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Report

from the

Joint Select Committee

on

Privilege Procedure

in Cases of;

~~together with~~

together with Minutes of Evidence (6 days) and appendices.

~~Proceedings of the Committee, Minutes of Evidence, and Appendices.~~

Ordered to be printed, 29th May, 1908.

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PROGRESS REPORT.

The Joint Select Committee appointed on the 1st April, 1908, in the House of Representatives, and on the 2nd April, 1908, in the Senate, to inquire and report as to the best procedure for the trial and punishment of persons charged with the interference with or breach of the powers, privileges, or immunities of either House of the Parliament or the Members or Committees of each House, and further on the 2nd April in the House of Representatives, and on the 8th April in the Senate, to inquire into and report upon any recent allegations reflecting upon Parliament or any of the Members thereof, have the honour to report as follows :—

Your Committee has held six sittings and examined the following witnesses relating to the question of procedure :—Mr. C. B. Boydell, the Acting Clerk of the Parliaments ; Mr. C. Gavan Duffy, C.M.G., Clerk of the House of Representatives ; Mr. R. R. Garran, C.M.G., Secretary to the Attorney-General's Department, and Parliamentary Draftsman ; and Professor Harrison Moore, of the Melbourne University.

Your Committee invited the Honorable Sir R. C. Baker, K.C.M.G., late President of the Senate, to give evidence before the Committee, or to reply to certain questions in writing. Your Committee, however, were sorry to receive a letter from Sir Richard Baker to the effect that the state of his health was such as to prevent him doing justice to the subject, and asking to be excused.

Professor Pitt-Cobbett, of the Sydney University, was also invited to attend and give evidence, but, owing to ill health, he asked to be allowed to send written replies to the Committee's inquiries. This statement will be found under the heading "Appendix A."

Your Committee received two letters from Mr. Octavius C. Beale, offering to give evidence in answer to certain complaints made against him, which letters will be found under the heading "Appendix B."

Your Committee have not had sufficient time or opportunity to inquire into or report upon any recent allegations reflecting upon Parliament. From the evidence presented to your Committee during their investigations, it appears that there is no statutory law in force authorizing Select Committees to summon and secure the attendance of witnesses before them, and compelling them to answer questions in evidence. It is true that the Standing Orders provide that Committees may summon witnesses, but they provide no effective coercive measures in case of disobedience or refusal to answer.

In this Report your Committee is only able to deal with the question of procedure in cases of certain breaches of privilege and contempt of Parliament.

By the Commonwealth Constitution Act, Section 49, it is provided that "the powers, privileges, and immunities of the Senate and of the House of Representatives and of the Members and the Committees of each House shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its Members and Committees, at the establishment of the Commonwealth." No declaratory Act has been passed, and consequently the powers, privileges, and immunities of each House of the Commonwealth Parliament and its Members and Committees are the same as those of the House of Commons. One of the unquestionable powers and privileges of the House of Commons is to punish persons proved to be guilty of printing and publishing or uttering any false, malicious, and scandalous libels or statements reflecting on the honour, integrity, and probity of the House or of any of its Members. Similarly the House can punish persons found guilty of obstructing, interfering with, or assaulting or insulting Members in the discharge of their Parliamentary duties, or bribing, or attempting to bribe Members.

The procedure adopted hitherto by the House of Commons and followed by other legislative bodies possessing its powers and privileges has been to summon the offender to the Bar of the House, interrogate him, and call upon him to show cause why he should not be committed for breach of privilege. If the House resolve that a breach of privilege has been committed, the President or the Speaker is authorized to issue his warrant for the imprisonment of the offender. Sometimes the warrant directs the Serjeant-at-Arms to detain the offender within the precincts of Parliament House, whilst in other cases the warrant directs the keeper of a common gaol to hold the prisoner. The power of the House, however, is limited to the duration of the current session, and upon the prorogation of Parliament the sentence of imprisonment expires *ipso facto*, and the offender is released, although it would be competent to either House to re-commit an offender in the ensuing session if it was thought he had not been sufficiently punished. Under the law of the Commonwealth Constitution as it stands at present, particularly having regard to Section 120, it is doubtful whether the keeper of a State prison would be bound to receive and detain an offender named in a warrant of the President or Speaker.

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

All the parliamentary and legal witnesses who gave evidence before your Committee were agreed that it would be competent for the Commonwealth Parliament by appropriate legislation to assign to the ordinary courts of law jurisdiction to deal with, either by fine or imprisonment, persons charged with and found guilty of contempt of Parliament in the shape of libels and slanders calculated to bring either House or its Members into hatred, contempt, and ridicule. It follows that persons charged with obstructing, interfering with, or insulting or assaulting, or bribing, or attempting to bribe Members, could be dealt with in the same manner. Such legislation would not create new offences, or offences previously unknown to the law of Parliament; it would merely provide a new tribunal for adjudication and determination and possibly a new measure of punishment.

The new tribunal so exercising judicial power could fairly be equipped with a greater discretion in the infliction of punishment than that possessed by either House. It could be authorized to punish libellers and slanderers of, and other offenders against, Parliament by imposing fines of a moderate or severe character, according to the heinousness of the offence or, in the alternative, imprisonment. It could also be authorized to impose upon the offenders the costs of the prosecution.

Your Committee do not propose to elevate breaches of privilege and contempts of Parliament to the high criminal grade of indictable crimes or misdemeanors required to be tried by jury. Such offences should be dealt with by a Judge, and, if possible, by a Justice of the High Court sitting in original and summary jurisdiction, and dealing with each case as promptly and inexpensively as possible.

To guard against the institution of frivolous prosecutions, and to secure the proper conduct of such prosecutions, it would be advisable that no person should be placed on his trial for such offences unless by a special order of the House affected, and that such cases should be commenced and conducted by, and in the name of, the Commonwealth Attorney-General.

It is important to consider what defence should be available on the hearing of a prosecution for defaming Parliament. Your Committee are of opinion that the registered printers and publishers of public newspapers should be held responsible for all libels on Parliament published in such newspapers, and that they should not be allowed to shelter themselves behind the plea that they did not actually write such libels, and were not aware of them until they saw them in print. Such a plea, if allowed, would destroy all possibility of vindicating the honour of Parliament, and protecting it against unjustifiable and scandalous attacks. In your Committee's opinion, the only defence available should be justification or proof of the truth of the statements complained of.

RECOMMENDATIONS.

Your Committee beg to recommend Federal legislation providing:—

(1) That all persons printing, publishing, or uttering any false, malicious, or defamatory statements calculated to bring the Senate or House of Representatives or Members or the Committees thereof into hatred, contempt, or ridicule, or attempting to improperly interfere with or unduly influence, or obstructing, or insulting or assaulting, or bribing or attempting to bribe Members of Parliament in the discharge of their duties, shall be deemed guilty of breach of privilege and contempt of Parliament, and shall be liable to be prosecuted for such contempts upon complaint instituted by the Commonwealth Attorney-General before a Justice of the High Court pursuant to a resolution authorizing such prosecution to be passed by the House affected.

(2) That such prosecutions shall be heard and determined by a Justice of the High Court in its original jurisdiction, and in summary way upon evidence upon oath presented in open court subject to the proviso that matters of form and not of substance can be proved by affidavit.

(3) That upon the hearing of such complaints the persons accused shall have the right to give evidence upon oath.

(4) That upon the hearing of complaints for libel and slander against Parliament the only defence available shall be justification or proof of the truth of the statements complained of.

(5) That upon such Justice of the High Court finding such complaints proved he shall, according to his judicial discretion, have power to impose a fine not exceeding Five hundred pounds or imprisonment not exceeding twelve months, and may in addition to such fine or imprisonment order the accused so found guilty to pay the costs of the prosecution.

(6) That, in view of the fact that a new measure of punishment for breach of privilege and contempt of Parliament is hereby recommended, your Committee cannot advise that the proposed new law should be made retrospective.

(7) That a law be passed defining the mode of proving by legal evidence what are the powers, privileges, and immunities of the House of Commons.

(8) That a law be passed making provision for the summoning, attendance, and examination on oath or affirmation of witnesses before Select Committees of either House, and in cases of contempt before the High Court.

JOHN QUICK,
Chairman.

Parliament House,
Melbourne, 28th May, 1908.

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~~Privilege Procedure Committee~~ 1

MINUTES OF EVIDENCE.

THURSDAY, 21ST MAY, 1908.

Members present:

Sir JOHN QUICK, in the chair;
Senator Chataway,
Senator Henderson,
Senator ~~the Hon.~~ Col. Neild,
Senator Turley,
Mr. Bamford,
Mr. Wise.

Chas. Broughton Boydell, Acting Clerk of the Parliaments, examined.

1. *By the Chairman.*—You have had certain questions submitted to you in reference to the powers, privileges, and immunities of the Senate and the House of Representatives, and the method of enforcing them?—Having had the advantage of being supplied with the questions to be submitted by this Committee, I have made some search in connexion with the subject of inquiry. As regards the interpretation of the legal points involved, that aspect will probably be more fully and authoritatively dealt with by the gentlemen learned in the law who are to give evidence.

2. What are the powers, privileges, and immunities of the Senate and the House of Representatives provided in section 49 of the Constitution?—Section 49 of the Constitution enacts as follows:—

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the Committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and Committees, at the establishment of the Commonwealth.

As no such declaration as that contemplated in the above section has, up to the present, been made by the Parliament, its powers, privileges, and immunities are those of the Commons House of Parliament of the United Kingdom, and of its members and Committees, at the establishment of the Commonwealth. The English Parliament is practically omnipotent, and Sir Edward Coke has aptly summed up its inherent power as being "so transcendant and absolute that it cannot be confined, either for causes or persons, within any bounds." The House of Commons declares its own privileges. Members enjoy freedom from arrest, except for crime and contempt of Court; freedom of speech; protection from libellous reflection or attempts to influence their votes by bribe or otherwise; and from bodily violence which might interfere with the free exercise of their votes. It assumes no general judicial authority, but claims to deal judicially with cases of privilege; may order the arrest of persons guilty of contempt and breach of privilege; compel attendance at the Bar of the House; punish offenders, and impose disciplinary regulations on its members. Investigation into charges against members is conducted either by the House or by a Select Committee, or by special Commission appointed under enactment, as in the case of the *Times* in 1887. As evidencing that the privileges claimed by the Parliament under section 49 of the Constitution are recognised by the Courts here, I might relate a case in connexion with the Senate Department in the year 1903, when Mr. U'Ren, an officer of the Senate, received a summons to attend

as a juror at the Criminal Court in Melbourne. Mr. U'Ren addressed a letter to the Sheriff, stating that his official duties would prevent him from attending as a juror. In reply to which he was informed that, under the circumstances, if he did not appear at the Court he would only be fined 1s. Mr. Blackmore, the Clerk of the Parliaments, then pointed out to the Sheriff that section 49 of the Constitution gave to the Senate the privileges of the House of Commons, and that one of such privileges was that its officers were exempt from serving on juries—a privilege which was confirmed by the *Imperial Juries Act* 1870. This representation, having been placed before His Honour Mr. Justice Hood, resulted in the following letter being sent to the Clerk of the Parliaments:—

Sir,

In reply to your letter of the 17th instant, in which you contend that Mr. U'Ren is not eligible to serve on the Jury, I beg to inform you that I have submitted the same to His Honour Mr. Justice Hood, who, under the circumstances, allowed me to withdraw the summons.

