

THE  
SUPREME COURT OF NEW SOUTH WALES

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JUDGES AND LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

SIR JAMES MARTIN, Knt., Chief Justice.	}	PUISNE JUDGES.
PETER FAUCETT, Esq.		
SIR WILLIAM MONTAGU MANNING, Knt.		
WILLIAM CHARLES WINDEYER, Esq.		
SIR JOSEPH GEORGE LONG INNES, Knt.		

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*PRIMARY JUDGES IN EQUITY:*

SIR WILLIAM MONTAGU MANNING, Knt.  
PETER FAUCETT, Esq., Acting-Judge in Equity.

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*JUDGES IN VICE-ADMIRALTY:*

SIR JAMES MARTIN, Knt., Judge Commissary.  
WILLIAM CHARLES WINDEYER, Esq., Deputy Judge.

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*JUDGE IN DIVORCE AND MATRIMONIAL CAUSES:*

WILLIAM CHARLES WINDEYER, Esq.

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# A TABLE

OF THE

## NAMES OF THE CASES REPORTED

IN THIS VOLUME.

### CASES AT LAW.

A		PAGE	
ABBOTT, McCULLOCH v.	- - -	212	
AH JONG, R. v.	- - -	131	
AMOS, COHEN v.	- - -	184	
ANDERSON v. SPOFFORTH	- - -	286	
APOLLO CANDLE CO. v. POWELL (P.C.)	- - -	47	
AUSTRALASIAN S.N. Co., KELLY v.	- - -	233	
B			
BANK OF NEW ZEALAND v. PROUDFOOT	- - -	177	
BANK OF NEW ZEALAND, PROUDFOOT v.	- - -	170	
BARRY v. HEGARTY	- - -	64	
BARTON, TAYLOR v.	- - -	1	
BENNETT, McELHONE v.	- - -	262	
BLAKENEY v. PEGUS (No 1)	- - -	107	
(No. 2)	- - -	223	
BREMNER v. WALKER	- - -	276	
BROWN v. WALKER (No. 1)	- - -	160	
(No. 2)	- - -	273	
C.			
CAMPBELL v. VICKERY	- - -	209	
CHRISTIAN v. WOODS	- - -	24	
COHEN v. AMOS	- - -	184	
COMMISSIONER OF RAILWAYS, McKINNON v.	- - -	247	
COX, WATERS v.	- - -	118	
D.			
DANGAR, RYAN v.	- - -	67	
DAVIES v. HARRIS (P.C.)	- - -	46	
DEANE v. NICCOL	- - -	145	
		PAGE	
DIBBS, WILSON v.		- - -	55
DIXSON, MORELL v.		- - -	145
DIXSON, POOLE v.		- - -	145
DUCY v. STEVENS		- - -	100
E.			
EAMES, R. v.		- - -	118
G.			
GODFREY v. POOLE		- - -	39
GREEN v. HORN		- - -	87
H.			
HARRIS, DAVIES v. (P.C.)		- - -	46
HEGARTY, BARRY v.		- - -	64
HEINZ v. WALKER		- - -	166
HEYDE v. SWAN (No. 2.)		- - -	33
HORN, GREEN v.		- - -	87
J.			
JARVIS, LOMAX v.		- - -	237
K.			
KELLY v. AUSTRALASIAN S.N. Co.		- - -	233
KEYS, R. v.		- - -	135
L.			
LOMAX v. JARVIS		- - -	237
LON FOOK, SHACK YIN v.		- - -	93

M.		PAGE			PAGE
McCulloch v. Abbott	- - -	212	R. v. Mowatt	- - -	289
McElhone v. Bennett	- - -	262	— v. O'Neill	- - -	43
McKaye R. v.	- - -	123	— v. Price	- - -	139
McKinnon v. Commissioner of Railways	- - -	247	— v. Spooner	- - -	191
Mealy, <i>Ex parte, re</i> Wilton	- - -	94	Ryan v. Dangar	- - -	67
Moore, Suttor v.	- - -	197			
Morell v. Dixon	- - -	145		S.	
Mowatt, R. v.	- - -	289	Scott, Wood v.	- - -	83
			Shack Yin v. Lon Fook	- - -	90
			Slattery, Naylor v.	- - -	256
			Spooforth, Anderson v.	- - -	286
			Spooner, R. v.	- - -	191
			Stevens, Ducey v.	- - -	100
			Suttor v. Moore	- - -	197
			Swan, Heyde v. (No. 2)	- - -	33
				T.	
			Taylor v. Barton	- - -	1
			Timbrell v. Waterhouse	- - -	77
				V.	
			Vickery, Campbell v.	- - -	209
				W.	
			Walker, Bremner v.	- - -	276
			Walker, Brown v. (No. 1)	- - -	160
			— (No. 2)	- - -	273
			Walker, Heinz v.	- - -	166
			Walton, <i>Ex parte</i>	- - -	110
			Waterhouse, Timbrell v.	- - -	77
			Waters v. Cox	- - -	113
			Wilson v. Dibbs	- - -	55
			Wilton, <i>Re, ex parte</i> Mealy	- - -	94
			Wood v. Scott	- - -	83
			Woods, Christian v.	- - -	42

## CASES IN EQUITY.

A.		PAGE	D.		PAGE
Atkinson, Hollander v.	- - -	69	De Lissa, Coleman v.	- - -	104
				G.	
			Gipps, Waller v.	- - -	40
				H.	
			Hodges, McLean v.	- - -	61
			Hollander v. Atkinson	- - -	69
			Hood v. Cullen	- - -	22
			Humphrey, Wentworth v.	- - -	1, 38

