PARLIAMENTARY PRIVILEGE

THE QUEEN v. RICHARDS, EX PARTE FITZPATRICK AND BROWNE

(1955), 92 C.L.R. 157.

On the application of Raymond Edward Fitzpatrick and Frank Courtney Browne, in the custody of Edward Richards pursuant to Warrants issued by the Speaker of the House of Representatives, the Supreme Court of the Australian Capital Territory granted an order nisi for two writs of Habeas Corpus directed to Edward Richards. The Supreme Court pursuant to s. 13 of the Australian Capital Territory Supreme Court Act 1933-50 later directed that the case be argued before a Full Court of the High Court of Australia.

The applicants had been committed to custody for three months under Warrants issued under the authority of the Speaker of the Australian House of Representatives. The Warrants were issued after the Privilege Committee of the House had found that articles in the Bankstown Observer attacking a member of that House constituted a contempt of Parliament.

Section 49 of the Australian Constitution Act, 1900, provides that:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

If it were decided (and the Full Court so decided) that Parliament had not so far declared the powers, privileges and immunities of the House of Representatives, the latter part of s. 49 became relevant. Dixon C.J., who delivered the judgment of the Full Court, pointed out that there were then two issues to be determined. In the first place, the Court had to consider the extent of the powers of the Commons House of the United Kingdom Parliament to commit persons

for breach of a Parliamentary privilege. In the second place, it had to consider whether the Australian House of Representatives by virtue of s. 49 of the Australian Constitution Act 1900 was possessed of similar powers.

Dixon C.J. found no difficulty in disposing of the first of these issues. He held that the House of Commons possessed the power to commit for a breach of privilege and that, if the Warrant issued by the Speaker of the House stated in general terms that the commitment was for breach of privilege, the Court could not enquire further. The Warrants issued in respect of Fitzpatrick and Browne were in such a form; they did not specify the grounds of the commitments and therefore the High Court was not in a position to determine whether these grounds were sufficient in law to amount to a breach of privilege. In support of this conclusion the learned Chief Justice cited the Case of the Sheriff of Middlesex (1840), 11 Ad. & E. 273; 113 E.R. 419; Dill v. Murphy (1864), 1 Moo. P.C. (N.S.) 487; 15 E.R. 784; Speaker of the Legislative Assembly of Victoria v. Glass (1871), L.R. 3 P.C. App. 560.

The second issue posed was answered with equal facility. Having regard to the language of the latter part of s. 49, the Chief Justice found it difficult to see how any other conclusion could be reached than that the law as to privileges of the House of Commons was to be applicable in Australia to the House of Representatives. The High Court felt obliged, however, to dispose of arguments based on the rigid character of the Australian Federal Constitution and on the theory of the separation of powers incorporated in that Constitution; in particular, it was argued that power of imprisonment belonged to the judicial power and ought not to be conceded to either House of Parliament. Regarding these contentions, the Court held that s. 49 was expressed in very plain words and that its meaning was quite clear. The section did not permit the Court, by reference to the more general considerations arising from the structure of the Constitution, to give to its words a restricted meaning which they did not properly bear.

Another argument of a technical nature and pertinent only to the Australian Constitution was placed before the Court, but was rejected.

The Court thus found itself in a position where it had before it a resolution of the House and Warrants declaring that Fitzpatrick and Browne were each guilty of "a serious breach of privilege". It therefore concluded that the two persons who sought relief were properly held and the applications for writs of habeas corpus were dismissed accordingly.

Fitzpatrick and Browne sought special leave to appeal to the Privy Council. Viscount Simonds, delivering the judgment of their Lordships, after admitting that the matter under review was one of great public importance, said that their Lordships were "satisfied that [the High Court's] judgment is unimpeachable" and that leave to appeal should not be granted: The Queen v. Richards; Ex parte Fitzpatrick and Browne (1955), 92 C.L.R. 171, 172.