Mr. U'Ren need not therefore attend the Court.

May, at page 62, says—

Each House, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by any separate right peculiar to each, but solely by virtue of the law and custom of Parliament.

and, further on, at the same page, lays it down that—

The law of Parliament is thus defined by two eminent authorities:—"As every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the High Court of Parliament hath also its own peculiar law, called the *lex et consuetudo Parliamenti*." This law of Parliament is admitted to be part of the unwritten law of the land, and as such is only to be collected, according to the words of Sir Edward Coke, out of the rolls of Parliament and other records, and by precedent and continued experience; to which it is added, that whatever matter arises concerning either House of Parliament, ought to be discussed and adjudged in that House to which it relates, and not elsewhere.

At page 63 of the same work, it is pointed out—

That neither House of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known law and customs of Parliament; which was assented to by the Commons.

It will thus, I think, be seen that the powers conferred by the section 49 are sufficiently ample to preserve the freedom and independence of members of the Commonwealth Parliament.

3. In the existing state of the law, could the Senate or the House of Representatives enforce its powers, privileges, and immunities, and in what way?—I consider that the Houses of Parliament have the power, under section 49 of the Constitution, to enforce their powers, privileges, and immunities, and to punish offenders. Under this head I quote from *May*, page 63—

The right to commit for contempt, though universally acknowledged to belong to both Houses, has been regarded with jealousy. But whilst the particular acts of both Houses should, undoubtedly, be watched with vigilance when they appear to be capricious or unjust, it is unreasonable to cavil at privileges which are established by law and custom, and are essential to the dignity and power of Parliament.

Numerous cases can be cited in the British House of Commons where offenders have been fined or imprisoned for offences against the privileges of Parliament; and *May*, at page 64, goes on to say—

The right of compelling the attendance of persons before Parliament, and of commitment being admitted, it becomes an important question to determine what authority and protection are required by officers of either house, in executing the orders of their respective courts.

And in support of the view that the Parliament has

such power, I will read from the preamble of a Bill now before this Parliament relating to parliamentary witnesses—

> And whereas the powers and privileges of the Senate and of the House of Representatives include amongst others the power to summon and compel the attendance of witnesses, to take evidence on oath or affirmation, to require the production of documents, to protect witnesses, and to punish persons guilty of breaches of privilege.

Story, in his *Commentaries on the Constitution of the United States*, writing of the powers of legislative bodies to punish for contempt, says (page 614, Vol. I., fifth edition)—

> Now, by the common law, the power to punish contempts of this nature belongs incidentally to Courts of Justice and to each House of Parliament.

He goes on—

> Mr. Justice Blackstone has, with great force, said that laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the Supreme Courts of Justice to suppress such contempts, &c., results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. And the same reasoning has been applied with equal force, by another learned commentator to legislative bodies. "It would," says he, "be inconsistent with the nature of such a body to deny it the power of protecting itself from injury or insult. If its deliberations are not perfectly free, its constituents are eventually injured." This power has never been denied in any country, and is incidental to the nature of legislative bodies.

Then, a little further on, dealing with this matter, the same writer says (section 847)—

> This subject has of late undergone a great deal of discussion both in England and America, and has finally received the adjudication of the highest judicial tribunals in each country. In each country, upon the fullest consideration, the result was the same, namely, that the power did exist, and that the legislative body was the proper and exclusive forum to decide when the contempt existed, and when there was a breach of its privileges; and that the power to punish followed as a necessary incident to the power to take cognizance of the offence.

4. Is any declaratory Act necessary to enable the Senate and the House of Representatives to enforce its powers, privileges, and immunities?—I consider that section 49 of the Constitution is sufficient authority for the Senate and House of Representatives to enforce their powers, privileges, and immunities. But Todd, in his *Parliamentary Government in the British Colonies*, speaking of the powers and privileges of local Legislatures, remarks that when the status of a Colony is raised to that of a self-governing autonomy it becomes desirable to clothe the legislative body with greater authority. On this subject he says—

> They will need coercive powers to enforce every lawful discharge of their appropriate functions, and to vindicate their proceedings from resistance or contempt. But in order to define with precision, and without excess, the powers proper to be conferred upon any legislative body, recourse should be had to statutory enactment.

5. Would the warrant of the President or the Speaker be sufficient authority to arrest and bring to the Bar of either Chamber any person charged with breach of privilege?—Yes. On this point I refer to *May*, page 67, where the case is quoted of the Serjeant-at-Arms of the House of Commons being turned out of Sir Francis Burdett's private house by force, as follows:—

> The opinion of the Attorney-General was consequently required to determine whether the serjeant was—
> "Justified in breaking open the outer or any inner door of the private dwelling-house of Sir F. Burdett, or of any person in which there is reasonable cause to suspect he is concealed, for the purpose of apprehending him; whether the serjeant might take to his assistance a sufficient civil or military force for that purpose, such force acting under the direction of a civil magistrate; and whether such proceedings would be justifiable during the night as well as in the day time."

> The Attorney-General answered all these questions, except the last, in the affirmative; and, acting upon his opinion, the Serjeant-at-Arms forced an entrance into Sir F. Burdett's house, down the area, and conveyed his prisoner to the Tower, with the assistance of a military force. Sir F. Burdett brought actions against the Speaker and the Serjeant-at-Arms in the Court of King's Bench, and verdicts were obtained for the defendants.
>
> The opinion of the Attorney-General, upon which the serjeant had acted, was thus confirmed. This judgment was afterwards affirmed, on a writ of error, by the Exchequer Chamber, and ultimately by the House of Lords.

There is also a case referred to in Quick and Garran's *Annotated Constitution*, which occurred in the State of Victoria, where it was held by the Colonial Court—

> That the power given by section 35 of the Constitution Act was well exercised by the Legislature of Victoria in the enactment of 20 Vic. No. 1, section 3, that the Legislative Council and Legislative Assembly of Victoria have all the privileges, immunities, and powers which were legally held, enjoyed and exercised by the Commons House of Parliament at the time of the passing the Constitution Statute.

In this case an action was brought against Sir Francis Murphy, the Speaker, for false imprisonment; but his action was upheld by the Supreme Court and afterwards, on appeal, by the Privy Council. A further case occurred in Victoria, where Glass and Quarterman were found guilty of contempt and breach of privilege, the record of which case says—

> They were arrested on the Speaker's warrant, brought before the House, found guilty, and committed to the custody of the keeper of the Melbourne Gaol. (*Quick and Garran*, p. 595.)

In this case also—

> The Privy Council held that the Assembly had, under section 35 of the Constitution Act and the Act 20 Vic. No. 1, the same powers and privileges as those of the House of Commons, and, among them, the power of judging for itself what is a contempt, and of committing for contempt by a warrant stating generally that a contempt has been committed. (*Quick and Garran*, page 506.)

6. Would the warrant of the President or the Speaker be sufficient to hold any person charged with and declared guilty of any breach of privilege?—I think so, as was established in the cases before referred to. Under the practice of the House of Commons, such a warrant would be amply sufficient; and similar cases have occurred in some of the Colonial Legislatures—more particularly in the State of Victoria, which had statutory authority almost similar in terms to section 49 of the Constitution.

7. Would the warrant of the President or the Speaker be sufficient authority to the keeper of any State gaol to hold persons found guilty of any breach of privilege?—I take this to be rather a matter for legal opinion than a constitutional question; but, reading section 5 of the Act to constitute the Commonwealth of Australia, together with section 49 of the Constitution, it appears to me that such a warrant would be a sufficient authority to the keeper of any State gaol to hold persons found guilty of any breach of privilege.

8. Has the Senate or the House of Representatives any authority to impose and enforce fines for breach of privilege?—Yes.

9. Can the Commonwealth Parliament, by appropriate legislation, delegate to courts of law jurisdiction to deal with persons charged with offences against Parliament, or breaches of parliamentary privilege?—This would appear to be a matter of constitutional law, which the Parliament should decide for itself. But, in support of the view that

such delegation might be effected by legislation, I will quote a resolution of the Standing Orders Committee of the Senate of the year 1904, when a Bill relating to parliamentary witnesses was referred to that Committee for consideration and report. The resolution—which inferentially supports such a contention—was as follows :—

> Although the Committee consider that both the Senate and the House of Representatives, and the Committees of either House, have power under the Constitution to administer oaths, and that the Senate and the House of Representatives have power respectively to deal with any witness who refuses to attend, to be sworn, or to answer questions, they do not consider that the time of Parliament should be taken up by matters of this nature, but that the Courts are better constituted to adjudicate on such matters.

10. Could such offences be dealt with by such Courts in a summary way?—As to that, I can hardly say, as I am not sufficiently acquainted with the procedure of the Courts.

11. Could Commonwealth legislation relating to procedure for breach of privilege be made retrospective, so as to cover offences during the current session of Parliament?—If Parliament were disposed to pass legislation, and to make it retrospective, I presume it could do so.

12. What advice or opinion relating to the foregoing matters are you prepared to offer?—Although I consider that the Parliament of the Commonwealth is clothed with all the necessary powers to protect its rights and privileges, and to punish offenders, still, from an extensive experience in the parliamentary service of the oldest State and of the Commonwealth, I have never known a case which has been dealt with in a conclusive manner by the House concerned. In the case of the State Parliament of New South Wales, with which I am most familiar, its powers and privileges were not defined by Statute, but were, rather, such as might be assumed to belong to them under the standing order which permitted of recourse being had to the forms and usages of the British House of Commons; so that the failure, in cases brought under its notice, to adequately punish offenders would probably have been less likely to result in a similar manner before the Houses of Parliament of the Commonwealth, whose powers, privileges, and immunities are laid down by the Constitution as being those of the British House of Commons. I believe there is a good deal of misconception by the public generally as to the very stringent and far-reaching powers of this Parliament; and, probably, if a report from this Committee contained an emphatic declaration that the Parliament possesses powers of punishment for contempt equally as stringent as those possessed by the Courts of Law, persons would be more careful to refrain from making reckless charges, or committing any other act which, if perpetrated in respect to the Judiciary, would meet with summary and condign punishment. The Senate has a provision in Standing Order No. 413 for dealing with statements in newspapers as breaches of privilege, and for declaring the writers of such statements guilty of contempt; but the standing order prescribes no method of punishing offenders, so that, having arrived at that stage, recourse to the procedure in the British House of Commons would be necessary to impose any penalty on the offender. As to procedure, I am of opinion that an Act declaring the privileges of the Parliament, and providing a method by which offenders could be dealt with by the Courts of Law, would result in the saving of the time of Parliament, and in placing such matters on a much more satisfactory footing than is the case now, the present mode of procedure being both cumbersome and ineffective, and uncertain in its results.

13. *By Senator Colonel Neild.*—Have you in your statement exhausted all the grounds on which the House of Commons is authorized by its resolutions to take action in respect to breaches of privilege?—By no means.

14. I thought not; there are others?—There are numerous cases, but I did not want to make my statement longer than I could help.

