S. A. SCOTT, THE PREROGATIVE OF THE CROWN IN EXTERNAL AFFAIRS AND CONSTITUENT AUTHORITY IN A COMMONWEALTH MONARCHY (TRINITY, 1968).

A B S T R A C T

Whatever may be the policy of a (declaratory) power in the Crown conclusively to certify the limits of its territorial sovereignty,— and whatever be the ultimate fate of such a power [linked, as it is in part, to the policy of, and indeed the existence of, a (constitutive) prerogative of cession] — still at all events the constituent function of the Crown is founded upon the (constitutive) prerogative of annexation, as distinct from any declaratory power. To annexation the will and pleasure of the Crown is, as a matter of constitutional law, both sufficient and necessary, without regard to any consideration of international law. The necessity of Her Majesty's pleasure is supported inter alia by the case of Staples v. The Queen (1899) (unreported), heard on application to the Privy Council for leave to appeal from the High Court of Matabeleland. A full report of the proceedings in both courts, including argument and reasons, being appended; the Privy Council deciding that territory remained foreign notwithstanding destruction by armed force of the previous native sovereignty and ensuing complete control by the Crown.

The prerogative of legislation is considered; semble a grant of representative institutions may be held subject to a reservation of the prerogative of legislation contained in an earlier but governing instrument. A prerogative of the Crown to legislate for the subject even in foreign territory, wherever the Crown has assumed a jurisdiction, is supported by limited judicial authority whose correctness is doubted. The true extent is considered of the continuance of existing laws in conquered and ceded territories.

The establishment of legislative institutions is considered. The incidents of these institutions are elaborated upon, and particularly the privileges of legislative bodies erected by the Crown. An account is given of the events in Newfoundland in August, 1838, giving rise to the leading case of Dr. Kielley in the Courts of Newfoundland, and, on appeal, in the Privy Council, laying down the rule that only necessary incidents are enjoyed at common law and not the lex et consuetudo parliamenti as known at Westminster: the rule herein laid down being applied more particularly against a power of committal for contempt. Earlier colonial and Privy Council precedents in the opposite sense are discussed. The rule is suggested to be one dictated by considerations of policy simply, and not determined by any particular view of the true basis of privilege in England. If anything, assimilation of the lex et consuetudo parliamenti to the common law serves as an argument for its passage to the colony, while attribution to lost statute might tend to establish peculiarity to England and colonial inapplicability; but the rule of inapplicability may be applied in any event.

The development of the principles of Kielley's Case is illustrated by the history of judicial decisions upon the central privilege, that of the power of arrest and committal; which is the best measure of privilege. Early resistance in Canada to the Privy Council's principles is found in the reasons of Canadian courts, though the actual holdings may in some cases be reconcilable: thus it is arguable that physical constraint may at common law be lawful in connection with election petitions and coerced attendance at bar in aid of inquiry —— though the authorities exclude imprisonment for the contempt of refusing to appear, as well as for other contempts committed by members and others whether in the face of the House or elsewhere.

The Canadian and Australian cases diverge sharply on the extent of the privilege of freedom from arrest in civil causes. In Canada the bulk of the decided cases have professed to find Kielley's Case consistent with a privilege extending, as in England, forty days before and after each session; in Australia release was refused to a member taken in execution even pending the session, on the ground that the interference with legislative proceedings was insubstantial.

An absolute privilege against defamation actions in respect of proceedings in the house is authoritatively established at common law. Members, however, have been made liable in respect of torts committed at their direction by reason of votes cast by them in favour of resolutions ordering the acts held unlawful. This absence of privilege appears supported only implicitly and sub silentio. That letters to Ministers by members, containing allegedly defamatory statements, are not absolutely privileged, is judicially supported. There is also authority making the privilege of free speech a right capable of supporting an action in damages when its exercise occasions a loss which would not otherwise have been likely to occur; even when, apart from the interference with free speech, no actionable wrong would have been committed. This is however criticised.

The proposition that a legislative body has at common law no juridical personality, and cannot in consequence be impleaded in any legal proceedings, is supported by the unreported case of Gabias v. Legislative Assembly of Quebec, of which a full report is appended. Judicial authority of high standing is also given for the further proposition that Her Majesty is not liable for obligations incurred by the Houses or their committees, or their officers on their behalf.

The Houses having a right of self-preservation, their officers and, more especially, presiding officers of the houses or their committees, may virtute officii preserve order by removing disorderly persons whether members or not, independently of any resolution of the House or a committee.

Parallel lines of authority not easily reconcilable in principle, govern the privilege of controlling composition. Suspension is permitted only as a defensive measure to remove an obstruction, and not as a means of punishing contempt. Its exercise is justiciable. It is limited as to time in that at common law a suspension may (apart from a possible right to suspend until apology) continue for no more than a sitting at a time; and it appears reviewable also as to cause. On the other hand, by the highest authority an exclusive jurisdiction is conceded to the houses at common law as to the trial of title to a seat, including qualification and due election; and this has so far been extended to incidental consequences as to exclude judicial jurisdiction to try the otherwise justiciable title to an executive office when the challenge was founded on alleged disqualification from a legislative seat on which the executive office was by law dependent. Such exclusive jurisdiction must be justified, if at all, on historical grounds; its necessity (within the rule of Kielley's Case) being negatived quite effectively by its nearly universal abandonment to the courts, as regards election petitions at least.

A power to make rules and orders for the government of the business of the house is not, at common law, a power of legislation; and it is not the more so for being set out in a statute, Privy Council opinion to the contrary notwithstanding.

.... Abstract ... p. 2

If a well-founded action may yet be a lawfully-punishable contempt, the legal system shows a rather unsatisfactory and somewhat mediaeval dualism; and so likewise if valid and competent legislation may be an actionable or restrainable wrong. There is judicial authority actually awarding damages for wrongfully procuring legislative action interfering with the execution of a contract; and even a judicial decision actually restraining a party from obtaining legislation considered an interference with pending litigation. It is doubtful that restraining the exercise of the legislative process is ever justified, even where, for example, presenting a bill for assent is in certain circumstances explicitly prohibited by statute; for it is difficult to see how the wrong can be a wrong to any given plaintiff; or (at least where the purported enactment will be void) how the damage can be attributable to completion of the legislative process, as distinct from enforcement of the invalid enactment.

While it was originally intended that the privileges of the Senate and Commons of Canada should be those of the Lords and Commons at Westminster, the Parliament of Canada was empowered by the British North America Act, 1867, to confer on its respective houses privileges not exceeding those in 1867 enjoyed by the Commons at Westminster. This power was almost immediately exercised to confer referentially the full measure of privilege as at Westminster; but it proved inadequate at the time of the Pacific Scandal to empower Commons committees to examine on oath, a general power acquired by the Commons at Westminster since Confederation. Accordingly the B.N.A. Act was in 1875 amended at Westminster to allow the Parliament of Canada to confer privileges not exceeding those at the time of conferral enjoyed by the Commons at Westminster. The anomalous result is that in this respect the legislative power of the Canadian parliament to confer privileges fluctuates with privileges at Westminster. It may be competent to the Parliament of Canada to remove this limitation, in exercise of its 1949 powers of constitutional amendment. Whether this is so appears to depend on whether the aforementioned restriction creates a limit inter se between Canada and the provinces.

The provincial legislative powers to amend from time to time the provincial constitutions; to deal with property and civil rights; and to punish by fine, penalty and imprisonment offences against otherwise competent provincial laws; have been held sufficient to support the conferral on their respective houses of privileges substantially the same as, and often exceeding, those of the Commons at Westminster; and this, without the restriction prescribed for the Parliament of Canada. Early disallowance of provincial statutes adopting referentially the privileges as at Westminster produced a characteristic type of provincial statute conferring nominate privileges and creating specific offences punishable by the houses. This has gradually been supplemented by referential incorporation, with modifications, of Westminster privileges. It has become common to make the houses courts of record, as the Commons at Westminster seems not to be. In the Province of Quebec, one offender was in 1922 by statute attainted and sentenced to one year's imprisonment; and the Council and Assembly of that province empowered in future to sentence for time certain not exceeding a year.

.... Abstract ... p. 3

The power to amend the law for the time being governing the lawmaking processes is considered, as also is the logical status of judicial review of legislation and enforcement of legal continuity. A court must inescapably apply the law, and recognize a given authority as competent to make law; the rest is a matter of degree. As to the United Kingdom, it is submitted that any rule against Parliament "binding" itself which goes further than merely denying that a legal vacuum may be created, but which yet admits the incontestable minimum of authority to change the constitution of Parliament, is not a meaningfully formulable proposition. The authority of the courts to insist that the conditions by law imposed on lawmaking be complied with as a condition of judicial recognition of the same, is said to be simply a corollary of the duty of the courts to notice and apply the law; to notice and apply, in sum, such rules only as form part of the corpus of the law; and this, indifferently whether the rule pressed by counsel upon the court is purported common law or purported statute. The issue remains, from first to last, a bare point of law, and there is no assumption whatsoever by the courts of a special jurisdiction to annul, to quash, or even to declare nullity. Indeed, the very basis of judicial authority is often undermined by its friends; thus learned authors speak of incompetent legislative activity as if it were, of itself, a cause of action giving rise to a jurisdiction to grant declarations; and even the Appellate Division of the South African Supreme Court is reported in the Coloured Voters Cases to have made orders in terms of the point of law involved; whereas, the proper object of judicial decrees is legal rights under the law, and not the law itself, which cannot be res judicata inter partes.

Some aspects of the Colonial Laws Validity Acts and the Statute of Westminster are considered, especially with reference to constitutional amendment powers.

The constitutional amendment power of the Canadian provincial legislatures assumes an especial importance in that proposed constitutional amendment formulae regularly assume action by the provincial legislatures; and in the measure that the latter may restructure themselves for some or all purposes, they may be able to complicate immeasurably a federal constitutional amendment process, by adding all manner of referenda, special majorities, and so forth. The few decided cases on the provincial constitutional amendment power, and particularly Re Initiative and Referendum Act of Manitoba, are closely examined. The conclusion is drawn that there is not the authority of the Privy Council for any proposition inconsistent with Trethowan's Case; that the provincial lawmaking authority may apparently be restructured as the provincial legislatures think fit; provided that referendal or other legislation, whether positive or repealing, must be submitted for royal assent to the Lieutenant-Governor; but that a condition precedent of voters' approval (and arguably also a condition subsequent) is entirely competent. Analogous problems suggested by the American experience are considered.

.... Abstract ... p. 4

THE PREROGATIVE OF THE CROWN IN EXTERNAL AFFAIRS AND CONSTITUENT AUTHORITY IN A COMMONWEALTH MONARCHY

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CHAPTER I

THE CROWN AND ITS CONSTITUENT FUNCTION

Policy and history have conjoined to place in the hands of the British Crown the legal authority to conduct the external relations *of* the British state; history, perhaps, has assumed the dominant rôle in a wider legal identification of the former *with* the latter.[1]

To the Crown, as executive government fell, through the exercise of its powers to declare and levy war, annex territory, and conduct diplomatic relations, the rôle of Imperial construction. And if, in George Washington's reputed phrase, influence is not government, the two do not in any event make incongruous company upon the same continuum. The Crown, at one time or another, has exercised both, and every intermediate degree, in foreign territory, and has done so,--so far at least as the law is concerned, *proprio motu*.[2]

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1. The State, whose personality 'we have been, more or less explicitly, trying to persuade ourselves that our law does not recognize': F. W. Maitland, 'The Crown as Corporation', *Collected Legal Papers* (Cambridge, 1911) III, p. 214, 'makes an undisputed appearance however, and its safety and interests are protected': G. M. Marshall, Comment on 'The State and its Interests', in [1962] *Public Law* 394 at p. 395,-- by the *Official Secrets Act*, 1911, 1 & 2 Geo. 5, c. 28 (U.K.). See *Chandler* v. *D.P.P.*, [1962] 3 All E. R. 142 (H.L.) on appeal from [1962] 2 All E.R. 314 (C.A.); and compare the definitions attempted by Lord Reid, [1962] 3 All E.R. 142 at p. 146, (impliedly) by Lord Hodson at p. 152, and by Lord Devlin at p. 156. On the distinct personality of Commonwealth countries see for example G. L. Haggen in (1925) 41 L.Q.R. 182 and H.T. Postle in (1929) 3 A.L.J. 109.

2. Though the unchallengeability of the Crown's exercise of jurisdiction has been uniformly conceded in the Queen's courts; as for example in *Nyali Ltd.* v. *Attorney-General*, [1956] 1 Q.B. 1 (C.A.); and is by statute exercisable against the Queen's own subjects: *Foreign Jurisdiction Act*, 1890, 53 & 54 Vict. c 37; yet, as the territory nevertheless remains foreign, difficult questions arise as to how far the Crown is exercising *foreign* sovereignty; and how far *its own*, as, necessarily, in some sense it must be. In *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, [1901] A.C. 373, an unduly neglected Privy Council decision, it was held that the law of Zanzibar was not, for Her Majesty's

By its own act it has annexed territory to its own dominions;[3] its will and pleasure to that effect being both essentially necessary and absolutely sufficient. Nor can its will be thought the less necessary to territorial accession to Her Majesty's dominions, merely because the pleasure of the Crown, rightly or wrongly, has been inferred from the granting of titles to land to settlers who, otherwise than under the authority of the Crown, settled in the dominions of a foreign state, and repulsed the forces of that state, which thenceforward made no attempt at effective occupation; for in that case[4] the meaning of the Privy Council was plainly not that simple physical possession implied

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Court, Zanzibar, foreign law; but rather, local law. When the Privy Council has uttered its well-known dicta on the subject of exercise of power in protectorates, it has done so on appeal from these courts characterized in Charlesworth as partaking in some measure of a foreign sovereignty. In what capacity, then, has the Privy Council spoken in, for instance, Sobhuza II v. Miller, [1926] A.C. 518 (P.C.), where their Lordships sat on appeal from the Special Court of Swaziland; or Jerusalem-Jaffa District Governor v. Suleiman Murra, [1926] A.C. 321 (P.C.), on appeal from the Supreme Court of (the mandated territory of) Palestine? If the Privy Council has sat as an appellate jurisdiction, have they not spoken in exactly the same capacity as the court below? And their Lordships' strict insistence in sitting only in appeal and not in review is vividly shown in, for example, Tilonko v. A.-G. of the Natal, [1907] A.C. 93, where the Board refused to hear an appeal from a so-called court-martial on the ground that it was not a court at all; the case was one of the well-known series arising from the Boer War; see also Marais v. The General Officer Commanding, [1902] A.C. 109 and, on a point analogous to that involved in Tilonko, see A.-G. for the Cape of Good Hope v. Van Reenan, [1904] A.C. 114.

3. See on annexation Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law (London, 1966) p. 98 ff.; especially for various instances of the exercise of such authority. For a Proclamantion of Annexation by the Governor-General of South Africa, annexing territory to the Union in the King's name, see H.J. May, The South African Constitution, 3rd ed. (Johannesburg, 1955) p. 557; being Appendix 26.

4. Attorney-General for British Honduras v. Bristowe, (1880), L.R. 6 App. Cas. 143 (P.C.: Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier); reversing the Supreme Court of British Honduras.

sovereignty as part of the Queen's dominions.[5] Though in Re Southern Rhodesia[6] the Privy Council, in preferring the Crown's title to that of the British South Africa Company to the lands of Southern Rhodesia after the forcible destruction of the previous native sovereignty, chose words some of which might imply that annexation is a consequence rather of facts than of juridical acts; that being part of the Queen's dominions is a fact rather than a legal status; yet even in that case the issue was one of property in lands rather than of territorial sovereignty in the strict sense;[7] the Board unmistakably indicated that the fact

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5. Per Sir Montague Smith for the Board at p. 148: 'The exact time when the Spanish Government can be said to have finally relinquished the territory, and the time when the British Crown assumed territorial sovereignty over it, are... both undefined. There certainly seems to have been an interval between the abandonment of Spanish and assumption of British sovereignty, though the length of that interval cannot be determined...'.

   'The country was formally declared to be a British colony, and formally annexed to the British dominion, by a proclamation of Her Majesty, dated on the 12th of May, 1862. The learned Chief Justice was of opinion that the Crown had not acquired or assumed territorial sovereignty in Honduras until this date. Their Lordships cannot concur in this view. Without going into the various acts previously done or exercised by the Crown with regard to this colony, or attemp ing to fix the precise date when territorial sovereignty was first assumed, it is sufficient for the decision of this case to say that the fact, which is fully established, that grants of land were made by the Crown as early as 1817, affords ample evidence that in that year at least the Crown had assumed terrotorial dominion in Honduras.' Emphasis added.

6. [1919] A.C. 211 (P.C.: Earl Loreburn, Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Scott Dickson).

7. Per Lord Sumner for the Board, [1919] A.C. at p. 239: 'The Crown does not claim to have annexed Matabeleland and Mashonaland. No Proclamation of annexation has ever been issued. Accordingly the Company contends that for want of it these regions have never belonged to the Crown, but that it has deliberately disinterested itself in regard to their ownership, and the conclusion suggested is that, if no one has now a better title than the Company, the inchoate title consisting of occupation is for present purposes property enough.'

of conquest did not of itself operate annexation to the Queen's dominions;[8] but that this was a matter for the Crown to decide at any time in the future as a matter of its pleasure;[9] that the only question was the true inference of the Queen is will to be drawn from what the Queen had done, no formal act such as a proclamation being necessary to effect annexation;[10] and that by the land settlement system it had established 'it was intended that the Crown should assume and exercise the right to dispose of the whole of the land not then in private ownership' and consequently 'it made itself owner of the land to all intents and

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8. Per Lord Sumner, [1919] A.C. at p. 240: 'The Crown has not bound itself towards its subjects to determine its choice upon a conquest either out of hand or once and for all. If Her Majesty Queen Victoria was pleased to exercise her rights, when Lobengula was defeated by her and her subjects, as to one part of the dominions in 1894 and as to another part not until 1898, if she was pleased to do so by public acts of State which indicate the same election and confer the same supreme rights of disposition over his conquered realm as annexation would have done, it is not for one of her subjects to challenge her policy or to dispute her manner of giving effect to it. The fact being established that a conquest of Lobengula and his dominions had occurred, the question is what Her Majesty's Government thereupon elected and intended to do in Her Majesty's name. It cannot be said that not to annex forthwith was a renunciation of all right to annex at any time, or that a disposition of the public lands in the conquered territories as ample as if formal annexation had taken place is less operative than if that form had been employed.' Emphasis added.

9. Ibid.

10. At p. 239, per Lord Sumner: 'No doubt a Proclamation annexing a conquered territory is a well-understood mode in which a conquering Poer announces its will urbi et orbi. It has all the advantages (and the disadvantages) of publicity an precision. But it is only declaratory of a state of fact. In itself it is no more indispensable than is a declaration of war at the commencement of hostilities. As between State and State special authority may attach to this formal manner of announcing the exercise of sovereign rights, but the present question does not arise between State and State. It is one between sovereign and subject. The Crown has not assented to any legislative act by which the determination of its will has been restricted to one definite form or confined within particular limits of ceremonial or occasion...'.

purposes as completely as any sovereign can be the owner of lands publici iuris.'[11] But be that as it may, there is the unreported Privy Council decision in Staples v. The Queen, rendered in 1899 on appeal from Southern Rhodesia, from whose terms, fully appended hereto,[12] it emerges that there is the distinct authority of the Board[13] that mere subjection by armed force, however absolute, does not of itself operate the accession of a territory to the Queen's dominions. This is, again, implicit in Rex v. Bottrill, Ex parte Kuechenmeister[14] where, notwithstanding

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11. [1919] A.C. at p. 240; 'and that the forms of an annexation to itself followed by a grant and conveyance to others for the purpose of grants over to settlers do not avail by their presence or their absence to affect the substance of these acts of State.' The Board then disparaged the importance of land titles; the list of cases referred to in argument, [1919] A.C. at p. 212, contains no reference to A.-G. for British Honduras v. Bristowe, (1880), L.R. 6 App. Cas. 143; ante, note 5; could it have escaped both sides, or could both sides have thought it too dangerous to cite?

    The way in which Lord Sumner frames his remarks tends to obscure the fact that his Lordship is not merely saying that no special forms are needed for annexation, but that no annexation at all has here taken place.

    Annexation, in fact, only occurred in 1923 by the Southern Rhodesia Annexation Order in Council, S. R. & O. XXI, 369, and was thus plainly not supposed to have occurred earlier.

12. Appendix I. See especially the headnote, at p. 1 of the Appendix; the exchange between counsel and the bench at p. 18 ff.; and the reasons, later communicated by authority of the Board, at p. 47 ff.

    It will be noted that in the communicating letter the Registrar of the Privy Council indicated that the words used by the various members of the Board during argument, were also to be considered part of the reasons for judgment.

    It appears that the documents hereto appended were saved from disposal which, it was indicated to the author by officials in the Office, would ordinarily have taken place. The author is much indebted to their kind assistance in locating them after the initial advice that they no longer existed.

13. Lord Halsbury, L.C., Lord Hobhouse, Lord Macnaghten, Lord Davey, and Sir Richard Couch. The case was cited by two Lords Justices of Appeal in R. v. Earl of Crewe, ex parte Sekgome, [1910] 2 K.B. 576 at p. 597 (per Vaughan Williams L.J.); and at p. 623 (per Kennedy L.J.).

the total displacement of the German public authorities by those established by His Majesty and his allies, a declaration by the Crown that the German state and nationality continued to exist, and that Germany was not annexed, and was indeed still at war despite the total surrender of its government, was conclusive upon these matters; and the applicant, a German national, might accordingly still be treated as an enemy alien. In answer to the reasoning that there could be no war against a state which had no government, and that the certificate of the Crown that war subsisted was, on its face, inconsistent with the reference therein to the assumption by the Crown and its allies of total governmental power, Scott, L.J., clearly put apart the position, whatever it might be, in international law, from that under the constitutional law of the British state:[15]

> 'This argument at first sight seems formidable, but in my opinion it rests on a fallacy, which can be stated thus: In the British constitution, which is binding on all British courts, the King makes both war and peace, and none the less so, in the eyes of the law, that he does so as a constitutional monarch on the advice of his democratic cabinet. If the King says by an Act of State that the Commonwealth of countries over which he reigns is at war with a particular foreign State, it is at war with that State, and the certificate of the Secretary of State is conclusive... When the King makes peace with an enemy State, that war comes to an end, but it does not come to an end before that peace is made. Whether international law has a different rule is irrelevant; for international law is only binding on our courts in so far as it has been adopted and made part of our municipal law; and the above propositions go, in my opinion, as far as our municipal law has gone.
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> 'It follows, therefore, that the certificate of the Secretary of State for Foreign Affairs, which says in terms that we are still at war with Germany, is binding at least in our municipal law, and therefore on all the King's courts...In our municipal law, whether it differs from international law or not, a state of war can continue, and the war with Germany is continuing, in spite of the fact that Germany then ceased to have any independent central government...'

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14. [1947] 1. K.B. 41 (C.A.: Scott, Tucker and Asquith L.JJ.).

15. [1947] 1. K.B. 41 at p. 50.

These authorities are more than sufficient, it is submitted, to override dicta oriented rather to international than to constitutional law, seeking to establish that conquest in fact is annexation in law.[16]

If the authority of the Crown is a necessary condition to the annexation of territory, so also is it sufficient. Professor W. Harrison Moore has clearly distinguished the executive act of annexation of territory to Her Majesty's dominions--constitutive in constitutional law--from that of certifying territory to be part of Her Majesty's dominions--a declaratory act; and has supported both:[17]

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16. Roberts-Wray points out, op. cit., p. 105, that Sir William Scott's dictum in the Foltina, 1814 1 Dods. 450 at p. 451; 165 E.R. 1374 at p. 1375, that '[N]o point is more clearly settled in the Court of Common Law than that a conquered country forms immediately part of the King's dominions', is based only on the inconclusive dictum of Lord Mansfield in Campbell v. Hall, (1774) 1 Cowp. 204; 98 E.R. 1045; that '[a] country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.' Roberts-Wray says, loc.cit., 'This does not necessarily conflict with our conclusion, for it does not tell us expressly when or by what means the country becomes a British dominion; it does not rule out the proposition that the Sovereign has an option.' The crux is, that Lord Mansfield's proposition seems directed to the point that such territories conquered as become the King's dominions [as had Grenada in the case at bar] are subject to the British Parliament. Moreover, Sir William Scott's statement supra, while not obiter (since he was deciding whether the taking of Heligoland made it, for the purpose of the Crown's grants of droits of admiralty, part of the King's dominions), yet suggests a possible distinction between territory which is under the full sovereignty of the Crown, and that which is under its dominion in a more limited sense. At p. 451 Sir William Scott says: 'I observe that the grant from the Crown to the Lord High Admiral applies to the King's dominions generally, and that there is nothing which points to a distinction between those parts of the King's dominions over which the Crown has plenum dominium or otherwise.' Again, at p. 452, referring to a distinction urged between territories whose fate had been ultimately settled upon the restoration of peace, and those conquered but not yet so disposed of, Sir William Scott said: 'The distinction between the two species of territory is, in fact, rather more formal than real and substantial, at least I must profess my inability to see any distinction between them that can materially affect the present question.' [Emphasis added].

> '[I]t is submitted that it would be intolerable that the door should be left open for an appeal to our Courts against the determination of the executive in a matter so vital to the conduct of those relations which are committed by the Constitution to the Crown. The Crown may annex and cede territory without any assent of Parliament, though cessions are sometimes confirmed by Parliament. It is difficult to believe that after the proclamations annexing the territory of the South African Republic and the Orange Free State, anybody could have been heard to say in a British Court that the territories were still foreign because Great Britain had not got a [title] good by international law, and because her sovereignty over them was not yet recognized by foreign powers. It is true that annexation, like a declaration of war, is a definite power of the Crown; and it does not necessarily follow in either case that, because these acts of State belong to the Crown, the Crown can, independently of the factum, bind Courts by its dictum as to the existence of a state of things which it might bring about if it should think fit to do so.'

The Crown's 'certifying power' itself, however well established it may now be as an authoritative mode of determining the extent of the Queen's dominions,[18] is, if anything, much the more disturbing of the two. Certificates may vary from cause to cause as to what the status of any given territory was at a single given time. Indeed, though the extent of the territorial jurisdiction may be noticed by the courts,[19]--as indeed it necessarily must for the purposes of issuing any piece of judicial process, of assuming jurisdiction over any cause, or of applying one system of law

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Sir Henry Jenkyns has given his opinion that: 'As a general rule, the British dominions cannot be added to or diminished without the consent of the Crown.' British Rule and Jurisdiction Beyond the Seas (Oxford, 1902) p. 2. What the exceptions are is not clear; the only evident refernece to the principle so stated is to be found at p. 4: 'An annexation, even if irregular in the outset, may possibly, if followed by a de facto incorporation for a long period of time, acquire, like other constitutional changes, validity through usage.'

17. Act of State in English Law (London, 1906) p. 35; emphasis added.

18. The Fagernes, [1927] P. 311 (C.A.); per Atkin and Lawrence L. JJ.; Reg. v. Kent JJ., ex parte Lye, [1967] 2 Q.B. 153 (Divisional Court: Lord Parker, C.J., SalmonL.J., and Blain J.); Post Office v. Estuary Radio Ltd., [1967] 1 W.L.R. 1396 (C.A.: Diplock, Sellers and Winn L.JJ.). The principles governing the effect of these certificates are, of course, authoritatively established in Duff Development Company v. Kelatan, [1924] A.C. 797 (H.L.).

rather than another,--yet this fundamental condition of all exercise of judicial authority is, by the existence of the 'certifying power', subjected to the pleasure of the Crown under a rule which would in terms allow it to declare excluded from the realm any territory it pleased, including London. The certifying power thus is not merely a declaratory analogue of an annexing power; it is also a declaratory analogue of a ceding power. Indeed, one of the best authorities for the existence of power of certifying the extent of the realm is The Fagernes,[20] where the jurisdiction of the High Court, in respect of a tort claim arising out of a collision in the Bristol Channel, was ousted on the basis of a statement made by the Attorney-General on the instructions of the Home Secretary. In a constitutional system where the Crown cannot legislate, a prerogative of cession is a dangerous anomaly whose impolicy leads authors to deny its existence[21] and courts to take great pains to avoid pronouncing upon its existence or extent,[22] even in the face of the weight of historical authority which virtually compels its admission, in some substantial degree at least. In a political system

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19. Authority for this, given in the context now under discussion, is to be found in the judgment of Atkin L.J. as he then was, with whom Lawrence L. J. agreed, in The Fagernes, [1927] P. 311 at p. 324.

20. [1927] p. 311.

21. '[I]t is probably true that any treaty involving the cession of British territory requires parliamentary approval for its effectiveness': per J.D.B. Mitchell, Constitutional Law (Edinburgh, 1964) p. 148.

22. In Damodhar Gordhan v. Deoram Kanji, (1875-6), 1 App. Cas. 332, the Privy Council (Lord Cairns, L.C., Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier), having heard elaborate argument (fully reported) from inter alia Sir William Harcourt, Q.C., William Forsyth, Q.C. [author of Cases and Opinions on Constitutional Law (London, 1869) where the authorities are collected and discussed at p. 182 ff.], Fitzjames Stephen, Q.C., and Edward Macnaghten, ordered a re-argument on whether indeed upon the true construction of the acts under consideration a cession had been intended. It was held that a purported transfer of British Indian territories

where the Crown cannot affect the legal rights of subjects by reason only of its undertakings to foreign powers, but must, as established in the classic decision in Walker v. Baird,[23] obtain competent legislation to make any necessary changes in the law, a power to cede territory sits ill. For like

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from the ordinary jurisdiction of Britishlaws and courts to the control of a foreign native ruler subject only to the political control of the 'Kattywar Political Agency', could not be construed as a cession in full sovereignty, and was ineffective to oust the jurisdiction of the British Indian courts; and this even on the hypothesis that the Secretary of State for India had decided that the territory was not part of British India.

Lord Selborne said for the Board at p. 380:

> 'Their Lordships think that if such an opinion had been expressed by the Secretary of State for India (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction"to the supervision, laws, and regulations of the Kattywar Political Agency," into a cession of British territory to a native state. Such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.'

The Bombay High Court (Appellate Civil Jurisdiction), sub nom. Da'modar Gordhan v. Ganesh Devra'm, (1873), 10 Bom. H.C. 37 (Lloyd & Kemball JJ.),on appeal from the Acting Judge of the District of Ahmedabad, confirming the decree of the Moonsiff of Gogo, had held per Lloyd J., inter alia, that the Crown had not a power of cession, at least in times of peace. Lloyd J., had said at p. 48:

> 'If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.
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> Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating, must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.'

In the Privy Council, their Lordships contented themselves, after hearing the above viewpoint get rather the worst of the argument, with saying (1876), L. R. 1 App. Cas. 332 at p. 373:

reasons does a power to interfere in the rights of subjects by declaring that a certain place is outside the Queen's sovereignty, even when, upon all relevant constitutive acts, the place is within it. The analogy between cession and certificate is implictly recognized by Diplock L. J. in the recent Court of Appeal decision of Post Office v. Estuary Radio Ltd., where his Lordship, for the Court[24] noted that since, in the case at bar, the area said by the Crown to be within territorial waters was 'greater than that previously claimed by the Crown', in consequence '[no] question, therefore, arises as to the Crown's right to abandon sovereignty without the authority of Parliament'.

But the power of declaring the sovereignty of the Crown is in any case so far harsher than the power to annex, that the subject is unable to rely upon the legal position as it is at the time he acts; for this may all be wiped out by the declaration of the Crown, which, made at the time of hearing, may have retrospective operation through its declaratory force.[25] The consequences of this in the case

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> 'The question, whether the law thus laid down by the High Court of Bombay is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion, which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But having arrived at the conclusion that the present appeal ought to fail without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay, as to be unable to advise Her Majesty to rest her decision on that ground.'

The power of cession is supported also by Lachmi Narain v. Partab Singh (1878) I.L.R. 2 All 1.

23. Walker v. Baird [1892] A.C. 491 (P.C.); but it should be noticed that the Board there left open the 'grave question' whether such a power might exist in the case of treaties of peace or treaties akin to treaties of peace: [1892] A.C. 491 at p.497.

24. [1967] 1 W.L.R. 1396 at 1403.

25. Ibid., p. 1401; and headnote, at p. 1398.

of criminal proceedings was the basis of the dissent of Salmon L. J. in Reg. v. Kent Justices, Ex parte Lye,[26] and the 'regret' expressed by Blain J. in the same case[27] at

> 'feeling compelled, as I do, rightly or wrongly, to a conclusion which postulates that a man may find himself in the position where what he starts by doing lawfully suddenly becomes an offence at a stroke of the pen. If, hereafter, it should be held that my conclusion is wrong, in the interests of the general principle of maintaining true principles of justice I, for one, should be delighted'.

It must be pointed out, however, that the offence there charged was that of broadcasting without a license in territorial waters, contrary to statute; and that the Territorial Waters in Council, 1964, extending territorial waters to the place in question was made on September 24, 1964, long before the defendants began broadcasting in September, 1965, and longer still before the broadcast charged as an offence, made on August 16, 1966. The result, in substance, was the same as an annexation; and the Order in Council operated prospectively, causing no more injustice than any other prospective legislation or executive act.

But if the authorities are prepared so to concede to the Crown the harsh power of declaring, absolutely and against any objection founded upon international law, the boundaries of the realm, by how much more do they support the same absolute power of annexation. The two, indeed, are confounded, and supported together, both in Reg. v. Kent Justices, Ex parte Lye.[28]

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26. [1967] 2 Q.B. 153.

27. Ibid., at p. 192.

28. Per Lord Parker C.J., [1967] 2 Q.B. at p. 173: ' In the absence of a definition, and there is none in the [prohibitory] Act, I have come to the conclusion that the expression "territorial waters" must mean waters over which from time to time the Crown may declare sovereignty. No doubt any declaration of sovereignty will in general, if not always, be made within the international law current at the time, though, if the Crown did exercise sovereignty over a greater area, these courts would have to enforce it; in general, however, the exercise by the Sovereign will not be over

and also in Post Office v. Estuary Radio Ltd,[29] where Diplock L. J. said for the Court of Appeal:

> 'It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. The Queen's courts, upon being informed by order in council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it...'.

The Court would, however, notice the international convention for the implementation of which the Order had been enacted, though the convention had not been therein mentioned,[30] since the convention constituted a 'declaration by the Crown' in exercise of its prerogative; preferring however the Order in Council, in case of conflict, as the later exercise of the Crown's pleasure.[31] It is clear, indeed, that treaties operating territorial transfer must at this date be accepted as effective municipal acts noticeable by the Courts and enforceable in the law of the realm according to their tenor so far at least as to operate an annexation to the Queen's dominions.[32]

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an area greater than is permitted under international law.' Again, at p. 173, '[A]lthough it is open to the Sovereign to declare sovereignty over an area greater than is strictly permitted by international law, international law will be the framework within which that declaration of sovereignty will in general be made...'. At p. 174, '[R]ather than to say that the determination is governed by international law, I would prefer to say that it is governed by declarations of sovereignty from time to time by the Crown.' And, at p. 176, citing The Fagernes, ante, Lord Parker said: 'I can see no reason for saying that, by the Act of 1878, the Crown has abrogated the prerogative right to lay down limits of territorial waters for purposes other than those set out in that Act [i.e., The Territorial Waters Jurisdiction Act, 1878, 41 § 42 Vict. c. 73]. Indeed, with regard to matters of international law covered by conventions, or with regard to treaties, or with regard to agreements between nations, the natural mode of confirming those conventions, treaties or agreements as part of the municipal law of this country [emphasis added] is by Order in Council...I quite appreciate that there is no question of asking the Attorney-General as to the limits of sovereignty declared by Her Majesty or exercised by Her Majesty in regard to any part of the open seas, but, if it is proper for this court to treat itself as bound by any advice so tendered, as in The Fagernes, it seems to me that the court is equally bound to pay attention and regard to the declaration of sovereignty which is to be found in the Order in Council in the present case.'

It is submitted, in sum, that the annexing power of the Crown is incontestably established, as well on principle as on authority; and that this is so, whatever the fate may be of the certifying power--which, after all, is not so firmly fixed as absolute crown privilege seemed under Duncan v. Cammell, Laird & Co.[33] Yet for proponents of that doctrine the unanswerable question was this: Could the Crown have removed all the evidence from the court record in Entick v. Carrington?[34] It is that case, its companions, and its successors, which showed that the common law does not rely on the Crown's sense of justice. And the certifying power may yet find its Conway v. Rimmer.[35] But if even the certifying power be thought necessary to protect the principle that 'the Courts of the King should act in unison with the Government of the King',[36] how much more so is the absolute power of annexation necessary to support the very basis of state authority?

Salmon L.J. appeared to differ only on the basis that the term 'territorial waters' in a penal enactment should be taken as territorial waters as they were at the time of its enactment.

Blain J., concurred with Lord Parker, C.J.

29. [1967] 1. W.L.R. 1396 at p. 1401; emphasis added.

30. Ibid., p. 1403.

31. Ibid., p. 1403-4.

32. Salaman v. Secretary of State for India, [1906] 1 K.B. 613 at p. 639-41; Campbell v. Hall, (1774) 1 Cowp. 204.

33. [1942] A. C. 624.

34. (1765) 19 St. Tr. 1030.

35. [1968] 2 W.L.R. 998.

36. Taylor v. Barclay, (1828) 2 Sim. 213; Foster v. Globe Venture Syndicate, [1900] 1 Ch. 811; The Fagernes, [1927] P. 311 at p. 324.

The Crown, then, of its own act annexes territory; and, less frequently, and more problematically, has by simple executive act relinquished it. By its own act, equally, it could,--and, especially in early times, did,-- provide for the government of its new dominions. In settled territories, to which English law ran, and in which the Crown could not, of itself, legislate, it might summon a representative assembly 'with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants'.[37] The Sovereign equally enjoyed 'the right of appointing such magistrates and establishing such Corporations and Courts of Justice as he might do by the Common Law at home', and 'the same prerogative and the same powers of Government that it does over its other subjects'.[38] In conquered and ceded territories the Crown enjoyed the well-known prerogative of legislation, exercisable against old inhabitants-become-subjects and other subjects resorting to the territory, alike;[39] lost by the grant of representative institutions unless therein reserved, or unless the power to revoke the institutions was itself reserved or otherwise competently acquired.[40]

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37. Kielley v. Carson, (1841-2) 4 Moo. P. C. 63 at p. 85; approved in Phillips v. Eyre, (1870) L.R. 6 Q.B. 1 at p. 19-20.

38. Ibid., and see also Sir James Bacon, V.-C., in Re Bateman's Trust, (1873) 15 L.R. Eq. 355 at p. 361; and Chitty J., in Re Oriental Bank Corporation, (1884) 28 Ch. D. 643 at p. 649: 'No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.'

39. Campbell v. Hall, (1774) 1 Cowp. 204; 98 E.R. 1045. See also Jephson v. Riera, (1835) 3 Knapp's P.C. 130; 12 E.R. 598, where the power was held exercisable not only by the Queen in Council but otherwise, as by Letters-Patent. In the same case the erection of courts of justive to administer the laws of England was held to be an introduction of English law; a curiously mediaeval way of introducing a system of laws.

40. Ibid.; and Abeyesekera v. Jayatilake, [1932] A.C. 260 (P.C.: Viscount Dunedin, Lord Blanesburgh, and Lord Darling); on appeal from Abeyesekere v. Jayatileke,

The rule, though laid down subject principally to the qualification that prerogative legislation could not violate 'fundamental principles'[41] is, even so, surely a very anomalous one; for, whatever freedom the Sovereign might have had to deal with the conquered inhabitants as aliens, reasoning from 'act of state' becomes implausible as to subjects; and, indeed, the prerogative being territorial, old subjects are equally amenable to it. Such a rule invites

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(1931) 32 N.L.R. 1 (Supreme Court of Ceylon: Fisher C.J. and Garvin S.P.J.); Sammut v. Strickland, [1938] A.C. 678.

In Abeyesekera v. Jayatilake, [1932] A.C. 260, appellant plaintiff sought to recover from respondent, the Editor of the Singhalese Etymological Dictionary, the penalties prescribed by the Ceylon (Legislative Council) Order in Council, 1923, for having sat and voted while he had a pecuniary interest in a contract with the Government. Before the action came to trial the Ceylon (Legislative Council) Amendment Order in Council was passed exempting the holder of the office in question from the disqualification of the Order of 1923, and indemnifying him against all consequences of its breach. The validity of the indemnifying provision was challenged, in substance, on the ground that no legislative power had been reserved in the Order of 1923, but only a power to amend its provisions, and that this did not confer sufficient authority to legislate by way of indemnity.

Counsel for the appellant argued, [1932] A.C. at p. 261, that 'the respondent could be relieved of liability only by an Act of indemnity passed by a competent legislature. The Order of 1923 having created for Ceylon a representative legislature without reserving the right to legislate by Order in Council, the legislature so created was the only competent legislature, apart from the Imperial Parliament. It is true that the Order of 1923 reserved the power to amend its provisions, but art.II. of the Order of 1928, which purported to exonerate the respondent, was not an amendment but simply an indemnifying provision; art. III. was an amending provision, but had no retrospective effect, and without art. II. was not an effective defence to the action.'

The rejection by the Privy Council of plaintiff's contentions, and the words of the Board (at p. 262ff.), provide support for each of the following propositions, and especially the first and third:

(i) A grant of representative institutions not reserving a power of legislation, may nevertheless be held to be subject to the dominion of a primary instrument itself containing such a reservation. Thus, assuming that the Order in Council of 1923 had created representative institutions within the rule of Campbell v. Hall [it satisfied at least the test of representative legislature laid down by the Colonial Laws Validity Act, 1865, since it comprised a house half elected by the inhabitants], even though the Governor could specially certify bills for passage by nominated members alone, there was then an instrument, granting representative institutions, and reserving only a power to amend, revoke or alter

the question why the Crown should not legislate for its subjects wherever it may think fit to establish for itself a jurisdiction abroad, at least in lands already containing some population. Is not an assertion of jurisdiction pro tanto either a cession or a conquest? The Foreign Jurisdiction Acts in the case of foreign territory 'supervene for the purpose of binding all the subjects of the Queen';[42]

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the instrument, but not to legislate. Nevertheless, it was held not to derogate from the terms of Letters Patent, themselves reserving, not only a power to amend, revoke, or alter, but also a power of legislation. The practice had been to provide generally for the constitution of the Island by Letters Patent containing the two reservations in question, the Letters Patent envisaging a legislative council 'as may be provided by any law for the time being in force in the Island'. The Order in Council itself providing for the Council professed to be made merely in exercise of the reserved prerogative 'to pass laws in and for the Island'. The Letters Patent were thus treated as the controlling instrument, governing even the operation of an Order in Council subsequently made, which was treated as made 'under' the Letters Patent.

(ii) A power to amend, revoke or alter the instrument granting legislative authority, being a power to dispose of legislative authority, necessarily includes within it the power to exercise legislative authority, even before amending, revoking, or altering.

(iii) The power to amend, revoke, or alter an instrument establishing a legislative authority suffices to allow amendment extinguishing rights accrued thereunder--even if that is to be characterized as retrospective legislation.

Sammut v. Strickland, [1930] A.C. 678, supports the prerogative of legislation even in the case of voluntary cession, and the revival of the prerogative of legislation when representative institutions are lawfully revoked.

41. Campbell v. Hall, ante; and see for example General Picton's Case, (1804) 30 St. Tr. 225-959, on the cesser of pre-existing laws against fundamental principles. In Eastern Rand Exploration Co., Ltd., v. Nel, [1903] T.S. 42, prerogative legislation extending certain contractual rights to relieve those who had been frustrated in their enjoyment by the South African war, was challenged as contrary to fundamental principles, and in particular as confiscatory of property. The Transvaal Supreme Court (Innes C.J.; Wessels and Smith JJ.,) held, apart from the terms of the Colonial Laws Validity Act, 1865, that it was not; for, following Willes J., in Phillips v. Eyre, (1870) L. R. 6 Q. B. 1, 20 ff., this must mean a principle of natural justice the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign State. See also Globe Advertising Co. v. Johannesburg Town Council, [1903] T.S. 335 at p. 343; N.Z.A.S.M. v. Douglas Colliery Ltd., [1905] T.S. 374. For an interesting political detention in Gibraltar see In re Zaghlul Pasha, (1923) 67 Sol. Jo. 382: 'The question was

are they then superfluous? Can the Crown without the aid of legislation deal with subjects in foreign lands by prerogative of legislation as it deals with foreigners by act of state? It is striking that such a view is supported even by the limited authority of the High Commissioner's Court for the Western Pacific in The Queen v. Weaver.[43]

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whether the Crown in giving laws to Gibraltar reserved the power to exclude habeas corpus.' Leave to appeal from the Supreme Court of Gibraltar was refused by the Privy Council.

42. Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co. [1901] A.C. 373 at 385; see also Jenkyns, British Rule and Jurisdiction Beyond the Seas (Oxford, 1902) pp.153 ff.

43. (1899) 1 Udal's Fiji Law Reports 155; per H.S. Berkeley, Chief Judicial Commissioner at p.158: '[N]or do I think that the authority of Her Majesty to make Orders in Council for the government of Her subjects in the Western Pacific is dependent upon...any Act of Parliament; and I am of opinion that Her Majesty the Queen possesses this power by inherent prerogative right, the exercise of which has been strengthened by the Pacific Islanders Protection Acts and the Foreign Jurisdiction Acts. It cannot be disputed that it is within the power of the sovereign to declare sovereignty over the islands in the Western Pacific should she be pleased to do so, and it follows that if complete sovereignty and jurisdiction over the islands and their inhabitants and the residents for the time being therein may be declared, a sovereignty--a jurisdiction--of a limited character and for certain purposes may equally well be declared. Now, for the purpose of affording protection to the inhabitants of the islands of the Western Pacific and for the further purpose of better government and control of Her Majesty's subjects in those islands, Her Majesty has been pleased in virtue of Her royal prerogative to declare that she has power and jurisdiction within certain of these Western Pacific Islands. Now the Sovereign may, in virtue of Her royal prerogative, exercise in every place where she has jurisdiction the right of appointing judicial and other officers, and, in all places which have been acquired by cession or conquest, the sovereign possesses the sole power of legislation until that power is parted with by the grant of a local legislature. Now this assertion by Her Majesty that she possesses power and jurisdiction within the Western Pacific Islands is, for the purposes of legislation, equivalent to the actual conquest by or cession to Her Majesty of these islands...'.

The prerogative of the Crown in external affairs has, in what may be described as the 'domestic' constitutional law of the United Kingdom, the obvious interest necessarily inherent in a self-evidently significant branch of the public law. For dependencies of the United Kingdom, and former dependencies, the interest is clearly dual. More problematically where the dependency remains foreign territory, in the 'dominion' stricto sensu the prerogative of the Crown in external affairs provides its constituent authority,--in addition to and quite apart from the conduct of its external relations by the Crown; whether the Crown 'in right of'[44] the United Kingdom, or,--the embryo being at length evolved into the likeness of the original,--'in right of' the Commonwealth country. In dependencies such as protectorates and protected states which remain throughout foreign territory, the activity of the Crown is juridically rather impalpable, for the whole system of 'law' there enforced by the Crown may prove on analysis to be,(at least quoad aliens) one complex of acts of state of the United Kingdom executive[45]

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44. If the Board in Williams v. Howarth [1905] A.C. 551 (Earl of Halsbury, L.C., Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley and Sir Arthur Wilson) be regarded as excluding the view that the Crown is the head of a series of quasi-corporations, one must retreat to finding a single personality-with several civil capacities or 'rights'. But what juridical act is sufficient to create a separate 'right' of the Crown? The creation of a jurisdiction with a separate legislature? Why then is there not a 'Crown in right of the North-West Territories of Canada'? Hood Phillips, Constitutional and Administrative Law, 4th ed. (London, 1967) p. 716 ff. at p. 720, considers the problems, and his conclusion cannot be improved upon: '[N]o formula yet devised is adequate to explain all the facts.' See most recently R. v. Secretary of State for the Home Department, Ex parte Shadeo Bhurosah, [1967] 3 All E. R. 831 (C.A.).

45. See, for example, R. v. Earl of Crewe, Ex parte Sekgome, [1910] 2 K.B. 576; on appeal from a Divisional Court of the King's Bench Division; The Times, Tuesday, December 14th, 1909, p. 3b. Vaughan Williams L.J., there held that the political detention of a native in a protectorate could be legally justified as an act of state (p. 606), though he implied that this was not necessary to decide; and Kennedy L. J., was of the same view (p.506). The Privy Council in Sobhuza II v. Miller,[1926] A.C. 518, at p. 523 thought that the expropriation of native interests in land could be 'referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890.'

with the usual incidents of executive acts. One would scarcely expect, for example, that the Crown can lose to aliens the (executive) prerogative of committing acts of state as it can lose to its subjects the (legislative) prerogative[46]; though the terms of the Foreign Jurisdiction Act, 1890[47] admit the argument that foreign jurisdiction is to be assimilated to that exercised in 'conquered and ceded territories' [i.e., apparently, those which have become the Queen's dominions], leading Sir Kenneth Roberts-Wray to treat (executive) prerogative action in protectorates, as analogous to the legislative prerogative in conquered and ceded lands: a result somewhat less implausible in view of the late rather eccentric development of executive quasi-legislation by the English Queen's Bench in Reg. v. Criminal Injuries Compensation Board, Ex parte Lain.[48]

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46. At least its 'legislative' power under the Foreign Jurisdiction Acts cannot be fettered by its executive acts: The North Charterland Exploration Company (1910) Limited v. The King [1931] 1 Ch. 168. Luxmoore, J., (at p.187) doubted whether 'since the passing of that Act [the Foreign Jurisdiction Act, 1890] the decision in the case of Campbell v. Hall can have any further operation.' See the dicta of Vaughan Williams, L.J., in R. v. Earl of Crewe, ex parte Sekgome [1910] 2 K.B. 576 at 606, which assume, though they do not decide, that it could be possible for the Crown to lose its absolute power in a protectorate by the grant of a constitution; and similarly in Nyali Ld. v. Attorney-General [1956] 1 Q.B. 1 at p.33 per Lord Parker, C.J.: 'Unless and until her powers are curtailed by the constitution set up for the territory or by the law made applicable therein, Her Majesty governs by virtue of the prerogative.'

47. 53 & 54 Vict., c.97, s.1: 'It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.' This may be construed as permissive only, and not as abrogating executive power.

48. [1967] 2 Q.B. 864 (Lord Parker, C.J., Diplock, L.J., and Ashworth, J.); Roberts-Wray, op.cit., pp.165 ff.; 187 ff. at p.193.

For the Queen's dominions stricto sensu, at any rate, the Crown, standing astride the horizon of their legal memory, provides for them their constituent authority. Law, and the state, as correlatives, find their foundation in the Crown. For settled territories, settlement under the authority of the Crown introduces the English common law and applicable statute law.[49] For conquered or ceded territories, the old laws may indeed continue until altered by the Crown or Parliament;[50] but their continued authority is attributable to the Crown, for at least the basic English public law is automatically introduced;[51] as Lord Stowell held in Ruding v. Smith:[52]

> 'Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it,--the administration of the law in the sovereign, and appellate jurisdictions--and all the laws connected with the exercise of the sovereign authority--must undergo alterations adapted to the change.'

Sometimes, of course, as in that case, the introduction of English has been widely interpreted; on other occasions, so narrowly as to induce the Privy Council to find in Donegani v. Donegani[53] that in Quebec after the cession:

> 'By the change of sovereignty, it happened that the law of England, and not the law of France, would of necessity determine the question who were aliens or not; but when the fact of alienage was established according to the English law, the civil consequences of alienage would be determinable by the local, that is, the Canadian law...'.

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49. Blankard v. Galdy; 2 Salk. 411, 91 E.R. 356; 4 Mod. 222, 87 E.R. 359; Comb. 228, 90 E.R. 445; Holt, 341; 90 E.R. 1089; Kielley v. Carson, (1841-2) 4 Moo. P. C. 63; Memorandum reported in (1772), 2 Peere Williams' Reprots 75; Blackstone's Commentaries on the Laws of England (Oxford, 1766) p. 106 ff.; The Lauderdale Peerage, (1885) 11 App. Cas. 692; per Lord Blackburn at p. 744-5.

50. Ibid., and esp. Campbell v. Hall, (1774) 1 Cowp. 204.

51. See the authorities collected by Roberts-Wray, op cit., p. 541 ff.; 559 ff.

52. (1821) 2 Hag. Consist. 371; 161 E.R. 774 (Consistory Court of London). The passage is taken from 2 Hag. Consist. at p. 383.

53. (1834-5) 3 Knapp 63; at p. 82 per Sir Lancelot Shadwell, V.-C

That case merely involved interests in land; but the principle was carried in Re Adam[54] to the lengths of applying the French law of Mauritius to determining the power to expel aliens; surely a critical matter of public law. In Corse v. Corse,[55] the three judges of the Quebec Superior Court severely criticized Donegani v. Donegani;[56] Smith J., observed:[57]

> '[T]he principle laid down seems to us to be erroneous. There it was ruled that the public law of England should determine who is an alien, and that determined, recourse should be had to the French law to learn his disabilities. We think this is wrong. You cannot separate the definition of what an alien is from what he can do. That is the practical result. What an alien is, is merely a definition; but to establish his rights is what is important.'

Mondelet J., added:[58]

> 'To say that the law of England shall decide what an alien is, and the Coutume de Paris what his disabilities are, is not only a contre-sens, but an impossibility.'

Day J., concluded:[59]

> 'I have always thought that there was a want of soundness in the distinction made in that case, between what an alien is, and what his disabilities are. The law of aliens rests upon grounds of public policy, and is derived from the authority of the sovereign to deal with his own subjects and with foreigners, on different conditions; and to decide that parties having no stake in the country shall not hold property in the country. It is based on the allegiance due from the subject to the sovereign, and is not a penalty but a matter of expediency and public policy.'

He, however, would have followed the Privy Council against his own view had he not been relieved by statute from the need to do so.

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54. (1837) 1 Moo. P.C. 460 (Lord Lyndhurst, Lord Brougham, and the Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy.)

55. (1854) 4 L.C.R. 310 (Lower Canada Superior Court).

56. (1834-5) 3 Knapp 63.

57. (1854) 4 L.C.R. 310 at p. 314.

58. Ibid., p. 315.

59. Ibid., p.316.

60. [1906] A.C. 542.

The Privy Council, as to the expulsion of aliens, at least, seems to have beaten something of a retreat in Attorney-General for Canada v. Cain[60] where (though the foregoing decisions of their Lordships' Board were cited) the prerogative of expulsion, held 'delegated' by statute to the Attorney-General for Canada was based on wider principles; particularly, that upon the cession of Canada:[61]

> 'The Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel, or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests...'.

Many have been the vicissitudes of the rule respecting the application of English public law in conquered and ceded lands.[62] In Quebec, at least, English law is generally applied as, of course, to public law matters, with a few exceptions;[63] perhaps a good working rule may be constructed by taking Blackstone's definition of prerogative as a model: public law consists of those rules which attribute liabilities/rights, privileges, immunities, or powers, by reason of a public function [the undefined variable], and out of the ordinary course of the law.

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61. [1906] A.C. 542 at 545; inter alia, Campbell v. Hall was cited.

62. See Union Government Minister of Lands v. Estate Whittaker, 1916 A.D. 194, and cases therein cited.

63. See inter alia Anctil v. The Queen [1959] Ex. C.R. 229; A.-G. v. Black (1828) Stuart's Reports (K.B.) 324; Chaput v. Romain [1955] S.C.R. 834; Campbell v. Judah (1884) 7 L.N. 147; Durocher v. Degré (1901) 20 C.S. 456; Drapeau v. Langlois [1950] R.L. 209; Silberberg v. Caron [1951] C.S. 131; Ex parte Levesque [1951] C.S. 140; [1951] B.R. 212; Exchange Bank of Canada v. The Queen (1886) 11 App. Cas. 157; Monk v. Ouimet (1874) 19 L.C.J. 71. In these the matter is adverted to. In hundreds of others, the English authorities are simply applied without comment.

