[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

RICHARDS;

Ex parte FITZPATRICK and BROWNE

H. C. of A. 1955.

MELBOURNE, *June* 22, 23, 24.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Parliament—Privileges—Enforcement—Nature of function—Judicial power—Whether open to Parliament having regard to structure of and division of functions under Constitution—Contempt—Power of Parliament to judge what constitutes—Speaker's warrant consistent on face with breach of acknowledged privilege—Conclusiveness—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 49, 50, *Chap.* III.

Under s. 49 of the Constitution the Senate and House of Representatives possess the powers, privileges and immunities of the House of Commons at the establishment of the Commonwealth, Parliament having made no declaration within the meaning of the section. The section operates independently of s. 50 and is not to be read down by implications derived from the general structure of the Constitution and the separation of powers thereunder. One such privilege is that of judging what is contempt and of committing therefor. If the Speaker's warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive, notwithstanding that the breach of privilege is stated in general terms.

Case of the Sheriff of Middlesex (1840) 11 Ad. & E. 273 [113 E.R. 419]; *Dill* v. *Murphy* (1864) 1 Moo. P.C.C. (N.S.) 487 [15 E.R. 784]; *Speaker of the Legislative Assembly of Victoria* v. *Glass* (1871) L.R. 3 P.C. App. 560, followed.

CASE referred by the Supreme Court of the Australian Capital Territory.

Raymond Edward Fitzpatrick and Frank Courtney Browne were taken into custody on 10th June 1955 by Edward Richards in pursuance of warrants issued by the Speaker of the House of Representatives of the Parliament of the Commonwealth. The

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warrants in all material parts were in similar terms, that relating to Raymond Edward Fitzpatrick being as follows :—

"The Parliament of the Commonwealth.

House of Representatives.

To Edward Richards, the person for the time being performing the duties of Chief Commissioner of Police at Canberra in the Australian Capital Territory :—

Whereas the House of Representatives did, on the tenth day of June, 1955 agree to the following resolution :—

'1. That Raymond Edward Fitzpatrick, being guilty of a serious breach of privilege, be for his offence committed to the custody of the person for the time being performing the duties of Chief Commissioner of Police at Canberra in the Australian Capital Territory or to the custody of the keeper of the gaol at such place as Mr. Speaker from time to time directs and that he be kept in custody until the tenth day of September, 1955, or until earlier prorogation or dissolution, unless this House shall sooner order his discharge.

2. That Mr. Speaker direct John Athol Pettifer, Esquire, the Serjeant-at-Arms, with the assistance of such Peace Officers of the Commonwealth as he requires, to take the said Raymond Edward Fitzpatrick into custody in order to his being committed to and kept in custody as provided by this resolution.

3. That Mr. Speaker issue his warrants accordingly.'

These are therefore to command you the said Edward Richards to receive the said Raymond Edward Fitzpatrick into your custody and with such assistance as you may require to keep him in your custody, subject to any direction given by me in pursuance of the said resolution, until the tenth day of September, 1955, or until earlier prorogation or dissolution, unless the House shall sooner order his discharge, and for your so doing this shall be your sufficient warrant.

Dated the tenth day of June, 1955.

(Sgd.) Archie G. Cameron

Speaker of the House of Representatives."

On 10th June 1955, on the application of Fitzpatrick and Browne as prosecutors, the Supreme Court of the Australian Capital Territory (*Simpson* J.) granted an order nisi for two writs of *habeas corpus* directed to the said Edward Richards.

On 15th June 1955, *Simpson* J. pursuant to s. 13 of the *Australian Capital Territory Supreme Court Act* 1933-1950 directed that the case be argued before a Full Court of the High Court of Australia.

The relevant statutory provisions are set out in the judgment of the Court hereunder.

