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Parliamentary Commission of Inquiry

G.P.O. Box 5218
Sydney, N.S.W. 2001
Ph: (02) 232-4922

Fergus
This is the letter
about which we
spoke yesterday
Daryl
17/9

With the compliments of

RECEIVED

PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

- 8 SEP 1986

The Hon Sir George Lush
Presiding Member
Parliamentary Commission of Inquiry
GPO Box 5218
SYDNEY NSW 2001

Dear Sir George,

Thank you for your letter advising me of the current activity being undertaken by the Commission in the expectation that legislation will be passed which will wind up the Commission.

In response to your invitation for me to comment on steps the Commission might take in the event that the existing enabling legislation is not repealed, I understand that the Senate will further consider the Bill in the week commencing 15 September and I would prefer to await the outcome of that consideration before making any comment.

Yours sincerely,

Douglas McClelland

(Douglas McClelland)

The Hon. Sir George Lush

Dear Sir George

Following our telephone conversation today, I enclose draft letters (identical in content) to the Presiding Officers of the Parliament.

Also enclosed are letters to the Attorney-General and the Special Minister of State covering copies of the first-mentioned letters, for information. Necessary franked envelopes are also forwarded.

I understand that you may telephone through amendments to the main letters and shall have someone stand-by to receive any such amendments.

I have retained file copies here - perhaps you could let me know when you have signed the letters in final form.

Yours Sincerely

J F Thomson
Secretary

26 August 1986

PRIVATE AND CONFIDENTIAL

The Hon. Michael J Young MP
Special Minister of State
Parliament House
CANBERRA ACT 2600

Dear Minister

I am enclosing for your information a copy of a letter that I have today sent to the President of the Senate and the Speaker of the House of Representatives.

Yours sincerely

Sir George Lush
Presiding Member

28 August 1986.

PRIVATE AND CONFIDENTIAL

The Hon. Lionel Bowen, MP
Attorney-General and
Deputy Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

I am enclosing for your information a copy of a letter that I have today sent to the President of the Senate and the Speaker of the House of Representatives.

Yours sincerely

Sir George Lush
Presiding Member

28 August 1986.

Senator the Hon. Douglas McClelland
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr President

On 19 August 1986 the Commission adjourned hearings sine die, in light of information available as to the Government's then intention to introduce legislation in the Parliament to wind up the Commission.

I understand that legislation was so introduced but has not yet been passed by the Parliament. I am informed, however, that while some of the provisions of the relevant Bill have not been agreed to by both Houses, clause 3, which would repeal the Parliamentary Commission of Inquiry Act 1986, is not the subject of dissension between the Houses. To the extent that agreement on this clause, though it is not yet law, is a clear indication of the wishes of the Parliament that the Commission ought not proceed with its inquiry until further directed by the Parliament, it seems to be inappropriate for the Commission to resume its investigations.

The matters raised in the Commission's Special Report to you of 5 August 1986 remain of significance in this context and I should add that Senior Counsel Assisting the Commission is of the view that in the present circumstances little would be gained from pursuing the costly exercise of continuing investigatory and related work. Moreover, press reports of debate in the Parliament indicate that neither House dissented from the course taken by the Commission in adjourning indefinitely the taking of evidence.

Accordingly, I have directed staff of the Commission to continue to suspend further investigatory action and to confine further activity to administrative work designed to give preliminary effect to such parts of the Bill as appear so far to be agreed by both Houses. In essence, this means work relating to winding down the Commission, putting off counsel and staff and the like, as well as sorting relevant papers now held by the Commission into the two classes contemplated by the Bill in its present form.

In the event that some form of penalty clause is agreed by both Houses and the Bill receives Royal Assent substantially in its present form, the Commission will then be in a position quickly to give effect to its requirements.

However, should no repeal take place of the Commission's Act before approximately 27 September 1986, it will be necessary under section 8 for the Commission to report on or before 30 September 1986, unless an extension of time is given. Our report to you of 5 August 1986 noted that the Commission was not then in a position to report in any concluded way by 30 September. Events since then have confirmed the impossibility of making such a concluded report by that date. I am giving some consideration to what steps might properly be taken by the Commission, including the possibility of a limited, essentially formal report, should the Commission's Act not be repealed in good time.

I note also that it will be necessary for some direction ultimately to be given, by legislation or otherwise, for the disposal of documents now held by the Commission (other than documents relating only to administrative matters, which it is proposed will be passed directly to the Department of the Special Minister of State).

In the meantime, I invite any comments you may have on any steps that the Commission might take in the event that its Act is not repealed.

I am sending a copy of this letter to the Attorney-General and the Special Minister of State for their information.

Yours sincerely

(Sgd)

Sir George Lush
Presiding Member

28 August 1986.

The Hon. Joan Child MP
Speaker of the House of Representatives
Parliament House
CANBERRA ACT 2600

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28 August 1986.

The Hon. Lionel Bowen, MP
Attorney-General and
Deputy Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

I am enclosing for your information a copy of a Special Report that I have today sent to the President of the Senate and the Speaker of the House of Representatives. The report has attached to it the Commission's reasons for its ruling, given on 5 August 1986, on the meaning of "misbehaviour" for the purposes of section 72 of the Constitution.

Yours sincerely

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19 August 1986

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CANBERRA ACT 2600

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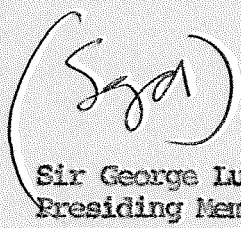

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19 August 1986

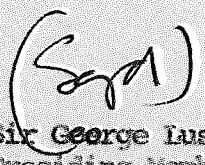
Senator the Hon. Douglas McClelland
President of the Senate
Parliament House
Canberra ACT 2600

Dear Mr President,

I am enclosing a further Special Report of the Commission, which deals with the publication by the Commission of reasons for its ruling, given on 5 August 1986, on the meaning of "misbehaviour" for the purposes of Section 72 of the Constitution.

The Commissioners understand that their Report and their reasons attached to it will be tabled in the Parliament during the current session.

Yours sincerely,



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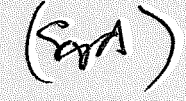

Sir George Lush
Presiding Member

19 August 1986

Special Report of the Parliamentary

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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

Parliamentary Commission of Inquiry

Presiding Member : The Hon. Sir George Lush
Members : The Hon. Sir Richard Blackburn, OBE
The Hon. Andrew Wells, QC

G.P.O. Box 5218
Sydney, N.S.W. 2001
Telephone: 232-4922

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Senator the Hon. Douglas McClelland
President of the Senate

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Speaker of the House of Representatives

PARLIAMENTARY COMMISSION OF INQUIRY

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 amd 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.