Thus, in conquered and ceded, and settled, dominions, alike, the authority of the Crown serves as constituent base. The legal continuity of the Commonwealth country is traced from the first introduction of the legal order with the Crown (taking the more congenial view that the two are correlative, and that the constitution follows the flag)[64] or by the Crown, taking the exercise of its authority as a

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64. Even with the exceptions noted in Dicey and Morris on Conflict of Laws, 8th ed. (London, 1967) Ch. 35, p. 1110 ff., how unco-ordinated must an empire, or a federal state, be thought, where the law in one part of the Queen's dominions, is fact elsewhere. The rule there stated that the Supreme Court of Canada will in an appeal from one province notice the laws of the others, was qualified in C.N.S. v. Watson, [1939] S.C.R. 11, by Duff C.J.C., who required at least allegation.

The imdications in Buck v. Attorney-General, [1965] 1 Ch. 745, that constitutional questions will be treated like all other questions of law, so that, while they will not themselves constitute a cause of action or basis for declaration, they may be ruled upon if justiciable rights are involved, is a welcome departure from Boardman v. Grand Trunk Railway Company of Canada, (1933) 49 T.L.R. 218, apparently overlooked in the recent case; where, after argument inter alia as to whether the Chancery Division could rule on the validity of certain Canadian Acts of Parliament and Orders in Council and agreements thereunder, Luxmoore, J., dismissed the action for lack of jurisdiction though, it would seem, justiciable rights were in issue as plaintiff sought a declaration not only of the point of law but of his rights in certain stock. The forum was thought in any case non conveniens; it may be that that sufficed to uphold the result. Counsel were Gavin Simonds and Sir Partick Hastings. (See also Buck v. Attorney-General, The Times, June 2, 1962.)

There is also increasing indication that 'the constitution follows the flag' in the sense that the Queen's judicial process will follow the Queen's executive and legislative authorities even into foreign territory, to review and control its action; though not to impugn otherwise valid prerogative action by act of state or otherwise. Compare, for example, R. v. Earl of Crewe, Ex parte Sekgome, [1910] 2 K.B. 576, and dicta therein on the availability of process; the detention being supported on the merits but Kennedy L.J. upholding the availability of process while Vaughan Williams L.J. denied it but found it unnecessary to decide; and Ex parte Mwenya, [1960] 1 Q.B. 241, where the Court of Appeal held that habeas corpus lay from the English Queen's Bench to a protectorate, though the latter was of course outside the Queen's dominions. See also R. v. Secretary of State for War, Ex parte Price, [1949] 1. K.B. 1; R. v. Secretary of State for Foreign Affairs, Ex parte Greenberg, [1947] 2 All E. R. 550, at p. 556.

prior constituent act.

A subject thus once perhaps a trifle condescendingly dealt with as 'colonial law',[65] and as such, now senescent, is today studied, from a partly different standpoint, as the basis of law and authority in independent states, and, in this light, invites anew the attention of learned authors.[66] As such it is a matter of practical daily import; for example on the applicability of English statutes in settled territories, and on the applicability of English rules in conquered and ceded ones, accordingly as the rule may be characterized as being iuris publici or iuris privati. To examine some of the aspects of this corpus of law is to examine the foundations of authority in modern states, not to succumb to mere archaism. Nor could even the contemplation of the 'new Athanasianism'--the many Crowns reconciled within the one--justly be taxed as simple indulgence in high-state aestheticism (high state being to low state as high church is to low church). Though it were undertaken as no more, the time would yet be propitious for a mere historical exercise: 'The owl of Minerva spreads its wings only with the falling of the dusk.'[67] But, in the end, the true lawyer will identify

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65. Anthony Stokes, A view of the Constitution of the British Colonies (London, 1783); Charles Clark, A Summary of Colonial Law (London, 1834); Sir Henry Jenkyns, British Rule and Jurisdiction Beyond the Seas (Oxford, 1902); Sir Charles James Tarring, Chapters on the Law Relating to the Colonies, 4th ed. (London, 1913); are a few of the leading general works on the subject.

66. See Lord Denning's Foreword to Roberts-Wray, Commonwealth and Colonial Law (London, 1966), p. v; and note also T. O. Elias, British Colonial Law (London, 1962). The classic work of Sir Kenneth Wheare, The Statute of Westminster and Dominion Status 5th ed., (Oxford, 1953) has become The Constitutional Structure of the Commonwealth (Oxford, 1960).

67. T. M. Knox, ed. and trans., Hegel's Philosophy of Right (Oxford, 1942) p. 13.

himself by making no more than a pretence at apology: for Tom Paine's strictures against ultra-sepulchral government,[68] what did Maitland himself care?[69]

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68. 'The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies.' Thomas Paine, The Rights of Man (1791), (London, J.M. Dent, Everyman's Library, 1954), p. 12.

69. The Forms of Action at Common Law (Cambridge, 1962) p. 2.

CHAPTER II

PARLIAMENTARY PRIVILEGES IN THE DOMINIONS: THE PRINCIPLES ARE ESTABLISHED

I. The Facts of Dr. Kielley's Case

Even if "warre of all men against all men" be not the natural human condition, partisan controversy is, it is clear, the natural condition of legislative assemblies: controversy which, even when confined to the prescribed forum--the floor of the house--keeps the law of parliamentary privilege ever topical in the most venerable Parliaments, as in the youngest. The Newfoundland House of Assembly may, perhaps, have lacked in Dr. Kielley's Case[1] some of the imagination of the House of Commons at Westminster in Lloyde's or Floyde's Case,[2] which ordered that the culprit should, inter alia:

> 'be brought to Westminster, into the great Yard before the Door of the great Hall of Pleas, and be there set, and stand, upon the Pillory, from Nine until Eleven of the Clock in the Forenoon, with a Paper upon his Hat, with this inscription, in capital letters, of these words; "For false, malicious, and dispiteful speeches against the King's Daughter, and her Husband;" and from thence shall presently ride to the Exchange within the City of London, upon a Horse, without a Saddle, with his Face backwards towards the Horse Tail, holding the Tail in his Hand, with the former Paper on his Head...'

nor was Dr. Kielley's counsel given quite the same opportunity to demonstrate his elusiveness vouchsafed to counsel in R. v. Paty,[3] who fled from the Serjeant-at-Arms through the

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1. Kielley v. Carson (1838) 2 Nfld. L.R. 91 (Supreme Court of Newfoundland); (1841-2) 4 Moo. P.C. 63; 13 E.R. 225 (Privy Council); being the trespass action. In the Matter of the Imprisonment of Edward Kielley (1838) 2 Nfld. L.R. 72 (Supreme Court of Newfoundland); proceedings in habeas corpus. The account given below is taken from these reports. See generally, D.W. Prowse, History of Newfoundland (London, 1895) pp.444 ff.

2. (1621) Commons Journals (1547-1621) pp.608-9; referred to in Erskine May's Parliamentary Practice, 17th ed., p.102, as Floyde's Case.

3. (1704) 2 Ld. Raym. 1105; 92 E.R. 232 (Court of Queen's Bench). Counsel sought a writ of error, which would have brought before the Lords a question as to the privileges of the Commons. Commons Journals (1702-4), 549 ff. Cited by Erskine May,

third-floor window of his Temple chambers, with rope and bedsheets. Nevertheless, events in Newfoundland barely five years after the opening of its first Assembly[4], apart from giving rise to the leading case on privilege in the dominions overseas, seem to confirm these propositions: first, that problems of parliamentary privilege tend to be the more complex and legally interesting--if not invariably more entertaining--in proportion as they spill over the confines of the assembly wall and involve outsiders; and second, that they tend to be the more entertaining--if not always the more complex and legally interesting--in proportion as the community in which they occur is the smaller and less developed, and its legislature the younger.

So far as can be ascertained from the conflicting testimony, Dr. Edward Kielley--who greatly resented aspersions cast upon him by John Kent, a member of the House of Assembly speaking from his place as such, on the subject of the St. John's hospital--met the latter in the streets of St. John's on August 6, 1838. The doctor claimed to have asked civilly whether relief could be afforded to a certain poor man who had applied to him, but to have been abused in response as

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The Law, Privileges, Proceedings and Usage of Parliament, 17th ed. (London, 1964) p.158.

4. On January 1, 1833, under the authority of a proclamation of William IV given at St. James's, July 26, 1832, which provided for the mode of election and quorum of the Assembly; itself actually summoned under the authority of Letters Patent bearing date March 2, 1832, appointing Sir Thomas John Cochrane governor of Newfoundland, and pursuant to accompanying instructions of July 26, 1832. See The Consolidated Statutes of Newfoundland, 1874, Appendix, p. xxxix, and Clark, A Summary of Colonial Law (London, 1834) p.435. The Imperial Statute 2 & 3 Will. IV, c.78 (1st August, 1832) envisages the summoning of the Assembly, and empowers the Sovereign with its consent to repeal or amend certain Imperial Statutes extending to Newfoundland, but does not itself profess to confer either authority to summon the Assembly or the power generally to legislate with its consent. See generally, Gertrude E. Gunn, The Political History of Newfoundland, 1832-1864 (Toronto, 1966), for an account of the period. The creation of this (representative) legislature is prerogative, therefore, notwithstanding its attribution by, for example, Miss Gunn, at p.11, to the Act 2 & 3 Will. IV c.78; and by Forsyth, Cases and Opinions on Constitutional Law

a 'cormorant and robber of the poor'. Mr. Kent insisted that the doctor had then shaken his fist in his face, and, threatening to pull his nose and calling him a 'lying puppy', warned him that he had it in for him and that his privileges would not protect him. Dr. Kielley admitted responding sharply, but denied all reference to the Assembly or its privileges.

Mr. Kent now appealed to the House; Dr. Kielley was arrested on August 6th by the Serjeant-at-Arms of the House of Assembly on the warrant of Mr. Speaker Carson, and was compelled to give security for his appearance before the House. On August 7th, the Speaker ordered his appearance at the Bar, informing him of Mr. Kent's complaint and of the report of a committee of the House finding, after examination of witnesses, 'a gross breach of the privileges of the House' which 'if allowed to pass unnoticed would be a sufficient cause of deterring members acting in the independent manner so necessary for a free Assembly'. Dr. Kielley 'observed that he was not aware that his conduct would be considered as a breach of the privileges of the House or he should have been sorry to have acted as he did'; and asked leave to explain the cause of the private quarrel, but was refused by the Speaker and ordered to retire. Being again ordered to the Bar by the House, which had agreed to hear him, he denied using language referring to the privileges of the House and complained that certain influences 'had for years been exercised to ruin him in his professional practice.'

> 'In the course of a rather lengthy address, during the delivery of which he was evidently under the influence of highly excited feelings, it appears that some expressions fell from Dr. Kielley which were considered by the House as an aggravation of his offence, and a further breach of their privileges '[5]

(London, 1869) p.27, to the Statutes 5 & 6 Vict., c.120 and 10 & 11 Vict., c.44. The present author's view is plainly supported by the remarks of Parke B. for the Board in Kielley v. Carson, (1841-2) 4 Moo. P.C. 63 at p.85 and p.86; quoted post p. 63.

5. (1838) 2 Nfld. L.R. 72 at p.73-4.

--in particular, attacking Mr. Kent as 'a liar and a coward'. The doctor was ordered to retire and it was resolved that he remain in the custody of the Serjeant-at-Arms until further orders. After some debate, a resolution moved by Mr. Kent, declaring that Dr. Kielley's conduct at the Bar was a contempt and ordering him into the custody of the Sheriff of Newfoundland and the gaoler of the district to be lodged in the common gaol until he should make an apology in a manner and form to be dictated by the House, was considered precipitate and ordered to stand over to the next day, and the House adjourned.
On resumed debate on August 8th, an amendment was carried that 'the House deem it inexpedient to proceed to extremities'; and that the doctor be ordered to the Bar to make an apology, and reprimanded but discharged if he complied with its terms. A letter from the doctor was read apologizing for his conduct before the House on the day previous, but when called to the Bar, and on hearing read to him the terms of an apology which he was to accept or reject, he declared that he 'could not, consistently with his sense of honor, make the apology required.' His withdrawal being again ordered, the original resolution was carried on Mr. Kent's motion, and Dr. Kielley was accordingly led through the streets by the Serjeant-at-Arms with his mace, to gaol and the sheriff's custody.

The doctor lost little time in applying for a writ of habeas corpus,[6] which was granted on affidavit by Lilly, J., argument taking place on August 9th in Chambers, whither the prisoner was brought up. After argument, the judge ordered Dr. Kielley's release, promising reasons in extenso later.

Undaunted by this temporary setback, the Assembly proceeded against Justice Lilly, the doctor, and the doctor's counsel. Noting that the last-mentioned was an officer of the Upper House and accordingly immune from the Assembly's proceedings for contempt, the Assembly resolved that he be not

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6. (1838) 2 Nfld. L.R. 72

admitted as the bearer of any messages from the Council; a resolution rescinded two days later.

On August 10th the House of Assembly, having formed itself into a Committee of Privileges, resolved--on the motion, it will have been guessed, of Mr. Kent--that Justice Lilly and the High Sheriff were both guilty of breaches of privilege for releasing the doctor, and ordered their arrest, along with that of Dr. Kielley. The Sergeant-at-Arms accordingly arrested Justice Lilly in Chambers whilst actually performing his functions; and, bearing his mace, dragged the Judge through the streets of St. John's, followed by a jeering mob, to the Speaker's rooms, and thence to the Serjeant's house. The sheriff suffered the same fate.

Governor Prescott, taking the obvious course, proceeded on August 13th to the Council Chamber, and, having summoned the Assembly to the Bar, drily observed:[7]

> 'It having been represented to me that an Assistant Judge of the Supreme Court has been arrested by order of the House of Assembly, in consequence of a decision made by him in his judicial capacity; and that the Sheriff has also been arrested for having obeyed a mandate of his superior, the said Judge, founded upon that decision--I feel myself compelled to have recourse to a prorogation for the purpose of putting a stop to proceedings which, independently of any question as to their legality, seem wholly unsuited to the character and condition of the Colony, and calculated to subvert that respect which is due, and which it is highly expedient that all classes of society should render to the Administrators of the Law in the exercise of their functions.'

Of the litigation arising from these events, the habeas corpus proceeding and its result--Dr. Kielley's release from custody--has already been adverted to. Prorogation having freed the learned Judge to hand down his reasons on the same day, his Lordship ruled[8] first, that the Assembly had no general title to the privileges enjoyed, by virtue of the lex et con-

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7. (1838) 2 Nfld. L.R. 72 at 77.

8. (1838) 2 Nfld. L.R. 72 at 77.

suetudo parliamenti, by the House of Lords and House of Commons; second, that it had in particular no 'power of punishing summarily for a breach of their privileges by imprisonment',[9] and, third, that the warrant was in any event on its face invalid because defective.

But Dr. Kielley's subsequent action for assault and battery and false imprisonment[10] against Speaker Carson and others, was heard by a bench of three judges; and on this occasion the Supreme Court, by a majority (Bourne, C.J., and Des Barres, J.; Lilly, J., dissenting) found for the defendants on the law--upholding the Assembly's privilege claims. It was this cause that went on appeal to the Privy Council, whose judgment of reversal,[11] pronounced by possibly the most remarkable constellation of eminent judges ever assembled together in that tribunal, finally laid down the law in the sense suggested by Justice Lilly, overruling not only a considerable body of colonial precedent, but also an earlier Privy Council judgment of the very Lord whose task it was to deliver the opinion of the Board on this occasion, Baron Parke,[12] commonly accepted

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9. The terms of his own question, put loc. cit. at p.78, and answered in the negative.

10. Kielley v. Carson, (1838) 2 Nfld. L.R. 91 (Supreme Court of Newfoundland); (1841-2) 4 Moo. P.C. 63; 13 E.R. 225 (Privy Council).

11. Kielley v. Carson, (1841-2) 4 Moo. P.C. 63; 13 E.R. 225; heard by Lord Lyndhurst, L.C.; Lord Brougham; Lord Denman; Lord Abinger; Lord Cottenham; Lord Campbell; Sir Lancelot Shadwell, V.-C.; Sir N.C. Tindal, Lord Chief Justice of the Common Pleas; Mr. Baron Parke; Mr. Justice Erskine; Rt. Hon. Dr. Lushington.

12. The earlier decision was, of course, Beaumont v. Barrett, (1836) 1 Moo. P.C. 59; 12 E.R. 733, heard in the Privy Council by Sir Lancelot Shadwell, V.-C., Mr. Baron Parke, Mr. Justice Bosanquet, and Hon. Thomas Erskine, Chief Judge of the Court of Bankruptcy; on appeal from the Court of Errors of Jamaica; see Supreme Court Decisions of Jamaica, 1774-1923 (London, 1924), 2 vols.; vol. 1 , p.433; (1835) MacDougall's Reports, p.73.

The reporter, Moore, is content to say in his headnote to the later decision, that the principles of the earlier were "examined"; Sir William Buell Richards, Chief Justice

as one of the luminaries of English law.

II. The Precedents

There was indeed no lack of precedent, whether of legislative practice or judicial decision, for the assumption and exercise of the privilege of committal for contempt in the Queen's dominions overseas by local assemblies--which appear to have acted, more often than not, on the premise that the privileges of the House of Commons inhered in them by virtue of the common law, or at least by usage, despite what appears to have been a prevailing contrary view of counsel.[13]

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of Canada, understood the one as "virtually reversing" the other: Landers v. Woodworth, (1878) 2 S.C.R. 158 at p.179, and this despite his sympathy for the earlier view upholding the privilege to commit: 'All my early reading, historical, political and legal, led my mind to give a ready assent to the doctrine, that it is one of the incidents to the possession of supreme legislative power, however limited the sphere for the exercise of that power (and though controlled by the Legislature of the Empire), that the Legislature exercising such power should have the right to punish parties for contempt. If they cannot do so, they are shorn of much of their dignity, and, in many respects, their influence and usefulness will be much impaired.' Per Richards, C.J., at p.176. In Fenton v. Hampton, (1858) 11 Moo. P.C. 347; 14 E.R. 727 (where the Lord Chief Baron, Sir Frederick Pollock, delivered the opinion of a Board consisting of himself and Rt. Hon. Lord Justice Knight Bruce, Rt. Hon. T. Pemberton Leigh (as he then was), and Rt. Hon. Lord Justice Turner), the Privy Council thought that Kielley v. Carson had raised 'the same question, in substance' as Beaumont v. Barrett, and that they were bound by Kielley v. Carson, 'the greater authority of which...it is quite unnecessary to enlarge upon': (1858) 11 Moo. P.C. 347 at p.396-7. In Doyle v. Falconer, (1866), L.R. 1 P.C. 328, their Lordships (Lord Westbury, Sir James Colvile, and Sir Edward Vaughan Williams) referred, parenthetically, to Kielley v. Carson as having 'overruled' Beaumont v. Barrett: loc. cit. at p.339, and this view has always prevailed in the Privy Council. John Chipman Gray made this case the example of the Privy Council overruling its precedents: post p. 58 n. 86.

13. Opinions of counsel were usually unfavourable to the assumption by local Assemblies of the privileges of the Commons, but frequently seemed to suppose that the law on this subject could be qualified by the 'local constitution' (which might mean no more than local statute); by usage (which was assumed, apparently, to be effective against the common law, but, even if merely evidence of the common law, would imply that the common law could differ from colony to colony; and by prescription. This raises the problem of the beginning of legal memory of an overseas dominion (is it the time of acquisition by the Crown? even when, as in conquered and ceded territories, the Crown merely continued, with certain changes, existing institutions?) and also the problem of the prescriptibility of the law; see on this point, Ramsay, J., in Ex parte Cotté

During its 1817 session, the Lower Canada Legislative Assembly committed Samuel Wentworth Monk to the common gaol during pleasure; the Court of Queen's Bench, releasing him at

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& Duvernay, (1875) 19 L.C.J. 210 at p.214 ff.(reported with Ex parte Dansereau, ibid.); his Lordship, reviewing the principles and precedents cited in support of the acquisition of privileges by usage, and discussing English legal memory and the lex et consuetudo parliamenti, said at p.215: 'No colonial dependency of the Crown of England, therefore, can have any such usage established in favor of its Legislative Chambers or of the members thereof. Their history is not sufficiently long, nor is it requisite in our day that privileges of this sort should be allowed to grow up under the plea of usage.' Though his Lordship was, of course, in dissent in the judgment given by a full bench in Ex parte Dansereau, ibid., only Sanborn, J., (at p.245) appeared to rely on usage by itself, as distinct from the basis of 'common law incident', to support the result of the majority; and in any event, Ex parte Dansereau, except so far as it is based on the Statute 33 Vict., c.5 (Que.) which conferred privileges by positive enactment, is a decision inconsistent with Kielley v. Carson, and not good law: per Richards, C.J., in Landers v. Woodworth, (1878) 2 S.C.R. 158 at p.191.

As regards usage, consider also the words of Chipman, C.J., for the Supreme Court of New Brunswick (Chipman, C.J., Botsford, Carter, Parker and Street, J.J.) in Hill v. Weldon, (1845) 3 Kerr 1, at p.47, where the Court, following Kielley v. Carson, rejected the contention that the New Brunswick House of Assembly might lawfully arrest and imprison the publisher of a libel upon a member of the House concerning his conduct in the House; and, dealing with an argument seeking to found this power on usage, said this: 'Has the House of Assembly then acquired this power by usage and custom acquiesced in and recognized? When the terms, acquiescence and recognition, are made use of, it is admitted that it is not an acquiescence of the Courts of Justice or recognition by law that is meant. The acquiescence spoken of is an unresisting submission to the exercise of the power of the House of Assembly wherever it was deemed necessary to enforce it, without any interference on the part of the Courts or Government with the exercise of such power--no call being made for the interposition of either. It is impossible that the right in question could be conferred by any such usage or acquiescence. It is no more than saying that the House has the right because it has asserted and exercised it, and no one objected. Usage and acquiescence may sometimes justify the inference that a right or power has been legally communicated, because it may be argued that unless it were legal it would not be submitted to; but then the presumed law is the foundation of the claim, and not the mere practice, which can never of itself make law.' [Emphasis added.]

As for counsel's opinion, see, for example, the rather cautious response of Sir William Murray and Sir Richard Lloyd, then respectively Attorney-General and Solicitor-General, in an opinion given on April 29, 1755, to the claim of the Jamaica Assembly 'calling in question His Majesty's right of issuing writs for electing members to sit in the assembly, without waiting for a message first from them'...'whilst the assembly is sitting'; the law officers replied that 'What the assembly claims seems analogous to the law and practice here; but it does not from thence follow that it is, or ought to be, the law there;

prorogation on habeas corpus proceedings,[14] observed per curiam, on the basis of the English decisions, that counsel had 'acted rightly' in avoiding 'all arguments upon his commitment and upon the inaccuracies, if any, of the warrant by which he was confined'. Though the Court's dictum that 'the question before us is thus limited to the enquiry, "whether the provincial parliament is prorogued"',[15] may most convincingly be attributed to reluctance to enter upon the decision of

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that must depend upon their own constitution and usage, which, without further light, we cannot venture to give an opinion upon.' George Chalmers, Opinions of Eminent Lawyers (originally published in London, 1814), American edition (Burlington, Vt., 1858), p.292-3 and p.352-3.

Compare the foregoing with the opinion of Charles Pratt, then Attorney-General, upon a dispute between the two Houses of the Maryland legislature: '[O]ur House of Commons stands upon its own laws, the lex parliam., whereas assemblies in the colonies are regulated by their respective charters, usages and the common law of England, and will never be allowed to assume those privileges which the House of Commons are entitled to justly here, upon principles that neither can, nor must be applied to the assemblies of the colonies...I shall only add here a general piece of advice to Lord Baltimore, that in this disposition of the lower house to assume to themselves any privilege which the English House of Commons enjoy here, his Lordship should resist all attempts where they are unreasonable, with firmness, and should never allow any encroachments to be established on the weight of that argument singly; for I am satisfied that neither the Crown, nor the parliament, will ever suffer those Assemblies to erect themselves into the power, and authority, of the British House of Commons.' Chalmers, Opinions, p.264-67.

In a similar sense, Sir Edward Northey and Sir Simon Harcourt (the latter subsequently Lord Chancellor), as Attorney and Solicitor-General, upon the mode of punishing an absentee representative of the Barbados Assembly: 'there being no power expressly lodged by Her Majesty in the assembly to punish such offences, they may be proceeded against in Her Majesty's ordinary courts of justice there, and punished by fine and imprisonment.' (February 1, 1704-5); Chalmers, Opinions, p.295. Emphasis added.

Note especially the opinion of Sir A. Cockburn, A.-G., and Sir R. Bethell, S.-G., that 'the law and practice of Parliament, as established in the United Kingdom, are not applicable to colonial legislative assemblies, nor does the rule of the one body furnish any legal analogy for the conduct of the other.' (Feb. 15, 1856) Cited by Forsyth, Cases and Opinions on Constitutional Law (London, 1869) p.25. Emphasis added. By this time, of course, the leading case had been decided, Kielley v. Carson (1842), (supra, note 12); Sir Richard Bethell was himself, as Lord Westbury, to play a part in applying it in the important case of Doyle v. Falconer, (1866), L.R. 1 P.C. 328.

14. Ex parte Monk, (1817) Stuart's Reports (L.C.K.B.) 120.

15. Loc. cit., p.121.

unnecessary points, and especially those raising inflammatory questions; and though Ex parte Monk[16] seems clearly to have decided no more than that:

> 'Without determining therefore, whether the detention of Mr. Monk was legal or illegal, whether the warrant, by which he is detained, is accurate or inaccurate, in point of form, or whether his commitment in any respect was right or wrong, we must discharge him upon the ground that the period for which he was committed has expired.'

the case has nevertheless been cited from time to time as authority for the privilege of committal itself.[17]

In McNab v. Bidwell,[18] an action in damages for trespass and false imprisonment brought against the Speaker and another member of the House of Assembly of Upper Canada for gaoling the plaintiff for the alleged contempt of having refused to answer certain questions, put to him by a select committee, concerning the 'Hamilton outrage'[19] and the threatened release from prison, by force, of one Francis Collins, the Chief Justice, Hon. John Beverley Robinson, finding for the defendants, thought that[20]

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16. (1817) Stuart's Reports (L.C.K.B.) 120 at p.121

17. Case of Daniel Tracey, (1832) Stuart's Reports (King's Bench) 478; per Kerr, J.; at p.502; per Bowen, J., at p.510 (though cited only as a parliamentary, and not a judicial, authority); per Taschereau, J., at p.515. Ex parte Cotté and Duvernay and Ex parte Dansereau, (1875) 19 L.C.J. 210, at p.214 per Ramsay, J., who, however, thought it overruled by Kielley v. Carson and subsequent cases; per Dorion, C.J., at p.232. Per Taschereau, J., in Landers v. Woodworth, (1878) 2 S.C.R. 158 at p.207; his Lordship, however, deferred (p.208) to Doyle v. Falconer, (1866), L.R. 1 P.C. 328.

18. (1830) Draper's U.C.K.B. Rep. 144

19. Apparently a reference to the hanging in effigy of Sir John Colborne, Governor of Upper Canada, arising from his refusal to pardon Francis Collins, editor of the Canadian Freeman and an agitator for reform and responsible government, who had been convicted of criminal libel; see A. Dunham, Political Unrest in Upper Canada (London, 1927) p.127

20. (1830) Draper's U.C.K.B. Rep., 144 at p.146

21. (1811) 14 East 1; 104 E.R. 501.

> 'As a mere legal question, the point in this case seems to me to be so free from difficulty that it is unnecessary to labour it, and I shall not consider it, in its several branches, with that minuteness which would be proper if I entertained doubts upon the subject.'

The learned Chief Justice, following Lord Ellenborough's classic judgment in Burdett v. Abbott,[21] attributed the Commons' privileges to common law as expounded by reference to principle,[22] quite apart from precedent, or prescription from time immemorial, or the fiction of a lost statute;[23] nor was his Lordship content to rest the provincial privilege on the introduction into Upper Canada of the English law respecting property and civil rights, or even English law generally; in Canada, too, it must rest on the common law, interpreted as, in his view, principle demanded:[25]

> 'if, a priori, and independently of precedents, such a body as the House of Commons must be armed with an authority to commit for contempts, and thereby to remove any immediate obstructions to its proceedings, I think the same power, for the same reasons, must be admitted to reside in the House of Assembly here: for that Assembly represents all the people in this province: it has, in conjunction with the other branches of the legislature, power to bind the lives, liberties, and estates of all the inhabitants of this country.'

His Lordship added:[26]

> '[I]t is obvious that it would soon become utterly helpless and contemptible, if it had not the power of deterring persons from

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22. (1830) Draper's U.C.K.B. Rep., 144 at p.155.

23. Ibid., at pp.150 and 154.

24. Ibid., at p.151.

25. Ibid., at pp.151-2.

26. (1830) Draper's U.C.K.B. Rep. 144 at pp.152-3.

> menace, defiance, and insult, by the exertion of such authority as is confided in all countries, under our constitution, to the common courts...'

and, finding a delicate formula for the assumption of Commons privileges:[27]

> 'I do not say, that because the British House of Commons has the power, therefore, under our adoption of the law of England, the same power is vested in the House of Assembly as a body perfectly similar; but I consider the question in this way:- the fact that the House of Commons assumes and exercises the right shews, that it is felt to be necessary in order to enable them to discharge their duties. I think the same necessity exists here, and, from principle, the same consequence in my opinion must follow such a necessity.'

Sherwood, J., concurred on the somewhat narrower grounds that the Assembly had simply enforced a properly-exercised right of inquiry to gain information which might be needed for legislation, for disciplining members by expulsion, or for making representations to Westminster, adding that[28]

> 'If if should at any time evidently appear, in the manner required by law, that the Legislative Council, or House of Assembly, had committed one of the King's subjects for some matter which could not, with the least semblance of truth, be considered a breach of privilege according to the established principles of our constitution and the laws of the land, courts of justice would do their duty and grant such relief as the law prescribes.'

Accordingly, even McNab v. Bidwell does not provide firm authority for a power of committal in the extreme, judicially-unreviewable, form upheld however reluctantly in England[29] by

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27. Ibid., at p.154.

28. Ibid., at p.157.

29. See generally, Erskine May, op.cit., 17th ed. (London, 1964) Ch. VII, p. 89 ff., esp. 92-8; also Ch. IX, p.150 ff; Burdett v. Abbott (1811) 14 East 1; 104 E.R. 501; Case of the Sheriff of Middlesex, (1840) 11 A. & E. 273; 113 E.R. 419.

judges who might well consider it sufficient accomplishment merely to incorporate the privileges into the lex terrae.[30]

The Case of Daniel Tracey[31] was taken to the Lower King's Canada Bench in 1832 upon habeas corpus proceedings arising out of a committal by the Legislative Council for a libel on itself. Counsel,[32] apart from challenging the validity of the committal for lack of a hearing, sought without more success to induce the court to distinguish committal for actual obstruction from committal for libel.[33]

In upholding the privilege claimed, Kerr, J., who, though characterizing the Council as 'a type and similitude of the house of lords'[34] did not concede them 'like the house of lords, a right to fine, or imprison beyond the session, nor such extensive privileges as the house of lords and commons possess'[35],

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30. See generally, May, op.cit., 17th ed. (London, 1964) Ch. IX, where a detailed history of judicial views of parilamentary privilege is given; Stockdale v. Hansard (1839) 9 A. & E. 1; 112 E.R. 1112, being at once the classic statement of the view that privilege was parcel of the law of the land, and of the manner in which that view could be and was disputed.

31. (1832) Stuart's Reports (Lower Canada) 478; King's Bench (Kerr, Bowen, and Taschereau, JJ.)

32. Andrew Stuart, 'confessedly one of the ablest men Canada ever produced,...the brother of Chief Justice [Sir] James Stuart...'; later briefly Solicitor General of Lower Canada (1838-40): A.W. Patrick Buchanan, K.C., The Bench and Bar of Lower Canada Down to 1850 (Montreal, 1925) pp.79-80. George O'Kill Stuart, the reporter of the decision, who gives the argument in extenso, then a new member of the Bar and later a judge of the Superior Court, appears to have been his nephew: op.cit., p.104. A contemporary was Sir William Blackstone's son Henry, Sheriff of Three Rivers (1799-1805) and later, Coroner of the District Quebec (1811-1825) until his death at age 62; 'Blackstone was educated at Oxford, and was a man of great ability. He came to Canada in 1797': Buchanan, op.cit., pp. 71 and 82.

33. The British Constitution was rather tartly described as 'bringing down with much pure gold and with an inextinguishable vitality some of the rubbish of a rude age.' (p.498)

34. (1832) Stuart's Reports, 478 at 499.

35. Ibid., p.500.

asked whether 'the exercise of the power of proceeding summarily and committing for a libel against the legislative council' could 'be refused to them, without their sinking into utter contempt and inefficiency'.[36] In deciding 'how far the legislative council and assembly may proceed to enquire summarily, and to commit during the session, for contempt',[37] his Lordship added the by-now-commonplace qualification:[38]

> 'I beg it to be understood that I am not prepared to say that no case could occur, or be presented to us in any shape, of assumed privilege, in which this court might not feel itself bound to relieve the subject from a commitment.'

Bowen, J., concurring, cited Blackstone and Holt,[39] and the English decisions, and held them applicable by analogy:[40]

> '[T]he privilege in question does not depend as has been argued in the present instance, upon the judicial authority vested in the body exercising the right of imprisonment for libel; but upon the principle of self defence as much and as correctly applicable to the legislative council as a branch of the provincial legislature as it can possibly be to either branch of the Parliament of Great Britain.'

A classic statement of that viewpoint which held that the privileges of the Imperial Houses of Parliament pass as common-law incidents to the houses of the legislatures in the dominions overseas, is perhaps that of Taschereau, J.,[41] in

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36. Ibid.

37. Ibid., p.502.

38. Ibid.

39. 1 Blackstone Commentaries 164; Holt on Libel 117, cap.8. Cited loc.cit., pp.504-5.

40. At p.510.

41. Apparently Justice Jean-Thomas Taschereau, père, 1778-1832; Justice of the Lower Canada King's Bench 1827-32. He had been arrested with Messrs. Bédard and Blanchet, the other owners of the Canadian newspaper, for "treasonable practices"

this case:[42]

> 'This province enjoys a constitution similar to that of England, in virtue of a particular statute, it is true, to make laws for the welfare and good government of the province. Although the statutes mention only this power, it does not deprive the colonial legislature of their powers which are inherent and necessary to bodies constituted to perform their duties with liberty, independence and for the general good. Each body of the colonial legislature must have in itself the elements of its own preservation and possess those rights which are inherent to similar bodies, and without which it would be constantly exposed to contempt and destruction. Then where, to what country or body must it look to seek for its powers and protecting laws, if it is not to the bodies,-- both houses of imperial parliament,--who have given the country a participation in a free, but strong and powerful constitution, capable of maintaining itself? If in England this power is recognized as inherent in the constitution, that is to say, as a parliamentary law necessary to the independence of their bodies, as a law of the country, it exists in this country. In granting us the constitution, Great Britain has given us the laws to protect it.'

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in 1810: see Case of Pierre Bédard (1810) Stuart's Reports (L.C.K.B.) 1; post p. 116-7.

42. (1832) Stuart's Reports (L.C.K.B.) 478 at 512; the excerpt is found at p.514. Some of his Lordship's dicta tend to reflect the most extreme view of privilege put forward in England; i.e., that the Houses were exclusive judges of their own privileges, a claim last made by the Westminster House of Commons in 1837, according to Erskine May: see generally, May, "Jurisdiction of Courts of Law in Matters of Privilege", Ch.IX of Parliamentary Practice (17th ed., 1964) p.150 ff.

Thus, Taschereau, J., said at p.515: 'We cannot take cognizance of its privileges, it belongs ad aliud examen. The habeas corpus act in England could not certainly give to one judge alone in chambers, or to a court the power of judging the privileges of the lords and common, neither then can the habeas corpus act give us the right of judging the privileges of the legislative council or assembly.'

His Lordship's words came but a few years before the famous case of Stockdale v. Hansard (1839) 9 A. & E. 1; 112 E.R. 1112, decisively established that the Courts of Law, at least, would not acquiesce in pretensions of that character; even if, by taking notice of Erskine May's conclusion that 'the old dualism remains unresolved' (op.cit., 17th ed., p. 173) they sometimes acknowledge the existence of another viewpoint and so lend it a certain standing: In re Parliamentary Privilege Act, 1770, [1958] A.C. 331, per Viscount Simonds, at p.353.

Infinitely the most impressive support for the views of the majority in the Newfoundland Supreme Court in Kielley's Case was, however, to be found in the Privy Council decision in Beaumont v. Barrett[43] which had come before their Lordships from Jamaica two years earlier. The Assembly of Jamaica, having taken offence at certain paragraphs in a newspaper, had vindicated its honour by committing for contempt; its exercise of this power was sustained by both the Supreme Court and the Court of Errors of the Island.

The Supreme Court of Jamaica 'entertained no doubt of the power of the House of Assembly to commit for contempts'[44] and were wholly uninfluenced by arguments that the Legislature of Jamaica 'is not a Parliament, but a legislative corporation created by the King's Charter to make laws for the internal government of the colony; that it is not a 'High Court of Parliament', and that it has not the power of impeaching; and being in these respects so different from the House of Commons of England, no decision which has confirmed to the British Parliament the power of committal for contempt, and the sole and exclusive right of determining what amounts to a contempt, can apply to this case.'

> 'It does not appear to the Court to be necessary to define the character of the assembly of this Island--it is enough for us to consider the nature of the duties which that body has to perform, and then, be it a legislative corporation or a Parliament, to determine whether the form of committing for contempt is not necessarily inherent in it to enable it to preserve its independence, maintain its dignity, and accomplish the object of its institution.'

This question,(whose emphatic affirmative answer on

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43. (1836) 1 Moo. P.C. 59; 12 E.R. 733 (Judicial Committee: Sir Lancelot Shadwell, V.-C., Mr. Baron Parke, Hon. Thomas Erskine).

44. Supreme Court Decisions of Jamaica (1774-1923), (London, 1924) Vol. 1 , p.433 at 434; see also (1835) MacDougall's Reports 73.

principle alone[45]

> 'In the absence of all precedent, it might fairly be inferred, that a body constituted for the purpose of making laws for the public welfare and the good government of the Island, would have necessarily inherent in it the power of summarily punishing those who obstruct its proceedings, for unless it possessed this power, it would be almost impossible that it should be able to perform effectively its important duties. This power is nothing more than the right of self-protection, and such a body must, à priori, be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be.'

was approved by the Privy Council on appeal,[46] was supported with both judicial and legislative precedent.[47]

Though the Board's expression of reluctance to overrule the Courts below[48]

> 'as these Courts are to be presumed to be cognizant of the law of the island, and have both decided that the power of imprisonment for the contempt in question was inherent in the House of Assembly, and that it was rightly exercised, we ought not to pronounce a contrary opinion, unless we saw clearly they had not that power, or did not properly use it, if they had;

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45. Ibid., p.435. Again, at p.437, following Lord Ellenborough in Burdett v. Abbott, (1811) 14 East 1; 104 E.R. 501, 'The necessity even of the case upon principles of natural reason, seems to require that such a body as the House of Assembly, instituted for such purposes as have been noticed, should possess the power of committing for contempts, which power, from its creation down to the present time, it has claimed, and, in fact, exercised.'

46. (1836) 1 Moo. P.C. 59; 12 E.R. 733

47. See esp. pp.435-7. An account is given of the Case of Cook and McNeil (1764), released, after argumeny of counsel, upon habeas corpus, by Governor Lyttleton, acting as Chancellor, from the custody of the Sergeant-at-Arms; the Governor's successor in the administration of the government, Lieutenant-Governor Roger Elliston, summoned the Assembly to the Council Chamber (1766), and announced that he had ordered as Chancellor the offending proceedings to be vacated, instructing the Registrar in the presence of the three branches of the Legislature to enter a vacatur in the records.

48. (1836) 1 Moo. P.C. 59, 73 at pp.74-5

> and in saying that, we cannot come to any such conclusion'

may be used to show that the Privy Council ruling in Beaumont v. Barrett was directed particularly to the local law of Jamaica, it seems plain that their emphasis was rather on a priori principles than upon those local precedents with which, if principal reliance were to be upon the Island Courts, those Courts must be familiar and which must constitute the reason for that reliance.

The ratio decidendi is all the more demonstrably to be discovered in Baron Parke's a priori pronouncement that[49]

> 'it would appear, I think, to be inherent in every assembly that possesses a supreme legislative authority, to have the power of punishing contempts, and not merely such as are a direct obstruction to its due course of proceeding, but such also as have a tendency indirectly to produce such an obstruction, in the same way as Courts of Record may not only remove or punish persons who actually are interrupting their functions, but may also repress those who indirectly impede the administration of justice, by disparaging and weakening their authority,

in that these words were in terms expressed to be delivered[50]

> 'without adverting for the present to what has been done by the Assembly, from the time its constitution was given to it in the year 1680, or relying upon the precedents laid before us',--

so that it would be virtually impossible for Baron Parke to distinguish Newfoundland from Jamaica on the "facts"--which, indeed, he made only a half-hearted attempt to do when the question was reconsidered in Kielley v. Carson[51]. Beaumont

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49. Ibid., p.76. Emphasis added.

50. Ibid. Emphasis added.

51. (1841-2) 4 Moo. P.C. 63; at p.90, 'the constitution and practice of different colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another,'...And, referring to Beaumont v. Barrett: 'The opinion of their Lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial;

v. Barrett was, and was intended to be, of perfectly general application. And if any doubt could remain as to the views of the Board in Beaumont v. Barrett as to the general incidence of the power to punish for contempt, or as to the general principles upon which they held that power to rest, such doubts must be dispelled by the dictum[52] that:

> 'Now if we apply that principle to this legislative body, which appears to possess supreme legislative authority over the whole of the island and its dependencies, we must in like manner say, that they have incidentally the power not only of punishing direct impediments to their proceedings, but indirect obstructions, such as are caused by libels reflecting on their conduct, and tending to bring their authority into contempt, and that independently of any precedent for its exercise.'

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but besides, it was stated to be and was entirely founded on the dictum of Lord Ellenborough in Burdett v. Abbott, which dictum we all think cannot be taken as authority for the abstract proposition, that every Legislative body has the power of committing for contempt. The observation was made by his Lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further.'

52. (1836) 1 Moo. P.C. 59 at p.78; emphasis added.

III. Kielley's Case and Privilege in Legal Principle and Public Policy

Faced, therefore, at the time of Kielley's Case, in the summer of 1838, not only with a series of colonial decisions favourable to the privilege of committal for contempt, but with a recent Privy Council judgment taking the same view in terms which must at least be described as unequivocal, he would have been a bold prophet indeed who would have ventured to predict success in the Courts for the doctor's challenge of the Newfoundland Assembly's privilege claims.

The lengths to which the Assembly had pressed the powers which it assumed were doubtless decisive in favour of Justice Lilly's conclusion; it may be doubted whether their Lordships could have been induced to abandon their own previous jurisprudence, enunciated by one of the most eminent of their number, had it not been for their alarm at the results of the fact that, in Justice Lilly's words,[54]

> 'such absolute powers as these are claimed to be exercised by a body, not being a Court of Record--scarcely six years in existence--consisting of but fifteen individuals, of whom six only form a quorum--eligible upon a qualification which in England would not entitle them to a vote for a member of Parliament--without the sanction of any law, usage or precedent--and having other abundant means of protection and redress, but merely because the House of Commons, forming with the House of Lords the Supreme Court of the Realm, and consisting of several hundreds of the most eminent men in the nation, for talent, learning, wealth and influence, exercise similar powers and privileges, originally assigned to them by a positive statute, and sanctioned by immemorial usage from the remotest ages.'

The implications of admitting such pretensions were strikingly clear; the circumstances of Dr. Kielley's case would fully indulge the greatest appetite for arguments ab inconvenienti.

That such considerations may have lost much of their force

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54. Re Edward Kielley, (1838), 2 Nfld. L.R. 72 at pp.87-8

can scarcely, it is submitted, justify any departure from Kielley v. Carson,[55] for the principles of that decision are surely supported as fully by its policy to-day as they were then, though now to be underscored rather by the trend at Westminster towards consistency with the philosophy of Kielley v. Carson, than in resistance of the claims of colonial assemblies to be assimilated to the Commons at Westminster.

But even were this not so; even were it to be supposed that policy justifies in the Dominion assemblies today the full measure of the lex et consuetudo parliamenti, the dictates of the fundamental postulate of the common law--that the judicial decision is in contemplation of law declaratory--is plainly outraged by any suggestion that an assembly can be taken to have gained suddenly at some arbitrary time[56] any increment of privileges; Kielley v. Carson[57] can therefore be departed from only at the price of its total repudiation as a correct statement of the common law; and it is plainly far too well established for that.[58]

Whether the privileges of the respective Houses of the United Kingdom Parliament, and more particularly those of the Commons, be attributed rather to the common law than to the legal fiction of a statute before the time of legal memory; or whether the latter solution be preferred; the choice would in no way seem determinative of the question as to how far these privileges have been introduced into the dominions overseas. The emphasis put by Lilly, J., on the antiquity of the privileges at Westminster would seem unwarranted; if anything, the more successfully they can be shown to be an

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55. (1841-2) 4 Moo. P.C. 63

56. Earldom of Norfolk Peerage Claim, [1907] A.C. 1; esp. p.12 per Earl of Halsbury; at p.15 per Lord Ashbourne; at p.16 per Lord Davey.

57. (1841-2) 4 Moo. P.C. 63

58. See ante p. 32 n. 12.

integral part of the common law, the more reason there is to conclude that they have been introduced with the common law[59] into the territory in question. But even the attribution of the Commons privileges to statute, fictitious or not, would scarcely seem to prejudice in any very material way the question of their introduction into the dominions, since English statutes applicable to the condition of the territory are held to be introduced, equally with the common law,[60] into colonies, whenever the common law is introduced in a body; and, conversely, that portion of the English law relating to the privileges of the Houses at Westminster, if held inapplicable to these territories, would seem not the less inapplicable for being the work of a statute than for being parcel of the common law; if anything, quite the contrary. If the view of the courts, therefore, is that the Westminster privileges are inapplicable, they will scarcely be deterred from so holding by reason only that the privileges are statutory. Indeed, successfully assimilating the Commons' privileges to the common law serves, if anything, as an argument in favour of their introduction into the dominions of the Crown; it is, therefore, curious that the learned judge so persistently presses such a view; thus[61]

> 'Its laws, customs and usages, which Sir Edward Coke and all the old writers style the lex et consuetudo Parliamenti, were from the earliest times held and considered to be part of the law of the land, and in that respect a part of the Common Law...'

and again

> 'If not the whole, the greater part therefore of these laws, customs and usages are coeval with the Common Law.'

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59. Or, in conquered and ceded territories, that part of the common law forming the public law of the new dominions; see, e.g. Ruding v. Smith, (1821) 2 Hagg. Consist. 371 at p.382; 161 E.R. 774; this will include the privileges of an assembly created therein by the Crown: Doyle v. Falconer, (1866) L.R. 1 P.C. 328 at p.341

60. See, for example, the rule as stated by Lord Blackburn in The Lauderdale Peerage, (1885) L.R. 11 App. Cas. 692 at 744-5

61. (1838), 2 Nfld. L.R. 72 at p.89

One might, indeed, rather have supposed it more to the learned judge's point to show that these privileges were indeed in England 'innovations'--the product perhaps of statute rather than of the common law--and, best of all, of statute within legal memory--and as such peculiarly English and inapplicable to the colonies. If the emphasis on the antiquity of usage in England be designed to contrast unfavourably with a recent colonial usurpation, that demonstration would seem, on the judge's own terms, either unnecessary--the evidence of the common law stemming from the colonial usage [itself insufficient to support the privilege claim,] being merged in the satisfactory evidence derived from English usage [sufficient in Lilly, J.'s view to show the common law]--or else futile, no amount of colonial usage being sufficient to legalize the unlawful acts.[62] In sum, English parliamentary privilege not being, at all events, the creature of statute within legal memory, even if occasionally recognized by statute, it does not seem to matter whether we attribute them to the common law or to lost statute antedating legal memory; in either event, the privileges pass if 'applicable'--itself a common law rule--and not otherwise.

The judicial decisions disclose, as we have seen, a sharp divergence in view as to whether the privileges pass as incidents to the houses of colonial legislatures upon their creation. We have also seen arguments of a formal

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62. Ante p.33 , n.13; Wilkes v. Wood, (1763) 19 St. Tr. 1153; Lofft, Michaelmas Term, p.1; Entick v. Carrington, (1765) 19 St. Tr. 1030; 2 Wils. 275.

    Lilly, J., is evidently uneasy about allowing de facto exercise of power to serve as a foundation in law for that power; thus, in speaking of the exercise of the power of committal by Assemblies in other colonies, the learned judge observes: 'The most probable foundation for the exercise of such power is long practice, not questioned in the first instance, and, after lapse of time and repeated exercise grown into an usage, and recognized perhaps by the Courts of Law. If so, such a power became to be, as regards such colony, in some respect part of the law of the land.' (p.84; emphasis added)

character, based upon the sources, on the one hand, of colonial law and on the other, of the lex et consuetudo parliamenti, designed to influence the decision one way or the other, but have suggested that they cannot determine the issue.

The conclusion that formal or analytical considerations are not decisive, and that the usual forms of legal reasoning do not point to one result as necessary or desirable for smooth integration into, and consistency with, the general corpus of the law, leaves the matter in the end open to conflicting views of expediency and public policy, to be settled by the final tribunal. Let us retrace the paths which the various judges took towards their differing judgments in the litigation arising from Dr. Kielley's Case.

IV. Kielley's Case in the Courts

Mr. Justice Lilly, whom events made a central figure in the celebrated dispute, had occasion to pass upon them judicially twice; first, in the habeas corpus proceedings which caused his involvement as an actor;[63] and again, in the trespass action against the Speaker.[64] The structure of his argument appears to consist in a major premise offering three alternative bases for demonstrating that the local Houses enjoy full 'Westminster privileges', if we may sobriquet them; and in a minor premise negating each, to produce a conclusion that these privileges do not, in fact, pass.

The alternatives offered are, first, express grant by statute or prerogative instrument; second, passage as a common law incident by analogy to Westminster; and third, passage as a common law incident upon the rule that every ancillary right passes with the principal grant which is necessary to prevent its purpose being defeated.

Negating the first alternative offers no difficulty. The instruments under which the Assembly was created do not mention such privileges; it[65]

> 'commenced to exist by virtue of a Commission from His late Majesty to the Governor of the Colony, empowering him to convoke General Assemblies from among the inhabitants of the Island, who, in conjunction with the Governor

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63. (1838) 2 Nfld. L.R. 72 (judgment delivered August 13, 1838)

64. (1838-9) 2 Nfld. L.R. 91 (judgment on demurrer being delivered in January term, 1839). 'The question is, in a great measure, the same one...': (1838-9) 2 Nfld. L.R. 91, per Lilly, J., dissenting in Kielley v. Carson, the trespass action, heard by a Supreme Court bench consisting of Bourne, C.J., DesBarres, J., and Lilly, J.

65. (1838) 2 Nfld. L.R. 72 at p.81

> and Council, were to make laws and ordinances for the good government of the Colony, not repugnant to the Acts of the Imperial Parliament. But is there in this Charter contained any thing which erects the House of Assembly of the Island into a body of the same power and authority, and possessing the same rights and privileges as the Imperial House of Commons? There is not.'

Nor could the Imperial statute book assist:[66]

> 'Is there any Statute or Act of the Imperial Parliament which defines their rights, powers and privileges, and declares them to be, within their jurisdiction, coequal in power with the House of Commons? There is none.'

His Lordship's trident is ready to puncture equally the second alternative:[67]

> 'Whence then--by what authority, and from what source, do they derive the power which they have exercised on the present occasion? I am given to understand that it is by analogy to the House of Commons and the Assemblies of other British Colonies--that is, because the House of Assembly is the representative branch of the local Legislature, it is therefore necessarily invested with all the privileges and powers acknowledged to belong to the House of Commons, as well as the customs and usages of the Houses of Assemblies of other colonies.'

Regarding the position in other colonies as irrelevant--based possibly on local statute or judicial decision or custom--his Lordship also rejects the analogy with Westminster.

One argument of a certain strength to distinguish the English and colonial situations consisted in the enjoyment by the United Kingdom Parliament of powers of judicature extending admittedly beyond anything that could be said to inhere in colonial legislative Houses--though in some territories the Council was an appellate court as well as an executive body serving often also as an upper legislative House. Thus, Lilly,

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66. Ibid.

67. Ibid.

J., said: [68]

> 'Every one who has sufficiently read the history of our mother country well knows that anciently the two Houses of Parliament sat together, and formed what then and after their separation was and still is called the High Court of Parliament--a Court of the remotest antiquity, of the highest dignity, and of the most unlimited power and authority within the realm. Its laws, customs and usages, which Sir Edward Coke and all the old writers style the lex et consuetudo Parliamenti, were from the earliest times held and considered to be part of the law of the land, and in that respect a part of the Common Law; and at the time of the separation of the two Houses, which was as early as the 49 Hen.III., the privileges enjoyed and the functions uniformly exercised by each branch of the Legislature were, in the opinion of Lord Ellenborough, by formal act at the time of their separation, statutably assigned to each.'

and again: [69]

> 'this power of the House of Commons, to commit for the like offence, originates, among other sources in its being part of the Highest Court of Record in the Realm, whose powers and privileges were originally assigned by statute, and have been sanctioned by immemorial usage...'

and similarly: [70]

> 'It is now, however, and indeed always has been clear law, that the House of Commons does lawfully possess the power of commitment for contempt, as in the nature of a breach of privilege--a power recognized by Statute as having been anciently exercised by them, equally applicable to the House of Lords, for they are one and the same in this respect (the Grand Council of the realm divided into two different parts), and carrying with them those powers which they collectively exercised before their separation.'

though it is not clear how--apart from its power of impeachment--the House of Commons differs in its judicial powers from the average colonial lower House; the only response is to allow it to form, in some vague sense, part of the Court of Record--'the King in Parliament'--whose authority is to all intents exercised by the House of Lords alone.[71]

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68. (1838) 2 Nfld. L.R. 72 at p.79

69. Ibid., at p.86

70. Ibid., at p.80

71. For authorities respecting the dispute upon whether or how far the Commons are a Court of Record, see Erskine May, 17th ed., at p.90 and 102. See post, p. 66 n. 107.

Here, then, Lilly, J., found one of his two points of distinction between the United Kingdom House of Commons and the Newfoundland House of Assembly:[72]

> '[O]ur House of Assembly does neither by itself nor in conjunction with the Council form a Court of Record; neither do the Council and Assembly together, nor does either, separately, form a Court of Judicature; nor does it possess the power of impeachment--one of the highest powers of the House of Commons, which may consequently commit even for a crime in order to an impeachment. The House of Lords, as is well known, is the highest Court of Record, and possesses supreme appellate jurisdiction with the realm; but does the Council of this Island, the upper branch of the Legislature, in the least respect whatever exercise analogous powers?'

the other being that:[73]

> 'our Assembly is not equal in power, even within this Colony, to the Imperial Parliament, to which it, as well as all other Legislatures in the Queen's Dominions, is subordinate--whose constitution is as yet liable to alteration by the Sovereign Power which granted it, and whose existence may, by an Act of Parliament, at any time be terminated.'

His Lordship, indeed, invoked opinions given as Attorney-General by Charles Pratt, later to be Lord Camden and to hold office as Lord Chief Justice of the Common Pleas and as Lord Chancellor,[74] whose view and prediction that not only did the local assemblies have no right to the privileges of the Commons, but 'neither the Crown, nor the parliament, will ever suffer those Assemblies to erect themselves into the power and authority, of the British House of Commons', while poor prophecy, were to prove good common law.

