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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES
COMMITTEE OF PRIVILEGES

Report relating to the use of or reference to the records of proceedings of the House in the Courts

together with
Minutes of Proceedings
of the Committee

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MEMBERSHIP OF THE COMMITTEE

Mr D. M. Cameron, M.P. *Chairman*

Hon. L. F. Bowen, M.P.
Hon. C. R. Cameron, M.P.[1]
Mr W. M. Hodgman, M.P.
Mr R. Jacobi, M.P.
Mr A. W. Jarman, M.P.
Hon. L. R. Johnson, M.P.[2]
Mr P. E. Lucock, C.B.E., M.P.[3]
Mr P. C. Millar, M.P.[4]
Mr G. G. D. Scholes, M.P.
Mr W. Yates, M.P.

Clerk to the Committee
Mr L. M. Barlin

1 and 2 On 22 May 1980 the House of Representatives resolved that during consideration of this matter the Hon. L. R. Johnson, M.P., be appointed in the place of the Hon. C. R. Cameron, M.P.

3 and 4 On 22 May 1980 the House of Representatives resolved that during consideration of this matter Mr P. C. Millar, M.P., be appointed in the place of Mr P. E. Lucock, C.B.E., M.P.

CONTENTS

EXTRACTS FROM THE VOTES AND PROCEEDINGS

No. 117 of Tuesday, 11 September 1979

4 PRIVILEGE—USE OF HOUSE RECORDS IN COURT—REFERENCE TO COMMITTEE OF PRIVILEGES: Mr L. K. Johnson raised as a matter of privilege an order, dated 23 August 1979, issued by the Supreme Court of New South Wales in the case of *Uren* v. *John Fairfax & Sons Limited* to permit the use in court for a limited purpose of certain records of the proceedings of the House.

Mr Sinclair (Leader of the House) moved—That the following matter be referred to the Committee of Privileges: The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

Debate ensued.

Question—put and passed.

No. 120 of Tuesday, 18 September 1979

8 COMMITTEE OF PRIVILEGES: Mr Sinclair (Leader of the House), by leave, moved—That the Committee of Privileges, when considering the matter referred to it on 11 September 1979, have power to send for persons, papers and records.

Question—put and passed.

No. 170 of Thursday, 1 May 1980

12 COMMITTEE OF PRIVILEGES: Mr Viner (Leader of the House), by leave, moved—That, during the consideration of the matter referred to the Committee of Privileges on 23 April 1980, Mr Scholes be discharged from attendance on the committee and Mr Holding be appointed to serve in his place.

Question—put and passed.

No. 176 of Thursday, 22 May 1980

16 COMMITTEE OF PRIVILEGES: Mr Viner (Leader of the House), by leave, moved—That during the consideration of the matter referred to the Committee of Privileges on 23 April 1980, Mr B. O. Jones be appointed to the committee in place of Mr Holding, appointed on 1 May 1980, Mr Millar be appointed in place of Mr Lucock and Mr L. R. Johnson be appointed in place of Mr C. R. Cameron, and that during consideration of the matter referred to the committee on 11 September 1979, Mr Millar be appointed in place of Mr Lucock and Mr L. R. Johnson be appointed in place of Mr C. R. Cameron.

Question—put and passed.

REPORT

1. The Committee of Privileges to which was referred the matter of the extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the privileges of the House, or of its Members, has agreed to the following Report.

The reference

2. The reference to the Committee arose out of a matter of privilege raised by the honourable Member for Burke (Mr L. K. Johnson, M.P.) on 11 September 1979 and was based on an Order made by Mr Justice Begg on Thursday, 23 August 1979 in the Supreme Court of New South Wales, Common Law Division. Mr Justice Begg's ruling, in turn, arose out of the case of *Uren* v. *John Fairfax & Sons Limited* ((1979) 2 NSW LR 287) in which the Honourable Thomas Uren, Member of the House of Representatives for the Division of Reid, New South Wales, had commenced an action for damages for defamation against John Fairfax & Sons Limited, publishers of the *Sydney Morning Herald* newspaper, in relation to the publication of an editorial in that newspaper of 3 April 1975.

3. The defendant petitioned the House of Representatives on 28 August 1979 for leave to be granted to the petitioner and its legal representatives—

(1) to issue and serve subpoenas for the production of the relevant official records of the proceedings of the House as described in the Second Schedule to the petition;

(2) to issue and serve subpoenas for the attendance in Court of those persons who took the record of such proceedings; and

(3) to adduce in evidence and to make reference to and otherwise to use in its defence of the said action in Court the full and official records of the proceedings and the proceedings themselves of the House as set out in the Schedule.

4. On 30 August 1979 the Leader of the House (the Right Honourable I. McC. Sinclair, M.P.) sought leave to move a motion to give effect to the action sought in the petition. Leave was refused but following the suspension of standing orders the motion was moved by Mr Sinclair. In the ensuing debate strong objection was taken to the proposal and the debate was subsequently adjourned, and the order later discharged. On the same day the following motion was agreed to by the House:

> That the petition of John Fairfax & Sons Limited presented to the House on 28 August 1979 be referred to the Committee of Privileges for consideration and advice as to whether the petition in whole or in part or any matter raised by it can be acceded to without derogation of the privileges of the Parliament or the Members of the Parliament and if so, the form in which it might be so acceded to.

5. Before the matter could be considered by the Committee of Privileges the case was settled by consent of the parties. Advice to that effect was conveyed to the House and on 11 September 1979 the House rescinded its resolution. However, on the same day the Order made by Mr Justice Begg on 23 August 1979 was raised as a matter of privilege and the House agreed to refer the following matter to the Committee of Privileges:

> The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

Powers, privileges and immunities of the House of Representatives, and of its Members

6. Section 49 of the Commonwealth of Australia Constitution Act provides 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.

7. Except in relation to a few minor powers, viz. Parliamentary Papers Act (protection of Printer), Parliamentary Proceedings Broadcasting Act (protection of the Australian Broadcasting Commission) and Public Accounts Committee and Public Works Committee Act (provisions respecting witnesses before these committees), the Parliament has not declared its privileges and they therefore remain those of the United Kingdom House of Commons as at 1 January 1901.

8. In considering the matter, the Committee referred to the practice and precedents of the House of Commons. Relevant cases and precedents are included in the Memorandum of the Clerk of the House of Representatives, a copy of which is appended to this Report.

9. Two references are of particular relevance to the Committee's inquiry. Under Article 9 of the Bill of Rights 1688, passed to the House of Representatives through Section 49 of the Constitution, it was declared—

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

In addition, Standing order 368 of the House of Representatives provides that:

> No officer of the House, or shorthand writer employed to take minutes of evidence before the House or any committee thereof, may give evidence elsewhere in respect of any proceedings or examination of any witness without the special leave of the House.

The Inquiry

10. The Committee sought and received submissions from The Clerk of the House of Representatives, The Secretary and Deputy Secretary of the Attorney-General's Department, Canberra, Emeritus Professor Geoffrey Sawer and the Hon. T. E. F. Hughes, Q.C. Mr Hughes agreed to the appointment as specialist adviser during the Inquiry.

11. The House of Representatives' experience in cases of this nature is limited. In 1963 the House had authorised 2 *Hansard* reporters to attend in the Supreme Court of the Australian Capital Territory to produce their shorthand notebooks and prove as fact the accuracy of the *Hansard* report of a particular proceeding in the House. In 1976, in response to petitions from Mr Danny Sankey, the House granted leave for the inspection of documents tabled in the House, to issue and serve a subpoena for the production of documents in the Queanbeyan Court and for an appropriate officer to attend the Court and produce the documents. However, the Fairfax petition and the Order of Mr Justice Begg raised new issues for the House.

12. In the absence of an established practice of its own the House of Representatives has resort to the practice and precedents of the United Kingdom House of Commons. The practice of that House in relation to the production in Court of evidence relating to its proceedings is governed by 2 resolutions of 26 May 1818 in the following terms:

(1) That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House, in respect of anything that may be said by them in their evidence.

(2) That no clerk or officer of this House, or short-hand writer employed to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere in respect of any proceedings or examination had at the bar, or before any committee of this House, without the special leave of the House.

Following the adoption of those resolutions a practice was established in the Commons of presenting petitions for leave of the House to allow its records to be referred to in a court of law. There are numerous occasions on which leave of the House has been sought and granted in the manner described.

13. The practice of the House of Commons has recently been the subject of an inquiry by its Committee of Privileges. On 10 November 1978 the Commons referred to its committee a complaint 'of the production of and reference to the Official Report of Debates in this House, without the leave of the House having been obtained, at the Central Criminal Court, in the case of Regina v Aubrey, Berry and Campbell'. The submissions made to that committee and the recommendations made by it are wholly relevant and of particular interest.

14. The Committee reported to the House of Commons as follows:

> The practice of the House which prevents reference to the Official Report in Court proceedings except after leave given in response to a petition appears to have developed out of the Resolution of 26th May 1818 which in terms merely requires the leave of the House to be granted for the attendance of its servants to give evidence in respect of the House's proceedings. The Resolution continues to provide an essential protection for the House in the matters to which it strictly relates, but Your Committee consider that no purpose is served by its extension to the requirement of leave merely for reference to be made to the Official Report. They believe that the provisions of Article 9 of the Bill of Rights, reinforced by the care taken by the courts and tribunals to exclude evidence which might amount to infringement of parliamentary privilege, amply protect the House's privilege of freedom of speech. Your Committee accordingly recommend that the practice of presenting petitions for leave to make reference to the Official Report in Court proceedings be not followed in the future and that, such reference be not regarded as a breach of the privileges of the House.

15. On 3 December 1979 the House of Commons debated the recommendation of its Committee of Privileges. A motion was moved to give effect to the Committee's recommendation but the House did not conclude its debate on the matter and as at the date of this Report the recommendation of the Committee of Privileges has not yet been adopted. The long established practice of petitioning the House for its leave has continued and has been *used as recently as 5 June 1980.*

16. The practice of other Parliaments with privileges similar to those of the House of Representatives has also been examined. Of particular interest is the position in the Canadian House of Commons. The Canadian House does not insist on its leave being given for *Hansard* reports to be used in court proceedings. The Canadian Courts have recently used *Hansard* extracts for the same limited purpose for which *Hansard* was used in the *Church of Scientology of California* v. *Johnson-Smith* case (*see* page 77—part of the Memorandum of the Clerk of the House of Representatives at Appendix I), without having petitioned the House of Commons and with impunity. The Courts have also used *Hansard* for other purposes without having petitioned the House of Commons and with impunity. In fact, no petition for leave to use *Hansard* reports in Court have ever been presented to the Canadian House but, in the opinion of the Clerk of the Canadian House, if such a request were to come before it the House would satisfy itself that the *Hansard* excerpts would not be used to question a proceeding in Parliament except under the statute law prohibiting members to sit and vote while disqualified.

Parliament except under the statute law prohibiting members to sit and vote while disqualified.

17. Having examined the practice in other Parliaments the Committee directed its attention specifically to the Order made by Mr Justice Begg in the Supreme Court of New South Wales in the case of *Uren* v. *John Fairfax & Sons Limited*. In doing so the Committee recognised that His Honour's ruling was an *ex tempore* judgment given in interlocutory proceedings very close to the trial.

18. The defendant (John Fairfax & Sons Limited) had asked for an Order that certain interrogatories be answered and verified by the plaintiff (Mr Uren). Certain of the interrogatories asked the plaintiff to agree that certain speeches in the Parliament shown in photostat copies in *Hansard* as having been made by him and two other persons were in fact made by him or them. Counsel for the defendant submitted that what the defendant was seeking to do did not infringe the privilege of a House of Parliament in relation to proceedings before it but merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House—not in any way to criticise them nor to call them in question in Court proceedings, *but to prove them as facts upon which the defendant alleged comments were made in the publication sued upon by the plaintiff*. Mr Justice Begg accepted the submission and ruled that this use of the fact of what was said in Parliament would not be a breach of the privilege of Parliament.

19. In his ruling Mr Justice Begg had this to say:

> In my judgment one might pause to question whether the privilege of Parliament in relation to the mere proof of *Hansard* in a court in Australia has not been entirely waived by Parliament in this country. It is a well known fact that proceedings in the Parliament are broadcast on radio to all the world and copies of *Hansard* are freely sold for fifty cents a copy at the Commonwealth Publications Sales Department in this city. And insofar as it falls to me to decide the question, I would hold that waiver by Parliament to this extent is clearly established. (Of course I am not dealing with any question of copyright in the publication.)

20. The Committee examined the Judgment of Mr Justice Begg and concluded that His Honour was in error. The opinion of Counsel was sought and it supported the conclusion at which the Committee had arrived.

21. The Committee believes that any alleged 'waiver' of Parliamentary privilege involved in the tacit consent to, or statutory authorisation of the particular modes of broadcasting or other publication of Parliamentary proceedings referred to by His Honour should not be taken to be 'an entire waiver' of any relevant privilege in all conceivable circumstances and for all conceivable purposes. Also His Honour may be thought to have missed the point that the relevant time for determining the privileges of Parliament for the purpose of applying Section 49 of the Constitution is not the present, but rather the time of the establishment of the Commonwealth. If that point is borne in mind it is not easy to ascribe an 'entire' effect to limited forms of supposed waiver. Parliament cannot 'waive' the law of privilege (which is part of the common law) in any sense of repealing it by alleged non-enforcement. Any established head of privilege remains part of the law, available to be enforced if it is the will of one of the Houses of Parliament that it should be enforced in relation to the proceedings of that House.

22. The Committee views the possible consequences of Mr Justice Begg's Order so seriously that it believes that if the case had not been settled between the parties and had in fact come to trial, the House of Representatives would have been obliged to take action to judicially test Mr Justice Begg's Order and to preserve and protect its own privileges. It appears to the Committee that His Honour's ruling went against the judgment in the significant cases of the *Church of Scientology* v. *Johnson-Smith*

((1972) 1QB 522 per Browne J at p. 528) and *Finnane* v. *Australian Consolidated Press Limited* ((1978) 2 NSW LR 435 at p. 439) and against proper principle.

23. It appears to the Committee that an appropriate course of action for the House to have taken in those circumstances would have been to adopt a resolution authorising the Speaker to seek leave pursuant to Part 8, Rule 8 of the Rules of the Supreme Court of New South Wales to be joined as a party to the proceedings for the purpose of endeavouring to uphold, by the institution of an appeal against the Order of Mr Justice Begg, a claim that such Order involved a breach of Parliamentary privilege.

24. The Committee was concerned that as a result of the Order of Mr Justice Begg in the case of *Uren* v. *John Fairfax & Sons Limited* the answers of Mr Uren to the interrogatories may have been used by counsel in cross-examination, had the case come to trial. Clearly, had this course been allowed, it could have been used as a spring-board for questioning the motives of a Member when he made his speech in the House. Such a gross violation of the privileges of the House enshrined in Article 9 of the Bill of Rights 1688 could not have gone unchallenged by the House.

25. Similarly, had the House acceded to the precise request contained in the Fairfax petition it may well have resulted in Counsel for the newspaper seeking to cross-examine Mr Uren on his motives when he made his speech in the House.

26. The vigorous debate which occurred in the House of Representatives on 30 August 1979 on the motion in relation to the Fairfax petition appeared to the Committee to accurately reflect the strong diverse views held by Members on whether the *Hansard* report of the proceedings should be available for use in the Courts. Whilst there was a recognition of the need to assist in the administration of justice in the Courts of law there was obviously a deep concern that approval of the Fairfax request may well lead to an erosion of the most fundamental and important of all Parliamentary privileges, that is, the right of free speech in the Parliament.

27. The Committee shares the concern of those Members who were opposed to the motion and having regard to the subsequent evidence obtained by the Committee in this case believes that some of the arguments used in opposing the granting of leave have been shown to have been well based.

28. The Committee received a submission to the effect that the simplest course for the House to follow in respect of requests of this nature would be to legislate pursuant to the power conferred by Section 49 of the Constitution so as to modify the present law derived from the Common Law, from Article 9 of the Bill of Rights 1688, and from Section 49 operating on those sources. Alternatively, the House could make machinery provision by delegation to the Committee of Privileges or to a special committee of the power to grant or withhold permission to prove something said in the House, conditionally or unconditionally.

29. The Committee was impressed by this proposition. It considers, however, that at the present time there is no need for legislation to be enacted, but that the House itself should set up its own machinery to give effect to the intention of the proposal.

30. The Committee has carefully considered the evidence put before it and, in particular, the conflict which has now arisen following the interpretations of Parliamentary privilege in the cases of *Finnane* v. *Australian Consolidated Press Limited* per Needham J. and *Uren* v. *John Fairfax & Sons Limited* per Begg, J. It has reached the conclusion that where, in the administration of justice, it is sought to produce the records of proceedings of the House without derogation from the privileges of the House or of its Members, the special leave of the House should be obtained.

31. The Committee believes that the petitioning process derived from the House of Commons continues to be entirely appropriate and serves the purpose of ensuring that the House itself is apprised of the circumstances of each case and is able to grant or withhold its leave for the use of its records in Court. It appears to the Committee that from the decision of the High Court of Australia in *The Queen* v. *Richards*; ex parte Fitzpatrick and Brown ((1955) 92 CLR157), it is for the House to judge of the occasion and the manner of its exercise of an undoubted privilege and it is therefore entirely proper for the House to place conditions on the use to which it will allow its records to be put in Court proceedings.

Recommendations

32. The Committee recommends—

(1) that the practice of petitions being presented to the House for leave to refer to House records in the Courts, derived from the long-established practice of the United Kingdom House of Commons, should be maintained;

(2) that upon presentation of a petition, the House shall, at the earliest opportunity, refer the petition to the Committee of Privileges for its consideration and report;

(3) that in considering the petition the Committee of Privileges should enable the Member (or former Member) referred to in the petition to be heard on his own behalf;

(4) that the Committee of Privileges, at the completion of its deliberations, should report to the House its views on the petition and, in addition, recommend such conditions upon the production of the record or *Hansard* report as it deems appropriate in all the circumstances.

33. The Committee further recommends that the House of Representatives should resolve:

(1) that the broadcast of the proceedings in the House of Representatives and the publication of those proceedings in *Hansard* do not amount to a waiver of privilege by the House of Representatives and that the decision to the contrary by Begg, J. in the case of *Uren* v. *John Fairfax & Sons Limited* is in error;

(2) that, whilst recognising that there are statutory exceptions, such as the Parliamentary Proceedings Broadcasting Act, and common law exceptions, such as the fair and accurate reporting of the proceedings of the House by the Press, the House reaffirms—

  (a) that as a matter of law there is no such thing as a waiver of Parliamentary Privilege;

  (b) that the House has a paramount right to impose such conditions as it deems appropriate on the production of any *Hansard* report or record of its proceedings in a Court; and

  (c) that such conditions as a matter of law are binding upon the Court before which the *Hansard* report or other records of its proceedings are produced.

D. M. CAMERON
Chairman

1 September 1980

MINUTES OF PROCEEDINGS
OF
THE COMMITTEE OF PRIVILEGES

NOTE: Minutes of Proceedings, or sections of the Minutes of Proceedings, relating to an inquiry still under consideration by the Committee have been omitted

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS
PARLIAMENT HOUSE, CANBERRA
THURSDAY, 13 SEPTEMBER 1979
(31st Parliament—7th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr L. F. Bowen
Mr Jarman
Mr Lucock
Mr Scholes
Mr Yates

Reference to Committee:

The following extracts from the Votes and Proceedings were reported:

(a) No. 116—30 August 1979—recording that the petition of John Fairfax & Sons Limited presented to the House on 28 August 1979 be referred to the Committee of Privileges for consideration and advice as to whether the petition in whole or in part or any matter raised by it can be acceded to without derogation of the privileges of the Parliament or the Members of the Parliament and if so, the form in which it might be acceded to.

(b) No. 117—11 September 1979—rescinding the resolution referring the petition of John Fairfax & Sons Limited to the Committee of Privileges.

(c) No. 117—11 September 1979—recording that the following matter be referred to the Committee of Privileges: The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House or of its Members.

The Minutes of Proceedings of the meeting held on 31 May 1978 were confirmed.

The Chairman presented the following paper:

Order made on 23 August 1979 by Mr Justice Begg in the Supreme Court of New South Wales in the case of *Uren* v. *John Fairfax & Sons Limited.*

Resolved: On the motion of Mr Lucock—

That the Clerk of the House of Representatives be requested to submit a Memorandum upon the questions of privilege involved in the matter referred to the Committee on 11 September 1979.

Resolved: On the motion of Mr Scholes—

That approval of the House of Representatives be sought for the Committee, when inquiring into the matter referred to it on 11 September 1979, to have power to send for persons, papers and records.

The Committee received and noted a letter which had been forwarded to Mr Speaker for submission to the Committee.

The Committee deliberated.

The Committee adjourned until Wednesday, 19 September 1979 at 8.30 p.m.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

TUESDAY, 16 OCTOBER 1979

(31st Parliament—8th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr C. R. Cameron
Mr Hodgman
Mr Jacobi
Mr Jarman
Mr Lucock
Mr Scholes
Mr Yates

The Minutes of Proceedings of the meeting held on 13 September 1979 were confirmed.

The Chairman informed the Committee of the circumstances which prevented the Committee meeting on 19 September 1979.

The Chairman advised the Committee that he had received an extract from the Votes and Proceedings No. 120 of 18 September 1979 recording a resolution of the House of Representatives granting the Committee power to send for persons, papers and records when considering the matter referred to it on 11 September 1979.

The Chairman brought up a memorandum prepared by the Clerk of the House of Representatives in relation to the matter referred to the Committee on 11 September 1979.

Mr John Athol Pettifer, Clerk of the House of Representatives, was called and examined.

Mr Lucock, by leave, took the Chair during the temporary absence of the Chairman.

The witness withdrew.

The Committee adjourned until a date and hour to be determined by the Chairman and notified to each member of the Committee.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA
WEDNESDAY, 7 NOVEMBER 1979
(31st Parliament—9th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr L. F. Bowen	Mr Jacobi
Mr C. R.Cameron	Mr Jarman
Mr Hodgman	Mr Yates

The Minutes of Proceedings of the meeting held on 16 October 1979 were confirmed.

The Committee deliberated.

Resolved: On the motion of Mr C. R. Cameron—

That the Secretary, Attorney-General's Department, Canberra and/or his nominee(s) be requested to appear before the Committee to assist in the matter referred to it on 11 September 1979.

Resolved: On the motion of Mr C. R. Cameron—

That the Chairman, Mr Bowen and Mr Hodgman should prepare a memorandum on behalf of the Committee inviting the Hon. T. E. F. Hughes, Q.C., to appear and assist the Committee in relation to the matter referred to it on 11 September 1979.

Resolved: On the motion of Mr C. R. Cameron—

That the Chairman, Mr Bowen and Mr Hodgman be authorised to take whatever steps are necessary to facilitate the Hon. T. E. F. Hughes, Q.C., appearing before the Committee.

The Committee adjourned until Wednesday, 14 November 1979 at 4.30 p.m.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA
WEDNESDAY, 14 NOVEMBER 1979
(31st Parliament—10th meeting)

Present:

Mr D.M. Cameron (*Chairman*)

Mr Bowen
Mr C.R. Cameron
Mr Hodgman
Mr Jacobi
Mr Jarman
Mr Scholes
Mr Yates

Resolved: On the motion of Mr C.R. Cameron—

That Mr J.A. Pettifer, Clerk of the House of Representatives, be admitted to this meeting as an observer.

The Minutes of Proceedings of the meeting held on 7 November 1979 were confirmed.

The Chairman advised that arrangements had been made for the Hon. T.E.F. Hughes, Q.C., to attend the Committee on Tuesday, 20 November 1979, at 8.15 p.m.

The Committee deliberated.

Resolved: On the motion of Mr C.R. Cameron—

That the committee request a copy of an opinion prepared by the Secretary, Attorney-General's Department, in respect of the publication of pamphlet reprints of Members' parliamentary speeches.

Mr Alan Reginald Neaves, Secretary, and Mr Patrick Brazil, Acting Deputy Secretary, Attorney-General's Department, were called and examined together.

The witnesses withdrew.

The Committee again deliberated.

The Committee adjourned until Tuesday, 20 November 1979 at 8 p.m.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

TUESDAY, 20 NOVEMBER 1979

(31st Parliament—11th meeting)

Present:

Mr D.M. Cameron (*Chairman*)

Mr Bowen
Mr C.R. Cameron
Mr Hodgman
Mr Jacobi
Mr Jarman
Mr Scholes
Mr Yates

Resolved: On the motion of Mr C.R. Cameron—

That Mr J.A. Pettifer, Clerk of the House of Representatives, be admitted to this meeting as an observer.

The Minutes of Proceedings of the meeting held on 14 November 1979 were confirmed.

The Chairman advised that Mr A.R. Neaves, Secretary and Mr P. Brazil, Deputy Secretary, Attorney-General's Department, proposed to make a written supplementary submission to the Committee.

The Chairman presented a copy of an opinion prepared by the Secretary, Attorney-General's Department, in respect of the publication of pamphlet reprints of Members' parliamentary speeches.

The Chairman informed the Committee that he had today received a letter from Mr Speaker enclosing a copy of a letter from the Editorial Manager, John Fairfax & Sons Limited.

Ordered: That the letter be received and consideration of it be deferred.

The Hon. Thomas Eyre Forrest Hughes, Q.C., was called and examined.

Mr Scholes, by leave, took the Chair during the temporary absence of the Chairman.

The witness withdrew.

The Committee deliberated.

Resolved: On the motion of Mr C.R. Cameron—

That the approval of Mr Speaker be sought to the engagement of the Hon. T.E.F. Hughes, Q.C., as specialist adviser to the Committee.

Resolved: On the motion of Mr Jacobi—

That the Chairman, Mr Bowen and Mr Hodgman should prepare a questionnaire to be submitted to the Hon. T.E.F. Hughes, Q.C., for written advice to the Committee.

Resolved: On the motion of Mr C.R. Cameron—

That the Committee authorises the publication to the Hon. T.E.F. Hughes, Q.C., of pages 26 to 58 of the transcript of evidence taken by the Committee to assist him in the preparation of his brief for the Committee.

The Committee adjourned until a day and hour to be determined by the Chairman and notified to each member of the Committee.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA
THURSDAY, 13 DECEMBER 1979
(31st Parliament—12th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Bowen
Mr C. R. Cameron
Mr Lucock
Mr Scholes
Mr Yates

The Minutes of Proceedings of the meeting held on 20 November 1979 were confirmed.

The Committee deliberated.

Resolved: On the motion of Mr C. R. Cameron—

That the Committee reaffirms its desire to seek the approval of Mr Speaker to the engagement of the Hon. T. E. F. Hughes, Q.C., as specialist adviser to the Committee, subject to Mr Hughes' acceptance of a fixed fee for his services to the Committee.

Resolved: On the motion of Mr Yates—

That Professor Geoffrey Sawer and Professor Gordon Reid be invited to tender written submissions to the Committee in respect of its current inquiry.

The Committee adjourned until a day and hour to be determined by the Chairman and notified to each Member of the Committee.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA
THURSDAY, 20 MARCH 1980
(31st Parliament—13th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Hodgman
Mr Jarman
Mr Lucock
Mr Yates

The Minutes of Proceedings of the meeting held on 13 December were confirmed.

The Chairman informed the Committee that the Hon. T. E. F. Hughes, Q.C., had agreed to accept a fixed fee for his services to the Committee and that on 14 December 1979 Mr Speaker had approved of his engagement as specialist adviser to the Committee during its present inquiry.

The Chairman informed the Committee that Professor Gordon Reid regretted that he had to decline the Committee's invitation to tender a written submission.

The Chairman presented a memorandum prepared by Emeritus Professor Geoffrey Sawer summarising his views on the matter referred to the Committee on 11 September 1979.

The Chairman presented a memorandum from The Secretary, Attorney-General's Department, Canberra, summarising and supplementing the legal submissions made by the Department to the Committee on 14 November 1979.

The Committee deliberated.

The Committee adjourned until a day and hour to be determined by the Chairman and notified to each Member of the Committee.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA
TUESDAY, 20 MAY 1980
(31st Parliament—15th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Bowen	Mr Holding
Mr C. R. Cameron	Mr Jarman
Mr Hodgman	Mr Yates

The Minutes of Proceedings of the meeting held on 15 May 1980 were confirmed.

The Committee having resumed its inquiry into the matter referred to it on 11 September 1979.

The Chairman presented an opinion dated 16 April 1980 received from the Hon. T. E. F. Hughes, Q.C.

The Committee deliberated.

The Committee adjourned until Monday, 9 June 1980 at 10.30 a.m.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

MONDAY, 9 JUNE 1980

(31st Parliament—16th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Bowen	Mr B. O. Jones
Mr Hodgman	Mr L. R. Johnson
Mr Jacobi	Mr Millar
Mr Jarman	Mr Yates

The Minutes of Proceedings of the meeting held on 20 May 1980 were confirmed.

