said Supreme Court at Gibraltar touching the Receiver that has been appointed, or otherwise, consistently with this Report, in case Her Majesty should be pleased to approve the same, and to order as is herein recommended; and such order of approval on this Report is to be without prejudice to any question as to the right of the sum of dollars 23. 7. and the sum of dollars 8. 1. 12. for alms respectively in the said schedule mentioned, or either of them, and without prejudice to any future proceeding in respect of any receipts by the Appellant subsequent to the year 1840, if any."

This Report being approved by Her Majesty in Council, an Order in accordance therewith was drawn up.

[Mews' Dig. tit. COLONY, III. APPEALS *to* PRIVY COUNCIL, 1. 4. 6. g.]

1908 a.c. 47
(1929) A.C. 21

[63] ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF NEWFOUNDLAND.

Ref'd. 1949 AC 12

EDWARD KIELLEY,—*Appellant;* WILLIAM CARSON, JOHN KENT, and Others,—*Respondents* * [Jan. 4, 5, and 6, 1841; May 23, 1842].

The House of Assembly of the Island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature [4 Moo. P.C. 84, 86, 88].

Semble.—The House of Commons possess this power only by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti* [4 Moo. P.C. 89].

Semble.—The Crown, by it prerogative, can create a Legislative Assembly in a settled Colony, subordinate to Parliament, but with supreme power within the limits of the Colony for the government of its inhabitants; but

Quere.—Whether it can bestow upon it an authority, viz., that of committing for contempt, not incidental to it by law [4 Moo. P.C. 86].

The principles of *Beaumont* v. *Barrett* (1 Moore's P.C. Cases, 59) and *Burdett* v. *Abbott* (14 East, 137) examined [4 Moo. P.C. 91, 92].

This was an appeal from the Supreme Court of Judicature of Newfoundland, upon a judgment on demurrer, pronounced on the 29th of December 1838, in an action brought by the Appellant against the Respondent, for assault, battery, and false imprisonment.

The Appellant was the district surgeon and manager of the Hospital in Saint John's town, the capital of Newfoundland. The Respondent, John Kent, was a member of the House of Assembly of Newfoundland, and, in his place in the House, had made some animadversions on the management of the Hospital.

On the 6th of August 1838, Kent reported to the [64] House of Assembly that the Appellant had been guilty of a contempt, having reproached him in gross and threatening language for the observations he had made, adding, "your privilege shall not protect you." The House immediately referred the consideration of Mr. Kent's complaint to a Committee of Privileges, before whom evidence as to the alleged breach of privilege was taken, and the House, upon their report, voted the Appellant guilty of a breach of the privileges of the House of Assembly, which, if passed unnoticed, would be a sufficient cause for deterring a member from acting with that independent conduct necessary for every Assembly, and ordered that the

* Present: The Lord Chancellor [Lord Lyndhurst], Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, The Vice-Chancellor of England [Sir Lancelot Shadwell], the Lord Chief Justice of the Common Pleas [Sir N. C. Tindal], Mr. Baron Parke, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

Speaker do issue his warrant to the Serjeant-at-Arms, to bring the Appellant to the Bar of the House, to be dealt with according to the pleasure of the House.

The Appellant was accordingly arrested, and on the following day, the 7th of August, brought to the bar of the House, where the Respondent, William Carson, the Speaker of the House of Assembly, read to him the resolution, which declared his conduct to the Respondent, Kent, to be a breach of privilege, and required him to explain. The Appellant, it appeared, instead of explaining his conduct, made use of violent language towards Mr. Kent, who was then in his place in the House; and the House thereupon directed him to withdraw, in the custody of the Serjeant-at-Arms. The House then resolved, that such conduct was a grievous aggravation and iteration of the contempt offered to the House by the Appellant, and directed that he should continue in the custody of the Serjeant-at-Arms until further order from the House. On the 9th of August the House resolved that the Appellant should again be brought to their Bar, and that he **[65]** should be required to apologize for the breach of privilege of which he had been guilty. The Appellant was accordingly placed at the bar, but he refused to make an apology. The House thereupon passed a resolution that he should be committed to the gaol of Saint John's, and ordered the Speaker to make out the necessary warrants to the Sheriff and the Gaoler, which was done, and the Appellant was committed thereon.

The Appellant was brought up, on the 10th of August, under a writ of *habeas corpus*, before one of the Judges of the Supreme Court, and discharged [see Printed Cases in Privy Council Appeals, Appx. C.].

In consequence of this commitment and imprisonment, the Appellant, in Michaelmas term 1838, brought an action of trespass and false imprisonment, in the Supreme Court of the Island, against the Respondent Carson, the Speaker, and Walsh the messenger, and Kent and others, members of the House of Assembly. The declaration consisted of four counts. The first count was for breaking and entering the Plaintiff's dwelling-house on the 6th of August, and seizing and imprisoning him, for the space of four days. The third count was for assaulting and imprisoning him generally; and the second and fourth counts, were for the battery.