It is surely on this point--the acceptability of the analogy--that the result--ultimately one of policy--must turn;

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72. (1838) 2 Nfld. L.R. 72 at p.82

73. Ibid.

74. Ibid.; and see ante p. 34-35 n.

for, if one should once accept, as did the Privy Council in the end, that the analogy fails, we are left only with the argument that the Westminster privileges are a necessary incident; and that view of necessity must surely be liberal indeed which calls the privilege of committal necessary. It is difficult to improve upon the words of Lilly, J., in this connection[75]

> 'If it be said that it is necessary to the House of Assembly to possess the power of punishing summarily, as for a breach of their privileges, (whatever these privileges may be assumed to be) as the House of Commons do, I deny it also. They are entitled, and I will admit particularly entitled to protection in the due performance of their functions, but the laws of the land are equally open to them as to every other lawfully constituted body, and amply sufficient to punish all offenders against that freedom and protection to which they are entitled. Their sittings are not necessarily open to the public, though it is most desirable they should be, but certainly they of all public bodies should know how to preserve order and decorum in their meetings, and of all public bodies would undoubtedly have the fullest aid of the constituted authorities to protect them. If, then, the power of imprisonment is not absolutely necessary, to them, it cannot for any other reason that I can discover, if indeed it could possibly upon this one, be said to be inherent in them (as some would have it) any more than the power of impeachment or any other of the extraordinary powers of Parliament is inherent in them.'

or again[76]

> 'I am far from denying to the House of Assembly, relatively with the other branches of the Legislature, the existence of certain privileges, as incident to their condition, but surely if it be deemed desirable or expedient, that they should possess further powers and privileges, and especially vindictive ones, they have in their own hands the means of legally acquiring them. It is quite competent for the Assembly, by an enactment in which the different branches of the Legislature may concur, to define and establish by law such powers and privileges...'

But while the remarks of Mr. Justice Lilly in Re Kielley,[77]

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75. (1838) 2 Nfld. L.R. 72 at p.86-7

76. In Kielley v. Carson, (1838) 2 Nfld. L.R. 91 at p.103-4

77. (1838) 2 Nfld. L.R. 72

the habeas corpus proceedings which he had heard alone in Chambers, were the views of the court in accordance with which judgment was rendered ordering Kielley's release, his Lordship's similar observations were given in dissent in Kielley v. Carson,[78] the trespass action brought against Mr. Speaker Carson, Mr. Walsh, the messenger, and Mr. Kent and other members of the House of Assembly. Of the majority of the Newfoundland Supreme Court in the latter case, DesBarres, J., stressed Lord Ellenborough's emphasis, in Burdett v. Abbott,[79] upon the necessity, on a priori principles, of the Westminster privileges of committal, noting that[80]

> 'bodies constitutionally exercising Supreme Legislative functions of the nature of the British House of Commons, and convoked by Royal Authority--must have the power of committing as for a breach of privilege necessarily inherent in them independent of any precedent. General convenience must always outweigh partial inconvenience. If it be warranted by Common Law it cannot be shewn to be illegal by any consequences drawn from Magna Carta...'

and brushing aside the need for colonial custom or prescription on the ground that the common law of England applied to Newfoundland.[81]

> 'It is quite unnecessary for me to follow the argument of counsel as to the discovery and settlement of this colony by English subjects, and to decide, according to his view, what laws shall be admitted and what rejected, at what time and under what circumstances. The fact that the general Common Law of England does operate throughout this Colony, is clearly manifested by reference to the proceedings of our Supreme

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78. (1838-9) 2 Nfld. L.R. 91; a better account of the parties named defendants will be found in the report of the Privy Council decision, (1841-2) 4 Moo. P.C. 63 at p.63 and p.65

79. (1811) 14 East 1; 104 E.R. 501.

80. (1838-9) 2 Nfld. L.R. 91 at p.108

81. (1838-9) 2 Nfld. L.R. 91 at p.109

> Court, where may be learned that the laws of the land are liable to frequent and most sudden changes in their course from analogous points adjudicated differently in the superior tribunals of England, and to which our Colonial Tribunals are required to conform. In the present case, for example, where the counsel at the Bar argued for ten hours at least upon adjudicated cases in England, it would have been unnecessary trouble, had not the principal or Common Law of England extended to the colony. Notwithstanding so much care and attention has been bestowed upon this important case, the strongest and most advantageous position, in my humble opinion, yet remains unnoticed. By an Act of the Imperial Parliament, now in force, this Court is made to determine according to the laws of England so far as the same can be applied.'

The concurring opinion of Bourne, C.J.,[82] who relied[83] more heavily on Beaumont v. Barrett[84], is striking not only for his testing 'necessity' purely by authority of decided cases, but for his assumption that no court considering the necessity of a power of committal could be engaged in any such thing as passing on the policy of such a power;[85]

> 'Speculative opinions may vary as to the comparative advantage or danger of endowing Legislators with the power to imprison without having recourse to the medium of the ordinary legal tribunals; whilst some may consider this necessary, (especially to the representatives of the people), for their self-protection, their freedom of debate, their full ability to inquire and collect facts and material previous to discussion; others may feel alarm that any body of men, (even though elected and trusted by a majority of their constituents), should be the arbiters in their own case, and may fear lest so vast a power should not all occasions by exercised in a manner sufficiently discreet and temperate. Leaving topics like these to be weighed by those who make and can alter laws, Judges, (who can do neither) have only to consider and interpret what the law is...'

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82. Ibid. at p.112 ff.

83. Ibid. at p.114 and 117

84. (1836) 1 Moo. P.C. 59

85. (1838-9) 2 Nfld. L.R. 91 at pp.112-13

On appeal to the Privy Council, the case was first heard by Lord Brougham, Sir Lancelot Shadwell, V.-C., Mr. Justice Erskine, and the Rt. Hon. Dr. Lushington; but, presumably as a result of doubts then felt as to the soundness of the Board's earlier decision in Beaumont v. Barrett, rehearing was ordered before a Board of eleven whose collective judicial eminence can scarcely have been equalled in the annals of the Privy Council, including as it did no less than four Lord Chancellors, past, present, and future, not to mention the heads of the great common law courts of Westminster Hall. Those present were the Lord Chancellor, Lord Lyndhurst; Lord Brougham; Lord Denman; Lord Abinger; Lord Cottenham; Lord Campbell; Sir Lancelot Shadwell; Sir Nicholas Tindal, Lord Chief Justice of the Common Pleas; Mr. Baron Parke; Mr. Justice Erskine; and Rt. Hon. Dr. Lushington.

The judgment of the Board was delivered by Baron Parke, who was thus allowed to repent rather than to be overruled[86] by someone else; and his Lordship's observation that the new ruling is unanimous is almost pointed:[87]

> 'We all, therefore, think that the opinion expressed by myself in the case of Beaumont v. Barrett ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the Common Law, that the House of Assembly have not the power contended for. 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.'

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86. For authorities treating Beaumont v. Barrett as overruled by Kielley v. Carson, see ante p. n. ; indeed, John Chipman Gray, The Nature and Sources of the Law, 2nd ed. (New York, 1924), ch.ix, p.217, uses the two cases as authority for the proposition that the Privy Council does not consider itself bound by its previous decisions: 'Thus the decision that a colonial legislature had a Common Law power to punish contempts, which was made in Beaumont v. Barrett, was overruled in Kielley v. Carson, the same judge, Baron Parke, delivering the opinion in both cases.'

87. (1841-2) 4 Moo. P.C. 63 at p.91

Some attempt was indeed made to suggest,(seemingly in order to distinguish the earlier case,) that the central dicta had been, in some measure, at any rate, obiter:[88]

> 'There is no decision of a Court of Justice, nor other authority, in favour of the right, except that of the case of Beaumont v. Barrett, decided by the Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by mysedf, immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extra-judicial; but besides, it was stated to be and was founded entirely on the dictum of Lord Ellenborough in Burdett v. Abbott, which dictum we all think cannot be taken as an authority for the abstract proposition, that every Legislative body has the power of committing for contempt. The observation was made by his Lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further.'

though it is not easy to see upon what other basis than common-law incidence Beaumont v. Barrett could be supported, unless it be long usage in Jamaica. Admittedly the Board equivocated upon this as a possibility in some territories:[89]

> 'It was however argued that in other colonies, the Legislative Assemblies exercise the power of committing for breach of privilege without objection, and that the usage in this respect was good evidence that such power was an incident attached by the Common Law, though not on the ground of necessity. And no doubt this argument would have had much weight, if there had been many Legislatures situate precisely as this is, and the usage to exercise the power of committal for breach of privilege had been frequent, and the acquiescence in its exercise long and universal, and that usage could have been explained only on the ground that the power was a legal incident. But no such usage has been proved, and the constitution and practice of different colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another. In some, the very exercise of the power,

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88. Ibid.

89. Ibid., p.90-91 ; and see In re Ewart (1864) S.C.J.B. 1, p. 47: (Jamaica); reported in Steqhens, ed., Supreme Court Decisions of Jamaica 1774-1923 (London, 1924), vol. 2, p. 1080; post p. 114

> with the sanction of the tribunals, and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law. But in this case, we have the simple question to decide, without any usage, any acquiescence, or any sanction of the Courts of Law, except in the very case in which we are now called upon to affirm or reverse the Judgment of the Court below. It remains to be considered how the question stands on express authority; and unless there be that satisfactory authority expressly in favour of the power, we must hold that the Common Law does not confer it.'

but this is wholly unsatisfactory as obliging reliance either on usurpation within time of legal memory, or the presumption of lost grant prior to a shorter colonial legal memory; which, as that memory will extend to all the colonial constituent acts, must mean reliance on a grant to the Legislature antecedent to its own creation.[90]

The scope of the question before the Board for decision is several times restated in the body of the judgment in materially differing ways; thus, at the outset it is said that[91] (I)

> 'The main question raised by the pleadings... was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly...'

and, more widely rephrasing the question:[92] (II)

> 'in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon complaint of contempt or breach of privilege';

or, again, the question was whether:[93] (III)

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90. See ante, p. 33 n. 13.

91. Ibid., at pp.83-4; emphasis added.

92. Ibid., at p.84; emphasis added.

93. Ibid., at p.86; emphasis added.

> 'by law, the power of committing for a contempt not in the presence of the Assembly, is incident to every local Legislature.'

Answers given by the Board included the statements that[94] (IV)

> 'Their Lordships are of opinion that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors...'

and, wider still, that[95] (V)

> 'the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not.'

One is therefore constrained to ask whether Baron Parke is dealing with all or some, and which, of the following powers: (1) arrest, before condemnation, with a view to adjudication; (2) adjudication upon a breach of privilege; (3) committal to prison as a punishment; (4) punishments for contempt other than by way of committal (as, for example, suspension of a member); and whether his Lordship is, in some or all of the foregoing cases, distinguishing (i) contempts committed in the presence of the legislature from (ii) contempts committed outside.

The last question, at least, can be answered with some certainty. Passages quoted above numbered (I), (III) and (IV) expressly include qualifications restricting the decision to offences committed out of the Assembly. His Lordship seems to have entertained a distinct reluctance to deal with contempts in the face of Assemblies, and fell back upon technicalities

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94. Ibid., at p.84; emphasis added.

95. Ibid., at p.88; emphasis added.

of pleading to avoid passing on the contempt which Dr. Kielley was alleged to have committed at the Bar of the Assembly while addressing it:[96]

> 'It is indeed stated in the plea of the Defendant Carson, and that of the other Defendants, members of the House, that something occurred which might amount to a contempt, committed in the fact of the Assembly, by the use of the violent and threatening words to one of the members then present in his place; but each plea also justified the original arrest of the Plaintiff below upon a warrant issued by the Speaker, founded on the complaint of a breach of privilege committed out of the House: and if the House of Assembly had not a power to issue that warrant, this part of such plea is bad; and as each plea is entire, the whole is bad.'

The question, in short, whether acts done in the face of the Assembly are to be distinguished from things done away from it, is expressly left open:[97]

> 'The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise in this case.'

But what, then, was decided? Baron Parke, for the Privy Council, succinctly states the classical rules as to the constitutional law of settled colonies:[98]

> 'Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother-country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament); and on the other hand, the Crown

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96. Ibid., p.84; this rather wide statement of the question in issue seems to have the support of the Privy Council in Doyle v. Falconer (1866) L.R. 1 P.C. 328 at p.339; post, p.89 where the Board finds in Kielley a general decision against punishment of and even adjudication upon contempts outside the Assembly.
97. Ibid.
98. Ibid., pp.84-5.

> possesses the same prerogative and the same powers of Government that it does over its other subjects...';

notes, in passing, the power of the Crown to summon a representative legislature, and the exercises of that power:

> 'nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign had not merely the right of appointing such magistrates and establishing such Corporations and Courts of Justice as he might do by the Common Law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the colony, for the government of its inhabitants. This latter power was exercised by the Crown in favour of the inhabitants of Newfoundland in the year 1832, by a Commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department...'

(by 'supremacy' being meant, of course, the local supremacy of the Legislature as a whole, and not of an Assembly alone); and opts for the view that necessity, not analogy, is to be the measure of Assembly powers:[99]

> 'Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. "Quando Lex aliquid concedere viditur et illud, sine quo res ipsa esse non potest." In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law.

His Lordship's explanation[100] of the extraordinary powers

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99. Ibid., p.88.

100. Ibid., at p.89; the reference is to the power described in the passage numbered (V) cited above at p. 61.

of the Westminster Houses suggests, though it does not declare, that the lex et consuetudo parliamenti is excluded in toto from the overseas dominions (a matter on which the Privy Council were, as will be seen, to be invited again to pronounce[101]):

> 'It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the lex et consuetudo Parliamenti, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favour of the assumption by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly--a claim for which there is not any colour of foundation.'

These remarks go far to establish that, even were analogy rather than necessity to be the rule of Assembly privileges, the material analogue is not the Westminster Parliament quâ Legislature, but the Westminster Parliament quâ High Court, and that this analogy fails; that as legislature, even supreme within its territorial jurisdiction[102] as their Lordships explicitly

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101. In Fenton v. Hampton (1858), 11 Moo. P.C. 347; 14 E.R. 727; see the reasons of the Board, delivered by Pollock, C.B., at p.393 ff.; at p.396 their Lordships not only hold, but interpret Kielley v. Carson as having decided, that the lex et consuetudo parliamenti does not apply to colonial legislative houses. And see Doyle v. Falconer (1866) L.R. 1 P.C. 328 at 339.

102. The Queen v. Burah (1878), L.R. 3 App. Cas. 889, esp. p.904; Hodge v. The Queen (1883), L.R. 9 App. Cas. 117, esp. p.132; Powell v. Apollo Candle Company, Ltd. (1885), L.R. 11 App. Cas. 282, esp. p.290; Riel v. The Queen (1885), L.R. 11 App. Cas. 675.

held the Newfoundland Legislature to be,[103] its 'functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions'[104] despite the difference between legislatures and municipal bodies:[105]

> 'These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make bye-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.'

And, so far as the latter analogy is concerned,--that of a local legislature with the High Court of Parliament,--the same words establish that a local Assembly is not, and is not a participant in, a Court of any description whatever; much less is it analogous to an English Court of Record:[106]

> 'Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.
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> 'Their Lordships, therefore, are of opinion,

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103. (1841-2) 4 Moo. P.C. 63 at 85; quoted ante at p. 63.

104. Ibid., at p.89.

105. Ibid.

106. Kielley v. Carson (1841-2) 4 Moo. P.C. 63 at pp.89-90. See also, Doyle v. Falconer (1866) L.R. 1 P.C. 328 at 339. A qualification might be necessary in the case of a Council which exercised the functions (now obsolete) of a court of justice, particularly jurisdiction with the Governor; in Equity, or by way of appeal.

> that the principle of the Common Law, that things necessary, pass as incident, does not give the power contended for by the Respondents as an incident to, and included in, the grant of a subordinate Legislature.'

And this is so, tenuous as may be the claim of the Commons at Westminster itself, to judicial functions,--only impeachment seemingly serving to distinguish the nature of their functions from those of local assemblies,--and dubious as may appear the status of the Westminster Commons as a court of record.[107]

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107. See the authorities cited by Erskine May, op.cit., 17th ed. (London, 1964) pp. 90, 102.

Because that great work overlooks, in this connection the very striking exchanges in the House of Lords on the Case of The Times (1831) 3 Parl. Deb., 3d. ser., 1478 ff., 1584 ff., 1701 ff., and 1748 ff., the present author begs to be forgiven for giving an account at much greater length than would otherwise be justified.

The Earl of Limerick who, as he himself said (April 18, 1831), 'was the last person in the United Kingdom who would wish to fetter the liberties of the public Press... was an advocate of the freedom of the press, and for that very reason...an enemy to its licentiousness' (p.1480), felt constrained to draw the attention of the House of Lords to an attack in The Times upon his speech opposing introduction of poor laws into Ireland, 'not for the purpose of letting the world know what passed in that House, but of dealing out its abuse and threats against any Member who did not agree with that paper in opinion' (p.1479). 'He would ask noble Lords, what could be more mischievous than the license of the Press that sported with private character, that wounded the feelings of individuals by the basest insinuations or the most insidious calumnies?...a chartered tyrant--a tyrant that ruled all things--that pressed everything under its feet. The newspaper to which he alluded was The Times of Saturday last. The article he had to complain of, and for which he should move that the editor of the paper be called to the bar of the House, began by describing him as a "thing" ...The next point he should call the attention of the House to was, the writer in question attacking him as an Irish absentee...It was a novel doctrine, that because a gentleman refused to reside on one part of his property, and preferred residing on another, he should be accused of betraying the rights of the people, and of being unworthy of any consideration...[His Lordship went on to suggest that it was not particularly pleasant to reside in Limerick with the disorders there which he described]...' (1480-81).

'He would beg their Lordships' attention whilst he read to them the whole of the paragraph he complained of, in The Times newspaper of Saturday [April 16, 1831]:- "Yet mean, cruel, and atrocious as the civilized mind must consider the doctrine that Ireland has no need of Poor-laws, or some equivalent of them--hateful and abominable as is such a screen for inhumanity--there are men, or things with human pretensions, nay, with lofty privileges, who do not blush to treat the mere proposal of establishing a fund for the relief of the diseased or helpless Irish

What actual determinations of law were made by their Lordships in Kielley v. Carson is a question to be answered by interpreting, in the light both of the general principles stated by the Board and of the facts and result of the present

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with brutal ridicule, or almost impious scorn. Will any man credit that an Irish absentee Lord could say what he is reported to have uttered in the House of Peers last night, when Lord Rosebery presented a petition, praying that a compulsory tax on land might be introduced into Ireland towards alleviating her poor. We shall not name him, because the House of Lords is armed with a thing called a bar, and other disagreeable appendages. But there are Members of that House who suprise nobody by declaring their indifference to popular odium, especially when they are at such a distance from Ireland as to ensure the safety of their persons.'...(1481)

Lord Brougham, L.C., having at first suggested (pp.1483-4) 'the printer of a Paper was the only person legally liable in such cases', the printer was ordered to attend at the Bar on the following morning (p.1493); and, on April 19, 1831 (p.1584 ff.) one Lawson appeared at the Bar, being printer of The Times; whence it emerged that he was not the person having control of the contents, but declined to say who were the Editors. Motion of Lord Wynford (who had been Best, C.J.) that Mr. Lawson be fined £100 and committed to Newgate until paid, was resisted by the Lord Chancellor, the Duke of Wellington, the Marquis of Lansdown [sic] and the Earl Grey; but an amendment was carried committing him to the custody of Black Rod to attend the following morning at ten (p.1588).

The matter was again discussed on April 20, 1831 (p.1701 ff.), the printer apologizing and asking for his release, and a debate arising as to the proper person to hold responsible for the publication, and the nature and extent of the guilt and appropriate punishment of the printer. It was in this connection that discussion moved towards the right of either House of Parliament to fine and commit for time certain. As these powers now appear indisputably established in the Lords, the exchange is of principal interest in relation to the Commons' powers to fine and imprison for time certain, and thus their status as courts of record,--the Commons' power have been put in question by Lord Brougham incidentally and almost, one might think, as a red herring.

Lord Brougham, L.C., said (p.1709), '...that I should ever agree with the noble Marquis to fine a man 100 l. and commit him to Newgate for six months, for a breach of privilege such as this, is altogether impossible. I must first have the question of your Lordships' privileges debated at length. I must open up the question of the right of the House to imprison for six months and inflict a fine--it may be of 10,000 l.--on an individual, tried by no jury, and defended by no counsel, because a noble Lord may complain of his feelings being injured by a newspaper paragraph...'

Continuing (at p.1710), '...if the noble Marquis [Lord Londonderry] thinks it a mere motion of course, that the King's subjects shall be sentenced to imprisonment and fines, he is very much mistaken, and will find, that every time such a thing shall be proposed, he and I must meet and battle, first,

case, the passages cited in which the Privy Council defined the issues and stated their conclusions. Taken separately, their Lordships' remarks can afford authority against arrest by the Assembly with a view to adjudication on a contempt or

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the point of law, secondly, the point of privilege; and if, upon these points, the right of fine and imprisonment be established, then we must dispute the point of justice to the public, of humanity to the individual, and of prudence and discretion in your Lordships.'...

It was a remark of Lord Tenterden's (p.1714) that was immediately afterwards seized upon by the Lord Chancellor. Lord Tenterden said, '...I think myself bound to inform your Lordships, that it is the constant practice of all Courts of law, in inflicting a fine, to add to that infliction this farther term--namely, that the party fined shall be imprisoned until that fine be paid. I speak, my Lords, of the superior Courts in Westminster-hall; and I am sure that instances of this practice will be found in all of those Courts. Now, my Lords, I cannot bring myself to think, that while the Courts of Westminster-hall possess this privilege, it can properly be denied to your Lordships...[And, having argued the necessity of these privileges]...'These, my Lords, are the reasons why the two Houses of Parliament, and why Courts of law, possess this power; these are the reasons why each of them ought to possess it: and I am quite sure that if they, and especially the two Houses of Parliament, did not possess this power of vindicating themselves, it would be impossible that their respective duties could be performed with dignity to themselves, or with advantage to the country.'

Lord Brougham, L.C., (pp.1714-15) after having doubted the existence of the privileges and attacked the policy of having recourse to them, replied to Lord Tenterden (p.1716) thus: 'Now, my noble friend the Lord Chief Justice may be very right--and I know your Lordships think he is--in saying that you have this power; but he cannot be right in the reasons which he has given for the possession of that power. Let him be quite right in saying that you have the power, but he must be quite wrong in the reasons which he has assigned for saying that you have it. What were those reasons? I heard them, my Lords, with wonder and amazement. He tells you, that because the Courts in Westminster-hall have the power to fine and imprison, so also must the Houses of Lords and Commons have that power. Good God! my Lords, who ever heard till this moment--when were you ever told to this day, when you have been told it by a Lord Chief Justice of England--that the House of Commons has the right to inflict fines and imprisonment upon his Majesty's subjects in vindication of their privileges? No one who knows anything about the law and the constitution of the country can hesitate for a moment in saying that the Lord Chief Justice is grievously in error here; and until I am told by my noble friend, in terms the most clear and explicit, I will not believe that he is prepared to defend and justify in law what he has thus said; for he has thereby conferred upon the House of Commons a power, which none of his least-learned, none of his worst, none of most corrupt, none of his least calm, his least temperate, or his least respectable, predecessors, ever dreamt of arming the Commons with. But I may be doing the Lord Chief Justice wrong; he may think, in conformity with the reasons he has given, that the House of Commons has this power though it does not

breach of privilege; against adjudication upon a contempt or breach of privilege; against committal to prison as a punishment for a contempt or breach of privilege; and against any other sort of punishment for (as distinct from repression of or resistance to) breach of privilege;--in each case, at least

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exercise it, for upon that, at least--the non-exercise of it--there can be no doubt. And if so, perhaps my noble friend thinks that the Commons have the power of examining upon oath as well as your Lordships, and that your Lordships and the Commons participate equally and reciprocally in all the privileges and powers incident to each...If my noble friend, the Lord Chief Justice, adheres to this opinion, let him make a motion upon the subject, and bring his store of legal research to bear upon it, and support it if he can. Let him do this, and if, in doing this, he should succeed in persuading your Lordships that the House of Commons has this power and privilege--and I should not be at all surprised if he did persuade your Lordships of it--your Lordships will have the satisfaction of knowing that you have, by the sanction of your Lordships' high authority, invested the House of Commons with a power which the stoutest friend of parliamentary privilege never before ventured to arrogate to the Commons House of Parliament.'

To this rather exaggerated expostulation--exaggerated particularly in view of fact that the Commons has claimed to be a court of record and has assumed to impose fines (see May loc. cit.)--Lord Tenterden responded rather meekly (p.1718): '... I never was a Member of the House of Commons, and therefore I must be far inferior in the means of information on this subject to my noble and learned friend on the Woolsack, who was for so long a time one of the most distinguished ornaments of that House. I spoke from recollection--it may be from imperfect recollection--but I was strongly impressed with the notion that there were instances in which the House of Commons had exercised this power. I was mistaken, I dare say: but with regard to this House, I think there can be no doubt that it has the power.'

The Lord Chancellor: '...the House of Commons has the power of commitment, but not for any certain time;...as a means of removing an obstruction; but the confinement...can last no longer than the end of the Session. The House of Lords, on the other hand, being a Court of Justice--a Court of record--nay, the highest Court of justice--is said to have the power of committing for a time certain, and of fining; but that power has been disputed by many sound lawyers...I know very well that the Court of King's Bench has decided otherwise...'

The matter being postponed to the morrow, it was again taken into consideration on April 21, 1831 (p.1748 ff.). Unfortunately for our purposes, the Earl of Mansfield moved to enforce the withdrawal of strangers. The reporter gives only the subject matter of discussion 'said to have taken place during the absence of strangers. As no contradiction has been given to it we think it right to preserve it' (p.1750), whence it appears that the Earl of Mansfield in 'a long and elaborate speech insisted upon the power of the House to impose a fine certain, and to imprison for a fixed period.' (We know that his uncle, the great Lord Mansfield, had declared in Jones v. Randall (1774) 1 Cowp. 17;

when the offence is not committed in the face of the House.

Elaboration had to await further litigation; but the later decisions, whether they be understood as enlarging upon or merely applying the decision of Kielley v. Carson, have gone far in supporting most of the propositions put forward above; save that it cannot be assumed that a bare adjudication of contempt is itself a legal wrong apart from the infliction of some penalty itself of a nature to give rise to legal relief when imposed without justification; and save also that it cannot be said with any conviction that the exercise of a power otherwise available to the Assembly [as expulsion is (unlike suspension) seems to be] becomes unlawful merely because done with the object of punishing for contempt or breach of privilege.

Moreover, whatever room there may have remained for differing views as to the actual determination in Kielley v. Carson, it was plain that major matters of principle had been settled: that the lex et consuetudo parliamenti could not be transposed in a body to the overseas dominions; and that the privileges of the houses of local legislatures were to be governed by a rule of necessity, not a rule of analogy. These principles went far to provide the basis of future decision.

The judgment of the Privy Council in Kielley v. Carson had therefore an importance far transcending the single privilege of committal for contempt; for it was in the light of the principles of that case that each aspect of privilege came inevitably to be examined. Nor is it surprising that this should be so; for the Commons at Westminster always rightly saw in the power of committal the principal safeguard of such other privileges as it might claim and seek to vindicate: 'as it hath privilege and jurisdiction too, so hath it also Coercion

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98 E.R. 944, that the House of Commons, at least, was not a court of record.) After this, some sharp words were exchanged between Brougham and Mansfield.

The result of the proceedings was that the sentence of the Lords--a reprimand--was delivered in a rather stately speech by the Lord Chancellor to Mr. Lawson, who was then discharged.

and Compulsion; otherwise the jurisdiction is nothing in a court, if it hath no Coercion'.[108] The power to commit was truly the yardstick of privilege; and, as in England, so in the overseas dominions the great questions of privilege came ultimately to be tested in the courts in consequence of its exercise. Kielley v. Carson,[109] in Her Majesty's dominions overseas, is Burdett v. Abbott,[110] Stockdale v. Hansard[111] Case of the Sheriff of Middlesex,[112] all in one; not to mention Jay v. Topham,[113] decision whereof in the Court of King's Bench in England, thought by the Commons adverse to their privileges, induced the latter to imprison the judges, Sir Francis Pemberton and Sir Thomas Jones; the same fate suffered by Mr. Justice Lilly here.

We shall see in due course the application--or non-application--of the principles of Kielley v. Carson to some individual privileges: freedom from arrest; control of the composition of the Assembly (including determination of due election or appointment and of qualifications, suspension, and expulsion); and freedom of speech. First, however, it will be convenient to conclude our treatment of the power of committal for contempt and breach of privilege.

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108. D'Ewes, Journals, p.145; cited by Erskine May, op.cit., 17th ed. (London, 1964) p.90.

109. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

110. (1811) 14 East 1; 104 E.R. 501.

111. (1839) 9 A. & E. 1; 112 E.R. 1112.

112. (1840) 11 A. & E. 273; 113 E.R. 419.

113. See Erskine May, op.cit. 17th ed. (London, 1964) p.155. Proceedings before the Bar of the House of Commons are reported at (1689) 12 How. St. Tr. 822.

CHAPTER III

PARLIAMENTARY PRIVILEGES IN THE DOMINIONS: THE PRINCIPLES ARE APPLIED

I. The Power of Arrest, Inquiry and Committal

1) Early Reaction to Kielley v. Carson

After the Union of 1840, the Court of Queen's Bench of Lower Canada, in seeking in Cuvillier v. Munro[1] to apply Kielley v. Carson principles to determine the extent of the privilege of freedom from arrest, heralded an ultimate (if not perhaps immediately a complete) submission to the principles laid down by the Privy Council.

Ex parte Lavoie[2] came in 1855 before a single judge of the Lower Canada Superior Court in Vacation, Badgley, J.; upon habeas corpus proceedings as the result of the Assembly's imprisonment for ten days for breach of privilege, of a deputy returning officer allegedly privy to the fraudulent inscription as legal votes in the poll books, of fictitious names amounting to a large proportion of the votes cast in his parish.

The judgment of the Court is unhappily rather blurred in its grounds of decision, which are rather adverted to than enumerated, and which therefore render the case somewhat difficult to relate to Kielley v. Carson. Specific statutory authority[3] is indeed invoked, and were the judgment flatly

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1. (1848) 4 L.C.R. 146 (Queen's Bench: Rolland, C.J., Day and Smith, JJ.). See also Hill v. Weldon (1845) 5 N.B.R. 1 (New Brunswick Supreme Court).

2. (1855) 5 L.C.R. 99.

3. 12 Vict., c.27 (Province of Canada) respecting elections to the Legislative Assembly of the Province of Canada, as supplemented by 14 & 15 Vict., c.1 (Province of Canada) providing for trial of election petitions.

   The latter Act provided inter alia for the trial of controverted election returns by the Assembly through a select committee; for commitment of recalcitrant witnesses; as well as commitment of the select committee, officers of the House, the commissioner for taking evidence, the

put upon this ground, the case could be said to be at least consistent with Kielley v. Carson, however much the statute in question was strained in its construction to find a gift of the power required, since the question would then become not so much one of parliamentary privilege as one of statutory construction. But having adverted to the supposed statutory authority, his Lordship suggests at one point that this alleged statutory power of committal in connection with the trial of controverted elections, is but declaratory[4] of the common law,

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clerks, bailiffs, etc., for breaches of the Controverted Elections Act. The Act also included a section, upon which reliance was specially placed, to deal, in terms of the marginal note, with 'cases where no express provision is made by this Act':

'CLX. And be it enacted, That if with regard to any Election Petition, any case shall arise as to which no express provision is made by this Act, and in which if it were treated as a case wholly without the purview of this Act, there would be a manifest failure of justice, without any error, fault or neglect of any of the parties interested, then such case shall not be held to be omitted, but it shall be lawful for the House, Speaker, General Election Committee, Chairmen's Panel, Select Committee, or Commissioner, as the case may be, to adopt such proceeding as they or he shall deem most consonant to the express provisions, spirit and intent of this Act, and when such proceeding shall not be taken by the House, to report the same to the House, for the information thereof only, and such proceeding shall not be held illegal, unless it be inconsistent with some express provision of this Act, or some other existing provision of law.'

4. (1855) 5 L.C.R. 99, at pp.127-8: 'The result of these statutory provisions evidently must be that the House of Assembly is clothed with undoubted judicial powers which would be null if they had not the authority to enforce them; that Returning Officers and their deputies have been and are subject to punishment by the House for malversation, that malversation being an especial breach of the privileges of the House, as an attempt to put in or keep out a Member unjustly; and that the general power accorded in cases not specially provided for in the statute, must almost always relate to the Returning Officer or his Deputy, or to some person not a Member, in respect of whom the House is authorized to make such orders as to the House may seem proper, necessarily implying the power subsisting in the House to enforce such orders. It may also be assumed that the power to imprison, incidentally mentioned in the 159th section of the [controverted elections] Act is not stated as a new power, for then special provisions for carrying it out would have been made; but it is mentioned as a power which, existing in and belonging to the House in the case referred to in that section, is to be exercised by the House; in fact, if the House had not power to send for Returning

and the judge at another point embarks upon the privileges of committal enjoyed by the Houses at Westminster, and the duty of the English courts to issue habeas corpus subject to their obligation to submit to the Speaker's warrant unless the cause disclosed on its face is such as could not in law amount to a contempt; and the learned judge suggests (never very clearly) that this is in some way in force in Canada.[5] Then his Lordship gives the impression that for the purposes of dealing with controverted elections the Assemblies have the powers of the United Kingdom House: including, apparently, the privilege of committal.[6]

Officers, these could not be compelled to amend their return, which is often necessary, they might defy the order of the House without this power of compulsion, and surely the Deputy on every principle of common sense and of law must be equally amenable to the same judicial power of the House. The House of Assembly have the unquestionable peculiar power of determining judicially all matters touching the election of their own members, including therein the performance of the duty of those officers who are entrusted with the regulation of the election of those members...' Emphasis added.

5. (1855) 5 L.C.R. 99 at 131 in fine and p.132.

6. Ibid., at pp.132-3. 'It may again be said that this applies to the British House of Parliament [sic], but not to the Provincial House of Assembly. The answer has already been given, and may be found in the judicial character of the House acting in this case, and the practice in matters of contempts. There only remains a matter of form, and here, although the warrant is not drawn with all the technical accuracy that might be desired, there is enough on the face of it to sustain the commitment. In ordinary warrants, the requisites are few in number... But with reference to this commitment, assuming that the House of Assembly had, under the Statutes, judicial powers, and that the warrant issued in the exercise and in virtue of those powers, the authorities of English law must prevail, and by them it is established incontrovertibly that the commitment may be by warrant, stating generally that a contempt or breach of privilege has been committed, without setting out the particulars of the contempt. Where, therefore, a commitment under such warrant is returned to a writ of Habeas Corpus, the Courts of Law cannot discharge the prisoner. [His Lordship cited the English parliamentary privilege cases by way of authority].'

Although Kielley v. Carson is distinguished[7] and not ignored or repudiated, it is far from clear that the reasoning in Ex parte Lavoie[8] is consistent either with the principles or with the holding of the Privy Council; though the result in Lavoie's Case can of course be rested upon, or at least attributed to, the claimed statutory sanction, and by this expedient rendered innocuous. Since opinions may differ as to the necessity of the coercive authority claimed as ancillary to what is, after all, an admitted jurisdiction to determine election disputes, it is possible, even accepting Kielley v. Carson, to take the view of Badgley, J., and to concede to a local Assembly a limited coercive power ancillary to its election jurisdiction. To see in Lavoie's Case resistance to the principles of Kielley v. Carson may therefore be going too far; but at least it suggested a restrictive approach to the famous Privy Council ruling.

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7. As is Cuvillier v. Munro, supra p. 72 'These cases do not carry out the broad principle maintained at the bar, and it may be sufficient to observe upon this point of the case, that the matter involved in this application is the arrest and commitment of a Deputy Returning Officer, for malfeasance in the discharge of his duties as such, and for which the House of Assembly had right of cognizance as a power necessary for its existence, and the proper exercise of its functions.' (1855) 5 L.C.R. 99 at 130.

This is followed by an attempt to distinguish Kielley v. Carson as dealing with a Legislature created under the royal prerogative--the Legislature of the Province of Canada itself being the creature of the Imperial statute 3 & 4 Vic., c.35--a distinction repudiated expressly by Pollock, C.B., for the Board when raised in connection with the Legislative Council of Tasmania in Fenton v. Hampton, (1858) 11 Moo. P.C. 347; 14 E.R. 727; at 11 Moo. P.C. 397. Badgley, J., to this apparent end said, (1855) 5 L.C.R. 99 at 130: 'It may be proper here to notice that the Legislature of Newfoundland was only a charter government until 1842, that it was constituted by Royal Charter in 1832, and that neither the charter nor the Royal instructions to the governor made grant of the privilege claimed to be exercised by that House.'

His Lordship also distinguishes Kielley v. Carson as being no more in pari materia with the present case than the English decisions which sustained the power of the Westminster Commons in circumstances similar to those of Kielley's Case; at p.130: 'That case, moreover, was of a nature entirely different from this, nor will I lose time in referring to the cases of Howard v. Gossett, Burdett, Hobhouse and others: all these turned upon the right and power and privileges of the House of Commons, which, though questioned, were sustained upon the principle that the law and custom of the Imperial Parliament formed part of the law of the land, and being exercised by a judicial body, a court of high eminence, it was not competent for any other Court, however elevated, to question the exercise of its authority in matters of contempt, which by common judicial consent could only be inquired of by the committing court. None of these cases are parallel with the case in hand, and in consequence do not apply.'

8. (1855) 5 L.C.R. 99.

2) The Privy Council Elaborates

In the twenty-year interval between Ex parte Lavoie in 1855 and Ex parte Dansereau[9] in 1875--an interval which, with the dissolution of the Province of Canada's legislative union of Upper and Lower Canada, and its replacement with the new Canadian federation of 1867,[10] was to provide the modern framework for parliamentary privilege questions in Canada--the Court at the centre of a far-flung Empire was to develop the 'common law of parliamentary privilege' with two important cases from such characteristically widely separated and diverse jurisdictions as the pastoral Australian island of Van Diemen's Land (now Tasmania), and the ruggedly beautiful sub-tropical Caribbean island of Dominica.

The first issue was availability of coercive power to enforce the giving of information to a legislative body or its committees when an inquiry was undertaken by punitive sanction.

Fenton v. Hampton[11] came before their Lordships' board[12] on appeal from the Supreme Court of Van Diemen's Land. The facts, as set out by Lord Chief Baron Pollock who delivered the judgment, showed that the respondent Hampton, who was Comptroller-General of Convicts in the Island, having been duly served with a summons, refused and neglected to appear at the appointed place and time before a Select Committee of the Legislative Council appointed to inquire into certain alleged

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9. (1875) 19 L.C.J. 210 at 219 ff.

10. By The British North America Act, 1867 (30 & 31 Vict., c.3) (Imp.).

11. (1858) 11 Moo. P.C. 347; 14 E.R. 727.

12. Knight Bruce, L.J.; Rt. Hon. T. Pemberton Leigh; Sir Frederick Pollock, Lord Chief Baron of the Exchequer; and Turner, L.J.

abuses in the Convict Department, the Council having resolved that the Committee should have leave to send for persons in order to prosecute the inquiry. The Legislative Council thereupon resolved that the Respondent be desired to attend at their bar, at the Council's House at Hobart Town, on a day and hour named. Again the respondent, though duly served with a summons did, to quote the hypothesis of the Board[13] 'wilfully and contemptuously, and without reasonable excuses' diregard the order, and refuse to attend. The Council, having then resolved that the respondent was guilty of contempt in disobeying the Resolution of the Council and the summons, 'further resolved that the Speaker should issue his warrant for the apprehension of the respondent, to be kept in the custody of the Serjeant-at-Arms during the pleasure of the Council'. The Speaker issued his warrant, and the Serjeant-at-Arms executed it, and took Hampton into custody, where he remained until prorogation. An action of trespass was successfully brought in the Supreme Court of Van Diemen's Land,[14] the Hon. Valentine Fleming, C.J., and Horne, J., finding that the committal was unlawful.

To the pleas made in their defence by the Appellants, Fenton, the Speaker, and Fraser, the Serjeant-at-Arms, urging the legality of the detention, the respondent demurred, both on the grounds that[15] 'the Legislative Council had no power by law to adjudicate upon, as a contempt, any act not done in the presence of the Council, in Council assembled, by any person not being a member or officer of the Council, and to punish for

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13. (1858) 11 Moo. P.C. 347 at 394.

14. Reported in extenso in Moore's Privy Council Reports: (1858) 11 Moo. P.C. 347 at 350 ff.

15. Ibid., p.350.

the same by imprisonment' and also on the ground that the 'warrant was bad upon the face of it, as it did not set forth facts or circumstances, authorizing the apprehension and detention thereby commanded.'

In the Court below the Chief Justice founded himself[16] upon 'Kielley v. Carson, the importance and authority of which cannot be overrated, seeing that it was twice argued before, and long deliberated upon by, an array of judicial learning and eminence rarely congregated together', by which 'Beaumont v. Barrett is now stripped of all authority, except' --interestingly enough--[17] 'that of usage and acquiescence, coupled with the adoption of the power in question by virtue of Legislative enactment forming the Act of Settlement of that Island'; and which, if understood as laying down no more than that,[18] as a 'broad basis',

> 'the House of Assembly in Newfoundland does not possess, as a legal incident to its functions as a Legislature, the power of arrest with a view to an adjudication upon past misconduct, as a contempt of its authority, such alleged contempt having been committed out of the House'

was still sufficiently wide to cover the case at bar--itself, of course, an arrest with a view to adjudication on, or a committal in punishment for, an act (or omission) out of the House (the case not even being one of coerced attendance at the bar); 'unless that case lays the ground for some solid distinction between the nature and character of the alleged contempt threatened in the present instance, the decision of the Privy Council appears to me to be conclusive of the question at issue.'

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16. Ibid., at p.369.

17. Ibid., and see ante p. 33 n. 13; p. 59 ff.

18. Ibid.

Of a distinction between a threat to a member (as in Kielley's Case) and a refusal to attend the Legislative Council at Bar, or its Committees (as here), his Lordship thought:[19]

> 'It seems to me that if their Lordships had intended to establish any distinction between the nature of contempts committed out of the House, so as to imply that in some the power of dealing with them by commitment passed as an incident, whilst in others it did not, it is impossible to conceive that their judgment, designed apparently as a guide for other Colonial Legislatures, would have been couched in such general language, especially as they so carefully guard themselves upon a distinction which might well be urged between contempts committed in the face of the Assembly, and out of doors; not indeed, that they determine, even in the former case, that the House could commit by way of punishment, for it is quite consistent with the decision that their power in such an event is limited to the compulsory removal of the obstruction.'

The Chief Justice added, perhaps obiter,[20] that the general warrant was also bad, since, the jurisdiction to commit (if any existed) being limited, the warrant must be specific so as to show that it was within jurisdiction.[21] On this point Horne, J., agreed with the Chief Justice,[22] with the general substance of whose judgment he appeared generally in

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19. Ibid., at p.371.

20. Ibid., at p.375: 'I might, indeed, have rested upon the opinion I have expressed on the first point to be determined, because, having arrived at the conclusion that the Council does not possess the power which it has assumed, it follows, as a corollary, that it could not exercise that power by the mode resorted to, nor, indeed, by any other mode. As, however, both questions are raised by the pleadings, and have been dwelt upon in the argument, I shall briefly declare my opinion on this second proposition.'

21. Ibid., p.375 ff.

22. Ibid., p.378.

accord;[23] disagreeing, however, on points which seem to savour almost of quibble.

While the Chief Justice understood the Imperial statute[24] applying 'all Laws and Statutes in force' in England to Van Diemen's Land, as being declaratory of what the common law of itself would in any event effect, as regards common law and English statute law enacted prior to settlement, and as being enacting only as to English statutes made after settlement but before the Imperial Act in question, Horne, J., on the contrary, concluded that the Imperial Act was completely an enacting statute, not declaratory in any degree; and Horne, J., inferred from this, apparently,--the train of reasoning is not clear--that the lex et consuetudo parliamenti would therefore be (contrary to the Chief Justice's view) introduced into the colony so far as it could be applicable: Horne, J., presumably treating the lex et consuetudo parliamenti as analogous to such a statute as,not being integrated with the common law, would not automatically follow with settlement. But Horne, J., having, with some fanfare[25] put his position that the lex et consuetudo parliamenti did exist in Tasmania so far as it was applicable, proceeded to deny that it was in the circumstances applicable. Was there, then, any significant difference between the two positions?

One very significant difference would seem to lie in Horne, J.'s support for a power to compel attendance in custody, even if not to punish for non-attendance:[26]

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23. Ibid., p.378-9: 'I concur with what has fallen from His Honor the Chief Justice with regard to the informality of the warrant, and I wish it were within my power to assent to the whole of his elaborate judgment. But there is one position of His Honour's to which, although I concur in the judgment, I cannot assent; and I feel it my duty as a Judge, to state my opinion upon that...'

24. 9 Geo. IV, c.83 (Imp.)

25. Ante, note 23.

26. (1858) 11 Moo. P.C. 347 at p.384.

> 'I say that the whole of the law of Parliament is not introduced, because the whole is not applicable to this Colony. None of the privileges, properly so called, of Members of Parliament, as from arrest, civil or other personal privileges, none of the powers of Parliament of determining what are, and adjudicating upon contempts not committed in the face of the House, but such powers only as are incident to their high functions of legislation, and upon that to the maintenance of and discharge of their office and duty, belong by law to the Legislative Council of this Colony. The examination into whatever belongs or relates to the peace, welfare and good government of this Colony, and the power of conducting such examinations by witnesses, and compelling their attendance by arrest where necessary, are the powers which by the law of Parliament they possess, and are essential to the discharge of those duties committed to them by the Imperial Parliament;'

and there is the suggestion that <u>coercive</u> imprisonment to <u>enforce</u> attendance [as distinct from <u>punitive</u> imprisonment for <u>failure</u> to attend] could lawfully be applied by the Council:[27]

> 'The Council is entrusted with the power, and has the right to inquire into everything which it concerns the peace, welfare, and good government of this Colony, for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category: co-extensive with the right to inquire, must be their authority to call for the attendance of witnesses, and to enforce it by arrest when disobedience makes it necessary, and this by the law of Parliament; but they have not followed that law: instead of ordering a witness to attend in custody at their bar, after disobedience of their summons, and so enforce the witness's attendance, they have at once, in his absence, resolved that he is guilty of a contempt, proceeded to punish, and ordered their Speaker to issue his warrant for his imprisonment. This act was contrary to the course of the law of Parliament, and clearly beyond the power enjoyed by that House, and is alone sufficient reason for allowing the demurrer;'

and even the hint that--as mere enforcement of <u>attendance</u> would be futile if the witness refused to answer questions--imprisonment <u>could</u> be applied to enforce co-operation:[28]

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27. <u>Ibid.</u>, at p.386.

28. <u>Ibid.</u>, at pp. 385-6; emphasis added.

> 'How, I say, has the Council executed their power? The warrant, upon the face of it, is general, and assumes that the whole law of Parliament is in force, that any and every contempt, whatever the Council may resolve to be a contempt, is punishable by the Council: this, indeed is not the law. Contempts in the face of the House obstructing the functions of legislation, and impeding its action, are within the law of Parliament, and may be dealt with by the Council by that law. The Council is entrusted with the power, and has the right to inquire into everything which it concerns the peace, welfare, and good government of this Colony, for them to know...';

on the principle, apparently, that refusal to co-operate would in those circumstances constitute a contempt in the face of the House--now an insufficient basis, to be sure, since the Privy Council determination(in Doyle v. Falconer[29]) that contempts in the face of the House are not to be distinguished from contempts committed out of its presence, as regards the power to punish them.

Here, plainly, is a difference of substance; and a difference upon a matter of no little importance, though it is hard to see how the answer turns on whether or not the lex et consuetudo has partial application. After all, if the power is held necessary, it can be supported as a common-law incident. The Court, agreed that there is no power to commit by way of punishment for non-attendance, seems divided on the existence of a power to compel attendance in custody and force testimony by coercive imprisonment; though the reasons offered as supposedly giving rise to the difference do not seem especially relevant.

To the Chief Justice, apparently, the lex et consuetudo was not introduced; to the Justice it was introduced, but was not applicable to the case at bar. The Judicial Committee, on

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29. (1866) L.R. 1 P.C. 328.

appeal, appear to have taken the former view,[30] though it is hard to see what their Lordships supposed to turn on the distinction; and it is not even easy to be sure that there is a meaningful difference between the two, as each allows full scope for the rule of inapplicability; and as a privilege, being once held necessary, will be part of the local law just as effectively by one name as by another.[31]

The material difference in the lower court lay, as above stated, in the possibility of attendance in custody and coercive imprisonment, though a ruling on this point was not necessary for the decision of the case. The Chief Justice, differing from Horne, J., thought that such a power was not in fact necessary[32]

> 'Let it be conceded that occasions may arise in which inquiry by the examination of witnesses ought to precede legislation; how rarely would it happen that any party required to attend would refuse; but even assuming such refusal, rare indeed would be the case, and such is not shown in this instance, where such party constituted the only fountain from which the required information could be drawn. Taking, however, that extreme and exceptional case, it would still be insufficient to let in the application of the maxim that things necessary pass as incident to the grant, to the extent which has been assumed, or to found the power or privilege which has been here exercised; because as regards the former, the legal power to legislate still exists, although its exercise in the particular

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30. (1858) 11 Moo. P.C. 347 at p.397: 'The "Lex et consuetudo Parliamenti" apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a Colony by the introduction of the Common law there.'

31. Dicta stating that the lex et consuetudo parliamenti is inapplicable suffer from distinct ambiguity: they can mean either that a rule is not to be applied to a colony by reason only that it is a part of the lex et consuetudo parliamenti; or that no rule of the lex et consuetudo parliamenti is, as such, to pass to the colony; or even, that no rule which forms part of the lex et consuetudo parliamenti can pass to the colony, whether under that name or as a common-law incident.

32. (1858) 11 Moo. P.C. 347 at pp.366-7.

> instance is impeded; and as regards the latter, because necessity alone, is inadequate to sustain such a power. If the House of Commons claimed a new privilege to-morrow, the exercise of which would invade the right of personal freedom beyond their walls, and the matter came before the Superior Courts in a shape in which they could take cognizance of it, I apprehend it would not be enough to establish an unanswerable case of simple necessity; it would be essential to add to that necessity, the evidence of usage... But I am prepared to test the question by every assumption in favour of the Defendants' case. Let the maxim be applied, and let it be granted that the power of inquiry, by the evidence of witnesses, is necessary to the Legislative, or, if you please, inquisitorial functions of the Council. No one, I conceive, will be found to contend that the exercise of that power could legally be carried one iota beyond the necessity which calls it into play. And what would be this limit? That on the Plaintiff's disregard of the summons of the Committee and of the order of the House, requiring his attendance at the bar, he be ordered to be brought up in custody for the purpose of being examined on the inquiry, and that the warrant be shaped accordingly. But this is not what has been done; the Plaintiff for his refusal to attend, has been adjudged guilty of a contempt, and his arrest and imprisonment are the penalty for that offence; it is not simply the coercive enforcement of his presence, but punishment for his disobedience in not being present...'

In a judgment also notable for decisions that legislatures the creatures of statute are indistinguishable in point of privilege from those summoned by the Crown[33] and that the lex et consuetudo parliamenti knows no application save to the Lords and Commons at Westminster,[34] even under the statute applying the common law to Van Diemen's Land, the Privy Council affirmed the result below, namely, that the House had not power to punish by way of imprisonment for refusal to appear. It followed Kielley v. Carson[35] 'the greater authority of

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33. Ibid., at p.397; ignored by Sanborn, J., in Ex parte Dansereau, (1875) 19 L.C.J. 210 at 239.

34. Ibid.; and see ante notes 30 and 31.

35. (1841-2) 4 Moo. P.C. 63.

36. (1858) 11 Moo. P.C. 347 at p. 396-7.

which, as compared with Beaumont v. Barrett, it is quite unnecessary to enlarge upon[36], but in terms which invite (though they do not support) the argument that, had defendants rested content with pleading the warrant of committal, it might have proved unexaminable in court:[37]

> 'It was argued, however, that as the Legislative Council had the power to make the inquiry out of which these proceedings arose, as inherently belonging to their Supreme legislative authority, the Supreme Court had no authority to examine into the validity of the warrant; but, we are of opinion that it sufficiently appeared by the pleas that this was an arrest with a view to punish for an act alleged to be a contempt, but committed away from the House of Assembly. Their Lordships, therefore, are of opinion, that it was not justified by the pleas, and that the judgment below ought to be affirmed, with costs...'

and in terms so framed as to leave entirely open the question of the right of an assembly to use imprisonment as an instrument, first, to enforce attendance (by procuring attendance in custody), and, second, to oblige the giving of evidence (by subjecting a recalcitrant witness to coercive imprisonment).

This important question does not appear ever to have been settled at common law; doubtless because the necessity to do so has so largely been obviated by statutory enactments conferring on local legislative bodies either the privileges of the House of Commons in their entirety, or a substantial range of the more important ones. A New South Wales case of 1860, R. v. Kelly, ex parte The Sheriff[38] does indicate that while a court may grant a writ of habeas corpus for the purpose of the

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37. Ibid., at p.397.

38. (1860) 2 Legge 1275 (New South Wales Supreme Court: Wise, J.). On an application in chambers by the Sheriff for habeas corpus to bring up before a committee of inquiry of the Legislative Assembly a prisoner undergoing sentence for perjury, he having been requested by letter from the Chairman to produce the prisoner, Wise, J., said at p.1275: 'The Sheriff very properly declined to act upon this letter, as undoubtedly he had no legal power to remove the prisoner from the gaol, and made the application.' At p.1276: 'It is clear that in England the Speaker of the House of Commons has the power of compelling the attendance of witnesses; but the decision of the Privy Council in Fenton v. Hampton [11 Moo. P.C. 347] that the lex et consuetudo parliamenti does not apply to Colonial Legislatures, coupled with the 13 Vict., No.6, leads to the inference that no such power of compelling

giving of evidence before a committee of a Legislatuve Assembly, such a body cannot itself compel attendance. Against this may be put various Canadian authorities supporting a certain inquisitorial power at common law. In Ex parte Monk[39] in 1817, which we have had occasion to consider already,[40] the imprisonment had arisen from Monk's refusal to produce certain registers and papers before the House of Assembly or its committee;[41] and in McNab v. Bidwell[42] in 1830, the alleged contempt upon which the imprisonment,, subsequently upheld by the Upper Canada King's Bench, was founded, was a refusal to answer questions put by a select committee. Admitting that the grounds upon which the latter[43] case was decided were too

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witnesses exists in a case like the present. I do not wish, however, to give a final opinion on this point, as it is not before me for judicial decision.' The Court, having adjourned the application to allow evidence to be obtained that prisoner's attendance was deemed necessary by the Speaker and Assembly, allowed the writ to issue 'although the powers of the Legislative Assembly to compel the attendance of witnesses may not be equal to those possessed by the House of Commons', on the grounds that (1) the prisoner was in custody only for misdemeanour; (2) the prisoner consented; (3) the Attorney-General consented; and (4) no public inconvenience would arise. A very cautious approach indeed; and the rule itself was to state the consent of the prisoner and Attorney-General.

39. (1817) Stuart's Reports (L.C.K.B.) 120.

40. Ante, p. 34. It has been submitted above that the legality of Monk's committal was not decided in Ex parte Monk (1817) Stuart's Reports (L.C.K.B.) 120; ante, p. 36.

41. See Dorion, J., in Ex parte Dansereau (1875) 19 L.C.J. 210 at 232. Journals of the Leg. Ass. of Lower Canada, 1817, p. 462, 468.

42. (1830) Draper's U.C.K.B. Rep., 144 ante p. 36.

43. Ante p. 36-38; at least by Robinson C.J., who upheld a general power of committal.

wide; admitting that Kielley v. Carson[44] rejects the reasoning by which its result had been supported; yet the actual holding is distinguishable from the latter authority. Even after Kielley's Case, the Court of Queen's Bench of the Province of Quebec was, in 1875, prepared to hold that (quite apart from the statutory authority[45] which probably sufficed to support the power then claimed,[46]) the common law itself would sustain, as a necessary legislative incident, the power there exercised by the Legislative Assembly of Quebec; which, desiring to obtain information upon a scandal respecting the sale of certain government property, had caused certain persons to be sent for under a Speaker's warrant[which, moreover, reciting merely the order of the Assembly that they 'be sent for in custody of the Sergeant-at-Arms; simply required the latter to take each 'into your custody...and bring him to the Bar of the said Legislative

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44. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

45. 32 Vict., c.6 (Que.)(Assented to, 5th April, 1869). '1. Any committee of the legislative council or of the legislative assembly of the province of Quebec, sitting in the exercise of its functions may examine witnesses upon oath, upon matters relating to the business then before it, and for that purpose the chairman, or any member of such committee, may administer an oath, in the form A hereto annexed, to any such witness.' By 33 Vict., c.5 (Que.) (Assented to 1st February, 1870) it was inter alia enacted: '2. Each house may, at all times, command and compel the attendance or production before such house or before any committee thereof, of such persons, papers and things as it may deem necessary for any of its proceedings or deliberations.' Sections 8 and 9 of the latter statute empowered the Houses to enquire into, and to punish by imprisonment during the session, infringements of the Act.

