at home preparing the way for the passing of the B. N. A. Act, *Doyle v. Falconer* was decided; and I understood that the judgment in that case suggested the introduction of section 18. *Doyle v. Falconer* does not maintain, however, the necessity of Imperial legislation to grant such powers; and I am inclined to think that a Legislature with general powers, unrestricted on this point, might give to anybody, and so to its Legislative Chambers respectively, powers similar to those exercised by the House of Commons in England. But be this as it may, the right was asked for and granted to the Parliament of Canada under the conditions that the powers should be defined by Act of the Parliament of Canada, and that they should never exceed those at the passing of the Dominion Act, held and enjoyed and exercised by the Commons House of the Parliament of Great Britain and Ireland, and by the members thereof. Parliament then has only the power in a restricted sense; and can it be for an instant maintained that a body possessing only special powers created by the same Act, should have, by implication, rights denied to the great legislative body of the country?

There is one section of the Local Act in question which suggests a doubt as to whether the Legislature of Quebec had any very sincere belief in its powers to pass it. Section 3 absolves from responsibility for civil damages for anything done under a warrant issued under the authority of the House.

If they had the power to pass the Act, no action could lie, and the section was unnecessary; if they had not the power, then this clause simply attempts to absolve certain persons from the civil consequences of a trespass.

I do not think it necessary to allude to the form of the warrant. It is plain that in issuing such a warrant the Speaker was not relying on the statute, for it is elementary that a statutory power does not authorize the assertion of its authority in a form so laconic as that adopted by the Speaker in the present instance. As little can it be supported on the modified theory of the Legislative Assembly possessing inherently those powers necessary

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for its existence. If a warrant so general in its terms can be supported in any case—which may fairly be doubted—it can only be on the assumption that the authority issuing it has all the privileges, immunities and powers of the English House of Commons. As it stands, the warrant only discloses an arbitrary arrest—an arrest absolutely without cause, and consequently a flagrant and dangerous violation of the liberty of the subject.

In the remarks I thought it my duty to make, to explain the reason for the order I must now issue, I have avoided any allusion to the object which every one of course knows the Legislative Assembly has in view in these proceedings, and this because I am not judicially seized of any such matter. This, however, I may add: that the utility of the object in view could, under no circumstances, affect my judgment. A bad precedent is generally established to serve momentary convenience.

On the whole, then, I am of opinion that the warrant must be declared illegal and quashed, and the petitioner be discharged from custody.

The same order must go in the case of *Ducernay*.

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J. C. arbitration of each witness whom he did not consider to have
 1896 been called unnecessarily, having regard to the character of his
 COMMISSIONER FOR EVIDENCE and the probability of his having to be recalled. The
 RAILWAYS allowance for the witness Coyle should also be determined
 v. according to this rule. Their Lordships are therefore of opinion
 O'ROURKE. that the order for review of the items in the schedule to the
 notice of motion for witnesses' expenses was properly made.
 The result is that in the principal appeal the order of the Full
 Court, so far as it relates to the consultations and conferences,
 should be reversed, and so far as it relates to the shorthand
 notes and witnesses' expenses should be affirmed, and their
 Lordships will humbly advise Her Majesty accordingly. No
 other question was argued in the cross-appeal, and their
 Lordships will humbly advise Her Majesty that it should be
 dismissed. The parties will pay their own costs of these
 appeals.

Solicitor for appellant : *G. M. Light.*

Solicitors for plaintiffs : *Young, Jones & Co.*

[PRIVY COUNCIL.]

J. C.* FIELDING AND OTHERS DEFENDANTS ;
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1896 ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

July 28. *Law of Nova Scotia—Jurisdiction of Provincial House of Assembly—Immunities of its Members—Order of Imprisonment—Revised Statutes, 5th Series, c. 3.*

The Nova Scotia House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and to punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment :—

* *Present*: LORD HALSBURY L.C., LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

Held, that the sections of the local Revised Statutes, 5th Series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are intra vires of the local legislature, as relating to the constitution of the province within the meaning of s. 92 of the British North America Act, 1867, or under the authority of s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognised by the Act of 1867, s. 88.

Barton v. Taylor (11 App. Cas. 197) distinguished.

APPEAL from an order of the Supreme Court (Dec. 2, 1893) dismissing the appellants' application to set aside a judgment and verdict in favour of the respondent for \$200 damages, and to enter judgment for the appellants.

The circumstances out of which litigation arose were these. The respondent was Mayor of Truro, in the Province of Nova Scotia. Lawrence, one of the appellants, was recorder of the town and a member of the House of Assembly. Lawrence's salary was increased by an Act of the local legislature (54 Vict. c. 119), whereupon the town council exhibited articles of complaint against him, charging him with misbehaviour in his office of recorder and as member of the legislature, and in particular with having promoted the increase of his own salary. The respondent afterwards signed and published a petition, annexing a copy of the articles, in which petition were certain statements reflecting upon the conduct of Lawrence, on whose motion a resolution was passed by the House that the respondent had by such publication been guilty of a breach of the privileges of the House, and should be summoned to attend at its Bar. The respondent contended that his acts complained of were done by him in good faith in his capacity of mayor, and were not libellous. He was ordered to withdraw and remain in attendance, and subsequently ordered to be called in and reprimanded. He refused to obey, and left the precincts of the House; whereupon he was by order of the House arrested by the serjeant-at-arms, brought to the Bar of the House, and directed by the House to be committed to the common gaol of Halifax for forty-eight hours, with a proviso that imprisonment should cease if

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any prorogation supervened. He was imprisoned, but shortly afterwards discharged on a writ of habeas corpus issued out of the Supreme Court.

Two days afterwards, on April 27, 1892, the respondent brought his action against the appellants, all of whom were present at and voted for the passing of the resolution which led to the imprisonment.

The defence rested upon Revised Statutes, 5th Series, c. 3, under which it was contended that the House of Assembly possessed the same privileges, immunities, and powers as were enjoyed by the House of Commons of Canada, and also of the United Kingdom; that by ss. 29, 30, and 33 the House was a Court of Record, with an inherent power to punish insults to or libels on its members during session, and that the appellants possessed the privileges of judges of a Court of Record; that by s. 26 they were exempt from any civil action or damages. Some of the appellants pleaded a special Act of indemnity relating to themselves passed on April 30, 1892, and entitled, "An Act to amend c. 3 of the Revised Statutes of the composition, powers, and privileges of the House."

At the trial the judge ruled that the action must be dismissed as against the appellants protected by the last-mentioned Act; but that as against the others the provisions of Revised Statutes, 5th Series, c. 3, under which they claimed to have proceeded, were not within the competency of the legislature.

On appeal, M'Donald C.J. and Graham E.J. agreed with the first Court that the provisions in question were ultra vires the local legislature, and that the indemnity clause (s. 26) did not apply. Ritchie J. thought that the provisions were not ultra vires, and that the House was sitting as a Court of Record and acting within its jurisdiction, its members being protected accordingly. Weatherbe J. thought that the statute should be construed as empowering the House to deal with matters of crime only as an incident of protecting members in their proceedings; that so construed it was not ultra vires, and was applicable to the proceedings in question. The Court being equally divided, the judgment appealed from was affirmed.