K.				PAGE			
KORFF, LANGDON v.	-	-	-	30	MACPHERSON v. SUTHERLAND -	-	46, 114
L.				S.			
LANGDON v. KORFF -	-	-	-	30	SUTHERLAND, MACPHERSON v.	-	46, 114
M.				W.			
McLEAN v. HODGES -	-	-	-	61	WALLER v. GIPPS -	-	40, 123.
					WENTWORTH v. HUMPHREY -	-	- 1, 38

### DIVORCE, ECCLESIASTICAL, AND VICE-ADMIRALTY.

A.				F.			
ALLEN v. ALLEN (Div.) -	-	-	-	3	FULLERTON'S WILL (Eccl.) -	-	15
D.				G.			
DENT v. DENT (Div.) -	-	-	-	1	NIGHTINGALE, THE (Vice-Adm.) -	-	18



# C A S E S

ARGUED AND DETERMINED IN THE

## SUPREME COURT OF NEW SOUTH WALES

IN ITS

### Common Law Jurisdiction,

DURING THE FIRST TERM, 1885.

TAYLOR v. BARTON.\*

1884

*Power of Assembly to adopt rules of the Imperial Parliament subsequently passed—18 & 19 Vict. c. 54, sec. 35 of Schedule—Power of Assembly to suspend a member from the service of the House.*

Nov. 20.  
Dec. 9.

By sec. 35 of the Schedule of the Act 18 & 19 Vict. c. 54, power was given to the Legislative Assembly in its first session, and "from time to time afterwards," to prepare and adopt such standing rules as should appear best adapted for the purpose there enumerated, all of which "rules and orders shall be laid before the Governor, and being by him approved shall become binding and of force."

Martin C.J.,  
Windeyer J.  
and  
Innes J.

By the first of the standing orders regulating the practice and conduct of the business of the Assembly "in all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House."

*Held*, that rules made by the Imperial Parliament after the passing of the first of the standing orders, not having been laid before the Governor, and not having been approved by him, had no validity. The adoption by the Governor cannot take place until the rules are in existence for him to approve of. If the standing order in terms professes to adopt rules of the Imperial Parliament to be made thereafter, it is *ultra vires* and of no effect.

*Held*, also, independently of this, that the standing order in question does not in terms apply to such future rules of the Imperial Parliament.

To an action brought by a member of the Legislative Assembly against the Speaker—1. For expelling the plaintiff from the Assembly Chamber; 2. For assaulting the plaintiff and keeping him from entering the Assembly Chamber—the defendant pleaded (*inter alia*) that a resolution was passed by the Committee of the whole House of Assembly that the plaintiff, having been named by the Chair-

\* Decided last Term.

1884

---

TAYLOR  
v.  
BARTON.

man as having persistently and wilfully obstructed the business of the Committee, be suspended from the service of the House. Upon report to the Assembly, a resolution of that body was passed that the plaintiff be suspended from the service of the House. And afterwards, during the same session of Parliament, and while the said suspension still remained in force, the plaintiff entered the Assembly and claimed the right to sit and serve as such member. And thereupon the defendant, as such Speaker as aforesaid, upon the refusal of the plaintiff to withdraw, under the authority of the said resolution, and in order to enforce the same, directed the Sergeant-at-Arms to remove the plaintiff from the said Chamber, and the said Sergeant-at-Arms then gently laid his hand, etc.

*Held*, that, by the plea, a right was set up in the Assembly to suspend a member for some time, definite or indefinite, quite apart from the question of the obstructive conduct actually existing. A right was therefore claimed to punish or coerce such member, even after the obstruction was over, and was no longer apprehended. That right the Assembly does not possess. The Assembly has no power to punish an obstructing member, or to remove him from the Chamber for any period longer than the sitting during which the obstruction occurred.

*Semble*, that the Assembly may expel a member if sufficient grounds exist to warrant such an extreme course, and of such sufficiency the House itself is the sole judge. Or the member may be removed to enable the business of any given sitting to go on, and for that purpose he may be kept excluded during that sitting.

DEMURRER. Declaration: Adolphus George Taylor sues Edmund Barton, Speaker of the Legislative Assembly of New South Wales, for that at Sydney, in the colony aforesaid, on the 22nd day of April 1884, the said Edmund Barton assaulted the said Adolphus George Taylor, he the said Adolphus George Taylor being at the time a member of the Legislative Assembly of New South Wales and one of the three members returned by the electoral district of Mudgee in the colony aforesaid under and by virtue of the Act 44 Vict. No. 13, and being then in the Legislative Assembly Chamber and about to consult, treat, deliberate, and give his vote in a meeting of the members then and there assembled to consult, treat, deliberate, and vote; and then pushed, shoved, and expelled, or caused to be pushed, shoved, and expelled, the said Adolphus George Taylor out of the said Legislative Assembly Chamber, and hindered and prevented him, the said Adolphus George Taylor, from remaining in and attending and being present at the said meeting. And afterwards, to wit on the 23rd day of April 1884, prevented the said Adolphus George Taylor from entering and remaining in the said Chamber as aforesaid, whereby the said Adolphus George Taylor was totally hindered, prevented, and excluded from re-



maining in and attending, and being present at the said meeting of the Legislative Assembly, and at a subsequent meeting of the Legislative Assembly, to wit on the 23rd day of April 1884, both held in the Legislative Assembly Chamber aforesaid, to the damage, detriment, and loss of the said Adolphus George Taylor.

1884  
TAYLOR  
v.  
BARTON.

2. In the second count the plaintiff sued the defendant for that he, on the days and dates aforesaid, and at the place aforesaid, assaulted the said Adolphus George Taylor, and kept him for a long time from entering the said Legislative Assembly, whereby he has suffered pain of mind and in his good name and reputation, and has been otherwise greatly injured.

