CHAPTER V

PARLIAMENTARY PRIVILEGES IN MODERN CHANGING SCENARIO

5.1 Introduction:

In the United Kingdom, no attempt has been made to codify the entire law of privileges historically the House of Commons established its privileges—through long and fierce struggles which led to the establishment of parliamentary privileges. Privileges were claimed as customary rights as a part of the kinds peace and repeated assertion of these rights won for them the status of legally recognized privileges. Now, in the United Kingdom, the privileges of parliament are based partly upon customs and precedents which are found in the rolls of parliament and the journals of the two houses and partly upon certain statutes which have been passed from time to time for the purpose of making clear the particular matters where in the privileges claimed by either house of parliament have come in contact either with prerogative of the crown of the individuals.¹

It is also a common knowledge that the privileges obtained in the House of Commons are not codified and that Commons declined to codify and define their privileges. But

in U.K., the questions of codifying the and defining the privileges has been raised from time to time and came up for consideration of the select committee on account of the suggestion of the General Council of the Bar and the law society. The memorandum submitted by the general council of Bar to the committee said.

The law is not only be devilled with uncertainty, at the best the archaic and arbitrary character of the law is offensive to modern thought. At worst it is a dangerous trap to the public outside Parliament we think the best solution of this problem will be to codify the law and practice relating to Parliament by statute or falling this by resolutions of the House of Commons."²

An article published in the "The Times," London on 17.3.57 also stated poignantly and pithily

"Surely in this country too, the time has come for a general consideration of the issues, the House of the commons is not in practice adapted to the exercise of the function of the judicial mature---the basis of the rules of privileges is clear enough namely the rules are extended to prevent actions, which would or would tend to obstruct the

functioning of the House this is a question with
which the courts could very well deal."³

Again on April 11, 1957, the following motion was
moved in the House of commons to codify and clarify the
law of privileges:

"That it be an instruction to the committee of
privileges in view of the prevailing public
uncertainty and an anxiety on the matter, to
prepare and submit to the House a report which
shall define the nature and clarify the purpose of
Parliamentary Privileges and recommend a
procedure designed to secure its equitable
protection."⁴

The matter was not much discussed as Mr. Sutler,
Lord Privacy seal and leader of the House, observed the
House of the following observation of Sir William Black
stones.

"The dignity and the Prestige of the House
will in great measure be preserved by not
defining the privileges."⁵

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3. Privileges Digest (1957) Vol.; No 1, p. 34. See also Jain D.C. Parliamentary Privileges under the Indian Constitution.
5.2 Position in India

In India, the demand for codification has been more categorical and in uncompromising terms. The law of privileges is contained in art 105 and 194 of the constitution. In these articles the privileges of Freedom of speech in Parliament and immunity to members from any proceedings in any court of law in respect of anything said or vote given by them in Parliament or any committee thereof have been specifically provide for in the Constitution.

Having specifically incorporated the most fundamental Parliamentary privileges and most basic immunity in the text of the constitution, the Constituent Assembly decided to leave the powers, privileges and immunities of each House of Parliament and state legislatures and as well as their members and committees in other respects, to be defined by law by the respective House from time to time.6

In clause (3) of article 105 would have ended there, then there could be no doubt that parliament of state legislature, as the case may be, shall have only such powers and privileges as are defined by law, but this does not mean that they will have none, if no such law is made as

6. Clauses (3) of Articles 105 and 194 of the Constitutions of India.
contemplated in this clause. But the second limb of article 105(3)\(^7\) confers on Parliament the powers, privileges and immunities of the house of commons until no such law is made defining their privileges the specific provisions until so defined by law," has been the main source of inspiration and arguments for recurrent and insistent demand for the codification of Parliamentary Privileges.