The Respondent, Carson, pleaded, first, the general issue, and, secondly, a special justification, as Member and Speaker of the House of Assembly, and set forth the circumstances, above-mentioned, and the several resolutions of the House of Assembly, in obedience to which, he averred he had acted.

Similar pleas were put in by the other Respondents.

To these special pleas by Carson, as well as by the other Respondents, the Appellant demurred. The **[66]** Respondents having joined to the demurrers, they were argued before the Supreme Court, which held them to be sufficient in law, and directed judgment to be entered up for the Defendants [Printed Cases *ubi sup.* Appx. G., and Appx. to Respondents' Case, Nos. 4 and 5].

From this judgment, the present Appeal was brought, which now came on for argument (Jan. 4, 5, and 6, 1841*).

Mr. Pemberton, Q.C., and Mr. Henderson, for the Appellant.—The question now before your Lordships is of great magnitude, involving the liberty of the subject in the Colonies. Three points are raised by this Appeal: First, whether the House of Assembly of Newfoundland had power to commit for a breach of privilege, as incident to the House as a legislative body; secondly, supposing such power to exist, whether it has been rightly exercised in this instance; and, lastly, whether the pleas contain a complete justification to the action. Now we contend, first, that the House of Assembly does not possess, by any law, the power of arresting and imprisoning for breaches of privilege; and even supposing such power to exist, we submit that it can only be exercised against its own members, and not against strangers for alleged contempts committed out of doors. The first consideration arises out of the known distinction between conquered and settled colonies. *Blankard* v. *Galdy* (2 Salk. 411), *Campbell* v. *Hall* (20 State Trials, 239). In the former, the power of the Crown is paramount; in the latter, the Colonists carry with them the laws of their native land, and whatever difference of opinion there may be with **[67]** re-

* Present: Lord Brougham, the Vice-Chancellor [Sir Lancelot Shadwell], Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

spect to the introduction of some of those laws, the right of exemption from personal violence, by any authority, but that of the law, is clear and undoubted. "No man shall be imprisoned but by the lawful judgment of his peers, or by the law of the lands" (Magna Charta, and see 28 Ed. III. c. 3), is the great charter of liberty, applicable alike to Colonists as to Englishmen.

It is necessary in the first instance to ascertain the powers of the House of Assembly. Newfoundland, is one of the earliest of our Colonies, it is a dependency of the Crown of England, by right of occupancy. Possession was taken in the year 1583, when the laws of England were introduced, and amongst them, freedom from personal violence, and continued in force, without alteration, down to the year 1832. In that year, the present Legislative Assembly was constituted by Letters Patent from the Crown, to the Governor, authorising him to convoke a Legislative Assembly for the Island, to consist of fifteen members. The qualification and method of the election of its members were regulated by a Proclamation of the Crown, of the 26th of July 1832 [see Printed Cases *ubi sup.* Appx. to Respondents' Case, No. 2]. Previous to this period the sole power of making laws for the Government of Newfoundland, was in the Legislature of this country. Any law, custom or usage for the justification of the act now complained of, has existed therefore, only, since the year 1832. It is attempted to support this privilege of committing for contempt, by analogy between the House of Commons and this Colonial Assembly. No such analogy exists. The House of Commons possess the power of commitment as part of the *lex et consuetudo parliamenti.* In Coke's 4th Institute, 15, it is laid down that matters of Parliament, are not to be decided by the Common **[68]** Laws, but *secundum legem et consuetudinem parliamenti.* The same doctrine is stated in 3 Hawkins P.C., book 2, c. 15, s. 73, and by Blackstone, 1 Com. 164. It is monstrous to suppose for an instant, that there can be a *lex et consuetudo* of an Assembly like Newfoundland, whose constitution existed only since 1832. The principles on which the English Parliament rests its rights and privileges cannot be extended to Colonial Assemblies. Their constitutions necessarily differ. Colonial Assemblies derive their powers from the Crown, and are regulated by their respective charters. Parliament stands on its own laws, the *lex et consuetudo parliamenti,* which are founded on precedents and immemorial usage. The Crown has no power, by virtue of its prerogative, to confer on the Legislative Assembly such powers as are possessed by the House of Commons, for it does not possess such authority itself. The only grounds on which the power of committal is exercised by the House of Commons, are thus stated by Lord Ellenborough, C.J., in *Burdett* v. *Abbott* (14 East, 136): "The privileges that belong to them seem at all times to have been, and necessarily must be, inherent in them: independent of any precedent, it was necessary that they should have complete personal security, to enable them freely to meet for the purpose of discharging their important functions, and also that they should have the right of self-protection." And again, "The right of self-protection implies, as a consequence, the right to use the necessary means for rendering such protection effectual. Independently, therefore, of any precedent or recognized practice on the subject, such a body must *à priori* be armed with a competent authority to enforce the free and independent exercise of its own **[69]** proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument that the House of Commons must be, and is, authorized to remove any immediate obstruction to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and effectual protection; it must also have the power of protecting itself from insult and indignity, when offered, by punishing those who offer it:" and the learned Judge goes on again to say, "Would it consist with the dignity of such bodies, or, what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparative tardy result of a prosecution, for the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies constituted for such purposes, and exercising the functions as they do, should possess the powers which the history of the earliest times shows that they in fact possessed and used." The House of Commons possess this power as a Court of Judicature, Coke's 4th Inst. 23; as part of the High Court of Parliament,