Cohen, Q.C., Longley (Attorney-General for Nova Scotia), and *Lewis Coward*, for the appellants, contended that the House of Assembly had power to commit for contempt committed in the face of the Assembly, and that the respondent had been guilty of such contempt. Reference was made to *Phillips v. Eyre* (1) and *Doyle v. Falconer*. (2)

[THE LORD CHANCELLOR. Those are cases which illustrate the implied power of the Legislature. Here there is a special Act, and the real question is whether it is *intra vires*.]

But apart from the special statute, the House of Assembly has powers, inherent in it, necessary for carrying on its business as such, including the power of punishing for contempts committed in the face of the Assembly. With regard to the power of the Assembly, as defined by, or derived from, statute, reference was made to the Imperial Act 28 & 29 Vict. c. 63, s. 5, by which the right of representative colonial legislatures to make laws respecting their own constitution and powers was conferred upon them. The British North America Act, 1867, does not purport to take away such right as regards Canada and its provinces. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the Act of 1867, the English Parliament defined the powers of the Dominion House of Commons; whilst it nowhere in the Act of 1867 or later defines those of the Assembly of Nova Scotia. But the Dominion House of Commons was created by the Act of 1867; the Nova Scotia House of Assembly existed prior thereto. Before 1867 Nova Scotia was governed by a Lieutenant-Governor and Legislative Assembly, who derived their powers under s. 5 of 28 & 29 Vict. c. 63. By s. 88 of the Act of 1867, the Nova Scotia constitution was continued as it existed at the date of the Union. Its power, therefore, to enact the provisions of Revised Statutes, c. 3, ss. 20 to 40, inclusive (see especially ss. 20, 29, 30, 31, and 33), relied upon by the appellants for their defence in this case, are derived from 28 & 29 Vict. c. 63. Beyond that, the Act of 1867, s. 92—see especially sub-ss. 1, 13, and 15—must be construed as conferring on the provincial legislature the exclusive right to amend the constitution of the province, to make laws

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(1) L. R. 6 Q. B. 1.

(2) L. R. 1 P. C. 328, 340.

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affecting civil rights in the province, and to impose punishment for violating any law of the province made in relation to any matter enumerated in s. 92. Sect. 91 must be read in conjunction with s. 92, and must not be construed so as to conflict with the fair meaning of s. 92. Reference was made to *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1); *Attorney-General of Ontario v. Attorney-General for the Dominion* (2); and to *Citizens' Insurance Co. v. Parsons*. (3) It was contended that ss. 20 to 40, both in their general result and in their particular provisions, are amendments of the constitution of the province within the meaning of s. 92. Further, s. 129 was referred to as preserving, and as intended according to its true construction to preserve, to the House of Assembly both the right to pass laws enabling it to commit for contempt and also its existing powers to commit for contempt and breach of its orders.

Edward Blake, Q.C. (of the Colonial Bar), and *Tyrrell Paine*, for the respondent, contended that the provisions of c. 3 of 5th series of Revised Statutes of Nova Scotia were ultra vires the local legislature. The appellants, they contended, could not rely on s. 20 of the Revised Statutes, 5th series, c. 3, because that section only covered cases not specifically provided for. The present case is specifically provided for—if regarded as libel, by s. 29, sub-s. 1; if regarded as contempt for disobedience to an order of the House, by s. 29, sub-s. 3. The respondent's case, however, with regard to both s. 20 and s. 29, is that they are ultra vires. They cannot be supported as being an exercise of the powers given by the Colonial Laws Validity Act, 1865, s. 5, for the definition of colonies given in that Act (s. 1) would not comprise the provinces united into the Dominion of Canada by the British North America Act, 1867. The legislative authority is different; the executive authority is different; the controlling power over legislation is different. Moreover, the effect of the British North America Act is to repeal the Colonial Laws Validity Act so far as the provinces are concerned. The provincial legislatures possess no powers of legis-

(1) [1892] A. C. 437, 441.

(2) [1894] A. C. 189, 200.

(3) 7 App. Cas. 96, 107.

lation either inherent in them or dating from a time anterior to the British North America Act: *Bank of Toronto v. Lambe*. (1) In order to ascertain what the powers of a provincial legislature are you must refer to s. 92 of the British North America Act. The appellants rely upon sub-ss. 1, 13, and 15 of that section. Sub-s. 1 gives the power to amend the constitution. This, however, does not involve the capacity to take the extraordinary powers purported to be given by the Revised Statutes, 5th series, c. 3. The capacity to take such powers and the power to amend the constitution are different things, and the Imperial Legislature, when they have intended to invest a colonial legislature with the capacity to take such powers, have used apt words for the purpose. See s. 18 of the British North America Act, s. 5 of the Colonial Laws Validity Act, and s. 35 of the Victoria Government Act, 18 & 19 Vict. c. 55. This last-mentioned Act shews conclusively that the power to amend the constitution does not include the capacity to assume such powers as are here claimed, for by s. 60 of the Act the power to amend the constitution is fettered by conditions to which the capacity of assuming such powers is not subject.

With regard to sub-s. 13 of s. 92, which gives the power to make laws in relation to property and civil rights, the powers taken are really an interference with the powers given to the Dominion Parliament. With reference to the criminal law authorized by s. 91, sub-s. 27, whether regarded from the point of view of libel or contempt, the effect of the 20th and 29th sections of the Revised Statutes, 5th series, c. 3, is to legislate as to criminal matters, and the legislation only incidentally relates to civil rights. For this purpose its real object and not its incidental effect must be regarded in order to determine whether it is within the competence of the provincial legislature. Sub-s. 15 of s. 92 has no operation unless the law is primarily in relation to some matter coming within that section. If it is, then no doubt such law may be enforced by fine, penalty, or imprisonment.

If the appellants rely upon s. 30 of the Revised Statutes, 5th series, c. 3, constituting each House of the legislature a

(1) 12 App. Cas. 575, at pp. 587, 588.

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Court of Record, that section is ultra vires both for the reasons given as to ss. 20 and 29 and because it in effect appoints the judges of the Court contrary to the provisions of s. 96 of the British North America Act.

There remains s. 26 of the Revised Statutes, 5th series, c. 3, which not only purports to take away the right of action against members, which it may be is legislation with regard to civil rights, but purports to alter the criminal law by giving the members immunity from prosecution. In fact, it makes any such action or prosecution a violation of the chapter, and, therefore, under s. 31 punishable as a crime. Such an interference with the liberty of the subject far transcends any powers possessed by the Imperial House of Commons, is in the highest degree tyrannical, and cannot be within the powers of the provincial legislature. If the appellants' contentions are correct, the provincial legislatures have far wider powers than those possessed by the Dominion Parliament, which by 38 & 39 Vict. c. 38, repealing s. 18 of the British North America Act, are limited to those possessed by the Imperial House of Commons at the time of the passing of any Dominion Act taking such powers.

Counsel for appellants were not heard in reply.

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The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from an order of the Supreme Court of Nova Scotia dismissing the application of the appellants for an order that the verdict and judgment entered for the present respondent at the trial of the action before Townshend J. might be set aside and judgment should be entered for the appellants. By the verdict and judgment in question the appellants were found to have unlawfully assaulted and imprisoned the respondent. The Supreme Court were equally divided. McDonald C.J. and Graham E.J. were in favour of confirming the judgment, whilst Ritchie J. and Weatherbe J. held that judgment should be entered for the appellants. The judgment of Townshend J. therefore stood confirmed.