PLEAS: 2. And for a second plea the defendant, as to so much of the declaration as complains of a trespass alleged to have been committed upon the 23rd day of April 1884, says that before the alleged trespass the said Legislative Assembly had been sitting in a committee of the whole House for and in the despatch of the business of Parliament, that is to say, for the purpose of considering the supply to be granted to Her Majesty; and the plaintiff, as such member of the said Legislative Assembly, was then and there present. And the said committee of the whole House, having considered certain conduct of the plaintiff then committed before the said committee, passed a certain resolution relating to the plaintiff, and to his said conduct, which said resolution was in the words following, that is to say:—"That Mr. Adolphus George Taylor, having been named by the chairman as having persistently and wilfully obstructed the business of the committee, be suspended from the service of the House." And the defendant says that the said conduct of the plaintiff and the said resolution were immediately reported to and brought under the notice of the said Assembly by the chairman of the said committee. And thereupon the said Assembly in Parliament assembled passed a resolution relating to the plaintiff and to the premises in the words following, that is to say:—"That Mr. A. G. Taylor be suspended from the service of the House." And afterwards, during the same session of Parliament, and while the said suspension still remained in force, the plaintiff entered the said Legislative Assembly Chamber while the said Assembly was

1884  
TAYLOR  
v.  
BARTON.

sitting for the despatch of the business of Parliament at the said meeting in the first count mentioned, and claimed the right to sit and serve as such member. And thereupon the defendant, as such Speaker as aforesaid, requested the plaintiff to withdraw from the said Chamber, which the plaintiff then refused to do, whereupon the defendant, acting under the authority of the said resolutions, and in order to enforce the same, directed the Sergeant-at-Arms of the said Assembly to remove the plaintiff from the said Chamber; and the said Sergeant-at-Arms then gently laid his hand upon the plaintiff and removed him from the said Chamber, using no more force than was necessary in that behalf, which is the alleged trespass.

3. And for a third plea the defendant as to so much of the declaration as complains of a trespass alleged to have been committed upon the 23rd day of April 1884, says that before and at the time of the alleged trespass, one of the standing orders of the said Legislative Assembly, being the first of the said orders regulating the practice and conduct of business of the said Assembly, was in the words following, that is to say:—"In all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House." And after the passing of the said order, and while the same was in force, and before the alleged trespass, a certain rule of the Imperial Parliament within the meaning of the said order was passed and came into force as a rule of the said Imperial Parliament, and continued to be in force at the time of the alleged trespass, which rule is in the words following, that is to say:—"That whenever any member shall have been named by the Speaker or by the chairman of a committee of the whole House, immediately after the commission of the offence of disregarding the authority of the Chair, or of abusing the rules of the House by persistently and wilfully obstructing the business of the House or otherwise, then, if the offence has been committed by such member in the House, the Speaker shall forthwith put the question on a motion being made, no amendment, adjournment, or debate being allowed—That such member be suspended from

the service of the House;’ and if the offence has been committed in a committee of the whole House, the chairman shall, upon a motion being made, put the same question in a similar way, and, if the motion is carried, shall forthwith suspend the proceedings of the committee and report the circumstances to the House, and the Speaker shall thereupon put the same question, without amendment, adjournment, or debate, as if the offence had been committed in the House itself. If any member be suspended under this order, his suspension on the first occasion shall continue for one week, on the second occasion for a fortnight, and on the third or any subsequent occasion for a month; provided always that suspension from the service of the House shall not exempt the member so suspended from service on any committee for the consideration of a private bill to which he may have been appointed before his suspension; provided also that not more than one member shall be named at the same time, unless several members present together have jointly disregarded the authority of the Chair; provided always that nothing in this resolution shall be taken to deprive the House of the power of proceeding against any member according to ancient usages.” And the defendant says that after the passing and coming into force of the said rule of the said Imperial Parliament, the plaintiff, being present at a sitting of a committee of the whole of the said Assembly, then engaged in the business of Parliament, that is to say, for the purpose of considering the supply to be granted to Her Majesty, and being such member of the said Assembly as aforesaid, committed the offence of abusing the rules of the said Assembly by persistently and wilfully obstructing the business of the said Assembly, and of the said committee. And immediately after the commission of the said offence the plaintiff was named by the chairman of the said committee, within the meaning of the said rule, and forthwith a motion was duly made, and was put by the said chairman, and carried by the said committee, which motion so carried related to the plaintiff and to the said offence, and was in the words following, that is to say:—“That Mr. Adolphus George Taylor, having been named by the chairman as having persistently and wilfully obstructed the business of the committee, be suspended from the service of the House.” And upon the

1884

---

TAYLOR  
v.  
BARTON.

1884

---

TAYLOR  
v.  
BARTON.

carrying of the said motion, the said chairman forthwith suspended the proceedings of the said committee, and reported the said offence and the carrying of the said motion to the said Assembly in Parliament assembled. And thereupon the defendant, as such Speaker as aforesaid, in accordance with the said rule, put the following question to the said Assembly:—"That Mr. A. G. Taylor be suspended from the service of this House;" and the said question was carried in the affirmative, and passed. And the defendant says that the case so arising upon the said offence of the plaintiff hereinbefore mentioned, was a case not specially provided for in or by any of the other standing orders, or sessional or other orders of the said Assembly within the meaning of the said first standing order. And the defendant further says, that within a period of one week after the passing of the said last-mentioned resolution, and during the same session of Parliament, and while the said suspension still remained in force, the plaintiff entered the said Legislative Assembly Chamber, while the said Assembly was sitting for the despatch of the business of Parliament, at the said meeting in the first count mentioned, and claimed the right to sit and serve as such member. And thereupon the defendant, as such Speaker as aforesaid, requested the plaintiff to withdraw from the said Chamber, which the plaintiff then refused to do; whereupon the defendant, acting under the authority of the said resolutions, and in order to enforce the same, directed the Sergeant-at-Arms of the said Assembly to remove the plaintiff from the said Chamber. And the said Sergeant-at-Arms then gently laid his hand upon the plaintiff and removed him from the said Chamber, using no more force than was necessary in that behalf, which is the alleged trespass.