From the New Zealand point of view, the decision in itself is not of great importance since it depended upon the interpretation of particular provisions of the Australian Constitution. However, it is of interest insofar as it raises the question of the privileges of the New Zealand House of Representatives, a subject which our own Courts have not been required to consider.

It appears that in order to exercise a similar power to that in dispute in Richards' case, the New Zealand House of Representatives would have to rely on one of the following alternatives:

(a) An inherent power possessed by virtue of its position as a supreme Legislative Assembly;

(b) An express grant of power by the Imperial Parliament; or

(c) A New Zealand Statute passed with Imperial authority.

Inherent Power?

In Beaumont v. Barrett (1836), 1 Moo. P.C. 59; 12 E.R. 733, the Privy Council decided broadly that the power of punishing for contempts is inherent in every assembly possessing "supreme legislative authority", if the contempt

directly obstructs or might obstruct the course of its proceedings.

In Kielley v. Carson and Others (1842), 4 Moo. P.C. 63; 13 E.R. 225, a contrary view was expressed. The judgment of twelve members of the Judicial Committee was delivered by Mr Baron Parke, who was a member of the Committee which had decided Beaumont's case. They held that, in deciding the case before it, the Privy Council was not bound by the latter case and that the power of "Committing for a contempt, not in the presence of the Assembly" is not "an incident to, and included in, the grant of a subordinate Legislature." The right of the House of Commons to commit for contempt depended on the lex et consuetudo Parliamenti and was peculiar to that House. This being so, their Lordships decided that the Assembly of Newfoundland had no such right. At p. 92 of the report, Mr Baron Parke says of the Newfoundland House of Assembly:

> They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess - the same exclusive privileges which the ancient Law of England has annexed to the House of Parliament.

This decision was followed by the Privy Council in Fenton v. Hampton (1858), 11 Moo. P.C. 347; 14 E.R. 727, and extended to cover a contempt committed in the presence of the Assembly during its sittings in Doyle v. Falconer (1866), L.R. 1 P.C. 328. It now appears beyond dispute that the inherent powers of colonial assemblies are confined to those powers which are in Mr Baron Parke's language in Kielley's case (supra, at p. 88) ". . . necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." Their powers are thus protective and self-defensive in character, and not punitive. For example, a member might lawfully be forcibly removed from such an assembly for disorderly conduct, but he could not be further penalized by fine or imprisonment or by unconditional suspension for an indefinite time; Barton v. Taylor (1886), 11 A.C. 197.

From these decisions it seems clear that the New Zealand

House of Representatives has no inherent authority to commit for contempt.

Express Grant?

We will now consider whether the Imperial Parliament has expressly granted to the New Zealand House of Representatives the power to commit for contempt. Here it should be noted that most members of the Commonwealth have had the privileges of the Commons House of Parliament expressly bestowed upon them by Imperial Statute, e.g. the Commonwealth of Australia (s. 49 of the Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict., c. 12); the Union of South Africa (s. 57 of the South Africa Act 1909, 9 Edw. VII, c. 9); Canada (The Parliament of Canada Act (38 & 39 Vict. c. 38, s. 1); the State of Victoria (18 & 19 Vict. c. 55); the State of Western Australia (Western Australian Constitution Act 1890, 53 & 54 Vict. c. 26, s. 36).

The New Zealand Constitution Act 1852 (Imp.) (15 & 16 Vict. c. 72) contained no similar provision, although s. 52 enabled the House of Representatives to prepare and adopt standing rules and orders for the orderly conduct of the House. The section appears to have confined the House to passing rules and orders of a protective and self-defensive nature. Section 53 enabling the General Assembly to enact laws "for the peace, order, and good government of New Zealand" would not itself authorize the House taking punitive measures against private citizens. This proposition follows from the Privy Council's decision in Kielley's case (supra), which decided that, upon a true construction of a Commission under the Great Seal, inter alia, empowering the Governor with the advice and consent of the Council and Assembly to pass laws "for the public peace, welfare and good government" of the Island of Newfoundland, no authority to commit for contempt was meant to be communicated to the Legislative Assembly.(1) The basis of this decision appears to have been that, if one House committed one of its own members or a private citizen for contempt of a Parliamentary privilege, it would not be exercising the authority given to the Legislative Assembly to enact laws. Accordingly the committal would be ultra vires that House.