The Chairman presented an extract from Votes and Proceedings No. 176 dated 22 May 1980 recording the following changes in the membership of the Committee—

(a) during consideration of matter referred to the Committee on 23 April 1980—Mr B. O. Jones in the place of Mr Holding (appointed 1 May 1980), Mr Millar in the place of Mr Lucock and Mr L. R. Johnson in the place of Mr C. R. Cameron.

(b) during consideration of matter referred to the committee on 11 September 1979—Mr Millar in the place of Mr Lucock and Mr L. R. Johnson in the place of Mr C. R. Cameron.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

TUESDAY, 12 AUGUST 1980

(31st Parliament—20th Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Bowen	Mr B. O. Jones*
Mr Hodgman	Mr Millar
Mr Jacobi	Mr Yates

* Present during consideration of matter referred to the Committee on 23 April 1980 only.

The Minutes of Proceedings of the meeting held on 11 August 1980 were confirmed.

Use of House records in the Courts—

The Committee proceeding to resume its inquiry into the matter referred to it on 11 September 1979—Mr B. O. Jones left the room.

The Committee deliberated.

The Committee adjourned until Monday, 1 September 1980 at 9.30 a.m. unless earlier called together at the request of the Chairman.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

MONDAY, 1 SEPTEMBER 1980

(31st Parliament—22nd Meeting)

Present:

Mr D. M. Cameron (*Chairman*)

Mr Bowen	Mr L. R. Johnson
Mr Hodgman	Mr B. O. Jones*
Mr Jacobi	Mr Millar
Mr Jarman	Mr Yates

* Present during consideration of matter referred to the Committee on 23 April 1980 only.

The Chairman submitted his Draft Report in respect of the use of or reference to the records of proceedings of the House in the Courts.

Paragraphs 1 to 19 agreed to.

Paragraph 20 amended and agreed to.

Paragraph 21 amended and agreed to.

Paragraphs 22 to 30 agreed to.

Paragraph 31 amended and agreed to.

Paragraph 32 amended and agreed to.

Report, as amended, agreed to.

Ordered:—That (1) the Memorandum prepared by the Clerk of the House of Representatives, (2) the Memorandum of the Attorney-General's Department, Canberra, (3) relevant sections of the Opinion prepared by the Hon T. E. F. Hughes, Q. C., and (4) the Memorandum prepared by Emeritus Professor Geoffrey Sawer, be attached to the Committee's Report.

Resolved: On the motion of Mr Bowen—

That the Draft Report, as amended, together with the attachments, be the Report of the Committee to the House.

The Minutes of Proceedings of the meeting held on 26 August 1980 were confirmed.

APPENDIX I

MEMORANDUM
BY
THE CLERK OF THE HOUSE OF REPRESENTATIVES

1979

HOUSE OF REPRESENTATIVES

COMMITTEE OF PRIVILEGES

The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members

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Notes prepared by the Clerk of the
House of Representatives

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25 September 1979

CONTENTS

HOUSE OF REPRESENTATIVES

COMMITTEE OF PRIVILEGES

Notes prepared by the Clerk of the House of Representatives

The following notes have been prepared at the request of the House of Representatives Committee of Privileges in connection with its inquiry into the matter of the extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

Extracts from the Votes and Proceedings of the House of Representatives, No. 117 of Tuesday, 11 September 1979

4 PRIVILEGE—USE OF HOUSE RECORDS IN COURT—REFERENCE TO COMMITTEE OF PRIVILEGES:

Mr L. K. Johnson raised as a matter of privilege an order, dated 23 August 1979, issued by the Supreme Court of New South Wales in the case of *Uren* v. *John Fairfax & Sons Limited* to permit the use in court for a limited purpose of certain records of the proceedings of the House.

Mr Sinclair (Leader of the House) moved—That the following matter be referred to the Committee of Privileges: The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

Debate ensued.

Question—put and passed.

ORDER OF
MR JUSTICE BEGG

made in the Supreme Court of New South Wales Common Law Division on 23 August 1979 in the case of *Uren* v. *John Fairfax & Sons Limited*

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

No. 2702 of 1975.

CORAM: BEGG, J.
Thursday, 23rd August, 1979.

UREN v. *JOHN FAIRFAX & SONS LIMITED*
ORDER

HIS HONOUR: The defendant in this action sought an order that certain interrogatories be answered and verified by the plaintiff. Mr McHugh of learned Queen's Counsel for the plaintiff has opposed the making of the order on three grounds:

(i) As to those interrogatories which ask the plaintiff to agree that he and two other persons made certain speeches in Parliament (as set forth in photostat copies of *Hansard*) were in fact made by him or them—that such question should not be asked because that would involve a breach of Parliamentary privilege. The particular interrogatories are 1, 3, 4, 6, 7, 9, 11, 14, 16, 17, 19, 21, 26, 27, 28, 29 and 36.

(ii) That certain of the interrogatories were oppressive because they relate to matters which were not within the knowledge of the plaintiff. The particular interrogatories are 26, 27, 28, 32, 33, 34, 35, 36, 40, 41, 42, 43 and 44.

(iii) As to others, that they were irrelevant (namely 2, 5, 8, 10, 12, 13, 15, 18, 20, 22, 23, 24, 25 and 30).

As counsels' arguments could not be completed yesterday morning, they were continued this morning by Mr Rowles (as Mr McHugh could not be present), and by Mr Levine of learned counsel for the defendant.

Plaintiff's counsel relied on the decision of Brown, J. in the English case—*Church of Scientology* v. *Johnson-Smith* (1972) 1 Q.B. 523, and a judgment of Needham, J. in *Finnane* v. *Australian Consolidated Press Ltd. & Ors.* (1978) 2 N.S.W.L.R. 435.

The first case was an action brought against the defendant Johnson-Smith, who was a member of Parliament, alleging defamation by him in the publication outside Parliament of an alleged attack upon the plaintiff. The defendant pleaded qualified privilege and to defeat this defence the plaintiff sought to establish malice on the part of the defendant and to this end, sought to prove in evidence what the defendant had said in the House. Upon objection being taken the Attorney-General appeared as *amicus curiae*.

Mr Rowles has relied strongly on that case and particularly to the statement of Brown, J. at p.29. His Honour said:

> I accept the Attorney-General's argument that the scope of Parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself. And I accept his proposition, which I have already tried to quote, that is, that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House. In my view this conclusion is supported by both principle and authority.

It is said that the Bill of Rights of 1688 is the basic instrument establishing this privilege of Parliament which provided 'Freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of the Parliament'.

At p. 531 Brown, J. held that it was not open to either party 'to go directly or indirectly, into any question of the motives of the defendant . . . or other member of Parliament in anything they said or did in the house. So far as the extracts of *Hansard* are concerned, which were read without objection yesterday, the Attorney-General says that the parties here ought to have petitioned the House for leave before referring to those extracts from *Hansard*. But he said that where the parties agree, as they have here, the House would be unlikely to have any objection even though there had not been a petition . . . '. Then after referring to Dingle's case (1960) 2 Q.B. 405 and to what Sir Jocelyn Simon, the then Solicitor-General, said in that case, Brown, J. continued, 'But the Attorney-General limited what he said about the probable attitude of Parliament to the use of *Hansard* by agreement by saying that *Hansard* could be read only for a limited purpose. He said it could be read simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person. But, he said, the use of *Hansard* must stop there and that counsel was not entitled to comment upon what had been said in *Hansard* or to ask the jury to draw any inferences from it. I can see that we may get into difficulties later on in this case about this matter. But the general principle is quite clear, I think, that is that these extracts from *Hansard* which have already been read must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in *Hansard*.'

In my judgment one might pause to question whether the privilege of Parliament in relation to the mere proof of *Hansard* in a court in Australia has not been entirely waived by Parliament in this country. It is a well known fact that proceedings in the Parliament are broadcast on radio to all the world and copies of *Hansard* are freely sold for fifty cents a copy at the Commonwealth Publications Sales Department in this city. And insofar as it falls to me to decide the question, I would hold that waiver by Parliament to this extent is clearly established. (Of course I am not dealing with any question of copyright in the publication.)

Mr Levine has submitted that what the defendant is here seeking to do does not infringe the privilege of a House of Parliament in relation to the proceedings before it, but merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House—not in any way to criticise them nor to call them in question in these proceedings, but to prove them as facts upon which the defendants allege comments were made in the publication now sued upon by the plaintiff.

I accept this submission and rule that this use of the fact of what was said in Parliament would not be a breach of the privilege of Parliament. The courts have traditionally treated with the greatest of care any claims of privilege that have been made in relation to the Parliament. As was pointed out by Sir Owen Dixon in probably the most important case in Australia in the upholding of Parliamentary privilege, namely, *The Queen* v. *Richards*, ex parte Fitzpatrick & Brown, 92 C.L.R. 157 where at p. 161 Sir Owen Dixon giving the joint judgment of Mr Justice McTiernan, Mr Justice Williams, Mr Justice Webb, Mr Justice Fullager, Mr Justice Kitto and Mr Justice Taylor, said:

> The question, what are the powers, privileges and immunities of the Commons House of Parliament at the establishment of the Commonwealth, is one which the courts of law in England have treated as a matter for their decision. But the courts in England arrived at that position after a long course of judicial decision not unaccompanied by political controversy. The law in England was finally settled about 1840.

He then went on to observe that it is the duty, and has been regarded on the highest authority, of being the duty of the courts to rule upon the existence or otherwise of the extent of the privilege of the House. Once it has been found to exist the court cannot enquire into its exercise.

The question that arises frankly and starkly here for decision is whether or not the use of something that was said by a Member of Parliament can be proved as a fact, not to support a cause of action, not to call it in question in any way but merely to use it as a fact upon which the individual right of freedom of speech in this community—that is to comment upon the public acts of people—can be properly based. In my judgment it can be.

I have considered the judgment of Needham, J. in *Finnane* v. *Australian Consolidated Press Ltd. & Ors.* (1978) 2 N.S.W.L.R. 435. I am not clear from the report of that case exactly what use was intended to be made of any materials which might have been forthcoming if the question which was there objected to had not been over-ruled. And the matters involved in this present case seem to me to be far removed from the proceedings before Needham, J. I think therefore it should be distinguished.

Turning now to the question as to whether the particular designated interrogatories are oppressive, I have reached the conclusion that this objection should be over-ruled. Perhaps to an ordinary member of the public the point would be well taken but here it is said that the plaintiff was at all relevant times a Minister in the Commonwealth Government and was at certain times the Deputy Prime Minister of Australia. I think it reasonable to assume in favour of the defendant that in a general way the plaintiff would have been in a position to have the knowledge necessary to answer these interrogatories. The objection on this ground fails.

In addition to those interrogatories, Mr Rowles has asked me to rule on interrogatories 2, 5, 8, 10, 12, 13, 15, 18, 20, 22, 23, 24, 25 and 30 submitting that they are not relevant to the issues before the court and should not be ordered to be answered. At this stage of the proceedings I have to look at them broadly. Some of them may be arguably not relevant, but I think this question will finally have to be determined by the trial Judge if it is sought to tender the answers to the interrogatories at the hearing. Mr Rowles, having made the point as to relevancy, will find that his client is not prejudiced by answering them. I direct therefore that those interrogatories be answered.

There is no objection to answering interrogatories 37, 38 and 39. I therefore direct that verified answers be filed and served at or before 4.00 p.m. on Thursday next, the 30th August.

As to costs, I order the defendant to pay the costs of this application so far as it relates to an order for interrogatories.

CONSTITUTIONAL PROVISION—GENERAL CHARACTER OF PRIVILEGE

Constitution

Section 49 of the Constitution states 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.

The Parliament has not so declared the privileges etc., except in relation to a few minor powers, viz. Parliamentary Papers Act (protection of Printer), Broadcasting of Parliamentary Proceedings Act (protection of Australian Broadcasting Commission) and Public Accounts Committee Act and Public Works Committee Act (provisions respecting witnesses before these committees).

To ascertain the law, it is necessary therefore for recourse to be had to the practice and precedents of the House of Commons. These are dealt with at length in Erskine May's *Parliamentary Practice*, 19th edition.

What constitutes privilege

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.
>
> (*May* 19, p. 67)

> The particular privileges of the Commons have been defined as: "The sum of the fundamental rights of the House and of its individual Members as against the prerogatives of the Crown, the authority of the ordinary courts of law and the special rights of the House of Lords".
>
> (*May* 19, p. 67)

> The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are "absolutely necessary for the due execution of its powers". They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity.
>
> (*May* 19, p. 67)

PARTICULAR REFERENCES IN RELATION TO MATTER BEFORE THE COMMITTEE

House of Representatives Standing order 368

No officer of the House, or shorthand writer employed to take minutes of evidence before the House or any committee thereof, may give evidence elsewhere in respect of any proceedings or examination of any witness without the special leave of the House.

The following references in *May* are relevant to this matter:

Evidence before the Courts as to proceedings in Parliament

The practice of the Commons regarding evidence sought for outside the walls of Parliament touching proceedings which have occurred therein also conforms to Article 9 of the Bill of Rights. This fact is well recognized by the courts, which have held that Members cannot be compelled to give evidence regarding proceedings in the House of Commons without the permission of the House. The meaning of the term "proceedings in Parliament" has not been expressly defined by the courts, although they have decided that various specific matters connected with Parliament do or do not fall within the ambit of its "proceedings".

Leave for production in a court of law of evidence given before the House or a committee.—The rights of the House are emphasized by the resolution of session 1818 which directs that no clerk or officer of the House, or shorthand writer employed to take minutes of evidence before the House, or any committee thereof, shall give evidence elsewhere, in respect of any proceedings or examination had at the bar, or before any committee of the House, without the special leave of the House. Parties to a suit who desire to produce such evidence, or any other document in the custody of officers of the House, accordingly petition the House, praying that the proper officer may attend and produce it; and the term 'proper officer' includes an official shorthand writer. The motion for leave may be moved without previous notice. During the recess, however, it has been the practice for the Speaker, in order to prevent delays in the administration of justice, to allow the production of minutes of evidence and other documents, on the application of the parties to a private suit. But should the suit involve any question of privilege, especially the privilege of a witness, or should the production of the document appear, on other grounds, to be a subject for the discretion of the House itself, he will decline to grant the required authority. During a dissolution the Clerk of the House sanctions the production of documents, following the principle adopted by the Speaker.

(*May* 19, pp. 88–9)

Petitions for attendance of witnesses or production of evidence in a court of law.—The presentation of a petition is the usual method of seeking the leave of the House for a Member to give evidence in a court of law touching proceedings in the House or in a committee, or for an Officer of the House to give evidence or produce documents relating to such proceedings, or for reference to be made in a court of law to the debates of the House. Following the presentation of such a petition an appropriate motion may be made, without notice, for the leave of the House to be granted.

(*May* 19, pp. 816–7)

Rules regulating requirement of notice

. . . on the presentation of a petition for the production of evidence in the possession of the House, the consequent motion for the leave of the House to be granted may be moved without notice, unless objection is taken.

(*May* 19, p. 366)

Statutory Recognition of the Privilege

This recognition by law of the privilege of freedom of speech received final statutory confirmation after the Revolution of 1688. By the 9th Article of the Bill of Rights it was declared "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament". The 9th Article of the Bill of Rights reinforced the statute of 4th Henry VIII, by giving its sanction to the Commons' claim to exclusive jurisdiction over words spoken in their own House.

(*May* 19, pp. 76–7)

Necessity of Freedom of Speech

Freedom of speech is a privilege essential to every free council or legislature. Its principle was well stated by the Commons, at a conference on 11 December 1667, the conference which resulted in the reversal of the conviction in 1629 of Sir John Eliot and others:

> "No man can doubt," they said, "but whatever is once enacted is lawful, but nothing can come into an Act of Parliament, but it must first be affirmed or propounded by somebody: so that if the Act can wrong nobody, no more can the first propounding. The members must be as free as the houses; an Act of Parliament cannot disturb the state; therefore, the debate that tends to it cannot; for it must be propounded and debated before it can be enacted".

This important privilege has been recognized and confirmed as part of the law of the land.

(*May* 19, p. 73)

Speeches in Parliament not actionable

The absolute privilege of statements made in debate is no longer contested, but it may be observed that the privilege which formerly protected Members against action by the Crown now serves largely as protection against prosecution by individuals or corporate bodies. Subject to the rules of order in debate, a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.

(*May* 19, p. 78)

The following relevant extracts are from *Parliamentary Privilege in Australia* by Enid Campbell:

Evidence of Proceedings in Parliament

The privilege of freedom of speech and debate in parliament has been held to require much more than that members of parliament, authors of petitions to parliament and parliamentary witnesses should not be liable for defamatory statements made in the course of parliamentary proceedings. According to article 9 of the Bill of Rights, proceedings in parliament are not to be impeached or questioned in any court of law or place outside of parliament, a provision which the courts have interpreted as imposing substantial restrictions on the reception in evidence before the courts of testimony relating to what has transpired in parliament. Before examining the judicial rulings on this subject, it is proposed first to consider the extent to which members and officers of parliament may be compelled to appear as witnesses in legal proceedings.

While the House is sitting, a member or officer of the House cannot, it is said, be compelled to appear as a witness before a court of law. The House has a paramount claim to the service of its members and reserves to itself power to determine whether or not members who have been served with subpoenas should be given leave of absence to attend in the court from which process has issued. Where leave is sought and refused, the practice is for the presiding officer of the House to formally request the court to excuse the member.

(pp. 34–5)

The rules regarding admissibility of evidence of parliamentary proceedings are not entirely clear and are complicated by the difficulties previously mentioned regarding the scope of proceedings in parliament. The reception of such evidence appears to depend first upon whether the House whose proceedings are sought to be tendered in evidence has given leave for such evidence to be given. A member of parliament, it was said in *Chubb* v. *Salomons,*[1] is not obliged to answer questions relating to proceedings in parliament unless the House of which he is a member has given leave for him to testify. But it is not simply a matter of compellability. Fundamentally it is one of admissibility, so that whatever be the status of the witness from whom the testimony is to be taken, no evidence as to parliamentary proceedings can be received unless parliamentary assent is given. This is borne out by Mr Justice Gibson's ruling in the Tasmanian case of *R.* v. *Turnbull.*[2] The accused, a minister of the Crown, had been prosecuted on several charges of bribery. Objection was taken by the defence to the production in evidence of statements made by the accused in the House of Assembly, as recorded in the *Votes and Proceedings,* and notes taken by a journalist present in the House. Such evidence, Mr Justice Gibson held, was inadmissible. It was, his Honour added, most important that members of parliament should be protected "from the use of statements made by him in Parliament in civil and criminal proceedings".

An interesting parallel to this case is provided by the South African case of *Kahn* v. *Time Inc.* (1956).[3] Section 2 of the South African Powers and Privileges of Parliament Act, 1911, guarantees "freedom of speech and debate or proceedings in Parliament" and provides that "such freedom of speech and debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament". Section 8 reinforces section 2 by conferring immunity from liability etc. on members in respect of things said or done in parliament. Finally, section 24 prohibits members, officers of parliament and shorthand writers employed by the Houses of Parliament from giving evidence elsewhere in respect of parliamentary proceedings without the special leave of the House. In the present case the court held that, providing the permission of the House had been obtained, evidence given before a parliamentary comittee was admissible as evidence before a court of law. In each case, however, the court had to be satisfied that the admission of such evidence would not prejudice freedom of speech. In the words of the court:

> The Court must be satisfied when called upon to determine whether the privilege may have been breached in a particular case that what is sought to be done is something which will or will not endanger the right of free speech enjoyed by members, by visiting upon the member concerned some consequence which might prevent him or deter him from carrying out his duties completely free from the fear of any outside interference.[4]

On this line of argument, the admission of evidence tending to incriminate a member of parliament must surely be excluded irrespective of whether the House's permission has been obtained or not.

(pp. 36–7)

The rule excluding evidence as to proceedings in parliament without the prior consent of the House does not prevent, so Lord Ellenborough held in *Plunkett* v. *Cobbett,*[5] evidence being received as to whether or not on a particular occasion a member participated in debate and the Speaker is required to answer any question directed to proof on that point.

(p. 38)

[1] (1852) 3 Car. & K. 75
[2] [1958] Tas. L.R. 80
[3] 1956 (2) S.A. 580
[4] 1956 (2) S.A. 584
[5] (1804) 5 Esp. 136

FINNANE *v.* AUSTRALIAN CONSOLIDATED PRESS LTD. AND OTHERS

Equity Division: Needham J.

Nov. 24, 27-30; Dec. 1, 5, 6, 22, 1978.

Evidence—Reproduction in court of debates in Parliament, without prior consent of relevant House—Breach of Parliamentary privilege—Failure by Parliament to complain—No waiver.

Evidence—Publication in newspapers of extracts from Parliamentary debates, without prior consent of relevant House—No complaint by Parliament against publication which is accurate and bona fide—Waiver of Parliamentary privilege presumed.

Companies—Appointment of inspector to investigate affairs of companies—Duty of inspector not to divulge confidential information received from witness—Witness free to disseminate such information as he chooses—Companies Act, 1961, *Pt.* VIA.

A person who had been appointed by the Attorney-General as an inspector to investigate the affairs of certain companies pursuant to s. 170 (1) of the *Companies Act,* 1961, sought to restrain the publishers of a weekly magazine and a weekly newspaper, and certain of their employees, and a witness before the investigation, from continuing to publish matter brought into existence in the course of, or in connection with, or for the purpose of the investigation, and for ancillary relief.

At the hearing, the admissibility of a question which counsel for one of the defendants sought to address to the plaintiff, intended to discover what had been said in the Federal Parliament about the publications, and the information contained in those publications, was argued: as was the admissibility in evidence of certain extracts from newspapers relating to discussions or statements in Parliament relating to the inquiry being conducted by the plaintiff, which counsel for that defendant sought to tender. The basis of the objection was that to admit the answer to the question or the newspaper matter into evidence would be a breach of Parliamentary privilege, if (as was the case) the consent of the particular House in which the statements were made had not been first obtained.

On the preliminary question argued, namely, whether (a) the answer to the question sought to be asked; and (b) the documents sought to be tendered, were admissible in evidence,

Held: (1) (a) The reproduction in a court, either by the tender of Hansard, or by any other procedure, of debates in Parliament is a breach of the privileges of Parliament, unless the consent of the House in which the debate took place has been previously obtained.

(b) This privilege extends to the tender in evidence of Parliamentary debates, either by agreement of the parties or by permission of the judge, and to be used solely for the purpose of establishing what was said in the House.

(c) The fact that the House does not complain at such use will leave the breach of privilege nevertheless still subsisting.

Church of Scientology of California v. *Johnson-Smith* [1972] 1 Q.B. 522, followed.

(2) For this reason the question which counsel sought to ask should be rejected.

(3) Since newspapers have for many years published extracts from Parliamentary debates without objection from Parliament, nor any attempt by Parliament to punish any newspaper for publishing an accurate and bona fide report of Parliament any proceedings, the consent of Parliament to such publication, and the waiver pro tanto of Parliamentary privilege, should be presumed.

(4) The newspaper extracts should be admitted into evidence.

With respect to the substantial relief sought,

Held: (5) Accepting that an inspector appointed under Pt. VIA of the *Companies Act* is bound to observe the confidences of a witness whom he examines, the witness, nevertheless, is not similarly bound.

Hearts of Oak Assurance Co. Ltd. v. *Attorney-General* [1932] A.C. 392, at pp.397, 398, 399; *Re Gaumont-British Picture Corporation Ltd.* [1940] Ch. 506 and *Re Pergamon Press Ltd.* [1971] Ch. 388, at pp. 400 and 404, distinguished.

Re London and Northern Bank Ltd. [1902] 2 Ch. 73 and *Re John Pringle & Co. Ltd.* (1935) 35 S.R. (N.S.W.) 95; 52 W.N. 37, referred to.

(6) Accepting that there is a public interest in keeping communications to an inspector appointed under Pt. VIA of the *Companies Act* confidential, this does not extend to fetter a witness before the inspector from communicating what he has told the inspector to a third party.

Rogers v. *Home Secretary* [1973] A.C. 388 and *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171, distinguished.

(7) While an inspector appointed under Pt. VIA of the *Companies Act* has an obligation of confidentiality to the persons whom he may require to attend his investigation, for the purpose of answering questions and producing documents, there is no obligation on the witness, owed to the inspector, to keep the contents of the interview confidential.

Fraser v. *Evans* [1969] 1 Q.B. 349, at p.361, applied.

(8) If, as has been held, a third party can require production of, and claim a right to inspect, notes of the examination of a second party by a first party (namely an inspector appointed under Pt. VIA of the *Companies Act*), it is impossible to argue that the inspector can restrain the second party from publishing those notes as he sees fit.

Barton v. *Csidei* (Court of Appeal, 25th October, 1977, unreported), applied.

(9) (a) An inspector appointed under Pt. VIA of the *Companies Act* has no private right to take proceedings to restrain publication of any material coming into existence in the course of his inquiry; or, as in the present case, to restrain further publication of matter already published.

(b) Any right to prohibit publication of such material in the context of Pt. VIA is a public right enforceable only by the Attorney-General.

Gouriet v. *Union of Post Office Workers* [1978] A.C. 435, applied.

CASES CITED.

The following cases are cited in the judgment delivered on 29th November, 1978:

Church of Scientology of California v. *Johnson-Smith* [1972] 1 Q.B. 522.
R. v. *Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157.
R. v. Turnbull [1958] Tas. S.R. 80.

The following cases were cited in the judgment delivered on 22nd December, 1978:

Barton v. *Csidei* (Court of Appeal, 25th October, 1977, unreported).
D v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171.
Davies-Roe and the Companies Act, Re (1965) 83 W.N. (Pt. 1) (N.S.W.) 10.
Fraser v. Evans [1969] 1 Q.B. 349.
Gaumont-British Picture Corporation Ltd., Re [1940] Ch. 506.
Gouriet v. Union of Post Office Workers [1978] A.C. 435.
Hearts of Oak Assurance Co. Ltd. v. *Attorney-General* [1932] A.C. 392.
John Pringle & Co. Ltd., Re (1935) 35 S.R. (N.S.W.) 95; 52 W.N. 37.
London and Northern Bank Ltd., Re [1902] 2 Ch. 73.
Pergamon Press Ltd., Re [1971] Ch. 388.
Rogers v. Home Secretary [1973] A.C. 388.

The following additional cases were cited in argument:

Argyle (Duchess) v. *Argyle (Duke)* [1967] Ch. 302.
Attorney-General v. *Jonathan Cape Ltd* [1976] Q.B. 752.
British Oxygen Co. Ltd. v. *Liquid Air Ltd.* [1925] Ch. 383.
Distillers Co. (Biochemicals) Ltd. v. *Times Newspapers Ltd.* [1975] Q.B. 613.
Guilfoyle v. *Bean* [1926] V.R. 498.

Lowe v. *Dorling & Son* [1906] 2 K.B. 772.
Riddick v. *Thames Board Mills Ltd.* [1977] Q.B. 881.
Sankey v. *Whitlam* (1978) 53 A.L.J.R. 11.
Seager v. *Copydex Ltd.* [1967] 1 W.L.R. 923; [1967] 2 All E.R. 415.

SUMMONS.

The plaintiff sought (1) a declaration that all information, records, notes, letters and other documents brought into existence in the course of, or in connection with, or for the purpose of the plaintiff's investigation into the affairs of certain companies pursuant to Pt. VIA of the *Companies Act* 1961, and all communications between the plaintiff and other persons in the course of, or in connection with, or for the purpose of the said investigation were confidential to the plaintiff, and might not be reproduced, published or disseminated otherwise than for the purpose of, and in accordance with, the said Act; (2) an injunction against each of the defendants restraining them from further publication, and (3) an order for the delivery up to the plaintiff of all such material.

The defendants were: (1) the publisher of a weekly magazine; (2) a journalist employed by that publisher, who was the author of two articles published in the magazine; (3) the editor of the magazine; (4) the publisher of a weekly newspaper; (5) a journalist employed by the second publisher, who was the author of an article published in the newspaper, and (6) a witness before the plaintiff's investigation under the Companies Act, who had communicated to the journalist certain information in relation to the investigation.

M. H. McHugh Q.C. and *D. E. Grieve*, for the plaintiff.

A. M. Gleeson Q.C., *W. H. Nicholas* and *C. F. Weigall*, for the first to third defendants.

F. J. A. Hoffey (solicitor) on 24th November, 1978; *M. L. Foster* Q.C. and *D. D. Levine*, on 27th November, 1978; *C. Darvall* Q.C. and *D. D. Levine* on 28th November 1978; *C. Darvall* Q.C. and *K. J. Kelleher* on 29th and 30th November, 1978 and 1st December, 1978; and *C. Darvall* Q.C. and *D. D. Levine*, on 5th and 6th December, 1978, for the fourth and fifth defendants.

