**PARLIAMENTARY SOVEREIGNTY: A LAW UNTO ITSELF**

**Speech delivered at a seminar held by the Australia and New Zealand**

**Association of Clerks-At-The-Table by the Hon Alan Blow AO,**

**Chief Justice of Tasmania, on 22 January 2019**

When I was asked to speak at this seminar entitled "Parliamentary Sovereignty: A law unto itself", my mind turned immediately to a court case in England in 1934 about the extremely important question of whether liquor licensing legislation applies to a parliamentary bar. The name of the case is *The King v Graham-Campbell; ex parte Herbert* [1935] 1 KB 594. The proceedings were instituted by a journalist and writer of satirical fiction named A P Herbert. He was later the MP for Oxford University from 1935 until 1950. In 1950 the idea of "one man, one vote" became so popular in England that the university constituencies were abolished.

On 10 April 1934 at 1.15pm Mr Herbert went to a bar in the House of Commons with a friend and purchased a glass of lager and a glass of gin and mixed vermouth. That evening at 6.30pm, he went to the bar again with an MP and two friends, and the MP purchased a round of drinks for the foursome. The following month Mr Herbert went to the Bow Street Police Court and instituted private prosecutions against 16 people – 15 Members of Parliament who were the members of the Kitchen Committee of the House of Commons, and the unfortunate manager of the refreshment department of the House. The charges alleged that they had unlawfully sold by retail intoxicating liquor, for the sale of which they did not hold a licence as required by a provision in a licensing statute. Applications for the issue of summonses to the 16 defendants came before the Chief Metropolitan Magistrate, Sir Rollo Graham-Campbell. He held that he had no jurisdiction, and declined to issue the summonses.

Like many unsuccessful litigants, Mr Herbert was aggrieved by the decision at first instance. He decided to take the matter to a higher court. He instituted proceedings for prerogative writs. He obtained rules nisi calling on the magistrate, the members of the Kitchen Committee, and the manager, to show cause why the magistrate should not proceed to hear and determine the applications for the summonses. Those proceedings came before a bench of three judges in the Divisional Court, presided over by the Lord Chief Justice of England, Lord Hewart. The Attorney-General, Sir Thomas Inskip, appeared as leading counsel for the defendants. This was clearly a case of national importance.

Their Lordships had no hesitation in concluding that the magistrate had been right to hold that he had no jurisdiction. At 602, Lord Hewart CJ quoted the words of Lord Denman CJ in *Stockdale v Hansard* (1839) 9 Ad & E 1 at 115, 112 ER 1112 at 1156:

"The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt."

Lord Hewart went on to say:

"Here, as it seems to me, the magistrate was entitled to say, on the materials before him, that in the matters complained of the House of Commons was acting collectively in a matter which fell within the area of the internal affairs of the House, and, that being so, any tribunal might well feel, on the authorities, an invincible reluctance to interfere."

That case can be regarded as the quirky tip of a very substantial iceberg. There is an enormous body of law as to the powers, privileges and immunities of parliaments.

From at least as early as the 15th Century, there have been tensions between the courts and the Houses of Parliament in cases relating to parliamentary privilege. For many years the House of Lords and the House of Commons consistently claimed to be the exclusive judges of their own privileges. However the courts tended to take the view that parliamentary privilege was a branch of the law that came within their jurisdiction. The courts and the Houses of Parliament were each supreme in their own sphere. Over the centuries some important principles were established. Generally speaking, courts have no jurisdiction in relation to the internal proceedings of a House of Parliament, nor in relation to the power of a House of Parliament to punish an individual for contempt. However the courts will otherwise generally decide questions of privilege that arise in litigation before them. I would like to say a little about some of the major conflicts between the courts and the Houses of Parliament that occurred as these principles were evolving.

In the fourth year of the reign of Henry VIII, a Member of Parliament named Richard Strowd was fined by a court for condescending and agreeing with other members of the House of Commons to pass certain legislation. Parliament responded by enacting a statute that was applicable not just to Richard Strowd's case, but also to all members of the then Parliament and subsequent Parliaments. That statute provided "that all suits, accusements, condemnations, executions, fines, amercements, punishments, corrections, grievances, charges and impositions … for any Bill, speaking, reasoning or declaring of any matter or matters concerning the Parliament to be commenced and treated of, be utterly void and of none effect."

