The Privilege of Members of Parliament from Detention

On 20 April 1971, Mr Gordon Bryant, ALP Member for Wills in the Commonwealth House of Representatives, raised a matter of privilege with respect to the commitment to prison of Mr T. Uren, ALP Member for Reid, on 10 April 1971; the House resolved to refer the matter to its Committee of Privileges. Mr Uren's imprisonment had lasted for three days and occurred in the following circumstances. He had participated in a moratorium march in Sydney and considered that in the course of this march he had been assaulted by a constable of police. Accordingly he brought an information against a constable in the Court of Petty Sessions at Sydney; on 5 January 1971, the Court held that the information failed (in substance because brought against the wrong constable) and on the application of the defendant constable Mr Uren was ordered to pay the defendant's costs in the sum of $80. The SM allowed three months for payment, and as mandatorily required by s. 82(ii) of the NSW *Justices Act* of 1902 he further judged that in default of payment within that time Mr Uren be imprisoned for forty days. Mr Uren considered that he should not have had an order for costs made against him and he did not pay the costs within the time provided. Accordingly a warrant to commit him was issued on 8 April 1971 under s. 87 of the *Justices Act*, and it was pursuant to this warrant that on 10 April he was arrested and committed to Long Bay Jail. Three days later, the costs were paid by Mr Clive Evatt Jnr (against Mr Uren's will), and Mr Uren was discharged.

S. 49 of the Commonwealth constitution confers on the Commonwealth Parliament the 'powers, privileges and immunities' of the UK House of Commons.[1] One of the oldest of those privileges is immunity of Members from various forms of legal process which might detain them or otherwise prevent them from rendering their services to the House; this privilege exists during sessions of the House, and for forty days before and after a session. However, the immunity from legal process has been progressively narrowed and one of the distinctions drawn in this process of narrowing is between 'criminal' and 'civil' causes. Generally speaking, Members were and are protected against detention in a civil but not in a criminal cause. The problem before the Select Committee was: did the detention of Mr Uren breach this privilege?

The Committee considered submissions on the question (written and oral) from Mr A.G. Turner,[2] the Clerk of the House of Representatives, from Mr C.D. Harders, the Secretary of the Commonwealth Attorney-General's Department and from myself. By majority, the Committee concluded that the commitment had constituted a breach of Parliamentary Privilege but that 'having regard to the complexities and circumstance of the case . . . the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which has occurred'. The report was presented on 7 May 1971,[3] and to it were attached the submissions by Mr Turner, Mr Harders and myself.

On 23 August 1971, the former Attorney-General and present Minister for

1. Until otherwise declared by Parliament; no such declaration has been made.
2. He confined himself to the collection of basic data and documents and did not express a view on the substantive issue.
3. 1971 Parliamentary Paper No. 40.

Foreign Affairs, Mr Nigel Bowen, QC, moved that the House note the Committee's report. He also informed the House that he personally disagreed with the view expressed by myself and preferred the view expressed by Mr Harders. He also read a letter received from Mr Askin, the Premier of New South Wales, who said that he and his Attorney-General likewise disagreed with the Committee report and with my opinion and considered them inconsistent with two decisions of the Supreme Court of New South Wales. However, since the Committee was not asking the House to say anything specific about the nature of the privilege in question, and was recommending no further action on the particular case, Mr Bowen invited the House simply to carry the motion for noting the report. Statements by leave were made by various members, but none of them dealt with the substance of the problem raised by the case. The most satisfactory feature of the debate was to show a general desire that the privileges of the Commonwealth Parliament should be investigated in depth and that proposals for their re-statement or codification should be considered.