The respondent was summoned to attend at the Bar of the

House of Assembly to answer a breach of the privileges of the House in having published a libel reflecting on a member or members of the House (in connection with their conduct as members of the House). He attended on two occasions, and on the second occasion was ordered to withdraw and remain in attendance during the debate which took place. On being called in by the serjeant-at-arms by order of the speaker he refused to obey the order and left the precincts of the House.

It is not denied that the respondent intentionally disobeyed the order of the House. He was thereupon arrested by order of the House, and on being brought to the Bar was adjudged to have been guilty of a contempt of the House committed in the face of the House, and was committed to the common gaol of Halifax for forty-eight hours. Upon this he brought an action for assault and imprisonment, and it is from the judgment in that action that the present appeal is brought. The appellants are sought to be made liable by reason of their having voted as members of the House of Assembly for the imprisonment of the respondent.

The acts complained of were justified under ss. 20, 29, 30, 31 of c. 3 of the Revised Statutes of Nova Scotia, 5th series. The appellants also relied on the indemnity given to members of the House of Assembly by s. 26 of the same statute.

These sections are as follows:—

“20. In all matters and cases not specially provided for by this chapter, or by any other statute of this province, the legislative council of this province and the committees and members thereof respectively, shall at any time hold, enjoy and exercise such and the like privileges, immunities and powers as shall be for the time being held, enjoyed and exercised by the senate of the Dominion of Canada, and by the respective committees and members thereof, and the House of Assembly, and the committees and members thereof, respectively, shall, at any time, hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada, and by the respective committees and members thereof; and such privileges, immunities and powers, of both Houses, shall be deemed to be

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and shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this province, and by and before all justices and others, be taken notice of judicially."

"26. No member of either House shall be liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him by petition, bill, resolution, motion or otherwise, or said by him before such House; and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages, shall be deemed violations of this chapter."

"29. The following acts, matters and things are prohibited, and shall be deemed infringements of this chapter:—

"1. Insults to or assaults or libels upon members of either House during the session of the legislature."

The other provisions of the section are immaterial to the present purpose.

"30. Each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into and (after the lapse of twenty-four hours) punishing the acts, matters and things herein declared to be violations or infringements of this chapter; and for the purposes of this chapter each House is hereby declared to possess all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters or things, and awarding and carrying into execution the punishment thereof provided for by this chapter, and amongst other things each House shall have power to make such rules as may be deemed necessary or proper for its procedure as such court as aforesaid.

"31. Every person who shall be guilty of an infringement or violation of this chapter shall be liable therefor (in addition to any other penalty or punishment to which he may by law be subject) to an imprisonment for such time during the session of the legislature then being held, as may be determined by the House before whom such infringement or violation shall be inquired into. The nature of the offence shall be succinctly

and clearly stated and set forth on the face of any warrant issued for a commitment under this section."

It should be mentioned that by an Act (Revised Statutes of Canada, 49 Vict. c. 11) the Dominion Parliament had already conferred on themselves the privileges, immunities, and powers of the House of Commons of the United Kingdom.

If it was within the powers of the Nova Scotia Legislature to enact the provisions contained in s. 20, and the privileges of the Nova Scotia Legislature are the same as those of the House of Commons of the United Kingdom as they existed at the date of the passing of the British North America Act, 1867, there can be no doubt that the House of Assembly had complete power to adjudicate that the respondent had been guilty of a breach of privilege and contempt and to punish that breach by imprisonment. The contempt complained of was a wilful disobedience to a lawful order of the House to attend.

The authorities summed up in *Burdett v. Abbot* (1), and followed in the case of *The Sheriff of Middlesex* (2), establish beyond all possibility of controversy the right of the House of Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law and without having its process interfered with by those courts.

The respondent, however, argues that the Act of the provincial legislature which undoubtedly creates the jurisdiction and further indemnified members of it against any proceedings for their conduct or votes in the House by the ordinary courts of law is ultra vires.

According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom, or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature. By s. 1 of 38 & 39 Vict. c. 38, which was substituted for s. 18 of the British North America Act, 1867, it was enacted that the privileges, immunities and powers to be held, enjoyed and

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(1) 14 East, 1.

(2) 11 Ad. & E. 273.

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exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing Legislature of Nova Scotia. By s. 88 the constitution of the Legislature of the Province of Nova Scotia was subject to the provisions of the Act to continue as it existed at the union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose.

Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated (*inter alia*), the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor.

It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the dis-

charge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

It is further argued that the order which the respondent disobeyed was not a lawful order, or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House, yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged to be libellous and during the investigation of the question who was responsible for its presentation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was *ultra vires*, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament; but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.

The effort to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of Legislature have been invariably unsuccessful, and

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it may be observed that 1 Wm. & M., Sess. II., c. 2, s. 1, sub-s. 9, "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament," is declaratory and not enacting.

Their Lordships are, therefore, of opinion that s. 20 of the Provincial Act is not ultra vires and affords a defence to the action. It may be that ss. 30, 31 of the Provincial Act if construed literally and apart from their context would be ultra vires. Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

It is to be observed that in the case of *Barton v. Taylor* (1), referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had in pursuance of statutory powers adopted certain standing rules or orders for the orderly conduct of the business of the assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident to or inherent in a Colonial Legislative Assembly. This Board refused to adopt that contention, but their Lordships expressly added:—

"They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly 'to adopt

(1) 11 App. Cas. 197.

from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred.' This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it."

But independently of these considerations the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action, and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.

No such question as that which arose in *Barton v. Taylor* (1) arises here. All these matters—the express enactment of the privileges of the House of Commons of the United Kingdom—the express power to deal with such acts by the Provincial Assembly—the express indemnity against any action at law for things done in the Provincial Parliament, are all explicitly given, and the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws.

For these reasons their Lordships will humbly recommend

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to Her Majesty that the judgment in this case should be reversed and judgment entered for the appellants here [the defendants below] with costs. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Hill, Son & Rickards.*

Solicitors for respondent: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

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Nov. 15.
1896
June 9;
July 28.

SMITH (OFFICIAL LIQUIDATOR OF THE BONANG }
GOLD MINING COMPANY, LIMITED) . . . } APPELLANT ;

AND

BROWN RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Companies Act, 1874, s. 57—English Companies Act, 1867, s. 25—Contract—Shares deemed to be fully paid up—Liability.

Where the members of a syndicate resolved to form a company, distributing the shares therein rateably amongst themselves according to the extent of their interests in the syndicate property; the same to be deemed in great part paid up, and a deed of sale of their property was executed by their trustees to a trustee for the company, afterwards filed with the registrar and adopted by the directors, which embodied the above resolution:—

Held, that the deed of sale was not a contract within the meaning of s. 57 of the Colonial Act of 1874, corresponding with s. 25 of the English Companies Act of 1867, so as to protect the shares from liability to calls in respect of the amounts which were to be deemed as paid up. It did not effect a genuine transfer of property in respect of which shares deemed to be paid up formed part of the consideration; nor were any legal rights or liabilities created thereby.

Hartley's Case (L. R. 10 Ch. 157) distinguished.

APPEAL by special leave from an order of the Supreme Court (Nov. 13, 1893) affirming an order of Manning J. (Aug. 25, 1893), which dismissed an application by the appellant that the

* *Present*: THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

TAB 5

THE DUKE OF NEWCASTLE APPELLANT;

AND

ROBERT MORRIS RESPONDENT.

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July 5, 7.*Statute—Bankruptcy—Non-Trader—Privilege of Parliament.*

Where persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges, are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist.

