

PARLIAMENTARY PRIVILEGE IN NEWFOUNDLAND: THE STRANGE CASE OF KIELLY VS CARSON

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Parliamentary privilege consists of the special rights attached to Parliament, its members and others necessary to discharge the functions of Parliament. It includes the right to punish those found in breach of parliamentary privilege. In the very early years of representative government in Newfoundland, the House of Assembly became somewhat over-zealous in protecting its privileges. This article describes a question of privilege which became an important constitutional precedent.

On August 6, 1838 John Kent, a member for St. John's, complained in the House that Dr. Kielly, a St. John's physician, had threatened and insulted him that morning because of statements he had made in the House about the St. John's General Hospital.¹ He claimed the protection of the House, which at once resolved itself into a Committee of Privilege. This Committee examined two witnesses to the quarrel, Patrick Byrne and Richard Butt. Both men testified that Dr. Kielly had called Kent a puppy, and had threatened to pull his nose. Butt testified too that Dr. Kielly had told Kent that his privileges would not protect him. This was enough. The Committee immediately rose, and reported to the House that the conduct of Dr. Kielly was "a gross breach of the privileges of this House", and that if allowed to pass unnoticed, it would be a sufficient cause of "detering members from acting in the independent manner, so necessary for a free assembly". The Speaker was authorized to issue his warrant to the Sergeant-at-Arms, to arrest Dr. Kielly, and bring him before the Bar of the House.

The following day the bold Dr. Kielly appeared at the Bar in the custody of the Sergeant-at-Arms. The Clerk read to him the evidence of the witnesses, and the report of the Committee on Privileges. The Speaker then gave him a chance to explain. But in the course of his explanation, the peppery Kielly lost his temper and called John Kent a liar, a coward and "many contumelious epithets".² The House ordered the angry doctor to withdraw, and then passed a resolution that he

should continue in the custody of the Sergeant-at-Arms "until futher orders from the House". An affronted member now moved that Doctor Kielly be sent to gaol until, "he do make such apology in manner and form as the House shall dictate". This motion did not pass.

On August 9th the House decided to discharge Doctor Kielly, if he would pay all expenses and apologize. But when he was again brought to the Bar of the House, the stubborn doctor again refused to apologize. The harassed House then sent him to gaol. Two days later the House requested Mr. Speaker to order the High Sheriff to bring "to the Bar of this House, the body of Edward Kielly". When the frightened Sheriff appeared, he told the House that he had, by order of a writ of "habeas corpus" brought Dr. Kielly before Judge Lilly who had then discharged him. He produced a copy of the Judge's order, which read: "The prisoner, having been brought before me on a writ, and after perusing the return of the sheriff hereto, I am of the opinion that the process by which the prisoner is held in custody is void, and I do now order him, therefore, to be discharged. The writ was signed, George Lilly, Assistant Judge."³

The House did not allow such a defiance of its authority to go unchallenged. It immediately resolved itself into a Committee of Privilege, and after considering the insult to its privileges, the Committee recommended that the Judge and the Sheriff both be imprisoned, "for acting in gross contempt of the Speaker's warrant, and a violation of the privileges of the

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Commons, the House of Assembly.” On the morning of August 13th, 1838, the citizens of St. John’s were treated to the spectacle of a venerable judge of the Supreme Court, being marched through the town to a common gaol by the Sergeant-at-Arms bearing the Mace.

When the House met in the afternoon, the Sergeant-at-Arms informed the members that Judge Lilly and the High Sheriff were both in gaol, but that he had been unable to find Dr. Kielly. While the members were trying to determine what action they ought to take

Canada, to lay the whole matter before the Earl of Durham, “Lord High Commander of Her Majesty’s North American colonies”, and to ask him to suspend Judge Lilly and High Sheriff Garrett, and to enquire into the action of the Governor in proroguing the House of Assembly “in the midst of the business of the colony”. They elected the Speaker, the doughty Dr. William Carson, and Peter Browne, one of the members for St. John’s as the delegates. The House then adopted a long address to the Earl of Durham, in which they set forth their grievances, and described Judge Lilly as “a man whose habits and education unfit him for the high situation of a judge”.