The specific problem raised by the Uren case has never previously arisen in Britain, in Australia or, so far as I can ascertain, in any other part of the Commonwealth which has inherited the English law on Parliamentary Privilege. This is surprising because the privilege against detention has been asserted by the House of Commons at least since the 15th century; the number of consequential cases brought before Courts of Law is small, but this is mainly because the House of Commons itself dealt with the vast majority of relevant cases, as have most of the British-derived legislatures in systems having a similar privilege rule. In Australia, the Parliaments of Victoria and Western Australia have, like the Commonwealth Parliament, been granted by or under their respective constitutions all the Commons privileges.[4] A similar course was taken in relation to the South Australian Parliament, but with restrictions on the privilege from detention which would probably ensure that circumstances like that arising in the Uren case do not give rise to a claim of privilege.[5] Professor Campbell,[6] Australia's most authoritative writer on these questions, says that the position in the other States is not entirely clear, but it may be inferred from the scanty authority she mentions that in New South Wales, Queensland and Tasmania if members have any immunity from arrest it would not extend to circumstances like those of the Uren case; probably there is no immunity at all.[7] However, the undoubted existence of the privilege in relation to the Commonwealth Parliament makes the matter of Australia-wide importance, and for reasons to be mentioned later it cannot be assumed that such privileges will soon be abolished so far as they exist in the Federal, Victorian, South Australian and West Australian cases.

4. *Constitution Act Amendment Act* 1958 ss. 12, 13 (Vic); *Parliamentary Privilege Act* 1891 s. 1 (WA). The latter Act goes on to restrict the House's powers in relation to contempts, but not the privileges of members.
5. *Constitution Act*, ss. 38, 39.
6. *Parliamentary Privilege in Australia* (1966).
7. This is because those three States have not adopted *en bloc* the privileges of the House of Commons, and the specific references to privileges in their relevant legislation do not mention the privilege from arrest. See, eg, Queensland *Constitution Acts* 1867–1961 ss. 41–52. The Privy Council has held in several cases, following *Kielley* v. *Carson* (1842) 1 Moo. P.C. 63, that the implied powers of 'colonial' legislatures are very limited; for reasons given by the Full Court of the Supreme Court of NSW in *Norton* v. *Crick* (1894) 15 NSW R. 172, it is unlikely that immunity from civil arrest would now be treated as implied because 'necessary' to the existence of a legislature, mainly because the possibility of arrest in such cases has been reduced in modern times.

My advice to the Select Committee was that Mr Uren had been detained in circumstances constituting a prima facie breach of the privilege. The advice of Mr Harders was to the contrary. The difference between us depended basically on a difference as to the proper way of formulating the privilege, though we may also have taken somewhat different attitudes to the interpretation of the (NSW) *Justices Act* provisions under which Mr Uren was detained. Perhaps our differences were also due to differing approaches to questions of legal interpretation, mine being more historical and teleological and his more conceptual.

The privilege from detention has never been stated in statutory form, nor even, with any careful attention to the phrasing of the matter, in a Commons resolution or judicial decision. Hence it was natural enough that when seeking some authoritative formulation, Mr Turner should have collected for the Committee a series of quotations from Sir Erskine May's standard work, *Parliamentary Practice*.[8] Notwithstanding its celebrity, I have always found *May* an unsatisfactory work, not well arranged and not written with the care which one expects to find in an authoritative legal text. This applies to the treatment of the 'Privilege of Freedom from Arrest or Molestation' in Chapter V. The chapter gives an excellent historical survey of the development of the privilege, and of the policies which caused its original existence and its progressive limitation, but I think it would be wrong to treat the general expressions used by May as if they were statutory expressions or even considered dicta in the judgments of courts. Professor Campbell writes of the same matters in her Chapter 4 titled 'Immunity of Members of Parliament from Legal Process', and her language seems to me more carefully chosen.

