

[PRIVY COUNCIL.]

BARTON DEFENDANT ;

AND

TAYLOR PLAINTIFF.

J. C.*

1886

Feb. 20 ;

March 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales, Legislative Assembly of—Power of Suspension—Action of Trespass—Pleas and Justification.

The respondent having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be “suspended from the service of the House,” he was removed therefrom and prevented from re-entering it :—

Held, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.

Held, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the Governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order.

The powers incident to or inherent in a Colonial Legislative Assembly are “such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute,” and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.

Doyle v. Falconer (Law Rep. 1 P. C. 328) approved.

APPEAL from a decree of the Supreme Court (Dec. 9, 1884), ordering judgment to be entered for the respondent on his demurrers to the pleas pleaded by the appellant in an action of trespass to his person brought by the respondent, who at the date thereof was a member of the Legislative Assembly of New South Wales, against the appellant, who was then the Speaker.

On the 23rd of April, 1884, while the Assembly was sitting in a committee of the whole House, it passed the following resolution in consequence of the conduct of the respondent :—“That Mr. Adolphus George Taylor, having been named by the chair-

* *Present* :—EARL OF SELBORNE, LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

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man as having persistently and wilfully obstructed the business of the committee, be suspended from the service of the House.” This resolution was reported by the chairman of the committee, and thereupon the Assembly passed the following resolution relating to the respondent:—“That Mr. A. G. Taylor be suspended from the service of the House.” Within a period of one week after the passing of the last mentioned resolution, the respondent entered the Legislative Assembly Chamber while the Assembly was sitting for the dispatch of business and claimed the right to sit and serve as a member, whereupon the appellant, as Speaker, requested him to withdraw, and upon his refusal directed the Serjeant-at-Arms to remove him from the chamber, which was accordingly done.

The trespasses alleged in the declaration in the action were the removal of the respondent from the chamber and preventing him entering it.

The appellant pleaded three pleas to the declarations. The first plea was not guilty. The second and third pleas each set forth the above resolutions, and alleged that while the suspension still remained in force the respondent entered the chamber; that the appellant, as Speaker, requested him to withdraw, and upon his refusal directed the Serjeant-at-Arms to remove him. The difference between the second and third pleas was, that the latter set forth the standing order of the Legislative Assembly and the standing rule or standing order of the Imperial Parliament hereinafter set out, and alleged that the entry by the respondent into the chamber took place within a period of one week from the passing of the last of the two resolutions, while the second plea did not set forth either of such standing rules or orders.

The respondent demurred to the second plea on the ground that the resolution of the Legislative Assembly was no justification for the alleged trespasses, and to the third plea on the grounds that the standing order of the Legislative Assembly had not such prospective operation as to adopt the Imperial standing order, and that if it had such a prospective operation it was *ultra vires*.

The appellant joined in demurrer, and the Supreme Court gave judgment for the respondent on the demurrer.

In pursuance of the power conferred on it by the Constitution Act, scheduled to 18 & 19 Vict. c. 54, s. 55, the Legislative Assembly prepared and adopted certain standing rules or orders for the orderly conduct of such Assembly, which were by such Assembly laid before the Governor, and were by him approved. The first of such standing orders is as follows, and was set out in the third plea:—

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“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.”

Before and at the time when the said standing rule and order was so approved, it was one of the rules or usages of the Imperial Parliament for either House of Parliament to suspend from the service of the House for such period as it should name, or without naming any period of suspension, until it should give directions in the matter, any member persistently and wilfully obstructing the business of the House.

After the said standing orders had been so approved by the Governor, but before the obstruction of business for which the respondent was suspended from the service of the House, a rule of the Imperial Parliament was made, and was a usage in force at the time of the alleged trespass hereinafter mentioned, which rule, also set out in the third plea, is as follows:—

“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 questions 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, on 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

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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 serving 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."

Sir *H. Davey*, S.G., and *J. D. Wood* (*Rigby*, Q.C., with them), for the appellant, contended that under the resolution there was a suspension of the respondent from the service of the House during pleasure. That depends in the first instance upon whether, according to the true construction of the standing orders of the Assembly, the rules, forms, and usages of the British House of Commons for the time being were adopted, or only those in force at the date of the standing order being passed. The intention of the legislature, having confidence in the House of Commons, was to adopt prospectively whatever rules it might prescribe. [LORD BLACKBURN referred to the Newfoundland case, *Kielley v. Carson* (1)]. The limitation here was, "so far as the same can be applied," i.e. so far as it was reasonable to apply them: see *Whicker v. Hume* (2), where the same words in 9 Geo. 4, c. 83, s. 24, are construed. In *Dill v. Murphy* (3) a similar restriction to that now sought to be implied, that is the restriction as to rules existing at the date of the order, was expressed; and ought if such had been the intention to have been expressed here. And at the date of the standing order it was a rule and usage of the Imperial Parliament that either House might suspend for such period as it

(1) 4 Moo. P. C. 63.

(2) 14 Beav. 527.

(3) 1 Moo. N. S. 487.

deemed proper any member who persistently and wilfully obstructed its proceedings. That was a rule which could be applied by the Assembly. Here no time was fixed, but it must be construed to be during pleasure. There is a wide difference between a power to imprison and a power to exclude or suspend. According to the usage of the British House of Commons at the date of the standing order there was a power to suspend: see May's Parliamentary Practice (8th ed. p. 61), referring to 9th Commons' Journal, p. 120. [LORD SELBORNE:—Assuming a power to suspend; here there was no limit assigned.] It was a temporary exclusion. There is a power inherent in the Assembly to suspend a member for proper cause without naming a period at which the suspension is to terminate. [LORD BLACKBURN:—Even a public meeting would have power to exclude a member disturbing its proceedings; but it is very doubtful whether this Assembly could exclude from its future meetings.] *Doyle v. Falconer* (1). [LORD BLACKBURN:—The proceedings here look more like a punishment than a matter of self-defence.] *Bradlaugh v. Gossett* (2); *Howard v. Gossett* (3). It cannot be said that suspension for a longer period than the sitting is unreasonable.

The respondent in person was directed by their Lordships to confine his argument to the second plea. He contended that exclusion could not be beyond a time reasonable for the exercise of the power. Here, according to the appellant's argument, it might have lasted two or three years. The Assembly should have regard in all cases at least to the probable duration of the circumstances which gave rise to its order. Any order which it makes should be submitted for the approval of the Governor.

Sir H. Davey, S.G., replied.

The judgment of their Lordships was delivered by

THE EARL OF SELBORNE:—

This appeal comes before their Lordships in such a way (on demurrer to pleadings) as to cause them some embarrassment. It

(1) Law Rep. 1 P. C. 328.

(2) 12 Q. B. D. 271.

(3) 10 Q. B. 359.

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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. 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, authorising 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* (1) and *Doyle v. Falconer* (2). 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" (3). 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, recognised 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" (4).

Those words were used by Sir James Colville, when delivering the judgment of this tribunal in *Doyle v. Falconer* (2), and their Lordships adopt them. It does not, however, appear to be a just

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(1) 4 Moo. P. C. 63.

(2) Law Rep. 1 P. C. 328.

(3) 4 Moo. P. C. 88.

(4) Law Rep. 1 P. C. 340.

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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* (1), 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' judgment, 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

(1) Law Rep. 1 P. C. 328.



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

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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, "suspended 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 of April alleged in the declaration took place after the suspensory resolution had been passed, "during the same session of Parliament and while the said suspension 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 Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any 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 judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it.

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

Solicitors for the appellant: *Mackrell, Maton, & Godlee.*

*The respondent in person.*

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