V. Bruce and, on 6th December, 1978, *A. B. Torok* (solicitor), for the sixth defendant.

Cur. adv. vult.

Nov. 29.

NEEDHAM J., Counsel for the first, second and third defendants, seeks to cross-examine the plaintiff on a statement made in the plaintiff's affidavit as follows: 'The publications referred to in the preceding paragraph hereof' (and I interpolate that those publications are publications in the 'Bulletin' of 18th October, 1978, and 25th October, 1978, and the 'National Times' of 19th November, 1978) 'have caused much public speculation as to the course of my investigation and statements have been made in the Federal Parliament about it.'

Mr. Gleeson sought to ask the plaintiff a question intended to discover what had been said in the Federal Parliament about the publications, and the information contained in those publications.

Mr. McHugh, appearing for the plaintiff, objected to the question, and I have heard interesting and informative argument on the admissibility of the question.

After Mr. McHugh's submissions, Mr. Gleeson tendered various extracts from newspapers relating to discussions or statements in Parliament relating to the inquiry

being conducted by the plaintiff. Mr McHugh again objected to their admission in evidence on a similar basis, namely, that the admission into evidence of the newspaper material would be a breach of Parliamentary privilege, without the consent of the particular House in which the statements were made.

In the course of a hearing which has had a rather desultory history, it is not convenient or, I think, apt for me to give a long judgment on the matter. I am indebted to both counsel for their consideration of the question, and I think I should merely state the views which I have reached after listening carefully to those submissions and, shortly, the reasons for them.

Mr McHugh submits that the reason why evidence is not permissible of what takes place in Parliament is because Parliament has a privilege as to the publication of its own proceedings, and he relies upon art. 9 of the *Bill of Rights*, 1688 (1 Will. & Mar. sess. 2, c. 2). He has referred me to much authority and to statutes of the Federal Parliament which have, in particular spheres, limited that privilege, but have not in any sense, as the High Court held in *R.* v. *Richards*[1] been a full legislation about the privileges of Parliament.

The rationale of the rule I think, at least originally, was that it was not open in the courts to question the conduct of any member of Parliament; certainly it was not open in the courts to make a member of Parliament in any way liable at law for what had been said in the House. That doctrine seems to have received some extension at the hands of the courts and with the support of text writers until there is a real question, I think, as to whether it is not a breach of Parliamentary privilege to attempt to give in evidence in legal proceedings, merely for the purpose of establishing it as a fact, that certain things were said in one of the Houses of the Parliament by a particular Member. One would have thought, uninstructed, that such evidence could not in any sense limit the privilege of Parliament, but I have been referred to the decision of Browne J in *Church of Scientology of California* v. *Johnson-Smith*[2], which seems to me to go so far as to say that reproduction in a court, either by the tender of Hansard or, it would seem, by any other procedure, of debates in Parliament would be a breach of the privileges of Parliament, unless the consent of the House in which the debate took place had been previously obtained. Of course, in that case, the facts were very different from the present proceedings, but Browne J., as it seems to me, has said[3] that the House—in that case, the House of Commons—would be unlikely to complain about use in court of debates of the House of Commons, if they were used for a limited purpose, namely, merely as proof of what was said. If anything further were to be adventured, for example, comments on the material by counsel or, no doubt, by the court, that would be a matter in which it would be likely that the House would exercise its privileges and, if necessary, enforce the prohibition on breach of them.

The mere fact that the House may not complain, if Parliamentary debates are tendered in evidence in a court, either by agreement of the parties or by permission of the judge, and used solely for the purpose of establishing what was said in the House, does not seem to me to mean, or to establish, that the privilege does not cover even that use of Parliamentary proceedings. It seems to me that the best reading I can give Browne J's decision[4] is that his conclusion was that even that minimal use of Parliamentary debate was not permissible, without the consent of the House.

Counsel have been unable to refer me to any other decision which deals specifically with this problem. There are decisions in which it has been sought to prove what a par-

1 (1955) 92 C.L.R. 157.
2 [1972] 1 Q.B. 522.
3 [1972] 1 Q.B. 522.
4 [1972] 1 Q.B. 522, at p. 531.

ticular party to litigation has said in Parliament, for example, see *R.* v. *Turnbull*[5], where it was sought to give in evidence statements made by Ministers in the House of Assembly in a prosecution of Dr Turnbull for corruption. The evidence was rejected. In the *Scientology* case[6], the statement by the learned judge goes further, I think, than merely to prohibit use of Parliamentary debate material against the party to the action.

As I have said, uninstructed by that decision, I would have been of the opinion that it was open to a party in legal proceedings to give evidence, if the evidence were relevant, of the fact that certain material had been published in Parliament, but it seems to me that as a matter of comity I should follow what Browne J. has said[7] in this context.

I was referred, as I said, to academic material which seems to support in general terms what Browne J. has said[8]: Mr McHugh also relied upon the Standing Order 368 of the House of Representatives, which prohibits any officer of the House, or shorthand writer employed to take minutes of evidence before it or at any committee, from giving evidence elsewhere in respect of any proceedings or examination of any witness, without special leave of the House. While that standing order does not cover this particular use or proposed use of Parliamentary debates, it certainly indicates an intention on the part of the Parliament to maintain its privilege of publication of its own debates.

For that reason, with some regret, I would reject the question which Mr Gleeson asked of the plaintiff.

The material which was tendered, being the extracts from various newspapers referring to Parliamentary debates on the relevant matter, is, I think, in a somewhat different position. It may well be, as Mr McHugh submits, that, in theory, any publication by a newspaper of what is said in Parliament may be a breach of Parliamentary privilege. However, one must determine the extent of that privilege and the attitude of Parliament itself to the hypothetical breach of privilege by consideration of what happens in the community. It is well known that newspapers have been publishing extracts from Parliamentary debates for many, many years. There has never, to my knowledge, been any objection by Parliament to newspapers giving such reports, nor any attempt on the part of either House of the Federal Parliament to punish any newspaper for an accurate and bona fide report of Parliamentary proceedings. I think it would be quite unreal for me to reject this material on the basis that it was not admissible without the minor consent of the House. I think that history requires me to reach the conclusion by inference that Parliament and each of the Houses of Parliament has given a general permission to newspapers to publish reports of their debates and that, accordingly, I could not, after all these years of experience of such use by newspapers of Parliamentary debates, hold that they were by publishing such material in breach of Parliamentary privilege. I infer, as I say, a general consent by Parliament to the publication of this material providing it is reasonably accurate and bona fide.

For these reasons, then, I would admit into evidence newspaper extracts dated 15th November 1978, 15th November 1978, 16th November 1978, and 17th November 1978, as exhibit 1B.

Order accordingly.

Dec. 22.

NEEDHAM J. The plaintiff was, on 22nd May 1978, appointed by the Attorney-General in and for the State of New South Wales as an inspector to investigate the

5 [1958] Tas. S.R. 80.
6 [1972] 1 Q.B. 522.
7 [1972] 1Q.B. 522.
8 [1972] 1 Q.B. 522.

affairs of certain companies, specified in the schedule to the appointment published in the New South Wales Government Gazette of 26th May 1978. Subsequently, the terms of his appointment were extended on two occasions. The appointment was expressed to be made under s. 170 (1) of the *Companies Act*, 1961, on the ground that the Attorney-General was of the opinion that it was in the public interest so to do.

The investigation has attracted public curiosity, because one of the directors of the companies the subject of it is a Minister of the Crown in the Commonwealth Parliament, Mr I. M. Sinclair.

The plaintiff, in the course of his investigation, has interviewed a number of persons, including Mr Sinclair, Mr Allan Walsh and Mrs Jessie Walsh, and Mr Creighton Walsh. He has also forwarded letters to Mr Sinclair in respect of matters arising in the investigation. Mr Creighton Walsh was interviewed by the plaintiff on two occasions, on 30th May 1978, and 4th July 1978. One of the plaintiff's letters to Mr Sinclair was dated 11th August 1978; it set out various assertions of fact, and various questions upon which the plaintiff invited comments from Mr Sinclair.

The *Bulletin* is a weekly magazine published by the first defendant. A story appeared in the issue of 24th October 1978, which was published on 18th October 1978, headed 'Corporate Sleuths Question Federal Minister'. The article was written by Mr Alan Reid, a journalist employed by the first defendant and himself the second defendant. It began: 'Ian Sinclair has been called upon by New South Wales State authorities to supply reasons why he should not be prosecuted for apparent breaches of the New South Wales Companies Act arising from the affairs of four family companies.' The article did not refer to the plaintiff's letter to Mr Sinclair, but some of the information published was based upon it. The second defendant was possessed of a copy of the letter when he wrote the article. He said the copy was delivered, in an envelope addressed to him by some unknown person, to the girl at the *Bulletin* office. In case the manner of his obtaining that document becomes of subsequent importance, I have to say that I have doubts whether Mr Reid thus came into possession of it. The doubts are caused by the fact that, when asked whether he had obtained the document 'from a person other than Mr Sinclair', he replied with the question: 'Do I have to name persons?'After having the ambit of the question explained to him, he said: 'I don't know', and then advanced the account to which I have referred. Mr Reid's question was quite unnecessary, unless he was aware of the source from which the document came, and was considering whether he would have to disclose that source. On an earlier day in the hearing of these proceedings, the fourth defendant, the publisher, amongst other journals, of the *National Times*, had sought to claim a journalistic privilege to refuse to produce documents which would have disclosed their source. The claim and the subsequent discussion of the matter in Court attracted some publicity. As there is no other evidence on the point, I am unable to say how Mr Reid obtained possession of the letter.

When Mr Reid came into possession of the letter of 11th August 1978, he said that he called upon Mr Sinclair and checked with him the accuracy of the document. Mr Sinclair mentioned to him a letter from the plaintiff to the solicitors acting for Mr Sinclair and others interested in the relevant companies dated 13th September 1978. He read part of it to Mr Reid, who made reference to that material in the first article.

After the publication of the article to which I have referred, the plaintiff apparently criticised its accuracy. He was telephoned by the third defendant, Mr Kennedy, the editor of the *Bulletin*, and the plaintiff referred to certain aspects of the article which were not accurate. In the following issue of the *Bulletin* dated 31st October 1978, the second defendant wrote a further article, headed: 'What the Special Investigator Wrote to Ian Sinclair.' He wrote that both the plaintiff and Mr Sinclair had been critical of the earlier article and added: 'So that readers may make up their own minds on

the correctness of our report, we now publish the entire contents of the letter in question.' The letter was then set out, and, on the second page of the article, there was a photograph of the five pages of the letter spread out so as to make visible part of each page, including the plaintiff's signature on p. 5.

After the first article had appeared, Mr Creighton Walsh, the sixth defendant, telephoned Mr Reid and offered to give him a copy of the transcript of his record of interview when he obtained it from the plaintiff. The sixth defendant obtained a copy of his record of interview, having signed the original, and handed it to Mr Reid on 3rd November 1978. On 4th November 1978, he gave another copy to the fourth defendant, the publisher of a weekly newspaper, *National Times*. Mr Walsh had a discussion with Miss Marian Wilkinson, an employee of the fourth defendant and herself the fifth defendant, on 4th November 1978. She had the copy of his record of interview, and also showed him, from a distance, a bulkier document which she described as a copy of Mr Sinclair's record of interview. The only evidence that Miss Wilkinson had that document is Mr Walsh's statement that she told him so. Miss Wilkinson was not called to deny it, and, on the evidence, I find that she was then in possession of a copy of a record of an interview between the plaintiff and Mr Sinclair.

In the edition of *National Times* of the week ending 25th November 1978, there was an extensive story headed: 'The Sinclair Crisis'. Reference was made to the contents of the interview between the plaintiff and Mr Walsh, and parts of the record were published verbatim.

The plaintiff issued a summons on 23rd November 1978, joining as defendants those five whom I have already identified as defendants, and Mr Walsh as the sixth defendant. He claimed a declaration that: '. . . all information, records, notes, letters and other documents brought into existence by him or on his behalf in the course of or in connection with or for the purpose of his investigation into the affairs of (the relevant companies) pursuant to part VIA of the *Companies Act*, 1961 are confidential to the plaintiff and may not be reproduced published or disseminated otherwise than for the purposes of and in accordance with the said Act.'

He also claimed an injunction against each of the defendants restraining them from further publication, and an order for delivery up to the plaintiff of all such material.

By an amended summons, filed by leave on 28th November 1978, the first claim was made in different terms: 'A declaration that all information, records, notes, letters and other documents brought into existence in the course of or in connection with or for the purpose of the plaintiff's investigation into the affairs of (the relevant companies) pursuant to part VIA of the *Companies Act*, 1961 and all communications between the Plaintiff and other persons in the course of or in connection with or for the purpose of the said investigation are confidential to the plaintiff and may not be reproduced published or disseminated otherwise than for the purpose of and in accordance with the said Act.'

The other claims were appropriately amended. During the hearing, which stretched over eight days, the parties handed up points of claim and of defence. After the evidence had been concluded, it was accepted by the plaintiff that the relevant material in the possession of the defendants did not extend beyond the records of the two Creighton Walsh interviews, the letter of 11th August 1978, and the letters of the plaintiff to the solicitors dated 13th September and 22nd September 1978. He claimed, however, that he was entitled to have the defendants restrained from further publishing details of his interview with the sixth defendant, from further publishing the letter of 11th August 1978, from publishing the September letters, and to an order that all such documents be returned to him.

The plaintiff based his claim on the following propositions: (1) Communications between an inspector appointed pursuant to the provisions of Pt. VIA of the Companies

Act and persons whom he interviews in connection with the investigation are confidential. (2) There is a public interest in keeping those communications confidential and they should not be disclosed otherwise than for the purposes of the Companies Act, except when some greater public interest requires their disclosure. (3) Since the confidentiality is a matter of public interest, it is not open to anyone to waive the requirement of non-disclosure. (4) The Court will enjoin parties to protect confidential information from unauthorised disclosure, and, where such information is confidential in the public interest, it will intervene to prevent unauthorised disclosure or use. (5) Any person with a sufficient interest may apply to the Court for such relief. (6) The plaintiff is such a person.

Counsel, in their excellent arguments, to which I am extremely indebted, approach the case from the basis of these six propositions. For the plaintiff to succeed he must establish each of these propositions, or at least, in respect of proposition 3, that what the plaintiff did did not constitute waiver on his part. I will consider the first proposition first.

Proposition (1):

The plaintiff sought to establish this proposition by reference to *Hearts of Oak Assurance Co. Ltd.* v *Attorney-General*[9]; *Re Gaumont-British Picture Corporation Ltd.*[10]; *Re Pergamon Press Ltd.*[11]; *Re London and Northern Bank Ltd.*[12] and *Re John Pringle & Co. Ltd.*[13]. It is necessary, I think, before considering those cases, to refer to some of the provisions of Pt. VIA of the Act. The plaintiff points out that the public interest was a matter of considerable concern to the legislature in enacting these provisions —s. 170 (1) is expressly directed to that consideration. The inspector's powers are set out in s.173, being powers to require production of documents and attendance of witnesses. Section 174 creates offences in officers, and s. 174 (3) deprives the officer of the evidentiary protection of the privilege from self incrimination. Section 176 is of great importance to this case. Section 176 (1) gives the inspector a right to cause notes of an examination to be recorded in writing, and he may require the witness to sign such notes which, when signed, may be used in evidence in any legal proceedings against that person. Section 176 (2) reads: 'A copy of the notes signed by a person shall be furnished without charge to that person upon request made by him in writing.'

Section 176 (3) places a limitation upon the use of notes relating to a question the answer to which a person has claimed might tend to incriminate him, and s. 176 (5), (6) and (7) are in the following form: '(5) The Minister may give a copy of notes made under this section to a duly qualified legal practitioner who satisfies the Minister that he is acting for a person who is conducting or is, in good faith, contemplating legal proceedings in respect of affairs of a company, being affairs investigated by an inspector under this Part.

(6) A duly qualified legal practitioner to whom a copy of notes is given under subsection (5) shall use the notes only in connection with the institution or preparation of, and in the course of, legal proceedings and shall not publish or communicate for any other purpose the notes or any part of the contents of them to any person.

(7) Where a report is made under section 178 any notes recorded under this section relating to that report shall be furnished with the report.'

By s. 178 the inspector is required to make a final report to the Attorney-General. He may also make interim reports and shall make such a report if so directed by the Attorney-General. Subject to s. 178 (3), a copy of a final report shall be forwarded to

9 [1932] A.C. 392
10 [1940] Ch. 506.
11 [1971] Ch. 388.
12 [1902] 1 Ch. 73.
13 (1935) 35 S.R. (N.S.W.) 95; 52 W.N. 37

the registered office of the company by the Attorney-General. Section 178 (3) provides that the Attorney-General is not bound to furnish a company or any other person (a reference, it seems, to an applicant under s. 169) with a copy of any part or with a complete copy of such a report 'if (he) is of opinion that there is good reason for not divulging the contents of the report or of parts of the report'. Section 178 (4) and (5) are as follows: '(4) The Minister may, if he is of opinion that it is in the public interest so to do, cause the whole or any part of the report to be printed and published.

(5) Where an inspector has caused notes of an examination under this Part to be forwarded to the Minister with the report to which they relate, a copy of the notes may, subject to section 176, be supplied to such persons and upon such conditions as the Minister thinks fit.'

The other provisions of s. 178 relate to prosecutions and proceedings being instituted by the Attorney-General in the name of the company 'for the recovery of damages in respect of fraud, misfeasance or other misconduct in connection with affairs of the company or for the recovery of property of the company'. Section 178 (11) empowers a court before which legal proceedings are brought against a company or person for or in respect of matters dealt with in a report to order that a copy of the report be given to that company or person. Section 180 empowers the Attorney-General to make application to the Court for the winding up of a company whose affairs have been investigated. 'Affairs' is defined very widely in s. 168.

The plaintiff submitted that this legislation required confidentiality in the process of the investigation, as prejudice could be suffered by the company or by any person interviewed by the inspector; the latter might be required to disclose confidential matters or even criminal acts.

In *Hearts of Oak Assurance Co. Ltd.* v. *Attorney-General*[14] the House of Lords held that an inspector appointed to report on the affairs of an industrial assurance company was not entitled to conduct the inspection in public, and that he was not entitled to make public the information gained by him in the course of such examination, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report and for purposes ancillary thereto. Lord Thankerton said[15] that, except in so far as the statute might direct otherwise, the affairs of the company 'are their own domestic matter'. There was a danger in allowing the inspector to make information public before his report had been finalised. His Lordship said[16] that the nearest analogy was to be found in s. 135 of the *Companies Act*, 1929, under which the Board of Trade was entitled to appoint inspectors to investigate the affairs of a company and to report thereon. There was no provision in the relevant statute relating to publication of information obtained in the investigation. That is, as has already appeared, a subject dealt with by the *Companies Act*, 1961. As Lord Macmillan said[17], the silence of the statute on the issue made it necessary for their Lordships 'to undertake the responsibility of inferring what was the intention of Parliament . . . from other provisions of the Act'.

Subject to the considerations raised by the differences in the legislation considered in that case and the *Companies Act*, 1961, the reasons given in that decision would establish that the inquiry of an inspector appointed under Pt. VIA should not be conducted in public, and that the inspector would be restricted in the use he could make of information obtained by him during the inquiry.

Re Gaumont-British Picture Corporation Ltd.[18] merely applies the House of Lords

14 [1932] A.C. 392.
15 [1932] A.C. 392, at p. 397.
16 [1932] A.C. 392, at p. 398.
17 [1932] A.C. 392, at p.399.
18 [1940] Ch. 506.

decision to s. 135 of the *Companies Act*, 1929, and holds that an inspector may have present at an examination any person whose presence is reasonably necessary for the purposes of his complying with his obligations; in that case, a shorthand writer.

Re Pergamon Press Ltd.[19] was a case principally concerned with the question whether inspectors appointed to investigate the affairs of a company should observe the dictates of natural justice, but Lord Denning M.R.[20], and Sachs L.J.[21] did speak of the necessity of ensuring that witnesses in such an investigation should be able to come forward and give evidence without fear that their revelations would become public. The case reinforces the point that the inspector or inspectors is or are under a duty not to make public evidence given before them. It says nothing of the right of the witness to disclose what has transpired.

Re London and Northern Bank Ltd.[22] arose out of an examination under the then English equivalent of s. 249 of our Act. The Court of Appeal stressed the fact that such an examination was private and Collins M.R. said[23], that 'the whole purpose of it might be defeated if the public—in this case an opposing litigant—were allowed to be present'. The rules expressly provided that such examinations should be held in chambers—see per Cozens-Hardy L.J.[24]. The case does not assist me to determine the issue presently being considered.

The decision in *Re John Pringle & Co. Ltd.*[25] was that shorthand notes of an examination under the antecedant of s. 249 were papers belonging to the Court, and that the Court had a discretion as to their disposal. I do not think that the case is presently relevant.

Those were the cases upon which the plaintiff relied to establish the first proposition. I do not think that they perform that task. There is much to be said for the proposition that the inspector is bound to observe the confidences of the witnesses whom he examines; none of these cases has anything to say about the right of the witness to disclose what the inspector said to him, and what he said to the inspector. Section 176 (2) gives the witness, once he has signed the notes of his examination, a right to possession of a copy. Nothing is said as to what he may or may not do with that copy. There are, however, in Pt. VIA, provisions which relate directly to the use which certain people may make of the notes of an examination—I have already referred to them. What the plaintiff asks me to do is to imply into s. 176 (2) a limitation which is not there, when limitations in other circumstances are expressed by the legislature.

Proposition (2):

I should, however, examine two other cases upon which the plaintiff relied to support the second proposition, because they were submitted to have general application. It was submitted that, in the case of confidential communications, a legal duty not to disclose them arises (a) where the communication is concerned with a subject of vital public interest, such as an investigation under Pt. VIA; (b) where the communication is of a private or confidential character; (c) where the disclosure of that class of communication might hamper the enforcement of the law or the maintenance of that subject of public interest, or (d) where the class of communication is analogous to or a legitimate extension of a recognised category of exclusion.

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19 [1971] Ch. 388.
20 [1971] Ch. 388, at p. 400.
21 [1971] Ch. 388, at p. 404.
22 [1902] 2 Ch. 73.
23 [1902] 2 Ch. 73, at p. 81.
24 [1902] 2 Ch. 73, at p. 84.
25 (1935) 35 S.R. (N.S.W.) 95; 52 W.N. 37.

The cases referred to were *Rogers* v. *Home Secretary*[26] and *D.* v. *National Society for the Prevention of Cruelty to Children*[27].

The first of these cases related to a claim by the Crown of privilege in respect of the production of letters, one, written by the Gaming Board to the chief constable of the county, requesting certain information about an applicant for certificates of consent in relation to five bingo clubs, and the other, the chief constable's reply thereto. The subject of the letters, having obtained a copy of the chief constable's letter, prosecuted him for criminal libel. To succeed, he had to prove that the letter had been sent, so he applied for witness summonses against the board and the chief constable requiring them to produce the letter. The Attorney-General sought an order of certiorari to quash the summonses on the ground that the documents were the subject of Crown privilege. Lord Reid said[28] that, just as the identity of police informers must be kept secret, so must the identity of those who volunteer information to the Gaming Board. The interest of the public in having the Board obtain information about applicants had to be balanced against the interest of the public that the course of justice should not be impeded by the withholding of evidence.

The case related to the question whether certain documents should be produced for the purposes of legal proceedings. It had nothing to do, in my opinion, with the question whether communications between an inspector appointed under Pt VIA of the Companies Act and a witness could be disclosed by that witness.

D. v. *National Society for the Prevention of Cruelty to Children*[29] raised the question whether the identity of a person who had made a complaint to the Society about the treatment of a child should be discovered in proceedings by the mother against the Society claiming damages for negligence. The House of Lords held that an immunity from disclosure of their identity should be extended to such informants such as was allowed to police informers. The public interest served by preserving the anonymity of both classes of informers was analogous.

Again, this case did not deal with the question which I have to decide. It was a question of the conflict of two types of public interest—that requiring the secrecy of communications by informers and that of the interests of justice. In the present case the question is whether communications between the plaintiff, an inspector, and witnesses are confidential in the sense that no party to them may disclose them except, as the plaintiff claims, 'for the purposes of the Companies Act'.

The defendants submit that the argument for the plaintiff is based on an ambiguity in the use of the word "confidential". There is a mutuality in that concept which does not always appear in privileges recognised by law. For example, legal profession privilege is the privilege of the client, and can be waived by him, whereas the lawyer is forbidden to disclose the communication without his client's express permission. It was submitted that the plaintiff would be debarred from disclosing what had transpired between him and the person whom he examined, but that no such prohibition rested upon the person examined. *Fraser* v. *Evans*[30] was cited as an example of the distinction.

In that case, the plaintiff had been retained by the Greek Government to write for it a report—he was a public relations consultant. His contract with the Government contained a term that he would not reveal to any person any information related to the work in the areas where he was operating, or information which came to his knowledge during the course of the contract. Mr Fraser wrote his report, and sent it to the Greek Government. A copy of the report came into the hands of a London newspaper, and Mr

26 [1973] A.C. 388.
27 [1978] A.C. 171.
28 [1973] A.C. 388, at p. 401.
29 [1978] A.C. 171.
30 [1969] 1 Q.B. 349.

Fraser sought to restrain the publication by the newspaper of any part of the report. He obtained interlocutory relief, but the Court of Appeal upheld the appeal from those orders. The reasons were expressed by Lord Denning M.R. as follows [31]: 'Mr Fraser says that the report was a confidential document and that the publication of it should be restrained on the principles enunciated in the cases from *Albert* (*Prince*) v. *Strange* [32] to *Argyle* (*Duchess*) v. *Argyle* (*Duke*).[33] Those cases show that the court will in a proper case restrain the publication of confidential information. The jurisdiction is based not so much on property or on contract as on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he had just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence. But the party complaining must be the person who is entitled to the confidence and to have it respected. He must be a person to whom the duty of good faith is owed. It is at this point that I think Mr Fraser's claim breaks down. There is no doubt that Mr Fraser himself was under an obligation of confidence to the Greek Government. The contract says so in terms. But there is nothing in the contract which expressly puts the Greek Government under any obligation of confidence. Nor, so far as I can see, is there any implied obligation'.

The defendants submit that this case is persuasive of the point I have to determine, and I think they are correct in that submission. If one spells out of the provisions of Pt VIA an obligation of confidentiality, it is an obligation owed to the persons whom the inspector may require to attend and answer questions and produce documents. While premature publication of a record or note of an interview could, in some circumstances, embarrass the inspector, there is, in my opinion, no obligation on the witness owed to the inspector to keep the contents of the interview confidential. The witness, in this case the sixth defendant, was lawfully in possession of the record of his interview, as distinct from the position in *Fraser* v. *Evans* [34], where the newspaper had no apparent right to be in possession of Mr Fraser's report. That makes that case stronger.

The defendants further submit that the plaintiff's reliance upon *Rogers* v. *Home Secretary* [35] and *D.* v. *National Society for the Prevention of Cruelty to Children* [36] to which cases I have already referred, emphasizes the question of mutuality. There is nothing in either case which could be said to raise a prohibition on the chief constable, in the first case, or the informer, in the second, from making public the contents of the letter or the complaint. Thus, a police informer, if he thought fit, could disclose his identity, and the nature of his communication, without any legal bar other than the law of defamation.

The plaintiff sought to support this proposition by reference to the history of the legislation which is now Pt. VIA. Undoubtedly one could infer that s. 176 (2) was added in 1971 because of the decision in *Re Davies-Roe and the Companies Act* [37] that a witness, under the legislation as it then existed, had no right to receive a copy of his evidence, although the reaction time does seem rather slow; but I think that reference to the amendments of 1971, if permissible, strengthens the case of the defendants. At the time the witness was given an unrestricted right to have a copy of his signed notes, provisions were made limiting the rights of other persons to use copies of notes given to them. I should add, while dealing with this matter, that the phrase in s. 178 (5) 'subject

31 [1969] 1 Q.B. 349, at p. 361.
32 (1849) 1 Mac. & G. 25; 41 E.R. 1171.
33 [1967] Ch. 302.
34 [1969] 1Q.B. 349.
35 [1973] A.C. 388.
36 [1978] A.C. 171.
37 (1965) 83 W.N. (Pt. 1) (N.S.W.) 10.

to section 176', in my opinion, requires the conclusion that s.178 is not intended to take away the absolute right given by s. 176 (2) and make it discretionary.

