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COMMISSION OF INQUIRY INTO
COMPENSATION ARISING FROM SOCIAL
SECURITY CONSPIRACY PROSECUTIONS

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Parliamentary Commission of Inquiry

Presiding Member : The Hon. Sir George Lush
Members : The Hon. Sir Richard Blackburn, OBE
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Special Report of the Parliamentary Commission of Inquiry

1. In our Special Report to you dated 5 August 1986 we reported that the Commission had, on that day, adjourned further hearings until 19 August or such later date as might be fixed by notice to the Judge's solicitors.

2. At its sitting this morning the Commission published reasons for its ruling, given on 5 August 1986, on the meaning of "misbehaviour" for the purposes of section 72 of the Constitution. A copy of the reasons has been provided to the Judge's legal advisers.

3. A copy of the reasons is attached to this report. The Commissioners understand that this report and the reasons will, if the Presiding Officers so wish, be tabled in the Parliament. The Commissioners respectfully express the opinion that the reasons should be made public. They may be thought to have some importance in the study of the law of the Constitution, and they should be considered by the appropriate Committee of the Constitutional Commission.

19 August 1986

.....Presiding Member

.....Commissioner

.....Commissioner

Senator the Hon. Douglas McClelland
President of the Senate

The Hon. Joan Child MP
Speaker of the House of Representatives

Re The Honourable Mr Justice L K Murphy

Ruling on Meaning of "Misbehaviour"

Reasons of The Honourable Sir George Lush

By Thursday 17 July 1986 counsel assisting the Commission had caused to be delivered to those representing Mr Justice Murphy twelve documents each purporting to set out, a specific allegation of conduct by the Judge (Parliamentary Commission of Inquiry Act, S.5(2)). Two further such documents have since been delivered.

At a sitting of the Commission on that day a decision was made to hear argument on the meaning of the word "misbehaviour" in S.72 of the Commonwealth Constitution, with a view to determining whether the allegations made in the twelve documents, or in other documents of the same kind which might be delivered after 17 July, asserted facts which were capable of constituting misbehaviour. The Commission heard that argument on 22, 23 and 24 July.

For the Judge, Mr Gyles and Mrs Bennett argued that the word "misbehaviour" denoted (a) misconduct in office, and (b) conviction for an infamous offence. They accordingly argued that, since none of the allegation documents asserted a conviction, they could only be supported if the facts asserted amounted to misconduct in office. Subject to further argument on the scope of the concept of misconduct in office, they argued that all or at least most of the documents would be found to fail to allege facts capable of constituting misbehaviour.

Their argument was based on a long line of English legal literature dealing with the tenure of offices held "during good behaviour", beginning with the Earl of Shrewsbury's Case in 1610, (1) and Coke's Institutes, published in 1641. In the former it is said that "there are three causes of forfeiture ... abusing, not using, or refusing." Not using included non-attendance when attendance was a public duty. The relevant passage in the latter states that the Chief Baron of one of the English courts of the time, the Court of Exchequer, held office during good behaviour, while the judges of the other courts held office during the King's pleasure. It then proceeds (2) : - "and (during good behaviour) must be intended in matters concerning his office, and is no more than the law would have

implied, if the office had been granted for life." At the time when this was written public offices were treated as a form of property, and the tenure of office was defined in terms similar to those used in grants of land for comparable tenures. The effect of a grant of office during good behaviour was that the grantee held the office for life subject to the termination of his interest for breach of the condition of good behaviour.

The argument traced the passing down of Coke's "misbehaviour in matters concerning his office" through writings of the 18th, 19th and 20th centuries. Many, and perhaps most, of these repetitions reflect no new thought, but they add the prestige of their authors to the original proposition. I note, at this stage, two of them.

In R. v Richardson (1758), (3) a case relating to the termination of an office in a local government corporation, Lord Mansfield said:-

> "There are three sorts of offences for which an officer or corporator may be discharged.
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
> 2d. Such as are only against his oath, and the duty of his office as a corporator and amount to breaches of the tacit condition annexed to his franchise or office.
> 3d. The third sort of offence for which an officer or corporator may be displaced is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law."

There then follows a series of observations on the mode of "trial" for the various "offences". Lord Mansfield's conclusion is that "for the first sort of offences, there must be a previous indictment or conviction", but that for the second sort the corporation has the power to try the issues. He does not specifically refer to the third sort, but the implication seems to be that the corporation will have power to try that sort of offence also.

Counsel informed us that the reference in Richardson's case was the earliest reference of which they were aware to the termination of an office upon conviction for an infamous offence. It seems more than possible that this concept is associated with that of forfeiture of property after conviction for treason or felony, and judgment of attainder. If so, it is another instance of the assimilation of public office to property.

Before turning to the second authority which I wish to quote, I mention that the English Act of Settlement of 1700, now to be found in the Supreme Court of Judicature Act 1925, provides that Judges of the High Court and Court of Appeal are to hold office during good behaviour, "subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament."

As will be seen, this Act has been treated by legal writers as creating two separate modes of dismissal - for breach of the condition of good behaviour, by the executive, and without cause shown by Parliament.

The second authority to which I wish to refer is a book written by Dr Alpheus Todd, "Parliamentary Government in England", 1892 edition. The relevant passages in this work have been extensively quoted in later writings.

At p.191 Todd wrote:-

> "Before entering upon an examination of the parliamentary method of procedure for the removal of a judge under the Act of Settlement, it will be necessary to inquire into the precise legal effect of their tenure of office 'during good behaviour,' and the remedy already existing, and which may be resorted to by the crown, in the event of misbehaviour on the part of those who hold office by this tenure.
>
> 'The legal effect of the grant of an office during "good behaviour" is the creation of an estate for life in the office.' Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, first, the improper exercise of judicial functions; second, wilful neglect of duty, or non-attendance; and, third, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury."

The authorities cited by Todd for his statement include an opinion of the crown law officers of the Colony of Victoria in 1864, as well as what may be called the traditional references to Cokes Institutes and Reports.

Later, at p.193, Todd dealt with the power of address given to the two Houses by the Act of Settlement:-

> "But, in addition to these methods of procedure, the constitution has appropriately conferred upon the two Houses of Parliament - in the exercise of that superintendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability of this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof."

It may be noted that in this passage Dr Todd used the word "misbehaviour" in a sense wider than that of his earlier definition.

The citation by Todd of the opinion of the crown law offices of Victoria leads me to refer to the position of judges in the Australian colonies before Federation.

Colonial judges traditionally held office during the pleasure of the Crown, but as self-government extended through the Australian colonies the constitutions granted to them contained provisions reproducing the Act of Settlement. Before the introduction of the Act of Settlement legislation, the position of colonial judges had come to be regulated by Burke's Act (22 Geo III c.75), which gave the Governor and Council of a colony power to remove a judge "if he shall be wilfully absent ... or shall neglect the duty of such office or otherwise misbehave therein". Appeal from such a removal could be taken to the Privy Council. Two Australian judges were removed under the provisions of this Act, Willis (New South Wales) (4) and Montagu (Van Dieman's Land) (5). It appears from a memorandum written by the Lords of the Council in 1870 that colonial legislatures might address the Crown for the removal of a judge under this Act. (6)

Reference to the Victorian opinion of 1864 shows that it is correctly and adequately quoted by Todd. In the opinion as in Todd, the word misbehaviour is used to describe both misconduct in office and misconduct not in office.

Counsel assisting the commission disputed all the arguments described above. Coke C.J.'s statement concerning the Barons of the Exchequer could be accepted, but there was no statement that a judge holding office during good behaviour could not be dismissed for conduct outside office which cast doubt on his fitness for office or which undermined his authority and the standing of his Court. They pointed out that there are, with the exception of cases relating to colonial judges, no reported cases of the removal of judges, and that the terms of the Act of Settlement have never been the subject of judicial interpretation. They argued that the word "misbehaviour" used in relation to judges did not have and never had had the meaning contended for. The only judicial authority for the argument that, apart from misconduct in office, conviction for a criminal offence was the only other form of misbehaviour, was said to be R. v Richardson (3), which did not concern a judge and which, having been decided in 1758, after the Act of Settlement, was decided at a time when the law relating to the termination of judges' appointments had deviated from that relating to most other offices. This case had never been given in judicial decisions the significance attributed to it by a succession of authors. They also contended that the second passage from Todd quoted above involved a rejection, not an acceptance, of Richardson's case.

Counsel for the Judge contended that, against the background of the law in England and Australia, the debates on the draft Australian constitution in 1897 and 1898 suggested an intention to adopt the meaning of misbehaviour which they said was relevant to forfeiture of an office held during good behaviour - i.e. misbehaviour in office as described by Dr Todd.

Counsel assisting the Commission challenged this view also.

It is convenient to deal with the debates at this stage. They began in 1897 with a draft in this form:-

> "Clause 70. - The justices of the High Court and of the other courts created by the Parliament:
>
> i. Shall hold their office during good behaviour:
>
> ii. Shall be appointed by the Governor-General, by and with the advice of the Federal Executive Council:

iii. May be removed by the Governor-General with such advice, but only upon an Address from both Houses of the Parliament in the same Session praying for such removal:

iv. Shall receive such remuneration as The Parliament may from time to time fix; but such remuneration shall not be diminished during their continuance in office."

By the end of the 1897 debate subclause (iii) had been amended to read:-

"iii. Shall not be removed except for misbehaviour or incapacity, and then only by the Governor-General in Council upon an address from both Houses of the Parliament in the same session praying for such removal."

By the end of the 1898 debate subclause (iii) read:-

"iii. Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the grounds of proved misbehaviour or incapacity."

The clause had assumed its final form by March 1898, the Drafting Committee having at that stage omitted the original sub-clause (i).

Counsel read to us passages from the debates which they submitted supported their respective arguments. No purpose would be served by quoting these again. It must be remembered that the use of the debates in a task of construing the Constitution is limited, and is best confined to obtaining a broad appreciation of dangers to be avoided or goals to be achieved - see Sydney v Commonwealth of Australia (7) and R. v Pearson, ex p. Sipka (8).

My view is that the debates show a lively appreciation of the special need which federation created for independence of the judges; that concern was felt that the Houses should not be able to remove judges without cause shown; and that although Dr Todd's views on misbehaviour as a breach of condition of office were placed before the representatives they took a general view that conduct which showed the judge to be unfit for office or which tended to undermine the judge's authority or public confidence in his court was properly a ground for removal. This last is illustrated by (a) the references with approval to Montagu's Case (5) and particularly to the allegation quoted

below from that case; (b) the absence of any suggestion that the introduction by amendment of the words "misbehaviour or incapacity" in subclause (iii) would narrow the grounds for removal to those said by the authorities to be appropriate to tenure during good behaviour; and (c) that the opposition to the introduction of the words was not based on the proposition that they would narrow the grounds upon which the Houses could act, but on the proposition that they might have the effect of depriving the Houses of the right of final decision by opening the way to challenges in the courts to the decisions of the Houses.

For the Judge, it was argued that in the drafting of the Constitution the power of the executive to terminate the office of a judge held during good behaviour had been eliminated, that the sole power to initiate removal had been vested in the Houses, and that they had in turn been restricted to dismissal upon grounds upon which the executive could have acted under the Act of Settlement or the Constitutions derived from it. It was argued that the course adopted, so interpreted, was appropriate to perceived goals of eliminating executive interference and giving judicial independence the special protection it needed in a Federation.

I find myself unable to accept this argument. My opinion is that S.72 must be construed against the background that it was designed to bring into existence an entirely new State. It was being written on a clean page. It was creating institutions based largely but not wholly on British antecedents, but in circumstances in which it cannot be assumed that the draftsman intended to reproduce the British antecedents.

Section 72 sweeps away the concept and finally the language of tenure of office which can be forfeited by the grantor for breach of condition by the grantee. Instead, in its original form it gave the sole power of removal to Parliament, to be exercised at will or, in other words, without the need to show cause. Then for the better protection of the independence of the judges it was amended so that a cause for dismissal had to be assigned and proved - a provision designed (a) to make impossible attempts to remove judges for purely political reasons and (b) to secure to the judge a right to defend himself.

The word chosen to describe the cause was "misbehaviour". This was a word traditionally used in defining the tenure of an office, but it is an ordinary English word of wider meaning than the so-called technical meaning assigned to it in the

context of tenure. If it were necessary to demonstrate this, the broad use of the word in the passages quoted from Dr Todd provides the demonstration. In its broad meaning it may be impossible to define exact limits of inclusion and exclusion. This, however, is acceptable when the word is used in the context of Parliamentary action: it is not here used as a word in a condition of defeasance of an interest in the nature of property. The latter concept has been eliminated - the power given to the Houses by the Act of Settlement was seen as being of a different nature from that of the executive enforcing forfeiture of an interest. This last is stated in the final sentence in the second quotation from Dr Todd above.

I must, however, note an expression used by Windeyer J. in Capital T.V. and Appliances Pty. Ltd. v Falconer (9). His Honour described the tenure of office of judges of the High Court as "terminable, but only in the manner prescribed for misbehaviour in office or incapacity." The meaning of "misbehaviour" in S.72 does not appear to have been the subject of argument in this case, and His Honour does not explain his addition of the words "in office". I have respectfully come to the conclusion that this dictum should not influence the opinion I have otherwise formed.

Accordingly, my opinion is that the word "misbehaviour" in S.72 is used in its ordinary meaning, and not in the restricted sense of "misconduct in office". It is not confined, either, to conduct of a criminal nature.

This interpretation can be said to leave judges open to the investigative activities of the contemporary world, and so to expose them to pressures to which, in the interests of independence, they should not be exposed.

The other side of this is that, however S.72 may be interpreted, judges are not immune from the activities to which I have referred, though it may be that there is a higher incentive for the investigator if there is a possibility that he may procure a removal. Judges, and in this context Federal judges in particular, must be safe from the possibility of removal because their decisions are adverse to the wishes of the Government of the day. Section 72 intends to afford this by requiring proof of misbehaviour. They cannot, however, be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them.

This seems to have been the attitude of the representatives at the Constitutional Convention. I have referred to the apparent approval through those debates of Montagu's case. One of the matters in that case on which Mr Justice Montagu was called upon to show cause why he should not be suspended was his "bill transactions, and pecuniary embarrassments, being apparently of such a nature as to derogate essentially from his usefulness as a Judge."

In argument in the Privy Council it was contended that "the various pecuniary embarrassments of the Appellant, while sitting as a Judge, in a Court composed of only two Judges, and necessarily requiring the presence of both, for the determination of all cases brought before it, was such as to be wholly inconsistent with the due and unsuspected administration of justice in that Court, and tended to bring into distrust and disrepute the judicial office in the Colony."

Montagu was in fact removed, not suspended. No reasons for judgment were given in the Privy Council, but it was the aspects of the case to which the above quotations refer which appear to have had the general approval of the delegates.

In essence, I have reached the conclusion which I have set out without querying the correctness of Todd's descriptions. We heard a powerful argument that these were not correct descriptions of the English position of which Todd was writing, and I do not wish it to be thought that I reject that argument. I do not find it necessary to state a conclusion upon it.

The view of the meaning of misbehaviour which I have expressed leads to the result that it is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values, are the standards to be expected of the judges of the High Court and other courts created under the Constitution. The present state of Australian jurisprudence suggests that if a matter were raised in addresses against a judge which was not on any view capable of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so.

Parliament may, if it should ever happen that a number of attacks on judges are made, establish conventions. Dr Todd states that "constitutional usage forbids either House of Parliament ... from instituting investigations into the conduct

of the judiciary except in cases of gross misconduct or perversion of the law, that may require the interposition of Parliament in order to obtain the removal of a corrupt or incompetent judge."

Finally, I state my opinion that the documents of allegation are not defective by reason of the fact that they individually may not contain allegations of either misconduct in office, incapacity, conviction for crime, or criminal conduct.

Footnotes

(1) 9 Co. Rep. 42,50; 77 E.R. 493, 504.

(2) 4 Co. Inst. 117

(3) 1 Burr. 517, 538

(4) Willis v Gipps (1846) 5 Moo. P.C. 379; 13 E.R. 356

(5) Montagu v Van Dieman's Land (1849) 6 Moo. P.C. 489; 88 E.R. 773

(6) 6 Moo. P.C. Appx. 9,12; 88 E.R. 827

(7) (1904) 1 C.L.R. 208, 213-4

(8) (1983) 152 C.L.R. 254, 262

(9) (1971) 125 C.L.R. 591, 610.

PARLIAMENTARY COMMISSION OF INQUIRY

Re The Honourable Lionel Keith Murphy
Ruling on Meaning of "Misbehaviour"

Reasons of The Honourable Sir Richard Blackburn OBE

The question for present determination by the Commission is the proper construction of the phrase "proved misbehaviour" in section 72 of the Constitution. There is no dispute that "misbehaviour" includes misconduct in the actual exercise of judicial functions, including neglect of, or refusal to perform, such functions. That needs no discussion, since none of the allegations before the Commission is of conduct of that kind. What is in issue is the nature of the misconduct required to satisfy the section, when it is not in the exercise of judicial functions, and whether in that event it is limited to the commission of a crime (or an "infamous crime") of which the judge has been been convicted.

Counsel for Murphy J. contended that the statement in Todd's Parliamentary Government in England which in substance is repeated and approved in many text-books (e.g. all editions of Halsbury's Laws of England) provides a complete answer to the question of the true construction of section 72. Counsel's contention was, first, that "proved misbehaviour" must necessarily mean what, at the time when the Constitution came into force, was meant by "misbehaviour" in the law applicable to English and Irish judges of the superior courts in those countries; and secondly, that the statement of Todd gives an accurate account of that law.

The passage in Todd is as follows:

> "The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, first, the improper exercise of judicial functions; second, wilful neglect of duty, or non-attendance; and

> third, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury.....These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour."

The quotation is from the revised edition of Todd's work (1892) at page 192.

Of this passage, some things, material to the question now before the Commission, must be said. In the first place, the sentence "Behaviour means behaviour in the grantee's official capacity" is plainly (as indeed the rest of the passage shows) not to be taken at its face value: misbehaviour outside the grantee's official capacity may be relevant.

Secondly, for the statement that conviction by a jury is required to establish misbehaviour outside the duties of the office, Todd cites R. v. Richardson (1758) 1 Burr. 517 as authority. The question whether that case does indeed support that proposition will be examined later.

Thirdly, as authority for the statement that the principles stated apply to all offices, whether judicial or ministerial, that are held during good behaviour, Todd cites Coke, 4 Inst. 117. This is incorrect: the passage in question (4 Inst. 117) merely says that certain judges, the Attorney-General, and the Solicitor-General, were appointed during good behaviour, and that certain other judges held their offices "but at will." Todd cites no other authority for this proposition.

Fourthly, the whole passage assumes, (or at least carries no suggestion to the contrary) that the distinction between "official misconduct" and "misbehaviour outside the duties of his office" is clear. This as is suggested later, may not necessarily be so.

In my opinion it is of capital importance to see the doctrine enunciated by Todd in its historical setting. English judges of the superior courts have for more than 250 years, and Australian Supreme Court judges have for more than 100 years, held their offices on "Act of Settlement" terms; that is to say, during good behaviour (leaving aside for the moment exactly what that means) but with the separate and independent liability to be removed on the address of both Houses of Parliament. It is acknowledged that the Houses of Parliament may address without regard to the letter of the law of good behaviour. A case of removal by address, therefore, would not be authoritative on the question of what is "misbehaviour", even if there were any significant number of them; in fact there is only one which went to the stage of the actual removal of the judge. Even more significant is the fact that since the end of the sixteenth century no judge holding office simply during good behaviour, or on "Act of Settlement" terms, has been removed by the Crown without address from Parliament, under the supposed power to do so, and in view of the existence of the procedure by address, and the predominance of the power of Parliament over that of the Executive, it seems almost unimaginable that any such case will ever occur

It seems to me, therefore, that a statement such as Todd's as to what constitutes judicial misbehaviour is a purely theoretical construction, derived from several sources:

(a) cases decided some centuries ago on the removal of office-holders;

(b) a line of cases extending into the eighteenth century on the removal by a corporation of one of its corporators; and

(c) the judgement of the Court of King's Bench, delivered by Lord Mansfield, in R. v. Richardson. Each of these elements requires some examination.

The removal of the office-holder by the grantor of an office held during good behaviour was the subject of much old learning which need not be examined here. As Todd says, the tenure of the office was considered to be an estate for life, and the office was regarded as property. The method by which such an estate was terminated apparently varied according to the nature of the office and the manner in which it was created; this topic is not material to the question before the Commission except in two respect relating to criminal law.

In the first place, if an office-holder was convicted of treason or felony, he automatically suffered attainder - which included the forfeiture of his property, including his office: see Cruise's Digest, 4th edition page 113, paragraph 99. Attainder was a very old doctrine which was abolished in England in 1870.

Secondly, it is said in some of the books that at common law, forfeiture of the office was a penalty available to a criminal court for an offence committed by an office-holder in the course of performing the duties of the office: see Bacon's Abridgement, 7th edition, volume VI page 45:

> "There can be no doubt but that all officers, whether such by the common law or made pursuant to statute, are punishable for corrupt and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices, etc.....As to extortion by officers it is so odious that it is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed."

At page 46 the author describes the several kinds of bribery, and proceeds:

> "And these several offences are so odious in the eye of the law, that they are punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment."

Another such authority is Hawkins' Pleas of the Crown, 1st edition, chapter 66, which is entitled "Offences by Officers in General." Section 1 appears not to deal strictly with criminal proceedings, but with forfeiture of an office for misbehaviour in it; but Section 2 clearly implies that forfeiture, or "discharge", may be a punishment at common law for misbehaviour in the office, citing the examples of a gaoler who voluntarily allows his prisoners to escape, or barbarously misuses them, and that of a sheriff who persuades a jury to underprize goods in the execution of a fi.fa.

The significance of these two connections between the law as to office-holders, and the criminal law, will appear later.

It appears that in the seventeenth and eighteenth centuries the law relating to the rights of corporators in municipal corporations became assimilated in some respects to the law relating to the tenure of offices. In Bagg's Case (1616) 11 Co. Rep. 97a, the "mayor and commonalty" of a borough were ordered by the Court of King's Bench to restore a burgess whom they had purported to "amove." The court held that in order to disfranchise a freeman of a corporation, the corporation must have power either by the express words of its charter, or by prescription; but that in the absence of such power the freeman must be convicted before he could be removed; Magna Carta, chapter 29, was given as the authority for this proposition. This ruling (as to the power of the corporation) was afterwards reversed, as will be seen later.

In R. v. Hutchinson (1722) 8 Mod. 99, mandamus was sought against the mayor and aldermen of a city to restore the relator to the office of "capital burgess" in the corporation, of which he had been disfranchised by the mayor's court for offering a bribe to a freeman of the city to vote for a candidate at an election for mayor. It was argued that as bribery was a crime at common law, the relator could not be disfranchised in the absence of a conviction, but the Court of King's Bench by majority held that notwithstanding the absence of a conviction, he could be disfranchised because the offence committed was a wrong to the corporation itself, and in the relator's capacity as a burgess.

In R.v. Mayor of Doncaster (1729) I Ld. Raym. 1564, mandamus was sought to restore the relator to the office of capital burgess in the corporation, from which he had been dismissed by the common council. The ground of his dismissal was that he had been dishonest in the office of chamberlain (which was one involving the care of the council's money) - an office to which only a burgess could be admitted. The court refused the order on the ground that the offences were alleged to have been committed in the office of chamberlain, and not as a capital burgess. In my opinion it is impossible to treat this case as any authority on the subject of "misconduct not in office." The report certainly does not so treat it.

R.v. Richardson (1758) was a decision of the Court of King's Bench delivered by Lord Mansfield. An information in the nature of quo warranto was laid against the defendant to show by what authority he claimed to be

one of the "portmen" of the borough of Ipswich. One of the defendant's pleas was that he had been appointed in the place of a person who had been lawfully removed by the Great Court of the borough. The crucial question in the case was whether this removal was indeed lawful.

Lord Mansfield stated the question as being whether the corporation had power to remove a portman. After referring to Bagg's Case, and quoting a relevant passage, he went on:

> "There are three sorts of offences for which an officer or corporator may be discharged.
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
> 2d. Such as are only against his oath, and the duty of his office as a corporator and amount to breaches of the tacit condition annexed to his franchise or office.
> 3d. The third sort of offence for which an officer or corporator may be displaced is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.
> The distinction here taken, by my Lord Coke's report of this second resolution ...."

(i.e. the passage he quoted from Bagg's Case)

> " .... seems to go to the power of trial, and not the power of amotion: and he seems to lay down, "that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment.""

This last proposition is Lord Mansfield's paraphrase of, or conclusion from, Bagg's Case; it is not a quotation made verbatim. He continues:

> "So that after an indictment and conviction, at common law, this authority admits "that the power of amotion is incident to every corporation." But it is now established, "that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction.""

This is one of two passages in the judgment (the other being in different words but of exactly the same meaning which occurs a little later) which were taken in later law to be of great authority.

The court next asserted the power (whether express, prescriptive, or neither) of every corporation, to try, as well as "amove" for, offences of the second category, i.e. misconduct in office. This is inconsistent with, and supersedes, Bagg's Case, on this point, but is irrelevant to the present question. In the course of establishing this point, the court repeated in different words the proposition I specially mentioned above, as follows:

> "For though the corporation has a power of amotion by charter or prescription, yet, as to the first kind of misbehaviours, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise: these ought to be established by a previous conviction by a jury, according to the law of the land; (as in cases of general perjury, forgery, or libelling, etc)."

Two things must be said of this proposition. In the first place, it is not clear whether the court intended it to be of general application to any office, or to be confined, as it certainly is in words, to the power of a corporation to remove a corporator or an officer of the corporation. If the latter alternative is correct, there is less warrant for the broad authority attributed to it by later writers such as Todd.

Secondly, the proposition seems to be lacking in earlier authority. It is one thing to say that attainder effects a forfeiture of an office (see above) or that forfeiture of an office may be a penalty available to the criminal courts for the appropriate common law misdemeanours (see above): it is quite another to say that conviction is necessary for the removal of a judge for non-official misconduct. For this, no authority other than R. v Richardson appears to have been cited; there is certainly no case in which it has been decided.

The proposition was not necessary for the decision in R.v Richardson, and did not purport to apply to the removal of a judge.

Thus, it seems to me, the basis of Todd's statement of the law relating to the removal of judges may not be as firm as it has been assumed to be. But I am not concerned to assert whether, or not, Todd's statement of

the law is "correct". I doubt whether that question has much significance, because, as I have said above, the law supposed to be applicable in England to the removal of a judge otherwise than by address has not for centuries (possibly never) been applied, and since the passing of the Act of Settlement, probably never will be applied. Whatever be the "correctness" of Todd's formulation, it seems to me a most insecure foundation for the proper construction of Section 72 of the Australian Constitution.

Moreover, there is a latent difficulty in any formulation which contains a distinction between misconduct in office and misconduct not in office. Into which category does abuse of the office come? - for example, using the office to assist in gaining an advantage for a private or non-judicial purpose. What if a judge interviews an officer of the Taxation Department on the subject of his own (or a friend's) income-tax liability, and attempts to persuade the officer by impressing him with his status and legal knowledge as a judge? Many similar or more serious possibilities can easily be imagined. If Todd's formulation be correct, this is not misbehaviour of which the law can take cognizance. It is not "the improper exercise of judicial functions"; it is "misbehaviour outside the duties of his office" yet it could not result in a conviction for any offence.

Let it be assumed, however, that there is a doctrine of the common law as to misbehaviour by an office-holder, and that (however it is formulated) it must be regarded as settled law. There is, nevertheless, in my opinion no compelling reason for construing Section 72 as incorporating that doctrine by implied reference. I think, moreover, that there are sufficient reasons for construing "misbehaviour" in a wider, non-technical sense.

It is appropriate to consider Section 72 in conjunction with the kinds of tenure of judicial office which were available, so to speak, for adoption, with or without amendment, or for use as a model, by the framers of the Constitution.

At common law, the condition of tenure of judicial office could be at pleasure of the Crown or in any less precarious mode. Most English judges in centuries earlier than the eighteenth, and many colonial judges up to the twentieth century, held their offices at pleasure. Scottish judges have always held their offices simply during good behaviour. Since the Act of Settlement, English judges, Irish

judges (until Irish independence) and later the judges of self-governing parts of the Crown's dominions such as the Australian States, held office under "Act of Settlement" terms, i.e. during good behaviour but with the liability of removal by address of both Houses.

With all these choices before them, the framers of the Constitution chose a novel tenure, not the same as any of those existing. They deliberately rejected the American model of impeachment, and they were very concerned to protect the judges from both the Parliament and the Executive and from both the Commonwealth and the States. I adopt, with respect, the statement by the Hon. Andrew Wells, in his opinion, of the evils of mischiefs which the framers of the Constitution were concerned to avoid.

They did not expressly create a tenure during good behaviour. We were referred to certain dicta of judges in the High Court of Australia in support of the view that Section 72 implies tenure during good behaviour, though it is not so expressed. In Capital TV and Appliances Pty Ltd v Falconer (1971) 125 C.L.R. at pp. 611-612, Windeyer J. said:

> "...the tenure of office of judges of the High Court ... is correctly regarded as of indefinite duration, that is to say for life, and terminable, but only in the manner prescribed, for misbehaviour in office ..."

(the last two words were introduced by his Honour; they are not in Section 72)

> " ...or incapacity. That is because, quite apart from the provisions of the Act of Settlement, and long before it, an estate to be held during good behaviour, or "so long as he shall well demean himself" if not expressly limited for a term, meant an estate for life defeasible upon misbehaviour."

His Honour was concerned in that case to show that the tenure of judges of the High Court and of other courts created by Parliament was of indefinite duration, i.e. for life; he was not, I think with great respect, directing his mind to the question whether whatever law is applicable in England to misbehaviour by a judge appointed quamdiu se bene gesserit is also applicable to judges holding office under Section 72. His remarks do not disturb the accuracy of the proposition that Section 72 does not expressly create tenure during good behaviour, so that to that extent the tenure it does create is sui generis. The same may be said of the dicta in Waterside Workers' Federation v J W Alexander Ltd (1918) 25 C.L.R. 434, to which we were also referred.

The tenure of judges under Section 72 is sui generis in two other respects: first, the address for removal must be "on the ground of proved misbehaviour or incapacity"; secondly, there is no other ground of removal. Such tenure is altogether novel. It has been described as a coalescence of the two aspects of tenure under the Act of Settlement; this is a figure of speech. The truth is that tenure under Section 72 is homogeneous and unique. In my opinion, therefore, it is not a necessary conclusion that "misbehaviour" in the section bears the same meaning that it bears in England in relation to tenure during good behaviour.

My opinion is fortified by noting that judicial misbehaviour or misconduct was referred to in the eighteenth and nineteenth centuries in several contexts in senses which are wider than that contended for by counsel for Murphy J.

The material words of Section 2 of the Act 22 Geo. III c.25 (Burke's Act, 1782) are:

> " ... be wilfully absent ... or neglect the duty of such office, or otherwise misbehave therein

This provision is for the removal of office-holders in the colonies, subject to an appeal to the Privy Council. It has been applied to judges, but it has not been suggested that in its application to judges, the word "misbehave" in the section is to be construed in accordance with Lord Mansfield's dictum in R. v Richardson; indeed, it has been otherwise construed (see below). There seems to be no good reason why "misbehave" in Burke's Act and "misbehaviour" in the Australian Constitution should be construed in different senses.

In Montagu v the Lieutenant-Governor of Van Dieman's Land (1849) 6 Moo. P.C. 489, the grounds on which the removal of a judge under Burke's Act was eventually upheld by the Judicial Committee included:

(a) an allegation that upon being sued for debt, he as defendant had applied successfully to set aside the plaintiff's action on the ground that that court would not be lawfully constituted if he were absent from the Bench, and he could not sit as a party.

(b) "the general state of pecuniary embarrassment in which he was found to be."

The point that this conduct did not justify amotion was explicitly taken by counsel for the appellant, but the Judicial Committee held that "there were sufficient grounds for the amotion of Mr Montagu." This is of course inconsistent with the doctrine formulated by Todd.

It is worth notice that the first of the two grounds quoted above was an example of abuse of the judicial office. What Montagu J. did was to make a lawful interlocutory application in the action against him, and the application succeeded. What was objectionable about this conduct was that it had the effect of denying justice to one of his creditors. This result was achieved by exploiting the fact that the law required him to sit in order to constitute the court for the hearing of the action. Was this misconduct in office, or outside the office?

In 1862 the law officers of the Crown advised the Secretary of State for the Colonies, with reference to Burke's Act, that

> "What the statute contemplates is a case of legal and official misbehaviour and breach of duty; not any mere error of judgment or wrong-headedness, consistent with the bona fide discharge of official duty. And we should think it extremely unadvisable that this power should be exercised at all, except in some very clear and urgent case of unquestionable delinquency ... " (quoted in Todd, Parliamentary Government in the Colonies, 2nd edition p.836)

Notwithstanding the use of the phrase"legal and official misbehaviour" it would seem that this opinion does not assume that conviction for a crime is necessary in the case of conduct not in the exercise of judicial office; indeed, it could not do so without implying that Montagu's Case was wrongly decided.

It must be added here, in order to explain what follows, that a question of judicial misbehaviour was several times referred to the Judicial Committee under another provision, Section 4 of the Judicial Committee Act 1833 - a provision couched in general terms which authorizes the Crown to refer any question to the Committee.

In 1870 the Secretary of State for the Colonies again requested advice, this time from the Judicial Committee itself, on the subject of the removal of colonial judges, and in consequence a Memorandum (6 Moo. P.C. 9) was drawn up and laid on the table of the House of Lords. This Memorandum purported to explain the views of the Committee "as far as they may be gathered from reported cases, and from the experience of the last thirty years." It is important to note that all methods of removal were considered, i.e. cases under "Act of Settlement" provisions (Boothby J. of the Supreme Court of South Australia); under Burke's Act; and also cases referred

under the Act of 1833. The significant feature of this Memorandum, for present purposes, is that it contains no suggestion that misbehaviour warranting the removal of a judge was to be defined in the strict sense set out by Todd which rests on the authority of R. v Richardson. The principal purpose of the Memorandum appears to have been to advise on procedure, but that is immaterial. Their Lordships used the phrases "grave misconduct", "gross personal immorality or misconduct", "corruption", "irregularity in pecuniary transactions", and "a cumulative ... case of judicial perversity, tending to lower the dignity of his office, and perhaps to set the community in a flame." In a separate memorandum by Lord Chelmsford expressing agreement with the principal Memorandum, his Lordship used the phrases "judicial indiscretion or indecorum", ebullitions of temper and intemperate language, leading continually to unseemly altercations and undignified exhibitions in Court", grave charges of judicial delinquency, such as corruption", "immorality, or criminal misconduct."

It is difficult to believe that if judicial misbehaviour was, in 1870, correctly and definitively formulated in the manner in which Todd did so, their Lordships in their memoranda made no reference to that doctrine.

All the foregoing discussion relates to the question whether "proved misbehaviour" in Section 72 of the Constitution must, as a matter of construction, be limited as contended for by counsel for Murphy J. In my opinion the reverse is correct. The material available for solving this problem of construction suggests that "proved misbehaviour" means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question. If it be a legitimate observation to make, I find it difficult to believe that the Constitution of the Commnwealth of Australia should be construed so as to limit the power of the Parliament to address for the removal of a judge, to grounds exressed in terms which in one eighteenth-century case were said to apply to corporations and their officers and corporators, and which have not in or since that case been applied to any judge.

In my opinion the word "proved" in the section implies that Parliament may adopt such method of proof as it sees fit, but may not address arbitrarily or without adverting to the question of proof. In each case, Parliament must decide, first, whether there is proved misbehaviour,and

secondly, whether bearing in mind the great importance, implied in the Constitution, of the independence of the judges, it should address for the removal of the judge.

PARLIAMENTARY COMMISSION OF INQUIRY

Re: The Honourable Mr Justice L.K. Murphy
Ruling on Meaning of "Misbehaviour"

Reasons of The Hon. Andrew Wells, QC

By virtue of sub-section (1) of s.5 of our Governing Act, we are responsible for determining, in order to advise Parliament, whether, in our opinion, any conduct of the Honourable Lionel Keith Murphy (hereinafter called "the Judge") has been such as to amount to "proved misbehaviour" within the meaning of section 72 of the Constitution.

There have been tendered to us some fourteen allegations, pursuant to sub-s.(2) of s. 5 of our Act, and I do not understand Mr Gyles to be submitting that any of them is defective for want of specificity. He has, however, challenged them in argument by, in effect, a demurrer; he contends that none of them, on their face, is capable of amounting to "proved misbehaviour" within the meaning of s. 72 of the Constitution and should be rejected now without moving to receive evidence in their support.

Mr Gyles contends that "misbehaviour" in s. 72 extends to conduct falling within either (or both) of two categories only, namely, misbehaviour in office, as that expression was understood at common law (in the relevant sphere of public law), and conduct not pertaining to the holder's office amounting to an infamous crime of which the holder has been convicted. It must be inferred that, in all the relevant circumstances, the draftsmen of our Constitution simply lifted the received meaning of misbehaviour in that sphere and carried it, unchanged, into s.72 notwithstanding that the procedures contemplated by that section are not the procedures in which it acquired its now received meaning.

Mr Charles has argued that s.72 has presented to the nation a provision that is, and was intended to be, a new creature; that the authorities relied upon by Mr Gyles do not make good the proposition they are said to establish; that even if they did, the Constitution has, by necessary implication; rejected it; and, that the word 'misbehaviour' should receive its natural meaning in the legislative and constitutional context in which it appears.

We are indebted to counsel for the thorough research they conducted, and for the exhaustive and cogent arguments they presented. It is here worth mentioning that the argument we listened to was the first ever presented in forensic conditions; as far as we are aware, no other Court or Tribunal has been called on to resolve the aforementioned issues, and no text writer or other authority has received the benefit of, or indeed, has in and through their own publications conducted, such a wide ranging debate.

Both counsel relied, in particular, on the Convention Debates (Adelaide (1897) and Melbourne (1898)) to support their arguments. The use to which they may legitimately be put will be separately considered; it will be found that they are indeed helpful, but cannot be decisive.

Speaking generally, counsel's researches comprised case law - some old, some more or less modern; extracts from text writers; certain Parliamentary papers containing opinions claimed to be authoritative; and extracts of legislation used for comparison or comment.

All the materials have been considered and reconsidered in conjunction with our own notes and outlines of argument handed up by counsel.

Apart from particular arguments based upon selected passages or decisions, the wealth of material made plain what a wide range of legislative models, of legal principles and rules, and of constitutional practices and conventions were available to our founding fathers and their draftsmen for consideration when the Constitution was being fashioned and drafted.

The Convention Debates make fascinating reading for the historian, and give grounds for all manner of speculation about what reasoning and motives were prompting the speakers, but the use we may make of them is limited.

In The Municipal Council of Sydney v. The Commonwealth (1904) 1 C.L.R. 208 (which concerned the interpretation of s. 114 of the Constitution) counsel proposed to quote from the Convention Debates a statement of opinion that the section only referred to future impositions. One after another the judges intervened, and the following colloquy (page 213) took place:

[GRIFFITH, C.J. - I do not think that statements made in those debates should be referred to.

BARTON, J. - Individual opinions are not material except to show the reasoning upon which Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole.]

The intention could be gathered from the debate, though it would not be binding upon the Court. The Federalist is referred to in American Courts.

[O'CONNOR, J. - That is an expert opinion, or a text book. Debates in Parliament cannot be referred to.]

There is a difference between parliamentary debates and those of the Federal Convention. The latter were the deliberations of delegates sent by compact between the States.

[GRIFFITH, C.J. - They cannot do more than show what the members were talking about.

O'CONNOR, J. - We are only concerned here with what was agreed to, not with what was said by the parties in the course of coming to an agreement.]

It might be the duty of the Court to modify the literal meaning of the words if they clearly failed to express the intention of the delegates.

[O'CONNOR, J. - The people of the States have accepted it as it now stands

BARTON, J. - You could get opinions on each side from the speeches in debate.

GRIFFITH, C.J. - They are no higher than parliamentary debates, and are not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth.]

This case was approved and applied in The Queen v. Pearson; ex parte Sipka (1983) 152 C.L.R. 254 in which Gibbs CJ, Mason J. and Wilson J., at page 262, approved the use of the debates for the purpose of seeing what was the evil to be remedied or what was the apprehended mischief that a particular provision was designed to prevent. If, in the Debates, it is permissible to identify an apprehended mischief to be prevented or a remedy to be provided, one may also, in my opinion, ascertain whether any relevant mischief or evil was not predicated or discussed.

Within the limits so imposed, I am of the opinion that the Convention Debates disclose -

(1) The delegates were not concerned with any supposed evil or mischief that might flow from a draft that used such general words as "misbehaviour" or "misconduct" without qualification. They did not discuss a circumscription of the words, with the exception of the word 'proved'.

(2) They were concerned with the mischief or evil of not sufficiently protecting High Court judges in a federal system, and, in particular, with the mischief or evil of allowing Addresses for removal without cause assigned. It goes without saying that they were equally opposed to the mischief or evil of leaving the judges to removal at the will or whim of the Executive.

(3) They were concerned with over-protecting the same judges (against erosion of their independence) to the extent of leaving corrupt or plainly defective judges on the High Court.

(4) They were concerned with avoiding the mischief or evil of allowing an errant judge to set the judicial arm against the Parliamentary arm, after the latter had addressed the Governor General seeking removal.

(5) They were concerned with avoiding the mischief or evil of removing a judge by procedures that denied him natural justice.

> (6) It may perhaps also be inferred that they were impressed with the mischief that was thought to flow from any Constitutional provision that would permit control of the judges to pass out of the hands of Parliament.

In my judgement, no more can be usefully extracted from the Debates for present purposes. It would be contrary to principle to analyse individual speeches and to attempt to trace the ebb and flow of opinion, argument, or misconception as the Debates progressed.

Reference to the Debates bears naturally on a fundamental tenet that should govern our approach to the Construction of s.72, which I make no apology for emphasising. We ought continually to bear in mind that we are construing a written constitution, not an unwritten one; it is not a domestic Act of Parliament. A written constitution must be understood as intended and calculated to apply to a growing and changing nation, and its language, so far as it may fairly extend, should be construed so as to accommodate that intention and aim.

That proposition should not be understood as a high sounding flourish without practical effect. One only has to recall how the construction of Section 92, of the external affairs power (paragraph XXIX of Section 51), and of the expression "With respect to", evolved to realize that the proposition has a capacity to bite. The fate of the XII Tables of ancient Rome testifies to the ultimate demise of rigid codes. The foregoing proposition may become relevant when standards of judicial behaviour fall for consideration.

Section 72 reads:

> The Justices of the High Court and of the other courts created by the Parliament -
>
> (i.) Shall be appointed by the Governor General in Council:
>
> (ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii) Shall receive such remuneration as the parliament may fix; but the remuneration shall not be diminished during their continuance in office."

In the history of the British Commonwealth and of other federal constitutions this provision is unique.

Generally speaking, it provides that there is but one constitutional authority who is vested with the power to remove a High Court Judge and he is the Governor-General in Council; that His Excellency (so advised) may exercise that power only upon receiving an address from both Houses of Parliament in the same session; and that that address cannot be expressed at large, but must assign, for such removal, the ground of proved misbehaviour or incapacity.

It is undisputed that this provision exhibits certain prominent features. The power to remove, though vested in the highest executive authority, may not be exercised at will or pleasure, or upon his own motion. The prayer for removal must come from the Houses of Parliament; they alone may institute the process of removal. The institution of that removal has been placed beyond the reach of the ordinary legal remedies, processes and procedures made available through the Courts - sc.fa., Criminal information, quo warranto, declaration and injunction- have been discarded. Impeachment has been rejected. Responsibility for instituting the process for removal and for framing appropriate procedures to that end has been exclusively reposed in the two Houses of Parliament. Executive discretion to act, or to decline to act, upon an address for removal is, in my opinion, retained.

The Constitution ensures, also, that the obligation to assign grounds for removal is not imposed simply by tradition and convention; those moving for an address must, by virtue of s.72, assign a specific cause for removal of the kind or kinds prescribed.

Finally, there is, in s. 72, a monitory insistence upon the need for proof of the grounds thus assigned; it is not good enough for those contending for removal to throw all manner of accusations against the judge which they cannot prove; the Houses of Parliament must satisfy themselves that the accusations are substantiated.

It is evident enough, therefore, that the makers of the Constitution, declined to transpose, unamended, an institution extracted from another system; they created one for the particular federal structure of a new nation. From a wide range of procedures, processes, causes, and conventions, they selected the elements from which s.72 is compounded.

Amidst the arguments and countervailing arguments presented to us by counsel, one proposition stands uncontested: justices of the High Court may be removed only by following the procedure set out by s.72 (see, for example, Zelman Cowan and Derham, "The Independence of Judges", 26 A.L.J. 462, at page 463/II).

Section 72 is both exclusive and exhaustive; it covers the field of both law adjective and law substantive with respect to the subject matter - the removal of Federal judges. In short, the section represents a code.

The approach that a Court should adopt to construing legislation that possesses the character of a code is well settled and conforms with the two fundamental aims of codification: generally, to provide a single authoritative body of statutory rules to govern the subject matter; and, in particular, to resolve uncertainties and controversies as to the former state of the law.

It seems to me that the proper course, in the first instance, is to examine the language of the Act, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to begin by inquiring how the law stood formerly, and then, assuming that it was intended to leave it unaltered, to see if the words of the Act will bear an interpretation in conformity with this view. If legislation intended to codify a branch of the law were to be thus treated, its utility and purpose would be destroyed and frustrated.

The purpose of such legislation is, I apprehend, that, on any point specifically dealt with by it, the law should be ascertained by interpreting the actual words used, instead of, as before, investigating a number of authorities, texts, and instruments, in order to discover, with more or less confidence; what the law was; more especially, if the investigation calls for a nice and critical analysis of early decisions, some of which are founded on procedures that are obsolete or superseded.

Of course, conformably with principles of statutory construction, resort to such sources may sometimes be necessary if a passage is truly uncertain or ambiguous, or a word is used that had previously acquired a fixed and settled technical or special meaning.

But, to my mind, resort to the former state of law must, in the nature of things, be subject to this condition, namely, that the legal context in which the former rule was operative should be, in substance, the same as that into which it is now sought to introduce it. Where, therefore, the codifying legislation predicates a legal institution that is fundamentally different, in its essential characteristics, from that in which the passage or word under debate was formerly used, the foregoing principle continues to apply, with, it may be, even stronger emphasis. (For an example of the above approach, see the speech of Lord Herschell in Bank of England v. Vagliano Bros [1891] AC 107, 144-5)

In the present case, it is not open to question that, by s.72, it was intended, both substantially and procedurally, to alter previous relevant rules and conventions. Even if we were to accept the limited and (so Mr Gyles puts it) technical meaning of the word 'misbehaviour'and to assume that it may legitimately be applied to judges, we should not conclude that the same meaning was intended to be attached to that word in the legal context of s.72. For the technical meaning (if there is one)could only have evolved in and through decisions of the kind to which Mr Gyles invited our attention, and they concerned issues resolved by Courts, in causes or matters instituted in accordance with curial processes. It has not, and could not, be suggested that the circumscribed meaning urged upon us was known in, or developed through, Parliamentary processes leading to an address to the Crown. The difference between the two legal contexts is both wide and clear.

In my opinion, therefore, in order properly to construe s.72, the supereminent task to be performed is to arrive at the meaning of the words selected, with such evident circumspection, by the Australian Convention, the United Kingdom Parliament, and their draftsmen. It behoves us, as a first step, to extract from the language of s.72 the last drop of meaning reasonably conveyed by a natural and straightforward construction. If no ambiguity or uncertainty is to be found, and there is no, or insufficient, reason for concluding that a word that formerly, in a given legal context, had acquired a special or technical

meaning, has been transported unchanged, into the legal context of s.72, there is no reason why the indigenous resources of the section should not suffice.

Before construing the actual words used, it is imperative to examine the structure and objects of the Constitution, and more especially of Chapter III (The Judicature).

The Commonwealth of Australia Constitution Act is an Imperial Act of Parliament to establish a government of and for one indissoluble Federal Commonwealth under the Crown. At the core of the government so established lies the constitutional principle of the separation of powers; this principle imports the independence of the judiciary created as one arm of Government.

The High Court is set up as the Court of last resort for the whole nation; in particular, it is the Court of last resort in matters arising under the Constitution and involving its interpretation. It determines the limits of the legislative powers of Federal, State, and Territory, Parliaments and other law making authorities. It holds the balance of power between Federal and State legislatures. It ensures that, as between Crown, Government, and the instrumentalities of Government on the one hand, and Her Majesty's subjects on the other, the former do not abuse their powers, and act within the limits of and pursuant to, the processes of law.

It is inevitable that, in the discharge of their responsibilities, the High Court will be dealing with many issues, both factual and legal, that touch and concern, directly or indirectly, the exercise or disposition of political power; and their decisions will, accordingly, have wider repercussions in the political life of the nation than those of any other tribunal. A justice who discharges such awesome and singular responsibilities must possess special talents and moral character, and receive special protection in the exercise of his office. The Constitution, by necessary implication, therefore, creates two public interests that impinge upon the office of High Court judge, and affect any language that relates to the manner in which he will execute it.

It follows, in my opinion, that general words in s.72, in so far as a reasonable interpretation will permit, should receive a construction that allows for those two interests.

In the first place, the language must, so far as may be, allow for the preservation of judicial independence. It is imperative to maintain that independence if a High Court judge is to be expected to speak out fearlessly when resolving issues that have political implications. It would be ironic to expect a judge so placed to do right without fear or favour, if to do so would render his reputation and his office vulnerable to the clamours and malice of individuals and of pressure groups who are dissatisfied with his work.

But the same language must accommodate another public interest of corresponding importance. The same public who must respect a High Court judge's independence is, in my view, entitled to expect from him a standard of competence and behaviour that are consonant with the national importance of his judicial function.

The office of judge differs markedly from that of many other public officials. The performance of his duty calls on him to display, of a high order, the qualities of stability of temperament, moral and intellectual courage and integrity, and respect for the law. Those and other like qualities of character and fitness for office, if displayed by a judge in the exercise of his judicial function, are unlikely to be found wanting in his conduct when not acting in office. If they are said to be genuinely possessed and not feigned, they would stand uneasily with conduct in private affairs that testifies to their absence.

There are, however, other qualities that do not carry the same guarantee of stability, integrity, and respect for the law in private life. For example, a man may possess profound learning, intellectual adroitness, and an accurate memory, and, by using them, adequately discharge the duties of many public offices; but, without more, he could not discharge the duties of judicial office.

In short, a man's moral worth, in general, pervades his life both in and out of office.

It is not surprising to find, therefore, that if, in the general affairs of life beyond his judicial functions, a judge displays aberrations of conduct so marked as to give grounds for the view that he lacks the qualities fitting him for the discharge of his office, the question is likely to arise whether he should continue in it. Such a question cannot be resolved without establishing standards of conduct by reference to which the

consequences of proven misconduct may be assessed.

In determining the standard of conduct called for by section 72, it is both logical and inevitable that regard should be had to the legislative and constitutional framework, referred to above, in which section 72 speaks.

At this point, one must be cautious. The Constitution was meant to apply to mankind, and it would be unreasonable to require of a judge a standard of extra judicial conduct so stringent that only a featureless saint could conform to it. It is only to be expected that High Court judges, like everyone else, will vary in character, temperament and personal philosophy. But there is, I have no doubt, a clear distinction between, say, mere eccentricity of conduct, or the fervent proclamation of personal views upon some matter of public concern, on the one hand, and plain impropriety, on the other.

There may be degrees of departure from wholly acceptable conduct outside the judicial function that fall short of misbehaviour in the foregoing sense. Without attempting to fix an exhaustive range of categories, it is possible to predicate conduct that is unwise, or that amounts to a marked, but transient, aberration or a momentary frenzy, or that would be seriously deprecated by other judges or by the community, but yet would not be so wrong as to attract the condemnation of s.72. Indeed, one may go further, and affirm that there may be conduct of such a kind that, if displayed habitually or on several occasions, could amount to misbehaviour, within the meaning of section 72, that nevertheless, if displayed only once or twice, or perhaps on a handful of occasions or in special circumstances, would not.

The issue raised by section 72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point, section 72 operates.

It is neither possible nor wise to be more specific. To force misbehaviour into the mould of a rigid definition might preclude the word from extending to conduct that clearly calls for condemnation under s.72, but was not - could not have been - foreseen when the mould was cast.

In my view, the construction of s.72 should be governed by the foregoing principles. Accordingly, the word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the constitution.

It is evident from this formulation that it raises questions of fact and degree. That is a feature of the British system of law that is frequently to be found, both in written and in unwritten law. A principle or rule of law cannot be condemned as so uncertain or imprecise as to be unworkable simply because its application is likely to raise difficult questions of fact and degree. In my judgment, while it may be impossible, by an act of professional draftsmanship, to describe, precisely and in general terms, where the dividing line runs between behaviour that attracts, and behaviour that does not attract, the sanctions of s.72, there should be no difficulty in determining on which side of the line a body of proven facts will fall.

Section 72 requires misbehaviour to be 'proved'. In my opinion, that word naturally means proved to the satisfaction of the Houses of Parliament whose duty it is to consider whatever material is produced to substantiate the central allegations in the motion before them. The Houses of Parliament may act upon proof of a crime, or other unlawful conduct, represented by a conviction, or other formal conclusion, recorded by a court of competent jurisdiction; but, in my opinion, they are not obliged to do so, nor are they confined to proof of that kind. Their duty, I apprehend, is to evaluate all material advanced; to give to it, as proof, the weight it may reasonably bear; and to act accordingly.

According to entrenched principle, there should, in my opinion, be read into s.72 the requirement that natural justice will be administered to a judge accused of misbehaviour. He should be given reasonable notice of allegations, which should be

formulated with reasonable particularity, and he should be heard in answer to what is alleged. The steps so far taken under and in pursuance of our governing Act have, in my judgement, met the demands of natural justice.

So far, the forensic issues raised before us have been examined by applying to s.72 what, I apprehend, are settled canons of construction. It now becomes necessary to scrutinize Mr. Gyles's submissions on behalf of the Judge, and, in particular, the case law and texts upon which those submissions are founded. I hope I do justice to the structure of his argument if I summarize it as follows:

1. To remove a Federal judge there must be agreement between the Houses of Parliament and the Executive that he should be removed; and grounds must be proved which amount to a breach of the condition of tenure of good behaviour.

2. The public office to which a judge is appointed possesses, generally with respect to the removal of the office holder, the same character as public offices held by all other holders of every rank.

3. Loss of tenure of office by reason of misbehaviour in office has always been a well-recognised legal ground for such loss. It relates only to conduct during office and must arise out of or touch and concern the official's function as office holder.

4. The only extension of the foregoing ground for removal was affected by the rule which included conviction in a criminal court of an offence correctly designated as infamous, committed during office.

5. The foregoing principles apply to judges as well as to other office holders, and the framers of our Constitution and the Legislature of the United Kingdom must be taken to have been aware of them.

6. There are no satisfactory criteria by which to judge the conduct of a judge outside the performance of his judicial functions if it does not result in conviction, and an enlargement of the word "misbehaviour" in s.72 to encompass such conduct would dangerously diminish the protection properly accorded to judicial independence. In particular, it would be contrary to principle and authority to treat "misbehaviour" as including "conduct which Parliament considers to be inconsistent with the holding of office" or "any conduct which Parliament considers unbecoming a judge".

7. The word "proved" in s.72, conformably with paragraph 4 above, means, in cases concerning misbehaviour not in office, proved by conviction for an infamous offence. In such cases, the role of the Houses of Parliament is to judge whether the conviction is of an offence sufficiently serious to warrant removal.

The several decisions cited by Mr Gyles were used previously to substantiate submissions three or four above, both of which concern the liability of the holders of public office to removal, and the inclusion of judges in the category of those holders.

In the early case of The Earl of Shrewsbury (1610) 9 Co. Rep. 42: 77 E.R. 793 the plaintiff brought an action on the case for disturbing the plaintiff in the exercise of his office, which was that of stewart of certain manors. By special verdict the jury had assessed damages, but counsel for the defendent moved several exceptions to the record: against the patent and the validity of the grant; (admitting the office) that the office was forfeited; against the writ and declaration; against the gist of the action; and against the verdict. The report with respect to the second exception was here relied on. The ground assigned for the alleged forfeiture was non-user of office, but the Court rejected the ground. It drew a distinction between those officers concerning the administration of justice or the Commonwealth in which the officer ex officio or of necessity, must attend without demand or request (when non user or non-attendance will work a forfeiture), and those in which he need not attend except upon demand or request. In the latter case no cause of forfeiture is to be found in non-user. In the

case at Bar, the stewart was under a duty to hold his Courts only when required, so non-user consisting allegedly in "failure to use his" office was no cause of forfeiture.

The Court summarised the relevant law in the following passage: "And for the better understanding of the true reason of it, it is to be known, that there are three causes [f]or forfeiture of seizure of offices for matter in fact, as for abusing, not using, or refusing."

It may be acknowledged that in discussing the relevant law and the facts of the case at Bar, the Court drew no distinction between office-holders, except the distinction connected with non-user; but it is equally clear that the Court, as 18th and 17th century courts were want to do, focused its deliberations upon the precise forensic issues joined and there is nothing in what they said that would warrant extending the legal rules enunciated, without further consideration, to the office of His Majesty's justices sitting in Courts of superior jurisdiction.

The proceedings in The King v. Hutchinson,Mayor, and the Alderman of Carlisle(1722)2 Ld.Raym 1565:92 E.R. 513 were commenced by mandamus, whose purpose was to restore one, Simpson, to the office of capital burgess. The return to the writ was to the effect that Simpson has been removed by the Court of Mayor for bribery.

Two exceptions were taken to the return: first, that the charge of the offence laid against him was uncertain and insufficient and accordingly bad in law; and second, because "bribery" was an offence at Common law, the Court of Mayor acted contrary to Magna Carta in entertaining the information against him, and removing him from his freedom before conviction in a court of law.

As to the second exception, the majority of the Court (Pratt CJ dis$) held that there was no breach of Magna Carta because the corporation had the power to remove for a crime where the immediate good of a corporation was concerned and the power to do so, as in the case at Bar, was conferred by the very words of the Corporation charter. There is doubt about the accuracy of the report on the first exception: the Lord Raymond report states that the court was equally divided and accordingly there "could be no judgement against the return"; but in S.C. Fort. 200 it is reported that after "some little doubt" "the whole court held it well, because on the whole return there appeared to be a good cause for removal".

It seems to me that the case cannot make any useful contribution to the matter before us. Mr Simpson's transgression was plainly misbehaviour in office; no question of misbehaviour out of office, or of misbehaviour of other kinds of office holders in or out of office was raised. Pratt CJ's preference for a trial in the courts at Westminister was not, it seems, based on the technical necessity for a conviction therein, but upon his low opinion of the court of Mayor, the members,(Mayor and common council-men) of which (he said), "are generally corrupted and use arbitrary methods in trials there." No part of the Court's reasoning was based on any such proposition as that the nature and the legal implications of all public offices are the same where forfeiture of, or removal from, office are concerned.

The case of Harcourt v. Fox (1693) 1 Shower 506: 89 E.R. 720 does not take the matter any further. The plaintiff, who was appointed Clerk of the Peace by the Earl of Clare, custos rotulorum, sued in indebitatus assumpsit for the fees of his office from the defendent, who had, purportedly, been appointed Clerk of the Peace by the Lord of Bedford, after he had replaced the Earl of Clare as custos rotulorum. The question was whether, under the relevant legislation, the plaintiff, who remained clerk so long as he should demean himself in the said office justly and honestly, necessarily suffered removal because the custos who had appointed him had been replaced. It was held that the plaintiff's office was not dependent on the continuation in office of the custos who appointed him; that the change or death of the custos should not avoid the office of the Clerk of the Peace.

It appears from the judgements that the Court directed its attention to the interpretation of the precise terms of the governing legislation, and were not concerned with reasoning about forfeiture of public office generally - a fortiori not with the removal of justices of the superior courts of the realm. Moreover, the terms of the plaintiff's appointment shows that the condition upon which he held office was limited, ipsissimis verbis, to demeaning himself justly and honestly in his office. No question arose whether misbehaviour out of office would work a forfeiture; the terms of the appointment precluded such a result.

In The King v. The Mayor,Alderman and Burgesses of Doncaster (1729) 2 Lord Raymond 1565: 92 E.R. 513 proceedings were again instituted by mandamus, by which Christopher Scot sought a command to restore him to the office of a capital burgess of the corporation. The return to the writ set out that Scot, after becoming a middle chamberlain, had, in effect, been guilty of fraudulent conversion of moneys received by him as such chamberlain; that, upon his appearing before the Mayor, aldermen and capital burgesses in common-council, he had been heard in answer to the offences alleged, but that he had been found guilty and removed from his office of capital burgess. The Court awarded Scot a peremptory mandamus to restore him to the office of capital burgess. Two reasons were assigned for the order: first, that the return did not set out and make good the power of the corporation to remove; second, that the reasons assigned for his removal related to his conduct in the office of chamberlain, but he had been removed from the office of capital burgess - ..."therefore" (said the Court)"this might have been a good reason to remove him from the office of chamberlain, but not of a capital burgess."

Accordingly (Mr Gyles submitted), the case is authority against any such proposition as that misbehaviour occurring other than in the office assailed can, in proper circumstances, be invoked to justify removal from that office.

To this submission there are, it seems to me, three answers. First, the arguments for and against the return were not reported, but so far as may be determined by examining the reasons for judgement, no attempt was made to take the case outside the narrow confines of the decision. Second, the whole disposition of the judiciary in Lord Raymond's generation was still to focus attention on the forms of action, or of other causes or matters, and not to be astute to find a lawful justification for facts found or returned that showed a substantial variance from what was strictly called for by the issues.

Third, the offices of common chamberlain and capital burgess, though public offices, would have been of minor importance to the nation compared with the public office of a justice or baron sitting in the Courts at Westminster; nothing said by the Court may reasonably be read as applying to judicial officers of such high standing.

A case that is regularly cited by text writers and legal officers, and to which our attention was strongly directed in argument, is Rex v. Richardson (1758) 1 Burr 539: E.R. 426. This was a general demurrer, on behalf of the King, to the defendent's plea to an information in the nature of a quo warranto exhibited against Thomas Richardson to show by what authority he claimed to be one of the portmen of the town or borough of Ipswich. The title he set out by his plea was, in effect, that upon a vacancy made by removal, he was duly elected, sworn, and admitted into the office in question, in order to fill up the vacancy.

Accordingly, the defendent's right depended upon whether the vacancy was duly created, and, if it was, whether the defendent was duly elected, admitted, and sworn.

The two points made upon the demurrer were that the corporation of Ipswich had no power to amove Richardson's predecessor, and that, even assuming a power to amove, the cause of amotion was not sufficient. It may be interposed here that the office was not one of those in which attendance to duty was ex officio, but depended upon a summons or demand; and that forfeiture was alleged because the encumbent had not attended "four occasional great courts" - one in particular. The outcome of the first objection depended upon whether a power of amotion was incident to the corporation, or whether its existence depended upon the corporation's having acquired it by prescription or by charter. The second of the two alternatives depended on the earlier case of Bagg 11 Co. Rep. 93 to 99. The first depended on the later authority of Lord Bruce's Case 2 Strange 819. Lord Mansfield, speaking for the whole Court, followed Lord Bruce's Case in which the Court had said that "the modern opinion has been that a power of amotion is incident to the corporation"; he endorsed the statement that "It is necessary to the good order and government of corporate bodies, that there should be such a power as much as the power to make by-laws."

Certain remarks made by Lord Mansfield in his approach to this ruling were relied on by Mr Gyles, and to these I shall recur.

Lord Mansfield, held that the cause for the exercise of the power of amotion was insufficient. It is unnecessary for the purposes of this judgement to repeat why.

There was, accordingly, judgement for the king.

As a preamble to a consideration of the question whether the corporation had power of amotion of an appropriate kind, Lord Mansfield set forth what he described as the "three sorts of offences for which an officer or corporator may be discharged." They were:

> "1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2d. Such as are only against his oath, and the duty of his office as a corporator and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3d. The third sort of offence for which an officer or corporator may be displaced of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.
>
> The distinction here taken, by my Lord Coke's report of this second resolution, seems to go to the power of trial, and not the power of amotion: and he seems to lay down, "that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment." So that after an indictment and conviction at common law, this authority admits, "that the power of amotion is incident to every corporation."
>
> But it is now established, "that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction." And there is no authority since Bagg's case, which says that the power of trial as well as amotion, for the second sort of offences, is not incident to every corporation."

Mr Gyles, as I understood his argument (which continued to rest upon the assumption that, in matters of removal therefrom, all public offices should be treated alike), submitted that Lord

Mansfield's survey reinforced his contention that "against the duty of the encumbent's office" which, in turn, amounted to a "[breach] of the tacit condition annexed to his office". It also confirmed (he maintained) that where the offence alleged had no immediate relation to his office, the power of amoval was exerciseable only where there was a "previous indictment and conviction."

There are, it seems to me, three reasons - two residing in general principle, and one depending on certain technical rules, of the criminal law which were removed by statute in all parts of our Commonwealth during the last century, why Mr Gyles would not be justified in carrying the rules assembled by Lord Mansfield directly into the heart of s.72.

The question before Lord Mansfield's Court related to the public office of portman. It is a far cry from such an office to that of a High Court judge who stands at the pinnacle of the Australian judicial hierarchy. It is, at least an historical argument of dubious validity to equate the one to the other, more especially if one bears in mind that eighteenth century common law rules governing the former are (by the argument) said to possess such a compelling claim to survival that they must be taken to have dominated the thoughts and the assumptions of the framers and draftsmen of a federal constitution for the twentieth century. I am unable to accept that the natural evolutions of history can accommodate a logic of that kind.