Explaining the reasons for leaving the parliament privileges undefined in the constitution, Dr. Ambedkar, the Chairman of the Drafting Committee pointed out that apart from the privilege of freedom of speech and immunity from arrest, the privileges of parliament were much wider and extremely difficult to define. In this view, it was not possible rather practicable to enact a complete code on privileges and immunities of parliament as a part of the constitution and the best course was to leave it to parliament itself to define its privileges and in the meanwhile to confer on parliament the privileges enjoyed by the House of commons, Dr. Alladi Krishnanswami Ayyar sought to justify the interim reference to the house of commons in the following words.\(^8\)

\(^7\) Out. 194(3) provide similar provisions in respect of state legislature.
"If you have the time and if your have the leisure to formulate all the privileges in a compendious form, it will be well and good. I believe a committee Constituted by the speaker on legislative side found it very difficult to formulate all the privileges unless they went in detail into the whole working of Parliamentary Institutions in England and the time was not sufficient before the legislature for that purpose, under these circumstances, submit there is absolutely no question of infra-dig."

It is however left to Dr. Rajendra Prashad, the President to sound a somewhat prophetic note, when he said:

"...the Parliament will define the powers and privileges but until the Parliament has undertaken the legislation and passed it, the privileges and powers of the House of commons will apply so it is a temporary affair."\(^9\)

### 5.3 Opposition to Codification

There is a reason to believe that the formula embodied in article 105 and 194 of the constitution in respect of

Parliamentary privileges had the support and the concurrence of the legislative wing speaking at the Presiding Officers conference in Sept. 1949. Late Sh. G.V. Mavalankar, the speaker of the central Assembly opined clearly"10

"It is better not to define specific privileges just at the moment but to rely upon the precedents of the House of Commons. The disadvantage of codification at the present moment is that whenever a new situation arises, it will not be possible for us to adjust ourselves to it and give members additional privileges. In the present setup any attempt at legislation will very probably curtail our privileges. Let us therefore, content ourselves with our being on par with the House of Commons"

The question of undertaking legislation on the subject has engaged the attention of the Presiding officers since 1938. Before 1947, the question was whether sec. 28 and 71 of the govt. of India Act, 1935 should be so amended so that the privileges of the Indian Legislatures were made the same as those enjoyed by the British House of Commons, and at

the conference held in 1939, the discussion proceeded on the Basis of Bengal Legislature Assembly Powers and Privileges Bill, 1939 on 12th July 1939, the conference agreed that there should be the definition of privileges. However no legislation on the subject was ultimately passed in the Bengal Legislature. In 1947, the conference agreed that each province should send its own draft of the privileges to the Central Assembly Department and thereafter a special conference be called to consider the matter. However, in mein of announcement by the government of U.K. on 20.2.47 regarding the transfer of power to India, the chairman informed the presiding officers of the state Legislature it would serve letter purpose at that stage.

Although between 1938-1947, there was a demand by presiding officers for express legislation to define and clarify the parliamentary privileges but from 1949 onwards, success one speakers' conferences have consistently opposed codification of privileges, and after Independence, as early as 1949, the question of defining the privileges of the legislature came up for consideration by the presiding officers of the various legislatures in September 1949, at a

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12. Ibid., p. 86.
conference of presiding officers, the question was discussed. The chairman, Late Sh. G.V. Malvalankar expressed the view that it was better not to define their privileges and it would render them in to difficulties to adjust to new situations whenever it arises.  

However after some discussion, it was agreed that a preliminary survey might be made to collect ideas as to what the privileges should be and to visualize the points on which the legislation might be necessary. A committee consisting of four speakers was appointed to examine the matter. In their report, the committee of speakers, made *inter alia* the following observation:

"It seems from this, as soon as legislature enacts a law, defining the powers, privileges and immunities of its members the privileges of the House of commons will not be available to the members of legislature. The committee is doubtful as to whether under article 194(3), a legislature can enact a law defining the powers, privileges and immunities. The committee is of the opinion if it is competent to a legislature under this article to enact such a law, then only

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the legislature should take the task of understanding the legislation, otherwise it would not be advisable to undertake any legislation at present whether it is open to legislature to do so or not depends upon the interpretation of article 194(3). As the question is one of the legal interpretation the committee has left the matter for the decision of the speakers conference.\footnote{14}

Accordingly the report of the speaker's committee was discussed in detail at the conference of the Presiding officers held in Aug, 1950 and the question of codification was rejected at its threshold by the chairman Late Sh. G.V. Malvankar when he put it in his opening address to the conference," the constitution has granted maximum possible privileges when the same are equated with those of the House of Commons. The undertaking of legislation in respect thereof is, therefore not at all necessary as an attempt at legislation would mean substantial curtailment of the privileges.\footnote{15}