Charles Gavan Duffy, C.M.G., Clerk of the House of Representatives, examined:—

15. *By the Chairman.*—Have you considered the questions submitted to you for the purpose of giving evidence before the Committee?—I have. I may say that, although the time allowed has been pretty long, the House of Representatives has been sitting almost continuously considering the Tariff, and, although I devoted my spare time to the questions, I have not been able to give the matter that close attention I desired.

16. How would you summarize the powers, privileges and immunities of the Senate and House of Representatives, provided for in section 49 of the Constitution?—The Federal Parliament, not yet having declared its powers, privileges and immunities under section 49 of the Constitution, has under the same section those of the House of Commons at the establishment of the Commonwealth. Few of these are contained in any Statute, but must be gathered from the declarations, customs, the usages of Parliament. Among the principal powers, &c., of the House of Commons would be included—

(1) Right of a member to state whatever he thinks fit in debate, however it may affect individuals, if it is not otherwise in violation of the rules of the House.
(2) Power to order attendance of persons whose conduct has been brought before the House as a matter of privilege.
(3) Power to commit for contempt.
(4) Power to suspend disorderly member.
(5) Power to expel member guilty of disgraceful conduct.
(6) Power to prevent publication of false or perverted reports of its proceedings.
(7) Power of Speaker, when accompanied by Mace, to arrest without previous order of House.
(8) Power of House to deal with all matters affecting elections to the House.

Under breaches of privilege would be included—

(*a*) Libels upon the House generally.
(*b*) Libels upon specific members in their character as members.
(*c*) Refusal of witness to attend, or to give evidence, or giving false evidence.
(*d*) Interference with witness.
(*e*) Interference with an officer in execution of the House's orders.

17. In the existing state of the law, could the Senate or the House of Representatives enforce its powers, privileges and immunities, and in what way?—I think the Senate or House of Representatives, having the powers of the House of Commons, would, in the same way as that body, find no difficulty in enforcing them. For example, if any one committed a breach of any of the privileges referred to, the person complained of could be ordered to attend at the Bar of the House to explain his conduct. If he did not attend, the House could order a warrant to issue for his arrest. The House could commit him to gaol or to be confined to Parliament House (*May*, p. 91), or order him to be admonished. I do not think the House could inflict a fine.

18. There might be some difficulty in enforcing the fine?—I do not think there has been a fine enforced in the House of Commons for about 250 years; and, therefore, that can hardly be considered a power now existing.

19. Is any declaratory Act necessary to enable the Senate and the House of Representatives to enforce its powers, privileges and immunities?—I do not think any declaratory Act is essential to enable either House to enforce its existing powers; at the same time, if it is desired to adopt a more modern system, legislation would be required.

20. If an Act were passed could Parliament take any powers in excess of those enjoyed by the House of Commons at the time of the passing of the Constitution?—That is a question about which there might be some considerable argument. Section 49 itself imposes no limit, such as may be found in most of the Constitutions of the States. At the same time, some constitutional lawyers are of opinion that if the powers, privileges and immunities were set forth in so many words, they must be *sui generis* —that Parliament would not be able to extend them in any direction it pleased. First of all—although one hardly likes to make the suggestion —there is the possibility that Parliament might ask for something quite unreasonable, and that the Act would be disallowed. Other lawyers, I understand, consider that if Parliament went to an unusual extreme in ~~asking for~~ powers, the High Court would possibly declare the Act *ultra vires*.

21. Would the warrant of the President or the Speaker be sufficient authority to arrest and bring to the Bar of either Chamber any person charged with breach of privilege?—I do not think there can be any question about that. At any rate, I know that warrants of the Speaker in the State Parliament of Victoria have had the effect of arresting and bringing to the Bar different offenders.

22. Would the warrant of the President or the Speaker be sufficient to hold any person charged with, and declared guilty of, any breach of privilege?—Yes.

23. Would the warrant of the President or the Speaker be sufficient authority to the keeper of any State gaol to hold persons found guilty of any breach of privilege?—I think there is no doubt that it would; it was found efficacious in the case of Glass.

24. That was under the State Constitution of Victoria?—Yes; and that Constitution is certainly no stronger than the Commonwealth Constitution.

25. Under this heading you will see that section 120 of the Constitution provides:—

> Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Do you think that that conveys the necessary authority?—I do not know whether a breach of privilege could be considered an offence against the laws of the Commonwealth—whether a libel or an attack on Parliament would come within the meaning of those words.

26. If a declaratory Act were passed, then a breach of privilege would be an offence against the Commonwealth law?—No doubt; but the question is as to the existing state of affairs.

27. Has the Senate or the House of Representatives any authority to impose and enforce fines for breach of privilege?—As I mentioned before, the House of Commons has not imposed a fine since

1666, and, therefore, I think the power may be considered obsolete. If a new Act were passed, the right to impose and enforce fines would, I think, be quite a proper provision therein. Fines have been imposed indirectly in Victoria in a few cases, under the name of "fees." In the session of 1899-1900 two newspapers, adjudged guilty of contempt, had, after apologizing, to pay £100 fees. each. Under the Victorian Standing Orders, very high fees are provided, being £50 for arrest, and £50 for commitment.

28. But if the session terminates, does not the sentence of detention expire with the session?—Yes.

29. And then the offenders escape without payment of the fees?—That is so. But the particular case I have mentioned was not near to the end of the session, and the offenders preferred to pay the fees.

30. But Parliament could not imprison an offender indefinitely, or for a specified term, in the existing state of the law?—I do not think so.

31. The authority of Parliament terminates at the end of the session?—Yes.

32. Can the Commonwealth Parliament, by appropriate legislation, delegate to Courts of Law jurisdiction to deal with persons charged with offences against Parliament, or breaches of parliamentary privilege?—I think there can be no doubt as to the power of Parliament to delegate its powers by legislation, the powers of Parliament being almost unlimited. So long as forty years ago, the Queensland Constitution Act set forth in detail the powers of the Parliament. It could punish summarily for certain contempts, and for disobedience to its order; for ~~refusing to be~~ not attending when summoned; and for assaulting and obstructing its officers; and for this purpose the House could direct the Attorney-General to prosecute before the Supreme Court any person charged.

33. Is that provided in the Queensland Constitution?—It is provided in the Constitution itself, and there are similar provisions in the Constitutions of Tasmania and Western Australia, but in the case of the larger States of New South Wales and Victoria, there is simply given the power to declare the rights and privileges. I am not sure that that power has been exercised in New South Wales, but it has been exercised in Victoria. In the case of Queensland, the offences are set out in detail, and constables and others are directed to assist in the execution of the orders of the House, and the gaoler to imprison offenders. I am giving these particulars in reply to the question whether it would be possible for the Commonwealth Parliament to delegate its powers to Courts of Law.

34. Do you think we could so delegate our powers?—I think there can be no doubt that Parliament could delegate its powers by legislation, seeing that it has all the powers of the Imperial Parliament.

35. Then if the Parliament could delegate such authority it might prescribe the method by which Courts of law should exercise the jurisdiction?—I suppose there cannot be a doubt that the powers of Parliament would include that.

36. Then Parliament might give jurisdiction to a single Judge of the High Court, or a Judge of the Supreme Courts of the States, to deal with such matters?—I do not think there is any doubt as to that.

37. Then I suppose that such legislation could be made retrospective so as to cover offences during the current session of Parliament?—I do not think there can be any doubt as to the power to make such legislation retrospective; but, at the same time, such legislation is not popular. It is laid down in

Wilberforce on Statute Law, p. 157, that retrospective laws are of questionable policy, and need express words or necessary implication, but are not necessarily opposed to natural justice. In *Maxwell on Interpretation of Statutes*, p. 334, it is stated: "It is hardly necessary to add, that, whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard." *Sedgwick on Construction of Statutory and Constitutional Law*, says, p. 164, it "appears to be clearly settled in England, that the rule to give statutes a prospective operation, is one of construction merely; that it will yield to the intention of the Legislature, if clear beyond doubt; and that the only question is, whether the retroactive intention is sufficiently expressed, and this is in entire harmony with the English doctrine . . that Parliament is supreme, and that there is no consitutional check on the supremacy of the law-making power." In the United States of America, the Constitution appears to expressly forbid, under Article I., section 9, paragraph 3, *ex post facto* legislation, but in *Black on Interpretation of Laws*, p. 265, the Court in Oregon is thus quoted:—"The presumption against retrospective construction has no application to enactments which affect only the mode of procedure and practice of the courts. No person has a vested right in any form of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, and if this mode of procedure is altered by statute, he has no other right than to proceed according to the altered mode. . . . . Statutes which relate to the mode of procedure . . . are valid; and it is no objection to them that they are retroactive in their operation. It is competent for the Legislature at any time to change the remedy or mode of procedure for enforcing or protecting rights . . . and such remedial statutes take up proceedings in pending causes where they find them." This dictum would clearly support making legislation relating to procedure for breach of privilege cover offences that had occurred during the current session. Of course, this clearly does not deal with new offences, but merely with the question of how the guilt is to be decided.

38. What advice or opinion relating to the foregoing matters are you prepared to offer?—I am inclined to think, after a great many years' experience, that the attempts made in the Victorian Parliament to deal with offences of this character, have met with very little success as a rule. I think that some legislation based on that of Queensland is required, giving the power, as the Chairman has suggested, to a Judge without a jury to decide cases. Juries are excellent theoretically, but, in cases where a good deal of feeling of one sort or another exists, it is not always easy to get a fair verdict, and it is safer to leave the matter to a Judge.

39. To deal with in a summary way?—Yes. This removes from Parliament the necessity of dealing with such matters—a work which, so far as my experience shows, it is not efficient to perform, and, when it does attempt to perform it, generally gives rise to considerable unpleasantness and ill-feeling.

40. *By Senator Colonel Neild.*—Do you not think that it would be advantageous to the public to have, in the form of a handy statute, the knowledge of their responsibility, which now can only be obtained by an elaborate investigation of the past history of the House of Commons?—I think that it would be

an advantage. I might say that my opinion was not asked exactly on this question, but as to whether it was essential to have an exposition of the law before endeavouring to enforce it.

41. *By Mr. Bamford.*—Do I understand you to say that, under existing conditions, without any declaratory Act; Parliament could delegate to the Federal or State Courts the trial of any person alleged to have committed an offence?—No; I was referring to the printed question which refers to legislation.

42. *By Senator Henderson.*—In answering question as to the ability of Parliament to enforce its powers, privileges, and immunities, you seem to speak very strongly about bringing persons to the bar of the House; I should like to know whether, in your opinion, it is imperative that a call to the bar of any outside offender must, in the existing state of the law, precede any other action?—I do not think that that is essential, but it seems to be more in consonance with British ideas that an offender should be brought to the bar of the House, where he has an opportunity, if he is able, to give some explanation before he is condemned. That is the only reason I have for thinking that a call to the bar of the House is desirable; otherwise Parliament would have to proceed to decide as to the guilt or innocence without the accused person having a chance of making an explanation.

43. That is to say, you do not think that Parliament, under existing conditions, could delegate its powers primarily to a Court of Law or a Court of summary jurisdiction?—Not under the present existing powers; I think it would require legislation.

44. *By the Chairman.*—Supposing a defamatory statement appeared in the newspapers, Parliament might proceed to denounce it as a false or malicious libel in the absence of the defendant?—Certainly.