46. Per Sir William Buell Richards, C.J., in the Supreme Court of Canada in Landers v. Woodworth (1878) 2 S.C.R. 158 at 191 '...the decision of the Court of Queen's Bench seems fully warranted by the terms of the provincial statute.'

Assembly]: Ex parte Dansereau.[47] Even making full allowance for any superfluous quality of the remarks there made upon the common law, the judges once having found the statutory authority sufficient; allowance also for reasons given flouting the rules laid down by the Privy Council, to be found in the opinions--in arguably a majority of the opinions--given in the case; allowance as well for doubts subsequently cast upon the reasons there given;[48]--all these being taken account of, there still remains the authority of four justices of five in the appellate court for the proposition that, even within the confines of 'necessity' as the test of privilege, a power of compulsory inquiry amounts to a necessary incident of a legislative assembly.[49]

The 1866 Privy Council decision of Doyle v. Falconer,[50] significant in a number of respects, is perhaps chiefly so because it complements Kielley v. Carson:[51] for it determines the great question which had there expressly been left open: namely, whether a local legislative body might have greater powers to deal with contempts committed to its face, than those out of its presence; and it decides that question in accordance

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47. (1875) 19 L.C.J. 210 at 219 ff. This was the view of a majority: Dorion, C.J., Monk, Taschereau and Sanborn, JJ., Ramsay, J., dissenting. We shall consider the case below; see post p. 97 ff.

48. Per Sir William Buell Richards, C.J., in the Supreme Court of Canada in Landers v. Woodworth (1878) 2 S.C.R. 158 at 191.

49. See post, p. 97 ff.

50. (1866) L.R. 1 P.C. 328 (Judicial Committee: Lord Westbury; Sir James William Colvile; Sir Edward Vaughan Williams). The decision is the only one mentioned in the account of Colvile given in Holdsworth, History of English Law, Vol. XIV (London, 1966) p.165, where it is described as "notable".

51. (1841-2) 4 Moo. P.C. 63.

with the same principles that had governed in the earlier cause:[52]

> '[which]...must here be taken to have decided conclusively that the Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. The case is one which, having regard to the constitution of the Committee before which it was argued for the second time, their Lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.'

The question is stated by Sir James Colvile, who spoke for the Board, in very wide terms[53]--the existence of an authority, not only to commit, but to 'commit and punish'; for 'contempts committed, and for interruptions and obstructions given to the business of the said House of Assembly'; and not only by Members--though that was the case at bar--but by 'its Members or others, in its presence and during its sittings'. Reaffirming the position, by now well established, that the lex et consuetudo parliamenti was peculiar to Westminster, and that there was no analogy between a local legislative body and a Court of Record,[54] their Lordships inevitably found in the supposed necessity of the privileges claimed--in their status as common law incidents--the gravamen of the dispute. Sir James Colvile's remarks upon this; his distinction between removal of obstruction and punishment of contempt; his affirmation of the jurisdiction of ordinary tribunals over offences in the Assembly; make his words perhaps a locus classicus for those seeking judicial authority on the whole subject:

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52. (1866) L.R. 1 P.C. 328 at 339, with similar observations on the lack of analogy to courts of record; and the peculiarity of the lex et consuetudo parliamenti.

53. Ibid., at p.338.

54. Ibid., at pp.339-40.

> 'If, then, the power assumed by the House of Assembly cannot be maintained by analogy to the privileges of the House of Commons, or the powers of a Court of Record, is there any other legal foundation upon which it may be rested? It has not, as both sides admit, been expressly granted. The learned Counsel for the Appellants invoked the principles of the Common Law, and as it must be conceded that the Common Law sanctions the exercise of the prerogative by which the Assembly has been created, the principle of the Common Law, which is embodied in the maxim, "Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest," applies to the body so created. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a Legislative body during its sitting, which last power is necessary for self-preservation. If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, their Lordships must answer in the negative. If the good sense and conduct of the members of Colonial Legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply, à fortiori, to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals.'

Nor is his Lordship's statement of principle and law less striking for his forceful comments on the considerations of policy which militate against conceding as common law incidents the powers claimed,[55] for all that he considers their

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55. Ibid., at pp.340-1; 'It may be said that the dignity of

Lordships[56] 'not at liberty to deal with considerations of this kind' which, he states, bear rather upon the desirability of conferring them by competent legislation.[57]

Falconer's action in trespass for assault and false imprisonment against Speaker Doyle and ten members of the Dominica House of Assembly was founded upon his having been taken to gaol by the Serjeant-at-Arms and imprisoned for three days by the gaoler, under the Speaker's warrant, issued upon resolution of the House, as a result of his having persisted in speaking when he had not the floor, of having refused to come to order, and of having directed an insulting attack upon the Speaker when the latter had called him to order.

Implicit in the success[58] of his action against the ten members,--sued apparently for having voted for the resolution under which the action complained of was taken--is a severe

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an Assembly exercising supreme legislative authority in a Colony, however small, and the importance of its functions, require more efficient protection than that which has just been indicated; that it is unseemly or inconvenient to subject the proceedings of such a body to examination by the local Tribunals; and that it is but reasonable to concede to it a power which belongs to every inferior Court of Record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it Judges in their own cause, and Judges from whom there is no appeal; and that if it may be safely intrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.'

56. See ante p. 57.

57. By an act of the local legislature; or even, had the Crown thought fit, through exercise of its prerogative legislative power enjoyed at the time the Assembly was created and English law introduced into the conquered or ceded island: ibid., p.341.

58. As indeed it had been in Kielley v. Carson (1841-2) 4 Moo. P.C. 63; but there it is not clear from the report how many members were named defendants.

limitation upon the privilege enuring to members in respect of the consequences of their words and votes on the floor of the House. These are usually spoken of as 'absolutely privileged';[59] a privilege, however whose operation beyond the area of the defamation action is at best uncertain, though a decision rendered sub silentio that members may by their words and votes be parties to a civil wrong, must be received with a certain caution at the least.

Of considerable interest, too--mainly because of its implication for limited statutory jurisdictions to punish for contempt,--was their Lordships' view of the validity of the warrants under which arrest and imprisonment were effected. Having decided as they did that the jurisdiction to punish for contempts in the face of the House did not exist, it was of course unnecessary for them,[60] though not on that account necessarily obiter,[61] to consider whether the warrants in exercise thereof were properly made; indeed, more than unnecessary, it is highly hypothetical to decide what warrants are legally necessary to exercise legally-nonexistent jurisdiction. Yet in saying that warrants in exercise of a limited jurisdiction of committal must show at least that the limits of jurisdiction have been kept, their Lordships point the way to a degree of judicial safeguard even in the face of the statutory attribution

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59. Post, p.125. See Gipps v. McElhone (1881) 2 N.S.W. L.R. 18; (Supreme Court of New South Wales: Sir James Martin, C.J.; Sir William Manning, J.; Windeyer, J.); approved by the Privy Council in Chenard v. Arissol [1949] A.C. 127.

60. '[T]he foundation of the justification pleaded fails; and it is unnecessary for them to consider at any length the subordinate question of the sufficiency of the warrants.' (1866) L. R. 1 P. C. 328 at p. 341-2.

61. Jacobs v. L.C.C. [1950] A.C. 361; per Lord Simonds at p.369, 'there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing.'

of powers of punishment; though the scope of judicial review must be assessed in the light of the fact that to several grounds of challenge to the warrants, namely:[62]

> 'that the two warrants mentioned in the pleas were illegally and untechnically made and issued in (1st) that they did not set forth the precise nature of the alleged contempt; nor (2nd) when and where the same was committed; (3rd) nor that it was committed in the face and during the sitting of the Assembly; (4th) nor that the Plaintiff was a Member of the Lower House of Assembly; (5th) that they did not limit or fix the term of imprisonment, but left such term to the discretion of the House; and (6th) that the warrant was not under the hand and seal of the Defendant, Doyle'

the Privy Council responded only[63] that they had

> 'no doubt that the warrants having been issued by virtue of an alleged authority which, if it existed, was confessedly a limited one, ought to have shewn on the face of them, that the alleged contempt was committed in the presence of the House, and so fell within the limits of that authority.'

By 1866, therefore, the basic principles governing the privileges of local legislative bodies in the British Commonwealth seem to have been settled with as much clarity and consistency as could reasonably be expected; and these principles were settled by judicial consideration of the fundamental privilege--to punish by imprisonment for contempt or breach of privilege.[64]

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62. (1866) L.R. 1 P.C. 328 at 332.

63. (1866) L.R. 1 P.C. 328 at 342; emphasis added.

64. In Re Brown (1864) 33 L.J.Q.B. 193, the Court of Queen's Bench in England, on a rule to show cause why a writ of habeas corpus should not issue to the gaoler of Castle Rushen in the Isle of Man to bring up the body of the prisoner James Brown, held inter alia that the House of Keys, being the lower house of the Court of Tynwald, the Island legislature, lacked power to commit for contempt when acting in its legislative capacity. This was so despite the proviso contained in s.32 of a local statute of 1st July, 1817, 'Provided always, and be it further enacted and declared, that nothing herein contained shall extend, or be construed to extend, to affect, abridge, or alter the

3) Resistance and Reconciliation in Canada

The cases of Ex parte Cotté and Duvernay[65] and Ex parte Dansereau[66] arose in 1875 from a scandal involving allegations of bribery, fraud and improper influence against at least one member of the Quebec provincial government and other persons, in connection with a deed executed by the Crown exchanging certain valuable land (earlier purchased for the construction of a lunatic asylum) for another tract of supposedly much less value.[67]

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power of Courts of Justice, and Magistrates, to punish contempts as formerly accustomed; and that the House of Keys, the Clerk of the Rolls, and the Registrars of the Ecclesiastical Courts, when in the execution of their respective offices, have and shall have the power of punishing contempts in like manner as any Court or Magistrate within the said Isle.' This statutory power was held to extend to the House of Keys only when acting in exercise of its judicial functions; the body being also a court of first instance and of appeal. It appears, therefore, that two capacities of the same body may be distinguished for purposes of the power to commit for contempt. Cockburn, C.J., said (at p.197): 'It is conceded on the part of those who shew cause on the present occasion, that the House of Keys, in its legislative capacity, has never hitherto exercised the power of committing for contempt. It has been decided by the Judicial Committee of the Privy Council [here Kielley v. Carson is cited] that where the legislature has not, by prescription [emphasis added] or by statute, the power of committing for contempt, that power is not necessarily inherent in a body simply because they are invested with legislative functions. If it should be desirable, on the part of the Court of Keys and the authorities of the island, to call upon us to review that decision, they may do so, if they should be so advised, by making a formal return to this writ, which would make it necessary for us formally to decide that question. At present, it is enough to say that there is that decision of the Judicial Committee of the Privy Council, and that we feel ourselves bound by it.' Blackburn, J., concurring, said (at p.198), 'I quite agree with what my Lord has said, that we are, according to the decision of the Privy Council bound to say that the House of Keys, as a legislative body, would not have inherent power to commit for contempt, and it is admitted that they have no prescriptive nor immemorial power to commit for contempt.' Mellor and Shee, JJ., concurred.

In Willis and Christie v. Perry (1912) 13 C.L.R. 592, the High Court of Australia (Griffith, C.J., Barton and Isaacs, JJ.), held, affirming the Supreme Court of New South Wales (Pring, Gordon, and Ferguson, JJ.) sub nom. Perry v. Willis and Christie (1911) 11 S.R. (N.S.W.) 479, that the Legislative Assembly of New South Wales, and a fortiori its Speaker, had no authority to cause the Serjeant-at-Arms to arrest outside the Chamber though within its precincts, and to bring into the Chamber against his will to hear an admonition by the Speaker, a member who had been guilty of disorderly conduct in the House but had walked out. The misconduct imputed to the member was that, having been dis-

Each of the applicants for habeas corpus was arrested under the authority[68] of a general warrant simply authorising arrest and conveyance to the Bar in custody, issued by the Speaker of the Assembly with a view to compel appearance and testimony before the Bar of the House upon the subject of the scandal.

Of the writs of habeas corpus granted by Ramsay, J., those in Ex parte Cotté and Duvernay[69] were made returnable before him,

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orderly within the House, he refused to take his place and listen in silence whilst the Speaker was calling him to order, but, instead, remained standing and persisted in disorder, shouted to other members to follow him out of the House, and left with his hat on and without making obeisance to the chair. Griffith, C.J., said (at p.598): 'the question is whether it can be called defensive action on the part of the Legislative Assembly of New South Wales to arrest a member who is out of the chamber and bring him back into it. The only purpose can be to punish him.' Sir Edmund Barton, concurring, found the case 'so abundantly clear that I am not justified in adding many words to what has been said by the Chief Justice' (p.598); and this though Sir Edmund, who before his accession to the bench had served the Commonwealth of Australia as its first Prime Minister, had been unsuccessful appellant in Barton v. Taylor (1886) L.R. 11 App. Cas. 197, a trespass action brought against him at a still earlier stage of his career when, as Speaker of the Legislative Assembly of New South Wales, he had unlawfully caused a member to be removed and excluded. See post, p.155 Sir Edmund continued (p.599), 'To bring him back into the chamber was in no sense an exercise by the Speaker of the self-protective power of the Assembly...Such misconduct might be ample warrant for bringing a member back and punishing him where there is power to punish. But where there is no punitive power, conduct such as that of the plaintiff, outrageous as it may be, does not warrant the Speaker, or an officer of the House under his orders, in arresting a member and bringing him back into the chamber.' Isaacs, J., delivered a concurring judgment. Defendants in the present case were the Speaker and the Serjeant-at-Arms, and the action was framed in trespass.

65. (1875) 19 L.C.J. 210; see ante p. 87-8.

66. (1875) 19 L.C.J. 210 at 219 ff.

67. See Church, A.-G. v. Middlemiss (1875) 19 L.C.J. 253, where the Superior Court (Johnson, J.) refused to annul the transaction, finding no fraud proved.

68. Issued apparently on the order of the House; though, in the latter case, at least, it does not clearly appear that such order was recited in the warrant.

69. See note 65, ante.

and he, concluding that the detention of these persons was unlawful, ordered their release; but as term was approaching, his Lordship ordered the writs in Ex parte Dansereau[70] returnable in term before the full Court of Queen's Bench; they, differing from his opinion, upheld the detention by a majority (Dorion, C.J., Monk, Taschereau, and Sanborn, JJ.; Ramsay, J., dissenting).[71]

Speaker's counsel founded the detentions both on the statutory rights of the Assembly under the provincial statute 33 Vic., c.5 (Que.),[72] and, alternatively, on alleged common-law

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70. See note 66, ante.

71. But on habeas corpus proceedings brought again by Cotté and Duvernay, following their re-arrest subsequently to the decision in Ex parte Dansereau, the Court, Taschereau, J., dissenting, ordered their release on the grounds that, Ramsay, J., having ruled their detention illegal, they could not be re-arrested either for the same cause or on the same warrant; see Ex parte Duvernay and Ex parte Cotté (1875) 19 L.C.J. 248.

72. 'An Act to uphold the authority and dignity of the Houses of the Quebec Legislature and the independence of the members thereof, and to protect persons publishing parliamentary papers.' Assented to 1st February, 1870. This provides in part:

'1. The word "House" or "Houses" in this act, shall mean House or Houses of the Quebec Legislature.

'2. Each house may, at all times, command and compel the attendance or production before such house or before any committee thereof, of such persons, papers and things as it may deem necessary for any of its proceedings or deliberations.'

This Act supplements the Act 32 Vic., c.6 (Que.) assented to 5th April, 1869, which enacts:

'1. Any committee of the legislative council or of the legislative assembly of the province of Quebec, sitting in the exercise of its functions may examine witnesses upon oath, upon matters relating to the business then before it, and for that purpose the chairman, or any member of such committee, may administer an oath, in the form A hereto annexed, to any such witness.'

powers. Ramsay, J., rejected both these grounds. In finding statute ultra vires he differed from the majority of the Court--a matter, however, whose consideration it is convenient to postpone to a treatment of statutory changes[73] in the common law on the subject whose exposition claims our present attention; it suffices here to observe that the view of the majority on this point was subsequently confirmed by the Privy Council in Fielding v. Thomas,[74] and to note the remarks of the first Chief Justice of the new Dominion of Canada, Sir William Buell Richards, delivered a few years later in the Supreme Court of Canada in Landers v. Woodworth:[75]

> 'I, nevertheless, feel compelled to yield to the high authority of Kielley v. Carson, decided by Judges of such very great acumen, on due consideration, and after so full an argument, and followed and approved of, as it has been, by the Privy Council in all the cases brought before that tribunal in which the question has been raised, and by the judicial decisions in all the Colonies that I am aware of, except in the case of Ex parte Dansereau, in the Province of Quebec, where the decision of the Court of Queen's Bench seems fully warranted by the terms of the provincial statute.'

But, as has already been suggested, the majority in Ex parte Dansereau did not rest their judgment wholly on the basis of the provincial statute law;[76] they found[77] the requisite power to be a common-law incident necessary to the Assembly's discharge of its functions; and even if in the course of doing so reasons were given which seem a plain challenge to the principles of Kielley v. Carson,[78] the holding itself is, arguably, reconcilable with the principles of that case: the appreciation of 'necessity' obviously being more than a little subjective.

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73. Post, p. 253.

74. [1896] A.C. 600.

75. (1878) 2 S.C.R. 158 at 191; emphasis added.

76. See ante, p. 87.

77. Even if an unnecessary decision be supposed to be obiter (as to which, see Jacobs v. L.C.C. [1950] A.C. 361 at 369),

Dorion, C.J., was clearly in favour of a fairly substantial common-law power:[79]

> 'I do not see that the power of Colonial Legislatures to summon witnesses in order to conduct the enquiries required for a proper understanding of the several questions affecting legislation or the administration of public affairs was ever challenged. Responsible Government, which has been recognised in the local as well as in the constitution of the general Government, would be a delusion if that power of enquiry was denied, and the enquiry would be valueless without the power of summoning witnesses. I consider this to be a necessary incident of the powers of Legislatures and of controlling the administration of public affairs, and as such I believe that the House of Assembly had a right to exercise it, as it was exercised under the Constitution of the late Province of Lower Canada in the case of Mr. Monk, who was imprisoned in 1817 for refusing to produce certain registers and papers before the House or a Committee of the House of Assembly. I cannot find a case where this power of Colonial Legislatures to summon witnesses has been questioned;'

and this, in his view, quite consistently with Kielley v. Carson,[80] followed as we have seen in Lower Canada by Cuvillier v. Munro,[81] both of which he cited:[82]

> 'I do not mean to say that our Local Legislatures are vested with all the privileges appertaining at common law by immemorial usage to the House of Commons in England. It has long been settled that they had not, but I merely say that they have a right to exercise such rights and privileges as are mere incidents of the powers specifically vested in them, and without which they could not properly exercise the duties devolving upon them.'

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the constitutional challenge to the validity of the statute lent some justification to deciding the common law position; expecially since there is a principle that the constitutional question of vires is to be last decided.

78. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

79. (1875) 19 L.C.J. 210 at 232.

80. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

81. (1848) 4 L.C.R. 146; ante, p. 72; post p. 117 ff.

82. (1875) 19 L.C.J. 210 at 232. At the same page his Lordship again referred to the power to summon witnesses as a neces-

Taschereau, J., asking himself the two questions, first, whether the Assembly had power to hold inquiries, forcing witnesses to appear before it and putting them on oath;[83] second, whether on their default to appear the Assembly could put them into the custody of its Sergeant-at-Arms, bring them to its bar, and, in consequence, deal with them 'sternly', answered his questions in the affirmative:[84]

> 'Un texte spécial de la loi donne ces pouvoirs à cette Assemblée; et de plus ces pouvoirs sont une conséquence nécessaire pour arriver à l'exécution de sa part dans la législation du pays.'

and again, not only in the exercise of legislative power stricto sensu:[85]

> 'Le plus grand reproche que l'on puisse faire à cet Acte, au moins au point de vue de la cause qui nous occupe, n'est pas celui d'inconstitutionnalité mais de son inutilité, car l'Acte de Confédération, en donnant à la Législature de Québec, le pouvoir de législater pour le bien du pays, de conserver et sauvegarder les propriétés immobilières de la Province, de changer toute sa constitution à l'exception de ce qui concerne le Lieutenant-gouverneur, en décrétant que toutes les lois et usages en force en la ci-devant Province du Bas-Canada y seraient

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sary incident, and on the latter occasion coupled it with a correlative power to punish disobedience as contempt: 'as a necessary incident of the exercise of its functions, the Local Legislature had the right to summon witnesses and punish them for contempt in disobeying its orders.'

83. How plausible was the claim to a common law power to examine witnesses on oath may be judged from the necessity, even for the House of Commons at Westminster and its committees, to obtain statutory authority to administer oaths: The Parliamentary Witnesses Oaths Act, 1871, 34 & 35 Vic.,c.83; superseding with a general authority, and repealing the more restricted provisions of 21 & 22 Vic., c.78, s.1 (2d August, 1858) and 34 Vic.,c.3, s.3 (28th February, 1871). Nor was this merely ex majore cautela. Under the original s.18 of the B.N.A. Act, 1867, the Parliament of Canada was empowered to invest its houses with privileges, powers and immunities not to exceed those enjoyed at the time of the passing of the B.N.A. Act by the Commons House of Parliament of the United Kingdom. The Canadian statute of 1873, 36 Vic., c.1 (Can.), professing to empower Committees of the Senate and Commons to examine witnesses on oath, was disallowed on the advice of the law

> conservées de même que si l'Acte de Confédération n'eût pas été passé, l'Acte de Confédération, dis-je, en conférant tous ces pouvoirs à la législature de Québec, a également et implicitement voulu lui donner les moyens de réaliser tout ce que cet Acte de Confédération lui permettait de faire et accomplir. Or, pour législater, il faut dans la plupart des cas une enquête sous la foi du serment, il faut prouver l'accomplissement de conditions et formalités précédentes, avant que d'accorder ou enlever des chartes, des priviléges, et empiéter sur les droits des habitants du pays.;'

but also as grand inquest of the Province:[86]

> 'Mais on dira encore que l'Assemblée Législative de Québec n'est qu'une des branches d'une Législature, avec pouvoir ou juridictior limités. J'admettrai que ses pouvoirs ne sont pas ceux de la Législature Impériale ni même de la Législature du Canada, mais je dis que, dans son domaine et ses attributions, elle a un pouvoir et une surveillance exceptionnelle et supérieure à tout autre, et qu'elle a des devoirs et obligations à remplir d'une telle importance, qu'elle ne pourrait légalement ni honnêtement remplir, sans les pouvoirs que l'avocat du Requérant lui refuse.'

so that, quite independently of the statutes, the Assembly enjoyed the requisite authority:[87]

> 'l'acte de 1896, 32 Vict. ch.6, permet l'examen des témoins sous serment. Je dis qu'indépendamment de cette Acte et de celui de 1870, qui confèrent expressément ces pouvoirs aux branches de la Législature de Québec, elles les possèdent, ces pouvoirs, ex necessitate rei comme corollaires des autres pouvoirs que lui donne l'Acte de Confédération et qu'il

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officers in London, precisely because in 1867 the Commons at Westminster had not enjoyed the power in question: see the materials collected in the compilation by W.E. Hodgins, Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation (Ottawa, Government Printing Bureau, 1896) pp.13-19. For subsequent developments, post, p. 256 ff.

84. (1875) 19 L.C.J. 210 at 233.

85. Ibid.; emphasis added.

86. Ibid., at p.234.

87. Ibid., at pp.233-4.

> n'était pas nécessaire d'une nouvelle législation pour les lui donner. En les définissant, la Législature n'a virtuellement fait que confirmer et déclarer ce qui lui appartenait déjà par un usage d'un nombre d'années d'au moins quatre-vingts, et comme conséquence de son établissement et de son existence comme Législature.'

Sanborn, J.'s well-written judgment expressly disclaims the necessity of deciding the common law,[88] but proceeds, nevertheless, to express, in affirmance of the privilege claimed[89], views on the common law which his Lordship considers quite consistent with those of the Privy Council:[90]

> 'Any person who refuses to attend, upon the summons of the Legislative Assembly, to give evidence, is obstructing that body in the legitimate execution of its functions. I think, without reference to the statute referred to, there must be an inherent right, in the Legislative Assembly, to compel persons to attend before them, and give evidence. This principle, it appears to me, is conceded in the cases of Kielley vs. Carson, and Doyle & Falconer. In the former, Baron Parke said, "We feel no doubt that such Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure free exercise of their legislative functions, they are justified in acting upon the principle of the common law;"'

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88. (1875) 19 L.C.J. 210 at 238. 'I hold that under this statute the Legislative Assembly of the Province of Quebec has a right to compel the attendance of Mr. Dansereau, before the bar of their House. Thus, holding, it is unnecessary for the purpose of this case to discuss the question of privilege as a common law right. This, however, is not a matter which this Court can dismiss in justice to the subject, without some observations upon the general privileges and powers which the Provincial Legislative Assembly has a right to claim.'

89. 'The arrest of Mr. Dansereau, by virtue of the power conferred by this Act, is, apart from the question of privilege, an inherent in, and incident to, every legislative body. Such privilege is exercised by one House upon an undefined law based upon the nature and usages of legislative bodies.' (1875) 19 L.C.J. 210 at pp.237-8.

90. Ibid., at p.239.

and though the learned judge treads upon the forbidden ground of analogy, he prepares a route of quick retreat:[91]

> 'In considering the privileges necessarily incident to Colonial Legislatures, we can only apply the constitution of the Parliament of the United Kingdom where the analogy obtains,'

and finds the power in question incident to a body which enjoys legislative power and acts as inquest of the province:[92]

> 'The Legislative Assembly of our Province has not the mere nude power of legislation. It has, by usage, and by a constitution modelled upon the English House of Commons, also an inquisitorial power to make itself acquainted, by means of Committees, of the needs of the Province, and the evils that exist in society over which it has control, in order to legislate intelligently, and administer wisely. The appointment of Committees of Inquiry for purposes of this nature is incident to the existence and proper working of every Legislative body. It is associated with all our ideas of legislation under the British system and has been exercised without question in all our Parliamentary history as a Province.'

Justice Monk concurred. Well might that learned judge indeed think that

> 'We go back scarcely a century, but even within that short period, we find the laws, usages and powers of our Parliament constantly and decisively asserted. We have the case of Mr. Young is 1793, that of Mr. Monk in 1817, those of Messrs. Tracy and Duvernay in 1832, of Brodeur and Lavoie in later times. These persons were brought before the Bar of the House on general warrants, some for breach of privilege, some for refusing to give evidence and to produce documents, some for libels on the House, and others for delinquencies cognizable by Parliament.',,

since the Monk against whom the Assembly had 'decisively asserted its privileges'[94] appears to have been none other than the learned judge's own father.[95]

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91. Ibid., at p.238.

92. Ibid.

93. Ibid., p.246.

94. See Ex parte Monk (1817) Stuart's Reports (L.C.K.B.) 120; ante p. 34.

95. The judge, Hon. Samuel Cornwallis Monk (1814-1888), a judge

His Lordship's[96] 'conclusion that our Local House of Assembly does, beyond all doubt, possess the right to summon any of the Queen's subjects in this Province to appear before it or its committee to give evidence, and for other objects; and that if these persons disobey, or disregard such summons, the House has the power to compel their appearance before the bar of the Assembly to be dealt with according to law, and the rules and resolutions of that body' is probably not wider than is warranted by the facts of the case; but like his colleagues, his 'reasons for coming to the conclusion' range widely over the common law of privilege, even though, at the conclusion of his judgment, he observes that they are really not necessary in face of a decisive statute.[97] This much being conceded, the learned judge rests his decision independently upon 'inherent and necessary powers'; and the authority of statute.[98] Upon the necessity of[99]

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of the Superior Court (1866-68) and then of the Queen's Bench (1868-88), was a nephew of Chief Justice Sir James Monk, and son of Samuel Wentworth Monk.

96. (1875) 19 L.C.J. 210 at 242.

97. Ibid., at p.247: 'I have been induced to go more fully into the above considerations than I deem at all necessary, in order to dispose of the questions submitted for our consideration, in consequence of the dissent of my honorable and learned colleague on my right, who rests that dissent upon grounds which this Court regards as untenable. But it is not essential that these questions should be raised at all. We have a positive law, a statute of the Local Legislature, the 33 Victoria, cap.5, which disposes at once of this case. The 2nd and 9th sections of that Act are decisive.'

98. Ibid.: 'Thus, therefore, as it appears to me, upon the three grounds above adverted to, 1st, the inherent and necessary powers of our Local Legislature; 2nd. The usage, precedents and decisions in relation to the powers of our Legislature for nearly 100 years; and partly under and in virtue of the clear and peremptory authority and requirement of positive laws, the 33 Vic., cap.5, and the statute of the same year, which authorises the administration of oaths to witnesses examined before committees of the House, we are bound to quash this writ of habeas corpus, and to uphold, in so far as this case involves the prerogatives of our Parliament, the authority of the House.'

99. Ibid., at pp.242-3.

> 'the powers, privileges and functions which, as it seems to me, at all times since the first granting of a Legislature to the colony, have been, and which now necessarily must be, inherent in that body, independent of any precedent or any usage'

there is no equivocation:[100]

> 'I am unhesitatingly of opinion that this power, authority or prerogative or whatever it may be termed, or whatever designation it may receive, is absolutely, indispensably necessary here, in order to carry on and accomplish the legislation of the country; and at the same time, for the purpose of exerting a vigilant supervision over the Executive Government in the execution of the authority confided to it, and in the performance of its duties towards the people, represented by the House of Assembly.'

That views may differ as to the necessity of the power to compel the giving of evidence or information, accordingly as a more or less liberal approach is taken, and necessity is 'reasonable necessity' or 'strict necessity', sufficiently appears from the division of the Supreme Court of Van Diemen's Land in Fenton v. Hampton[101] already considered, and from the narrow grounds upon which the Privy Council had there affirmed the lower court. That Ramsay, J., in Ex parte Cotté and Duvernay,[102] in dissent in Ex parte Dansereau,[103] hewed in his treatment of the common law more closely to the paths of the stricter necessity generally characteristic of the decisions of the Board, is of significance, though it does not of itself show that the majority were seeking to resist the principles laid down in the leading cases.

Ramsay, J.'s views as expressed in Ex parte Cotté and Duvernay[104]

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100. Ibid., at p.244.

101. (1858) 11 Moo. P.C. 347; 14 E.R. 727; ante p.

102. (1875) 19 L.C.J. 210.

103. (1875) 19 L.C.J. 210 at 219 ff.

104. Ibid., at p.217.

> 'Necessity to be the groundwork of a power of this sort must be an absolute necessity; such for instance as the power of an assembly to keep order within the hall where its deliberations are carried on, but not as a mere matter of convenience. In the case of Doyle vs. Falconer, an outrage in the face of the House was held not to justify a commitment. Now the object of a Legislature is to make laws and not to take inquests. There cannot then be any absolute necessity in their hearing witnesses. So much is this the case that there is no common law right to examine a witness under oath in committee or before either of the Houses of Parliament in England, except only in cases of impeachment, before the Lords. There is not, therefore, anything judicial in such a proceeding. The so-called witnesses are merely advisers, what they say has only argumentative authority, for in judicio non creditur nisi juratis;'

and, in dissent in Ex parte Dansereau:[105]

> 'But to take the more plausible pretention put forward for the House of Assembly. They say, we must have incidentally the powers necessary to our existence; it is necessary to our existence that we should be able to make enquiries, and we cannot make enquiries unless we can compel the attendance of witnesses. No one contests the first and second of these propositions; but what is said is this, that the right to compel the attendance of witnesses is not essential to making enquiries. People in every day life make enquiries constantly, yet they have no power to compel their neighbours to come in and give them their advice. The Crown too requires to make enquiries much more urgently than either House of Parliament; but it has no power to this day, in England, to compel the attendance of witnesses before its Commissioners. Two cases were suggested by Counsel, to show that the power to examine witnesses was essential to the House. One was to prove the preamble of a private bill; and the other, corruption on the part of a member.
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> 'If it were necessary to have the power to compel the presence of witnesses in certain cases, it does not follow that the House should have the power inherently in all; so that, unless it can be shown that this is one of those cases, the argument would not help the pretention ostensibly pur forward. But the preamble to a private bill has never been proved, in the strict sense of the word. It is substantiated to the satisfaction of the Committee, and that is all. It was only by the Act 21 and 22 Vic., cap.78,

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105. Ibid., at p.222.

> that committees in England have the power to examine witnesses on oath; consequently, a committee is not at common law restricted in any way as to the extent of information is should have before it declares the preamble proved. In practice it is hardly possible to conceive the necessity of compelling witnesses to appear, to prove or disprove the preamble of a private bill. The parties interested in a private bill are under a compulsion much more stringent than the most enthusiastic advocate of privilege could devise to come in and say their say to the committee. I have seen warm debates as to the right to produce evidence on private bills. I remember of no case where it was necessary to compel the attendance of persons. But in any case, if we are to build up the right for the House of Assembly, on any grounds of necessity such as that insisted on, we must say, by parity of reasoning, that the Corporation of Montreal has a similar right on an application to put up a steam engine in a back street,'

are well worth quoting, not only for their inherent and persuasiveness, but because it is hard to escape the feeling that Ramsay, J.'s is the assessment of necessity that would probably have commended itself to the Privy Council had the matter come squarely before them. The learned judge, having pointed out the implications of the power claimed[106] for the liberty of the subject:

> 'It is perfectly evident that if the House may compel the attendance of witnesses, it may compel the production of "papers and things". Now let us see how far this leads us. Not only may a man be interrogated by the members of a body, not logically trained to decide nice questions of evidence, and consequently totally unfit to limit an enquiry to its just proportions, but it may compel him to produce his private papers, and every movable in his possession for their inspection.'

--remarks pregnant with significance in our own times which have seen no little abuse of the power of legislative inquiry--seeks also to show by way of illustration that in the scandal giving rise to the litigation at bar, no serious, or (at any rate) essential, purpose was being served by the inquiry being

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106. Ibid., at p.223.

conducted in the House.[107]

But though the actual holding of the majority was one which could honestly, even plausibly, be thought consistent with Kielley v. Carson and the subsequent Privy Council cases, the opinions of Taschereau and Monk, JJ. disclose what amounts undeniably to hostility to the leading cases, and the judgments of Dorion, C.J., and Sanborn, J., arguably a certain measure of resistance.

It is significant, for example, that Fenton v. Hampton,[108] which, if not on all fours with the case at bar, was at least the closest to it of those decided by the Privy Council--dealing as it did with punishment for refusal to attend at bar to give information--was at no point cited (much less distinguished) by the majority justices; and this, though it is hardly to be supposed that it could have escaped their attention: first, because it was expressly cited by their brother, Ramsay, J., in support of his divergent position[109] in Ex parte Cotté and Duvernay; and second, because Doyle v. Falconer[110] is cited by two judges in Ex parte Dansereau[111]--and Doyle v. Falconer itself approves and follows[112] Fenton v. Hampton.

Quite the contrary. Dorion, C.J., cites[113] in support

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107. Ibid., p.224.

108. (1858) 11 Moo. P.C. 347; 14 E.R. 727.

109. (1875) 19 L.C.J. 210 at 213.

110. (1866) L.R. 1 P.C. 328.

111. (1875) 19 L.C.J. 210 at 223, per Ramsay, J.; at 239 per Sanborn, J.

112. Ibid., at p.339.

113. (1875) 19 L.C.J. 210 at 232.

of his position the United States case of Anderson v. Dunn[114] where in the words of Dorion, C.J.[115] 'the Supreme Court decided that the power to commit for contempt others than members of the Legislature, although not expressly given by statute, was a necessary incident of the powers of the Assembly.' That this was to be repudiated by the United States Supreme Court[116] five years after his own opinion, Dorion, C.J., could not, of course, foresee; but he must have understood that Anderson v. Dunn, in company with Kielley v. Carson, would produce something decidedly less than harmony; and, moreover, as his brother, Ramsay, J., explicitly pointed out,[117] 'It is needless to cite the case of Anderson and Dunn, for it was examined in the case of Doyle and Falconer, and whether Anderson's case was decided rightly or the reverse, it cannot weigh with us, for its authority was rejected by the Privy Council'.[118]

Again, Dorion, C.J., is content to support the general warrants made use of by the Assembly in the case at bar, by reference to the English privilege cases[119] and the Canadian privilege cases[120] prior to the decision in Kielley v. Carson[121] none of which would, since Kielley's Case, seem to govern.[122]

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114. 6 Wheaton 204 (1821); cited as to p.228.

115. (1875) 19 L.C.J. 210 at 232.

116. Kilbourn v. Thompson 103 U.S. 168 (1880).

117. In Ex parte Dansereau (1875) 19 L.C.J. 210 at 223.

118. See Doyle v. Falconer (1866) L.R. 1 P.C. 328 at 339.

119. Case of the Sheriff of Middlesex (1840) 11 A. & E. 273; 113 E.R. 419; Howard v. Gossett (1845) 10 Q.B. 359; 116 E.R. 139.

120. Ex parte Monk (1817) Stuart's Reports (L.C.K.B.) 120; Ex parte Tracey (1832) Stuart's Reports (L.C.K.B.) 478; Case of Brodeur, Journals of the Legislative Assembly of the Province of Canada (1854), p.

121. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

How far Taschereau, J., was concerned to reconcile his views with those of Kielley v. Carson may be judged from his approving reference[123] to Lord Tenterden's views[124] on the absolute necessity of a power in a legislative assembly to punish libels; and his support of the validity of the Assembly's general warrants by reference to English authorities.[125] A common law power to punish libels, which one would have expected to see the learned judge distinguish, is instead twice reiterated,[126] and authorities invoked which would have seemed effete since Kielley v. Carson.

Sanborn, J., though not quite so aggressive about staking privilege claims in forbidden territory, enjoyed the peculiar faculty of discerning what no one else could have done: namely, Privy Council approval of the early Canadian cases upholding a power to punish for libel.[127]

In upholding the privilege claim in the case at bar, as necessary to a Legislative Assembly, Monk, J., did not blush to suggest that the necessity of a privilege was much the same thing as its enjoyment at Westminster;[128] necessity being plainly assimilated to analogy (called by that name or some other), and the learned judge comes very close to transplanting the lex et consuetudo parliamenti in a body:[129]

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122. See Dorion, C.J., at (1875) 19 L.C.J. 210 at 231.

123. (1875) 19 L.C.J. at 234.

124. Case of The Times, ante, p. 66.

125. (1875) 19 L.C.J. 210 at 235: 'Les précédents anglais sont dans le même sens, c'est-à-dire justifiant un simple mandat d'arrestation sans expression de cause.'

126. (1875) 19 L.C.J. at 233; at 234; and at 234-5.

127. See (1875) 19 L.C.J. 210 at 239.

128. Ibid., pp.243-4.

129. Ibid., p.243; emphasis added.

> 'It was not contended by the counsel for the Speaker that the Legislative Assembly of Quebec possesses all the powers and privileges of the Imperial House of Commons. It is a legislative body, no doubt, but subordinate to that of the Parliament of Great Britain, and subject to its control, if it chose to exercise it. Therefore, such a pretension would perhaps be inadmissible. I do not consider myself bound, in the present instance, to decide that question; it isnot at all necessary that I should do so. Vague or cogent analogies may exist between the two bodies; but I do not, in any way, or in the least degree, rest my opinion on these assumed or apparent analogies. They may be referred to, or even invoked, in order to illustrate matters of history and parliamentary usage, but not as being of material importance, in deciding this case.

Necessity becomes diluted into convenience:[130]

> '[T]hese powers and privileges of the Imperial House of Commons are implied in the very existence of that body, and...they result and have resulted from necessity, or, as some would say, from convenience (pretty much the same thing in matters of this kind)...'

and all the privileges of the Commons at Westminster are to be considered necessary:[131]

> '[T]he peculiar powers, laws and usages of the British House of Commons are numerous and extensive, and are now, moreover, pretty well defined--they are and always have been, I presume, deemed to be inherent, indispensable--in fact, absolutely necessary for the unmolested and efficient exercise of its authority and functions as a legislative body. Upon no other grounds, and for no other reasons, could they have existed, or would they have been tolerated by the British people.'

so that his Lordship is drawn to the blithe conclusion:[132]

> '[T]he same kind of necessity and implied authority, in this respect, though in a subordinate degree, appertains and is vested in the Legislative Assembly of Quebec, as in the Imperial House of Commons. This I think, is beyond controversy, and I am not disposed to ignore or criticize those powers as they are claimed and enforced in England; and unless our law is clear, decisive and peremptory, I will not and cannot impede or overrule their exercise by our own Legislature.'

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130. Ibid.

131. Ibid.

132. Ibid., at p.244.

The learned judge, being good enough to refrain from challenging the House of Commons at Westminster, obviously expects his charity reciprocated; evidently disinclined to attempt the impossible, he makes no attempt to reconcile his own sweeping dicta with the restrictive words of Kielley v. Carson, or, for that matter, with any other of the Privy Council decisions in point; accomplishing, indeed, the rather remarkable feat of avoiding entirely dignifying these cases by citation. His Lordship is content to present as a single striking aperçu[133] what none but the most penetrating minds could read in those decisions:[134]

> 'It is unnecessary to refer at length on the present occasion to the decision of the highest tribunals of England, or to the opinions of eminent judges in their courts, in order to show that the view here taken as to the inherent authority of Parliament, and the force of parliamentary precedent and usage, even in subordinate legislatures such as ours have been fully sustained.'

Unhappy indeed the judge who can only overrule a claim of privilege at the price of branding the Legislature a mob of flagrant tyrants:[135]

> '[T]he authority and inherent privileges of the House of Assembly, have virtually continued, though occasionally in abeyance, through all the changes of our Constitution, and they exist now in as full force as they did for a long time, and immediately previous to Confederation. I consider myself, therefore, bound by what I regard as an established usage, and I cannot in the face of all this decide that for nearly a century, and up to the present day, the Legislature of this country has, in the instances adverted to, and which in part illustrate its history, been acting as a mob, perpetrating illegal

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133. No doubt destined for the immortality envisaged by Holmes—'A man's system is forgotten: only his aperçus remain.' Holmes to Pollock, August 28, 1920. Mark de Wolfe Howe, ed., Holmes-Pollock Letters (Cambridge, 1946), ii, 52.

134. (1875) 19 L.C.J. 210 at 247.

135. Ibid., pp.246-7.

> acts, and guilty of flagrant tyranny and violations of the law of the land. Such an assumption on my part, in view of the arguments from necessity and usage, above set forth, would not only be inadmissible, but at the same time,'

--what must obviously be avoided at all costs--

> 'it would be a preposterous judgment.'

The opinion expressed in Ex parte Dansereau upon the necessity at common law of the important privilege of compulsory inquiry, was that of a four-to-one majority of a full bench in a court from which, but twenty years ago, an appeal lay directly to the Queen in Council; for that reason, if for no other, it merits the rather extended consideration just given. But even more, we see in some, at least, of those opinions a determined and unapologetic resistance to principles laid down in an undeviating series of Privy Council decisions, of which the first was delivered by probably the most eminent collection of judges ever assembled at the Board upon an appeal.

The reconciliation of Justice Taschereau,[136] therefore, to the principles of Kielley v. Carson, after his elevation to the newly-created Supreme Court of Canada in 1875, can perhaps be said to mark the date at which the matter was finally closed; for if some subsequent decisions seem inconsistent with the broad stream of case law, they would seem rather inadvertent than recalcitrant.

Curiously enough, however, Taschereau, J., even at the later date, in giving his opinion in 1878 in the case of Landers v. Woodworth[137] professed the view[138] that Baron Parke, in Kielley v. Carson,[139] in leaving open the possibility of committal for a contempt in the face of the House, was really handing down a decision in favour of such a power;[140]

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136. Jean-Thomas Taschereau, fils.

137. (1878) 2 S.C.R. 118.

138. Ibid., at pp.207-8.

139. Ante, p. 62.

and it was to the authority of Doyle v. Falconer,[141] oddly enough, rather than to that of Kielley v. Carson,[142] that his Lordship in the end submitted; indeed, the learned judge treats the Doyle Case as overruling the Kielley decision;[143] a doctrine whose novelty is quite sufficiently demonstrated by the slightest acquaintance with the words of Sir James Colvile in Doyle's Case[144] on the subject of the Kielley decision.

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140. 'The contempt complained of in the present case was committed within the House and during its sittings. It was incumbent on the House, I apprehend, to notice the contempt, and it was accordingly done...Now, I do not think that should our decision be against the respondent [and thus in support of the privilege], it would be contrary to that of the Privy Council in Kielley v. Carson, which was, as I said, for a contempt outside the House...So far, it seems evident to me, that the case of Kielley v. Carson, far from being adverse to the pretensions of the appellants, does, in fact, support them.'

141. (1866) L.R. 1 P.C. 328.

142. (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

143. 'But a new feature, and, I may say, a great complication, has been brought into the case by the judgment of the Privy Council in England in the case of Doyle v. Falconer, which judgment is to the effect, that the Legislature of Dominica did not possess the power of punishing a contempt, even committed by one of its members. I am forced to submit to this judgment of the highest tribunal in England in Doyle v. Falconer. This judgment being the last on the subject is binding on this court, as much as the ruling in Kielley v. Carson, before its overturning by Doyle v. Falconer would have been. I, therefore, declare, though most unwillingly, in favour of a confirmation of the judgment appealed from.' (1878) 2 S.C.R. 118 at 208.

144. '[I]f the elaborate judgment which was then pronounced [i.e., Kielley v. Carson] has in terms left open the question which is raised in the present case, it has stated principles which go far to afford the means of determining that question.' (1866) L.R. 1 P.C. 328 at 339. The sudden deference to Doyle v. Falconer is the less convincing in that the decision had been before the earlier court; Ex parte Cotté and Duvernay (1875) 19 L.C.J. 210 at pp.213, 217, and 218. In Ex parte Dansereau, per Ramsay, J., at p.223; per Sanborn, J., at p.239.

The wheel, in some sense, came full circle to Beaumont v. Barrett[145] in the 1864 Jamaica Supreme Court decision in Re Ewart,[146] where the judges, deferring to the Privy Council so far as to hold the general warrant in the case at bar bad and insufficient to justify detention, left open the question whether, particularly as regards contempts in the face of the assembly [which, until Doyle v. Falconer[147] in 1866 could still be distinguished from contempts committed outside its walls], the Jamaican House could exercise powers of punishment for contempt, the more especially on the basis of a possible prescriptive acquisition of this power in Jamaica; an argument to which Baron Parke, in his embarrassed overruling of Beaumont v. Barrett in Kielley v. Carson,[148] had by his equivocations lent some colour.[149]

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145. (1836) 1 Moo. P.C. 59; 12 E.R. 733.

146. Stephens ed., Supreme Court Decisions of Jamaica, 1774-1923, vol.2, p.1080; (1864) S.C.J.B. 1, p.47; (The Chief Justice, Kemble, Cargill, and Kerr, JJ.).

147. (1866) L.R. 1 P.C. 328.

148. (1841-2) 4 Moo. P.C. 63 at 90-91; ante, p. 59.

149. The Jamaican Supreme Court followed Kielley v. Carson [(1841-2) 4 Moo. P.C. 63] and Fenton v. Hampton [(1858) 11 Moo. P.C. 347] as 'authorities quite conclusive that the "lex et consuetudo Parliamenti" are vested exclusively in the House of Lords and the House of Commons of England, and do not, and cannot, appertain to the supreme legislative bodies of any colony. It follows, then, that no such powers as the law of Parliament can confer on England, belong to the House of Assembly in Jamaica' (p.1081). Accordingly, a general warrant signed and sealed by the Speaker of the Assembly ordering the Sergeant-at-Arms to imprison in the common gaol during the session until further orders 'for a breach of its privileges and a contempt of the authorities of the House committed by the said David Ewart in the face thereof', was 'bad on its face and void' notwithstanding the local Act, 17 Vict., c.29, 'that the Assembly of Jamaica shall continue to have use, exercise and enjoy the like powers, privileges, rights and immunities, as they have hitherto used, and enjoyed, and which of legal right appertain to and belong to them.'

Assuming that a contempt had here been committed in the face of the House, and that the Assembly was entitled to commit in such circumstances, (p.1080), 'the question simply is whether it has exercised that right in a proper manner'. (At p.1081): 'Then can that body commit a person to prison on a warrant, framed as this is, in the exercise of its authority as a superior Court of Record?

'In my opinion it cannot--the House of Assembly can in no sense be called a court--nor can it be said to have ever formed a part of any Court; andit certainly does not, and never did, judicially determine anything--and if not a Court, then, of necessity, not a Court of Record.'

'Therefore, in my opinion, the House of Assembly does not lawfully possess the authority which it claims, of issuing warrants, not subject to review, or otherwise than at common law.'

It is interesting that the Court, though taking great care to disclaim any decision on a power to commit for contempts out of the House, protested a good deal less on the subject of contempts in the face of the House. (At p.1080): 'I do not desire to decide, nor do I think the Court is called on in this case to consider, whether that body has, or has not, the power to commit to prison for a contempt, otherwise than for some act in their presence. Such a question does not now arise, and therefore the numerous instances in which the House of Assembly has exercised the power of committal for constructive contempt or breach of privilege, whichever it may be called, and to which we have been referred, are in no way applicable to the present case.'

II. Freedom from Arrest

The privilege of immunity from being impleaded in courts of law, which by 1770 had suffered in England complete attrition by successive statutes[150] could almost certainly not be said to be a necessary common law incident; and clearly does not inhere in those legislative bodies whose privileges are by statute defined by reference to those at Westminster: thus in 1940 a Canadian M.P. was refused a stay of proceedings sought to last until twenty days after prorogation.[151]

The privilege of freedom from arrest [for, in substance, civil causes] flourishes still in England;[152] and, where it is assumed to exist at common law or is expressly applied by statute, it gives rise to the same problems of scope.[153]

The English privilege extends to forty days before the day fixed for the beginning of the session; and forty days after its prorogation or dissolution; as being the period ultimately settled on as a 'reasonable time' for coming and going.[154]

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150. See May, op.cit., 17th ed. (London, 1964) pp.75-6.

151. Pelletier v. Howard (1940) 43 R.P. 258 (Superior Court: White, J.).

152. Stourton v. Stourton [1963] P.302.

153. Case of Pierre Bédard (1810) Stuart's Reports 1 (Lower Canada King's Bench: Sewell, C.J.; Williams and Kerr, JJ.) Applicant had sought habeas corpus to secure his release from detention upon a warrant authorizing his imprisonment for 'treasonable practices'. The provincial statute 43 Geo. III, c.1, 'An Act for the better preservation of His Majesty's Government, as by Law, happily established in this Province' [11th August, 1803], allowed detention on a warrant signed by three of the Executive Council, for treason, misprision of treason, and 'treasonable practices'; but it contained a saving clause (s.6) providing 'that nothing in this Act, shall extend or be construed to invalidate or restrain the lawful rights and privileges of either branch of the Provincial Parliament in this Province' The court thought that privilege could not extend to treasonable practices if it did not extend to sedition (reviewing the Commons' resolution on the Wilkes Case: see May, 17th ed., p.79), but held that in any event it had no notice of Bédard's election to the last or the newly-elected Legislature.

154. May, 17th ed., pp.74 ff; p.84; Goudy v. Dunscombe (1847) 1

Whether this privilege attached at all at common law to legislative bodies in the dominions; and, if it did, to what extent, is a matter of controversy. In the Case of Pierre Bédard in 1810,[155] the Lower Canada King's Bench thought that, inasmuch as the English authorities as they then stood indicated that after a dissolution privilege extended to a 'convenient time' rather than a settled forty days, a person who had been a member before dissolution could not claim that he had not, between the first and the nineteenth of March, the day of his arrest, a convenient time to return to his home in Quebec City, the very place where the Legislature sat. By 1848, the date of Cuvillier v. Munro,[156] the great case of Kielly v. Carson[157] had been decided by the Privy Council, and the Lower Canada Queen's Bench accordingly sought to apply the test of necessity to a member of the Legislature of the Province of Canada taken on a capias ad respondendum twenty days after the prorogation of one session, and twenty days before the day fixed for the commencement of the next. The judgment of the Court, delivered by Justice Charles Dewey Day, later first Chancellor of McGill and codifier of the Quebec civil law, considered the question one 'to be decided rather upon authority, than from a reasoning upon general principles';[158] and their Lordships found that the same privilege existed as the 'protection from personal arrest on the ground of necessity [which] has been chiefly recognized with respect to persons attending the adminis-

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Exch. 430; In re Anglo-French Co-Operative Society, (1880) L.R. 14 Ch. D. 533.

155. Ante, note 153.

156. (1848) 4 L.C.R. 146 (Lower Canada K.B.: Rolland, C.J.; Day and Smith, JJ.).

157. (1841-2) 4 Moo. P.C. 63.

158. (1848) 4 L.C.R. 146 at 151.

tration of public justice.'[159]

> 'But as necessity is the origin and foundation of the privilege, so this same necessity must be the measure of it. That is to say: in every case the Member claiming the exemption must show that his arrest would interfere with his legislative functions, and prevent the discharge of his duties to the country. The right is that of the elective body of the Province, and not of the individual, and is not to be confounded with any supposed sacredness of person, derived from his office, giving a continual exemption. And I would go even so far as to say that so little is there of personal privilege in it, that the arrest of a Member of the Legislature would not be null if at the time of making the application for his enlargement, the interest of the public in the liberty of such Member had ceased to exist.'

The conclusion being that 'it does attach on the ground of necessity, to the extent of such necessity and not beyond it',[160] the Court decided that it did 'not appear that he was either going to or returning from his legislative duties in the House of Assembly. Indeed, the contrary is rather to be presumed from the fact that neither of the Proclamations alluded to, contain the words "for the despatch of business," and it is a matter of notoriety that when these words are not inserted no session is expected to take place. Such being the case, the Petitioner cannot be held to fall within the legal necessity which has been defined, and is, therefore, not entitled to claim exemption under it.'[161] Perhaps the Court was not entitled to draw this inference from the Proclamation;[162] but it was certainly entitled to find as a fact that the member was not coming or going to the Legislature.

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159. Ibid., p.153; the passage quoted is at pp.154-5.

160. Ibid. p.156.

161. Ibid., p.155.

162. See Moriarty v. Kavanagh (1861) 4 Nfld. L.R. 591 at 596-7 per Little, J.

Rennie v. Rankin[163] came before the Supreme Court of New Brunswick in 1850, on a motion by defendant to set aside a capias ad respondendum on the ground that he was a member of the House of Assembly. Chipman, C.J., in delivering the opinion of the Court, held proceeding by capias to be inappropriate, for '[t]he original principle of law as regards the capias is arrest; the admitted principle of law as regards a member of the House of Assembly is freedom from arrest. These two principles are opposed to each other...' and accordingly suit was not to be commenced by this means against a member. The court conceded the privilege as it existed in England, though without explaining how a forty-day rule met the test of Kielley's Case, which had been stressed in argument. The judges simply said that the case 'must be decided on principle, in the absence of direct authority as regards Colonial Legislatures', and concluded:

> 'We do not mean to say that a member of the House of Assembly must necessarily, during all the time he is a member, retain the privilege against arrest. The privilege cannot go beyond that enjoyed by members of the House of Commons...as existing during a session and for forty days before or after a prorogation or dissolution. No question arises here on this point, and we believe care is always taken to prorogue for such period as will leave the privilege constantly in force.'

