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Present: Schneider J.

In the Matter of an Application for a Writ of Prohibition.

ABDUL CADER *v.* H. P. KAUFMANN AND L. D. PARSONS.

Writ of prohibition—Charge of defamation against member of Council—Words uttered in Council—Privilege.

A member of the Legislative Council of Ceylon is not entitled to absolute immunity from civil and criminal proceedings in respect of statements made by him in Council.

APPLICATION for a writ of prohibition made by the petitioner, who is a member of the Legislative Council, against the 1st respondent, who is the Police Magistrate of Colombo, forbidding him from continuing proceedings in case No. 37,928 of the said Court, in which the 2nd respondent, who is a Government Medical Officer and Superintendent of the Lunatic Asylum, preferred a charge of defamation against the petitioner. The charge was based upon statements made by the petitioner in the Legislative Council as member and was preferred before the 1st respondent, who entertained it and directed process to issue calling upon the petitioner to answer the charge. The petitioner applied to the Supreme Court for an order prohibiting the continuance of the proceedings in the Police Court.

H. V. Perera (with *Marikar*, *Rajapakse*, and *Deraniyagala*), in support.—We claim absolute privilege for statements made by us in course of debate in Legislative Council. If the privilege we claim is only qualified, we would have to go to Court and prove certain facts before privilege is extended to us, and prohibition would not lie.

Absolute privilege does not mean a privilege to be malicious. It means an immunity from legal consequences, and immunity from being even compelled to appear in Court. Of course such an immunity entails a privilege to be malicious, but that is merely a consequence of absolute privilege, not its essential feature. (*Bottomley v. Brougham*,[1] *Burr v. Smith*.[2])

The reason for absolute privilege is necessity. A balance has to be struck between the good and evil flowing from freedom of speech. (*Scott v. Standsfield*,[3] *Munster v. Lamb*,[4] *Ex parte Wason*,[5] *Chatterton v. Secretary of State for India*.[6])

[1] *(1908) 1 K. B. 584.*
[2] *(1909) 2 K. B. 306 at 311.*
[3] *(1868) 3 L. R. Ex. 220.*
[4] *(1883) 11 Q. B. D. 588.*
[5] *(1869) 4 Q. B. 573—L. R. 4 Q. B.*
[6] *(1895) 2 Q. B. 189.*

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Where Parliament grants a power, every power reasonably necessary for the exercise of that power is impliedly granted. (*Borton v. Taylor*,[1] *Doyle v. Falconer*,[2] *Stockdale v. Hansard*.[3])

Our legislative Council not only legislates, but under the Order in Council creating it, exercises critical functions as well. For the proper exercise of these powers, there can be no doubt that full freedom of speech is necessary, with immunity from any form of liability in law. If the privilege of members is only qualified, anyone who considers himself defamed, as a result of a member performing his critical functions, could go to Court and file a plaint, whereupon it will be necessary for the member to defend himself in Court, and prove to the satisfaction of the Judge that his statement is privileged, incurring all the expenses and trouble which such a course entails. The fear of such constant litigation would certainly act as a deterrent to any member from performing his high duties freely. It is therefore necessary to have an absolute privilege. For absolute privilege is an immunity from even being dragged to Court. Where a Judge sees on the face of the plaint that the statement complained of is absolutely privileged, he must refuse to entertain it.

We claim that the plaint in this case discloses only a statement that is absolutely privileged, and that therefore the learned Police Magistrate should have rejected it.

Where the power of freedom of speech is abused our Legislature has the power to punish, but outside its walls the question whether such power has been abused cannot be entertained, even in a Court of law. Where one has a right to do a thing, even an abuse of that right is not an offence.

Our Legislature has exclusive jurisdiction to inquire whether the matter complained of in this case is an abuse of the powers given to a member. (*Bradlaugh v. Gossette*.[4])

The Order in Council lays down certain rules for the Legislative Council, and states in rule 1 that in *casus omissus* one must look to the rules, usages, and practices of the House of Commons.

The Order in Council does not deal with the question whether a member can defame a person in the course of debate. So one must ascertain what the rules, usages, and practices are in the House of Commons in regard to such a question. There is no doubt that in the House of Commons the right exists to defame another in the course of debate. That being so, a member of our Council too has a similar right. Now, this right is conferred on him by nothing less than an Order in Council, which is a part of the law of this country. Surely it is axiomatic that what the law of this country allows one to do, it cannot at the same time punish.

[1] *(1886) 11 App. Cases 197.*
[2] *(1886) L. R. I. P. C. 328.*
[3] *(1839) 9 A. & E. at p. 148.*
[4] *(1884) 12 Q. B. 275.*

L. M. de Silva, Deputy Solicitor-General (with *Obeyesekere, C.C.*), for 1st respondent.—In this matter a writ of prohibition does not lie. It is clear law that prohibition only issues where a Court has no jurisdiction or acts in excess of jurisdiction, *e.g.*, Court of Requests trying a divorce action. (*Halsbury 141.*)

A writ of prohibition will not be granted merely where a Court has acted on an erroneous decision. (*Bacon's Abridgment, p. 564.*)

The general principle on which prohibition issues is that one Court is usurping the jurisdiction of another, and from this it follows that there must be some Court that is capable of hearing the matter in dispute. (*Short on Mandamus, p. 426.*)

In this case the Police Court has jurisdiction to inquire into the matter. In England it has been held that Courts of law can go into the question of parliamentary privilege. (*Anson, vol. I., 1922 ed., 190; Stockdale v. Hansard.*[1])

This is a non-summary inquiry, and further facts may transpire in the course of the case which will disentitle applicant to the right of privilege. Thus prohibition should not be granted at this stage. (*In re Application of Abdul Latiff* [2]*; In re Villa Varayan.*[3])

Hayley, K.C. (with *Ferdinands*), for 2nd respondent.—The privileges of the House of Commons are the result of conflicts between it and the King, and do not exist in the case of a Legislature made and brought into existence by the King.

