SOME ASPECTS OF PARLIAMENTARY PRIVILEGE IN THE LEGISLATIVE ASSEMBLY OF WESTERN AUSTRALIA

When I conceived the thought of writing this Article I had intended to cover a much wider canvass than the present finished product. A number of factors have persuaded me to confine the article to a more restricted field.

The first of those factors was the time available. The second was the physical limitation on research by reason of my residence being over 150 miles from the nearest law library of any size. These two factors determined that I should confine my comments and submissions to the Legislative Assembly of Western Australia and resist the temptation to propound propositions which would have application to other legislative chambers. Nevertheless the points I do make in this paper might apply equally to other chambers but I am afraid I must leave it to any interested reader to undertake his own research on that subject.

A third and more compelling reason for the reduction in ambit of this article is the tabling recently in the Legislative Assembly of a report by the Standing Orders Committee. That report according to the press recommends the establishment by the Assembly of a Privileges Committee. The newspapers also tell me that the report will not be debated by the House until the next Parliamentary session in 1973. At the time I made the choice of subject I had no idea that the Standing Orders Committee was then discussing it. In consequence I decided that I should not make any submissions or offer any comments on the best methods of trying and dealing with offenders against Parliamentary Privilege. In writing in a professional journal at the present time as a former Speaker and Chairman of the Standing Orders Committee of the House, I think I should remain quite neutral on that subject. Initially I had intended to risk criticism by offering some suggestions on that very vexed question.

To understand any subject one must go back to the beginning. In its earliest days the English Parliament had a judicial streak.[1] In fact, it has been emphasised by Maitland in his introduction to the Par-

[1] See Erskine May, PARLIAMENTARY PRACTICE (17th edition 1964) pp. 3-4.

liamentary Roll of 1305 that Parliament was, *inter alia,* the Monarch's highest Court of Justice. Erskine May says:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.[2]

The Privy Council in 1842 in *Kielley v. Carson,*[3] ruled that the power to punish for contempt is inherent in each House of Parliament in the United Kingdom, not as a body with legislative functions, but as a descendant of the High Court of Parliament and by virtue of the *lex et consuetudo parliamenti.*[4] This inherent right of the Parliament at Westminster has been specifically conferred on or assumed by the Parliament of the Commonwealth of Australia and of its constituent States. This inheritance of power from the Mother of Parliaments to her daughters in Australia has not been achieved in each instance in identical form. In some cases the bequest is contained in the Constitution Act which was initially passed in the United Kingdom to establish either the Commonwealth or the relevant State as an autonomous governing body. In others it has been assumed. In 1908 Sir Robert Garran expressed the view that in any event "the right would be inherent in the nature of Parliament".[5] Nevertheless, the Privy Council decision in *Kielley v. Carson,* supra, rather suggests that the contrary is the case.

In some cases the Parliament at Westminster conferred on the newly created legislatures the powers, privileges and immunities of the House of Commons at the time of the creation of the particular Parliament. In other cases it contented itself with conferring on the newly created legislature the power to determine its own powers, privileges and immunities. Victoria and Western Australia were both cases where this latter procedure was adopted, but in the case of the Commonwealth the Parliament was empowered to declare its privileges but until it did so it inherited the powers, privileges and immunities of the House of Commons as at the date of the establishment of the Commonwealth.

---

2 Idem p. 42.
3 13 E.R. 225.
4 Idem 235.
5 See Progress Report of the Joint Select Committee of the Parliament of the Commonwealth on Privilege and Minutes of Evidence, 1908, p. 14.

The power was exercised by Victoria in 1857 and the Parliament of the Colony (as it then was) enacted that the Legislative Council and the Legislative Assembly each possessed all the privileges, immunities and powers of the House of Commons at the time of the passing of the Constitution Act for the Colony of Victoria. This particular enactment was challenged in the Supreme Court of Victoria but on appeal to the Privy Council was upheld.[6]

On the 1st April, 1908 in the House of Representatives, and on the 2nd April, 1908 in the Senate, the Commonwealth Parliament appointed a Joint Select Committee

> to enquire and report as to the best procedure for the trial and punishment of persons charged with the interference with or breach of the powers, privileges, or immunities of either House of the Parliament or the Members or Committees of each House.