the *aula regia*. After the separation of the legislative body into two distinct houses, each retained, to this extent, at least, the power that was common to both, and this power has been recognized at an early period, confirmed by the highest authorities, sanctioned by unvarying usage, and recognized by Acts of Parliament. The question, whenever the privileges of the Commons have been disputed, has always been, whether the particular act was justified or not, by the *lex et consuetudo parliamenti*. Is the House of Assembly of Newfoundland a Court of Justice? Certainly not. Lord **[70]** Ellenborough expressly puts the right of arrest upon the ground that Parliament was part of High Court of Judicature (14 East, 1, 36-7), and that although that character was now divided by the two Houses, and exercised in fact by but one, yet that it was only as a Court that it was originally so possessed. Mr. Justice Bayley also held the privilege as an incident to a High Court of Judicature (*ib.* 159). Then if the House of Assembly at Newfoundland, is not a Judicial Assembly, it is impossible to apprehend upon what ground, the proposition that the privilege here claimed, is incident to it, rests. If it existed in the House of Assembly since 1832, it must have formerly existed in the Council. If the Crown had the power of constituting the Council as it pleased, and of assigning the number of the Legislative Assembly, it could also make a Council with all these powers without a House of Assembly. Such a position might lead to the exercise of the most frightful tyranny, for the Council, consisting of a few individuals, might commit any one who, in their opinion, was guilty of any offence, or, by suspending any member of their body, introduce a more pliant one in his stead. How could the Crown delegate to an Assembly like that of Newfoundland such powers as it does not itself possess? The Crown may, no doubt, incorporate a body of persons in the Colonies, or at home, and invest them with power to legislate for themselves; but in doing so, it can give them no power to commit and imprison for contempt. Indeed, there exists no necessity for such power in an Assembly of this nature. It has not supreme power even in the Colony, for its acts are liable to disallowance by the Crown. No assembly has supreme power but the Imperial Parliament. The **[71]** East India Company possessing legislative powers over a territory more vast than our House of Commons, has not such a power. The Corporation of the City of London has no such power. There are only two instances of such a power, namely, the House of Commons and the Courts of Justice. *Beaumont* v. *Barrett* (1 Moore's P.C. Cases, 59) is the only authority which can be cited on the other side. That was an Appeal from a judgment of the Court of Error at Jamaica, affirming a judgment of the Supreme Court, overruling the general demurrers of the Appellant, to the pleas of justification pleaded by the Respondent, to an action of trespass and false imprisonment, brought against them by the Appellant, such imprisonment having taken place for a libel which had been resolved by the House of Assembly to be a breach of the privileges of the House. In delivering the judgment of their Lordships, Mr. Baron Parke said (*ib.* 76), " Without adverting for the present to what has been done by the Assembly from the time its constitution was given to it in the year 1680, or relying upon the precedents laid before us, it would appear I think to be inherent in every Assembly that possesses a supreme legislative authority, to have the power of punishing contempts; and not only such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as Courts of Record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice by disparaging and weakening their authority:" and after adverting to, and quoting the language of Lord Ellen-**[72]**-borough in *Burdett* v. *Abbott* (14 East, 137), the learned Judge proceeds, " Now if we apply that principle to the Legislative body which appears to possess supreme legislative authority over the whole of the island and its dependencies, we must in like manner say that they have incidentally the power, not only of punishing direct impediments to their proceedings, but indirect obstructions, such as are caused by libels reflecting on their conduct, and tending to bring their authority into contempt, and that independently of any precedent for its exercise. But if we look into the authorities adduced in this case, we shall see that this power has been exercised without dispute, so far as relates to the imprisonment of persons for contempt, from that period (1680) down to the present day: " and after citing the precedents produced from the year 1686 to 1709, of the

