CALLED TO THE BAR OF THE HOUSE OF COMMONS

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Recent instances in the United States in which persons cited for contempt by congressional committees have subsequently been freed by the courts have led to the suggestion that those allegedly in contempt should be tried at the bar of the legislature concerned rather than in the courts. People have been heard at the bar as recently as 1955 in the Australian House of Representatives, and 1957 in the United Kingdom House of Commons, but the summoning of persons to the bar of the Canadian House of Commons has not been seen for nearly half a century, and the cases that have occurred have attracted remarkably little attention from writers on history, politics and law. An examination of the instances that have arisen since Confederation makes clear that the House's right to issue summonses or, in stubborn cases, warrants has many practical applications. The practice itself is a necessary part of the machinery by which Parliament protects its privileges, and derives from Parliament's mediaeval status as a High Court, particularly as influenced in later years by the aggressive assertion of parliamentary privilege by the House of Commons in the sixteenth century and after.

The High Court of Parliament, Professor M. P. Clarke has written (following standard authorities[1]), "like any other, had

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[1] M. P. Clarke, Parliamentary Privilege in the American Colonies (Yale, 1943) pp. 3-4. See Sir T. Erskine May, A Treatise on the Law, Privileges, Proceedings and Usage of Parliament (14th ed., London, 1946; Sir Gilbert Campion, editor); C. H. McIlwain, The High Court of Parliament and its Supremacy (Yale, 1910); A. F. Pollard, The Evolution of Parliament (London, 1920); and bibliographical references therein. For Canada, see S. S. Watson, The Powers of Canadian Parliaments (Toronto, 1880); J. G. Bourinot, Parliamentary Procedure and Practice in the Dominion of Canada (3rd ed., Toronto, 1903; T. B. Flint, editor); A. Beauchesne, Rules and Forms of the House of Commons of Canada

its special type of law to enforce; and this was the *Lex et Consuetudo Parliamenti*, which developed through actions and decisions of parliament in ways comparable to those by which the common law grew from the work of the itinerant justices. At first the House of Commons was the grand inquest of the realm, and occupied a position relative to the High Court of Parliament similar to that held by a grand jury in relation to a court of more ordinary type. But it could not long remain content with this role alone. In the sixteenth century, particularly in the reign of Queen Elizabeth, the development of the lower house, because of the exigencies of circumstances, caused it to take on in some measure the appearance and even the functions of a court. The term 'court' crept into the records. The house had a bar; and many persons knelt at it or appeared before it with counsel or witnesses or both. The sergeant, who was the special officer of the house, arrested scores of persons, and either kept them in his own custody or sent them to the Tower or some other prison." Until the middle of the seventeenth century the Commons also levied fines, but since then imprisonment and censure have been the only punishments inflicted.

Naturally the assemblies in English colonies, as quickly as they were established, made assertions of parliamentary privileges similar to those enjoyed by Englishmen at home, and those in what is now Canada were no exception. The peculiar nature of parliamentary privilege, dependent as it is on a concept of a body of law which is part of the general law, yet independent of it, produced within Britain a prolonged struggle between Parliament and the courts, and the claims of upstart colonial assemblies could not be expected to go unchallenged. While all the colonies on this side of the Atlantic issued statements of privilege, some of them with great frequency and of an appealing extravagance, the Privy Council held as late as 1841 that a local assembly (in this instance, Newfoundland's) did not have the same privileges as Parliament in England. "The reason why the House of Commons has this power [of committing a person for contempt] is not because it is a representative body with legislative functions", the Privy Council

(3rd ed., Toronto, 1943); R. MacG. Dawson, The Government of Canada (2nd ed., Toronto, 1954). References to recent cases in other Commonwealth countries are in: Commonwealth of Australia, Parliamentary Debates (House of Representatives), Sept. 30th, 1954, June 10th and August 30th, 1955; The Table (The journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments), Vol. XXIV, 1955, pp. 83-92; New Statesman and Nation, Aug. 6th, 1955, p. 158; Spectator, Jan. 18th, 1957, p. 68; *ibid.*, Jan. 25th, 1957, p. 103; *ibid.*, Feb. 1st, 1957, p. 132; *ibid.*, Feb. 15th, 1957, p. 199.

found, "but by virtue of ancient usage and prescription: the *lex et consuetudo parliamenti*, which forms a part of the common law of the land." Their lordships also held that the power asserted by the Newfoundland legislature was not indispensable to an assembly in the discharge of its functions: "All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions".[2]

Consistently with this judicial opinion, the British North America Act of 1867 did not expressly provide that all British parliamentary practices could be assumed by the new Canadian legislature. However, the act did allow Canada to place "the Privileges, Immunities, and Powers" of the Dominion Parliament on a statutory foundation, for they were to be "such as are from Time to Time defined by Act of the Parliament of Canada", provided that they never exceed those held at the passing of the B.N.A. Act by the United Kingdom Parliament and its members (section 18).