Furthermore, it must be remembered that much of Lord Mansfield's survey was obiter. There was no doubt that, if Richardson's predecessors had mis-conducted themselves, they had done so in office, and no question of misconduct beyond their office arose for consideration. The two points decided in Lord Mansfield's judgement related to the inherent power of a corporation and the sufficiency of the cause of removal.

Finally, in so far as conviction for a criminal offence was alluded to, an earlier passage of the judgement suggests, as Mr Charles pointed out, that conviction may have been regarded as necessary, not because it was deemed the only acceptable proof of misconduct outside the encumbent's office, but because the attainder that resulted from conviction for treason or felony automatically worked a defeasance of the tenure of office. If

this is a correct historical cause for the rule, it would appear to rest upon the feudal notion of tenure, which was exemplified in the holding of an office quamdiu se bene gesserit; in other words, the tenure was not of a simple interest for life, but of an interest for life subject to a conditional limitation. It seems to me impossible to carry the fascicule of rules governing a tenure of this kind into s.72, from which, incidentally, an express grant of judicial tenure during good behaviour, when s.72 was in draft form, had been removed by the Convention.

Mr Gyles relied upon The Queen v. Owen (1850) 15 Q.B. 476: 117 E.R. 539, more particularly, because it concerned alleged misbehaviour outside the encumbent's office. There was an information in the nature of a quo warranto (ex relatione, one, Williams) for usurping the office of Clerk of the County Court of Merioneth, established under Stat. 9 & 10 Vict. c.95.

Williams had, with the Lord Chancellor's approval, been removed from the office by the County Court judge "by reason of certain inability by him... for and in the said office within the meaning of the Statute"; the 'inability' referred to, in fact consisted in his being in circumstances of great pecuniary embarrassment, but there was no evidence that that embarrassment had affected him in the execution of his duty.

The relevant statutory provision gave power to remove "in case of inability or misbehaviour". It was argued by the Attorney-General (inter alia) that "If the party were a fraudulent debtor, and absenting himself, that would be a case of misbehaviour: but no fraud is imputed; and the prosecutor appears to have been regularly in attendance. That his retaining office might exasperate his creditors, or that the Judge might put less trust in him, does not amount to such positive inability as the Statute requires in sect. 24. Want of confidence might be a reason for requiring security but not for dismissal."

Sir F. Kelly, contra, maintained that the Judge's discretion was unreviewable for reasons that he advanced.

In reply, the Attorney-General gave the Crown's contention:

> "What is "inability" or "misbehaviour" within the meaning of the statute must be matter of law; the degree or extent of any thing, which, according to

> its degree and extent, may or may not constitute such inability or misbehaviour, may be matter of fact. Insolvency may lead to inability, as drunkenness may lead to murder; but it has not been found that insolvency in the present case has led to inability; and insolvency per se is not inability."

The Court (Lord Campbell CJ and Erle J.) gave judgement for the Crown. Each judgement was concise and unambiguous.
In the course of his judgement Lord Campbell CJ said:

> "In case of inability or misbehaviour the Judge may remove the clerk, and only in case of inability or misbehavour. Inability is alleged as the ground of removal in this case. Do the facts found shew inability? No; they shew ability. It does not appear that insolvency had produced any disabling effect on the mind of the clerk; and it is stated that he was not physically disabled from performing his duties. No other "inability" existed than pecuniary embarrassment: that in itself is no inability; and our judgment must be for the relator."

Erle J. was of the same opinion:

> The full effect of the verdict probably is that there was no present inability with reference to either the mental or the bodily powers of the relator, but [486] that he might become so harassed as to be unable at some future time to discharge his duties, or that he might be tempted to commit some act of dishonesty. Now I cannot say, as matter of law, that mere insolvency so enfeebles the intellectual powers, or so endangers the moral principles of a man, as in itself to constitute inability within the meaning of this statute."

On the face of the report, there seems to be some support for one limb of Mr Gyles's argument, but I am far from convinced that it carries him home, or even very far. It seems to me that there are, within the interstices of the case, evidence of contemporary opinion inconsistent with his proposition, or at least consistent with a contrary proposition.

Both argument and judgements centred upon the prosecutor's alleged 'inability'- not "misbehaviour' - to perform the duties of his office, and it was an undisputed fact that his ability to do so was in no wise reduced by his impecuniosity. Moreover, it is worth remarking that when the Attorney-General was moved, in passing, to refer to the word 'misbehavour' he conceded that want of confidence in the encumbent could justify the taking of security, though not dismissal. That statement related to the facts of the case at Bar, but it was at least consistent with the proposition that bad cases of such misbehaviour (outside office) could so shake the Judge's confidence in his clerk as to justify dismissal.

Furthermore, the pith and substance of the Court's judgements did not exclude the possibility in other cases that a Clerk of Court's conduct outside office might demonstrate, in contra-distinction those circumstances of pecuniary embarrassment before them, inability within the meaning of s.24 of the Statute.

The Privy Council appeal of Montagu v. the Lieutenant-Governor and the Executive Council of Van Dieman's Land (1849) VI Moore 489 received the close attention of both counsel.

The case concerned a judge in the Colony of Van Dieman's Land who had been amoved from office by an order of the Lieutenant Governor in Council. The section which governed the latter's power was Stat. 22 Geo III c.75 s.2 read as follows:

> "And be it further enacted by the authority aforesaid, that if any person or persons holding such office, shal be wilfully absent from the Colony, or Plantation, wherein the same is, or ought to be, exercised, without a reasonable cause, to be allowed by the Governor and Council for the time being, of such colony or plantation, or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to amove such person or persons from every or any such office; and in case any person or persons so amoved shall think himself aggrieved, to appeal therefrom, as in other cases of appeal, from such colony or plantation, whereon such amotion shall be finally judged of, and determined, by His Majesty in Council."

The relevant circumstances and grounds of complaint are conveniently summarised in the report of the argument of Sir Frederick Theseiger Q.C. (who appeared for the Lieutenant Governor and Council):

> "The order was fully justified by the conduct of the Appellant; the chief grounds of complaint against him are, first, obstructing the recovery of a debt, justly due by himself; and, secondly, the general state of pecuniary embarrassment in which he was found to be in. The Appellant having first put his lawful creditor in a situation whichcompelled him tosue for his debt in a Court of Justice, avails himself of his judicial station in that Court, being the only Court in which the acion could be brought, to prevent the recovery of the debt, [498] which he admitted to be due; this is an act impeding the administration, and thereby as amply to justify his removal. Secondly, it appears, from the evidence, that the Court composed of only two Judges, and necessarily requiring the presence of both, for the determination of all cases brought before it, were such as to be wholly inconsistent with the due and unsuspected administration of justice in the Court, and tended to bring into distrust and disrepute the judicial office in the Colony: this was another strong reason for his removal.

Their Lordships, in conformity with convention in such cases, gave their report (which was confirmed by order in Council) without reasons:

> "The Lords of the Committee have taken the said Petition and Appeal into consideration and having heard counsel on behalf of Mr. Montagu and Likewise on behalf of the Governor-General of Van Dieman's Land, their Lordships agree humbly to report to your Majesty, as their opinion, that the Governor and Executive Council had power by law to amove Mr. Montagu from his office of Judge of the Supreme Court of Van Dieman's Land, under the authority of the 22nd of Geo. III.; that, upon the facts appearing before the Governor and Executive Council, as established before their Lordships, in

> that case, there were sufficient grounds for the amotion of Mr. Montagu; that it appears to their Lordships, that there was some irregularity in pronouncing an order for suspension; but, inasmuch as it does not appear to their Lordships, that Mr. Montagu has sustained any prejudice [500] by such irregularity, their Lordships cannot recommend a reversal of the order of amotion."

There can be no doubt that the first complaint alleged misbehaviour in office, but the second, of which the gravamen was the Judge's 'pecuniary' embarrassment, concerned mis-conduct in private life which, having regard to the constitution of his Court, tended to bring into distrust and disrepute the judicial office in the Colony.

Their Lordships, as appears from the above citation, did not state the ground upon which they tendered their recommendation to Her Majesty, but one may legitimately conclude that both grounds, jointly and severally, contributed to their Lordships decision.

The case of Ex parte Ramshay (1852) 18 QB. 173: 118 ER 65 relates, once again, to alleged misbehaviour in office of the most obvious kind. Application was made for a quo warranto against a County Court Judge, on the relation of a person who had held the office immediately before him, and whohad been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster, under stat. 9 & 10Vict. c. 95, s.18 - It appeared that, on a memorial addressed to the Chancellor, charging the relator with general misbehaviour, and particlarizing one instance more strongly, and praying for his dismissal, the Chancellor had held an inquiry, which was attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and, within a few days after the close of the inquiry, had dismissed the relator by an instrument finding inability and misbehaviour, but not specifying any particular instance. Affidavits denying the inability and misbehaviour in the cases adduced on the inquiry, and generally, were put in.

The Court refused the rule. It was clear that the relator had been fully heard, and that the charges, if true, were well capable of shewing inability or misbehaviour (the critical criteria), and the decision of the Chancellor was confirmed. It seems to me that the case raised primarily the question whether the removal had been carried out according to the due process of law and natural justice. The misbehaviour alleged

was, it is true, misbehaviour in office, but in the circumstances, there was no cause for the Court to turn its attention to anything else.

Mr Gyles appealed to In re Trautwein (1940) 40 SRNSW 371 to assist in the understanding of the rule he was espousing that if mis-conduct beyond office was to give grounds for removal, it could only be considered if there was a conviction for an infamous offence. This case (Mr Gyles contended) demonstrated that the infamy of the offence was to be determined by reference to, and only to, the character of the crime revealed by the formal conviction.

The Constitution Act (N.S.W.) 1902 provided that "If any legislative Councillor - (f) is.....convicted of felony or infamous crime, his seat in such council shall thereby become vacant." The Councillor in question had been convicted of a serious federal offence, namely, of falsely representing that a document had been duly executed by the parties whose signatures it bore, with the object of avoiding bankruptcy proceedings and obtaining time for the payment of money owing tothe State and Commonwealth Taxation Commissioners. The misconduct alleged included the making of knowingly false misrepresentations and forgery.

In my opinion, the case is not an authority for the proposition for which it was cited. Maxwell J., when considering the infamy of the crime said:

> "Before dealing with the elements of the crime proved, I should refer to one argument raised by Mr. Windeyer. He has pressed very strongly that in order to resolve the question regard must be had only to the offence as set forth in the section creating it. Section 29 (b) of the Commonwealth Crimes Act, 1914-1932, is in these terms:-
>
> "Any person who imposes or endeavours to impose upon the Commonwealth or any public authority under the Commonwealth by any untrue representation made either verbally or in writing with a view to obtain money or any other benefit or advantage shall be guilty of an offence."

> He further adds that adopting that course, it cannot be said that that section creates an offence that should be regarded as an infamous crime. I am of the opinion that that is not the proper approach. In my view the Court should have regard to the offence as laid and proved, and should consider also its nature and essence. That that was the practice of the Common Law Courts when the competency of the witness was in question is clear from the text books and the cases."

In adopting what he deemed to be the proper approach he later continued:

> "What then is the essence of the offence of which the respondent was convicted? The certificate of conviction shows that he proferred as a genuine document that which was, to his knowledge, not genuine. As disclosed by the information (which alone can be looked at for this purpose) a document dated 3rd August, 1938, purported to be an agreement the parties to which were the respondent, three members of his family and the two Commissioners (Federal and State) of Taxation. The untrue representation (made both orally and in writing) was that it was a document between all parties.
>
> I have no doubt that the proper conclusion is that the names of some at least of the parties were forged. The use made of the document was the obtaining its execution by the two Commissioners with the resulting benefit to the respondent - this being his object - that the Commissioners refrained from instituting bankruptcy proceedings against the respondent, and from taking other steps to enforce immediately payment of certain moneys set out in the agreement.
>
> The representation by the respondent found to be untrue to his knowledge involved something at least analogous to the crime of forgery; whether the fact would sustain an indictment for forgery which is under our law the subject of statutory definition it is unnecessary to decide. That by reason of its being analogous to forgery it is properly designated an "infamous crime" within the meaning of the Common Law doctrine set forth above, is inescapable."

In my opinion, the case tends to support the principle I enunciated earlier that when examining ["proof"] of "misbehaviour" within the meaning of s.72, Parliament is not bound exhaustively and exclusively to a consideration of any formal conviction tendered to them; they must (to use Maxwell J's approach) look at the essence of the case made against the judge and determine, as a matter of fact and degree, whether it amounts to misbehaviour or not.

Some reliance was placed upon Terrell v. Secretary of State for the Colonies [1953] 2 Q.B. 482 for the purpose, I judge, of lending support to Mr Gyles's thesis that holders of public office do not, in any significant respect, differ from one another where removal from office is in issue.

The judge in the above case had been a judge in the Straits Settlement in Malaya. The country of his jurisdiction had been occupied by the enemy during the war, and on 7 July 1942 his appointment was terminated. It was held that he had been appointed during the King's pleasure, not during good behaviour, as alleged, and that the termination of his tenure of office had been validly effected.

In the course of his judgement (at page 498) Lord Goddard said: "Moreover, I can see no good reason whya judge appointed during pleasure should be in any different position from this point of view [se. from the liability to have his office terminated at the King's pleasure] from any other person in the service of the Crown."

In my opinion, this pronouncement cannot support Mr Gyles's case. The condition for the termination of offices held during the King's pleasure - namely, an exercise of will by the Crown leading to the decision to dismiss - is so comprehensive in the generality of its application that it leaves scant room for drawing distinctions based on the grounds for removal. There was, in any event, no suggestion in this case that the judge had in any way misbehaved.

Reference was made during argument to Attorney-General for New South Wales v. Perpetual Trustee Company (1955) 92 C.L.R. at pages 118 to 119, but I can find nothing in this well--known case to assist in the resolution of the legal question now raised. The inquiry in the case related to the legitimacy of a claim for damages quod servitium amisit where the service in question was that of a police officer.

Henry v. Ryan [1963] Tas E.R. 20 also dealt with the office of Constable; the justices appeal raised the question whether a constable had, contrary to the Police Regulation Act, been guilty of discreditable conduct against the discipline of the police force. The learned Chief Justice was apparently content to treat the misconduct alleged as misconduct in private life, but concluded: "I cannot doubt that misconduct in his private life by a police officer of a nature which tends to destroy his authority and influence in his relations with the public amounts to 'misconduct against the discipline of the police force.' A police officer must be above suspicion if the public are to accept his authority."

In so far as this case has value for present purposes, it tends to support the underlying philosophy of the principle I regard as the correct one to be applied to s.72.

Windeyer J., whose knowledge of, and judgments dealing with, legal history are legendary, gave judgements in two cases in the High Court, passages from which were cited by Mr. Gyles and relied on to support his argument.

Marks v. The Commonwealth (1964) 111 C.L.R. 549, at pages 586 -9 was the first of those. For the purposes of his judgement, Windeyer J. found it necessary to examine a wide range of offices held under the Crown, the conditions upon which they were held, and the manner in which they could be terminated. It was submitted that Windeyer J's examination approached them indiscriminately, as offices held under the Crown, and that it was remarkable, if judges were to be regarded as a race apart, that, in the course of carrying out such a searching examination, Windeyer J. did not say so. On the contrary, the judgement tended (Mr Gyles maintained) to support the common legal status of all such offices.

In the second case, Capital T.V. Appliances Pty.Ltd. v. Falconer (1970-71) 125 C.L.R.591 Windeyer J. delivered himself of a dictum in the course of carrying out a similar examination in which judges, generally, and Federal judges, in particular, received attention. At page 611, Windeyer J. had this to say:

> "However, the tenure of office of judges of the High Court and of other federal courts that is assured by the Constitution is correctly regarded

> as of indefinite duration, that is to say for life, but capable of being relinquished by the holder, and terminable, but only in the manner prescribed, for misbehaviour in office or incapacity."

The other members of the Court in this case did not deem it necessary to conduct an inquiry of such particularity, and our attention was not drawn to any passages in the other judgements that could be regarded as supporting, or dissenting from, the view there expressed.

With unfeigned respect for Windeyer J, I find myself unable to regard the latter part of the above passage as representing a considered and comprehensive formulation of the subject matter. I find myself constrained to regard it, so far as it extends to a description of misbehaviour, as a passing reference only, and not as a conclusion upon its legal characteristics reached after a consideration of extensive argument. It fails to convince me of the soundness of Mr Gyles's principal point.

It is evident enough that Windeyer J's disquisition in the Marks case (supra) upon offices under the Crown treated them, subject to variations imposed by Statute or other governing instrument, as exhibiting, in many respects, the same qualities. But I did not find anything in his judgement that was so strongly and comprehensively expressed that it would constrain a Court today to hold, in compliance with his exposition, that the early common law of England should dominate the approach that should be taken to s.72.

Mr Gyles relied also upon the works of several text writers who are regarded generally as authoritative, to support his grand premiss that the word 'misbehaviour' was invested with a received meaning which was limited in the manner set forth earlier. Several were old established sources of early common law; Coke, Comyns, Hawkins, Chitty, Bacon, and Cruise. I shall not pause to weigh their texts. On the whole, they did no more than reflect the substance of early case law, to important examples of which our attention was drawn, and which I have already discussed. Their digests carry the weight of their personal authority, but the law they expound is of a past age.

From 1700 onwards, of course, the office of judges in superior courts was controlled both by the common law and the writs and procedures through which it was applied, and by the Act of Settlement and the constitutional conventions, that in course of time, came to surround it. Constitutional historians such as Hallam and Hearn may delight in the niceties of scholarly debate over the exact extent of the changes wrought by the Act of Settlement, and the metes and bounds of the common law that continued to prevail in the courts. It cannot be denied, however, that, by the time Todd was writing at the end of the nineteenth century, there were two distinct spheres in which, in principle, action could be taken to remove a judge of a Superior Court in England. There were also statutes controlling the appointment and removal of colonial judges.

In England, a judge could be removed through one of the common law procedures - scire facias or criminal information; impeachment was, in theory, available, but was generally regarded as obsolete.

In addition, by a totally independent process, a judge could be amoved by the Crown upon an address from the two Houses of Parliament.

Under the common law process, both substance and procedure were narrowly confined, and rested upon the implications and legal effect of the grant of an office during good behaviour, which amounted to the creation of an estate that was regarded as determinable only by the grantee's incapacity from mental or bodily infirmity or by breach of good behaviour. The purview of misbehaviour was determined by the nature of its converse, good behaviour, and the cases discussed above were looked upon as generally authoritative.

The parliamentary process was by no means so confined. Todd (Parliamentary Government in England - 2 Ed page 860) describes its potentialities and limits thus:

> "But, in addition to these methods of procedure, the constitution has appropriately conferred upon the two Houses of Paliament - in the exercise of that superintendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper

> exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of, or exception from the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.
>
> In entering upon an investigation of this kind, Paliament is limited by no restraints, except such as may be self-imposed. Nevertheless, since statutory powers have been conferred upon Parliament which define and regulate the proceedings against offending judges, the importance to the interests of the commonwealth, of preserving the independence of the judges, should forbid either House from entertaining an application against a judge unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both Houses in an address to the crown for his removal from the bench. 'Anything short of this might properly be left to public opinion, which holds a salutary check over judicial conduct, and over the conduct of public functionaries of all kinds, which it might not be convenient to make the subject of parliamentary enquiry.'

I intend no disrespect to such eminent authors as Quick and Garran ("The Annotated Constitution" (1901)), but I find it extraordinary that, virtually without explanation or justification, they took Todd's summary of the conditions upon which tenure of office held during good behaviour was determinable at common law, and applied it, to the word misbehaviour in s.72 - thus (at page 731):

> "MISBEHAVIOUR OR INCAPACITY. - Misbehaviour means misbehaviour in the grantee's official capacity. "Quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life." (Coke, 4 Inst. 117.) "Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise." (Todd, Parl. Gov. in Eng., ii. 857, and authorities cited.)"

Renfree adopts the same view and the same restrictions ("Federal Judicial System of Australia", page 118).

Such a view of the law seems to me to set at naught first, that Todd described so clearly the Parliamentary processes for removal that took their constitutional origins from the Act of Settlement; and, second, that the Commonwealth Constitution rejected an explicit reliance upon the determinable limitation of an office held for life during good behaviour, and embraced the Parliamentary institution for an address by the Houses of Parliament to the Crown, which was traditionally associated with misbehaviour of a much wider nature, disengaged from the Common law.

There is nothing in the writings of the other commentators which suggests, to my mind that the wider meaning of misbehaviour, in the Parliamentary context, is wrong. What drives home the construction that I regard as the correct one is the absence from writings and commentaries of any substantial debate, whether self-generated or imposed from without, upon the ambit of the word 'misbehaviour' in s.72.

The conclusion I have stated receives further indirect support from two other sources - An opinion of the Attorney-General and Minister of Justice in Victoria (22 August 1864), and a Memorandum of the Lords of the Council on the removal of Colonial Judges (1870).

The 1864 opinion was prepared to advise whether the Governor in Council had power to suspend, until the pleasure of Her Majesty be made known, a Judge of the Supreme Court who was allegedly absent from Victoria without reasonable cause allowed by the Governor in Council. There fell for consideration the Victorian Constitution Act which enacted, in effect, that the commissions of the Judges shall remain in force during good behaviour, notwithstanding the demise of Her Majesty: Provided that it may be lawful for the Governor to remove any such Judge upon the address of both Houses of Parliament.

The writer then sets forth the common law position as he deemed it to be - for my part I have considerable reservation as to the correctness of his summary, though I accept it for the moment - and then continued:

"These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour (v. 4 Inst. 117). But in addition to these incidents, the tenure of the judicial office has two pecularities: - 1st. It is not determined, as until recently all other public offices were determined, by the death of the reigning monarch. 2ndly. It is determinable upon an address to the Crown by both Houses of Parliament. The presentation of such an address is an event upon which the estate in his office of the Judge in respect of whom the address is presented, may be defeated. The Crown is not bound to act upon that address; but if it think fit so to do it is thereby empowered, (notwithstanding that the Judge has a freehold estate in his office from which he can only be removed for misconduct, and although there may be no allegation of official misbehaviour) to remove the Judge, without any further inquiry, or without any other cause assigned than the request of the two Houses. There has been no judicial decision upon this subject; but the nature of the law which regulates the tenure of the judicial office has been explained by Mr Hallam in the following words: - (Const. Hist. Vol. 3, p. 192) "No Judge can be dismissed from office except in consequence of a conviction for some offence, OR the address of both Houses of Parliament, which is tantamount to an Act of the Legislature." Mr. Hallam proceeds to explain the policy of this particular tenure in the following terms: - "It is always to be kept in mind that they (the Judges) are still accessible to the hope of further promotion, to the zeal of political attachment, to the flattery of princes and ministers; that the bias of their prejudices as elderly and peaceable men will, in a plurality of cases, be on the side of power; that they have very frequently been trained as advocates to vindicate every proceeding of the Crown; from all which we should look on them with some little vigilance, and not come hastily to a conclusion that because their commissions cannot be vacated by the Crown's authority, they are wholly out of the reach of its influence. I would by no means be misinterpreted, as if the general conduct of our Courts of Justice since the Revolution, and especially in later times, which in

> most respects have been the best times, were not deserving of that credit it has usually gained; but possibly it may have been more guided and kept straight than some are willing to acknowledge, by the spirit of observation and censure which modifies and controls our whole Government."

It seems to me impossible to suppose that the framers of our Constitution would not have been aware, at least, of this opinion (and probably of the conditions upon which all Colonial judges then hold office), and accordingly must have been aware of the ambit of the power of removal through the process of address to the Crown. The opinion presented and described a model of great significance and practical utility, which, in one form or another, would have kept the superintendance of the judiciary in the hands of Parliament (subject to such limitations as might be imposed); it was obvious and available.

The Lords memorandum (whose authors included such eminent lawyers as Lord Chelmsford and Dr Lushington) provided, in the clearest terms, a salutory reminder that communities may be faced with judicial delinquency of many different kinds, and that it was imperative to have flexible but just procedures and principles for dealing with such conduct to which resort could finally be had. It is only necessary to cite one brief extract to show that their Lordships were in no wise exercised in their minds about placing technical limits on the sort of judicial transgressions that should warrant removal or suspension :

> "It may be remarked, generally, that it is extremely difficult, and might be highly injurious to the public service, to lay down an inflexible rule as to the mode of procedure to be adopted in all cases of this nature. When a Judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the Colony of his guilt, it would be extremely improper that he should continue in the exercise of judicial functions during the whole time required for a reference to England, or a protracted investigation before the Privy Council. Immediate suspension is, in such cases, a necessity, if much greater evils are to be avoided."

It is not to be supposed that the framers of our Constitution, their legal advisors and draftsmen, and the legal and historical experts who assisted the United Kingdom Parliament, would have been unaware of this memorandum. It confirms, if confirmation is necessary, the wide range of constitutional models available to them; it evinces a determination to meet the problem of erring colonial judges with whatever constitutional means were at hand, and not with procedures circumscribed by the forms and the technicalities incident to common law rules of earlier centuries. There is no reason to suppose that the Convention and the Parliament at Westminster would have judged themselves limited in the choices available to them when building a constitution for a new age.

I should not conclude this ruling without making one further feature of s.72 clear. The word 'misbehaviour' in that section has a definite legal content. I agree that the Houses of Parliament have the power and responsibility of deciding whether any conduct of a judge which is the subject of a motion to address amounts to misbehaviour. That does not however make them masters of the law:: it means rather that they must conscientiously accept the legal test of what is misbehaviour and decide, as a matter of fact and degree, whether behaviour proved against the judge meets the criteria embodied in the test. It is no part of this ruling that the Houses of Parliament may vary that test from case to case.

I am also of the opinion that if the Houses of Parliament pronounced to be misbehaviour that which, at least arguably, was not, the question whether there was factual material upon which the Houses could find misbehaviour proved would be justiciable in the High Court: it would there raise an issue akin to that which is regularly debated in a Court of Criminal Appeal, namely, whether there was evidence upon which the jury, subject to a proper direction in law, could fairly have arrived at the verdict from which the appeal was brought.

For all the foregoing reasons, I am of the opinion that Mr Gyles's objection to the allegations against the Judge must totally fail. I would so hold.

Hon. Andrew Wells Q.C.,
8 Scenic Way,
CARRICKALINGA SA 5204

Dear Mr Wells,

I am enclosing a copy of Sir Richard Blackburn's draft ruling on the meaning of misbehaviour for purposes of section 72 of the Constitution. The enclosed draft is dated 13 August 1986.

Yours faithfully,

J.F. Thomson
Secretary

13 August 1986

COMMONWEALTH REPORTING SERVICE
Law Courts Building, Queens Square, Sydney, NSW 2000 (02) 2308322

TRANSCRIPT OF PROCEEDINGS

Transcript-in-Confidence

PARLIAMENTARY COMMITTEE OF INQUIRY

SIR GEORGE LUSH, Presiding Member
SIR RICHARD BLACKBURN, Commissioner
THE HONOURABLE ANDREW WELLS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 22 JULY 1986, AT 10.25 AM

Continued from 17.7.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: Subject to what counsel may say, the commission has considered that appropriate hours for us to keep now that we seem to be moving into a regular pattern of hearings would be from 10 to 11.30 with a quarter of an hour off, and then from 11.45 until 1, resuming at 2 and continuing until 4. If counsel would find it more convenient to resume at 2.15 and go on till 4.15, I do not think we would have any objection. Do those suggestions seem convenient to counsel? Which time for adjournment at lunch or the resumption after lunch would be more convenient?

MR GYLES: Could we try 2 and if it becomes inconvenient inform the commission of that?

MR CHARLES: It is fine as far as we are concerned. I think if anything it is likely to be a bit more difficult for my friends than for us because of our propinquity.

SIR G. LUSH: We will follow that pattern. We are late in starting today because of events which have happened but by way of establishing the routine we will rise for a quarter of an hour at half past 11. Mr Gyles, I think when we last sat it was agreed you would begin today.

MR GYLES: May I say two things before going to that argument purely for the purpose of flagging them for later consideration if it becomes necessary? The first is that I may wish to put an argument as to whether some of the allegations in their present form are specific allegations in precise terms. Secondly, it may be that I would seek leave to ask the commission to again consider in a little more detail the effect of previous inquiries on some of the allegations. I know that was dealt with in the ruling on Friday and I merely foreshadow that I may make an application in relation to that topic.

What we have done to assist, or we hope assist the commission, is to prepare a written outline of argument and also to assemble in photostat form all of the source material referred to in the outline of argument. Because of the difficulty of obtaining books, we felt this was the only way of doing it.

SIR G. LUSH: That will be very helpful to us.

MR GYLES: We have prepared sets for each commissioner. What we can do is to give one set to the shorthand writers provided that that is what

could be called a boomerang set. We are short of copies, and if they could be given back to us at the end of the day we would be much obliged.

SIR G. LUSH: You would like it embodied in the transcript for possible future use?

MR GYLES: No, it is just that it may be useful to the shorthand writers to have it.

SIR G. LUSH: It may be, to faciliate the citations, and so on.

MR GYLES: I do not wish to elevate an outline of argument into something more significant than it is, it is intended to be an outline rather than a full submission. If I could take the course, however, of going through it and taking the commission to the source documents as we come to them.

Our first submission is that it is important to distinguish between the grounds for removal of a judge and the procedure for removal of a judge. Prior to 1900 a judge who held office during good behaviour could be removed by the Crown for breach of that condition of tenure, as with any other office holder from the Crown upon that tenure by the writ of scire facias or by virtue of the Act of Settlement could be removed by the Crown upon an address from both houses of parliament for any cause whether or not a breach of the condition of good behaviour. There was also the possibility of impeachment, which may be put aside for present purposes. It should also be noted that many judges did not hold office during good behaviour but rather during pleasure, including colonial judges.

The first work to which we make reference is Todd's Parliamentary Government in England.

That which I have just read we imagine will be uncontroversial and we have simply chosen initially to refer to Todd's Parliamentary Government in England. Those same principles are set out in a number of other authorities which will be referred to later in the morning. We have chosen that today as the first citation because that is a work which was current at the time of the convention debates and the formation of the Constitution. It also of course remains an authoritative source in this field.

If the commission pleases, at page 190 of Todd's volume 1, if I could pick it up at about half-way down the page beside Tenure of Office:

> Previous to the revolution of 1688, the judges of the superior courts, as a general rule, hold their offices at the will and pleasure of the Crown . . . . . to place the matter beyond dispute.

Then that limitation was removed. Then going to the middle of the next page:

> Before entering upon an examination of the parliamentary method of procedure for the removal of a judge under the Act of Settlement . . . . . must speedily be decided.

Then I do not think I need read the top half of page 193. Picking it up about six lines down:

> The peculiar circumstances in which each of the courses above enumerated would be specially applicable have been thus explained . . . . . by the joint exercise of the - - -

SIR R. BLACKBURN: Can I stop you for a minute, Mr Gyles? There is rather a puzzle there, is not there? It appears to me that the word "misdemeanour" is used in its more legal non-technical literary sense there, "misconduct" not being an actual crime because it is contrasted with the words "actual crime."

MR GYLES: Yes. The word is used in some of the authorities and that may throw some light on that passage.

SIR R. BLACKBURN: Yes, but "misdemeanour" in one category then "actual crime" in another suggests that "misdemeanour" there does not mean what it means in criminal law.

MR GYLES: No, it may mean a breach - - -

SIR R. BLACKBURN: Of right conduct?

MR GYLES: Yes. It may mean a breach of the condition of tenure not simply right conduct, I would submit.

SIR R. BLACKBURN: Yes.

MR GYLES: Then the learned author goes on:

> But, in addition to these methods of procedure, the constitution has appropriately conferred upon the two houses of parliament . . . . . and not an incident or legal consequence thereof.

For present purposes I do not need I think to read further and the commission will find that the summary in paragraph 1 of our written submissions is repeated in many of the sources to which reference will be made.

SIR G. LUSH: I was looking for the source of the quotation in which the applicability of the various courses is discussed on page 193. It appears to be the Lord's Journals.

MR GYLES: Yes. That arose from some submissions made to the parliament. It is a summary made in the course of submissions to parliament. In any event, as to the substantial point that we make, that is, that there were two basic means of removal, one was for breach of tenure of office by the Crown. The precise procedure does not matter particularly, whether it is by way of scire facias, information or indictment. That was one leg. The other leg quite separate from it was the removal by the Crown upon address to both houses of parliament, the significant difference being that in relation to the first matter, that is, breach of conditions of tenure, it was necessary to prove a breach of tenure, a breach of the tenure of the condition of good behaviour.

As to the second, address from both houses of parliament, there was no such limitation and parliament might address for whatever cause seemed good to them. In answer to Sir George Lush, I think it is all from Sir Jonah Barrington's case. So, the second submission that is included in our outline of argument is as follows: thus, the Constitution takes an established procedure for removal, that is, address from both houses of parliament, and makes it the sole procedure but limits the application of the procedure to those grounds which would have justified the removal of the judge by the Crown without an address.

So, you take one of the forms of procedure but limit it by reference to the grounds or circumstances under which the other could be exercised. So that to remove a federal judge there are two requirements: the first is that there must be agreement between each house of the legislature and the executive, and that was the only protection and still is for judges holding office during good behaviour under the Act of Settlement in the United Kingdom. The second is that there must be circumstances or grounds proved which amount to a breach of the condition of tenure of good behaviour.

That leads us then to the third point we make. Reference to the convention debates shows that the framers of the Constitution were well familiar with the common law position and made a deliberate choice to increase the independence of the federal judiciary beyond that of even the judges of the High Court in England because of the central role that it plays in upholding the Constitution, in particular in deciding issues between the Commonwealth and states, a role not played by the common law or colonial courts.

We have had extracts made from the convention debates in Adelaide 1897 and Melbourne 1898 in as far as those debates deal with what is now section 72, which I think was originally clause 70. I think the members of the commission wil find those debates amongst the source materials that we have provided. I obviously will not now read to the commission all of these debates and of course they must be read with the limitations which are inherent in the fact that what individual speakers may happen to say is not necessarily a guide as to the will of the body and indeed in the end it is the Imperial Parliament that passed this Constitution. That said, however, may I take the commission to some aspects of that debate.

The proposal which was before the Adelaide convention appears at page 944. The proposal was that they shall hold their offices during good behaviour; shall be appointed by the Governor-General, by and with the advice of the Federal Executive Council; may be removed by the Governor-General with such advice, but only upon and address from both houses of the parliament in the same session praying for such removal; and then there is the remuneration condition. The significant thing about that is that it is the position which then pertained in relation to act of settlement judges, that is tenure of office during good behaviour but provision for removal on address from both houses of parliament.

Mr Kingston at page 946 through to 947 argued for a more restricted power of removal and that appears from page 946, right-hand column in the middle. He proposed shall only be removed for misconduct, unfitness or incapacity. Mr Symon said substitute misbehaviour for misconduct and as will be later seen, that prevailed. The explanation appears just above that in the right-hand column of 946, having referred to the removal provisions:

> It strikes me that if you pass that the effect will be that on the address of both houses a judge can be removed independently of whether or not he has been guilty.

That means guilty of a breach of condition of good behaviour:

> And that should not be so.

Mr Barton said:

> You must read sections 1 and 3 together.

Mr Kingston said:

> You may but we must make the thing as clear as clear can be. We should amend the clause.

And then he proposed the amendments. Debate continued and then at the foot of page 946 in the right-hand column:

> I want paragraph 3 turned into a clause for the further protection of judges . . . . they may feel secure in their office.

Then Mr Isaacs as he then was came in to speak against that proposal and wished to leave the position as it was in the draft. Again I do not propose to read all that Mr Isaacs said about it. May I highlight some aspects of what he had to say. At page 947 in the right-hand column he went through the historical position as he then understood it and as appears in Todd

and is as reflected in our outline of argument, paragraphs 1 and 2.

Then at page 948 left-hand column about point 7 of the column:

> And if he were not guilty technically of misbehaviour as a judge, he may defy the parliament, the Crown and the nation. That is a position which we ought not to court.

This makes it abundantly clear that Mr Isaacs was arguing for a proposition that there should be a power of removal in the parliament and the Crown not where a person is not guilty technically of misbehaviour as a judge. Then he read the Victorian constitution and again drew attention to the two methods of removal and - - -

SIR R. BLACKBURN: May I interrupt you again, what he is arguing for is the inclusion of a reference to unfitness or incapacity.

MR GYLES: No with respect not.

SIR R. BLACKBURN: He is saying you might want to remove a judge because he is incapable and not because he has misbehaved.

SIR G. LUSH: There is a sentence in the middle of the left-hand column beginning, "If we introduce" which seems to tell against that suggestion.

MR GYLES: May I answer Sir Richard Blackburn in this way, undoubtedly one of the examples which Mr Isaacs was pointing to was mental or physical incapacity.

SIR R. BLACKBURN: Yes.

MR GYLES: Which was not picked up by the draft then before the convention. However, and I have not read it of course in sequence, I do submit when one reads what he has to say he is certainly not limiting himself to that. Rather he is putting the point of view that it should be a matter entirely for parliament and the Crown untrammelled or unfettered by any statutory or constitutional precondition.

He maintained that position not only in Adelaide but also in Melbourne. It is interesting to see that at page 948, interesting and we would submit in the end rather decisive in our favour that he referred to and read to parliament from Todd the passages which I have just read to this commission at pages 948 and 949. Having done that, at the foot of page 949 in the left-hand column he said:

> In a matter of this kind it is highly important that we should not put . . . . provide that the salary -

and so on. So it is quite plain that the convention had before it a very clear exposition of the then current position and had before it two very clear arguments, the first being that the address should be only upon grounds that Mr Isaacs called technical misbehaviour. On the other hand, an argument that it should not be so limited and, of course, we know that it was the former which prevailed.

Mr Symon in answer to Mr Isaacs said at page 950 that he supported the amendment and it seemed to him that Mr Isaacs was not quite accurate when he suggested the convention misapprehends the position that already exists in constituional law regarding the position of judges:

> The misapprehension is on his own part in assuming . . . . . of the minor parties in the community.

We would say that those words are as true now as they were then:

> He goes on to elaborate that point . . . . has ever been exercised.

and so on. Then on the next page he accepts the change from misconduct to misbehaviour. Sir John Downer:

> I think misbehaviour has always been the word and is all that is necessary.

With respect, that was a correct interjection. Mr Symon said:

> I should be content with putting in misbehaviour.

Mr Symon then repeats his view about the fundamental nature of the High Court and the serious character in the interests of the Constitution, and they involve not only the interests of the states both large and small but of the individual as well:

> And therefore their independence should be placed above . . . . . the amend-ment has been moved.

Mr Barton pointed out the Canadian constitution fell into the error of, in effect, the act of settlement pro-visions which is what Mr Isaacs had been arguing for but at the foot of page 952 Mr Isaacs said:

> Who would be the judges of misbehaviour in case of removal of a judge . . . . all I contend for.

The commission will bear those words in mind. They will fall into place a little later in the argument. Mr Barton was then concerned to ensure that no judge could be removed without cause assigned and without being guilty of misbehaviour.

Then Mr Fraser, Mr Dobson, Mr Douglas and Sir John Downer and so on.

I next refer to the Melbourne debates. By then it was clause 72. The drafting had been altered in subsection (III):

> Shall not be removed except for misbehaviour or incapacity, and then only -

At page 311 - - -

SIR G. LUSH: Just pause for a moment, Mr Gyles. Where is the Melbourne draft set out?

MR GYLES: Page 308, right-hand column. The commission will see clause (III) is amended from that which was before the Adelaide convention to include the restrictive provision:

> Shall not be removed except for misbehaviour or incapacity, and then only -

etcetera. At page 311 the Victorians were unpersuaded by the defeat of the Adelaide convention and returned to the fray with an amendment which would have restored the position to that which Mr Isaacs argued in Adelaide. In other words, returning to the Act of Settlement position that a judge could be removed by the Governor-General and council upon an address for any cause without there being any necessity to prove misbehaviour, incapacity or anything like that. Mr Isaacs, without any disrespect to him, then repeated the same argument that he had advanced at the Adelaide convention unsuccessfully. Mr Kingston, Mr Barton and others similarly maintained their position. Mr Kingston, for example, at page 314 said:

> I do not think . . . . . challenged in the slightest degree, well and good.

Then there is further debate which led to the insertion of the word "proved" as an amendment. The amendment was moved at page 318, right-hand column:

> "upon the grounds of proved misbehaviour or incapacity" be added to the subsection.

Mr Reid said:

> I do not think the word "proved" is necessary . . . . . method of arriving at a conclusion.

Then it was left to the drafting committee, the Victorian amendment having been defeated.

Insofar as it may be necessary to have resort to the convention debates to decide what is after all in the end a fairly simple question of statutory construction in the light of the law as it was then understood shows a deliberate choice having been made to limit the power of the Crown to remove upon address from parliament to what Mr Isaacs called technical misbehaviour. It reveals the reasons for that, the reason being the particular role of the High Court in our federal Constitution. May we then go to a series of propositions which flesh out a little the first three points.

It will be appreciated that if we are correct in those first three propositions then all one needs to ask is, what was misbehaviour in office at that time? Our fourth proposition is that a judge is appointed to a public office of the same character as other public officers. That appears from a number of sources, not all of which have been extracted here but I could perhaps draw attention to some of them. The Victorian law officers opinion is actually in a bundle a little lower down. It is number 34, the opinion of the Attorney-General and Minister of Justice. It has page 10 on the top of it. I will read all of the relevant parts of this opinion now and not repeat them later.

The question which arose was a question of suspension of judges which is not relevant here. It is an opinion by the Attorney-General and Minister for Justice. Mr Higginbotham, as he then was, was the Attorney-General. I refer to the last paragraph on page 10:

> The 38th section of the Constitution Act follows terms of the Act . . . . . enforced by a scire facias.

That summary of the position is as good a short and accurate statement as might be found anywhere.

SIR R. BLACKBURN: Does it take it any further than perhaps Todd?

MR GYLES: I am not sure that it does. This is in 1866.

SIR G. LUSH: The edition of Todd that you copied was 1892.

MR GYLES: There may have been an earlier edition. The attorney goes on to say this however:

> These principles apply to all offices whether judicial or ministerial that are held during good behaviour.

Then they go to discuss other matters which do not concern this commission.

I refer to Halsbury Laws of England 4th Edition under the heading Constitutional Law, volume 8, paragraph 1107.

This paragraph, I might say, is in the same terms as the first edition of Halsbury on the same point, the authorship of which under this heading is attributed to Holdsworth. The point I presently seek to make is that the position of judges is dealt with under the heading, Offices expressed to be held during good behaviour, in the general Constitutional Law volume.

I am sorry if what I am putting is trite, but I just wish to underline that circumstance. I will not repeat the reading of this passage either, so may I read it now because it is relevant for more than one part of the argument. The first part of the paragraph I think I need not read in detail but draw your attention to it as stating the position as I have submitted it to be, and then behaviour - - -

SIR G. LUSH: I think perhaps you might read it, because my recollection of that paragraph is that it is worded to express some uncertainty, possibly arising from the fact that the position has often been asserted but never really authoritatively established. Does not the Halsbury sentence include the words, "It is said"?

MR GYLES: Well, may I read it?

> Judges of the High Court and of the Court of Appeal . . . . . determined for want of good behaviour - - -

SIR G. LUSH: Those are the words. It struck me as curious when I saw them, as if the authors were not completely satisfied in some way.

MR GYLES: May I pass over that? I appreciate what is being said to me.

HON A. WELLS: Footnote 5 would indicate who it was perhaps who said it, but unfortunately that is not on this.

MR GYLES: No. I do not have the volume here, but that can be checked.

SIR G. LUSH: I have located my handwritten note of this now. This may answer Mr Wells' question. For what it is worth, I have written under words marked with quotation marks which you have just read, "Supporting reference given is Barrington's case, (1830) 62 Law Lords Journals."

MR GYLES: Yes. Todd quoted that.

HON A. WELLS: That expression, "It is said", dates from the first edition. I have it photocopied here, and it gives the same references.

MR GYLES: Yes. In any event, we are not conscious of any view ever expressed to the contrary of the view which is in all of these authorities and all of these sources, but going on:

> The grant of an office during good behaviour . . . . . or refusal to perform the duties of the office.

As I say, that is relevant to various parts of the argument. For present purposes, we are drawing attention to the fact that a judge's office being held upon good behaviour is the same as other administrative or other offices held on the same tenure.

In Marks v The Commonwealth, Windeyer J, amongst others of the justices of the High Court, had occasion to give some consideration to what an office under the Crown was, and there may be a question as to how much of the detail of what he said received the support of the other members of the bench. It is Marks v The Commonwealth (1964) 111 CLR 549, and the passages to which I immediately refer are passages at 586 and 589.

SIR G. LUSH: It is the army officers case.

MR GYLES: Yes. Your Honour the presiding officer will recall this case, I think. From 586 to 589 Windeyer J discussed what an office under the Crown is, and at 586 said:

> Servants of the Crown, civil and military, are employed . . . . . as in the case of judges of the superior courts.

Then in the discussion that follows, and particularly at page 589, his Honour assumes that the office of judge is similar to, governed by similar rules as the holding of other offices under the Crown.

Whilst I have that report open, might I draw attention to the fact that at 567 to 572 there is an historical survey of what office means and its derivation and the like, and once again, as appears from, for example, 571, his Honour includes judicial office as one of those offices.

Then there is the case of Terrell v Secretary of State for the Colonies, (1953) 2 QB 482. The passage to which I refer is at 498 to 9. In the middle of 498, the Lord Chief Justice said, just after referring to Rann v Hughes:

> Moreover, I can see no good reason why a judge . . . . . person in the service of the Crown.

Then one small passage at the foot of 499, which has relevance for other purposes, if there be any doubt about it:

> Since that case I think it may very well be . . . . . which is really the same thing.

And he goes on to discuss other matters. We have given a reference there to two other cases which discuss what an office is. I do not propose to read from them, although we have copied extracts from Attorney-General v Perpetual Trustee, (1954) 92 CLR 113 at 118 to 121, and Miles v Wakefield Council (1985) 1 WLR 822. As I say, I do not stay to read those cases, but they do discuss what an office is.

Our fifth proposition is that whilst the tenure of office by reason of misbehaviour in office has always been a well-recognized concept, it only relates to matters occurring during office with the necessary connection with office.

The first authority to which I refer is the Earl of Shrewsbury's case. The references are in the submissions, in the outline of argument. The passage which has at all times thereafter been cited appears at page 804 of the reprints, at page 50 of the original report. If the commission picks it up just below the start of page 50 of the original report - - -

SIR R. BLACKBURN: Could you give us the reference again, Mr Gyles?

MR GYLES: Yes. If the commission will look at paragraph 5 of our written outline of argument, it is the Earl of Shrewsbury's case, (1610) 9 Co. Rep. 42, 50; and volume 77 of the reprint, 793, 804. The passage is at the foot of page 804, the last full paragraph:

> As to the 2, admitting that the plaintiff can make a deputy . . . . . not using or refusing.

Abusing or misusing -

which is the first of the three -

> - as if the marshal or other gaoler suffer voluntary escapes . . . . it is a forfeiture of their offices.

A little bit like the case we have in New South Wales:

> So if a forester or parker . . . . is no cause of forfeiture without demand.

Then they go on to deal with the third matter. So that the first active ground is abusing office. I see it is 11.30.

SIR G. LUSH: Is that passage you have just read part of the judgment in the case, or is it part of the description of the proceedings?

MR GYLES: I confess that I had thought so.

SIR G. LUSH: Now that I see it again I can remember looking at this case not long after our appointment, so I found it very difficult to read.

MR GYLES: We will have a look at that. I had assumed so. At least I had assumed it was at least a reporter's summary or statement of what the judgment was.

HON A. WELLS: It is always a very difficult thing to determine whether he is adding a little sermon of his own or whether he is reporting. He was not the world's greatest reporter, perhaps one of the world's greatest commentators.

SIR G. LUSH: We will adjourn for fifteen minutes.

MR GYLES: I do not think I can decide something which legal historians might debate. For relevant purposes all of the commentators and, in particular, the commentators that were extant, or commentaries which were extant in 1900, certainly take the view that this is authoritative and the commentaries to the present day say the same thing.

If I may then go to Coke himself in volume 4 of the Institutes, CAP XII. It is actually on page 117, the paragraph which deals with the chief baron.

(Continued on page 175)

Continuing:

> The chief baron is created by letters patent and the office is granted to him . . . . . if the office had been granted for life.

etcetera. Looking at three of the digests - - -

SIR R. BLACKBURN: That cannot be taken. This is taken - misconduct in matters not concerning his office is totally irrelevant, is not it?

MR GYLES: I would so submit, yes. The extension came later.

SIR R. BLACKBURN: I see, yes, the extenison came later. Yes, I see.

MR GYLES: The first of the digests is Cruises Digest. We refer to volume 3 under the heading Officers and from paragraphs 98 through to 111 there is discussion of loss of office. We have not reproduced 110 and 111. I do not think that matters. Paragraph 98:

> Offices may be lost by forfeiture, by acceptance of another office incompatible with that which the person already holds, or by the destruction of the principal office, or the determination of the thing to which the office was annexed.

Forfeiture is the only relevant heading. Continuing:

> Offices of every kind are not only subject to forfeiture for treason or felony . . . . . it was said in Lord Shrewsbury's case that "there are three causes of forfeiture - - -

and that is at the passages set out. Then going to 101, an office I am not familiar with:

> A filazer of the court of common pleas was absent from his office during two years, and farmed it from year to year, without leave of the court, for which he was discharged, and no record of the discharge was entered on the roll. Upon his bring an assise, this was held a good discharge.

102:

> If a tenant in tail of an office commits a forfeiture, it shall bind the issue by force - - -

I do not think we need be troubled with that. I think that is really all one can glean from that.

Apart from treason and felony there is no suggestion that conduct out of office would lead to its forfeiture.

HON A. WELLS: What about taking an office that is incompatible with that which you already hold? That could be quite lawful and outside the range of your own office and they say that is a ground of forfeiture.

MR GYLES: Yes, that is one of the express grounds of forfeiture. That is a separate heading, that is not a forfeiture, with respect. That is a separate heading. By acceptance of an incompatible office - - -

HON A. WELLS: What does it do?

MR GYLES: It disables you from performing the office presumably is the - if I may read from paragraph 107:

> A person may lose an office by the acceptance of another office, incompatible with that which he already holds. And all offices are incompatible and inconsistent where they interfere with each other, for that circumstance creates a presumption that they cannot be both executed with due impartiality.

In other words, it affects the ability of the person to perform the office itself.

In Comyn's Digest, volume 5 under the heading Officer, pages 152 to 157 - - -

SIR G. LUSH: This is the one, is not it?

MR GYLES: Yes. I should have written Comyn's on it. There is a front sheet in the material already I think. It is Comyn's Digest volume 5. It should be written on the top of it, if the commission pleases. How an office shall be lost. The first heading is By sale, and we need not trouble ourselves with that. Two, By forfeiture:

> If you break the condition annexed to it by law by non user or abuser . . . . does not attend.

Thirdly, by misdemeanour in his office:

> If he commits a misdemeanour contrary to the nature of his office as if a gaoler of a prison be guilty of extortion or suffers two voluntary escapes.

I presume that means gross negligence.

SIR R. BLACKBURN: Once again "misdemeanour" is fairly clearly used in its literary rather than in its technical sense.

MR GYLES: May I come back to that?

SIR R. BLACKBURN: Yes, I do not want to take you off your track.

MR GYLES: I wondered whether in the passage from Todd it was not referred to in the sense of contrasting it with felony. I thought I would come back to that in due course.

SIR R. BLACKBURN: Yes, all right.

MR GYLES: If you unlock the doors and go away, negligent escape is not a forfeiture nor is single ecape, non-user or abuser, the liability for servants, deputies, non-residents and so on but the significant thing is if he commits a misdemeanour contrary to the nature of his office and all the examples are of people doing things in office which are an abuse of that office and the description of it is misdemeanour in his office. Non-attendance upon the King in his wars, acceptance of another incompatible office, destruction of the thing for which the office was granted, neglect of odes and sacrament, surrender by death of the King.

Bacon's abridgement, volume 6 under the heading offices and officers, pages 41 to 46 deal with forfeiture of an office:

> It is laid down in general that if an officer . . . . . forfeiture or seizure of offices by matter in deed.

Three are then set out and the examples given. Then there is the abbot of St Alban example which is detaining persons in prison for a long time and then the scire facias:

> Be brought to repeal . . . . but a voluntary escape.

Then there is the example of a parker or a forester cutting down a tree, insufficiency, the filazer again, then there is Pilkington's case. The clerk of the peace indicted and removed for not delivering records to the new custos rotulorum, custody of a castle with all profits granted to him for life of which the inheritance has been granted to B and he refuses to inhabit, that is forfeiture, attainder and the effect of that and so on.

The next heading is (N) where for corruption and oppressive proceedings officers are punishable; and herein of bribery and extortion:

> There can be no doubt but that all offices . . . . . is merely void.

Then there is a particular example. There is the definition of bribery in connection with office and common law bribery of a judge in relation to a cause depending before him. The conclusion is:

> All wilful breaches of the duty of an office are forfeiture . . . . . endeavour to enumerate them.

So we can take it that it is a misdemeanour or in the common law sense to breach office. That gets back to what Sir Richard Blackburn was putting to me a little while ago, that all wilful breaches of the duty of an office are forfeitures of it and also punishable by fine, etcetera. All of the discussion in Bacon either under forfeiture of office or corruption, oppressive proceedings and so on plainly relate to the conduct by an officer in the conduct of his office.

Then there is the old case of Harcourt v Fox which is reported in 1 Shower 506. This was a case where a clerk of the peace - - -

SIR G. LUSH: What is this text, an English Report?

MR GYLES: No, that is from the English Report and I just have not got to hand what the English Report is but I will pick that up before the day is out. It is volume 89 of the reprints, page 720. The clerk of the peace was suing for fees and prerequisites of office. The question which arose was whether his office was terminated by reason of the termination of office of the custos rotulorum who had appointed him. There are some passages to which I would draw attention in the judgment of Eyres J at page 725:

> We are, I must confess, much in the dark . . . . . set up a jurisdiction in others.

Then his Lordship goes on, picking it up at about point 3 on the following page:

> The intention of the act appears from the . . . . . is plain -

and so on.

Just below 520 in the original report:

> without any strained construction, both by the intent of the lawmakers . . . . . for the express words of the act are - - -

and so on. In the judgment of Justice Gregory at the foot of the next page, 728, there is a reference about ten lines from the bottom:

> For in the next following . . . . . but that of good behaviour.

Chief Justice Holt at page 733, towards the foot of the page there is a reference to the fact that before this act the justices of the peace could not remove him for misdemeanour but the custos was able to do it. At page 734:

> Sixthly, it seems to me upon the whole frame of the Act . . . . . to have the office so easily vacable.

We, with respect, submit that precisely the same principle applies to all holders of public offices holding on this tenure, including judges. It is for the public interest to find able clerks of the peace, to encourage them to take the office so that they shall not be at risk of losing it for anything other than misbehaviour in that office. Later down the page, about point 6:

> I am the more inclined to be of this opinion . . . . . only determinable upon misbehaviour.

The Chief Justice goes on to deal with the particular case before him. On the following page, 735.5:

> It is said that a grant . . . . . as expounded by usage - - -

and so on. That goes on to another point.

HON. A. WELLS: What was the primary debate in this case - the debate between on the one hand those who said that simply by removal of the custos led to an automatic removal of the clerk of the peace and the others who said, no, there is an actual durable estate? That was the fight, was it not?

MR GYLES: That was the dispute, that was the debate.

SIR G. LUSH: The decision was what?

MR GYLES: The decision was there was a durable estate.

SIR G. LUSH: Early on there was a passage quoted from the relevant act.

MR GYLES: I probably put that badly. In that passage from Justice Eyres, he was there setting up the former act which placed the office in the power of the custos. The act which was then in force which is also dealt with changed the control as it were from the custos to the justices. I was reading from the foot of page 725. That must be read in context with what appears at page 726, which I also read, which was that the change in act would seem to be significant for the purposes of the decision in the case. My point in reading 725 was the concept that your risk of removal depends upon there being what is called misdemeanour.

Then there is the Mayor of Doncaster's case, 2 Lord Raymond at 565, volume 92 of the reprints, page 513. The charge is set out at the foot - - -

SIR G. LUSH: What was the date of this, do you know, Mr Gyles?

MR GYLES: I cannot tell you offhand I am afraid.

SIR R. BLACKBURN: About 1730.

HON. A. WELLS: At the beginning of the 18th century.

SIR R. BLACKBURN: The date is given in the next case, at the end.

MR GYLES: It is. 1730. The previous case was 1729 so we are pretty close. This was a mandamus to the mayor, aldermen and burgesses of Doncaster commanding them to restore a named person to the office of a capital burgess of that corporation. To justify their refusal to do so, they made charges about him. They appear at the foot of page 1565:

> then the return sets out . . . . . .
> . . contrary to the trust reposed in him.

and so on. Half way down the page:

> Nov. 28, 1729, the Court unanimously awarded . . . . . but not of a capital burgess.

SIR G. LUSH: What do you make of that case - the fact that he was a thief in one capacity did not make him unfit for office in another?

MR GYLES: Yes. It has to be in that case. We then come to paragraph 6. We say the only extension of this concept was to include conviction of an infamous offence during office. That springs from Richardson which is 1 Burrow 539. This is from the English Reports. It

will be borne in mind that treason and felony according to the commentaries were always a ground for removal from office. In Richardson's case - I do not think I need trouble the commission with the detailed facts. Lord Mansfield's judgment commences at 437 of the English Reports. I pick it up at the beginning of the judgment, 437.6:

> The general quesiton upon the plea is
> . . . . . admitted and sworn.

The defendant was claiming to be the replacement:

> Upon the first point . . . . . .
> of a motion is not sufficient.

SIR G. LUSH: I am sorry to interrupt you, Mr Gyles. Was this another mandamus case?

MR GYLES: It was probably a removal from office case, if I can just go back. It was a quo warranto to show by what authority he claimed to be one of the portmen of the town or borough of Ipswich.

SIR G. LUSH: Information in the nature of quo warranto.

MR GYLES: Yes.

SIR G. LUSH: I am not sure what the proper term is, but who was the prosecutor for the writ? The proceedings were by the attorney, but was the previous incumbent trying to get that, or what was happening?

MR GYLES: I would presume so, but we will certainly look at that. I suppose that would in any event only be a matter of locus standi and would not affect the substance of the matter. His Lordship comes to deal with the first objection that they had no power to amove.

> This objection depends upon the authority of the second resolution . . . . . before he can be removed.

This appears by Magna Carta, and then:

> And if the corporation have power by charter or prescription . . . . . that he was not reasonably warned, such removal is void -

and so on. So that is a natural justice point. the Bagg's principle, of course, relates to - when it says convicted of any such offence which is against the duty and trust of his freedom and to the public prejudice of the city and against his oath, they speak of matters which relate to his oath of office, and the examples bear that out. Mansfield LJ goes on:

> Previous conviction was not a circumstance at all necessary . . . . . as much as the power of making bylaws.

Then they went on to look to the particular circumstances of the case, which was an absence from duty, and discussed that, and I do not think that is of any significance in the present case.

In our respectful submission, Richardson's case goes to the limit of what might be appropriate in relation to a statutory public office. If it

were to do so, it would be our argument that indeed in relation to a judge whose office is limited by misbehaviour in office, conviction of an offence is not a ground for removal. We do not need to press that argument here, because we know that there has been no conviction. Certain it is that Richardson's case is the fullest extent of the relevance to office of conduct out of office. The judgment in this case has never been subsequently doubted in any decision, and is cited by all commentators as stating the law.

SIR R. BLACKBURN: But surely Richardson's case is confined to the powers of a corporation. That is what it is all about, and that is what he repeatedly talks about.

MR GYLES: I am not quite sure why that is said, with respect, because if it is being put to me that Richardson's case deals with removal by a corporation, I agree. If it is said that what appears at page 538 and 539 of the original report is limited to the cases of corporations, then I say that is simply wrong.

SIR G. LUSH: Is it possible that the reference to conviction on the top of page 438 of the English report print springs from a doubt whether the corporation had any power to try an offence - at any rate, no power to try a matter which might be an offence under the general law?

MR GYLES: Well, the difficulty about the power of the corporation is said to spring from Bagg's case, and it would be a fuller reference to Bagg's case which would resolve that question. We have here the passage from Bagg's case which Lord Mansfield sets out, starting at page 437 of the original report, over to 438.

SIR G. LUSH: Right in the middle of page 438, there is a paragraph which begins, "The distinction here taken." Do you pick that up?

MR GYLES: Yes.

SIR G. LUSH: The distinction here taken seems to go to the power of trial . . . . .
. . . . . conviction upon an indictment.

Well, if the corporation wanted to assert that the office holder had been guilty of theft outside his office, then the view may well have been held that they had no power to determine that, not because their right to dismiss upon the facts might be assumed, but because if they attempted to determine conduct outside misbehaviour directly in the office, they might be met with one of a number of prerogative writs based upon material which might dispute the view of the facts which they had taken.

For instance, the dismissed man in the hypothetical example I gave might take proceedings to be restored to his office or have his successor thrown out, and the issue could be finally determined before the corporation.

MR GYLES: Well, it is an interesting theory, but there is no support for it in Richardson's case, and one would perhaps have to go back to Bagg's case.

SIR G. LUSH: Well, in the next paragraph after the one I have been referring to, it goes on:

> It is now established that though a corporation has express power . . . . . indictment and conviction.

That is a quotation. The passage in the judgment is that there is no authority since Bagg's case which says that the power of trial as well as amotion - the second sort of offences is not incident to every corporation. So there seems to be an undercurrent or substratum of the concept of the two distinct powers involved, and one is the power of trial, which may be quite a different thing from the appropriateness of taking matters into consideration. Once the conviction is recorded, it is the conduct revealed by that that leads to the amotion, I imagine, not the fact of the conviction itself.

Once the conviction is recorded it is the conduct revealed by that that leads to the amotion, I imagine, not the fact of the conviction itself.

MR GYLES: The offence, not the conduct, with respect, the offence revealed.

SIR G. LUSH: Well, in that case, it is the conviction itself that leads to the amotion.

MR GYLES: Yes.

SIR G. LUSH: However, we will have to come to whatever difficulties there are about that in due course, I suppose.

MR GYLES: I am anxious to deal with them as they arise because Richardson's case is of - - -

SIR G. LUSH: I do not want to take you ahead in your argument, but in this kind of level, the corporation level of case and, for that matter, under section 72, could a man convicted come to his dismissing authority, be it corporation or houses of parliament, and say, "I was not guilty of that offence. Somebody else has since been discovered to have comitted it, and I want to be exempt from the consequences that would flow if I have been convicted, and unjustly so, and I do not want to be bothered going through the enormous difficulties of getting a new trial on the ground of new evidence."

MR GYLES: The answer to that would be plainly yes because the dismissal is not automatic.

SIR G. LUSH: It is the plea rather than - - -

MR GYLES: There must always be the opportunity of putting to the dismissing authority, whoever that may be, the true circumstances of the conviction in order to persuade them not to exercise any power which the conviction may have triggered. Obviously in each case, whether it be the Crown, corporation or the parliament, the question which remains is whether the conviction is of a character which it bears, particularly under section 72, parliament and the Crown, or parliament certainly, has a residual - it is more than residual - has a substantive decision to make as to whether they seize on the thing. But perhaps just to deal with several of the points which have been put to me. In my respectful submission, the statements in Richardson's case whilst applying to a corporation are not limited to corporations but deal with office generally. Certainly they have been so regarded by every commentator, certainly they were so regarded by all the commentators up to 1900 and, of course, all those since 1900.

SIR R. BLACKBURN: I am not clear now for what proposition you say that Richardson is authority.

MR GYLES: It is authority for the proposition that where what is alleged against the holder of an office is conduct which has no immediate relation to his office, then there is only ground for removal if there is a conviction of an offence which makes a party infamous and unfit to execute any public franchise, public office. That is the proposition.

SIR R. BLACKBURN: [redacted]

MR GYLES: [redacted] All of them. As to the point put to me by the presiding commissioner, it is correct to say that the decision, or one of the points of the case was that contrary to what had been understood from Bagg's case a corporation does itself have power to amove for misconduct in office without there being a conviction in relation to matters which are against the duty of the office. What this case leaves open is - I withdraw that because it is not necessary to be troubled by it. The passage from Bagg's case which is recited in Richardson's case does not itself turn on any procedural problem about trying somebody, as far as one can read it.

SIR G. LUSH: Are we going to deal with Bagg's case immediately after Richardson's?

MR GYLES: I had not intended to but will make sure we do get it.

SIR G. LUSH: I have only a half-dozen very short lines noted. I have looked at the case probably in the English Reports, and the note that I have written down is, "Held that a corporation must have authority to discharge a person either by charter or prescription. If not he ought to be convicted in course of law," which is somewhat cryptic, but it may be that it is cryptic in the original print too.

MR GYLES: The actual resolution in Bagg's case is set out at Richardson's case, which is why I had not gone back to Bagg's case. If we go back to page 437 of the English Report about 11 lines from the bottom, Lord Mansfield says:

> This objection -
>
> that they had no power to amove -

- depends upon the authority of the second resolution in Bagg's case . . . . . he ought to be convicted by course of law before he can be removed.

That is the resolution in Bagg's case.

SIR R. BLACKBURN: Based on Magna Carta, which makes this very distinction, the law of the land or the judgment of his peers.

MR GYLES: Yes, and Bagg's case goes on - if the corporation have power by charter or prescription to remove him for reasonable cause then it is the law of the land, but if they have no such power then he ought to be convicted by the normal process. The question simply was whether or not there is an implied power of removal in a corporation. Bagg's case says it has got to be express.