exercise of the authority by the House of Assembly and the Act of the Colonial Legislature, 1 Geo. II., c. 1, passed in 1728, which directed that " all laws and statutes of England as have been at any time esteemed, introduced, and accepted, or received, as laws in the island, should, and were thereby declared to be, and continue, laws of Her Majesty's Island of Jamaica for ever," observed that, " on this the legality of the power in question might be supported, if it did not belong to the Assembly, as we think it did by law, as a necessary incident to its legislative authority." The decision in that case may be supported upon the ground of usage since the year 1680. It cannot affect or govern the present case. The course adopted to justify the claim made here, has been to refer to instances of the exercise of a similar power by other Houses of Assembly. Precedents have been brought forward from the Journals of the [73] Houses of Assembly of Barbadoes, Antigua, Montserrat, the Bahamas, Nova Scotia, New Brunswick, and Prince Edward's Island (these precedents were printed in a Supplemental Appendix [Printed Cases in Privy Council Appeals]). The earliest period of the exercise of this power by any of these bodies was by the House of Assembly of Prince Edward's Island, in the year 1812. Barbadoes was founded in the year 1649, but the first instance of the exercise of this power by the Assembly is in 1821. If the power of committal existed as a necessary incident to the House of Assembly from 1649, how came it that it was never exercised till 1821? With respect to Antigua, that colony was settled in 1631, but no instance of committal for contempt could be found till 1819, and that was against a member of the House of Assembly. In Montserrat, there was no instance of committal of a person who did not appear to be a member of the House. In Nova Scotia, the earliest instance was in 1818, and in New Brunswick in 1832. But the usage in one colony, even if it existed, is no authority for the power being in another. If the doctrine in *Beaumont* v. *Barrett* [1 Moo. P.C. 69] is to be applied, the power is just as incident to the Council composed of three persons, as the whole Legislative Assembly.

II. The mode in which this supposed right has been exercised.—The whole proceedings were irregular. The Appellant was taken into custody without being summoned, and convicted without being heard, or the deposition of a single witness taken on oath. It appears that a Committee of the House of Assembly having resolved, on the complaint of one of its members, that a breach of privilege was committed, ordered the individual so transgressing into custody, kept him in custody for two days, ordered him to be brought to the Bar of the House to make an apology, and, this [74] latter command not being complied with, directed that he should be committed until such apology was made. There was no adjudication. The warrant was not under seal, and does not record that any adjudication or conviction had taken place; and moreover, it contains matter not justified by the previous proceedings. When the Appellant was brought to the Bar of the House of Assembly, he was detained two days, though the warrant on which he appeared was spent, and a resolution of the House for detaining him until he made an apology was no more operative than a judgment of a Common Law Court would be without a writ. Supposing the power of commitment to exist, the manner of exercising it in the present instance was illegal, and contrary to every principle of natural justice and positive law. Neither can the second warrant be sustained—it is bad in law on two grounds; *first*, it does not follow the resolution of the House; and, *secondly*, according to law, it is void, being for an indefinite period. *Burdett* v. *Abbott* (14 East. 149-50), *Stockdale* v. *Hansard* (9 Add. and Ell. 1), and the authorities there cited, show the extent to which this power can be exercised. Privileges of the House of Commons are as much a part of the law of the land as the Statute, Ecclesiastical, or Admiralty laws—all of which are noticed and determined by Courts of Common Law.

III. The plea is no justification.—The rule of law is that the plea must justify the act complained of. *Gregory* v. *Hill* (8 Term. 299), *Duppa* v. *Maya* (1 Saunders, 286, Note), *Smith* v. *Nicholl* (5 Bing. N.C. 208; S.C. 7 Scott, 147), *Greene* v. *Jones* (1 Saunders, 297). The judgment complained of must fail, even on this ground of objection. [75] The pleas are bad, as they purport to justify without confessing a battery.

Mr. M. D. Hill, Q.C., and Mr. Fleming, for the Respondents.

I. The power of committal for a violation of privilege is necessarily inherent in every Legislative Assembly. *Beaumont* v. *Barrett* [1 Moo. P.C. 59]. Such authority

