Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barton v. *Taylor, from the Supreme Court of New South Wales; delivered 6th March* 1886.

Present:

LORD SELBORNE.
LORD BLACKBURN.
LORD MONKSWELL.
LORD HOBHOUSE.
SIR RICHARD COUCH.

This appeal comes before their Lordships in such a way (on demurrer to pleadings) as to cause them some embarassment. It is evident, when the second and third pleas are both looked at together, that by passing the resolution of suspension against the Respondent, the Legislative Assembly of New South Wales meant to act upon the Standing Order of the British House of Commons which is set forth in the third plea, and is therein described as "a rule of the Imperial Parliament;" and which was assumed to be applicable, under its own Standing Orders, to the New South Wales Assembly. If that assumption had been correct, the suspension would have been good in law for the definite period of a single week. Their Lordships, however, are of opinion that the Standing Order of the British House of Commons set forth in the third plea was not, in April 1884, by adoption or otherwise, a rule of procedure applicable to the Legislative Assembly of New South Wales.

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Assuming (but not deciding) that under the 35th section of the Constitution Act it might have been competent to the Legislative Assembly and Governor to prepare and adopt a Standing Rule or Order, declaring that all rules and orders of the British House of Commons, whether then in existence or to be at any time afterwards made, for the orderly conduct of its business, should be adopted and followed by the Legislative Assembly, their Lordships are of opinion that the Standing Order set forth in the third plea cannot properly be so construed. The words "resort shall be had to the rules, forms, and "usages of the Imperial Parliament" (taking the expression "Imperial Parliament" to be distributive, and to refer, when the proceeding is one of the Legislative Assembly, to the British House of Commons) naturally signify the then existing and known rules, forms, and usages of the House of Commons. In the absence of words of prospect or futurity, and of any context indicative of an intention so improbable as that of adopting by anticipation all future changes in the procedure or practice of the House of Commons, their Lordships think it would be unreasonable so to construe the Standing Order. They think, therefore, that the third plea is bad, and that the demurrer to it was rightly allowed.

In the second plea their Lordships find no averment, either of any Standing Order of the Legislative Assembly itself, or of any rule, form, or usage of the Imperial Parliament, authorizing or justifying the trespass complained of by the Plaintiff. The intention of that plea seems to have been to justify the trespass on the ground of an inherent power in every Colonial Legislative Assembly to protect itself against obstruction, interruption, or disturbance of its proceedings by the misconduct of any of its members in the course of those proceedings. The nature, grounds,

and limits of that power (which undoubtedly exists) have been several times considered at this Board, especially in the case of Kielley *v.* Carson (4 Moore, P. C. 63), and Doyle *v.* Falconer (1 L. R., P. C. 329). It results from those authorities that no powers of that kind are incident to or inherent in a Colonial Legislative Assembly (without express grant), except "such "as are necessary to the existence of such a "body, and the proper exercise of the functions "which it is intended to execute" (4 Moore, P. C. 88). Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary. If the question is to be elucidated by analogy, that analogy is rather to be derived from other assemblies (not legislative), whose incidental powers of self-protection are implied by the common law (although of inferior importance and dignity to bodies constituted for purposes of public legislation), than from the British Parliament, which has its own peculiar law and custom, or from Courts of Record, which have also their special authorities and privileges, recognized by law. "If a member of a Colonial House of "Assembly is guilty of disorderly conduct in "the House while sitting, he may be removed "or excluded for a time, or even expelled. . . . "The right to remove for self-security is one "thing, the right to inflict punishment is "another. . . . If the good sense and conduct "of the members of Colonial Legislatures prove "insufficient to secure order and decency of "debate, the law would sanction the use of that "degree of force which might be necessary to "remove the person excluded from the place of

" meeting, and to keep him excluded " (1 L. R, P. C. 340).

These words were used by Sir James Colvile, when delivering the judgment of this tribunal in Doyle *v.* Falconer, and their Lordships adopt them. It does not, however, appear to be a just inference from the expressions, " excluded *for a time*," and " to *keep him excluded*," that a power to exclude a member, and to keep him excluded, for a length of time unlimited, or limited only by the discretion of the Assembly, was considered in Doyle *v.* Falconer, or ought, on sound principles, to be now held by their Lordships to be necessary to the existence of such a body or to the proper exercise of its functions. The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the Assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the Assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection on his own conduct by the person suspended ; nor would anything less be generally sufficient for the vindication of the authority and dignity of the Assembly. The sitting or meeting, as a whole, has a practical unity. It commences with the usual forms of opening, when the Speaker takes the chair ; it is terminated by the adjournment of the House. It has its proper rota of business (such as, in our House of Commons, the Notices and Orders of the Day) ; a separate record of the whole business done at each such sitting or meeting (including the suspension of a member,

if that should take place) is entered upon the journals. The "service" of members in attendance at each such sitting or meeting is continuous; and at each adjournment that service is interrupted, not to be renewed until after an interval of some hours, days, or weeks, or even months, as the case may be.