Privilege of Parliament exists at Common Law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege.

Before the *Bankruptcy Act* of 1861 traders having privilege of Parliament were rendered liable to the bankrupt laws, but the privilege of freedom from personal arrest was expressly reserved to them. By the 69th section of the Act of 1861 all debtors (non-traders as well as traders) were made liable to the bankrupt laws. Nothing was said in the Act to reserve to debtors who had privilege of Parliament their freedom from personal arrest:—

Held, that the statute included all debtors whatever, but that such debtors as were entitled to privilege of Parliament still continued to enjoy its protection.

ON the 21st of June, 1869, the Respondent filed his Petition in the usual form in the Court of Chancery, praying that an adjudication in bankruptcy might be made, under the *Bankruptcy Act* of 1861, the 24 & 25 Vict. c. 134, s. 69 (1), against the Appellant. It was contended, in answer, that the Appellant, being a non-trader, a peer of the realm, and enjoying privilege of Parliament, was not subject to an adjudication in bankruptcy. Mr. Commissioner *Winslow* adopted this view of the case, and dismissed the Petition. On appeal to Lord Justice *Giffard*, the order of Commissioner *Winslow* was, on the 20th of November, 1869, discharged, and the Petition remitted back for hearing (2). The present appeal was then brought.

(1) "All debtors whether traders or not shall be subject to the provisions of this Act; but no debtor who is not a trader shall be adjudged bankrupt

except in respect of some one of the acts of bankruptcy hereinafter described as applicable to a non-trader."

(2) Law Rep. 5 Ch. Ap. 172.

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Sir *R. Palmer*, Q.C., and Mr. *Ernest H. Reed*, for the Appellant :—

Privilege of Parliament is inconsistent with liability to the bankrupt law. Wherever, therefore, the Legislature has intended that a person having privilege of Parliament should be liable to be declared a bankrupt, it has expressed that intention in clear terms, has specified the particular cases in which, and the circumstances under which, the bankruptcy should be adjudged, and has accompanied its special directions with a formal saving of the Parliamentary privilege. All these things are wanting in the statute of 1861. There is a mere enactment that all debtors shall be liable to be declared bankrupts; non-traders are, for the first time, introduced as liable to the bankrupt law, and there is no mention whatever of any class of persons who, in consequence of enjoying certain well-established privileges, have always been exempt from the operation of those laws.

This Parliamentary privilege exists by the Common Law, and cannot, therefore, be taken away, in part or in the whole, except by express and direct legislation. *Blackstone* (1) describes the privileges of Parliament as being “large and indefinite,” and as being capable of being determined by Parliament alone; and among these privileges that of personal freedom from arrest is most important. *Bacon’s Abridgment* (2) is to the same effect; and these Parliamentary privileges were fully recognised in the *Privilege Case* (3). Of course the other subjects of the realm are not to be left without legal remedies for legal claims they may have against members of either House of Parliament; but the mode of proceeding in such cases has always been the subject of special legislation. The 10 Geo. 3, c. 50, is an instance of this, and there are many others. [The 1 Jac. 1, c. 13; 12 & 13 Will. 3, c. 3; and 2 Anne, c. 15, were specially referred to.] The 4 Geo. 3, c. 33, was the first statute that subjected persons having privilege of Parliament to the operation of the bankrupt law, but that statute carefully prescribed the times and the forms of the proceedings, and, in sect. 4, expressly enacted that “nothing in this Act shall subject any person entitled to privilege of Parliament to be arrested or imprisoned during the time of such privilege, except in cases made felonies by the Acts relating to bankruptcy.” That form

(1) 1 Comm. 164.

(2) Tit. Privilege, C.

(3) Sir *W. Jones*, 154.

had been followed in all similar statutes since that time. It is clear, therefore, that whenever the Legislature intended that a person having privilege of Parliament was to be brought within the operation of a statute, it took care to guard against the violation of that privilege itself. The 12 & 13 Vict. c. 106 (the *Bankruptcy Act* of 1849) contained (sect. 66) an enactment precisely similar to that in the 4 Geo. 3, c. 33, s. 4; and did so, of course, because by the 77th and 78th sections persons having privilege of Parliament were, according to certain forms therein prescribed, made subject to the bankrupt laws. The 24 & 25 Vict. c. 134 (the *Bankruptcy Act* of 1861), the Act now in question, repealed a great many of the sections of the preceding statute, but incorporated others into its own provisions. Among those which were to be read as part of the more recent Act were the 66th, the 77th, and the 78th sections. The principles by which statutes of this kind were to be construed were stated in *Hawkins v. Gathercole* (1), and in the case of *Ex parte Bristow* (2) Lord Cairns refused so to incorporate all the unrepealed provisions of the Act of 1849 into the Act of 1861 as to make the non-trader, who was then first rendered liable to bankruptcy, subject to all the provisions which, by sect. 101 of the Act of 1849, had been directed against the trader alone. [THE LORD CHANCELLOR:—In all former cases the Legislature had only applied itself to dealing with the trader, because until the Act of 1861 none but a trader could be made a bankrupt.] But the sect. 221 of that Act, and its sub-sections, appear to include acts which may be done by all persons whatever, whether privileged or unprivileged. It was necessary, following the rule of previous legislation, to have an express provision to deal with members of Parliament, but if the 69th section is taken to be construed as including a person enjoying Parliamentary privilege, then he is dealt with as a private individual and no more, and his privilege is taken away by mere inferential construction. So to construe the section would include all persons whatever, and would make even princes of the royal blood liable to the law of bankruptcy. [THE LORD CHANCELLOR:—No. Such a liability must be specially provided for by the members of the royal family being expressly named.] Many of

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(1) 6 De G. M. & G. 1.

(2) Law Rep. 3 Ch. App. 247.

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the provisions of the general law would never have been applicable to a person having Parliamentary privilege. That is shewn by reference to some of the provisions of the Act of 1849. For example, by the 119th section of that Act, any bankrupt keeping out of the way might have been arrested. That could not have been intended to apply to such persons, and the same observation may be made as to several other sections of that statute. [THE LORD CHANCELLOR:—The statute 1 & 2 Vict. c. 110, gives some large remedies against the real estates of judgment debtors and against their personal property, but contains a clause by which those who take a debtor's person in execution lose the benefit of these special remedies. Would you say that, as a person having privilege of Parliament cannot have his person taken in execution, therefore these special remedies were inapplicable to his estates?] Whatever may be said on that point, it is clear that a member of Parliament, not being liable to arrest, cannot come within any clauses the provisions of which are founded on the power to arrest. In all the statutes, from the earliest time to the present (the statute of 1861 omitting all mention of the matter), the Legislature in making a person with privilege of Parliament liable to the bankrupt law has coupled that liability with a declaration that his person shall be free from arrest. By omitting all mention of this matter, the statute of 1861 could not have created a liability which never before existed. It cannot, therefore, have intended to deal with persons having privilege of Parliament. General words, a mere indefinite phrase, cannot have the effect of taking away this long and carefully-guarded privilege. If that could be so, then some of the other provisions of the statute would be useless, and even superfluous. The Legislature has itself strengthened this argument, and shewn what the previous law was, by having made a new enactment entirely at variance with that law. Thus the 120th section of the 32 & 33 Vict. c. 71 (the Act of 1869), for the first time declares that "If a person having privilege of Parliament commits an act of bankruptcy he may be dealt with under this Act in like manner as if he had not such privilege." This is itself a declaration that till that Act he could not be so dealt with. The case of *Meymot* (1) really