is absolutely essential, as well for the due exercise of the functions of a Legislative body, as for enabling those who compose it, efficiently and independently to perform the duties imposed upon them. It is an essential incident to the constitutional functions of a House of Assembly. The House of Assembly of Newfoundland is a Legislative body convoked by Commission and instructions from the Crown. They have the power of making local ordinances not repugnant to the law of England (1 Blackstone, Com. 108). It cannot be disputed that the Crown has the power of creating a local jurisdiction, *Dutton* v. *Howell* (Showers, Par. C. 24), or of following its subjects, by granting a local Legislature in the country to which they have emigrated, which should exercise supreme authority so far as is consistent with their dependence on the mother country. We admit, the argument of the Appellant, that English settlers carry with them their rights according to the English Law, varied only by local circumstances. They have, as a consequence, the right to Courts of Justice for the purpose of administering the law, and it cannot be questioned that those Courts have the same power of committing for contempt as the Courts of England. Settled colonies have a right to a Legislature *ex necessitate;* for Acts passed in the mother **[76]** country subsequently to the settlement do not bind the colony unless the colony is expressly named. As a colony, therefore, requires new laws, it follows that it has a right to a Legislative Assembly, and one as like to the Houses of Parliament as circumstances admit. The Canada Act, (31 Geo. III., c. 31,) which established the Legislative Assembly there, provided also for an hereditary House and titles of nobility. It is true, this was never acted upon, but it shows that the intention was to assimilate it as nearly as possible to the Legislative body in this country. This right to a Legislature, is an inchoate right in every colony, requiring no Charter or Act of Parliament to call it into existence: the mere will of the Sovereign, expressed in a letter of instructions to the Governor, is sufficient. As regards the right of convoking a Legislative Assembly, no distinction exists between a settled or conquered colony (Chalmers' Opinions [1], 222-3). No authority can be produced to overrule the universal principle that a House of Assembly was not as powerful in a settled as in a conquered country. It has been admitted that this power has been exercised in Jamaica, but then the Appellant's Counsel account for that fact by saying that it was not a privilege incident to a popular Assembly, but exercised in virtue of the full and complete Legislative power of the Crown over a conquered country; but they should have gone further, and shown in what respect the House of Assembly of Jamaica was gifted with powers not possessed by Newfoundland. The Act of 1832 established the present House of Assembly; but it was not a new institution—it had been in action for centuries; its powers known and its attributes settled by long experience. **[77]** The question, then, is narrowed, to what are the incidents of a General Assembly. In Mr. Burke's account of European America (2 Vol. 296-7), it is said that the first colony which was settled was that of Virginia, which was governed at first by a President and Council appointed by the Crown. The colonists were, however, afterwards " empowered to elect representatives for the several counties in which the province is divided, with privileges resembling those of the House of Commons in England." Again, in Edwards' History of the West Indies (2 Vol. 344), a work of considerable reputation, it is laid down " that Provincial Parliaments or Colonial Assemblies being thus established and recognized, we shall find that in their formation, mode of proceeding, and extent of jurisdiction within their own circle, they have constantly copied, and are required to copy, as nearly as circumstances will permit, the example of the Parliament of Great Britain." He goes on further to say, " They commit for contempts; and the Courts of Law have refused, after solemn argument, to discharge persons committed by the Speaker's warrant." Now, this authority to commit for contempt has been invariably exercised by all the Colonial Houses of Assembly whenever they may have been called upon to exercise it. It does not rest merely upon principle. In the American Archives in the course of printing, by the order of the Congress (Vol. I. p. 1119-20, Brit. Mus.), under the date of the year 1775, the Journals of the House of Assembly in New Jersey, one Murdock was committed by the House for contempt, in sending a challenge to one of the members. Another case—that of Cook and Macnaughten—occurred **[78]** in Jamaica in 1776 (2 Edwards' Hist. of West Indies, 422), of a committal for contempt by the House of Assembly. The powers possessed and exercised by the

Houses of Assembly in the West Indies have been equally enjoyed by similar bodies in whatever colonies they were erected. The extracts from the Journals of the Houses of Assemblies of New Brunswick, Nova Scotia, and of Prince Edward's Island, which are printed in the Supplemental Appendix, prove the exercise of the same authority by the Legislative Assemblies in those colonies. Evidence of usage cannot be stronger or more conclusive. The precedents of the exercise of the power to commit in the colonies are not numerous, but they are satisfactory. In *Regina* v. *Patty* (2 Ld. Ray, 110-9), which was the case of an inquiry by the Court of King's Bench into the proceedings of the House of Commons, Justice Powys says, " The reason why there were no precedents of that kind was very obvious, viz., that it would be unreasonable to put the Judges upon determining the privileges of the House of Commons, of which privileges they have no account nor any footsteps in their books: that the House of Commons have the records of them." It is contended, on the other side, that the power in the House of Commons to commit for contempt is derived from the ancient *aula regis*. This cannot affect our argument; the House of Commons is no further a Court of Justice than is a Colonial House of Assembly. The principle that the power of commitment for contempt is incident to high deliberate Assemblies, is fully recognised in *Burdett* v. *Abbott* (14 East, 137), *Beaumont* v. *Barrett* (1 Moore, P.C. Cases, 76). This **[79]** latter case was adopted by Lord Denman in *The Queen* v. *Gossett* (3 Per. and D. 362), and the same principle is recognised in Ferrier's case (1 Hats. Pre. 56, 57), *The King* v. *Faulkner* (2 Crom. M. and R. 525). The whole of the authorities upon this point are collected in *Stockdale* v. *Hansard* (9 Add. and Ell. 1). The case of *Anderson* v. *Dunn* (Wheaton, 204, N.S.) was a commitment by the Congress, of a stranger for contempt. By the American Constitution, the Congress have no power but that specially delegated to it, the residuum of power remaining in the separate Sovereign States. By that Constitution, power to arrest and commit for contempt was expressly given to it over its members, but no such power was given over strangers: yet it was held in *Anderson* v. *Dunn*, that such power was necessary and incident to the functions of Congress. No act of Parliament ever gave the House of Assembly of Jamaica the power to commit, yet they exercised the power as being inherent in the Supreme Legislative authority. *Beaumont* v. *Barrett* [1 Moo. P.C. 59]. *Burdett* v. *Abbott* [14 East, 137]. An attempt, however, has been made to distinguish *Beaumont* v. *Barrett* from the present case, by reason that Jamaica was a conquered colony, and Newfoundland a settled colony. This objection is untenable. It has been expressly held by Lord Mansfield, in *Hall* v. *Campbell* (Cowpers, 213; S.C. Lofft, 655; 20 State Trials, 326-7), that Jamaica was not a conquered colony. That learned Judge said, that after the conquest, and before the settlement of the colony by the English, " all the Spaniards having left the island, or having been killed, or driven out of it, the first settling was by an English colony, who, under the authority of the King, planted a vacant island belonging to him in right of his Crown," and **[80]** that it was, therefore, to be considered as a planted colony. It must be put upon the same footing as Newfoundland. Neither is this power confined to Legislative Assemblies or Courts of Law. Justices of Peace commit for contempt. *Cropper* v. *Horton* (8 D. and R. 166), *Bennett* v. *Watson* (3 M. and S. 1), *Mayler* v. *Lamb* (7 Taunt. 63). 2 Hawkins, B. 2, S. 3. 2 Hales, P.C. 122. Courts of Equity—*Wellesley* v. *Duke of Beaufort* (2 Russ. and Myl. 639), *In the matter of the Ludlow Charities* (2 Myl. and Cr. 316)—and the Ecclesiastical Courts—*Barlee* v. *Barlee* (1 Add. Ecc. Rep. 301)—not being Courts of Record, also commit for contempt. It is not denied that the House of Assembly, by its constitution, has Supreme Legislative power in the island. Why, then, if it possess the greater power, should it not possess the less, and that one so necessary to the due performance of its duties and independence of its members? The power in question is not likely to be abused; it is subject to the checks of prorogation and dissolution. There is no analogy between Corporations and Legislative Assemblies. Corporations have no power to preserve their independence from the Crown; but Houses of Assembly stand between the Crown and the people, as the House of Commons does. A House of Assembly cannot perform its functions without the same powers as the House of Commons; and from the tenor of the Royal instructions (Clark's Colonial Law, 435) to the Governor of Newfound-