In the 17th Century there were considerable tensions between the Stuart Kings and members of the House of Commons in relation to questions concerning the jurisdiction of courts. The case of *The King v Elliot* (1629) Cro Car 181, 79 ER 759 provides a good illustration of those tensions. In 1629, Charles I dissolved Parliament, and he then proceeded to rule without a parliament for 11 years. Some MPs resisted the Royal command to dissolve the Parliament. When the Speaker sought to vacate the Chair in obedience to the King's command, two members seized him, thrust him back into the Chair, and held him there while another member, Sir John Eliot, addressed the House. Eliot and the other two MPs were arrested, prosecuted in the Court of King's Bench, fined and committed to the Tower of London. In 1667, long after the death of Eliot, and after the Civil War, the abolition of the monarchy, and the Restoration, the House of Lords held that the decision of the Court of King's Bench in 1629 had been erroneous. The House resolved that the statute concerning Richard Strowd was "a declaratory law of the ancient and necessary rights and privileges of Parliament".

After the Glorious Revolution of 1688, Parliament enacted the Bill of Rights (1 Wm & Mary, Sess 2, c2). The preamble to that statute lists a number of ways in which James II was said to have endeavoured to subvert "the Lawes and Liberties of this Kingdome". Amongst other things, it was said that he endeavoured to do so "By Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament". In Article 9 of the Bill of Rights, Parliament declared "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament". That provision remains in force today.

In 1811 the Court of King's Bench dealt with the case of *Burdett v Abbot* (1811) 14 East 1, 104 ER 501. The plaintiff, Sir Francis Burdett, a baronet, was a member of the House of Commons. He wrote a letter that was published in a weekly journal in March 1810. He criticised the House of Commons for having a radical named John Gale Jones committed to prison for contempt of Parliament. He had spoken about this in the House, without success. The House resolved that the letter was "a libellous and scandalous paper, reflecting on the just rights and privileges of the House". It resolved that Sir Francis be committed to Tower of London, and ordered the Serjeant-at-Arms to take him into custody. The Serjeant-at-Arms went to the home of Sir Francis with a party of armed soldiers, and found that the doors were locked. The Serjeant-at-Arms broke in, and took Sir Francis to the Tower. Sir Francis subsequently sued the Speaker for damages for trespass. The Court of King's Bench held that the House of Commons had a long recognised power to commit for contempt, and that the Court had no power to look behind the warrant and make its own findings as to the allegation that a contempt had been committed.

A crisis relating to the power of the House of Commons to publish written material developed during the late 1830s. A man named Stockdale published some books whose contents were apparently inconsistent with the moral standards of Victorian gentlemen. One was described in his pleadings as "a certain physiological and anatomical book written by a learned physician on the generative system, illustrated by anatomical plates": *Stockdale v Hansard* (above) at Ad & E 1-2, ER 1113. Some of Stockdale's books were found in the hands of prisoners in Newgate Prison. That fact was mentioned in a Report of the Inspectors of Prisons of Great Britain that was tabled in the House of Commons. That House resolved and ordered that the report be printed and published. The report described Mr Stockdale's anatomical book saying, "This last is a book of a most disgusting nature and the plates are indecent and obscene in the extreme." It also said that medical publishers described it as "one of Stockdale's obscene books". Stockdale sued the publishers of the inspectors' report for damages for libel. The names of those publishers were James Hansard, Luke Graves Hansard, Luke James Hansard, and Luke Henry Hansard. In proceedings before the Court of King's Bench in 1839, they demurred, contending that the power of the House of Commons to publish reports was "an essential incident to the constitutional functions of Parliament" and that the publication was therefore lawful. The Court of King's Bench rejected that argument: *Stockdale v Hansard* (above), and the case subsequently proceeded to trial. Stockdale lost, but not because of anything to do with parliamentary privilege. The jury were apparently just as disgusted by the book as the Inspectors of Prisons had been.