(1) 1 Atk. 196-201.

does not affect this question. No one can tell whether the commission there was a friendly commission or not; all that is known is, that a clergyman was not relieved against a commission of bankruptcy, but was left to his remedy at law. But when the case is properly considered it ceases to bear the authority which has been attributed to it. The law to make a peer or a member of Parliament liable to bankruptcy was there spoken of as if perfectly clear and settled. Yet that was a case which occurred in 1747, and in 1763 the Legislature itself declared in the Act of 4 Geo. 3, c. 33, that "Whereas merchants, &c., within the descriptions of the statutes relating to bankrupts having privilege of Parliament are not compellable to pay their just debts, or to become bankrupts, by reason of the freedom of their persons from arrest upon civil process, and some doubts have also arisen whether in cases of bankruptcy a commission can be sued out during the continuance of such privilege." That declaration of the Legislature destroyed all the value of the *dictum* (1) (for it was no more) which had fallen from Lord *Hardwicke*. The case of *Harris v. Lord Mountjoy* (2), does not assist the other side, for that case was fully considered by Lord Chief Justice *Tindal* in *Cassidy v. Steuart* (3), where the Court held most clearly that a *ca. sa.* against a member of Parliament must be set aside as irregular, though it was expressly and avowedly issued not to be put in force against his person, but only, when his privilege had expired, to serve as the foundation for proceedings to outlawry. That case shews that, even as a mere preliminary form, a recognised proceeding at law cannot be employed where its object is to do indirectly that which the law has not directly authorized. By the statute of 1861, certain proceedings alone are to be taken; the 76th section specially prescribes them, and none other can be adopted, and that section must apply equally to traders and non-

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(1) "A commission of bankruptcy formerly issued against a peer, an Earl of *Suffolk*, for trading in wines, and though there may be some particular powers that commissioners of bankruptcy could not exercise against a peer, yet notwithstanding this, he may be liable to a commission of bankruptcy if he

will trade, and so may a member of the House of Commons, though, while he continues a member, there are some particular powers of commissioners that cannot be exercised." 1 Atk. 201.

(2) 2 Leon. 173.

(3) 2 Man. & G. 437.

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traders. Now those proceedings are, according to the principle laid down in the case just cited, not capable of being applied to persons having privilege of Parliament, and therefore it is clear that the Legislature could not, by the 69th section of the Act of 1861, contemplate making peers or members of the House of Commons subject to the provisions of the law of bankruptcy.

The Court will not under such circumstances give the words of the 69th section the extraordinary interpretation now sought to be put upon them. If that should be done this consequence would follow, that under the 221st section the privileged person might be subjected to punishment by imprisonment, which never could have been intended. As to these matters, this statute is a penal statute, and ought therefore to be strictly construed. Yet the argument on the other side, disregarding that principle of construction, seeks to have the meaning of the words enlarged, and to substitute, in effect, in the 69th section of the statute, the word "person" for those of "trader" and "non-trader." That cannot be done, and a non-trader having privilege of Parliament is not subject to the provisions of the section.

Mr. *De Geer*, Q.C., and Mr. *Bagley*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Lord *Hatherley*):—

My Lords, this case has been extremely ably argued before us, both by Sir *Roundell Palmer*, and by Mr. *Reed* whose very ingenious argument we have listened to with great pleasure; but at the same time it has failed, I think, to convince any of your Lordships that there can be any sound ground for saying that those debtors who, if traders, were subject to the operation of the Bankruptcy Law of 1849, are to be exempted from the operation of the Act of 1861, which declares that all debtors, whether traders or not, shall be subject to its operation, simply on the ground of there not being a specific provision as to immunity from arrest which they before enjoyed; arrest being one of the consequences of bankruptcy.

The whole of the argument has really been rested upon this, which appears to me to be an unsound foundation. The privilege.

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of Parliament, which in the case of a peer is clearly a privilege not confined to the actual sitting of Parliament, the privilege by which those who are members of either House of Parliament are free from arrest in respect of debt, is a privilege which has been recognised as being founded upon Common Law. No doubt it did stand upon the Common Law, and in the subsequent legislation on the subject care was taken that that Common Law privilege should be protected by special clauses inserted in the various Acts of Parliament, the general provisions of which might seem to militate against the privilege.

With regard to the early cases which have been referred to, this observation occurs to me. In the case before Lord *Hardwicke*, *Meymot's Case* (1), His Lordship held that, at all events, a commission of bankruptcy might rightly issue against a person having privilege of Parliament, because although the privilege settled by the Common Law protected him against some of the consequences of bankruptcy (namely, the consequence of arrest), yet the other consequences would follow his property. It was not necessary that the act of bankruptcy should be occasioned by arrest; there were other acts of bankruptcy that might be committed by him, and a commission of bankruptcy might follow in respect of those other acts of bankruptcy, and when that commission issued his property would be subject to be dealt with according to the law of bankruptcy.

The Act of *George III.* to which we have been referred—one of the earliest Acts dealing with this subject—was an Act which contained a recital of a very marked character, drawing a distinction between that which was or was not possible with reference to persons having the privilege of Parliament, and that which was merely a subject of doubt, in consequence of cases that seem to have occurred shortly before the passing of the Act.

The recital of that Act, passed in 1764 (4 Geo. 3, c. 33), was in these words:—[His Lordship read it (2).]

The preamble, therefore, clearly distinguished between the two points which required to be dealt with. One point was this, that inasmuch as persons having privilege of Parliament could undoubtedly not be arrested, there did not exist the means of com-

(1) 1 Atk. 196, 201.

(2) See *ante*, p. 665.

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selling them to become bankrupts; and the other point was, the question whether they were otherwise exempted from the operation of the laws of bankruptcy, for doubts had arisen as to whether or not the statutes of bankruptcy could be applied to them. I do not think that anything more was done by that statute than this, that the privilege was distinctly recognised with reference to arrest, and at the same time it was distinctly provided that the doubts as to liability to bankruptcy should be silenced by enacting that commissions of bankruptcy might, notwithstanding those doubts, be issued.

Subsequently to that, it appears that various Acts of Parliament, cited to us by Sir *Roundell Palmer*, and commented upon by Mr. *Reed*, dealing with the subject matter of debts, and making provision for their payment, have from time to time contained a reservation of the privilege of Parliament. So again the Bankruptcy Acts have from time to time done the same, even when bringing more and more within the consequences of bankruptcy persons having privilege of Parliament. Care has been taken to preserve that privilege. But it does not seem to me that on that account we are to say (for that would be too sweeping and dangerous) that in every case where a debtor is mentioned, and no saving is contained of the particular character which is here referred to, the debtor mentioned in the Act being subject to process of execution against the person, a debtor having privilege of Parliament may be included in the general provision. It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute—and thereby the inconvenience would be avoided, which, in many cases, would be very great, of saying that by no possibility can you construe an Act dealing with a debtor in a way which might interfere with the protection of his person from arrest, so as to include under that Act any person having the privilege of Parliament.

