

9,1958

In the Privy Council.

UNIVERSITY OF LOIN THE MATTER of a Reference under the Judicial
W.C.1. Committee Act, 1833, Section 4 [3 & 4 Will. 4 c. 41]
-2 FEB 1959 AND
INSTITUTE OF AD. IN THE MATTER of the Parliamentary Privilege Act,
LEGAL STUDIES 1770 [10 Geo. 3 c. 50]
AND
IN THE MATTER of the Fifth Report from the
Committee of Privileges, Session 1956/57.

52231

10 **Case for the Solicitor for the Affairs of
Her Majesty's Treasury.**

The submission by the Solicitor for the Affairs of Her Majesty's Treasury in support of the view that the House of Commons would not be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a Writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

20 1. By Order in Council dated 13th December, 1957, Her Majesty by and with the advice of the Privy Council was pleased to refer to the Judicial Committee for their hearing and consideration the question of law whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770 (hereinafter called "the Act of 1770"), if it treated the issue of a Writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

2. The circumstances giving rise to the said reference are as follows :— App. Folder

30 (i) The Committee of Privileges, appointed by the House of Commons on 8th November, 1956, to whom was referred the Matter of the Complaint, made upon 8th April, 1957, by the Right Honourable George Russell Strauss, Member for Vauxhall, of certain actions of the London Electricity Board which, he submitted, were calculated to impede him as a Member in the performance of his Parliamentary duties and constituted a breach of the privileges of the House, considered the matter and in their Report to the House reached the following conclusions, namely :—

40 (a) In writing a letter dated 8th February, 1957, to the Paymaster-General, of which the London Electricity Board complained, Mr. Strauss was engaged in a "proceeding in Parliament" within the meaning of the Bill of Rights of 1688. App. p. 1

(b) The London Electricity Board in threatening in letters from themselves and their solicitors to commence proceedings for libel against Mr. Strauss for statements made by him in the course of a proceeding in Parliament were threatening to impeach or question the freedom of pp. 7-15

Mr. Strauss in a Court or Place outside Parliament, and accordingly the London Electricity Board and their Solicitors had acted in breach of the privilege of Parliament.

(c) The opinion of the Judicial Committee of the Privy Council should be sought on the question whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a Writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privilege.

(ii) Subsequent to the reception by the House of Commons 10 of the said Report a humble Address dated 4th December, 1957, was presented to Her Majesty by the House of Commons praying that Her Majesty would refer to the Judicial Committee of the Privy Council for hearing and consideration the question of law, whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a Writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges, in order that the said Judicial Committee might, after hearing argument on both sides (if 20 necessary), advise Her Majesty thereon; and further praying that Her Majesty, upon receiving the advice of the said Judicial Committee, would be pleased to communicate such advice to the House of Commons, in order that the House might take such action as seemed to it proper in the circumstances.

3. The reference will involve the consideration of two of the privileges claimed and enjoyed by Parliament, and in particular by the House of Commons, and of the right of the House of Commons to enforce a due observance of its privileges and to 30 punish for contempt anyone who acts in breach of any of its privileges. The privileges in question are freedom of speech in Parliament and the freedom of Members of Parliament from arrest during the time Parliament is sitting and during the period within which the privilege extends.

4. The right of Members of Parliament to speak freely in Parliament and not to have their speeches impeached or questioned elsewhere was recognised by the Crown in the reign of King Henry the Fourth. It was first given statutory recognition by the Privilege of Parliament Act, 1512 (commonly known as 40 Strode's Act), which was passed after Richard Strode, a Member of Parliament had been punished by the Stannary Court for bringing forward a Bill in Parliament for the regulation of the tin industry. This Act provides, *inter alia* :—

“ And . . . that sutes accusementes condempnacions execucons fynes amciamentes punysshmentes correcons grevances charges and impositions putte or had or here after to be put or hadde unto or uppon the said Richard and to evy other of the pson or psons afore specified, that nowe be of this psent Parliament or that of any Parliament hereafter 50 shalbe for any bill spekyng reasonyng or declaryng of any mater or maters concyning the Pliament to be comened and treated of, be utterly voyd and of none effecte ”.

4 Hen. 8 c. 8.
pp. 17-21

1 Will. & Mary
sess. 2 c. 2.
pp. 23-33

The right was reaffirmed in the Bill of Rights, 1688, which after reciting that—

“ the late King James the Second by the assistance of diverse evill councillors judges and ministers employed by him did endeavour to subvert and extirpate the Protestant religion

and the lawes and liberties of this Kingdome . . . By prosecutions in the Court of King's Bench for matters and causes cognizable onely in Parlyament and by diverse other arbitrary and illegall courses ”

enacted, *inter alia* :—

“ Freedom of speech—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 ”.