45. But you suggest that it is consonant with the idea of British fair play to give the offender an opportunity of coming to the bar, and defending himself, before he is condemned?—The position would vary with the circumstances. For instance, the case of a newspaper ~~leading article~~, in which the words could bear only one meaning, would be quite different from that of a person who was reported at a meeting to have said something on which more than one construction could be placed. In the first case Parliament would be perfectly justified, on the evidence of the ~~leading~~ article itself, in deciding that it was in contempt of Parliament, while, in the other case, the offender ought to have an opportunity of explaining that, perhaps, the words were not reported exactly as he said them, or that the meaning which Parliament attached to them was not the meaning intended.

Robert Randolph Garran, C.M.G., Secretary to the Department of the Attorney-General, and Parliamentary Draftsman, examined:—

46. *By the Chairman.*—Have you considered certain questions which have been submitted to you for your opinion?—Yes, they were given to me some days ago, and I have considered them so far as time has allowed.

47. What are the powers, privileges, and immunities of the Senate and the House of Representatives provided in section 49 of the Constitution?—~~If there is~~ no declaratory Act under section 49, the powers of the Commonwealth Parliament are those of the British House of Commons. Those powers are classified in various ways by various authorities, and there are some rights of Parliament which some authorities consider as privileges and some do not.

A very instructive classification is given in *Anson on the Constitution*. Substantially the classification is as follows:—Freedom of the person, which under Statute in England, is practically confined to the freedom of the member from arrest and imprisonment during sessions, and for a limited period before and after sessions. The freedom used to be very much wider and extend to the members' servants, and so forth, but it was limited by 10 George III., c. 50. The freedom of the person also includes the right to decline attendance on subpœna, and to exemption from service on juries. Then comes freedom of speech, which includes immunity from being called to account for any action or speech in Parliament. It also includes the right to exclude strangers from Parliament, and to prevent the publication of debates, though apparently it does not include the right to authorize the publication of debates so as to make them privileged from action for defamation.

48. That would require a special Act of Parliament?—Yes; it is the subject of special legislation in England, and I think in most of the Colonies. Then there are two more or less formal rights which I believe are asked for by the Speaker in England annually, but which do not seem to have any great practical importance. These are the right of access to the Crown, and the right to have the best construction put upon the proceedings of Parliament. Then comes the right of Parliament to provide for its own proper constitution, which involves the filling of vacancies, the trial of disputed returns, the suspension or expulsion of members, and so forth. There is also the exclusive right of Parliament to regulate its own internal concerns, which includes the right to be the interpreter of its own Standing Orders, rules, and procedure. Lastly, there is the right to punish breaches of privilege. This right, as regards its application to persons not members of the House, includes disrespect to the House, disobedience to an order of the House, and interference by violence, intimidation, or bribery with procedure, officers, or witnesses.

49. There can be no doubt that the publication of a libel against Parliament or any of its members is a breach of privilege?—No doubt at all, I think.

50. Such as accusing Parliament of corruption?—That would undoubtedly be a breach of privilege.

51. Even in the existing state of the law?—Even in the existing state of the law—that is, under English cases.

52. Do you think that, in the existing state of the law, the Senate or the House of Representatives, on being libelled, could direct the Attorney-General to institute a prosecution in any of the courts?—Against the House collectively?

53. Yes; could that direction be given under common law or under any Statute?—I do not know of any Statute which would enable that to be done. I do not think it could be done at common law, because the House collectively is not a person, and it is not a corporation. I should think that a criminal libel against a member, as an individual, could be prosecuted by law.

54. On the member's initiative?—On the member's initiative. The proceeding would have to be under State law; and it would depend on the State law how it should be initiated. But, in most criminal offences, the information can be laid by anybody; and I suppose that the Attorney-General, as a citizen, could initiate the proceedings. As Attorney-General of the Commonwealth, however, I

do not see how he would have any *locus standi* to prosecute, in the name of the King, under State law. Commonwealth legislation would, I think, be required.

55. In your opinion, is a declaratory Act necessary under section 49 of the Constitution?—I think not. That section distinctly invests each House with the powers of the House of Commons; and I think that either House could do what the House of Commons does, namely, summon the accused person to attend, and, in the event of his refusal to obey the summons, issue a warrant for his arrest, bring him to the Bar of the House, and then proceed to commitment.

56. Do you think it would be advisable to pass a declaratory Act, indicating generally or specifically the powers, privileges, and immunities, so that the public may have notice?—I think it would be very advisable to pass a declaratory Act enumerating the privileges of Parliament; but, at the same time, it would be just as well to so express it that it should not be in derogation of the privileges that now exist.

57. That is, if we proceed to define the privileges we may limit them?—Quite so; and you may find you have limited something in a very undesirable way.

58. Do you think that a declaratory Act might be passed specifying some of the powers, privileges, and immunities without prejudice to others not enumerated?—I think so.

59. There would be no danger?—I think not.

60. Do you think it would be advisable, in such a declaratory Act, to have a section similar to that in the Western Australian Parliamentary Privileges Act as follows:—

> 2. Subject to the provisions of this Act, any copy of the journals of the House of Commons printed, or purporting to be printed by the order or printer of the House of Commons, shall be received as *prima facie* evidence without proof of its being such copy, upon any inquiry touching the privileges, immunities, and powers of the said Council or Assembly, or of any Committee or member thereof respectively.

We require some authority or source for our powers, privileges, and immunities?—Yes, I think it would be very advisable ~~not~~ to have the powers, privileges, and immunities defined, especially if the intention is to make the breach of them a statutory offence and to intrust its punishment to the courts of justice. It is very desirable that the courts should not have to search amongst ancient ~~Parliamentary~~ records in order to find out what the privileges are.

61. Could the Commonwealth Parliament, by appropriate legislation, delegate to courts of law jurisdiction to deal with persons charged with offences against Parliament, or breaches of parliamentary privilege?—I think so, undoubtedly. Subsection 39 of section 51 of the Constitution gives the Parliament power to make laws with reference to the execution of any power vested by the Constitution in Parliament, or in either House thereof; and section 49 gives each House of Parliament the powers, privileges, and immunities of the House of Commons. In my opinion, Parliament has power to pass laws for the execution and enforcement of those powers and privileges in any way in which it thinks fit. The subject-matter is one which belongs to the Commonwealth Parliament; and the mode of enforcing its powers, and the means to be adopted, are entirely in the discretion of Parliament. I think that Parliament could make breach of privilege a statutory offence cognizable by the ordinary courts of the country.

62. Do you think it would be advisable that the House affected should, as a condition precedent to the institution of a prosecution before the ordinary Courts, pass a resolution authorizing or directing such prosecution?—I think it would. There can be no doubt that any prosecution of the kind ought to be in the hands of the House—possibly on the direction of the Speaker by order of the House. The exact method of initiating the prosecution is, of course, a matter of detail; but, certainly, the question whether there should or should not be a prosecution should be entirely for the House itself.

63. *By Senator Turley.*—At the present time, has the Speaker not the right, as attaching to his office, for the protection of Parliament, to direct a prosecution or to summon any one to the bar of the House without an express order of Parliament?—Not without the order of the House, I think; the Speaker's warrant to bring an offender to the bar, or to arrest an offender on commitment, is always based on an order of the House. I do not think that the Speaker has any power of his own motion to bring a man to the bar.

64. *By the Chairman.*—First, you think that the House affected should pass a resolution authorizing a prosecution?—Yes.

65. Then, what would be the best way to get the accused person before the Courts—by summons, rule *nisi*, or how?—I think that would depend on the nature of the offence; but I do not see why the offender should not be either indicted or dealt with in a summary manner, in the same way as a criminal offender. Some classes of offences it might be as well to make indictable, while others might be dealt with in a summary way; in either case, the ordinary procedure should be followed, with ~~any~~ exception that ~~might be thought necessary~~ under the direction of the House.

66. There is a desire that such proceedings should be shortened as much as possible, and not made too expensive—a desire to make them as summary and swift as possible, and not to magnify them to the importance of great State trials?—I am inclined to think that, in most cases, summary proceedings would be quite sufficient. Where a money penalty, even a substantial penalty of £500, was involved, the case could be dealt with by a Court of summary jurisdiction. There are degrees of libel; there is ordinary defamation, and there is criminal libel; and for that it might be that greater powers of punishment would be required than Courts of summary judisdiction are invested with.

67. Of course, the rights of private members are established at common law, and no legislation is required to protect them?—No; in case of ordinary libel, they can sue in the Courts.

68. What is wanted, required, apparently, is the protection of the corporate honour of Parliament in some swift and summary manner?—Of course, a member, in most cases, can only protect his rights at his own expense and risk; but there may be cases of individual libel in which Parliament might think fit, for the sake of its own dignity, to take proceedings. But the law of libel is fairly adequate.

69. On the House ordering a prosecution, do you not think that the Attorney-General should have the conduct of such an important matter?—Yes, I think he should. Of course, if it were an indictable offence, the Attorney-General would, as usual, ~~conduct the case~~; but even if it were not an indictable offence, I think such a prosecution should always be conducted by the Crown law authorities, just as prosecutions in the Police Courts for breaches of the Commonwealth Acts are conducted. I think it follows as a ~~matter of~~ consequence.

70. The Western Australian Parliamentary Privileges Act, section 14, provides—

> The publishing of any false or scandalous libel of any member touching his conduct as a member by any person other than a member is hereby declared to be a misdemeanor.

Section 15 of the same Act provides—

> It shall be lawful for either House to direct the Attorney-General to prosecute before the Supreme Court any such person guilty of any other contempt against the House which is punishable by law.

You will observe that the offence is defined as a misdemeanour. It is not necessary to make such a offence a misdemeanour, is it?—In the Commonwealth ~~law~~ we do not use the words "misdemeanour" or "felony"—we use simply the word "offence."

71. If there were a misdemeanour, it would have to be tried by a jury?—That would depend on the ~~practice of the Supreme Court~~ of Western Australia, but I should think it would be.

72. Under Commonwealth law, a misdemeanour must be tried by a jury?—~~I think so.~~ Of course, if it were an indictable offence, it would have to be tried by a jury, and, practically, the only distinction under Commonwealth law are indictable offences and offences punishable summarily.

73. If it were provided that any person who published a false and scandalous libel of Parliament should be guilty of an offence, and liable to fine or imprisonment at the order of a Judge of the High Court, would that meet the case?—I think it would be wise to provide that offences of this kind are punishable summarily. ~~It is a matter of interpretation; and~~ the Acts Interpretation Act ~~of~~ 1904 lays down rules ~~for interpreting~~ as to when, in the absence of express words, an offence is to be considered summarily punishable. Where there is only a pecuniary penalty or ~~imprisonment I think,~~ for not more than ~~one year~~, then, in the absence of any express words to the contrary, the offence is summarily punishable; but, if the punishment is imprisonment for more than ~~a year~~, then the offence is indictable.

74. You are aware that in the Supreme Court contempt of Court may be dealt with summarily by the Judges?—Yes.

75. Would there be anything extraordinary in Parliament adopting a similar procedure?—I think that could be done, but the contempt which is punishable summarily in the Courts is usually contempt in the face of the Court—when a man is caught *flagrante delicto*.