The Canadian courts generally approached the subject of freedom from arrest with rather more liberality than had the Lower Canada Queen's Bench. Thus, again in Wadsworth v. Boulton[164] a member of the Legislature of the Province of Canada obtained in 1850 his release from arrest in execution twenty-two days after the dissolution of the Legislature, on the ground that the privilege existed and extended forty days after prorogation or dissolution. McLean, J., was indeed pressed with

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163. (1850) 1 All. 620; 6 N.B. Rep. 620 (Supreme Court: Chipman, C.J.; Carter, Parker and Street, JJ.); at pp.622-3.

164. Wadsworth v. Boulton (1850) 2 Ch. R. 76 (McLean, J.).

the argument that[165] 'the members of the provincial legislature, a body constituted by an act of the imperial parliament, and with powers limited by the very act under which they hold their sittings, are not entitled to claim any exemption from imprisonment, or any privileges beyond what may be necessary to enable them to perform their legislative duties'; and, startlingly enough,[166] 'It [was] conceded that the provincial legislature must necessarily be invested with sufficient power to protect itself and its members against insult, while assembled for legislative purposes: that parties may be compelled to attend to give evidence relative to matters pending; and that, in short, the necessary power and authority must be vested in the two branches of the provincial legislature, to enable them to carry out their public functions; but it is contended that they do not enjoy any power, and that their members enjoy no privileges beyond what may be necessary in this respect.' The learned judge found, of course, freedom from imprisonment to be necessary to attend to legislative duties;[167] but did this necessity extend for so long a period before and afterwards as in England?

> 'Then, if a member were to be arrested on a ca.sa., and committed to jail, he would, on the ground of necessity, be entitled to be discharged from custody for the purpose of enabling him to attend his legislative duties; and what would form a reasonable period for such attendance, and for returning from them, would become a matter of question, depending upon the distance to be travelled, and the facilities of travelling in each case.'
>
> 'But the necessity for the attendance of members, in order to discharge their legislative duties, is not less important in this province than in England; though the interests involved in legislation of this province and of the United Kingdom bear but slender proportion to each other; and if it has been deemed essential in England to guard against an infringement of public right, by the protection from arrest of an individual holding the responsible position of a representative in the legislature of this country, I do not see that it is less important or essential in this province.'

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165. Ibid., p.83.

166. Ibid., pp.83-4.

167. Ibid., p.84.

As these words[168] suggested, his Lordship, basing himself on the English authorities, concluded that[169] '[w]hether the term of forty days is more or less than a reasonable period to enable members to go to the place of meeting of parliament, or to return from thence, cannot now be questioned...'. This decision in Chambers was followed by an opinion of the Upper Canada Queen's Bench in 1852 in the matter of The Queen v. Gamble and Boulton,[170] where the English authorities were carefully reviewed and followed, despite Cuvillier v. Munro,[171] which the Court professed to suppose was decided on a system of laws other than the English,[172] and Kielley v. Carson[173] in which the Court saw 'nothing...at variance with the assertion and enjoyment of this privilege by our legislature'. The court leant on the one hand upon provincial statutes providing for the mode of suit against privileged parties, and on the other upon statutory saving clauses for parliamentary privileges; and though these statutes in no case expressly enacted or declared or necessarily presupposed the privilege in question, the questionable inference was drawn that it existed; a conclusion 'confirmed...by our general adoption of the law of England'.[174]

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168. Ibid.

169. Ibid., p.83.

170. (1852) 9 U.C.Q.B. 546 (judgment of the court given by Draper, J.).

171. (1848) 4 L.C.R. 146; discussed (1852) 9 U.C.Q.B. 546 at 553-4 and 554-5.

172. It had, on the contrary, been decided explicitly on the basis of Privy Council's view of that part of English public law respecting the incidents of legislative bodies created by the Crown in dominions outside the United Kingdom--as laid down in Kielley's Case.

173. (1841-2) 4 Moo. P.C. 63.

174. (1852) 9 U.C.Q.B. 546 at 554; ante note 172.

In the result, Boulton, who in the earlier case had obtained his release by reason of a forty-day privilege held to exist following dissolution, again obtained his freedom on the ground that he enjoyed an immunity from arrest during the forty days next preceding the day of the return of the writs of election. The same court in Henderson v. Dickson[175] under the eminent presidency of Sir John Beverley Robinson, Bart., C.J., applied the same privileges to a legislative councillor in 1860, but held that committal for disobedience of an order to submit to examination as a judgment debtor, was committal for contempt rather than in execution; and this, the court thought, lay outside the privilege.[176]

The courts of Newfoundland, twenty years after the Privy Council judgment in Kielley v. Carson,[177] would scarcely, one may assume, have forgotten that cause célèbre; and, indeed, Little, J., drew copiously from its words when, in Moriarty v. Kavanagh,[178] he held, nevertheless, that members of the Newfoundland House of Assembly enjoyed the same privilege of forty days before and after sessions as in England; the defendant accordingly obtained his release from a capias ad respondendum. The principle that there must be some immunity was clear;[179] and, 'if the main principle be conceded', then, '[b]y analogy to the House of Commons and the decisions in English Courts', forty days before and after a session was to be assumed 'to be what, in the language of the authorities, is termed "a convenient time"'.[180]

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175. (1860) 19 U.C.Q.B. 592.

176. Compare Stourton v. Stourton [1963] P.302, and In the Matter of a Special Reference from the Bahama Islands [1893] A.C. 138. The Court likewise assumed that the status of a legislative councillor, unlike that of a peer, was not to be noticed: (1860) 9 U.C.Q.B. 592 at 594.

177. (1841-2) 4 Moo. P.C. 63.

178. (1861) 4 Nfld. L.R. 591.

179. Ibid., p.595.

180. Ibid., p.596.

But, whatever immunity from processual coercion a member may enjoy at common law or by statute, he had best beware of all forms of coercion save that upon the person; thus an order for the examination on discovery of a member of the House of Commons of Canada may, if he unreasonably refuses to attend, be enforced by striking out his defence.[181]

The Australian courts have shown themselves singularly less generous than their Canadian cousins; the New South Wales Supreme Court went indeed to the opposite extreme in 1894, when in Norton v. Crick[182] it refused a member release from arrest in execution even though the Legislative Assembly of that colony was then sitting. At the relevant time, of course, neither capias ad respondendum nor capias ad satisfaciendum could, as a general rule, be had in New South Wales unless it were shown that the defendant was about to abscond out of the jurisdiction or to remote places in the colony. 'It is scarcely necessary to point out the strange anomaly which would arise if under the present circumstances the privilege existed. If claimed it would be on the ground of the necessity for the member's attendance in Parliament at the time when he was about to cause this attendance to cease by leaving the colony or absconding to some remote place therein.'[183] But the case at bar was one where imprisonment for debt still existed; for the member had been taken, not as being about to abscond, but as a judgment debtor in an action for malicious prosecution. And imprisonment for debt survived in New South Wales in cases of breach of promise of marriage, libel, slander, seduction, and "any malicious injury"; the last class being held to comprehend malicious prosecution. But since the case at bar was (so far as the court could ascertain) 'only the third case in which a writ of capias ad satisfaciendum has issued against a member of Parliament since the institution of Parliamentary government, and seeing that the writ can issue only when it

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181. Cox v. Prior (1899) 18 Ont. P.R. 492 (Street, J.).

182. (1894) 15 N.S.W.R. 172 (Darley, C.J.; Innes and Foster, JJ.)

183. Ibid., at p.177.

is shewn that the member is about to abscond from the colony, or in the few instances in which a defendant can now be imprisoned for debt, we are unable to see that any Parliamentary inconvenience is at all likely to arise by allowing plaintiffs to have the same rights and remedies against members of Parliament for the recovery of what may be due on a judgment which they possess against others of Her Majesty's subjects.'[184] The test of necessity was rigorously applied; perhaps too much so.[185] For if one member might be imprisoned, so might all; and even one might be enough to make a great difference to the result of votes on legislation and other matters. The frequency of interference with functions is scarcely the appropriate test, but rather the degree of interference. Actions for defamation would probably not be greatly increased in number if the privilege for words spoken in the House were relative only and not absolute; yet an absolute privilege exists.

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184. Ibid., pp.177-8.

185. At p.178: 'We are convinced that if no such privilege existed in England by lex et consuetudo of Parliament, the English Parliament would not under existing circumstances, and considering the present law of arrest, think that such a privilege was necessary in order to enable it duly to discharge its functions.' Where, as in South Australia, Imperial privileges had been extended by statute, the usual forty-day rule applied: Wicklein v. Ward (1880) 14 S.A.L.R. 21.

III. The Privilege of Free Speech

(1) The Existence of the Privilege

The Privilege of free speech attaches as a necessary common-law incident to Commonwealth legislative bodies and enures to their members individually so as to protect them from actions and prosecutions for defamation. The decision to this effect by the New South Wales Supreme Court in Gipps v. McElhone,[186] a case involving questions put in the Assembly, was approved by the Privy Council in Chenard v. Arissol.[187] Their Lordships indeed quoted with approval the words of Sir James Martin, C.J. who, in the earlier case, had responded to the argument that 'in the mother country the privilege arises from the lex et consuetudo of Parliament, and is based upon that and upon nothing else; and that such a privilege is therefore peculiar to the Imperial Parliament', with the categorial opinion that:[188]

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186. (1881) 2 N.S.W.R. 18 (Martin, C.J.; Manning and Windeyer, JJ

187. [1949] A.C. 127; on appeal from the Seychelles.

188. (1881) 2 N.S.W.R. 18 at 21; approved by the Privy Council; [1949] A.C. 127 at pp. 133-4. Sir William Manning, J., concurring added, (1881) 2 N.S.W.R. 18 at 24: 'I never had any doubt upon the question of the privilege of a member of Parliament...the public interests require that what is said in the Legislature should be absolutely privileged. Doubtless there may be members of strong energy, easy credulity, and impulsive temperament, who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most importar that there should be perfect liberty of speech in Parliament even though sometimes it may degenerate into license.' Windeyer, J., added at 25: 'I, like the Chief Justice, was unaware till to-day that the privilege of Colonial Parliamer was seriously questioned ... I never understood it to be contended that an action would lie for a speech delivered in the Assembly, though it was properly contended that a member might be liable if he chose afterwards to publish hi: speech. This privilege is based not on lex et consuetudo of Parliament, but upon necessity. On the same grounds are based the absolute privilege of judges and jurymen ... Ther are no higher duties than those of a member of the Assembly and legislation would be paralysed if members could be harassed by actions of libel at every turn.'
See also per Sir Horace Archambeault, C.J., in Club de la Garnison v. Lavergne, (1918) 27 B.R. 37 at 38, on the privilege of free speech as existing independently of any statute.

> 'There is no doubt in my mind of the existence of this privilege, and that it is absolute. It arises from inherent necessity. The necessity is just as great here as in the Imperial Parliament.'

(2) The Scope of the Privilege

The metes and bounds of the privilege of free speech are a matter of much difficulty, since both physical precinct and functional occasion seem to have relevance to their delimitation. Thus the Privy Council in A.G. of Ceylon v. De Livera[189] adopted the view that the writing of a letter by a Member to a Minister to urge or oppose compulsory acquisition of certain land bore sufficient relation to his functions as Member of Parliament to bring it within the scope of a statute making it an offence to offer any gratification to a member 'as an inducement or reward for such ... member's doing or forbearing to do any act in his ... capacity as such member'. This does not of course mean that privilege would attach to such a letter, for the privilege does not embrace all that may be said to be done in one's capacity as a member. Indeed, their Lordships pointed out that the situation was distinguishable from the Strauss Case,[190] where 'speakers, though differing on the issue whether a member approaching a Minister on a departmental matter affecting his constituency was taking part in a proceeding in Parliament, were at one in thinking that he would be performing his duty as a member in so acting.'[191]

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189. [1963] A. C. 103.

190. See Hood Phillips, Constitutional Law, Lith. ed., p. 172 ff Yardley, (1962) 15 Parliamentary Affairs 500 Post p. 189.

191. [1963] A. C. 103 at 121.

That there is indeed judicial authority on the point at issue in the Strauss Case appears to have gone unnoticed; a 1936 Quebec Superior Court decision, Vezina v. Lacroix,[192] dealt with a case closely similar to Strauss, and its holding restrictive of privilege corresponded with that later reached by the United Kingdom House of Commons in the latter case. It is the more relevant in that the House of Commons of Canada enjoys by statute[193] the privileges of the United Kingdom House of Commons, and it was the federal House whose privileges were at issue. The proceedings on which judgment was rendered were of the nature of a demurrer to an action in damages brought against a Member alleging that the latter had caused plaintiff's dismissal from the Civil Service of Canada by a letter written to the Minister of Marine falsely, so it was claimed, accusing plaintiff of engaging in partisan political activities. Langlais, J., , on the basis of English and Canadian authorities[194] held that the privilege exists only within the walls of the House, adding[195]

> 'D'où j'en conclus que pour que le député invoque son privilège, il faut qu'il soit à la Chambre des Communes, dans l'exercise de ses fonctions ... Il est bien évident qu'un député est responsable des dommages qu'il cause en dehors de la Chambre des Communes.
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> 'Mais on dit: le défendeur a agi en sa qualité de député, puisque les lettres produites à l'appui de l'action, sont signées "député de Québec-Montmorency".

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192. (1936) 40 R. P. 1 (Langlais, J.).

193. R.S.C. 1952 c. 249, s.4.

194. May, 11th ed., pp.86-131; Odgers on Libel and Slander, 5th ed., p. 231; Bourinot, p. 239; Anson, Law and Custom of the Constitution (1922) I, p. 86.

'D'abord à ce moment-là le défendeur n'était pas député, il l'était de fait et non de droit, car il n'avait pas été assermenté. Ensuite un député peut-il dans une lettre au patron d'un employé, fût-il ministre, alléguer des choses que je dois supposer fausses pour les besoins de l'argumentation pour causer du dommage à cet employé et lui faire perdre sa position?

'Du fait que la correspondance aurait été déposée à la Chambre des Communes quand il écrivit sa lettre. Ce n'est pas sur une enquête de la Chambre des Communes qu'il à procédé, c'est de lui-même, "proprio motu". Il rapporte les supposés méfaits d'un employé du service civil et lui cause des dommages. Ce n'est pas la mission des députés tel que nous l'enseignent les auteurs, tel que nous l'indique la Constitution. Ils sont là pour représenter le peuple et faire des lois ...'

'Comme je le disais tantôt, quand it est en chambre, le député est protégé par son privilège et quand il est en dehors de la Chambre, il devient citoyen ordinaire.'

(3) A Shield or a Sword?

So far as it concerns immunity from actions of the nature of claims for the damage arising from defamatory statements, the privilege clearly belongs to the individual member, who may invoke it quite independently of the pleasure of the House of which he is a member.

Can a member claim the privilege of free speech as a sword, and not merely as a shield? To intimidate or punish a member for what he has said or done in the House is to commit a contempt of the House for which punishment may be inflicted at least by those legislative bodies enjoying punitive powers.

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195. (1936) 40 R.P. 1 at 3-4. His Lordship goes rather further, in suggesting that the member's letter was outside his functions, than would be consistent with A.G. of Ceylon v. De Livera, [1963] A.C. 103, and in particular with the passage at 121 of that report, cited immediately above. Furthermore, though the oath will in the ordinary course be taken almost as soon as a member enters the House, it is open to question that the subscribing of the oath is a necessary condition precedent to the enjoyment of the privilege. In the interval, one would suppose the privilege available, as for example is that of freedom from civil arrest; though the latter can obviously be distinguished as facilitating attendance on the House.

But will the member have, for example, an action in damages or an injunction on the ground that that may be a civil wrong by reason of its interference with his freedom of speech which, otherwise, would be no wrong? To put a similar case, it may be a contempt of court to intimidate or punish a witness for what he says in court; can a witness then sue in damages for prejudice, not otherwise actionable, traceable to what he has said or may say in court? These were the very interesting issues respectively raised in the Quebec case of Lavergne v. Le Club de la Garnison de Québec[196] and the English decision in Chapman v. Honig,[197] a remarkable pair of cases.

Lavergne, by profession an advocate, was often rumoured to have been Sir Wilfrid Laurier's natural son by his confidante, Emilie Lavergne; certainly the stormy young nationalist was not the least of the political thorns in his side.[198] Successively Liberal and Nationalist, he had, after a period as a Member of the House of Commons of Canada, been elected a member of the Quebec Legislative Assembly; he was to die a Conservative and Deputy Speaker of the House of Commons. Though he had attacked Canadian participation of every description in every Imperial war effort from every platform, he had by 1916 become a Lieutenant-Colonel of Canadian Militia, and had for ten years been a member of the defendant, the Quebec Garrison Club, an officers' club of

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196. (1917) 27 B.R. 37 (Queen's Bench: Sir Horace Archambeault, C.J.; Cross, Carroll, Pelletier and Désy, JJ.); on appeal from (1917) 51 C.S. 349 (Superior Court: Roy, J.).

197. [1963] 2 Q.B. 502 (Court of Appeal: Lord Denning, M.R.; Pearson and Davies, L.JJ.).

198. Joseph Schull, Laurier (Toronto, 1965).

great social standing.[199] Certain members of the latter had complained to the committee of a speech made by Lavergne on the floor of the Legislative Assembly; the committee having declined to act, a general assembly of members was called, which by a majority ordered the committee to expel Lavergne, who by the present action sought damages from the club, and an injunction restraining it from expelling him. He was successful in obtaining both forms of relief in both courts, in addition to an order annulling, or declaring the nullity of, the resolution. It would have sufficed to have found, as did all the judges in both courts, that the manner of expulsion was in breach of the club rules, under which the committee had an exclusive jurisdiction. But Roy, J., in the Superior Court at least alluded to the speech as having been clothed in parliamentary privilege,[200] though he does not appear[201] to have held that this constituted an independent legal basis of relief; and, in the Queen's Bench, the Court, with the exception of Cross, J., who explicitly held the contrary, ruled that the relief was independently well-founded 'parce que la résolution dont il s'agit constitute une violation d'une immunité parlementaire, celle de la liberté de parole'.[202] Where the Court below had stopped with Lloyd George's anti-war protests at the time of the Boer war,[203] Sir Horace Archambeault, C.J., brought the history of free speech back to Haxey's Case,

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199. It was incorporated by the act 43-44 Vict., c.84 (Que.), assented to 24th July, 1880, and could accordingly be sued as indicated above.

200. (1917) 51 C.S. 349 at 356-7.

201 Cross, J., contra (1917) 27 B.R. 37 at 44. Quoted post, p.13[illegible].

202. (1917) 27 B.R. 37 at 38; per Sir Horace Archambeault, C.J.

203. (1917) 51 C.S. 349 at 354.

temp. Richard II,[204] _via_ the Glorious Revolution, James I, and Henry VIII. His Lordship no doubt thereby established unshakably the proposition that[205]

> 'Comme on le voit, un membre du parlement ne peut être inquiété en aucune manière, ni par qui que ce soit pour ses votes ou ses discours au sein du parlement'.

Indeed, the proposition that Lavergne might not lawfully be 'troubled' for his words on the floor of the House was one with which no one would quarrel--so long at least as it meant that Lavergne was immune from suit and that the House might in exercise of its statutory powers in that behalf[206] lawfully proceed in appropriate cases to punish for contempt anyone who interfered with Lavergne's freedom of expression. No explanation was, however, given as to why Lavergne had a pecuniary or proprietary interest in the privileges of the Assembly, such as could be kept intact with damages or an injunction; nor why, if this be thought a somewhat unfair way of stating the question, his membership in the club could constitute a legal interest any greater, or less defeasible, than provided by the club rules which defined it, merely because he was a member of the Assembly, and merely because that happened to provide the occasion on which other members might decide to terminate their association with him--provided always that they complied with the rules. Archambeault, C.J.'s opinion for the majority of the Queen's Bench is content to show that the privilege extends beyond immunity from suit--that intimidation is in some sense unlawful--and to hold the action well founded.[207]

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204. (1917) 27 B.R. 37 at 39; May, _op. cit._, 17th ed., p. 49.

205. _Ibid.,_ p.40.

206. Then found in R.S.Q. 1909, ss.132, 136, and 137. Now found in the _Legislature Act_, R.S.Q. 1964, c.6, ss.66, 70 and 71.

207. 'L'appelant soutient que la prohibition ne s'applique qu'aux tribunaux de justice, et qu'elle ne va pas jusqu'à empêcher un club d'expulser l'un de ses membres pour paroles condamnables prononcées au sein du parlement. Cette prétention est absolument mal fondée. Le privilège est d'application universelle. En 1621, les communes affirmèrent[:]

The contrary view of Cross, J., is well worth quoting[208]

> 'On the merits of the resolution here in question, the respondent took the ground that: as the matter of complaint consisted of some thing said by him in a speech in the Legislative Assembly, the legal immunity enjoyed by a member of Parliament is such that even a social club could not consider what he had said in deciding whether he ought to continue to be a member of the club or not. The Superior Court has taken that view and given it as one of the reasons of its judgment in favour of the respondent. With deference, I would say that this is a mistake which seems to have arisen from overlooking the real nature of a social club. For what is said in parliament there is immunity from those legal consequences which would attach if the thing were said outside of parliament, but just as

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that every member hath freedom from all impeachment, imprisonment, or molestation, other than by censure of the House itself, for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament business.

Quelques années plus tard, la révolution de 1688 confirma de nouveau l'existence du privilège. L'article 9 du Bill of Rights dit expressément:

That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

May dit à ce sujet:

Taking care not to say anything disrespectful to the House, a member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals and he is protected by his privilege from any action for libel, as well as from any other question or molestation.

Il est évident que si une personne ne peut pas assigner un député devant les tribunaux pour paroles offensantes ou injurieuses prononcées au sein du parlement, elle peut encore moins se rendre justice elle même en l'expulsant d'un club pour les mêmes raisons.

May, parlant d'une loi adoptée en 1512, sous Henri VIII à propos de la fameuse affaire Strode, dit encore [:]

The words of the statute also leave no doubt that it was intended to have a general operation in future, and to protect all members, of either house, from any question on account of their speeches or votes in Parliament.

Comme on le voit, un membre du parlement ne peut être inquiété en aucune manière, ni par qui que ce soit pour ses votes ou ses discours au sein du parlement...

Je n'ai aucune hésitation à décider que la résolution adoptée par le club est une violation de l'immunité parlementaire de la liberté de parole. Un membre du parlement ne doit être en aucune manière gêné ou entravé dans son droit de parler ouvertement et librement sur toute question qui peut être discutée en parlement. Aucune crainte ou appréhension ne doit restreindre ce privilège qui, comme le disent les auteurs, est une partie essentielle de la constitution qui nous régit.' (1917) 27 B.R. 37 at 39-41.

208. (1917) 27 B.R. at 44-5.

> an elector would incur no responsibility of which a court could take cognizance by voting against a candidate for re-election to parliament for the single reasons that the candidate had previously made an obnoxious speech in parliament, so likewise the fact that a social club takes as its reason to expel a member the fact that the member had made an obnoxious speech in parliament is not an act into which a court will inquire. It is not touched by the matter of legal immunity from consequences of what is said in parliament. The real immunity is not parliamentary immunity at all, but is the immunity of the elector in the one case and that of the club in the other, in other words, the right of a club to say whether a person shall continue to be one of its members or not, and this without having to give any reason for its decision, provided it be not capricious. It must have the right to preserve harmony amongst its members. The immunity of a member of the Legislature does not differ, in effect from other familiar kinds of immunity such, for example, as that enjoyed by a person who disregards social usages in matters of deportment or attire. In either case, the conduct may not be agreeable to a club and may cause club membership to be severed. Social regulations or relations between a club and its members are not regulated and tested by rules of constitutional law or parliamentary privilege.

A closely analogous problem confronted the English Court of Appeal in Chapman v. Honig,[209] where plaintiff, who had been one of defendant landlord's tenants, had received from the latter a notice to quit which was entirely unimpeachable except in that it was motivated by the fact that plaintiff had given evidence in court against defendant in a tort action successfully brought against the landlord by another tenant. It was conceded that the facts were such as to constitute a contempt of court through the likelihood of the victimisation of the witness becoming known and the consequent interference with the administration of justice. The court below had restrained the landlord from interfering with plaintiff's occupation of the premises, but plaintiff in the end had decided that it was intolerable to remain, and he accordingly claimed damages on the action which came to appeal. The Court of Appeal, by a majority (Pearson and Davies, L.JJ.; Lord Denning, M.R., dissenting) held that no actionable wrong had

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209. [1963] 2 Q.B. 502 (C.A.).

been committed; in substance, because contempt of court was a wrong to the administration of justice and not to the individual affected by it,[210] who would have recourse for any act that was, independently of its quality as a contempt, a civil wrong.[211] Pearson, L.J., was particularly concerned to vindicate the idea that 'the same act as between the same parties cannot reasonably be supposed to be both lawful and unlawful--in the sphere of contract, valid and effective to achieve its object, and in the sphere of tort, wrongful and imposing a tortious liability';[212] though that is quite consistent with the view that the notice to quit was an unlawful act and invalid therefore in every sphere, and, indeed, Lord Denning was not suggesting otherwise:[213]

> 'To my mind the whole case depends upon this one point: When the landlord served this notice to quit, was his act lawful or unlawful? If it was lawful, so that the notice to quit was good, then I think the plaintiff must fail. He cannot complain of being evicted if his tenancy was validly terminated...But if it was unlawful, so that the notice to quit was bad, then the plaintiff must suceed: for in that event the conduct of the landlord, in putting padlocks on the doors and attempting to evict the tenant, was undoubtedly a trespass and breach of covenant for quiet enjoyment.'

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210. Per Pearson, L.J., at p.519; per Davies, L.J., at 524.

211. Pearson, L.J., limited the scope of his holding; at p.522 he said: 'It is not necessary...for the determination of the present case, to decide as a general proposition that there can never be a right of action for damages for contempt of court. The general proposition might well be correct, but in the present case it is enough to say that there can be no such right of action in respect of an act which, as between the plaintiff and the defendant, has been done in exercise of a right under a contract or other instrument and in accordance with its provisions.' The concurrence of Davies, L.J., probably extends to this reservation: see at pp.526-7.

212. Ibid.

213. Ibid., at p.510

And again:[214]

> 'Once it is held that the act of the landlord, in giving this notice to quit, was unlawful, it must follow that the notice itself was invalid and will not be enforced by the courts. Just as no criminal can enforce rights resulting from his own crime...so also no contemnor can enforce rights resulting from his own contempt...'

More to the point was the question put during argument by Davies, L.J.:[215] 'Is the tenant to stay there for the rest of his life?' It was, indeed, difficult to see how the rights of the plaintiff, who had no more than a tenancy at will, could be supposed to have been invaded, so as to give rise to reintegration by means of damages. Thus, Pearson, L.J. said[216]

> 'if the landlord had not given the offending notice to quit when he did, the tenant would have retained his tenancy subject to the landlord's right to terminate it at any time by duly giving notice to quit. The tenant could not reasonably be allowed to gain security of tenure by giving evidence against his landlord.'

An illustration put by Davies, L.J.[217]

> 'To take an example almost on all fours with the present facts. Suppose a valet gives evidence against his master in a divorce suit. On the next day the master, in order to punish his valet, terminates his service by proper notice, say, one month. What damage has the valet suffered? And if the notice were bad, for what period of time will any subsequent notice given by the master to the valet entitle the latter to claim damages?'

was taken up by Lord Denning:[218]

> 'The case was put of the valet who gives evidence against his master in a divorce suit. Next day the master, out of spite, dismisses him by a month's notice. Clearly the notice is unlawful. But the servant cannot stay on against the master's will. The law never enforces specifically a contract for personal service. But what are the damages? They would, I think, be such damages as a jury might assess to recompense him for the loss of the chance of being kept on longer, if he had not been victimised.'

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214. Ibid., at p.512.

215. Ibid. at p.508.

216. At p.522.

217. At p.524.

218. At pp.513-4.

Lord Denning, in sum, would allow plaintiff an action upon his expectation of the defendant's mere good pleasure. The same reasoning would, for example, equally render actionable striking the plaintiff from the defendant's guest list, from which might result loss of social and economic advantages flowing from occasional presence at dinner. Plaintiff clearly had no greater right to stay in the flat than to stay on defendant's guest list.

(4) Notice of proceedings in Parliament

How far the rule in the Bill of Rights, that freedom of speech and debates or proceedings in Parliament ought not to be questioned in any court or place out of Parliament, extends to prevent tribunals, whether courts or commissions of inquiry, from receiving evidence of events within the precincts of Parliament, is a matter of considerable difficulty, since, taken to the widest extent, it would operate to allow the Houses to enforce a far wider freedom from judicial control than the Courts are prepared to concede as a matter of substantive law. The power to commit by general warrant of course allows the Houses a lever to insist upon their views; but exclusion of evidence is a rather less blunt instrument. The English cases have gone far; it is doubtful that the common law would, in the dominions, have given nearly so wide a scope to the privilege of free speech. Indeed, almost all the cases which we have considered, ruling unfavourably to privilege, would have been arrested by a rigorous application of the terms of the Bill of Rights.[219] Even the application of the general rule that members are subject to the ordinary, e.g. criminal, law could arguably be frustrated.[220]

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219. See ante, p. 91 ff.

220. For example, a prosecution for assault in the precincts of the House: A.-G. N.S.W. v. Macpherson (1870) L.R. 3 P.C. 268; see generally

The English authorities were carefully reviewed in 1956 by Mr. Justice Townley, of the Supreme Court of Queensland, sitting as Commissioner under a Royal Commission into Certain Crown Leaseholds.[221] On the basis of these authorities the learned Commissioner held that a Senator of the Commonwealth Parliament [whose respective houses under s.49 of the Constitution Act enjoy the same privileges as the United Kingdom House of Commons], whose allegations, in the course of a speech in the Chamber, of corrupt conduct in relation to certain Crown leaseholds, had caused the setting up of the inquiry, was not himself bound to give evidence concerning those allegations. The learned Commissioner said this:[222]

> 'From these passages I deduce the proposition that a member of the House of Commons is not bound to give evidence of what passes within the House without the permission of the House. I do not think it follows that he is bound to give such evidence if he has the permission of the House but with that question I am not really concerned. Here Senator Wood objects to giving evidence and there is no suggestion that he has received the permission of the Senate to do so.'
>
> 'The conclusion at which I have arrived is that, even if Senator Wood entered the box and were sworn as a witness, he is not bound to answer whether he in fact made the speech in question or any question as to his reasons for making it, as to the information he possessed when he made it, or as to the person or persons from whom he obtained such information. The terms of the telegram and letters sent to the Senator by the Crown Solicitor show the nature of the information which would be sought from him.
>
> 'It seems to me that the question is to be decided on broad and not on narrow grounds. It was, in effect, suggested that Senator Wood might enter the box and repeat afresh the allegations made by him in the Senate. How can I compel him to do so? That would seem to me merely an attempt to do by indirect means what may not be done by direct. Whatever means were adopted to get him in the witness box and however astute a method of examination or cross-examination employed it would still be an attempt to examine him as to allegations made by him in the course of a speech in Parliament.

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221. Reported under that name in [1956] St. R. Qd. 224 (Townley, J., as Commissioner).

222. [1956] St. R. Qd. 225 at 232-3.

> 'I therefore think that I must rule that Senator Wood may not be compelled, while he objects and has not the permission of the Senate, to give evidence of matters coming within the terms of my Commission.
>
> 'I find it unnecessary to rule upon the question of the Senator's immunity from service of a summons to attend as a witness. Authority was cited to show that the right to such immunity in the case of a subpoena to give evidence in a court was invariably waived. The short answer is that there has been no such waiver here.
>
> 'It is hardly necessary for me to say that The Commission of Inquiry Acts, 1959 to 1954 cannot affect the validity of any claim to privilege or immunity here put forward.'

The principle that the court can take no evidence of events in Parliament, whatever its true extent at Westminster and those legislative bodies enjoying privilege as at Westminster, and whatever its compass be at common law in the dominions, seems essentially vexatious at best and dangerous at worst, as interfering with the enforcement of the law, whatever the law may be in any given circumstances.[223] If certain acts are to be privileged, let them be so by substantive rules, and not by rules which exclude evidence, and which may put the fate of the suit at the pleasure of a majority of the house.

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223. See for example, in England, R. v. Governor of Brixton Prison, ex parte Enahoro [1963] 2 Q.B. 455, at 467. Exclusion of debates on the ground of irrelevancy to the meaning or nature of an enactment debated in the House is, of course, a different matter; see A.-G. of Canada v. Reader's Digest Association (Canada) Ltd. [1961] S.C.R. 775 (Supreme Court of Canada).

IV. Personality and Civil Responsibility

Do legislative bodies enjoy a distinct civil personality? They are not anywhere known to be endowed with any expressly; and, as they appear able to perform their functions without the aid of a corporate existence, none is in principle to be implied. Such civil liability, whether contractual or extracontractual, as may be incurred, is, it would appear, incurred by members and officers themselves, and neither by houses nor committees as distinct civil personalities, nor on behalf of Her Majesty.

The last two negative propositions, at least, can be supported with decided cases which, though culled from the Canadian reports and court records, seem to be of general applicability.

The Queen v. MacLean[224] came to the Supreme Court of Canada upon a demurrer to a petition of right to recover from the Crown in right of Canada damages in respect of an alleged breach of a printing contract entered into between suppliant and 'Henry Hartney, in his capacity as Clerk of the Joint Committee of both Houses of the Parliament of Canada, on the printing of Parliament'. This contract had been executed after the Clerk, as above designated, had called for tenders, of which that of suppliant had been duly accepted by the joint committee, whose report was adopted by both Houses of Parliament. Henry, J., acting as judge of the Exchequer Court of Canada[225] accepted the validity of the claim,as having been entered into by the clerk as such 'by the direction and under the authority of that committee, representing as they did the Senate and House of Commons jointly, by whom they were appointed and authorized for that purpose, and the whole proceeding was done with the sanction and approval of the government'. It had, the judge said,

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224. (1881) 8 S.C.R. 210.

225. Ibid., at p.216.

been founded on estimates moved in the House by the Minister of Finance; payments were, under the Appropriation Acts, to have been made from public funds, and security given for due performance was to be forfeit to the Crown. The contract, in sum, thought the learned judge, 'was wholly in the public interest'.

The Supreme Court of Canada were unanimously of the contrary opinion;[226] the Chief Justice, Sir William Johnstone Ritchie, rejecting suppliant's contentions in the most decisive terms:[227]

> 'Her Majesty is no party to this agreement directly or indirectly. The Parliamentary printing was matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control. The Crown could neither dictate to the joint committee of both Houses, nor interfere, nor deal with any contract entered into by them or by their clerk under their authority. The Crown neither authorized the execution of any contract for the work contemplated, nor in any way authorized the doing of the work to be performed under this contract. The Crown neither employed the suppliants to do this work nor entered into any contract in reference thereto. The suppliants were in no way bound to the Crown or, in respect to this contract, subject to its control. The Crown could neither put an end to the contract, nor enforce it, nor in any way interfere with its execution. This contract gave the Crown no right of action against the suppliants, nor the suppliants against the Crown; in other words, the Crown was no party to the contract, and, therefore, cannot possibly on any principle I can conceive, be held responsible for a breach of it.'

Kimmitt v. The Queen[228] followed the MacLean decision; suppliant failed in his claim to recover from the Crown in right of Canada fees and disbursements in respect of professional services as accountant allegedly performed for the Committee of Privileges and Elections; it being thought by Burbidge, J., in the Exchequer Court of Canada[229]

> 'clear, both on principle and authority, that one who performs labour at the instance of a Committee of the House of Commons does not thereby acquire an action against the Crown for his services'.

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226. Sir William Johnstone Ritchie, C.J., (1880) 8 S.C.R. at 224-5; Strong, J., concurring in the opinion of Ritchie, C.J.; Taschereau, J., at p.246; Gwynne, J., at pp.246-7. The Court differed upon certain other claims contained in the same petition.

Liability may well be incurred by members of a committee who contract for or obtain goods or services; possibly even by whole houses; and conceivably in certain circumstances--at least when acting in their own name--by officers; though statutory provision is commonly made for what is known as 'internal economy' of the Houses.[230] But be that as it may, the proposition that a legislative body itself has not a distinct civil personality, and cannot ever therefore as such be civilly responsible, whatsoever be the nature of the claim, is supported by the express decision of Casgrain, J., in the Quebec Superior Court in 1965 in the unreported case of Gabias v. Assemblée législative du Québec, fully reported below.[231]

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227. At pp.224-5.

228. (1896) 5 Exch. C.R. 130.

229. At p.133.

230. See The House of Commons Act, R.S.C. 1952, c.143, ss.15 ff; The Senate and House of Commons Act, R.S.C. 1952, c.249, ss.47 ff.

231. Appendix II.

V. Control of Composition and Preservation of Order

(1) Preservation, Protection, and Punishment

Tradition has it that, in response to the Nova Scotia authorities engaged in the reconstruction of the legislative buildings, who had ordered mural decorations 'suitable for a House of Assembly', a London dealer 'sent out such as were used in English public houses, with a careful attention to appropriateness in connection with the bar room.'[232] He, doubtless, was guided by a higher light; for though the inebriation of members does not always result from alcohol, the problems of order, and the common law solutions to those problems, are not wholly dissimilar to those of an innkeeper.

In examining the legal basis of the powers claimed by Commonwealth legislative bodies to commit for contempt,[233] we have observed the unwillingness of the courts to discern, through the attributes of common disorder, an essential confusion on an altogether higher plane; and their consequent sternness in refusing, at common law, powers greater than those of 'self preservation' or 'self protection' which even a publican might enjoy in analogous circumstances.

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232. Hubert v. Payson (1903) 36 N.S.R. 211 at 226, per Graham, E.J.

233. Supra, Chapters II and III (I).

For Canadian legislative precedents, see Sir John George Bourinot, Parliamentary Procedure and Practice, 4th ed. by T.B. Flint, (Toronto, 1916) p.60. For Australian precedents, see the pioneering study by Enid Campbell, "Penal Jurisdiction of Australian Houses of Parliament", (1963) 4 Sydney Law Review, p.212 ff. at 223 n. There is a general essay written from an historical point of view by Carl Wittke, "Parliamentary Privilege in the Empire", being No. XI in the collection of Essays in History and Political Theory in Honour of Charles Howard McIlwain (Harvard University Press, Cambridge, Mass., 1936).

But where preservation or protection ends, and punishment begins, is not always easy to say. In asking what is meant by punitive powers, Enid Campbell, always a discerning critic, asks,[234] 'Imprisonment and fine are, by any tests, forms of punishment, but does punishment in this context also include suspension and expulsion of members of Parliament?'

But is it indeed true that imprisonment is always punishment? Imprisonment, after all, may be coercive rather than punitive; thus civil contempt is to be distinguished from criminal contempt.[235] The question of a common law power to enforce attendance at bar in custody in aid of inquiry appears not concluded;[236] if it exists--and the judicial authority for its existence is not insignificant[237]--then, as the exercise of such a power constitutes an imprisonment, it follows that the upholding of that power includes the upholding of an imprisonment otherwise than by way of punishment.

Not only can a power (such as imprisonment), prima facie of a punitive character, be said most plausibly to assume in some cases a non-punitive character--so, too, conversely can it

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234. Op.cit., p.215.

235. In the Matter of a Special Reference from the Bahama Islands [1893] A.C. 138 (which raises inter alia the prerogative right to pardon sentences of committal by the Courts) will generously repay the reader even in entertainment alone; and see also, for example, Stourton v. Stourton [1963] P.302.

236. See ante, p.85ff while Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada, 4th ed. by T.B. Flint (Toronto, 1916) pp.70 ff., assumes that 'The Senate and House of Commons have the right, inherent in them as legislative bodies [emphasis added], to summon and compel the attendance of all persons within the limits of their jurisdiction, as witnesses, and to order them to bring with them such papers and records as may be required for the purpose of an inquiry', the learned author gives no decided case as his authority; though the power of the Houses of the Canadian Parliament exists anyway, of course, by virtue of the Senate and House of Commons Act, R.S.C. 1952, c.249, ss.4 to 6 and s.24 ff.

237. Ante, p. 94 ff.

be said that other powers, not prima facie punitive, become punitive according to the purposes for which they are exercised, if the purpose of exercise be admitted as a test: for example, exclusion from lodgings, grounds, libraries, or other facilities.[238]

If the exercise of a given power by the House be permissible for one purpose, and not for another, the Courts are clearly left with the particularly invidious function of canvassing the objects motivating the assembly in any particular case; this, as it will require passing on the whole of the events of any given affair, must prove far more uncomfortable for the courts than would a simple determination in favour of, or against, a claim by the House that a given power is at its disposal.

Nor, it is clear, can this problem be made to disappear by renouncing, for example, all powers of imprisonment. The question reappears in respect of the exercise of every power, so long as the test is not simply whether a power is, or is not, inherently punitive as such, and accordingly does not, or does, exist in law; but whether the purpose of its exercise in the circumstances was, or was not, punitive.[239]

(2) The Power to Preserve Order

The power of the officers of a legislative body to preserve order, even proprio motu and without specific authority from the house, as well against the general public as against members, is supported by two useful authorities, Payson v. Hubert[240] and Toohey v. Melville[241] respectively from the Supreme

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238. See, for example, Barnes v. Purcell [1946] St.R.Qd. 87; [1946] Q.J.P.R. 76 (Appeal from the Magistrates' Court to a Full Court of the Supreme Court of Queensland: Macrossan, A.C.J., E.A. Douglas, J., Philp, J.).

239. Compare, for example, Kariapper v. Wijesinha [1967] 3 All E.R. 485, with Liyanage v. The Queen [1967] A.C. 259, which illustrate the difficulties of defining what is punitive.

240. (1903) 34 S.C.R. 400 (Sir Elzéar Taschereau, C.J.; Sedgwick, Davies, Nesbitt and Killam, JJ.;) on appeal from (1903) 36 N.S.R. 211.

241 (1892) 13 N.S.W. L.R. 132 (Windeyer, J., with whose opinion

Court of Canada and that of New South Wales, and supporting the power against the one and the other.

The former action was brought to recover damages for an alleged assault by the Chief Messanger of the Nova Scotia Legislative Assembly, who had, on the order of the Speaker, removed the plaintiff, 'an extremely erratic and excitable personage', from the smoking room of the Legislative Building, from its corridor, and from the staircase leading from the street, on the ground that she was causing a disturbance. She had, indeed, been similarly removed on previous occasions, and had on one occasion, in fact, violently attacked the Attorney-General when acting as a committee chairman, denouncing him as a 'thief, scoundrel, rogue' for having cruelly wronged her by 'robbing' her of her estate.[242] Davies, J., as he then was[243] held that:[244]

> '[T]he public have access to the Legislative Chamber and to the precincts of the House as a matter of privilege only, and under either express or tacit license, which can at any time be withdrawn or revoked when in the interest of order and decorum it is judged to be necessary. That withdrawal of license can either be general as regards the whole public or special with respect to individuals who make themselves so offensive as to prejudice the proper conduct of public affairs committed to the Assembly or its Committees. It can ex necessitate be exercised by the Speaker or officers of the House in proper cases as against individuals offending against the rules of order and decorum or interfering with the proper discharge of their duties by members in the intervals of the adjournments of the House between its sessions, as well as by the House when

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Stephen, J., concurred, and Innes, J.).

242. (1903) 34 S.C.R. 400 at 408-9, per Davies, J.

243. He had been Premier of Prince Edward Island, and later Minister of Marine and Fisheries of Canada; he was to become Chief Justice of Canada as Sir Louis Davies in 1918.

244. (1903) 34 S.C.R. 400 at 413. At p.415 he emphasized: 'The powers and duties of the officers of the House with respect to the preservation of order and decorum within its precincts are as applicable to the intervals of time of adjournments between the sessions as to the sessions themselves.'

> actually sitting. Any other rule would leave the Assembly rooms, the meetings of committees or the work of the members carried on during the adjournment at the mercy of any individual or body of men who might obtrude themselves into the Chamber or its Committee Rooms and prevent the public business being carried on. Of course I do not refer to any arbitrary or capricious or malicious action on the part of the Speaker or his officers, but one which was a bona fide exercise of what I consider to be a necessary power.'

Indeed,[245]

> 'the liberty of access which the public has to attend the proceedings of the House of Assembly and its Committees and to visit the precincts and rooms of the House is not a right but a license or privilege capable of being revoked, and when properly revoked as to any one leaving him or her a trespasser and liable to expulsion as such.'

The power of a presiding officer of a legislative body to preserve order as against the members, even without the authority of a resolution of the house, was upheld by the Supreme Court of New South Wales in Toohey v. Melville,[246] a trespass action brought against the Chairman of Committees of the Legislative Assembly for his having, while presiding over the House in Committee of the Whole, ejected plaintiff and excluded him from the Chamber. The court considered, and upheld, the sufficiency in law of the defence, which was that plaintiff was interrupting and obstructing the business of the house, and more particularly persisting in standing when required to be seated, and addressing the house when ruled out of order. The case was distinguished as differing altogether from Kielley v. Carson[247], Fenton v. Hampton[248] and Doyle v. Falconer[249] in that this was 'a course

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245. (1903) 34 S.C.R. 400 at 417.

246. (1892) 13 N.S.W. L.R. 132.

247. (1841-2) 4 Moo. P.C. 63.

248. (1858) 11 Moo. P.C. 347.

249. (1866) L.R. 1 P.C. 328.

taken, not in any way to punish the plaintiff for misconduct, but simply to maintain order, and to enable the deliberations of the Committee of the Whole House to be carried on. No such question, therefore, arises here as to the limited punitive powers of colonial Assemblies as arose in the cases referred to, and the question of the power of the defendant as Chairman of Committees to cause the removal of the plaintiff from the chamber must be decided on the same principles as would determine the legality of similar action by the Chairman of Committees in the House of Commons, should there be no standing order of the House of Commons providing for the mode of dealing with such a case.'[250] As Justice Windeyer noted, the very decisions which were such firm authority against punitive powers were equally strong support for protective powers; and since 'it seemed to be virtually conceded by the plaintiff's counsel that the committee could by resolution order the removal of the offending member', 'the argument...was practically narrowed down to the question whether the chairman should not have been armed by such a resolution before he acted.'[251] The House in Committee was not, as to its right to keep order, to be distinguished from the House sitting formally under the Speaker, and[252]

> 'The Chairman of Committees in Committees of the Whole House, or the Speaker, if the House is sitting, is clothed with every power which is necessary to maintain order. The common right to remove an intruder or a member obstructing the proceedings which is in the whole committee is both by virtue of the appointment of the chairman and by the standing order delegated to the chairman. Chosen by the House to guide its deliberations in committee, and to maintain the order which is necessary for such deliberations, in all matters of order he voices its opinion and gives practical expression to its will. All that the committee would do if asked its opinion, he

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250. (1892) 13 N.S.W.L.R. 132 at 135; per Windeyer, J.; with whose opinion Stephen, J., concurred.

251. At p.137.

252. At p.139.

> does, on the assumption that he is expressing its will, and knowing that if he acts in opposition to the tacit will of the committee as a whole its dissent will be quickly expressed. In this respect it appears to me that the common law powers of the Chairman of Committees are clearly as great as, and are certainly no less than, those possessed by the chairman of any other lawful meeting of citizens.'

The consequences of denying this power, and the necessity which must be inferred from a consideration of those consequences, are well expressed by the learned judge:[253]

> 'It requires little consideration to shew that, unless the chairman is armed with this authority, the deliberations of the committee may be completely obstructed, and that the committee may be rendered unable to discharge its functions altogether. If, as contended, a resolution must be passed empowering the chairman to order the removal of the offending member, the same disorder which in the first instance prevented the business being carried on, and which necessitated the resolution, might still be continued and the deliberations of the committee when debating the resolution proposed might be completely obstructed. On the discussion of such a resolution, moreover, further disorder might arise necessitating the moving of another resolution for the removal of another offending member, and so on ad infinitum, thus making the descussion of the original resolution impossible. Every argument founded upon the inconvenience and impossibility of passing a resolution by the committee authorising the removal of a disorderly member applies with equal force to obtaining the authority of the House, which would have to be preceded by a resolution in committee that the chairman leave the chair and report the matter to the House, the passing of which resolution might be obstructed by further disorder. It is absurd to suppose if a member assaulted another and a violent contest took place, that the fight should be allowed to continue till a resolution was passed ordering the removal of the offending member. It would be equally absurd to require a resolution ordering the removal of a member who insisted in beating a drum which drowned the voices of members taking part in the proceedings, and which would alike prevent the moving of a resolution ordering his removal. These may be said to be extreme cases not likely to arise; but it is by extreme cases that we must test the validily of the argument that the chairman has not the power peremptorily to order the removal of a member interrupting the proceedings of the committee. The necessity of the case is at once the basis of the power, and the test of the legality of its exercise in any given instance. How the interruption is caused is of no consequence, provided the necessity arises.'

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253. At pp.138-9.

Innes, J., concurred, expressing closely similar views.

(3) The Control of Composition

It does not seem possible to reconcile on principle the categorical refusal of the courts of law in the dominions to try title to seats in legislative bodies, with their insistence, almost as categorical, on trying the rights of members to sit in the face of attempted expulsions. Neither exclusive jurisdiction can be said to be necessary to the existence of these bodies. So little, indeed, can the right of a representative assembly to try elections be considered a necessary incident--'without which the thing itself could not exist'--that this power has almost universally been confided by statute to the hands of the courts of law.

We have suggested that there is no more reason for the courts to try suspensions than to try the title to the seat. Perhaps this should be slightly qualified. Admittedly, it would be unreasonable that the courts should be excluded from the determination of every matter involving a collateral decision upon a person's rights of membership in a legislative body. To admit such a claim would possibly involve an abdication by the courts of their jurisdiction, as wholesale as any ever claimed by the most enthusiastic proponents of privilege: for every adjudication of a privilege claim doubtless requires it to be presupposed in some way that a given person is or is not a member or officer of a legislative body. In that sense, there is less anomaly in admitting that a legislative body may exclusively try title, than there is in admitting that it may exclusively try the consequences of that title. Particularly is this so if the exclusive right of the house to try title is confined to proceedings which operate in rem on the seat, and which do not merely try the title in order to allow the application of some legal consequences. Even so, trying the validity of suspensions even if treated as collateral attack, has much of the colour of direct attack, upon the status of a member.

But an 'inherent right' (and particularly an exclusive right) of all legislative bodies to try title to their own membership--however patently inconvenient--however 'unnecessary' in any sense of the term--however little more plausible than an exclusive jurisdiction, steadfastly refused, to try the consequences of membership--has received the consistent support of the highest judicial authorities; and not only so, the Privy Council, in affirming this 'inherent right' has considered the legal title to seats so peculiar a matter that, even when confided by statute to the courts, no appeal will be permitted unless specially provided for by statute.[254] The jurisdiction has been treated as so special that the question has been said to be, not whether the ordinary right of appeal from court orders is excluded, but whether a right of appeal is specially annexed; and this is said to be so, even where the legislative body itself may never have exercised the jurisdiction.[255] The principle is explained by the assumption that the Assembly, in substituting a court in its own stead, could not have intended an appeal;[256] whereas what in law took place was not a delegation or surrender by the Assembly, but a change in the law by the Legislature, respecting the mode of determination of rights, which, after all, are 'in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words'.[257] Indeed, in Patterson v. Solomon[258] in 1960, the Judicial Committee so far extended its refusal to allow judicial trial of title to seats in legislative bodies as to refuse to allow judicial contestation of executive office dependent by statute on legislative

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254. Théberge v. Laudry (1876) 2 App. Cas. 102 (Quebec); Strickland v. Grima [1930] A.C. 285 (Malta); Senanayake v. Navaratne [1954] A.C. 640; Patterson v. Solomon [1960] A.C. 579 (Trinidad and Tobago).

255. Patterson v. Solomon [1960] A.C. 579.

256. Théberge v. Laudry (1876) L.R. 2 App. Cas. 102 at 106, 108.

257. Per Stephen, J., in Bradlaugh v. Gossett (1884) 12 Q.B.D. 271 at 286.

258. [1960] A.C. 579.

seats, when the ground of challenge of the executive office was that its holder had become disqualified from keeping his seat.

On history, then, rather than consistency of principle, an extremely wide exclusive jurisdiction is firmly established in favour of legislative bodies to try title, especially title in rem, to membership; and this, whether the issue is one of the validity of the election or appointment, the qualifications for election or appointment, or supervening disqualification.

Thus in Théberge v. Laudry[259] the Privy Council spoke of 'that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly', and in which their Lordships would not allow judicial intervention further than provided by statute, as they were[260] 'the rights and the privileges of the electors and of the Legislative Assembly to which they elect members', which 'have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly'. The jurisdiction was described in 1930 as 'inherent', in Strickland v. Grima,[261] a Maltese appeal, and the principle has been uniformly applied.[262] R. ex rel. Tolfree v. Clark[263] was an unsuccessful attempt to

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259. (1876) 2 App. Ca. 102 at 106 (Lord Cairns, L.C., Sir Barnes Peacock, Sir Robert P. Collier, Sir Henry Keating).

260. (1876) 2 App. Cas. 102 at 107.

261. [1930] A.C. 285 (Judicial Committee: Lord Blanesburgh, Lord Warrington of Clyffe, and Lord Thankerton).

262. Ante, note ; and see Cross v. Carstairs (1913) 47 S.C.R. 559. There are many cases digested in which these principles are implicit, and many containing dicta to the like effect; of especial interest are Re Prince Albert; Strachan v. Lamont (1906) 3 W.L.R. 571; affirmed 4 W.L.R. 411; and Davis v. Barlow (1910) 15 W.L.R. 49; 20 Man R. 158.

263. [1943] O.R. 501 [1943] 3 D.L.R. 684 (Court of Appeal for Ontario: Riddell, Fisher, Henderson, Gillanders, and Laidla JJ.A.); on appeal from [1943] O.R. 319; [1943] 2 D.L.R. 554 Leave to appeal to the Supreme Court of Canada refused: [1944] S.C.R. 69, as the subject-matter of the case had disappeared upon the supervening dissolution of the legislature, and the appeal would not be decided for costs alone

challenge by quo warranto the right of members to sit under the wartime extension by statute of the life of the Ontario legislature; after an elaborate and learned examination of the remedy of quo warranto, it was held that a seat, at least for the purposes of that remedy, was not an office; the challenge failed for that reason quite apart from any question of the validity of the statute. So far are matters connected with membership in legislative bodies excluded from judicial jurisdiction that it was denied by the Supreme Court of Canada in Temple v. Bulmer[264] that the courts had any 'jurisdiction' to enforce an explicit statutory duty placed upon the Clerk of the Crown in Chancery to issue a writ of election after a seat in the Ontario Legislative Assembly had been vacant for three months; and mandamus was accordingly refused to an elector who sought to compel a writ to be issued. It is fair to add, of course, that while the Supreme Court of Canada said that it expressed 'no opinion on that part of the judgment of the Court of Appeal which deals with the status of the applicant to invoke the jurisdiction of the Courts if there were such jurisdiction',[265] it in substance decided the point by saying, in effect, that any duty imposed by the section was owing to the Legislative Assembly.[266] A similar attitude has lately been taken by the Privy Council[267] and may extend even to payment of statutory salary by legislative officers,[268] though non-liability of officers may be correlative to the liability of the Crown,[269] and apt words may impose a liability on the officers themselves.[270]

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264. Temple v. Bulmer [1943] S.C.R. 265.

265. [1943] S.C.R. 265 at 267; judgment of the Court by Sir Lyman Duff, C.J.

266. 'Any duty imposed by that section upon the Clerk of the Crown in Chancery is imposed upon him in his character of an officer under the control of the Legislative Assembly and answerable to the Legislative Assembly': [1943] S.C.R. 265 at 267.

267. Kariapper v. Wijesinha [1967] 3 All E.R. 485 at 496.

268. Ibid., but compare R. v. Dickson, Ex parte Barnes [1947] St. R.Qd. 133 (Macrossan, C.J.; E.A. Douglas and Matthews, JJ.

The embarrassment of having one unshakable line of authorities based on Kielley--notably Barton v. Taylor[271] and Landers v. Woodworth[272]--supporting the justiciability of the right to sit in the Assembly as against exclusion upon unlawful 'suspension'--and another equally powerful jurisprudence, which we have just examined, refusing to allow judicial trial of the right to sit in the House even where an executive office is contingent thereon, was apparent in the conflict of judicial opinion in Chamberlist v. Collins.[273] Plaintiff, who had been expelled from the Yukon Territorial Council as having become disqualified through an interest in a public work, sought a deelaration that he had been wrongfully expelled, against the Speaker, the Commissioner [the chief executive officer] of the Territory, and the appropriate electoral officers; and an injunction against the latter to restrain the issuance of a writ of election. Sheppard, J.A., for himself and Bird, J.A., distinguished the successful trespass action arising from the suspension in Landers v. Woodworth[274] thus:[275]

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269. Reg. v. Lords Commissioners of the Treasury (1872) 7 Q.B. 387.