DEMURRER to the second and third pleas: the points for argument being—1. As to the second plea, that the Legislative Assembly acted unlawfully in passing the said resolution in the defendant's second plea mentioned, and that the defendant was not justified in carrying out the said resolution. 2. That the adoption of the said resolution in the said second plea mentioned by the said Legislative Assembly is no justification of the defendant for the assault set out in the plaintiff's declaration. 3. As to the third plea—That standing order No. 1 of the Legislative Assembly in the defen-

dant's third plea mentioned has not such a prospective operation as to adopt the Imperial standing orders in the defendant's third plea mentioned, and that if the said standing order has such prospective operation it is *ultra vires* within the *Constitution Act*.  
4. That the said Imperial standing orders in the defendant's said third plea mentioned and referred to are not adopted by the said standing order No. 1, and are not in force in this colony.

1884

---

TAYLOR  
v.  
BARTON.

*The Plaintiff*, in person (20th November 1884), in support of the demurrer—The pleas are bad. As to the third plea:—Standing order No. 1 of the Assembly limits the application of the rules of the Imperial Parliament to cases “not specially provided for hereinafter;” and, “so far as the same can be applied, to the proceedings of this ‘House.’” As to the first limitation, standing orders 95 and 96 provide for the expulsion of members causing obstruction to the business of the House. As to the second limitation, the clause of the rules of Imperial Parliament set out in the third plea contains a provision that “nothing in this resolution shall be taken to deprive the House of the power of proceeding against any member, according to ancient usage”: that clearly is not applicable to the circumstances of a Colonial Assembly, where no ancient usage can exist. Standing order No. 1 was passed in 1872, and it received the assent of the Governor prior to the passing of the Imperial order. It, therefore, cannot be construed so as to adopt by anticipation the rule subsequently made by the Imperial Parliament; and so far as it purports to do so, it is *ultra vires*. By sec. 35 of the “*Constitution Act*” (1), power is given to the Legislative Assembly “in the first session and from time to time afterwards” to prepare and adopt standing orders. The Assembly must, therefore, take the initiative in making the orders, and can-

(1) 18 & 19 Vict. c. 54 (schedule) s. 35 enacts:—“The said Legislative Council and Assembly, in the first session of each respectively, and from time to time afterwards as there may be occasion, shall prepare and adopt such standing rules and orders as shall appear to the said Council and Assembly respectively best adapted for the orderly conduct of such Council and Assembly respectively . . . all of which rules and orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force.”—1 *Ol. Stat.* 360.

1884

---

TAYLOR  
v.  
BARTON.

not adopt by anticipation orders which may afterwards be passed by the Imperial Parliament. It is open for argument whether any standing order survives the parliament by which it was made. By the same section, all such rules and orders of the Assembly must be approved of by the Governor. They must, therefore, be made before they can be laid before the Governor for his approval. How can the Governor adopt standing orders to be passed long after the expiration of his term of office? Such a construction would take away from Her Majesty's representative the right reserved to him by the *Constitution Act* to disallow any rules passed by the House of Assembly. The Governor has no power to adopt standing orders which might not come into operation until after the expiration of his term of office. The orders of the Imperial Parliament were passed to repress the obstruction of a particular body of its members, and are not applicable to the circumstances of our House of Assembly.

As to the second plea:—The plaintiff had a right to attend the sittings of the House of Assembly as the representative of Mudgee, and that constituency had a right to be represented in the House. The Assembly has no power, by a resolution, to suspend a member from the service of the House. The Assembly has no power to punish its members; and the suspension of the plaintiff amounted to a punishment, not being necessary for the preservation of order, the obstruction having then ceased. There was no trial, because the party accused was not heard in his defence, in violation of the rights of *Magna Charta*, and of the principles of the common law. If an illegal order is made by one of the Houses of Parliament, an action will lie at the suit of the person injured against an officer executing such illegal order. The limited authority of Colonial Parliaments was stated by this Court in the case of *Apollo Stearine Coy. v. Powell* (2). *Bradlaugh v. Gossett* (3) may be quoted on the other side; but that case does not apply to the act of a Colonial Legislature. That case only decided that the House of Commons had power over its own members in a matter con-

(2) N.S.W. L.R. 160 (reversed on appeal to the Privy Council reported *post*.)

(3) 12 Q.B.D. 271.

cerning the internal government of the House, and the conduct of debates. The House of Commons is a supreme tribunal, and its proceedings and conduct are not open to criticism in any court of law. Our colonial House of Assembly on the other hand possesses only delegated powers, owing its authority to the *Constitution Act*; and it is only empowered to make laws for the peace, welfare, and good government of the colony. In *Bradlaugh v. Gossett* (4), it was argued that, since an appeal lay from the Court of Queen's Bench to the House of Lords, and since the Houses of Parliament possess equal co-ordinate authority, if the Court of Queen's Bench had jurisdiction to judge as to the privileges of the House of Commons, it would be enabled to decide as to the powers and privileges of a body holding a superior position in the State; and one House of Parliament would be the supreme tribunal to judge of the privileges of the other House.\* No such absurdity will arise in the case now before the Court, because the appeal from the Supreme Court is to the Queen-in-Council. Another difference between the House of Commons and a Colonial Assembly is, that the former is a Court having judicial as well as legislative powers. The powers of our Supreme Court, on the other hand, were created by charter prior to the *Constitution Act*, and the latter enactment, while conferring legislative powers on our Houses of Parliament, expressly reserves the judicial powers previously conferred on the Supreme Court. The Imperial Parliament thus conferred its judicial powers on the Supreme Court, and invested our Houses of Parliament with its purely legislative powers. The plaintiff's right of representation being conferred on him by Statute, it would require an Act of as high a character to take such right away. The judgment of Lord Chief Justice *Holt* in the case of *Ashby v. White* (5) is applicable to the circumstances of a Colonial House of Assembly. *Beaumont v. Barrett* (6) does not apply to a colony which has been acquired by settlement, and not by conquest. *Dill v. Murphy* (7) only decided that the Victorian Parliament had authority to adopt and assume to itself the

1884

---

TAYLOR  
v.  
BARTON.