Later the terms of reference of the Committee were widened but the additional subjects are not particularly germane to the subject matter of this article. The Chairman of the Select Committee was Sir John Quick and it took evidence from a number of distinguished Parliamentary officers and constitutional lawyers. On the 28th May, 1908 it submitted a Progress Report which contains, in effect, the findings and recommendations of the Committee on the subject with which I am concerned. Its later report is irrelevant to the subject. In the text of the report the Committee stated:

> One of the unquestionable powers and privileges of the House of Commons is to punish persons proved to be guilty of printing and publishing or uttering any false, malicious, and scandalous libels or statements reflecting on the honour, integrity, and probity of the House or any of its Members. Similarly the House can punish persons found guilty of obstructing, interfering with, or assaulting or insulting Members in the discharge of their Parliamentary duties, or bribing, or attempting to bribe Members.

The Report then went on to state that the procedure adopted by the House of Commons had been to summon the offender to the Bar of the House, interrogate him, and call upon him to show cause why he should not be committed for breach of Privilege. If the House resolved on committal then the Presiding Officer would be authorised to issue a warrant for the imprisonment of the offender.

The Report further observes—

---

6 See Speaker of the Legislative Assembly of Victoria v. Glass (1871) L.R. 3 P.C. 560.

> The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice. It is hardly consistent with the dignity and functions of a legislative body which has been assailed by newspapers or individuals to engage within the Chamber in conflict with the alleged offenders, and to perform the duties of prosecutor, judge, and gaoler.

Apart from that aspect, the opinions of the very learned lawyers who gave evidence before the Committee were to the effect that any warrant for imprisonment automatically expired with the expiration of the Session then current and that the House of Commons had not asserted a power to fine offenders since the latter part of the 17th century. In any event, it was doubted by the learned lawyers as to whether the House of Commons had ever possessed the power to fine. The earlier assumption by the House of this power appears to have been based on the assumption that it was a Court of Record by analogy to the House of Lords. There could be no doubt that the House of Lords is a Court of Record because of the appellate jurisdiction vested in it and not by reason of it being one of the Chambers of the legislature. It was stated by some of the learned witnesses that the better opinion was that the House of Commons was never a Court and therefore never possessed the power to fine offenders.

The views expressed by the eminent witnesses are supported by Lord Mansfield in *R. v. Pitt*.[7] Although the House of Commons has never specifically abandoned its claim to be able to fine for offences, it has not in fact attempted to fine any offender since 1666.

In Western Australia, being one of the Parliaments empowered to declare its own Privileges, the Parliamentary Privileges Act 1891 was enacted and there are also some provisions on this subject in the Criminal Code. Needless to say, the Criminal Code provides for any offences against its provisions to be dealt with by the Courts in the ordinary way. On the other hand, the Parliamentary Privileges Act, firstly, empowers Parliament to deal with offences and, secondly, authorises prosecution by the Attorney General in the Courts on the direction of the relevant House.

I do not intend to refer to the provisions in the Criminal Code beyond stating that the relevant provisions may be found in ss. 54 to 61 inclusive and 361 of the Code. Those provisions are part of the Criminal law of the State and would be implemented in the same

[7] (1762) 97 E.R. 861.

manner as any other provision of the Code. They do not in any way confer any powers on Parliament as such and consequently are foreign to this article.

Before giving any detailed consideration to the Parliamentary Privileges Act it is important to first examine the relevant section in the Constitution Act, 1889. Section 36 of that Act reads:—

> It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively. Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.

It is significant to note that in Victoria the relevant section differed in one major aspect. In the Victorian Constitution Act, which of course was enacted long before its West Australian counterpart, the phrase used in the proviso was "shall exceed those now held" instead of "shall exceed those for the time being held". In the case of the Commonwealth of Australia the Parliament was empowered to declare its privileges but s. 49 of the Commonwealth Constitution Act provided that until so declared they should be "those of the Commons House . . . at the establishment of the Commonwealth".

It is of some importance to determine firstly whether the restrictions imposed on the Parliament of Western Australia are greater than those imposed on its sister Parliaments in the Commonwealth and Victoria. The meaning of the phrase "for the time being" has been considered by the Courts on more than one occasion but in each instance in a different context.[8] If one transfers the purport of those decisions to the context of s. 36 of the Constitution Act 1889 one could conclude that the proper meaning of the phrase was those held at the relevant date by the House of Commons. It is noteworthy that in *Stone v. Wood*[9] the Court rejected the proposition, although in a different context, that "for the time being" was synonymous with "from time to time". If I accept the interpretation that the phrase means "those held at the relevant date" it behoves me to determine what day is to be deemed the relevant date. It would seem to me to be the date on which the particular enactment under which the Parliament declares

8 See Ellison v. Thomas (1862) 31 L.J. Ch. 867; Stone v. Wood [1917] 2 K.B. 885; Wankie Colliery Co. v. Inland Revenue Commissioners [1922] 2 A.C. 51.