10 5. It is respectfully submitted that on the true construction of the Privilege of Parliament Act, 1512, and of Article 9 of the Bill of Rights, 1688, an action brought against a Member of Parliament in respect of a speech made by him in Parliament or a proceeding by him in Parliament was and is void and of no effect. Such an action, it is respectfully submitted, was not and is not known to or recognised by the law. The Courts never had and have not any jurisdiction to entertain any such action.

20 6. The privilege claimed and enjoyed by Members of Parliament of freedom from arrest during the time Parliament extended in the seventeenth century and earlier owing to the legal procedure in force to freedom from having any civil action brought against them during the period covered by the privilege. During the eighteenth century Parliament by a series of Acts culminating in the Act of 1770 abrogated the privilege of Members of Parliament of not having any ordinary civil action brought against them, while expressly retaining the privilege of freedom from arrest. The Acts are the following : An Act for preventing any Inconveniences that may happen by Privilege of Parliament, 12 & 13 Wm. 3 c. 3. pp. 35-39
 30 1700 ; An Act for the further Explanation and Regulation of Privilege of Parliament in Relation to Persons in publick Offices, 2 & 3 Anne c. 18. pp. 41-43
 1703 ; An Act to amend an Act passed in the twelfth and thirteenth year of the Reign of King William the Third, intituled, An Act for preventing any Inconveniences that may happen by Privilege of Parliament, 1738 ; An Act for preventing Inconveniences arising in Cases of Merchants, and such other Persons as are within the Description of the Statutes relating to Bankrupts, being intituled to Privilege of Parliament, and becoming insolvent, 4 Geo. 3 c. 33. pp. 51-53
 1763 ; and the Act of 1770. 10 Geo. 3 c. 50. pp. 55-57

40 7. The most relevant provisions of the Act of 1770 are as follows :—

50 “ Whereas the several Laws heretofore made for restraining the Privilege of Parliament, with respect to Actions or Suits commenced and prosecuted at any Time from and immediately after the Dissolution or Prorogation of any Parliament, until a new Parliament should meet, or the same be reassembled ; and from and immediately after an Adjournment of both Houses of Parliament for above the Space of Fourteen Days, until both Houses should meet or assemble ; are insufficient to obviate the Inconveniences arising from the Delay of Suits by reason of Privilege of Parliament ; whereby the Parties often lose the Benefit of several Terms ; For the preventing all Delays the King or his Subjects may receive in presenting their several Rights, Titles, Debts, Dues, Demands or Suits, for which they have cause ; be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled and by

the Authority of the same, That from and after the twenty-fourth day of June One thousand seven hundred and seventy, any Person or Persons shall and may, at any time, commence and prosecute any Action or Suit in any Court of Record, or Court of Equity, or of Admiralty, and in all Causes Matrimonial and Testamentary, in any Court having Cognizance of Causes Matrimonial and Testamentary, against any Peer or Lord of Parliament of Great Britain, or against any of the Knights, Citizens and Burgesses, and the Commissioners for Shires and Burghs of the House of Commons of Great Britain 10 for the Time being, or against their or any of their menial or any other Servants, or any other Person intitled to the Privilege of Parliament of Great Britain ; and no such Action, Suit or any other Process or Proceeding thereupon, shall at any Time be impeached, stayed or delayed, by or under Colour or Pretence of any Privilege of Parliament.

II. Provided nevertheless and be it further enacted by the Authority aforesaid, That nothing in this Act shall extend to Subject the Person of any of the Knights, Citizens and Burgesses, or the Commissioners of Shires and Burghs of the 20 House of Commons of Great Britain, for the Time being, to be arrested or imprisoned upon any such Suit or Proceedings.”

8. It is respectfully submitted that the words “ any Action or Suit ” in the Act of 1770 mean solely any action which can be brought against a Member of Parliament and do not embrace an action brought against a Member of Parliament, which is unknown to the law, which the Courts have no jurisdiction to entertain and any proceedings which are void and of no effect. It is accordingly further submitted that the Act of 1770 does not empower anyone to bring an action against a Member of Parliament in 30 respect of a speech made by him in Parliament or a proceeding by him in Parliament.