New Zealand Legislation?

This brings us to the third and last of the alternatives proposed above. One of the earliest Acts passed by our Legislature was the Privileges Act 1856, s. 1 of which enabled the Speaker of the House, acting under a standing or special order, to direct all such proceedings as he considered essential to the maintenance of order within the House during its sittings. If any person, whether a member or not, being within the place of Assembly of the House refused or neglected to obey the order of the Speaker, or otherwise disturbed the House, he might by Warrant of the Speaker, be committed to the Sergeant at Arms. Such a person might be punished by a fine not exceeding twenty pounds and in default of payment thereof to a term of imprisonment not exceeding one month. Certainly the section did not simply declare the existence of certain self-defensive powers. It went further and allowed offenders to be punished. However, it is perhaps significant that the Speaker's authority in this regard was limited to the confines of the House, and could be exercised only to maintain order. Thus it may be argued - without confidence - that although a penalty could be lawfully imposed for disobedience the power involved was essentially of a self-defensive nature.

The Parliamentary Privileges Act 1865 repealed both s. 52 of the New Zealand Constitution Act 1852 (Imp.) and s. 1 of the Privileges Act 1856. The repealed sections were replaced, in part, by s. 4 of the 1865 Act, which (with modifications) is now contained in s. 242 (1) of the Legislature Act 1908:

> The Legislative Council and House of Representatives respectively, and the Committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as on the first day of January, one thousand eight hundred and sixty-five, were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Act as on the twenty-sixth day of September, one thousand

eight hundred and sixty-five (being the date of the coming into operation of the Parliamentary Privileges Act, 1865), were unrepealed, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.(2)

It is upon this provision that the House must rely as authority for the exercise of the power of committal. Therefore the section deserves close analysis. It is to be noted that two limitations are placed on the privileges, immunities and powers possessed by the Commons House of Parliament which our House of Representatives is to enjoy. First, our House is to hold only such of them as the Commons House held on the first day of January 1865. Second, and of greater significance, our House is to hold such powers, privileges and immunities only insofar as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Act 1852, as were unrepealed on the 26th day of September 1865.

As has already been pointed out, the only provision of the Constitution Act 1852 which directly bore on the privileges of the House of Representatives was s. 52 which enabled the House of Representatives to prepare and adopt standing rules and orders for the orderly conduct of the House. This section might have provided a basis for argument that an attempt to extend the privileges of the House beyond those of a protective and self-defensive character to include the power to commit for contempt would have been repugnant to, even if it was not inconsistent with, the provisions of the Constitution Act,(3) but the section was repealed by s. 3 of the Parliamentary Privileges Act 1865 itself. Nevertheless, the reference to the New Zealand Constitution Act 1852 does prompt the question as to the authority of the New Zealand Parliament to pass s. 4 of the Parliamentary Privileges Act 1865, and, eventually, s. 242 (1) of the Legislature Act 1908. An answer to this question calls for a consideration of s. 53 of the Constitution Act, s. 5 of the Colonial Laws Validity Act 1865 (Imp) (28 & 29 Vict. c. 63), the Statute of Westminster Adoption Act 1947 and the New Zealand Constitution Amendment Act 1947 (U.K.) (11 Geo. VI c. 4).