SIR R. BLACKBURN: Unless there is conviction.

MR GYLES: Unless there is conviction, yes. Richardson's case says there is an implied power of amoval in a corporation. All that we see in this report down to the end of the inverted commas at the end of the first paragraph on 438 is all from Bagg's case.

SIR R. BLACKBURN: Where he says just below the middle of 438, but it is now established, and then in quotation marks that though a corporation has express power of amotion, etcetera, do you think Lord Mansfield was there citing some authority or do you think he was doing what he did tend to do and modern judges tend to do, lay down the law and put it in quotation marks to give it a bit more authority?

MR GYLES: I suppose that it may be safer to go back to Bagg's case. I do not know whether he is purporting to quote from Bagg's case, but I think not. He may be repeating what he had said before.

SIR R. BLACKBURN: Because he refers to the first sort of offences, he himself has set out - - -

SIR G. LUSH: I think there is a real difficulty in understanding exactly what was decided here because I have the feeling that the sense of Bagg's case was that in the absence of an express power to remove, any one of these three types of conduct would have to be proved aliunde, that is, outside the corporation, and if that was what Bagg's case was

saying then Richardson's case says it is now the modern law that every corporation has an implied right to amove, but Richardson's case somehow produces a novel division between class one and classes two and three.

MR GYLES: Not really, with respect. It must be remembered that the history of it is that the only indication - I withdraw that - in relation to loss of office whether it be corporate office in this sense or in any sense, was limited to a breach of your office, misbehaviour in office. The only other ground was felony or treason as a separate matter because anybody who had been found guilty of felony, convicted of felony or treason was beyond the pale, they were unfit to hold any office anywhere and, with respect, when it is said that it is novel, we protest about that. What we say is that if it were not for Richardson's case one would not even argue that there is anything more than felonies or treason. The abolition of felony would have to be catered for now, of course, but it would be offences of the nature of previous felonies, the old capital offences.

The old capital offences. So much appears, in our respectful submission, very plainly from all we have said to date. It is only when we get to Richardson's case that the position is somewhat blurred by going beyond - well, it does not go beyond felony, the examples do not I think go beyond felony; but what Richardson's case does is to recognize and spell out what was always the position. If you were to be discharged from your office you had to misbehave in your office unless you were beyond the pale by reason of a conviction.

Richardson's case did nothing to change that. It deals with the circumstances under which the patron of the office holder may amove an office holder for other than a criminal conviction and it decided in that sense a very narrow question as to whether there was an implied power to do so.

Bagg's case makes clear if there is an express power to remove from office for misbehaviour in office, then that may be done. So, it is not simply a procedural sort of point. They are saying there is no implied power. If you have got it by charter or if you have got it by - what is the word - - -

SIR G. LUSH: Proscription.

MR GYLES: Proscription, then you may amove. If you have not then we will not imply it and that is where Richardson's case departs from Bagg's case. So, if anything, Richardson's case might be a slight expansion of the law as it had been understood in relation to conviction.

SIR G. LUSH: If this is a convenient time, Mr Gyles?

MR GYLES: Yes.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Yes, Mr Gyles?

MR GYLES: If the commission pleases, we have photostated some portions of Bagg's case over the luncheon adjournment. Again, it is a report by Coke and it appears to be his summary of the points resolved in argument. Question 1, which appears from page 1278 of the English Report - perhaps I just should read from 1277 because it shows what the point of the case was. 98A in the original report:

> It was resolved by the court that there was not any just cause to remove him . . . . . for the party grieved in such case.

And then as to the first question:

> It was resolved that the cause of disfranchisement ought to be grounded upon an act which is against the duty of a citizen . . . . . in cities and boroughs.

That is the definition of the causes for disfranchisement or loss of office.

That relates to matters of course relating to and in the conduct of office. The second point which is set in Richardson's case - I think it is set out completely in Richardson's case, if I am not mistaken. I do not think I need read that. It is set out fully in Richardson's case. The thing which is of interest is the note by the author of the reports, note D on the foot of page 1279. The reference is Bull v The Queen and the Mayor of Derby. I will obtain that and draw it to the attention fo the commission in due course.

SIR G. LUSH: Where does that note come from? It was not the practice of the editors of the English Reports to add notes, was it?

MR GYLES: It must be a subsequent report because it includes within it a reference to Richardson's case, which was some - - -

SIR G. LUSH: Yes, it is quite a recent edition.

MR GYLES: I am not sure what date it was. I am just looking for the date of Bagg's case. Perhaps I will look at the beginning of 11. That will give us the clue, I think. This is from the actual report, the English Report, if I may read it, from page 1145:

> The 11th part of the reports from Sir Edward Coke - - -

etcetera:

> diverse resolutions and judgments given upon solemn arguments with great deliberations . . . . . published in the 13th year of James - - -

I am not sure what the year is. My learned friend was mumbling something about 1600.

MR CHARLES: 1615.

MR GYLES: 1615. This is the answer to the question:

> With notes and references by John Farquhar Fraser Esquire of Lincoln's Inn, barrister at law.

MR GYLES: I do not know when Mr Fraser was operating. I will endeavour to find that out too. If I may return then to the outline of argument, on page 3 paragraph (6) adding perhaps a reference to Bagg's below Richardson, we go on submit there is no authority for the proposition that conduct unbecoming or any such concept has ever been a ground for removal of a public office holder. There is even a question as to whether misbehaviour connected with office which is also a crime, requires conviction to be proved. The commission will have noted that in the case of Richardson that was left open and in the note to Bagg's to which I have just referred, the view was expressed that you would need a conviction if it were a single act and unless what might be called the civil part of it could be separated from the criminal part of it. That was in the note (d). Perhaps I should draw particular attention to that in this connection and also for the commission to make a note re see also Bagg's below the reference to Hutchinson.

In the note (d) on page 1279 of Bagg's case where the offence is criminal in both respects, the difference seems to be that:

> If it consists of one single fact as . . . . . the business of the corporation.

And, of course, the following part of the note supports the proposition which I put earlier, that it is the infamy of the crime, not the infamy of the circumstances which leads to the result.

Hutchinson's case, it is a little hard to pick up, case No 64 and this is from 88 English Reports page 77, the extract that we have, this was again a mandamus to restore the previous office holder, the office of a capital burgess. If I may read from the second page, page 78, the form of return:

> The return was that the corporation had been . . . . . which the law describes.

The Chief Justice at page 102 of the original report:

> Pratt, Chief Justice. By the return of . . . . . of a crime.

I do not think I need trouble about that:

> As to the question whether . . . . contrary to such good -

and so on.

So that even in the time of this decision which I will have to pick up, it was still to be argued that even in a case where what is done is damaging to the very body in relation to which the office is held, that is bribery in connection with the very office, it was still the view of the Lord Chief Justice that that should be prosecuted in the courts of Westminster.

SIR R. BLACKBURN: Hutchinson's case is not authority for the point for which you cited. It seems to decide that you can remove a man for a crime closely connected with his office even though there is no conviction for it.

MR GYLES: I think it would have been better expressed, there was even a connection as to whether misbehaviour connected with the office is also a crime.

SIR R. BLACKBURN: Yes.

MR GYLES: We go on to say the distinction is well illustrated by the case of Montague v Van Diemen's Land, 6 Moore 489, 13 ER 733. That was the Tasmanian judge and the facts for present purposes can be sufficiently gathered from the argument for the Lieutenant Governor and council and indeed we have not had copied the whole of the report but the points perhaps appear also if I could draw the commission's attention to page 493 of the original report. There are four matters particularly drawn to the attention of the judge.

HON A. WELLS: These pages seems to be higgledy-piggledy.

MR GYLES: Yes. We have put the headnote in, 489 of the original report. Then we pick it up at 491. I have drawn attention to what appears on 493, the four points set out there. I think it goes in sequence from there on.

The argument for the Lieutenant-Governor picks up half way down page 497:

> The order was fully justified by the conduct of the appellant . . . . justify his removal.

With respect, we agree with that.

SIR R. BLACKBURN: We do not know exactly how he prevented the recovery of the debt, do we? What did he do?

MR GYLES: I think it needed two judges to sit and he would not sit.

SIR G. LUSH: It is the second allegation, is it not? It seems possibly a little strange because he would have been disqualified anyway.

MR GYLES: It may well have been one of those situations where the constitution of the tribunal was such that the rules of contrary interest and bias and so on really cannot apply because there is nobody else to sit. It is probably so that the particular one also dealt with what he did in office. We respectfully agree with that argument. Counsel goes on:

> Secondly, it appears from the evidence . . . . . this was another strong reason for his removal.

Unless that is understood to be linked with what he did because of his impecuniosity as a judge that we respectfully submit is not a ground of misbehaviour. What happened was that Lord Brougham on behalf of the board reported:

> The lords of the committee have taken the said petition . . . . . author of amotion.

So the actual decision in the case is quite neutral as to the point here being taken.

SIR R. BLACKBURN: Is it, Mr Gyles? This was a case under Burke's Act and Burke's Act says, shall be lawful for the governor and counsel to remove a person who shall neglect the duty of such office or otherwise misbehave therein.

MR GYLES: Yes. Quite.

SIR R. BLACKBURN: What about this business of being generally pecuniarily embarrassed? It was misbehaviour in office.

MR GYLES: I submit that cannot be drawn from this case. What the case shows is that there were two grounds argued

for the Lieutenant-Governor as warranting removal. One was, as he put it, such a gross act of misbehaviour in his office as amply to justify his removal. Of course, that is correct. The second matter would in our submission plainly not be misbehaviour in office but the fact that it did not amount to misbehaviour in office was quite irrelevant because the first is sufficient.

SIR R. BLACKBURN: Did they hold that?

MR GYLES: They did not say anything. They just said there are ample grounds. If I can take you again to the actual report of their lordships - they have taken the petition and so on:

> Under the authority . . . . . .
> for the amotion of Mr Montagu.

That does not establish that the alternative ground was sufficient. The first ground on any view was sufficient.

SIR R. BLACKBURN: It did not establish the first one either.

MR GYLES: Perhaps not. I entirely agree, with respect, but it is my submission that the first is plainly sufficient and on any view would come within the tests which have been laid down by the authorities.

HON A. WELLS: Why does not the second? His behaviour in bringing about this condition of impecuniosity was such as closely and directly to affect him in the conduct of his judicial office.

MR GYLES: I put the qualification earlier that it depends how one understands what is being said there. The mere fact that a judge is impecunious or even bankrupt is not in my respectful submission misbehaviour. It may be, given certain circumstances. If, for example, he had gambled with court money and became insolvent because of that, that would be plainly enough and there may be many other instances which would lead to insolvency, combined with other matters, being sufficient to remove but it cannot in my respectful submission be argued that impecuniosity is a ground for a removal of a judge. It is certainly not misbehaviour in office as such.

SIR G. LUSH: Well, whatever may have been said in Montagu's case by Lord Brougham, does the combination of facts in the way the prosecution was put raise a question whether misbehaviour in office is a phrase which covers those things which would tend to bring into distrust and disrepute the judicial office?

MR GYLES: As I understand it, that is the argument which will be put against us here. That is why I raise it. This

case neatly points up the dilemma or distinction between acts which are plainly misbehaviour in office and acts which are not but which are said to be.

SIR G. LUSH: Said to affect the reputation of the office?

MR GYLES: That is so - subject to the qualification always that in the present circumstances of the case there may have been an argument that what was done did as a whole, because of the impecuniosity, amount to misbehaviour in office. Returning to the outline of submissions, paragraph 7: these principles have always been held to apply to judges as well as other office holders, and the framers of the Constitution and the legislature which passed the Constitution must be taken to have been aware of them. Indeed, Mr Isaacs, as he then was, read the relevant portion of Todd to the convention. Windeyer J in Capital TV and Appliances Pty Limited v Falconer (1970-1971) 125 CLR 591 at 611-612 said:

> The tenure of office of judges
> . . . . . misbehaviour
> in office or in capacity.

We have reproduced that on the following page from that judgment.

SIR R. BLACKBURN: What do you rely on there?

MR GYLES: The words "misbehaviour in office".

SIR R. BLACKBURN: But does that notjust mean misbehaviour while holding the office?

MR GYLES: No, with respect. That is the whole point of all these authorities. It is misbehaviour by your conduct in the office.

SIR R. BLACKBURN: What Windeyer J must be saying if you are right is that a judge can never be removed for misbehaviour which has got nothing to do with the office.

MR GYLES: Save for conviction.

SIR R. BLACKBURN: He does not say that.

MR GYLES: He said what he said. It means misbehaviour in office. That is a phrase which appears, I think, in the various authorities to which I have referred. It plainly means misbehaviour whilst you are conducting yourself as the officer. I must have made myself very unclear this morning. All of those passages to which I have referred make that point.

HON A. WELLS: Something is missing, is it not, in that particular passage? It is just a question of what use

we can make of it if something rather important is missing.

MR GYLES: Yes. Indeed, his Honour, was not bringing himself to the point at issue, so I do not seek to get more out of it than I can; but the phrase "misbehaviour in office" does not talk about misbehaviour not in office. It cannot mean simply, and never has meant simply, co-terminus with office in a point of time. Why otherwise the debate about Richardson and the like? Why the commentaries? Certainly his Honour regarded section 72 of the Constitution as being the equivalent of holding office with a good behaviour tenure. That of course was before the constitutional amendment about the period of office.

It is our submission that what we have submitted, namely that the conduct in question must have the requisite connection with the conduct of the office, not simply the fact that it is done whilst the person happens to hold the office, is the view which is expressed by every commentator that we have been able to find save for the one to which we will refer in a moment. That has its own significance because it will be a most remarkable thing if everybody from Cook to Mansfield to the present day, included amongst them the many noted legal historians, have got it wrong, although I suppose that is possible.

But more importantly, the common view of all those in the law when the Constitution was being considered, both in this country and in the United Kingdom, was as we have submitted it to be. If that be correct, it is simply not open to anybody in 1986 to say, doing the work of a legal historian, we disagree with Coke and Mansfield and Bacon and Comyn and Cruise and Halsbury and the various other people to whom I will refer in a moment. It is simply not possible to do that.

The Constitution, bearing in mind, of course, it is a constitution and was the result of federal negotiations, nonetheless is as with all other pieces of law: if it uses well-known concepts and phrases, it must be taken to use those in the sense that they were understood at the time, and misbehaviour in office was certainly understood in the way which we have submitted it ought to be.

SIR R. BLACKBURN: Mr Gyles, are you going to cite that memorandum by certain members of the Privy Council which is set out in Moore's Privy Council Reports?

MR GYLES: I am not familiar - - -

SIR R. BLACKBURN: It was mentioned in Mr Pincus's opinion, which I think is appended to one of the Senate reports.

MR GYLES: I have certainly read Mr Pincus's opinion. I do not recall that particular - - -

SIR G. LUSH: I think it is attached to volume 6 of Moore, the report in which Montagu's case appears.

SIR R. BLACKBURN: Yes, it is, and there is an additional opinion of Lord Chelmsford on the same subject, and there are words there which at least require a bit of explanation.

MR GYLES: I will endeavour to do that, but I will go through these authorities now. The Opinion of the Victorian Law Officers was referred to earlier, and I should go back to it in view of the discussion which has occurred since. This is the 1866 document No 34, at the top of page 11:

> Misbehaviour means behaviour in the grantee's official capacity -

to pick up the point that has just been put to me -

> It does not mean behaviour by the grantee whilst he happens to hold office . . . . . established by a previous conviction by a jury.

In my respectful submission, those words cannot be read as other than saying that misbehaviour in office means misbehaviour in your judicial capacity, either by improperly exercising it or wilfully neglecting it. The only extension of that is conviction for an infamous offence for which the offender is rendered unfit, not to be a judge particularly but to exercise any official office or public franchise.

SIR G. LUSH: There is the same difficulty in the wording in that passage as there is in the wording in one of Todd's passages. The word misbehaviour is given a definition as the improper exercise of judicial functions, and then is used again in a plainly different sense a few lines further down.

MR GYLES: Could I ask where?

SIR G. LUSH: I am sorry, it is misconduct where it last appears, official misconduct.

> The question whether there be misbehaviour rests with the grantor . . . . . misbehaviour must be established by a previous conviction by a jury.

It is used again.

MR GYLES: Yes, but is that not the third case above.

> Misbehaviour includes firstly the improper exercise . . . . . in office or public franchise.

SIR R. BLACKBURN But it is not, strictly speaking, literally consistent with the previous short sentence: "Behaviour means behaviour in the grantee's official capacity." That sentence cannot stand by itself. It does not mean what it appears to say.

MR GYLES: As I have endeavoured to put this morning, it was only in cases of treason or felony that there was a special rule, because in the case of treason or felony there was forfeiture, automatic forfeiture, and that is the source of this category, if you like, that exists outside office.

The commission may recall the case of Dugan - I will have copies made overnight - in which the High Court considered the position of a felon suing for defamation. The reference is Dugan v Mirror Newspapers, (1979) 142 CLR 583. But taking this passage first, is it not clear that the authors of the opinion are saying that in that class of case where you may lose office by reason of conviction for an infamous offence, if that offence is such as to render the offender unfit to exercise any office or public franchise, and that must be proved by conviction by a jury.

HON A. WELLS: The thing that troubles me about this sort of publication - I purposely use a neutral phrase there - is that when they extended their opinions to matters that we are interested in, they did not necessarily have very great relevance to the things that they were interested in. What they were interested in in this case was a judge from the Supreme Court who was wilfully absent from Victoria without reasonable cause, allowed by the Governor-in-Council. There was not really any occasion, was there, to explore the periphery of the meaning of misbehaviour. They were concerned with whether this came clearly within a denial of his fundamental duty as a judge in office. There is no question that it was in relation to office.

MR GYLES: Yes, it was the second of the categories I have mentioned, wilful neglect of duty and non-attendance.

HON A. WELLS: That is right.

MR GYLES: I agree. The opinion is not directed to the particular point at issue. However, when one finds the position being stated, with respect, very clearly, although in general terms in a number of places, then one is led to the view that they are correctly stating the general position as if it is established law and does not require any real examination.

The passage from Todd I also took the commission to earlier, and that should also be referred to under this heading. Without repeating the reading of it at this point, it will be recalled that at pages 191 to 192, one finds a passage which is, if not precisely, virtually precisely the same as the Victorian Opinion, and I think as Sir Richard Blackburn may have surmised this morning, Todd may well have been a source, an unattributed source for the Victorian Opinion. I do not know when the Todd edition was first - it may be the other way round. Yes, I am grateful to my friend. 1892 was the first edition of Todd.

HON A. WELL: It says new edition abridged and revised by Spencer Walpole. What does that mean?

SIR R. BLACKBURN: It must have been earlier than 1892.

MR GYLES: It must have been, but I do note that one of the references in Todd is the Victorian Opinion.

SIR R. BLACKBURN: That may have been Mr Spencer Walpole.

MR GYLES: Yes, we will try and track that little bit of legal history down when we see the book itself, but all that I have said concerning the Victorian Opinion applies to Todd, with the extra significance that we know that the Todd version was read during the convention debates by Mr Isaacs, as he then was, although he, of course, cited it to argue for a different result, and I think he read this very passage out.

Then Quick and Garran, the Annotated Constitution, paragraph 297 at 731, in that passage cite both Coke and Todd adopted.

These are not in any order of importance, if I may say so, they are a miscellaneous order. Then there is Mr Zelman Cowen, as he then was, and David Derham, The Independence of Judges, 26 Australian Law Journal 462. I do not think the reference to the journal has come out. It is headed The Independence of Judges. the learned authors made an historical survey of the position, and at page 463 of the volume dealt with the rules relating to the removal of judges. They first of all distinguished the two procedures, that is address for the removal of a judge form the estate conditional upon good behaviour, citing from at that point the Solicitor-General's opinion - sorry, the Attorney-General's opinion, so I withdraw that. Another opinion, not the opinion I read, but another opinion, and they say:

> Two questions arise here. What type of mis-behaviour will lead to forfeiture . . . . . which is quoted in the footnote hereunder.

Footnote 10 reproduces what is in the opinion to which the commisison has been referred and, with respect, whilst there can be no question but that it is only conviction for infamous offence which is there set out. The authors then go on to deal with the procedure for removal, and I do not think it is necessary to become involved in any close analysis of that.

There was then a riposte in the same volume of Australian Law Journals, but at page 582, and I am afraid we have cut off the identify of the author and I have forgotten it, but it is only of marginal significance anyway. 26 ALJ, it is one sheet:

> It is the view of the judges . . . . it is not a ground for removal of a judge.

HON. A. WELLS: I think this came from Shetreet.

MR GYLES: No, ti is headed Australian Law Journal volume 26. It is page 582. It is noted in our submissions beside the Cowe - Derham article. In the Wheeler article, the removal of judges from office in Western Australia, the second page, misbehaviour definition. Then there is the very comprehensive book by Shetreet, Judges on Trial. We have reproduced on this point pages 88 and 89. As I say, Shetreet's book, Judges on Trial. Again it is a one page copy. In a learned and comprehensive analysis of the position of judges in the relevant portion of it the learned author says:

> Acts which constitute a breach of the good behaviour condition . . . . . for removal from office held during good behaviour.

HON. A. WELLS: Did Professor Jackson in his book give any further indication of what he meant by scandalous behaviour?

MR GYLES: No. I have reproduced that page from the book but I did bring the book up from the library yesterday. As Shetreet notes, it is at page 368. I will hand it up to the commission now. It is footnote 1, and it just makes the bald assertion. I will hand it up and perhaps copies could be made.

SIR G. LUSH: I thought I had seen somewhere in these papers a photograph of the title page of Shetreet.

MR GYLES: There should have been, I am not clear that there is.

SIR G. LUSH: What are his qualifications?

MR GYLES: He is an Israeli academic.

SIR G. LUSH: I see another document of his here says he is from the Hebrew University of Jerusalem.

MR GYLES: This I think was his doctoral thesis. There is another document of his which I will be referring to shortly which is probably what you have in mind. He has written extensively on this topic and probably the book should speak for itself as to the quality of the scholarship. We would submit that it is the most comprehensive analysis of the subject and the most scholarly analysis of the subject.

Then Halsbury's Laws of England I have read and I do not repeat except to say that on the relevant matter or the present point there is no qualification to the statement, and Holdsworth and succeeding editors have stated misbehaviour as to the office itself:

> Behaviour means behaviour in matters concerned in the office . . . . . refusal to perform the duties of the office.

So that that is also on all fours with the other statements.

Anson's The Law and Custom of the Constitution. I am afraid we do not have a copy of that available at the moment. We will endeavour to rectify that overnight.

SIR G. LUSH: We have it, pages 222 and 223.

MR GYLES: I will withdraw my apology.

SIR G. LUSH: You might repeat for me the name of the book from which it is taken.

MR GYLES: Anson The Law and Custom of the Constitution part I pages 222 to 223. This is a copy from the second edition, 1907.

SIR G. LUSH: There is a handwritten inscription at the top of our photostat. It gives the date 1907, then it appears to us volume 2, part I.

MR GYLES: I would like to correct our reference in our outline of argument to volume 2, part I of the second edition. We chose that edition because it is closest to 1900. I am not conscious there has been any alteration since, in fact, I am not conscious whether there is another edition. Under grounds of dismissal:

> Appointments made during good behaviour create a life interest . . . . . as would make the convicted person unfit to hold public office.

Renfree, the Federal Judicial System of Australia, pages 117 and 118 are reproduced under the heading Tenure of Justices. Renfree has written in rather indecipherable handwriting on the right-hand column. I will not read all of the passage under Tenure of Justices, but on page 118, the middle of the page, it reads:

> Misbehaviour as used in section 72 means misbehaviour in the grantee's official capacity . . . . . any office or public franchise.

Then Hearn, the Government of England, 1867 and the passage in particular is at 82 and the parts reproduced start at 81:

> By the Act of Settlement the judges commissions are issued . . . . held during good behaviour.

I think Maitland is the one that we were missing. Perhaps I may be permitted to read from page 313 of Maitland, the Constitutional History of England. I do not think it is there; Maitland, the Constitutional History of England, 1920. It is a course of lectures. Page 331:

> So soon as the House of Hanover comes to the throne judges commissions have been made . . . . . except either in consequence of a conviction for some offence or on the address of both houses.

SIR R. BLACKBURN: That is not consistent with what we have been - - -

MR GYLES: That is consistent with the - it is narrower than - it does not deal with conduct in office which is not an offence.

SIR R. BLACKBURN: Quite.

HON A. WELLS: I think with all due deference to our greatest legal historian, and I think he probably is, this was a very early text book written primarily I think for students.

MR GYLES: It was a course of lectures.

HON A. WELLS: All right, a course of lectures, but it was for students. It was to give them a broad picture of the English constitution. I do not think he had devoted himself, as you used to say, to sunning manuscripts in the Canary Islands. He was merely giving a very readable picture of the British constitution.

MR GYLES: Yes.

SIR G. LUSH: But at the same time I noticed a fragment in the extracts from Hearn that we have. On the first page, page 81, in the paragraph numbered 6, the second sentence:

> Few of our historians or juridical writers have noticed the peculiarity of this tenure . . . . . to parliament only.

I have not read the rest of it which may sort it all out.

MR GYLES: What the learned author was there - - -

SIR G. LUSH: He is busy refuting that loose expression, is he?

MR GYLES: Yes. He is drawing attention to the fact that it is the Crown that removes upon the address of parliament.

SIR G. LUSH: I see, he is going on there with greater particularity.

MR GYLES: The part which I read was the part which dealt with the misbehavour. It did not go on to deal with procedural aspects of the matter. Hood Phillips, Constitutional and Administrative Law - we have had extracts from the sixth edition, pages 382 to 383, Constitutional and Administrative Law, sixth edition. The passage on judicial independence starts at the foot of page 381.

SIR G. LUSH: The other Jackson was Professor R.M., was not it?

MR GYLES: I am just checking to see if it was the same one. It is not. Under the heading Judges of the Superior British Courts - I am sorry, I have just missed something. Page 383:

> It is commonly but erroneously stated . . . . . for a serious offence.

For reasons already advanced we suggest with respect that that reservation is correct and it was really conviction of a felony or treason which forfeited the office and that is the correct understanding of the position:

> The Queen would be bound by convention to act on an address from both houses.

So that in our respectful submission every commentator from Coke down has said that it is official misconduct which is the touchstone. The extension if it be one is to the felony of treason; query from Richardson's case, any conviction of any infamous crime. There is a truly remarkable coincidence of opinion by all commentators. Apart from Mr Jackson nobody that I know of suggested the contrary, save perhaps for the counsel's argument in Montague's case and subject to the opinion that Sir Richard Blackburn has asked us to deal with, and may I reserve that position?

Whilst it is true that these commentaries and statements have primarily, principally, perhaps at all been concentrating on the particular point which is in issue in this matter, in my respectful submission it is far too late to say that they have all misunderstood the position. It must be taken to have been established long before 1900 that in relation to the office of judge the judge could only be removed by the Crown for conduct not as a judge in a judicial capacity if there be a conviction for what amounts to at least an infamous offence.

Our submission then goes on in paragraph 8 to say that it should be that of a tenure for a term defeasible upon misbehaviour or tenure during good behaviour, which amount to the same thing, a common feature of offices created by the federal parliament. Whilst some of these offices are judicial or quasi judicial the great majority are not. They are administrative or commercial. We will hand up a list in a moment. The commission has it and I will identify it in a moment.

It is perfectly obvious that the well known principles which apply to removal from office are applicable in relation to these office-holders, as the word "misbehaviour" would be given the normal meaning attributed to misbehaviour in office. The position of a judge is no different.

We have taken out two lists. One of them is a list of statutes where "misbehaviour" and "office" appear in conjunction. This is from the Commonwealth Statutes. I have looked myself at a number of these and indeed inspired by Windeyer J in the Army case I had started this process when the ability of clers to search more quickly than I was utilised.

Indeed, if one takes even the first volume of the 1973 consolidation of the Commonwealth statutes, one can find the great number of those statues. As will be seen, many of them are administrative. Many of them are quasi commercial, various marketing boards, grant commissions, research, film and television, broadcasting tribunals and the like.

In addition, there are quasi judicial persons like members of the Administrative Appeals Tribunal the Ombudsman and the like. Some of them as with the Administrative Appeals Tribunal and the Ombudsman can only be removed by the Governor General in council upon address from both houses. Others can be removed by the Governor General upon the ground of misbehaviour. these bodies are, I think, exclusively but certainly almost exclusively offices appointment to which is made by the Governor General in council. Some of them contain in addition to the power of the Governor General to remove for misbehaviour specific clauses providing for removal in certain specified circumstances such as bankruptcy and the like. There is also a list - - -

SIR R. BLACKBURN: While we are on that subject, if you are using as an argument the fact that a lot of other officers are by statute made terminable in this way, a great many Commonwealth acts provide that bankruptcy is a disqualification but you say in the case of a judge bankruptcy is totally irrelevant?

MR GYLES: Yes, unless it causes him to do something imprudent in the course of his official duty.

SIR R. BLACKBURN: No, in the case of bankruptcy, if a sequestration order is made against him.

MR GYLES: It is irrelevant as indeed it is irrelevant to a barrister or an accountant; perhaps not an accountant but people who are not handling money it is irrelevant but as I say there are in a number of those statutes particular clauses dealing with disqualification causes like bankruptcy. Then the second list is good behaviour and office. I have struck out some which relate to good behaviour bonds and the like. This has significance for a couple of reasons. the first is that there can be a tendency to over emphasise the special position of judges in relation to the ground for removal. The special position of judges is protected as much by the procedure for removal as the grounds for removal. There cannot be any difference between the grounds, the misbehaviour grounds for a judge than for other officers holding on a good behaviour tenure or on a fixed term subject to removal for misbehaviour.

Plainly enopugh as we have put, Richardson's case and the like govern all of these bodies and there is no

basis for distinguishing the office of judge from these other bodies.

SIR T. BLACKBURN: It is intended, is it, that the list of good behaviour acts is only a relatively short one?

MR GYLES: It is a relatively short one and I think we have indeed indicated some that are not relevant because they are good behaviour bond provisions.

SIR G. LUSH: The good behaviour list have the expression, to hold office during good behaviour, or equivalent, do they not?

MR GYLES: Yes. Mr Justice Windeyer and many others have said that the principle - there is no distinction between the holding upon good behaviour on the one hand or holding for a term or for life subject to removal for misbehaviour. Misbehaviour at least was a term of art with a well recognised meaning.

HON A. WELLS: It might have quite a difference though in the means by which you are putting it to an end.

MR GYLES: Indeed. The procedural side is very significant I would agree. It will be appreciated that federal judges, of course, are different not only because of procedural necessity to have an address from both houses and removal by the Crown but because of the word "proved" misbehaviour so that gives special position to the judges but that is not to be found in the definition of misbehaviour. That is our short point. The principle from Richardson is - - -

SIR G. LUSH: Since that FOI case, the absence of the word "proved" may not be very significant. It is significant in the Constitution because of the implication it carries that the resolutions are not to be passed for political reasons.

MR GYLES: Yes, we gave it a little more importance than that. We say that they are not to be passed for any cause which is not misbehaviour in office. That is what the framers of the Constitution said and that is what we submit the Constitution says.

SIR G. LUSH: You get that from the word misbehaviour, not from the word proved.

MR GYLES: Yes. The word proved is a - - -

SIR G. LUSH: It seems to be a word of admonition.

MR GYLES: Yes. Well in relation to conduct in office which is not an offence, there is perhaps a question about it. In relation to conduct out of office, it reinforces what we put in any event would be the position. Our ninth point in the notes is that disqualification of members of parliament and aldermen of councils depends upon conviction. Sections 44 and 45 of the Commonwealth Constitution provide the disqualifications of a member of parliament and the second of those is:

> Atainted of treason, or has been convicted and is under sentence . . . . . for one year and longer.

Interestingly enough it is an undischarged bankrupt or insolvent and the other disqualification features. We have chosen or taken the New South Wales Constitution Act. It is from volume 2. The heading is not there but it is the Constitution Act. That is of some significance because it goes back - the New South Wales legislature pre-dates the Commonwealth legislature:

> (19) If any legislative councillor is atainted of treason or convicted of felony or infamous crime.

Now that is a very interesting choice of words because it will be recollected that we submit that the disqualification from office is treason or felony. The New South Wales legislature in 17 Victoria number 41 included the words "or infamous crime". I have not done my arithmetic but 17 Victoria would be - - -

HON A. WELLS: 1954 or 1955.

MR GYLES: Yes. They pick up the words or infamous crime which fairly plainly would come from Richardson's case which we say was an impermissible extension of the underlying principles. We do not have to become involved in that because we are quite content with the situation that it is conviction which is required.

Then the New South Wales Local Government Act 1919, and this would have had a history, section 30 subsection (2) relevantly he has been convicted of a felony and has not received a free pardon or served his sentence or he is undergoing a sentence of imprisonment or he has committed an electoral offence or he has been convicted of having acted in civic office whilst disqualified. I am not sure what to make of (2c), whether that is justem generis or - - -

HON A. WELLS: I suppose that is one of these things where you get a conflict of office.

MR GYLES: Yes. In the United Kingdom what we have done is to reproduce page 39 from the 1971 edition of Erskine May on the Law of Privileges, Proceedings and Usages of Parliament, 18th edition, page 39. The statutory disqualification was the Forfeiture Act 1870:

> Imposes on any person . . . . .
> . . . . . from re-electing the expelled member.

There was a case in New south Wales concerning infamous crime - it is re Troutwein - where Maxwell J conveniently looked at the history of the matter at page 374. The charge is set out at 372 - did impose upon the Commonwealth by an untrue representation and was convicted. 374:

> The question therefore remains for decision . . . . . I am satisfied that the latter is the test to be applied.

We respectfully submit that that would also apply to prove misbehaviour in the meaning of the constitution.

> It is necessary in this connection to examine . . . . . that creates the infamy.

Of course, we rely on that:

> In Clancey's case the person was convicted of bribing a witness not to give evidence.

I do not think I need to read the passage from Clancey. Pendock v Mackinder, it is the crime and not the punishment that makes the man infamous. Bushel v Berrett is a different principle:

> An examination of this case . . . . infamous crime within the meaning of the section.

SIR G. LUSH: is there a slight swing in the learned judge's attitude? He seems to move from the position of what is an infamous crime is to be determined by what was regarded as an infamous crime when the act was passed to a much more mobile contemporary evaluation of crime. I should think that they were really opposite arguments to one another in a situation such as he was faced with. Does Troutwein's case end with this decision?

MR GYLES: I believe so. He says the Court of Disputed Returns. I am not sure there is an appeal from the Court of Disputed Returns. I think there is not. Indeed, I am fairly sure that is the case. Can I pick up that thought for present purposes. Construed as we would construe it,the constitution has an ambulatory effect but that is not inconsistent with our submission that the meaning of the word is to be taken in the light of the authorites as they then stood. In other words, misbehaviour means misbehaviour in office as it was then understood. However, when one sees what the definition then was, it obviously has an ambulatory effect. It is up to parliament to decide what crimes are infamous. If one gets beyond treason and felony and having decided

what crimes are infamous, they can decide whether or not they are grounds for removal.

It is our case with conduct out of office that conviction is a necessary pre-condition. Given the conviction, the next question arises is, is that crime so infamous that no holder of public office, no holder of any public office could continue to hold that office because of it? You do not say, could a High Court judge continue in office; you say, could any public officer continue in office. Obviously in practice there is an ambulatory content to that because what one generation may regard as inconsistent with the holding of any public office, the next generation may not.

Of course, in relation to conduct in office, the same point arises. What is to be regarded as a breach of office sufficient to warrant removal will change from generation to generation. To that extent, what Maxwell J did, whilst perhaps it is not expressed as well as it could be, is to say - yes, you take the words as they were, in the way that they were then understood. A concept like misbehaviour and the concept of conviction for offences and the way that they are to be judged will vary from time to time.

HON A. WELLS: I have missed part of your argument. When you say that it all depends upon the crime do you mean it all depends upon the nature of the provision that creates the crime or upon the elements that together make up the crime, or do you mean that it is in fact the nature and essence of what was done on the particular occasion which happens to be a crime, which of those three - and there may be others.

MR GYLES: I think it is the second, that is the elements of the offence, the definition of the crime itself.

HON A WELLS: I follow. I just noticed that Maxwell J eschews that approach because he said:

> In my view the court should have regard to the offence as laid and proved and should consider also its nature and essence.

That is page 678 point 7. Is that the part that was not quite so well expressed?

MR GYLES: I do not think, with respect, that his Honour is saying that you re-try the circumstances of the case.

hON A. WELLS: No but you look at the substance and what really constituted the crime. He says that what this man did was very closely approximate to that of forgery and a forgery in the circumstances proved. That is what he seems to have acted on. He expressly rejected Mr Windeyer's argument that he put forward

saying, you look at the section, you look at its elements. He said you do not do that.

MR GYLES: I did think that what was taken was the statement on page 372, the statement of the offence. I have no quarrel with that. You look to see what the conviction was for.

SIR G. LUSH: On that statement, it looks as if it is a conviction for fraud.

MR GYLES: Yes. It is clearly permissible to say, what was he convicted of? The answer is that which appears under the heading (a) on page 372-373. It is then relevant on the face of that to know that that involved actual dishonesty.

I am not sure whether that really answers the question, but it is the nature of the conviction which is the touchstone, and that would include within it necessarily the nature of the offence itself and the crime as charged.

HON A. WELLS: This was in effect a sort of a case stated, was it not?

MR GYLES: Yes.

HON A. WELLS: On the court of disputed returns.

MR GYLES: Yes.

HON A. WELLS: And paragraph (a) on page 352 was the case stated, was in fact the substance of the offence. It was not the formal charge.

MR GYLES: I must confess that I read that as being the formal conviction.

HON A. WELLS: Up at the top it says the honourable so and so has become vacant by reason of the following facts, namely, and then it goes on.

MR GYLES: May I suggest it goes on that he was convicted by for that he did, and for his said offence it was adjudged that he should be imprisoned and so on. I with respect would suggest that that was the charge.

SIR G. LUSH: It was a long-winded charge, was it not?

MR GYLES: Long-winded, but I suppose we cannot really tell from the report. That is what it amounts to. You see, are not they all particulars of the untrue representation, if I can put it rhetorically. It appears to us that that simply sets out the charge, imposed upon the Commonwealth by an untrue representation made orally and in writing, that is to say, and then sets out the various representations and:

> The said untrue representation was made . . . . . to enforce payment.

HON A. WELLS: I think what you say has some support from page 379, but of course the learned judge goes on and says, I have no doubt that the proper conclusion is that the names at least of some of the parties were forged, and he goes on to develop that.

MR GYLES: That is, we would suggest, probably getting into prohibited waters there, but whether it is or not, the critical question is that in all of these things

the fundamental substratum is a conviction. I see it is 4 o'clock.

AT 4.05 PM THE MATTER WAS ADJOURNED
UNTIL WEDNESDAY, 23 JULY 1986

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TRANSCRIPT OF PROCEEDINGS

PARLIAMENTARY COMMISSION OF INQUIRY

SIR GEORGE LUSH, Presiding Member
SIR RICHARD BLACKBURN, Commissioner
THE HONOURABLE ANDREW WELLS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON WEDNESDAY, 23 JULY 1986, AT 10.08 AM

Continued from 22.7.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: Mr Gyles?

MR GYLES: What I shall do is to complete our outline of argument, and then come back to deal with a couple of matters which arose in the course of argument yesterday. I think I had dealt with paragraph 9 of our written outline on page 5, and we go on to paragraph 10.

> Office holders who have a tenure during good behaviour . . . . . necessary incident of judicial office.

We refer there to an article by Shetreet in a recent International Legal Practitioner, and at the back of that article footnotes 31, 32 and 33 provide some interesting parity of material. The particular one that I draw attention to just to make this point is footnote 33 where the author looks at the various provisions in the United States.

> 45 states were removed due to . . . . . moral turpitude.

So it cannot be argued the notion that there must always be some criteria, rather like those set out in the allegations which we have been given here, of conduct contrary to accepted standards of judicial behaviour. Merely to contemplate that is to appreciate the force of what is put in our submission 10. Once the test becomes the accepted standards of judicial behaviour, one asks, accepted by whom and in what respect. Is it meant behaviour on the bench, for example, of a judge who chooses not to wear a wig? Is that contrary to the standards of accepted judicial behaviour? It could be argued to be so.

When one contemplates off bench behaviour, it is a most extraordinary notion that one judge would presume to know or to say what another judge does or should do in his private capacity. I mean, it is in a sense impertinence to suggest that one judge or any group of judges, or any one politician or group of politicians, can say what is the accepted behaviour of judges in private lives.

But consider the scope for oppression which lies within that concept. If there is a judge who persistently, because of a conviction as to the law, finds a particular way, contrary to the views of the governing party or contrary to the interests of a pressure group, however large or small; they then put a private inquiry agent to investigate the judge's conduct and then make allegations, well or ill-based as to his conduct and his associates, then publishes that in a newspaper and then, of course, it is said, well, of course there is a slur upon the judge and it must now be dealt with,

and the judge is called upon to face some sort of inquiry into it. A more pernicious method of interfering with the independence of the judiciary could not be imagined and, of course, it was for that reason that the framers of our Constitution ensured that that would not happen.

Paragraph 11 of our outline of argument:

> The effect of a submission to the contrary of the foregoing . . . . . "proved" must mean "proved by conviction."

The role which the Houses of Parliament have in relation to misbehaviour not in office is to judge whether the conviction is of an offence sufficient to warrant removal. It is my respectful submission that the key to this whole question really lies in paragraph 11. Yesterday during the course of argument reference was made to an opinion by Mr Pincus. I went back and had a look at that opinion last night. I am not sure how I should deal with that. It is an opinion by counsel upon the very matter. It is arising out of these circumstances.

SIR G. LUSH: I do not suggest how you should deal with it, Mr Gyles, but you may think it appropriate simply to face the fact that the members of the commission have seen that and the two opinions of the Solicitor-General as well. The Solicitor-General's first opinion, as with Mr Pincus, was in the first Senate report, and the Solicitor-General's second opinion was in Hansard.

MR GYLES: In any event, I do face that fact. My submission is that it is one thing to refer to opinions given by law officers of the Crown prior to 1900, because that is a safe guide or maybe at least one of the safe guides to what the view of the law which was then current was; it is quite another to have regard to opinions of counsel on the very matter in question. As far as the Solicitor-General's opinion is concerned, that is entitled to some respect as the executive government is bound by it, and normally we would suggest parliament is.

SIR R. BLACKBURN: Not bound by it, Mr Gyles, surely?

MR GYLES: The executive government - - -

SIR R. BLACKBURN: Not bound by it. The Attorney-General may take it or reject it.

MR GYLES: With respect, I accept that. He is entitled to reject it. If he does not, the Solicitor-General's opinion will bind the executive government.

SIR R. BLACKBURN: It is not binding. Suppose the Attorney-General is not in cabinet but cabinet contains a couple of other lawyers and they persuade cabinet that the opinion of the Solicitor-General is not worth tuppence halfpenny, there is nothing illegal about that.

MR GYLES: We are not suggesting it is illegal but as a matter of constitutional convention I would have thought that the Attorney-General would have to resign if that was the case.

SIR R. BLACKBURN: I would be very surprised if that were the case but you may be right.

MR GYLES: It is perhaps an error - - -

SIR G. LUSH: Perhaps it is not very fruitful.

MR GYLES: It is an arid debate.

SIR R. BLACKBURN: You are saying it is entitled to more weight because it is binding on the executive government.

MR GYLES: Certainly a great deal more weight than the Pincus opinion.

HON A. WELLS: Coming down to Mr Pincus's opinion, it cannot be put any higher than this; simply it is an opinion roughly equivalent to a carefully expressed opinion in a law journal and people are entitled to consider it. Even counsel can put it up in debate with the court and say, I adopt this argument, I adopt this exposition, and so on. Is there any other way in which the Pincus opinion could be used?

MR GYLES: That is the highest use it can be put to.

HON A. WELLS: It is simply a convenient way of expressing a point of view, is it not?

MR GYLES: Yes. In any event, there it is and I will deal with it. The fundamental fallacy in Mr Pincus's opinion is that he appears to completely misunderstand the position after the Act of Settlement. He seems to take the view that the position which pertained by which the Crown might remove upon address to the Houses of Parliament was the procedure chosen by the Constitution. That, as I have endeavoured to put in our very first paragraph, is a constitutional heresy of the first order. Because however there has reference been made to this opinion I must take a little more time perhaps to spell that out.

I think it would be correct to say that in many of the references I have already given to the commission - the true position post-1700 would be well understood. That is, that the parliament in addressing the Crown for the removal of a judge was not bound by the conditions of tenure of the judge. In other words, it was not limited to those causes which would be a breach of good behaviour or, put another way, would be misbehaviour. Parliament could address the Crown for any cause which it thought proper and the Crown could accede to that address even though the basis for the address would not have warranted the removal of the judge by virtue of breach of the condition of tenure. I will not re-read the references which relate to that point that I have already dealt with but I will go to some other passages from Shetreet which put the position very clearly.

SIR G. LUSH: Are you going to that same article?

MR GYLES: The book, Judges on Trial. From page 90 to 95 there is a discussion as to whether the address for removal was exclusive, and Shetreet dealt with the interpretation of the Act of Settlement at those pages. I do not read them but in our respectful submission that is an account which we adopt. At page 104 to 105 - this is also extracted in the same bundle - the learned author at page 105, first paragraph, says:

> The result is that parliament is not subject to any statutory limitation . . . . . justifies removal from office.

SIR G. LUSH: There is an assumption there that there must be an allegation of misconduct. Where does that derive from in the Act of Settlement?

MR GYLES: There is none. There must be a cause assigned, that is all.

SIR R. BLACKBURN: Does it say that - there must be a cause assigned?

MR GYLES: No, but a fuller account appears from page 90 to 95.

SIR G. LUSH: Is the Act of Settlement actually quoted here? I think it is probably quoted in the Pincus opinion but I have not got it here.

MR GYLES: It is in curious places.

SIR G. LUSH: I think it is quoted in the Pincus opinion. On page 4 of the opinion which appears at any rate in the typewritten version of the report to the Senate in August 1984 the words in quotation marks are, "But upon the address of both Houses of Parliament it may be lawful to remove them". If that is correct, there is no reference to cause or allegations or anything else.

MR GYLES: No. That is the point.

SIR G. LUSH: Are you looking for the passage in the Pincus opinion, Mr Gyles? It is under the heading, England.

MR GYLES: If I could read what I believe to be the position:

> Judges commissions be made . . . . it may be lawful to remove them.

That is at page 10 of Shetreet. There will no doubt be other sources for that. The present English clause which is the replacement for that - if I could read it onto the transcript:

> All the Judges of the High Court and the Court of Appeal with the exception of the Lord Chancellor shall hold their offices during good behaviour subject to removal by His Majesty on an address to His Majesty by both Houses of Parliament.

The Judicature Act 1873-1875 had an equivalent provision. That was probably the provision current in 1900.

Shetreet's point, if I may put it this way - without reading in detail all he says about it because it is in the passages - is that there is no limit on the power of parliament to address the Crown for removal. It is the Crown of course which does the removing, not parliament. The conventions which have grown up about the addressing have the consequence that it is custom or conventional to have a cause assigned. The act itself leaves it at large.

SIR R. BLACKBURN: That is only what people have said because it has only happened once, has it not? You could hardly call it a convention.

MR GYLES: There has only been one address successful but there have been many addresses.

SIR R. BLACKBURN: Addresses to both Houses of Parliament? What has happened to them - the Crown refused to act on them or what?

MR GYLES: Well, perhaps I have answered a little quickly. There have been many - - -

SIR G. LUSH: Motions for - - -

MR GYLES: Many motions for - - -

SIR R. BLACKBURN: Motions for address?

MR GYLES: It may be correct that there has only been one to the Crown, although from the colonial courts there have been addresses.

SIR R.BLACKBURN: But that was quite different.

MR GYLES: Quite different, yes. In any event, the parliamentary manner of dealing with it is spelt out in detail in various sources which I have not here reproduced.

SIR R.BLACKBURN: It is said by people in books that parliament is bound to conduct a quasi judicial inquiry but it does not really go any further than that, and they did that in the case of Sir Jonas of Barrington.

MR GYLES: Yes, but I think it is correct to say there have been a number of proceedings in parliament which would test that proposition although the further proposition that the ultimate address must contain a cause or will contain a cause is probably not tested beyond that case, although the form of the motion which brings the matter before the parliament would, one imagines, be a safe guide. In any event, that is not critical to my submission to Mr Shetreet's point and indeed our point is that there is no limitation upon parliament's power or parliament's ability to seek removal and it is certainly not limited to grounds which would permit the Crown to otherwise remove. Before passing to the question of colonial judges and a further visit to Pincus, may I refer the commission to a case of ex parte Ramshay 8 QB 183 118 ER 65. We have reproduced certain passage pages from this report (1852) 18 QB 173.

SIR R.BLACKBURN: I thought you said 192.

MR GYLES: Did I say 192?

HON A. WELLS: Yes.

MR GYLES: I was wrong. It is (1852) 18 QB 173.

HON A.WELLS: 192 is the passage.

MR GYLES: 192 is the passage I have had reproduced. If I could read from the headnote.

MR CHARLES: We have the whole report here.

MR GYLES: Very good. As will be seen from the headnote, application was made for a quo warranto against a County Court judge on the relation of a person who had held the office immediately before him and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster under the statute. Perhaps if I read on:

> It appeared that on a memorial address to the Chancellor . . . . . decision of the Chancellor being therefore final.

It is a case really of judicial review, the circumstances under which the court will intervene, and as the headnote shows, the substance of the decision was that provided the person had been heard and provided that the facts were capable of constituting misbehaviour or inability, then the court would not intervene. Of course, we do not quarrel with that approach to the matter. At pages 192 and following there is reference to some earlier decisions which are of significance. Perhaps if I could pick it up at 193:

> Sir Fitzroy Kelly relied much on Regina v Owen . . . . . no question arose as to the right and so on.

Then there is reference to the Parish Clerk case which is not relevant for present purposes. That analysis of Regina v Owen is absolutely correct, as one would assume. It was a case in which the clerk was, it was alleged, unable to pay his debts but there was no suggestion that that had affected his conduct as a clerk. The authority of Owen, which we have not had copied, but appears as - - -

MR CHARLES: I have copies.

MR GYLES: That would be helpful, thank you. My learned friend has had this copied. Reading from the headnote:

> A County Court clerk removed . . . . . and the relator was entitled to judgment.

The case again is, of course, primarily a judicial review case as to the circumstances when a court will intervene. Can I take the commission to page 543 of the English report, 484 of the original report, to adopt as being put in language more apt than I can think of this point. The Attorney-General in reply put to the court:

> What is inability or misbehaviour within the meaning of the statute . . . . . insolvency per se is not inability.

It follows, of course, that neither is it misbehaviour. It was argued inability rather than misbehaviour for the very good reason that one cannot imagine that being held to be misbehaviour. The Lord Chief Justice:

> You must look at the facts found by the jury . . . . . must be for the relators.

Mr Justice Erle was of the same opinion:

> The County Court judge has . . . . .
> . . . . . constitute inability within
> the meaning of this statute.

We submit that these two decisions very much place into context the Montagu point that I was putting yesterday, that there may well be circumstances where bankruptcy or pecuniary embarrassment might lead to misbehaviour in office but the mere fact of pecuniary embarrassment does not.

SIR R.BLACKBURN: There is all the difference in the world between a superior judge and a clerk of a County Court. I would have said they were in different spheres, Mr Gyles. Bankruptcy may well be a disqualifying characteristic for a person performing judicial offices but not for a person performing administerial - - -

MR GYLES: I think it is difficult to deal with, except to say that we respectfully disagree, and that there can be no such distinction drawn. The principle which is enunciated in Ramshay and Owen is that you must find inability or misbehaviour in office, and that is the question.

SIR R.BLACKBURN: Yes, but what is the office? Inability relates to the office, surely. What may be inability in one office is not necessarily so in another.

MR GYLES: Conceding that to be so, the question to be asked is why for relevant purposes is a judge any different to a clerk qua pecuniary embarrassment? Indeed the history of the courts of this country, if anybody reads the biographies of them, will show that many judges were in a state of pecuniary embarrassment, and acute pecuniary embarrassment. Indeed I will bring back some references to those circumstances. It simply is not right to suggest that pecuniary embarrassment has ever been regarded, apart from the argument in Montagu as being a ground for removal of a judge.

SIR R. BLACKBURN: Suppose for the moment it is not in itself - it was not the point in the Montagu case, the judge was being harried by a large number of creditors and he was putting them off all the time and he was in public disrepute for that reason; whereas if a judge is severely pecuniarily embarrassed but it is kept in the background so that it never becomes a matter of public scandal, that is a totally different matter.

MR GYLES: No, but your Honour is with respect reading something into that. This notion of public scandal is something that comes only from that argument in Montagu; it is found nowhere else.

SIR G. LUSH: That may be so, Mr Gyles, but if you are asking yourself the question whether what produces inability in a clerk of a court will necessarily produce inability in a judge, or, rather, the converse, what will not produce inability in a clerk cannot produce inability in a judge; are you under an obligation to look at the principle that the judge must be seen to be discharging his duties in accordance with the traditions of his office where the clerk discharges his duties in the privacy of his room presumably.

MR GYLES: I must confess for the moment whilst I do not put the proposition - - -

SIR G. LUSH: It becomes a question of fact in each case really, does not it; although I would concede that in the question I have just put to you there is the additional element that what affects the judge's public stature would conceivably be regarded as producing inability.

MR GYLES: That is the point of departure. I do not put a submission that for all purposes when considering misbehaviour, or inability if that be relevant, that one equates necessarily a county court judge's clerk with a judge. I do not put that proposition. What I do put, however, is that whether it be judge, clerk, chairman of the Reserve Bank board, or whatever, that one is considering, the question of misbehaviour is misbehaviour in office; and it does not mean

inability, and it does not mean loss of stature. People may lose stature for all sorts of reasons good and bad and it will be destructive of the independence of the judiciary if a judge who was performing his function as a judge with no criticism at all was to be hounded out of office by reason of some other factor which some people thought lowered his dignity in the eyes of others. There is no distinction between a judge and any other high office holder or low office holder in relation to that matter.

SIR R. BLACKBURN: Why does parliament so often make bankruptcy a disqualifying condition for a public statutory office?

MR GYLES: Because many statutory office holders handle money, that will be one good reason; there may be others.

SIR R. BLACKBURN: You mean the argument is that a man who is bankrupt has a greater temptation to peculation, to fraudulent conversion of the money?

mR GYLES: No, not necessarily fraudulent conversion; that is not the normal cause of bankruptcy. It is imprudence, financial imprudence is the normal cause. But the fact is that in relation to federal judges there is no disqualifying feature of bankruptcy. It does not matter whether we think it is right or wrong; parliament cannot do it, neither can this commission. The Constitution governs this, not somebody's idea of what parliament may have thought is a good policy, or what any people in this room might think is a good policy. There is simply no disqualification of a federal judge because of bankruptcy; nor could any statute impose that qualification; it would be unconstitutional to do so. And as to calling it misbehaviour, that with respect borders on the absurd, or is absurd. In Owens case it was not even suggested that it went to misbehaviour. It was suggested to go to inability. And we know from Ramshay that the court said there was no imputation of inability or misbehaviour in his office; and no inability or misbehaviour in his office appeared. Now Ramshay was a case also about a judge, was it not, a county court judge. To say that Owen was an inappropriate analogy - - -

SIR R. BLACKBURN: What if a judge while not having his estate sequestrated makes an arrangement with his creditors, a voluntary arrangement with his creditors?

MR GYLES: Yes.

SIR R. BLACKBURN: You would say that is not misbehaviour?

MR GYLES: That is certainly not misbehaviour. How can it be misbehaviour? Misbehaviour must imply some moral

turpitude. The fact that a person happens to be bankrupt may be the result of the imprudence of his relatives who he has guaranteed. In one well known case where a former chief justice of the High Court had been bankrupt apparently because he guaranteed and met the obligations of a member of his family. True he had been discharged before taking office. I am not suggesting that is a particular analogy but would it be any different if it had happened during office? As I understand it occupations continue during bankruptcy except for some limited classes of occupation where people are handling money. Of course, parliament in various places may choose to, as we know, make bankruptcy a disqualifying feature for certain offices but the Constitution does not do that. It would be certainly in our submission not misbehaviour on any view - on any view not misbehaviour, query incapacity. I would submit that for the reasons in Owen and Ramshay it would not be incapacity. But that is the heading under which insolvency would be argued I would suggest with respect, rather than misbehaviour.

SIR R. BLACKBURN: Yes, it could be.

MR GYLES: Even if I am wrong about it, that is probably the - - -

SIR R. BLACKBURN: Certainly.

MR GYLES: May I come to deal with the memorandum - - -

SIR R. BLACKBURN: Mr Gyles, I wonder if I could mention a point.

MR GYLES: Yes.

SIR R. BLACKBURN: Leave it for the moment if it would take you off your track; but there is another possibility which as far as I know never occurred. What if it had occurred that a judge in the first place - this is after the Act of Settlement but before the creation of the divorce court in 1857 in England - the judge had been the unsuccessful defendant in an action of crim con, in other words had adultery proved against him in a court with the consequence that his wife was able to divorce him by act of parliament. Or, after the creation of the divorce court, that a judge had had adultery and cruelty proved against him in the divorce court. Are you saying that that would be an open and shut case? There is no question that that could not possibly be misbehaviour? Or what? Because looking at what occurred to other notable political figures against whom adultery was proved in the latter part of the 19th century, namely, they were by public opinion absolutely removed from the political sphere altogether. Now, of course, I know nowadays it would not happen probably; but what

do you say about that?

MR GYLES: First of all may I put to one side - it is a little difficult to answer simply because after the Act of Settlement parliament were entitled to seek removal on that ground. And the Crown were entitled to remove on that ground if there was an address from both Houses. So that it is unlikely to have actually arisen in the form we are now putting it. However, assume that parliament did not for one reason or another take any action, could the Crown have done something - could the Crown have removed the judge for that reason? That is the way the point would arise.

SIR R. BLACKBURN: I suppose so, yes.

MR GYLES: Now that would depend upon whether there was a conviction. As I recall it - and I am afraid my history is not very good about this - adultery was a criminal offence, was it not, in those days?

SIR R. BLACKBURN: I do not think so.

SIR G. LUSH: Ecclesiastical.

MR GYLES: Ecclesiastical only, yes.

SIR R. BLACKBURN: But quite obsolete; no one has been prosecuted for adultery for centuries, long before the 19th century.

MR GYLES: I do not know whether there has been any discussion as to whether an ecclesiastical offence would be, but I will assume not for the moment. It would follow from my argument that the judge in those circumstances could not be removed by the Crown. They might be removed by the Crown after address but not by the Crown itself and indeed it rather points up the fact that the public opinion is not the litmus test of misbehaviour in office. Indeed as I have endeavoured to put in various ways, that in a sense is our point, that the public popularity or unpopularity, or even public view as to propriety which shifts and changes perhaps year by year, is not the touchstone by which misbehaviour in office is to be judged. It can be in the normal way dealt with by the address of both Houses of Parliament under our particular system but that is where the Constitution deliberately says federeal judges are in a different position from that of the state judges, or the imperial judges.

SIR R. BLACKBURN: So your whole argument amounts to this, that proved misbehaviour in section 72 means behaviour such that at common law it would have been sufficient ground for the grantor of an office held during good behaviour to terminate the office?

(Continued on page 231a)

MR GYLES: Quite.

SIR R. BLACKBURN: And you say that has to be read into the words "proved misbehaviour"?

MR GYLES: I do not say it has to be read into; I say that is the proper construction of those words bearing in mind the common understanding of all at that time and indeed subsequently. Whether or not Lord Mansfield and company were correct is really beside the point. We of course suggest that they were, but it is really beside the point. By 1900 the meaning of misbehaviour, judicial misbehaviour, or misbehaviour in office was very well established and indeed was, as I have said on more than one occasion, read to the people participating in the debate itself by Mr Isaacs. More importantly it just cannot be overlooked that the Constitution Act is an act of the Imperial Parliament in 1900 choosing particular words with a particular meaning.

SIR G. LUSH: They were accepted. History shows, does not it, that the Imperial Parliament exercised no choice over the words?

(Continued on page 232)

MR GYLES: I am picking up both limbs, if I may. I am putting that all of the common law world had the common understanding as to what misbehaviour meant, both the Australian participants and the Imperial Parliament. There is no distinction between the common law position whether it be in Australia or England at that time. I am reminded that the words used by Sir John Downer were, "I think misbehaviour has always been the word and that is all that is necessary". It was not a populist document, and that ultimately is where Mr Pincus misconceives the position when he says you look at it as a piece of English and say what would I say misbehaviour means. He does not even cope with the fact that it is misbehaviour in office.

SIR R.BLACKBURN: Sir John Downer said that, what he did not say was it must be misbehaviour and only misbehaviour will do because we are trying to insert the common law as regards the termination of an office by the grantor.

MR GYLES: But every commentary at the time said that. It was said and it was read to them by the unsuccessful advocate for the other point of view. He wanted the Act of Settlement maintained, he wanted the Act of Settlement maintained so parliament would have the control untrammelled by the legal questions which arise on misbehaviour. But the convention did not accept that. They took misbehaviour and they took it and explained why because of the very special position of the federal judges, otherwise, you would have governments of all types in a position to embarrass a judge who made unpopular constitutional decisions, and, of course, the addition of the word "proved" adds special force to that submission.

SIR R.BLACKBURN: You have not really dealt with that, have you, the particular effect of the word "proved"?

MR GYLES: No, I have put a submission that at least in relation to matters out of office it reinforces the submission we are now putting.

SIR R.BLACKBURN: I suppose it does. If we look at the Solicitor-General's opinion, it appears to me - I am not sure - that he relies on the word "proved" to support his contention that proof of a conviction is not necessary, mere proof of the commission is enough.

MR GYLES: I know, and perhaps I should face that fact, too, in due course. Without meaning disrespect, we would suggest that the Solicitor-General squibbed the position when he finally got there. All of the reasoning leads inevitably to the conclusion that

conviction is required,and for some reason which I at least have the gravest difficulty following, he said, oh well, it does not have to be, it can be proved aliunde. But I will deal with that, or endeavour to.

Can I go then to that old memorandum from the Lords of the Council on the removal of colonial judges which appears in 6 Moore New Series page 9? Mr Pincus did refer to it although I do not think it was set out, and I am afraid I now realise it has not been copied. My learned friend reminds me it was handed up yesterday. It is headed Appendix, Memorandum of the Lords of the Council.

SIR G.LUSH: It is page 9 in the appendix, is it?

MR GYLES: Yes. I am not so sure that is right, perhaps it has been transposed from where it would have otherwise appeared. I will not read it all, but can I make the following points about it? The first is that it was a document which is dated in or about 1870. That is certainly the date of Lord Chelmsford's observations. Secondly, that it related to the removal of colonial judges generally and was not restricted to nor did it restrict itself to an amotion under Burke's Act. That was only one of the procedures which was relevant to the position of certain colonial judges but not all by any means. That much is clear from page 10 in the middle. There is a reference to the Boothby case which was an address of the colonial legislature. Then the memorandum goes on:

> All the forms of suspension or removal which are in use . . . . . being provided by the statute itself.

Then there are the various other alternatives. So that when on pages 11 and 12 reference is made to:

> Gross personal immorality or misconduct with corruption . . . . . and it must be borne in mind -

and so on. The first point to notice is that Mr Pincus stopped his citation of that passage at "judicial functions", and that does somewhat change the sense of it. But be that as it may, with colonial judges the methods of removal were not restricted to amotion under Burke's Act and, indeed, encompassed other forms of removal, and so it is possible that those other forms of removal could have been utilized for the removal of colonial judges without having to prove misbehaviour in office

under Burke's Act. That is assuming that this memorandum is at all talking about purely personal conduct unassociated with office. It probably is when talking of gross personal immorality.

HON A.WELLS: Would it be confined to that though? It would include, would not it, immorality in a much wider sense, usually the case, that affects his ability to retain the confidence of the colony in judicial matters?

MR GYLES: Let me accept that dealing with this memorandum it says gross personal immorality or misconduct with corruption or irregularity of pecuniary transactions. My point is that that on the face of it at least appears to be wider than misbehaviour in office.

HON A.WELLS: Oh, yes.

MR GYLES: And I am endeavouring to point out that the methods of removal would permit that wider area to be encompassed in the case of colonial judges, and the fact that in this memorandum there is a reference to those grounds for removal throws no light at all upon the meaning of misbehaviour in office either under Burke's Act or under our Constitution. One way or another all of those matters got to the Privy Council either by law or by special leave of the Privy Council or by the Crown referring it.

Also, the opinions of the Honourable Stephen Lushington and the Honourable Sir Edward Ryan and, indeed, the memorandum itself and the observations of Lord Chelmsford indicate that these are administrative opinions rather pointing to what should be an administrative procedure. The position of colonial judges was examined extensively by Todd in his book Parliamentary Government in the British Colonies. We have extracted portions of that.

This is a very long extract and I will not read all of it, but may I start by reading:

> As long as judges of the Supreme Courts of law in the British colonies . . . . . appointments during pleasure.

Then there are references to various acts which affect tenure, including Burke s Act, and the commission can read for itself these various passages. There is a reference to Montagu's case at page 831, which is neutral, I think, to this point, the other cases of Sanderson and Beaumont, the Ionian Islands, Ceylonese judge, and then at page 836 there is an opinion which I would read:

> The law officers of the Crown in 1862 advised the secretary . . . . . other exigencies which may arise.

We, of course, stress there the words "legal and official misbehaviour and breach of duty." Todd is speaking of 22 George III.