\footnote{15} Ibid., pp. 88-89.
Again during 1954, when the Press commission also put forth the plea of codification of privileges, commenting on the recommendations of the commission, the chairman of the presiding officer conference held in Rajkot on 3rd Jan, 1955 strongly argued that no doubt, the difficulties of the press were real but from the point of view of the legislature it would not be in its interest to codify the privileges and observed as under:

"Any codification is more likely to harm the prestige and sovereignty of the legislature without any benefit being conferred on the Press. It may be argued Press is left in the dark as to what the privileges are. The simple answer to this is that those privileges, which are extended by the constitution, are equated with the privileges of House of commons. It has to be noted that House of commons does not allow the creation of new privileges; and no codification, therefore, is necessary. The conference of presiding officer, therefore unanimously decided that "in the

16. Press Commission of India Report, 1954 Part I, Para 1096. Earlier the report in Para 1090 has stated that several representations had been made to the commission that the law on the point to be elucidated.
present circumstances codification is neither necessary nor desirable."\textsuperscript{17}

From this it would appear that the main reason for the reluctance of the Parliament to codify the privileges it is submitted with utmost respect, is the apprehension that codification would curtail their privileges and their accompanying apathy of power, which has the support and concurrence of legislature wing.

5.4 Instances for Codification

The aversion for codification really lay in the apprehension of Parliament that once the privileges were embodied in the legislature enactment, it would be open to judicial scrutiny and would be tested on the touch stone of its consistency with the fundamental rights\textsuperscript{18} and that is precisely the main dominating reason for observing calculated silence by Parliament and state legislatures for the last 60 years after the constitution came into force. No doubt this apprehension of Parliament is borne out and justified by the observations of the Supreme Court in Search light case.\textsuperscript{19} Where in the majority opinion after seeking to reconcile the conflict of privileges viz-a-viz

\textsuperscript{19} M.S. M. Sharma v. Shri Krishna Sinha, AIR 1959 SC 395.
Fundamental Rights by the rule of Harmonious construction, categorically observed that in case the Parliament chooses or enacts a law on the privileges the law will be subject to the test that it does not infringe or contravene the transient provisions of the part III relating to the Fundamental Rights.

But the minority opinion delivered by justice K. Soba Rao was not even prepared to make this concession also. He was of the opinion that equation of Parliamentary privileges in India with those House of commons was merely a transitory provision and that privileges were subject to fundamental rights. He concluded that

"It may not be out of place to suggest to the appropriate authorities to make a law regulating the powers, privileges and communities of the legislature instead of keeping the branch of law in a nebulous state with the result that a citizen will have to make a research with the unwritten law of the privileges of House of commons at the risk of being called before the bar of legislature"\(^20\)

It is submitted that if this suggestion was made in 1959, had bear earnestly taken up and the Legislature had

\(^{20}\) Ibid., p. 395 (418).
defined their privileges power and immunities, the special reference no. 1 of 1964\textsuperscript{21} and under article 143 would not been necessary.

It may be pointed out with due respect that the reason that if law is made on privileges, it would be subject to fundamental rights and if no such law is made the privileges would be absolute, is not a sound reason. This is an evasion of our constitutional provisions and particularly of the fundamental right which are given a transcendental position. This reason also involves an assumption that fundamental rights are unwanted obstacles in the way of exercise of Parliamentary privileges indeed, it is a negation of philosophy underlying the concept of rule of law accepted by our constitution. No institution, created by the constitution, particularly the law making bodies of our country could support this reason which cuts across its philosophy.

5.5 Objective under the Constitution

Furthermore, it was the intention of the constitution makers that the provision in this regard contained in clause (3) of articles 105 and 194 are of transitory in nature. These

\textsuperscript{21} In re under Art. 143 AIR 1965, p. 745.
provisions concerning the parliamentary privilege also suggest, the need for their codification.