If there is one Court competent to hear this case, it is the Police Court of Colombo. (*In re Joseph Baly* [4]*; In re John Ferguson.*[5])

The accused would only be entitled to a writ of prohibition if there is no Court that can adjudicate on his conduct, not otherwise.

Roman-Dutch law knows nothing of absolute privilege, and we are governed by it. There is only qualified privilege. (*4 Maasdorp, pp. 102 and 103; De Villiers, p. 35; Voet IX. 2, 15; Voet XLVII. 10, 2; 3 Menzies, 42.*)

Rule I, sub-section (3), is subordinate to clause 59, which applies usages, &c., of House of Commons to business of our Legislature. The substantive rights of the subject cannot be subordinated to rules made to facilitate the business of the Legislature.

This is a criminal charge under the Penal Code.

Section 2 makes the Penal Code water-tight, and there can be no exceptions, except those it contains. No defence of privilege can be pleaded to a charge of criminal defamation. (*Chakravarti v. Ram Doyal De* [6]; *2 Gour, 3rd ed., p. 2586.*)

[1] *112 English Reps. 1112.*
[2] *19 N. L. R. 346.*
[3] *7 N. L. R. 116.*
[4] *3 Lorenz 238.*
[5] *1 N. L. R. 181.*
[6] *(1920) I. L. R. 48 Cal. 388 at 425.*

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L. M. de Silva, in reply.—The words of rule 1 contain " so far as the same may be applicable to this Council ". It is submitted that only such of those privileges of Parliament as are not contrary to the laws of Ceylon are " applicable ".

The principle of necessity is best discussed in *Fenton v. Hampton.*[1]

The principle only applies where the power granted will be an absolute nullity without further implied power.

H. V. Perera, in reply.—We admit that prohibition only lies where a Judge acts in excess or without jurisdiction.

The scope of writs of prohibition is well set out in *Rex v. Electricity Commissioners.*[2]

We need not wait till we are actually affected in any way. The Supreme Court can issue a writ of prohibition where a Court is proceeding to do something which even the Supreme Court itself has no jurisdiction to do [3] (*Re* Jayawardana).

When the Magistrate issues summons in a case where he should not, the writ would lie. (*Channel Coaling Co. v. Scott.*[4])

My argument is not that because the Members of the House of Commons are absolutely privileged, so members of our Legislature are similarly privileged.

My argument is that absolute privilege is an essential feature of the House of Commons, or for a matter of that, any Legislature, and therefore it is a feature of our Legislature.[5]

Rule 13 gives our Legislature a critical function.

The exercise of a right given by law cannot result in a wrong. If we have only a qualified privilege than an offence must be committed, for qualified privilege is only a defence, and a defence presupposes an offence. But the exercise of our right cannot result in an offence. Then we must have something more than qualified privilege, which is a mere defence. We have absolute privilege, which is an immunity.

The Penal Code undoubtedly contains all the defences to criminal defamation. Absolute privilege is not a defence. It is an immunity from inquiry, and from being even brought to Court, and can exist side by side with the Penal Code. The Indian decisions are based on a misapprehension of the meaning and scope of absolute privilege and should not be followed.

[1] *11 Moore, P. C. p. 347 at p. 360.*
[2] *(1924) 1 K. B. 171.*
[3] *8 N. L. R. 152.*
[4] *(1927) 1 K. B. 145.*
[5] *Erskine May on Parliamentary Practice.*

August 27, 1928. SCHNEIDER J.—

The material upon which I was invited to decide this application is to be found in the pleadings which consist of the petition and affidavit of the petitioner. Stated shortly, the material facts are these:—

The 2nd respondent, who is the Medical Officer in charge of the Government Lunatic Asylum, and a public servant, preferred a charge of defamation, an offence punishable under the Penal Code, against the petitioner as having been committed by a statement made by the petitioner, who is a member of the Legislative Council, in the course of a debate in the Council. The charge was preferred before the 1st respondent, one of the Magistrates of the Police Court of Colombo. He entertained it and directed process to issue calling upon the petitioner to answer to the charge on February 28. On the 25th the petitioner presented this application to this Court by way of a petition and an affidavit praying that after notice to the respondents an order be made prohibiting the continuance of the proceedings in the lower Court. The respondents were noticed and the matter was argued on several days. The words complained of were not before me, nor were they brought into the argument which proceeded on the assumption that the two questions to be presently mentioned were the only ones for determination. The questions were these:—Is the petitioner entitled, as a member of the Legislative Council, to absolute immunity from civil and criminal proceedings in a Court of Law as regards statements made by him in the Council as one of its members? If he is so entitled, can he maintain the present application for a Writ of Prohibition? The questions were argued before me in that order. I think it will be convenient to consider them in the same order. Before proceeding to the consideration of them, I am desirous to convey how much I feel indebted for the full, careful, and able manner in which this application was argued on both sides. I have derived material assistance from the elaborate exposition and analysis of the principles and authorities which were cited. For an exposition of the privilege claimed, I was referred to the judgment of Channell J. in *Bottomley v. Brougham.*[1] In that case "absolute privilege" was claimed for the report of an official receiver made to a Court under the Companies (Winding Up) Act.[2] Channell J. said at page 586:—

> "I should first like to explain my view, which is derived from the former cases, as to the meaning of what is called 'absolute privilege'. I do not think that it is a very accurate expression, and I am sure that calling it a 'privilege' is sometimes misleading. Privilege means in the ordinary

[1] *(1908) 1 K. B. D. 584.*

[2] *53 & 54 Vic. c. 63.*

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way a private right. Now, there is no private right of a Judge, or a witness, or an advocate, to be malicious. It would be wrong of him, and if it could be proved I am by no means sure that it would not be actionable. The real doctrine of what is called ' absolute privilege ' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice ; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of ' absolute privilege ' is sometimes complained of is that it is not thoroughly understood. That explanation of the doctrine will be found here and there in many of the cases, although it never seems to have been put into the head-note, and so it does not appear prominently as the real ground of the doctrine. In *Munster v. Lamb*,[1] for instance, the explanation of the doctrine is given in some of the judgments, but it is not to be found in the headnote ; and the same remark applies to some of the cases earlier than *Munster v. Lamb*."