270. Reg. v. Commissioners for Special Purposes of the Income Tax (1888) 21 Q.B. 313.

271. (1886) 11 App. Cas. 197 (Privy Council: Earl of Selborne, Lord Blackburn, Lord Monkswell, Lord Hobhouse, and Sir Richard Couch).

272. (1878) 2 S.C.R. 158 (Supreme Court of Canada).

273. (1962) 34 D.L.R. (2d) 414 (B.C. Court of Appeal: Bird, Sheppard and Norris, JJ.A) on appeal from (1962) 32 D.L.R. (2d)/64 (Territorial Court of the Yukon Territory: Parker, J.).

274. (1878) 2 S.C.R. 158. The Yukon Territorial Council is a subordinate legislature established by the Parliament of Canada.

275. (1962) 34 D.L.R. (2d) at 417.

> 'There the plaintiff brought action against the Speaker and certain members for trespass by assault and the defendants pleaded that the plaintiff was removed by the Sergenat-at-Arms on resolution of the House of Assembly of Nova Scotia. That action was within the Court's jurisdiction and the defence required the Court to determine whether the removal was legal which involved an inquiry into the powers of the Legislature under those circumstances. The Court held in effect that the removal being punishment for an offence not an immediate obstruction to the proceedings was beyond the powers of the Assembly. There the question was the implied power of that Assembly to punish for an offence under those circumstances. Here the question is whether the Council had the power to decide the eligibility of the plaintiff to sit as a member and the Courts of various Provinces have uniformly held that the power so to decide is within the powers of the Provincial Legislature... That rule should be applied to this Council created by the Yukon Act.'

Norris, J.A. reached the same result by a different means. In neither opinion is the reasoning--nor perhaps could it be--completely satisfying; though this appears to be due partly to confusion of legislation by the Commissioner in Council with exclusion by the Council itself.

(4) Suspension

That the nature and extent of the common-law power of legislative bodies to suspend is a vexed question, we have already seen on a number of occasions.[276] It entangles the threads of authority which accord a wide and exclusive privilege of controlling composition (and often deny the courts the right to try the legal consequences), with those which deny a privilege of punishment. Permeating the whole is the problem of how far the test of punishment is to lie in the effect of the power, and how far in the purposes of those who wield it. Superadded is the problem of going behind the formula in terms of which the causes of suspension may be stated by the Assembly resolution or Speaker's warrant, to obtain particulars; and the nature of the evidence, if any, which the courts will require in proof of stated causes of suspension.

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276. Ante, Chapter III.

How vexed the matter really is may be seen from a consideration of the exchange between Professor E.C.S. Wade[277] and Enid Campbell[278] on a suspension in the Singapore Legislative Assembly in 1960. While Professor Wade assumed that the powers of Commonwealth legislative bodies to suspend would, as a matter of common law, be those of the House of Commons at Westminster, Enid Campbell, after a careful review of the Commonwealth authorities (excluding, however, the important decision of Landers v. Woodworth[279]) and a close examination of the leading case, Barton v. Taylor,[280] showed at once how unfounded such an assumption was, and how little defined the extent of an assembly's powers of suspension still remains at common law.

The leading case upon the common law power of suspension is, unquestionably, Barton v. Taylor,[281] a Privy Council appeal from New South Wales. The elegant judgment of the Earl of Selborne was concerned to deal only with the points actually arising in the cause, and so it left much unanswered. His Lordship did, however, at least declare that the principle applicable to the

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277. "Contempt of Parliament in a Commonwealth State", (1961) 3 University of Malaya Law Review, 1.

278. "Suspension of Members of Commonwealth Parliaments" (1961) 3 University of Malaya Law Review 267.

279. (1877-8) 2 S.C.R. 158 (Supreme Court of Canada); on appeal from Woodworth v. Troop (1876-7) 2 Russell & Chesley, 11 Nova Scotia Reports, 84 (Supreme Court of Nova Scotia).

280. (1886) 11 App. Cas. 197.

281. (1886) 11 App. Cas. 197 (Privy Council: Earl of Selborne, Lord Blackburn, Lord Monkswell, Lord Hobhouse, Sir Richard Couch); on appeal from the Supreme Court of New South Wales (Martin, C.J., Windeyer, and Innes, JJ.), sub nom. Taylor v. Barton (1884) 6 N.S.W.L.R. 1.

power of suspension was, at common law, that indicated by the previous privilege cases: namely, that it might be exercised so far as it could be considered protective or self-defensive, but that it could not be exercised punitively.[282] Just what dividing line between the two is supported by the case is more open to question. Is an assembly limited as to the cause of suspension; or as to the time of suspension; or both?

Enid Campbell has suggested that[283]

> 'On a strict analysis all Barton v. Taylor decided was that where it is resolved that a member be suspended from the service of the assembly for persistently and wilfully obstructing the business of the House, in contravention of the Standing Rules and Orders, and where no time is specified as to the period during which the resolution is to operate, either in the resolution itself or in the Standing Rules and Orders, the resolution is incapable of operating beyond the sitting during which the offence was committed.'

That is, perhaps (so far as is immediately material), all that it was really necessary to decide. But it is submitted that it did decide rather more.

So far as regards a power of suspension limited as to time, it is submitted that the case includes a holding, as part of the ratio decidendi, that at common law a suspending resolution could not be interpreted to operate beyond the sitting precisely because the legislative body could not suspend beyond the sitting--with the possible qualification left open that there might be a power to exclude until apology.[284] If that is the

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282. (1886) 11 App. Cas. 197 at 203.

283. Op.cit., 3 Univ. of Malaya L.R. at p.270.

284. (1886) 11 App. Cas. 197 at 204: '[I]t may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be ultra vires or not.' At p.205 his Lordship again spoke of 'power to suspend toties quoties, sitting after sitting, in case of repeated offences (and, it may be, until submission or apology)...'.

true meaning of the Privy Council's words, their opinion to that effect is not obiter dictum merely because the other, narrower, ground, included in the greater, would have been sufficient to support the result.[285] The resolution in the case at bar had simply ordered suspension. The Privy Council could have said that in the absence of contrary words this meant suspension for the sitting. What their Lordships instead chose to say was that suspension beyond a sitting was not a necessary incident of a legislative body, and that legislative bodies could at common law exercise no power beyond common-law incidents. They merely added that they had 'also' been led to the conclusion that 'even if a power of unconditional suspension during the pleasure of the Assembly did exist, a suspensory resolution not expressed (or interpreted by any standing order) to be conditional on something to be done by the person suspended, or to be during pleasure, or for a definite time, ought not to be held operative beyond the end of the current sitting.'[286]

The Earl of Selborne specifically directed himself to the interpretation of the words of the Board in Doyle v. Falconer,[287] which had delimited the common law powers of an assembly, on the basis that a member who was 'guilty of disorderly conduct in the House while sitting' might 'be removed or excluded for a time, or even expelled...The right to remove for self-security is one thing, the right to inflict punishment is another...'.[288] The

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285. Jacobs v. L.C.C. [1950] A.C. 361 at 369: 'If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, than a case which ex facie decided two things would decide nothing.'

286. (1886) 11 App. Cas. 197 at 205; emphasis added.

287. (1866) L.R. 1 P.C. 328.

288. (1866) L.R. 1 P.C. 328 at 340; emphasis added.

Board in the earlier case had also said that:[289]

> 'If the good sense and conduct of the members of Colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded.'

It was the terms 'remove', 'exclude', and 'keep excluded', which required to be construed, and it is submitted that the words of the Earl of Selborne commenting upon the Doyle Case show, as well from their terms as from the object of interpretation, in unmistakable language, the intention to lay down as law the proposition that local assemblies are at common law limited as to the duration of a suspension; and that the proper duration is, apart from the possibility of a right to exclude until apology, the sitting:[290]

> 'Those words were used by Sir James Colvile, when delivering the judgment of this tribunal in Doyle v. Falconer, and their Lordships adopt them. It does not, however, appear to be a just inference from the expressions, "excluded for a time," and "to keep him excluded," that a power to exclude a member, and to keep him excluded, for a length of time, unlimited, or limited only by the discretion of the assembly, was considered in Doyle v. Falconer, or ought, on sound principles, to be now held by their Lordships to be necessary to the existence of such a body or to the proper exercise of its functions. The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection on his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly. The sitting or meeting, as a whole, has a practical unity. It commences with the usual forms of opening, when the Speaker takes the chair; it is terminated by the adjournment of the House. It has its proper rota of business (such as, in our House of Commons, the notices and orders

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289. Ibid., emphasis added.

290. (1886) 11 App. Cas. 197 at 203-4.

> of the day); a separate record of the whole business done at each such sitting or meeting (including the suspension of a member, if that should take place) is entered upon the journals. The "service" of members in attendance at each such sitting or meeting is continuous; and at each adjournment that service is interrupted, not to be renewed until after an interval of some hours, days, or weeks, or even months, as the case may be.'

The same view, indeed, had been taken by Sir James Martin, who, speaking for the Court below, and relying, just as did the Earl of Selborne, on Doyle v. Falconer,[291] said,[292] in terms which should not be ignored merely because an appeal is reported:[293]

> '[W]e have it authoritatively decided how far by the common law the power of a colonial Assembly extends in dealing with contempt and interruptions in their proceedings. They cannot in any case punish; they can only remove the offender, and if a member, they have the power to exclude him for a time, or even as their Lordships hold, to expel him; in which last case, however, the constituency might at once proceed to a new election, which they could not do in the case of a suspension. In the case of a stranger who has no right without permission to be present, they may exclude him altogether; but in the case of a member who, not having been formally expelled, has a right to be present, while not obstructing the proceedings, they can exclude him as long only as the necessity exists for his exclusion by reason of such obstruction. The duration of such exclusion must be determined on each separate occasion when the necessity for it arises. It would be absurd to limit it to the mere time occupied in the offending member's removal, so as to admit of his return to the Chamber immediately afterwards. It would be equally absurd to hold that he might be indefinitely excluded. The only reasonable view to take of this power of exclusion is to limit it to the actual sitting during which the necessity for its exercise arose. When a member while the House is sitting insults the Speaker, as in the Dominica case, and persists in insulting him, his removal is obviously a proper and necessary thing to enable the business to proceed, and there can be no right in the member so misconducting himself and so removed to come back immediately after making a promise to discontinue his obstructive conduct. The House cannot reasonable be expected on such a promise being given to

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291. (1866) L.R. 1 P.C. 328.

292. (1884) 6 N.S.W.L.R. 1 at 21.

293. It was Sir James Martin's opinion on the common law privilege of free speech in dominion legislative bodies which, laid down in Gipps v. McElhone in 1881 (at 2 N.S.W.L.R. 18), was approved in 1948 by the Privy Council in Chenard v. Arissol [1949] A.C. 127.

> allow the offender to return, with the possibility of the same misconduct being repeated and the like order for exclusion being again rendered necessary. Such a proceeding would partake too much of the character of burlesque to be laid down as the rule in such cases. If the House, having removed one of its members for obstructing its proceedings, thinks fit, on being satisfied that there is no further likelihood of his continuing his misconduct, to re-admit him immediately after, they will of course do so, but during that sitting they need not further concern themselves about his re-admission. At the next or any subsequent sitting the excluded member must, if he has not been formally expelled, have the right to resume his place in Parliament, unless he is then again guilty of obstructive conduct, or presents himself in a condition, such as to render his presence itself an obstruction. The right to exclude "for a time," which the Privy Council has declared to be the law, cannot in reason be extended beyond the sitting when its exercise is called for. It is a right to be exercised for one sitting only, for the plain reason that, until the contrary appears, a longer exclusion is unnecessary.'

This, it is submitted, is authoritative as far as it goes; and Enid Campbell appears willing at least to the case the quality of 'sure guidance', if not positive authority, on the proposition that at common law (apart from any right to exact an apology),[294]

> 'the assembly may resolve that a member be suspended for a definite period of time not exceeding the end of the current sitting, and a resolution for suspension expressing no such period will be construed as operating no further than the end of the current sitting'.

A legislative body is, then, limited at common law as to the duration of its suspension.

Is a legislative body limited at common law similarly as to the cause for which it may suspend? Is this, too, reviewable by the courts? On this point one must probably conclude that Barton v. Taylor[295] is not an authority which can be relied upon. But it is not insignificant that the Earl of Selborne summed up his holding in those terms:[296]

> 'The power, therefore, of suspending a member guilty of obstructive or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorize a suspension

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294. 3 Univ. of Malaya L.R. at 284.

295. (1886) 11 App. Cas. 197.

> until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time.'

Again, his Lordship said,[297]

> 'If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse...Powers to suspend toties quoties, sitting after sitting, in case of repeated offences (and, it may be, till submission or apology), and also to expel for aggravated or persistent misconduct, appear sufficient to meet even the extreme case of a member whose conduct is habitually obstructive or disorderly.'

Both the principles laid down and approved by the Privy Council in Barton v. Taylor,[298] and the terms in which the judgment of the Board was expressed, point to a power of suspension limited as to cause. Were it not that a wide sphere of exclusive jurisdiction over control of composition has been conceded as a common law incident, the necessity of having a cause of suspension and making it good by evidence in court, would be clearly pointed to by the leading privilege cases. The cause of suspension in Barton v. Taylor was not canvassed by the Board, for the simple reason that the action brought was one of trespass, and Edmund Barton, as he then was, the Speaker who had ordered plaintiff's exclusion, justified his action solely on the basis of resolutions passed respectively by the Committee of the Whole and the Assembly, reciting that plaintiff had been named by the chairman as guilty of persistently and wilfully obstructing the business of the committee, and suspending him. His pleas were demurred to; and thus for the purposes of the appeal, obstruction, a legitimate cause of suspension, was admitted. The only issue was the lawful duration of the suspension.

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296. At pp.204-5; emphasis added.

297. Ibid., p.205; emphasis added.

Enid Campbell appears to concede that the power of suspension is limited as to cause:[299]

> 'Whether the necessities of self-preservation justify a power of suspension for any cause the assembly nominates, the Committee did not say. Its attention was directed primarily towards conduct calculated to disrupt proceedings or to lower the tone of debate. Although it cannot fairly be supposed that the interest of self-preservation requires a power of discipline so nebulous as to allow for suspension on any pretext, it may be that it does justify a power to discipline a member whose conduct (as a member) tends to bring the legislature into disrepute or to lower its dignity and authority. On this view, the making of wild and unfounded allegations of improprieties on the part of other members might warrant suspension.'

She points to the dictum in Doyle v. Falconer[300] suggesting that suspension may be used 'to secure order and decency of debate'; its authority derives, of course, from the fact that the member punished in that case had directed insulting language at the chair. In the light of Landers v. Woodworth[301] it is perhaps rather too wide to say that '[n]o case has yet arisen in which a court of law has had to determine whether or not a member of a colonial assembly may be suspended for contempt simpliciter';[302] one is rather inclined by that case to the conclusion that suspension for contempt is possible only insofar as contempt may be considered obstruction.

She has rightly pointed out that a limited right of suspension suggests a judicial review of its exercise:[303]

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298. (1886) 11 App. Cas. 197.

299. (1961) 3 Univ. of Malaya L.R. at 271.

300. (1866) L.R.1 P.C. 328 at 340.

301. (1877-8) 2 S.C.R. 158 (Supreme Court of Canada); see p.164ff

302. (1961) 3 Univ. of Malaya L.R. at 272; at 273 she suggests:

> 'Although the power to suspend for contempt may itself be abused by a parliamentary majority bent more on censorship of the embarrassing backbencher than on upholding the dignity and authority of the institution, it is not improbable that the doctrine of self-protection would be held to justify a power to suspend for utterances calculated to bring the whole institution into disrepute. This view by no means implies a power of suspension unlimited with regard to the grounds on which an assembly might lawfully suspend

> 'The right to sit and vote in Parliament is undoubtedly a right exercisable only in Parliament, and whether it is regulated by statute or otherwise, the Houses of the British Parliament have exclusive jurisdiction to determine whether or not the right may be exercised in the sense that no court of law will presume to impugn the correctness of decisions made by the Houses themselves. To date, the Judicial Committee of the Privy Council has not had occasion to consider whether the same principle applies to colonial assemblies. If, as has been suggested, colonial assemblies have power to suspend only for limited causes, it would not be unreasonable to assume that the legality of a suspensory resolution depends on the actual commission by the suspended member of an offence for which he may be suspended, and that the courts should at least satisfy themselves that there was evidence to support the judgment of the House that the member had committed such offence';

and, though one may not unreasonably, in the absence of direct authority analogous to Bradlaugh v. Gossett,[304] treat the line of Judicial Committee cases running from Théberge v. Laudry[305] as having a similar effect, yet this only serves to highlight the anomalies inherent in the boundaries of judicial review drawn by their Lordships as regards the right to sit.

In the light of Landers v. Woodworth,[306] it may be too conservative to conclude that[307]

> 'Such guidance as can be drawn from past judicial experience indicates that where a Commonwealth court is not as a matter of law bound to treat a legislative assembly on precisely the same footing as the House of Commons, it will nevertheless, as a matter of policy, take the course of least resistance in conceding to the assembly exclusive jurisdiction in determining whether an occasion has in fact arisen for the exercise of an acknowledged suspensory power. But beyond this, analogy with British practice ceases. In the actual penalties which the assembly seeks to impose on delinquent members, Commonwealth courts have consistently adhered to the view that the disciplining body is not the sole arbiter.'

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its members; indeed it is to be doubted whether present authority provides a sufficiently firm basis for assuming that this is in fact the case.'

303. Ibid., at pp.278-9.

304. (1884) 12 Q.B.D. 271.

305. (1876) 2 App. Cas. 102; see ante, p. 148-52.

306. (1877-8) 2 S.C.R. 158; see post, p. 164.

or again that:

> 'Once the stage has been reached when the courts reserve to themselves power to inquire into the legality of action taken, or authorised to be taken, against a member whose conduct is adjudged to merit suspension, little ingenuity would be needed to so enlarge the function of judicial review that the court would be required to be satisfied that there was evidence supporting the decision of the assembly. While it may be doubted whether any court now would appropriate to itself the function of ascertaining whether as a matter of fact circumstances for the exercise of the power of suspension had arisen, it could well be that to satisfy itself of the legality of the resolution, the court would require proof that the member had been adjudged guilty of misconduct for which the assembly had power to suspend;'

particularly in view of the words of Ritchie, J., for himself and Strong and Fournier, JJ., in Landers v. Woodworth,[308] on a similar trespass action arising from a purported suspension:

> '...[T]o afford a good defence, defendants were bound to allege, and prove, all the circumstances which made it right and proper for them to interfere with the Plaintiff as the time they caused him to be removed from his place in the House of Assembly,--such interference being prima facie against right.'

From the courts of Nova Scotia--a fertile source of privilege disputes--Woodworth's Case[309] brought the power of suspension for review before the Supreme Court of Canada in 1877, a decade before the matter was canvassed in the Privy Council in Barton v. Taylor[310] on appeal from New South Wales. It must be considered one of the two leading cases on a matter at once important, and obscure.

Plaintiff Woodworth had sued the Speaker and certain other members and officers of the Nova Scotia House of Assembly for an

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307. (1961) 3 Univ. of Malaya L.R. at 279 and 285; emphasis added.

308. (1877-8) 2 S.C.R. 158 at 202; emphasis added.

309. Landers v. Woodworth (1877-8) 2 S.C.R. 158 (Supreme Court of Canada); on appeal from Woodworth v. Troop (1876-7) 2 Russell & Chesley, 11 Nova Scotia Reports 84 (Supreme Court of Nova Scotia).

310. (1886) 11 App. Cas. 197.

alleged assault occurring upon the occasion of his forcible exclusion from the House as a result of charges which he had brought against the Provincial Secreatry, a member of the Assembly, of falsifying and tampering with official documents [land grants].

Defendants justified excluding plaintiff on grounds which may thus be organized and summarized: (1) that the charges, even if made in good faith, were brought without sufficient consideration or proper investigation; (2) that plaintiff refused to make the apology therefor subsequently demanded by the Assembly; and (3) that plaintiff had used abusive and insulting words and behaviour during the consequent proceedings and deliberations of the Assembly.

Plaintiff contended, on the other hand, (1) that even if he had not, at the time of bringing his charges against the Provincial Secretary, made out a prima facie case (as he insisted he had indeed done), still, the Assembly, by immediately appointing a committee to investigate the charges, and by considering them (instead of demanding that Woodworth first make out a better case) had so far ratified and excused his conduct as to preclude them from invoking it, or any proceeding founded on it, either as a contempt or an obstruction. In other words, if enough of a case against the Secretary was presented to justify the Assembly's proceeding therein, there was therefore enough to justify plaintiff's own. (2) Plaintiff further urged that, as the Assembly had in fact excluded him on account of the alleged contempt of his refusal to apologize, they could not justify their action either on the ground that his charges had constituted contempt or that his subsequent abusive language had; moreover, the alleged language and behaviour, not having been mentioned in the various resolutions of the House, could not be taken into consideration: indeed, the last resolution, ordering his exclusion made no reference even to the charges he had made; (3) in any event, these alleged wrongs with which he was taxed were not present obstructions but, at most (which he denied) past contempts, whose punishment was, he contended, beyond the power of the Assembly, not only as regards committal, but even by way of suspension.

The courts throughout sought only to apply the Privy Council decisions. McDonald, J., at trial, while reserving the case for the full Supreme Court of Nova Scotia, adverted in his address to the jury, to Kielley v. Carson[311] and Doyle v. Falconer,[312] from which he inferred the very general propositions, extending far beyond merely denying the power to commit--that[313]

> 'Legislative Assemblies like ours have not, in the absence of express grants, the power to adjudicate upon, nor punish for contempt, but they have the power to remove any obstructions offered to their proper action as Legislative Assemblies during their sittings, because such last mentioned power is necessary for self-preservation and the proper performance of their functions.'

Applying this to the case at bar, the jury were directed[314]:

> '...[Y]ou are to consider whether, on the one hand, turning the plaintiff out at the time and in the manner proved was, in point of fact, necessary on the ground that he was an obstruction to the business of the House, in which case he would have no right of action; or on the other hand, whether or not he was removed, not because he was such an obstruction, but merely for a contempt in refusing to make an apology for a past offence...'.

The jury found a verdict for plaintiff, awarding him five hundred dollars in damages; on a rule nisi to set the verdict aside, the case was argued before the Full Court, whose judgment sustaining the verdict was delivered by the Judge in Equity, Hon. John W. Ritchie,[315] and seems, on fair inference, to indicate agreement with each of the grounds taken by plaintiff.

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311. (1841-2) 4 Moo. P.C. 63.

312. (1866) L.R. 1 P.C. 328.

313. (1876-7) 11 N.S.R. 84 at 95.

314. Ibid. The jury were also told that (at p.96), 'while a member has a right, in his place, to raise his voice to correct abuses if there is reasonable ground for believing that such abuses exist, he is obstructing the business of the House within the meaning of the law that I gave them, if he takes advantage of his position, without reasonable cause to represent the existence of abuses merely as a pretext to enable him to vilify or abuse any other member.'

315. Des Barres and McDonald, JJ., concurring; Wilkins, J., dissenting.

The Nova Scotia Court's agreement with the plaintiff's first contention--that the accusation could not (especially when the house itself took up the charges for investigation) constitute a breach of privilege merely for lack of sufficient evidence or prior consideration before making them--may fairly be inferred from his Lordship's observation that[316]

> 'His alleged offence, in the first instance, consisted in his having made a charge against a member of the House, and a member of the Government, the subject matter of which was one proper for the consideration of the House and which he had a right to bring to its notice. And if this were not done in a proper manner, and if in doing so he used language which was deemed unparliamentary, or was disorderly in his conduct, he should have been called to order at the time, and the matter disposed of as provided for by the 12th and 13th rules of the House, in evidence, which direct the mode of proceeding in such cases. But the complaint against the plaintiff was not that in making the charge against Mr. Vail, he did so in an unparliamentary manner, but simply that he made a charge against him which involved a high crime and misdemeanor, and thereupon, investigation having taken place, the House, coming to the conclusion that it was unfounded and made without sufficient evidence to sustain it, and without the necessary preliminary investigation, resolved that he had been guilty of a breach of privilege. Assuming this to be all true, it is somewhat difficult to perceive how the conduct of the plaintiff could be held to be a breach of privilege.'

Plaintiff's second argument--that <u>even supposing there to be a contempt</u>, the suspension must be treated as <u>punishment</u> of <u>past contempt</u> rather than <u>suppression</u> of <u>present obstruction,</u> for the punishment of which the House had no power even by suspension, let alone committal--seems equally to have found favour with the Nova Scotia Supreme Court:[317]

> 'Certainly there is nothing alleged against him which rendered his removal necessary to enable the House to conduct its business or perform its functions as a legislative body, <u>however blameworthy and subject to censure he may have been</u>, in not having more fully investigated the subject before making the charge.'

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316. 11 N.S.R. 84 at 113-4.

317. <u>Ibid.</u>, at p.114; emphasis added.

And again,[318]

> 'In effect, having adjudicated on the question and decided that the plaintiff had been guilty of contempt, the House punished him for such contempt by removing him from the House, and depriving him of his privileges as a member till he shoild purge himself of the contempt by making the prescribed apology; and the jury have found under the charge of the Judge that the exacting of the apology was for a past offence, and the plaintiff was turned out of the House because he would not repeat it, though he was not then obstructing the business of the House, and I do not see how, under the evidence, they could have arrived at any other conclusion.'

Ritchie, Eq.J., for the Court, equally agreed that the defendants might not plead in justification of plaintiff's exclusion any of plaintiff's acts save only those within the scope of the resolution expelling him.[319]

Wilkins, J., dissented on the ground that plaintiff's conduct had been unjustifiable, particularly as the statements had been made during the course of a debate without any legitimate object which could be promoted; that the Assembly was entitled to exact an apology and to exclude a member until it was forthcoming; and that indeed refusal to make the required apology was a present obstruction. What the Assembly had done was, his Lordship thought, lawful as a necessary legal incident and indeed supportable also on the ground that one who becomes a member of an Assembly is taken to submit voluntarily to its rules.[320]

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318. At pp.114-5.

319. At p.111: 'The defendant's justification must depend solely on evidence connected with the subject referred to in these resolutions. The only grounds of complaint against the plaintiff, for which he was expelled from the House, were the charges he made against Mr. Vail, and his declining to make the apology dictated to him; and, therefore, all evidence adduced by the defendants at the trial of alleged misconduct on the part of the plaintiff, on other and different occasions in relation to other persons, cannot justify the act complained of, if it is not justifiable on the grounds set out in the resolution, and in my opinion all such evidence was irrelevant to the issue, and ought not to have been received, as it constituted no justification...'.

320. Wilkins, J., in his dissenting opinion, which appears at (1876) 11 N.S.R. 84 at 119 ff., sought to distinguish Doyle v Falconer [(1866) L.R. 1 P.C. 328], which had decided, as its headnote indicates, that 'The Legislative

The majority judgment of the Supreme Court of Nova Scotia received the unanimous confirmation of the Supreme Court of Canada. Sir William Buell Richards, the first Chief Justice of the Dominion, opened his opinion with a somewhat grudging submission to the principles laid down by the Privy Council:[321]

Assembly of Dominica does not possess the power of punishing a contempt, though committed in its presence and by one of its Members...'. Wilkins, J., said, at p.120, 'By that decision, so far as it necessarily extends, we are, of course, bound; and were the case under present review a case in which the Legislative Assembly of Nova Scotia had punished judicially a contempt that had been committed in its presence, and by one of its members, Doyle v. Falconer would govern it. I think it is not that case ...'. His Lordship never clearly explains why, save in that he distinguishes judicial from non-judicial punishment, as suggested in the term judicial in the preceding passage [emphasis added]; it may be that suspension itself is not considered, unlike committal, a 'judicial' sentence and punishment; it may be that his Lordship relies only on his view that refusal to apologize is present obstruction.

In terms rather reminiscent of social contract philosophy, his Lordship questioned the premises of Doyle v. Falconer and doubted that the powers which he would uphold were likely to be abused by the House. At p.122 the following appears:

> 'Yet the assumed possible abuse of the power is not very probable, in relation to any Assembly within the Queen's Dominion, upon which competent authority has conferred full legislative powers; and it could only affect a subject's liberty within very narrow limits, and those confined to a body of men who are, in a certain sense, in voluntary association with each other. A Colonial Legislative Assembly is, among other characters that it bears, a society formed under circumstances which involve a presumption that every member of it has, when he entered it consented to have his conduct, in presence of the society, regulated by the majority of those who compose it, and to submit to its sentence, not being contrary to law, nor inconsistent with its rules and usages, if pronounced in respect of his personal demeanor, as a member, in the presence of the Body. In a case of such a sentence I do not perceive a consequence of the anomaly adverted to by their Lordships, viz: that of a power exercised by a judge in his own cause,--not at least to any alarming extent. The censured member has, in that case, in a certain sense, in effect, pronounced sentence on himself.'

The learned judge feared that unless the assembly could exact such an apology, it followed that 'the grossest conceivable insult' by a member would be 'an offence for which the House could not compel that member to apologize' unless it amounted to actionable defamation, and even then only after a long delay: an unnecessary qualification in view of subsequent holdings that speech in such Assemblies is absolutely privileged. (Ibid., p.1278).

The House must, his Lordship considered, have at least the power to censure in its discretion conduct occurring therein and to exact an apology 'how limited soever the inherent powers of a Legislative Assembly in a Colony may be, it does appear to me to be a necessary incident to its status, and essential to the performance of its functions, that it may exact from a member an

> 'All my early reading, historical, political and legal, led my mind to give a ready assent to the doctrine, that it is one of the incidents to the possession of supreme legislative power, however limited the sphere for the exercise of that power (and though controlled by the Legislature of the Empire), that the Legislature exercising such power should have the right to punish parties for contempt. If they cannot do so, they are shorn of much of their dignity, and, in many respects, their influence and usefulness will be much impaired';

and concluded a lengthy review of all the relevant Privy Council decisions with the remark that:[322]

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apology for that which the House has resolved to have been a breach of the privileges of the House. If that power exists, the House alone, in my opinion, is competent to judge of the propriety of the mode and terms of the apology, provided they be not such as involve a violation of any rule or usages of that Assembly, which is not in any way shewn to have marked the conduct of the House in the case before us.' (Ibid., pp. 128-9).

In a critical passage, Wilkins, J., explained that exclusion in the circumstances was in his view not punishment but enforcement of the rules against present obstruction and thus 'clearly within that exercise of power by a colonial Legislative Assembly which is recognized as legal by the Judicial Committee in Doyle v. Falconer--legal because essential'; (Ibid., pp. 129-30).

> 'Now it appears to me quite clear that the removal was not ordered as a punishment, but as the only possible means at the command of the House of compelling obedience by the plaintiff to an order of the House that required him to do something which it was competent to the House to require him to do. The removal was not ordered that the plaintiff should expiate any previous offence by punishment. The House deemed the then presence of the plaintiff in the House, required to apologize, for what had been pronounced to be a breach of privilege, and declaring, then and there, his intention not to apologize, to be, in effect, an obstruction to the business of the House. In my opinion, his continued presence therein, under the circumstances, was in its nature, and would have been in its necessary consequences such an obstruction. The business of the House could not have been conducted, with decency, order, and self-respect, if the plaintiff had been allowed to remain in the House. Self-protection, therefore, in my opinion, called for his removal, as a necessity. It must be borne in mind that the plaintiff's refusal to apologize, coupled with his avowed determination to remain in the House--the actual ground of his expulsion--was a matter that could not have been taken cognizance of by the ordinary legal tribunal of the Province.'

321. (1878) 2 S.C.R. 158 at 176.

322. Ibid., at p. 190.

> 'In fact, the practice and principles laid down by, and acted on, in the British House of Commons in reference to its privileges, seem to have been instinctively (if I may use the term) adopted by all legislative bodies modelled on the English system possessing supreme legislative authority, however limited its sphere, as incidental and necessary to the exercise of their high functions; and, I must confess, that it is with the greatest reluctance I recede from the opinion which prevailed so universally and for so long a time, and was sustained by such high authorities. I, nevertheless, feel compelled to yield to the high authority of Kielley v. Carson, decided by Judges of such very great acumen, on due consideration, and after so full an argument, and followed and approved of, as it has been, by the Privy Council in all the cases brought before that tribunal in which the question has been raised.'

But if the Court's judgment was but an application of the Privy Council's principles, it was nevertheless a very strict application. After all, in Doyle v. Falconer the Judicial Committee had allowed an important caveat to balance their Lordships' finding against the privilege of committal claimed in that case:[323]

> 'If a Member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled';

though this passage, which supports a power of suspension, is itself qualified by remarks of ambiguous effect which immediately follow:

> 'but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships' judgment, all that is warranted by the legal maxim that has been cited [i.e., Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse not potest], but the latter is not its legitimate consequence',

and immediately precede:

> 'It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a Legislative body during its sitting, which last power is necessary for self-preservation',

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323. (1866) L.R. 1 P.C. 328 at 340. Emphasis added.

and which can be understood as limiting even the power of 'removal' to the suppression of obstruction, and not allowing it to extend to punishment [whatever the dividing line may be]: the view, indeed, here taken by the Supreme Court of Canada, and in 1886 made its own by the Privy Council in Barton v. Taylor.[324]

The Chief Justice of Canada thus regarded himself precluded by authority from finding for the defendant on the law and conceding the privileges necessary to the defence; but his Lordship went further, and found for the plaintiff also on the merits of his conduct, since[325]

> 'the documents in the office which he did see gave grounds for believing that something irregular had taken place, and he may have honestly believed that the alterations had been made in the grant after it had been signed by the Lieutenant-Governor, and, if so believing, he would naturally think it was his duty to call the attention of the House to the matter with a view of having it investigated. He was not at that time considered as in any way violating the rules of the House, or entrenching on its rights and privileges. In fact, it was thought necessary to enquire into the matter, and the result of the enquiry clearly shewed, that the grave charge of altering the record of grants after they had received the signature of the Lieutenant-Governor was not correct;'

and the test was[326]

> 'If he believed the charge to be true, and had reasonable grounds for such belief, it was his duty to bring the matter to the consideration of the House that it might be enquired into, and applying the same rule that would prevail even in an action for a malicious prosecution, he would be justified in making the charge if he had reasonable and probable cause for doing so;'

which test the Chief Justice evidently thought satisfied by the condition of the records. And while[327]

> 'it would not be unreasonable to suppose, that the gentleman making the charge would express his satisfaction that the enquiry had shown that it was not well founded, though, at the time he made it, he believed it to be true, and considered he had reasonable grounds for such belief. He does not appear to have taken this course, which, perhaps, would have satisfied the House, and the difficulty that followed might have been avoided;'

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324. (1886) 11 App. Cas. 197.

325. (1878) 2 S.C.R. 158 at 194.

nevertheless[328]

> 'a statement or complaint made by a member of the legislature, in his place in the house, with a view of having an enquiry in any matter in which the public have an interest, or, I apprehend, in which even a private person feels aggrieved, takes higher ground of privilege than an ordinary complaint made in a matter in which a party has an interest, asking to have his complaint legally investigated.'

The Chief Justice thought that the only path open to the House, if it disapproved of the charges, was to have refused to take them up at all: and even in that case the House could have taken no action against the plaintiff unless he had persisted and so caused obstruction:[329]

> 'When the member makes his statement, he exercises the right of freedom of speech, and, in making charges against gentlemen holding official positions, very great latitude is allowed in the use of vituperative language. If the language used is unparliamentary, it may be taken down, and the House decides upon it. If not called to order, and the House considers it necessary for its own dignity to enquire into the matter, it takes the initiative and appoints a committee, or institutes an enquiry, as the case may be. The member has only exercised his right of freedom of speech in bringing the matter to the attention of the House. If that body is to be considered as the grand inquest of the Province, who are to devise the means of correcting abuses and insuring good government in matters within their control, it must be the right and privilege of all parties, whether members of the legislature, or private citizens, to place their grievances, or the public wrongs complained of, before the body properly authorized to investigate them and grant redress. The member of the legislature, exercising his right of speech, makes a complaint. If the subject matter of his complaint turns out on an enquiry not to be true, we have not been shewn any authority or precedent where a member can be charged with

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326. (1878) 2 S.C.R. 158 at 193.

327. Ibid., at pp. 194-5.

328. Ibid., at p.195.

329. (1878) 2 S.C.R. 158 at 195-6.

> being guilty of a breach of the privileges of the house for so doing. If the house thinks the enquiry ought not to be made, and refuses to take it up, and the member persists in bringing it forward, so as to obstruct the business of the house, it may be that he might then become liable to the censure of the house, and, if he persisted in the interruptions unreasonably, he might, to quote the words used in Doyle v. Falconer, "be removed or excluded for a time, or even expelled." But the house, having thought it was a matter which required their attention, took it up and ordered an investigation, and, after that, I fail to see how they could properly declare, that what the member had done was a breach of their privileges. It seems to me, therefore, the very foundation of the other proceedings fails, and what was subsequently done cannot justify the expulsion of the plaintiff from the seat which he had a right to occupy.'

Richards, C.J., seems to have accepted the plaintiff's alternative contention that even if he had offended, still exclusion until apology constituted punishment, and Doyle v. Falconer[330] precluded punishment of any description for breach of privilege:[331]

> 'What right had they to require him to make this apology? Was it necessary to do so in order to go on with the public business? He had made the charge several days before that, so that the offence, if it were an offence at all, had been committed in a way apparently not interfering with the proper action of that body; so there would be no pretence that he was to apologize for that. Then the other alternative is, that this was a punishment inflicted on him by the House for the offence they had declared him guilty of, viz.: a breach of the privileges of the House. Doyle v. Falconer delcares they have no power to punish even for a contempt; therefore, I think it clear they have no such power by resolving that a party had been guilty of a breach of their privileges, when, in truth, they failed to show that any privilege which they possessed had been interfered with.'

But, as we have seen, the Chief Justice had taken the view that no offence had been committed by plaintiff, and so he held the refusal to apologize to fall with the supposed offence of making the charge:[332]

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330. (1866) L.R. 1 P.C. 328.

331. (1878) 2 S.C.R. 158 at 198. Emphasis added.

332. Ibid., at p.199

> 'If it be admitted that the making of the charge, no exception being taken to it at the time, was not a violation of the privileges of the House, it would seem strange indeed, if a refusal to make an apology, based on the ground of the plaintiff having been guilty of such a breach of privilege, could properly be delcared a contempt.'

It is not easy to see why a majority of both courts[333] should have thought it so very obvious that charges against a member and minister, amounting virtually to forgery, should, even assuming them to be made without the least probable cause[334], be excused--even if they would otherwise be held a contempt--merely because the House chooses to investigate them without first demanding that a prima facie case be made. Why should the House not be entitled to give the accuser a chance to vindicate himself in the event, by an investigation which may culminate in a proof of the charges, whether rashly made or not--and, only after the accuser has failed to make them good, look to the question as to whether he had, at least, sufficient cause the justify his making them? Surely the accuser can be excused for either of two reasons: first, that his charges were true, and second, that he had reasonable grounds to believe, or at very least an honest belief in, their truth. Why should the assembly not be entitled to look to the former first, especially as they can then give the member accused the chance to clear himself publicly?

The concise opinion of Ritchie, J., with whom Strong and Fournier, JJ., concurred, formulated the principles applicable to the case along the traditional lines[335]

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333. Ritchie, J., in a succinct judgment with which Strong and Fournier, JJ., concurred, expressed (at p.201 ff.) views on this point similar to those of Richards, C.J.; with him, they form a majority of the court, whatever Taschereau and Henry, JJ., may be understood to have said on the point.

334. That does appear to be the assumption; the views of the majority do not appear to depend upon their decision that, in the case at bar, the plaintiff did have sufficient cause.

> Ritchie, J., said, at p.203:
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> 'If the Plaintiff believed, and had reasonable grounds for believing, the charge to be true, or honestly and fairly believed the public interests demanded that it should be investigated, and, in

> 'I think a series of authorities, binding on this Court, clearly establish that the House of Assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute, nor essentially necessary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and that, without prescription or statute, local legislatures have not the privileges which belong to the House of Commons of Great Britain by the Lex et consuetudo Parliamenti.

Applying them to the instant case[336]

> 'In this case, to afford a good defence, defendants were bound to allege, and prove, all the circumstances which made it right and proper for them to interfere with the Plaintiff at the time they caused him to be removed from his place in the House of Assembly,--such interference being primâ facie against right. The allegations and circumstances shown in this case afford, in my opinion, no justification for Plaintiff's removal; he was not then guilty of disorderly conduct in the House, or interfering with, or in any way obstructing, the deliberations or business, or preventing the proper action of the House, or doing any act rendering it necessary, for self-preservation or maintenance of good order, that he should be removed.'

> the bonâ fide discharge of his public duty, brought the matter in a decorous and proper manner under the consideration of the House, he was, no doubt, acting in the proper discharge of his duty as an independent representative of the people, and not open to reproach, still less punishment. When the charge was so made the House do not appear to have taken exception to the manner or language in which it was made (which under the circumstances might, and very possibly ought, to have been done), nor did the House require the Plaintiff to present a primâ facie case, nor require to be stated any ground on which the charge was based, nor was the Plaintiff required to satisfy the House that there was reasonable or probable ground for the charge, nor did the House in any way resolve that the Plaintiff in making the charge, either as to manner or matter, was out of order; but, on the contrary, ordered the charge to be investigated by a committee, which committee, after investigation, found, and no doubt properly found, the charge unfounded, and that the evidence completely exculpated the Provincial Secretary.'

335. (1878) 2 S.C.R. 158 at 201.

336. Ibid., p.202; emphasis added.

Ritchie, J., apparently agreed with the Chief Justice that the House, by taking up the charge, precluded itself from denying that it was made with reasonable and probable cause; and, in addition, his Lordship pointed out that a minority of the committee of inquiry had expressly found, while concurring in the innocence of the Provincial Secretary, that reasonable grounds existed for Plaintiff to have made his charge; and the learned judge observed:[337]

> 'Before the committee the Plaintiff appears to have offered evidence to show the information he received at the Crown Land Office, and which, he alleged, justified him in putting forward the charge and bringing it under the notice of the House; but this evidence a majority of the committee appear persistently and determinately to have refused to permit to be given, and the House, without further evidence or trial, or even calling on Plaintiff for an explanation, as Lord Denman expresses it, "with one voice, accused, condemned and executed" the plaintiff in this proceeding.,

Upon the whole, therefore,[338]

> 'I can see nothing whatever to justify this action of the House. They undertook to exercise judicial functions they clearly, under the authorities, did not possess. They had no power, for the cause alleged, to adjudge Plaintiff guilty of a contempt, or breach of privilege, and subject him to the galling punishment of making a most humiliating apology, not as a member in his place in the House, but as a culprit at the bar of the House, with the doors of the House open; still less ought this to have been done without calling on Plaintiff for any explanation, and without any evidence, trial or investigation whatever of the offence of which they adjudged him guilty.'

Taschereau, J., as we have already seen,[339] declared 'though most unwillingly, in favour of a confirmation of the judgment appealed from.' Henry, J., delivered a concurring judgment 'agreeing with the general conclusions arrived at by my learned brethren, but holding views in some respects different';[340] though it is hard to find any difference of

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337. Ibid., p.204.

338. Ibid., pp.204-5; emphasis added. These circumstances plainly influenced the court, but it is submitted that they do not qualify the result further than has already been stated.

339. Ante, p. 112 ff.

340. (1878) 2 S.C.R. 158 at 208.

substance other than a somewhat greater emphasis on the existence, even in England, of power in the courts to review a committal for contempt by the Commons, at least when the cause is stated in the warrant. On the issues as to plaintiff's conduct, Henry, J., agreed with his brethren in supporting plaintiff, though, inasmuch as these questions 'are subordinate to the question of jurisdiction raised',[341] he rested his decision on the distinction between removing obstruction and punishing alleged offences, which 'renders anything further respecting them unnecessary'. However, unlike Richards, C.J., and Taschereau, J., who were decidedly sympathetic to the conferral on Provincial Assemblies of wide privileges, and unlike Ritchie, J., whose judgment, silent on this point, was concurred in by Strong and Fournier, JJ., Henry, J., looked upon extensive privileges with a decidedly jaundiced eye, thinking that[342]

> 'a Provincial Assembly, drawn, as a rule, not from the ranks of first-class public men, and whose numbers, being comparatively small, may be expected to become more bitterly excited by political squabbles, and whose supporters on both sides, out of the Legislature, would, in many cases, subordinate their judgments to their political proclivities, and thus a suitable controlling public opinion could not safely be relied on;'

a situation which he expected to last 'for many years to come'.

To what propositions, then does Woodworth's Case give the authority of the Supreme Court of Canada? The case appears, at the least, to establish (rightly or wrongly) as regards dominion assemblies at common law, the following: (1) Where a member has reasonable cause to believe, or apparently even an honest belief in the necessity of the investigation of, charges against a member, the making of them, in a decorous manner, is not cause for reproach against him, still less of punishment. (2) Where the house undertakes an investigation of charges, without first demanding that a prima facie case be made, it cannot later

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341. Ibid., p.215.

342. Ibid., p.213.

reproach the member who has made the charges. (3) Semble, to remove a member from his place [otherwise than in deciding on the title to his place] is prima facie wrongful, and every circumstance rendering it rightful must be both alleged and proved in court. (4) If the passage above quoted[343] from the first paragraph of Ritchie's judgment is an independent ground of decision, then it appears to follow that, even where a member does make himself guilty of a contempt in the face of the house, he may be excluded so long only as he is actually obstructing the house, or doing any act rendering it necessary, for the maintenance of self-preservation or good order, that he be excluded. (5) Richards, C.J., and Henry, J., and arguably Taschereau, J., because he concurs generally in the opinion of his brethren and supports generally a confirmation of the judgment appealed from, would apparently hold that, even if a member be in contempt, he may nevertheless not be excluded unless he is actually obstructing the business of the house; and that a refusal to apologize does not constitute the requisite obstruction. If Ritchie, Strong, and Fournier, JJ., be thought not to go so far,[344] then, provided Taschereau, J., be taken as concurring with Richards, C.J., or with the Court below, the same result is reached because in that event the decision of the court below is affirmed on equal division. The reporter, for whatever reason, thought, as the headnote indicates, that the Court did hold to that effect.

The 1965 Quebec Superior Court case of Gabias v. The Legislative Assembly of the Province of Quebec, reported below[345]

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343. Ante, p. 176.

344. That is, if they rest their result only on their conclusion that, in fact, plaintiff at bar had been justified in making his charge because he did have probable cause or because the assembly proceeded to investigate the charge.

345. Appendix II.

for the first time, considered a three-year suspension upon a member, renewed from session to session, imposed for having made accusations of corruption against another member who was also Attorney-General, but without sufficient investigation. The suit necessarily failed as having been directed against a non-existent defendant, the Legislative Assembly, which was held by Casgrain, J., not to be a body corporate. Perhaps it would properly have failed also on the ground that the injunctive relief and declaratory relief sought could not be granted even against a proper defendant (on the ground that the proceedings might then in effect be a trial of title to a seat). The learned judge, however, also denied the jurisdiction of the courts altogether with respect to Assembly proceedings, citing (apart from writers not dealing specifically with colonial assemblies at common law) judicial authorities concerned with the exclusive right of a legislative body to try the title to its seats.[346] Had the proceedings been sufficiently well drawn to have gone to appeal and survived, it would have been interesting to see what the higher courts would have thought of such a decision in a case where the suspension was (i) imposed for making a charge upon a member without sufficient investigation, though it was made upon affidavit evidence of one who said he had given the bribe; (ii) in circumstances where the Assembly had taken up, and investigated, the charges; (iii) for a period of three years, the suspension being continued from session to session; and a decision moreover where the court gave no sign of any awareness of Barton v. Taylor[347] or Landers v. Woodworth[348], the latter almost on all fours with the facts of the Gabias case.[349]

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346. R. ex rel. Stubbs v. Steinkopf (1964) 49 W.W.R. 759; 47 D.L.R 2d 105; and Cross v. Carstairs and R. ex rel. Tolfree v. Clark, ante, p. 149 ff.

347. (1886) 11 App. Cas. 197 at 205.

348 (1877-8) 2 S.C.R. 158.

349. See ante, p.164ff. The reader is referred to the following portions of the Debates of the Legislative Assembly of Quebec, for much interest, information, and misinformation: 27th Legislature, 3rd Session, June 30th, 1964, Vol.1 No.98

(5) Expulsion

The authorities which attribute to assemblies an exclusive jurisdiction to try title to, and in some cases the consequences of, membership, also suggest a right to expel, particularly for disqualification.[350] Doyle v. Falconer,[351] too, suggests such a power, though for the cause of 'disorderly conduct'; Barton v. Taylor[352] points to it as a remedy for 'aggravated and persistent misconduct'.

There appears to be no distinct judicial decision directly upon the point; the most interesting remark is that of the Earl of Selborne for the Board in Barton v. Taylor[353] denying that expulsion stands to suspension as the greater to the less:

> 'To argue that expulsion is the greater power, and suspension the less, and that the greater must include all degrees of the less, seems to their Lordships fallacious. The rights of constituents ought not, in a question of this kind, to be left out of sight. Those rights would be much more seriously interfered with by an unnecessarily prolonged suspension than by expulsion, after which a new election would be immediately held.'

This may perhaps indicate that an Assembly would not be answerable to the courts for an expulsion. In view of the disruption which would be caused by any direct judicial attack on the expulsion, in the ensuing electoral process; and in view of the impact which any review of the validity of the expulsion of one member would have upon the title of a person elected to succeed him, it might well be that the courts would consider the cause of expulsion unreviewable, save in pursuance perhaps of an express statutory jurisdiction, and more particularly a jurisdiction to try the validity of the election of the new member, which jurisdiction might extend to permit raising the validity of the expulsion of the old.

A recent authority from Ceylon, Kariapper v. Wijesinha,[354] supports, though in a rather different context, the non-punitive character of a disability to sit in a legislative body, imposed

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p. 4236 ff.; July 2, 1964, Vol. 1, No.99, p. 4269; July 8, 1964, Vol 1, No. 103, p. 4489 ff.; July 22, 1964, Vol. 1, No.113, p. 4899 ff.; July 23, 1964, Vol. 1, No.114, p. 4945 ff.; July 29, 1964, Voll, No.118, p.5001 ff.; 27th Legislature, 4th Session, January 26, 1965, Vol2, No.3, p.34 ff.; January 27, 1965, Vol.2, No.4, p.81 ff.; March 17, 1965, Vol.2, No. 31, p. 1320 ff.; March 18, 1965, Vol.2, No. 32, p. 1353ff.; See also Journals of the Legislative Assembly of Quebec, 1964, 27th Legre., 3rd Sess., 12-13 Eliz.II, June 30, 1964, p. 591-3; July 8, 1964, p. 615-9; July 22, 1964, p. 691; July 29, 1964, p. 727-34; and 13-14 Eliz.II, 27th Legre. 4th Sess., January 26, 1965, p. 32-3; January 27, 1965, p. 39.

by statute; upon a member owing to conduct previous to the statute; the exclusion was characterized as 'purifying' or--less suitable for our purposes--'disciplinary' and so not a usurpation of judicial authority.

(VI) Some Problems of Scope

To classify problems involving parliamentary privilege is not necessarily to solve them; nor per contra does solution necessarily make classification easy.

Is it a common law offence to bribe a member to vote for a resolution that members of the Executive Council have not the confidence of the House? Is it a common law offence to conspire to do so? Is it material that the same act may be punishable as a contempt of the House? Have the Courts jurisdiction? The Queen's Bench Division of the Ontario Supreme Court held in Reg. v. Bunting[355] in 1885 that such acts were indeed indictable,[335] though O'Connor, J., dissented on the basis that, saving treason, felony, and breaches of the peace, all acts done in contravention of the law and constitution of parliament were reserved to its exclusive cognizance; that parliament alone, with those exceptions, could deal with matters relating to its own dignity, or to its powers, members and business; and that, in a matter concernin parliamentary business, bribery of a member was not an indictable offence by common law or statute. The Privy Council, in 1870, hel

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350. Ante, p. 150 ff.

351. (1866) L.R. 1 P.C. 328 at 340.

352. (1886) L.R. 11 App. Cas. at 205.

353. Ibid.

354. [1967] 3 all E.R. 485; see p. 491.

355. (1885) 7 O.R. 524.

356. (1870) L.R. 3 P.C. 268 (Lord Cairns, Sir William Erle, and Sir James William Colvile).

in A.-G. N.S.W. v. Macpherson[356] that a criminal information was good which charged an assault by one member upon another in the precincts of the House (in the circumstances at bar, an antechamber), and that the information was not vitiated for surplusage merely because it was also charged that the assault was in contempt of the Assembly--this being treated as mere matter of aggravation. In Commission Royale d'Enquête v. Boulanger,[357] decided in the Quebec Queen's Bench (Appeal Side) in 1962, respondent petitioner, a legislative councillor, failed in his attempt to restrain the conduct of a royal commission of inquiry, which was engaged in investigating the activities of persons associated with a previous government, set up with a view to ferreting out corrupt activities. Petitioner, inter alia, claimed that the commission was infringing the privileges of the houses by investigating matters within their peculiar purview. Two opinions were written for the Court, by Owen and Montgomery, JJ., respectively; these were each concurred in by the other members of the Court, Taschereau, Badeaux, and Laroche ad hoc, JJ. While Owen, J., reached the result on other grounds, concurred in by Montgomery, J., the latter said:[358]

> 'I am not satisfied that petitioner, as private member of the Legislative Council, has the right to take it upon himself to defend the dignities and privileges of that House. Such action is usually taken by means of a resolution of the House concerned and by contempt proceeding. I can, in any event, find no substantial basis in law for the alleged privilege.'

R. v. Bunting[359] was discussed, for allegations had been made that members of both houses of the Provincial Legislature had received illicit rewards in the form of opportunities for the

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357. [1962] B.R. 251 (Taschereau, Owen, Montgomery, Badeaux, and Laroche, ad hoc, JJ.).

358. [1962] B.R. 251 at 261.

359. (1885) 7 O.R. 524.

favourable purchase of shares and bonds of the Quebec Natural Gas Corporation, in connection with the transfer to that corporation of public gas utilities. The Ontario case was approved and followed. The Petitioner's locus standi problems were obvious--he was, after all, scarcely in a position to show that his interests were threatened by the Commission; as Montgomery, Judge, observed:[360]

> 'I need scarcely add that it has not been suggested before us, and I do not mean to suggest, that petitioner has received a bribe or been guilty of any corrupt practice. As pointed out by my colleague, there is no specific allegation in his petition to suggest that his personal interests are in any way directly threatened by the Royal Commission;'

--but, quite apart from them, petitioner's claims as to privilege were also rejected. The learned judge added[361]

> 'The fact that the Legislature has adopted a law under which either House may institute proceedings for the disciplining of its members, involving possible expulsion, does not mean that such members are no longer subject to the general law in respect of all offences of which the House might take cognizance...'
>
> 'If the acts of a member of the Legislature in relation to a bill may render him liable to criminal prosecution, I see no reason why they may not form the subject of an investigation under the Public Inquiry Commission Act. If the report of the Commission discloses that there has been an offence under section 100 of the Criminal Code, the Lieutenant-Governor in Council may order the Attorney-General to take the appropriate steps to have the offender prosecuted. If it comes to the attention of either House that there has been a violation of the Legislature Act by one of its members, that House may take steps to have the member's seat declared vacant, but whether such House does so or not appears to be a matter within its uncontrolled discretion.'

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360. [1962] B.R. 251 at 264

361. [1962] B.R. 251 at 263; see ante p.136 ff.