A close examination of the Constituent Assembly debates also lead to a similar inference and conclusion. In Dr. Ambedkar's view it was not practicable to enact a complete code of privileges powers and immunities of parliament as a part of the constitution and that the best cause was to leave it to the Parliament itself to define its privileges on Parliament and in the meantime to confer all the privileges on Parliament. 22 Shri Alladi Krishna Ayyar while giving reasons in the Constituent Assembly for incorporating the position as it obtained in U.K. at the commencement of the Indian Constitution viz. Articles 105(3) and 194(3) said that there was no need to formulate privileges in a compendious form and it was difficult to do so before thoroughly going into the whole working of the system in England: moreover, there was nothing which prevented parliament from enacting law on the subject. 23

The only reason, therefore emerges, from the debates in the Constituent Assembly, is that there was shortage of time with the Constituent Assembly, and the provision was meant to be transitory in nature.

Again a careful perusal of article 105(3) and 194(3) also suggest that dominant intention of the constitution makers was that the privileges have to be defined by law of land. In order to provide for the interim period preceding codification of privileges. It has been stated that the legislature shall have such powers as are enjoyed by the British House of commons. Suba Rao C.J. after examining this clause thoroughly concludes:

"It is impossible to conceive that people of India solemnly declared that privileges of the legislature should be permanently those of foreign country, particularly when the said country happens to be erstwhile ruler. If the second limb of the clause was intended or even expected to because permanent feature in our constitution the clause would not have limited the operation of the privilege of the House of commons to those existing as on 26 Jan, 1950."\(^{24}\)

The expression 'at the commencement of the constitution' employed in articles 105(3) and 194(3) is also a pointer to the transitory nature of the second limb of these said articles this second part of the clause has the words,

until so defined" which clearly imputes that privileges will have to be defined by law. The majority in the reference case also came to the similar conclusion when it stated.

"The constitution makers must have thought that the legislature will take some time to make laws in respect of their privileges and immunities. During this internal it was necessary to confer on them necessary powers, privileges and immunities which are contemplated by Cl. 3 of article 194 are identical privileges and immunities which every legislature must possess in order that it may be able to function effectively and that explains the purpose of the latter part of the clause (3).\textsuperscript{25}

According to justice K. Suba Rao," it is wrong to interpret this article viz. Article 105(3) as giving this alternative powers to the legislature to make a law or to accept the foreign law for good. If the framers of the constitution would have that very intention, the language of the clause would have been worded as the powers, privileges and immunities of each House of Parliament etc. shall be those of House of Commons, provided that of it so chooses,

\textsuperscript{25} AIR 1965 SC 745.
may make law defining its privileges in substitution or in modification of such powers and privileges of the Houses of commons. But as the article is not so worded then there can be only one interpretation viz. the privileges will have to be defined by law. Again according to his lordship, even if second part of the clause(3) gives the alternative power it is against self respect of our country not to enact a law on the point and to keep it as a moments of our prolonged slavery.

To this last point of arguments of K. Suba Rao, Dr. Pachuri has remarked that if it is taken to be so that it will be moments of our prolonged slavery by not defining the law, then judiciary is the most slavish of slaves in India because it is they, who have even after independence taken resort to interpret the law in India on English precedent and case laws. But it is submitted that the observation of Dr. Pachauri is not sound and terrible the judiciary being the interpreter and guardian of the constitution has to interpret it in view of the most suitable rules of interpretation since

27. Ibid., p. XIX.
the constitution itself provides for the decision of privacy council will be bending in India.\(^{29}\)

Secondly when the Indian Parliament during its tenure of 60 years has gained vast and sufficient experience and precedents, there seems to be hardly any necessity to look to a foreign law and that too without any authoritative statement of powers, privileges of the House of commons, where itself there is a consistent demand in the public and legislation for defining the privileges because of its uncertainty.

It would appear that it is not mere a memento but it is very real and live. Fine and again our legislators speakers, judges and lawyers have to go about finding out parliamentary practice in the U.K. This unhealthy dependence on unwitting law of the British House of commons does not appear to bring any benefit to Indian legislature and citizen. The intervening period, which the constitution maker intended has been understand by a reasonable period.\(^{30}\) And with no stretch of imagination the period of 60 years can be understood as not a reasonable period.