Fletcher Moulton L.J. in his judgment in *Burr v. Smith* [2] adopted that exposition remarking that it appeared to him " to be most admirably expressed and perfectly accurate ". The privilege was claimed for the petitioner in this application as having been granted in express terms, and also as an incident to the powers conferred on the Council by its constitution.

It is necessary here to refer briefly to the constitution of the Legislative Council, for it is upon a consideration of its constitution that the question has to be decided whether the privilege has been granted in one or the other or both of the ways in which it is claimed to have been granted. The Council was constituted by " The Ceylon (Legislative Council) Order in Council, 1923 ", which was promulgated by a proclamation dated February 16, 1924. On that day the Legislative Council which existed previously ceased to exist, and, by virtue of Articles I and IV of the Order, in place of it

[1] *11 Q. B. D. 588.* [2] *(1909) 2 K. B. D. 306.*

the present Council was constituted. The Order was amended by "The Ceylon (Legislative Council) Amendment Order in Council, 1924," but this amendment has no reference to the provisions of the constitution of the Council which are relevant to the question under consideration. As the Council has been entirely created by the Order in Council, all its functions, rights, and privileges must be ascertained from the provisions in the Order. The only provision in the Order which has any reference to the question under consideration is the following Article:—

"LIX.—(1) The course of business and procedure and the preservation of order at meetings of the Council shall be regulated by the rules and orders set forth in Schedule III. to this Order.

"(2) Subject to the provisions of this Order, and such instructions as aforesaid, the Council may from time to time make rules and orders to supplement the rules and orders set forth in Schedule III. to this Order, and may rescind, vary, or amend any such rules and orders as above referred to."

The rules and orders referred to in that Article appear to have been replaced by a set of rules and orders dated October, 1927. It is these rules and orders which were in force at the date of the alleged commission of the offence. A careful study of the Articles of the Order in Council, the rules in Schedule III., which are referred to in Article LIX., and the rules and orders dated October, 1927, has failed to disclose to me anything showing that the privilege claimed has been expressly granted. The only provision to which I was referred as containing the grant in express terms was rule 1 of the rules and orders of October, 1927. The rule in question is the following:—

"1. In all cases not herein provided resort shall be had to the rules, forms, usages, and practices of the Commons House of Parliament of Great Britain and Ireland, which shall be followed so far as the same may be applicable to this Council, and not inconsistent with the following rules and orders, nor with the practice of this Council."

It was submitted that this rule should be construed as having expressly conferred the privilege by its provision that the "usages and practices of the Commons House of Parliament" should be followed—that the absolute privilege of speech claimed came within either one or both of the words "usages and practices." If the privilege claimed has been expressly granted, I would hold that it necessarily follows that this application should be allowed, but I have no hesitation in holding against the contention that it has been granted expressly by that rule or that it has been granted expressly by any of the other rules. The contention that it has been expressly granted appears to me to be wholly unsustainable. The object of

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those rules is clearly defined by Articles LIX. as being for the regulation of " the course of business and procedure, and the preservation of order at meetings of the Council," or, as the marginal heading to that Article has it, they are the " Standing Orders " of the Council. No rule in fact contains any reference to a right of privilege of the kind claimed. Rule 1 is nothing more than a provision for *casus omissi*. It was intended to be utilized in any case for which no express provision has been made and which might arise in connection with the object of the rules, that is, regarding the procedure to be followed for conducting the business of the Council and the preservation of order within. A rule intended to confer the grant of a right or privilege not directly connected with procedure in the conduct of the business of the Council or preservation of order would be out of place in a set of rules such as those in Schedule III. of the Order in Council or those dated October, 1927. It would be inconsistent with the object of the rules as a whole and also with the special object of rule 1 to construe this rule as expressly conferring a right of immunity from actions. The language of the rule is also against that construction. Writers on parliamentary procedure and privileges and rights regard the words " usages and practices " as meaning things quite distinct from " privileges." May, in his *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, writes under the head of " Practice and Proceedings in Parliament [1] ":—

> " The proceedings of Parliament are regulated by ancient usage, by established practice, and by the standing orders. Ancient usage, when not otherwise declared, is collected from the journals, from history and the early treatises, and from the continued experience of practised members.
>
> " The orders and regulations for regulating the proceedings of Parliament are recorded in the journals of both Houses, which may be divided into 1, standing orders; 2, sessional orders; and 3, orders or resolutions undetermined in regard to their permanence."

And in the chapter in which he deals with the " General View of the Privileges of Parliament " he writes[2]:—

> " Both Houses of Parliament enjoy various privileges in their collective capacity, as the constituent parts of the High Court of Parliament; which are necessary for the support of their authority, and for the proper exercise of the functions entrusted to them by the constitution. Other privileges, again, are enjoyed by individual members; which secure their independence and dignity.

[1] *May: A Treatise on the Law, Privileges, Proceedings, and Usage of Parliament, 10th ed. p. 144.*

[2] *Loc. cit., p. 57.*

" Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute. Upon these grounds alone all privileges whatever are founded."