76. It is more than that, because a newspaper publisher, who prints anything in contempt of the administration of the Court, may be dealt with summarily on a rule *nisi*?—Generally speaking, the contempt is committed in the face of the Court, though no doubt a superior Court has power to punish contempt committed otherwise. But it is a procedure, the extension of which to ~~Parliament~~ would probably meet with a good deal of criticism. In the one case, the Court is looking after its own dignity, but, if the Court is called upon to assert the dignity of Parliament, there are very strong reasons for dealing with the matter in the ordinary course, as in the case of a criminal offence against the law.

77. You have no doubt about the constitutionality of such proposed legislation?—No; I think Parliament could make the offence punishable, and provide its own procedure and remedy.

78. For instance, the power could be delegated to a Judge of the High Court?—I think so.

79. Or to a Judge of the Supreme Court in the State in which the libel is published?—I think so, but I do not know whether Parliament could compel a Judge of the Supreme Court to take cognizance of the matter.

80. Would it not be Federal jurisdiction?—If it were made a statutory offence, which had to be punished as a matter of law, he would take cognizance of it, but, if it were a matter of contempt, it would be open to doubt.

81. It would be a criminal offence to libel Parliament?—If it were made a criminal offence, then no doubt it would be a judicial proceeding.

82. Just as under the Customs Act?—Yes.

83. There would be no doubt as to the right and authority of Parliament to protect itself against insults, and any invasion of its privileges?—That right is clearly given by the Constitution and even apart from section 49, the right would be inherent in the nature of Parliament. As a matter of fact, the Tasmanian Parliament passed a Parliamentary Privileges Act in 1858. There is no grant in the Tasmanian Constitution of any particular Parliamentary privileges, but privileges were defined in the Act very much on the lines of the English privileges; and, so far as I know, that Act has never been questioned. But our Constitution distinctly gives the Parliament certain priyileges to start with, and the power to declare its own privileges afterwards.

84. Do you think that, under section 49, the Parliament can arrogate to itself powers, privileges, and immunities in excess of those at present enjoyed by the House of Commons?—I do not think there is any limitation to the powers, privileges, and immunities enjoyed by the House of Commons at any particular time. The section of the Constitution, as first drafted, provided that the privileges, powers, and immunities should not be in excess of those enjoyed by the House of Commons at the passing of the Constitution, but those words were omitted and the present words substituted, which give Parliament unlimited power, apparently, to declare its own powers, privileges, and immunities. I think the only limitation is that Parliament cannot enlarge the reading of the Constitution, and that what it declares must really be in the nature of powers, privileges, and immunities as known to law. The question is rather like that at present under consideration by the High Court, as to the meaning of the word "trade mark"—whether or not it is confined to "trade mark" as meant in English law in 1900.

85. Could it be contended that, inasmuch as the House of Commons cannot imprison a libeller beyond the duration of the current session, the Commonwealth Parliament could not pass legislation ordering imprisonment beyond the currency of a session?—I think that Parliament has ample power to prescribe by legislation the punishment which it will inflict for breach of privilege.

86. You observe that, if the Commonwealth Parliament has that power, it can exceed the punishment which the House of Commons can impose?—I think it can.

87. That means that we have greater powers, privileges and immunities than the House of Commons?—The only limitation to our legislative power on the point is the limitation of the subject-matter—the question as to what are powers, privileges, and immunities. If you once establish that there is a privilege, and that there has been a breach, then I think the dealing with the offender is a matter on which our legislative power is absolutely plenary. We are not in any way limited by the extent of the punishment which it has been the practice to impose in England.

88. Our Constitution does not expressly say that the privileges, powers and immunities of the Fede-

ral Parliament shall not exceed those of the House of Commons?—No; and, even if it did, I do not think it would mean that the punishment for a breach of privilege shall not exceed the punishment as imposed by the House of Commons. In the nature of things, however, I do not think that without legislation Parliament could hold a man after prorogation; but, with legislation, I think there is no limit whatever.

89. Have you any other advice or opinion you would like to submit?—I think that, as a previous witness said, although Parliament has power to deal with these matters itself, the exercise of the power by Parliament is not a satisfactory method of dealing with what is really a matter of judicial determination. I consider that legislation would be advisable, entrusting the punishment of offenders to the courts. The details of such legislation are matters of opinion, but what I have in my mind is something of this sort. First of all, there should be a definition, more or less exhaustive, of the privileges and immunities of Parliament, and a distinct indication that a breach of those privileges shall be an offence punishable in a specified way. Then certain judicial tribunals should be invested with authority to hear and determine such cases, presentment to be only upon direction by the Speaker, or the President, or by the Chairman of a Parliamentary Committee.

90. The Speaker or President of the House affected?—Yes; ~~of the House or Committee of the House~~ affected. I think there should also be a provision declaring that ~~action by the court~~ is not to be in derogation of the existing privileges and powers of Parliament.

91. *By Senator Chataway.*—Do I understand that you express the opinion that in dealing with breaches of privilege either House has the right to impose punishment by fine?—That is rather a difficult question. In England, the House of Lords has frequently imposed fines, but the House of Lords is a judicial as well as a legislative body. It is a court of record. The House of Commons used occasionally to impose fines, but I believe that the last instance was in 1666. Many authorities have based ~~upon~~ this right to ~~enforce~~ fines upon ~~offenders~~ the argument that the House of Commons also was a court of record. Other authorities, however, hold that it is a matter of considerable doubt as to whether it ~~was~~ a court of record. The power has certainly not been exercised—that is to say, it has been in disuse—for so long, that it may be regarded as practically obsolete, except to this extent—that I believe that it is a practice of the House to order an offender to be imprisoned, and to make it a condition of release that certain fees should be paid. As there is no particular limit to the amount of fees, imprisonment can practically be enforced in default of payment. But of course if the House is prorogued, the offender must be released without payment.

92. You have no doubt that in a declaratory Act we can make breach of privilege an offence, and that we can enforce the payment of fines?—I have no doubt whatever of that, but as the law stands at present it would appear that there is some difficulty as to whether there is power to ~~enforce payment~~ of fines. There is certainly no machinery to enforce payment.

93. *By Mr. Wise.*—Would a warrant of the President of the Senate or the S~~~~ker be sufficient authority to the keeper of any State gaol to hold in prison a person found guilty of any breach of privilege?—I think so, if the warrant were directed

to the keeper of the gaol. It seems to me that the warrant would authorize the detention of the person mentioned in it. The English practice has been, I think, to commit the person to the custody of the Serjeant-at-Arms, and he is then sent either to the Tower or to Newgate. I see no reason why the warrant should not authorize detention in a State gaol, though I am not at all sure that there would be any obligation on the part of the State gaoler to receive the prisoner. I doubt whether section 120 of the Constitution, which provides that the States shall make provision for the detention in their gaols of persons convicted of offences against the Commonwealth, would apply to a case of commitment for contempt by either House of the Legislature. That would hardly be a conviction in the ordinary sense in which the word is used in English law.

94. *By Mr. Bamford.*—You say that Parliament has power to prevent debates from being published, and has no power to order publication. Am I to understand that, supposing that what might be considered libels or defamatory assertions, were made in Parliament, and were published as an extract from *Hansard*, the publisher would be liable?—In the absence of a law on the subject, Parliament has power, but an individual House of Parliament has not power, to make such publication privileged against any action for libel outside the House. A Parliament can circulate anything it likes, but an order of one House does not privilege publication to the world at large in the absence of legislation by Parliament to that effect.

95. Do you not think that when the corporate honour of Parliament is assailed the High Court only should be appealed to for the purpose of vindicating the honour of Parliament?—That is rather a question of policy. I can conceive of reasons which might make it desirable, in particular cases at all events, not to go to any inferior Court, but to the High Court itself. So much would depend upon particular cases. There might be cases in which the honour of Parliament was assailed, but in which adequate redress could be obtained in a Court of summary jurisdiction. There might be other cases in which it was desirable to go to the High Court. Perhaps it might be advisable, in considering any legislation on the subject, to put in power to that effect.

96. *By Senator Turley.*—I understood you to say, Mr. Garran, that an ordinary offence might be tried in a summary manner without a jury, but that indictable offences must, under the Constitution, go to a jury?—That is so. That is to say, where a charge was brought against any one, and it was made the subject of an indictable offence, the Court could not deal with it without a jury.

97. *The Chairman.*—That is so under the Western Australian Act. These offences against Parliament can only be dealt with if they are declared to be misdemeanours, and, therefore, only by a jury?—That is so.

98. *By Senator Turley.*—Then the Commonwealth Parliament would not have power to say that these cases shall be dealt with in a summary manner?—The Parliament can declare what offences shall be indictable, and what shall be dealt with summarily, but if Parliament makes an offence indictable, any trial on indictment must be by jury. But Parliament can provide that the offence shall be punishable summarily if it likes; or Parliament can give an option, allowing the offence to be tried either on indictment or summarily. If it were tried

summarily, it would not be tried by a jury; but if on indictment it must be.

99. An indictment means a summons to the person who is charged?—An indictment is in the nature of a prosecution by the Attorney-General, as representing the Crown. A summary proceeding is usually upon information by a private individual.

100. *By Senator Colonel Neild.*—Or a police officer?—Or a police officer, but, if so, in his capacity as a private individual, and not because he is a police officer.

101. *By Senator Turley.*—In the event of an Act being passed of such a character as you suggest, could a case be taken directly to the High Court without going to any of the ordinary Courts first?—If the Act so provided. The High Court is a Court of original jurisdiction, and if Parliament thought fit to provide that it should be approached in the first instance, that could be done.

102. Parliament could provide that the case should only go to the High Court?—That could be done if Parliament thought fit.

103. *By the Chairman.*—The offender could be summoned before the High Court to answer a charge of contempt of Parliament, could he not?—Yes.

103A. An ordinary summons, returnable before a Judge of the High Court, could call upon a person to show cause why he should not be committed to prison for contempt of Parliament?—That is so.

104. An ordinary summons, a rule *nisi*?—That is so.

105. Do you think that any discretion should be vested in the Judge of the High Court as to whether he should issue such a summons?—That is assuming that that was the mode of procedure prescribed?

106. Yes?—I should think that if Parliament thought it right to direct the offender, or the accused, to be brought before the Court he ought to be so brought. Of course, the discretion of the Court would come in, in deciding whether to commit him or not.

107. Do you think that an application for a summons ought to be made on affidavit?—That would be, I suppose, an affidavit by the Speaker or President?

108. Or of any authorized officer?—I do not see the necessity for an affidavit if you have a resolution of the House.

109. You would have to prove that?—You would need to have it proved, but the Act would make the provision. I think that something under the hand of the Clerk of the House, or of the Speaker, should satisfy the Court without any oath.

110. Do you think it would be necessary to have an affidavit declaring the offence?—In a criminal trial the mode of affidavit might be undesirable.

111. The procedure might be affidavit plus trial?—I am inclined to think that the trial of the offender would be better. Affidavits are not very satisfactory methods of eliciting the truth.

112. *By Senator Chataway.*—Would it not be necessary, having remitted a case to the High Court, to leave it to the Court; would it not be a matter for the Judge to decide whether he would deal with the case by trial or affidavit?—I think that it would be in the Judge's hands, or in the hands of the Court, which would prescribe rules of procedure. Very often, in investing the Court with jurisdiction, it is common to lay down its procedure with a certain amount of definiteness.