Canada at once took advantage of these clauses to assert for the federal legislature the same privileges as were enjoyed at Westminster in 1867. The first rules adopted by the House of Commons (which began by carrying on provisionally with the rules of the assembly of the late Province of Canada) said little about privilege, but they did assert that, "in all unprovided cases, the rules, usages and forms of the House of Commons of the United Kingdom . . . shall be followed". In 1868 a specific statutory basis was established for the privileges of the Canadian Parliament, claiming all those enjoyed in Britain at the passage of the B.N.A. Act; the second amendment to the B.N.A. Act, passed in 1875, removed the disability which limited privileges in Canada to those enjoyed in Britain in 1867.[3] The Standing Orders of the Canadian House of Commons still echo the 1867 rule, now enlarged, that in all unprovided cases the usages and customs of the United Kingdom House of Commons, "as in force at the time, shall be followed so far as they may be applicable". Thus whatever British privileges may be (and modern authorities still quote with approval Blackstone's ancient dictum that "the dignity and independence of the two Houses are in great measure preserved by keeping their

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[2] *Kielley* v. *Carson* (1841), 4 Moore P.C. 63. In 1829, however, the legislature of the Province of Canada had committed Allan MacNab to jail, and been upheld by the local courts.

[3] Journals of the House of Commons of Canada, 1867-8, pp. 115-125; Statutes of Canada, 31 Vict., c. 23; British Statutes, 38-39 Vict., c. 38.

privileges indefinite"), Canada's are at least potentially the same; and on the occasions when persons have been summoned to the bar of the Commons in connection with a real or suspected breach of privilege, British practices have provided most of the procedure followed.

While the summoning of persons is wound up inextricably with the development of parliamentary privilege, it does not follow that all those who are summoned or ordered to appear at the bar are necessarily concerned with privilege, for a person may be summoned merely to give evidence as a witness. A survey of the eighteen cases between Confederation and 1913 (the last instance), one of which resulted in the committal of a person to prison, will establish this point, and demonstrate also the catholicity of the House's views in deciding who should appear before it.

1868. On May 1st, Henry Joly, M.P., who was chosen as chairman of a select committee appointed to try a petition complaining of an undue election to the House, failed to appear on the day appointed for the swearing of the committee and was, on a motion, ordered into the custody of the Sergeant-at-Arms. The Sergeant in due course reported that he was unable to comply with the order, as Joly had left Ottawa. No further proceedings were taken.

1873. Early in the first session of the second parliament, two leading Liberal members moved that the Speaker "do issue his warrant, summoning Richard James Bell" (returning officer for Muskoka) to the bar, "to answer for his return to the Writ of Election for the said district". Bell appeared on the day named in the motion (March 26th) and requested counsel, which was granted on a further motion. He was examined at length concerning his alleged partisanship in the election, and ultimately the House resolved that Bell had "acted illegally at the said election" but that, as "in so doing has acted under legal advice, he be discharged". The House further resolved that the obtaining of legal advice by a returning officer through the intervention of a candidate "is improper, and cannot be countenanced in the future". Bell was summoned to the bar to hear the resolutions read and discharged.

1873. On April 7th, a member charged that two other members had been traduced in an Ottawa newspaper; the offending paragraphs were read into the Journals of the House, and their alleged author, Elie Tassé, ordered to appear forthwith at the bar. When the Sergeant reported that Tassé was not within the precincts of

the House, the Speaker was authorized to issue a warrant summoning him to appear at a stated time. Tassé, who was employed as a translator on the Commons' staff, appeared as ordered and admitted that he was the chief editor of the newspaper concerned. (He was not asked if he had himself written the offending passages.) He declined to name the proprietors of the newspaper other than those whose names appeared in the newspaper, on the ground that he did not wish to name as proprietors persons who might not be. He was directed to withdraw, and no further proceedings followed. He was, however, suspended from the Commons' staff. When some members subsequently accused the Prime Minister of conniving at Tassé's easy escape, Macdonald replied that "it was the duty of the examiners, having taken the matter in hand, to press it to the last extremity".