It would appear, accordingly, that it is not possible to entertain the contention that the words " usages and practices " in the rule in question mean or include privileges. If the contention were upheld, it must logically follow that the members of the Legislative Council are entitled at least to a very large number of the privileges enjoyed by the House of Commons, if not to all of them. To me it seems inconceivable that if the grant of such a high privilege as the one claimed had been intended, it should not have been made in unequivocal terms, and not left to be gathered by giving to the language of a rule a meaning which the words used do not appear to have been intended to bear. The difficulty of entertaining the contention increases considerably when the history of the struggle of the Commons for obtaining recognition of the rights and privileges which they now enjoy is recalled, and it is remembered that the claim to those rights and privileges was preferred as based upon the Common law of the realm and as belonging to the House as a constituent part of the High Court of Parliament and as derived from the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament.

The Legislative Council cannot prefer the claim to immunity on any of those grounds. The Common law of England does not apply to it. It is not a Court in any sense, and it is not entitled to the *lex et consuetudo Parliamenti*. It is the creation of the Order in Council and derives all its power and privileges from it. The argument I am now considering was addressed to that array of judicial learning and eminence rarely congregated together which decided *Kielley v. Carson* [1] in 1842. It was argued that a despatch which accompanied the Commission for the establishing of the Legislative Assembly of Newfoundland, and which contained instructions to the Governor of the Colony with reference to the mode of conducting business and the forms of procedure which were to be assimilated to those of the British House of Commons—that is, what would correspond to the rules and orders of the Ceylon Legislative Council—conferred the power of committing for contempt to the same extent as that right was exercised by the House of Commons. Baron Parke, in disposing of this argument, said:—

" At all events, terms so vague and general could never have been used with the intention of giving the powers of commitment and other privileges of so important a nature, if the authority of the Crown was required to bestow them by a special grant."

[1] *IV. Moore, P. C. p. 63.*

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For the reasons given, I have no hesitation in holding that the privilege claimed has not been granted expressly.

I will now proceed to consider the other part of the argument that the right of privilege claimed is an incident attaching to the powers granted to the Council by its constitution. The form in which that argument was presented in substance was this. The Council is a legislative body, as by Article XLVII. of the Order in Council the Governor is granted the power " to make laws for the peace, order, and good government of the Island with the advice and consent of the Council." It is empowered by Article LIX. to make rules and orders for regulating its course of business and for the preservation of order internally. Under the rules and orders made by virtue of that power its members have the right to put question relating to public affairs (rule 12), to propose a motion in any matter of public interest (rule 13), to introduce a bill (rule 18), and to debate upon any bill (rule 26). As well for the due exercise of those functions as for enabling those who compose the Council efficiently and independently to perform the duties imposed upon them freedom of speech is absolutely essential.

The following passages from writers upon the subject support this view:—

" Freedom of speech is a privilege essential to every free Council or Legislature.[1]

" Freedom of speech is inherent in the idea of a deliberative assembly.[2]

" Freedom of speech is the essential attribute of every free legislature and may be regarded as inherent in the constitution of Parliament.[3] "

This freedom of speech by legal implication carries with it immunity from all actions in any Courts of law. If it were necessary for the purpose of the argument to inquire whether such freedom of speech might not be abused, it might be pointed out that there are certain provisions in the rules themselves intended to check such abuse. Certain conditions have to be fulfilled before a question is admissible (rule 12 (2)), members can be punished by being named (rule 55), or by being directed to withdraw (rule 57), and, finally, the proceedings in Council can be suddenly terminated by the exercise of the power to adjourn the Council (rule 59).

In short, the argument was that the reasons for which the law extended the right of absolute privilege to the statements written or words spoken by certain classes of persons were in a great measure applicable to the words spoken by members of the Council in their place.

[1] *May : A Treatise on the Law, Privileges, Proceedings, and Usage of Parliament, 10th ed., ch. IV.*

[2] *Wigmore : Select Cases on the Law of Torts, vol. II., p. 790.*

[3] *Chalmers & Asquith : Outlines of Constitutional Law, 3rd ed., p. 291.*

A very large number of authorities were cited consisting of text books and reports of cases in order to support this part of the argument and illustrate the classes of persons to whom the privilege had been held to be applicable and the consideration for so holding. I do not consider it necessary to refer expressly to all of them, although I have in fact read the greater number of them once again for the purpose of writing this judgment. The cases fall into two groups, but rest upon the one common foundation that the rule of immunity is conceded on grounds of public policy, that it exists for the public benefit. The cases which fall into the group which I will now consider consist of two sub-groups. In one of these sub-groups are all those cases in which absolute privilege has been extended to words spoken or statements made in the course of the administration of justice by Judges of Courts of law, counsel, parties and witnesses, and by official receivers in the performance of their duty as prescribed by the Companies (Winding up) Act, 1890.[1] Into the other sub-group fall those cases where the privilege has been extended in regard to statements made in documents which are privileged, such as state despatches and reports made by public servants in the course of their public duties. I do not consider it necessary to refer to any other case falling into the former sub-group than that of *Munster v. Lamb* (*supra*). It is an important decision, in that the former cases are discussed in it, and it contains certain *dicta* on which special emphasis was laid as supporting the argument under consideration. I will give three extracts. In the course of his judgment Fry L.J. cited and accepted as a correct declaration of the Common law of England the following passage from *Dawkins v. Lord Rokeby*[2]:—

> "Whatever is said, however false or injurious to the character or interest of a complainant, by Judges upon the Bench, whether in the superior Courts of law or equity, or in the County Courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the Legislature in either House of Parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged and cannot be inquired into in an action at law for defamation."

Speaking of the principle, Brett M.R. said:—

> "The ground of the decision (*Scott v. Stansfield*[3]) was that the privilege existed for the public benefit; of course it is not for the public benefit that persons should be slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit

[1] *53 & 54 Vic. c. 63.*

[2] *Law Rep. 8 Q. B. 255.*

[3] *Law Rep. 3 Ex. 220.*

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and mischief to the public, it is thought better that a Judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty."

