# A PRIVILEGE OF PARLIAMENT*

On 8th March 1951, Mr. Speaker Cameron was asked in the House of Representatives to give "a proper interpretation" of a paragraph on page 115 of May's *Parliamentary Practice*.[1] That paragraph is in the following terms:—

> On 22 June 1858 the House of Commons resolved, "That it is contrary to the usage and derogatory to the dignity of this House that any of its members should bring forward, promote or advocate in this House any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward."
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> This resolution has been held not to preclude a Member who has been concerned in a criminal case which has been decided from taking part in a debate relating to the case.

On 13th March Mr. Speaker referred briefly to the House of Commons debate upon which the Resolution was founded; he stated that the Resolution was part of the practice and usage of the United Kingdom on 1st January 1901 (the date of the establishment of the Commonwealth), and that "under section 49 of the Constitution and Standing Order 1[2] of this House, it is binding upon all members excepting the Attorney-General when appearing in court on behalf of the Commonwealth." But he did not make any statement in explanation of the precise ambit of the 1858 Resolution. No doubt this omission prompted the late Mr. J. B. Chifley, then Leader of the

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1 The references in the Commonwealth Parliamentary Debates and in this article (unless otherwise stated) are to the 14th edition of May. In the 15th edition the relevant paragraph appears on page 116.

2 Sec. 49. "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."
Standing Order 1. "In all cases not provided for hereinafter, or by sessional or other orders or practice of the House, resort shall be had to the practice of the Commons House of the Parliament of the United Kingdom of Great Britain and Northern Ireland in force for the time being, which shall be followed as far as it can be applied."
The Standing Orders of the House of Representatives derive their force and authority from section 50 of the Constitution—"Each House of the Parliament may make rules and orders with respect to (i.) The mode in which its powers, privileges, and immunities may be exercised and upheld; (ii) The order and conduct of its business and proceedings either separately or jointly with the other House."

Opposition, to give his own interpretation of the operation of the Resolution, and to admit frankly that he did so because he considered that the question (put by a government supporter) was aimed at the Rt. Hon. Dr. H. V. Evatt, P.C., K.C., Deputy Leader of the Opposition, who had appeared for the Waterside Workers' Federation of Australia in the case of *Communist Party of Australia and others v. Commonwealth*[3] in which the constitutional validity of the Communist Party Dissolution Act 1950[4] had been successfully challenged. Mr. Chifley contended that the 1858 Resolution applied only to "proceedings in the House that are directly associated with a matter in which a member of the House had acted privately, in the way stated in the Resolution, and does not relate to purely *(sic)* similar matters in which a member might have engaged some years before the proceedings in the House occurred . . . ."; but although he introduced his statement with a "desire for some clarification of the matter that (the Speaker had) just dealt with," the Speaker made no further comment.[5] The House then proceeded with the business on the notice paper. Later in the same day the Prime Minister, the Rt. Hon. R. G. Menzies, P.C., K.C., reviewed the consequences of the High Court's decision and foreshadowed an early election involving both Houses if the Labour Party, in a majority in the Senate, persisted in obstructing the passage of Bills which the government regarded as essential to its policy. "Let the opposition reject that measure" (a Bill to substitute a Board of Directors for the single Governor of the Commonwealth Bank), he said. "Let the machinery of the Constitution work. Let us go to our masters, the Australian people, and ask them to say where they stand on these crucial issues of the Communist conspiracy, of law and order in industry, of the public safety, of the preparation of this country to meet as heavy a cloud of danger as free men have looked at for many long months."[6] The Senate having "failed to pass" the Commonwealth Bank Bill the Prime Minister was of opinion that one of the situations contemplated by section 57 (the "deadlock" clause) of the Constitution had arisen, and sought and obtained on 18th March 1951 the dissolution of both Houses. At the April election the government obtained comfortable working majorities in both the House of Representatives and the Senate; the new Parliament met

[3] [1951] Argus L.R. 129.

[4] For the history of this Act in Parliament and before the High Court of Australia see the author's article, *Australia's Communist Party Dissolution Act*, in (1951) 29 Can. Bar Rev. 490.