Then at page 838 and following, there is set out the material relating to the Barry matter in Victoria, and again without reading all of that, may I highlight some aspects of it. It starts at 838. At 840 there is reference to an opinion by the Minister of Justice and Attorney-General. The first question is:

> whether the act 15 Vic. No 10 . . . . is really consistent with the tenure of good behaviour.

We respectfully submit that again that is a very convenient summary and short statement of the position as it then existed. Pleasure of parliament in effect because of the ability to address or removal for misbehaviour in office sufficient to constitute a legal breach of the condition of his patent - that is consistent with the 1862 opinion which I read to the commission yesterday, and would be a very safe guide as to the view of the Australian law authorities at that time. This, of course, was a very public controversy and all of these matters were in public.

Then at 842, a petition from the judges was forwarded to the governor with a report of the law advisers, to show:

> The judges had altered their ground . . . . . before a court of competent jurisdiction.

So it was the view of Victorian judges at the time.

> If so, it was contended that there was no such inconsistency . . . . . as the judges had asserted.

The view that was taken was that there was in fact no power of suspension in Victoria at the time. The balance of the material, including particularly the case of Boothby, is interesting historical background, including much as to the appropriate practice in relation to addresses, but I think is not directly in point in the - - -

SIR G. LUSH: Mr Gyles, my memory fails to bring up the answer to this question: what judge did the 1862 opinion refer to?

MR GYLES: I believe it was Barry, I think it is the start of that controversy. Can I just check that?

SIR G. LUSH: That is what I was thinking, but the account which you have just given us refers to the events beginning in 1864. Perhaps Barry in 1864 precipitated a crisis that had not quite eventuated in 1862.

MR GYLES: Perhaps so - this may be my fault. The opinion was 1864. I think I have misled everybody. I probably said 1862. It was 22 August 1864.

SIR G. LUSH: Is that then the same opinion as is quoted in Todd?

MR GYLES: I think it must be.

SIR G. LUSH: The Attorney-General in the letter to Governor Darling of August 22, 1864 - that letter in the next paragraph on page 840 is referred to as "this opinion."

MR GYLES: Yes, it looks to be the same. I did at one stage look at the detail of the judge's position, the petitions and the like. I will perhaps dig those up and make them available to the commission.

I referred yesterday to the case of Terrell v Secretary of State for the Colonies, and we only reproduced part of that decision. I hand up the whole of it. The short point of the case is that colonial judges in the absence of some special provisions were appointed at pleasure, and I think that I need not read the whole of the decision. It is available there.

The significance of it is that it puts into context the memorandum which Mr Pincus referred to. That memorandum is dealing with a situation where in general tenure was at pleasure, and I have said

that the ability to remove did not depend in many cases upon Burke's Act. What I would then propose to do is to go to the opinions to which reference has been made. I see it is nearly half past eleven. That might be a convenient time to break.

SIR G. LUSH: We will resume sitting in a quarter of an hour.

SIR G.LUSH: Yes, Mr Gyles?

MR GYLES: Before turning to the Pincus opinion, may I just mention briefly one matter that I referred to on several occasions yesterday. It will be recalled that in Cruise's Digest, paragraph 99, under the title Officers, it is said:

> Officers of every kind are not only subject to forfeiture for treason or felony like other real property but -

and I suggested that that was the source of the Richardson statement about conviction of infamous crime. Overnight I have endeavoured to find a convenient reference to the effects of conviction of treason or felony. I have not been able to find anything which is succinct and comprehensive about it but the law of attainder and forfeiture was plainly that which the author or Cruise's Digest had in mind.

That was a concept which was abolished in the United Kingdom in 1870 by the 1870 Forfeiture Act, but even after that time and under that act a person convicted of treason or felony forfeited any civil office under the Crown or any other public employment. I do not wish to go into all the complications of that branch of the law except to say that that is very probably the source of the jurisdiction which is exercised. May I then go to Mr Pincus's opinion. As far as the United States position is concerned, I do not propose to take time on that. There is a great variety of legislation and practice in the United States and a great deal of interesting commentary there upon the English position, and it would be a treatise in itself to analyse it.

As it happens, we say that it supports our view, but that there is so much direct authority in England on the point and so many direct commentaries on the point, we think we need not be troubled by the American situation. Nor, I think, does Mr Pincus really suggest that he gets any support from America.

As fas as his analysis of the English position is concerned, it is notable for the fact that, as I put before morning tea, he treats as the body of applicable law of precedent that which has been the subject of addresses or the possible subject of addresses of both Houses of Parliament. He cites, it will be seen, Mr Shetreet's work concerning Kenrick J. We agree with Mr Shetreet's summary of that case and the effect of it, and it will be appreciated because of the passages that the commission

has read from Mr Shetreet's work that he, in our submission, correctly draws a sharp distinction between the position where there is an address for removal which can be on any ground and the ability of the Crown to remove for misbehaviour, so that that is a particularly inapt example, to analyse the position or the meaning of good behaviour or misbehaviour.

A parliamentary motion for removal has absolutely nothing to do with misbehaviour. It is also true, or can be accepted as true, that in the removal cases after the Act of Settlement there is no notion that they were restricted to the previous position. Of course that is so. Indeed, that is our very point and Shetreet's very point. The comment that:

> If the draftsman of the constitution . . . . . intention was unclear.

is,with respect, a most remarkable statement. When the words of the Act of Settlement are contrasted with the words of section 72, the difference is apparent and deliberate. Then, the passage in the middle of the page in which the writer of the opinion ventures the view that:

> If this passage was intended to convey that a judge might misbehave as scandalously as he pleased in matters not concerning his office without risking that office, it is hard to believe that it could be correct.

Again, with respect - - -

SIR R.BLACKBURN: Which page are you referring to now?

MR GYLES: Does the commission have an opinion which starts with a No 12 on the bottom?

SIR G.LUSH: Yes, the seventeenth page of that numbering, I think.

MR GYLES: Yes, the seventeenth page. I was reading from the middle of the page.

SIR R.BLACKBURN: Yes, I have it.

MR GYLES: May I just examine that a little more carefully. First of all, the passage from Coke's Institute Reports and many other quotations to the same effect were not in incautious language.

They expressed the notion of what misbehaviour in office means and meant. Conduct outside office always depended upon conviction, we would suggest originally of treason and felony, and then nextly of an infamous crime, if that be an extension. That is if there could have been in those days an infamous crime which was not a felony which I would take leave to doubt. It is not surprising, indeed it is in accordance with ordinary principles, that conduct of a person should be dealt with by the normal law and the normal courts. That should not be surprising to anybody, indeed it should be surprising that the contrary should be suggested. The best, and we would submit the only safeguard as to what is infamous behaviour is conviction of that infamous behaviour in the way which the law provides for. And it is by no means surprising that that should be so.

I pass over what is said about Richardson's case. That debate has been extensive here and my friend will no doubt make some submissions about that himself. The colonial judges, I think we have one way and another dealt with that. The convention debates; in my submission he has just plainly misread those debates and in particular has misread Mr Isaacs as he then was. As to his general commentary, I do not state a debate. We will listen to my learned friend's submission on that point. But there was one case to which he did refer, I am just looking for the passage.

HON A. WELLS: Mr Gyles, while you are looking for that, I just want to make sure I am following the general trend of this argument - - -

MR GYLES: Yes.

HON A. WELLS: Fundamentally as I understand it what you are saying is this, that the learned author has confused the ambit of the ground upon which an address for removal can be presented with the grounds that are available for a strict application of the judicial process.

MR GYLES: Yes.

HON A. WELLS: Does that fairly sum it up?

MR GYLES: That is the critical defect.

HON A. WELLS: Right.

MR GYLES: There was one other - I am just looking for a reference which I cannot pick up. I thought Mr Pincus had referred to Stanley Burbury's decision - I must be wrong about that. As far the Solicitor-General's opinion is concerned, or opinions are concerned, as the commission will know his first opinion of 24 February 1984 adopts, if I may say so with respect, an analysis

of the English position and of the convention or the position that was relevant in 1900 and of section 72 which accords completely with ours, save for the fact that he rejects conviction as a necessity. He says it is serious criminal conduct. I would like to put some submissions about that. I should also refer to Henry v Ryan to which he refers in paragraph 20, if I could hand up copies of that decision.

All I wish to say about Henry v Ryan is that the plaintiff was convicted of the charge and appealed, so it is a curious procedural situation. He was charged before a court of summary jurisdiction with an act of misconduct against the discipline of the police force by discreditable conduct, etcetera. It is not a case of removal of an office holder, and thus what is said about the position in this case is purely obiter dicta and not directed at all to the question as to removal from office of an office holder. It may well be apparent from the submission which I have put already and will in due course put that the notion that misbehaviour in office within the authorities to which we have referred encompasses conduct short of conviction of an infamous crime is - I put that badly. This case does not establish, nor is it aimed at the question as to whether conduct short of conviction for an infamous crime is a ground for removal of a public office holder where the test is misbehaviour in office. It will be apparent to the commission that our submission is that otherwise than by conviction in such a fashion there is no wider test and no wider application of any such principle.

SIR R. BLACKBURN: I am sorry, Mr Gyles, I do not really follow that. Would you put that again?

MR GYLES: Yes, the case of Henry v Ryan was not a case of dismissal of an office holder for misbehaviour in office. It was a charge under the police regulations. Thus it is not directed to, nor does it establish that the grounds for removal of a public office holder for misbehaviour in office include conduct outside office, which are not the subject of conviction of an infamous crime.

HON A. WELLS: I do not really read the learned Solicitor-General's submission to mean that that is how he was - - -

MR GYLES: No. To so read it would be inconsistent with his view. All I do is simply draw the commission's attention to it as it is - - -

SIR R. BLACKBURN: All he is relying on is the dictum of the Chief Justice, is not it?

MR GYLES: Yes. Sir Garfield Barwick, whose opinion is referred to also - - -

SIR G. LUSH: This seems by the date to have been a private opinion.

MR GYLES: Yes, it was; I can say it was - it was an opinion given to the Crown by Sir Garfield when he was at the bar.

SIR G. LUSH: Not when he was Attorney-General?

MR GYLES: Not when he was Attorney-General.

SIR R. BLACKBURN: Given to the Crown? It looks as though it was more likely given to the banks.

SIR G. LUSH: History would suggest that, too.

MR GYLES: No, it was not, it was given to the Crown. When I say the Crown, that is a loose use of the word. It was given, I think, to the Commonwealth Crown-Solicitor instructing him on behalf of the Reserve Bank.

SIR R. BLACKBURN: I see, nothing to do with the bank nationalization.

MR GYLES: No, I do not think it was.

SIR R. BLACKBURN: That was much earlier.

MR GYLES: As I read the Solicitor-General's opinion, it is paragraph 21 that makes the assertion that in matters not pertaining to office the requirement is not conviction for an offence in a court of law:

> Inasmuch -

he says -

> as parliament considers the matter, the question is . . . . . the parliament acting on power -

and so on. That all, if I may say so, assumes the correctness of the statement in the third sentence; and the assertion is repeated in paragraph 23. That goes back to paragraph 15.

SIR G. LUSH: Paragraph 15 is the operative paragraph of the opinion on this point.

MR GYLES: Yes; and the operative part of that clause is obviously:

> Proved misbehaviour must be established in parliament and whatever the offence such proof is not predicated upon anterior conviction in a court of law.

(Continued on page 243a)

With respect I just cannot follow why he says that. If as Quick v Garran accepts, Todd is correct when he says - let me assume for the moment that our submissions here are correct and that the framers of the Constitution intended to pick up by the use of the word "misbehaviour" what I would call a common law definition of that word. Let us make that assumption for a moment. In conduct out of office, that requires conviction of a crime of the requisite quality.

MR GYLES: That is proved by proving the conviction and, no doubt, parliament would have to be satisfied that there had been such conviction. Upon proof of the conviction parliament would have to then be satisfied that the crime was of the requisite quality. That being so it does not in any sense derogate from the role of parliament in the matter, it simply avoids the rather absurd result that it is parliament which tries a crime. In other words, you prove your conviction before parliament and then it is parliament's decision as to whether or not that is proved misbehaviour. The mere fact of a conviction does not prove misbehaviour, it is the nature or quality of the crime in the way discussed yesterday. So, with respect to the Solicitor-General, it appears to us that he has rather missed the point there.

HON A. WELLS: Is not he simply saying proved means proved to the satisfaction of the parliament?

MR GYLES: Yes, but what is proved? If we are correct and if he, with respect, is correct, he has said he adopts the analysis of the position that we put forward, that is, that proved misbehaviour, or that misbehaviour is intended to pick up that learning which attached to the removal by the Crown, not removal on address from parliament.

HON A. WELLS: I understand that is your basic argument, I am simply saying is not that what he did? If you go to page 10, he seems to reinforce that by quoting Todd about 10.5 in which he, in effect, says notwithstanding what courts may have said or tribunals, parliament has to do it.

MR GYLES: Yes.

HON A. WELLS: That is how I understood him to be arguing.

MR GYLES: My answer to that is that accepting the substantive analysis which we make and he makes, there is no difficulty in giving parliament the job by saying prove your conviction and then prove it is misbehaviour by looking at the nature of the crime.

HON A. WELLS: Quite.

MR GYLES: May I also inquire whether the commission has the Solicitor-General's supplementary opinion?

SIR G. LUSH: Yes, we have.

MR GYLES: I think I can do little more than commend that opinion to the commission, save that insofar as it perpetuates the error that it is up to parliament to try the crime, and I adopt as part of my argument - - - .

SIR G. LUSH: I am not sure that your last proposition is as simple as it sounds. The concept of misbehaviour is in the description a mixed question of fact and law, is not it?

MR GYLES: Yes.

SIR G. LUSH: What facts are parliament to look at, the fact of conviction or the facts constituting the crime which may never have been admitted, or what else?

MR GYLES: Well, I put yesterday and I would maintain the submission that what is first requisite is proof of the conviction.

SIR G. LUSH: Misbehaviour lies in being convicted.

MR GYLES: Being convicted of the particular infamous crime, particular crime. The starting point is to prove the conviction and see what the conviction says about the conduct. That does not preclude argument being adduced before parliament by the person the subject of the motion to argue that it is nonetheless not something for which removal should be the result, and presumably he would be at large in what he put forward, but it could not rise above that the prosecution, to take a description, could not rise above the conviction. If it is a conviction for negligent driving, you cannot call evidence to say it was a particularly negligent bit of driving, and that is the nature of the crime, that is the nature of the charge.

SIR G. LUSH: Suppose the judge says this was really only very slightly negligent and it might have happened to all of us?

MR GYLES: That would be a submission which has the potential - not the accused but the person who is subject to the disciplinary procedures, I would not argue against his ability to put that to parliament.

SIR G. LUSH: There are two alternative positions in the kind of hypothetical case we are discussing. One is that the argument of the judge before parliament would be - I was never guilty of misconduct and analysed the conviction does not show it. The other would be that the judge before parliament is saying - I admit that I am convicted, I admit that I am therefore guilty of misbehaviour, but the consequences of forfeiture should not follow.

MR GYLES: It is an isolated example, or something.

SIR R. BLACKBURN: Or that it is a very minor example of the offence.

SIR G. LUSH: As soon as he does that he goes back to the first position, does not he?

MR GYLES: But as far as the defendant is concerned - I use that word for the moment - he can put anything he likes to parliament, parliament can listen to him or not listen to him as the case may be, but what is the precondition to the exercise of the ability of the Crown to remove ultimately is that the address should be for proved misbehaviour. It is the Crown that does the removing, they have got to have an address which does provide for proved misbehaviour.

It is an essential to that that it will have been proved that there was a requisite conviction. That having been proved it is a matter for parliament to decide whether or not to address the Crown. There may also be there a question of law for the High Court as to whether or not the crime is of such a character as to disqualify. As in that case of the County Court this morning, he analysed it and said there is a question of law involved in what misbehaviour is but you have got a question of fact as to whether the facts amount to it in the particular circumstances.

SIR G. LUSH: The county court clerk.

MR GYLES: I think, with respect, that is right. It was the clerk's case that they said that - Owen.

HON A. WELLS: I am afraid I cannot see myself that you can avoid going into the substance of the matter. Supposing the defendant, to use the same phrase, says, "Look, really I was convicted but look at the circumstances", and he goes into all the evidence. That for a start would not be improper, I would say it is entirely proper. If there was someone else talking about it in parliament, might they not also go into the facts and say, "Yes, but that is a misreading of the facts, they are so and so, the inference is this"? Do they not have to canvass the whole weight and effect of what the evidence was?

MR GYLES: Maybe it depends on the circumstances. It may be that there would be cross-examination of the judge.

HON A. WELLS: Quite. It could happen.

MR GYLES: But our simple point is that it is a necessary element, it is a prerequisite that there be a proof of conviction. Whatever else there may be is not to the point. Now, in many cases that will mean that the circumstances of the case will be either not queried at all or queried only in certain essentials or certain elements. The extent to which parliament would permit the challenge to a conviction is, of course, a matter for it. It cannot say there was no conviction but it may say well, having heard all the circumstances we will not address the Crown for removal, but it does mean that parliament is not trying the offence. Whatever else it is doing, it is not doing that, that has

been done by the courts of the land, and it is exercising its own jurisdiction to decide whether to address the Crown.

That puts the position in its proper perspective. A body of that sort, as with other disciplinary type bodies, can consider the effect of conviction, and so on, but it should not be the prosecuting authority in matters outside office.

I think I have drawn the attention of the commission to all the sources that we are aware of, and we have put our submissions as to the general principles. Applying those to the allegations, it is our submission that in the events which have happened none of the allegations so far advanced will satisfy the necessary criteria because they do not pertain to the conduct by Mr Justice Murphy of his office as a judge, and they do not reveal, nor is it alleged that there is any conviction. Thus on what has been so far alleged, there is no point in proceeding further to decide any facts in relation to them, it would be best to bring this matter urgently to an end by reporting to parliament and enabling the matter to be disposed of according to law.

SIR G. LUSH: Mr Gyles, before you sit down, have your researches involved a study of Professor Sir Harrison Moore's - I think he was knighted - essays on the Constitution before 1900 in his book The Australian Constitution of 1902?

MR GYLES: I can recall reading something of Professor Harrison Moore's. I have not got it with me and I do not recall what he said, to be quite frank.

SIR G. LUSH: I have only seen some references to it in an article in Current Law, and it is the suggestion of the author that Harrison Moore's opinions were ambivalent, but I find it difficult to grasp what the professor had in mind in some of the things that he is simply quoted as saying. I have not seen the entire works at all.

MR GYLES: As I say, I am nearly sure that at one stage I looked at one of his books, but I will have to check.

SIR G. LUSH: There are references to it in an article by a man called Thompson in Current Law, and that is the only source of my information. I have not got my copy of that article here at the present time.

It is a long article in two parts. A great deal of it is footnotes.

MR GYLES: Current Law - I am showing my ignorance. Is that not - - -

SIR G. LUSH: I did see the word Butterworth at the bottom of it.

MR GYLES: Yes, that is the one I had in mind. I regret to say I am not aware of Mr Thompson's article either, so I will check both of those.

SIR G. LUSH: The reference to Professor Harrison Moore's views is at the beginning of the second article, or the second part of the article.

MR GYLES: We will certainly check that.

SIR R. BLACKBURN: I am worried about the possibility that the distinction between misbehaviour in office and misbehaviour not in office is more subtle and complicated than you have allowed for in your argument. Let me take an exaggerated case. [redacted]

What if a High Court judge who holds views about the way a case should be decided which is currently being heard by an inferior court, gets in touch with the judge or magistrate hearing that case and says, what you ought to decide in this case is so-and-so, do not forget that the law is so-and-so and do not make the mistake of deciding it as if the law were something else. Is that misbehaviour in office or misbehaviour not in office?

MR GYLES: And I take it that he would be in the same judicial hierarchy.

SIR R. BLACKBURN: Yes. He is automatically in Australia if he is a High Court judge.

MR GYLES: I am sorry, yes - High Court judge. Well, I put the submission that it is out of office because it is not in the conduct of his judicial functions. If that distinction is not the correct distinction, then it may be a question, or is a question of fact, I suppose, as to whether or not that was truly exercising his function as a High Court judge, superior in the judicial hierarchy, to that judicial officer. It would be a crime, of course, as well, but that does not meet what has been put to me.

SIR R. BLACKBURN: Contempt of court.

MR GYLES: Well, it would be perverting the course of justice.

SIR R. BLACKBURN: Would it?

MR GYLES: No. I have too readily said that. That probably would not, if it reflected his genuine view of the law.

HON A WELLS: He would be commending a view of the law, which is the law.

MR GYLES: Quite. I withdraw that comment. I can see that that might be thought to be - a tribunal of fact might take the view that that was within the scope if the simpler approach chat we submit is the right one is not accepted.

SIR R. BLACKBURN: So that it would be different if an appeal had actually been instituted to the High Court and the High Court judge rang up the judge who had decided the case in the first place for information about why he decided it as he did, and secondly, added the comment that he should have decided it in such-and-such a way. That would put it on the other side of the line.

MR GYLES: Yes, it would.

SIR R. BLACKBURN: So to be misconduct in office, it has to relate to an actual proceeding in the High Court.

MR GYLES: That would be one view, yes. I quite see the point that is being made, but one can ask other questions. What if a judge who has decided a case at first instance speaks with a judge, an appeal judge, about the case. Is that conduct in office? We would say plainly not. It is private conduct.

What if the judge below rings counsel who is going to argue the case and says, I think you ought to argue such-and-such and so on; again, he has performed his role, he is no longer acting as a judge. I think that is the best way I can answer the question.

SIR R. BLACKBURN: Well, it is a form, I suppose you could say, of abuse of the judicial office.

MR GYLES: Yes.

SIR R. BLACKBURN: I expect I know your answer to this question. What if, and this has no resemblance whatsoever, as far as I know, to any of the allegations before us, the judge attempts to persuade somebody to give him some special advantage, shall we say particularly

good seats at the opera, by saying, you had better give me these goods seats, otherwise I will make things uncomfortable for you on any occasion that I can; I am a judge of the High Court. Is that misbehaviour in office or out of it?

MR GYLES: In general our answer would be out of office, but again I can conceive of circumstances where it might on one view of it qualify, if you had a litigant with a case before the court - - -

SIR R. BLACKBURN: Yes, if the person whom he attempts to persuade is a litigant, that makes it pretty clearly misbehaviour in office, I suppose. What if he is not?

MR GYLES: I would submit not because - if that is within the arena, any time a judge who sits in the jurisdiction deals with anybody in a matter of commerce or - he does not have to say it; he has to ring up and say, I want a ticket to the opera and I am very anxious to go with my wife, I have got my mother down here and I am terribly anxious that she go. I would submit that that sort of thing is really beyond the scope of misbehaviour in office. It is not carrying out the judicial office - - -

SIR R. BLACKBURN: But if he uses the fact that he is a judge to add weight to his persuasion, that is misbehaviour out of office?

MR GYLES: Out of office.

SIR R. BLACKBURN: And on your argument it would be not really misbehaviour at all of any kind?

MR GYLES: That is so. You see, there are all sorts of common law misdemeanours that exist, and I have not been through them all to find out to what extent abuse of office in that sort of way might be a common law misdemeanour. I suspect it might be, but it is not, in our submission, misbehaviour in office.

SIR R. BLACKBURN: It would follow very clearly then on your argument that if he takes part in an active electioneering campaign for a political party, that is certainly not misbehaviour.

MR GYLES: It is certainly not misbehaviour.

SIR R. BLACKBURN: It is not in office - - -

MR GYLES: It is not a crime.

SIR R. BLACKBURN: And it is not in any way - - -

MR GYLES: No. Indeed, this raises the whole question very squarely, which appears perhaps most plainly from Mr Shetreet's work, where he devotes several chapters to what is and what is not, as it were, acceptable judicial conduct, the extent to which one can participate in politics, the extent to which one can do this and do that.

It is our submission that that is all irrelevant so far as Australian federal judges are concerned, for better or worse, that the Constitution adopts a certain course and that puts federal judges in a very particular position, which does not exist in the states and does not exist in England.

SIR R. BLACKBURN: The founding fathers of the Constitution must be taken to have been quite happy with that possibility, that a judge could not be attacked on that ground.

MR GYLES: Yes, well, that was the decision - there are all sorts of evils involved and all sorts of choices to be made. The choice they made was to prefer independence of a judiciary to a well-mannered judiciary.

SIR G. LUSH: It is deeper than that. Your argument is that they preferred independence of the judiciary to control of the judiciary by parliament?

MR GYLES: Yes, that puts it, I think, fairly insofar as I would - control by parliament except for what they do in office or what they are convicted by outside of office. It removes the controlof parliament in extra-judicial activities save for conviction. Of course, that choice was by no means unusual, bearing in mind the American experience where high crimes and misdemeanours were the grounds for removal of a Supreme Court judge in the United States.

SIR R. BLACKBURN: That was by impeachment.

MR GYLES: By impeachment, but nonetheless high crimes and misdemeanours by impeachment. It is not for us to debate whether or not the choice which was made was the correct one. I would argue strongly that it is, that the independence of the judiciary, of the High Court, and that is what the Constitution is primarily concerned with, although not entirely concerned with, is such that there should be no ability in a constitution with the division of power between centre and state to have the central parliament exercising undue control over the judges or having the ability to put pressure on the judges, or having people in the community who are affected to be able to put pressure on judges by saying, we do not like your Franklin Dam decision, we will therefore put pressure on you for such-and-such reasons, which may

be quite spurious - they may be spurious, they may be correct, but irrelevant, and yet place enormous presure on the judge concerned.

In my respectful submission, of course, that is precisely what has happened in this matter, that insofar as any wrongdoing out of office is concerned, it is only a matter for the criminal law, and that the pressures which are being placed upon this judge are such that should not be there.

What is also avoided, of course, by our submission is the complete discretion which is otherwise given to parliament. We made that point this morning, and perhaps I should repeat it in conclusion, that the view contrary to ours really equates our Constitution with the Act of Settlement, and commits to parliament really a completely unfettered discretion in the matter.

Picking up what was said about participation in politics, there is no a priori reason why judges should not be in politics, provided that if a case comes before them which involves a matter which they have been involved in in politics, they cannot sit on that case. There is no reason a priori why judges - - -

SIR G. LUSH: This may be true enough of common law judges, but it is a little difficult in the present context, is it not?

MR GYLES: These may be excellent reasons why no judge does or will. It is no necessary ground for his removal. For example, should judges be directors of companies? It might be said, oh, that is a dreadful thing, he cannot possibly do that. It is the same as being in politics. Mr Shetreet at least says that in days gone by, and indeed in this century, judges were directors of companies.

SIR R. BLACKBURN: Public companies.

MR GYLES: Yes, business activities, and their names were advertised in connection with the companies, page 334 of Mr Shetreet.

SIR R. BLACKBURN: Certainly Lord Birkenhead was in his somewhat disreputable old age, and he was a judge of the House of Lords, which is such an anomalous - - -

MR GYLES: Yes. In any event, our point is that so far as conduct outside of your judicial function is concerned, which is after all what it is all about - I mean, the notions of judicial etiquette and public

(Continued on page 252a)

participation, of probity and the like, are really only a means to the end, and the end is the proper conduct of judicial functions.

(Continued on page 253)

The choice that the Solicitor-General and we put is that that choice has been made, it has been made in the constitutional forum and that is really the end of it.

SIR R.BLACKBURN: I should have said, if I may just take this up, and I am possibly wasting time - you say there is no a priori reason why a judge should not engage in politics provided he disqualifies himself in any case in which a political issue arises but does that not overlook the importance of the judge not appearing to be politically committed when a party comes along - the judge does not know what political party he belongs to but a party who is disappointed by the judge's decision and is a member of the opposite political party is likely to think that the judge is biased because he knows that the judge is a member of the opposite political party.

MR GYLES: That says that one really cannot have an ex-politician as a judge. The fact of the matter is that more than half of the High Court have been politicians. It is not assumed that people who are sufficiently convinced by the correctness of the cause to actually devote their life to that party will cast aside those principles upon appointment to the bench. Nobody in their right mind would suggest that anyone who has been a member of the Liberal Party will not remain of that persuasion. The fact that one may not be a card carrying member is irrelevant. It is well-known to litigants that judges have personal political views. Indeed, all judges no doubt have political views. The fact you do not know them does not mean they are not biased.

SIR R.BLACKBURN: You draw the line somewhere I suppose is the answer and the line is usually requiring the judge to cease membership of a political party.

MR GYLES: Who requires that? That is the question. The sort of things a great majority of judges may think is a proper way of conducting themselves is really not the test. It is a very dangerous test in my sub-mission. What about the first judge who decideed not to join the Adelaide Club? That may sound today a silly example but it may well have been regarded very seriously, that a judge would not join the Adelaide Club, or the Melbourne Club. One can think of all sorts of examples of what all judges or most judges at a particular time would think appropriate or inappropriate. It is a very unsafe guide as to for what conduct a judge should be removed.

As drunkenness may lead to murder, so active membership of a political party may lead to judicial

misbehaviour because if the judge, having actively participated in agitation for example about a particular matter then has some litigation involving that matter and sits on it, that would be or may be judicial misbehaviour. However, we know that judges sit on boards of hospitals, on boards of educational institutions; they have farms. Judges have been the president of the Australian Conservation Foundation. Judges are in all sorts of activities which have the potential for litigation and the potential for bias. The range of judicial involvement will vary from day to day, from court to court, from man to man.

Judges are on senates of universities and universities are involved in litigation. It is a very slippery slope to start applying one's own instinctive notion of what a judge should do and saying, any judge who disagrees with me or my friends is therefore beyond the pale. A justice of the United States Supreme Court in a case I read protested very much at the notion that judges should ride herd on other judges for that very reason. It will lead to judicial conformity, it will lead to judicial timidity; unless there is a breach of the law involved, best leave it to the proper selection of judges, to the peer pressures which exist and to the community pressures which might exist.

SIR G.LUSH: Thank you, Mr Gyles. Mr Charles?

MR CHARLES: If the commission pleases. I would start by saying that if my friend's submissions are right, if the Constitution has preferred independence to a well-mannered judiciary or has preferred independence to control by parliament, [redacted] However, if one can take the submissions to their logical conclusion, it would also follow that a judge who had committed murder whilst overseas in a country with which Australia had no extradition treaty, who had returned to Australia and of course was not prepared to return to that other country, who had publicly admitted in Australia his guilt of that murder, would not be guilty of misbehaviour and could not be removed from the bench. Secondly, if the judge had been tried for murder, had been found not guilty by reason of insanity - - -

SIR G.LUSH: Is this still the foreign murder?

MR CHARLES: No, your Honour. On this occasion we have a murder committed in Canberra.

MR GYLES: What about of another judge?

MR CHARLES: He has been found not guilty by reason of insanity but his insanity was fortunately temporary; he has recovered; he is therefore not now suffering incapacity; he cannot be removed from the bench. Thirdly, the judge has committed a murder but did not give evidence at all. He is acquitted for lack of evidence. He later admits to a variety of people that in fact he was guilty of the murder but cannot now be re-tried. Not having given sworn evidence, he has not committed perjury. He in turn cannot be removed from office.

Suppose that the judge has been tried for a serious offence - call it one of infamy - in Australia and convicted. Suppose that the conviction is quashed on appeal or suppose that at trial the judge was acquitted either because the necessary consent to prosecute had not been obtained or because a limitation period had expired. Let us assume that it is clear that the judge has admitted he was guilty of the offence in question; again, he cannot be removed from office. Let us assume finally that the judge has been tried for a serious offence involving dishonesty.

SIR G.LUSH: A recent Victorian Giannerelli case gives some point to that last example - a recent and continuing point.

MR CHARLES: It causes barristers to move uneasily at the bar table, but your Honour, suppose, fifthly, that the judge has been tried in a serious offence involving dishonesty by a court which has power to grant an adjourned bond without proceeding to conviction. In that fifth situation also the judge, let us say, has been found guilty of the offence but a conviction is not recorded. That judge also cannot be removed. If my friend's arguments are right, in each of those five cases we have just put to the commission it must inevitably follow that that judge may remain a member of the High Court and no steps can be taken to remove him from it.

May I take the position a step further. Let us assume for the moment that we are treating what I might call the Griffith view as the correct one. Suppose that it is said that a conviction is not required but that a criminal offence of a sufficient degree of infamy must be involved. It would then follow that in these situations, also a judge could not be removed from office. Firstly suppose that the judge has since his appointment endorsed a political party, accepted a position as its patron

or president and publicly campaigned for its election to office. Secondly, suppose that the judge has engaged in discussions with other persons which are clearly preparatory to a conspiracy to commit a serious crime but falls short of establishing that conspiracy.

Suppose, for example, that the judge is heard discussing with another the possibility of hiring someone to commit a murder or discussing the possibility of importing heroin, but again at a stage which is preparatory to rather than the actual commission of the offence. Suppose thirdly that the judge has set in train a course of conduct which would amount to the commission of a serious offence. Suppose that the judge by way of example tells another that he proposes to burn down his house to claim the insurance. He is found approaching the house with a container of kerosene, he makes full admissions as to his intent but in law his acts are still preparatory to the commission of the offence and he cannot be convicted of it.

Fourthly, suppose that the judge has attempted to commit a crime in circumstances where it was impossible for him to do so. Suppose, for example, that the judge shot his wife intending to kill her and his wife had, immediately before the shot, had a heart attack and died and it was her dead body into which the bullet entered; no offence has been committed. Suppose the judge attempted to manufacture drugs by a process which, unknown to him, could not bring about that result.

Fifthly, suppose that the judge has habitually consorted with known criminals and engaged in joint business with them but in a state in which the offence of consorting has been abolished. By way of analogy, suppose that a judge of the United States Supreme Court was constantly seen in the company of Al Capone.

Sixthly, suppose that the judge has, in a state in which prostitution is legalized, been a partner in the ownership and running of a brothel. Seventhly, suppose that the judge has habitually used marihuana and other drugs in a jurisdiction which has decriminalized such use.

Eighthly, suppose that the judge has frequently been sued for non-payment of his debts and deliberately avoids paying his creditors. Ninthly, suppose that the judge has frequently been sued for defamation and required to pay damages; or tenthly, suppose that the judge conducts a number of business enterprises through a corporate structure for which the judge has repeatedly with his companies been involved in proceedings under the Trade Practices Act and in consequence of which the judge has repeatedly been found to have made false and misleading statements.

In each of those ten situations, the Griffith view, if I may again so call it, would lead to the conclusion that no steps can be taken to remove the judge under section 72 of the Constitution from office. Of course, a priori it must follow, on my friend's submissions, that in those circumstances no step can be taken to remove the judge from office. My friend may be right, but if so one is forced to the conclusion that that is what the framers of our Constitution intended. There may be another view which we may raise at 2 o'clock.

SIR G. LUSH: Thank you, Mr Charles.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Mr Charles?

MR CHARLES: If the commission pleases, before lunch I had been dealing with my friend's submission as to the desirability of independence rather than a well mannered judiciary. I have put a number of examples to the commission of what we say must follow from my friend's submissions. The conclusion in our submission is that if my friends are right it would follow that the desirability of independence was thought so great that not only was parliament relinquishing control but that parliament was prepared to contemplate the continued existence of a corrupt judiciary, not simply an ill mannered one. When I say continued existence, I mean not that the judiciary was corrupt at that time, the contrary, but that a state of affairs becoming known indicating clear corruption would be allowed to continue; indeed no steps could in the circumstances I have put to the commission be taken to right that situation.

We would submit that that conclusion would come as a surprise to the framers of the Constitution and I desire shortly to take the commissioners to the convention debates which my friend has opened to the commission for the purpose of going through them because we would submit that the conclusions here asserted could be drawn from the debate are not clearly apparent and that indeed a careful reading of them suggests a number of alternative possible contentions,

Your Honours, before I go further I should say that we did have prepared an outline of argument and if I can now hand that up to the commission. The outline has suffered in utility since it was first prepared because it was prepared before my friend's argument had been delivered and in our answering argument we propose to follow the one that was put by my friends so that I do not propose to read or to refer in detail to our outline of argument. We simply leave it with your Honours and now turn to other matters.

May I now invite the commission's attention to the parliamentary debates, those at Adelaide and Melbourne.

SIR G. LUSH: We got these yesterday, did not we?

MR CHARLES: They were the third and fourth documents, Mr President, that my friend handed to the commission. The Adelaide debate are both of April 1897 and they begin at page 944.

SIR G. LUSH: Yes, I was just trying to locate the reference to them in Mr Gyles' outline because my documents happen to be grouped according to - - -

MR CHALRES: The reference, Mr President, was made to them at the point in argument which I think was in paragraph 3 on the second page. They are not referred to specifically in the outline of argument. The Melbourne debate, your Honours, is the one that took place on 31 January 1898 and begins at page 308. Before turning to the debates themselves, we would submit this, that it is perfectly clear that Dr Todd would have said in relation to a judge involved in each of the 15 situations we put to the commission before lunch that that judge, if I can call him Judge Z, should unquestionably have been removed from office. And equally we would submit a careful reading of the convention debates suggests that the framers of the Constitution would all have taken precisely the same view. In our submission it is not possible to find one member of the convention debates who would have taken a different view.

SIR R. BLACKBURN: It would have been easy for Todd, of course; he would simply have said that parliament would have gone ahead.

MR CHARLES: Indeed so. We would submit that if one is attempting to distil a number of propositions which might be seen as the general view of those taking part in the convention debates, they might come to something like this - and,of course, we recognise the difficulty of a process of this kind. Some of the debate was as Mr Justice Pincus put it - murky and confused. But we would submit that it is possible to see some lines of argument appearing and receiving apparent acceptance. I will come to what reliance one might place on this later but we would submit that these propositions canbe seen to have some support.

The framers of the Constitution firstly intended to guarantee independence to judges of the High Court. That was the keystone of the federal arch. They were not to be removable at the whim of the executive or parliament. We would say, secondly, it can be seen that the judges were intended to be and to remain persons of the highest quality and character from whom very high standards of behaviour would be expected. And we would submit that there was no question in the minds of anyone present that the judge from Van Dieman's Land, Mr Justice Montagu, was properly amoved.

Thirdly, the framers plainly wished to depart from the prevailing position in England where parliament could without reason address the Crown calling for removal. Now fourthly, they wished to provide a single means of removal, by which I really

mean exclusive means of removal of a High Court judge, permitting that to occur only if, firstly, both Houses in a single session determined to address; secondly, on the ground of misbehaviour or incapacity; and, thirdly, which had been proved. And we would say that implicit in that last proposition was that there should be an appropriate allegation of misbehaviour or incapacity; and, secondly, proof of it; and, thirdly, that the judge had been given an opportunity of answering the complaint.

The next and fifth major proposition from the debates is we would submit that the framers wished to maintain the ability to remove from office a judge whose behaviour had brought the office into disrepute. Sixthly, they wanted to leave that decision in the hands of parliament, and included in that decision was the decision as to what was misbehaviour and whether it had been proved, and that that was to be free from challenge.

If I can now turn to the Adelaide Convention debates and take the commission to them. Starting at page 945 and beginning with the right-hand column, 945 point 7, in the speech of Mr Wise. After reference to the impeachment process in the United States, Mr Wise says:

> The power of removing upon an address from both houses . . . . . something of the same power exists here.

May I underline in passing the reference to the fact that it was a power of removing upon an address from both houses for misbehaviour. Plainly that cannot be misbehaviour in the sense that my friend has been asserting because the address from both houses, part of the Constitution of New South Wales and Victoria, was a completely broad entitlement not necessrily related in terms to misbehaviour in the sense suggested. So that Mr Wise is using the word in a different sense. Mr Douglas also:

> And in Tasmania . . . . . but there was no doubt that the judges were properly removed.

He is referring, of course, among others, to Mr Justice Montague, and we would submit that it is perfectly clear, and Mr Wise who was a barrister and former Attorney-General of New South Wales obviously knew the circumstances in which Mr Justice Montague had been removed, and which included as one of the two asserted reasons impecuniosity, financial embarrassment. There was no doubt that the judges were properly removed.

Carrying on down the page to what Mr Kingston has to say, he starts:

> I think we should be at great pains - - -

SIR G. LUSH: That is properly removed under the powers of address though, it is not properly removed for breach of condition of tenure.

MR CHARLES: I accept that, but what I seek to put by that is that Mr Wise's view put to the convention was that a

judge ought to be removed in those circumstances. The view that my friend is seeking to put is that in the interests of independence a right to remove in those circumstances was apparently being given up.

SIR R. BLACKBURN: Montague was under Burke's Act whch contains the words, "for misbehaviour therein".

MR CHARLES: Yes. Mr Kingston after asserting that we should be at great pains to secure the absolute independence of the judges of the Federal Court and that it would be a glaring mistake if we do not protect them from ill-considered action refers to the "during good behaviour" epxression, and continues:

> That is a most excellent principle to lay down . . . . . although his behaviour is everything that could be desired.

In other words, it was to remove the entitlement of the Houses of Parliament to remove a judge who had been behaving properly that amendments were being suggested. Then continuing on the right-hand side, Mr Kingston says at 946 point 4:

> It strikes me that if you pass that the effect will be . . . . . whether or not he has been guilty, and that should not be so.

Again it is the entitlement that the other provision would have given to remove a judge who had been behaving with perfect propriety that was the concern.

Then we come to the insertion of misbehaviour. Mr Kingston suggests the alteration and the inclusion of, "should be removed for misconduct, unfitness or incapacity".

SIR G. LUSH: Just immediately after the last passage you read from Mr Kingston, Mr Barton says you must read sections 1 and 3 together, which may imply that he was taking the view of misbehaviour that is put against you, if you read 1 and 3 together, and the point of reading 1 and 3 together seems to be that 3 becomes operative to terminate the good behaviour tenure granted by 1. It may be, and for all I know it may suit your purposes, but it certainly may be that Mr Barton is expressing Mr Gyles' view in that line and a half.

MR CHARLES: He was, indeed, possibly doing so, but he was doing so in a way which would not have been consistent with the views expressed by the Victorian law officers because their view is certainly that although persons

held offices during good behaviour there was an entirely separate right provided on the part of the Houses of Parliament to address for removal. But, in any event, Mr Barton is certainly pressing that view. Mr Kingston then suggests insertion of the phrase, "may be removed for misconduct, unfitness or incapacity", and Mr Simon suggests substituting misbehaviour for misconduct. Mr Kingston says:

> I am inclined to think that that would require . . . . . as far as ever I possibly can.

Mr Wise wants to leave out unfitness. Mr Kingston says:

> I think there is a class of cases . . . . . independent of any misbehaviour.

Then near the bottom of that column in Mr Kingston's speech, the closing words of it, he says:

> I believe there will be a general desire . . . . . they may feel secure in their office.

Then we have the long speech of Sir Isaac Isaacs, and my friend has read most of this to the commission so I will not repeat it. The then Mr Isaacs was putting the view that if you departed from the position that had been found in the Victorian and other state constitutions you would be producing a situation that it would be very difficult to control judges and providing all sorts of potential for a most unsavoury situation to arise, and it should not be allowed to happen. Sir John Downer says:

> There is a balance of risks which we might well take together.

Then Mr Isaacs continues and reads, as my friend said, the passages from Todd to the convention but in circumstances which require some careful examination because the passages from Todd start with the fact - at the top of the right-hand side of 948 - the good behaviour provision and the right to address.

Mr Isaacs said:

> A judge holds office . . . . . .
> the will of the people in that respect.

Then Mr Isaacs continues with the legal effect of a grant of an office. Mr Higgins asked:

> Does that include ordinary unfitness
> . . . . . incapable because of age.

Then Mr Isaacs continues with the reference to the passage on which so much reliance is placed by my friends. Then there is reference to:

> The legal accuracy of the foregoing
> definitions . . . . . non-
> performance of the condition.

May I stress to the commission in reference to the kind of misbehaviour by a judge that would be a legal breach, implicit in that is that there may be other kinds of misbehaviour. Then there is reference next to:

> But in addition to these methods of procedure
> . . . . . or legal consequence
> thereof.

Again going back to the start of that last paragraph:

> This power is not in a strict sense
> judicial. It may be invoked upon occasions
> when the misbehaviour complained of would not
> constitute a legal breach.

In other words, the word is here being used and Todd was using it to cover both situations of the misconduct that would entitle a person to claim forfeiture of an office, and also the misconduct that would justify the Houses of Parliament presenting an address to the Crown - misbehaviour in both cases.

That is why we submit that it cannot be said that misbehaviour as a noun has a technical meaning limited in the way my friends have suggested. One has twice on this very page and twice out of Todd found explicit reference to misbehaviour in a context which quite clearly shows that misbehaviour there is being used generically to cover the sort of misconduct that would justify the removal of a judge in one or other way.

Then Mr Isaacs goes on to continue his argument on the right hand side of 949 point 5:

> It is quite right that the judges should hold their offices . . . . . salary of the judges should be beyond reach.

At the bottom of the page Mr Isaacs thinks it would be a very great mistake:

> if it were departed from the lines that have worked so well for nearly two centuries under the British Constitution.

Then on page 950 Mr Symon takes up the propositions Mr Isaacs has been putting forward, and on the left hand side of 950 point 5, says:

> It seems to me that my honourable friend Mr Isaacs . . . . . that already exists in constitutional law.

He takes him to task, and turns to the federalists and to the quotation from Hamilton, and he then read and justifiably stressed the passage on the right hand side on the bottom half of the page. Then on page 951 Mr Symon makes reference, at the bottom of the speech before Sir John Downer intervenes:

> It would be introducing an element of great uncertainty . . . . . misbehaviour and incapacity.

Sir John Downer says:

> I think misbehaviour has always been the word. . . . . exercise its power of removal.

Again, we would submit that the clear reference back is to the circumstances in which Mr Isaacs and Todd have pointed to the operation of attempts to remove judges in contra distinction to situations where attempts might be made to remove a judge who is acting properly. Mr Symon then says:

> The two words suggested are exhaustive of the conditions . . . . . I think it is a distinct improvement.

Then there is reference in Mr Barton's speech - he does not accept what Mr Isaacs has put, which is interesting, because in the second debate he does to some extent turn to the Isaacs view. On page 952 on the left hand side - - -

SIR G. LUSH: Are these rather, apparently rather loosely expressed amendments exactly what we are dealing with at page 951, was that amendment to insert in what is called section 3 - that is in fact clause 70(3) -

the words, "on the grounds of misbehaviour or unfitness," or something like that?

MR CHARLES: I believe so, Mr President. I had assumed - - -

SIR R. BLACKBURN: The amendment is shown on page 950.

MR CHARLES: And at page 946 point 5, right hand side. Mr Barton, continuing on page 952, points to the matter of which the view opposed to Isaacs is really placed. At 952 point 6, left hand side:

> The Canadian Constitution amounts to an attempt to place it . . . . . I agree with Mr Symon in that respect.

Then Mr Isaacs comes back to his point:

> Who would be the judges of misbehaviour . . . . . so long as both houses concur.

I have been reading from the bottom quarter of the left hand column of 952 and the first third of the right hand column. So that again, we submit that what is plain is that those who opposed the Isaacs view simply wanted cause to be inserted and later proved, and were not attempting to limit the area of misbehaviour.

Then on page 953 we have a series of - firstly, I should say before Mr Higgins enters the fray, Mr Barton at 953 point 6 on the left hand side, quite agrees with:

> any honourable member who will endeavour to amend this clause . . . . . guilty of incapacity or misbehaviour he should be removed?

Answer: "Yes." It is the opinion of parliament on the matter. It is not some strictly technical settled and received meaning that is being looked at here, again in the context of what has been said from Todd. Mr Higgins:

> Then the end of it all is to leave it to the two Houses of Parliament.

Then Mr Higgins continues, and he obviously does not accept that this is going to be the effect of the amendment. At 953 point 8, right hand side:

> May I point out to Mr Kingston . . . . . that there has been misconduct.

And this is a man who is going to become a High Court judge, a very skilled lawyer, referring to misconduct, not misbehaviour.

Misconduct or incapacity . . . . .
. . . . . salary.

He says he has to vote against the amendment.

Then Mr Fraser, who turned out to be a thoroughly pugilistic debater in these proceedings says:

> If the removal of a judge . . . . Therefore Parliament is the Supreme Court in this case.

Near the bottom of the page we get the interventions of Mr Dobson who was described shortly afterwards as a radical, revolutionary firebrand. He says:

> It is rather difficult to answer the well-put arguments of Mr Kingston . . . . . has been guilty of misconduct or incapacity.

Again misconduct:

> There will be caused an enormous amount of litigation . . . . . that judge ought to be removed.

There is an interchange with Mr Symon. Then Mr Dobson said:

> A judge will not be found guilty . . . . . he brought the administration of justice into disrepute and contempt.

The relevance of that is simply that this very fact situation was brought to the attention of the members of the convention, not the fact that he had misused his office to stop his creditors succeeding but the second of the two situations put to the court by Sir Frederick Thesiger in argument:

> It is much better to leave with the Federal Parliament . . . . . unless misconduct -

Again misconduct:

> or incapacity were proved as facts . . . . . If he is found guilty of misconduct, either moral or judicial, he ought to be removed.

Here is the person arguing strongly against the Isaacs amendment but insisting that moral misconduct was a proper basis for removal of a judge:

> These are questions of fact . . . . . fearless in doing their duty -

That submission is in the context of a man who wants a judge removed from office for moral misconduct. Sir John Downer, Mr Symon and Mr Barton think Mr Dobson's sentiments are radically wrong and revoluntionary. A firebrand, even a Tory, according to Mr Douglas. We would submit that in so doing they were not traversing the suggestion that the judge had been properly removed in Tasmania. What they were opposing was his view that there should be a complete breadth of entitlement in parliament without cause given for the removal of a judge. Sir John Downer continues:

> But as far as this particular part of the Bill is concerned . . . . . no possible relation to what we are doing now?

Then Sir John Downer on page 956 on the lefthand side at point 8:

> What is provided here? . . . . . or something else -

"or something else", your Honours:

> but there is no method prescribed as to how they have to find this out . . . . diminish the independence of its members.

Before reading on, can I forewarn your Honours that Sir John Downer was about to suggest an amendment introducing impeachment:

> The Americans required two things to be done, and their custom has worked well. I think we had better do the same. They require an impeachment to be made by one House and a trial by the other.

Near the bottom of the page at 956,point 8, Sir John Downer says:

> We ought to surround the removal of the judge . . . . . They will represent the same class in both Houses.

Then he suggested impeachment. Sir John near the bottom of the lefthand side of page 957 says:

> I think this is a matter well worthy of the serious consideration of honourable

> members. We should make our Supreme Court so strong and powerful that no Government will be able to set the Constitution at defiance owing to the presence of a majority in either House.

The Sir William Zeal who quite plainly was not a lawyer, on the righthand side said he wants to put forward the popular view of the matter:

> Honourable members, particularly of the legal profession, have discussed this question at great length -

I do not think Sir William Zeal was concerned with distinctions between misbehaviour and misconduct because he says in the middle of page 957:

> Are honourable members going to suppose . . . . . Let us go to work and try to complete this Federal Constitution.

At the bottom of the page:

> If a judge does wrong, punish him, but if he does that which is right we shall all of us honor him. I trust members will take a sensible and practical view of the question.

Small concern for the technical meaning of misbehaviour, we would say. At page 959, after the redoubtable Carruthers who can always be relied upon to defend us, we have on the righthand column of 959 Mr Kingston who talks of altering his proposed amendment:

> I have altered the amendment . . . . . at the will and pleasure of the Executive and of the Parliament.

Mr Isaacs again:

> Who will be the final judge . . . . . in such way as they see fit.

Then there is some further discussion but little I think that bears any necessity for reading, unless my friend wishes me to. Reference to this part is completed at the top of page 961 lefthand column:

> Subsection as amended agreed to.

We would say that it is absolutely impossible from that expanded reading of the debate at the Adelaide

(Continued on page 270a)

convention on section 72 to find any concern to limit the definition of misbehaviour or the entitlement of parliament to remove to the circumstances my friend has called for. Indeed, in so far as one can gain assistance from the convention views we would submit that every indication is to the contrary. There is not one person at that debate who can be shown to be suggesting that a judge who is, we would say corrupt in the circumstances we have opened our argument here was intended to remain a judge of the High Court. Independence was important but not to bought at that price.

Turning next to the Melbourne convention, commencing at page 311 - - -

SIR G.LUSH: I suppose that last proposition is true but was not Isaacs J originally at least saying, if you depart from the draft which was initially before them, you will be creating a situation in which corrupt judges may stay in office? Nobody said, "Yes, we are" in those terms or even in oblique terms.

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MR CHARLES: At page 948.6, Sir Isaac Issacs was saying:

> If we depart from the present British practice . . . . . that is a position we ought not to court.

What Sir Isaac was arguing, as we follow it, was that by removing the broad entitlement of parliament to act without cause stated, you are giving the judge a series of procedural arguments which he could take that there was not technical misbehaviour stated; he was entitled to go to the courts; it had not been proved.

We would say it does not follow from that that it was being suggested that any particular received definition of misbehaviour was involved because one then comes to the references in Todd to misbehaviour used both in what my friend would call its technical meaning and in a wider meaning covering an occasion for removal of misconduct on an address of parliament under the Constitution, and in circumstances where Sir Isaac then accepts later that if parliament is to be the judges of misbehaviour, then that removes his complaint. That is at page 952.

We see what appears to be acceptance by acclamation of that view. We would submit insofar as Sir Isaac Issacs had his doubts on this score, they were being taken away both on that page, 952, and in the later intervention in debate that arose at page 959, right hand column, point 7.

If I could then come back to the Melbourne convention debates and start at page 311, the relevant passage goes from page 311 to page 318, and one finds the redoubtable Mr Issacs rising to the defence of the Victorian position again in the left hand column at 311.2. The amendment had been suggested by the Victorian Assembly, again attempting to reinsert the right of both houses to pray for removal. Mr Issacs says:

> I would like to explain why the Legislative Assembly of Victoria suggests the insertion of these words in the United States.

Then there are two very testy interjections indicating that at least some members found Mr Issacs a pest. Then Mr Issacs goes on:

> I have no doubt that the Honourable Member's knowledge of Canada . . . . . during good behaviour -

SIR G. LUSH: Which page are you reading from?

MR CHARLES: I am sorry, your Honour, 311 in the left hand column at point 5. Mr Fraser has had quite enough about the United States; he says he knows all about it:

> In the United States Constitution it is provided that judges shall hold their office . . . . . a judgment in favour of a state as against the Commonwealth.

Obviously Mr Issacs regarded that as open and he is simply saying that the parliament would do it:

> Mr Symon: do you contend that a judge should be removed . . . . . as it is left in the colonies.

Then at page 312, left hand side, point 2:

> I should say that every precaution should be taken . . . . . he would have the right to appeal.

Then there is discussion about how you can attempt to avoid that. Mr Issacs at page 313.6, left hand column:

> To remove any misconception these words should be added . . . . . misbehaviour or incapacity.

Then there is a discussion about how this can be done. Mr Issacs says:

> I am quite prepared to accept the suggestion of Mr Reid -

that is the one in the middle of the page:

> - what I desire to do is to prevent such a calamity . . . . . to be final and unchallengeable.

He is quite willing to accept what Mr Reid suggested. Mr Kingston then takes the matter up at page 313.6, left hand side:

> I think the intention of the convention at Adelaide was this, to prevent the judges being removable at the whim and caprice of both houses of the legislature -

not to limit misbehaviour in the way my friend has suggested:

If you give to the federal
parliament the uncontrolled
power . . . . . .
shall not be challenged in the
slightest degree, well and good.

Mr Isaacs again supports what Mr Reid has suggested. Mr Kingston says at 314.4, left:

> I would suggest that if we add after the words "misbehaviour and incapacity" . .. . or insert similar words -

and this, of course, your Honours, is clearly the origin of proof -

> and in express terms state that the findings . . . . . Federal Parliament unchallangeable and without appeal.

And, your Honours, "behave themselves in the best sense of the term" in our submission does not again lend itself to the assertion of a settled technical meaning in the way my friend has suggested. Now Mr Fraser, who is, my friend is right in asserting, from Victoria, goes on that both houses might produce false evidence; evidence could be trumped up by a cabinet anxious to get rid of a judge; and Mr Barton then starts to indicate that he has been converted by what Mr Isaacs has had to say. And this all becomes apparent in the course of the next two pages.

He wants to put the amendment in a different place; Mr Isaacs says he does not care where, so long as it is inserted. And then a form of amendment is suggested by Mr Barton at page 314.7, right hand side. And it is quite clear that what Mr Barton, the leader of the convention, was trying to do, was to accommodate the Isaacs view. Mr Barton at the top of page 315, left hand column:

> I may say that in the convention in Adelaide, in 1897 . . . . if we were to impose such a task upon it.

Again, your Honours, as a judge having committed some misdeed, not an offence, not criminality, not criminal conviction, but as having committed some misdeed.

Then at page 316 we have got at the bottom of the left-hand column Mr Kingston saying:

> I understand that the proposal is this - that whilst you provide . . . . . final finding.

Mr Fraser is still at it:

> If parliament has to decide on misbehaviour . . . . . mere subterfuge.

At which there is a horrified interjection from Mr Isaacs. Then we have Sir George Turner:

> I have heard so many statements lately . . . . . creating a parliament at all.

Then at page 317 we have Mr Fraser complaining at the top of the page:

> It is only a majority in either house, and the majority may be only one in either house.

And Sir George Turner:

> It is a matter for the majority in both . . . . . no provision of this kind in the bill.

Then Sir George Turner at the bottom of the page - I should go back one interjection. Mr Reid:

> And if a judge lost his brain, he would be the last man to believe it.

And Sir George Turner:

> There is no doubt of that, because many of those . . . . . if we make the clause read - - -

And he sets out his view. And:

> That will make it perfectly plain that a judge is not to be . . . . . to finally determine the matter.

Your Honours, twice in that passage Sir George Turner has indicated a view which is not one of technical misbehaviour. He has spoken, firstly, 317, left-hand side at point 9, "such gross misbehaviour", and 317, right-hand side at point 2, "some misbehaviour - reckless misbehaviour that will mean - - -". Now that is not a received view of misbehaviour. Then Mr Barton at the middle of 317, right-hand side:

> I should like to know whether it is or is not . . . . . into any mistrial of the matter.

That is the desire to ensure a hearing in fairness to the judge. Then Mr Symon at the bottom of the page:

> I shall be found supporting the amendment as indicated by my friend . . . . . perfectly content to leave the final decision to them.

And they are still concerned that the judge should have a right to defend himself; and there was thought to be an implied power of suspension; and Mr Symon says:

> I am satisfied that Federal Parliament would give an accused judge . . . . of defending himself.

Then Mr Barton, right-hand side, 318.3, moves the amendment upon the grounds of proved misbehaviour or incapacity. Mr Kingston:

> We want to make it perfectly clear that the decision . . . . . shall be conclusive.

And there is reference to what form the amendment should take and Mr Isaacs then says:

> I understand that the drafting committee will not be . . . . shall be unchallangeable.

Now, your Honours, that is as far as the debates went and we would submit that there is nowhere in the debate in either place any justification for it to be asserted that any person taking part in those debates had a view of misbehaviour confined to criminal conduct of an infamous nature resulting in a conviction. It simply is not there.

SIR G. LUSH: It is misbehaviour outside misbehaviour in the duties of the office?

MR CHARLES: Yes, we would say it is perfectly clear that what was being talked about was misbehaviour, or misconduct, or gross misbehaviour, or reckless conduct - a variety of different expressions are used which follow from the first description of

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the situation by Mr Isaac Isaacs where misbehaviour is used twice in reference to two quite different types of conduct: those that would entitle the person to move in the narrow sense that my friend has referred to, and also those that would be proper to be taken into account by the Houses of Parliament in England as a basis for praying for removal.

Now what the real argument was was how the situation could be left in the hands of parliament safely so as to secure independence. It was to be left in the hands of parliament and there had to be an allegation of misbehaviour and that had to be proved. And in that way the judge knew what was being complained of against him and was given an opportunity of answering it and also, because that did not entitle them, parliament, to act on mere whim or caprice. It did not entitle parliament to seek to remove a judge who was behaving with perfect propriety. And we say that it was in that context that the independence of the judiciary was seen to be protected.

(Continued on page 277)

SIR R. BLACKBURN: Am I right in saying what you are contending against is not merely that misbehaviour out of office cannot be limited to misbehaviour shown by a conviction but much wider than that, misbehaviour referred to in section 72 is not limited by the common law rules about the misbehaviour which would entitle the grantor of an office to terminate the office?

MR CHARLES: Indeed, your Honour.

SIR R. BLACKBURN: You do take that wider?

MR CHARLES: I do. My learned junior tells me that the Fraser in question was the former prime minister's grandfather. Obviously a man of determined streak who may have passed on certain characteristics to his grandson. We would say that there is simply in the convention debate no justification shown for what my friends have sought to derive from it in argument.

SIR R. BLACKBURN: There is one other possibility, of course, that although the founding fathers may not have had that intention, it is the only one which you can properly read into the words they have used.

MR CHARLES: That would only be the case if it were clear beyond argument that the words mean that or that misbehaviour could only be seen in a particular light at that time, and I am going to turn to that argument next.

We would submit that as to the first point, the general meaning of the words, the debates suggest in the strongest terms that the members did not have a clear view of what misbehaviour was. What they were saying was we cannot judge it now, we are going to have to leave it to parliament as the will of the people to decide from time to time, but there must be misconduct of some kind, it cannot be whim or caprice. They were, we would submit, preserving for parliament a right to define misbehaviour having regard to the circumstances alleged, and no notion whatever, we would respectfully submit, of conviction surfaces at any time in the debates from start to finish, apart from the reference that Sir Isaac Isaacs made to the definition in Todd where one talks of the condition upon which an office can be forfeited.

We would submit on the meaning of the expressions used that neither word that is in the phrase "proved misbehaviour" readily gives rise either to the Bennett or Griffith view, if I can so describe them, in deference to Dr Bennett, Queens Counsel, rather than the Dr Bennett present view as stated in the opinion which your Honours have. I am told to describe them as submissions rather than opinion.

The natural meaning of misbehaviour, we would submit, as a matter of definition would cover a

judge whose conduct had brought his high office into disrepute, and we would also submit that the word, "proved", suggests something entirely different from conviction. A conviction may or may not stand, and witness the very events which took place earlier this year. We find a conviction at the first trial, an appeal, and an acquittal on the second trial. We say it is also clear enough from the form of debate at the convention that the framers expected by use of the word, "proved", that there would be some form of proof tendered to parliament, not that one looked at a conviction obviously outside parliament.

The Bennett view requires the conclusion that those who framed the Constitution intended for the purpose of securing the independence of the judiciary both a new procedure for removal which clearly was contemplated but also to relinquish the right to remove a judge who had disgraced his office in the ways suggested at the start of this argument before lunch.

SIR R. BLACKBURN: Where do we get the Bennett view? You have referred to it more than once. The Pincus view I understand, the Griffith view I understand.

MR CHARLES: If your Honour looks at the report to the senate of the Senate Select Committee of August 1984, your Honour will find three things included. One of those is the opinion of Mr Justice Pincus, the last is the opinion of Dr Gavin Griffith, and immediately preceding that is a series of submissions on the inappropriateness of interrogation of a judge, and in the course of that will be found what is the basis for the Bennett view, page 44.

HON A. WELLS: While you pause there, I just want to make quite sure that I am following that part of your submission which says that broadly speaking the convention finally decided to leave the matter of what was misbehaviour to parliament. I suppose theoretically there are two ways of interpreting that. One way would be to attribute to parliament the right to expand or contract the legal content of what was proved misbehaviour properly interpreted so as to make it suitable to these circumstances or those circumstances. That would be one possibility. The other possibility is to say that proved misbehaviour has a general generic character and its application depends upon matters of fact and degree, and to that extent parliament would have it in their hands to decide what is in application proved misbehaviour. To my mind those are the two alternatives that present themselves. Do you espouse either one of those two, or another, or some mixture?

MR CHARLES: I really espouse neither because I say that what the framers intended but which they may not in law have been able to achieve was to leave it entirely to parliament to say what was misbehaviour, what was misconduct, which would justify the removal of a judge.

HON A. WELLS: The justification for removal is the sole criteria?

MR CHARLES: Yes, but there had to be some form of justification in the form of misconduct stated in the intention of the framers of the Constitution. we will come later to the question of whether in law they may successfully have achieved that because we will submit that the High Court would not permit such a situation to exist, that there is an area in which curial review is possible and, indeed, under the Constitution would necessarily have to exist, but the thrust of our submission on this is that the whole context of this debate was one pointed in a quite different direction from that which has been suggested by my friends.

They have suggested that those taking part in the debates had in mind a settled meaning of misbehaviour. We have submitted that as a proposition that is wrong as the extract from Todd itself shows and, secondly, that the framers of the Constitution in section 72 intended to depart from the area of misconduct which might in the past have permitted a judge to be removed, and to limit that right in the interests of independence to a very very much narrower area of misbehaviour, and what we say is that it is quite plain that neither of those two things was in the minds of any of those debating, that their concerns were entirely different. They wanted judges who were heard to have their debts outstanding and with bailiffs waiting at their front gate and disgracing their office in that way, they wanted them removed just as much after the Constitution had been implanted in Australia as before. It would not have entered anyone's head, with respect, that it was going to be suggested that any conduct outside office no matter how disgraceful, that a conviction was required for a criminal offence before removal could take place.

We would submit that reading those debates that would have been treated with scorn and derision by those present at these functions if suggested to them at that time.

SIR G. LUSH: They were afraid of without cause removal. They may or may not have been afraid of trumped up removal if, indeed, the distinction is relevant.

MR CHARLES: Some such as Mr Fraser were concerned with this possibility, the majority, we would say, were taking the view clearly enough that parliament exercising the will of the people and being bicameral could be trusted, provided that there was to be misbehaviour stated and provided it was to be proved, that those safeguards were sufficient to ensure that a person could not be removed for mere whim because, let us say, he had opposed the government once too often.