The defendants referred me to the order made by the Court of Appeal (Street C. J., Hope J. A. and Reynolds J. A.) in *Barton* v. *Csidei*[38] as showing that the plaintiff's claim of confidentiality was misplaced. The Court, reserving its reasons for so doing, made the following declarations: 'Declare that (1) the first and second defendants are bound to produce to the third defendant in response to a summons under s. 26 Justices Act the notes of examination under s. 176 (1) Companies Act; (2) the third defendant is not precluded from permitting inspection by the plaintiff and/or his legal advisers of the notes of examination of the first and second defendants under s. 176 (1) Companies Act either in whole or in part by reasons of anything in s. 26 Justices Act; (3) the third defendant is not precluded from permitting inspection by the plaintiff and/or his legal advisers of the notes of examination of the first and second defendants under s. 176 (1) Companies Act either in whole or in part by reason of anything in Part VIA Companies Act; (4) the third defendant is not precluded from permitting inspection by the plaintiff and/or his legal advisers of the notes of examination of the first and second defendants under s. 176 Companies Act either in whole or in part on the grounds that the said notes belonged to a class of documents inspection of which is prohibited or ought not be permitted in the public interests.'

The third defendant was the magistrate. The defendants submit that, if a third party can require production of, and claim a right to inspect, notes of the examination of another party by an inspector appointed under Pt. VIA of the Act, it is impossible to hold that the inspector could restrain the witness from publishing those notes as he saw fit. Although the issue in the present case was not the issue in that case, the approach of the Court of Appeal, particularly in the fourth declaration, does appear to me to support the defendants' submissions, and to cast doubt on the applicability of some of the English decisions relied upon here by the plaintiff.

The defendants disputed all the propositions relied upon by the plaintiff, but, as, in my opinion, the plaintiff has failed to establish his primary submission, I do not think that I need to consider the other interesting questions raised by this case. I do, however, consider that I should determine the question whether the plaintiff, in his capacity as an inspector appointed under Pt. VIA of the Act, has a right to take proceedings to restrain publication of any material coming into existence in the course of his inquiry. This question arises because of the plaintiff's claim that further publication of his letter to Mr Sinclair and publication of the other letters should be prohibited. The claim was based upon the concept of confidentiality, but, on the seventh day of the hearing, the plaintiff sought to raise a right in him to such orders on the basis of his copyright in his letters. The defendants were not ready to deal with such a claim, and it was agreed that any question of copyright should be deferred.

So far as the plaintiff's claim is based on confidentiality, it seems to me that he is making a claim in aid of a right in him as an inspector appointed by the Attorney-General under Pt. VIA of the Act. That could not, in my opinion, amount to a private right. It is a right in him as such an inspector. The plaintiff submitted that that gave rise to a private right in him, but I could not uphold such a contention. Any right to prohibit publication of such material in the context of Pt. VIA would be, in my opinion, a public right and such a right must be enforced by the proper person, in this case the Attorney-General. I think that the decision of the House of Lords in *Gouriet* v. *Union of Post Office Workers*[39] substantiates the defendant's proposition.

38 Court of Appeal, 25th October 1977, unreported.

39 [1978] A.C. 435.

For the reasons I have given, I think that the plaintiff's case fails. So far as the question of copyright is concerned, I think it preferable to dismiss these proceedings without prejudice to the plaintiff's right, if so advised, to commence proceedings against some of the defendants relying upon a claim of copyright in the letter or letters. Some of the defendants would not be parties to such proceedings, and I see no advantage, and some disadvantage, in leaving it open to the plaintiff to make his claim in these proceedings.

This case attracted some publicity during the hearing. In those circumstances, I think it proper for me to make it clear that my judgment is based purely upon legal principle. I say nothing as to the propriety of the conduct of any of the parties, plaintiff or defendants. The question of Mr Sinclair's role, or anyone else's role, in the companies the subject of the plaintiff's investigation is not before me, and I have not heard evidence which relates to those matters.

I dismiss the proceedings with costs. Should no appeal be lodged within the appropriate time, I direct that the exhibits be returned and that the orders I made relating to their inspection be revoked.

Order accordingly.

Solicitors for the plaintiff: *Madgwicks.*

Solicitors for the first to third defendants: *Allen, Allen & Hemsley.*

Solicitors for the fourth and fifth defendants: *Stephen, Jacques & Stephen.*

Solicitors for the sixth defendant: *A. B. Torok & Co.* (Burwood) by their Sydney agents, *Higgins Morgan & Partners.*

O. M. L. DAVIES,
Barrister.

MATTERS FOR DETERMINATION BY THE COMMITTEE

The matter referred to the Privileges Committee, namely:

> The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members

arose out of a matter of privilege raised by the honourable Member for Burke (Mr L. K. Johnson) on 11 September 1979 and was based on an order made by Mr Justice Begg on Thursday, 23 August 1979 in the Supreme Court of New South Wales Common Law Division (see page 25).

Mr Justice Begg's ruling, in turn, arose out of the case of *Uren* v. *John Fairfax & Sons Limited*. In this case the Honourable Thomas Uren, Member of the House of Representatives for Reid, had commenced an action for damages for defamation in the Supreme Court of New South Wales against John Fairfax & Sons Limited, publishers of the *Sydney Morning Herald* newspaper in relation to the publication of an editorial on 3 April 1975. The defendants petitioned the House on 28 August 1979 requesting extracts from *Hansard* and the right to take other actions and on 30 August 1979 the petition was referred to the Committee of Privileges for consideration and advice (see copy of Petition, page 88).

On 11 September 1979, advice having been received from the legal representatives of John Fairfax & Sons Limited, that the case had been settled by consent of the parties, the resolution of the House of 30 August was rescinded as subsequent action on the Petition was not required.

However, the order of Mr Justice Begg of 23 August 1979 raises important matters of privilege. Indeed, it touches upon the most fundamental of all privileges of the Parliament, namely that of freedom of speech. Recognition by law of the privilege of freedom of speech received statutory confirmation in the United Kingdom after the Revolution of 1688. By Article 9 of the Bill of Rights of 1688 it was declared 'that the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament'. This privilege has been passed to the Commonwealth Parliament through section 49 of the Constitution.

In considering the matter referred to it, the Committee must weigh the need to protect the most important of the privileges of the House against the need to ensure that it does not hinder the administration of justice in court proceedings.

In considering the reference which the Committee has before it, together with the circumstances of the ruling of Mr Justice Begg, one concludes that one way in 'which the House might facilitate the administration of justice' would be to allow records of proceedings of its debates to be taken into evidence (for a limited purpose only) without having to petition the House to do so. Mr Justice Begg obviously thought that it should. After quoting relevant sections from the English case, *Church of Scientology of California* v. *Johnson-Smith* (1972) 1 Q.B. 523 (see page 77), Mr Justice Begg stated:

> In my judgment one might pause to question whether the privilege of Parliament in relation the the mere proof of *Hansard* in a court in Australia has not been entirely waived by Parliament in this country. It is a well known fact that proceedings in the Parliament are broadcast on radio to all the world and copies of *Hansard* are freely sold for fifty cents a copy at the Commonwealth Publications Sales Department in this city.

> And insofar as it falls to me to decide the question, I would hold that waiver by Parliament to this extent is clearly established. (Of course I am not dealing with any question of copyright in the publication.)
>
> Mr Levine has submitted that what the defendant is here seeking to do does not infringe the privilege of a House of Parliament in relation to the proceedings before it, but merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House—not in any way to criticise them nor to call them in question in these proceedings, but to prove them as facts upon which the defendants alleged comments were made in the publication now sued upon by the plaintiff.
>
> *I accept this submission and rule that this use of the fact of what was said in Parliament would not be a breach of the privilege of Parliament.*

And again—

> The question that arises frankly and starkly here for decision is whether or not the use of something that was said by a Member of Parliament can be proved as a fact, not to support a cause of action, not to call it in question in any way but merely to use it as a fact upon which the individual right of freedom of speech in this community—that is to comment upon the public acts of people—can be properly based. In my judgment it can be.

The House of Representatives' experience in cases of this nature is limited to the occasion on 7 May 1963 (Votes and Proceedings 1962–63/464) when the House resolved that two officers of the Parliamentary Reporting Staff 'be authorised to attend in the Supreme Court of the Australian Capital Territory at 10 a.m. on the 8th May 1963, to give evidence in relation to a proceeding in the House on the 3rd October, 1962 . . .' The *Hansard* officers were required only to produce their shorthand notebooks and prove as fact the accuracy of the *Hansard* report of the particular proceeding.

> (On 4 June 1976, in response to petitions from Mr Danny Sankey, the House granted leave for the inspection of documents tabled in the House, to issue and serve subpoena for the production of documents in the Queanbeyan Court and for an appropriate officer to attend the court and produce the documents. It is to be noted that this case related to documents presented to the House, not to a *Hansard* report of proceedings.)

The Commonwealth Parliament has always used as a guide the procedures and practices of the House of Commons in relation to matters of privilege. In the Commons requests for the production in court of *Hansard* and other records of the House are regularly acceded to. A practice has evolved whereby persons desiring the production of House records in court proceedings petition the House for leave to do so. Almost without exception such requests are agreed to by the House (see pages 82, 83 & 85 of these notes).

A schedule showing the occasions between November 1948 and July 1978 when the House of Commons was petitioned to grant leave for the production of records of the House in court proceedings, and the action taken by the House in respect of those petitions, is annexed to the House of Commons Report attached to these notes as Appendix B. Later cases are shown as Appendix C.

The practice of the Commons has recently been the subject of an inquiry by its Committee of Privileges. On 10 November 1978, the Commons referred to its Committee a complaint 'of the production of and reference to the Official Report of Debates in this House, without the leave of the House having been obtained, at the Central Criminal Court, in the case of *Regina* v. *Aubrey, Berry and Campbell*'. The submissions made to that Committee and the recommendations made by it are wholly relevant and of particular interest. The report is appended to these notes as Appendix B.

In his submission to the Committee, after outlining the existing arrangements, the Clerk of the House of Commons had this to say:

> The observations made above refer only to the production in court of *Hansard* and other documents, *simpliciter* (simply). What they are used to prove is quite a different matter . . . The House has every conceivable right to insist that the provisions of Section 1, Article 9, of the Bill of Rights 1688 are meticulously observed and in my view the courts have a duty to ensure that there is not a shadow of an erosion of the rights and privileges of the House on this score.

The Clerk went on to say:

> Finally the most important point of all is that although the House may grant leave for its published documents to be used as evidence in court it has never attached conditions as to the use which may be made of them in court. And it is difficult to see how the House could do so. Even if the House was placed in possession of the pleadings or the charges, it could not know what course the action was likely to take. Thus in Dingle's case, the House in granting leave for the Report of a Private Bill Committee to be tendered as evidence, had no reason to suppose that Counsel would attempt to go behind the report and impugn the proceedings of the Committee. It was left to the Judge with the assistance of the Solicitor-General as *amicus curiae* (a friend of the court or a disinterested adviser) to uphold the privileges of the House.
>
> In these circumstances the Committee may wish to consider whether the procedure by way of petition for leave and a subsequent order for leave has now become a meaningless formality and of little practical value in maintaining the privileges of the House; and whether as such the procedure could be dispensed with.

The United Kingdom Committee of Privileges reported to the House of Commons on 7 December 1978 as follows:

> The practice of the House which prevents reference to the Official Report in Court proceedings except after leave given in response to a petition appears to have developed out of the Resolution of 26 May 1818 which in terms merely requires the leave of the House to be granted for the attendance of its servants to give evidence in respect of the House's proceedings. The Resolution continues to provide an essential protection for the House in the matters to which it strictly relates, but Your Committee consider that no purpose is served by its extension to the requirement of leave merely for reference to be made to the Official Report. They believe that the provisions of Article 9 of the Bill of Rights, reinforced by the care taken by the courts and tribunals to exclude evidence which might amount to infringement of parliamentary privilege, amply protect the House's privilege of freedom of speech. Your Committee accordingly recommend that the practice of presenting petitions for leave to make reference to the Official Report in Court proceedings be not followed in the future and that such reference be not regarded as a breach of the privileges of the House.

Advice received from the House of Commons on 17 September 1979 stated that the Commons had not yet adopted the recommendation of the Committee nor passed any resolution in relation thereto.

I have made inquiries also in respect of the practice followed by other Parliaments with privileges similar to those of the House of Representatives. Of particular interest is the position in the Canadian House of Commons.

The Canadian House does not insist on its leave being given for *Hansard* reports to be used in court proceedings. The Canadian courts have recently used *Hansard* extracts for the same limited purpose for which *Hansard* was used in the *Church of Scientology of California* v. *Johnson-Smith* case (see page 77) without having petitioned the House of Commons and with impunity. The courts have also used *Hansard* for other purposes without having petitioned the House of Commons and with impunity. In fact no petition for leave to use *Hansard* reports in Court has ever been presented to the House but, in the opinion of the Clerk, if such a request were to come before it, the House would satisfy itself that the *Hansard* excerpts would not be used to question a proceeding in Parliament except under the statute law prohibiting members to sit and vote while disqualified.

Clearly any impeachment or questioning by the courts of speeches made in the House of Representatives would be a most serious infringement of Members' right of freedom of speech. But the question to which the Committee is likely to apply itself is whether the House should permit the production of records of its proceedings for the purpose only of establishing as fact that a particular speech or speeches were made in the House by a particular Member or Members at a particular time.

If the Committee is to draw on the experiences of other Parliaments, particularly the Commons Houses of the United Kingdom and Canada, it may feel disposed to recommend the adoption of a procedure whereby records of the House may be admitted into evidence in court proceedings, without the leave of the House having been first obtained, for the limited purpose only of establishing that a particular statement was made by a particular person at a specified time. To do so would accord with the Canadian practice and that proposed by the Clerk of the United Kingdom House of Commons in his submission to the Committee of Privileges of that House and subsequently recommended by that Committee.

THE COMMITTEE OF PRIVILEGES: FUNCTIONS, PROCEEDINGS ETC.

Standing Order

House of Representatives Standing Order No. 26 is as follows:

> A Committee of Privileges, to consist of nine Members, shall be appointed at the commencement of each Parliament to inquire into and report upon complaints of breach of privilege which may be referred to it by the House.

Witnesses—Summoning of and administration of oath

House of Representatives Standing Orders Nos 354 to 368 deal with the calling of witnesses etc.

May 19th ed., pp. 644–5, deals with the general powers of a Select Committee regarding the attendance of witnesses.

In 1941, the Chairman of the Commonwealth Parliament War Expenditure Committee asked the Solicitor-General for advice on certain questions. In dealing with the following question: 'Has a Select Committee or Joint Committee power to summon persons to give evidence and to administer oaths to witnesses', the Solicitor-General (Opinion 53 of 1941) said that if a Select Committee is empowered to send for persons, papers and records, it may, in his opinion, summon witnesses to give evidence.

By virtue of section 49 of the Constitution, the power contained in the *Parliamentary Witnesses' Oaths Act* 1871, of Great Britain for any Committee of the House of Commons to administer an oath to a witness is conferred on each House of the Commonwealth Parliament and on the Committees of each such House. This power, however, does not extend to a Joint Committee.

The Solicitor-General briefly answered the question by stating:

> A Select Committee or a Joint Committee authorised to send for persons, papers and records has power to summon witnesses. A Select Committee also has power to administer oaths to witnesses. It is doubtful whether a Joint Committee has that power.

Scope of Inquiry

> A select committee, like a Committee of the whole House, possesses no authority except that which it derives by delegation from the House by which it is appointed. When a select committee is appointed to consider or inquire into a matter, the scope of its deliberations or inquiries is defined by the order by which the committee is appointed (termed the order of reference), and the deliberations or inquiries of the committee must be confined within the limits of the order of reference . . . interpretation of the order of reference of a select committee is a matter for the committee . . . If it is thought desirable that a committee should extend its inquiries beyond the limits laid down in the order of reference, the House may give the committee authority for that purpose by means of an instruction.
>
> (*May* 19, p. 635)

> Besides the report properly so called relating to the subject-matter referred to the committee, it is frequently necessary for a committee to make what is termed a special report in reference to some matter incidentally arising relating to the powers, functions or proceedings of the committee . . . A report from a committee desiring the instructions of the House as to the authority of the committee or the proper course for it to pursue; or a report

that a witness has failed to obey a summons to attend or has refused to answer questions addressed to him by the committee, are examples of such special reports.

(*May* 19, pp. 661–2)

A House of Representatives case of a special report relates to the Committee of Privileges inquiring into articles in the *Bankstown Observer* (1955). An article dated 28 April 1955 had been referred to the Committee. Subsequently, the Committee presented a special report to the House seeking authority to include in its investigations articles appearing in the *Bankstown Observer* of 5th, 12th and 19th May. The House agreed to a motion that the Committee's request be acceded to.

(V & P 1954–55, pp. 225, 239)

> . . . The scope of any inquiry (of the *Committee of Privileges*) comprises all matters relevant to the complaint. The committee does not sit in public.

(*May* 19, p. 675)

The foregoing reference in *May* results from a resolution of the House of Commons in 1947–48:

> That when a matter of complaint of breach of privilege is referred to a Committee, such Committee has, and always has had, power to inquire not only into the matter of the particular complaint, but also into facts surrounding and reasonably connected with the *matter of the particular complaint*, and into the principles of the law and custom of privilege that are concerned.

(House of Commons Journals 1947–48, p. 23)

Counsel: Lack of judicial form—

> Persons accused of breaches of the privileges or of other contempts of either House are not, as a rule, allowed to be defended by counsel; but in a few cases incriminated persons have been allowed to be heard by counsel, the hearing being sometimes limited to "such points as do not controvert the privileges of the House". Where a person has been allowed to make his defence by counsel, counsel have sometimes been heard in support of the charge; and where a complaint of an alleged breach of privilege was referred to the Committee of Privileges, counsel were allowed, *by leave of the House*, to examine witnesses before the Committee on behalf of both the Member who had made the complaint and the parties named therein. (The last cases recorded in *May* were in the 18th century.)

Details of the Commons Practice in relation to counsel appearing before Select Committees are given in *May*, 19th ed., pp. 644–6.

During the course of the sittings of the House of Representatives Committee of Privileges in the *Bankstown Observer* case, Mr R. E. Fitzpatrick, who had been called by the Committee, requested that he be represented by counsel. By resolution, the Committee decided to hear counsel on the following two points:

(a) as to his right to appear generally for Mr Fitzpatrick; and
(b) as to the power of this Committee to administer an oath to the witness.

The Committee heard counsel on these points but did not agree to counsel's application to appear. (Report of Committee tabled 8 June 1955, pp. 9–10.)

> Little attempt is made in the Committee of Privileges to observe judicial forms. Persons accused of contempt of the House are not as a rule allowed to be defended by Counsel, though in a few cases the House has given leave for an exception to be made. The Committee of Privileges usually hears only the parties concerned and the Clerk of the House, and the House decides the appropriate penalty on the tenor of the debate on the Committee's report.

(Extract from Paper prepared by the Clerk of the House of Commons for the Association of Secretaries-General of Parliaments—March 1965.)

Protest or Dissent may be added to the Report—

Standing order 343 reads as follows:

The chairman shall read to the committee, at a meeting convened for the purpose, the whole of his draft report, which may at once be considered, but, if desired by any Member it shall be printed and circulated amongst the committee and a subsequent day fixed for its consideration. In considering the report, the chairman shall read it paragraph by paragraph, proposing the question to the committee at the end of each paragraph—"That it do stand part of the report". A Member objecting to any portion of the report shall move his amendment at the time the paragraph he wishes to amend is under consideration. A protest or dissent may be added to the report.

J. A. PETTIFER

Clerk of the House of Representatives

25 September 1979

EXTRACTS FROM HANSARD

SPEECHES MADE IN THE HOUSE OF REPRESENTATIVES

30 AUGUST 1979 AND 11 SEPTEMBER 1979

30 August 1979, pages 828–38

LEAVE OF HOUSE FOR PRODUCTION OF DOCUMENTS AND ATTENDANCE OF OFFICER AT COURT PROCEEDINGS

Mr SINCLAIR (New England—Leader of the House)—Mr Deputy Speaker, I ask for leave of the House to move a motion granting leave of the House for production and adduction as evidence of certain documents and the attendance of an appropriate officer of the House for court proceedings.

Mr DEPUTY SPEAKER (Mr Giles)—Is leave granted?

Mr Lionel Bowen—No, it is not, Mr Deputy Speaker.

Mr DEPUTY SPEAKER—Leave is not granted.

Mr Lionel Bowen—I would like to address you in this regard, if I may, to indicate the Opposition's attitude.

Mr Sinclair—When I move for the suspension of Standing Orders would be an appropriate time, would it not?

Mr DEPUTY SPEAKER—There is no form of the House which I can see which will enable the Deputy Leader of the Opposition to speak, unless he seeks leave to make a statement, which I presume he is not prepared to do in the circumstances.

Mr Lionel Bowen—No. I refused leave.

Mr Sinclair—You are refusing leave to move a motion, are you not?

Mr Lionel Bowen—Yes, for reasons I want to put.

Suspension of Standing Orders

Mr SINCLAIR (New England—Leader of the House) (3.6)—I move:

That so much of Standing Orders be suspended as would prevent the Leader of the House moving:

That, in response to the petition of John Fairfax and Sons Limited presented to the House on 28 August 1979, this House grants leave—

(1) to the petitioner and its legal representatives to issue and serve subpoenas for the production of the relevant official records of the proceedings of the House as described in the second schedule of the petition,

(2) to the petitioner and its legal representatives to adduce the said official records of the proceedings as evidence of what was in fact said in the House and

(3) to an appropriate officer of the House to attend in court and to produce the said official records of proceedings and to give evidence in relation to the recording of proceedings provided that the officer shall not be required to attend at any time which would prevent the performance of his duties in the Parliament.

Mr LIONEL BOWEN (Kingsford-Smith) (3.7)—I want to put the Opposition's objections to this motion in two areas. I submit that the Leader of the House (Mr Sinclair) is not entitled to move the motion. It relates to a petition. That is the second point. I question what procedure of the House allows the Minister to move a motion simply because he wants to do so. I submit that there is none. Coming immediately to the second point, the Minister wants to comply with the terms of a petition. We have to look at the rules this House has relating to petitions. Standing Order 130 states that the only things that we can do with petitions are to print them or to refer them to a select committee of the House. Nothing more can happen. In other words, under Standing Order 130 there can be no motion related to anything else. I am not anxious to delay the House, but the point I am making is that the Minister has no right of his own volition to move such a motion. That is the first point. The second point is that we should look at our procedures in relation to petitions. We can do certain things—print them or send them to a select committee. Accordingly, I do not think there is any validity in moving for the suspension of Standing Orders to do something which the Minister is not entitled to do.

Mr Sinclair—Mr Deputy Speaker, on that question, could I suggest that if Standing Orders are suspended those restraints applied by the Standing Orders can hardly apply after Standing Orders have been suspended. For all that there might be validity if only the Standing Orders were to be taken into account, the motion I have just moved suggests that the provisions of the Standing Orders should be suspended. Once they are suspended I do not believe that any of the restraints suggested by the Deputy Leader of the Opposition would apply to this debate.

Mr SPEAKER—The Leader of the House has moved for the suspension of Standing Orders to enable him to move a motion concerning leave of the House for production of documents and attendance of an officer at court proceedings. I understand that the Deputy Leader of the Opposition has refused leave to suspend Standing Orders.

Mr Lionel Bowen—Mr Speaker, you did not have the advantage of listening to me earlier.

Mr SPEAKER—I was in transit.

Mr Lionel Bowen—I know. I make the point that we are anxious not to delay the House unnecessarily. I think this is a question of matters of serious importance to the Parliament not only today but also in the future. The Minister is now seeking to move a motion after moving for the suspension of Standing Orders. Two issues are involved. We are not granting leave because we do not want the Minister, because of numbers in this House, later on to be able to say that the House gave him leave to do something. I make the point that even if the House wanted to give leave for the moving of the motion it could not do so. I say that there is no procedure by which the Minister can move the motion. The House itself, as a corporate body, can do something, but no one segment of the House can do something on behalf of the House. I am making the distinction in this case because it relates to the privileges of the House. I do not want to go into the matter at length at this stage. The privileges of the House are the privileges of the whole House by unamimous decision, not by a majority decision or by the Minister moving a motion. This matter involves the question of the privilege of the whole House.

We do not give leave. Let us look at what he wants to do should leave be granted by a majority decision. Again I make the submission that no one person in the House has the right so to do. The House, by unanimous decision, can agree to give leave and to do certain things. In other words, it is a corporate position relating to privileges. It is not for any one individual to indicate that he thinks this ought to be done or that ought to be done from the point of view of the privileges of this House.

In making my remarks about a petition I adverted to the fact that under the Standing Orders the House may do certain things relating to petitions. Under Standing Order 130 they may be either printed or sent to a select committee. I acknowledge that if Standing Orders were suspended that provision may not apply. But the question then arises: What do we do with the petition? There is no procedure to allow the Minister to move a motion to do something with a petition—particularly something that would affect the rights and privileges of any member of this House—unless the House agreed by unanimous decision. It would have to agree that there should be a suspension of Standing Orders. That would have to be unanimous. The leave to do what was wanted in the petition would also have to be unanimous.

Mr SPEAKER—In relation to the point the honourable gentleman has put, I do not follow his argument that the second stage requires unanimity. The first stage—that is, for leave—can be refused by one voice. Therefore, if one voice can prevent leave being granted, it requires unanimity. But if leave is given for this purpose—I suppose leave was given—the motion can pass on a majority. It would not require unanimity at the second stage.

Mr Lionel Bowen—If leave were given there would be no need to suspend Standing Orders; one would merely want leave to go ahead according to the terms of the petition.

Mr SPEAKER—As I see the position, the Leader of the House has asked for leave. I will need to put to the House the question: Is leave granted? The Deputy Leader of the Opposition has indicated the reason why leave may be refused. That I follow. But when I put the question that leave be granted, if there is a dissentient voice leave is not granted. Then the forms of the House would enable certain measures to be taken by the Leader of the House; that is, to move for suspension of Standing Orders which would require an absolute majority, in which case that would not be unanimity but an absolute majority. If the motion for suspension of Standing Orders were passed the original motion could be put. It would then be passed or failed on a majority of the House. I am informed by the Clerk that leave was asked for and was refused.

Mr Lionel Bowen—With your indulgence, Mr Speaker, I wish to focus attention on the motion for the suspension of Standing Orders, which is what the Leader of the House is anxious to have disposed of. I make the point that the effects of carrying the motion will interfere with the rights and privileges of the House.

Mr SPEAKER—That goes to the substance.

Mr Lionel Bowen—Yes, the substance. I make the point that it is not in order to do that. I get that aspect into focus.

Mr Holding—Mr Speaker——

Mr SPEAKER—I notice that the honourable member for Melbourne Ports is seeking to catch my attention. What does the honourable member wish to address himself to?

Mr Holding—I suppose I should raise this argument as a point of order and as a matter of privilege. It seems to me that the matter which is raised by the Leader of the House clearly relates to the privileges and prerogatives of this House. In substance, this is an attempt to limit the existing rights that are attached to the privileges of this House and the right of members to control their own proceedings. As it is a matter of privilege, it seems to me, Sir, that, as you are the custodian of the rights and privileges of this Parliament, it is important that this matter not be as it were taken over by the Executive arm of government, no matter how worthy its motives. Because it is a matter of privilege, and as such it should first of all be drawn to your attention, as the custodian of the rights and privileges of this chamber. That being so, it does raise very

serious issues that go not merely to the rights of this House but also precedents which may be established.

I would have thought—and I raise it as a matter of privilege—that ultimately it is a matter in which the jurisdiction of the House ought to be vested in you, Sir, and quite properly the matter should be referred to the Privileges Committee whose task would be to advise the House on the proper course that we should take in respect of this petition. I believe that that would be a far more proper course of action than the course which we have embarked upon in which a member of the Executive, whatever the motives—and I accept them as being proper motives—seeks to embark upon a course which has the result of bypassing both the Chair and the Privileges Committee on what is a matter of privilege. I raise my point in that way.

Mr SPEAKER—I call the Leader of the House.

Mr SINCLAIR (New England—Leader of the House) (3.17)—In reply—I address my remarks to the motion and the two matters that have been raised. As you, Mr Speaker, have identified, the question now before the House is a motion for the suspension of the Standing Orders. Therefore, the matters relating to leave being granted does not pertain. With respect to the suggestion made by the honourable member for Melbourne Ports (Mr Holding), I fail to see how a reference to the Privileges Committee, which is a committee of this place, can in any way give to it powers greater than this House itself exercises. Quite obviously, as a subsidiary of this Parliament, that Committee can have no greater powers. Indeed, the powers of the Privileges Committee are very much the powers of this place insofar as they are delegated to that Committee for a specific purpose. You, Mr Speaker, as the Presiding Officer of this chamber, are, of course, a member of this chamber. I suggest that perhaps what the honourable member for Melbourne Ports has been addressing himself to is not the question of the motion for the suspension of Standing Orders but the substantive motion which would flow if the motion for the suspension of the Standing Orders is carried in accordance with the rules of this place. I believe that it is necessary to suspend the Standing Orders because, under our existing Standing Orders, there is no procedure for the consideration of a petition other than by this method. On that point I am in complete agreement with my friend, the Deputy Leader of the Opposition (Mr Lionel Bowen).