To illustrate the contrast, we find in *May*[9] the following general statement: 'the privilege of freedom from arrest is limited to *civil causes,* and has not been allowed to *interfere* with the *administration* of criminal justice . . .'. (Emphasis supplied). Professor Campbell writes:[10] 'if a Member of Parliament is arrested or imprisoned for a criminal offence, his status in no case entitles him to special consideration'. It can be seen that the formulation by May tends to concentrate attention on the *general character* of a *litigious event* in which a Member of Parliament is involved. The formulation by Professor Campbell concentrates attention on the *specific character* of an action taken in respect of a *particular* Member. If one begins with May's general formulation it is natural to continue (as Mr Turner did in his memorandum) with May's summary of the history, as follows:[11]

> In early times the distinction between 'civil' and 'criminal' was not clearly expressed. It was only to cases of 'treason, felony and breach (or surety) of the peace' that privilege was explicitly held not to apply. Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanours, in the growing list of statutory offences, and, particularly, in the case of preventive detention under emergency legislation in times of crisis, there was a debatable region about which neither House had until recently expressed a definite view. The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character.

8. 17th edition by Sir Barnett Cocks.
9. P. 78.
10. P. 59.
11. P. 78.

Pursuing such a line of thought, one naturally turns to legal dictionaries, and phrases judicially defined, to see if there is some reasonably clear conception of a 'criminal cause', and of a 'civil cause'; then we can fill out May's language by incorporating those concepts into his propositions. The volume of authority relevant to the question is less than might be expected, but it is nearly all one way; the notion of a 'criminal cause' or a 'criminal proceeding' has been given an extended scope, with the emphasis on procedure rather than on the 'essential nature' of the conduct under consideration, though references to 'punishment' as an ingredient in the situation do occur; in mixed situations, where the matter may appear in some respects civil and in others criminal, the tendency is to classify the whole matter as 'criminal'. If the indications of these authorities are carried uncritically into the language of May, the result is to suggest very strongly that Mr Uren was detained in a criminal cause or matter. Such a decision would also establish consistency in the use of the relevant expressions over a wider field of legal discourse.

The principal English decisions leading to the result just mentioned fall into two groups: first, a series of cases under the *Debtors Act* 1869, beginning with *Middleton* (1871),[12] of which *Edgcome* (1902)[13] is commonly mentioned; second a series of cases under the *Judicature Act* 1873 beginning with *Mellor* (1880),[14] of which *Seaman* (1896)[15] is commonly mentioned. The first line of cases established that the exceptions to the abolition of imprisonment for debt, laid down in s. 4 of the *Debtors Act,* should be treated not simply as leaving *enforcement* by imprisonment open in those cases; the excepted cases are by implication to be considered as *offences,* so that the imprisonment also has a quality of *punishment.* Thus, in *Middleton,* default by a trustee under the third exception was so treated: incidentally, *Hatherley* L.C. asserted[16] that sums recoverable summarily before justices under the second exception must be something in the nature of a penalty, a view according with other dicta of the period in which the notion of a summary civil jurisdiction is still treated as against the order of nature. It is fairly plain that in *Edgcome, Vaughan Williams,* L.J., who gave the principal opinion, was not too happy about this aspect of *Middleton,* and preferred the earlier view[17] that imprisonment related to the payment of a sum of money should, prima facie, be treated not as a punitive but as a means of enforcing payment. However, he thought that the 'punitive' theory of the *Debtors Act* exceptions was now too firmly established, and accordingly that a commitment for failure to pay rates had to be treated as punitive under the second exception in s. 4 of the *Debtors Act.* It is not surprising that their Lordships felt some qualms at having to treat non-payment of rates as quasi-criminal, but this was the inevitable consequence of the highly artificial interpretation placed on the *Debtors Act.*

The second series of cases was concerned with the interpretation of s. 47 of the *Judicature Act* 1873 which, in effect, excluded the Court of Appeal from general appellate jurisdiction 'in any criminal cause or matter'. In *Mellor,* the defendant failed to send a child to school, in breach of bye-laws under the *Elementary Education Act* 1870; this might have been treated as giving rise only