[5] *1951 Commonwealth Parliamentary Debates (Nineteenth Parliament)*, 329-330.

[6] *1951 Commonwealth Parliamentary Debates (Nineteenth Parliament)*, 368.

on 12th June 1951, and on 5th July the Constitution Alteration (Powers to deal with Communists and Communism) Bill was read for the first time. The Bill proposed to amend the Constitution by giving to the Commonwealth Parliament (a) a general power to make laws as to communism and communists, and (b) a specific power to re-enact the *Communist Party Dissolution Act 1950* with or without relevant amendments. Later in the same day the second reading began; at the conclusion of the Prime Minister's speech the debate was adjourned on the motion of Dr. Evatt, who had succeeded to the leadership of the Labour Party after the death of Mr. Chifley. At the resumption of the debate on 10th July a government supporter rose to order, drawing the Speaker's attention to his ruling of 13th March and submitting that the ruling debarred the Leader of the Opposition from speaking to the matter before the House. Dr. Evatt asked, "What is your ruling, Mr. Speaker?" The latter replied, "My ruling is and was that if an honorable member has appeared in the courts in a case and then attempts to speak or vote in this House on that matter he cannot be allowed to do so under a decision of the House of Commons of 1858. The decision of the House of Commons to which I have referred was in force when federation was effected, and, according to section 49 of the Constitution, this House took over the rules, standing orders, usages and procedure of the Commons as at that time. That is still one of the rules of the Commons and, so far as I know, it has never been superseded by this House."[7] In answer to a question from the Deputy Leader of the Opposition Mr. Speaker then specifically ruled that "unless some special provision is made, (Dr. Evatt) will not be in order in so speaking."

The ruling, if correct, appears likely to prevent a considerable number of members from addressing the House upon any matters in regard to which, at any time during their parliamentary careers, they have accepted some fee or payment for services rendered outside Parliament; it also appears to operate as a permanent disqualification, applicable for the remainder of the parliamentary life of the affected member. But it is submitted that Mr. Speaker misunderstood the nature and effect of the 1858 Resolution and that in any event it was inapplicable to the debate in the House of Representatives on 10th July 1951. That Resolution, the terms of which have already been given in the first paragraph of the quotation from May, was moved in the House of Commons by Lord Hotham, and is expressed

[7] *1951 Commonwealth Parliamentary Debates (Twentieth Parliament)*, 1032, 1076-1081, 1211-1212.

so widely as to include all members of the House, not merely those who are lawyers. It is clear from the speech of the mover that what he had in mind was to disqualify members who were being paid by some person or body outside Parliament to press for a particular measure in Parliament which would give relief or advantages to that person or body. It is equally apparent from his words that he meant the phrase "for or in consideration of any pecuniary fee or reward" to apply not so much to the proceeding or measure in which the member might have acted or been concerned *outside the House,* as to the act of bringing forward, promoting, or advocating *in the House* the proceeding or measure which would benefit his undisclosed client. He was obviously reluctant to frame his motion in such a way as to assert bluntly that some members were being paid (or bribed) from outside sources to advocate particular measures in the House; but from the way in which he spoke to his motion it is evident that this is what he had in mind. During the debate several members pointed out that the motion was expressed in dangerously wide terms, but were assured that the resolution, if adopted, would be applied with common sense and equity so as not to apply to any member who had no (paid) axe to grind in regard to matters coming before the House. The resolution was accordingly adopted.