1873. On May 10th, in accordance with a statutory requirement, the names of five members appointed as a select committee to try an election petition were called, and two of them, Sir John A. Macdonald and F. M. Pearson, failed to appear. An hour later, when the names were again called and the two delinquents were still absent, they were ordered into the custody of the Sergeant. The Sergeant reported on May 12th that he had been unable to arrest Pearson, owing to his absence from the city, but that he had Macdonald in custody. Then one of Macdonald's colleagues, Dr. Charles Tupper, read an affidavit, which was a medical certificate, establishing that he had given his professional opinion to Sir John, "for the preservation of his health, that he should for some days refrain from the discharge of his duties". Macdonald was ordered discharged and no further action was taken against Pearson.

1873. On November 3rd, Robert Cunningham, M.P., made a detailed statement in the House, alleging that he had been offered a bribe, through Alderman Heney of Ottawa, to vote in favour of the government on a pending motion, and the Sergeant-at-Arms was directed to take Heney into custody forthwith. The Sergeant reported on the following day that Heney was in custody, and the House ordered that Heney remain in attendance until called. On November 7th, as the House was awaiting the arrival of Black Rod from the Senate with the usual summons to the Senate that precedes prorogation, Sir John A. Macdonald, seconded by Mr. Langevin, moved that Heney be now brought to the bar. The prorogation meant an automatic discharge from custody for Heney, for since 1839 the Commons in Britain has been "considered without power

to imprison for a period beyond the session".[4] Heney was not again summoned, although he could have been again committed to custody when the House next met.

1874. On March 30th, the House ordered that the Attorney General of Manitoba, H. J. Clarke, be summoned "to answer such questions as may be put to him relative to the Indictment laid before the Grand Jury of the Queen's Bench of Manitoba, and the True Bill returned by the said Grand Jury against Louis Riel, the Member Elect for the District of Provencher . . . for the murder of Thomas Scott". Clarke appeared and produced a warrant for Riel's arrest, stating that he had brought it in case Riel presented himself, as he intended to arrest him (although a member's freedom from arrest during a session is a privilege dating back to mediaeval times). Clarke was examined at length on March 31st and April 9th, with members on occasion objecting to questions that were asked, the Speaker variously sustaining and overruling the objections.

Two Ottawa policemen, McVeity and Hamilton, were also summoned and examined briefly concerning an Ottawa warrant for Riel's arrest. All three witnesses were ordered "to withdraw, and to remain in further attendance if required", but none were recalled, and on April 14th the House voted down a motion to recall Clarke. During the proceedings, Riel was ordered to appear in his place but, on his failure to do so, he was not ordered into the custody of the Sergeant. Instead, on April 16th, he was expelled from the House. (On being re-elected, he was in effect expelled again, when the House took official notice that he appeared to have been adjudged an outlaw.)

1879-80. On May 13th, Mr. Mackenzie, M.P., stated from his place that on the previous Saturday, in the House, a stranger named Macdonnell had called L. S. Huntington, M.P., "a cheat and a swindler". The Speaker had ordered Macdonnell out of the House, but he returned and was expelled by the Sergeant, still insisting that Huntington was a cheat and a swindler. A determined man, Macdonnell then wrote a note, repeating his opinion, and sent it in to Huntington. Macdonnell was ordered to attend at the bar at the next sitting. On May 15th (prorogation day) the Speaker reported that efforts to locate Macdonnell had failed, and his summons expired on prorogation.

On February 16th, 1880, previous journal entries relating to the episode were read on a motion of the Prime Minister's, and

[4] May, *op. cit.*, p. 99.

Macdonnell was again summoned to the bar. He appeared on the day ordered and expressed a desire to apologize for "the remarks made by me to the Honorable member for Shefford". He was ordered to withdraw, while the House decided that he be given leave "to make the apology and explanation". (The Speaker, incidentally, revealed that Macdonnell had visited him to apologize privately, but that he had considered a public apology necessary.) Macdonnell returned to make his apology, which was noteworthy because he apologized only to the House, not Huntington; because he asserted (despite the admission just quoted) that his remarks were addressed not to any member but to a gentleman beside him; and he did not apologize for the note, although he was ready to do so, because he had been advised that it was not a breach of privilege, "not having been committed within the House, and the words used not referring to any action of Mr. Huntington in his parliamentary capacity". Macdonnell then withdrew and, despite strong objections from the Liberals, the House decided to accept his modest apology, and voted down a motion to have him apologize also to Huntington. A motion declaring his actions a breach of the privileges of the House was passed; it concluded with an assurance that the House "does not feel itself called upon to proceed further in this matter". Macdonnell was recalled while the motion was read to him by the Speaker, and he was discharged, presumably to resume his work as a leading officer in the Conservative party in Toronto.