12. *Middleton* v. *Chichester,* L.R. 6 Ch. 152.
13. *Edgcome* v. *Edgcome* [1902] 2 K.B. 403.
14. *Mellor* v. *Denham,* 5 Q.B.D. 467.
15. *Seaman* v. *Burley* [1896] 2 Q.B. 344.
16. At p. 156.
17. Repeated, apparently *per incuriam,* by *Mellish,* L.J. in *Cobham* v. *Dalton* (1875) L.R.10 Ch. 655.

to a 'civil penalty', but was treated as 'in truth a criminal offence'. The decision typifies the tendency of nineteenth century English law to treat even the most trivial breaches of statutory law or law derived from statutes as criminal, a view contrasting with the contemporary tendency of US law to create a special category of 'infractions' which are neither criminal nor civil.[18] *Seaman* concerned an application to enforce payment of a poor rate by warrant of distress, the warrant being enforceable in default of payment by imprisonment. *Esher* M.R. said, 'it seems to me that the question is really one of procedure'.[19] *Kay* L.J. said 'it appears to me that, if there be a provision in a statute that that which is merely a civil liability may be enforced by a proceeding in its nature criminal, that proceeding is nonetheless criminal for the purposes of s. 47 of the *Judicature Act* 1873 because it is applied to a civil liability'.[20] Hence, it can be seen that the doctrine of this line of cases has come to be that the essential nature of the liability to be enforced is irrelevant for classifications of legal procedure. However, their Lordships, as is common, reinforced this clear doctrine by hinting[21] that the liability to pay the poor rate in any event itself smacked of crime, because 'it is a payment to be made in pursuance of a public duty, which cannot be enforced by action or in any other way than by proceedings before magistrates'. (Nevertheless, the court was by now prepared to concede that magistrates could have some civil jurisdiction.) *Esher* M.R. summed up the test for such cases thus:[22] 'the question is not whether the proceeding must, but whether it may end in imprisonment'.

These lines of English authority were much quoted in two decisions of the Supreme Court of New South Wales which in turn are relied on by Premier Askin and Attorney-General McCaw of New South Wales in the letter they wrote to the Commonwealth Prime Minister objecting to the decision of the Privileges Committee mentioned above. These cases are *Walsh* (1912)[23] and *Duffy* (1958).[24] *Walsh*, a Full Court decision, was concerned with the question whether summary proceedings for detinue of goods brought by a husband against a wife under s. 32 of the *Police Offences Act* 1901–8, were 'criminal proceedings' so as to be maintainable (contrary to the common law as to actions between spouses) pursuant to s. 20 of the *Married Women Property Act*. The Court held that the proceedings were 'criminal' for this purpose, relying particularly on the formulation in *Seaman* as to the *possible* ending of the proceedings in imprisonment; that possibility existed because the Justices had a discretion to order imprisonment in default delivery of the goods.[25] It is clear that *Street* C.J., like *Vaughan Williams* L.J. in *Edgcome*, was not altogether happy about this result,[26] but felt compelled by the weight of the English authority to treat as criminal something which might in its nature be thought a civil matter. However, he consoled himself with the further thought—also, as we have seen, prominent in the English cases such as *Seaman*—that in any event unlawful detention could well be thought of as a 'police offences' matter, saying 'the matter is, in point of

18. See 50 *Corp. Jur. Sec.* Sec. 77. The American doctrines arose from the necessity to reconcile summary proceedings with constitutional guarantees of jury trial.
19. At p. 346.
20. At pp. 349–50.
21. See especially *Esher* M.R. at p. 347.
22. At pp. 349–50.
23. *Ex parte Walsh*, 12 S.R. (NSW) 306.
24. *Ex parte Duffy, re Automobile Advance Agency Co Ltd*, 58 S.R. (NSW) 343.
25. The possibility arose from the combined effect of s. 32 of the *Police Offences Act* and s. 82 of the *Justices Act* under which Mr Uren was ordered to be imprisoned.
26. See p. 314.