9 See note 8.

the privileges, immunities, or powers became law. It might be argued that it was the day on which the relevant action or happening occurred giving rise to the application of the Statute. I could not favour such an interpretation as it would mean that the particular Statute was founded on a shifting base. This of course is not foreign to our legal structure when one contemplates the numerous decisions on the defence power of the Commonwealth. Such a method of approach, although admirable when applied to the defence power, is unsatisfactory when dealing with a penal provision. After all surely the validity or effect of a statute should not change because of some changes elsewhere after passage of the statute through Parliament. The question however is only of relevance if one accepts the proposition that s. 36 of the Constitution Act should remain inflexible until specifically amended by Parliament under s. 73 of the same Act. I will discuss that question later.

Section 1 of the Parliamentary Privileges Act makes interesting reading and supplies some guidance as to how our original Legislators under responsible Government viewed the provisions of s. 36 of the Constitution Act. Section 1 of the Parliamentary Privileges Act 1891 may be subdivided as follows:

1. It declares the privileges, immunities and powers of both Houses of the Parliament.
2. It declares them to be the same as held, enjoyed and exercised by the House of Commons, at the time of the passing of the Act or those thereafter for the time being held, enjoyed and exercised by the House of Commons.
3. It then goes on to say that the statutory provisions mentioned by me in paragraph 2 hereof shall be so "so far as the same are not inconsistent with the said recited Act (i.e. the Constitution Act) or this Act".
4. That the privileges immunities and powers so inherited shall be those "held possessed or enjoyed by custom statute or otherwise".
5. Then there is a proviso which reads

> Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail.

If one analyses s. 1 one is forced to the conclusion that it creates confusion. It begins by spelling out quite clearly the draftsman's interpretation of s. 36 of the Constitution Act and in so doing he went further than I would have gone in the circumstances and further than I was prepared to concede in my earlier discussion of this

question. Then he performs a volte face by saying at the end in effect that if any of the specific powers later defined in the Act happen to go beyond the limitations imposed by s. 36 of the Constitution Act then the Parliamentary Privileges Act is to prevail. This imposes on me the task of examining whether or not the Parliamentary Privileges Act can be said to be a valid amendment of the Constitution Act, but before doing so I propose examining the later provisions of the enactment and the manner in which they have been implemented by the Legislative Assembly through the medium of its Standing Orders. Before leaving s. 1 of the Parliamentary Privileges Act I must observe that it still leaves open the question of the shifting sands. It does in general terms state that any subsequent privileges, powers and immunities of the House of Commons can be asumed by the State Parliament. On the face of it this would be so if they did not in any way offend the later specific provisions of the Act.

The Parliamentary Privileges Act in dealing with interferences with or breaches of the powers, privileges or immunities of either House or the Members or Committees of each House (to borrow the words of the charge to the Commonwealth Joint Committee in 1908) provides:—

1. Each House is empowered to impose fines (as prescribed in its Standing Orders) for a number of offences mentioned in s. 8 of the Act.
2. In default of payment of the fine, imprisonment may be directed by the House until such fine is actually paid.
3. Section 14 of the same Act provides that the publication of any false or scandalous libel of any Member touching his conduct as a Member by a person other than a Member is a misdemeanour and that it shall be lawful for either House to direct the Attorney General to prosecute before the Supreme Court any such person committing any such misdemeanour. Penalties which can be imposed are two years imprisonment or a fine of $200 or both. It is noteworthy that some of the learned lawyers who gave evidence before the 1908 Joint Select Committee of the Commonwealth Parliament expressed the opinion that the reference to a misdemeanour implied that the trial had to be by a Judge and Jury.
4. Section 15 of the same Act declares that either House may direct the Attorney General to prosecute before the Supreme Court "any such person guilty of any other contempt against the House which is punishable by law". This is an interesting provision, the exact legal effect of which I do not know.

It should be borne in mind that in the year 1891 (one year after Responsible Government came to Western Australia) there was no Criminal Code. What other offences in 1891 were punishable by law is not clear to me. Consequently just what other offences are caught by the last provision I do not know.