Particularly in a federal state, interesting conflicts can arise involving privilege problems. If, as Paty's Case[362] and the Case of the Sheriff of Middlesex[363] showed, the law admits that not every war between institutions of state admits of a judicially-imposed settlement, it would seem to make no difference in principle whether the war (as, by use of the weapon of general warrant) is conducted between two houses of the same legislature, or two houses of different legislatures. Yet one may suspect that in a federation the courts will attempt to police such struggles on the basis that there is something worse than illegal imprisonment--namely 'unconstitutional' (constitutionally illegal) imprisonment. "Br'er Rabbit" principles (tear me, burn me alive, boil me in oil, but don't throw me into the briar patch) may be discerned at work in the interlocutory judgment of the Supreme Court of Canada in B.C. Power Corporation v. B.C. Electric Company.[364] Had officers of the British Columbia government wantonly seized the assets there disputed, as a simple and ordinary outrage, they might have been bled in damages in tort individually, but, under the common law rule, no specific recovery of the property could have been had without the Crown's fiat on a petition of right, since specific recovery against the officers would have been recovery against the Crown. But simply because the B.C. Legislature had [allegedly] put waste paper onto its statute books--an ultra vires statute--the seizure had ipso facto become worse than simple outrage the Supreme Court of Canada ordered the Government dispossessed of the property, in favour of a receiver. The tort, it would

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362. (1704) 2 Ld. Raym. 1105; May, op.cit., 17th ed., p.157-8; Hood Phillips, op.cit., p.189.

363. (1840) 11 Ad. & E. 273.

364. [1962] S.C.R. 642 (Kerwin, C.J., Taschereau, Cartwright, Fauteux, Martland, and Ritchie, JJ.,Abbott, J., dissenting.

seem, had become an unconstitutional tort.

What then of Mr. Diefenbaker's Case? What, indeed, is Diefenbaker's Case? This, doubtless, is a question put with deplorable flippancy by many Canadians. But in the present context we may take it to refer to the Right Honourable gentleman's objection, on the floor of the House of Commons on March 25, 1965, as leader of the Opposition, to a draft address to the Sovereign directly appearing on the order paper of the Quebec Legislative Assembly; an objection taken on the ground that this was constitutionally improper.[365] This complaint was denounced in the Quebec Legislative Assembly by the then premier, Hon. Jean Lesage, as being itself 'une violation flagrante des privileges de l'Assemblée législative du Québec;' the premier added that he was, however, advised that Mr. Diefenbaker was protected by his own parliamentary privilege.[366] Even supposing that the words had been uttered by Mr. Diefenbaker outside the House of Commons, it would seem clear that the process of the province is absolutely limited to its territory;[367] Mr. Diefenbaker could then do as he pleased in Ontario with impunity. And if he entered the Quebec jurisdiction, then, even if his words could be taken to fall within any of the classes of things prohibited by what is now s.6 of the Legislature Act[368] (assaulting, insulting or libelling

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365. Can. H. of C. Deb., March 25, 1965, p. 12,763 ff.

366. Débats de l'Assemblée législative du Québec, March 26, 1965, p. 1622 ff.

367. Ottawa Valley Power Co. v. Hydro-Electric Power Commission, [1936] 4 D.L.R. 594; Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission, [1937] 3 D.L.R. 458; Royal Bank v. The King, [1913] A.C. 283; Ex parte Eli, [1920] 1 W.W.R. 661; Deacon v. Chadwick, (1901) 1 O.L.R. 346

368. R.S.Q. 1964, c. 6

members during or within twenty days before or after a session; obstructing, threatening, or attempting to force or intimidate members; etc.), still, the prohibitions of that Act are framed in quasi-penal terms as 'infringement of the provisions of this subdivision'--and penal legislation is presumed to be confined to acts done in the jurisdiction, quite apart from any territorial limitations on provincial authority. But if he were convicted, rightly or wrongly, of a breach of privilege on that or some other cause, quaere, how far his federal parliamentary immunity from arrest would protect him from jail under the provincial statute, which seems quasi-penal. Quaere the power of the Parliament of Canada, since the British North America (No. 2) Act, 1949, to increase the privileges of its houses beyond the limits envisaged by s.18 of the Act of 1867, as amended and protect its members from provincial jails. Quaere, also its power to give its process superior force over any immunity from arrest enjoyed by provincial legislators under provincial laws as they now are or might in future be.

CHAPTER IV

PLURALISM WITHIN A MONISTIC LEGAL ORDER

That one Court may sanction as unlawful for the purposes of a system of law which it administers, the very thing which another Court of the same state considers lawful; that the former may by its lawful process restrain the doing of an act which is simultaneously lawful and enforceable for the purposes of the legal process of the latter; is a proposition which may be said to have ceased for some time to be a matter of current legal controversy in England. But if this is so, it, surely, is equally true that the victory of such a principle is a victory of history alone; none constructing or reconstructing a legal order would be likely to do so on such principles; and theoretically at least the old dualism of law and equity has been long overwhelmed in the oblivion of a unified judicature. The fate of that dualism bears witness to a primitive pluralism deferring to a more mature monism; as surely as does the abandonment of the outworn conceptual structure within which the mediaeval distinguished the law of this, that, or the next court, where we would prefer to distinguish courts administering different parts of the law of the land.

The dualism of law and equity is not a dodo of English law; others of its species survive, flourishing particularly in Commonwealth jurisdictions abroad. The Case of the Sheriff of Middlesex[1] keeps a pride of place in texts and casebooks partly because it shows so vividly the practical consequences of such dualism in the context of English parliamentary privilege. But it, after all, rests on the rule that courts may not enquire into the cause of committal; a pre-eminently practical obstacle to resolving the conflict; and it permits the aesthetic satisfaction of supposing that, were the cause fully stated to the Court, the latter could undertake the restoration order in the

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1. (1840) 11 A. & E. 273.

plenitude of its jurisdiction. A willing law finds itself, alas! here, as all too often elsewhere, unable to deal with what it cannot inform itself of.

But that explanation will not do if the law be understood to admit that a well-founded legal proceeding may yet constitute a contempt giving rise to a punishment equally well founded in law--that is to say, good enough to satisfy a court of law if fully set forth on a warrant of committal. The survival of such a pretension is, in a sense, merely an aspect--though perhaps the most acute aspect--of the survival of the Commons' more general claim of a right to determine, autonomously and conclusively, every question relating to the existence, extent, and application of their own privileges.[2] This claim in the extreme form approved by Coke[3]--he who was 'as tender of the privileges of this House as of my life, and they are the heart-strings of the Commonwealth'[4]--made the law respecting Parliament a wholly distinct and separate body of law, distinct from the common law even in its widest sense. Approved by not a few judicial dicta, this doctrine extended even to denying that the parliamentary law could be known to the courts: 'there is a particular cunning in it not known to us'.[5] That a well-founded action may be a lawfully-punishable contempt appears to require at any rate the acceptance of two collateral bodies of law; but

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2. See Erskine May, op.cit., 17th ed., (London, 1964) Ch.IX, p.150 ff. See generally also Yardley, "The House of Commons and its Privileges since the Strauss Affair" (1962) 15 Parl. Aff. 500; Hood Phillips, op.cit., 4th ed., p.168 ff; Wade and Phillips, Constitutional Law, 4th ed. (London, 1965) 149 ff; R.F.V. Heuston, Essays in Constitutional Law 2nd ed. (London, 1964) Ch.4, p.82 ff.

3. Coke's dicta are collected in May, op.cit., pp.162-3.

4. Quoted (1923) 1 Can. Bar Rev. 10, without the original source given; attributed to a speech in the House of Commons.

5. May collects the authorities, op.cit., p.165 ff; the words are those of Powys, J., with special reference to elections, in Ashby v. White (1701) 2 Ld. Raym. 938 at 944; 92 E.R. 130.

whatever it requires, precisely that pretension is still seriously put forward, as appears from the relatively recent events of the Strauss Case,[6] and seriously treated, if not welcomed or approved, by the Courts: In re Parliamentary Privilege Act, 1770,[7] which carries a hint of hostility.[8] Characterization of the bringing of an action as a distinct contempt is not unknown to statutory formulations of privilege,[9] though the

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6. See Hood Phillips, Constitutional and Administrative Law, 4th ed. (London, 1967) pp.172-4; Yardley, op.cit., (1962) 15 Parl. Aff. 500.

7. [1958] A.C. 331; see esp. pp.353-4. Dualism will, of course, exist to the extent that there are any cases where well-founded actions are also punishable contempts. The House has, of course, considered that lawsuits brought with the object, or even with the effect, of testing or flouting, or infringing, privilege claims, are punishable contempts. Stockdale v. Hansard (1839) 9 A. & E. 1 and the Sheriff of Middlesex Case (1840) 11 A. & E. 273, suggest the unliklehood of the courts of admitting that the bringing of at least well-founded proceedings can be a contempt; nor can the House be said to rely on the Courts' willingness to uphold any such contention: the House rather trusts to the silence of its warrants, which prevents the question being canvassed at all.

8. 'Their Lordships...express no opinion...on the question whether the mere issue of a writ would in any circumstances be a breach of privilege. In taking this course they have been mindful of the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrongs and would not prejudice the hearing of any cause in which the plaintiff sought relief...': [1958] A.C. 331 at 353.

9. See, for example, The Legislature Act, R.S.Q. 1964, c.6, s.67: 'No legislative councillor or member of the Legislative Assembly shall be liable to any action, arrest, imprisonment or damages by reason of any matter or thing brought by him by petition, bill, resolution, motion, or otherwise, before the House or any of its committees, or by reason of anything said by him before such House.'

'The bringing of such action, the causing or effecting of any such arrest or imprisonment, or the awarding of any damages, shall be deemed to be an infringement of the provisions of this subdivision.'

The marginal note--'Freedom of speech'--suggests that this section is to be restrictively construed as to its scope: extending, perhaps, only to immunity from defamation, and not, e.g., to immunity from suit as a joint tortfeasor for acts directed to be done. Restrictive construction of provisions granting immunity from tort liability is supported, for example, by Chaput v. Romain [1955] S.C.R. 834; Roncarelli v. Duplessis [1959] S.C.R. 122; and authorities

statutes may be read to make offences only out of the bringing of unfounded suits.

The problems of pluralism within the monistic legal order may be seen in other ways. Can it be an actionable wrong to procure the exercise of sovereign power, itself ex hypothesi unchallengeable? When can one be a wrongdoer for being party to that which is in law no wrong? In Rafael v. Verelst[10] defendant, President of Bengal under the East India Company, (who had not justified specially on the basis of his authority), was found by a jury to have caused the imprisonment of plaintiff in a native state under the authority of its ruler, but by the procurement of the defendant, under his awe and influence, the ruler acting contrary to his own inclination out of a fear of offending defendant. This was held by the Common Pleas to give rise to legal liability. De Grey, C.J.,[11] considered 'the Nabob as not being the actor in this case; but the act to be done, in point of law, by those who procured or commanded it; and in them it may doubtless be a trespass; and spoke of him as 'a mere instrument'; and asked, 'If, in the doing of an act, there be several intervening agents, and one happens not to be amenable, will it be said that all the rest are excused? Suppose it be the very act of the Nabob, who lends himself to the defendant's will, and undergoes a voluntary servitude to his pleasure,--the accidental circumstances of such a man shall not exempt the rest, who concur in the act.' Gould, Blackstone,

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there collected; and even the Privy Council has shown a willingness to refuse literal effect to privative clauses: Colonial Bank of Australasia v. Willan (1874) L.R. 5 P.C. 417.

But whether this section be widely or narrowly read, the offence of bringing suit may be thought coextensive with the immunity from suit; so that, while it is no offence to bring a successful suit, the bringing of one which is not well founded would be a contempt.

10. (1775) 2 Wm. Bla. 621; 96 E.R. 1055. Common Pleas: De Grey, C.J., Gould, Blackstone, and Nares, JJ.

11. Ibid., p.1058.

and Nares, JJ., concurred; Blackstone, J., referring to the jury's verdict, adding, 'After such a finding, there is no room for argument. The Nabob is a mere machine,--an instrument and engine of the defendant.'[12]

Can then the enactment of a valid statute be, collaterally, a legal wrong? Can he who promotes, opposes, procures, or even is party to, its enactment, be guilty of a legal wrong?[13] Can he be made to suffer penal sanctions, be restrained, be amerced in damages? If one of the steps in the process of enactment involves a legal wrong of any of these types, will the result be a juridical nullity? Conversely, does a wrong of one of these types arise merely because a nullity is in train of 'enactment'? Who, for example, is wronged if a comic magazine is presented by the Clerk to the Sovereign or his representative, for royal assent?

All these intriguing questions fall in the penumbra between the subjects commonly called 'parliamentary privilege' and 'parliamentary sovereignty'.

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12. Ibid., p.1059.

13. The Professional Matriculation Act, R.S.Q. 1964, c.246, prohibits the Queen's Printer from publishing in the Quebec Official Gazette any notice of presentation, to either House of the Legislature, of a Bill authorizing admission to study or practise of certain professions, including those of advocate, notary, physician, pharmacist, dentist, surveyor, architect, engineer, chemist, veterinary surgeon, and public accountant, unless accompanied by a certificate of approval from the governing board of the profession in question. The same Act also prohibits the clerk of either House from receiving or printing such bill without such certificate. No penalties are specified.

I. Damages and the Legislative Process

Twenty-five years as Dean of the Faculty of Law of McGill University did not inhibit Sir John Abbott, later Prime Minister of Canada,[14] from professing to negotiate the sale, in 1887, of a statute incorporating an electric company, as if such a 'charter' were a chattel; an adventure which received no encouragement from the Quebec Queen's Bench which in Vipond v. Robert[15] held the supposed object of the sale to be res extra commercium,[16] and the sale, if any had been intended, void.

It is curious that Sir John should also have been a defendant in the earlier of an obscure pair of cases both reported as Gregory v. Canada Improvement Co.[17] In the first, a Nova Scotia Equity decision, plaintiff sought to restrain promotion by defendant and others of certain Nova Scotia provincial legislation which, he considered, jeopardized his rights to certain mortgage bonds which defendant was to deliver to him as soon as they could be legally issued. The bonds in question were to be those of a certain railway company; and were to be secured upon, amongst other things, a branch railway which was to be handed over by the Dominion Government as a subsidy for the construction of a railway extension. The railway company and defendant compan

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14. Dean 1855-1880; Prime Minister 1891-2.

15. (1908) 17 B.R. 403; (Queen's Bench, Appeal Side: Taschereau, C.J., Bossé, Trenholme, Lavergne, and Cross, JJ.)

16. See per Bossé, J., at p.417; and per Cross, J., at p.419: 'It is a matter of public policy that acts of the legislature should not be subjects of purchase and sale.' Bossé, J.'s language was wider; '...dans les circonstances que j'ai relatées, la charte ne pouvait être vendue, ni former l'obje d'un contrat civil...'; ibid., p.417.

17. (1879) Russell's Equity Decisions (N.S.) 358 (Ritchie, E.J.); (1883) 5 La Thémis 10 (Que. S.C.: Jetté, J.)

were contractually bound to plaintiff to use every diligence to obtain the legal issuance of the bonds, in good, sufficient, legal and available form; and the bonds were to be free of unusual clauses impeding the holders or trustees from selling the property subject to lien, foreclosing the mortgage, or otherwise realizing them in case of non-payment; moreover, the railway company would, 'if it should prove necessary to do so, apply for an endeavour to procure at the earliest opportunity such legislation as would remedy any alleged defects, if any existed, in their organization.'[18] But, as the Court observed,[19] 'All parties to the arrangement seem carefully to have guarded themselves from undertaking to perform what it was not in their power to do, and the undertakings of the companies to give a lien on the Pictou Branch were strictly conditional on its delivery over by the Dominion Government and the terms on which it should be delivered.'

Plaintiff considered himself aggrieved by an agreement entered into between the defendant company, the railway company, and the Governments of Canada and Nova Scotia, whereby the branch railway was to be held by the Government of Canada as its property until the extension should be finished to the satisfaction of the Nova Scotia government; and whereby only then should the branch railway be delivered over, and even then on the condition that, if the extension together with branch and ferry were not operated to the satisfaction of the Lieutenant-Governor in Council of Nova Scotia, the same should be forfeit to the Nova Scotia Government free of all encumbrances. As his security would thus be precarious, plaintiff sought to restrain defendants, which included the two companies and various individuals,[20] including the Hon. Samuel Creelman,

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18. (1879) Russell's Equity Decisions (N.S.) 358 at 360.

19. Ibid., p.361.

20. These included Hon. J.J.C. Abbott, as Sir John then was, presumably because of some connection, which does not appear clearly from the report, with one or other of the defendant

Commissioner of Public Works and Mines of Nova Scotia,[21] 'from carrying out or acting upon any agreement theretofore made in violation of the said settlement or compromise, or from applying for, encouraging or adopting any legislation by which the value of the bonds which...were to be delivered to the plaintiff, might be depreciated, or the property on which the same was to be secured might in any event cease to be the property of the said Railway...Company, free from liability on account of such bonds'.[22]

Plaintiff's suit failed. The government was free to deliver the branch as a subsidy on any terms it pleased, or not at all. Defendants, being in no position to get the branch save on terms satisfactory to the government, were not willingly prejudicing plaintiff; and they had promised the branch as security only on condition that the government would in fact deliver it. They were therefore not in breach of their duty to plaintiff in <u>any</u> event. The Court went further, however, and thought that the terms which made the subsidy conditional upon satisfactory operation of the system, were reasonable terms, and such as must have been envisaged by everybody including plaintiff. Though the agreement had not protected the bond-holders from loss consequent upon a default of the railway company--'and it did occur to me that it would be unreasonable that their security should be liable to be destroyed without notice and without their being able to prevent the forfeiture and protect their interests'[23]--the draft bill prepared for

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companies; Sir John was at this time not in Parliament, and shortly thereafter became counsel to the C.P.R. Also defendants were Sir Hugh Allen--railway promoter <u>par excellence</u> in Canadian history through his involvement in the scandal which brought down Sir John A. Macdonald's government in 1873; and Hon. John Hamilton.

21. He was represented by Hon. John Thompson, then Attorney-General for Nova Scotia; later to be Sir John Abbott's successor as Prime Minister of Canada.

22. (1879) Russell's Equity Decisions (N.S.) 358 at 359.

23. <u>Ibid.</u>, p.362.

submission to the legislature did require that the trustees for the bondholders to be given notice and the opportunity to save their security on giving their undertaking to keep the railway system in operation. 'This is all that in my opinion they have a right to expect.'[24] But even this was ex gratia; for, were there no means of preventing forfeiture, still 'if the Dominion Government would not consent to hand over the ...Branch on any other terms, I do not see what redress the plaintiff would have.'

Plaintiff found a happier forum in Quebec some four years later, in an action for damages brought against the defendant company and Sir Hugh Allan, who allegedly controlled the majority of its share capital, for recovery of the face value of the bonds. By this time, the Canadian and Nova Scotian legislation to which plaintiff objected had been enacted, and the Hon. Justice Jetté of the Quebec Superior Court found[25] that the defendant company had contractually undertaken the formal and absolute obligation to deliver the bonds claimed of the quality and with the conditions of privilege and preference stipulated in the deed and assured by the legislation under whose aegis the arrangement had been made;[26] that the performance of the

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24. Ibid.

25. 5 La Thémis 10 at 17. (1883)

26. The Court thus read very differently the Canadian statute 40 Vict., c.46 (Stat. Can., 1877) from Ritchie, E.J., sitting in Equity in Nova Scotia; for he understood defendant to have no absolute right to the branch railway. Perhaps this was merely because any right was defeasible by Parliament; or because the requirement that the Minister of Public Works be satisfied applied to the construction of the railway. '1. The Pictou and Truro Branch Railway... shall be transferred absolutely to the person or company constructing the line from New Glasgow to the Strait of Canso, and providing a proper steam ferry across the strait, as soon as such railway is constructed, with proper rolling stock and other appurtenances, and such ferry is provided to the satisfaction of the Minister of Public Works.'

obligation undertaken by the defendant company had become impossible; that though this impossibility resulted from an act of political power, this act could not however be considered in the circumstances as having the character of superior force, and as exonerating the defendant from responsibility, seeing that it is a principle that the fait du prince liberates the debtor only when it renders performance absolutely impossible, but not when it merely renders performance more onerous and difficult; that, furthermore, the legislation in question had been obtained by the railway company in concert with the defendant company, the two being in substance and reality one, the defendant company notably having opposed amendments by which plaintiff sought to protect his rights in the statutes in question: and in such a case the fait du prince could not be taken into consideration, even had it prevented execution totally. The result of these circumstances was that the impossibility of performance, being the result of the act and fault of defendant, transformed the obligation by operation of law, from the very day performance became impossible, into a claim in damages, against the defendant company.[27] Judgment was accordingly given for the full face value of the bonds; though this seems almost as consistent with a restitution based on frustration as with a condemnation for damages arising from wrongfully procuring legislation; saving, of course, that the debtor lost the benefit of the term of the bonds.[28]

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27. Sir Hugh Allan was held not liable in damages. The Court dismissed the latter's defence in law that the declaration showed no personal obligation on his part to plaintiff and that there was no juridical relationship between the parties; Jetté, J., holding that the allegations of participation in the defendant company's fraud through participation in the above-recited acts, were indeed sufficient in law; but that defendant Allan had not been shown guilty of fraud by the acts imputed to him, and that there was no legal fraud in the acts and agreements in which Allan had participated; (1883) 5 La Thémis 10 at 14.

28. Cited and followed by Boossard, J., in Benaroche v. O'Connell [1963] C.S. 543.

The Quebec proceedings in damages thus indicated, and the Nova Scotia injunction proceedings did not deny, that a statute --or acts done in relation to its passage--may in some circumstances be the object of civil obligations enforceable by the Courts; though it would appear that a statute is to be spared at least the indignity of sale as a chattel: res mobilis, res vilis. A person who participates in the passage of legislation may therefore, it would seem, become liable to indemnify others for the damage flowing therefrom, in some circumstances at least. Here the legislation in question had destroyed the object of the obligation; and the Court explicitly held that the participation of the debtor of that obligation in such destruction prevented a release which might otherwise have arisen from the doctrine of fait du prince ('act of state'). Would the result have been the same had the statute specifically decreed the extinction of the obligation itself? Could the court have then said, 'True, defendant has been released from the obligation; but not from a liability in damages for having procured that release.'? If such reasoning be admissible with regard to obligations, how can rights of property be distinguished? What is to distinguish reasoning such as the following: 'True, the legislature has quieted your title to this land--or settled in your favour this will in which you are interested--; but the Act says nothing against your paying for the consequent damages'? Can there be said to be an obligation not to promote certain types of legislation? Should legislation sometimes carry a provision indemnifying the 'wrongs' involved in its own promotion?

So far as specific performance, at least, is concerned, there is an interesting case law on the subject.

II. Specific Performance and the Legislative Process

Judicial review, as applied to the process of law-making, endeavours to ensure that the law shall be made only according to law: by the competent authorities acting within the limits of their competencies and through procedures laid down by law. Injunctive relief against those taking part in this legislative process (participating at the centre, like legislators and officers, or at the periphery, like the interested or participating public) is an extreme form of control: the constitutional authorities note the existence of injunctive relief with doubt and approve it--if at all--only uneasily; the courts, for their part, view it with suspicion and apply it--if at all--only reluctantly.

(1) Activities Involving Specific Illegalities

Legal contexts may easily be ranked as to their relative appropriateness for injunctive relief as a remedy where "illegality" (to use a comprehensive term) is alleged.

First amongst these contexts comes, no doubt, the situation in which one of the elements of the legislative process is prohibited by law from acting in a certain way in certain circumstances.

This may be illustrated by a fairly typical form of constitutional entrenchment, of which section 80 of the British North America Act contains an instance; the proviso to that section reads:

> "Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed by the Legislative Assembly

> with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed."

Here, it is made unlawful for the recipient of the prohibition (presumably, everyone) to present to the Lieutenant-Governor certain Bills unless the latter are passed by the requisite majority; and the Lieutenant-Governor is prohibited from assenting to such Bills unless the Assembly present an address stating compliance. In both these cases strong arguments can be developed for enjoining threatened violations: for the statute clearly singles out and brands with illegality the act of "presenting" the Bill in the one case, and the act of "assenting" to it in the other; though, even here, are concealed subtle problems in greater number than might be supposed.[29]

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29. (i) Quaere, what differences can be found, and distinctions made, between the effect of such words as "it shall not be lawful to present" and "shall not assent"? The sanction for doing that which "it shall not be lawful" to do might be damages or nullity or even a jail term: why an injunction necessarily? (ii) A difference can be drawn between a Clerk of the Parliaments performing the (ministerial) function of presenting and a Lieutenant-Governor's performing the act of assenting, as regards (a) their respective amenability to judicial process of this--or other--sort; (b) the person(s) to whom they owe their respective duties to refrain from acting--only those to whome these duties are owed being entitled, one assumes, to enforce them; (c) the discretion which (in law) they respectively exercise in deciding what their duty is.

Application of the rule inclusio unius exclusio alterius could here produce interesting results. The act of presenting the bill is made conditional upon proper passage not upon an address reciting proper passage; the act of assenting is made conditional upon an address reciting proper passage, but not upon the fact of proper passage. In each case, does the imposition expressly on one of the two conditions impliedly exclude the other? Seemingly the Lieutenant-Governor may lawfully assent so long as he receives the appropriate address, whether that address state the truth or (by error or fraud) a falsehood. On the other hand, seemingly, no one may present the bill unless proper passage has in fact occurred. Quaere, whether an illegal presentation so far contaminates the whole legislative process as to nullify the bill even after assented to; if it does not, and the Lieutenant-Governor, on receipt of a false address, signifies the royal assent, what remedy would lie against the improper proceedings? Would it not seem that injunction alone would be effective--injuction against

In Australia this form of entrenchment has been not uncommon; the most notable instance of its use being in an enactment to protect the Legislative Council of New South Wales with a requirement of a referendum before the Royal Assent to any bill to abolish it, or to remove the entrenching provision itself. The attempt to abolish the Council without complying with the referendum requirements led to the celebrated Trethowan's Case,[30] in which the Supreme Court of New South Wales,[31] the High Court of Australia,[32] and the Privy Council[33] upheld the validity and effectiveness of the entrenchments against two bills designed respectively to repeal the entrenching provisions and then to abolish the Council: bills which had passed both Houses and were to be presented for royal assent without having been put to a preliminary referendum. A pronouncement upon such a question of law would, in the ordinary course of events, have come in proceedings where the Courts had to apply, or decline to apply, the impugned provisions of the supposed new laws, on the basis that they were validly enacted law, or that they were not. But Trethowan's Case was not one where the impugned legislation had been put upon the statute book; even supposing that to be enough, without a threat of

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presentation? And if the injunction were disobeyed, would that involve the nullity of the assent--or would it merely mean that the clerk who has presented it, being in breach of an injunction operating in personam only, and affecting him alone--would be punishable for contempt?

30. Trethowan v. Peden and Others (1930) 31 S.R. (N.S.W.) 183 (Supreme Court of New South Wales: Street, C.J., Ferguson, James, Owen and Long Innes, JJ.); A.-G. for N.S.W. and Others v. Trethowan and Others (1931) 44 C.L.R. 394 (High Court of Australia: Gavan Duffy, C.J., Rich, Starke, Dixon and McTiernan, JJ.); and in the Privy Council, [1932] A.C. 526 (Present: Lord Sankey, L.C., Lord Blanesburgh, Lord Hanworth, M.R., Lord Atkin, and Lord Russell of Killowen).

31. (1930) 31 S.R. (N.S.W.) 183 (Long Innes, J., dissenting).

32. (1931) 44 C.L.R. 394 (Gavan Duffy, C.J. and McTiernan, J., dissenting)

33. [1932] A.C. 526.

enforcement, to give rise to relief; which seems not the case.[34] The objects of attack in Trethowan's Case were rather two bills which had not even received royal assent. Indeed, the proceedings before the courts came by way of injunction sought by two members of the Legislative Council to restrain the defendants, the President of the Legislative Council (whose duties included presenting bills to the Governor for Royal Assent), and various Ministers of the Crown for New South Wales, from presenting or endeavouring or causing to be presented for royal assent either of the Bills in question.[35] Far from threatening to enforce their provisions as law, no one even pretended that they were laws at all. Even the bare question of law before the courts, therefore, was not whether the contents of a purported enactment did or did not form part of the corpus of the law, but whether, in the event that the Sovereign were later to give assent, the contents of the resulting instrument would, or would not, be law. And the facts relied on as giving rise to the injunction proceedings, consisted in express or implied threats to complete by royal assent a legislative process which claimants themselves contended could not produce a valid law; a process, therefore, whose output, on that hypothesis, would, of itself (i.e. apart from enforcement), seem incapable of causing damage to plaintiffs. But the distinctive feature of the legal basis of the injunction claim, was that it did not depend alone on a willingness of the courts to restrain the presentation for assent of a bill simply

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34. See Saumur v. The Attorney-General for Quebec [1964] S.C.R. 252, where the statute claimed to be ultra vires, if not on its face, was, at least as a matter of notoriety, directed against the appellant's sect, the Witnesses of Jehovah, though there had been neither enforcement nor threat of enforcement. Declaratory relief was refused. See Comment by the present author in (1965) 11 McGill L.J. 88, and also his 'Note on the Nature of Legal Interest in Constitutional Litigation' (1966-67) 12 McGill L.J. 136. See also for example Buck v. Attorney-General [1965] 1 Ch. 745.

35. See (1930) 31 S.R. (N.S.W.) 183 at 184-7.

because the result would be a nullity. Nullity, of course, would be an inevitable consequence of the continued validity and effectiveness of the entrenching provisions against non-compliant Bills; this seemed plain from the terms of the entrenching provisions,[36] and not an issue in the case.[37] It was not simply because the royal assent would produce a nullity that the presentation was sought to be restrained; but rather, because the terms of the entrenching provisions imperatively provided that a bill within their purview 'shall not be presented to the Governor for His Majesty's assent' until approved by the electors. Presentation itself appeared in the circumstances to be in some sense unlawful.[38] Could presentation then be restrained at the suit of the plaintiffs? In the Supreme Court of New South Wales, at least four judges of a bench of five held that it could.[39] The majority, interestingly enough, was exactly the same as the majority in favour of the validity and efficacy of the entrenching provisions with their referendum requirement. All the judges save Long Innes, J., would have held the bills void though assented to; and all, save, apparently, he, were prepared on final judgment to restrain their being presented for assent at all. The majority found that the suit was one available to a proper plaintiff, and that the two members were

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36. Inserted into The Constitution Act, 1902 (No.32 of 1902; N.S.W.), by the Constitution (Legislative Council) Amendment Act, 1929 (No.28 of 1929; N.S.W.), s.7A provided inter alia:

> '7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of subsection six of this section, shall its constitution or powers be altered except in the manner provided in this section.
>
> (2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.
>
> ...
>
> (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not extend to any Bill for the repeal or amendment of any of the following sections of this Act, namely [here followed a list of excepted sections].'

such plaintiffs; because (they thought) the threatened breach of the statutory prohibition against presentation would, at least temporarily, prejudice plaintiffs in the enjoyment of their offices and privileges[40], whilst, on the other hand, the giving

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37. See, for example, in Trethowan v. Peden (1930) 31 S.R. (N.S.W.) 183, the remarks of Owen, J., at p.221: 'If these bills had been presented for and had obtained the Royal assent, this Court clearly would have had jurisdiction to declare that the Acts so constituted were invalid, and to grant the plaintiffs some form of relief.' See also [1932] A.C. 526 at 541.

    What was at issue principally was, precisely, whether the entrenching clauses were valid and effective against subsequent non-complying enactments.

38. 'Indeed, the presentation of the Bill to the Governor without such approval would be the commission of an unlawful act': [1932] A.C. 526 at 541.

39. The actual proceeding reported is a motion to continue, until hearing of suit, an interim injunction which had been granted ex parte by Long Innes, J., on refusal of undertaking by defendants (other than Sir John Peden, the President of the Council, who never appeared.) To this motion defendants demurred ore tenus, and all grounds of law in support of, as well as against, the substance of the claim were ventilated. The majority overruled the demurrer and upheld plaintiff's contentions as to the effectiveness of the entrenchments and his right to an injunction. Long Innes, J., dissented as to the former, but under compulsion of the majority ruling considered that he ought to concur in the order for an injunction. His reasons, however, indicate that he did not consider the injunction a proper one, and was granting it on the balance of convenience; in other words, it would appear to have been, for him, an interlocutory measure, to await the ultimate outcome of the case. By consent, the motion before the court was turned into a motion for a decree, which was granted, including the injunctions asked.

40. Per Street, C.J., (1930) 31 S.R. (N.S.W.) 183, 196 at 205: 'The plaintiffs...point out, with truth, that it is the duty of the Crown, and of every branch of the Executive, as well as of every citizen, to abide by and to obey the law, and they say that all they are asking is that they may be protected against a threatened breach of a statutory mandate by which they will be injuriously affected. Under the law as it stands to-day, as now declared by this Court, there is a valid statutory prohibition against the presentation to the Governor of a Bill to repeal s.7A until it has been approved by the electors. To grant the relief asked for will not in my opinion amount to an interference with the internal affairs of either House of Parliament or with any of the privileges of Parliament, and I think, therefore, upon the whole, that the suit is one which will lie at the instance of a proper plaintiff having a sufficient interest to maintain it.'

of the injunction would not be an unlawful or improper interference in the internal affairs of the Houses of Parliament. Much could have been said--though it was not--on the question whether the principles laid down in Bradlaugh v. Gossett[41] for the Houses at Westminster, could be applied to the Legislature of New South Wales, which had enacted no statute applying the Westminster privileges in their entirety to its own houses. Could it be said to be 'necessary' to the Houses of that state that, in the words of Lord Coleridge, C.J., 'What is said or done within the walls of Parliament cannot be inquired into in a court of law'?[42] Certainly, as we have seen, it is not true of an overseas dominion assembly at common law to say, as that judge immediately added, 'The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.'[43] Can it be said to be a 'necessary incident' to a local assembly that it may be said of it, as was said of the House of Commons by Stephen, J.,[44] that it 'is not subject to the control of Her Majesty's Courts in the administration of that part of the statute-law which has

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'On this point I entertain no doubt but that the plaintiffs, who may be deprived of their parliamentary privileges, temporarily at all events, if the threatened breach of the law is committed, have a sufficient interest to entitle them to approach the Court.'

Ferguson, J., at p.211: 'With regard to the jurisdiction of the Court to entertain the suit, and the right of the plaintiffs to present it, I have nothing to add to what has been said by the learned Chief Justice.'

James, J., concurred in the Chief Justice's judgment (at p.212).

Owen, J., said at p.219: 'The plaintiffs and the other members of the Legislative Council (on whose behalf the plaintiffs sue) hold, as members of that Council, high office in the State with important duties to perform and privileges to enjoy. Sec. 7A was enacted in order to extend some measure of protection to or to safeguard the Legislative Council and its members. It is clear to my mind that the presentation of these Bills, passed by both Houses, to the Governor for His Majesty's assent must or may endanger the continuance of the office, duties and privileges of the members of the Council as members of that body. Therefore, the presentation of the Bills in question to the Governor without first having obtained the approval of the electors is not only in direct contravention of the terms of the section but must necessarily prejudice the plaintiffs.' At p.221 his Lordship added: 'The injury to and the loss sustained by the plaintiffs cannot be estimated in damages; even if adequate

relation to its own internal proceedings'? It is in the highest degree doubtful that such principles can be reconciled with the leading authorities on 'colonial' privileges. The subject was not broached by the justices of the majority; for they were prepared to assume that the principles laid down by Lord Coleridge, C.J., with the concurrence of Mathew, J., and by Stephen, J., either were not applicable to the situation before them, or were overriden by the terms of the entrenching statute.[45]

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damages could be assessed, the Court would have no right to compel the plaintiffs to barter their office, rights and privileges for a monetary compensation, and the only adequate relief that can be granted is by way of injunction.'

41. (1889) 12 Q.B.D. 271 (Queen's Bench Division: Lord Coleridge, C.J.; Mathew and Stephen, JJ.).

42. Ibid., p.275.

43. Ibid. And this, on the authority of Lord Ellenborough in Burdett v. Abbott, 14 East 1, whose applicability since Kielley v. Carson (1841-2) 4 Moo. P.C. 63, it is unnecessary to elaborate on.

44. Ibid., at p.278.

45. A somewhat circular argument to meet a claim of a privilege to administer the statute law. See per Owen, J., (1930) 31 S.R. (N.S.W.) at p.221: 'In my opinion that case has no application to what is under consideration before us. [There follows the passage quoted supra, note 37.] It is true that Sir John Beverley Peden is an officer of the Legislative Council whose duty it is to present these Bills to the Governor, but an injunction to prevent him from so doing in direct contravention of an Act duly passed by Parliament is, in no sense, an interference with the rights, powers and privileges of Parliament. Sec.7A, sub-ss.(2) and (6) prohibits in the plainest terms the presentation (i.e., by the appropriate officer of Parliament) to the Governor for His Majesty's assent. The threatened presentation in the present case is by statute made illegal, and the Court must have, and I am satisfied has, power in a proper case to restrain the committing of such an illegal Act. If the Court has that power, I am satisfied that the Court ought not, in a case such as this, to refrain from exercising it.'

Street, C.J., with whom Ferguson and James, JJ., concurred, said (at p.204):

The arguments based on privilege were thus rejected by the majority of the New South Wales Supreme Court in Trethowan's Case, whether framed in terms of a lack of judicial jurisdiction, or the impropriety of its exercise.[46] Even Long Innes, J., was prepared to go so far as to find a legal interest, sufficient to support equitable relief of the type sought, in the right of a whole House to participate in the legislative process, and semble, possibly also in the right of an individual member to vote,[47] but gave reasons clearly indicating that the

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'Then comes the next question of importance, that is to say whether this suit is one which the Court has jurisdiction to entertain. Dr. Evatt put his submission in this way. No suit, he said, can be maintained in the King's Courts which has for its object the prevention of the free access to the King or his representative of the officers of Parliament, or the King's Ministers responsible to Parliament, with a view to the Royal assent being obtained to legislation of a public character proposed to be enacted by both Houses of Parliament. He further submitted that there is no equitable right to restrain the King in Parliament, or the responsible Ministers of the Crown, or the officers of either House of Parliament, from passing, or taking part in passing an enactment, whether ultra vires or not. These propositions within limits may be sound, but I do not think that we need to consider them closely, because, in my opinion, what the plaintiffs are seeking to do in this suit does not come within them. Dr. Evatt also submitted that the judiciary has no control over the Legislature, and that it cannot enjoin it from passing an unconstitutional Act. Again, I am inclined to agree, but I do not agree with his further submission that this is an entirely novel attempt to interfere with legislative officers in carrying out their duties. What they are seeking to do is to prevent what they allege is a threatened violation of the statutory inhibition contained in sub.s.2 of s.7A of the Constitution Act...Dr. Evatt's submission is that the judiciary cannot interfere between Parliament and the King, and that the plaintiffs' only remedy if an unconstitutional law is passed is to apply to the Court, after it has been passed, to have it declared invalid ...To grant the relief asked for will not in my opinion amount to an interference with the internal affairs of either House of Parliament or with any of the privileges of Parliament, and I think, therefore, upon the whole, that the suit is one which will lie at the instance of a proper plaintiff having a sufficient interest to maintain.'

46. The ground of privilege was formulated in terms of these alternatives by Long Innes, J., (1930) 31 S.R. (N.S.W.) 183 at 232: '[T]here remains for consideration Dr. Evatt's further contention that this Court either has no power to grant the injunctions prayed in this suit, or alternatively, if it has such power, should not exercise it.' Again, ibid., he spoke of the argument 'that, in any event, this Court either could not, or should not, interfere by injunction

injunction was, in principle at least, in his view an improper one:[48]

> 'Although the suit takes the form of an action in personam, it is, to my mind, in substance a suit the object of which is to prevent the two Houses of the Legislature from communicating to the third element thereof, His Majesty, their advice in regard to legislation in the process of making; it also, incidentally, prays in effect that this Court should interfere with the internal affairs of Parliament. In Bradlaugh v. Gossett (12 Q.B.D. 271, at 286) Stephen, J., said: "No precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament." To grant the injunctions in question, will, therefore, not only create a precedent, from which the Court need not shrink, but--what constitutes in my view a far graver objection--will, in all probability, constitute an infringement of the privileges of Parliament, and may provoke a most undesirable conflict between Parliament and the Judiciary.'

even if not beyond jurisdiction in the strict sense.[49]

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to prevent both Houses of the Legislature communicating, through the prescribed channel, with His Majesty's representative, the Governor, for the purpose on the one side of giving, and on the other side of receiving, the advice of such Houses with regard to legislation in the making.' Compare the words of Evatt, C.J., and Sugerman, J., in Clayton v. Heffron (1961) 61 S.R. (N.S.W.) 768 at 798: 'The question is not one of jurisdiction in the strict sense so much as of the principle upon which the court should proceed in any particular matter in determining the circumstances in which it should intervene and those in which it should regard the authority of the Legislature or its Houses as exclusive in relation to their own proceedings or to their officers or others charged with giving effect to their directions.'

47. (1930) 31 S.R. (N.S.W.) 183 at 232: [Dr. Evatt's further contention that this Court either has no power to grant the injunctions or, alternatively, should not exercise it] 'was based on two grounds: first, that the plaintiffs were not competent, in other words, had no rights of a nature which would entitle them to equitable relief of this nature; and secondly, that, in any event, this Court either could not, or should not, interfere by injunction...' ...'As regards the first point, I feel no difficulty. In Ashby v. White (1 Bro. P.C. 62) it was held by the House of Lords that the wrongful refusal of the vote of an ordinary elector at a Parliamentary election constituted an actionable trespass, sounding in damages, even though the persons for whom he wished to vote were elected.' After quoting the remarks of Stephen, J., in Bradlaugh v. Gossett (1884) 12 Q.B.D. 271 at 285-6 that rights to be represented in

Though he dissented from the majority finding in favour of plaintiffs' contentions and supporting the validity and effectiveness of the entrenchments, Long Innes, J., had proceeded, under compulsion of that ruling, to consider whether they were entitled to the injunctive relief sought; and, though he appeared to think that, in principle, they were not, he did concur in the order of the Court granting the injunctions--treating them, it would seem, as being rather of an interlocutory than of a final character, as the case was destined for appeal.[50]

The Supreme Court of New South Wales had thus been induced to pronounce upon the questions of law which have made Trethowan's Case famous, in proceedings of a kind open to the gravest legal doubt; doubt which indeed has long survived the controversy over the 'substantial' questions themselves. Had the availability of injunctive relief been re-examined in the appellate courts, the proceedings would have stood in danger of collapsing in limine; for, though a declaration had also been sought,[51] in addition to injunctions, the prayer for a declaration could not,

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Parliament, and to sit and vote as duly-elected representative, were legal rights strictissimo sensu, Long Innes, J., added, at p.233, 'In the present case the plaintiffs are suing, not on their own behalf merely, but on behalf also of all other the members of the Legislative Council of New South Wales, who are not defendants to the action. The case involves the rights, therefore, of the whole of one of the two Houses of Parliament to take its share in the process of legislation. Without further elaborating the matter, I may say that I have no doubt that the plaintiffs are competent.'

48. (1930) 31 S.R. (N.S.W.) 183 at 234; see authorities cited at 233-4.

49. (1930) 31 S.R. (N.S.W.) 183 at 235; his Lordship was 'of opinion that the Court has the necessary jurisdiction'.

50. This explanation is supported (i) by his application of the balance of convenience test: at p.235; (ii) by his regret that the President of the Legislative Council was not present to give undertakings which would have relieved the Court of the embarrassment of granting the injunction: ibid.

51. (1930) 31 S.R. (N.S.W.) 183 at 186: 'The plaintiffs...claim

it appears, by itself have supported the suit, if the plaintiffs were not also entitled to the injunctive relief,[52] even supposing that there can be a better right to declaratory than to injunctive relief in circumstances like those at bar, which is doubtful.[53] Had the proceedings collapsed, the Courts could not properly have ruled upon the great questions of law which it was sought to put to them, until a proper suit was brought, perhaps arising from an attempt to enforce abolition of the Council after assent was given to the Bills, or perhaps founded on attempts to give effect to "laws" passed without Council's consent. The further Trethowan's Case proceeded, the greater, it seems, was the interest on all hands in avoiding any ruling on the injunction problems; accordingly, the High Court, in granting special leave to appeal[54] restricted that leave to the

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...(a) That it may be declared that a Bill to abolish the Legislative Council or repeal or amend the provisions of s.7A of the Constitution Act, 1902, cannot be presented to the Governor for His Majesty's assent until approved by the electors in accordance with such section.' Quaere, whether a declaration in such terms would be a declaration of rights stricto sensu, or instead, rather of the character of a declaration of law; and quaere the impact of the rules of res judicata upon such a decree. Cf. (1966-67) 12 McGill L.J. 136.

52. This appears from the joint opinion of Sir Owen Dixon, C.J., McTiernan, Taylor, and Windeyer, JJ., in the later case of Clayton v. Heffron (1960) 105 C.L.R. 214 at 231 ff., which was the opinion of the majority of the High Court, and in the course of which it was said, at pp.232-3: 'It is not unimportant to bear in mind that in New South Wales a declaration of right may not be made unless according to the principles of equity the plaintiff is entitled to consequential relief whether by way of injunction or by some other remedy.' The separate opinions of Fullagar, Kitto, and Menzies, JJ., in the same case do not contain any observations on the point.

53. Zelman Cowen in his note "The Injunction and Parliamentary Process" (1955) 71 L.Q.R. 336 at 342, appears to assimilate the two. See in general also Sawer on the same subject, (1944) 60 L.Q.R. 83.

54. A.-G. N.S.W. v. Trethowan (1931) 44 C.L.R. 394 at 399.

questions 'whether the Parliament of the State of New South Wales had power to abolish the Legislative Council of the said State or to alter its constitution or powers or to repeal sec. 7A of the Constitution Act 1902 except in the manner provided in the said sec. 7A.' The appeal to the Privy Council was similarly restricted.[55] The opinions given in the Supreme Court thus stood as the highest authority on the granting of injunctive relief in aid of a statutory prohibition of presentation.[56]

While the Australian High Court bench has not since had occasion to take the matter further, in the sense of a ruling on the question of injunction in aid of express statutory prohibition, their Lordships have given utterance to various remarks, both judicial and extrajudicial, on the subject. Thus, in Hughes and Vale Pty. Ltd. v. Gair[57] the High Court refused an injunction to restrain the presentation of a Bill for royal assent in circumstances where the only wrong which could result, if any, would be an ultra vires 'enactment'; for there was no statute prohibiting simple presentation of such a bill. On this the High Court were all agreed; but the question of injunction to restrain presentation when in contravention of statute was expressly reserved; McTiernan, J.,[58] being most explicit on this point. But Sir Owen Dixon, C.J., went on to deliver a comment which, it has been said, 'suggests clearly enough (although the language of the Chief Justice was that of doubt and not of categorical disapproval) that there is no case in which an injunction should issue to interfere with parliamentary process.'[59] The language from which such an inference has been drawn warrants quotation:[60]

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55. [1932] A.C. 526 at 528.

56. See also Taylor v. A.-G. for Queensland (1917) Q.S.R. 208.

57. (1954) 90 C.L.R. 203 (High Court: Dixon, C.J., McTiernan, Webb, Fullagar, Kitto and Taylor, JJ.)

58. (1954) 90 C.L.R. 203 at 205.

'The Court is of opinion that this application should be refused. An application for an injunction restraining the presentation of a Bill for the Royal Assent is, I will say, not unprecedented but it is at least very exceptional. We do not think it should be granted on this occasion or later or in any case.

'I should like to say for myself that the problem presented as to the effect of Attorney-General (N.S.W.) v. Trethowan is by no means new. I was a member of the Court in 1931 when it decided that case and I can say from my own personal recollection that when the Court limited the grant of special leave so that the question should not be argued... it was not because the Court was of opinion that the decision of the Supreme Court on that particular point was right, but because it was thought inconvenient to allow a procedural question of that sort to intrude itself into such a matter calling for urgent and definite decision. For myself I have long entertained a doubt as to the correctness of the decision of the Full Court of New South Wales in that case even on the terms of that Act. The Act was of a very special character and contained a provision in sub-s. (2) of s. 7A that a Bill for any purpose within sub-s. (1) of s. 7A should not be presented to the Governor for His Majesty's assent unless the Bill had been approved by the electors in accordance with the section. Such a provision amounted to an express negative provision, containing a prohibition of the course in the event restrained by injunction. Because of the doubt I then entertained, which I still entertain, as to the correctness of that decision, in my own judgment delivered in this Court in Trethowan's Case,[61] in speaking of the hypothesis I put of a similar Bill coming before the United Kingdom Parliament, I used the expression that if it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present a Bill for that assent, the courts would be bound to pronounce it unlawful to do so.

'In the present case the applicant, once the Bill is assented to, will have its remedy and if it thinks fit to apply and makes out a prima facie case this Court will not be slow to intervene to give that interlocutory relief which is appropriate...'

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59. Zelman Cowen, Note on "The Injunction and Parliamentary Process" (1955), 71 L.Q.R. 366 at 341; emphasis added.

60. (1954) 90 C.L.R. 203 at 204-5.

61. (1931) 44 C.L.R. at 426.

Sir Owen has suggested extrajudicially that:[62]

> 'If you have an Act such as was in question in Trethowan's Case (supra), an Act of Parliament saying that the Speaker or whichever officer is involved shall not present a Bill for the Royal Assent, then, if the Royal Assent will make the Bill law, what business have the courts to interfere and say the law shall not be made by the addition of the Royal Assent to what has already been done? If, on the other hand, the Act will be void notwithstanding the Royal Assent why do you want an injunction? Why should it not be left until afterwards? That is the view which I have hitherto adopted.'

The New South Wales Supreme Court decision appears still to stand as the leading authority in favour of injunctive relief in aid of statutory prohibitions governing the legislative process; for there the court upheld injunctive relief as a remedy on final judgment. Similar questions arose in McDonald v. Cain[63] in 1953 in Victoria, where it was unlawful to present for assent bills making certain constitutional amendments unless approved on second and third readings by absolute majorities of the Council and Assembly. Plaintiffs were members of the Legislative Assembly who objected to certain provisions of a Bill inter alia revising constituency boundaries, and which had not been passed by an absolute majority of the Council, the President ruling that none was required. On the day after the Bill had been so passed, plaintiffs issued two writs, one against the Premier and all the members of the Executive Council, and the other against the Clerk of the Parliaments, seeking merely declarations that it was unlawful to present or cause to be presented for assent the Bill in question. The Clerk of

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62. "The Common Law as an Ultimate Constitutional Foundation", Paper by Sir Owen Dixon, and Discussion (1957) 31 A.L.J. 240 ff at 254.

63. [1953] V.L.R. 411 (Adjourned from Sholl, J., to a Full Court: Martin, O'Bryan and Gavan Duffy, JJ.) See Note in (1953-4) 27 A.L.J. 740, and the additional information given by K.A. Aicken in the Discussion of Sir Owen Dixon's paper (ante, note 62), at (1957) 31 A.L.J. 252. See also the Note already cited, by Z. Cowen, (1955) 71 L.Q.R. 336 at 338 ff.

the Parliaments having advised the Premier that he intended, in the absence of a Court order, to present the bill to the Governor for assent as was his duty under the Joint Standing Rules, the Crown Solicitor was obliged to withdraw an undertaking earlier given not to proceed with assent provided the actions were promptly prosecuted. Accordingly, Sholl, J., granted a six-day interim injunction to last to the hearing of a _further_ motion to continue the injunction until the trial of the action. When _this_ motion came on, he adjourned it for argument to the Full Court where, by consent, it was treated as the trial of the action; but Sholl, J., did grant an interlocutory injunction to last until the hearing before the Full Court a few days later; and the Full Court itself continued the injunction until the determination of the action--which, being against the plaintiffs, on the ground of law that the absolute majority requirement did not apply to the bill in question--the action failed completely and no further relief of any description was granted. In addition, the Court, in the first place, held that the Members had, as _electors_ in their own constituencies, a sufficient right, by reason of their votes as such [if not as _members_ for constituencies which would only be altered at the next election] to maintain the proceedings. Gavan Duffy, J., who did not appear to consider it relevant to distinguish the availability of declaration from that of injunction, doubted whether either was available, but declined to decide the question, this being unnecessary; while Martin, J., did not seem to think either form of relief improper; and O'Bryan, J., it seemed, would have been willing to give at least a declaration against the Ministers, and perhaps an injunction, also, against the Clerk of the Parliaments.

The most recent litigation, that of _Clayton_ v. _Heffron_,[64]

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64. (1961) 61 S.R. (N.S.W.) 768 (Supreme Court: Evatt, C.J., Owen, Herron and Sugerman, JJ., McLelland, C.J. in Eq.); (1960) 105 C.L.R. 214 (High Court: Dixon, C.J., McTiernan,

arose out of another (ultimately abortive) attempt to abolish the Legislative Council of New South Wales. Here plaintiff members of the Legislative Council, joined for reasons which need not here be canvassed by one member of the federal House of Representatives, sought to restrain the Premier and other Ministers of the Crown, and the Electoral Commissioner, from taking steps to hold a referendum. The Council had not itself passed the abolition bill, and it was proposed to be sent anyhow to referendum in virtue of a deadlock clause in the New South Wales Constitution. Plaintiffs claimed that this was unlawful, first, because the deadlock clause had, they said, not been validly enacted,[65] and second, because if valid it had not been complied with.[66] In order to facilitate a speedy disposition of the legal questions involved, an agreement was reached assuming that injunctions would be available if the Bill would still be invalid, even though approved by referendum, for lack of compliance with other requirements. On this basis the Supreme Court of New South Wales and the High Court of Australia heard the case, and held, in lengthy, interesting, and complex judgments, that all imperative legal requirements had been met, and that the bill, if approved by referendum [where, in fact, it was ultimately rejected] would be good law. Both because of the agreement between the parties and because the action ultimately failed on other grounds, it was unnecessary to decide on the availability of injunctive relief. However,

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Fullagar, Kitto, Taylor, Menzies and Windeyer, JJ.). See the excellent discussion and historical materials in a note by N.J. Moses, "Problems of Constitutional Amendment in New South Wales", (1962) 4 Sydney L.R. 105.

65. For various reasons reminiscent of the arguments in Trethowan's Case.

66. Inter alia because the bill was, it was said, a hybrid not fitting into the provisions sought to be used; and because the Council had refused, on the ground that the Bill infringed their privileges by originating in the Assembly, to appoint Managers to confer, or to attend the joint sitting thus, they hoped, frustrating compliance with the "manner and form" laid down in the deadlock clause.

the joint opinion of Dixon, C.J., McTiernan, Taylor, and Windeyer, JJ., a majority of the High Court, (which includes some rather tart strictures[67] on the proceedings:

> 'How it is possible to support a claim for equitable relief of this nature it is difficult to understand. Indeed the constitution of the suit as a whole strikes one as an experiment against the success of which law equity and wisdom combine.')

makes the point that whereas, in Trethowan's Case, a statutory prohibition would have been violated (not to present for assent without a referendum), there was applicable here no such prohibition (as, not to submit to referendum without complying with preliminaries); this case was, in substance, a claim that a process was being pursued which must end in an invalid "enactment"; and Trethowan's Case 'can have nothing to do with an attempt to secure the intervention of a court of equity in a legislative process on the ground that the procedure is misconceived or alternatively has not been correctly pursued'. Their Lordships further 'assumed that the suit would not have been entertained by the Supreme Court sitting in Equity, had it not been' for the concession. The case, in sum, was that of an attempt to bring an alleged nullity to the statute book; and their Lordships might have made the point that it could make no difference whether the ground of nullity was failure to comply with state-statutory conditions for legislation, as was here claimed, or infringement of a provision in the Constitution of the Commonwealth, as was claimed in Hughes and Vale Pty. Ltd. v. Gair.[68]

Particularly subtle problems arise where it is sought to enforce rules whose breach will not ultimately result in the nullity of the instrument emerging from the process. Such rules are, for example, most of the rules of parliamentary procedure

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67. (1960) 105 C.L.R. 214 at 233-4.

68. (1954) 90 C.L.R. 203. See ante p. 211 and post p. 224.