P. D. Phillips Q.C. (with him *A. F. Mason*), for the prosecutor Fitzpatrick. Section 49 of the Constitution does not authorize the House of Representatives to determine after the event that a person, not being a member and not on account of anything done in the House, has committed a breach of privilege or to direct the Speaker to cause such person to be punished. Section 49 is a grant of legislative power. Once Parliament makes any exercise of the power, however partial, the provision that the privileges shall be those of the House of Commons ceases to operate. Such an exercise has been made by the *Parliamentary Papers Act* 1908-1946 and the *Parliamentary Proceedings Broadcasting Act* 1946. Even without s. 49 the mere creation of Parliament would carry with it all necessary powers. [He referred to *Barton* v. *Taylor* (1); *Kielley* v. *Carson* (2).] The necessary consequence of s. 50 of the Constitution is that Parliament cannot continue to invent modes of exercising privileges, because it has defined the modes by its Standing Orders: see Orders 24, 62, 97-99. No mode of exercising privileges by issue of a Speaker's warrant has been prescribed. The doctrine of the *Case of the Sheriff of Middlesex* (3) is inapplicable because s. 50 takes the place which it would otherwise occupy. Alternatively, the privileges of Parliament are part of the law, the Constitution being an Imperial Act of Parliament. Power to declare a person to have broken the law and to cause that person to be punished for the breach is part of the judicial power committed to this Court by s. 71 of the Constitution. There is no reason why the grant of judicial power as exercised by the House of Commons should not yield to s. 71 of the Constitution. It is not essential to the maintenance of the privilege and nothing in the nature of the power makes it improper or unfit to be exercised by courts. It was held that the grant of privileges necessary for the maintenance and working of a colonial legislature did not carry the complete and untramelled powers of the House of Commons. [He referred to *Kielley* v. *Carson* (4).] The same view was taken in relation to Congress in the United States of America. [He referred to *United States of America* v. *Bryan* (5); *United States of America* v. *Rumely* (6).] The House of Commons has been recognized as exercising judicial power in enforcing its privileges. [He referred to the *Earl of*

(1) (1886) 11 App. Cas. 197.
(2) (1842) 4 Moo. P.C. 63, at pp. 85, 86, 88 [13 E.R. 225, at pp. 233, 234].
(3) (1840) 11 Ad. & E. 273 [113 E.R. 419].
(4) (1842) 4 Moo. P.C. 63 [13 E.R. 225].
(5) (1950) 339 U.S. 323 [94 Law. Ed. 884].
(6) (1953) 345 U.S. 41 [97 Law. Ed. 770].

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Shaftsbury's Case (1); *Burdett* v. *Abbot* (2); *Case of the Sheriff of Middlesex* (3); *Doyle* v. *Falconer* (4).] The division of powers in the Constitution is necessarily vague at certain points and political rather than juridical in conception. [He referred to *Reg.* v. *Davison* (5); *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (6); *Victorian Stevedoring & General Contracting Co. Pty. Ltd.* v. *Dignan*; *Meakes* v. *Dignan* (7); *State of New South Wales* v. *The Commonwealth* (8); *Anderson* v. *Dunn* (9).] A general warrant must conform with the Constitution. The warrant can not preclude inquiry into the question whether power has been exceeded. [He referred to *Kilbourn* v. *Thompson* (19).] *Speaker of the Legislative Assembly of Victoria* v. *Glass* (11) decides no more than that a general warrant may be issued. That is not disputed.

R. J. M. Newton (with him *J. McI. Young* and *N. M. Stephen*), for the prosecutor Browne. In finding the prosecutors guilty and punishing them, Parliament was exercising a judicial function of government contrary to Chap. III of the Constitution. [He referred to *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (12); *W. Harrison Moore*: *The Constitution of the Commonwealth of Australia* (2nd ed.) (1910), at pp. 321, 322; *May's The Law, Privileges Proceedings and Usage of Parliament* (15th ed.) (1950), pp. 59, 93; *Brass Crosby's Case* (13); *Burdett* v. *Abbot* (14); *Case of the Sheriff of Middlesex* (15); *Kielley* v. *Carson* (16); *Howard* v. *Gosset* (17).] There was no division in the functions of government in the Victorian Constitution dealt with in *Speaker of the Legislative Assembly of Victoria* v. *Glass* (11). Section 49 is to be read as subject to the rest of the Constitution including Chap. III. The case involves the construction of s. 49 and consequently is a matter for this Court, notwithstanding the general terms of the warrant.