\(^{29}\) Article 372 of the Constitution of India.  
\(^{30}\) K. Soba Rao; Forward to V.G. Ramachandra's Law of Parliamentary Privileges 1966 ed, p. XXIV.
Another apprehension that if law is made, the privilege will became justifiable, if detracts from the prestige of legislature, has also indeed no justification. The prestige of an Institution does not depend upon the justify ability or the non justifiability of its acts, rather it hinges on its performance passed on sound principles. It that be not so, the legislature will lose its prestige and reputation every time its acts are set aside by the judiciary on the other hand its prestige will be enhanced in the public eye. The judiciary and legislature have been assigned the respective sphere by the constitution Parliament had been given power to remove the judges of the High Court and Supreme Court, could it be said that the judiciary has lost its prestige similarly the election of the members of Parliament can be set aside by judiciary and acts of Parliament can be set asides if they are not consonance with the provisions of the constitution could then it be said that Parliament loses the prestige.\textsuperscript{31} Besides these overwhelming reasons in the favour of codification, there are academic lawyer who strongly favour the codification on laws of privilege in India.

Sh. A.P. Chatterjee has suggested defining and codifying law relating to contempt and breach of privileges.

\textsuperscript{31} Ibid., p. XX.
This according to him will serve dual purpose; on the one hand it will enable the citizens to know the law on the subject and on the other hand it will protect them against the arbitrary exercise of powers by Parliament in the case of contempt and breach of privileges.\textsuperscript{32}

Chairman constitutional and Parliamentary studies Dr. L.M. Singhvi also favours the codification. In his view the codification of the privilege would undoubtly strengthen the fundamental rights of speech and expression; and it would be transition from an inchoate and nebulous uncertainty to a state of greater legislative precision and clarity.\textsuperscript{33}

Sh. V.G. Ramachandoan has pleaded for codification, which according to him is in accordance with the constitution and code of privileges will be useful in the prevailing uncertainty.\textsuperscript{34}

Dr. B.R. Chauhan also favours codification of privileges, especially with reference to the branches of privileges and contempt of House, keeping in view the uncertainty in this branch of the law of Parliamentary Privileges.\textsuperscript{35}

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\item \textsuperscript{32} Chatterjee, A.P., Parliamentary Privileges in India, 1971 ed., p. 13.
\item \textsuperscript{33} Singhvi, L.M., the nestim of codification of privileges in India (Journal of Constitutional and Parliamentary studies, p. 295(300).
\item \textsuperscript{34} Rama Chandran; V.G. Law of Parliamentary Privileges in India, 1966 ed.
\item \textsuperscript{35} Dr. B.R. Chauhan, Codification of Privileges : A Search paper.
\end{itemize}
Some of the members of the constituent assembly also strongly objected to the reference to the House of commons and pleaded for enacting law on the matter. Prof. Sibban Lal pleaded for appending an appendix containing the privileges of the House of commons to the Constitution. Late Shri P. Gobindamemon, the then law minister was also in favour of codification. He asserted that, I think it is possible to codify the privileges and there is a good case for its codification especially after presidential reference care codification and definition is however, not impossible task.

Even the eminent persons concerned with the Parliamentary business, Shri S.L. Sakdhar and M.N. Kaul, who earlier were not committed, to the codification have changed their opinions and now plead for codification, by saying that enough experience has been gained during the last 60 years and enough conventions and precedents and case law has developed.

The press commission also made recommendation as early as 1954, when it stated:

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"It would therefore, be describable that both Parliament and state legislature should defined by legislation the precise powers, privileges and immunities art 105 and 194 to contemplate enactment of such a legislation and its during the intervening period that Parliament and state legislature have been endowed with powers, privileges and immunities of House of commons."

5.6 Position in Other Countries

Privileges have been codified in some of the countries having Parliamentary systems namely Kenya, Malaysia, Mauritius, Sri Lanka, Tnoudad Tobaga and Zambia among the commonwealth countries South Africa a former member of the commonwealth has also defined the privileges and the power of their House of Legislatures. However, the Federal Parliament of Canada and Australia40 have not codified the privileges, but these countries have a close relationship with Britain and moreover their cultural and social attitudes are materially similar to those of people in Britain Indian conditions are similar to those of the developing nations such as Kenya, Sri Lanka, and Mauritius etc. And hence the

40. The Parliament of South Australia under Sec. 35 of the constitution act, 1855-56 passed a legislation in 1858 codifying the privileges and powers of local legislature. As a result of this the court began to Southise the warrant issued by speaker. But the legislation were repealed in 1858.
experience of their countries is helping to us. Furthermore there has been also insistent demand even in U.K. to define and codify the law of privilege on account of its uncertainty and vagueness.