1887. On May 12th, the House resolved to summon J. R. Dunn, the returning officer for Queen's, New Brunswick, "to answer for his conduct in returning, as elected, a candidate who did not receive a majority of the votes cast" at the last election. Dunn appeared on May 30th and in answer to the first question replied that he wanted "the assistance of counsel, to protest against these proceedings being taken against me by the House of Commons, and also, to advise and assist me in whatever things may be necessary". Dunn then withdrew and a discussion arose, in which members argued whether Dunn had any right, with or without counsel, to protest against the proceedings, and whether, since he was appearing merely as a witness and not as an accused person, he should have counsel at all. The Minister of Justice, Thompson, seconded by the Prime Minister, moved that "he be allowed the assistance of Counsel to advise him and to argue any questions of law that may arise", which carried. An amendment supported by Opposition members failed; it suggested in part that, "after the questions

submitted by this House have been answered to the satisfaction of that House, Mr. Dunn be authorized to be heard by Counsel to argue the question of his responsibility for his conduct".

When Dunn was recalled, one of his two counsel made a lengthy speech challenging the jurisdiction of the House over Dunn, since trials of controverted elections had been referred from the House to the ordinary judicial process in 1874, and a case involving the election in which Dunn had been returning officer was before the courts in New Brunswick. The essence of his argument was that a violation of a statute cannot also be a breach of privilege, so that "Dunn should no more answer to the question put to him than if the House had summoned him here and attempted to try him for violation of any statute law of the country". The Minister of Justice, a former judge, submitted that "the power of the House remains notwithstanding the passage of the Election Act and the penalties therein prescribed" and his view prevailed.[5] Thereafter Dunn's hearing became anti-climactic, for he explained that he had considered one candidate improperly nominated and had therefore, on legal advice, returned his opponent as elected. He was discharged, and the House took no further action.

1891. On June 5th, the Select Standing Committee on Privileges and Elections, which had been making extensive inquiries into the affairs of some contractors who had done work for the government, reported to the House that a witness, Michael Connolly, had been ordered to produce certain documents and books of account and had "distinctly refused". The committee said in part: "Your Committee, being of the opinion that the discharge of the duties of the Committee, imposed on them by the House, requires that the books should be placed under the control and in the possession of your Committee . . . and request the action of the House thereon". Sir John Thompson moved that Connolly be ordered to attend at the bar, and the motion carried.

Connolly appeared on June 16th and the committee's report to the House of Commons was read to him. He was asked, on a motion of Sir John Thompson's, if he was prepared to surrender the books wanted by the committee, and it was further moved that he be heard by counsel; counsel at once entered a long argument against the production of the books. The basis of the argument was that Connolly's books contained references to many

[5] Canada, House of Commons Debates, 1887, pp. 624 ff. See also *ibid.*, pp. 616 ff.

transactions other than those being investigated, and that "this honourable House, guided as it would be by the principles and rules adopted in respect of such matters in the courts of justice, would equally respect the private rights and interests of a witness under such circumstances, and would not require that I should part with the custody or control of the books or oblige me to submit them to the Committee for a general inspection of their contents". The concluding sentences of the argument somewhat weakened the structure of the whole, for counsel conceded that if, despite Connolly's plea, the House ordered that he surrender his books, he would "bow with submission".

Sir John Thompson, supported by the House, rejected Connolly's argument, chiefly on the grounds that the analogy between Connolly's position and that of a witness in court was not valid. Connolly had, Thompson asserted, in effect offered to produce his books in a manner which sealed them, and which would not be tolerated in a court. "I admit", Thompson stated in part, "that an enquiry of this kind, by means of a committee composed of upwards of forty persons, sitting in the capacity of judges, is a very awkward proceeding, indeed, and a very inconvenient one sometimes, when we have to decide nice questions of this kind; but it is by no means beyond the power of the Committee to arrive at a method of testing what part of the books ought to remain closed".[6] On Thompson's motion, Connolly was ordered to deliver the books to the Clerk of the House.

1891. Two other incidents during this year would have normally resulted in the appearance of a person at the bar, except that one individual, despite a trip to Quebec by the Sergeant-at-Arms and a diligent search of his "residence, office and other places", could not be found; and the other fled to the United States, and communicated thenceforth with the House of Commons by mail. On August 13th Thomas McGreevy, M.P., was ordered to attend in his place and, on his failure to do so, was ordered into the custody of the Sergeant, who could not find him. McGreevy was expelled from the House on September 29th, "having been guilty of a contempt of the authority of this House, by failing to obey its Order to attend in his place therein, and having been adjudged by that House guilty of certain of the offences charged against him on the eleventh day of May last".