The Standing Orders of the Legislative Assembly provide:—

(a) for the arrest of a stranger by the Sergeant-at-Arms on the direction of the Speaker but on being so arrested the stranger can only be discharged on a direction of the Assembly (S.O.77);

(b) a person declared guilty of contempt can be fined by the Assembly up to $100 and detained for a period not exceeding fourteen days pending payment of the fine (S.O.78);

(c) a person declared guilty of contempt under s. 8 of the Parliamentary Privileges Act 1891 may be fined by the Assembly such amount as the Assembly thinks fit (S.O.79);

(d) a person wilfully or vexatiously interrupting the business of the Assembly or obstructing the approaches to the Chamber or occasioning a disturbance within the precincts of the Chamber shall be guilty of contempt and may be committed by the Speaker to the custody of the Sergeant-at-Arms and shall be detained until discharged by the Assembly (S.O. 80);

(e) a person may be declared guilty of contempt on the motion of any member complaining concerning any published statement (S.O.137).

It will be noted that there is power to declare guilt for contempt under S.O. 78 and there is also power under S.O. 79 to deal with any of the offences listed in s. 8 of the Parliamentary Privileges Act 1891. There may be some doubt as to the validity of the fining power in S.O. 78 in a case where the offence was not one mentioned in s. 8 of the Act. The words "Each House . . . is hereby empowered to punish . . . *as for contempt* by fine according to the Standing Orders . . . any of the offences hereinafter enumerated", which are the relevant words of s. 8, are extremely interesting. They rather suggest that the draftsman assumed that each House possessed the inherent power to fine for contempt.

I do not propose making a minute examination of the Parliamentary Privileges Act and of the Standing Orders to determine in how many places and on how many occasions the Parliament or the House may have assumed authority greater than that possessed by the House of Commons on 26th February 1891 (being the date of assent). It is

sufficient for my purpose to note that there were at least two excesses over the limitation imposed by s. 36 of the Constitution Act.

The first was contained in s. 1 of the Act, the second was implied by s. 8 when it talked of the power of the House to fine for contempt and then empowered the House to provide for fines for other offences. It might even be argued that the powers granted under s. 15 were in excess of those held by the House of Commons. These particular difficulties and any others which may be unearthed can be disposed of very conveniently if it can be asserted with conviction that in any event the Parliamentary Privileges Act 1891 validly amended the Constitution Act 1889. This point I will now examine.

It was stated by Lord Cairns in the *Speaker of Legislative Assembly of Victoria v. Glass*[10] that the privileges of the House of Commons must be taken notice of judicially and that the Court taking notice of them should know at what time they were exercised by the House of Commons. That being the case it is competent for any Court to examine the privileges of the House of Commons, determine what they may have been at a particular time, how they have been varied, and then compare them with the privileges being exercised by the Legislative Assembly of Western Australia to determine whether or not at any relevant time there has been a material difference.

Having done that and assuming that the Court concludes that there is a material alteration contained in say the Parliamentary Privileges Act then the Court would have to face its next obstacle. That is whether in the case of the Parliament of Western Australia it can examine the validity of the Statute or whether, by reason of s. 73 of the Constitution Act 1889, it must treat any enactment (which does not impinge on the powers of the Commonwealth of Australia) as being a valid piece of legislation.

This question is governed very largely by the classic decision of the Privy Council in *McCawley v. The King*.[11] Without indulging in a long dissertation on that celebrated case I think it can be said fairly that it decided, *inter alia*, "that unless special legislative procedures are prescribed the Constitution Act may be amended or repealed in the same fashion as any other local legislation".[12]

Section 73 of the Constitution Act 1889 states—

---

10 See note 6.

11 [1920] A.C. 691.

12 Fajgenbaum and Hanks, AUSTRALIAN CONSTITUTIONAL LAW (1972) p. 11.

> The legislature of the Colony shall have full, power and authority, from time to time, by any Act, to repeal or alter any of the provisons of this Act.

There is no mention in this Section of a requirement that it can only be amended by either:

(a) An Act specifically entitled as an amendment to the Constitution Act, or

(b) by an Act bearing another title which states quite clearly therein that it is expressly intended to amend some specific and named provision of the Constitution Act, or

(c) states equally clearly that it is so enacted notwithstanding any provisions of the Constitution Act to the contrary.

There are two provisos to s. 73 but neither of them are relevant to the matters covered by the Parliamentary Privileges Act and the Standing Orders adopted by the Legislative Assembly in accordance with that Act.

In consequence I would submit that if in fact any statute passed by the Parliament gives to the Parliament greater powers privileges and immunities than those specified in s. 36 of the Constitution Act then it can be said to be a valid alteration of that Section within the power given to the Parliament by s. 73 of the Constitution Act.