113. *By Mr. Bamford.*—In connexion with the matter with which we are dealing, is it your opinion that we can pass legislation of a retrospective character?—It depends a great deal on the nature of the legislation. There are two questions—the question of the constitutional validity of retrospective legislation, and the question of propriety in the ordinary sense. It is generally recognised, I think, that legislation may properly be retrospective when it deals with a matter of procedure only, and not with substantive rights. But I am inclined to think that useful legislation of this kind would probably be ~~more than~~ legislation with regard to more than procedure only. I should think that it would involve the mode of punishment. It would be necessary, for instance, to enable imprisonment for a fixed term to be imposed, and probably it would be necessary to make a statutory offence what was formerly not a statutory offence. It appears to me that that would be an alteration of substance coming within the rule that an Act is not to be construed as retrospective unless at any rate it is made clear from its words that it is meant to be. I incline to think, too, that that might raise a question as to the validity of the Act. We have never had any definite decision as to how far the Commonwealth can impose retrospective legislation. There was the case of the *Colonial Sugar Refining Company against Irving*, in which an Excise levied by the Commonwealth on sugar in the hands of the ~~company~~ was held to be good. But I do not know whether it would be held to be necessary for the "peace, order, and good government" of the Commonwealth, that Parliament should create an offence and impose a punishment for an act which at the time it was committed was not an offence against the law of the Commonwealth, and had not that punishment attached to it. The question seems to me to be a very difficult one to answer definitely, in the absence of any clear idea as to what the nature of the proposed legislation is. One would have to see the actual enactment before expressing any definite opinion as to whether it could be made retrospective or not.

114. *By the Chairman.*—It would not be creating a new offence; you admit that?—No; I think it would not be creating a new offence. It would be an offence that was previously a breach of the *lex et consuetudo Parliamenti*, but not a criminal offence under the statute law of the Commonwealth. That seems to me to be something more than a matter of procedure. In the case to which I have referred—the *Colonial Sugar Refining Company against Irving*—I think it is reported in the 1905 Appeal Cases—the Court held that the question whether there might be an appeal to the High Court or the Privy Council was a question of substance, not of procedure, and therefore that the Commonwealth Judiciary Act, which provided that there should be no appeal in certain cases, and that the only appeal should be to the High Court, did not apply to actions instituted before the Act was passed.

115. We have been asked to investigate certain charges and accusations made against Parliament during the current session by certain newspapers and persons. They are recent cases. I wish to ask your opinion on this question. Could we summon the proprietors of any of those newspapers or the persons alleged to have libelled Parliament, before us, and examine them on oath as witnesses?—I think so.

116. In what way. Have we power to summon witnesses?—I think you can summon them, and call upon them for explanation.

117. How could we get them here?—If they did not obey the summons, then I think the House might, through the Speaker, issue his warrant for their arrest, and bring them before the Bar of the House.

118. Has this Committee power to summon them?—Do you mean for purposes of punishment?

119. No; for examination?—Yes; I am inclined to think that the Committee can summon witnesses, but it cannot administer an oath.

120. Suppose we were to issue a summons to the proprietors of the *Bulletin* calling upon them to come and give evidence, and they refused to come; what could we do?—I am not sure what the law would be as to that. I did not come prepared to answer that question. I recollect that Parliament is engaged in considering a Bill for the purpose of making its powers clear in that respect. There seems to be a considerable amount of doubt as to what those powers exactly are. I am not prepared to say off-hand what the powers are.

121. There are two standing orders of the House of Representatives in regard to witnesses. They read as follows:—

> Witnesses, not being members, shall be ordered to attend before the House, or a Committee of the Whole, by summons under the hand of the Clerk of the House, or before a Select Committee, by summons under the hand of the Clerk attending the Committee.
>
> If a witness fails or refuses to attend or to give evidence, the House, on being acquainted therewith, can deal with the matter.

So that it would all depend on what the House would do?—The question would be whether it is a privilege of the House in the ordinary sense to compel the attendance of a witness. I should think that it is a power or privilege of the House to enforce the attendance of witnesses; and, that being so, I should say that disobedience of such an order would be a breach of privilege.

122. What then?—Then comes the same process, the House orders the Speaker to issue his warrant.

123. And the Serjeant-at-Arms arrests the offender?—Yes.

124. And in the ultimate resort that is the only remedy at present?—That is the only remedy at present.

125. We have now followed the matter down to the root. Do you think there is a necessity for the passing of the Parliamentary Witnesses Bill at present before Parliament?—I think there is a necessity for it. Parliament might have powers, but they are unwieldy powers when they come to be exercised.

126. You think that it is highly necessary that the Parliamentary Witnesses Bill should be passed as expeditiously as possible before another such question arises?—I think so, certainly.

127. Have you seen the Parliamentary Witnesses Bill?—I have. It has been before the draftsman on many occasions.

FRIDAY, 22ND MAY, 1908.

Members present:

Sir JOHN QUICK, in the chair;
Senator Chataway,
Senator Henderson,
Senator Colonel Neild,
Senator Turley,
Mr. Bamford,
Mr. Wise.

William Harrison Moore, Professor of Law in the University of Melbourne.

128. Have you considered the series of questions submitted to you by this Committee?—I have.

129. What are the powers, privileges, and immunities of the Senate and the House of Representatives provided in section 49 of the Constitution?—I cannot do better than answer the question in the words of the section, because they seem to be so explicit as to leave very little room for interpretation. It reads—

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

That is perfectly general, and it puts us on an inquiry as to what are the powers, privileges, and immunities of the Commons House of Parliament, its members, and its Committees. Those powers and privileges can be gathered from well-known works on the subject; but in Quick and Garran's *Annotated Constitution*, at pages 501 and 502, there is an enumeration which seems to me to cover the ground exactly.

130. Do you think that the Federal Parliament, by declaratory Act, could arrogate to itself powers, privileges, and immunities in excess of those which are now enjoyed by the House of Commons?—I think that it could, subject to this qualification, that the powers, privileges, and immunities that it took would have to be reasonably relevant to either House, its dignity, the effectiveness of membership, and so on. The question of what is "reasonably relevant" arises under a great many powers in the Constitution. It is a very difficult question to define, save in relation to particular cases. To take a particular case, the House of Commons has not, according to the better opinion, the power to fine. I do not see why, under this provision in the Constitution, the Parliament should not declare that either House should have the power to fine, either in lieu of or in addition to the power to imprison. I should think, on the other hand, that it could not say that nobody but a member of Parliament should, for instance, wear a white hat. That would not be "reasonably relevant" in any sort of way to the effectiveness of membership; it is entirely outside the subject and probable scope and intent of the power.

131. I believe it is a fact that at present the House of Commons, and consequently either House of the Federal Parliament, could only order imprisonment for contempt during the currency of a session?—That is so.

132. Then, under section 49, the Federal Parliament could pass a measure providing, as a punishment for contempt, imprisonment for a definite period?—I should think so.

133. *By Mr. Bamford.*—That is beyond the term of the session?—Yes.

134. *By the Chairman.*—In the existing state of the law, could the Senate or the House of Representatives enforce its powers, privileges, and immunities, and in what way?—I think so, in any way that has been usual in the case of the House of Commons. It could charge its officers, or some other person, with the duty of arresting, bring the person arrested to the bar, and then proceed to award such punishment as has been customary in the House of Commons—that is an admonition or a reprimand by the Speaker or imprisonment.

135. It could only arrest by its own officers, I presume?—I should not like to express a final opinion about that. I should have thought that any person who was entrusted with the warrant of the Speaker would be, for that purpose, an officer of the House.

136. Yes, but not a servant of the House?—I should think so for that purpose. I had not considered that question, and I would not like to give a final answer now. What seems to me to be the sacred thing is the warrant of the Speaker.

137. The Speaker could not put his warrant in the hand of, say, a policeman and ask him to enforce it?—I should have thought that he could.

138. The policeman, being a State officer, would not be bound to obey him?—No; but if he did obey him the warrant would be a good one, and I should take it well executed.

139. If we could get the police authorities to undertake to enforce the warrant of the Speaker or the President, it would be a good arrest?—I believe that it would be a perfectly good arrest, but I agree that the policeman would not be bound to execute the warrant.

140. Then the only effective method of arresting offenders and bringing them to the Bar which either House of the Parliament has at its command is by the Sergeant-at-Arms in the case of the House of Representatives and by the Usher of the Black Rod in the case of the Senate?—I should say so.

141. Unless an agreement or a convention were entered into with the States to allow their police authorities to enforce a warrant?—Yes.

142. Is any declaratory Act necessary to enable the Senate and the House of Representatives to enforce its powers, privileges and immunities?—Certainly it is not necessary.

143. Would it be advisable?—I should think not, for the reason that, if you proceed to pass a declaratory Act, you must do one of two things. Either you must proceed in the general ~~in each case~~, and then you do no more, it seems to me, than re-enact a provision of the Constitution; or you must descend to particulars, and then there is always the danger that in descending to particulars you may have omitted something.

144. Would the warrant of the President or the Speaker be sufficient authority to arrest and bring to the bar of either Chamber any person charged with breach of privilege?—I think so. Originally it was very commonly believed that the powers of colonial Legislatures in regard to commitment were of a limited kind and restricted to commitment for breach of some specific privilege. In the case of Glass against the Speaker of the Legislative Assembly of Victoria—a case which, I daresay, has been referred to—the Privy Council held that the power to commit for contempt was in the case of the Victorian Assembly, as in the case of the House of Commons, a substantive power, and that there

was no authority to go beyond it in any Court.

145. It was held, I think, that the warrant might be general?—Yes, it is sufficient that the person is held in custody under a warrant of the Speaker. That being so, the position is exactly the same as in the case of a commitment by one of the superior Courts, and the cause of commitment, its legality or otherwise, could not be inquired into.

146. Would the warrant of the President or the Speaker be sufficient to hold any person charged with and declared guilty of any breach of privilege?—I think so, in view of the decision to which I have just referred. The power to arrest and the power to hold stand on the same footing.

147. Has the Senate or the House of Representatives any authority to impose and enforce fines for breach of privilege?—That must depend upon whether the House of Commons has any such power. I think that it is now taken as practically certain that it has not. It is a matter on which there has been doubt, and I find that in the edition of *Odgers on Libel and Slander*, published in 1906, Mr. Blake Odgers—who is a great authority on the law of libel and slander, and who, if I remember aright, was for some time a member of the House of Commons—states that it has the power to fine. But I think that that statement appears in the book by inadvertence, and that the true position is that the House of Commons has no such power. There was, as you know, a great dispute at various times as to whether it is to be regarded as a Court of record. If it is to be regarded as a Court it would have the power to fine, but the better opinion now is that its privileges rest on a different basis, that it is not a Court, and that it has not the power to fine.