May's *Parliamentary Practice* gives no reference to any subsequent debate on the applicability of the resolution to a particular member until 1893, when Mr. Speaker Arthur Wellesley Peel (who had then held office for nine years) gave an important interpretative ruling. The matter arose in the following way. During the Conservative administration of Lord Salisbury, a number of persons in Ireland (referred to in the debates as "the Gweedore prisoners") had been sentenced to terms of imprisonment for manslaughter in respect of the killing of a police officer which took place during a riot in which they participated. Lord Salisbury's government was replaced in 1892 by a Liberal administration led by Mr. Gladstone, which immediately recommended to Her Majesty that the Gweedore prisoners be released; no doubt this was due partly to the Liberal policy of conciliation towards Ireland, partly to the fact that the government depended for its majority on the support of the Irish Nationalist members. The action of the government was severely criticised by many members of the Opposition in both Houses; in the House of Commons Mr. John Ross, member for Londonderry City, submitted a written notice of an amendment which he proposed to move to the address-in-reply regretting that the clemency of the Crown had been extended to the Gweedore prisoners. But Mr. Ross had been one of

the counsel briefed to prosecute them; whereupon Mr. C. A. V. Conybeare, member for the Camborne division of Cornwall, after private notice to the Attorney-General addressed a question to him, "whether it is consonant with the practice of the Bar that a counsel, who had been engaged in a criminal prosecution, should in his capacity of Member of this House make use of and divulge information which he has become possessed of in his capacity as prosecuting counsel, in bringing before the House a Motion relative to the case in which he has been engaged?" It will be noted that Mr. Conybeare's question related solely to professional etiquette; it was left to an Irish Nationalist member, Mr. J. G. S. MacNeill, representing Donegal South, to raise in the course of the discussion of professional propriety the larger issue whether Mr. Ross's amendment was out of order because of the Resolution of 1858. Mr. MacNeill asked the Speaker to rule whether "the conduct of the hon. and learned Gentleman the Member for Londonderry does not completely come under the rule thus laid down; and whether it is . . . inconsistent with good order . . . that a gentleman should be a paid advocate one day, and the next day should, as an independent Member of Parliament, take part in a discussion on the case in which he had previously been professionally engaged, and deal with the case as a matter of public policy?"

Mr. Speaker's reply must be given in extenso.[8] "There are two Resolutions of this House", he said, "dealing with the question. One was passed in the year 1830, and the other in 1858. In the year 1830 it was alleged that Members of this House promoted, for pecuniary reward, Private Bills, in which they were professionally interested, and a Resolution was passed forbidding any Member, by himself or by his partner, to promote in this House Private Bills in which he was engaged. Some years passed, and in the year 1858 another allegation was made—namely, that the Rule had been evaded, and that Members of this House in taking up cases were really paid for advocating those cases in the House, and a very stringent Resolution was passed, which, by leave of the House, I will read." (Mr. Speaker then read the Resolution of 1858). "The House will see," he continued, "that that was strictly confined to the cases in which a Member, in his public capacity as a Member of Parliament, advocated a particular person's cause or promoted any case, and received a pecuniary reward for so doing. That, I think, is the distinction. To say that any Member who has been engaged in a criminal case is not to engage in this House on

[8] See *Parliamentary Debates*, 1893; Fourth Series, Vol. viii, 1055-1056.

a subsequent occasion in a Debate relating to the same case I cannot, because as far as the rules of the House are concerned I do not think it is contrary to them. I can quite understand that it would be highly improper for any member to take part in a discussion here on a case in which he was concerned and which was still undecided; but after the case had been decided, then there might be information at his disposal which could be usefully supplied for the conduct of the Debate. . . . The House will therefore see, on the point of Order, that I cannot stand in the way of the hon. Gentleman to whom reference has been made bringing on this matter; but, at the same time I shall leave it to the Legal Profession to decide whether it is contrary to legal etiquette for hon. and learned members to take part in a Debate under the circumstances." There was no notice of motion to disagree with the Speaker's ruling; the member for Londonderry City then formally moved his amendment deploring the grant of the royal clemency but was later allowed to withdraw it on the suggestion of Mr. A. J. Balfour (the reasons for withdrawing the motion were political, in no way connected with the 1858 Resolution or professional etiquette).