Another messenger now arrived from the Governor to say that he was prepared to pass the Revenue Bill, and he requested it be sent to him immediately for his signature. But the House was not going to be brow-beaten in this way. They sent back a reply that they could not comply with the Governor’s message. The exasperated Governor immediately summoned the members to the Council chamber, and prorogued the House. In his speech from the Throne, he stated frankly that he had prorogued the House in order to put a stop to these proceedings which he described as unsuited to the character and condition of the colony. He said that the actions of the House of Assembly were calculated to subvert the respect which was due to the administrators of the laws in the exercise of their functions. With the House prorogued, the Judge and Sheriff were released from gaol.

The Supreme Court of Newfoundland later upheld the actions of the House of Assembly, but this decision was overruled by the Judicial Committee of the Privy Council in 1842. Its judgement declared that the privileges of the British House of Commons, of which the right to punish for contempt is one, belong to it, “by virtue of the *lex et consuetudo parliamenti*”, which is a law peculiar to, and inherent in, the two Houses of Parliament of the United Kingdom, and is not transferred to Colonial Legislatures.⁴

The bold Dr. Kielly now became the hero of the Tories, and songs were sung in his honour.⁵ The author remembers singing as a boy in Fortune Bay, once a Tory stronghold:

“Did you ever see Dr. Kielly Oh?
With his boots all polished and styly Oh?
With his high cocked hat, and fiddle and bow,
Did you ever see Dr. Kielly Oh?”

The debonaire doctor was not lacking in courage or optimism, for in 1843 he petitioned the Governor asking that all the costs incurred in the suit of *Kielly vs. Carson*



next, a letter from the Governor was delivered informing the Speaker that he was coming down immediately to the Council Chamber to prorogue the General Assembly. The House then went into Committee of Privilege to decide what it should do. This Committee presented a resolution to the House setting forth what had happened and stating that prorogation at this time would “leave the public to conclude that the House of Assembly had acted unconstitutionally”. The Committee also recommended that a deputation be sent to

be paid by the House of Assembly.⁶ The House refused to pay these costs which amounted to £960.

It is only fair to say, in defence of the actions of the House of Assembly, that the Privy Council's ruling in 1842 was a reversal of its own judgement in the case of *Beaumont vs. Barrett* in 1836, which had upheld the right of colonial assemblies to punish for contempt. Also, in the neighbouring Province of Nova Scotia, the Assembly had long held fast to its right to punish and imprison people guilty of breaches of privilege. In 1759, the House of Assembly of Nova Scotia had arrested the Deputy Secretary of the Province for using, "very threatening and scandalous words against a member". In 1829 they had expelled a member, John A. Barry, and later when Barry published a letter in which he referred to the Committee of Privilege as a "privileged committee", the House had ordered him to be imprisoned for the remainder of the session. It is not strange that with these precedents of Nova Scotia, and the decision of the Privy Council in *Beaumont vs. Barrett* in front of them, that the members of the House of Assembly of Newfoundland had come to the conclusion that they had a right to imprison those who insulted and threatened members, and defied the authority of the House.

Kielly vs. Carson is an important case because it declares that colonial parliaments do not have the inherent right to adjudicate upon and inflict punishment for

contempt, that being a judicial, and not a legislative power, but only the self-preservative power of removing any immediate obstruction to its own proceedings. This principle was again declared by the Supreme Court of Canada in *Landers vs. Woodworth*. In 1876 the Nova Scotia House determined to preserve its privileges passed an Act which not only provided privileges similar to those of the Canadian House of Commons, but created itself a Court of Record, competent to try and punish a comprehensive list of offences described in the Act as breaches of privilege. This Act was not disallowed by the Canadian House of Commons.

Section 11 of Newfoundland's *House of Assembly Act*, declares the following actions illegal: assaulting members during session; obstructing and threatening members; refusing to obey a rule or order of the House; or tampering with witnesses of the House or its Committees. Section 12 protects from damages persons who act on the authority of the House. Section 16 provides that persons found guilty of violating an Act are subject to a penalty of not more than \$100.00 or to imprisonment not to exceed three months during the session of the legislature as the House may determine. By this Act, the House constitutes itself a court competent to try and sentence persons whom it thinks guilty of infringing its privileges. But its authority lasts only during the session, for prorogation or dissolution of Parliament puts an end to the imprisonment of anyone it has sentenced.

NOTES

1. *Journals of the House of Assembly*, 1838, p. 60
2. *Ibid.* p. 67
3. *Ibid.* p. 73
4. *Kielly vs Carson* 4 Moo. PCC 63
5. Prowse, *History of Newfoundland*, p. 446
6. *Journals of the House of Assembly*, 1843, p. 111