However Stockdale commenced several more cases against the Hansards. Things came to a head when one of those cases was not defended. Stockdale obtained judgment by default. Damages were assessed at £600. The Hansards did not pay. Stockdale caused the sheriff to seize and sell goods belonging to the defendants. The sheriff was reluctant to enforce the judgment, but did so after being ordered to by the Court. The House of Commons then passed a resolution declaring that a contempt of their privileges had been committed, and ordering the sheriff to pay the money back to the Hansards. Stockdale obtained an order from the Court of King's Bench requiring the money to be paid to him: *Stockdale v Hansard* (1840) 11 Ad & E 253, 113 ER 411. The sheriff complied with the order of the court. The House of Commons had the sheriff and one of his deputies arrested by its Serjeant at Arms and held in custody.

Habeas corpus proceedings were instituted in the Court of King's Bench. In a return to the writ, the Serjeant at Arms relied on a writ issued to him by the Speaker. On its face the Speaker's writ disclosed that the two prisoners had "been guilty of a contempt and breach of the privileges" of the House of Commons, and required him to take their bodies into custody and keep them safely during the pleasure of the House.

The four judges of the Court of King's Bench each held that the Speaker's warrant was in order, and that they therefore had no power to order the release of the prisoners: *Case of the Sheriff of Middlesex* (1840) 11 Ad & E 273, 113 ER 419. They followed *Burdett v Abbot* (above): a court could not look behind a warrant issued by the Speaker for a person to be committed for contempt. Williams J said, at Ad & E 295, ER 427:

"Whether or not, in the present instance, it was right to visit any person with the anger, or justice, of the House of Commons, is a question with which we have no concern. On grounds of law, the only grounds we have a legal right to proceed upon, we cannot order these gentlemen to be discharged."

Something needed to be done to resolve the stalemate in relation to the fundamental question relating to the Parliament's freedom of publication. As a result, the Parliament passed the *Parliamentary Papers Act* 1840. That Act provided that any court proceedings that had been commenced against anyone for publishing anything printed by order of either House of the British Parliament must be stayed upon the delivery of documents establishing that the publication was by order of either House. That legislation has been replicated in Australian jurisdictions.

In 1884 there was a case in England that provides a good illustration of the proposition that the courts have no jurisdiction in relation to the internal proceedings of a House of Parliament: *Bradlaugh v Gossett* (1884) 12 QBD 271. The plaintiff, Mr Bradlaugh, had been elected to the House of Commons. Apparently he had previously done something which caused the majority of the Members of the House to take the view that he had disturbed the proceedings of the House. He asked the Speaker to call him to the table for the purpose of taking the oath that MPs were required to take, with a view to then taking his seat. However the Speaker did not invite him to do that, and the House resolved "that the Serjeant-at-Arms do exclude Mr Bradlaugh from the House until he shall engage not further to disturb the proceedings of the House".

Bradlaugh sued the Speaker, seeking a declaration that the order of the House was beyond its power and jurisdiction, and therefore void, and also seeking an order restraining the Serjeant-at-Arms from preventing him by force from entering the House and taking the oath. The Speaker, represented by the Attorney-General and two junior counsel, argued that the court had no jurisdiction to make the orders sought. Lord Coleridge CJ and two other judges unanimously held that that was so. Lord Coleridge said at 275:

"The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord Ellenborough, 'They would sink into utter contempt and inefficiency without it'."

That was a reference to the judgment of Lord Ellenborough in *Burdett v Abbot* (above).

The 19th Century saw the establishment of legislatures and parliaments in British colonies and dominions. Inevitably questions arose as to whether they possessed the same powers and privileges as the British Parliament. In the case of *Kielley v Carson* (1843) 4 Moo PC 63, 13 ER 225, the Privy Council held that the House of Assembly of Newfoundland did not have the power to punish for contempt.