And Fry L.J. said:—

"The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against Judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions being brought in cases where they ought to be maintained that has led to the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty."

Of the cases falling into the latter sub-group two should be specially referred to. One of them is *Dawkins v. Lord Paulet.*[1] It is an important decision because of the observations to be found in the judgment of Mellor J. demonstrating the reasons given and arguments urged for extending the benefit of absolute privilege to a military officer in regard to statements contained in a report made by him to his superior officer in the ordinary course of his duty as such officer. Mellor J. said[2]:—

"He (the Attorney-General) claimed the immunity for the defendant (military officer) for acts done in the course of his duty on the higest grounds of policy and convenience."

"The Attorney-General relied not only upon the analogy he drew from the case of a Judge, juryman, or witness, but he cited, in support of his argument, the opinion of Lord Mansfield and Lord Loughborough, in the case of *Sutton v. Johnstone.*[3]

"'If this action be admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.' And, again, 'If every trial that is by court-martial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be.'

"It (that is, the exposition of the law in *Sutton v. Johnstone*) proceeds upon the principle that 'the law will rather suffer a private mischief than a public inconvenience.' It was observed by Eyre B. in delivering the opinion of the Court of Exchequer, that the ground upon which the

[1] *(1869) Law Rep. 5 Q. B. 94.* [2] *(1869) Law Rep. 5 Q. B. at page 114.*
[3] *1 T. R. 544.*

immunity from actions enjoyed by Judges and jurymen proceeds, is, that 'the law gives faith and credence to what they do and therefore there must always, in what they do, be cause for it, and there never can be malice in what they do.' Compton J. in *Fray v. Blackburn* [1] stated that the immunity of Judges of the superior Courts was established to secure their independence, and to prevent them being harassed by vexatious actions. It is manifest that the administration of justice would be paralyzed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously and not *bona fide*."

"Ministers of the Crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudical such advice may be to individuals."

The other is *Chatterton v. The Secretary of State for India in Council*,[2] where it was held that a communication relating to State matters made by one officer of state to another in the course of his official duty is absolutely privileged. Lord Esher M.R. said:—

"The reason for the law on this subject plainly appears from what Lord Ellenborough and many other Judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal. If an officer of state were liable to an action for libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an officer of state. Therefore the law confers upon him an absolute privilege in such a case."

And Kay L.J. said:—

"I cannot see how the business of government could be carried on if such a statement were the subject of an action for libel."

[1] *3 B. & S. 578.*

[2] *(1895) 2 Q. B. 189.*

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The principle to be deduced from the cases from which I have given extracts, and from the others which are in the same category, is, that the privilege is extended to the persons with whom those cases are concerned on the grounds of public policy and public convenience, or, as stated in one of the extracts[1]:—

> "The law will rather suffer a private mischief than a public inconvenience."

It is the same principle which is contained in the maxim *Salus populi suprema lex.* Commenting on which the authors of *Broom's Legae Maxims*[2] write:—

> "This phrase is based on the implied assent of every member of society, that his own individual welfare shall in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy of even sacrificed for the public good."

It is a principle which is recognized as a part of the Roman-Dutch law. Grotius[3] says:—

> *Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quae privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedre illi ipsi voluisse censendi sunt qui in civilem coetum coierunt.*

It is a principle accordingly about the application of which to this Island there can be no question. I think the reason to be deduced from those decisions for extending the immunity to those persons is that without it they would not be able to execute the duties required of them, as those duties so very frequently require that they should speak or write freely and be fearless of consequences so far as actions being brought against them are concerned, that the immunity was absolutely essential in their cases, that it is *sine quo res ipsa esse non potest.* A little consideration of the duties required of Judges, counsel, witnesses and parties, and of official receivers under the Companies (Winding up) Act will show how frequently and even unexpectedly occasions will arise calling for freedom of speech and how the "administration of justice would be paralyzed unless they were protected from actions, and in the case of official reports and state documents, as Kay L.J. remarked. "how could the business of government be carried on" without that immunity. A consideration of the duties to be performed by members of the Council does not convince me that their duties too cannot be performed unless the same protection were extended

[2] *Broom's A Selection of Legal Marims, 8th ed., p. 1.*
[3] *Grotius de Jure Belli et Pac., bk. III., ch. 20, s. 7, ss. 1.*

to the members of the Council. I grant that they must have freedom of speech and need no authority to concede that. But is it necessary for the due exercise of that right that the members should be immune from all actions at law? I think not. Privilege in respect of defamation is of two kinds. There is the absolute privilege which is conceded, as we have already seen in the decisions, to Judges, counsel, witnesses and parties in a proceeding in a Court in law, and to statements made by public officers in state documents and official documents of a confidential nature. On public grounds no action lies against them however maliciously they may have acted. Then there is the qualified privilege or *sub modo to* which every subject of His Majesty the King is entitled provided the occasion on which the defamatory matter is written or spoken is privileged and there is an absence of express malice, or as Lord Esher M.R. said:—

> "He is using the privileged occasion for the proper purpose and is not abusing it."