SIR G. LUSH: At one stage in the passages which you read there was a suggestion put forward, in effect, that all that should be required was that the address itself should contain the words, "upon the ground of misbehaviour or incapacity" and, "proved" was apparently inserted to make sure, as one of the endeavours to make sure that parliament's decision was final. I referred when I was speaking to Mr Gyles this morning to some references to Harrison Moore, and I will not repeat what I said then about the insufficiency of my reading of the book, but one of the extracts suggest that Professor Moore took the view that even in its final form section 72 was capable of permitting an address which merely made an allegation and which had no substance to it. It may have been a cynical approach, indeed, it may not have been the professor's approach at all, but it does appear by the footnotes to the article.

MR CHARLES: We will come to the writings of Mr Harrison Moore later, your Honour, but certainly that very learned gentleman did take the view that in 1897 and in 1910 judicial review was possible.

SIR G. LUSH: Yes he did, but it was not only that. The footnote in the article to which I am referring is that he said at the end of all this the judges here were not a scrap better off than they were in England. That certainly would have disappointed those who took part in the debate that has been read to us in the last two days.

MR CHARLES: It certainly would.

SIR G. LUSH: Are you leaving the debates at this stage?

MR CHARLES: Not quite.

SIR G. LUSH: Perhaps you would tell me when you are.

MR CHARLES: I have just got to deal briefly with the extent to which one can use the comments in these convention debates. There are limits to the extent to which it is permissible to have regard to them. It is plainly proper to do so for the purpose of seeing what was the evil to be remedied.

MR CHARLES: I wanted to take the commission briefly to two cases for that purpose. The first of these is the Municipal Council of Sydney v The Commonwealth, 1 CLR 208. The relevant passage is at pages 213 and 214. The commission will see at page 213 point 2:

> Counsel then proposed to quote from the convention debates . . . . . evil to be remedied.-

and so forth. In the second case, The Queen v Pearson ex parte Sipka, 152 CLR 262, the reference is in these terms, in the joint judgment of the Chief Justice and Mason and Wilson JJ, at the top of the page:

> It is unnecessary for present purposes to consider the extent . . . . . what was the evil to be remedied.

The convention debates are referred to as showing that the apprehended mischief which section 41 was designed to prevent was that the women of South Australia might be deprived of the federal franchise of the Commonwealth parliament.

We would say that you cannot count heads for or against a particular view. What is clear, we would submit, as one of the evils to be remedied, was that parliament was not intended to be at large in its address to the Governor-General. We would say that in the interests of federation, the position in the United Kingdom was to be departed from, having regard to the special position of the federal courts, in particular the High Court, in a federation, and for the better protection of the judge some formality was to be imposed on the proceedings by the use of the word "proved", but equally again, what mischief was to be remedied, we would say that if one found a corrupt judge in office, and by corrupt I mean someone guilty of misconduct in what I put is the wider sense of the term, parliament was to be the tribunal of fact in what was misbehaviour.

HON A. WELLS: I suppose, rather ironically, to put that within the mould with your basic proposition, the evil to be avoided was the position in the United Kingdom.

MR CHARLES: Yes, certainly. Mr President, I am about to leave the position of the debates.

SIR G. LUSH: When did subsection (1) drop out of this clause? In both the Adelaide and Melbourne debates the proposed clause contained the words "shall hold their offices during good behaviour." When did that drop out?

MR CHARLES: Obviously it does not seem to have occurred at any stage during Adelaide or Melbourne. Do members of the commission have in the copy of the Melbourne debates an attachment, which is the last two pages, draft of a bill? I have a copy which may have been produced out of my office rather than my friend's, which indicates draft of a bill.

SIR G. LUSH: What we have ends at page 318.

MR CHARLES: Well, can I hand up one copy at this stage and read from my own copy which I will hand up to the commission in a moment. The commission will recall that the Melbourne debate took place on 31 January 1898. I have a two page document headed, "Copy of Federal Constitution under the Crown as finally adopted by the Australasian Federal Convention at Melbourne on 16 March 1898." It is headed, "Copy of a Bill", and that shows that section 72 did not have the former subsection (1) so at some stage within the two months, or indeed the six weeks, between the Melbourne debate and the next convention, also in Melbourne, that first subsection had dropped out.

HON A. WELLS: I suppose, like many of these things, it may have been done in the quiet back rooms of the draughtsman.

SIR G. LUSH: There is an express reference by Mr Isaacs in the debate to the fact that their wording was sent off to the draughtsman to be dealt with further. This draft, you say, appeared in March?

MR CHALRS: It is headed at the top of the page, your Honour, 16 March.

SIR G. LUSH: What I had in mind was that it might have been the subject of some discussion in the debates, but that is evidently not so.

MR CHARLES: I have not been able to find any, if such a discussion existed. May I simply remind your Honours that on page 316 of the Melbourne debate the adoption of subsection (1) appears to have been agreed to at 316 point 2. Subsection (1) was agreed to, and then subsections (1) and (2) were transposed, and the chairman said:

> The question now is that subsection (2) stand part of the clause . . . . . to carry out the intention.

I do not think I can point to any other reference in that debate until one gets to Mr Isaacs's suggestions that the drafting committee:

> is not to be bound by the form of words adopted by us then, and that they are to frame the clause using such language as they think will meet our intention.

That is at page 318 on the right hand side near the bottom.

SIR G. LUSH: Does its omission have any effect on the meaning of the words that remain?

MR CHARLES: With respect, we would say no. The view of tenure during good behaviour certainly resulted in it being asserted that there was some form of, in effect, feudal tenure with a provision for forfeiture. That would not have been consistent with the scheme that was produced by the remainder of the bill, because there was no suggestion or intention that there be forfeiture. What was intended was that in the event of misconduct, the parliament, and only the parliament, should have the right to address, stating the cause and proving it.

If there had been retained the provision for tenure during good behaviour, that would have opened the possibility of some person moving for writ of sci fa to say that some form of conduct had occurred,

the position had been forfeited and seeking to oust the judge from his bench.

SIR G. LUSH: Yes. I had thought that you might answer my last question, the question whether the omission made any difference to the interpretation by saying that it tended - it could not be decisive, but that it tended to emphasie a divorce between the word "misbehaviour" remaining and the traditional "during good behaviour" which had been there originally. The argument against you might have had more force if the conjunction between "good behaviour" and "misbehaviour" had been maintained. I thought you might answer me along those lines, but one way or another I do not suppose it is a consideration that could carry very much weight.

MR CHARLES: I am reminded that it has been held that the judges in fact hold office during good behaviour, authority for which is the Waterside Workers Federation of Australia -v- Alexander, vol.25 CLR434. It is unlikely that we would have offered an answer to the presiding members question in the way suggested because we would submit that there were not in fact two divisions between the differing meanings of behaviour, that it is just a generic meaning of misconduct: only when one was concerned with a forfeiture of office because of a failure to act in good behaviour was it possible - possible not necessarily right - that one could move only for certain types of misconduct of types of misbehaviour.

SIR R. BLACKBURN: I do not really see the meaning of the statement, "The judges hold their office during good behaviour". If the section 72 method is the only method of getting rid of them, it seems to be an empty formula. Perhaps if I read that case, I will see what the point was.

MR CHARLES: May I in conclusion this afternoon draw the Commission's attention - we have discovered in the course of wide ranging researches that a student at Monash University last year was completing an honours thesis on the interpretation and application of section 72.

SIR G. LUSH: If I was still in charge I might say, and what is your next authority?

MR CHARLES: The particular value of this is not so much the arguments, although it happens that they coincide with many of the arguments we put to the commission and I hope they are not the worse for that, but because of some helpful footnotes which the student has included in them. May I draw to the Commission's attention what Sir Winston Churchill said, referred to at page 23 in the English Parliamentary Debates:

> The form of life and conduct
> . . . . . appearance
> of impropriety.

And what then follows. Likewise, page 24, what was said by Jackson and lastly, may we refer to the passage from Sir Robert Peel in the House of Commons in Barrington's case set out at the top of page 25, talking of Burke's Act, where Sir Robert said:

> The act that renders our judges
> . . . . . the address to
> Crown for his removal.

I simply put this document forward. I do not seek to use it other than simply to say that some of the footnotes are helpful and that the passages just referred to bear on the extent of the demands that society makes on judges and which we would submit are relevant to a contention we will come to that there is a standard of conduct which is regarded as generally acceptable for judges and which, despite what my friend says, is observable and applicable.

SIR G. LUSH: It did not disclose the name of the author.

MR CHARLES: I believe that the author is a person called Sheridan. I really cannot claim to attach significance to the opinions stated in it.

SIR G. LUSH: I was not expecting that but if it is to be referred to it ought to be acknowledged.

MR CHARLES: I understand that the student referred to is one Sheridan. I cannot even say of which sex.

SIR G. LUSH: What is the chapter 4 of?

MR CHARLES: My understanding again is that what happens is that the honours theses are printed at the end of each year and this may be either one chapter of a thesis - indeed I suppose it must be having regard to the pagination. The whole is contained in a bound volume which the university puts - - -

SIR G. LUSH: The heading, interpretation and application of section 72 implies that at least the other three chapters were dealing with the constitution. Something has gone.

MR CHARLES: And that there are the previous 19 pages.

SIR R. BLACKBURN: Presumably the fact that it is printed indicates it was accepted as warranting the admission to the degree?

MR CHARLES: Again, I assume so, your Honour.

SIR G. LUSH: You cannot say more than it was typed.

MR CHARLES: Very little more at this stage, your Honour. I succeeded in catching the document before it had been sent off for printing to be included in the bound volume.

(Continued on page 286a)

SIR G. LUSH: We shall adjourn until 10 o'clock tomorrow morning.

AT 4.05 PM THE MATTER WAS ADJOURNED
UNTIL THURSDAY, 24 JULY 1986

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TRANSCRIPT OF PROCEEDINGS

Transcript-in-Confidence

PARLIAMENTARY COMMISSION OF INQUIRY

SIR GEORGE LUSH, Presiding Member
SIR RICHARD BLACKBURN, Commissioner
THE HONOURABLE ANDREW WELLS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON THURSDAY, 24 JULY 1986, AT 9.50 AM

Continued from 23.7.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: Mr Charles, do you wish to say anything about the arrangements of the hearings next week?

MR CHARLES: Yes, Mr President; with the consent of my friend we were both concerned, if we could raise the matter, to ask the commission to consider when again evidence should start in the light of the fact that argument will proceed we think at least throughout today. We hope it will finish today on the question now being argued. The commission may have a view as to how long it would take to produce a report. I think I speak for my friend when I say that both of us would regard it as desirable that the opinion of the commissioners on this aspect be delivered before the High Court hearing. Is that fair - - -

MR GYLES: I think our concern is to have it delivered before there is any evidence led, having got as far as we have. Because if we succeeded in our argument that means that evidence led really is irrelevant. I also agree it would be desirable to have it before the High Court hearings but our primary concern is to have the commission's ruling on the substantive aspects of the matter. We do not see this as a sort of introduction or preliminary to a High Court case; we are here primarily to have the commissioners' own views.

SIR G. LUSH: Yes. The present plan, of course, is to sit next Wednesday for evidence. If we postpone the start of evidence until the following Monday I think that it should, unless some misfortune intervenes, be within the commission's capacities to deliver its views on the current matter at the end of next week.

MR CHARLES: I am told, Mr President, that that Monday, which would be 4 August is a public holiday in New South Wales - - -

MR GYLES: No, I have been reminded it is Bank Holiday.

MR CHARLES: - - - and that the courts usually do not sit on that day.

SIR G. LUSH: At any rate we need not pursue the matter. Time is obviously valuable today from what you have already said, but if inquiries can be made during the day or at lunch-time and if it is agreed that we postpone the start of evidence until the first available day that week, that will do for present purposes, will not it?

MR CHARLES: Yes. Can I indicate to assist my friends that unless it is inconvenient to them for some reason, the case I would propose to proceed with first is the Thomas allegation in that week, and that unless they are unprepared, I would propose to commence with that, which is allegation number 1, on the Monday or Tuesday, whichever day turns out to be convenient, in that week.

MR GYLES: Perhaps all I should say about that is that I have indicated to my learned friend that is one of the allegations which, if they are to be pursued, we would like more time to prepare. He has taken that into account and he still says he wants to do that first. We will have to do our best. It seems to us there are a number of other allegations that could be pursued before that.

SIR G. LUSH: Maybe, we have ten days. You will need more than that - or twelve days, if it is Tuesday.

MR GYLES: Because time is valuable, I do not propose to elaborate upon the point at the moment.

SIR G. LUSH: Yes. Mr Charles, we will proceed with the argument.

MR CHARLES: I have been asked yesterday questions about the tenure on which members of the High Court are thought to hold office, and I have referred the commissioners to Alexander's case. Can I give four short references to Alexander's case. I think I have given your Honours the citation of the case: (1918) 25 CLR 434. The first reference is that of the Chief Justice at page 447, and after reference to the term, what the Chief Justice said was:

> The word does not of itself import any particular duration or tenure of office. Whenever used its meaning may and indeed must be controlled by the subject matter and the context.

SIR G. LUSH: What word is he speaking about?

MR CHARLES: He is speaking of a point in relation to the President of the Arbitration Court:

> Whenever used its meaning may and indeed must be . . . . . in section 12 of the Arbitration Act -

I think there is nothing further of particular relevance to be found in that passage there. Indeed, I ought really to have read the preceding paragraph. The Chief Justice said, after reference to the appointment of the President of the Court:

> The language demands careful examination . . . . . holds judicial office during good behaviour.

Then the second passage is in the judgment of Sir Edmund Barton at page 457.

SIR G. LUSH: That means that in successive paragraphs the Chief Justice referred to tenure during good behaviour and appointment for life.

MR CHARLES: Yes.

SIR G. LUSH: There is perhaps no difference between the two.

MR CHARLES: Yes, indeed. I will not read - I think the relevant passage in Sir Edmund Barton's jdugment is at page 457.5 for the rest of the page; in the judgment of Sir Isaac Isaacs and Sir George Rich at pages 469 to 470; and in the judgment of Mr Justice Powers at page 486.

SIR R. BLACKBURN: How did the question arise?

MR CHARLES: The question arose, your Honour, in the context of whether in the case of the Commonwealth Court of Conciliation and Arbitration the appointment could be made for a term of years or as a chapter 3 court had to be for life and it was incidentally in the course of that examination, in the course of deciding that the appointment had to be for life as a chapter 3 court that the incidental reference is made to the members of the High Court holding during good behaviour.

I had been dealing with the convention debates and had finished that examination. The next part of our argument relates to the position as to misbehaviour generally and that is whether there can properly be said to have been a received or technical meaning of the word which in some way the framers of the Constitution unknowingly translated into section 72. My submission is that it must have been unknowing because we assert that it would not be the ordinary meaning of misbehaviour and examination of the convention debates does not suggest that that is what they intended the word to mean. We make three broad propositions. The first of them is that in our submission misbehaviour never had the meaning at common law which is claimed for it. In our submission misbehaviour was a generic term used in relation to judges to describe conduct which justified removal from office.

One of the ways in which removal from office was obtained was in cases where forfeiture was claimed by the writ of sci. fa., scire facias.

SIR G. LUSH: That was a procedure.

MR CHARLES: Indeed, your Honour, in circumstances where it was claimed that the office had been forfeited by breach of condition. In that situation there may be justification for limiting the grounds giving rise to forfeiture and seeking certainty for those grounds and particularly in the light of the feudal nature of the tenure of offices, that officers frequently were passed on through a family. It would be in the highest degree desirable that the circumstances under which an office might be lost through breach of condition and vacated should be known with precision. But in relation to judges, it is our primary contention that it never had the meaning which is claimed for it.

Secondly, our second proposition is that if misbehaviour did have the meaning attributed to it in relation to forfeiture of offices, we say that misbehaviour in relation to removal from judicial office

had a wider meaning covering all forms of conduct justifying removal from judicial office. Our third proposition is that if misbehaviour has at common law a narrowly defined technical meaning in relation to grounds for removal from judicial office, then we submit that the word was not used in that sense by the framers of our Constitution. We say there that the Constitution coalesces two separate procedures by which removal could be obtained and on the assumption made in proposition 3, operates in differing areas of misconduct. We say that the fact that in order to secure the independence of the judiciary, the Crown's more readily available procedure was relinquished, does not lead to the conclusion that reduced standards of behaviour were thereafter to be expected from judicial officers.

From those three propositions we move to the question - - -

SIR G. LUSH: There is something I would like you to repeat in that third proposition, Mr Charles. You said that the Constitution coalesces two procedures and I am not clear exactly what followed after that. You referred to different areas of conduct. Were you saying with the coalescence of the two procedures the Constitution operates in the two spheres of conduct that were previously relevant to the two different procedures?

MR CHARLES: Can I start my answer, Mr President, by saying the assumption on which the third proposition is based is that our first two are wrong and there is a narrow technical meaning of misbehaviour. The coalescence occurs in this way, there was a right in the Crown to remove a judge using the fact of forfeiture of office on this assumption operating where there had been technical misbehaviour occurring, where there had been misbehaviour in office and misbehaviour outside office on conviction for an infamous offence.

There was a second and quite separate procedure by which the Houses of Parliament could, on any ground, address the Crown praying for removal. No grounds needed to be specified but by convention that was limited to misconduct of the judge but used in a different sense covering moral turpitude and in general terms we would say unfitness for office demonstrated by improper action.

What we say is that the coalescence which occurred was that now only the Houses of Parliament were entitled to produce an address praying for removal but in circumstances not at large but where there had been misbehaviour. We say that what occurred was the removal of one form of procedure, the procedure that entitled - on the one hand the Crown no longer was

entitled to act by sci fa or on any other basis of its own motion and on the other the Houses of Parliament could only act on the basis of stated misconduct. It was intended to bring about a procedural operation but not a variation of the type of conduct that would produce removal from office. I am not sure in so doing I have properly answered your Honour's question.

SIR G. LUSH: I think so.

MR CHARLES: Probably at much more length than was necessary.

SIR R. BLACKBURN: But on that argument coalescing seems hardly the word, does it, because there was nothing left of the power of the grantor of an office. It was a new procedure for removing judges altogether.

MR CHARLES: Yes, precisely.

SIR R. BLACKBURN: Which had nothing in it of the pre-Act of Settlement common law procedure.

MR CHARLES: Yes, precisely. We say that in considering the position at common law one has to recall the purposes of the Act of Settlement. The Act of Settlement were intended to secure the position of the judges against intervention by the Crown by introducing the notion of the judicial office being held during good behaviour in contradistinction with their offices being held at pleasure. It was the stewards encroachments on judicial independence that had brought this about.

Parliament which had not been seen to encroach in that way always retained the right of address without such limitations of cause. We concede that those who have commented on the meaning of during good behaviour in the context of the Act of Settlement have substantial arguments for saying thatits operation in that context should be confined partly because the feudal nature of tenure and the operation of the condition brought about forfeiture vacating the office and partly because Parliament had that residual power, that wide ability to seek removal. Most of the commentators upon whom reliance has been placed have been stating views as to the operation and meaning of tenure during good behaviour against that backdrop. The context of the Constitution is so different we would submit that the views of the commentators can have little bearing upon it.

It is quite plain that there is no thought of vacation of office in section 72. The removal from office can only be brought about by the address of both Houses of Parliament in the same session.

The offices plainly are not vacated by breach of condition. So that the circumstances which caused the commentators to produce the theories they have simply have no operation in this respect, and we submit that when one is dealing with section 72 one is in quite uncharted seas. The commentators have usually, not invariably, but usually not been forced or required to grapple with the precise problems which really are thrown up for the first time in this case.

If we can go back to the various commentators upon whom reliance has been placed and start with Quick v Garran. The passage that my friend referred to is at pages 731-2 in paragraph 297, and here one sees certainly it is asserted that misbehaviour means misbehaviour in the grantee's official capacity. It reads:

> The quamdiu se bene gesserit must be intended in matters concerning his office . . . . . if the office had been granted for life.

The difficulty with the argument in my friend's terms is that that very description of misbehaviour is in its very nature inconsistent with what is now claimed for its technical operation because that solely relates to misbehaviour in office. There is no necessary relevance to conduct outside office at all, whether with or without conviction, and, of course, one goes back to Coke for that statement of it.

Then one finds following the inclusive definition taken from Todd that it includes a proper exercise of judicial functions, neglect of duty or non-attendance, and then thirdly this question of conviction for infamous offence, and the authority that is assumed to produce that is Todd.

If one goes back to Todd and attempts to see why - I am now about to ask your Honours to look at a different version of Todd from the one my friend has produced. This is the second edition.

HON A. WELLS: Could I just clear my mind of the general direction of your argument and see if I am on the right lines? What you are putting is this, is it, that because these early authorities centred all their reasoning upon a notion of a conditional limitation affecting a tenure of office and hence were naturally circumscribed in their approach by consideration of misbehaviour in office, that type of argument does not apply to the present context of section 72 because there is no question here of holding during good behaviour, indeed, that was eliminated in the convention debates, and what we are concerned with here is simply

a condition subsequent in defeasance, which is quite a different order altogether.

MR CHARLES: Precisely. When one goes back to Todd it may be helpful to draw the commission's attention to the fact that the document that has just been handed up is the second edition of Todd. The chronology was that Todd had produced his first edition in 1866, and the relevance of that, of course, is that that followed the delivery of the opinion of the Victorian law officers in 1864. The second edition was produced in 1887, and the revised edition that my friend has used was in 1892. The second edition is the one that a reference is about to be made to. The revised edition from which my friend has been working is the edition of 1892. Todd had died in 1884 after some 50 years in public life. I think he had gone to Canada at the age of eight, taking, as the book says, his family with him. A man of some natural brilliance, he had written his first book at 19, becoming librarian, I think, of the Canadian Parliament, and it was on the basis of the work he did there in later life that these volumes were produced. At any event, after that entirely irrelevant digression, he produced this work, and may one start at page 855 and following. The work is particularly interesting because it sets out in a number of different places reference to cases where the judges, and particularly colonial judges, had been removed from office.

We find reference at page 855 to the Act of Settlement that the judges commissions are made quamdiu se bene gesserit, and may I add for completeness that that provision had been introduced into the Australian colonies in the 1850s. The Constitution Acts of Victoria, New South Wales and, I think, elsewhere in the colonies usually at around 1855 had introduced that provision, in certainly Victoria and New South Wales. Todd then continues in dealing with the position, and when one gets to 857 where he sets out the legal effect of the grant of an office during good behaviour in terms which are taken almost directly, in fact, probably directly from the opinion of the colonial Crown Law officers. Beginning at the middle of page 857 he sets out what my friend regards as the classic meaning of misbehaviour - we draw attention again to the fact that it is inclusive - and continues over to page 858 with the assertion that in cases of official misconduct the decision of the question whether there has been misbehaviour rests with the grantor, and asserts that in cases of misconduct outside the duties of his office the misbehaviour must be established by a previous convication by a jury.

Then he continues that the legal accuracy of that foregoing definition of the circumstances under which

a patent office may be revoked is confirmed by an opinion of the English Crown Law offices, and then he turns to Barrington's case, how Mr Denman at the Bar of the House of Commons when acting as counsel on behalf of Sir Jonah Barrington had set out what were, it was said, the circumstances under which a judge could be removed, and the writ of sci. fa. to repeal, and the patent, the criminal information, and the other circumstances. The particular passage is set out at page 859 point 5, and if your Honours wish to see it, the passage from the Lords Journal is in the commission at the present time through the courtesy of Mr Darryl Smeaton who succeeded in obtaining it in circumstances we did not think possible.

The passage talks first of cases of misconduct not extending to a legal misdemeanour. The appropriate course appears to be by sci.fa.to repeal his patent, good behaviour being the condition precedent of the judge's tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, by impeachment; fourthly, and in all cases at the discretion of Parliament.

One relevant fact, we would say, is that the references here totally contradict the view that misbehaviour had a limited technical meaning, in our submission, because what is being put is that if misconduct does not extend to legal misdemeanour, then the appropriate course is by sci. fa.

SIR G. LUSH: This passage is in the other edition of Todd verbatim.

MR CHARLES: Yes, indeed, and they all come, as we understand it, from Barrington's case but, in our submission, this set of propositions is quite inconsistent with any view of a limited technical meaning of misbehaviour.

SIR R. BLACKBURN: One of my difficulties with this is to know where the end is of the quotation that begins with the words, "First in cases of misconduct". Where is the closing inverted comma?

MR CHARLES: That we should be able to find if we look at the Lords Journal. I think that the quotation ends, "Fourthly and in all cases". What is happening is that one is reading from the petition of Sir Jonah Barrington. The quotation starts at page 599 of the Lords Journal - "Upon reading the petition of Sir Jonah Barrington", and whoever produced the petition was somewhat verbose because the petition continues over the next two full pages, and on the third page of it in the journal, page 602, in the middle of the page, we find:

> The petitioner humbly suggests that there are four . . . . . inquisitorial and judicial jurisdiction of the House of Lords.

SIR R. BLACKBURN: So that is a second quotation - by the joint exercise?

MR CHARLES: Yes.

MR CHARLES: Yes.

SIR R. BLACKBURN: Are we to take it that Todd, in quoting from Sir Jonah Barrington's petition, is implying approval that the law is correctly stated in this petition?

MR CHARLES: We would say that that form of approval appears to be given by Todd, because what he says is elsewhere the peculiar circumstances under which each of the courses above enumerated would be specially applicable and would be thus explained, and he continues at page 860:

> By these authorities it is evident . . . . . in addition to these methods of procedure.

- and this is the critical passage -

> The constitution has appropriately conferred upon . . . . . on which the office is held.

This passage also appears to be the basis for the passage in Halsbury in paragraph 1107. The passage is:

> Such offices may, it is said, be determined . . . . . vested in the House of Lords.

The authority given is Barrington's case, and presumably it is said by Todd.

SIR G. LUSH: Or it is said in the petition and not with authority. That may be the implication.

MR CHARLES: Yes.

SIR R. BLACKBURN: Is Todd really giving his approval to the proposition that if the judge has committed what he calls an actual crime, then he has to be impeached and that sci fa would not do? Is that what he means?

HON A. WELLS: I thought he was saying that misdemeanours, whatever that means, would ordinarily be done by criminal information.

MR CHARLES: What one appears to have is four situations: misconduct not extending to legal misdemeanour - I must say the inference I had from that is that conduct amounting to criminal misbehaviour leading to conviction is not really covered by that at all; secondly, when the conduct amounts to what the court might consider a misdemeanour, presumably a lesser offence, then by information; thirdly, amounts to crime by impeachment;

and fourthly, in all cases at the discretion of parliament.

That appears to be quite inconsistent with the alleged common law definition of misbehaviour, but what is perfectly plain is that what is said on the next page is totally inconsistent with the asserted common law meaning of misbehaviour because in terms it is so.

> It may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held.

What follows is equally relevant.

> The liability to this kind of removal . . . . . legal consequence thereof.

SIR R. BLACKBURN: Yes, but that is a description of what parliament can do under the Act of Settlement.

MR CHARLES: Yes, and it is said to arise in the case of misbehaviour. Continuing:

> In entering upon an investigation of this kind parliament is limited . . . . . for his removal from the bench.

All we say is that quite plainly what is being contemplated is misbehaviour of certain kinds, but in the fourth class of cases referred to arising from Barrington, one sees it being referred to by Todd as such grave misconduct as would warrant or compel the concurrence of both houses in an address to the Crown for his removal from the bench. But that is also referred to by him immediately before his misbehaviour.

Now, when one proceeds through the passages that follow, one comes to Mr Justice Fox's case at pages 862 and following. Various cases are thereafter set out in which the procedure has been followed. Sir Jonah Barrington's case is dealt with in detail at pages 867 to 869. As far as we know, this is the only case on which an address to the Crown from parliament has actually brought about the removal from office.

Then, your Honours, other cases are referred to leading to the statement of a variety of propositions set out on page 872 and following, as to the way in which parliament should move, the type of procedure that should be followed. I simply draw them to the

commission's attention because they indicate what Todd regards as a fairly set form of procedure, and may I take the commission now to proposition 4 appearing on page 874.

> That the House of Commons should not initiate and ministers of the Crown . . . . . honourable discharge of the judicial office.

We say those last two lines are of particular significance, because it is really critical to the argument of my friends that the term misbehaviour is the same for all offices. My friends put it, as we understand it, that really no relevant distinction is to be made between a superior court judge and clerk of the county court, or a forester, or a filazer - a filazer is someone who looks after files and issues writs in superior courts. We say that it is simply preposterous to assert that there is no relevant distinction between such offices, and we would submit that it is indeed axiomatic in the contrary fashion that misbehaviour must be related to and the conduct tested against the office in question.

SIR G. LUSH: I can understand that this is a submission of what ought to be in the Constitution, but Mr Gyles' argument is that the practices to which you have referred, and particularly those dealt with at page 874 of these references, spring entirely from the second procedure open under the Act of Settlement, and while the word misbehaviour may be attached to this in the literature as a matter of law, misbehaviour is not attached to that second power; it is attached to the first power relevant to the Act of Settlement.

Mr Gyles says it has been carried into the one and only power in the Constitution, and when you look at where it came from, it must mean what it meant in the first power contemplated by the Act of Settlement. The fact that the second power contemplated by that act is very much wider, he says, is nothing to the point. I hope I do him justice.

MR CHARLES: I am sure my friend would say he has been done justice. We would say, your Honours, that my friend's argument is based upon assertions made by a series of commentators and that what one sees on examiantion of the authorities relied on is a series of murky streams consistently rising above their source, because when one goes back to the authorities in question, they in no case provide authority for the assertions claimed by the commentators, and in fact have never, as far as we can find, been actually applied to removal from judicial office.

SIR R. BLACKBURN: What you say really is that when the founding fathers used the word misbehaviour in section 72, they might just as well have been referring to this sort of passage in Todd as to that passage in Todd which describes the strict common law rules for the termination of an office by the grantor.

MR CHARLES: Precisely, your Honour, yes. Indeed, when one examines the convention debates, that is exactly, we say, what is shown to have happened. There is simply no basis for saying that misbehaviour in any case in relation to judicial office has been shown to have that meaning.

We say that when one looks at Todd and sees the heresies that thereafter have got in to the legal literature, one has to go back to the authorities beforehand and examine them to see what justification exists.

Now, from Todd one then has to go back to the Victorian Law Officers on whom my friend placed some reliance. It is always nice for Melbourne counsel to hear Victorian law officers being referred to with such respect, but when it is a person from the Sydney bar doing so, one wonders where the knife in the napkin is. When I say that reference is made to the Victorian Law Officers, I would claim that Victoria has produced better than Sir George Higinbotham and Sir Archibald Michie. However, one finds again indeed the passage to which reference has been made in Todd, but one also finds that the whole authority asserted for it is the King v Richardson in Burrow's report, which your Honours have.

Now, as to the opinion of the Victorian law officers in this troublesome dispute with Sir Edmund Barrie, may we make these points, your Honours. They were talking in the context of section 38 of the Victorian Constitution Act following the Act of Settlement. Secondly, your Honours, they used, as did Todd, the verb "includes"; and we would submit that it is not clear that they were attempting an exhaustive enumeration of the circumstances of misbehaviour. Thirdly, they rely on the authority of Richardson and we will come to that in a moment. Fourthly, they assume that Richardson delimited what may constitute misbehaviour in an unofficial capacity in respect of all officers. Finally - - -

SIR G.LUSH: Would you repeat the fourth, please.

MR CHARLES: The assumption that is made, your Honour, is that Richardson's case delimited what may constitute misbehaviour in an official capacity in respect of all officers. And the last point we make, the fifth, is that the Victorian law officers relied at length on Hallam and we are handing up a passage from Hallam, your Honours. It is Henry Hallam's Constitutional History of England, 5th Edition of 1846 in two volumes. And what Hallam said at the bottom of page 356 after the quamdiu se bene gesserint provision:

> We owe this important provision to the . . . . . tantamount to an act of the legislature.

We would say with respect to Hallam that that seems to have got it wholly wrong in the way in which he has asserted it; and certainly if the statement from Barrington's case is right, that is quite wrong; and Hallam is much relied upon by the Victorian law officers.

Now, your Honours, going back in to the main authority relied on by my friends and by Todd and by the Victorian law officers and everyone else, including Halsbury, who asserted this curious limitation for misbehaviour, Richardson - your Honours have the reference - 1 Burrows 539, dating of course from 1758. One notes that the problem was whether Richardson had good title to the office of portman - not, as unfortunately appeared by misprint in Justice Pincus's opinion, postman -of the town of Ipswich. And it turned on, of course, whether the corporation had the power to amove Richardson's predecessors for not attending the great court. The decision was that the corporation had an incidental power to amove and that the absences from the great court by

Richardson's predecessors was not sufficient to be a cause of forfeiture.

Your Honours, as far as we are aware this is the sole judicial authority for the view my friends have argued as to the meaning of misbehaviour in section 72, the sole judicial authority; and as far as we know it has never been judicially applied to the removal of a judge. There are a number of points we would make about the case. It has been dealt with at length and I do not propose to read the judgment but to point to page 437 of the English Report and to draw your Honours' attention to the fact that in the nominate report the relevant passage begins at page 536 and goes to the end of page 539.

The points to make about Richardson's case in our submission are, firstly, this: Richardson did not concern judges at all. It was after the initial Act of Settlement. Firstly, the case did not concern judges at all; secondly, the judgment is not expressed to contain a definition of misbehaviour; thirdly, it concerned the powers of a corporation, in particular its power to amove and its power to try offences having no immediate relation to the duties of an office; fourthly, we would say it is by no means clear that Lord Mansfield used the word "offence" as meaning anything other than a breach of duty.

SIR R.BLACKBURN: Where did he use it? Can we have a look at that?

MR CHARLES: Yes, your Honour, that appears in the English Report at page 438.4.

SIR R.BLACKBURN: I see, there are three sorts of offences.

MR CHARLES: Yes:

> There are three sorts of offences for which . . . . . indictable at common law.

We say he is talking generally about the breach of duty.

Your Honours, we say, fifthly, that when Todd adopted the limited scope of the word he directly contradicted his own adoption of it by the very passage - - -

SIR G.LUSH: We are leaving Richardson's case, are we?

MR CHARLES: No, your Honour, I am simply glossing it, if

I may put it that way. Todd adopted this case for a particular view but then himself proceeded directly to contradict that adoption in the passages we have referred to at pages 859-60. The last point we make, your Honours, is that when it is said - - -

SIR R.BLACKBURN: I do not quite follow that because Todd did not claim to be citing Richardson except as authority for the common law power of the grantor; is not that right?

MR CHARLES: I accept that, your Honour; I think I was being unfair to Todd in what I was putting to the commission. In so far as it is said that Todd's words amount to an adoption of this narrow and technical meaning of misbehaviour, then that proposition is contradicted by what is set out at page 859-60. One would have to concede that Todd is seen by a number of commentators as having adopted that view but I think for better argument we would say that Todd in fact did not. The assertions made later that he did are wrong and are contradicted by what appears at 859-60.

SIR R.BLACKBURN: Yes.

MR CHARLES: The last proposition in relation to this - - -

SIR G.LUSH: This revives the feeling I had before. This is really a semantic point about the word "misbehaviour", is not it? Todd, one would think, knew what he was doing and he was talking about Richardson's case in Act of Settlement terms in terms of forfeiture. There was no provision for addresses of Houses of Parliament in relation to Portman. He has used the word "misbehaviour" as appropriate to cover both the occasion of a forfeiture and the occasion of an address, but that is all. That is the essence of it, is not it?

MR CHARLES: Yes. Now, lastly, your Honours, implicit in what is put here is that the circumstances under which even an officer or corporator may be discharged are capable of clear definition in three cases; taken from Cook's reports and the Earl of Shrewsbury's case, use, abuse and non-use. Even that in our submission is not clear by any means because at least two of the commentators, Bacon in the abridgement and Hawkins took a different view. We are having some difficulty at the bar table in working out what is meant by Hawkins in the Savoy, unless that is where it was printed. In any event, your Honours, what we say is that Hawkins, the commission will see, looked at the position in relation to offences by officers in general and set out as to, on the first page:

Offences by officers seemed reducible to

the following heads . . . . . .
or extortion.

And at the end of the relevant section on page 168 these words appear:

> But it would be endless to enumerate all the particular instances where an officer . . . . . deserves to be punished.

In other words, we would saw Hawkins in 1716 taking the view that there was no ready classification of these matters but they were at large and readily discernible by common-sense.

SIR G.LUSH: All his examples are within your division misuse, are not they?

MR CHARLES: I draw the commission's attention to what appears on the first page because in that part, your Honours, there had been reference made to his obligation that the grantee ought to execute it diligently and faithfully, not acting contrary to the design of it and matters of that kind, so that one is neglectful breach of duty.

SIR R. BLACKBURN: But this triggers on criminal law and all he is talking about is possible crimes committed by officers, is that right?

MR CHARLES: Yes, pleas of the Crown.

SIR R. BLACKBURN: Yes.

MR CHARLES: In Bacon's abridgement, I think my friend has referred at some length to these passages, but at pages 45 to 46, as spoken in the context of forfeiture of an office, at page 45:

> There can be no doubt that all offices whether such by the common law . . . . . which make bring disgrace on the court themselves.

Then, in the last passage on page 46:

> Also it is said in general that all wilful breaches of the duty of an office . . . . . that it seems needless to endeavour to enumerate them

which we say is really precisely the same proposition as was being made by Hawkins.

SIR G. LUSH: Is this document you have handed up the same as the one we already have?

MR CHARLES: I think there may be a bit more in the extract we have sent up from Bacon's abridgement than the part relied on by my friends.

SIR R. BLACKBURN: Yes, the previous thing - no, it is the same.

MR CHARLES: I am sorry if we have unnecessarily multiplied the amount of paper the commissioners have. I want next to take your Honours to Chitty's Prerogatives of the Crown. My friends made the assertion that all offices are the same. We take the commission now to Chitty's Prerogatives of the Crown. This is of 1820. I ask the commissioners to look first at pages 82 to 83. At 82.7:

> Offices may be granted at will, of which there are many instances . . . . . unless sooner removed by the new King.

Then there is reference in the next paragraph to judicial offices. Chitty then continues to deal with public offices in the next paragraph; ministerial offices on the next page. Then, at page 85.2:

> Offices may be lost; among other things; . . . . . determination of the thing to which the office was annexed.

At the end of the next paragraph:

> The most methodical and perspicuous mode . . . . . and thirdly, refusal.

The only point we make of this is that although the assertion is made that all offices are the same, the commission will have noted that the termination of judicial office is dealt with in an entirely separate and distinct portion of the chapter in such a way to suggest that Chitty at least, and well after Richardson's case, does not see them as being necessarily within the same particular parameters.

The stream of authority is not, in our submission, assisted in any way by going back to Bagg's case in 11 Coke's Reports. That simply involved, in our submission, doubt arising from chapter 29 of Magna Carta as to the loss of office unless involving process by decision of the officer's peers or the law of the land. It simply involved, we would say, doubt as to the corporation's power to try which existed at the time of Bagg's case and which had been vindicated by the time of Richardson's case as appears on page 439 of the report of Richardson.

It is for those reasons that we say that when one traces back the stream of authority and finds the source, it is really quite plain that Richardson was not saying what is said for it has never been treated judicially as having said it. It may be, as was suggested in my friend's argument, not I think by him, that this whole quesiton of forfeiture of office has been confused by the fact that to the conditions which could result in forfeiture of an office, abuse, misuse or non-use, there is inevitably added the fact that attainder for serious offences would also bring about loss of office not because it was in some sense a forfeiture by breach of condition but by the effect of attainder, and that that has been in some way woven in in the course of Richardson's case into the circumstances operating as a breach of the condition of tenure.

It worked with the same result in terms of feudal tenure as a breach of the condition of office. We would say that that is where this misuse or misunderstanding of the position at common law has arisen, and a sufficient oddity that would follow is that the consequences of attainder having come to an end in something like 1870, it would be suggested that the same consequences ought to flow at 1900 at the time of the Constitution, 30 years later. In any event, we say

that when one was looking at the circumstances under which a feudal tenure could be terminated, and seeing that considered in Bagg and in Richardson - - -

SIR G. LUSH: Could you just stop for a moment. I am not sure I am clear about the legal significance of attainder. Was it not a sort of private act of parliament?

MR CHARLES: I believe not, your Honour. It was a consequence flowing from conviction for certain particularly serious crimes.

SIR G. LUSH: What does the expression act of attainder mean?

MR CHARLES: I think that may well have been a particular act, but I think the word has a separate meaning. I will search for it shortly. I do not have it with me at the moment, but my understanding was that it was a consequence said to follow from the conviction for certain serious crimes.

SIR R. BLACKBURN: An act of attainder was brought about in an ad hoc situation by an act of Parliament.

MR CHARLES: Yes.

SIR R. BLACKBURN: I am not quite clear about your argument here, Mr Charles.

MR CHARLES: What I am saying is that clearly enough when one is looking at the circumstances which might cause an office to be vacated and a feudal tenure to be brought to an end, it was necessary to have certainty and one finds in the Earl of Shrewsbury's case and what follows statements made as to how an office can be lost and the phrase misuse, abuse and non-use. Now to that trilogy has been added, not because it was necessarily a condition but because it produced the same result, conviction for a serious offence which by its operation also brought the office to an end.

SIR R. BLACKBURN: Yes.

MR CHARLES: From the fact that now one finds in four circumstances a feudal tenure being terminated, so it seems to have been asserted later that those are the circumstances amounting to misbehaviour.

In relation to Richardson's case, one finds Lord Mansfield saying that there are three sorts of offences for which an officer or corporator may be discharged and one finds them set out in 1, 2 and 3. What he is saying, we would put it, in relation to the first is that the officer or corporator may be discharged if he has committed an infamous offence, the fact being that by virtue of attainder, his office has been vacated. In the second and third one finds the situation is elsewhere set out which would bring about his loss of office. Lord Mansfield we would say has worked the three in together but not in such a way as to leave anyone properly later to say that those were the three circumstances of misbehaviour. The need for - - -

HON A. WELLS: In effect what you have put is simply this, is it not, the consequences of attainder are not a forfeiture of office in any real sense at all. Forfeiture of office is a separate classification concerned with misbehaviour within the office.

MR CHARLES: Yes.

HON A. WELLS: Attainder is simply an incidental consequence that an office should be forfeited.

MR CHARLES: Yes and what one then finds in the very next paragraph is the problem with the necessity for prior

conviction is again nothing to do with the definition of misbehaviour. The whole question of the relevance of a prior conviction simply arose because of the problems of Magna Carta and the question whether the corporation had the right in effect to try someone in circumstances amounting to an allegation of criminal conduct. Again we would say that has absolutely nothing to do with the definition of misbehaviour. It is something which the corporation may have a problem in dealing with.

The Magna Carta says it cannot and unless the power is expressly given it by the law of the land or prescription, a corporation cannot do it but that has nothing to do with the right of the Houses of Parliament in effect to try a judge for his bad behaviour. It has nothing whatever to do with the right under this Constitution of the Houses of our Parliament to look at the behaviour of a judge.

SIR R. BLACKBURN: Yes, but did it have something to do - I mean, was there a general law about the power of a grantor to terminate an office that he had granted or are you saying that the necessity to prove a conviction in the case where the offence was not in the office was limited to corporations for these special reasons that you have just been describing?

MR CHARLES: No, I say that those who had persons in various offices had difficulty in trying someone for what was said to involve criminal conduct because of Magna Carta.

SIR R. BLACKBURN: Yes, I see.

MR CHARLES: It certainly is not limited to corporations but as the law as to corporations developed and from Baggs case to Richardsons case, so the power of the corporation to deal with its offices was seen to enlarge. But we would say it is that notion that has engrafted the wart or quite unnecessary extravagance that some sort of conviction is necessary in criminal cases for there to be misbehaviour.

SIR G. LUSH: We started a little earlier and we might perhaps make a break a little earlier if this is a convenient point for you, Mr Charles.

MR CHARLES: Yes, indeed.

MR CHARLES: Your Honours, the next case to which I wish to make reference is the case of Mr Justice Montagu's deliciously named Algernon Montagu from Van Dieman's Land. His activities appear to in every way merit his name. The reference is VI Moore at page 489, and the year of the decision being 1849. We draw attention in particular to Sir Frederick Thesiger's argument. The argument has been read. We respectfully remind your Honours that two grounds are put as the separate chief grounds of complaint at the start just before the end of page 497 of the nominate report. One sees the chief grounds of complaint against him are first obstructing the recovery of a debt justly due by himself and, secondly, the general state of pecuniary embarrassment in which he was found to be in. My friend has put that being in a state of pecuniary embarrassment or being bankrupt would not be acts of misbehaviour in relation to a High Court judge. This relates, if I may say so, to my friend's axiomatic proposition that there is no difference between officers, what is misbehaviour for a county court clerk is misbehaviour for a superior court judge without distinction.

We would say that the reason why that proposition is so fundamentally wrong can be easily stated. A county court clerk is not affected in the way he carries out his office necessarily by being in a state of financial embarrassment, indeed, if I can say so with no intention of being disrespectful to county court clerks, most of them are in a state of financial embarrassment. They nonetheless act quite properly in their offices, they file files in the right place, and it is not necessary that they be seen to be people of wealth and position to occupy that particular office.

There is the most plain and obvious distinction in the case of a judge. As one saw in the words of Mr Dobson in the debates in the Adelaide convention, what an unfortunate position it is seen to be, how much it brings the office of judge into disrepute if people are saying to one another in the street that so and so cannot pay his debts, or if there is a bailiff waiting at his gate. One can give a more dramatic example of this. If one takes the case of Sir Garfield Barwick of revered memory, the fact was, it is known, that Sir Garfield was once bankrupt in circumstances which reflect nothing but credit upon him for taking upon himself the debts of his brother. He had, however, of course long since recovered from that state when he became a justice of the High Court. It might well have been impossible, probably would have been impossible to have appointed him to that office had he remained

bankrupt, notwithstanding that the circumstances in which he became bankrupt redounded only to his credit. The reason is this. If a person is a member of the Federal judiciary, that person certainly being of the Federal Court rather than the High Court, might well have to preside and was certainly qualified to preside as a judge in bankruptcy. Now we would say it is inconceivable that one could have a judge or potential judge in bankruptcy who was also bankrupt.

SIR R. BLACKBURN: Well, Mr Charles, what about the Family Court?

MR CHARLES: Your Honours, I say nothing of the Family Court. It may be that different standards might be regarded as acceptable in that court having regard to the different functions of that court, but we would say that in relation to judges of the Federal Court and judges of the High Court sitting on appeal from that court that while it is not for me to say but a matter for judges to say what are acceptable standards of behaviour for a judge that reasons why different standards are applicable to a judge is obvious for that reason, the functions they have to perform, the respect they must command in the community in order to be able to uphold the fabric of the administration of justice in our society.

We say, your Honours, that these decisions are replete with references to the high standard of conduct required of judges because only if judges maintain their standards will their dispensation of justice in the community be accepted by the community. That logic, we submit, is perfectly plain from the argument of Sir Frederick Thesiger and from the way in which Montagu case was dealt with in the Privy Council. When one ends the first argument at the turn of the page in the nominate report, one sees:

> This was an act impeding the administration . . . . . another strong reason for his removal.

Then Lord Brougham at page 499 says - this is page 777.4:

> Upon the facts appearing before the governor . . . . . amotion of Mr Montagu.

It plainly did not occur to their Lordships to be necessary to differentiate between the first and second grounds for amoval, and we say that it is plain from that, and would remind your Honours of the circumstances in which the matter was brought to the attention of those debating at the Adelaide convention.

SIR R. BLACKBURN: If you go back to pages 491 and 492, you see what the facts were in much greater detail. The obstructing of the debtor appeared to have been done in this way, that the debtor sued him, Mr Justice Montagu, and Mr Justice Montagu himself went before the Chief Justice and got an order to show cause why the writ should not be set aside, because the court had to be constituted by two judges, and presumably, therefore, Montagu could not sit in it and so the case could not be determined at all, and so the writ had to be set aside.

MR CHARLES: Yes.

SIR R. BLACKBURN: But if you look at the next paragraph on page 492, it appears that a Mr Young had brought several actions on behalf of the Bank of Australasia, in which actions he alleged that Mr Justice Montagu had decided in favour of the defendants upon a technical point, being himself at that time indebted to them. Does that explain the allegation that his general state of pecuniary embarrassment was - - -

MR CHARLES: I think one has to continue reading through page 493, because one finds reference at the top of page 775 of the English Report two statements disproving Mr Justice Montagu's statement that the debt there alluded to was of long standing, but that it had stood over by Mr Addison's consent, and in fact the accounts are set out, and the fourth in particular:

> To his, Mr Justice Montagu's, bill transactions . . . . . his usefulness as a judge.

That is of the essence of what is said here, the, in effect, conduct bringing the bench into disrepute. If you do act in your private life in a way that excites public scandal, you derogate from your usefulness as a judge.

SIR R. BLACKBURN: I wondered if it might be a little more narrow than that, that if you had a large number of creditors

around the small town of Hobart in 1849, it is highly likely that those creditors will come along as plaintiffs, or one of them, and you would be disqualified, so your general state of pecuniary embarrassment is directly related to the fact that you are likely to be disqualified in a substantial number of cases.

MR CHARLES: We would say, your Honour, that that is certainly a possible explanation of the case, but that the way in which it is put in argument certainly suggests a wider basis, there were various pecuniary embarrassments - - -

SIR G. LUSH: The reference in the facts to bill transactions suggests the borrowing of money on bills, to me, and failure to honour the bills when they became due. That might be regarded as a good deal more reprehensible than not paying tradesmen.

MR CHARLES: Yes. In Mr Behan's work on Mr Justice Willis, it will be found that that judge, a member of the bench in Victoria, used regularly to attack counsel who appeared before him if he was aware that they used accommodation bills or bills as a means of paying their creditors, and he regularly asserted that not only was it quite wrong for any counsel appearing in his court to be involved in any way with horse racing but if he found that they used bills, they would be struck off the rolls in his court. I doubt if it could be said that using accommodation bills is improper behaviour by a judge, but being in a state of continuous and known pecuniary embarrassment is a different question.

MR CHARLES: The last words used in the relevant part of the argument of Sir Frederick Thesiger were:

> And tended to bring into distrust and disrepute the judicial office in the colony. This was another strong reason for his removal.

That is why I say while it is possible that the argument is limited in the way your Honour has just put to me, we say it is also open to a wider construction, and in any event that if bankruptcy supervened, that would be a more serious and more obvious basis for asserting misbehaviour, and we have made the point that the Privy Council sees no reason to differentiate the grounds for saying that amoval was properly brought.

SIR R. BLACKBURN: You will notice that Lord Brougham says that their Lordships do not state their reasons in those cases, so we do not get much information.

MR CHARLES: No. I think it was taken as being so clear a case that it really did not require comment, and if I may say so, with good reason.

Next, in our submission, it is difficult to over-estimate the importance of the words used in the appendix, the memorandum of the Lords of the Council, on the removal of colonial judges, because insofar as one is looking at the standards of behaviour regarded as appropriate and required for such judges, they are very clearly set out. If one starts with the main memorandum, the relevant passage begins at 10 at page 827.5:

> Some factual means ought to exist for removal . . . . . charged with grave misconduct.

Now, your Honours, we say that when one remembers that this document was produced in 1870, my friends assert that by this stage there had long since passed into the common law a received technical meaning of misbehaviour well known to everyone; so well known that all sorts of people at the constitutional convention were using it even though most of them were not lawyers, and all entirely well understood as the basis on which judges were to be removed from office. That seems to have escaped their Lordships of the council and they talk about grave misconduct; they do not talk about misbehaviour in this passage. And when one finds the matter being next discussed, the circumstances under which judges are to be removed from office, one would have expected, if this expression "misbehaviour" was to be so well known and received, that the circumstances of its operation would have been equally well known to them and the idea of tenure during good behaviour, terminating only on misbehaviour in office or conviction for serious offence. Now what one finds is really, if I may say so, as one would expect, that judges charged with gross personal immorality are to be removed from office. Now has anyone ever suggested anywhere, but of course particularly in the convention debates, that judges charged with gross personal immorality should remain in office? Of course they have not. Everyone has assumed that they would be removed from office. And what one finds here is that when a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions:

> - - - on evidence sufficient to satisfy the executive role . . . . . or a protracted investigation.

This, your Honours, is a case where it is said that matters such as immorality, irregularity in pecuniary transactions, they are sufficient to justify suspension even before the matter has been properly tried out by the Privy Council. You do not in a case of a charge of that kind even allow the judge to remain on the bench in the meantime. What they go on to say - and the distinction is of some significance - in the next paragraph is:

> On the other hand when the charges against a judge consist not in any alleged . . . . . lower the dignity of his office.

That situation, your Honours, is one that will more normally be found in a case of misbehaviour in

office; a cumulative case of judicial perversity: someone who consistently shouts at people appearing before him, or gets enraged at people appearing in his court; misuses his office in various ways. That is what one will more normally find for misconduct in office. That, is said, it is more difficult to justify suspending him. It is harder for the local executive to act on its own reponsibility. In cases of this kind you will probably have to wait until the Queen in council acts.

So obviously, your Honours, what is seen by this is that it is a worse reflection on the judiciary requiring suspension rather than postponement in cases where you have got gross personal immorality, or irregularity in pecuniary transactions. And we would say the inference one draws is that what is being said here is that in the kinds of immorality or irregularity which my friends are saying the constitution precludes as a basis for removal of High Court judges are seen to be cases requiring more immediate action to remove the judge from office pending a proper trial of it.

This is quite plainly not a single view because we find Lord Chelmsford saying really precisely the same sort of thing. In the opening words of his Lordship's comments on the right hand side in page 16 of the report, and in that passage his Lordship talks about the desirability of ample opportunity being given to the judge to answer the charges; and then over the page, after talking of the behaviour of the judge being incompatible with the temperate and dignified administration of justice:

> In these cases it would be better in my opinion to inform the judge . . . . . of the Privy Council.

You do not suspend a judge who is behaving badly on the bench. You tell him what it is; you give him a chance to answer it; and then you send it back to the Privy Council:

> These observations do not apply to . . . . . immediate removal from the bench.

Precisely the same thought, if I may say so. And we would submit that the opinions of the Right Honourable Stephen Lushington and the Right Honourable Sir Edward Ryan are to the same effect.

We would submit with respect that that memorandum is entirely inconsistent with the views argued by my friends suggesting that there is a received and technical meaning of misbehaviour. And we would submit that what those arguments lead to is that what is misbehaviour requiring the removal of a judge from the bench is of a very much wider description covering personal misconduct, gross personal immorality, covering irregularity in pecuniary transactions, covering cases of immorality and corruption.

SIR R. BLACKBURN: Is not it important to be sure that in these cases they were contemplating - I mean in this memorandum they were contemplating the case of a judge who had been the subject of addresses under Act of Settlement provisions in the colonies which came to the Queen and were referred by her to the Privy Council?

MR CHARLES: Yes.

SIR R. BLACKBURN: And not only to judges who were removed under Burke's Act.

MR CHARLES: Yes, your Honour.

SIR R. BLACKBURN: I suppose that is so.

MR CHARLES: Indeed so, your Honour, yes.

SIR R. BLACKBURN: Certainly Boothby, whom they mentioned, was dealt with under the South Australian equivalent to the Act of Settlement but it went to the Queen and not to the governor of the colony.

MR CHARLES: Yes.

SIR R. BLACKBURN: If they were contemplating the removal under the colonial equivalent of the Act of Settlement then, of course, your argument is very much stronger. If they were only contemplating removal under Burke's Act, well your argument is not so strong.

MR CHARLES: Yes. In our submission it is plain that they were looking at the position generally and that is to say covering both. And as your Honour points out, explicit reference is made to Mr Justice Boothby's case and to the fact that addresses to the Crown had been relied on.

SIR R. BLACKBURN: Yes.

MR CHARLES: And indeed, as appears in the middle of page 10, all the forms of suspension or removal which are in

use lead by different roads to the same result.

SIR R. BLACKBURN: Yes.

MR CHARLES: Likewise, can I add what appears at the bottom of that page:

> Charges brought a colonial assembly against a judge . . . . . Queen in council.

SIR R. BLACKBURN: Yes, but some of those cases at least were under a provision in an act of - was it William IV, which was in very general terms, that the Queen may refer any matter referred to her to the Privy Council.

MR CHARLES: Yes. I suppose I should also draw your Honour's attention to page 829 at the beginning of page 15 of the nominated report:

> It is scarcely necessary to add that in colonies . . . . . corroborates the argument stated in the paper.

So in other words, your Honours, we submit that it is clear that what their Lordships are stating is of general operation in any of the various methods by which removal of a judge from office can be obtained.

May I next give the commission a short reference to Wade and Phillips Constitutional and Administrative Law at pages 316 to 317. It is the ninth edition of Wade and Phillips.

SIR G. LUSH: Is this the same Mr Phillips as Hood and Phillips.

SIR R. BLACKBURN: No, Hood Phillips is a different one.

MR CHARLES: No, indeed not, your Honour.

SIR G. LUSH: It is O. Hood, Phillips and Jackson. Yes?

MR CHARLES: At page 316.5, Tenure of Judges, it is said that:

> Judges of the High Court and Court of Appeal held their offices during good behaviour . . . . . although arguably any conviction is misconduct.

Then there is Lord Russell's case referred to and:

> Since the Act of Settlement only one judge has been removed from office . . . . . witnesses may be called to give evidence.

We say as to that that was has in effect happened with the commentators since Todd is that most of them have not been required to give serious attention to the question which is now of critical importance for this commission, and what has simply happened is regurgitation by one commmentator after another of the notion seen to be derived by Todd from the Victorian Law Officers.

It has simply been passed down a pile of people, in most cases after the Constitution was adopted in 1900. We say that the fact that a lot of academic commentators have simply accepted a line of thought without being required by particular cases to give clear attention to the problems involved is no justification for saying that this is now a received part of the common law.

SIR G. LUSH: You simply want to direct our attention to the fact that Wade and Phillips are commentators who do not follow that pattern.

MR CHARLES: The part they take is in effect to say, "Well, it is not really quite clear". If I may say so, exactly the same comment can be made about the passage from Anson upon - - -

SIR G. LUSH: Although Wade and Phillips referred to the possibility of dismissal not only for misconduct but for any other reason which the houses might adopt, they do not seem to attempt - when they come to a definition of misconduct they do not go very far into it, do they?

MR CHARLES: No, they do not, but what one finds is that the position is not wholly certain in their view. Of course,

they talk about the wider bases on which judges may be removed. When one goes back to the passage in Anson, what one finds, if I may simply read from the single sheet that my friend relied upon at pages 222 to 223, it is the 1907 edition of Anson, what is said is that:

> Appointments made during good behaviour create a life interest in the office . . . . . good behaviour in respect of the office held.

Again, your Honours, that is a statement inconsistent with any behaviour outside office, even criminal, being relevant:

> Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect, or it would seem conviction for such an offence.

We would say considerable doubt is being expressed by the learned author, both the "appears to mean" and the "it would seem" - a consequence of a paucity of judicial experience in this area.

May I, in passing, note that when one looks at the Constitution itself and the circumstances under which members may be disqualified from office, one does find in section 44 disqualification being found in subsection 2 as:

> Being attainted of treason or has been convicted or is under sentence or subject to be sentenced for any offence.

So, at least so far as members are concerned, those who framed the Constitution were prepared to descend to specific reference to conviction. Obviously not very much can be made of this, but we simply point to it as an indication that in that respect at least those who framed the Constitution were prepared to descend to reference to a conviction as a means for seeking to remove a judge. They obviously do not - and having regard to that, we would say it is at least open to inference that if it had been put to those constructing the Constitution, "Do you think that in relation to conduct outside office such as immorality or peculation or matters of this kind that it will be necessary to have a conviction before there can be misbehaviour?" They would have said that that was wholly outside their intention.

On the question of what is meant by proved misbehaviour, we say that the intention of the Constitution or at least of those who framed it was clearly never demonstrated in the second debate, the Melbourne debate;

that what was intended was two things. It was to provide protection for the judge in giving the judge some form of hearing, notification of what was alleged against him, and the necessity for proof of it. Secondly, it is clear enough on the face of what was being said by those debating the matter that they also thought that use of that expression would procure finality for the decision of parliament.

That is something which we submit they may have failed to achieve because, notwithstanding what they said and intended, in our submission the High Court would say that judicial independence is to be maintained by curial review in this respect. We submit that misbehaviour has no technical meaning. We say that one can suggest tests which would be applied, for example conduct which would be regarded as sufficiently morally reprehensible whether or not criminal as to render the person unfit to exercise the office.

One can use a variety of different sentences to try to achieve this, but alternatively one would say: conduct which is inconsistent with accepted standards of judicial behaviour - [redacted] sufficiently serious to lead to the conclusion that the person is no longer fit to be a judge. We submit that the intention of the framers of the Constitution was fairly clearly that they wanted parliament to be left as the judges of what is the sort of behaviour, the sort of conduct which would justify removal from office, but we say also that the High Court would intervene to correct, firstly, any denial of natural justice to the judge, for example if the judge was not given notice of the allegations made against him, or a fair hearing, or if the material was not proved.

Secondly, we say that if parliament attempted to give the word misbehaviour a meaning or operation more extensive than the word can legitimately bear; and thirdly, if there were a decision to address made in the complete absence of evidence of misbehaviour, we say that in those circumstances the court would intervene.

SIR R. BLACKBURN: Does this matter to your argument, though, the argument that the HIgh Court would intervene?

MR CHARLES: It is not critical to our argument in any sense, your Honour. We include this in our argument simply for the purposes of making the argument itself complete.

SIR R. BLACKBURN: Yes.

HON A. WELLS: I suppose it is important, is it not, in this respect, that it does away with the suggestion

that the final result of what you have previously been putting is to leave a sort of roving commission in the hands of parliament to redefine misbehaviour from time to time, and that in turn worked back to cast doubt on a more erratic meaning of misbehaviour.

MR CHARLES: If I may say so, exactly. My friends have put it that one simply cannot have a definition of misbehaviour in the form that we have now suggested because it would result in - I am attempting to find the passage in my friend's argument. Really, it relates to the suggestion that there is scope for oppression; there could be no more pernicious method of interfering with the indep-pendence of the judiciary; that it is impossible to work out any sort of definition - matters of this kind. We say that those are arguments which simply on examination do not stand up.

SIR R. BLACKBURN: On the other hand, Mr Charles, you have to face this argument, do you not: you cannot have it both ways, the founders of the Constitution clearly wanted parliament to have the last word and it can be argued therefore that they intended to imply a technical meaning for the word misbehaviour.

MR CHARLES: What we say as to that is that examination of the debates shows that that was not their intention. They were saying that there was a wide field in which it might be necessary to seek to remove a judge, although obviously enough they also thought that those circumstances would arise very infrequently. Having said that, they were maintaining, although they thought there may be no judicial review and did not want one, that the real protection for the judges was that these were parliamentarians in two separate houses expressing the will of the people and they would not act unless there were proper grounds of misconduct and that that position was secured by having to state the grounds of misconduct and prove them.

HON A. WELLS: As I tried rather stumblingly to indicate yesterday, parliament has ample grounds for working if they have to determine within a particular legal content whether as a matter of fact and degree it justly applies to the facts proved. They have ample room for operation and that would take up what you have just been putting. It would still leave very much what the founding fathers wanted, namely parliament to be in a fairly dominant position.

MR CHARLES: Yes. I think it may be helpful to raise at this stage what Sir Harrison Moore said when commenting at this very time on his view of what was being brought about. The sequence is that Sir Harrison Moore prepared a set of essays on the constitution and the constitutional debate. They were produced in 1897. Your Honours will see them under the heading, W. Harrison Moore, the Commonwealth of Australia (1897). Sir Harrison Moore produced his work on the Constitution in 1902 in its first edition and a second edition was produced in 1910. I have not been able to find the 1902 first edition.

SIR G. LUSH: I think that is because it is on my desk.

MR CHARLES: That may explain the absence of it in the library, your Honour. My understanding is that there was a change of intention demonstrated in Sir Harrison's work between 1902 and 1910.

SIR G. LUSH: I have checked the references from the footnotes to that article of Thompson's that has been mentioned two or three times. What it says is accurate but perhaps we can get that for you.

MR CHARLES: The first edition of 1902 - in 1897, what Moore said is at the bottom of page 101:

> Section 72 carefully protects the office and the emoluments of the Federal Judge

He then sets out how the judges are to be appointed:

> not to be removed except for incapacity or misbehaviour - - -

and then only by address. He goes on:

> We here depart from the provisions . . . . . now open to such review

It may be that that statement was what caused Sir Isaac Isaacs to come back then at the start of 1898 in the Melbourne convention, concerned about the possibility of judicial review. Your Honours will recall his statements in that convention and how in the course of his speech he converted Sir Edmond Barton, who had previously been against him. The fact that Sir Harrison Moore - a very well known Victorian academic - had the previous year produced his essay may well, we would submit, have caused Sir Isaac Isaacs and possibly the Victorian assembly in making the suggestions it did. At page 279 point 5 in Sir Harrison Moore's first edition of 1902 he said:

> The ministry of the day and the . . . . in any court of law.

That would have been doubtless in the light of the very strong expressions of opinion which were quite clear in the debates in the Melbourne convention. That having been said in 1902, we find in 1910 - one finds at page 203 point 8 an interesting gloss on those words:

> The ministry of the day . . . . was flagrantly unjust.

It is not a full reversion to the 1897 view but it is the start of a swing back.

SIR R. BLACKBURN: How would you invoke the jurisdiction of the High Court in such a case, I wonder?

MR CHARLES: We would say that in no circumstances would the High Court intervene in relation to a debate itself in parliament. It simply would not happen. What would happen would be that at some stage after the debate had completed - - -

SIR G. LUSH: The High Court would not enjoin a debate.