On August 27th the Committee on Public Accounts reported that André Sénécal, the Superintendent of Printing, who had al-

[6] *Ibid.*, 1891, pp. 895-906.

ready appeared before the committee, had disobeyed an order to appear again, but had instead written to the chairman, declining the committee's invitation. Sénécal was ordered to attend at the bar on September 1st and on his failure to do so was ordered into the custody of the Sergeant-at-Arms, who could not locate him.

1894. On June 7th the Select Standing Committee on Privileges and Elections reported to the House that, in reference to an election the members were investigating, they had summoned by telegraph from Quebec J. B. Provost and O. E. Larose to appear as witnesses, and neither had appeared. The committee had then sent to the sheriff of Quebec summonses for Provost and Larose and, though they were served with the summonses, they had again defaulted. The House thereupon ordered that Provost and Larose appear at the bar on June 11th. They failed to appear then, although the Speaker affirmed that both parties had received the second summons, and the House ordered that the Speaker issue his warrant for their arrest. They attended in the custody of the Sergeant-at-Arms on June 13th and previous journal entries relating to them were read. Both, in answer to questions, made their excuses (which included references to a death in the family, the necessity of keeping a business establishment open, and their repugnance to testifying against a relative and former colleague), expressed contrition, and indicated their willingness to appear now before the Committee on Privileges and Elections. On this condition, they were ordered discharged from custody.

1906. On June 6th, a leading Opposition member, George Foster, M.P., complained in the House about an article which had appeared in La Presse, published in Montreal, which he considered libellous, and at his request the article was read. Foster then moved that the author, E. E. Cinq-Mars, a member of the Parliamentary Press Gallery, be summoned to the bar. Cinq-Mars appeared on June 7th and his article was read again, this time in French. Cinq-Mars requested a week's adjournment, "to consult counsel and prepare my defence", and on a motion by the Prime Minister this was granted.

Cinq-Mars appeared again on June 14th and the article was read in English, following which he was examined. Foster moved that Cinq-Mars be asked "upon what actions, conduct or expressions . . . during the present session of this House, did you base the following statements . . .?" and his motion was altered by a surprise amendment from the Liberal benches which deleted the phrase "during the present session", and thus enormously widened the

grounds on which Cinq-Mars could build his defence. The debate on the motion and amendment was a long one, concerning largely the freedom of the press in political affairs. The accused became so tired of standing that a thoughtful member suggested he be offered a chair.

Cinq-Mars made an able speech whose main point was that his statements about Foster were true, supporting his argument with a variety of quotations from Foster's speeches; he was then ordered to withdraw but to remain within call. The House resumed debate, Foster's wisdom in having Cinq-Mars summoned being again questioned. Laurier, indeed, while personally deprecating Foster's course, nevertheless added, "the law of parliament seems undoubted that he has the right to bring the matter before us". Laurier also said: ". . . I think we must maintain the doctrine that the press, like everybody else, is amenable to the jurisdiction of this Parliament". He therefore moved that the passages in Cinq-Mars' article which were complained of "pass the bounds of reasonable criticism and constitute a breach of the privileges of this House; that Mr. Cinq-Mars, the writer of the article, has incurred the censure of the House". Cinq-Mars was recalled to hear his censure read, and he was discharged.

1912-13. On February 17th, 1913, the House was informed that R. C. Miller, a witness before the Public Accounts Committee, had refused to answer a question. (Miller had also been called before the Public Accounts Committee in the session of 1911-1912, and in default of his appearance had been summoned to the bar of the House then, but could not be located.) The question he refused to answer in 1913 was of more than ordinary interest, "To whom did you pay the sum of forty-one thousand and twenty-six dollars for the purpose of securing contracts from the Government of the Dominion of Canada as alleged by you amounting to one hundred and seventeen thousand dollars or thereabouts" between 1907 and 1911? Miller appeared on February 18th and, on being asked the question, requested counsel. He was, on a motion, permitted counsel, and counsel at once informed the House that "my client refuses to answer the question for the reason that it would incriminate him, and I consider it an unwarranted interference with his private business". Miller was thereupon ordered into the custody of the Sergeant-at-Arms for having refused to answer the question.