148. Can the Commonwealth Parliament, by appropriate legislation, delegate to Courts of Law jurisdiction to deal with persons charged with offences against Parliament, or breaches of parliamentary privilege?—In answering the question I would except a little to the term "delegate." I have no doubt that the Parliament could declare that the offences which it has been in the habit of punishing, or which it has been regarded as having the power to punish, should be dealt with in Courts of Law rather than at the bar of either House. But I do not think that that would be strictly an exercise of the power of delegation. It would be simply that such things, being against the law of the land, were the subject of prosecutions in the appropriate Courts. I except to the term "delegate" for the reason that there is some question as to how far under the Constitution the Legislature could actually delegate any power either to the Executive or to the Judicature. That is a difficult question, which some day or other will, no doubt, have to be determined. In regard to this particular power of punishing for contempt, I should very much doubt whether the Parliament could constitute, say, a special commission not consisting of members of Parliament at all, and declare that that commission should have the power of punishing persons for offences. That, to my mind, would be a delegation, and as a delegation it might not be lawful. But I do not think that it would be in any sense a delegation to declare that that particular kind of offence against the law of the land should be the subject of indictment or criminal proceedings in the ordinary Courts of the country. If that were done, I should suppose that the trial would have to be by jury, in view of section 80 of the Constitution.

149. That is, if the offence were declared an indictable one?—If the offence were declared an indictable one. I suppose you suggest, as an alter-

native, punishment on summary conviction?

150. Yes?—If it were punishable by summary conviction, that no doubt could be provided for, but if it were made an indictable offence it would have to go before a jury.

151. But it need not be made an indictable offence?—Yes.

152. Parliament could declare it to be an offence against the Act triable by a Judge of the Supreme Court or a Judge of the High Court, or even triable in a Court of Petty Sessions exercising Federal jurisdiction?—That raises a constitutional question of some importance as to what is the meaning of this provision in section 80 of the Constitution—

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury.

153. You are aware that "the trial on indictment of any offence" means the trial of those offences which by law are declared indictable?—Yes.

154. It is a matter of declaration as to what is to be indictable?—Yes.

155. If jurisdiction were given to the High Court or to, say, a Justice of the High Court, to deal with this class of offence, would that become a branch of the judicial power of the Commonwealth?—If it did not become a branch of the judicial power, I should think that it was a delegation of power, and therefore possible—I do not by any means say necessarily—open to the very difficult questions that arise on the subject of delegation generally. As you know, that opens out a very broad question as to how far under a Constitution such as ours we follow the very stringent provisions on that subject which have been, by interpretation, read into the American Constitution.

156. An offence against the Customs Act triable by, say, the High Court becomes a part of the judicial power?—Yes.

157. Consequently an offence against the Parliament triable by the High Court would also become a part of the judicial power?—Yes, I take it that it would.

158. So that there cannot be any doubt about the jurisdiction of the High Court to deal with such offences?—I should think not. Take a particular matter connected with the powers of Parliament wherein it has parted with its jurisdiction to the Courts. The construction of the validity of elections is an instance in which that power has been exercised.

159. That becomes a branch of the judicial power?—Yes.

160. Because it arises under a law passed by the Parliament?—I take it so.

161. Then, assuming that such offences were not declared to be misdemeanours or indictable offences, I apprehend that the High Court or any Court vested with jurisdiction could deal with such cases in a summary way?—I take it that they could.

162. Could Commonwealth legislation relating to procedure for breach of privilege be made retrospective, so as to cover offences during the current session of Parliament?—Taking the question in the terms in which it is set out in this printed paper, if the Act referred simply to a matter of procedure, I should say so. If it did not refer to procedure—if, for instance, it proceeded to create a new offence—I think that it is doubtful whether it could.

163. Do you not think that under the Constitution the Federal Parliament could pass retrospective legislation?—I think that it has a very consi-

derable power of passing retrospective legislation; but on the definition of "legislative power," I am merely expressing a doubt which has arisen in my mind in dealing with the Constitution—there is some doubt as to whether that would extend to declaring to be an offence something which had been done before the passing of the Act. There has been before the High Court one case in which that doubt was glanced at. It was in regard to the retrospective operation of the Customs Act, and something was said by the Chief Justice to indicate that, in deciding the case in respect of the retrospective operation of some provision of that Act, they were not deciding the question as to whether the Parliament could declare to be an offence something which was not an offence at the time when it was done.

164. It is not proposed to declare something an offence which was not originally an offence, but merely to create another jurisdiction to try the offence?—That, I think, could be done.

165. That would not be a violation of the rule against retrospective legislation?—I think not.

166. It would be a matter of procedure?—Yes. Supposing that the Act dealt with procedure, I do not see any difficulty about the matter at all; but, if it did something more—if, for instance, it imposed a fine or gave power to impose a fine—I should think that that would stand on a different footing, and it would then be arguable that it could not apply to something that took place before it was passed.

167. You think that to create a new penalty would be a substantial act?—Yes, that is something different from procedure.

168. What advice or opinion relating to the foregoing matters are you prepared to offer?—I do not know that I have anything in general to add. I have dealt with the law of the matter so far as it appeared to be necessary for the purposes of this inquiry, and so far as was covered by the printed questions. I do not suppose that you desire that I should enter upon other questions of construction which might arise on, say, section 49. Take, for instance, the provision that "The powers of the Senate and of the House of Representatives shall be such as are declared by the Parliament," and so on. What is the meaning of "powers" there? It certainly would not include an addition of substantive powers in the shape of new subjects of legislation or anything of that kind. That has to be remembered in connexion with the section, and, further, of course, that it has to be read subject to the Constitution. In a number of matters, for instance, in regard to financial powers, the Constitution has specifically defined what the powers of the two Houses respectively are to be, and the power of Parliament under section 49 is, of course, limited by those provisions. I will be very glad to answer any questions so far as I am able to do so, but I do not know that I have any general observations to make.

169. *By Mr. Bamford.*—Did I understand you to say that you did not think that a declaratory Act is necessary?—I do not think it is necessary at all, and, if I may say so, I should very much doubt whether it is advisable.

170. *By Colonel Neild.*—With reference to the question of giving effect to an order of either House of the Parliament in the matter of arrest, in your opinion would it not be competent for either House to appoint, by resolution, any State police official

to give effect to any order for arrest?—Yes, subject to this qualification, that he would not be bound to carry out the warrant, except with the permission of his official superiors.

171. That is the rule which applies now to Commonwealth matters?—Yes. The general rule on the subject of the relation of Executive officers I take to be this, that in the Constitution there is nothing which prevents the Commonwealth from intrusting the execution of its laws to State officials, but that the effectiveness of that depends upon the extent to which a State would allow its officers, whom it engaged and appointed for the performance of State functions, to co-operate with the Commonwealth.

172. Then any difficulty of the kind would be no greater in the matter of a request by either House of the Parliament for the intervention of a State official than now exists in connexion with giving effect to Commonwealth laws in the same way?—Precisely the same.

173. *By the Chairman.*—I presume that in order to authorize police officers to enforce Federal legislation that authority should be given by statute?—I think that it should, excepting that so far as the privileges of either House are concerned, it seems to me that the essential thing—the thing which really gives the authority—is the warrant, and that if a warrant under the hand of the Speaker is put into the hands of any person whomsoever—an officer of the House or an officer of the Commonwealth not connected with the House, or an officer of the State, or a mere private person—it could be properly executed by him, and would be as good and effective as it would be if placed in the hands of the Sergeant-at-Arms.

174. *By Senator Chataway.*—You were speaking just now of the disadvantages of a declaratory Act if it went into particulars. Would it not be possible to declare our powers, privileges, and immunities with a saving clause that they are not in derogation of any others?—Yes; that would be possible.

175. *By the Chairman.*—But you thought that it would be wise to deal with those powers, privileges, and immunities one by one, so to speak, as they arose, and as is necessary to bring them into operation—that is without a declaratory Act, and in general, too?—I should think that that would be the wiser course. I cannot see any very great advantage that is to be gained from a declaratory Act, unless the idea is that the public would be better informed as to what privileges the Houses of Parliament claimed. Save for that, I cannot see that there is any advantage at all in a declaratory Act.

176. People can find those privileges by referring to the Standing Orders, or to any work on the Constitution?—Yes; and they are just as likely to seek out those sources as to seek out provisions in the statute-book, I should think.

177. Have you anything else to add?—Nothing.

APPENDIX A.

ANSWERS TO QUESTIONS SUBMITTED TO PROFESSOR PITT-COBBETT, M.A., D.C.L., OF SYDNEY UNIVERSITY.

I. In my opinion, in default of express legislation, the effect of section 49 is to confer on the Senate and House of Representatives all those powers, privileges and immunities, whether corporate or personal, which belonged to the House of Commons at the time of the establishment of the Commonwealth, in so far as such powers or privileges are enforceable by local machinery [as to which see below]; and to incorporate these in the Constitution and law of the Commonwealth; of which all courts in the Commonwealth would be required to take judicial notice. The powers and privileges of the House of Commons, although they have never been the subject of precise legal definition, are yet ascertainable by reference to established usage and the decisions of the English Courts.

[This conclusion is based primarily on the terms of section 49, which are sufficiently explicit to render it unlikely that they would be cut down by reason of their derogating from the liberty of the subject. It is also borne out by the judgments both of the Full Court and the Privy Council in *Dill* v. *Murphy* (1 Moo. P.C. N.S. 487); and on the question of judicial notice by the judgment of the Privy Council in *The Speaker of the L.A. of Victoria* v. *Glass* (L.R. 3 P.C. at 572)].

II. Section 50 of the Constitution, of course, contemplates the making of rules and orders by each House, with respect to the mode in which its powers and privileges may be exercised and upheld; and one Standing Order [No. 80 H.R.] has, I see, already been adopted with respect to this matter. But even in default of the adoption of such rules, it appears to me to be competent to either House in cases of alleged breach of privilege, to adopt resolutions requiring the attendance of the party accused—to enforce such attendance by warrant under the hand of the President or Speaker as the case may be (and for this purpose, if necessary, to call in aid the services of the State authorities)—and after hearing the accused to adopt, if thought fit, a resolution for his committal for breach of privilege; and to give effect to such committal by warrant under the hand of the President or Speaker.

[This conclusion is based on the provisions of section 49; and of the decisions of the well-known English cases such as *Stockdale* v. *Hansard* (9 Ad. and E. 1), the case of the Sheriff of Middlesex (11 Ad. and E. 273), *Burdett* v. *Abbott* (14 East 137), *Howard* v. *Gossett* (10 Q.B.D. 359); as well as on the decision in the case of *The Speaker of the L.A. of Victoria* v. *Glass* (at p. 570 *et seq.*)]

III. No declaratory Act appears to be *necessary* to enable the Senate and House of Representatives to enforce their powers and privileges. At the same time if either House should desire to take full advantage of the powers conferred on it by the Constitution there can be no doubt—(*a*) That the adoption of rules and orders under section 50 would obviate many difficulties; and (*b*) That the passing of a declaratory Act would serve to make the law more clear and explicit, and might also serve to avoid the raising of some awkward questions. For my part, however, I should venture to submit that the passing of a declaratory Act is even more important for the purpose of limiting the scope of the powers and privileges otherwise conferred by section 49 which, as they stand, appear to be altogether inconsistent with that distinction between the legislative and judicial powers, which is drawn both by our own Constitution and by that of the United States; and the existence of which, under the United States Constitution, led to a denial of the right of Congress or of either House, to exercise any general power of punishing for contempt:—c.f. *Kilbourn* v. *Thompson* (103 U.S. 168).

IV. In my opinion, the warrant of the President or the Speaker would be a sufficient authority to bring to the bar of either Chamber, any person charged with any breach of privilege.

[See answer to question VI.]