MR CHARLES: No, under no circumstances but what would happen is that after the debate had completed and at a time when an address was either being prepared to be sent up or in the course of being sent up or something of that kind, proceedings would be taken by way of

declaration or injunction or action of that kind to prevent an address proceeding to the Governor in Council or the Governor in Council acting upon it.

We would submit that there is no technical meaning of misbehaviour in the way that has been suggested. We say that the lack of any readily apparent definition of misbehaviour confirms the unwisdom of attempting to substitute other words for those which appear in the Constitution or of attempting an abstract exercise in the absence of facts. We respectfully submit that it is not simply a question of, apart from official misconduct, has a criminal offence been committed or is there a conviction for one, because we say that either question misses the whole point. We would say the question is the nature of the conduct, the nature of the misconduct or misbehaviour. Is it such as to unfit the judge for his office? That in our submission is at bottom the question that has to be asked. Is fitness for office involved?

SIR G. LUSH: I understand the argument but what is put against you of course is that first of all the limitation is to conduct in office, and that is investigated without reference to conviction. Mr Gyles says it is an extension, possibly even a dubious extension to look at what might be called the private life of the encumbent. The only extent to which that has been permissible by history, he says, is when there is a conviction.

MR CHARLES: Your Honour, we say that is wholly wrong.

SIR G. LUSH: I know you do but I think your last propositions do rather less than justice to Mr Gyles argument. In the first place you made no reference to the conduct in office and in the second place to take conviction by itself, as you did, hardly conveys the atmosphere or implications of his statement that this was an extension of the essential thing; it was conduct in office.

MR CHARLES: If I can go back to that, we gave his argument the justice it deserved. It is our submission that the reason for there having to be reference at all in the authorities to conduct in office is because of the feudal nature of a tenure held during good behaviour and the circumstances in which there was seen to be a breach of those conditions of tenure affecting the office. When one looks at the position of a forester or something of that kind, one sees the necessity for looking at types of conduct in office. However, we say that historically when one looks at the circumstances in which on an address from the Houses of Parliament there have been seen to be grounds for removal from office, one does

not see any limitation of this kind. One sees by historical convention, being built up and acknowledged in Todd, the types of conduct upon which an address for removal should be brought.

They have no relation necessarily to conduct in office. They have no relation to criminal convictions. They look at the question of the general conduct and its operation in relation to the person's fitness for office. We say that that is not the question of legal wrongdoing - whether within the purview of the civil or criminal law appears to be far less important than the nature and moral quality of the conduct in question.

SIR G. LUSH: There is one exception to what you just said, perhaps more than one, but what of that case - I began to try and locate it last night but I did not have adequate papers with me. What of that case in which a clerk had - - -

MR CHARLES: Owen, your Honour?

SIR G. LUSH: He had gone in for a peculation in one area and that was held not to affect him in another.

MR GYLES: That was the Mayor of Doncaster.

SIR G. LUSH: Is that cited in your summary, Mr Gyles?

MR GYLES: Yes, it is.

SIR G. LUSH: I have got it, paragraph 5.

MR CHARLES: Yes, the King v Mayor, Aldermen and Burgesses of Doncaster in the County of York. I think the relevant passage that my friend read was at page 1566 of the nominant report in these words:

> For they held first . . . . . .
> but not of a capital burgess.

HON A. WELLS: That was very closely linked up with the procedure undertaken, was it not?

MR CHARLES: Yes. That seems to suggest, Mr President, that in the first place what was said against him was relevant to his holding the position of chamberlain and was not relevant to his position as a capital burgess. We say in relation to that, that it is in the first place inconsistent with the view that all offices are the same, in other words, that activities as a county court clerk are seen in the same light as those of a superior court judge.

The second point we would make is it is plainly in relation to activities in office that this argument is made and what is simply said as we follow it is that when one is looking at activities in office, it is activities in relation to that office and not a different office that are relevant.

SIR G. LUSH: Mr Wells has pointed out to me at the bottom of the first page of the photostat that we were given the return to the writ of mandamus is described as setting out Scott 1718 was chosen chamberlain. He became middle chamberlain and took upon him the execution of that office, 1719, that he as middle chamberlain received several sums of money of the tenants of the corporation mentioning them particularly due to the corporation, of which he may have no account, retained them for his own use, charged the corporation moneys as laid out which he never laid out and so on. So what has happened is that the writ of mandamus has gone directing them to restore him to the office, I suppose, and they have made return to it saying we are entitled not to because he committed sins in some other office. The question is whether the matter was decided as some kind of pleading point or whether it was decided as a matter of substance. But if it was decided as a matter of substance, it seems to involve quite a narrow view of what is conduct in office.

MR CHARLES: I accept that that may be derived from the case, a narrow view of conduct in office and as such, we say it has absolutely nothing to do with the sort of misbehaviour that would justify the removal of a judge because we would say a judge who was also shown to have and received sums of money of attendance of a corporation giving no account to them but concealing them and detaining them to his own use would be in very great danger of being removed for misbehaviour from judicial office if that were proved against him even though he might have been able to be removed as chamberlain but not as capital burgess.

It was Owen's case that caused my friend to wax lyrical on the pecuniary embarrassment of a county court clerk and as Lord Campbell said, no other ability existed than pecuniary embarrassment, that in itself is no inability and our judgment must be for the latter. Now, it was inability or misbehaviour that was being referred to and we say that there are very good reasons for saying that pecuniary embarrassment are not either inability or misbehaviour in a county court clerk. We would say that Montagu's case indicates an entirely different state of affairs obtaining in relation to superior court judges.

We say that nothing further needs to be derived from Owen's case in relation to the meaning of misbehaviour. When one comes to Ramshay, however, and looks at the argument that was there put, my friend read from page 72 of the English report, page 193 of the nominant report beginning at the passage, "Sir Fitzroy Kelly relied much on the Queen v Owen". The passage immediately preceding the one he read beginning with page 193, page 72 of the English reports in Ramshay's case, these words are used by the Lord Chief Justice. He said:

> But after all we must look at the language which the legislature has employed . . . . the language of the legislature.

Then there is reference to Owen in the passage there set out. What we derive from the passage we have just read is in relation to an expression, inability or misbehaviour, they say you have to put meaning on it in its natural and grammatical meaning, nothing appearing to show it is used in any extraordinary sense. In other words, that does not suggest a technical and received meaning of misbehaviour. It is lawful to remove for inability or misbehaviour is not the natural and grammatical meaning of the language. We say that that is quite inconsistent in again, I think it is the 1850s. I think it was 1852. That is entirely inconsistent with any suggestion that at this time there is a received and technical meaning of the word misbehaviour.

May I refer briefly to Harcourt v Fox. That is the case of custos rotulorum and I only desire to refer to two passages. The first of them is in Mr Justice Ayres judgment at page 726 beginning at page 520 of the nominant report. It is in Showers Kings Bench Reports. You have the reference to the case I think and the case itself. Mr Justice Ayres says:

> And I do think without any . . . . .
> . . . . . state of Henry VIII.

Then to the same effect at page 736 of the English Report, 736.8, and this time I am reading from the Lord Chief Justice, Chief Justice Holt:

> That this is an estate for life appears from the words of the act . . . . must hold in this, this is in office.

All we draw from this is, firstly, this is the estate, a feudal estate, held during good behaviour, and drawing attention to the fact that the contrary behaviour determines it, that the expressions used are, with respect, loose; again they do not suggest a technical meaning of misbehaviour. It may be that in cases determining feudal tenure quite specific precision came to be required, but these words do not suggest that precision, these words suggest simply so long as he behaves himself well, and we would submit a much wider connotation.

SIR G.LUSH: What had happened in this case, the real trouble here was that some intermediary who held the grant of this office had himself died, and the question was not actually about the man's behaviour, and if that is right there was no need to attempt to define it. It seems to have been some intermediate grant or call for custos. I do not understand the word in its context. He seems to have made the grant to the incumbent who was party to these proceedings, a party alleging that he had an interest for his own life, and the contrary argument, which I think succeeded, being that the termination of the estate, so to speak, of his headlands or the custos had terminated his interest.

MR CHARLES: I think it is the other way round, your Honour, and my friend certainly thinks so. I will try to give you a short statement immediately after lunch as to exactly what did happen.

SIR G.LUSH: You mean it was decided that in spite of the death of the custos the estate still remained for life?

MR CHARLES: Yes.

SIR G.LUSH: But no point arose as to what was misbehaviour, or not, did it?

MR CHARLES: I do not think so.

SIR G.LUSH: The only point that arose was what the limitation during good behaviour produced in terms of tenure.

MR CHARLES: It means it is as irrelevant to questions of

misbehaviour in judicial office as all the other cases that are relied upon for this so-called technical meaning.

SIR G.LUSH: Well, having made that winning-post - - -

MR CHARLES: I will finish very shortly after lunch.

MR GYLES: I wonder if the commission might be prepared to sit at a quarter past two so I can get myself in some sort of order to shorten my reply.

SIR G.LUSH: I remember an encouraging remark made by Sir Garfield Barwick in somewhat similar circumstances - you would take up a good deal less time if I say yes.

LUNCHEON ADJOURNMENT

MR CHARLES: Can I take the commission on a short excursion into attainder. I am reading from Chitty's Prerogatives of the Crown, Chitty junior of 1820. At page 221 Chitty says:

> The forfeitures for which the crime of high treason . . . . . lands and goods shall be forfeited.

In other words, ordinarily speaking, in the case of those crimes the attaint is the judgment of death being passed, and Blackston, in a commentary reported at pages 213 to 214, says this:

> The true reason and only substantial ground . . . . . majesty of the public resides.

If, therefore, an office is regarded as a species of property, then one sees some basis on which the attaint following crimes of high treason, petty treason or felony may be said to work a forfeit of that property. It is highly doubtful, one would have thought, that it was an operation in the same area of criminal law that has been referred to in Richardson's case where the reference is to some form of infamous crime, but it may be that it is a notion of that nature which brought about the additional stipulation.

SIR R. BLACKBURN: What was that reference to Blackston, please, Mr Charles?

MR CHARLES: The passage is quoted in Chitty at pages 213 to 214, and the reference to Blackston is in the first volume of the commentaries at page 299.

Now, in addition to the attaint following conviction for those crimes, there was provision in the Houses of Parliament for an act of attainder, and this jurisdiction was stated in these terms, that proceedings against accused persons by bill of attainder are in usual legislative form and follow the stages of a public bill, and that is said in the note to paragraph 735. I am reading from the fourth edition volume 10 of Halsbury, paragraph 735, and in note 1 to that paragraph, the bill of attainder is said to be a bill to declare a person attainted, that is to say:

> Under the spell or corruption of blood . . . . . there has been no example since the 18th century.

One assumes a bill of attainder would be introduced against a person of great consequence in the community, a noble or somebody of high office, somebody of that kind.

Your Honours, the other matters that I want to deal with shortly - Henry v Ryan. to which reference is made, is an example, we would say, of the way in which conduct out of office may be relevant to misconduct justifying removal from office. I do not desire to read the case. Your Honours have had the passage read from page 91.7 of 1963 TasLR in the judgment of Sir Stanley Burbury. It is an example of how:

> Misconduct in his private life by a person discharging . . . . . to continue in his office or profession.

Your Honours, my friend referred to Capital TV v Falconer, 125 CLR 611. May I simply submit that insofar as Sir Victor Windeyer was saying, at page 611, that judges of the High Court held an office terminable only in the manner prescribed for misbehaviour in office or incapacity, that was Sir Victor's own personal gloss on the Constitution, and we would respectfully submit an inadmissible gloss.

I said to your Honours that I would attempt to obtain a short statement of Harcourt v Fox. The question for determination was whether Harcourt, who was a duly constituted clerk of the peace by the custos rotulorum, did thereby become clerk for life, only removal for misbehaviour, or whether his continuance in office depended on custos rotulorum in office.

It was a competition between the two acts - 37 Henry VII chapter 1 and 1 William and Mary chapter 21. Your Honours, I do not desire to refer at any length to the commentators my friends have referred to but simply by way of example can I refer to the article in the Australian Law Journal by those two budding academics, Sir Zelman Cowen and Sir David Derham, on The Independence of Judges at page 463, left-hand column, where the authors say:

> Two questions arise here . . . . .
> . . . . . to work a forfeiture?

And then say:

> So far as the first question is concerned, a good statement . . . . . in the footnote hereunder.

Can I submit to your Honours that that is a good example of how this heresy we would say has grown up. What has happened is, they say, "What type of misbehaviour . . . . . a good statement is to be found". Now, there is no critical examination of it, it is simply asserted: there it is; that is good enough. No attempt to investigate difficulties that will work in operation; just, it is there in the authorities, and a quick adoption of it in practice. And it has of course not occurred to it in sufficient frequency to cause problems to be seen, examined and understood. Now by contrast when one looks at Jackson's work one sees that Professor Jackson in the passage that my friend put to the commission comments that:

> In that judicial process the ground for cancellation would be misbehaviour . . . . .
> . . . . . private capacity.

Now Jackson obviously of course has turned his mind to it but as he says in the body of his work at page 368, and really, if I may say so, with particular point:

> As no English judge has been removed since the Act of Settlement . . . . .
> . . . . . is by no means certain.

That, your Honours, at the very least is clear and makes very difficult the assertion that there is a received and technical meaning of misbehaviour.

HON A WELLS: What was the reference to that passage?

MR CHARLES: It is at page 368 of Jackson's work - The Machinery of Justice in England, 6th edition at page 368. I notice that my friend regards the authority as so

disreputable that he has not included it in his outline of argument at all.

Now we would say that it is entitled to quite as much weight, and in logic is to be preferred to Professor Shetreet's work where at page 89 he says that Professor Jackson's opinion it is respectfully submitted cannot be sustained and points out that no authority for it is cited. And Shetreet asserts that:

> It clearly appears from the authorities that except criminal . . . . . during good behaviour.

Now Shetreet like so many others goes back to Richardson which does not support his contention; relies on Anson in which the doubt is quite clearly stated on the face of the assertion; goes back to Halsbury, which simply regurgitates the provision from Todd and Hearn. So one only judicial authority which does not support the proposition.

The last two matters then, your Honours, that we desire to put in argument - - -

SIR G. LUSH: What was the page of Shetreet?

MR CHARLES: 89, your Honour.

SIR G. LUSH: Is it Accountability, or Judges on Trial?

MR CHARLES: Judges on Trial, not the work on accountability.

SIR R. BLACKBURN: I think we have only got pages 90 and following; or did we get another one?

MR CHARLES: I am surprised, your Honours, because I thought it began at 88. I think a number of additional pages were supplied during my friend's argument.

SIR R. BLACKBURN: That is right.

MR CHARLES: Now, your Honours, my friends have said that it is all far too uncertain if you are going to have these wins of what is acceptable in judicial behaviour. We say it is really not difficult at all to decide what are acceptable standards of judicial behaviour and we say that the High Court, if parliament attempted to remove a judge simply because they did not like the judge or because the judge had dissented once too often, or the judge had voted against the government on five occasions, the mere statement of the offence would entitle and compel the High Court to intervene very quickly indeed to prevent any action being taken successfully to remove a judge in circumstances of

that kind. And if parliament for political reasons or because of the actions of a particular pressure group were to attempt to act in that way they would be stopped. Now we submit that is no argument and involves no interference with the judiciary.

Now, your Honours, can we attempt to encapsulate our arguments in conclusion in five propositions. We say, firstly, that the consequences of the Bennett view, if I may so desribe it, being accepted, are potentially very serious. In the interests of independence it is said that Australia has given up the ability to remove from office a High Court judge who could be seen to be demonstrably unfit to hold office in the circumstances - and there were 15 of them - put by us at the outset of our argument.

Secondly, the question is, did those who framed the Constitution intend this? We say that examination of the debates and of the Constitution itself provides no support for this view and indeed, your Honours, we say that examination of both suggests the contrary, that the framers were not using misbehaviour in any technical sense even if the word did have a limited meaning.

Thirdly, your Honours, we ask, does the Constitution mean what is claimed in ordinary language? To which we would answer, in the ordinary grammatical meaning of the words, indeed not. What is suggested is a strained and artificial meaning which could only be justified by a very clear demonstration of the reception into the Constitution of a word of well accepted technical meaning.

Fourthly, your Honours, we ask, did the word misbehaviour have such a limited meaning? To which we would answer for the reasons put this morning at length, no. We submit that the circumstances in which judges could be removed from office were well understood and accepted, repeatedly tested in the parliament and the Privy Council, and we say that never in any case has it been said that a judge can only be removed from office for conduct outside his office involving serious offence and/or resulting in conviction.

Lastly and finally, your Honours, we ask, is such a technical view of misconduct - - -

SIR G. LUSH: That last comment is framed in terms of an offence.

MR CHARLES: Yes, your Honour.

SIR G. LUSH: It has never been said in any case that the judge cannot be removed - - -

(Continued on page 340a)

MR CHARLES: Can only be removed from office for conduct outside his office involving a serious offence and/or resulting in conviction, which is to test both the Griffith and the Bennett views.

(Continued on page 341)

Our fifth question is: is such a limited and technical view of misconduct or, I should say, misbehaviour, necessary to preserve the independence of the judiciary.

We submit that question should be answered in the negative for four reasons. Firstly, because two houses, the states and the people's houses, must both decide by majority to address in the same session. Secondly, on grounds of misconduct of which notice has been given to the judge. Thirdly, proof in circumstances in which the judge was given a fair hearing. Fourthly, the High Court being entitled to intervene to protect the judge if parliament attempted to act without proof or if the conduct alleged could not constitute misbehaviour. Your Honours, unless there are any other questions we can answer to assist the commission, we have nothing further to say.

SIR G.LUSH: Thank you, Mr Charles. Mr Gyles?

MR GYLES: My learned friend would qualify for the role of chief historian for Jozef Stalin, having in mind his revision of history. May I leave aside for a moment what Sir Harry Gibbs recently told us was Sir Garfield Barwick's description of a good deal of my friend's address and that is points of prejudice, and concentrate firstly on history. After all, the point at issue in the end, once history is understood, is a fairly narrow one; that is whether misbehaviour in section 72 refers to misbehaviour in office.

If the answer to that is yes, then subject to one subsidiary question our submission is correct. My learned friend sought to suggest that all of the commentators who passed upon this question either before 1900 or after it have been mistaken; in particular they have been mistaken as to the effect of Richardson's case. I do not think, however, he seriously challenged our submission that in relation to judges and other people who hold offices upon tenure which can only be terminated upon proof of misbehaviour, that misbehaviour means misbehaviour in office.

HON A.WELLS: It must at least include that.

MR GYLES: That is the meaning of misbehaviour when it is used in that context.

HON A.WELLS: I see, yes.

MR GYLES: There is the subsidiary question as to what misbehaviour in office means but the first question

I do not think he reall· could seriously challenge the authorities - - -

SIR G.LUSH: But as a condition subsequent, his misbehaviour in office - - -

MR GYLES: Is properly described as misbehaviour in office. There is a subsidiary question as to what that encompasses.

HON A.WELLS: I am sorry, I do not want to be seen to be picking a point but I have understood your argument and Mr Charles comments on this facet of it to turn upon your attributing to the Constitution the grant of an actual life tenure in office - determinable limitation, determinable on misbehaviour.

MR GYLES: I do not think I have pinned myself to that analysis.

HON A.WELLS: I am sorry, I thought that was the force of the during good behaviour act.

MR GYLES: That is very much a subsidiary point. The question is, what does section 72 of the Constitution mean.

HON A.WELLS: Leading up to that, I mean.

MR GYLES: The office of a High Court or a Federal Court judge is an office granted by the Governor-General in council based upon the Constitution and on any relevant legislation. The High Court have said that that is an office held on good behaviour or the equivalent but my submission at the moment is that, in historical terms, the removal of an office holder who held office on terms that it could be brought to an end for misbehaviour, the term was misbehaviour in office.

The procedure for removal by the Crown upon address from parliament was a quite separate and distinct method of removal which did not depend upon good behaviour, misbehaviour or any other stated standard or criteria. As I understand his argument this morning, it was that the original heresy was that of the Victorian Law Officers; that was picked up by Todd and thereafter everybody has simply adopted Todd.

He fails to deal with Hearn. It will be recalled that I referred, although briefly, to The Government of England, W.E. Hearn, 1867. That, I understand, is the first edition of Hearn. I do not have the volume myself but my instructing solicitor has made enquiries and there was a second edition in 1886.

We believe that the passage we have copied is from 1867, the first edition.

At page 82 will be found an analysis of the position, page 82 to the top of page 83, which is entirely consistent with and based upon the same sources of the Victorian Law Officers and Todd and all of the subsequent commentators. Whether between all of the sources there has been some unattributed plagiarism, we simply do not know. All we know is that the contemperaneous commentaries all drew the same conclusion from the sources. Having had occasion to go back to Hearn, may I ask the commission to read on from that paragraph on page 83 through to page 87.

That, in our submission, is an excellent account of the choice that Australia had to make at the time of federation. It puts it in a way which at least, I would submit, is illuminating. If I could pick up and read from point 5 of page 84:

> It is contended that the power of amotion is inconsistent . . . . . the object of the clause -

This is the clause in the Act of Settlement:

> was undoubtedly to prevent . . . . one case as it has been in the other -

the proviso being the ability of the parliament to address for removal:

> The judges would have held their office . . . . . may be obtained from the Constitution of the United States.

SIR G. LUSH: Before we leave that paragraph - I am looking at the bottom of page 85 where it is said that the grievance was the removal of judges for political reasons as the mere will of the executive. The remedy was designed to correct this grievance but not to go further. The remedy that he is there referring to was the establishment of the good behaviour tenure instead of the at pleasure tenure, was it?

MR GYLES: Yes, it must be so. As is implicit in that, there are two aspects; there is a good behaviour tenure being imported and then the proviso to it.

SIR G. LUSH: Upon all the material that we have had before us in the last three days the proviso does not restrain the executive in any way at all.

MR GYLES: The proviso provides a mechanism by which the executive can remove the improper judge but only on address from the parliament.

HON A. WELLS: So it was before it covered the field, in effect. It excluded the executive acting on its own motion.

MR GYLES: No, it did not exclude it. On the contrary. The executive acting on its own motion for breach of the tenure of good behaviour remains.

HON A. WELLS: Outside that?

MR GYLES: Yes.

SIR G. LUSH: That is the assumption we have been making but there are one or two authorities that really suggest that the Act of Settlement has never been thoroughly analysed itself. Have there been any instances of prerogative removal of judges since the Act of Settlement?

MR GYLES: Of judges holding tenure under the Act of Settlement?

SIR G. LUSH: Yes.

MR GYLES: I cannot bring any to mind. The colonial experience is an unsafe guide to that because the Act of Settlement did not apply to them, although there were like provisions. I do not know that there are any contemporaneous commentaries which cast doubt on the position. They were there up to 1900. I will read on and endeavour to put what we suggest is the view being advanced:

> Some confirmation of this view may be obtained from the Constitution of the United States . . . . . without any obligation on the Crown to accept it.

What the author is saying is this: where independence of the judges does not warrant a paramount interest - that is, where independence from executive and legislature is not necessary - then the address provides a method by which the legislature retains control over what the author calls improper judges; that is judges who are doing their job properly but who for other reasons it is desired to remove. It is precisely that which the United States Constitution removes because of the special constitutional position of the federal judges in that country, by a particular mechanism. The framers of the Australian Constitution were provided with the same dilemma or same question. Because of the fact that the federal judiciary - particularly of course they had in mind that the High Court can declare unconstitutional legislation of the federal parliament, and because they determine disputes between the federal and the state bodies you cannot have a situation in which the legislature and the federal body retains the ability to deal with judges in the way the Act of Settlement deals with them. The solution, or the compromise if you like, which was adopted by the Australian Constitution is different from that chosen by the American Constitution but so far as extra judicial activity is concerned, the effect is very much the same. When one comes to look again, I hope very quickly, at the constitutional debates with this in mind it will be seen that this very question, framed in almost the same way, was the question which was debated.

Mr Isaacs as he then was, supported by Mr Higgins and others, said the present position in relation to the legislative control over judges has worked satisfactorily; we ought not to give up legislative control over the judges. The other point of view most clearly enunciated by Mr Kingston was that the very nature of the federal court which was being constituted and its powers and functions made it necessary that that parliamentary control over the judges be limited, not simply as a matter of form but as a matter of substance.

The argument of the opponents on the status quo it was said simply did not take into account the new and special role that the High Court was to play in declaring legislation unconstitutional and in the division between centre and state. It was the very debate which occurred. Before going to those debates, may I pick up the other matter which I promised to do and my learned friend has anticipated me, that was to go to Mr Harrison Moore's commentaries. I think everybody has been provided with extracts from two sources from Mr Harrison Moore.

SIR R. BLACKBURN: Before we come to that, with apology to you, I just do not follow how what you have been saying to us goes to the centre of your argument at all, that is, on

the nature of misbehaviour. What is the relevance of what you are saying?

MR GYLES: As far as my analysis of Hearn is concerned, in my submission he makes clear that the method of removal of judges otherwise than by parliamentary address related to their activities as judges in office.

SIR R. BLACKBURN: You mean he implies or says they could not be removed for activities out of office?

MR GYLES: Yes, save for conviction. That is the first point. He says all that very clearly on pages 82 and 83. That is the first point I get from Hearn. He draws the same conclusions from the sources as do the other commentators upon which we rely. This was a source available at the time. Secondly, I drew attention to an aspect of Hearn which I had not drawn attention to before but which fits in with our understanding of the convention debates, that there is a sharp division between a unitary state where the judiciary has no role in declaring legislation unconstitutional or deciding between organs of government on the one hand, and a state that does. There is his analysis at page 85.6 of how the address by parliament dealt with a judge whose actual conduct in the exercise of his office could not be impugned yet it might be highly inexpedient to keep him as a judge. The English system opts for parliament having power to deal with that situation, as indeed it does in New South Wales and Victoria and other states of Australia. If, although a judge is conducting himself properly in office, for good reason it is inexpedient that he continue, parliament may pray for his removal. It is that point which is given up in America and we say given up in Australia quite deliberately under this Constitution. It is the deliberate choice that was made to give up the power to remove an inexpedient judge.

SIR R. BLACKBURN: All this depends upon your acceptance of Hearn's dogmatic statement that misbehaviour means in the first place misbehaviour in the grantee's official capacity, and also includes a conviction.

MR GYLES: Yes, quite.

SIR R. BLACKBURN: So he does not take us any further on that point?

MR GYLES: He does not take us any further on that point. He leaves us precisely where we were before with all the other commentators but in the further passages which I have read he puts into context, in my submission, in a very clear way what lies behind all of this, that it is the extra work which the address does enabling parliament to have a general control over judges in the sense of all of their conduct, is the very thing which was given up by the Americans and was given up by us in return for, and that was the evil that was avoided by section 72 or put another way, the object be achieved by section 72 was to preserve the independence of the judiciary, not just from the executive but also from the legislature save in certain situations.

If I could then go to Harrison Moore, the first of the sources were the lectures in 1897, pages 102 and 103. He says:

> We here depart from the . . . . .
> . . . . . in the courts.

And so on. That latter point is the point where there was some wavering by that learned commentator but his first point is that the change between the two types of tenure, double condition of tenure, the change in that was to emphasize the fact that the courts are guardians of the Constitution even against parliament. Precisely the same point that Hearn makes. It is perhaps more clearly expressed in the second edition to which you have, pages 202 to 203.

HON A. WELLS: May I just remind you again he was there dealing with a proposed section which included the holding of office during good behaviour which meant that misbehaviour was the coming into operation of a condition or limitation.

MR GYLES: I must confess that I would submit that that is hardly critical to his analysis of the position.

HON A. WELLS: I thought throughout that part of your argument that led up to saying this is misbehaviour in office that we are concerned with was because in effect the High Court judges held office during good behaviour. That was a tenure that it borrowed all the qualifications of a condition of limitation and that that meant it was misbehaviour in office that we were dealing with.

MR GYLES: I certainly am happy to have that as one line of argument. I do not in any sense limit myself to that line of argument. It is not an essential part of my argument that it be said that there is a strict tenure of office on good behaviour. It may or may not be. Mr Justice Windeyer thinks it is. The High Court in Alexander's case thought it was but I am not pinning my argument to that. My argument is what does misbehaviour mean in section 72.

HON A. WELLS: All right, if that is so then you disavow any help in that wider way from getting the tenure of office?

MR GYLES: Indeed I do not. I do not disavow. Indeed I said I relied upon as a line of argument what we submit is a correct analysis by Mr Justice Windeyer and other members of the High Court which says this is tenure on good behaviour. I do rely upon that. However, we do not depend upon that. The separate argument is simply that the words of section 72 of the Constitution where they use misbehaviour, where misbehaviour is used in a particular sense and the understanding of that sense depends amongst other things upon the state of the common understanding of the Constitutional position as it was at the time of the constitution. That is what I am examining as indeed those commentators were. I am not pinning myself on any fuedal notion of tenure so far as High Court judges are concerned.

In his second edition, Harrison Moore said at the foot of page 202:

> The provisions of the Commonwealth constitution go beyond . . . . of the causes stated.

In other words, wrapped up in that short passage are the propositions which we are advancing as the fundamental propositions to be understood in analysing this question. The power to address is additional to the power to remove for misbehaviour; it is not in lieu of it and those independent powers are interwoven in section 72 and that is precisely the first two propositions we advanced before here in chief and we have looked at the first edition of Harrison Moore and so far as this point is concerned, the words are in precisely the same terms. Tne first edition was 1902.

Reminding the commission of those matters, may I briefly go back to the debates. My learned friend put in his address yesterday and returned to it again today but really misbehaviour according to Todd had various meanings in 1900 or 1897, 1898. One of them he said was from page 897 of that work. I will come back to that later. But may I remind the commission of precisely what was put to the commission by Mr Isaacs who I had thought it was being cited by my learned friend as the person who understood the correct position. That appears at page 947 in the 1897 debates and he says in the right-hand column:

> Far back up to 1688 or thereabouts . . . . . Houses of Parliament at all.

I ask that particular attention be paid to the words in regard to the office and that, of course, refers to the power of the grantor of the office, in this case because of the High Court it would have been the governor general but if parliament comes to the conclusion that for reasons good and sufficient for parliament these judges ought to be removed, they may without any judicial determination of the question of misbehaviour ask the Crown to remove them and the Crown has power to do so. So that Mr Isaacs as he then was is clearly adopting the view that the two remedies are cumulative. The condition of removal under the first of those alternatives is judicial misbehaviour in regard to their office. Removal by parliament is done without any determination on the

question of misbehaviour. It is suggested in some fashion misbehaviour is being used in some unspecified way. Here is the proponent for the status quo, distinguished lawyer then and with a distinguished career thereafter who is clearly adopting the analysis that Todd and Hearn and all of the other commentators theretofore adopted in putting it very clearly to parliament. Then on the following page - - -

SIR R. BLACKBURN: Is he implying when he says if they are guilty of judicial misbehaviour in regard to their office and may be removed without any vote, does he mean if they are guilty of judicial misbehaviour not in regard to their office they may not be removed by the Crown?

MR GYLES: He is saying judicial misbehaviour means misbehaviour in office.

SIR G. LUSH: There is no other judicial misbehaviour.

MR GYLES: There is no other. It must be so. First of all as a piece of English and secondly as a piece of commonsense that is what he is saying. It happens to accord with all of the commentaries also and accords with the passage that he himself reads from Todd later. With respect to my learned friend, it cannot be that all of these learned people have so fundamentally made a mistake.

SIR R. BLACKBURN: Including the Lords of the Privy Council in their memorandum? They were clearly completely wrong?

MR GYLES: No, not at all. As I have put in chief and as I thought had been put to my learned friend when he put a submission about that memorandum, that memorandum dealt with all methods of removal and certainly we are not limited to judicial misbehaviour or removal by the grantor for breach of a condition of good behaviiour. What Mr Justice Isaacs is talking about and what Todd is talking about are those circumstances where tenure is held upon good behaviour.

The memorandum of tne Crown law officers dealt with all manner of tenure, prima facie not for good behaviour. Prima facie, as Terrell's case tells us, it was held on pleasure, normally of pleasure and the methods of removal were not limited to Burkes Act. That memorandum was not wrong. I never submitted it was wrong. I have simply said it dealt

with an umbrella situation and was plainly inapplicable to judges where misbehaviour as a judge is necessary for removal.

Of course, in addition to my submissions the supplementary opinion of the Solicitor-General adequately demolishes Mr Pincus's contention upon that particular memorandum. Going back to Mr Isaacs, page 948, he draws attention again to the distinction:

> For instance, a judge might not be guilty of judicial misbehaviour but he might suffer such incapacity as to unfit him.

Then at the foot of the same paragraph he says:

> It will bring upon us much possible litigation . . . . that is a position which we ought not to court.

This is not the language of the layman, this is not loose language, this is language deliberately chosen in the light of what he had earlier said. What Mr Justice Isaacs is saying is that if you amend the constitution in the way we now know it was amended you will achieve a situation in which a judge who is not guilty of misbehaviour in office can stay in office notwithstanding the fact that he does not have the confidence of the Houses of Parliament, and that is precisely what has happened, Mr Isaacs was right, his view did not prevail, a contrary decision was taken, and that is the position Mr Justice Murphy may be in.

We are not talking about the litigious part of it, but the effect of it is this. If in relation to a judge he has not been guilty of misbehaviour in office, and if he has not been convicted, he may defy the Parliament, the Crown or the nation, and that was the purpose of the founding fathers of our consitution, it was the purpose of the framers of the United States Supreme Court. That is the most fundamental question in this case, and in our respectful submission, Mr Isaacs as he then was got it quite right.

The response which comes is more illuminating, or just as illuminating - "That is a balance of risks that we might well take together". I will come back to balance of risks when I deal with my learned friend's point of prejudice but, yes indeed, a judge may defy Parliament, he may defy the Crown and the nation provided that he does not misconduct himself and provided that he is not in office, and provided that he is not convicted of an offence.

SIR G. LUSH: I think I grasp what you are saying quite clearly, Mr Gyles, but if that was what Mr Isaacs feared, how

did he come to approve of the introduction of the proved misbehaviour provision as a solution to what he was worried about?

MR GYLES: Political commonsense.

SIR G. LUSH: You mean he counted the numbers?

MR GYLES: He simply counted the numbers and saw that his cause was lost and it was best to salvage something out of the wreck. If you read the Melbourne debates he again put forward the amendment that Victoria proposed, that again although Mr Barton started to waver, the numbers were against him, and so he changed the position, I think, of the clause in an endeavour to avoid judicial review. He sought, I think, if you read those debates, appreciating the inevitable, to endeavour to frame the clause in a way which he thought was more likely to avoid judicial review than the way the clause had been framed.

What I have just put, of course, is very much reinforced by what follows from Mr Justice Isaacs. He then read the situation concerning the Victorian constitution and said:

> So that a judge holds office
> subject to removal for two
> reasons . . . . . .
> we must trust Parliament.

Then he reads Todd.

SIR G. LUSH: It is always difficult to pick up these documents and read them in a scrappy form. 948 occurs in the debate on amendment, does not it?

MR GYLES: Yes, it does. The amendment is set out on the right hand side. The clause itself appears at 944, then on the right hand side of 946 half way down is the actual amendment, but because of interjections it could be taken that misbehaviour was to be the word rather than misconduct, and there were suggestions that unfitness should be dropped out.
Mr Justice Isaacs went on to read Todd, including the passage about misconduct outside of the duties of office for misbehaviour must be established by a previous conviction of a jury. Then, of course, he contrasts with that the position under the act of settlement proviso where there can be an address to the Crown.

So it is a little difficult, I would have put, with respect, to suggest for a moment that there is some view which now be taken of Todd which differs from that which Mr Justice Isaacs was then putting.

Mr Symon, and I will not reread this because I have taken the commission to it, at 950 makes the precise point that I have already made that the problem with the Isaacs view was that it just ignores the fact that he does not appreciate the effect of the High Court's role in the federation. Mr Symon has precisely the same view. Mr Barton has the same view. Mr Higgins, who was on Isaacs Js side, shared his concern. At the foot of page 953:

> May I point out to Mr Kingston . . . . .
> . . . . . leaving it to the house to prove capacity and misbehaviour.

and so on. He proposed an amendment which is an interesting amendment because it would have avoided judicial review except in the most extreme of cases - if both houses are of the opinion that he has been guilty of misconduct or misbehaviour. As the commission appreciate, they were not the words chosen, they were the objective words, misbehaviour or incapacity.

As far as the 1898 debates are concerned, at 313 I should point to a passage in the righthand column at the bottom which I had not been able to read in my earlier copy of this. Mr Kingston, at about point 7 of the page:

> To prevent the judge being removed . . . .
> . . . . . he need fear no one, he will favour no one.

So again there is the stress upon behaviour in his high judicial office.

The point the presiding commissioner put to me appears from page 313 in the lefthand column. So that, in our submission, when history is looked at, it is impossible to sustain any point of view which says that really everybody has misunderstood Richardson's case and what the duties of a judicial office are and that we in 1985 can now correct all of that misapprehension and say that the word "misbehaviour" will now mean what we think it means, not what all of the commentators thought it meant in 1900 and not what all the commentators have thought it has mean up to the present day, apart from Pincus J. I leave aside counsel's argument in cases because they are not a reflection of counsel's opinion at all.

Before leaving history, could I just say a word about Doncaster's case? It is my respectful submission that that was the case in Lord Raymond's reports. May I put the submission that that did not depend upon any procedural point, it was a mandamus of calling

upon them to show cause why they should not restore Scott to the office of capital burgess. Then they make the return which justifies their action. The passage was read out this morning. At the foot of the page of the English report:

> He received several sums of money . . . . . mentioning them also particularly.

Then there are recitals as to the fact that he was called upon to answer anyway and he was held guilty.

SIR G.LUSH: I do not know enough about the forms of the writs, particularly the writ of mandamus then in use, but it struck me that the writ must have contained an order or there would not have been a return made to it. Can you tell me whether it was likely that the writ stated a ground?

MR GYLES: I do not know, but one imagines that the writ - well, the writ commanded them to restore Scott to the office of capital burgess, the ground presumably being that he had been wrongfully excluded from that office.

SIR G.LUSH: The answer was that he had been guilty of default as chamberlain.

MR GYLES: Been excluded for good cause.

SIR G.LUSH: I would not think that it would be impossible it did go off on a pleading court because, though it is not said as far as I know, what perhaps might have been said was that the return might have been good if it had said having defaulted as chamberlain he was thereby rendered unfit for his office.

SIR R. BLACKBURN: Moreover, the office of capital burgess appears to have been a real office, whereas the office of chamberlain was not an office in that sense at all, was it?

MR GYLES: That makes our point, if I may say so, all the more powerful. You see, the first answer is that the only guide we have is what the court is reported as having said, and it is not reported as a pleading point at all. That is point one. Point two, we know what the return said, it is set out there. It is set out, as far as we know, verbatim.

SIR R. BLACKBURN: They purported to remove him from his office of capital burgess for his said offences and misbehaviours.

MR GYLES: That is right.

SIR R. BLACKBURN: And all those offences and misbehaviours were offences and misbehaviours qua chamberlain, not qua capital burgess.

MR GYLES: No, that is not correct, with respect.

HON A. WELLS. I thought the courts made that very clear towards the end of the judgment.

MR GYLES: No, it has just been put to me that the misbehaviours are all in office of chamberlain, not burgess. That is not correct.

HON A. WELLS: Yes, but they picked the wrong one, to put it in colloquial language.

MR GYLES: No, with respect, they did allege that as capital burgess he obstinately and voluntarily refused to obey several orders and laws and so on. That was said not to be particularized, but it is not correct to say that they picked the wrong office. Capital burgess, as Sir Richard Blackburn has said, was a real office, and they had to make out a case for removal of a person from a real office.

One of the grounds of misbehaviour was that he had in another position acted contrary to the codes of that position. He had taken money and he had made false returns as to expenditure. In other words, it is saying that because you misconducted yourself in that dishonest fashion in that office, you are unfit for that office. They are saying, as is said here against Mr Justice Murphy, because of things you have done outside your role as High Court judge, you have shown yourself unfit to be the burgess of this corporation, of this body, precisely the argument my learned friend has put, could not be closer, and what the court said was not go away and come back with another pleading, because they did not want to remove him as chamberlain, they wanted to remove him as

burgess, they said that:

> What he was charged with was not in his office . . . . . but not of capital burgess.

HON A. WELLS: That is the very point that they are trying to make.

MR GYLES: With respect, it escapes me.

SIR G. LUSH: Was the office of chamberlain something that one of the burgesses was appointed to?

SIR R. BLACKBURN: Yes, it says that.

SIR G. LUSH: It does say he was chosen chamberlain, and that may imply that he was chosen by the burghers.

SIR R. BLACKBURN: Yes, the chamberlain was appointed out of the capital burgesses. That is in the middle of the paragraph.

MR GYLES: Let us say that a justice of the High Court happens to be a chancellor of a university, and as part of the alleged proved misbehaviour it is said whilst chancellor of the university you kept for yourself emoluments of office and fees to which you were not entitled and charged to that university expenses and received expenses which were never incurred by you, well knowing that you had not incurred them. It is as simple as that.

HON A. WELLS: Does that not show a very narrow view of the compass of the office and of the obligations under it, in that particular case?

MR GYLES: In this case it shows that if you wish to remove somebody from office A, you cannot remove them because of misbehaviour in office B unless you are convicted of a criminal offence in office B.

SIR R. BLACKBURN: No matter what the office is. We are talking about the office of a judge of a High Court - makes no difference.

MR GYLES: Not in that respect. I did not put, I have not put and I do not put that all offices are the same for all purposes. That was never part of my submission, as the transcript will show. It is that they are the same in this respect, that misbehaviour in office has the same limits, whatever be the office. It must be misbehaviour in the office in question or conviction out of it. To that extent it does not matter whether you are a portman or a High Court judge or the chairman of the Reserve Bank or all the other offices held on good behaviour or terminable by misbehaviour. You cannot be removed from those offices for misbehaviour for what you do in some other office unless you are convicted of a criminal offence in relation to that conduct.

If, for example, there had been proceedings in relation to his conduct as chamberlain which had led to a conviction against him, and on the facts here it looks as if it could have been; then, of course, he would have been removable under the general principles, but not otherwise.

The short point I make about that case is there is absolutely no suggestion that that is a procedural matter or a pleading matter, and when one analyses what the pleading was, and it is set out in detail, it says precisely what is being said against Mr Justice Murphy, that you have whilst in some other capacity done something which is dishonest or wrong, sure you have not been charged or convicted of it, but you have done something which is wrong. My friend keeps saying that there is no authority and these are all commentators who have gone wrong. Even if Lord Mansfield went wrong and even if in 1986 it is possible to correct him, since 1730 this deciison has stood and never been doubted.

My friend also said on more than one occasion, quite repeatedly, that we were arguing for a technical meaning of misbehaviour. Might I suggest that we are doing no such thing. Misbehaviour in conjunction with office, misbehaviour which justifies removal from office, is limited only in the respects that I have mentioned. That relates to misbehaviour in office and does not relate to conduct out of office save for conviction. That is not a technical meaning. That is the ordinary meaning which it has always borne.

Now, what, may I ask rhetorically, is the definition of misbehaviour which is put forward by my learned friend? We have listened with interest to his submission and we have read carefully Mr Pincus's opinion, and we can find no endeavour to explain what misbehaviour means.

Let me concentrate, because this case concentrates upon it, on misbehaviour out of office. What is the definition of misbehaviour out of office? One can understand misbehaviour in office. It has been explained on many occasions. No doubt one cannot catalogue examples of it, but there is a very clear notion as to what a person does when he misbehaves himself in the conduct of his office.

What, however, is misbehaviour out of office? Where is the definition of it? According to my learned friend, apparently it means anything which Parliament thinks it means. It is Alice in Wonderland. He says that the High Court can correct it. He says the High Court - I will not go into the question of justiciability. Let me assume for the purposes of the argument that is correct. If our meaning of misbehaviour is not correct and if it is at large, by what criteria is the High Court to draw the line, and I suppose it would be correct to say that there must be a cause assigned - I withdraw that. That may not be correct. As in Brown v Fitzpatrick, it may be sufficient if all that happens is the Parliament to produce an address to the Crown saying on the basis of misbehaviour.

Even if that not be right and if the High Court can go into the proceedings in Parliament and see what happened there - it may be that if what is recited to be or charged to be misbehaviour could not be behaviour at all. Let us say it is an omission of some sort. I cannot think of a good example now, and it is very difficult to think of examples which would be beyond or outside the definition of misbehaviour as it is being put here, so far outside that the court can say there is no possibility of that being regarded as misbehaviour, although there are no limits - - -

HON A. WELLS: A matter of eccentricity would probably supply your example, would it not?

MR GYLES: That may be a positive act though, and once you have a positive act it may be difficult to - you see, I suppose even wearing no shoes on to the bench may be said to be within the range of misbehaviour. If that sort of view is correct, then if one goes back to Hearn and goes back to the debates, this very evil which was to be avoided has not been avoided, and the open-ended nature of it will leave the federal judiciary in the same position as the state judiciaries and English judiciaries in practice, and that, of course, was debated at the convention and we say that that result was never intended.

Before going back to the points of prejudice there was some debate about Barrington's case - what Denman said and what Todd said at 859-60.

SIR R. BLACKBURN: This is the first edition of Todd? The second rather - - -

MR GYLES: Yes, I have taken the one my friend handed up. Now that is apparently taken from the speech of Denman as he then was before the House of Lords. There was some debate this morning as to whether it was being said that if you were dealing with a crime you could only proceed by way of impeachment. Now we know from what the same counsel put to the House of Commons that that was not being submitted. In the Mirror of Parliament 1830, 22 May, page 1897, Mr Denman said - he was putting an argument there ought to be proof by a court beforehand:

> There was one mode of proceeding, namely, by impeachment . . . . . sue the Attorney-General.

He then went on to debate the matter further. So it is not being put that these were exclusive categories; they were cumulative, depending upon the seriousness of the conduct.

My learned friend from the passage at 860 developed an argument which I think is the high point of making bricks out of straw.

SIR R. BLACKBURN: What, Todd at 860?

MR GYLES: Todd at 860, yes.

SIR R. BLACKBURN: Well which edition are we talking about?

MR GYLES: The one my learned friend handed up which is the second edition.

SIR R. BLACKBURN: My photocopy only goes as far as 856.

HON A. WELLS: That is the first one; the second one is a different size and different printing.

SIR R. BLACKBURN: We have had three photocopies from Todd, have we?

MR GYLES: There is Todd on the colonies; Todd on parliamentary government mark 1 and mark 2.

SIR R. BLACKBURN: I see, now I understand. I am sorry, Mr Gyles, go ahead.

MR GYLES: I was full of admiration for this submission. At page 860 Todd examines the procedure of the Houses of Parliament and says that:

> This power is not in a strict sense . . . . . office is held, reliability, et cetera.

Now we know from what Todd has previously said that in dealing with legal breach of the conditions on which the office is held he has a plain view of what misbehaviour means. What he is plainly saying there is that the parliament may go beyond misbehaviour into other conduct and he then says: therefore Todd is using the word misbehaviour in that sense; therefore the framers pf the constitution might be. Even apart from what Mr Justice Isaacs actually read to the convention, we would say that is a very inventive way of overcoming the formidable barrier that Todd presents to the argument my learned friend advanced.

Could I then deal with the points of prejudice, the argument - the 15 examples of the dreadful things that could happen if you uphold our view. Now may I put our general answer to this without conceding that everyone of his examples is apt. Let me assume for the purposes of this exercise some, or a large number of his examples are correct.

HON A. WELLS: Are what?

MR GYLES: Are correct. I do not want to concede every line of what he has put there but may I accept for the purposes of argument that a number of his 15 points are correct if we are correct. Now argument from absurdity - and this is argument from absurdity - has its limitations. The chief limitation is that it does not deal with the proper context. A judge is appointed carefully, taking into account not just his legal expertise but his temperamental suitability for the job, his personality, his standing in the community, his mode of life and the like. And the framers of the constitution would make that assumption. That would have the consequence that it will be expected that judges will normally be and will always be persons who when appointed bear that character. That has the consequence not only that may be expected that they will generally behave in the way that a gentleman might behave; but they would be expected to resign in the event that they became involved in some of the conduct which is referred to in the 15 points. So that the fundamental substratum of all of this is that we are dealing with removal of judges who have been properly and carefully chosen. Thus the practical chance of these things happening is very slight.

Certainly it is as absurd to pose these examples as it is to pose a situation where parliament, as Mr Justice Isaacs said, corruptly decide to move against a judge because of his opinions; or where a dissident litigant or dissident group raise against the judge allegations of private conduct which call for the sort of difficulty that is now being occasioned to this judge. That once an allegation is made people say: unless it is answered it will not go away. The allegation may be completely baseless but it is still an intimidation. It may indeed have some validity but in fact, but in truth be no basis for removal, but nonetheless causes intimidation.

We have had examples here amongst these allegations. More importantly, let us say that somebody politically motivated, personally motivated, does raise from private conduct a matter which right thinking people would regard as irrelevant but which occurred and which the parliament act upon to remove that judge where the High court cannot do anything about it because it is an act - justiciability is no answer to this problem. He could have abused a chauffeur or upbraided a clerk of the High Court. One could think of even more stupid examples where, if parliament wishes to rid themselves of an embarrassing judge who was voting the wrong way on constitutional issues, it can sieze upon that.

The Right to Life organization may say that that judge should be removed because he participated in his wife having an abortion - perfectly legal; or that he had been divorced. Arguments in absurdity really are of no great assistance. If what is submitted by us is correct, then the consequence is that a judge must conduct himself properly in his office. If external behaviour is alleged it must be a breach of the general law. It is very dangerous, in our submission, to construct standards which are said to be bad but which do not breach the law and for which citizens are not punishable. This is the real point about all this.

Let us assume that in every one of these examples which is correct - and I do not really stay to analyze them in detail - in every one of these cases if the example is correct, it is correct because the criminal law and the law of our land does not impose punishment in those circumstances. If that be so, then the law so operates and people in the same position are free to do all manner of things. They walk in this country unstained by the fact that they may have killed somebody overseas.

Even the most outlandish of these examples, positing a judge who will make these admissions and so on, all it means is that the general law of the land allows that to happen. As was said in the convention debates, it is a question of balancing risks. The risks of a High Court judge doing these fifteen things or those which are truly of concern is so minimal, and even if he does them, they are not a breach of the general law. If they were heinous, if they required punishment, then there should be conviction because if a person is in Australia, he is subject to our legislature - there is no difficulty about having a crime that says you cannot do something

overseas if you are an Australian resident.

The risks of that happening are far less real than the pressures of political parliamentary, extraparliamentary pressure upon federal judges who, every day of the week - perhaps that is an exaggeration - many times a year will be deciding issues as to the validity of legislation and as to the rights of the centre against the state. We know for a fact that those things will happen every year and often every year. We know that there will be disaffected states, there will be disaffected politicians, disaffected litigants and people with access to crime.

We know those pressures will be there and it is that which the American Constitution and the Australian Constitution take pains to relieve the federal judge from pressure because of it. The risks of that pressure are great, they are inevitable. What is not inevitable is that one has a maverick judge doing the types of things which Mr Charles finds offensive. As I say, I do not want to stay to give detailed argument about all of these examples.

SIR R. BLACKBURN: Mr Gyles, I appreciate entirely what you have been saying but it can be put against you in a slightly different way that when you have the Act of Settlement situation, you do not have to worry about any of these because parliament could take it in hand and remove the judge. Therefore, it might be suggested it seems improbable that the framers of the Constitution intended proved misbehaviour in section 72 to have the technical meaning for which you are arguing. It seems more probable they intended proved misbehaviour to have the wider, looser meaning so that these cases could not occur.

MR GYLES: But why, though, with respect? I know it is put against me, but why? That is the very point that the convention debate centred upon; should the Act of Settlement position be so or not? The decision was not. Why not - because, as they said, and as Hearn makes clear, the Act of Settlement provisions are not appropriate where you have judges holding the central position in the constitutional framework where they need protection from parliament as well as from the executive; that the framers of the constitution, when the debates are read, deliberately stood aside from and abjured the parliamentary control which was the position in the States.

That being so, once they did depart from that model for the reason that was given, then one says, having departed from the model, they had two well known methods - and I forget the phrase Mr Harrison-Moore used but - they joined the two together.

SIR R. BLACKBURN: Coalesced.

MR GYLES: Coalesced, yes. Of course, as we have said on more than one occasion, the role of parliament is by no means - under our construction of these provisions, parliament still has a very significant role to play. They are the initiators, and in cases of misconduct in office they have a very significant role to play in deciding whether the conduct is such as is inconsistent with office; in relation to external matters they have to have the conviction established, and then they have to decide whether that conviction is - I accept that the debate here is inevitably skewed because of the facts here.

All of these provisions were primarily, of course, being looked at in the light of misconduct in office, I appreciate that, but we submit that the policy reasons in favour of our submission are powerful and whether they are or not, they appeal to those responsible for the framing of the constitution. Might I say just in short form that we do not necessarily agree that example five, that is an offence proved and a bond would not be a conviction under the cirucmstances. That is a matter of construction which one could argue.

SIR G. LUSH: I think some of the statutes which provide for that expressly say that there will not be a conviction.

MR GYLES: Yes, that is a matter of looking at the - - -

SIR G. LUSH: They must, in fact, or in Victoria they do because the order is for adjournment.

MR GYLES: Yes. In any event, that is perhaps a small point. On the second set of examples, I was going to go on to say that we did not see some of them as being terribly necessary in any event, but I think that is probably not helpful.

MR CHARLES: I was not suggesting they were.

MR GYLES: Yes. If the commission pleases.

(Continued on page 365a)
Transcript in Confidence

SIR G. LUSH: Thank you, Mr Gyles. We are indebted to counsel for their assistance in this matter and we will endeavour on our part to deal with in as rapidly as may be.

MR CHARLES: May I clarify something? Our understanding is that there will be no hearings next week. Is that a correct understanding?

SIR G. LUSH: Yes. Unless we run into difficulties of our own with our plans for next week, we will expect a start to be made on evidence on the Tuesday of the following week, which I think comes to the 5th. If counsel are unable to agree on what is to be taken first, then we will arrange a short hearing to deal with that matter.

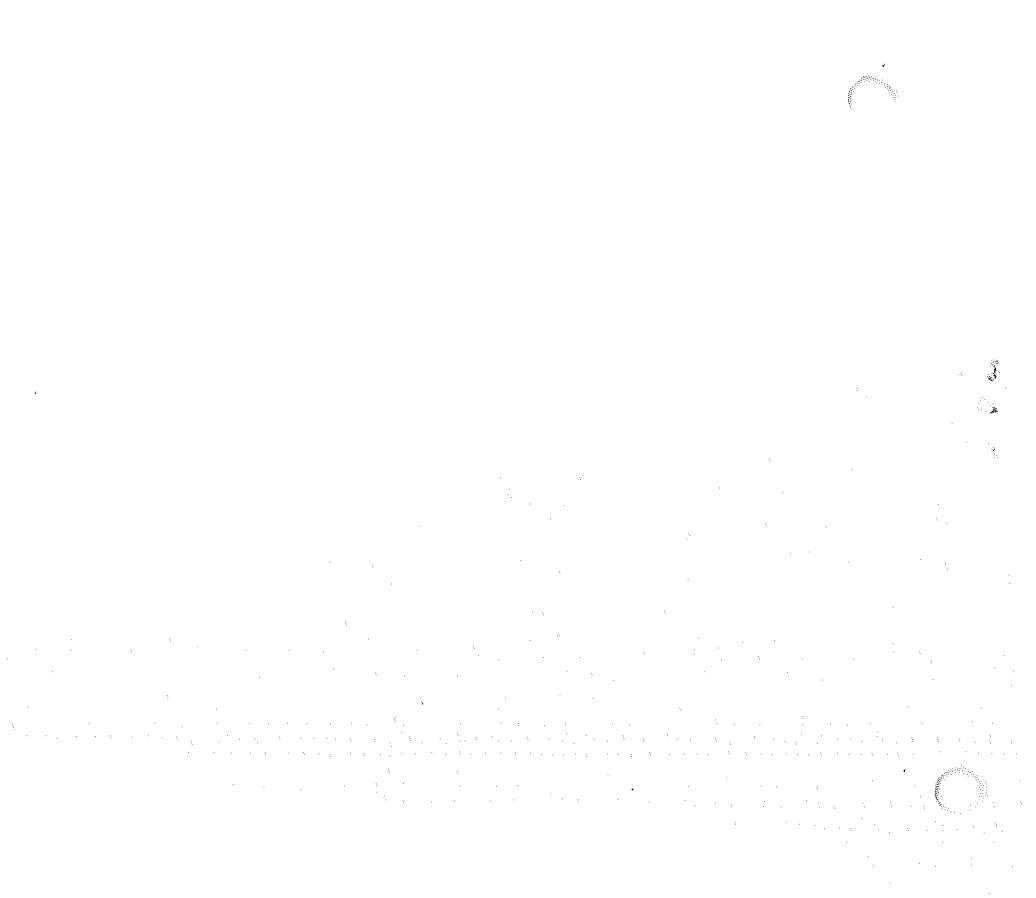
MR CHARLES: Both sets of counsel have need for a hearing at some stage before evidence begins for the return of subpoenaed documents. We are in the commission's hands. It need not be a lengthy hearing.

SIR G. LUSH: You mean simply for the production of them in this building?

MR CHARLES: Yes, on subpoena. My friend suggests Thursday. We have no objection to Thursday as long as that date is convenient to the commission.

SIR G. LUSH: Thursday would be acceptable, Mr Charles. To get it clearly on the transcript, that will be Thursday 31 July at 10 am. We will now adjourn these sittings of the commission until then.

AT 4.25 PM THE MATTER WAS ADJOURNED
UNTIL THURSDAY 31 JULY 1986.



Charles

PARLIAMENTARY COMMISSION OF INQUIRY

OUTLINE OF ARGUMENT BY COUNSEL ASSISTING AS TO THE MEANING OF "MISBEHAVIOUR"

For hearing - Tuesday 22 July, 1986

1. It is submitted that each of the twelve allegations so far delivered would, if proved, constitute misbehaviour within the meaning of section 72 of the Constitution.

2. Misbehaviour neither has, nor had in 1900, a technical meaning.

3. An office held quamdiu se bene gesserit meant and means no more than that the office holder could not be removed so long as he conducts himself well in his office; that being decided, in the first instance, by the grantor:
Harcourt v Fox 1 Show. 46, 506, 536; 89 ER 680, 720, 750.

4. Whether a person conducts himself well in his office must, of course, depend on the office. Wilful non-attendance would not be misconduct where the duties of the office are for example

delegable: it would of course now be misconduct in the case of a judge.
Earl of Shrewsbury's case (1610) 9 Co. Rep. 42a, 50a; 77 ER 793, 804.

5. Similarly, in relation to matters not involving the duties of the office, the question is whether the office holder has so misbehaved as to warrant removal from the office. Regard must be had to the nature of the office: campaigning for a political party may not be misbehaviour in a public servant holding office under the Public Service Act 1922 but would be in a judge.

6. It is submitted that conduct seriously or persistently contrary to accepted standards of judicial behaviour constitutes misbehaviour within the meaning of section 72.

7. The proposition that misbehaviour requires conviction for infamous offence, derives, in point of judicial authority, solely from the decision of Lord Mansfield in Rex v Richardson (1758) 1 Burr 517; 97 ER 426.

8. The question for decision in Richardson's case was whether the Corporation of Ipswich had power to

amove certain aldermen for not attending a Court. The decision centred on the implied powers of corporations to remove officers. It is not possible to equate the position of a judge of the High Court of Australia with that of an alderman of a municipal corporation: behaviour which might make a judge "infamous" or render him unfit to hold office might not have the same result for an alderman. Neither is it possible to equate the powers of the Houses of Parliament and of the Governor-General in Council under the Constitution with the position of a municipal corporation.

9. Richardson's case was not expressed to contain a definition of "misbehaviour". Neither is it clear that Lord Mansfield used the word "offence" as meaning a crime.

10. It is apparent from the argument for the petitioner in Barrington's case which is set out at page 859 of Todd's Parliamentary Government in England that the patent of a judge could be repealed in England for misconduct not extending to a legal misdemeanour.

11. Absurdities could well arise if a criminal conviction were necessary before an address could

be made arising from behaviour not including the duties of an office. The absurdities include where the office holder had been tried for a serious criminal offence and acquitted but then boasted that he was in fact guilty of the offence: because he had not given sworn evidence at his trial, he could not be charged with perjury. Similarly, if an office holder were tried for a serious offence and convicted but the conviction were quashed for some technical reason such as a limitation period having expired. Another example would be where the office holder had been tried for a serious offence involving dishonesty but the Court, having found him guilty, did not proceed to conviction.

12. There would also be absurdities if, although a conviction was not necessary to constitute misbehaviour, criminal conduct was. On that view, a judge who had campaigned publicly for the election of a particular political party could not be removed. An office holder who engaged in discussions with others to commit a crime but in circumstances falling short of establishing a conspiracy would, on this view, be immune. Similarly, a judge who habitually consorted with known criminals in a jurisdiction where the offence of consorting had been abolished could not

be the subject of an address. Another example would be where a judge deliberately avoided paying his just debts until proceedings were taken against him by his creditors.

13. Alternatively, it is submitted that if misbehaviour in respect of an office had, in 1900, a technical meaning, that meaning was not carried forward into section 72 of the Constitution.

14. On this argument it is accepted that misbehaviour in relation to the removal of judges was limited to firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty or non-attendance; and thirdly, conviction for any infamous offence by which, although not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. (See the Opinion of the Victorian Law Officers: Votes and Proceedings of the Legislative Assembly, Victoria, 1864-5 Vol 2 p 10).

15. The procedures available were either outside the Parliament, by a writ of scire facias or information or indictment, or within Parliament by impeachment or by way of address by both Houses.

In the latter case the Houses were not limited to grounds which might constitute an offence.

16. It is submitted that in investing each of the Houses of Parliament with the power to determine the question of whether or not there had been misbehaviour, it was intended by section 72 to make Parliament the judge and to free it from any technical meaning of "misbehaviour". It is submitted that in deciding that Parliamentary proceedings were to be the sole procedure it was not intended to limit the application of the procedure to circumstances which would have justified removal by the Crown apart from an address.

17. The independence of the judiciary is protected by the role of the Courts in determining in a given case whether specified conduct could not amount to misbehaviour. In other words, the meaning of "misbehaviour" is justiciable and in a case where there was no behaviour which could constitute misbehaviour any attempt by the Houses to make an address could be challenged in the High Court. Alternatively, any attempt by the Executive to act on such an address could be challenged.

18. It is also the case that section 72 protects the judge as office holder from interference by the grantor, the Crown. The power of the grantor to remove cannot be exercised except upon fulfilment of the condition of an address by each House. In other words, it is not a mere breach of condition that exposes a judge to removal but a breach proved in the Parliament and upon which the Parliament has decided to act. It would seem also that the Governor-General in Council retains a discretion as to whether he should act on the address. If advised not to act by his Ministers then he could not do so.

RE THE HONOURABLE LIONEL KEITH MURPHY

Gyles

"PROVED MISBEHAVIOUR" - SECTION 72 CONSTITUTION

OUTLINE OF ARGUMENT by Gyles

1. It is important to distinguish between the grounds for removal of a judge and the procedure for removal of a judge. Prior to 1900, a judge who held office during good behaviour could be removed by the Crown for breach of that condition of tenure, as with any other office holder from the Crown upon that tenure, by the writ of scire facias, or, by virtue of the Act of Settlement, could be removed by the Crown upon address from both Houses of Parliament for any cause (whether or not a breach of the condition of good behaviour). There was also the possibility of impeachment, which may be put aside for the present purposes. It should also be noted that many judges did not hold office during good behaviour but rather during pleasure (including colonial judges).

Todd - Parliamentary Government in England, volume 1, pages 188-198 (see also the various authorities to be referred to below).

2. Thus, the Constitution takes an established procedure for removal (address from both Houses of Parliament) and makes it the sole procedure, but limits the application of the procedure to those grounds which would have justified the removal of the Judge by the Crown without an address. So that to remove a Federal judge, there are two requirements - the first is that there must be agreement between each House of the Legislature and the Executive, and the second is that there must be circumstances or grounds "proved" which amount to a breach of the

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condition of tenure of good behaviour.

3. Reference to the Convention debates shows that the framers of the Constitution were well familiar with the common law position, and made a deliberate choice to increase the independence of the Federal judiciary beyond that of even the judges of the High Court in England, because of the central role that it plays in upholding the Constitution (in particular in deciding issues between Commonwealth and States), a role not played by the common law or colonial courts.

4. A judge is appointed to a public office of the same character as other public offices.

VICTORIAN LAW OFFICERS (INFRA)

Halsbury - Laws of England, 4th edition, Constitutional Law, volume 8 para. 1107.

Marks v. Commonwealth (1964) 111 CLR 549 at 586-9.

Terrell v. Secretary of State (1953) 2 QB 482, 498-9 (see also as to "office" Attorney General v. Perpetual Trustee (1954) 92 CLR 113, 118-121; Miles v.Wakefield Council (1985) 1 WLR 822; Marks v. Commonwealth, supra, at 567-572).

5. Loss of tenure of office by reason of misbehaviour in office has always been a well-recognised concept. It only relates to matters occurring during office and with the necessary connection with office.

Earl of Shrewsbury's Case (1610) 9 Co. Rep. 42, 50; 77 ER 793, 804.

Coke 4 Inst. 117

Cruise's Digest, volume 3 "Offices" paras. 98-111.

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Comyn's Digest, volume 5 "Officer" pages 152-7.
Bacon's Abridgment, volume 6 "Offices and Officers" pages 41-6.
Harcourt v. Fox 1 Shower 506, 519, 534-6.
R. v. The Mayor etc. of Doncaster 2 Ld. Raym 1565; 92 ER 513.