In this case the action will lie if there be evidence of express malice. The first kind of privilege seems rather to attach to the person or character of the person writing or speaking the defamatory matter, the second to the occasion when the defamatory matter is written or spoken. The case from which I have taken the words quoted above, although not precisely in point, yet might usefully be referred to here. It is *Royal Aquarium and Summer and Winter Garden Society, Ltd., v. Parkinson.*[1] In it absolute privilege was pleaded for defamatory statements made by a Councillor at a meeting of the London County Council for granting music and dancing licences, on the ground that the meeting was a Court within the meaning of the rule by which such statements before a Court are accorded that privilege. But it was held that the Councillor was only entitled to the ordinary privilege which applies to a communication made without express malice on a privileged occasion. Fry L.J., discussing the argument that the existence of the immunity is based on considerations of public policy and that as a matter of public policy wherever a body has to decide questions and in so doing has to act, judicially, it must be held that there is a judicial proceeding to which the immunity ought to attach, said:—

> "Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position

[1] *(1892) 1 Q. B. 431.*

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of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege. I find no necessity or propriety in carrying the doctrine so far as this argument requires. It is to be borne in mind that there is a great difference between the constitution of the kind to which I have referred and most Courts. Courts are, for the most part, controlled and presided over by some person selected as specially qualified for the purpose; and they have generally a fixed and dignified course of procedure, which tends to minimize the risks that might flow from this absolute immunity."

And Lopes L.J., speaking of the absolute privilege, said:—

" It has been conceded on the grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who by their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them. It is, however, a privilege which ought not to be extended."

Considering how very rarely an occasion will arise when it would be necessary in the proper exercise of the freedom of speech for a Councillor in his place to make any defamatory statement, I am not convinced that either necessity or propriety has been shown to exist for carrying the doctrine of immunity to the extent which the argument requires and that the protection afforded in ordinary cases is not sufficient.

I now come to the other group of cases which consists of decisions not only of paramount authority and importance but which have a more direct bearing upon the question under consideration. For although the precise question raised by this application has not been decided in any one of them, yet principles are there stated which go far to afford the means of determining that question. They are decisions of the House of Lords and the Judicial Committee of the Privy Council wherein the claim to some power or privilege by a Supreme Legislative Assembly or Council of a Colony or Settlement of the Empire has been adjudicated upon by the application of the legal maxim: *Quando lex aliquid concedit concedere viditur et illud sine quo res ipsa esse non potest.* If this maxim is applicable in the decision of the question under consideration and if the immunity claimed is something incident to the freedom of speech granted by the powers conferred on the Council the claim must be upheld.

If it be asked how that maxim is applicable, I would say that there are two answers which can be given to that question. One is this. It is not a rule peculiar to the English law. It is a maxim which might be regarded as an axiom. It is derived from common sense and natural equity. It is of such general application that it may be considered as exhibiting the very foundation on which some part of the Legal Science exists. It is a rule which results from a simple process of reasoning. And as the foundation of the Roman-Dutch law consists of equitable principles and as there is nothing in the rule repugnant to the principles recognized by that law, but on the contrary, as it formulates a natural and equitable principle, there is no reason why the rule should not be adopted in a case such as this, in the absence of any express provision in the Roman-Dutch law which is our Common law. That is an answer which might be given if in fact the Roman-Dutch law does not contain this or a similar rule. That it does or does not contain such a rule I am unable to say as I have not searched the books in order to ascertain and to express a definite opinion on the point.

The other answer is this, and I would rather prefer to rest upon it my argument that the maxim is applicable to the question I am engaged in deciding. The Council has been created by His Majesty's Order in Council. It is the Common law of England which sanctions the exercise of the prerogative by which the Council has been created, therefore the rule in question, being a rule of the Common law, applies in the construction of the effect of the powers granted. The full import of that rule has been carefully inquired into and elaborately set forth by the Chief Justice of the Supreme Court of Van Dieman's Land in his judgment in *Fenton v. Hampton* [1] in the following terms:—

> "Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists—that the power may be legally exercised without the doing that something else, or, even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention unless the enforcing power be supplied—then in any such case the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply as a *casus omissus*."

[1] *11 Moore P. C. 360.*

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I cannot do better than adopt that exposition of the rule if for no other reason than that the cases cited in its elucidation do as a matter of fact range themselves under the principle of positive duty or general inevitable necessity, non-compliance with which would deprive the law, whatever it be, of all operation. I shall say no more now about this case but will later refer to it again. Before proceeding farther it would be convenient to dispose of a subordinate argument here.

It was contended that the Council was the supreme legislative body in this Island, and in support of this the case of *Powell v. Apollo Candle Company, Limited* [1] to be found in this group was relied on. One of the questions in that case for decision was whether the New South Wales Legislature created by virtue of powers given under an Imperial Act [2] was an agent or delegate of the Imperial Parliament. In their judgment Their Lordships mentioned the cases of *Regina v. Burah* [3] and *Hodge v. The Queen* [4] decided by their own Board, and cited from the former the following passage from the judgment of the Lord Chancellor as laying down the general law:—

> " The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Legislature, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself.

They said:—

> " These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

It was argued that the Ceylon Legislative Council came within the Colonial Legislatures contemplated in that judgment; that it was a " Colony " and a " Representative Legislature " within the meaning assigned to those terms in the Colonial Laws Validity Act, 1865,[5] and within the limits placed by the Order in Council, that it has the power under section 5 of that Act " to make laws respecting even its own constitution and powers " and that within those limits and within the Island it has supreme legislative power.

[1] *(1885) Law Rep. 10 A. C. 282.*
[2] *18 & 19 Vic. c. 54.*
[3] *3 App. Cas. 889.*
[4] *9 App. Cas. 117.*
[5] *28 & 29 Vic. c. 63.*

I will accept the contention that the Ceylon Legislative Council has supreme legislative power. It was then argued that in consequence of that supreme position the immunity claimed should be deemed to be an incident attaching to the powers of legislation conferred on it, although the same incident would appear not to attach to the powers of legislation granted to Municipal and Urban Councils, to Local Boards, and Boards of Health, because their powers are of a subordinate character. I cannot assent to this argument. I think there is no reason for this distinction. The question of the existence of the immunity does not hinge upon the higher dignity and importance which attach to particular legislative bodies or to the exalted character of the functions to be performed, but upon essential necessity, as the decisions already cited show and as it will appear from the decisions to be presently mentioned. If necessity does exist for the extension of the immunity to the Legislative Council the same necessity does also exist as regards the other legislative bodies.