So a petition, which calls on the members of this place to deliberate on and to react to the terms of that petition, having been presented to this Parliament, it is necessary for us to consider it. I believe that it is necessary, therefore, for a procedure to be devised whereby the petition can be considered. That procedure is achieved by the suspension of the Standing Orders. I believe that this House should support the motion for the suspension of the Standing Orders whereupon we can then deliberate on the question of the substantive motion which relates to where, in what way and with what restraints the actual petition presented to the Parliament should or should not be accepted.

I suggest that there is every reason why the Parliament does need to deliberate on the substantive question for it is a matter which, whilst it may not have arisen very often, has in fact arisen on a number of occasions previously including, I understand, in 1963, and more recently on another occasion involving a case in Queanbeyan, of which we are all cognisant, and with respect to another case now before the courts. I do not think that any of us particularly wish to address ourselves to issues outside this chamber that may or may not at any future time be before the courts but I think that as a parliament we do have a real responsibility to ensure that we do take a point of view which sets a precedent from which on future occasions the courts, litigants and indeed

members of this place can know on what occasions and in what circumstances the procedures of this House in the form known as *Hansard* can be turned to and used within those proceedings in other places.

I, therefore, would contend that it is absolutely essential that we do find a procedure to consider the substantive motion. Of course the only way to do that is to suspend the Standing Orders. I think that the honourable member for Melbourne Ports might wish to express in discussion on the substantive motion a point of view which might relate to a way by which this sort of matter could otherwise be considered.

Mr SPEAKER—There is no course open to me other than to put the motion for the suspension of Standing Orders. If it is defeated, that will be the end of the matter, although with notice it can be given a rebirth. But, if the matter is carried, it will come forward for discussion. I intend to put that motion. Before I do so, I will hear the honourable member for Melbourne Ports, who is seeking to attract my attention.

Mr Holding—Thank you, Mr Speaker. In that case, I ask for a specific ruling from you, Mr Speaker, because I think an important matter of precedent is involved. I ask you to rule specifically whether it is appropriate, when a petition presented to this House which clearly raises a matter of privilege that that matter procedurally it ought first be referred to the Chair and the Privileges Committee rather than being handled by the method that is now being adopted. I raise this matter specifically and seek a ruling from you, Mr Speaker, because I think the procedure that we now establish will set some very important precedents.

Mr SPEAKER—I will respond to what the honourable member for Melbourne Ports has said. Firstly, I was informed by the Clerk of the nature of the petition. I informed myself as to what possible action may be taken by one or more members of the House. In fact, when the petition was read out, no action was taken. However, given the nature of the petition, it was obvious that there had to be a response, and that response may have been to do nothing, which in itself would have been a response. Alternatively, positive action needed to be taken. The fact is that, under the Standing Orders, action would have to come from a member of the House and the Leader of the House normally would be obliged to fulfill the requirement of bringing the matter before the House which, as I perceive it, is what he has done.

Before doing so, the matter was brought to me for my reaction by the Acting Leader of the House, the Minister for Business and Consumer Affairs, and I indicated to him that in my view the precedents were that this Parliament should do what it can to facilitate the course of justice in the courts and that we could not obstruct that if we could allow a course to be adopted without interfering with the ancient privilege of Parliament, that ancient privilege being no benefit to individual members but the ability of and the freedom for members of Parliament to speak the truth and to demand the truth within the Parliament without action being taken outside the Parliament to challenge what was said.

Against that background, I asked to see the motion which may be moved. The motion as formulated was done in association with the Clerk, with advisers of the Leader of the House and advisers of the Attorney-General. I am bound to say that there was some discussion about item (2). It reads:

> (2) to the Petitioner and its legal representatives to adduce the said official records of the proceedings as evidence of what was in fact said in the House and

The question that arose was whether, in facilitating the judicial process, that would in any way weaken the privilege of the Parliament rather than add to it. There was some discussion about that point. The Leader of the House had the responsibility of putting the motion. He has left it in that form. Having put aside those preliminary points, it is

now my duty under the Standing Orders to put the motion for the suspension of Standing Orders before the Chair.

Question put:

That the motion (**Mr Sinclair's**) for the suspension of Standing Orders be agreed to.

The House divided.

(Mr Speaker—Rt Hon. Sir Billy Snedden)

Ayes	76
Noes	32
Majority	44

AYES

Adermann, A. E.	Johnson, Peter
Aldred, K. J.	Johnston, Roger
Anthony, J. D.	Jull, D. F.
Baillieu, M.	Katter, R. C.
Baume, M. E.	Killen, D. J.
Birney, R. J.	Lloyd, B.
Bourchier, J. W. (Teller)	Lucock, P. E.
Bradfield, J. M.	Lusher, S. A.
Brown, N. A.	MacKellar, M. J. R.
Bungey, M. H.	MacKenzie, A. J.
Burns, W. G.	McLean, R. M.
Burr, M. A.	McLeay, John
Cadman, A. G.	McMahon, Sir William
Cairns, Kevin	McVeigh, D. T.
Calder, S. E.	Macphee, I. M.
Cameron, Ewen	Martyr, J. R.
Carlton, J. J.	Millar, P. C.
Chapman, H. G. P.	Moore, J. C.
Connolly, D. M.	Neil, M. J.
Cotter, J. F.	Newman, K. E.
Dobie, J. D. M.	Nixon, P. J.
Drummond, P. H.	O'Keefe, F. L.
Edwards, H. R.	Peacock, A. S.
Ellicott, R. J.	Porter, J. R.
Falconer, P. D.	Robinson, Eric
Fife, W. C.	Ruddock, P. M.
Fisher, P. S. (Teller)	Sainsbury, M. E.
Garland, R. V.	Shack, P. D.
Giles, G. O'H.	Shipton, R. F.
Gillard, R.	Short, J. R.
Graham, B. W.	Simon, B. D.
Groom, R. J.	Sinclair, I. McC.
Haslem, J. W.	Staley, A. A.
Hodgman, M.	Street, A. A.
Howard, J. W.	Thompson, D. S.
Hunt, R. J. D.	Viner, R. I.
Hyde, J. M.	Wilson, I. B. C.
Jarman, A. W.	Yates, W.

NOES

Armitage, J. L.	James, A. W.
Blewett, N.	Jenkins, H. A.

Bowen, Lionel	Johnson, Keith (Teller)
Brown, John	Johnson, Les (Teller)
Bryant, G. M.	Jones, Barry
Cass, M. H.	Kerin, J. C.
Cohen, B.	Klugman, R. E.
Dawkins, J. S.	McLeay, Leo
Everingham, D. N.	Martin, V. J.
Fry, K. L.	Morris, P. F.
Holding, A. C.	Scholes, G. G. D.
Howe, B. L.	Uren, T.
Humphreys, B. C.	Wallis, L. G.
Hurford, C. J.	West, S. J.
Innes, U. E.	Willis, R.
Jacobi, R.	Young, M. J.

PAIRS

Goodluck, B. J.	McMahon, Les
Corbett, J.	FitzPatrick, J.

Question so resolved in the affirmative with an absolute majority.

Mr Scholes—I take a point of order. Mr Speaker, I ask for a ruling from the Chair on the question which appears to be before the House and which has been before the House on at least one other occasion; that is, the question of a member's individual privileges as a member of Parliament in respect of those matters which he utters in this House under privilege as a member of the Parliament. Will the passage of a resolution of this House override or be able to override in retrospect the privileges of the individual member of this House? Secondly, is such a resolution ultra vires the Constitution which provides that the privileges of members of the Parliament are not fixed by the Standing Orders nor by a resolution of the Parliament in any way. The privileges are those which are specified in the Constitution and which accrued to the House of Commons at the time of the formation of this Parliament. They are open to be altered by the Parliament only by legislative form. I am not sure whether it is fair to ask you, Mr Speaker, to rule now on whether this type of resolution will retrospectively take away from a member of this House, by allowing speeches in the Parliament to be used in evidence against him in a court, the privileges which accrue to him as an individual member of the Parliament and whether it is in breach of the Constitution.

Sir William McMahon—May I reply to the point of order. The honourable member for Corio is not right. He has obviously forgotten the Sankey case.

Mr Young—That does not make the Sankey case decision right.

Sir William McMahon—I have nothing to do with this matter. I did not even know it was coming on. I ask honourable members opposite not to associate it with me. I wish they gave me all the support I would like them to give me. It will be remembered that the Sankey case involved four members of the Parliament, including the then Prime Minister. An information was lodged which was the beginning of a process that might have led up to criminal proceedings. The House itself—it was led by the honourable member for Corio as Speaker—moved the motion approving of the production of documents before the Court of Petty Sessions at Queanbeyan. Then, in evidence, it was argued that they were to be produced but they were not to be regarded as evidence in the case for some other frivolous reason. The matter was ruled on by the High Court. The High Court has given its decision. I believe that in a case like this no privilege should be given to any particular member of parliament. I rose to argue against the case put by the honourable member for Corio representing the Opposition. We should do all in our power to ensure that there is fairness and justice. In the administration of

justice we should not hold back from producing documents which may be useful in making a decision.

Mr SPEAKER—The matter which the right honourable member for Lowe spoke of really goes to the substance of the matter.

Mr Lionel Bowen—I wish to speak to the point of order. Often a debate is clouded by some irrelevant factor. The right honourable member for Lowe has introduced an irrelevant factor. I am not being disrespectful, but the Sankey case related to the production of documents tabled in the House. This petition does not relate to that at all. We are well aware of the problems that may arise with privileges of Parliament. When the Opposition was in government, it argued the question of privilege in the Sankey case, and lost. I want to shorten the issue. It has nothing to do with the Sankey case. It is a decision of law now that it is for the judges themselves to decide whether privilege will be granted to any document tabled here. This Parliament lost the case. The matter before us is another matter altogether. It concerns debates in Parliament and whether *Hansard* can be used in the courts as evidence. I support what the honourable member for Corio said. We are talking about the ancient Bill of Rights and the principle that debates in this Parliament may not be the subject of test in any other court.

Mr Sinclair—As I understand the point raised by the honourable member for Corio, I think he needs to distinguish between what I see as the powers of this House covered by a resolution and the powers of this House covered by the introduction of a passage of a Bill and its subsequent reference to the Senate, its passage by both Houses and subsequent approval by the Governor-General. By resolution we can effect changes in matters pertaining to our Standing Orders and the procedures and practices of the Parliament. With a Bill, we can set down procedures, and indeed laws, which are then interpreted in the courts. If we pass a motion within this chamber, that does not in any way affect the interpretation of the law as seen by the courts outside this Parliament. On the other hand, if we pass a Bill which is within the constitutional powers of the Parliament to pass, it does affect the extent to which the judges, in the interpretation of the law, can apply their rulings with respect to the law as it is then changed.

I suggest that the point raised by the honourable member for Corio ignores the difference between the two measures. In this instance the Government seeks only to act within the powers of the Parliament. We seek in no way to affect decisions that may be taken by the judiciary. We seek only to produce evidence. The motion which I am about to move will enable that to be done, but only insofar as our Standing Orders may be varied for that purpose, and privilege may be waived for that purpose. In no way will any ruling of the Parliament or any motion of the Parliament affect any judicial decision that might flow from it.

Mr Scholes—Mr Speaker, on a point of order——

Mr SPEAKER—Is this a separate point of order?

Mr Scholes—No. I want to speak further to the original point of order actually.

Mr SPEAKER—I will allow the honourable member for Corio indulgence.

Mr Scholes—I do not reply to the right honourable member for Lowe. I think his question is quite different. It involved matters which arose outside this Parliament. But the Leader of the House in his last sentence indicated that what is intended by the motion is that the privileges of an individual member of this House, in retrospect, will be waived by a majority decision of this House. The privileges of a member of Parliament are bestowed upon him by the Constitution and cannot be waived by any other member or the member himself.

Hansard is a privileged document. It was a privileged document even before this Parliament was formed. The only way it can cease to be a privileged document is by passing legislation which conforms to the Constitution of Australia to take away the privilege which is attached to that particular document. If this motion is passed and it becomes the practice that the majority of members—that is, governments—may take away an individual member's privileges because he, as a member of the Opposition, is unable to obtain majority support, then the Parliament will cease to have any effective privilege. Retrospectivity will apply and a majority of members probably hostile to a member will be able to determine that that particular member should not enjoy the privileges of Parliament. That is what we are about. I do not believe the Parliament has the authority to change that situation by resolution. Certainly the moral authority of a government, which commands a majority, to take away from an individual member the privileges which accrue to him as his right as a member of parliament is put in question by this motion.

Mr SPEAKER—The honourable member for Corio has raised a point with me and asked me for a ruling. I will give such a ruling. The privileges of the House and of individual members in it was originally established by the Bill of Rights. That privilege of the legislature has been upheld by the courts. The courts have assiduously upheld the privilege because they are bound to do so by statute, by constitutional convention and by the assertion of the privilege by the Parliament. The Parliament has always asserted that privilege and always will, I believe, in our system. What is asked for here is not a waiving of the privilege, as I understand it, as I interpret it. What is asked for here—

Mr Scholes—It is the right to use against a member a privileged document.

Mr SPEAKER—I ask the honourable member for Corio to remain silent. I gave him great indulgence to speak. I ask for him to remain silent. What is asked for here is the facility to take to a court a record as proof of the fact that the words were said but not so that they can be challenged in any way, or form part of any general position at law either of defence or of prosecution. That is the matter which I think has to be very carefully guarded. I give an example. If somebody was sued for a libel and the person's defence was that it was reporting what was said in the Parliament it may be necessary for that defence to produce the *Hansard* to show the words were said. In that case I am sure the Parliament would seek to facilitate the course of law, provided it did not subtract in any way from the privilege of Parliament—and it would subtract if there were any challenge to the freedom of the individual member in the Parliament to say whatever he chose without it being brought into contest outside the Parliament. That is the issue as I see it here—whether or not the privilege will be protected.

I have no doubt whatever that every member of this Parliament wishes the privilege to be protected, not that it gives any member of Parliament any special privileged position in the normal usage of the term 'privilege'; it is an ancient concept which enables people in the Parliament to speak for their electors, under the Constitution, freely, without fear or favour. That is the point in question. There has been a petition which asks for the production of *Hansard* to prove certain matters which are related to the petition. The petition is not being answered according to the motion which is about to be moved and which has been circulated, but certain capacity is being given by resolution of the House; and that is to produce the record through an officer. Whether or not it will weaken privilege is a matter that can be dealt with as a substantive debate.

I rule that it is capable of being agreed to by this Parliament. The Parliament will have to make up its own mind as to whether the motion will subtract from the ancient privilege of the Parliament. Therefore, the motion will be put, will be argued and will be resolved by the Parliament of its own will.

Mr Lionel Bowen—Mr Speaker, without delaying the House, I raise a point of order. I interpret your ruling as saying that it is a matter for the House, by majority, to determine the situation. We have been making the point that we have no objection to the matter being resolved by unanimity but that we certainly do have an objection to a majority decision. I take it that your ruling is that the majority will suffice?

Mr SPEAKER—I am ruling that this is a motion and that the House determines its own course of action by the procedures laid down in the Standing Orders; that is, the motion is moved, there is a debate on the motion and then the question is put.

Mr SINCLAIR (New England—Leader of the House) (3.47)—I move:

That, in response to the petition of John Fairfax and Sons Limited presented to the House on 28 August 1979, this House grants leave:

(1) to the Petitioner and its legal representatives to issue and serve subpoenas for the production of the relevant official records of the proceedings of the House as described in the second schedule of the petition,

(2) to the Petitioner and its legal representatives to adduce the said official records of the proceedings as evidence of what was in fact said in the House and

(3) to an appropriate officer of the House to attend in Court and to produce the said official records of proceedings and to give evidence in relation to the recording of proceedings provided that the officer shall not be required to attend at any time which would prevent the performance of his duties in the Parliament.

As the debate on the introduction has suggested— —

Mr Lionel Bowen—Mr Speaker, I raise a point of order in relation to the wording of the motion. It is a motion that the House grants leave. I submit that we cannot decide by motion that the House grants leave. Leave cannot be granted by a majority decision. If one member dissents, then leave is not granted. I just make the point that the motion is worded as though leave is going to be granted. It should not be so worded because leave was refused.

Mr SPEAKER—Ruling on the point of order, the Deputy Leader of the Opposition is taking the word 'leave' and applying it as though it were capable of only a single meaning. In fact, in this motion there is a different usage of the word 'leave' from its usage in the Standing Orders which deals with leave being sought to enable an honourable member to make a statement or to move suspension of Standing Orders. This motion refers to leave being granted to a petitioner. Therefore it is not a matter of leave being granted or refused. It is a motion of the House.

Mr Lionel Bowen—With respect, Mr Speaker, I think that the motion would be in order if it proposed that we just comply with the petition. That is what it is about. To talk about leave relates to the proceedings of this House.

Mr SPEAKER—I rule against the honourable gentleman. I call the Leader of the House.

Mr Lionel Bowen—I raise one further point of order on another matter altogether. It relates to Standing Order 124. I know the Standing Orders have been suspended. You may care to address your mind to it immediately. It states:

No reference may be made in a petition to any debate in Parliament.

I invite you to look at the wording of this petition which asks for the production of *Hansard* records over a period from 1965 onwards. I submit to you, Mr Speaker, that by doing so the petition is seeking to refer to the debates in this Parliament. I do not wish to delay the House, but I do not think the petition is in order in relation to the proceedings of this House.

Mr SPEAKER—That is an entirely different point of order. It relates to whether the petition itself is in order. The Clerks have held it to be in order. Prima facie I therefore accept it as being in order. Dealing specifically with the point of order, Standing Order 124 states:

> No reference may be made in a petition to any debate in Parliament.

I have always interpreted that as meaning that a petition cannot say that the debate was right or wrong. This petition relates to a different purpose; and that is the provision of the record of a debate as distinct from involvement in the debate itself. I rule against the honourable gentleman.

Mr SINCLAIR—The matter before the House is of some considerable importance. I understand and appreciate the concern that is expressed by some members of the House about procedure. I shall therefore briefly advert to it. Standing order 132 states:

> A copy of every petition lodged with the Clerk and received by the House shall be referred by the Clerk to the Minister responsible for the administration of the matter which is a subject of the petition.

As a result, the Clerk referred the petition to me. I have a letter addressed to me as Leader of the House, dated 28 August, requiring me to act upon it. Members will know that under the procedures of this House as set out by Erskine May in the nineteenth edition of *Parliamentary Practice*, there are a number of references to the circumstances under which *Hansard* can be produced. In particular I draw the attention of honourable members to page 89 and the paragraph which reads:

> Leave for production in a court of law of evidence given before the House or a committee.—The rights of the house are emphasized by the resolution of session 1818——

Which, of course, was well before 1901—

> Which directs that no clerk or officer of the House, or shorthand writer employed to take minutes of evidence before the House, or any committee thereof, shall give evidence elsewhere, in respect of any proceedings or examination had at the bar, or before any committee of the House, without the special leave of the House.

Of course, it is to that principle that the motion that I have moved is addressed. On 28 August John Fairfax and Sons Ltd petitioned this House to permit certain of the official records of its proceedings to be provided to the Supreme Court of New South Wales in connection with proceedings before it. Proceedings have been initiated by the honourable member for Reid (Mr Uren) who is claiming damages for defamation from the petitioner. The petitioner further seeks leave of the House to make reference to and otherwise to use in its defence the official records which it has requested be provided to the court. Honourable members will note from the second schedule of the petition that the records sought to be produced extend over a period from 1965 to 1973. The petitioner also has requested leave of the House to issue and serve subpoenas for the attendance in court of those persons who took the record of the proceedings concerned.

This is not the first occasion that the Parliament has been asked to agree to assist the courts in their work. On one occasion in 1963 this House gave leave for two *Hansard* reporters to give evidence in actions in relation to the proceedings in this House the previous year. For the record of this instance I draw the attention of honourable members to the Votes and Proceedings of 7 May 1963, page 464. Honourable members will also recall that in 1976 the House gave leave for the production to the court of certain papers that had been tabled in the Parliament. For the record of this instance I draw the attention of honourable members to the Votes and Proceedings of 4 June 1976 on page 247. There are quite a number of modern cases in which the House of Commons has acted similarly.

It is against that background that I have moved the present motion. It is designed to enable the records in question to be produced in court by an appropriate officer of this House and to enable the petitioner to adduce the official records as evidence of what was in fact said in the Parliament. It will be noted, however, that the leave to be granted will go no further than to make it possible to establish what was in fact said. It will not allow the honourable member to be interrogated in relation to his statements in the House—that is, the leave to be given takes full account of the duty of this House to maintain the fundamental right of freedom of speech in the Parliament. That right is guaranteed in Article 9 of the Bill of Rights 1688, which declares that the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court of place out of Parliament.

The motion I have moved is in accordance with the principles enunciated by the court in the case cited by the petitioner in paragraph 5 of the petition. That case, the Church of Scientology of Calfornia v. Johnson-Smith, is reported in *1972 1 All England Reports* at page 378. In that case the court noted with approval the submission of the Attorney-General that *Hansard* could be read simply as evidence of fact—what was, in fact, said in the House on a particular day by a particular person. The court went on to say that the use of *Hansard* must stop there and that counsel was not entitled to comment on what had been said in *Hansard* or to ask the jury to draw any inferences from it.

We certainly seek to contain the application of the motion before the House to that constraint, as interpreted before the court on that occasion. The court then saw the general principle as quite clear. It was that *Hansard* must not be used in any way which might involve questioning, in a wide sense, what was said in the House, as recorded in *Hansard.* The motion does not give leave to the petitioner in the terms requested; nor should this House do so. I have outlined the principles that have led to my moving this motion in the terms set down, because it is appropriate that they be generally understood. To the extent that it is possible, we all wish to assist the work of the courts and the administration of justice. We must do so only to the extent that the right to freedom of speech in this place is not put at risk.

There are, within the petition, two matters that I would like briefly to draw to the attention of the House. The first is one that concerns me, and for this reason I have asked the Clerk of the House to consider whether some amendment might be necessary. In clause (1) there is reference to 'the production of the relevant official records of the proceedings of the House as described in the second schedule of the petition'. The honourable member for Reid (Mr Uren) has drawn my attention to the fact that in the petition only certain pages are referred to, with respect to certain dates. It could well be that those pages do not contain the whole of the speech made by a member in the Parliament on a particular day. I believe that there would be difficulties if only part of a member's speech in the House were to be quoted from, and not the whole of that speech. I, therefore, intimate that I will seek leave to adjourn this debate in order to ensure that we can pick up the point which has only just been raised with me by the honourable member for Reid and which I believe is a point of which very serious account needs to be taken.

The second point relates to the wording of clause (2). This is one which you, Mr Speaker, very correctly drew to my attention and the attention of the Attorney-General (Senator Durack). Following our discussion, I have consulted on this matter; that is, the extent to which the words in the latter part of clause (2) are in fact a restraint on the application of the motion or an extension of it. It was suggested by you, Mr Speaker—if I may refer to this in the House—that the words after 'proceedings' might be deleted; in other words, that clause (2) should only read: 'to the Petitioner and

its legal representatives to adduce the said official records of the proceedings'. That means that the words 'as evidence of what was in fact said in the House' should be deleted.

The Attorney and those who advise us do not favour that course. They believe that the present wording is preferable. It is for that reason that I now submit it to the House, as the Attorney, who has been consulted, feels that there is a greater restraint on the use of the official records if those words are included. As I have intimated, the honourable member for Reid has suggested that there is a necessary amendment to clause (1) of the motion. As it is an amendment which needs to be seriously considered before the debate in the chamber is concluded, I suggest that I might seek leave to continue my remarks at a later hour, so that we can pick up the point that the whole of any member's speech should be referred to the court, not a part of it, as it is in terms of the wording that now appears in clause (1).

Mr SPEAKER—The Leader of the House has asked for leave to continue his remarks at a later hour this day. If that is agreed to by the House it will have the effect of adjourning the debate. I notice that the honourable member for Melbourne Ports is standing. Is he wishing to speak to the substance of the motion, or does he wish to take a point of order? I will hear him initially.

Mr Holding—I wanted to speak to the substance of the motion, but I also wish to give notice of an amendment which may well cause the Leader of the House (Mr Sinclair) to consider his course of action. My amendment would be:

That all words after 'House' (second occurring) be omitted with a view to substituting the following words: 'refers the matter to the Committee of Privileges for investigation and report'.

I am happy to address myself to the substance of what the Minister has said and, at the same time, to the amendment.

Mr SPEAKER—I will not permit that. I must deal with the matter which is before the House at the moment. The honourable member for Melbourne Ports has given notice of the amendment he would propose to move at the appropriate time. If the request by the Leader of the House is accepted by the House, that will, of course, adjourn the debate, and at a later time the honourable member can decide whether he will move his amendment. In the meantime, if the request of the Leader of the House is agreed to it will give him an opportunity to consider the proposed amendment.

Mr Holding—I do not wish to lengthen the debate, but it does seem to me that what I am proposing to the House in my amendment is a quite different and substantive method of approaching this matter.

Mr SPEAKER—That is apparent. The honourable gentleman need not proceed any further. It is perfectly apparent that the amendment the honourable gentleman proposes to move is a different method. But I must deal with the procedures of the House as they arise. What has arisen is a request from the Leader of the House to continue his remarks at a later time.

Mr Lionel Bowen—In an endeavour to assist the House, let me say that I think it would be quite reasonable to continue this debate on the understanding that if the Leader of the House (Mr Sinclair) wanted the motion to refer to the whole of any *Hansard* speech there would be no objection from this side of the House. I think it is important that we get on with the debate on the principle of whether it is a question of privilege that the House ought to decide one way or the other. I just make that point, as the Leader of the House has some technical difficulty as to what is in the second schedule. We will not be arguing that. We are arguing the whole principle of what privilege is all about, not the question of a page of a speech or a complete speech. I say that, Mr

Speaker, because this is a matter for serious consideration and I believe that we ought to deal with it and dispose of it. There are a number of people who wish to participate in the debate. I also invite Government members to have a look at what is happening here, because it has nothing to do with personalities or politics and it has everything to do with privilege. I invite all honourable members to look at the request that has been made by the petitioner and what I believe should be refused. I am only making the point that the debate might continue——

Mr SPEAKER—Order! The point is made. Does the Leader of the House wish to pursue the point of seeking leave to continue his remarks at a later time?

Mr Sinclair—Yes, Mr Speaker. I wish to pursue the point of seeking leave to continue my remarks at a later stage. It might well be that we will accept the amendment to be moved by the honourable member for Melbourne Ports (Mr Holding). However, I am not too sure of the time factor and I need to check on that to see whether that presents any particular problems.

Mr Scholes—Mr Speaker, I take a point of order. I want to make a point for consideration by the Leader of the House in the redrafting of the motion. The terms of privilege on the publication of remarks by a member, even by the member himself, have a consequence upon them, namely, that no remarks may be taken or published out of context, and that includes where a total speech of a member is taken out of context. I only ask that the Leader of the House, when he is redrafting his motion, take into account the fact that merely having a total speech might not maintain the context of the remarks or the totality of the debate.

Mr SPEAKER—The point is taken.

Mr Hodgman—Mr Speaker, I seek your indulgence to raise one small drafting matter to be considered by the Leader of the House?

Mr SPEAKER—The honourable gentleman has that indulgence. He may proceed.

Mr Hodgman—I will not develop it in detail; but, in relation to the opinions given by yourself, Mr Speaker, and by the Attorney, I commend to the Leader of the House the point that if it is the view that the latter opinion is to be followed—and I do not express a view one way or the other, as to which is the better—if he wants to make the point that he says he wants to make, after the word 'proceedings' the word 'only' should be added so that paragraph (2) of the motion would read: 'to the Petitioner and its legal representatives to adduce the said official records of the proceedings only as evidence of what was in fact said in the House'. I simply commend that to the Leader of the House, if that is the course that he wishes to follow.

Mr Sinclair—Mr Speaker, may I say with your indulgence that I have just checked on the timing factor and there are obviously very real implications in this motion. I believe that it would be advantageous were the matter to go to the Standing Committee on Privileges for its investigation. It would enable adequate consideration to be given to the wording. I think, therefore, proceedings might be expedited were the House to accept the reference made by the honourable membr for Melbourne Ports (Mr Holding) and then the amendment of which I gave notice could be taken into account by the Standing Committee on Privileges at the appropriate time together with those remarks made by the honourable member for Denison (Mr Hodgman).

Mr SPEAKER—The way in which this can be handled is that I will put the question that the right honourable gentleman have leave to continue his remarks at a later time. I indicate to the House that I will rule that an issue of privilege arises here and will send it to the Privileges Committee for consideration. The right honourable Leader of the House has sought leave to continue his remarks at a later hour.