truth, *quasi* criminal'.[27] He rejected a contention that the English cases could be confined to the interpretation of the particular statutes there under consideration, and treated the resulting rule as generally applicable, at least prima facie, in all matters of criminal procedure. In *Duffy*, the Full Court under the next *Street* C.J. was directly concerned with a criminal appeal question; the principal opinion is that of *Owen* J., with whom *Street* C.J. and *Roper* C.J. in Eq. concurred. The question was whether s. 122 of the (NSW) *Justices Act* permitted an appeal to Quarter Sessions from a magistrate's order for the return of goods made under the combined provisions of the *Hire-Purchase Agreements Act* and the *Justices Act* s. 32. Since *Owen* J. thought, obviously correctly, that s. 122 permitted appeals in such cases even if they were to be treated as civil, it is arguable that what he then said about s. 32 of the *Justices Act* creating a criminal cause was *obiter*. However, he went on to adopt the 'possible imprisonment termination' theory of *Seaman* and *Walsh* as showing the criminal nature of the proceedings for the purpose of the grant of appellate jurisdiction, in case such a characterization was relevant; so far, this added nothing to the earlier cases. But he also introduced an aspect not mentioned in the earlier cases, namely that the imprisonment authorised by the *Justices Act* (both in s. 32 and in s. 82) could be at the discretion of the Justices either hard or light labour; 'such an impriosnment is not therefore a mere imprisonment as a judgment debtor'. It was another of these consolatory suggestions designed to quieten doubts about a general doctrine which only *Kay* L.J. in *Seaman* has been prepared to state in its full simplicity and artificiality.

That the doctrine emerging from the above cases is not the most natural way of considering provisions like s. 82 of the (NSW) *Justices Act* can be seen from the language of the High Court in *De Vos* (1947)[28]. The case concerned the refusal of a magistrate in New South Wales to apply s. 82 in relation to a fine and costs imposed under the *Commonwealth Conciliation and Arbitration Act*, which conferred jurisdiction on State courts. *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. held that the magistrate had acted wrongly, and the decision rests mainly on the Commonwealth Act and on questions of inconsistency of Commonwealth and State law. However, they had occasion in passing to mention the character of s. 82. *Latham* C.J. referred to it as a 'criminal remedy'.[29] *Rich* J. said that s. 82 'provides imprisonment as the method of enforcing the fine'.[30] *Starke* J. said: 'that provision' (sc. requiring that the defendant be ordered to be imprisoned unless the fine and costs are paid) 'is imperative but it is not the imposition of a substantive or new penalty but a mode of execution—the enforcement of payment of a penalty adjudged to be paid'.[31] *Williams* J. described s. 82 as the 'method of enforcing the payment of the penalty and costs'.[32] These dicta clearly treat s. 82 as a means of enforcing or carrying into execution a primary order, with the implication that the quality of the proceedings depends upon the nature of the primary order, and is not derived from s. 82 itself.

In my view, the reasoning of the cases so far considered has little relevance to the question of parliamentary privilege, having regard to the history and purposes of the rules governing the latter. In those cases, the Courts have been concerned to develop a precise and artificial rule for determining questions of

27. P. 315.
28. *De Vos* v. *Daly* 73 C.L.R. 509.
29. P. 515.
30. P. 522.
31. P. 517.
32. P. 518.

legal procedure. So far as the decisions follow a policy, it is the defensible one of ensuring that certain clusters of cases are for all purposes treated as coming within the system of jurisdiction and procedural rules generally known as 'criminal', even though at certain points the result is to treat conduct as criminal which would not ordinarily be described as such. The Parliaments, however, are not interested in or concerned with questions of that sort. They began with a general rule that Members should not be obstructed from discharging their duties by the operations of the law, but subject to a countervailing principle that the privilege 'is not to be used to the danger of the Commonwealth'.[33] The exceptions to the privilege were originally defined as covering only 'treason, felony, or breach of the peace',[34] but have been extended to other misdemeanours and summary offences as they were established and have come to include wartime detention under national security arrangements. It is clear from the history outlined by May, and from the eloquent discussion of the privilege by *Brougham* L.C. in *Wellesley* v. *Duke of Beaufort* (1831),[35] a case of contempt of Court, that all attention is concentrated on the position of the individual Member of Parliament who has been detained. Can it be said of him that what he has done is, in *Brougham* L.C.'s words, 'in *substance* not criminal but civil'?[36] It follows that the fears expressed by Mr Askin in his letter were groundless. There is no conflict between the decisions of his Supreme Court and the finding of the Privileges Committee in the Uren case; they dealt respectively with two completely disparate universes of legal discourse.