land accompanying the Commission, it was manifestly the intention of the Crown to confer similar powers upon the House of Assembly.

II. This power has been well exercised. If only irregularly exercised, the objections urged are of no weight, [81] because each Court judges of its own proceedings. Was it meant to be said that there was no jurisdiction in the House of Commons to commence by taking a party into custody? It is true that, in the exercise of their discretion, this is seldom done; but that is not the question; the question is, whether they have jurisdiction or not. Suppose there should be a riot, or a disturbance, at the door of the House, and a messenger should go out to arrest the parties, would it be necessary that he should first ascertain the names of the rioters, and summon them? No; they would be brought in immediately. If a contempt were committed in a Common-Law Court, they would order the transgressor into custody without a warrant of commitment. *King* v. *Clerk* (1 Salk. 349). If the House have a right to commence by arrest, it is only matter of discretion whether they exercise that right in the first instance or not. Courts of Law could make a rule, if they pleased, that a party be attached in the first instance without showing cause. The Respondent was brought up in custody—not in execution: the House resolved itself into a committee, that is equivalent to reporting to the House. The warrant is good. *Beaumont* v. *Barrett* (1 Moore, P.C. Cases, 80). Lord Mansfield, in *Burdett* v. *Abbott* (4 Taunt. 447), said, on an objection to the Speaker's warrant, that it was enough if the warrant stated it to be for contempt. In Lord Shaftesbury's Cases (6 How. St. Tri. 1269, 1271; S.C. 1 Mod. Rep. 144), the warrant was general. Warrants need not be under seal. *Reg.* v. *Paty* (2 Ld. Ray, 1105). Instances are numerous in the Journals of the Houses of Lords and Commons, of parties being obliged to apologise. In *Money* v. *Leach* (19 How. St. Tri. 1002; S.C. 3 Burr. 1742, and 1 Wm. Bl. 554), a list of general warrants is set forth. The form of at-[82]-tachments used in the superior courts of Westminster, which are upon mesne process, are general (Tidd's Pract. Forms, p. 63). Admitting that the last warrant did not follow the resolution of the House, yet it is immaterial, as it was merely for the regulation of their own proceedings. When the Respondent refused to make an apology, the Speaker did what he had a perfect right to do—directed the Sheriff to take him into custody until he made an apology. By an Act of Parliament of Canada, Courts of Justice had the power to transport for life. In the late case of The Canadian prisoners (5 Mee. and Wel. 32), the Court transported certain persons for fourteen years, to commence from their arrival in Van Dieman's Land. Now, this was for an uncertain term; yet it was held that, as the Court could transport for life, the lesser power was included in the greater.

III. The point of pleading is subordinate to the important point really at issue. If the pleadings are insufficient, why was not such objection taken in the Court below? where, if sustained, we should have moved to amend.

Mr. Pemberton replied.

The Appeal was, by the direction of their Lordships, re-argued by one Counsel on each side (23rd May 1842); by Mr. Henderson, for the Appellant, and Mr. M. D. Hill, Q.C., for the Respondent.