(1) (1677) 1 Mod. Rep. 144 [86 E.R. 792].
(2) (1811) 14 East. 1, at pp. 149, 159 [104 E.R. 501, at pp. 558, 561].
(3) (1840) 11 Ad. & E. 273, at pp. 289, 295 [113 E.R. 419, at pp. 425, 427].
(4) (1866) L.R. 1 P.C. App. 328, at p. 339.
(5) (1954) 90 C.L.R. 353, at pp. 380-382.
(6) (1938) 59 C.L.R. 556, at pp. 580 et seq.
(7) (1931) 46 C.L.R. 73, at p. 96.
(8) (1915) 20 C.L.R. 54, at pp. 73 et seq., 82, 83, 88, 90, 101.
(9) (1821) 6 Wheat. 204 [5 Law. Ed. 242].
(10) (1881) 103 U.S. 164 [26 Law. Ed. 377].
(11) (1871) L.R. 3 P.C. App. 560.
(12) (1909) 8 C.L.R. 330, at p. 382.
(13) (1771) 2 Black. W. 754 [96 E.R. 441].
(14) (1811) 14 East. 1 [104 E.R. 501].
(15) (1840) 11 Ad. & E. 273 [113 E.R. 419].
(16) (1842) 4 Moo. P.C. 63 [13 E.R. 225].
(17) (1845) 10 Q.B. 359 [116 E.R. 139].

J. D. Holmes Q.C. (with him *R. Else-Mitchell*), for the respondent, were not called upon.

The judgment of the Court was delivered by:—

DIXON C.J. This case is one of considerable importance, but we think its difficulty is not equal to its importance. It is a matter which should be dealt with at once, and although we would in ordinary circumstances prefer to put our judgment in writing, we think it is better to deal with the matter orally now.

These are two applications for *habeas corpus* which come before us on a reference from the Supreme Court of the Australian Capital Territory. The Supreme Court of the Australian Capital Territory issued what we think, having looked at the rules of that court, must be an order nisi for two writs of *habeas corpus* directed to Edward Richards as the person for the time being performing the duties of Chief Commissioner of Police at Canberra. The writs, if issued, would be for the production of the bodies of Raymond Edward Fitzpatrick and Frank Courtney Browne. The return to the writs, if issued, must be that warrants had been issued by the Speaker of the House of Representatives commanding Mr. Richards to take the two persons into his custody, and the return would have recited the warrants. The question on the return to the writs of *habeas corpus* would then be whether the warrants would be a sufficient answer so that it would be proper for the court to remand the two prisoners and not to discharge them.

The reference to this Court is under the provisions of s. 13 of the *Australian Capital Territory Supreme Court Act* 1933-1950, which enables that court to direct that a case should be argued before us, and the case has accordingly been argued before us. It is, I think, correct that in the circumstances of this case an application might have been made in the first instance to us because, as the argument shows, the matter arises under the Constitution. The Constitution in s. 49 provides:—"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 Speaker's warrants were, as they say on their face, issued pursuant to resolutions of the House. The basis upon which the House appears to have proceeded and upon which the warrants were issued is that the Parliament has not declared so far the powers, privileges, and immunities of the Senate and of the House

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of Representatives, and that the latter part of s. 49 is in operation, with the consequence that the powers of the House of Representatives are those of the Commons House of Parliament of the United Kingdom and of its members and committees at the establishment of the Commonwealth.

The 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.

The first question is, what is that law ? It must then be considered whether that law is, by virtue of the provisions which we have read, in force in Australia and applies to the House of Representatives.

It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: 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. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with cases by which it was finally established, namely, the *Case of the Sheriff of Middlesex* (1).

So far as this country is concerned, it is established authoritatively by the decisions of the Privy Council in *Dill* v. *Murphy* (2) and in *Speaker of the Legislative Assembly of Victoria* v. *Glass* (3). Lord *Cairns*, speaking on behalf of the Privy Council in the latter case states what in the opinion of the Board was the result in England of the law (4). It is unnecessary to say more about the *Glass Case* (5) than that it arose from proceedings in the Legislative Assembly of Victoria against Mr. Hugh Glass, under which he was committed, and that the Legislative Assembly of Victoria under provisions which were examined in the judgment was in effect in

(1) (1840) 11 Ad. & E. 273 [113 E.R. 419].
(2) (1864) 1 Moo. P.C. (N.S.) 487 [15 E.R. 784].
(3) (1871) L.R. 3 P.C. App. 560.
(4) (1871) L.R. 3 P.C. App., at pp. 572, 573.
(5) (1871) L.R. 3 P.C. App. 560.

enjoyment of the powers and privileges of the House of Commons. Lord *Cairns* says: "Beyond all doubt, one of the privileges—and one of the most important privileges of the House of Commons—is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated, been well established in this country"—that is in the United Kingdom—"that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is" (1). His Lordship a little later on the same page describes the privilege in these terms: "the privilege or power, namely, of committing for contempt, of judging itself of what is contempt, and of committing for contempt by a warrant stating generally that a contempt had taken place" (1).