The excessive generality of May's reference[37] to 'interference with the administration of criminal justice' is sufficiently shown by his own text. The Commons interfered freely with the administration of criminal justice by successfully asserting the privilege from legal process in order to protect Members from subjection to subpoena as witnesses,[38] and from jury service,[39] and Members could not give bail in criminal matters since their immunity extended to detention as a means of enforcing bail undertakings.[40] The Commons approached these issues not on grounds of procedure, but of substance, as is vividly illustrated by their handling of committals for contempt. They never asked whether the committal occurred in the course of a criminal cause or a civil cause. The enquiry was, irrespective of the nature of the 'cause' in general, whether the specific contemptuous conduct of the Member in question was such that it could in a substantial sense be called 'criminal', or whether on the other hand it was a mere failure by the Member to carry out a judicial order of a procedural kind which was enforceable as a contempt.[41] It should be noted that under the test of 'possibility of imprisonment', all contempts are criminal.

A subsidiary test formulated by Lord Brougham in *Wellesley* and adopted with approval by Professor Campbell[42] is whether the imprisonment is imposed 'for the purpose of coercing the defendant into doing or abstaining from doing

33. May p. 78.
34. *Ibid.*
35. 2 Russ & M. 639.
36. *Ibid.*, at p. 667; my emphasis. The contempt was abduction of a Ward of Court.
37. P. 78.
38. Report of Commons Select Committee on Privilege 1967, para. 102. This privilege is preserved in the South Australian Constitution, s. 39.
39. May p. 77; the exemption existed and still exists by privilege as well as under *Jury Act* provisions.
40. May p. 73.
41. May pp. 82–4.
42. *Op. cit.* p. 63.

some act, or for the purpose of punishment'. The test was quoted with approval by *Scarman* J.[43] in *Stourton* v. *S*, [44] one of the very few reported modern cases where a question of privilege has been judicially considered; a Peer was held exempted by privilege from attachment for failure to comply with orders made against him under the *Married Women's Property Act 1882*. For these reasons, Professor Campbell suggests that if the defendant in *Seaman* had been a Member of Parliament he might have been able to claim privilege, a view with which I respectfully agree. However, it should be observed that this subsidiary formulation may have its dangers, which were illustrated by some of the things written and said in connection with the Uren Case. Philosophers have proposed that there might be such a thing as punishment divorced from the commission of an offence,[45] but I should think that this is bad moral philosophy, and it is certainly bad law. Associated with any legal enquiry as to a 'punishment' must be an enquiry as to whether the person to be 'punished' has done some act which could conceivably be treated as amounting to an offence, for which the 'punishment' is imposed. We have seen above that even when elaborating the doctrines of *Seaman* and of *Edgcome,* the courts endeavoured to locate some punishable conduct. May's reference to 'cases which, while not strictly criminal partake more of a criminal than a civil character',[46] should be interpreted accordingly. It is not the general setting of a case but the nature of the specific allegation involved against a specific Member of Parliament which needs to have this preponderantly criminal character, and it is implicit in *Wellesley* that there should be *offence* as well as punishment. Lord Brougham said:[47] 'If the contempt savours of criminality, and the sentence is penal, that . . . appears to be enough' (sc. to defeat the privilege).