Of the cases which I shall now refer to, the oldest is *Kielley v. Carson* (*supra*) decided in 1843 by a Bench consisting of the Lord Chanceller, two noble members of the Judicial Committee who had formerly held the Great Seal, the three chiefs of the Common Law Courts in Westminster Hall, two out of the four members of the Court who were present at the decision of the case *Beaumont v. Barrett*,[1] the Vice-Chancellor, and Dr. Lushington.

The importance of this case cannot be over-rated, seeing that it was twice argued and was decided by such an array of judicial learning and eminence.

It was an appeal from the Supreme Court of the Island of Newfoundland. The appellant was arrested and brought before the bar of the House of Assembly upon a warrant issued by the Speaker in consequence of a complainant made by a member of the Assembly that the appellant had reproached him in gross and threatening language out of the doors of the House for the animadversions he had made in his place in the House on the management of the hospital of which the appellant was manager. When brought to the bar and the charge was read to him he again used violent language towards the same member in the presence of the Speaker. He was thereupon required to apologise. He refused and was committed to jail, from which he was discharged by an order of the Supreme Court when he was brought up upon a Writ of *Habeas Corpus*.

The House of Assembly was constituted by a Commission issued by His Majesty the King. It gave the Governor, with the advice and consent of the Legislative Assembly, full power " to make, constitute, and ordain laws for the public peace, welfare, and good

[1] *1 Moore P. C. C. 59.*

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government of the Island." Accompanying the Commission was a despatch from a Secretary of State for the Colonies containing instructions to the Governor regarding the mode of conducting the business of the Assembly and the forms of procedure which were to be assimilated to those of the British House of Commons. I mention these details to show that the House of Assembly, in regard to its powers and procedure, was in the same position as the Ceylon Legislative Council.

The judgment examined *Beaumont v. Barrett* (*supra*), which was a case from Jamaica, in which it was decided that an Assembly possessed of supreme legislative authority had the power of punishing contempts; that the power was inherent in such an Assembly and incident to its legislative functions. According to the judgment in that case every Colonial Assembly or Council possessed the same authority to punish for contempts which the House of Commons has exercised in the United Kingdom for a long series of years. Their Lordships would not follow this case. The judgment of Baron Parke which states the reasons for the decision contains certain *dicta* which I would quote here. He said:—

> "The whole question then is reduced to this—whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature."[1]
>
> "If that power was incident as an essential attribute."[2]
>
> "Their Lordships see no reason to think, that in the principle of the Common law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. *Quando lex aliquid concedit, concedere viditur et illud, sine quo res ipsa esse non potest.* In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the Common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever

[1] *At p. 233.* [2] *At p. 234.*

> the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions as a local Legislature, whether representative or not. 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."[1]

The words " reasonably necessary for the proper exercise of its functions," &c., in the headnote of this case is somewhat misleading. The word " reasonably " is not to be found anywhere in the judgment in the same conjunction. On the contrary, from the passages which I have cited, which are the only ones having a direct bearing on this point, and from the general reasoning in the judgment, it is quite clear that the necessity must be inevitable and not merely reasonable. It must be a *res sine qua esse non potest.*

Next in point of time comes the case of *Fenton v. Hampton* (*supra*) already mentioned. It was an appeal from the Supreme Court of Van Dieman's Land in 1858. The question to be decided was similar to that decided in *Kielley v. Carson* (*supra*), which was followed, viz., whether the Legislative Council had the power to punish for contempt of its authority. The Legislative Council of Van Dieman's Land was established by an Act of Parliament. Its legislative powers were identically the same as those of the Ceylon Legislative Council. It was held that the power to punish claimed did not belong to the Legislative Council as inherent to the supreme legislative authority it possessed and that the *lex et consuetudo Parliamenti* apply exclusively to the Lords and Commons of the United Kingdom and do not apply to the supreme Legislature of a colony by the introduction of the Common law there.

I would next mention *Doyle v. Falconer* [2] as the same question was decided in that case too. It was an appeal from the Court of Common Pleas of Dominica. The two cases just mentioned were followed and it was held that—

> " The Legislative Assembly of Dominica does not possess the power of punishing a contempt, though committed in its presence and by one of its members ; such authority does not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti*, which is inherent in the two Houses of Parliament in the United Kingdom, or to a Court of Justice, which is a Court of Record : a Colonial House of Assembly having no judicial functions."

[1] *At p. 234–5.*

[2] *(1866) 1 L. R. (P. C.) 328.*

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There is one passage in the judgment which was delivered by Sir James Colvile which might be usefully cited here [1]:—

"The learned Counsel for the appellants invoked the principles of the Common law, and as it must be conceded that the Common law sanctions the exercise of the prerogative by which the Assembly has been created, the principle of the Common law, which is embodied in the maxim *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest* applies to the body so created. The question, therefore, is reduced to this : Is the power to punish and commit for contempts committed in its presence one necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute ? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting he may be removed, or excluded for a time, or even expelled ; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in Their Lordships' judgment, all that is warranted by the legal maxim that has been cited, but the latter is not its legitimate consequence. To the question, therefore, on which this case depends, Their Lordships must answer in the negative. If the good sense and conduct of the members of Colonial Legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting, and to keep him excluded. The same rule would apply a *fortiori* to obstructions caused by any person not a member. And whenever the violation of order amounts to a breach of the peace, or other legal offence, recourse may be had to the ordinary tribunals.