9. It is also respectfully submitted that the contention that the Act of 1770 does empower anyone to bring an action against a Member of Parliament in respect of a speech made by him in Parliament involves a dilemma, which may be stated as follows :— The Bill of Rights by Article 9 re-affirmed a privilege which is the privilege of Parliament as a whole and accordingly Parliament could visit with its displeasure and punishment any person or persons who initiated proceedings before a Court of Law in respect 40 of a speech made in Parliament. If Section 1 of the Act of 1770 affects the privilege or immunity confirmed by Article 9 then one of two results must follow. One result would be that this privilege or immunity ceased wholly to exist and in consequence not only would Parliament have no right to punish for contempt any one initiating such proceedings, but equally an individual Member of Parliament, if brought before a Court, would not be able to plead the defence of absolute privilege. A Member of Parliament would be thus in the position that he would have available to him in respect of a speech made by him from his place in the 50 House only the defence of qualified privilege, which is at Common Law available to all persons, who in appropriate circumstances publish utterances in the discharge of a social or other duty. The other possible result would be, if the said contention is well founded, that Parliament’s privilege confirmed by Article 9, although not wholly abrogated by Section 1 of the Act of 1770, was nevertheless fundamentally altered in character. On this view the effect of the impact of Section 1 of the Act of 1770 on Article 9 of the Bill of Rights would be to convert the privilege vested in

Parliament as a whole, which privilege Parliament had the right to guard against contempt, into a wholly different privilege, namely, that consisting in the right vested in the individual Member of Parliament, at his own volition, to plead by way of defence to an action brought against him absolute privilege in respect of the words spoken by him from his place in Parliament.

10. It is respectfully submitted that it is in the first place not possible to construe Section 1 of the Act of 1770 as having extended to the length of depriving a Member of Parliament of the right to raise absolute privilege as a defence to an action, this being a right generally recognised as existing. It is, however, also submitted that it is equally difficult to construe Section 1 of the Act of 1770 as changing by implication without express words for that purpose a privilege of Parliament as a whole into a wholly different individual right vested in each Member of Parliament. Reliance will be placed upon the general principle of construction that Acts of Parliament will be in general construed in such a way as not to involve a repeal by implication without express reference of previous Acts, particularly when the previous Acts are fundamental in character conferring rights basic to the whole system of government and on the special rule that privileges enjoyed by Parliament or by Members of either House can only be abrogated by express words in a statute.

11. It is further respectfully submitted that the Act of 1770 and the Acts which preceded it, all of which being in *pari materia* must be read as a whole, were upon their true construction designed and intended solely to lessen the inconveniences caused by the privilege of freedom from arrest enjoyed by Members of both Houses of Parliament and were not designed or intended to alter any other privileges of Parliament or Parliament's power to punish for contempt. The words "Privilege of Parliament" used therein have, it is submitted, a technical meaning and are used consistently throughout to refer solely to the privilege from arrest and to no other privilege of Parliament. Attention is drawn to Section 128 of the Bankruptcy Act, 1914, as showing that these words have a limited and technical meaning.

4 & 5 Geo. 5 c. 59.
p. 65

12. It is furthermore respectfully submitted that the terms of Section 1 of the Act of 1770 are by no means free from ambiguity and generality. It is, for instance, open to question as to what is the effect of the words "impeached" "stayed" and "delayed" contained therein. It is submitted that an action for slander brought against a Member of Parliament in respect of a speech made by him in the House of Commons might be impeached, stayed or delayed within the meaning of those words in the Section if the Defendant in the action relied upon the defence of absolute privilege. All the more might it be impeached, if he took proceedings to have the Statement of Claim struck out as disclosing no cause of action or asked before the action was tried on its merits for it to be decided as a preliminary point of law whether or not the Statement of Claim disclosed a cause of action in law. A Defendant might further, it is submitted, be impeaching an action if after the opening of Counsel for the Plaintiff to the effect that the complaint related to a speech in Parliament, he through his Counsel submitted that the action should proceed no further. Moreover, if it should be found, contrary to the submissions, contained in paragraph 11 that the words "Privilege of Parliament" have not a technical and limited meaning, it is submitted that the words "any Privilege of Parliament" are words of generality and ambiguity.

13. Once it is found or conceded that there may be some ambiguity or generality in the words used in Section 1 of the Act of 1770, it is submitted that the clear intention evidenced in the preamble to the Act of 1770 and in the previous Acts in *pari materia* can be lawfully employed to restrict the general words contained in that Section.

14. It is further respectfully submitted that if, as submitted in paragraph 12 hereof, a Defendant would be "impeaching," "staying" or "delaying" an action if he or his Counsel took the steps or any of them described in paragraph 12, it must follow 10 that the effect of Section 1 of the Act of 1770 is that a Member of Parliament, sued for slander in respect of words uttered by him from his place in the House, could not raise the defence of absolute privilege. It is respectfully submitted that Section 1 cannot have this effect.

15. In the premises it is submitted that the Act of 1770 in no way affected any of the Privileges of Parliament other than the privilege of freedom of a Member of Parliament from being made a party to an action and that the House of Commons would not be acting contrary to the Act of 1770, if it treated the issue 20 of a Writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.

FRANK SOSKICE.

B. CLAUSON.

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FOR THE SOLICITOR FOR THE AFFAIRS OF
HER MAJESTY'S TREASURY.

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