Leave granted; debate adjourned.

Privilege

Mr SPEAKER—On the basis of what I have heard in the preceding debate, I indicate to the House that I believe an issue of privilege arises. I will refer the matter to the Privileges Committee for report to me.

LEAVE OF HOUSE FOR PRODUCTION OF DOCUMENTS AND ATTENDANCE OF OFFICER AT COURT PROCEEDINGS

Mr SINCLAIR (New England—Leader of the House) (8.47)—Mr Deputy Speaker, in accordance with Standing Order 95 I raise a matter of privilege. Following the discussion in the House earlier today I move:

That the petition of John Fairfax and Sons Limited presented to the House on 28 August 1979 be referred to the Committee of Privileges for consideration and advice as to whether the petition in whole or in part or any matter raised by it can be acceded to without derogation of the privileges of the Parliament or of the Members of the Parliament and if so, the form in which it might be so acceded to.

Mr LIONEL BOWEN (Kingsford-Smith) (8.48)—The Opposition has no objection to that course. I just say that this petition opens new procedures that have never been dealt with in this House before. It differs from any petition that has been discussed previously. It is without precedent. I think that all members of the House ought to be concerned as to their privileges. I suggest that they all take an interest in the petition and what it means to them and make whatever submissions that they think fit to the Privileges Committee, rather than just assume that the Committee will do all the work. The petition, if acceded to, will mean that whatever is said in the course of debate in this Parliament in future can be the subject of examination in the witness box, particularly on the question of credibility. So this is a very major step forward. I should like all honourable members to take an interest in it on the merits of their rights.

Mr SINCLAIR (New England—Leader of the House) (8.49)—in reply—Mr Deputy Speaker, with your indulgence I should like to endorse the remarks of the Deputy Leader of the Opposition (Mr Lionel Bowen). The Government is certainly not trying to rush through this matter in a way which denies proper and adequate consideration of the matter of privilege. Indeed, it is for that reason that I have accepted the suggestion of the honourable member for Melbourne Ports (Mr Holding). However, I suggest to the Committee that I do not believe that the matter can be left for unduly protracted debate. I think there is a necessity for this matter to be considered when the House resumes after next week's adjournment. I hope that it might be possible before the end of the week after we resume for the House to consider the Committee's report and for the Parliament then to take its decision on the matter.

Question resolved in the affirmative.

11 September 1979, pages 897–8

Mr SPEAKER (Rt Hon. Sir Billy Snedden) took the chair at 2.15 p.m., and read prayers.

MATTERS OF PRIVILEGE

Mr SPEAKER—I have received a telegram from the solicitors acting on behalf of John Fairfax and Sons Ltd in relation to a petition presented to this House on 28 August 1979 which the House referred to the Committee of Privileges on 30 August 1979 for consideration and advice. The telegram reads as follows:

The defamation proceedings between Mr Tom Uren and John Fairfax and Sons Limited our client were settled by order made by consent of the parties by His Honour Mr Justice Nagel after the case commenced yesterday.

In the circumstances no further steps with respect to the petition need to be taken. A formal letter follows.

Stephen, Jacques and Stephen

Mr SINCLAIR (New England—Leader of the House)—Mr Speaker, following the presentation of the telegram to which you have just adverted, I seek leave to move a motion to rescind the reference of the petition to the Privileges Committee. In so doing, I indicate to the House that it is my understanding that the honourable member for Burke (Mr Keith Johnson) intends to raise as a matter of privilege an order issued in that case by His Honour Mr Justice Begg. I intend thereafter to move a motion for a further reference to the Privileges Committee.

Leave granted.

Motion (by **Mr Sinclair**) agreed to:

That the resolution of the House of Representatives of 30 August 1979, referring to the Committee of Privileges the petition of John Fairfax and Sons Limited presented to the House on 28 August 1979, be rescinded.

Mr KEITH JOHNSON (Burke) (2.18)—I raise a matter of privilege. It has come to my notice that in the Supreme Court of New South Wales on 23 August 1979 Mr Justice Begg issued an order in the case of Uren v. John Fairfax and Sons Ltd. The effect of the order, as I understand it, was to permit the use in court for a limited purpose of certain records of the proceedings of this House. It is well known that, by the 9th Article of the Bill of Rights, it was declared:

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

That is a direct quote from page 77 of the 19th Edition of May's *Parliamentary Practice*. It seems to me Mr Speaker, that the action of Mr Justice Begg may have infringed the privileges of this House. I ask for your ruling whether this is an appropriate matter to be referred to the Committee of Privileges.

Mr SPEAKER—I have had the opportunity of seeing the order of Mr Justice Begg. I have had the opportunity also of consultations with the Leader of the House. A motion which I understand the right honourable gentleman is about to move has my concurrence. I think that that motion, if passed by the House, will encompass the matter raised by the honourable gentleman without identifying it as the sole issue. It is a broader issue. I therefore will call upon the Leader of the House to move his motion. I am quite sure the honourable member for Burke will be satisfied that the matter will be incorporated within that motion if it is passed by the House.

Mr SINCLAIR (New England—Leader of the House) (2.21)—I move:

That the following matter be referred to the Committee of Privileges—The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

This motion, in its wider compass, picks up part of the purpose for the earlier reference to the Privileges Committee. In this chamber there is obviously a concern as to the extent to which proceedings should be made available to the courts in future instances. Whilst the honourable member for Burke (Mr Keith Johnson) has raised a specific matter, the Government feels that there would be more benefit for the consideration of this chamber if the Privileges Committee were to look at the matter in the broad rather

than in the particular. I would therefore commend this broader motion for acceptance by members of the chamber.

Mr UREN (Reid) (2.22)—My case with John Fairfax and Sons Ltd has been settled. An apology was tendered today on the editorial page of the *Sydney Morning Herald.*

Mr LIONEL BOWEN (Kingsford-Smith) (2.23)—Without quibbling with the words in the motion, in an effort to expedite the matter and to agree that something should be decided by the Privileges Committee, I wish to state that in the case in question the idea behind the petition was to use the *Hansard* of this House to cross-examine a member. I think that is an infringement of privilege. I do not think any petition, no matter which side of the House it comes from, should ever be granted unless the House is unanimous that the course of justice would be furthered. One cannot have the cause of justice furthered by a majority of the House. The rights of the House belong to each member and should not be transgressed by a government or by anybody getting the numbers and saying: 'I am going to make certain that what you said in the House is going to be the subject of cross-examination in a court'. I think the rule is clear, as referred to by the honourable member for Burke (Mr Keith Johnson). The Bill of Rights gives certain freedom of expression in this chamber. If what each of us says in the course of that expression is going to be the subject of cross-examination in the witness box, we lose that freedom. I do not think it is a matter for any court to determine.

I make this point: This House is a court in itself—a supreme court—to try to regulate the conduct of members. If a member transgresses the rights of individuals, we, as a parliament, can deal with that member and can expel him. There is a sanction on our behaviour here. But to inhibit us on the basis that perhaps we are not allowed to say something, because if we do we can be the subject of legal action which will be the subject of cross-examination, I think, is an inhibition of our rights. Whilst everyone is anxious to facilitate the cause of justice, I do not think the motion ought to be on that basis. I do not want to alter it now, but I want to say that if and when it goes to the Privileges Committee, members of the Committee ought to look at the rights of each and every one of us in this chamber on the basis that those rights are in no way interfered with unless the House unanimously agrees that such action can take place.

Mr SPEAKER—I will ensure that the point made by the Deputy Leader of the Opposition goes to the Privileges Committee if, as I anticipate, the House approves the motion. The Privileges Committee will have to consider this matter in detail. I am sure it is the will of the House to facilitate the courts to the extent possible without derogation from the privileges of the House.

Question resolved in the affirmative.

REPORT OF THE UNITED KINGDOM COMMITTEE OF PRIVILEGES

ON

REFERENCE TO OFFICIAL REPORTS OF DEBATES IN COURT PROCEEDINGS

FIRST REPORT

FROM THE

COMMITTEE OF PRIVILEGES

TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE

Session 1978-79

REFERENCE TO OFFICIAL REPORT OF DEBATES IN COURT PROCEEDINGS

Ordered by The House of Commons *to be printed*
7th December 1978

LONDON
HER MAJESTY'S STATIONERY OFFICE
40p net

Tuesday 29 *October* 1974

Ordered, That a Committee of Privileges be appointed.

Monday 18 *November* 1974

Ordered, That the Committee of Privileges do consist of Seventeen Members.

Ordered, That the Committee have power to send for persons, papers and records.

Ordered, That Six be the Quorum of the Committee.

Ordered, That these Orders, and the Order relating to Privileges made on 29 October, be Standing Orders of the House until the end of this Parliament.—(*Mr Walter Harrison.*)

Ordered, That Mr Attorney General, Mr Arthur Bottomley, Mr Edward du Cann, Mr Hugh Fraser, Mr Edward Heath, Mr Cledwyn Hughes, Mr Sydney Irving, Mr Ian Mikardo, Mr John Peyton, Sir Peter Rawlinson, Sir David Renton, Mr Edward Short, Mr Michael Stewart, Mr G. R. Strauss, Mr Jeremy Thorpe, Sir Derek Walker-Smith and Mr Frederick Willey be members of the Committee of Privileges.

Ordered, That the members of the Committee of Privileges nominated this day shall continue to be members of the Committee for the remainder of this Parliament.

Ordered, That this be a Standing Order of the House.—(*Mr Walter Harrison.*)

Changes in the membership of the Committee

On 28 February 1975 Mr Edward Heath was discharged, and Mrs Margaret Thatcher was added to the Committee.

On 1 November 1976 Mr Michael Foot was added to the Committee in the place of Mr Edward Short.

On 26 November 1976 Sir Peter Rawlinson and Mrs Margaret Thatcher were discharged, and Sir Michael Havers and Mr William Whitelaw were added to the Committee.

On 7 February 1978 Mr John Peyton was discharged, and Mr Francis Pym was added to the Committee.

On 17 November 1978 Mr Francis Pym was discharged, and Mr Norman St. John-Stevas was added to the Committee.

Friday 10 *November* 1978

Complaint having been made by Mr Christopher Price, Member for Lewisham West, of the production of and reference to the Official Report of Debates in this House, without the leave of the House having been obtained, at the Central Criminal Court, in the case of Regina v. Aubrey, Berry and Campbell;

Ordered, That the matter of the complaint be referred to the Committee of Privileges.—(*Mr Christopher Price.*)

FIRST REPORT

The Committee of Privileges, to whom was referred the matter of the production of and reference to the Official Report of Debates in this House, without the leave of the House having been obtained, at the Central Criminal Court, in the case of Regina v. Aubrey, Berry and Campbell, have agreed to the following Report:—

1. Your Committee have examined the circumstances in which it is alleged that the Official Report of Debates was quoted in the course of the trial of Aubrey, Berry and Campbell at the Central Criminal Court in November 1978. They are indebted to Mr Speaker for supplying them with copies of a letter addressed to him by the trial Judge, accompanied by the official shorthand writer's transcript of the relevant parts of the proceedings. Your Committee fully accept that, on the facts as initially disclosed to Mr Speaker, this was a proper case for their consideration, and the more so since it has given them an opportunity to examine the rules and practice of the House in this regard. However, from these documents they are satisfied that neither the Judge nor Counsel for the Crown made use of the Official Report in a manner which could affect the privileges of the House.

2. The practice of the House which prevents reference to the Official Report in Court proceedings except after leave given in response to a petition appears to have developed out of the Resolution of 26th May 1818 which in terms merely requires the leave of the House to be granted for the attendance of its servants to give evidence in respect of the House's proceedings. The Resolution continues to provide an essential protection for the House in the matters to which it strictly relates, but Your Committee consider that no purpose is served by its extension to the requirement of leave merely for reference to be made to the Official Report. They believe that the provisions of Article 9 of the Bill of Rights, reinforced by the care taken by the courts and tribunals to exclude evidence which might amount to infringement of parliamentary privilege, amply protect the House's privilege of freedom of speech. Your Committee accordingly recommend that the practice of presenting petitions for leave to make reference to the Official Report in Court proceedings be not followed in the future and that such reference be not regarded as a breach of the privileges of the House.

APPENDIX

'HANSARD' AND OTHER DOCUMENTS AS EVIDENCE IN THE COURTS

Memorandum by the Clerk of the House

The Practice of the House

The Resolution of 1818 and its effect in the House

1. The practice of the House in relation to the production in court of evidence relating to its proceedings is governed by two resolutions of 26th May 1818, in the following terms:

(*a*) That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House, in respect of anything that may be said by them in their evidence.

(*b*) That no clerk or officer of this House or short-hand writer employed to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere, in respect of any proceedings or examination had at the bar, or before any committee of this House, without the special leave of the House.[1]

2. It seems clear from the wording of the Resolutions, and from the report of the debate thereon[2] and the ruling of Mr Speaker Manners-Sutton given on the previous day,[3] that the matter which the House had chiefly in mind at the time was the production in court, by the Shorthand Writer of the House, of evidence which had been taken before a committee. Nevertheless, use is made in the second resolution of the word 'proceedings' in a way that cannot be unambiguously restricted to the words 'examination had at the bar' which follows it; and in his ruling of 25th May Mr Speaker said that it would be impossible to afford witnesses protection unless the House had some restraint on the manner in which 'either its proceedings or its witnesses' were produced in evidence before the courts of law.

3. In fact, it seems clear that the broader interpretation of the word 'proceedings', even if not present in the minds of Members at the time of the passing of the Resolution, was early adopted. On 7th February 1831 a Petition was presented for the production in evidence of a copy of another Petition previously made to the House (this, as far as can be ascertained, is the only instance in which the question for leave to produce a document before a court was negatived)[4]; and on 4th August 1845 leave was given for the first time for the production of Reports of certain debates.[5]

4. Whether the word 'proceedings' contained in the second Resolution is used in the broad sense, or restricted to those proceedings which are concerned with the taking of evidence, the Resolution imposes no specific barrier upon their being taken into consideration by the courts; all that it purports to do is to prohibit the servants of the House from attending the courts to assist in such consideration, unless the special leave of the House be given.

5. In one respect, the Resolution's terms appear to be more restrictive than the practice which had previously obtained. Mr Speaker Manners-Sutton observed in his ruling of 25th May that all the instances that he had considered concurred in showing that an application for permission had 'either been made to the House of Commons or to the

[1] CJ (1818) 389.
[2] Parl. Deb. (1818) 38, cc. 956–7.
[3] *Ibid*, c. 919.
[4] CJ (1830–33) 217–8.
[5] CJ 1845 888.

Speaker'; indeed, on an earlier occasion, application for the same Shorthand Writer's attendance had been made to the Speaker personally and had been granted by him. The formal effect of the Resolution, therefore, was to place the discretion whether or not to grant permission exclusively in the hands of the House; but it appears to have become established by 1844 that 'during the recess it has been the constant practice for the Speaker to grant such leave, on the application of the parties to a suit'[6]. Reference to this practice continues to be made in ensuing editions of *May*, but in the fourth (1859) edition a rider was added to the effect that should the suit involve any question of privilege, or should the production of the document appear, on other grounds, to be a subject for the discretion of the House itself, the Speaker would decline to grant the required authority[7].

Recent statements of the present practice

6. The statement by Mr Speaker Manners-Sutton, to which reference is made in paragraph 2 above, that the House needed to have some restraint on the manner in which its proceedings were produced in evidence before the Courts, appears neither to have caused any comment at the time, nor to have required any elaboration during the century and a half thereafter; a search through the records of notable rulings by Speakers and their Deputies which have been compiled since 1857 by successive Clerks of the House has failed to disclose any further reference to the matter by the Chair, until the occasion which will be described in the next paragraph.

7. On 18th July 1975 the Solicitor-General presented a petition for the production of eleven extracts from *Hansard*, covering debates between the years 1806 and 1975, and immediately moved the relevant motion. It being a Friday morning, no objection could be taken to the debate proceeding, but a number of Members expressed disquiet at the discussion of such a matter without notice. When a Member further queried why the approval of the House was needed at all, and whether the presence of Officers of the House was essential to the verification of *Hansard*, Mr Speaker Selwyn Lloyd observed:

> It may be that this matter arises out of the desire of the House to safeguard its documents and its proceedings; and whether that is right or wrong, is not a matter for me to say. The custom of the House at present is that the House allows its records to be referred to in a court of law or to be proved by one of its Officers only with the leave of the House. This is an attempt to preserve the privilege of the House. Whether that is good or bad is not a matter for me.

No Member showed any disposition to query this description of the practice of the House; and later in the debate, on being asked what would be the result if leave was refused by the House, the Solicitor-General replied:

> 'If leave were refused, the court would have to decide the particular issues before it without the advantage of having these documents.'

There thus appeared in the context of a single debate two authoritative declarations, the effect of which was to establish that both House and Law Officers were agreed that the permission of the House was required for the use of its records by a court of law, and that *Hansard* was included among the records to which this rule applied[8]. There appears to be no reason to dispute that these two statements, between them, represent what has come to be understood and accepted by the House as the usual practice.

7A. It will be observed that one of the main causes of the difficulties described in the

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[6] May (1st edition) p. 216.

[7] May (4th edition), p. 483.

[8] The outcome of the debate, which was adjourned and resumed four days later, was that the question that was not decided because it appeared on the division that 40 Members were not present (H.C. Deb. (1974–75) 895, cc. 1921–37); *ibid* 896, cc. 220–60). No subsequent attempt to seek leave was made.

previous paragraph was the fact that the motion following the Petition had been made without notice. This was not the first time that disquiet had been aroused by this procedure. On 28th July 1959 objection had been taken to the moving of such a motion at the time of unopposed business, and the question was therefore not proposed from the Chair; notice of a motion was accordingly given for the following day, when it was agreed to after debate but without objection[9]. A similar incident occurred on 2nd July 1976 (after the events described in the previous paragraph)[10]; and on 15th March 1977 the Solicitor-General moved a motion, of which notice had been given, relating to a petition which he had formally deposited on the previous day (thereby ensuring that its terms were set out in the Votes and Proceedings before the motion came to be debated) without making an oral presentation on the floor of the house[11].

8. The occasions on which the leave of the House has been sought in the manner described above since the passing of the Resolution of 1818 have been numerous, and a description of them all would be of little value to the Committee; it may, however, be helpful to list those instances which have occurred since the last war, and a Table annexed to this Memorandum sets out their details. It has not been possible to compile a similar list of modern occasions when leave has been given not by the House itself but by Mr Speaker (see paragraph 5 above); no formal announcement that such leave has been given is made in the House, and continuous records have not been kept. It is, however, understood from the Speaker's Secretary that Mr Speaker has given leave in this manner on three occasions during the last five years.

The Practice of the Courts

9. Certain actions in the courts are summarised below in relation to the view which courts have held regarding evidence on proceedings in the House tendered without leave of the House. In the main they relate to the Official Report which is the subject of the complaint referred to the Committee. But cases are also cited which bear on the production of evidence of proceedings in the House and of documents other than *Hansard* published under the authority of the House, without leave of the House, insofar as they may be relevant.

Chubb v. Salomons 1851 (2 CAR & K74)

10. In an action for debt for penalties of £500 for voting in the House of Commons without having taken the prescribed oaths, a witness being a Member of Parliament was asked whether the defendant voted in a particular division. The witness pleaded parliamentary privilege to refuse to answer the question. Thereafter the following exchanges between counsel for the plaintiff and the judge are quoted verbatim from the Law Report:—

> Pollock, C. B.—Under these circumstances I shall not compel the witness to answer without the permission of the House having been obtained.
>
> Bramwell—I submit that there is no such privilege.
>
> Pollock, C. B.—As this is a point of importance and novelty I will consult the other judges. (His Lordship having conferred with the other learned barons who were sitting *in banco*) said, "The other judges consider that I was right in not insisting on the witness answering the question without the permission of the House."

11. Later the Clerk of the House was permitted to give evidence in regard to the administration of the oath, after stating that he had "the permission of the House of Commons to give evidence in this cause."

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[9] H.C. Deb. (1958–59) 610, cc. 283–4, 631–8.
[10] H.C. Deb (1975–76) 914, cc. 795–7, 1130.
[11] Votes and Proceedings, 14th March 1977: H.C. Deb. (1976–77) 928, cc. 314–8.

M'Carthy v. Kennedy, 1905 (The Times Newspaper, March 4th 1905: this case is not reported in the Law Reports)

12. The following exchanges between Gill, K.C. (Counsel for the Plaintiff), Duke, K.C. (Counsel for the Defendant) and the Court (Darling, J.) are self-explanatory:

> Mr Gill tendered *Hansard* for March 6 and April 18, 1902 under 8 and 9 Vic., c. 113, section 3, which makes Parliamentary journals provable by a copy printed by the King's printers[12].
>
> Mr Duke said that these were not Parliamentary journals, which were totally different documents from *Hansard* and were signed by the Speaker.
>
> The Judge.—That section does not apply.
>
> Mr Gill.—I propose to put in the Parliamentary Debates, Authorised Edition, printed by Wyman.
>
> The Judge.—Those are not the Parliamentary journals which are signed by the Speaker, and do not give the speeches. I shall not admit the evidence.

Dingle v. Associated Newspapers Ltd., and others (2QB, 1960, 405)

13. This was an action by the plaintiff for libel appearing in a newspaper report concerning the circumstances in which shares in a cemetery were acquired by the Manchester corporation. The plaintiff relied in part upon the report of a Private Bill Select Committee, the Journal and relevant *Hansards*, and leave was obtained from the House for the documents in question (but not the Committee's Minutes of Proceedings or of evidence), to be given in evidence before the court (see Annex). The substance of the action does not concern the complaint before the Committee, but it was indicated, or appeared to be indicated in the opening speech for the plaintiff, that an attack was to be made on the report of the Select Committee, and that the attack was, perhaps, to be carried to the extent of impugning the validity of the report on the grounds of some defect in procedure.

14. The Solicitor-General (Sir Jocelyn Simon) thereupon appeared as *amicus curiae* (with Mr. J. R. Cumming-Bruce) in regard to the question of parliamentary privilege and said that there were two species of evidence in question—the minutes of proceedings of the select committee, which were laid on the table of the House and were not published, and what were officially called the minutes of evidence. A request for the production of the minutes of proceedings had been made to the Speaker of the House of Commons on behalf of the plaintiff in the action, but the Speaker had refused it on the ground that the proper course was for the plaintiff to proceed by petition to the House for production of the minutes. No such petition had been made; and any evidence relating to these minutes of proceedings would, in his submission, clearly be a breach of parliamentary privilege.

15. The minutes of evidence were taken down and transcribed by an official shorthand writer, who was an officer of the House, and by a standing resolution he could not be called to produce the transcript or give evidence without leave; in this case leave had not been requested. Any member of the public, however, could buy a copy of the transcript; so that if the minutes of evidence could be proved *aliunde*, for example by being an agreed document as in this case, it was unlikely that the House would treat its production as a breach of privilege.

16. It was important to remember that the House had never formally waived its privilege to prevent publication of its proceedings. There was, however, little doubt that if a petition had been made for the production of the minutes of evidence, as it had

[12] Under the Evidence Act 1845, 8 & 9 Vic., c. 113 section 3, any copy of the Journals of either House purporting to be printed by the printers to the Crown or by the printers to either House of Parliament or by any or by either of them shall be admitted as evidence thereof by all courts . . . without any proof being given that such copies were so printed.

been for the copies of official reports of debates, it would have been granted. It therefore seemed that the court could safely consider a transcript of the evidence without any practical risk of collision with the House; but, in his submission, the proper procedure in future cases would be to present a petition. Reports by government departments to the select committee fell into the same class as the minutes of evidence, and all that he had already said applied to them also.

17. The Judge (Pearson, J.) asked whether the position still was that it would not be right to comment upon the conduct of the select committee.

18. The Solicitor-General said that if any comments were made or its validity impugned or any reflection made on its conduct, that would be very much in the danger area. The plaintiff's proposal to call evidence which was the same as that given before the select committee would not, however, be a breach of privilege.

19. In his judgement, Pearson, J. referred to the Bill of Rights 1688 section 1 article 9 on freedom of speech which provides, 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. He also referred (*inter alia*) to Bradlaugh v. Gossett (1884: 12 Q.B.D. 271) where it was held that each House had the right to judge its own proceedings. Thereafter his judgement continued:—

> In my view, it is quite clear that to impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 of the Bill of Rights. No such attempts can properly be made outside Parliament.
>
> The next point was that the Solicitor-General and Mr Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality: indeed, to a large extent, any such comment would not be relevant at all.
>
> Accordingly, for two reasons, because of the desire which the courts have to co-operate as far as possible with the parliamentary authorities in matters where there may be some debatable ground on which a conflict might arise, and because of the lack of materiality or even of relevancy, any comment has, throughout the proceedings, been ruled out.
>
> I had better explain briefly why I say that any comment of that kind is of no materiality, and possibly of no relevancy, to the issues in the action. As to the basic facts of the case, clearly, in my view, this court should make its own findings based on the evidence adduced and on the arguments presented in this court, and that should be done without regard to any decisions reached or opinions expressed or findings made by a different tribunal having a different function, and, probably, different issues before it, and having received different evidence and a different presentation of the case.
>
> There were other matters, and also minor details of evidence, and I should mention that the Solicitor-General and Mr Cumming-Bruce supplied further information and explanations with regard to the production of certain documents and other matters of evidence in which parliamentary privilege might be involved, but those are points of detail. I would say only this, that manifestly the parliamentary authorities have given the fullest co-operation to facilitate the administration of justice without detriment to parliamentary privilege. This court is indebted to the Solicitor-General and to Mr Cumming-Bruce for their intervention as *amici curiae*, and for the friendly help which they afforded in that capacity.

Church of Scientology of California v. *Johnson-Smith* (*1972 2 Q.B. 522*)

20. This was an action brought by the plaintiffs against the defendant (a member of Parliament) for damages for libel published in a television broadcast. Plaintiffs relied on proceedings reported in *Hansard* to prove malice in connection with the television

broadcast. Plaintiffs had not petitioned the House for leave to use *Hansard* in evidence, nor had such leave been given.

21. The Attorney-General (Sir Peter Rawlinson) appeared as *amicus curiae* (with Mr Gordon Slynn). He contended that the privileges and rights of Parliament extended beyond the interests of an individual Member and it was necessary to represent the interests of Parliament as a whole. In his view the attitudes of the courts should be such as to exclude any evidence which might affect the interest of Parliament. The inquiry in the court must be directed to the words spoken on the television programme and the plaintiffs could not pray in aid anything that happened in Parliament even as a matter of history. If, however, it was agreed between the parties that something occurred in Parliament, but neither party wished to examine it, then extracts from *Hansard* could be agreed between the parties without a petition to the House of Commons.

22. The Attorney-General continued to say that technically no evidence of what was said in Parliament could be given without the authority of the House, which had to be obtained by way of petition. In the present case by agreement extracts from *Hansard* had been handed in without the permission of the House and it was not expected that there would be any objection. But it was emphasised that if evidence was to be given as to what was said in the House, permission to do so would have to be sought by petition to the House. A reference could be made to the making of a speech as a matter of history, such as the date on which it was made and who made it, but there could be no impeachment of the speech.

23. The Attorney-General concluded his original submission by stating that there should be no reference to, no evidence of, and no submissions based on, the defendant's conduct in Parliament by any witness. The passages that had already been read from *Hansard* were agreed, but no evidence should be directed to them, no inferences should be drawn from them on any matter as to malice and no analysis of them in cross-examination should be allowed.

24. Later, after submissions by Counsel for the parties, the Attorney-General replied that if the parties had agreed to extracts from *Hansard* being read it would be unlikely that the House of Commons would treat its production as a breach of privilege. *Hansard* could be used to prove the fact that a particular person on a particular day said something in the House of Commons. But inferences could not be drawn. Facts revealed from *Hansard* could be used in cross-examination, for example, if *Hansard* said a witness was in one place and the witness said he was elsewhere. A jury should not be asked to judge between what a Member of Parliament said in the House of Commons and out of it. He referred also the submissions of the Solicitor-General in Dingle's case (see paras 14–18 above) and stated that that was still the position.

25. The Attorney General concluded by saying that the court should in any event strictly limit the use of *Hansard* to prove the fact that a particular person at a particular date had referred to particular matters in the House of Commons. The extracts should be used solely to prove these facts and they should not be used to prove inferences which would reflect on the maker of any statement in the House.

26. In his judgment Browne, J. agreed generally with the submissions of the Attorney-General. He said in particular: 'But the general principle is quite clear, I think, and that is that these extracts from *Hansard* which have already been read must not be used in any way which might involve questioning in a wide sense what was said in the House of Commons as recorded in *Hansard*.' It was held that the scope of Parliamentary Privilege was not limited to the exclusion of any cause or action in respect of

what was said or done in the House itself, but extended to the examination of proceedings in the House for the purpose of supporting a cause of action, even though the cause of action itself arose out of something done outside the House.