In the House of Representatives Mr. Speaker Cameron's rulings on the applicability of the 1858 Resolution were not entirely consistent. On the first occasion (13th March 1951) he said that "the Resolution . . . was, on the 1st January, 1901 . . . part of the practice and usage of the United Kingdom House of Commons. I therefore rule that under section 49 of the Constitution and Standing Order 1 of this House, it is binding upon all members except the Attorney-General when appearing in court on behalf of the Commonwealth." But on the second occasion (10th July 1951) he did not base his ruling on the dual foundation of section 49 and Standing Order 1, but exclusively on the former, according to which, he said, "this House took over the rules, standing orders, usages and procedure of the Commons as at that time", i.e., 1st January 1901. (In point of fact section 49 does not refer to "rules, standing orders, usages and procedure" but to "the powers, privileges and immunities" of the two Houses. Under section 50 each House independently may make "rules and orders" as to the *manner of upholding* its powers, privileges, and immunities and as to the conduct of its business; but the powers, privileges, and immunities themselves can only be declared *by the Parliament,* and until so declared are to be those of the United Kingdom House of Commons as at 1st January, 1901. It is a moot point whether either House can waive a privilege conferred upon it automatically by section 49 of the Constitution or subsequently by Act

(or "declaration") of the Commonwealth Parliament—a point to be discussed later).

If May is correct in including the 1858 Resolution in Chapter VIII (Breaches of Privilege and Contempts:— Misconduct of members or officers of either House as such), the Resolution is a "privilege" within the meaning of section 49 and vests in the House of Representatives by virtue of that section. But it is submitted that what is made applicable by section 49 is not the 1858 Resolution *simpliciter* but that Resolution as interpreted and applied by the Speaker of the House of Commons in 1893; for it was the Resolution as so interpreted which was a privilege of the Commons House of Parliament of the United Kingdom at the establishment of the Commonwealth. May, after giving the text of the Resolution, immediately adds a note that "This Resolution has been held not to preclude a Member who has been concerned in a criminal case which has been decided from taking part in a debate relating to the case", and then gives a reference to the 1893 debates.[9] May's note is misleading insofar as it may imply that the Speaker's interpretation referred *only* to members who had participated in a concluded criminal prosecution; while it was a member's participation as prosecuting counsel which caused the question to be raised, the Speaker's ruling, as can be seen from the quotation already given, was much wider in its terms and effect. In point of fact the Speaker regarded such a member as possibly having "information at his disposal which could be usefully supplied for the conduct of the debate." Such a member's participation in the debate, it seems, was to be encouraged, not prohibited. Participation is prohibited only if the member is to receive a fee for his participation.

Assuming however, for purposes of argument, that the 1858 Resolution is to be applied regardless of the interpretative ruling of 1893, does it even in its widest terms apply to the case under examination? In his capacity as counsel Dr. Evatt appeared before the High Court on behalf of the Waterside Workers' Federation to argue that as the Constitution then stood, the *Communist Party Dissolution Act 1950* was unconstitutional. Had the measure subsequently before the House been a Bill to amend that Act so as to eliminate the provisions which the High Court declared unconstitutional, it might be argued—though, it is submitted, on very tenuous grounds—that the Bill was "a proceeding or measure in which" Dr. Evatt had "acted or been concerned for or in consideration of any pecuniary fee or reward."

[9] See note 8 *(supra)*.

(Incidentally, as already briefly indicated, the course of the debate on the 1858 Resolution makes it clear that the words "for or in consideration of any pecuniary fee or reward" did not refer to what the member had done *outside* the House but to what he might seek to do *in* the House. What he did outside in the course of his profession or business, and whether he did it for reward or gratuitously, was normally no concern of the House, particularly at a time when members were not paid for their parliamentary services; what the House did object to very strongly was members' accepting from interested parties outside the House a fee or reward for promoting their interests in the House. Admittedly the Resolution, as it stands, is capable of two interpretations; but examination of the 1858 and 1893 debates will quickly show which is correct).