From the previous discussions of both the academic circle and Parliamentary using, the arguments against codification has been mainly.

1. That codification of law on the subject will make the privilege of parliament justifiable and will be subjected to fundamental rights.

2. That it is their accompanying apathy for power as it will not be possible to add to the existing privilege once they are codified and Parliament is very jealous of its privileges and does not want its curtailment, rather they want privileges to be flexible.

On the other hand the case for the codification, as discussed has been that :

(1) It is infra dig for a fully independent country to refer to British House of commons for its determination.

(2) The privileges will remain vague, uncertain and inscrutable for the citizen and press, unless parliamentary privilege are clearly defined and precisely delimited through codification.
(3) The constitution specifically envisaged privilege being defined and codified.

(4) In any case there is no question of any fresh privilege being added in as much as (a) under the constitution, even at present Parliamentary privilege having been equated with House of commons as on 26.1.50 are limited and (b) in the House of common itself creation of new privileges is not allowed.

(5) During last more than 60 years sufficient experience has been gained and also considerable case law and conventions have already grown in the country on the subject.

From the foregoing discussions, it transpires that while the Parliament has been against codification but it is submitted that the argument in favour of codification outweighs the opinion against it. It is therefore submitted that the time has come when it is necessary to consider seriously the question of undertaking the legislation on subject. It should no more be allowed to remain in nebulous and uncertain state taking into consideration all the previous aspects and ramifications of this vexed question and in view of the enlightened public opinion the time now ripe for liberalizing the rigid attitude of the Parliament. The ice has
to be cut and it can not be postponed indefinitely on the ground of complexity of the subject.

5.7 **Constitution (44th Amendment) Act, 1978**

The question of codification has also to be examined in view of the Constitution (44th amendment) act 1978 which omits the reference to the house of commons and instead refer to the privilege as may be defined from time to time by law and until so defined, shall be those of that House and of its member and committees immediately before the coming into operation of sec. 15 of the Amendment Act.\(^41\) Thus the constitution seeks to do away with the theory of evolution of the power and privilege of the House of Parliament, its members and committee thereof but would retain the over provisions of articles 105 and 194 that privileges will be those as may be defined by law from time to time.

Secondly it is submitted that although the reference to House of Commons has been omitted but it still remain indirectly. In order to examine and ascertain as to what are those privileges of Indian Legislature, its members and committees there of during the period between the coming into force\(^42\) of the section 15 and 26 of the constitution (44th amendment) act 1978 and the Indian Constitution, we must

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42. The Section 15 and 26 of the Constitution (44th Amendment) Act, 1978 have not come into operation as on 19.6.79.
go to the House of Common to ascertain the nature and extent of privileges', and therefore, the reference though indirectly becomes both necessary and inevitable.

It is submitted, therefore, that the constitution (44th amendment) Act, 1978 does not in any may minimize the necessity of codification of the privileges and it is suggested that immediate steps for codification of Parliamentary privileges in the need of the hour. Parliament is a part of democratic process and the democracy and defined by Great President Abrahman Lincoln" People takes priority rights of the people should take precedents over the privileges of Parliament accept there precedents to fundamental rights causes obstructions to the democratic function of the Parliament. Parliament being representative of the people should not become the master of the people by not codifying the privileges. Every citizens should have the right to criticize the functioning of any institution but to lack of Parliament. When we are proceeding towards transparency in the functioning of the state, then Parliament is also one of the limb of the State and can not claim immunity for its sections which are in contravention or encroach upon the fundamental rights of the citizens. The apprehension of Parliament, as discussed above is false and without any
substance libelous statements made by any person attributed to any organ of the state, including the Parliament will be taken sufficient care under the ordinary law of the land.

Therefore, the Parliament should take necessary steps for codification of Privileges now the Indian Democracy is well natured, its fear is unfounded. Rather codification will enhance the status and reputation of Parliament and the servant of the people will remain servant, and the master will remain the master.