It does not follow however that all and every provision of the Standing Orders of the Parliament on this subject can be accorded the same sanctity. If any Standing Order does trespass into territory barred by s. 36, then its validity may depend on whether or not it can be said to be authorised by the Parliamentary Privileges Act or some other statute passed by the Parliament. Section 73 does not accord to a single House the privilege of amending the Constitution. However this raises another question which is beyond the limits of this article, namely the extent to which the Courts may examine the actions of either House in the exercise of its Standing Orders. Suffice it to say that I reserve this question for further consideration on a more appropriate occasion.

The only matter therefore which may cause some difficulty is the dragnet provision in s. 1 of the Parliamentary Privileges Act incorporating into the Act changes in the powers privileges and immunities of the House of Commons and which are not specifically dealt with in a contrary manner elsewhere in the Act. To my mind this is a dangerous provision and the Parliament would be well advised to consider deleting it. At the same time it might be opportune to place

beyond doubt any of the other matters mentioned above either by specifically amending s. 36 of the Constitution Act or by declaring in the Parliamentary Privileges Act that it stands as a valid enactment notwithstanding any provision in the Constitution Act to the contrary. At the same time the Legislature could tidy up s. 15 of the Parliamentary Privileges Act.

HUGH GUTHRIE*

* *Speaker of the Legislative Assembly of Western Australia 1968-71 and Barrister and Solicitor of the Supreme Court of Western Australia.*

RECENT CASES

Criminal procedure—bail

R. v. CUTLER[1]

C was standing trial on an indictment containing two counts, one charging him with the commission of a crime and the other with the commission of a misdemeanour. During the period between his committal and the beginning of the trial C was admitted to bail. The question arose whether the trial judge had jurisdiction to admit to bail during trial persons charged and in the hands of the jury on an indictment alleging the commission by him of a crime.

Burt J. observed that it might be thought to be an odd thing that there should be such an absence of authority on a question such as this, arising as it did under the Criminal Code which had been in operation in both Queensland and Western Australia for 70 years or thereabouts. He could find no reported decision on the point in Western Australia and only two in Queensland.[2] Burt J. understood that neither decision was regarded as having established the law for that State and made reference to an unreported decision of Mansfield J. which denied bail and led to the amendment of s. 555 of the Queensland Criminal Code in 1964 giving express power to the court to admit any person to bail after the trial had commenced, notwithstanding that such person had been given in charge to the jury. Section 573 of the Criminal Code of Western Australia had not, however, been amended and reads—

> The Supreme Court or a judge thereof may admit to bail any person who has been committed for trial or for sentence or is in custody upon a charge of an indictable offence whether bail has been refused or not or may reduce the bail of any such person to whom bail has been granted.

---

1 Unreported, in Supreme Court of Western Australia, May 1972, before Burt J.

2 R. v. Kennedy [1941] Q.W.N. 49—bail refused when the accused's health was not so bad that he could not safely be trusted to the care of the gaol authorities. E. A. Douglas J. observed that an application could not be made in the absence of the jury, but it is not clear from the report of the case at what stage the application was made.

Burt J. held that s. 573 had no bearing on the problem. It dealt with the position *prior* to trial, not with the admission of an accused to bail *during* the hearing.

He did, however, consider that the power to admit to bail can be extracted from s. 611 when read with s. 610 (adjournments). Section 611 of the Code provides—

> When the trial of a person charged with an offence on indictment is adjourned, the Court may direct the trial to be held either at a later sitting of the same Court, or before some other Court of competent jurisdiction, and may remand the accused person accordingly, and may, in a proper case, admit him to bail, or enlarge his bail if he has already been admitted to bail, and may enlarge the recognisances of the witnesses.

When the Court grants an adjournment the Court has power to admit an accused to bail. In reaching this conclusion Burt J. said that he was

> very much influenced by the knowledge that the jurisdiction to admit to bail during trial has been exercised by judges of this Court on a number of occasions and I think I should follow the precedent so set as it proceeds from a construction of the section which I think is plainly open.

He went on to distinguish between two kinds of adjournment—an adjournment in the course of the trial as distinct from an adjournment of the complete trial. In this instance he was concerned in the admission to bail during an adjournment such as an adjournment overnight.

In exercising his discretion on the particular facts he made a number of pertinent observations on a number of matters.[3]

(i) *Likelihood of conviction*—

> . . . the consideration . . . as to whether there is a likelihood of the accused being convicted is—must be a criterion which is irrelevant to the exercise of my discretion at this point of time. I say that because to decide otherwise would be to draw me as the presiding judge into a consideration of that matter, which indeed would be unfortunate, and worse still, it would involve me in making some judicial pronouncement upon it which of course would be quite improper.

---

[3] Referring in particular to those listed in Brown, *Bail—An Examination* (1971) 45 A.L.J. 193.