But can a Bill to provide for the holding of a referendum on the question of altering the Constitution be deemed to be in essence the same "proceeding or measure" as an Act, relating to the same subject-matter, which had been declared unconstitutional by the High Court? If it is, no member who at any time in the past (when a member) has accepted a fee for professional (not necessarily legal) advice can safely speak on any measure remotely related to the subject-matter of the advice; for example, a member who, being a professional accountant, has advised a client on matters relating to the latter's liability to income tax and has received a fee for his advice would appear to be precluded from speaking to any Bill to amend the Income Tax Act. The Prime Minister himself, in the light of his very extensive practice in the past in relation not merely to constitutional matters but to other fields of litigation, may well come under the ban—unless in some way a time limit is to be imposed on the operation of the disqualifying Resolution. In view of the far-reaching implications of the Speaker's ruling, it seems unfortunate that the Vice-President of the Executive Council (the Hon. E. J. Harrison), instead of moving the suspension of the Standing Orders[10] to enable Dr. Evatt to speak, did not move that the matter be referred to the Committee of Privileges under section 24 or to the Standing Orders Committee under section 23 of those Orders.

10 The minister's actual motion was "That so much of the Standing Orders be suspended as would prevent the Leader of the Opposition from making his speech." The form of the motion suggests that the Minister himself was uncertain which Standing Order, if any, prevented the Leader of the Opposition from speaking; an uncertainty which is intelligible in view of Mr. Speaker's new ruling which was based on section 49 of the Constitution alone and therefore by implication excluded the Standing Orders.

Comment on two other matters must now be made. After the Speaker's ruling that the Leader of the Opposition was disqualified from speaking because of the 1858 Resolution (applicable, according to the Speaker himself, by virtue of section 49 of the Constitution), a motion was put and carried on the voices to suspend Standing Orders so as to allow Dr. Evatt to speak. Was this motion in order? It is submitted that it was not. It is provided in Chapter 1 of the Standing Orders that "In all cases not provided for hereinafter, or by Sessional or other Orders or practice of the House, resort shall be had to the practice of the Commons House of the Parliament of the United Kingdom of Great Britain and Northern Ireland in force for the time being, which shall be followed as far as it can be applied." Section 50 of the Constitution, under which each House can make orders governing its own procedure, differs from section 49 in that there is no automatic adoption of House of Commons' Rules until the House of Representatives otherwise provides; hence the necessity of Chapter 1 of the Standing Orders, to fill in the gaps. If Mr. Speaker Cameron had ruled in July, as he did in March, that the 1858 Resolution was incorporated in the Standing Orders by virtue of Chapter 1, the suspension of those Standing Orders would have included the suspension of the incorporated Resolution; but he ruled that the Resolution was part of the "rules, standing orders, usages and procedure" *(sic)* of the House by virtue of section 49 of the Constitution. Hence it appears that the suspension of Standing Orders could not have the effect of suspending the operation of a Resolution which formed no part of them, and that when the Leader of the Opposition spoke he was still under the disqualification declared by Mr. Speaker.

There is another point of Parliamentary procedure which appears to need clarification, in regard to the right of a member to move to dissent from the Speaker's ruling. After the Speaker had ruled that the Leader of the Opposition was not in order in speaking to the Bill, the Minister moved the suspension of the Standing Orders. Dr. Evatt spoke to that motion, protesting that he had the right to speak to the measure before the House and disclaiming any desire to benefit from the suspension of Standing Orders; the Hon. A. A. Calwell (Deputy Leader of the Opposition) then moved to dissent from the Speaker's ruling, but was told that there was already a motion before the Chair (the Minister's motion to suspend Standing Orders) which must first be dealt with. As soon as the Minister's motion was agreed