In answer to an argument that the judging of the contempt without appeal was a mere incident or accident applicable only in England and not passing to the Legislative Assembly of the Colony of Victoria, his Lordship proceeded to say this: "Their Lordships are entirely unable to accede to this argument. They consider that there is an essential difference between a privilege of committing for contempt such as would be enjoyed by an inferior court, namely, privilege of first determining for itself what is contempt, then of stating the character of the contempt upon a warrant, and then of having that warrant subjected to review by some superior tribunal, and running the chance whether that superior tribunal will agree or disagree with the determination of the inferior court, and the privilege of a body which determines for itself, without review, what is contempt, and acting upon the determination, commits for that contempt, without specifying upon the warrant the character or the nature of the contempt. The privileges, their Lordships think, as thus stated, are essentially different. The latter of the two privileges is a higher and more important one than the former. The ingredients of judging the contempt, and committing by a general warrant," by which His Lordship means a warrant which describes the contempt in general terms, "are perhaps the most important ingredients in the privileges which the House of Commons in this country possesses; and it would be strange indeed if, under a power to transfer the whole of the privileges and powers of the House of Commons, that which would only be a part, and a comparatively insignificant part, of this privilege and power were transferred" (2).

(1) (1871) L.R. 3 P.C. App., at p. 572.

(2) (1871) L.R. 3 P.C. App., at pp. 572, 573.

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In the present case the warrant would clearly be sufficient if it had been issued by the Speaker of the House of Commons in pursuance of the resolution of that House. Indeed, the contrary is not urged. It would be sufficient because it recites in each case that the person concerned has been guilty of a serious breach of privilege and it recites a resolution to that effect, and the resolution proceeds that for his offence he be committed to the custody of the person for the time being performing the duties of Chief Commissioner of Police at Canberra, or to the custody of the Keeper of the Gaol at such place as Mr. Speaker from time to time directs. The operative words of the warrant directed to Mr. Richards are these :—" These are therefore to command you the said Edward Richards to receive the said Raymond Edward Fitzpatrick " (in one case) " and Frank Courtney Browne " (in the other) " into your custody and with such assistance as you may require to keep him in your custody subject to any direction given by me in pursuance of the said resolution until " the dates and the events which are mentioned.

Now, if, under the law which we have attempted to describe, that warrant were produced to a court sitting in London, as we are here, as a warrant of the House of Commons, it would be regarded by the court as conclusive of what it states, namely, that a breach of privilege had been committed and that the House, acting upon that view, had directed that the two persons concerned should be committed and the Speaker, accordingly, had issued his warrant. In the ordinary phrase current in the law courts, it would not be possible to go behind that warrant. It states a contempt or breach of privilege in general terms, and not in particular terms, but it is completely consistent with a breach having occurred and it states that one did occur.

The question in the case is whether that state of the law applies under s. 49 of the Constitution to the House of Representatives. If you take the language of the latter part of s. 49 and read it apart from any other considerations, it is difficult in the extreme to see how any other answer could be given to the question than that that law is applicable in Australia to the House of Representatives. For s. 49 says that, until the powers, privileges and immunities of the House are declared by Act of Parliament, the powers, privileges and immunities of the House shall be those of the Commons House of Parliament of the United Kingdom at the establishment of the Commonwealth. The language is such as to be apt to transfer to the House the full powers, privileges and immunities of the House of Commons. As Lord *Cairns* has said, an essential ingredient, not a

mere accident, in those powers, is the protection from the examination of the conclusion of the House expressed by the warrant. There are, however, other considerations in this Constitution which have been availed of by counsel for the two men concerned as grounds upon which to urge that a restrictive construction should be given to those words, giving them less operation than their terms seem to require, and we shall now express our view upon those arguments.