There is little authority as to whether s. 53, under

which the General Assembly was said to be competent to make laws "for the peace, order, and good government of New Zealand", enabled the colonial legislature to adopt the full range of "privileges, immunities, and powers . . . enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland". Fielding v. Thomas, [1896] A.C. 600 concerned the authority of the Legislature of the Province of Novia Scotia to enact that its House of Assembly should have the privileges etc. enjoyed and exercised by the House of Commons of Canada (which had acquired by a Federal Act, authorized by imperial legislation, the privileges etc. of the House of Commons of the United Kingdom). The Judicial Committee held that the enactment in question, if not authorized by s. 5 of the Colonial Laws Validity Act, was authorized by s. 92 of the British North America Act 1867 under which a provincial legislature might exclusively make laws concerning, inter alia, the amendment of the "constitution" of the province. In delivering the judgment of the Privy Council, Lord Halsbury L.C. did, however, say (at p. 609):

> According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom, or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the Imperial Legislature.

It is reasonable to suppose that the Lord Chancellor would not have regarded imperial authority to legislate for "peace, order, and good government" as the "express authority" in question.

In Chenard v. Jaochim Arissol, [1949] A.C. 127 the Judicial Committee of the Privy Council had to consider Clause 8 of Letters Patent of 31 August 1903 which enabled the Governor acting with the unrepresentative Legislative Council of Seychelles to make ordinances for "the peace, order, and good government of the Colony". Their Lordships held that this Clause empowered legislation under which no prosecution or action for defamation was to be competent against "the President or a member of the Legislative Council for anything said or written by him in such capacity from his place in such

Council . . . ." In reaching this conclusion Lord Reid, delivering the judgment of the Judicial Committee, said (at p. 132):

> A power to make ordinances for the peace, order and good government of a colony does not authorize alteration of the constitution or powers of the colonial legislature, but it does authorize the enactment of rights, privileges and immunities whether these be general or in favour of particular persons or classes of persons.

Lord Reid does not appear to have envisaged anything more than those privileges which would fall within the protective and self-defensive categories; and later on in the judgment His Lordship held that the Seychelles legislation in question was not "a law respecting the constitution, powers or procedure of the legislature of Seychelles within the meaning of s. 5 of the Colonial Laws Validity Act" (ibid 133).

In Fielding v. Thomas (supra) s. 5 of the Colonial Laws Validity Act 1865 was suggested as a possible source of authority for a full grant of privileges to the Nova Scotia House of Assembly. The section says in part:

> . . . every representative legislature shall, in respect of the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature.

We do not know that Lord Reid and his learned colleagues in the Chenard case would have regarded the conferment of power to exercise privileges going beyond a protective character as involving an alteration of the "constitution or powers" of a legislature or a law respecting its "constitution, powers, and procedure", but we can say that the arguments used by their Lordships suggest a conclusion that either s. 53 of the Constitution Act 1852 or s. 5 of the Colonial Laws Validity Act provides authority for s. 242 (1) of the Legislature Act 1908.

A more definite conclusion is provided by Fielding v. Thomas (supra). After suggesting that s. 5 itself gave the

authority sought in that case the Judicial Committee went on to decide that the grant of privileges involved was a matter affecting the "constitution" of the province.(4) The submission is, therefore, that s. 242 (1) is a law "respecting the constitution, powers, and procedure" of the New Zealand legislature and is accordingly authorized by s. 5 of the Colonial Laws Validity Act. It is relevant to note that the Colonial Laws Validity Act 1865 entered into force on 29 June 1865, some three months before the coming into operation of the Parliamentary Privileges Act 1865, s. 4 of which was the predecessor of s. 242 (1).

This submission, if correct, does not dispose of the matter. By s. 2 of the Statute of Westminster Adoption Act 1947 s. 2 and certain other sections of the Statute of Westminster 1931 (U.K.)(22 Geo. V c. 4) were adopted in New Zealand and the adoption was to have effect from the commencement of the Adoption Act, i.e. 25 November 1947. Section 2 (1) of the Statute of Westminster provides:

> The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

There may be room for argument as to the effect of the adoption of this provision on laws made between the commencement of the Statute of Westminster (11 December 1931) and 25 November 1947; but if s. 2 (1) of the statute does remove the authority contained in s. 5 of the Colonial Laws Validity Act - this point is discussed below - it does not do so retrospectively to 11 December 1931. Hence s. 2 (1) does not deprive the New Zealand Parliament of its authority for s. 242 (1) of the Legislature Act 1908.