The public nature of proceedings in Parliament

27. It should be noted that in Dingle's case the Solicitor-General, while not resting his submission entirely upon this argument, said that 'it was important to remember that the House had never formally waived its privileges to prevent publication of its proceedings' (see para. 16 above). That statement was correct at the time. But on 16th July 1971 the House did in fact waive its privileges in this regard. The Committee will wish to consider whether this waiver affects the Solicitor-General's later submission that 'the proper procedure in future cases would be to present a petition' (see para. 16 above).

28. The relevant resolution of the House of 3rd March 1762 forbidding publication of its proceedings reads as follows:—

> *Resolved, Nemine contradicente,*
> That it is an high Indignity to, and a notorious Breach of, the Privilege of this House, for any News Writer, in Letters, or other Papers (as Minutes, or under any other Denomination) or for any Printer or Publisher of any printed News Paper, of any Denomination, in Great Britain, Ireland, or any other Part of His Majesty's Dominions, to presume to insert in the said Letters or Papers, or to give therein any Account of the Debates, or other Proceedings of this House, or any Committee thereof, as well during the Recess as the Sitting of Parliament; and that this House will proceed with the utmost Severity against such Offenders.

29. The resolution of 16th July 1971 waiving the privileges of the House reads as follows:—

> Resolved, That notwithstanding the Resolution of the House of 3rd March, 1762, and other such Resolutions, this House will not entertain any complaint of contempt of the House or breach of privilege in respect of the publication of the debate or proceedings of the House or of its Committees, except when any such debates or proceedings shall have been conducted with closed doors or in private, or when such publication shall have been expressly prohibited by the House.

30. The original resolution of the House clearly refers only to newspaper and similar publications; and the waiver does no more, on its face, than repeal the original prohibition. No reference is made to publication as evidence in a court of law in either resolution. It may well be the Committee and the House will take the view that the waiver of privilege in July 1971 had, in fact, wider implications than the mere publication in newspapers and could be taken as an indication that the House had no objection to the production of *Hansard* and other published proceedings as evidence in court—subject of course always to the safeguards as to their use imposed by the Bill of Rights. This is certainly a sustainable argument. But until this point is settled with certainty, I doubt whether, as Clerk of the House, I could properly advise anyone to rely upon this argument in deciding whether or not to petition the House for leave if he wished to tender *Hansard* as evidence in court.

Observations on the present practice for obtaining leave

31. Despite the observations of Mr Speaker Selwyn Lloyd and the remarks of Attorneys- and Solicitors-General both in the House and in the courts, it is doubtful whether the House has ever addressed itself to the question whether leave of the House is required for the production of *Hansard* and other published documents in court. There is no resolution of the House on this score and no case of production without leave has hitherto been treated as a contempt. As has been shown in the introductory paragraphs the practice of petitioning for leave is one which has evolved, perhaps from

greater caution on the part of those concerned. Whether this can be said to amount to a statement of a privilege (which must always have existed, since the House cannot create new privileges) is for the Committee to determine. The House has indeed forbidden its officers to give evidence in court regarding certain documents (see the resolution of the House quoted in para. 1). But it may be said first that this resolution requires considerable interpretation to demonstrate that *Hansard* is to be included among the documents referred to; and secondly, assuming that *Hansard* is to be included within the scope of the resolution, the House has never resolved in terms that *Hansard* or indeed other documents may not be proved *aliunde* or treated as agreed documents.

32. The observations made above refer only to the production in court of *Hansard* and other documents, *simpliciter*. What they are used to prove is quite a different matter and is dealt with in para. 35 below. The House has every conceivable right to insist that the provisions of section 1, Article 9, of the Bill of Rights 1688 are meticulously observed and in my view the courts have a duty to ensure that there is not a shadow of an erosion of the rights and privileges of the House on this score.

33. It has been noted above (see para. 7A) that the procedure of the House does not require notice to be given of a petition for leave to produce the published records of the House as evidence in court, nor is notice required of the motion which grants such leave if moved immediately thereafter. I do not think that it would be an exaggeration to say that such proceedings are in effect sprung upon the House. In these circumstances it is perhaps difficult to see how the House can be expected to give proper consideration to the merits of the petition, unless the procedure adopted by the Solicitor-General on 14th and 15th March 1977 is invariably followed.

34. The difficulty has partly arisen from the time at which such petitions (in common with all other petitions), and the consequent motions for leave, are taken. Petitions are presented either immediately before the half-hour adjournment on the first four days of the week, or immediately after prayers on a Friday. On any of these occasions it is rare for more than a handful of Members to be present taking an active interest in proceedings. There is, of course, no doubt as to the validity of an order for leave agreed to by the voices of a handful of Members. But a waiver of privilege—if this be still a privilege—is a serious matter. It is right that the House should be asked to consider a waiver under these conditions.

35. Finally the most important point of all is that although the House may grant leave for its published documents to be used as evidence in court it has never attached conditions as to the use which may be made of them in court. And it is difficult to see how the House could do so. Even if the House was placed in possession of the pleadings or the charges, it could not know what course the action was likely to take. Thus in Dingle's case, the House in granting leave for the Report of a Private Bill Committee to be tendered as evidence, had no reason to suppose that Counsel would attempt to go behind the report and impugn the proceedings of the Committee. It was left to the Judge with the assistance of the Solicitor-General as *amicus curiae* to uphold the privileges of the House.

36. In these circumstances the Committee may wish to consider whether the procedure by way of petition for leave and a subsequent order for leave has now become a meaningless formality and of little practical value in maintaining the privileges of the House; and whether as such the procedure could be dispensed with. In doing so, they would no doubt require to be satisfied whether both statute law (as principally exemplified in the Bill of Rights) and common law (as exemplified by the causes mentioned in this Memorandum together with other authorities cited in those actions) are

sufficient to protect the privileges of this House including the protection of witnesses appearing before the House and its committees.

37. If the Committee and the House were inclined to dispense with the present procedure, there is one last difficulty to consider, namely the question of proof of the published documents of the House. The Journal as already mentioned may be used as evidence without proof. But unless the parties are prepared to agree a document without proof (as I understand can be done in criminal causes as well as civil causes), the court may require proof if one party objects to the production of the document without it. Proof of House documents can only be given by an Officer of the House, etc., and at present the resolution of 1818 (see para. 1) forbids any officer, etc., to do so without leave of the House. This I think could be overcome if the House were to make an order relieving officers from the 1818 prohibition solely in so far as proving documents published by or under the authority of the House is concerned; savings would, however, still in my view be required maintaining the prohibition against giving evidence regarding any *unpublished* document or any proceeding of the House not documented, without leave of the House.

38. If this were done I could see no difficulty in making administrative arrangements for the appropriate Officer of the House to attend a court at the request of a party for the purpose stated above. Those responsible for the conduct of causes might, however, do well to remember that the service of a *subpoena* within the precincts of the House has in certain circumstances been treated as a contempt.

ANNEX

Date of petition	*Title of petition*	*Court before which case heard*	*People and papers sought*
4.11.48	Braddock v. Tillotsons Newspapers Ltd (2 petitions)	King's Bench Division of High Court	(1) Members and others. (2) Journal. Members and a Clerk. *So ordered.*
28.7.59	Dingle v. Assoc. Newspapers Ltd	Queen's Bench Division	Officers of the House. Report of Committee on Private Bill, Journal and relevant Hansards. *So ordered* [29.7.59].
1.5.63	Regina v. Governor of Brixton Prison and another (*ex parte* Enahoro)	Appeals Committee House of Lords and before Lords if leave to appeal granted	Hansards and Officers of the House. *So ordered.*
21.5.65	Hazeltine Research Incorp. v. Zenith Radio Corporation	Federal District Court, Chicago, 111	Certificate of authenticity of Journal entries relating to the presentation of three papers on broadcasting, with a take note Resolution on one of them. *So ordered.*
21.7.67	Wigg v. The Spectator Ltd	Queen's Bench Division of High Court	Leave sought for Wigg to give evidence touching on Debates etc., in House. *So ordered.*
6.2.68			Members to give evidence on statements in the House. *So ordered.*
14.2.68			As above, also a political correspondent. *So ordered.*
26.2.68	Accident at Hixton Level Crossing	Tribunal directed by the Minister of Transport	Report of Committee on British Transport Commission Bill, Committee Minutes of Evidence and Hansards, Proper Officer. *So ordered.*
11.2.70	Regina v. Owen	The Courts of Law (*sic*; no particular court mentioned in the petition or motion)	Documents laid before Estimates Committee and Sub-Committees together with Minutes, Minutes of Proceedings and Reports and office papers, and evidence of two Clerks. *So ordered.*

24.2.75	H P Bulmer and Showerings Ltd v. J Bollinger and Champagne Lanson pere et fils	Chancery Division, High Court	One Hansard. *So ordered.*
18.7.75	Attorney General against Jonathan Cape Ltd and others and against Times Newspapers Ltd	Queen's Bench Division High Court	Eleven Hansards and proper Officer. *Not decided—less than 40 voted.* [21.7.75].
11.11.75	Rotan Tito and Rabi Council of Leaders v. HM Attorney General	Chancery Division, High Court	Eleven Hansards and proper Officers. *So ordered.*
8.12.75	Congregational Memorial Hall Trust Ltd	Chancery Division, High Court	Minutes of Evidence before a Private Bill Committee, one Hansard and proper Officers. *So ordered.*
21.5.76	Laker Airways Ltd	Queen's Bench Division, High Court	Three Hansards and proper Officers. *So ordered.*
2.7.76	Felixstowe Dock and Railway Company and British Transport Docks Board	Queen's Bench Division, High Court	Minutes of Evidence before a Private Bill Committee and proper Officers. *So ordered.* [5.7.76].
9.11.76	Anglian Water Authority	Chancery Division, High Court	Minutes of Evidence before a Private Bill Committee and proper Officers. *So ordered.*
21.2.77	Mark Jeffrey Hosenball	Divisional Court of Queen's Bench Division	One Hansard, and proper Officer. *So ordered.*
14.3.77	Metzger and others v. the Department of Health and Social Security	Chancery Division, High Court	Five Hansards, one Standing Committee Hansard and proper Officers. *So ordered.* [15.3.77].
6.4.77	Roger John Payne	Queen's Bench Division, High Court	Two Hansards. *So ordered.*
26.7.77	Michael Hugh Litchfield v. Times Newspapers and Susan Joy Kentish v. Times	Queen's Bench Division, High Court	Minutes of Evidence, tape recordings, transcripts and documents of a Select Committee and proper Officers. *So ordered.*
7.7.78	Burmah Oil Company v. Governor and Company of the Bank of England	Chancery Division, High Court	One Hansard. *So ordered.*

PROCEEDINGS OF THE COMMITTEE

TUESDAY 21 NOVEMBER 1978

Members present:

Mr George Strauss, in the Chair

Mr Attorney General	Mr Ian Mikardo
Mr Arthur Bottomley	Sir David Renton
Mr Michael Foot	Mr Norman St. John-Stevas
Mr Hugh Fraser	Mr Michael Stewart
Sir Michael Havers	Sir Derek Walker-Smith

Mr William Whitelaw

The Committee deliberated.

[Adjourned till Tuesday, 23 January 1979, at Five o'clock.]

Draft Report, proposed by the Chairman, brought up and read the first and second time and agreed to.

A Paper was ordered to be appended to the Report.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

HOUSE OF COMMONS CASES SUBSEQUENT TO JULY 1978

(for earlier cases *see* Annex to Appendix B)

Date of petition	*Title of petition*	*People and papers sought*
27 Nov 1978	M. A. Brown	Select Committee Evidence and Report of debate, proper officers—*so ordered*
24 Jan 1979	Regina v. Henn and Darby	One Hansard, proper officers—*so ordered*
5 Feb 1979	D. F. Charlton	Reports and transcripts (written answers), proper officers—*so ordered*
23 Feb 1979	United Newspapers Publications Limited	3 Hansards, proper officers—*so ordered*
23 Feb 1979	Express Newspapers Limited	3 Hansards, proper officers—*so ordered* (Same as previous case)

VICTORIA—LEGISLATIVE ASSEMBLY

Some cases

2 March 1869

Resolution agreed to as follows:

That leave be given to the Clerk of the Legislative Assembly, the Clerk of the Committees of the Assembly and the Shorthand Writer to the Parliament to appear and give evidence, and to produce any document in their or either of their possession in a case now pending in the Supreme Court, of *Alexander* v. *Jones.*

2 August 1871

Resolution agreed to as follows:

That permission be granted to the Clerk of the Legislative Assembly, the Government Shorthand Writer, and the Clerk of Committees to attend at the Supreme Court to give evidence and produce papers on behalf of the defendant on the trial of the cause *Adams* v. *The Queen.*

12 November 1879

The Speaker informed the House that the Clerk of the Assembly had been served with a subpoena, requiring him to attend the Supreme Court, in its insolvency jurisdiction, on Thursday, November 13, to give evidence in the matter of Jeremiah Dwyer, a member of the House, and in the matter of the petition of the Australian and European Bank, and to produce the minutes of the Legislative Assembly for the present session, and also the notice paper containing all questions asked by the said Jeremiah Dwyer with reference to the Commercial Bank.

Leave was given to the Clerk, or some other officer of the Assembly, to attend and produce the documents as directed by the subpoena.

8 October 1952

Resolution agreed to as follows:

That leave be given to Members of the Legislative Assembly to attend, if they think fit, as witnesses before the Royal Commission appointed to inquire into certain allegations of improper conduct in respect of a motion of no confidence moved in the Legislative Assembly on Wednesday, the seventeenth September last, and to officers of Parliament to give evidence before, and to produce such documents as may be required by, the said Royal Commission.

26 September 1961

Mr Speaker announced that a subpoena had been served on the Clerk of the Legislative Assembly requiring him to appear in the Court of Petty Sessions at Prahran in a case involving William Edward James Mayne. The nature of the information was that the

defendant being the printer of matter commenting on a candidate did fail to print the name and place of residence of the author thereof contrary to section 267 (2) of Act 6224. The subpoena required the Clerk to attend the Court and produce for examination the writ issued by the Governor in relation to the election held on 15 July 1961.

The Assembly granted leave to the Clerk, or some other officer of the Legislative Assembly, to attend and produce the document as required by the said subpoena.

THE PETITION OF JOHN FAIRFAX & SONS LIMITED

The petition of John Fairfax & Sons Limited which was presented to the House on 28 August 1979 by the honourable Member for Bradfield (Mr D. M. Connolly, M.P.) is as follows:

Petition

To the Honourable the Speaker and Members of the House of Representatives in Parliament assembled. The humble petition of the undersigned John Fairfax & Sons Limited, respectfully showeth—

1. On 4 April 1975 Mr Thomas Uren, Member of the House of Representatives, commenced action for damages for defamation in the Supreme Court of New South Wales against your Petitioner.

2. The publication of which your Member complains is an editorial in the *Sydney Morning Herald* newspaper of 3 April 1975 entitled 'Sowing the Wind'. The text of that editorial is set out in the first schedule of this petition.

3. In its defence of the said action your Petitioner relies (*inter alia*) upon a defence of comment upon matters of public interest based upon (or to an extent upon) proper material for comment as provided by the Defamation Act, 1974 (N.S.W.).

4. Your Petitioner has been advised that if its defences are to be made out it will be necessary for it to adduce in evidence and to make reference to and otherwise use in its defence of the said action full and official records of the proceedings and the proceedings themselves of this House set out in the second schedule.

5. Your Petitioner has been advised further that the proper procedure for obtaining the right to adduce in evidence and make reference to and otherwise use in Court in the defence of the said action the full and official record of the said proceedings and the proceedings themselves is to petition this House and seek its leave (see *Church of Scientology* v. *Johnson-Smith* (1972) 1 All E.R. 378).

Your Petitioner therefore humbly prays that your Honourable House will grant leave to your Petitioner and its legal representatives—

(1) To issue and serve subpoenas for the production of the relevant official records of the proceedings of this House as described in the second schedule.

(2) Further, to issue and serve subpoenas for the attendance in Court of those persons who took the record of such proceedings.

(3) Further, to adduce in evidence and to make reference to and otherwise to use in its defence of the said action in Court the full and official records of the proceedings and the proceedings themselves of this House set out in the second schedule hereto.

First Schedule

'Sowing the Wind'

HOW strange and—it is not too strong a word—how sinister it is that an Australian Government should welcome and endorse the development of a situation which will change the balance of power in Australia's region to Australia's serious disadvantage. It is hard to believe that any Australian, unless dedicated to the world triumph of communism, should regard not only with equanimity but actually with approbation the progressive collapse of the land barriers which have hitherto separated us from the States and from a political system implacably dedicated to the destruction of the freedoms we take for granted. It is the more disturbing when one considers that it is the same Government which, in the name of social progress, has stripped Australia of its defences.

Yet we have had this week senior ministers, one of them the Deputy Prime Minister, making it quite clear that they regard what is happening in Indo-China as the best possible outcome—without, it should be added, one word of recognition that the price of this lauded 'final solution' is death and suffering for great masses of ordinary Vietnamese people. The Prime Minister's stony—or perhaps embarrassed?—silence gives consent. In any event, he is on earlier record as ranging Australian policy behind 'the best and most enlightened movements in world affairs'. We have, in short, been put in the position where the success of communist arms in Asia is accepted as a desirable aim of Australian foreign policy and where the Asian powers with which we seek friendship are China and North Vietnam.

Two things obviously influence the attitude of Government ministers: an ideological sympathy for communism as an anti-capitalist, anti-imperialist doctrine and a hatred, in some cases a near-pathological hatred, of the United States. It is curious that men like Dr Cairns and Mr Uren show themselves in their judgments on such a situation as that in Vietnam as true racists. The only 'foreign intervention', the only 'aggression' can come from a white nation; Asians are Asians and therefore when they fight one another it must be a civil war. The idea that it is as silly to talk of Asians in this way as it would be to talk of Europeans has not penetrated. Thus American intervention is seen as aggression but North Vietnam's attack on neighbouring States is not. America's increasingly feeble support of South Vietnam and Cambodia is wicked; China's massive aid to North Vietnam is not. The double standard this primitive racism involves has led Australian foreign and defence policies into paths very dangerous for our future national security. When we reap the whirlwind history will not have far to look for its guilty men.

Second Schedule

Date			Hansard page reference
1965	March	25	347
1966	March	22	434 and 435
	May	10	1648
1968	March	28	621
	September	11	913
1969	March	4	350
	August	21	617
1970	April	14	1073
	May	7	1839
	September	17	1342
1971	March	16	889
	September	29	1663
1972	April	12	1513, 1514 and 1515
	May	9	2200, 2222 and 2223
1973	December	13	4732

THE COMMON SEAL of JOHN FAIRFAX & SONS LIMITED was hereunto affixed by authority of the Board of Directors in the presence of:

Director

Secretary

Director

MEMORANDUM

BY

ATTORNEY-GENERAL'S DEPARTMENT, CANBERRA

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE OF PRIVILEGES

Use of the Proceedings of the House in the Courts

Memorandum by Attorney-General's Department

This memorandum summarises and supplements the legal submissions by the Department on 14 November 1979 concerning the following reference made on 11 September 1979 by the House of Representatives to inquire and report on:

> The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.

The reference arose out of the order made by Begg J. of the N.S.W. Supreme Court on 23 August 1979 in *Uren* v. *John Fairfax and Sons Ltd* that the plaintiff answer interrogatories that he and two other persons made certain speeches in Parliament (as set forth in photostat copies of *Hansard*). Leave of the House to tender the Hansard had been sought, but had not been obtained.

Begg J. considered that, if it were necessary to decide the point, the privilege of Parliament in relation to the mere proof of *Hansard* in a court had been waived in Australia. He accepted the argument that what the defendant was seeking to do was merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House—not in any way to criticise them nor to call them in question in those proceedings, but to prove them as facts upon which the defendants alleged comments were made in the newspaper publication sued upon.

Submissions

1. Consideration of the legal aspects of the reference must begin with section 49 of the Constitution, which reads:

> 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.

2. The Parliament has not enacted a comprehensive code relating to Parliamentary privilege and the consequence is that the major source of the law relating to the subject of the reference is the powers, privileges and immunities in respect of the House of

Commons and its members and committees in 1901: *R.* v. *Richards; Ex parte Fitzpatrick and Browne* (1954) 92 C.L.R. 157.

3. The powers, privileges and immunities thus applied in 1901 by the Constitution included the following:

(a) Article 9 of the Bill of Rights 1688, which provides:

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

(*Comment*: It will be seen that the words used are very wide. The effect of section 49 of the Constitution is to give those words overriding constitutional force in Australia in relation to each House of the Commonwealth Parliament, until the Parliament otherwise declares.)

(b) It is within the power of either House, should it deem it expendient, to prohibit any publication of its proceedings but generally the power was not exercised by the House of Commons in 1901 or by either House of the Commonwealth Parliament since that date.

(*Comment*: For a historical summary of developments with regard to the publication of debates, see Redlich, *Procedure of the House of Commons*, Vol. 2, pp. 36–8. As a result a report of Parliamentary proceedings in a newspaper or other publication would presumably not be a breach of privilege, unless there were special circumstances such as that the report was manifestly inaccurate or untrue.)

(c) No clerk or officer of the House or shorthand writer should give evidence in a court or elsewhere in respect of any proceedings without the special leave of the House.

(*Comment*: It seems that the matter the House of Commons had chiefly in mind when it passed the resolution of 26 May 1818 on this subject was the production in court of evidence that had been taken before a committee, and Standing Order 368 of the House of Representatives refers to 'evidence before the House or any committee thereof'. However, it seems that the broader interpretation comprehending evidence of any Parliamentary proceedings was early adopted, well before 1901. See the memorandum of the Clerk of the House of Commons appended to the Report of the Committee of Privileges on Reference to Official Reports of Debates in Court Proceedings (ordered by the House of Commons to be printed 7 December 1978, p. 1). It follows that, if a party to court proceedings can only prove what was said in Parliament by calling an officer or shorthand writer, he must obtain leave.)

4. The only Commonwealth Acts that need to be considered in relation to whether there have been any changes since 1901 are the *Parliamentary Papers Act* 1901 and the *Parliamentary Proceedings Broadcasting Act* 1942:

(a) It is clear from the terms of section 3 (2) of the Parliamentary Papers Act that the Government Printer is authorised to publish the reports of the debates of each House.

(*Comment*: There is no statutory equivalent of section 3 (2) in the United Kingdom. However, on 16 July 1971 the House of Commons passed a resolution that it would not entertain any complaint of contempt of the House or breach of privilege in respect of the publication of the debates or proceedings of the House or of its committees except when any such debates or proceedings shall have been conducted with closed doors or in private or when such

publication shall have been expressly prohibited by either House. The memorandum of the Clerk of the House contained in the Appendix to the Report of the Committee of Privileges of 1978 noted, without expressing a firm conclusion, that there is a sustainable argument that the House has thereby waived any objection to the production of *Hansard* in Court, subject however to the safeguards as to their use imposed by the Bill of Rights.)

(b) The better view of section 3 (2) of the Parliamentary Papers Act is that this provision does not preclude a House from directing that a particular sitting shall be conducted with closed doors and without any publication of the proceedings. Section 3 (2) was inserted in 1935 primarily to protect the Printer from being sued for defamation after he does publish *Hansard*, and also to protect other persons who distribute *Hansard* (see *Commonwealth Parliamentary Debates*, Vol. 145, p. 2829).

(*Comment*: Whether the provision effectively does this is a matter that perhaps requires examination, but that is a separate matter from the subject of the present reference.)

(c) The Parliamentary Proceedings Broadcasting Act provides that the ABC shall broadcast the proceedings of one or other House upon such days and during such periods as the Joint Committee on the Broadcasting of Parliamentary Proceedings shall determine.

5. Recent views expressed by English Law Officers (the Solicitor-General in *Dingle* v. *Associated Newspapers Ltd* (1960) 2 Q.B. 405 and the Attorney-General in the *Scientology Case* (1972) 1 Q.B. 522) were that limited use might be made of *Hansard* in court proceedings without the likelihood of there being any objection if leave were not obtained, but that at the same time the privilege to prevent publication still remained. It was said that, 'technically', no evidence could be given without the authority of the House, which had to be obtained by way of petition.

6. One example given of where there would be no objection if leave was not obtained was where both parties to the proceedings agreed that *Hansard* be used as to what had occurred in Parliament and neither party wished to examine it. Other circumstances seem to have been envisaged where no objection would be expected if leave was not obtained and *Hansard* was used for a similar limited purpose without petitioning for and obtaining leave.

7. Other recent cases are *Mundey* v. *Askin* (decision given on 24 July 1975), in which the N.S.W. Court of Appeal upheld the tender of *Hansard* to prove as a fact that certain things were said in the N.S.W. Legislative Assembly without any question of further examination of the circumstances in which the debate had taken place or the motives of the participants, and *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505, in which objection was taken that evidence was given without leave by members of Parliament that documents were tabled in Parliament. Leave does not appear to have been obtained in the former of these cases. The High Court in *Sankey* v. *Whitlam* found it unnecessary to decide the objection taken in that case, although Gibbs J. stated that the legal authorities indicated that the law is that a member is not *compellable* to give evidence without leave rather than that he is not *competent* to give evidence without that leave (21 A.L.R., at p.524).

8. The above summary of the position suffices to demonstrate that a number of difficult questions arise on the subject of the present reference. One is whether the general authority that has clearly been given for the publication of debates does not extend to the tender of debates in court, so as to prevent any real objection being raised as to breach of the privilege to prevent publication.

(*Comment*: Begg J. spoke of a 'waiver' of the privilege. The view of the Clerk of the House of Commons that there is sustainable argument to similar effect in relation to the Commons has already been mentioned above. Compare *Finnane* v. *Australian Consolidated Press Ltd* (1978) 2 N.S.W.L.R. 435, in which Needham J. held on the one hand that the reproduction in court of the debates in the Commonwealth Parliament, even by agreement of the parties, was a breach of privilege unless the consent of the House had been obtained, but, on the other hand, that newspaper extracts should be admitted in evidence since newspapers had for many years published extracts from Parliamentary debate without objection.)

9. A sounder basis for claiming that the leave of the House concerned is required may be the principle of freedom of Parliamentary debate enshrined in Article 9 of the Bill of Rights. It may be argued that the widespread practice of seeking the leave of the House of Commons could be justified as being a means by which the House could assure itself that the freedom of debate was not being endangered.

10. However, a further question then arises, namely whether the practice of seeking leave had at 1901 the status of a power, privilege or immunity of the House of Commons. The question, what are the powers, privileges and immunities of the Commons at the establishment of the Commonwealth, is one which the courts have treated as a matter for their decision: *R.* v. *Richards; Ex parte Fitzpatrick and Browne* (1954) 92 C.L.R. 157, at p.161.

11. The memorandum of the Clerk of the Commons indicates that there may be serious difficulties in establishing that the practice constituted an undoubted privilege. The relevant passage states:

> 31. Despite the observations of Mr Speaker Selwyn Lloyd and the remarks of Attorneys- and Solicitors-Generals both in the House and in the courts, it is doubtful whether the House has ever addressed itself to the question whether leave of the House is required for the production of *Hansard* and other published documents in court. There is no resolution of the House on this score and no case of production without leave has hitherto been treated as a contempt. As has been shown in the introductory paragraphs the practice of petitioning for leave is one which has evolved, perhaps from greater caution on the part of those concerned. Whether this can be said to amount to a statement of a privilege (which must always have existed, since the House cannot create new privileges) is for the Committee to determine. The House has indeed forbidden its officers to give evidence in court regarding certain documents (see the resolution of the House quoted in para. 1). But it may be said first that this resolution requires considerable interpretation to demonstrate that *Hansard* is to be included among the documents referred to; and secondly, assuming that *Hansard* is to be included within the scope of the resolution, the House has never resolved in terms that *Hansard* or indeed other documents may not be proved *aliunde* or treated as agreed documents.

12. Assuming, however, there to be a privilege requiring the leave of the House (whatever its basis), it seems clear that the privilege is that of the House and not that of the member concerned.

(*Comment*: Gibbs J. stated in *Sankey* v. *Whitlam* that 'No doubt the privilege (that members cannot be compelled to give evidence of proceedings in Parliament) is that of the House, rather than that of the individual member', though he added that the case did not make it necessary to consider what the position would be if it appeared that the House wished to insist upon the privilege but the member took no objection. Browne J. in the *Scientology Case* was quite clear that the privilege was not that of any individual member.)

13. Any decision of the House on granting leave may be expected to pay regard to the overriding requirements of Article 9 of the Bill of Rights. But the decision would be a

matter for the House as a whole, by majority if there was a division of opinion on the matter.