"It may be said that the dignity of an Assembly exercising supreme legislative authority in a Colony, however small, and the importance of its functions, require more efficient protection than that which has just been indicated; that it is

[1] *(1866) 1 L. R. (P. C.) 328 at p. 340–1.*

unseemly or inconvenient to subject the proceedings of such a body to examination by the local Tribunals ; and that it is but reasonable to concede to it a power which belongs to every inferior Court of Record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character ; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it judges in their own cause and judges from whom there is no appeal ; and that if it may be safely intrusted to magistrates who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.

" Their Lordships, however, are not at liberty to deal with considerations of this kind. There may or may not be good reasons for giving by express grant to such an Assembly as this, privileges beyond those which are legally and essentially incident to it. In the present instance, this possibly might have been done by the instrument creating the Assembly ; since Dominica was a conquered or ceded Colony, and the introduction of the law of England seems to have been contemporaneous with the creation of the Assembly. It may also be possible to enlarge the existing privileges of the Assembly by an Act of the Local Legislature passed with the consent of the Crown. But Their Lordships, sitting as a Court of Justice, have to consider, not what privileges the House of Assembly of Dominica ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must show that it is essential to the existence of the Assembly, an incident *sine quo res ipsa esse non potest.* Their Lordships are of opinion that it is not such an incident."

Here again the principle recognized would appear to be that the power claimed must be essential to the discharge of the functions required of the legislative body.

Then comes the case of *Barton v. Taylor,*[1] which was an appeal from the Supreme Court of New South Wales. It was held that the powers incident to or inherent in a Colonial Legislative Assembly did not extend to the unconditional suspension of a member during the pleasure of the House. The Earl of Selbourne, who delivered the

[1] *(1886) 11 A. C. 197.*

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judgment, speaking of *Kielley v. Carson* (*supra*) and *Doyle v. Falconer* (*supra*) said :—

> " It results from these authorities that no powers are incident to a Colonial Legislative Assembly except such as are necessary to the existence of such a body and the proper exercise of the functions it is intended to execute."

There remain in this group two cases which I should mention. They are *Dill v. Murphy* [1] and *Fielding et al. v. Thomas*.[2] They are not concerned as the cases just considered were with questions of the grant of powers by implication, but they are useful as illustrations of the fact that where it was intended to grant any right, privilege, or immunity, it has been granted in express terms, and also as illustrating the manner and language in which the grant has been made.

The one was an appeal from Dominica and the other from Nova Scotia. In both the question was whether it was within the power of the provincial legislature to make certain laws defining the rights, privileges, and immunities to be held and enjoyed by the Assembly and its members. In both cases, purporting to act under powers conferred, the Legislatures had enacted that the Council or Assembly and its members " should hold, enjoy, and exercise such and the like privileges, immunities, and powers as are held, enjoyed, and exercised by the Commons House of Parliament of Great Britain."

In *Fielding et al. v. Thomas* (*supra*) the act proceeded further to enact that no member shall be liable to any civil action or prosecution by reason of any matter or thing said by him before the House, and that the House shall be a Court of Record with all the rights and privileges of such a Court.

On the authority of *Fielding et al. v. Thomas* (*supra*) it might have been contended that the Colonial Laws Validity Act (*supra*) empowered the Ceylon Legislative Council to make similar laws as those contemplated in that case to confer rights, privileges, and immunities on the Council and its members. I express no opinion whether that would be a sound argument or not. If the Council has that power it has in fact made no such laws.

This application must fail if the privilege claimed is not an incident to that freedom of speech which is necessary for the exercise of the functions entrusted to the Legislative Council. Absolute privilege from all actions does not appear to me to be necessary either essentially or even reasonably.

As far as I am aware this is the first instance of proceedings being taken in a Court of law against a member for anything done or said within the Council although for well-nigh upon a century the work

[1] *(1864) 1 (New Series) Moore P. C. C. 487.* [2] *(1896) A. C. 601.*

of legislation has been carried on here by a Council, which at all times enjoyed the same freedom of speech. Laws are not made to meet such rare cases.

Ad ea quae frequentius accidunt Jura adaptantur is a maxim of the law generally recognized. And where the law does not grant a power or privilege in express terms how much greater is the reason why it should not be construed as granting it by intendment especially where the privilege is in derogation of the liberty or interests of other subjects.

When we find express provision had been made by Imperial Legislation for the grant of powers, privileges, and immunities in 1854 and 1867 to Colonies in Australia and to Nova Scotia, when we see questions concerning the grant of such privileges have come up before the highest Court of the Empire from 1843 to 1895, it does not seem possible to take the view that in drafting the Order in Council by which the Ceylon Legislative Council was constituted, the grant of privileges and immunities had been overlooked. The more reasonable view to take is that in erecting such statutory bodies as the Ceylon Legislative Council it has been assumed that the freedom of speech necessary to carry out their duties could be exercised under the protection afforded by other means than by the implication of a privilege infringing upon the personal rights of the subjects.

I hold that the absolute privilege claimed has not been granted expressly or by implication. I dismiss the application, and order the applicant to pay the costs of the 2nd respondent.

Several other questions were raised and discussed, such as whether the English law doctrine of absolute privilege was known to or recognized in the Roman-Dutch law or in this Island, whether the Ceylon Penal Code was not exhaustive of all defences pleadable to a charge of defamation under the Code, and whether this application for a writ of prohibition could be maintained in the circumstances in which the application has been made. It is unnecessary to form any opinion on these questions to decide the main question which I have now decided.

In conclusion, I would express my regret for the very unusual delay which has taken place in delivering this judgment. The question raised was new to me. The authorities cited were spread over a hundred books. The vacation began within a few days of the conclusion of the argument, and there was considerable difficulty in getting and in carrying about the books with me on my vacation and during the time I have been on circuit, which began in the middle of the vacation and has continued up to the present time, except for a break of a few days in Colombo.

Application dismissed.