It is convenient, first, to go to the important argument that this Constitution of Australia is a rigid federal Constitution under which it is the duty of the courts of the Commonwealth, and, indeed, the courts of law generally, to consider whether any act done in pursuance of the powers given by the Constitution, whether by the legislature or by the executive, is beyond the power which the Constitution assigns to that body.

As a general proposition, the truth of that consideration admits of no denial. It is a Constitution which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires. In the everyday work of this Court, we are accustomed to examining the validity of Acts of Parliament. Less often does the validity of an executive act come to be considered, but it stands upon the same footing. It is urged for that reason that we should refuse to adopt as applicable under our Constitution the view of the Court of Queen's Bench pronounced in 1840 and adopted as for the Colony of Victoria by the Privy Council in 1871, and that we should construe s. 49 as not transferring to Australia that element in the law governing the privileges and powers of the House of Commons.

The answer, in our opinion, lies in the very plain words of s. 49 itself. The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies. Added to that simple reason are the facts of the history of this particular branch of the law. Students of English constitutional history are well aware of the controversy which attended the establishment of the powers, privileges and immunities of the House of Commons. Students of English constitutional law are made aware at a very early stage of their tuition of the judicial declarations terminating that controversy, and it may be said that there is no more conspicuous chapter in the constitutional law of Great Britain than the particular matter with which we are dealing. It is quite incredible that the framers of s. 49 were not completely aware of the state of the law in Great Britain and,

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when they adopted the language of s. 49, were not quite conscious of the consequences which followed from it. We are therefore of opinion that the general structure of this Constitution, meaning by that the fact that it is an instrument creating a constitution of a kind commonly described as rigid in which an excess of power means invalidity does not provide a sufficient ground for placing upon the express words of s. 49 an artificial limitation.

It is perhaps proper to add that those general considerations were not entirely inapplicable under the flexible Constitution of Great Britain, having regard to the view which the Queen's Bench took of the situation; because the Queen's Bench took the view that it was for the courts to judge of the existence of privileges. But—consistently as they believed with that view—they also took the view that in the practical application of the privilege both upon all questions of fact and upon questions as to whether the facts fell within the scope of the privilege, the resolution of the House and the warrant of the Speaker were conclusive.

Then it was argued that this is a constitution which adopts the theory of the separation of powers and places the judicial power exclusively in the judicature as established under the Constitution, the executive power in the executive, and restricts the legislature to legislative powers. It is said that the power exercised by resolving upon the imprisonment of two men and issuing a warrant to carry it into effect belonged to the judicial power and ought therefore not to be conceded under the words of s. 49 to either House of the Parliament. It is correct that the Constitution is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap. III. It is further correct that it is a general principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers or authorities in any body except the courts which are described by Chap. III of the Constitution. Accordingly, it is argued that a strong presumption exists against construing s. 49 in a sense which would enable the particular power we have before us to be exercised by the Senate or the House of Representatives. It was pointed out that in the case of the Inter-State Commission s. 101 had received a construction which made it impossible to invest the Inter-State Commission with the character of a court and confide to it judicial functions, because it was not a body which fell within Chap. III. That was relied upon as an instance or example of the kind of construction or interpretation which we were urged to adopt in the case of s. 49.

The consideration we have already mentioned is of necessity an answer to this contention, namely, that in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives. It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere. But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.

It was then urged that in point of fact the particular part of s. 49 upon which the case turns was spent because the legislature consisting of the Crown and the two Houses had exercised the power which is given by the earlier words of s. 49, considered in conjunction with s. 51 (xxxvi.) of the Constitution.

Section 49 begins by bestowing upon the legislature the power to declare the powers, privileges and immunities of the Senate and the House of Representatives, and it is only until they declare such powers that they enjoy the powers of the Commons House of Parliament under the transitional provision, as it has been called, with which the section ends.