At Moo PC 89, ER 235, Parke B, speaking for the Privy council, said this about the power to punish for contempt:

"… the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

In 1855 a similar question arose in relation to the Legislative Council of Van Diemen's Land. The Council established a Select Committee to enquire into allegations of abuses in the Convict Department. A summons to appear before the Committee was served on the Comptroller-General of Convicts, but he refused to attend. The Council found him guilty of contempt, had him arrested by its Serjeant-at-Arms, and kept him in custody until the Governor prorogued the Council. The Comptroller-General sued the Speaker and the Serjeant-at-Arms for damages for trespass. They of course pleaded that his apprehension and detention were justified by the resolutions of the Legislative Council. My predecessor, Fleming CJ, held that that was not a sufficient defence. The Speaker and the Serjeant-at-Arms appealed to the Privy Council, but they were unsuccessful: *Fenton v Hampton* (1858) 11 Moo PC 347, 14 ER 727. The Privy Council followed its earlier decision in relation to the Newfoundland Assembly.

Later in 1858 the Tasmanian Parliament legislated to give itself powers to order the attendance of individuals, and to punish certain contempts: *Parliamentary Privilege Act* 1858. That statute is still in force, 160 years later. There is similar legislation in other Australian jurisdictions.[[1]](#footnote-1)

The authors of the Constitution of the Commonwealth of Australia prudently included a section about the powers, privileges and immunities of the Commonwealth Parliament – s 49. That section reads as follows:

"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 Commonwealth Parliament has enacted a few statutes pursuant to s 49, including the *Parliamentary Papers Act* 1908, the *Parliamentary Proceedings Broadcasting Act* 1946, and the *Parliamentary Privileges Act* 1987. Section 16 of the 1987 Act includes a detailed non-exhaustive definition of the expression "proceedings in Parliament" for the purposes of Article 9 of the Bill of Rights. However the legislation enacted under s 49 by no means covers the field, and the law of parliamentary privilege in relation to the Commonwealth to a large extent remains that which applied to the House of Commons in 1901.

The power of the Commonwealth Parliament to be a "law unto itself" is epitomised by the case of *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. Fitzpatrick was the owner of a weekly suburban newspaper called the Bankstown Observer. It was distributed free of charge in Bankstown and surrounding Sydney suburbs. Browne was the editor of the paper. The local Liberal MHR was a Mr Morgan. An issue of the newspaper included an article with the headline "MHR and Immigration Racket". It alleged that before World War II Morgan had engaged in corrupt schemes involving refugee migration from Europe to Australia.[[2]](#footnote-2) Mr Morgan informed the House of Representatives that the article had impugned his personal honour and had challenged his fitness to be a Member of Parliament. He successfully moved that the article be referred to the Privileges Committee. Fitzpatrick and Browne appeared, first before that Committee, and later before the Bar of the House. On a motion from the Prime Minister, the House voted that they be committed to gaol for 90 days. They were taken into custody by the Chief Commissioner of Police at Canberra, Mr Richards.

They sought to challenge the lawfulness of their imprisonment by instituting habeas corpus proceedings in the Supreme Court of the ACT. Those proceedings were removed into the High Court. The seven judges of the High Court held that the applications for writs of habeas corpus should be refused. Essentially they followed the 1840 decision of the Court of King's Bench in the *Case of the* *Sheriff of Middlesex* (above).

In the report of the case in the Commonwealth Law Reports, there is absolutely nothing about the conduct of Fitzpatrick and Browne that was the subject of the finding of contempt. The case concerns the information on the face of the Speaker's arrest warrants and s 49 of the Constitution. Each warrant recited the resolutions of the House of Representatives to the effect that the individual in question was guilty of a serious breach of privilege, together with details of the resolutions as to arrest, imprisonment, and so forth.

Dixon CJ, delivering the judgment of the court, rejected all of the prisoners' arguments, and concluded, at 170:

"We are therefore in a position of having before us a resolution of the House and two warrants which conclusively show that a breach of privilege has been committed and the two persons who seek release are properly held by the person to whom these proceedings are addressed, Mr Edward Richards."

Much of Australia's law as to parliamentary powers, privileges and immunities has been inherited from the Parliament at Westminster, and was developed in the context of very different constitutional arrangements from those that apply in Australia today. Our constitutional arrangements are based on the separation of powers to a far greater extent than was the case in Britain in the centuries when the relevant principles were developed. Many of the old cases related to struggles to establish the power of Parliament at the expense of the power of the monarch – struggles to limit the powers of monarchs who believed that they ruled by divine right.