V. In my opinion, the warrant of the President or the Speaker, would be a sufficient authority—assuming the procedure to have been regular as regards notice and opportunity of defence—to hold any person committed to the custody of the proper officers of either House, who had been found guilty of any breach of privilege.

[See answer to question VI.]

VI. In my opinion, the warrant of the President or the Speaker would be a sufficient authority to the keeper of any State gaol to hold any person found guilty of any breach of privilege.

[This conclusion is founded on the terms of section 49 of the Constitution, and on section 5 of the Commonwealth of Australia Constitution Act; the judgments in *Stockdale* v. *Hansard* (9 Ad. and E. 1), and the case of the Sheriff of Middlesex (11 Ad. and E. 273); and on the procedure adopted in Grissell's case (May, *Parliamentary Practice*, 10th edition, p. 88; and see also *Bourinot*, p. 198)].

But the detention both in this, and the preceding cases (IV. and V.), would only be warranted during the continuance of the session; although it would be competent to either House to recommit an offender in the ensuing session if it was thought that he had not been sufficiently punished.

[This conclusion is founded on the practice as stated in May, *Parliamentary Practice*, 10th edition, p. 88.]

If, in any such case, a writ of *habeas corpus* were sued out, and a "GENERAL return" were made to the writ, it would not, I think, be competent to any court to release the party imprisoned, because the return did not specify the grounds upon which he had been adjudicated guilty of contempt. Nor would any court, in such a case, be at liberty to go behind the committal, and to inquire into the facts constituting the alleged contempt. To an action of false imprisonment, moreover, brought by a person arrested or imprisoned for contempt, against any officer acting under the orders of either House, such a commitment could be ~~effectively~~ really pleaded in bar to the jurisdiction.

[This conclusion is based on the judgments in the case of the Sheriff of Middlesex (11 Ad. and E. 273), and other cases previously referred to; as well as on the case of *Lines* v. *Russell* (19 L.T. 364).]

VII. Neither the Senate nor the House of Representatives has any authority to impose or enforce fines for breach of privilege. Their powers are only the powers of the House of Commons; and such a power, on the part of the House of Commons, which was doubted and denied during the most arbitrary times, has long since been abandoned.

[This conclusion is borne out by May, *Parliamentary Practice* at p. 90; and by an explicit statement to that effect by Lord Brougham, L. Ch., in the House of Lords on the 21st April, 1821.]

VIII. The Parliament of the Commonwealth, unlike that of the Dominion of Canada, has unrestricted power to declare its powers, privileges, and immunities, and to make such provision for their enforcement as it may think fit.

In view, moreover, of the fact that it is not itself a delegate of the Imperial Legislature, it could, I think, by appropriate legislation, delegate to courts of law jurisdiction to deal with persons guilty of offences against Parliament or breaches of parliamentary privilege; so long as it did not arrogate to itself any power, privilege, or immunity outside the scope of section 49 of the Constitution.

[This conclusion is based on the terms of section 49; *Powell* v. *The Apollo Candle Co.* (10 App. Ca. 282); and the view adopted by the authors of the "*Commentaries on the Constitution*" at p. 506.]

IX. The Parliament of the Commonwealth could, I think, by appropriate legislation, empower such courts to deal with such offences against Parliament or breaches against parliamentary privilege, in a summary way; although it might perhaps be a wise precaution in view of possible deductions from section 80 of the Constitution, to give persons accused of offences such as criminal libel, which would otherwise be tried by indictment, a right to elect to be tried either summarily or by jury.

X. Much, I think, would depend upon the nature of such legislation. If such *retrospective* legislation, even though within the scope of section 49, were to bestow powers and privileges or to prescribe punishments in excess of those at present vested in the House of Commons, its validity might conceivably be questioned on the ground of its constituting an encroachment by the Legislature on the judicial power.

[This conclusion rests on the probability that the principles adopted by the United States Court with respect to legislative encroachments on the judicial power might be applied to the Constitution of the Commonwealth. Cf. Cooley, *Constitutional Limitations*, at p. 111.]

XI. Viewing this question not from the standpoint of existing law, but from the point of view of justice and expediency, I would venture to submit (1) that each House of the Commonwealth Parliament should be invested by express legislation, with sufficient authority both over its members and over strangers, to protect itself from insult or interruption during the conduct of its business; and also to protect its individual members from insult or interruption in the actual discharge of their parliamentary duties (2) but that, for the rest, the punishment for such offences as libel or other alleged contempts, should be left to the operation of the ordinary law, and to trial by *disinterested* tribunals, possessing *adequate* powers of punishment.

[My reasons for entertaining this opinion are shortly as follow:—(1) A political assembly has never been, and never will be, capable of exercising judicial functions with that calmness and impartiality which are essential to their proper discharge. (2) Trial by an *interested* tribunal must always be foreign to British ideas of justice. (3) The assumption of judicial powers by either House of the Commonwealth Parliament would—having regard to the distinction drawn in our Constitution between the legislative and judicial power—be altogether anomalous. Such powers have, on this ground, been denied to the Congress of the U.S.A. [Supra]. Nor, is it desirable in the interests of freedom that the functions of making law and applying law should ever be vested in the same hands. (4) The assumption by either House of the Commonwealth Parliament of powers and privileges even equivalent to those possessed by the House of Commons—and especially of the right to constitute itself the sole judge of what amounts to a breach of privilege or contempt, and to withhold its action from the scrutiny of its courts, would really constitute an assumption by each branch of the Legislature of an authority above that of the *ordinary* law of the land. (5) The powers and privileges exercised by the House of Commons are in themselves wholly anomalous. They date back to a time when barons, knights, and burgesses formed one House, which possessed judicial as well as legislative powers. The exercise of such powers and privileges by the House of Commons has, in fact, been grossly abused; and has led to incidents as discreditable as the persecution of Floyde, the oppression of Ashby, and the punishment of persons politically opposed to the views of the majority, as in the cases of Mist and Murray. The exercise of these powers in later times has nearly always proved ineffective; and has often served to impair both the dignity and usefulness of the House. (6) In the case of a new and comparatively inexperienced legislative body, eager to push its powers to their utmost limit, and perhaps less amenable to the restraining influence of public opinion and the power of the press, the danger of such powers being used oppressively would, I venture to think, be even greater. (7) With respect to libels more particularly, I should submit (*a*) that so far as relates to libels on the individual members, these should be left to the operation of the ordinary law; and (*b*) that as regards corporate libels (if one may use the term), the reputation of either branch of the Legislature is not so delicate and fragile as to require the possession of summary or exceptional powers to restrain attacks upon it.]

(Sd.) PITT CORBETT.

APPENDIX B.

Parliament House, Melbourne,
April 8th, 1908.

Sir John Quick,
Chairman,
Parliamentary Privilege Committee.

DEAR SIR,

Herewith please find a letter from Mr. O. C. Beale, who requests me to forward same to the Chairman.

Yours truly,
WILLIAM H. WILKS.

Trafalgar-street, Annandale,
6th April, 1908.

DEAR SIR,

On page 9794 of *Hansard* you are reported to have said:

> "It will be remembered that the honorable member for Lang asked the honorable gentleman whether his attention had been directed to the report of an interview with Mr. O. C. Beale, who, by inuendo, charged honorable members with corruption. His attention was also called to an article in *The Bulletin*, which, by inference, made a similar charge against many honorable members."

Firstly, I refuse to be linked in any way with the statements made in the newspaper as to corruption of members of the House of Representatives, which accusations I read with astonishment and complete disbelief. I have never expressed or implied dishonour, still less corruption, upon the part of any members of the Parliament, but, on the contrary, have at many times and places asserted and defended their and its good name.

I handed to yourself copies of a German newspaper containing direct charges of corruption against members of the Commonwealth Parliament, founded upon an extract from a London paper, which was also untruthful. Those statements which are out of any control from Australia, I contradicted. But they have their source in Australia, and for that reason I showed them to you. Certainly they are beneath contempt, and mere contradiction may suffice.

I have repeatedly, in circulars addressed to members, drawn attention to the fact of money having been subscribed by persons in the piano importing trade to maintain lobbyists to influence members of Parliament by representations or otherwise. That is not an accusation of corruption in any sense, as has been alleged, nor does it even imply attempts at corruption on the part of lobbyists. To representations there can be no objection, for they can only be true, but against the other part I have protested by circular (which has been stated by members themselves to be the legitimate means of access), namely, misrepresentations and, still worse, actual inventions. Statements have been supplied by lobbyists to members, which have appeared in *Hansard*, wholly untrue and injurious, concerning my company's business. However objectionable, all that is far apart from corruption, and it is against all that that my protest has been raised.

It has not yet been denied that the traders met, subscribed money in sums of £50 and upwards specifically to maintain lobbyists, and did maintain them, whose work during months was to influence the views, and thus the votes, of members. There could be no other object, but that is not corruption. It is for Parliament to decide if the method be legitimate and worthy of extension. Inquiry is easy, by calling the lobbyists, who are perfectly well known to members, and by calling the subscribers, if needful, also.

~~Privilege Com.~~ App. B-2

As a Select Committee has been appointed for the purpose of dealing in some way with the matter of privileges and immunities of members, I ask you to be good enough, as member for this electorate, to hand this letter to the Chairman of the Select Committee when he shall have been chosen.

Yours faithfully,

OCTAVIUS C. BEALE,
Managing Director.

Hon. William Henry Wilks, M.H.R.,
Parliament House, Melbourne, Vic.

TELEGRAM FROM ANNANDALE, SYDNEY, ADDRESSED TO HON. AUSTIN CHAPMAN, PARLIAMENT HOUSE, MELBOURNE.

Please hand previous telegram and letter addressed to you as New South Wales member to Sir John Quick.

OCTAVIUS C. BEALE.

Address—Annandale.

Melbourne,

Honorable Austin Chapman, Parliament House.

At my personal inconvenience I am desirous of appearing before newly appointed Select Committee on Privileges on Saturday afternoon and Monday morning next. I leave Melbourne for London Monday afternoon, my family already travelling on the steamer to Adelaide. Please inform Chairman of Committee so that arrangements may be made.

Letter following

7.4.08

OCTAVIUS C. BEALE,
Annandale.

Trafalgar-street, Annandale,
7th April, 1908.

DEAR SIR,

I telegraphed to you to-day as per enclosed copy:

"Melbourne. Honorable Austin Chapman, Parliament House. At my personal inconvenience I am desirous of appearing before newly appointed Select Committee on Privileges on Saturday afternoon and Monday morning next. I leave Melbourne for London Monday afternoon, my family already travelling on the steamer to Adelaide. Please inform Chairman of Committee so that arrangements may be made. Letter following.—OCTAVIUS C. BEALE, Annandale."

The days stated will not interfere with the Parliamentary duties of the honorable members, and I trust that a quorum of the Select Committee can arrange accordingly.

I desire to submit a copy of printed and published accusations of dishonesty against members of Parliament, and to accompany those papers by absolute disproof of the dishonesty alleged.

Further, I desire to assist the Committee by placing within their reach means of inquiry into the machinations of persons outside of Parliament, of which I have previously complained.

I should not thus trouble you, but I am not aware of the name of the Chairman, and therefore request you to hand him the telegram and letter.

Yours faithfully,

OCTAVIUS C. BEALE,
Managing Director.

Hon. Austin Chapman, M.H.R.,
Parliament House, Melbourne, Victoria.