It is hardly necessary to say that there is no legislation upon the statute book which purports to be a declaration of the powers, privileges and immunities either of the Senate or the House of Representatives, stating comprehensively what they desire them to be. But what was relied upon were two statutes, of which it was said that perhaps more or less accidentally they represented a declaration of one or two minor powers or privileges. The first of those is the *Parliamentary Papers Act* 1908-1946. The Act deals with the publication of parliamentary papers by the government printer and with giving immunity from action or other civil proceedings to those who publish or cause to be published parliamentary papers. It also provides in general terms that it shall be lawful for the Senate or the House of Representatives to authorize the

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publication of any document laid before it and likewise for a committee to do so. It is said that without the authority of the House or of a statute publication of parliamentary proceedings or papers was regarded as amounting to a breach of privilege and in any case a person publishing such a report enjoyed no immunity from suit and therefore that this statute dealt with a matter of privilege. The second Act of Parliament relied upon was the *Parliamentary Proceedings Broadcasting Act* 1946. It is unnecessary to describe that Act. It is enough to say that it enables the broadcasting of some of the proceedings of the House to take place, requires the Australian Broadcasting Commission to broadcast them and gives immunity from action or proceedings civil or criminal against any person for broadcasting any portion of the proceedings of the House.

What is urged in relation to those Acts of Parliament is that they were enacted in pursuance of the power which arises from a combination of s. 51 (xxxvi.) of the Constitution with the earlier part of s. 49, and that because they were such an enactment it followed that the latter part of s. 49 could no longer have any application. We think this argument is untenable. What the earlier part of s. 49 says is that the powers, privileges and immunities of the Senate and of the House of Representatives shall be such as are declared by Parliament. It is dealing with the whole content of their powers, privileges and immunities, and is saying 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 Houses 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.

We think it is right to add that the provisions of these two Acts are more properly to be referred to s. 51 (xxxix.) of the Constitution. That provision deals with the power of the legislature to make laws with respect to matters that are incidental to the exercise of power by, *inter alios*, Parliament. More naturally, the two Acts—the *Parliamentary Papers Act* and the *Parliamentary Proceedings Broadcasting Act*—fall within that provision and are justified by it. It may well be that they are not correctly regarded as provisions

which exercise the power given by s. 51 (xxxvi.) of the Constitution in combination with s. 49.

Section 49 is followed by s. 50, which is ancillary to it. Section 50 provides:—"Each House of Parliament may make rules and orders with respect to—(i) The mode in which its powers, privileges, and immunities may be exercised and upheld: (ii) The order and conduct of its business and proceedings either separately or jointly with the other House." It is argued that when the two provisions are read together the proper construction of them in combination is to treat s. 50 as subtracting something from s. 49. That is to say it subtracts part of the subject matter and deals with it separately. That which is taken it is suggested at least includes the power to issue a warrant which is conclusive of what it states. The power given by s. 50 has not been exercised in relation to matters of the kind now in question and it is contended that until the power under s. 50 is so exercised, s. 49 is insufficient to give the authority now claimed.

The material words of s. 50 are that each House may make rules and orders with respect to the mode in which its powers, privileges, and immunities may be exercised. The argument, I think, may be stated in more than one way. It may be stated that the issue of the warrant and the giving it a conclusive character is merely a mode of exercising the powers given by s. 49 and therefore falls within s. 50. It may also be stated in a much wider way, namely, in effect that the powers under s. 49 are contingent upon the Houses exercising their authority under s. 50 and making rules and orders with respect to the mode by which the powers, privileges and immunities may be exercised. As the House has not made such rules in relation to a matter of this description, it is suggested that the power under s. 49 has not arisen.

The argument is ill-founded, in our opinion. Section 50 is a mere power. It is clear that s. 49 has an operation which is independent of the exercise of the power of s. 50. It seems clear too that the operation of s. 50 is permissive or enabling and that s. 49 carries with it the full powers of the House of Commons, including the power which is now in question, even although nothing is done under s. 50. The words of Lord *Cairns* on this aspect of the case may again be referred to, because they make clear what we are concerned with, namely, that the conclusiveness of the resolution of the warrant is an important or essential part of the privileges of the House of Commons and not a mere accident or incident or matter of procedure. For reasons given we are of the opinion that the argument based upon s. 50 has no substance.

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Accordingly, all the arguments which have been advanced for giving to the words of s. 49 a modified meaning, and the particular argument for treating them as not operating, fail. 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.

It follows that the applications for the writs of *habeas corpus* should be refused and we accordingly refuse them.

Applications refused.

Solicitors for the prosecutor Fitzpatrick, *J. W. Maund & Kelynack*, Sydney, by *Whiting & Byrne*.

Solicitors for the prosecutor Browne, *Herman Fawl & Norton*, Sydney, by *Moule, Hamilton & Derham*.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.