It was against that background that the High Court was called upon to determine issues relating to the power and privileges of the New South Wales Legislative Council in the case of *Egan v Willis* (1998) 195 CLR 424. I will not say much about that case because I understand it may be the subject of a separate session at this seminar. However the fundamental point that emerges from *Egan v Willis* is that, when a question about the powers, privileges or immunities of a legislature does arise for determination by a court, and cannot be answered simply reference to s 49 of the Constitution or some piece of legislation, the question has to be determined by reference to what is "necessary" or "reasonably necessary".

That was the test that the Privy Council adopted in *Keilley v Carson* (above) – the Newfoundland case. In the words of Parke B (at Moo PC 88, ER 234), a legislature has no inherent powers other than "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute". Those words were cited in *Egan v Willis* by Gaudron, Gummow and Hayne JJ at [31], by McHugh J at [81], and by Kirby J at [121], 485.

Given the nature of the work of Members of Parliament in a modern representative democracy, it is appropriate to take a very wide view as to the scope of the privileges and immunities necessary for a House of Parliament to function properly and effectively.

*Egan v Willis* was an unusual case because neither side argued that the courts lacked jurisdiction to adjudicate upon the matters in controversy. Usually litigation about parliamentary proceedings provokes a dispute as to whether a court has jurisdiction. The settled position of the courts, as stated by Dixon CJ in *R v Richards; ex parte Fitzpatrick and Browne* (above) at 162 is that "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."

I began today by talking about the important issue of the immunity of parliamentary bars from liquor licensing legislation. The position in relation to that issue can probably be regarded as having been settled in 1934. However there are statutes of a different nature that are likely increasingly to give rise to questions about parliamentary privilege and immunities. To an increasing extent, investigations by police and executive agencies rely upon statutory powers regarding search warrants, telephone intercepts, listening devices, and the like.

Parliaments are not alone in having to face difficult situations in relation to search warrants. In 2014 a police officer obtained a search warrant authorising a search of a registry of the Supreme Court of Queensland and the seizure of certain documents. The Queensland Court of Appeal held that executing a search warrant in the precincts of the court would amount to a contempt if, but only if, it interfered with the court's administration of justice: *R v Dunn* [2014] QCA 254, [2015] 2 Qd R 407 at [19]-[24]. On the other hand it amounts to a contempt if doing something that would otherwise be lawful interferes with the administration of justice: for example, arresting a litigant whose case is before the court: *Cole v Hawkins* (1738) 95 ER 396.

As recently as 6 December last, the Senate passed a resolution regarding parliamentary privilege and the seizure of material by executive agencies. The resolution referred to s 49 of the Constitution, to Article 9 of the Bill of Rights, and to s 16 of the *Parliamentary Privileges Act* 1987 (Cth). The resolution went on to say that the Senate:

"• declares for the avoidance of doubt:

(i) that the right of the Houses to determine claims of privilege over material sought to be seized or accessed by executive agencies adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed, and

(ii) in particular, that these rights adhere against the covert use of intrusive powers, by which agencies may seek to seize or access information connected to parliamentary proceedings without the use or presentation of warrants;

* requires the executive and executive agencies to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege; and
* calls on the Attorney-General, as a matter of urgency, to work with the Presiding Officers of the Parliament to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the House of Representatives Committee of Privileges and Members Interests."

The tensions between the executive and legislative branches of government have not come to an end. It will be interesting to see what happens in the future when courts are asked to adjudicate in relation to claims of parliamentary privilege relating to the use of statutory powers by investigative agencies. At least it can be said that the ground rules as to the jurisdiction of courts have been established.

1. *Constitution Act* 1975 (Vic), s 19; *Constitution Act* 1934 (SA), s 38; *Parliament of Queensland Act* 2001 (Qld), ss25-47, s 40A; *Parliamentary Privileges Act* 1891 (WA). [↑](#footnote-ref-1)
2. National Archives of Australia Fact Sheet 204: <http://www.naa.gov.au/collection/fact-sheet/fs204.aspx>, accessed 14 January 2019. [↑](#footnote-ref-2)