Now, that proposition seems to me so wide, that without going through all the Acts of Parliament which have been enacted with respect to debtors, I shall not be able to do full justice to the

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inconveniences that might arise; but I confess that I have the strongest possible impression of the mischief which would be introduced if such a conclusion were to be arrived at, and I should pause to make farther inquiry into it, if I did not think that upon the statute we are dealing with there can exist no reasonable doubt whatever. In the course of the ingenious argument we have heard at the Bar, I called Mr. *Reed's* attention to a case that might possibly occur under the Act of 1 & 2 Vict. c. 110, which deals with judgments against debtors. The Act gives very enlarged remedies against the real estate of judgment debtors, and still more enlarged remedies against their choses in action and chattels, with a clause (1) that any person taking a debtor in execution shall lose the benefit of these special provisions with respect to judgments. The argument might just as well be urged that as that Act speaks expressly of a debtor taken in execution, none of those remedial measures with reference to execution against the land or the chattels can possibly apply to a person having privilege of Parliament, because as it talks of the person being taken in execution, it must be inapplicable to a person having the privilege of not being liable to be personally taken in execution. If that was true it would follow that you could not avail yourself of these beneficial and remedial clauses against the land or chattels of a person having the privilege. Of course, that would be a curious extension of the argument that has been urged here, but still it is one that would very logically follow from the reasoning adopted in the present case.

Now what do we find in the present case? We find in the Act of Parliament of 1849, following a variety of other Acts, that provision is made with reference to persons having the privilege, who may become bankrupt. That Act of Parliament consolidated the previous Acts containing certain provisions with reference to traders having privilege of Parliament, and the 65th and 66th sections are important. The 65th section declares that all traders should be deemed liable to become bankrupt. And then the 66th section says, "That if any such trader having privilege of Parliament shall commit any act of bankruptcy he may be dealt with under this Act in like manner as any other trader, but such

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person shall not be subject to be arrested or to be imprisoned during the time of such privilege, except in cases made felonies or misdemeanours by this Act."

It is not altogether useless, perhaps, to observe that the 65th section does not say whether it means persons having the privilege of Parliament or not, but it seems to assume that under the words "all traders," shall be included persons having the privilege of Parliament; and having assumed that, it proceeds, in the 66th section, to say what shall be done in the case of a trader having the privilege. The argument from this has been that the words "all traders" except for that clause, would not have involved any person having the privilege of Parliament; and that although the 66th clause proceeds on the assumption of there being traders having the privilege of Parliament, the 65th would not have included them had not the 66th clause been inserted.

Now let us see what is done under the Act of 1861. The 232nd section of that Act enacts that the two Acts "should be construed, together with so much of the *Bankrupt Consolidation Act*, 1849, as remains unrepealed, as one Act." Then the 69th section, the one upon which the argument here chiefly turns, says, as to the persons to be made subject to the Act, "all debtors whether traders or not shall be subject to the provisions of this Act." Nothing could be more extensive, nothing could at first sight appear to be more entirely in the mind of the Legislature than the purpose of including every man who had a debt, whatever his position might be; just as in the other statute it is said that "all traders" shall be liable to become bankrupt. Then it is said that in the event of their becoming bankrupts, certain particular traders should have a privilege which other traders should not have. Then the original Act having said "that all traders shall be deemed liable to become bankrupt," this Act says, "all debtors whether traders or not." I think the observation of Lord Justice *Giffard* is perfectly just, that the words "all debtors" included persons of every description. We cannot construe the words "all debtors" as making an exception from the class of debtors, so that those who really are debtors, but who have this particular privilege, shall not be liable to them. The 69th section expressly enacts that "all debtors whether traders or not" shall be subject to the same consequences as "all

traders" in the previous Act were subject to, which "traders" did include every class. To restrict its meaning would be contrary to all the principles of construction, and would lead to the necessary conclusion that in every instance where the word "debtor" is mentioned in any Act of Parliament whatsoever, you are to except this particular class of persons, unless you find this privilege specially referred to.

But the case does not rest even here. I should be quite satisfied, even if we had not the 66th section in the previous Act with reference to traders having certain immunities, to come to the conclusion that in law your Lordships would be justified in holding that the clause in that Act of Parliament dealing with all debtors includes all debtors whatever, whether having this privilege or not. This would not lead to the destruction of the privilege unless there was some special clause in the Act striking at and distinctly abolishing it; but as debtors they would be subject to all the consequences which as debtors they are liable to now. At this moment they would, as debtors, be liable to have their goods taken in execution, and to have their land taken in execution. They would be liable to every consequence to which they were originally liable as debtors. But it being one consequence of their position, not for their own personal benefit at all, but for the good of the state, and resting upon sound grounds of state policy, that they should have a privilege which is secured to them by the Common Law—I believe from the earliest times—that they should be personally free from arrest, that privilege would still follow them. It is not because, *ex majore cautela*, several Acts of Parliament have thought it necessary specially to reserve that privilege, that it is to be held to be abolished and annihilated in every other Act of Parliament in which it is not expressly reserved. I think that that is safe ground to rest the case upon, that it is consonant to the Acts of Parliament to say that debtors having the privilege of Parliament are included under the phrase of "all debtors;" but that the privilege is not gone because it is not specially struck at. It only amounts to saying, that they having the privilege at Common Law, and it being recognised by a number of Acts of Parliament, that privilege will not be annihilated because it is not specially dealt

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with in this Act of Parliament. Lord *Hardwicke* seems to have come to that conclusion in *Ex parte Meymot* (1), and I apprehend it is a sound and safe conclusion.

With reference to this particular Act and the special case before us, there is much to be said (if it were necessary) as to the reservation in the 69th section with regard to non-traders. A certain Act 'passed as to traders says that every trader in a certain special position shall be in future, as he was previously, free from arrest; but that privilege does not apply with regard to felony or misdemeanour, for the privilege of Parliament never extended to felony and misdemeanour at all. Now, reading the two Acts together, when the 69th section of the Act of 1861 says, "All debtors whether traders or not shall be subject to the provisions of this Act," I apprehend that it is a legitimate way of construing the Act (if it were necessary) to say, that this Act subjects all debtors, traders or non-traders, to the same consequences to which all traders were before subject; that we must then find to what things traders were subjected, and finding what these things were, we must apply them to this new class, non-traders, certain persons on account of their peculiar privilege being alone excepted. They are to be subjected to the liabilities of traders—they must continue to enjoy the privileges which traders of their class before enjoyed. That would be the rational and sound construction of the Act.

I do not feel myself in any way impeded by the decision of Lord *Cairns* from taking this view. I notice that decision for two reasons, first, because Sir *Roundell Palmer* said that he was surprised that Lord Justice *Giffard*, in giving judgment in this case, had not noticed it; and, secondly, because of the respect that I have for any decision whatever coming from Lord *Cairns*, by whom I should be glad to be instructed. I observe that he very carefully, as is consistent with his course in giving judgment in all cases, confined himself to the case that he had to determine; and at the outset of his judgment he expressly said (2), "In this case I do not mean to give any opinion as to the extent to which the 101st section of the Act of 1849 is incorporated into the Act of 1861,

(1) 1 Atk. 196, 201.

(2) *Ex parte Bristow*, Law Rep. 3 Ch. Ap. 247.

nor any opinion as to the incorporation, or the extent of the incorporation, of any other section of the Act of 1849 in which the word 'trader,' occurs. I think it quite sufficient to confine the observations I am about to make to the precise case which is now before the Court."