In addition to the authorities referred to in the previous argument, Calvin's Case (Coke's 7 Rep. [6]); 2 Halliburton's History of Nova Scotia, p. 324; Gordon's History of New Jersey, 337; Pownall's History of the Colonies, p. 60; Woodstock's Constitution of the British Colonies, p. 141; The Commission for establishing a Legislative Assembly in Newfoundland, 26th July 1832, and the instruc-[83]-tions from the Colonial Office thereon [see Printed Cases, Appx. to Respondent's Case, No. 2]; Clark's Colonial Law, p. 435; and the case of Upper Canada, Parliamentary papers, 1828,—were cited and relied upon.

Mr. Baron Parke (Jan. 11, 1843).—The great importance of the principal question in this case induced those of their Lordships who heard the first argument, to request that a second might take place before themselves and other members of the Judicial Committee. The case has been again argued before the Lord Chancellor, the Lords Brougham, Denman, Abinger, Cottenham, and Campbell, the Vice-Chancellor of England, the Lord Chief Justice of the Common Pleas, Mr. Justice Erskine, the Right Hon. Dr. Lushington, and myself; and I have been instructed by their Lord-

ships to state the reasons for the advice which they will give to Her Majesty to reverse the Judgment of the Court below.

That Judgment was given in favour of the Defendant upon a demurrer to several special pleas to an action of trespass for false imprisonment, by which the acts complained of were justified by the Defendant Carson, as Speaker of the House of Assembly of Newfoundland, by other Defendants as Members of that House, and by one as messenger in aid of the Serjeant-at-Arms, upon an arrest and commitment for an alleged breach of privilege of the House.

Several objections were taken of a formal nature to these pleas, which it is unnecessary to state, as the opinion of their Lordships is not founded upon any of those objections. The main question raised by the pleadings, and applying equally to the case of all the Defendants, was whether the House of Assembly had the power to arrest and bring before them, with a view [84] to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege. It is indeed stated in the plea of the Defendant Carson, and that of the other Defendants, members of the House, that something occurred which might amount to a contempt, committed in the face of the Assembly, by the use of the violent and threatening words to one of the members then present in his place; but each plea also justified the original arrest of the Plaintiff below upon a warrant issued by the Speaker, founded on the complaint of a breach of privilege committed out of the House: and if the House of Assembly had not a power to issue that warrant, this part of such plea is bad; and as each plea is entire, the whole is bad. The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise in this case.

Their Lordships are of opinion that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors, and consequently that the judgment of the Court below must be reversed.

In order to determine this question, and to ascertain what the legal powers of the Assembly were, it is proper to consider first, under what circumstances it was constituted, and what was the legal origin of its powers.

Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother-country carried with them such por-[85]-tion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament); and on the other hand, the Crown possesses the same prerogative and the same powers of Government that it does over its other subjects: nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign had not merely the right of appointing such magistrates and establishing such Corporations and Courts of Justice as he might do by the Common Law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants. This latter power was exercised by the Crown in favour of the inhabitants of Newfoundland in the year 1832, by a Commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department; and the whole question resolves itself into this,—whether this power of adjudication upon, and committing for, a contempt, was by virtue of the Commission and the instructions legally given to the new Legislative Assembly of Newfoundland. For under these alone can it have any existence, there being no usage or custom to support the exercise of any power whatever.

In order to determine that question, we must first consider whether the Crown did in this case invest the local Legislature with such a privilege. If it did, a further question would arise, whether it had a power to do so by law.

If that power was incident as an essential attribute [86] to a Legislative Assembly of a dependancy of the British Crown, the concession on both sides that the Crown had a right to establish such an Assembly, puts an end to the case. But if it

is not a legal incident, then it was not conferred on the Colonial Assembly, unless the Crown had authority to give such a power and actually did give it.

Their Lordships give no opinion upon the important question whether, in a settled country such as Newfoundland, the Crown could by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority, not incidental to it, of committing for a contempt—an authority, materially interfering with the liberty of the subject, and much liable to abuse. They do not enter upon that question, because they are of opinion, upon the construction of the Commission and of its accompanying document, that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland; and if it did not pass as an incident, by the creation of such a body, it was not granted at all. This appears to be clear from the consideration of the Instruments.

By the Commission for the establishing the Legislative Assembly, dated the 26th July 1832, His late Majesty King William the Fourth authorized the Governor, with the advice and consent of the Council of the Island, from time to time, to summon and call General Assemblies of the freeholders and householders within the Island, in such manner and form, and according to such powers, instructions and authorities as were granted or appointed by the general instructions accompanying the Commission, or according to such further powers, instructions or authorities as should at any time thereafter be granted or appointed under His [87] Majesty's sign manual and signet, or Order in Council, and that the persons thereupon duly elected should take the oaths, and should be called, and declared the General Assembly of the Island of Newfoundland; and the Governor, with the advice and consent of the Council and Assembly, or the major part of them respectively, should have full power to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of the Island and its dependencies, and the people and inhabitants thereof, and such other as should resort thereto, which laws, etc. were to be as near as might be to the laws and statutes of the United Kingdom, and subject to the approbation of His Majesty and to the negative voice of the Governor.