---

(4) 12 Q.B.D. 271.

(5) Lord Raymond, 938.

(6) 1 Moo. P.C. 59.

(7) 1 Moo. P.C. 487.

1884  
TAYLOR  
v.  
BARTON.

powers which the Imperial Parliament had at the time of the passing of the Victorian *Constitution Act*; it did not authorise the adoption of standing orders subsequently passed by the Imperial Parliament. In *Fenton v. Hampton* (8), a Tasmanian appeal, Chief Baron Pollock held that the *lex et consuetudo parliamenti* did not apply to the Legislature of a colony by the introduction of the common law there. In *Kielley v. Carsen* (9), an appeal from Newfoundland, the Court drew a distinction between removing an obstruction or impediment to the business of the House, and punishing an offence, and held that the Colonial Legislature did not possess the powers and privileges conferred by the ancient law of England on the Imperial Parliament. The case of *Doyle v. Falconer* (10), an appeal from Dominica, went to show that a local Legislature had power to remove an impediment, while it existed, but had no power to punish; the exercise of such power not being necessary for the due performance of legislative functions. The Assembly, in the case now before the Court, had no authority to exclude the plaintiff for days after the temporary obstruction had ceased; such a power is not a necessary incident to the exercise of legislative functions, but is an attempt to assume judicial powers. The Supreme Court has jurisdiction to examine the proceedings of the House of Assembly, and to determine whether it acted within the authority conferred on it by the Imperial Parliament.

*Salomons, Q.C., (C. B. Stephen with him)* for the defendant—The pleas are good. As to the second plea, that plea is limited to the alleged assault on 23rd April. The plaintiff, having acted in obstruction of the business of the House, was removed by virtue of the inherent power which the House as a legislative body has to preserve liberty of debate. We admit that the House cannot punish a member, for example, by imprisoning him; but the removal of the plaintiff was for the purpose of allowing the House to proceed with its business. *Kielley v. Carson* (9) decided that the maxim which governed cases of this sort was—*Quando lex aliquid*

(8) 11 Moo. P.C.C. 347.

(9) 4 Moo. P.C. 63; 7 Jur. 137.

(10) L.R. 1 P.C. 328; 4 Moo. P.C.C. N.S. 203; 36 L.J. P.C. 34.



*concedit, concedere videtur et illud, sine quo res ipsa esse non potest*; and by virtue of that principle, the Assembly has the right to protect itself against all interruptions impeding the proper exercise of its functions, by removal, suspension, and, if necessary, the expulsion of the offender. The plaintiff was removed for the purpose of allowing the business of the House to be proceeded with. *Doyle v. Falconer* (11) is in our favour.

1884

---

TAYLOR  
v.  
BARTON.

[SIR J. MARTIN C.J. That case went further than any other, in deciding that the House may *expel* a member.]

The House has power to remove a member, and keep him excluded from the Chamber: *Bradlaugh v. Gossett* (12); *Burdett v. Abbot* (13); *Stockdale v. Hansard* (14). A Court of law cannot inquire into what is done within the walls of Parliament for the purpose of enforcing internal discipline.

As to the third plea. Assuming that the first standing order is not *ultra vires*, we submit that the language used in it shows that it is applicable to rules of the Imperial Parliament subsequently passed. The words "resort shall be had" are future in their terms. The words "sessional orders" refer to future orders not then in existence.

[SIR J. MARTIN C.J. What is the meaning of the word "hereinafter"? Does it not refer to the existing rules of Parliament?]

We think that it means "hereafter." The standing order relates to any orders made from time to time by the Imperial Parliament. The words "from time to time" refer to rules "thereafter to be made." Sessional orders mean orders passed from session to session. The standing order means that where new circumstances arise, they are to be determined by the rules of the Imperial Parliament existing and in force at the time of the offence.

As to whether the Assembly had power to adopt the standing order of the Imperial Parliament, the case of *Dill v. Murphy* (15)

(11) L.R. 1 P.C. 328; 4 Moo. P.C.C. (14) 7 C. & P. 731; 9 A. & E. 1; 11 N.S. 203; 36 L.J. P.C. 34. A. & E. 253.

(12) 12 Q.B.D. 271.

(15) 1 Moo. P.C. N.S. 487.

(13) 5 Dow. 165; 14 East 1, 154.

1884 decided that sec. 35 of the Victorian *Constitution Act*, which  
 TAYLOR gave that House of Assembly power to "define" its privileges,  
 v. allowed the House to declare that it possessed the privileges of  
 BARTON. the House of Commons, and decided that it was not necessary  
 to an effective exercise of the powers so conferred that the  
 privileges adopted should be enumerated. That case was  
 followed in *The Speaker of the Legislative Assembly of Victoria v. Glass* (16).

[SIR J. MARTIN C.J. Are the allegations in the plea equivalent to a statement that the plaintiff obstructed the proceedings of the House?]

The House itself is to judge whether a member has been causing obstruction, otherwise a jury or a District Court Judge might be asked to try the question whether the conduct of a member amounted to obstruction of the business of the Assembly. The question of internal discipline is for the House itself to determine.