6. The only extension of this concept was to include conviction of an infamous offence during office.

Rex v. Richardson 1 Burrow 539.

There is no authority for the proposition that "conduct unbecoming" or any such concept has been a ground for removal of a public office holder. There was even a question as to whether misbehaviour connected with office, which is also a crime, requires conviction to be proved.

Bagg's case 11 Co. Rep. 93B 98A
R. v. Hutchinson 8 Mod. 99; 88 ER 77.

The distinction is well illustrated by the case of Montagu v. Van Dieman's Land 6 Moore 489; 13 ER 773. The first ground argued to justify amoval was clearly appropriate, the second ground was not.

7. These principles have always been held to apply to judges as well as other office holders, and the framers of the Constitution, and the Legislature which passed the Constitution, must be taken to have been aware of them. Indeed, Mr. Isaacs (as he then was) read the relevant portion of Todd to the Convention. Windeyer J. in Capital TV and Appliances Pty. Limited v. Falconer (1970-71) 125 CLR 591 at 611-2 said:-

"...the tenure of office of judges of the

that

> High Court and of other Federal Courts but is assured by the Constitution is correctly regarded as of indefinite duration, that is to say for life, capable of being relinquished by the holder, and terminable but only in the manner prescribed, for misbehaviour in office or incapacity."

Opinion of the Victorian Law Officers 1864 (Votes and Proceedings of the Legislative Assembly, Victoria 1864-5 volume II c2 Page 11).

Quick and Garran - The Annotated Constitution of Australian Commonwealth para. 297 pages 731-2.

Zelman Cohen and David Derham - The Independence of Judges 26 ALJ 462, particularly at 463 (see also 26 ALJ 582).

Wheeler - The Removal of Judges from Office in Western Australia, Western Australian Law Review 305, particularly at 306-7.

Halsbury's Laws of England, 4th edition, Constitutional Law, volume VIII para. 1107 (which is in identical terms, so far as is relevant, to the first edition of Halsbury on the same point, the authorship of which is attributed to Holdsworth).

Shetreet - Judges on Trial 88-89.

Vol 2

Anson - The Law and Custom of the Constitution Part I 222-223 (2nd ed. 1907).

Renfree - The Federal Judicial System of Australia p 118.

Hearn - The Government of England (1867) 82.

Maitland - The Constitutional History of England 313.

Hood Phillips - Constitutional and Administrative Law 6th ed. 382-2.

8. It should be noted that tenure for a term defeasible upon misbehaviour, or tenure during good behaviour (which

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amount to the same thing) is a common feature of offices created by the Federal Parliament. Whilst some of these offices are judicial or quasi judicial, the great majority are not - they are administrative or commercial. A list will be provided at the hearing. It is perfectly obvious that the well-known principles which apply to removal from office are applicable in relation to these office holders, as the word "misbehaviour" would be given the normal meaning attributed to misbehaviour in office. The position of a judge is no different.

9. It is also to be noted that disqualification of Members of Parliament and Aldermen of Councils depends upon conviction.

Constitution ss 44, 45.
Erskine May - Law etc. of Parliament, 18th edition, page 39.
Constitution Act (NSW) s 19.
Local Government Act (NSW) s 30.
In re Trautwein (1940) 40 SR (NSW) 371.

10. Office holders who have a tenure during good behaviour stand in sharp contrast to office holders at pleasure, and to servants. They are given that tenure in order to secure independence in the conduct of the office, for the benefit not only of the office holder, but of the public generally. If an office holder is liable to be removed for conduct not connected with office otherwise than by conviction in the courts of the land, because of "conduct unbecoming the office" then independence is diminished. The opportunity for direct and indirect pressure from disaffected litigants, political crusaders, politicians, the executive and even other

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judges upon a judge making unpopular decisions is greatly increased. There are no criteria by which to judge the conduct. The evil is particularly obvious when (as is often the case) the one political party controls both Houses of Parliament. It is not a necessary incident of judicial office.

Shetreet - Judicial Accountability

11. The effect of a submission to the contrary of the foregoing is to render nugatory the obvious intent of s.72. If "proven misbehaviour" simply means "any conduct which Parliament considers to be inconsistent with the holding of office" or "any conduct which Parliament considers unbecoming a judge", then it is the equivalent of the pre 1900 position under the Act of Settlement where Parliament could address the Crown for removal for any cause. At least in the case of conduct not connected with office, "proved" must mean "proved by conviction".

12. The role which the Houses of Parliament have in relation to misbehaviour not in office is to judge whether the conviction is of an offence sufficient to warrant removal.

APPENDIX 6 (ii)

IN THE MATTER OF

SECTION 72 OF THE CONSTITUTION

OPINION

1. I am asked the meaning of "misbehaviour" in section 72 of the Constitution, and, in particular, whether misbehaviour for this purpose is limited to matters pertaining to the judicial office in question and conviction for a serious offence which renders the person concerned unfit to exercise the office.

2. So far as relevant, section 72 provides -

> 72. The Justices of the High Court and of the other courts created by the Parliament -
>
> (i) Shall be appointed by the Governor-General in Council:
>
> (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

3. Clearly the ambit of the grounds for removal from office embraced by section 72 is limited by comparison with the position of judges under English law. Section 72 gives conscious effect to the principle that the judiciary in our Federal system should be secure in their independence from the legislature and the executive. This was a matter which considerably exercised attention in debates during the drafting processes leading to its final formulation. Quite deliberately, the conventional grounds for termination of judicial tenure were narrowed.

4. The English position is that judges hold office during good behaviour or until removed upon address to the Crown by both Houses of Parliament.

5. Coke described the grant as creating office for life determinable upon breach of condition: Co. Litt. 42a. Now tenure is until retiring age. A judge may be removed by the Crown for misbehaviour (or want of good behaviour) without any address from Parliament. The position as to su misbehaviour is conveniently summarised by Todd, Parliamentary Government in England, ii, at 857-8 -

> 'The legal effect of the grant of an office during "good behaviour" is the creation of an estate for life in the office.' Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour But "like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury.

6. The contrasting Parliamentary jurisdiction to address for removal is described by Todd (at 860) as an additional power unrelated to breach of condition which -

> ... the constitution has appropriately conferred upon the two Houses of Parliament - in the exercise

> the proceedings against offending judges, the importance to the interests of the commonwealth, of preserving the independence of the judges, should forbid either House from entertaining an application against a judge unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both Houses in an address to the crown for his removal from the bench. 'Anything short of this might properly be left to public opinion, which holds a salutary check over judicial conduct, and over the conduct of public functionaries of all kinds, which it might not be convenient to make the subject of parlimentary enquiry.'

9. Under our Constitution Parliamentary address is the only method for judicial removal. The reason sufficiently is summarised by Quick and Garran, The Annotated Constitution of the Australian Commonwealth, 733-4, under the heading "Reasons for Security of Judicial Tenure":

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. "Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained ... Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge". (Todd, Parl. Gov. in Eng., i. 574.)

Hence the structure of the Constitution itself explains this direct limitation upon the power of judicial removal. The desire is to protect the judiciary as the interpreters of the Constitution.

10. Clearly section 72 excludes all modes of removal other than the one mentioned. This deliberate limitation, apparent from the terms of the section, is emphasised by permissible consideration of legislative history. To paraphrase what Stephen J. said in Seamen's Union of Australia v. Utah Development Co., (1978) 144 C.L.R. 120, 142-4, it is from the successive drafts of the Bills which ultimately became our Constitution that the true role of section 72 emerges; its history and origins cast light upon meaning, the precise effect of which may otherwise be subject to some obscurity.

11. The first draft of the Commonwealth Bill of 1891 departed from English and colonial precedent and tied revocation of office held during good behaviour to address from both Houses. At Adelaide, in the 1897 Bill, this intention was made clear. In committee, tenure was further secured by resolution to limit parliamentary power of intervention to cases of misbehaviour or incapacity. The clause read:

> 72. The Justices of the High Court and of the other courts created by the Parliament:
>
> (i) Shall hold their offices during good behaviour:
>
> (ii) Shall be appointed by the Governor-General in Council:

(iii) Shall not be removed except for misbehaviour or incapacity, and then only by the Governor-General in Council, upon an Address from both Houses of the Parliament in the same Session praying for such removal.

In the Melbourne session on the 31st January 1898 Mr Barton successfully moved that tenure be further secured by providing that a parliamentary address must pray for removal "upon the grounds of proved misbehaviour or incapacity".

12. Although their Honours regarded it as unnecessary then to consider the extent to which the Debates may be regarded in the construction of the Constitution, in Re Pearson; Ex parte Sipka, (1983) 57 A.L.J.R. 225, 227, Gibbs C.J., Mason and Wilson JJ. accepted Griffith C.J.'s dictum in The Municipal Council of Sydney v. Commonwealth, (1904) 1 C.L.R. 208, 213-214, that it is permissible to have regard to Convention Debates, "for the purpose of seeing ... what was the evil to be remedied". Perusal of the Adela and Melbourne Convention Debates confirms the extent to whic the delegates desired to deal with the need adequately to safeguard the independence of the judiciary as an essential feature of the separation of powers in the Federal system. Todd's summary of the English position (set out in paragraph 5 above), which was read by Mr. Isaacs at Adelaide on 20th April 1897 (Convention Debates 948-9), was the received meaning of misbehaviour. Each of the successive amendments to the draft clause was intended further to limit, for the purpose of the

Constitution, the power of removal to a single specific and narrow basis related solely to the established ground of removal for breach of condition for good behaviour. The general discretionary power of Parliament to address for removal on grounds other than misbehaviour, in the technical sense understood by the delegates, was eliminated; with the function of finding such misbehaviour vested in the Parliament rather than in the Executive.

13. What then is proved misbehaviour or incapacity? Incapacity is easily dealt with: it extends to incapacity for mental or physical infirmity, which always has been held to justify termination of office: see Todd, at 857. The addition of the word "incapacity" does not alter the nature of the tenure during good behaviour; it merely defines it more accurately: see Quick and Garran, at 732.

14. As noted in paragraph 5 above, Todd, at 857-8, purported exhaustively to define misbehaviour as breach of the condition for judicial office held "during good behaviour" as including -

(1) the improper exercise of judicial functions;

(2) wilful neglect of duty or non-attendance; and

(3) the conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise.

Todd's commentary, at 858, was that the decision of whether the first category of misbehaviour is constituted rests

with the Crown. However in the case of the third category, misconduct outside the duties of office, he stipulated misbehaviour must be established by previous conviction by a jury. Similarly Halsbury's Laws of England, 4th ed, viii, para. 1107, which accepts Coke's statement that "behaviour" means behaviour in matters concerning the office and also the exceptional case of conviction upon indictment for any infamous offence of such a nature as to render the person unfit to exercise the office. Much might be said as to the received meaning of infamous offence. It is discussed in R. v. Richardson (1758) 1 Burr. 517, in the context of removal from office. Bacon's Abridgement, 7th ed., iii, 211 regarded such offences as embracing convictions for treason, felony, piracy, praemunire, perjury, forgery, and the like, together with crimes with penalty "to stand in the pillory, or to be whipped or branded". All this is somewhat archaic for contemporary definition. Maxwell J. in In re Trautwein, (1940) 40 S.R. (N.S.W.) 371, warned against exhaustive definition, and adopted the sensible approach of having regard to the nature and essence of a proved offence without attempting a definition or enumeration of the crimes which fall within the expression. To his Honour (at 380) infamous crime was one properly described as "contrary to the faith credit and trust of mankind". Such ambulatory approach seems appropriate to give continuing content to any limitation expressed by reference to infamous offence, although it certainly does not close the otherwise open texture of meaning.

15. However defined, Todd's third category of breach of condition for office held during good behaviour requires conviction for offence. Hence it is curious that, without comment, Quick and Garran (at 731) accept Todd's three categories as defining misbehaviour for the purposes of section 72. However a definition requiring conviction for offence in misbehaviour not pertaining to office does not rest easily with Quick and Garran's clear recognition of the essential limitation of section 72 requiring address of Parliament upon the proved ground of misbehaviour as the sole basis for removal (at 731) -

> The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition - that of misbehaviour or incapacity - and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

Obviously "proved misbehaviour" is to be established to the Parliament and, whatever the offence, such proof is not predicated upon anterior conviction in a court of law.

16. The ultimate requirement of section 72 is for address upon "proved misbehaviour". Quick and Garran's views (at 732) are -

> No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full

opportunities of defence, and the proof established by evidence taken at the Bar of each House.

Odgers, Australian Senate Practice, 4th ed., 598, suggests, without discussion, that the probable procedure would be by way of joint select committee, with the accused being allowed full opportunities to defend himself. However it is difficult to see how Parliament adequately could discharge its obligation to address upon "proved" misbehaviour if the trial function were to be delegated (cf. FAI Insurances Ltd. v. Winneke (1982) 41 A.L.R. 1, 17 per Mason J., discussing delegation of enquiry by Governor-in-Council). Todd, ii, 860-875, requires "the fullest and fairest enquiry into the matter of complaint, by the whole House, or a committee of the whole House, at the Bar; notwithstanding that the same may have already undergone a thorough investigation before other tribunals" such as a select committee.

17. Inasmuch as the Convention Debates reveal mischief intended to be dealt with, clearly it was contemplated that Parliament could fix its own procedures: see Convention Debates, 20th April 1897, 952, (Mr Isaacs and Mr Barton) and 959-960 (Mr Kingston). At the Melbourne Convention it was made clear that the judge would be entitled to notice and to be heard: (see Convention Debates, 31st January 1898, 315, (Mr Barton)). Hence Parliamentary discretion as to mode in which power should be exercised is in the context of obligation that charges be formulated, and full opportunities for defence be furnished, before

18. Quick and Garran reject any analogy between the Parliamentary discretion to address on grounds which do not constitute a legal breach of the condition on which office is held and the position which obtains under section 72. After reciting Todd's summary of the discretion in Parliament and in particular his conclusion that Parliament is "limited by no restraints except such as may be self-imposed" (set out in paragraph 6 above), the authors note (at 731) -

> These words are quite inapplicable to the provisions of this Constitution. Parliament is "limited by restraints" which require the proof of definite charges; the liability to removal is not "a qualification of, or exception from, the words creating a tenure," but only arises when the conditions of the tenure are broken; and though the procedure and mode of proof are left entirely to the Parliament, it would seem that, inasmuch as proof is expressly required, the duty of Parliament is practically indistinguishable from a strictly judicial duty.

19. The conferring of exceptional function to find proved misbehaviour is not equated to vesting discretion in Parliament to define misbehaviour constituting breach of condition of office. The general power of a Parliament to address for removal where there is not technical misbehaviour is negated by section 72. The power is limited to address only upon proof of misbehaviour, and neither House is at large to define and recognize misbehaviour as it pleases. Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning related to offences against the general law of the requisite seriousness to be described as infamous. To this extent it has an ascertainable

meaning, even if content varies in particular circumstances In consideration of the issue of proved misbehaviour Parliament is obliged to apply this meaning.

20. The inquiry is whether the offence is of such nature as to render the person unfit to exercise the office, although it is not committed in connection with the office. The notion that private behaviour may affect performance of official duty was expressed by Burbury C.J. in Henry v. Ryan, (1963) Tas. S.R. 90, 91:

> ... misconduct in his private life by a person discharging public or professional duties may be destructive of his authority and influence and thus unfit him to continue in his office or profession.

Sir Garfield Barwick, in opinion of 18th November 1957 on clauses of the Reserve Bank, Commonwealth Bank and Banking Bills of 1957, dealing with office held "subject to good behaviour", wrote -

> Good behaviour ... refers to the conduct of the incumbent of the office in matters touching and concerning the office and its due execution, though the commission of an offence against the general law of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office would be a breach of the condition of good behaviour even though the offence itself was unrelated to the duties and functions of the office ...
>
> There is, in my opinion, no significant difference between a condition of good behaviour and a condition against misbehaviour. Indeed, in the older books the word "misbehaviour" is often used as synonymous with a breach of good behaviour. Thus, the "misbehaviour" in the Bill will be held to refer to conduct touching and concerning the duties of the member in relation to the office, but will also include acts in breach of the general law of such a quality as to indicate that the member is unfit for office.

I concur with this opinion. It represents a contemporary statement of the quality of offence not pertaining to office which may constitute misbehaviour. As discussed in paragraph 14 above, the content of offence so expressed is much the same as what may now be understood as embraced by infamous offence.

21. It follows that the terms of section 72 dictate meaning for "proved misbehaviour". The fundamental principle of maintaining judicial independence is recognized by excluding all modes of removal other than for misbehaviour as a breach of condition of office. In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law "of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office". Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral or social character or conduct. The Parliamentary enquiry is whether commission of an offence of the requisite quality and seriousness is proved. Parliament would act beyond power if it sought to apply wider definition or criteria for misbehaviour than the recognized meaning of misbehaviour not pertaining to office.

22. Parliament has, of course, a residual discretion not to address for removal, even if proved misbehaviour is found.

23. Accordingly the question asked in paragraph 1 is answered -

Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to -

(1) judicial office, including non-attendance, neglect of or refusal to perform duties; and

(2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.

SOLICITOR-GENERAL

CANBERRA

24th February 1984.

APPENDIX 4

OPINION OF MR C.W. PINCUS, Q.C.

The first problem is the legal question of the meaning of "misbehaviour" in s.72 of the Constitution which reads, in part, as follows:

> "The Justices of the High Court and of the other courts created by the Parliament -
>
> (i) shall be appointed by the Governor-General in Council:
>
> (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity".

The suggestion has been made that "misbehaviour" has a technical meaning which significantly limits the power of removal. This view is adequately summarised in an opinion from the Solicitor General of 24th February 1984 with which I am briefed:

> "The conferring of exceptional jurisdiction to find proved misbehaviour is not equated to vesting jurisdiction in Parliament to define misbehaviour constituting breach of condition of office. The general power for Parliament to address for removal where there is not technical misbehaviour is negated by Section 72. ... Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning relating to offences against the general law of the requisite seriousness to be described as infamous..." (para. 19)

> "In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law 'of such a nature as to warrant the conclusion that the encumbent is unfit to exercise the office'. Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral social character or conduct. The Parliamentary enquiry is whether commission of an offence is of the requisite quality and seriousness is proved". (Para. 21).

Since, as will appear, I do not agree with the Solicitor General, it will be necessary to examine in detail the authorities on which he relies. Before I come to do so it is convenient to mention briefly the position with respect to removal of judges under the United States Constitution.

UNITED STATES.

In many respects the Australian Constitution was modelled upon that

of the United States. As to the removal of Federal judges, however, the language used here departed significantly from that which had, by 1900, produced a number of removals of judges in the U.S. Under Article III, Section 1, of their Constitution, judges hold office during good behaviour. The power to remove is by a process of impeachment on the ground of "Treason, Bribery and other High Crimes and Misdemeanours". When our Constitution was framed, there was at least an arguable view in the U.S. that the expressi "High Crimes and Misdemeanours" required proof of indictable offences: see in particular the work, written in 1891, by H.L. Carson: "The Supreme Court of the United States - Its History". If it had been intended, by our draftsme to require the commission of a defined offence against the law of the land, one might have expected the use of the American phrase "Treason, Bribery and other High Crimes and Misdemeanours" or some adaptation of it. Instead, the simple word "misbehaviour" was used - a word which does not, to the mind innocent of any "technical" meaning, suggest the necessity of proof of an offence.

It is significant, also, that in this century it seems to have beco accepted in the United States that in no case is proof of a specific violatio of a statute necessary for removal. In 1972 there was published by the Congressional Research Service of the Library of Congress a work "The Constitution of the U.S. - Analysis and History". At p.578 the (unknown) author suggest that the Constitution allows -

> "... the removal of judges who have engaged in serious questionable conduct although no specific universal statute

This point is elaborated by W. Wrisley Brown in a useful note in Vol.26 of the Harvard Law Review at p.684; he points out that the process of impeachment, which is that used to remove Federal judges (and Presidents) was taken over from an ancient English parliamentary process, the scope of which was not confined to crimes against the ordinary law of the land. An example (not referred to by Wrisley Brown) of the use of this process in England was the attempted impeachment of Warren Hastings for "high crimes and misdemeanours". As to the type of behaviour enlivening the Senate's jurisdiction the author says at p.692:

> "An act or a course of misbehaviour which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and this impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed function. Such an offence, therefore, may be characterised as a high crime or misdemeanour, although it may not fall within the prohibitory letter of any penal statute. Furthermore, an act which is not intrinsically wrong may constitute an impeachable offence solely because it is committed by a public officer... For example, a judge must be held to a more strict accountability for his conduct than should be required of a marshal of his court...".

This exposition appears to me persuasive.

I refer also to the note in 51 Harvard Law Review p.335 to the effect that the words "Treason Bribery and other High Crimes and Misdemeanours" apply to matters other than indictable offences, relying on the decision in Ritter v. U.S., noted in 300 U.S. 668. It will be observed that the Supreme Court refused to entertain an appeal from Judge Ritter, who complained that the broad view of the meaning of "High Crimes and Misdemeanours" to which I have referred was applied against him by the Court of Claims.

Insofar as the American law provides any help, then, it gives no support to the view expressed by the Solicitor General. Of much more importance, however, are the law and practice in England and its colonies prior to 1900, and to those subjects I now turn.

ENGLAND.

Two hundred years before our Constitution was enacted, it had be the law in England (established by the Act of Settlement 1700) that judges held office during good behaviour "but upon the address of both Houses of Parliament it may be lawful to remove them". See Wade & Phillips "Constitutional Law" 8th Ed. (1970) pp. 8, 9. The effect of this enactment was, in my opinion, to permit removal of a judge in respect of matters done in his private capacity and not necessarily constituting an offence. The plainest case is that of Judge Kenrick referred to by Shimon Shetreet in his work "Judges on Trial" at p.143. In 1826 the judge was charged with prosecuting a poor man for theft in order that he might get possession of his house and then trying to persuade the man to plead guilty, promising to ask for leniency. Shetreet says:

> "The important principle established in this case was that 'by the Act of Settlement it was the duty of the House to examine the conduct of the judges, if notoriously improper, even on matters that affected their private character'. Although it was generally agreed that misconduct of a judge in his private life may justify an address for removal, in the absence of clear evidence of corrupt motives, the House refused to interfere".

Just as importantly, there appears to be no trace, in the removal cases after the Act of Settlement, of the notion that in such questions the

constituted "good behaviour". If the draftsmen of our Constitution knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear.

Dr. Griffith Q.C. refers to Halsbury's Laws of England 4th Ed. Vol.8 para. 1107 and the acceptance there of the passage in Ch.12 of Volume 4 of Coke's Institutes, p.117 -

> "The Chief Baron is created by letters patent, and the office is granted to him quandiu se bene gesserit, wherein he has a more fixed estate (it being an estate for life) than the justices of either bench, who have their offices but atwill: and quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life and in like manner are the rest of the barons of the Exchequer constituted, and the patents of the Attorney General, and solicitor are also quamdiu se bene gesserit".

If this passage was intended, in the 17th century when it was written, to convey that a judge might misbehave as scandalously as he pleased in matters not concerning his office, without risking that office, it is hard to believe that it could be correct. Coke does not say anything about offences committed by a judge in such matters. However it came to be accepted that an office held during good behaviour (quamdiu se bene gesserit) could be terminated in respect of matters not concerning office and the leading case which established that was R. v. Richardson in 1758 reported in 1 Burrow 517. The officer whose conduct was in question in that case was a "postman" of the town of Ipswich - what we would call today an alderman. In view of the weight which this decision must carry if the view against which I argue is to be held correct, it is worth quoting the relevant part of Lord Mansfield's judgment in full:

> "There are three sorts of offences for which an officer or corporator may be discharged.
>
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2d. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3d. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.
>
> The distinction here taken, by my Lord Coke's report of this second resolution, seems to go to the power of trial, and not the power of amotion: and he seems to lay down, 'that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment'. So that after an indictment and conviction at common law, this authority admits, 'that the power of amotion is incident to every corporation'.
>
> But it is now established, 'that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction'.

By the date of R. v. Richardson the removal of judges was governed by the Act of Settlement referred to above and not by the general law with respect to removal of officials set out in R. v. Richardson. The case therefore had no bearing upon the removal of English judges. Further, the judgment of Lord Mansfield did not purport to be an interpretation of the expression "misbehaviour", which is not to be found in the report; nor, indeed, is "good behaviour" mentioned; the case is really about the inherent power of a corporation to dismiss its officers. It does not appear to me to follow, logically, from anything said in Richardson's case that the power of Parliament to remove judges is restricted in any such fashion as there laid down. Further, the case has never (as far as I have been able to ascertain), been regarded in England as having anything to do with the removal of judges, in the more than 200 years since it was decided.

Looking at the matter more b-

fathers of our Constitution intended to make the relatively simple language of s.72 able to be construed only by reference to such ancient English texts. It should be kept in mind that what the delegates were confronted with was the task of making a constitution for a new nation. I do not understand why it should be thought that they intended what they said to be read down by reference to what was said by Lord Coke about the tenure of the Barons of the Exchequer in 1628. It is more probable that what our constitutional draftsmen had in mind, as to the law about removal of judges, was English practice, or that with respect to colonial judges, in the 19th century.

THE PRIVY COUNCIL - COLONIAL JUDGES

There is a number of reported instances of removal or attempted removal of colonial judicial officers. Of these two went from Australia to the Privy Council in the middle of the 19th century.

The first case was Willis v. Gipps in 1846, reported in Volume 5 of Moore P.C. 379 (13 E.R. 536). That was decided under the statute of 22 Geo.III c.75, Section 2 of which gave a power of removal expressed, so far as relevant, in these terms:

> "And... if any person or persons holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised, without a reasonable cause to be allowed by the governor and council for the time being of such colony or plantation, or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such governor and council to amove such person or persons from every or any such office...".

Although the statute did not say so, the Privy Council held that the "amoval" could not lawfully be effected without giving the judge in question an

I have advised (above) that the power under s.72 cannot, as a matter of l be exercised ex parte but only after affording such an opportunity. The other, perhaps lesser, importance of the case is in the interposition of Baron Parke at p.391 of the report, which appears to be founded on the view that the law as to removal at common law was relevant under the stat

In the second of these cases, Montague v. Lieutenant Governor an Executive Council of Van Diemen's Land (1849) 6 Moore P.C. 489, 13 E.R. 7 the same statute was in question, with respect to a Tasmanian judge. One the complaints made about him was that he incurred indebtedness and frustr attempts to recover, on the part of the creditor, by misuse of his judicia office. At p.493 it is said that the Colonial Secretary wrote to the judg informing him that the matters in question "seriously affected his charact and standing as a judge of the Supreme Court". This, to my mind, suggests a broader and less technical view of the basis of removal of a judge than that based on R. v. Richardson (above). Sir F. Thesiger Q.C., who appeared against the judge, explained to the Board:

> "The chief grounds of complaint against him are, first obstructing the recovery of a debt, justly due by himself; and secondly, the general state of pecuniary embarrassment in which he was found to be in".

~~There is no trace, here, of the judge's position being~~ protected, as to ~~matters outside the exercise of his duties, by any requirement that an offe be proved;~~ it was not an offence to get into debt, however heavily. Counse also said that the behaviour complained of "tended to bring into distrust and disrepute the judicial office in the Colony". The judge's removal was upheld, despite the presence of an irregularity; the proceeding brought

against him had been expressed to be with a view of a suspension, not removal.

Although no reasons other than formal ones were given, it is noteworthy that no-one appears to have thought that there was a difficulty in accusing the judge of being in a "general state of pecuniary embarrassment". The statute said "neglect the duty of such office, or otherwise misbehave therein", words suggestive of the law as laid down by Coke. Yet it appeared to be accepted in the Privy Council that any sort of misbehaviour might suffice to justify removal. The Montague case tends against the applicability of Coke's view, in modern times, and against the notion that R. v. Richardson applies to the interpretation of our s.72.

In the same volume of Moore there is an Appendix consisting in a memorandum of members of the Privy Council on the removal of colonial judges. (See 16 E.R. 828). Again, the "technical" doctrine I am attacking is not reflected in it:

> "When a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, ... it would be extremely improper that he continue in the exercise of judicial functions...".

The expression "gross personal immorality" is surely not intended to be confined to commission of offences. To take a simple example, one would be confident that the authors of the memorandum would have regarded it as ground for removal if it were found that a judge had been conducting a brothel, whether or not his doing so was prohibited by statute in the place in which he held office. There is reference to moral misbehaviour, also, in Lord Chelmsford's observations on the memorandum which are to be found at

of the Appendix, referring to his view that certain matters should be decided in the first instance by the Privy Council:

> "These observations do not apply to grave charge of judicial delinquency, such as corruption; or to cases of immorality, or criminal misconduct".

In these expressions, the word "immorality" refers to conduct which is no of a judicial character and which is not criminal.

CONVENTION DEBATES

Having read the relevant parts of the debates in Adelaide in 1 and Melbourne in 1898, I am somewhat doubtful of the usefulness of the r made by the delegates, as a guide to the proper construction of s.72. Th discussion was sometimes a little confused, the delegates' notions as to likely effect of the proposed provisions were not by any means all the sa and it is unsafe to assume that those who did not speak out necessarily a with those who troubled to voice their opinions. All that having been sa in my view it is impossible to extract from the records evidence that any single delegate believed that the operation of s.72 would be limited in t fashion suggested by the learned Solicitor-General. The closest approac such an expression of view which I have been able to find was the speech Mr. Isaacs (later Isaacs J.) on 20th April 1897 (pp. 948-9) which is also referred to by the Solicitor-General. At one stage in this address (in t left-hand column of p.948) Isaacs implied that the word "misbehaviour" in this context is absolutely confined to misbehaviour as a judge, but he di not say that he favoured limiting the power of removal to that narrow gro He seemed to commend to the other delegates a

the then Victorian Constitution, which he summarised as follows:

> "So that a judge holds office subject to removal for two reasons - first, if he is guilty of misbehaviour, and, secondly, if the Parliament thinks there is good cause to remove him, when they may petition the Crown to do so".

He then quoted the passage from Todd set out in paragraph 5 of the Solicitor-General's opinion. It has been observed by another, and I agree, that the critical sentence in Todd commencing "Misbehaviour includes" is hardly suggestive of an exhaustive definition. At p.949 Isaacs quoted further from Todd:

> "But, in addition to these methods of procedure, the Constitution has appropriately conferred upon the two Houses of Parliament - in the exercise of that super-intendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of its judicial office.... This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held".

Note that the word "misbehaviour", where last used, plainly refers to misbehaviour other than that which would at common law have operated to put an end to an office held during good behaviour. Reading the remarks of Isaacs as a whole, there seems to me no solid ground for saying that he thought that the use of the word "misbehaviour" in the Constitution would confine the power of removal in the way suggested by the Solicitor-General - even if it were legitimate to infer that all the other delegates had the same view as did Isaacs.

I have noted, also, as additional evidence that Isaacs did not regard the use of the word "misbehaviour" in the then Clause 72 as [illegible]

any precise technical significance, the fact that he, like others, used the word "misconduct" in debate as synonymous with misbehaviour - see for example p.312 of the record of the Melbourne Convention, 31st January 1898.

I disagree, then, with the view of the Solicitor-General that s.7 in referring to misbehaviour used the word "in the technical sense understc by the delegates" - p.12. I think this is based upon a misreading of the debates and upon the misapprehension that at the end of the 19th century the notion of judicial misbehaviour justifying removal from office had some received technical meaning. The contrary is so; the Privy Council had long before made clear that such misbehaviour could consist in a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not amounting to the commission of an offence at all. I note that Mr. Wise, at p.945 and p.946 of the Adelaide debates, referred to colonial removal cases in terms which showed he was alive to the point that no crimin conduct is necessary to justify removal.

GENERAL

In my opinion, too much has been made of Todd's statement as to what misbehaviour "includes". Further, there has been drawn too readily the conclusion that the use of the word "misbehaviour" was intended to incorporat the law as to removal of judges in England prior to the Act of Settlement 170 An interesting example of this is to be found in the opening passage of Quick & Garron's "Annotated Constitution of the Australian Commonwealth" para. 297, in which the learned authors quote part of the passage from Coke

on p. 6 above. Notice that the authors quote, as if it laid down Australian law, Coke's view that "quamdiu se bene gesserit must be intended in matters concerning his office", implying that misbehaviour in non-judicial life cannot be relevant - a view which they immediately contradict by quoting Todd.

In my opinion, a safer course is to come to the Constitution unaided by any authority, in the first place, and see if there is an ambiguity. Is the word "misbehaviour" obscure? One is assisted, in construing it, by the fact that it is the justices of the High Court and of other courts who are being spoken of. It is, when one keeps the subject matter in mind, unlikely that it was intended to make judges who are guilty of outrageous public behaviour, outside the duties of their office, irremovable. I suggest an example suggested by an American impeachment case: Suppose a High Court judge took office as Patron of a political party, used the prestige of his office in making public addresses urging people to vote for that party, and openly engaged in election campaigns as a speaker, promoting the party's policies and attacking those of the other side. Although such conduct would be by no means an offence and would, indeed, be free from blame if done by anyone other than a judge, surely it would justify removal. I do not say that Parliament would be <u>obliged</u> to remove such a judge - merely that that would constitute misbehaviour giving rise to a discretion to remove him. It would be misbehaviour in a High Court judge, though not in an ordinary man, because it must lead to utter destruction of public confidence in the judge's ability properly to decide matters before him having a political flavour.

Argument against my view is based on the fact that the attachr to an office held for life, of a condition of good behaviour has been h not to put an end to the holding of the office, as to conduct outside official duties, in the absence of proof of a conviction. The reasons f my believing that that doctrine should not be held to govern the use of word "misbehaviour" in s.72 may be summarised as follows:

1. As to the judiciary, both in England and the Colonies it had become clear before 1900 that the power to remove for judicial misconduct was not so confined.
2. The law with respect to non-judicial removals, as to conduct outside office, required a conviction; the language of s.72 at least makes it clear that that is not necessary.
3. As a matter of practicality, it would have been foolish to leave Parliament powerless to remove a judge guilty of misbehaviour outside his duties, as long as an offence could not be proved; that remark applies particularly to the High Court, which was to occupy a position at the pinnacle of the Australian Court system, and to exercise a delicate function in supervising compliance with the requirements of the Constitution on the part of legislatures.

I note that the opinion of Sir Garfield Barwick, quoted by the Solicitor-General, is inapplicable to the construction of s.72 for two rea

firstly, because it relates to the construction of a condition as to good behaviour, which is not to be found in s.72; secondly, it has not to do with removal of judges under s.72 or at all, but to the security of tenure of bank officers. Lastly, I record the comments of the delegates at p.952 of the Adelaide convention, as casting doubt on the theory that there was an intention to limit the plain words of s.72 by ancient technical rules:

> "Mr. Isaacs: Who would be the judges of misbehaviour in case of removal of a judge?
>
> Hon.Members: The Parliament.
>
> Mr. Barton: The two Houses of Parliament.
>
> Mr. Isaacs: Would they be the judge of the misbehaviour?
>
> Mr. Barton: Unquestionably.
>
> Mr. Isaacs: If that is so it is all I contend for."

SUMMARY OF OPINION

As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.

C.W. PINCUS

14th May 1984

Government will be building on its proud record of sound economic management and progressive social reform which was established by last year's Budget and consolidated during the Autumn sittings this year.

This government has had to tackle, during its seventeen months in government, economic and social problems of a kind not seen in this country for over 50 years. Our program should be seen in this light.

Our major objective this sitting will be to provide sufficient fiscal stimulus to maintain the momentum of private sector expansion, including by direct support for business; to provide further improvements in pensions and other welfare payments, to provide tax cuts which will support the accord, boost family income and stimulate consumer spending - all this while achieving a significant reduction in the Budget deficit.

In addition to the key Budget Bills already introduced on Budget night we intend introducing further Bills to amend the Income Tax Assessment Act, the Income Tax (International Agreements) Act and the Bank Account Debits Tax Administration Act to implement measures announced in or before the Budget. We intend to continue our fight against tax avoidance with Bills to counter trust stripping schemes.

In addition to revising the Medicare levy threshold and ceiling we will introduce a Bill to amend the National Health Act and the Health Insurance Act which will, among other things:

alter drug pricing arrangements; and

encourage provision of respite care in nursing homes.

We will introduce a Bill to implement a new Commonwealth State Housing Agreement which will launch a ten year assault on housing-related poverty. In addition to a further social security and repatriation legislation amendment Bill we intend if time permits to introduce a supported accommodation assistance program to provide support for those in crisis situations and for the chronically homeless.

(The home and community care part of the aged care package is to be introduced in the Autumn sittings next year.)

We intend to amend the Trade Practices Act by repealing sections 45D and 45E and will be amending the Conciliation and Arbitration Act to provide a mechanism whereby secondary boycott disputes can be dealt with by the Conciliation and Arbitration Commission.

We also intend to introduce a Bill to bring about a major consolidation of all existing veterans' entitlement legislation.

The Government will be embarking on major industry restructuring and assistance measures all of which have already been announced and some extensively canvassed. Briefly these will include legislation to:

establish an automotive industry authority as part of the revised assistance to the industry. Associated with this initiative will be the introduction of measures to provide support for the design and development of motor vehicles;

revise industry arrangements for the retail marketing of petrol;

amend the Petroleum (Submerged Lands) Act to facilitate and encourage off-shore petroleum exploration and development activity, and to give effect to the area to be avoided by ships around the Bass Strait petroleum production facilities;

introduce a package of Bills to restructure the wheat marketing and pricing arrangements;

revise arrangements for the fishing industry to introduce a new management policy and further assistance measures;

amend the export inspection charge provisions for meat, dairy products and eggs following review of these procedures;

revise arrangements for the canned fruits marketing industry.

The Government also intends to introduce, if time permits, a package of Bills to reorganise the dairy marketing industry. These will not be passed during the Budget sittings but will provide the opportunity for detailed public debate to take place on a more informed basis.

As already announced by the Minister for Education and Youth Affairs the Government will introduce a major item of legislation to revise the system of grants to the States and the Northern Territory for schools assistance. This will be introduced together with States Grants Bills for tertiary education, as well as Bills to adjust grant levels in line with cost supplementation arrangements.

In line with an announcement made last April the Government intends introducing a Bill to amend various electoral, health, social security and education Acts to bring arrangements for Christmas Island broadly into line with the rest of Australia.

Bills will also be introduced to:

enhance the role, jurisdiction and enforcement powers of the Human Rights Commission;

introduce changes to the supplementary licence scheme for broadcasting and television in preparation for its early commencement;

guarantee borrowings raised by Qantas to purchase Boeing 767 aircraft;

enhance the Commonwealth's ability to collect air navigation charges and introduce separate airport charges;

enable the *Empress of Australia* to be replaced, thereby ensuring the survival of the Bass Strait sea passenger service;

replenish Australia's contribution to the International Development Fund;

restrict the use of Australian passports to Australian citizens and remove the distinction between immigrants who are British subjects and those who are not;

implement the report of the remuneration tribunal in respect of salaries and allowances following the 1984 general review.

In addition the usual Statute Law (Miscellaneous Provisions) Bill will include a number of matters of minor significance.

We will of course be proceeding with Bills before the Parliament, including:

The Constitution Alteration Bills;

Defence and Repatriation Bills;

Conciliation and Arbitration; and

the six Export Inspection Charge Bills

As always, unforeseen circumstances may give rise to additional legislation and pressure on parliamentary debating time as well as on the Parliamentary Counsel's time and resources may not enable all of the legislation forecast to come forward as soon as we would like. In addition, the Government may still consider other measures which could result in legislation in the current sittings. However, the program I have outlined continues the direction of reform established by the Government thus far.

I commend the Government's program and look forward to the assistance of honourable senators in its implementation.

SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

Ministerial Statement and Notices of Motion

Senator GARETH EVANS (Victoria—Attorney-General) - by leave - I wish to make a statement on the Government's response to the report of the Senate Select Committee on the Conduct of a Judge. The issues confronting the Government and the Senate arising out of the report of the Senate Select Committee on the Conduct of a Judge are about as serious as could possibly be imagined. An allegation has been made against a very senior Federal judge that, if substantiated, would amount to the commission by that judge of the criminal offence of attempting to pervert the course of justice. The evidence in support of that allegation has failed to convince the Senate Committee as a whole that there is a prima facie case against the judge, but equally it has failed to convince all members of the Committee that there is not.

The decisions that are taken on this report will have major consequences for the independence and the integrity of the Federal judiciary and the whole balance of power between the courts, the Executive Government, and each House of Parliament. Also, they obviously will have the most important consequences for the Federal judge concerned, Mr Justice Lionel Murphy, who has served on the High Court since 1975. He is now the most senior judge on the High Court, after the Chief Justice and Sir Anthony Mason, and, as occasion requires, presides over that court.

The matters to be dealt with must therefore not be approached lightly or dismissively, or in any partisan spirit. It is particularly important that the decisions we make in this matter—either on the part of Government or on the part of the Senate—not be a hothouse reaction to passing pressures that ignore the deeper issues and values that are involved. What we do now transcends the particular case. It will set the pattern for how our institutions respond in future to grave allegations of judicial misconduct without jeopardising the independence and integrity of the judiciary.

Proper Approach to Section 72

The decisions we take need to be taken in the light of the proper procedure and criteria to be applied when a House of Parliament addresses a question of misbehaviour under section 72 of the Constitution. Section 72 provides that a Federal judge:

shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for the removal on the ground of proved misbehaviour or incapacity.

Address for removal is the only action that Parliament can take.

The Government's position on the criteria and procedures that are available under section 72 has been clear from the outset. On 28 February, I tabled the opinion of the Solicitor-General, which I believed—and still believe now—to be the sound and the correct interpretation on this matter. It pays due regard to the role of the Houses of Parliament, and at the same time addresses the basic issues of the independence of the judiciary and the separation of powers. The Government does not accept the view of section 72 contained in the opinion of counsel to the Senate Committee, Mr Pincus, QC, insofar as it supports giving each House of Parliament more or less unfettered freedom to say what private misconduct constitutes misbehaviour. In this connection, Mr President, I now table a supplementary opinion by the Solicitor-General, which confirms his earlier opinion and explains in full the reasons why he, as does the Government, rejects Mr Pincus's approach. The Government's view, based on the authorities fully cited by the Solicitor-General——

Senator Chipp—Do you table that or incorporate it?

Senator GARETH EVANS—I am happy to incorporate it in *Hansard*, if I have leave to do so, at the conclusion of the statement.

Senator Chipp—That would be valuable, if the Attorney-General would not mind doing so.

The PRESIDENT—Will the Attorney-General seek leave to have the document incorporated in *Hansard* at the end of the statement?

Senator GARETH EVANS—I will, Mr President. The Government's view, based on the authorities fully cited by the Solicitor-General, is that the concept of 'proved misbehaviour' in section 72 has only two possible areas of application. The first area is misbehaviour in the exercise of judicial functions, including neglect or non-attendance. In the absence of any question of criminal or civil liability of a kind appropriately

proved in the courts, 'proof' here would have to be to the satisfaction of each House of the Parliament, following procedures established by Parliament.

The second area is misbehaviour involving a breach of the general law of such a quality as to indicate unfitness for office. Parliament would normally rely for 'proof' here on the outcome of ordinary court proceedings, but Parliament could also, should it choose to do so, prove the matter to its own satisfaction by properly established parliamentary procedures.

Counsel for the judge, Mr David Bennett, QC, has expressed the view that a conviction in court is necessary to establish 'proved misbehaviour', at least in relation to conduct not immediately pertaining to the duties of judicial office. The Government's view, as I have previously indicated to the Parliament, is not so limited. The traditional authorities, in particular Quick and Garran, in their *Annotated Constitution of the Commonwealth of Australia*, acknowledge a proper determining role for Parliament itself, although emphasising the very judicial way in which Parliament would need to act in such matters. Thus Quick and Garran say:

> No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full opportunities of defence, and the proof established by evidence taken at the Bar of each House.

The reference is to the 1901 edition, at page 732. While acknowledging a proper role for Parliament itself, as well as the courts, in establishing 'proved misbehaviour' for the purposes of section 72, the Government does not, however, accept that it would be constitutionally capable for the actual proof of misbehaviour to be vested in any other kind of body—for example, a royal commission, or a parliamentary commissioner or parliamentary commission purporting to exercise power delegated by one or both Houses. This follows, in our view, from the necessarily judicial character of the 'proving' process; it is a very long established principle in Australian constitutional law that Federal judicial power can be exercised only by courts either created or vested with jurisdiction under chapter III of the Constitution, and there could be few more sensitive tasks of a judicial character than determining proof of misbehaviour against a High Court judge. The only exception, as we see it, to the rule requiring judicial proof or court proof is that which enables proof to the satisfaction of Parliament itself, and that power is in turn vested in the Parliament by virtue of section 72 (ii)—itself part of chapter III of the Constitution which gives the legislature a central role in the removal process.

The most fundamental difficulty with Mr Pincus's interpretation of section 72—insofar as it would allow Parliament to range more or less at will in determining what constitutes 'proved misbehaviour' rather than being confined to the two categories I have identified above—is that it takes no account of the object or purpose of security of tenure given to judges by section 72. The Solicitor-General's original opinion points out that section 72 was intended to give 'conscious effect to the principle that the judiciary in our Federal system should be secure in their independence from the legislature and the executive'. The Pincus opinion just does not address the issues of judicial independence and separation of powers, and the consequences—for removal procedures under the Constitution—that flow from the emphasis given in the Constitution to those principles. Quick and Garran put the point very well at page 733 of their book quoting the relevant part of Todd's *Parliamentary Government in England*:

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained . . . . Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge.

Some classes of 'misbehaviour' may not be subsumed by the approach of Quick and Garran—for example, partisan political activity or notorious private behaviour not directly related to, or affecting, the conduct of judicial office. So be it. What may be a cause for admonition by the Chief Justice of the court in question, peer group pressure and like forces, should not necessarily be regarded as grounds for dismissal. The separation of powers principle demands that the power of Parliament to remove a judge not extend to undefined residual areas of behaviour which are neither clearly illegal nor clearly related to the performance of judicial duties.

The 'Age' Tapes and the Briese Allegation

It is well to recall that the Senate Committee was established to inquire into and report upon the conduct of the judge as revealed by the *Age* tapes and transcripts. The Committee's findings on this question could not be more clear-cut. They were, first, that it was unable to conclude that these materials relating to the conduct of a judge were authentic or genuine except to the limited extent that limited acknowledgements had been made. Secondly, as to the tape recordings, there is nothing contained therein which could amount to or provide evidence of misbehaviour of the judge, whatever interpretation of section 72 of the Constitution is accepted. As to the transcripts, the Committee reported that no facts had been established in respect of conduct revealed by them which constituted misbehaviour under section 72, whatever interpretation of misbehaviour is accepted. Well may David Solomon say in the *Australian Financial Review* of 28 August that the *Age* 'did not come out covered in glory from the Senate investigation' and that:

> . . . it is quite extraordinary that a paper which is generally concerned about proprieties should have carried such a thin report of the Committee's conclusions about material which the *Age* itself had published so prominently.

I say no more on that aspect.

The nub of the Committee's report clearly concerns the allegation made to it in the course of its inquiry by Mr Clarrie Briese, Chief Stipendiary Magistrate of New South Wales. The criminal nature of the allegation appears to have been downgraded by some commentators, but I point out that the Committee agreed, in paragraph 79 of its report, that the allegation of Mr Briese, if sustained by the evidence, was that Mr Justice Murphy had engaged in conduct which constituted the offence of attempting to pervert the course of justice. The Committee specifically referred to the offence to that effect created by section 43 of the Commonwealth Crimes Act. That is a very grave charge. The Committee did not seek to rule as a court on this charge but specifically limited itself to considering whether the evidence by Mr Briese could constitute the offence of attempting to pervert the course of justice. There was a difference of views on the Committee, as all know. Senators Tate, Crowley and Bolkus did not believe that the evidence of Mr Briese was of sufficient strength to establish a prima facie case of misbehaviour by the judge. Senator Durack and Senator Lewis, without finding that the judge had been guilty of misbehaviour, concluded that there was a prima facie case against the judge. Senator Chipp, for reasons he carefully explained in his dissenting report and in his statement to the Senate on 24 August, felt unable to express a conclusion on this matter.

The seriousness of this offence and the clear division of opinion in the Committee have led the Government to conclude that further action of some kind needs to be taken to clear the air, and to remove the cloud hanging over the judge and the High Court. The question is what. So far as misbehaviour occurring otherwise than in the exercise of judicial functions is concerned, there are simply no precedents to bind or guide us, except that during the term of my immediate predecessor, Senator Durack, a serious criminal charge involving conduct not pertaining to judicial office was brought against a member of the Family Court of Australia and the judge was acquitted. Apparently that was regarded as the end of the matter. On that occasion, certainly, the matter was not raised in the Senate by Senator Durack or, so far as I am aware, by any other senator. Certainly, the situation in relation to investigations by Senate committees on matters of routine legislative inquiry provides no precedent as to the course that the present Committee should have followed, or that we in the Senate should now follow or authorise, in relation to the interrogation of the judge in the context of the possible application of section 72 of the Constitution.

Possible Approaches for Resolution of the Matter

The Government has therefore given most serious consideration as to how this situation should be dealt with. One approach would be to consider the institution of criminal proceedings, having regard to the essentially criminal nature of the allegation that has been made. A second approach would be to confine further consideration of the matter to the Parliament, in particular by reconstituting the Senate Committee and directing it to conduct on this occasion a judicial examination of the issues relating to Mr Briese's allegation. A third general approach that has been carefully considered is whether the resolution of these matters might most appropriately be

achieved by a person or body, other than a criminal court, outside the political and parliamentary arena.

Approach I—Criminal Proceedings

In the Government's view, the proper course to adopt at this stage is to exhaust the criminal prosecution option before considering any other approach. This is justified by:

the nature and seriousness of the allegation, which has been made on oath and tested by parliamentary committee examination;

the belief by two Committee members that a prima facie case has been made out, with a third member not persuaded to the contrary; and

the likely inability of non-court and non-parliamentary procedures, including a royal commission or parliamentary commissioner, so called, to satisfy the technical 'proved misbehaviour' requirement in section 72 of the Constitution.

If it can be established that Mr Justice Murphy used the words 'and what about my little mate?', and did so with the intention of influencing the course of the committal proceedings involving Morgan Ryan, then the character of this conduct is criminal. If he did not use those words, or used them without that intent, then the conduct is innocuous. There is no middle ground in relation to that conduct. At this stage there is no evidence at all available to the Government to enable it to form a view on this question. All the Government has is the Senate Select Committee's summary of what Mr Briese has said in sworn evidence to the Committee. That, of course, is classic hearsay.

Since the tabling of the report in Parliament on 24 August 1984 Mr Briese has indicated to the Australian Federal Police, on an approach initiated by me, that:

(a) he did not propose to be interviewed at this stage;

(b) he did not intend to make a formal complaint; and

(c) he will decide his future conduct in the light of the decisions, if any, taken by the Parliament.

According to the Committee summary, Mr Briese gave evidence of a conversation which occurred when the judge telephoned Mr Briese and said he had discussed the question of the independence of the magistracy in New South Wales with the New South Wales Attorney-General and the Government was going ahead with legislation to give effect to it. Mr Briese states that the judge then said to him: 'And now what about my little mate?'. The Senate Select Committee report then makes the following observations on this evidence:

> In evidence Mr Briese was unsure of the exact opening words of the inquiry ('and' or 'now' or 'and now') but was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceeding conversation
>
> The Judge's recollection is that he did not use the expression 'my little mate'.

The description I have just given of the relevant events is based upon Appendix 5 of the Committee's report. Essentially what emerges is two materially different versions of the events—Mr Briese's version and the judge's version.

Assuming the judge did make the statement 'and now what about my little mate?' with the intention of influencing the course of the Morgan Ryan committal proceedings, there are three provisions of Commonwealth criminal law which may be relevant:

(a) section 33 of the Crimes Act 1914, which deals with official corruption and provides for an indictable offence with a maximum penalty of 10 years imprisonment;

(b) section 43 of the Crimes Act 1914, which deals with attempting to pervert justice with a maximum penalty of 2 years imprisonment; and

(c) section 7A of the Crimes Act 1914, which deals with inciting to or urging the commission of offences with a penalty of $2,000 or imprisonment for 12 months.

The 'Prosecution Policy of the Commonwealth,' tabled in the Parliament on behalf of the then Attorney-General, Senator Durack, in December 1982, lays down three principles which must be satisfied before prosecutions should be brought—

(a) the evidence must establish a prima facie case against the defendant;

(b) a prosecution should not normally proceed unless there is a reasonable prospect of conviction. It should be rather more likely than not that the prosecution will result in conviction—the so-called 51 per cent rule;

(c) whether in the light of provable facts and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution.

(a) Prima facie case. The purpose of this rule is to ensure that the evidence in support of the prosecution is sufficient to establish the commission of the offence on the criminal standard of beyond a reasonable doubt. This principle must be satisfied by the application of objective professional judgment. Failure to apply this standard would be contrary to processes of the law and may expose an initiator of the prosecution to action for malicious prosecution.

(b) The 51 per cent rule. There are precedents to support the proposition that in cases of this kind a prosecution should be brought to clear the air, notwithstanding that the available evidence may not satisfy the 51 per cent rule. Sir Thomas Hetherington, the English Director of Public Prosecutions, has recently said that the 51 per cent chance of conviction rule will not be applied in the case of allegations against police officers, whose public position requires the ventilation in court of allegations which amount to prima facie evidence of crimes.

(c) Public interest considerations. It is axiomatic that prosecutions should not be brought otherwise than in the public interest. The question which arises is whether, in the light of provable facts and the whole of the surrounding circumstances, the public interest requires that a prosecution be brought. Among the many considerations that may be relevant in this respect is the desirability, even in circumstances of a relatively weak *prima facie* case, of bringing a prosecution to clear the air. One New South Wales precedent comes to mind: In 1964 a member of the typing pool at Parliament House made allegations of criminal misconduct against the then Chief Secretary. The Solicitor-General, although unconvinced of the likelihood of a prosecution succeeding, deemed it in the public interest to lay charges, and to instruct the President of the New South Wales Bar Council, then John Kerr QC, to prosecute. After hearing evidence, the magistrate declined to commit.

There are three persons who could make a decision to prosecute: (a) Mr Briese—or for that matter any private persons; (b) the Attorney-General; or (c) the Director of Public Prosecutions.

Mr Briese may be put aside at the outset. Although this course is open to him at law, he has made it clear that he does not intend either bringing proceedings, or making a complaint at this stage.

The Attorney-General could take the initiative in the matter. Notwithstanding the existence of the DPP it would be open to me to consider criminal proceedings, and institute them if I saw fit. I refer to section 10 of the Director of Public Prosecutions Act 1983. However, I have decided not to do so in this case. In reaching this decision I have had regard to the following matters:

(a) The Government has recently established the office of DPP to revitalise, and bring greater independence to, the prosecution of offences against the laws of the Commonwealth. I do not consider that I should bypass the proper function of the DPP in this matter. I envisage doing so only in the most exceptional circumstances.

(b) Much of the debate in this matter has been in the political arena. Should I decide not to prosecute or should I decide to prosecute and the prosecution fails, the criticism may well be made that these processes lacked independence. The DPP has been established to provide the degree of independence which is required.

This leaves only the DPP, and the Government has decided that he is the appropriate person to make any decision whether or not to prosecute. I accordingly foreshadow that I shall be moving at the appropriate time in the following terms:

That the Senate—

(1) refer—

(a) all evidence given before the Senate Select Committee on the Conduct of a Judge; and

(b) all documentary or other material furnished to the Committee,

relevant to the Briese allegation, to the Director of Public Prosecutions for consideration by him whether a prosecution should be brought against the judge, and

(2) request the Director of Public Prosecutions, should he conclude that a prosecution not be brought, to furnish a report to it on the reasons for reaching that conclusion.

If criminal proceedings are brought and determined only two consequences can follow: If the judge is convicted—presumably of attempt to pervert the course of justice under section 43 of the Crimes Act—the precondition of 'proved misbehaviour' under section 72 would appear to be clearly established, and an address could proceed without further Committee deliberation; if the judge is acquitted there would be no apparent remaining basis, so far as the particular Briese allegation was concerned, for any suggestion of some lesser form of section 72 misbehaviour.

Approach II—Further Parliamentary Procedures

Further consideration by the Parliament of the issues involved in an option which is certainly technically available on the views expressed on

section 72 of the Constitution by the Solicitor-General and by me. However, the Government's view is that further consideration by Parliament should only proceed after exhaustion of the criminal prosecution option, as already outlined. There are a number of reasons why a further parliamentary procedure is not appropriate or desirable at this stage, but should only be a matter—if at all—of last resort.

First, given that the Committee was evenly divided on the question as to whether it should proceed from its initial investigative phase to a more formal 'judicial' phase, there would seem to be a strong case for an independent expert assessment of the question of whether there is a prima facie case, such as to justify a full scale 'judicial' proceeding, before that course is embarked upon. Secondly, while there may not always be any alternative procedure available for the resolution of particular kinds of section 72 misbehaviour questions that may arise, when as here the allegation is of criminal conduct, the Senate should be very slow to proceed to try the issue itself rather than resorting to the ordinary criminal processes.

Thirdly, allegations of criminal conduct demand compliance with rigorous procedures, and the careful application of appropriate standards of proof, by persons who are both expert and detached. I imply no criticism of the Senate Committee or any of its members, but the fact remains—as they would readily concede—that its members are less well-equipped to resolve these questions than the established procedures and institutions of the criminal law. Fourthly, the fact that a High Court judge is involved here means, consistently with separation of powers principles, that Parliament should involve itself in the process when, and only when, it is necessary for it to do so. It is not necessary for it to do so now since 'proof' of misbehaviour may be sought by other means, namely the ordinary criminal processes, and that again would appear the proper avenue for resolving the matter in the first instance.

None of these considerations weigh conclusively against any further consideration of this matter by a properly constituted—or reconstituted—parliamentary committee. I simply emphasise the desirability of matters of this kind, and gravity, being dealt with by ordinary criminal processes so far as is possible. In the event, however, that the DPP should advise that on the material presently available there is no basis on which a prosecution could or should proceed, it may be that the Parliament—the Senate—would wish to reconsider the question of some further Committee proceeding. Certainly, for reasons I shall shortly set out, there would appear to be no other appropriate machinery on which Parliament could properly rely for such further consideration.

If the Senate were to take the course of constituting or reconstituting a committee to conduct a further so-called 'judicial phase' inquiry, the appropriate course would appear to be to follow the general lines of the submission made by Mr Hughes, QC, on behalf of the judge -and endorsed in the report of Senators Durack and Lewis—by applying the principles of natural justice as follows:

(a) Taking any necessary evidence or further evidence in the presence of the judge and his counsel;

(b) permitting cross-examination of witnesses; and

(c) allowing the judge to then determine whether or not he would give sworn evidence and be subject to questioning by the Committee.

Approach III—Extra-parliamentary determination of issues (otherwise than through institution of criminal proceedings)

The Government has also considered other options for the determination of issues arising in this matter, in particular the following three possibilities which have each received a degree of public attention:

(a) An application by the Government, or possibly by the Senate through its President, to the High Court to resolve the questions both of law and fact that are raised by the Briese allegation;

(b) A royal commission specifically inquiring into the Briese evidence in relation to Mr Justice Murphy;

(c) A parliamentary commissioner or multi-member commission exercising delegated power from the Senate to determine the facts.

The Government has concluded, for reasons I shall now set out, that the problems with each of these courses are such as to warrant their exclusion from further consideration.

(a) APPLICATION BY GOVERNMENT OR THE SENATE TO THE HIGH COURT TO RESOLVE THE QUESTIONS OF BOTH FACT AND LAW

Although this approach would be a move to take the matter out of the political arena and to have all issues authoritatively decided, there is no obvious way of initiating proceedings in the High Court which the High Court would accept as both within its jurisdiction and within its duty to determine. I am not satisfied, in the absence of the kind of advisory opinions, jurisdiction that would have been available had a referendum proposal been put and passed on this occasion, that the High Court would have jurisdiction, and the Solicitor-General agrees. Moreover, it may be necessary for either the Senate or the Government to act as complainant and allege misbehaviour on the part of the judge in order to have standing to bring the matter before the Court. On the information available to it, the Government would not be prepared to take that course.

(b) ROYAL COMMISSION SPECIFICALLY INQUIRING INTO ALLEGATION OF MR BRIESE

The purpose of such a royal commission would be to establish a non-political impartial investigation by a body with coercive powers. However, there is an important question of principle whether that would be an appropriate step for the Executive Government to take, having regard to the independence of the judiciary.

Also, there must be a real doubt whether the Executive Government can, through a royal commission appointed by it, compel a Justice of the High Court to attend and answer questions relating to his possible removal. Clearly, there would be the possibility of a constitutional challenge.

The royal commission's report would not legally conclude anything. Its findings could not bind the Senate. In the final result, if the commissioner reported that the judge was guilty of the conduct complained of, parliamentary or criminal proceedings would need to be taken and the whole matter reheard. It is also relevant to mention here that evidence given by the judge before the commission would not be admissible against him in legal proceedings. Similar considerations apply in relation to a possible reference of the matter not to a royal commission but to the National Crime Authority; the only significant procedural difference between the Authority and a royal commission for present purposes being that while the evidence of the judge would be usable in subsequent proceedings, the excuse of self-incrimination would be available.

(c) PARLIAMENTARY COMMISSIONER OR COMMISSIONER EXERCISING DELEGATED POWERS FROM SENATE

There is no clear precedent for what has been proposed in relation to the appointment of a parliamentary commissioner with compulsive powers to conduct a hearing to determine the facts. Such nineteenth century English precedents as have been referred to appear to fall short of what is involved in the present case. It is not clear to extent power was claimed and exercised to compel witnesses to appear before the persons appointed in those cases to gather information or examine documents or accounts on behalf of the parliamentary committees in question.

The Senate in 1982, on a motion by me, directed Senators Chaney and Guilfoyle to deliver to Sir John Minogue, QC, a retired judge, papers relating to tax avoidance and evasion. This was done so that Sir John Minogue could be given the function of editing 'bottom of the harbour' legal opinions held by the then Government with a view to the documents in their edited form being tabled in the Senate. This too falls far short of what would be involved in setting up a parliamentary commissioner with powers to conduct a hearing and to make findings of fact.

It follows that there must be a doubt about the power of the Senate to compel the attendance of witnesses before a parliamentary commissioner. Legislation could be considered to deal with this deficiency. However, the enactment of legislation purporting to delegate the 'misbehaviour-proving' function to a commissioner, while removing one possible area of legal uncertainty, would nonetheless still not put beyond doubt the possibility of a constitutional challenge arguing that such 'proving' had to be, if not by a court, then by Parliament itself, or at least by a parliamentary committee.

As well as the uncertainty in relation to the power to compel testimony before the parliamentary commissioner, there would also be uncertainty as to the protection available to the commissioner and witnesses in relation to things said in the course of the hearing. Obviously a question would arise whether the proceedings before the commissioner could be regarded as 'proceedings in Parliament' within the meaning of the protection afforded by the freedom of speech and debate clause contained in Article 9 of the Bill of Rights as applied to the Senate by section 49 of the Constitution. It would be important for those taking part in the proceedings before the commissioner, and for the commissioner himself, or the commission members themselves that the same privileges and immunities be available as if the proceedings were before a committee of the Senate, and firm assurances on this matter could not be given in the absence of express legislation.

This leads to a further problem with this course, and that is the question of whether it

would be possible to find a suitable person or persons who would have the necessary qualities for the most serious and unprecedented role he, she or they would be asked to undertake, and who would be available and willing to undertake that role.

Finally I point out, in case there may be some misunderstanding on the point, that even if the Senate were to appoint a parliamentary commissioner he or she could not actually determine the question of misbehaviour. His or her findings could not constitutionally bind any member of the Senate. It would still be a matter for the Senate to decide whether the conduct amounted to 'misbehaviour' and a trial at the Bar of the Senate may, in the absence of a conviction by a court, be necessary for this purpose.

Conclusion

The course which the Government proposes is, in summary, that there be a reference of the matter in the first instance to the Director of Public Prosecutions in order that the criminal prosecution option may be fully considered, with any necessary further consideration—other than by the criminal courts—being by way of parliamentary rather than any extra-parliamentary process. The Government firmly believes that not only is this approach likely in the long run to prove the most expeditious, but that it is the only appropriate, responsible and constitutionally sound means of resolving such concerns as may continue to be felt following the tabling of the Senate Committee report.

What is abundantly clear is that the longer this matter lingers, the greater will be the damage caused to the reputation and prestige of the High Court and to the respect afforded to the institution of the judiciary generally. There is an enormous burden resting upon the Senate, and it is important that we discharge it quickly, conscientiously and honourably. I seek leave to incorporate in *Hansard* the text of the Solicitor-General's opinion.

Leave granted.

The opinion read as follows—

In the matter of Section 72 of the Constitution

SUPPLEMENTAL OPINION

1. In this matter, the conclusions of my opinion of 24th February 1984 were

> Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to –
>
> (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and
>
> (2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.

2. An Opinion dated 14th May 1984 of C. W. Pincus Q.C., counsel assisting the Senate Select Committee on the Conduct of a Judge, is Appendix 4 to the Committee's Report tabled in the Senate on the 24th August 1984. (As the paragraphs of the Pincus Opinion are un-numbered, I refer to it by its pagination in the published Committee Report).

The Pincus Opinion [at 13] extracts parts of paragraphs 19 and 21 of my opinion. I correct the following errors of transcription of these parts

Paragraph 19—

line 1. 'function' not 'jurisdiction'
line 2. 'discretion' not 'jurisdiction'
line 4. 'of a' not 'for'
line 8. 'related' not 'relating'

Paragraph 21—

line 5. 'incumbent' not 'encumbent'
line 8. add 'or' after 'moral'
line 10. delete 'is'

The Pincus Opinion then states

> Since, as will appear, I do not agree with the Solicitor General, it will be necessary to examine in detail the authorities on which he relies

The conclusion of the Pincus Opinion [at 27], under the heading 'SUMMARY OF OPINION', is –

> As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "Technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.