Accompanying this Commission was a despatch from Viscount Goderich (now Earl of Ripon) containing instructions (see Clark's Colonial Law, 435) to the Governor for the regulation of his conduct, upon which some reliance was placed on the argument at the Bar, as affording evidence of the intention of the Crown to confer the power in question upon the House of Assembly. The Commission itself where such an authority would naturally be expected to be found if the Crown had intended to confer it, is entirely silent upon this subject, nor does it grant any of the privileges of the British Parliament; and the terms used by the Earl of Ripon's letter have probably reference to the mode of conducting business and the forms of procedure, which are to be assimilated to those of the British House of Commons—at all events, terms so vague and general could never have been used with the intention of giving the powers of commitment, and other privileges of so important a nature, [88] if the authority of the Crown was required to bestow them by a special grant.

The whole question then is reduced to this,—whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature.

The Statute Law on this subject being silent, the Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. "*Quando Lex aliquid concedit, concedere viditur et illud, sine quo res ipsa esse non potest.*" In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the

Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. [89] All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make bye-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.

It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favour of the assumption by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly—a claim for which there is not any colour of foundation.

Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts [90] of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

Their Lordships, therefore, are of opinion, that the principle of the Common Law, that things necessary, pass as incident, does not give the power contended for by the Respondents as an incident to, and included in, the grant of a subordinate Legislature.

It was however argued that in other colonies, the Legislative Assemblies exercise the power of committing for breach of privilege without objection, and that the usage in this respect was good evidence that such power was an incident attached by the Common Law, though not on the ground of necessity. And no doubt this argument would have had much weight, if there had been many Legislatures situate precisely as this is, and the usage to exercise the power of committal for breach of privilege had been frequent, and the acquiescence in its exercise long and universal, and that usage could have been explained only on the ground that the power was a legal incident. But no such usage has been proved, and the constitution and practice of different colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them. and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another. In some, the very exercise of the power, with the sanction of the [91] tribunals, and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law. But in this case, we have the simple question to decide, without any usage, any acquiescence, or any sanction of the Courts of Law, except in the very case in which we are now called upon to affirm or reverse the Judgment of the Court below. It remains to be considered how the question stands on express authority; and unless there be that satisfactory authority expressly in favour of the power, we must hold that the Common Law does not confer it.

There is no decision of a Court of Justice, nor other authority, in favour of the right, except that of the case of *Beaumont* v. *Barrett* [1 Moo. P.C. 59], decided by the

Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett* v. *Abbott* [14 East, 137], which *dictum* we all think cannot be taken as an authority for the abstract proposition, that every Legislative body has the power of committing for contempt. The observation was made by his Lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further.

We all, therefore, think that the opinion expressed **[92]** by myself in the case of *Beaumont* v. *Barrett* [1 Moo. P.C. 59] ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the Common Law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient Law of England has annexed to the House of Parliament.

The Judgment will be reversed, and there must be a Writ of Inquiry of damages, unless the parties can agree among themselves upon some sum—they had better do that. They ought to consider that it was a mere question of right to be tried, and, therefore, probably they will be able to do that. All we can do is to remit the record back to the Court below for inquiry.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 6. *Legislatures;* also tit. PARLIAMENT, A. INTERNAL MANAGEMENT, 2. *Powers of.* Followed in *Fenton* v. *Hampton*, 1858, 11 Moo. P.C. 347; and *Doyle* v. *Falconer*, 1866, L.R. 1 P.C. 328, 4 Moo. P.C. (N.S.) 203, on point as to committal by Colonial Legislature: and see *Phillips* v. *Eyre*, 1870, L.R. 6 Q.B. 1; Forsyth's *Cas. Const. Law*, 25; and charge of Blackburn J. in *Reg.* v. *Eyre*, 1868, p. 66.]

ON PETITION FROM BRITISH GUIANA.

IN RE BUTTS * [June 20, 1842].

Ex-parte.

In ranking Creditors under an execution sale, the Court of British Guiana declared by definitive sentences, the Petitioner's constituents' claim preferential. Appeals were interposed from these sentences. Pending the Appeals, the Petitioner filed a Petition in British Guiana, praying the Court to proceed to judgment of *prae et concurrentiae*, and to award the monies to be paid to him, *sub cautione de restituendo:* this the Court refused. The Petitioner then applied *ex-parte* to Her Majesty in Council, to reverse the order of refusal, and for an order upon the Judges in British Guiana, directing them to entertain the Petitioner's application. Held by the Judicial Committee, that an *ex-parte* Petition, under such circumstances, could not be entertained.

This was a Petition, presented by Richard Grosvenor Butts, as attorney in the colony of British Guiana, for **[93]** George Milne and others, Trustees under a deed of Trust of John Feering and wife, and also as attorney for Robert James Grant, of London, creditors, claiming under an execution sale of the plantation Vrees en

* Present: Lord Wynford, Lord Brougham, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.