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Now, what was the precise case before the Court? It was one with respect to which there can be no doubt that the judgment was perfectly sound, and stood upon a basis which cannot be in any way shaken. The case was this:—With reference to traders a certain course of dealing was pointed out in the Act of 1849, which is incorporated with the Act of 1861, and a certain different course of dealing with regard to the very subject matter which was before His Lordship for judgment, was pointed out with reference to non-traders. As regarded traders, you might substitute any one creditor for another in the course of proceeding under the Bankruptcy Acts. So that, in the event of the death or removal of the creditor who had first taken proceedings to obtain adjudication, another might continue those proceedings. The reason was pointed out by Lord *Cairns*, namely, that it was utterly immaterial who the creditor was, as long as he was a creditor, because the proceeding was *ex parte*. Such notices as were to be given were specified, but they were of a character which made it entirely indifferent to the person against whom the adjudication was sought whether they were given by *A.* or *B.* Now Lord *Cairns* says, as to the non-traders, I find that a totally different course is prescribed. A non-trader may contest the right of a particular creditor to proceed against him, and the non-trader having that particular right it makes all the difference to him whether it is *A.* or *B.* who is pursuing him. He may have a case against *A.* which he has not against *B.*; and, therefore, in that case, it is by no means an indifferent matter whether a fresh creditor takes up the proceedings or not, for a fresh case is brought in, and a case which the debtor may fairly and distinctly dispute. In that state of things it is idle to ask me to read a clause which has reference to traders who are subject to one course of procedure as applying to the case of a non-trader who is subject to another course of procedure.

But it is very different when the matter is one of exemption from

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a particular consequence of a statute reserving an old and undoubted privilege ; and then, on the introduction of non-traders, subjecting them to the serious consequences previously applicable to traders alone, and in that way to the consequences of the penal provisions of the Act. You find that the persons into whose class they are brought have exemption from the penal consequences of this Act, and so the question arises whether this new class thus found to be introduced into the case ought or ought not to have the same protection as the old class with regard to any penal consequences ? It seems to me that this case may be rested upon the ground that all debtors are included in the Act, but that all such privileges are saved to them as ought to be saved under the Common Law to the former class of bankrupts, unless those privileges are specially struck at by Act of Parliament. I should be content to rest my view of this case upon that ground ; but as regards the particular case before us, it might well be rested even upon the construction of the Act itself. And in both points of view I think the appeal must fail.

LORD WESTBURY :—

My Lords, let us first consider what is the *onus* that lies on the Appellant. The *onus* is this, that he must prove to your Lordships conclusively, that when we find in the Act of 1861 the positive enactment that “ all debtors whether traders or not shall be subject to the provisions of this Act,” these words “ all debtors ” do not include debtors having privilege of Parliament. The words are positive ; they are without any exception expressed. He must shew, therefore, by argument as conclusive as the positive words of the enactment itself, that such an exception is necessarily implied.

Now, how does the Appellant propose to discharge himself of that obligation ? He says, first, that it has always been a principle of the bankrupt law to make careful provision for the personal immunity of members of Parliament ; and he refers to the 4 Geo. 3, and the statute of 1849, in illustration of the care that has been taken to provide for that personal immunity. He then goes on to assume as a fact that there is no such provision, express or implied, contained in the Act of 1861 as applicable to non-

traders being members of Parliament; and from the alleged or assumed absence of any such provision he draws the extraordinary conclusion that the Act of Parliament when it speaks of "all debtors" did not intend to include therein debtors, non-traders, having privilege of Parliament.

Now, it is quite obvious that no such conclusion can be drawn from any such words. You may draw the conclusion if you please that provision for the exemption of non-traders being members of Parliament has been omitted by inadvertence, but it would be wild to come to the conclusion that because there was no such provision the positive words of the statute, used without qualification, must be read and considered and understood as being subject to a very great qualification.

Well, then he carries his argument a little farther; because he contends that, according to the principles of law, as recognised in the statute of the 4 Geo. 3, no commission of bankruptcy could be issued against a trader having privilege of Parliament without the express permission of the Legislature. That, again, is an assumption which appears utterly unwarranted—and the investigation of this matter, which has been made here and elsewhere, has conclusively shewn the accuracy of Lord *Hardwicke's* view on the matter. Lord *Hardwicke* laid down, in 1747, that if a peer or a member of the House of Commons is a trader, there is nothing to prevent his being adjudicated a bankrupt. He held also, with that peculiar soundness of view which characterised the mind of that great Judge, that it may follow that the personal privilege which is attached to a member of the Houses of the Legislature, not being taken away by enactment, may exempt the person, when adjudicated a bankrupt, from some of the personal liabilities which attach to an ordinary bankrupt. But he held, that although that personal exemption might remain that would be no reason why the individual should not be adjudicated a bankrupt. That appears probably to have been somewhat canvassed, or the inconvenience that was felt arising from the proposition of law was regarded as a thing that required to be remedied; because if you held a member of the Legislature to be subject to bankruptcy you were met by this difficulty, that unless he voluntarily committed an act of bankruptcy you never could enforce the law of bank-

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ruptcy against him. For at that time the only mode of compelling him to commit an act of bankruptcy was by throwing him into prison and keeping him there for a certain time, after the expiration of which period of imprisonment you were entitled to consider him as having committed an act of bankruptcy, and to issue a commission against him. But as you could not throw a member of the Legislature into prison there was no mode of compelling him to commit an act of bankruptcy. And, therefore, to promote Lord *Hardwicke's* view of the law, and not to question it, means were provided by the statute of 4 Geo. 3, to compel a member of the Legislature to commit an act of bankruptcy without the necessity of throwing him into prison. And the statute proceeds on that principle—not as recognising the impossibility of making a member of the Legislature a bankrupt, but as holding him liable to bankruptcy, and assisting the creditor to obtain the benefit of that process by furnishing him with the means for compelling the member of the Legislature to commit an act of bankruptcy. And therefore the statute, in the preamble, states distinctly that “inasmuch as members of the Legislature were not compellable to pay their just debts or to become bankrupt by reason of the freedom of their persons from arrest”—then it goes on (which was the main object of the enactment) to give a judgment creditor a right to a summons, and to provide that non-compliance with that summons should, in certain cases, be an act of bankruptcy by the peer or member of Parliament. It is quite clear that that never would have been done if it had not been considered that at that time they were liable to the bankrupt law although they could not be compelled to commit an act of bankruptcy.

But the rest of the statute, which was relied on in the argument, was this, that it having been recited in the preamble that doubts had arisen whether in cases of bankruptcy a commission of bankruptcy could be sued out during the continuance of the privilege of Parliament, then, to remove that doubt, and to remove it by what is declaratory of the law, and not by making a new law, it is provided that if a member of Parliament or a peer commits an act of bankruptcy, “any creditor or creditors may sue out a commission of bankruptcy against him, and the Commissioners in such commission, and other persons may proceed thereon in like manner

as against other bankrupts; any privilege of Parliament to the contrary notwithstanding."

Now that Act of 4 Geo. 3 has long since been swept away; but though it has been repealed, its effect as a declaration of the law must still be considered as operative; and therefore the Legislature, in the subsequent Acts of Parliament, has not deemed it necessary to follow its very words. And in the Act of 1849 nothing is said about permission to sue a fiat in bankruptcy; but what is said is limited to this, that if any such trader having privilege of Parliament shall commit an act of bankruptcy, he may be dealt with under this Act in like manner as any other trader. Therefore it is plain that the Act of Parliament treated him as liable to be adjudged a bankrupt, and treated him as liable to all the consequences, save only those that might affect the privilege of personal immunity.