to on the voices,[11] the Speaker gave the call to Dr. Evatt; Mr. Calwell then attempted to move his motion of disagreement with the Speaker's ruling, only to be told that he could put that question on the notice paper; "he cannot submit it to the House at the moment because it has no effect." But Standing Order 101 provides that "If any objection is taken to the ruling of the Speaker, such objection must be taken at once and in writing, and a Motion of Dissent moved, which, if seconded, shall be proposed to the House, and debate thereon shall proceed forthwith." If "at once" means that no other business can intervene between the Speaker's ruling and the motion to disagree, it is largely a matter of chance whether any such motion can be properly moved. The Speaker does not assume, and rightly does not assume, that members will disagree with his rulings; when he has given a ruling, the business of the House continues, and the call goes to the member who rises first. Under Order 60, "When two or more Members rise together to speak the Speaker shall call upon the Member who, in his opinion, first rose in his place; but it shall be in order to move, that any member who has risen 'be now heard', or 'do now speak'." If a member who wishes to move to disagree with a ruling by the Speaker is slow in rising in his place, or if he rises quickly but is deemed to have risen after another member to whom the Speaker thereupon gives the call, it appears that the opportunity to raise an objection is irretrievably gone since, even if the objecting member is the next to get the call, his objection is not made "at once". But Mr. Speaker Cameron does not seem to have ruled Mr. Calwell's first attempt as being out of order on the ground that it was not made "at once", but that there was another motion al-

11 According to Hansard, "Question resolved in the affirmative." Standing Order 400 provides that "In cases of urgent necessity, any Standing or Sessional Order or Orders of the House may be suspended for the day's sitting, on Motion, duly moved and seconded, without notice: Provided that such Motion is carried by an absolute majority of members having full voting rights." Hansard gives no clue as to how Mr. Speaker assured himself that an absolute majority of members was in favour of the Motion to suspend Standing Orders; this appears to be unusual in the light of the forms observed on earlier occasions. For example, when Standing Orders were suspended without notice on 10th July 1946 to enable the Minister for Air to make a statement on certain press articles referring to the Royal Australian Air Force, the *Votes and Proceedings of the House of Representatives* (No. 120 of 1946) state—"Question put and passed, with the concurrence of an absolute majority of the Members of the House"; while the matter is thus reported in *Commonwealth Paliamentary Debates* (vol. 187, p. 2333): "Mr. SPEAKER—There being an absolute majority of the whole number of Members of the House present and no dissentient voice, I declare the question resolved in the affirmative."

ready before the House; yet Mr. Calwell was again ruled out of order when he sought to propose his motion of objection immediately after that prior motion had been carried. It is submitted that the opportunity to move an objection ought not to depend upon the member's success or failure to get the first call after the ruling.

The practice of the House of Commons is not helpful on this point because the Standing Orders of that House (unless altered since 4th November 1947) contain no provision corresponding with Standing Order 101 of the House of Representatives. I have been able to find in May's *Parliamentary Practice* only one reference to dissent from the Speaker's ruling; it is stated (at p. 355) that "Disagreement with a ruling by the Speaker cannot be raised as a matter of privilege". Hence it seems that a motion under Standing Order 101 cannot get the benefit of Standing Order 97—"All questions of Order and matters of Privilege at any time arising shall, until disposed of, suspend the consideration and decision of every other question". In the House of Commons, motions to dissent from a ruling by the Speaker appear to very rare; the actual practice seems to be based on a direction in 1881 by Mr. Speaker Brand (who had held the office since 1872) that "the rules of debate forbid" (any member) "to call in question any ruling of the Chair without specific Notice of Motion". Standing Order 101 of the House of Representatives requires a dissenting member to take immediate objection to a ruling, and as debate on the objection must proceed "forthwith" the practice of the House of Representatives is very different from that of the House of Commons. If, moreover, that Standing Order provides the only means of raising objections to a ruling (i.e., if it excludes the House of Commons practice of requiring Notice of Motion), a strict interpretation of the words "at once" may at times make rulings unchallengeable. Mr. Speaker Cameron, however, said that the question could be put on the notice paper; had that been done (in fact it was not), a point of order might well have been taken that the procedure was inconsistent with Standing Order 101.

It is not the purpose of this article to express any comment on the Communist Party Dissolution Act 1950, the unsuccessful referendum to alter the Constitution, or the professional propriety of Dr. Evatt's appearance for the Waterside Workers' Federation when Deputy Leader of the Opposition or of his subsequent speech on the Referendum Bill. Its sole concern is to point out the effect of Mr.

Speaker's ruling on the 1858 Resolution, and to draw attention to what appear to be anomalies in the parliamentary procedure adopted in consequence of that ruling.

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