Applying these views to the Uren case, the inescapable consideration which drove me to conclude that the detention was in breach of privilege arose from the circumstance that Mr Uren's only possible 'offence' had been a failure to pay costs. It may be doubted whether any general characterization of a compendious provision like s. 82 of the (NSW) *Justices Act* should ever determine a privilege matter, since this section is clearly applicable in respect of orders to pay money, even as against unsuccessful *defendants,* which could not possibly be regarded as 'criminal' for privilege purposes. Owing to the history of the section, a choice between two levels of imprisonment has been introduced in a setting where, for some purposes, such a choice may seem inappropriate. However, with respect to *Owen* J., even this choice is quite consistent with a view of the section as intended only to provide a means of execution in relation to primary orders which are wholly civil; presumably, a magistrate would be entitled to vary the nature of the imprisonment not only for punitive purposes (where the primary order is plainly criminal or quasi criminal) but also on his estimate of the kind of imprisonment most likely to ensure payment (where the primary order is plainly civil). In all the discussions over the Uren case, nobody has had the hardihood to suggest that an order to pay costs, made against an unsuccessful informant, which was the primary order here relevant, in itself amounted to the imposition of a criminal penalty. A magistrate who did try to introduce a punitive element into the assessment of costs would assuredly find himself reversed on appeal. Hence the only element in the proceeding which could conceivably be treated

43. Now Chairman of the English Law Commission.
44. [1963] 1 All E.R. 606.
45. Honderich, *Punishment,* Chapter 1.
46. P. 78.
47. *Ibid.,* p. 667.

as criminal or quasi criminal was the failure of Mr Uren to pay the costs once they had been ordered. There is no common law or statutory rule making failure to pay costs an offence, and such failure could be an offence only on the theory that failure to observe a magisterial order is in itself an offence. There is actually no general doctrine to that effect, but even if there were, the offence could only be in the nature of contempt of court, and the principles outlined by May in relation to contempts would have to be applied when the question arises in the context of privilege. This would be an obvious case of 'contempt in procedure', and so not a contempt involving the standards of conduct and the intent appropriate to a parliamentary decision that Mr Uren was being detained in respect of criminal conduct.

The *Commons Select Committee* mentioned above[48] recommended that the privilege of members against legal detention should be abolished. May and others point out that the scope of the privilege was much reduced by nineteenth century changes in the law which removed imprisonment as an ordinary step in civil procedure, both mesne and by way of execution. Actually imprisonment remains more important in practice than these dicta suggest, chiefly because of the number of men imprisoned for failure to pay maintenance to illegitimate children and to deserted wives and children. During the Uren debate, Mr Uren himself pointed out that about one-third of the persons in detention in New South Wales were there in substantially civil causes. A consideration of the Uren case has caused me to doubt the wisdom of abolishing the privilege against detention. I do not think that an unsuccessful prosecutor MP should be in gaol during Parliamentary sessions, nor do I think that Members of Parliament generally ought readily to be allowed such excuses for non-attendance in Parliament. Furthermore, I doubt whether it is desirable that Members should be held under arrest or imprisoned in connection with those parts of the criminal or quasi criminal law, such as status offences, offences of vicarious liability and offences of strict liability, where individual criminal knowledge and intent on the part of the Member himself is lacking. There is also a case for privilege in petty criminal matters like parking offences. It would certainly be desirable that many, if not all, aspects of Parliamentary privilege should be placed under the jurisdiction of the Courts so that we could avoid such disturbing scenes as occurred in the *Fitzpatrick and Browne* (1955)[49] case, when the accused, whatever their faults, were hectored by Parliamentary silks and denied representation by counsel. There is, however, still much to be said for the English medieval view that the duties of Members to their Parliament should be given first priority, and there is much to be said for leaving to committees of the Houses, rather than to a Court, the question whether the privilege from detention ought to be asserted in a particular case. The privilege need last for only, say, seven days before and after Periods rather than Sessions, which would still leave plenty of time during adjournments and between Sessions in which those concerned can press claims against Members with the full rigour of the law.

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48. See note 38.
49. *R* v. *Richards ex parte Fitzpatrick and Browne*, 92 C.L.R. 157.

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