The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgement, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be *ultra vires* or not. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse. It is true that confidence may, generally, be placed in such bodies; and there may be cases (as in such very important colonies as this of New South Wales) in which there may be preponderating reasons for entrusting them with much larger powers than those which ought to be implied from the mere necessity of the case.

But their Lordships are at present considering only those powers which ought to be implied on the principle of necessity, and which must be implied in favour of every Legislative Assembly of any British possession, however small, and however far removed from effective public criticism. Powers to suspend *toties quoties*, sitting after sitting, in case of repeated offences (and, it may be, till submission or apology), and also to expel for aggravated or persistent misconduct, appear to be sufficient to meet even the extreme case of a member whose conduct is habitually obstructive or disorderly. To argue that expulsion is the greater power, and suspension the less, and that the greater must include all degrees of the less, seems to their Lordships fallacious. The rights of constituents ought not, in a question of this kind, to be left out of sight. Those rights would be much more seriously interfered with by an unnecessarily prolonged suspension than by expulsion, after which a new election would immediately be held.

The same considerations have also led their Lordships to the conclusion that even if a power of unconditional suspension during the pleasure of the Assembly did exist, a suspensory resolution not expressed (or interpreted by any Standing Order) to be conditional on something to be done by the person suspended, or to be during pleasure, or for a definite time, ought not to be held operative beyond the end of the current sitting. The resolution pleaded in this case was, "That Mr. A. G. Taylor be suspended from the "service of the House." If more was meant than to suspend him for the rest of the then current "service," their Lordships think that it ought to have been distinctly so expressed. "Suspension" must be temporary; the words, "sus- "pended from the service of the House," may

be satisfied by referring them to the attendance of the member in the House during that particular sitting. So much as this is necessary to make the suspension effective, more is not. The case is not that of the suspension of a public officer, *ab officio*, by a competent judicial or executive authority, having jurisdiction over the officer or over the tenure of his office, and acting *in pœnam*, not for self-defence only. Nor is it like that of a commitment, where the gaoler or public officer who receives a prisoner into his custody under a legal warrant is bound to detain him till he has authority for his release.

Even, therefore, if the second plea had set forth the Standing Order of the Legislative Assembly, adopting the rules, forms, and usages of the British House of Commons, and had contained an averment which was admitted by the demurrer to be true that, at the time when that Standing Order was made, the British House of Commons had and exercised the power of unconditional suspension for an indefinite or unlimited period of time, their Lordships would have agreed with the Court below, so far as to hold that the suspension pleaded in this plea was not to be construed as operative beyond the sitting during which the resolution was passed.

The second plea contains an averment that the trespass of the 23rd April, alleged in the declaration, took place after the suspensory resolution had been passed, "during the same "session of Parliament and while the said sus- "pension remained in force." The argument at their Lordships' bar was conducted upon the assumption (or concession) that this ought to be understood as equivalent to a statement, that the alleged trespass took place during a sitting of the Assembly subsequent to that at which the suspensory resolution was passed; in which

view, the averment that the suspension remained in force is one not of fact but of law. It is therefore unnecessary to consider whether, in the absence of such a concession on the Appellant's part, their Lordships would have been justified in so construing this averment.

Their Lordships entertain no doubt of the validity of the Standing Order of the Legislative Assembly, adopting, so far as applicable to its proceedings, the rules, forms, and usages which were in force in the British House of Commons at the time when that Standing Order was passed, and assented to by the Governor of New South Wales. They think it proper to add, that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly "to adopt from the Imperial Par-"liament, or to pass by its own authority, any "Standing Order giving itself the power to punish "an obstructing member, or remove him from "the Chamber, for any period longer than the "sitting during which the obstruction occurred." This, of course, could not be done by the Assembly alone, without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers, given by the Constitution Act, are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.* Their Lordships' affirmance of the judgement appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can

give the resolution suspending the Respondent a larger operation than that which the Court below has ascribed to it.

Their Lordships will humbly advise Her Majesty to affirm the judgement appealed from, and to dismiss this appeal, with costs.