*The Plaintiff*, in reply—The rules adopted by the Victorian Parliament in *Dill v. Murphy* (17) were rules of the Imperial Parliament which were then in force. A public meeting would have the right to remove any person obstructing its proceedings, but it could not go further and say that he should not attend any meetings for six weeks. Parliament has no right to measure out punishment to any of its members.

*Cur. adv. vult.*

On 9th December, the written judgment of the Court (their Honours the Chief Justice, Mr. Justice Windeyer, and Sir G. Innes) was delivered as follows by—

SIR J. MARTIN C.J. This is an action brought by a member of the Legislative Assembly against the Speaker—1, for expelling him from the chamber of that body during its sitting on the 22nd of April last; and 2, from preventing him from entering such chamber on the 23rd April, and being present at a meeting of the

(12) L.R. 3 P.C. 560; 40 L.J. P.C. 17. (17) 1 Moo. P.C. N.S. 487.

Assembly then being held. To this declaration, so far as relates to the prevention of the plaintiff from entering the chamber on the 23rd of April, the defendant has pleaded two pleas. In the first of these pleas it is alleged that the plaintiff being present at a sitting in committee of the whole House, and the committee having considered certain conduct of his, committed before it, the committee passed a resolution relating to the plaintiff and his conduct, to the effect that "having been named by the chairman as having persistently and wilfully obstructed the business of the committee, he be suspended from the service of the House." The plea then goes on to state that the plaintiff's conduct and the said resolution were immediately reported to the House, which thereupon passed a resolution in reference to the plaintiff and the premises, to the effect that the plaintiff "be suspended from the service of the House." The plea then further alleges that afterwards, and "while the suspension still remained in force," the plaintiff entered the chamber while the Assembly was sitting, and claimed the right to sit and serve as a member, and being requested by the Speaker to withdraw he refused to do so, whereupon the defendant, "acting under the authority of the said resolutions," directed the Sergeant-at-Arms to remove the plaintiff from the chamber, which was done with no unnecessary force. In the second of these pleas it is alleged that at the time of the trespass complained of, it was one of the standing orders of the Assembly that in all cases not specially provided for, "resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House." The plea then alleges that after the passing of this order, and before the alleged trespass, the Imperial Parliament passed a rule, which was in force at the time of the trespass, to the effect that "whenever any member shall have been named by the Speaker, or by the chairman of a committee of the whole House, immediately after the commission of the offence of disregarding the authority of the Chair, or abusing the rules of the House, by persistently and wilfully obstructing the business of the House or otherwise," then he may be "suspended from the service of the House;" that such suspension "on

1884

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TAYLOR  
v.  
BARTON.

1884

TAYLOR  
v.  
BARTON.

the first occasion shall continue for one week, on the second occasion for a fortnight, and on the third or any subsequent occasion for a month." The plea then goes on to allege that the plaintiff "committed the offence of abusing the rules of the said Assembly by persistently and wilfully obstructing the business of the Assembly," whereupon the two resolutions set out in the former plea were adopted—the one in committee and the other in the House itself. It is then alleged that the case was not specially provided for, and that the plaintiff entering the chamber within a week after the passing of the resolution suspending him, and while the suspension remained in force, was on his refusal to withdraw removed from the chamber by the Sergeant-at-Arms by the defendant's orders.

Both these pleas were demurred to, the latter chiefly on the grounds, 1—that the standing order adopting the rules of the Imperial Parliament had reference only to the rules then existing, and not to future rules; and 2—on the further ground that it was not competent to the Legislative Assembly to pass a standing order adopting beforehand any rule, form, or usage which the Imperial Parliament might subsequently adopt.

By the 35th section of schedule 1 to the Act of Parliament 18 & 19 Vic, c. 54, power was given to the Legislative Assembly in its first session, and "from time to time afterwards," to prepare and adopt such standing rules and orders as should appear best adapted for the purposes there enumerated, all of which "rules and orders shall be laid before the Governor, and, being by him approved, shall become binding and of force." It was contended that under the express terms of this section every standing order made by the Assembly, before it can become "binding and of force," must be laid before the Governor and be approved by him, and that it thence necessarily follows that rules made by the Imperial Parliament after he had given his assent to the standing order authorising resort to be had to the rules of that Parliament, not having been laid before him, and not having been approved by him, can have no validity. We are clearly of that opinion. To hold otherwise would be yielding to the Imperial Parliament the power, in cases for which any local orders have not expressly provided, to prescribe rules sanctioned

neither by the Assembly nor the Governor. But this authority cannot be thus conceded without a direct violation of the 35th section already mentioned. By that section the standing orders of the Assembly must be adopted by the Assembly itself, and the Governor must approve them, to give them validity. This adoption cannot take place till the rules are in existence to adopt, and the Governor's approval cannot be held to have been given to rules not laid before him for his sanction. The Governor might undoubtedly approve as he did, *in globo*, of the adoption of such existing Imperial Parliamentary rules and orders as it was competent for the Assembly itself to pass, because of them he must be taken to have had cognizance. But of rules and orders not then made he could know nothing, and therefore could form no judgment of the propriety of applying them. If, therefore, the standing order set out in the second plea to the removal of the plaintiff on the 23rd of April, in terms professes to adopt rules of the Imperial Parliament to be made thereafter, it is *ultra vires* and of no effect.

But independently of this, and also of the question whether the Assembly itself has any power to pass such an order, we are of opinion that the order in question does not in terms apply to such future rules of the Imperial Parliament, inasmuch as the direction to resort to the rules, forms, and usages of the Imperial Parliament must be held to apply only to such rules, forms, and usages as it was competent for the Assembly, with the Governor's approval, to assent to, as it must be intended that in framing the rule in question that only which could be lawfully done was the thing intended. It follows from this, in our opinion, that this second plea is no answer to the declaration, as it is based upon rules which had no validity so far as concerned the Legislative Assembly.