Well, that was followed by the enactment of 1861; and the words there are not permissive merely, but they are compulsory; because it is said there that all debtors whether traders or not shall be subject to the provisions of the Act. And therefore we come back to the former proposition, that unless you can shew sufficient ground to exempt a peer or a member of Parliament, being a non-trader, from the operation of this enactment, this enactment gives the fullest possible power to bring them within the scope of the bankrupt law, and to make them liable to adjudication of bankruptcy, and to the consequences of adjudication. But I deny altogether an assumption that has been made, namely, that the privilege of the person will be lost in such a bankruptcy in the case of a non-trader, in consequence of there being no stipulation in the statute saving the privilege. I do not think that that would be the consequence at all—I think it would be left still, as Lord *Hardwicke* put it, that the privilege of Parliament would remain, and would override any enactments which, in the case of ordinary individuals, might infringe upon personal immunity. It would remain precisely as Lord *Hardwicke* treated it as remaining, antecedently to the statute of 4 Geo. 3. But it is unnecessary to discuss that, because we come to the question, What is the effect of the incorporation of the 69th section of the Act of 1849 into the statute of 1861. The whole of the Act of 1849 is,

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by the operation of the Act of 1861, incorporated into it, unless it is anything that is inconsistent with it, and is made part of it, and is to be read in connection with it. It is a much easier conclusion, much more natural, and much more conformable with law, to read the statute of 1849, when incorporated with the Act of 1861, as extending to the non-trader the privilege given to the trader, and to hold the words which subject non-traders to the provisions of this Act as equivalent to putting the non-trader, where the contrary is not to be derived from the context, in the same position as the trader previously stood. Your Lordships will find that throughout the whole Act of 1861, wherever the non-trader is intended to stand on a different basis or footing from that of the trader, words are expressly introduced to declare it. But there are some provisions taken from the Act of 1849 which were applicable, of course, only to traders, and which, by force of the incorporation of this Act into the Act of 1861, may well be held applicable to non-traders by virtue of the words that they shall be subject to the provisions of this Act—there being nothing in the Act of 1861 that renders the incorporation of the non-trader into the enactment inconsistent with the rest of the statute. There is nothing at all inconsistent in holding that a non-trader, if a peer of Parliament, shall be put in the same position in which a trader, being a peer of Parliament, formerly was; it would be for his benefit and not for his injury. There is nothing, therefore, inconsistent in holding the incorporation sufficient to give him the benefit of the privilege which had been previously given to the trading peer of Parliament in precisely the same manner as if the enactment had been re-enacted, and made applicable to the non-trading peer of Parliament. That is a much easier conclusion than to hold that by reason of the provision not being repeated and made applicable to the non-trading peer of Parliament, the non-trading peer of Parliament is to be exempted altogether from the operation of the statute. It is unnecessary determine this one way or the other, the *ratio decidendi* being, in my opinion, that the words “all debtors whether traders or not,” comprehend the non-trading peer being a debtor as much as they comprehend the trading peer being a debtor; and that there is nothing in the suggestions which have been made to us that is of sufficient weight to compel us (for

we must be compelled) to limit the universality of the enactment, and to take a certain class of persons only, by inference or a supposed implication, out of the extended ambit or the universality of these words.

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With reference to the decision of Lord *Cairns*, there can be no doubt about it, because it related to process. The process against a trader being, throughout the Act of 1861, a different one from the process against a non-trader—and there being that distinction in all the procedure as against the one class and the other carefully preserved by the Act of 1861—Lord *Cairns* refused to allow a mere directory provision, upon a matter of procedure contained in the Act of 1849, as to a trader, to be extended by implication to a non-trader under the Act of 1861; and most wisely and most rightly, because nothing can be more carefully distinguished in the Act of 1861 than what shall be the procedure against the one class and what shall be the procedure against the other.

I am very glad that we have had this matter so thoroughly investigated as it has been at the Bar, as we may feel every confidence that everything material for arriving at a right determination has been presented to us; but, notwithstanding all that has been urged, we can have no doubt as to the correctness of the decision from which this is an appeal.

LORD COLONSAY:—

In common with your Lordships I have listened with great interest to the argument which has been brought before us in this case. It appeared to me that everything that could possibly be said in support of the appeal was said, and with great clearness and force. The basis of the argument was this:—that prior to the year 1849 a person having the privilege of Parliament was not to be adjudged a bankrupt; and that in the year 1849 the law made a person, though having privilege of Parliament, if he was a trader, liable to be adjudged a bankrupt, but at the same time reserved to him, in express terms, that protection which has been alluded to in the course of the argument. Then came the Act of 1861, under which the present proceedings took place; and the argument was that that Act of 1861, though in words it extends to all debtors whether traders or not, does not comprehend a person

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having the privilege of Parliament who is a non-trader. That there is no reservation of his privilege, and you must hold either that he is excluded from the operation of the Act, or that there was no protection for him under the privilege of Parliament, the last being held to be the stronger proposition; and, therefore, to exclude the general scope which is proposed to be given to these words, "all debtors whether traders or not."

It appears to me that this is not a sound argument. In the first place, the Act of 1849 placed beyond all doubt this proposition, that a person having the privilege of Parliament may be adjudged a bankrupt, that is to say, that those provisions of the bankrupt law which apply to the distribution of property, and so forth, may be put into operation and carried through, consistently, however, with the reservation of the Parliamentary privilege—protection to the person of the bankrupt. Now, that being so, the question comes to be whether in the Act of 1861 the general words "all debtors whether traders or non-traders," are to be read as comprehending a person having the privilege of Parliament who is a non-trader, seeing that the Act of 1861 does not repeat the protection which is contained in the Act of 1849. I think that the Act of 1849 in as far as it contains that statement of protection contains what was not necessary. But, certainly, now that we have that Act, we have the protection applied to persons possessing that protection brought under the operation of the bankrupt law. I think that the sound construction is, that the Act of 1861 is to receive effect according to the plain meaning and interpretation of the words, "all debtors whether they are traders or non-traders;" and that they who have the privilege of Parliament do not lose it. They are placed in the same predicament with those persons who under the Act of 1849 are described as traders and have privilege of Parliament. Indeed, I think that was a protection which could not be lost without being expressly taken away. It is not inconsistent with an adjudication of bankruptcy that the persons had such protection as appears clearly by the Act of 1849. Therefore, I think that the judgment of the Court below was a right judgment.

THE LORD CHANCELLOR :—My Lords, I think the proper course

will be to declare the opinion of your Lordships in answer to the question stated in the special case, namely, "Whether a peer of the realm, enjoying privilege of Parliament, and being a non-trader, is subject to an adjudication of bankruptcy under the *Bankruptcy Act*, 1861." I shall propose to your Lordships to answer that question in the affirmative, and that the appeal be dismissed, and that the costs of the petitioning creditor be paid out of the estate.

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*Appeal dismissed, the costs of the petitioning
 creditor to be paid out of the estate.*

Lords' Journals, 7th July, 1870.

Solicitors for the Appellant: *Munns, Nunn, & Longden.*

Solicitors for the Respondent: *Lawrance, Plews, Boyer, & Baker.*

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, as amended**

**Court File No.:
CV-21-00656040-00CL**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
LAURENTIAN UNIVERSITY OF SUDBURY**

***ONTARIO*
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto

**BOOK OF AUTHORITIES OF THE
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