I am asked to reconsider my opinion in the light of the Pincus Opinion.

3. I find it difficult to respond to the Pincus Opinion in any structured way. The Opinion does not acknowledge the distinction, shortly stated by *Quick and Garran* at 731 (set out in paragraph 5 below), that the tenure of British judges is determinable upon two conditions, namely for misbehaviour or by address from both Houses. The essential matter is that, with the English position in mind, the draftsmen of section 72 consciously departed from it. The relevant exercise in determining the meaning of the section is to identify these points of departure and to establish the consequences. The Pincus Opinion omits squarely to address these issues of construction arising from the terms of the section itself. Although the Pincus Opinion engages that it will examine in detail the authorities upon which I relied in my opinion, the course of its discussion is fixed more by reference to its own English and colonial precedents. For that reason, it is necessary separately to consider the force and relevance of the authorities drawn upon by the Opinion, and the manner in which they are put as advancing contrary argument.

4. It is necessary first to identify the matters of disagreement. The Pincus Opinion does not dissent from my conclusion that misbehaviour may be determined by Parliament. Unfortunately, it does not separately discuss the position in respect of misbehaviour pertaining to office. Misbehaviour of this sort, namely the improper exercise of judicial functions or wilful neglect of duty or non-attendance, was accepted by me as a matter to be found by proof in appropriate manner to Parliament. By inference, the Pincus Opinion does not demur from my conclusion that matters of these sorts are not predicated upon proof of any contravention of the law. Hence the difference between the opinions is limited to conduct not pertaining to office. My view is that a Parliamentary inquiry is limited to whether there is a contravention of law of the requisite seriousness. The conclusion of the Pincus Opinion [at 27] is that contravention of the law is not a relevant inquiry, it being for Parliament to decide whether 'any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office'.

5. In paragraph 15 of my opinion I accepted the analysis of *Quick and Garran* (at 731)

> The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour, or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition that of misbehaviour or incapacity- and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

Quick and Garran (at 733-4), explain the reason for this difference (set out in full in my paragraph 9), namely, that

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference.

For the reasons stated, I found that it was only misbehaviour falling within the first condition referred to by *Quick and Garran* which was embraced within the meaning of 'misbehaviour' in section 72. I also accepted that misbehaviour in this sense meant misbehaviour as a breach of condition of office held during good behaviour. Further, as noted above, I expressed the view that the improper exercise of judicial functions, and wilful neglect of duty or non-attendance, were matters which, if established, would constitute misbehaviour, and that for the purposes of section 72 such misbehaviour was not predicated upon proof of any contravention of the law. It was, and remains, my opinion that in matters of misbehaviour not pertaining to office, it is necessary for there to be proved a contravention of the law of the requisite seriousness.

6. As it does not address itself to the dichotomy between conduct pertaining to office and other conduct, much of the Pincus Opinion is directed to a false issue, namely, to establish that the word 'misbehaviour' in section 72 is not limited to 'proof of an offence'. The true differences seem to be first, that I regard 'misbehaviour' in section 72 as having a meaning limited to behaviour constituting a breach of condition of office held on good behaviour and, secondly, that in respect of misbehaviour not pertaining to office, my opinion is that such misbehaviour may be constituted only by a contravention of the law of the requisite seriousness. The relevant conclusion of the Pincus Opinion seems to be that for all categories of misbehaviour contravention of the law is not a relevant enquiry, and [at 27] that it is for Parliament to decide whether 'any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office'. Apparently Parliament is to be guided in the task of enquiry as to whether 'proved misbehaviour' is established by reference to expressions of the sort to be garnered from the Opinion. Including references in authorities cited with approval in the Opinion, these expressions include formulations such as 'notoriously improper', 'misbehave . . . scandalously'), 'get into debt', 'any sort of misbehaviour', 'gross personal immorality or misconduct', 'corruption', 'irregularity in pecuniary transactions', 'moral misbehaviour', 'immorality', 'misconduct', or, as more widely expressed, 'a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not amounting to the commission of an offence at all' and 'outrageous public behaviour, outside the duties of their office'.

7. I confirm in paragraph 5 above my acceptance of the analysis of Quick and Garran which identifies the differences, and the principal reason for the differences, between the tenure of British judges and of Federal judges under the Australian Constitution. My conclusion was that section 72 applies to exclude all modes of removal other than for misbehaviour as a breach of condition of office. Only Parliament may initiate removal by way of address upon the specified ground, namely 'proved misbehaviour'. My argument was not based upon the broad application of the English authorities, either ancient or contemporary. It was based upon the proper construction of the terms of the section itself, aided by what was put as permissible references to both legislative history and to the clear departure of its terms from the then recognised position in respect of the tenure of office of British judges. Hence in a very real sense the matters discussed in the Pincus Opinion under its various headings stand outside the course of the argument which they are intended to attack. In particular, the Opinion neither recognises nor discusses the distinction in British constitutional law between the power to remove for misbehaviour as a breach of condition of office held on good behaviour, and the open-textured ground for removal upon address of both Houses of Parliament. For this reason, it is bordering upon irrelevant to engage in a detailed rebuttal of many of the points sought to be made in the Opinion. However some criticisms and observations usefully may be made. I follow the order of the sub-headings of the Pincus Opinion.

8. UNITED STATES [13-16]. I do not read the Pincus Opinion as itself drawing strength from American law. As I neither referred to nor relied upon American doctrine, it is curious that the Opinion first discusses the United States Constitution, particularly as this leads to the conclusion [at 16] that 'it gives no support to the view expressed by the Solicitor General'. Neither does it support the Pincus Opinion.

9. The Opinion contrasts the phrase 'Treason, Bribery and other High Crimes and Misdemeanours' in Article II, section 4 of the United States Constitution with the word 'misbehaviour' in section 72, to suggest that this 'simple word' was intended to be used without technical meaning. In its context, this comment is impermissable. It is clear

that the word 'misbehaviour' as used in section 72 is derived from English constitutional law, and that it is not used in contrast with the terms of the American Constitution dealing with impeachment. Rather it is framed in conscious contrast with the law of judicial tenure in Britain. Secondly, and somewhat inconsistently with the first point, the Pincus Opinion also relies upon the alleged circumstance that the particular phrase in Article II has been read with a wider meaning than its terms suggest. If the Opinion here seeks to infer that if an equivalent to the American expression, such as 'treason, bribery, and other felonies and misdemeanours', appeared in section 72 it would be held to have a meaning wider than the commission of an offence, such a suggestion must be rejected out of hand. I comment also that the decision of Ritter v. U.S. referred to [at 15] has no relevance: the note at 300 U.S. 668 merely says that a petition for a writ of certiorari was denied, without reasons, and the report of the Court of Claims below, (1936) 84 Ct. Cls. 293, deals with the quite different point of whether proceedings in the Senate could be the subject of judicial review.

10. We are concerned with the meaning of 'proved misbehaviour' in section 72 of our Constitution. American constitutional law furnishes no relevant learning. This is more obviously so in respect of the construction of section 72 than in respect of other parts of the Constitution where there is less divergence, both in word and context, between the two Constitutions: see generally Attorney-General (Cth); Ex rel McKinlay v. Commonwealth (1975) 135 C.L.R. 1, 24, 47; Australian Conservation Foundation v. Commonwealth (1978-1980) 146 C.L.R. 493, 530 and Attorney-General (Vict.); Ex. rel. Black v. Commonwealth (1981) 146 C.L.R. 559, 578-9, 598-9, 603, 609 and 652. Hence I put the American authorities on one side. They are of no assistance.

11. ENGLAND [16-19]. As has already been said, the failure of the Pincus Opinion to recognise the distinction between removal in cases of breach of condition of office held during good behaviour and the power of Parliament to address upon grounds not necessarily arising from a breach of such condition destroys the relevance of the discussion of English law which leads to the general conclusion that no offence need be proved to establish misbehaviour. The cases of Judge Kenrick, [discussed at 16], concerned a judge facing charges of misconduct in the House of Commons. The two cases are not reported in the Law Reports, but in (1825) 13 Parl. Deb., 2nd Ser. and (1826) 14 Parl. Deb., 2nd Ser. The allegations clearly involved criminal offences, but as the matter was before Parliament a breach of the law was not required to be established. For this reason, the quotation from Shetreet, Judges on Trial (1976), 143, [at 16], which deals with whether misconduct of a judge in his private life justified the address for removal, is unexceptionable.

12. The Pincus Opinion [at 17] goes on to make one of its several references to the supposed intention of the founding fathers or the draftsmen of the section: 'If the draftsmen of our Constitution knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear'. In other parts of his Opinion Pincus also seeks to draw strength from negative surmise of intention; for example, at 14, 18-19, 22, 25 and 26. With respect, it must be said that such references do not advance argument; they more stand in substitution for it. In this particular aspect, I comment that in drawing section 72 the draftsmen made intention abundantly clear. When the conditions for tenure in England, as they were understood by the founding fathers, are contrasted with the terms of section 72 the intention of the draftsmen is made quite clear by the specific departures from English law. First, the section excludes all modes of removal other than that for misbehaviour as a breach of condition of office and, secondly, it makes Parliament the sole repository of the power to address upon the ground of such misbehaviour. As a further limitation, the misbehaviour is required to be 'proved'. This is the distinction recognised and stated by Quick and Garran, (set out in paragraph 5 above). In this aspect, it is difficult to suggest that the terms of section 72 could be framed in a manner more directly to distance the Australian provision from the English position.

13. As I merely made passing reference in paragraph 14 of my opinion to R. v. Richardson, when discussing the meaning of the expression 'infamous offence', the Pincus Opinion [at 17-18 and 21] also addresses a false issue by seeking to establish that this case does not bear upon the removal of English judges. (My discussion of what is 'infamous offence' is taken up in paragraphs 19 and 20 to lead to my conclusion that the relevant quality of contravention of the general law in respect of misbehaviour not pertaining to office is whether it is 'of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office'. Discussion of Richardson in the Pincus Opinion does not touch upon this conclusion).

14. For the reason stated in paragraph 12 above, I agree with the Pincus Opinion [at 19] in its comment that when they framed section 72 what the founding fathers had in mind as to the law about the removal of judges was English practice in the 19th century. Where we differ is in our statement of the relevant law in respect of judicial tenure in England, and in our recognition of the effect of the clear departures from the English position which are embraced by the terms of the section.

15. The Privy Council-Colonial Judges [19-22]. Although the issue of the Privy Council and colonial judges is separately discussed by Pincus, there is little reason to suppose that the draftsmen of our Constitution had any particular regard to the position of colonial judges up to the mid-nineteenth century. The tenure of colonial judges, including the judges of the Australian colonies before responsible Government, was much less secure than for English judges. For this reason I doubt very much the relevance of the Opinion's consideration of the peculiar position of colonial judges before the 1850's.

16. Even if relevant, the discussion under this heading does not take the argument of the Pincus Opinion any distance; indeed to the contrary. The authorities referred to very much support the distinctions made in my opinion. Willis v. Gipps [at 19-20] is concerned with the requirement that a judge be given an opportunity to be heard before removal. Although the facts are not set out in Moore's Reports, the conduct of Willis as a judge in the District of Port Phillip are matters of common historical knowledge: see, for example, B. A. Keon-Cohen, John Walpole Willis: First Resident Judge in Victoria (1972) 8 M.U.L.R. 703 and A. C. Castles, An Australian Legal History (1982), 239-243. The allegations against Willis were very much in respect of conduct pertaining to office, and hence misbehaviour within the meaning of section 2 of Burke's Act. Upon this statutory ground, no contravention of the general law was required to be established.

The interjection of Parke B. [referred to at 20] is not relevant to the issue of whether misbehaviour not pertaining to office is predicated upon breach of the law.

17. The 1849 case of Montagu [discussed at 20-21] does not take matters any further. There always are dangers in seeking to establish a decision's authority by reference to successful counsel's argument. I contrast the comment of Deane J. in Hammond v. Commonwealth (1982) 42 A.L.R. 327, 341. What next follows after the quotation from Thesiger Q.C. [referred to by Pincus at 20] is a submission which makes it clear that his submission was that the case was one of misbehaviour pertaining to office—

> The Appellant having first put his lawful creditor in a situation which compelled him to sue for his debt in a Court of Justice, avails himself of his judicial station in that Court, being the only Court in which the action could be brought, to prevent the recovery of the debt, which he admitted to be due; this is an act impeding the administration, and thereby defeating the ends of justice, and was such a gross act of misbehaviour in his office, as amply to justify his removal. Secondly, it appears, from the evidence, that the various pecuniary embarrassments of the Appellant, while sitting as a Judge, in a Court composed of only two Judges, and necessarily requiring the presence of both, for the determination of all cases brought before it, were such as to be wholly inconsistent with the due and unsuspected administration of justice in that Court, and tended to bring into distrust and disrepute the judicial office in the Colony.

Hence each of the two grounds embraced by the quotation set out in the Pincus Opinion fairly is characterised as misbehaviour pertaining to office. On the underlying issue of misbehaviour, the decision was, in the judgment of Lord Brougham (at 499), that on 'the facts appearing before the Governor and Executive Council, as established before their Lordships, in that case, there were sufficient grounds for the motion of Mr. Montagu'. These facts are not set out in length in the report, but, as has been said, the submissions of Thesiger make it clear that they went to establish misbehaviour pertaining to office. As such, it did not, of course, require contravention of the law to constitute misbehaviour within section 2 of the Act.

18. The Memorandum of the Lords of the Council on the Removal of Colonial Judges, [constituting an appendix to 6 Moore N.S. and relied upon at 21-22] in no way supports the view that gross personal immorality is sufficient to justify removal as misbehaviour within the meaning of section 2 of the Act. What is clearly recognised in this Memorandum is the distinction between 'amotion' pursuant to the Act, upon which there was an appeal to the Queen in Council, and the separate and prerogative process whereby (whether with or without an order for suspension by the Colonial Governor), the issue of removal may be referred, upon Petition to the Queen, to the Privy Council for determination. This latter procedure was the colonial equivalent to the Parliamentary power to address for removal. In the Memorandum it is regarded as an exercise of a species of original jurisdiction, contrasted with the separate jurisdiction to hear appeals against actual removal pursuant to section 2 of Burke's Act. Of course the power of the Privy Council to act in its original jurisdiction was not limited to any narrow grounds of misbehaviour constituting breach of condition of good behaviour, and, for that reason, in cases not pertaining to office it was not tied to alleged contravention of the law.

19. There is a similar mixture of discussion [illegible]d Chelmsford's observations [referred to at 21-2[illegible]e short statement of Lord Chelmsford merely adds some general comments to the Memorandum. It deals with both the appellate jurisdiction of the Privy Council under the Act and the original jurisdiction outside it. Lord Chelmsford accepts that a judge may be suspended pending the exercise of the original jurisdiction. The sentence after next to that quoted [at 22] is

> Such serious cases ought to be brought before the Privy Council, either by appeal on the part of the removed or suspended Judge, or upon the recommendation of the Secretary of State

Hence the remarks are apt to cover both conduct constituting a breach of condition of office and other conduct which may justify petition to the Privy Council (either with or without suspension), analogous to the English Parliamentary power to address. Moreover, Dr. Lushington, who gave an opinion immediately after Lord Chelmsford, stated that the procedure of suspension and reference to the Privy Council in its original jurisdiction is appropriate in cases of the sort discussed.

20. In the result the Memorandum has little relevance to the proper construction of section 72. If it is an authority for anything, it supports the distinctions made in my opinion.

21. Convention debates [22-24]. As has been said, the meaning of section 72 is to be derived from the construction of its terms, standing within Chapter III and the Constitution as a whole, and having regard to the extent to which it provides that judicial tenure under the Constitution differs from tenure of British judges under English constitutional law. As is picked up in paragraphs 10 and 11 of my opinion, legislative history casts permissible light upon meaning. This does not mean that too much is to be constructed from selective quotation of the Convention Debates. The references made in paragraphs 12 and 17 of my opinion were for the limited (and, as was suggested, also permissible) purpose of ascertaining the mischief to be remedied. The identified mischief was the perceived necessity adequately to safeguard the independence of the judiciary as an essential feature of the Federation established by the Constitution. It does not further the task of construction to speculate [as does the Pincus Opinion at 22] that there may have been a silent majority of delegates in disagreement with those who spoke.

22. Clearly it was the primary concern of Mr Isaacs, both at the Adelaide Convention (20th April 1897) and at Melbourne (31st January 1898) to ensure that a decision of Parliament to address for removal should not be challengeable. It was at the Melbourne Convention that Isaacs accepted the amendment to add 'upon the ground of misbehaviour or incapacity'. Isaacs then accepted (Conv. Deb. at 313) that 'to remove any misconception, these words should be added, so that the Houses may show that they are not attempting to remove a Judge for anything but misbehaviour or incapacity'. His concern (also at 313) was to ensure that in the exercise of the power so limited, Parliament's decision should not be amenable to review.

> I want to lay it down distinctly that a Judge shall not be removed under any circumstances, except for misbehaviour or incapacity; but I want the verdict of Parliament—the verdict of the States House by itself, the verdict of the people's House by itself, the conjoint, independent and separate verdicts of these two Houses to be final and unchallengeable.

Of course the speeches and the opinions of Isaacs, and any other delegate, are not determinative of meaning. Reference to them merely is confirmatory of what is comprehended upon construction of the terms of section 72 itself, namely that it is for Parliament alone to address for removal, but upon the limited ground of proved misbehaviour or incapacity.

23. The Pincus Opinion [at 23] asserts that what is referred to as a critical sentence of Todd (set out in my opinion, paragraph 5) commencing 'Misbehaviour includes . . .' is hardly suggestive of an exhaustive definition. In its context, I disagree. Todd was there seeking to define misbehaviour constituting breach of condition of office granted during good behaviour which would support the exercise of the power of removal without address of Parliament. In other words, he sought to define the content of the first condition of office referred to by Quick and Garran (set out in paragraph 5 above). As he was seeking to mark out the limits of the amenability of a judge to removal by the Crown without address from Parliament, there is no reason to suppose that his statement was intended to be anything else but exhaustive. This particularly must be so in the circumstance that conduct not constituting breach of condition of office was nonetheless subject to address by Parliament on grounds which were required neither to pertain to office nor to arise from any alleged contravention of the law. It was this power of Parliament which Todd [at 860, quoted in my paragraph 6 and by Pincus (quoting Isaacs) at 23] described as one which 'may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held'. Having acknowledged that the power to address for removal was not dependent upon misbehaviour pertaining to office or contravention of the law, it cannot be supposed that in the context of discussion of the power to remove for breach of condition of office, Todd contemplated the existence of an unspecified fourth or wider category of misbehaviour in addition to the three categories stated in his definition. There simply is no basis for inference that Todd embraced the possibility of any wider meaning of misbehaviour as part of the Crown's power to remove for breach of condition.

24. For the reasons stated, I also disagree with the comment in the Pincus Opinion [at 24] that it is a misapprehension to say that at the end of the 19th century the notion of judicial misbehaviour justifying removal from office had some received technical meaning. Misbehaviour, as a breach of what Quick and Garren refer to as the first condition of office, did have a technical meaning. In England, and in the Australian States, the Parliamentary discretion to address for removal remained at large. As has been seen, both British judges and colonial judges were amenable to removal for misbehaviour as a breach of condition of office; they were also liable to removal for some wider ground (not necessarily related to breach of the law) which would not constitute breach of the term for office held during good behaviour. The Pincus Opinion [at 24] does not take this matter any further by reference to what Mr. Wise said at the Adelaide debates. The comment in the Opinion is based upon a misconception. In any event, at 945, Mr. Wise makes it clear that here he was referring to the power of removing on address from both Houses, where, of course, to use the expression of the Pincus Opinion, 'no criminal conduct was necessary'.

25. GENERAL [24-27]. Contrary to what the Pincus Opinion states [at 24], it is not the case that a conclusion has been drawn 'too readily' that the use of the word 'misbehaviour' was intended to incorporate the law as to the removal of judges in England prior to the Act of Settlement of 1700, whether by reference to Coke or otherwise. My opinion draws no such conclusion by reference to the law of removal prior to 1700. As has been seen, what is contrasted with the terms of section 72 is the law in respect of the tenure of British judges, as it was seen when section 72 was drafted, and the obvious points of departure of section 72 from this law.

26. The Pincus Opinion [at 25] invites what is described as the 'safer course', namely, 'to come to the Constitution unaided by any authority, in the first place, and see if there is an ambiguity'. I readily accept that the words of section 72 should be construed within their context in Chapter III and the Constitution as a whole. The terms of section 72 do not stand alone. As the Pincus Opinion [at 25] points out for a contrary purpose, one is assisted in construing section 72 by the fact that it is the Justices of the High Court, and of other Federal Courts, who are being spoken of. To paraphrase the expression of the Opinion 'when one keeps the subject matter in mind' the limiting operation of section 72 becomes clear. Its interpretation is to be built upon the foundation of its context within the Constitution, as a whole, and recognition of the section's obvious and deliberate departure from the terms of judicial tenure under the British Constitution. Those differences are confirmed by the history of the section. As has been said, the reasons for section 72 being drawn to enhance the security of judicial tenure are sufficiently summarised by Quick and Garran, at 733-4 (referred to in paragraph 5 above). In essence, the Pincus Opinion concludes that Parliament may address for removal upon a ground defined upon its whim. The existence of such power would be destructive of the status and independence of the High Court as the independent interpreters of the Constitution and the Federation established by it. The example of the Pincus Opinion of a Judge becoming involved in political activities is inapposite. The relevant enquiry is whether the conduct complained of either constitutes misconduct pertaining to office or a contravention of the law of the requisite seriousness.

27. On the only occasion [at 26] where it refers to the principle, the Pincus opinion seems to accept that for breach of condition of good behaviour conduct outside official duties requires proof of conviction. The Opinion gives three grounds to support the view that this doctrine does not govern the use of the word 'misbehaviour' in section 72. In my view, none of these reasons sustains the load which Pincus seeks it to bear.

(1) Pincus asserts that both in England and the colonies before 1900 it is clear that the power to remove for judicial misconduct was not so confined. The answer to this is that in England before 1900 breach of condition of good behaviour was so confined; the quite separate power of Parliament to address always was unrelated to the issue of breach of condition of good behaviour. The position of the colonies is not particularly relevant on this aspect; although, as has been seen, the application of Burke's Act leads to the same result.

(2) The Opinion asserts that the language of section 72 makes it clear that conviction is not necessary in respect of conduct outside office. This assertion highlights the fact that the Pincus Opinion nowhere acknowledges that the requirement of section 72 is for 'proved' misbehaviour. The Opinion does not concede that there is any work to be done by this word to enhance the operation of the section. It is section 72 itself which requires an address of Parliament upon the ground of 'proved' misbehaviour. It must be that what is to be proved is to have some content. My view is that this requires the finding of grounds which constitute misbehaviour as a breach of condition of office held during good behaviour. It is difficult to comprehend that the proper meaning of the requirement for 'proved misbehaviour' is to be fixed by reference to undefined conduct left subjectively at large. The requirement for 'proved misbehaviour' does not rest easily with assertions that matters such as 'immorality', 'moral misbehaviour', 'a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not a mounting to the commission of an offence at all', or 'outrageous public behaviour, outside the duties of their office' are amenable to proof as misbehaviour.

(3) The Pincus Opinion suggests that it 'would have been foolish to leave Parliament powerless to remove a judge guilty of misbehaviour outside his duties, as long as an offence could not be proved'. (This is a variation of what is stated [at 25] with respect to 'outrageous public behaviour'). The Opinion asserts that this remark 'applies particularly to the High Court, which was to occupy a position at the pinnacle of the Australian Court system, and to exercise a delicate function in supervising compliance with the requirements of the Constitution on the part of the legislatures'.

Apart from begging the question as to what is misbehaviour, this comment ignores the obvious operation of section 72 to give direct effect to the principle that the judiciary should be secure in their independence from control by the legislature and the executive. Far from being a proper assumption that it was intended that a Justice of the High Court should be amenable to removal for undefined reasons relating to behaviour 'outside his duties', it is the position of the High Court in the Australian Constitutional structure which both explains and confirms the limitations which seem to be clearly enough embraced by the terms of section 72 itself. It is the antithesis of the recognition of the High Court as the arbiters of the Constitution to concede that there is a general power to control the composition of the Court by the application of an undefined power in Parliament to address for removal.

28. As to this aspect of the argument, I do not understand the relevance of the dialogue between Messrs. Isaacs and Barton (with the delegates playing chorus) extracted [at 27] for the stated purpose of 'casting doubt on the theory that there was an intention to limit the plain words of s.72 by ancient technical rules'. Far from modifying the words of section 72 by reference to ancient technical rules, it is the plain words of section 72 which alter the terms of judicial tenure existing in English law. Be that as it may, the dialogue itself is relevant only to the result which (as is noted in paragraph 22 above) Isaacs was anxious to ensure, namely, that it was for Parliament alone to determine the issue of misbehaviour. The dialogue says nothing relevant to the proper meaning of 'proved misbehaviour'.

29. Hence in as much as the argument of Pincus is intended there to be drawn together [at 26-27], it is suggested that the maters relied upon are destructive of the conclusion that the requirement for 'proved misbehaviour' in section 72 is not limited to that which would constitute breach of condition of office held during good behaviour.

30. The Pincus Opinion does not demonstrate error. This is not surprising for, as has been noted, it turns away from discussion of the miters which I found determinative of the proper construction of section 72. My reconsideration of these matters goes to confirm my earlier opinion that, for proved misbehaviour in matters not pertaining to office, section 72 requires proof of contravention of the law of the requisite seriousness.

GAVIN GRIFFITH
Solicitor-General

3rd September 1984

Senator GARETH EVANS I seek leave to give notice of motion.

Leave granted.

Senator GARETH EVANS I give notice that, on the next day of sitting, I shall move:

That the Senate-

(a) refer—

(i) all evidence given before the Senate Select Committee on the Conduct of a Judge, and

(ii) all documentary or other material furnished to the Committee,

relevant to the Briese allegation, to the Director of Public Prosecutions for consideration by him whether a prosecution should be brought against the Judge; and

(b) request the Director of Public Prosecutions, should he conclude that a prosecution not be brought, to furnish a report to it on the reasons for reaching that conclusion.

Finally, I formally table my ministerial statement and move:

That the Senate take note of the statement.

Senator DURACK (Western Australia) (3.49)—The Attorney-General (Senator Gareth Evans) has put down a most important, but I regret to say, disappointing statement in regard to the report of the Senate Select Committee on the Conduct of a Judge which was tabled in this chamber a little over a week ago. The statement of the Attorney covers a lot of matters of serious legal and constitutional importance. I believe it is necessary to study them carefully. Certainly, in the time that has been available since notice was given of this statement, it has not been possible for me at least to study the supplemental opinion of the Solicitor-General which has just been incorporated. Of course, that opinion covers ground of which we are very familiar. I think the issues have now become fairly clear in relation to the question of what amounts to misbehaviour. I feel that the

→ file memorandum
Counsel + Solicitors

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IN THE MATTER OF SECTION 72 OF THE CONSTITUTION

Our advice is sought by the Attorney-General of the Commonwealth on the meaning of "proved misbehaviour" in Section 72 of the Constitution. In particular we are asked:

(1) Is misbehaviour for this purpose limited to matters pertaining to:-
   (a) the judicial office in question; and
   (b) the commission of a serious offence which renders the person unfit to exercise the office.

(2) In relation to (1)(b) is it a prerequisite that there has been a conviction in a court.

(3) What is the standard of proof required.

(4) Is the Parliament's decision justiciable, either in relation to proof of facts or interpretation of the Constitution (e.g. the meaning of the word "misbehaviour").

We propose to make some general observations about Section 72 before considering the specific questions.

The Section provides so far as relevant:

The Justices of the High Court and of the other courts created by the Parliament -

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

Section 71 vests the judicial power of the Commonwealth in the High Court of Australia, in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. It goes on to provide that the High Court is to consist of a Chief Justice and so many other Justices, not less than two, as the Parliament prescribes.

This Section has been long interpreted to mean that, except where the Constitution may otherwise expressly provide, the Commonwealth's judicial power may be exercised only by courts. Section 49 of the Constitution is one such exception. That Section, it will be remembered, provides that the "powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom and of its members and committees, at the establishment of the Commonwealth."

Since the Commons House possessed the power of committing for contempt of Parliament, of judging itself of what is a

contempt and of committing for contempt by a warrant stating generally that a contempt had taken place and because the Constitution expressly in Section 49 gave to the Commonwealth Parliament its members and committees the powers privileges and immunities of the Commons House, that Section necessarily conferred power to judge of contempt of it and to commit to prison those guilty of it: Reg. -v- Richards; Ex Parte Fitzpatrick and Browne (1955) 92 C.L.R. 157; 92 C.L.R. 171.

The address referred to in Section 72 is not a power privilege or immunity of the Commons House. That House has no part to play in the removal of those exercising the judicial power of the Commonwealth. And the Senate and the Representatives when acting under Section 72 do not exercise any of those privileges powers and immunities secured to the Houses their members and committees by Section 49 any more than they do so when exercising the legislative powers given by Section 51 and Section 122. For Section 49 relates only to those rights and privileges of the Houses, their members and committees necessary to maintain for each House its independence of action and the dignity of its position: see Reg. -v- Richards (supra.) at pp. 162-163; Halsbury 4th Ed. Vol. 34 par.1479, p.593.

The power to remove a federal judge, like the power to appoint, is vested in the Governor-General in Council, that is, the Governor-General acting with the advice of the Federal Executive Council: Section 63. Between the office holder and the Executive there is inserted the requirement that removal shall be only upon or consequent to an address of both Houses. It may be, but it is not required, that removal following an address would be a matter of course.

Whatever the opinion of the Houses, the Governor-General may only act upon his Ministers' advice and their advice might be against removal. The possession by the Crown of a discretion as to compliance or non-compliance with an address was asserted by two eminent lawyers: see Opinions on Imperial Constitutional Law (1971) p.65. Section 72 is not inconsistent with the existence of such a discretion in the Governor-General should his Ministers so advise him.

And the address may only pray for such removal "on the ground of proved misbehaviour or incapacity". It is necessary to approach the significance to be attached to the expression "proved misbehaviour or incapacity" with a number of factors in mind. First is that the only constitutional authority given to the Houses is to address the Governor-General in Council praying for the judge's removal on one or more of the specified grounds. There is not a power of impeachment of all civil officers. In this regard the Australian Constitution differs from that of the United States which by Article 3 Section 1 provides that the judges of the Supreme and inferior courts hold their offices during good behaviour and by Article 2 Section 4 that all civil officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery and other High Crimes and Misdemeanours. See Constitution of the United States of America, Senate Document No. 92-82 (1973) p.574 for instances of the application of Article 2 Section 4 to judges.

Again it needs to be remembered that, unlike the House of Lords, neither the Senate nor the Representatives possesses, except as Section 49 provides, any judicial power. That power by a provision "novel in the Empire" in the language used by Griffith CJ. as long ago as 1918 (Waterside Workers

Federation of Australia -v- J.W. Alexander Limited (1918) 25 C.L.R. 434 at p.441) is vested by Section 71 in the courts we have earlier mentioned. Yet the unique provision made by the addition of the word "proved" to the expression "misdemeanour or incapacity" suggests the exercise of an authority indistinguishable from the judicial power. At its lowest, it implies a charge, evidence and something very like trial.

Looking at the Constitution with the benefit of judicial examination of Chapter III extending over three quarters of a century, one cannot but be impressed by the unfailing emphasis placed upon the notion expressed in Section 71 that the Courts alone may exercise judicial power. Section 72 contains no grant to the Parliament of any authority (except to address the Governor-General in Council). It may be that the reason for inserting the impeachment power (Article 2 Section 4) into the U.S. Constitution was that it, by Article 111 Section 1, vested the judicial power in the Supreme Court and the inferior courts. Thus express provision was made to overcome the fact that Congress might not, as Parliament may not except for Section 49, exercise judicial power.

If therefore any powers of adjudicating upon the question whether behaviour amounts to proved misbehaviour are vested in the Houses of Parliament, it must be given by implication. Yet such an implication is inconsistent with the principle in Section 71 that adjudicatory powers are, except as otherwise expressly given, for the courts alone. To them is committed the power and authority also finally to interpret and apply the Constitution. If such a power of decision rests with the Parliament, how in

a matter central to the independence of the federal judiciary may the courts correct what may be an error? There is no remedy against an address of both Houses. Whatever else happened, it would stand. And it should be remembered that Section 72 is of vital importance to the States whose interests are often adverse to those of the Commonwealth. For Section 74 makes the High Court in effect the final arbiter on inter se questions: see Waterside Workers Federation of Australia -v- J.W. Alexander Limited (1918) 25 C.L.R. 434 at pp.468-469.

And no reason exists to imply such an adjudicatory authority in the Houses. The requirement for an address from both Houses is not to grant positive authority, but to check that of the Executive which, absent statutory requirement, might dismiss at pleasure: see Alexander's case (supra) at p.468.

In the event we think that the words "proved misbehaviour" should be given the meaning which they naturally bear, that is, as requiring the finding by a court of acts which amount to misbehaviour in proceedings to which the judge is a party.

Section 76(i) of the Constitution read with the Judiciary Act gives the High Court original jurisdiction in matters arising under the Constitution, or involving its interpretation. Properly constituted proceedings raising the question whether specified acts or activities on the part of a federal judge constituted misbehaviour within the meaning of Section 72(ii) of the Constitution or, for that matter, whether specified judicial failures or physical or other frailties constituted incapacity within that provision, would raise matters within Section 76(i). The judicial finding would establish "proved

misbehaviour or incapacity".

We do not wish to imply that only by such proceedings might the necessary basis for an address be laid. There might, however unlikely, be conviction of bribery, for example. We mention Section 76(i) only to indicate that the view we take of the meaning of "proved misbehaviour" in Section 72(ii) accords not only with constitutional principle developed over the last 80 odd years and with the separation and mutual independence of the judicial and legislative organs but yields as well a practical and effective result.

We have mentioned above a conviction for bribery as illustrative of activity by a judge which all would accept as establishing "proved misbehaviour". The illustration was intended to relate to the acceptance by a federal judge of a bribe to procure a favourable decision. But should a judge be convicted abroad of bribing a jailer to procure the release from unjustified and arbitrary imprisonment of a member of his family, for example, that result need not follow.

Whether activity amounts to "proved misbehaviour" is in the last resort a question of the interpretation of the Constitution. On those questions the High Court is the final judge. The Parliament is not. In many cases, no doubt, the activities established by curial decision will leave no doubt that they amount to misbehaviour upon which an address may be founded. The Parliament, however, may not itself decide finally either the existence of the activities nor their quality. In other words, the question of the meaning of the expression and of its application to established activities is always one for the judicature,

although in many cases, its intervention may not be necessary.

Where doubt exists the judge or the Speaker or President of the Senate, or the Attorney-General may invoke the jurisdiction of the High Court either under section 75(iii) or (v) or section 76(i) of the Constitution.

It is thus our view that the existence of activities said to amount/"proved misbehaviour" depends upon their being curially found to exist. Whether such found facts constitute "proved mishehaviour" within section 72(ii) is likewise a judicial question. However, facts curially established may be such as to leave no doubt that the federal judge who performed them was guilty of "proved misbehaviour". Nonetheless, even in such a case the question whether they do bear that character may be determined by the Court either at the instance of the judge the Speaker, the President of the Senate or the Attorney-General of the Commonwealth.

We realise that the conclusion we favour does not accord with much that was said during the Convention debates. But the Constitution must be interpreted according to its language and consistently with the principles that the High Court has elaborated since 1901. And it can hardly be denied that many even of the more illustrious delegates did, when judges of the High Court, express constitutional views that have been long rejected. The Engineers' Case (1920) 28 C.L.R. 129 is devoted to rebutting one such error. The Boilermakers' Case (1956) 94 C.L.R. 254; 95 C.L.R. 529 is a more recent if more doubtful example of the development of constitutional principle unforeseen at the Convention debates.

Above all, conclusions apt for a unitary system in which the House of Lords is also a court are not appropriate to a federation where the various governmental functions are constitutionally assigned to different organs. No doubt one must bear in mind the effect upon such notions of representative government, as the observations concerning delegated legislation in Victorian Stevedoring and General Contracting Co. Pty. Limited and Meakes -v- Dignan (1931) 46 C.L.R. 73 at pp.101-102 make clear. See also the Boilermakers' Case 94 C.L.R. at pp.276-278. But the central fact remains that the Parliament is assigned only the authority to address the Governor-General in Council praying the removal of federal judges upon grounds of proved misbehaviour or incapacity. It is not assigned an impeaching power. It is not assigned a judicial power. Without them it possesses no authority to decide whether activity exists or existed which may amount to misbehaviour nor whether the true complexion of established activity is "proved misbehaviour".

We turn now to the particular questions we are asked.

In our view, to constitute misbehaviour the acts or defaults in question must normally be in the performance of the duties of the judicial office since that behaviour will bear directly on that question. But there may be imagined cases where although acts are not done in the exercise of judicial power, yet they are so connected with it that they do amount to misbehaviour in the judicial office. The facts of Montagu -v- Lieutenant-Governor etc. of Van Diemen's Land (1849) 6 Moo. P.C. 489; 13 E.R. 773, which show a misuse by a judge of judicial office so as to obstruct the recovery of a debt against him, would amount to such misbehaviour.

Whether the commission of an offence amounts to proved misbehaviour must depend on the offence. It will normally be 'serious' if that word is meant to refer to moral turpitude even though the crime is not so expressed. But the characterisation of the quality of the act must ultimately be made by the judicial arm. No doubt that decision will not be divorced from community notions as to what may disqualify a person from holding the judicial office in question, for the question only arises in the context of displacing a judge from his office.

Conversely, the commission of a serious offence would not be, in our view, an exhaustive statement of the acts which might amount to misbehaviour. We think that the proper emphasis should be on the seriousness or moral quality of the acts rather than whether or not they happen to be criminal. For example, in respect of an assault committed by a judge it would not in our view be determinative of the question of misbehaviour whether the acts amounted to an offence or that the rights infringed were asserted in a civil action for tort. We should say that the examples given in R. -v- Richardson (1758) 97 E.R. 426, 439 tend to confirm the inappropriateness of the classification of an action as a crime or a tort as determinative of the present question.

To adapt some of the observations of the members of the High Court in Ziems -v- Prothonotary of the Supreme Court of New South Wales (1957) 97 C.L.R. 279, allowing an appeal where a barrister's name was removed from the Roll of Barristers on the ground of his conviction and sentence for manslaughter, the question is not whether a judge has committed an offence or whether he has been convicted, it

is whether his conduct constitutes misbehaviour so as to render him no longer fit to be a judge. But where actions of the judge in his private character, connected neither with his judicial duties nor the misuse of his office, are relied on to constitute proved misbehaviour, they must be more than unconventional or unwise. Morally reprehensibe legal wrongdoing must be involved, although the form of the punishment or the reparation of the rights of those injured need not, in our view, be that of the criminal law.

To that extent the suggested criteria for misbehaviour beg the question whether a person is unfit to exercise the office by reason of misbehaviour. To substitute other words for those appearing in the Constitution may often be, at best, unhelpful. It is the text itself which has to be construed.

We therefore answer question one No, for the reasons given.

We have perhaps said enough to answer Question two also. To reiterate, it is the seriousness of the acts which, in our view, provides the best guide to the decision of the ultimate issue. Where the acts are criminal then they would normally be established by conviction. But conviction is neither a necessary nor sufficient pre-requisite to a conclusion of misbehaviour. However on the view we take the proof of the misbehaviour must be extraneous to the Parliament.

Question three asks what is the standard of proof required. Where the proof is made in criminal proceedings then the standard will be, subject to statute, proof beyond reasonable doubt. Otherwise the standard will be the civil standard affected by considerations of the seriousness of the allegations made and the gravity of the consequences flowing from a

particular finding referred to in Briginshaw -v- Briginshaw (1938) 60 C.L.R. 336.

As to justiciability, we have already said that the existence of activities said to constitute "proved misbehaviour" must be judicially established. Whether activities thus established amount to "proved misbehaviour" is a question of the interpretation of the Constitution. On such questions the High Court alone is the final judge. Since the interpretation of section 72(ii) bears upon the legal rights of judges, it follows that neither House may conclusively determine these questions.

We do not doubt that the Parliament would in such matters, particularly where the decision of the Court had been obtained by the Speaker or the President of the Senate, apply the Court's decision.

We do not think that the High Court could set aside an address by both Houses of the Parliament even if it was based on an erroneous view of the meaning of section 72(ii).

However, the Court could, and in our view would, restrain the Ministers comprising the Federal Executive Council from advising His Excellency to remove the judge. It would also, we think, if occasion required it, restrain His Excellency from acting on advice to remove the judge. If the address was not founded upon "proved misbehaviour" properly construed, it would quash any order removing the judge. The Court would only act if the activities established to its satisfaction were not "proved misbehaviour" within section 72(ii) properly understood.

The address and the actions of the Parliament leading to its adoption bear no relation either to the matters comprised within section 49 and referred to in Reg. -v- Richards Ex parte Fitzpatrick and Browne (supra.) nor to those purely internal procedures mentioned in Osborne -v- Commonwealth (1911) 12 C.L.R. 321. The address is an essential statutory pre-requisite to displacing a federal judge from his office, the taking of which jeopardises his right to its enjoyment.

We answer the questions as above.

Chambers,
August 13, 1984

M. H. BYERS

A. ROBERTSON

MEMORANDUM

This memorandum deals with the expression "proved misbehaviour" in Section 72 of the Constitution. In particular, it summarizes the three principal views which have hitherto been expressed regarding that expression, and sets out a number of criticisms which may be made of at least two of those views. The analysis takes the form of a consideration of a number of hypothetical examples of behaviour which might give rise to a suggestion that there has been "misbehaviour" tested by each of the views referred to.

(a) The Bennett View

In a memorandum dated 4 July 1984, and included in the Report to the Senate by the Senate Select Committee on the Conduct of a Judge (August 1984), Dr Bennett suggests that insofar as one is dealing with the conduct of a judge (other than the manner in which he exercises or has exercised his judicial functions), the only type of behaviour which can give rise to "proved misbehaviour" is conduct which has led to a criminal conviction. Parliament's role under Section 72 is said to be confined to considering whether the circumstances of the conviction and the nature of the offence are such that the conviction constitutes "proved misbehaviour". Not all convictions would be sufficiently grave to warrant this description eg. traffic violations.

Bennett suggests that any broader view would be untenable. He says it would be astonishing if the Parliament were to conduct what would amount to a trial for a serious criminal offence.

He does not indicate whether a conviction for a sufficiently grave offence sustained before the judge assumes judicial office (but not disclosed by him) could amount to "proved misbehaviour". The tenor of his advice, however, is that pre-appointment conduct would be irrelevant.

I do not set out in this memorandum the full range of arguments which Bennett draws upon to sustain his conclusion. It is plain, however, that he takes the view that the words "proved misbehaviour" had acquired a technical meaning in the last decade of the nineteenth century, and that this meaning is reflected in Section 72 as it is to be construed today.

(b) The Solicitor-General's View

In a memorandum dated 24 February 1984 the Solicitor-General considers the term "proved misbehaviour" within the meaning of Section 72. He concludes that it is limited to matters pertaining to:

(i) "judicial office, including non-attendance, neglect of or refusal to perform duties; and

(ii) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office".

Dr Griffith does not distinguish between conduct under (ii) which occurred pre-appointment, and similar conduct post-appointment. It may be inferred, however, that since the conduct set out in (i) can only occur post-appointment, and since no distinction is drawn in the language preceding (ii), that the Solicitor-General would take the view that pre-appointment conduct cannot, as a matter of law, amount to "proved misbehaviour".

The distinction between pre-appointment and post-appointment conduct was never discussed during the course of the Convention Debates. The strongest argument for excluding pre-appointment from consideration conduct is the threat that extensive scrutiny of such conduct would pose to the independence of the judiciary. The temptation to roam back through the life of a judge looking for criminal conduct (no matter how isolated, or remote from the time of appointment) would always be present to a Government dissatisfied with the rulings given by that Judge in matters affecting Government programmes.

(c) The Pincus View

This view finds expression in a memorandum dated the 14 May 1984. Mr Pincus contends that whether any conduct alleged against a judge (not pertaining directly to his judicial office) constitutes misbehaviour is a matter for Parliament. There is no "technical" or fixed meaning of misbehaviour. It is not necessary in order to invoke the jurisdiction under Section 72 that an offence against the general law be proved. There may be other discreditable conduct on the part of a Judge which may demonstrate that he is unfit to hold judicial office. This will be a matter for Parliament to determine.

Once again Mr Pincus does not, in terms, distinguish between pre-appointment conduct, and post-appointment conduct. The tenor of his advice seems to be that it is entirely a matter for Parliament as to whether any such discreditable behaviour (no matter when it occurred) renders the Judge unfit to hold judicial office.

Criticisms of the Bennett View

Dr Bennett suggests that his view is supported by an analysis of the Convention Debates and the relevant statements of legal principle which are set out in the authorities dating back to the eighteenth century. This memorandum does not deal with that argument. Rather, it seeks to demonstrate that the Bennett view would give rise to some absurd consequences by testing that view in the light of some concrete examples.

Each of the following situations would plainly be thought to render a Judge unfit to hold judicial office. The Bennett view would dictate that no steps could be taken to remove the Judge even if the facts set out were clearly proved - beyond reasonable doubt, if necessary, or openly admitted by the Judge.

1. The Judge has, post-appointment, committed murder while on an overseas trip in a country to which he cannot be extradicted.

2. The Judge has, post-appointment, been tried for murder in Australia, and found not guilty by reason of insanity. He is no longer insane, however,and therefore not suffering from any incapacity.

3. The Judge has, post-appointment, been tried for murder in Australia, and acquitted. The Judge then openly boasts that he was, in fact, guilty of the offence. Because he did not give sworn evidence at his trial, he cannot be charged with perjury.

4. The Judge has, post-appointment, been tried for a serious offence in Australia,and convicted. The conviction is quashed on appeal because (a) a necessary consent to prosecute had not been obtained from a duly authorised officer
or (b) a limitation period had expired, which fact had gone unnoticed.

5. The Judge has, post-appointment, been tried for a serious offence involving dishonesty in Australia. The Magistrate finds him guilty but determines to grant an adjourned bond without proceeding to conviction.

Criticisms of the Griffith View

Each of the following situations would be thought by many to render a Judge unfit to hold judicial office. The Griffith view would lead to the conclusion that no steps could be taken to remove the Judge even if the facts set out were clearly proved.

1. The Judge has, post-appointment, openly endorsed a particular political party, and publicly campaigned for its election to office.

2. The Judge has, post-appointment, engaged in discussions with others which fall short of establishing a conspiracy to commit a crime, but are clearly preparatory to such a conspiracy. For example, the Judge is overheard to be discussing with another person the possibility of hiring someone to commit a murder. Alternatively, the Judge is overheard discussing with another the possibility of importing some heroin from overseas.

3. The Judge has, post-appointment, set in train a course

of conduct which, if completed, will amount to a serious criminal offence. All that has hapopened thus far, however, falls short of an attempt to commit that offence. For example, the Judge tells another that he proposes to burn down his premises and claim the insurance. He is found with a container of kerosene as he approaches those premises, and makes full admissions as to his intent. He cannot be convicted of attempted arson, or attempting to defraud his insurance company because his acts are not sufficiently proximate to the completed offence to amount to an attempt.

4. The Judge has, post-appointment, attempted to do something which is "impossible", and therefore has committed no crime. For example, the Judge has attempted to manufacture amphetamines by a process which cannot bring about that result (unknown to him). See DPP v Nock (1978) A.C. 979

5. The Judge has, post-appointment, habitually consorted with known criminals, and engaged in joint business ventures with them. The offence of consorting has been abolished in the jurisdiction in which these acts take place. To take an analogy, assume that a Justice of the United States SupremeCourt was constantly seen in the company of Al Capone. Would such conduct not tend to bring the administration of justice into disrepute?

6. The Judge has, post-appointment, been a partner in the ownership of a brothel. The jurisdiction in which that occurs has legalized prostitution, and it is no offence to own a brothel there either.

7. The Judge has, post-appointment, habitually used marijuana and other drugs in a jurisdiction which has decriminalised such use, but treats these as "regulatory" offences.

8. The Judge has, post-appointment, frequently been sued for non-payment of his debts. He deliberately avoids paying his creditors until proceedings are taken against him.

9. The Judge has, post-appointment, frequently been sued for defamation, and has been required to pay damages each time.

10. The Judge has, post-appointment, conducted a number of enterprises through a corporate structure. His actions have led to prosecution under the Trade Practices Act for false or misleading statements. Both he, and his comopanies have been fined.

Pre-Appointment Conduct

It is arguable that discreditable conduct on the part of the Judge pre-appointment may amount to "proved misbehaviour", or, at least, be relevant to post-appointment conduct. If the point of a conviction is that it demonstrates unfitness for

office because it may establish a propensity to commit that type of conduct again (or other criminal conduct) why is it relevant that the initial criminal behaviour occurred pre-appointment? The test is whether it allows the necessary inference to be drawn. A criminal act committed one week prior to appointment is no different to a criminal act committed one week after appointment. The same applies to discreditable conduct.

It follows that criminal conduct or discreditable conduct which is so remote in time from the time of appointment as to render it improper to infer that such conduct is likely to be repeated may be excluded from consideration. For example, an isolated assault committed while the Judge was a youth would plainly fit this description. Some conduct is so serious, however, that irrespective of when it was committed, great harm would be done to the integrity of the judicial system if it became known that a Judge of the highest Court had been responsible for it. These are questions of degree, in the first instance, for Parliament to determine.

Mark Weinberg
24 June 1986

MEMORANDUM

This memorandum deals with the word "misbehaviour" in section 72 of the Constitution. It traces first the history of the view which has been expressed that the word had in 1900 a technical meaning which was adopted by the framers of the Constitution. Thereafter an alternative view is suggested.

In questions of constitutional history the orthodox starting point is Quick and Garran. In their Annotated Constitution of the Australian Commonwealth (1901) they deal with the word "misbehaviour" in section 72 as follows

> Misbehaviour means misbehaviour in the grantee's official capacity. "Quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life". (Coke, 4 Inst. 117.) "Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise." (Todd, Parl. Gov. in Eng., ii. 857, and authorities cited.)

This passage was quoted by Mr Isaacs (as he then was) at page 948 of the Convention Debates at Adelaide in 1897. Mr Isaacs also quoted the continuation of the extract from Todd as follows -

> "In the case of official misconduct, the decision of the question whether there be a misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office the misbehaviour must be established by a previous conviction by a jury."

The passage in Todd (which I have set out as it appears at page 858 of the second edition) was in fact reproduced from an opinion dated 22 August, 1864 of the Victorian Attorney-General Mr Higinbotham and the Minister for Justice Mr Michie:

> The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the office (Co. Lit. 42 v.). Such an estate, however, is conditional upon the good behaviour of the grantee, and like any other conditional estate may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity (4 Inst. 117). Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty or non-attendance (9 Reports 50); and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise Rex v Richardson (1 Burr. 539). In the case of official misconduct, the decision of the question whether there be misbehaviour, rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury. (1b).

This opinion was given in relation to section 38 of the Constitution Act of Victoria which is in the following terms:

> "The Commissions of the present judges of the Supreme Court and all future judges thereof shall be continue and remain in force during their good behaviour notwithstanding the demise of Her Majesty or Her heirs and successors any law and usage or practice to the contrary thereof in anywise notwithstanding: provided always that it may be lawful for the Governor to remove any such judge or judges upon the address of both Houses of the Legislature."

A number of observations can therefore be made about the contention that misbehaviour in a person's unofficial capacity means a conviction for any infamous offence by which the offender is rendered unfit to exercise any office or public franchise.

First, it can be said that Messrs Higinbotham and Michie did not use the word "means" but the word "includes". It is not apparent that they attempted an exhaustive enumeration of the circumstances of misbehaviour.

Secondly, Messrs Higinbotham and Michie rely on the authority of Rex v Richardson.

Thirdly, the contention involves the proposition that judges appointed under Chapter III of the Constitution hold office during good behaviour.

Fourthly, the contention assumes that the decision in Rex v Richardson delimits what may constitute misbehaviour in an unofficial capacity in respect of all officers.

Fifthly, it is assumed by the proponents of the contention that the new procedure provided in section 72 of the Constitution does not affect the question.

In examining these matters it is convenient first to set out a further passage from the opinion of Messrs Higinbotham and Michie. With the omission of one sentence the passage earlier set out continues

> "These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour (v. 4. Inst. 117). But in addition to these incidents, the tenure of the judicial office has two peculiarities: 1st. It is not determined, as until recently other public offices were determined, by the death of the reigning monarch. 2ndly. It is determinable upon an address to the Crown by both Houses of Parliament. The presentation of such an address is an event upon which the estate in his office of the judge in respect of whom the address is presented, may be defeated. The Crown is not bound to act upon that address; but if it think fit so to do it is thereby empowered, (notwithstanding that the Judge has a freehold estate in his office from which he can only be removed for misconduct, and although there may be no allegation of official misbehaviour) to remove the Judge without any further inquiry, or without any other cause assigned than the request of the two Houses. There has been no judicial decision upon this subject; but the nature of the law which regulates the tenure of the judicial office has been explained by Mr Hallam in the following words:- (Const. Hist. Vol. 3, p.192) "No Judge can be dismissed from office except in consequence of a conviction for some offence, OR the address of both Houses of

> Parliament, which is tantamount to an Act of the Legislature)."

It can be observed that Hallam's statement of the effect of the Act of Settlement takes no account of removal for misbehaviour in the course of judicial duties.

In similar vein, Todd, having set out the passage from the opinion of Higinbotham and Michie referred to what Mr Denman stated at the bar of the House of Commons when appearing as counsel on behalf of Sir Jonah Barrington. Mr Denman said that

> "Independently of a parliamentary address or impeachment for the removal of the judge, there were two other courses upon for such a purpose. These were (I) a writ of scire facias to repeal the patent by which the office had been conferred; and (2) a criminal information [in the court of kings bench] at the suit of the attorney-general."

Todd explains (at page 859)

> "Elsewhere, the peculiar circumstances under which each of the courses above enumerated would be specially applicable have been thus explained: "First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by scire facias to repeal his patent, "good behaviour" being the condition precedent of the judges tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, then by impeachment; fourthly, and in all cases, at the discretion of Parliament, "by the joint exercise of the inquisitorial and judicial jurisdiction" conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the Crown for the removal of a judge."

The passage in quotations is from the Lords Journal (1830) v.62 page 602. It totally contradicts the proposition that misbehaviour had a technical meaning limited to an infamous offence the subject of a conviction. Barrington is the only judge to have been removed by the Crown upon an address by both Houses.

Todd (at page 860) then goes on to explain that the two Houses of Parliament had had conferred upon them:

> a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.

This passage is also inconsistent with the excerpt from the Lords Journal reproduced by Todd on the preceding page of his book. Further, it contains a use of the word misbehaviour which suggests that it did not, to Todd, have a technical meaning.

It will of course be necessary to return to the question of whether section 72 of the Constitution limits the Parliament to those matters which are said by Todd to go to the breach of the conditions upon which an office is granted. But

first, a perspective on the conclusions of Messrs Higinbotham and Michie and upon the historical meaning of misbehaviour is afforded by considering the facts and the judgment of Lord Mansfield for the Court in Rex v Richardson (1758) 1 Burr 517; 97 ER 426.

The question in Richardson's case was whether Richardson had good title to the office of a portman of the town of Ipswich. The answer to that question depended on whether there was a vacancy duly made, that is, whether the Corporation of Ipswich had power to amove Richardson's predecessors for not attending the great Court.

Lord Mansfield (at page 437) began by referring to the second resolution in Bagg's case, 11 Co. 99 "that no freeman of any corporation can be disfranchised by the corporation; unless they have authority to do it either by the express words of the charter, or by prescription".

At page 439 of the report of Richardson's case this proposition was said to be wrong and the correct law was that "from the reason of the thing, from the nature of corporations, and for the sake of order and government" the power of amotion was incident, as much as the power of making bye-laws.

It was therefore decided first that the Corporation had an incidental power to amove. The second question was whether the cause was sufficient. It was held that the absences from the great Court by Richardson's predecessors was not sufficient to be a cause of forfeiture.

It was however in relation to the first point, the question of whether the Corporation had power to amove, that the following appears

> "There are three sorts of offences for which an officer or corporator may be discharged.
>
> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2nd. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3rd. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.

The Court overruled the decision in Bagg's case to the extent that it stood for the proposition that a corporation did not have authority, apart from by charter or prescription, to disfranchise a freeman of a corporation unless he was convicted by course of law. That part of the decision turned on a corporation's power of trial rather than the power of amotion. The decision of the Court was that the power of trial as well as amotion for the second

sort of offences was incident to every corporation. Those offences, it will be recalled, are those against the officer's oath and the duty of his office as a corporator.

It is in this context that Lord Mansfield said, at page 439:

> "Although the corporation has a power of amotion by charter or prescription, yet, as to the first kind of misbehaviours, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise: these ought to be established by a previous conviction by a jury, according to the law of the land; (as in cases of general perjury, forgery, or libelling, etc)."

It is this notion which finds its way into each edition of Halsbury's Laws of England. In the 4th Edition, Volume 8 at paragraph 1107 the law is stated as follows:

> Judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, the Comptroller and Auditor General, and the Parliamentary Commissioner for Administration hold their offices during good behaviour, subject to a power of removal upon an address to the Crown by both Houses of Parliament. Such offices may, it is said, be determined for want of good behaviour without an address to the Crown either by criminal information or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords. The grant of an office during good behaviour creates an office for life determinable upon breach of the condition.
>
> "Behaviour" means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office. "Misbehaviour" as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or

> neglect of or refusal to perform the duties of the office.

The authorities given for the propositions contained in the second paragraph above quoted are 4 Co. Inst. 117, R v Richardson and the Earl of Shrewsbury's case (1610) 9 Co. Rep. 42a at 50a. This last reference is to the statement (77 ER at 804) "there are three causes of forfeiture or seisure of offices for matter in fact, as for abusing, not using or refusing".

The same propositions are repeated in Hearn's Government of England (1886) at pages 83 and 84, Ansons' Law and Custom of the Constitution, (1907) Volume 2 Part 1 pages 222 to 223 and, most recently, in Shetreet's Judges on Trial (1976) at pages 88 to 89. The relevant paragraph in that book is as follows

> "Conviction involving moral turpitude for an offence of such a nature as would render the person unfit to exercise the office also amounts to misbehaviour which terminates the office, even though the offence was committed outside the line of duty. In Professor R.M. Jackson's opinion, at common law "scandalous behaviour in [a] private capacity" also constituted breach of good behaviour. It is respectfully submitted that this statement, for which no authoriy is cited, cannot be sustained. It clearly appears from the authorities that except for criminal conviction no other acts outside the line of duty form grounds for removal from office held during good behaviour."

The authorities for the proposition contained in the first sentence and in the last sentence are Richardson's case, Anson, Halsbury and Hearn.

In other words, the sole authority relied on is the decision of Lord Mansfield in Richardson's case which centred on the implied powers of corporations to remove officers. There has been no judicial decision upon the provisions of the Act of Settlement providing for the tenure by which judges hold their office. Richardson's case appears to have been referred to judicially only once and that was in R v Lyme Regis (1779) 1 Doug KB 149; 99 ER 149, another decision of Lord Mansfield dealing with the implied powers of municipal corporations. Uninstructed by the opinions of learned authors, one would have thought that the nature of the office must have a large bearing on the type of conduct which would render an incumbent unfit to continue to hold it. It is impossible to equate the position of a judge with that of an alderman of a municipal corporation: behaviour which might make a judge "infamous" might not have the same result for an alderman.

There can be no doubt that judges appointed under Chapter III of the Constitution hold office during good behaviour: the High Court so decided in Waterside Workers' Federation of Australia v J.W. Alexander Limited (1918) 25 CLR 434, 447, 457, 469-470, 486. Neither can there be any doubt that

there is only one method of removal, that being by the Governor-General in council (the executive) on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. Where opinions diverge is as to what misbehaviour means. One view, shared by Mr D. Bennett QC and the Solicitor-General, is that in 1900 the word had a technical meaning and it is that meaning which was, and was intended to be, adopted in section 72 of the Constitution.

As to this, there are a number of observations to be made. Firstly, the sole judicial authority relied on is Richardson's case; secondly, that case did not concern judges; thirdly, it was not expressed to contain a definition of "misbehaviour"; fourthly, it concerned the powers of a corporation, in particular its power to amove and its power to try offences having no immediate relation to the duties of an office; fifthly, it is not clear that Lord Mansfield used the word "offence" as meaning other than a breach of law rather than a crime; sixthly, Todd's adoption of the apparently limited scope of the word is directly contradicted by the passage he quotes at page 859 of his work from the Lords Journal as follows:

> First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by scire facias to repeal his patent, "good behaviour" being the condition precedent of the judges tenure.

Seventhly, it appears from Bacon's Abridgement (7th ed.) VI p41 and Hawkins Treatise of the Pleas of the Crown 1. Ch 66 at least that misbehaviour having immediate relation to the duty of an office was not defined and had no technical meaning; it would be illogical to attribute a technical meaning to one aspect of the term.

It therefore seems unlikely that "misbehaviour" had a technical meaning in relation to the tenure of judges. If that be so then it is improbable that the delegates at the Constitutional Convention intended such a meaning. Indeed a concern of the delegates was to elide all formerly available procedures into one where the tribunal of fact was to be the Parliament. That in itself would seem to render less persuasive the view that a conviction for an offence was to be a necessary pre-condition of removal.

It is permissible to have regard to the debates at the Constitutional Conventions at least for the purpose of seeing what was the evil to be remedied: Municipal Council of Sydney v Commonwealth (1904) 1 CLR 208, 213-214; The Queen v Pearson; Ex parte Sipka (1983) 152 CLR 254, 262. It would not appear to be permissible to consider the speeches of individual delegates so as to count heads for or against a particular view. What is clear from a consideration of the various drafts of the Constitution and from the debates is that the Parliament was not intended to be at large in

making its address to the Governor-General. The practice in the United Kingdom was to be departed from having regard to the position of the Federal Courts, and in particular the High Court, in a federation. Secondly, for the better protection of the judges, it was intended by the word "proved" to impose some formality upon the conduct of the proceedings before the Parliament which was to be the tribunal of fact.

Before suggesting what the relevant test of misbehaviour might be, the question should be addressed of whether or not the proceedings in Parliament could be the subject of curial review. In my opinion it is clear that the High Court would intervene to correct any denial of natural justice and also to correct any attempt to give the word "misbehaviour" a meaning more extensive than it can legitimately bear. The Court might also intervene were there to be a total absence of evidence of misbehaviour. The proceedings are not internal to Parliament nor do they concern the privileges of the Houses. The matters referred to in Reg v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157 and in Osborne v The Commonwealth (1911) 12 CLR 321 would not therefore lead the Court to stay its hand.

It may be also that the High Court would decide that any facts upon which the Houses proposed to make an address

would need to be established in appropriate court proceedings.

Assuming then that misbehaviour has no technical meaning, what test is to be applied in respect of conduct off the bench? Having regard to the necessary preservation of the independence of the judiciary from interference, it would seem clear that conduct off the bench which would be described merely as unwise or unconventional would not constitute misbehaviour.

The lack of any readily apparent definition confirms the unwisdom of attempting to substitute other words for those which appear in the Constitution and of attempting an abstract exercise in the absence of facts. It would however seem simplistic to attempt to deal with the question on the basis of whether or not there was a conviction or whether or not a criminal offence had been committed by the Judge. It is by no means true to say that criminal offences are constituted only by conduct which destroys public confidence in the holder of high judicial office; some offences would not have that result. At the same time it would be the case that that confidence could be destroyed by conduct which, although not criminal, would generally be regarded as morally reprehensible. One manner of framing the question is to ask "is the conduct so serious as to render the person no longer fit to be a judge?" with that question being tested

by reference to public confidence in the office holder. It would appear to be unnecessarily restrictive, as well as leading to arbitrary distinctions, to demand that the conduct must be unlawful. Additionally that result or intention sits oddly with vesting a part of the power in the Parliament without reference to any anterior proceedings.

These notions are not, of course, of clear denotation and connotation. But that would seem to be a necessary consequence of the question in hand which, in relation to particular conduct, must have different answers in different times. It is a matter of fitness for office; all the facts and circumstances of alleged misbehaviour must be considered so as to weigh its seriousness and moral quality. Wrong doing must be a necessary requirement: legal wrong doing within the purview of the civil or criminal law would seem to be less important than the moral quality of the act.

I turn finally to the two related quesitons of whether or not misbehaviour within the meaning of section 72 may be an aggregation of incidents and whether behavour before appointment might of itself constitute misbehaviour.

As to the first of these questions I see no reason why the moral quality of the behaviour should not be arrived at upon a consideration of a sequence of events. This is not to say that a series of peccadillos might constitute misbehaviour

where one would not, but a series of events over a number of years could go to prove the quality of a particular act or acts.

Similarly, leaving aside questions of non-disclosure (see New South Wales Bar Association v Davis (1963) 109 CLR 428) there would appear to be no reason why facts and circumstances before a person's appointment as a judge could not be considered in determining the quality of an act or of acts after appointment. It would seem however that acts which took place before appointment, which were not of a continuing nature and which cast no light on behaviour after appointment, could not constitute misbehaviour in office.

A. ROBERTSON

Wentworth Chambers

23 June, 1986

PARLIAMENTARY COMMISSION
OF INQUIRY

MEMORANDUM

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