However, it is also clear that the leave of the House if given (or even the consent of the individual member concerned) could not lawfully authorise the use of *Hansard* in any way that conflicted with Article 9 of the Bill of Rights. The courts would be bound to uphold the wide protection given by Article 9, and there is no suggestion in any of the cases that they perceive their duty to be otherwise.

14. Thus Browne J. stated in the *Scientology Case* that the general principle is quite clear and that is that the extracts from *Hansard* that had already been read in that case must not be used in any way which might involve questioning in a wide sense what was said in the House of Commons as recorded in *Hansard*. He held that the scope of Parliamentary privilege was not limited to the exclusion of any cause of action in respect of what was said or done in the House itself, but extended to the examination of proceedings in the House for supporting a cause of action, even though the cause of action itself arose out of something done outside the House. As a result the plaintiffs in that case were not allowed, in seeking to refute the defendant's plea of fair comment, to rely on *Hansard* to prove malice on the part of the defendant.

15. Similarly there seems to be no reason to believe that Begg J., had he been trying the action, would have allowed cross-examination in *Uren* v. *John Fairfax & Sons Ltd* questioning what was said in the Parliamentary speeches in question. He required the plaintiff to answer the interrogatories in question, on the basis that the defendant was merely seeking to prove as a matter of fact that the plaintff and others had made certain speeches in the House.

(*Comment*: Gibbs J. appears to have taken a similar approach in *Sankey* v. *Whitlam*—see 21 A.L.R., at p. 523.)

16. Thus, it would not be possible (even if the leave of the House were obtained) to base or otherwise support proceedings against a member by reference to what was said by him in Parliament.

17. Any declaration by the Parliament to alter the existing powers, privileges and immunities would have to take the form of an Act of Parliament.

5 March 1980

OPINION

PREPARED BY

THE HON. T. E. F. HUGHES, Q.C.

(Note: Relevant sections only of the Opinion are included)

Parliamentary Privilege

Opinion

I set out seriatim the questions submitted to me by the Committee of Privileges of the House of Representatives and my answers thereto.

1. *Would the passage of legislation be necessary to effect a declaration of privilege under section 49 of the Constitution?*

   In my opinion, the answer to this question is 'yes'. 'The Parliament' as referred to in section 49 of the Constitution is a tripartite entity, consisting of the Sovereign, the Senate and the House of Representatives: see section 1 of the Constitution. The only way in which it can declare its will is by the enactment of a statute. Reference to *Quick & Garran: Commentaries on the Constitution* (p. 506) shows that these learned authors accepted without any question the proposition that the powers conferred by section 49 must be exercised by the ordinary processes of legislation.

2. *Is it possible for a Member himself, or the House by resolution, to waive his, or its, privileges?*

   If I may say so, there may be a fundamental error inherent in the notion that a member of parliament has privileges of his own that are capable of waiver by him. The rationale of the common law of parliamentary privilege must be that down through the centuries the Houses of Parliament at Westminster have deemed that certain safeguards are essential to their effectiveness as independent legislative bodies and have so acted that such safeguards apply as law. Now it is obvious that many of these safeguards operate for the benefit of individual members, so as to enable them to maintain independence and freedom from certain legal constraints in going about their business as members. Take, for example, the absolute privilege from liability for defamation that attaches to words spoken by a member in the House. In the unlikely event of a member being sued for having spoken those words, he may plead the privilege. In the even more unlikely event of his not defending such an action by raising the plea, the House of which he is a member would not be without power to intervene to uphold the privilege: in such a case it would surely be open to the House to cite the Plaintiff for breach of privilege in suing on words spoken in the Parliament. Such considerations as these tend to point to the reality of the legal situation: any relevant

privilege belongs to parliament as a whole. Thus the House may 'waive' its privileges, in the sense of not enforcing them in particular circumstances. Any such 'waiver' is incapable, however, of abrogating the privilege in relation to future events. An appropriate mode of waiver is a resolution applying to a given case.

One of the privileges of Parliament is that a member cannot be compelled, without the permission of his House, to give evidence in a court of law as to what happened in the House: *Sankey* v. *Whitlam* ((1978) 53 A.L.J.R. 11 per Gibbs A.C.J. at pp. 20–21). An individual member of the House cannot waive any of *its* privileges, for they, in their nature, belong to the House itself and not to the individual: '. . . the privilege of Parliament is the privilege of Parliament as a whole and not the privilege in (*sic*) any individual member': *Church of Scientology* v. *Johnson-Smith* ((1972) 1 Q.B. 552 per Browne J. at p. 528). 'No doubt the privilege is that of the House itself rather than that of the individual member': per Gibbs A.C.J. (supra) at p. 21. It should be mentioned, however, that a member waives no privilege by electing, without any submission to purported compulsion, to testify in a court as to what happened on a particular occasion in the House. The relevant privilege in this connexion is that he may not be compelled, without the leave of the House, to testify as to any such event. No breach of this privilege can arise unless compulsion is attempted; and consent is of course quite incompatible with compulsion. It may well be, however, that even today it is technically a breach of the privilege of Parliament for evidence to be given in a court, without leave of the appropriate House, of what was said in Parliament. This was the argument put to and accepted by Browne J. by the then Attorney-General of England in *Church of Scientology* v. *Johnson-Smith* (supra): (see (1972) 1 Q.B. at p. 525). The decision of Browne J. was followed by Needham J. in the Supreme Court of New South Wales in *Finnane* v. *Australian Consolidated Press Limited* ((1978) 2 N.S.W.L.R. 435 at p. 439). The appropriate procedure for seeking such leave is to petition the House.

I must express my view that Begg J. in *Uren* v. *John Fairfax & Sons Limited* ((1979) 2 N.S.W.L.R. 287) went wrong in the following passage in his reasons for judgment (p. 289):

> In my judgment, one might pause to question whether the privilege of Parliament in relation to the mere proof of *Hansard* in a court in Australia has not been entirely waived by Parliament in this country. It is a well known fact that proceedings in the Parliament are broadcast on radio to all the world, and copies of *Hansard* are freely sold for fifty cents a copy at the Commonwealth Publications Sales Department in this city. And in so far as it falls to me to decide the question, I would hold that waiver by Parliament to this extent is clearly established. Of course I am not dealing with any question of copyright in the publication.

It seems to me that any 'waiver' of Parliamentary privilege involved in the tacit consent to, or statutory authorisation of, the particular modes of broadcasting or other publication of Parliamentary proceedings referred to by His Honor should not be taken to be an 'entire waiver' of any relevant privilege in all conceivable circumstances and for all conceivable purposes. Also, His Honour may be thought to have missed the point that the relevant time for determining the privileges of Parliament for the purpose of applying section 49 of the Constitution is not the present, but rather the time of the establishment of the Commonwealth. If that point is borne in mind, it is not easy to ascribe an 'entire' effect to limited forms of supposed waiver. Parliament cannot 'waive' the law of privilege, which is part of the common law, in any sense of repealing it by non-enforcement. Any established head of privilege remains part of the law, available to be enforced if it

is the will of one of the Houses of Parliament that it should be enforced in relation to the proceedings of that House.

2A. *Is it possible for a 'Committee of each House' by resolution to waiver its privileges, or the privileges of its individual members?*

In my opinion, the answer to this question must be no. Any privilege attaching to the proceedings of a Committee of the House can only be derivative. Any investiture by the House of power in a Committee to conduct certain proceedings would not be taken to include power to waive, in relation to such proceedings, any Parliamentary privilege that so attaches to it or to its members.

2B. *Is it possible for a member of a 'Committee of each House', himself, to waive his own privilege with respect to his participation and activities as a member of that Committee?*

In my opinion, no: see my answers to questions 2 and 2A.

3. *Is it possible for a 'Committee of each House' (s. 49 of the Constitution) by resolution to waive its privileges or the privileges of its individual members?*

This question may be thought to cover very much the same ground as questions 2A and 2B. It should be answered in the negative.

4. *Is it possible for a Member of a 'Committee of each House', himself, to waive his own privilege with respect to his participation and activities as a member of that Committee?*

In my opinion, no. See generally my answers to questions 2 and 2A.

5. *Does the grant of leave by the House for the production in court of Hansard reports of a Member's parliamentary speech over-ride the privilege of the individual Member under Article 9 of the Bill of Rights?*

6. *If so, is there a case for legislation to safeguard the rights of an individual Member?*

I question whether the grant of such leave would over-ride any privilege of an individual member. As I have indicated, the proper basis upon which to regard privilege in this area of discourse is to regard it as the privilege of Parliament as a whole rather than that of the individual member.

7. *Would a court 'respect and give full credit' to any limitation imposed by the House on the use to which particular records could be put?*

The decision of the High Court of Australia in *The Queen* v. *Richards; ex parte Fitzpatrick and Browne* ((1955) 92 C.L.R. 157) establishes that any question arising under section 49 of the Constitution as to what were the 'powers, privileges and immunities of the Commons House of Parliament at the establishment of the Commonwealth' is a matter proper for judicial decision: ' . . . it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise' (ibid. at p. 162). This passage in the joint judgment seems to me to provide the key for answering this question. A Court, if it is satisfied that any limitation imposed by the House upon the use to which its records may be put falls within the scope of a recognized head of parliamentary privilege, *must* respect that limitation. If, however, a Court were to adopt the view of Begg J. in Mr Uren's case (supra) to the effect that it is not a breach of Parliamentary privilege to prove, without the leave of the House, what

was said in Parliament, it might well regard itself as free to disregard any restrictions imposed by the House on the use to which such material, if proved, could be put. It is clear, however, that no Court could ever properly disregard Article 9 of the Bill of Rights 1688, so long as by virtue of the operation of section 49 of the Constitution it forms part of the law of the Commonwealth. Section 1 of Article 9 is as follows:

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

A case such as *Church of Scientology* v. *Johnson-Smith* (supra) demonstrates the operation of the principle that a member of Parliament may not be criticised or impeached in court proceedings for what he did or said in his House. It may not be put against him that in whatever he so did or said he was acting improperly or with an improper motive: ibid. at p. 129.

8. *Is it desirable to legislate to allow the admission of Hansard in court as a matter of course (without the leave of the House) for certain limited purposes?*

My own opinion—and I emphasise that it is in its nature 'political' rather than 'legal'—is that such legislation may well be desirable: it would eliminate the present state of uncertainty as to the extent, if any, to which *Hansard* or parliamentary papers may be proved for the purposes of Court proceedings without leave of the House; it would relieve the Houses of the need to consider petitions such as those which were presented in relation to the *Sankey* prosecution and Mr Uren's recent libel action.

9. *Should a Member himself choose to tender in court a Hansard report of his parliamentary speech, does that render him liable to cross examination in respect of that speech contrary to Article 9?*

The form of the question seems to assume that, if one leaves aside any question of Parliamentary privilege, the *Hansard* version of a member's speech is of itself and by itself admissible as proof of what a member said in the House. This is not so. Of course if a member goes into the witness-box, he may be allowed to say that what is recorded in *Hansard* represents what he did say in the House. *Hansard*, however, is not a document which proves itself; although I think that it would be within the legislative competence of the Parliament so to provide.

If a member is in the witness box in court proceedings and if a speech made by him in the House is in evidence, whether by the admission of a *Hansard* record of it or otherwise, it would not be lawful for the court to permit him to be cross-examined so as to impeach his reasons or motives for making that speech or as to the beliefs or views that he expressed in it: such a course would constitute a clear infringement of Article 9 of the Bill of Rights.

10. *If so, could he also be examined in respect of any earlier speeches on the same subject?*

This question must be answered in the same sense as that in which I have answered question 9.

11. *Are options available to the House to challenge a court ruling admitting into evidence Hansard or other House records e.g. Justice Begg's order?*

It is difficult to give a general answer to this question, because the availability or otherwise to the Parliament of a *judicial* remedy would depend very greatly upon the circumstances of the particular case. It is my opinion that in a case such as Mr Uren's recent libel action, it would have been open to the Speaker of the

House of Representatives, upon an appropriate resolution of the House, to have sought leave pursuant to Part 8, Rule 8 of the Rules of the Supreme Court of New South Wales to be joined as a party to the proceedings for the purpose of endeavouring to uphold, by the institution of an appeal against the order of Begg J., a claim that such order involved a breach of Parliamentary privilege.

Part 8, Rule 8 (1) is in the following terms:

> Addition of parties. (1) Where a person who is not a party–
>
> (a) ought to have been joined as a party; or
>
> (b) is a person who joinder as a party is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon,
>
> the Court, on application by him or by any party or of its own motion, may, on terms order that he be added as a party and make orders for the further conduct of the proceedings.

It seems to me that the order made by Begg J. gave rise to a situation falling within sub-paragraph (b). In this connexion a comparison should be made with *Corporate Affairs Commission* v. *Bradley* ((1974) 2 N.S.W.L.R. 39).

It would never be possible to implead effectively, by joining as a party to proceedings, any judge of a superior court of record of a State of the Commonwealth for the purpose of establishing that in the exercise or purported exercise of his jurisdiction he committed a breach of parliamentary privilege. This, in my opinion, is the law because of the well-entrenched principle that judges of superior courts are immune from all actions in the ordinary courts of law for any acts done by them in their capacity as judges. The latest expression of this principle is to be found in *Calvin* v. *Carr* ((1977)2 N.S.W.L.R. 308 at p. 340). On the other hand, a judge of a Federal court, other than the High Court, is exposed to the remedies of prohibition, mandamus and injunction: for the purposes of the application of section 75 (v) of the Constitution such a judge is 'an officer of the Commonwealth'. I can therefore conceive a situation in which the Parliament, through one or both of its presiding officers, would have standing to seek a remedy pursuant to that particular provision of the Constitution in a case in which it is alleged that a federal judge (other than a Justice of the High Court) has in the course of exercising his judicial functions committed a breach of parliamentary privilege.

Lastly, it should not be forgotten that in the far distant days of the late 17th century, the House of Commons dealt with two judges of the Court of King's Bench for breach of privilege found to have been committed by them in giving judgment in the case of *Jay* v. *Topham:* each of them was ordered by the House to be taken into custody until the next prorogation. See the account of this case given in *Erskine May's Parliamentary Practice,* 14th ed. at pp. 153–4. While it is not to be imagined that in modern times the Parliament would find a need to resort to such an exercise of its powers to punish for breach of privilege, its jurisdiction to do so can hardly be doubted.

12. *Should the House attempt to define its privileges or is it preferable to leave them undefined and capable of definition case by case?*

This is a matter of political judgment. Perhaps it should be borne in mind, in making it, that codification—as any such legislative exercise would be—means the achievement of relative certainty at the price of a degree of inflexibility; whereas the continuation of the status quo means relative flexibility at the price of a degree of uncertainty. But on balance, there must be a lot to be said for

bringing the law of Parliamentary privilege into line with modern conditions, however painstaking and difficult the task of formulating legislation may be.

13. *Would the passage of legislation declaring some privileges result in section 49 ceasing to have any force e.g. to remove the cover of the Bill of Rights?*

This problem was touched on in *Ex parte Richards; Re Fitzpatrick and Browne* (supra). At p.168, in the joint judgment, it was stated that the earlier part of section 49 of the Constitution deals 'with the whole content' of the powers, privileges and immunities of the Senate and of the House of Representatives and says that Parliament may declare what they are to be. 'It contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers or privileges; it is concerned with the totality of what the legislature thinks fit to provide for both House as powers, privileges and immunities. When it says that "until declared" they shall be those of the Commons House of Parliament it means that until the legislature undertakes the task of providing what shall be the powers, privileges and immunities they shall be those of the Commons House of Parliament. We think, therefore, that in the absence of some much more general provision than the two very minor and subsidiary matters referred to, the latter part of the section continues to operate.'

Now, the argument to which this passage in the judgment was directed was to the effect that the enactment of the *Parliamentary Papers Act* 1908–1946 and the *Parliamentary Broadcasting Act* 1946 had operated to expend and exhaust the power of the Parliament to declare the privileges and immunities of each of its two Houses, so that the law of privilege as it applied to the House of Commons at Westminster on 1st January 1901 no longer applied to the Federal Houses.

The lessons taught directly by, and by logical extension from this part of the High Court's judgment seem to me to be these: First, nothing but a legislative exercise in covering the whole field of parliamentary privilege will displace the operation of the common law of privilege referred to in section 49. Second, it would always be open to the Parliament so to cover the field by making specific provision with respect to particular subject matters and by enacting in express terms that except to the extent of such specific provision, the privileges etc. of the two Houses shall be those of the House of Commons at Westminster as at a particular date.

14. *Would any declaration now or in the future by the House of Commons as to what was the common law on privilege in the United Kingdom prior to 1901 have any force in the House of Representatives?*

In my opinion, any such declaration would be of no more than persuasive effect. It is for the House of Representatives, in any case in which it is appropriate for it to do so, to make its own determination as to what was the common law of privilege of the House of Commons at the relevant date.

15. *Is there any reason why the privileges of the Senate and the House could not be different (by declaration)?*

In my opinion, the answer to this question is 'no': section 49 seems to me to be wide enough in its terms to empower the Parliament to legislate differently for the two Houses and, for that matter to legislate for codification, wholly or in part, of the privileges of one House alone. But if an exercise of partial codification were attempted, it would be prudent, indeed vital, to enact that the privileges of the House in question shall remain as fixed by the latter part of section

49, or by references to the privileges of the House of Commons as at some particular date other than that of the establishment of the Commonwealth.

16. *Is it likely that the High Court would be prepared to rule on what were the privileges inherited from the House of Commons as at 1901; if so, would there be any right of appeal from the ruling?*

In my opinion, the High Court would be prepared, and indeed would be bound, in a proper case to give such a ruling. The relevant principles are set out in the judgment in *Fitzpatrick's* case (supra).

17. *If a House were to adopt by resolution a report of the Committee of Privileges which recommended a certain course of action in respect of requests for admission of House records in a court, would this resolution be accepted and given effect to by the courts?*

This question does not easily lend itself to a general answer. The best answer I can give is that if the course of action recommended by the Committee of Privileges and adopted by the House were to fall within the proper ambit of the Parliament's power with respect to its own privileges, a Court would be bound to adhere to such a course. By contrast, if the Parliament imposed restrictions in pretended exercise of such powers and beyond the limits of any of its privileges, a court would not be so bound.

20. *To what extent and in what circumstances can Hansard reports be tendered in evidence or used in examination, cross-examination or interlocutory proceedings in a Court or otherwise?*

As I have already indicated (see my answer to question 2), it is my opinion that Parliament has power to control the extent to which evidence may be given in court proceedings of what took place in the House. This view is reinforced by the following passage in *Erskine May* (14th ed.) at pp. 637–8.

> The practice of the Commons regarding evidence sought for outside the walls of Parliament touching proceedings that have occurred therein is regulated by the resolution of the session of 1818, which directs that no clerk or officer of the House, or shorthand writer employed to take minutes of evidence before this House, or any committee thereof, shall give evidence elsewhere, in respect of any proceedings or examination had at the bar, or before any committee of the House, without the special leave of the House(s).
>
> Accordingly parties to a suit who desire to produce such evidence, or any other document in the custody of officers of the House, in a court of law, petition the House, praying that the proper officer may attend, and produce it; and the term 'proper officer' includes an official shorthand writer. The motion for leave may be moved without previous notice. During the recess, however, it has been the practice for the Speaker, in order to prevent delays in the administration of justice, to allow the production of minutes of evidence and other documents, on the application of the parties to a private suit. But should the suit involve any question of privilege, especially the privilege of a witness, or should the production of the document appear, on other grounds to be a subject for the discretion of the House itself, he will decline to grant the required authority. During a dissolution the Clerk of the House sanctions the production of documents, following the principle adopted by the Speaker.
>
> It has been held by the courts that the evidence of Members of proceedings in the House of Commons is not to be received without the permission of the House, unless

they desire to give it; and, according to the usage of Parliament, no Member is at liberty to give evidence elsewhere in relation to any debates or proceedings in Parliament, except by leave of the House of which he is a Member.

What is the position if the parties to an action agree to the tendering in evidence of a copy of *Hansard* as proof of what was said in the House on a particular occasion? Does the implementation of such an agreement involve a breach of privilege? Technically it may do so (see answer to question 2) but it may be doubtful in the extreme whether the House would react in an adverse fashion.

What the Solicitor-General of the day had to say about this sort of problem when he appeared as *amicus curiae* in *Dingle* v. *Associated Newspapers* ((1960) 1 Q.B. 405 at pp. 411-412) is set out in the annexed photostat. His submissions seem to propound a commonsense solution. See also in this connexion the *Church of Scientology* case (supra) at p. 525.

21. *To what extent and in what circumstances, if any, have the privileges of Members as defined under Article 9 of the Bill of Rights deemed to have been waived, varied or otherwise affected?*

So long as Article 9 of the Bill of Rights remains part of the law of the Commonwealth, as it does by virtue of section 49 of the Constitution, there can be no effective waiver or abandonment of its provisions. It is a law that commands obedience; and a statute cannot be repealed by waiver.

22. *In what circumstances is it possible to allow the reporting of Parliamentary debates by the Press, radio or television and the circulation of Hansard reports or any extract therefrom without in any way affecting the absolute privilege of Members?*

The absolute privilege of members with respect to what they say in the House cannot be affected by any of the forms of reporting or broadcasting referred to in this question.

23. *Where Parliament accedes to a petition request for the production of Parliamentary Papers, or Hansard reports, to what extent and in what circumstances, does this not affect the individual Member's right to absolute privilege in respect of statements made by the Member in the Parliament in relation to such papers or Hansard reports?*

In my opinion, the absolute privilege is in no way affected.

24. *Is it desirable to have legislation which would limit the concept of Parliamentary Privilege to immunity for a Member and any other person publishing or distributing the comments of a Member in Parliament from civil action or criminal prosecution while at the same time allowing defendants in civil or criminal proceedings to rely on statements made by the Member in the Parliament?*

I am not sure that I fully understand the intent of the question. But if it is meant to propound the idea that it may be desirable to limit the ambit of parliamentary privilege so that it provides but one basic immunity of the kind suggested, I could not accept that such a drastic curtailment of privilege would be desirable. The privileges of Parliament cover a wide range of topics and situations. See, for example, *Quick & Garran* (op. cit.) at p. 502. If one bears in mind the rationale of the common law of parliamentary privilege, which is to uphold the effectiveness and proper status of Parliament, it would seem that the provisions of any such body of law, whether it be written into a statute or left to be deduced

from precedents of the past, ought not to be confined within such narrow limits as the question proposes.

Signed (T. E. F. HUGHES)

Chambers,
16th April 1980.

ANNEXURE TO OPINION OF

THE HON. T. E. F. HUGHES, Q.C. OF 16 APRIL 1980

my view, this court should make its own findings based on the evidence adduced and on the arguments presented in this court, and that should be done without regard to any decisions reached or opinions expressed or findings made by a different tribunal having a different function, and, probably, different issues before it, and having received different evidence and a different presentation of the case.

Then, secondly, in so far as there is an issue under the Parliamentary Papers Act, 1840, s. 3, the fact that a report of the select committee was made is simply an event which happened, and it is not relevant to inquire how it came to be made or what led up to it, and, if the defendants can show that they printed and published extracts from that report, and did so in good faith and without malice, they are entitled to that statutory defence, and no amount of comment on the report or on the proceedings leading up to it would deprive them of that defence or make it any worse or any better.

Finally, on the issue as of the assessment of damages, here again the report of the select committee is an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants are not responsible for that damage and, again, any amount of comment would have very little, if any, materiality and perhaps not even relevancy.

So on those two main points no difficulty arises at all. There were other matters, and also minor details of evidence, and I should mention that the Solicitor-General and Mr Cumming-Bruce supplied further information and explanations with regard to the production of certain documents and other matters of evidence in which parliamentary privilege might be involved, but those are points of detail.[1] I would say only this, that manifestly the parliamentary authorities have given the fullest co-operation to facilitate the administration of justice without detriment to parliamentary privilege. This court is indebted to the Solicitor-General and to Mr Cumming-Bruce for their intervention as amici curiae, and for the friendly help which they afforded in that capacity.

[The remainder of the case does not call for report. There were findings that the defendants had acted in good faith and without malice, so that the publication of the extracts from the select committee's report was privileged, and that the offer made by the plaintiff on behalf of the Manchester Corporation to buy the shares of the Ardwick Cemetery Ltd. for £1 each was a suitably generous offer, as the shares were worth considerably less than £1 each.]

Judgment for the plaintiff for £1,100.

Solicitors: *Stephenson, Harwood & Tatham for Grundy, Kershaw, Farrar & Co., Manchester; Swepstone, Walsh & Son; Treasury Solicitor.*

[1] The Solicitor-General, referring to the question of parliamentary privilege, said that there were two species of evidence in question—the minutes of proceedings of the select committee, which were laid on the table of the House and were not published, and what were officially called the minutes of evidence. A request for the production of the minutes of proceedings had been made to the Speaker of the House of Commons on behalf of the plaintiff in the action, but the Speaker had refused it on the ground that the proper course was for the plaintiff to proceed by petition to the House of production of the minutes. No such petition had been made; and any evidence relating to these minutes of proceedings would, in his submission, clearly be a breach of parliamentary privilege.

The minutes of evidence were taken down and transcribed by an official shorthand writer, who was an officer of the House, and by a standing resolution he could not be called to produce the transcript or give evidence without leave; in this case leave had not been requested. Any member of the public, however, could buy a copy of the transcript; so that if the minutes of evidence could be proved aliunde, for example by being an agreed document as in this case, it was unlikely that the House would treat its production as a breach of privilege.

It was important to remember that the House had never formally waived its privilege to prevent publication of its proceedings. There was, however, little doubt that if a petition had been made for the production of the minutes of evidence, as it had been for the copies of official reports of debates, it would have been granted. It therefore seemed that the court could safely consider a transcript of the evidence without any practical risk of collision with the House; but, in his submission, the proper procedure in future cases would be to present a petition. Reports by government departments to the select committee fell into the same class as the minutes of evidence, and all that he had already said applied to them also.

His Lordship asked whether the position still was that it would not be right to comment upon the conduct of the select committee.

The Solicitor-General said that if any comments were made or its validity impugned or any reflection made on its conduct, that would be very much in the danger area. The plaintiff's proposal to call evidence which was the same as that given before the select committee would not, however, be a breach of privilege.

MEMORANDUM

BY

EMERITUS PROFESSOR GEOFFREY SAWER

Faculty of Law 29 January 1980.

Administration of Justice: Reference to records of proceedings of the House of Representatives.

Suggestions of Emeritus Professor Geoffrey Sawer

1. I have considered carefully the excellent summary of material relating to this question, dated 25 September 1979, prepared by the Clerk of the House, and have discussed the matter with two colleagues of this Faculty who have special knowledge of the subject.

2. The simplest course to follow would be to legislate pursuant to the power conferred by S. 49 of the Constitution so as to modify the present law derived from the common law, from S. 9 of the Bill of Rights 1688, and from S. 49 operating on those sources. However, legislation would not be appropriate unless agreement could be reached with the Senate, since it is a matter on which a uniform provision applicable to both Houses could and should be enacted. If that cannot be done, the House could make machinery provision by delegation to the Committee of Privileges or to a special Committee of the power to grant or withhold permission to prove something said in the House, conditionally or unconditionally; that is a matter on which the Members and Officers are much better informed than myself and I make no further reference to it. In what follows I deal only with possible legislation.

3. The obvious model to follow is S. 7 of the Commonwealth *Evidence Act* 1905–73, which sets out a simple and convenient method of admitting in evidence the Votes and Proceedings, Journals and Minutes of the Houses as evidence that a motion, resolution or bill was moved etc. in the terms set out and on the specified date. Exactly the same provision should be made for admitting *Hansard*, but the question remains whether the matter admitted should be limited in its probative effect to establishing that the statement in question was made by the Member named at the date specified, on analogy with existing S. 7, or whether the material can be used for some further purpose.

4. It is obviously arguable that the essential freedom of parliamentary debate would be substantially preserved if the privilege of members was confined to immunity from any action at law, civil or criminal, or before any tribunal exercising quasi-judicial powers, as may have been the original intention of S. 9 of the Bill of Rights. If this policy were preferred by Members, there would be no difficulty in carrying it into effect in the drafting of the section of the Evidence Act here proposed. However, the information available suggests that Members would wish the privilege to be retained in a wider form than the basic and essential immunity mentioned above. For example, I

should think it probable that Members would not wish to be exposed to the possibility of cross-examination in a witness-box concerning something said by them in debate, nor even to the possibility of inferential comments by Judge or Counsel on something said in debate. I sympathise with that sort of fear, especially as entertained by non-lawyers. I think the wider sort of privilege is desirable in order to ensure fearless debate. It would accordingly be in my opinion best to confine the probative force of the suggested section to the fact that the statement was made in the terms reported at the designated date.

5. A provision so limited would, it appears, satisfy most of the demands so far made for relaxing the present Australian and British position. It would not affect the existing ability of the Houses to entertain and grant or refuse a petition to allow debate to be used for some further purpose.