Miller was brought to the bar on February 20th, this time represented by different counsel, and, on being again asked the ques-

tion, requested permission to make a statement, to be followed by his counsel. Leave was granted to consult his new solicitor, and Miller then, in his opening words, withdrew the statement made on his behalf by his previous counsel. He expanded his remarks, and was interrupted by the Speaker, who addressed the question to him again. Then, on a motion, he was allowed to give his reasons for refusing to answer the question; his chief point was that he had not paid anything for contracts to any senator, M.P., or any official of the government. Miller's counsel was permitted to supplement his statement, and he argued that, while technically the evidence given by Miller before the Public Accounts Committee and the House could not be used as evidence in the courts, three cases involving Miller were nevertheless before the courts, and Miller could thus conceivably prejudice his own side if the House pressed him to answer its question. Counsel suggested that the question posed by the House assumed something that Miller had not admitted: that he had spent $41,000 exclusively on the obtaining of government contracts (and an examination of Miller's evidence before the Public Accounts Committee indicates that the point had not been elucidated as fully as it might.) Counsel suggested further that the House would be but doing simple justice if it allowed the matter to rest until at least after the court cases were heard. Miller could always be summoned to the bar again.

The House was unimpressed and, after sundry manoeuvres, some of them obviously partisan, decided that Miller's refusals to answer were a breach of privilege, and he was ordered to be committed forthwith by the Sergeant to the Carleton County jail until prorogation, or until released by order of the House. (He remained there until prorogation on June 6th.) The same motion authorized the jail keeper to receive Miller into custody, and the operation was executed on a Speaker's warrant.[7]

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The power of the House of Commons over those who are arrested at its order could not be more clearly demonstrated than by the Miller case for, as Sir Wilfrid Laurier pointed out at the time, the issue of whether the question which Miller refused to answer was leading or misleading became irrelevant once he had refused: the refusal itself was a contempt of Parliament, and that at once

[7] This case includes an excellent debate on Parliament's position as a court. See *ibid.*, February 17th, 18th, 20th and 21st, 1913, *passim.* All details of the foregoing cases can be found in the Journals of the House of Commons of Canada for the relevant dates, and discussion in the House is recorded in the Debates.

became the only issue. Laurier did express grave doubts about Parliament's power in regard to one problem which could not arise in Britain: Could the Dominion legislature commit a person to a jail under provincial jurisdiction? In the event, whether it could or not, it did. Had the House decided that it did not have the power to send Miller to a provincial jail, it could of course have committed him to a federal penitentiary, or simply kept him under guard in a room in the Parliament Building, as it did immediately following his arrest.

The procedure followed in all eighteen cases under consideration was based throughout on the assumption that the House of Commons is a court, and each member a judge. All official proceedings concerning the person at the bar, including questions and answers, were reported in the official record of the House, the Journals. When the judges wished to discuss something among themselves, the person at the bar was in every instance but one required to withdraw, and (unlike other courts) the discussion among the members was reported in the Hansard, like any other debate. Sometimes the discussion was clearly partisan, but enough leading members of the House (many of them lawyers) have always taken a sufficiently grave view of the matter in hand that in no case can it be said that, in view of the importance of parliamentary privilege, the House acted hastily or unwisely. Whenever a person was disciplined in any way, the record stated the reasons.

No settled differences in the way in which the House examines persons summoned to the bar, as distinct from those brought to the bar in custody, have arisen in Canada. Technically, all questions addressed to the person at the bar appear to be voiced through the Speaker, after a member has made a motion that the question be asked and the House has agreed. The record in Canada is not entirely clear, however, and in some early cases this awkward device seems to have been ignored, and Members have questioned the person at the bar directly. Since every question is a motion, a majority of the House could prevent the asking of any particular one, but the House has normally followed the lead of Thompson, who in 1887 said: ". . . I should be exceedingly averse to offer any argument, against any question which any hon. member sitting as a judge, thinks is pertinent".[8] Members have objected to questions, with the Speaker sometimes sustaining the objection, questions

[8] Canada, House of Commons Debates, 1887, p. 631. On the precise procedure that is supposed to be followed, see Beauchesne, *op. cit.*, pp. 205-206.

have on rare occasions been amended before being put, and there is at least one instance of the House voting down a proposed question. Once, in 1913, a ruling made by the Speaker (in connection with an amendment to a motion that the person at the bar retire) was appealed, the House upholding the Speaker. Even at its best, the procedure is slow and cumbersome, particularly when (as in 1906) the person at the bar is insufficiently acquainted with English to be examined in the language, and the majority of the judges are insufficiently acquainted with French to examine him in that. The awkwardness of the procedure no doubt is one reason why modern instances of calling persons to the bar are rare.