We come now to the first plea to the same trespass of the 23rd of April, which seeks to justify the action of the defendant without reference to any special rule, but apparently on the inherent right of the Assembly, as a legislative body, to exclude the plaintiff as one of its members in the manner complained of. The power of legislative bodies in the colonies of the Empire to deal with obstructions and contempts has, on several occasions,

1884

---

TAYLOR  
v.  
BARTON.

1884  
TAYLOR  
v.  
BARTON.

formed the subject of discussion in the Privy Council, and the decisions of that tribunal have not at all times been consistent with each other. The Privy Council being, so far as the colonies are concerned, their court of final appeal in the same way as the House of Lords is the court of final appeal from the Common Law Courts of the United Kingdom, it might reasonably be expected that its judgments should on all occasions be uniform on any given question, no matter how often it might be submitted for decision. That this has not always been so we see by a reference to the cases of *Beaumont v. Barrett* (18), determined in 1836, and *Kielley v. Carson* (19), decided in 1842. In the former of those cases that able and experienced judge, Baron *Parke*, in delivering the opinion of the Privy Council, said (p. 76):—"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 merely such as are a direct obstruction to its due course of proceedings, 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." His Lordship then cited a passage from Lord *Ellenborough's* judgment in *Burdett v. Abbott* (20), and said (p. 78):—"Now, if we apply that principle to this 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."

In 1821 the power of the House of Representatives in the United States to bring before it and punish a person not a member for a contempt was upheld by the Supreme Court, then presided over by Chief Justice *Marshall*, who had Mr. Justice

(18) 1 Moore P.C. 59.

(19) 4 Moore P.C. 63; 7 Jur. 137.

(20) 5 Dow. 165; 14 East 1, 154.

1884

---

TAYLOR  
v.  
BARTON.

---

*Storey* as one of his associates. On that occasion the judgment of the Court was delivered by Mr. Justice *Johnson*. The case is *Anderson v. Dunn* (reported in 6 Wheaton, 204). The language of this judgment is slightly rhetorical; but it is, as might be expected from the eminence of the tribunal, a well-reasoned deliverance. At the outset the Court says that the pleadings had narrowed down the merits to the simple inquiry "whether the House of Representatives can take cognisance of contempts committed against themselves under any circumstances." In discussing this question, the Court made the following observations, which obviously have a wide and general application:—"But if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have entrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the ends of their creation. . . . That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eyes of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness or repel insult is a supposition too wild to be suggested. . . . But it is argued that the inference, if any, arising under the Constitution is against the exercise of the powers here asserted by the House of Representatives; that the express grant of power to punish their members respectively and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members. This argument proves too much, for its direct application would lead to the annihilation of almost every power of Congress. . . . In reply, the suggestion that on this same foundation, of necessity might be raised a superstructure of implied powers in the Executive and every other department and even

1884

TAYLOR  
v.  
BARTON.

Ministerial officer of the Government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. Even corruption anywhere else would not contaminate the sources of political life. In the retirement of the Cabinet it is not expected that the Executive can be approached by indignity or insult, nor can it ever be necessary to the Executive or any other department to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings with the attack or feints of the harpies of imagination."

Thus it appears that those two high tribunals, the Supreme Court of the United States in 1821 and the Privy Council in 1836, held that a legislative body having supreme legislative authority had, from the necessity of the case, power to punish a person not a member for a contempt committed elsewhere than in the presence of the legislative body itself.

In *Kielley v. Carson*, however, the soundness of this view was called in question, six years after the decision of *Beaumont v. Barrett*. This case was twice argued before the Privy Council, and no less than 11 judges sat to hear it, including in their number the most eminent lawyers of that time. Baron *Parke* delivered the judgment then, as he did in the previous case of *Beaumont v. Barrett*. "The whole question," says his Lordship (p. 88), "then is reduced to this, whether by law the power of committing for a contempt not in the presence of the assembly is incidental 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 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 videtur 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 proceedings. 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 principles 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. 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." Their Lordships, having thus decided in clear opposition to the judgment of *Beaumont v. Barrett*, go on to say in express terms (p. 91) that they "do not consider that case as one by which they ought to be bound in deciding the present question." It will be observed that in the case of *Kielley v. Carson* the point decided was as to the power of a colonial Assembly to punish for contempts committed by strangers not in its presence. "The question," their Lordships say (p. 84), "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."

In *Fenton v. Hampton* (21), decided in 1858, the same point arose as in *Kielley v. Carson*, and the Privy Council (p. 397) thought they were bound by that case, the greater authority of which, as compared with *Beaumont v. Barrett*, "it was quite unnecessary to enlarge upon."

The right of a colonial Assembly to punish for a contempt committed in its presence remained undetermined till 1866, when it arose for express decision in the case of *Doyle v. Falconer* (22). There a member of the House of Assembly of Dominica, being called to order by the Speaker, said:—"Who the devil are you to call me to order? You are a disgrace to the House." The

1884

---

TAYLOR  
v.  
BARTON.

(21) 11 Moore P.C.C. 347.

(22) L.R. 1 P.C. 328; 4 Moo. P.C.C. N.S. 203; 36 L.J. P.C. 34.