The position as to the future is more obscure. The wording of s. 2 (1) of the Statute of Westminster would seem to be concerned with the problem of repugnancy, with which s. 2 as a whole deals. In other words, s. 2 is aimed at the enlargement of legislative power by the removal of the limitations contained in s. 2 of the Colonial Laws Validity Act under which colonial legislation repugnant to United Kingdom legislation extending to a Colony was void and inoperative. The wording of s. 2 (1) was not so appropriate

if the intention was to delimit or remove an existing power, i.e. that conferred by s. 5 of the Colonial Laws Validity Act 1865.(5) It is therefore suggested, without enthusiasm, that it might be argued that the adoption of s. 2 (1) did not deprive the New Zealand Parliament of authority to re-enact in the future provisions corresponding to s. 242 (1) of the Legislature Act 1908. Moreover, would not an Act repealing s. 242 (1) be a law "respecting the constitution, powers, and procedure" of the Legislature?

The doubt which exists on this point prompts a further question. Can the New Zealand Parliament now find elsewhere than in s. 5 of the Colonial Laws Validity Act authority to pass legislation affecting the powers of the House of Representatives to exercise privileges of a punitive character? It is not possible within the scope of this Review article to attempt to provide a detailed answer to this question; but such an answer would have to consider the effect of the provisions of the New Zealand Constitution Amendment Act 1947 (U.K.) and the present status of s. 53 of the Constitution Act 1852.

Under the 1947 Amendment the New Zealand Parliament can alter, suspend, or repeal "at any time, all or any of the provisions of the New Zealand Constitution Act, 1852". There is little doubt that this authority would enable the General Assembly to amend the 1852 Act so as either to confer directly on the House of Representatives the full range of privileges or to provide the General Assembly with express authority to accord the privileges to the House of Representatives by another enactment. The more interesting question, having regard to the above discussion of the limited effectiveness of the peace, order, and good government provisions in s. 53 of the 1852 Act, is whether the New Zealand General Assembly has now the authority to enact provisions equivalent to s. 242 (1), without the intermediate step of amending the Constitution Act. It is thought that it could. The authorities discussed above concerned the powers of a colonial legislature which the New Zealand House of Assembly was, until at least 1907. It is confidently submitted that the Judicial Committee of the Privy Council would now regard a constitutional provision authorizing the Legislature of an independent member of the Commonwealth to pass laws for

"peace, order, and good government" as an unrestricted grant of the "widest amplitude of power"(6) and, therefore, as providing the authority in question.

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(1) Newfoundland was a settled colony and its first Legislative Assembly was created by a Commission under the Great Seal, a prerogative instrument. The Judicial Committee in Kielley's case (at p. 86) refused to give an opinion as to whether the Crown could by its prerogative have expressly bestowed on the Legislative Assembly the power to commit for contempt.

(2) The Legislative Council was abolished by the Legislative Council Abolition Act 1950; see s. 2 (4) of that Act.

(3) See review of Woolworths (New Zealand) Limited v. Wynne, [1952] N.Z.L.R. 496 in V.U.C. Law Review, Vol.1, No.1 (October 1953), 32.

(4) See also 5 Halsbury's Laws of England (3rd ed.), 588.

(5) For discussions of the applicability to New Zealand of s. 5 of the Colonial Laws Validity Act 1865 (Imp.) and of the effect, so far as New Zealand is concerned, of ss. 2 and 8 of the Statute of Westminster 1931 (U.K.), see McGechan in "The Statute of Westminster" (1944) 20 N.Z.L.J. 18 and in "Status and Legislative Inability", New Zealand and the Statute of Westminster (ed. Beaglehole, 1944), 65, 97 ff.

(6) Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127, 154, J.C.