Once the House has made an order concerning the person who is either at the bar or whose presence is desired there, it is executed by the Sergeant-at-Arms, if necessary on a warrant from the Speaker. The Sergeant has travelled considerable distances to take persons into custody, and has also relied on the co-operation of sheriffs. The expenses, if any, of witnesses are paid (not in advance, as the appearance of Provost and Larose established in 1894) and it is a standing order of the Commons that before any stranger can be released from the custody of the Sergeant, he must pay a fee of four dollars.[9] No oath has yet been demanded of persons at the bar, regardless of the reason for their appearance, although an oath may be required.

A genuine oddity in the status of a person at the bar of the House of Commons is that it is not always certain whether he is a witness or an accused (or, indeed, whether the House is acting as judge or prosecutor, or both). Sometimes, to be sure, there is no doubt: Clarke, McVeity and Hamilton in 1874 were witnesses only, who came in answer to summonses; they were not in any sense being prosecuted. But Miller in 1913, and Connolly in 1891, among others, came to the bar accused of having failed to behave satisfactorily before committees of the House, and Heney in 1873 was accused of having tried to bribe a member. When in 1887 Dunn was ordered to attend "without delay, to answer for his conduct", there was such disagreement over his status that leading lawyers on opposite sides of the House flatly contradicted each other, and his examination proceeded with some members treating him as an accused person, and others as a witness. And what of the two journalists, Tassé and Cinq-Mars, who in effect were accused of libelling members and, because of this, summoned to give

[9] Canada, Standing Orders of the House of Commons (1955 ed.), No. 88(2).

evidence, which could not have concerned anybody but themselves?[10]

The rights of a person at the bar, when there are only eighteen Canadian cases (not all of them relevant to this point) from which to draw generalizations, with all decisions depending on the opinions of a majority in the House of Commons, are indeed not wholly clear, even when it is clear that he is an accused person. The nature of the accusation has so far always been clear. A person at the bar may not incriminate himself for, as Beauchesne (following May) has said: "Witnesses, petitioners and others, being free from arrest while in attendance on Parliament, are further protected, by privilege, from the consequences of any statements which they may have made before either House; and any molestations, threats or legal proceedings against them will be treated by the House as a breach of privilege".[11] (On the other hand, as the Dunn and Miller cases show, being involved in other legal proceedings is no protection against parliamentary action.) The shelter afforded by habeas corpus appears to become effective only after Parliament has been prorogued. "Warrants for commitment issued by the Speaker by order of the House provide good returns to writs of habeas corpus" May has stated; and Beauchesne adds, "Although the return is made according to law, the parties who stand committed for contempt cannot be admitted to bail, or the cause of commitment be enquired into, by the courts of law". Further, a Speaker's warrant need "not be technically formal, according to the rules by which the warrants of inferior courts are tested".[12] No appeal can arise from a decision made by the House when sitting as a court and, judging from an argument presented in 1913 and accepted by the House, a person at the bar can be asked to divulge any information whatever, including professional secrets.[13]

Two rights of persons at the bar would appear to be fairly well established: the House has never denied witnesses, or those in custody, an opportunity to make statements of explanation or defence, and leave to be represented by counsel has always been granted when requested. Thus Bell and Dunn, the two returning officers; Macdonnell, a visitor who had called a member a cheat and a swindler; Connolly, Provost and Larose, the contumacious witnesses; Cinq-Mars, the journalist, and Miller, the businessman;

[10] On this point see May, *op. cit.*, pp. 136-140.
[11] Beauchesne, *op. cit.*, p. 85.
[12] See May, *op. cit.*, p. 93; Beauchesne, *op. cit.*, p. 86.
[13] Canada, House of Commons Debates, 1912-13, p. 3704.

all made statements on their own behalf and most of them were admirably lucid. In addition, Bell, Dunn, Connolly, Cinq-Mars and Miller all requested, and were permitted, counsel, the House also granting a week's adjournment in one instance in order that the person at the bar and his counsel might have time to consider their position. No case has yet arisen in Canada where witnesses have been called to testify against a person at the bar, nor have witnesses for the defence been requested.