1884  
TAYLOR  
v.  
BARTON.

member refusing to apologise when called upon, and using further insulting language to the Speaker, as that he was "expelled the House for robbery," he was thereupon "committed to the common gaol during the pleasure of the House." The member so imprisoned brought his action, and a plea setting forth the facts having been overruled on demurrer, he recovered damages for the imprisonment. The defendants appealed to the Privy Council against the decision overruling the demurrer. In giving judgment, their Lordships said that one of the questions to be decided was whether the House of Assembly had authority "to commit and punish for contempts committed and for interruptions and obstructions given to the business of the said House of Assembly by its members or others in its presence and during its sittings." The point thus specially raised, and not up to that time determined, is at length decided as follows:—"Is," say their Lordships (p. 340), "the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sittings, which last power is necessary for self-preservation. If a member of a colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is in their Lordships' judgment all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends their Lordships must answer in the negative. If the good sense and conduct of the members of colonial Legislature proves, as in the present case, insufficient to secure order and decency in debate, the law would sustain the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him

excluded. The same rule would apply *a fortiori* to obstructions caused by a person not a member. And whenever the violation of order amounts to a breach of the peace or other legal offence, recourse may be had to the ordinary tribunals."

1884

---

TAYLOR  
v.  
BARTON.

In the paragraph of the judgment here cited, we have it authoritatively decided how far by the common law the power of a colonial Assembly extends in dealing with contempt and interruptions in their proceedings. They cannot in any case punish; they can only remove the offender, and if a member, they have the power to exclude him for a time, or even as their Lordships hold, to expel him; in which last case, however, the constituency might at once proceed to a new election, which they could not do in the case of a suspension. In the case of a stranger who has no right without permission to be present, they may exclude him altogether; but in the case of a member who, not having been formally expelled, has a right to be present, while not obstructing the proceedings, they can exclude him as long only as the necessity exists for his exclusion by reason of such obstruction. The duration of such exclusion must be determined on each separate occasion when the necessity for it arises. It would be absurd to limit it to the mere time occupied in the offending member's removal, so as to admit of his return to the Chamber immediately afterwards. It would be equally absurd to hold that he might be indefinitely excluded. The only reasonable view to take of this power of exclusion is to limit it to the actual sitting during which the necessity for its exercise arose. When a member while the House is sitting insults the Speaker, as in the Dominica case, and persists in insulting him, his removal is obviously a proper and necessary thing to enable the business to proceed, and there can be no right in the member so misconducting himself and so removed to come back immediately after making a promise to discontinue his obstructive conduct. The House cannot reasonably be expected on such a promise being given to allow the offender to return, with the possibility of the same misconduct being repeated and the like order for exclusion being again rendered necessary. Such a proceeding would partake too much of the character of burlesque to be laid down as the rule in such cases. If the House, having removed one of its members for obstructing its proceed-

1884  
TAYLOR  
v.  
BARTON.

ings, thinks fit, on being satisfied that there is no further likelihood of his continuing his misconduct, to re-admit him immediately after, they will of course do so, but during that sitting they need not further concern themselves about his re-admission. At the next or any subsequent sitting the excluded member must, if he has not been formally expelled, have the right to resume his place in Parliament, unless he is then again guilty of obstructive conduct, or presents himself in a condition such as to render his presence itself an obstruction. The right to exclude "for a time," which the Privy Council has declared to be the law, cannot in reason be extended beyond the sitting when its exercise is called for. It is a right to be exercised for one sitting only, for the plain reason that, until the contrary appears, a longer exclusion is unnecessary.

In the present case the plea alleges the plaintiff's "suspension from the service of the House" by a resolution of the Assembly, and it then goes on to say—"That afterwards, during the same session of Parliament, and while the said suspension still remained in force, the plaintiff entered the said Legislative Assembly Chamber while the said Assembly was sitting for the despatch of the business of Parliament, at the said meeting in the said first count mentioned, and claimed the right to sit and serve as such member; and thereupon the defendant, as such Speaker as aforesaid, requested the plaintiff to withdraw from the said chamber, which the plaintiff then refused to do, whereupon the defendant, acting under the authority of the said resolutions, and in order to enforce the same, directed the Sergeant-at-Arms of the said Assembly to remove the plaintiff from the said chamber." There is no statement in this plea of any time having been fixed by the House for the continuance of the plaintiff's suspension, but that some time or other was in the contemplation of the House must be inferred from the allegation that the plaintiff entered the chamber "while the said suspension still remained in force." In this plea a right is therefore set up in the Assembly to suspend a member for some time, definite or indefinite, quite apart from the question of obstructive conduct actually existing. It is impossible to distinguish this alleged right to suspend from a right to punish or coerce even after the obstruction is over and is no longer

apprehended, and that is precisely a right which the Privy Council has declared that colonial Assemblies do not possess. If the plea had alleged that the plaintiff had obstructed the proceedings of the House, and that having for such obstruction been removed he returned to the chamber without the permission of the House during that same sitting, the case would have been different, and the justification would have been complete. But it cannot be held that a member of the Legislative Assembly can be "suspended" at its pleasure for misconduct of any kind. He may be expelled if sufficient grounds exist to warrant the House in taking that extreme course, and of such sufficiency the House itself must of necessity be the sole judge. But in the absence of any resolution formally expelling a member, he cannot be "suspended," although he may be removed to enable the business of any given sitting to go on, and he may for that purpose be kept excluded during that sitting which he has so interrupted and obstructed.

From what we have already said, it will be gathered that in our opinion the Assembly has neither the power to adopt from the Imperial Parliament nor to pass of its own authority any standing order giving itself the power to punish an obstructing member or remove him from the chamber for any period longer than the sitting during which the obstruction occurred. Whether the Assembly ought to possess the powers claimed is a question for the consideration of the Legislature. This Court can only declare the law as it finds it laid down by authority which they must respect. And in obedience to that law we must on these demurrers give judgment for the plaintiff.

*Judgment for the plaintiff.*

Attorney for the defendant: *Williams*, Crown Solicitor.

1884

TAYLOR  
v.  
BARTON.