(despite their presence in statutes: cf. B.N.A. Act, 1867, s.54); and those where the rules, though truly statutory, are either directory only, or subordinated to statutory provisions indemnifying any breach. The latter was the case in the well-known decision in Harper v. Secretary of State for the Home Department,[69] a suit by two parliamentary electors of a Manchester constituency to restrain presentation for Her Majesty's pleasure of a draft Order in Council redistributing seats and altering the boundaries of plaintiffs' constituency. Though this order had been approved by a resolution of each House of Parliament as required by statute, plaintiffs complained that it was not within the enabling statute, since, they said, the report of the Boundary Commissioners for England, on which the draft order was founded, was in law no report at all, by reason of having infringed the rules laid down in the statute. But the statute also provided that[70]

> 'The validity of any Order in Council purporting to be made under this Act and reciting that a draft thereof has been approved by resolution of each House of Parliament shall not be called in question in any legal proceedings whatsoever.'

When, therefore, plaintiffs issued their writ for declarations and an injunction against the submission of the draft Order to Her Majesty, it was, in the words of Roxburgh, J., in the High Court, 'now or never';[71] and the learned judge granted the injunction on an ex parte basis, to last until a hearing inter

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69. [1955] 1 Ch. 238. See generally, Marshall and Moodie, Some Problems of the Constitution (London, 1961) 95 ff. See also Merricks v. Heathcoat-Amory, [1955] 2 All E.R. 453.

70. House of Commons (Redistribution of Seats) Act, 1949, s.2 (7).

71. Quoted from Law Report in The Times, sec. 15, 1964, by Marshall and Moodie, op.cit., p.97.

partes; but the hearing was anticipated by the Court of Appeal[72] who, deciding in substance the merits, held that the injunction should not have been granted, and allowed the appeal; and this, both on the ground that the rules laid down in the statute had indeed been complied with by the Boundary Commissioners, and also on the ground that, at least in the circumstances, their compliance was in any event a matter for Parliament alone, whose sanction was to refuse to approve a report.

How far can the doing of a 'valid' juridical act be a restrainable civil wrong? Does the mere presence of a validating provision or rule give someone the standing to restrain in personam, or declare the illegality of, an instrument which, without a validating provision, would be void, but whose nullity alone, however total it might be, could not, even then (being only a bare point of law) support by itself a declaration at the suit of the same plaintiff? One is immediately reminded of Sir Owen Dixon's dilema[73] that 'if the Royal Assent will make the Bill law, what business have the courts to interfere and say the law shall not be made by the addition of the Royal Assent...? If, on the other hand, the Act will be void notwithstanding the Royal Assent why do you want an injunction?' Can the enactment of a valid law by a restrainable civil wrong? If a process of enactment infringes a statutory provision, will that provision be held to have been prescribed in favour of a person whose interests would be hurt by that enactment?

The Court of Appeal thought that the proceedings at bar involved 'matters which at any rate come somewhat near to touching on the relative spheres of Parliament and the courts', a conclusion which must in some degree have influenced its attitude, though Lord Evershed disclaimed[74] any awe at the prospect:

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72. Lord Evershed, M.R.; Jenkins and Hodson, L.JJ., concurring.

73. Supra, note 62.

74. [1955] Ch. 238 at 248.

> 'I have said that the case is...a striking one, coming near, at the least, to involving the privileges and powers of Parliament; but let me say at once that the courts have never been reluctant or afraid to exercise their powers where they are satisfied that such powers reside in the courts and that some one or more of the subjects of Her Majesty are in danger of finding their rights imperilled.'

But parliamentary assertions of privilege, past and present, do influence judicial views precisely on what the rights of subjects are and what the scope of judicial authority is; and the general aura of privilege surrounding a more clearly legislative process may help to explain why R. v. Electricity Commissioners[75] was thought inapplicable, though there an order of the commissioners was quashed by prohibition which, had it gained parliamentary approval, would have had effect 'as if enacted in this Act'. Trethowan's Case, too, was distinguished, in a rather uninformative and unsatisfactory fashion:[76]

> 'But that was a case where the legislature concerned, namely, the legislature of New South Wales, had under the Australian Constitution strictly limited legislative functions; and, it having been shown that the proposed Act of Parliament had disregarded the provision in the Constitution which required a particular sanction on the part of

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75. [1924] 1 K.B. 171. Lord Evershed said of it [1955] 1 Ch. at p.252, that there 'the court granted a writ of prohibition against the Electricity Commissioners. But, in that case, what the Electricity Commissioners were told to do was to prepare certain schemes which would become orders on their confirmation, first by the Minister, and later by the resolution of the House. They would always be the orders of the commissioners, and the Act, which imposed on them the duty of making these schemes, plainly imposed on them quasi-judicial functions. In that case, it was discovered that, while they were proceeding, and before they had reached the stage of preparing and presenting an order, they had gone altogether outside the functions which were committed to them by Parliament...' Lord Evershed added, at p.253, 'If the Boundary Commission had been given similar functions, and if it had become manifest at some stage or on any occasion that they were exceeding them, it might well be that the court would think it right to make a prerogative order of prohibition or mandamus to compel them to perform their functions properly. I observe that Atkin, L.J., forbore from expressing any view as to what the court would do if Parliament had, in fact, approved the order which the commissioners had been restrained from proceeding to make.'

76. [1955] Ch. 238 at p. 253.

77. Is it necessary to recur to Bowles v. Bank of England [1913] 1 Ch. 57?

> the electorate, the courts in Australia restrained members of the Legislative Council, other than the plaintiffs, who were suing, from proceeding to take the measure for the approval of the Governor-General; and the Privy Council here affirmed them. That seems to me to be quite a different case from the present. We are in no sense here concerned with a Parliament or legislature having limited legislative functions according to the constitution.'

The Privy Council did not affirm or even consider the injunction; and the Court in Harper was concerned, if not with a Parliament of limited powers, at least with a Commission and individual Houses of Parliament with limited powers,[77] though one would not wish to cavil at details in an unreserved judgment. But as Lord Evershed was not content with a finding that the commission had not erred[78]--he needed, after all, some grounds for anticipating a hearing on the merits in the Chancery Division--one is obliged to ask just what the other reasons were which militated against the action, and, more particularly, against the interim injunction. The words used by the Court do not seem to admit of a more certain answer than that the statutorily-prescribed rules were held to be only directions stipulated in favour of the constituent elements of Parliament which alone could complain of non-compliance; at any rate unless 'the commission on the face of a report made recommendations which were manifestly in disregard of the Act of 1949 and of the rules thereunder', an eventuality upon which it was unnecessary to rule.[79]

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78. [1955] Ch. at p.250: 'On this matter I have myself come to a clear conclusion that there is no ground for saying that this report, as I read it, was such a substantial departure, or was indeed any departure, from the rules which the commission had to have in mind.'

79. [1955] Ch. at p.251: 'My reading of these rules and of the whole Act is that it was quite clearly intended that, in so far as the matter was not within the discretion of the commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that, on any of these occasions when reports were presented, it would be competent for the court to determine and pronounce on whether a particular

This decision itself would seem characteristic of the trend of the decided cases: a notable reluctance to interfere, whether by enjoining or restraining acts forming part of a process characterised as legislative; both because such a process lies in an area considered privileged, and also because an individual will rarely be said to have an interest in the operation of that process itself; being confined to invoking ultra vires as a ground of law; and then only when legal rights require consideration of that ground. A violation of the rules of a legislative process will rarely constitute, as such, a wrong to an individual plaintiff. If there can be no 'negligence in the abstract'[80]--no 'negligence in the air'--then may one not conclude that there can be no wrong in the air? So a striking pair of cases--Thorne v. B.B.C.[81] and Cowan v. C.B.C.[82] would suggest. The denial by the Court in the latter case, of the interest of plaintiff, a Member of the Canadian House of Commons, to sue to restrain French-language broadcasts in Ontario, has been criticized for not proceeding to the substance of the matter and deciding whether the C.B.C. did or did not owe plaintiff a duty to refrain from French broadcasts.[83]

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line which had commended itself to the commission was one which the court thought the best line or the right line--whether one thing rather than another was to be regarded as practicable, and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be...I find it unnecessary to say what the court would say or should do if the commission on the face of a report made recommendations which were manifestly in complete disregard of the Act of 1949 and of the rules thereunder. I find it difficult to think that Parliament would pass them by unnoticed; but, if Parliament none the less adopted them, I find it unnecessary to say what view the court might take.'

80. Thomas v. Quartermaine (1887) 18 Q.B.D. 685 at 694; Palsgraf v. Long Island Railroad Co., (1928) 248 N.Y. 339; 162 N.E. 199.

81. [1967] 2 All E.R. 1225 (C.A.).

82. [1966] 2 O.R. 309; 56 D.L.R. (2d) 578 (Ontario Court of Appeal).

83. B.L. Strayer in a Note (1967) 45 Can. Bar Rev. 154.

But are the two not the same thing; can there be a wrong distinct from the interest to complain of it and take appropriate proceedings? Does a wrong mean more than the remedies to which it gives rise? Can there be wrong simpliciter? Cowan's Case was also said to show 'the poverty of Canadian public law';[84] but perhaps that is excessively cautious and temperate; perhaps it shows the non-existence of Canadian public law--and British public law too; perhaps there is indeed none but private law,--and murder merely a cause of action giving rise to a right in Her Majesty to sue for, or remit, certain pains and penalties. Perhaps this is no bad thing.

All these issues are, to a striking extent, revealed in proceedings to restrain steps in a legislative process. The Courts have, as a rule, as we have seen, adopted a conservative approach. Occasionally, however, a spirit of adventure has shown itself. Such is the decision of Montpetit, J., in the Quebec Superior Court in Redbrooke Estates Ltd. v. City of Montreal[85] where, confronted with Privy Council authority holding that rights to build not perfected by issuance of a permit are defeasible by minicipal bye-law, his Lordship held that the enactment of the bye-law could itself be held to be a restrainable wrong, particularly where issuance of the permit had been delayed in order to allow a bye-law to be passed to defeat the building scheme; and it was not the less a restrainable wrong for the fact that, if once enacted, the bye-law would be valid and effective.

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84. Ibid.

85. Unreported; to be reported by the author shortly in McGill Law Journal. Record: S.C.M. No.578, 377; judgments on interlocutory injunction and mandamus, December 18, 1962. Court of Queen's Bench (Appeal Side), District of Montreal, No.7991 (Casey, Montgomery and Badeaux, JJ.); appeal from rulings on admissibility of evidence.

(2) Ultra Vires Statute

Second, apparently, would come those legal contexts where an improperly passed Bill (i.e., one not conforming to the legal (including constitutional) requirements of valid legislation) would be simply null despite the Royal Assent. Such is the typical case of the ultra vires federal or provincial statute: where--while no specific illegality is committed in the course of its passage--the result is nonetheless a nullity. This is the result of the most common form of entrenchment (in some sense it is the genus of which all others are the species) and occurs whenever the special requirements of a constitutional amendment process are violated; these rules for constitutional amendment imposing special formalities for the passage of certain classes of laws; and nullity being the consequence of their violation.

Argument to justify an injunction in such a situation can take the form of denying that a legislature can be wronged by being obstructed in the passage of a Bill which, even if duly passed and assented to,,would be null and void. Arguments against such a position are much stronger, it is submitted; and they seem to prevail, for injunctions in such circumstances seem, in Commonwealth jurisdictions, unknown. The reasons against such injunctions in the circumstances mentioned, include the following: (1.) a right not to be affected by statutes which are ultra vires null, and void, is not a right that a piece of parchment upon which the "act" is inscribed be not dealt with by an assembly of persons; or that it be not presented by one person to a second; or that it be not solemnly pronounced upon by the latter, and signed; (2.) enjoining a whole bill involves obstructing both valid and invalid provisions; a bill can surely not be stopped merely because some portion is bad, especially where the remainder will in any event be null; (3.) if ex

hypothesi only invalid bills may be enjoined, there is presupposed a final determination on the matter before the injunction; but if bills may be enjoined because of prima facie invalidity, the Legislature has been obstructed in the passage of legislation which it had a right to pass, and which would have come into effect earlier had there been no injunction; it would seem that the law cannot be construed to allow interference with proceedings which, in the event, are valid; (4.) it is hard to see how, in law, anyone can be injured by, say, an invalid presentation or an invalid assent: rather, the injury would seem in law to come from things done or threatened to be done under the supposed authority of the invalid legislation: and these other things can be separately enjoined; as, threatened enforcement of the statute.

It was precisely in the context of an ultra vires statute that Hughes and Vale Pty. v. Gair and Others[86] arose. Here applicants sought an ex parte injunction from the Australian High Court to restrain the Speaker of the Legislative Assembly of Queensland and certain officers of the Parliament from presenting to the Governor for the Royal Assent a Bill passed by the Assembly; the motion also sought injunctions restraining individual members of the state government, their servants and agents, from presenting or endeavouring to present or causing to be presented to the Governor for the Royal Assent the said bill.

The alleged grounds were that the Bill, even if assented to, would be void as repugnant to section 92 of the Australian Constitution providing for absolute freedom of trade. Dixon, C.J., for the High Court refused the application; the Court not, it would seem, even requiring to withdraw for consultation. Dixon, C.J., observed:[87]

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86. (1954) 90 C.L.R. 203. See ante p. 211 and p. 216.

87. (1954) 90 C.L.R. 203 at 204.

> 'An application for an injunction restraining the presentation of a Bill for the Royal Assent is, I will say, not unprecedented, but it is at least very exceptional. We do not think it should be granted on this occasion or later or in any case.'

In reference to the refusal in Trethowan's Case to hear or determine the question of injunction, his Lordship noted:

> 'I was a member of the Court in 1931 when it decided that case and I can say from my own personal recollection that when the Court limited the grant of special leave so that the question should not be argued, and the question before the Court was restricted to the validity of section 7A of the Act there in question, it was not because the Court was of opinion that the decision of the Supreme Court on that particular point was right, but because it was thought inconvenient to allow a procedural question of that sort to intrude itself into such a matter calling for urgent and definite decision. For myself I have long entertained a doubt as to the correctness of the decision of the Full Court of New South Wales in that case on the terms of that Act...'

Most significant of all, however, was the apparent distinction made by the learned judge between Trethowan's Case and other cases where injunctions might be sought--in that Trethowan's Case was an instance where a specific illegal act was involved:

> 'Such a provision [in the entrenching Act] amounted of course to an express negative provision, containing a prohibition of the course in the event restrained by the injunction.'

The Court--and especially McTiernan, J.--were careful, however, to leave the question quite open.

(3) "Illegalities" at the Periphery

Far the weakest legal context for interfering by injunction in the legislative process would seem to be that in which the statute would be perfectly valid if enacted--and involve in the course of enactment no specific illegality by Crown, legislators, or parliamentary officers--but be thought objectionable

by the Courts on certain legal or moral grounds. Such is the case especially at the periphery of the legislative process, where private citizens are involved and the legislation in question is of a "private" type, though, often, stricto sensu resulting in a public act. Interferences in vested rights sub judice at the time of promotion of the legislation provides one instance; agreement--often with valuable consideration--to refrain from promoting (or, as the case may be, opposing) "private" legislation, is another.

The bills which we are here discussing are such that, on due passage, they are ex hypothesi valid and unattackable acts after the Royal Assent is received. In no sense are they ultra vires. The Courts, being concerned only with a statute before them, and not with Parliament's motives for enacting it, cannot set aside a statute as having been procured by false representations or other improper conduct.[88] For while in practice the Bill may have passed by processes of a markedly judicial character, still in form and in law the Bill becomes an enactment like any other, and indeed in Quebec so-called 'private acts' seem to be invariably public acts, under Article 10 of the Civil Code, inasmuch as they do not contain provisions declaring them to be private; in the statute book they are only distinguished by their segregation, after some yellow index pages, in the latter part of the volume. In Edinburgh and Dalkeith Ry. v. Wauchope[89] Lord Campbell observed, inter alia, that if an Act, whether public or private, had passed both Houses and received the Royal Assent [as to which he thought the Parliament roll conclusive], it was an Act of Parliament, whether or not the rules of the Houses had been observed in its passage, and, more particularly, whether or not a party affected had been given the notice and hearing to which

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88. Lee v. Bude and Torrington Junction Railway Co. (1871) L.R. 6 C.P. 576 (fraud alleged); Labrador Co. v. The Queen [1893] A.C. 104 at 123 (error).

89. (1842) 8 Cl. & F. 710.

he was under those rules entitled. The hearing essential to a judicial process was in a legislative one a mere privilege.

It was precisely in a situation where the Bill, if duly passed and assented to, would unquestionably have been good law, that Challies, J., as he then was, sitting as a judge of first instance in the Superior Court of Quebec, awarded, on June 17, 1955, an interim injunction to restrain a party to a lawsuit from seeking a 'private' Act from the Quebec Legislature, which Act, if passed, would determine the litigation in his favour.

The case was that of Berthiaume v. Du Tremblay,[90] and we can centre our discussion upon it, as it seems much the most drastic of reported cases.

The plaintiff, Berthiaume, had an interest, under the will of his late grandfather, in the newspaper La Presse, and, upon the basis of alleged maladministration, instituted proceedings against the trustees seeking an order for restoration to La Presse of some three million dollars allegedly received in excess dividends; and further seeking removal of the trustees.

The defendants, having all appeared and contested, had begun to take proceedings to secure from the provincial Legislature a statute which would terminate the legal proceedings in their favour. This statute--which ultimately reached the statute book as 3-4 Eliz. II. ch. 173 (Que.), receiving the Royal Assent on February 22, 1955--provided that, inter alia,

> '2. The present trustees shall remain in office and all acts done or performed by the trustees and by the directors of the Company and by each of them, acting as such, since the death of the late Trefflé Berthiaume, are declared valid, final and lawful for all legal purposes as regards all persons whomsoever; it is expressly declared that such acts have not engaged and in no case engage the personal responsibility of the trustees and of the directors of the company or of one or many of them, or constitute a cause of removal of the trustees.
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> '11. The costs incurred for the passing of this act by the parties mentioned therein and by those which intervened shall be paid by the company which shall also pay all the costs incurred

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90. [1955] R.P. 328 (C.S.).

> by the parties respecting the actions pending before the Superior Court for the District of Montreal, which actions...are hereby declared abondoned and finally settled.'

Challies, J.; took the view[91] that

> 'Such an attempt by private individuals to induce the Legislature to interfere with and intervene in a case pending before the Courts of this Province in which they are parties is most improper and indeed shocking. If the Respondents have a defence to offer they have the same rights as any litigant to present their defence and to proceed to trial on the merits. If the defence is maintained, the action will be dismissed. If the defence is held to be unfounded and the action to be well founded, the action will be maintained.'

His Lordship added that

> 'This is clearly a situation where the opposite party, that is, the respondent, is about to do an act in violation of Plaintiff's rights respecting the subject of a pending action which is of a nature to render the final judgment ineffectual and which, if Plaintiff's action be well founded, will produce great or irreparable injury. It is also a case where the Court is justified in granting an interim injunction without notice.'

Let us suppose with the learned judge that a final judgment of theSuperior Court is always equivalent to justice, and that the rights of the parties as set out in the judgment always fairer than those established by the legislature--let us disregard the many occasions upon which judges have regretted absurd and unreasonable results which the existing law has forced upon them. Let us, at least, assume that the final judgment of the Superior Court would in this case have been in every way a felicitous one. But to say this is not to say that, in law, the Court may suppose that the Legislature will deal unfairly with the parties; and even if it does so suppose, the Legislature is, one must remember, entitled to legislate fairly or unfairly. The substance of the learned judge's decision is, after all, simply that it is undesirable that such a statute should be passed.

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91. [1955] R.P. at 332.

The learned judge invoked both judicial authority and that of learned authors in favour of his right to grant an injunction. The English cases cited were: Steele v. North Metropolitan Railway Company;[92] Re London, Chatham and Dover Railway Arrangement Act;[93] Heathcote v. North Staffordshire Ry. Co.[94] Writers quoted were Halsbury and May. Canadian authorities cited as being to the same effect were Helm v. Port Hope[95] and Mathew v. Guardian Assurance;[96] but as the remarks in these latter cases are merely obiter; and as these cases deal with quite other matters remote from the present; and as these cases in any event rather mention or cite than argue and approve an injunction in the situation under discussion here, they need receive no further attention. If the relevant jurisprudence be considered, however, it will be readily discovered that it constitutes at most authority for the existence of a "jurisdiction" to grant the injunction, exercisable in "appropriate" cases which no one has ventured to define or even instantiate; but, more important, the cases are clear authority for uniform refusal of injunctive relief in a variety of cases much more strongly deserving such relief than that before Challies, J. It will be seen that, in sum, the cases, while perhaps vague and general authority to suggest that in some circumstances, injunction might conceivably be granted, are clear and specific authority as to thecases where it will not.

Those commentators cited by the learned judge purported to do little more than to paraphrase the jurisprudence. Halsbury, after all, is of the nature of a digest; and the passage quoted by his Lordship[97] cautiously observes that 'On the principle

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92. (1866) 2 Ch. App 237.

93. (1860) 5 Ch. App. 671.

94. (1850) 2 Mac. & G. 100; 42 E.R. 39; (1851) L.J. Eq. 82.

95. (1875) 22 Gr. Ch. 273.

96. [1918] S.C.R. 47.

that the Court in granting an injunction operates in personam an application to Parliament could be restrained in a proper case, but a proper case for the purpose does not often occur.'

May, as cited, observed[98] that 'the solicitation of a bill in Parliament has been regarded by courts of equity so completely in the same light as an ordinary suit that the promoters have been restrained from proceeding...' but in tracing a case to which he refers, it is to be seen that what was enjoined was the expenditure of corporate funds: A.-G. v. Commissioners of the Township of Kingston[99]; where a Vice-Chancellor's order, upheld on appeal, restrained the Commissioners in their corporate capacity from promoting a bill considered in the circumstances as an evasion of the Towns Improvement Act; but this, of course, deprived them of the use only of the corporate seal and funds. As May observed under the editorship of Fellowes, Cocks, and Campion in 1957[100]

> 'Although the practical effect of such orders may be to render further proceedings on a private bill impractical, a distinction may nevertheless be drawn between them and cases where an unequivocal personal restraint is concerned.'

Nor, indeed, does that authority approve the granting of such injunctions:[101]

> 'A common injunction would issue on occasions when a suitor proposed to make an unconscientious use of his legal rights. Because the courts of common law could not entertain equitable objections, equity was obliged to intervene.

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97. 2nd ed., Vol.18, No.15, p.11.

98. 14th ed., 1946, p.825.

99. (1873) Ir. Eq. 383.

100. 16th ed., (London, 1957), p.866.

101. Ibid.

> Parliament, however, would appear to stand in no need of such an ancillary jurisdiction; for not only may equitable doctrine be taken into account, but considerations of public policy can also be examined, a task which the courts cannot perform;'

and while a more succinct account of the matter in 1964 under Sir Barnett Cocks[102] omits this expression of doubt, the difficulty of imagining a case where interference would be proper is still stressed.[103]

Let us, then, examine the jurisprudence.

In Ware v. Grand Junction Water Works Co.[104] Lord Brougham, L.C., observed,[105] in refusing the injunction sought, that:

> 'It is quite idle to represent this, as was first sought to be done, as an attempt to restrain by injunction the proceedings of the High Court of Parliament. This is no injunction to restrain the proceedings of Parliament, or to restrain any parties who may be called upon by the authority of Parliament from intervening in such proceedings. It is simply an injunction to restrain a partnership now existing under a certain constitution from doing any act in its corporate capacity with a view to obtaining a new modelling of that constitution... I am of opinion that the right to take proceedings in Parliament in the way that is proposed is incident to a corporation of this nature...I will not interfere to restrain the company, quâ corporate body, from applying to the Legislature and obtaining a change in its constitution which will put those Acts of Parliament on a different footing...'

If there be in this decision implicit authority for enjoining other corporations in appropriate circumstances, one must observe that Lord Brougham is speaking here of applications against bodies "quâ corporate bodies" and not against individuals.

An injunction was again refused in A.-G. ex rel. Fawcett v.

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102. 17th ed., (London, 1964) 869 ff. at 870.

103. Ibid.: '...there is no doubt that the courts have expressed their great reluctance to interfere, and have emphasized that the strongest possible arguments must be adduced to obtain relief...In some cases judges have gone so far as to state that it is difficult to conceive of circumstances

The Manchester and Leeds Railway Company[106] despite the view of the Court that the approach to Parliament was in violation of an undertaking to the Court. Here, a railway company, in consideration of being permitted to proceed with certain works pending a trial at law as to whether such works conformed to an Act of Parliament, undertook to deal with the works as the Court might afterwards direct. Before the trial had taken place, the company, without notice to the other parties to the case, petitioned the House of Commons for leave to bring in a bill, one of the clauses of which proposed that in all proceedings at law and in equity, the works which had been done should be considered as a compliance with the statute, and that there be no power in law or in equity to compel their removal. The bill containing the clause was duly introduced into the House of Commons. Lord Cottenham, L.C., felt the solicitation of Parliamentary interference to be no less serious an affront to his administration of justice, and no less an interference in a lawsuit, than did Challies, J., in Berthiaume v. Du Tremblay. His Lordship observed:

> 'In this case I should undoubtedly have compelled the parties to leave the works in the state in which they then were, unless they had come into an undertaking which would put their opponents precisely in the same state, after the result of the action, as they were in at the time the application was made to me.

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in which an injunction might issue...It would be difficult, indeed, to conceive of stronger grounds for proceeding than in Bilston Corporation v. Wolverhampton Corporation...' ([1942] Ch. 391).

104. (1831) 2 Russ & M. 470; 39 E.R. 477.

105. At p.483.

106. (1838) 1 Ry. & Can. Cas. 436.

> Now why did I not do that? Because the parties undertook, that if I did not interfere with the prosecution of their works, and the completion of the viaduct which they had commenced, I should have the same jurisdiction over the subject-matter, after the result of the action was known, as I had at that moment; that is to say, I should be at liberty to deal with the work complete as I could at that moment with the work incomplete. In terms that was the meaning of the undertaking; it was the ground upon which they obtained my acquiescence in their being permitted to go on pending the inquiry at law.'

Indeed, not only had their adversaries been given no notice of the proceedings in Parliament, but his Lordship did 'not find that this clause gives either House of Parliament the slightest intimation of what had taken place; on the contrary, looking at it in the words in which it is framed, any person would suppose, that there was a viaduct constructed far more beneficial than the one contemplated by the original act; but for some reason or other, not explained, not exactly in conformity to it...'

His Lordship, summarizing his dilemma, remarked:[107]

> 'without communication to their opponents, they endeavour to obtain a legislative enactment, making that a compliance with the act of Parliament which, if the clause is of any value at all, was not so in itself; and depriving this court of jurisdiction to do that, which by contract they undertook the court should have power to do. If this clause was to become law, it is quite obvious, that this court would be entirely disarmed of all authority. I do not see how it could punish the parties for a contempt, because it never could make an order for commitment: the court would be prohibited from ordering them to do any thing, with regard to the existing erections, it could not put the parties into contempt, for not doing that which it had not directed to be done. It would not be easy for this court to say, that obtaining the act of Parliament was a contempt.'

But the remedy which the noble and learned lord on the woolsack would apply, was not an injunction.

> 'If, unfortunately, I can find no remedy for this, it will compel the court to deal with the parties, who are brought before it, with an extremity of harshness, which, perhaps, the strict rules of the court may sometimes impose; because it will be impossible for the court to trust to any thing, except to the strict letter of its orders.'

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107. At p.457.

Had he been notified of the attempt to alter by law the rights of the parties pendente lite[108]

> 'I could not have objected to their so applying to Parliament, but I should have made a different order from that which I did make. I should, at least, have prevented them from going on with the work until the question of right was ascertained.'

The tone of injury is evident in his Lordship's observation that

> 'They obtained a benefit by holding out, that I should be permitted to deal with the works, when erected, in the same way as if they remained in the then existing state; and then they endeavour to obtain the authority of Parliament, to prevent me from carrying into effect the undertaking they gave...'

An injunction was nevertheless refused; but in refusing it his Lordship left the door open for such injunctions in other cases:

> 'I do not feel, that I can interfere in the present state of proceedings. Whether I might have done so before the party had applied to Parliament, is a matter I do not go into. It will require great consideration, before this court will prevent people from petitioning the Houses of Parliament. That is the first proceeding; but when they have petitioned, and either house has entertained the bill, it becomes the act of the house, and not the act of the party... No case has been cited, in which this court has interfered to restrain parties from petitioning Parliament, or applying to Parliament for any law which they supposed would be granted: unless a very strong authority is produced for that purpose I should be disinclined to assume that jurisdiction.'

In the event the objectionable clause was dropped in Parliament. Though the application was here unsuccessful, it is interesting that the door has on each occasion been left slightly ajar, and persons led to walk through for a new attempt. Here, the Lord Chancellor suggested a possible distinction between proceedings commenced and those not yet begun: while this distinction has ultimately failed of acceptance, there have been counsel ready to press it upon the courts.

Abortive generosity with such an injunction occurred in Stockton and Hartlepool Rail. Co. v. The Leeds and Thirsk and the Clarence Railway Company.[109] The cause came before Lord

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108. At pp.457-8.

109. (1848) 2 Ph. 666.

Cottenham, L.C., upon a motion to dissolve an injunction granted by the Vice Chancellor to restrain the Leeds and Thirsk Company from opposing a bill brought into the House of Lords by the Clarence Company, for the amalgamation of the latter company with the former, or doing any act to prevent or delay the passing of such a bill into law. In this instance, of course, the restraint was put upon an appearance in Parliament to oppose, not to promote, a bill; but there is, it would seem, no difference in principle.

It is not surprising that Lord Cottenham had[110] 'much satisfaction in finding (and it is no more than what I expected from the learned counsel engaged on the part of the defendants), that no question had been raised here as to the jurisdiction of the Court to interfere in a case of this kind if a proper case were made.'

His Lordship seems, in view of his earlier hesitancy, to have gone rather far in his elaboration:

> 'There is no question whatever about the jurisdiction: a party who comes to oppose a railway bill in Parliament does so solely in respect of his private interest, not as representing any interest of the public, or for communicating any information to Parliament. He is not even allowed to be heard as a Petitioner against the bill, unless he has a locus standi in respect of some property or interest liable to be affected by it, if it should pass into law. This Court, therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from restraining a party from petitioning against a bill in Parliament as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims. About that there can be no question whatever; nor could any doubt be raised about it, except by the same confusion of ideas which gave rise to the old discussion between Courts of law and Equity which has been so long set at rest and which was founded on the supposition that the injunction operated upon the Court and not on the party. Having, therefore no doubt as to the jurisdiction, I proceed to enquire whether a proper case is here made for its exercise.'

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110. At p.670.

The applicants had, however, failed[111] to 'prove that the Clarence Railway Company are entitled to have that Act passed: for, if they are not, it follows that those against whom it is to be pressed in Parliament have a right to resist it, and thus there can be no fraud, therefore, in opposing it...'

The eloquence of Lord Cottenham on the subject of injunctions against petitions as to bills, was one of the gifts of the railway era. A third case came before his Lordship shortly thereafter.

Heathcote v. North Staffordshire Railway Company[112] arose from an agreement with a railway company, whereby a party undertook to withdraw his opposition to their Bill in Parliament, in consideration of their completing their railway in a certain manner. The company, however, finding themselves unable to carry out their contract, gave notice of their intention to apply to Parliament for an Act to authorise abandonment of their scheme. The party to the aforementioned contract secured from the Vice Chancellor an injunction restraining the Company from making this application; it was dissolved on appeal by the Lord Chancellor, Lord Cottenham, whose remarks on this occasion are of especial interest, since they lend support to directly opposing viewpoints.

His Lordship's dicta firmly assert, on the one hand, a "jurisdiction" to issue such injunctions as those claimed; and equally firmly on the other assert the impropriety of its exercise upon grounds which leave little room for the exercise ever being proper. Indeed, his Lordship himself admits inability to imagine any appropriate circumstances.

His Lordship plainly finds a "jurisdiction" and apparently thinks that no breach of parliamentary privilege would be involved in its exercise:

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111. Ibid., p.667.

112. (1850) 2 Mac. & G. 100 at 109; 42 E.R. 39.

> '...it has been suggested that this Court could not interfere without infringing upon the privileges of Parliament: so the Courts of Common Law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases the Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere that I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property...'

It should not be forgotten, however, that, if while using the notion of 'jurisdiction' in a loose sense, one may say 'the court has jurisdiction in such circumstances to make such an order' and mean by these words that such an order in such circumstances is a proper one upon the legal merits; yet, nevertheless, using 'jurisdiction' in the strict, the formal and technical sense, a proposition such as 'the court has jurisdiction in such circumstances to make such an order' means only that the court has a legal competence to proceed to the hearing and determination on the merits in the assurance that if, on the merits, the order should be made, it will be a competent order, even if an erroneous one.

Surely it is only in the latter sense that his Lordship finds a jurisdiction to exist; That his Lordship founds his conclusions to that effect upon the rule that his injunction operates in personam, surely demonstrates clearly enough that his Lordship claims jurisdiction in the formal sense only.

That such is really Lord Cottenham's view seems to be borne out by the unequivocal ruling against the propriety, on the merits, of issuing the injunction claimed. His Lordship's unfavourable ruling on the merits is as emphatic as his favourable ruling on the jurisdiction:[113]

> '[In a proper case] I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property;

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113. Ibid., pp.109-10.

> but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of Common Law: the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal right; but the ordinary province of Parliament in such bills is to abrogate existing legal rights, and to create new rights. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should by its injunction deprive the subject of the benefit of Parliamentary interference in all such cases...'

His Lordship concluded,[114]

> 'What difference, then can it make whether such pre-existing legal rights exist by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering or affecting such pre-existing rights, providing as it always does or intends to do, compensation to the party affected; and in neither has this Court a right to interfere by injunction to deprive the subject of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contracts or otherwise...'

Lord Langdale, M.R., refused an injunction to restrain the directors of a company from promoting a Bill or from using the corporate seal in connection therewith; but did restrain the use of corporate funds, in Stevens v. South Devon Ry. Co.[115] Here there were two classes of shareholders in a railway company; a general meeting authorised the directors to apply for legislation materially altering the existing rights of the two classes inter se: the Court refused to restrain them from doing so, but it denied them the corporate funds.

Another assertion that the jurisdiction existed, coupled with doubts whether it could properly be exercised, and a refusal of injunction in the circumstances, followed in Lancaster and Carlisle Rail. Co. v. North Western Rail. Co.[116] Here the defendant railway company had agreed with the plaintiff railway company not to apply to Parliament to make any line or branch-

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114. Ibid., pp.110-11.

115. (1851) 13 Beav. 48; 51 E.R. 18.

116. (1856) 2 K. & J. 293.

line, connecting the respective railways, except a certain main line and branches regarding which application had already been made to Parliament. In consideration of this undertaking, plaintiffs agreed to withdraw their opposition to the Bill, and support it instead, if necessary, petitioning Parliament in its favour. Plaintiffs performed their part of the bargain, and defendants secured their Act; but defendants sought to secure from Parliament power to make a deviation in breach of their agreement. Plaintiffs sought to enjoin promotion of this bill; but the injunction was refused by Sir Page Wood, V.-C.

The learned Vice Chancellor raised but did not decide the question whether such a contract was valid at all; and thought that, assuming it was, plaintiff's remedy lay in damages. He was clear, however, that there could be no specific performance.

The decision featured the by-now-usual reassertion of jurisdiction. The learned Vice Chancellor remarked:[117]

> 'That the Court has power to interfere by injunction to restrain a person from petitioning Parliament upon a proper case being made out, I never entertained any doubt: indeed, it would not be possible to entertain the slightest doubt after the decisions--that of Lord Cottenham not being by any means the first, for Lord Brougham had expressed himself equally clearly in the case of Ware v. The Grand Junction Waterworks Company...'.

But jurisdiction was one thing and its exercise another:

> 'How far it is expedient or proper for the Court to exercise this jurisdiction is a totally different question, and upon this, considerable light has been thrown by three decisions of Lord Cottenham...'.

Referring to the case of A.-G. v. The Manchester and Leeds Railway Company,[118] his Lordship thought that 'There, certainly, the conduct of the parties was such as would have induced the Court, if anything could induce the Court, to take a very summary mode of arresting their proceedings.' His Lordship added[119] that

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117. Ibid., p.303.

118. (1838) 1 Ry. & Can. Cas. 436. See ante, p. 231-234.

119. (1856) 2 K. & J. 293 at 307.

in the case before him 'It was said that this was the very case which Lord Cottenham would have conceived. I can hardly suppose that Lord Cottenham would have said that it was difficult to conceive a case so simple--the case of an express agreement not to apply for an Act.' His Lordship then observed:[120]

> 'I am supposing the agreement to contain an express stipulation that the company will not submit those grounds of public policy to Parliament; and the question to be, not whether it may or may not be inconsistent with public policy to allow such an agreement to be entered into at all, but whether this Court should interfere for the purpose of specifically performing the agreement by preventing the application to Parliament.'

Upon this his Lordship's conclusion was clear:

> 'if Parliament, notwithstanding all those grounds, considers it to be for the public benefit to pass the bill, observe the position in which the plaintiffs seek to place this Court: the Plaintiffs call upon this Court to interfere to prevent the Defendants from making out, to the satisfaction of Parliament, that it is for the public benefit that this agreement should be rescinded; they call upon this Court to interfere to prevent a public benefit from being secured (for it is only on the ground of its being for the public benefit that Parliament will rescind the agreement).
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> 'It seems to me that it would be in the highest degree improper for this Court to take upon itself to give this specific relief, when there is but one alternative that can possibly be presented, viz., the rejection or the passing of the bill: the one event being such that the Plaintiffs would be secured by damages, the other such that the Court, supposing it so to interfere, would be preventing a public benefit.'

His Lordship did, however, reject the proposition that restraint from resisting a private bill was indistinguishable from restraint from promotion. That question was left open, as was the question whether 'the contract was void in itself on grounds of public policy.'

The question next came before the Courts in the case of Steele v. North Metropolitan Railway Company.[121] Upon the

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120. Ibid., p.309.

121. (1867) 2 Ch. App. 237.

agreement of the Railway Company to purchase his land, and upon their inserting a clause to that effect in their Act, a landowner withdrew his opposition to the Act. They afterwards applied to Parliament for an act to enable them to abandon the branch affecting the land in question, and to repeal that clause. An injunction against their doing so was denied.

The jurisdiction was again affirmed; its exercise again denied, though Vice-Chancellor Wood seemed to view the potentiality of such exercise as being more real than did Lord Chelmsford, on appeal. The learned Vice Chancellor remarked:

> 'That the Court had jurisdiction to prevent an application from being made to Parliament in any case where the rights were simply private between the parties, there could be no doubt. It was formerly maintained that it was impossible to prevent an individual from applying to Parliament, because that would be an interference with the privileges of the High Court of Parliament itself. That argument, however, was answered at once by Lord Cottenham saying that the Court of Chancery did not interfere with the Court of Parliament, but only acted on the conscience of the individual who proposed to make the application. In the case of private bills, in which, with one remarkable exception, the public could have no interest, it might well be conceived that where a tenant for life had stipulated that he would not apply for a private Act, he might be restrained from so doing. But in the case of public bills, the jurisdiction would remain as before; but the difficulty was to conceive a case on which it would be applied.'

The learned Vice Chancellor was unprepared, however to go as far as to grant the relief sought:

> 'As to this particular case, there could be no doubt whatever. In the first place, there was nothing in the shape of an express contract not to apply to Parliament again. If a man had made an agreement to buy a house or field, and afterwards found the agreement inconvenient, and wished to apply to Parliament to set it aside, that possibly might be a case in which the Court would interfere, and say that this, not being a matter of public policy, the man should not make an application. But this was the case of a company who were about to carry into effect a public purpose, and the Legislature had authorized them to make several branch railways... They had entered into no agreement not to apply to Parliament, and now intended to apply for power to abandon the line...that alone would not release them from their obligation to the Plaintiff, and therefore they intended to apply to Parliament, to do so...and it was for Parliament to say what compensation, if any, was to be made to the Plaintiff..!

The Lord Chancellor declined to speculate on appropriate cases for relief; he was content to assert the jurisdiction but deny the injunction:[122]

> 'Now, there is no doubt (as has been said by many judges) that you may interfere to prevent a person applying to Parliament, because you are acting on the person, and restraining him from taking a step which the Court says ought not to be taken. But no case has been produced to me in which the Court has ever prevented an application to Parliament for an Act; and, in some of the cases which have been cited in the course of argument, it has been stated that there is some difficulty in conceiving a case in which such a course could be adopted.'

His Lordship summarized the situation as follows:[123]

> 'We have been told by judges of great eminence that the Court has power to interfere by injunction to prevent an application to Parliament; but they all decline to define the occasion which would justify such an interference, and even express an opinion as to the difficulty of conceiving a case in which any one could be so restrained. Although, in common with my predecessors, I assert the right to grant an injunction in a proper case, like them I will not attempt to define my power, but will simply say that this is not a case in which I think I ought to interfere.'

An injunction was in fact granted by Sir John Stuart, V.-C., but was dissolved on appeal by Lords Justices Selwyn and Giffard, in Re London, Chatham and Dover Railway Arrangement Act, ex parte Hartridge and Allender.[124] Owing to grave financial difficulties, Parliament by statute placed the London, Chatham and Dover Railway under the supervision of the Court of Chancery, whose consent was also made necessary for most litigation against the Company. The present applicants had by Court order been made, for limited purposes, the representatives of the shareholders. The directors, with the approval of large majorities at meetings of the creditors and shareholders respectively, promoted a bill in Parliament which had, apparently, as originally drawn, related to a voluntary compromise, but which in the course of its passage, assumed the shape of a compulsory reference to arbitration. The applicants, claiming

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122. Ibid., p.240.

123. Ibid., p.243.

to act as shareholders' representatives, sought[125] 'permission to them, as the representatives of the...shareholders...to oppose the passing of the said bill, or that the directors of the Company might be restrained from further prosecuting or promoting the said bill in Parliament in the name of the Company, and from using the name of the company in introducing, prosecuting or promoting any other bill in Parliament affecting rights and interests of the stockholders and shareholders... without the previous sanction of the Court.'

As sought, the relief would, even if granted, seem to have bound the Company--and the directors, but only as directors --leaving the latter free in principle to approach Parliament provided that they did so without the company seal or funds. The relief granted by the learned Vice Chancellor was less clearly confined to the directors qua directors; as reported it provides:[126]

> 'The order on this summons will be according to the second alternative, to restrain the persons named in the summons from further promoting the bill before Parliament, and from using the seal of the company for any such or the like purposes; and as other persons may apply to Parliament for leave to promote the bill, there must be an order that the applicants have leave to appear and oppose any further proceedings on the bill.'

The order of the learned Vice Chancellor seems to go rather beyond enjoining the promotion of a bill with company money and seal; and had it stood undissolved would apparently have afforded a precedent for the decision of Challies, J. As regarded the merits, the injunction was granted, because, in the view of the Vice Chancellor, allowing the bill to proceed would have been unjust and injurious to the shareholders, and

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124. (1869) 5 Ch. App. 671.

125. Ibid., p.672.

126. Ibid., p.676.

abusive of the powers granted to the directors by the special act, misleading to Parliament, and depriving the shareholders of the judgment of the Court in pending proceedings. He gave a lengthy account of the affairs of theCompany, and based his jurisdiction to enjoin applications to Parliament upon the authorities already considered, thinking, however, that some of Lord Cottenham's 'observations on the powers of Parliament' were 'applicable to public acts rather than to private Acts.'[127]

The learned Vice Chancellor concluded with a passage which would no doubt have given some comfort to Challies, J.:[128]

> 'I have thought it proper to state so much, as it is matter which ought not to be withheld when Parliament, in its judicial character, is dealing with the affairs of this company, and is asked to stop the course of justice in this Court. So far as I know, no case has occurred in which, pending proceedings in this Court, Parliament has ever interfered with the course of justice in the proper tribunal. If such a precedent is established, it does not require much sagacity to see that disastrous results will ensue. Nor do I understand that in this case the bill could have proceeded so far but that, by a misrepresentation founded on a mistake the Committee of the House of Commons is induced to believe that this Court could grant no adequate relief. I abstain on this occasion from going further into the provisions of this Act of Parliament, which seems founded on mistaken representations of the proceedings, and powers, and duties, of this Court...',

had the decision not been overruled on appeal.

It was not doubted on appeal that 'if the Court has jurisdiction in this case, and if the proceedings on the part of the directors can be shown to be ultra vires, the Court will consider the application sufficiently grounded, although made on the application of only two shareholders', applicants being recognised as shareholders and no more. But the special board of directors[129]

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127. Ibid., p.627 (n) at 674.

128. Ibid., p.676.

129. Ibid., p.678.

> 'who by the authority of Parliament have been invested with such discretionary powers have exercised that discretion by the introduction and promotion ofthis bill; and secondly, that the meetings have sanctioned the submission of the question as to the appointment of the arbitrators, whether voluntary or compulsory, to the consideration of Parliament.'

Sir C.J. Selwyn, L.J., then proceeded[130] to consider

> 'whether it is fit for the Court to restrain the further prosecution of the bills by the directors. Upon the law as applicable to these subjects there can be no doubt. The learned Vice-Chancellor has said that the cases cited before him were authorities in favour of such an interference by the Court. To a certain extent I agree with the opinion expressed by the Vice-Chancellor, and I think there are expressions to be found in all the judgments that were referred to, shewing that the Court, although it does not assume the power to interfere with the proceedings of Parliament, still has a power to act in personam, and, if a proper case should be proved, to restrain any person from making an improper application to Parliament; but, as the learned judges who decided these cases have also said, it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise that power. I agree, therefore, with the Vice-Chancellor in saying that such cases are authorities for the possession of such a power by the Court; but what we have to consider is, whether, in the present case, it is proper for the Court to exercise that power. On this point the authorities are abundant.'

His Lordship then considered the Manchester and Leeds Railway and the Lancaster and Carlisle Railway cases (supra), the one an application to Parliament tantamount to a breach of an agreement in court not to do so; the other an application in breach of an express agreement; these cases appeared to his Lordship 'very much stronger than the present in favour of the interference of the Court', and he concluded that[131] 'it cannot be considered an improper use of the name and seal of the company by these directors to put them to any ordinary Petition for a bill without attempting to assume any other character than that which these directors do and must fill, and

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130. Ibid., p.679.

131. Ibid., p.681.

which must be known to both Houses of Parliament.' His Lordship thought that 'in truth, the present matter is reduced to this, that in the opinion of certain persons, including the two gentlemen who have made the application, and including the learned Vice-Chancellor, it is not expedient that the bill should pass. That matter is one with which I think we have nothing to do, and upon which we are not called to pronounce any opinion.' The order was accordingly discharged, leaving both parties free to support or oppose the bill.

Sir G.M. Giffard, L.J., concurred, observing that[132]

> 'We have the authority of Lord Brougham, Lord Cottenham, Lord Chelmsford, and the present Lord Chancellor [Lord Hatherley] one and all agreeing that, though there may be some special cases under which, by the jurisdiction in personam, an injunction might be granted, yet that in no case which has ever come before the Court has such an injunction been granted, nor has anyone ventured to say in what particular case such an injunction would be granted. Here I have been unable to see any equitable ground for interfering.'

It was, he thought[133] necessary to 'give credit to the House of Commons and to the House of Lords for having a desire to do that which is right in the matter; and one may see at once that the mode in which these directors are proceeding is simply the old, the regular, and the constitutional mode of proceeding where you desire to alter the rights of the parties in a case in which, by the law as it exists, they cannot otherwise be altered...'.

Perhaps the strongest case in favour of injunctive relief against the proceedings upon a bill was made out in the well-known case of Bilston Corporation v. Wolverhampton Corporation[134]

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132. Ibid., p.682.

133. Ibid., p.683.

134. [1942] Ch. 391; [1942] 2 All E.R. 447.

which came in 1942 to the Chancery Division, before Simonds, J., as he then was. A local Act of Parliament had made binding between the two corporations an agreement relating to water supplies in their respective areas, under which it was agreed that the Wolverhampton Corporation would not at any time oppose any application by the Bilston Corporation to Parliament for obtaining additional water supplies, provided that no such supply or part thereof were obtained within the water district of the Wolverhampton Corporation. In pursuance of the agreement, the Bilston Corporation introduced a bill to develop additional water sources outside the Wolverhampton Corporation's water district; but the Wolverhampton Corporation, despite the agreement, lodged a petition to oppose the bill; and the Court refused, despite the agreement embodied in the statute, to intervene by injunction.

Simonds, J., observed:[135]

> '...The question then arises whether this is a matter with which the Court ought to interfere by injunction. The court clearly has power to enforce a contractual obligation entered into by a person or corporation that he or it will not apply to Parliament or will not oppose an application to Parliament by another person. That jurisdiction was asserted over and over again by Lord Chancellors in the middle of the last century, but it is significant that the assertion was always accompanied by the statement that it was difficult to conceive a case where such a jurisdiction should be exercised...'

His Lordship added:

> 'Questions of policy in the broadest sense which have no place in the consideration of a case in this court are, if not the only matters, the substantial matters which Parliament has to take into account. Accordingly, it would, in my view, be improper for any court to intervene to prevent those matters being put before Parliament in order that, on the broad questions of public policy, it may be determined whether or not a party should be released from some contractual obligation; which is informed of what has taken place and is competent to determine whether an obligation heretofore imposed on a person or corporation ought to remain binding on him.'

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135. At p.392.

The learned judge could 'see no difference' between contractual obligations not to apply to parliament and contractual obligations not to oppose applications; and he significantly refused to distinguish a statutory obligation from a contractual obligation, being of the view that one has a right to seek release from obligations of either sort:[136]

> [The agreement] 'was confirmed by the Act of 1893 so that what was theretofore no more than a contractual obligation became also a statutory obligation. A party may petition Parliament equally for release from a contractual obligation as from a statutory obligation. In either case the matter is one appropriate to be considered by Parliament itself and not by this court.'

It would seem that the learned judge is here confusing, on the one hand, (i) the source (contract, etc., or statute) and content of the obligation from which release is being sought, with, on the other hand (ii) the source (contract, etc., or statute) of the obligation which excludes means of obtaining release. Thus, a man may have a right to seek release as much from statutory as from contractual obligations, without any difference being involved; but it does make a difference whether his obligation to refrain from promoting or opposing a bill to effectuate such release, is itself a statutory obligation or merely a contractual one.

It might have been preferable had his Lordship said instead that a statutory obligation like that in question would not be construed as being enforceable by injunction. Even upon these grounds, however, the case is much stronger than Berthiaume v. Du Tremblay[137] and would seem to govern it.

A review of the jurisprudence, then, seems conclusive against the correctness on the merits of the grant of injunction by Challies, J., in Berthiaume v. Du Tremblay. Great doubts

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136. Ibid., p.394.

137. [1955] R.P. 328.

have been expressed as to whether even in the clearest cases--where specific illegalities (violations of statutory prohibition) occur in the legislative process--these could be enjoined. Injunctions against the passage of bills by reason only that they would be null even after receiving the royal assent, have been unceremoniously refused. And, as regards the outermost aspects of the legislative process--the communication of persons with the Legislature--the Courts have claimed the 'jurisdiction' to interfere by injunction, but have uniformly refused to do so even in extreme cases. Promotion of bills interfering with vested rights, even pendente lite; promotion of bills despite undertaking to the courts; promotion of bills despite solemn engagements not to do so; promotion of bills prohibited by agreement embodied in an act of Parliament: none of these has met with an injunction, even though the Bench has more than once thought that the bills ought in justice to fail of passage, or indeed that they subverted the administration of justice.

Upon the case-law alone, therefore, the decision of Challies, J., would seem erroneous. But it is significant that authors of the highest eminence have taken up viewpoints even more strongly adverse to that taken by Challies, J.

Commenting upon the Bilston Corporation Case, Holdsworth[138] remarked:

> 'A principle which the Courts have consistently refused to apply is obviously suspect. In fact it is unsound because it rests on a mistaken analogy to the issue of a common injunction. As I pointed out in my History, vol.ix, 361, the analogy is mistaken for the following reason. In the case of the common injunction the application was to prevent a person from enforcing a right which was given to him by the rules of law...but in the case of an application to Parliament the application is made to a tribunal which can take into account not only the rules of equity but also considerations of public policy. The reason, therefore, upon which the issue of common injunctions was justified fails to apply to an application to Parliament. But if this analogy is destroyed, it would seem to follow that the dicta which assert the existence

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138. (1943) 59 L.Q.R. 2 ff., at p.3.

> of this jurisdiction, which are all based on the supposed existence of this analogy, are demonstrably unsound.'

Holdsworth then asked what was left of the main principle, if it rested upon a false analogy, and if it did not in any event extend even to agreements enjoying the force of law, not to promote (or, oppose) bills; and that learned author concludes that it was unfortunate that Simonds, J., did not rule outright against the power itself; hoping, however, that this course would be adopted in the future.

The last Vinerian Professor likewise took a similar position,[139] adding the authority of an Equity voice which might have been expected to support a 'roguish thing' if defensible.

It seems difficult, therefore, to avoid the conclusion that, even if technically there be a jurisdiction to grant the injunction, the exercise of that jurisdiction cannot be a proper one.

III. INJUNCTION AS A CONTEMPT

Challies, J., noted that the injunction operates, not against the Act of the Legislature, but in personam upon the applicant. Very true; but so, too, it may be added, does the power of the Assembly to commit for contempt operate in personam; and if it had committed the learned judge for contempt for issuing the injunction, that warrant of committal would have operated in personam upon the judge and not upon the Court or its order.

A committal by general warrant--reciting only that the prisoner has committed a contempt--would seem clearly valid an unimpeachable, since it would preclude inquiry into the facts and reasons for the committal. What then if the whole of the facts of the case were set out upon the face of the warrant?

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139. Hanbury, Modern Equity, 7th ed. (London, 1957).

The matter could then be ruled on by the courts upon a habeas corpus or otherwise, for the question would be the sufficiency in law of the warrant. In such circumstances the superior courts of judicature would be given the chance to say the last word: would they hold that the injunction could be treated by the Assembly as a contempt only if granted without jurisdiction (so that if there be indeed a jurisdiction there can be no contempt); but that there would, in any event, be no contempt if there is merely erroneous exercise of jurisdiction on the merits? Such a result might seem plausible, and save the learned judge from the wrath of an outraged assembly; possibly the protection could be extended further; and, on the basis that there is always jurisdiction in the Superior Courts of judicature, even a wrong taking of jurisdiction is still not a nullity as it would be in an inferior tribunal. Here, the learned judge, having at least a kompetenz-kompetenz would be protected from the consequences of error.

If, of course, even a 'lawful' act can be a contempt[140] it may follow that none of the foregoing principles could serve to make the warrant invalid.

We have already examined the notion that damages may be available even if an injunction is not, in respect of wrongful promotion or opposition of legislation; an idea supported by Gregory v. Canada Improvement Co.[141] and not discouraged by Sir Page Wood, V.C., in Lancaster and Carlisle Rail. Co. v. North Western Rail Co.[142] Such a recourse, when founded on contractual agreements not to promote or oppose, will, of course, depend on whether they are valid, a matter canvassed in the various cases on the subject and never decided; the House of

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140. Ante, at the beginning of this chapter; and see Chapman v. Honig [1963] 2 All E.R. 513.

141. (1883) 5 La Thémis 10.

142. (1856) 2 K. & J. 293.

Commons, at least, having condemned them as improper.[143] Where a breach of statute is committed in the course of enacting legislation, the case for injunction, and that for damages, are rather improved, though still subject to problems of interest in the one case and in the other. A Quebec professional governing body might thus succeed in restraining applications to the legislature in breach of statute,[144] because the statute is enacted to protect an interest of which the professional body is made guardian. Could it collect damages for the same reason? To allow such an action would be to allow coining into money a public interest of a seemingly non-pecuniary sort. What of a clerk of the parliaments who presents a bill for assent in defiance of statute? If the bill when assented to is still a nullity, one may deny with some reason that any damage can be said to result: for example, if it professes to abolish a Legislative Council, the members ought to stand their ground. But if it is valid once assented to, can it not be argued that damage has resulted from wrongful presentation? The same authorities which support the interest of members of an upper house to restrain wrongful presentation can, after all, be used to support a right of action in damages for loss of office.

Such are the paradoxes of the pluralism of legal systems within a legal order; and of the interaction of parliamentary privilege and legislative sovereignty.

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143. See May, 17th ed., p. 870 n.

144. Ante, p. 192.