The right to counsel received a thorough airing in 1887, in the Dunn case. Dunn, as already noted, requested counsel "to protest against these proceedings", as well as for the usual reasons, and the House permitted him "the assistance of counsel to advise him and to argue any question of law that may arise". When some members objected that only questions of fact, not law, were involved, and that Dunn had no need of counsel until a question of law arose, the Minister of Justice argued: "I would suggest that it is necessary, if counsel is to be of any assistance when questions of law do arise, that counsel should be present at the whole examination. And I submit to the hon. gentleman's own judgment this proposition, that if counsel is to be of any benefit at all to the person to be examined, it must be in the discretion of that counsel himself to raise any legal question on behalf of his client that may occur to him in the progress of the examination. It is true, the examination, so far as the House is concerned, will be confined to questions of fact entirely; but if there is a legal question in respect of which the person inculpated can claim exoneration, surely it can only be right that the question should be raised. It cannot be raised by a layman; it can only be raised by a person learned in the law, and if he is to have that assistance, it should be when the question is first raised."[14]

Actually, the circumstances in which most persons attend at the bar of the House tend to militate against the performing of more than routine services for a client by counsel. To object to the proceedings continuing at all, on the ground that the House is without jurisdiction (as Dunn's counsel did in 1887), is to challenge a decision which the House has already made. To object to a particular question, under the procedure followed, might similarly involve objecting to a motion which the House has already passed; this point was pertinent in 1913 when some members, following a lead introduced by Miller's counsel, were told by a spokesman for the majority that they were objecting to the form of a question "too late".[15]

[14] *Ibid.*, 1887, p. 616.

[15] *Ibid.*, 1912-13, p. 3704.

Nonetheless, of the three men who brought counsel to the bar of the House (Cinq-Mars, in 1906, apparently took legal advice but appeared alone), two (Bell and Dunn) were discharged and one (Connolly) agreed, in a statement made by his counsel, to bow to the House's will. Only one of the counsel who have been engaged has himself incurred the displeasure of the House: in 1873, counsel for Bell was rebuked for impertinence, but, as an observant member remarked at the time, he was not "at present responsible for his actions". The House itself has not used counsel, although in Britain (where persons accused of breaches of privilege have not generally been allowed to be defended by counsel) the practice is not unknown.[16]

The reasons why no person has been ordered to the bar since 1913, whereas in the previous half century there were eighteen instances, are not difficult to appraise. For one thing, the cases of the three members of Parliament who failed to attend meetings of committees appointed to try election petitions would not now arise, since controverted election disputes have been referred to the courts. The type of activity involving government contracts which resulted in the expulsion of McGreevy and the summoning of Sénécal, Connolly and Miller would nowadays be at least as likely to be examined by a body such as a royal commission as by a parliamentary committee or the House as a whole. The election machinery has been running smoothly for so many years that it is not easy to think of circumstances developing that would precipitate a returning officer into the House; and the press today is more temperate than it used to be. Too, judging from the decline in modern times of the Public Accounts Committee, Parliament, possibly influenced by a changing climate of opinion about the liberties of the subject, has lost much of its zest for such activities as calling persons to account. Consider the case of Sir John A. Macdonald, in the custody of the Sergeant-at-Arms, being excused (with the House in a very cheerful frame of mind) on the basis of a medical certificate signed by Dr. Charles Tupper: how much imagination would it have taken to think of Mr. St. Laurent or Mr. Mackenzie King, also in custody, being excused on a certificate from Dr. J. J. McCann?

But the chief reason why no one has appeared at the bar of the House since 1913 is simply that no case has arisen which, in the opinion of a majority of the members, would justify it. As Arthur Meighen observed in 1913, nobody was committed to prison by the

[16] May, *op. cit.*, p. 140.

Commons in the forty-six years between Confederation and 1913 because nobody during that period defied the House. (Strictly speaking that is not true: in 1878 one Sutherland defied the Public Accounts Committee and was reported to the House, but so close to the end of a session that no action could be taken.) Similarly, in the opinion of a majority of the members, nobody has done anything in the following forty-four years to earn an appearance at the bar, although two citizens may have come close to it in 1956.[17] Nevertheless, so long as Parliament is free, the right of the House to summon and commit will remain unimpaired. "It seems that the first duty of Parliament", Beauchesne wrote in 1943, "is to keep its privileges." And again: "The power of commitment with all the authority which can be given by law becomes the keystone of parliamentary privilege".[18]

The Developing Common Law

Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionized by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place. (*Per* Lord Radcliffe in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] 2 W.L.R. 158, at pp. 180-181)

[17] Canada, House of Commons Debates, 1956, pp. 4528ff. The Speaker here entertained a motion that the writers of two letters to an Ottawa paper, Eugene Forsey and Marjorie Le Lacheur, had made statements which were "derogatory of the dignity of parliament and deserve the censure of this house". The Speaker subsequently ruled that the statements were "fair and reasonable comment", a decision which precipitated a crisis in the House. Another instance of a person escaping a summons to the bar occurred on April 4th, 1907, when the House negatived a motion to call C. H. Beddoe, Accountant of the Department of the Interior, to reply to questions concerning an audit.

[18] Beauchesne, *op. cit.*, pp. 81-82.